

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

CINCINNATI COCA-COLA BOTTLING COMPANY,
A DIVISION OF COCA-COLA ENTERPRISES, INC.

and

Cases 9-CA-39507
9-CA-39623
9-CB-10751

BOTTLE BEER DRIVERS, BEER AND SOFT DRINK
BOTTLERS AND ALLIED WORKERS, LOCAL UNION
NO. 1199, AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Jonathan D. Duffy and Patricia Fry, Esqs.,¹
for the General Counsel.

William G. Trumpeter, Esq.,
(*Miller & Martin, LLP*),
of Atlanta, Georgia, for the Respondent Company.

Julie C. Ford, Esq.,
(*Logothetis, Pence, & Doll*),
of Dayton, Ohio, for the Respondent Union.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of an order consolidating cases and a consolidated complaint and notice of hearing (complaint) issued by the General Counsel on November 21, 2002,² based on CA charges filed by the Respondent Union (the union) on August 12 and September 23, and a CB charge filed by the Respondent Employer (the company) on September 5.

The alleged unfair labor practices (ULPs) in this case were triggered by a series of events that occurred on the evening of August 8, in connection with shop steward and relief operator Danny Hatfield's circulation of an "open letter" (the letter)³ among other employees for signature.

The complaint alleges that the company committed the following violations of the National Labor Relations Act (the Act): (1) since on or about April 1, maintaining and enforcing an unlawful no solicitation rule, and maintaining an unlawful no distribution rule, thereby

¹ Ms. Fry represented the General Counsel in the CA case, while Mr. Duffy represented the General Counsel in the CB case.

² All dates are 2002 unless otherwise indicated.

³ GC Exh. 12.

violating Section 8(a)(1) of the Act; (2) on or about August 9, suspending Hatfield because he allegedly violated such no solicitation rule and engaged in concerted activity, thereby violating Section 8(a)(1) of the Act;⁴ and (3) since September 4, failing and refusing to furnish the union with information it had requested, which was necessary for, and relevant to, the union's performance of its duties as the collective-bargaining representative of unit employees. Specifically, the company is alleged to have failed and refused to furnish the union with the names of witnesses and times of the specific allegations on which it relied in determining to suspend Hatfield on August 9, thereby violating Section 8(a)(1) and (5) of the Act.

The union is charged with violating Section 8(b)(3) of the Act by, since August 9, failing and refusing to furnish the company with information that it had requested which was necessary for and relevant to the company's investigation of Hatfield's activity and for determining whether the company should settle a grievance filed on Hatfield's behalf by the union. Specifically, the union is alleged to have failed and refused to furnish the company with the letter Hatfield circulated.

Pursuant to notice, a trial was held before me in Cincinnati, Ohio, on February 11, 12, and 13, 2003, at which the General Counsel, the company, and the union were represented by counsel.⁵ All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel, the company, and the union filed posthearing briefs, which I have duly considered.

⁴ The General Counsel does not allege that the company's disciplinary action against Hatfield was account of union activity in violation of Section 8(a)(1) and (3) of the Act. Although the complaint does not have "protected" before "concerted activity" (paragraph 9(b)), no contention has been raised at any point in this proceeding that circulation of the letter was per se unprotected under the Act.

⁵ The following corrections are made to the transcript:

Tr. 56, L. 12 – change "agreed" to "agrees,"

Tr. 62, L. 12- change "documents" to "document."

Tr. 247, L. 25 – change "accumulative" to "cumulative."

Tr. 268, LL 3 – 4 –change "many" to "any."

Tr. 268, L. 4 – change "forum" to "form."

Tr. 290, L. 8 – change "deiced" to "decided."

Tr. 375, L. 4 – change "In" to "I."

Tr. 489, LL 18 & 22 – change "clansmen" to "Klansmen."

Tr. 539, L. 16 – change "horse" to "hoarse."

Tr. 545, L. 5 – change "clansmen" to "Klansmen."

Tr. 578, L. 16 – change "ask" to "were asked."

Tr. 580, L. 16 – change "relevance" to "reasons."

Tr. 589, L. 20 – change "going not" to "not going to."

Tr. 598, L. 1 – change "so" to "no."

Tr. 601, L. 9- change "field" to "afield."

Tr. 603, L. 7 – change "counter-failing" to "countervailing."

Tr. 624, L. 24 – change "petition" to "partition."

Tr. 677, L. 3 – change "petit" to "partition."

Tr. 714, L. 13 – change "me" to "him."

On the entire record in this case, including my observations of the witnesses and their demeanor, I make the following

Findings of Fact

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The following employees and union shop stewards testified: Hatfield, Mike Lawson, and Daniel Skeans, all called by Ms. Fry in the CA case; and Victor Gamble, called by the union in the CA case.

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The following company representatives testified, listed in order of their positions in the management structure at times relevant to this proceeding:

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1) Troy Ellis, director of operations for Ohio and Kentucky - called by the company. Ellis is responsible for all production, manufacturing, warehousing, and transportation in both states.

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2) Lisa Brown, senior operations manager - called by Mr. Duffy in the CB case (and for a very limited purpose by the company, to wit, the foundation for Respondent Employer's Exhibit 6). According to Ellis, she is, in effect, his second in command over operations. She testified that her primary focus is on the collective-bargaining agreement and grievances.

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3) Garry McGuire, employee relations manager - called by Ms. Fry as an adverse witness under Rule 611(c). McGuire is in charge of human resources for the operations side of the facility, including production, warehouse, fleet, and maintenance.

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4) Bryant Lewis, production manager - called by Ms. Fry as an adverse witness under Rule 611(c), and by the company.

5) Production supervisors Timothy King and John Morgan - called by the company.

Testifying as a representative of the union was Randall Verst, union president and business agent - called by Ms. Fry in her case in chief against the company, by Mr. Duffy in his case in chief against the union, and as an adverse witness by the company.

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Background

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At all times material, the company, a corporation, has been engaged in the manufacture of soft drink products at its Cincinnati, Ohio facility (the facility), which comes under the jurisdiction of the company's Kentucky and Ohio division. The company's status as an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act has not been contested, nor has the union's status as a labor organization within the meaning of Section 2(5) of the Act.

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The facility employs approximately 700 employees, of whom approximately 250 are represented by the union which, since at least 1992 and at all times material, has been the designated exclusive collective-bargaining representative of certain employees, including production and warehouse employees.⁶ There are 5 to 6 union stewards, including Hatfield.

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⁶ The full unit description is set out in Par. 6 of the complaint, GC Exh. 1(g).

The current collective-bargaining agreement is effective by its terms from January 14, 2001, through March 14, 2004.⁷ Negotiations for it were held in early 2001, resulting in no changes in the no strike clause, article 7.⁸

5 The parties stipulated that the company's April 1, 1998, work rules were in effect until new work rules were implemented on January 1, 2003.⁹

10 In approximately late July, union steward Smith and warehouse employee Hawser requested an informal meeting with management concerning various complaints by warehouse employees against their supervisors. During that meeting, management made certain comments deemed denigrating to employees. These comments later circulated among employees and were reported to Verst. Employees also filed numerous grievances raising problems with supervisors and their attitudes.

15 In approximately September 2001, 7 African-American employees (including Cheikh Thaim) and 1 Asian-American employee filed a racial discrimination lawsuit against the company in state court. It remains pending.

20 The production area has a bottle side and a can side. Each side has machine operators (operators), relief operators, and a supervisor. Operators and relief operators are separate classifications, but the same employees can serve in both capacities, since they bid on positions every 3 months and can switch positions as operators or relief operators quarterly. There are a total of approximately 60-75 operators and 4-6 relief operators. On a typical shift, there will be an average ratio of 1 relief operator to 3 operators, but sometimes the ratio can be 1 to 4 or 5.

25 The relief operators' primary function is to relieve the operators on their first and third breaks of 10 minutes each and on their second or "lunch" break of 30 minutes. The order in which the relief operators relieve the operators is basically left up to the employees, with little supervisory interface. There is no set time for breaks for either relief operator or operator, except that an operator's meal break is normally taken within 1-1/2 hours before or after the middle of the shift. Thus, King, Hatfield's supervisor, testified that employees may at times take later (nonmeal) breaks and that a relief operator might not take his last break until 10 p.m. As far as Hatfield was concerned, "Most of the time, he was on his own doing his duties. If he felt like taking a [third] break at 9:30, he could. If he felt like taking it at 10:00, he could. I didn't have a problem with that" (Tr. 628).¹⁰

30 Sometimes, relief operators will take over when an operator is absent or on vacation. When not relieving operators, a relief operator engages in other duties, including setting up machines, keeping them properly supplied, and cleaning up.

40 Machines normally run constantly, but at times there are stoppages. When, a relief operator is relieving an operator, they occasionally converse, sometimes on nonwork subjects, and these conversations do not delay production. Supervisors sometimes stop and talk to an operator while the machine is running, and some of their conversations are not job related. An employee can talk while the machine is loading; in this regard, Hatfield testified without

⁷ GC Exh. 2.

⁸ For ease of reading, Arabic numbers will be used in lieu of Roman numerals when referencing contractual provisions.

50 ⁹ GC Exh. 3 and RE Exh. 1.

¹⁰ King appeared quite candid and sincere, and I fully credit his testimony.

controversion that he has never been told that he is not allowed to talk to other employees as he walks through the plant or while loading up machines. Operators can leave a machine without relief to go to the office to get a battery or to make a quick trip to the nearby restroom.

5 The supervisors' office (the office) is used by both can side and bottle side supervisors. There is a cooler outside the office door, and employees often stop there for drinks. Employees sometimes take breaks in the office, where they may use the phone or get coffee. The door to the office is steel with wire mesh glass in the center. It is locked most of the time but frequently is left propped open. It automatically locks when it is closed.

