NITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ONCOR ELECTRIC DELIVERY COMPANY, LLC

Respondent

and **Cases 16-CA-103387**
16-CA-112404

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 69, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. STATEMENT OF THE CASE

COMES NOW Counsel for the General Counsel, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and files this Answering Brief to Respondent's Exceptions and Brief in Support of Exceptions (herein Exceptions) to the Decision and Recommended Order of the Administrative Law Judge.

The hearing in this matter was conducted before the Honorable Administrative Law Judge Ira Sandron on April 28, 2014 through May 1, 2014 and June 18-20, 2014. On November 4, 2014, the Judge issued his recommended Decision and Order. In his Decision and Order, the Judge found that Respondent unlawfully discharged employee Bobby Reed for engaging in

protected concerted activity and/or union activity, when he testified in a hearing before a State State Senate Committee concerning smart meters. The Judge also found that Respondent refused to bargain with the Union by failing to furnish the Union with requested information that was relevant and necessary to its role as collective bargaining representative. (JD slip op. at 35, LL. 24-34). [1] The recommended Decision and Order requires Respondent to cease and desist its unlawful conduct, offer Reed reinstatement and make him whole for any loss of earnings and other benefits as a result of the discrimination against him and post an appropriate notice to employee. (JD slip op. at 36-37).

On January 16, 2015, Respondent filed ninety-five Exceptions to the Judge's findings of facts, credibility resolutions, application of Board case law, conclusions of law, remedy and order. Counsel for the General Counsel submits that Respondent's exceptions should be denied and that the Judge's decision is supported by the credible record evidence and case law. Counsel for the General Counsel urges the Board to adopt the Judge's decision. In the following Section II of this brief, the undersigned sets forth a statement of material facts and thereafter in Section III of the brief specific points of fact in record evidence and case law are detailed that address the Respondent's Exceptions and support the Judge's findings and conclusions.

II. STATEMENT OF FACTS

In discussing the facts, the brief will describe Respondent's corporate structure; the Union's historical involvement with and advocacy concerning smart meters; Respondent's adoption of a hostile stance during bargaining in the days leading up to Reed's testimony before a Texas State Senate hearing concerning the safety of Respondent's smart meters; Reed's

[1] References to the record are as follows: JD slip op. for Administrative Law Judge's Decision, Tr. for Transcript; Jt. Exh. for Joint exhibits, GC Exh. for General Counsel exhibits and R Exh. for Respondent exhibits.

consultation with fellow union officials and a public official concerning smart meters; Reed's truthful testimony regarding smart meters based on a combination of his own experience working for Respondent as a troubleman and a lineman and the Houston IBEW Local's experience regarding smart meters; rebuttal witness Dennis Waugh's testimony which confirms Reed's Texas State Senate testimony was truthful; Respondent's hostile demand to Reed for information which it knew was not in his possession; Reed's request for information to address Respondent's hostile demands; Respondent's knowledge of smart meters problems, including fires and lawsuits, prior to its termination of Reed; Respondent's unlawful termination of Reed for his union and protected concerted activity; and Reed's request for additional information to demonstrate the truthfulness of his Texas State Senate testimony.

A. Respondent Oncor's Corporate Structure and Operations, Including Its Role in Smart Meter Deployment

Respondent is a regulated utility that provides electricity transmission, distribution and measurement services to approximately 10 million customers in North Texas and beyond, including Dallas/Fort Worth, Midland-Odessa, Tyler and Austin (JD slip op. at 9, LL. 30-32; Tr. 759, LL. 20-24; 760, LL. 2-8). Respondent employs approximately 3500 employees in more than 50 locations (JD slip op. at 9, LL. 36-37; Tr. 760, L. 15). Its corporate headquarters is located at 1600 Woodall Rogers, Dallas, Texas, where approximately 500 of Respondent's employees are located. (JD slip op. at 9, LL. 38-39; Tr. 761, L. 10).

