Neptco, Inc. *and* Teamsters Local Union 61, affiliated with International Brotherhood of Teamsters.[1]
Case 11–CA–18576

December 13, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 25, 2000, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below, and to dismiss the complaint.

We agree with the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) by threatening employees[4] and by prohibiting them from wearing union insignia. We also agree with the judge's dismissal of allegations that the Respondent violated Section 8(a)(3) and (1) by discharging employees Ken Price and Gordon O'Meara.[5] For the reasons discussed below, however, we reverse his findings that employees Donald Parnell and Alesa Tingler were discharged in violation of Section 8(a)(3) and (1), and we shall dismiss the complaint in its entirety.

1. Facts

The relevant facts are more fully set forth in the judge's decision. The Respondent operates a manufacturing plant in Granite Falls, North Carolina. Teamsters Local Union 61 began an organizing campaign at the Respondent's facility in May 1999. After August 1999, the Union apparently ceased actively campaigning and held no further meetings with employees. Employees continued to submit authorization cards until early January 2000.[6]

The events that gave rise to the discharges of alleged discriminatees Donald Parnell and Alesa Tingler, both of whom were machine operators working at the Granite Falls plant, occurred on January 26. That morning, Parnell went to the warehouse area of the plant to obtain some packing materials. On his way back to his work area, Parnell met Supervisor Douglas Laws. Laws asked Parnell why he was in the loom area and Parnell responded, "I'm trying to get some materials." Laws reminded him that he should ask his lead person to get materials for him. Laws told Parnell to return to his machine, and instructed him to remain in his work area and inform his lead person if he needed any materials.

Later that same day, Laws observed Parnell and Tingler standing near the production office, away from their machines, talking with Janet Barker, an office employee. Laws motioned for them to move along and then walked away from the office. Shortly thereafter, Laws looked back and observed that the group had not dispersed. When Parnell and Tingler noticed Laws looking at them, they immediately disbanded.[7]

Before returning to her work area, Tingler went to the restroom and then to the canteen. Upon her return, Laws told Tingler that he had been to her machine twice in the

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Counsel for the General Counsel has excepted to the judge's finding that counsel acted unethically by selectively quoting the testimony of Supervisor Douglas Laws in his posthearing brief. While all attorneys appearing before the Board have a duty to truthfully and accurately represent the evidence and the law, we disavow the judge's finding that counsel for the General Counsel impermissibly quoted the testimony of Supervisor Laws or that he has engaged in unethical conduct. Chairman Battista agrees with the judge that counsel's conduct was "regrettable" and "clumsy." However, the judge did not find that the conduct was unethical, and the Chairman would also not make that finding.

[4] We agree with the judge's dismissal of the allegation that Supervisor Robert Church threatened employees in violation of Sec. 8(a)(1) by telling them that the Respondent had a list of people in the front office and was "cleaning house." This statement was made in the context of a discussion of employee discharges not otherwise implicated in this proceeding. Furthermore, although the evidence shows that another supervisor, Robert Coffey, had provided the Respondent with a list of union supporters, there is no evidence that the employees were aware of that list at the time of Church's statement. In this setting, we find that employees could not have reasonably understood Church's statement as threatening employees with discharge for their union activities.

[5] In affirming the judge's dismissal of the allegations as to the discharge of employee Gordon O'Meara, we find it unnecessary to pass on the judge's finding that the Respondent lacked knowledge of O'Meara's union activities because Supervisor Church's knowledge of O'Meara's union activities was obtained prior to Church's promotion to a supervisory position. Rather, we rely solely on the judge's alternate findings, based on the credited evidence, that O'Meara's vulgar and obscene conduct in the presence of a female job applicant was not shown to have been treated in a disparate fashion, and that the personal embarrassment of O'Meara's supervisor over that misconduct was the sole basis for the supervisor's recommendation to discharge O'Meara.

[6] All dates hereafter are in 2000 unless otherwise indicated.

[7] There is no evidence that Laws had any further contact with Parnell that day.

intervening 20 minutes, that she had not been there, and that a spool on the machine had stopped in her absence. Tingler told Laws that she was sorry, explaining that she left her machine to go to the restroom. At that point, Laws sent Tingler home for the day.

Thereafter, Laws met with Human Resources Manager Linda West concerning the incidents involving Parnell and Tingler. After reviewing their personnel files, Laws and West recommended to Plant Manager Dharman Hensman that both employees be discharged. Hensman approved the discharges.

The next day, January 27, Parnell was given a letter stating that his employment was being terminated. Although the letter gave no specific reason for the discharge, Parnell was told that it was due to his job performance.

Tingler was not notified of her discharge until January 31, which was the first day she had been scheduled to work after January 26. Laws handed Tingler a letter similar to the letter given to Parnell a few days earlier, and told her that she was being terminated because of her job performance and "the incident that happened last week."

The Respondent contends that Parnell's and Tingler's conduct on January 26 violated company work rules, which are set forth as groups I and II in the employee handbook. Group I work rules prohibit, for example, insubordination and refusals to comply with a superior's instructions, while group II work rules prohibit an employee from leaving the job during work hours without a supervisor's authorization. A violation of a group I work rule may result in immediate discharge, while a violation of a group II work rule may result in disciplinary action ranging from warnings to suspension or termination. The work rules specifically state that "[a]lthough the company normally follows a progressive corrective action procedure, this procedure may be altered by specific circumstances at the employer's discretion." The Respondent claims that these work rules allowed the discharges of Parnell and Tingler and that these employees' union activity played no part in the decision to discharge them.

2. Discussion

"Employees have a statutory right to engage in union activity without interference from their employer. But, the Act is not a shield protecting employees from their own misconduct or insubordination."[8] Under the standard set forth in *Wright Line*,[9] the General Counsel bears the initial burden of establishing that the employer's discharge of employees for insubordination was motivated by animus toward their union activities. A mere suspicion of unlawful motivation for the discharges is not sufficient to constitute substantial evidence that the discharges resulted from improper motives.[10] Only if the General Counsel meets this initial burden, must the Respondent prove that it would have taken the same action even if the employees had not engaged in union activity. Unlike the judge, we find that the General Counsel has failed to satisfy his initial *Wright Line* burden. As explained below, the General Counsel failed to show that the discharges of Parnell and Tingler were motivated by union animus.

The judge's finding of union animus with respect to the discharges of Parnell and Tingler is based exclusively on conjecture. Specifically, the judge relied on the brief conversation that Parnell had with Supervisor Gary Greene about the Union's organizing campaign on January 21.[11] Greene asked Parnell, an open union advocate, how the Union was going, and Parnell responded that the Union was "limping along." Although the judge dismissed allegations that this exchange was an unlawful interrogation, he nevertheless inferred from this exchange that Greene must have conveyed Parnell's remarks to Plant Manager Hensman. The judge also inferred that Hensman instructed Laws to "crack down" on Parnell in order to extinguish any remaining employee support for the Union. There is no evidence, however, that Greene repeated Parnell's comment to Hensman, nor is there any evidence that Hensman suggested to Laws that they needed to take action with regard to the union organizers. We therefore reject the judge's findings regarding what supposedly ensued from Parnell's statement. The judge engaged in the same speculation—that the Respondent was attempting to purge those who supported the union movement—in finding that Tingler's discharge was motivated by union animus. Therefore, this finding is unsupported as well.

Having rejected the judge's principal finding regarding union animus, we also specifically reject the judge's

[8] *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977) (union supporter lawfully discharged for disregarding his superior's order).

[9] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

[10] See *Mueller Brass Co. v. NLRB*, 544 F.2d 815, 819 (5th Cir. 1977) ("The mere fact that a specific employee not only breaks a Company rule but also evinces a pro-union sentiment is alone not sufficient to destroy the just cause for his discharge.")

[11] The General Counsel had relied on other evidence to support the contention that the Respondent harbored union animus, all of which were rejected by the judge. No exceptions have been filed to these findings of the judge.

conclusion that the proffered reasons for the discharges were false.

As to Parnell's discharge, the judge's pretext analysis proceeds from the erroneous premise that Human Resource Manager West's characterization of Parnell's conduct as "insubordination" would be accurate only if it comported with the judge's view of the common definition of that term. The Respondent claims that Parnell was insubordinate by his repeated "wandering" away from his machine, despite repeated counselings that he remain at his work location.[12] The judge said that Parnell was not in each instance refusing to obey a discrete and direct order, which the judge held was a prerequisite for insubordination. But the judge failed to acknowledge that the Respondent's own understanding of "insubordination" encompassed the more general failure to adhere to the Respondent's expectation that Parnell "stay at his machine." That the Respondent may have also characterized as insubordination an employee's disregard of a direct instruction does not establish that Parnell's conduct could not also be characterized that way. In any event, Parnell had been directed to "stay at his machine," had failed to do so, and thereby had engaged in insubordinate conduct[13] even under the judge's definition of that term.[14] Further, even if his misconduct was not a group I offense, the Respondent's work rule gave it the discretion to discharge an employee for a group II offense. Accordingly, we reject the judge's conclusion that the Respondent falsely claimed that Parnell had engaged in insubordination.

As to Tingler's discharge, the judge acknowledged that she had engaged in two instances of misconduct on January 26 for which she could have been disciplined: her continued socializing after being motioned to "move on" and her abuse of restroom privileges. Tingler had been told to "move along" back to her machine. She did not immediately do so. Only after the supervisor looked back did she do what she had been told. The disobedience was insubordination, and a group I offense. In addition, as noted above, even if the offense was not a group I offense, the Respondent had the discretion to fire her. The fact that the level of discipline was harsh, according to the judge and our dissenting colleague, does not make the discipline per se unlawful under the Act.[15] In the absence of evidence of animus, the judge erred in determining that the level of discipline applied was itself unlawful or that the Respondent was exploiting an opportunity to get rid of a strong union supporter.[16]

We further find no merit in our dissenting colleague's position that Supervisor Church's statement to employees that the Respondent was "cleaning house," which we have unanimously dismissed as an independent 8(a)(1) violation, demonstrated unlawful intent and union animus on the part of the Respondent. Church made no specific reference to the Union, and the statement is too vague to support the conclusion that Church was referring to union supporters or otherwise expressing the Respondent's views on union activity.

Unlike our colleague, we also find nothing suspect about the timing of the discharges. "[Coincidence in time between union activity and discharge or discipline is one factor the Board may consider. . . . But mere coincidence is not sufficient evidence of [union] animus."[17] As stated above, the Union's organizing campaign was effectively over by the fall of 1999. Parnell and Tingler were not discharged until several months after the Union had ceased actively campaigning at the Respondent's facility. Thus, we find nothing about the timing of the discharges that suggests the Respondent was motivated by union animus.

Finally, we disagree with our colleague's contention that the Respondent failed to abide by its disciplinary policy in terminating Parnell and Tingler. Although it appears that the type of misconduct for which the employees were discharged could have resulted in less severe penalties under the Respondent's system of progressive discipline, the Respondent's policy also provides that the Respondent may alter disciplinary consequences based on the circumstances of a particular situation. Here, where there is no independent evidence of any union animus on the part of the Respondent, the burden never shifted to the Respondent to justify the discipline under *Wright Line* principles. Therefore, we will not infer, merely based on the Respondent's exercise of its

[12] Laws testified that he had orally admonished Parnell a number of times prior to Parnell's discharge. The judge inferred that Parnell would have admitted that Laws' accusations were true had the General Counsel raised the issue during Parnell's testimony.

[13] The judge found that Parnell was not explicitly told that he was fired for insubordination. But, that does not establish that he was not in fact fired for insubordination.

[14] See *Parker Hannifin Corp.*, 259 NLRB 263, 266 (1981) (employee's refusal to follow her supervisor's instruction to return to her workstation constitutes a lawful reason for her discharge).

[15] "The decision of what type of disciplinary action to impose is fundamentally a management function." *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977).

[16] "In passing the Act, Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient. The Board has no authority to sit in judgment on managerial decisions." *NLRB v. Florida Steel Corp*., 586 F.2d 436, 444–445 (5th Cir. 1978).

[17] *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717–718 (7th Cir. 1992).

discretion under its disciplinary system, that the alleged discipline was unlawfully motivated.

"Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws."[18] In sum, we do not find sufficient evidence to support a finding of antiunion motivation underlying the discharges of Parnell and Tingler. Accordingly, we reverse the judge and dismiss the 8(a)(3) and (1) allegations concerning the discharges of Parnell and Tingler.[19]

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority's view, this is not a matter of accepting an employer's managerial judgment. Instead, it is a matter of determining the employer's real motive. The evidence here demonstrates that the Respondent discharged two leading union supporters (Donald Parnell and Alesa Tingler) without affording them the normal course of progressive discipline under its established disciplinary policy. The Respondent gave the same reasons for both discharges, which the judge correctly found to be false. Before the firings, a supervisor announced to employees that the Respondent was "cleaning house." The discharges, in turn, eliminated the core of the Union's faltering support in the workplace. Because the record undercuts the Respondent's claimed reasons for the discharges, I would affirm the judge's finding that the discharges were motivated by antiunion animus and therefore violated Section 8(a)(3) and (1).[1]

I.

The Respondent made the decision to discharge Parnell and Tingler, acknowledged union activists, on the afternoon of January 26, 2000,[2] after Supervisor Douglas Laws had observed them away from their workstations.

The next day, Parnell met with Laws and Human Resources Director Linda West, at which time Parnell was given a letter informing him that he was being terminated immediately. The letter gave no reason for the termination. When Parnell asked why he was being terminated, Laws told him that it was for "job performance." Parnell then pressed for more details, and Laws stated that, "Job performance covers a lot of things."

Tingler was informed of her termination during a meeting with Laws and West on January 31, her next scheduled workday. Laws told Tingler that she was being terminated because of "the incident that happened last week," and her performance. Tingler also received a termination letter that was identical to the one that Parnell had received.

The Respondent maintains an employee handbook, which divides work rules into two categories, group I and group II, for the purpose of discipline. A violation of a group I work rule by an employee can result in immediate discharge, while a violation of a group II work rule normally results in progressive discipline. The handbook states that employees who accumulate three written warnings will be discharged, but that "although the company normally follows a progressive corrective action procedure, this procedure may be altered by specific circumstances at the employer's discretion." Human Resources Manager Linda West testified that the Respondent considers only disciplinary history during the most recent 12 months of employment in determining the extent of discipline to be imposed.

After her discharge Tingler filed a claim for unemployment compensation with the North Carolina Employment Security Commission. In response to an inquiry from the Commission as to why Tingler was discharged, West asserted that Tingler was discharged pursuant to a violation of group II work rules 2 (failure to wear safety glasses) and 7 (leaving the job during working hours without permission).

II.

Unlike the majority, I would find that the General Counsel has met his burden of establishing that the discharges of both employees were unlawfully motivated. It is undisputed that the Respondent knew that both Tingler and Parnell were union activists, and the Respondent's explanation for summarily firing these employees does not stand up.

There is no contention by the Respondent that the personnel file of either Parnell or Tingler included any written warnings issued during the prior 12 months,[3] or that it had followed progressive disciplinary steps in discharging these employees. Rather, the Respondent contends that both Parnell and Tingler were discharged for insubordination, which is a group I work rule infraction, for which an employee may be immediately discharged. The Respondent also contends that it exercised its discre-

[18] *Midwest Regional Joint Board v. NLRB*, supra at 440.

[19] Contrary to the opening assertion of our colleague, we fully understand that this case turns on motive. We have shown, at some length, that the burden of showing unlawful motive has not been met.

[1] I agree with the majority as to the dismissal of the remaining complaint allegations, as found by the judge.

[2] All dates are 2000 unless otherwise indicated.

[3] Parnell had no written or oral warnings for that period, although there were two negative notes that did not rise to the level of a warning. Tingler had a single oral warning as a result of an October 1999 glue spill.

tion to bypass the usual disciplinary steps, applicable to group II work rule infractions, and immediately discharge the employees as a result of its frustration with the failure of both employees to improve their work habits.

The only evidence that the Respondent presented in support of its contentions was the testimony of Laws and West. However, the judge discredited that testimony, rejecting as pretextual their explanations for recommending that the employees be summarily discharged. It is well established that when an employer's stated motives for its actions are found to be false, the Board may infer from all of the circumstances that the employer's true motive is an unlawful one that the employer seeks to conceal. See, e.g., *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470, (9th Cir. 1966). The evidence presented here warrants such an inference.

First, with regard to Parnell, the judge discredited Laws' assertion that he told Parnell that he was being discharged because he was insubordinate. In discrediting this testimony, the judge cited the consistency of the testimony of West and Parnell, as well as notes made by West on Parnell's termination letter, indicating that Parnell was told only that he was being discharged for his job performance. In short, the judge found that the proffered explanation at the hearing for Parnell's discharge was false. Moreover, no documentary evidence supports the Respondent's claim that it considered the conduct insubordinate at the time of the discharge. Indeed, the evidence regarding employee Tingler's discharge is to the contrary, as discussed below.[4]

As to the remaining reason asserted for Parnell's discharge, Laws testified that he relied on Parnell's being a chronic "wanderer." Although the judge found that the evidence supported this characterization of Parnell, he found that this was not the real basis for the discharge. In particular, the judge disbelieved Laws' testimony that he recommended that Parnell be discharged for "wandering" because imposing less severe disciplinary consequences would not have changed Parnell's behavior. In discrediting this assertion, the judge relied on evidence demonstrating that Parnell had responded positively in the past when he was warned that his conduct was unacceptable.[5] Further, there is no evidence to indicate that Parnell was ever warned that his job performance was deficient because of his "wandering" or that his conduct could result in discharge. Thus, the Respondent failed to show the necessary "specific circumstances" to justify a summary discharge for a group II work rule infraction.

With regard to Tingler, the judge discredited West's testimony that Tingler was discharged for insubordination. The judge relied on the inconsistencies between West's proffered explanation for the discharge at trial, which involved insubordination, and her previous report to the Employment Security Commission, which did not. Noting the absence of any mention of insubordination in the report to the Commission, which relied solely on group II work rule infractions, and based on West's demeanor, the judge specifically found that insubordination was a reason added at the hearing to enhance the Respondent's defense.

Further, the judge found that Laws "padded" his reasons for recommending Tingler's discharge by asserting that Tingler failed to wear side shields for her safety glasses on January 26. Shortly before meeting with West to discuss Tingler's discharge, Laws sent West an e-mail stating that there had been several issues with regard to Tingler that day, including her failure to wear the side shields. However, the judge found that Laws never mentioned anything to Tingler about side shields on the 26th, that she had never been disciplined for failing to wear side shields,[6] and that Laws' reliance on this was nothing more than a device to bolster the reasons first proffered at the hearing for the discharge.

As the judge did, I would find that the Respondent clearly disregarded its established disciplinary policy in dealing with Parnell and Tingler. The evidence indicates that the type of misconduct for which the employees were ostensibly discharged—socializing and being away from their respective work areas during worktime—is no more serious than misconduct covered by group II work rules, which normally results in progressive discipline. Indeed, Plant Manager Hensman admitted that he could not recall any prior situation in which he discharged an employee for being away from his or her workstation "right off the bat." It is further admitted by the Respondent's supervisors that both employees were "good" em-

[4] Although I do not disagree with the judge's doubts that Parnell had actually engaged in insubordination, I find it necessary only to rely on the judge's finding that the Respondent did not, in fact, base its disciplinary decision on a group I work rule infraction (insubordination) which would have itself justified immediate discharge.

[5] This conclusion is supported by evidence showing that Parnell had received four oral warnings for a variety of reasons during the period from August 1997 through April 1998, but thereafter so improved his performance that he was one of a few employees who received a "quality achievement award" in May 1999 for his work in the latter half of 1998.

[6] Significantly, the judge credited Tingler's testimony that it is relatively common for employees not to wear side shields and for supervisors to have to remind employees to wear them.

ployees prior to their discharge. Yet the Respondent terminated Parnell and Tingler, both leading union supporters, without affording them the usual steps in the disciplinary process, and then offered no credible explanation for this action.