10 The disciplinary process contained in the 1998 work rules had 5 steps: counseling statement (optional), verbal warning, written warning, suspension, and termination. However, in the context of grievances unrelated to this matter, the company took the position that such a counseling statement did not constitute discipline. See General Counsel's Exhibit 18, containing statements to that effect from Ellis (May 14) and Greg Camarata, labor relations manager (April 10). The 2003 work rules eliminated the counseling statement step.

15 Randall Verst has been president and business agent of the union since January 1, 2000. Before then, he was a shop steward at the facility, where he was employed since June 20 1992. The union represents employees of 11 companies, including Coca-Cola.

The Company's no solicitation no distribution rule

25 Facts regarding the company's no solicitation no distribution rule are not in controversy. The company does not contend that at any time material it has maintained any such policy beyond that which is contained in its work rules and in memoranda entitled such, issued by Human Relations Director Thomasina Kennedy on January 1, 2000, and January 1, 2001.¹¹ Lewis testified that the no solicitation policy Hatfield violated was contained in the 1998 work rules (at page 10, number 7) and in the memorandum of January 1, 2001.

30 In relevant part, the 1998 works rules provided (at page 10):

35 It is the policy of the Company that the unauthorized solicitations by employees . . . upon Company property by or on behalf of any organization or association are strictly prohibited. This prohibition applies . . . to employees on working time. . . . It also covers Soliciting in any form . . . Authorized solicitation by employees would be limited to the main cafeteria during employees (sic) authorized lunch period and would be subject to management approval. It is also the policy of this Company that the distribution of any literature by employees on Company property is prohibited . . .

40 In relevant part, both memoranda provided:

45 Solicitation by any employee is not permitted during the employee's working time or during the working time of any employees being solicited. . . . Because of the problem presented by litter and debris, distribution of literature by employees on Company property is prohibited at all times. . . .

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¹¹ RE Exh. 2 and GC Exh. 9, respectively. The language is identical.

In January, employee Dave Willis received a counseling for violating the company's solicitation policy by selling candy on company property.¹² In connection with the resulting grievance, Verst requested, both orally and in writing, a copy of the current company solicitation policy.¹³ Ellis responded, "In regard to a copy of the work rules that you verbally requested,
 5 please reference the most recent revisions currently on file with the union. Our policies have not changed."¹⁴ Verst testified that the union had on file the 1998 rules but not the 2000 or 2001 memoranda. Further, he testified that he was never told of any no solicitation rule in effect other than that contained in the 1998 work rules. His testimony on this matter was not controverted.

10 The testimony of both manager Lewis and Lawson, who has been an employee at the company for 28 years and a steward since 1982, reflects that the 1998 and 2003 work rules were distributed to employees and posted on the production department bulletin board. The 2000 and 2001 memoranda were posted in the production area but not formally distributed to employees.

15 Regarding the policy under the 1998 work rules, Lawson testified that solicitation could not be done on work time only if it interrupted someone else's work, and former director of operations Skip McGee said that employees could sell things and obtain signatures for political campaigns in the break room and in the work area if they did not interrupt the line. Lawson also
 20 testified that employees are permitted to sell things and talk to other employees in the break room. Supervisor Morgan testified that get-well cards are permitted to be passed around. Skeans, who has been employed for 10 years at the facility and third shift shop steward since January 2000, testified that supervisors vary in strictness in enforcing work rules.

25 The no solicitation no distribution rule was changed in the 2003 work rules, and the General Counsel does not allege that anything in the new policy is violative of the Act.

The open letter

30 The letter which was circulated by Hatfield and other stewards¹⁵ read as follows:

OPEN LETTER TO COCA COLA MANAGEMENT

35 This letter is being written by the below listed members of Teamsters Local Union 1199. We request that the Company allow our fellow members and ourselves to come to work and do our jobs, without being treated with disrespect by management. We have been continually disrespected and
 40 offended by the Company's inflammatory remarks and actions. We as Members have been referred to as inmates of any asylum, animals in a zoo and other recent comparisons. This is repulsive and offensive to all of us. Management's attempt to preface certain statements with a vague reference to public perception is also insulting to our members since the warehouse does not come in direct contact with the public. We have also had to deal
 45 with a Company supervisor cutting up a Union member (sic) personal hat, a Company supervisor cussing at probationary employees, management Inappropriately touching Union members, and a supervisor who has

¹² See GC Exh. 17, in which the supervisor wrote in, "no soliciting on company property."

¹³ GC Exh. 18.

¹⁴ Ibid.

¹⁵ GC Exhs. 7 & 12.

5 admitted to looking under bathroom stalls. ENOUGH!!!! We care about our jobs and take pride in our work but we are paid to work not to be mistreated and insulted . . . The Company has not hesitated to terminate a large number of Union employees and hold them accountable for many alleged things, yet the same accountability has not gone for management. Has the Company motto changed from "Putting your people first" to "Do as I say not as I do"?

10 Verst testified that after receiving various complaints, he drafted a letter, which he discussed with several people (including shop stewards Lawson and Skeans, according to their testimony), before finalizing it. The letter was the finished product. He gave copies to at least 2 stewards, and all stewards subsequently circulated it among employees. On August 12 and 13, in the company parking lot, Verst himself obtained some employee signatures. As a result of this, he received an undated letter from Ellis, accusing him of violating the visitation article in the
15 collective-bargaining agreement.¹⁶

20 Verst further testified that the letter was not put on union letterhead because he did not consider it to be union business; rather, he wrote the letter for the members "to help them express [their] frustrations" (Tr. 331). On cross-examination, he testified that he typed the document just to try to help out the members, and not as union president. He testified that many of the statements imputed to supervisors or management in the letter arose in negotiations, grievance meetings, or at the meeting with Smith and Hawser. I asked Verst when his perception of the letter changed from considering it nonunion to union, and he replied, it was after Hatfield was put on open suspension.
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30 When I asked him if he had any idea what would happen with the open letter once he obtained all of the signatures, Verst replied that he did not have a plan. However, both Skeans and Hatfield testified that they understood that the letter would be presented to company officials.

35 I find disingenuous Verst's attempt to separate the union from the document. He was the one who physically prepared the letter, after input from shop stewards, and he gave it to shop stewards to distribute for signature and then return to him. All of the stewards circulated the letter, and there is no evidence that anyone else did so. Moreover, the letter opens with, "This letter is being written by the below listed members of Teamsters Local Union 1199," and throughout the document there are repeated references to union members. Many of the incidents described in it arose in the context of management-labor interaction. I conclude that a person reading the letter would reasonably have concluded that it was from the union which, as it turned out, was supervisor Morgan's conclusion.
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45 I also find incredible Verst's testimony that he did not know what he would do with the letter once he obtained signatures. Such testimony flies in the face of its first line: "OPEN LETTER TO COCA COLA MANAGEMENT." Aside from this, It would have been senseless for him to have taken the time and effort to prepare and finalize the letter and instruct union stewards to circulate it among employees for signature if he had no plan for taking some subsequent action. Finally, Verst's testimony on this point was contradicted by the testimony of shop stewards.

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¹⁶ RU Exh. 1.

Events of August 8

5 The most important incident that evening occurred in the supervisors' office and involved four people: relief operator Danny Hatfield and operator Victor Gamble (can side), and supervisor John Morgan and relief operator Cheikh Thaim (bottle side). A key participant in what took place, Thaim was out of the country during the hearing and did not testify. None of the parties attempted to subpoena him or motioned to continue the hearing for purposes of securing his testimony.

10 Hatfield has been a union steward for approximately 1 to 1-1/2 years. He has been employed at the facility on the night or second shift (2:30 p.m. to 10:30 p.m.) since July 1993, as an operator or relief operator. On August 8, he was a relief operator on the can side, with King as his immediate supervisor. The other supervisor on duty was Morgan, on the bottle side. Hatfield was responsible for relieving operators Gamble, Ron Monday, and Richard Chaney that evening. Of these individuals, only Gamble testified.

15 Both Hatfield and first shift shop steward Lawson testified that when Hatfield came to work on August 8, Lawson handed him the letter at about 2:30 p.m. He said that Verst had given it to him to get signed and told him to let union members read the letter and sign, if they wished, on the attached sheet. He told Hatfield to do this when he (Hatfield) was on breaks. Hatfield testified that he knew he could get signatures only on break times. No one told him to keep the letter a secret; Lawson told him that management was going to get the letter in a couple of day.

25 Hatfield testified that at about 6 p.m., he gave the open letter to Monday, whom he was relieving for lunch. He asked Monday to read it while he was on lunch and to sign it if he liked. When Monday returned from lunch, he gave Hatfield the letter back. Hatfield went to relieve the next operator, Gamble, at about 6:30 p.m. He told Gamble the same thing about signing and also that anyone else in the lunchroom on lunch break could read and sign it. Gamble corroborated Hatfield's placement of the time this occurred, at about 6:30 p.m., and what Hatfield told him about signing it if he wished. No one else from whom Hatfield solicited signatures testified. Other than hearsay evidence, there is nothing in the record to show that Hatfield said anything different to anyone else, and I decline to find that he did so.

30 Hatfield testified that at about 6 p.m., he gave the open letter to Monday, whom he was relieving for lunch. He asked Monday to read it while he was on lunch and to sign it if he liked. When Monday returned from lunch, he gave Hatfield the letter back. Hatfield went to relieve the next operator, Gamble, at about 6:30 p.m. He told Gamble the same thing about signing and also that anyone else in the lunchroom on lunch break could read and sign it. Gamble corroborated Hatfield's placement of the time this occurred, at about 6:30 p.m., and what Hatfield told him about signing it if he wished. No one else from whom Hatfield solicited signatures testified. Other than hearsay evidence, there is nothing in the record to show that Hatfield said anything different to anyone else, and I decline to find that he did so.

35 Gamble and Morgan both testified about the circumstances of Morgan finding out about the letter and reading it, although there were differences in their accounts. Thus, Gamble testified that after Hatfield relieved him, he ate in the cafeteria and then went to the office to make a telephone call, while still on his lunch break (which ended at approximately 7 p.m.). Thaim was alone in the office and asked what document Gamble had. Gamble gave it to him, saying he could go ahead and read it. Gamble left the letter with Thaim and, as he was leaving, Morgan came in. Gamble returned to his workstation, where Hatfield had been relieving him.

