Ivy Steel & Wire, Inc. *and* United Steel Workers of America, AFL–CIO–CLC, Local Union 8567–14. Cases 4–CA–32812, 4–CA–32859, and 4–CA–33096

January 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 9, 2005, Administrative Law George Alemán issued the attached decision. The General Counsel, the Respondent, and the Charging Party each filed exceptions and supporting briefs. The Respondent and the General Counsel also filed answering briefs, and the Respondent filed a reply brief 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 record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the judge's recommended Order as modified and set forth in full below.[4]

The judge found, among other things, that the Respondent "engaged in, and/or created the impression that it was engaging in surveillance." As explained below, we find that the record establishes that the Respondent violated Section 8(a)(1) both by creating the impression of surveillance *and* by engaging in surveillance, thus requiring the Respondent to cease and desist from engaging in both kinds of unlawful conduct.

With regard to the Respondent's creation of the impression of surveillance, the record shows that on April 25, 2004,[5] the Respondent's employees attended a meeting at the union hall to discuss the possibility of a strike. A few days before the meeting, employees Michael Stinsky, Dennis Conti, and George Alaishuski spoke about the meeting while at work. The Respondent's general manager of operations, George Wyss, was also present when the employees discussed the upcoming union meeting. Wyss chimed in that, on the day of the meeting, he would be at the Bottleneck Bar. The Union hall is located across the street from the bar and is clearly visible from the windows inside the bar. Alaishuski then asked Wyss if he liked to ride the mechanical bull at the bar. Wyss replied that he did not, but reiterated that he would be at the bar on the day of the meeting.

"[T]he test for determining whether an employer has created the impression of surveillance is whether the employee would reasonably assume from the statement that their [sic] union activities had been placed under surveillance." *Fred'k Wallace & Son*, 331 NLRB 914 (2000), quoting *Flexsteel Industries*, 311 NLRB 257 (1993). We find that Wyss' statements met this standard. During an employee discussion of an upcoming union meeting, Wyss repeatedly asserted that he would be across the street from the union hall, at the Bottleneck bar, on the day of the union meeting, and added that his reason for being there had nothing to do with one of the bar's noted attractions (i.e., riding the mechanical bull). The employees would reasonably assume in these circumstances that Wyss was informing them that his presence at the bar was to surveil employee attendance at the union meeting. Accordingly Wyss' statements violated Section 8(a)(1) as alleged.[6]

[1] There are no exceptions to the judge's denial of the General Counsel's motion to amend the complaint to allege that the Respondent violated Sec. 8(a)(1) of the Act by failing to comply with employee Mauro Molinaro's request for union representation at a disciplinary meeting on February 11, 2004.

[2] The Respondent has excepted to 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.

The Respondent also contends that the judge's rulings, findings, and conclusions demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contention is without merit.

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by unilaterally lowering Timothy Hinkle's pay, we note that the Union was not placed on notice of such a change, and therefore did not request bargaining over the matter. Although the credited testimony shows that the Respondent mentioned in negotiations that Hinkle's wage was above scale, the credited testimony does not show that the Respondent expressed any intent or desire to lower Hinkle's wages.

[4] We shall modify the judge's recommended Order to include the appropriate remedial language for the judge's finding, which we adopt, that the Respondent violated Sec. 8(a)(1) by maintaining an unlawful no-solicitation rule. *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005); *Cintas Corp.,* 344 NLRB 943 (2005).

We shall also modify the judge's recommended Order to include the appropriate remedial language for the judge's finding that the Respondent violated Sec. 8(a)(1) by enforcing its rule 6 of the "Group II Major Violations" against Molinaro for engaging in protected union activity. There are no exceptions to this unfair labor practice finding.

In addition, we shall delete from the judge's recommended Order and notice the language requiring the Respondent to cease and desist from unlawfully threatening surveillance. This language is superfluous in light of the modified Order's prohibition against creating the impression of surveillance, engaging in surveillance, and in any like or related manner interfering with employees' Sec. 7 rights. See fn. 6, infra.

[5] All dates hereafter are in 2004, unless stated otherwise.

[6] Technically, the Respondent created the impression that a future union activity would be surveilled. However, we believe that this would cause the same degree of interference and intimidation as would

We further find that the Respondent engaged in actual surveillance of employees' union activity. The record shows that, consistent with his statement to employees a few days earlier, Wyss—along with the Respondent's general manager, Kyle Urban—was present at the Bottleneck Bar on April 25. The record further shows that, Wyss and Urban were seated at the window facing the union hall while employees exited from the meeting, that Wyss took notes as he observed the exiting employees, and that employees were able to see Wyss and Urban watching them as they exited the union hall.

In its exceptions, the Respondent argues that the two managers were merely at a public place and did not attempt to ascertain the content of the union meeting. However, the managers were able to identify the participants. Further, based on Wyss' statements to employees a few days earlier, it is clear that the managers' presence at the bar, seated at the window facing the union hall, was anything but coincidental.[7] Rather, the evidence shows that the Respondent unlawfully surveilled its employees' union activity, and thus the Respondent violated Section 8(a)(1) as alleged.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Ivy Steel & Wire, Inc., Hazleton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule in its employee handbook requiring employees to obtain permission before engaging in lawful solicitation in the plant.

(b) Creating the impression of surveillance of employees' union activities.

(c) Engaging in surveillance of employees' union activities.

(d) Suspending and discharging employee Mauro Molinaro or any other employee for engaging in protected concerted or union activity.

(e) Unilaterally lowering the wage rate of Timothy Hinkle or any other employee without first giving the Union prior notice and an opportunity to bargain over the change.

(f) Enforcing rule 6 of the "Group II Major Violations" in its employee handbook to discipline employees for engaging in protected union activities.

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

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

(a) Rescind the language contained in rule 5 of the "Group II Major Violations" in its employee handbook.

(b) Furnish all current employees with inserts for its current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all current employees a revised handbook that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

(c) Within 14 days from the date of the Order, offer Mauro Molinaro full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights and privileges he previously enjoyed.

(d) Make Mauro Molinaro whole for any losses he may have sustained as a result of his unlawful 3-day suspension and discharge, with interest, as provided in the remedy section of the judge's decision.

(e) Rescind the unilateral change made in Timothy Hinkle's wage rate, and make Timothy Hinkle whole for any loss of earnings and other benefits he sustained as a result of the unilateral reduction in his wage rate, with interest as provided in the remedy section of the judge's decision.

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

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

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the more typical case in which there is an impression of surveillance of past union activity.

[7] Thus, *DMI Distribution of Delaware*, 334 NLRB 409, 417 (2001), cited by the Respondent, is distinguishable. In that case, the Board adopted the judge's finding that the presence of two supervisors in a restaurant at which a union was holding an employee meeting did not constitute surveillance. There was no evidence, as here, that the supervisors knew about the meeting prior to their attendance at the restaurant.

[8] Having found that the Respondent engaged in surveillance of employees' union activity on April 25, we find it unnecessary to pass on the judge's failure to find any additional instances of unlawful surveillance, because any such findings of violations would be cumulative and would not affect the remedy.

(h) Within 14 days after service by the Region, post at its facility in Hazleton, Pennsylvania, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2003.

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

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

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule in our employee handbook requiring employees to obtain permission before engaging in lawful solicitation in the plant.

WE WILL NOT create the impression of surveillance of employees' union activities.

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT suspend and discharge employee Mauro Molinaro or any other employee for engaging in protected concerted or union activity.

WE WILL NOT unilaterally lower the wage rate of Timothy Hinkle or any other employee without first giving the Union prior notice and an opportunity to bargain over the change.

WE WILL NOT enforce rule 6 of the "Group II Major Violations" in our employee handbook to discipline employees for engaging in protected union activities.

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

WE WILL rescind the language contained in rule 5 of the "Group II Major Violations" in our employee handbook.

WE WILL furnish all current employees with inserts for our current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all current employees a revised handbook that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

WE WILL, within 14 days from the date of the Board's Order, offer Mauro Molinaro full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights and privileges he previously enjoyed.

WE WILL make Mauro Molinaro whole for any losses he may have sustained as a result of his suspension and discharge, with interest.

WE WILL, rescind the unilateral change made in Timothy Hinkle's wage rate, and make Timothy Hinkle whole for any loss of earnings and other benefits he sustained as a result of the unilateral reduction in his wage rate, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Mauro Molinaro's unlawful suspension and discharge and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

IVY STEEL & WIRE, INC.

[9] 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."

Randy M. Girer, Esq., for the General Counsel.
Vincent J. Pentima and *Brian Casal, Esqs.,* for the Respondent.
Illia M. Schwarz, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. A hearing in this matter was held in Hazleton, Pennsylvania, from September 28 through October 1, 2004, based on a consolidated complaint issued on August 26, 2004, by the Regional Director for Region 4 of the National Labor Relations Board (the Board), alleging that Ivy Steel & Wire, Inc. (the Respondent) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1]

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) by creating the impression that its employees' activities were being kept under surveillance; threatening to, and in fact engaging in, such surveillance activities; maintaining an overly-broad no-solicitation rule; unlawfully applying two work rules against employee Mauro Molinaro; and by refusing to grant Molinaro's request for union representation before issuing him a 3-day suspension on February 11.[2] The 8(a)(3) allegations raised in the complaint include the February 11, 2004 suspension of Molinaro, and his subsequent discharge on February 16, 2004. Finally, the complaint alleges that the Respondent violated Section 8(a)(5) by unilaterally reducing the wage rate of employee Timothy Hinkle without giving the Union prior notice or an opportunity to bargain over said reduction. In a timely-filed answer to the complaint, the Respondent denies having engaged in any unlawful conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party,[3] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with a facility in Hazleton, Pennsylvania, is engaged in the manufacture and sale of reinforced steel products. During the year preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The 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, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

1. Respondent's acquisition of the Hazleton facility and related matters

Prior to 2002, the Respondent's facility in Hazleton, Pennsylvania, was owned by Structural Reinforcement Products, Inc. (SRP). In May 2000, the Union was certified as the exclusive collective-bargaining representative of SRP's "full-time and regular part-time production and maintenance employees" employed at the Hazleton plant (GC Exh. 2). Sometime thereafter, in 2002, the Union and SRP began negotiations for an initial collective-bargaining agreement to cover the unit employees. On or about December 31, 2002, MMI Products, Inc. (MMI)[4] purchased SRP, and continued operating SRP's Hazleton facility under Ivy Steel & Wire, an incorporated subsidiary of MMI.

The Respondent began operations in early January 2003,[5] with the same unit employees, numbering around 45, and supervisors formerly employed by SRP. It also continued in effect SRP's employee wage ranges,[6] and other terms and conditions of employment, including its employee handbook.[7] Among the various policies and procedures set forth in the employee handbook is a progressive disciplinary system which categorizes certain employee misconduct as either a "Group I Violation," a "Group II Major Violation," or a "Group III Intolerable Violation." There are nine types of misconduct listed under group I violations, the penalty for which is a verbal warning for a first offense, a written warning for a second offense, a 3-day suspension without pay for a third offense, and termination of employment for a fourth offense. Group II major violations identify six acts of misconduct for which the penalty is a written warning for first offense, a 3-day suspension without pay for a second offense, and termination for a third offense. Two of the six acts of misconduct listed as group II major violations, and which are at issue here, include rule 5, which prohibits employees from soliciting for any purpose in the Respondent's plant without first obtaining its permission, and rule

[1] The unfair labor practice charges which gave rise to the allegations in the consolidated complaint were filed by United Steel Workers of America, AFL–CIO–CLC, Local 8567–14 (the Union).

[2] Over the Respondent's objection, the General Counsel was allowed to amend the complaint to include the allegation involving the refusal to allow Molinaro union representation at the February 11 suspension meeting.

[3] While addressing itself on brief only to the 8(a)(5) allegation involving Hinkle, the Charging Party adopts the arguments contained in General Counsel's brief in all other respects.

[4] Headquartered in Texas, MMI manufactures products from steel rods at numerous facilities in Texas, Florida, North Carolina, Indiana, and Pennsylvania.

[5] All dates are in 2003, unless otherwise stated.

[6] The wage range for employees differed depending on their job description (see R. Exh. 8).

[7] It is patently clear from the record evidence, and the Respondent does not claim otherwise, that Ivy Steel & Wire is a successor employer to SRP under the holdings of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987). An employer is deemed to be a successor and generally succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit, are former employees of the predecessor, and if the similarities between the two operations manifest a '"substantial continuity' between the enterprises." See *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003), quoting *Fall River Dyeing Corp,* supra at 41–43.

6, which prohibits employees from engaging in malicious mischief, horseplay, or fighting endangering the safety of others. Finally, group III intolerable violations identify 14 acts of employee misconduct the penalty for which is an immediate termination.

