

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

ROADWAY EXPRESS, INC.

and

CASE 12-CA-22202

AMADEO BIANCHI, an Individual

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, LOCAL 769,  
successor to INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
LOCAL 390

and

CASE 12-CB-5002

AMADEO BIANCHI, an Individual

*Christopher Zerby, Esq.*, for the General Counsel.  
*Barbara Harvey, Esq.* (on brief) for the Charging Party.  
*Todd A. Dawson, Esq. and Chris Bator, Esq. (Baker  
& Hostetler, LLP)*, for the Respondent Employer.  
*Howard Susskind, Esq. and Marcus Braswell, Esq.  
(Sugarman & Susskind, P.A.)*  
for the Respondent Union.

DECISION

Statement of the Case

**KELTNER W. LOCKE, Administrative Law Judge:** Respondent Employer discharged a shop steward for conduct associated with his representation of another employee. Previously, the steward had campaigned unsuccessfully against the Union business agent who assisted him in grieving the discharge. The record establishes that Respondent Employer violated Section 8(a)(1) and (3) by discharging the steward, but Respondent Union neither breached the duty of fair representation nor violated the Act.

**Procedural History**

5 This case began on April 16, 2002, when the Charging Party, Amadeo Bianchi, filed an unfair labor practice charge against Roadway Express, Inc., docketed as Case 12–CA–22202, and a charge against International Brotherhood of Teamsters, Local 390, the predecessor to the Respondent Union named in the Complaint. The Board’s Regional Office docketed the charge against Local 390 as Case 12–CB–5002. On July 2, 2002, the Charging Party amended both of those charges.

10 On July 30, 2007, the Regional Director for Region 12 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (the “Complaint”). In doing so, the Regional Director acted on behalf of, and with authority delegated by, the Board’s General Counsel (the “General Counsel” or the “government”). The Respondents filed timely Answers.

15 A hearing opened before me on March 24, 2008 in Miami, Florida and closed on March 25, 2008, after all parties had the opportunity to call witnesses and present evidence. Thereafter, the parties submitted briefs.

20 **Admitted Allegations**

In their Answers, as amended at hearing, the Respondents admitted certain of the Complaint allegations. Based upon those admissions, I make the following findings:

25 The unfair labor practice charges were filed, amended and served as alleged in Complaint paragraphs 1(a), 1(b), 1(c) and 1(d).

30 At all material times, Roadway Express, Inc. (“Respondent Roadway” or “Respondent Employer”) has been a Delaware corporation, with its corporate office located in Akron, Ohio, and an office and place of business located in Miami, Florida. At all material times, Respondent Roadway has been engaged in the transportation of industrial, commercial, and retail goods throughout the United States, and between the United States and foreign countries.

35 Respondent Roadway is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and therefore is subject to the Board’s jurisdiction. Its operations meet the Board’s criteria for the exercise of its jurisdiction.

40 At all material times, the following individuals have been supervisors of Respondent Roadway within the meaning of Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act; Terminal Manager Christopher Clark; City Dispatcher and Supervisor Lauren Finley; Terminal Operations Manager Craig Henschel; Inbound Foreman William Jongeblood; Supervisor Craig Michael; Pickup and Delivery Supervisor and Safety Manager Bud Rowland; Labor Relations Manager Wilbur Williams; Assistant Terminal Manager Michael Wilson.

45 Some time in November 2004, Local 390, International Brotherhood of Teamsters, merged into Local 769, International Brotherhood of Teamsters. At all material times since November 2004, Local 769 (the “Respondent Union”) has been the successor to Local 390, with

no alteration of the identity of the bargaining representative. At all material times, the Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times, Donald Marr held the position of business agent of the Respondent Union, and was its agent within the meaning of Section 2(13) of the Act. At all material times until on or about October 22, 2002, Geraldine Pape held the position of President and Business Manager of Local 390, Respondent Union's predecessor, and was Local 390's agent within the meaning of Section 2(13) of the Act.

### Facts

At all material times, Respondent Union or its predecessor, Local 390, has been the exclusive bargaining representative of a unit of Respondent Roadway's employees. These employees include drivers and dock workers.

Charging Party Amadeo Bianchi worked in the bargaining unit until his discharge on about October 30, 2001. At the time of his discharge, Bianchi was also the chief union shop steward, a position he had held since 1984.

On five occasions, Bianchi ran unsuccessfully for higher union office. Three times, he ran for president, and twice for delegate. In campaigning for union office, candidates grouped themselves into "slates." Bianchi ran as part of the "slate" which opposed the incumbent candidates.

Respondent discharged Bianchi and another employee, Isaaah Daniels, at the same time, and as a result of events involving both of them. These events are crucial to the outcome of this case and therefore should be examined carefully. At the outset, determining what happened requires an assessment of witness credibility.

My observations of the witnesses lead me to conclude that Daniels' testimony is most reliable. Where Daniels' testimony conflicts with that of other witnesses, I credit Daniels. Likewise, I conclude that Bianchi's testimony merits trust. The following summary of events relies on the credited testimony of Daniels and Bianchi.

On October 12, 2001, Daniels was working the night shift. He experienced chest pain which he then believed to be heartburn.

Daniels told his supervisor, Craig Henschel, about the discomfort, and Henschel gave him some antacid. When the pain continued, Daniels told Henschel that he couldn't work, and Henschel sent him home.

The next day, Daniels became concerned about the chest pain and went to a fire station, where a paramedic or emergency medical technician performed an electrocardiogram and concluded that Daniels was not having a heart attack. However, when he continued to experience pain, Daniels went to a hospital emergency room, where he complained of chest pain radiating to the back. The hospital admitted him on October 13, 2008 and discharged him the next day.

Daniels testified that, while at the hospital, a physician told him that he had a “severely pulled muscle” over his heart. However, the hospital discharge summary lists the following diagnoses: (1) chest pain, (2) gastritis, (3) high blood pressure.

5 Even though the discharge summary does not mention a pulled muscle, it doesn’t exclude the possibility that a physician who examined Daniels made such a statement. Moreover, only the discharge summary, and not Daniels’ entire “chart,” is in evidence. As stated above, my observations of Daniels lead me to conclude that he is a trustworthy witness. Accordingly, I conclude that a physician did tell him that a pulled muscle caused his chest pain.

10 Daniels telephoned Henschel from the hospital and told him that a pulled muscle, rather than heartburn, had caused the pain. However, Daniels testified that he “didn’t go into a whole lot of detail” because Henschel was busy.

15 The hospital discharged Daniels on October 14, 2001 but he did not return to work. According to Daniels, he telephoned Business Agent Marr three or four days later.

20 “I told him,” Daniels testified, “that I worked on the 12th and I got injured and I was out of work for several days and I was in the hospital for two days.”

According to Daniels, Marr asked if he had filled out an injury report. When Daniels answered that he had not, Marr said that it was too late.

25 Marr’s testimony about this conversation differs. In Marr’s version, he asked Daniels whether “it had happened at work” and Daniels had replied that he didn’t know. As discussed above, my observations of the witnesses lead me to place considerable trust in Daniels’ testimony. Additional reasons persuade me that Marr’s testimony, quoted above, is not so reliable.

30 The General Counsel asked Marr if he told Daniels that (Terminal Manager) Chris Clark would get “pissed off” if Daniels filed an on-the-job injury report. Marr’s response did not answer the question, so the General Counsel asked it again. Marr’s reply again ignored the question, which the General Counsel then asked for the third time. Marr answered: “I don’t recall telling him that at that conversation, no. I think that was his statement, not mine.”

35 Marr’s failure to provide a responsive answer, twice, does not foster confidence in his testimony. Moreover, this instance wasn’t the only time that Marr sidestepped the question.

40 Because of litigation unrelated to the Act, a court-appointed master supervised the Union’s internal election process in 2001. At one point, Marr complained to the master that Bianchi had engaged in improper campaigning. Ultimately, after an investigation, the master rejected this complaint. The master’s report concluded that Marr had “misrepresented the practice permitting campaigning and thereby misled the protestor into pursuing this protest.” During Marr’s testimony, the General Counsel questioned him about the master’s report:

45 **Q** BY MR. ZERBY: Well, isn’t it true that the investigative officer stated that you misrepresented the practices?

**A** The practice under the guidelines, you could not campaign in the Employer’s break room.

Q Isn't it true though that the investigator concluded that you misrepresented that practice?

A He practiced in the break room.

Q My question again is isn't it true that the investigator concluded that you misrepresented that practice permitting campaigning?

A Misrepresent — the practice was you could only campaign in parking lots, not in a break room. That's why I filed the charge.

Q Isn't it true that the investigator concluded that when you filed the charge, you misrepresented the practice?