40 Morgan's account was that at between 9:10 and 9:15 p.m., he and Thaim walked into the office, talking about Thaim's relief. Thaim was on work status at the time. Gamble was inside, reading a newspaper. He said that he was on break. There was a letter next to him. Morgan saw that it consisted of 2 pages; a top sheet and a signature sheet. He asked Gamble what it was, and Gamble replied, "union stuff." Morgan said he wanted to read it. Gamble gave the letter to Thaim and told him to make sure it got back to him (Gamble). Gamble then left. Thereafter, both Morgan and Thaim simultaneously read the letter. I conclude that, at this point, Thaim was engaged in union activity on working time, with Morgan's approval, indeed, encouragement. Thaim was never disciplined as a result.

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As to the letter's contents, Morgan testified that it was a typewritten document stating that the company treated employees badly, made reference to supervisors cutting up hats¹⁷ and looking under stalls, and mentioned things that employees had been called, such as animals in a zoo, and inmates in the asylum. The letter stated that "they wasn't [sic] going to take it anymore – they wasn't [sic] going to tolerate it" (Tr. 653). When asked who was not going to take it anymore, he replied, the union. On cross-examination, he conceded that he could not recall the exact words, that it may have said, "We," and that it might not have specifically contained the word "union" (Tr. 665).¹⁸ The last thing he read was about the company putting people first and something like, "Do as I say, not as I do" (Tr. 654). He saw nothing in the letter about strikes, work stoppages, or slowdowns.

When shown General Counsel's Exhibit 12 on cross-examination, Morgan stated that, to the best of his recollection, it was the document he saw on August 8. Until he prepared with the Company's counsel for the trial, he was never shown the letters the union faxed to the company in August.¹⁹

According to both Hatfield and Gamble, Gamble returned to his station (at about 7 p.m.) without the letter. Hatfield asked where it was, and he replied that he had given it to another employee, Thaim, who was in the office.

Hatfield and Gamble together went to the office. Gamble testified that when they went there, he (Gamble) was supposed to be at his workstation. He was never disciplined for being away from his machine. However, he testified without controversion that the machine was backed up at the time and that when the line is backed up, the machine cannot run. Management never interviewed him about what happened that night.

Hatfield, Gamble, and Morgan testified concerning what occurred after Hatfield returned to the office, at shortly after 7 p.m., according to Hatfield and Gamble; at about 9:15 to 9:20 p.m., according to Morgan. I do not believe that any of them deliberately gave a knowingly false time. Indeed, whichever version of the time is accepted would seem immaterial.²⁰ Gamble was the only operator Hatfield relieved that evening who was called to testify, and I accord his testimony on this the most weight. In addition, McGuire's notes of his conversation with Morgan on August 9 have the notation, "conducting union business in middle of his [Hatfield's] shift."²¹ This would be consistent with Hatfield relieving operators for their lunch breaks, not their third breaks, and supports the time given by Hatfield and Gamble. Accordingly, the weight of evidence leads me to conclude that the incident occurred at shortly after 7 p.m.

There is no dispute that the door was locked, and inside the office, Thaim and Morgan were reading the letter. Hatfield knocked on the door and called Thaim's name, asking him what he was doing. The area of the plant was somewhat noisy. When Thaim did not respond, Hatfield knocked a second time, according to Hatfield himself, "a little harder" this time (Tr. 199). Gamble testified that Hatfield's knocks were normal but "enough for them [Thaim and Morgan]

¹⁷ In February or March 2001, Morgan was involved in a hat incident, in which he cut up an employee's hat. He received a disciplinary suspension, completed a probationary period, and received anger management counseling.

¹⁸ In any event, based on Gamble's statement that it was "Union stuff" and the wording of the document, Morgan could reasonably have concluded that the letter was union sponsored.

¹⁹ GC Exh. 7.

²⁰ The company's posthearing br. (at 17 fn. 5) concurs with this conclusion.

²¹ GC Exh. 8(c).

to hear it" from inside the office (Tr. 465). Finally, Morgan testified that Hatfield pounded the door so hard that he thought its glass was going to be knocked out.

5 Either Thaim or Morgan opened the door for Hatfield, and Gamble left at that point and returned to his workstation. According to Morgan, Hatfield kept yelling at Thaim, asking what he was doing, and he snatched the letter out of Thaim's hand. Thaim and Hatfield went out of the office, around to the side (Gamble also observed that Hatfield and Thaim walked out of the office). Aside from the matter of characterization of Hatfield's tone as "yelling" and of the manner in which he obtained the letter, Hatfield's account was not inconsistent with Morgan's. 10 Thus, Hatfield testified that he took the letter from Thaim and asked him what he thought he was doing by showing the letter to supervisors. Hatfield conceded that he might have spoken "a little louder than I normally would," but he did not yell (Tr. 199). Thaim said he did not know he was not supposed to show it to supervisors. Thaim did not say that he was upset by Hatfield's conduct, and Hatfield did not apologize to him.

15 Evaluating the various accounts and the overall circumstances, I believe that Hatfield knocked loudly, even banged, on the door, but Morgan's description, perhaps the result of his already being upset over the contents of the letter, strikes me as a bit exaggerated. I further find that Hatfield made it clear to Thaim that he was upset over Thaim's allowing Morgan to read the letter and that he spoke loudly and heatedly. Whether that could be characterized as yelling and shouting involves semantics and subjective statement of mind, and since Thaim was not called as a witness, I will not attempt to decide this. The same holds true as to whether Hatfield "took" or "snatched" the letter from Thaim. 20

25 During the incident, Hatfield was not aware of any employees in the immediate area, other than those mentioned, and the record contains no evidence of such

30 After getting the letter from Thaim, Hatfield testified that he went to do his third lunch, for Chaney, at the can line depalletizer (the depal), which Hatfield was supposed to do after Gamble came back from lunch.²² The office was on Hatfield's way to the depal.

35 Morgan contacted King by radio at about 9:15 p.m. and said that he needed him. When King arrived, Morgan told him that Thaim had shown him some kind of paper in the office and that Hatfield had knocked on the door "pretty hard" to try to get it back (Tr. 620). He further related that the paper was a petition stating that supervisors treated employees poorly, although Morgan did not go into great detail about its contents. King suggested he call their manager, Lewis, and in King's presence, Morgan called Lewis at home at about 9:30 p.m.

40 King testified that as far as the evening of August 8 was concerned, he paid no particular attention to Hatfield and had no issues with him, and that, to his knowledge, Hatfield did his job that night. Management never asked King any questions about Hatfield's performance that evening.

45 Morgan testified that when he spoke with King about the incident, he reviewed the contents of the letter and that he did not know if they (presumably, the union) could circulate it. He further testified that when he spoke with Lewis, he explained that they had a letter that was being circulated around, recited some of what it stated, and asked what they should do. I later specifically asked Morgan whether, in reporting the incident to Lewis, he said anything

50 ²² Morgan testified that Hatfield was supposed to be relieving Chaney for his third break, rather than his second or lunch break.

else about the incident with Hatfield other than the contents of the letter itself. He responded that he “just described the letter to him the best I could” (Tr. 669).²³ It is clear from Morgan’s testimony that he was most troubled by the contents of the letter itself, as opposed to Hatfield’s conduct. Lewis told King to tell Hatfield to put away the letter and to come to Lewis’ office the following afternoon at 2:30 p.m., when he reported to work.

After relieving Chaney, Hatfield went to lunch himself. He later relieved Monday and Chaney for their third breaks and, when Chaney returned, took his own third break at approximately 10 p.m. While at the crossover area, shortly after 10 p.m., he ran into some of the mechanics, who had clocked out and were going home. One of them mentioned the letter, so Hatfield gave it to them and said they could read and sign it if they wanted.²⁴ As the mechanics were signing, Morgan came over to Hatfield (at 10:02 p.m., according to Morgan). Morgan told him to put the letter away and to see Lewis the following day when he reported to work at 2:30 p.m.

Further, according to Morgan, he told Hatfield to relieve Chaney on his last break, since Hatfield had not done so. When asked how he knew this, Morgan replied, “Because we’d been in the office—he was there at 9:15 when he was pounding on the door” (Tr. 659). On cross-examination, he admitted that he had no information what Hatfield did from approximately 9:15 or 9:20 p.m. until 10:02 p.m. or when Hatfield took his breaks that evening. Hatfield testified that he relieved Chaney on his last break and, as previously stated, King testified that he knew of no problems with Hatfield’s work performance that night. Accordingly, I find no basis to conclude that between 9:15 p.m. and 10:02 p.m., Hatfield failed to perform his assigned relief duties.

Events of August 9

On August 9, prior to the 2:30 p.m. meeting, Hatfield spoke with Verst; and Brown, McGuire, and Lewis called Morgan by speaker phone.

In his telephone conversation with Verst, Hatfield stated that he had a meeting scheduled with management in the afternoon, and he described what occurred the previous evening. Verst asked Hatfield if he had been on break or lunchtime, and he replied yes. Hatfield stated that he was going to leave the letter home for the day. Verst told Hatfield to cooperate and answer questions but that if the company had any questions about the contents of the letter, the company should call him (Verst). I find this to further support the conclusion that the letter was union connected.

Management’s speaker call to Morgan was at shortly after 9 a.m. They asked him more about the letter, and he told them in detail what he had read. Morgan had no further involvement in the matter until he prepared with the company’s counsel for this trial. He was never asked to put anything in writing concerning what he witnessed that evening.

Both Lewis and McGuire took notes during their conversation with Morgan.²⁵ Their notes are consistent with one another and with Morgan’s testimony, as far as what Morgan

²³ He did the same when talking with Lewis, Brown, and McGuire the next morning, as discussed hereinafter.

²⁴ It is uncontroverted that the mechanics (Katz, Locey, and Ward) had clocked out and were no longer on working time.

