

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

VULCAN MATERIALS COMPANY

and

Case 14—CA—27555

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 841, AFL-CIO

John P. Hasman, Esq. and Monette Zuch, Esq.,
for the General Counsel.

Jeffrey M. Mintz, Esq. of Atlanta, Georgia, and
Sam L. Frazier, Esq. of Birmingham, Alabama,
for the Respondent.

John D. Moore, of Terre Haute, Indiana, for the
Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Saint Louis, Missouri, on March 2 and 3, 2004. The charge was filed September 8, 2003,¹ and an amended charge was filed November 10. A complaint and notice of hearing was issued December 12, and an amended complaint and notice of hearing was issued December 16.

The amended complaint alleges that the Company suspended and discharged an employee, Kevin Boyer, and suspended two other employees, Greg McMillan, and Brian Darling. It further alleges that the Company imposed these disciplinary sanctions because the employees assisted the Union and engaged in concerted activities. The General Counsel asserts that the Company's conduct was in violation of Section 8(a)(1) and (3) of the Act. The General Counsel also contends that the Company implemented a work rule imposing an on-call obligation without affording the Union an opportunity to bargain with the Company regarding such a rule. This conduct, and the subsequent suspension and discharge of Boyer for a purported violation of this on-call rule, are alleged to be in violation of Section 8(a)(1) and (5) of the Act. The Company filed an answer, denying the material allegations of the amended complaint.²

¹ All dates are in 2003 unless otherwise indicated.

² In its answer, the Company also raised an affirmative defense invoking the limitations period established in Section 10(b) of the Act. (GC Exh. 1(i), p. 4.) It has not presented evidence or argument relating to this defense, either at trial or in its brief. In the absence of any evidence supporting this defense, I conclude that it was simply a pro forma inclusion in the answer.

As described in detail in the decision that follows, I conclude that the General Counsel has established that Boyer engaged in protected union activities and that the Company was aware of his participation in those activities. I further determine that the General Counsel has met his burden of demonstrating that Boyer's participation in such activities was a substantial motivating factor in the decision to suspend and terminate his employment. I also conclude that the Company has failed to establish that it would have suspended and terminated Boyer's employment regardless of his participation in protected union activities. I next find that the General Counsel has shown that McMillan engaged in protected union activities and that the Company was aware of his involvement in those activities. I also conclude that the General Counsel met his burden of establishing that McMillan's participation in such activities was a substantial motivating factor in the decision to suspend his employment. I further find that the Company has met its burden of showing that it would have suspended McMillan's employment regardless of his participation in protected union activities. I conclude that Darling engaged in protected union activity and that the Company was aware of his participation in such activity. I do not find that the General Counsel met his burden of demonstrating that Darling's protected union activities formed a substantial motivating factor in the Company's decision to suspend his employment. Finally, I find that the Company did unilaterally promulgate a new on-call policy without first affording the Union an opportunity to bargain about such a policy.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, is engaged in the mining and production of crushed rock at its facility in Casey, Illinois, where it annually derives gross revenues in excess of \$100,000, and purchases and receives at its Casey, Illinois facility, goods valued in excess of \$50,000 directly from points outside the State of Illinois. The Company admits⁴ 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 that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Facts*

Vulcan Materials Company is a New Jersey corporation that operates 220 worksites in 22 states. One of its executives characterized it as the Nation's "foremost" producer of

³ The transcript contains a number of errors. At p. 67, l. 10, the witness testified that he would have expected them to "call." At p. 328, l. 18, the witness stated that Darling, "helped me for a while." At p. 389, l. 23, the witness is describing "Lon [Shields]" as jumping out of his chair. At p. 416, l. 1, the transcript characterizes the testimony that follows as "recross examination." It was actually the only cross-examination of the witness. At p. 453, l. 10, the witness says he is the "boss." At p. 482, l. 5, I actually said that the witness' statement was "not" an answer to counsel's question. At p. 489, l. 5, the witness said "he" wanted to keep his job. At p. 551, l. 3, the witness was being asked what happened after Kevin said he would "not" go. At p. 553, l. 10, counsel asked the witness whether Heft was "not" normally working at a rock quarry. The remaining errors of transcription are not significant or material.

⁴ See, the Company's answer, paragraphs 2 and 3. (GC Exh. 1(i).)

processed and crushed rock supplied to concrete and asphalt companies. (Tr. 465.) Located in South Central Illinois, the Casey facility forms a part of the Midwest division of the Company. The facility consists of a limestone quarry that contains two components separated by a township road. The western component is the pit, the area where mining is performed. The eastern component contains the processing facility, including the crushing equipment, scale house, office, and settling ponds.

Prior to the events under discussion, the Casey facility was the only nonunion facility in the Company's Midwest division. The Union had engaged in an organizing campaign at the facility during 2002. In July 2002, an election was held under the auspices of the Board. The bargaining unit members did not choose to be represented by the Union.

During 2003, the Casey facility became extraordinarily busy supplying crushed rock for use in the repaving of a nearby interstate highway, I-70. The Company's operating schedule as of March 31 showed thirteen production employees engaged in three, round-the-clock, work shifts. (GC Exh. 5(b).) These shifts routinely operated 6 days per week. In addition, the Company frequently sought volunteers to operate the plant on Sundays. Among the employees working at the facility during this period were the three men involved in this case. Brian Darling was hired in March 2001 as a lot loader operator. Greg McMillan was hired at approximately the same time. After originally serving as a millman, he was assigned to quality control duties. Kevin Boyer was hired as a millman in May 2002. In October of that year, he was promoted to the position of leadman, receiving a \$1 per hour increase in pay.

The evidence demonstrates that during the summer of 2003, the facility's huge workload led to considerable stresses and strains. For example, in mid-August, Alan Shoemaker, the Company's area operations manager responsible for a number of facilities including Casey, was also filling in as superintendent at Casey. He asked Boyer to seek volunteers to work on Sunday, August 10. Boyer canvassed the staff and informed Shoemaker that nobody was willing to work that Sunday. Early Sunday morning, Shoemaker called a number of employees directly, continuing to look for volunteers.⁵ Among his calls was one to Boyer's home at 8 a.m. Boyer was not at home and the call disturbed his wife. In addition, Boyer received calls from 4 other employees complaining that Shoemaker had called them on a Sunday morning after they had already indicated that they were unavailable for work on that day.

Shoemaker's early morning calls and the resulting complaints from his coworkers upset Boyer. He telephoned Graham Ault, the human resources administrator for the Midwest division, to register his complaint. Boyer testified that this prompted Shoemaker to approach him at the facility. Shoemaker appeared "very upset" and complained about Boyer's call to Ault. (Tr. 236.) After attempting to justify his behavior, Shoemaker told Boyer that, "if it made me feel better, that he would apologize to me." (Tr. 237.)

While there was no testimony regarding Boyer's precise motivation, I infer that Shoemaker's series of telephone calls, coupled with other concerns, prompted Boyer to contact John Moore on August 11. Moore is the Union's organizer and business representative. The two men had worked together during the 2002 organizing campaign. In fact, Moore characterized Boyer as his "main contact" with the employees during that campaign. (Tr. 154.)

⁵ One of those employees testified that during the call Shoemaker stated that the Company was "in desperate need of rock." (Tr. 410.)

After speaking with Moore on August 11, Boyer met with him and signed a card authorizing the Union to represent him. Moore gave Boyer additional cards for distribution to his coworkers.⁶

Based on his general dissatisfaction with the working conditions as leadman, Boyer approached Shoemaker, telling him,

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that, if he wanted to, they could take the lead man job away from me and put me back to my driller or truck driver [jobs] because I couldn't keep running at that pace, working all them hours and then being woke up all night long, trying to solve problems at the plant.

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(Tr. 232.)

As the summer of 2003 ended, the Casey facility underwent an unusual number of significant developments. It was the confluence of so many events and alterations that form the background to the matters under consideration. Perhaps the foremost of these developments was the completion of the I-70 project. This resulted in a large-scale reduction in workload, requiring widespread changes in the Casey operations. As Shoemaker described it, management "restructured the whole operation." (Tr. 22.) These changes were described to the work force at a meeting conducted by Shoemaker on August 22.

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During the meeting, Shoemaker addressed a wide variety of topics. He announced the layoff of 4 employees due to the anticipated reduction in workload. He also notified the employees that the night shift would be eliminated. Numerous assignment changes were announced, including the assignment of McMillan and Darling as the afternoon shift operators and the assignment of Boyer as a truck operator/driller. These changes were memorialized in a written notice with an effective date of August 25. (GC Exh. 4.) Shoemaker made particular reference to the changes affecting Boyer.⁷ He explained that Boyer was no longer the leadman and he instructed the employees that, "they no longer needed to be calling Kevin [Boyer] at home, for any of their needs. They needed to direct their calls to Tom Heft."⁸ (Tr. 526.) Heft was serving as the acting superintendent of the Casey facility and had been assigned to this position since July. Finally, Shoemaker praised the work force for their efforts over the summer, including the long hours and hard work required on the I-70 project. He told them that they "should enjoy the three day weekend with their families, that Labor Day weekend." (Tr. 24.)

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On the same day as Shoemaker's staff meeting, the Union's renewed organizing effort reached its culmination. Having obtained authorization cards from a majority of bargaining unit members, Moore contacted Phillip Miller, the director of human resources and administration for the Midwest division, seeking voluntary recognition of the Union. He transmitted copies of the signed authorizations to Miller. (GC Exh. 8.) Miller and Ault reviewed the cards, and Miller signed a statement of voluntary recognition on August 22, granting the Union "voluntary recognition for the purpose of representation as outlined by the National Labor Relations Act."

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⁶ Boyer took these additional cards to work and left them in his truck. He informed his coworkers of this and explained that they could sign cards and return them to the vehicle. Boyer testified that, as of August 13, he received numerous signed cards that he gave to Moore.

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⁷ It should be noted that Boyer's reassignment was not unwelcome. Boyer testified that he was "glad" to give up the lead position, "because of all the phone calls I was receiving at home and all the hours and stuff." (Tr. 217.)

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⁸ Indeed, Shoemaker pointed at Boyer and told him, "that-a-way, you won't be receiving any more phone calls at home." (Tr. 231.)

(GC Exh. 9.) Thus, at the same moment that the Company underwent a complete reorganization, the workers selected and received union representation.

5 On the implementation date of the facility's reorganization, August 25, management and workers engaged in discussions regarding the precise contours of the changes. McMillan questioned Heft about the arrangements for lunch on the afternoon shift. Heft indicated that there would be no actual break, but that the two men could eat their lunch while continuing to operate the equipment. Boyer also approached Heft to discuss the impact of his reassignment and the lack of a leadman position at the facility. He advised Heft that he needed to become aware of the duties formerly performed by the leadman so that they could be reassigned.

10 Among the discussions on August 25, were those involving the issue that is at the heart of the controversy involving McMillan and Darling's suspensions. Those two men were the only operators assigned to the new afternoon shift. No supervisors or leadmen were to be present during the shift. As a result, Heft testified that on this first afternoon of the new second shift, he approached McMillan who was engaged in operating the crusher. As Heft put it, he

20 told him, first of all, if he had any problems, he needed to call me. I was staying at the Comfort Inn. I gave him my cell phone number. I told him it was written on the—there is a slate board in the break room, in the back of the shop. I wrote my cell phone number on that and I told him, if he had any problems, to give me a call.

25 (Tr. 589.) Heft testified that he then drove to Darling's worksite and,

relayed the same information to him. I said, you know, my phone number is on the wall, up in the break room. I am staying at the Comfort Inn. If you have any problems, give me a call.

30 (Tr. 590.)

35 In contrast to Heft's testimony, McMillan provided a different version of their discussion. He testified that he chose to approach Heft because, "there were some things I wanted to ask him" about the new shift assignment. (Tr. 324.) Specifically, he reports that he asked Heft, "in case of emergency, who I was to call?" (Tr. 324.) He testified that Heft gave him his cell phone number and told him he was staying at the Comfort Inn. Darling testified that he never had any conversation with Heft regarding contact procedures for the afternoon shift.

40 There are a number of reasons why I credit Heft's version of these events. To begin with, McMillan was evasive under cross-examination. When asked if Heft approached him to discuss his expectations for the afternoon shift, McMillan responded that, "[i]f it happened, I do not remember that it did . . . I am not saying it did not. I do not remember." (Tr. 347.) Shortly thereafter, McMillan was asked directly if Heft told him that he expected to be contacted in the event of problems on the shift. He again reported that Heft may have said this, but he did not remember. I find these purported memory lapses to be peculiar. Just days after these

45 conversations, McMillan was suspended for alleged failure to obey Heft's instructions to call him in the event of problems. It is apparent that the nature and content of McMillan's discussions with Heft on August 25 were crucial to his defense against this charge of misconduct. Having been aware of their significance from an early date, McMillan's asserted failure of recollection

50 strikes me as an evasion.

Beyond my conclusions regarding McMillan's testimony that he lacked recollection of Heft's instructions, there is highly persuasive evidence showing that McMillan had previously acknowledged the accuracy of Heft's version of the August 25 discussions. Those discussions were a central topic of the disciplinary conference held on September 4 that resulted in McMillan's suspension. Moore was present during that conference as McMillan's union representative. He took notes during the meeting. Moore testified that those notes show that Heft said he told McMillan to call him "if there are any problems out here." (Tr. 189.) Counsel for the Company asked Moore if, "McMillan said that's right, that's what he told me." Moore responded by stating, "[t]hat is true." (Tr. 189.) Counsel followed up by again asking Moore if his notes taken during the meeting showed that McMillan admitted that Heft had told him to call if there was a "problem." (Tr. 190.) Moore confirmed that this was accurate. Thus, the testimony of McMillan's union representative demonstrates that McMillan had earlier corroborated Heft's version of their conversation. This is compelling evidence in support of Heft's description.

