

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ATLANTA BRANCH OFFICE  
DIVISION OF JUDGES

DTR INDUSTRIES, INC.

and

Case No. 8-CA-33708-1

INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA, UAW

*Iva Y. Choe, Esq.* for the General Counsel.  
*Robert F. Rivera, Esq.* and *James A. Rydzek, Esq.*  
(*Jones Day*), of Cleveland, OH, for the Respondent.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: The charge was filed by International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW (Union, Charging Party or UAW) against DTR Industries, Inc. (DTR or Respondent) on September 30, 2002.<sup>1</sup> The charge was amended on December 17 and January 27, 2003, and a complaint was issued on February 28, 2003 alleging that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by (a) in early summer 2002 at its facility, by its representative Thomas King, giving employees the impression that their union activities were under surveillance, (b) in early summer 2002 at its facility, by King, threatening its employees with discipline if they continued their support and activities on behalf of the Union, (c) on or about August 29, by King, at the Respondent's facility, threatening employees with layoff and job loss if the employees selected the Union as their bargaining representative, (d) on or about September 25, 26, and in late September 2002 by its representatives David Berry, Rick Mead, Roger Helms and David Byglin, at Respondent's facility, disparately enforcing its solicitation policy and its uniform policy against employees showing their support for the Union, and (e) in late August or early September 2002 by King, at Respondent's facility, giving the impression that employees' union activities were under surveillance, and (2) violated Section 8(a)(1), and Section 8(a)(1) and (3) of the Act by (a) on or about September 17 selecting its employee Daniel Gahman for a drug test and discharging him on September 25 because he formed, joined and assisted the Union and engaged in concerted activities, (b) on or about August 30 suspending its employee John Callahan, (c) on or about September 6 discharging Callahan, (d) on or about September 18 suspending Callahan after an internal peer review group overturned Callahan's September 6 discharge, and (e) on or about January 3, 2003, failing to return Callahan to his former or substantially equivalent position of employment, engaging in the conduct described above in (2) (b), (c), (d), and (e) because Callahan formed, joined and assisted the Union and engaged in concerted activities. In its answer the Respondent denies violating the Act as alleged in the complaint, and the Respondent asserts that the disciplinary action taken against

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<sup>1</sup> All dates are in 2002 unless indicated otherwise.

Graham and Callahan was taken for a valid and lawful business reason; that Callahan voluntarily resigned his position with the Respondent on June 24, 2003, and had he not, he would have been terminated; and that King's above-described comments on August 29 about the Respondent being the "sole source supplier" to various of its customers are protected under  
 5 Section 8(c) of the Act, and were the type of comments expressly approved in *DTR Industries, Inc. v. NLRB*, 39 F.3d 106 (6th Cir. 1994).

A trial was held in this matter on December 16, 17, and 18, 2003, in Lima, Ohio. On the entire record, including my observation of the demeanor of the witnesses, and after considering  
 10 the briefs filed by Counsel for General Counsel and the Respondent, I make the following

## Findings of Fact

### I. Jurisdiction

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The Respondent, a Delaware corporation with an office and place of business in Bluffton, Ohio, has been engaged in the business of manufacturing rubber products for the automobile industry. The Respondent admits that annually, in performing its business, it sells and ships goods valued in excess of \$50,000 directly to points located outside the State of Ohio.  
 20 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 Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

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The Respondent manufactures rubber and plastic automotive hoses and also rubber anti-vibration products. It has three shifts at its Bluffton facility, namely the first which runs from 7 a.m. to 3:20 p.m., the second which runs from 3 p.m. to 11:20 p.m., and the third which runs from 11 p.m. to 7:20 a.m. There are about 800 employees at the Bluffton facility, with about 375  
 30 on the first shift, 225 on the second shift, and 200 on the third shift.<sup>2</sup>

The Respondent's employee handbook, General Counsel's Exhibit 2, contains the following:

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Our non-union status is a compliment to all of our ... [employees] and all of our managers at DTR. We believe that it is not necessary for our ... [employees] to belong to a union in order to enjoy a satisfying work life at DTR. It is the commitment of DTR management to make every effort to maintain a working environment where ...  
 40 [employees] can openly discuss their problems and ideas. Maintaining this type of environment and maintaining positive relationships between all ... [employees] protects our customers, our jobs and our Company.

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When called by Counsel for General Counsel, King, who is the Respondent's Executive Coordinator, testified that it is the Respondent's preference to remain union free, and the Respondent does not think a union would contribute any positive affect to the relationship between the Company and its employees.<sup>3</sup>

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<sup>2</sup> The employees are referred to as associates by DTR but since the Act refers to employees, that is how they will be described herein.

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<sup>3</sup> As Executive Coordinator, King is responsible for all Human Resources activities in the Company with respect to all of the employees and management. He reports to the President of  
 Continued

According to his testimony, in mid-July 2002 while he was on vacation, Callahan, who was hired in 1996 and was a general laborer in hose manufacturing on assembly line 3, was “begged” by his supervisor Chad Risner to come to work on a Sunday because DTR had to quickly get out some parts for Honda to replace some bad parts.<sup>4</sup> Callahan testified that Risner told him that he could run line 3 faster than anybody, he knew the machinery, and he could get the parts out. Callahan worked that Sunday.

When he returned from his vacation Callahan went to Line Assembly 2 for about 2 weeks.

In July 2002 Callahan, who worked on the first shift, became active in the Union organizing drive at DTR. He attended union meetings, signed a union authorization card, passed out union leaflets, had other employees sign union authorization cards, and talked about the Union every work day in the lunchroom when he passed out union leaflets.

In July 2002 Gahman, who worked on the third shift, became active in the Union organizing drive at DTR. He attended union meetings, passed out union authorization cards during his lunch and breaks, in the smoking area in front of DTR and at a bar after work, and talked about the Union to employees. While he was talking to other employees in the smoking area or in the lunch room about the Union, he saw Helms, who is the third shift supervisor. Helms also showed up at the bar where the employees hung out after work.

King met with Gahman in late July 2002. King’s notes, General Counsel’s Exhibit 11, taken during this meeting read as follows:

Dan Gayman - [sic]  
 Pretty much done with U –  
 don’t intend to do any more.  
 Leave it where it is

Joke about knives.

Attended 3 meetings – won’t  
 attend any more. Disgusted with it.

.... [end of page two of General Counsel’s Exhibit 11 which is a copy of King’s handwritten entries on a page of his notebook with a portion redacted]

Won’t be a future problem –  
 I’ve pretty much relinquished  
 everything. [page three of General Counsel’s Exhibit 11 which is a copy of King’s handwritten entries on a page of his notebook with a portion redacted]

the Company, the Chairman, the COO, and the CEO.

<sup>4</sup> At the trial herein it was determined that the employment history that Callahan gave in his 1996 DTR application for employment, Respondent’s Exhibit 1, was not correct in that while he indicated that he worked for two named companies in 1990, he was in fact in prison (from 1986) for “Agg Burglary,” was paroled on “11-08-91,” and his “Final Release” occurred on “12-04-92.” See Respondent’s Exhibit 4 which is a Certification of Record from the State of Ohio Department of Rehabilitation and Correction.

King testified that he thought that the meeting took place on July 22 after 7 a.m.<sup>5</sup>

5 Gahman testified that in the beginning of August 2002, the morning after he attended a union meeting at the hotel in Bluffton, King spoke to him about union activities; that the discussion took place in the conference room at DTR; that he, King, Helms, Laura Crisp, who is Safety Director, and Byglin, who is the third shift Human Resources Specialist, were present; that King said that he was aware that Gahman was an outspoken supporter for the UAW and had attended union meetings; that King said that several things had been brought to his  
10 attention about Gahman's behavior that he did not approve of; that King said that he had heard that Gahman had sharpened a knife for an employee in trade for the employee signing a union authorization card, and Gahman refused to install a fan for an employee who did not support the UAW; that he told King that he did sharpen an employee's knife as a favor to the employee and after he sharpened the knife, he talked to the employee about the Union and the employee did  
15 sign a union authorization card; that it was not a trade off; that he told King that he could check the computer record and he would see that he, Gahman, installed all of the fans that were requested; that King said that he "wasn't happy with my support ... of the UAW, and he thought there was good people working there and the UAW would be a bad thing for them ... [a]nd if he didn't hear anymore reports about my support and the UAW or openly supporting the UAW, that  
20 there would be no further mention of the allegations that he brought up" (transcript page 181); that King then said that "if he continued to hear reports about my UAW support that there would be disciplinary action for the knife incident and the fan incident" (Id.); that he told King that "it wouldn't be a problem because I had come to a decision to discontinue my support for the UAW and, ... that I would no longer be involved with it one way or another so that he wouldn't be  
25 getting any more reports about me and UAW activity" (Id.); that at the union meeting the day

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<sup>5</sup> The ellipsis in the above quoted material is a line at the bottom of page two of General Counsel's Exhibit 11 which reads as follows; "Wayne Harrison articles." It is not clear what this refers to. Page one of General Counsel's Exhibit 11 are the following notes of King which he  
30 testified he took between 6:30 a.m. and 7 a.m. on July 22:

7/22/2 – 6:30A – Tom King  
Kevin Phillips, Dave Byglin, Bill Yokas  
7/17  
Wed AM after 1st break  
35 Dan Gayman [sic] approached  
Kevin in break room in  
front of other people – asked  
him & girlfriend to sign card.  
Other guy signed after Dan  
40 sharpened fish & filet  
knives.  
zone D woman  
Gayman [sic] felt he had better  
than 50% of 3rd & good amount  
45 of 1st shift. Can't get 2nd  
shift going.

King testified that he believed the reference to the zone D woman referred to Kevin Phillips telling him that the woman complained that Gahman would not install a fan unless she signed an authorization card. King did not know the woman's name. Those portions of King's notes  
50 between the divulged entries for the meetings with Phillips and Gahman and after the divulged notes for Gahman's meeting were redacted by the Respondent.

before he bragged about his methods to get people to listen to him; that more specifically he bragged about sharpening an employee's knife and then told the employee about the Union and got him to sign a union authorization card; that at the union meeting he also spoke about a female employee asking him why she could not have a fan installed in her area, and later, during break, he told the employee that if they had a union, they might be able to get a fan for every employee like a UAW Ford plant; that at the time there was no work request to install a fan in her area so he did not have the authority to install a fan for her; and that before this he believed that union meetings were confidential.

10 On cross-examination Gahman testified that King opened the meeting with "[I]t's been brought to my attention" (transcript page 229); that he has sharpened knives many times; that the knife sharpener that he used was his own that was bought for him for Christmas; that he did sharpen the knife at issue on Company premises; that he had been doing it for all the years that he worked at DTR; that King said that it had been reported to him that Gahman told one or more employees that he would not install a fan unless they signed a union authorization card; that he told King this was not true; and that he understood King to then say that if he heard any reports about him supporting the UAW, King would discipline him.

20 When called by the Respondent, King testified that he received information from an employee through several supervisors that Gahman was organizing during working hours on the plant floor, disrupting other employees by attempting to persuade them to sign authorization cards while both Gahman and the other employee were supposed to be working; that he told the supervisors that he wanted to meet with the employee to hear the information himself; that he had a meeting with the third shift employee, Phillips, who told him that (1) Gahman inappropriately in front of other people tried to get him and his girlfriend while they were in the cafeteria to sign authorization cards, (2) he heard that Gahman sharpened a knife for an employee and in exchange the employee signed an authorization card, and (3) he heard that Gahman was telling people that (a) if they signed an authorization card, he would install a fan for them, and (b) if they did not, he either would not install a fan or the installation would be low priority; that General Counsel's Exhibit 11 are his notes of the meeting he had with Phillips on July 22; that, with respect to Gahman's solicitation of Phillips signature on an authorization card, Phillips told him that he did not like being interrupted on a break; that later that same day he met with Gahman, with Bill Yokas, Helms and Byglin present; that he asked Gahman about what another employee had told him he heard; that Gahman volunteered that he was disgusted with the Union, he had attended three union meetings, and he is not going to be involved anymore; that Gahman denied the allegation about the fan installation but admitted sharpening a knife, and said that he did it all the time; that he told Gahman that he could not sharpen personal knives for anyone on DTR's property with its equipment during working hours because it creates substantial liability and risk for DTR, and uses time he should be performing his duties; that he did not tell Gahman anything about the fact that he knew that Gahman was attending union meetings; that he did not tell Gahman that if he did not engage in union activity in the future, he would not be disciplined for the knife sharpening; and that he did not make threats of any kind to Gahman regarding the events that were reported to him. On cross-examination King testified he assumed that the complaining employee was on his break when Gahman solicited his signature on a union authorization card; that he did not speak with the employee who had his knife sharpened or the employee who allegedly complained about the fan; that after speaking with Gahman, he had Byglin and Helms check the records with respect to fans and they did not find anyone who wanted to come forward and say the alleged fan incident happened; that he did not think the complaining associate knew the name of the woman in zone D who complained about a fan; and that the only report that he had about Gahman engaging in union activity during work time was from Phillips.

Callahan passed out union leaflets outside of DTR's facility three times. The first time was In mid-August 2002 when he passing out leaflets from 6 a.m. to 6:45 a.m. He was standing on the outside of the west parking lot on the main road with two other employees and two or three UAW representatives. A police officer came to the site and he indicated that he just  
5 wanted to make sure that the people handing out leaflets knew where they were supposed to stand.

