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Oncor Electric Delivery Company, LLC *and* International Brotherhood of Electrical Workers, Local Union No. 69, affiliated with International Brotherhood of Electrical Workers. Cases 16–CA–103387 and 16–CA–112404

July 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On November 4, 2014, Administrative Law Judge Ira Sandron 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 Charging Party filed cross exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

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,[2] and conclusions, except as modified in this Decision and Order, to amend his remedy, and to adopt his recommended Order as modified and set forth in full below.[3]

As further discussed below, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Bobby Reed because of his protected union activities. We also affirm, for the reasons stated in the judge's decision, the finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide information pertaining to Reed's discharge that the Union requested on December 18, 2012, and March 25, 2013, respectively. However, we reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with requested information pertaining to the discharge of employee Samuel Goodson.

I. THE DISCHARGE OF BOBBY REED

Bobby Reed was a long-term employee of the Respondent and its predecessor electric transmission and distribution utility companies. He most recently worked as a "trouble man," a first responder to partial or total power outages. Since April 2011, Reed has been the Union's full-time business manager and financial secretary, a position he held concurrently with his trouble man position. Reed was also the Union's chief negotiator in bargaining for a successor to the collective-bargaining agreement, set to expire on October 25, 2012. In advance of its expiration, the Union and the Respondent met on August 23, 2012, to discuss issues and schedule negotiations. The Respondent offered a 1-year extension, including a 3-percent wage adjustment for most, but not all, employees. Reed objected to the proposal, stating he would not agree to a contract unless all employees received a wage increase. At some point during the meeting, Kyle Davis, the Respondent's director of employee and labor relations, referred to an upcoming legislative session concerning smart electric meters ("smart meters"), which bargaining unit employees service at customers' homes.

The first formal negotiating session took place on October 8. Just before the session began, Reed and Union President Charles Jackson met with Davis and Barbara Gibson, the Respondent's senior labor relations manager. Reed told Davis and Gibson, "I'm trying to play nice in the sandbox, we're here to make a deal today, if we can't, I'm going to be in Austin testifying before the senate commerce committee tomorrow about smart meters." Davis asked if that was a threat, to which Reed replied, "no." Davis then responded that if Reed thought he needed to testify, that's what he needed to do.

The next day, Reed, appearing as a representative of the Union, testified briefly before the Texas Senate

[1] On June 27, 2016, the Respondent filed a "Motion to Strike, Otherwise Nullify, and/or Motion to Dismiss the May 23, 2016 Notice of Ratification Issued by General Counsel Richard F. Griffin, Jr." In its motion, the Respondent contends that former Acting General Counsel Lafe Solomon was "invalidly appointed" and that current General Counsel Griffin lacked authority under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 et seq., to ratify the prior decision to issue complaint in this case. We have previously considered and rejected these arguments, and we do so again today. See, e.g., *Adriana's Insurance Services*, 364 NLRB No. 17, slip op. at 1–2 fn. 1 (2016). Because the Respondent failed to raise these arguments in its exceptions or at any earlier point in this proceeding, the arguments are waived. See *1621 Route 22 West Operating Co., LLC*, 364 NLRB No. 43, slip op. at 1 fn. 4 (2016). Further, contrary to the Respondent's criticism, we find no basis for the Respondent's claim that the General Counsel's Notice of Ratification was legally insufficient.

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

[3] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change and to conform to the violations found and the Board's standard remedial language.

Committee on Business and Commerce about potential safety hazards associated with smart meters. His testimony triggered discussion and investigation by the Respondent's officials, who ultimately discharged Reed on January 14, 2013.

The judge found that the General Counsel met his burden under *Wright Line*[4] of proving that Reed engaged in the concerted, protected activity of serving as the Union's chief negotiator and testifying before the senate committee, and that the Respondent harbored animus against Reed's protected activity and discharged him for that activity. In exceptions, the Respondent contests the finding that it bore antiunion animus against Reed. It admits discharging Reed for his testimony, which it contends was unprotected individual activity. The Respondent also contends that, even if concerted, the testimony lost the Act's protection because it contained malicious falsehoods damaging to the Respondent's business. In answering these exceptions, the General Counsel reiterates an argument it previously made to the judge: that, in light of the Respondent's admission that it discharged Reed for his testimony, proof of motive is not an issue and a *Wright Line* analysis is not required. Rather, the determinative issue is whether the conduct in question was protected by the Act.[5] For the reasons discussed below, we agree with the judge that Reed's testimony constituted protected union and concerted activity and that Reed did nothing to lose the Act's protection. Accordingly, we conclude that Reed's discharge was unlawful even in the absence of specific evidence that the Respondent was motivated to act by animus against his testimony and his role as the Union's negotiator.

Reed Engaged in Protected Union Activity

As stated above, Reed was the Union's chief negotiator in bargaining for a successor collective-bargaining agreement with the Respondent. Reed's brief testimony before the state senate committee, during an allotted 2-minute period, is set forth in full in the judge's decision. He testified that after the Respondent started using smart meters his service calls increasingly involved the new meters "burning up and burning up the meter bases"; that on numerous calls he had to inform customers that their meter bases had burnt up and they were responsible for paying for the repair before their electricity could be restored; that the problem related to the new meters being bigger than the old analog meters and not fitting on the old base; that another union local was also experiencing a significant increase in the meters burning up; and that "I do know a little bit about fire and heat, and these things are causing damage to people's homes." We agree with the judge that Reed's senate testimony was union activity and therefore concerted. Reed was told about the committee hearing by the Union's attorney, and testified on a matter of ongoing concern to the Union. He openly testified in his capacity as a union official and the Respondent knew it.

Relying on *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), and their progeny, the Respondent contends that Reed's senate testimony was undertaken on an individual basis and therefore was not concerted.[6] However, "when an individual assists a union, or engages in union-related activity, by definition he [or she] is engaged in concerted activity." *Tradesmen International, Inc.*, 332 NLRB 1158, 1159 (2000) (citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984) (Section 7 of the Act "defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities")), enf. denied on other grounds 275 F.3d 1137 (D.C. Cir. 2002). This is particularly self-evident when the employee testifies in his or her capacity as a union official, as in *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989) ("concerted nature of Vicknair's testimony is established by the capacity in which Vicknair was testifying—as chairman of the [u]nion's safety committee"), enfd. mem. 924 F.2d 1055 (5th Cir. 1991). Accordingly, we find that Reed was engaged in concerted activity when he testified.

We further find that Reed's testimony was "for the purpose of collective bargaining or other mutual aid and protection" within the meaning of Section 7 of the Act.[7]

[4] 251 NLRB 1083, 1089 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

[5] See, e.g., *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003) (no *Wright Line* analysis of motive undertaken where the conduct subject to a challenged employment action is undisputed; sole issue is whether conduct has statutory protection); *Valley Hospital Medical Center*, 351 NLRB 1250, 1251–1252 fn. 5 (2007), enfd. mem. 358 Fed.Appx. 783 (9th Cir. 2009) (same).

[6] Under *Meyers II*, concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887. But because the concerted nature of Reed's senate testimony derives from the fact that he was assisting a labor organization within the meaning of Sec. 7, there is no need to apply the *Meyers Industries* line of cases to determine whether Reed's testimony was a concerted, rather than an individual, act.

[7] Sec. 7 protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

Reed's testimony before the Texas Senate was at least partially motivated by his attempt to gain leverage for the Union in bargaining negotiations with the Respondent. As such, his testimony constituted assistance to a labor organization "for the purpose of collective bargaining," and thus protected union activity within the meaning of Section 7. See *GHR Energy*, 294 NLRB at 1014.[8]

Reed's testimony is also protected under the "mutual aid or protection" clause of Section 7. It is well established that Section 7 protects employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). "Thus, it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause." Id. at 565–566 (footnotes omitted). Nevertheless, "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." Id. at 567–568.

This case, however, is easier than *Eastex*. The employees in that case were concerned with a state right-to-work law and the minimum wage—topics over which the employer lacked any control. 437 U.S. at 558. Here, by contrast, the Respondent exercises control over the installation of the smart meters that were the subject of Reed's testimony. Because of this, Reed's testimony before the Texas Senate about the safety of smart meters bears a more "immediate relationship to employees' interests" in seeking to improve their own working conditions than was the case in *Eastex*. Id. at 567.[9]

We also find that Reed's senate testimony concerning smart meters and meter bases heating up and burning more frequently related to (and was spurred by) an ongoing and legitimate concern of the Union about the safety of represented bargaining unit employees working with the meters, particularly given the hazard of electrical arcs. It is not disputed that safety of the new devices to workers was one of the reasons the Union's attorney informed Reed of the upcoming senate hearing.[10] Respondent Supervisor Michael Anderson admitted that, since the Respondent began using smart meters, several trouble men had informed him that smart meters were heating up and that the meter base lugs were melting or burning.[11] Reed had observed this in responding to an increased number of service calls involving the burning of meter base lugs connected to smart meters, which, according to Reed, "created a hazard for the employees" servicing the meters because an employee pulling the smart meter from the meter base "could possibly pull the load wire out, which would result in a flash." In this connection, Reed was personally familiar with the potential danger posed by an electrical arc or "flash," which he described as a "ball of fire" that could be 240 volts and could burn an employee.[12] Supervisor Anderson described such an electrical arc as a "contained [electrical] fire" that may be large or small and could burn a person if substantial enough. And, the Respondent's expert witness testified that the temperature of such an arc could be anywhere from 5,000 to 7,000 degrees Fahrenheit.

In addition to Reed's personal knowledge of smart meters heating and burning, he learned from IBEW Local 66 that the smart meters they were handling were similarly heating up on meter bases, burning, and sparking. Prior to Reed's senate testimony, he also spoke to Dallas County Assistant Fire Marshal Michael Simmons about problems with smart meter installations in the course of Simmons's investigation of house fires originating at or near meter bases and involving smart meters. Given the-

activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[8] Member McFerran finds it unnecessary pass on this rationale for finding that Reed's testimony was "for the purpose of collective bargaining or other mutual aid or protection," inasmuch as she agrees that his testimony clearly satisfied the "mutual aid or protection" requirement for the reasons articulated below.

[9] The Board has consistently held that a union official's testimony before a governmental body is protected under Sec. 7. See, e.g., *GHR Energy*, 294 NLRB at 1014 (employee/union official's testimony before a state agency and a U.S. Senate committee about employer's violations of environmental law was union and concerted activity); *Tradesmen International*, 332 NLRB at 1159 (union organizer/applicant for employment engaged in union and concerted activity by testifying before a municipal board). The Board looks to whether the concerted activity bears "some relation to legitimate employee concerns about employment related matters." *Tradesmen International*, 332 NLRB at 1160.

[10] The Union's attorney—whom the judge expressly credited—testified that he learned from IBEW members in Dallas and Houston about the issue of smart meters and meter bases burning, and that the Union and the industry group of which the Respondent was a member had discussed safety concerns about smart meters. He further testified that the safety concern was one reason why he notified Reed of the senate hearing.

[11] The meter base contains wires, four lugs, and four jaws. Lugs are angled connectors attached to wires in the meter base, and jaws are straight-slot metal receivers in the meter base adjacent and wired to the lugs. Although the judge found that lugs are part of the meter, the record evidence indicates that the lugs are part of the meter base.

[12] Reed suffered second-degree burns from an electrical arc/flash while working with an analog meter in the mid-1980s.

se facts, Reed's perception of a fire or electrical-arcing hazard to himself and his coworkers was entirely reasonable. Moreover, in his senate testimony, Reed illustrated the effect on employees' working conditions of the increase both in the number of service calls and the frequency with which they had to deal with disgruntled customers when explaining to them that they must pay to repair or replace their burned up meter bases. See *Davis Supermarkets*, 306 NLRB 426, 454–455 (1992) (noting customer contact as a factor in determining the onerousness of changes to working conditions), enfd. 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994).

Based on the foregoing, we find that Reed's testimony before the Texas Senate was "for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act. Accordingly, Reed's conduct was protected by Section 7 unless the Respondent can prove that some aspect of the testimony warrants forfeiture of protection.[13]

Reed's Texas Senate Testimony Did Not Lose the Act's Protection

Otherwise protected employee communications will lose their protection "if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (citation omitted), enfd. mem. 358 Fed.Appx. 783 (9th Cir. 2009); see generally *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). However, "[t]he mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue." *Valley Hospital Medical Center*, 351 NLRB at 1252 (citing *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003)). The Respondent contends that Reed's testimony lost the Act's protection because his statements that smart meters were causing fires and damaging customers' homes were maliciously untrue. We reject this argument.