The employee handbook also contains the following SOLICITATION AND DISTRIBUTION POLICY":[8]

> In order to prevent disruptions in the work place as well as protect employees from harassment and interference with their work, the following rules regarding solicitation and distribution of literature on the Company's property must be observed. Violation of these rules will be cause for appropriate discipline under Group II conduct rules.
>
> During working time, no employees shall solicit or distribute literature to another employee for any purpose.
>
> No employee who is on non-working time shall solicit or distribute literature to another employee who is on working time.

The Respondent's current managerial/supervisory team includes General Manager of Operations Marco Wyss; Assistant Plant Manager Tim Dunlap; Operations General Manager Kyle Urban, Human Resources Director Gary Hoffpauir, Production, Shipping and Scheduling Supervisor Anthony DeBalko; and First-Shift Supervisor John Lichty.

On taking over SRP's operations, the Respondent continued to recognize the Union as the exclusive bargaining representative of the unit employees and, in late January 2003, began negotiating with Union for an initial contract. The Respondent's bargaining team at these negotiations included Attorney J. (Jerry) Anthony Messina and Hoffpauir, who served as its principal spokespersons, along with Wyss, Dunlap and MMI Regional Manager Stephen Carson. Former SRP general manager, Bill Duffy, took part in the negotiations on behalf of the Respondent until about mid-February 2003. The Union was represented at the bargaining table by Steelworkers Sub-District Director Joseph Pozza,[9] and Union President David Fiore. In July 2003, Fiore quit his employment and was replaced by the Union's new president, Michael Stinsky. The Union's recording secretary, Dennis Conti, also attended the negotiations until resigning in June 2004.[10]

In the latter part of 2002, before Respondent took over SRP's operations, SRP conducted a layoff that affected numerous employees, including Hinkle and Fiore. Hinkle had worked for SRP since at least April, 2001 as an outside crane operator at a wage rate of $12.35/hour.[11] The wage range for outside crane operators was $9.95–$12.75 (R. Exh.–8). In October 2001, Hinkle was reassigned to a utility or custodial (janitor) position inside the facility but kept at the same wage rate of $12.35/hour, a position he held for some 8–9 months, after which he was reassigned to the position of inside material handler at the same $12.35/hour rate. The top wage rate for material handlers was $11.95/hour (R. Exh.–8). On October 7, 2002, Hinkle was laid off by SRP from his material handler position.

2. The facts surrounding Hinkle's pay reduction

On January 15, 2003, Hinkle was recalled by the Respondent and assigned the position of material handler on the second shift. Although his pay rate as a material handler, according to Respondent's Exhibit-8, should have been no more than $11.95/hour, Hinkle was brought on by the Respondent at the $12.35/hour rate he had been earning prior to his layoff, notwithstanding Hoffpauir's testimony at the hearing that it was not the Respondent's practice to keep an employee at a higher rate when placed into a lower rated job. (Tr. 616.) Fiore, who had also been laid off by SRP in late 2002, was also recalled by the Respondent in January 2003, and assigned to an LPT-2 (rolling machine) operator's position.

The record, in particular the parties' bargaining notes and testimonial evidence, reflects that Hinkle was the subject of some discussion by the parties during their negotiations, although there is disagreement between the parties as to the purpose or reason for such discussions. Attorney Messina served as the Respondent's primary spokesperson during these negotiations, and Hoffpauir, the other spokesperson, was its official note taker.

Messina testified as follows regarding the negotiations and the Hinkle matter. One of the main concerns both parties had during the negotiations was the fact that employee wages had not changed in 3 years, and that both the Respondent and the Union were concerned that many employees were frozen at the top of their wage range. While both sides agreed to negotiate the issue, they disagreed on the approach that should be taken, with the Respondent taking the position that any increases should be merit-based and the Union wanting any increase to be automatic. Messina recalls the Respondent offering to provide an immediate 2-percent increase to the top of the wage range, which Pozza rejected because the latter wanted any increase in wages to be an across the board raise for all employees, not just to those at the top of their wage range.

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[8] A copy of the employee handbook was received into evidence as GC Exh. 10. Hoffpauir's testimony on whether the employee handbook was adopted by the Respondent was ambiguous. Thus, when asked by counsel for the General Counsel if the Respondent had adopted the employee handbook formerly used by SRP, Hoffpauir replied, "We just have continued it." However, when questioned about the "solicitation and distribution" policy contained in the handbook at p. 19, Hoffpauir seemed to backtrack from his earlier answer by stating that "The handbook, to my knowledge this handbook is, may not even be used anymore except it is in place." (Tr. 641–642.)

[9] Pozza replaced Steelworkers Staff Representative Lew Dopson as bargaining representative in February 2003. He did not, however, begin attending bargaining sessions until April 6 (Tr. 543–544). Dopson had been involved in the negotiations between SRP and the Union. He did, however, sit in for Pozza at the bargaining sessions held by the parties in August. (Tr. 227.)

[10] The record shows that the parties held numerous bargaining sessions throughout 2003, including three in July (July 8, 9, 10) and two in August (August 19 and 20). Hoffpauir testified to having attended all but possibly one of the bargaining sessions; Messina, as reflected by bargaining notes received into evidence, attended several sessions between February and June, the July 8 session, the August 19 and 20 sessions, and several other sessions between September and November.

[11] A copy of a payroll status change form received into evidence as GC Exh. 40 shows Hinkle received an annual review on April 16, 2001, and had his pay increased from $11.95 to $12.35/hour.

Messina claims that the Union complained about Hinkle in the same context that it complained about the merit system for wages, accusing the Respondent of playing favorites with Hinkle. He recalled that at one meeting, after the Union was handed a document listing all employees by name, job title, wage rate, and date of hire, the Union remarked that the Respondent was playing favorites with three individuals, one of whom was Hinkle, because these three individuals were being paid above the top of their wage range. Messina explained that the two unidentified individuals who received the higher wage rate were being paid extra because they were leadpersons who were generally paid a lead rate over and above the top of their wage range. Hinkle, he contends, was simply kept at the same rate he was receiving before being laid off by SRP, explaining that the Respondent simply did not want to reduce Hinkle's pay (Tr. 656). Messina recalls Fiore complaining that Hinkle was being paid more, and that he (Fiore) should be paid the same as Hinkle. He contends that on numerous occasions, the Union complained that it was unfair for Hinkle to be paid over the wage range for his position (Tr. 658). Asked if a discussion occurred with the Union over Hinkle's rate, Messina answered, "Sure, we didn't just put it up out of the sky." He explained that the discussion about Hinkle being overpaid was prompted by seniority sheets provided to the Union showing, inter alia, that Hinkle was being paid above the range for his job title (Tr. 658). According to Messina, the Union repeatedly asked to have Hinkle's pay reduced during the negotiations.

Yet, when asked on cross-examination how often such a request was made by the Union, Messina could recall only two occasions on which he purportedly discussed the matter with Pozza, asserting that both occasions occurred sometime after Fiore's departure. Pressed by the General Counsel to describe what Pozza actually said to him about reducing Hinkle's pay, Messina reluctantly admitted that Pozza never actually came out and asked for a reduction in Hinkle's pay, but rather did so implicitly by repeatedly insisting that the Respondent was playing favorites with Hinkle. Messina contends that on the first of the two occasions in which Hinkle's pay was purportedly discussed, he specifically asked Pozza if he (Pozza) wanted the Respondent to reduce Hinkle's pay, and that Pozza declined to answer and, instead, repeated that the Respondent was playing favoritism. (Tr. 661, 664–665.) He claims that he then notified the Respondent that no favoritism should be shown and agreed that Hinkle was overpaid for his position. He purportedly returned to further discuss the matter with the Union, explained that the Union was making a big fuss, and that the Respondent was not playing favorites. He then told the Union that the Respondent intended to adhere to the status quo and would be moving Hinkle back to his normal rate, e.g., the existing rate for his job. Messina could not point to any specific bargaining notes or other writing to show that the Union had, in fact requested and agreed to have Hinkle's pay reduced (Tr. 672). Nor, for that matter, did Messina ever claim that the parties had reached an agreement to lower Hinkle's pay. Rather, he testified only that Hinkle's pay was reduced because he believed, from the alleged repeated complaints by the Union that Hinkle was receiving favorable treatment, that this implicitly was what the Union was actually seeking.

Hoffpauir testified that from the very first bargaining session, Hinkle's name was brought up repeatedly by the Union. He claims that at some of these meetings, Fiore accused the Respondent of favoring Hinkle, and complained that despite having a more difficult job to perform, and that Hinkle served as his assistant, he was being paid less than Hinkle. He recalled that at an April 8, bargaining session, there was some discussion about Hinkle and another employee, Keselica, receiving the "wrong pay," but could not recall if this particular subject was raised by the Respondent or the Union. He did recall recording in his bargaining notes that Hinkle's or Keselica's pay would remain the same and not be lowered. Hoffpauir contends that the Respondent decided not to lower their pay because there was no agreement between the parties to do so. (Tr. 591–592; R. Exh. 40.) Asked if the Respondent had intended to take action with respect to Hinkle's "wrong pay," Hoffpauir responded, "No, it did not that day," referring to this particular meeting in April. Hoffpauir contends that at subsequent meetings, including one held the following day, April 9, the Union, and in particular Pozza, continued to insist that Hinkle was being favored by the Respondent and was overpaid, and sought a reduction in Hinkle's pay.[12]

Hoffpauir contends that at the very outset of the negotiations, he and the other members of the management team did not really understand what it was the Union was seeking regarding Hinkle's wage rate, and that it was not until sometime around July 10, that he and other members of Respondent's bargaining team finally understood the Union's position about Hinkle being overpaid. He explained this inability to grasp the Union's purported argument on the fact that, prior to July 10, he and the other members of the bargaining team were preoccupied with learning how best to operate the facility and, consequently, had difficulty understanding the claims allegedly being made by Fiore and other union representatives about Hinkle being overpaid or receiving favored treatment. In a nutshell, Hoffpauir insisted that "it was difficult for us to put all of that together "(Tr. 600). Hoffpauir recalls that at an August 19, bargaining session, the parties discussed wage increases for employees, with the Respondent proposing granting a pay increase to employees at the top of the wage scale because said employees had not received a wage increase in 5 years. He contends that at this meeting, Pozza and the Union opposed the proposal because it did not go far enough, preferring instead a wage increase for all employees.[13]

[12] Hoffpauir's April 9, bargaining notes contain an entry that reads, "Hinkle is overpaid" (R. Exh. 39). When asked who made the remark that led him to make this particular entry, Hoffpauir could not say for sure, stating first that it was Fiore, but subsequently adding that "it may have been someone else on the Union side." (Tr. 595.)

[13] Although Hoffpauir claims that Pozza was at the August 19, meeting, Pozza denied attending any bargaining sessions in the month of August. He testified that he was working on another assignment during the month of August and that Dopson sat in for him during the August negotiations. A review of Hoffpauir's own August 19 bargaining notes shows that Hoffpauir recorded the names of Union Representatives Dopson, Conti, and Stinsky, but not Pozza, as being present at that session. While Hoffpauir's notes for that day make reference to Pozza saying, "No" to the Respondent's wage proposal, I am, convinced, on

Hoffpauir testified that at a bargaining session held sometime in August, he and Pozza spent about 1-1/2 hours discussing Hinkle's situation.[14] However, when told by the General Counsel that Pozza had not attended any bargaining sessions in August, Hoffpauir proffered, somewhat unconvincingly, that the 1-1/2-hour-long discussion he referred to in his affidavit "may not have been with Pozza" after all, and could have been with Dopson or, alternatively, that the conversation may have been with Pozza but occurred sometime in July, rather than in August.

Hoffpauir also recalled giving the Union a copy of a seniority list containing the names of employees, their hire date, job title, salary range, and current rate of pay (R. Exh. 26). Relying on a handwritten notation found in the upper right hand corner of Respondent's Exhibit 26, stating that the Company gave the Union a copy on "8/10/03," Hoffpauir testified that the Union was handed a copy of Respondent's Exhibit 26 at an August 10 bargaining session. As Respondent's Exhibit 26 is undated, it cannot be ascertained from the face of the document when it might have been prepared. However, Hoffpauir's testimony, that he handed a copy of Respondent's Exhibit 26 to the Union during an August 10 bargaining session, if true, suggests that the document was prepared sometime prior to that date and, consequently, that Hinkle's reduction in pay went into effect prior to August 10, since Respondent's Exhibit 26 shows Hinkle's pay rate at $11.15/hour.

There are, however, reasons to doubt Hoffpauir's testimony regarding Respondent's Exhibit 26. Thus, Hoffpauir, as noted, initially testified, without equivocation, that the document was "passed across the bargaining table" to the Union at the August 10 session. When asked if the document was personally handed or sent to the Union, Hoffpauir responded, with a hint of indignation, that he would not place a notation on a document saying it was given across the table if he, in fact, had not done so. He elaborated that "typically, at the table I make the note and hand it across the table to them," e.g., the union representatives (Tr. 602), implicitly suggesting thereby that this is what occurred in this case. Yet, when told that the parties had not met on August 10, Hoffpauir distanced himself from his previous claim about having personally handed Respondent's Exhibit 26 to a union representative at the negotiations and suggested, instead, that Respondent's Exhibit 26 may have been mailed to the Union. Given the inconsistencies in his testimony, Hoffpauir's claim of having provided the Union with a copy of Respondent's Exhibit 26 is found not to be credible.

