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Detroit Newspaper Agency, d/b/a Detroit Newspapers and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO.
Case 7-CA-42544

September 28, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On June 21, 2000, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

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

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

The judge found that the Respondent violated Section 8(a)(3) and (1) by terminating reinstated striker Thomas Hydorn because of his union and protected activities. In its exceptions to the judge's decision, the Respondent argues that the complaint should be dismissed because the General Counsel failed to meet his *Wright Line*³ burden of establishing that a motivating factor in the Respondent's decision to discharge employee Thomas Hydorn was Hydorn's union or protected activities. Specifically, the Respondent argues that because the evidence of antiunion animus on which the judge relied consisted of Board decisions⁴ that were denied enforce-

ment in the court of appeals,⁵ the evidence does not support the administrative law judge's finding of antiunion animus. For the following reasons, we find that the Respondent's termination of Hydorn violated the Act.

Background

The pertinent facts are fully set forth in the judge's decision. Briefly, in 1995, during negotiations for a successor collective-bargaining agreement, six unions representing various units of the Respondent's employees launched a strike against the Respondent. One of those six unions was Detroit Mailers Union No. 2040, the Charging Party in this case. Although no agreement had been reached, the unions ended their strike in 1997 when, on behalf of the striking employees, they made an unconditional offer to return to work. The Respondent treated the returning strikers as economic strikers and offered them reinstatement as positions became available. With the strikers' return, tension arose between them and the replacement workers.

The Present Case

In 1978, Thomas Hydorn began his employment with the Respondent. From the beginning of that employment, Hydorn worked as a material handler and was a member of Local 2040. During his approximately 17 years of prestrike employment, Hydorn received only one disciplinary notice, for absenteeism. Hydorn participated in the Union's 1995-1997 strike and picketing of the Respondent.

On August 16, 1999, 18 months after the Union's unconditional offer to return to work, Hydorn was reinstated to a material handler position on the 8 p.m. to 4 a.m. shift at the Respondent's North Plant in Sterling Heights, Michigan. Following a brief orientation, the Respondent assigned Hydorn to one of its "inserters," a machine that installs advertisements and other supplements into the newspaper. The inserter is staffed by a leadman operator and one or more material handlers, according to the number of supplements that have to be handled. The material handler's job is to keep the inserter supplied with supplements and to monitor the "heads" and "buckets" for paper jams or paper drags. It is also the job of the material handler closest to the paper drag to clear it. This latter duty represented a change in the material handler's duties. Before the strike, the leadman machine operator was responsible for clearing paper drags; material handlers were prohibited from performing this work. Hydorn's brief poststrike orientation did not cover this change in the material handler's duties.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We have modified the judge's recommended Order and notice in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), *Excel Container*, 325 NLRB 17 (1997), *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001)

³ 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

⁴ *Detroit Newspapers*, 330 NLRB 505 (2000); *Detroit Newspapers*, 326 NLRB 782 (1998); *Detroit Newspapers*, 326 NLRB 700 (1998).

⁵ *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000).

On August 24, from 5 to 7 p.m., Attorney John Taylor, Respondent's in-house labor counsel, conducted a seminar for Respondent's supervisors on disciplinary procedures. Taylor covered, among other things, the "[e]lements of [e]ffective [c]orrective [d]iscipline," including "[i]nvestigat[ing] thoroughly before assuming guilt," and "[g]iv[ing the] employee an opportunity to respond," using a "progressive disciplinary" approach taking into consideration the employee's "[l]ength of service" and "[p]rior work and conduct record."

Later the same day of this supervisory training, Hydorn was assigned to work on an inserter with Material Handler John Dutka. Hydorn was stationed at the "V head" of the machine while Dutka was situated at the "W head," closer to Machine Operator William Mihalik.

The first half of the 8 p.m. to 4 a.m shift passed without incident. However, about 1 a.m., shortly after the lunchbreak, Mihalik called out to Hydorn and Dutka, "paper drag." (That call was intended to signal to the material handlers that a paper jam needed to be cleared, otherwise additional supplements could not be cleanly inserted.) In response to Mihalik's call, Dutka, who was closest to the paper jam, cleared the paper drag. Hydorn saw Dutka clear the paper drag and, based on his pre-strike experience, told Dutka that clearing paper drags was not the material handler's responsibility. Hydorn then pointed at Mihalik and said it was the operator's "fucking job," and that was why he got paid the "big fucking dollars." Upon hearing Hydorn's remarks, Mihalik telephoned Supervisor Casey Leach.

Leach arrived and, after speaking with Mihalik, told Hydorn that it was his job as a material handler to clear paper drags, if he was in a position to do so. Leach did not directly order Hydorn to clear a specific drag because, as found by the judge, "there was no paper drag pending at the time." Hydorn, still believing that material handlers were forbidden from doing this task, responded that he would not clear paper drags, even if it meant that he might be suspended or fired. Leach then called for Louis Monroig, the acting post-press manager. Monroig appeared, discussed the situation with Mihalik and Leach, and then approached Hydorn. Monroig asked Hydorn if he understood that Leach had given him a direct order to clear paper drags. Hydorn responded that he would not remove paper drags because that was the operator's and not the material handler's job. Monroig ordered Hydorn to his office. Hydorn requested union representation and Harold Sorenson was summoned to represent him.

Upon Sorenson's arrival, the meeting proceeded. Sorenson advised Hydorn that it was, in fact, his responsibility to clear paper drags. Hydorn continued to insist

that it was the operator's job, and told Leach and Monroig that he would not handle paper drags. Monroig told Hydorn that he was suspended pending an investigation and directed Hydorn to turn in his identification card. Hydorn turned in his card to Sorenson and left the building under the escort of a security guard.

Later that morning, after the end of the shift, Karen Zemnickas, post-press director, was participating in a company golf outing when she was telephoned and informed about the circumstances of Hydorn's suspension. Zemnickas met with two other Respondent management officials who were also at the outing: Mike Martin, a post-press manager at the North Plant, and in-house counsel Taylor. Taylor advised Zemnickas to obtain written accounts of the incident from the supervisors involved, which they could review upon their return to work from the outing.

Zemnickas obtained Monroig's and Leach's written reports and interviewed them regarding the incident with Hydorn. She then discussed the matter with Taylor, who also had reviewed Monroig's and Leach's reports. Neither Zemnickas nor Taylor discussed the matter with Hydorn; nor did they interview Sorenson, Dutka, or Mihalik. Taylor recommended that Hydorn be discharged and Zemnickas, based on her own evaluation, concurred in that judgment.

On August 27, at Zemnickas' direction, Manager Martin issued a letter to Hydorn informing him that he was discharged because of his "refusal to follow the instructions and the direct order given by your supervisor."

The Union filed a grievance contesting Hydorn's discharge. At the October 8 third-step grievance meeting, Hydorn apologized for his August 25 conduct. His union representatives conceded that Hydorn had been out of line but argued that: the supervisors had handled the situation poorly; Hydorn had received only a hypothetical and not a direct order to clear a paper drag; and Hydorn's discipline was excessive when compared to that imposed on other employees. Specifically, Union Representative Young pointed to an allegedly comparable circumstance of insubordinate behavior by replacement employee Marcia Murphy that resulted in only a 1-week suspension. Zemnickas rejected the Union's arguments and affirmed her original decision to discharge Hydorn.

In the Respondent's final answer to the grievance, in-house counsel Taylor wrote the Union on October 21, that Hydorn's grievance was denied on the basis that Hydorn had refused to follow the instructions of his supervisor.

Analysis

In *Wright Line*, the Board established an analytical framework for deciding cases turning on employer moti-

vation. To prove that an employee was discharged based on an unlawful motive, the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel makes such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, 251 NLRB at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The elements the Board considers when determining whether an employer's conduct was discriminatorily motivated are generally the alleged discriminatee's protected activity, employer knowledge of that activity, and union animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993). However, the Board has held that "motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992) (citations omitted). The Board has further stated that "evidence of a 'blatant disparity is sufficient to support a prima facie case of discrimination.'" *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998), quoting *Fluor Daniel*, 304 NLRB at 970-971.

Applying these principles here, we find that the General Counsel met his burden of establishing by a preponderance of the evidence that Hydorn was suspended and discharged because of his union and protected activities. We further find that the Respondent did not meet its burden of showing that it would have discharged Hydorn even in the absence of those activities.

The strike in this case was prolonged and bitter. It lasted from July 1995 until February 1997, and ended without a collective-bargaining agreement being reached. Numerous unfair labor practice charges were filed by the Respondent as well as by the striking unions, and the striking employees who returned to work did so to altered working conditions, without the benefit of the seniority system that previously applied. Further, during the course of the strike, the Respondent escalated tensions between strikers and the replacement workers by distributing a bulletin to the replacements telling them that the strikers were seeking to take their jobs.⁶

⁶ Contrary to our dissenting colleague's assertion, we are not relying on these facts as evidence of the Respondent's animus. Rather, we are considering the setting in which Hydorn's discharge occurred. Although the D.C. Circuit denied enforcement of the Board's finding of unfair labor practices connected to the strike events, no one disputes the hostile and bitter atmosphere in which those events took place. The

After the strike was over, Supervisor Monroig, who was hired by the Respondent during the strike, contributed to the tensions between replacements and returning strikers by telling the former strikers that the strike had been a mistake, their return was an "unconditional surrender," the unions were at fault, and that union employees had ruined everything while the Respondent had gotten things back together again.⁷

Against this backdrop, the Respondent reinstated Hydorn to a material handler's position on August 16, 1999. It is undisputed that Hydorn, who had been a union member since 1978, engaged in protected union activities during the strike. Hydorn participated in the Union's 1995-1997 strike against the Respondent and, during its course, occasionally picketed the Respondent.

There is also no doubt that the Respondent knew that Hydorn was a union adherent. This is shown by Hydorn's open support for the Union's strike. In addition, as the judge observed, the Respondent's own records listed Hydorn's status as a "Union Returnee" on his application for reinstatement at the conclusion of the strike.

Quite apart from the then extant Board decisions on which the judge relied, the totality of the circumstances supports the judge's finding that the Respondent's discipline of Hydorn was discriminatorily motivated. Thus, at the time of his August 1999 reinstatement, Hydorn had been off the job for more than 4 years. Despite this fact, Hydorn and other reinstated material handlers received only a brief orientation by Post-Press Director Zemnickas. In that orientation, Zemnickas told the reinstated strikers that they would have the same duties, except that they might be required to work at more than one workstation. Zemnickas did not tell Hydorn or the others that,

dissent seems to fault the administrative law judge for having relied on findings of animus that were only subsequently denied enforcement. Moreover, our dissenting colleague accuses us of taking an unwarranted "second bite at the animus apple." We merely have examined the record, without reference to the findings of animus subsequently invalidated by the court, to determine if the General Counsel presented enough evidence to support his case.

⁷ This evidence regarding Monroig's statements is based on Sorenson's testimony, which was specifically credited by the judge where it was not contradicted by other witnesses. Monroig did not deny making the statements in question. Our dissenting colleague declines to rely on this credited testimony, although he chooses to rely on the testimony of Zemnickas, despite the judge's finding that the problems with her testimony "cast a cloud of doubt over the entirety of her testimony."

Contrary to our dissenting colleague's allegation, we are not relying on Monroig's statements as direct evidence of the Respondent's animus toward returning strikers. Although not conceding that Monroig's statements, taking into account his supervisory status and the surrounding atmosphere, were not coercive, we consider his comments as evidence of the general atmosphere in which the Respondent discharged Hydorn without regard to its own disciplinary guidelines.

contrary to pre-strike operating procedures, they—the material handlers, as opposed to the inserter operators—would be required to clear paper drags. Accordingly, when Hydorn repeatedly stated, on August 25, that the task of clearing paper jams belonged to leadmen operators, and not material handlers, he was accurately reflecting the prior practice which—to his knowledge—had never been changed. Yet it was purportedly that unannounced change that precipitated Hydorn’s discharge, slightly more than 1 week after his reinstatement.

