Exxon Mobil Corporation *and* Nick Slusher. Case 13–CA–40976

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The issue presented in this case is whether the Respondent unlawfully terminated chief steward Nick Slusher because of his involvement in protected grievance-related conduct. We find, contrary to the judge and the dissent, that Slusher was not engaged in protected grievance activity. Rather, we find that Slusher was engaged in unprotected harassment of a fellow employee because of that employee's dissident union activities**.** We, therefore, find that the Respondent lawfully terminated Slusher for his unprotected conduct.[1]

It is well established that employees, under Section 7 of the Act, have the protected right to file and process grievances, and the discipline or discharge of employees for doing so is a violation of Section 8(a)(1). See, e.g., *Prime Time Shuttle International*, 314 NLRB 838, 841 (1994); *Thor Power Tool Co.*, 148 NLRB 1379, 1380–1381 (1964), enfd. 351 F.2d 584 (7th Cir. 1965). The Board has long made clear that the grievance activities of union stewards are especially important to the effectiveness of grievance-arbitration machinery. *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976).

The Board also has made clear, however, that the protections afforded to grievance activity do not extend to harassing conduct. "While Section 7 shields employees from potential employer discipline or other adverse action in the exercise of Section 7 rights, it does not permit employees to use grievances as a sword to gain immunity from the consequences of harassment." *Caterpillar Tractor Co.*, 242 NLRB 523, 530 (1979), enfd. 638 F.2d 140 (9th Cir. 1981).

This improper use of the grievance procedure is precisely what happened here. Thus, we find that Slusher is not entitled to the protection accorded to grievance-related conduct, because his filing of a grievance was a poorly disguised attempt to cloak his earlier harassing conduct with protected status.

The record shows that on February 26, 2003,[2] unit member Dan Breneisen filed a decertification petition with the Board. The decertification election was scheduled for April 11.

Before the decertification election, Slusher obtained a court abstract from Lake County, Illinois, showing that Breneisen had been charged with driving-under-the influence (DUI) on September 24, 1995. Slusher admitted that on April 6—5 days before the decertification vote initiated by Breneisen—he gave (or showed) a copy of the court abstract to unit employees Rich Moreno and Roy Machinski and to Supervisors Kevin Lozinak and Jim Heisen, and that he may have inadvertently given it to unit employee Michael Schaeffer. The judge found that Slusher distributed Breneisen's court abstract in support of a grievance regarding the allegedly disparate application of the Respondent's drug and alcohol policy. The record, however, supports a different interpretation

On April 10, Breneisen filed a complaint with Respondent's management that Slusher "has taken personal and confidential records about me and has passed out photocopies to my fellow co-workers." That day, the Respondent notified Slusher that "it had received another complaint of harassment" against him; but to avoid disrupting the decertification election, it would investigate the harassment complaint after the election.

It was not until April 11, just before the unit voted that day in favor of decertification, and representation ceased, that Slusher filed a grievance alleging disparate treatment under Respondent's drug and alcohol policy. We find that Slusher's grievance filing was an attempt to cloak his unprotected harassment of Breneisen for filing a decertification petition. Our reasons follow.[3]

It is undisputed that Slusher learned of Breneisen's DUI-incident as early as February 20, yet took no steps to file a grievance until nearly 2 months later on the date of the decertification election. Thus, the timing of Slusher's discovery of the DUI incident and the distribution of the court abstract, as compared to his subsequent grievance filing, shows that Slusher's object in circulating the DUI record was to harass Breneisen, who he knew was subject to discharge under the Respondent's strict drug and alcohol policy if it was determined by the Respondent that Breneisen had failed to disclose the DUI-incident. The grievance filing itself came only after Slusher was told of the Respondent's investigation of the

[1] On December 24, 2003, Administrative Law Judge Joseph Gontram issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] All dates are in 2003 unless otherwise noted.

[3] In view of our disposition of the case, we find it unnecessary to pass on the Respondent's exceptions to the evidentiary rulings discussed in sec. II,D of the judge's decision.

harassment complaint against him, and as the Union itself was being decertified.

In addition, the April 11 grievance filed by Slusher was a cloak to provide cover for the circulation of the DUI report. Slusher filed it on April 11 on behalf of former unit member Frank Blommaert, alleging the latter's disparate treatment under the Respondent's drug and alcohol policy as compared to Breneisen. Blommaert, however, was terminated on January 10, and the parties' contract required that such a grievance be filed no later than 30 days following the occurrence giving rise to it. Slusher, a veteran steward, was certainly well aware of this 30-day deadline. As the judge found, Slusher filed "more than the average number of grievances" and was "punctilious in enforcing the contract." Slusher's filing of the grievance, at the time he did so, fully substantiates our conclusion that it was an attempt to cloak Slusher's earlier harassment of Breneisen with protected status.[4]

We do not agree with our colleague that our decision "raises serious concerns about the future protection of grievance activity in the workplace." We simply conclude that the circulation of Breneisen's DUI record was in retaliation for his decertification activity, and that the grievance filing was an effort to disguise this fact.

Conclusion

For the reasons set forth above, we find that the Respondent did not violate the Act by suspending and discharging Slusher for harassment.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

The majority reverses the judge's rock-solid findings, based largely on credibility, that chief steward Nick Slusher was engaged in protected grievance activity; that he did not lose the protection of the Act; and therefore the Respondent violated Section 8(a)(1) of the Act by suspending and discharging him for engaging in that protected activity. This unwarranted rejection of the judge's findings raises serious concerns about the future protection of grievance activity in the workplace.

[4] We do not pass on the issue of whether the grievance was time-barred under the contract. Although it appears to be, that issue is to be resolved in the grievance-arbitration machinery. We agree, however, that the timing of the grievance supports the proposition that the grievance was filed to justify the earlier circulation of Breneisen's DUI record, and that such circulation was in reprisal for Breneisen's decertification activity. Thus, we agree that regardless of whether the grievance was untimely, the Respondent lawfully discharged Slusher based on his harassment of Breneisen.

Factual Background

The Respondent's drug and alcohol policy had been a dominating issue for the bargaining unit of fuel tanker drivers. The Union had consistently disputed the implementation of the policy since its inception in 2001, and had even filed unfair labor practice charges over it. Chief steward Nick Slusher had filed several grievances over the policy on behalf of unit employees. Not surprisingly, the Respondent's drug and alcohol policy was one of the paramount issues in the parties' negotiations for a successor contract, because the unit drivers viewed the policy as directly impacting their eligibility to continue driving. The parties' negotiations were ongoing since the expiration of the previous contract on April 30, 2002, and were continuing after the decertification petition was filed by driver Dan Breneisen on February 26, 2003.

At a union meeting on March 12, 2003, discussing inter alia the policy, Breneisen stated in front of approximately one dozen fellow drivers that he "had a DUI [driving-under-the-influence]" in the past. Indeed, he had admitted this to Slusher when asked in February 2003. Slusher spoke to the Union's business representative about filing a grievance alleging disparate application of the policy, because unit driver Frank Blommaert had been suspended in August 2002 for a DUI-incident, while in contrast Breneisen had not been suspended for his DUI-incident. Seeking to document their claim through public records, Slusher obtained on April 5, 2003, a court abstract from Lake County, Illinois, showing that Breneisen had been charged with driving-under–the influence (DUI) on September 24, 1995.

On April 6, Slusher gave a copy of the court abstract to Supervisors Kevin Lozinak and Jim Heisen who would be involved in processing the grievance. In addition, while handing out copies of the Union's bargaining proposals, Slusher gave (or showed) a copy of the court abstract to unit employees Rich Moreno and Roy Machinski, explaining his belief that it supported a disparate application grievance.[1]

On April 11, 2003, Slusher filed the grievance. There is no dispute that Slusher was, as the judge found, an "extremely aggressive" union advocate who filed numerous grievances on behalf of the bargaining unit, and "aggressively enforced the collective-bargaining agreement throughout his tenure" as chief steward until the day it ended when the Union was decertified on April 11, 2003.

[1] Slusher testified that while giving unit employee Michael Schaeffer copies of the Union's bargaining proposals, he may have also given him a copy of the abstract.