Nor am I convinced that Respondent's Exhibit 26 was in existence on or around August 10, as suggested by Hoffpauir's testimony, for other payroll documents offered into evidence show that Hinkle's pay must have been reduced on or around September 1. For example, Hinkle's earnings statement for the pay period ending August 31, shows that, as of the latter date, Hinkle was still being paid at the $12.35/hour rate. His next earnings statement for the period ending September 7, however, reflects a reduction in Hinkle's hourly rate to $11.15/hour (see GC Exhs. 6 and 7). A notation written on General's Counsel's Exhibit 7 by Hinkle, stating that he had had his pay reduced during this pay period but did not know why, together with the fact that he was still as his $12.35/hour rate as of the preceding pay period, strongly suggests that the reduction in Hinkle's pay went into effect at the beginning of the pay period ending September 7. Further, Respondent's Exhibit 14, which contains a breakdown of Hinkle's wages for 2003, shows Hinkle's pay being reduced from $494 to $446 per week following the pay period ending August 31, again supporting a finding that Hinkle's pay was reduced on or around September 1. In light of these facts, it is highly unlikely that Respondent's Exhibit 26, showing Hinkle's pay at $11.15/hour, was in existence prior to September 1. Rather, I find it more likely than not that Respondent's Exhibit 26, which, as noted, is undated, was in fact created sometime after Hinkle's pay reduction went into effect on or about September 1, and that the handwritten notation therein showing that it was given to the Union presumably by Hoffpauir on August 10, is a pure fabrication.

Hoffpauir further claimed that at a bargaining session conducted sometime after Fiore's departure in July, he specifically asked Pozza, "Are you saying [that] we have to lower Mr. Hinkle's pay?", and that Pozza replied, "Yes." (Tr. 606.) According to Hoffpauir, he and Pozza agreed that Hinkle would be placed in the appropriate pay range for the material handler position based on his skills. Soon thereafter, the Respondent, according to Hoffpauir, reduced Hinkle's pay to $11.15/hour without any objection from the Union. (Tr. 611.) He contends that at some point after Hinkle's pay was lowered, he was asked by someone from the Union if Hinkle's pay had been reduced, to which he answered, "Yes." (Tr. 611.)

Pozza, as noted, became actively involved in the negotiations on April 6. Pozza denied Hoffpauir's claim that he or any other member of the Union's bargaining team requested or agreed to have Hinkle's pay reduced during the negotiations, and denied hearing Fiore complain about Hinkle.[15] He further denied Hoffpauir's claim that the two engaged in a 1-1/2-hour discussion over Hinkle's pay. Pozza, however, did recall the Respondent mentioning on or around July 10, that Hinkle was being paid above his wage scale, but testified that he first learned sometime after August or September from either Stinsky or Conti that Hinkle's pay had been abruptly reduced. (Tr. 542, 546.) As to Respondent's Exhibit 26, the seniority list Hoffpauir claims was given to the Union on August 10, showing Hinkle's pay at $11.15/hour, Pozza did not recall ever seeing or receiving it.

Nor did Pozza recall discussing during the negotiations a company proposal to raise the wage rates of employees at the top of their wage range, but did remember the Union taking the position at the bargaining table that under the Company's merit

the basis of Pozza's testimony, and the fact that Hoffpauir did not include Pozza's name as being in attendance, that Pozza was not present at the August 19 bargaining session.

[14] Hoffpauir's testimony regarding this 1-1/2-hour discussion with Pozza came after Hoffpauir was shown a sworn affidavit he gave to the Board containing the assertion.

[15] Pozza does admit that as he did not become involved in the negotiations until April 6, he would not have known whether any such complaint by Fiore regarding Hinkle occurred prior to his arrival.

wage system, some employees were receiving wage increases while others were not. He further testified that he understood the Company's policy regarding the wage rate of an employee who is moved from one job classification to a lower classification to be that the employee was kept at the higher wage rate.

Dopson, as noted, attended bargaining sessions in February before being replaced by Pozza, and sat in for Pozza during the two August bargaining sessions. He recalls Hinkle's name being brought up but in connection with the latter's alleged inability to perform certain work. He denied that any mention was made or discussion had about reducing Hinkle's wage rate by the parties during the meetings he attended, and denied that, during the August meetings he sat in for Pozza, the Union asked for Hinkle's wage to reduced. His testimony in this regard thus contradicts Hoffpauir's vague assertion that the 1-1/2-hour conversation he claimed to have had in August regarding Hinkle may have been with Dopson, rather than Pozza.[16]

Fiore testified that he never asked the Respondent during the negotiations to reduce Hinkle's pay or complained about Hinkle being overpaid. (Tr. 165.) Nor did he recall anyone from the Union ever stating during the negotiations that Hinkle was overpaid. He did recall bringing up the fact that his work as an LPT-2 operator was more difficult and demanding than that being performed by Hinkle, and asking the Respondent to re-evaluate his work and adjust his pay upward.[17] He further recalled Hinkle's name being discussed in connection with another individual, Mike White, who was scheduled to be laid off from a welding position but who, instead, was transferred to a position in the fabrication shop and given a $2-an-hour pay cut.[18] He contends that to the extent any mention may have been made about Hinkle being overpaid, it was done to show a discrepancy between the top rate Hinkle was receiving as a crane operator, and the White situation. (Tr. 173.) Fiore was not certain if the Respondent had a practice of reducing the wage rate of employees who were transferred from a higher rated job to a lower rated one. He did, however, recall that the Union, during negotiations, took the position that when employees are moved from a higher to a lower rated job, they should be able to retain the higher pay rate.

As the Union's recording secretary, Conti took notes at every bargaining session until June 2004, when he left the Respondent's employ. He testified that at no time during the negotiations he attended did the Union complain about Hinkle being overpaid or ask that the latter's pay be reduced (Tr. 198). Conti claims that he first learned of Hinkle's pay reduction from Hinkle himself. The latter, he contends, approached him soon after receiving a pay cut and asked Conti why it had been done. Conti responded that he did not know but would find out. Conti claims he brought the matter to Pozza's attention soon thereafter, and that Pozza assured Conti he would seek an explanation from the Respondent at the next bargaining session scheduled for October 1. At the October 1 session, Pozza, according to Conti, did ask the Respondent about Hinkle's pay cut and threatened to file charges regarding the matter (Tr. 196). Conti's bargaining notes for that day appear to corroborate his testimony in this regard (GC Exh. 5). Conti did not recall if the subject of Hinkle's wage cut was ever again brought up in subsequent negotiations.

Stinsky took over for Fiore as union president sometime in August and attended and took notes at all bargaining sessions since that time. Like Pozza, Fiore, and Conti, and, contrary to Hoffpauir, Stinsky testified that at no time during the negotiations he attended did anyone from the Union ask to have Hinkle's pay reduced. He claims that the first he heard of Hinkle's reduction in pay was when Hinkle approached him sometime on or around September 13, and told him about the cut in pay, and asked Stinsky to look into it. Stinsky jotted down the information about Hinkle's pay cut in a small pocket-size notebook he carried around to record items needing attention.[19] Stinsky believes he may have told Conti about Hinkle's situation, and also discussed the matter with Wyss before they began their next bargaining session. Stinsky claims Wyss told him that Hinkle's rate had been changed because Hinkle had not been performing up to the Respondent's expectations.[20] As Wyss did not testify, Stinsky's claim as to what Wyss said was the reason for Hinkle's pay cut, is uncontested and accepted as true. Stinsky recalls Pozza raising the issue of Hinkle's pay cut at the October 1 bargaining session, and threatening to file a charge over the pay reduction. The Respondent purportedly agreed to look into the matter.

3. The facts surrounding Molinaro's suspension/discharge

Molinaro, a union member since 1981, was employed as a forklift operator at the Hazleton facility from April 1996 until February 16, 2004.[21] He contends that he was often outspoken on union and other matters affecting employees. By way of example, Molinaro testified about a meeting that took place in late January, at which Wyss discussed, inter alia, a change in Department of Transportation (DOT) rules that would affect how employees did their work. Wyss, he contends, mentioned that DOT rules now required trucks coming into the plant to

[16] Regarding this alleged 1-1/2-hour-long conversation Hoffpauir claims he may have had with either Pozza or Dopson, I find it never occurred. This alleged conversation could not have taken place with Pozza in August since the testimony of both Pozza and Dopson, supported by the August bargaining notes, make patently clear that Pozza did not attend any bargaining sessions in August. Dopson similarly denied, credibly in my view, having had any such discussion with Hoffpauir. Further, Messina, who attended both August bargaining sessions, made no reference in his testimony to having witnessed any such conversation between Hoffpauir and Pozza. In short, Hoffpauir's claim of having discussed Hinkle with Pozza for about 1-1/2 hours is, in my view, a pure fabrication.

[17] Fiore purportedly quit his job in July after failing to receive an evaluation.

[18] White, according to Fiore, was subsequently transferred back to the welding shop but not given the $2 increase he lost when he was initially transferred to the fabrication shop. (Tr. 183.)

[19] The page in the notebook on which Stinsky recorded his discussion with Hinkle was received into evidence as GC Exh. 3.

[20] While initially testifying that Wyss did not respond to his inquiry, Stinsky subsequently recalled, with the aid of a sworn affidavit he gave to the Board, that Wyss told him it that it was Hinkle's lack of performance that led to the pay cut (Tr. 124–125).

[21] All dates relating to the allegations pertaining to Molinaro and to alleged acts of surveillance by the Respondent (discussed infra) are in 2004, unless otherwise indicated.

pick up Respondent's finished product to leave within 1 hour, or the Respondent would be subject to paying "waiting" time fee. Wyss told employees that due to the change in DOT rules, employees would have to work faster. Molinaro responded that if the Respondent expected employees to work faster, it seemed only proper that employees shoud be re-evaluated and given raises. Wyss suggested that Molinaro discuss the matter with the Union, to which Molinaro replied that he, Wyss, had the right to manage with or without the Union. Molinaro's testimony in this regard is undisputed as Wyss did not testify.

In his capacity as forklift operator, Molinaro was one of six individuals on two separate shifts supervised by DeBalko. Each shift has a forklift operator, a crane operator, and a rigger. Molinaro worked on the second shift and another forklift operator, Chris Zelenak, worked the first shift. Their duties included unloading steel rods delivered to the plant, transferring the raw material to storage areas in the plant's yard, "staging" the raw material for processing into steel wire and mesh inside the plant, and transporting the finished product, e.g., wire mesh, from the plant to storage areas in the yard and onto trucks for shipment.

Although the Respondent does not utilize forklift operators or other yard employees on its third shift, the production of wire mesh from raw material continues on that shift, and the responsibility for moving the wire mesh produced on the third shift, along with all that produced on the first shift, is on the first-shift forklift operator. Further, as most of the deliveries of raw material received by the Respondent arrive during the first shift, with some, but not as much, coming in during the second shift, the task of unloading that material also falls on the first-shift forklift operator and other first-shift employees. According to Zelenak, the amount of work performed by the shift forklift operator was simply too much for one person to handle. He testified that some four years earlier, he and Molinaro agreed to share some of the workload. However, in early 2004, Zelenak complained to DeBalko that he "couldn't handle the work load anymore" (Tr. 383). DeBalko, he contends, instructed him to get help from the crane operators on that shift. Zelenak presumably did so and testified that it did alleviate the workload somewhat.

Zelenak testified that soon thereafter, on Friday, February 6, he and first-shift yard employee, Mike Heintzleman, were called to a meeting with DeBalko and told that he wanted them to begin "swing" shifts, meaning that every 2 weeks or so, employees on the first shift would be assigned to the second shift, and the latter shift employees to the first. DeBalko, according to Zelenak, told them he wanted to make the change to see how the two shifts worked together. Selenak was not sure if DeBalko held a similar meeting with the second-shift employees. Molinaro testified that he too was present at this February 6 meeting. He also recalled DeBalko telling employees at this meeting that the Respondent was having difficulty obtaining the rods needed to produce mesh and that, consequently, it might have to go from three shifts to two.

Molinaro also recalls making certain remarks to Wyss and DeBalko during the week of February 6, regarding the Respondent's obligation to bargain in good faith. He contends that the Union's position regarding the negotiations was that "all they have to do to negotiate in good faith is to show up for the meetings." He remembered that on more than one occasion during this particular week, he remarked to Wyss and DeBalko that he did not believe that the Respondent's approach to the negotiations constituted good faith bargaining. He also recalled commenting to employees and managers alike that the Respondent "did not want this union because then we will have to have a contract book, and then they won't be able to change things, and what's in the book they are going to have to go by until the next contract, and then they will have to open up the contract and try to change things" (Tr. 281). Molinaro's testimony in this regard is undisputed. Wyse did not testify, and DeBalko, who did testify, was not questioned about the remarks Molinaro claims he made to both.[22] I credit Molinaro's undisputed testimony as to the comments he made to Wyse and DeBalko. His unrefuted assertion, about mentioning to other employees and unnamed managers that the Respondent did not want the Union because they would be unable to change things once employees obtained a contract, is likewise credited.

