

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

C & F FOODS, INC.

and

Case 14—CA—27640

UNITED STEELWORKERS OF AMERICA,  
LOCAL 7686, AFL—CIO, CLC

*Rotimi O. Solanke, Esq.*, for the General Counsel.  
*Mark J. Rubinelli, Esq.*, of St. Louis, Missouri,  
for the Respondent.  
*Karl Sauber, Esq.*, of St. Louis, Missouri, for  
the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Saint Louis, Missouri, on March 4, 2004. The charge was filed October 31, 2003,<sup>1</sup> and an amended charge was filed December 22. The complaint was issued December 30.<sup>2</sup>

The complaint alleges that a company supervisor informed an employee, Clarence Kimble, Jr., that he was being denied access to the Company's facility because he had an arbitration hearing pending against the Company. The complaint further alleges that the Company did deny Kimble access to its facility because he had engaged in union activities and had participated in proceedings before the Board. Finally, the complaint asserts that, by denying access to Kimble, the Company imposed a unilateral change in the terms and conditions of employment without first giving the Union notice and an opportunity to bargain regarding this change. It is contended that the Company's actions were in violation of Section 8(a)(1), (3), (4), and (5) of the Act. The Company filed an answer denying the material allegations of the complaint.

As described in detail in the decision that follows, I conclude that a supervisor of the Company did inform Kimble that he was being denied access to its premises because he had an arbitration proceeding pending against the Company. I also find that the General Counsel

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<sup>1</sup> All dates are in 2003 unless otherwise indicated.

<sup>2</sup> At trial, counsel for the General Counsel amended the complaint to correct the spelling of the name of the alleged discriminatee, Clarence Kimble, Jr.

has met his burden of showing that Kimble engaged in protected union activities, that the Company was aware of his participation in these activities, and that his involvement in these activities formed a substantial motivating factor in the decision to deny him access. I also conclude that the Company has failed to show that it would have denied access to Kimble  
 5 regardless of his participation in the union activities. I next determine that the General Counsel has not met his burden of showing that Kimble's involvement in proceedings before the Board was a substantial motivating factor in the Company's decision to deny him access. Finally, I find that the Company's decision to deny access to Kimble constituted a unilateral change in the terms and conditions of employment, and that the Company failed to provide notice to the Union  
 10 and an opportunity to bargain regarding this change.

On the entire record,<sup>3</sup> 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

15 Findings of Fact

I. Jurisdiction

20 The Company, a corporation, processes and packages foodstuffs at its facility in Sikeston, Missouri, where it annually sells and ships from its Sikeston, Missouri facility goods valued in excess of \$50,000 directly to points outside the State of Missouri. The Company admits<sup>4</sup> 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.

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II. Alleged Unfair Labor Practices

A. *The Facts*

30 C & F Foods, Inc., is a California corporation with headquarters in that state. The Company operates a plant in Sikeston, Missouri, engaged in the processing and packaging of dried beans, rice, and popcorn. It employs approximately 50 workers at the facility. Operations are conducted in two shifts. Each shift's schedule includes breaks and a lunch period.

35 In November 2000, Local 7686 of the United Steelworkers of America was certified as the collective-bargaining representative of certain employees at the Company's Sikeston facility. The Company and Union entered into a collective-bargaining agreement with an effective date of November 20, 2000, and a termination date of May 20, 2004.<sup>5</sup> (GC Exh. 2.) The agreement contains a provision that is at the heart of the controversy in this case. Article XIX, paragraph  
 40 12, provides in its entirety,

The [Bargaining] Unit President, President of the Local or

45 <sup>3</sup> There are a small number of errors of transcription. At p. 92, l. 4, of the transcript, the witness actually responded that he had no "idea" what the maintenance men did with their logs. At p. 118, l. 15, I indicated that I would not admit a document "sua sponte." At p. 119, l. 2, I stated that I would "note" counsel for the Company's objection to the admission of the document. Any other errors in transcription are not significant or material.

50 <sup>4</sup> See the Company's answer, p. 1. (GC Exh. 1(g).)

<sup>5</sup> At the time of trial, this agreement was in effect. The record does not disclose the current status of the parties' collective-bargaining relationship.

International Representative will be afforded access to the plant during breaks or lunch with prior notice to the Company.

(GC Exh. 2.)

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Among those authorized to have access to the facility by the terms of the agreement is the bargaining unit's president. In February 2002, Clarence Kimble was appointed to this position by the president of Local 7686.<sup>6</sup> He had been an employee of the Company since August 1999, and was serving as a machine operator, running a packaging machine on Line 5.

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As unit president, Kimble performed a variety of duties, including monitoring of the Company's compliance with the collective-bargaining agreement, serving on the safety committee, coordinating the activities of the stewards, and representing employees in the grievance process. Kimble's union duties required frequent interaction with the Company's supervisors, including Joseph Crowell, the plant manager at Sikeston. Kimble testified that, since he became unit president, he has handled 15 to 20 grievances on behalf of bargaining unit members. Local 7686 pays Kimble for performing his duties as unit president.

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As part of his work for the Union, Kimble became involved in a disciplinary situation involving the Company's two maintenance men, Jimmy Hale and Ron Ward. In February, the two men were issued a warning, "[f]or not filing, or keeping up documents on maintenance work, proper procedure in maintenance work." (Tr. 47.) Kimble testified that he processed grievances for both men arising from this discipline.

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Hale testified that he was issued the warning for failing to turn in maintenance logs. Because this was the issue, he informed Kimble that he possessed copies of the logs, which he kept in his toolbox. Hale reported that,

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I told him [Kimble] I had them, you know, and he said well, that would be helpful to the, to the grievance so then I, I got'em and give'em to him.

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(Tr. 141.) By the same token, Kimble testified that he accepted the logs from Hale because of their potential value "[t]o show that they [Hale and Ward] have been keeping up the maintenance logs." (Tr. 53.) Kimble placed the logs in his storage shed at home. Both Kimble and Hale indicated that the grievance never went forward since Hale decided not to press the issue because he was planning to retire in the near future.<sup>7</sup> Hale did retire effective August 9.

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On June 9, the Company suspended Kimble from employment. On June 13, it discharged Kimble. Plant Manager Crowell testified that the sole reason for Kimble's suspension and discharge was his failure to meet efficiency standards for the machine he was assigned to operate. Kimble also testified that Crowell told him he was being discharged for "[i]nefficiency." (Tr. 21.) Immediately after Kimble's suspension, the Union filed an unfair labor practice charge alleging that the disciplinary action taken against Kimble represented unlawful discrimination designed to discourage membership in the Union. (GC Exh. 3.) Shortly thereafter, Kimble also filed a grievance regarding his suspension and discharge.

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<sup>6</sup> The president of Local 7686 testified that, ordinarily, the unit president is elected to this position. In this bargaining unit, officers are appointed because of a "troubled situation." (Tr. 125.) The precise nature of the trouble was not indicated.

<sup>7</sup> Ward did not testify and the status of his grievance was not developed in the record.

On June 20, Kimble took two steps necessary to the processing of his contests of the decision to terminate his employment. He attended the first step meeting regarding his grievance. This was held at the Company's facility. He also attended a meeting in Cape Girardeau with an employee of the General Counsel. The purpose of this meeting was to provide information to the General Counsel related to the processing of the Union's unfair labor practice charge arising from his suspension and termination. Approximately a week later, Kimble again visited the plant in order to participate in the second step meeting on his grievance.

In early July, William Berry, the president of Local 7686, addressed a letter to Crowell, in order to inform him "of the current status of Clarence Kimble with respect to the Union."<sup>8</sup> He advised Crowell that Kimble was continuing to receive his salary as unit president, "and will continue to do so until his grievance is resolved." Finally, Berry observed that the Union expected that Kimble "will be able to conduct Union business, with proper notification, during this time." (GC Exh. 6.)

Just over a week later, on July 16, the Company demonstrated its acquiescence in Berry's expectation regarding Kimble's ongoing status by admitting Kimble to the facility twice in order to meet with bargaining unit employees assigned to each shift. Berry accompanied Kimble on both visits. Both men signed the visitor's log and obtained visitor passes.

In the meantime, Kimble's grievance remained pending at the third step of the grievance process. Crowell testified that, since he would be representing the Company at this step in the process, he began to prepare for the meeting by seeking records that would shed light on the issue of Kimble's work performance and efficiency. He requested that Kimble's direct supervisor, Randy Cooper, provide him with the maintenance logs pertaining to Kimble's machine for the period from July 2002, until the date of Kimble's termination. He also asked the office manager, Paula Chamberlain, for "invoices and/or purchase orders for parts relevant to [Kimble's] Line 5 [machine]." (Tr. 182.) Crowell testified that his purpose in seeking these records was to look for any possible mitigating explanation for Kimble's allegedly poor productivity. As Crowell explained it, "in all fairness if there's an issue there where his machine would not have run an 80 percentile rate, then reasonably it's not in his control . . . because it's mechanical." (Tr. 209.) Thus, because the maintenance logs are "historical documents on the condition of the machine,"<sup>9</sup> they would be valuable in assessing Kimble's work performance. By the same token, the invoices and purchase order records would also document the condition of Kimble's machine by indicating whether it had been necessary to purchase replacement parts. As a result, these records would provide similarly useful insights into the reasons for the quantity of work produced by Kimble.