Legal Principles

As the majority acknowledges, it is settled law that the filing of grievances unquestionably is protected concerted activity, and union stewards play an integral role in overseeing grievance procedures. See, e.g., *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984). As the Board has summarized:

> It is well settled that filing grievances under a collective-bargaining agreement constitutes protected concerted activity. Union stewards filing and processing grievances on behalf of other employees similarly enjoy the protection of the Act, even if, while doing so, they exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure. [Footnotes and quotation omitted.]

Roadmaster Corp., 288 NLRB 1195, 1197 (1988), enfd. 874 F.2d 448 (7th Cir. 1989). One additional fundamental principle must be underscored: the courts and the Board have long held that grievance-related activity conducted prior to the actual grievance filing is likewise protected concerted activity. This includes, inter alia, investigating whether a grievance should be filed;[2] assisting employees in writing up a grievance;[3] pre-filing handling of complaints;[4] soliciting grievances from fellow employees;[5] and assembling workers to present grievances.[6]

Analysis

The judge's key finding is unassailable under the above principles: steward Slusher's pre-grievance distribution of the court abstract to demonstrate the basis for filing the disparate treatment grievance is protected concerted activity. The judge credited Slusher's testimony that he showed fellow employees the court abstract in support of his belief that a disparate treatment grievance should be filed. The protected status of a steward discussing and advocating the potential filing of a grievance with unit members is incontrovertible. The judge cogently articulated this tenet:

> The bargaining unit members had a right to know if the employer was treating them in a disparate manner [and] to know if such disparate treatment favored antiunion members. These are matters that could have a significant [e]ffect on their union activity and the Union's negotiations for a new collective-bargaining agreement, which were ongoing at the time.

Further, neither the majority nor the Respondent contend that Slusher was unprotected in his distribution of the court abstract to the Respondent's supervisors who would be involved in processing the grievance. As the Supreme Court stated in *NLRB v. City Disposal Systems,* "an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated" may serve as "a natural prelude to . . . the filing of a formal grievance" and is protected to the same extent as the filing of the formal grievance itself. Id. at 836–837. Thereafter, Slusher filed the disparate treatment grievance, which is without dispute protected concerted activity.

The majority's depiction of steward Slusher's protected grievance activity as unprotected harassment of Breneisen is simply unfounded. The majority does not even attempt to show that Breneisen or the Respondent had a confidentiality interest in the court abstract—which as the judge observed is a public record—that constrained Slusher's union activity. Indeed, Breneisen had announced the fact that he had a DUI in a union meeting in front of his fellow drivers. "The fact that Respondent or even [Breneisen] felt that [Slusher] was engaged in 'harassment' . . . does not render the activity unprotected." *New York Telephone Co.*, supra at 582. The Respondent's antiharassment policy does not privilege it to discharge an employee for conduct protected by the Act. See *Consumers Power Co.*, 282 NLRB 130, 132 fn. 15 (1986).[7]

The record fully explains, and the judge specifically addressed, the chronology the majority posits as suspect. Slusher waited to file the grievance until he received confirmation of Breneisen's DUI incident. He did not obtain that confirmation via the court abstract until April 5, and he filed the grievance within 1 week of his receipt

[2] *Consumers Power Co*., 245 NLRB 183, 187 (1979) (steward unlawfully disciplined for using company time to informally investigate a disagreement which had not yet become a formal grievance). See *New York Telephone Co.*, 266 NLRB 580, 582 (1983).

[3] *Caterpillar Tractor Co. v. NLRB*, 638 F.2d 140 (9th Cir 1981), enfg. 242 NLRB 523 (1979).

[4] *May Co.,* 220 NLRB 1096, 1097 (1975), enfd. 555 F.2d 1338 (6th Cir. 1977) (per curiam); *Thor Power Tool Co.*, supra, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965).

[5] *United Parcel Service of Ohio*, 321 NLRB 300, 323 (1996); *Universal City Studios,* 253 NLRB 1013, 1017 (1981).

[6] *Shell Oil Co. v. NLRB*, 561 F.2d 1196 (5th Cir. 1977), enfg. 226 NLRB 1193 (1976).

[7] See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) ("where, as here, the harassment charges directly relate to and implicate the employees' exercise of their Section 7 right . . . the Respondent cannot apply its [antiharassment] policy without reference to Board law"), enfd. 263 F.3d 345 (4th Cir. 2001). Compare *Craig Hospital*, 308 NLRB 158 fn. 1 (1992) (employee involved in grievance procedure lawfully discharged where she affirmatively agreed to keep the proceedings of the grievance committee confidential, she intentionally violated that agreement, and respondent had a legitimate interest in maintaining the confidentiality of its in-house grievance procedure).

of it, and showed the abstract within that same week. As the judge found, "timing points more to a proper, protected purpose than a retaliatory purpose." The fact that Slusher filed the grievance on the date of the decertification election is easily explained; there is no dispute that Slusher was an extremely aggressive steward who would continue representing employees—and filing grievances—until the very minute that representation ceased. And that is what he did.

The judge specifically credited testimony that Slusher's conduct was not in retaliation against Breneisen's filing of the decertification petition. The judge found that Slusher acted to help employee Bloommaert win back his job; to "force the Respondent to honor the contract and treat the employees fairly"; and to "properly pursue a claim of disparate treatment." As the judge explained, the goal here—as in any disparate treatment claim—is to have all employees treated as well as the more favored employee, not to have the favored employee treated as poorly as the grievant. The majority's speculation that Slusher sought to have Breneisen fired is baseless, and ignores that Slusher initiated the entire sequence of events—by asking Breneisen whether he had a DUI—*before* Breneisen had even filed the decertification petition.

Because the Respondent's suspension and discharge here was motivated solely by Slusher's protected grievance activity,[8] the only remaining inquiry is whether Slusher's conduct was so egregious as to take it outside the protection of the Act. *American Steel Erectors*, 339 NLRB No. 152, slip op. at 2 (2003); *Roadmaster Corp.*, 288 NLRB 1195, 1197 (1988), enfd. 874 F.2d 448 (7th Cir. 1989). As explained above and found by the judge, Slusher engaged in neither harassment nor unjustified extreme behavior causing him to lose the protection of the Act.[9]

Conclusion

The Charging Party was clearly engaged in protected grievance-related activity, contrary to the majority's contention. Accordingly, his discharge for engaging in that activity violated Section 8(a)(1) of the Act.

[8] Of course, "the protection of the Act does not depend on the employer's or the Board's appraisal of the merits of the grievance, such as whether the contract disposes of the question raised in the grievance." *Caterpillar Tractor Co.*, supra at 530. Yet the majority suggests that the grievance is unprotected because of its timing relative to the contractual time limits. Whether the grievance here is contractually time barred—a questionable proposition when it was promptly filed upon obtaining confirmation of the disparate application claim—is a question appropriately resolved within the grievance-arbitration process, as my colleagues agree.

[9] The judge found based on credibility that Slusher did not lie during the Respondent's "harassment" investigation. Accordingly, the Respondent's contention that Slusher lost the protection of the Act by lying is meritless.

Charles Muhl, Esq., and *Brigid Barnicle, Esq.,* for the General Counsel.

Gregg T. Schultz, Esq., of Fairfax, Virginia, and *Charles E. Beck, Esq.,* of Houston, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 20–21, 2003. The charge was filed on April 16, 2003, and the complaint was issued June 3, 2003.[1] The complaint alleges that Exxon Mobil Corporation (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by suspending and discharging its employee, Nick Slusher, because he engaged in certain activities, allegedly protected by the Act, as the chief steward for the International Brotherhood of Teamsters, AFL–CIO, Local 705 (the Union).

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of petroleum refining and distribution at various facilities throughout the United States. The Respondent's facilities include fuel transfer terminals in Arlington Heights (Des Plaines) and Lockport, Illinois, where it annually purchases and receives goods and services valued in excess of $50,000 from points located outside the State of Illinois. 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all times material to this proceeding, Nick Slusher, Dan Breneisen, Michael Ostergaard, Frank Blommaert, Dan Wallace, Rich Moreno, and Michael Schaeffer were drivers for the Respondent and were members of the Union and the bargaining unit in this case. Kevin Lozinak is the Respondent's fleet supervisor for the Chicago area, and is Slusher's direct supervisor. Jim Heisen is a fleet foreman and is Lozinak's direct supervisor. Debra Ellis is a human resources advisor for the Respondent.