The record further establishes that Hydorn was disciplined for misconduct he did not commit. According to his discharge notice, Hydorn was terminated because of his “refusal to follow the instructions and the direct order given by your supervisor.” However, while Hydorn may have exhibited insubordinate behavior on August 25, we agree with the judge that “he never defied a direct order to remedy a pending paper drag. . . .” He could not have; Leach never gave Hydorn a direct order to clear a paper drag.⁸ Thus, the Respondent’s stated reason for discharging Hydorn is false. Because it is false, we must determine whether that false reason was designed to conceal an unlawful reason for Hydorn’s discharge. See *Shattuck Denn Mining v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Evaluating all of the evidence, we are persuaded that it was. This is particularly demonstrated by the Respondent’s rush to discipline Hydorn in disregard of its own investigative and disciplinary procedures.

The Respondent failed to investigate fully the circumstances surrounding Hydorn’s suspension on August 25. Monroig suspended Hydorn on August 25, “pending an investigation.” That investigation was conducted by Manager Zemnickas. According to the Respondent’s own guidelines, which Zemnickas had Attorney Taylor review with subordinate supervisors only hours before Hydorn’s suspension, Zemnickas’ investigation should have been “thorough,” and provided Hydorn with an “opportunity to respond.” Zemnickas’ “investigation” clearly did not comport with those standards. Zemnickas and Taylor admitted that they did not interview Hydorn, the accused, or Dutka, the other material handler present at the incident. Nor, according to the credited testimony of inserter operator Mihalik, did any representative of

⁸ Our dissenting colleague contends that Hydorn did refuse a direct order and that he sought to unilaterally dictate to the Respondent his terms and conditions of employment. This view ignores the circumstances in which the incident occurred. With tempers already flaring, the Respondent insisted that Hydorn acknowledge facts not previously communicated to him: that his job now included the responsibility of clearing paper drags. No specific work was required of Hydorn at that moment; and there is no evidence that he persisted in his view of this job requirements once his equanimity returned after the confrontation ended.

management interview him before discharging Hydorn. Instead, the Respondent rushed to judgment and terminated Hydorn by letter of August 27, for an act which he did not commit.⁹ Under these facts, we agree with the judge’s conclusion that Respondent’s disregard of its guidelines is “suspicious.”¹⁰ Further, we find that the Respondent’s cursory investigation—contrary to its own, contemporaneously reinforced, investigative guidelines—supports the conclusion that the Respondent was not interested in the outcome of a fair investigation.¹¹

This conclusion is bolstered by the fact that the Respondent failed even to consider whether Hydorn’s offense warranted application of its progressive disciplinary policy. Thus, the Respondent did not take into account that this was Hydorn’s first offense for insubordination, and that, except for an absenteeism infraction early in his tenure, he had an unblemished disciplinary record during his approximately 17 years of employment with the Respondent.

Under all of these circumstances, we find that the General Counsel has met his burden of establishing a prima facie case that Hydorn’s protected and union activity was a substantial or motivating factor in the Respondent’s decision to discharge him. We stress the Respondent’s animus, as expressed by Supervisor Monroig, toward returning strikers such as Hydorn. In this setting, reinstating returning striker Hydorn, a known union sup-

⁹ The dissent states that it “borders on frivolous” to suggest that the Respondent failed to conduct a meaningful investigation, and that the Board is attempting to “dictate appropriate methodologies” for the investigation. On the contrary, we are merely finding that the Respondent’s failure to follow its own stated guidelines is evidence of its discriminatory motivation. It is our dissenting colleague who would find that Respondent’s investigation, and the ensuing inference of animus for the failure to meet that standard, is based solely on the Respondent’s own policy.

¹⁰ A thorough investigation could have revealed, for example, that Hydorn was not the closest material handler to the paper drag, and thus responsible for clearing it, or that Hydorn had not been informed previously of his responsibility for clearing paper drags, and that this responsibility prior to the strike had been held by the operator not the material handler.

¹¹ We disagree with our dissenting colleague’s view that the Respondent’s investigative guidelines were not followed because Hydorn was not a candidate for “corrective” discipline and because his “extreme” insubordination was “inconsistent” with continued employment. The evidence concerning nonstrikers in the Local 2040 bargaining unit who were disciplined for insubordination reveals otherwise. These employees were given “corrective” discipline rather than discharge in circumstances far graver than Hydorn’s conduct presented. Thus, the Respondent did not discharge employees who refused repeated direct orders to perform work. Further, one employee who threatened Monroig used obscenities in speaking with him, and stated she didn’t care if she was sent home, but was given only a suspension. Given a demonstrated tolerance for this type of conduct, the contention that Hydorn’s behavior called for action beyond the Respondent’s investigative guidelines is inconsistent with the totality of the evidence.

porter, to a workplace still simmering with many of the tensions that erupted during the strike, the Respondent put him in a material handler's job with the new and unstated responsibility of clearing paper drags, then discharged him 11 days later for merely threatening not to perform that responsibility, which he previously had been prohibited from performing. Further, the Respondent dismissed Hydorn, falsely alleging he disobeyed a direct order, without following its own investigative procedures or its progressive discipline policy.

Having found that the General Counsel has met his *Wright Line* burden, we further find, for the reasons stated by the judge, that the Respondent did not meet its burden of proving that it would have discharged Hydorn even in the absence of his protected union activity. The Respondent has sought to meet this burden by, among other things, producing evidence that it discharged six non-strikers for insubordination.¹² The Respondent argues that this evidence demonstrates that it treated Hydorn similarly to those employees who did not engage in union activity. The judge found, however, and we agree, that the six instances relied upon by the Respondent do not support that contention. As the judge noted, "[i]n all but a single case, the evidence available indicates that th[ose] discharges were based on significantly more than an isolated episode of insubordination." Thus, in five of the cases on which Respondent relies the employees committed specified offenses in addition to insubordination or multiple instances of insubordination. By contrast, the Respondent discharged Hydorn for a single, isolated instance of insubordination.

As to the sixth employee, Usman Daramy, the evidence shows that he was discharged for "refusal to obey a direct order from the Division Sales Manager and [i]nappropriate behavior." (Emphasis added.) As the judge observed, the Respondent presented no evidence explaining the nature of Daramy's "inappropriate behavior." However, it seems clear that Daramy's inappropriate behavior was an additional factor that contributed to the Respondent's decision to discharge him. Hydorn, on

¹² Our dissenting colleague disingenuously suggests that Hydorn engaged in multiple acts of insubordination because he repeatedly refused to agree with the Respondent's repeated assertions that it was his job to clear paper drags and he initially balked at turning over his identification and leaving the premises. While we agree that Hydorn behaved in a disrespectful and insubordinate manner, we cannot view this one incident as evidence of multiple acts. Hydorn returned to a workplace containing deep and lingering bitterness, on both sides, based on the strike and its effects. On his return to work, the Respondent did not tell Hydorn about the change in the responsibilities of his job to include the clearing of paper drags. He reacted strongly when confronted by his superiors about his new responsibilities, but his insubordinate behavior was limited to the single occasion on which they initially informed him about the change.

the other hand, was discharged for the singular act of "refus[ing] to follow the instruction and the direct order given by [his] supervisor." Under the circumstances, and particularly since Hydorn did not refuse a direct order as cited by the Respondent, we are unable to conclude from the Respondent's evidence that it evaluated Hydorn's misconduct according to the same standard applied to employees who did not engage in protected activities.¹³

Furthermore, in this case, the General Counsel has produced significant evidence of disparate treatment. Based on Respondent's personnel records, the General Counsel has shown that between February 1997 and November 1999, Respondent disciplined 37 non-strikers for insubordination less harshly than Hydorn. In 20 of those 37 instances, the Respondent only issued a warning to the offending employee, while in the remaining cases the employees were disciplined with suspensions. We agree with the judge that "the evidence in this case shows that the Respondent had a relatively lax attitude towards insubordination by non-strikers, even those who defied multiple direct orders or had been insubordinate on prior occasions."¹⁴

We are particularly persuaded of the Respondent's disproportionate response to Hydorn's behavior based on the evidence concerning nonstriking employee Marcia Murphy. She threatened Monroig that she would "kick his ass" and that she was not "one of his bitches." When Monroig threatened to send her home, Murphy told him "I don't give a fuck and you can send me home because I don't need this shit." Murphy was given a 1-week suspension rather than discharge. The record evidence on

¹³ We find our dissenting colleague's reliance on the discharges of Daramy and employee Sylvia Dean to be misplaced. As noted above, Daramy's discharge, without regard to Daramy's work unit or the judge's view that non-strikers generally received lesser discipline, is distinguishable from Hydorn's: unlike Hydorn, Daramy refused a direct order. Regarding Dean, she had been given a lesser discipline for a previous instance of insubordination, in which she refused a direct order.

Our dissenting colleague suggests that we unfairly rely on the reference to Daramy's "inappropriate behavior" while ignoring the absence of a reference to prior misconduct in Dean's discharge. As noted, the Respondent has a policy of progressive discipline. Accordingly, although Dean's prior behavior undoubtedly impacted the level of discipline meted out to her, the prior acts need not necessarily have been cited in the document stating her latest misconduct and discharging her. Moreover, although the dissent deems Hydorn's behavior akin to Daramy's in being "inappropriate," the pertinent point is that the Respondent did not label it as such and did not rely on that as part of its basis for Hydorn's discharge.

¹⁴ In considering whether the Respondent engaged in disparate treatment in its discipline of Hydorn, we draw no inference from the Respondent's failure to prove that it either reprimanded or suspended a returning striker for insubordination. Our analysis is based on comparing the conduct and discipline of Hydorn with those other incidents that were actually adduced at the hearing.

discipline, as discussed above and in the judge's decision, amply demonstrates that the Respondent treated Hydorn more harshly than nonstrikers, like Murphy, who engaged in similar conduct. Thus, we find that the Respondent engaged in disparate treatment in disciplining Hydorn. Given disparate treatment and the independent evidence of union animus, including the Respondent's generalized animus towards returning strikers as expressed by Monroig, we conclude that the Respondent has failed to meet its affirmative burden of showing that it would have discharged Hydorn even absent his union activities. Accordingly, we find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Hydorn for engaging in protected concerted union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Detroit Newspaper Agency d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth below.

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in order to discourage union activity.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Thomas Hydorn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to any rights or privileges previously enjoyed.

(b) Make Thomas Hydorn whole for any loss of earnings or benefits he may have suffered due to the Respondent's discrimination, in the manner set forth in the remedy section of the attached decision.

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

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the Respondent's facility in Sterling Heights, Michigan, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being duly 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 August 27, 1999.

(f) Within 21 days after service by the Regional Director, 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. September 28, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS

MEMBER SCHAUMBER, dissenting.

Introduction

Were it the Board's role to sit in judgment on the relative wisdom or abstract fairness of disciplinary decisions made by employers, this case might present a closer question. The individual fired by the Respondent, Thomas Hydorn, enjoyed a long and largely unblemished prestrike tenure. He returned to Respondent's employ after a 4-year absence following an undoubtedly disheartening, demonstrably bitter, and ultimately unsuccessful economic strike. Hydorn found his workplace

¹⁵ 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."

populated with new supervisors and replacement co-workers, and faced significantly different working conditions. Under such circumstances, Hydorn's adamant, repeated and uncontested refusal to perform important aspects of his job could be viewed as an impetuous lapse in judgment warranting less severe sanctions. However, it is not our place to second-guess personnel decisions; our sole responsibility is to determine whether the General Counsel has established by a preponderance of the evidence that discriminatory animus was a substantial or motivating factor in the challenged disciplinary action. Because the General Counsel did not come close to meeting that burden in the instant case, I respectfully dissent.