Crowell testified that when he requested the maintenance logs from Cooper, Cooper was unable to provide any of them. According to Crowell, Cooper told him that one of the maintenance men, Hale, had given such logs to Kimble. Crowell then sought the logs from Hale.<sup>10</sup> Hale told Crowell that he had provided maintenance logs to Kimble. At this point, Crowell phoned Carmen Begany, the corporate director of human resources, who was located

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<sup>8</sup> Berry neglected to date his letter, but counsel for the Company indicated that it was received on July 8.

<sup>9</sup> Tr. 211.

<sup>10</sup> Crowell did not indicate that he attempted to obtain any logs from the other maintenance man, Ward.

at the Company's headquarters in California. He advised her that, "we had a problem with documentation missing." (Tr. 182.)

5 After speaking with Begany, Crowell met with the two maintenance men. Hale confirmed that he had given logs to Kimble. Crowell did not attempt to elicit additional details and did not question Hale about his reasons for giving logs to Kimble. He testified that he had been "directed" not to ask such questions of Hale. (Tr. 183.) Following the meeting with Hale and Ward, Crowell again contacted Begany. He testified that, "she instructed me to ask Jim Hale to go ahead and give us a written statement that he had given the logs to Clarence [Kimble] as Clarence had asked him to do." (Tr. 184.) I note that Begany's orders contained an unfounded assumption that Kimble had requested the logs from Hale. Crowell testified that he had been directed not to determine the actual circumstances leading to Hale's provision of the logs to Kimble. As a result, there does not appear to have been anything to suggest that Hale's actions had been in response to a demand from Kimble.

15 Crowell testified that during his second conversation with Begany, he raised the issue of Kimble's continuing access to the Company's premises, observing,

20 if those [logs] are gone, we have, we have documents on bulletin boards in the plant, we have documents throughout the plant, and now I have a concern for the security of those, those documents that we have.

25 (Tr. 186.) As a result, he told Begany that he did not wish to allow Kimble to visit the plant until the issue had been resolved. Begany advised Crowell that she would handle this issue.

30 Chamberlain testified that she was present during discussions between Crowell and Hale. She confirmed that Hale was asked to provide a written statement about the logs. He responded by indicating that he would "write us one and get it back to us." (Tr. 219.) After several days, Chamberlain again asked Hale for his written statement. He told her that, "[h]e didn't know how to write it up." (Tr. 219.) At this point, Chamberlain told Hale that she would assist him.

35 There is considerable variance in the accounts of Chamberlain and Hale regarding the manner in which Hale's statement was composed. There is no doubt that Chamberlain typed the document and Hale signed it. In its entirety, it is dated August 6, and reads as follows,

40 I, Jim Hale, gave maintenance logs to Clarence Kimble because of issues of maintenance non-performance and he asked me for them.

(GC Exh. 11.)

45 In her testimony, Chamberlain thrice affirmed that she simply typed what Hale said to her. He appeared to read it, and then he signed it. On cross-examination by counsel for the General Counsel, she conceded that she did not prompt Hale to provide additional information such as why Kimble wanted the logs, which logs Kimble sought, or where Hale had obtained the logs that he provided to Kimble. After obtaining Hale's signature on the document, she sent the original to Begany.

50 Hale testified that the manner in which the document was created was significantly different from the version reported by Chamberlain. A portion of counsel for the Respondent's

cross-examination of Hale illustrates this difference,

COUNSEL: . . . did Paula Chamberlain just write this without any input from you?

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HALE: Yeah, Paula helped me out.

COUNSEL: Okay, how did she help you out? That's what I want to know.

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HALE: She wrote it and I signed it, that's—

. . . .

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COUNSEL: Did Paula ask you to tell her verbally what to write on this statement?

HALE: I don't think so, no. I mean, she just wrote down and had me sign it.

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(Tr. 167.) Hale reported that his difficulties in dealing with the statement stemmed from his lifelong troubles with illiteracy. When counsel for the Company asked him if he signed the document without knowing what it said, he responded,

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I don't know half of what I sign in this life, I'm, I'm lost.  
I am lost completely in this life.

(Tr. 167.)

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On the same day that Chamberlain and Hale met to prepare the written statement, Berry and Kimble made another routine visit to the plant to discuss union business with bargaining unit members. The men signed the visitor's log and were admitted to the facility. (R. Exh. 3.) Kimble visited the plant on the following day, August 7, as well. His purpose in making this visit was to participate in his step three grievance meeting. Once again, he signed the visitor's log and was admitted. Crowell testified that he also participated in this meeting. Although he did not have maintenance logs available to assist him during the meeting, he used the parts invoices regarding Kimble's machine as a substitute for the logs.<sup>11</sup>

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On the day following Kimble's grievance meeting, Chamberlain sent an e-mail to Begany, reporting that,

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it has come to our attention that we are missing Maintenance Logs from early October 2002 through early February 2003. Mr. Clarence Kimble illegally obtained these documents from Jim Hale in early February after the Maintenance employees were given a verbal warning.

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(R. Exh. 8.)

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<sup>11</sup> The logs and invoices provided a cross check for each other, or, as Crowell put it, "a check and balance" to each other. (Tr. 195.)

5 It will be recalled that Begany had informed Crowell that she would handle the issue of Kimble's possession of maintenance logs, including the question of his continued access to the plant. On September 4, she took the first step in addressing the situation with the Union. In a letter to an official of the Union, John Wiseman, Begany stated that,

10 [i]t has been brought to the attention of this office that Mr. Kimble requested the Maintenance Logs from "early October 2002 through February 2003." Mr. Jimmy Hale, (signed statement attached herewith), was the recipient of said request.

15 (R. Exh. 6.) Begany went on to note that, "the discovery of Mr. Kimble's un-authorized removal and keeping of company property re-inforces our decision not to re-instate him to his previous employment." [Hyphens in the original.] Finally, Begany demanded the return of the logs and observed that, since they had been "illegally obtained," they should not be received "as evidence in any of the present and/or future hearings that might be held." (R. Exh. 6.) It is noteworthy that Begany's letter did not raise any issue concerning Kimble's continuing access to the facility to conduct union business.

20 Having failed to resolve the grievance regarding Kimble's termination at the preliminary steps of the contractual grievance procedure, on September 15, the Union informed Begany that it would "proceed to arbitration with this case." (GC Exh. 5.) Three days later, Local 7686 President Berry wrote to Crowell, reminding him that Kimble continued to be employed by the Union as unit president, and would "continue in this capacity pending settlement of his grievance at arbitration." He advised Crowell that Kimble "needs to be able to continue to visit with the workers for brief periods during their lunch-breaks. . . Mr. Kimble will give advance notification of the times and dates of his intended visits." (GC Exh. 7.) The letter then addressed an unrelated piece of union business with the Company. Crowell testified that he received this letter and forwarded it to Begany.

30 On September 25, the Regional Director issued a written notice to the Company and the Union advising that he had decided to defer the proceedings regarding the Union's unfair labor practice charge arising from Kimble's discharge. His purpose in ordering such deferral was to permit the parties to proceed with their contractually mandated arbitration of the grievance arising from the same discipline.<sup>12</sup> In reaching this decision, the Regional Director observed that the Company had agreed to arbitrate the grievance and also to "waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute." (GC Exh. 9.) In concluding his letter explaining the decision to defer processing of the unfair labor practice charge, the Regional Director advised the parties that the Union was permitted to "obtain review of my action deferring this charge by filing an appeal with the General Counsel." In addition, the Regional Director informed the Union that, upon completion of the arbitration, it would possess the right to seek review of the arbitrator's award. The Company was not advised of any right to seek review of either the deferral decision or the outcome of the arbitration proceeding.

45 Shortly after the deferral decision, on September 30, Kimble contacted Chamberlain to make arrangements for another set of visits to employees on each shift. The first such visit was conducted between 1 and 1:30 p.m. Kimble signed the visitor's log and met with bargaining unit

50 <sup>12</sup> As the Regional Director noted, such deferral is authorized by the Board under its policy set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

members. He testified that,

5 I asked them did they have any complaints, during that time  
nobody had any complaints and, and we just laughed and  
talked then.

(Tr. 41.) Later that day, Chamberlain telephoned Kimble, informing him that the plant was  
having problems with “machinery.” (Tr. 44.) As a result, the second plant visit would have to be  
rescheduled. Chamberlain told Kimble to call her on the following day to arrange for the  
10 postponed plant visit.

On the next day, October 1, for the first time, Begany addressed the Union regarding the  
issue of Kimble’s continuing access to the Company’s premises. In a letter to Berry, she  
expressed the Company’s viewpoint, noting that,

15 C & F Foods, Inc. feels that in view of the fact that Mr. Kimble  
was terminated from his employment for what we feel was  
“just cause” it would be inappropriate for him to visit our facility.

20 (GC Exh. 8.) No other reason for the denial of access to Kimble was provided. Begany  
requested that “another representative be assigned” to visit the bargaining unit members at the  
plant. (GC Exh. 8.) Her letter indicates that she provided a copy to Crowell in Sikeston.

Kimble reported that, shortly thereafter, he phoned Chamberlain to reschedule his visit.<sup>13</sup>  
25 Kimble and Chamberlain disagree about the content of their conversation on this occasion.  
Kimble testified that Chamberlain told him that,

30 she had a got a memo on her desk from, from California  
from Ms. Carmen [Begany] . . . The statement read that  
I was not allowed back on the company because of the  
arbitration pending.