During the period December 1996 to April 2003, the Union represented the fuel tanker drivers and the product technicians (the bargaining unit) at the Respondent's Des Plaines and Lockport, Illinois facilities (Illinois facilities). Sometime in 2000 or 2001, Exxon Corporation merged with Mobil Corporation.[2] Before the merger, each company had its own drug and

[1] All dates are in 2003 unless otherwise indicated.

[2] The witnesses, including managers, either did not know when the merger occurred, or they were not asked, or they gave conflicting dates.

alcohol policy for its drivers. The Respondent's Illinois facilities had been Mobil facilities before the merger.

The last collective-bargaining agreement between the Respondent and the Union expired on April 30, 2002. Negotiations failed to produce a new agreement. On February 16, 2003, the union members voted against going on strike. On February 26, 2003, Dan Breneisen, a driver and member of the bargaining unit, filed a decertification petition with the Board. On April 11, 2003, the unit members voted to support the decertification petition, and shortly thereafter the Union ceased to represent the drivers and product technicians at the Respondent's Illinois facilities.

B. Drug and Alcohol Policy

In 2001 and after the merger, the Respondent decided to impose Exxon's drug and alcohol policy in the former Mobil facilities, including Des Plaines and Lockport. This policy required the drivers to disclose all drug and alcohol-related arrests and convictions. Failure to disclose was cause for immediate termination. A driver who did disclose was removed from his driving duties, but the Respondent represented that it would make an effort to find that employee another job somewhere in its corporate structure.

The Respondent contends that its policy did not require the disclosure of arrests. This contention is simply not true, at least for arrests that occurred after the implementation of the policy. Frank Blommaert, a driver and bargaining unit member, disclosed to the Respondent in 2001, pursuant to the policy, that he had been charged with, i.e., arrested for, a drunk driving offense (DUI). The Respondent immediately removed Blommaert from his driving duties. Indeed, both Blommaert and Debra Ellis, the Respondent's human relations advisor, described the policy as requiring employees to disclose any drug or alcohol-related "incident," which certainly appears to cover arrests, if not much more. (Tr. 164, 266–267.)[3]

When the new policy was implemented in 2001, the Respondent's drivers were required to sign a statement of compliance. This statement of compliance obligated every driver to disclose drug and alcohol-related convictions, but it did not refer explicitly to arrests. On the other hand, it did require the employee to disclose any participation in a structured rehabilitation program for substance abuse. (R. Exh. 7.) (This latter requirement is considered below in relation to the disparate treatment grievance of Blommaert.) Nevertheless, in spite of the express provisions of the statement of compliance, and in light of the actions of Blommaert in disclosing his arrest, and of the Respondent after it learned of his arrest, it is clear that the Respondent required employees to disclose drug and alcohol-related arrests.

The Respondent's contention that the policy did not require the disclosure of arrests is credited only for the initial compliance form that employees were required to complete when the policy was first instituted in 2001. Thus, Breneisen did not disclose his previous DUI arrest on his compliance form because, as the Respondent argues, he was not convicted of that DUI.

[3] References to the transcript of the hearing are designated as Tr.

Adding another possible element of uncertainty to this drug and alcohol policy, drug and alcohol-related convictions that were more than 5 years old when the statement of compliance was signed might not disqualify a driver from his or her job. An unidentified committee in some other location in the Respondent's corporate structure made the determination of whether such a conviction would disqualify the driver. There is no evidence of what factors that committee considered in making its determination.

The Union had opposed the implementation of the Exxon drug and alcohol policy to the former Mobil facilities in Illinois. The Union claimed that this was a matter that should have been negotiated, although the Union was not successful when it filed an unfair labor practice charge over the implementation of the drug and alcohol policy. The Union, through Slusher, did file at least three grievances on behalf of bargaining unit members who were adversely affected by the implementation of the new drug and alcohol policy. These grievances were filed on behalf of Moreno, Wallace, and Blommaert.

C. Slusher's Suspension and Discharge

Slusher worked for the Respondent for 14 years. He was elected the Union's chief steward on January 23, 1998, and he remained the chief steward until the Union was voted out in April 2003. As the chief steward, his duties were to enforce the collective-bargaining agreement, including the investigation, filing, and processing of grievances. Slusher was punctilious in enforcing the contract. He also prepared the grievances himself and filed his own information requests. He filed more than an average number of grievances. During the last 2 years before he was discharged, he filed approximately 15–20 grievances. Steven Matter, the union representative, described Slusher as being "extremely aggressive. He was good at what he did. He just followed that contract to a T. I mean, his job was to hold up the integrity of it and he did." (Tr. 196–197.)

Blommaert was charged with a DUI offense in August 2002. He was immediately suspended from his driving duties. However, the Respondent maintained his base pay while it looked for some other nondriving job that he might be able to perform in the Respondent's facilities. On December 20, 2002, the Union filed a grievance regarding Blommaert's suspension from driving.[4] This grievance alleged that the Respondent had unilaterally changed the terms and conditions of Blommaert's employment by suspending him from his driving duties pursuant to the newly instituted drug and alcohol policies of Exxon.

During the period April 2002 to April 2003, the Respondent and the Union were engaged in negotiations for a new collective-bargaining agreement. During this time, Slusher often advocated the Union and the Union's positions to the unit members. On February 11, Slusher had a discussion with fellow

[4] There was some confusion over whether this grievance was filed in November or December 2002, which was due in part to leading questions from counsel. However, the grievance is dated December 20, 2002, and it refers to actions committed on November 22. Despite the confusion, Slusher confirmed that the parties first met on the grievance on December 20. The grievance itself is the best evidence of the date it was filed. Accordingly, I find it was filed on December 20, 2002. (See GC Exh. 2.)

driver, Mike Ostergaard, regarding the Union and the upcoming strike vote. Ostergaard was publicly and vociferously opposed to a strike, and had distributed flyers to the bargaining unit members advocating that they vote against a strike. During this discussion, Slusher told Ostergaard that he might be subject to internal discipline by the Union because of the affect his actions were having on the Union's negotiating position. Ostergaard reported this conversation to Lozinak who told Ostergaard to put his complaint in writing.

The Respondent did not explain why it told a bargaining unit member, who was against the Union, to submit a written complaint against the Union's chief steward regarding a discussion and a disagreement between those unit members of the benefits, disadvantages, and resulting repercussions of supporting the Union. Lozinak stated that he was very busy at the time, and so he asked for a written complaint. This may explain why Lozinak requested something in writing, but it does not explain what Lozinak's or the Respondent's interest was in a dispute between union members about union business nor why Lozinak solicited a written complaint about such union matters. Ostergaard's written complaint calls Slusher's actions "harassment," yet the discussion between Ostergaard and Slusher was a discussion between two bargaining unit members about unionization, a matter that is protected under Section 7 of the Act.[5] The Respondent's solicitation of a written complaint from the antiunion advocate against the prounion advocate in a protected discussion between two bargaining unit members is suspicious.

While Slusher was investigating the December 20, 2002 grievance, he learned that Breneisen might have had a DUI in the past, yet the Respondent had not suspended him when it instituted the Exxon drug and alcohol policy. In February 2003, Slusher asked Breneisen about his DUI, and Breneisen admitted that he did have a DUI.[6] Breneisen took offense at Slusher's questions and, bypassing his first-level supervisor, informed Heisen that Slusher had asked him about his DUI. Heisen told Breneisen that he should inform Lozinak if Breneisen felt that Slusher was "asking the wrong questions." (GC Exh. 11, Attachment 1.) Accordingly, Breneisen prepared a written complaint about Slusher asking him about his previous DUI offense.

It is difficult to understand the Respondent's interest, much less concern, about the type of questions Slusher had asked Breneisen. Again, the conversation concerned a union matter, with Slusher attempting to investigate the possible disparate treatment of the bargaining unit members.

Slusher spoke to Matter, the Union's business representative, about Breneisen's DUI. Matter told Slusher to confirm the DUI through public records. Slusher was able to confirm Breneisen's DUI on April 5, 2003, when Blommaert gave Slusher a copy of the abstract[7] on Breneisen's DUI that Blommaert had obtained at the Lake County, Illinois courthouse. Blommaert also gave a copy of this file to Matter. After receiving the file from Bloomaert, Matter advised Slusher to file a disparate treatment grievance on behalf of Blommaert, and Slusher agreed to do so. Slusher filed the disparate treatment grievance on behalf of Blommaert on April 11.

