American Golf Corporation, d/b/a Mountain Shadows Golf Resort *and* Laborers' Local Union No. 139 Laborers' International Union of North America, AFL–CIO *and* Eli Jensen. Cases 20–CA–26942, 20–CA–27175, 20–CA–27207, and 20–CA–27472

April 17, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 2, 1998, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief that the Charging Party joined, and the Respondent filed a brief in reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to adopt the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended order as modified and set forth in full below.

For the reasons stated by the judge, we affirm his finding that the Respondent unlawfully issued written warnings to employee Eli Jensen in the first months following his return from layoff in August 1995. We also affirm the judge's finding that Jensen was engaged in protected activity on March 4, 1996, when he placed a call to a competitor of the Respondent urging him to attend a city council meeting scheduled for the following day. However, contrary to the judge, we find that Jensen's distribution of a handbill outside the city council chambers on March 5, 1996, was unprotected under the principles set out in *Jefferson Standard Broadcasting Co.*[3] Accordingly, we remand the case to the judge for a finding as to whether the Respondent has established its asserted defense under *Wright Line*[4] that it would have suspended and discharged Jensen for his unprotected distribution of the handbill even if he had not made the protected March 4 phone call.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[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] *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Facts

As recounted in the judge's decision, during the period from October 1995 through January 1996, Jensen communicated extensively with Rohnert Park city officials and members of the city council with regard to his ongoing disagreement with the Respondent over the treatment of maintenance employees at the city-owned public golf course which the Respondent managed. As detailed in the decision, these communications ranged from complaints about the slow progress of contract negotiations to protests about the impact of the Respondent's maintenance practices on the availability of work for the maintenance employees. Jensen and other employees also distributed materials to Rohnert Park residents soliciting their support. There is no dispute that these communications had a nexus with terms and conditions of employment for the maintenance employees and were protected under Section 7 of the Act, and there is no contention that the Respondent made any attempt to discipline Jensen or any other employee for these activities.

On March 2 and 3, 1996, Jensen prepared and distributed to area residents a handbill urging residents to attend an upcoming Rohnert Park city council meeting on March 5. The handbill, quoted in full in the judge's decision, complained about alleged bad-faith bargaining by the Respondent and the city council's failure to intervene and urged residents to attend the meeting and support the maintenance employees.

On March 4, Jensen also tried to speak with the owner of one of the Respondent's competitors, Tom Isaak of Courseco. Jensen, however, was able only to leave a message with Isaak's administrative assistant. According to Jensen's credited testimony, he informed the assistant that he was calling to invite Isaak to the March 5 city council meeting, that Mountain Shadows' maintenance employees were having "union problems" with the Respondent and that they were having trouble negotiating with the Respondent. Jensen never did speak directly to Isaak. Isaak did, however, report Jensen's attempted communication to the Respondent's regional operations manager, Dave Pillsbury.

On March 5, Jensen went to the city council meeting. Because he did not see any representative from the Respondent in attendance, he decided to leave and thus did not participate in any formal way with the meeting of the city council. As he was departing, however, he deposited on a table outside of the city council chamber about 24 copies of a flyer he had previously prepared for the meeting. This document stated:

> Rohnert Park Residents,
>
> Does American Golf retain a greater percentage of profits from the clubhouse facilities (as compared to green fees)? There's no money budgeted for needed course upgrades, but a capital cost, non-budgeted item like the restaurant addition can be

funded. (We can have a couple of drinks while we watch the course dry out.) Since I'm familiar with neither their business model (vague) nor revenue derivation, I can only guess as to the intent of expenditures.

That non revenue-generating items like installing a drainage system where none exists or installing a second sprinkler system around the sandtraps (both capital costs), don't get done because they weren't budgeted, is typical of "operating statement" thinking. If such course upgrading does not have an easy, immediately calculable payback, it is not done. The money goes into areas where American Golf realizes a greater profit. (i.e. banquet/tournament facilities.)

While Mountain Shadows is a community facility, it is also a business. In order for a business like this to thrive, they must employ "balance sheet" thinking (but let's include the golf course). The clubhouse was a significant investment. American Golf will focus on this area for now since it's not getting the desired returns from the golf course (resident rates?) "getting by," "it's an ongoing process" or "next year we'll budget for it," are not acceptable responses! The condition of the courses does not put Mountain Shadows first on anyone's list, even subsidized residents. If the facility was up to par, it wouldn't have to be "sold" to anyone. While it would be great to have a tour calibre course, greens fees wouldn't be this side of a hundred dollars. Obviously, benchmarks have to be established objectively. It would seem however, that American Golf would rather have a mediocre business proposition than a good product. That is a business decision, and not necessarily good for the community.

Dollar for dollar, Mountain Shadows has the potential to be the best buy in the area. For too many years, proper maintenance has been ignored. If American Golf isn't prepared to look after the facility, perhaps it's time the city found a new partner? Maybe Courseco in Petaluma or the Arnold Palmer Management Company in Orlando?

Poor Management*Poor Business & Marketing Practices*Poor Maintenance

Is Rohnert Park Getting the Best Deal?

The Respondent obtained a copy of the flyer from the Rohnert Park city manager. The Respondent thereafter approached Jensen on March 12, the next day that Jensen was at work,[5] and stated to him that the company had questions about his loyalty, and inquired whether he had been involved in contacting a competitor or drafting the document left at the city council meeting. Jensen requested the assistance of his lawyer as a condition of responding further. The Respondent acknowledged Jensen's right to have an attorney, but notified him that he would be suspended until he responded to the Respondent's inquiries.

The superintendent of the Respondent, Mike Higuera, thereafter sent Jensen a letter, dated March 14, stating:

> As you know, on March 12, 1996, you met with myself and Mike McCraw at the golf course. At that meeting, we asked you about recent information we had received that indicated that you (1) had contacted Tom Isaak, the owner of Courseco, a competitor company, to solicit his company's interest in the management of the Mountain Shadows Golf Course, and (2) had been involved in drafting and/or circulating a memorandum that is extremely critical of American Golf's management of Mountain Shadows and of its business practices. The only conceivable objective of such conduct would be to interfere with American Golf's relationship with its landlord, the City of Rohnert Park, and perhaps to sever American Golf's relationship with Rohnert Park. If successful, such efforts would result in serious damage to American Golf business and revenue, and potentially, American Golf employees would lose employment opportunities. When we asked you about this, you refused to confirm or deny your involvement in either of the above-mentioned activities.
>
> Obviously, if you were involved in such activities, we have grave concerns about your loyalty to the Company and your apparent willingness to undermine American Golf's relationship with its landlord. If you were not involved in such efforts, we would have expected that you would have so advised us at our March 12, 1996 meeting. We are now faced with facts which appear to indicate serious disloyalty on your part, and no facts from you to rebut that inference.
>
> After you refused to confirm or deny your involvement in the above activities, you indicated that you wanted to have your lawyer present before you answered any other questions, even though your union representative was present at our March 12th meeting. Although we normally speak with employees without lawyers being present, we are willing to allow you to bring your lawyer to a meeting about this matter if that is still your desire.
>
> Accordingly, we would like to meet with you on Friday, March 15, 1996, at 10:00 a.m. to resume your discussion of this matter. If this time does not work for you please call today with an alternate time. It is imperative that if you have any information which would allow us to reach a different conclusion regarding your involvement in these activities, we need to hear that. Please feel free to bring your lawyer and/or union representative. In the

[5] Jensen was on disability leave from the date of the city council meeting until March 11, but did not return to work until March 12 due to weather conditions.

meantime, and as we discussed with you on Tuesday, we have taken you off duty.