(Tr. 46.) Under cross-examination, Kimble repeated essentially the same testimony, confirming  
that Chamberlain had informed him that,

35 she had a memo on her desk from California, Carmen, that  
because of the arbitration that’s pending I was not allowed  
back on company property.

40 (Tr. 79.) He maintained that he was certain that Chamberlain stated that the reason for his  
denial of further access to the plant was the pending arbitration.

By contrast, Chamberlain, while agreeing that the conversation occurred, described it as  
follows:

45 Mr. Kimble had called and asked to come onto the property and  
I told him that Ms. Begany had sent a letter denying him access  
to the property, if he had any questions he needed to contact the

50 <sup>13</sup> Kimble showed some confusion regarding dates. He did indicate that this call was made  
sometime in October. Chamberlain testified that it was in “early October.” (Tr. 223.)

union hall.

(Tr. 223.) She testified that this was the entire content of the conversation and that she never told him anything regarding arbitration.

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After being denied access to the plant, Kimble phoned Berry. He testified that he told Berry that Chamberlain had stated that his denial of access was “because of the arbitration that’s pending.” (Tr. 80.) Berry confirmed the phone call from Kimble and indicated that he received Begany’s letter on the following day. He conferred with Wiseman and decided to file an unfair labor practice charge regarding the denial of access to Kimble. That charge was filed on October 31, alleging that the Company had violated Section 8(a)(1) and (5) of the Act by “failing or refusing to allow the Unit President Clarence Kimble access to the employer’s facility for the processing of employees’ grievances.” (GC Exh. 1(a).) On December 22, the Union amended this charge, alleging that the denial of access to Kimble also violated Section 8(a) (3) and (4) of the Act. (GC Exh. 1(c).) On December 30, the General Counsel issued the complaint. (GC Exh. 1(e).)

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Since October 1, the Company has refused to permit Kimble access to its facility in Sikeston in order to meet with bargaining unit members. As of the time of trial in this matter, the arbitration proceeding regarding Kimble’s termination was scheduled for April 2004. I have not been advised that the arbitrator has rendered a decision.<sup>14</sup>

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#### *B. Legal Analysis*

Before addressing each of the General Counsel’s allegations that the Company’s denial of access to Kimble violated various provisions of the Act, it is necessary to discuss the question of Kimble’s status. It is undisputed that Kimble was discharged from his employment on June 13, more than 3 months prior to the Company’s announcement that it would bar him from further access to its facility. Nevertheless, I conclude that the provisions of the collective-bargaining agreement, the language of the Act, and the Board’s interpretations of that statutory language all establish that Kimble retained the status of an employee for purposes of this decision.

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The parties’ collective bargaining agreement provides that a person “shall cease to be an employee of the Company” if he or she is “[d]ischarged for just cause.” (GC Exh. 2, Art. XVII, par. 4.) Later in the same agreement, the parties provide for a grievance procedure through which disputes may be resolved. The final step in that procedure is arbitration. The agreement specifically outlines an arbitrator’s duties in “discharge or discipline cases.” (GC Exh. 2, Art. XIX, par. 5.) The arbitrator is instructed to resolve the following questions,

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- (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so
- (2) whether such conduct or actions by the grievant justified the disciplinary action by the Company and, if so
- (3) whether the Company acted in good faith.

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(GC Exh. 2, Art. XIX, par. 5.)

As stated in Begany’s letter of October 1, the Company contends that Kimble was

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<sup>14</sup> As to the logs that were in Kimble’s possession, the Union mailed them to the Company in November.

discharged for just cause. The collective-bargaining agreement provides that an arbitrator must make the final determination of whether such just cause existed. Since arbitration had not yet been held at the time that the Company denied further access to Kimble, he could not have ceased to be an employee since there had not been any final determination of whether his discharge had been made for just cause. The provisions of the parties' collective-bargaining agreement continued to afford Kimble the status of an employee. Beyond this, the agreement also provided a right of access for union officials regardless of their status as employees of the Company. For example, there is no dispute that Berry was entitled to access as the President of Local 7686, although he has never been an employee of the Company. As unit president, Kimble was similarly entitled to access irrespective of his current employment status. (GC Exh. 2, Art. XIX, par. 12.)

In addition to the parties' agreement, the language of the Act extends protection to a person in Kimble's position. Section 2(3) provides that:

[t]he term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

Because Kimble's discharge is the subject on an ongoing unfair labor practice proceeding, Kimble's status falls within the protections of this statutory language.<sup>15</sup>

In interpreting the statutory language, the Board has held that a discharged employee was entitled to the protection of Section 7 of the Act when an employer threatened his arrest for failure to leave the workplace. The Board noted that,

notwithstanding his discharge, [the worker] remained a statutory "employee" within the meaning of Section 2(3) of the Act, as the Board has long held that that term means "members of the working class generally," including "former employees of a particular employer." [Footnote omitted.]

*Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977). See also, *Waco, Inc.*, 273 NLRB 746, fn. 8 (1984). As a result, I conclude that, although the Company has discharged Kimble, he retains the status of an employee both within the terms of the collective-bargaining agreement and the requirements of the Act.

I will now assess the General Counsel's contention that, when the Company informed Kimble and the Union that he was no longer granted access to the facility, it violated four separate provisions of Section 8(a) of the Act.

1. *The statement allegedly made in violation of Section 8(a)(1)*

The General Counsel's first substantive allegation against the Company is that an admitted supervisor, Chamberlain, told Kimble that he was "denied access to Respondent's facility because [he] had a pending arbitration hearing against Respondent." (GC Exh. 1(e), par.

<sup>15</sup> There is no contention that Kimble has found equivalent employment elsewhere.

5.) It is contended that such a statement constitutes a violation of Section 8(a)(1) of the Act.

The Board has held that employees who seek to enforce provisions of collective-bargaining agreements or process grievances are engaged in protected, concerted activity. For instance, in *Black Magic Resources, Inc.*, 312 NLRB 667 (1993), two employees filed grievances related to a pay dispute under their contract. The Board found that they were discharged for this activity, and that those discharges violated the Act. In another case involving discharges arising from employees' attempts to enforce their collective-bargaining agreement, the Board affirmed an administrative law judge's decision reinstating the employees. In reaching this result, the judge had noted that, "[t]he Board has long held that employees who attempt to enforce the provisions of a collective-bargaining agreement are engaged in protected concerted activity." *In re US Postal Service*, 332 NLRB 340, 343 (2000), enf. 25 Fed. Appx. 41 (2d Cir. 2001). It is apparent that, if the supervisor told Kimble that his denial of access to the facility was imposed due to his decision to seek arbitration of his grievance as authorized in the collective-bargaining agreement, such a statement constituted unlawful interference, restraint, and coercion of the bargaining unit members because it would deter those employees from asserting their rights under that collective-bargaining agreement.

I must now determine whether Chamberlain made such a statement to Kimble. As counsel for the Company observes, resolution of this issue presents "a classic credibility dispute." (R. Br. at p. 6.) In a letter dated September 15, the Union had formally notified the Company that it was proceeding with arbitration regarding Kimble's discharge. Both Kimble and Chamberlain agree that they had a telephone conversation early in October, and that during this conversation Chamberlain told Kimble that his access to the facility to conduct union business had been revoked.

In his prehearing affidavit<sup>16</sup> and during his testimony, Kimble stoutly and consistently maintained that Chamberlain told him that the reason his access was being revoked was "because of the arbitration pending." (Tr. 46.) He also asserted that Chamberlain informed him that this decision was made by Begany and that Chamberlain had become aware of the decision because "she had a memo on her desk from California, Carmen." (Tr. 79.)

By contrast, Chamberlain steadfastly denied having told Kimble that his access was revoked due to his pending arbitration. Chamberlain, however, did corroborate Kimble's account that she made reference to correspondence from Begany, noting that, "I told him that Ms. Begany had sent a letter denying him access to the property." (Tr. 223.)

Counsel for the Company contends that I should credit Chamberlain's denials because, "[t]here is no logical reason for the grievance or the arbitration to be mentioned in Chamberlain's conversation with Kimble in connection with the letter from Ms. Begany." (R. Br. at p. 7.) I disagree. The context persuasively suggests otherwise. As Judge Learned Hand observed in a case dating from the first decade of the Act's existence,

[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.

*NLRB v. Federbrush Co.*, 121 F. 2d 954, 957 (2d Cir. 1941). In this case, it is that juxtaposition

<sup>16</sup> R. Exh. 4.

between Chamberlain's denial of access to Kimble and her admitted reference to a written communication from Begany that provide a compelling logical connection supporting Kimble's accounts of the conversation.

5           It will be recalled that Chamberlain told Kimble that "Begany had sent a letter denying him access." (Tr. 223.) This must be a reference to Begany's letter to the Union dated October 1.<sup>17</sup> That letter specifically states that the reason for denial of future access to Kimble was his termination from employment for "just cause." (GC Exh. 8.)