Although the judge found that some of Reed's testimonial statements about smart meters were arguably "imprecise, even careless," particularly in failing to distinguish between meters and meter bases, the judge did not find, and the Respondent has failed to prove, that Reed's statements were maliciously untrue. Indeed, during the Respondent's deployment of smart meters, trouble men reported an increase in incidents of burned up smart meters and meter bases due to installation issues and to loose connections resulting from narrower "blades" on smart meters not fitting as securely into the "jaws" of meter bases. As discussed above, several trouble men had informed the Respondent that, since the deployment of smart meters, such meters were heating up and meter base lugs were melting or burning. And contrary to the Respondent and consistent with Reed's senate testimony, Reed identified at the Board hearing multiple handwritten trouble tickets involving incidents of meter bases and connected smart meters heating and burning. In addition, Reed testified at the Board hearing that he considered the meter base to be part of a customer's home given that the customer owns the equipment and is responsible for making any necessary repairs to it.[14] Thus, his senate statement that smart meters were causing damage to customers' homes is not inconsistent with his Board testimony that the heating and electrical arcing of a bad connection between a smart meter and meter base had caused meter bases to burn up; nor is it inconsistent with what Assistant Fire Marshal Simmons told him about investigations into house fires involving or originating at or near smart meters.

Moreover, the Respondent acknowledges on brief that the handwritten trouble tickets Reed identified show that "broken lugs in the meter base can cause damage to the meter base, or in rare occasions[,] to the meter (either analog meters or smart meters)." The Respondent maintains that this problem is not tantamount to the meter *itself* causing damage to a customer's home. In this regard, the Respondent's argument is that Reed testified falsely (i.e., with knowledge of or reckless disregard for truth or falsity of his statements) by suggesting that the heating and burning of smart meters and meter bases were intrinsically caused by smart meters themselves, rather than the connection between the new meters and the existing bases. This is a highly technical argument, one which belies any suggestion that Reed knowingly

[13] We therefore reject the Respondent's contention that the foregoing employment-related concerns are too attenuated from employees' terms and conditions to be protected, and instead relate to the Respondent's third-party customers rather than to employees. Principally, the Respondent relies on *Waters of Orchard Park*, 341 NLRB 642 (2004), and *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), enfd. 522 F.3d 46 (1st Cir. 2008). Those cases are distinguishable inasmuch as they involved employee concerns for the health and safety *only* of third parties—patients in *Orchard Park* and students in *Five Star*. Here, by contrast, the safety and customer interaction concerns that were the subject of Reed's senate testimony directly related to (and arose from) the daily work that unit employees performed. In any event, we also agree with the judge's finding, which the Respondent has not addressed, that the increasing number of difficult interactions with customers regarding the smart meters had a meaningful impact on working conditions.

[14] The Respondent's senior vice president of transmission and distribution operations, Walter Mark Carpenter, consistently testified that the meter bases connected to smart meters "are often attached to the customer's property."

made a false statement or testified recklessly when stating that smart meters are a cause of increased heating and burning. Indeed, smart meters and meter bases are interconnected components that must remain connected to operate. Where, as here, the evidence indicates that possible hazards stemmed from new smart meters not properly fitting onto the existing meter bases, it is of little moment for our purposes whether Reed precisely stated that hazards arose from the new meters themselves or from their connection to the meter bases in the 2 minutes he was allotted to testify. Ultimately, to the possible extent that Reed's testimonial statements—in failing to adequately distinguish between smart meters and meter bases—could fairly be characterized as "false, misleading or inaccurate[, this] is insufficient to demonstrate that they are maliciously untrue." *Valley Hospital Medical Center*, 351 NLRB at 1252.[15]

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Bobby Reed for engaging in protected concerted union activity.

II. THE INFORMATION REQUEST FOR SAMUEL GOODSON

The Respondent discharged employee Samuel Goodson on July 16, 2013, for allegedly lying in the course of a company investigation about safety violations. The investigation pertained to an incident that occurred on May 13, 2013 ("the incident"), involving both Goodson and employee Eddie Lopez. The Union filed a grievance over Goodson's discharge. By letter dated July 24, 2013, to Respondent Senior Labor Relations Manager Barbara Gibson, the Union requested Goodson's and Lopez's attendance, safety, and discipline records since January 1, 2008. Among other information, the Union's letter requested:

> 12. Any and all information the Company considered and relied upon in its decision not to terminate Eddie Lopez in connection with an incident involving Sam Goodson on or about May 13, 2013, any document indicating who made the decision to not to terminate Lopez, and any document indicating who had input into and/or recommended such decision.
>
> 13. A complete copy of the results of the Company's internal investigation, including any written statements or documentation from supervisors, superintendents, managers, or any other company representative in connection with any incident and/or conduct by Eddie Lopez that played a part in the Company's decision not to terminate Mr. Lopez in connection with an incident involving Sam Goodson on or about May 13, 2013.
>
> 14. A complete copy of the results of the Company's internal investigation, including any written statements or documentation from bargaining unit employees that the Company used in making its decision not to terminate Mr. Lopez in connection with an incident involving Sam Goodson on or about May 13, 2013.
>
> 15. A complete copy of any written statement given to the Company by Eddie Lopez and/or made by the Company concerning any statement by Mr. Lopez in connection with the incident that led to the termination of Mr. Goodson.
>
> 16. Complete copies of performance evaluations or any written evaluations of Eddie Lopez from January 1, 2008 through the present.

Reed testified that he requested this information to determine whether Goodson was treated disparately vis-à-vis Lopez and whether the Union should continue with Goodson's grievance. Reed further testified that he was satisfied that as of December 2013, the Respondent had given the Union everything that was responsive up to the date of Lopez's promotion out of the bargaining unit on May 26, 2013, which occurred less than 2 weeks after the incident. The Respondent considers the information pertaining to Lopez after he left the unit to be irrelevant.

The sole issue with respect to the Goodson information request allegation is whether the Respondent was obligated to furnish information about Lopez after his promotion to a position outside of the bargaining unit. The judge dismissed the allegation because the information sought, "[o]n its face . . . would not appear to shed light on the merits of Goodson's discharge or whether he was treated differently from Lopez when Lopez was a unit employee," indicating that it was not presumptively relevant. Where, as here, requested information is not presumptively relevant because it pertains to a nonunit employee, the General Counsel must show "either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the [employer] under the circumstances." *Disneyland Park*, 350 NLRB 1256,

[15] The Respondent also contends that Reed's senate testimony lost the Act's protection because it "disparaged Oncor's business reputation" and was "calculated to cause Oncor harm." Reed, however, did not attack the Respondent, its operations, or its product, but rather raised legitimate, employment-related concerns about smart meter installations that employees were themselves performing and about smart meters generally. See *Valley Hospital Medical Center*, 351 NLRB at 1252 fn. 7; see generally *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). The cases on which the Respondent relies are inapposite inasmuch as they involved maliciously untrue statements. As explained above, even if Reed may have been imprecise, he did not testify with knowledge of or reckless disregard for truth or falsity.

1258 (2007) (citations omitted). Contrary to the judge and our dissenting colleague, we find, based on the language of the Union's request and the timeline of events, that the relevance of the requested information would have been apparent to the Respondent. Lopez and Goodson were involved in the same May 13 incident that led to Goodson's discharge; accordingly, information about Lopez relating to this incident was obviously relevant for comparator purposes. See, e.g., *NLRB v. Postal Service*, 888 F.2d 1568 (11th Cir. 1989) (enfg. 289 NLRB 942 (1988)); *North Germany Area Council v. FLRA,* 805 F.2d 1044 (D.C. Cir. 1986). Further, Lopez was promoted out of the unit less than 2 weeks after the incident, long before the Respondent disciplined Goodson and Lopez on July 17 and 16, respectively. Given that timeline, it is likely that the Respondent created many of the documents pertaining to the May 13 incident after Lopez's promotion. The results of the Respondent's incident investigation and references to the incident appearing in Lopez's written statements, disciplinary records, or performance evaluations would thus be likely to show how the Respondent handled and referred to Lopez's role in the incident as compared to its treatment of Goodson. Such information about the incident, even if contained in documents created after Lopez's promotion, would be relevant to the Union in assessing whether to proceed to arbitration on Goodson's grievance. Id.; see also *Disneyland Park*, 350 NLRB at 1258. Accordingly, we find that the Respondent violated Section 8(a)(5) by refusing to provide this information.[16]

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 4 in the judge's decision.

"4. By failing and refusing to furnish the Union with requested information that was relevant and necessary for the processing of its grievance of Samuel Goodson's discharge, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(5) and (1) of the Act."

[16] Chairman Pearce would affirm the judge's dismissal of this allegation. The Respondent provided the Union with requested personnel information (attendance, safety, and discipline records) for Goodson until his discharge and for Lopez until the latter's promotion out of the bargaining unit. The Respondent declined to provide the Union with Lopez's post-promotion personnel records, claiming lack of relevance, and the Union offered no explanation why it was entitled to this nonpresumptively relevant information. In these circumstances, and noting that Goodson and Lopez were disciplined for different conduct on May 13, Chairman Pearce finds that the General Counsel—who did not except to the judge's dismissal of this information request allegation—failed to meet the legal standard for demonstrating relevance.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In addition to the remedial actions set forth in the judge's decision, to remedy the Respondent's unlawful failure and refusal to provide relevant and necessary information requested by the Union with respect to the grievance of the discharge of Samuel Goodson, we shall order the Respondent to furnish the Union with the information it requested on July 24, 2013.

ORDER

The National Labor Relations Board orders that the Respondent, Oncor Electric Delivery Company, LLC, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization by testifying before a legislative committee or other government entity.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

(b) Make Bobby Reed whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Bobby Reed for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Bobby Reed, and within 3 days thereafter, notify him in

writing that this has been done and that the discharge will not be used against him in any way.

(e) 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.

(f) Furnish to the Union in a timely manner the information requested by the Union on December 18, 2012, March 25, 2013, and July 24, 2013, respectively.

(g) Within 14 days after service by the Region, post at its Dallas, Texas facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 16, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 December 18, 2012.

[17] 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."

(h) Within 21 days after service by the Region, file with the Regional Director for Region 16 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.

Dated, Washington, D.C. July 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization by testifying before a legislative committee or other government entity.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

WE WILL make Bobby Reed whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Bobby Reed for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on December 18, 2012, March 25, 2013, and July 24, 2013, respectively.

ONCOR ELECTRIC DELIVERY COMPANY, LLC

The Board's decision can be found at www.nlrb.gov/case/16–CA–103387 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Jonathan Elifson, Esq., for the General Counsel.
David C. Lonergan and *Amber M. Rogers, Esqs. (Huston & Williams LLP),* for the Respondent.
Hal K. Gillespie, Esq. (Gillespie Sanford, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on a January 31, 2014 consolidated complaint and notice of hearing (the complaint) that stems from unfair labor practice charges that International Brotherhood of Electric Workers, Local Union No. 69, affiliated with International Brotherhood of Electric Workers (the Union) filed against Oncor Electric Delivery Company, LLC (the Respondent, the Company, or Oncor).

I conducted a trial in Fort Worth, Texas, from April 28-31 and from June 18-20, 2014, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Did the Respondent's discharge of union Business Manger/Financial Secretary Bobby Reed on January 14, 2013, for testifying about smart meters (also called

(2) advanced meters or AMS meters) at a Texas State Senate committee meeting on October 9, 2012, violate Section 8(a)(3) and (1) of the Act? Or, as the Respondent contends, was he lawfully discharged because he violated Oncor's code of conduct by providing false information to an outside party?

(3) Did the Respondent violate Section 8(a)(5) and (1) by its responses to the Union's information requests of December 18, 2012, and March 25, 2013, pertaining to Reed's discharge grievance; and of July 24, 2013, relating to Samuel Goodson's discharge grievance?

Procedural Matters

Videoconference testimony of witness Waugh.

Counsel for the General Counsel (the General Counsel) moved to allow Dennis Waugh, who retired from Oncor in 2011 and now resides near Colorado Springs, Colorado, to testify via videoconference at the NLRB Regional Office in Denver, rather than have to testify in person in Fort Worth. The Respondent opposed the motion. I allowed the testimony by videoconference from the Denver Regional Office, approximately 2 hours from Waugh's home, while reserving a decision on whether such testimony should be admissible.

As the Respondent's counsel noted on the record, Board law is sparse on the subject, and no Board decisions address whether videoconference testimony should or should not be allowed over objection. Clearly, the general principle is that testimony should be live, so that the judge and counsels are in the best position to observe the witness. However, exceptions can be warranted. Thus, Federal Rule of Civil Procedure 43(a) provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." As the note to the 1996 amendment to the FRCP 43(a) states, "Safeguards must be adopted to ensure accurate identification of the witness and the protection against influence by persons present with the witness."