Jensen did not thereafter speak to the Respondent regarding these matters, but the union attorney who became active on Jensen's behalf ultimately admitted to the Respondent that Jensen had prepared the March 5 flyer and had left copies at the city hall, and that he had contacted Courseco. After it became clear that the Respondent would not be permitted to speak directly to Jensen on these matters, Director of Maintenance Mike McCraw prepared the following letter, dated April 5, 1996:

> Over the last few weeks we have met with you, your union representative, and most recently with your attorney regarding (1) your contacting of Tom Isaak, the owner of Courseco, a competitor company, to solicit his company's interest in the management of the Mountain Shadows Golf Resort, and (2) your drafting and/or circulating to the public a memorandum that disparages American Golf Corporation and its management team and the quality of the golfing conditions at Mountain Shadows. It was our desire to give you every benefit of the doubt with respect to these matters and to hear your side of the story. Unfortunately, despite the several meetings mentioned above, you have refused to respond to our questions regarding your involvement in the above-mentioned activities.
>
> At our April 1, 1996 meeting at your attorneys' office, your attorney, Mr. Supton, confirmed that you were involved in the above-mentioned matters, but he refused to allow us to speak with you about these matters, Thus, it appears very clear that you were involved in these extremely disloyal acts, that you do not deny involvement in this misconduct, and that you will not even speak with us about this matter.
>
> Based upon the above, we must regrettably inform you that your employment is being terminated. We can see no legitimate reason for your attempts to destroy the Company's relationship with the residents of Rohnert Park and to solicit a competitor company to attempt to take over the golf course. If your actions were successful, it would most likely result in the loss of jobs and a diminution of business for the Company. Given the nature of your inappropriate actions and your failure to discuss them with us, we do not believe that it serves anyone's interest to continue the employment relationship.

The Respondent delivered a copy of this letter to Jensen on April 5.

Discussion

As the judge stated, there is no dispute that the reasons for Jensen's suspension and discharge are the two reasons stated in the above-quoted correspondence: (1) his contacting of the Respondent's competitor on March 4 and (2) his drafting and distribution of the March 5 flyer at the city council meeting. Thus, the threshold issue is whether the judge correctly found that these actions were protected under Section 7 of the Act.

Applicable Principles

In *Jefferson Standard*, the Supreme Court held that a television station was justified in discharging certain of its technician employees who had prepared and distributed to the public some 5000 copies of a handbill strongly disparaging the quality of the station's broadcasting and suggesting that the community was being treated as "second-class." Although the technicians' union was involved in a collective-bargaining dispute with the employer, the employees were not on strike, the handbill made no reference to the union or to any dispute or issue relating to the technicians' employment, and the handbill did not purport to solicit support or sympathy for the technicians. The Court agreed with the employer that the handbill demonstrated such "detrimental disloyalty" as to provide cause for discharge.

In cases decided since *Jefferson Standard*, the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection.[6] Applying those principles to the facts here, we find that Jensen's March 4 phone call to Respondent's competitor was protected, but that his distribution of the March 5 flyer was not.

1. The March 4 phone call

With respect to the first prong of the *Jefferson Standard* analysis, we note that Jensen's call was expressly related to the maintenance employees' ongoing dispute with the Respondent. Thus, according to Jensen's credited testimony, he specifically advised the person who answered the phone that the maintenance employees were having "union problems" and that they were having trouble negotiating with the Respondent. With respect to the second prong of the *Jefferson Standard* test, nothing said by Jensen in the course of the call was so flagrantly disloyal, reckless or maliciously untrue as to cause him to forfeit the Section 7 protection to which he otherwise would have been entitled. Rather, the credited testimony is that Jensen simply left a message inviting Issak to the March 5 city council meeting. There is no evidence that he solicited Isaak to try to take over management of the golf course or to otherwise attempt to interfere with American's business relationship with the city.

[6] See, e.g., *Cincinnati Suburban Press*, 289 NLRB 966, 967–968 (1988); *Emarco, Inc*., 284 NLRB 832, 833 (1987); *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979).

2. The March 5 handbill

Although we agree with the judge that the March 4 telephone call was protected, we find, contrary to the judge, that Jensen's distribution of the March 5 flyer is the type of conduct that the Court found to be beyond the protection of the Act in *Jefferson Standard*. Like the handbill at issue in that case, Jensen's March 5 flyer "made no reference to a labor controversy or to collective bargaining." 346 U.S. at 468. Like the *Jefferson Standard* handbill, it made a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." Id. at 471. And like the *Jefferson Standard* handbill, although its ultimate purpose—to put pressure on the Respondent with respect to negotiations with the Union—was lawful, "[T]hat purpose . . . was undisclosed." Id. at 972, quoting 94 NLRB at 1511. In contrast to other materials distributed by Jensen to enlist public support for the maintenance workers, the March 5 flyer did not mention the problems the employees' union was having negotiating with the Respondent, and bore no indication that it was written by or on behalf of any employee of the Respondent. Rather, the matters addressed in the flyer related solely to the impact of the company's capital investment and other business practices on the quality of the service provided to customers. Although the flyer did make a reference to proper maintenance having been ignored—an issue with an actual nexus to the employment concerns of the maintenance workers—the reference occurred in the context of a suggestion that the City consider turning over management of the facility to one of the Respondent's competitors, not as a way to change labor practices at the golf course but to make the course a better "buy" for area residents. There was no indication that the maintenance issue was being raised as part of an effort to enlist public or governmental sympathy or support for the maintenance employees' collective bargaining efforts. In the words of the Supreme Court, the flyer was "not part of an appeal for support in the pending dispute" but rather was a "separable attack purporting to be made in the interest of the public rather than in that of the employees." Id. at 477.

The fact that Jensen circulated the flyer at a time when he was otherwise actively engaged in protected activities under the Act is no more pertinent here than it was in *Jefferson Standard*. The Court stated in that case that:

> The fortuity of the coexistence of a labor dispute affords [the discharged handbillers] no substantial defense. While they were also union men and leaders in the labor controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their handbill . . . omitted all reference to it. The handbill diverted attention from the labor controversy. It attacked public policies of the company which had no discernible relation to that controversy.

Id. at 476. Similarly here, in contrast to other handbills prepared and distributed by Jensen in connection with the employees' dispute with the Respondent, the March 5 flyer omitted all reference to the labor controversy and attacked policies of the Respondent with no discernible relation to it.

We find the instant case distinguishable from *Emarco*, supra, and *Cincinnati Suburban Press*, supra, the decisions relied on by the judge. In *Emarco*, two employees who had recently been out on strike and who had not yet been called back to work went to a jobsite where their employer was a subcontractor to see if anyone was working for the employer at that location. While there, they ran into the general contractor, and in response to his query as to the cause of the strike, explained that the strike had been precipitated by their employer's 5- or 6-month delinquency in payments to the employees' health and welfare fund. The judge credited as "an exaggerated version of the actual statements" of the two employees testimony that they also made remarks to the general contractor to the effect that their employer didn't pay his bills, that the job was too big for him to finish and that he was "no damn good" and a "son of a bitch." In rejecting the employer's claim that the remarks were unprotected under *Jefferson Standard* and that employees' had thereby forfeited their rights to reinstatement, the Board noted that the remarks were in response to questions about the cause of the strike and the reasons for the Respondent's delinquency and found that they "were made in the context of and were expressly linked to the labor dispute." 284 NLRB at 834. Here, in contrast, nothing in the flyers directly or indirectly linked the issues raised to any labor dispute. Moreover, the flyers were left at a public location for distribution to members of the public who would not necessarily have any knowledge of the existence of such a dispute.

In *Cincinnati Suburban Press*, a newspaper employee who had been involved in an unsuccessful organizing drive was terminated for publishing in a local magazine and distributing to his fellow employees an account of the organizing drive which discussed certain antiunion acts purportedly engaged in by supervisors and employees during the course of the campaign. The Board found that the employee's conduct fell within his Section 7 rights and found merit in the contention that the article was "inextricably intertwined" with the ongoing union organizing effort. The article in that case consistently referred to the union organizing drive, the response by management, and the NLRB election process. In contrast, Jensen's handbill made no mention of the labor dispute, the Union, management's treatment of the employees, or any issue having anything discernibly to do with employees' terms and conditions of employees.