Facts

Hydorn worked at Respondent's plant in Sterling Heights, Michigan, primarily as a material handler, from 1978 through July 1995. Material handlers operate inserter machines, which place advertising supplements into newspapers and comics. In July 1995, a number of unions representing Respondent's employees, including Teamsters Local 2040, to which Hydorn belonged, initiated what was later determined to be an economic strike against Respondent.¹ During the course of the strike, Hydorn, like many other union members, occasionally engaged in picketing of Respondent's facilities.

Respondent recalled Hydorn to its Sterling Heights plant 4 years later on August 16, 1999. On his second day back, Hydorn was observed smoking while standing at his station. His supervisor, Louis Monroig, informed him that smoking was not permitted on company time and an animated exchange ensued, after which Hydorn refused Monroig's offer to shake hands. Several days later, Hydorn was working at a material handler's station when a paper jam or "drag" occurred near the station where Hydorn and another employee, John Dutka, were working. The machine operator called out "paper drag," and asked that someone clear it. Dutka did so, after which Hydorn pointed to the machine operator and loudly said that it was the operator's "fucking job" to clear drags, which was why they were paid the "big fucking dollars."

¹ In *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 122 (2000), the D.C. Circuit held that the Board's conclusion that Respondent committed various unfair labor practices during the negotiations leading to the 1995 strike was legally erroneous and unsupported by substantial evidence, and therefore reversed the Board's subsequent order holding the strikers to be unfair labor practice strikers. Consequently, as an economic striker, Hydorn and his fellow employees were not entitled to backpay or immediate reinstatement, but remained eligible for recall if and when substantially equivalent positions became available. See generally *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

The operator, unamused by Hydorn's observation, called a supervisor, Casey Leach, to report it. Leach explained to Hydorn that clearing drags was part of the material handler's job. Hydorn replied that he would not clear paper drags, even if it meant that he would be suspended and fired. Leach then called the acting post-press manager, Monroig, who, after conferring with the machine operator and Leach, asked Hydorn if he understood that he had been given a direct order to clear paper drags. Hydorn again responded that he would not remove paper drags because he viewed that task to be the operator's job, not his. Monroig then asked Hydorn to accompany him to his office, at which point Hydorn invoked his right to the presence of a union representative.

Monroig and Leach met with Hydorn and Union Representative Harold Sorenson in the post-press supervisor's office. Sorenson, like Messrs. Leach and Monroig before him, confirmed to Hydorn that it was, in fact, Hydorn's job to clear paper drags. Although Hydorn now had been thrice warned by a supervisor, manager, and union official that material handlers were required to remedy paper drags, he continued to insist that was not his job and told Leach and Monroig directly that he refused to do such work. Monroig then suspended Hydorn and asked him to turn in his identification card, which Hydorn also stubbornly refused to do. He ultimately acquiesced, relinquishing the card to Sorenson, after which a security guard escorted Hydorn from the plant.

The following day, the post-press director, Karen Zemnickas, learned of the incident. She arranged a meeting with a post-press manager at the Sterling Heights plant, Mike Martin, and Respondent's senior legal counsel and director of labor relations, John Taylor. Zemnickas frequently consulted Taylor on disciplinary matters that might lead to termination. Taylor directed Zemnickas to have the responsible supervisors prepare written reports, after which they would meet to determine the proper course of action. Zemnickas subsequently interviewed Monroig and Leach, and provided their respective written accounts to Taylor. Taylor met again with Zemnickas and ultimately recommended discharging Hydorn because of Hydorn's repeated refusal to perform a duty that both management and the union had told him was part of his job.² Consistent with that recommendation of counsel, Respondent terminated Hydorn on Au-

² Taylor testified that "[t]he information that I was provided, and that I looked at, indicated that Mr. Hydorn had been asked by management . . . to perform a particular task . . . and that he refused. That a union steward had also asked him to do it, and he refused. And that his attitude was also a factor. His attitude was not only did he refuse, but on top of that he said, "Go ahead and fire me. Because I am not going to do it today and I am not going to do it tomorrow." ALJD at 5 (quoting Tr. at 514).

gust 24, 1999, for his “refusal to follow the instructions and the direct order given to him by his supervisor.”

The ALJ’s *Wright Line* Animus Analysis

In finding that the General Counsel satisfied his initial *Wright Line*³ burden of proving that discriminatory animus was a substantial or motivating factor in the decision to terminate Hydorn, the judge relied upon four factors: (1) animus towards returning strikers inferred by the judge based on prior unfair labor practices found by the Board in connection with the strike; (2) the timing of Hydorn’s discharge within 11 days of his “delayed” reinstatement; (3) evidence that Respondent did not interview all witnesses to the incident and did not follow recently discussed termination guidelines in processing Hydorn’s discharge; and (4) a notation on a document in Hydorn’s personnel file identifying him as a returning striker. Whether this “evidence” even creates a triable issue of fact as to Respondent’s motivation is debatable, but it clearly falls far short of proof by a preponderance of the evidence, a fact the majority effectively concedes, as discussed below, by abandoning much of the judge’s reasoning.

First, the D.C. Circuit, subsequent to the judge’s decision in this case, refused to enforce the Board’s determination that Respondent violated the Act in the Board cases relied upon by the judge as “background evidence” of animus, concluding in no uncertain terms that the Board’s findings were “legally erroneous and unsupported by substantial evidence.” 216 F.3d at 231. Thus, the “ample evidence” of anti-union animus the judge discovered in those cases simply vanishes, and his suggestion that Respondent improperly “delayed” in reinstating Hydorn is plainly wrong.⁴

Second, if the timing of the disciplinary action in the case supports any inference, it is that Hydorn’s uncontested insubordination provoked his discipline (which followed shortly thereafter), not any protected activity in which Hydorn may have engaged on the picket line years before. Indeed, there is no evidence that Hydorn was a particularly active union proponent, or that Respondent

had any reason to single out him, rather than other returning strikers, for discipline. Cf. *Saga Food Service of Hawaii, Inc.*, 265 NLRB 1668, 1673 (1982) (respondent’s knowledge of broad-based support among its employees for the union “dilutes any assertion that [r]espondent had [an] insidious reason to single out certain persons for discrimination.”).

Third, the judge’s conclusion that Respondent’s alleged “failure to conduct a meaningful investigation” of Hydorn’s misconduct supports a finding of animus impermissibly treads on legitimate managerial prerogatives and is wrong as a matter of objective fact.⁵ It is simply not the Board’s province to dictate appropriate methodologies for workplace investigations, and the Board possesses no unique expertise qualifying it to do so. Only where the record evidence reflects a demonstrable departure from prior standards for investigations of similar misconduct (i.e., disparate treatment), or indicia of a sham investigation, is an inference of animus warranted. Here, the General Counsel demonstrated neither.

The judge identified no regularly followed practices from which the Respondent departed in investigating Hydorn’s misconduct or making the decision to terminate him. Rather, he deemed “particularly suspicious” Respondent’s failure to interview the nonmanagement material handlers who witnessed the incident on the line. However, the judge ignored the fact no one contests that Hydorn’s refusals to clear paper drags occurred in the manner conveyed to Taylor through the written reports of Monroig and Leach, who, unlike any nonmanagement materials handler, personally observed Hydorn’s repeated refusals to perform the work at issue. Indeed, even union president, Alex Young, conceded that Hydorn behaved poorly, and Hydorn himself admitted, in a moment of candid understatement, that he had been guilty of a “bad attitude.” Consequently, there was no need to corroborate uncontested material facts through additional witness interviews, and there was no basis for the judge to infer animus from Respondent’s entirely reasonable decision not to do so.

Lacking any evidence of an actual departure from Respondent’s normal investigation procedures, the judge attempted to infer animus from Respondent’s alleged

³ In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established its familiar framework for determining whether an employer has discriminated against an employee in violation of Sec. 8(a)(3). Under that framework, in which unlawful intent is an essential element, the General Counsel must first, by a preponderance of the evidence, make a showing “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” 251 NLRB at 1089. Only if the General Counsel makes such a showing, does the burden of persuasion then shift to the employer “to demonstrate that the same action would have been taken even in the absence of the protected conduct.” *Id.*

⁴ Fn. 1, *supra*.

⁵ As noted above, consistent with her normal practice, Zemnicks consulted with Respondent’s senior legal counsel and director of labor relations, Taylor, upon learning of the incident. At his direction she then interviewed the managers who witnessed the insubordination and had them prepare written statements detailing the facts. She then met again with Taylor to discuss how to proceed and acted on his legal advice to effect the termination. To assert that such an investigation was not “meaningful,” particularly when the Hydorn’s repeated refusal to clear paper drags was undisputed, borders on frivolous.

departure from standards contained in an “outline [] of elements of effective discipline” prepared by Taylor for Respondent’s supervisors at Zemnickas’ request shortly before Hydorn’s termination. The outline included typical suggestions for supervisors such as investigating thoroughly before assuming guilt, progressive discipline, and providing employees an opportunity to respond. Nothing, however, in the outline dictated that the outline’s suggestions were to be followed mechanically and inflexibly in every situation (e.g., by interviewing unnecessary corroborative witnesses), and there is absolutely no evidence that the informational outline had been implemented as a matter of practice. Moreover, even it had been, there was no “blatant bypassing” of the outline’s guidelines as found by the judge, because witnesses *were* interviewed and Hydorn *was* given multiple opportunities to explain his actions. Similarly, Respondent did not “assume” Hydorn’s refusal to clear paper drags—Hydorn made his position on that point abundantly clear. Thus, the effective discipline outline provided no legitimate basis for inferring animus.

Finally, the judge gleaned knowledge and animus from the fact that a document in Hydorn’s personnel file identified Hydorn as a recalled striker, while Zemnickas testified initially that she did not believe Respondent maintained such records.⁶ When shown the document, Zemnickas explained that the notation might have been necessary to ensure the proper resumption of Hydorn’s employee benefits. Nothing in this exchange evidences the requisite *Wright Line* animus. First, there is no evidence that either Zemnickas or Taylor, the individuals responsible for the termination decision, knew of the document or considered it or Hydorn’s status as a recalled striker in deciding on the appropriate response to his insubordination. Second, some record of Hydorn’s status would not be unusual because of the implicated benefits issues and because economic strikers retain recall rights that employers must honor and document. Third, even assuming knowledge of Hydorn’s status on the part of the relevant decisionmakers, there is absolutely no evidence of a causal connection between that status and his termination. If knowledge of an employee’s status as a returning striker sufficed to satisfy the General Counsel’s burden, we effectively would be imposing a presumption that any disciplinary action taken against a returning striker is unlawful. While my colleagues seem prepared to head down that path, the Act does not provide strikers such blanket protection.

⁶ Though the judge did not find Zemnickas to be a reliable witness, he could not decide whether her fault was “untruthfulness or lapse of memory.”

In short, the judge’s *Wright Line* analysis, which is particularly colored by reliance on prior Board findings denied enforcement by the D.C. Circuit, is, like those prior Board findings, legally erroneous and unsupported by substantial evidence.