Here, Waugh was not alleged as a discriminatee and was not a direct witness to any of the events underlying the complaint; rather, his testimony was limited to background evidence related to problems with smart meters. Waugh testified from the Regional Office, with a Board agent present at all times. The videoconference equipment worked flawlessly, and counsels

and I had the opportunity to see and hear him clearly. In all of these circumstances, I am satisfied that his testimony by videoconference was appropriate and that his testimony was sufficiently reliable to be admitted and considered even though he was not physically present.

The General Counsel's motion to amend at trial

On June 19, 2014, at the conclusion of the second day of the resumed trial, the General Counsel stated that he wished to move to amend paragraph 15 of the complaint to include the allegation that the Respondent unreasonably delayed furnishing information in response to all three information requests. The following morning, the seventh and last day of trial, he submitted General Counsel's Exhibit 1(x). The Respondent's counsel objected, and I offered the Respondent an opportunity to offer testimony why its delays in furnishing information were not unreasonable. However, the Respondent's counsel stated that he was not prepared to go forward and instead wanted a continuance to prepare. I granted the General Counsel's motion to amend. The Respondent's counsel continued with the presentation of the Respondent's case in chief, before resting.

Upon further reflection and with the benefit of additional research, I reverse my decision granting the motion to amend. Amendments to a complaint are allowed "upon such terms as may be deemed just." Board's Rules, Section 102.17. Whether it is just to grant a motion to amend a complaint during a hearing is based on three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service,* 347 NRLB 1167, 1171 (2006), enfd. after remand 315 Fed.App.318 (4th Cir. 2009); *Cab Associates*, 340 NLRB 1397, 1307 (2003). A review of the cases indicates that the motion should not be granted if any of the three factors are decided against the General Counsel.

In a case with similar facts, *New York Post Corp.*, 283 NLRB 430 (1987), a judge allowed, over the respondent's objection, a motion to amend made on the last day of hearing, to add the allegation of unlawful delay in furnishing information. The Board reversing, stating (at 431):

> There is no explanation why counsel for the General Counsel waited until the last minute to add this allegation to the complaints . . . . Although the record reveals some discussion from which the Respondent earlier surmised that amendments to the complaints might be proposed, we do not share the judge's confidence in finding that the Respondent was not prejudiced by the 11th hour amendments.

Here, the General Counsel was aware prior to the beginning of the trial that the Respondent had provided some of the information that the Union had requested in its three information requests after much time had elapsed. The General Counsel offered no reason for why the motion to amend was not made earlier, indeed not made prior to or at the beginning of the trial, or at the very least prior to the trial's resumption on June 18. In this respect, on April 30, the General Counsel raised—somewhat causally—the issue of unlawful delay but took no action to amend the complaint until the end of the second day of the resumed trial and after the Respondent had presented most of its case in chief. The burden is on the General Counsel to aver violations, and the Respondent's burden is to refute them once they are made—not to rebut them in advance.

For that reason alone, the motion to amend was deficient. Requiring the Respondent to alter or expand its evidence at the end of the trial, and/or necessitating a continuance to ensure that the Respondent has full due process, would be untenable and fly in the face of the goal of timely and efficient administrative adjudication.

Accordingly, the General Counsel's motion to amend is now denied.

Witnesses

The General Counsel's witnesses were Reed; Waugh; Edward (Rick) Childers and Greg Lucero, officials of IBEW Local 66, which represents employees of CenterPoint, Oncor's counterpart in the Houston area; Richard Levi, a union-side labor attorney who represents IBEW; and Michael Simmons, assistant fire marshal for Dallas County, who was stipulated to be a qualified expert in arson and fire investigations.

The Respondent called the following company representatives, with their positions at times relevant:

(1) James Greer, senior vice president and chief operations officer, the highest-level management official herein.

(2) Distribution operations department:

1. Vice-President Keith Hull.
2. Reginald Bonner, director of distribution operations, who reported to Hull.
3. Donna Smith (aka Donna Smith Jackson), trouble department manager, who reported to Bonner.
4. Troublemen Supervisors Michael Anderson and Randle Efflandt, both of whom reported to Smith and who supervised Reed.

(3) Transmission and distribution operations department:

1. Senior Vice-President Walter Carpenter;
2. Mark Moore, senior director of measurement services, who reported to Carpenter.
3. Timothy Burk, director of measurement services, who reported to Moore.

(3) Employee and labor relations department:

(1) Director Kyle Davis.
(2) Barbara Gibson, senior labor relations manager, who reported to Davis.

(5) Associate General Counsel John Stewart, whose jurisdiction includes the claims department.

(6) Data Analyst Karen Rosen.

The Respondent also called Kenneth Longeway as an expert witness; the parties stipulated to his expertise in the area of fires in general.

Credibility

At the outset, I note the well-established precept that a witness may be found partially credible; the mere fact that the

witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials,* 342 NLRB 1172, 1200 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997); *Excel Container,* 325 NLRB 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2nd Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

I also note that when a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLR 636, 640 fn. 15 (1995), modified on other grounds 86 F.3 d 1401 (5th Cir. 1996). When this occurred, I have credited the uncontroverted testimony of the opposing witness.

In my findings of fact, I will address credibility resolution in the context of specific events. My general conclusions and some specific credibility problems are set out below.

The General Counsel's Witnesses

Fire Marshal Simmons had no incentive to testify either for or against Oncor or Reed, and he testified in a straightforward and credible manner. Childers also testified credibly and did not appear to exaggerate problems that Local 66 members had experienced with smart meters. The same holds true of Lucero and Levy. Nothing in their demeanor or the substance of their testimony raised doubts about the reliability of their testimony, and I credit it.

Reed testified at great length, and portions of his testimony were credible and consistent. However, he was equivocal and uncertain on whether he ever spoke to Simmons before he testified before the senate committee on October 9, 2012. Thus, he first stated that he believed he called Simmons after he testified, during the period when he was trying to get evidence supporting his testimony, and that he believed all of his approximately six conversations with Simmons were after his testimony. However, he then indicated that it was "possible" that they spoke before the committee hearing. Further, his recollection of what they said in approximately six conversations was unsatisfactorily vague. He could recall only that in one of the conversations, Simmons said he had evidence of smart meters causing fires. In contrast, Simmons testified that they had only two conversations, and he gave a detailed account of each. I credit his testimony that there were two conversations, one of which occurred before Reed testified at the senate hearing, and on their contents.

Moreover, Reed's testimony that he saw "hundreds" of meters burned up and in the condition reflected in General Counsels Exhibits 9 through 17 was not supported by other evidence, and his description of Davis' demeanor at the October 8 negotiations session seemed overblown and exaggerated. Finally, Reed testified on cross-examination that he told Gibson on March 25, 2013, that the tickets she was providing to him were not the tickets that he had requested. In contrast, he stated in his affidavit that he did not specifically tell her that.

Waugh testified that he told his three supervisors individually about problems with smart meters, before or after safety meetings but did not do so at the safety meetings themselves because he feared retribution. He further testified that there was "very little discussion . . . at all" about smart meters at those meetings.[1] However, he later testified—inconsistent with a professed fear of retribution—that when troublemen brought up issues with smart meters, the supervisors "would listen to us . . . . [T]hey allowed us to talk. We were free to come in and talk to them any time, and they were very gracious."[2] Further, if the safety concerns of troublemen were as significant as Waugh testified, I cannot believe that troublemen would have not taken more vigorous action to avoid being subjected to potentially serious injuries.

The Respondent's Witnesses

Supervisor Anderson testified credibly and candidly, as reflected by his testimony that troublemen had come to him and reported smart meters were heating up and the lugs melting or burning, and that troublemen reported more situations with spread jaws or broken lugs with smart meters vis-à-vis the analog meters that they replaced. Accordingly, I credit his testimony in full. The same holds true for Supervisor Efflandt, who also testified credibly and candidly both as to the use of "service tickets" and the problems that troublemen reported to him about smart meter installation in the early months of their deployment (he stopped being a direct supervisor in late 2008).

I had no specific credibility issues with the testimony of Burke, Gibson, Moore, Rosen, and Stewart. Moreover, although the Respondent has had a contractual relationship with Longeway, and paid him to be a witness, nothing in his testimony suggested deception or exaggeration. Therefore, I generally credit these witnesses.

Carpenter, Davis, Hull, and Greer testified about their discussions concerning Reed's testimony before the senate committee. Their testimony concerning those discussions was far too consistent and struck me as scripted rather than believable. All of them seemed to go out of their way to minimize Greer's role, frequently using the collective "we" rather than specifying who said what, even when I directly asked some of them to do so. I cannot believe that their discussions, particularly concerning Reed's discharge, were as democratic as they portrayed and that Greer, the top-ranking Oncor official involved in the decision to discharge Reed, took such a passive role.

Further, I do not believe the testimony of the management representatives, including Greer, that when Greer first learned of Reed's testimony before the senate committee, his primary reaction was surprise and that his focus was in finding out whether there was any basis to Reed's allegations. As I will discuss, Oncor's installation of smart meters was a multimillion dollar project affecting millions of customers, and Reed's negative statements about smart meters before the legis-

[1] Tr. 1545, et. seq.
[2] Tr. 1547.

lative committee with oversight over public utilities was not only embarrassing but carried the risk of potential repercussions from the committee and/or the Texas Public Utilities Commission. I note Greer's testimony that he had responsibility over smart meter deployment, that he was involved in the decision to discharge Reed because of the importance of smart meter deployment, and that the Respondent was in favor of smart meters. In these circumstances, I am certain that, contrary to the testimony of management representatives but consistent with common sense, Greer was furious with Reed and expressed that sentiment from the start.

Davis was one of the witnesses who gave the "party line" when testifying about what Greer stated in conversations after the latter learned about Reed's testimony. Further, I do not credit his testimony to the extent that it indicated that it was not until January 2013 that Greer first raised Reed's position as a union official as a consideration. Finally, Davis did not offer a satisfactory explanation of why, in February 2014—over a year following Reed's discharge—he decided to recommend to Hull that they again review tickets to "make sure we had done it right."[3]

Similarly, when I asked Hull if Davis said why he suggested a second review, Hull was vague and somewhat nonsensical: "He just said we hadn't—he had no way of taking into account of it, so he wanted to make sure everybody had that ability to see it. . . . Nobody had looked at the records . . . that Smith had produced."[4] I also do not credit Hull's testimony that management did not discuss Reed's discharge until a meeting in January 2013. In this regard, Greer is normally not involved in the disciplinary process, and I am convinced that he raised at least the possibility of Reed's discharge from the start.

I note that Bonner testified in a confident and even manner except when he was asked if he had any input in the decision to discharge Reed: "I—out—I—I . . . I was not included—in that consensus decision to determine—to discharge Mr. Reed.[5]" This rather startling exception to the smooth flow of his testimony in general has to make me wonder why, and it reinforces my conclusion that Oncor representatives did not give me an accurate account of the decision-making process that led to Reed's discharge.

As was Bonner, Smith was generally unequivocal and spoke in an assured manner. However, on cross-examination by the Union's counsel, she was markedly evasive on the subject of troublemen using handwritten trouble tickets (or service tickets), in the context of her claim that she did not view them as "trouble tickets."

Thus, she testified that she was aware of handwritten service tickets, as contained in General Counsel's Exhibit 3, but did not give a response answer when I, and then the Union's counsel, asked when she first became aware of that kind of trouble ticket. She switched between using the past and present tense as far as troublemen keeping such records and gave contradictory testimony about whether they were company records, as follows.

Smith testified that "[s]ome of the troublemen use--have filled them out and turned them into [sic] service center . . . . [T]hey're not official company documents, however"[6]; then contradicted herself by testifying that if Reed had any handwritten tickets, they were "just hand–copies that he would have kept himself"[7]; but also conceded that if troublemen turned in such forms, they were placed and stored in a file cabinet in the central service center in Dallas. Since such documents were later furnished to Reed, the Company clearly retained them on a permanent basis.

Efflandt, who supervised troublemen, including Reed, until late 2008, contradicted Smith's testimony that the service tickets were not company documents. Thus, he testified that he got the service ticket form (with the Oncor logo) from the print shop and that the troublemen filled them out and gave them back to him to be stored, that the troublemen also referred to them as "trouble tickets," and that he was aware that Reed used service tickets at the time that Efflandt supervised him.

Finally, I note the reference in an internal management email of November 5, 2012, to a manual review of Reed's "pre-October 2010 *paper* tickets" (emphasis in original) for nonrestore orders, reflecting that Oncor kept certain records in paper form.