CONCLUSION

As explained above, we agree with the judge that Jensen's March 4 phone call constituted protected concerted activity. Since there is no dispute that Respondent relied on the phone call as one reason for suspending and discharging Jensen, the General Counsel has therefore met his initial burden of showing that protected activity was a motivating factor in Jensen's suspension and discharge. As stated above, however, we have further found that Jensen's distribution of the March 5 flyer was not protected by the Act. Although the Respondent does not dispute that it relied on both incidents as the basis for its actions against Jensen, it argued at trial and in its exceptions to the judge's decision that it would have discharged Jensen for distributing the March 5 flyer even if he had not made the March 4 phone call. Because the judge concluded that both activities were protected, he made no findings with regard to this contention. Accordingly, we will sever the allegations concerning Jensen's discharge, and remand the case to the judge for a determination as to whether the Respondent has met its burden under *Wright Line* of showing that it would have taken the same action even in the absence of the protected March 4 phone call.

ORDER

The Respondent, American Golf Corporation, d/b/a Mountain Shadows Golf Resort, Rohnert Park, California, its officers, agents, successors, and assigns, shall1

1. Cease and desist from

(a) Issuing written warnings or otherwise discriminating against any employee for supporting Laborers' Local Union No. 139, Laborers' International Union of North America, AFL–CIO, or any other union, or for giving testimony under the Act.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to Eli Jensen's August 16 and September 15, 1995 warnings, and within 3 days thereafter notify him in writing that this has been done and that these warnings will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Mountain Shadows Resort facility in Rohnert Park, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations concerning the discharge of Eli Jensen are severed, and this proceeding is remanded to the administrative law judge for further appropriate action consistent with this decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT issue written warnings or otherwise discriminate against any employee for supporting Laborers' Local Union No. 139, Laborers' International Union of North America, AFL–CIO, or any other union, or for giving testimony under the Act.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Eli Jensen's August 16 and September 15, 1995, warnings, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that these warnings will not be used against him in any way.

AMERICAN GOLF CORPORATION, D/B/A
MOUNTAIN SHADOWS GOLF RESORT

Margaret M. Dietz and *Jill Hawkin*, *Esqs.,* for the General Counsel.

Daniel F. Fears and *William A. Calhoun II*, *Esqs. (Payne & Fears)* of Irvine, California, for the Respondent.

Eli Jensen, pro se, of Santa Rosa, California.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Paul D. Supton and *Theodore Franklin*, *Esqs*. *(Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for Charging Party Local 139.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard the above-captioned cases on May 13, 14, 15, and 16, 1997, at San Francisco, California.[1] The question to be resolved in this proceeding is whether American Golf Corporation, d/b/a Mountain Shadows Golf Resort (Respondent or the Company) violated Section 8(a)(1), (3), and (4) of the Act by issuing disciplinary warnings, suspending, and discharging employee Eli Jensen in 1995 and 1996.[2] Respondent's timely answer denies the commission of the alleged unfair labor practices.

After carefully considering the entire record in this matter, the demeanor of the witnesses who testified, and the posthearing briefs of the General Counsel, Respondent, and Charging Party Jensen, I have concluded that Respondent violated Section 8(a)(1), (3), and (4) of the Act, as alleged, based on the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a California corporation, with an office and place of business in Rohnert Park, California, operates golf courses. In the 12 months preceding the issuance of the earliest complaint in this matter, Respondent derived gross revenues in excess of $500,000. During the same period, Respondent purchased and received goods valued in excess of $5000 which originated from points directly outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Facts

1. Background

The Mountain Shadows Golf Resort is owned by the city of Rohnert Park (the City) but has been operated by the American Golf Corporation (American Golf) since 1979 pursuant to a lease arrangement between the City and American Golf. In 1988, the City and American Golf entered into a new long-term lease arrangement that will expire in 2028. The Resort consists of two 18–hole golf courses generally referred to as the north course and the south course. Under the lease agreement, American Golf is responsible for maintaining the golf courses. Jensen, the alleged discriminatee in this case, was employed in the department 40, the maintenance department responsible for the upkeep of the golf courses.

At relevant times, the management and supervision of Mountain Shadows and department 40 underwent considerable changes for a variety of reasons, mostly related to a general restructuring of American Golf's operations. At the beginning of August 1995 Mark Flowers served as the general manager of Mountain Shadows and had an office in the resort's clubhouse. Dan Ross served as American Golf's regional vice president with responsibilities for 13 other area golf resorts managed by that company. Ross' office was also located at the Mountain Shadows Resort. Sam Singh, the Mountain Shadows' maintenance superintendent at that time, was in charge of department 40 and supervised its employees. Dave Dutt, an individual long employed at Mountain Shadows, served as the assistant maintenance superintendent in department 40.

Effective October 1, Ross relinquished his regional responsibilities and became the Mountain Shadows' general manager, a position he had previously held, and Flowers left the employ of American Golf. In November, Dutt ceased work somewhat suddenly apparently due to poor health. Thereafter, Depak Lal, a department 40 employee, served as the acting assistant maintenance superintendent and, in January or February 1996, he was officially promoted to that position. In early January 1996, Singh was reassigned to the maintenance superintendent's position at the Tilden Park Golf Course in Berkeley, California, also managed by Respondent, and Mike Higuera became Mountain Shadows' maintenance superintendent. At all relevant times, Mike McCraw served as Respondent's regional director of maintenance and maintained an office in Aptos, California.

In late 1994, the Rohnert Park city council established a golf course committee consisting of two council members and some citizens at large to hear citizen complaints about Mountain Shadows' operations and provide oversight consistent with the City's interests. At the same time, the City's parks department was directed to conduct a regular review of golf course maintenance. Since then, the city manager has periodically provided the Company with a list of the maintenance work expected and the Mountain Shadows' general manager then prepares an action plan to carry out this suggested work.

The Union commenced an organizing campaign seeking to represent the department 40 employees at Mountain Shadows in 1994. In connection with this campaign the Union filed an NLRB representation petition that ultimately culminated in a Board-conducted election on July 27, 1994, as well as a number of unfair labor practice charges. The tally of ballots from that election reflected that eight employees voted for representation, eight against, and that there had been two challenged ballots, those of Jensen and Maykeo Thirakoun. Following the election, the Union filed objections to the election, claiming that the Company's alleged unfair labor practices interfered with the conduct of the election. Subsequently, the objections and the unfair labor practices matters were consolidated in a single proceeding heard over the course of 7 days by my colleague, Administrative Law Judge Jay R. Pollack.

[1] Obviously, the sheer number of charges filed in this overall labor dispute reached confusing proportions. The transcript reflects 10 separate charges but fails to reflect Case 20–CA–27175 filed by the Union on March 22, 1996, alleging that Eli Jensen had been suspended and terminated in violation of Sec. 8(a)(1) and (3). The transcript is corrected to reflect that charge shown in the formal papers as G.C. Exh. 1(u). Cases 20–CA–26684, 20–CA–26909, 20–CA–27132, 20–CA–27165, 20–CA–27249, and the 8(a)(1) and (5) allegations in 20-CA–26942 were withdrawn on May 9, 1997. G.C. Exh. 2(hh). Cases 20–CA–27009 and 20–CA–27114 were withdrawn and severed from this proceeding on May 14, 1997. See Tr. 276. The pending cases are reflected in the above caption.

[2] Most of the relevant events in this case occurred between June 1995 and May 1996. All dates that do not reflect the calendar year fall in that period.

On June 27, 1995, Judge Pollack issued his decision finding that Respondent violated Section 8(a)(1) and (3) of the Act and that Respondent's unfair labor practices constituted objectionable conduct in the representation proceeding. *Mountain Shadows Resort*, JD (SF)–74–95. Among other things, Judge Pollack found that Respondent unlawfully reclassified employees Maykeo Thirakoun and Jensen (later laid off consistent with their unlawful reclassification) in order to affect the outcome of the election, and engaged in numerous other unlawful activities in the critical period prior to the representation election, also designed to undermine the Union's majority status among Respondent's maintenance employees. Judge Pollack recommended that the Board instruct the Regional Director to open and count the two challenged ballots and to certify the Union if the revised tally reflected that the Union obtained a majority. In the event the Union failed to demonstrate its majority status by this means, Judge Pollack concluded that the Board should set aside the results of the election and order Respondent to bargain with the Union anyway. Judge Pollack made this alternative recommendation because he concluded that Respondent's unfair labor practices had undermined the Union's previous majority standing as reflected by authorization cards it obtained during the organizing campaign and that it was unlikely that the Board's traditional remedies would suffice to erase the effects of Respondent's unfair labor practices. In the absence of exceptions, the Board adopted Judge Pollack's recommended order as provided in its Rules and Regulations.