The Majority’s Second Bite at the Animus Apple

Apparently recognizing that the judge’s *Wright Line* analysis cannot survive scrutiny, my colleagues take a different tack, but one no less errant. First, despite the D.C. Circuit’s decision, the majority—in assessing “the totality of circumstances” supporting its finding of animus—cites “the numerous unfair labor practice charges” filed during the strike and the fact that the Respondent allegedly escalated tensions during the strike by distributing a bulletin to replacement workers telling them that the strikers were trying to take their jobs. In effect, the majority attempts to sneak in the back door what the D.C. Circuit threw out the front. There is simply no evidence that Respondent engaged in unlawful conduct during the strike to support a finding of Section 7 animus.

Second, in finding animus the majority relies on comments purportedly made by Supervisor Monroig to the effect that the strike had been a mistake, that the strikers’ return was an “unconditional surrender,” that the unions were at fault, and that union employees had ruined everything while the employer had gotten things back together. The sole “evidence” of such comments is hearsay reports provided by Union Representative Sorenson, a witness the judge described as “very lacking in credibility based on his evasive demeanor and the contradictions in his testimony.” More importantly, even if credited, Monroig’s purported statements of opinion shed no light on whether Taylor’s and Zemnickas’ decision to terminate Hydorn was colored by discriminatory animus. Finally, Section 8(c) precludes the use of such statements to establish an unfair labor practice. See 29 U.S.C. § 158(c) (“The expressing of any [non-coercive] views, argument or opinion, . . . shall not constitute or be evidence of an unfair labor practice . . .”).⁷

Third, the majority faults Respondent for failing to more extensively retrain Hydorn before returning him to the line, and somehow concludes that Respondent’s failure supports a finding that Hydorn’s discharge was discriminatorily motivated. I see no logic in that leap. Even supposing that Hydorn’s initial profane outburst could be excused by his ignorance of Respondent’s new operating requirements for materials handlers, Hydorn’s

⁷ See also *NLRB v. Lampi LLC*, 240 F.3d 931, 935 (11th Cir. 2001) (Sec. 8(c) prohibits Board reliance on lawful statements as evidence of either an unfair labor practice or Sec. 7 animus); *Carry Cos. of Illinois, Inc. v. NLRB*, 30 F.3d 922, 927–928 (7th Cir. 1994) (same).

initial ignorance does not explain or excuse his subsequent refusals to clear paper drags. Respondent “announced” to Hydorn not once, not twice, but three times that clearing paper drags was part of his job, and each time Hydorn refused to perform such work, even if it meant that he would be suspended or fired.

Fourth, in a painfully strained bit of semantic slight of hand, the majority asserts that “the Respondent’s stated reason for discharging Hydorn is false [i.e., pretextual],” and that Hydorn “was disciplined for misconduct he did not commit.” This because Hydorn’s discharge notice stated that he was terminated for “refusal to follow the instructions and the direct order given by your supervisor,” when, in fact, says the majority, Hydorn “never defied a direct order to remedy a *pending* paper drag.” (Emphasis added.) Of course, the discharge notice does not say he did. Rather it says Hydorn refused to follow the instructions and the direct order given by his supervisor—namely to clear paper drags. Indeed, as the credited testimony summarized in the judge’s decision states: “Monroig asked Hydorn if he understood that [supervisor] Leach had given him *a direct order to clear paper drags*, and Hydorn again stated that he would not remove paper drags because doing so was the job of the operator, not of the material handlers.” There is absolutely no dispute that Hydorn pointedly refused to follow the instructions of his supervisor, and repeatedly refused to comply with a “direct order” to clear paper drags.⁸ Hence, the only confusion concerning the basis for Hydorn’s discharge emanates from my colleagues.

Having erroneously found Respondent’s basis for discharging Hydorn to be false, the majority, as part of its animus inquiry, proceeds to assess “whether that false reason was designed to conceal an unlawful reason for Hydorn’s discharge”—i.e., whether the Respondent’s reason was a pretext for discrimination against Hydorn because of his Section 7 activity. Putting aside the subtle burden shifting this analysis achieves,⁹ the evidence cited by the majority falls woefully short of establishing pretext or discriminatory animus.

First, my colleagues, like the judge, fault the thoroughness of Respondent’s investigation, characterizing it as a “rush to judgment,” despite the uncontested nature of Hydorn’s conduct, Zemnicks’ several consultations with counsel, her interviews of pertinent witnesses and

⁸ The word “refuse” means “to show or express a positive unwillingness to do or comply with (as something asked, demanded, expected).” Webster’s Third International Dictionary.

⁹ It is one thing to buttress a strong prima facie case with clear evidence of pretext, as the Board often does, it is another to fashion a weak prima facie case from equally weak evidence of pretext—i.e. that the Respondent here purportedly failed to carry its burden of proof in its rebuttal case.

obtaining of written statements for Taylor’s review, and despite the fact that employers have every incentive to expedite investigations where employees have been suspended. To repeat, on the facts of this case, it was by no means unreasonable for the Respondent to eschew additional witness interviews in light of Hydorn’s admitted refusal to clear paper drags, a job duty he deemed exclusively the province of operators making “the big fucking dollars.” Nor, given Hydorn’s conceded “bad attitude” and stubborn insistence that he would not clear paper drags even if it meant his suspension and termination, do I find it the least bit surprising that Taylor saw no need to provide Hydorn additional opportunities to respond. Nothing in the general supervisory guidelines required Respondent to do so, nor did those guidelines mandate progressive discipline in every case.¹⁰ In fact, the record reflects that Respondent imposed a range of discipline from written warnings to discharge for acts of insubordination, and terminated at least one nonstriking employee (Daramy) based on a single act of insubordination less severe than Hydorn’s. Stripped to the core, my colleagues simply disagree with the severity of the discipline imposed and substitute their judgment for that of the Respondent. While their obvious sympathy for Hydorn is understandable, this is not arbitration, and our sole authority is to determine whether the General Counsel carried his burden of establishing a violation of the law. Because the General Counsel failed to satisfy his initial *Wright Line* burden, I would dismiss the complaint.

Respondent’s Rebuttal Case

In my view, the evidence of animus and a causation nexus in this case is so weak that a discussion of whether Respondent met its *Wright Line* rebuttal burden is academic. However, because my colleagues go there, I feel

¹⁰ Hydorn’s insubordination in this case was extreme and directly challenged Respondent’s authority to establish production procedures for workers on the plant floor. In effect, by announcing his intention to defy any future directive to clear paper drags, Hydorn was seeking to unilaterally dictate to the Respondent a term and condition of employment. See, e.g., *Valley City Furniture*, 110 NLRB 1589, 1594–1595 (1954), *enfd.* 230 F.2d 947 (6th Cir. 1956) (reasoning that attempting to dictate terms and conditions of employment was antithetical to the objectives of the Act). See also *Broyhill & Associates, Inc.*, 298 NLRB 707, 709–710 (1990) (in which the Board adopts, on quite similar facts, the judge’s determination that the General Counsel failed to establish that respondent’s stated basis for discharging the employee—namely his repeated and stubborn threat not to work an assigned shift—was a pretext for discrimination, notwithstanding somewhat inconsistent application of respondent’s progressive discipline policy). In light of Hydorn’s repeated insistence that he would not clear paper drags regardless of the discipline imposed, Respondent’s managers Taylor and Zemnicks could reasonably conclude that progressive discipline would be futile and that Hydorn’s attitude and behavior was inconsistent with continuing an employer/employee relationship.

compelled to at least make several points concerning their analysis.

First, close scrutiny of the record evidence relating to allegedly disparate treatment of insubordinate employees, if anything, reveals that the Respondent's practice in disciplining employees for insubordination was and is decidedly mixed—both with respect to striking and nonstriking employees. That is, Respondent, given the myriad factual scenarios encompassed within the realm of “insubordinate” behavior, has consistently been inconsistent in imposing discipline. Indeed, the record suggests that this lack of uniformity in discipline has long been a source of tension between the Respondent and the Union. Thus, even assuming some inconsistency with respect to Hydorn, that inconsistency shows only that Respondent did not have a hard and fast rule that discharge was the automatic penalty for insubordination; it does not reflect disparate treatment of returning strikers generally or Hydorn specifically.

Second, my colleagues, like the judge, dismiss Respondent's evidence that it discharged six nonstrikers for insubordinate conduct, arguing that all but one of those cases involved more than a single isolated act of insubordination. However, Hydorn did not engage in a single act of insubordination—he steadfastly and repeatedly refused to clear paper drags even in the face of contrary advice from his union representative, occupying the time of several supervisors in the process. He then refused to comply with a request that he turn in his identification and leave the premises. Moreover, over the course of his insubordination, which amounted to insistence on unilaterally establishing the duties of his position, Hydorn demonstrated and articulated his utter disregard for the potential consequences of his actions. Not one of the four cases cited by the judge as examples of nonstriking employees subjected to lesser discipline, including employee Murphy, involved such persistent challenges to duties assigned to a job classification.

Third, contrary to the judge and my colleagues, I believe that the cases most factually similar to Hydorn's situation are those of employees Sylvia Dean and Usman Daramy, nonstrikers Respondent terminated for insubordination. The judge attempted to distinguish Dean's case on the ground that she had been insubordinate on a previous occasion more than a year earlier. However, Dean's discharge notice does not mention the previous offense. Rather, it notes that Dean was discharged for refusing to perform an assignment and continuing that defiance after being warned that doing so could lead to her termination—exactly the behavior at issue here. See R. Exh. 3.

Similarly, the majority attempts to distinguish Daramy's case on the ground that his discharge notice indicated termination for refusing a direct order *and* “inappropriate behavior.” Though no record evidence exists regarding the nature of the allegedly additional “inappropriate behavior,” my colleagues reckon that “it seems clear that Daramy's inappropriate behavior [whatever it may have been] was an additional [and distinguishing] factor that contributed to Respondent's decision to discharge him.” Hydorn, by contrast, the majority claims, was discharged for the “singular act” of refusing a direct order from his supervisor (which, as noted above, they conclude he never did). The majority's analysis scoots past the contrary approach taken with Dean, whose discharge notice makes no reference to the prior act of insubordination used to distinguish her case.¹¹ More importantly, it ignores the reality of what actually transpired in favor of an unrealistic and artificially narrow focus on the precise language of the discharge notice. No one can reasonably dispute that Hydorn engaged in conduct Respondent deemed “inappropriate” in the course of his refusal to clear paper drags. Nor can one reasonably claim that Respondent did not consider the entire course of Hydorn's conduct in deciding what discipline to impose. Taylor testified that he reviewed and relied upon the written statements prepared by Supervisors Monroig and Leach, spoke with Zemnickas, and took into account Hydorn's “attitude,” which was “[g]o ahead and fire me[,] because I am not going to [clear paper drags] today and I am not going to do it tomorrow.”

Finally, contrary to the majority's view, the fact Respondent more frequently responded to single acts of insubordination by nonstrikers with warnings or suspensions does not establish disparate treatment of Hydorn.¹² Respondent demonstrated that it did terminate similarly situated nonstriking employees for insubordination, including Daramy and Dean. The fact that other employees received lesser sanctions demonstrates only that insubordination may take many forms and that Respondent did not automatically respond to such misconduct by terminating the offender. Accordingly, even assuming

¹¹ You cannot have it both ways, focusing narrowly on the language of discharge notices when favorable to do so, but viewing more expansively the relevant conduct to distinguish other cases.

¹² As to the theory, urged by the General Counsel and relied upon by the judge, that Respondent systematically disciplined strikers more harshly than replacement workers, the evidence does not support such a finding. Nor was such an allegation contained in the complaint or litigated at the hearing. My colleagues recognize as much and distance themselves from the theory. Nonetheless, that theory appears to underpin my colleagues' view of the case—i.e., that Respondent was simply looking for an excuse to discharge reinstated strikers.

arguendo satisfaction of the General Counsel's *Wright Line* burden, I would find that Respondent carried its rebuttal burden of establishing that it would have discharged Hydorn for gross insubordination even if he had not joined his coworkers on the picket line.