Beginning in the fourth quarter of 2008 and continuing into December 2012, Respondent oversaw the installation of more than 3 million "smart meters," or digital metering devices, throughout its operating area. (Tr. 763, LL. 1-9). Smart meters replaced previous analog meters. (JD slip op. at 9, LL. 23-31; Tr. 762, LL. 14-25; 763, LL. 1-9).

Meters plug into meter bases and function as a unit, with the meter base plugging into the electrical panel for power. (JD slip. op. at 9, LL. 38-41). Repairs to the meter bases, which are the customers' property, are paid by the customer and may run into thousands of dollars. (JD. slip op. at 10, LL. 5-6; Tr. 239, L. 20).

B. The Union's Historical Involvement and Advocacy Concerning Smart Meters

Richard Levy, legal director of the Texas AFL-CIO and an attorney who represents several IBEW locals, including Local Union 69, began speaking with Bobby Reed, the Charging Party's Business Manager and Financial Secretary, around the mid-1990s concerning smart meters. (Tr. 34, LL. 13-18). In 2003, Levy sent an e-mail to all Business Managers and Financial Secretaries of Texas IBEW Locals regarding deregulation of the electricity market in Texas. (Tr. 38, LL. 18-25; Tr. 39, LL. 1-14, GC Exh. 2). Deregulation, from the Texas AFL-CIO's standpoint, caused abuse to consumers and caused labor-management relations to become more contentious. (GC Exh. 2). The Texas AFL-CIO sought to ensure that only IBEW members serviced meters out of concern for worker safety and to minimize negative effects on workers' jobs. (Tr. 38, LL. 18-25; 39, LL. 1-14). Levy contacted IBEW officials, including among others Greg Lucero, Business Manager of IBEW Local 66 in Houston, to request that they present the day-to-day concerns of the Union to public bodies. (Tr. 42, LL. 9-21; GC Exh. 2).

On October 7 or 8, 2012, Levy advised Reed by phone (on short notice) that Texas State Senator John Carona was going to hold a public hearing concerning metering and that he knew the issue was important to his members (JD slip op. at 13, LL. 5-8; Tr. 47, LL. 9-18). On the day of the hearing, Reed advised Levy that he was in Austin and was going to attend the hearing. (Tr. 49, LL. 15-16). Levy stated that the Union's concerns with smart meters included how they would affect employees' jobs and worker safety. (Tr. 51, LL. 12-18).

C. Respondent Adopts a Hostile Stance Toward the Union and Reed During Bargaining In the Days Leading Up to Reed's Testimony

Bobby Reed, the discriminatee in this case, has served as Business Manager, the highest rank in Local Union 69, from 1999 to present day, stepping down to Assistant Business Manager for three years between 2008 and 2011. (JD slip op. at 9, LL. 9-10; Tr. 102, LL. 19-25). Reed worked as a troubleman for Respondent for approximately ten years, serving as a first responder. (JD slip op. at 9, LL 12-14; Tr. 103, LL. 8-10). Prior to holding that position, Reed worked for several years for Respondent as a journeyman lineman. As a lineman, his duties included installing and maintaining the electrical distribution system. (JD slip op. at 9, LL 12-14; Tr. 104, LL. 17-19).

On August 23, 2012, the parties met in Arlington, Texas to discuss several issues. (JD slip op. at 10, LL. 18-19; Tr. 179-185 passim). Reed asked for bargaining dates for negotiating a successor collective bargaining agreement. (JD slip op. at 10, LL. 18-19; Tr. 182, LL. 7-8). Kyle Davis, Respondent's Director of Employee and Labor Relations, responded by sliding a one-year contract extension across the table. (JD slip op. at 11, LL. 9-10; Tr. 182, LL. 8-12). Davis told him that there were things going on in Austin that they did not need to get in the middle of (this was a reference to a proposed legislative provision for customers to opt out of smart meters at no charge, something the Union supported and Respondent opposed). (JD slip op. at 11 fn. 13; Tr. 182, LL. 17-25; Tr. 183, LL. 1-13). During the meeting, Davis called Reed a liar and said that he was always sticking his head in the sand, ignoring the facts and trying to fight the Company[2]. (JD slip op. at 10, LL. 33-38; Tr. 183, LL. 18-22; 185, LL. 14-16; 1533, L. 25; 1534, LL. 1-2).