10           From all this, I conclude that during the conversation with Kimble, Chamberlain was guided by Begany's letter of October 1. That letter drew a direct connection between the denial of access and the Company's "just cause" for Kimble's discharge. Of course, Chamberlain was well aware that she had given Kimble access several times since his discharge. It is but a short  
15           step for Chamberlain to have concluded that Begany's citation to the cause of Kimble's discharge was a reference to the recent demand for arbitration on the very issue of the "just cause" underlying Kimble's termination. In drawing this inference, I have considered the admitted context, that Chamberlain was advising Kimble that his access was revoked, that she was guided in her discussion by the contents of Begany's letter, and that Begany's letter cited the very issue that lay at the heart of the Union's demand for arbitration. All of these  
20           circumstances tend to corroborate Kimble's account of the conversation.<sup>18</sup>

          Having concluded that Chamberlain informed Kimble that he was being denied access to the Company's facility for the purpose of conducting union business because he had demanded his contractual right to arbitrate the causes of his termination, it follows that I find that the

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<sup>17</sup> Counsel for the General Counsel speculates that Chamberlain may have been referring to a supposed response by Begany to Chamberlain's e-mail of August 6. (GC Br. at fn. 12.) There is nothing in the record to support this, and contrary to counsel's assertion, such a response was never introduced into evidence. It is far more likely that Chamberlain was  
30           referring to Begany's letter to the Union, a letter written on the very day of her conversation with Kimble. Of course, in the world of 21st Century communications it is hardly remarkable that Chamberlain would have obtained a copy of this very recent letter by fax or through attachment to an e-mail. My conclusion in this regard is reinforced by Chamberlain's description of the document as a "letter" and by Kimble's recollection that Chamberlain did not claim that Begany's  
35           communication was addressed specifically to her. To the contrary, her suggestion to him that he "needed to contact the union hall" indicates that she was referring to Begany's letter to the Union. (Tr. 223.)

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<sup>18</sup> I have also made the usual analysis of the respective interests of the opposing witnesses. It is clear that Kimble was a highly interested party. Yet, it must also be recognized that,  
40           compared to the typical alleged discriminatee, his interest was relatively circumscribed since the issue of access was certainly far less vital to his economic and vocational concerns than the issue involving the cause for his termination. His pecuniary interest here was limited to the small stipend he received for his union activities. Chamberlain was also a highly interested participant. The Company clearly perceived the damage that a finding of improper statements from her would cause in this litigation. Counsel for the Company contended that, absent  
45           acceptance of Kimble's version of Chamberlain's words, "the General Counsel does not have a scintilla of direct evidence of anti-union animus or unlawful motivation sufficient to support a violation of Section 8(a)(1), (3), or (4)." (R. Br. at p. 8.) It was apparent to me that Chamberlain grasped the fact that her statements stood at the heart of this litigation and could prove highly  
50           embarrassing in her position as a supervisor of the Company. On balance, the witnesses' respective interests are roughly equivalent.

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Company has violated Section 8(a)(1) of the Act.

2. *The denial of access as a violation of Section 8(a)(3)*

5           The General Counsel contends that the Company's decision to revoke Kimble's access  
to its facility constituted unlawful discrimination designed to discourage membership in the  
Union. (GC Exh. 1(e), par. 10.) In assessing this contention, I must apply the analytical  
framework established in *Wright Line*.<sup>19</sup> As described by the Board in *American Gardens*  
10 *Management Co.*, 338 NLRB No. 76, slip op. at p. 2 (2002), this involves consideration of the  
following five sequential steps,

15                         First, the General Counsel must show the existence of activity  
protected by the Act. Second, the General Counsel must prove  
that the respondent was aware that the employee had engaged  
in such activity. Third, the General Counsel must show that the  
alleged discriminatee suffered an adverse employment action.  
20 Fourth, the General Counsel must establish a motivational link,  
or nexus, between the employee's protected activity and the  
adverse employment action.

25                         If after considering all of the relevant evidence, the General  
Counsel has sustained his burden of proving each of these four  
elements by a preponderance of the evidence, such proof warrants  
at least an inference that the employee's protected conduct was a  
motivating factor in the adverse employment action and creates a  
rebuttable presumption that a violation of the Act has occurred.  
30 Under *Wright Line* the burden then shifts to the employer to  
demonstrate that the same action would have taken place even in  
the absence of the protected conduct. [Citations and footnotes  
omitted.]

35                         There can be no doubt that Kimble was a highly active participant in protected union  
activities.<sup>20</sup> He was the bargaining unit's president, a member of the safety committee, and a  
participant in the contractual grievance process both in his capacity as unit president and  
individually as a grievant regarding his own discharge from employment. Concerning his  
participation in his own grievance, I note that the Supreme Court has emphasized the  
importance of extending statutory protection to employees in their exercise of such contractual  
rights, noting that,

40                                 by applying Section 7 to the actions of individual employees  
invoking their right under a collective-bargaining agreement,  
the [Board's] doctrine preserves the integrity of the entire  
collective-bargaining process, for by invoking a right grounded  
in a collective-bargaining agreement, the employee makes  
45 that right a reality, and breathes life, not only into the promises  
contained in the collective-bargaining agreement, but also into

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<sup>19</sup> 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.  
989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

50                         <sup>20</sup> The Company contends that Kimble's receipt of Hale's maintenance logs was misconduct  
that removed Kimble from the Act's protections. I will address this issue later in the decision.

the entire process envisioned by Congress as the means by which to achieve industrial peace.

5 *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835-836 (1984). Thus, by acting as unit president and also by individually asserting rights as an employee covered by the collective-bargaining agreement, Kimble was engaging in protected concerted activity. It is also clear that the Company was thoroughly familiar with the nature and extent of Kimble's union activities.

10 I further conclude that the revocation of Kimble's contractually based right of access for the purpose of conducting union business constituted an adverse employment action. The Board does not limit its definition of an adverse action to such obvious measures as suspensions or discharges. For example, in *International Paper Co.*, 313 NLRB 280 (1993), it held that an employer's decision to order an early halt to certain employees' participation in a training course was an adverse action. I also agree with counsel for the General Counsel that the Board's decision in *United States Postal Service*, 308 NLRB 893 (1992), mandates a similar conclusion regarding the action taken against Kimble. In *Postal Service*, the employer placed new restrictions on a steward's right of access to the workplace. The Board found the imposition of those restrictions to be an unlawfully motivated adverse employment action. It is evident that, if placement of restrictions on access can constitute an adverse action, then total revocation of such access is clearly the sort of employer action contemplated by the *Wright Line* analysis.

25 Having found involvement in protected activity, employer knowledge of such involvement, and imposition of an adverse employment action, the focus now turns to the question of employer motivation. 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 whole. See, *Sears, Roebuck and Co.*, 337 NLRB 443, 443 (2002), citing *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), *enfd.* 976 F.2d 744 (11th Cir. 1992). Direct and circumstantial evidence should be considered. *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at p. 3 (2003). I find that both direct and circumstantial evidence support the General Counsel's allegation that animus against Kimble arising from his union activities formed a substantial motivating factor in the decision to revoke his access to the plant.

35 I have already found that the Company's office manager, Chamberlain, told Kimble that revocation of his access was being imposed due to his participation in the arbitration process regarding his grievance. Chamberlain's statement draws a direct link between the adverse action and Kimble's participation in a contractually authorized grievance procedure. Her statement is strong evidence of an unlawful motivation underlying the Company's action in barring Kimble from its facility.

40 In addition to this direct evidence, a variety of circumstantial evidence sheds light on the Company's motivation. Perhaps the most compelling form of such evidence is the Company's failure to maintain a consistent explanation for its conduct. The Board has long held that the offer of shifting rationales is probative evidence of unlawful animus. By way of a recent example, see *McClendon Electrical Services, Inc.*, 340 NLRB No. 73 (2003), slip op. at p. 2. The basis for this analytical principle is that when an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons' to justify" its unlawful conduct. *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

In this case, the Company has asserted three different reasons for eliminating Kimble's

access to the plant. The first reason cited is contained in Begany's October 1 letter to the Union. In that letter, the Company's top human resources official plainly states that the denial of access is premised on the Company's "just cause" in firing Kimble. (GC Exh. 8.) Shortly thereafter, Chamberlain elaborated on this rationale by informing Kimble that the denial of access was due to his invocation of the right to arbitrate the question of such just cause for his termination. Finally, at trial, the Company has contended that it decided to revoke Kimble's access because he had improperly obtained maintenance logs. I find it particularly noteworthy that the Company's ultimate position asserted at trial is completely different from the previous two somewhat related contentions raised in Begany's letter to the Union and Chamberlain's conversation with Kimble. I readily infer that this difference arises from recognition that the first two rationales are plainly inconsistent with Kimble's rights under the collective-bargaining agreement and the Act. The Company's assertion of various and disparate reasons for its behavior, including a belated assertion of a completely new reason, is strong evidence that it is avidly searching for a lawful justification designed to mask its unlawful motivation.

In addition to shifting rationales, I find that the timing of the decision to deny further access to Kimble is circumstantial evidence of unlawful animus against him arising out of his participation in union activities. The Board has often observed that temporal connection between an adverse employment action and the affected employee's protected behavior is probative evidence on the issue of employer motivation. For example, it has approvingly cited language from the Seventh Circuit noting that, "[t]iming alone may suggest anti-union animus as a motivating factor in an employer's action." *Sears, Roebuck and Co.*, 337 NLRB 443, 443 (2002), citing *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). In this case, timing is particularly significant when examined with respect to each of the Company's three asserted rationales.

On October 1, Begany terminated Kimble's access to the plant, reporting that his prior discharge for just cause rendered his continuing access to the plant "inappropriate." (GC Exh. 8.) The timing suggests that this rationale is pretextual. Kimble's discharge occurred on June 13. He was admitted to the plant for the purpose of meeting with bargaining unit members on July 16, August 6, and September 30.<sup>21</sup> Therefore, it is difficult to perceive any connection between the June decision to terminate his employment and the October decision to terminate his access. The lack of any nexus between the timing of these two events undercuts Begany's asserted rationale for the adverse employment action.