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

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL not discharge or otherwise discriminate against employees in order to discourage union activity.

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

WE WILL, within 14 days from the date of this Order, offer Thomas Hydorn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to any rights or privileges previously enjoyed.

WE WILL make Thomas Hydorn whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge of Thomas Hydorn and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DETROIT NEWSPAPER AGENCY D/B/A DETROIT
NEWSPAPERS

Linda Rabin Hammel, Esq., for the General Counsel.

Robert M. Verduysey, Esq. and *William E. Altman, Esq.* (*Verduysey, Metz & Murray*), of Bingham Farms, Michigan, for the Respondent.

Duane F. Ice, Esq. (*Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.*), of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on March 14 and 15, 2000. The charge was filed on November 9, 1999, and the complaint was issued on December 30, 1999. The complaint alleges that Detroit Newspaper Agency d/b/a Detroit Newspapers (the Respondent) discharged Thomas Hydorn in violation of Section 8(a)(1) and (3) of the Act because he participated in a strike against the employer and engaged in protected activity by questioning whose responsibility it was to perform a particular work task, and because of his union membership and support. The Respondent denied the essential allegations of the complaint and raised a number of affirmative defenses. The General Counsel and the Respondent filed posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a joint operating agreement partnership, with an office and place of business in Detroit, Michigan. It is engaged in the publishing and circulation operations of two newspapers—The Detroit News and The Detroit Free Press. During calendar year 1998, the Respondent derived gross revenues in excess of \$500,000 from these activities, and purchased and received at its facilities in the State of Michigan goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

The Respondent admits, and I find, that Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO (Local 2040 or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent prints and distributes two newspapers—The Detroit News and The Detroit Free Press—and sells advertising in both publications. One of the Respondent's printing facilities, referred to as the North Plant, is located in Sterling Heights, Michigan. At the North Plant a group of employees

known as “material handlers”¹ use “inserter machines” to place supplements into the newspaper and comics. Material handlers man various stations, called “heads,” positioned around each inserter machine. Each material handler places a particular supplement into the machine, and then the machine inserts the supplements into the newspaper or comics. There can be close to two dozen material handlers assigned to each inserter machine, depending on the number of supplements in that issue. An “operator” also works at each inserter machine. The operator is a nonmanagement employee, but one who has responsibility for directing the work group at the inserter machine and running the computer that helps the machine function properly. From time to time supplements misfeed in the machine, and this problem is, in most instances, referred to as a “paper drag.”² When a paper drag occurs a sensor causes the machine to cease functioning until someone “clears” the paper drag by removing the misfed paper and, if necessary, resetting the machine.

Thomas Hydorn began working for the Detroit Newspapers in 1978. Prior to his discharge on August 27, 1999, Hydorn had worked for approximately 12 to 15 years on inserter machines at the Respondent’s North Plant. Most of this time Hydorn was a material handler, although he also served intermittently as an operator during busy periods. In the very early period of his employment, while he was a part-time employee, Hydorn received one disciplinary notice for absenteeism. However, Hydorn subsequently was hired as a full-time employee and received no other discipline of any kind prior to the incident that preceded his discharge in August 1999.

Beginning in July of 1995, a number of employees represented by Local 2040, and five other unions, ceased work and began a strike against the Respondent. Thomas Hydorn was among these employees. In February 1997, the striking members of Local 2040 abandoned the strike effort and made an unconditional offer to return to work. The Board subsequently issued a decision on August 27, 1998, which held that the Respondent was guilty of multiple unfair labor practice violations against the members of Local 2040 and other unions, that the strike was caused by the Respondent’s unfair labor practices, and that the strike was an unfair labor practices strike from its inception.³ In a separate decision issued the same day, the Board found that the Respondent had committed an unfair labor practice by failing to immediately reinstate the striking workers when they made an unconditional offer to return to work. The Board’s Order called for the immediate reinstatement of the strikers.⁴ Hydorn was reinstated approximately 1 year later,

over 2 years after the Union’s unconditional offer to return to work. When Hydorn returned, the Respondent assigned him to a position as a material handler on the night shift at the North Plant, where Hydorn had worked before the strike in the same capacity on the day shift. At the time Hydorn was rehired, the Respondent placed a form in Hydorn’s personnel file that identified him as a “Union Returnee.”

Prior to resuming his duties, Hydorn attended a brief orientation given by Karen Zemnickas, post-press director. Zemnickas is the management official at the North Plant in charge of the work, and discipline, of Local 2040 members. She also oversees the fourteen supervisors who direct the work of Local 2040 members. In the orientation, Zemnickas discussed the job duties of the material handler position and distributed written materials. Zemnickas told Hydorn that he should do the job as he had done it before, except that he might now be called upon to work at more than one station. Although the Respondent had changed its policy regarding who was to clear paper drags at the inserter machine, Zemnickas did not tell Hydorn about this change, nor did the written materials mention it. Before the strike, the inserter machine operator had responsibility for clearing paper drags, and material handlers were forbidden from doing so. When Hydorn returned to work, the new rule, of which he was not apprised, was that the material handler was to clear a paper drag if he or she was nearest to it.

Almost as soon as Hydorn was reinstated, tensions developed between him and Louis Monroig, a supervisor hired during the strike. On his second day back, Monroig observed Hydorn smoking during a period when the inserter machine was idle, and Monroig informed Hydorn that this was not permitted on company time. As part of the ensuing exchange, or shortly thereafter, Monroig said “we can do this the easy way or we can do this the hard way, but you’re going to do it my way.” (Tr. 110 and 150.) After making this statement, Monroig offered to shake Hydorn’s hand, but Hydorn refused.

The episode that immediately preceded Hydorn’s suspension and discharge also involved Monroig and transpired a week later during the night shift that began on August 24, and ended on August 25.⁵ Hydorn and John Dutka, another material handler, were assigned to workstations adjacent to one another on an inserter machine at the North Plant. William Mihalik, who was hired after the strike began, was the “operator” of the machine. At about 1 a.m. in the morning, a paper drag occurred near the stations where Hydorn and Dutka were assigned, but

tain strike-related activities. *Teamsters Local 372 (Detroit Newspapers)*, 324 NLRB 364 (1997).

¹ Apparently, during an earlier period the position now called “material handler” was referred to as “mailer.” To avoid confusion I will refer to the position as “material handler” regardless of what timeframe is being discussed.

² There was also some discussion in the testimony of a variant of a paper drag that was known as a “floater” or “rotor floater.” Since the difference does not affect the outcome of this case, I will refer to both types of problems generically as “paper drags.”

³ *Detroit Newspapers*, 326 NLRB 700, 707 (1998).

⁴ *Detroit Newspapers*, 326 NLRB 782, 785 (1998). The Board has also found the Union guilty of unfair labor practice violations for cer-

⁵ There was some confusion in both the testimony and the documentation as to whether the events occurred on the shift that began on August 24, and ended on August 25, or during the shift that began on August 25, and ended on August 26. I conclude that the episode took place during the August 24 to 25 shift. The confusion regarding the date appears to have been initiated by the letter from Mike Martin, post-press supervisor, which stated that Hydorn was discharged based on his actions on August 26. (GC Exh. 3.) At the hearing, Martin testified that his letter stated the wrong date, and that the relevant events took place during the shift that ended on August 25. This was corroborated by other witnesses and also by one contemporaneous written report. See GC Exh. 5.

closest to Dutka's position. Mihalik called out "paper drag" and said that somebody should get it. He did not refer to any employee by name or direct an individual employee to address the problem; however, Hydorn understood the statement to be directed at both himself and Dutka. As a practical matter, Hydorn could not have cleared the pending paper drag without maneuvering around Dutka, given their respective positions and the configuration of the machine. Dutka left his workstation and cleared the paper drag. After Dutka cleared the paper drag, Hydorn told Dutka that it was not their responsibility as material handlers to fix paper drags. Hydorn pointed at Mihalik and said that it was the operator's "fucking job" and that was why he got paid the "big fucking dollars."⁶ Hydorn made these statements to Dutka loudly enough for Mihalik to hear, and Mihalik called for Casey Leach, an individual hired after the start of the strike who had recently been made a supervisor.

Leach arrived and told Hydorn that it was Hydorn's job to clear paper drags, but did not directly order Hydorn to clear a specific drag. Indeed, there was no paper drag pending at the time. Hydorn, still believing that material handlers were forbidden from doing this task, responded that he would not clear paper drags, even if it meant that he would be suspended or fired. Leach called for Monroig, who was generally a supervisor, but who was on this shift acting in the capacity of post-press manager—a higher position in the supervisory hierarchy. When Monroig arrived at the machine there was no paper drag pending. Monroig discussed the situation with Mihalik and Leach, and then approached Hydorn. Monroig asked Hydorn if he understood that Leach had given him a direct order to clear paper drags, and Hydorn again stated that he would not remove paper drags because doing so was the job of the operator, not of the material handlers. Monroig told Hydorn to come to the post-press supervisor's office, at which point Hydorn requested union representation.

Shortly thereafter, Monroig and Leach met with Hydorn and Harold Sorenson, a union representative who had been called by Leach, in the post-press supervisor's office. At that meeting, Sorenson confirmed to Hydorn that it was, in fact, his responsibility to clear paper drags. Although Hydorn had now been told by a supervisor, a manager, and a union official that material handlers were required to remedy paper drags, he continued to insist that it was the job of operators, and told Leach and Monroig that he would not clear paper drags. Monroig suspended Hydorn and directed him to turn in his identification card. Hydorn at first resisted surrendering the card, then gave it to Sorenson and left, escorted by a security guard.

Karen Zemnickas, post-press director, was informed about the incident involving Hydorn in the early morning hours of August 25, while at a company golf outing. She arranged a meeting with two of the Respondent's other management officials who were also at the outing. One was Mike Martin, a post-press manager at the North Plant, and the other was John Taylor who was the Respondent's senior legal counsel and director of labor relations. Taylor provides advice to supervisors and managers regarding the discipline of workers in a number of bargaining units at the North Plant, including local

2040, in which Hydorn worked. Zemnickas generally consults Taylor when discharge is being considered as discipline. Taylor's advice was that Zemnickas have the supervisors involved prepare written accounts of the incident, and that they review the situation upon their return to work from the golf outing.

Subsequently, Zemnickas interviewed Monroig and Leach regarding the incident with Hydorn. She then discussed the matter with Taylor, who had reviewed the written accounts of the incident prepared by Monroig and Leach. Neither Zemnickas nor Taylor discussed the matter with Hydorn, Sorenson, or Dutka. Taylor recommended to Zemnickas that Hydorn be discharged. Taylor testified regarding the basis for his recommendation as follows:

The information that I was provided, and that I looked at, indicated that Mr. Hydorn had been asked by management, supervision, to perform a particular task, which was to clear the paper drag, and that he had refused. That the Union steward had also asked him to do it, and that he refused. And that his attitude was also a factor. His attitude was not only did he refuse, but on top of that he said, "Go ahead and fire me. Because I am not going to do it today and I am not going to do it tomorrow."

(Tr. 514.) Zemnickas decided to discharge Hydorn. On August 27, only 2 days after the incident occurred, and 11 days after Hydorn returned to work following the strike, the Respondent issued a letter, under Mike Martin's signature, which informed Hydorn that he was discharged because of his "refusal to follow the instructions and the direct order given by your supervisor." (GC Exh. 3.)