A He could have, but the practice was you could not campaign in break rooms. That's why I filed the charge.

The non-responsiveness of Marr's answers concerns me. Additionally, another portion of Marr's testimony raises further concerns about his credibility. That testimony will be examined later in this decision, after some discussion necessary to place it in context.

The concerns about Marr's testimony lead me to conclude that it is not as reliable as that of Daniels and Bianchi. Crediting Daniels, I find that he did tell Marr that he had been injured at work.

Based on Daniels' testimony, I also find that Marr told Daniels that it was too late to file an injury report and advised Daniels to fill out a lost time claim form. (Daniels explained that employees used this form for off-duty injuries. The form is an application for benefits provided by the Union, and not an application for workers' compensation.)

Daniels' telephone conversation with Marr took place on October 17 or 18, 2001. About a day later, Daniels participated in a "three-way" telephone conversation with Charging Party Bianchi and another Roadway employee, Shawn Becker, who initiated the call.

During this conversation, Daniels mentioned that he had gotten hurt at work. Bianchi replied that if he had gotten hurt at work, then he should fill out an injury report, that is, a workers' compensation claim form, rather than seeking the lost time benefits provided by the Union.

Because the outcome of the unfair labor practice case against Roadway turns on what Daniels said to Bianchi and on how Bianchi replied, the credibility of these two witnesses becomes crucial. Therefore, it is appropriate to examine the relevant evidence carefully.

Only three persons – Becker, Daniels, and Bianchi – heard what was said during this telephone conversation, and Becker didn't hear all of it. (When the "call waiting" feature alerted Becker that someone else was telephoning him, he switched to the incoming call.) However, all of the testimony paints a consistent picture of what Daniels told Bianchi and what Bianchi said in response.

Daniels testified that he told Bianchi that "I worked at night and I got injured." According to Bianchi, Daniels reported that he had telephoned Terminal Operations Manager Henschel from the hospital and reported that "he had a pulled muscle over his heart and he got hurt at work."

5 Becker testified that “Daniels explained to Amadeo [Bianchi] about how he pulled the muscle in his heart.” Although this testimony doesn’t specifically quote Daniels as saying that he pulled the muscle while on the job, Becker then quoted Bianchi as saying “if you get injured at work. . .” Such a reply would seem unlikely if Daniels had not, in fact, told Bianchi that the injury occurred while working.

In sum, the testimony of all three witnesses to this conversation supports the conclusion that Daniels told Bianchi he had been injured at work. I so find.

10 According to Daniels, Bianchi replied by saying “that if I got injured, I should fill out an injury report.” Bianchi testified that he told Daniels “If you got hurt at work, you have to file an on–the–job claim, Comp claim.”

15 Becker did not hear this part of the conversation. He had switched to the incoming call after Bianchi said “if you get injured at work. . .”

20 As stated above, my observations of the witnesses persuade me that Daniels testified reliably. Moreover, nothing in Bianchi’s demeanor suggested that he was not telling the truth. Crediting Daniels and Bianchi, I find that Bianchi did tell Daniels that if he suffered an injury at work, he should file an on–the–job injury report.

25 During this conversation, Daniels described the conversation he had had with Business Agent Marr, who had told Daniels he should file for the Union’s lost–time benefit rather than for workers’ compensation. Crediting Bianchi’s testimony, I find that Bianchi replied to Daniels by saying that if he actually had gotten hurt at work, it would defraud “Central States” (the Union’s fund) to file for the lost–time benefit.

30 No evidence indicates that, during this telephone conversation, Daniels and Bianchi discussed filing a fraudulent workers’ compensation claim. The record does not establish that Daniels and Bianchi engaged in such collusion at any time. Certainly, no witness testified that he overheard Daniels and Bianchi plotting to defraud the workers’ compensation fund.

35 It may be noted that during the lawsuit in federal District Court, witnesses testified about these same events both in pre–trial depositions and from the witness stand during the trial itself. If the discovery and testimony in that case had revealed any evidence that Daniels and Bianchi had plotted to defraud workers’ compensation, almost certainly that evidence would have been offered into the record here.

40 In the absence of such evidence, I will not presume that Daniels and Bianchi ever collaborated in an attempt to defraud workers’ compensation. Rather, I find that they did not.

45 After Daniels unsuccessfully requested the form used to report an on–the–job injury, Bianchi obtained the form and gave it to him. Bianchi also was present when Daniels completed the form and answered Daniels’ questions about the proper way to fill it out. I find that in doing so, Bianchi was acting in his capacity of chief Union shop steward.

At one point, Daniels asked Bianchi what date he should put on the form. It appears that Bianchi understood Daniels to be asking “what date should I put down the injury happened?”

Bianchi replied that Daniels should put down the date of the injury.

5 The “date of the injury” – or, more exactly, the date Daniels believed that he sustained the injury – was October 12, 2001, when chest pain caused him to leave work early. However, Daniels dated the form itself “10/12/01,” thereby indicating incorrectly that he had signed the form on the date of the supposed injury.

10 Daniels testified that doing so was a mistake. Besides Daniels’ demeanor, another reason leads me to credit this testimony. Daniels’ birthday is October 12, 1967. However, on that part of the form for “date of birth,” Daniels wrote “10/12/01” rather than “10/12/67.” Daniels obviously had no reason to lie about his birth date. Therefore, the incorrect birth date would appear to be further evidence of Daniels’ confusion.

15 Moreover, it may be noted that after Daniels’ discharge, he testified before a grievance resolution panel that he had made a mistake when he dated the form. The panel reinstated Daniels. Although the panel did not explain its reasons for doing so, it would appear unlikely for the panel to have restored Daniels’ employment if the panel members had disbelieved his testimony. Stated another way, if the panel members had rejected Daniels’ testimony that he had made a mistake, they necessarily would have concluded that he had lied on the form, which would constitute fraud. In those circumstances, it seems quite improbable that the panel would have ruled in his favor.

20 In any event, crediting Daniels, I conclude that he simply erred when he dated the form October 12, 2001. Management, however, viewed the incorrect date as evidence that Daniels was trying to conceal the 10–day period which had elapsed between the claimed injury and the time he reported it.

25 On October 30, 2001, Respondent Roadway terminated Daniels’ employment. The discharge notice gave the following reason: “An act of dishonesty with fraud in reporting a personal illness or injury as an on–the–job injury and completing injury documents on 10/22/01. For the above, you are hereby discharged.”

30 At the same time it fired Daniels, Roadway also terminated Bianchi’s employment. The October 30, 2001 discharge notice provided this explanation:

35 YOU VIOLATED OUR POLICY (OR CONTRACT) BY:

40 Your act of dishonesty, being involved in and promoting fraud by reporting a personal illness or injury as an on–the–job injury. On–the–job injury documents were completed on 10/22/01. For the above, you are hereby discharged.

45 Both Daniels and Bianchi filed grievances. Under the established grievance procedure, management answers the grievance in writing. Terminal Manager Christopher Clark’s answer to Bianchi’s grievance stated, in pertinent part, as follows:

On the evening of 10/18/01 Bianchi called a laid off employee (Gerome Daniels) that was off due to a personal medical condition as of 10/12/01. Bianchi said Shawn Becker (a laid off employee) called Gerome [Daniels} on an issue not related to Gerome’s medical condition. Gerome had been off work since he took himself out of service on 10/12/01 at

01:15 AM (he started at 0001, 10/12/01). Gerome had what he called “heartburn”. Gerome checked himself into North Shore Medical Center on his wife’s Cigna Insurance on Saturday, 10/13/01 at 1438 PM. The notation on the bottom of this exhibit shows Accident Work Related: NO (exhibit 1). During this conversation Bianchi told Gerome not to go to the Union Hall on Friday 10/19/01 and complete Central States Lost Time Benefit forms as Gerome was advised to do by Don Marr (390 Business Agent). Bianchi told Gerome to fill out on[-]the[-]job injury forms at Roadway on the next day. Gerome called at approximately 11:30 AM 10/19/01. Gerome talked with Bud Rowland (Personnel Manager) and Mike Wilson (A.T.M.). [assistant terminal manager] Gerome told them both that he wanted them to fax the injury report to the union hall. Mike and Bud told him they could not fax it and to come to Roadway to fill out the forms. Gerome did not come in 10/19/01 to fill out the forms. Gerome showed up on Saturday, 10/20/01 at 11:30 AM. I happened to be here and after finding out he did not show up 10/19/01 as instructed, I instructed him to come back Monday, 10/22/01 to see Bud Rowland (Bud had all pertinent information concerning Gerome’s last night worked). I would have completed the forms at this time but I did not know where Bud’s information was. Gerome said he would.