Approximately two weeks after he first handed out union leaflets outside of DTR's facility, Callahan did it for the second time. King drove by while Callahan was 3 feet behind someone who tried to give King a union leaflet.  
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On Monday August 26 Desmond Williams, who is a group leader, assigned Callahan to Assembly Line 3.<sup>6</sup>

On August 27 at about 9 a.m. Williams told Callahan that parts were coming out at a bad angle and he should set the parts down at a different angle when he took them out of the machine. The operation Callahan was performing that day involved putting a piece of hose on a machine, which machine then coats the inside of the hose with an adhesive and inserts a metal piece on each end of the hose. Callahan then took the hose attached to the two metal pieces  
15 out of the machine and placed it on a bar at a certain angle to allow the adhesive to set. After a set period of time had passed, Callahan would crimp both metal ends over the hose and place the part in an oven to cure the adhesive. About 11 a.m. Williams told him that the parts were still coming out at a bad angle. Callahan testified that Williams spoke to him three times that day about bad parts, finally asking him if he had problems or was anything wrong with him; that he  
20 had been setting the parts on the bar exactly the way Williams wanted him to set them; and that after the third time he did not hear from Williams again that day.  
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On August 28, according to Callahan's testimony, Williams approached him about 11 a.m. and told him that the parts were coming out at a bad angle. Callahan testified that he told Williams that they needed to get the set up guy, Dan Staley; that when Staley came to the machine Callahan assembled a part, while Staley stood there, and he handed the part to Staley who put it in the inspection jig and determined that it was not within specifications; that they did three more parts and each time the part, when placed in the jig, did not meet specifications (It did not fit properly in the jig.); that he told Staley to handle the part himself when it came out of the machine so there would not be any question about the way Callahan was handling the part; that Staley told him "that it was the machine, ... to go to lunch, ... he would get a production supervisor to look at it" (transcript page 115); that Williams was not present while he and Staley were running parts; that he went to lunch and when he returned Staley, in Williams presence, told him when the part came out of the machine he should rotate it at a 180 degree angle and set them down; and that he followed this procedure the rest of the day.  
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On cross-examination Callahan testified that once the part is crimped he does not put it directly in the curing machine but rather he puts it in the chuck which drops it in the oven; that he did not recall there being any sensors in the chuck to determine if the part has been crimped properly; that as long as the part fits in the hole on the chuck, it blocks the sensors and the part will be dropped into the curing oven; that the part is in the curing oven for 80 minutes; that when the part comes out of the curing oven it is pressure tested by other employees; that the part is put is put back in another oven to dry it off from the water test; that he was told that the parts were bad but he was not told that the angle on the small metal piece was not within  
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<sup>6</sup> Crisp testified that a group leader is a first level supervisor.

specifications; that the involved part is a high pressure fuel hose; that he made the part on hundreds of occasions prior to the two days in question; that the only difference between line 2 and line 3 with respect to this part is that one is left handed and the other is right handed; that in the past he has made some bad parts but he never made 500 bad parts in the past; that there  
 5 was a situation where the metal was bad and there were “thousands of bad parts” (transcript page 144) run, and this was the time that someone had sent bad parts to Honda and Risner called him while he was on vacation and asked him to run the parts for Honda; that in that situation the larger piece of metal was bad<sup>7</sup>; that on Monday August 26 he did not have a  
 10 problem with the same part; that the part is placed on the bar to make sure that as the adhesive sets the angles of the metal to the hose are correct; that he was given a one point lesson on how to support the smaller metal block, part 01-291, (which at that point is attached to the hose, the other end of which is attached to the large metal block) on a bar so as to avoid producing “bad angles,” Respondent’s Exhibit 5; that on August 27 he was told that he made bad parts in the morning and after lunch as well; that on August 28 he started making good parts after lunch;  
 15 that

Now I’m fast at this. I’m the best at this area, this job. There’s nobody who can put out parts quicker than I can and I can do those three [on the bar – the one point lesson indicates that “AT LEAST 3 TO 4 PARTS SHOULD BE RAN AHEAD TO GIVE GOOD  
 20 SET UP TIME,” Respondent’s Exhibit 5] before they dry and I’m thinking as I’m grabbing them and doing them, they’re not having time to dry because I, I am pretty quick at it.

I’ve got to be real good and the more I think about it, I think that’s what the  
 25 problem is. When I grab them I go, I move quick. This machine is a little slower than Line 2 and you have to get a thousand parts out a day[;] [Transcript page 152]

that he told his supervisor, Williams, the second day that the machine was a little slower and he happened to move a little faster; that he thought that he made more parts on August 27 and August 28 then he did on August 27; that there were no problems with bad parts after Staley  
 30 looked at the machine; that in a letter he gave to the Board in the course of the investigation of this case he indicated that he ran the involved Line 2 machine 20 to 25 other times; that he made the involved part hundreds of times; that there are bad parts every day; that he did not recall ever making 500 bad parts, not even on August 27 and 28; that he never told Williams or  
 35 King that he thought that the problem was that he was working too fast, but he did tell this to peer review; that the Company never told him what the problem was with the bad parts; and that they did tell him that it was a bad angle but they did not tell him if it involved the small block or the large block side.

On redirect Callahan testified that Williams told him that the part was coming out at a  
 40 bad angle; that Williams showed him how to lay the part on the bar, namely the tip of the small

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<sup>7</sup> As noted above, a piece of metal is attached to the two ends of the hose. See  
 45 Respondent’s Exhibit 2. Both pieces of metal are hollowed, metal blocks with two pieces of tubing (small pipes) extending out from the blocks. Those tubes which connect with the two ends of the hose have an attached crimping collar or sleeve so that the tube goes inside the rubber hose while the crimping collar or sleeve attached to the tube goes outside the rubber hose. Both pieces of tubing which connect to the rubber hose are bent at an angle to the hollowed metal block from which they extend. The larger metal block has a mounting plate  
 50 attached to it. And the smaller block appears to have a mounting hole drilled through the block itself.

block, and he told Williams that is how he had been doing it; that he went to lunch and when he returned Williams and Staley told him to lay the part on the bar at 180 degrees different than he had been doing so that now the big block was on the bar instead of the small block (This is contrary to the placement of the part on the bar set forth in the above-described One Point Lesson, Respondent's Exhibit 5.); that pursuant to these instructions he placed the big block on the bar and there was no trouble for the next day and a half; that a One Point Lesson took about 1 minute to read, sign, and pass on to another employee at the morning meeting; and that he did not recall the One Point Lesson received as Respondent's Exhibit 5.

Williams, who worked for DTR for over 6 years and is a group leader in hose assembly, testified that he had been a group leader for 4 years and had been in hose assembly for 18 months at the time he testified at the trial herein on December 17, 2003; that he made the involved part during his training program when he came over to hose assembly; that an assembly machine is used to connect the two metal parts at the ends of the hose; that the machine places glue inside the hose and then takes the two metal blocks and inserts them in the hose; that the assembler then places the assembled part on a blue bar in front of him so that the correct angle is maintained during the setting process; that the assembler should have between three and five assembled pieces on the bar; that the assembler then slides the parts along the blue bar, taking the part that has been resting on the bar the longest and he crimps the sleeves at both ends; that the assembler then puts the crimped part into a chuck which verifies that both ends are crimped and places the part in heat treat where it stays for about 80 minutes to make sure the adhesion is set in place<sup>8</sup>; that after the heat treat, the part goes through a high pressure water leak test; that the part then goes inside a dryer and then to final inspection; that, as here pertinent, the final inspector inspects the angles in a check fixture; that Respondent's Exhibits 2 and 24 through 30, collectively, are pictures of the involved part before it is assembled, good and bad assembled parts, the check fixture, and five of the assembled parts on the blue bar; and that the small metal block always is the one to rest on the blue bar.

With respect to Callahan, Williams testified that on Monday August 26 Callahan was working on line 2 and he did not have a problem with the involved part; that on Tuesday August 27 Callahan was working with the same part but on a different line, line 3, than Monday August 26; that about 8:30 a.m. on August 27 his final inspector Janet Schrader, who was being trained by Rick Stewart, reported to him that she was receiving bad angles; that the shift began at 7 a.m.; that he spoke to Callahan and showed him how to lay the parts on the bar; that about 1.5 hours later Schrader reported to him that she was receiving bad angles again; that he spoke to Callahan again and Callahan repeated a statement he made during their first conversation namely, that he thought that the problem had to be with the inspector; that the rejected parts were then reinspected by Williams' person in charge, Jerry Blossard, who was an experienced inspector; that Blossard reported to him that out of 142 parts made by Callahan, 137 were bad; that he spoke with Callahan again asking him if there was any problem other than work causing him to make bad parts; that after lunch Callahan made good parts for the rest of the day and nothing had been changed on the machinery; that assemblers on the shifts before and after Callahan's August 27 shift made the same part on the same machine and they did not have any difficulty in making good parts; that about 8:30 a.m. on the morning of August 28 Stewart and Schrader reported to him that they were getting really bad parts after the shift change divider, which were Callahan's parts; that the parts were so bad that it was not just a matter of not using

<sup>8</sup> A video tape was received in evidence as Respondent's Exhibit 22, which shows the involved process up to the time the part is placed in heat treat. Williams testified that if the part is not crimped, an alarm goes off and the door to the heat treat will not open; and that once the part is crimped the metal ends are set in place.

the bar properly but rather the assembler would intentionally have to twist the part; that he spoke to Callahan, telling him that the angles were worse than yesterday; that he himself ran two parts, marking them with white marks; that 90 minutes later the inspectors reported to him that they received the two parts with white marks and they came out good but Callahan's parts continued to come out really bad; that there were about 350 bad parts; that he told his supervisor, Rick Huffer, that an extraordinary amount of bad angles came off line 3, and Huffer told him to check into it; that he told Callahan to stop running the process; that he had never seen so many bad parts; that Callahan said that he thought that the assembly machine was not working properly; that if this was the case he himself would not have been able to make two good parts; that he called his set up man, Staley, who repairs machines, and had him look at the fixture, and he got the production engineer for that area, Doug Caldwell; that Staley, who is an hourly employee, checked the fixture while he watched; that they had the check fixture with them to make sure the angle was correct; that at the start of every shift the assembler is supposed to use the check fixture to check the first part; that if he was making bad parts on August 28, he should have caught it when he used the check fixture on the first part; that when Staley checked the parts that he made on the check fixture he found that they were good; that Caldwell could not find any problem with the check fixture; that neither Staley nor Caldwell found anything wrong with the machinery; that neither he, nor Staley, nor Caldwell made any changes to the machinery; that Callahan was at lunch during the inspection process; that when Callahan came back from lunch he made good parts the rest of the day; that on the really bad parts he concluded that Callahan had to intentionally turn the part to take it so far out of specifications; that the assemblers who worked on the two shifts after Callahan making the same part on the same machine did not have any problems; that on August 29 Callahan made good parts all day; that his supervisor told King about the situation; that sometime that week he and Huffer met with King; that he thought that during this meeting he said that the assembler had to be forcibly turning the parts for them to come out that bad; and that General Counsel's Exhibit 9 are his planner notes which were made on the dates indicated.<sup>9</sup>

On cross-examination Williams testified that before he worked in hose assembly he worked in hose metal which is the department which makes the parts for hose assembly; that bad parts are cut up and scrapped so that they are not sent out by mistake; that on August 27 the first time he spoke with Callahan about 8:30 a.m. he showed Callahan how to place the part on the bar and he stood there for a few minutes and watched Callahan place the parts on the bar, but he did not see Callahan place the parts in heat treat; that before lunch on August 27 he again showed Callahan how to place the parts on the bar and he stood there for a few minutes and watched Callahan place the parts on the bar, but he did not see Callahan place the parts in heat treat; that he did not have any documents with him to show that (1) the assemblers who worked second and third shift making the same part on the same machine made good parts, or (2) Callahan made good parts after he asked him if he had any problems outside work on August 27; that in his planner notes, General Counsel's Exhibit 9, he does not indicate that Callahan made good parts after he asked him if he had any problems outside work on August 27; that his planner notes for August 28 do not indicate that Callahan made good parts on August 28; that his planner notes do not indicate that Blossard inspected parts and found five

<sup>9</sup> An entry for August 27 reads: "Callahan fault 130 pcs. of bad angles @ \$12.50." And the following entries were made for August 28:

Conversation w/ John Callahan about angles being worst [sic] than the 137 pcs. scrapped yesterday. Parts so bad that small ... [end] not even touching block. Informed him on how it should be set on the bar.

....

Rick informed H.R., Steve U., Bill Y. Tom King about the situation.

good parts; that on August 28 after he spoke with Staley and Caldwell, he told Callahan, when he returned from lunch, that the machine was okay to operate and to make sure that he used the bar; that he could not recall if Staley and Caldwell were at the machine when Callahan returned from lunch on August 28; that he believed that he saw Callahan making parts after lunch on August 28; and that he knew that Callahan was a supporter of the UAW in that he saw him out in the parking lot.

On redirect Williams testified that he and Blossard cut Callahan's bad parts up and disposed of them so the bad parts would not get to DTR's customers; that this is normal operating procedure; and that on August 27 between 50 to 100 of the parts were really bad.

Subsequently Williams testified that even if the hose were placed at a 90 degree angle to the bar, the angle should not be bad if the small metal block was properly resting on the bar; and that the part of the machine which holds the metal blocks during the assembly process cannot move.

Staley testified that he has worked at DTR since 1992 and he is a setup person; that on August 28 Blossard asked him to look at the machine that Callahan was using; that he is the first person to look at a machine if there is a problem; that the first thing he checked on the machine Callahan was using was the MM (adhesive) flow which was okay; that he took a part from the assembly machine, laid it on the bar, crimped it, and checked the angles on it in Callahan's presence; that the angle was a couple of degrees off; that he then looked to see if anything was loose thereby allowing movement; that the metal and the hose are clamped down when they are inserted so there is no movement; that he could not find anything wrong with the machinery and he did not make any adjustments to the machinery; that he then got Caldwell, an engineer, so they could get engineering involved; that they were having a problem with the angle of the small metal block end and they looked at the fixture in the machine to see if there was abnormal wear; that he and Caldwell did not find anything wrong with the machinery or the fixtures and they did not make adjustments of any kind; that Callahan was there when he and Caldwell checked out the machine and fixture, and they could not find a problem; that on September 4 [Tuesday of the following week (transcript page 504)] King asked him if he checked out the machine; that King asked him to take him through what he did to the machine step by step, and he told King that there was nothing wrong with the machinery and no adjustments were made; and that he did not know why bad parts were being made. On cross-examination Staley testified that it was before lunch when Blossard asked him to look at Callahan's machine; that the part he made touched the blue nylon on the check fixture which meant it was a bad part; that when he could not figure out why he was having bad parts he called Caldwell; that he did not know how many parts he made; that when he and Caldwell looked at the machine he did not recall Williams being present; that he made one or two bad parts and then he got the engineering department, Caldwell, involved; and that he and Caldwell concluded that

[I]f you laid the part down, at a 90 degree angle, to the bar, you could have ... one or two degree angle, that the angle would be off.

But, we found that if you laid it basically at a 45 degree angle, to that bar, and let it set up, you would be okay. the parts were good. [Transcript page 510]

Staley further testified that he could not recall if he spoke with Callahan after Caldwell arrived at Callahan's work station; that he would have to say that he and Caldwell talked to Callahan on how to place the part on the bar; that he was aware of the fact that this was not the first time Callahan made this part; that it would appear that Callahan would, therefore, have known the

angle before the day in question; that he spoke with King after Labor Day; that he was on vacation on Friday August 30 and he had a message that King wanted to speak with him about the Callahan situation; that he telephoned King who told him that he knew he was on vacation and they would talk when he got back to work; and that he returned to work on Tuesday  
5 September 3. Subsequently Staley testified that he checked the left side of the machine because that is the side which involves the small metal part (block); that they were having the angle problem on the small metal part end of the hose; that while the angle of the large piece, if it was inaccurate, might affect the remainder of the piece, DTR still used the same fixtures, unmodified, at the time of the trial herein; that he did not check the right side of the machine  
10 which temporarily houses the large metal block because his concern at the time was the small side; that when the assembler hits the start button, the first movement is for brass clamps to hold down the metal parts in place in the fixtures in which they are sitting; that the clamps have a sensor which requires a contact to be made in order for the machine to proceed; and that the contact is determined by stroke length.

15 At the 7 a.m. monthly P/A meeting in August 2002, according to the testimony of Respondent's employee Rita McVetta, King spoke to the 40 or so assembled employees, telling them that "the sole source suppliers we were and that if we got Union into the plant that they wouldn't probably do business with us and we wouldn't have jobs." (transcript page 15) The  
20 president employees meetings are held once a month. On cross-examination McVetta testified that she attended a union meeting away from the Respondent's facility "where a man spoke who identified himself as the President of a Union that supplied goods to Honda" (transcript page 19); that she could not recall if the union meeting occurred before King spoke to the employees at the August 2002 president employees meeting; that she could not say whether  
25 the speaker at the union meeting talked about the fact that Honda would not care whether DTR was the sole source supplier; that at the August 2002 president employees meeting King said that sole source meant that for a number of customers DTR was the only provider for a number of parts; that she knew that DTR is the sole source provider to many of its customers; that most of DTR's customers are "just in time," which means that the customer needs parts when they  
30 are scheduled; that King said that "if we got a, had a Union in the plant that they would not do business with us" (transcript page 22); and that in her affidavit to the Board she indicated that King said "[I]f we had a Union in there customers would not want to deal with us because of the Union" (transcript page 24).