On Sunday, February 8, the Union held a meeting with employees at its union hall to discuss strike issues. The meeting, according to Molinaro, was well-attended. He recalled that during the meeting, he expressed the view that the Respondent was not negotiating in good faith, and gave an account of how he had been involved in a successful strike against a former employer, and that the employees were able to prevail only by sticking together. Zelenak apparently attended the meeting, although Molinaro claims he was unaware of it, and only learned of Zelenak's presence the following evening, February 9, from coworkers Tony Andrews and Charlie Boyle. He claims that Andrews and Boyle brought up the fact that they had seen Zelenak at the meeting because the latter, according to Molinaro, did not regularly attend such meetings, a claim denied by Zelenak.[23] Molinaro then commented to Andrews and Boyle that "maybe Chris [Zelenak] could be the company spy and went back and told [management] everything" that had occurred at the union meeting the day before. Zelenak denied informing anyone in management about the meeting.

On February 10, as first-shift employees Roger Gering and Nate Staley were punching out from their first shift, Molinaro, who was reporting to work, mentioned to them that Zelenak might be the company spy who told management everything about what had transpired at the union meeting. Gering and Staley, according to Molinaro's uncontradicted testimony, replied that Zelenak might very well be a company spy since Zelenak and certain management officials, including Wyss and DeBalko, hang out together on weekends. Molinaro recalled two management officials standing nearby who, in his view, could have overheard his conversation with Gering and Staley. (Tr. 291–292.)

[22] The failure to question DeBalko about, or to call Wyse to refute, Molinaro's testimony as to what he said to them regarding the Respondent's attitude toward bargaining, warrants an adverse inference that had DeBalko been asked or Wyse called to refute Molinaro's statement, they would not have done so.

[23] Zelenak claims to have attended between 80 to 90 percent of the union meetings.

In the afternoon of February 10, DeBalko held a meeting with employees to discuss how best to coordinate the work between the first and second shift. He contends he did so because the first- and second-shift employees appeared to be having some problems, and he had received complaints that one shift was doing more work than the other. Zelenak, who was out sick that day and had not reported for work, did not attend this meeting.

DeBalko testified that soon after he began the meeting, Molinaro interrupted and remarked, "Let's get this straight; we are here because Chris Zelenak is complaining. You know, it is not something that we are doing, it is Chris." Molinaro, he claims, proceeded to accuse Zelenak of being a company spy, stating, "We are sitting here having this meeting because Chris is a spy, and he is complaining about us or telling you things that we are not doing." Although he tried to get the meeting back on track, DeBalko claims he was unable to do so because Molinaro continued interrupting and "beating" up on Zelenak, asserting that employees knew Zelenak was Wyss' friend. Purportedly unable to continue his presentation, DeBalko ended the meeting after only 15 minutes or so. DeBalko claims he took no action against Molinaro for calling Zelenak a spy as he did not consider Molinaro's spy remark to be a threat but simply an expression of Molinaro's opinion. He acknowledged that Molinaro was outspoken and had, in the past, complained to him about other matters, such as large potholes in the yard, maintenance needed on the forklifts, and delivery trucks arriving late. (Tr. 756–759.)

Molinaro's version is that he attended the February 10 meeting shortly after his conversation with Gering and Staley. At the meeting, DeBalko explained that employees would be going to swing shifts. Employees Boyle and Andrews became upset at this as it would affect their ability to get their children off to school in the morning. Molinaro had no problem with the change as he had done swing shifts in the past, and let DeBalko know that he was not opposed to it. At one point, Molinaro asked DeBalko about Zelenak. Molinaro then commented that Zelenak had been out 1 day and left early on another, and asked if Zelenak had simply left or was given the day off with pay. Molinaro went on to say that he believed Zelenak to be a company spy, and suggested that Zelenak may have told management what had occurred at the union meeting. He then asked DeBalko in a joking manner if he had allowed Zelenak to take the day off with or without pay. DeBalko simply smiled and said nothing. (Tr. 297–298.)

Zelenak reported for work on the morning of February 11. He testified that some 10 to 15 minutes after he began his shift, a "manager," whom he did not identify, called him "a company snitch," a scab," and a "Company spy," and that, soon thereafter, some five to six employees also began referring to him as a company spy. When he asked the latter who was responsible for spreading this rumor, he was told it was Molinaro, and that the latter had already been fired for his remarks. (Tr. 386–387.) Zelenak claims he then went to DeBalko around 8 a.m. that morning to complain about the name calling, that DeBalko took him to see Wyss, and that, once there, he told DeBalko and Wyss that Molinaro was going around telling people that he was a company spy. According to Zelenak, Wyss and DeBalko advised him not to worry because Molinaro had already been fired. (Tr. 407.) He purportedly told Wyss and DeBalko that if, for some reason, Molinaro was to get his job back, he wanted Molinaro put to work at another location so he would not have to deal with him.[24]

After his meeting with DeBalko and Wyss, Zelenak returned to work. He testified that the name calling he experienced that morning did not continue after that. At some point just prior to the end of his shift that day, Zelenak again went to see DeBalko and informed him that he intended to leave his job in 2 weeks. Zelenak believes this meeting occurred with DeBalko only. He testified on direct examination, and again on cross-examination, that he gave DeBalko 2 weeks' notice because he "couldn't handle my job" and largely because of his "workload." (Tr. 388, 410.) As to the workload, Zelenak explained that he had "just come back from a bad cold, it was freezing cold outside, and [he] had a high fever." He testified that "there could have been different circumstances" for his wanting to leave, but that "it was just too much," and that he "shouldn't have been there even that day" but had to go to work because he did not get paid for sick days. (Tr. 411.) He recalled complaining to DeBalko at this meeting that the workload had not been distributed properly, that he was getting all the work, that it never stopped, and that management didn't care if the workload was not being distributed evenly and he got stuck with all the work. On cross-examination, after much prodding by Respondent's counsel, Zelenak testified that Molinaro's conduct in spreading rumors about him being a company spy and a snitch part was a factor in his decision to resign.[25]

DeBalko agrees that Zelenak came to see him on the morning of February 11. His version of the exchange that occurred between the two that morning is at odds with, and indeed contradicts, Zelenak's account of their meeting. According to DeBalko, Zelenak only asked what had happened at the February 10 meeting because he had heard that Molinaro made some remarks about him at the meeting. DeBalko responded that it was no big deal, that Molinaro was just going off a bit, and not to worry about it. DeBalko did not describe Zelenak as being upset or angry, but rather as merely curious about the remarks Molinaro had made about him. (Tr. 718.) Nor did DeBalko mention anything in his testimony about taking Zelenak to see

[24] Zelenak's testimony on direct examination regarding his meeting with DeBalko that morning varied somewhat from the account he gave cross-examination. On direct examination, for example, Zelenak claimed to have met only with DeBalko, and did not mention telling Wyss and DeBalko that he did not want to work together with Molinaro if, for some reason, the latter was to be rehired. Rather, on direct examination, Zelenak recalled asking DeBalko why Molinaro had been fired, and returning to work after DeBalko declined to give him an answer.

[25] Asked by Respondent's counsel if "the reason and true reason" for deciding to leave was because "of the grief" he had been put through in being called a spy, Zelenak replied, "No. A lot of the reason was the workload." When Respondent's counsel asked if Zelenak had a reason for not wanting to ascribe his resignation to the name calling he experienced on February 11, Zelenak answered, "I don't know." Only after further questioning by Respondent's counsel did DeBalko reluctantly admit that Molinaro's "spy" remarks about him had "played a part" in his decision to give 2 weeks notice. (Tr. 411.)

Wyss that morning, or telling Zelenak not to worry because Molinaro had already been fired. Rather, DeBalko contends that he and Zelenak "just had a couple of words and things," after which he advised Zelenak not to worry about the remarks made by Molinaro, that it was not a big deal, and that he was overreacting and should just ignore Molinaro. DeBalko claims he had no intentions of disciplining Molinaro when Zelenak came to see him the first time (Tr. 779), an assertion clearly inconsistent with Zelenak's own assertion of DeBalko saying to him during that same conversation that Molinaro had been fired.

DeBalko agrees that Zelenak came to see him a second time several hours later. His description of what occurred during that second meeting is, again, at odds with Zelenak's version of that meeting. Thus, according to DeBalko, Zelenak complained about "hearing a lot of things from the plant." Specifically, Zelenak purportedly told him that "Mauro [Molinaro] is at it again," that now it was not only Molinaro but other "people in the plant against him," that it was not worth working in fear, and that the Respondent could not protect him. Zelenak, he contends, also expressed concern that his tires might get slashed and his car might be damaged, and then notified DeBalko that he was giving him 2 weeks notice. (Tr. 719, 780.)

However, Zelenak, as previously noted, claims he told DeBalko at this second meeting only that he was leaving because he couldn't handle the workload any longer. While Zelenak, as further noted, admitted taking into account Molinaro's "spy" remarks in arriving as his decision to submit his resignation, he never testified to having mentioned this to DeBalko at this second meeting. Zelenak, in fact, denied telling DeBalko that he was afraid he might get beat up or have his tires slashed, or that he felt or had been threatened by Molinaro.

DeBalko, it should be noted, was inconsistent on the question of whether Zelenak complained about being threatened by Molinaro. Thus, he initially testified that he decided to discharge Molinaro because of the threats he had made to Zelenak. However, he subsequently conceded that Zelenak never actually complained about being threatened by Molinaro (Tr. 739). DeBalko's further testimony about Zelenak complaining to him during this second afternoon meeting about Molinaro being at it again and turning employees against him, is likewise inconsistent with Zelenak's testimony that the name calling he had been subjected to when he first arrived for work that morning abated soon thereafter and did not continue. Finally, DeBalko testified that he advised Zelenak not to be rash about resigning, and that he felt and hoped that the matter would just blow over within 2 weeks.[26]

Despite his asserted belief that the Zelenak-Molinaro incident would go away in 2 weeks, DeBalko nevertheless claims that, after Zelenak came to see him the second time, he went and informed Wyss of what had occurred and explained that Zelenak was resigning because of Molinaro. He contends that Dunlap and manufacturing process engineer Bart Downey joined the meeting soon thereafter at DeBalko's request. According to DeBalko, Downey had purportedly seen Molinaro amid a group of employees hollering and screaming earlier that day, that Downy reported the incident to an individual named Maureen, and that the latter passed the information on to him. Because the meeting centered on Molinaro, he and Wyss decided to call Downey in to the meeting to discuss what he observed. Downey testified that he had indeed seen Molinaro on the plant floor screaming and waving his arms at other employees, as if involved in a fight, and told DeBalko, Wyss, and Dunlap this at a meeting held the following morning. There is no evidence that this alleged incident was ever investigated by Downy, DeBalko, Wyss, or any other management official.

DeBalko testified that he, Wyss, and Dunlap reviewed Molinaro's personnel file, concluded therefrom that Molinaro had a history of violent outbursts and, consequently, decided to suspend Molinaro for 3 days pending a final decision as to what course of action to take. DeBalko claims that no decision was made at that time on what further action to take against Molinaro because they simply wanted to get Molinaro out of the work environment "so that they could find out what was going on." (Tr. 734.) His assertion in this regard, as previously noted, squarely contradicts Zelenak's testimony that he was told by DeBalko and Wyss when he met with them on the morning of February 11, that Molinaro had been fired.

An "Employee Warning Report" was thereafter prepared accusing Molinaro of intimidating Zelenak by "spreading false and malicious reports to co-workers that he was the company spy," thereby creating "a hostile work environment for Chris Zelenak which resulted in his resignation." The report charges Molinaro with violating rule 6 of the "Group II Major Violations" (discussed supra), and cites February 10, as the date the alleged violation purportedly occurred. The report advises Molinaro that, based on a "prior written warning" issued to him on April 8, 2003 (see GC Exh. 15),[27] he was being suspended for 3 days "prior to discharge." (See R. Exh. 22.)

DeBalko testified that after the warning was prepared, Molinaro and Second-Shift Supervisor Bill Jisinsky were called to a meeting where DeBalko read the writeup to Molinaro informing him of the suspension.[28] (Tr. 735). Wyss and Dunlap were apparently also present. He recalled that after notifying Molinaro of his suspension, the latter chuckled and stated, "[Y]ou have got to be kidding me," and then asked what the Union had to say about his suspension. DeBalko purportedly responded

[26] As it turned out, Zelenak was persuaded by Stinsky shortly thereafter not to leave.