By the same token, there is no apparent nexus between the October 1 termination of Kimble's access and the Company's asserted rationale regarding his possession of maintenance logs. Kimble received the logs from Hale in February. In early August, Kimble's supervisor, Cooper, informed Crowell that Hale had given logs to Kimble. By August 6, the Company had completed whatever investigation it decided to make into this issue. It was on that date that Chamberlain obtained her written statement from Hale. By at least August 8, information regarding the logs had been transmitted to the highest human resources official, Begany. Nevertheless, no action was taken to terminate or restrict Kimble's access to the plant until almost 2 months thereafter. Once again, there is no apparent connection between the discovery of Kimble's possession of maintenance logs and the imposition of the denial of access to the plant.

Unlike the lack of association between the adverse action and these two asserted

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<sup>21</sup> This does not include Kimble's additional visits for the purpose of participating in the grievance procedure regarding his termination.

rationales, there is a nexus between Chamberlain's rationale and Kimble's denial of access. The Union mailed the Company formal notice of its decision to proceed to arbitration of Kimble's grievance on September 15. (GC Exh. 5.) Merely 2 weeks after receipt of this notice, Chamberlain told Kimble that he was being denied further access to the plant due to his decision to arbitrate his grievance. This represents a significant connection in time, leading me to conclude that it is more likely than not that the Company's October 1 decision to terminate Kimble's access was directly linked to the Union's September 15 notification of the decision to arbitrate Kimble's grievance. In reaching my conclusion with regard to the connection between these two events, I note that invocation of the right to arbitration meant that the grievance procedure would be prolonged, the Company would be required to justify its actions before an impartial adjudicator, and, as required by the collective-bargaining agreement, the Company would have to bear one-half of the expenses associated with the arbitration.

Having found that both direct and circumstantial evidence support a finding of animus, it is also appropriate to assess the veracity of the Company's rationale as advanced at trial for the denial of Kimble's access 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 proffered motive for termination of Kimble's access, his possession of maintenance logs, is a pretext constructed to conceal the true reason, his protected union activities, including his recent demand for arbitration of the grievance arising from his termination.

The Company's current and belated theory supporting its decision to terminate Kimble's access is his supposed violation of company policy by obtaining and retaining possession of maintenance logs. Presumably, this is based on a violation of the company handbook's prohibition of "unauthorized removal" of company property. (R. Exh. 2, Rule of Conduct Number 21.) In their testimony, Company officials presented this as a clear-cut case of employee misconduct by Kimble. Indeed, the purported misbehavior was apparently so obvious that Crowell conceded that the entire investigation of the matter consisted of Chamberlain's obtaining of a single sentence written statement from Hale.

The most fundamental difficulty with the Company's position is that the evidence developed at trial demonstrated that the nature of Kimble's conduct in accepting and retaining maintenance logs was far from obvious. Indeed, considerable and persuasive evidence indicated that Kimble's behavior in this regard was not objectionable. It will be recalled that the Company's position, in the words of its counsel, is that Kimble's access was terminated, "only after the company had learned that Mr. Kimble had removed *company* maintenance logs from the company's property without prior authorization." [Emphasis supplied.] (Tr. 16-17.) I find that the evidence does not support this assertion. Instead, the evidence shows that Kimble removed Hale's copies of maintenance logs from the company's property.

In reaching the conclusion that the logs in question were actually Hale's copies, I note that there are two persons who have direct knowledge as to this issue. The first such individual is Hale's immediate supervisor, Cooper. Crowell testified that Cooper was the custodian of maintenance logs submitted by the two maintenance men. In fact, in the past Crowell had examined such logs in a file kept in Cooper's office. It is noteworthy that Cooper was not called as a witness. Counsel for the Company asked Crowell if Cooper was still employed by the Company. Crowell stated that he was no longer so employed. Counsel did not pursue this further. There was no indication that Cooper was unavailable to testify. It is apparent that Cooper's testimony would be central to the Company's contention that Hale had improperly kept

his maintenance logs in his toolbox instead of submitting them to his supervisor. Such testimony would be essential in establishing that Kimble's removal of the logs was an unauthorized taking of company property.

5           The Board has long held that an adverse inference may be drawn against a party who, absent adequate justification, fails to call a witness whose testimony may reasonably be assumed to be favorable to its position. In *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, at fn. 1 (1977), the Board approvingly cited a treatise describing this principle, noting that,

10                         where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. [Citation omitted.]

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See also, *Daikichi Corp.*, 335 NLRB 622, 622 (2001). Based on the importance of Cooper's knowledge regarding Hale's logs and the Company's complete failure to explain why he was not called to testify, I infer that his testimony would not have supported the Company's contention that the logs Kimble obtained were property of the Company and not his own copies.

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In concluding that the logs possessed by Kimble were actually his own copies, I place primary weight upon the testimony of the other individual who would have been knowledgeable regarding the logs, Hale.<sup>22</sup> I found Hale's testimony regarding the logs to be credible. As a retired employee, he had no ax to grind. From his demeanor and presentation as a witness, I conclude that he was reluctant to become involved and had no particular desire to favor either party's cause.

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Hale testified that it was his practice to use the office copy machine to make a duplicate of his maintenance logs.<sup>23</sup> He would place one copy in his supervisor's mailbox and store the other in his own toolbox. He also reported that company officials knew that he kept copies of the logs for his own use. Significantly, he testified that, with regard to his own copies of maintenance logs,

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35                         there was times that Randy Cooper come to me and asked me to make some copies of mine because they have misplaced theirs, so they'd come to me and ask me to make some more copies and give it to them on account of a, an inspection is coming in or something like that.

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(Tr. 144.) When counsel for the General Counsel asked Hale who owned the logs that Kimble had obtained, his succinct answer was, "[m]e, they belong to me." (Tr. 144.) Beyond this, Hale presented a convincing explanation as to why he took the trouble to keep copies of the logs that he submitted to Cooper. He noted that the Company ordered spare parts for its machines based on a review of the contents of the maintenance logs. He went on to recount that on

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<sup>22</sup> As counsel for the General Counsel has observed, it is interesting to note that the two key individuals with knowledge concerning these logs, Cooper and Hale, were both no longer employed by the Company. Despite this, the General Counsel produced Hale's testimony.

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<sup>23</sup> Hale also testified that he had great difficulty in preparing the entries on the logs. He took the logs home, and his wife spent much time and effort assisting him with this chore.

occasion,

5 we'd never get the parts and then, then it'd come back and they'd jump on me because we didn't have the parts and I'd have a copy of where I ordered parts to prove that I did, you know.

10 (Tr. 145.) In fact, Hale testified that he always made copies of his logs prior to placing them in Cooper's mailbox. Additionally, Hale also testified that he specifically told Kimble that the logs he was giving to him from his toolbox were "a copy of mine."<sup>24</sup> (Tr. 161.) When asked if he thought he had done anything wrong in giving the logs to Kimble, he responded,

15 [n]o, I mean, I, I mean I thought they were mine, you know, I mean, it was my copies, you know.  
(Tr. 170.)

20 The uncontroverted evidence from a witness I found to be an impartial source shows that the logs that Hale gave to Kimble were copies he kept in his toolbox as a form of insurance in order to address questions regarding problems with availability of spare parts for the machines. Because those copies were also useful proof that he had been preparing the logs as required in his job, he gave them to Kimble to assist in his defense against an allegation that he had been derelict in this regard.

25 I recognize that the fact that the Company's position that Kimble accepted custody of the company's copies of the logs is inaccurate, standing alone, does not establish that its defense is pretextual. The Board has held that an employer's failure to prove that a discharged employee had engaged in the misconduct alleged does not demonstrate pretext. It noted that an employer's defense could be sustained even if it mistakenly assumed misconduct so long as it held a good faith belief that the misconduct had occurred and that this mistaken belief was the actual motivating reason for taking adverse action against the employee. See, *Doctor's Hospital of Staten Island, Inc.*, 325 NLRB 730, fn. 3 (1998), and *McKesson Drug Company*, 337 NLRB No. 139, fn. 7 (2002). In this case, I find that the employer did not have such a good faith belief and did not rely on Kimble's asserted misconduct in denying him access.

35 As counsel for the General Counsel compellingly observes,

40 here the evidence establishes lack of a genuine investigation into the misconduct alleged. The entire investigation comes down to a one-sentence written statement by a witness who can neither read nor write proficiently.

(GC Br. at p. 26.) It was Chamberlain who took the lead in obtaining this statement from Hale.

45 <sup>24</sup> There are indications that Cooper failed to properly keep and store the maintenance logs. It is significant that when Crowell demanded the logs, Cooper was also unable to produce those prepared by the other maintenance man, Ward. Furthermore, Kimble only had logs dated from November 15, 2001 through October 9, 2002. Crowell asked Cooper for logs in August 2003. Cooper was unable to produce any logs at all. Kimble's possession of logs dating from 2001-50 2002 does not in any way explain Cooper's inability to produce logs prepared after October 2002.

Yet, she conceded that while working with Hale to prepare the statement, she did not ask him why he gave logs to Kimble, where he obtained these logs, and whether they were the company's copies of the logs.