²⁵ GC Exh. 8(b) (Lewis) and 8(c) (McGuire).

5 stated was in the letter. However, although McGuire's notes mention disruption or interference with production and conducting union business on work time, Lewis' notes do not, leading me to conclude that those notations in McGuire's notes were based on his assessment of what Morgan had said, rather than anything Morgan expressly stated. Indeed, according to Morgan's testimony, he did not raise either issue in his conversations with management on August 8 and 9.

10 According to McGuire, after the conversation, he, Brown, and Lewis reviewed the incident and talked with Ellis over the phone. They determined there were several apparent violations and decided to ask Hatfield to provide them with the document he had circulated. McGuire further testified that, prior to the 2:30 p.m. meeting, they decided that if Hatfield did not provide them with the document or with new information, they would place him on a suspension pending completion of the investigation, in particular based on Article 7 sections 1 and 3. However, I note that there is absolutely no evidence in the record to suggest that prior to the 15 2:30 p.m. meeting, management had any reason to believe that Hatfield would not provide the document, raising questions about the reliability of McGuire's testimony.

20 The 2:30 p.m. meeting took place in Brown's office. Everyone who attended the meeting testified about what was said: Brown, McGuire, Lewis, Lawson, and Hatfield. As would naturally be expected, there were some variations. On major points, however, all of the versions were generally quite consistent. Lewis did most of the talking for management. He asked Hatfield what went on the night before. Hatfield responded that he did not do anything and did not know what kind of answer Lewis wanted. Lewis referred to the incident at the office with Thaim and the later incident with the mechanics. He talked about a preliminary 25 investigation being conducted that morning and felt further investigation would proceed more smoothly if Hatfield submitted the letter he had circulated. Hatfield replied that he did not have it (he testified that it was at home). Brown asked whether he meant that he did not have it with him and needed to go home and get it. Hatfield did not give her a direct answer, just saying that he did not have the letter and to call Verst if she wanted it. After Hatfield refused to provide the 30 document, Lewis stated that he was being placed on an open suspension, pending further investigation, and referred to article 7 section 1, pertaining to work slowdowns or stoppages. Hatfield turned in his badge and went home.

35 About half an hour after the 2:30 p.m. meeting had concluded, Brown, with McGuire present, called Verst. Brown and Verst testified about the conversation. Their versions were fairly consistent. Brown told Verst that McGuire was with her, and Verst replied that he was only in a position to listen because of that. Both Brown and Verst testified that she referred to the issue of Hatfield conducting union business on work time (interrupting the mechanics while they were working, according to Verst). Brown also testified she referred to the matter of a possible 40 work stoppage or slowdown, but Verst could not recall whether she mentioned it in the conversation or he had heard it from Hatfield earlier in the day. In any event, the primary subject in their conversation was the letter. Brown related that Hatfield had said he did not have the letter and if they had any questions about it, to call Verst. She asked Verst if he knew the letter they were talking about, and he replied yes. He said he had a copy and would consult 45 with legal counsel and then decide what to do. She asked Verst if he was going to make Hatfield the "sacrificial lamb" but subsequently said she was not trying to play on words, but she needed a copy of the document to expedite the investigation.

50 Ellis testified that Brown and McGuire called him on August 8 or 9. They told him that Hatfield had circulated a letter to employees and had been disruptive in demanding it back from one of them and then had refused to give the letter back. He told Brown to investigate and read the contract for possible violations and then give him a recommendation. He testified that his

next conversation with Brown occurred after Hatfield was suspended; she stated that Hatfield had refused to give her the letter and that management had to talk to Verst to get it. He told her to put Hatfield out on open suspension and continue the investigation to find out the content of the letter and what conversation went along with his soliciting signatures.

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This testimony of Ellis regarding the timing of the phone calls and what was stated therein does not gibe with the sequence of events as established by all of the witnesses who participated in the August 9 meeting. For example, according to his testimony, his first conversation with Brown and McGuire occurred before Hatfield was suspended (at the 2:30 p.m. meeting on August 9). Prior to that meeting, Hatfield had not been asked to provide the letter, yet Ellis testified Brown and McGuire told him in this conversation that he had refused to give the letter back. In light of Ellis' position in high management and the close time frame involved, I do not hold these particular inconsistencies to reflect negatively on his credibility.

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Brown testified that management needed the letter in order to be able to determine the scope of everything that had occurred. Based on her conference call from Morgan, she concluded there possibly might be inflammatory words in the document. McGuire testified that he wanted the letter specifically to explore the sentence that Morgan had remembered—that the union was not going to tolerate it—to determine whether Hatfield violated article 7 section 1, and to conclude the investigation.

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Verst testified that he did not provide the letter to Brown on August 9, because signatures still needed to be collected, he wanted to discuss the matter with counsel, and he wanted as many signatures as possible so there would not be retribution by the company.

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Brown testified that it was her understanding at the time of the August 9 meeting that Hatfield had allegedly engaged in union activity on company time and had either incited and/or contributed to the possibility of a work slowdown or work stoppage. I note that, according to Ellis, Brown and Lewis said nothing about these subjects when they spoke to him on August 8 or 9. Further, Lewis testified that he did not say anything to Hatfield at this meeting about circulating the document on work time.

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Management's investigation

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Ellis, Brown, McGuire, and Lewis participated in management's investigation, with Ellis and Lewis talking directly with persons involved in the incidents of August 8. This investigation, starting on August 9, and continuing until after September 5, occurred during a time frame when a number of other events described subsequently took place. The issue of management's need for the Hatfield letter in conducting and concluding its investigation became the main bone of contention between the company and the union.

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Lewis testified that he interviewed only supervisors Morgan and King, to determine whether there was a violation of article 7 section 1. The latter simply told him the events occurring after Morgan called him to come to the office. As noted previously, Morgan testified that no one spoke to him about the incident after the morning of August 9, so I will conclude that, with respect to interviewing him, Lewis was referring to the August 9 telephone call in which Brown and McGuire participated.

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Ellis testified that, in investigating, he spoke with the following employees: Thaim and Locey on September 4, and Katz and Ward after the September 5 meeting. Thus, not until September 4, did management speak to any employee witnesses.

When asked on cross-examination about his investigation after August 9, in particular, its purpose, Lewis was markedly nervous, hesitant, and tentative, and his testimony was hard to follow,²⁶ even taking into account that he was vigorously cross-examined by Ms. Fry and Ms. Ford. Although he earlier testified that he interviewed Morgan and King to see if Hatfield had violated Article 7 section 1 (attempting to interrupt or interfere with the company's operations), he admittedly did not ask them to conduct an investigation to see whether there had been any interruption of work. When asked why not, he stated that, "If I was investigating to see whether or not there was a slow down, I would have. But that wasn't what I was looking for" (Tr. 711). When then asked what he was looking for, he replied (ibid):

There was – there was (sic) several violations. The violation that I knew about was the – uh, interruption to – uh, the interruption that he caused that night. But the main issue was the suspension, and it didn't have anything to do with Article Seven. But he was suspended for providing the misleading evidence.

Lewis conceded that he had no knowledge of Hatfield stopping any employees from performing their work. He testified that he wanted to read the document to see if Hatfield had the intention of causing a boycott or slow down but admitted that, "We produce close to 200,000 cases a day. It's hard to see 15 minutes worth of slow down in a 200,000 case run" (Tr. 712). Given this, it is difficult to see how Hatfield, acting alone, could have had such an intention.

Ellis testified that he asked the employees he interviewed questions concerning whether they signed the letter and what Hatfield said to them. He did not ask them whether they or Hatfield were or were not on working time when they signed the letter. He further testified that Locey told him that Hatfield told him the union wanted him to sign and that Thaim talked about the fact that he was "disrespected" by Hatfield (Tr. 501). As I stated at the hearing, these hearsay statements were admitted only for the purpose of Ellis' state of mind and not for the truth of the matters asserted therein. Ellis testified that "they basically corroborated almost down to the degree what Morgan had said" (Tr. 513), obviously based on what other management representatives had told him, since Ellis never spoke directly with Morgan. Oddly, Ellis took no written statements from the employees and did not even memorialize his conversations with them by taking any kind of notes, even though he testified that the racial discrimination lawsuit "has caused us to be a lot more cautious in the way we deal with certain situations. It's caused us to sort of make sure we examine every single decision with a lot more diligence" (Tr. 484-85).

No one from management ever spoke to Gamble or Chaney. When I asked Ellis why he did not interview Gamble, he replied that he saw no point in doing so, because Thaim and Morgan were so consistent in their descriptions of the incident. I find this a flimsy reason for not interviewing a key witness, who could have shed important light on the office incident which, according to Ellis, was what was initially related to him as the source of Hatfield's alleged misconduct.

Events occurring between August 9 and August 26

On August 12, Hatfield came to the union hall and gave Verst the letter that he had circulated. That same day, Verst went to the facility and, in the parking lot, obtained additional signatures on the letter. Ellis testified that when he learned of this, he believed that Verst was "covering up" for Hatfield and that Hatfield had committed a terminable offense under the

²⁶ See Tr. 709, et seq.

contract, which was to instigate a work slowdown or work stoppage (Tr. 496). When asked why he came to this conclusion, Ellis stated that that would have been the only reason Verst would have felt it necessary to come and obtain signatures and the only reason why Verst would not provide the letter. I find Ellis' reasoning to be farfetched.

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Ellis testified that made the sole decision to return Hatfield to work during the pendency of the investigation, as a good faith effort to retain his employment as a long-term employee and not put him under undue hardship while the company completed its investigation. He did not consider the matter closed, because he still did not have the document and had not been able to talk to the people Hatfield had asked to sign it. This testimony strikes me as curious, when Ellis did not interview any employees until September 4, even though he already had information that Thaim and Gamble had been in possession of the letter, and that he at no time ever attempted to speak to Gamble. Further, as described subsequently, by August 15, Ellis had copies of what the union represented was Hatfield's letter, and he could have shown those to Thaim and Gamble, yet he did not do so. Nor did he ever ask Morgan if he recognized the language in them as being what he recalled reading on August 8.