35 James Lehman, who has been an employee of the Respondent for over 14 years, attended a 2:35 p.m. P/A meeting in August 2002. He testified that there were about 30 employees at the meeting; that King told the employees that there was a third party trying to organize, the employees had the right to choose whether they wanted third party representation, and there were some facts he thought the employees needed to know; and that King told the  
40 employees that if they unionized, they "would lose sole supplier source from Honda and Toyota and if this happened there would be a reduction of jobs and therefore Honda and Toyota could no longer rely on us as source suppliers" (transcript page 33). On cross-examination Lehman testified that he attended union meetings but that he did not recall a meeting in July or August 2002 where a man presented himself as a Honda Local Union President; that the Union never  
45 talked to him about the sole source issue; that Honda and Toyota are two of the biggest DTR customers, DTR is the sole source for the rubber parts that it supplies to Honda and Toyota, DTR is a just in time supplier for Honda and Toyota, and an interruption in DTR's production would cause a problem for Honda and Toyota; that it is his understanding that DTR has been fined for interruptions in the just in time system; that King pretty much said that if Honda and  
50 Toyota or any other customer became concerned about the reliability of DTR's production flow, then those customers would look for other sources; and that King said that if the customers pulled some business away from DTR because of fear of reliability, that would mean that there

would be less work and fewer jobs at DTR.

5 According to his testimony, on August 29 Callahan ran the same part and no one said that the parts were bad. Callahan testified that about 3 p.m. Williams asked him to come to the office; that he saw King and Huffer in the office and he told Williams that he wanted to get someone to sit in with him; that King raised his voice and said that he should not have walked out to get someone to sit in on the meeting with him, he should have asked and management would have gotten someone; that King asked him why were the parts being made bad; that he told King that he did not know, he had been at DTR for 6 years and he had never had any trouble with bad parts; that he told King about Staley, and King said that they were not bad parts the day before; that he got upset, was a little loud and yelled because he was being accused of something he did not do, and he knew that he did not do it; that he told them that he came in while on his vacation just a couple of weeks ago and worked on a Sunday; that he swore on both of his kid's lives that he did not do this on purpose; that King said "well you sound like you got an attitude problem and you're the type we don't need here" (transcript page 118); and that King said that he was going to investigate further and he would get back to him the next day. On cross-examination Callahan testified that when King asked him what happened he did not tell King that he was working too fast; and that he used the same machine on August 29 that he used on August 27 and 28 and he did not have any problems with bad parts.

20 Williams testified that he attended a meeting with Callahan, King, Huffer, and employee Sheen Mitchell, who Callahan brought to the meeting; that King talked to Callahan about the bad parts and said that they were going to investigate further; and that Callahan did not offer any explanation.

25 Gahman, who worked on the third shift, testified that in August 2002 he attended a P/A meeting at which King said as follows:

30 ... he explained to us that we had a sole supplier deal going with some of our customers where we were the only company that made particular parts for them, and said that if the UAW was to get into DTR that we would lose that sole supplier status ... because the companies would no longer feel confident with us being their only supplier because the UAW would make us more unreliable.

35 And so they would allow other companies ... to compete with us for some of the parts that we were making. And he stated that if that happened it would result in layoffs and DTR had never laid anyone off he said he, in the time that they'd been a company, but if the UAW came there that that policy would ... have to change. [Transcript page 185]

40 On cross-examination Gahman testified that he had very little knowledge about DTR's customers or their policies since that was not part of his job; that he understood what King said about sole source and the Just in Time inventory system where the customer did not have a large inventory that they could use if there was any interruption in the flow of parts from DTR; that King said that customers would be concerned if there was a union at DTR and the possibility of a strike; and that King said that there would be layoffs if customers pulled part or all of their business out of DTR.

50 When called by the Respondent, King testified that he has been involved with DTR since 1989, he was present for the union organizing effort in 1989 and the resulting litigation, he attended the original hearing in 1991-1992, he went to the Sixth Circuit Court of Appeals for the argument in that case, and he knew that one of the major issues in that case was the sole

source issue; that DTR's customer base consists of Tier I business, namely, Japanese transplants<sup>10</sup>, Ford Motor Company, and previously Chrysler, and some Tier II business with some other suppliers in the automotive industry; that Japanese transplants account for 95 percent of DTR's business; that just in time is part of the Toyota production system whereby the part must be delivered at a specific time and not early or late; that virtually all of its customer base uses just in time; that he knew and reviewed DTR's sole source statements which were at issue over 10 years ago; that he was familiar with the Sixth Circuit Court of Appeals decision regarding DTR's use of sole source statements to employees; that he decided to insert the sole source issue into the campaigning in 2002 because DTR wanted to make sure that the employees understood what sole source supplier meant and its value to the business and to the employees' jobs; that additionally, he had received a report that at a union meeting a person who said that he was the president of a UAW local in the Cleveland area that was a supplier to Honda told DTR employees that they should not worry about being unionized, the supplier to Honda was unionized; that in his mind it was the Union that first raised this issue: that he made substantially the same presentations at all of the August 29 P/A meetings; that at the meetings he defined the sole source supplier<sup>11</sup>, said that many of DTR's customers give it 100 percent of their business regarding specific parts and this gives DTR a great deal more business than it otherwise would have; and that he told the employees

I'm bringing up this issue because you need to understand the impact of this. We all know that there's union organizing going on here. You have to be blind not to understand that this is happening.

And we consider it ... not only our right but our responsibility to make you aware of the consequences of possible union organization on our sole source supplier status.

....

We currently enjoy our sole source supplier status. If the ... [employees] at DTR should decide to be represented by a union, and that's entirely your choice, you have that right under the law to do that, I am not attempting to infringe on that right at all, but if you decide to do that you have to understand that our customers will most likely re-evaluate our position with them in relation to the sole source supplier status.

....

It's just common sense. .... Our customers are smart. They run successful businesses because they're smart.

And if they look at DTR and see that we are now represented by a union and there is the potential of a work stoppage, they cannot afford to have any one company control their business.

So they will re-evaluate as to whether or not we ought to continue to enjoy our status as a sole source supplier. I can't say what's going to happen. I - I have no way to predict what they are going to do. But they are going to review our status, that's for certain.

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<sup>10</sup> Mazda, Subaru, Isuzu, and the joint venture between Toyota and GM.

<sup>11</sup> King testified that roughly 75 percent of DTR's sales revenue comes from sole source business.

And it may come to the point where they would decide that they are in too vulnerable a position to allow us to be the sole source supplier of that product and they could give part or all of the business to somebody else.

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We don't know how they would divvy it up, if they would divvy it up. But that risk is there.

King further testified that prior to making this presentation he checked with DTR's attorney, James Ryder, to make certain that the law in the Sixth Circuit had not changed and he could make this type of presentation without violating the law; that implementing the just in time system is complicated; that customers come to the DTR facility frequently to work on the just in time system; that DTR's view that the customers would review the sole source status is based on DTR's dealing's with its customers closely on the just in time system; that he told the employees that they were DTR's most valuable resource, DTR wants to protect jobs, and DTR was not making threats that they were going to lay anybody off; and that if customers take business from DTR, it's hands may be tied. On cross-examination King testified that he received the report about an individual who spoke at a union meeting from an employee the Monday after the meeting; and that the employee also told him how many employees were there. On redirect King testified that the employee volunteered the information about the union meeting.

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According to his testimony, on August 30 Callahan started work at 7 a.m. and at 9 a.m. Williams called him into the office with King, and Huffer. Callahan testified that King said "we don't need your type running the machinery here anymore. I want you to turn your time card in. You can talk to your wife on the way out, tell her you ... can pick her up and you'll hear from us in the mail shortly." (transcript page 118); and that he asked them if they had spoken with Staley and they said "yes." (Id.). On cross-examination Callahan testified that at the time of the trial herein his wife still worked for DTR.

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When called by Counsel for General Counsel, King testified that he recommended Callahan's termination to Steve Underbrink, who is the Director of Manufacturing, Yokes, who is Vice President of manufacturing, Fajiwara, who is Chairman and CEO, and Okata, who is President and COO. According to King's testimony, he believed that Callahan purposely and intentionally produced scrap parts and even if he did not, he was certainly guilty of gross negligence in the performance of his duties. King testified that supervisors Huffer and Williams told him on August 27 that they were having a problem with production and Callahan's performance; that they told him that Callahan was running an extraordinary number of bad parts; that on August 28 he attended a meeting with Underbrink, Huffer, and Williams about this situation and they reviewed it; that at this meeting Williams said that Callahan produced good parts on the afternoon of August 27 and then on the morning on August 28 Callahan began producing bad parts which were even worse than the day before; that later on August 28 he met with Callahan, Underbrink and Williams; that Callahan denied that he made bad parts, he claimed that Staley, who is the set up person in Callahan's department, understood why Callahan was running bad parts, and he asked King to talk with Staley; that in fairness to Callahan he spoke with Staley on August 29; and that he saw General Counsel's Exhibit 8 but he did not recall when he first saw it and he did not recall if it was one of the documents that he relied on to make the decision to terminate Callahan.<sup>12</sup>

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<sup>12</sup> The exhibit is a one page document which is signed at the bottom by Williams. The first half is dated August 27 and reads as follows;

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Final Inspection (Janet Schroeder) tells me that she was receiving 01291D with Bad  
Continued

When called by the Respondent, King testified that on Tuesday August 27 Huffer reported to him that Callahan was running an incredibly large number of bad parts, way beyond anything DTR had experienced before in that area, and Huffer did not know why; that on  
 5 Wednesday August 28 about lunch time Huffer with Williams told him that Callahan had run a significant number of bad parts; that they told him that after Williams spoke to him on Tuesday Callahan ran good parts but he ran bad parts Wednesday morning and they were even worse; that he had a meeting at 3:30 on August 28 with Huffer, Williams, Callahan, and Mitchell; that he told Callahan that he thought he was doing it intentionally, and Callahan denied this; that  
 10 Callahan told him to talk to Staley, who knew what was wrong; that he told Callahan that he had not talked to Staley but he would talk with Staley before he went any further; that during the meeting he told Callahan that instead of just bringing in another employee, Mitchell, he should have come into the meeting alone, asked if it was an investigatory interview, request a representative, and then management would have the option to agree or just cancel the  
 15 meeting; that he told Callahan that he did not have the right to pull someone off her job without getting permission from management; that Staley had already gone home; that he believed that he talked with Staley on August 29 between P/A meetings; that Staley told him that there was nothing wrong with the equipment, the jigs and fixtures, they talked about how to use the bar and Callahan knew how to use it, but otherwise he did not see that anything was wrong; that on  
 20 Friday morning he met with Williams, Huffer, Keith Caudill, Steve Underbrink, and Yokas; that they determined the problem had to be an operator issue and he concluded that it had to be intentional; that he recommended to senior management that Callahan be terminated; that he

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angles.

25 Told John Callahan of the situation and that he needs to watch his angles. Said he didn't know what could be causing the problem, but it might be the inspector.

Later on she said that she was still receiving bad angles. I went to John showed him how to sit the parts on the bar.

Jerry Blossard said he inspected 142 pcs, found 5 pcs good.

30 Took John off to have a one on one conversation about what could be the problem. Told him this was unusual for him. He said he has been running this for three years and doesn't know what the problem could be. I asked was there anything bothering him and if so is there anything I could do to help. He said no, nothing at work. I let him know how many bad ones were run.

35 Continued to build for the rest of the day with no problems.

The remainder of the document is dated August 28 and reads as follows:

40 Shortly after 8:30 am was informed by Final Inspection that they were receiving bad angles right at the shift change divider. I immediately told John about it. Once again showed him how to lay the parts on the bar. I marked 2 pcs with white marker on how they should be. Told him to lay his parts like that and continue to build.

Later Rick and Janet both informed me that his parts were still coming out bad after they received the 2 parts with white marks (both good pieces). At this time I told John not to run anymore until Dan Staley (set-up) looked at it. He did this around 11:15 am. John said it was the assembly fixture.

45 During his lunch period Dan, Doug and myself looked at the process. Did some test samples on how to lay the parts and tried to recreate the bad angle. Came to the conclusion that there was nothing wrong with the fixture, but it was the way the parts were being laid on the bar after assembly. Moved the bar to a distinct location and turned the pieces at an angle. We then took digital photos ... of proper bar placement.

50 .... [Photo omitted]

He ran good parts for the rest of the day, ended up with 346 bad angles.

met with Callahan on Friday morning August 30, with Huffer, Williams, and possibly Jean Ream present; that he told Callahan that they had concluded that he purposely made bad parts, he should leave the premises, and he would be advised regarding his status; that he did not tell Callahan the he did not want people like him around DTR; and that senior management decided to terminate Callahan because they concluded that it was intentional. On cross-examination King testified that when Huffer told him on August 27 that Callahan had run 137 bad parts it was either late morning or after lunch; that DTR's employees are not trained on how to ask for a representative in a disciplinary meeting; that he did not recall that Staley said that he had spoken with Callahan; that Staley may have said that he spoke with Callahan; that "[o]kay yes" Staley told him that he talked to Callahan about how to place the parts on the bar (transcript page 482); and that he did not recall how long his meeting with Yokas, Williams, and Underbrink on August 30 lasted but it was held before he met with Callahan around 9 a.m.

By letter dated September 6, General Counsel's Exhibit 18, King, as here pertinent, advised Callahan as follows:

This letter is official notification of the termination of your employment from DTR Industries, Inc. effective today, September 6, 2002.

The period between August 30 and September 6, 2002 is considered a suspension without pay.

On September 11 Callahan requested peer review of his termination, General Counsel's Exhibit 19.<sup>13</sup> The peer review panel hearing was scheduled for September 17. Gahman testified that he knew Callahan because Callahan worked on the third shift when Gahman first started working at DTR; and that by letter dated September 11, General Counsel's Exhibit 21, he was advised that he was selected to participate in a Peer Review on September 17.

With respect to the peer review procedure, King testified, when called by Counsel for General Counsel, that if an employee requests peer review, which is available only with regards to a termination, it is King's responsibility to make certain that the proper process is followed to select the peer review panel, schedule the peer review meeting, he functions as a facilitator with the peer review panel members, he distributes the ballots when the panel members are prepared to vote, he counts the ballots, and he reports the decision to the employee and the Human Resources Specialist who presented the case for the Company. King also testified that he does not have a vote in the peer review; that the terminated employee picks ping pong balls with numbers on them to select members of the peer review panel; that after the members are identified based on the number on the ping pong ball, the terminated employee has the right to eliminate one of the employee members chosen and one of the management members chosen so that there are three employees and two management members on the panel; that he attends all of the peer reviews at the Bluffton facility; that at the peer review the terminated employee decides if he or she wants to present their case first; that he then asks the panel members if they discussed the case with the terminated employee or the Human Resources Specialist who is presenting the Company's case; that the peer review panel members are not told in advance of the peer review what case they are hearing or who the other panel members are; that after the presentations are made, panel members may ask to have another person who may have some relevant information brought to the hearing so that they can question the person; that he

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<sup>13</sup> The peer review form indicates, as here pertinent, "[a]s an ... [employee] of DTR Industries, you have the right to have a termination decision reviewed by a panel of ... employees and Managers."

is present during the discussion of the panel; that when the discussion is complete he distributes ballots to the panel members and they vote secretly on whether to confirm or overturn the decision; and that he collects the folded ballots, throws them against a wall, picks them up, reads them, and then announces the results.