Other evidence in the record reinforces the judge's finding of an unlawful motive and demonstrates that the Respondent harbored animus towards the Union. During the Union's organizing campaign, the Respondent obtained a list of union supporters from one of its supervisors. In early January, Supervisor Robert Church told a group of employees that the Respondent had a list of people in the front office and that the Respondent was "cleaning house."[7] A few weeks later, Parnell and Tingler, who were known by the Respondent to be active union supporters, were discharged. Such remarks, in context, are not mere coincidence, but are evidence of the Respondent's antiunion animus.[8]

Finally, I would find the timing of the discharges of the two leading union supporters, at the same time the Union's campaign was faltering, to be suspect. Although it was apparent that the Union was not making much progress in organizing employees, the Respondent knew that neither Tingler nor Parnell had given up in their attempts to bring the Union into the plant. By getting rid of both employees, the Respondent killed the principal remaining basis of the Union's support.

In my view, the evidence is sufficient to establish that the discharges were unlawful. In contrast, the majority dismisses the judge's findings of pretext, contending that the judge substituted his definition of insubordination for that of the Respondent. I disagree. Rather, the judge disbelieved the testimony of Laws and West that *they* considered the employees to be insubordinate, and found that this explanation for the discharges was false. Consequently, I would find that the discharges violated the Act.

[7] Because there is no evidence that the employees knew that the Respondent had a list of union supporters, I agree with the majority that, at the time, the employees would not reasonably have interpreted Church's statement as a threat. This finding, however, does not preclude a finding that the statement did, in fact, reflect the Respondent's animus.

[8] I would also find that a statement made by Plant Manager Hensman to employees during the Union's organizing campaign, that the plant was nonunion and the Respondent wanted to keep it that way, further supports the finding of the Respondent's antiunion animus. Although Hensman's statement was not alleged to be unlawful, it nevertheless supports a finding of animus on the part of the Respondent. See, e.g., *Overnite Transportation*, 335 NLRB 372, 375 fn. 15 (2001); *Gencorp*, 294 NLRB 717 fn. 1 (1989); *Smith's Transfer Corp.*, 162 NLRB 143, 161–164 (1966).

Jasper C. Brown Jr., Esq., for the General Counsel.
A. Bruce Clarke, Esq. and (brief only) *Sheri L. Roberson, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart)*, of Raleigh, North Carolina, for the Respondent, Neptco.
Johnny Sawyer, Business Agent (Teamsters Local 61), of Asheville, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. At the entrance to the American cemetery on Iwo Jima, the haunting challenge from a chiseled inscription greets the visitor. As if spoken by voices from the graves of the more than 6000 United States Marines who once were buried there, the souls of these heroes solemnly declare:[1]

When you go home
Tell them for us and say
For your tomorrow
We gave our today

This is a discharge case. Of the four employees that Neptco fired in January 2000, I find in favor of the Government respecting two. One of these two is Donald Parnell—the acknowledged leader of the employees supporting the Union's organizing campaign. The sacrifice at Iwo Jima, of course, was physical death in wartime combat. Even so, the sentiment expressed in the above quotation reminds us here that there are American workers who, because of their vigorous and public support of a union, pay the ultimate employment price—they give their "today" (their jobs) so that workers who follow will have a "tomorrow."

Neptco fired the four employees during the 2 days of January 26–27, 2000.[2] The four dischargees had been active in the Union's organizing campaign that began about May 1999. The parties dispute whether the organizing campaign had ended about July/August (Neptco's position) or whether it remained viable in January 2000 (as claimed by the Government and the Union).

I presided at this 4-day trial in Morganton, North Carolina beginning June 12, 2000, and concluding on June 15. Trial was pursuant to the March 31, 2000 complaint and notice of hearing, issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 11 of the Board. Such pleading is based on an unfair labor practice charge filed against Neptco on February 1, 2000, in this case by Teamsters Local Union 61 (Union, Teamsters, or Local 41).

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Neptco, a Rhode Island corporation, that Neptco is a statutory employer, and that the Union is a statutory labor organization. Neptco has a plant at Granite Falls, North Carolina, and that is the facility involved here.

[1] J. Bradley with R. Powers, *Flags of Our Fathers* 246–247 (Bantam Books, 2000). On November 10, 1954, the 179th anniversary of the U.S. Marine Corps, the U.S.M.C. War Memorial was unveiled and officially dedicated in Washington, D.C. (Id. at 326; National Park Service website).

[2] Unless otherwise indicated, the dates run from May 1999 to early 2000.

Neptco employs about 200 employees at the Granite Falls facility. (1:98; 2:350.)[3] Neptco's history is described in the employee handbook (GC Exh. 11 at 6–7), and we there learn that the Granite Falls plant opened in 1985. Similar company history, which I consider only as supplemental background, is found at Neptco's website, www.neptco.com. Founded in 1953, that history details, Neptco was acquired in 1987 (handbook) by Cookson Group plc of London, England. "Founded in 1704, Cookson is one of the world's leading specialist industrial materials companies." (Website.) At the website (as well as in the handbook), Neptco's products also are described, apparently including the fiber optic cable involved here. When he began testifying, Dharman P. Hensman, the plant manager of the Granite Falls facility, used a small section of such a cable to describe the item produced at Granite Falls. (2:352–358.) Similar cables are depicted at the website. The website's page for corporate history lists principal personnel as including Vice President of Operations Lois Kilsey. Hensman testified that he reports to Kilsey. (2:386–387.)

The complaint contains just two allegations of 8(a)(1) coercion—a threat of retaliatory discharge (three incidents), and an instruction (a single occasion) to cease wearing union insignia. The four instances of this alleged coercion are listed as occurring from mid-September to January 21. Neptco denies. The complaint also alleges that Neptco violated Section 8(a)(3) of the Act by firing four employees in late January—Kenny Price on January 26 and Gordon O'Meara, Donald Parnell, and Alesa Tingler on January 27. Admitting the discharges, MTSI denies that it violated the Act by such disciplinary actions.

Johnny Sawyer, the Union's business agent, describes the organizing as beginning with a call in May 1999 to his office by Donald R. Parnell. Later that month Sawyer held a first meeting with about five or six employees at a restaurant with subsequent meetings at the home of Alesa Tingler. (1:29–1:30; 4:877.) Sawyer asserts that the organizing campaign remained active through July and August. (1:30–1:31.) Indeed, the record reflects that the Union received signed authorization cards into January 2000, with 10 cards bearing dates from October 1 to January 3. (1:33–34; 2:290; R. Exh. 7.) However, the organizing drive apparently never gained enough support for the Union to file a petition for a Board-conducted election.

Of the 14 witnesses who testified, 7 were called by the General Counsel, who then rested the Government's case in chief (2:339), and 7 were called by Neptco, who then rested (4:876–877.) [The transcript fails to show Neptco's resting. The page citation I give is based on my trial notes as the point at which the resting would appear if shown.] The Government recalled Sawyer for a short rebuttal stage. There was no surrebuttal. At Neptco's request, sequestration of the witnesses, with certain exemptions, was ordered. (1:25–27.)

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the posttrial briefs filed by the General Counsel and by Neptco, I make these

[3] References to the 4-volume transcript of testimony are by volume and page. Exhibits are designated GC Exh. for the General Counsel's, and R. Exh. for those of Respondent Neptco.

FINDINGS OF FACT

A. Neptco's Operations at Granite Falls

At its Granite Falls facility, Neptco manufactures shielding and pulling tapes for the wire and cable industry, and fiber optic strength members and packaging tape for the electronic industry. The plant of some 200 employees (direct and indirect) operates on a continuous 7-day schedule, around the clock, with about 160 of the 200 employees assigned to four shift crews working 12-hour shifts. (1:98, 115; 2:350–360.)

Dharman P. Hensman became the plant manager in January 1999. (2:350, 362.) Linda B. West, human resources manager, who has worked for Neptco at the Granite Falls plant since 1982, reports to Hensman. (2:417; 3:552.)

Following his January arrival at the plant, Hensman spent much of his early days on the plant floor, even operating, and learning to operate, the machines. Then he began making changes. (2:362.) Still in that first January, Hensman spoke to the employees, assembled in different groups at different times and generally grouped by their job function. His topic was, "What It Takes To Be No. 1." (R. Exh. 11.) He spoke about correcting various problems pertaining to productivity and attendance, and he set goals. (2:363–365, 368–370.) Either in late December 1999 or early January 2000, Hensman spoke to the employees again to discuss how the plant had done in 1999 in reaching the goals that he had set shortly after his arrival. Although most of the goals were met, some were not. Absenteeism and tardiness were two items that he discussed. Among other things, Hensman stressed that employees needed to arrive on time and be at their machines in order to get good "turnover" (good production, apparently), and he also stressed that he expected efficiency in the process of operating the equipment. (R. Exh. 12; 2:365–368, 387.)

B. Neptco's Response to the Union's Organizing Effort

In May management showed employees a film conveying a message that employees did not have to sign union cards or to be threatened by a union and that a union would not always do good things for employees. Following the film Plant Manager Hensman, with Human Resources Manager West present, reiterated a point made in the film by telling the assembled employees that the plant was nonunion and that Neptco wanted to keep it that way. (1:172, Price.) In making his statement to the employees, Hensman abbreviated Neptco's policy statement, set forth in the employee handbook, so as to stress the nonunion part. The full policy paragraph reads (GC Exh. 11 at 8):

> It is the policy of the Company to provide meaningful work in a satisfactory, safe working environment where all employees have the opportunity to progress to the optimum of their skill, energy and ability while earning fair and competitive wages. We strive to continue this tradition by encouraging each employee to think and speak freely with managers at all levels without the intervention of third party union representation. Because of this firm conviction, we believe that a continued union-free operation is to the best advantage of both employees and the Company.

In addition to the first opposition film shown in May by Neptco (as mentioned earlier), Neptco appears to have shown

other films opposing unionization. (2:388, Hensman) None of these other films is described in the record. Neptco also held meetings with its supervisors, and instructed them in the "Do's and Don'ts" of a union organizing campaign, telling them, in the process, to pay closer attention to their employees. (4:806–807, Laws.) Supervisor Laws testified that he did pay closer attention, and that he started issuing warnings to alleged discriminatees Parnell and Price. (4:807.) However, the warnings, Laws asserts, were issued in response to events on the plant floor and not as a result of the meeting with management. Thus, Laws assures, his warnings practice did not change. (4:807–808.)

Management also sought feedback and opinions from each of its supervisors regarding employee union sentiment or non-union sentiment. Apparently in response to Neptco's request for such information, Robert E. Coffey, then a production supervisor (per trial amendment of the complaint, an admitted statutory supervisor during the relevant period, ending with his September 9, 1999 termination (1:7–9, 70, 99) provided a list of union supporters to Human Resources Manager Linda West (1:77) and also to Production Manager (1:77, 123) Alan Yancey (1:77).

To the extent that any testimony of former Supervisor Coffey supports, or aids in supporting, any finding that I make in this decision, I have weighed Coffey's potential bias (possibly resulting from his discharge by Neptco) in resolving credibility and making my findings. Having observed Coffey testify, and weighing all considerations, I find former Supervisor Coffey to be a credible witness who testified with a persuasive demeanor.

C. Allegations of Coercion

1. Threats of retaliatory discharge[4]

(a) Supervisor Robert Dean Church

(1) Mid-September 1999

Complaint paragraph 8(a) alleges two dates as to Supervisor Church—mid-September and early January. Respecting the mid-September incident, machine operator Gordon R. O'Meara, who worked on the term of Supervisor Robert Dean Church, testified that Church came walking through the area and stopped briefly to talk with employees at their machines. Employee Richard Roark was present. As Church and O'Meara talked, the Union was mentioned, and Church asked O'Meara how he felt about it. O'Meara said that he favored the Union, but that he did not care one way or the other. In a jocular fashion, O'Meara then asked how much Neptco would pay the employees to keep the Union out. Church replied, "Well, if it gets in, you'll be lucky if you have a job." O'Meara just turned around and resumed working and Church moved to the next machine. (1:132–135, 162–163.)

Roark, who no longer works at Neptco, and who apparently has moved to Indiana (1:132), did not testify.

Denying that such a conversation occurred (3:643–644), Church goes on to report that in September he was still a lead person in training to be a supervisor, and that he did not independently take charge of the "C" shift until October 25, 1999. (3:638–642; R. Exh. 29 at 2.) Indeed, Church asserts that he did not even meet O'Meara until early October (3:640–641, 663), and asserts (3:643, 663) that he did not know O'Meara was a union supporter. Church's training schedule (R. Exh. 29) reflects that Church did not begin working with crew C until September 22, that he is described there as a "Shadow Supervisor" for September 22 and 24, an "Acting Supervisor" from September 27 to October 21 and on October 25, "Assume Crew C independently."

Regardless of what the titles might suggest in the way of employee or supervisory status, the simple fact is that the supervisory status of (Robert) Dean Church was not litigated by the Government (although Neptco offered some evidence, such as Church's training schedule and his testimony about that schedule), and Neptco does not admit as to such status until October 25. Even if Church were to be viewed as a statutory agent once he became an "Acting supervisor" on September 27, that date does not reach back to the mid-September allegation.

Because O'Meara testified more persuasively on this issue than did Church, I credit O'Meara's version of the mid-September conversation. However, I also credit Church's description of when he became the supervisor of the shift, that date being October 25. The timing of Church's promotion from lead person to supervisor was put in issue by Neptco's answer to the complaint. (3:639–640.) Finding that the Government failed to establish that, as of mid-September, Robert Dean Church was a statutory supervisor or a statutory agent (indeed, on brief the General Counsel does not address the matter), I shall dismiss complaint paragraph 8(a) as to the mid-September allegation.

(2) Early January 2000

O'Meara testified that in early January as he was outside in the smoking area talking with employee Cheryl Bogle about some employees who recently had been fired, Supervisor Church came outside and joined their conversation. Church said that the front office had a list of people who were "in the Union," that Neptco would be "cleaning house," and that first shift lead person David Allen probably would be "next." (Allen visibly wore union insignia.) Church began laughing as he reported these facts, and O'Meara extinguished his cigarette and went inside. It was cold outside, and the conversation was short. (1:136–138, 163–164.)

Cheryl Bogle corroborates only some of O'Meara's testimony. First, Bogle's memory is rather fuzzy about the timeframe, and she tends to place the incident in late December or around the first of the year. As this is not a significant variance from the allegation, I deny Neptco's motion (1:61) to strike her testimony because of the asserted variance.

The bigger problem is that, in rendering her account of the "long list in the office" and "cleaning house" of Church's attributed remarks on direct examination (1:42–44), Bogle fails to quote Church as mentioning "union," and on cross-examination she admits (1:64) that Church did not say that the terminated employees had been fired because they were involved in the Union. She adds that she believes that most of them were so involved. (1:64.) That fact merely tends to support an infer-

[4] Complaint par. 8(a) alleges 8(a)(1) threats of retaliatory discharge by Supervisors (Robert) Dean Church and Greg Greene.

ence that any assertion that Church referred to the Union is based on the assumption that the discharges were union related simply because the dischargees had supported the Union. Further complicating the issue, Bogle further testified, on cross-examination, that Church did mention David Allen as possibly being the next person to be terminated. (1:63.)

For his part, Supervisor Church denies having any conversation with O'Meara about the Union, and no conversation in which he told of another employee who might be terminated. Moreover, Church has never heard of any effort or purpose that lead person David Allen, who remains employed with Neptco, was to be terminated. (3:644–645.)

As Bogle appeared to testify with sincerity, I treat her testimony and that of O'Meara as a composite account. That composite version fails to persuade that Church (whom I do not credit respecting this conversation) injected the word "union" into his remarks. What apparently happened, I find, is that because the terminated employees were union, the concept of "union" was transferred to the remarks that Church made about a list of employees to be terminated and the "cleaning house" statement. Thus, what could well have been a reference to employees with poor records of productivity or attendance, or other inefficiencies, became, in O'Meara's account, union supporters. This is not to say that O'Meara gave a deliberately false account. What is more likely is that the mental transposition in O'Meara's mind was completely unconscious on his part. In any event, finding the evidence insufficient to support the allegation, I shall dismiss complaint paragraph 8(a) as to Church for early January 2000.

(b) Supervisor Gregory Greene

Complaint paragraph 8(a) alleges one date as to Supervisor Greg Greene—January 21, 2000. The Government's supporting witness is Donald R. Parnell, one of the alleged discriminatees, and Supervisors Gregory M. Greene and Gary Greene (no relation) provide rebutting testimony.

As he was walking in the aisle past the production office on January 21, Parnell testified, Supervisors Gregory Greene and Gary Greene entered the aisle walking toward Parnell. On seeing Parnell, they started laughing. Reaching them, Parnell asked them what was so funny. "You are," Gary Greene replied, who then asked how the Union was going. "We're limping along," Parnell answered. Gregory Greene then asserted, "You're finished, the Union's dead." "Do you think so," Parnell commented as he walked away. (2:301–302.)

Gary Greene denies the incident (4:846–847, 850), as does Gregory Greene (4:871–872) who also adds, in response to a leading question, that he never threatened Parnell (4:855). The Greenes also describe an unrelated matter concerning whether Parnell offered to give Gary Greene his union badge if the Union campaign failed. Although I credit Parnell's account, I find no need to summarize this matter further because the "You're finished" conversation is a stand-alone event.

Finding Parnell credible as to the aisleway conversation with the Greenes on January 21, and not believing the denials of the Greenes, I nevertheless shall dismiss complaint paragraph 8(a) as to Supervisor Greg Greene regarding January 21, 2000. At trial the General Counsel argued that the reasonable interpretation of Supervisor Greg Greene's remark ("You're finished. The Union is dead.") is (2:344), "You're about to be fired and the Union is dead." Arguing more generally in the Government's brief, the General Counsel nevertheless always sees fit to fashion the Government's argument based on the contention that the quoted remark should be read as if it contained an "and." The Government's argument is unpersuasive.

I find the reasonable interpretation of the quoted remark to be a reference to the Union's organizing drive, not to Parnell personally. Parnell openly and vigorously supported the Union. Supervisor Gregory Greene's remark simply meant, I find, that the Union was finished because the Union's organizing campaign was dead. Factually, Supervisor Gregory Greene was substantially correct, for the Union's last formal meeting was in August (1:31), and the last signed authorization card the Union received was dated January 3, 2000. (2:290; R. Exh. 7.) Therefore finding nothing coercive in the quoted statement made to Donald Parnell, I shall dismiss complaint paragraph 8(a) as to Supervisor Greg Greene respecting the date of January 21, 2000.

2. Instruction to remove union insignia

Complaint paragraph 8(b) alleges that on November 5, 1999, Neptco, by Plant Manager Dharman Hensman, "Interfered with its employees' union activities by instructing its employees to remove wearing apparel displaying union insignia on their person." Alesa Tingler, one of the alleged discriminatees, testified in support, and Hensman opposed.

Referred as a temporary employee in October 1998, Alesa Tingler was hired as a regular employee of Neptco on December 28, 1998. (2:244–245.). When Dharman Hensman became Plant Manager of Neptco's Granite Falls facility in January 1999 (2:350, 362), he was trained by Tingler for several hours one day on Tingler's "glass yield" machine. (2:252, 376, 393–394.) Hensman asserts that he and Tingler joked "all the time." (2:376, 393.) Seemingly this is testimony that Hensman is describing a working relationship with Tingler that continued beyond the day that she trained him.

Tingler testified that she frequently wore union insignia from June until she was fired in late January 2000. (2:248, 252.) On November 5, Tingler testified, she was wearing her union T-shirt (bearing the names of union officials Hoffa and Cipriana) in the glass yield area. Plant Manager Hensman came by and said, "Get that damn thing off." Hensman then "chuckled." Tingler replied that she had dated enough truckdrivers that she could get by wearing the T-shirt. They both laughed about it, and Hensman went on his way. (2:248–250, 252, 281.)

On January 18, Tingler again wore her union T-shirt. The next day, January 19, Tingler wore a Neptco shirt. As she and Hensman passed in an aisle adjacent to the work area, Hensman said that her shirt was much better and that she should burn the other one. On this occasion, rather than laughing as in November, Hensman's facial expression did not change from its general appearance. (2:250–252.) The relevance of the unalleged January incident is unclear. I find that it fails to add any clarification to the November incident that is alleged.