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August 26 meeting

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Pursuant to Ellis' decision, Hatfield returned to work on August 26. That afternoon, he attended a meeting in Brown's office. Also present were Brown, McGuire, Lewis, and Lawson. Hatfield testified that he was asked no questions. He was handed a notice of disciplinary action, which they stated warranted the discipline that had already been issued. Lewis, who typed up the document and signed as the supervisor, testified that he did not prepare it until August 26, because the company was trying to complete its investigation but could not because it did not have all of the necessary information. My comments at the end of the preceding paragraph apply regarding management's investigation apply equally here.

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Hatfield's conduct on August 8 was found to have violated the following:

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1. Article 5 section 7, "conducting union business on company time" (it was also stated that he was also counseled on this activity on two other occasions, 12/17/02 and 12/21/02 (sic)).²⁷
2. Article 7 section 1, "circulating an inflammatory document for signatures, in an attempt to interrupt or interfere with the company's operations."
3. Article 7 section 3, [as a union steward] "failing to take immediate affirmative steps to terminate the activities being violated from [Article 7] section 1 [interruption or interference with the company's operations]."
4. Work rules and the no solicitation policy, "by circulating and soliciting signatures for this document.
5. Work rules, "during your interview on August the 9th you gave misleading or inaccurate information about the events of August 8th."

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The disciplinary reports went on to state:

We consider these actions to be severe and warrant immediate termination, but in a good faith effort will retain your employment. The measure of discipline for this offense

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²⁷ On December 21, 2001, Hatfield received a counseling for engaging in union business on company time (GC Exh.14). As noted earlier, the company has taken the position in other matters that such counselings are not disciplinary.

will be time served on your suspension dating from August 9th returning to work on today's date of August the 26th 2002. This is being done on a non-precedent setting basis and any future actions of this nature will lead to discipline up to and including termination.

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Insofar as violating article 5 section 7, McGuire testified that from talking to Morgan, who witnessed the interaction between Thaim and Hatfield, he believed Hatfield was conducting union business on working time. On later examination by the union's attorney, he testified that Morgan had suggested that Hatfield engaged in that activity in the general time frame of 9:15-10 p.m. At one point, he testified that Hatfield was interfering with Thaim's working time, during their conversation of 4-6 minutes. Later, on further examination, he conceded that he did not know if either or both Thaim and Hatfield were on break at the time of the Incident, and on redirect, admitted that he did not know when Hatfield took his breaks that day. I note here that management never interviewed King, Hatfield's direct supervisor, about this.

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McGuire testified that other employees have been disciplined for conducting union business on company time. Two examples were provided. In one, an employee received a 5-day suspension in November 2001; however, the basis of the discipline was given as instigating a work stoppage under article 7 section 1, and there was no mention of article 5 section 7.²⁸ In the second, an employee called Verst on working time on February 11, and received a verbal warning.²⁹

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On cross-examination, Ellis was asked about the contention made in the position letters submitted by the company's attorney in the ULP investigation, that Hatfield had solicited on working time.³⁰ Ellis testified this referred to the point in time when Hatfield and Gamble were at the office door. He explained that both could not have been on break, and since Gamble was on break when he came into the office, he assumed Hatfield was supposed to be relieving him. Further, he testified, his investigation led him to believe that Hatfield was on company time when he solicited Locey and the other mechanics, more specifically that Morgan had seen Hatfield soliciting the 3 mechanics on his working time. According to Ellis, Morgan or Lewis told him that at the time Hatfield was talking with the mechanics, he was responsible for relieving Chaney on the depal and that either Morgan or Lewis told Hatfield to put away the letter and go relieve Chaney.

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Lewis testified, on the issue of solicitation on working time, that through the course of the investigation, "there was much debate" on whether Hatfield was on break at particular times, but "he certainly interacted with people that weren't" (Tr. 701).

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The above testimony of Ellis, McGuire, and Lewis reflects the confusion management had on August 26, regarding the basis for the conclusion that Hatfield had solicited on company time. This confusion cannot be excused on the ground that Hatfield failed to cooperate in the investigation and failed to provide the letter; as stated earlier, management never interviewed Gamble or Chaney about their first-hand knowledge of the events of August 8, or questioned King about Hatfield's performance.

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In terms of article 7 section 1, interference with the company's operations, McGuire testified that several employees saw Hatfield screaming at Thaim and that this was disruptive to

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²⁸ GC Exh. 5.

²⁹ GC Exh. 6.

³⁰ GC Exhs. 20-22, dated August 23, September 6, and October 10, respectively..

business; further, supervisors had to focus on taking care of the problem instead of running production, and this also slowed down the operation. No one directly involved in the incident who testified—Hatfield, Gamble, or Morgan—said that any other employees were in the vicinity. Further, neither Morgan’s nor King’s testimony support McGuire’s contention that production
5 was slowed down because supervisors were diverted from performing their normal supervisory functions. Moreover, on later examination, McGuire admitted that he had no knowledge that Hatfield slowed down any other production employees, and Lewis conceded the impossibility of quantifying any impact Hatfield’s activities had on production. Accordingly, these unsupported assertions of McGuire are given no weight and must also be deemed to reflect negatively on his
10 overall reliability as a witness.

McGuire additionally testified that he thought Hatfield was “deliberately circulating a Petition that had potential to cause us to have less production and be less in control of our production environment” (Tr. 84). Aside from the vagueness of his words and the fact that his
15 conclusions seem grossly out of proportion to the event, even as described by Morgan, McGuire admittedly had no evidence that Hatfield told employees to slow down. I deem this yet another example of McGuire’s lack of credibility.

Ellis’ testimony in this area was equally unconvincing. Regarding the allegation in the company’s August 23 position statement that Hatfield actually interfered with production, Ellis explained that this referred to the fact that no one was operating Gamble’s machine at the time that he and Hatfield were at the office. Further, “[Hatfield’s] actions at the door were disruptive and interfered” with productivity (Tr. 534). However, he conceded that he did not know if any
20 other employees were in the hallway and witnessed what occurred, and further conceded that neither Morgan nor Thaim were engaged in production at the time they were in the office. Similarly, when questioned on cross-examination about the reference to “encouraging a slowdown” in the company’s October 10 position statement, Ellis testified this was based on what Ellis thought might be in the letter. However, Ellis admittedly had no evidence that Hatfield told employees that the union wanted them to slow down.
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As to article 7 section 3, Hatfield, as a union steward, was alleged to have violated the agreement by not taking affirmative steps to stop actions interrupting or interfering with the company’s operations. McGuire testified that, according to Morgan, Hatfield was on working
30 time from approximately 9:15 p.m. to 10 p.m. and during that period, he went to the office, pounded on the door so hard that Morgan feared the glass would break, and demanded the letter back from Thaim. McGuire also stated that, according to Morgan, when he went to tell Hatfield to see Lewis the next day, Hatfield was having 2 mechanics sign the document.
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Both the company’s attorney’s August 23 and September 6 position statements refer to “coercion” by Hatfield in soliciting signatures, the latter mentioning Locey by name. When
40 asked about the alleged coercion, Ellis testified that this referred not only to Locey but to Katz, as well. According to Ellis, they both said that Hatfield had told them the union wanted them to sign. Inasmuch as Ellis testified that he did not interview either Locey or Katz until September 4, I find curious mention of coercion in the August 23 position statement. Contradicting Ellis,
45 McGuire admitted that he was not aware of any coercive conduct by Hatfield.

I discussed in a previous section of this decision Hatfield’s alleged violation of the no solicitation policy.

As to violating work rules by providing misleading or inaccurate information, Lewis
50 testified that during the interview on August 9, Hatfield first said he did not know what they were talking about, then said he did not have the document and refused to provide it, and finally

stated that he did not have anything else to say and to call Verst. It was stipulated that there is nothing in the work rules about giving, misleading or inaccurate information being a basis for discipline. Thus, Lewis cited a nonexistent work rule as a ground for Hatfield's suspension, another reason I find that Lewis was not a credible witness.

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Events after August 9 concerning the letter

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On August 15, after obtaining all of the signatures, Verst telefaxed signed letters to company management and to company headquarters in Atlanta.³¹ After the transmittal page, the first page began with, "To Whom It May Concern: The following are some of the letters signed by members of Teamsters Local 1199. . . ." Verst did not include the actual letter circulated by Hatfield because at that time he had information that the company had not talked to any of the people involved in the incident and therefore could not determine how the company was investigating. The union was also still concerned with retaliation against employees who signed and possible pressure on witnesses to bolster the company's case against Hatfield.

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Despite these articulated concerns, the union provided no evidence that the company has retaliated against employees in the past for signing any kind of similar documents or that the company has ever attempted to pressure employees during any prior investigations. Nor did the union provide any evidence that the company pressured any employees in this matter.

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On recross-examination, Verst added an additional reason for not providing a copy of the original letter Hatfield circulated. He testified that when Brown initially asked for a copy of the letter, he did not understand her to want a copy of the letter Hatfield had circulated. I assume Verst meant the actual letter but, even so, this testimony makes no sense. In what other letter would Brown have been interested?

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On examination by Mr. Duffy on the CB charge, Verst admitted that when he received Brown's August 30 telefaxed letter³² on September 4, he did realize that the company was requesting the specific document that Hatfield had circulated. He also conceded that he never explicitly asked why the company wanted it,

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Brown testified that they knew that Hatfield's letter was not included in the fax, because none of them had his signature or those of others they knew had signed his letter. Ellis testified that the fax from Verst looked tampered with—there were different font sizes—and the letters were not 2 pages, with the second a signature page, as described by Morgan. On cross-examination, Ellis conceded that he had no evidence that Hatfield's letter was any different from those, which were faxed.

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In her August 30 letter, Brown referenced the telefax that Verst had sent on August 15. She stated that the fax contained several copies of a document signed by various employees but that the company was specifically asking for the document that Hatfield had in his possession on August 8.