On 10/22/01 at 0545 AM, A. Bianchi asked City Dispatcher, Lauren Finley, for an injury packet for Gerome Daniels. Lauren gave him the injury packet (Exhibit G). At approximately 0615 AM, 10/22/01, A. Bianchi handed the injury packet to Craig Michael (Driver Superintendent), (Exhibit H). Craig had just walked through the door moments earlier and did not know the history. Craig put this on Bud’s desk. Bud came in at 0730 AM, 10/22/01. He opened the packet to find it had not been completed properly and the supervisor’s report was not completed at all (this would have been done if Gerome would have come in to see Bud as he was instructed to do by the TM, Chris Clark). After reviewing the employee’s injury report, Bud saw that Gerome had put the date on the bottom of the form as 10/12/01, not 10/22/01. Gerome completed the form on 10/22/01 not 10/12/01. After a phone call from Gerome, it was determined that A. Bianchi told Gerome to put the date of 10/12/01 on the forms instead of 10/22/01.

As per Exhibits D, E, I, J1, J2 and K, it is clear A. Bianchi told Gerome to date the injury form the wrong date. This would make the injury appear to have been reported on 10/12/01 and not a later date. It appears that if Gerome had the intention to report this medical condition, he would have done so Saturday, Sunday, Monday, Tuesday, Wednesday or Thursday. It was not until he was told by A. Bianchi not to fill out Central States Lost Time forms but rather to file an injury form with Roadway Express that Gerome called Roadway to fill out the forms.

Respondent Roadway denied both Bianchi’s grievance and Daniels’ grievance at this initial level. The contractual grievance procedure provides for a hearing before a joint area grievance committee, consisting of two Union and two management members from trucking companies with which the Union has a collective–bargaining relationship.

The joint area grievance committee conducts a hearing at which the grievant and representatives of the Union and management have the right to participate. The committee considers testimony given during the hearing, documentary evidence, and the arguments of the parties. The committee members meet in private and then issue a decision which sustains or denies the grievance. The decision does not include any explanation for the committee’s action.

5 The collective–bargaining agreement provides that the joint area grievance committee’s actions are final and binding, with one exception. If the committee deadlocks on a discharge or suspension grievance, then a “regional arbitration panel” decides the matter. That exception, however, is not relevant here because the joint area grievance committee did not deadlock.

10 On November 13, 2001, the committee heard Daniels’ grievance and held in his favor. The next day, the committee, consisting of the same four individuals, heard Bianchi’s grievance. At the outset of the hearing, Labor Relations Manager Wilbur Williams described why Roadway had discharged Bianchi. He stated, in pertinent part, as follows:

15 . . .Mr. Bianchi asked City Dispatcher, Lauren Finley, for an injury packet for Gerome Daniels. At 05:15 a.m., on October 22nd, 2001, Mr. Bianchi handed the completed injury packet to Craig Michael, the Driver Superintendent. The date on the bottom of the form is October 12th, 2001, not October 22nd, 2001. After a phone call from Gerome, it was determined that Bianchi told Gerome to put the date of October 12th, 2001 on the form, instead of October 22nd, 2001. As the chief steward, Mr. Bianchi, through his collusion, was involved in and promoted fraud and dishonesty with coercion in deceiving the Company.

20 Although Williams then quoted the explanation provided to Bianchi in the discharge letter, he did not explain why Respondent accused Bianchi of promoting fraud and dishonesty “with coercion.” The record does not indicate that Bianchi engaged in any coercive conduct.

25 As noted above, the committee consisted of the same four individuals who had sustained Daniels’ grievance the day before. However, the committee denied Bianchi’s grievance. It provided no explanation for this decision.

30 Bianchi sued both Roadway and the Union under Section 301 of the Labor–Management Relations Act, alleging that Roadway had discharged him unlawfully and that the Union had failed to represent him fairly. At the trial level, the jury returned a verdict in Bianchi’s favor.

35 However, the United States Court of Appeals for the 11th Circuit reversed. It held that Bianchi had waived his right to contest the fairness of the Union’s representation because, at the close of the grievance hearing, he had stated that he believed the Union’s business agent had represented him “properly and fairly.” The Court’s decision had the effect of denying Bianchi’s claims against both Roadway and the Union.

## 40 **The effect of other proceedings**

### 40 **I. The Grievance Proceedings**

45 Respondents raise a number of defenses related to the principles of collateral estoppel and res judicata. They can be summarized as follows: The Charging Party already has had at least two bites at the apple and he shouldn’t be allowed a third.

One of those “bites” involved filing a grievance concerning his discharge and participating in the hearing, described above, on November 14, 2001. Respondents urge that the Board defer to the panel’s decision denying the grievance.

5 The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues. *Kvaerner Philadelphia Shipyard*, 347 NLRB No. 36, slip op. at 2 (June 9, 2006), citing *Olin Corp.*, 268 NLRB 573, 574 (1984); *Aramark Services, Inc.*, 344 NLRB 549, 550 (2005). The Board similarly defers to the grievance resolution decision reached by a joint committee such as the one which heard Bianchi’s grievance in the present case. *United Parcel Service*, 274 NLRB 667 (1985). Accordingly, in deciding whether the joint committee’s decision merits deferral, I will apply the same deferral standards the Board applies to the awards of arbitrators.

10 The party opposing deferral has the burden of showing that deferral is inappropriate. *Turner Construction Co.*, 339 NLRB 451 (2003). This burden is a heavy one. *Kvaerner Philadelphia Shipyard*, above.

15 The Board has defined four criteria for determining whether deferral is appropriate. The party opposing deferral must show that at least one of these criteria has not been met. The criteria are as follows:

- 20 1. The arbitral proceedings appear to have been fair and regular.
2. All parties have agreed to be bound.
3. The arbitrator’s decision is not “clearly repugnant” to the purposes and policies of the Act.
4. The arbitrator must have considered the unfair labor practice issue which is before the Board.

25 *The Motor Convoy, Inc.*, 303 NLRB 135 (1981), citing *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Raytheon Co.*, 140 211 NLRB 883 (1963).

30 **1. The first two criteria**

At the outset, it may be noted that the words “fair and regular” in the first criterion refer to the grievance *proceedings* rather than to the result. Applying this standard therefore does not involve deciding whether the outcome was “fair” or just. Rather, the criterion focuses on the procedure.

35 Bianchi attended the proceeding and had the opportunity to speak and present evidence. Indeed, it is clear that he played a significant role in making sure that his Union representative presented the evidence in the manner he wanted. The record does not reveal any manifest procedural unfairness. Moreover, the proceeding was “regular” in the sense that the collective–bargaining agreement established this forum and Bianchi’s hearing did not differ procedurally from those of other grievants. I conclude that the proceeding satisfies the “fair and regular” requirement.

45 As already noted, the collective–bargaining agreement established this procedure for resolving grievances. Accordingly, all parties agreed to be bound. I conclude that the second criterion has been satisfied.

Whether the grievance committee’s decision satisfied the third and fourth criteria will be discussed at some length below. Before applying these criteria to the facts, however, it may be

helpful to describe them in greater detail.

To meet the third criterion, an arbitrator’s award must not be “clearly repugnant” to the purposes and policies of the Act. An arbitrator’s decision is not “clearly repugnant” to the purposes and policies of the Act if it is “susceptible” to an interpretation which is consistent with the Act.

If Board precedent exists that supports an arbitrator’s decision, it cannot be said that the decision falls outside the broad parameters of the Act. Thus, such a decision is not palpably wrong or clearly repugnant to the Act, even if other Board precedent is arguably contrary to the arbitral decision. *Kvaerner Philadelphia Shipyard*, above, citing *Marty Gutmacher, Inc.*, 267 NLRB 528–533 (1983).

The Board has interpreted its fourth criterion – that the arbitrator must have considered the unfair labor practice issue – to allow deferral even in some cases where the arbitrator made no mention of the alleged unfair labor practice. It suffices if the contractual issue decided by the arbitrator is “factually parallel” to the unfair labor practice issue. *Nationsway Transport Service*, 327 NLRB 1033 (1999). The arbitrator also must have been “presented generally” with the facts relevant to resolving the unfair labor practice. *The Motor Convey, Inc.*, above.

## **2. Was the grievance decision “palpably wrong”?**

In determining whether the area grievance committee’s decision was “palpably wrong” and “clearly repugnant to the purposes and policies of the Act,” it should be noted that Respondent discharged Bianchi for his actions as the Union’s steward. Thus, Labor Relations Manager Williams told the joint grievance committee that Bianchi had requested the “injury packet” for Daniels and that “it was determined that Bianchi told Gerome to put the date of October 12th, 2001 on the form, instead of October 22nd, 2001.”