[2] The ALJ found that it did not make a difference whether Davis called Reed a liar or simply called him "untruthful" but did not make a specific finding regarding which word Davis used.

The parties next met on October 8, 2012, the day before Reed testified before the Texas State Senate Committee on Business and Commerce. (JD slip op. at 11, L. 28; Tr. 151, LL. 16-18). The atmosphere in the meeting was strained. (JD slip op. at 11, LL. 33-34). Reed attempted to discuss several non-economic issues such as rest time and moving employees from service center to service center. (JD slip op. at 11, LL. 11-14). Davis responded by saying that they were not interested at the time and that there was a fair offer on the table; Davis asked Reed to take Respondent's proposal to the members for a vote. (JD slip op. at 11, LL 18-20; Tr. 187, LL. 17-21). Reed informed Davis that on the following day the Union was going to vote on whether to accept Respondent's one-year contract proposal. (Tr. 188, L. 25; 189, LL. 1-2).

Following the ratification votes, at the end of the week of October 25, 2012, Reed spoke by phone to Senior Labor Relations Manager Barbara Gibson to inform her of the result of the vote. (JD slip op. at 14, L. 14; Tr. 193, LL. 24-25). During this conversation, Gibson claimed that the Union sabotaged the vote by telling members not to vote for the contract. (JD slip op. at 15, LL. 1-2; Tr. 194, LL. 11-16). Reed denied sabotaging the vote and told Gibson that he began every meeting by saying that unless the membership heard otherwise, they should assume that the Union leadership was recommending a yes vote. (JD slip op. at 15, LL. 2-4; Tr. 194, LL. 24-25; 195, LL. 1-2). The parties met three or four times after that before reaching agreement on a successor collective bargaining agreement (after Respondent terminated Reed). (JD slip op. at 12, fn. 16; Tr. 195, LL. 16-25; 196, LL 1-20).

D. Before Testifying, Reed Consults with Fellow Union Officials and Assistant Fire Marshall Michael Simmons

Prior to his Texas Senate hearing testimony, Reed called Greg Lucero, Business Manager of IBEW Local 66 in Houston. (Tr. 162, LL. 21-25; 163, LL. 1-2). Reed asked Lucero if Local 66's represented employees were having trouble with smart meters. (Tr. 84, LL. 22-24; 164, LL.

1-5). Lucero said yes. (Tr. 85, L. 8). When Reed asked Lucero if he had any proof of the types of problems employees were experiencing, Lucero told him to call Edward (Rick) Childers, Assistant Business Manger of Local 66 (Tr. 84 passim; 164, LL. 1-5).

Although Lucero directed Reed to speak to Childers, Lucero himself knew of problems reported to him from his stewards, such as "the meter burning up in the jaws." (Tr. 86, LL. 14-16). Lucero also learned that the jaws were not "fitting as tight, I don't think as they should." (Tr. 86, LL. 5-8). This "causes a loose connection, a loose connection that ultimately causes heat; heat ultimately causes fire; it'll burn those jaws up." (Tr. 86, LL. 14-16).

These fires can also include flashes and blasts, which can cause "from nothing to third degree burns" to the employees working on them. (Tr. 89, LL. 5-8). Lucero notes that bargaining unit employees must ultimately face the customer and tell them that they need to get an electrician "and we get blamed for it because you are right there." (Tr. 90, LL. 8-11). The problems Lucero described were not nearly as frequent with analog meters as they are with the smart meters. (Tr. 88, LL. 1-2, 101).