While McMillan attempted to evade direct confirmation of Heft's account during the trial, Darling flatly contradicted it. He denied having any sort of discussion with Heft regarding contact procedures. I do not credit this denial. First of all, it is noteworthy that Heft's account of his conversations on this topic was strongly corroborated by McMillan's admission of the accuracy of that account during the September 4 meeting. The fact that McMillan provided corroboration of Heft's account of their discussion lends support to Heft's account of the virtually identical conversation with Darling. Secondly, as will be described later in this decision, I found Darling's overall testimony to lack credibility. I based this conclusion on the intangible factors regarding his demeanor and presentation as a witness and upon the very tangible contradictions between his accounts and those of other witnesses as to important aspects of these events in controversy. Finally, I note that Darling's contention that neither the supervisor nor the employees chose to raise the issue of contact procedures is inherently unlikely. Common sense suggests that at least one or the other would have wished to establish the guidelines regarding supervisory contact during the new shift. Of course, my conclusion in this regard is based on more than mere common sense. It is reinforced by both Heft and McMillan's testimony. Whatever their disagreements regarding the precise content of their conversation, both men clearly agree that the topic arose and was discussed. Darling's claim that he never participated in a similar discussion is not plausible.

After these discussions regarding the operation of the new afternoon shift, McMillan was dissatisfied with the proposed arrangements for the operators' lunch. He phoned Boyer to express his unhappiness. On August 26, Boyer telephoned Moore to raise the issue of a lunch-break for the afternoon shift. Moore called Heft and referred him to the provisions of the Company's handbook for the Casey facility. The handbook clearly provided that employees were to receive a 20-minute paid lunch during every shift. (GC Exh. 2, p. 5.) Heft told Moore he would have to check into the matter. He referred the issue to Ault, his human resources administrator. Ault advised Heft that Illinois law required a lunch period and instructed Heft that, "[t]hey will get their lunch break." (Tr. 598.) Later on that day, Heft told McMillan that he could take his lunch period.

August 27-28 proved to be eventful for the newly established afternoon shift. At approximately midnight, a rock became wedged in the entrance to the crusher. While not routine, this type of problem occurred from time to time in the operation of the facility. McMillan testified that he and Darling made a variety of preliminary attempts to dislodge the rock. When these were unsuccessful, they proceeded to open the crusher. Upon opening the crusher, the men discovered a more serious problem; one of the large breaker plates inside the crusher was damaged. A broken bolt had caused the plate to dangle in a dangerous manner. After noticing

this problem, McMillan observed to Darling, “even if we get the rock out, we really cannot start back up because of this plate being ready to fall out.” (Tr. 326.) Given the situation, McMillan reported that,

5 [w]e tried tying chains on [the rock], to pull the rock out,
and we were having no luck and it was time for our shift
to end. So, at that time, we just, you know, cleaned up
and went home.

10 (Tr. 328-329.) McMillan did indicate that the two men discussed the possibility of repairing the
plate.⁹ He testified that Darling told him that there were no bolts available to accomplish the
repair. McMillan accepted Darling’s assertion in this regard and the men did not look inside the
shop to determine if bolts were in stock. Before leaving for the day, the men prepared the
15 customary production report, noting that production ceased after midnight due to a “[r]ock hung
up in crusher.” (GC Exh. 6(l).) McMillan testified that the men also left a note in the break-
room, telling the incoming millmen on the day shift that “the plant was not ready to operate.”
(Tr. 328.)

20 In his testimony at trial, Darling also recounted these events. His account was
noteworthy for its contradictions and discrepancies. As indicated by McMillan, Darling also
reported that a rock became stuck in the crusher entrance at midnight. He indicated that the
two men worked on the rock for “about two hours.” (Tr. 404.) At this point, approximately 2
a.m., they noticed that the plate was “missing.” (Tr. 404.) Darling testified that,

25 we found the ware plate but we knew that there was no
bolts to put it back in with. It takes special bolts to put
them back in with and we knew we never had any.

(Tr. 405.) He clearly testified that both he and McMillan had recently determined that the bolts
were not kept at the facility.

30 On cross-examination, Darling changed this testimony. The discussion proceeded as
follows,

35 DARLING: I told Greg [McMillan]. I said, I already knew that there
was not any because it did take special bolts and you have to make
them.

COUNSEL: You knew, from a previous problem, with that very same
40 breaker plate?

DARLING: Yes. Yes.

...

45 COUNSEL: Mr. McMillan did not have any idea, did he, because he was
new to that position, from having been in Quality Control –

50 ⁹ Both McMillan and Darling testified that, if the proper parts were present, they were each
qualified to perform the repair.

DARLNG: Correct.

COUNSEL: So, he relied on you.

DARLING: Yes.

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(Tr. 423-424.) Darling next testified, in direct contradiction to McMillan, that the men went to the shop to see if they could locate the necessary bolt. He testified that they spent approximately 30 minutes in this search effort. Apart from being completely at variance with McMillan's account, Darling's story is difficult to credit. Given his clear assertion that he already knew the bolts were not kept in stock, it seems unlikely that he would have undertaken a search of the shop. In this regard, McMillan's version makes much more sense. One would expect, as McMillan indicated, that given Darling's certainty about the Company's failure to keep bolts on the premises, they would have decided that it was a waste of time to go to the shop to search for them.¹⁰

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In further contradiction to McMillan's account, Darling next testified that after concluding their search of the shop, the men returned to the crusher and worked on the plate. He stated that the men worked on the plate for another 30 minutes, until the end of their shift.¹¹ He specifically denied that they performed the usual clean up of the work area before departing. By contrast, it will be recalled that McMillan testified that the men worked on dislodging the rock, cleaned up the area, and then concluded their shift. Once again, McMillan's account makes more sense. The men faced two separate problems that precluded ongoing production. They believed they lacked the crucial part to repair the plate. As a result, it makes sense, as McMillan reported, that they would focus their efforts on the other problem, the removal of the stuck rock. Darling's contention that they continued a futile effort to work on the plate is illogical. By the same token, McMillan's testimony that the men performed the usual final clean up of the work area makes sense. Once again, Darling's account is noteworthy for its total variance with McMillan's.

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At approximately 6 a.m., Heft arrived at the facility. He read the production report and drove to the crusher to inspect it. He directed the day shift workers to obtain a new plate and two bolts from storage on the premises. The new plate was installed and the stuck rock was pushed through the entrance with a hammer. Heft testified that production resumed between 9 and 10 a.m. As the repairs were underway, at 8:30 a.m., Heft phoned his supervisor, Shoemaker, to discuss the failure of McMillan and Darling to contact him during the afternoon shift in order to report the difficulties they were experiencing. Shoemaker instructed him to refer the issue to Ault. Ault directed Heft to contact the two men and inform them that they were suspended pending investigation and that they should be prepared to make themselves

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¹⁰ The evidence shows that the correct type of bolts were actually in the shop. Thus, if Darling and McMillan had made the thorough search reported by Darling, it seems likely that they would have discovered the necessary bolt.

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¹¹ Darling's timeline for these events does not add up. The afternoon shift terminated at 2 a.m. (GC Exh. 4.) Darling claimed that the rock became hung up at midnight and they worked on it for approximately 2 hours. They noticed the damaged plate at 2 a.m. Nevertheless, they spent 30 minutes in the shop looking for a bolt. They then worked on the plate for another 30 minutes before quitting. Under this scenario, it would have been 3 a.m. McMillan does not claim that they worked past the end of the shift and there is no evidence to suggest that they did so.

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available for the investigation on the following day. Heft attempted to reach both men, but they were not at home. He left messages for each man.

5 Ault intended to conduct the disciplinary investigations regarding McMillan and Darling on August 28. Meanwhile, another employee notified Moore that the two bargaining unit members had been suspended pending investigation. On August 27, Moore telephoned McMillan and told him that he would try to arrange to attend the investigatory meeting on the following day.

10 On August 28, Ault drove to Casey in order to hold the investigatory meetings. Heft phoned McMillan and told him to report to the facility. McMillan advised Moore of the timing for the meeting. Moore, noting that it would take him an hour to drive to Casey, instructed McMillan to formally request the presence of his union representative. Everyone except Moore having assembled, the investigatory meeting regarding McMillan began at approximately 11 a.m. As Moore was not yet present, McMillan read a statement that referenced the Act and requested
15 "that this interview not begin until my union representative is present." (GC Exh. 10.) McMillan attempted to phone Moore to ascertain his expected arrival time. The line was busy. After waiting a short time, Ault cancelled the meeting.¹² Darling was also notified by phone of the cancellation of his meeting. Moore arrived at Casey shortly thereafter. He attempted to discuss the suspensions with Heft, but was rebuffed. He telephoned Ault and was told that the meeting
20 would have to be rescheduled and that the Company would have to locate another human resources official to substitute for Ault.

25 August 29 was the last workday before the Labor Day weekend. Boyer used this occasion to raise an issue with Heft that had been simmering. Boyer has a young daughter who suffers from a disability. He testified that a local medical school was sponsoring a 2-hour seminar about this condition on September 2 at a nearby town. The seminar presented a unique opportunity for him to learn more about the condition and the best treatment strategies. As a result, he had previously requested and received permission to leave work to attend the event. Unfortunately, on August 27, Heft advised Boyer that he had to cancel this permission.
30 Boyer testified that Heft told him this was necessary because "the new superintendent was coming in [on September 2] and he wanted me to be there to discuss things with him." (Tr. 245.)

35 Being very upset with Heft's decision, Boyer raised the issue on the 29th. Heft again denied Boyer permission to leave work. Heft testified that, "I told him he couldn't go because there was already—there were two other people on vacation and, plus, at that time, the second shift had been suspended and we were very short-handed." (Tr. 85.) After being told this, Boyer responded by warning Heft that, with the new superintendent due to start his first day on the job,
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I didn't want to have to call and ask for union representation, but I wanted him to be aware of how urgent it was, that I had to go to this for my daughter's condition, an[d] that, if I had to, I would call the union representation to see if I could go.
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50 ¹² Ault was facing time pressure, as this was his last day at work prior to beginning his honeymoon.

(Tr. 246-247.) Indeed, Boyer did call Moore to seek his assistance. Moore told Boyer that he would go to the Casey facility at 6 a.m. on the following Tuesday, “to intervene if it was necessary.” (Tr. 139.)

5 The Casey facility was closed for the holiday weekend from August 30 through
September 1. Unfortunately, a proverbial “Act of God” was now added to the rush of events that
were challenging these parties. Over that holiday weekend, heavy rains drenched the Casey
area. Shoemaker testified that he saw the forecast for those rains on the Weather Channel. He
was aware that Heft, the acting superintendent, was primarily an expert in sand and gravel
operations and was not particularly familiar with rock quarry operations. As a result, Shoemaker
10 was concerned that Heft would not comprehend the need to make prior arrangements to deal
with problems caused by heavy rain at the Casey quarry. These potential problems took two
forms. At the pit, excess rainwater would fill the pit floor and preclude mining and transportation
of rock. The proper response to this problem was to operate a diesel pump designed to clear
out the excess water. The second problem involved the processing portion of the facility. This
15 operation used a number of settling ponds. In the event of extraordinary rainfall, it was possible
that a pond could overflow, causing wastewater to enter a nearby creek. The result would be an
unlawful environmental contamination. The solution to this potential problem was the
adjustment of a system of pipes designed to channel overflow into a diversion pond.

20 With these issues in mind, Shoemaker decided to call Heft and testified as follows
concerning his reasoning:

25 So, knowing that Tom [Heft] was a temporary Manager there,
I wanted to make sure that he had made any kind of arrangements,
you know, to cover for the weekend that he needed to . . . So, I
just wanted to double-check and make sure that the [sic] had
everything taken care of, for the weekend.

30 (Tr. 528.) When the two men spoke, Shoemaker asked whether Heft had made “arrangements
to take care of the pumps¹³ and water lines down there for the settling pond.” (Tr. 528.) As
Shoemaker had feared, Heft reported that he had not made any such arrangements. He
promised to do so.

35 On August 31, at approximately 5:30 p.m., Heft telephoned Boyer. He selected Boyer
because he was the only employee whose phone number he possessed. He had Boyer’s
number because Boyer had until recently been the facility’s leadman. Although there were
some differences in their accounts, Heft and Boyer provided similar testimony regarding their
conversations that evening. As Heft put it, he began by seeking Boyer’s advice,

40 I asked him if they had gotten quite a bit of rain in the area
and he said that they had gotten a pretty good amount. I
said, you know, do you think it could be a problem in the pit
or quarry? He said, yeah, it could be a problem. I asked him,
if he could go take a look at it.

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¹³ Throughout the trial, various witnesses tended to refer to “pumps” in the plural. They
were alluding to the diesel pump at the pit and to an electric pump in the processing area.
Analysis of the testimony about these pumps makes clear that the electric pump would not be of
any use in the event of heavy rainfall. It was not operated that weekend since it would not have
50 served any purpose to run it.

(Tr. 581-582.) Heft told Boyer that he would accompany him to the facility. Boyer told Heft that he was not available for this duty because he was awaiting telephone calls about his deer. Boyer's reference to his deer involved his side business of raising these animals for sale to customers. Earlier that evening, Boyer had placed an internet advertisement for his deer and was waiting on calls from a number of prospective customers.¹⁴ At this juncture, Boyer asked Heft for his phone number and told him that he would call him back shortly.¹⁵

After terminating the conversation with Heft, Boyer called Moore. He reminded Moore that he was no longer the leadman. He asked Moore, "if the company could force him to go to work on Sunday night." (Tr. 139.) Moore opined that Boyer could not be required to respond given his new job classification and the fact that the plant was not engaged in active operations over the weekend. Moore instructed Boyer to tell Heft that he should call Moore if Boyer's refusal was considered a problem. Boyer called Moore a second time to make certain that he had Moore's correct cell phone number so that he could give it to Heft.