Bianchi took both of these actions – obtaining the injury form and advising Daniels on how to complete it – in his capacity as Union steward. The actions had nothing to do with Bianchi’s responsibilities *as an employee* and Bianchi had nothing to gain by taking them. Thus, the reasons Respondent cited for discharging Bianchi solely concerned his concerted Union activities. Indeed, in the Respondent’s opening statement to the joint grievance committee, Williams identified Bianchi as a steward:

[T]he chief steward, Mr. Bianchi, through his collusion, was involved in and promoted fraud and dishonesty with coercion in deceiving the Company.

Bianchi’s duties as Union steward clearly constitute concerted activity protected by the Act. There is no apparent reason for Labor Relations Manager Williams to identify Bianchi as chief Union steward unless he wished the grievance committee to consider that fact in deciding the outcome of the grievance. Moreover, it appears that the grievance committee not only considered Bianchi’s status as steward, but held it against him.

Roadway had discharged Daniels for “An act of dishonesty with fraud in reporting a personal illness or injury as an on–the–job injury,” and had discharged Bianchi for assisting Daniels. However, the grievance committee had *sustained* Daniels’ grievance, which implicitly

rejected the assertion that Daniels had been engaged in fraud and dishonesty.

The next day, the same committee upheld the discharge of Bianchi, whom Respondent had fired for “promoting fraud and dishonesty” and for “collusion” with Daniels. If both Daniels and Bianchi had *colluded* in fraud, then they would have been equally guilty. However, without explanation, the committee found that Bianchi’s conduct warranted discharge but that Daniels’ did not.

The only apparent difference between Daniels and Bianchi is that Bianchi was chief Union steward and engaged in protected activity. The committee clearly knew about this difference because, as noted above, Roadway’s argument to the committee mentioned that Bianchi was chief steward. If the grievance committee had another reason, unrelated to Bianchi’s protected activities, for treating him more harshly, it could have said so. It did not.

The Board has held that an arbitral decision is not “clearly repugnant” if it is “susceptible to an interpretation consistent with the Act.” *Olin*, above, 268 NLRB at 574. Therefore, I must ascertain whether the grievance committee could have treated Bianchi more harshly than Daniels for any reason unrelated to Bianchi’s protected activity.

Here, it is difficult to weigh whether the grievance committee’s decision is “susceptible to an interpretation consistent with the Act” because the committee offered no explanation for its decision and, accordingly, there is nothing to interpret except the one-sentence ruling. Moreover, the committee’s reasoning is not self-evident. Indeed, it is next to impossible to infer the committee’s reasoning from the results because the committee reached conflicting decisions in the Bianchi and Daniels cases.

If the committee’s action – upholding the discharge of the Union steward but reversing the discharge of another employee for essentially the same conduct – can be interpreted in a manner consistent with the Act, such an interpretation eludes me. The present record certainly doesn’t suggest such a nondiscriminatory reason. In sum, I conclude that the grievance committee’s decision is palpably wrong and clearly repugnant to the purposes of the Act.

**3. Did the grievance committee consider the unfair labor practice?**

A provision in the collective-bargaining agreement prohibits discrimination against an employee because of union activities. Specifically, Article 21 states, in pertinent part:

Any employee, member of the Union, acting in any official capacity whatsoever shall not be discriminated against for his/her acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer’s business, nor shall there be any discrimination against any employee because of Union membership or activity.

However, the Union did not invoke, cite, or otherwise refer to this contract language either in the grievance itself or during the proceeding before the grievance committee. The record does not suggest that the Union ever argued that Respondent Roadway had discriminated against Bianchi because of his acts as Union steward. Similarly, nothing indicates that the grievance committee considered this issue.

In other respects, the record does not establish that the grievance committee considered any issue factually parallel to the unfair labor practice issue. The Union argued that Bianchi had not acted dishonestly but it made essentially the same argument in Daniels’ case, and Daniels was not a Union steward. The grievance committee had no reason to consider Bianchi’s status as a steward or the protected nature of his activity because the Union did not invoke the contractual language quoted above or argue that Bianchi’s conduct was entitled to its protection.

Accordingly, I conclude that the grievance committee did not consider the unfair labor practice issue. Therefore, its decision is not entitled to deferral.

For the above reasons, I have concluded that deferral to the joint grievance committee’s decision is not appropriate. Therefore, I proceed to the merits of the case.

As discussed below, the credited evidence establishes that Respondent Roadway discharged Bianchi because of Bianchi’s protected activities as Union shop steward. This finding affords an additional reason not to defer to the grievance resolution process. Where the precipitating event leading to an employee’s termination is the employee’s protected activity, the Board considers deferral inappropriate. *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 (1997).<sup>1</sup>

## II. The Lawsuit

As noted above, Bianchi filed a federal lawsuit against the Employer and the Union and prevailed at the trial level. However, the United States Court of Appeals for the 11th Circuit held that Bianchi had waived his right to contest the fairness of the grievance proceeding and reversed. Here, I must determine whether the Court of Appeals’ decision precludes any part of the present litigation. For the reasons discussed below, I conclude that it does not.

When it reversed the trial court’s judgment in favor of Bianchi, the Court of Appeals did not delve into the facts considered by the jury. Rather, it focused on an answer Bianchi provided in response to a question by a member of the joint committee which heard his grievance. After both sides had presented evidence to the committee, but before the committee issued its decision, one of the committee members, Pete Webb, asked the grievant two customary questions. The transcript of the grievance hearing reports the exchange as follows:

Webb: Any further questions? Mr. Bianchi, there’s two (2) questions that we ask at the end of the case. First (1st) of all, do you feel that you’ve had an opportunity to say everything and present every piece of evidence that needs to be entered on your behalf?

<sup>1</sup> It may be noted that the General Counsel’s brief offers a further reason for denying deferral: “In *Kansas Meat Packers*, 198 NLRB 543, 544 and fn. 5 (1972), the Board concluded that deferral to arbitration would be repugnant to the purposes of the Act because it would relegate the alleged discriminatees to an arbitral process authorized, administered and invoked entirely by parties hostile to their interests.” For the following reason, however, I believe that the cited case is not apposite.

The *Kansas Meat Packers* case (also known as *Aristo Foods*) involved a question of prearbitration deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), rather than the post-award Spielberg deferral sought here. Because the grievance proceeding already has taken place, what happened there is a matter of established fact which can and should be evaluated under the Spielberg standards.

5           Bianchi: Bianchi. Once again I wish I would have been more and I didn't know about what, reading the same thing into the, for these A, B, C, D, and F, up to L and have Gerome in here to ask the questions. I was un, unprepared for that and I should have been more prepared. But other than that, I presented anything that I could.

          Webb: So your answer is yes?

          Bianchi: Yes.

          Webb: Secondly, do you feel that the Local Union has represented you properly and fully?

10          Bianchi: I believe Don Marr represented me properly and fully.

          The Court of Appeals held that Bianchi's words – "I believe Don Marr represented me properly and fully" – constituted a waiver of his right to contest the quality of the representation in the Section 301 lawsuit. For that reason, it reversed the judgment.

15           Here, for a simple reason, I need not go into an elaborate comparison of the Court's standards for finding a waiver with the Board's standards for finding a waiver. The simple reason is this: Bianchi did not possess any authority to waive the Board's right – more exactly the General Counsel's right – to prosecute the unfair labor practice cases.

20           By analogy, the relationship of tort law to criminal law illustrates why Bianchi did not possess authority to waive the government's right to prosecute. Suppose, for example, that Person A commits a battery on Person B. Suppose further that Person B calls the police, resulting in Person A's arrest, and also sues A in civil court. The battery constitutes both a crime and a tort.

25           As the plaintiff in the civil action, Person B can waive his right to pursue the tort claim or otherwise bring the litigation to an end. However, he does not have a similar right to control the criminal case. Certainly, Person B may try to persuade the prosecuting attorney to drop the charge, but the prosecuting attorney has a duty to act on behalf of the citizenry to preserve the public peace. Exercising prosecutorial discretion, she could decide that the public will not suffer significant harm if she drops the charge; she also could decide that it would serve the public interest to continue the prosecution, even over the victim's objection.

30           Analogously, a union's breach of the duty of fair representation may create a civil cause of action and also constitute an unfair labor practice violation of the National Labor Relations Act. In the civil action, the plaintiff may waive his right to proceed, but he cannot control whether the prosecutor – the Board's General Counsel – decides that the public interest requires litigation of the unfair labor practice.

35           It should be stressed that the difference between the plaintiff's personal cause of action in the 301 suit and the unfair labor practice is not merely a theoretical or academic matter. Rather, Congress has committed to the Board and its General Counsel exclusive responsibility to make sure that the statutory system of collective representation actually functions in the workplace.