In early 2002, Slusher had seen unit members' personnel files in connection with a previous grievance. The Respondent argues that Slusher learned at this time that Breneisen had a DUI. (R. Posthearing Br. pp. 15–16.) This contention is rejected. Slusher testified that he learned of Breneisen's DUI in February 2003, while reviewing personnel files in connection with Blommaert's December 2002 grievance. (Tr. 25–26.) Slusher was cross-examined on this assertion, but his testimony on cross-examination was ambiguous at best, and counsel did not follow up or attempt to have Slusher explain. (Tr. 74–76.) In considering Slusher's demeanor and overall testimony, I conclude that he learned of Breneisen's DUI in February 2003.

The abstract pertaining to Breneisen's DUI shows that he was charged with DUI on September 24, 1995. In lieu of a trial, Breneisen was placed under supervision for 1 year, fined $995, required to attend a DUI school for 6 months, and required to attend a program dealing with victim-impact, which he completed on October 15, 1996. The abstract does not clearly show whether these conditions were imposed as a result of a DUI conviction or instead of a DUI conviction, although it does indicate that a bench trial was not held. Nevertheless, Slusher was still under the impression at the hearing in this case that the abstract showed Breneisen's conviction for DUI.

The evidence in this case does not disclose whether Breneisen acknowledged in his compliance statement to the Respondent that he had been required to attend a DUI school.[8] This compliance statement required the disclosure of any participation in a structured rehabilitation program for abuse of alcohol. The Respondent's failure to suspend Breneisen as it had done to other drivers for similar alleged offenses, notably Rich Moreno, would give the Union and Slusher an argument on behalf of their bargaining unit employees of disparate treatment. Moreno had an equal, if not more compelling, argument on disparate treatment as Blommaert. Moreno had been removed from his driving responsibilities because he had participated in an after-care program involving drugs or alcohol. Likewise, Breneisen had participated in a court-ordered alcohol program as a result of his DUI. The Respondent made no attempt to explain the different treatment accorded to Moreno and Breneisen. The Respondent did not call Breneisen, who was antiunion and who is still employed by the Respondent, as a witness so that he could clarify or explain his abstract and his compliance statement.

[5] Ostergaard's written complaint was offered and received not for the truth of the allegations in the complaint. (Tr. 324.) Ostergaard did not testify at the hearing. Accordingly, I credit Slusher's account of his discussion with Ostergaard, which is the only substantive evidence of the discussion in the record.

[6] The Respondent argues that Slusher testified that Breneisen stated to him that he had been convicted of a DUI, and that such testimony is incredible. (R. Posthearing Br. p. 18.) Whether or not such testimony would be incredible, this was not Slusher's testimony. (See Tr. 26.)

[7] Abstract, court file, and judicial summary are the terms used by the witnesses to describe the document obtained by Blommaert from the Lake County courthouse. It is a three-page document using various headings, including "Date," "Charge," and "Outcome," relating to the 1995 DUI case against Breneisen.

[8] See R. Exh. 7 as an example of the compliance statement signed by Slusher.

Slusher felt that this new information about Breneisen was evidence of disparate treatment because Breneisen had been involved with a DUI without being suspended, whereas Blommaert had been involved with a DUI and was suspended. Accordingly, on April 6, the day after he received the file, Slusher gave a copy of Breneisen's DUI abstract to or shared it with union members Moreno and Roy Machinski, and with his supervisors, Lozinak and Heisen. Moreno had a pending grievance with the Respondent over Moreno's suspension from his driving duties because he had attended a drug rehabilitation program. Machinski saw Slusher share the document with Moreno, and he asked to see a copy. Slusher showed it to him. Slusher gave a copy to Lozinak and Heisen because they were his supervisors and would be involved in the disparate treatment grievance that Matter had already directed Slusher to file.

While Slusher was showing Breneisen's abstract to Moreno and Machinski, he was also showing these two drivers and other union members copies of the Union's proposals to the Respondent during the continuing negotiations for a collective-bargaining agreement. Slusher was a member of the Union's bargaining committee and he kept the members informed of the continuing negotiations. Slusher had copies of both sets of documents at the same time, and he acknowledges that copies of Breneisen's abstract could have gotten mixed up with the written proposals that he handed to various members, including Michael Schaeffer.

On April 10, Breneisen complained to Lozinak about Slusher handing out copies of Breneisen's abstract to some unit members. Like he did when Ostergaard came to him with a complaint about Slusher, Lozinak told Breneisen to put his complaint in writing. Also like the Ostergaard situation, Breneisen's complaint dealt with Slusher's protected activities, in this instance Slusher's pursuit of a disparate treatment grievance against the Respondent based on its enforcement of its drug and alcohol policy. Also, like Ostergaard, Breneisen opposed the Union.

On April 10, Breneisen sent his written complaint to Lozinak and Heisen. On that same day, Lozinak gave a letter to Slusher notifying him that the Respondent had received another complaint of "harassment" from a worker (referring to Ostergaard's and Breneisen's complaints), and that once the election was over, the Respondent would investigate the new complaint. Lozinak told Slusher the complaint concerned Slusher's handing out Breneisen's abstract. Slusher told Lozinak that the file was public information and that anyone had a right to see it.

Moreover, the Respondent should have known at this time that the crux of Breneisen's complaint dealt with protected activities by Slusher, just as it knew that the subject of Ostergaard's complaint was protected activities by Slusher. In any event, Slusher told the Respondent when he was suspended and before he was discharged that his activities were protected and were in support of the Union's claim concerning the disparate treatment of workers in the enforcement of the Respondent's drug and alcohol policy.

On April 11, Slusher filed the grievance on behalf of Blommaert alleging that Blommaert was the victim of disparate treatment. The basis for this grievance was the disparate treatment of Blommaert versus Breneisen under the drug and alcohol policy. The Respondent presently argues that Slusher's distribution of Breneisen's abstract could not have been done in support of the grievance on behalf of Blommaert because the grievance was not filed until 5 days after Slusher gave out copies of the abstract to some unit members. This extremely limited view of relevant or supportive activities for a grievance cannot be accepted.

A union steward can engage in activities relevant to a grievance that is contemplated, but has not yet been filed. Indeed, such prefiling activities could be more important than any other activities in connection with the grievance. A dedicated union steward would conduct a prefiling investigation in order to attempt to file only meritorious grievances or to obtain additional information or input from union members about various aspects of the grievance. Slusher showed Breneisen's abstract to Moreno, who had a pending grievance on the application of the drug and alcohol policy, and he showed a copy to Machinski who asked to see it. He acknowledges he might have inadvertently shown it to other unit members, but whether he did is irrelevant to whether he was engaged in protected activities. Certainly, the bargaining unit members had an interest in knowing and were entitled to know that the Respondent, at least arguably and apparently, was treating similarly situated workers differently in the enforcement of its drug and alcohol policy. Similarly, the unit members had an interest in knowing that the worker the Respondent had treated favorably, and disparately, was a worker who opposed the Union. Represented workers have an interest in knowing, and have a right to know from their union, when their employer treats similar workers differently. The mere fact that Slusher distributed Breneisen's abstract several days before he filed Blommaert's disparate treatment grievance does not detract from the propriety, relevance, and protected nature of Slusher's actions. See *New York Telephone Co*., 266 NLRB 580, 582 (1983).

On April 14, the first workday following the decertification election and the second workday following Breneisen's complaint, Lozinak and Heisen met with Slusher in Lozinak's office. Lozinak first told Slusher that he was being suspended based on, and pending an investigation of, the claim of harassment filed by Breneisen. Lozinak then asked Slusher if he had given Breneisen's abstract to anyone. Slusher replied that he had only shown it to Moreno and Machinski, and had given copies to Lozinak and Heisen. Slusher denied placing copies of the abstract in employees' lockers at the Lockport facility. Lozinak told Slusher that he was being suspended pending an investigation. Lozinak came to this hasty conclusion in spite of the protected nature of Slusher's activities. Slusher was suspended, based on Breneisen's complaint, which alleged, in substance, that Slusher had "harassed" Breneisen by showing bargaining unit members the basis on which the Union intended to pursue a disparate treatment grievance on behalf of one of the bargaining unit members. (Tr. 53, 328, 413; R. Exh. 14.)