[27] The April 8, 2003 warning resulted from an incident involving Molinaro and Zelenak. Zelenak's version of this incident is that on April 8, 2003, Molinaro questioned about him about a forklift, and soon thereafter threatened to put his fist through Zelenak's chest. Zelenak denied being physically assaulted by Molinaro, and testified that, soon after the incident, Molinaro came up to him, shook his hand, and apologized. DeBalko testified that Zelenak came to him on April 8, 2003, to complain that Molinaro had physically grabbed him, threatened to hit him, and also threatened his life. He contends that Zelenak expressed fear that Molinaro was going to kill him. Zelenak, however, denied that Molinaro ever threatened to kill him, and testified that there have been no further incidents with Molinaro since then.

[28] DeBalko testified to telling Molinaro at this meeting that he was being suspended "until further notice." (Tr. 734–735.) As noted, however, he also claimed to have read the suspension writeup to Molinaro, which states clearly that his suspension was to last 3 days and not, as DeBalko claimed, "until further notice."

that the union representative was gone for the day and would be contacted in the morning. Molinaro, he contends, signed the writeup and left without saying anything else. Neither he nor any of the management representatives present at the meeting asked Molinaro any questions, or asked Molinaro for an explanation prior to suspending him. Molinaro was instructed to call in on the third day to find out his status.

Molinaro recalls being summoned by DeBalko just 2 hours into his shift on February 11, to a meeting with DeBalko, Wyss, and Dunlap, and told by DeBalko that he was being written up for making intimidating and malicious statements about Zelenak. He claims he asked DeBalko, "[W]here's my Union representation?" and that DeBalko replied that all of the union guys had already left. Wyss, he contends, remarked, "There is no union." Molinaro stated that his remark about Zelenak being a company spy was protected as a free speech right, and explained that he never actually called Zelenak a company spy but had, instead, stated only that Zelenak might be a company spy. According to Molinaro, DeBalko brought up Downey's claim of seeing Molinaro yelling and screaming as if engaged in a fight. When he asked if Downey had actually seen him fighting, DeBalko answered, "no," at which point Molinaro asked, "Then what's the problem?" (Tr. 301, 303.)

Molinaro was then handed the written warning. He made no mention in his testimony of DeBalko reading the warning aloud to him. In the "Employee Statement" portion of the warning, Molinaro wrote that Zelenak chose to resign because of the heavy workload and the hardship the Company "puts us through." He explained that he did so because Zelenak had, for years, been saying that he was going to leave the plant because he couldn't take the work anymore and not because of any particular employee. Molinaro claims that on reading the notation in the warning stating he was being suspended "prior to discharge," he became convinced that he would not be returning to work and was being fired, and that his belief in this regard was confirmed when he was directed to empty his locker and remove all his belongings. Molinaro did recall DeBalko instructing him to call in on the third day to see if he still had a job.

I credit Molinaro's more detailed account of the suspension meeting over DeBalko's somewhat inconsistent version. DeBalko's claim, for example, that he told Molinaro he was being suspended "until further notice," when the suspension notice itself, which DeBalko claims he read aloud to Molinaro, on its face states that the suspension was for three days only, undermines his account. It is unlikely that DeBalko would tell Molinaro that his suspension was of an indefinite duration, e.g., "until further notice," if, as he contends, he read the contents of the warning to Molinaro. Further, the fact that DeBalko instructed Molinaro to call in on the third day of his suspension to find out "what was going on," also makes it unlikely that he would have told Molinaro that the suspension was "until further notice." Had they been called to testify, either Wyss, Dunlap, or Jisinsky, all of whom were present at the suspension meeting, would have been able to add some clarity to DeBalko's version of events, or disputed Molinaro's account. The Respondent's failure to call any of them as witnesses leads me to believe that if called, they would not have corroborated DeBalko's account.

According to DeBalko, on the third day of Molinaro's suspension, he, Wyss, and Dunlap met and decided to terminate Molinaro. DeBalko admits that he did not adhere to the 3-step progressive disciplinary process required for a "Group II" violation. He explained that he did not do so because the April 8, 2003 warning previously issued to Molinaro made clear that it was a "last chance" warning and that any future similar misconduct by Molinaro would result in his dismissal.[29]

Asked what the reason or reasons were for the decision, DeBalko, as previously discussed, initially stated that it was because Zelenak had complained that Molinaro "was threatening him." He subsequently admitted that Zelenak never actually said he had been threatened by Molinaro, but rather stated only that he "felt threatened" by the latter (Tr. 739). DeBalko added that the April 8, 2003 incident involving Molinaro and Zelenak was also taken into account in deciding to terminate Molinaro DeBalko insisted that it was not the "spy" remarks made by Molinaro at the February 10, meeting, but rather the effect those remarks had on Zelenak, which led to the decision to terminate Molinaro. (Tr. 739–742, 744.) He admits that had Zelenak not complained to him about feeling threatened by Molinaro's remarks, the latter would not have been discharged on the basis of any prior misconduct, including the April 8, 2003 warning. As previously discussed, however, Zelenak flatly denied making any such comment to DeBalko. When he called DeBalko 3 days later, Molinaro was told his services were no longer needed.

As evident from the above description of DeBalko's and Zelenak's testimony, there is a real discrepancy between what each claims was said or occurred during their February 11, meetings. DeBalko's assertion, for example, that he had no intentions of disciplining Molinaro when Zelenak first complained to him on the morning of February 11, is clearly at odds with, and squarely contradicts, Zelenak's claim of being told by

[29] A review of R. Exh. 20, the April 8, 2003 warning referenced by DeBalko, reveals no mention of this being a "last chance" warning. DeBalko explained that the "last chance" notification given to Molinaro is contained in a typewritten report, received into evidence as R. Exh. 21, prepared on the basis of handwritten notes made by Wyss at the meeting at which Molinaro received the April 8, 2003 warning. DeBalko admits that he did not see what Wyss had actually written in his notes, nor was he able to identify when R. Exh. 21 was prepared or who might have prepared it. Wyss, the one individual who could have identified the contents of R. Exh. 21 as reflecting his alleged handwritten notes, did not testify. Further, DeBalko speculated that Molinaro would have received a copy of R. Exh. 21, admitting that he did not know this for a fact. DeBalko nevertheless testified that Molinaro was expressly warned during that meeting that he would be discharged if he engaged in similar conduct in the future. For his part, Molinaro admits receiving the April 8, written warning (GC Exh. 15), but denies being told that this was a "last chance" warning. Rather, he recalls Wyss saying only that if he and Zelenak could not get along, he would have to get rid of both of them. (Tr. 312.) He also denied receiving or seeing a copy of R. Exh. 19, noting that if he had been given a copy by DeBalko or Wyss, his signature would be on the document indicating he received it. I credit Molinaro's account and find, particularly since there is no mention in GC Exh. 15 of it being a "last chance" warning, and since Wyss, who could have established the reliability of R. Exh. 21 as well as DeBalko's own assertion as to what Molinaro may have been told, was not called to corroborate either.

DeBalko at that morning meeting that Molinaro had been fired. Clearly, both accounts cannot be correct, for either DeBalko told Zelenak, when the latter first came to see him, that Molinaro had already been fired, as Zelenak contends, or he did not, as claimed by DeBalko. As between the two, I found Zelenak's account, and his testimony in general, to be more reliable and credible than DeBalko's.

While there are some inconsistencies between Zelenak's trial testimony and statements contained in an affidavit he gave to the Board regarding this matter, they are relatively minor and, in my view, not the result of any intent by Zelenak to be deceitful or to fabricate testimony. Rather, from his testimony at the hearing, I am convinced that Zelenak viewed himself as being caught between the proverbial "rock and a hard place," having on the one hand to testify for the General Counsel in support of the complaint allegations against his Employer, while, on the other, having to provide testimony against fellow union member, Molinaro. Zelenak's dilemma in this regard, I believe, tended to make him anxious and nervous and led to the minor ambiguities in his testimony. Overall, I am satisfied that Zelenak testified in an honest and truthful manner.

DeBalko, on the other hand, was not so convincing. His testimony seemed more calculated and contrived, and simply did not ring true. He was also prone to exaggeration, as when he described the April 8, 2003 incident between Molinaro and Zelenak. His assertion, for example, that Zelenak reported to him that Molinaro had physically assaulted and threatened to kill Zelenak was not corroborated by Zelenak, nor was his further claim that, during his second meeting with Zelenak on February 11, Zelenak expressed fear that his tires would be slashed and his car damaged. I am convinced that DeBalko's comments in this regard were, if not outright lies, gross exaggerations of what Zelenak may have said to him designed to bolster the Respondent's stated reason for discharging him.[30]

Thus, I find that when Zelenak first went to complain to DeBalko on the morning of February 11, about being called a "spy" and a "snitch," DeBalko told Zelenak not to worry because Molinaro had already been fired. I further find, again consistent with Zelenak's credited account, that when he gave DeBalko 2 weeks' notice the second time he went to see him on February 11, Zelenak cited his difficulty in handling his workload as the reason for wanting to leave, and never told DeBalko that he was doing so because he felt threatened by Molinaro. Although Zelenak admitted that his decision to leave was motivated, in part, by Molinaro's "spy" remarks, Zelenak did not mention this to DeBalko.

Zelenak's credited testimony thus makes patently clear that the decision to fire Molinaro was made before Zelenak first lodged his complaint with DeBalko at 8 a.m. on February 11. The decision to terminate Molinaro, therefore, must have been based on something other than the complaint lodged by Zelenak with DeBalko on the morning of February 11, or by anything Zelenak may have said to DeBalko during the second meeting that day. The only incident involving Molinaro immediately preceding Zelenak's February 11, meetings with DeBalko occurred at DeBalko's employee meeting the day before, February 10, during which Molinaro first expressed the view that Zelenak might be a company spy. I am convinced that it was this February 10, behavior by Molinaro which DeBalko found particularly intrusive and unruly, and not any complaints Zelenak may have made to DeBalko the following day, which prompted DeBalko to initiate disciplinary proceedings, e.g., "a suspension prior to discharge," against Molinaro. The entry on the "Employee Warning Report," showing that Molinaro's suspension was based on conduct that purportedly occurred on February 10, supports such a finding.[31] DeBalko's assertion, therefore, that Molinaro was suspended and thereafter fired on the basis of complaints he received from Zelenak on the after-

[30] The Respondent's characterization and/or description on brief of Zelenak's testimony as "candid," "true emotion," and "heartfelt" makes clear that it too views Zelenak as a credible witness. Ironically, the Respondent makes little reference to DeBalko's testimony, and offers no explanation for the discrepancy between Zelenak's claim of being told by DeBalko and Wyss during their February 11 morning meeting that Molinaro had been fired, and DeBalko's version that he simply told Zelenak to ignore Molinaro and, by implication, made no mention of Molinaro having being fired.

[31] There are other discrepancies between what is contained in the "Employee Warning Report" issued to Molinaro, and the testimony of the various witnesses involved in this incident. The report, as noted, states that Zelenak formally complained "that he was intimidated by Molinaro" spreading false and malicious reports to co-workers." According to the report, this alleged incident of intimidation occurred at around "3:00 p.m." on "2/10/04" in the vicinity of where the "time clock" is located (see R. Exh. 22). Molinaro, as noted, admitted having a discussion with employees Gering and Staley on the precise date, time, and place stated in the report during which he expressed to them, and they concurred, his belief that Zelenak was a company spy. Zelenak, however, was not at work on February 10, and could not have witnessed this incident or, for that matter, been the direct recipient of any "intimidating" remarks by Molinaro that day. Zelenak, as noted, was out sick that day and did not return to work until the following day, February 11, 2004. Zelenak, however, made no mention in his testimony of having received any intimidating threats from Molinaro on February 11, or any other day, nor did he mention anything about any incident involving Molinaro occurring on February 10, at 3 p.m., in the vicinity of the timeclock, as set forth in the report. He did not testify, for example, to having been told by either Gering or Staley of the conversation they had with Molinaro. Clearly, Zelenak had no first-hand knowledge of what occurred on February 10 at 3p.m., near the timclock as he was not at work that day. What is not clear, however, is just where the Respondent obtained the information about the alleged February 10 incident which, according to the employee warning report, formed the basis for the suspension that was issued to Molinaro the following day. It would not have come from Zelenak, for he credibly denied having been intimidated or threatened by Molinaro. Nor did DeBalko claim to have spoken with Gering or Staley about what Molinaro said to them regarding Zelenak on February 10. DeBalko, in fact, claimed that it was the alleged complaint made by Zelenak on the afternoon of February 11, about feeling threatened by Molinaro, and the 2-week notice given by Zelenak during that meeting, that led to Molinaro's suspension, not anything that occurred on February 10. His testimony in this regard thus renders suspect the declared reason shown in the report that the suspension resulted from an incident that occurred at 3 p.m., on February 10, near the timeclock. The above-described discrepancies cast doubt on the reliability and veracity of R. Exh. 22, and serve to undermine the explanation proffered therein by the Respondent for suspending Molinaro. I note in this regard that Wyss, who signed and presumably was responsible for authoring R. Exh. 22, did not testify, leaving unresolved the ambiguities contained in the report.

noon of February 11, is found not to be credible. I find instead that the decision to suspend and discharge Molinaro arose from the remarks he made about Zelenak at DeBalko's February 10, meeting.