Hensman asserts in answer that, respecting the November incident, he told Tingler he thought she had lost the (union) T-

shirt. She said that she had just grabbed the first garment available when she rolled out of bed that morning. Denying that he had threatened Tingler, Hensman reports that he was joking. Not long before his June 2000 testimony, Hensman relates, Neptco, as was its custom, distributed T-shirts bearing Neptco's logo. The next day Tingler came in wearing hers and asked Hensman if that was better. Hensman assured her that it was better. (2:377–378.)

Hensman denies ever telling Tingler to take her T-shirt home and never wear it to work again. "If anything, I would have probably told her I hope its gets lost, or something like that." (2:378.) Responding to leading questions,[5] Hensman testified that he was joking and that Tingler returned his smile. (2:378.) Asked, on cross-examination, whether he had told Tingler to remove her union T-shirt, Hensman testified (2:393): "No, I don't know that I used that terminology. I probably told her to change it out."

Although I credit Tingler's version of the November incident, I find nothing coercive in the circumstances. Clearly both Hensman and Tingler treated Hensman's remark as mere jesting as if between two coworkers. I also credit Hensman that the two continued their jesting relationship after Hensman completed his one day of training by Tingler, and that they joked with each other frequently. Accordingly, I shall dismiss complaint paragraph 8(b).

Having dismissed all allegations of complaint paragraph 8, I now shall dismiss complaint paragraph 8 in its entirety.

D. Allegations of Discrimination

1. Kenneth E. Price

(a) Facts

Hired in September 1998, Price worked as a machine operator for Neptco until he was discharged on January 26, 2000. (1:169; GC Exh. 8.) In May 1999, Price and some other employees began discussing the merits of union representation, and in May and June he attended union meetings at the home of Alesa Tingler. (1:170) As described earlier, one of management's first responses was to show employees a film conveying a message that employees did not have to sign union cards or to be threatened by a union and that a union would not always do good things for employees. That was followed by Plant Manager Hensman's statement that the plant was nonunion and that Neptco wanted to keep it that way. (1:172.)

About 40 minutes following the film meeting, Hensman came by Price's machine and a conversation ensued. Price asked Hensman what Hensman thought about the Union. Hensman told Price that, in Hensman's opinion, a union was not needed at Granite Falls. Price responded that, with a union, the employees could get more benefits and higher pay. (1:173.) What Hensman answered, or how the conversation concluded, is not supplied.

From May until December, Price asserts, Price would converse with his supervisor, Douglas Laws, about the benefits of unionization, with Price vigorously expressing support for the Union. At times when Price gave an example of how some unfair (as perceived by Price) event had occurred, and that such would not have happened with a Union at the plant, Laws simply would say that the Union would not have helped Price. (1:174–175.)

Price also wore a union button off and on until some date in November 1999. (1:175, Price.) Agreeing that Price only wore his union button sporadically, Laws asserts that the first time he saw Price wearing a union button was in July. (4:746.) Moreover, Laws reports that Price was not outspoken in favor of the Union, and that Price only would speak favorably of the Union when things were not going Price's way, such as when Laws had to caution Price about something. (4:831.)

From Neptco's viewpoint, Price chiefly had problems in two areas—(1) wandering away from his work station, and (2) attendance. Memos were placed in Price's personnel file concerning these matters, and Price also was disciplined over some of these concerns. The event triggering Price's discharge appears to have been the December attendance report (which Laws read about mid-January) again showing violations by Price of Neptco's attendance policy. Laws decided to recommend discharge. Bad weather delayed implementation of the discharge decision, but on January 26, 2000 Supervisor Laws, in the presence of Human Resources Manager Linda B. West, notified Price that his employment with Neptco was terminated. Turn now to the documentation, from Price's personnel file, covering these events.

So far as the record reflects, Price's initial notice of an attendance problem came on May 24 with a "nonconformance log" (R. Exh. 2) to alert him of a developing attendance problem concerning the months through April. (3:615, West.) Such a log is simply an "awareness tool" to alert the employee; it is not a disciplinary notice, both West (2:431–432) and Laws (4:726) testified. Laws explained the purpose of the notice to Price and told him that it was not disciplinary in nature. (4:726.)

On June 20, Price, in an act of horseplay, took an air hose and (with the nozzle about a foot from his face) blew compressed air into his mouth. For this rather unsafe activity Supervisor Laws issued Price a first oral ("verbal") warning. (4:726.) The oral warning was documented (R. Exh. 3) for Price's personnel file. (2:437.) Although Price asserts that Laws did not show him the documentation (1:231), Price admits that he so acted on this occasion and that he should not have done it. (1:205–207.) The file document specifies, as to the horseplay, a violation of group II work rule 6 (GC Exh. 11 at 33). The document also asserts that Price violated group II work rule 4, by "neglecting his job duties," and work rule 5, by "inefficient job performance."

The warning document (R. Exh. 3) was one of the items in Price's personnel file that Human Resources Manager Linda West and Supervisor Douglas Laws considered when they reviewed the file when considering whether to recommend discharge to Plant Manager Hensman. (2:437.)

Barely 2 days later, on June 22, Laws issued another documented "verbal" warning (R. Exh. 4; 3:476) to Price, this time for attendance problems through May. (2:438; 3:608–609; 4:731, 830–831.) Although Neptco's policy permitted a written

[5] In determining the credibility of witnesses, an ALJ must weigh whether important evidence was elicited by leading questions even when there were no objections to the leading nature of the questions.

warning for this second warning, Supervisor Laws gave Price a "second chance." (3:631–633, West; 4:729, Laws.)

On Saturday, June 26, Laws testified, he again had a problem with Price's not staying in his work area. Laws reminded Price of the situation just 6 days earlier when he had engaged in horseplay and when Price, according to Laws, had been out of his work area. Getting tired of "chasing Kenny around," Laws documented the matter with an e-mail (R. Exh. 5) to Plant Manager Hensman and Human Resources Manager West. (4:734–736, 826–827.) Although Price (1:212) was never provided a copy of the e-mail, when shown a copy at trial, he verified the accuracy of the contents. (1:213–214.) The text reads (R. Exh. 5):

> Today I had a discussion with Kenny about his horseplaying (air hose) and not staying in his assigned work area. I told Kenny that he needed to stay in his assigned work area and that I do not wish to have this type of discussion with him again, about either of these situations.
>
> Kenny's reply was "why is everyone always worried about what Kenny is doing and not anyone else". My reply to him was that I will handle his situation in the same manner I do with anyone else, nothing is different for anyone else.

Price confirms the conversation as described in the e-mail. (1:213–214.) Laws confirms that Price complained that Laws was "picking on" him. (4:735, 826–827.) Laws asserts that he could have issued (but did not) a formal warning to Price, but instead chose merely to document the conversation is order to give Price a "break." (4:735.) He simply wanted Price to work; he did not want to fire Price. (4:736.)

The next incident occurred on August 26. Laws testified that Price, neglecting his duties, let the I-Beam machine run nearly out of resin. (4:737–739, 827–829.) As Laws describes in his e-mail of August 21 to Linda West and to Alan Yancey (R. Exh. 6):

> Today Kenny Price nearly ran the I-Beam machine out of resin, the top portion of the material was totally unsaturated, on several of the ends. The operators were able to save the machine, but had to hustle. Kenny said he was in the creel and had went to the back of the machine, and was talking to David Allen. I told Kenny this was unacceptable and he needed to stay on his machine and check the required items on a frequent basis. I suggest that we issue Kenny a warning of some type (verbal or written). He keeps making the comment that he wished we would go ahead and fire him (I think that is what he wants).

Although this "discussion note" was in Price's personnel file (2:438, West), Laws does not recall that any warning ever issued on the incident. (Presumably Laws' request simply was overlooked or put to the side in the rush of business, for the record contains no evidence that any such warning ever issued.) Again, Laws testified, Price complained that Laws was "picking on" him for being out of his work area, and that he "wished we would just go ahead and fire him." Laws said that if Price was not pleased with working at Neptco, that was his choice, that he could do something about it. "Why don't you just go ahead and fire me?" Price asked. Laws does not describe his response, if any, but testified that he did not want to fire Price, that he just "wanted Kenny to do his job." (4:736–739.) Laws assumes from the "picking on" comment that Price was contending that Laws, in effect, was selectively enforcing the work rules. Price never said that Laws was favoring others, and in any event such was not the case, Laws testified. (4:826–829.) Conceding that he expressed the "go ahead and fire me" sentiment to Laws, Price admits that he said it, but that he did so in jest, and that Laws was aware he was joking. (1:217–218.)

On October 7, matters shifted to the formal stage, with Supervisor Laws issuing a letter to Price as a "a first written warning" for poor attendance. Despite this written warning, Price admits that he continued having attendance problems between October 7 and January 26. (1:227.)

The next incident occurred on January 13. In a hand note, dated January 13, to Linda West (LBW), Laws wrote (R. Exh. 16) that, as he confirmed at trial (4:744), he had observed Price socializing with other employees near the breakroom and restroom area, and he suggested that the "next warning" issue to Price. Laws' request resulted in the generation of another formal letter, dated January 13, from Laws to Price (2:445; 3:617;4:745), the text of which reads (GC Exh. 7):

> You received a non-conformance log [R. Exh. 2] on May 24, 1999 and a verbal warning [R. Exh. 4] on June 22, 1999 for excessive absenteeism or tardiness for any reason. Additionally a verbal warning [R. Exh. 3] was issued on June 20, 1999 for engaging in horseplay. A first written warning [GC Exh. 6] for excessive absenteeism or tardiness was issued on October 7, 1999.
>
> This [GC Exh. 7] is a second written warning for violation of Group II Work Rule 5 (p. 33) [GC Exh. 11 at 33], inefficient job performance.
>
> Each employee and their [sic] responsibilities are important to Neptco. Failure to meet requirements of the company as outlined in the handbook [GC Exh. 11] may cause hardships on other employees and result in loss of business. Your actions must improve, or further disciplinary action will take place, up to and including discharge.

On that January 13, Price admits, he did step some 10 to 15 feet away from his inkjet machine to converse with one of his friends who was walking by in the adjacent aisle across from the men's room. Price also concedes that during this conversation he had his back to his machine. While Price was there away from his work station, Supervisor Laws came by. Laws told Price to return to his machine, and if he caught Price again (away from his work station), he would write him up. (1:181–183; GC Exh. 3.)

Later that day, on exiting the men's room, Price met Doug Crisp, the process engineer on the I-beam machine where Price had worked before moving to his current position on the inkjet printer. Standing near the same spot as before, this time by the door to the employee canteen some 10 feet from his machine, Price was discussing with Crisp the fact that the I-beam was being sold and dismantled. As luck would have it, once again Supervisor Laws approached. Reminding Price of his warning earlier that day, Laws now told Price that he would write him

up. When Price told Laws that the two had been discussing business, Laws, without asking Crisp any questions, said, "Don't give me that. You were socializing." Before the union campaign, Price asserts, when Laws saw Price 10 to 15 feet from his machine, Laws had not said anything. (1:183–186.)

Neither party called Crisp to testify. Laws, who testified after Price did, was not asked about the Crisp incident, and Neptco does not address it on brief. Presumably, therefore Neptco does not contest Price's description of the topic of his conversation with process engineer Crisp. Perhaps Neptco sees no need to do so in view of Price's admission (1:225–226) that he did what the subsequent warning (GC Exh. 7) stated. That is, he, in Price's words, was "off my machine—out of my work area." (1:181, 229.) Supervisor Laws confirms that "inefficient job performance" covers roaming away from one's job. (4:247.)

From Price's own description, it is obvious that, to Supervisor Laws on that January 13, Price (1) had failed to honor the second chance that Laws had given Price earlier that same day, and (2) whatever Price and Crisp were talking about, it had nothing to do with Price's job at the inkjet printer.

Because of various delays, Supervisor Laws did not receive or read the attendance report for the year of 1999, dated January 5 (GC Exh. 10), until, he implies, some point after mid-January. (4:747–748.) As reflected by that report, since his first written warning of October 7 for excessive absenteeism (GC Exh. 6), Price had been absent one full day and he had incurred four tardies (GC Exh. 10; R. Exh. 14).[6] By the rule of the employee handbook (GC Exh. 11 at 21; 2:422), "Three sequential partial (late, leave early, or leave/return) days of absence totaling less than 12 hours will be considered as 12 hours absence." Unfortunately, the handbook does not define "sequential." Does the term mean, for example, three tardies unbroken by a full day of work? Although that seems to be the interpretation given by Human Resources Manager West at trial (2:422), where (2:442) she uses the term "three consecutive deviations," in practice it appears that she and Neptco simply count the number of tardies in whatever period of time is being examined. (GC Exhs. 15, 16 at 2–3, 17.) Even that is difficult to check, as to certain exhibits in the record, because the crews work rotating shifts. Thus, what may appear to be a gap, may be regular off time between the rotating shifts. As this point was not fully developed, I simply work from the record as it exists. That record shows, for example, that West counts three tardies, one each in the months of March, April, and May (R. Exh. 15), as one 12-hour absence against Price. (2:443.) Accordingly, I count the one full day of absence plus four tardies after October 7 (GC Exh. 10) a equal to two full (12-hour) days of absence, or 24 hours of absence during that period.

Turn back now to the point when Supervisor Laws read Price's attendance report for 1999. (GC Exh. 10.) Laws saw that, since the warning of October 7 (GC Exh. 6), Price had accrued one full chargeable absence (12 hours) plus the four partials (all tardies), counting as another 12-hour absence, for a total of 24 hours of absence. To Laws, this attendance report showed no improvement by Price in his attendance problems. (4:748.) Indeed, the November–December average of 2.5 incidents per month (not counting the birthday absence) of either an absence or a tardy shows an even greater rate of incidents than the 1.5 per month average for the first 10 months of 1999, and not counting the 3 days missed for one funeral and 2 days of vacation (GC Exh. 10). Moreover, although Laws had not yet received an attendance report for January, Laws knew that Price already that January 2000 had been tardy and left early. (4:749.) In fact, the record (R. Exh. 14 at 3) shows two tardies and one "leave and return" (4:822), all by January 13. (4:749, 822.) In other words, Price was beginning the year 2000 at an even greater rate for attendance incidents than he had generated for the closing 2 months of calendar year 1999. Price had no other attendance deficiencies before his January 26 termination (4:822), but, of course, in mid-January Laws could not know what the future held other than that it looked unacceptable.

On receiving and reviewing the 1999 attendance report for Price (GC Exh. 10), Supervisor Laws concluded that he could no longer deal with the problems that Price generated. He therefore recommended to Human Resources Manager West that Price be terminated. He so recommended because (3:681):

> Kenny had a long history of not doing things. Being out of certain areas, his attendance was bad. Horse playing, stuff of that nature, and just, it was just getting old. I couldn't deal with it. And I didn't want him setting an example for new people coming in the door.

To Laws, the continued attendance problems triggered his decision (3:681; 4:748) because (4:751, 821) they were the "last straw." West confirms that Laws recommended that Price be discharged. (2:448; 3:619.) They reviewed Price's personnel file, and concluded that they should recommend discharge based on Price's (1) continued attendance problems, (2) roaming outside his work area, (3) inattention to his machine, and (4) horseplay. (3:606, 619.) About January 24 or 25, West orally so recommended to Plant Manager Hensman who orally approved the recommendation the same day. (2:453–455.) On Wednesday, January 26, Supervisor Laws discharged Price. West attended the termination meeting. (1:186; 3:464; 4:748–749.)

At his termination, Laws read from a two-sentence termination letter (GC Exh. 8; 1:186; 3:463, 605; 4:749). The first sentence informed Price, "Effective today, your employment with NEPTCO Incorporated has been terminated." The second sentence explained that an accompanying package would describe certain matters pertaining to any continuation of benefits. [Having overlooked the offer of GC Exh. 8 (1:189, 191), I now receive GC Exh. 8 into evidence.]

Price asked for specifics, but all Supervisor Laws would say was "Job Performance." (1:186–187, 201.) West testified that it is Neptco's policy not to give specific reasons beyond the wide-ranging "Job Performance." The purpose of the policy is to avoid potential arguments and the possible creation of a hostile situation. (3:464, 562, 605, 626.) Waiting in the lobby with Laws and West for taxi transportation to his home, Price asked West, "Linda, please tell me the reason you fired me."

[6] Although Price also was absent on his birthday, November 12 (GC Exh. 10), birthday absences are not counted as attendance deviations. (2:446, West.)

As from Laws earlier, the reply from West was: "Job performance." (1:201–202.)

West testified that the term "job performance" covers, in effect, everything—including all the issues covered in the trial (even as to the other alleged discriminatees), such as profanity, attendance, attention to the job, and "basically anything that's in our work roles." (3:464–465.)

Responding to Price's claim for unemployment (GC Exh. 9; 1:191), West (on February 15) wrote, on the form supplied by the North Carolina Employment Security Commission (ESC), that Price was discharged for (GC Exh. 9 at 3):

> Violation of Group II Work Rule #7: Leaving the job or regular working place during working hours without authorization from your supervisor. Mr. Price participated in orientation when the handbook was revised in detail [no ending period]

Asked why attendance was not mentioned to the ESC, West rather candidly explained that the ESC does not consider poor attendance to be misconduct, and if Neptco believes that the person does not deserve unemployment, then West emphasizes only those matters that constitute misconduct. (3:613–614, 622.)

Respecting the Government's contention that the evidence shows disparity, the General Counsel points to testimony by Price that, after the Union campaign began (and presumably after Price made public in May his support of the Union), Supervisor Laws began closely monitoring him, which he had not done before, and Price noticed that Laws did not do the same respecting other employees. As to Price, Laws would come by and say, "A little birdie told me you've been in the breakroom too long," or "You were wandering there," or "I'm just making sure you're here." (1:176–177.) By contrast, Josh Fox would go to the supervisors' office frequently to use the telephone, yet Laws "usually" never said anything to him. (1:177.) He Lee, a splicer from Laos, frequently left his splicing department (40 to 50 feet away) to come into Price's area to socialize with Yeng Yang, a Laotian friend of Lee. (1:177–180.) However, there is no evidence that Lee's visits to Price's department were ever observed by Supervisor Laws or that anyone ever reported such visits to Laws.

No evidence was presented concerning whether phone calls by Fox were excessive or beyond what is normally allowed. Moreover, the Government failed to establish that the personnel file of Josh Fox does not contain any warnings, or even memos, for excessive use of the telephone. Apparently there were none, for Supervisor Laws denies that Fox frequently was away from his work station. (4:806.) Moreover, Fox appears to be a poor example of favoritism by Laws. Thus, on December 29, Supervisor Laws issued Fox a written warning (second) for profane or abusive language. (R. Exh. 19 at 4; 3:485.) Laws testified that Fox was so warned for writing "Neptco sucks" on a production paper that he later submitted. (4:802.) The very next day, December 30, Fox damaged a machine because, as Laws describes (4:803), of his inattention to his duties. Laws recommended termination (4:803.) That same day Fox was fired. (R. Exh. 19 at 5; 3:485, West) So far as Laws could see, Fox never wore any union insignia. (4:803–804.) To the extent that Fox went to the production office and used the telephone, I find, crediting Supervisor Laws, that such use was not beyond the privilege normally granted employees. In any event, I find no favoritism nor disparity respecting the example of Josh Fox.

As for the change respecting Price, recall Laws' testimony that, following management's May meeting with the supervisors, Laws began observing employees closer, and that he issued warnings to employees (and alleged discriminatees) Parnell and Price—but only because of events on the plant floor, not because of the meeting with management, and not as a result of any change in his practice. (4:807–808.)

From the viewpoint of Supervisor Laws, Price brought some bad habits with him when he transferred from the night shift about March 1999—such as wandering off his job, and coming to the production (supervisors') office just to talk. Laws had to correct Price almost daily for these deficiencies in his job performance. (3:683–687.) After a couple of months of this, as the record reflects, Laws began documenting these events. It so happens that the documentation began after the Union's organizing had become common knowledge, after Plant Manager Hensman had spoken to the employees, and after management told the supervisors to watch their employees more closely—an instruction Supervisor Laws admits (4:807) that he followed.