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Regarding Callahan’s peer review, King testified, when called by Counsel for General Counsel, that he was the facilitator; that HR specialist Ream presented DTR’s case; that employees John Thomas, Gahman, and Gary Averecsh were chosen from the employee pool, and Woody Roberts and Curt Stover were chosen from the management pool to be on Callahan’s peer review panel<sup>14</sup>; that Ream explained the process to the peer review panel members, she provided them with the number of bad parts Callahan ran on August 27 and 28, and showed them the bar used to establish the proper angle for the part and the jig used to determine if the part is within specifications; that he did not make a statement to the panel at Callahan’s peer review but he did ask them if they discussed the matter prior to convening; that he did not recall making any statement to the panel with respect to the facts leading up to Callahan’s discharge; that he could not recall whether any witnesses were called before the peer review panel; that the peer review panel overturned Callahan’s discharge; that as demonstrated by the ballots, General Counsel’s Exhibit 10, the vote was three to two to overturn the decision to terminate Callahan<sup>15</sup>; and that he, along with Yokas, Fajiwara, Okata, and Underbrink decided to suspend Callahan even before Callahan’s peer review panel met. On cross-examination King testified that he met with upper management twice in September before the peer review panel meeting regarding Callahan; that at the second September meeting they discussed the possibility that the peer review panel would overturn the termination and what his recommendation was to do if that happened; that he could not recall what questions the peer review panel asked him; that he is not aware that the employee who is faster than Callahan making the involved part makes any bad parts; that during the peer review panel discussion Averecsh, who is a maintenance person, said that everyone runs scrap; that he did not have any evidence of the bad parts that Callahan ran; that he did see Callahan’s bad parts on either Thursday evening, August 29, or Friday morning, August 30 ; that it is DTR’s practice not to leave those parts on the plant floor so as to eliminate any risk of a part like that going out to a customer; and that the hose is cut on the part.

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Callahan testified, with respect to his peer review hearing, that he presented his case after the Company presented its case; that he told the peer review panel he did not do it, he told them what happened from his point of view, and he told them that they should call Staley in as a witness; that later that day he was told by King “that the peer review reversed and I could have my job back but that I was going to be suspended from September 18 until January 3, 2003 without pay” (transcript page 121); and that he went to the UAW hall and he was told that they were going to file charges on his behalf. On cross-examination Callahan testified that one of the theories he provided to the peer review panel was the theory that he was working too fast. On

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<sup>14</sup> Employee Rick Stewart and manager Joe Brinkman were stricken from the list of those chosen by Callahan. General Counsel’s Exhibit 7.

<sup>15</sup> The ballots read as follows:

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Case # \_\_\_\_\_ Date \_\_\_\_\_

Peer Review Ballot

Place an X to indicate your blind ballot on this decision.

Confirm the decision \_\_\_\_\_

Overturn the decision \_\_\_\_\_

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It appears the same person wrote the case number and the date on each of the ballots. Therefore, the panel members only placed an “X” on the ballot.

redirect Callahan testified that he was not present during the Company's presentation; and that during his presentation to the peer review he was asked questions.

5 Gahman testified that Ream presented the Company's case to the peer review panel, stating that a lot of bad parts were produced on a particular day and Callahan was operating the machine that the parts were produced on; that after Ream finished King

10 took over .... [stating] that he firmly believed that ... [Callahan] made the parts bad on purpose because ... [Callahan] made good parts before ... he always made good parts and now he was making bad parts and they couldn't determine a reason for the ... parts to be bad. So it was his conclusion that therefore ... Callahan was responsible for the parts being bad. [Transcript page 188] [Emphasis added]

15 Gahman testified that Callahan stated that

he did not produce bad parts on purpose. It was his sincere feeling that he was actually doing the Company a favor.

20 He said that he was on vacation and that they called him and told him they really needed him because somebody else was ... sick and they needed ... somebody to run a particular machine.

25 He said the machine was not the machine that he normally operated, but he felt that he had the ability to do it, so ... as a favor ... he would come in on his day off and run the machine for them, and that he did his very best ... to do his job as he always had before.

30 And he said when it was brought to his attention that parts were coming out bad the he did fully cooperate with his supervisor and the Production Specialist to try to determine the reason for the bad parts. [Transcript page 188]

35 According to Gahman's testimony Callahan said that the Production Specialist was Staley; and that the peer review panel wanted to speak with Staley but for one reason or another he did not appear at the meeting. Gahman testified that the peer review panel requested to speak with Staley and the request was denied; that he believed that they asked King if they could speak with Staley; that King then went outside the room and after a short period he came back in and he could not recall if King said that Staley was not available, or he was not there, or what reason King gave the panel; that a majority of the peer review panel voted that Callahan was unjustly fired and he should be reinstated with his back pay; that he got upset when he found out that  
40 Callahan was not going to be reinstated but rather he was going to be suspended and punished for the incident that Gahman thought a majority of the peer review panel had just decided that there was not enough evidence to support; that it was 2 p.m. and he works the third shift so to him it is like 2 a.m., he made the effort to come in, and for the Company to suspend Callahan after the decision of the peer review panel made him feel like it was all just a total waste of his  
45 time; and that what the Company did made him change his mind so that he supported the Union again.

50 On cross-examination Gahman testified that he knew Callahan before the peer review panel meeting; that he and Callahan had shown up at a lot of union meetings; that he talked with Callahan about the Union a lot; that he was friends with Callahan; that he did not recall talking with Callahan about his termination before the peer review panel meeting; that he did not have any contact with Callahan during which he discussed his termination before the peer

5 review panel meeting; that he did not recall discussing Callahan's situation with the members of  
the peer review panel before the meeting; that the first time he knew that the peer review panel  
meeting was about Callahan's termination was when he showed up for the meeting that day;  
that during the meeting King told the peer review panel members that he was convinced that  
10 Callahan had done this on purpose because Callahan was very experienced in running these  
parts and had never had a problem prior to those two days; that he believed that King also said  
it was intentional on Callahan's part because they could not find any problem with the machine  
and that was a factor in his consideration; that King might have mentioned that the employees  
who worked on the same machine before and after Callahan did not have a problem making  
15 good parts; that King might have said ("that sounds familiar"<sup>16</sup>) something about the volume of  
bad parts, namely that it was one thing to run 5 or 10 bad parts, but when there are 500 over the  
course of two days, that is a whole other ballgame; that he did not know if King said that one  
reason he was convinced that Callahan had done this purposely was because sometimes he  
could produce good parts and sometimes he could produce bad parts, but there was nothing  
20 that changed on the machinery or the setup to explain why that was the case; that if King made  
this statement he would not have believed him since he works in maintenance, is familiar with  
machines, and knows that machines run good parts and sometimes they run bad parts and this  
is typical; that King said that Callahan and no one else had ever been able to come up with an  
explanation of why bad parts occurred; that this is why the peer review panel wanted to talk with  
25 Staley; that in his presentation to the peer review panel Callahan said that he did not know why  
the bad parts were being produced, he was doing his best to do it exactly as his supervisors  
instructed him; and that he did not recall Callahan telling the peer review panel that the problem  
he was having with bad angles on the parts was because he was working too fast.

30 Williams testified that he was called as a witness before the peer review panel; that he  
was asked if the bad parts could be intentionally made; that he answered that the bad parts  
would have to be intentionally made; that he had never heard Callahan's theory before that he  
was so fast that he was getting the parts off the bar into the crimper before they were properly  
set and that was the problem; that Callahan is not the fastest operator of the involved machine;  
and that there is no way that moving the parts off the bar too quickly would produce really bad  
35 parts; and that he prepared the notes received as General Counsel's Exhibit 8 not long before  
the peer review at the behest of Ream for her use at the peer review. On cross-examination  
Williams testified that he did not indicate in his prepared notes received as General Counsel's  
Exhibit 8 that the only way that an operator could come up with extremely bad parts was  
intentionally; that under the August 28 portion of his notes he indicates that he came to the  
40 conclusion that there was nothing wrong with the fixture but it was the way the parts were laid  
on the bar after assembly; that he believed that he came to the conclusion that Callahan made  
the bad parts intentionally before the peer review but he did not write this in his summary  
prepared for Ream; that he was not sure if it was before or after the peer review panel meeting  
that he started making extremely bad parts to try to recreate the bad parts that Callahan made;  
and that the bad part he brought to the trial herein was dated October 6, 2003 but this was not  
the first bad part he made.

45 When called by the Respondent, King testified that he did not make any presentation  
before the peer review panel; that during the discussion after the presentations of Ream and  
Callahan, he did recall responding to some questions; that he did not recall Callahan arguing  
that he was working too fast and that was the problem; that the first time he heard this theory  
was at the trial herein; that he did not believe that anyone asked for Staley to be brought into the  
peer review meeting as a witness, he did not recall that request being made; that the panel has  
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<sup>16</sup> Transcript page 223.

the right to request a witness who they think will be able to provide information; that DTR would respect that request; that the panel asked to talk to Williams and Williams was brought into the meeting; that he was present for the panel members deliberations but he did not express an opinion; that with the support of DTR management, he decided to suspend Callahan because  
5 regardless of what the peer review panel decided, in his mind Callahan had done it intentionally, and even if Callahan had not done it intentionally, he was still guilty of gross negligence; that while Callahan's suspension raises the question why have a peer review process if DTR can overturn it by giving Callahan a lengthy suspension, he did not overturn the peer review decision  
10 in that they can only review terminations which does not mean that no other corrective action can take place if the termination is overturned; and that the involved parts cost the company \$12.60 and, therefore, 500 bad parts is about \$6,000 worth of scrap.

By letter dated September 17, General Counsel's Exhibit 20, King advised Callahan as follows:

15 This is official notification that you are suspended without pay from employment at DTR Industries for the period September 18, 2002 through January 3, 2002. This suspension is due to your conduct during August 27 and 28, 2002 when you destroyed critical safety parts supplied to our customers. You are expected to return to work on Monday, January  
20 6, 2003. Upon your return, you will be assigned to a department and shift based on our needs at that time. We will contact you before January 6, 2002 to give you instructions as to where to report and to whom you must report. [Emphasis added]

Callahan testified that he could not recall when he received his last discipline before this.

25 With respect to DTR's drug and alcohol policy, King testified, when called by Counsel for General Counsel, that random drug testing started at DTR in 1998; that when the policy was initially implemented in November 1998 all of the employees were tested for drugs and alcohol; that individuals were randomly selected for drug testing in August and September 2002 but he  
30 could not recall when the previous time was when employees were randomly tested for drugs; that Crisp, the Manager of Safety Training and Wellness, determines when a random drug testing is going to take place; that Crisp reports directly to him and he is informed when random drug testing is going to take place; that the procedure for selecting individuals for random drug testing involves Crisp or Tonya Weigt, Respondent's on site Occupational Nurse, contacting  
35 Lima Memorial Hospital Occupational Health Center and requesting that a random list be compiled for a specified number of people; that after Crisp or Weigt receives the list, the employee is notified that they have been selected for a random drug test; that the HR Specialist who gets the employee informs the employee that he or she is going to have a drug or alcohol test; that the HR Specialist sometime escorts the employee to the Wellness Center for the  
40 random drug test; that he has not taken a random drug test and he has not observed a specimen being collected; and that he could only recall receiving a note from Weigt one time regarding a drug test and it involved Gahman. King testified that he believed that he received the note in September 2002. Her note, General Counsel's Exhibit 4, which is titled Center for Occupational Health Progress Report and is dated "9-18-02," reads as follows:

45 Employee (Daniel Gahman) was chosen for a random drug screen. When he brought out his first specimen it was very brown in color and was only about 20cc with no temp. He was then asked to give another specimen so we could obtain a minimum of 30cc of urine. He was instructed to drink up 40oz (4 glasses) of water and to stay up front near  
50 the HR office. After drinking, he stated he was able to go to the restroom and when he brought out his specimen, which was a bright neon yellow, approximately 40 to 60 cc, there was no temperature on the side of the cup and the cup, to touch, was not warm.

5 He was then instructed that he needed to give another specimen since this specimen had no temperature and this time it would have to be witnessed by either Tom King, HR or Dr. M. Young MD. He said that his wife was waiting on him and that he was already late to meet her and he didn't know if he could have another one done. He wanted to know what would happen if he couldn't make it. He was instructed that if he refused to give another witnessed specimen then it was policy to be terminated. He questioned the fact that if he refused to donate a specimen he would be fired but if he came back positive he would get another chance and counseling. He was then instructed that if he gave a specimen and it was positive then it was my understanding that DTR would offer counseling but a refusal was termination. He then stated that he would prefer to go to Lima Memorial and have Dr. M. Young witness his specimen. LMH was contacted that he would be arriving.

15 King further testified that it was unusual for him to receive such a note; that Weigt is in charge of the specimens that are provided by employees for testing; and that it is his understanding that she collects the specimen, has the necessary forms filled out, verifies the identification numbers, and complies with the required chain of custody procedures to send it for testing to Quest.

20 Weigt testified that she prepared her above-described notes on September 18 because Gahman's first specimen was too small and it was extremely dark, and his second specimen was glow in the dark yellow and lacked temperature.

25 Gahman started working for DTR in July 1999. At the time of his termination he was working third shift maintenance. He was supervised by Tony Averecsh, Mead, and Helms. Gahman was responsible for keeping production running and completing work orders. On Wednesday September 18 during shift change Byglin told him that he needed to go with him. Byglin did not tell him why. They went directly to the nurses station at DTR. The nurse informed him that he had been selected for a random drug screening. Gahman testified that they both entered the men's room and he went into a stall; that he gave the nurse a specimen, she said that it was not the correct temperature, and she dumped the specimen down the urinal; that the nurse told him that he would have to give her another specimen and he told her that he was not able to at that time; that she told him that he should drink three glasses of water and she has someone bring him three glasses of water; that he sat outside the men's room until he could produce another specimen; that the nurse said the that second specimen was not the correct temperature and she dumped the second specimen down the urinal; that the nurse told him that he had three options, namely (1) he could refuse to give a third sample and he would be terminated, (2) he could have King observe the actual collection of the sample, or (3) he could go to the Memorial Hospital and let a physician observe the collection of the sample; that he chose option 3; and that he went directly from work to the hospital, where they took his picture, a Dr. Young observed him produce a specimen, Dr. Young gave the specimen to a nurse who said that the specimen was not the correct temperature, and Dr. Young told the nurse that it would be an acceptable sample because he observed the production of the sample and the temperature would not matter because of that.

45 On cross-examination Gahman testified that he knew that he was going to fail the drug test; that he did not remember the DTR nurse also telling him that the first specimen was too small of a sample to measure; that the nurse did not take the second sample and send it out to be tested but rather she also dumped the second specimen down the urinal; that he signed page 2 of General Counsel's Exhibit 5 which indicates, as here pertinent, "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the

information and numbers provided on this form and on the label affixed to each specimen bottle is correct"; that both of the samples that he provided at DTR were dumped down the urinal; that he asked the nurse what would happen if he did not sign the form, she said that he would be terminated immediately, and he signed the form; that he gave a statement to the National Labor  
 5 Relations Board (Board) on October 21 but he did not indicate in it that the nurse threw out the second sample; that when he gave the statement to the Board, he was aware that he had been terminated for giving a fraudulent sample; that he thought he did tell the Board that the second sample had been dumped; that he did mention to the Board that the first sample was dumped but there is no mention of the second one in his affidavit; that he provided two additional  
 10 statements to the Board and neither one mentions that the second sample was dumped; and that he did not give any fraudulent samples.