40           An employer's discharge of a union steward because he exercised statutory rights isn't just a private matter between the company and the employee. Rather, such an unlawful action harms other bargaining unit employees. In fact, it causes three different kinds of harm.

5 First, the unlawful discharge of the shop steward deprives the employees of representation by the person they had designed, through their union, to be their closest and most immediately accessible adviser and spokesman. Second, the unlawful discharge also discourages other employees from being willing to serve as union steward. Third, until remedied, the unfair labor practice potentially chills every steward’s willingness to discharge his duties conscientiously and assertively.

10 The Court of Appeals reversed the District Court’s judgment in Bianchi’s Section 301 lawsuit without ever reaching the pivotal issue in the present 8(a)(1) and (3) case, namely, whether Respondent Employer discharged Steward Bianchi unlawfully. For that reason alone, it would be inappropriate to defer to the Court’s 8(a)(1) and (3) findings. There *were no* 8(a)(1) and (3) findings.

15 Because of its holding that Bianchi had waived the right to challenge the fairness of the Union’s representation of him before the joint committee, the Court of Appeals necessarily never reached any issue concerning the propriety of the employer’s action. Thus, it never considered whether the discharge met, or failed to meet, the standards established through collective bargaining.

20 Moreover, it could not have reached, in any event, the issue of whether Bianchi’s discharge violated the National Labor Relations Act. Bianchi’s 301 lawsuit did not raise this issue, the Court did not have jurisdiction to decide it, and neither the Board nor its General Counsel appeared as a party in that action.

25 Accordingly, I conclude that the Court’s dismissal of the 301 lawsuit does not preclude the present unfair labor practice litigation.

30 The Complaint in this case alleges that Respondent Employer discharged Bianchi in violation of Section 8(a)(1) and (3), but it also alleges, in part, that Respondent Union breached its “duty of fair representation” and thereby violated Section 8(b)(1)(A) of the Act. It might be argued that, although the Court lacked jurisdiction to decide the 8(a)(1) and (3) allegations, it nonetheless possessed and exercised authority to determine whether the Union breached its duty of fair representation. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that the National Labor Relations Act did not give the Board exclusive jurisdiction to determine and remedy such breaches. Section 301 of the Act afforded an employee an independent right to sue a labor organization for such a breach.

40 However, in dismissing the 301 suit, the Court of Appeals held only that Bianchi had waived his right to contest the fairness of sufficiency of the Union’s representations. For the reasons discussed above, an individual’s waiver of a right to sue under Section 301 of the Act does not waive the General Counsel’s right to enforce Section 8(b)(1)(A).

45 In sum, I conclude that the litigation in federal court, and the decision of the United States Court of Appeals, do not preclude the resolution of any issue in this proceeding.

**III. The Election Appeals Master**

Because of a federal lawsuit not involving the Board, a court–appointed master oversees the internal elections conducted by the International Brotherhood of Teamsters. Respondent Roadway argues that the court–appointed master ruled on the allegation that Respondent Union failed to represent Bianchi fairly in the grievance proceeding. Specifically, in its post–hearing brief, Roadway states, in part:

Bianchi then filed an election protest with the Office of the Election Administrator. . . claiming that Marr did not represent him properly during his grievance proceeding. (Tr. 53.) Gerry Pape, the Union president at the time, hired counsel to defend the Union in regard to the protest and to demonstrate that Bianchi had been properly represented in all respects. (Tr. 128) Although the Administrator initially found in Bianchi’s favor, the Election Appeals Master, The Hon. Kenneth Conboy (a former federal judge) reversed. (Tr. 53.) He found that there was no evidence of any wrongdoing by Marr or anyone else associated with the Union. (Tr. 53.) Bianchi’s protest therefore was dismissed.

(Emphasis in original.)

Respondent Roadway’s brief referred to transcript page 53, which records the examination of Business Agent Marr by Roadway’s counsel. Marr’s testimony included the following:

**Q** I’d also like to ask you, we talked a little bit about the Election Administrator and the November 2nd, 2001 decision.  
The Election Administrator’s decision, those are appealable to the Elections Appeals Master, correct?

**A** Yes.

**Q** And I believe if you look at the last page of General Counsel Exhibit 12 — actually, I’m sorry, it’s the next — third from the last page — one more — fourth from the last page, on Page 4, it says Kenneth Conboy, Election Appeals Master?

**A** Yes.

**Q** Is that right?

Now, Mr. Bianchi filed a protest regarding your handling of his grievance, correct?

**A** Yes.

**Q** The grievance that we’re, in fact, talking about in this proceeding.

**A** Yes.

**Q** And he made essentially the same thing that he’s making in this proceeding, that you did not appropriately represent him in that grievance, is that right?

**A** Yes.

\* \* \*

**Q** BY MR. DAWSON: And in that proceeding, the Election Appeals Master found that there was absolutely no evidence that you had done anything wrong, isn’t that right?

**A** Yes.

This conclusory testimony, in response to leading questions, fails to convince me that the election appeals administrator actually reviewed the Union’s handling of Bianchi’s discharge grievance and ruled that the Union had not breached its duty of fair representation. The duties of

an election appeals master involve oversight of the campaigns for internal union office and the voting itself. The record does not establish that this official either had the authority to review how well the Union performed in grievance proceedings or actually scrutinized how the Union represented Bianchi in the grievance proceeding.

5

Respondent’s argument also suffers from more fundamental difficulties. At the beginning of Marr’s testimony excerpted above, Roadway’s counsel directed Marr’s attention to General Counsel’s Exhibit 12, a report signed by the election appeals master, Kenneth Conboy. However, this report had nothing at all to do with Bianchi’s discharge grievance or the Union’s representation of Bianchi at the discharge hearing.

10

Indeed, Conboy’s report is dated November 2, 2001, which was 12 days *before* the joint committee heard and ruled upon Bianchi’s grievance. Thus, both the timing of Conboy’s report and its contents undercut Respondent Roadway’s argument that Conboy examined the Union’s representation of Bianchi at the grievance proceeding and concluded that it was fair.

15

In its brief, Respondent Roadway did not cite any other evidence to support its argument that the election appeals master reviewed the Union’s handling of the Bianchi grievance. The brief does refer to the testimony of the former local president, Geraldine Pape, recorded at transcript page 128. This testimony concerns Pape’s retention of counsel to defend against the Section 301 lawsuit which Bianchi had filed. It doesn’t refer to the election appeals master.

20

In sum, Respondent Roadway’s argument that the election appeals master reviewed the Union’s handling of Bianchi’s grievance draws no support from the record. Accordingly, I reject it.

25

**IV. Further Discussion of Marr’s Credibility**

Although Marr’s testimony, quoted above, does not support the Respondent’s argument, it does raise further concerns about his credibility. In the interest of clarity, it appeared preferable to delay this further examination of Marr’s credibility until now, after Marr’s testimony had been placed in context.

30

First, the testimony excerpted above indicates that Marr was willing to assert that Bianchi made “essentially the same” argument to the election appeals master that Bianchi was making here, namely, that the Union “did not appropriately represent him” in the grievance proceeding. However, as already noted, the election appeals master issued his report *before* Bianchi’s grievance hearing, and the master’s report, of course, said nothing about that hearing.

35

For another reason, Marr’s testimony raises concerns about his credibility. It should be noted that Roadway’s counsel had directed Marr’s attention to the report of the election appeals master (General Counsel’s Exhibit 12) shortly before asking the following:

40

**Q** BY MR. DAWSON: And in that proceeding, the Election Appeals Master found that there was absolutely no evidence that you had done anything wrong, isn’t that right?

45

**A** Yes.

In fact, the election appeals master’s report did include an unfavorable reference to Marr’s conduct. This report focused on a protest which Marr’s “slate” of candidates had made against Bianchi’s “slate” of candidates. Marr’s “slate” (the “Hoffa Unity slate”) had accused Bianchi’s “slate” (the “Leedham slate”) of campaigning in a driver’s break room where “there was no pre-existing right to campaign.” In his November 2, 2001 report, the election appeals master rejected this allegation. Moreover, in the paragraph penultimate to his ruling, the master’s report stated, in part, as follows:

Finally, we reject the declaration by Marr that campaigning is prohibited inside CF facilities under Local 390’s jurisdiction, finding that he has engaged in such activity himself without challenge or objection. Given his own conduct in this regard, we find it unfortunate that he has misrepresented the practice permitting campaigning and thereby misled the protestor into pursuing this protest.