The Government also argues that the evidence supports a finding that disparity is shown regarding attendance in that Neptco terminated Price while allowing others with worse attendance records to remain. Specifically, the General Counsel points to three employees: Sherry Petty, Kendra Burnette, and Tommy Barlow. West explains that Petty, who accumulated more poor attendance hours than Price, was allowed some leeway because she was switched from an 8-hour shift to a 12-hour shift, and because she held a critical position, with a skill difficult to replace, that of loom operator. (3:579–585.) Moreover, Petty's only problem was attendance. (3:633.) Eventually, on June 5, 2000 (3:578), Petty was terminated for poor attendance. With the discrepancy credibly explained, and in light of the discipline imposed on her, I find no disparity established by Petty's case.

On November 16, Kendra Burnette received her second written warning (R. Exh. 18 at 2–3), this time for poor attendance. (3:483.)[7] As of her November 16 warning, Burnette had accumulated 120 hours of absences. (3:568.) Burnette worked on the crew of Supervisor Destry Watson. (R. Exh. 18 at 1.) Under Neptco attendance policy, an employee on the 12-hour crews is allowed absences, including partials, of 48 hours before discipline is imposed. (GC Exh. 11 at 21; 2:423.) No set number of hours mandates discharge under the policy, West explains. (2:423; 3:584.) West testified that Burnette, knowing that she was heading for discharge, never returned to work after receiving the warning for excessive absenteeism. (3:568–569.) The General Counsel argues (Br. at 49) disparity on the basis that Burnette was not terminated. As already noted, Price's 24 hours of absenteeism (by my count) during the last 2.5 months of 1999, plus additional attendance problems during the first 13

[7] Burnette's first warning (R. Exh. 18 at 1), on 6–15–99, was for insubordination. (3:482, 570.) Supervisor Watson's note at the bottom of the warning letter reflects that Burnette apologized to Watson for her misconduct.

days of January 2000, prompted Supervisor Laws to recommend discharge for Price. Was this disparity? I discuss this question in a moment.

At some point after his August 31, 1998 second written warning for excessive absenteeism (GC Exh. 19), Tommy Barlow switched from the crew of Gregory Greene to that of Douglas Laws, for on May 20, 1999 Laws issued Barlow another (GC Exh. 20) second written warning for excessive absenteeism when Barlow accumulated 72 hours of absenteeism. (GC Exh. 17; 3:601–602.) West testified that, for attendance, Neptco uses a rolling 12-month period (3:593), and that the additional second warning (rather than discharge) was given to Barlow because his schedule had been changed when he was placed on a special product line being established. In view of the schedule change and new assignment, Barlow was given another chance. (3:594–595.) The gesture was unsuccessful, and Barlow quit on September 13 (3:593), after accumulating another 24 hours of absenteeism because of, it appears, tardies (GC Exh. 17) following his additional second warning of May 20.

(b) Discussion

No disparity exists, I find, between the treatment given Kenneth Price and that accorded to, for particular example, Kendra Burnette. First, Burnette did not work on the crew of Supervisor Laws. Different supervisors may handle matters differently. Indeed, Neptco's disciplinary policy (GC Exh. 11 at 31) is loaded with discretionary options. For example, any discipline to be imposed can vary "depending upon individual circumstances." (GC Exh. 11 at 31; 2:424, West.) Also, although "progressive corrective action" is normally followed, "this procedure may be altered by specific circumstances at the employer's discretion." (Id.) And a "verbal" warning need not precede a written warning. (GC Exh. 11 at 31; 2:425.)

Second, there is no evidence that Supervisor Watson had any current problem with Burnette other than her attendance. Contrasted with that situation, Supervisor Laws had a continuing problem with Kenneth Price not only as to attendance but also respecting his habit of walking away (even if only 10 to 15 feet away) from his work station. There had been past problems, as well, including the safety violation of using an air hose to blow compressed air into his mouth. Price's latest attendance numbers were merely the "last straw." The fact is, Supervisor Laws had run out of patience cautioning, correcting, warning, and accommodating Kenneth Price and so he recommended termination.

Note that Laws skipped the opportunity at least four times to impose stronger discipline on Price. The first occasion was his issuance of an oral warning (R. Exh. 4) to Price on June 22, for attendance through May, when he could have issued a first written warning. Only 2 days earlier, on June 20, Price had received his first oral (verbal) warning based on the air hose incident.

For the second occasion, Laws gave Price a free ride. This came on June 26 when Price was out of his work area. Laws could have issued a first written warning then, but opted to give Price a "break" by simply documenting the matter with an e-mail (R. Exh. 5).

Number three came on August 26 when Laws sent an e-mail (R. Exh. 6) describing the depleted resin incident. Although Laws recommended that a warning of some type issue, none did because the matter simply "fell through the cracks." Recall that this was the incident when Price, in the fashion of a juvenile, suggested that Laws go ahead and fire him. The point is, had Laws been gunning for Price, Laws clearly would have specified at least a first written warning. Indeed, with the discretion granted by Neptco's policy, Supervisor Laws could have accelerated the discipline and for that incident recommended termination. He did not do so.

Price received a fourth favor from Laws on January 13 when Laws again gave Price a pass (plus a cautionary warning) on the first incident of the day. Thus, if Laws possessed animus against Price, Laws rather strangely bypassed different opportunities to grease the skids for Kenneth Price.

Finding no animus by Supervisor Laws against Kenneth Price because of the latter's union activities, and no evidence of disparate treatment, I find that the Government has failed to show, prima facie, that a motivating reason for the January 26, 2000 discharge of Kenneth Price was his open support of the Union. Accordingly, I shall dismiss complaint paragraph 9 as to "Kenny" Price.

2. Gordon R. O'Meara

(a) Introduction

One of three asserted union supporters terminated on January 27, 2000 (Donald Parnell and Alesa Tingler being the other two), Gordon R. O'Meara was employed on the crew of Supervisor (Robert) Dean Church at the time of his January 27 termination. (1:129.) Although Neptco's January 27 letter (GC Exh. 4) of termination to O'Meara merely states that his employment with Neptco "has been terminated," the specific reason was an incident involving the use of "profanity" (actually, vulgar slang accompanying an obscene gesture, the latter sometimes referred to as "flipping the bird"). The Government stresses the point that O'Meara is the first employee at this facility of Neptco ever fired for uttering "profane" language spoken to another employee and not directed at a supervisor or accompanied by actual or threatened misconduct. (Br. at 13.)

The Government's statement itself demonstrates that more factors are involved than simply ascertaining the words and gesture. There is no question that language including "cuss" words (vulgarities, profanities, obscenities) are uttered on occasion on the plant floor by some of the workers, and also at times in the production office by some of the supervisors. After hearing a substantial amount of evidence respecting this, and finding that it had reached the cumulative point, I confined the Government to an offer of proof as to any further. (1:148.)

Respecting the extent of use, I find that it is not uncommon and is consistent with such utterances heard in manufacturing plants, machine shops, and construction sites on occasion. That is, such language may be heard, among other occasions, whenever something malfunctions and an employee lets loose with a curse word or two, or even three, or when someone mashes a finger. Plant Manager Hensman expresses it as happening, so far as he has heard, when someone "smashes their finger." (2:383, 392.) What Hensman personally has heard, I find, falls

substantially short of what may be heard at times on the plant floor or even in the production office where the supervisors work on occasion. Even so, when Hensman asserts that he opposes the use of profanity in the plant (2:384, 392), so as to guard against any charge of sexual harassment (2:384), or exposing visitors to such (2:384), I understand his policy to draw a distinction between (1) cursing uttered spontaneously at a malfunctioning machine, or when a finger is pinched, and (2) vulgarities, profanities, or obscenities delivered casually in the presence of other employees or supervisors (possibly creating a risk of sexual harassment), or especially in the presence of visitors, and especially so if the cursing occurs in a context involving anger or confrontation.

An important word here is context. Thus, the initial question here is, "What were the circumstances when the incident occurred?" Was it just when a finger got pinched or hit, or did it involve words of sexual innuendo in the presence of the opposite sex, or was the situation one of anger and confrontation? Finally, the end question is what motivated Supervisor Church to recommend termination? Was it merely the words (one word, actually) and gesture? Was it that plus the circumstances? Or was it O'Meara's (lukewarm) support of the Union? For the discharge to be a violation of Section 8(a)(3) of the Act, as alleged, it has to be the last item because the first two are in the nature of subjects for an arbitration under a collective-bargaining agreement.

Turn now for an introductory look at the incident. It occurred the evening of Wednesday, January 26, 2000. (1:138; 3:669.) As Supervisor Church was interviewing a job applicant (a female named Chris Kluesinger, 3:647) in the production office, sitting before one of the large plate glass windows that look out into the plant (3:648–651), Church saw that O'Meara was approaching the office, presumably to ask Church a question. Church apologized for the interruption, and asked Kluesinger to wait a second while Church went out to see what the approaching employee needed. At that moment, as Church and Kluesinger were looking through the glass at O'Meara, and with O'Meara just a few feet from the door,[8] they saw O'Meara throw up a middle finger and yell to some coworker, not in their view (3:651–652): "You pussy!"

On hearing and observing this, Church turned to Kluesinger (who was shaking her head and appeared embarrassed) and asked her to wait while he handled the matter. Church then went to the door and opened it just as O'Meara had put his hand on the door handle. This startled O'Meara. Church was angry, and it appeared to him that O'Meara recognized this. Church told O'Meara that his conduct was very inappropriate, and (3:652): "I'm here conducting an interview with a woman. You'll be lucky if you just get a warning. You may get terminated for this. And I want you to go back to your machine right now. I'll talk with you later."

According to O'Meara, Church spun him around and told him to watch his language. O'Meara thought the matter was settled. (1:140, 154.) Although conceding that the noise level in the plant was "pretty loud," O'Meara claims that his comment to his friend Chatman was no louder than the level he was using to testify. (1:141.) Given the loud noise level in the plant, and the fact that Church and, apparently, Kluesinger heard and understood O'Meara's comment to Chatman, I do not credit O'Meara. Instead, crediting Church, I find that O'Meara yelled out his comment while throwing up a hand gesture of a middle finger.

O'Meara immediately left, and Church went back inside the production office where he told Kluesinger that he was sorry. Kluesinger said it was okay, that she had been around factories and had heard that kind of language. Church told her that such conduct was not acceptable. Kluesinger said that she appreciated his statement and his action. (3:652, 674.) Supervisor Church reacted quickly. Church and O'Meara dispute what was said between them at or near the door, and I address that later. Kluesinger possibly heard some of the exchange between the two, but neither party called her to testify. Kluesinger was hired, but she later resigned. (3:655.)

As this incident served as the primary basis for O'Meara's discharge the next day, it is relevant to note that the word "pussy," used by O'Meara on this occasion, has an entirely proper meaning (one that constitutes the primary meaning in dictionaries), so that it appears in many nursery rhymes and children's stories, such as in the lovable verse, "The Owl and the Pussy-Cat," by Edward Lear. Recall the memorable first lines:

> The owl and the Pussy-cat went to sea
> In a beautiful pea-green boat:
> They took some honey, and plenty of money
> Wrapped up in a five pound note.

Sadly, as the dictionary explains, the term has acquired a "vulgar slang" secondary meaning in reference to a woman's vulva. In conjunction with the obscene gesture of "flipping the bird" at Chatman, it is clear that the vulgar secondary meaning was intended here by O'Meara. Thus, by this foolish and rather twisted joke, and using vulgar slang with the obscene gesture, O'Meara was telling his "friend" Chatman that Chatman was not a man. All in all, it doubtlessly was a rather disgusting and embarrassing spectacle for a visitor, particularly a female visitor in the midst of male employees, to have to witness.

(b) Knowledge

Supervisor Church denies knowing whether O'Meara supported the Union. (3:643, 663.) Presumably the time denied refers to the date of O'Meara's discharge. There is testimony that in early June O'Meara attended a union meeting at the home of Alesa Tingler, with some 12 to 20 employees attending, although they were not all present at once, and that Church, then simply a lead person, also attended and assertedly should have seen O'Meara there. (1:30, 129–130; 2:295–296; 4:877–880.) Church admits that he attended a small gathering at Tingler's home, but describes it more as a small social gathering of about seven or eight persons, not including the person he much later (around October 1, 3:641, 663) met who was introduced as O'Meara. With as few people as were there, Church asserts

[8] Church places the distance from the glass window at about 2 feet. (3:651, 670) O'Meara estimates that he was 8 to 10 from the production office when he saw his friend Hank Chatman talking on the pay phone right outside the production office. (1:139–140; R. Exh. 3.)

that he would know if O'Meara had been one of them. Church asserts that O'Meara was not there—at least while he was present. (3:645–646, 663–669.)

The evidence is weak respecting any identification at this meeting, with the strongest, that both O'Meara and Church were at the same meeting, coming from Union Representative Sawyer who admits (4:879–880) that he does not know whether Church saw O'Meara. O'Meara makes no claim that he saw Church at the meeting, much less that Church saw him, and Alesa Tingler, at whose home the meeting was held, was not asked about the topic. I find the evidence about the June meeting insufficient to show any knowledge on the part of lead person Church. Were I to reach the point, I would credit Church's positive testimony that the person he later met as O'Meara was not at the gathering (union meeting) when he was present.

In view of this finding, I need not address two other issues (not briefed by either party). First, even if lead person Church had seen O'Meara there, would mere presence at an early union meeting properly translate into "knowledge" that the mere attendee is a union supporter (as distinguished from someone who comes seeking information, or from simple curiosity, or anticipating free snacks and sarsaparilla)? Indeed, if mere attendance so translates, then Church would be so labeled, except (3:646, 663–664) he admittedly debated in support of Neptco at the meeting.

Second, assuming what otherwise would constitute "knowledge" flowing from seeing O'Meara at the early June meeting, would such knowledge by Church, acquired while he was not a statutory supervisor, carry over and be charge against Neptco the moment that Church became a statutory supervisor? Stated in broader terms, does all knowledge of union matters (such as names of card signers) gained while a mere employee, convert into the employer's knowledge bank once the employee becomes a statutory supervisor? I postpone discussion of this question for the moment.

According to O'Meara, about 2 weeks after this union meeting, he signed a union card, "wore one of the buttons" (presumably a union button worn in a visible position) for an unspecified time, and talked with other employees at work about the Union. (1:129–130.) O'Meara does not claim that Church was a witness to any of this, and he specifically does not assert that, after Church became a statutory supervisor, that O'Meara wore a union button and that Church (or anyone in management) either commented about the button or looked directly at the button.

Earlier I described the alleged mid-September 8(a)(1) conversation between O'Meara and (Robert) Dean Church. Church is alleged to be a statutory supervisor as of the conversation. Although crediting O'Meara concerning the conversation, I concluded that I would dismiss the allegation because there was no showing, as of mid-September, that Church was either a statutory supervisor or a statutory agent. As Church's schedule (R. Exh. 29) reflects, he was not working with crew C in mid-September. Even if the term "mid-September," or "Middle part of September 1999" per complaint paragraph 8(a), were interpreted to encompass the 2 days of September 22 and 24 when Church was serving in the capacity of (R. Exh. 29) a "Shadow Supervisor" (presumably simply observing while following a statutory supervisor around), that title would not, of itself, establish even statutory agency, much less the capacity of a statutory supervisor. I find that the mid-September timeframe would not encompass any of the dates of September 27 to October 21 (R. Exh. 29) when Church served on crew C as an "Acting Supervisor."

Because I have credited O'Meara concerning the mid-September conversation, I now must address the question of possible carry-over knowledge. That is, does the knowledge carry over and attach to both Church and Neptco as of October 25 (when Church took charge of crew C) and forward to January 27 when Church, and Neptco, terminated O'Meara? First, recall that the knowledge would be merely that O'Meara told Church that he favored the Union,[9] but that he did not care one way or the other. (1:134, 160–161.) Thus, even with O'Meara's joke question to Church (what would Neptco pay the employees to keep the Union out), nothing in the conversation suggested that O'Meara would do anything for the Union other than, possibly, vote for it should the matter come to a vote. O'Meara admits he was not wearing either a union T-shirt or a union button as of the conversation. (1:162.) Thus, the "knowledge" flowing from this conversation would be that O'Meara simply would be one of those who possibly would vote for the Union in an election, but that his support was lukewarm, and he wore no union insignia promoting the Union. That kind of generic "knowledge" of lukewarm union sentiments hardly supports a finding of animus by Neptco, and in any event is not knowledge of "union activity." As to the latter point, see *Drug Plastics & Glass Co.,* 309 NLRB 1306, 1310 (1992), enf. denied on other grounds 44 F.3d 1017 (D.C. Cir. 1995).

Notwithstanding the foregoing, if it is assumed for the moment that Church (and therefore Neptco) was determined to eliminate any possible union supporters whenever the opportunity to do so arose, we are still back to the question of whether mid-September knowledge by nonsupervisory lead person Church of lukewarm union sentiments on the part of employee O'Meara carried forward and attached to Church and Neptco as of October 25. I find the answer to that question to be no. If the answer were otherwise, then whenever an employer promotes a rank-and-file employee to supervisory status, the employer instantly would be charged with all the knowledge possessed by the new supervisor of all confidential union activities (including the identities of card signers) of which he was aware as of the time of his or her promotion. Probably no employer would be interested in being so charged. Accordingly, I find that knowledge acquired by an employee of the union activities and union sentiments of other employees is not carried forward, and charged against the employer, when the employee is promoted to statutory supervisor. To find otherwise would authorize employers to require such newly promoted employees to disclose all such confidential knowledge that they possess (on the theory that the requirement would be justified because any action motivated by that early knowledge could bind the employer now). Certain risks are inherent with any promotion. I

[9] Even this was only after counsel, on cross-examination, seemed to push O'Meara into reporting that as fact. (1:161–162.)

find that Neptco is not automatically charged with whatever knowledge lead person Church gained through his mid-September 1999 conversation with O'Meara.

Finally, if Supervisor Church, acting in January on his mid-September knowledge that O'Meara's sentiments favored the Union, were found to have fired O'Meara because of those sentiments as expressed in mid-September, then such action (if proved, including by proper inference) would be chargeable against Neptco.

(c) O'Meara terminated

O'Meara places the (obscenity) incident at about 8:30 p.m., observing that interviews of job applicants, when held, are usually shortly after the 7 p.m. shift change. (1:138, 143, 154.) Church recalls the time as being about 9 p.m. (3:699.) After the incident, Church spent another 15 minutes or so completing his interview with Kluesinger (3:652, 669), and then he apparently spent some time drafting or typing an e-mail that he sent to West at 9:40 p.m. At 9:40 p.m., about 45 minutes or so (I find) after the incident, Church e-mailed Human Resources Manager Linda West. In his e-mail (R. Exh. 27), in which Church describes the incident, Church begins, "Linda, I need either a formal written warning or a termination paper for Gordon O'Meara." The e-mail concludes (R. Exh. 27):

> I am writing this as an official documentation stating this action which probably falls under a sexual harassment more than a group II #6 work rules violation in the hand book. Thank you. RDC

The e-mail bears the actual date of January 26, but a reference in the text is to January 27. The latter date is based on the plant's business calendar which dates a night shift as the following day—January 27, here. (3:530, 653–654.) After sending the e-mail, and reconsidering the seriousness of what he thought could be construed as sexual harassment, Church (who, with other supervisors some 3 to 4 weeks earlier, had attended a sexual harassment seminar, 3:646–647) left a voice mail for Linda West in which he specifically recommended that O'Meara be terminated. (3:526–527, 653, 673.)

O'Meara and Church disagree as to further contacts that shift. O'Meara asserts that later in the shift, some time between 2 and 5 a.m. (1:143, 154–155), Church called him to the production office and told O'Meara that he was a good employee, and did what Church asked without complaint, but he (Church) probably would have to issue him a written warning over the incident. O'Meara asked why, saying that he thought the matter was settled earlier when O'Meara said that he would watch his mouth. Church replied that it was because it occurred during Church's interview of the female job applicant and therefore the incident likely would be viewed as "sexual harassment." O'Meara wondered (to himself, apparently) how there could be sexual harassment when the female (Kluesinger) did not work for Neptco, but his description suggests that he did not ask Church this question. (1:143, 155.)