On April 14, Lozinak investigated Slusher's statements regarding the distribution of Breneisen's abstract. He obtained written statements from Mike Schaeffer and Machinski stating that Slusher had given them each a copy of Breneisen's ab-

stract.[9] Lozinak also viewed a videotape that he claims showed Slusher distributing Breneisen's abstract in the Lockport facility. While the Respondent offered the tape into evidence, it did not want to play the tape at the hearing. Because of the disadvantage and difficulty this judge would have in attempting to decipher what was said by whom on the tape, and what persons were visible on the tape, the Respondent's offer of this tape was refused. I do not make an adverse inference from the Respondent's refusal to play the tape nor do I infer that the tape shows that Slusher distributed the abstract at the Lockport facility. In view of the Respondent's refusal to play the tape that it claimed to have brought to the hearing, I am unable to conclude that the tape does or does not show that Slusher distributed Breneisen's abstract to anyone at the Lockport facility.

Lozinak prepared a memorandum and an e-mail, and Heisen prepared an e-mail, purporting to describe what occurred at the April 14 meeting among Slusher, Lozinak, and Heisen. (R. Exhs. 14,15, 17.) These documents tend to support the Respondent's claim that Slusher told them he had only given copies of Breneisen's abstract to Lozinak and Heisen, but did not give it to any drivers. Nevertheless, I have substantially discounted these self-serving documents. Moreover, Heisen's e-mail was sent to Lozinak, and it is unlikely that Lozinak's memorandum would differ substantially, if at all, from the e-mail of his supervisor dealing with the same event. In addition, these documents are contradicted by Lozinak's admission to Ellis that Slusher previously told Lozinak that he gave the information to his supervisor "and to one other person." (Tr. 276.)

Slusher testified that he told Lozinak and Heisen that he had given or showed the abstract to Moreno and Machinski. (Although these are two "other" persons rather than one, the more important fact is that he admitted giving the abstract to another driver.) Moreover, if Slusher had wanted to dissemble at the hearing, he would likely have claimed that he told Lozinak and Heisen that he also gave a copy of the abstract to Schaeffer. Slusher did not make this claim, although he did admit that it was possible that the abstract was inadvertently given to Schaeffer while Slusher was distributing to the bargaining unit members the Union's latest proposals. In addition, Slusher was a credible witness and his testimony on this matter was given in a candid and forthright manner. Finally, Slusher had no reason to lie about whether he distributed the abstract to his bargaining unit members, and to Moreno in particular because Moreno had a pending grievance dealing with the Respondent's drug and alcohol policy. The bargaining unit members had a right to know if the Respondent was treating similarly situated workers differently, just as they had a right to know if such disparate treatment was weighted in favor of antiunion workers. For all of these reasons, I find that Slusher did not lie when he was asked by Lozinak to name the persons to whom he had given the abstract, and he replied that he had given it to Moreno, Machinski, Lozinak, and Heisen.[10]

On April 23, Lozinak spoke to Slusher on the telephone and sent him a letter, and on each occasion told Slusher that his employment was being terminated both for lying in a company investigation and for violation of the Respondent's harassment policy. Lozinak's termination letter to Slusher states: "Your termination is based upon lying in a company investigation and violation of the Exxon Mobil Harassment Policy." (GC Exh. 7.) On the other hand, in his telephone conversation with Slusher, Lozinak further explained to Slusher that he was, in fact, being terminated for giving out Breneisen's abstract. (Tr. 56.)

At the hearing, the Respondent changed its story and claimed that Slusher had been fired only for lying. It emphasized and repeated that it had a policy against lying and it cited examples of other employees who had been terminated for violating the lying policy. By citing these examples, the Respondent again sought to confirm, explicitly and implicitly, that lying was the only reason Slusher was terminated. Lozinak testified that the reason he recommended Slusher be terminated was because "He lied, that's it." (Tr. 378, 388.) Moreover, the second sentence of the Respondent's posthearing brief states, consistent with its presentation during the hearing: "Slusher's termination was based upon his lying during a Company harassment investigation."

In its posthearing brief, the Respondent states, "The starting point of the company's case is that Mr. Slusher distributed the abstracts *en masse*." (R. Posthearing Br. p. 7.) However, this "starting point" was not proven. The Respondent argues that Slusher was the only employee to whom Blommaert gave a copy of the abstract, and therefore, is the only person who could have distributed the abstract to the employees' lockers at the Lockport facility the next day. But, Blommaert himself could have distributed the abstract the next day. Also, Slusher gave a copy of the abstract to Matter, and the Respondent failed to establish whether Matter gave the abstract to any other employee. In short, the evidence leaves open the possibility that at least one or more of several employees could have distributed the abstract. Thus, the starting point of the Respondent's case was not proven. Moreover, this new starting point discloses yet another shift in the Respondent's explanation for its action in discharging Slusher.

Lozinak based his discharge of Slusher, in part, on Slusher's alleged "mass distribution" of Breneisen's abstract. (GC Exh. 7.) However, and without regard to the Respondent's position at the hearing that lying was the only basis for Slusher's discharge, Lozinak's attempt to explain what he meant by "mass distribution" was contrived and incredible. Lozinak first denied that mass distribution referred to the alleged distribution of the abstract to the employees' lockers at the Lockport facility. Then, Lozinak confessed that maybe he used a "bad word" in

[9] These written statements were admitted upon the Respondent's representation that they were not being offered for the truth of the statements, but for the proposition that Lozinak had a good-faith belief that Slusher had lied to him when Slusher denied distributing Breneisen's court file to all of the persons, viz. Schaeffer, who said that Slusher had given them a copy. (Tr. 324.)

[10] Whether Slusher was mistaken is another question. It is certainly possible that he was mistaken because he admitted that he might have inadvertently given the file to Schaeffer. Although there is a written statement from Schaeffer in evidence that would support such inadvertent disclosure, that document was not offered for the truth of the statement. (R. Exh. 11; Tr. 335.) Thus, the most that can be said is that it is possible Slusher was mistaken.

referring to mass distribution. Then, Lozinak stated that by mass distribution, he meant any distribution outside of supervisors. None of those statements are believable, and they disclose a person who, realizing he used a phrase in his discharge letter that his Company has a difficult time explaining, offers increasingly incredible explanations in an effort to extricate himself. They also show a person whose testimony is not worthy of belief.

D. Evidence–Limited Admissibility

During the hearing and with Lozinak on the witness stand, the Respondent offered into evidence several documents for the limited purpose of showing the alleged reasonableness of Lozinak's action in terminating Slusher's employment. The Respondent expressly waived any intent to offer the documents for the truth of the matters contained therein. These documents, (including R. Exhs. 8–12, 16–17; Tr. 324, 326, 327–328, 335, 368), were received in evidence upon this representation.

Lozinak was cross-examined by the General Counsel about the Respondent's harassment policy and whether that policy prohibited employees from discussing, and perhaps coming to disagreements about, union matters. Lozinak was hesitant in his answers and was generally not credible in attempting to explain what the harassment policy covered. Later, the General Counsel offered into evidence the Respondent's position statement for the purpose of proving the following statement in that document: "At that time [during the weeks before the decertification election], the Company was weary of disciplining an employee [Slusher] for harassment which basically consisted of union propaganda and threats. . . ." The apparent, indeed obvious purpose of the offer was to impeach Lozinak's testimony concerning the scope of the harassment policy, whether it applied to union and concerted activity, and whether Slusher had been disciplined for engaging in union and concerted activity.

When the General Counsel offered the Respondent's position statement into evidence, the Respondent requested that the entire statement be placed into evidence, including all attachments. The General Counsel did not object, and the entire position statement was received. (Tr. 422–423.) The attachments to the position statement included the same documents that had previously been offered by the Respondent and received into evidence for a limited purpose, viz. (R. Exhs. 8–12, 16–17). The Respondent now contends that these documents are in evidence for all purposes, including the truth of the matters contained in the documents. This contention is rejected.