For the above reasons, I discredit Smith's testimony that the service tickets were not considered company documents and a type of trouble ticket.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, and the thoughtful posttrial briefs that the General Counsel, the Union, and the Respondent filed, I find the following.

At all times material, the Respondent has been a Texas limited liability corporation with an office and place of business in Dallas, Texas, engaged in the business of transmitting and distributing electricity to approximately 10 million residents in north Texas. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

Oncor is regulated by the state Public Utilities Commission and comes under the jurisdiction of the State Senate Business and Commerce Committee (the senate committee). It has about 3500 employees, who work out of 50 or more locations. Approximately 500 of them work out of the corporate headquarters in Dallas.

The Union represents a unit that includes all regular employees in classifications covered under certifications 16-RC-951, 16-RC-1078, 16-RC-1079, and 16-RC-10746, as reflected in the parties' 2010-2011 collective-bargaining agreement, in effect at all times material.[8] The agreement did not have any

[3] Tr. 1443.
[4] Tr. 1138-1139.
[5] Tr. 1210.
[6] Tr. 1268.
[7] Tr. 1269.
[8] See Jt. Exh. 20 at 5, 45. Davis testified that this has been the unit description since 2008. The Respondent contended at trial that they are separate units but does not dispute that the Union represents all of the employees in them. The parties agreed at trial that any issue about the scope of the bargaining unit does not bear on the allegations herein; indeed, none of the parties' briefs address the scope of the bargaining unit.

provision about discipline, but a May 26, 2010 issuance by the human resources office contained such.[9] Therein, a progressive discipline system was set out, providing the following formal discipline if informal couching and counseling is unsuccessful: step one-oral warning; step 2-written warning; step 3-suspension; and step 4-termination. The caveat is set out that the seriousness of an offense may justify bypassing one or more of the steps.

In April 2011, Reed became the Union's full-time business manager and financial secretary, and he remains in that role today.

Reed worked for Oncor and its predecessor employers since May 1978. For approximately the last 10 years, he was a trouble man (aka trouble shooter) or first responder for Oncor. Before that, he was a journeyman lineman, involved in maintenance and installation.

Reed was one of approximately 107 troublemen who worked under Smith and five supervisors. His normal responsibility was responding to power outages; for example, when a car hit a pole, and going out to the site to get the lights back on. If he could not, he called a repair crew to come out.

Smart Meter Deployment

A smart meter is a digital metering device that allows for remote control readings and distinction, as opposed to analog meters.

Oncor began deployment of smart meters to replace analog meters in the fourth quarter of 2008. The huge magnitude of the project is clear from the numbers: approximately 3000 meters daily, 80,000 monthly, and 960,000 yearly were installed. In context, in prior years, the Company normally changed about 60,000–65,000 meters annually. By the completion date in December, approximately 3.25 million smart meters had been installed. Axiomatically, Greer testified that Oncor favors smart meters.

One of the effects of Oncor's installation of smart meters was the layoff of meter readers and certain field service employees, some of whom were terminated from employment. Internal union communications reflect concern over this erosion of bargaining-unit work.

The technology of smart meters is an important element of this case, and I will briefly describe it. The operating system consists of three interconnected components, each of which is stand-alone but works in conjunction with the other two: the smart meter, the meter base or meter can, and the electrical panel. Electricity flows into the meter through the meter base, which is connected to the electrical panel. The meter is plugged into the four jaws of the meter base by what is termed blades, lugs, or prongs.[10] The jaws thus serve as the receptacle for the meter.

Analog meters used the same components. The smart meter is the responsibility of Oncor; the customer is responsible and must pay for repairs to the meter base and electrical system. However, during the deployment, the Company paid contracted electricians to make repairs if the customer experienced any problems in service.

CenterPoint, Oncor's counterpart in the Houston, Texas area, has also deployed smart meters to replace analog meters. Landis+Gyr (L+G) manufactures Oncor's smart meters; Itron, CenterPoint's meters. Local 66 is the Union's counterpart in the Houston area.

Events preceding Reed's testimony on October 9, 2012

In Negotiations

The 2011-2012 collective-bargaining agreement was effective through October 25, 2012, and in advance of its expiration, the Union and Oncor met on August 23, 2012, to discuss issues and schedule negotiations. Reed was the chief spokesperson for the Union; Davis for Oncor. Gibson and International Representative George Crawford also attended. The meeting lasted several hours.

Reed and Davis testified in detail about the meeting. Gibson did not; her testimony thereon was limited to answering the Union counsel's question of what, if anything, Davis said about Reed's truthfulness.

Davis' description of what was said at the meeting was considerably more detailed than was Reed's, although their accounts were, for the most part, not necessarily inconsistent. Accordingly, I generally credit Davis' account.

However, as to Davis' negative remarks about Reed, Davis testified that he said only, "Bobby, you don't tell the truth."[11] On the other hand, Gibson corroborated Reed's testimony—consistent with what he said in his November 8, 2012 letter—that Davis said more than that. Her version was almost identical to Reed's, other than her stating that Davis used the term "untruthful" but did not call Davis a liar per se,[12] a difference that matters little in substance since the terms are basically synonymous. I also note that Reed's testimony thereon on the first day of trial and on the last day of trial was very consistent. I therefore credit Reed's and Gibson's similar versions.

Further, neither Davis nor Gibson denied Reed's testimony that at the meeting, Davis referred to an upcoming legislative session concerning smart meters, and Reed's testimony thereon comported with what he stated in his November 8 letter. Therefore, I credit Reed on this, as well.

At the start of the meeting, Reed asked why the Company had changed its rule regarding how long employees had to be off hydocodone before they could perform safety-sensitive work, from eight hours to 36 hours. Davis replied that this was not a change in the rule but rather a change in the medical review officer's interpretation of the rule. He and Reed went back and forth about whether it was a change in the rule or in its interpretation. After that, the parties exchanged letters of intent. Oncor offered a 1-year extension, including a 3-percent wage adjustment for most, but not all, employees. Reed asked its purpose, and Davis replied that the upcoming state legisla-

[9] Exh. 30.

[10] See R. Exhs. 4 and 5 (photographs of a smart meter, the first with the clear plastic top removed and the wiring revealed); R. Exh. 14 (photograph of a meter base, with identification of parts).

[11] Tr. 1393.

[12] Tr. 1533-1534.

tive session might result in changes.[13] Reed objected to the proposal, stating he would never agree to a contract where people did not get a wage raise. Reed then went on to provide a list of 23 or 24 items about which he wanted to talk at negotiations, such as rest time and moving people from service center to service center. As to the latter, Davis stated that this had created problems in the past. Reed explained how it worked in Dallas. Davis reminded him that the bargaining unit was not just in Dallas but covered a wide geographical area.

At the end of the meeting, Davis asked him to take the Company's proposal to his members and let them vote on it. Reed replied that he would present it to the members but that they were not going to like it and that he still want to set up dates for negotiations.

At some point during or at the conclusion of the meeting, Davis stated that Reed was always looking for a fight with the Company, that he stuck his head in the sand, and that he did not tell the truth. Whether Davis said this in the context of their discussions on service center moves (Davis) or on the Company's proposal for a 1-year contract extension (Reed) is immaterial because both related to Reed's performance of his duties as a union official.

On October 8, 2012, the parties met for their first negotiations session. Davis and Reed were again the respective spokespersons. The other attendees included Gibson, Union President Charles Jackson, and four employees who were members of the Union's negotiating team.

Davis and Reed testified about this meeting; neither Gibson nor any of the other participants did so. Their accounts were somewhat different but not necessarily incompatible. It is clear from their testimony that the atmosphere was somewhat strained. I believe that Davis was not as cordial and even keeled as he portrayed himself but not as bellicose and hostile as Reed described him.

Davis was the sole witness to testify about a premeeting that day that he and Gibson had with Reed and Jackson, at the Union's request. Reed did not rebut the statements that Davis attributed to him. Accordingly, I draw an adverse inference, and credit Davis' uncontroverted testimony as follows.

At the premeeting, Reed stated, "I'm trying to play nice in the sandbox, we're here to make a deal today, if we can't, I'm going to be in Austin testifying before the Senate commerce committee tomorrow abut smart meters."[14] Davis asked if that was a threat. He said no. Davis responded that if he thought he needed to testify, that's what he needed to do.

At the beginning of the formal meeting, which started at about one p.m., Reed said that he wanted to talk about overtime pay vis-à-vis meal allowance for overtime. Davis interrupted and stated that the Company had thought about it and now was willing to pay for only three committee members to attend negotiations, one representative for each of the three bargaining units.[15] Davis further stated that if the Union agreed to take Oncor's proposal to a vote, the Company would pay for all of the union committee members who were present.

During the course of the meeting, Reed made several economic proposals, each of which Davis immediately rejected with the statement that the Company was not interested in it at the time but would take at look at it. He said that the Company had a fair package offer on the table. At the conclusion of the meeting, the parties scheduled another meeting for October 22 or 23.[16]

The next morning, October 9, Reed called Davis and told him that the Union had decided to take the Company's proposal back to the membership for a vote. Davis responded that was good and that the Company would pay all the union committee members who had been present for negotiations the previous day. Following that, Reed scheduled with Gibson a ratification vote for the weeks of October 15 and 22.

Reed's communications concerning smart meters

On dates uncertain prior to October, Childers of Local 66 and Reed had a number of conversations about problems with smart meters. Childers testified that he believed the first occurred in 2012; however, an April 14, 2011 email, discussed below, indicates that it occurred prior to that date.

In that conversation, Reed asked if Local 66 was having any issues with installation of smart meters at CenterPoint. Childers said yes, that they had some issues with them melting or burning up meters cans, burning up customers' equipment, and sparking (creating electrical arcs). He told Reed that he would go out to the shops and talk with the meter technicians who repaired damaged meters. Within a few days, Childers called Reed back and said that he had spoken with meter testers, who reported they were seeing a lot of issues with communication between the meters and remote site control, as well as seeing many issues with meters melting or burning up. As to the latter, Childers told Reed that the meter techs believed it was because of loose connections due, in part, to the blades on the smart meters being a little thinner; this loose connection created heat and an arc that could burn up the meter.[17]

In an April 14, 2011 email to Cory Hendrickson, staff contact person for State Representative Sylvester Turner, Reed voiced safety concerns with smart meters that CenterPoint was installing.[18]

On October 7 or 8, 2012, Richard Levy, attorney for various Texas labor organizations, including the Union, informed Reed that Senator Carona's committee was having a public hearing on smart meters and suggested that Reed might want to attend. Respondent's Exhibit 2 is a notice of that public hearing. One of its stated purposes was to take invited and public testimony concerning whether smart meters "have harmful effects on health" and "whether an independent testing company analysis on the safety of advanced meters should be commissioned."

[13] Apparently referring to the Union's attempts to get an opt-out for smart meter customers at no charge, legislation that I can logically assume Oncor opposed.

[14] Tr. 1399.

[15] Tr. 1401-1402 (Davis).

[16] Negotiations continued and, in January or February 2013, after Reed's discharge, the parties agreed on a new contract.

[17] I recognize the hearsay nature of what Childers related about this, but it was admissible to show Reed's state of mind, not the truth of the matter asserted.

[18] GC Exh. 2 at 13. The date of the email is inconsistent with Reed having his first conversation on the subject with Childers in 2012.

See also Respondent's Exhibit 21 (press release).

Reed testified that he decided to attend and testify at this hearing when he encountered a hostile environment in negotiations on October 8 and determined that negotiations would go nowhere.

On about that same day, Reed called Assistant Fire Marshal Simmons. Simmons stated that his office had been involved in two fires in Lancaster as a result of smart meters and that he was trying to see if there was a pattern of whether their installation in old or new houses caused fires. He asked Reed about any installations issues, and Reed said yes, that some of the installations were having difficulty in putting meters in small, older houses. He specifically mentioned a woman's home in the southern Dallas County. Reed also stated that he was going to attend a senate hearing in Austin and would probably be able to obtain more information.

Reed's testimony on October 9, 2012

Before testifying on October 9, Reed signed the senate committee's witness list as representing "(Self; IBEW Local 69), Dallas, TX."[19] He did not sign "for" or "against" but "on." He was allotted 2 minutes to speak.

Since the sole reason that the Respondent has advanced for Reed's discharge was based on his statements before the senate committee on October 9, I will set out his testimony verbatim from Joint Exhibit 1 at 77–79, stipulated to be an accurate rendition of what the senate committee recorded.[20]

TESTIMONY BY BOBBY REED, ONCOR ELECTRIC DELIVERY

MR. REED: Yes, sir. My name is Bobby Reed.