4. The 2004 union meetings

The record reflects that Local 8567-14 maintains a union hall at One N. Broad St., in West Hazleton, Pennsylvania, where it holds monthly meetings with unit employees, typically on Saturdays or Sundays between 1 and 4 p.m. The union hall is situated diagonally across a bar and restaurant known as "The Bottleneck Bar." Both locations, e.g., the union hall and the bar, are separated by N. Broad St., a busy four-lane street.

Stinsky testified that during a union meeting held on February 1, at the union hall, unit employees who were at the Bottleneck Bar prior to the start of the meeting told him they had seen Wyss at the bar. Stinsky and Conti then went over to the Bottleneck Bar to see if Wyss was still there. On entering the bar, they saw Wyss and his wife sitting at a table next to a window from which the union hall was visible. Wyss, according to Stinsky, was gazing out the window in the direction of the union hall. Stinsky testified that he had seen Wyss at the bar on prior occasions, but never with his wife except on this one occasion. (Tr. 96–97.) He recalls seeing Wyss at the Bottleneck Bar on three to five occasions between February and April, when union meetings were being held, but also saw him on several other occasions when no meetings were being held.

Stinsky recalls that a few days prior to an April 25, union meeting to discuss strike plans, he, along with Conti, employee George Alaishuski, and Wyss were in the plant standing near a welding machine when Conti mentioned something about the upcoming union meeting. Wyss, according to Stinsky, chimed in that he would be at the Bottleneck Bar that day, e.g., the day of the union meeting (Tr. 106). Stinsky attended the April 25 union meeting, and testified that after the meeting ended, he along with Union Treasurer Richard McGettigan, and Union President Ronald Lynn,[32] went across the street to the Bottleneck bar to see if Wyss had shown up. When all three entered the bar, they observed Wyss and Urban sitting at the bar counter. A short while later, Wyss and Urban moved from the counter to a table along a wall near a window that looked out at the front entrance to the union hall across the street.

Conti also testified regarding Wyss' presence at the Bottleneck Bar during union meetings. Like Stinsky, he recalled having a discussion with Stinsky and Alaishuski about the April 25 meeting a few days earlier, and recalls Wyss also being present during that conversation. Conti claims that at one point, Alaishuski asked Wyss if he had ever ridden the "mechanical bull" at the Bottleneck bar, and that Wyss answered he had not, but that he would be at the bar on Sunday, April 25, for the meeting (Tr. 200).[33] According to Conti, he had seen Wyss at the Bottleneck Bar on four occasions between February and April 25, when the Union was holding meetings. He claims that on one of those occasions, Wyss was with his wife, on another occasion he was alone, and on the remaining two occasions, he was accompanied by supervisor Urban. Conti contends that after the April 25 union meeting ended, he went over to the Bottleneck bar and saw Wyss and Urban sitting at a table along the wall next to a window that looked out towards the entrance to the union hall. Both were seated at the same location they had been in during their prior visits to the bar. Conti testified that he frequents the Bottleneck Bar twice a month, and believes that Wyss does not regularly visit the bar because when he asked the bartender if Wyss went there often, the bartender answered that Wyss did not visit the bar much. (Tr. 208–209.) Conti explained that his query to the bartender was intended to find out if Wyss was spying on employees and the union meeting, and that he concluded, from the bartender's response, that Wyss was indeed spying on them.

McGettigan and Lynn also testified to attending the April 25 union meeting and to seeing Wyss and Urban at the Bottleneck Bar that day. McGettigan testified that he was asked by Pozza to attend the meeting because the subject matter to be discussed involved a strike. At some point during or after the meeting, Pozza asked him to go over to the Bottleneck Bar to see if Wyss and Urban were there. As he, Lynn, and Stinsky were crossing the street heading towards the bar, Wyss and Urban were pulling up. Stinsky then pointed out who Wyss was as McGettigan had never before seen Wyss or Urban. When he entered the bar, McGettigan observed Wyss and Urban sitting at the table near the window from where the union hall could be seen. He recalls seeing both drinking beer, and Wyss writing something on a piece of paper. McGettigan further recalls buying Wyss and Urban a beer and asking the bartender to tell Wyss it was from the Steel Workers. A short while later, as McGettigan got up to go to the men's room, Wyss, he contends, approached him and asked for his name and who he worked for. McGettigan responded that it was none of Wyss' business, and that if he wanted to find out who McGettigan was, Wyss had ways of finding out. He does recall telling Wyss that he was there to support his "brothers at Ivy Steel." At one point during that brief encounter, McGettigan claims he told Wyss that he found it ironic that "on this particular Sunday, at this time, he just happened to be sitting at this bar." McGettigan could not recall anymore of this conversation.

Like McGettigan, Lynn testified that Pozza and Stinsky asked him, either during or at the end of the union meeting, to go over to the Bottleneck Bar to see if Wyss and another individual were there. When he got there, Stinsky, who apparently accompanied Lynn to the bar, identified Urban to him. Prior thereto, Lynn had no knowledge of who Urban or Wyss were. Lynn claims that Urban was seated at the bar having a beer, and was joined shortly thereafter by Wyss, who was identified to him by Stinsky. A short while later, he observed Wyss and Urban leave the bar counter and take seats at the table near the window that looked out towards the union hall. Like McGetti-

[32] McGettigan and Lynn are not employees of the Respondent.

[33] Conti's version of what Wyss said during this discussion differs slightly from Stinsky's account. Their accounts, however, are mutually corroborative to the extent they confirm that Wyss expressed his intent to be at the Bottleneck Bar on the day the Union was to hold its meeting with employees. Nevertheless, I accept Conti's more detailed account of what was said by Wyss that day, to wit, that he did not go to the Bottleneck Bar to ride the "mechanical bull," but "would be at the bar on Sunday [April 25, 2004] for the meeting," as accurate.

gan, Lynn recalls seeing Wyss writing something down on a piece of paper. He also recalls seeing McGettigan buy Wyss and Urban a beer, and observed Wyss having a conversation with McGettigan as the latter was heading towards the men's room. He did not, however, hear the exchange that occurred between them.

B. Discussion and analysis

1. The allegation involving Hinkle's pay

The complaint alleges, and the General Counsel contends, that the reduction in Hinkle's wage rate in September, from $12.35/hour to $11.15/hour, was done unilaterally by the Respondent without giving the Union prior notice and an opportunity to bargain over the change in Hinkle's pay.[34] The Respondent admits that Hinkle's pay was cut sometime in August, but contends that the reduction was made at the Union's behest and pursuant to an agreement reached with the Union during the negotiations. I find merit in the allegation.

First, I find no merit in the Respondent's contention that the Union asked it to reduce Hinkle's pay during the negotiations. While Hoffpauir and Messina testified that such a request was made on more than one occasion by the Union, and Pozza in particular, during negotiations, said testimony was disputed by Pozza, Fiore, Conti, and Stinsky, all of whom denied that any such request was ever made. Dopson likewise testified that no such request was made by the Union at the August meetings he attended. I reject Hoffpauir's and Messina's testimony in this regard as not credible. Their testimony regarding this matter was neither consistent nor supported by the Respondent's or the Union's bargaining notes received into evidence.

Hoffpauir's claim, for example, that Pozza expressly asked to have Hinkle's pay reduced, does not square with, and seems to run counter to, Messina's claim that Pozza never actually verbalized his request for Hinkle's pay to be reduced, but rather hinted at it by repeatedly insisting that Hinkle was being favored by the Respondent. Messina somehow inferred, unreasonably in my view, from Pozza's alleged remarks about Hinkle, that the former was actually seeking a reduction in Hinkle's pay. Clearly, if, as claimed by Hoffpauir, Pozza had willingly answered "yes" to Hoffpauir's query of whether the Union wanted Hinkle's pay reduced, I find it highly unlikely that Pozza would have turned shy and been unwilling to respond in like fashion to the identical question allegedly posed to him by Messina. Rather, I find it more likely than not that, as reluctantly testified to by Messina, no such verbal request was ever made by Pozza either to Messina or to Hoffpauir, and that Hoffpauir was not being truthful in asserting that Pozza expressly told him to reduce Hinkle's pay.[35] Nor am I convinced that Pozza implicitly conveyed that message to Messina by purportedly responding to the latter's query that Hinkle was receiving favored treatment. Thus, even if I were to believe, and I do not, that Messina asked Pozza point blank if he wanted Hinkle's pay reduced, Messina had no reasonable basis for assuming or concluding, solely on the basis of Pozza's alleged response that Hinkle was receiving favorable treatment, that Pozza was somehow demanding that Hinkle's pay be reduced.

In sum, Hoffpauir's and Messina's claim that the Union repeatedly asked for a reduction in Hinkle's pay during negotiations is found not to be credible. I note in this regard, and both Hoffpauir and Messina conceded, that none of the parties' bargaining notes makes reference to any such request by the Union, or to the alleged agreement to reduce Hinkle's pay that Hoffpauir claims was entered into by the parties during said negotiations. I am convinced that had such an agreement been entered into, a seasoned labor attorney like Messina, with more than 30 years' experience, would have made sure that that agreement would be reflected somewhere in the bargaining notes, or memorialized in some other form or fashion. The absence of any mention or reference in the bargaining notes to such an agreement, and the Respondent's failure to produce, other than Hoffpauir's rejected testimony, some credible documentary or other evidence establishing the existence of an agreement, leads me to conclude that no such agreement to reduce Hinkle's wage rate was ever entered into between the Respondent and Union during their negotiations.

Nor is there any indication in the record, other than Hoffpauir's and Messina's discredited assertions that the Union sought and agreed to Hinkle's reduction in pay, that the Re-

[34] The Respondent does not deny that it is a successor employer, or that it had a duty to bargain with the Union over the reduction in Hinkle's pay.

[35] Hoffpauir was generally not a very credible witness both from a demeanor standpoint and from inconsistencies in his testimony. For example, in support of his rejected claim that Pozza asked to have Hinkle's pay reduced, Hoffpauir, as noted, testified to having had a 1-1/2-hour long discussion with Pozza sometime in August on the Hinkle matter, but changed his story when confronted with the fact that Pozza had not attended any of the August bargaining sessions. Pozza credibly, in my view, denied Hoffpauir's claim in this regard. Further, I note that Messina, the Respondent's principal negotiator, made no mention in his testimony of having witnessed a discussion of that duration between Hoffpauir and Pozza at any bargaining session. Nor was Hoffpauir consistent in explaining how he allegedly provided a copy of R. Exh. 26 to the Union, asserting, rather assuredly at first, that it was handed to the Union at an August 10 bargaining session, as reflected in a handwritten notation found on R. Exh. 26, but subsequently claiming, after being told that the parties did not meet on August 10, that it might have been mailed to the Union instead. Hoffpauir's further claim, that he and the other members of his bargaining team were somewhat clueless at first about what the Union was allegedly claiming regarding Hinkle, and that it was not until several months after the start of the negotiations that they purportedly figured out what the Union was allegedly asserting, again makes little sense and came across as another of his fabrications. Again, I note that Messina made no such claim in his testimony. His poor demeanor on the witness stand, coupled with the inconsistencies in his testimony, leads me to conclude that Hoffpauir did not testify in an honest and truthful manner, but rather tailored his testimony to fit the Respondent's desired outcome. His testimony on the question of why Hinkle's pay was reduced is therefore rejected as not credible.

Messina was equaling uninspiring as a witness. He seemed at times unable or, as I am more inclined to believe, unwilling to give an honest and straightforward answer to some rather simple questions posed to him on cross-examination by the General Counsel, despite experiencing no similar difficulties, and seeming more self-assured, when questioned on direct by Respondent's counsel. Thus, I give little or no weight to Messina's testimony on the question of what may have transpired at the negotiations regarding Hinkle.

spondent's decision to reduce Hinkle's pay was ever discussed, much less bargained over, with the Union during negotiations. There is, to be sure, some evidence to suggest that the issue of employee wages may have been the subject of some discussion by the parties during bargaining. The focus of such wage discussions, however, appeared to center on whether or not to grant an increase to employees who were at the top of their wage range, as allegedly proposed by the Respondent, or to grant an across-the-board wage increase to all unit employees, as allegedly sought by the Union. Although the Respondent on brief asserts that Hinkle's wage reduction was raised by the Union and discussed by the parties in context with their discussion of the above wage proposals, there is simply no credible evidence to support that assertion.

The bargaining notes do show certain comments being made at the February 25 and July 10 bargaining sessions about Hinkle being overpaid or making more money than Fiore. Thus, Respondent's Exhibit 11, the Respondent's February 25 notes, contains a comment about Hinkle being paid more than Fiore, but does not identify the source of the comment. However, Respondent's Exhibit 9, the Respondent's July 10 notes, and General Counsel's Exhibit 47 (at p. 13), the Union's own notes of that day, show the Respondent bringing up the subject of Hinkle being "over range" or "paid above his rate." Both the Respondent's and the Union's July 10 notes thus make clear that it was the Respondent, and not the Union as claimed by Hoffpauir and Messina, which first broached the subject of Hinkle's pay.