Thereafter, Respondent offered to reinstate Jensen and Thirakoun. Both men returned to work by early August. On September 5, their challenged ballots were opened and counted. One ballot was declared void and the other ballot was counted as a vote for representation so that the revised and final tally reflected that nine employees voted for representation and eight employees against. The Regional Director then certified the Union as the employee representative on September 13. Jensen claimed to have told a number of employees at the time of the election and thereafter that he had voted for the Union.

2. Jensen's undisputed protected activities

As reflected in Judge Pollack's decision, Jensen testified in that proceeding about matters relevant to his reclassification and layoff as well as other matters pertaining to the allegations in that case, including coercive statements by Maintenance Superintendent Singh. In this proceeding, Jensen testified that he was in attendance at the entire prior proceeding on all days except one. Between the time of his reinstatement in early August 1995 and his discharge in early April 1996, Jensen actively assisted the Union by a series of activities designed to pressure Respondent in the course of its negotiations with the Union, to aid in the organizing of other American Golf employees at both Mountain Shadows and other golf courses in Northern California, and to protest other actions taken at Mountain Shadows. Thus, he drafted a notice dated August 21 and posted copies at various locations around the course clubhouse and pro shop inviting the employees of other departments to unionize. Together with maintenance employee Dirk Russell, Jensen compiled materials urging employees to organize and distributed them to employees at approximately five Northern California golf courses operated by American Golf. As detailed more fully below, he prepared and circulated a protest letter for signature by the maintenance employees related to his August 16 warning notice. After bargaining commenced in October, Jensen and other employees, at the suggestion of Union Agent Bill Smith, attended Rohnert Park city council meetings where they complained about the slow progress in negotiations and protested short workweeks during the winter rainy season in light of the amount of necessary maintenance work perceived by them at Mountain Shadows. At one of those meetings, maintenance employee Jose Campos made a presentation, with pictures, in an effort to demonstrate certain alleged maintenance problems at Mountain Shadows related to the existing sprinkler and drainage systems. Concurrent with their activities before the city council and its golf course committee, Jensen and other employees distributed materials to Rohnert Park residents soliciting their support.

In January 1996, the appearances by the employees at the city council meetings reached a zenith. In preparation for the January 16 city council meeting, Jensen drafted a presentation to be made by Russell. Apparently copies of Russell's speech were distributed at that meeting. Following the January 16 city council meeting (attended by Union Agent David George and some of the maintenance employees), Rohnert Park City Manager Joseph Netter faxed a written copy of this presentation to Ross. Ross, in turn, faxed it to the corporate human relations department in Santa Monica, California, as was his practice with all of the union-related materials which he received. Generally speaking, this missive accuses American Golf of "milking" Mountain Shadows and putting a "minimum back into [the] facility." It also charges the Company with "[r]ealizing profits on the backs of underpaid employees and sub-standard maintenance." After listing a variety of alleged maintenance problems at Mountain Shadows, the written presentation asserts that "American Golf must learn to treat its employees with dignity and to give us a decent living." Further, this presentation invites the reader or hearer (presumably city council members and others in attendance) to "help in getting your partner to negotiate with us." Asserting that the employees "genuinely care about the condition of this facility," the written presentation states: "It doesn't matter to us who runs the facilty, [sic] the City or some new partner." Near the end the presentation states: "If the courses are operating at only 55% capacity, maybe a more grounded business approach is necessary? Poor management, poor business and marketing practises [sic], poor maintenance. Are we getting the best deal."

As a result of the Union's presentation on January 16, Ross and Respondent's vice president for human resources and corporate counsel, Loretta Raftery, attended the city council meeting on January 23 to present the Company's side of the ongoing labor dispute. Two days later, the Rohnert Park Mayor Armando Flores wrote to Ross stating the City's expectation that the Company comply with existing labor laws and expressing its expectation for the Company's "diligence in working towards a resolution regarding employee negotiations." At least Jensen, if not others, felt this response by the City was tepid at best.

At some point in late January or early February, the section workers were not permitted to work due to a threat of rain. Following this action, Jensen, Campos, and Esquivel made an appointment with City Manager Netter to complain of Respondent's continuing practice of sending employees home early notwithstanding the considerable amount of maintenance work they felt they should be permitted to do even in inclement weather.

Both Ross and Raftery concede that they were aware of virtually all of Jensen's union activities. Ross regularly faxed the

written materials pertaining to these union activities to the corporate human relations department when he received them and both Ross and Raftery acknowledged that they knew Jensen had prepared many of them. The evidence further indicates that City Manager Netter regularly faxed copies of materials, including materials related to the labor dispute, which he obtained in connection with the course operations to the Mountain Shadows' management.[3] In addition, Jensen completed the Company's self-evaluation form in October 1995. In the portion provided for the employee to state his goals and objectives for the next 6 months, Jensen wrote:

> To void American Golf's contract with Rohnert Park. To replace Santok [Singh]. To unionize the cart barn & restaurant employees. To make Mountain Shadows the excellent facility that it could be. To unionize six other American Golf operations. To get a new pair of "Nikes" & "*JUST DO IT*!"

Although Respondent now uses this first phrase as a part of its justification for Jensen's discharge, no one discussed his responses with him at any time.

3. Jensen's August 16 warning

Jensen returned to work in his former position as a section person on August 3, and was assigned to maintain the "back nine" portion of the south course. In Jensen's view, his replacement had poorly maintained that portion of the course and he set about to remedy maintenance deficiencies that he observed. Among other things, Jensen claims without contradiction that he cut down four dead trees between the time of his reinstatement and August 14. On August 15, Jensen cut down another dead tree described as a pine approximately 30 feet tall in the rough area where several large trees divide the fairways for the 10th and 18th holes on the south course. Jensen admittedly did not seek authorization from any manager or supervisor prior to removing these particular dead trees as he understood that the section persons were supposed to cut down and remove dead trees. Section workers Jose Esquivel and Manual Garcia agreed that, up to that time, section persons were not required to obtain management approval to remove dead trees. They both testified about cutting down dead trees without any prior authorization. Indeed, Garcia testified that a couple of days after the election, even General Manager Flowers observed him cutting down a dead tree and apparently said nothing to him about it.

While removing the larger branches of the tree he felled on August 15, a local resident who resides adjacent to the 13th hole approached Jensen and asked him to stack some of the wood adjacent to the fence dividing his property from the golf course for use as firewood. Jensen agreed to do so and apparently hauled at least part of the wood from the larger branches to that area. Jensen explained that he did so in order to avoid filling the Company's commercial debris box with considerable trimmings because Dutt had earlier asked the section persons to do what they could to prevent that box from filling too fast.

Ross learned from Flowers that Jensen had cut down the tree on August 15. According to Ross, Flowers contacted him in his nearby office after Dutt reported it to Flowers. Thereafter, Ross, Flowers, and Dutt discussed, among other things, whether any supervisor or manager had authorized Jensen to cut the tree down. Having agreed that such authorization had not been received from any of them, a telephone call was placed to Singh, who was home ill that day. The two managers learned from Singh that he had not authorized Jensen to remove that particular tree. Ross and Flowers then rode out to the area where Jensen was working on the tree, unaccompanied by Dutt, Jensen's immediate supervisor who purportedly raised the issue. Flowers queried Jensen as to whether he had been authorized to cut the tree down and what he was doing with the wood. Jensen admitted to Flowers that no one had authorized the tree cutting and that he was dropping the wood off at a neighbor's house adjacent to the 13th fairway. Flowers instructed Jensen on the spot that the wood should be stacked in the maintenance area for use in the clubhouse rather than giving it away but did not otherwise admonish him for cutting the tree down in the first place. According to Ross, Flowers and him then returned to their offices and decided, after some further discussion, that Jensen should be given a written warning for cutting the tree down and giving the wood away without authorization.