Having consulted Moore, Boyer called Heft. He asked Heft if he had tried to reach anyone else who could go to the facility. Heft indicated that he had not.¹⁶ Boyer testified that he then posed the following question to Heft,

I asked him if he was asking me or if he was telling me, and he made the comment, if I ask you, what is your answer, and I said I have other obligations I can't get out of, Tom, and he says what if I tell you then, and I told him, if he's telling me, that I need him to call John Moore, my business agent, and discuss it with him that I can't get out of my obligations.

¹⁴ Boyer testified that he also mentioned other issues that precluded him from reporting to the facility that night, including having dinner company and needing to watch his young daughter while his wife was out shopping for dinner. He conceded that he did not go into "great detail" about these problems. (Tr. 262.)

¹⁵ Heft testified that during this first phone call the two men discussed the availability of other employees. Heft also contended that during their first phone discussion, Boyer specifically refused to comply with his direction to check the facility. Boyer testified that he did not specifically refuse to comply and that the two men did not discuss the possibility of assigning other employees to the task. He testified that he never conclusively refused Heft's instruction to report to the facility; instead he told Heft that he would call him back. He also asserted that the issue of finding other employees to check the quarry arose during their second phone call. Boyer's version makes more sense. It is likely that during the first call Boyer left his response to Heft's instructions open. This fits with the uncontroverted evidence that he promised Heft that he would call him back shortly. I find it logical to conclude that it was during that second conversation, when Boyer's position became clearer, that the men discussed locating other employees to do the job.

¹⁶ The fact that Heft had not attempted to contact other employees supports the conclusion that Boyer's account of their conversations is more accurate. Under Boyer's version, it would be logical for Heft to wait for Boyer's return call before determining whether he needed to make alternative arrangements. I find that this is what occurred. If Heft is correct that Boyer plainly refused to go, then one would have expected that Heft would have begun his search for alternate help immediately.

(Tr. 288.) Upon hearing Boyer's response, Heft asked if anyone else could handle the task. Boyer suggested Darling, a logical choice since he had the greatest experience in operating the pumps. Heft, noting that Darling was on suspension, asked if another employee, Gary Simonton, was available. He asked Boyer for Simonton's phone number. Significantly, in an affidavit Heft provided prior to trial, he reported that, "I ended the conversation by saying something to the effect of okay." (Tr. 604.) Specifically, Heft agreed that, "I never told him his job was on the line if he refused [to report to the facility]." (Tr. 604.) Boyer confirmed that Heft never threatened him with any disciplinary consequence for refusing to report. Both Boyer and Heft testified that Heft never characterized the issue as an emergency.

After his second conversation with Boyer, Heft phoned Shoemaker and told him that Boyer had declined to report to the facility. Shoemaker testified that he "could not believe it" and assumed there had been "some misunderstanding." (Tr. 529.) Shoemaker directed Heft to call Boyer again to "make sure that Kevin understood it was an emergency situation." (Tr. 25.) Heft testified that he dialed Boyer's number, but "did not get an answer." (Tr. 585.) He then tried to phone Simonton but received a busy signal. Finally, he phoned an employee of the Company's facility in Decatur and obtained his agreement to travel with him to Casey. The two men arrived in Casey at approximately 10 p.m. They proceeded to adjust the pipes at the settling ponds and fuel and start the pit pump.

Boyer testified that in the period after his second conversation with Heft, he received three or four calls from prospective buyers of his deer. He also spent time on the internet and on his cell phone. In addition, Boyer telephoned Moore to see if he had been contacted by Heft. Moore told Boyer that he had not received a call from Heft. Finally, Boyer testified that, "I never did hear back from [Heft] that night at all."¹⁷ (Tr. 295.)

On September 2, the first working day after the long weekend, Moore kept his commitment to Boyer by appearing at the Casey facility before 6 a.m. His purpose was to intercede on Boyer's behalf regarding the medical seminar that he sought to attend. Moore spoke to Heft, telling him,

that the union felt like that what [Boyer] was doing was not something to be penalized for and that we would do anything and everything in our power to insure that he got to go to that seminar.

(Tr. 141.) Heft telephoned both Shoemaker and the human resources department. Shoemaker told him, "if there's any way, let [Boyer] go." (Tr. 86.) Moore testified that Heft then "very begrudgingly" told him that Boyer could attend the seminar. (Tr. 141.) Under cross-

¹⁷ Both counsel left the precise reason for Heft's inability to reach Boyer for a third conversation less than fully explored (perhaps for tactical reasons). Boyer testified that he did not have caller identification. The record does not disclose whether Boyer's use of the internet would render him unable to receive phone calls. The record also does not disclose the precise details of Heft's attempt to call him. For example, Shoemaker testified that Heft simply told him "he could not get a hold of Kevin." (Tr. 539.) While Heft testified that Boyer did not answer the phone, in his much earlier written description of these events, he simply said that he "[c]ould not reach him." (R. Exh. 1(d).) Although Boyer testified that he owned an answering machine, Heft never indicated that he left a message. Boyer was not asked whether his phone ever rang that evening and he chose not to answer it. Nor was he asked whether he received a message from Heft.

examination, Moore testified to his understanding of Heft's attitude, noting that, "I gathered that he didn't like me telling him that the union was taking the position that he was entitled to go to that seminar." (Tr. 187.)

5 At approximately 8 a.m., Heft approached Boyer who was engaged in his work duties. He told Boyer that he could attend the seminar. Boyer departed for this event at 9 a.m., and returned to work at 1:45 p.m. Upon his return, he presented Heft with a certificate of his attendance at the seminar.

10 While Boyer was attending the seminar, management discussed whether to impose disciplinary sanctions against him. Heft and Shoemaker conferred at the Casey facility.¹⁸ Shoemaker presented the issue to the top human resources administrator of the Midwest division, Miller, who instructed Heft to prepare a written report and to suspend Boyer. Heft testified that the decision to suspend Boyer was made at some point after Boyer was given permission to attend the seminar.

15 After Boyer's return to work that day, Heft asked him to come to the office to meet the man who was replacing him as superintendent, Lon Shields. Shoemaker, Heft, and Shields performed the introduction. Boyer testified that there was a period of silence, so he volunteered that it was time for him to return to work and start drilling. Shoemaker stopped him and told him
20 that Heft had something to say to him. Heft advised Boyer that he was being suspended, "because I failed to come to work and start the pumps on Sunday night." (Tr. 254.)

25 Early the following day, Moore contacted Shoemaker regarding Boyer's suspension. He was subsequently informed that the Company had scheduled a series of meetings on September 4 to address the suspensions of Boyer, McMillan, and Darling. On that date, the meetings were held. In addition to each of the men whose discipline was under consideration, the meetings included Heft, Shields, Miller, and Shoemaker. Moore attended each meeting as union representative.

30 The first meeting addressed disciplinary action regarding McMillan. Miller, the human resources representative, read a description of the Company's version of events. McMillan agreed to the accuracy of this description.¹⁹ As Miller described it,

35 [d]uring the meeting, as we were asking Greg [McMillan] what had occurred, Tom [Heft] explained to him; Greg, you know that I instructed you to call me, if there is a problem and my number was

40 ¹⁸ The two men do not agree as to when this happened. Heft reported it was early in the morning, between 6 and 7 o'clock. Shoemaker testified that, while he spoke to Heft by phone regarding Boyer's wish to attend the seminar, he only arrived at Casey during the afternoon. As discussed later in this decision, the timing of these events is significant in evaluating the credibility of the Company's asserted justification for Boyer's discipline. Hence, I find it disturbing that the two managers disagree about it to such a substantial degree. Given
45 Shoemaker's need to travel some distance to reach Casey, I conclude that he would certainly have remembered leaving at a very early hour of the morning so as to have arrived between 6 and 7 a.m. Instead, he recalled arriving in the afternoon. Concluding that his recollection of his travel schedule would be clearer than Heft's, I credit Shoemaker's account of the timing.

50 ¹⁹ As previously noted, Moore's contemporaneous notes of this meeting confirm that McMillan agreed with the description of Heft's instructions to him regarding the need to contact him if problems arose during the afternoon shift.

there on the whiteboard and the hotel, five minutes away and Greg agreed.

....

5 Greg fully acknowledged it was his responsibility to fix the problem, get the problem repaired, including calling Tom if he needed to. There was no denial of that.

10 (Tr. 478, 480.) McMillan told the men that he had not called Heft because, "I did not feel like it was an emergency." (Tr. 332.)

15 After this discussion, the management officials withdrew in order to caucus. Miller testified that they took note of a prior written warning issued to McMillan on August 8 for an instance of "inattention to duties" resulting in the loss of an entire day's production of a particular rock product. (GC Exh. 15.) It was decided to impose a suspension as the appropriate response to this new incident.

20 Once the disciplinary sanction had been selected, the management officials returned to the meeting and advised McMillan and Moore that McMillan would remain on suspension and would be authorized to return to work on September 8. In addition, on that date McMillan was required to sign a document stating that he was being disciplined for having "disregarded [a] specific work instruction" requiring that he contact Heft "if any issues arose on the second shift." The document also specified that any further violation of work rules as set forth in the Company handbook would "lead to immediate termination." (GC Exh. 16.)

25 Darling's meeting was next. He was offered an opportunity to explain his conduct. In response, he stated that, "he wasn't aware that Tom [Heft] was to even be called, but he didn't feel that there was anything that Tom could have done if they would have called him." (Tr. 144.) He flatly denied that Heft had given him any instructions about contacting him. Beyond this, Darling declined to provide additional explanations.²⁰ Miller testified that he was troubled by both the content of Darling's statements and his attitude. Characterizing Darling's demeanor as "cocky,"²¹ Miller went on to contrast his behavior with that of McMillan,

35 We just had the previous individual in, Greg McMillan, who very clearly remembered all the happenings, who did not deny it and felt that—yeah, I was aware I should have called and offered that up very easily and then, for Brian [Darling] to come in and say, I do not recall that, it was [dis]concerting.

40 (Tr. 486.)

Once again, management left the room to discuss the appropriate sanction. Darling's disciplinary history was examined. It was noted that he had been issued a warning for tardiness

45 ²⁰ In his testimony, Darling agreed that he was given an opportunity to present his side of the story. However, he noted that, "I chose not to." (Tr. 410.) Strangely, in his testimony, Darling also offered that, "I cannot remember what went on that day [of the disciplinary meeting] right now." (Tr. 414.) Given that the Company's discipline of him was a central issue in the litigation involving Darling, this purported failure of recollection is highly unusual.

50 ²¹ Tr. 485.

5 in August 2002, and a 3-day suspension for unsafe operation of a dump truck resulting in an accident in May 2003. (GC Exhs. 17, 18.) The managers also discussed Darling's attitude during the meeting and noted that consideration of all of the relevant factors could justify termination under the Company's progressive disciplinary system. As a result, they returned to discuss the situation further with Darling, telling him that they were troubled by his attitude and that he had "conveyed himself like he did not want to work here." (Tr. 488.) Miller testified that Darling "changed his tone" and told the supervisors that "he liked working there and he wanted to keep his job." (Tr. 489.)

10 Based on Darling's change of attitude, the managers made a final decision to forego termination and impose a second suspension. Darling was advised of this decision and informed that his first day back at work would be September 8. On that date, he signed a document identical to the one signed by McMillan. (GC Exh. 19.)

15 The final meeting concerned Boyer's fate. Heft told the participants that Boyer "had specifically flat out refused to come to work." (Tr. 145.) Boyer denied this. In Moore's words, Boyer explained that,

20 he never did tell them, no, he couldn't come. He just kept telling them he had prior commitments and previous plans and asked [Heft] twice to call me if there was a problem with that.

25 (Tr. 145.) Moore asked whether the Company took the position that "they had the right to call anybody at any time?" (Tr. 145.) He tartly observed that the Company's position caused him to wonder "if slavery was still in effect or if it had been abolished." (Tr. 145.) In response to Moore's inquiry as to whether the men were required to be "on-call, 24/7," Miller put the Company's position as follows,

30 We felt, in the event of any emergency like this, it could have catastrophic consequences, on our facility, that, you know, we would turn to the person that was qualified or capable, if they were available to come in and do the work.

35 (Tr. 497.)

40 During the meeting, the supervisors asked Boyer to write down his version of the events under discussion. They retired from the room, leaving Moore and Boyer together. Boyer wrote a short description, explaining that on that evening he "was expecting phone calls [and] had other plans made already." As a consequence, he "couldn't leave my house because these guys are to call back about buying some deer from me." Finally, he asserted that, "I never said no!" (GC Exh. 14.)

45 When the managers returned to the room, they read Boyer's statement and expressed surprise at its brevity. Shields opined that Boyer's conduct on the night in question was insubordination. Miller informed Moore and Boyer that "the company's viewpoint was termination." (Tr. 260.) Since this meeting, the Company has refused to employ Boyer.

50 Based on the disciplinary actions taken against Boyer, McMillan, and Darling on September 4, Moore filed the original charge in this case on the following Monday. (GC Exh. 1(a).) On this date, McMillan and Darling returned to work after their suspensions.

On September 12, Shields, the new superintendent at Casey, engaged in a heated discussion with the employees regarding Boyer's termination. The men complained that the Company had been wrong to fire Boyer. According to one of the employees who was present, Scott Downey, Shields told the employees,

5 if the company is to call us—we are on-call 24 hours a day,
seven days a week and if they call us, we are to be there.

(Tr. 381.) Shields testified that he told them,

10 we are going to ask for volunteers, for these situations—situations
could arise. We are going to ask for volunteers. If we do not get
volunteers, we will have to tell people they have to come to work.
You know, we will have to assign their work and, if we do not
15 assign their work, then we have problems.

(Tr. 452.) This provoked an angry response from the employees. Emotions flared and Shields testified that he decided that, "I will stand up. I will take control. I am the boss. I will show a little control." (Tr. 453.) Downey testified that Shields responded to the complaints about Boyer's termination by "yelling."²² (Tr. 382.) Shields described his own retort, telling the men
20 that,

[w]e are not on call 24/7 but, if we have emergencies at this quarry,
who am I supposed to call? I am going to call the employees that
work here . . . who else am I supposed to call? Who the hell else
25 am I supposed to call, if we have a problem out here?