After Lucero's suggestion, Reed spoke to Rick Childers in late 2012[3]. (Tr. 163-64 passim; 258-261 passim). Reed asked him if Local 66 knew if CenterPoint had the same problem with meters being turned in burned up. (JD slip op. at 12, LL. 29-30; Tr. 165, LL. 23-25; 262, LL. 13-14). Childers said that union members had been complaining during union meetings that meters and meter cans were burning up, and that customers' equipment was burning up and sparking (creating electrical arcs). (JD slip op. at 12, LL. 30-32; Tr. 262, LL. 13-21). Childers said that he would check with employees in the meter shop to see what types of

[3] As noted in the ALJ's decision, it was not clear when the conversations occurred precisely. However, the ALJ correctly found that the conversations occurred "on dates uncertain prior to October" 2012.

problems they were experiencing specifically. (JD slip op. at 12, LL. 32-33; Tr. 165, LL. 24-35; 166, L. 1; 262, LL. 22-25; 263, L. 1).

When Childers checked with CenterPoint workers in the meters shop, he learned that there was a significant increase in burned smart meters being turned in to the shop. (Tr. 166, LL. 3-6; 264, LL. 19-25). Childers explained that part of the problem was a loose connection between the meter and the meter base because the smart meters had thinner "blades" than the previous analog meters. (JD slip op. at 12, LL 36-38; Tr. 265, LL. 3-6).

Childers told Reed that the loose connection caused heat, which, in turn, caused an electrical arc, which resulted in "two pallets of burned up meters" in CenterPoint's meter shop. (Tr. 265, LL. 13-22). Childers also told Reed that when CenterPoint technicians pulled the meters out, the meters were creating arc flashes, which could burn the customers' wiring and create "hazardous conditions." (Tr. 267, LL. 16-21; 274, LL. 9-20). These hazardous conditions include potentially causing arc flashes, which could result in anything from minor to third degree burns to technicians who remove the meters. (Tr. 275, LL. 12-20). More generally, Childers reported meter technicians had reported problems with meters' communication with the remote site control and many issues with meters melting or burning up. (JD Slip Op. at 12, LL. 33-36).

Childers brought to the hearing two burned smart meters as demonstrative aids, with Meter A being burned and Meter B on its way to being burned. (Tr. 267 passim; GC Exh. 9-19). Childers explained that a loose connection caused the meter to start to burn which eventually resulted in catastrophic failure. (Tr. 273, LL. 21-25; 274, LL. 1-4).

Smart meters have also created extra work for workers represented by IBEW Local 66 (Tr. 276, LL. 22-25). Childers explained that analog meters did not have the same problem of burning as smart meters. (Tr. 277, LL. 12-17).

Reed also spoke to Michael Simmons, Assistant Fire Marshall for Dallas County and an expert witness in fire protection and arson, regarding problems with smart meters, on or about October 8, 2014, prior to Reed's Texas State Senate testimony. (JD slip op. at 13, L. 17; Tr. 166-169 passim). Simmons told Reed that his office had investigated fires in Lancaster that were the result of smart meters and that Simmons was trying to see if there was a pattern of whether smart meters' installation in old or new houses caused fires. (JD slip op. at 13, LL. 17-19; Tr. 301, LL. 1-5). Simmons asked Reed about this issue and Reed said that there were problematic installations in small, older houses. (JD slip op. at 13, LL. 20-21).

During this same conversation, Simmons informed Reed that one of the Lancaster fires was at a home located at 1218 Lynette. (Tr. 308, LL. 14-15). Another was at 2213 Canyon Oaks. (Tr. 309, LL. 13-14). Simmons notes that there were two meter-related fires within a mile of each other within a three-month period and communicated this information to Reed. (Tr. 322, LL. 9-13; 336, L. 35; 337, L. 1).

Reed advised Simmons about the hearing in Austin that he planned to attend; Simmons said that he could not attend because of his schedule. (JD slip op. at 13; Tr. 298, LL. 9-13). Simmons and Reed talked again after Reed attended the Austin hearing, and Reed informed Simmons that he had been terminated. (Tr. 299, LL. 10-17).