Federal Rule of Evidence 105 provides as follows:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Notwithstanding this rule, a court may properly restrict its consideration of evidence that has been admitted whether or not a party has interposed a limiting request. As the court stated in *Clark v. United States*, 61 F.2d 695, 708 (8th Cir. 1932):

> The fact that immaterial evidence may have been admitted does not necessarily require the reversal of a case where a court sits without a jury as a trier of fact, as there is a presumption that it acts only upon the basis of proper evidence.

If a jury had received this documentary evidence, the General Counsel would be hard-pressed to raise an objection. However, it is the Board's duty to consider only the evidence that was properly and lawfully admitted. The documentary evidence under consideration herein was neither properly nor lawfully admitted, at least for the wholesale purposes presently sought by the Respondent.

The evidence was not properly admitted without limitation because it is apparent from the context in which the evidence was offered that the General Counsel was offering the documentary evidence solely for its impeachment value. Thus, the General Counsel did not offer the attachments to the position statement, and only after the Respondent's counsel requested that the entire document be admitted, did the General Counsel agree. Accordingly, these documents were received for the limited purpose of impeaching Lozinak, in spite of the lack of a limiting request from counsel. Moreover, before the General Counsel offered the position statement into evidence, the Respondent's counsel had already offered many of the documents that were attachments to the position statement. The General Counsel had objected to the admission of those statements, and the Respondent's counsel had agreed that he was not offering them for the truth of the matters contained therein. Based on the Respondent's representation, the documents were received into evidence for a limited purpose.

The documents are written statements by third persons who were not called as witnesses in this case. They are clearly hearsay and would not have been admitted if they had been offered for the truth of the matters contained therein. I will not permit the statements to come in through the back door (or in a backhanded manner) when they had already been given only limited admission through the front door. The documents were received in evidence and are considered for the purposes offered by both parties—by the Respondent as evidence that Lozinak had a good-faith basis for deciding to discharge Slusher, and by the General Counsel as part of a document offered to impeach Lozinak.

E. Analysis

1. Suspension of Slusher on April 14

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

The Respondent suspended Slusher on April 14, because of a complaint by Breneisen that Slusher gave copies of his abstract to other bargaining unit members. Slusher had received the abstract from a bargaining unit member who had a pending grievance, and it tended to show that the Respondent had treated similarly situated bargaining unit members differently. Slusher gave or showed the abstract to other bargaining unit members pursuant to and in support of that grievance process, and in support of the Union's dispute regarding the implementation of the Respondent's drug and alcohol policy. Indeed, one of the employees to whom Slusher gave a copy of the abstract had a pending grievance under that same drug and alcohol pol-

icy. Such actions in support of grievances are protected under the Act. *NLRB v. City Disposal Systems,* 465 U.S. 822, 836 (1984); *Roadmaster Corp*., 288 NLRB 1195 (1988).

The protected nature of Slusher's actions in distributing Breneisen's abstract is not affected by the merits of or success of the grievance. *John Sexton & Co*., 217 NLRB 80 (1975). Thus, the Respondent's argument regarding the validity of the Union's disparate treatment claim in Blommaert's grievance is misplaced. Moreover, I need not address the validity of the Union's disparate treatment claim to acknowledge the propriety of making the claim. Both Blommaert and Breneisen were drivers for the Respondent and they were both arrested for DUIs. However, Blommaert was suspended, but Breneisen was not. Breneisen's DUI occurred before the Respondent implemented the Exxon drug and alcohol policy on the Mobil drivers, and perhaps that explains why the two drivers were treated differently. However, if so, the Respondent never explained this reason and the basis for the disparate treatment to Slusher, and even if it had, the Union, through Slusher, would still have the right, if not obligation, to challenge the propriety of the disparate treatment in a grievance. The mere articulation of a basis for disparate treatment does not require the other party to accept it nor does it prevent the other party from challenging it through proper channels.

Slusher properly filed a grievance on behalf of Blommaert in December 2002, challenging the drug and alcohol policy, and properly filed a grievance on behalf of Blommaert in April 2003, alleging disparate treatment. The second grievance was generated by the abstract Blommaert gave to Slusher on April 5. Slusher was engaged in protected activities under the Act when he, in turn, showed the abstract to other bargaining unit members on April 6, and when he filed Blommaert's grievance on April 11.

Although Lozinak suspended Slusher based on Breneisen's April 10 complaint of harassment, a memorandum written by Lozinak on April 14, could be read to imply that Slusher was also suspended for Breneisen's previous complaint against Slusher (involving Slusher's questions to Breneisen regarding his DUI), and Ostergaard's February 21 complaint against Slusher (regarding the discussion between Slusher and Ostergaard about supporting the Union).[11] Even if the Respondent were to claim that Slusher was suspended because of all three complaints, the determination that Slusher was suspended for protected activity would not change. All three complaints involved complaints by antiunion workers (Breneisen and Ostergaard) against the union steward for engaging in protected activities on behalf of the Union and other bargaining unit members. And whether or not the Respondent labels such protected activity as harassment, the activity remains protected. *New York Telephone Co*., 266 NLRB 580, 582 (1983) (naming the activity harassment did not change or affect the protected nature of the activity).

Where an employer is found to have disciplined an employee because of protected activity, it is not necessary to analyze the action pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Neff-Perkins Co*., 315 NLRB 1229 (1994) (*Wright Line* analysis is unnecessary in a single-motive case). However, the present case involves a variation of that principle. Here, the immediate cause of Slusher's suspension was not something that he had done, but was simply the allegation by another employee that Slusher had done something (which, as it turns out, was protected under the Act). Nevertheless, the same, single-motive analysis set forth in *Neff-Perkins* should apply here where the employer precipitously disciplines an employee based on such a complaint because the alleged underlying, protected activity is still the substantial basis for the discipline. The fact that the employer would suspend the union steward on the basis of an allegation, and before an investigation may show that it had already decided the issue, or that it was intent on taking action against the union steward, but it does not change the underlying and purported basis for the discipline.

Although the Respondent claims to have suspended Slusher pending the completion of its investigation, that investigation was completed on the very day Slusher was suspended. The investigation entailed obtaining two written statements and viewing a videotape. In light of the speed with which this investigation was completed, and the otherwise precipitous action in suspending Slusher, I conclude that the Respondent had already completed its investigation when it suspended Slusher. Slusher was suspended not to allow the Respondent to complete an investigation, but rather to obtain the necessary supervisory approvals for Slusher's discharge. (See Tr. 414–416.)

When an employee is disciplined for conduct that is part of the res gestae of protected union activities, as occurred herein, it must still be determined whether the employee's actions were so egregious as to place him outside the protection of the Act. *American Steel Erectors, Inc*., 339 NLRB No. 152 (2003); *Consumers Power Co*., 282 NLRB 130, 132 (1986). The standard for making this determination is whether Slusher's actions were so flagrant, violent, or extreme as to render him unfit for future employment with the Respondent. *Dreis & Krump Mfg.,* 221 NLRB 309, 315 (1975).[12]

Slusher's conversation with Ostergaard involved a discussion between two bargaining unit members about the advantages and disadvantages of union representation. Slusher advocated union membership and Ostergaard was against union membership. Slusher did advise Ostergaard that the Union could impose a sanction for his actions against the Union and in derogation of the Union's negotiating position. However, there is no evidence that this was said in a malicious, abusive, or improper manner. Indeed, the Respondent did not call Ostergaard as a witness, and I credit Slusher's account of the discus-

[11] See R. Exh. 14, which refers to harassment "claims" against Slusher.

[12] This standard may not be fully or properly applicable when the discipline under consideration is a suspension rather than a discharge. Nevertheless, it is proper to use the standard in these circumstances in order to account for and be governed by the element of extreme misconduct that the standard encompasses. Moreover, the question of "unfit for future employment" need not be reached if the conduct, in the first instance, is not flagrant, violent, or extreme. Such is the case here. Finally, the standard would be properly applicable in any event when considering the lawfulness of Slusher's discharge, which is addressed below.

sion. The discussion between Ostergaard and Slusher was an entirely proper, if not normal, discussion between two workers who were on opposite sides of the union representation issue. *See Liberty House Nursing Homes*, 245 NLRB 1194, 1202 (1979) (a discussion between a prounion and an antiunion employee, in which a threat of discharge was made, constituted protected activity).