On August 24, three days prior to the issuance of the letter discharging Hydorn, Taylor presented a "Labor/Legal Issues Workshop," at the North Plant in response to a request from Zemnickas. The outline of that talk includes a section on the "Elements of Effective Discipline." This outline states that a "cardinal principle" of an investigation of misconduct is to "[i]nvestigate thoroughly before assuming guilt" and to "[g]ive [the] employee an opportunity to respond." The outline states that among the factors to consider in determining proper corrective action are the employee's "[l]ength of service" and [p]rior work and conduct record." The outline listed "[p]rogressive disciplinary action" as one of the "Elements of Effective Corrective Discipline." (R. Exh. 8.)

Although Taylor had given this presentation only days before, much of the advice was not heeded in the decision-making process regarding Hydorn, even by Taylor himself. Martin, Zemnickas, and Taylor did not talk to Hydorn at all about the incident prior to issuing the letter, dated August 27, converting his suspension to a discharge. In fact, it does not appear that these officials provided Hydorn with any opportunity to respond to the allegations against him prior to issuance of the discharge letter on August 27. Nor did Martin, Zemnickas, or Taylor interview or obtain statements from Mihalik, Dutka, or any nonmanagement witness to the incident, or for that matter from Sorenson, who was present at the initial meeting when Hydorn was suspended. In his testimony explaining the considerations that led him to recommend that Hydorn be terminated, see *supra*, Taylor made no mention of Hydorn's ap-

⁶ Operators are paid more than material handlers are.

proximately 15 years of service with the Respondent or of Hydorn's virtually unblemished prior work and conduct record, although his seminar outline specifically stated that these were factors to be considered. Nor did Zemnickas or Martin state that Hydorn's length of service or work record were factors in the decision. Progressive discipline was not applied inasmuch as Hydorn was discharged for his first offense.

On September 1, 1999, Alex Young, president of the Union, filed a formal grievance regarding Hydorn's discharge. A joint standing committee meeting regarding the grievance was held on October 8, 1999, which was attended by Taylor, Zemnickas, Young, and Hydorn. At the meeting, Young argued that the discipline was excessive because Hydorn had never received a direct order to remedy a pending paper drag. Rather he had received a "hypothetical" order to remedy paper drags in the future. Moreover, as noted above, Dutka, not Hydorn, was nearest to the drag and therefore was the one who would have been compelled to act under the general rule that paper drags were to be cleared by the closest material handler. Young conceded that Hydorn had behaved poorly, but took the position that the supervisors had also done so. He argued that a lack of communication between Hydorn and the supervisors had unnecessarily escalated to the point that Hydorn was discharged.

At the same meeting, Young argued that the discipline was excessive because lesser discipline for similar offenses had been meted out to workers hired as strike replacements. Young presented Zemnickas and Taylor with documentation regarding the discipline that Zemnickas had given Marcia Murphy, another worker supervised by Monroig, but one who had been hired as a replacement after the strike began. In his written summary of the events that led to Murphy's suspension, Monroig stated the following:

I . . . heard Marcia Murphy yelling and swearing. I asked her what was the matter and she said that she told Gloria that she didn't want to work up here and the bitch has her favorites and took care of them. . . . [A]s I walked away I heard her say, "he better walk away or I will kick his ass because I'm not one of his bitches." . . . I walked over to her and said enough already you vented for 15 minutes; now stop, she said bullshit. I then told her it's a long day so give me a break and she said fuck that we still have nine hours of this. I then told her if she didn't stop yelling and using profanity I will send her home, she then said I don't give a fuck and you can send me home because I don't need this shit. I then knocked her off and told her to call in before reported to work again. This is a clear case of insubordination and I will not stand for that type of abuse from anyone.

(GC Exh. 14) Murphy, who had a far shorter period of service than Hydorn, and was also supervised to some extent by Monroig, received a 1-week suspension for her insubordinate behavior.

At the standing committee meeting on October 8, regarding the grievance, Hydorn stated that he was guilty of a "bad attitude" and he apologized for his behavior. (Tr. 282.) Apparently neither Young's arguments, nor Hydorn's apology were persuasive to Zemnickas and Taylor. In a letter dated October 21, Taylor informed Young that the grievance was denied be-

cause of Hydorn's refusal to follow the instructions of his supervisor. The unfair labor practice charge giving rise to the instant complaint was subsequently filed on November 9. The Regional Director issued the complaint in this case on December 30, 1999.

B. Credibility

I credited the testimony of Mihalik, Leach, and Monroig regarding some of what occurred at the North Plant on August 25. I did not, however, credit their testimony that Hydorn, not Dutka, was closest to the paper drag. See *American Pine Lodge Nursing*, 325 NLRB 98 (1997) (A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says); see also *Excel Container, Inc.*, 325 NLRB 17 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony). Both Hydorn and Dutka testified that it was Dutka who was closest to the paper drag, and that Hydorn could not have reached it without maneuvering around Dutka. I found Dutka's testimony on this point particularly credible. He testified in a direct and clear manner, and expressed complete certainty regarding his and Hydorn's relative positions with respect to the paper drag. Dutka has nothing personally at stake in this proceeding, is not a personal friend of Hydorn's, and has only worked with Hydorn to a limited extent in the past. Dutka readily admitted that there were aspects of the incident at the inserter machine about which he had no knowledge, and he seemed disinclined to embellish his testimony to suit either side in this dispute. My credibility findings with respect to Dutka are made independently of Dutka's status as a current employee of the Respondent at the time of his testimony. I nevertheless note that these findings are consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977); see also *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996).

Hydorn's own testimony was contradictory and vague regarding many aspects of the incident, a result, I believe, largely of his self-confessed agitation at the time those incidents took place. As a result, I have not credited a good deal of his account. I did, however, credit Hydorn's testimony regarding his position relative to the paper drag. Unlike much of his other testimony, his memory was clear about this aspect of the incident, and his demeanor was straightforward when testifying about it. I also note that Hydorn specifically testified that, at the grievance meeting on October 8, Zemnickas acknowledged that it was Dutka's responsibility to get the paper drag at issue since Dutka was the one closest to it. (Tr. 109.) Zemnickas testified, but did not contradict Hydorn's testimony regarding this. (Tr. 491.)

While both Monroig and Leach prepared written accounts of the incident shortly after it occurred, neither one of those accounts states that Hydorn was nearest to the paper drag, although this would have been a significant point given the rule that the person closest to the paper drag was responsible for clearing it. In fact, in his written statement Leach indicates that

he was called to the inserter machine because Hydorn was telling Dutka that it was not their job as material handlers to clear paper drags. If Hydorn had been closest to the paper drag, I would expect that his own failure to clear the paper drag, not his statements to Dutka, would have been the problem that necessitated supervisory intervention.

Mihalik did not prepare a statement, but I found him a less credible witness than Dutka on the question of the respective positions of Hydorn and Dutka. Mihalik testified that after giving the general command to clear the paper drag, he directly told the material handler at the “V head,” who he had earlier identified as John [Dutka], to clear the paper drag. (Tr. 390–391.) This would suggest that Dutka was closest to the paper drag, since the rule was that the material handler closest to the drag was responsible for clearing it. Looking at the testimony in context, it is possible that Mihalik intended to testify that he told Hydorn, not Dutka, to clear the paper drag. However, the discrepancy suggests confusion, or lapse of memory, on Mihalik’s part regarding the respective positions of Dutka and Hydorn. By contrast, Dutka was very clear that he, not Hydorn, was the one closest to the paper drag, and that he cleared the paper drag without either Hydorn or himself being given a direct order to do so. In addition, unlike Dutka, Mihalik has something at stake in this case. It was Mihalik who first called a supervisor about Hydorn after Hydorn had referred to Mihalik in an insulting and profane manner. Moreover, Mihalik knew that Hydorn was a returning striker and he testified that he had received literature from the Respondent stating that the returning strikers wanted to take away the jobs of the replacement workers. (Tr. 397, 402.) Thus, I believe that Mihalik’s testimony was tainted to a degree by bias as well as being undermined by discrepancies showing confusion or lapse of memory.

I did not credit Leach’s claim that he gave Hydorn a direct order to clear an existing paper drag. Leach’s own testimony was inconsistent regarding this point. First he testified that he had told Hydorn that it was Hydorn’s job to clear paper drags, but that he had never directly ordered Hydorn to clear a pending paper drag. (Tr. 420–421.) Later Leach testified that he had directly ordered Hydorn to clear the paper drag, or at least that he had told Zemnickas this. (Tr. 430.) I do not credit the latter statement, which was conclusory and contradicted by his more precise testimony giving the specifics of the incident, and was also undercut by his written statement, which makes no mention of giving Hydorn a direct order regarding an existing paper drag. (See GC Exh. 5.) I also do not credit Leach’s testimony that a paper drag occurred after he arrived at the inserter machine to talk to Hydorn. In his written statement, Leach did not mention that a paper drag occurred while he was at the inserter machine with Hydorn. Moreover, Dutka specifically denied that a paper drag occurred during this timeframe, and for the reasons discussed above I found Dutka a very credible witness.

I agree with the arguments in the Respondent’s brief that Sorenson was very lacking in credibility based on his evasive demeanor and the contradictions in his testimony. I have generally not credited Sorenson’s testimony except where it was uncontroverted or was corroborated by other evidence.

Zemnickas was not a credible witness. For example, she first testified that the company did not in any way identify which workers were returning strikers. (Tr. 492.) However, a document was subsequently introduced from Hydorn’s personnel file that explicitly identified him as a “Union Returnee.” (GC Exh. 19.) This document was initialed by Zemnickas herself at the time Hydorn was rehired. (Tr. 503.) When confronted with the document, Zemnickas changed her earlier position, and claimed that the company identified returning strikers in order to ensure that the strikers’ benefits would resume. (Tr. 503–504.) Zemnickas also testified that as part of her investigation prior to discharging Hydorn in August of 1997, she spoke to Monroig, Leach, and *Mihalik*. (Tr. 487.) However, Mihalik, one of the Respondent’s own witnesses, said that this was not true, and that no one from the company had discussed the incident with him or asked him to put his recollection in writing until a week before the hearing in March of 2000. (Tr. 401–402.) John Taylor stated that he did not have any statement from Mihalik before recommending Hydorn’s discharge. (Tr. 528.) Zemnickas’ untruthfulness, or lapse of memory, regarding these important factual matters cast a cloud of doubt over the entirety of her testimony.

C. *The Complaint Allegations*

The complaint alleges that the Respondent violated Section 8(a)(1) and Section 8(a)(3) of the Act by discharging Hydorn on August 27, 1999, because he participated in the strike, engaged in concerted protected activity by questioning whose job it was to clear paper drags, and was a member of the union. The complaint further alleges that by taking this action the Respondent interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act.

III. ANALYSIS⁷

A. *Were the Respondent’s Actions Motivated by Anti-Union Considerations?*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent’s actions were motivated, at least

⁷ The General Counsel in this case served a subpoena duces tecum on the Respondent and, after the hearing began, the Respondent produced records in response to this subpoena. The Respondent asserts that this subpoena was improper and that the complaint should therefore be dismissed. R. Br. at 7–8. The Respondent claims that the General Counsel violated “its own rules” against discovery by serving the subpoena and then reviewing the subpoenaed documents during the hearing. Contrary to the Respondent’s contention, the subpoena procedure did not violate the Board’s rules, but is specifically provided for under the Board’s rules and regulations Sec. 102.31. Indeed, the Respondent availed itself of this very procedure to request documents from the Union. The Respondent’s assertion that the General Counsel’s subpoena was in violation of Board rules, and that the complaint must be dismissed on that basis, lacks merit.

in part, by antiunion considerations. The General Counsel meets this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, supra at 1105.