(Tr. 452-453.)

On this same day, September 12, Boyer reappeared at the Casey facility.²³ He was
30 performing work as an employee of one of the Company's subcontractors. When Shields observed his presence, he instructed him to leave the premises. Under examination by counsel for the General Counsel, Shields confirmed that, in counsel's words, he told Boyer to depart, observing that, "the union didn't run Vulcan, that [Shields] did." (Tr. 101.)

35 During this period, Shields also took steps to avoid a situation similar to the Labor Day weekend problem. He conducted pump training for the employees so as to have "a group of people who knew how to do this job" in order that "we would never get caught in the situation where somebody needed the weekends off or something and we would always have people." (Tr. 449.) Shields testified regarding the Company's current practices designed to assure
40 coverage in the event of unforeseen circumstances. He reported that he seeks and obtains two volunteers who agree to be available over the weekend. Shields noted that in the event of heavy rain, the volunteers are "to go and fuel the pumps, and start the pumps, and keep the quarry de-watered." (Tr. 104.) He reported that he has never had any difficulty in securing such
45 volunteers because the Company offers the volunteers a "very good financial incentive,"

²² Shields' demeanor on the witness stand when recounting these discussions corroborated Downey's characterization of his conduct. I would describe him as becoming agitated in recalling his response to the employees' criticisms of the Company's decision to fire Boyer.

²³ There was no evidence regarding this seeming coincidence, but one may infer that
50 Boyer's reappearance provoked the discussion about the justice of his termination.

Because the decisive portion of this analysis is different as to each of these three alleged discriminatees, I will address their cases individually. I will then assess the General Counsel's remaining allegation concerning the employer's imposition of a unilateral change in the conditions of employment.

5 1. Boyer's suspension and termination

10 There can be no doubt that Boyer was a very active participant in protected union activities. During the Union's initial organizing campaign, Boyer was described as the "main contact" between the Union's organizer and the Company's work force. (Tr. 154.) That campaign culminated in an election in July 2002, at which Boyer participated as an observer for the Union. He underscored his support for the Union by wearing a Local 841 cap while performing his observer role.

15 After the Union lost the election, matters remained in hiatus until Boyer revived the issue of representation in August 2003. He contacted the organizer, signed an authorization card, obtained additional cards that he made available to bargaining unit members, and returned signed cards to the organizer. The evidence supports a finding that Boyer was the employee most responsible for the success of the Union's effort to become the representative of the Company's bargaining unit employees.

20 At trial, Boyer readily agreed that the majority of the union activities described above were performed outside the view of management. Nevertheless, the evidence clearly establishes that, once the Company recognized the Union, Boyer engaged in direct and pointed union activities that were specifically designed to gain the attention of the Company's managers. 25 In particular, immediately after the Union obtained status as representative of the bargaining unit, Boyer thrice in rapid succession brought the power of the Union to bear in order to accomplish objectives that he sought concerning terms and conditions of employment.²⁵ Specifically, one week to the day after the Company recognized the Union, Boyer made a strong invocation of the Union's power to intervene in support of his request for permission to 30 attend a medical seminar regarding his daughter's disability. He warned Heft that, despite the unfortunate timing of the changeover to a new superintendent on the day of the seminar, "if I had to, I would call the union representation to see if I could go." (Tr. 247.)

35 Just 2 days later, on August 31, Boyer linked his expression of unwillingness to report to the facility to his participation in the Union. Indeed, Boyer's last words to Heft regarding this issue were a demand to discuss the asserted need for him to report for this assignment with his union representative. Thus, in the process of declining to accede to Heft's demand that he perform this task, he relied on the support and protection of his newly acquired collective-bargaining representative.

40 Two days after Boyer's second use of the prospect of Union intervention to assist him in resolving a dispute with management, Boyer deployed his collective-bargaining representative in a direct intervention with management. As he had previously warned Heft he would do, on 45 September 2, Boyer procured Moore's presence at the workplace to support his demand that he be given time off to attend the seminar. Moore performed this function with vigor, warning Heft that the Union "would do anything and everything in our power to insure that [Boyer] got to go to

50 ²⁵ Boyer also invoked the Union's assistance on behalf of McMillan and Darling's lunch hour situation. There is no evidence showing that the Company was aware that it was Boyer who referred this issue to the Union.

that seminar.” (Tr. 141.) After application of this pressure, despite Heft’s prior repeated refusals to authorize Boyer’s time off, the Company relented and approved Boyer’s request.

5 It is evident that Boyer’s key union activities subsequent to the Union’s recognition as bargaining representative were very well known to the Company. The evidence supports a conclusion that Boyer energetically engaged in a pattern of reliance on the Union to support his efforts to enforce his views of the proper terms and conditions of employment by the Company.

10 I note that the Company contends that Boyer’s failure to report for work in an emergency situation took his conduct out of the Act’s protected status. For reasons shortly to be discussed, I have concluded that Boyer’s failure to report was not the reason for his suspension and termination, but merely a pretext that the Company belatedly cites as justification for its unlawfully motivated decision to discipline Boyer. Nevertheless, I will examine the Company’s argument regarding the parameters of protected activity.

15 In its brief, the Company cites two precedents in arguing that Boyer’s failure to obey an order to report to work in an emergency constituted unprotected conduct. I find both cases to be distinguishable in crucial ways. At the outset, I note that in both cases the issue concerned the motivation underlying the employer’s decision regarding which employees to select for an on-call assignment. By contrast, there is no contention in this case that Boyer was selected for
20 the assignment due to his participation in union activities.²⁶ As a result, neither precedent cited by the Company directly addresses the issue regarding Boyer. Furthermore, to the extent that the Board’s decisions in the cited cases are relevant, they do not advance the Company’s cause.

25 In *Yesterday’s Children, Inc.*, 321 NLRB 766 (1996), enf. in part, vacated in part, 115 F.3d 36 (1st Cir. 1997), a nursing home found itself critically understaffed on a particular shift, a situation that the administrative law judge characterized as unusual. The Board upheld the judge’s conclusion that the home’s management had not engaged in discriminatory conduct by ordering three off-duty union supporters to report to work. It is instructive to note the behavior of
30 the home’s managers as contrasted with Heft’s conduct in similar circumstances. Before calling on the three employees, managers contacted every per diem employee but found that none were available. They also contacted every regular employee on another shift and obtained assistance from several of them. Interestingly, a supervisor tried to phone one employee but did not have an accurate telephone number. The supervisor then traveled to that employee’s
35 home and obtained her assistance. After much effort, management secured the voluntary services of three employees and then ordered three union supporters to report in order to meet the emergency need for staffing. Under these circumstances, it was concluded that the Company’s requirement that the three union supporters report to work was not discriminatory.

40 In stark contrast to the nursing home supervisors in *Yesterday’s Children*, Heft called only Boyer. He tried to call Simonton, but gave up when the line was busy. Although the evidence showed that a majority of the employees were competent to perform the services needed,²⁷ Heft did not ask Boyer for any other phone numbers and made no additional calls to Casey employees. Instead, he chose to call a Decatur employee who agreed to perform the
45 needed work. Heft simply made a desultory, yet ultimately completely successful, effort to locate someone who was available to report to the facility. Under circumstances where Heft

²⁶ The evidence shows that Heft selected Boyer because he possessed Boyer’s telephone number. He had neglected to keep a list of other employees’ numbers.

²⁷ For example, see Tr., at pps. 96 and 263-264.

failed to reasonably exhaust his alternatives, Boyer's actions do not support a finding of unprotected conduct under the Board's holding in *Yesterday's Children*.²⁸

The second precedent cited by the Company, *The Mead Corp.*, 275 NLRB 323 (1985), also highlights the deficiencies in Heft's behavior. In *Mead*, the plant experienced an emergency situation when a machine malfunctioned. A large number of millwrights were needed to make the repairs. Management contacted millwrights assigned to other shifts but was unable to enlist a sufficient number to perform the work. A supervisor then spoke to all three of the millwrights on the current shift. One volunteered to continue working after the end of his shift. Another declined to volunteer, but agreed to obey a direct order to remain on duty. A third refused entirely, citing the provisions of the plant's collective-bargaining agreement. The supervisor specifically warned him "that disciplinary action could result." The employee responded by telling the supervisor to, "[b]e my guest." 275 NLRB at 323. The employee left the plant. Later that morning, the supervisor telephoned him and again told him that he could be disciplined if he refused to come back to work. He again told the supervisor to "[b]e my guest" and threatened to file a charge with the Board. The employee was issued a 3-day suspension. When ruling in favor of the Company, the Board noted that the Company had a "well-established" policy regarding the "forceovers" of employees in emergency situations. 323 NLRB at 324. Every millwright had previously experienced at least one such forceover. The Board also noted that efforts had been made to procure millwrights from other shifts. Interestingly, the Board "emphasize[d] that [the employee] refused a direct forceover order while still on the job." 323 NLRB at 324. Ultimately, it concluded that, "there is no evidence of disparate treatment. Respondent had a past practice of forceovers. It did not single out [the employee] for a forceover." 323 NLRB at 324.

Again, all of this stands in contrast to the situation here. The Company had no past policy of calling in off-duty employees without having made prior voluntary arrangements for such call in. The Company made only the desultory effort already described in an effort to locate a willing employee. And, unlike the employee in *Mead*, Boyer was not already at the plant but was at home on a holiday weekend. Most tellingly, the supervisor in *Mead* made a particular effort to warn the employee about the disciplinary consequences of his refusal, not only at the time of the request, but again by a telephone call to the employee at his home.

Unlike the employers in the cases cited by the Company, in this case management had no prior policy or practice of requiring mandatory on-call reporting. The past policy and practice was for managers to solicit and obtain volunteers who agreed to be available for emergency purposes during predesignated weekends.²⁹ In a recent case, the Board has addressed the issue of protected conduct when employees refuse to perform such voluntary on-call work. In

²⁸ Furthermore, the judge in that case hardly issued a ringing endorsement of the Company's conduct in forcing the three employees to report to work. In an example of creative wordsmithing, he characterized the Company's behavior as being "a bit gestapoish." 321 NLRB at 777.

²⁹ Counsel states that there was "no fixed policy . . . while Heft was Acting Superintendent." (R. Br. at fn. 6.) Heft was only at Casey for a few months. The uncontroverted evidence showed that, prior to Heft's brief tenure, voluntary on-call was always prearranged. As counsel for the Company notes, water problems are "common with mining operations." (R. Br. at p. 8.) It is evident that the Company would have needed, and did in fact have, a system for addressing such problems. That system relied on previously designated volunteers for each weekend. Indeed, the chain of events here was initiated due to Shoemaker's concern that Heft may not have implemented the Company's policy of prearranging for weekend coverage.

St. Barnabas Hospital, 334 NLRB 1000 (2001), enf. 46 Fed. Appx. 32 (2nd Cir. 2002), the employer maintained a voluntary on-call system for surgeons. After a work dispute, four of these surgeons wrote a letter to management threatening to refuse to perform such on-call work any longer. They were discharged. The Board found a violation of the Act, holding that

5 [b]ecause the on-call work was voluntary, we also agree with
the judge that the discriminatees' concerted threat to stop
performing on-call work was protected activity. The Board has
long held that a refusal to perform voluntary work does not
constitute an unprotected partial strike. [Citations omitted.]

10 334 NLRB 1000, 1001. In this case, the Company's preexisting policy and practice was for
emergency work to be performed by designated volunteers. As a result, Boyer's decision to
decline to volunteer did not forfeit the protection of the Act.

15 Having found that Boyer engaged in protected activity and that the Company was aware
of the crucial aspects of his involvement, the third analytical step is readily resolved. There is
no doubt that Boyer's suspension on September 2, and his termination shortly thereafter were
adverse employment actions, indeed his termination was the ultimate form of employer
sanction.

20 The analysis now focuses on the issue of employer motivation. Did animus arising from
Boyer's protected activities form a substantial and motivating factor in the decision to terminate
his employment? In making this evaluation, the Board has instructed that the totality of the
evidence must be considered. In other words, a conclusion must be drawn from the record as a
25 whole. See, *Sears, Roebuck and Co.*, 337 NLRB 443, 443 (2002), citing *Fluor Daniel, Inc.*, 304
NLRB 970 (1991), enf. 976 F.2d 744 (11th Cir. 1992). Both direct and circumstantial evidence
should be considered. Probative circumstantial evidence includes,

30 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. [Citation omitted.]

35 *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at p. 3 (2003).

40 Although animus is commonly revealed through circumstantial factors, I find that there is
a significant item of direct evidence of such animus against Boyer arising from his union
activities. Just over a week after his discharge, Boyer returned to the facility as an employee of
a subcontractor. The superintendent, Shields, ordered him to vacate the premises. Shields
linked this order not to the mere fact that Boyer was a discharged former employee, but directly
to Boyer's participation in union activities. In his testimony, Shields admitted that he taunted
Boyer by pointing out that the Union did not run Vulcan. I readily infer that Shields intended to
45 make a direct connection between Boyer's attempts to invoke the Union in his disputes with
management and his subsequent discharge and banishment from the Company's premises.

50 The fact that Shields' statement occurred after Boyer's discharge does not alter my
conclusion that the statement is highly probative evidence of animus against Boyer arising from
his union activities. It was made only 8 days after the discharge and its reference to Boyer's
union activities drew the direct connection to that discharge. In addition, the Board has very

recently noted that direct evidence arising after an adverse employment action may properly be considered as to the question of animus. In *Davey Roofing, Inc.*, 341 NLRB No. 27 (2004), the issue was the employer's motivation in laying off certain employees. The employer's vice president made antiunion statements subsequent to that layoff. The Board held that the administrative law judge "correctly found evidence of animus" from consideration of those post-layoff statements. 341 NLRB No. 27, slip op. at p. 2. I conclude that Shields' remark to Boyer on September 12 throws a potent and revealing light upon the Company's conduct and motivation.