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Verst responded by letter to Ellis dated September 4,³³ in which he stated that the union did not have an issue with providing the company with a copy of the letter, after the company

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³¹ GC Exh. 7.

³² GC Exh. 19.

³³ GC Exh. 15.

provided the exact allegations, including the names of witnesses and times of events, of what it claimed Hatfield did wrong.

5 After the filing of charges in Cases 9-CA-39507 and 9-CB-10751, Verst, by letter dated September 19,³⁴ renewed the union's request for the exact allegations, reiterated its position that it was willing to provide the letter after it received that information, and proposed a simultaneous exchange.

10 The company never responded to either letter. Brown testified that the company did not reply to the Verst's September 19 offer because they were convinced that Verst was interested only in preventing Hatfield from being subject to further disciplinary action and not in assisting management come to a quick and fair resolution. She did not believe that anything could be accomplished. From past experience, she did not believe that Verst would follow through on what he said.

15 September 5 meeting

20 Three grievances were filed over Hatfield's suspension,³⁵ and they were included among various grievances discussed at a meeting held in the operations conference room on the afternoon of September 5. Ellis, Brown, McGuire, Verst, and Skeans all testified about this meeting, at which Hatfield and Camarata were also present. Inasmuch as several witnesses, including representatives of both the company and the union testified about the meeting, additional testimony would have been cumulative, and I draw no adverse inference from Hatfield and Camarata not being asked to testify about it. In any event, there are no substantial
25 credibility issues relative to what was said at the meeting. Again, as is natural, the recollections of the witnesses varied somewhat, but they were consistent on the basics.

30 On the matter of Hatfield's grievances, the last to be discussed, Ellis tried to direct questions to Hatfield, but Verst responded on his behalf. Ellis asked if Hatfield was conducting union business or union activity. Verst replied that it was a concerted effort but not union business. Verst stated that he needed more specifics of the reasons why Hatfield was suspended. Lewis referred to what was stated in the suspension notice. Ellis said that Hatfield's letter was not in the packet which Verst had faxed and that the company needed to get a copy of the actual document in order to complete its investigation. Verst stated he had it
35 but would not provide it until the company specifically told him why Hatfield was being suspended.

40 It is clear from the various accounts that what was no doubt a tense situation to begin with grew more heated. Ellis commented to the effect that Verst was being nonresponsive and was interfering in the investigation. Verst responded that as far as he could see, there had been no investigation. At what turned out to be the end of the meeting, Verst stated that the union wanted to recess or to take a break. When Ellis responded that Hatfield had to stay, Verst responded that Hatfield was not on the clock and could go, and the union representatives and Hatfield left the room. Ellis may have expressly stated that the meeting was over but, in any
45 event, everyone understood that was its status. When the union representatives returned, management was in the process of packing up their materials, and they themselves packed up and left.

50 ³⁴ Ibid.

³⁵ GC Exh. 13.

Following this aborted third step grievance meeting, by letter dated September 12, from Camarata,³⁶ the company denied Hatfield's grievances at the third step, stating that the company was continuing to investigate the matter and would complete the investigation only when the union complied with the information request to furnish the letter. Until that time, the investigation would remain open.

The grievances are pending arbitration, both parties having received a panel of arbitrators from the Federal Mediation and Conciliation Service.

Analysis and Conclusions

The no solicitation no distribution rule

The company changed its no solicitation no distribution rule through implementation of new work rules on January 1, 2003, and the General Counsel does not contend that anything contained therein is unlawful. Thus, the issue of the legality of the superseded rule well might be considered moot, had Hatfield not been disciplined in August 2002, in part based on its alleged violation.

The importance of balancing the need of employees to communicate with one another at the workplace on matters concerning their Section 7 rights, while at the same time preserving the right of employers to maintain discipline and order in their establishments, has long been recognized. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 US 793, 797-98 (1945). In striking this balance, the Board distinguishes between solicitation and distribution of literature. A policy prohibiting solicitation by employees during "working time" is presumptively valid, *Our Way, Inc.*, 268 NLRB 394 (1983), but employers may lawfully prohibit distribution of literature by employees in work areas at any time. *RCN Corp.*, 333 NLRB No. 45 (2001); *United Parcel Service*, 327 NLRB 317 (1998), *aff'd*, 228 F.3d 772 (5th Cir. 2000). The Board treats employee efforts to obtain signatures on authorization cards as solicitation rather than distribution of literature, *Mid-Mountain Foods, Inc.*, 332 NLRB 229 no. 19, fn. 2 (2000), and I conclude that Hatfield's circulating for signature a single 2-page document should also be considered solicitation. None of the parties have argued to the contrary.

Clearly, the 1998 policy was unlawful on its face for several reasons, as advanced by Ms. Fry on behalf of the General Counsel. First of all, the requirement that employees obtain employer authorization to engage in solicitation was unlawful. *Opryland Hotel*, 323 NLRB 723, 728 (1997); *Baldor Electric Co.*, 245 NLRB 614 (1979). Further, I agree that the language that solicitation was "limited to the main cafeteria during employees(sic) authorized lunch period," implicitly barred solicitation in other nonwork areas (e.g., the parking lot) and on other nonworking time (e.g., the 10-minute breaks). Additionally, the prohibition against distribution was overly broad, in that it was not limited to work areas. *RCN Corp*, *supra*; *United Parcel Service*, *supra*; *Ingram Book Co.*, 315 NLRB 515, 516 (1994).

Accordingly, I conclude that the 1998 rule was facially invalid. The company takes the position that defects in the rule, at least insofar as solicitation was concerned, were corrected by promulgation of the 2000 memorandum.³⁷ Neither the General Counsel nor the union asserts that the no solicitation policy set out in the 2000 memorandum was facially invalid. However,

³⁶ GC Exh. 16.

³⁷ As to no distribution, the memorandum continued to set out an overly broad and unlawful rule, by not allowing distribution in nonwork areas on nonworking times.

they contend that the memorandum should not be treated as curing the 1998 work rules provision because it was not effectively communicated to employees or to the union.

5 When an employer maintains a no solicitation policy that is presumptively invalid on its face, the employer bears the burden of showing that it effectively communicated to employees a clear intent to permit them to solicit in nonwork areas on nonworking time. *Fleming Companies*, 336 NLRB No. 15 (2001); *Tawas Industries*, 321 NLRB 269 (1996); *MTD Products*, 310 NLRB 733 (1993). *Family Foods, Inc.*, 300 NLRB 649, 662-663 (1990), *enfd.*, 968 F2d 1214 (6th Cir. 1992).

10 It is not disputed that whereas the 1998 and 2003 work rules both were posted on the bulletin board and handed out to employees, the 2000 and 2001 memoranda were only posted. In my view, effective communication of the superseding policy would have required that it be communicated in the same way as the original policy, to wit, handed out or otherwise directly provided to each employee, as well as being merely posted.

15 Further, in January, a supervisor, in effect, applied the overly broad 1998 rule, by writing “no solicitation on company property,” when he issued a counseling statement to employee Willis, for selling candy on company property. See General Counsel’s Exhibit 17. Moreover, when, in connection with the grievance that Willis filed, Verst requested a copy of the company’s current no solicitation rules, Ellis responded, “Please reference the most recent revision currently on file with the Union. Our policies have not changed.” See General Counsel’s Exhibit 18. Verst testified without controversion that the last company document he had on the matter was the 1998 work rules and that the company never told him there were any other solicitation policies in effect.

20 In these circumstances, I conclude that the company has failed to meet its burden of showing that the overly broad restrictions on solicitation contained in the 1998 work rules were effectively superseded by the 2000 (or 2001) memoranda. Accordingly, the unlawful provisions in the 1998 work rules regarding both no solicitation and no distribution remained in practical effect until the January 2003 work rules were instituted. Moreover, the unlawful no solicitation rule was enforced against both Willis and Hatfield, as previously described.

25 I find, therefore, that the company violated Section 8(a)(1) by maintaining and applying an unlawful no solicitation rule from on or about April 1, 2002,³⁸ until January 1, 2003.

30 The no distribution rule set out in the memoranda was overly broad and was not corrected until the January 1, 2003 rule went into effect. There is no evidence that it was enforced. Accordingly, I find that the company violated Section 8(a)(1) by maintaining an unlawful no distribution rule from on or about April 1, 2002,³⁹ until January 1, 2003.

45 ³⁸ The alleged onset date for the violation is based on Willis’ counseling. See Ms. Fry’s br. at p. 8, where she refers to the date of his counseling in January. The April date in the complaint apparently is based on the date of the third step hearing on the grievance that was filed over the counseling. See GC Exh. 18.

50 ³⁹ It is not clear how the General Counsel arrived at this date, since the Willis counseling did not involve distribution, and the General Counsel has not averred that the no distribution rule was enforced. Nonetheless, there can be no doubt that the invalid no distribution rule was in effect as of on or about April 1.

Hatfield's suspension

5 The events of August 8, the resulting suspension of Hatfield, and the refusal of both
company and union to provide the other with evidence pertaining to that suspension, did not
arise in a vacuum but occurred in the context of longstanding animosity between management
and the union. The record is replete with evidence showing their mutual distrust and antipathy.
10 Illustrative of this, Brown and Ellis suspected that Verst had an ulterior motive for not furnishing
a copy of the actual letter Hatfield circulated; Brown testified that "based on previous dealings"
with Verst (Tr. 611), they did not trust him to follow through on his commitments; and Verst
testified that he did not wish to furnish the actual letter because he feared the company would
retaliate against employees and coerce them into providing false information in its investigation
of Hatfield.

15 Although within the penumbra of protected concerted activity, the letter was hardly a
model of restraint, and the wisdom of circulating such a document is questionable, particularly in
a management-labor atmosphere that was already laden with antagonism. Morgan—to whom
obvious reference was made--and higher management understandably were upset by its
circulation at the facility, particularly when it appeared to be a union undertaking on its face. In
20 my view, the union has unsuccessfully tried to separate itself from the letter, which its president
drafted, finalized, and prepared; gave to union stewards to distribute; and, in fact, personally
circulated for employees to sign. It might well be that Hatfield's circulation of the petition would
be found to have been union activity, had that been alleged by the General Counsel.