5           The peculiarly limited nature of the Company's investigation is also highlighted by the failure to take action against Hale. After all, if Kimble's acceptance of the logs was an infraction, surely Hale's conduct in providing them to Kimble was at least as serious a breach of the rules of conduct. Despite this, both Hale and Crowell agreed that Hale was not subject to any discipline arising from this purported misconduct. Crowell presented two explanations for this. 10 First, he noted that he had verbally reprimanded Hale by questioning him "intensely" about his conduct. (Tr. 207.) This is unconvincing. Asking questions is not the same as verbally admonishing an employee for misbehavior. Furthermore, the Company's disciplinary rules require that, "[v]erbal warnings are documented in the employee's personnel file as they occur." (R. Exh. 2., Employee Discipline, par. 4.) There is no such documentation in Hale's file.

15           In explaining the disparity in treatment between Kimble and Hale, Crowell also contended that the Company failed to discipline Hale because Hale was about to retire. This argument also fails to withstand scrutiny. Hale, an employee who was in active service with the Company, was not disciplined because he was going to retire in the near future. Kimble, an 20 employee who had already been discharged, was disciplined arising out of the same incident. As counsel for the General Counsel puts it,

25                           [i]f indeed Kimble engaged in extraordinary, serious misconduct as claimed, no amount of goodwill due a retiring employee would spare Hale from discipline [for the same misconduct]. Respondent did not discipline Hale precisely because he violated no rules, and neither did Kimble. The very wide disparity in the treatment of Kimble and Hale is demonstrative of unlawful motivation and pretext.

30 (GC Br. at p. 25.)

35           In addition to this suspicious disparity in treatment of the two employees alleged to have participated in this workplace infraction, I also note the similarly suspicious departure from the Company's established disciplinary procedures set forth in the collective-bargaining agreement. Art. XIX, No. 13, of that agreement provides,

40                           [a]ll disciplinary action must be issued to the employee by the Company within three (3) working days of the alleged violation; otherwise no discipline can be issued. The employee shall be provided a copy of any disciplinary action.

45 (GC Exh. 2.) Of course, it is appropriate to interpret this language to mean that the Company must issue discipline within 3 days of learning about an alleged violation. Viewed in the best light, the Company completed its investigation by obtaining Hale's statement on August 6. Kimble was not informed of any adverse employment action until October, a period vastly in excess of the allotted 3 days. In addition, he was never provided with a copy of any disciplinary action as also required by the agreement. The complete departure from established protocol is 50 probative evidence of irregularity motivated by unlawful animus against Kimble arising from his decision to arbitrate his grievance and from his continuing access to the facility to engage in union business.

Based on the direct and circumstantial evidence just detailed, I find that the General Counsel has met his burden of showing that Kimble engaged in protected union activities, that the Company was aware of Kimble's activities, and that a substantial motivating factor in the decision to deny access to Kimble 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 action 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 action 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),

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.

337 NLRB 1120, 1126.

In the present case, I specifically find both that Kimble did not in fact remove the Company's copies of records without authorization and that the Company did not rely on Kimble's possession of maintenance logs in deciding to terminate his access to its facility. Instead, it relied on unlawful motives stemming from his invocation of his contractual right to arbitration of his grievance and his participation in union activities as unit president. 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,

[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.

340 NLRB No. 56, slip op. at p. 2. Here, even if viewed in a light favorable to the Company, the asserted reason for the adverse action taken against Kimble was pretextual. In other words, even if one assumes that Kimble's behavior in accepting Hale's copies of logs was somehow wrongful, it did not form the actual basis for the Company's actions against him. Because the evidence demonstrates that the real basis for the Company's decision to belatedly bar Kimble from further access to its facility was animus arising from its displeasure regarding his protected activities, application of the pretext method of analysis results in a finding that the Company's

action was taken in violation of Section 8(a)(3) of the Act.

2. *The denial of access as a violation of Section 8(a)(1)*

5 The General Counsel alleges that, apart from being an instance of unlawful discrimination, the denial of access to Kimble also represented an independent violation of the rights guaranteed by Section 8(a)(1) of the Act. Analysis of this contention begins with recognition that Kimble was engaged in protected concerted activity.

10 I have already found that Kimble engaged in a variety of union activities, including representation of Hale concerning a warning he had received for deficient performance of his duties as maintenance man and the prosecution of his own grievance arising from his discharge for deficient performance of his duties as a production worker.<sup>25</sup> The Board has observed that it is

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well-established Board law that a steward is protected under the Act when presenting a grievance to an employer. Thus, as was stated in *Clara Barton*,<sup>26</sup> a steward is protected by the Act “even if he exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure.” [Footnote omitted.]

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25 *The Union Fork and Hoe Co.*, 241 NLRB 907, 908 (1979). In this case, Kimble’s receipt of maintenance logs from Hale was an act performed entirely within the res gestae of the protected activity of assisting Hale in the preparation of his defense against an accusation of work-related misconduct.

30 Although it is clear that Kimble was engaged in concerted activity, the Company contends that he lost the benefit of the Act’s protection because he was guilty of serious misconduct. That misconduct consisted of his acceptance and retention of company property, the maintenance logs. I have already determined that Kimble’s conduct in this regard is far less serious than the Company suggests. Kimble did not acquire possession of the company’s copies of these logs. Instead, he accepted Hale’s own copies, documents that Hale collected for the very purpose of protecting himself against allegations of malfeasance. While it is far from clear that acceptance of Hale’s own copies of the logs represented any misconduct at all, for purposes of further analysis, I will accept the Company’s assertion that Kimble’s retention of such documents was improper.<sup>27</sup>

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40 <sup>25</sup> At trial, the Company sometimes appeared to suggest that Kimble acquired the logs with an eye to using them with reference to his own performance problems, not Hale’s. The record refutes this. In Hale’s written statement drafted with Chamberlain’s assistance, he states that he gave the logs to Kimble “because of issues of maintenance non-performance.” (GC Exh. 11.) Maintenance issues would be those related to Hale’s job, not Kimble’s production work. Management’s understanding of this was made clear in an e-mail from Chamberlain to Begany wherein she reported that Kimble obtained the logs from Hale, “after the Maintenance employees were given a verbal warning.” (R. Exh. 8.) This fully corroborates the testimony of Hale and Kimble as to the reasons for Hale’s transfer of the logs to Kimble.

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<sup>26</sup> *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976).

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<sup>27</sup> The Company does not contend that the documents contained trade secrets, product information, or other material of significance beyond simply providing information about the

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In evaluating the seriousness of misconduct by Kimble while representing Hale, I will apply the standards enunciated by the Board, keeping in mind their underlying rationale. The Board has held that,

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[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is [disciplined] for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service. [Footnotes omitted.]

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*Consumers Power Co.*, 282 NLRB 130, 132 (1986).

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As counsel for the Company recognizes, most of the precedents addressing this question involve violent misbehavior, abusive language and conduct, or profanity. As recent examples, see, *Aluminum Co. of America*, 338 NLRB No. 3 (2002) (use of profanity so severe as to forfeit employee's protection under the Act) and *Nynex Corp.*, 338 NLRB No. 78 (2002) (aggressive conduct that disrupted work activity leading to loss of protection under the Act). Because there is no contention that Kimble engaged in any such misconduct, these precedents are of limited value. However, there are a number of prior decisions that involve circumstances bearing more similarity to Kimble's behavior.

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In *Roadmaster Corp.*, 288 NLRB 1195 (1988), enf. 874 F.2d 448 (7th Cir. 1989), a union grievance committeeman signed other employees' names to grievance forms. He did this because he was unable to contact the employees and was concerned that the filing deadline would pass. The company terminated him for violating a rule prohibiting falsification of documents. The Board found that the company's decision violated Section 8(a)(1) because the grievance committeeman's acts were committed within the *res gestae* of the grievance procedure, appeared to have been reasonable actions "when attempting to ensure that employee's grievances were processed," and were not taken with intent to deceive the employer. 288 NLRB at 1197. As a result, the conduct "was neither extraordinary, obnoxious, nor wholly unjustified, and did not cause his grievance-filing activities to lose their protected character." 288 NLRB at 1197.

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Recently, an administrative law judge addressed another issue bearing similarity to Kimble's situation. A union steward was discharged for refusing to give management a disposable camera that he had used to take photographs of the workplace. He had taken the photographs in order to preserve evidence related to a grievance. The judge found that the steward's conduct was not so egregious or offensive as to forfeit protection of the Act. *Wells Lamont, Inc.*, 2002 WL 415641 (NLRB Div. of Judges) (2002).

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A case that bears even greater similarity to the situation under consideration is *The Union Fork and Hoe Co.*, *supra*. In that case, a steward was assisting an employee regarding a

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repair history of the production machines and the work activities of the maintenance men. Thus, Kimble's possession of these records did not violate any confidentiality interest of the Company.

controversy over the amount of pay for certain work. A meeting with a supervisor was held in the supervisor's office. The employee's timesheet was attached to a clipboard in that office. During a heated discussion of the issue, the employee grabbed the timesheet and gave it to the steward. The steward left the office, taking the timesheet with him. The steward later gave the timesheet to the employee, who told the supervisor that he had destroyed it. The Company discharged the steward. The Board ordered reinstatement, concluding that the steward's conduct did not cross "a line beyond which employees may not go with impunity while engaging in protected concerted activities." 241 NLRB at 908.