Tonya Weigt, who is a licensed practical nurse, has been the plant nurse at DTR since the end of July or the beginning of August 2002. She testified that she is an employee of DTR;  
 15 that in her prior employment she has given close to, if not over, one thousand drug screens; that at DTR after an employee is selected for a drug test she takes the name and show it to Crisp, who is the Safety Director and her supervisor<sup>17</sup>; that she then gets someone from Human Resources to get the employee and bring him to the nurses office; that she works from 6 a.m. to 4 to 6 p.m.; that she has the employee fill out a consent form, Respondent's Exhibit 6; that  
 20 Respondent's Exhibit 7 is a chain of custody form; that she was trained at the Lima Memorial Hospital with respect to chain of custody; that after the employee fills out the consent form she basically fills out step 1 of the chain of custody form to the extent that information is not already on the form, and she indicates how many drugs they are going to test for in the screening, namely 10; that she then asks the employee to provide a specimen in a container which up to  
 25 that point has been sealed and which she opens in front of the employee, Respondent's Exhibit 8; that she tells the employee how much specimen, 30 cc's, the laboratory needs in order to do the test; that the specimen container has a temperature indicator strip which measures between 90 and 100 degrees Fahrenheit; that specimens of less than 30 cc's are flushed down the toilet; that when the employee gives the specimen to her she checks the temperature and makes sure  
 30 that there is 30 cc's in the container; that the specimen is placed in a larger container and labeled with a specimen ID number over the top of the lid so that it seals the lid completely; that the specimen ID number that she uses to seal the lid is an adhesive strip which she takes from the bottom of the custody and control form and puts over the lid to seal it; that the adhesive strip has the specimen ID number along with a bar code and also a place where the donor initials  
 35 and dates the adhesive strip used to seal the container; that she reviews the step 1 portion of the chain of custody form with the employee, along with the specimen ID number; that she puts the sealed specimen in a bag and she puts the tracking label over the bag for a second seal; that she continues reading the rest of the custody and control form with the employee, completing step 2 by marking the specimen temperature yes or no, single specimen collection,  
 40 and completing step 4 by signing the form, printing her name, giving the time and the date, and checking off Quest Diagnostics Courier; that she then would have the employee fill out step 5 of the form, as here pertinent, sign and date a certification that the employee

provided my urine specimen to the collector; that I have not adulterated it in any manner;  
 45 each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information and numbers provided on this form and on the label affixed to each specimen bottle is correct[;]

that sticker B is not used because DTR only sends one specimen; that DTR's Medical Review  
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<sup>17</sup> Crisp corroborated that Weigt began working for DTR in July or August 2002.

Officer is Dr. Maris Young who receives the results from Quest Laboratories of all drug screens; that Dr. Young, who is located with Lima Memorial Hospital, is not a DTR employee; that the specimen which is in a bag with the third seal placed on it is placed in a lock box for pickup by Quest Diagnostics Courier; that no one has access to the box until the Quest Diagnostics  
 5 Courier employee picks up the specimen; that when Dr. Young receives the results he informs DTR; that DTR does not select employees for random drug testing but rather it contacts Lima Memorial Hospital when DTR wants to have a random drug screen and DTR tells Lima Memorial Hospital how many employees it needs to randomly test and the Hospital has a  
 10 computer system that randomly generates names; that DTR does not have any control over who is selected for random testing; that when DTR receives a list of names from Lima Memorial Hospital that is the first time DTR knows who is going to be tested<sup>18</sup>; that a lot of people were tested in September 2002 because DTR was going from one medical provider to another, Lima Memorial Hospital, and it had to test 25 percent of its work force in a particular time period,  
 15 which ended in September 2002 for the Bureau of Worker's Compensation (BWC)<sup>19</sup>; and that normally the people on the list are tested the day after DTR receives the list, if not the same day. On cross-examination Weigt testified that she believed that there were some random drug tests at DTR in August 2002; and that she is the first one at DTR to see the computerized lists of DTR personnel like those in Respondent's Exhibit 9. On redirect Weigt testified that Respondent's Exhibit 12 are the lists for random drug tests in August 2002.<sup>20</sup>

20 With respect to Gahman, Weigt testified that she received the list from Lima Memorial Hospital dated September 17 on September 17 with Gahman's name on the list; that Gahman's test was unusual in that his first specimen was only about 20 cc's and it was brown; that she had never seen a specimen quite that dark; that she flushed the specimen down the toilet and  
 25 told Gahman to drink at least 40 ounces of water and then try again; that she routinely discards undersized specimens; that Gahman's second specimen was a very bright neonish, kind of yellow; that the quantity was sufficient; that she had never seen a specimen that bright; that there was no temperature on the urine specimen cup; that she sealed it just like she would a regular specimen because it was an adequate amount; that she went through the steps on the  
 30 chain of custody form, as described above, and Gahman signed it; that she then told Gahman that he had to have a witness specimen after that because of the temperature; that Gahman signed General Counsel's Exhibit 5 acknowledging that the specimen was sealed; that she also signed the form and she put Gahman's specimen in the lock box; that she is the only one from DTR with a key to the lock box; that she told Gahman that he needed to produce a witnessed  
 35 specimen and he could either have someone from management at DTR or Dr. Young at Lima Memorial Hospital be the witness; that Gahman said that he did not have the time because his wife was waiting; that she told Gahman that if he refused to give a specimen, he would be terminated; that Gahman asked him what would happen if he tested positive and she told him that a first offender would get counseling<sup>21</sup>; and that before this test she had not met and she

40 \_\_\_\_\_  
<sup>18</sup> See Respondent's Exhibit 9 which are lists dated September 3 (25 names), 9 (15 names), 16 (15 names), 17 (15 names), and 23 (30 names with one crossed out). These are all of the lists for September 2002. Crisp' name was on the September 3 list and she took the drug test. She pointed out that the random drug testing program encompasses both management and  
 45 hourly employees.

<sup>19</sup> Crisp testified that random drug testing of a specified percentage of the total workforce over the course of a year entitles DTR to receive the BWC premium discount for a 5 year period which ended in September 2003.

<sup>20</sup> The dates included are August 5, 12, and 26. There are four names on each of the lists.

50 <sup>21</sup> The first offender remains on the random drug screen list and also the person can receive a follow up test at any time during the following year.

5 did not know Gahman. On cross-examination Weigt testifies that she did not specifically remember indicating that King would be the witness at DTR; that she told Gahman that King could observe him producing a specimen; that to her knowledge King has never observed an employee producing a specimen; that she might have mentioned King as a male figure in HR but she did not specifically remember saying Mr. King; and that the statement on the Quest  
10 Diagnostics report on Gahman's second specimen (Respondent's Exhibit 10 and page 3 of General Counsel's Exhibit 5) that "THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF THE RANGE FOR A NORMAL URINE" is based on her checkmark in step 2 of the chain of custody form, page 2 of General Counsel's Exhibit 5.

15 Crisp testified that DTR does not have the ability to determine whose names are pulled on the random drug testing lists; that she telephones the Occupational Health Clinic at Lima Memorial Hospital and asks them to do a random pull; that the list is sent to a confidential fax machine in Human Resources where Weigt gets it; that the random selection process is described in Respondent's Exhibit 14; that Respondent's Exhibit 15, 16, 17, 18, and 19 are BWC progress reports that she submitted to demonstrate DTR's eligibility for the premium discount; that there were so many random drug tests in September 2002 because DTR had changed to Lima Memorial Occupational Health, Weigt was hired, and the deadline for getting 200 random drug tests completed to get the premium discount was September 30; that Weigt's predecessor did not do random drug testing; that on September 18 Weigt told her that the first specimen that Gahman produced was dark and the second specimen was almost like a fluorescent type color; and that Weigt told her that the temperatures were off on both specimens and she needed to send Gahman for an observed specimen collection.

25 On Friday September 20 Dr. Young telephoned Gahman and told him that the specimen had come up positive for marijuana. Dr. Young asked Gahman if he took the prescription medicine Marinol and he told him he did not. Dr. Young told him to telephone Crisp to find out what he should do from there. Crisp told him to report to work and attend counseling at Century Health. On cross-examination Gahman testified that Crisp told him that he had to attend  
30 counseling before coming back to work and he did not work on the shift beginning on Sunday September 22.

35 Crisp testified that on Friday September 20 she found out about Gahman's positive test result for marijuana, Respondent's Exhibit 11, when Dr. Young's office telephoned her and confirmed that Dr. Young spoke to Gahman about the positive results on the drug test; that a positive results in the individual receiving counseling before coming back to work, and the individual is subject to a minimum of four additional tests during a 1 year period; and that she sent Gahman to Century Health for counseling on Monday September 23 because this was the soonest appointment she could get him. On cross-examination Crisp testified that typically the drug counseling lasts from three to five sessions but a person could have just one session; and that Gahman went to one session and then returned to work so he had not completed counseling.

45 Gahman attended the counseling on Monday September 23 and was told to telephone Crisp, advise her that he attended, and ask her what the procedures would be from there. Crisp told him to report to work that night at his regular starting time. He did.

50 On cross-examination Weigt testified that on September 23 she received the last page of Respondent's Exhibit 9, which is the Lima Memorial Hospital list, dated September 23, of DTR personnel to be randomly tested; that Gahman's name is on the list; and that she did not

conduct a random drug test on Gahman on September 24.<sup>22</sup> On recross Weigt testified that she did not recall giving Gahman a drug test on September 24. Subsequently Weigt testified that Gahman was not tested on September 24 because "I believe that's around the time that we got confirmation from the first test that was sent back." (transcript page 287) Then on redirect Weigt testified that this would be the fraudulent test which report indicated not human urine, and at that point the decision was made that there was no point in testing any further.

Crisp testified that she found out about the test result on Gahman's second specimen, Respondent's Exhibit 10, on Tuesday, September 24 or Wednesday, September 25; that she believed that she received it on Tuesday September 24 or she received notice of it; that the report, Respondent's Exhibit 10, indicates that the specimen that was given to Weigt by Gahman was not human urine; that when she received that report on Tuesday afternoon, she contacted King and told him that DTR had a fraudulent sample given to it; that Gahman's shift ended at 7 a.m. on September 24 so he would have already left the facility when she received the report; that King comes to work at 6 a.m. on Wednesdays for group leader meetings; that on Wednesday September 25 King told her that he met with Gahman, sent him home, and he was terminated for submitting a fraudulent sample; that there was one other fraudulent specimen situation, Respondent's Exhibit 20, and the involved employee, Randy Evans, was terminated by letter dated October 8, Respondent's Exhibit 21; that first page of the report on Evans' specimen indicates that there is something in the urine; that if there is an additive or something interferes with the testing of the sample, then a second test is done to find out what adulterant is present in the urine; that the second report shows the presence of chromium in the specimen; that King got Dr. Young on the speaker phone to explain what this meant, and she was present for the conversation; that Dr. Young said that this was an extreme amount of chromium in the urine, and it would not be naturally occurring in human urine; that Dr. Young told them that the purpose of adding chromium to a specimen would be to throw off the test so that you could not get an accurate test of whether prohibited substances were present in the specimen; and that the chromium is a masking agent. On cross-examination Crisp testified that she believed that on Tuesday afternoon September 24 she received the results of the test of Gahman's second specimen; that she believed that the results came in the mail because there would not have been a reason for the Occupational Clinic to actually call her; and that the Occupational Clinic does telephone her for a confirmed positive.

At the time of the trial herein, McVetta, who has worked for the Respondent for 15 years, had never been selected for a random drug test although she had been tested apparently before the Respondent started doing the testing on a random basis.

Callahan testified that he was tested for drugs in 2000 at DTR but it was not a random test in that the whole plant had to take a drug test at that time; and that he was not given a random drug test from 2000 to 2002 and he did not know anybody who got one during those years.

On September 24, according to the testimony of R. Shawn Carnahan, who has worked for the Respondent for three years, Berry, who is the second shift plant supervisor, and Helms, who is the third shift plant supervisor, in his presence, told Gahman to remove the union hat he was wearing at Respondent's facility. Carnahan testified that Berry told Gahman that it was against company policy to wear a UAW hat in DTR's facility; that when Gahman protested he was told to speak to King in the morning; that Berry said the hat was offensive to him when Gahman asked him if he had to take the hat off because it had UAW on it; and that toward the

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<sup>22</sup> She also did not conduct a random drug test on Gahman on September 23.

end of that shift Mead, who is the first shift group maintenance leader which is a supervisory position, told Gahman to take off the UAW pin he was wearing it was offensive and Gahman needed to go to Human Resources and talk to King about it. On cross-examination Carnahan testified that he did not know if Gahman was disciplined for wearing a UAW hat and pin; that he  
 5 has worn a hat or a pin and he was not disciplined for it; and that he did not know anyone in the plant who wore a hat or a pin and was disciplined for it.

Gahman attended a union meeting at 9 p.m. on September 24 and then reported for work at his normal starting time at 11 p.m. He was in DTR's facility for about 5 to 10 minutes  
 10 when second shift supervisor Berry noticed that he was wearing a hat with the UAW logo on it and told him to take the hat off. He asked Berry why and Berry said that he was offended by it. He told Berry that another employee was wearing a Bengals hat and he was offended by the other employee's hat. He asked Berry if he had to take his hat off, did the other employee have to take his hat off also. Berry told Gahman that if he had a problem with the other employee's  
 15 hat he had to go report it to the HR Department. Gahman took his hat off and went to HR where he spoke with Dave Byglin, who is the third shift HR representative and a woman who is the second shift HR representative. He told them that Berry told him to take off the hat and he asked them why he could not wear the hat. The second shift representative told him that he could not wear anything with a UAW logo on it in the plant. He asked her why and she told him  
 20 because we are not a union shop. He told her that this was not a Bengals shop but the other employee was wearing a Bengals hat. He then asked her if the other employee could wear the Bengals hat, why couldn't he wear the hat with the UAW logo on it.<sup>23</sup> Byglin said that they were not qualified to answer that question and if he wanted an answer he would have to talk with King.

At the end of this shift, which would have been Wednesday morning September 25, Gahman attended a transition meeting. Rick Mead, who is the Maintenance Group Leader, told him to take off the UAW pin he was wearing. Gahman asked him why and Mead told him that he  
 25 could not wear anything with a UAW logo on it inside DTR's facility. When he asked Mead why, Mead told him to go see King right now and ask him. At that point Gahman and another  
 30 employee became engaged in a verbal confrontation over Gahman wearing a UAW pin. Byglin walked into the room and told Gahman that King was ready to talk to him now. Byglin took him to King's office. Gahman asked King why he could not wear a UAW pin and King said that it was irrelevant, he wanted Gahman's time card and his keys to the building, he wanted Gahman to  
 35 exit the building and not talk to anyone on the way out, and Gahman would receive information in the mail to notify him of the status of his employment with DTR.