SEN. CARONA: Bobby Reed. Okay. Yes.

MR. REED: Yes, sir. I work for Oncor Electric Delivery and have for about 34 years. I was a lineman and now trouble man. As of last April, I became a representative for our local union there in Dallas, or all over the state, for Oncor employees.

What I came to testify about today is when they started installing the AMS meters, I noticed that the tickets that I worked or the work orders that I went out on were beginning to be increasingly of the meters burning up and burning up the meter bases. And it's kind of a two-issue thing there I wanted to bring up to you.

But I can't tell you how many times I went out. And when I go to a low income house where this lady comes out, this elderly woman, that's widow woman and she says, you know, "What's the problem?" And I said, "Well, your meter base burnt up, and it's your equipment and you have to pay for the repairs before you can get your lights back on." And she tells me, "Well, I've been living here for 45 years, and I've never had a problem until they installed that meter." And that just has happened a lot.

When this started to increase--

SEN. CARONA: Do you believe that it is attributable directly to the meter or perhaps the age of the line in a box?

MR. REED: No, it's the meter. And I've read that about the wiring in the box. But the meter is just a little bit bigger than the old analog meter, and especially for an older house, it's a 100-amp meter base normally. And when you have to set that meter, it's a little bigger, and the cover won't go down. So people have to manipulate that meter in order to get the cover to lock.

But when I started noticing this, I called the union there in Houston and asked them if they were experiencing the same thing. And he told me he would go by the meter shop that next day and then call me. And he called me the next day and said that they are experiencing a significant increase in the meters being turned in that are burnt up from the old analog meters to now, the AMS meter.

SEN. CARONA: That's interesting. That will be something we want to look a little further at I'm sure.

MR. REED: I don't know much about frequency, but I do know a little bit about fire and heat, and these things are causing damage to people's homes.

SEN. CARONA: Thank you, sir. Appreciate you make the trip.

Events after October 9, 2012

The result of the October 2012 ratification votes was that the membership rejected the proposal. On about October 25, 2012, Reed called Gibson and informed her of that. Gibson did not deny the following account of Reed, which went unrebutted. I draw an adverse inference from this and credit Reed's testimony as follows.

Gibson responded that Reed and Union President Jackson had sabotaged the vote by telling members not to vote for the contract. Reed denied this, stating that he had no idea about what she was talking because he began every ratification meeting by saying that the Union recommended a "yes" vote.

Following Reed's discharge, Reed and Simmons had a second, short conversation. Simmons stated that he had had another fire in southern Dallas County. Reed said that he had been discharged from Oncor for attending the senate hearing but was still involved with the Union. He also mentioned a couple of situations involving meter installation in houses.

Oncor's response

Moore, who spoke at the senate committee hearing on the Respondent's behalf "for" smart meters, was present when Reed testified. He reported it to Davis, who in turn reported it to Greer that same day. Davis testified that the possible discipline of Reed for what he said in his testimony was raised early on and, for that reason, Davis wanted to get a transcript of that testimony.

The next morning, October 10, 2012, Davis, Greer, and Hull

[19] R. Exh.16 at 2.

[20] With the exceptions that the word "basis" at 78 L. 2 should read "bases," and at 78 L. 9 should read "base."

met and watched the video of the senate hearing.[21] As I indicated earlier, I am not convinced that they gave me a complete account of what they, particularly Greer, said at the meeting, or at subsequent meetings regarding Reed. However, I do credit their testimony that Greer stated that he wanted to see if there were company documents backing up Reed's testimony that smart meters caused fires and damage to customers' homes. He asked Hull to check distribution or outage tickets, also called trouble tickets; and Davis to check the compliance hotline (through which employees could anonymously voice any concerns). Soon after the meeting, Greer asked Carpenter to check measurement service orders or tickets since Reed might have worked them. Later that morning, Greer discussed Reed's contentions with Allen Nye, Oncor's General Counsel, and they decided that the claims department should check for claims concerning smart meters.

Greer testified that "[i]t was really the totality of the comments he [Reed] made, not any specific line, that caused me concern, and the need to conduct the investigation."[22] Accordingly, I will consider them in that context.

That day, Davis checked help line records for any concerns that indicated smart meters were causing fires, found none, and reported such to Greer.

After the meeting, Hull directed Bonner to put together a plan to look at tickets Reed had worked during the smart meter deployment period to determine whether there was anything reflecting that smart meters caused fires or damaged customers' homes.

For necessary context, CATS stands for computer assisted trouble system, under which supervisors at the operating center generated the tickets from customer calls, dispatched troublemen, and then input information that the troublemen reported about the outage. This system was in effect until approximately October 2010, when it was replaced by OMS (outage management system). Under this system, the troublemen themselves generate the tickets using portable personal computers, and they input information electronically rather than calling it in to the dispatcher to enter.

Bonner thereafter met with Smith and directed that there be a search of Reed's CATS tickets from November 2008, when ONCOR began replacing analog meters in the Dallas area, until October 2010, and of subsequent OMS tickets up to April 2011, when Reed began working full-time for the Union.

Smith had someone query the OMS records for Reed's name, logon, ID, and radio number. She also hired contractors to pull boxes of CATS tickets to locate tickets for the period when Reed was a troubleman. They went through approximately 178,000 tickets and pulled out 1370 that were Reed's. Smith reviewed all of them for comments saying that smart meters caused a fire or contained terms such as "lugs burned," " lights blown on arrival," " no power," or "customer's problem." The CATS system did not electronically store data for "non-restore" tickets, as opposed to service calls for power outages. Therefore, Reed's pre-October 2010 handwritten non-restore paper tickets were manually reviewed.

Smith determined that 822 out of the 1370 CATS tickets related to smart meters. Of these, 108 contained remarks about meter or meter base.[23] None of Reed's 26 OMS tickets or non-restore paper tickets had any such notations.

Smith reported her findings to Bonner by emails dated October 19 and November 4, 2012.[24] She stated therein that the damage or burning that Reed reported involved the meter base and that troublemen to whom she had talked mentioned problems with installation of smart meters and with components other than the meter itself (i.e., rings or jaws).

Bonner personally reviewed the 108 tickets mentioned above and concluded that none of the comments mentioned that the smart meter itself caused fires or damage to customers' homes. He reported this to Hull on about November 5.

After the management meeting on October 10, Carpenter met with Moore and told him to check the meter dispatch tickets or measurement orders from the last quarter of 2008 through 2011, when Reed might have been dispatched to prearranged installations. Moore contacted Debra Anderson, director of market operations, who had Data Analyst Karen Rosen run a search of all service orders for a trouble man identified as "JYMR" for the above period. She found none. On October 22, 2012, Rosen emailed Anderson with the results of her inquiry, and Anderson in turn emailed Moore,[25] who related it to Carpenter.

After the October 10 management meeting, Nye asked Stewart if he knew of any claims or lawsuits where smart meters had caused a fire. Stewart is responsible for all litigation against the Company and directly supervises the claims manager. Based on Stewart's personal knowledge, a check of the claims data base, and an update from a litigator in his office, Stewart found about five lawsuits regarding smart meters, two or three of which claimed that smart meters caused a fire. None of them went to trial: one was dismissed on a motion for summary judgment, and the other two settled. In one, L+G indemnified Oncor, so presumably, the problem arose from the smart meter itself. However, the factual underpinnings of the case are not in the record. Stewart reported back to Nye that he could find no occasions in which he was able to identify a smart meter as the cause of a fire.

On about November 6, 2012, Greer met with Carpenter, Davis, and Hull in his office.[26] The latter three related to Greer the results of their respective inquiries and their conclusion that they had found nothing to support Reed's claims that smart meters caused fires or damage to customers' homes. The record is not clear who proposed that Reed be given an additional

[21] The persons present according to Davis and Hull. Although Greer also said that Carpenter was also in attendance, Carpenter did not testify about the meeting. Whether Greer spoke to Carpenter at said meeting, or shortly thereafter, is immaterial.

[22] Tr. 942.

[23] R. Exh. 26 at 2, a November 4, 2014 email from Smith to Bonner. Bonner testified that the number was 143, but I assume that the email figure is more reliable.

[24] R. Exh. 26.

[25] R. Exh. 22.

[26] Testimony of Greer and Hull. Moore did not testify about this meeting, and I believe that Davis was mistaken when he placed him there.

opportunity to provide documentation or information to support his testimony, but that decision was made at the meeting. Davis recommended that communication with Reed be in writing.

By letter of November 7, 2012, to Reed, Greer referenced Reed's testimony about smart meters causing damage to customers' homes, stated that the Company had conducted a thorough investigation but thus far found no evidence to support that testimony, and requested that Reed provide, as soon as practical, any and all information upon which he based his testimony.[27]

Reed responded by letter of November 29, 2012, explaining that he did not specifically testify that smart meter installations were damaging customers' homes or created a safety hazard, that his testimony was based on his own experiences in dealing with trouble incidents that occurred following smart meter installations, and that the details of those incidents were properly reported on his trouble tickets.[28]

After sharing Reed's response with other management, Greer responded to it with a December 14, 2012 letter.[29] He stated that a review of the transcript showed that Reed had specifically said that smart meters were damaging homes, that the Company's review found no evidence to support his testimony, and Reed had not provided any information in response to Greer's November 7 letter. He next cited the Company's code of conduct requirement that employees report suspected violations of the code of conduct, policy, laws, or regulations, and its prohibition against providing misleading or fraudulent information to, inter alia, any public official or governmental agency. He said that the Company would consider the facts that it had and issue appropriate discipline, and that Reed had to submit before December 19 anything else that he wished to be considered.

The record does not reveal who first raised violation of the code of conduct as a basis for disciplining Reed, or when. Greer testified that Reed was discharged for violating the code of conduct by providing false testimony to outside parties,[30] the sole violation referenced in Reed's discharge letter, discussed below. Accordingly, I will not address any arguments by the Respondent that Reed also violated the code of conduct by not reporting what he perceived as unsafe or dangerous conditions.

The provision concerning providing information provides, in relevant part[31]

> Employees should never provide misleading or fraudulent information or information known to be incorrect, either in writing or orally, to the Company or any Company representative; any public official, governmental agency, or internal or external auditor, or in any public communications.
>
> . . . .
>
> Employees shall fully cooperate and shall not withhold information or given false or misleading information in an investigation including Company investigations and those conducted by external parties. . . .

[27] Jt. Exh. 5.
[28] Jt. Exh. 6.
[29] Jt. Exh. 7.
[30] Tr. 768; see also Tr. 1180 (Hull).
[31] Jt. Exh. 18 at 6.

Reed responded by December 18, 2012 email and mail.[32] He asserted that he was engaged in protected union activity when he testified, that he testified truthfully, and that the December 14 letter seemed driven by antiunion animus.

December 18, 2012 information request

In his letter, Reed requested the following, within the next 14 days:

(1) The pages and lines of the Code of Conduct to which Greer was referring in his December 14 letter.

(2) All documents reviewed and/or created or considered in connection with the Company's investigation.[33]

(3) All completed trouble tickets that Reed had handled since the start of deployment of smart meters.

It is undisputed that Oncor did not provide any of the requested information prior to Reed's discharge. Greer shared the letter with Carpenter, Davis, and Hull.

January 2013 decision to discharge Reed

Apparently in December 2012 or January 2013, Davis asked Gibson to research what Oncor had done in the past with employees who provided false information. From her own experience and review of the historic data base of discipline going back to 2008, she found that the Company had consistently discharged employees for the first offenses of falsifying company records, providing false information in an investigation, safety violations, theft, violations of drug and alcohol polices, and violations of firearms policies. She reported that back to Davis. She also showed him a chart that she had prepared that summarized the 18 discharges for providing false or misleading information.[34] He asked her to participate in a meeting with Greer.

Davis testified that only one exception has been made to discharging an employee who provided false statements; for an employee who had a verifiable medical condition that affected his memory.

Normally, Hull was the final decision maker for discharge or step 3 grievances involving bargaining unit employees, but Greer testified that he was involved in the decision to discharge Reed because of the importance of smart meter deployment and Greer's role as being in charge of the program.[35] I am convinced that Greer's involvement was also due to Reed's position in the Union but, in any event, Greer's participation was highly unusual. Indeed, the Respondent cited no other examples thereof.

In approximately the first week of January 2013, Greer held a meeting with Carpenter, Davis, and Hull. Gibson was present for part of it. I am not confident that management representa-

[32] Jt. Exh. 8.
[33] This information was also requested in a separate letter of the same date, which also was emailed and mailed. See Jt. Exh. 9.
[34] R. Exh. 31, which she prepared in preparation for Goodson's grievance. Reed's name was later added. None of them involved statements to a public body.
[35] Tr. 1143, 817.

tives gave me a complete or fully accurate picture of this meeting, due to their constant use of the collective "we" and their contradictory testimony as to what Greer said.