The references in the July 10 and February 25 bargaining notes, are sketchy at best and, other than showing that Hinkle may have been overpaid, offer no insight or clue as to what, if anything, may have been said or discussed by the parties on the issue of Hinkle's pay at those two bargaining sessions. In and of themselves, the references to Hinkle's wage in the above notes do not establish that the parties exchanged proposals of any kind on the Hinkle matter, or held in-depth discussions or bargained over what, if anything, should be done about Hinkle's wages. Nor do I find anything in the February 25 and July 10 notes, or in any of the parties' other bargaining notes, to suggest that the subject of reducing Hinkle's wage rate was raised and discussed by the parties in conjunction with, and as part of, the discussions they purportedly had on their respective proposal to increase employee wages.

To summarize, the Respondent's claim that it lowered Hinkle's wage rate at the Union's request, and after negotiating with and entering into agreement with the Union over the matter, lacks evidentiary support and is, therefore, found to be without merit. I find it more likely than not, particularly in light of the Union's and the Respondent's own July 10 bargaining notes, that it was the Respondent, not the Union, who first brought up the subject during negotiations of Hinkle being overpaid. I further find that on or about September 1, the Respondent unilaterally reduced Hinkle's wage rate without giving the Union prior notice or an opportunity to bargain over said decision. The few bargaining notes which show the Respondent complaining about Hinkle being above his wage range or overpaid do not show the Respondent expressing to the Union its intent to lower Hinkle's wage rate to conform to the rate he purportedly should have been receiving as a material handler, or any discussions being held between the parties regarding the Respondent's representation that Hinkle was overpaid. The credible evidence of record, including Stinsky's undisputed account as to what Wyss told him, leads me to believe that the real motivation for the reduction in Hinkle's wage rate stemmed either from the Respondent's desire to bring Hinkle's pay down to that called for in the wage range for his position, or because Hinkle, according to Wyss, was not performing up to expectations. In either case, that decision was not prompted by any request from the Union, nor was it the product of any negotiations or agreement by the parties.

The subject of Hinkle's wages is a term and condition of employment that has long been recognized as a mandatory subject of bargaining.[36] Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject, *NLRB v. Katz*, 369 U.S. 736 (1962), and an employer violates its duty to bargain if, when negotiations are in progress, it unilaterally institutes changes in existing terms and conditions of employment. *Northwest Graphics, Inc.*, 343 NLRB 84 (2004). This is precisely what occurred here with Hinkle's wage cut. While there was some brief mention made by the Respondent during one or two bargaining sessions about Hinkle's pay exceeding the maximum allowable rate for his position, no proposal to reduce Hinkle's pay was ever presented by either party during said negotiations, nor did any bargaining ever take place on whether to reduce Hinkle's pay. Rather, the decision to reduce Hinkle's pay was undertaken unilaterally by the Respondent. Further, this unilateral change was, in my view, "material, substantial, and significant" in that this more than 9-percent reduction in pay meant that Hinkle was receiving $48 less a week. *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). The fact that the unilateral change in Hinkle's wage rate may have affected only one unit employee, and not other members of the bargaining unit, does render the change inconsequential or insubstantial. See, *Kentucky Fried Chicken*, 341 NLRB 69 (2004). Accordingly, I find, as alleged in the complaint, that the Respondent's unilateral change in Hinkle's pay, without giving the Union prior notice and an opportunity to bargain, violated of Section 8(a)(5) and (1) of the Act.

2. The allegations involving Molinaro

a. His suspension and discharge

The complaint alleges, the General Counsel contends, and the Respondent denies that Molinaro was unlawfully discharged for his Union or other protected activity. The analytical framework for determining employer motivation in a case alleging a discriminatory discharge was established by the Board in *Wright Line*, 251 NLRB 1018 (1980), enfd. 662 F.2d

[36] Sec. 8(d) requires collective bargaining over "wages, hours, and other terms and conditions of employment." Mandatory subjects of bargaining are those encompassed within 8(d)'s phrase, "wages, hours, and other terms and conditions of employment." *RCA Corp.*, 296 NLRB 1175, 1176 (1989); also *Columbia University*, 298 NLRB 941 (1990) ("wages are undeniably a mandatory subject of bargaining").

899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright line*, the General Counsel, as part of her burden of proof, must first make a prima facie showing that the discharge or other action taken against an employee was motivated by antiunion considerations. To make out a prima facie case, the General Counsel must show that the employee, Molinaro in this case, had engaged in union or other protected activity prior to his discharge, that Respondent knew or was aware of his activities, and that it harbored antiunion animus. If the General Counsel succeeds in meeting this initial burden, the burden shifts to the Respondent to demonstrate that it would have discharged Molinaro even in the absence of union activity. The General Counsel, I find, has made a prima facie showing that Molinaro was discharged for his union or protected activities.

As found above, it was the remarks made by Molinaro at DeBalko's February 10 meeting about Zelenak being a company spy, not anything Zelenak may have said to DeBalko the following day, that led to Molinaro's 3-day suspension and subsequent discharge. Remarks similar to those made here by Molinaro about Zelenak being a company spy have been found by the Board to be protected under the Act. See *Somerset Shirt & Pajama Co.*, 232 NLRB 1103, 1109 (1977); also *Hertz Corp.*, 316 NLRB 672, 692 (1995); *Bakersfield Memorial Hospital*, 305 NLRB 741, 746 (1991). As pointed out by the judge and affirmed by the Board in *Bakersfield Memorial*, supra at 746, the right of one employee to warn other employees of spies or informers in their ranks is protected by Section 7 of the Act. Thus, statements of an employee to others based on a good-faith belief that another is an informer constitutes protected activity.

Contrary to the Respondent's assertion on brief, Molinaro's February 10 remark about Zelenak being a spy was neither malicious nor, in my view, made in bad faith. DeBalko himself, as noted, testified that he viewed Molinaro's remark as a mere statement of opinion and not a threat. Molinaro, I find, honestly believed, from his perception of Zelenak's relationship with certain of Respondent's managers, and his belief that Zelenak did not regularly attend union meetings but did attend the one held on February 8, to discuss strike matters, that Zelenak might be a company spy and not to be trusted. Molinaro, it should be noted, was not alone in his belief, for fellow employees Gering and Staley apparently shared the same view. As Molinaro pointed out in his testimony, during his conversation with Gering and Staley just before DeBalko held his February 10 meeting, both expressed the view that Zelenak might be a company spy. Molinaro's testimony in this regard was uncontradicted and found to be credible. Whether true or not, Molinaro's suspicion about Zelenak being a company informer was reaffirmed by Gering and Staley just before Molinaro made known his own views about Zelenak being a spy at the February 10 meeting. Consequently, when Molinaro made his remark, he honestly, but in all likelihood, mistakenly believed that Zelenak was a company informer. The Respondent's suggestion on the other hand, that Molinaro's comment about Zelenak was motivated by ill-will or for the purpose of harming Zelenak, is devoid of evidentiary support and without merit. Accordingly, I find that Molinaro's remark during the February 10 meeting about Zelenak being a spy was protected under Section 7 of the Act. As the remark was made in the presence of DeBalko, and as the suspension and discharge occurred in direct response to the exercise by Molinaro of his Section 7 right, it follows that the General Counsel has satisfied the knowledge and animus elements of her prima facie case and has met her *Wright Line* initial burden of proof.[37]

The Respondent contends that Molinaro was lawfully discharged not for what he said at DeBalko's February 10 meeting about Zelenak being a company spy, but rather because of the effect it had on Zelenak, e.g., causing Zelenak to be fearful of Molinaro and to tender his resignation, conduct which it further contends amounted to a group II major violation. The Respondent's argument in this regard is flawed in several respects. First, Zelenak, as found above, never told DeBalko that he was resigning because he felt threatened by Molinaro or because Molinaro had called him a spy. Although I believe, as testified by Zelenak, that Molinaro's "spy" remarks were taken into account by Zelenak when making his decision to resign, Zelenak never made that fact known to DeBalko during either of their two February 11 meetings. Rather, according to Zelenak's credited testimony, he simply told DeBalko that he was leaving because he could no longer handle the workload and simply had had enough. The Respondent's assertion, therefore, that it took the action it did against Molinaro because Zelenak had told him he had become fearful of Molinaro as a result of the latter's spy remarks and could no longer work with him, lacks credible evidentiary support.

Indeed, as further found, the decision to discharge Molinaro was made even before the Respondent learned from Zelenak that the latter had been called a "spy" and a "snitch" by employees. Thus, according to Zelenak's credited account, when he first complained to DeBalko on the morning of February 11, about being called a "spy" and "snitch" by employees, and of the fact that Molinaro was apparently responsible for the remarks being made, DeBalko told him not to worry because Molinaro had already been fired. DeBalko's statement to Zelenak about Molinaro having been fired is consistent with, and appeared to corroborate, what Zelenak credibly testified other employees had told him before he first went to see DeBalko. Thus, not only is there no credible evidence of Zelenak telling DeBalko that he feared, and was consequently quitting because of, Molinaro, even if such statements had been made by Zelenak to DeBalko, they could not have played any role in the decision to suspend and terminate Molinaro since said decisions had already been made before Zelenak first complained to DeBalko on the morning of February 11.

In sum, I find no credible evidence to support, and consequently reject as without merit, the Respondent's defense that Molinaro was suspended and discharged because Zelenak may have felt threatened by, and submitted his resignation due to, the remarks Molinaro made about him being a company spy. Rather, Molinaro, as previously discussed and found, was discharged solely for referring to Zelenak as a company spy at

[37] Molinaro's unrefuted and credited testimony about the prounion remarks he made to Wyss and DeBalko during the week of February 6, 2004, further serves to establish knowledge by management of Molinaro's prounion sympathies.

DeBalko's February 10 employee meeting. Nor, in any event, would the stress caused to Zelenak by Molinaro's remark have justified disciplining Molinaro for engaging in Section 7 protected activity. Thus, in both *Hertz Corp.* and *Bakersfield Memorial Hospital*, supra, the Board found that the discipline imposed on employees who accused others of being a spy to be unlawful notwithstanding that the recipients of such accusations, like Zelenak here, became so upset as to cause one to leave work early, cry on the way home, and complain that other employees would not want to work with her, see *Hertz*, supra at 680, and to have adversely affected the job performance of the other, see *Bakersfield Memorial*, supra at 743. As previously discussed, Molinaro's expressed belief that Zelenak might be a company spy was made in good faith, and not for the purpose of denigrating Zelenak or otherwise causing him harm. As such, Molinaro's remarks about Zelenak being a company spy were clearly protected. The Respondent's decision to suspend and discharge Molinaro for engaging in such conduct thus violated Section 8(a)(3) and (1) of the Act. I further agree with the General Counsel that by disciplining Molinaro, pursuant to the provision in item 6 of the group II major violations in the employee handbook prohibiting the coercion or intimidation of fellow employees, for his protected activity of calling Zelenak a spy, the Respondent independently violated Section 8(a)(1) of the Act.[38]

b. The alleged Weingarten violation [39]

As previously pointed out, at the hearing the General Counsel moved to amend the complaint to include an allegation that the Respondent's failure to comply with Molinaro's request for union representation during the February 11 suspension meeting amounted to a violation of his *Weingarten* rights and violated Section 8(a)(1). The motion to amend was granted over the Respondent's objection. The Respondent, on brief, renews its objection to the amendment on grounds that the allegation is time barred under Section 10(b) of the Act.[40] On further reflection, I find that the amendment to the complaint was improperly granted and that the allegation is indeed time barred.

Section 10(b) precludes the Board from considering allegations of unlawful conduct occurring more than 6 months prior to the filing of a charge. The Board, however, will consider such untimely allegations if it finds the alleged unlawful conduct in question to be "closely related" to allegations contained in a timely-filed charge. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988). In applying the "closely-related" test, the Board looks at whether (1) the otherwise untimely allegation involves the same legal theory as the allegations in the timely filed charge;[41] (2) the allegations arise from the same factual circumstances or sequence of events; and (3) a respondent would raise similar defenses to both allegations. Id.