Weigt testified that on Wednesday September 25 she received the results from Quest Diagnostics of the test of the second specimen Gahman gave her on September 18 at DTR,  
 40 Respondent's Exhibit 10 and page three of General Counsel's Exhibit 5<sup>24</sup>; that she contacted her supervisor Crisp, who administers the drug free work place program; that Respondent's Exhibit 11 is Gahman's positive report for marijuana<sup>25</sup>; that as demonstrated by page two of Respondent's Exhibit 11, Gahman declined a retest of the specimen after it is split; and that she received the positive test results before she received the fraudulent test results. On recross  
 45 Weigt testified that she received the report on the second specimen on September 24 or 25 but

<sup>23</sup> The "UNIFORM RULES," General Counsel's Exhibit 22, which Gahman acknowledged receiving in 1999, specify "4. Hats are allowed, ... [employee's] choice. If the hat is deemed  
 50 inappropriate the ... [employee] will be asked to remove the hat."

<sup>24</sup> The report date and time are September 19 at 6:38 p.m.

<sup>25</sup> The report date and time are September 19 at 9:05 p.m.

before that Crisp received a verbal over the phone; and that she did not receive a telephone call regarding the report on Gahman's second specimen.

5 By letter dated September 26, General Counsel's Exhibit 23, King, as here pertinent, advised Gahman as follows:

This is official notice of the termination of your employment from DTR Industries, Inc. effective immediately.

10 The reason for your termination is your submission of at least one false sample when you were selected for a random drug test pursuant to DTR's Drug and Alcohol Free Policy.

15 When called by Counsel for General Counsel, King testified that he recommended that Gahman be terminated and his recommendation was supported by other members of the consensus decision making process, namely Walt Hawkins, who is the manager of plant maintenance in engineering, Yokas, Fajiwara, and Okata. According to his testimony, in making his recommendation King relied on a report from the laboratory that does the testing that Gahman had submitted a specimen that was not human urine but rather a substitute. See page 20 three of General Counsel's Exhibit 5.<sup>26</sup> King testified that he believed that he received the report on Tuesday September 24 from Crisp but he could not recall the time of the day he received it; that he did not rely on General Counsel's Exhibit 6 which is the report from the Quest lab indicating that Gahman tested positive for marijuana metabolites; and that he was informed that Gahman tested positive.

25

<sup>26</sup> As here pertinent, the report reads as follows:

	DRAWN DATE AND TIME	RECEIVED DATE	REPORT DATE AND TIME
30 Gahman, Daniel	09182002 07:47AM	09192002	09192002 6:38PM

....

\*\*\* POSITIVE/ABNORMAL REPORT \*\*\*

....

35 THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF RANGE FOR A NORMAL URINE (32-38 C/90-100 F).  
SPECIMEN SUBSTITUTED: NOT CONSISTENT WITH NORMAL HUMAN URINE

40 CERTIFYING SCIENTIST: DARLENE MANOJLOVSKI  
SPECIMEN RECEIVED AND PROCESSED IN THE SCHAUMBURG DHHS CERTIFIED LABORATORY.

LAB: Quest Diagnostics – Chicago  
506 E State Pkwy  
Schaumburg, IL 60173

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>> END OF REPORT <<

50 Page two of General Counsel's Exhibit 5 is the form filled out and signed by Weigt and Gahman, dated 9/18/02. Weigt indicated that the specimen was collected at 7:47 a.m. and she checked the "no" box for "Read specimen temperature within 4 minutes. Is the temperature between 90 ... and 100 ... [degrees] F?" and she indicated on the form that it was a single specimen collection. Otherwise she did not comment on the form about the specimen.

When called by the Respondent King testified that one other employee at DTR submitted a fraudulent urine sample and he was terminated; that, as here pertinent, page 27 of DTR's employee handbook indicates that "[t]he following conduct will not be permitted and will result in discharge: 1. Falsification or employment applications, medical documentation or any other company records/documents. .... 6. Dishonesty, stealing or removal of another ...

5 [employee's] property or DTR property without permission"; that other employees have been terminated for falsifying documents of one kind or another; that he had nothing to do with the selection of Gahman to take a random drug test, and there is no way he could have done that ; that he met with Gahman on September 25; that he had been told that Gahman wanted to

10 speak with him and he needed to talk with Gahman; that Byglin was there when he met with Gahman; that Gahman asked him about the UAW hat and he told Gahman that the hat was irrelevant, it was not part of the meeting; that he told Gahman that he wanted to talk to him about the false specimen that he submitted for a drug test, pointing out that the report indicated that the specimen did not have a temperature and was not consistent with human urine; that

15 Gahman said that his other test did not have temperature either; that he told Gahman that that did not matter and the important point was that he submitted a sample that was not consistent with human urine; and that he then told Gahman to leave the building and he would be contacted regarding his status.

20 On cross-examination King testified that he did not call Quest Diagnostics to determine what the analysis of Gahman's specimen test meant; that he asked Weigt on September 24 what the Quest Diagnostic report meant; that he thought that Crisp was present at this meeting; and that about 6 a.m. on September 25 Byglin and Helms told him that Gahman wanted to see him, but he could not recall if they said something about a hat or a pin.

25 Callahan handed out union leaflets for the third time at the end of September or the beginning of October 2002. The leafleting started at 10 p.m. and lasted 1 hour.

30 On January 6, 2003 Callahan returned to work at DTR in mixing manufacturing. Callahan testified that he had received a letter from DTR's Human Resources department telling him he was supposed to report to King at 2 p.m. on January 6, 2003, and King told him that he was going to the second shift in the mixing department and he had no bid rights (to bid on other jobs); that King told him that he "was walking a very fine line" (transcript page 122) and he could start working on January 7, 2003 on the first shift for 4 to 6 weeks and then he would be going

35 to the second shift; and that he had never worked in the mixing department before, it is very dirty and physical work where new people start "[I]t's very hard to keep people working there, [I]t's the worse [sic] job in the plant by far." (transcript page 123). On cross-examination Callahan testified that employee Gloria Davis bid into the mixing department to be able to go from the third shift to the first shift and that was the only way she could go on the first shift; that

40 there are two parts to the mixing department and Davis did not work in the part that he worked in; and that his pay and benefits were not affected when he went into mixing.

45 When called by the Respondent, King testified that he assigned Callahan to the mixing department because he still believed that Callahan intentionally ran the bad parts; that Callahan was put where the damage he would create would be minimized because before rubber leaves mixing it is goes through quality testing; that mixing is not the dirtiest, heaviest, and least attractive job in the plant; that there are very high seniority people in the mixing department; that one man has been there since 1989 by his own choice and he has enough seniority to bid out to another department; that it is dirty work but it is not the type of operation that Callahan

50 described; and that Callahan ended up on the second shift because that is where DTR needed manpower, and he was not going to displace any other employee by putting Callahan in his place. On cross-examination King testified that Callahan was assigned to work the various

positions in the mixing area because employees in the mixing area rotate jobs weekly.

In February or the beginning of March 2003 Callahan was moved to second shift. He quit working for DTR in June 2003. Counsel for General Counsel stipulated that there is no claim for reinstatement regarding Callahan.

Using King as a sponsoring witness, Counsel for General Counsel introduced a number of exhibits, General Counsel's Exhibits 12 through 17, which deal with the disciplining of other employees, namely Nicole Davis, Lewis Shine Sr., Stephanie Brown, Danny Smith, Martin Baldazo, and Dominic Worthy, respectively. All of these employees are currently employed by DTR. Davis has had on-going quality issues, passed bad parts, has received a number of warnings, and one of the notes in her file, as here pertinent, reads as follows: "Please get her off final or Ford line entirely. My #s are way down from correcting her bad parts. Thank you for any help you can give me. Also, could she come back here & re-do her own mess? To discard all those parts is really a big waste." (emphasis in original) The note is signed by Karen Davis. Shine on more than one occasion had multiple parts returned from the customer that were defective and on other occasions the defective parts were caught before they went to the customer. Brown received a verbal warning for running 173 bad parts. Smith ran 104 parts which were not the right length, he falsified documents, he ran 78 parts with wrong hose, and did not follow standard operating procedures on more than one occasion. Baldazo received a number of warning notices and verbal warnings and a formal letter of warning conduct which reads, as here pertinent, as follows:

On December 21, 2001, you were issued a Written Warning for Conduct. On February 20th and 22nd, 2002, you ran the wrong chemicals in two batches or rubber causing lost production and high scrap costs. This action necessitates this Formal Letter of Warning. Any further Conduct violation will necessitate the next step of disciplinary action up to termination.

And Worthy ran rubber in extruder disregarding proper procedure which caused substantial loss of product, ran product with print message illegible, and did not follow standards and make sure the product running was correct.

With respect to the disciplines described in the next preceding paragraph, King testified that none involve people doing "anything intentionally to sabotage the operations or to purposely make bad parts or to intentionally violate SOP's or requirements." (transcript page 464)

#### Analysis

Paragraph 6 of the complaint alleges that in early summer 2002, the exact date being unknown, Respondent, by its representative, Thomas King, at Respondent's facility, gave employees the impression that their union activities were under surveillance. Counsel for General Counsel on brief contends that Gahman testified that after he began his union activity he saw Helms in areas he did not formerly regularly see Helms, including the bar where employees hang out after work. The Respondent on brief argues that the standard for determining whether an employer violates the Act by giving the impression of surveillance is 'whether the employee would reasonably assume from the statement in question that ... [his or her] union activities had been placed under surveillance,' *Fred'k Wallace & Son*, 331 NLRB 914, 914 (2000) citing *Flexsteel Industries*, 311 NLRB 257 (1993); and that the only reference that can be stretched to relate to this allegation was Gahman's recollection of exaggerating stories about knife sharpening and fans at a Union meeting the day prior to the meeting with King.

Helms, Byglin and either Yokas (according to King) or Crisp (according to Gahman) were present at the July 22 meeting between King and Gahman. None of these other supervisors were called by the Respondent to corroborate King's testimony. The Respondent chose to rely solely on the testimony of King, whose credibility - because of the questionable role he played in almost all that occurred in this proceeding, obviously was going to be an issue. At the outset of this meeting King told Gahman that he was aware that Gahman was an outspoken supporter of the UAW. Contrary to his testimony, King also told Gahman that he was aware Gahman had attended union meetings. Then King told Gahman that it had been brought to his attention that Gahman had sharpened a knife for an employee in exchange for the employee signing a union authorization card, and Gahman refused to install a fan for an employee who did not support the UAW. Gahman had made statements about knives and fans at the union meeting the day before. He realized that what he said had been relayed to King, and as so often occurs, something was lost in the repeating of the statements. As King's own notes of this meeting reflect, Gahman admitted that he had "[a]ttended 3 union meetings - won't attend any more. Disgusted with it." General Counsel's Exhibit 3. Gahman explained that before this he believed that the union meetings were confidential. His meeting with King was not about a knife and fans. His meeting with King was about Gahman's union activity. The last entry in King's notes on his earlier meeting with Phillips indicates that "Gayman [sic] felt he had better than 50% of 3rd & good amount of 1st shift. Can't get 2nd shift going." Undoubtedly this was Phillips repeating a statement that Gahman made at the union meeting the day before.<sup>27</sup> King, who attended law school, and did not hesitate to tell Gahman on September 25 that the union paraphernalia issue was irrelevant, demonstrated what was relevant to him about this meeting in his own notes of his July 22 conversation with Gahman. All of his notes (excluding Gahman's name) deal with the union activity of Gahman except for one line which deals with knives (There is no reference to fans in King's notes of his discussion with Gahman.).<sup>28</sup> In making it a point to tell Gahman that he knew that Gahman was an outspoken supporter of the UAW and attended union meetings, and then going on to basically repeat what Gahman said at the union meeting the day before, King was creating the impression of surveillance. Gahman could reasonably assume that his union activities had been placed under surveillance. The Respondent violated the Act with respect to Gahman as alleged in paragraph 6 of the complaint.

Paragraph 7 of the complaint alleges that in early summer 2002 at its facility, King, threatened its employees with discipline if they continued their support and activities on behalf of the Union. General Counsel on brief contends that King's threat of future discipline if Gahman failed to renounce his union support is a violation of Section 8(a)(1) of the Act. The Respondent on brief argues that DTR did not threaten discipline for employees who supported the Union;

<sup>27</sup> Actually a portion of King's notes were deleted. The portion occurs between that portion of King's notes dealing with his meeting with Phillips which were turned over to Counsel for General Counsel and King's notes on his meeting with Gahman. King testified that "I think ... it may have been these notes that are on the first page or some notes relating to another meeting, I'm not positive." (transcript page 78) Respondent's attorney indicated "[t]hose notes reflect an entirely different employee and a entirely different set of incidents so it was redacted." (transcript page 79)

<sup>28</sup> There is a line at the bottom of the page which reads as follows; "Wayne Harrison articles." It is not clear what this refers to. No one testified that this was something that was discussed during King's meeting with Gahman. While it might be argued that the line "Won't be a future problem -" could refer to sharpening knives, both the placement of this line after "Attend 3 meetings - won't attend any more. Disgusted with it," and Gahman's testimony that he told King that it would not be a problem because he had come to a decision to discontinue his support for the UAW warrants the conclusion that this line also referred to union activity.

that Gahman's testimony is directly contradicted by King; that the contents of the meeting come down to the conflicting testimony of Gahman, an admitted illegal drug user who falsified a drug test, and King, a former union organizer who is keenly aware of what can and cannot be said to employees in the context of union organizing; that Gahman is essentially accusing King of stupidity in claiming he threatened discipline for his union activities; and that General Counsel failed to prove that Respondent violated the Act by threatening discipline for union support.

Again, the Respondent could have but did not call the other supervisors who were present at the July 22 meeting between King and Gahman to corroborate King's testimony. Again it is King's word against the word of Gahman. Why? If King's testimony is the truth, it would be so easy to corroborate it with the other supervisors. Gahman did not have a representative with him at this meeting so he has no one he could call to corroborate his testimony. That is not the case, however, with King. King had three other supervisors with him in this meeting. None were called to testify about this discussion. Why not? The Respondent argues that the contents of the meeting come down to the conflicting testimony of Gahman, an admitted illegal drug user who falsified a drug test, and King. But we also have King's own contemporaneous notes of the meeting, General Counsel's Exhibit 11. King testified that Gahman volunteered that he was disgusted with the Union, he had attended three union meetings, and he is not going to be involved anymore. King's notes indicate that Gahman said that "[w]on't be a future problem – ." What was the problem that was not going to occur in the future? The "[w]on't be a future problem – " statement, according to King's own notes, occurs right after "Attend 3 meetings – won't attend any more. Disgusted with it" and just before "I've pretty much relinquished everything."<sup>29</sup> As noted above, Gahman testified that King said that he "wasn't happy with my support ... of the UAW ... [a]nd if he didn't hear anymore reports about my support and the UAW or openly supporting the UAW, that there would be no further mention of the allegations that he brought up" (transcript page 181); that King then said that "if he continued to hear reports about my UAW support that there would be disciplinary action for the knife incident and the fan incident" (Id.); and that he told King that "it wouldn't be a problem because I had come to a decision to discontinue my support for the UAW and, ... that I would no longer be involved with it one way or another so that he wouldn't be getting any more reports about me and UAW activity" (Id.) King's notes, in conjunction with Gahman's testimony, demonstrate, in my opinion, that the "[w]on't be a future problem – " statement referred to union activity. King testified that Gahman volunteered that he was not going to be involved with the Union any more. Gahman made this statement but it was made after King threatened him with disciplinary action if he continued to support the Union and engage in union activities. With respect to Gahman, King violated the Act as alleged in paragraph 7 of the complaint.