Thus, Carpenter testified that Greer indicated the direction of discharge but could not remember his exact words, Hull testified that "[w]e determined" to discharge Reed, and Davis testified that Greer indicated at the end of the meeting that "he was going to think about it."[36] However, Greer testified that at the meeting, he announced his decision to discharge Reed, based on the recommendations of the team.[37] In this regard, Davis testified (at Tr. 1427-1428) that Greer asked how Reed should be informed of his discharge.

In any event, management, including Greer, determined that Reed had made false statements before the senate committee in violation of the Company's code of conduct because they had been unable to find a basis for it, and Reed had provided no additional information despite being afforded the opportunity to do so. Greer asked Gibson how any other employee would be treated for the same offense. She replied, the employee would be discharged, and Davis agreed. Gibson then left the meeting, which continued. Greer made the final decision to discharge Reed.

At no time did management meet in person or speak with Reed orally regarding his testimony.

Reed's discharge and subsequent grievance

Greer issued a January 14, 2013 discharge letter to Reed, stating that, effective immediately, he was discharged for violating the code of conduct by falsely testifying that smart meters were causing damage to peoples' homes.[38] Greer said that the Company's review of all CATS/OMS tickets assigned to Reed from November 2008 through October 2010 had not found any report involving a smart meter causing damage to customers' homes. He added that, pursuant to Reed's request, Reed could contact Smith to schedule a review of those tickets.

By an email to Gibson dated January17, 2013, Reed notified the Company that the Union had a grievance regarding his discharge ready for the third step of the grievance procedure as per article IV section 7 of the collective-bargaining agreement.[39] The grievance[40] was formally presented at a February 14, 2013 third-step grievance meeting attended by Hull and Gibson for the Company, and Reed and three other union representatives.

Reed and Hull testified similarly. The meeting was very short. After Reed presented the grievance, Hull asked if he had additional information, to which Reed replied no. Reed then stated that the attorneys would handle it.

By a February 21, 2013 letter from Hull to Reed, the Company denied the grievance, saying that no additional information had been provided at the February 14 meeting.[41] On February 26, 2013, the Union filed a request for arbitration with the Federal Mediation and Conciliation Service (FMCS).[42]

By letter of March 25, 2013, from Reed to Gibson, the Union made a request for information in connection with the upcoming FMCS arbitration on Reed's discharge.[43]

Following is a summary of what he requested:

> 1—5—Documents reflecting customers' claims for damages to (or problems with) customers' meter bases and/or metering equipment from January 1, 2008, to date.
>
> 6 and 7—Identification of all electrical contractors or other businesses that Oncor used or had on standby to repair customers' meter bases and/or metering equipment since January 1, 2008.
>
> 8—All service tickets filled out by troublemen that included any of the following words: "breaker heading[sic], burn, burned, defective load lugs, defective smart meter, fire, fire dept, heating up, load lugs, load side lug, MB, meter, meter base, meter block, meter lugs, mtr, smart meter" since January 1, 2008.
>
> 9—All CATS/OMS tickets assigned to troublemen that included substantially all of the words in the preceding request, for the same time period.
>
> 10—All documents reviewed, created, or considered in connection with the investigation referenced in Greer's November 17 letter.
>
> 11—12—A copy of the code of conduct referenced in Greer's December 14, 2012 letter, highlighting or marking the specific provisions which Reed had violated or with which he had not complied.
>
> 13—Regarding Reed's December 18, 2012 letter,
>
> (a) Did Greer receive the letter and, if so, on what day did he first read it?
>
> (b) (Various questions relating to meter bases being homeowners' equipment).
>
> (c) (Several questions relating to what Davis said at the August 23, 2012 meeting).
>
> (d)-(g) Who determined that Reed's assertions about events that occurred during bargaining were accurate or inaccurate, and when.
>
> 20—Regarding the discharge letter, inter alia,
>
> (a) Did Oncor contend that anything that he said in his testimony was false and, if so, what Oncor contended was the truth.
>
> (b) Oncor's reasons for selecting and using the time period from November 2008 through October 2010 as the CATS/OMS tickets to review.
>
> (c) Oncor's reasons for not reviewing the CATS/OMS tickets of all troublemen.
>
> (d) Oncor's reasons for not reviewing the service tickets that Reed had filled out or the service tickets of all troublemen..
>
> (e) Oncor's reasons for not interviewing Reed.
>
> (f)Who made the decision to discharge Reed and who had input in the decision.

[36] Tr. 1628, 1130, 1437.
[37] Tr. 812, 916.
[38] Jt. Exh. 10.
[39] Jt. Exh. 22.
[40] Jt. Exh. 21.
[41] Jt. Exh. 23.
[42] Jt. Exh. 24.
[43] Jt. Exh. 11.

(g)Any and all documents and/or information upon which the Company considered and relied in the discharge decision, including its internal investigation in advance of the discharge.

21—24—Various documents pertaining to Reed's work record.

25—Prior instances in which Oncor accused and/or disciplined an employee for allegation violation of company rules and/or the code of conduct in connection with testimony to any governmental body.

26—Prior instances in which Oncor was aware of testimony by an employee to a governmental body.

Oncor did not respond to this information request. Its defense at trial is set out in the analysis and conclusions section.

Also on March 25, 2013, Reed met with Smith at the north service center in Dallas as per Greer's offer in the discharge letter. She produced in unredacted form the CATS tickets that Reed had worked, which his comments indicated were meter related.[44]

When Reed started to review them, he asked what they were because he had never seen one. and he commented that "they were not his handwriting."[45] Smith replied no, that these

represented what he had reported to the operators, who recorded what he said. Reed asked if he could take them with him, and she replied no. He then asked if he could make copies. She said no, because they contained customer information, and he needed to request them from Gibson but that they would be provided.

Inasmuch as Reed's affidavit contradicted his testimony that he told her the information was not what he had requested, I do not find as a fact that he said such. However, since it is undisputed that he stated that he had never before seen CATS tickets, the only reasonable conclusion would have been that his request for trouble tickets referred to something else.

At trial, Smith took pains to emphasize that the handwritten tickets were not official company documents, and she averred that she did not know that Reed was referring to them in his December 18, 2012 information request concerning trouble tickets. Nevertheless, she conceded that some troublemen filled out handwritten trouble tickets, which were turned in and kept in a file cabinet at the service center. Moreover, Supervisor Efflandt testified that he would get the form (with the company logo) used for handwritten tickets from the print shop, that troublemen filled them out and returned them to him, and that the handwritten tickets were officially called service tickets but that troublemen also referred to them as trouble tickets.

In light of what Reed told Smith about never before seeing CATS tickets, his allusion to handwritten tickets, and her knowledge that handwritten trouble tickets were used, Smith had to be on notice, actual or constructive, by the beginning of the meeting that his information request encompassed handwritten trouble tickets.

The parties had no further communications in 2013 regarding Reed's information requests.

Sam Goodson grievance

The Respondent discharged Goodson in the summer of 2013, for allegedly lying in the course of a company investigation concerning safety violations in connection with an incident that occurred on May 13, 2013 (the incident), which also involved employee Eddie Lopez. The Union filed a grievance over the discharge, and by letter dated July 24, 2013, to Gibson,[46] requested information pertaining to the incident; Goodson's attendance, safety, and discipline records since January 1, 2008; and the same records for Lopez. Reed testified that he requested such information to determine whether Goodson was treated disparately vis-à-vis Lopez and whether the Union should continue with Goodson's grievance.

Gibson responded by a September 3, 2013 letter, in which she provided some, but not all, of the requested information by way of attachments and a flash drive.[47]

As to the bases for the decision to discharge Goodson, Gibson responded, "[I]n addition to admissions made by Mr. Goodson during the Company's investigation and observations made by Company representatives, the Company replied upon its policies and procedures. See attachment 'A' [code of conduct and employee handbook] and attachment 'B' [statements]."

Reed testified that this response was unsatisfactory because it did not elaborate on what the admissions and observations were. However, as part of its response, the Company furnished statements from supervisors and their notes from interviews with Goodson, Lopez, and other employees concerning the incident.

The Company objected to most of the requests for information pertaining to Lopez on the grounds that they invaded the privacy of nonbargaining unit employees and were irrelevant. However, by letter of December 20, 2013, to Reed, Gibson provided a supplemental response to the information request.[48] Therein, she provided the requested information regarding Lopez that had not been furnished in the first response, up to the date of May 26, 2013, when Lopez was promoted to a measurement position outside of the bargaining unit. Reed testified that he was satisfied that as of December 2013, the Respondent had given the Union everything that was responsive up to the date of Lopez' promotion.

In the supplemental response, Gibson also provided Reed with the names of the persons involved in the decision to discharge Goodson and the person who made the final decision, as Reed had requested.

Accordingly, the only issue with respect to the Goodson information request is whether the Respondent was obliged to furnish information about Lopez after his promotion to a position outside of the bargaining unit. After receipt of the second response, the Union had no further communication with the Respondent concerning this information request.

[44] R. Exh. 27 (976 pages, redacted).
[45] Tr. 1252-1253 (Smith).
[46] Jt. Exh. 15
[47] Jt. Exh. 16 (approximately 619 pages of attachments).
[48] Jt. Exh. 17 (approximately 41 pages of attachments).

Events in 2014

In February 2014, when this matter was already scheduled for trial, Davis recommended to Hull that they re-review the trouble tickets "to make sure we had done it right."[49] At trial, he did not offer a cogent explanation of why he did so. As I mentioned earlier, when I asked Hull if Davis said why he suggested a second review, Hull's response was unintelligible: "He just said we hadn't—he had no way of taking into account of it so he wanted to make sure everybody had that ability to see it. . . . Nobody had looked at the records . . . . that Donna Smith had produced."[50] Moreover, Greer testified that "[w]e wanted to make sure that we provided him with every opportunity to look at the--the records that he might want to look at."[51]

Since Reed had been discharged over a year earlier, I cannot see how a further review of the trouble tickets constituted an "opportunity" for him. I am not convinced that management expressed on the record the real motivation for the second review, and I will not engage in speculation as to what it was.

In any event, Greer sent Reed a letter dated February 28, 2014, in which he implicitly referenced the information request allegations related to Reed in the complaint, and offered him an opportunity to review all of the Metro East CATS trouble tickets from October 1, 2008, to October 4, 2010, including the approximately 1700 trouble tickets assigned to him; as well as electronic OMS ticket records for the period from October 5, 2010, to April 30, 2011, when he became a full-time business manager.[52] In the course of the letter, Greer stated that Smith on March 25, 2013, had told him to put in writing any request for redacted copies of the CATS tickets, but he had failed to do so.

Reed replied by letter of April 9, 2014.[53] As to a written request, Reed pointed to his March 25, 2013 information request, which included a request for production of all service tickets for Oncor that included certain key words, described earlier. He stated that for the first 6 or 7 years that he was a troubleman, he used handwritten service or trouble tickets, and specifically requested an opportunity to review and obtain copies of them.

Reed arranged with Burke to review the handwritten trouble tickets on April 22, 2014, at the customer service center. On that date, they met in the center's supervisors' office, where the approximately 14,000 handwritten tickets were kept in a file cabinet. Gibson and Ross McAuley of the Union also were present. They were there from about 10 a.m. until shortly before 1 p.m., when Burke had to leave for a preannounced appointment. Reed reviewed the tickets and pulled those that he believed supported his position by reflecting meter bases or smart meters burning up, for the period from 2007 through February 2010. Gibson provided Reed with copies of the tickets that he had pulled.[54]

It is undisputed that Reed did not get an opportunity to review part of the third and last drawer containing the tickets[55] from March to May 210 because Burke had to leave. However, both Burke and Gibson testified that Reed stated at the end of their meeting that he was done.

McAuley was not called as a witness, Reed testified that he could not recall anything being said about his coming back to see the rest, the parties scheduled no further meetings, and Reed never later requested one. In light of these factors, I credit Burke's and Gibson's account. If Reed had indeed concluded that he needed to review additional documents, logic dictates that he would have requested a date to return, particularly with the trial scheduled to begin 6 days later.

Smart meters, smart meter bases, and fires

In key respects, the testimony of the General Counsel's and the Respondent's witnesses were substantially consistent and credible, and I find the following facts.

Initially, a distinction must be made between the smart meter itself and its installation vis-à-vis the meter base in which it sits.