E. Reed Testifies Truthfully Regarding Smart Meters Based on a Combination of His Own Experience and the Houston Local's Experience

On October 9, 2013, Reed testified at the Texas Senate Business and Commerce Committee concerning smart meters. (JD slip op. at 13, LL. 27-29; Tr. 104, LL. 21-23; Jt. Exh. 1). Reed only had two minutes to present his testimony. (JD slip op. at 13, L. 29; Tr. 173, LL. 14-15). The witness list for the hearing shows that Reed signed in as an official of IBEW Local 69. (JD slip op. at 13, LL. 27-29; R. Exh. 16). Reed stated, "[T]he 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. " (JD slip op. at 14, LL. 6-8; Jt. Exh. 1).

Several of Respondent's witnesses corroborated the fact that Oncor increasingly experienced some of these problems during smart meter deployment. For example, Senior Director of Measurement Services Mark Moore stated that there was an increase in burned lugs during the deployment of smart meters. (Tr. 1011, L. 25; 1012, LL. 1-2). Moore also stated that the Company had electricians on retainer to repair meter bases that were damaged during deployment. (Tr. 1029, LL. 1-7). Vice President of Distribution Operations Keith Hull also acknowledged that Reed reported a burned meter. (Tr. 1177-1178 passim). Supervisor Michael Anderson acknowledged that he had heard technicians talking about burned lugs since Respondent's deployment of smart meters. (Tr. 1328, LL. 10-12). He also admitted having seen burned smart meters that were sent to the meter shop. (Tr. 1330, LL. 1-10).

Several of Reed's handwritten service tickets and those of other technicians mention problems with heating and burning of smart and analog meters, fires, jaws spread apart, burned meter bases, damaged or burned lugs and that electricians were required to repair them. (GC Exh. 3 at 1, 5, 6, 7, 9, 12, 14, 15, 18, 20, 21, 22, 27, 33, 34, 36, 37, 38, 41, 42, 44, 45, and 46). In one of Respondent's reviews of Reed's CATS tickets[4], Director Reginald Bonner noted that "damaged meter base, advised customer" was one of the most frequent remarks on the tickets. (R. Exh. 26). This means that the customer required an electrician to repair the meter base as Respondent trains its workers that "the meter base is the customer's responsibility to install and maintain." (Tr. 1225, LL. 7-12).

[4] CATS tickets are created by dispatchers when a troubleman reports a problem to a dispatcher and the dispatcher enters the underlying information from the report into a database.

Reed stated in his testimony that he called the Houston IBEW Local and that they were experiencing the same sort of problems, meaning that they were experiencing a significant increase in burned meters being turned in as compared to the previous analog meters. (JD slip op. at 14, LL. 27-29; Jt. Exh. 1). As noted above, Childers checked with CenterPoint workers in the meter shop. From those workers, Childers learned that there was a significant increase in burned meters being turned in. (JD slip op. at 12, LL. 33-36; Tr. 264-265 passim). Childers reported this information to Reed. (Tr. 265, LL. 20-22).

Finally, Reed stated that he knows a "little bit about fire and heat, and these things are damaging customers' homes." (JD slip op. at 14, Jt. Exh. 1). As noted above, Assistant Fire Marshall Simmons spoke to Reed on or about October 8, 2012, the day before Reed's state senate testimony, and told him that his office was involved in investigating two fires that were the result of smart meters. (JD slip op. at 13, LL. 17-19). Respondent's Associate General Counsel, John Stewart, acknowledged that there were two or three lawsuits and approximately five claims concerning smart meters filed against Respondent. (Tr. 1604, LL. 6-8). In one of the settled lawsuits, the plaintiff alleged, and intended to offer an expert to support, that "the fire in question was caused by electrical failure within the electric meter installed at the residence owned by Mr. Thomas Chaney." (GC Exh. 21). Finally, Chief Operating Officer Jim Greer testified that Respondent was aware of two fires in Arlington, Texas, in 2010 that were caused by meter installations or by damage to the meter bases. (Tr. 802, LL. 15-25).