Slusher's discussion with Breneisen regarding Breneisen's DUI was also handled properly and civilly by both parties to the conversation. Slusher was attempting to obtain information for use in a prospective disparate treatment claim. Breneisen voiced no opposition to Slusher's questions, and he told Slusher about his previous DUI. Indeed, in March during a safety meeting, Breneisen told many of his other coworkers about his DUI. It was only after his meeting with Slusher that Breneisen went to Lozinak with a complaint. But Breneisen's "Monday-morning" complaint does not change the nature of his discussion with Slusher, which was handled properly by both parties.

Finally, there was nothing in Slusher's distribution of Breneisen's abstract that could be called, or that approaches, flagrant, violent, or extreme. Slusher showed the abstract to Moreno, who had a pending grievance under the drug and alcohol policy, and he showed it to Machinski, a bargaining unit member who asked to see it. Slusher may also have inadvertently shown the abstract to Schaeffer. These actions were in furtherance of Slusher's duties as the union steward.

The Respondent argues that Slusher distributed Breneisen's abstract to workers at Lockport by placing copies of it in the employees' lockers. In fact, Slusher's denial of this activity was, at least at the time, the lie for which the Respondent claimed to have discharged Slusher. (Tr. 154.) However, the Respondent did not offer into evidence the videotape that perhaps would support that claim. Moreover, even if I were to accept that claim, it would not change the result. The bargaining unit members had a right to know if the employer was treating them in a disparate manner. They were also entitled to know if such disparate treatment favored antiunion members. These are matters that could have a significant affect on their union activity and the Union's negotiations for a new collective-bargaining agreement, which were ongoing at the time. The information in the abstract was not private. It was accessible to anyone at the Lake County courthouse, and it was directly relevant to the ongoing negotiations and to at least one pending grievance and one prospective grievance. Moreover, Breneisen had already demonstrated his lack of concern over the matter becoming public by stating in front of about 10–12 workers that he had a DUI. Accordingly, Slusher's distribution of the abstract is equally protected whether he distributed it to two workers or many workers.

Thus, assuming that Breneisen objects to the distribution of the abstract, which can only be assumed since Breneisen did not testify at the hearing, such an objection is undercut by Breneisen's public disclosure of his DUI before his coworkers at the safety meeting in March, 1 month before Slusher showed the abstract to coworkers. Moreover, Slusher's distribution of the abstract to his supervisors is something that was proper and in furtherance of the grievance, and was a disclosure that would necessarily have been done when the grievance was filed. Slusher's limited distribution of the abstract as found herein was proper and was not beyond his legitimate pursuit of the Union's and his grievant's interests.

For the Respondent to label Slusher's protected activities as harassment, and for it to investigate these activities upon the solicited complaints of antiunion workers, says more about the Respondent's union animus than it does about any impropriety of the actions. There is no evidence in this record indicating that Slusher's actions, for which he was investigated and suspended by the Respondent, were undertaken in a flagrant, violent, or extreme manner. Also, Slusher's motivation in distributing the abstract was in furtherance of protected activity, and was not retaliatory or otherwise improper. *See Prescott Industrial Products Co*., 205 NLRB 51 (1973) (where the Board listed improper motive as a factor that characterized activity no longer protected by the Act). Moreover, there is no evidence in the present case that Slusher's actions were such as to render him unfit for future employment with the Respondent.

Where the conduct for which the Respondent claims to have disciplined an employee was protected union activity, the only issue is whether the employee lost the protection of the Act by his conduct. *Felix Industries*, 331 NLRB 144 (2000). I find that Slusher did not lose protection under the Act. Accordingly, his suspension violated Section 8(a)(1) of the Act.

2. Discharge of Slusher on April 23

A. The Respondent claims that Slusher lied when he responded to questions from his supervisors during their investigation of his distribution of Breneisen's abstract, and that he was discharged for lying. Slusher allegedly lied when he answered, as Lozinak testified, that he did not distribute Breneisen's abstract to any coworkers. This interrogation occurred in Lozinak's office, and Lozinak, Heisen, and Slusher were the only persons present. As explained above, the distribution of the abstract constituted protected, union activity by Slusher.

An employee is under no obligation to respond to questions that seek to uncover his protected activities. *See United Services Automobile Assn.*, 340 NLRB No. 90 (2003); *St. Louis Car Co*., 108 NLRB 1523 (1954). An employer may not discharge an employee for lying in response to such questions. E.g., *Tradewaste Incineration,* 336 NLRB 902 (2001). Thus, taking the Respondent at its word, that it discharged Slusher for lying when he was being interrogated about his protected activity, the Respondent's discharge of Slusher violated Section 8(a)(1) of the Act. *Frazier Industrial Co*., 328 NLRB 717 (1999).

The Respondent argues that the Act does not give employees carte blanche to lie about protected activity; therefore, Slusher could be lawfully discharged for lying about it. I need not address the Respondent's carte blanche argument in order to find and conclude, as I do, that the discharge of Slusher under the circumstances of this case violated the Act. The circumstances of Slusher's discharge include the following: (1) he was engaged in protected activities for which the Respondent interrogated and suspended him; (2) he responded to the questions asked of him by the Respondent; (3) the Respondent had no other, lawful reason to interrogate Slusher about his protected activities; (4) the Respondent knew that Slusher's activities

were protected and, in any event, Slusher told Lozinak that his activities were protected before Lozinak terminated him; and (5) the Respondent discharged Slusher for engaging in his protected activities and for lying about his protected activities, but he did not lie.

The Respondent relies on *6 West Limited Corp. v. NLRB*, 237 F.3d 767 (7th Cir. 2001), for the proposition that an employer may terminate an employee for lying about protected activity. However, in *6 West Limited*, the employee was fired for appearing to lie about misconduct in the workplace. This misconduct was the theft of pages from a notebook kept in the manager's locked office. The misconduct was not alleged to be protected activity and the court did not address such a claim. Accordingly, *6 West Limited* does not support the Respondent's contention that Slusher could be terminated for allegedly lying about his protected activities under the circumstances in the present case.

Moreover, the proposition put forth by the Respondent does not withstand analysis under the Act or the long and consistent enforcement of the Act by the Board. Under the Respondent's argument, an employer that had a strict policy against lying could fire a worker who was talking to a coworker about bringing in a union, but when interrogated by his supervisor if he was talking about union matters, denied that he had talked about it. (This hypothetical is more stark than, but not substantially different from, the situation in the present case in which the Respondent discharged Slusher because he allegedly lied when interrogated about protected activity.) The Board has long held that lying under those circumstances was not misconduct, but rather was evidence of coercion to support an 8(a)(1) violation. See, e.g., *Performance Friction Corp*., 335 NLRB 1117 (2001). Under the Respondent's argument, an employer could lawfully discharge an employee because of responses by the employee that were caused and coerced by, and resulted from, the employer's own violations of law. The Respondent cannot create good cause for discharging Slusher under these circumstances. *Supershuttle of Orange County, Inc.,* 339 NLRB No. 2 (2003). The Respondent's argument is rejected.

The Respondent contends that Lozinak had a good-faith, reasonable basis for believing that Slusher had lied. I accept this contention, without deciding it, but it does not change the result. First, whether or not Lozinak believed that Slusher had lied, Lozinak knew that the alleged lie concerned protected activity. Second, since Slusher did not lie to Lozinak, Lozinak's reasonable belief that he did lie would certainly not render Slusher unfit for future employment with the Respondent.

Slusher was discharged for alleged misconduct that was part of the res gestae of protected union activities. His conduct, whether it is viewed as distributing Breneisen's abstract to bargaining unit members or responding to interrogation from his supervisors about such distribution, did not cause him to lose the protection of the Act. Under all of the circumstances, I conclude that the Respondent's discharge of Slusher violated Section 8(a)(1) of the Act.

B. Alternatively, in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), the Supreme Court held that "[Section] 8(a)(1) is violated if the employee is discharged for conduct in the course of protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." The elements of this violation are (1) protected activity, (2) knowledge by the employer, (3) the reason for the discharge was misconduct in the course of such protected activity, and (4) the employee was not, in fact, guilty of such misconduct.