Church's version expands the contacts. First, at some unspecified time after the incident, Church went out and spoke with O'Meara and (presumably) then with Chatman. Church went to O'Meara to ascertain to whom O'Meara had hollered his remark and given the hand gesture. Learning that it was Hank Chatman, Church went to Chatman and told him, "You guys shouldn't be yelling across the plant." Chatman said okay. (3:671.)

Still later, apparently, in the shift, O'Meara, as Church asserts, came to Church, expressed concern about his job, and asked whether he was going to be terminated. "Gordon, you'll probably be terminated," Church replied. Reportedly, O'Meara was not happy at that news. (3:654.)

Church asserts that on the third occasion after the incident (the time and location of the third conversation are not described), O'Meara apologized to Church and stated that, at the time of the incident, he was unaware that (Kluesinger) was in the production office with Church (3:672) and that (3:676) he had just been joking with Chatman. However, as Church reports, before the incident Church had taken Kluesinger on a tour of the plant. That tour had included a stop at O'Meara's machine so that Church could explain its operation to Kluesinger. Then Church and Kluesinger returned to the production office to talk. Thus, there was no way that O'Meara would not have known that Church was in the production office with Kluesinger. (3:672–673.) The implied reference here is to Church's earlier testimony that the employees know that Church interviews job applicants in the production office and that such interviews are not to be interrupted. (3:648.)

The implication of O'Meara's testimony is that he concedes the fact of interviews in the production office, except he points to the lateness of the hour as an excuse for his surprise to learn that an interview was taking place. (1:142–143.) However, that defense is largely neutralized by Church's report, described above, that he had just escorted Kluesinger on a plant tour—which included a stop where O'Meara was operating his machine. O'Meara did not return to the witness stand during the rebuttal stage to address these extra conversations described by Church. I credit Supervisor Church's account of the conversations during the shift of January 26–27, 2000, including the extra conversations not mentioned by O'Meara. What happened, I find, is that O'Meara was more intent on acting foolishly toward Chatman (by hollering a vulgarity and making an obscene gesture) than he was in paying attention to the work environment and the real possibility that job applicant Kluesinger was still in the production office being interviewed.

When O'Meara came to work the following evening, January 27, 2000, Supervisor Church, handing O'Meara a letter of termination (GC Exh. 4), advised O'Meara that he no longer was employed at Neptco. (1:144–145.) Because of a conflict, Human Resources Manager West was not present. (3:528.) O'Meara asserts that he reminded Church of an incident some 2 weeks earlier when O'Meara, seeing Church with his safety glasses pushed up on his head, had pointed to them as a joking comment on the fact that Church is always reminding O'Meara to wear his own safety glasses. O'Meara reminded Church that, on the earlier occasion, Church had told him, "Don't you turn this shit around on me. I'll have your goddamn ass on that chopper so fast it'll make your head spin." To this reminder by O'Meara, Church, looking O'Meara straight in the eyes, replied [direct address pronouns supplied], "You're fucking crazy. I don't talk to people that way." (1:144, 164–168; 3:656.)

Denying most of the foregoing reference to profanity and obscenity, Church concedes that on one occasion when he got upset with O'Meara he told O'Meara that if he could not keep his safety glasses on and watch his machine, "I would have his [your] ass at the chopper." The chopper, as Church explains, is a dirty machine that no one wants to operate. (3:657.) As to this dispute, O'Meara testified more persuasively, and I credit his version that Supervisor Church spoke at O'Meara's termination interview as O'Meara has described.

At one point on cross-examination (3:673) Church indicates that his motivation that O'Meara be terminated was based not only on the obscenity incident but also on the fact that he constantly had to walk around and tell O'Meara to get back to work on his machine. (3:673.) Church had never issued O'Meara a written warning for being off his machine, but matters were "getting close to that." (3:674.) Church was short handed and wanted to salvage O'Meara who did good work when he remained on his machine. (3:675.)

On direct examination Church asserts that his voice mail to West pushed for termination because Church did not want O'Meara's misconduct to set an example for Church's crew. (3:654.) On cross-examination Church adds that O'Meara's conduct violated a work rule (none specifically identified in his description) plus the "sexual harassment" aspect. (3:674.)

To the extent that Church's recommendation to terminate O'Meara may have been motivated because of a violation of a work rule pertaining to not leaving one's work station, I find that such was not conveyed to West either in the e-mail (R. Exh. 27) or the voice mail. Clearly the only "work rule" violation that West considered and addressed to Plant Manager Hensman was one dealing with a "slang obscenity" occurring when Supervisor Church was interrupted during his interview of a job applicant. (3:526–528, 550.) However, no specific work rule is cited, and the profanity ground appears in two work rules in group I (rules 2 and 8) and one in group II (rule 6).

The group I rules (the violation of which can result in immediate termination per GC Exh. 11 at 31) provide (GC Exh. 11 at 32):

> 2. Insubordination, including but not limited to: refusal to work, refusal to carry out a work assignment, abusive/profane language, assault on a supervisor, or disrespectful attitude.
>
> 8. Threatening, intimidating, coercing, interfering, or using abusive/profane language with another employee, management representative, or any other individual authorized to be on Company property.

The Group II rule provides:

> 6. Engaging in roughhousing, practical jokes, horseplay, fighting, or use of profane or abusive language.

Turning to the sexual harassment policy, which was the primary concern of Church, the text of that policy reads (GC Exh. 11 at 34):

> Making sexual advances or sexually harassing another employee is against Company policy. If any employee feels he/she is being sexually harassed, the instance(s) should be reported immediately to his/her supervisor or the Employee Relations Manager. A confidential investigation will take p[lace] and a written record made. Management of NEPTCO does not condone sexual harassment and any employee found guilty of this transgression will be subject to disciplinary procedures.
>
> Sexually-harassing conduct in the work place, whether committed by supervisory or non-supervisory personnel, is prohibited. This includes, but is not limited to: offensive sexual flirtations; advances; propositions; verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual, and any offensive display in the work place of sexually suggestive objects or pictures.

Plant Manager Hensman himself indicates that, in general, O'Meara was discharged for making a profane gesture near where Supervisor Church was interviewing a job applicant. (2:383.) Asked what made this event worthy of discharge (a discharge he approved, 2:383), Hensman answered (2:384):

> Well, the—we had been going through making up our supervisors and employees sensitive to sexual harassment, that kind of thing, and we really don't condone, obviously, any kind of profanity, especially in this nature where we're interviewing a prospective new employee. So that's why it came to this—this discharge.

Both West (3:527, 550) and Hensman (2:393) stress the context in which the incident occurred as being the reason for not considering a warning rather than the penalty of discharge, with that context being the gross nature of the vulgarity and the fact that it occurred within a few feet of a female job applicant when the supervisor was interviewing her in the production office.

As Neptco's counsel stated at trial, Neptco has no duplicate past example of this incident. (3:533.) To show consistency in imposing discipline for an event that had extensive cursing, however, Neptco cites the example of Althea Clark and Mary Williams who were fired about January 8, 1999 after they, meeting with Supervisor Chris Worley the night of January 7 to discuss a nonwork matter concerning the two employees, escalated their discussion into a dispute and then into a heated argument with angry cursing at each other. Supervisor Worley sent them home and then told Linda West that he wanted both fired. They were discharged. (3:531–532, 553–554; 4:697–705, 720–721.)

Among various examples,[10] the Clark/Williams incident apparently is the closest that Neptco has for consistency, yet even this incident is only remotely similar to our situation. It does show this, however: When a supervisor personally determines that an incident not only has crossed the line from merely unacceptable and punishable into termination territory by virtue of being excessively gross and inexcusable, then it appears that

[10] Supervisor Worley asserts that he once issued Mickey "Mitch" Snyder a written warning, about December 1999–January 2000, for using profanity. (4:722.) No copy of the claimed document was introduced. Worley did not testify persuasively as to this, and I do not credit his account.

Neptco supports the supervisor and terminates the employee (provided that the misconduct is prohibited by one of Neptco's rules).

That returns us to the question of what actually motivated Supervisor Church. Was he really so embarrassed and offended by O'Meara's misconduct that he sincerely thought that O'Meara had passed the point of no return? Or did Church gleefully balloon this small bit of vulgar joking—serious but limited—into a crime demanding industrial execution in order to get rid of a union supporter?

(d) Conclusions

Finding that the Government failed to show, prima facie, that a motivating reason for Neptco's discharge of Gordon O'Meara was his asserted union activities, I shall dismiss complaint paragraph 9 as to him. Based on my findings, knowledge by Neptco of O'Meara's union sentiments is not established by the evidence. Even if knowledge is somehow deemed established, I still would find no prima facie case of a violation. No animus against O'Meara is shown (and, by his own admission, when O'Meara spoke to lead person Church in mid-September, O'Meara, at most, voiced only lukewarm sentiments favoring the Union), nor is there any evidence that O'Meara was treated in a disparate fashion by his discharge. The evidence shows, I find, that Supervisor Church was personally embarrassed and angered by O'Meara's vulgar and obscene misconduct just a few feet from where Church was interviewing a female job applicant. Church's immediate and strong reaction to that misconduct reflects that it was the misconduct—not the expression of some tepid support for the Union over 4 months earlier—that was the sole basis for supervisor Church's recommendation that O'Meara be discharged. Plant Manager Hensman confirms that such misconduct was the basis of his approval of the discharge recommendation. Accordingly, I shall dismiss complaint paragraph 9 as to Gordon O'Meara.

3. Donald R. Parnell

(a) Facts

Hired September 22, 1996, Donald R. Parnell operated the huge LFE machine on the Flex line under Supervisor Douglas Laws when Laws fired him on January 27, 2000. (2:292–293, 299, 303–304, 375; GC Exh. 13.) Laws describes the machine as "huge," about 16 feet tall, and almost as large as the courtroom where this case was being tried in Morganton. (4:783.) The parties stipulated that Parnell was a leading in-house organizer for the Union, and that Neptco was aware of that fact. (2:295–297.) Supervisor Laws concedes that he was well aware of Parnell's status as a leading organizer for the Union (3:680; 4:786–787). Human Resources Manager West concedes her knowledge that Parnell wore union insignia (3:552), and Plant Manager Hensman freely acknowledges (2:371) that Parnell, who talked with him frequently about different aspects of the organizing campaign, appeared to him to be the leading supporter of the Union among the employees. In short, knowledge is established.

Before his discharge in late January 2000, Parnell had never received a written warning (2:306, 309, 337; 3:625), and none was in his personnel file when he was terminated (4:819). However, from August 5, 1997 to April 22, 1998, Parnell had been given oral notice, as documented for his personnel file (R. Exh. 8 at 1–5), on four occasions of rule infractions (extended breaks, carelessness—machine ran dry, poor housekeeping of his work area,[11] and poor attendance). Parnell admits as to a couple of these past incidents, has no recall of the earliest one, and, while admitting that the machine ran dry, denies that he was careless and asserts that he was on lunchbreak when it ran dry. (2:328–333.) All four oral documentations were by Greg Greene, Parnell's supervisor at the time. Although objecting on other (overruled) grounds (2:328; 3:500; 4:859), the Government did not object to evidence about these pre-1999 matters on the basis of relevance. There is no evidence that they were weighed as a factor in the decision to discharge Parnell, and they expressly (4:867–868) were not offered for that purpose. They were offered as bearing on motivation in that they show that Neptco wrote up similar conduct even before the union organizing began. (4:868–869.)

For attendance matters, the employee handbook provides that everything is considered in a "rolling" 12-month period. (GC Exh. 11 at 21; 2:422; 3:578, 593, 595; 4:830.) No language in the handbook expressly so provides as to infractions of other rules. Even so, Human Resources Manager West testified that the same rolling 12-month policy (referred to as a "sundowner" period or policy, 3:589) is applied to other infractions. (3:589, 633.) Thus, while warnings even 20 years old, for example, physically remain in a person's personnel file, anything older than 12 months is not weighed in making a current decision (in "determining the next level" of discipline), and this "sundowner" policy was applied as to the four alleged discriminatees here. That is, West assures us that nothing over 12 months old was counted against the alleged discriminatees. (3:589–591.)

In late January 1999, Parnell was one of about eight (2:318) employees who won Neptco's prestigious Quality Achievement Award (QAA). (2:300, 317–318, 395.) The QAA is second only to the Employee of the Year Award. (2:300.) Although Neptco's president made the announcement in January 1999, the actual award ceremony was held at the company picnic in early May when trophies were given to Parnell and the other employees by Neptco's president. (3:623.) West testified that Parnell had not been a good worker the first half of 1998. He received the award, West testified, because Neptco wanted to reward him for his turnaround during the second half of 1998.[12] (3:622–623.) However, West asserts (3:624), Parnell's "performance level in 1999 and 2000 was not the level that it was during the last half of 1998." This is not necessarily inconsistent with the view of Supervisor Laws that in 1999 Parnell was a "good" employee who "did his job." (4:811.) What Supervisor Laws meant, I find, is that Parnell "did his job," and was a "good" employee, when he stuck to operating his machine as opposed to his roaming around the plant. Laws specifically

[11] "Good Housekeeping" is required, under pain of discipline, under Neptco's safety policy. (GC Exh. 11 at 27–30.)

[12] Actually, the last critical item in Parnell's file for 1998 is an April 22 "verbal" warning for attendance.

makes this distinction elsewhere in his testimony. (4:781, 785–786.) I address the asserted roaming later.

Parnell's personnel file contains two negative notes for 1999. The first is a May 24 nonconformance log (R. Exh. 8 at 6) alerting Parnell that his attendance problems had reached the danger zone. (2:333–334, 337; 4:780.) The log is not a warning, just an "awareness tool," a "wakeup" notice. (2:431–432; 3:492–493; 4:725–726, 810–811.) The second negative note pertains to a glue spill at Parnell's LFE machine. On August 8, Parnell failed to tend his machine. As a result, the machine pumped nearly 55 gallons of glue onto the floor. The spill was a "huge mess," requiring the use of four bags of rags, the help of other operators, and nearly an hour to mop and clean, and even then the floor was left "sticky" for awhile. Parnell had gone to test some glue in the quality control department, while his coworker (partner) on this two-person operation had left for lunch, even before Parnell left to test the glue. Parnell apologized to Laws, explaining that he had tried to "work ahead" by taking a "shortcut" around the standard procedure. [By "shortcut" apparently is meant that Parnell did not wait to make sure the pumping went smoothly, but instead bypassed that step of monitoring to go test the glue at quality control, thereby leaving the machine untended since his coworker was at lunch.][13] (4:783–785, 816–817, Laws.) On August 8, Laws emailed (R. Exh. 8 at 7) Linda West, describing the event essentially as set forth above. Parnell confirms that the e-mail description is "pretty accurate." (2:334.) In any event, I credit the description given by Laws. No other critical notes reached Parnell's personnel file until the January 26 incidents that led to Parnell's discharge.

Before summarizing the discharge incidents of January 26 (they pertain to "socializing" and being away from the work area), and the subsequent decision process, I must return to the asserted "roaming" of Parnell. West claims that several supervisors had observed the "extensive" roaming by Parnell (no names, fact description, or timeframe given), that she also had observed such (no timeframe stated or factual description), and that she was satisfied that Supervisor Laws had given Parnell "fair warning numerous times to stay on his machine." (3:497, 499.) Laws complains that Parnell, who had a "history" (4:813) of roaming, would even come into the production office and "look over my shoulder sometimes, just to see what I was doing." Laws would have to stop what he was doing and move Parnell "on his way." (4:781.) By January 26, Laws was tired of the "repeat sessions" with Parnell. "I was sick of dealing with" those sessions. "I was tired of dealing with it." (4:789.)

Presumably Laws was "sick" of the roaming because it surely, with Parnell's "history" of roaming, had been going on all during 1999. Yet there is not one note in Parnell's file about "roaming" or these asserted "repeat sessions." Any remarks in the file at all about being away from the machine pertain to other incidents such as the August 1999 glue spill, and none of those remarks assert that Parnell had been away "roaming." Nor is there a single note in the file by Laws complaining that Parnell comes into his office and looks "over my shoulder," and none by Laws documenting any other "roaming" by Parnell. And as quick as West is to remind others to be sure and document matters (as she did with her August 25, 1997 e-mail (R. Exh. 32) to supervisors Greg Greene and Robert Coffey), West obviously saw no need either to remind Laws and these other unnamed supervisors to submit e-mails for Parnell's personnel file, nor did she remind herself to do likewise. As "Poor Richard" phrased it in "Poor Richard's Almanack" of 1742:[14]

> He that sows thorns, should not go barefoot.

Turn now to the incidents of January 26, 2000. The first one involves a morning trip to the warehouse. Parnell testified that, as part of his job (2:307, 308), he went to the warehouse area to obtain some packing materials. [The plant layout diagram, GC Exh. 3, shows Flexline at the lower right of the diagram, on the OSP side of the plant. At the top right side is "Receiving" with what appears to be racks nearby. Presumably this is where Parnell went, rather than to the far left side of the plant where a "Warehouse Area," with racks, is shown near the shipping department. Presumably those racks are for items being shipped, and probably would not have materials or supplies that the operators would use.] While there, Parnell noticed a shortage of cones. On his return, Parnell met Supervisor Laws, and he informed Laws of the cone shortage. Laws told him to let (lead person) David (David Allen, apparently)[15] worry about that and for Parnell to "stay on your job." (2:307; direct address pronoun substituted.)

On cross-examination, Parnell confirmed as "pretty accurate" (2:335) a January 26 file memo by Laws, the text of which reads (R. Exh. 8 at 8):[16]

> On the morning of 1/26/00, at appx. 7:30 a.m. during the walk through with the night crew supervisor, I observed Donald (Donnie) in another work area (Looms). I pulled Donnie aside and asked him to return to his machine and if he needed mat'l's or anything to see his leadperson and stay in his work area.
>
> Later the same day appx. 2:15 p.m., I observed Donnie in the production office area, Donnie seen me coming towards the office and moved on. Donnie was socializing!!!

At trial Laws expanded on his memo to Parnell's file to state that as he and the night supervisor, Chris Worley, were making a tour of the plant, they met Parnell walking from the loom area toward the LFE machine at the "opposite" end of the plant. (4:787.) On the diagram (GC Exh. 3), "OSP (Looms)" is shown at both top middle and bottom of the right side of the plant. Thus, Parnell very well could have been coming from the receiving racks, at the very top right of the diagram, as he proceeded through Looms and on down toward his LFE machine in Flexline.

Laws testified that on stopping Parnell and asking him why he was back in the loom area, Parnell replied that he was trying to get some materials. In answer to further questions, Parnell

[13] On brief (Brief at 44), Neptco merges the August 1999 glue spill (R. Exh. 8 at 7) and the January 1998 "let LL machine run dry" incident (R. Exh. 8 at 2, 3).

[14] *Benjamin Franklin*, *Writings* 1223 (Library of America, 1987).

[15] David Allen apparently is one of Supervisor Laws three (3:679) lead persons on the day shift. (1:137, 192–193.)

[16] The second paragraph pertains to the second incident of that day.

replied that he normally asks his lead person or Laws when he needs materials, and that on this occasion he had not asked his lead person. Laws stated that Parnell did not have access to the "system" [a computer system, apparently] to adjust the inventory numbers and therefore he should ask his lead person. "If you can't get your materials, come see me. I'll take care of them." At that point Laws told Parnell to return to his machine. On cross-examination Laws declared that in fact it was unusual for an operator to be going after supplies. (4:787–788, 811–812.) I do not credit the extra conversation that Laws would now add to his memo. He makes it sound as if he preached to Parnell on that occasion. Laws was not persuasive in testifying about that. Given the fact that Supervisor Worley was waiting for Laws, the likelihood is that Laws was about as brief as is his memo, and Parnell confirms that the description in the memo is "pretty accurate." However, I credit Laws respecting his testimony on cross-examination that it is unusual for an operator to be going after supplies. He testified in a persuasive and definitive way. In fact, the implied existence of a computer system (presumably keeping track of inventory) may well be the reason that it would be unusual for an employee to be going after materials.