F. Dennis Waugh's Testimony Demonstrates that Reed's Testimony is Consistent with Other Troubleshooters' Experience with Smart Meters

Dennis Waugh was an employee of Oncor and its predecessors from May 1969 to March 1, 2011. He worked as a troubleman or troubleshooter for the last 24 years of his employment with Respondent. (Tr. 1536, LL. 2-5). Waugh voluntarily retired. (Tr. 1538, LL. 7-9). Waugh

currently lives in Florissant, Colorado and was in the process of moving his residence at the time of the hearing and was thus unable to travel to Texas to testify. (Tr. 1537, LL. 8-10). The ALJ correctly found that Waugh's videoconference testimony was appropriate. (JD slip op. at 2, LL. 37-39). Factors supporting allowing the testimony included the limited nature of Waugh's testimony, the presence of a Board agent with Waugh at all times during his testimony from another NLRB regional office, and the functionality of the videoconference equipment. (JD slip op. at 2, LL. 33-39).

Waugh was supervised by Keith Berry, Michael Anderson, and Randy Efflandt. (Tr. 1538, LL. 15-25; 1539, LL. 1-14). Waugh worked with smart meters for approximately 18 months to two years before his retirement. (Tr. 1540, LL. 1-4).

In his experience with smart meters, Waugh saw that smart meters ". . . didn't seem to be tight in the meter lugs. They seemed to be looser. They didn't seem to make as good a connection. We had heating problems with them, and the outage problems with them, too." (Tr. 1540, LL. 18-21). With respect to heating problems, Waugh explained that, on occasion, when he would pull out malfunctioning smart meters, "the back would be burnt up or the meter lugs would be burnt up in the meter base." (Tr. 1541, LL. 1-2). Waugh experienced this anywhere from once or twice a month to three or four times a month. (Tr. 1541, LL. 4-6). This happened more frequently after Respondent started using smart meters. (Tr. 1541, LL. 10-11).

Waugh spoke to Supervisors Efflandt, Anderson and Leslie Tidwell about problems with smart meters on at least one occasion. (JD slip op. at 6, LL. 6-8; Tr. 1543, LL. 1-5). Although he did not recall exact dates of the conversations, Waugh reported to them that the meters were "going off, opening up on their own, and then having heating problems with them." (Tr. 1543, LL. 17-25; 1544, LL. 1-4). Waugh experienced this when he was working on fire calls (calls

involving structural fires, including businesses, apartments, homes, and residences) and the back of the meter would be completely burned out. (Tr. 1543, LL. 17-20). Waugh responded to more fire calls once the smart meters were deployed and these often involved heating problems at the meter base. (Tr. 1544, LL. 1-18)

Waugh also spoke to Efflandt, Anderson, and Tidwell before or after monthly safety meetings. (JD slip op. at 6, LL. 6-8; Tr. 1545, LL. 15-23). During one conversation, one of the supervisors told Waugh something to the effect of, "[T]hey're going to be used, so we're going to have to work with them." (Tr. 1546, LL. 22-23). This conversation took place within a three-month period of Respondent's deployment of smart meters. (Tr. 1547, LL. 2-5).

G. Respondent Conducts a Sham Investigation and Demands that Reed Furnish Information that It Knew Was Not in His Possession

Mark Moore, Respondent's Senior Director of Measurement Services, was present during Reed's Senate hearing testimony. Immediately after Reed's testimony, Moore called Labor Relations Director Davis and advised him about Reed's testimony. (JD slip op. at 15, LL. 13-15; Tr. 1033, LL. 11-15) Davis immediately notified Chief Operating Officer Greer. (JD slip op. at 15, LL. 14-15; Tr. 984, L. 18). Davis, Greer and Vice President Keith Hull watched a tape of Reed's testimony the following day. (JD slip op. at 15, LL. 19-20).