The following day, Flowers called Jensen to his office and, in the presence of Singh, gave Jensen a written warning notice. The notice advised Jensen not to "make a major change in the golf course" or take wood to a homeowner without prior management authorization, and warned that a "repeat of any similar circumstances or failure to exercise good judgment may result in further disciplinary action up to & including termination." Neither Flowers nor Singh testified in this proceeding but Ross testified that this particular tree was strategically located near the 10th green so that it added to the playability of the hole. Although Jensen, himself an avid golfer, agreed that trees in the rough but still in bounds (as was this particular tree) can affect the playability of holes, the pictures of the remaining stump from this tree show that it was one of several trees in a row between two fairways. In addition, Ross said that management had concerns about potential liability problems that could arise from having employees cut down such large trees alone but there is no evidence that Flowers addressed this matter when he spoke with Jensen.

In the next few days, 12 maintenance department employees, including at least 2 employees who had, at least earlier, openly refused to support the Union, signed a letter addressed to Flowers asserting that the warning given to Jensen was "totally unnecessary" and was "done to harass him." The letter, drafted and circulated by Jensen, goes on to state: "[I]t is a customary duty of section persons to cut down dead trees, not only as a safety precaution, but also as an aesthetic consideration.'' The protest letter further asserts that section persons had not previously been required to seek management authorization to cut dead trees.

Jensen then gave the letter to Flowers. Flowers responded to the protest letter by a memorandum dated August 22 addressed to all of the maintenance workers. Flowers' memorandum notes initially that the employees' "recent communication," i.e., their protest letter, makes it appear "that there is a misunderstanding as to our policy on course maintenance." The memo also states that while section persons were expected to "clear away dead brush, fallen limbs and the like," advance management authorization was required for "any change that might fundamentally alter the golf course, such as cutting down an

[3] In my judgment however, it would be entirely unwarranted to infer that Netter sided with one party or the other in this labor dispute because of this practice. Rather, the evidence shows that Netter and American Golf officials perceived the City's relationship to American Golf as a partnership and that they conducted their affairs with each other consistent with that concept.

entire tree." The memo further reminded the employees that similar authorization was required before "you give away debris, firewood or anything else to the houses neighboring the course." A few days later, Jensen responded in writing to Flowers' memo. In his response, Jensen caustically noted that Flowers had failed to mention that the tree involved was dead and pointedly challenged Flowers to rescind the written warning in light of the acknowledged "misunderstanding" in order to avoid the appearance of harassment. The warning was never rescinded.

4. Jensen's September 15 Warning

Subsequently, on September 15, Department Superintendent Singh issued a "final written warning" to Jensen. This two-page warning alludes to Jensen's, (1) failure to properly clean a restroom; (2) failure to properly place the cups and pins on the greens; and (3) failure to complete his regular morning "set up" duties in a reasonable period of time. It makes no mention of the tree cutting incident. The warning recites that Singh spoke to Jensen concerning these matters on August 24, September 2 and 8, respectively, and further states that Jensen would be terminated unless there was "an immediate and sustained improvement in [his] performance and level of cooperation."

Jensen acknowledged that Singh had verbally admonished him about all three matters set out in the final warning but asserted that these matters represent a pattern of harassment by Singh. More particularly, he testified that Singh told him that a customer had complained about the course restroom. Jensen accompanied Singh to the restroom for an inspection. According to Jensen, Singh told him at this time that he wanted the restroom washed down inside and out everyday. Jensen told Singh that he would need brushes and cleansers as well as a hose, none of which had been previously provided, to perform the work outlined by Singh. Jensen also told Singh that he would need chemicals to treat the septic tank that was causing the unpleasant odor about which Singh also complained. Subsequently, Jensen was provided with the tools and cleansers requested and he thereafter performed the restroom cleaning tasks assigned by Singh, apparently without further complaint. Later, either Singh or Dutt subsequently posted a notice concerning the section duties that included an instruction to thoroughly wash down the course restrooms only once a week or as needed.

Jensen further recalled that Singh had verbally admonished him about a pin placement after a customer purportedly had complained that one of the pins had been cut too close to the apron surrounding one of the greens within Jensen's scope of responsibility. According to Jensen, Dutt had instructed him to place the pins at least four to five paces from the edge of the green and in this particular instance, he had, in effect, placed the pin this minimum distance from the edge of the green. However, when Singh spoke to him about the matter of pin placements, he instructed Jensen to put the pins eight or nine paces from the edge of the green and thus closer to the center of the green as preferred by some golfers.[4]

[4] Ross, formerly the Mountain Shadows golf pro, explained that USGA rules require that the holes be cut at least four paces (about 12 feet) from the apron. However, he explained that on public courses typically used by average golfers, it is generally more desirable to cut the holes nearer to the center of the green as that general location permits easier play.

Jensen also recalled that Singh complained about the length of time he took to perform his morning setup duties. According to Jensen, Singh told him that Garcia took only 3 hours to perform these tasks whereas Jensen required 4 to 4-1/2 hours. Subsequently, Jensen learned from Garcia that Singh was accurate about the amount of time Garcia took to complete this work but that Depak Lal assisted him with some of his setup duties. Garcia corroborated Jensen's assertion that Lal had been helping him through this period of time.

5. Jensen's suspension and discharge

On March 2 and 3, Jensen prepared and distributed copies of a notice urging Rohnert Park residents living near Mountain Shadows to attend the city council meeting on March 5. This notice, highlighted with graphics of monkeys, reads as follows:

> Rohnert Park City Council doesn't "see" that there is a problem at Mountain Shadows, between employees and American Golf. City Council doesn't want to "hear" the truth about violations of federal law or American Golf's refusal to bargain in good faith as ordered by an administrative law judge. City Council doesn't want to "tell" American golf to settle this dispute. "There's nothing we can do", they say! American Golf violates city policy by not dealing with its "employees in a fair manner."
>
> Please help support the maintenance workers of Mountain Shadows by attending the City Council meeting on Tuesday, March 5/96, at 6:30. "Tell" City Council you support us. Maybe they'll "hear" that!

On March 4, Jensen admittedly telephoned the office of Tom Isaak, the owner of Respondent's competitor Courseco, and spoke with Isaak's administrative assistant. Jensen testified that he told Isaak's administrative assistant, obviously after identifying himself, that the Mountain Shadow's maintenance employees were having "union problems" and that they were having trouble "negotiating with American Golf." Jensen said that he also told the administrative assistant that the City was not pleased with American Golf's maintenance work and that he was calling to invite Isaak to the March 5 city council meeting. All told, Jensen estimated that he spoke with the assistant about 5 minutes. He further testified that he has never met Isaak but he felt, in effect, that Isaak's presence at the city council meeting would serve to put added pressure on the Company. Jensen denied that his call to Isaak was for the purpose of soliciting his assistance to void American Golf's contract with the City. According to Raftery, the day after this call by Jensen, Isaak telephoned Dave Pillsbury, Respondent's regional operations manager, to report Jensen's contact with his office.

In addition, Jensen prepared another document, made copies, and went to the city council meeting on March 5. When he saw that there were no representatives of American Golf at the city council meeting, Jensen left. On his way out, however, he left 24 copies of his prepared statement on a table in the foyer immediately outside the city council chamber. This statement, which admittedly serves as one of the two reasons Jensen was fired about a month later, reads as follows:

> ROHNERT PARK RESIDENTS,
>
> Does American Golf retain a greater percentage of profits from the clubhouse facilities (as compared to green fees)? There's no money budgeted for needed course upgrades, but a capital cost, non-budgeted item like the res-

taurant addition can be funded. (We can have a couple of drinks while we watch the course dry out.) Since I'm familiar with neither their business model (vague) nor revenue derivation, I can only guess as to the intent of expenditures.