Turning now to consideration of circumstantial evidence, I begin the analysis with evaluation of the timing of Boyer's suspension and discharge. In *McClendon Electrical Services*, 340 NLRB No. 73, slip op. at fn. 6 (2003), the Board took note of its longstanding principle that, "where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised." [Citation omitted.]

Boyer's suspension took place 4 days after he warned Heft that he would seek Union intervention in order to obtain permission to attend the seminar. It occurred just 2 days after Boyer, while declining to report to the facility, told his superintendent to take the matter up with his union representative. Finally and most strikingly, Boyer was suspended mere hours after he brought his union representative to the facility to argue in support of his attendance at the seminar.³⁰ In a venerable and often-cited case, *NLRB v. Rubin*, 424 F.2d 748, 750 (2nd Cir. 1970), an organizing campaign began in the first week of June. The union requested voluntary recognition on June 9. On June 9 and 10, the company laid off numerous employees. In upholding the Board's determination of an unlawful motive for the layoff, the Court of Appeals noted the "stunningly obvious timing." The evidence in this case amply supports an identical conclusion.

In addition to highly suspicious timing, I find that the circumstantial evidence of unlawful motivation includes disparity in treatment of Boyer in three aspects. The Company abruptly changed its attitude toward him upon the advent of his pattern of invoking union assistance in his disputes with management, treated him differently from the manner that would be expected under its articulated philosophy of progressive discipline, and imposed harsher discipline against him than it did toward other employees alleged to have committed similar infractions of work rules.

It is instructive to begin the analysis of disparate treatment by considering Boyer's position within the work force prior to the recognition of the Union. In October 2002, less than a year before the events under discussion, Boyer was promoted to a position as the sole leadman. The testimony was replete with references to the fact that the employees relied on Boyer's advice and instructions in performing their duties. Indeed, their practice of calling him at home at all hours was a source of frustration for Boyer. There are revealing glimpses in the record showing that, like the line employees, the managers held Boyer in high esteem. Heft had dinner at Boyer's home.³¹ In February 2003, an employee was disciplined regarding absenteeism. In the report documenting this discipline and counseling, management made

³⁰ Viewed another way, Boyer was fired only 6 days after his initial invocation of the Union's assistance, only 4 days after he referenced the Union in his resistance to reporting to the facility to check the rain situation, and only 2 days after he brought his representative to the facility to argue for leave to attend the seminar.

³¹ Counsel for the Company also accurately notes that two other supervisors had visited Boyer at his home. See R. Br. at p. 25.

specific note of the fact that the employee “was again counseled (with Kevin Boyer present) to have a full understanding of the requirements of the attendance policy.” (GC Exh. 2(i).) As to the issue that the Company claims precipitated its decision to fire Boyer, the documentary record also reflects its high past regard for his conduct. Rather than showing any inclination by Boyer to shirk voluntary work on Sundays, the record is noteworthy for containing a report of the discipline of another employee in February 2003 for harassing Boyer because Boyer was
 5 “volunteering for work on Sunday, Feb. 9, 2003.” (GC Exh. 20(f).)

As one would expect given Boyer’s high status within the work force, his own disciplinary record was clean. There was no evidence that he had ever received so much as a verbal
 10 warning.³²

All in all, I find that the testimony and documentary evidence establish that management viewed Boyer as, at the very least, first among equals within the ranks of ordinary employees. His knowledge of the work processes was held in high regard and he appears to have been the
 15 “go-to guy” for this work place. As counsel for the Company put it,

[t]he Company came to rely upon him due to his experience and knowledge; he helped resolve production problems of other employees directly and regularly.

(R. Br. at p. 9.) Despite a spotless disciplinary history and the evidence showing his position within the Company, he was abruptly discharged very shortly after he began invoking the assistance of the Union.

The Company contends that it fired Boyer due to his failure to report to the facility when instructed to do so by Heft. It characterizes this offense as insubordination. The Company maintains a written disciplinary policy contained in its handbook for the Midwest division. (GC Exh. 3, pp. 26-28.) Under that policy, there are two categories of disciplinary infractions, type I and type II. Included among the more serious, type I offenses is insubordination, as well as,
 30 such obviously substantial misconduct as theft of property, violence, deliberate vandalism, use of illegal drugs, or possession of weapons on company property. After listing type I offenses, the policy provides, in totality, that, “[t]hese infractions are those which may be cause for immediate suspension (for up to 5 days) and subject the employee to possible discharge.” (GC Exh. 3, p. 26.)

I note that even within the category of the most serious, type I offenses, the policy invites the exercise of a considerable range of discretion. It does not stipulate any automatic sanction for the commission of even the most serious offenses, noting simply that such conduct “may” be cause for suspension or termination. In addition, the policy language appears to suggest that
 40 suspension is the remedy of first resort. Beyond this, by providing that a suspension may be for a term of “up to 5 days,” the duration of any suspension imposed is left open for the exercise of supervisory judgment. Finally, the policy is quite clear in providing that even the most severe misconduct is not subject to automatic termination. Thus, even for an offense such as being

³² To be precise, it was uncontroverted that Boyer had been suspended in spring 2002. Upon its own investigation, the Company determined that the suspension was wrongful. As a result, it was expunged and Boyer received backpay for the period he had been suspended. If anything, these events (occurring in proximity to the first union organizing campaign) would have suggested that the Company proceed with caution in assessing subsequent allegations of
 50 misconduct by Boyer.

intoxicated on the job, assaulting a coworker, or stealing company property, the authorized remedies include suspension and “possible discharge.” In other words, although type I offenses are considered as the most serious forms of misconduct, the disciplinary policy calls for the exercise of a wide range of discretion in the imposition of discipline. There does not appear to be anything that must be imposed automatically or any policy precluding the imposition of lesser discipline than even a suspension.³³

Even if one were to assume that the Company disciplined Boyer for the type I offense of insubordination, the actual discipline imposed appears to be draconian when contrasted with the high degree of latitude authorized by the policy. I find it significant that the ultimate sanction was imposed on Boyer, an employee who had previously been held in high regard and who had never been subject to any prior discipline. This impression is reinforced when one considers the nature of the alleged insubordination. While it is clear that an employee who is at work in the facility and refuses a direct order to perform a legitimate job function has committed a serious infraction of orderliness and discipline, Boyer’s alleged offense is of a far more ambiguous nature.

At the outset, one must note that the unfortunate situation that ensnared Boyer was caused by the failure of the acting superintendent to conform to the Company’s past practice and policy regarding weekend coverage for emergencies. This was rendered quite clear during an exchange between counsel for the General Counsel and Heft’s supervisor, Shoemaker,

COUNSEL: Okay and you called Tom Heft Labor Day weekend to make sure he had made arrangements, for somebody to go check on the facility. Correct?

SHOEMAKER: Yes.

COUNSEL: Okay and did you do that because that was the practice when you had been there [as acting superintendent at Casey]?

SHOEMAKER: I actually did it because the—I saw the storms that were blowing up and the heavy rains that were coming.

COUNSEL: Okay.

SHOEMAKER: It was excessive and I know the situation down there. So, I was just calling him to make sure—

COUNSEL: Okay, because Tom [Heft], as the Superintendent, was responsible for having made arrangements with someone to watch the facility.

SHOEMAKER: Yes.

³³ The Company does not contend otherwise. Counsel reported that “it is abundantly clear and uncontroverted that the Company retains the flexibility and discretion to adjust the steps based upon the nature of the offense and the record of the employee.” (R. Br. at p. 21.) See also, R. Br. at p. 3.

(Tr. 546.) It was Heft's inattention to the looming problem of the weather and his noncompliance with the requirements of Company policy and practice designed to cope with such challenges that provoked the issue.³⁴

5 The Company does not contend that Boyer was in some way responsible for protection of the facility in the event of heavy rain. Both Shoemaker and Heft testified that if Boyer had not answered the original telephone call from Heft, he would not have been subject to discipline. As Heft put it, if Boyer had not been at home, he would have just gotten "a hold of someone else." (Tr. 53.) Beyond this, the evidence reflects that the conversations between Heft and Boyer were filled with ambiguity. In his pretrial affidavit, Heft conceded that he never told Boyer that he considered the problem at the facility to be an emergency. He also never warned Boyer that his failure to report to the facility would be considered a disciplinary infraction, let alone a firing offense. To the contrary, Heft indicated that he ended the conversation with Boyer by "saying something to the effect of okay." (Tr. 604.)

15 The circumstances surrounding this alleged insubordination cry out for careful assessment of the context and application of a calibrated disciplinary response within the framework of discretion provided in the Company's policies. Despite this, management never articulated any of its reasoning in imposing the drastic sanction of termination. At the September 4 meeting with Boyer and his union representative, the top human resources official simply stated that "the company's viewpoint was termination." (Tr. 260.) In contrast to the substantial body of written disciplinary notices prepared by management regarding other employees, Boyer was never given any written explanation for the decision to terminate him. Most importantly, although several officials who participated in the decision to fire Boyer presented detailed testimony, none of them attempted to articulate the Company's thought processes. Nobody testified that consideration had been given to Boyer's spotless record, to the appropriateness of lesser sanctions such as suspension, or to all of the ambiguities involved in the assessment of the alleged insubordination, including the fact that Boyer had not been on duty when he committed this alleged misconduct and had not been warned that his refusal to report could lead to disciplinary sanction. For these reasons, I find that the Company's harsh application of its disciplinary procedures to Boyer was suspiciously irregular.

35 Lastly, I conclude that the Company's treatment of Boyer was disparately severe when compared to the treatment of other employees who were accused of similar misconduct. At the outset, I note that the human resources official responsible for the Casey facility, Ault, testified that he was unaware of any prior disciplinary action against any employees for failure to report when not scheduled to be at work. Indeed, he testified that he was not aware of any rule requiring that, in counsel's words, "employees were expected to be on call." (Tr. 122.) As a result, it is not possible to compare the Company's treatment of Boyer with any history of treatment of other employees for the identical purported offense.³⁵

40 Review of the other disciplinary records admitted into evidence also does not reveal any discipline for an offense characterized by the Company as insubordination. Despite this, the

45 ³⁴ Heft conceded as much, testifying that he "didn't have anything set up ahead of time" over the Labor Day weekend. (Tr. 51.) He also testified that, although he would be 70 miles away from the facility over the weekend, he failed to bring a list of employee telephone numbers with him. The only phone number he had in his possession was that of the former leadman, Boyer.

50 ³⁵ Review of the Company's history of administering discipline is limited since management purged the disciplinary records in 2002. As counsel for the Company notes, this was done in response to employee complaints of "favoritism and unfairness" in the past. (R. Br. at p. 5.)

record does contain discipline of two employees for the offense of “fail[ure] to follow a simple and specific work instruction.” (GC Exhs. 16, 19.) Ironically, these employees were McMillan and Darling and the work instruction was the requirement that they contact Heft in the event of production problems. Having been found to have committed this offense, both men were subject to suspension, not termination.³⁶ Unlike Boyer, both men had a history of prior discipline. Less than 3 weeks before his failure to follow Heft’s instructions, McMillan had been issued a written warning for inattention resulting in the loss of an entire day’s production of one of the company’s rock products. Similarly, approximately 3 months prior to his failure to contact Heft after experiencing production problems, Darling had been issued a 3-day suspension for unsafe operation of a truck resulting in an accident. Beyond that, Darling had an earlier warning for tardiness. Despite their prior histories, both men received lesser sanctions than Boyer. In addition, the evidence shows that in the case of Darling, supervisors made every effort to temper the severity of his discipline. In their caucus on September 4, the managers recognized that even under the more lenient type II disciplinary policy, termination would be authorized given Darling’s history of progressively severe disciplinary infractions. Despite this, they returned to the meeting to give Darling a further opportunity to mitigate his sanction. When Darling expressed his continued desire to work for the Company, the managers readily retreated from consideration of termination and imposed a second suspension instead. All of this tempered and deliberate exercise of discretion contrasts sharply with the harsh and precipitate termination of Boyer, an employee with a prior spotless record. I find the contrast to be probative circumstantial evidence of an unlawful motive underlying the decision to fire Boyer.

Having found that direct evidence and a variety of circumstantial evidence exists to support a finding of animus, it is also appropriate to assess the veracity of the Company’s proffered reason for Boyer’s discharge in drawing a conclusion as to whether the General Counsel has met his initial burden under *Wright Line*. The Board has observed that it is “well settled that, where an employer’s stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal.” [Citations omitted.] *Key Food*, 336 NLRB 111, 114 (2001). In this instance, I conclude that the Company’s stated motive for Boyer’s suspension and discharge, his refusal to report to the facility on August 31, is a pretext constructed to conceal the true reason, Boyer’s repeated and forceful invocation of the Union as an ally in his disputes with management.

In concluding that the Company’s defense is pretextual, I rely heavily on a precise analysis of the timing and sequence of events during the crucial period from August 31 to the date of Boyer’s suspension on September 2. Boyer committed his alleged firing offense in the early evening of August 31. Heft’s final conversation with Boyer on that evening left matters as appearing to be “okay.” (Tr. 604.) There is no evidence that management contacted Boyer between the time of this final conversation and the start of Boyer’s normal work shift on September 2. This contrasts sharply with management’s behavior in dealing with McMillan and Darling’s alleged misconduct just 5 days earlier. In that instance, both men were telephoned at home on the same day as their alleged offense and informed that they were not to report for

³⁶ Miller testified that McMillan and Darling’s failure to follow a specific work instruction was considered to be a type II infraction. This is a judgment call within the broad discretionary framework of the written policy. Failure to follow Heft’s specific instruction could be characterized as a type II, “inattention to duties” infraction, or as a type I, “insubordination” offense. (GC Exh. 3.) Management chose to deem it the lesser type of offense. By the same token, Boyer’s failure to follow another specific instruction from Heft could have been deemed a type II offense. Management elected to characterize it as a more severe type I offense.

their next work shift.³⁷ The failure to similarly notify Boyer is indicative of a conclusion that Boyer's conduct was not under consideration for disciplinary action.