The second incident of that date already is briefly described in the second paragraph of the above-quoted file memo by Laws. In very brief testimony, Parnell states that he went on break at approximately "2:00, 2:15." On his way to take his break in the smoking area, Parnell reports, "I stopped and spoke with[17] Alesa Tingler and Janet Barker, and I seen Doug [Laws] in the Rewind area." Laws saw him, Parnell acknowledges, and Laws motioned for them to "move along." Parnell states that he went back to his job, remembered that he needed to "get my cigarettes and went back to get my cigarettes." (2:307–308.) Parnell apparently is saying that he somehow left his cigarettes in the area where he had been conversing with Tingler and Barker, and he went there to retrieve them. The cigarettes would not have been in the smoking area because, recall, Parnell was on his way "to" the smoking area when he stopped to talk with Tingler and Barker. Thus, under Parnell's version, he either lost out on his smoke break or talked through it there at the production office.

Alesa Tingler appears to be describing this same incident as being when she had started for a restroom break about 3:15 p.m. As she walked by the production office, she waved at the employees she saw there: Parnell and Janet Barker. "Janet waved for me to come in the office and—and asked me a question, and I talked to her for a minute or two and then went on around the corner to the bathroom." (2:257.) On cross-examination Tingler suggests that she and Barker may have conversed the minute or two "at the door" to the production office. (2:269–270.) This indicates that what happened, and I so find, is that initially it was Parnell and Barker conversing inside the production office. (Recall that the larger section of the production office has large glass windows looking out into the plant.) When Tingler stopped, Barker came to the door, followed shortly by Parnell, with the trio moving to just outside the door shortly thereafter. That is where they were when Supervisor Laws came by not long thereafter.

Supervisor Laws' description is a bit more detailed. On this occasion, Laws reports, he was on the OSP side of the plant (right side, GC Exh. 3), near the breakroom there,[18] when he was paged to call shipping. On making that call from a telephone near the canteen, he was asked to check on a spool that was a rush job. Laws' line of march from the canteen would be south, or down,[19] toward the production (supervisors') office. (4:758–760.) The row of rooms that includes the canteen runs vertically for some distance, stopping several feet from the production office, with an open working section and then a splice section followed by a branch of the aisleway turning just before (above, on the diagram) the production office and going left (west) through a doorway that leads into the big middle section of the plant, the splice (bottom), rewind (middle), and composites (top) sections. (GC Exh. 3.) As much of the production office, including the entrance, is on a line with the vertical row of rooms that includes the canteen, someone, such as Laws, would be able to see only the eastern (right) end of the production office from a telephone near the door to the canteen.

As Laws proceeded and drew closer to the production office, he noticed three employees having a conversation just outside the door to the production office. The three were Donald Parnell, Alesa Tingler, and Janet Barker. [Barker works at some position in the office. (2:269, Tingler.) It is unclear whether Tingler is referring to the main office, at the far left side of the plant diagram, or to the production office as the place where Barker works.] Passing close by the trio, Laws motioned for the group to move on. As Laws entered the splice and rewind sections he looked back (apparently through what is a doorway as shown on GC Exh. 3) and saw the trio still congregated there. When Parnell and Tingler observed Laws looking back at them, the trio broke up and scattered. (4:758–759, 788, 812–813.)

Time estimates of this incident vary widely. As quoted earlier, Laws' hand-printed note (R Exh. 8 at 6) puts the time at 2:15 p.m., Parnell describes it as "2:00, 2:15" (2:307), and Alesa Tingler, as mentioned, estimates the time as about 3:15 p.m. (2:257) And that is not all, for the earliest time, and document, appears to be an e-mail (R. Exh. 25 at 6) at 1:50 p.m. that same date from Laws to West concerning three incidents involving Tingler on that date before he sent Tingler home, with the incident in issue here being the second one itemized (but not described) in Laws' e-mail to West. No party offered Tingler's timecard in evidence (for the purpose of learning when Tingler clocked out) to assist in ascertaining the time of the sequence of events.

Not fully developed in the record, the time of the incident has potential importance only because Parnell asserts (2:307) that he was heading for his afternoon smoke break when he stopped to converse with Tingler and Barker. The time assumes some importance in relation to any claim that Parnell

[17] Not "smoked with" as incorrectly rendered at 2:307:21–22.

[18] As one looks at the plant diagram (GC Exh. 3), the OSP canteen is just below the midpoint, and to the left, of the right side of the plant.

[19] As no compass orientation of the diagram is given, the parties at times substituted north for the top and south for the bottom. (2:271.)

was not legitimately away from his machine. Supervisor Laws asserts that when the incident occurred it was not the breaktime of either Tingler or Parnell. (4:760, 789.)

Neptco and Laws used a written break schedule. (3:514; 4:757; R. Exh. 25 at 4, effective "12/1/99".) Laws asserts that employees were told to "stick to" these breaktimes. (4:757.) Tingler confirms this, but adds that if an employee had to leave at a different time to be sure and let someone know. (2:268.) Parnell suggests that going "off" the break schedule was something more acceptable than what Laws or Tingler report. (2:309.) A (Sunday) January 9 e-mail (R. Exh. 25 at 3) from Laws to the local managers gives a topical listing of items Laws covered that date in a meeting of his "A" crew. Of some 20 items listed, breaktime is the first. Laws asserts that in the crew meeting that Sunday he emphasized that employees were to take their breaks only "during your scheduled break times." (4:743.) Laws confirms that Tingler was present (4:756), but he says nothing about Parnell or even the time of the crew meeting. If the meeting was held at the start of the shift, Parnell may not have been present, for his attendance calendar (R. Exh. 20 at 2) reflects that he was 1.5 hours "tardy" on that date. That presumably means that he arrived for work 1.5 hours late that morning.

Turning to the printed break schedule, note that it specifies "LFE 1" and "LFE 2." (R. Exh. 25 at 5.) Presumably that would be Parnell and his coworker, with Parnell (who was at the top pay scale, 2:294) probably "LFE 1." Both LFE 1 and 2 are shown as having scheduled afternoon smoke breaks, their times being, respectively, "2:50–3" and "3:05–3:15." (R. Exh. 25 at 5.) Neither of those times fits the period described by Parnell or by Supervisor Laws in either his e-mail (R. Exh. 25 at 6) or his hand note (R. Exh. 8 at 8), although Tingler's time estimate would be very close to the breaktime for "LFE 2."

Because the parties neither fully developed the scheduled breaktime matter, nor even focused on the time of this incident, nor briefed it as an issue, too much ambiguity exists to make a finding. I decline to make that finding based simply on the naked assertion of either Parnell or Laws when the parties easily could have developed facts corroborating one witness or the other. At the very least Parnell could have testified, but did not, as to whether his breaktime, per the printed schedule, had been modified. Thus, I simply find that the incident occurred sometime the afternoon of Wednesday, January 26, 2000. I make no finding whether Parnell's presence there on this occasion was part of an authorized break for him. Consequences may flow from this depending on which party, if either, needs a finding as to whether Parnell was there as part of an authorized break. Thus, I leave the testimony as is—meaning that I accept it not for accuracy, but as what the witnesses believed both at trial and back on that January 26.

On the assumption that Parnell thought he properly was on break, and Laws thinking that it was not the breaktime of either Tingler or Parnell, we have the supervisor, Laws, being "real disappointed" in seeing Parnell out of his work area after Laws had already told him earlier that day to "stay on your job." (4:788–789.)

Supervisor Laws testified that, after completing his rush job with the spool, he returned to the production office and wrote the two-paragraph hand note (R. Exh. 8 at 8), quoted earlier, about the two incidents of that January 26. Then he had a meeting with West and recommended that Parnell be terminated. (4:789, 813.) West confirms that Laws came to her with the hand note and asked how they should address the matter. They reviewed Parnell's personnel file, noting the two documents there bearing dates within the last 12 months (the May 24 attendance log and the e-mail about the August glue spill). Agreeing with the termination recommendation, West went to Plant Manager Hensman and informed him of their recommendation. (3:490–496, 624–625.) Hensman approved (2:374), and West then prepared the discharge letter (GC Exh. 13; R. Exh. 8 at 9). (3:496.)

On Thursday, January 27, 2000, Parnell was called into a conference room where he learned that effective that date his employment with Neptco was terminated. (2:303–305, Parnell; 3:497–498, West) Parnell asked why, and Laws replied, "Job performance." (2:305; 3:498.) When Parnell asked for more detail, Laws said "Job performance covers a lot of things." (2:303.)

West testified that she agreed with the decision to discharge because she and other supervisors had seen Parnell away from his work area on other occasions, and that she was satisfied Supervisor Laws "numerous times" had given Parnell "fair warning" to stay on his machine. (3:496–497.) No consideration was given to issuing a written warning to Parnell rather than terminating him because there were two instances of insubordination on the same date, West testified. (3:626.)

According to Laws, he told Parnell that his termination was because of his performance, the information in his file, of his being totally insubordinate, and that such was unacceptable. (4:790–791, 814.) On cross-examination Laws asserts that when Parnell asked why he was being fired that Laws told him it was for "a series of events that he had in his file, that led to his termination." Laws denies giving Parnell any specifics, and agrees that he did not ask Parnell about seeing him off his job about 2:15 p.m. the day before in order to give Parnell an opportunity to explain. (4:815.) Laws did not because, he asserts, "it was the second time that day, and the previous day before [January 25] he did the same thing, so no." (4:815.) Laws acknowledges that he prepared no file memo pertaining to any such incident on January 25. (4:816.)

Observing that Parnell and West are in general agreement concerning what was said, and that notes written by West on Neptco's copy of the termination letter are consistent with that version, I do not credit the version given by Supervisor Laws (only on direct examination, and inconsistent with his response on cross-examination) that he mentioned the file and "insubordination."

Asked why he recommended termination, Laws described the "repeat sessions" and his fatigue of "dealing with it" that I summarized earlier. Asserting that he did not think "another" warning would do any good, and he therefore chose termination, Laws explains (4:789–790):

> He wouldn't have been any better. I'd had numerous discussions and discussions wasn't getting it. I believe the piece of

> paper that came along with the warning wouldn't do the job either.

As Parnell was not asked about the accusations that he did a lot of roaming and wandering away from his machine when he was supposed to be there working, the record contains neither a denial nor an admission by him. Although both Human Resources Manager West and Supervisor Laws testified after Parnell, the General Counsel did not call Parnell at the rebuttal stage so that he could address these accusations. Yet the accusations constitute a critical point. If I credit Supervisor Laws respecting the matter of roaming/wandering, and as to his informal admonishments that Parnell return to work, that finding could be a step toward dismissing the complaint as to Parnell. Should I infer that had Parnell been called on rebuttal to answer these accusations of wandering and of admonishments that he would have admitted them?

To assist in answering that question, note this fact. The General Counsel did not have to wait until rebuttal to ask Parnell about the accusations, because the General Counsel had been forewarned even before the trial. Back when NLRB Region 11 was investigating the charge, Neptco made the same accusations in its March 20, 2000 position letter (GC Exh. 2 at 5–6) to the Region. Despite this foreknowledge of this critical point, the General Counsel never asked Parnell about the accusations. Instead, the General Counsel twice asked Parnell whether he had ever received any *written* warnings during his last 12 months (2:306, 337), and once (2:309) as to whether he had ever received a *written* warning for being away from his job. Because there were no such written warnings, or any disciplinary actions in his file for the last 12 months, Parnell correctly answered in the negative each time. In other words, the General Counsel avoided the issue, giving Parnell no chance to respond to the issue.

Of course, that leaves the testimony of Supervisor Laws uncontested. In effect, the General Counsel simply abandoned the field of contest as to this issue. Accordingly, I infer that had the General Counsel asked Parnell about the accusations of roaming by Parnell and of informal admonishments by Supervisor Laws, Parnell would have admitted that the accusations were substantially true.

That does not end the inquiry, however. Because these wanderings and admonishments were so numerous during 1999 (especially, it appears, during the second half of the year), these wanderings and admonishments had become practically a perk of Parnell's job. Notice that the "return to work" and "stay on your job" admonishments contain no notice or threat that any further roaming would subject Parnell to possible discipline. As already noted, Supervisor Laws never so much as sent an e-mail to the file documenting any of these numerous incidents (as he did with the August 8 glue spill). In fact, Supervisor Laws (and Human Resources Manager West and Neptco, for that matter) simply tolerated Parnell's habit of roaming. Indeed, Neptco admits as much in its March 20 position letter when it writes, "Parnell enjoyed socializing off his job on working time. NEPTCO management responded reasonably to him and spoke with him informally about this many times." (GC Exh. 2 at 5.) "Spoke with him informally" many times, but not once so much as threatened the possibility of even a "verbal" warning.

Of course, such tolerance by Supervisor Laws and Neptco did not create some vested right in employee Parnell to a guaranteed continuation of this tolerance. However, various laws restrict Neptco's right to switch, without warning, from tolerance to punishment. One such law is the National Labor Relations Act. The restriction is that the switch may not be made if a motivating reason is to retaliate against the employee because of his union activities.

Plant Manager Hensman states that, in approving Parnell's discharge, he understood that the recommendation was based on "insubordination" in that Supervisor Laws, earlier on January 26, already had told Parnell to stay on his machine, and then later that day Parnell again was wandering away from his job. (2:375.)

Earlier, Hensman testified that he told his management, respecting their dealings with all employees, including union supporters, that they should do as they normally would do, and to just follow the employee handbook, that it was their "bible," and to "just go by the handbook." (2:372, 388, 390.) Respecting progressive discipline, however, "it depends on the kind of violation." Thus, Hensman's recollection is that a "gross" violation did not merit progressive discipline. (2:389.) Actually, the handbook's language is not even that restrictive (GC Exh. 11 at 31; 2:424):

> Although the company normally follows a progressive corrective action procedure, this procedure may be altered by specific circumstances at the employer's discretion.

Before reaching the discussion of this and Parnell's case generally, one topic remains—examples offered by Neptco of other discharges for "insubordination." As I summarize these examples, it will be pertinent to see what Neptco considers conduct "gross" enough (in the words of Plant Manager Hensman) to bypass the steps of progressive discipline and to go direct to termination.

The first of these is the February 1, 2000 discharge of Alan Buchanan. What few details there are of this example are from a three-line e-mail (R. Exh. 22) of February 1 from Supervisor Dean Church to Human Resources Manager West describing an event the night of Thursday, January 27. According to the e-mail,[20] Church instructed Buchanan "to run some specific printer orders that were needed for the next day. These orders were not done or even started. Allen [sic] agreed and committed to have these orders done and failed to do so. The next crew had to hurry and complete these orders that had to ship the same day."

Human Resources Manager West also identified the February 2 termination letter to "G. Alan Buchanan." (R. Exh. 22 at 2.) Per Neptco's policy (at least for letters prepared by West), the letter gives no reason. Hand notes by West at the bottom of Neptco's copy, per the testimony of West, reflect that Buchanan called in on Wednesday, February 2, and spoke with

[20] Although Church testified as one of Neptco's witnesses, he was not asked about Alan Buchanan or about any documents relating to Buchanan.

West, inquiring whether he had been terminated. She confirmed that status and, it appears, she informed him that it was because he had not followed instructions. He apparently asked "What instructions?" and she told him the instructions pertaining to the printer machine. (R. Exh. 22 at 2; 3:504–505.)

I attach no weight to the Buchanan example because the record fails to reflect whether, at the time of his termination, Buchanan already was laboring under an existing written warning, with termination being the next step. Even if I were to consider Buchanan's case, the result would be the same for two reasons. First, in his testimony, Supervisor Church did not describe whether there were other examples of this conduct for which Church, if not formally warning him, had admonished him for failing to follow instructions. [Under the group I work rules, rule 2, respecting insubordination, includes "refusal to carry out a work assignment."] (GC Exh. 11 at 32.) Second, as the General Counsel argued, in part, in support of the Government's objection at trial (3:505–506), the situation here is not comparable to Parnell's. Buchanan was expressly instructed to do a specific job. He failed to do any of it. (What excuse he had, if any, is not shown. We do not know whether other work consumed all his time, whether he was working too slow, or whether he simply did not want to do that assignment and therefore declined to do it.) By contrast, as Supervisor Laws had told him on numerous occasions before, "Stay on your machine." While that generally may be considered an order to do just that, Neptco's complete tolerance amounted to the grant of an informal "perk" (revocable on notice) to Parnell. Thus, I find the situations of Buchanan and Parnell to be not comparable.

The second example advance is that of the January 19, 2000 discharges of Chris Bay (R. Exh. 23; 3:511), and Brian D. Pierce (R. Exh. 24; 3:513) for repeated horseplay that included "tampering with" Neptco's property (a violation of group I, rule 5). As the preamble to the rules states, "Violation of any of the work rules listed under group I may result in immediate discharge." (GC Exh. 11 at 31.) By contrast, the group II rules prohibit, in rule 4, "Loafing, loitering, or neglecting duties during work time," and, by rule 7, "Leaving the job or regular working place during working hours without authorization from your supervisor." (GC Exh. 11 at 33.)

Violation of the group 11 rules "may" result in any of the disciplinary steps, "depending upon the individual circumstances." (GC Exh. 11 at 31.) As we have seen, progressive discipline is "normally" followed, but may be altered "by specific circumstances at the employer's discretion." (GC Exh. 11 at 31.)

The Bay/Pierce discharges are not comparable for two reasons. First, they involved tampering, a deliberate offense subjecting an employee to immediate discharge. Second, supervisor Chris Worley testified that both already had received two or three "write-ups." (4:710.) If anything, the progressive treatment accorded Bay and Pierce support the Government's case.

Neptco also cites (Br. at 45 fn. 17) the June 29, 1999 discharge of Crystal L. Lingerfelt by Supervisor Chris Worley. (R. Exh. 21 at 4.) The Lingerfelt situation, as with that of Bay and Pierce, is more favorable to the Government because it shows that she had received progressive discipline—even a "second written warning" for "inefficient, incompetent, or careless job performance." (R. Exh. 21 at 3; 4:719–720; 3:503, West.)

The last case advanced by Neptco as comparable is the December 14, 1999 discharge of Leander Belcher. Although at trial I overruled the General Counsel's objection to relevance of the documents (R. Exh. 26) pertaining to Belcher (3:520, 524), I here agree that the case of Leander Belcher, hired October 27, 1999 (R. Exh. 26 at 1; 3:520, West), is not comparable to that of a regular employee. Belcher "was terminated for several reasons" (R. Exh. 26 at 2), and the list is lengthy, including "refusal to work," a bad attitude, the use "of offensive language on several occasions," trashy area, left material holders empty for next crew once ("This causes voids in the product"), and failure, after repeated notice, to wear his safety glasses. The question posed by Supervisor Worley to West was whether Neptco should continue to train Belcher or to terminate him. The decision was to discharge. (3:520, West; 4:711–713, Worley.) Indeed, on cross-examination Supervisor Worley explained that the "Refusal to work" was outright "insubordination" when Belcher declined an express order to work on a specific machine (4:718):

> I'm not going to work on that machine.

The wonder is that Belcher lasted some 6 weeks. The discharge of Leander Belcher is not comparable because (1) he was a probationary employee and (2) among his many infractions was a defiant and deliberate insubordination.

(b) Discussion

As this is not an arbitration, the issue here is not whether Neptco, and particularly Supervisor Laws, followed the provisions of the employee handbook, and whether Neptco properly bypassed the steps in its normally-applied policy of imposing progressive discipline, but whether all the circumstances demonstrate that the union activities of Donald Parnell were a moving cause for his January 27 discharge. That is, was the motivation of Supervisor Laws and of Neptco tainted by considerations given to Parnell's union activities and sentiments? The issue really boils down to an inquiry into how union considerations could have been a moving cause for the discharge when the really active portion of those activities were back in May–July? Why would Neptco wait until the following January 2000 to get rid of the leading supporter of the Union? Indeed, if union considerations were a moving cause, then why would Supervisor Laws pass up a golden opportunity to issue Parnell a written warning (thereby taking an important step in the progressive disciplinary procedure) over the August 1999 glue spill?