I discern from these precedents that, absent violent, profane, or abusive misbehavior, the Board will find that the vital interests embodied in Section 7 of the Act will often trump an employer's desire to enforce technical workplace rules. In my view, such is the case when a union official improperly receives possession of an employee's copies of routine company documents during the course of representing that employee in a workplace dispute. Such conduct does not rise to the level of excess that would forfeit the protection of the Act. Even assuming Kimble did something wrong, his conduct was directly connected to his union activity on behalf of Hale, was not objectively unreasonable, and was not so obnoxious or excessive as to take him outside of the Act's embrace. As a result, I find that when the Company decided to terminate his access to the facility for the purported reason that he had improperly obtained maintenance logs during the course of representing a bargaining unit member in a workplace dispute, it engaged in an independent violation of Section 8(a)(1) of the Act.

### 3. *The denial of access as a violation of Section 8(a)(4)*

The General Counsel contends that the Company's denial of access to Kimble constituted a violation of Section 8(a)(4) of the Act. That Section prohibits discrimination against an employee because he or she has "filed charges or given testimony" under the Act. The Board has construed this provision liberally in order to protect against coercion designed to frustrate implementation of the Act's remedial purposes. *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001). Assessment of purported violations of Section 8(a)(4) is performed by using the *Wright Line* test. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).

Because the analytical structure employed is identical to the process already utilized to assess the Company's conduct with reference to Section 8(a)(3) of the Act, it is unnecessary to repeat the initial steps in detail. I have already found that Kimble engaged in protected union activities and that the Company was aware of his participation in such activities. Furthermore, when the Company revoked Kimble's access to the facility, it imposed an adverse action against him, severing virtually his last remaining link to the bargaining unit in which he served as Unit President.

At the next step of the analysis, I must determine whether a nexus exists between Kimble's pursuit of remedial assistance from the Board and the Company's decision to deny him access to the plant. Simply put, the General Counsel "has the initial burden of proving that the employee's protected activity was a motivating factor in the employer's action." *McKesson Drug Co.*, supra, slip op. at p. 2. In attempting to satisfy this burden, counsel for the General Counsel relies on the timing of the Company's decision. Specifically, in his opening statement counsel for the General Counsel asserted that the denial of access violated Section 8(a)(4),

because the denial [of access] occurred soon after the region, region 14, that is, notified the respondent that Clarence Kimble's unfair labor practice charge was being deferred to contractual grievance arbitration proceedings.

(Tr. 10.) In his post trial brief, counsel repeated this line of reasoning, noting that, “Chamberlain told Kimble he was denied access, in early October, barely a week after Respondent would have received notice of deferral.” (GC Br. at p. 14.)

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While I have certainly relied, in part, on this sort of circumstantial evidence in finding unlawful motivation with respect to the alleged violation of Section 8(a)(3), I cannot conclude that the evidence of timing supports a similar conclusion when examining the issue of employer motivation under Section 8(a)(4). The difficulty with the General Counsel’s argument is that, when viewed in its full context, the chronology fails to support an inference that the employer terminated Kimble’s access in response to his participation in proceedings before the Board.

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Kimble’s involvement with the Board commenced on June 10, the date on which the Union filed an unfair labor practice charge alleging that the Company’s decision to suspend Kimble’s employment was unlawfully motivated by a desire to “discourage membership” in the Union. (GC Exh. 3.) Three days later, the Company discharged Kimble.<sup>28</sup> Shortly thereafter, as authorized in the collective-bargaining agreement, Kimble filed a grievance contesting his discharge. On July 8, the Company received a letter from Berry advising that Kimble retained his position with the Union and that the Union “expected that he will be able to continue to conduct Union business, with proper notification, during this time.” (GC Exh. 6.)

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During the remainder of the summer, Kimble pursued his grievance through the contractual process and continued to receive permission to enter the Company’s facility to prosecute this grievance and to conduct union business by meeting with bargaining unit members. On September 15, the Union formally requested arbitration of Kimble’s grievance. I have already found that this action prompted the Company to respond by terminating Kimble’s access to the facility. I based this conclusion on the direct evidence of Chamberlain’s statement to this effect, and on circumstantial evidence as discussed earlier in this decision. Ultimately, I found that the denial of further access to Kimble was made in retaliation for his demand for arbitration, a demand that caused the Company to incur expenses related to arbitration, experience potentially significant delays in accomplishing its objective of terminating Kimble’s employment, and requiring that it prove to an outside arbitrator that its actions were justified and that it had acted in good faith. In my view, direct and circumstantial evidence demonstrated that there was a clear nexus between the burdens and risks imposed on the employer by the demand for arbitration and the employer’s decision to terminate Kimble’s access shortly thereafter.

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Ten days after the Union demanded arbitration of Kimble’s grievance, the Regional Director issued a letter informing the parties of his decision to defer unfair labor practice proceedings in light of the arbitration process.<sup>29</sup> (GC Exh. 9.) In order to accept the General

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<sup>28</sup> The General Counsel has alleged that Kimble’s discharge was unlawfully motivated by his union activities. The Regional Director has deferred this issue in favor of arbitration of Kimble’s discharge. At trial before me, all parties agreed that the merits of the allegation of unlawful animus leading to Kimble’s discharge are not before me. (Tr. 14.) No evidence regarding the events leading to Kimble’s discharge was presented in this trial and I have not considered any issue related to that discharge.

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<sup>29</sup> In drafting this letter, the Regional Director adopted the specified form language contained in the Casehandling Manual, Part One, Unfair Labor Practice Proceedings, sec. 10118.6. This is noteworthy since it demonstrates that the representations made in the Regional Director’s letter reflect the Board’s authorized policies and procedures.

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Counsel's contention that this letter prompted the Company to retaliate against Kimble in violation of Section 8(a)(4) of the Act, I must logically find that the Company's officials would have been displeased by the Regional Director's decision to suspend the Board's formal processes in deference to the parties' contractual arbitration mechanism. I draw the opposite  
 5 conclusion. In my view, a fair reading of the parties' tactical litigation strategies demonstrates that the Company would not have been expected to take issue with the Regional Director's decision and may reasonably be assumed to have been pleased with that decision.

The record does not reveal whether any party initiated a request that resulted in the  
 10 Regional Director's decision. It is, however, clear that the Company was an active participant in the decision-making process regarding deferral. In his letter, the Regional Director lists his reasons for ordering deferral. Among the reasons cited was the fact that,

[t]he Employer is willing to process a grievance concerning the  
 15 above allegations in the [unfair labor practice] charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.

(GC Exh. 9, p. 1.) From this, it is evident that the Company was an active collaborator in the  
 20 decision to grant deferral, having agreed to the preconditions needed to justify such deferral.

In further support of a conclusion that the decision to defer was not a decision that the  
 25 Company would have viewed in a negative light, I note that the Regional Director's letter does not inform the Company of any right to appeal the deferral decision. Instead, the letter describes in detail the "**Charging Party's Right to Appeal.**" [Emphasis in the original.] (GC Exh. 9, p. 2.) This certainly suggests that the decision to defer was not an action that would have been expected to arouse the Company's ire against Kimble.

In fact, the decision to defer appears more likely to have been viewed by management  
 30 as a tactical victory, reducing the Company's costs of litigation and making it unlikely that the Company would have to defend its decision to terminate Kimble in two separate forums. As the Board noted in its leading case regarding deferral to arbitration,

[t]he long and successful functioning of grievance and  
 35 arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal,  
 40 and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute.

*Collyer Insulated Wire*, 192 NLRB 837, 843 (1971). By ordering deferral to arbitration, the  
 45 Regional Director made it far less likely that the Company would find itself enmeshed in that complex administrative and judicial process.

I cannot conclude that the General Counsel has met his burden of showing that a nexus  
 50 existed between the timing of the deferral decision and the termination of Kimble's access. There is no allegation that the Company took adverse action against Kimble due to his decision to file a charge in June. The Regional Director's decision in September to defer action on that charge was not adverse to the Company's interests. Instead, the deferral was likely to spare the Company from additional expenses of litigation and from the need to justify its conduct in

proceedings before a formal administrative adjudicatory body. As a result, I do not find that it provoked any retaliatory response. Instead, as I have already explained, I find that the timing of the Company's decision to terminate Kimble's access was significant for an entirely different reason, its displeasure that Kimble had chosen to escalate his prosecution of his contractual grievance by demanding arbitration, a process that would force the Company to incur expenses and delays and would require the Company to justify its conduct and demonstrate its good faith.

Because the General Counsel has failed to establish a logical nexus between the the Union's filing of an unfair labor practice charge that culminated in the Regional Director's decision to grant deferral and the Company's decision to terminate Kimble's access to its facility, I do not conclude that the Company has violated Section 8(a)(4) of the Act.

4. *The denial of access as a violation of Section 8(a)(5)*

Finally, the General Counsel contends that the termination of Kimble's access to the Company's facility was made in violation of Section 8(a)(5) of the Act. That section imposes a bargaining obligation on an employer once its employees have decided upon representation by a union. The Board has held that, due to the nature of this obligation,

[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).

In this case, Kimble's right of access to the facility was established by the parties' collective-bargaining agreement. That agreement was in effect at all times material to this issue. On or about October 1, the Company decided to terminate Kimble's access. It communicated this decision to Kimble and Berry in two ways. On October 1, Begany sent a letter to Berry advising him that it was "inappropriate" for Kimble to continue to visit the facility. (GC Exh. 8.) At virtually the same time, Chamberlain spoke to Kimble by telephone and informed him that he was no longer allowed on the Company's premises. Berry testified that he was never given notice or an opportunity to bargain about the termination of Kimble's access.