It is undisputed in this case that Hydorn is a member of the Union and had engaged in protected activity by participating in a strike against the Respondent. In addition, I have no doubt that the Respondent was aware of Hydorn's involvement with the Union and the strike. The Respondent explicitly identified Hydorn as a "Union Returnee" on a form placed in his personnel file at the time of his reinstatement. Zemnicks, the management official who made the decision to discharge Hydorn, herself initialed the personnel form identifying Hydorn as a "Union Returnee." (GC Exh. 19.) Thus the Respondent was aware of Hydorn's union membership and strike activity.

The record also provides ample evidence that the Respondent harbored anti-union animus. In the wake of the strike against the Respondent, the Board issued multiple decisions finding the Respondent guilty of unfair labor practices against Local 2040 and other unions. See, supra, fn. 3 and 4; see also *Detroit Newspapers Agency*, 330 NLRB 505 (2000). The Board found that the Respondent had exhibited bad faith in its bargaining with the Union by: repeatedly obfuscating and withholding details about its proposal so that the employees' bargaining representative could not formulate a response; providing more information on its proposal to unit employees than it provided to their bargaining representative; proposing bargaining on dates when it knew the employees' representative was unavailable and then falsely informing employees that the representative had refused to attend a bargaining session; misrepresenting the representative's position to unit employees; and unilaterally implementing a proposal that was inherently destructive of the statutory collective-bargaining process. 326 NLRB 700, 706 (1998). In another case against the Respondent, the Board held that the Respondent had unlawfully refused to immediately reinstate the former strikers upon their unconditional offer to return to work. 326 NLRB 782 (1998). The Board's Order called for the immediate reinstatement of the striking members of Local 2040, but the Respondent did not reinstate Hydorn until August 16, 1999, almost a year later. It is proper to rely on the findings and evidence in recent cases against the Respondent as background in this case. *Stark Electric*, 327 NLRB 518 fn. 2 (1999); *Tama Meat Packing v. NLRB*, 575 F.2d 661 (8th Cir. 1978), enfg. as modified 230 NLRB 116 (1977), cert. denied 439 U.S. 1069 (1979). The background of the claimant's bad-faith bargaining behavior and its unlawful failure to immediately reinstate the returning strikers supports the conclusion that the Respondent harbored antiunion animus.⁸

⁸ The Respondent argues that under a Board decision from 1977 "a finding of violations of 8(a)(5) 'is essentially a dispute resolved under

Timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity, see, e.g., *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177(2000); *American Wire Products*, 313 NLRB 989, 994 (1994), and the timing of Hydorn's discharge in this case provides further evidence of discriminatory motive. The Respondent issued the letter discharging Hydorn only 11 days after Hydorn returned from work following the strike. As discussed above, the Respondent had previously unlawfully refused to immediately reinstate Hydorn, and finally reinstated him almost a year after the Board's Order calling for the immediate reinstatement. The fact that the Respondent discharged Hydorn for alleged insubordination only days after the belated reinstatement is very suspicious, particularly given that Hydorn had never been disciplined for insubordination in his 15 years of employment with the Respondent prior to the strike.

An employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee and failure to give the employee an opportunity to explain are indicia of discriminatory intent. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir. 2000). Such indicia are present here. Neither Taylor, who recommended Hydorn's discharge, nor Zemnicks, who made the discharge decision, gave Hydorn any opportunity to address the allegations against him prior when the Respondent issued the discharge letter on August 27. Indeed, when Hydorn was able to address the allegations him at a grievance meeting on Octo-

contract law without necessary implication of animus.'" (R. Br. 10.) (*Ray's Liquor Store*, 227 NLRB 1800 (1977)). The prior case at issue there centered on the question of whether, as a matter of contract law, an offer by the employer had expired prior to the union's acceptance of it. The Board affirmed the administrative law judge's conclusion that the employer's offer had not expired, that an agreement had therefore been reached between the employer and the union, and that the employer had violated 8(a)(5) when it refused to honor that agreement. *Ray's Liquor Store*, 224 NLRB 26 (1976). I agree that the 8(a)(5) violation in that case involved a "dispute resolved under contract law" and that, without more, it would not carry "a necessary implication" of antiunion animus. However, the 8(a)(5) violations found against the Respondent are of a different variety altogether. The Respondent's 8(a)(5) violations, discussed above involved, inter alia, providing misinformation about the bargaining representative to members of the bargaining unit, and attempting to go around the bargaining representative by giving the members of the unit more information about its proposal than it gave to the bargaining representative. This was not a dispute over contract law, but rather over the Respondent's effort to use misinformation and other tactics to undermine the Union and the bargaining process. The Board has not hesitated, in appropriate cases, to conclude that prior 8(a)(5) violations involving bad-faith bargaining are evidence of antiunion animus. In *CJC Holdings*, 320 NLRB 1041 (1996), the administrative law judge found that the employer's use of "bad-faith tactics during . . . negotiations," "demonstrate[d] an anti-union animus." The Judge's rulings, findings, and conclusions were affirmed by the Board. Similarly, in *Union-Tribune Publishing Co.*, 307 NLRB 25 (1992), the Board considered an 8(a)(5) violation involving bad-faith bargaining to be a factor supporting an inference of anti-union animus. Under the facts present in this case, I conclude that the Respondent's prior 8(a)(5) violations are a factor supporting an inference of antiunion animus.

ber 8, he conceded that he had been guilty of a “bad attitude,” and apologized for his behavior. Moreover, neither Taylor nor Zemnickas claim to have interviewed or obtained statements from Dutka or any of the other material handlers who witnessed the episode. This failure is particularly suspicious given that only a few days earlier Taylor had, at Zemnickas’ request, outlined the elements of effective discipline, and had included among those elements: giving the employee an opportunity to respond; investigating thoroughly before assuming guilt; and considering the employee’s length of service and prior conduct record. In this case, Zemnickas, in consultation with Taylor, decided to discharge Hydorn—an employee with 15 years of service and no prior discipline for insubordination—without even giving him an opportunity to explain his actions and without interviewing anyone other than the supervisors who alleged the insubordination. An employer’s departure from established procedures for discharge is evidence of unlawful motive. *Ed-dyleon Chocolate Co.*, 301 NLRB 887, 889 (1991); *Richmond Refining Co.* 212 NLRB 16, 19 (1974); see also *D.H. Baldwin Co.*, 207 NLRB 25, 27 (1973), *enfd.* 505 F.2d 736 (8th Cir. 1974) (deviation from established practice of reassigning, rather than discharging, poorly performing employees, an indicia of discriminatory motive). While the disciplinary guidelines outlined by Taylor are something short of “established procedures,” they were guidance from the Respondent’s director of labor relations. I would expect Taylor to follow his own advice, absent a satisfactory explanation for deviating from it. Similarly, it is fair to expect that Zemnickas would follow the guidelines that she herself had asked Taylor to provide. That the Respondent so blatantly bypassed the most basic elements of the guidance when it investigated and disciplined Hydorn supports the view that the Respondent wished to be rid of Hydorn for reasons other than his misconduct alone.

The conclusion that the discharge was motivated by anti-union animus is also buttressed by the fact that the Respondent explicitly identified Hydorn as a returning union member at the time of his reinstatement. As discussed above, Zemnickas at first testified that the Respondent did not keep records of which employees were returning strikers. It was only after she was confronted with a document containing the “Union Returnee” notation that she admitted that the Respondent maintained such information in its records and claimed that doing so was necessary to ensure the proper resumption of employee benefits. In these circumstances I find that the notation confirms that the Respondent was singling out Hydorn for discriminatory reasons. This is especially true in light of the evidence, discussed below, that nonstrikers were treated less harshly than Hydorn for similar conduct.

I conclude that the General Counsel has easily cleared the hurdle of establishing that this Respondent harbored antiunion animus. The General Counsel has established that Hydorn engaged in union and protected activity, that the Respondent was aware of this, and that the Respondent had antiunion bias. Under the *Wright Line* standards, the General Counsel has met its initial burden of showing antiunion animus was a factor in Hydorn’s discharge.

B. Would the Respondent Have Discharged Hydorn Absent Anti-Union Considerations?

Since the General Counsel has met its initial burden of showing that the Respondent’s actions were motivated, at least in part, by antiunion considerations, the burden shifts to the Respondent under *Wright Line*, *supra*, to show that it would have taken the same actions even in the absence of Hydorn’s union and protected activities. See *Senior Citizens*, 330 NLRB 1100, 1105 (2000); *NLRB v. General Sec. Services Corp.*, 162 F.3d 437, 445 (6th Cir. 1998).

The Respondent contends that its actions were taken because of Hydorn’s insubordinate conduct on August 25. The record leaves no doubt that Hydorn did behave improperly. I agree he was insubordinate and conclude that his misconduct played a role in the Respondent’s decision to discipline him. Although I find that Hydorn never defied a direct order to remedy a pending paper drag,⁹ he was insubordinate when he told Leach and Monroig that he would not clear paper drags in the future despite their instructions. However, under *Wright Line*, once the General Counsel has shown that antiunion animus played a part in the decision to discharge an employee, the Respondent cannot meet its burden merely by showing that employee misconduct also factored into the Respondent’s decision. Rather, the Respondent must show that the misconduct would have resulted in the same discipline even in the absence of the employee’s union and protected activities. *Monroe Mfg.*, 323 NLRB 24, 27 (1997). As discussed below, the evidence in this case shows that the Respondent had a relatively lax attitude towards insubordination by nonstrikers, even those who defied multiple direct orders or had been insubordinate on prior occasions. This leads me to conclude that the Respondent has not shown that it would have discharged Hydorn for his insubordination if not for Hydorn’s union and protected activity. *Id.* at 26–27 (employer violated Sec. 8(a)(1) when it discharged employee who engaged in protected activity based on a rule that was not strictly enforced against other employees).

At the hearing, the General Counsel and the Respondent each introduced evidence regarding the discipline that the company had meted out to other employees.¹⁰ The General Counsel

⁹ Mihalik simultaneously directed Dutka and Hydorn to clear a paper drag, a task that requires only one person. Dutka cleared the paper drag. The fact that Hydorn failed to clear the paper drag before Dutka did, does not constitute defiance of a direct order. For the reasons discussed above, I do not credit Leach’s claims that he gave Hydorn a direct order to clear an existing paper drag.

¹⁰ Both the General Counsel and the Respondent introduced evidence of discipline involving employees not only in the Local 2040 bargaining unit, but also in the Local 372 bargaining unit at the North Plant. Nevertheless, the Respondent contended strenuously at the hearing and in its post-hearing brief, R. Br. at 25–26, that there was not a sufficient nexus to make discipline of employees of Local 372 relevant to the question of whether Hydorn, who was a Local 2040 employee, was discriminated against. I conclude that the evidence of discipline received by employees of Local 372 is relevant to an evaluation of whether Hydorn was disciplined more harshly because of his union activities. The Respondent’s own witness, John Taylor, testified that, as director of labor relations, he was involved with disciplinary actions and grievance meetings regarding members of both Local 2040 and Local 372. The documentary evidence shows that Taylor received

introduced an exhibit containing records showing that 37 non-strikers who were disciplined for insubordination between February of 1997 and November of 1999, had received lesser punishment than Hydorn. (GC Exh. 14.) The punishments meted out to these nonstriker employees ranged from a verbal warning to a 15-day suspension. In 20 of the 37 instances put forward by the General Counsel, the nonstriker employee received only a reprimand or warning for insubordination.