5 As mentioned, Boyer did not hear from management over the remainder of the holiday weekend. He reported early in the morning of September 2 in order to begin his normal work shift. Without interference from management, he did begin to work. Although Heft was present at the facility early that morning, he made no effort to prevent Boyer from engaging in his usual work activities. Nor did he advise Boyer that his conduct on August 31 was under investigation or consideration. The fact that Boyer was allowed to return to work without comment from management is strong evidence that his conduct over the weekend was not an issue.

10 While Boyer began his customary work shift, Moore intervened with Heft regarding Boyer's request to attend the medical seminar scheduled for later in the morning. Heft telephoned Shoemaker and the human resources department regarding this issue. Shoemaker told Heft, "if there's any way, let [Boyer] go." (Tr. 86.) Based on this, Heft, "very begrudgingly" informed Moore that Boyer could be excused from work to attend the seminar. (Tr. 141.) At approximately 8 a.m., Heft went to Boyer's worksite and told him that he could attend the seminar. I find these events to be a key to understanding the employer's conduct and motivation. If the Company intended to investigate, suspend, or discipline Boyer for his conduct on August 31, why did Heft engage in discussion with Moore regarding attendance at the seminar? And, why did he telephone his supervisor and his human resources staff to seek their input regarding Boyer and Moore's request? It appears obvious that if management had really intended to suspend and discipline Boyer for misconduct on August 31, Heft would simply have told Moore that the issue regarding Boyer's request for permission to leave work to attend the seminar was moot. Rather than deal with the Union's representative regarding a contentious issue and ultimately retreat from his prior stance after application of pressure by the Union, Heft would certainly have told Moore that Boyer was suspended and did not need permission to attend the seminar since he would not be working at all on that day.

30 The fact remains that while Boyer was not suspended from employment prior to his attendance at the seminar, he was suspended immediately after his return to the job. What caused this abrupt turnabout in his fortunes? The only significant intervening event between Boyer's commencement of his workshift early on September 2 and his suspension later that day was Moore's appearance at the facility to argue strongly in support of Boyer's desire to attend the seminar. Upon being told by Moore that the Union would do "anything and everything in our power" to assist Boyer, Heft backed down from his repeated refusals to authorize Boyer's departure. He conveyed the impression to Moore that he was very displeased. Thereafter, while Boyer was at the seminar, Heft met with Shoemaker and Shoemaker conferred with Miller. As Heft stated in his testimony, it was at this point (after Boyer was given permission to attend the seminar) that management decided to suspend Boyer.

40 Application of logic to consideration of this sequence of events compels a conclusion that the Company did not suspend Boyer due to his alleged misconduct on August 31. Instead, I find that the manner in which the parties behaved on September 2 shows that Boyer was suspended on that date because he had procured Moore's attendance at the facility to argue forcefully, and ultimately successfully, on his behalf. Visible and vigorous union intervention had

50 ³⁷ Counsel for the Company notes that the immediate notification of suspension given to McMillan and Darling was "consistent with [the Company's] practice" regarding disciplinary situations and I agree that the evidence supports this conclusion. (R. Br. at p. 13.) The failure to follow this practice in the case of Boyer is significant.

been followed by Heft's reluctant reversal of a decision he had previously repeatedly defended. This was the cause of Boyer's abrupt suspension mere hours after Moore's visit to Casey. The Company's assertion that it was earlier conduct by Boyer that led to his discipline is belied by analysis of what happened when. The Company's defense is mere pretext constructed to conceal the unlawful motivation undergirding Boyer's suspension and discharge.

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Based on direct and circumstantial evidence just detailed, I find that the General Counsel has met his burden of showing that Boyer engaged in protected union activities, that the Company was aware of Boyer's activities, and that a substantial motivating factor in the decisions to suspend and fire Boyer was animus against him arising from those union activities. Ordinarily, analysis under *Wright Line* continues to the final step of the process. At that step, the employer must show that it would have imposed the same adverse actions regardless of the employee's participation in protected union activity. The Board, however, draws a careful distinction in circumstances where the trier of fact concludes that the employer's proffered reason for the adverse actions is merely pretextual. As the Board noted in *La Gloria Oil and Gas Co.*, 337 NLRB 1120 (2002), *affd.* 71 Fed. Appx. 441 (5th Cir. 2003),

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Having found that the General Counsel has met its initial burden of persuasion, we now examine the Respondent's argument that it would have taken the same action in the absence of that protected activity. In doing so, we must distinguish between a "pretextual" and a "dual motive" case. If the Respondent's evidence shows that the proffered lawful reason for the discharge did not exist, or was not, in fact relied upon, then the Respondent's reason is pretextual. If no legitimate business justification for the discharge exists, there is no dual motive, only pretext.

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337 NLRB 1120, 1126.

In the present case, I specifically find that the Company did not rely on Boyer's refusal to report to the facility on August 31 in deciding to suspend and fire him. Instead, it relied on unlawful motives stemming from his invocation of union support in his disputes with management. As a result, the situation is similar to that described in *Golden State Foods*, 340 NLRB No. 56 (2003), where the Board disagreed with an administrative law judge's application of a dual motive analysis. The Board observed that,

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[t]he judge relied on a dual motive analysis in reaching this conclusion [that the employer discharged an employee in violation of Section 8(a)(3) of the Act], because he found that legitimate reasons existed, along with the predominating unlawful motive, for the Respondent's actions. Because neither the judge's findings nor the record establish that the Respondent relied on those reasons, however, we would not characterize this case as one of dual motive. Instead, we find the reasons supplied by the Respondent to be a pretext and adopt the judge's conclusion that the discharge and suspension were unlawful based on a pretext analysis.

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340 NLRB No. 56, slip op. at p. 2. Here, even if viewed in a light favorable to the Company, Boyer's discharge was pretextual. In other words, even if one assumes that Boyer's behavior on August 31 was somehow wrongful, it did not form the actual basis for the Company's actions against him. Because the evidence demonstrates that the sole basis for the Company's

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decision to suspend and terminate a previously highly valued employee with a spotless record was its displeasure at his union activities, application of the pretext method of analysis results in a finding that the Company's decisions to suspend and terminate Boyer were made in violation of Section 8(a)(1) and (3) of the Act.

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2. McMillan's suspension

Under the *Wright Line* criteria, analysis of the lawfulness of the Company's decision to suspend McMillan commences with the question of his union activities. The evidence shows that McMillan did engage in protected union activity, albeit at a level far less than that of Boyer. McMillan's first such activity was his signing of a union authorization card on August 12. (GC Exh. 8.)

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The only other union activity reflected in the record was McMillan's complaint to Boyer regarding Heft's instruction that the afternoon shift employees eat their lunch while continuing to operate the equipment. The testimony does not explicitly address McMillan's reason for raising this issue with Boyer. While it was possible that he was merely complaining to a fellow employee, I infer that he presented the issue to Boyer because of Boyer's involvement with the Union. I reach this conclusion because McMillan testified that during the 2003 organizational campaign, Boyer "was the one that always talked to me about . . . getting back into the union." (Tr. 335.) Furthermore, the evidence from a wide variety of sources clearly establishes that Boyer was the main contact between the bargaining unit members and the Union's business representative. Therefore, I conclude that McMillan's complaint to Boyer was protected activity consisting of a referral of his problem regarding working conditions on the afternoon shift to the Union for assistance.

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I also find that the Company was aware of both of McMillan's instances of involvement in protected union activity. Moore transmitted McMillan's authorization card, along with those signed by 10 other employees, to the Company on August 21.³⁸ (GC Exh. 8.) While there is no direct evidence that the Company knew that McMillan had transmitted his complaint about the lunch period to the Union, the circumstances compel a conclusion that the Company was aware of this. McMillan had his discussion with Heft regarding lunch on August 25. Moore contacted Heft on the following day to successfully intervene on McMillan's behalf. Certainly, Heft would have drawn the obvious conclusion that McMillan had referred his complaint to the Union in order to obtain the assistance that Moore promptly provided.

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Since it is evident that the Company's decision to suspend McMillan was an adverse employment action, it is necessary to determine whether McMillan's union activity constituted a substantial and motivating factor in his discipline. While this is a close question, on balance I conclude that animus arising from union activity was a significant component, but certainly not the sole factor, in the Company's motivation. I base this conclusion on several considerations, including the direct evidence of such animus expressed by Shields just over a week after McMillan's disciplinary conference. While Shields' comment was directed at Boyer, it reflected an attitude by a key manager that the Company was in a struggle with the Union for control of the workplace. This expression of attitude, pointedly made in the direct context of Boyer's

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³⁸ If the Company had reviewed the authorization cards with an eye to determining which employees were most active in the organizing campaign, attention would not have focused on McMillan. While he signed his own card, he did not witness any other cards. By contrast, Dave Cisney witnessed 4 cards in addition to signing his own. Scott Downey witnessed 3 cards in addition to signing his. (GC Exh. 8.)

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unlawful termination, was evidence that the Company was willing to engage in unlawful activity in order to demonstrate its control. I infer that this consideration formed part of the background of the decision to suspend McMillan. In particular, I reach this conclusion because McMillan's successful complaint about the lunch period would have been part and parcel of the managers' perception that there was a struggle for control between management and the Union. In addition, as in the case of Boyer, I am prepared to infer animus from the timing of McMillan's initial suspension just 2 days after he discussed the lunch period with Heft and just 1 day after Moore raised the same issue with Heft. Taken together, this evidence raises a reasonable inference of animus, leading me to find that the General Counsel has met his burden in this regard.

The burden of persuasion now shifts to the Company. Would the Company have imposed McMillan's suspension regardless of his participation in protected activity? I conclude that the Company has carried its burden of demonstrating that McMillan's disregard of an important work instruction would have resulted in his suspension regardless of his union activity.

In reaching this ultimate decision favorable to the Company's position, I begin by noting that the evidence establishes that McMillan did engage in a clear violation of his supervisor's work instruction. I have already explained my reasons for concluding that Heft credibly testified that on August 25 he instructed McMillan to telephone him in the event of problems on the afternoon shift.³⁹ Mere days later, McMillan chose to disobey this instruction. In explanation, he contended that the situation at the plant on August 27-28 did not constitute a problem requiring contact with his supervisor. His reasoning in this regard is inconsistent and unpersuasive.

On direct examination, McMillan asserted that his rationale for failing to contact Heft when confronted with both a rock stuck in the crusher entrance and a broken plate was that these were not emergencies. He elucidated by explaining that these problems were not like an injury on the job or "like, if the motor would have burned up, you know, and—I mean, we would have had major problems that we—seen there was—early in the shift that we—seen there was no way to repair or go on." (Tr. 333.)

There are several concepts conveyed in McMillan's struggle to explain his conduct. First, he contends that he did not call because there was no emergency situation, such as a work injury. The difficulty with this explanation is that I have already credited Heft's testimony that he did not limit his instructions to emergency situations, but directed McMillan to call in the event of problems at the facility.⁴⁰ I also agree with counsel for the Company's observation that the record contains persuasive evidence regarding the Company's past policy and practice as to the employees' duty to seek supervisory input in the event of problems. (R. Br. at pp. 42-43.) Boyer testified that when he was the leadman, he received as many as three telephone calls per night at his home from employees seeking to discuss production problems or issues. This

³⁹ It is evident that I have chosen to credit portions of Heft's testimony and to discredit other aspects, particularly relating to Boyer's firing. I have reached these conclusions through consideration of the entire record and context as described in the body of this decision. As the Board has observed, "nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness' testimony." [Citation omitted.] *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

⁴⁰ In his brief, counsel for the General Counsel concedes that Heft told McMillan to call in the event of "any problems." (GC Br. at p. 6, citing numerous portions of the transcript.)

history supports Heft's contention that he instructed the men to call him in the event of problems.

5 Second, McMillan is claiming that the situation that night was not a "major" problem such as if a motor had burned up. I disagree. If a motor had burned up, production would have been halted until a repair or replacement could have been arranged. By the same token, the combination of a stuck rock and a broken plate resulted in a halt of production until repairs or replacements had been effected. There is no meaningful distinction to be drawn between McMillan's example and the actual circumstances on August 27-28. Both would be problems well within the meaning of Heft's instructions.

10 Finally, McMillan is raising an issue of timing, indicating that had the situations under consideration occurred "early in the shift," then he would have called Heft. (Tr. 333.) Counsel for the Company explored this further,

15 COUNSEL: You would have called, if there were two hours left in the shift, but not, if there was one hour left in the shift.

MCMILLAN: Correct.

20 (Tr. 350.) I cannot comprehend the distinction. It is evident that Heft's purpose in instructing the afternoon shift employees to call him in the event of problems was to enable him, in his supervisory capacity, to immediately assess the situation and determine the correct course of action. The purpose of Heft's instruction remains applicable regardless of the point during the workshift that problems arose. Indeed, the only understanding that I draw from this portion of McMillan's defense is that he is essentially conceding that the combination of two situations that arose on that shift was precisely the type of problem that Heft had included within the meaning of his instructions. Otherwise, there would have been no purpose in calling Heft regardless of the timing of the untoward events.

30 Actually, on cross-examination, McMillan demonstrated an accurate understanding of the meaning and significance of Heft's instructions. Counsel for the Company asked him if the appropriate response to the production problems that arose that night constituted a "judgment call." (Tr. 352.) McMillan agreed with this characterization. Counsel then further explored McMillan's understanding of the issue by asking him if,

35 [t]he problems that would prompt a call for direction and advice or instruction from a Superintendent are where you have some sort of production hang-up, an unusual production hang-up that you cannot deal with, through your normal fix-it type efforts and/or
40 some sort of a safety hazard issue. Right?

MCMILLAN: Correct.