The Company does not and cannot contend that it had a contractual right to terminate Kimble's access. For example, counsel for the General Counsel questioned Crowell regarding the Company's rationale for continuing to permit access by Kimble after he had been terminated from employment and even after it had learned that he came into possession of maintenance logs. In response, Crowell acknowledged that

[u]ntil Ms., Ms.—Begany restricted his, his access to the plant, we abided by the contract and by the clause . . . he was a union president and by contract when he called in and wanted to come in that, by contract we'd abide by that.

(Tr. 210.) Indeed, on redirect examination Crowell reiterated this point, noting that

[u]p until Ms. Begany sent the letter restricting his entrance, I still acted within the guidelines of the contract allowing him, per

his request, to visit the plant.

(Tr. 215.) From this, it is clear that the Company acknowledges that Kimble retained his contractual right of access.

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Apart from a contractual right of access, the Board has held that unilateral imposition of restrictions on access by union officials may violate the statutory obligation to bargain. In *Peerless Food Products, Inc.*, 236 NLRB 161 (1978), the employer unilaterally changed its very liberal policy permitting virtually unlimited access to a nonemployee union business representative. In finding that such a unilateral change could violate Section 8(a)(5), the Board held that, “[a]lthough the [employer’s] policy d[id] not derive from the express terms of the collective-bargaining agreement,” past practice had “elevate[d] it to a term of employment not susceptible to unilateral change.” 236 NLRB at 161.<sup>30</sup> Obviously, this would be even clearer in a case where the access policy had been enshrined in the parties’ collective-bargaining agreement. I conclude that the denial of access was a subject falling within the Act’s bargaining obligation requirement.

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The Company raises two arguments in defense of its unilateral decision to terminate Kimble’s preexisting right of access. First, counsel for the Company notes that,

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Berry admitted that the Charging Party could have appointed some other individual to the position of Unit President. There is no evidence that Respondent would have failed to recognize whoever the Charging Party appointed as Unit President, other than Kimble.

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(R. Br. at p. 12.) It follows that counsel is suggesting that the Company would have granted access under the collective-bargaining agreement to any other person appointed as unit president. This line of reasoning is unacceptable. Even if one were to assume that the Company held a good-faith belief that elimination of Kimble’s access was necessary, such belief would not obviate the need for notice and opportunity to bargain. As the Board observed in *Peerless*,

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[p]lainly, that Respondent may have perceived some business need or necessity, or that one may have in fact existed, for changes in its policy of allowing [the union’s business representative] unlimited access to the plant does not relieve Respondent of its statutory obligation to bargain with its employees’ representative about that matter. [Citation omitted.]

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236 NLRB at 161. Furthermore, the suggestion that the Union should simply have removed Kimble and appointed another unit president is repugnant to the policies underlying the Act. The Board has noted that the focus of an employer’s refusal to bargain is on the “injury to the union’s status as bargaining representative.” *Great Western Produce, Inc.* 299 NLRB 1004, 1005 (1990). It is difficult to envision a greater injury to that status than an employer’s action in

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<sup>30</sup> In *Peerless*, the Board went on to find that the changes in access were so insignificant that they did not rise to the level of a breach of the bargaining obligation. By contrast, in this case the Company has denied all access to the Union’s unit president in specific contravention of a provision of the collective-bargaining agreement. In my view, the Board would deem this to be a significant unilateral change.

seeking to force the union to remove its duly appointed unit president and to replace him with someone more acceptable to the employer.

5 The Company's second defense to the alleged violation of Section 8(a)(5) is the assertion that the Union waived its right to bargain about the termination of access for the unit president. Counsel for the Company observed that,

10 [i]t is well settled that when an employer informs a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.

15 (R. Br. at p. 12.) The first difficulty with this argument is that it ignores the parties' collective-bargaining agreement. That agreement specifically negates any obligation of the Union to request bargaining about a subject that was covered in the agreement. As the parties' contract put it,

20 [e]ach party waives any obligation during the term of this Agreement to negotiate further or bargain collectively about any subject or matter, which is specifically referred to or covered by this Agreement.

(GC Exh. 2, Art. XX, par. 1.) Thus, it is not the Union but rather the Company that has waived any right to collective-bargaining about the unit president's access to the Company's facility.

25 Apart from the contractual difficulty with the Company's waiver defense, the Board's precedents demonstrate that waiver would not be applied in these circumstances. The Board's position was comprehensively outlined in *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), and the many cases cited therein. It was noted that unions do have an obligation to make timely requests for bargaining. However, this duty only attaches when an employer has communicated its notice of a proposed change "sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain." *Pontiac Osteopathic Hospital*, supra, citing language from *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982). Otherwise, the change is simply a "*fait accompli*," and not the type of notice "upon which the waiver defense is predicated." *Pontiac Osteopathic Hospital*, supra, citing language from *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972).

40 In this case, the Company provided notice orally and by letter at the same time as the denial of access became effective. There was simply no opportunity for the Union to make a timely demand for bargaining. It is apparent that the Company's efforts to transmit its decision regarding Kimble's access were simply informational. Under such conditions, the Union had no duty to seek to bargain regarding the *fait accompli*.

45 I conclude that the complete termination of Kimble's contractual right of access to the Company's facility was a unilateral change in a term and condition of employment invoking the statutory duty to provide notice and opportunity to bargain. I further conclude that the Union did not waive its right to such notice and opportunity to bargain. As a result, I find that the Company's failure to provide reasonable notice and an opportunity to bargain about the termination of Kimble's access to its facility violated Section 8(a)(5) of the Act.

#### 50 Conclusions of Law

By telling its employee, Clarence Kimble, that his access to its facility was being

terminated because he had a pending arbitration, and by terminating such access, the Respondent has been interfering with, restraining, and coercing employees in violation of Section 8(a)(1) of the Act. By terminating Kimble's access to its facility 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 unilaterally terminating Kimble's access to its facility without giving the Union reasonable 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 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 action designed to effectuate the policies of the Act.

The Respondent, having unlawfully terminated Clarence Kimble's access to its facility by a letter dated October 1, 2003 (GC Exh. 8.), it must be ordered to rescind this letter.

The Respondent, having unlawfully imposed a unilateral change in the terms and conditions of employment of its employees, it must be ordered to provide reasonable notice and meaningful opportunity to bargain before making any proposed changes in the hours, terms, and conditions of employment for its employees in the bargaining unit.

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 recommended<sup>31</sup>

### ORDER

The Respondent, C & F Foods, Inc., of Sikeston, Missouri, its officers, agents, and representatives, shall

#### 1. Cease and desist from

(a) Informing Clarence Kimble or any other employee that his or her access to its facility has been terminated because the employee has a pending arbitration against the Company.

(b) Terminating Clarence Kimble's access to its facility or otherwise discriminating against him or any other employee for supporting, engaging in activities on behalf of, or seeking assistance from the United Steelworkers of America, Local 7686, AFL-CIO, CLC, or any other union.

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<sup>31</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Changing the hours, terms, and conditions of employment for its employees in the bargaining unit described below without first affording the United Steelworkers of America, Local 7686, AFL-CIO, CLC, reasonable notice and meaningful opportunity to bargain over the proposed change.

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

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

(a) Within 14 days from the date of this Order, rescind the letter dated October 1, 2003, terminating Clarence Kimble's access to the Company's Sikeston facility.

(b) Notify and provide the United Steelworkers of America, Local 7686, AFL-CIO, CLC, with meaningful opportunity to bargain before making any proposed change in the hours, terms, and conditions of employment for employees in the following bargaining unit:

All production and maintenance employees employed by the Company at its Sikeston, Missouri, facility, excluding all clerical, professional, managerial, and technical employees, guards, and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, post at its facility in Sikeston, Missouri, copies of the attached Notice marked "Appendix."<sup>32</sup> 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 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 October 1, 2003.

(d) 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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<sup>32</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

5 Dated, Washington, D.C.

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Paul Buxbaum  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

20 WE WILL NOT tell Clarence Kimble or any other employee that they are no longer permitted  
access to our facility because they have an arbitration hearing pending against us.

25 WE WILL NOT terminate Clarence Kimble's access to our facility or otherwise discriminate  
against him or any other employee for supporting, engaging in activities on behalf of, or seeking  
assistance from the United Steelworkers of America, Local 7686, AFL-CIO, CLC, or any other  
union.

30 WE WILL NOT change our rules governing access to our facility by union representatives or  
change any other hours, terms, and conditions of employment without first giving reasonable  
notice and a meaningful opportunity to bargain to the United Steelworkers of America, Local  
7686, AFL-CIO, CLC.

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.

35 WE WILL, within 14 days from the date of the Board's Order, rescind our letter terminating  
Clarence Kimble's access to our facility.

40 WE WILL, on request, bargain with the United Steelworkers of America, Local 7686, AFL-CIO,  
CLC, and put in writing and sign any agreement reached on hours, terms, and conditions of  
employment for our employees in the following bargaining unit:

45 All production and maintenance employees employed  
by the Company at its Sikeston, Missouri, facility, excluding  
all clerical, professional, managerial, and technical employees,  
guards, and supervisors as defined in the Act.

C& F Foods, Inc.

(Employer)

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

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

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.

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