Among the nonstrikers within the Local 2040 bargaining unit who received lesser discipline than Hydorn were a number whose misconduct was similar to Hydorn's. Gwendolyn Hayes, a nonstriker who was within the Local 2040 bargaining unit, received a 3-day suspension for insubordination in April of 1998. The documentary evidence shows that Hayes refused instructions from a supervisor to feed a hopper by hand, and then refused the same instruction again when it was given by a superintendent. She was told to go home after her repeated refusal to perform the task as instructed. Tamika West, a nonstriker who was part of the Local 2040 bargaining unit, was disciplined in February of 1998 and again in May of 1998 for refusing to follow the directions of supervisors. In the second instance she is reported to have disobeyed a direct order. Despite the fact that she disobeyed a direct order on that occasion, and that it was her second act of insubordination in less than 6 months, West received only a written warning as punishment. The Respondent suspended Tonya Stewart, another nonstriker who was within the Local 2040 bargaining unit, for insubordination in May of 1999. Stewart was instructed several times to help out at another workstation, but she refused to do so, and then ignored the supervisor when he tried to talk to her about it. When the supervisor suspended her, Stewart defied him by returning to her workstation and refusing to surrender her identification card. For this conduct Stewart received a 3-day suspension. Marcia Murphy, a nonstriker within the Local 2040 bargaining unit, received a 1-week suspension for insubordination in November of 1997. According to Monroig's account of her misconduct, Murphy had stated that she would "kick his ass" and that she was not "one of his bitches." Monroig directed Murphy to stop "venting," to which she replied "bull-

copies of discipline letters involving employees in both the Local 2040 and the Local 372 bargaining units. In the instant case, it was Taylor who recommended that Hydorn be discharged in August of 1999, and then signed the letter stating that the grievance regarding that discipline had been denied. Taylor's involvement demonstrates a nexus between the discipline of Local 372 employees and the discipline received by Hydorn.

In addition, the Board has recently found the Respondent guilty of unfair labor practices affecting employees within multiple bargaining units, including Local 2040 and Local 372. See *Detroit Newspapers Agency*, 330 NLRB 505 (2000); *Detroit Newspaper Agency*, 326 NLRB 782 (1998); *Detroit Newspaper Agency*, 326 NLRB 700 (1998). The Respondent's recent history of a pattern of unlawful antiunion practices involving multiple bargaining units, as well as the involvement of Taylor, makes the discipline received by workers in Local 372 relevant to the question of whether Hydorn was disciplined more harshly because of his union activities. I did, however, consider the arguments made by the Respondent in determining how much weight to accord to the evidence, and gave relatively greater weight to records regarding discipline that involved employees in the Local 2040 bargaining unit.

shit" and, later, "fuck that." Monroig told Murphy that if she did not stop yelling and using profanity he would send her home to which he reports she replied "I don't give a fuck and you can send me home because I don't need this shit." (GC Exh. 14.)

None of the Respondent's witnesses discussed the discipline that had been given to these employees, compared Hydorn's misconduct to theirs, or specifically explained why Hydorn had been discharged when these employees received only warnings, reprimands, or suspensions. The Respondent did, however, introduce evidence showing that it had discharged six nonstrikers. In all but a single case, the evidence available indicates that these discharges were based on significantly more than an isolated episode of insubordination. One of the nonstrikers, Robert MacDonald, a Local 372 bargaining unit employee, was discharged not only for insubordination, but also because of his "overall disciplinary record," and because he had made false allegations involving racism against a manager. Jacqueline Ridley, a nonstriker and Local 372 bargaining unit employee, was discharged in part for insubordinate behavior, but also because of her overall disciplinary record and because she had been involved in three avoidable accidents. A third nonstriker, Hillard Smith, who was within the Local 2040 bargaining unit, was discharged for insubordination, but his misconduct involved not only failing to follow instructions, but also threatening a supervisor. The Respondent also introduced documents stating that Sylvia Dean, a nonstriker who was in the Local 2040 bargaining unit, had been discharged for refusal to follow instructions on June 17, 1998. However, these records also state that this was not Dean's first offense and that she had been previously disciplined for insubordinate conduct on March 15, 1997.¹¹ Sandra Shelton was discharged in May of 1998 for her overall disciplinary record and performance. She was discharged only after three instances of misconduct. Prior to the episode that led to her discharge, she had behaved insubordinately towards Monroig in November of 1997 and had failed to perform duties in December of 1997.

The last of the discharged employees forwarded by the Respondent is Usman Daramy, an employee in the Local 372 bargaining unit, who was discharged for failure to follow a direct order and "inappropriate behavior." I begin by noting that while I have not accepted the Respondent's own contention that the discipline of Local 372 members is completely irrelevant in this case, I do find that such evidence is entitled to less weight than evidence regarding employees who, like Hayes, West, Stewart, and Murphy, were within the same bargaining unit as Hydorn. In addition, the evidence introduced by the Respondent does not reveal what Daramy's "inappropriate behavior" was or whether it was similar to Hydorn's conduct. Even if the conduct was similar, it would not be sufficient to show that the Respondent would have discharged Hydorn absent his union and protected activity, given that the great weight of the evidence regarding other discipline shows that nonstrikers, including at least four within Local 2040 who were guilty

¹¹ The records submitted state that as punishment for Dean's first insubordination offense she was "sent home, paid for shift." GC Exh. 18.

of misconduct similar to Hydorn's, received lesser discipline than Hydorn.¹²

The Respondent also offered evidence regarding two employees who, like Hydorn, were returning strikers, but who received discipline short of discharge for their insubordination. Ronald Swoveland, who was within the Local 2040 bargaining unit, received a 10-day suspension for failure to follow instructions, and Wayne Tabb, who was a Local 372 employee, received a 3-day suspension for refusal to follow a direct order. However, the Respondent did not introduce evidence of any returning strikers who received only a warning or reprimand as punishment for insubordination, even though the evidence indicates that this was the single most common punishment it meted out to nonstrikers for insubordination.¹³ Thus, this evidence, if anything, actually suggests disparate treatment of returning strikers other than Hydorn, and undercuts the Respondent's contention that it would have treated Hydorn the same even if he had not been a striker and union member. See *American Wire Products*, 313 NLRB at 994 (absent a reasonable explanation, disproportion between the number of union and nonunion employees discharged may be persuasive evidence of discrimination); *Sonoma Mission Inn & Spa*, 322 NLRB 898, 905 (1997) (indicia of improper motive when employees who were not involved in protected activity are given lesser discipline for worse conduct).

The Respondent argues that the General Counsel has failed to establish disparate treatment because "no testimony was offered explaining the circumstances underlying the discipline that had been issued" to the nonstrikers. Respondent's Brief at 21. However, the burden at this stage in the analysis is on the Respondent, since the General Counsel has introduced other evidence independently sufficient to show that antiunion motives played a part in Hydorn's discharge. If the Respondent was aware of evidence showing that the circumstances surrounding the lesser discipline issued to similarly situated nonstrikers were different than the circumstances involved in Hydorn's case, then it could have introduced that evidence at the hearing. Moreover, although all the details of the discipline administered to each of the other insubordinate employees was not developed, the evidence that was presented tends to support the conclusion that the Respondent treated similarly situated nonstrikers better than Hydorn. I conclude that the record evidence regarding the discipline received by other employees clearly fails to satisfy the Respondent's burden of showing that it would have taken the same action against Hydorn absent his union and protected activity.

¹² The Respondent also introduced evidence showing that Elaine Rideout, a nonstriker who was within the Local 2040 bargaining unit was discharged for insubordination on October 2, 1998. However, a document subsequently introduced by the General Counsel showed that the Respondent revoked this discipline and reinstated Rideout.

¹³ Excluding Hydorn, the record contains evidence of approximately 45 instances when the Respondent disciplined an employee at least in part for insubordination. In 21 of these cases the punishment was a warning or reprimand (treating Dean being "sent home, paid for shift" as a warning), in 18 cases it was a suspension (treating the period prior to Rideout's reinstatement as a suspension), and in 6 it was discharge.

The Respondent also contends that unlawful discrimination has not been shown since the General Counsel did not produce evidence that nonstriker employees who received lesser discipline had refused multiple direct orders or had said that the Respondent could fire or suspend them. Respondent's Brief at 27. As noted above, the burden at this point in the analysis is on the Respondent, not the General Counsel. At any rate, even the records that are available do show that, in fact, both Hayes and Stewart—two nonstrikers—had refused multiple direct orders during the episodes that led each to receive a 3-day suspension. West, another nonstriker employee, was insubordinate on two occasions within a 6-month period yet received only a written warning as punishment. Murphy received only a 1-week suspension after continuing to yell and use profanity after Monroig repeatedly told her to stop. When Monroig told Murphy that he would send her home unless she stopped yelling and using profanity she replied, "I don't give a fuck and you can send me home because I don't need this shit." GC Exh. 14. Thus the evidence that was presented does not support the Respondent's contention.

"While it is a truism that management makes management decisions, not the Board, . . . it remains the Board's role, subject to deferential review, to determine whether management's proffered reasons were its actual ones." *Detroit Paneling Systems*, 330 NLRB 1170 (2000) quoting *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998). In this case, the evidence leads me to conclude that the Respondent would not have discharged Hydorn for his insubordination absent his union and protected activity. I find that the Respondent discharged Hydorn because of his union and protected activities, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

By discriminatorily discharging employee Thomas Hydorn because of his union and protected activities, Respondent has violated Section 8(a)(3) and (1) of the Act, and that violation is an unfair labor practice within the meaning of the Act.¹⁴

¹⁴ I make no determination regarding the question of whether Hydorn engaged in protected concerted activity on August 25, by questioning whether it was the job of material handlers to clear paper drags. There is Board precedent indicating that Hydorn's statements to Dutka are properly viewed as a protected effort to educate a co-worker about duties and that Hydorn's subsequent insubordinate statements to Leach and Monroig were part of the *res gestae* of that protected activity and not so offensive, vulgar, defamatory, or opprobrious as to deprive his actions of their protected status. See, e.g., *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995). There is, however, Board precedent that favors a contrary conclusion. *C & D Charter Systems*, 318 NLRB 798, 802 (1995), *enf.* 88 F.3d 1278 (D.C. Cir. 1996); *Daly Park Nursing Home*, 287 NLRB 710 (1987). Fortunately it is not necessary for me to enter onto this difficult terrain. As discussed above, I conclude that Respondent's decision to discharge Hydorn was unlawfully motivated by Hydorn's union and strike activity and that the Respondent has not shown that it would have discharged Hydorn based on his insubordination alone. Therefore, the Respondent has violated Section 8(a)(1) and Section 8(a)(3) regardless of whether Hydorn's conduct on August 25, was protected, and I need not reach the question involving the status of that conduct.

THE REMEDY

In addition to the usual cease-and-desist order and other affirmative action, I will recommend that the Respondent offer full and immediate reinstatement to employee Thomas Hydorn to his former job or, if that job no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings or benefits resulting from the discrimination against him. The backpay is to be computed in accordance with *F.W. Woolworth, Co.*, 90 NLRB 289 (1950), with interested computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings and of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in order to discourage union activity.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within days from the date of this Order, offer Thomas Hydorn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to any rights or privileges previously enjoyed.

(b) Make Thomas Hydorn whole for any loss of earnings or benefits he may have suffered due to the Respondent's discrimination, in the manner set forth in the remedy section of the attached decision.

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

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

(e) Post at its printing facility in Sterling Heights, Michigan, copies of the attached notice marked "Appendix."¹⁶ Copies of

¹⁵ 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.

¹⁶ 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 Na-

the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C. June 21, 2000

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against employees in order to discourage union activity.

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

WE WILL, within 14 days of this Order, offer Thomas Hydorn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to any rights or privileges previously enjoyed

WE WILL make Thomas Hydorn whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Thomas Hydorn that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

DETROIT NEWSPAPER AGENCY D/B/A DETROIT
NEWSPAPERS

ional 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."