When the jaws in the lug in the meter base are too wide or loose, either as the result of improper installation of the smart meter and/or the thinner blades of the smart meter not fitting well, this can cause the jaws to heat. Such heating can cause the lug to break and the plastic block of the meter itself to heat and burn, resulting in a flash or electric arc and in the meter burning up. Broken or bent lugs can result from loose connections between the jaws and the smart meter, improper installation, constant putting meters in and out, tampering, improper installation, or movement of the earth. The age of the meter base is a contributing factor, as is its proper maintenance.

After smart meter deployment began, both Reed and Waugh noticed more situations in which improper connection between the smart meter and the lugs (the jaws in particular) had resulted in heating and/or burning.[56]

Managers Carpenter Moore, and Smith, and Supervisors Anderson and Efflandt did not contradict their testimony. Thus, following the start of deployment, troublemen told Anderson of situations where the jaws were spread too wide apart and did not make good connection with the smart meter, and they and told him that the smart meters were heating up and the lugs melting or burning. Anderson candidly testified that this occurred "through the whole time" of deployment, not just in the early part,[57] and that he observed lugs that appeared to be heated up and melted, along with damaged meters. Efflandt received complaints from troublemen about smart meter installation but not about the smart meters per se. He recalled incidents in which, after the smart meter was installed, troublemen would be dispatched because the customer was having flashing problems due to changing of the meter. Carpenter and Moore

[49] Tr. 1443.
[50] Tr. 1138-1139.
[51] Tr. 818.
[52] Jt. Exh. 12.
[53] Jt. Exh. 13.

[54] GC Exhs. 3 (48 tickets, of which Reed testified 26 support his position); 4 (1 ticket, which he testified supports his position). All are redacted.
[55] Tr. 1369 (Burke).
[56] See, e.g., GC Exh. 3 at 15 (Reed handwritten trouble ticket).
[57] Tr. 1341.

both testified about an increase in the number of burned lugs during deployment, although Carpenter indicated that many may have been preexisting. Moore testified that CATS tickets in General Counsel's Exhibit 26 reflect problems with smart meter connections, not the meters themselves. Finally, when Smith had discussions with troublemen in November, they mentioned problems with installation of smart meters and with components other than the meter itself (i.e., rings or jaws).

Consistent with the above, the reports that Local 66 representatives Childers and Lucero received from members indicated that that the major cause of burned up Itron smart meters in Houston appeared to be due to loose connections, owing in part to their thinner blades vis-à-vis the analog meters that they replaced. This is what they told Reed in 2012. In line with their testimony, Longeway, the Respondent's expert witness, was aware that Itron had produced models in which the blades were too thin and did not seat with sufficient pressure in the jaws of the meter base.

Similarly, when Reed and Assistant Fire Marshal Simmons had discussions in 2012, the focus was on whether smart meter installation caused fires, not on whether the meters themselves did so.

Longeway testified about his controlled laboratory experiments with L+G smart meters that led him to conclude that they could not cause fires.[58] Oncor had him examine four instances where there were fires after smart meter installation to determine if the smart meters were responsible. He concluded that the smart meter had not caused any of them; rather, they were caused by faults in the electrical system or by broken lugs.

Prior to Reed's testimony before the senate committee, Greer was aware that claims had been made that smart meters were causing damage to customers' property, and he had been informed that in two incidents in Arlington, a problem with the customer's meter base had caused a fire.

In sum, the record reflects that the primary cause of heating that resulted in burned out smart meters and in fires was not from any defects in the meters but rather stemmed from their connections with the meter bases.

Analysis and Conclusions

The information requests

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). To trigger this obligation, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Requests for information concerning the terms and conditions of bargaining unit employees are presumptively relevant. *Postal Service*, 359 NLRB 56, 56 (2012); *LBT, Inc.*, 339 NLRB 504, 505 2003); *Uniontown County Market*, 326 NLRB 1069, 1071 (1998). On the other hand, requests for such information regarding nonbargaining unit employees do not enjoy that presumption, and the union bears the burden of showing of showing relevancy. *Southern California Gas Co.*, 342 NLRB 613, 614 (2004); *Sheraton Hartford Hotel*, 289 NLRB 463, 463-464 (1984). The burden is not a heavy one, requiring a showing of probability that the desired information is relevant and would be of use to the union in carrying out its statutory duties and responsibilities. *Acme Industrial*, supra at 437; *Postal Service*, 310 NLRB 391-392 (1993). An employer must furnish presumptively relevant information on request unless it establishes legitimate affirmative defenses to production. *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995).

Since a bargaining representative's responsibilities include the administration of the collective-bargaining agreement and the processing and evaluating of grievances thereunder, an employer is obliged to provide information that is requested for the processing of grievances or potential grievances. *Acme Industrial*, supra at 436; *Postal Service*, 337 NLRB 820, 822 (2002); *Beth Abraham Health Services*, 332 NLRB 1234, 1234 (2000).

July 24, 2013 Goodson information request

The Respondent ultimately furnished all of the requested information except for information about Lopez after his promotion outside of the bargaining unit.

The general proposition, as stated above, is that requests for information regarding nonbargaining unit employees do not have the presumption of relevance. Thus, in *Southern California Gas Co.*, above, the Board found that the union's request for safety orders in connection with the union's complaint before a public utility commission was not presumptively relevant. However, the Board emphasized that the requested information was sought solely in regard to an action outside the collective-bargaining process (a complaint filed before a state agency) and had no connection with a grievance or possible grievance; if so, such information "[might] well be presumptively relevant." 342 NLRB at 615.

Goodson's discharge in July 2013 stemmed from an incident on May 13, 2013, that involved both him and Lopez. The Respondent furnished Lopez' work records to May 26, 2013, so the only issue is whether it was also obliged to provide such information for the period after Lopez was promoted to a position outside of the unit.

Reed testified that the Union requested Lopez' records: (1) to determine if Goodson's discharge constituted disparate treatment vis-à-vis Lopez; and (2) to evaluate the merits of Goodson's grievance and decide how to proceed with it. Since the Respondent provided such records up to May 26, 2013, there is no outstanding issue on whether that information was presumptively relevant. Whether such information after May 26 was presumptively relevant requires an analysis of whether it reasonably would have assisted the Union in achieving those ends.

The grievance concerned Goodson's discharge, and nothing in the record indicates that Goodson or anyone else filed any grievance over the Respondent's selection of Lopez for a nonbargaining unit position. On its face, Lopez' attendance, safety, and discipline records in a nonbargaining unit position, starting approximately 2 weeks after the pivotal incident took place, would not appear to shed light on the merits of Good-

[58] See R. Exhs. 4–12.

son's discharge or whether he was treated differently from Lopez when Lopez was a unit employee. After the Respondent raised objections to providing this information, the Union never responded in any way and therefore never articulated any reason why it was needed.

Accordingly, with regard to the July 24, 2013 request, I conclude that the Respondent did not fail and refuse to furnish information that was relevant and necessary.

December 18, 2012 request

The General Counsel contends that the Respondent unlawfully refused to furnish a portion of Reed's handwritten trouble tickets; the line and section number of the code of conduct that he allegedly violated, and documents reviewed and/or relied on in discharging Reed.

Regarding the remaining handwritten trouble tickets that Reed did not have time to review on April 22, 2014, Reed stated at the conclusion of the meeting that he was done, and he never requested a further opportunity to see them.

As far as the code of conduct, Greer's letters of December 14, 2012, and January 14, 2013, quoted the provision in the code of conduct regarding false testimony, thereby making unnecessary a description of the line and section numbers in the code.

The information request also asked for "All documents reviewed and/or created or considered in connection with the Company's investigation."

Prior to December 18, 2018, in looking for indications that smart meters were causing fires, Davis checked help line records; Smith had a search conducted of Reed's CATS and OMS tickets, as well as his nonrestore paper tickets; Moore had a search conducted of Reed's prearranged installation tickets; and Stewart examined the claims data base.

Although some of these documents were later provided to Reed, not all were. The Respondent never raised any objections to providing any of these documents, either on the basis of being burdensomeness, or otherwise, and it never offered any alternatives to furnishing them in raw data form, such as in summaries or recaps. That they were presumptively relevant is patently obvious.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with all of the documents that it reviewed or considered prior to December 18, 2012, in connection with its investigation of Reed's conduct.

March 25, 2013 request

As with the December 18, 2012 request, the Respondent ultimately furnished Reed with some, but not all, of the information. The Company's position is that this information request constituted an attempt by the Union for prearbitration discovery and that it therefore had no obligation to comply therewith. I will not address any contentions in the Respondent's brief that the requests were burdensome because the Respondent did not put on any evidence to that effect.

The Board has held that there is no right to pretrial discovery when a grievance has been referred to arbitration. The lead case standing for that proposition is *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362, 1362 (1998). See also *Ormet Aluminum Products Corp.*, 335 NLRB 788, 789 (2001), in which the Board affirmed that holding but distinguished situations where the requests for information were made before the third-step grievance had been denied and the grievance was referred to arbitration. The Board has continued to draw this distinction. See *Hawaii Tribune-Herald*, 356 NLRB 661 (2011); *Pulaski Construction Co.*, 345 NLRB 931 (2005).

In *California Nurses Assn.*, above, the Board found that the union was not required to provide the employer with the names of witnesses it intended to call, and the evidence on which it intended to rely, at the arbitration hearing. However, the Board also found that the union violated Section 8(b)(3) by refusing to provide the employer with the facts and documents relevant to each incident on which the union was relying to support its grievance and the names of persons involved in each incident.

Not inconsistent with *California Nurses Assn.*, cases issued both before and after it, state that the duty to supply information extends to a request for material to prepare for arbitration. See, e.g., *Fleming Cos.*, 332 NLRB 1086, 1094 (2000) ("Employer must furnish information that is necessary to property prepare for arbitration as long as the information is relevant to the grievance scheduled for arbitration."), cited with approval in *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1353 (2010); *Jewish Federation Council,* 306 NLRB 507 fn. 1 (1992); *Chesapeake & Potomac*, 259 NLRB 225, 227 (1981), enfd. 687 F.2d 633 (2d Cir. 1982). As the Board stated in *Ormet*, above at 789, "One of the functions of arbitration procedures, is to permit the union the opportunity to evaluate the merits of the grievance, at whatever stage, and perhaps withdraw it if necessary, once it receive[s] the information."

National Broadcasting Co., 352 NLRB 90 (2008), cannot be cited as precedent in light of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 2365 (2010). Nevertheless, it may be instructive. Therein, the Board affirmed a judge who, citing *Jewish Federation Council*, above, and *Pulaski Construction Co.*, 345 NLRB 931, 936 (2005), clarified the scope of *California Nurses Assn.* as:

[P]rovid[ing] a limited exception to the Board's requirement to suppy information, as to names of witnesses it intends to call and evidence it intends to rely upon at the arbitration proceeding. It is that kind of information, which delves into the Respondent's strategy and preparation in litigation the arbitration, that the Board viewed as being precluded from disclosure as a substitute for pretrial discovery. 352 NLRB at 100.

In sum, at the prearbitration stage, a party can request substantive information pertaining to the issues but not information about the other parties' planned presentation of its case before the arbitrator.

Reed's March 25, 2013 information request entailed information pertaining directly to his discharge, possible disparate treatment, and/or records that might substantiate the testimony that he gave before the senate committee. None of the requests crossed over the line and into the type of information deemed "pretrial discovery" that the Respondent would have been privileged to withhold.

Accordingly, I conclude that the Respondent violated Sec-

tion 8(a)(5) and (1) by failing and refusing to provide the Union with all of the information that it requested in its March 25, 2013 request.

Reed's Discharge

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), sets out the normal framework for deciding 8(a)(3) violations. However, in 8(a)(3) cases where the employer asserts that an employee engaged in misconduct during the course of otherwise protected activity, the Board looks to the factors set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), to aid in determining whether the employee's conduct became "so opprobrious as to lose protection under the Act." *Kiewit Power Constructors Co.*, 355 NLRB 708, 708 (2010). In that situation, resort to a *Wright Line* analysis is unnecessary. Ibid.

Here, though, the Respondent disputes whether Reed's testimony was protected or concerted activity. Moreover, the Board has found that *Atlantic Steel* is "tailored to workplace confrontations with the employer," or to confrontational verbal attacks on supervisors that occurred near, but not within, the workplace. *Three D, LLC*; 361 NLRB No. 31 slip op. at 4, 4 fn. 14 (2014). Reed's testimony to Senator Carona took place several hundred miles from the workplace, away from any other bargaining-unit employees, and was in no way directed to individual supervisors or managers. Accordingly, the environment in which his conduct occurred did not fit into an *Atlantic Steel* analysis, and I will use a *Wright Line* analysis.