That non revenue-generating items like installing a drainage system where none exists or installing a second sprinkler system around the sandtraps (both capital costs), don't get done because they weren't budgeted, is typical of "operating statement" thinking. If such course upgrading does not have an easy, immediately calculable payback, it is not done. The money goes into areas where American Golf realizes a greater profit. (i.e. banquet/tournament facilities.)

While Mountain Shadows is a community facility, it is also a business. In order for a business like this to thrive, they must employ "balance sheet" thinking (but let's include the golf course). The clubhouse was a significant investment. American Golf will focus on this area for now since it's not getting the desired returns from the golf course (resident rates?) "getting by," "it's an ongoing process" or "next year we'll budget for it," are not acceptable responses! The condition of the courses does not put mountain shadows first on anyone's list, even subsidized residents. If the facility was up to par, it wouldn't have to be "sold" to anyone. While it would be great to have a tour calibre course, greens fees wouldn't be this side of a hundred dollars. Obviously, benchmarks have to be established objectively. It would seem, however, that American Golf would rather have a mediocre business proposition than a good product. That is a business decision, and not necessarily good for the community.

Dollar for dollar, mountain shadows has the potential to be the best buy in the area. For too many years, proper maintenance has been ignored. If american golf isn't prepared to look after the facility, perhaps it's time the city found a new partner? Maybe courseco in petaluma or the arnold palmer management company in orlando?

POOR MANAGEMENT*POOR BUSINESS & MARKETING PRACTICES * POOR MAINTENANCE

* IS ROHNERT PARK GETTING THE BEST DEAL? *

The Company learned about the March 5 flyer when the City Manager Netter faxed a copy to Ross the following morning. Ross in turn faxed it to Respondent's human relations department in Santa Monica, where it came to Raftery's attention.

On March 11, Jensen returned to work from a disability leave that commenced on February 15. However, he and the other maintenance employees were sent home due to rain. On the following day, Jensen worked for 4 hours and then was called to a meeting conducted by McCraw in the general manager's office at Mountain Shadows. Maintenance Superintendent Higuera and Union Representative David George were also present. At this meeting, McCraw told Jensen that the Company had questions concerning his loyalty and wanted to know if he had been involved in contacting a competitor or drafting the March 5 flyer. After giving Jensen a copy of the March 5 flyer, McCraw informed Jensen that its legal department was looking into action to take concerning the flyer. Jensen then informed McCraw that, if that were the case, he would be unwilling to say anything without his own lawyer present. Although McCraw acknowledged Jensen's right to have an attorney, he told Jensen that unless he answered questions about these matters, he would be suspended. After Jensen further indicated his unwillingness to do so, McCraw suspended him for 3 days, effective immediately.

McCraw held another abortive meeting with Jensen and the same individuals on March 22. After Jensen again declined to answer questions about contacting a competitor or the March 5 flyer at this meeting, McCraw suspended Jensen indefinitely.

In late March, Raftery provided Union Representative George with specific information that the Company wanted to speak to Jensen about and the documents involved. As a result, a meeting was arranged at the Oakland office of Paul Supton, the Union's attorney. In addition to Supton, George, and Jensen were present on the union side. Raftery attended with Company Attorney Barrett. Supton, however, kept the two sides separated in different rooms. Eventually, Supton admitted to Raftery and Barrett that Jensen had contacted Courseco, one of Respondent's business competitors, and that he had prepared the March 5 flyer and had left copies at city hall that day but asserted that both actions were protected activity.

Following the April 1 meeting at Supton's office, it became clear to Raftery that the Company would not be permitted to speak directly to Jensen so she proceeded to bring the matter to a close. The following testimony by Raftery summarizes her subsequent actions and the rationale behind them:

> Q. BY MR. FEARS: Did you ever receive any communication from Mr. Jensen, David George, the union or Mr. Supton that you could speak to Mr. Jensen directly about these two subjects?
>
> A. No.
>
> Q. Mr. Supton made it clear at his offices that you couldn't?
>
> A. Yes.
>
> Q. What was the next thing that happened leading to the termination of Mr. Jensen?
>
> A. I knew I needed to think about it for a while. I still felt it didn't sound—I still didn't understand it. I felt we were missing some pieces. I wrote a letter to Mr. Supton confirming the conversation we had in his office just to make sure I got it right. I think he wrote me a letter back. He disputed something I said in my letter to him. I realized I wasn't going to be get anymore information. I had tried every source I could think of. At that point, I started thinking about what we should do in terms of Mr. Jensen's employment.
>
> Q. Were you involved in the actual decision to terminate Mr. Jensen?
>
> A. Yes.
>
> Q. Did you do that in conjunction with Mr. McCraw, the Director of Maintenance?
>
> A. Yes.
>
> Q. Why was Mr. McCraw involved in that decision?
>
> A. My goal with Mountain Shadows was to make sure that we did everything that we needed to do to both have a productive working environment to comply with the bargaining order and our obligations under the National Labor Relations Act, and to try to move our relationships with our employees forward in a positive direction. To that end, I had begun dealing with Mr. McCraw. He and I were helping the management team there make sure they managed that property correctly. Many of the decisions

were being closely supervised by Mr. McCraw because of all the trouble we had there.

Q. What did you and Mr. McCraw decide with respect to Mr. Jensen after the April 1 meeting?

A. We talked about options about what to do about a co-worker who is looking to ruin the company or our business, and ultimately decided the only option that made sense at the time and now was to terminate Mr. Jensen's employment.

Q. How did you distinguish Mr. Jensen's activities relative to Mr. Isaak and the March 5th memorandum from other activities he engaged in?

A. To me, it was clearly different. I had seen so many other memos and knew of visits to city hall, and all of those were surrounded by the labor situation. They were things that I could explain, as I did when I visited the city council. That was something I was familiar with, yes it existed. It wasn't great publicity for us.

We had some different views of it, but we had no problems talking with our landlord, the constituents there and our customers about our side of that story and the fact there was a labor situation going on. By that point, it really wasn't affecting me too much other than I was still involved in the collective bargaining. These two acts stuck out like a sore thumb to me. My reaction was that it was outrageous. That an employee would be trying to solicit a competitor to get our contract. I was concerned that we were in a situation here where we had someone who had taken us on as a mission and his mission was to void our contract with the city. Interpret that however you want. I read it as this person want[s] to kill our relationship with the city.

Q. With respect to your decision that you and Mr. McCraw reached, did you consider Mr. Jensen's prior union activities?

A. Considered it with respect to the history that was there. The history was there. I was well aware of that. It had nothing to do with these two acts. I was somewhat immune to the union activity at that point. It really was fairly routine. It went neatly into a part of my daily life. It was protected activity and very easy for me to see that. This was not. It was a very different kind of activity.

On April 5 Jensen was at Mountain Shadows to golf. McCraw approached him and handed him a termination letter. That letter notes that Supton had confirmed that Jensen had contacted Courseco's owner, Tom Isaak, to solicit his company's interest in managing Mountain Shadows and that Jensen had drafted and circulated to the public a memorandum that disparaged the Company, its management team and the quality of the golfing conditions at Mountain Shadows. The letter further characterizes these actions as "extremely disloyal acts and advises that "[g]iven the nature of your inappropriate actions and your failure to discuss them with us, we do not believe that it serves anyone's interest to continue the employment relationship."

B. The Decisional Framework

The complaint alleges that the two warnings and Jensen's suspension and termination violate Section 8(a)(1), (3), and (4) of the Act. Section 8(a)(1) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the fundamental rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." Section 8(a)(4) prohibits employers from "discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under [the] Act." An employer violates Section 8(a)(3) by terminating employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). An employer violates Section 8(a)(4) by terminating employees who furnish information to support unfair labor practice charges in another case. *Operating Engineers Local 302*, 299 NLRB 245 (1990).