Paragraph 8 of the complaint alleges that on or about August 29, King, at the Respondent's facility, threatened employees with layoff and job loss if the employees selected the Union as their bargaining representative. General Counsel on brief contends that pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) an employer is free to predict the economic consequences it foresees from unionization so long as the prediction is "carefully phrased on the basis of objective fact to convey ... [its] belief as to demonstrably probable consequences beyond ... [its] control ...."; that King told DTR's employees that its customers would, in fact, review DTR's status as a sole source supplier; that such a statement is more than just a prediction in that it informs employees that upon such a review of DTR's status, jobs would be lost; that King provided no objective facts that sole supplier status would be lost, specifically any facts demonstrating that Honda, Toyota or any of its other customers would

<sup>29</sup> As indicated above "Wayne Harrison articles" is written at the bottom of the page after "Attended 3 meetings – won't attend any more. Disgusted with it."

view unionization as a vulnerability in and of itself to contemplate changing DTR's status; and that statements similar to those made by King during the involved P/A meetings have been found to be threats of reprisal in violation of Section 8(a)(1) of the Act, *ITT Automotive*, 324 NLRB 609, 622 (1997) and *Long – Airdox Co.*, 277 NLRB 1157, 1169 (1985). The Respondent on brief argues that DTR complied with the law of the United States Court of Appeals for the Sixth Circuit in *DTR Indus., Inc. v. NLRB*, 39 F.3d 106 (6th Cir. 1994) when King delivered a speech on the Company's sole source status in response to union misinformation; that King relied on objective facts based on his experience in the industry, focusing on what customers might do in response to unionization and not on what actions the Company would take if the Union were successful; that King spoke to the employees in terms of what might happen and not what would happen; that King told the employees that he had no way to predict what the customers would do if DTR's employees chose to be represented by the Union; that King focused on the fact that customers would re-evaluate the sole source status of the Company and that the re-evaluation presented a risk of customers removing business from DTR; that General Counsel's witnesses McVetta and Lehman supported King's assertion that he based his speech on objective, widely known facts, and that he focused on what customers might do, not DTR; and that King's speech is protected by Section 8(c) of the Act and did not violate Section 8(a)(1) of the Act.

At pages 618 and 619 in *Gissel*, supra, the Court indicated

an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control .... If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. .... As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.' [Citations omitted.]

DTR has been down this road before. One would think that the second time around DTR would want to avoid any question with respect to what its representative told employees. Yet DTR did not make a video or even an audio recording of what King told the employees. Indeed DTR did not even introduce into evidence a prepared printed text of what King told the employees about what he believed were the consequences of unionization. Why not? Did DTR want the flexibility to assert that it said one thing while King in fact said something else? Indeed from the Company's side, King is the only witness with respect to what he told the employees at the P/A meetings. On brief the Respondent cites the testimony of two employees called by Counsel for General Counsel with respect to what King said at two of the involved P/A meetings. Actually a third employee testified about what King said at the third shift P/A meeting. Contrary to the argument of DTR on brief, McVetta and Lehman did not testify that King based his speech on objective, widely known facts, and focused on what customers might do, not DTR. Rather, McVetta testified that King said that DTR was a sole source supplier and if the Union got into the plant, customers "wouldn't probably do business with us and we wouldn't have jobs." (transcript page 15, emphasis added) In her affidavit to the Board, McVetta indicated that King said "[I]f we had a Union in there customers would not want to deal with us because of the

Union.” (transcript page 24, emphasis added) As noted above, Lehman, who attended another meeting, testified that King told the employees that if they unionized, they “would lose sole supplier source from Honda and Toyota and if this happened there would be a reduction of jobs and therefore Honda and Toyota could no longer rely on us as source suppliers” (transcript page 33, emphasis added). Lehman also testified that King pretty much said that if Honda and Toyota or any other customer became concerned about the reliability of DTR’s production flow, then those customers would look for other sources, and if the customers pulled some business away from DTR because of fear of reliability, that would mean that there would be less work and fewer jobs at DTR. As set forth above, Gahman testified that King said if UAW was to get into DTR, it would lose its sole supplier status, customers would allow other companies to compete with DTR for some of the parts that it was making, layoffs would result, there had never been layoffs at DTR but if UAW came in that policy would have to change, customers would be concerned if there was a union at DTR and the possibility of a strike, and there would be layoffs if customers pulled part or all of their business out of DTR.

As here pertinent, in *Gissel*, supra, at 618, the United States Supreme Court indicated that the

a prediction as to the precise effects ... [the employer] believes unionization will have on ... [the] company ... must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond ... the employer’s control... [Emphasis added]

More often than not there are at least two ways to view something. Here, one way is to view situation from the perspective of the Company. If the employer believes that something is likely, it might be argued that this sufficient. But it appears that what really matters is the impact the employer’s statements have on the employees. While the expression of views is to be encouraged, if they contain an implied threat, they are in violation of the Act. What the employer may think it knows is of no consequence if the employer does not carefully explain, giving the employees the objective facts upon which it basis its prediction. If the employer believes that there are demonstrably probable consequences, explain them fully to the employees, giving valid examples to support its statements (if such examples exist). To make conclusionary statements to employees without carefully phrasing the statements on the basis of objective fact might unjustifiably raise questions and concerns in the minds of the employees, and invite scrutiny. DTR’s approach here did just that. Again the Respondent set it up so that to believe DTR’s position one must rely on King’s word alone. The problem with this approach is that I did not find King to be a credible witness. I credit the testimony of the three employees who testified about what King said at the three P/A meetings they attended. King did explain to the employees what a sole source supplier is. But he did not carefully phrase his predictions on the basis of objective fact. The employees walked away from the meetings with the understanding that if they had a Union, “customers would not want to deal with ... [DTR],” DTR “would lose [its] sole ... source [standing] from Honda and Toyota and if this happened, there would be a reduction of jobs,” and DTR’s layoff “policy would ... have to change.” King intended to make the employees fear the loss of their jobs and in taking the approach he did; he succeeded in conveying this fear. The Respondent violated the Act as alleged in paragraph 8 of the complaint.

Paragraph 9 of the complaint alleges that on or about September 25, 26, and in late September 2002 by its representatives David Berry, Rick Mead, Roger Helms and David Byglin, at Respondent’s facility disparately enforced its solicitation policy and its uniform policy against employees showing their support for the Union. General Counsel on brief contends that the testimony of Carnahan and Gahman on this issue should be credited, taking into consideration

that the Respondent presented no witnesses to rebut or refute their testimony; that Respondent's actions in prohibiting Gahman from wearing a union hat and a union button, while allowing other employees to wear non-union related items cannot be said to be a nondiscriminatory approach to its uniform rule; and that in *E.I. Dupont Nemours*, 263 NLRB 159, 166 (1982) the Board held that a supervisor's statements to an employee that he should not wear various items with pro-union insignia was coercive and violated Section 8(a)(1) of the Act. The Respondent on brief argues that the Board held in *Beverly California Corp.*, 326 NLRB 232, 261-262 (1998) no violation of the Act where vague evidence of disparate enforcement of a dress code was merely an isolated incident; that Carnahan was never disciplined for wearing a hat or pin; and that there is insufficient evidence to support a finding that Respondent violated Section 8(a)(1) of the Act by disparate enforcement of Respondent's uniform policy.

As pointed out by Counsel for General Counsel, Respondent presented no witnesses to rebut or refute the testimony of Carnahan and Gahman, which testimony is credited. Contrary to the impression Respondent attempts to convey on brief, the issue is not discipline. Rather it is the disparate enforcement of the uniform policy. The wearing of a union hat or pin is a protected Section 7 activity. The Respondent has not shown that it has a business justification for its prohibition. And the Respondent allowed the wearing of a Bengals hat at the same time it prohibited Gahman from wearing a UAW hat and pin. The Respondent violated the Act as alleged in paragraph 9 of the complaint in that it disparately enforced its uniform policy against showing support for the Union.

Paragraph 10 of the complaint alleges that in late August or early September 2002 King, at Respondent's facility, gave the impression that employees' union activities were under surveillance. Since there does not appear to be any evidence of record to support this allegation, it will be dismissed.

Paragraph 11 of the complaint alleges that on or about September 17 Respondent selected Gahman for a drug test and discharged him on September 25 because he formed, joined and assisted the Union and engaged in concerted activities. General Counsel on brief contends that the Respondent's decision to terminate Gahman was discriminatory, pretextual and violative of Section 8(a)(1) and (3) of the Act; that the results of the Gahman's second specimen was reported on September 19 about 2.5 hours prior to the report of the third specimen and yet the Respondent did not take any action on it until September 25; that while the Respondent asserts that the lab report on the second specimen, namely,

"THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF RANGE FOR A NORMAL URINE (32-38 C/90-100 F).  
SPECIMEN SUBSTITUTED: NOT CONSISTENT WITH NORMAL HUMAN URINE

should be read as two separate statements, no evidence was adduced at the trial herein that this was not a single statement about the temperature and a descriptive statement that the temperature is inconsistent with human urine; that King admitted that he did not contact the medical review officer to explain the results of the second specimen<sup>30</sup>; that King did contact the

<sup>30</sup> Counsel for General Counsel cites transcript page 475. At page 475 King was asked if he ever called Quest Diagnostics to determine what the analysis of Gahman's specimen test meant. He did not. But Quest Diagnostics and the medical review officer, Dr. Young, are not one and the same. Nonetheless, notwithstanding the fact that King did not understand what the Quest Diagnostic report meant regarding Gahman's second specimen, he only went to Weigt,

Continued

medical review officer to explain the results of the second test on Evans specimen; Respondent's knowledge of Gahman's union activity is admitted; that Gahman was the subject of several independent 8(a)(1) violations; that the Board has held that unlawful discrimination against one pro-union employee based on antiunion animus supports an inference that same animus motivated its actions against other employees who supported the union, *Embassy Vacation Resorts*, 340 NLRB No. 94 (September 30, 2003); that after Gahman participated in the Callahan peer review and renewed his open support for the Union, the Respondent used the report of the test of the second specimen to justify his termination; that the Respondent never explained the delay in learning the results of the second specimen; that Respondent perfunctorily and unlawfully took the opportunity to terminate Gahman; and that the Board has concluded that an employer's failure to conduct a fair investigation is evidence of discriminatory intent, increasingly so in the context of hostility toward the union, *Metal Cutting Tools, Inc.* 191 NLRB 536, 542-43 (1971). The Respondent on brief argues that General Counsel has failed to demonstrate a prima facie case of anti-union animus in the selection of Gahman for a random drug test and in the discharge of Gahman; that King's decision was made with the knowledge that all procedures were followed in Gahman's test and Gahman's falsification was a serious offense for which discharge was the proper course of action; that even assuming that General Counsel made a prima facie case, DTR has met its burden of demonstrating that Gahman was lawfully discharged for submitting a fraudulent specimen during his random drug test; that Gahman's testimony that his second specimen was discarded is belied by the fact that he signed the chain of custody form, and never told DTR or the Board about this assertion; that the only other case involving an employee, Evans, who submitted a fraudulent drug specimen during a random drug test, the employee was also terminated, only two weeks after Callahan; and that Graham was treated no differently than Evans.

As set forth in *Fluor Daniel, Inc.*, 304 NLRB 970, at 970 (1991),

In *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982),<sup>4</sup> the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.<sup>5</sup> The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence.<sup>6</sup> The finding may be inferred from the record as a whole.<sup>7</sup>

<sup>4</sup> Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>5</sup> *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966).

<sup>6</sup> *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co.*, 285 NLRB 81, 82 (1987).

<sup>7</sup> *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972)

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, General

who is a licensed practical nurse who has been trained to collect urine specimens. (transcript page 475). There is no evidence of record that King contacted the medical review officer.

Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of  
5 false reasons given in defense may support such inferences.

Here Gahman had engaged in union activity, King unlawfully coerced him to stop his union activity, King - from Gahman's point of view - made the peer review on which Gahman sat on his own time a nullity, Gahman resumed his union activity, DTR's supervisors unlawfully told  
10 Gahman to stop certain of his union activity, and then Gahman was terminated at the end of the shift after he was told to take off his UAW hat and pin and challenged the directive. As noted herein, these were not the only indicia of antiunion animus on the part of DTR. Counsel for General Counsel has made a prima facie case with respect to Gahman's termination. It has not  
15 been demonstrated that the selection of Gahman for a random drug test was in any way related to any union or concerted protected activity. Contrary to Gahman's belated assertion under oath, the evidence of record does not demonstrate that the second specimen was discarded. The evidence of record demonstrates that the second specimen was sealed and sent to the lab.

The burden of going forward has shifted to DTR to demonstrate that Gahman would have  
20 been terminated notwithstanding the protected conduct. As noted above, it is also well settled that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. Here, DTR's business justification for Gahman's termination is the lab report on the second specimen. As indicated above, Counsel for General Counsel contends, with respect to  
25 the lab report on the second specimen, namely,

"THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF RANGE  
FOR A NORMAL URINE (32-38 C/90-100 F).  
SPECIMEN SUBSTITUTED: NOT CONSISTENT WITH NORMAL  
30 HUMAN URINE[.]

that no evidence was adduced at the trial herein that this was not a single statement about the temperature and a descriptive statement that the temperature is inconsistent with human urine. As conceded by Weigt, the first of the two above-described sentences is based solely on her  
35 check mark regarding temperature on the chain of custody form. (In this regard, it is noted that the temperature on the third specimen was also outside the specified range but it was accepted for processing because Dr. Young indicated that he observed Gahman producing the specimen.) Quest Diagnostics could not and did not do any testing with respect to the temperature of Gahman's second specimen at the time of collection. As indicated on the chain  
40 of custody form the temperature reading must be made within 4 minutes of production. "OUTSIDE OF RANGE FOR NORMAL URINE" could be consistent with "NOT CONSISTENT WITH NORMAL HUMAN URINE." In other words, the lab may have concluded that since the second specimen at the time of collection did not register on the temperature gauge on the container, it was not consistent with normal human urine. The "SPECIMEN SUBSTITUTED"  
45 may be nothing more than a conclusion reached from the fact that the second specimen was outside the temperature range for normal urine. Apparently, no further testing, as in the case of Evans (which involved an adulterant), was done to determine what the substance was if it was not human urine. The second page of Respondent's Exhibit 11 shows that Gahman declined to have his third specimen, which produced positive test results, retested at his own expense  
50 (\$150). So an adulterated specimen (Evans) is further tested. With a positive test result on Gahman's third specimen he is offered the opportunity for retesting. But with Gahman's second specimen, which the Respondent is claiming is fraudulent and justifies his termination, he is not

offered further testing of retesting. Unless the lab was relying on the lack of a temperature reading to reach the conclusion "SPECIMEN SUBSTITUTED," the Respondent has not shown why Gahman was not accorded the opportunity to have a second test or a retesting on the second specimen. King testified that he had to get an understanding what the lab report on Gahman's second specimen meant. In other words, by King's own admission the lab report is not clear on its face. King admitted that he did not contact Quest Diagnostics to explain its report on Gahman's second specimen. It was not established, even with the name of the certifying scientist on the report, that Quest Diagnostics would have provided this information to King over the telephone. However, what was established is that King could get information by telephone about drug test results from the medical review officer, Dr. Young. King did contact the medical review officer to explain the results of the second test on Evans' specimen. But with the lab report on Gahman's second specimen, according to King's testimony, he went to Weigt, who - as here pertinent - is a licensed practical nurse trained and experienced in the area of collecting urine specimens for drug tests. It was not shown by DTR that Weigt is a certifying scientist like Darlene Manojlovski, whose name appears on the lab report of Gahman's second specimen. It was not shown by DTR that Weigt is a medical review officer like Dr. Young, who - after contacting Quest Diagnostics (if necessary), undoubtedly could have given King the understanding he was seeking with respect to what the lab report on Gahman's second specimen meant. Whatever doubt there was with respect to the lab report regarding Gahman's second specimen was resolved by King against Gahman without according him the same treatment that Evans received. Gahman was treated disparately and DTR did not explain what justified such disparate treatment. As the Board pointed out at page 3 in *Embassy Vacation Resorts*, 340 NLRB No. 94 (September 30, 2003)

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity. E.g. *W.F.Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

DTR has not shown that Gahman would have been terminated notwithstanding the protected conduct. With respect to Gahman's termination, DTR violated the Act as specified in paragraph 11(B) and (C) of the complaint.