Thus, although Marr testified that the election appeals master had found “absolutely no evidence” that he, Marr, had “done anything wrong,” in fact, the election appeals master concluded that Marr had misrepresented and misled.

It should be emphasized that I do not rely upon the opinion of the election appeals master – that Marr had misrepresented and misled – in performing my own assessment of Marr’s credibility. Rather, I am concerned about the difference between Marr’s testimony concerning the election appeals master’s report and the contents of the report itself.

It is true that Marr simply answered “yes” in response to a leading question, namely, that the master had found “absolutely no evidence” that Marr had done anything wrong. If Marr himself had volunteered during his testimony that the master had found absolutely no evidence that he had done anything wrong, it certainly would have caused greater damage to Marr’s credibility than did his succinct response to the attorney’s question. All the same, it is appropriate to consider Marr’s answer in this instance along with other factors reflecting on his credibility.

In sum, I do not believe Marr’s testimony to be as reliable as that given by Daniels and Bianchi. In view of this conclusion about Marr’s credibility, it is not necessary to take judicial notice of Marr’s federal court testimony, as the General Counsel sought in a post-hearing motion.

### **The Unfair Labor Practice Allegations**

#### **1. The 8(a)(3) and (1) allegations**

The evidence establishes that Respondent discharged Bianchi for actions he performed in his capacity as Union steward. The Act protects a Union steward’s advising and assisting an employee in dealing with the employer on a work-related matter. Therefore, Respondent discharged Bianchi for conduct which the Act protects.

In these circumstances, the Supreme Court’s decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) establishes the analytical framework to be followed. Because the evidence clearly establishes that Respondent Employer discharged Bianchi for statements he made and

actions he took as a Union steward – activity clearly within Section 7’s zone of protection – the discharge must be found to be unlawful unless, during the course of the protected activity, Bianchi engaged in misconduct so egregious that it removed him from the protection of the Act or rendered him unfit for further service. *Bloomfield Health Care Center*, 352 NLRB No. 39 (March 20, 2008), *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006).

When the credited evidence establishes that an employer has discharged an employee for conduct during the course of protected activity, the burden of proceeding shifts to the employer to prove that it acted with an honest belief that the employee had engaged in misconduct. When the employer has established such a good faith belief, the burden shifts back to the General Counsel. At this point, if the General Counsel proves that the asserted misconduct did not, in fact, occur, the discharge will be found violative. *Accurate Wire Harness*, 335 NLRB 1096 (2001) *Webco Industries* 327 NLRB 172 (1998) However, if the General Counsel cannot establish that the employee did not engage in the asserted misconduct, the employer’s defense goes un rebutted and prevails. *Bloomfield Health Care Center*, above, *Marshall Engineered Products Company, LLC*, 351 NLRB No. 47 (September 29, 2007)

Clearly, Respondent Roadway contends that Bianchi engaged in misconduct warranting his discharge. Thus, its post–hearing brief states that on “October 30, 2001, Bianchi was discharged for assisting rank–and–file member Isaah “Gerome” Daniels. . .in filing a fraudulent workers’ compensation claim.”

Respondent Roadway bears the burden of demonstrating that it did hold an honest belief that Bianchi had engaged in this misconduct. However, Board precedent establishes a relatively low threshold for showing that such an honest belief existed. Although the employer must do more than merely make the assertion, some specific record evidence linking particular employees to particular allegations of misconduct will suffice. An employer’s honest belief may be based on hearsay, and the employer need not interview the employee before taking disciplinary action. *Avery Heights*, 343 NLRB 1301 (2004), citing *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980), *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979), and *Detroit Newspapers*, 340 NLRB 1019 (2003).

Respondent Roadway has met its burden of showing that it possessed such an honest belief. Daniels initially had informed management that he had heartburn. Only later did he claim that he had pulled a muscle. Moreover, management had learned that the Union’s business agent, Marr, told Daniels to file for Union benefits not related to workers’ compensation and that Steward Bianchi had, in effect, contradicted Marr’s instruction. Certainly, management had grounds to be suspicious. Considering the low threshold for proving an honest belief, I conclude that Respondent Roadway has met its burden.

However, I conclude that the General Counsel has proven that Bianchi did not, in fact, engage in misconduct. As noted above, my observations of the witnesses lead me to credit Daniels and Bianchi. Based on their testimony, I find that Bianchi believed that Daniels had suffered a work–related injury. Moreover, I find that Bianchi did not, at any time, intend to deceive or defraud Respondent Roadway. To the contrary, he intended to assist Daniels in filing an on–the–job injury report which Bianchi believed to be truthful.

Accordingly, I conclude that Respondent violated Section 8(a)(1) and (3) of Act by discharging him, and thereafter violated the Act by refusing to reinstate him.

5 **2. The 8(b)(1)(A) allegations**

Complaint paragraph 8(a) alleges that from on or about October 30, 2001, to on or about November 14, 2001, Respondent Union processed a grievance filed by Bianchi concerning his discharge “perfunctorily, with hostility and in bad faith.”

10 Complaint paragraph 8(c) alleges that this conduct (processing the grievance “perfunctorily, with hostility and in bad faith”) resulted in the denial of the grievance. Respondent Union denies these allegations.

15 At the outset, it should be noted that Bianchi’s grievance was not “clearly frivolous.” Indeed, his grievance arose out of the same facts as the Daniels’ grievance, which the joint committee sustained.

20 **Did the Union Breach Its Duty of Fair Representation?**

A union breaches its duty of fair representation toward employees it represents when it engages in conduct affecting those employees’ employment conditions which is arbitrary, discriminatory, or in bad faith. A union’s actions are arbitrary “only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.” *National Association of Letter Carriers*, 347 NLRB No. 27 (May 31, 2006), citing *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991)(internal quotation marks omitted).

30 To enjoy this “wide range of reasonableness,” a union must act “in good faith, with honesty of purpose, and free from reliance on impermissible considerations.” *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, 336 NLRB 972 (2001), citing *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479, 480 (2000) and *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). In *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, the Board also stated that “A union violates its duty of fair representation if its disposition of a grievance was “motivated by ill will or other invidious considerations.” *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, above, citing *Bottle Blowers Local 106 (Owens–Illinois, Inc.)*, 240 NLRB 324 (1979).

40 These quotations from *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, above, might, if considered in isolation, suggest that union officials’ hostility to a grievant, if arising from the grievant’s protected activities, alone would suffice to violate the Act. However, I do not understand the Board to be saying that ill will or invidious considerations would make unlawful a union’s otherwise appropriate disposition of a grievance. For example, if a grievance were clearly frivolous, a union lawfully could refuse to take it to arbitration even if  
 45 union officials bore hostility towards the grievant because of his protected activities. Likewise, if a union official zealously pursued a grievance, the fact that the official secretly hated the grievant because of the grievant’s protected activities would not render unlawful conduct which otherwise would be appropriate.

On the other hand, proof of hostility isn't always required to establish a violation of Section 8(b)(1)(A). Although the General Counsel must show "something more than mere negligence," a union's extreme dereliction of its duty as exclusive bargaining representative can violate Section 8(b)(1)(A) even in the absence of an unlawful motive. See, e.g., *Unlicensed Division, District 1 (Mormac Marine Transport)*, 312 NLRB 944 (1993)

In sum, a breach of the duty of fair representation can arise only when a union's action or inaction adversely affects an employee in the bargaining unit which the union represents, but this necessary condition – an adverse effect upon a represented employee's terms and conditions of employment – is not, by itself, sufficient. Whether or not the union's action or inaction is lawful depends on an additional factor. The action or inaction either must result from negligence greater than "mere negligence," or it must result from some invidious reason, such as hostility engendered by the grievant's protected activities.

Therefore, the analysis appropriately begins by asking what the Respondent Union did which potentially harmed the employee it had a duty to represent. The General Counsel's brief argues that Business Agent Marr's conduct violated the Act in a number of ways.

The Daniels grievance hearing took place the day before the Bianchi grievance hearing. The General Counsel's brief states that before the Daniels' hearing, Marr "asked Daniels to lie and say that he had not been hurt at work."

Based on Daniels' testimony, which I credited for the reasons discussed above, I find that before Daniels' grievance hearing, Business Agent Marr told him that if he said that he "got injured off the job," he wouldn't have to appear before the joint committee, the implication being that the Union and Employer would settle the grievance in Daniels' favor. Daniels declined to make such a statement.

The General Counsel's brief argues that when Business Agent Marr suggested to Daniels that he disavow having been injured at work, Marr was trying to make it appear that Bianchi had encouraged Daniels to lie about the cause of the medical problem. Thus, the brief states:

If Daniels agreed to say that he was not injured at work, it would have appeared that Bianchi had told him to falsely change a personal injury to an on-the-job injury. Marr's attempt to get Daniels to essentially assert that Bianchi had engaged in misconduct once again demonstrates Marr's hostility and bad faith toward Bianchi.