In the present case, Slusher was engaged in protected activity and the Respondent knew of this because Slusher both filed Blommaert's disparate treatment grievance and told Lozinak of the protected activity before Slusher was terminated. Slusher was discharged because, according to the Respondent's revised rationale, he allegedly lied about the protected activity. Finally, Slusher was not guilty of this misconduct, i.e., lying about the protected activity. Accordingly, the Respondent's discharge of Slusher violated Section 8(a)(1).

C. The Respondent also contends that, under *Wright Line*, supra, there is no evidence of illegal motive or union animus, and if there were, the Respondent would have taken the same action in the absence of protected activity. Since Slusher was discharged because of his protected activity, this latter argument is rejected without further discussion. And although it is not necessary that I engage in a *Wright Line* analysis, I will briefly address the Respondent's former argument regarding the presence or absence of illegal motive or union animus.

Antiunion motivation may be, and often is, established indirectly. All of the circumstances in the case should be considered in making a determination of motive. *Fluor Daniel, Inc*., 304 NLRB 970 (1991). Among the individual factors that the Board has found to support an inference of animus are (1) the abruptness of the termination; (2) failure to adequately investigate the alleged misconduct; (3) the unexplained failure to produce critical evidence or testimony which would be supportive of the employer's claims; and (4) shifting or inconsistent explanations. See, e.g., *Medic One, Inc*., 331 NLRB 464, 475 (2000); *Dynabil Industries,* 330 NLRB 360 (1999); *Lampi LLC*, 327 NLRB 222 (1998); and *Master Security Services*, 270 NLRB 543, 552 (1984).

(1) and (2). The Respondent decided to discharge Slusher as soon as he responded to Lozinak's question about naming the persons to whom he had distributed the abstract. Lozinak concluded that Slusher must have lied because Lozinak had statements by Schaeffer and Machinski that they had received copies of the abstract from Slusher. But Schaeffer's statement shows, at most, that Slusher may have been mistaken, not that he lied. (See R. Exh. 11.) Machinski's statement is less clear on whether Slusher may have been mistaken, but the possibility of mistake, rather than a deliberate lie, is still apparent. (See R. Exh. 12.) Moreover, the Respondent failed to get or request clarification from these employees, either at the time or at the hearing. More importantly, the Respondent failed to confront Slusher with these statements or ask him to elaborate on the possible inadvertent disclosure of the abstract. Thus, the Respondent acted abruptly in discharging Slusher and it failed to adequately investigate Slusher's alleged misconduct, i.e., whether he had lied.

(3) The Respondent not only failed to call as witnesses, Schaeffer and Machinski, from whom it had obtained written statements, it more tellingly failed to call Breneisen as a witness. Breneisen was against the Union and had filed the decerti-

fication petition. Breneisen is the one who filed the complaints against Slusher and is the person whose abstract Slusher had distributed. Breneisen presumably would be favorable to the Respondent, would be opposed to Slusher, and certainly would have had important information to provide in this case. The Respondent offered no explanation for its failure to call Breneisen as a witness.

(4) Lozinak telephoned Slusher on April 23 to tell him of his termination. Lozinak told Slusher that he was being terminated for giving out Breneisen's abstract. When Slusher received Lozinak's termination letter, lying was added to the reason(s) for his termination. At the hearing of this case, the Respondent, perhaps appreciating that Slusher's distribution of the abstract was protected activity, alleged that lying was the only reason for Slusher's discharge. These shifting explanations undercut any claim of a lawful basis for Slusher's discharge, and make incredible the differing explanations put forward by the Respondent.

The Respondent has maintained throughout this proceeding that Slusher's distribution of the abstract was not protected activity, and, going further, that such distribution constituted harassment. If the Respondent truly viewed the distribution of the abstract in this manner, it would have sought to learn how Slusher obtained the abstract. If Slusher obtained the abstract from another employee, which he did, that employee would or could be equally or more responsible than Slusher was for its distribution. But the Respondent showed that it was not truly concerned with investigating and discovering the persons who were responsible for distributing the abstract. The Respondent demonstrated that it was only concerned with obtaining evidence against Slusher. And the striking characteristic that distinguishes Slusher from every other driver is that Slusher was the union steward for 6 years, and he aggressively enforced the collective-bargaining agreement with the Respondent throughout his tenure.

Accordingly, for all of the foregoing reasons, I conclude that under a *Wright Line* analysis, the General Counsel has satisfied its burden of proving unlawful motive or union animus in the Respondent's discharge of Slusher.

The Respondent argues that by pursuing the disparate treatment claim on behalf of Blommaert, Slusher violated his duty of fair representation to Breneisen. The Respondent argues that Slusher really intended for Breneisen to lose his job as opposed to Blommaert being successful in the grievance and winning back his job. This argument is rejected factually and legally. I have found that Slusher properly pursued the grievance on behalf of Blommaert, and, in doing so, did not intend to harm Breneisen. Moreover, there was sufficient evidence to file the grievance, if not to oblige Slusher to pursue it. Second, the Respondent's argument stems from the necessary fact that in every disparate treatment claim, there is one employee who is (allegedly) treated better than the grieving employee. If the Respondent's argument were valid, an employer would be immune from disparate treatment claims and a union could never pursue such a claim or grievance when both of the comparable employees were union members.

I do not doubt that Slusher was likely less troubled over possible adverse consequences to Breneisen than he might have been if the comparable employee were not antiunion. But whether Slusher was troubled is not the issue. He did not investigate and file the grievance on behalf of Blommaert in order to harm Breneisen, but to help Blommaert and to force the Respondent to honor the contract and treat the employees fairly.

The Respondent lists various factors to support its argument that Slusher's distribution of the abstract was motivated by his intent to retaliate against Breneisen. The Respondent argues that Slusher failed to investigate the claim, but this is exactly what Slusher did do. He waited until he received the proof of Breneisen's DUI before he disclosed it to any unit members or supervisors. The Respondent argues that the timing is suspicious because Slusher's distribution of the abstract occurred about 5 weeks after Breneisen filed the decertification petition. However, a more compelling argument on timing is the fact that Slusher filed the grievance on behalf of Blommaert within 1 week of his receipt of the abstract, and the distribution of the abstract occurred within that week. Thus, timing points more toward a proper, protected activity purpose than a retaliatory purpose. The Respondent also argues that Slusher ignored Breneisen's explanation of his DUI, but this argument, instead, ignores Slusher's testimony. Slusher testified that Breneisen told him that he (Breneisen) had a DUI. Slusher did not claim that Breneisen stated that he had been convicted of a DUI. The Respondent argues the latter point, and then, having set up the pigeon, shoots it with the argument that it is incredible. This argument is rejected. The Respondent also argues that Slusher departed from past practice because he failed to raise the disparate treatment issue on behalf of two other employees who had grievances in 2002. However, I have found that Slusher did not learn of the disparate treatment until 2003, and did not obtain documentary proof of it until April 5, 2003. Accordingly, Slusher did not ignore Breneisen's explanation and did not depart from his past practice. In distributing the abstract, Slusher was not motivated by an intent to retaliate against or harm Breneisen, but rather to properly pursue a claim of disparate treatment on behalf of a bargaining unit member.

A union is able to pursue a claim of disparate treatment on behalf of a union member just as any other person who is subject to discriminatory treatment. The purpose of such a claim is to assert rights under the law on behalf of the grievant, not to penalize the comparable employee, even if that employee is treated better than similar employees. The objective is to have all employees, including the grieving employee, treated as well as the more favored employee, not the reverse so that all employees would be treated as poorly as the grieving employee. Slusher validly and properly investigated and asserted rights under the law on behalf of Blommaert who apparently and arguably was treated different from and worse than a comparable employee. By doing so, he violated no duty to Breneisen.

For all of the foregoing reasons, I conclude that the Respondent discriminated against Nick Slusher and violated Section 8(a)(1) of the Act when it discharged Slusher because of his protected activities.[13]

[13] The General Counsel alleges that the Respondent's suspension and discharge of Slusher also violated Sec. 8(a)(3) of the Act. In view of the remedy provided herein, I find it unnecessary to determine whether the

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 Respondent violated Section 8(a)(1) by suspending and discharging its employee, Nick Slusher.

3. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found that the Respondent unlawfully suspended and discharged Nick Slusher, I shall order that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

Respondent also violated Sec. 8(a)(3) of the Act. *Postal Service*, 250 NLRB 4, 6 (1980).