The General Counsel contends, and the Respondent denies, that the "closely-related" test has been met here. I agree with the Respondent. First, the legal theories underlying both the timely filed 8(a)(3) unlawful suspension/discharge allegation of Molinaro, and the otherwise untimely 8(a)(1) *Weingarten* allegation, are not the same. Thus, the theory behind the 8(a)(3) allegation is that Molinaro was unlawfully suspended and subsequently discharged for his union or other protected activity. Resolution of this issue requires application of the causation test set forth in *Wright Line*, supra. That test, as noted, calls for a burden-shifting analysis and requires the General Counsel to establish a discriminatory motivation for the action taken by the employer. To establish a *Weingarten* violation, the General Counsel need only show that an employee was subjected to an investigatory interview that he or she reasonably believed could lead to discipline, and that the employee asked for but was denied union representation during that interview. See, e.g., *Consolidated Edison Co. of New York,* 323 NLRB 910, 917 (1997). Unlike in *Wright Line*, supra, the General Counsel is not required to show that an employee was engaged in union or other protected activity prior to demanding his or her *Weingarten* right to have a union representative present during the investigatory interview, or that the employer's refusal to grant the employee's request was motivated by antiunion considerations. It is patently clear, therefore, that the theories underlying both allegations are not the same, and involve very different elements of proof. Consequently, I find that the first prong of the "closely-related" test has not been met here.

[38] Although DeBalko, on direct examination by Respondent's counsel, testified that Molinaro's conduct was also viewed as violating rule 10 ("engage in malicious mischief, horseplay, or fighting endangering the safety of others") of the "Group III Intolerable Violations," on cross-examination he testified that this particular provision was not used to support the suspension and termination decision. (Tr. 743;787.) While somewhat ambiguous, his testimony in this regard is bolstered by the fact that the "Employee Warning Report" issued to Molinaro on February 11, in conjunction with his suspension makes no mention of this provision. (See R. Exh. 22.) Thus, I do not agree with the General Counsel's assertion on brief that the Respondent unlawfully relied on item 10 of the "Group III Intolerable Violations" to suspend Molinaro.

[39] See *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, the Court held that an employee has a Sec. 7 right to request representation as a condition to participating in an investigatory interview which the employee reasonably believes will result in disciplinary action. In *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979), the Board held that the *Weingarten* right to representation does not apply when the purpose of the interview is merely to inform an employee of a previously-made disciplinary decision. However, when an employer "informs the employee of a disciplinary action and then seeks facts or evidence in support of that action . . . . the employee's right to union representation" may apply. Id., also *PPG Industries*, 251 NLRB 1146 fn. 2 (1980).

[40] Sec. 10(b) of the Act bars the Board from proceeding to complaint on a charge filed and served more than 6 months after an alleged unfair labor practice. Here, the alleged violation of Molinaro's *Weingarten* rights occurred on February 11, 2004, the same day he was given his suspension. The charge alleging the suspension to be unlawful was timely filed on March 1, 2004, and made no mention of or reference to an alleged unlawful denial of Molinaro's *Weingarten* rights. The alleged *Weingarten* violation was raised for the first time by the General Counsel at the hearing in late September 2004, more than 6 months after the *Weingarten* violation allegedly occurred.

[41] The Board has made clear that it is not necessary for the same section of the Act to be invoked to satisfy this first prong of the "closely-related" test. *Nickles Bakery of Indiana*, supra at 928 fn. 5.

Nor would the defense raised by Respondent to the *Weingarten* allegation be the same as or similar to the allegation that it unlawfully suspended and discharged Molinaro for his union or protected activity. Thus, in defending against the *Weingarten* allegation, the Respondent would have to show either that the February 11 suspension meeting was a disciplinary, not an investigatory, meeting called for the sole purpose of notifying Molinaro of its decision, or that Molinaro, in fact, never asked for union representation at that meeting. On the other hand, to defend against the 8(a)(3) suspension/discharge allegation, the Respondent would have to show that Molinaro did not engage in any union or other protected activity or, if he had, that Molinaro would have been suspended and discharged even if he had not engaged in any such activity. It is patently clear, therefore, that the Respondent's defense to the timely filed 8(a)(3) charge, alleging Molinaro's suspension and discharge to be unlawful, has no bearing on, and is wholly irrelevant to, the question of whether Molinaro's *Weingarten* rights were violated, and vice-versa.

In sum, I find that the untimely 8(a)(1) *Weingarten* allegation is not "closely-related" to the 8(a)(3) allegation involving Molinaro's suspension and discharge, and, as such, cannot be considered under Section 10(b). Accordingly, the grant of the General Counsel's motion at the hearing to amend the complaint to include the *Weingarten* allegation was improper. The motion to amend the complaint in this regard is therefore denied.[42]

3. The 8(a)(1) allegations

a. The rule requiring prior approval for solicitation

The complaint alleges, and the General Counsel contends, that the language on page 17 the Respondent's employee handbook, set forth as rule 5 in the group II major violations (GC Exh. 10, p. 17), prohibiting employees from soliciting for any purpose within the plant without its permission, is facially unlawful and violates Section 8(a)(1) of the Act. The Respondent argues that its actual policy regarding employee solicitation and distribution is set forth in the "Solicitation and Distribution Policy" found on page 19 of the handbook, not the language listed as item 5 under group II violations, and that said "Solicitation and Distribution Policy" is, on its face, lawful. As to the language in item 5 of the group II violations requiring that employees obtain permission before soliciting, the Respondent argues that that language serves as nothing more than a notification to employees of the consequence for violating the "Solicitation and Distribution Policy" found on page 19 of the handbook. Alternatively, it argues that the allegation, that its "Solicitation and Distribution Policy" is facially unlawful, is timebarred under Section 10(b).

Regarding the 10(b) defense, it should be noted that the General Counsel, contrary to the Respondent's assertion, is not challenging the validity of the "Solicitation and Distribution Policy" found on page 19 of the employee handbook. Rather, the focus of the General Counsel's attention, and what has been alleged as unlawful, is the language in rule 5 of the group II violations, which prohibits employees from soliciting anywhere in the Respondent's plant without its prior approval. Consequently, I need not pass on the validity of the Respondent's "Solicitation and Distribution Policy," or on the question of whether Section 10(b) precludes consideration of such an allegation. However, the mere maintenance of a facially invalid no-solicitation rule during the 10(b) period violates the Act even if the rule was promulgated outside the 6-month limitations period and has not been enforced. *MEMC Electronic Materials,* 342 NLRB 1170, 1193 (2004); *Eagle-Picher Industries, Inc.,* 331 NLRB 169, 186 (2000); *Alaska Pulp Corp.*, 300 NLRB 232, 233 (1990).[43] The Board in this regard has pointed out that "the mere existence of a broad no-solicitation rule may chill the exercise of employees'Section 7 rights." *Alaska Pulp Corp.*, 300 NLRB at 233.

As to the requirement in rule 5, group II violations, that employees must obtain permission from the Respondent before engaging in solicitation anywhere in the plant, that provision is clearly unlawful. It is well settled that, absent special circumstances, employees have a statutory right to engage in solicitations in both work and nonworking areas during their nonworking time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); also *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Federated Logistics & Operations*, 340 NLRB 255 (2003). Nor are employees required to obtain their employer's permission to engage in such protected activity. A rule imposing such a requirement as a precondition to engaging in such activity is unlawful. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000). On its face, the language in rule 5 requires that employees seek prior approval from the Respondent for all solicitation occurring within the plant, including that undertaken by employees on their own free time. The Respondent does not contend that the requirement in rule 5 is not subject to

[42] Even if the *Weingarten* allegation were found to have been timely filed under the "closely-related" test, I would nevertheless recommend dismissal of the allegation, as the February 11 suspension meeting was not, in my view, an investigatory one but rather convened for the sole purpose of notifying Molinaro of his 3-day suspension. Assuming, arguendo, that the Respondent had not yet made a decision on whether to keep or terminate Molinaro when it issued him the 3-day suspension, an argument which, as found above, I reject as contrary to the weight of the evidence, it is nevertheless clear that a final decision to *suspend* Molinaro was made prior to the February 11 meeting. Other than a brief exchange regarding what Downey had observed, I find nothing in Molinaro's credited version of the February 11 meeting to suggest that Molinaro was questioned about the conduct which led to the suspension, or that the DeBalko or anyone else at the meeting tried to elicit information from Molinaro. While I am convinced that Molinaro asked for union representation at the February 11 meeting, that fact alone can hardly serve to transform the February 11 meeting into an investigatory interview triggering *Weingarten* rights.

[43] The Board's recent decision in *Delta Brands, Inc.*, 344 NLRB 252 (2005), is neither applicable nor controlling here, for that case involved the question of whether the mere maintenance of a facially invalid no-solicitation rule in an employer's policy manual constituted, without more, objectionable conduct sufficient to warrant setting aside a Board-conducted election. Unlike in *Delta Brands*, supra, the issue here is whether the maintenance of a rule requiring employees to obtain permission from the Respondent before engaging in any solicitation in the plant violates the Act. Thus, the question of whether the mere maintenance of such a rule violates the Act was not before, nor addressed by, the Board in *Delta Brands*, supra.

being enforced. But even if the Respondent had no intentions of enforcing rule 5, rule against employees who wish to engage in solicitation deemed protected by the Act, there is no evidence that employees were ever told or made aware of that fact, or that they were given assurances that prior approval was not required for employees to solicit on their own free time. The "prior approval" requirement of rule 5 of the group II violations is therefore overly broad and unlawful under Section 8(a)(1) of the Act.

b. The surveillance allegations

The General Counsel contends, and I agree, that the Respondent, on April 25, engaged in, or at a minimum created the impression that it was engaging in, the unlawful surveillance of its employees' union activities when Wyss and Urban appeared and remained at the Bottleneck Bar while the Union conducted a strike meeting with Respondent's employees at its hall across the street. The test for determining if an employer has created an impression of surveillance is whether the employees could reasonably assume from statements made or, in my view, from certain employer conduct, that their union activities were being kept under surveillance. See *Grouse Mountain Lodge*, 333 NLRB 1322 (2001), and cases cited therein.

The undisputed and credited testimony by Stinsky, Conti, McGettigan, and Lynn makes patently clear that Wyss and Urban were at the Bottleneck Bar on April 25, at the same time that the Union was holding its meeting with Respondent's employees across the street from the Bottleneck Bar at its union hall. Wyss' appearance and presence at the Bottleneck Bar on this particular date and time was no mere coincidence, for Wyss had, just a few days earlier, told Stinsky and Conti, while they were discussing the upcoming union meeting, that he would be at the bar on April 25. More importantly, Wyss made clear to them, in response to Conti's query on whether Wyss ever rode the "mechanical bull" at the bar, that his reason for going to the bar was not to ride the bull but because of the union meeting that was to be held. Thus, when Stinsky and Conti, after the April 25, union meeting ended, encountered Wyss and Urban at the Bottleneck Bar on April 25, seated near a window from where the comings and goings of employees attending the union meeting across the street were easily observable, they could reasonably have concluded, particularly in light of what Wyss told them would be his reason for going to the bar that day, that Wyss and Urban had been keeping watch, and were there solely to observe, which employees attended the union meeting. Accordingly, I find, as alleged in the complaint and as argued by the General Counsel, that on April 25, the Respondent, through Wyss and Urban, engaged in, and/or created the impression it was engaging in, the unlawful surveillance of its employees' union activities, in violation of Section 8(a)(1) of the Act. I also agree with the General Counsel that by telling Stinsky and Conti, a few days before the April 25 meeting, that he would be at the Bottleneck Bar for the meeting, Wyss conveyed the impression that his purpose in going to the bar was to keep the employees' union activities under surveillance. His comment in this regard amounted to an unlawful threat of surveillance and violated Section 8(a)(1) of the Act.[44]

CONCLUSIONS OF LAW

1. The 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 maintaining a rule in its employee handbook requiring employees to get its permission before engaging in lawful solicitation, the Respondent violated Section 8(a)(1) of the Act.

4. By suspending and thereafter discharging employee Mauro Molinaro for engaging in protected activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By unilaterally reducing the wage rate of employee Timothy Hinkle without giving the Union prior notice and an opportunity to bargain, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The above-described violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found herein, the Respondent has not engaged in any other unfair labor practices.

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 shall be required to rescind and not give effect to rule 5 of the "Group II Major Violations" in the employee handbook which prohibits employees from engaging in lawful solicitation in the plant without prior authorization from the Respondent.

To remedy its unlawful unilateral change in Hinkle's wage rate, the Respondent shall be required, if so requested by the Union, to rescind the change made to Hinkle's wage rate. It shall also be ordered to make Hinkle whole for the loss in wages and other benefits he may have sustained due to the unilateral reduction in his wage rate, in accordance with *Isis Plumbing Co.*, 138 NLRB 716 (1962), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As to its unlawful discharge of Molinaro, the Respondent shall be required to, within 14 days from the date of the Order, offer him full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed. Further, the Respondent shall be required to make Molinaro whole for any loss of earnings and other benefits he may have suffered resulting from his unlawful 3-day suspension and discharge in the manner prescribed in *Isis Plumbing Co.* supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

[44] The complaint alleges other instances of surveillance by Wyss on February 1, and on two other unspecified dates. The facts surrounding these other alleged instances of unlawful surveillance by Wyss are too vague and tenuous to support the finding of additional violations.

Finally, the Respondent shall, within 14 days from the date of the Order, remove from its files any and all references to Molinaro's unlawful suspension and discharge, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

[Recommended Order omitted from publication.]