Previously I found no merit to a key portion of the Government's argument—the complaint paragraph 8(a) allegation that, on January 21, Supervisor Greg Greene had threatened employees with retaliation for their engaging in union activities. Recall that this is the allegation that the General Counsel, at trial and on brief, always interprets the testimony, in making the Government's argument, as if that testimony included an "and" in the middle of the statement. The "and" tends to convert the first half of Supervisor Greg Greene's statement into an implied

threat that Parnell himself was finished and, in addition, "the Union's dead." But as I have found, the statement had no "and," nor was Greene's remark a statement about Parnell personally.

Aside from that alleged threat, the Government relies for animus on three things. The first is an event early in the organizing campaign when a procession of supervisors, with Laws as the last, took turns in telling Parnell that he could not distribute union handbills in the plant's parking lot, with Laws even telling him that he would get into trouble if he did not stop. Parnell bravely resisted the bullying and went to Plant Manager Hensman who, after checking, told Parnell that he could so distribute during the 30 minutes before and after a shift change. (2:298–299, 314–315.) Good heavens, the incident calls to mind a verse from Thomas Macaulay's, *Horatius*:

> Then outspake brave Horatius.
> The captain of the gate:
> "To every man upon this earth
> Death cometh soon or late.
> And how can man die better
> Than facing fearful odds
> For the ashes of his fathers
> And the temples of his gods?"

Second, in the early days of the organizing campaign, Parnell testified (2:309–310), supervisors (unnamed) followed him in the plant and into the smoking area, and "I was always within eyesight of one of them." However, it appears that the supervisors may well have been reacting to what they considered employees overstaying their smoke breaks, for, as Parnell explains on cross-examination, he was only one of a group of employees asked to leave the smoking area and to return to work. (2:323–325.)

For the third item the General Counsel quotes testimony given by Supervisor Laws in response to a question from me. Thus, on brief (Br. at 31) the General Counsel observes that Laws acknowledged that he had not issued Parnell a warning, written or oral, concerning his predischarge conduct (over the past 12 months). (4:819–820.) That was followed by the following exchange (4:820–821):

> JUDGE LINTON: Just a moment before you go with Mr. Price. With respect to Mr. Parnell, if I can understand it, you say that you were just frustrated and [had] about had it with the problems with him. In connection with your practice that you say you would try to do is to give people the—or as a matter of fact you gave him back in the summer [not "summary" as rendered], there were two or three times that you could have issued him warnings and did not?
>
> A. That's correct.
>
> JUDGE LINTON: Then there comes January when it means his termination, you issued him a termination, rather than give him a written warning to really kind of like a knock on the head to wake him up. I guess I don't understand what seems to be such a change in your approach. In the summer you were generous and in January while apparently you had lost your patience you lost it to the extent that you departed from your normal practice and I guess I am having a little difficulty understanding that change. Is there anything that you can tell me that might help me understand?
>
> A. As time went on the experience I had with Donnie since he had told us that he was doing the union campaign and stuff—
>
> [On brief (Br. at 31), the General Counsel concludes the exchange at this point and proceeds to argue that Laws' answer is an admission showing that he had chosen to ignore the employee handbook's (progressive) disciplinary procedure "because he was motivated by Parnell's active union involvement. In his apparent zeal to purge the company of its most active union supporter, Laws also disregarded the assertion of Plant Manager Hensman to follow the handbook procedure." And, "Finally, in a moment of truth, Supervisor Laws acknowledged the unlawful motivation to accelerate Parnell's discharge because, . . . 'he had told us that he was doing the union campaign and stuff . . .'." Continue now with the balance of Laws' answer.]
>
> JUDGE LINTON: Since what?
>
> A. Since he started doing the union and got involved he had gone to where he would wander more and more. As the time went on he would wander more and more off of his machine every day. And I would always tell him, "Donnie return to your machine. Get back to your work area. Get out of the office and let me do my work." It seemed like those situations got worse and worse as time went on and there were verbal things that I told Donnie that I don't have documentation on that I would tell him. I'd say hey do this and do that and go back to your machine and do your job. That day [January 26] he had two situations. The same situation and I was just tired of dealing with it.
>
> JUDGE LINTON: In retrospect you would have been better off issuing him a warning or two along the way then wouldn't you? You wouldn't have to make such a big explanation.
>
> A. For documentation purposes, that's probably correct, but I wanted Donnie to do his job. I didn't want to fire Donnie. He just kept on getting lackadaisical on doing his job and wandering around. I was just tired of dealing with it. Chasing him down and for him to get back on his work.
>
> JUDGE LINTON: Thank you. Proceed.

The tactic used by the General Counsel in presenting the Government's argument on this third item, quoted above in the bracketed portion, is regrettable. I must comment about the ethics of this tactic. The General Counsel has deliberately split the answer of the witness, disregarding the bulk of the answer and the portion containing the message of the answer. The tactic would suggest, to someone reading only the brief, that the answer physically ends just before my interruption. Even assuming that, had the answer been the introductory part just before my interruption, and that possibly the General Counsel's argument, although a long stretch, arguably could be made based on that abbreviated portion, the balance of the answer

shows that the severing tactic by the Government was deliberate.

Whatever happened to the canons of ethics, and especially to the one about "Candor with the court"? That one is still around. See Rule 3.3, Model Rules of Professional Conduct, ABA, 1999 edition at 62. I also remind the Government that, in its role as the prosecutor in unfair labor practice trials,[21] its goal is not to win, but to see that justice is done. Thus, even though unfair labor practice trials are not criminal cases, the compelling moral force of the American Bar Association's 1908 original[22] Canons of Professional Ethics, Canon 5,[23] nevertheless applies: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." To similar effect, see *Berger v. U.S.,* 295 U.S. 78, 88 (1935) (". . . not that it shall win a case, but that justice shall be done.") (Sutherland, J.).

What mystifies here is that the distortion of the answer of the witness is so blatant, so obvious, and so, well, clumsy. In that sense, the argument is not misleading, just highly improper at best, and at worst, unethical. I am disappointed.

Turning now to the merits of the three items, none of them suggests animus. The comments of the supervisors, including Laws, were corrected by Plant Manager Hensman. More than that, the comments reflected a misunderstanding of either Neptco's policy or of the law. That misunderstanding did not disclose any personal animus by Supervisor Laws against Parnell.

The second item has been covered. To the extent that Parnell asserts that he was followed by any supervisors (he does not name any) at places other than the smoking area, I do not credit him. As to this, he testified in generalities, gave no names or dates, and was generally unpersuasive on the point.

Respecting the third item, the attribution of an admission of an unlawful motive based on the Government's deliberate distortion of the answer given by Supervisor Laws, it is clear that Laws answered that, following Parnell's informing Neptco that he was supporting the Union, Parnell had started wandering from his job "more and more." Over time, it became "worse and worse." Laws did not file any memos or issue any warnings because he just "wanted Donnie to do his job. I didn't want to fire Donnie." In short, the General Counsel's third item supposedly showing animus shows just the opposite—compassion and patience.

The case boils down to the question of whether Supervisor Laws is to be believed. That is, did Parnell really do all that roaming and wandering, with not even a single memo put in his file, so that Supervisor Laws finally reached the end of his patience, so much so that his judgment snapped and instead of calling for a warning he recommended termination? Remember, this is the supervisor who merely sent an e-mail—not even a "verbal warning"—to Human Resources Manager West when Parnell created a "huge mess" by negligently causing the August 8 glue spill. Now, in January, after much asserted roaming and wandering, with oral entreaties doing no good, a second incident of such on January 26 causes Laws to skip any warnings and go direct to recommending termination.

By being away from his machine the afternoon of January 26, and talking with Alesa Tingler and Janet Barker by the door to the production office, was Parnell, as one might reasonably conclude, being "insubordinate" (a group I violation), or merely "neglecting his duties," or away from his "regular working place" without his supervisor's authorization (group II violations), and if the latter, would they reasonably be classified as "gross" so as to justify bypassing the regular stops of Neptco's progressive disciplinary procedure?

Agreeing with the Government, I find that both Neptco itself, in its past disciplinary actions, and by the language of its rule, interprets "insubordination" to mean a refusal to comply with a specific instruction to do, or not do, a specific act. To the extent that 'Stay on your machine" could qualify as a direct order, toleration of Parnell's roaming and socializing habit by both Neptco (West and the other unnamed supervisors that she mentioned), and especially by Supervisor Laws, leaves Neptco's sudden change of course against Parnell open to question.

At this point it is time to ask what is there here that the Government can use to show, prima facie, an unlawful motive? One thing left to the Government is the January 21 laughing taunt by Supervisor Greg Greene (in the presence of Supervisor Gary Greene) to Parnell that, in effect, Parnell's efforts to help the Union had failed, the organizing campaign is over (the "You're finished" portion) and (second half) "the Union's dead."

As I have found, the statement is not unlawfully coercive. However, I find that the taunting statement reveals the mental image of Neptco's management, and that such mental image reflects a current interest in and evaluation of all things union. It shows that, in the mind of management, only now (January 21) can it truly be said—"the Union's dead." In other words, the Union's organizing effort was still very much on management's mind as late as January 21, and management associated Parnell with the Union's organizing effort. The implication of this, I find, is that top management now gave the "All Clear!" signal for supervisors to get rid of any remaining active supporters of the Union. However, it seems that a bit more is needed to move the implication from possible speculation to more solid ground.

Recall the process of the decisionmaking. Clearly Neptco made a stretch in order to cast this as a matter of insubordination. Going even further, Human Resources Manager West even calls the January 26 morning incident an "insubordination." (2:558–559.) But before the first incident that morning, Laws had not (at least not that morning) told Parnell to stay at his machine. For his part, as summarized earlier, Parnell thought that his job duties included going after supplies. Regardless of the correctness of Parnell's understanding, as he had gone for supplies before, nothing suggests that he was not sincere in his belief. Thus, he at least thought that his going for supplies that morning was proper. Human Resources Manager West therefore stretches to include this as an act of insubordination.

[21] *Zurn/N.E.P.C.O.*, 329 NLRB 484 fn. 2 (1999).

[22] Preface to *Model Rules of Professional Conduct* (ABA, 1999 ed.).

[23] F.R. Shapiro, *The Oxford Dictionary of American Legal Quotations 352* (Oxford Univ. Press, 1993).

When Supervisor Laws and West reviewed Parnell's personnel file, they confirmed that there was not a single disciplinary action—not even a "verbal"—within the last 12 months. Yet Human Resources Manager West, joining with Laws on his recommendation of termination, went to Plant Manager Hensman with the joint recommendation from her and Supervisor Laws that Parnell be terminated. No progressive discipline of either a "verbal" warning first, or even a written warning. Skip all that and go direct to discharge. Why the urgency in terminating Parnell after all these months of what Supervisor Laws, and West, too, had been tolerating? Supervisor Laws may have been "tired of dealing with it," but I do not credit Laws when he asserts that he did not think that a warning paper would do any good. In fact, Parnell's record shows that a January 1998 "verbal" warning (R. Exh. 8 at 3) for poor attendance, an informal threat in August 1997 (R. Exh. 8 at 1) of possible discipline for extended break, the April 1998 informal threat (R. Exh. 8 at 4) of "other steps" if he did not clean up his work area, and the May 1999 nonconformance log for poor attendance (R. Exh. 8 at 6) all achieved positive results. Everything in Parnell's record shows that when management made it clear by informal warning that other steps would be taken if he did not shape up, Parnell complied. Thus, the record does not support Supervisor Laws, and as to this, Laws did not testify favorably, and I do not credit him.

From the view of Plant Manager Hensman, what was so "gross" about one more example, of many, of being away from his machine, after having been told to stay there, that called for bypassing the normal route of progressive discipline. As I have found, it was not insubordination because of the toleration that Neptco had granted Parnell. And Hensman's effort to call it that merely reflects the stretching Neptco has done here to leapfrog any intermediate steps—steps that, the record shows, Parnell would comply with—in order to get rid of the main union activist now.

The fact is, the action against Parnell does not pass the smell test. The odor rising to the sky is so fetid that even the passing clouds choke and turn a deathly hue. And trumpets across the heavens announce the galaxies' indictment—taint infects the decision to terminate Donald R. Parnell. I do not believe either Human Resources Manager West or Plant Manager Hensman respecting Parnell's case. They testified with unfavorable demeanor and unpersuasively. Respecting Supervisor Laws, I find that he acted without animus through the summer, fall, and into January 2000. But I do not believe his story that he lost his patience so much that he just concluded that termination was the only feasible solution.

No, another reason is at work here. Another motivation. It is a motivation, I find, that flows not from the bottom (Supervisor Laws) up, but from the top (from Plant Manager Hensman, and even, perhaps, from Neptco's corporate office) down. An important clue exists in the January laughing taunt by Supervisor Greg Greene on January 21. As I have found, that laughing taunt reveals management's secret that it was still evaluating the viability of the Union's campaign. I find that Parnell's answer (2:302) to Supervisor Gary Greene's question of how the union was going, "We're limping along" (such answer conveyed, I find, to Plant Manager Hensman), served as a "wake-up" to management that it needed to apply the finishing blow. Fully aware that Parnell was the key, Plant Manager Hensman (either directly or, I find, through Human Resources Manager West), instructed Supervisor Laws to cease tolerating Parnell's wandering and enjoyment of (GC Exh. 20 at 5) "socializing off his job on working time." Complying with this instruction, Supervisor Laws cracked down on Parnell at the first clear opportunity—the 2:15 p.m. (one of Laws' time marks, the other being the 1:40 p.m. e-mail) incident that we have here.

The morning incident on January 26 was not a clear opportunity because Parnell had gone for supplies, although the occasion gave Laws a chance to tell Parnell, again, to stay on his machine. Laws' brief reference (4:815) to a similar incident on January 25 was not developed or litigated, and I therefore am unable to evaluate it.

The statutory vice of the crackdown is not that Neptco cracked down, even singling out Parnell for the crackdown. Indeed, Parnell may have been the only employee who, at Neptco's tolerance, "enjoyed socializing off his job on working time." (GC Exh. 2 at 4.) If Neptco's motive for the crackdown had been for the purely business purpose of restoring adherence to plant rules, the action, perhaps would have been unfair (no informal warning, no intermediate written "wake-up" warning, and certainly no "second written warning" as given, for example, to Crystal Lingerfelt—(R. Exh. 21 at 3; 3:503), but it would not have been illegal. No, the statutory vice here is that Neptco cracked down, and bypassed the steps of its own progressive disciplinary system, for the chief purpose of guaranteeing that "The Union's dead."

Because Neptco's decision to terminate Donald Parnell was motivated chiefly by Parnell's position as leader of the remnant of employees supporting the Union, Neptco's January 27, 2000 termination of Donald R. Parnell was unlawful. So finding, I shall order Neptco to offer Parnell immediate and full reinstatement, and to make him whole, with interest.

4. Alesa Tingler

(a) Facts

First working at Neptco through a temporary service from October 1998, Alesa Tingler was hired as a regular Neptco employee on December 28, 1998. At the time of her January 27, 2000 (effective date, GC Exh. 12) discharge,[24] Tingler worked under Supervisor Laws in the composites department where she primarily operated a 702 machine, a machine that produces fiber optic cable or fiberglass rods for telephone and television cable. (2:245–247, GC Exh. 3.) Laws recalls that Tingler switched to the 702 machine about the fall of 1999. (4:839–840.)

On various factual points that follow, the versions of Tingler and Supervisor Laws differ. I find the facts generally as reported by Tingler, whom I credit on any disputed matters, rather than as reported by Laws, whom I do not believe. Tingler testified with a persuasive demeanor, whereas Laws did not. To some extent the description overlaps with that given in Donald Parnell's case, the common incident being a certain

[24] Because of days off, Tingler did not receive actual notice until she returned to work Monday, January 31, 2000. (2:260–264.)

"socializing" by the door to the production office the afternoon of January 26.

Company knowledge as to Tingler's union sentiments is not contested. In addition to being a member of the organizing committee and opening her home for two union meetings in June, Tingler occasionally wore union T-shirts from early in the campaign until her termination. (2:247–248, 252.) As previously discussed, Plant Manager Hensman joked with Tingler about her union T-shirt. Supervisor Laws admits (4:838) knowing that Tingler supported the Union, but he denies (4:841) that such fact figured into his decision to recommend that Tingler be fired.

Before Tingler's last week, the only negative item in her personnel file was the documentation (R. Exh. 25 at 1–2) of a November 3 verbal warning given by Supervisor Laws to Tingler on October 31. On this occasion Tingler, as she admits (2:253–257, 282), neglected adequately to observe the work of a trainee who was to add epoxy to the raw glass. As Tingler worked with another employee at the other end of the machine, the trainee left to obtain more mix. Unfortunately, the trainee had to wait in line for the mix, and the machine began running raw glass. Tingler admits (2:256) that she had erred, and that Laws gave her a verbal warning that she be more careful and not to let it happen again. Tingler denies any awareness that the matter had been documented. (2:282.)

Supervisor Laws asserts that the lost product was costly, and that he decided on a verbal warning because on some other occasions he informally had been required to caution Tingler to monitor her machine more closely. (4:752–755, 833.) I credit Tingler's denial (2:280–281) that Laws had ever so cautioned her individually other than what he had said to everyone in shift meetings. As we see in just a moment, that was a topic that Laws had raised in a shift meeting on January 9. I find that at trial he simply tarred Tingler with that charge when in fact any problems he had on that score were with others or that his January 9 message was simply a reminder of this standard requirement. As Tingler credibly testified (2:281), the requirement of staying with the machine was just common sense (implying that she did not need to be reminded anyhow).

Tingler admits that, on some four or five occasions in the fall and winter, Supervisor Laws had spoken to her about the need that she wear the side shields for her safety glasses. (2:282.) However, it was rather common that employees failed to wear the side shields and the supervisors frequently had to remind the employees to wear them. (2:285.) In any event, at her late December evaluation, Laws told her that there was no problem with her work,[25] that other supervisors had "raved" about her performance, and that she would receive a pay increase of 2.5 percent, or 21 cents per hour. (2:264.) Although other employees told Tingler that such a raise was at the top of the range for pay increases granted by Supervisor Laws (2:265), there is no nonhearsay evidence establishing that to be fact.

On January 9, Supervisor Laws held a shift meeting with his employees and covered a list of topics. (R. Exh. 25 at 3; 4:743.) Among the items Laws emphasized were the need for employees to observe the scheduled break periods and that they not be out of their work areas at other times, and for employees to monitor their machines closely. (4:743.) Laws asserts that Tingler was present at the meeting. (4:756–757.) Referring to the printed break schedule (R. Exh. 25 at 4), Laws asserts that Tingler's afternoon breaks came at 12:30 to 12:50 (the paid lunch period, apparently), 3 to 3:10 p.m., and 4:30 to 4:40 p.m. (4:758.)

Restroom breaks could be taken as needed provided that the employee alerted his or her neighbor operator before leaving the work area. (2:246, Tingler; 4:836, Laws.) Tingler's working "partner," or neighbor operator, was Robert Arney. (2:246; 4:764, 835.) As of the trial, Arney still worked at Neptco (4:835, Laws), but neither party called him to testify. Tingler asserts that she unsuccessfully made inquiries but could find no one who knew how to contact Arney. (2:265–266.) The General Counsel represented that he likewise had been unsuccessful. (2:266.) The General Counsel requests (Br. at 24) that I draw an adverse inference from Neptco's failure to call Arney as a witness. As Arney was not a representative or agent of management, he was equally available to both parties, and I decline to draw the requested adverse inference. Nor do I draw an adverse inference against the Government for failing to locate and call Arney as a witness.

Recall from the fact summary regarding Donald Parnell's case, that sometime during the afternoon of January 26, Supervisor Laws (proceeding from the OSP area on the right side of the plant, through rewind in the center section, and on to shipping at the northeast end of the plant) observed employees Tingler, Parnell, and Janet Barker conversing by the door to the production office. As Laws passed the trio on his rush errand, he waved for them to move on. About half way through rewind he looked back and the group was still socializing. When they saw him looking back they scattered. (4:759–761, 788, 812–813, Laws.)