25 However, I am not being asked to decide the propriety of the letter or whether Hatfield
was engaged in union activity. Rather, the issue before me is whether Hatfield's suspension
without pay, and the placement of such disciplinary action in his personnel record, was based
on his protected concerted activity and therefore violative of the Act.

30 The company argues that, separate and apart from its application of the no solicitation
rule, which I have found unlawful, it had valid grounds for suspending Hatfield and would have
suspended him in the absence of that rule, citing *Wright Line*, 251 NLRB 1083 (1980), enfd.,
662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Essentially, the company
contends that the manner in which Hatfield engaged in the activity of circulating the letter
removed him from the protection of Section 7 of the Act.

35 Under *Wright Line*, the General Counsel has the initial burden to persuade, by a
preponderance of the evidence, that protected activity was a motivating factor in the employer's
action, and this may be shown by either circumstantial or direct evidence. More specifically, the
General Counsel must show that the employee was engaged in protected activity, that the
40 employer had knowledge of this activity, and that the activity was a motivating or substantial
reason for the employer's action. Once the General Counsel has met its burden, the burden of
persuasion shifts to the employer to show by a preponderance of evidence that it would have
taken the action even in the absence of the protected activity. See *NLRB v. Transportation
Corp.*, 462 US 393, 399-403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002).

45 That Hatfield's conduct of soliciting signatures on the letter was protected concerted has
not been contested, and the company clearly had knowledge of that activity on August 8. Such
activity formed the sole basis for Hatfield's discipline (other than the allegation that he violated a
work rule by giving misleading or inaccurate information). I draw inferences that protected
50 activity was a motivating factor in the company's suspension of Hatfield from the following: the
discipline imposed on Hatfield for violating the no solicitation rule, the nature of management's
investigation, the shifting and expanding reasons alleged for the discipline, the failure of the

company to follow its progressive disciplinary procedure, and Lewis' use of a nonexistent work rule as a ground for the suspension.

5 In terms of application of the no solicitation rule, the only evidence of any other
employee admonished for its violation concerns Willis. He received just a counseling statement,
which both Ellis and Camarata represented to the union did not constitute a form of discipline
and hence was nongrievable. See General Counsel's Exhibit 18. By its own statements,
therefore, the company did not discipline such other employee for violating the no solicitation
10 policy. The harshness of Hatfield's treatment compared with that received by Willis leads to the
inference that the penalty imposed against him was motivated by animus and not legitimate
employment reasons. *Burger King*, 279 NLRB 227, 239 (1986); *The Moore Co., Inc.*, 264 NLRB
1212 (1982); *Fayette Cotton Mill*, 245 NLRB 428, 429 (1978); *Keller Mfg. Co., Inc.*, 237 NLRB
712, 713-714 (1978). Further suggestive of improper motive with respect to the company's
15 enforcement of its no solicitation rule against Hatfield was the testimony of supervisor Morgan
that employees circulate get-well cards, and that of Lawson, an employee of 28 years, that
employees are permitted to sell things, demonstrating that other forms of solicitation are
allowed.

20 Turning to management's investigation, by no stretch of the imagination can it be
deemed fair and complete. Bryant only spoke to Morgan on the morning of August 9, and he
never asked King, Hatfield's direct supervisor, about Hatfield's performance on August 8. Ellis
never spoke directly to Morgan or King. He never showed Morgan the faxed letters he received
from the union on August 15, to see if Morgan recognized the language. Indeed, there is no
25 claim that he ever showed them to anyone who worked in production that evening. He
admittedly waited until September 4 to interview Thaim and Locey and did not interview Katz
and Ward until after September 5. This was in spite of the fact that Hatfield was suspended on
August 9.

30 Most damaging to the company, no one from management ever interviewed steward
Gamble who, by all accounts, was an important witness to the office incident and also to the
issue of when he and Hatfield took their breaks that evening. Ellis' explanation that he did not
interview steward Gamble because the versions of Morgan and Thaim were so consistent is
patently unpersuasive and seriously undermines his overall credibility. First and foremost, it
35 makes no sense for him not to have interviewed a key witness. Moreover, by Ellis' own
testimony, he did not interview Thaim until September 4—after Hatfield's suspension was
effectively confirmed on August 26. Additionally, his failure to interview Gamble flies in the face
of his testimony that, as a result of the racial discrimination lawsuit, management took great
pains to do things right, which presumably would have included investigations.

40 Shedding still further doubt on the genuineness of the investigation is management's
failure to obtain any sworn statements or, indeed, anything in writing, from any witnesses, either
supervisors or employees. Even more inexplicably, Ellis' failed to keep any kind of notes of
anything he was told by witnesses.

45 Here, Hatfield, a 10-year employee and union steward, had been suspended and faced
possible termination, yet management conducted an incomplete and undocumented
investigation. The company cannot successfully argue that its incomplete investigation was
caused by the union's failure to provide the letter and by Hatfield's noncooperation, since it still
had sufficient information from the outset to identify the most important witnesses, and sufficient
50 documentation by August 15, to proceed with a meaningful investigation.

5 In sum, the company's investigation was so flawed that it cannot be considered to have been bona fide. The Board has consistently held that an employer's failure to conduct a fair and complete investigation gives rise to an inference of unlawful animus. *Publishers Printing Co., Inc.*, 317 NLRB 933, 938 (1995); *Burger King Corp.*, supra at 239; *Syncro Corp.*, 234 NLRB 550, 551 (1978); *Firestone Textile Co.*, 203 NLRB 89, 93 (1973).

10 As time went on, management's claimed bases for imposing discipline on Hatfield expanded beyond Morgan's initial complaint. In fact, Hatfield's alleged coercion of other employees was not raised until the company's counsel's responses to the ULP charges (an allegation that was not substantiated by testimony at the hearing). A company's shifting of reasons for discipline, which can encompass expansion, is indicative of discriminatory motive. See, e.g., *Central Cartridge, Inc.*, 236 NLRB 1232, 1260 (1978).

15 In suspending Hatfield, the company did not follow the steps set out in its progressive discipline system but imposed the most severe penalty short of termination. The company cannot justify suspension on the basis of Hatfield's alleged misconduct, when it failed to conduct a full and fair investigation. Although the Board does not impose on employers an obligation to promulgate a progressive disciplinary system, it has held that if an employer does maintains such a system, failure to follow it frequently indicates a hidden motive for imposing more severe discipline. *Fayette Cotton Mill*, supra at 428; *Keller Mfg. Co., Inc.*, supra at 713-714; *Taylor Bros., Inc.*, 230 NLRB 861, 868 (1977).

25 Finally, Lewis stated in the disciplinary notice that Hatfield violated a work rule by giving "misleading or inaccurate information" during his interview on August 9, but the parties stipulated that no such work rule exists. Lewis' citing of a bogus violation, standing alone, provides a strong basis for concluding that management was looking for pretexts to discipline Hatfield.

30 Based on all of the above, I conclude that the General Counsel has met its burden of persuasion of showing that Hatfield's protected activity was a motivating factor in the suspension. Having reached that conclusion, the second step under *Wright Line* is determining whether the company nevertheless had independent legitimate reasons justifying its action.

35 Reviewing the various allegations set out in the disciplinary notice, I find that the company has failed to meet this burden of persuasion. As set forth earlier, the company cannot rely on its no solicitation rule as a legitimate ground for discipline, since I have found it was invalid. Indeed, even if were not facially unlawful, its application against Hatfield was suspicious under the circumstances I have described.

40 In terms of article 5 section 7 (conducting union activity on company time), management witnesses were inconsistent in articulating who was allegedly on company time when Hatfield engaged in solicitation. Thus, McGuire equivocated, Ellis testified that it was Hatfield, and Lewis stated that it was other employees. Indeed, Lewis indicated that management disagreed internally about whether Hatfield had been on working or break time.

50 No employee witnesses testified that Hatfield solicited them on his or their working time. It is undisputed that the 3 mechanics were off the clock when they interacted with Hatfield. When Hatfield earlier returned to the office, Thaim was reading the letter (which Gamble had told Morgan was "union stuff") with the express approval, even encouragement, of Morgan, his direct supervisor. Thus, Thaim cannot be considered to have been on working time, as asserted by the company. Significantly, there is no evidence that management even criticized,

let alone disciplined, Morgan, for allowing Thaim to read the letter on his working time, and Thaim received no discipline of any kind. Gamble testified that he was on working time when he and Hatfield went to the office, but his un rebutted testimony was that his machine was not then in operation. In any event, Gamble was never disciplined in any way. In sum, the record does not support the conclusion that Hatfield solicited any employees while they were on actual working time.

Nor has the company satisfactorily shown that Hatfield was on working time while he solicited other employees. I do not doubt Hatfield's testimony that he genuinely believed that he was on his break times, and the company has not shown by reliable evidence that this was not the case. Even assuming arguendo that, when Hatfield went to get the letter from Thaim or when he spoke with the mechanics, he briefly engaged in union business on his own working time, several factors lead me to conclude that he would not have been disciplined for this reason but for the content of the letter. First, Thaim was reading the letter on his working time with the express approval of his direct supervisor, and neither of them were disciplined for that; second, there was no impact on productivity; and third, there is a fairly lenient policy regarding operators being allowed to leave their machines for short periods and to engage in brief conversations during the process of relief,

As to article 7 section 1 (circulating an inflammatory document for signatures, in an attempt to interrupt or interfere with the company's operations), the letter could well have been considered inflammatory. However, there is nothing in its language reflecting an intention to cause any kind of work slowdown or affect production in any way, nor was there any evidence to reflect that Hatfield told employees anything to this effect. Indeed, even the hearsay statements of employees to management contained nothing showing such intention. It follows from this, that the derivative article 7 section 3 violation alleged by management (as a steward, "failing to take immediate affirmative steps to terminate the activities being violated from [Article 7] section 1") was similarly unsupported.