As 8(a)(3) and (4) cases generally turn on the question of employer motivation, the Board and the courts employ a causation test to analyze the merits of such allegations. *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Sea-Land Service*, 837 F.2d 1387 (5th Cir. 1988). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Typically, the General Counsel meets this burden by presenting credible evidence showing a reasonable proximity in time between the adverse action in question and the employer's knowledge of, and hostility toward, the employee's protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). Although not conclusive, timing is usually a significant element in finding a prima facie case of illegal termination. *Equitable Resources*, supra.

If the General Counsel establishes a prima facie case, the employer must then shoulder the burden of persuading the trier of fact by a preponderance of the evidence that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply,* supra. To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Finally, in reaching the conclusions set forth below, I have generally credited Jensen's testimony primarily for the following reasons. First, on certain significant points, the General Counsel elicited testimony of other witnesses or provided documentary evidence corroborating Jensen's account. Second, Jensen's testimony stands uncontradicted on other significant points in circumstances showing that witnesses were available to Respondent that could have contradicted his testimony. Third, Jensen readily admitted matters that were not in his interest. And finally, nothing in Jensen's demeanor while testifying would warrant discrediting his uncontradicted testimony. Although Jensen occasionally exhibited a certain degree of testiness in response to repeated questioning about a few matters, I find that human response entirely understandable in his particular circumstance.

C. Further Findings and Conclusions

1. The August 16 warning

The General Counsel argues that the Company issued the August 16 warning to Jensen in retaliation for his testimony in the prior case heard by Judge Pollack and in retaliation for his union activity. Respondent argues, in effect, that Jensen deserved the warning because he violated a longstanding company policy by cutting down a large tree without management authorization.

I am satisfied that the General Counsel established a prime facie case as to the August warning. The evidence shows that Jensen had been reinstated to his position at Mountain Shadows only 2 weeks prior to the August 15 warning pursuant to the Board's order in the prior case. It also shows that he attended virtually all of the lengthy prior hearing and testified in contradiction to assertions made by Respondent at that earlier hearing. Hence, the General Counsel clearly established the elements of activity and knowledge required in virtually all discrimination cases. The warning itself establishes that Respondent took adverse action against Jensen. Although the General Counsel adduced no direct evidence that the warning resulted from Respondent's animosity against Jensen because of his support for the Union and his testimony in the prior proceeding, motive and animosity may be inferred from the circumstances. *Fluor Daniel, Inc*., 304 NLRB 970 (1991). I find such inferences warranted here. In a nutshell, the city of Rohnert Park's oversight reports to the Mountain Shadows' manager regularly called for the removal of dead trees. The consistent testimony of the maintenance employees and the protest letter signed by virtually all of the section workers shows that they had, in effect, long operated to remove dead trees *sans* prior management authorization. Where, as here, Respondent's written warning to Jensen issued only shortly after his ordered reinstatement and without any attempt to alert employees that its regular and longstanding practice about cutting trees at this course had changed, I find it would be reasonable to infer that Jensen's protected activity motivated this adverse action.

Respondent's case is not persuasive. Apart from Flowers' written assertions in the warning itself and his subsequent memorandum, none of the three managers or supervisors employed at Mountain Shadows at the time testified about this particular incident or the practices and policies in existence at that time. Although the evidence shows that both Flowers and Dutt left their employment with Respondent in 1995, it is admitted that Singh was still employed by the Company at the time of the hearing at a nearby Bay Area golf course. Ross' vague testimony that decisions about cutting dead trees are never entrusted to section workers simply flies in the face of the overwhelming evidence here. Flowers' subsequent written acknowledgement to the employees that there was a "misunderstanding" with respect to the tree cutting policy is, in my judgment, virtually tantamount to an admission regarding the regular practice in effect at Mountain Shadows when this incident took place. Finally, Respondent failed to explain its refusal to withdraw the warning as requested by Jensen even after acknowledging a misunderstanding about its tree cutting policy. In my judgment, Respondent failed to provide persuasive evidence that it required management approval for the removal of dead trees prior to this incident. Indeed, the evidence is overwhelmingly otherwise. Accordingly, I have concluded that Respondent, in effect, "changed horses in midstream" in order to penalize Jensen, only recently reinstated to his job. Plainly, this sudden warning is an obvious pretext that only serves to taint Respondent's motives in virtually all of its dealings with Jensen after his reinstatement. I strongly suspect that the reason Dutt kept, or was kept, entirely out of the direct discussions with Jensen over this matter was because he also knew how blatantly unfair it was.

I therefore conclude, in agreement with the General Counsel, that Respondent issued the August 16 warning to Jensen in retaliation for his assistance to the Union in the prior case, including his testimony at that hearing, in violation of Section 8(a)(1), (3), and (4) of the Act.

2. The September 15 final warning

I am likewise satisfied that the General Counsel established a prima facie case with respect to Jensen's September 15 final warning. The same evidence offered to show the elements of activity and knowledge in connection with the August 16 warning apply here. In addition, this warning occurred only 2 days after the Union was certified by the NLRB apparently on the basis of Jensen's vote albeit Respondent's duty to bargain would have accrued otherwise. Moreover, the General Counsel adduced considerable evidence that Singh's actions toward Jensen amounted to harassment. Thus, Jensen claimed without contradiction that Singh insisted that the restroom had to be thoroughly cleaned every day but shortly thereafter Dutt told Jensen he was cleaning the restroom too often. Only a month after the written warning, posted instructions directed more lenient restroom cleaning requirements. Furthermore, Singh's assertion in the warning that Garcia performed the morning setup functions almost 50 percent faster than Jensen is disputed by Garcia's own account and Jensen's claim, corroborated by Garcia, that Lal assisted Garcia through the relevant period with morning setup duties, is credible. Finally, contrary to the claim in the warning, Jensen asserts that he moved the pin at the 12th green in accord with Singh's direction. These factors, together with the pretextual character of the August 16 warning, strongly support the General Counsel's assertion that this warning too was motivated by unlawful reasons.

Respondent argues that the General Counsel failed to prove any union animus on its part in connection with this warning. I reject this contention especially in view of the finding above that Jensen received what, in my judgment, amounted to an unlawfully motivated warning over the tree incident. Moreover, Respondent's argument that both the restroom problem and the pin placement problem arose from customer complaints fundamentally begs the question. Based on Jensen's unrebutted testimony that he took immediate corrective action as to these relatively minor problems, Respondent's case takes on an unpersuasive luster as a result of its failure to secure Singh's rationale for faulting an employee weeks later who complied with his instructions. Respondent's case is equally unpersuasive as to the third matter mentioned in the September 15 warning. On this point, Respondent claims that the big deal made by the General Counsel over Jensen's work pace came to naught with its showing that Jensen eventually conformed to the standard set by Garcia. In support, Respondent points only to Higuera's vague and unpersuasive response to a single leading question, qualified and muddled by the Higuera's subsequent response to the next question asked.[5] In essence, the General Counsel chal-

[5] Specifically, the testimony of Higuera cited by Respondent is as follows:

lenged the veracity warning's work pace assertions through the testimony of Jensen and Garcia in a manner that called into question the bona fide character of the entire warning. I simply am unable to conclude that Respondent has met its burden of persuasion in view of its failure to call Singh as a witness to secure a credible rebuttal to that challenge.

Accordingly, I have concluded that Singh's September 15 final warning, like the August 16 warning, bears the indicia of an overarching unlawful motive designed by Respondent's agents to rid itself of the union activist chiefly responsible for having to bargain with the Union. I find that this warning violates Section 8(a)(1), (3), and (4), as alleged.

3. Jensen's suspensions and discharge

No issue exists as to the underlying motive for Jensen's suspension and discharge. The sole question involved on this issue is whether or not Jensen's admitted conduct in contacting Respondent's competitor and distributing the March 5 memo lacked protection under Section 7 of the Act. Respondent argues that the Supreme Court's rationale in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), places this conduct by Jensen beyond the pale of protected activity whereas the General Counsel, the Union, and Jensen all claim his activity was protected. Under *Wright Line*, any conclusion that Jensen's conduct lacked protection would mean that the General Counsel failed to prove a prima facie case.