Paragraph 12 of the complaint alleges that on or about August 30 Respondent suspended its employee John Callahan, on or about September 6 it discharged Callahan, on or about September 18 it suspended Callahan after an internal peer review group overturned Callahan's September 6 discharge, and on or about January 3, 2003, it failed to return Callahan to his former or substantially equivalent position of employment, engaging in this conduct because Callahan formed, joined and assisted the Union and engaged in concerted activities. General Counsel on brief contends that the record is replete with incidents that DTR treated Callahan differently than other employees in that other employees were disciplined for making bad parts, but never discharged, suspended or even suspended for almost 3 months; that no evidence was submitted to show that Callahan intentionally made bad parts; that a prima facie showing has been made in that Callahan engaged in union activity in plain view of King, Williams admitted that he knew that King was a union supporter in that he observed Callahan engage in union activity in the parking lot, DTR engaged in antiunion animus, and Callahan was suspended, terminated, and suspended; that King's decision to recommend that Callahan be dismissed was made the day after the P/A meetings with associates; that the Respondent's unwillingness to follow the decision of its own peer review panel is further demonstrative of its unlawful motivation; that Respondent intended to get rid of Callahan in whatever fashion it

could; that the severity of discipline issued to pro-union Callahan is not only extraordinary but unparalleled, and it supports an inference of unlawful motivation; that Callahan was transferred to the second shift in the mixing department, and King's own notes indicate that he knew that the Union did not have support on the second shift; that DTR has submitted no explanation for the difference in treatment between Callahan and its employees Davis, Shine, Brown, Baldazo, Smith, and Worthy, beyond King's insistence that Callahan intentionally ran bad parts; that Williams testified that he did not conclude that Callahan intentionally ran bad parts until after Callahan's discharge and before his peer review; and that conveniently the parts run by Callahan were not available at the trial herein as DTR conveniently discarded all of the parts under the ruse that it immediately scraps all defective parts. The Respondent on brief argues that General Counsel failed to prove that DTR was motivated by anti-union animus; that Callahan was discharged because DTR's investigation led only to one logical conclusion, namely, Callahan acted intentionally; that assuming the General Counsel did make a prima facie case, DTR met its burden under *Wright Line*, supra in that Callahan would have been suspended and terminated for intentionally running bad parts even absent his union activities; that Board cases have held that impairing production, either intentionally or not, is a lawful reason for termination, *Meaden Screw Products*, 325 NLRB 762, 769-71 (1998) and *Kawasaki Motors Corp.* 268 NLRB 936, 940-42 (1984); that Callahan's explanation that he was too fast at running the part is not credible in view of the fact that this explanation was first offered at the trial herein, and Callahan is not credible since he lied on his DTR job application providing false dates for work experience when he was actually serving a prison sentence of over 5 years in the Ohio prison system as a convicted felon; that the argument that other employees were not terminated for running bad parts does not help Callahan because it was not shown that the other employees ran as many bad parts as Callahan and it was not shown that any of the other employees intentionally ran bad parts; that all of the other involved employees were counseled or disciplined but since their offense was less than Callahan's, their treatment was also less severe; that Callahan was placed in his new position upon his return to work due to valid concerns that he had intentionally run bad parts; that Callahan did not receive a cut in pay or benefits upon his return to work following his suspension; and that his placement on the second shift was due to the fact that it was the shift where he was needed in mixing.

Callahan engaged in union activity and DTR knew it. He was suspended, terminated, and then suspended again when the majority of the peer review panel that DTR set up did not go along with DTR's termination of Callahan. The violations of the Act found herein demonstrate the anti-union animus of DTR.

Has DTR demonstrated that Gahman would have been terminated notwithstanding the protected conduct? In his post peer review panel decision letter suspending Callahan for about three and one half months, King wrote "you destroyed critical safety parts supplied to our customers." This sentence makes it sound like Callahan sabotaged a critical part used in the fuel line of automobiles and the parts were "supplied to ... [DTR's] customers." There was no showing that any part that Callahan assembled on August 27 or the 28 was supplied to a DTR customer. However, no one testified to deny Callahan's testimony that approximately a month earlier his supervisor, Risner, asked him to come in off vacation to run replacement parts on assembly line 3 for Honda after someone had run "thousands of bad parts," and someone had sent the bad parts to Honda. The Respondent did not deny Callahan's testimony that in that situation the larger piece of metal was bad. Staley admitted that if there is a problem with the large metal block, it could throw the small metal block off.

The burden has shifted to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. DTR could have saved a representative number of the parts assembled by Callahan on August 27 and 28, put the "**NO GOOD**,

**SAMPLE**” DTR red tag it has on the parts as it did with Respondent’s Exhibits 25 and 27, put them in a cardboard box, and taped a **“NO GOOD, SAMPLE”** DTR red tag to the outside of the box so that no one would mistakenly send them to a customer. Then DTR could have shown the parts at the trial herein so that they could be compared.<sup>31</sup> DTR chose not to take this approach.

5 Instead DTR relies on testimony about the parts assembled by Callahan on August 27 and 28. But DTR does not have the inspectors, Schrader or Stewart, or the person who counted the alleged bad parts, Blossard, testify. Rather it relies on the testimony of supervisors King and Williams, and hourly employee Staley. It was conceded by Staley that he himself made a bad part or parts on the involved machine on August 28. On brief DTR claims that “Staley

10 intentionally made a bad part but the angle was only slightly off and was attributable to improper use of the bar. (Tr. 510, 513)”<sup>32</sup> This might refer to parts that Staley made after Callahan went to lunch but it does not refer to parts Staley made before Callahan went to lunch. Staley testified that he himself ran one or two parts, they were bad parts and he got engineering out there to “test run the machine to - - to try to figure this out.” (transcript page 510) Staley did not testify

15 that he made the bad parts intentionally. And he certainly did not do this while Callahan was there and before Caldwell was called to the machine. Staley also testified that he and Caldwell concluded that if the assembler laid the part on the bar at a 90 degree angle to the bar, the angle of the part would be off resulting in a bad part; and that he and Caldwell found that if the part was placed at a 45 degree angle to the bar it would set up okay. Williams, on the other

20 hand, testified that even if the hose was placed at a 90 degree angle to the bar, the angle should not be bad if the small metal block was properly resting on the bar. Williams testified that when Staley came to the involved assembly machine on August 28, and Staley ran parts in his presence, the parts were good. This appears to contradict Staley’s and Callahan’s testimony. Williams then testifies that they talked with Caldwell who could see no problem with the

25 machine. If, according to William’s testimony, the parts that Staley made were good, it is not clear why there would have been any need to call Caldwell over. But Staley provided the reason when he testified that he himself ran one or two parts, they were bad parts and he got engineering, Caldwell, out there to “test run the machine to - - to try to figure this out.” (transcript page 510) According to Staley, Caldwell was called “[a]fter I couldn’t figure out why we’re having these [bad parts].” (transcript page 509) Staley also testified that he made some parts with

30 Callahan and he did not remember Williams being present. Williams testified that Callahan was not there for the inspection process. And Callahan testified that Williams was not there when Callahan and Staley ran the bad parts. I conclude that when Staley first came to the machine Williams was not present. Callahan and Staley, and then Staley alone ran parts and they were

35 all bad. Staley told Callahan that it was the machine and Callahan should go to lunch while Staley was going to get someone else to look at the machine. Callahan went to lunch. While Callahan was at lunch Caldwell looked at the machine with Staley and Williams present. During that period it appears that Staley ran some parts and it was finally determined that if the parts were laid on the bar a certain way the parts would be good. When Callahan returned he was

40 told to change the way he laid the parts on the bar while they set.

In his memorandum prepared at the behest of Ream for the peer review panel, Williams wrote “[c]ame to the conclusion that there was nothing wrong with the fixture, but it was the way the parts were being laid on the bar after assembly. Moved the bar to a distinct location and turned the pieces at an angle. .... He ran good parts for the rest of the day....” (General

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<sup>31</sup> No one denied Callahan’s testimony that there was a problem with the big metal part on parts shipped to Honda in July 2002. The tubes which extend from the large block and the small block and are inserted into the rubber hose are bent, and it appears that the angles are

50 compound when the face of the block from which the tubes extend is taken into consideration.

<sup>32</sup> Respondent’s brief, page 10.

Counsel's Exhibit 8, emphasis added) There is no assertion in the memorandum that Callahan intentionally made bad parts. There is no assertion in the memorandum that the parts were so bad that Callahan had to be acting intentionally, and the problem could not be accounted for by the way he was laying the parts on the bar. Indeed William's memorandum seems to indicate just the opposite. Yet Williams testified that he, in effect, told Huffer and King before they met with Callahan on August 29 that the parts were so bad that Callahan had to be acting intentionally, and the problem could not be accounted for by the way he was laying the parts on the bar. When asked on cross-examination when he came to the conclusion that Callahan made the bad parts intentionally, Williams answered that he was not sure of the exact date. When asked further if it was before or after the peer review, Williams testified "I do believe it was before the peer review." (transcript page 412) Williams lied about this material fact while under oath. This became DTR's strategy after King et al realized that employees who performed this kind of work, who knew that there was scrap, who knew that there were variations, and that machines do not always perform perfectly would not buy what DTR was selling. No one, including the named supervisor – Risner, denied Callahan's testimony that just a month before his termination thousands of bad parts involving the larger metal block were run and they were sent to Honda.

It was not demonstrated that when Callahan was terminated, Williams had concluded that Callahan acted intentionally, and Williams had told his superiors that Callahan had acted intentionally. There is no mention of Callahan acting intentionally in the termination letter dated September 6 from King to Callahan. Only after a majority of the peer review panel, which was not shown the parts and which did not have the opportunity to speak with Staley, overturned Callahan's termination and found that Callahan should be reinstated with back pay, did King write to Callahan in General Counsel's Exhibit 20 falsely accusing Callahan by indicating that he "destroyed critical safety parts supplied to our customers." (emphasis added) King lied under oath about addressing the peer review panel in his attempt to have Callahan's termination confirmed. King took an extraordinary measure, he knew it, and he was not going to admit it at the trial herein even though he was under oath. King also lied to Callahan when he told him on August 30 that he had spoken with Staley as Callahan had requested. King did not deny Callahan's testimony that on August 30 King said "we don't need your type running the machinery here anymore. I want you to turn your time card in. You can talk to your wife on the way out, tell her you ... can pick her up and you'll hear from us in the mail shortly." (transcript page 118) While Callahan's letter of termination is dated September 6, Callahan was effectively fired on August 30 with the above-described King statement. And this occurred before King spoke with Staley. There was no real need for King to speak with Staley before telling Callahan to get out. What occurred did not depend on what Staley would say. What occurred was occasioned by something else, namely Callahan's union activity. The Respondent did not meet its burden of demonstrating that Callahan's suspension, termination, and suspension would have taken place notwithstanding his protected conduct.

In January 2003 DTR did not return Callahan to his former or substantially equivalent position of employment. Obviously DTR did not return Callahan to his former position but the Respondent argues that the position to which it returned Callahan is substantially equivalent notwithstanding the fact that DTR denied Callahan bidding rights when he returned. The only employee who worked both in hose assembly and in mixing who testified at the trial herein was Callahan. Callahan testified that mixing was very dirty and physical work. King did not deny this. Rather, King testified that mixing is not the dirtiest, heaviest, and least attractive job in the plant. That is not, however, the issue. The issue is was Callahan returned to a substantially equivalent position of employment. The obvious answer is he was not. Callahan did not have bidding rights, he was placed on a different shift, and King did not deny that the work in mixing is dirty and physical. DTR violated the Act as alleged in paragraph 12(A), (B), (C), (D) and (E) of the



that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

5 The Respondent having discriminatorily discharged Gahman and Callahan, it must offer Gahman reinstatement, and make Gahman and Callahan whole for any loss of earnings and other benefits, computed on a quarterly basis, from Gahman's date of discharge to date of proper offer of reinstatement to Gahman, and from August 30, 2002 to January 6, 2003 for Callahan, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>33</sup>

#### ORDER

15 The Respondent, DTR Industries, Inc., of Bluffton, Ohio, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

(a) Giving an employee the impression that his union activities are under surveillance.

(b) Threatening an employee with discipline if he continued his support and activities on behalf of the Union.

25 (c) Threatening employees with layoff and job loss if the employees selected the Union as their bargaining representative.

30 (d) Disparately enforcing its uniform policy against an employee who shows his support for the Union.

(e) Unlawfully discharging Daniel Gahman because he formed, joined and assisted the Union and engaged in concerted activities.

35 (f) Unlawfully suspending John Callahan.

(g) Unlawfully discharging John Callahan.

40 (h) Unlawfully suspending John Callahan after an internal peer review group overturned John Callahan's September 6 discharge.

(i) Unlawfully failing to return John Callahan to his former or substantially equivalent position of employment.

45 (j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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50 <sup>33</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

5 (a) Within 14 days from the date of the Board's Order, offer Daniel Gahman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

10 (b) Make Daniel Gahman and John Callahan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Decision.

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

20 (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.

25 (e) Within 14 days after service by the Region, post at its facility in Bluffton, Ohio copies of the attached Notice marked "Appendix."<sup>34</sup> Copies of the Notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since July 22, 2002.

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

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50 <sup>34</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

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John H. West  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

10 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

15 Form, join, or assist a 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

20 WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT threaten you with discipline if you continue your support and activities on behalf  
of the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW.

25 WE WILL NOT threaten you with layoff and job loss if you select the INTERNATIONAL UNION,  
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA, UAW as your bargaining representative.

30 WE WILL NOT disparately enforce our uniform policy against you if you show your support for  
the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA, UAW.

35 WE WILL NOT unlawfully suspend, discharge, or fail to return you to your former or  
substantially equivalent position of employment because you form, join and assist the  
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA, UAW and engage in concerted activities.

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

WE WILL within 14 days from the date of the Board's Order, offer Daniel Gahman full  
reinstatement to his former job or, if that job no longer exists, to a substantially equivalent  
position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

45 WE WILL make Daniel Gahman and John Callahan whole for any loss of earnings and other  
benefits resulting from their discharges, less any net interim earnings, plus interest.

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

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DTR Industries, Inc.

(Employer)

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Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1240 East 9th Street, Federal Building, Room 1695, Cleveland, OH 44199-2086

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(216) 522-3716, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3723.

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