45 (Tr. 353.) In essence, McMillan is conceding the Company's point.⁴¹ The stuck rock combined with the broken plate certainly constituted "an unusual production hang-up" well within the

50 ⁴¹ McMillan conceded the issue a second time when he agreed with counsel for the Company that, if Heft had ordered him to call in the event of "problems," the situation that night was the type of problem that Heft would have intended to mean. (Tr. 350.)

meaning of Heft's instruction to call him for supervisory "advice or instruction."⁴² As Heft put it, "[w]hen they got to the point where they saw the breaker plate and they decided that they didn't have any way or they couldn't find anything to fix that plate, they should have called me." Tr. 80.)

5 The importance of compliance with Heft's work instruction was underscored in this case by the fact that the employees had incorrectly assumed that the necessary materials to repair the plate were not available. Had they phoned Heft, it appears likely that he would have informed them that the bolts and a replacement plate were on the premises. In his testimony, McMillan conceded that he and Darling were qualified to perform the repair of the plate if the materials were available to them. The evidence demonstrates that, apart from theoretical considerations, McMillan's failure to obey Heft's instructions prevented immediate corrective action that would have assisted in returning the facility to productive status. The Company's decision to discipline McMillan for his failure to follow this instruction in the circumstances presented was a legitimate exercise of its supervisory authority and I find no evidence that it was a pretext.

10 Having found that McMillan's conduct constituted a legitimate subject for disciplinary action by the Company, I have examined the manner in which the Company exercised its authority. I conclude that the Company's actions were consistent with its preexisting policies and procedures.

15 At the outset, I note that the evidence showed that there had been no prior history of disciplinary proceedings involving the type of infraction at issue here. The Board has noted that it is "rare to find cases of previous discipline that are 'on all fours' with the case in question," and that this does not raise any adverse inference against an employer. *Merillat Industries, Inc.*, 307 NLRB 1301, 1303 (1992).

20 Examining the Company's compliance with its preexisting policies and procedures, it will be recalled that the handbook establishes two forms of infractions, the more serious type I misconduct and the lesser, type II, misbehavior. As with Boyer's failure to report to the facility when directed, McMillan's failure to contact his supervisor could be characterized as either a type I, "[i]nsubordination" offense or a type II, "[i]nattention to duties" offense. (GC Exh. 3, pp. 26, 28.) In resolving the ambiguity in the characterization of Boyer's offense, management selected the more onerous categorization. By contrast, in assessing McMillan's misconduct, he was deemed to have committed a lesser, type II, offense. This does not demonstrate a mindset designed to unlawfully interfere with McMillan's rights under the Act.

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40 ⁴² Counsel for the General Counsel attempted to defend McMillan's conduct by introducing evidence about past situations that had arisen in which employees had not called their supervisor and were not disciplined for failing to do so. None of these are comparable to the combined impact of the two production problems that night. For example, it may be that the mere existence of a stuck rock would not require a phone call to Heft. I need not resolve this question, since the subsequent discovery of the broken plate greatly transformed and magnified the problem. Similarly, it is true that another employee did not call when confronted by a broken plate. However, that employee proceeded to fix the plate by himself allowing production to resume. Once again, I need not decide whether McMillan's failure to call would have been reasonable had he fixed the plate. The fact remains that the situation that night was unique. The combined problems, coupled with the employees' determination that they were unable to repair either one, clearly fell within the ambit of Heft's orders.

According to the handbook, employees who have committed a type II infraction are subject to a “progressive discipline process” that begins with a verbal warning, proceeds to a written warning, suspension, and ultimately, “[s]uspension subject to discharge.” (GC Exh. 3, p. 27.) I find that the processing of the complaint against McMillan complied with this disciplinary structure. The Company convened a meeting with supervisors, a top human resources representative, a union representative, and McMillan. McMillan was given an opportunity to explain his behavior. He took this opportunity to forthrightly admit his responsibility “to fix the problem, get the problem repaired, including calling Tom [Heft] if he needed to.” (Tr. 480.)

After discussion of the circumstances, the managers met separately. They took note of McMillan’s prior written warning for an infraction that Miller described as “very significant.” (Tr. 472.) This offense had occurred less than a month previously and had resulted in the loss of an entire day’s production of one of the Company’s products. As a result, the managers decided to impose the next higher sanction on the progressive disciplinary ladder, a suspension. Upon review of these actions, I conclude that the Company afforded McMillan his right to union representation and a reasonable opportunity to explain his conduct to the officials who were going to decide the issue. After following this procedure, those officials imposed a disciplinary sanction that conformed to the progressive structure established by the Company’s preexisting policies.⁴³ Finally, the Company prepared a specific written statement setting forth its rationale for imposing the suspension and provided a copy to McMillan.⁴⁴

Since McMillan failed to follow a specific work instruction resulting in delays in production, had recently been subject to a written warning for other misconduct that impeded production, was provided reasonable opportunity to defend himself against the allegation, and received a sanction in accordance with the Company’s written policies and procedures, I find that the Company met its burden of demonstrating that, regardless of McMillan’s involvement in protected union activities, he would have been suspended for this infraction. As a consequence, McMillan’s suspension did not violate the Act.

3. Darling’s suspension

Examining the remaining allegedly unlawfully motivated disciplinary action, analysis begins with the issue of Darling’s protected union activity. On August 12, Darling signed an authorization card for the Union. Downey signed the card as witness. On the same date, Downey also signed a card that was witnessed by Darling. Darling testified that these actions constituted his only union activities.

On August 21, Moore transmitted a copy of Darling’s signed authorization card, along with those signed by 10 other employees, to Miller in support of the Union’s request for voluntary recognition as bargaining unit representative. Miller reviewed the cards with Ault.⁴⁵ They did not provide Heft with copies of the cards prior to the time of Darling’s suspension.

⁴³ It is true that the total period of suspension turned out to be rather lengthy. I agree with counsel for the Company’s observation that the length of the suspension was occasioned by the delay in holding the disciplinary meeting, a delay that was “rational and reasonable and not evidence of improper motive.” (R. Br. at p. 43.)

⁴⁴ I place no significance on the fact that, at trial, this was sometimes termed a “last chance agreement.” Under the progressive system of discipline, having now been suspended, McMillan was subject to discharge if he committed even a single new type II infraction. The document simply informed him of this reality.

⁴⁵ As with McMillan, had Miller and Ault examined the cards in an effort to discern the level

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5 Since Miller was an active participant in the decision to suspend Darling, I find that the General Counsel has shown both that Darling engaged in some degree of protected activity and that the Company was aware of his participation. As his suspension was an adverse employment action, I must next determine whether the General Counsel has met his initial burden of showing that improper animus against Darling was a substantial and motivating factor in the decision to suspend him. I conclude that this burden has not been met.

10 In finding that the Company was motivated by animus against Boyer and McMillan arising from their protected activities, I have placed significant weight on the direct evidence. When Shields told Boyer that he could not enter the Company's premises even as an employee for a subcontractor, he took it upon himself to add that management ran Vulcan, not the Union. I have already noted that this assertion provides a powerful insight into the thinking of a key manager. The comment, coupled with its context linking it directly to Boyer's termination and banishment, reflects specific animus against those employees who chose to involve the newly
15 recognized Union in issues affecting conditions of employment that had previously been the sole province of supervisors. It will be recalled that Boyer had done this at least 3 times in rapid succession and that McMillan had done the same when obtaining union intervention regarding his lunch period.

20 In sharp contrast to Boyer and McMillan, Darling never sought to involve himself in what management perceived as a struggle for control of the facility between the supervisors and the Union. The evidence contains nothing to indicate that management's animus against those who would invoke the Union in attempting to mold workplace policies was directed at Darling, someone whose only significant involvement in union affairs was the signing of an authorization
25 card. Darling's level of involvement in the Union was merely as one among the majority of the facility's bargaining unit members. I simply cannot find any direct evidence that the particular type of animus felt by the managers was of a nature that would have caused it to be targeted at Darling.

30 Turning to circumstantial evidence, there are two items of significance, timing and conformity of the suspension to preexisting disciplinary policies and procedures. I recognize that the timing of Darling's suspension shortly after voluntary recognition of the Union and on the same day as the actions taken against Boyer and McMillan is legitimate circumstantial evidence of unlawful motivation. By the same token, examination of the manner in which the
35 Company imposed the suspension raises at least as strong an inference of regularity.

40 As with McMillan, analysis of the Company's actions leading to Darling's suspension begins with recognition that Darling violated a specific work instruction by failing to contact Heft when confronted with two separate problems that precluded continuing production.⁴⁶ Although

of union activity by individual employees, attention would not have focused on Darling. Darling witnessed Downey's card. Downey witnessed Darling's card and the cards signed by 2 other employees. Another employee, Cisney, witnessed 4 cards signed by his coworkers. Finally, Boyer's card was the only one witnessed by a nonemployee, Moore, the Union's organizer.
45 Thus, unlike Cisney, Downey, or Boyer, there was nothing in the packet of cards to suggest a particularly active role by Darling.

⁴⁶ In fact, Darling's misbehavior was arguably worse since he was the one who wrongly insisted that the men could not repair the plate due to lack of needed parts. In addition, while McMillan's accounts of these events contain contradictions and evasions, there are also
50 forthright statements accepting responsibility. By contrast, Darling's testimony was internally

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the precise gravity of this misconduct was subject to interpretation, his supervisors elected to consider it as a lesser, type II, form of infraction. Darling was afforded a meeting at which supervisors, a top human resources representative, and his Union representative participated. He was offered a chance to explain his conduct. It is noteworthy that he declined the opportunity to do so.⁴⁷

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At this point in the meeting, the supervisors withdrew to discuss the circumstances. They noted that Darling had a prior written warning for tardiness and a prior suspension for unsafe operation of a truck resulting in an accident causing property damage. (GC Exhs. 17, 18.) They also took note of Darling's poor attitude displayed during the preceding portion of the meeting. They acknowledged that under the Company's progressive disciplinary system as set forth in the handbook, Darling was eligible for termination.⁴⁸ In a significant indication of lack of improper motivation, the managers returned to the meeting room and gave Darling a last opportunity to change his attitude so as to mitigate the severity of their disciplinary sanction. Offered this opportunity, Darling took advantage of it by telling the supervisors that he liked his job and wished to remain employed by the Company. In light of this change of his "tone," it was decided to forego termination and impose a second suspension.⁴⁹ (Tr. 489.)

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I find that there is nothing in the manner by which management treated Darling to suggest any improper motivation. If anything, the evidence suggests that Darling's supervisors were willing to give him the benefit of the doubt. When offered the opportunity under the progressive disciplinary system to terminate his employment, they shrank from it. This is hardly the conduct of supervisors who are motivated by unlawful animus against an employee.

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There is no direct evidence of animus against Darling. Apart from mere timing, there is no circumstantial evidence to support such a conclusion. To the contrary, compelling circumstantial evidence exists which tends to negate the inference of unlawful motivation.⁵⁰

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inconsistent and frequently at variance with other accounts. I did not find him to be a credible witness in any regard. I infer that the Company's managers also took his credibility into account. They testified that he displayed a poor attitude and only a last minute change of demeanor saved him from discharge.

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⁴⁷ At trial, Darling's efforts to justify his behavior were unconvincing. When asked what sort of situation he believed would require a call to Heft, he flippantly suggested, "if you are dying." (Tr. 420.) On cross-examination, he was asked a hypothetical about a rock that became stuck and could not be removed within 45 minutes of the start of a shift. He agreed that, in such an event, "we had better be calling somebody." (Tr. 421.)

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⁴⁸ In fact, when Darling was suspended for operating the truck in an unsafe manner, he was warned in writing that "[a]ny further incidents of this type will result in progressive disciplinary action, up to and including discharge." (GC Exh. 17.)

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⁴⁹ While the written policy permits managers to accelerate discipline by imposing a more severe sanction, it does not specifically authorize managers to impose a less severe sanction. Nevertheless, an overall reading of the disciplinary procedures in the handbook does suggest a wide degree of discretion. Management's decision to impose a second suspension appears consistent with this latitude.

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⁵⁰ I realize that in considering the manner and type of discipline imposed I am performing somewhat of the reverse analysis from that which may be applied when there is evidence of an employer's assertion of a pretextual reason for an adverse employment action. If evidence of pretextual justification for an employee's discharge or suspension can be considered on the issue of animus (as in the leading case of *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)), it appears similarly appropriate to assess the impact of evidence that

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In my view, the quantum of evidence presented on this issue by the General Counsel is similar to that discussed by the Board in *Cardinal Home Products, Inc.*, 338 NLRB No. 154 (2003). In that case, an employee known to support the union was reassigned to a more difficult job. The employee discussed his reassignment with a supervisor who confirmed the employee's belief that he was reassigned because his employer "wants to see me work my ass off." 338 NLRB No. 154, slip op. at p. 6. The General Counsel alleged that the reassignment violated Section 8(a)(1) and (3) of the Act. In dismissing this allegation, the Board noted,

Under *Wright Line*, supra, it is the General Counsel's burden to establish that the Respondent's animus against [the employee's] support for the Union was a motivating factor in the decision to reassign him to the machine job. Here, however, the General Counsel has failed to prove a nexus between the Respondent's antiunion animus, which as we have observed above is established in this proceeding, and the reassignment of [the employee].

...

While the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a "mere suspicion" that union activity was a motivating factor in the decision. Here, the General Counsel's case rests on little more than suspicion, surmise, and conjecture. In sum, we find that the General Counsel has failed to adduce evidence sufficient to establish that antiunion sentiment was a substantial or motivating factor in the Respondent's employment decision to reassign [the employee].