As noted previously, the last ground cited in the disciplinary notice (providing misleading or inaccurate information) had no basis in the work rules.

I conclude from the above that Hatfield was suspended for engaging in protected concerted activity, in part based on the application of an invalid no solicitation rule, and that the company has failed to demonstrate that it had independent legitimate grounds for imposing such discipline on him. Accordingly, I find that its suspension of Hatfield on August 9, violated Section 8(a)(1) of the Act.

Failure to furnish information

This case is somewhat unusual in that the General Counsel contends that both the company and the union violated the Act by their reciprocal failure to provide each with information relating to the company's investigation of the August 8 incident.

It is axiomatic that an employer's duty to bargain with a union encompasses the duty to furnish information relevant to enforcing provisions of a collective bargaining agreement and to processing grievances. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *General Motors v. NLRB*, 700 F.2d 1083 (6th Cir. 1983); *Amersig Graphics*, 334 NLRB No. 109 (2001), at p. 9. A labor organization's duty to furnish information relevant to grievances parallels the employer's obligation. *International Brotherhood of Firemen & Oilers Local No. 288 (Wyandotte Corp., DeKalb)*, 302 NLRB at 1008-1009 (1991); *Printing & Graphics Communications Local 13 (Oakland Press)*, 234 NLRB 994, 996 (1977).

As stated in Mr. Duffey's posthearing brief, there does not appear to be any authority for the proposition that one party to a collective-bargaining agreement is privileged to withhold information it is required by law to furnish to the other, until it is furnished with information that the other party by law is required to furnish to it. In other words, there is no quid pro quo doctrine applicable in this area.

On September 4, and thereafter, the union requested that the company provide it with the names of witnesses and the times of events upon which it relied in determining to suspend Hatfield on August 9. This was after the suspension was finalized on August 26, and but one day before a scheduled third-step grievance hearing. There can be no issue that such information was necessary for the union to effectively represent Hatfield as a grievant. The company never responded to the letter, nor had the company earlier ever provided the specific information requested.

The company throughout has defended largely on the basis that without the union's providing it the Hatfield letter, it could not conduct a full and final investigation. Ellis and Brown testified that they distrusted Verst and doubted not only copies of other letters that he provided but whether the letter which Hatfield circulated was different. However, I find it highly significant that, after they received copies of the other letters, along with Verst's representation that Hatfield's letter was identical, management did not even bother to show them to Morgan, to see if he recognized them as the same as Hatfield's, or were different. In fact, Morgan confirmed at the hearing that the letters were all the same in terms of content. Nor did management ever show those letters to Gamble or Thaim, or any other employees who worked that shift.

Moreover, from the outset, management stated that they believed Hatfield may have conducted union business on company time. The union provided copies of other letters by fax on August 15, and all of those letters had identical language. In these circumstances, it would not have been logical to conclude that Hatfield, alone among the stewards, had a different document. In any event, as I stated above, management could easily have shown those other letters to Morgan, Gamble, and Thaim but never did so.

Based on the above analysis, I conclude that any failure and refusal of the union to provide the Hatfield letter did not excuse the company from providing the information requested by the union in connection with Hatfield's suspension and resulting grievance. If the company had determined by August 26 that it had sufficient basis to finalize Hatfield's August 9 interim suspension, it certainly should have had enough specific evidence in terms of witnesses and times to provide such information to the union on September 4, the day before the third-step grievance hearing was scheduled.

Therefore, I find that the company violated Section 8(a)(1) and (5) of the Act by, since September 4, failing and refusing to furnish the union, on its request, with the names of witnesses and the times of events on which the company had relied in making its decision to suspend Hatfield on August 9.

As to the allegation against the union, the company on August 9, and thereafter, requested that the union provide it with the letter Hatfield had circulated on August 8. This document played an integral part in the events of August 8, and clearly was relevant to the company's investigation. Verst testified that he feared the confidentiality of witnesses would be compromised by production of the letter, in particular that management would coerce them to skew the investigation against Hatfield. However, the most important employee witnesses to the incident—Gamble, and Thaim—obviously were already known to be such by management,

and there is no record evidence to show that the company has in the past coerced witnesses or attempted to do so in this matter. If coercion was Verst's concern, he could have asked witnesses to report back to him if they felt management had engaged in improper conduct in interviewing them.

5

Verst's refusal to provide the letter did not prevent the company from engaging in a more diligent investigation and, as stated earlier, did not excuse the company from its obligation to provide the union with the information the union requested. However, Verst's conduct constituted a failure to reasonably cooperate in the company's investigation and in the contractual grievance procedure. I do not doubt that Verst had genuine concern over what happened to Hatfield after August 8, and wished to assist him in fighting the suspension. Unfortunately, however, his nonproduction of the letter had the impact of reinforcing management's distrust of the union's motives and, to that extent, Hatfield likely suffered the consequences.

10

15

Although Verst's September 19 offer to exchange information may well have been made in good faith, the union did not, in fact, provide the letter. Rather, it continued to condition its willingness to furnish the letter on the company's provision of information that the union sought, as a quid pro quo.

20

The complaint alleges that the union refused and failed to furnish the letter on or about August 9. However, inasmuch as the actual letter was not in the union's possession until August 12, I find that was the operative date for the commission of the ULP; indeed, the General Counsel contends that the union's provision of copies of other letters, although identical in language, was not sufficient.

25

Based on the above, I find that the union violated Section 8(b)(3) of the Act by, since August 12, failing and refusing to furnish the company, on its request, Hatfield's letter.

30

Conclusions of Law

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

35

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent Employer has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act:

40

a. Maintaining and enforcing an unlawful no solicitation rule from on or about April 1, 2002, until January 1, 2003, and maintaining an unlawful no distribution rule for that same period.

45

b. Suspending Danny Hatfield on August 9, 2002, based in part on said rule, because he engaged in protected concerted activity.

50

c. Failing and refusing since September 4, 2002, to furnish the Respondent Union, on its request, with the names of witnesses and times of the specific events it relied upon in determining to suspend Hatfield on August 9, 2002.

4. By the conduct described in paragraph 3(A) and 3(B) above, the Respondent Employer violated Section 8(a)(1) of the Act.

5 5. By the conduct described in paragraph 3(C) above, the Respondent Employer violated Section 8(a)(1) and (5) of the Act.

10 6. By failing and refusing since August 12, 2002, to provide the Respondent Employer, on its request, with the document Hatfield circulated for signatures on August 8, 2002, the Respondent Union has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 7. By the conduct described in paragraph 6, the Respondent Union violated Section 8(b)(3) of the Act.

15 Remedy

20 Having found that the Respondent Employer and the Respondent Union have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁰

30 ORDER

The Respondent Employer, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

35 Cease and desist from maintaining and enforcing an overly broad no solicitation rule, from maintaining an overly broad no distribution rule, and from suspending or otherwise taking action against any employee for engaging in solicitation that is lawful under the Act.

40 Cease and desist from suspending or otherwise disciplining employees because they engage in protected concerted activity.

45 Cease and desist from failing and refusing to provide Teamsters Local 1199, on its request, with information pertaining to disciplinary actions, that is necessary for it to represent employees under the grievance procedure contained in the collective-bargaining agreement.

50 ⁴⁰ 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.

1. Take the following action necessary to effectuate the purposes of the Act.

5 (a) Make Danny Hatfield whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

15 (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20 (d) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix A."⁴¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer 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 Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees in its employ at any time since August 9, 2002.

30 (e) 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 Employer has taken to comply.

35 The Respondent Union (Local 1199), Cincinnati, Ohio, its officers, agents, and representatives, shall

40 Cease and desist from failing and refusing to provide Cincinnati Coca-Cola Bottling Company, on its request, with information necessary for and relevant to the company's investigations of possible employee misconduct and for determining whether the company should settle grievances.

45 1. Take the following affirmative action necessary to effectuate the purposes of the Act.

50 ⁴¹ If this Order is enforced by a Judgment of the 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."

(a) Within 14 days after service by the Region, post at its union office in Cincinnati, Ohio, copies of the attached notice marked "Appendix B"⁴² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Local 1199's authorized representative, shall be posted by Local 1199 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Local 1199 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, Local 1199 has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Cincinnati Coca-Cola Bottling Company at any time since August 12, 2002.

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

Dated, Washington, D.C. April 30, 2003

Ira Sandron
Administrative Law Judge

⁴² If this Order is enforced by a Judgment of the 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."

APPENDIX A

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT suspend or otherwise discipline any of you for engaging at your workplace in solicitation or distribution that is lawfully permitted under the National Labor Relations Act (the Act).

WE WILL NOT maintain or enforce any no solicitation or no distribution rule that prohibits solicitation or distribution that is lawfully permitted under the Act.

WE WILL NOT fail and refuse to provide to Teamsters Local Union 1199, on its request, information pertaining to disciplinary actions, that is necessary for it to effectively represent employees under the grievance procedure contained in our collective-bargaining agreement.

WE WILL make Danny Hatfield whole for any loss of pay or other benefits suffered as a result of our unfair labor practices.

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

5

CINCINNATI COCA-COLA BOTTLING COMPANY,
A DIVISION OF COCA-COLA ENTERPRISES, INC.

10

(Employer)

Dated _____

By _____

(Representative)

(Title)

15

20

25

30

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.

35

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

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

40

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, (513) 684-3663.

45

50

APPENDIX B

NOTICE TO MEMBERS

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to provide to Cincinnati Coca-Cola Bottling Company, on its request, documents necessary for, and relevant to, the company's investigations of possible employee misconduct and for determining whether the company should settle grievances filed under our collective-bargaining agreement.

BOTTLE BEER DRIVERS, BEER AND SOFT
DRINK BOTTLERS AND ALLIED WORKERS,
LOCAL UNION NO. 1199, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

(Labor Organization)

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.

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