However, even if Daniels had been willing to state that he wasn't injured at work, such a statement would not be tantamount to saying that the shop steward had encouraged Daniels to make a false claim. Thus, I reject the General Counsel's argument that Marr was trying to get Daniels "to essentially assert that Bianchi had engaged in misconduct."

The General Counsel cites the pejorative language which Marr used in referring to Bianchi as evidence that Marr intended to undermine Bianchi's grievance. Obviously, Marr was irritated and even angry at Bianchi, but in the particular circumstances presented here, I do not conclude that Marr's use of a vulgar epithet shows that Marr intended to represent Bianchi unfairly or try to defeat his grievance.

5 Rather, I conclude that Marr sincerely believed that Daniels had *not* suffered a work-related injury. When Daniels left work on October 12, 2001, he gave heartburn as a reason. Moreover, Daniels did not claim to have suffered an injury at a particular point in time – for example, because of an accident at work – but instead claimed to have discovered, after the fact, that he had pulled a muscle. Marr had legitimate reason to question that conclusion.

10 In these circumstances, it was not unreasonable for Marr to seek to resolve Daniels’ grievance by having him disavow the on-the-job injury claim. Such a disavowal wouldn’t necessarily doom Bianchi’s grievance because it could still be asserted that Bianchi acted with the good faith belief that Daniels had, in fact, sustained an on-the-job injury.

15 The General Counsel’s brief further argues that Marr’s actions during both Daniels’ hearing and Bianchi’s hearing breached the Union’s duty to represent Bianchi fairly. Thus, the brief states:

20 The positions that Marr took and the statements he made during Daniels’ and Bianchi’s grievance hearings also demonstrate his hostility and bad faith. During Daniels’ hearing Marr told the Grievance Committee on about five occasions that Daniels did not know how he had been injured, despite the fact that Marr knew full well that Daniels believed that he had been injured at work. Marr also told the Grievance Committee repeatedly that he personally did not know how Daniels was injured and that it was not his position that Daniels was injured at work. These false statements by Marr make it appear as if Bianchi told Daniels to claim a personal injury as an on the job injury and again demonstrate Marr’s hostility toward Bianchi.

25 (Transcript and exhibit citations omitted.)

30 The General Counsel thus asserts that it was improper for Marr to tell the grievance committee, during Daniels’ hearing, that Daniels didn’t know how he had been injured. However, the General Counsel’s argument faces a major obstacle: Daniels did not know whether he strained the muscle at work. During his hearing, he told the grievance committee:

35 I’m still under my doctor’s care and we didn’t know the decision from him. I’ll be going back the 26th to see what he says about my injury, whether it’s on-the-job or personal injury. So whenever I get a statement from my doctor, then I will be able to give more information about it.

40 Thus, Daniels’ testimony at the grievance hearing contradicts General Counsel’s argument that Marr “knew full well that Daniels believed he had been injured at work.” Daniels himself did not know the etiology of the medical problem.

45 Likewise, the record does not support the General Counsel’s assertion that Marr made “false statements” by saying he did not know how Daniels was injured. Daniels’ own testimony, quoted above, establishes that he, Daniels, wasn’t sure how or where he was injured. If Daniels himself wasn’t sure, there was no way for Marr to know.

Marr did nothing wrong in claiming uncertainty about the origin of Daniels’ medical problem. His statements do not breach the duty of fair representation.

The General Counsel’s brief further argues that Marr improperly told the grievance committee that Shop Steward Bianchi had told Daniels that the injury was job–related and that all Daniels did was follow the steward’s instructions. The brief continues:

5 Marr then told the committee that Daniels “never intended to defraud the company. The  
 advice he got from the steward is what he took his directive from.” (GC 10) Marr also  
 informed the committee on multiple occasions that in contrast to Bianchi, he (Marr) had  
 advised Daniels to complete Central States forms. (GC 10). In making these statements  
 10 Marr sent a strong message to the Grievance Committee that Bianchi intended to defraud  
 Respondent Employer, despite the fact that the same committee was to hear Bianchi’s  
 grievance the following day. Thus, Marr ensured that the committee would believe that  
 Bianchi advised Daniels to claim a personal injury as an on–the–job injury and that  
 Bianchi advised Daniels to engage in fraud. These statements demonstrate Marr’s  
 15 hostility toward Bianchi and constitute a breach of the Union’s duty to represent Bianchi  
 fairly.

In evaluating the General Counsel’s argument, it first should be noted that it assumes  
 Marr knew that the same committee which was hearing the Daniels grievance would be deciding  
 Bianchi’s case the next day. However, the record leaves room to question whether Marr had  
 20 such knowledge.

Moreover, contrary to the General Counsel’s argument, I do not conclude that Marr’s  
 assertions that he told Daniels to complete a Central States form (rather than a workers’  
 compensation form) “demonstrate Marr’s hostility toward Bianchi. . .” The record does include  
 25 evidence indicating that Marr bore ill feelings towards Bianchi, but Marr’s statements to the joint  
 committee do not constitute part of that evidence.

As a Union business agent, Marr was a labor relations professional, and the members of  
 the joint committee were also labor relations professionals. They were his peers, and Marr  
 30 naturally would have a personal interest in maintaining their respect. Marr believed he had given  
 Daniels correct advice which would have kept Daniels out of trouble. Marr would feel a normal  
 human inclination to let his peers know that he wasn’t responsible for this awkward situation.  
 Whether or not Marr’s statements breached the duty of fair representation – a question to be  
 discussed next – they do not, themselves, demonstrate that Marr was hostile to Bianchi.  
 35

The General Counsel faults Marr for telling the grievance committee both (1) that  
 Daniels filed an on–the–job injury report because of Bianchi’s advice and (2) that Marr had told  
 Daniels to file for Central States benefits. However, both these statements are true. Bianchi *had*  
 told Daniels to file an on–the–job injury claim and Marr had told Daniels to do otherwise. The  
 40 General Counsel’s argument notwithstanding, I cannot conclude that Marr breached the duty of  
 fair representation by telling the truth.

Moreover, the credited evidence does not support a finding that Marr made any false  
 statement to the joint committee in either grievance hearing. I conclude that he did not.  
 45

The General Counsel’s brief further argues that Marr “mounted a vigorous and relatively  
 thorough defense of Daniels” but only a “weak defense” of Bianchi. However, the transcripts of  
 these grievance hearings do not demonstrate that Marr performed any less zealously in one than  
 the other.

How closely should I scrutinize and compare Marr’s performance as an advocate at these two grievance hearings? Ordinarily, a union enjoys a “wide range of reasonableness” in deciding how to represent a grievant. *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, above, suggests that a union may be afforded this “wide range of reasonableness” only when it acts “in good faith, with honesty of purpose, and free from reliance on impermissible considerations.” Presumably, the General Counsel would argue that Marr’s hostility towards Bianchi because of the latter’s protected activity deprives the Union of this “wide range of reasonableness” and compels stricter scrutiny.

Even assuming that Marr bore hostility towards Bianchi, it isn’t clear to me that such hostility is inconsistent with Marr acting “in good faith, with honesty of purpose, and free from reliance on improper considerations.” It raises that possibility, of course, but an advocate can represent a client zealously even if the advocate doesn’t like the client personally. Both professionalism and a competitive desire to win can cause the advocate to disregard personal feelings and do the best job possible.

In a separate section below, I will discuss in greater detail the evidence that Marr harbored hostility towards Bianchi. To summarize that discussion, the present record does not persuade me that Marr’s hostility towards Bianchi compromised his good faith and honesty of purpose in representing Bianchi before the joint committee.

Accordingly, I conclude that the Respondent Union remains entitled to a “wide range of reasonableness.” Moreover, I conclude that Marr’s actions and decisions as Bianchi’s advocate fall within that range of reasonableness.

However, even should I scrutinize Marr’s conduct more strictly, I would not conclude that it breached the Union’s duty to represent Bianchi fairly. Contrary to the implication conveyed by the General Counsel’s brief, the record does not establish that Marr sacrificed Bianchi to win Daniels’ grievance. Likewise, I cannot conclude that Marr compromised Bianchi’s case to gain an edge in Daniels’.

Were I to scrutinize Marr’s performance at the Bianchi grievance hearing more closely than I believe appropriate, I might wonder why he did not invoke the specific language set forth in Article 21 of the collective–bargaining agreement, stating in part that any employee “acting in any official capacity whatsoever shall not be discriminated against for his/her acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer’s business. . .” Marr did tell the joint committee that Bianchi was only doing his job as a steward, but left it at that, without citing the contractual language.