338 NLRB No. 154, slip op. at p. 6. [Citation omitted.] By the same token, in this case the evidence shows that the employer harbored animus against employees who sought intervention by the Union into their workplace disputes with management. Nothing beyond mere suspicion supports a finding that they transferred such animus to an employee who had not engaged in such conduct and whose only significant union activity was the signing of the sort of card that had been signed by the majority of bargaining unit members. Because the General Counsel has failed to meet his initial burden, I conclude that Darling's suspension was not unlawful under the Act.⁵¹

4. The alleged unilateral imposition of an on-call rule

The General Counsel's remaining allegation is that, "[o]n about August 31, 2003, Respondent implemented a rule requiring all unit employees to be on-call 7-days a week, 24-

supports the legitimacy of management's actions. Such evidence is equally probative circumstantial evidence as to an employer's motivation.

⁵¹ In the interest of decisional completeness, I note that if one were to carry the analysis to the final step, I would find that the Company met its burden of showing that it would have suspended Darling regardless of his union activities. I would base such a finding on the reasons I have outlined when discussing McMillan's suspension and my evaluation of the particular manner in which Darling's suspension was decided.

hours a day.” (GC Exh. 1(g), p. 3.) At trial, counsel for the General Counsel elaborated by noting that,

[t]he allegation in the Complaint is that the Employer implemented and enforced the policy on the Labor Day weekend but that it was, also, promulgated by Lon Shields, at a later date . . . That it was verbalized to the work unit after Mr. Boyer was—after it was enforced against Mr. Boyer.

(Tr. 338.) It is contended that the Company’s actions in this regard constituted a unilateral imposition of a new term and condition of employment without first affording the newly recognized Union notice and an opportunity to bargain about that on-call policy and its effects. This is alleged to constitute a violation of Section 8(a)(1) and (5) of the Act. I find that the evidence supports the General Counsel’s position.

When the Company chose to accord voluntary recognition to the Union based on a showing of majority support through signed authorization cards, it accepted the statutory obligation to bargain with the Union in good faith. See *Research Management Corp.*, 302 NLRB 627 (1991); and *Richmond Toyota*, 287 NLRB 130 (1987). The Board has held that once the bargaining obligation attaches,

[i]t is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees’ bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications. [Citation omitted.]

Flambeau Airmold Corp., 334 NLRB 165, 165 (2001).

I readily conclude that imposition of a new on-call obligation upon employees who are otherwise off duty constituted a change related to hours, terms, or conditions of employment.⁵² For example, see: *Colonial Press*, 204 NLRB 852 (1973), *enfd.* 564 F.2d 101 (8th Cir. 1977) (unilateral elimination of opportunity to acquire overtime hours is unlawful); and *Morgan Services, Inc.*, 336 NLRB 290 (2001) (unilateral change to department’s work schedule is unlawful).

The Company contends that in discharging Boyer for failing to comply with a demand that he report for work during a time when he was off-duty, it did not change its preexisting policies. The record does not support this contention. In fact, the preexisting policy and practice was to designate specific volunteers as having the responsibility of reporting to the facility in the event that bad weather occasioned a need for remedial actions. Boyer articulated the prior state of Company operations in this regard when responding to counsel for the Company’s question as to whether, prior to the events under consideration, anybody had ever been called to the facility due to a similar situation. He responded that,

⁵² The Company does not contend otherwise. In a discussion with counsel for the Company, I asked whether there was any issue about whether an on-call obligation was a mandatory subject for bargaining under the Act. Counsel’s succinct response was, “[n]o.” (Tr. 210.)

5 I'm not aware of any, because anything with water pumps or the plan was always volunteered earlier in the week so you could schedule your weekend around it. Even way prior to that guys were asked about running the pumps that weekend or there was already a person designated for it, so there was— there hadn't ever been an emergency case where somebody needed to be called. It was always pre-scheduling on management's part.

10 (Tr. 272.)

The testimony of various management witnesses supported Boyer's description of the past practices.⁵³ Counsel for the General Counsel examined Ault, the human resources official most familiar with the Casey operations, as follows,

15 COUNSEL: To your knowledge, was there any written policy at the Casey facility that employees were expected to be on call at the facility during the month of August, 2003?

20 AULT: That employees were expected to be on call?

COUNSEL: Yes.

AULT: No, I don't know of any rule.

25 (Tr. 122.) As would be expected in light of this, the Company's witnesses were unable to cite any previous instances in which such an on-call policy had been invoked, either to require an employee to report or to discipline an employee for failing to so report. Furthermore, in reference to the incident at issue, Shoemaker agreed, in counsel's words, that it was Heft's responsibility "to make sure that somebody was assigned to run the pumps that weekend." (Tr. 30 28.) Interestingly, when Moore raised this issue with the Company's top human resources official for the Midwest division, Miller responded by observing that in the event of an emergency, "we would turn to the person that was qualified or capable, if they were available to come in and do the work." (Tr. 497.) This formulation of the Company's practices directly undermines the contention that there was a preexisting mandatory on-call requirement of the 35 type being asserted here. By observing that the Company would search for an "available" employee in such circumstances, Miller is effectively conceding that the Company's policies did not direct that an otherwise unavailable employee be required to report.

40 I have already described in detail the conversations between Heft and Boyer regarding Heft's instruction that Boyer proceed to the facility on the evening of August 31, a day on which he was off-duty. Those discussions were marked by ambiguity. Heft never informed Boyer that he was relying on any specific Company rule, policy, or practice in directing him to report to the facility. Nor did he warn Boyer that his failure to obey could result in disciplinary sanctions.

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⁵³ In addition, there is no on-call policy expressed in either the Company's Midwest division employee handbook or the Casey Quarry hourly employee handbook. The Casey handbook does contain a section entitled, "Overtime Procedure." It is silent regarding this issue. (GC Exh. 50 2, pp. 4-5.)

In light of this background, I find that when the Company belatedly asserted that its rationale for imposing discipline on Boyer was his failure to obey a rule or policy requiring his attendance when ordered, it was making a unilateral change in the hours, terms, and conditions of employment. Because this purported rationale for Boyer's discipline was first asserted after the Company had extended voluntary recognition to the Union, the unilateral change was made in violation of the statutory obligation to bargain in good faith imposed by Section 8(a)(1) and (5) of the Act.⁵⁴

Although the Company's initial invocation of an on-call policy requiring attendance of otherwise off-duty employees was in the context of its efforts to justify Boyer's discharge, it subsequently underscored its adherence to this policy on an ongoing basis. The facility's new superintendent, Shields, readily agreed that he told the employees about this policy during a meeting on September 12,

COUNSEL: At that meeting, did you also tell the men that there'd be times during unforeseen events that you or someone from the company might call them and they'd be expected to report to work?

SHIELDS: Yes.

COUNSEL: Okay. And those unforeseen events would be at times outside of their normal working time?

SHIELDS: Yes.

(Tr. 96.) In fact, Shields chose to vigorously assert this policy in an effort to "take control" and show the employees that, "I am the boss." (Tr. 453.) His own account shows the emphatic nature of this directive, noting that he rhetorically asked the assembled employees, "[w]ho the hell else am I supposed to call?" (Tr. 453.) Finally, Shields confirmed the new policy in writing. On November 17, he sent an e-mail to Ault in which he explained that he had told the employees that, "if needed on off hours[,] employees would be called to help in times of unforeseen events." (GC Exh. 7.)

The evidence shows that prior to the events of the Labor Day weekend, the Company had a longstanding practice of making advance assignments to volunteers for coverage of unusual situations that would require personnel to report to the facility when otherwise off-duty. At a time after the Company extended voluntary recognition to the Union, it chose to assert a new policy as justification for its discipline of Boyer. That new policy held that employees were subject to mandatory call to report immediately to the facility at any time in the event of unforeseen events. While first asserted in connection with the justification for Boyer's discharge, the new policy was repeatedly affirmed thereafter.

The Company's promulgation of a new policy regarding an off-duty obligation to report to work constituted an unlawful unilateral change in the hours, terms, and conditions of employment. In *Great Western Produce, Inc.*, 299 NLRB 1004, 1005 (1990), the Board held that the "focus" for analysis of alleged violations of Section 8(a)(5) through imposition of unilateral changes is whether the employer's conduct has damaged the union's status as

⁵⁴ There is no contention that the Company sought to notify the Union about this proposed change prior to announcing it as the rationale for Boyer's discipline.

bargaining representative. I agree with counsel for the General Counsel's observation that, not only did such damage occur in this case, but it was "especially severe" because the unlawful conduct took place shortly after recognition of the Union and was prompted by the discharge of the employee most associated with the Union's organizational campaign. (GC Br. at p. 25.) The Company's actions in asserting a new on-call work policy violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

By suspending and discharging its employee, Kevin Boyer, due to his participation in protected union activities in order to discourage its employees from engaging in these or other such activities, the Respondent has been discriminating in regard to the hire, tenure, or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. By making unilateral changes in the hours, terms, and conditions of employment of its employees through imposition of an on-call rule, without giving the Union notice and a meaningful opportunity to bargain, Respondent has violated Section 8(a)(1) and (5) of the Act. The Respondent did not violate the Act in any other manner alleged in the amended complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged an employee, Kevin Boyer, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension and discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having instituted an on-call requirement for its employees without having provided notice and a meaningful opportunity to bargain to the Union, it shall be ordered to rescind this on-call requirement. Specifically, I am referring to the policy described in Shields' e-mail communication to Ault dated November 17, 2003.⁵⁵ (GC Exh. 7.) While the record does not demonstrate that any employees have been subject to discipline for violation of the unilaterally imposed on-call requirement, I will recommend imposition of a make-whole remedy in the event that during compliance proceedings it is determined that any bargaining unit member has suffered adverse consequences for violation of this requirement. See *Livingston Pipe & Tube, Inc.*, 303 NLRB 873, at fn. 4 (1991), enf. 987 F.2d 422 (7th Cir. 1993). The

⁵⁵ The Company contended that it suspended and discharged Boyer for violating this newly promulgated on-call rule. Had I found this to be true, I would have ordered that he be reinstated and made whole for any losses he suffered in consequence of this violation of Section 8(a)(1) and (5) of the Act. For reasons discussed in detail in this decision, I have found that Boyer was not suspended or discharged for violating the on-call rule. Instead, I have concluded that assertion of this rationale was a pretext designed to mask Boyer's suspension and discharge for engaging in protected union activity. Therefore, my conclusion that he must be reinstated and made whole is based on violation of Section 8(a)(3), rather than violation of Section 8(a)(5).

Respondent shall also be ordered to provide notice and, upon request, to bargain with the Union over any proposed change in the hours, terms, and conditions of employment.⁵⁶

I shall also recommend that the Respondent be ordered to post an appropriate notice in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁷

ORDER

The Respondent, Vulcan Materials Company, of Casey, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against Kevin Boyer or any other employee for supporting, engaging in activities on behalf of, or seeking assistance from the International Union of Operating Engineers, Local 841, AFL-CIO, or any other union.

(b) Changing the hours, terms, and conditions of work for its employees in the bargaining unit described below without first affording the International Union of Operating Engineers, Local 841, AFL-CIO, notice and meaningful opportunity to bargain over the proposed change.

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

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

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

(b) Make Kevin Boyer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Decision.

⁵⁶ While such a provision of the order is required to effectuate the remedial purposes of the Act, I recognize that Moore testified that the Company and the Union have already engaged in such bargaining regarding coverage at the facility in the event of unforeseen circumstances. Moore indicated that the parties have reached a "gentlemen's agreement" about this issue. (Tr. 151.)

⁵⁷ 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.

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

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(d) Offer all bargaining unit employees who have been discharged, suspended, or otherwise been subject to adverse employment action as a result of the unilaterally implemented on-call requirement immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(e) Make whole all bargaining unit employees for any losses they may have suffered as a result of the unlawful implementation of the on-call requirement, with interest as computed in the manner set forth in the remedy section of the decision. In addition, remove from its files any reference to any discipline imposed under the on-call requirement, and notify the affected employees that this has been done and that the discipline will not be used against them in any way.

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(f) 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.

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(g) Within 14 days from the date of the Board's Order, rescind the policy requiring those employees in the bargaining unit described below who have not previously been designated to be on-call to report to the facility during off-duty periods upon the demand of management.

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(h) Notify and provide the International Union of Operating Engineers, Local 841, AFL-CIO, with meaningful opportunity to bargain before making any proposed change in the hours, terms, and conditions of employment for its employees in the following bargaining unit:

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All loader operators, drillers, truck drivers, millmen, and primary/plant operators employed by the Company at its Casey, Illinois facility, excluding all plant clerical employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

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(i) Within 14 days after service by the Region, post at its facility in Casey, Illinois, copies of the attached notice marked "Appendix."⁵⁸ Copies of the notice, on forms provided by the Regional Director for Region 14, 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

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⁵⁸ 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."

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customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 2003.

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

Dated, Washington, D.C. May 25, 2004

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Paul Buxbaum
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT suspend, discharge, or otherwise discriminate against Kevin Boyer or any of you for supporting, engaging in activities on behalf of, or seeking assistance from the International Union of Operating Engineers, Local 841, AFL-CIO, or any other union.

WE WILL NOT make changes in the hours, terms, and conditions of employment for our bargaining unit employees in the bargaining unit described below without first providing notice to the International Union of Operating Engineers, Local 841, AFL-CIO, and giving the Union a meaningful opportunity to bargain about the proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

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

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Kevin Boyer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

WE WILL, on request, bargain with the International Union of Operating Engineers, Local 841, AFL-CIO, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All loader operators, drillers, truck drivers, millmen, and primary/plant operators employed by the Company at its Casey, Illinois facility, excluding all plant clerical employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL, within 14 days from the date of this Order, rescind our policy requiring bargaining unit employees who have not previously been designated to be on-call to report to the facility during off-duty periods upon the demand of management.

WE WILL offer all bargaining unit employees who have been suspended, discharged, or otherwise subject to adverse employment action as a result of our unlawfully implemented on-call policy immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits they may have suffered as a result of the unlawful implementation of the on-call requirement, less any net interim earnings, plus interest.

VULCAN MATERIALS COMPANY

(Employer)

Dated _____ By _____

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.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829

(314) 539-7770, Hours: 8 a.m. to 4:30 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, (314) 539-7780.