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

If the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the second part of the *Wright Line* analysis comes into play: the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

Two separate but overlapping activities of Reed need to be considered: (1) his testimony on October 9, 2012, and (2) his role as chief union spokesperson in negotiations over a successor collective-bargaining agreement, both before and after his testimony.

Turning to the first prong of *Wright Line*, Reed unquestionably was engaged in protected activity when he served as chief union spokesperson in negotiations. The Respondent argues that because Reed's testimony to the senate committee was as an individual and was not concerted in nature, that conduct did not constitute protected concerted activity. As the Respondent points out, Reed essentially testified solely about his own experiences, and he did not have specific authority by other employees to testify. The cases that the Respondent cites do stand for the proposition that for an employee's activity to be concerted, it must be of a collective, not individual, nature.

However, Reed's was not only an employee—he also held the position of union business representative, and his activity must be considered in that context. In this regard, the Board considers the holding of elective office to be "persuasive and substantial evidence that the officer is an agent, absent compelling contrary evidence." *Mine Workers Local 1058 (Beth Energy)*, 299 NLRB 389, 389-390 (1990), revd. on other grounds, 957 F.2d 149 (4th Cir. 1992); *Teamsters Local Union 526* (*Penn Yan Express)*, 274 NLRB 449, 449 (1985), citing *Electrical Workers IBEW Local 453 (National Electric)*, 258 NLRB 1427, 1428 (1978). Whether members had actually authorized his action is not decisive. See *Mine Workers Local 1058,* above at 390 fn. 7, citing Sec. 2(13) of the Act. These cases dealt with union liability for the actions of its officials, but the principle that they enunciate logically applies to a situation such as this one. It would inequitable and illogical to hold otherwise.

Reed's appearance as a witness before the senate committee expressly included his union affiliation. Thus, he signed the witness list as representing Local 69, in addition to himself; introduced himself to Senator Carona not only as a lineman and now troubleman for Oncor but also as a local union representative since April, and referred in his testimony to his communications with the Houston local union. Moreover, Reed, in his capacity as a business representative, had previously been in communication with a legislative aide on the subject of smart meters. Reed thus had apparent authority to act on behalf of the Union, whether or not the members actually authorized his testifying before the senate committee.

The Respondent further contends that his activity was not protected because his testimony did not relate to wages and working conditions but rather concerned general safety of customers. The cases that it cites in its brief stand for the proposition that raising safety or quality of care concerns on behalf of nonemployee third parties is not protected under the Act. Again, though, those cases involved individual employees, not

union officials such as Reed. Regardless, even though Reed focused on problems experienced by customers, his testimony about meters/meter bases heating up or burning and mention of fires causing damage to homes reasonably inferred a potential connection to the safety of employees involved in smart meter installation. Even if it did not, then certainly an increase in the number of instances of meters/meter bases heating up or burning impacted on the nature of the troublemens' day-to-day work—increasing both the number of their service calls and the number of irate or upset customers when troublemen informed them that they would be have to pay an electrician to make meter base repairs. I note that Supervisors Anderson and Efflandt confirmed that troublemen reported to them an increase in the number of burned up meter bases as the smart meters were deployed.

I conclude, therefore, that his activity in testifying before the senate committee was protected. The Respondent further argues that even if Reed's testimony constituted concerted, protected activity, it lost the protection of the Act because it was deliberately false and/or given with reckless disregard for the truth. See *TNT Logistics*, 347 NLRB 568, 569 (2006); *Sprint/United Managegmen. Co.*, 339 NLRB 1012, 1018 (2003). I will later discuss this contention.

Turning to the second prong of *Wright Line*, there is no question that the Respondent knew of Reed's conduct during the course of negotiations and of his testimony on October 9.

As to the third prong, there is direct evidence of animus toward Reed for engaging in collective-bargaining activities. First, at or at the conclusion of the August 23, 2012 prenegotiations meeting, Davis stated that Reed was always looking for a fight with the Company, that he stuck his head in the sand, and that he did not tell the truth. This was in the context of either in their discussions on service center moves or on the Company's proposal for a 1-year contract extension. Second, when Reed called Gibson on October 25, 2012, and told her that the membership had rejected the Company's proposal, she responded that he and Jackson had sabotaged the vote by telling members not to vote for the contract. In light of these statements, animus is established. I will address the accusations that the Respondent made against Reed with regard to his testimony in discussing the Respondent's defenses.

Reed was discharged on January 14, 2013, presumably based solely on his testimony on October 9, 2012, satisfying the last element of *Wright Line* as far as establishment of a prima facie case.

I now turn to whether the Respondent has shown that it would have taken the same adverse action even in absence of Reed's protected activity.

Had Reed's only union activity been testifying on October 9, and had the Respondent's witnesses given credible and convincing testimony regarding their deliberations leading up to his discharge, this would be a much simpler case. As I said early on, the Respondent naturally would have been very displeased—to put it mildly—at Reed's negative comments about smart meters before the senate committee having jurisdiction over public utility companies.

However, at the time that he testified on October 9, and at the time of his discharge on January 13, 2013, the parties were engaged in negotiations over a successor contract, and on October 25, Gibson accused him of sabotaging the ratification vote and causing its rejection by the membership. And, for the various reasons I have stated, I do not believe the testimony of Greer or the other management representatives about their discussions concerning Reed's testimony and how they reached the decision to discharge him..

Certain aspects of the investigation that management conducted between October 10, 2012, and January 13, 2013, are suspect. First, no one at any time interviewed Reed, or even talked to him by telephone. Second, the Respondent's refusal and failure to provide Reed with the service tickets that he contended supported his testimony contraindicated a desire to give Reed the opportunity to refute the contention that he had lied.

Thus, by letter of November 7, 2012, to Reed, Greer referred to Reed's testimony about smart meters causing damage to customers' homes, stated that the Company had conducted a thorough investigation but thus far found no evidence to support that testimony, and requested that Reed provide, as soon as practical, any and all information upon which he based his testimony. In his response letter of November 29, 2012, Reed stated that details of incidents that occurred following smart meter installations could be found in his trouble tickets. Yet, the Respondent ignored this, as well as his March 25, 2013 prearbitration information request, which explicitly distinguished CATS/OMS tickets from service tickets that troublemen filled out, even though Smith, Anderson, and Efflandt were all aware that troublemen had filled out handwritten service tickets that the Company kept. Indeed, Reed was not afforded the opportunity to review his service tickets until April 2014, just days before the trial opened.

In short, the Respondent's failure to conduct a full and fair investigation is a factor that leads to the inference of animus and constitutes evidence of discriminatory intent. See *Hewlett Packard Co.,* 341 NLRB 492, 492 fn. 2 (2004); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973).

Why the Company decided in February 2014 to re-review the CATS/OMS tickets and allow Reed to review them—more than a year after he was discharged—remains an unexplained mystery that sheds further doubt on its motives.

Conduct that violates Section 8(a)(5) may evidence union animus. *Atlas Refinery*, 354 NLRB 1056, 1072 (2010); *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001). I find that to be the case here, where the Respondent failed and refused to furnish Reed with information solely in its possession that he claimed would exonerate him from the accusation that he had lied about smart meters before the senate committee. This also reinforces the conclusion that the Respondent did not conduct a bona fide, objective investigation but, rather, had already decided the outcome.

Moreover, an employer's failure to follow its progressive disciplinary policy frequently indicates an improper motive for the imposition of more severe discipline. *Fayette Cotton Mill*, 245 NLRB 428 (1978); *Keller Mfg. Co.*, 237 NLRB 713, 713–714 (1978). The Respondent has fired employees for the first offense of making deliberately false statements during company investigations as per the code of conduct provision on which the Respondent relies, but there have been no other instances

where an employee was fired for lying before a legislative committee or other outside body.

The question is whether the evidence supports a conclusion that the Respondent reasonably determined that Reed had deliberately given false testimony and should be discharged rather than subjected to a lesser penalty. This also goes to the Respondent's averment that Reed lost the protection of the Act because his statements to the senate committee were deliberately false and/or given with reckless disregard for the truth

In the 2 minutes that he was allotted, Reed testified that he noticed increasing number of work orders where the smart meter burned up and burned up the meter base, that the meter and not the wiring was the cause, that the size of the meter caused installation issues, and that the local union in Houston also reported a significant increase in meters that were burnt up.

I recognize that Reed was imprecise, even careless, with some of his statements about smart meters, in particular by his failure to distinguish between meters and meter bases; that portions of his testimony may have been melodramatic or exaggerated; and that some of his motivation might have been less than altruistic, i.e., to get back at Davis for what was occurring in negotiations and/or to give the Union an opportunity to speak against smart meters, deployment of which had taken away members' jobs.

Nevertheless, I cannot conclude that the Respondent has established that it reasonably determined that Reed deliberately lied about smart meters causing fires or damage to customers' homes and that his situation was therefore analogous to employees who were discharged for bald-faced falsehoods. Thus, it is not disputed that during deployment of smart meters, troublemen reported an increase in reported incidents of burned up meter bases because of installation issues, including those resulting from the narrower blades of the smart meters not fitting as well into the meter bases. Reed cited some of his service or trouble tickets that reflected this. It is also undisputed that, on some occasions, fires did result from the meter bases burning up and then burning up the meters.

In these circumstances, and in light of Reed's very long tenure—he was an employee of Oncor and its predecessors for over 34 years—I find that the Respondent's imposition of the penalty of discharge, rather than a lesser penalty as per the Respondent's progressive discipline system, was another indication of unlawful motivation.

In sum, the Respondent has failed to meet its burden of showing by a preponderance of evidence that it discharged Reed solely for permissible purposes unconnected to his protected activity, to wit, his actual or perceived stance regarding the Respondent's proposals during negotiations and/or his testimony on October 9, 2012. See *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005). I base this on the Respondent's express animus toward Reed for his role in negotiations, both before and after he testified and before his discharge; the Respondent's failure to conduct a full and fair investigation into the assertions that Reed had made before the senate committee; the Respondent's failure to satisfactorily present a believable account of the deliberations leading to Reed's discharge; the decision to discharge such a long-term employee rather than impose lesser discipline; and the Respondent's inability to show that Reed deliberately lied about smart meters to the senate committee.

As a matter of dicta, public policy favors encouraging all constituents, including union representatives, to freely voice their concerns and thoughts with their legislators in an open forum. Indeed, that is the primary purpose of holding public hearings, including the one at which Reed was among the numerous speakers who, either on behalf of organizations or as individuals, presented various viewpoints on smart meters and their effects.

In sum, I conclude that the Respondent's discharge of Reed violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

By discharging Bobby Reed, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

3. By failing and refusing to furnish the Union with information that it requested that was relevant and necessary for processing its grievance over Reed's discharge, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

REMEDY

Because I have 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.

Specifically, the Respondent must offer Bobby Reed reinstatement and make him whole for any loss of earnings and other benefits that he suffered as a result of his unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Further, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and, if it becomes applicable, shall compensate Reed for any adverse tax consequences of receiving a lump-sum backpay award. *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[59]

ORDER

The Respondent, Oncor Electric Delivery Company, LLC., Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[59] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

(a) Discharging or otherwise discriminating against any employee for engaging in activities on behalf of the International Brotherhood of Electric Workers, Local Union No. 69, affiliated with International Brotherhood of Electric Workers (the Union).

(b) Failing and refusing to furnish the Union with information that it requests that is relevant and necessary for it to process grievances on behalf of unit employees.

(c) 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) Within 14 days from the date of the Board's Order, offer Bobby Reed full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bobby Reed whole for any loss of earnings and other benefits that he suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

(d) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful discharge of Bobby Reed, 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.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Dallas, Texas, copies of the attached notice marked "Appendix."[60] Copies of the notice, on forms provided by the Regional Director for Region 16, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 December 18, 2012.

(g) 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 be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 4, 2014

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 discharge or otherwise discriminate against you because you engage in activity on behalf of the International Brotherhood of Electric Workers, Local Union No. 69, affiliated with International Brotherhood of Electric Workers (the Union).

WE WILL NOT fail and refuse to provide the Union with information that it requests that is relevant and necessary for it to fulfill its functions as your collective-bargaining representative, including the processing of grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

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

WE WILL make Bobby Reed whole for any loss of earnings and other benefits that resulted from his unlawful discharge.

WE WILL reimburse Bobby Reed an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

WE WILL submit the appropriate documentation to the Social

[60] 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."

Security Administration (SSA) so that when backpay is paid to Bobby Reed, SSA will allocate it to the appropriate periods.

WE WILL remove from our files any reference to our unlawful discharge of Reed and WE WILL, within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

ONCOR ELECTRIC DELIVERY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16–CA–103387 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.