Such an inquiry, though, would seem to be exactly the sort of nitpicking and “Monday morning quarterbacking” which the Board long has eschewed. Moreover, even were some hypothetical panel of expert advocates to conclude that, ideally, Marr should have raised this argument, its omission hardly would establish that Marr failed to represent Bianchi fairly and in good faith.

In sum, no matter what hostility Marr might have felt towards Bianchi personally, the credited evidence does not establish that it affected Marr’s representation of Bianchi before the

joint committee. The record also does not establish that Marr acted dishonestly, incompetently or perfunctorily while appearing before the joint committee on behalf of Bianchi and Daniels.

5 Because the credited evidence fails to establish that Marr did anything he shouldn't have done, or failed to do anything he was obliged to do in representing Bianchi, I conclude that the Respondent Union did not breach its duty of fair representation. This conclusion holds regardless of whether Marr disliked Bianchi because of Bianchi's protected activities.

10 An analogy to a Section 8(a)(3) case may be appropriate here. In a case alleging discrimination in violation of Section 8(a)(3), proving animus alone will not establish a violation. Rather, the General Counsel must also prove that there was an adverse employment action. Likewise, proving that union officials bore hostility to someone because of that person's protected activities will not establish a breach of the duty of fair representation. The government must also show that the union acted in some improper way by doing something it should not have done, by failing to do something required, or by discharging its duty in merely a perfunctory manner.

15 Complaint paragraph 8(a) alleges that Respondent Union processed Bianchi's discharge grievance "perfunctorily, with hostility and in bad faith." The credited evidence fails to establish that the Union acted perfunctorily or in bad faith. Whatever hostility Marr may have held towards Bianchi is not sufficient by itself to establish a violation. Therefore, I recommend that the Board dismiss the charge against the Union.

25 **Evidence of Hostility Against Bianchi**

For the reasons discussed above, I have concluded that, because the evidence fails to establish that the Union represented Bianchi unfairly, it isn't necessary to consider whatever hostility Business Agent Marr may have harbored because of Bianchi's protected activities. In case the Board may disagree, the following analysis discusses evidence related to Marr's hostility.

30 Three different witnesses testified that Marr referred to Bianchi with a pejorative vulgar epithet. Marr did not deny using that expression, but explained that he applied it to many people, not just to Bianchi. Such language, Marr testified, was common in the industry: "We can make — and when I say we, the Teamsters, we can make a sailor blush." No other witness contradicted this testimony, which I credit.

35 Marr's own testimony reflects his feelings about Bianchi. Although, as discussed above, Marr sometimes failed to answer questions responsively, he did not attempt to conceal his opinion of Bianchi. Thus, Marr testified:

40 **Q** Explain under what circumstances you would have conversations with Ms. Pape about Mr. Bianchi?

45 **A** He was a pain in the ass politically. He's just a pain in the ass politically. As far as a shop steward, he was a very good shop steward, but everybody acknowledged it. And when I say that, we had our political differences. He belonged to TDU.

“TDU” stands for “Teamsters for a Democratic Union.” The record does not reveal the exact nature of the differences between the TDU and the faction to which Marr belonged.

5 To prove that Marr harbored hostility towards Bianchi, the General Counsel relies in part on the testimony of Geraldine Pape, who was president of Local 390 from 1998 to 2002. She testified that Marr told her that Bianchi “was going to lose” the grievance concerning his discharge. According to Pape, she told Marr “Bianchi is not a threat to you and that you do not need to do this. And he said okay.”

10 Pape testified that after Bianchi lost the grievance, she gave Marr a warning letter “because I told him not to do that. And I told him if he ever did it again, he would be fired.”

15 The record includes a July 15, 2002 warning letter from Pape to Marr. The letter states as follows:

Please be advised that this is a final warning letter for failure to follow instructions. Previously you have been warned three times about instructions I have given to you and you have totally ignored my instructions and proceeded in your own fashion. This is the  
20 fourth incident that you have not followed my instructions. Therefore, if there is another occurrence in that you disregard my instructions I will have no alternative than to terminate your employment.

25 This letter does document the tension between Union President Pape and Business Agent Marr, but it certainly does not corroborate Pape’s testimony that she issued Marr a warning concerning his handling of the Bianchi grievance. Pape wrote this letter some 8 months after the joint committee ruled against Bianchi, and it makes no reference to either Bianchi or his grievance.

30 Additionally, Pape had some difficulty remembering details. More than 6 years had elapsed between the events and her testimony, so memory difficulties might be expected. However, her inability to recall details does cast some doubt on the reliability of her testimony.

35 Marr flatly denied that Pape had any discussions with him about the Bianchi grievance. He testified that the conversation Pape described “never took place.”

40 Based on my observations of the witnesses, I credit Marr rather than Pape. Accordingly, I conclude that he did not tell Pape that Bianchi was “going to lose” his grievance. Moreover, I am quite skeptical of Pape’s claim that after the joint committee denied the Bianchi grievance, she warned Marr that if he ever “did it again,” she would fire him.

45 Even if credited, Pape’s testimony would fall short of establishing that Marr participated in, or knew about, any kind of plot to compromise the impartiality of the joint committee or to cause the committee to rule against Bianchi. Although, crediting Marr, I conclude that he never told Pape that Bianchi was “going to lose,” this vague statement hardly would support a finding that the joint committee proceeding had been rigged. Equally plausibly, it simply could have been a prediction as to how the joint committee would rule.

5 Although I do not rely upon Pape’s testimony, which I do not credit, Marr’s own testimony does establish that he was not particularly fond of Bianchi, whom he considered a “pain in the ass” politically. Essentially, Marr considered Bianchi to be an irritation. Although this rather low level of animosity arguably might have affected how well Marr represented Bianchi, on the other hand, it might not have.

10 Based on the present record, I conclude that Marr’s dislike of Bianchi did not affect his professional representation of Bianchi during the grievance proceeding. Bianchi said as much when he told the grievance committee “I believe Don Marr represented me properly and fully.” Although Bianchi later disavowed this statement, I conclude that he was telling the truth.

### Conclusions of Law

15 1. Roadway Express, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

20 2. International Brotherhood of Teamsters, Local 769 and its predecessor, International Brotherhood of Teamsters, Local 390, are labor organizations within the meaning of Section 2(5) of the Act.

25 3. Respondent Roadway Express violated Section 8(a)(1) and (3) of the Act by discharging employee Amadeo Bianchi on October 30, 2001, because of Bianchi’s protected activities as union steward.

4. Respondent International Brotherhood of Teamsters, Local 769 and its predecessor, International Brotherhood of Teamsters, Local 390, did not violate Section 8(b)(1)(A) or Section 8(b)(2) of the Act.

30 5. Except for the conduct described in paragraph 3 above, neither Respondent violated the Act in any manner alleged in the Complaint.

### Remedy

35 Having found that Respondent Roadway Express has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix A.

40 Respondent Roadway must reinstate Amadeo Bianchi to his former position or to a substantially equivalent position if his form position no longer exists. Respondent Roadway also must make Amadeo Bianchi whole, with interest, for all losses he suffered because of his unlawful discharge.

45 Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended<sup>2</sup>

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**Order**

The Respondent, Roadway Express, Inc., its officers, agents, successors, and assigns, shall

10

1. Cease and desist from:

(a) Discharging an employee because of the employee’s protected union activities or because of the employee’s status as a union shop steward.

15

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

20

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

25

(a) Offer Amadeo Bianchi immediate and full reinstatement to his former position or, if his former position no longer exists, to a substantially equivalent position.

(b) Make Amadeo Bianchi whole, with interest, for all losses suffered because Respondent unlawfully discharged him.

30

(c) Within 14 days after service by the Region, post at its facilities in Miami, Florida, copies of the attached notice marked “Appendix A.”<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 2001.

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<sup>2</sup> If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

<sup>3</sup> 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.**”

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

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Case 12-CB-5002 is severed from Case 12-CA-22202 and dismissed.

Dated Washington, D.C., July 24, 2008

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**Keltner W. Locke**  
**Administrative Law Judge**

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APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board had 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** interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

**WE WILL NOT** discharge or otherwise discriminate against an employee because of protected Union activity or because of his status as a Union shop steward.

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

**WE WILL** offer Amadeo Bianchi immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position is not available.

**WE WILL** make Amadeo Bianchi whole, with interest, for all losses he suffered because we unlawfully discharged him.

**ROADWAY EXPRESS, INC.**  
**(Employer)**

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

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

201 East Kennedy Boulevard, Suite 530, Tampa, FL 33602-5824  
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (813) 228-2455