Respondent argues that *Jefferson Standard* "put clear limits on employees' right to disparage their employer." In that case, the union and certain technicians at that company's television station, without striking, engaged in informational picketing and handbilling at the station for well over a month which clearly advertised an existing labor dispute. Thereafter certain of the technicians began a wide spread distribution of approximately 5000 handbills over the course of a ten-day period that, according to the Supreme Court, "deliberately undertook to alienate their employer's customers by impugning the technical quality of his product [without indicating] that they sought to secure any benefit for themselves, *as employees*, by casting discredit upon their employer." These handbills made no mention of the existing labor dispute. The company responded by discharging 10 of the individuals it found responsible for distributing these disparaging handbills. The Board held that this conduct was not protected and that the employees were discharged lawfully. When the case reached the Supreme Court, it agreed. In so doing, the Court stated:

> Their attack related [in the 5000 handbills] related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support. It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability.
>
> The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense. While they were also union men and leaders in the labor controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their handbill . . . omitted all reference to it. The handbill diverted attention from the labor controversy. It attacked public policies of the company which had no discernible relation to that controversy. The only connection between the handbill and the labor controversy was an ultimate and undisclosed purpose or motive on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession. A disclosure of that motive might have lost more public support for the employees than it would have gained, for it would have given the handbill more the character of coercion than of collective bargaining.

More recently, the Board characterized the holding in *Jefferson Standard* as permitting employees to "engage in communications with third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless or maliciously untrue to lose the Act's protection." *Emarco, Inc*., 284 NLRB 832, 833 (1987). See also *Cincinnati Suburban Press,* 289 NLRB 966, 967 (1988).

Here, Respondent contends that Jensen's March 5 flyer, unlike earlier documents he authored and distributed, made no reference to the labor dispute or any company labor practice, made no reference to wages, hours and working conditions, and asked for no public sympathy or support for a labor dispute. Instead, Respondent charges, the flyer attacked policies related to finance, marketing and administration for which management alone was responsible. In addition, Respondent asserts that the flyer constituted a continuing attack, initiated while off duty, upon the very interests which Jensen was being paid to conserve and develop.

Respondent also contends that it was justified in relying on Jensen's admitted March 4 phone call to Isaak, its competitor. This action, Respondent argues, demonstrates further disloyalty on Jensen's part especially when considered in the context of its ongoing problems with the City over its operation of Mountain Shadows and Jensen's expressed objective in October 1995 to "void" American Golf's contract. Alternatively, Respondent contends that even if it is found that the Isaak phone call was protected, it established that Jensen would nonetheless have been discharged because of the disparaging and unprotected March 5 flyer.

The General Counsel claims that Jensen's conduct in early March cannot be severed from his earlier, admittedly protected activities and, hence, his March conduct is protected. Overall, the General Counsel argues that this case is factually distinguishable from the *Jefferson Standard* case. Thus, the General Counsel asserts that as Jensen's March conduct is limited and isolated, that his March conduct posed no significant threat to Respondent's business, and that the content of the March 5 flyer is connected to matters raised in his earlier writings concerning this dispute. For these reasons, the General Counsel contends that the reasons advanced for suspending and dis-

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Q. BY MR. FEARS: Did you get along well with Mr. Jensen?

A. Fine.

Q. After you started working with him, did it appear that Mr. Jensen sped up his work?

A. Yes. Mr. Jensen was cooperative.

Q. Did you ever come to the conclusion that he could work at a faster pace.

A. Yes, no doubt.

charging Jensen are a pretext seized by Respondent to rid itself of Jensen because of his protected activities.

In *Emarco,* supra, two employees of a subcontractor awaiting reinstatement following a strike over their employer's inability to make timely contractual payments to their union's welfare and pension fund met with a contractor which utilized their employer on a particular job. On this occasion, the employees told the general contractor that their employer "never pay their bills," "can't finish the job," "is no damn good," and was "a son of a bitch." Nevertheless the Board held that these disparaging remarks were protected because they "cannot be considered in a vacuum" and were, in the overall context of the labor dispute between the subcontractor and the union representing the employees, "an extension of a legitimate and ongoing labor dispute."

Cases of this nature require a factual determination as to whether the conducted at issue is related to an extant labor dispute. *Jefferson Standard,* supra*; Emarco,* supra*.* In light of that required test, Respondent's narrow reading of the March 5 flyer without regard to the overall context of its labor dispute with the Union fails. For reasons set forth below, I have concluded that the activities which provoked Respondent to suspend and later discharge Jensen clearly related to the ongoing labor dispute and are protected.

First, Jensen's uncontradicted account establishes that the underlying labor dispute was prominently mentioned in the course of his telephone conversation with Isaak's administrative assistant and no evidence shows that he explicitly solicited Isaak to involve himself in attempting to interfere with American Golf's business relationship with the City. Even if Jensen mentioned that the City was dissatisfied with American Golf's maintenance of Mountain Shadows, I am unable to conclude that this minimal disparagement rose to the level of a malicious attack on Respondent's services which would justify his discharge even if considered separately. No evidence shows that Isaak actually went to the March 5 meeting or otherwise initiated any contact with any city official about the matter. That being the case, and as the evidence shows that Isaak immediately called Pillsbury to alert Respondent to Jensen's call, I find it reasonable to conclude that Isaak treated Jensen's solicitation as little other than an annoyance about a matter that was of no moment to him.

Second, the "monkey" flyer distributed to residents around the Resort in advance of this particular city council meeting unmistakably identified the labor dispute as the core problem. To the extent that these citizens took it upon themselves to attend the meeting as requested, they would have been well aware of the underlying labor dispute context of Jensen's March 5 flyer. To the extent that other citizens attended the March 5 meeting and happened upon one of the limited number of flyers left by Jensen on this single occasion, it is highly likely that they would have been in attendance at that meeting for other reasons. In these circumstances, those few citizens as yet unfamiliar with the overall dispute would not likely have a significant interest in the matter.

Third, the city officials empowered to affect the Respondent's existing lease arrangement were, by March 5, well acquainted with this labor dispute and the Union's charges that Respondent's alleged maintenance deficiencies adversely affected the represented maintenance workers' economic well being. Jensen's specific reference in the March 5 flyer to the supposed need for new sprinkler and drainage systems clearly provided a nexus for city officials to connect the flyer to the Union's prior, repeated complaints. And unlike the situation in the *Jefferson Standard* case, all of the evidence here suggests that the City and American Golf had a long-term, legally binding relationship that would have required a complicated and time consuming effort to sever.

Fourth, in view of the prior complaints by the Union and the employees about Respondent's alleged deferred maintenance practices, the March 5 flyer's references to these maintenance issues provides a clear, though implicit, connection to the ongoing labor dispute. Indeed, the sloganeering at the bottom of the March 5 flyer, obviously lifted verbatim from the January 16 written presentation, provides a clear link to the past protected activities. After admitting a lack of expertise, Jensen's references in the flyer to matters of finance are designed to illustrate the adverse impact Respondent's policy choices have on the deferred maintenance question of concern to him. In this context, his criticisms are far less authoritative than those found in the *Jefferson Standard* case.

Having concluded that Jensen's disputed activities were protected, I find that he was also privileged in his refusal to submit to questioning as requested by Respondent's supervisors and agents. As Respondent admittedly suspended and then discharged Jensen for protected activities, I find it thereby violated Section 8(a)(1), (3), and (4) of the Act, as alleged. *Emarco*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By issuing written warnings, suspending, and then discharging Eli Jensen, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (4) and Section 2(6) and (7) of the Act.
4. Respondent's unfair labor practices 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.

Having discriminatorily suspended and then discharged Eli Jensen, Respondent must offer him reinstatement to his former position and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his suspension and discharge to date of a 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).

Respondent must further remove from any of its records any reference to Jensen's August 16 and September 15 warnings, his March 12 and 22 suspensions, and his April 5 discharge, and notify him in writing that such action has been taken and that any evidence related to these warnings, suspensions and discharge will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]