Tingler testified that, on this occasion, she had left her machine to go to the restroom. She first told her work partner, Robert Arney, who nodded and said "Okay." Tingler likewise had covered for Arney in the past when he needed to go to the restroom. (2:257–258, 266–267.) Tingler reports that her journey took her from her machine in composites, in the middle of the plant, down to the spot by the door to the production office and the group conversation (of a "minute or two") and then to the restroom in the OSP area on the right side of the plant. (2:258, 268–271; GC Exh. 3.)

On leaving the restroom, Tingler entered the adjacent canteen and purchased some aspirin (in a package, apparently) from a vending machine (2:272) for a toothache she had. She then left the canteen, heading for her machine. All this time, from leaving her machine, Tingler carried a can of soft drink. (2:272, 275.) Tingler does not say whether the drink was open for sipping during this trip, or, if not, what her purpose was in carrying the drink. As Tingler left the canteen and started toward her machine, she heard herself being paged by Supervisor Laws to report to the production office. Arriving there she did not find Laws so she went to her machine and found Laws waiting for her there. (2:258–259, 270–275.) The total time

[25] Supervisor Laws admits that Tingler had been doing "a good job." (4:838.)

for this restroom break took some 15 to 20 minutes, Tingler testified. (2:276.)

When Tingler arrived at her machine, Laws told her that he had been to her machine twice in 20 minutes, that Tingler had not been there, that a spool had stopped, that he did not know how long it had been stopped, and for her to get her tools because he was sending her home for the rest of the day. She told him she was sorry but that she left because she had to go to the restroom. Laws replied that he was sorry but that he was still sending her home. (2:259–260, 263, 276.)

When a spool, or "winder," stops, sometimes the operator can restart it. If unsuccessful at that, the operator can take steps to stabilize the machine in order to prevent further damage to the product or even to the machine. (2:276–278, 286–287.) However, Tingler testified, even had she been at the machine when it stopped, she could not have prevented the stoppage, and the other seven lines continued to run. Machine 702, she explains, has been a problem machine that she could not help when a line stopped, so she normally simply cut out the line that was jammed, or in trouble, and reported the matter to the supervisor for a repair order. (2:283–285, 287.) In the past, when a spool stopped, the operator would go to the supervisor and he would write a repair order for the maintenance department to restore the operation. Tingler is unaware of anyone else ever being disciplined over the stopping of a spool. (2:259–260, 285.) When she left for her restroom break, Tingler credibly testified, she checked the spools and they were running properly and giving no warning of any developing problem. (2:284.)

Former Supervisor Robert Coffee confirms Tingler's description respecting machine 702's having a problem with stops and that he simply prepared a service order and turned the breakdown over to maintenance. Coffee never disciplined an employee for having a spool stoppage on machine 702. (1:96, 114.) Coffee agrees, however, that he would expect someone to be covering the machine, for it makes the situation worse if no one is watching the machine. (1:114–115.) Contending that machine 702 only infrequently stopped, Supervisor Laws agrees that when a spool stops the lead person fills out a form requesting service by maintenance. "But somebody has to be there to see that it stopped to report it." Finally, Laws could not recall ever disciplining anyone, before Tingler, when a spool stopped. (4:837.)

Supervisor Laws testified that, after completing his rush work, he went to Tingler's work station to check on adjustments the engineers had been making to the counter-puller—a device that pulls material through the machine. That device was leaving marks on the material, so the engineers planned to adjust the settings so that the device would cease making the marks. According to Laws, an engineer asked "the operator" to keep a close eye on the operation. (4:763.)

Arriving at Tingler's machine, and finding Tingler absent, Laws stepped the 6 to 8 feet to the next machine and asked Robert Arney where Tingler was. Arney answered that he did not know. To Laws' question of whether Tingler was on break, Arney replied, "No, it's not her break time." Then to Laws' next question asking whether Tingler had told Arney that she was going on break (apparently implying a request to watch her machine), Arney replied, it appears (4:836), in the negative. Laws then went to a telephone and paged Tingler. (4:764, 835–836.)

After placing the page, Laws walked to the other end of Tingler's machine. At that point he observed Tingler approaching from the direction of the production office. As Tingler arrived, Laws observed that she was carrying an unopened soft drink can and an unopened bag of potato chips. (4:764.) Whether at that point or earlier (the testimony is unclear), Laws inspected the machine and found that one of the lines had been slipping and had stopped. Attributing the problem to adjustments made by the engineers, Laws asserts that, had Tingler been there monitoring her machine, she could have adjusted the line (implying that she could have prevented the stoppage). Even so, he expressly does not blame her for the stoppage, but only for her not being there watching her machine. (4:765–766.)

When Tingler arrived at the machine, Laws asked her where she had been. She told him that she had gone to the restroom and then to the canteen to get something to drink. To his question, Tingler acknowledged that she did not know that a line had stopped. Laws said that she had just come off break less than an hour earlier. Other than the "something to drink," Tingler gave no explanation for having a new drink and a bag of chips. Rather than dealing further with the matter, Laws told Tingler to get her coat and tools and to go home for the rest of the day. Tingler complied. Laws testified that he was "just tired of dealing with" the same problems of Tingler's not being on her machine, of not wearing side shields, and "I just didn't want to deal with it anymore. I was getting tired of it." Laws estimates that at least 20 minutes had elapsed from the time he had waved "move on" to the group and the moment when Tingler arrived at machine 702. (4:766–768, 836.)

Supervisor Laws then sent (4:768) the following e-mail, dated January 26, 2000 at "1:50 PM," to Human Resources Manager Linda West, Manager Yancey, and Plant Manager Hensman regarding Tingler (R. Exh. 25 at 6):

> Three issues today, 1—not using side shields on her glasses after numerous reminders over the past weekend. 2—Gathered in front of prod. office socializing with D. Parnell and JEB (broken up by dcl). 3—Not at machine 702 appx. 20 minutes after broke up socializing episode with a line stopped in the machine.
>
> At this point she was sent home for the day!!!!!! dcl

The correct time appears to be mostly immaterial here, for there is no dispute that Tingler contends she was gone on a restroom break, not a scheduled break. Thus, the credibility issues are whether Tingler, as she asserts, told Arney that she was going to the restroom, or whether Laws credibly reports that Robert Arney denied that Tingler had told him she was leaving for a break. As Neptco puts it on brief (Br. at 39 fn. 11):

> Whether Ms. Tingler actually informed Mr. Arney about where she was going is not the issue. The issue is what Mr. Laws believed.

Conceivably, Tingler could have so informed Arney, and obtained his affirmation, as she testified, yet Arney, either forget-

ful or worse, could have denied knowledge to Laws. That is, in theory both Tingler and Laws could be correct. As that remote possibility is highly unlikely, and it being far more likely that either Tingler or Laws has not accurately reported the event, I later shall approach the credibility issue on the basis that only one of the two is correct.

Following his e-mail to West and the others, Supervisor Laws met with West. They went through Tingler's personnel file, and concluded that the discharge of Tingler should be their recommendation to Plant Manager Hensman. (3:514–515, West; 4:768, 840, Laws.) Laws asserts that he so recommended even though, as a Neptco employee, Tingler had never been given a written warning for any infraction of the rules. (4:840–841.) Laws denies that Tingler's union activities played any part in his termination recommendation. (4:841.) Hensman approved the recommendation to discharge. (3:515, West.)

Hensman confirms that he approved, explaining that, while he was unaware of all the details, as he recalled, the termination recommendation was based on Tingler's machine running out of epoxy while she was away from her work area (2:379), and because, according to Tingler's supervisor, Tingler had a problem "roaming off her job." As Hensman explains, Tingler's machine had eight lines running—a total of some 40 miles of material. A defect can cause a lot of (expensive) scrap. So Neptco wants the operators to be at their machines monitoring the operation. "So, we want our employees to be there on a continuous basis." (2:378–380, Hensman.) Hensman does not recall whether Tingler had incurred any previous discipline before she was terminated. (2:324.)

The following day, January 27, West prepared the termination letter. (3:515.) When Tingler returned to work on Monday, January 31, Supervisor Laws came and escorted her to a conference room where, in the presence of West (2:261; 3:516; 4:771), he told Tingler that, effective that day, her employment with Neptco was terminated because of "the incident that happened last week." (2:261, 264, Tingler.) Laws handed Tingler the letter informing her that, "Effective today, your employment with NEPTCO Incorporated has been terminated." (GC Exh. 12; 2:261–262.) I specifically credit Tingler's credible report that Laws added the reference about the "incident that happened last week" over the limited description by West simply repeating essentially what the letter states. (3:516.) Indeed, even Laws asserts that he added the phrase, "due to her [your] performance." (4:771.) Although I find that Laws did mention "performance," I also find that he went further and explained that it was "the incident that happened last week." The only incident of "last week" which Tingler could recall was the spool incident. Indeed, the only days that she had worked the previous week were Sunday and (January 26) Wednesday. (2:264.)

On her employment claim of January 31, Tingler reports the reason given to her as being, "Job performance—no particular reason." (GC Exh. 14 at 1.) The "no particular reason" is not inconsistent with Tingler's testimony about "the incident that happened last week" because the latter is merely an event, not a specific ground.

Neptco's February 15 response, submitted by Human Resources Manager West (3:555), reads that Tingler was discharged "due to" (GC Exh. 14 at 4: 3:555):

> Violation of Group II Work Rule #2—failure to wear safety glasses, and #7 Leaving the job or regular workplace during working hours without authorization from your supervisor. Ms. Tingler participated in orientation when the handbook was covered in detail.

Both grounds are of the group II rules (GC Exh. 11 at 33) with number 7, if not expressly so designated above, then clearly so stated by West (2:426–427) at trial. Also at trial, West asserted that, in her opinion, the termination recommendation was appropriate because Tingler's conduct on January 26 constituted insubordination. (3:515, 554.) West sought to classify both the grounds just quoted as being examples of insubordination on the basis that Tingler had been told to wear her safety glasses, and did not, and to remain at her work place, and did not, and therefore Tingler was "being insubordinate" (3:556). West did not submit the one word "insubordination" to the North Carolina Employment Security Commission (ESC) because in her experience the ESC always asks for details if only one word is submitted as the basis for the termination. (3:556, 614.)

Assuming for the moment that Neptco could treat, as insubordination, a "refusal" to wear safety glasses and a "refusal" to remain at the work station, the next question would be whether such "refusal" encompasses mere negligence in recalling, or interpreting, some generic instruction. I need not address that question because such is not the issue here.

West testified with an unfavorable demeanor, and I do not credit her. Had insubordination really been the ground, it would have been quite simple for West to have written that on the form and to have cited the specific rule against insubordination, group I rule 2 (GC Exh. 11 at 32):

> 2. Insubordination, including but not limited to, refusal to work, refusal to carry out a work assignment, abusive/profane language, assault on a Supervisor, or disrespectful attitude.

Then, after writing "Insubordination," West could have given the more specific grounds—refused to wear safety glasses, and refused to remain at work station. Clearly West was capable of doing this because of her long experience and because of her complete familiarity with the specific rules and their numbers. The reason West did not do so, I find, was that at the time of the events, insubordination was not a reason, but was added for the trial to enhance the chance of a successful defense. In any event, as I earlier found, Neptco interprets the group I insubordination rule as applying to a knowing refusal of a direct order to do, or not do, a specific act or course of conduct. Regardless, even that is not the issue here.

What was involved on January 26 was an issue of taking a restroom break. Earlier I outlined the credibility issues to be resolved as to the restroom break, and I reach those issues later. Before that, turn to the "side shields" (snap-ons for the safety glasses). The evidence as to this is ambiguous in relation to January 26. Supervisor Laws' e-mail of that date (R. Exh. 25 at

6), quoted earlier, begins: "Three issues today, 1—not using side shields on her glasses after numerous reminders over the past weekend." First, the exhibit was not received for the truth of the contents. I ruled that way, in sustaining the General Counsel's objection (3:516) that the document is untrustworthy, on the basis that, in the circumstances of a union organizing campaign, warnings, memos, and notes placed in the personnel file of an employee openly active for the union lack the trustworthiness of general business records. I therefore received the exhibit (R. Exh. 25) on the limited basis that it reflects documents that Neptco reviewed and relied on in making its decision to discharge Tingler. (3:518–519.) Respecting the court case I there referred to (but not by name) as support for my ruling, see *Pierce v. Atchison Topeka and Santa Fe Ry. Co.,* 110 F.3d 431, 443–444 (7th Cir. 1997) (not error under FRE 803(6) for trial judge to exclude memo to employee's personnel file from Santa Fe official in age discrimination case).

Asked about that e-mail at trial, Supervisor Laws testified that he again had a side-shield problem (not using them) with Tingler on that January 26. After describing the shields a snap-ons, Laws then asserts (4:758–759):

> And I continually had to tell her to put her side shields on her glasses, and safety glasses are required throughout the manufacturing area by all employees. I continually had to tell her to put her things on, again, this situation I'd had her to do it, and I'd had numerous problems with her not doing things on this particular day.

The question here is whether Laws is saying that on January 26 he had to talk with Tingler about her side shields, or whether he is describing efforts he had made over the past several months, with a kind of mushy slide across what, if anything, took place on January 26 regarding side shields. Recall that Tingler admits (2:282) that, on four or five occasions during the fall and winter of 1999–2000, Supervisor Laws had reminded her to use her side shields. But Tingler also testified (2:285) that it is common for employees not to wear their side shields, and for supervisors to remind them, and (2:262–263) that she recalled no instruction on January 26 from Laws about side shields and no statement about the topic at her termination. Indeed, recall that, as I have found, at the termination, Supervisor Laws told Tingler that she was being terminated for the "incident that happened last week."

The "incident last week" was, I find, Tingler's restroom break of 20 minutes. (As Laws is specific about the duration, and as Tingler says that it was 15 to 20 minutes, I find the time to have been 20 minutes.)

I also find that Supervisor Laws said nothing about side shields to Tingler on that January 26. To the extent Laws' testimony is that he did, I do not credit him. Laws testified unpersuasively, and the facts, just described, also indicate otherwise. What Laws was relying on in his e-mail of January 26, I find, was earlier dates when he had reminded Tingler to wear her side shields. This padding of the e-mail by reaching back to a topic, side shields, that had never so much as generated a note to the personnel file, and never as much as a "verbal" warning, much less a written warning, simply was for the purpose of adding support to the incident that triggered the discharge. Of course, the issue to be reached shortly is what motivated Laws to do the padding. Was it truly a general frustration with Tingler, or was it the unlawful motivation of padding the record for getting rid of her because of her support of the Union? Turn now to the topic of comparable examples.

As comparable examples, Neptco (Br. at 40), cites the discharges of Crystal Lingerfelt and Leander Belcher. Lingerfelt was terminated by Supervisor Chris Worley. (4:705, 720.) The June 29 termination letter (R. Exh. 21 at 4) from Supervisor Worley states that Lingerfelt was terminated "based on the number of work hours missed and job performance." Respecting Lingerfelt, Worley testified (4:705):

> This individual had, on numerous occasions, not worn her safety glasses, and this is, you know, I try to give someone the benefit of the doubt, especially when it's hot in the plant. Hey, you know, if they're cleaning the, it's one thing, but if they're just clearly not wearing them it's another. She had been written up on several occasions for not wearing safety glasses. What we try to do with out processes is once a person receives a warning, then, if they break the rule again, they receive another warning, and then, so forth and so forth until termination is determined.

Rather than comparable treatment as to Tingler, Neptco's treatment of Lingerfelt supports the Government's case. The record clearly shows that Neptco accorded Lingerfelt the full range of its progressive disciplinary system (oral warning, two written warnings, then termination; R. Exh. 21). What Worley possibly meant by his testimony that Lingerfelt had "been written up on several occasions for not wearing safety glasses" is that he had submitted notes for her file—documentation of informal counselings—after talking with her "more than a dozen times" (4:719) about her safety glasses.

Although it would appear that a failure to wear safety glasses is potentially substantially more dangerous than the failure to wear snap-on side shields on the safety glasses, the distinction was not litigated on the record. Accordingly, I treat "side shields" as if they were the same thing as "safety glasses" in terms of Neptco's concern about safety.

In any event, I note that Neptco accorded Lingerfelt progressive discipline, but failed to do so as to Alesa Tingler. Indeed, Tingler had received nothing more than a single verbal warning (when the epoxy ran out on October 31), and no written warnings, during her tenure with Neptco. Thus, I find that the Lingerfelt example shows disparity of treatment in light of the accelerated discipline imposed on union supporter Tingler.

As noted earlier, Leander Belcher was still within his 90-day probationary period when he was terminated. (4:711.) He had been told "on several occasions" to wear his safety glasses. (4:711, Worley.) Belcher was terminated on December 15 (4:713) for several reasons (R. Exh. 26), including the fact that he had "refused to work in some other areas." (4:712.) As probationary employees do not receive the "benefits" outlined in the handbook (GC Exh. 11 at 15), it appears that Neptco need not extend progressive discipline to a probationary employee. Accordingly, I find Belcher's situation to be inapposite in evaluating Neptco's treatment of Alesa Tingler.

(b) Discussion

Although Neptco is correct, as quoted earlier, that, "The issue is what Mr. Laws believed," it must be determined whether Laws believed as he testified respecting his asserted January 26 conversation with Robert Arney, Tingler's neighboring operator. Did Arney really say that he did not know where Tingler was? Did Tingler simply proceed to her restroom break without saying anything to Arney? Crediting Tingler, I find that, as she describes, Tingler did tell Arney that she was leaving for the restroom and that he acknowledged this. I do not credit Supervisor Laws concerning his description of his conversation with Robert Arney. Earlier I wrote that I would draw no adverse inference against either party for its failure to call Arney as a witness. Even so, in resolving credibility, and not as an adverse inference, a judge may consider that a party failed to call a potentially corroborating witness. *C & S Distributors,* 324 NLRB 404 fn. 2 (1996).

Neptco asserts that it chose not to call Arney because he is not a supervisor. (Br. at 39 fn. 11.) In resolving credibility against Supervisor Laws regarding his asserted conversation with Robert Arney, I consider the fact that Neptco did not itself call Robert Arney who could have given testimony corroborating the version of Supervisor Laws. Not crediting Laws as to this, I therefore find either that Laws never spoke with Arney (a possibility) or (another possibility) that Arney told Laws that Tingler had left for a restroom break.

Supervisor Laws, I find, recognized that he had an incident at hand to serve as a vehicle for getting rid of a strong union supporter. The first part of the incident was the "socializing." Crediting Supervisor Laws as to this aspect (he testified clearly on the point, and Tingler did not return on rebuttal to deny his description), I find that the Tingler trio did not disperse when Laws, passing them on his rush errand, waved for them to "move on." Not until he reached the next section and looked back did they cease the socializing. So that part is something that Laws could have warned Tingler about.

I also credit Laws that when Tingler returned to her machine she was carrying an unopened can of softdrink and an unopened bag of potato chips. Again, and particularly in light of the "socializing," Supervisor Laws reasonably could have issued Tingler a warning for abusing the restroom privilege.

Instead of warnings under the progressive disciplinary system that Neptco followed previously, and with employees not open union supporters, however, Supervisor Laws padded the facts by injecting the topic of side shields, and then totally accelerated the discipline direct to termination. Human Resources Manager West, of course, was right there in the decision process, and instead of ensuring that the progressive discipline system was followed, simply joined in the recommendation that Tingler be sent to the industrial gallows. All this, I find, was motivated by Neptco's renewed desire, as I earlier found respecting Donald Parnell, to move decisively on the information, given by Parnell, that the union movement among the employees was still alive. The actions as to both Parnell and Tingler were designed to drive a stake through the heart of whatever remaining interest existed for representation by the Union. I so find.

Finding that Tingler's discharge was unlawfully motivated, and that Neptco has failed to demonstrate that, in any event, it would have terminated Tingler, I shall order Neptco to reinstate Alesa Tingler and to make her whole, with interest.

CONCLUSIONS OF LAW

1. By discharging employees Donald R. Parnell and Alesa Tingler because of their union activities, Neptco has violated Section 8(a)(3) and (1) of the Act.
2. Neptco has not violated the Act as otherwise alleged.
3. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make each of them 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).

[Recommended Order omitted from publication.]