Although Respondent traditionally interviewed employees under investigation, including employees accused of lying or making false statements, in this instance, Respondent deviated from its standard investigative procedure and did not interview Reed regarding his Senate hearing testimony, knowledge of smart meters or damage to customers' homes. (JD slip op. at 20, LL. 4-5; Tr. 199, LL. 10-12; 904, LL. 1-12; 1145, LL. 6-8; 1232, LL. 11-16; 1259, LL. 23-25; 1418, LL. 9-12). Instead, Greer corresponded with Reed via letter. Greer sent the first letter to Reed on November 7, 2012. (JD slip op. at 17, LL. 19-22; Jt. Exh. 5).

Greer's November 7, 2012 letter states that Respondent found no evidence of tickets related to smart meters damaging customers' homes. (JD slip op. at. 17, LL. 19-20; Jt. Exh. 5). The letter concludes by demanding, as soon as possible, "all evidence upon which you based on testimony." (JD slip op. at. 17, LL. Jt. Exh. 5).

On or about November 29, 2012, Reed responded by letter. In this letter, he stated that his testimony was based "on my experiences in dealing with trouble incidents that occurred following smart meter installations" and that these experiences were properly recorded on trouble tickets. (JD slip op. at 17, LL. 24-28; Jt. Exh. 6). Reed also stated, "[T]here were more frequent incidents of failures of smart meter bases following the change from analog meters to smart meters" and his observations were consistent with verbal reports from those working at other electrical utilities. (Jt. Ex. 6). On December 14, 2012, Greer responded by letter and inaccurately stated that Reed provided "no information" and ended by threatening Reed with "appropriate discipline." (JD slip op. at 17, LL. 30-39; Jt. Ex. 7).

Greer gave Reed less than one week to provide anything else before the Respondent would make a decision regarding Reed's employment. (JD slip op. at 17, LL. 30-39; Jt. Ex. 7). At hearing, Greer testified that he knew Reed did not have trouble tickets in his possession, but, if he did, he could be subject to discipline for having Respondent's documents in his possession without authorization. (Tr. 875, LL. 19-25).

H. To Address Respondent's Hostile Demands for Evidence, Reed Requests Information Which Respondent Unlawfully Refuses to Provide (December 18, 2012 Information Requests)

On December 18, 2012, Reed answered COO Greer's December 14, 2002 letter. In his letter to Greer, Reed explained that he was engaged in protected union activity when he gave his October 9, 2012 testimony. (JD slip op. at 18, LL. 21-23; Jt. Exh. 8). His letter also explained

that Reed was unaware of any Code of Conduct violations or any other violations of policy or law. (Jt. Exh. 8). In this same letter, Reed asked for the page and line numbers of alleged code of conduct violations concerning Bobby Reed; all documents reviewed and/or created in consideration with the Employer's investigation of Reed's alleged misconduct; and all trouble tickets handled by Reed since installation of the AMS meters began. (JD slip op. at 18, LL. Jt. Exh. 8).

In a second letter, this one also dated December 18, 2012, Reed again asked for all documents reviewed and/or created in consideration with the Employer's investigation of Reed's alleged misconduct. (JD slip op. at 18 fn. 33; Jt. Exh. 9). This was a second request for this information.

Reed asked for this information in order to know what part of the Code of Conduct he allegedly violated and to know what documents Respondent reviewed and created pursuant to its investigation of Reed's alleged misconduct. (Tr. 197, LL. 9-11). He also requested the information to demonstrate that he was not lying in his Texas Senate testimony. (Tr. 197, LL. 15-24).

I. Respondent Unlawfully Terminates Reed for His Union and/or Protected Concerted Activity

On or about January 14, 2013, Greer, by letter, notified Reed that Respondent was terminating his employment. (JD slip op. at 20, LL. 9-12; Jt. Exh. 10). The letter acknowledges Reed's status as a union official. (Jt. Exh. 10). The letter states that Respondent reviewed CATS/OMS tickets assigned to Reed from November 2008 through October 2010 and did not find any "involving an advanced meter system (smart meter or AMS meter) causing damage to customer homes." (JD slip op. at 20, LL. 9-11; Jt. Exh. 10). Reed timely filed a grievance over his termination. (JD slip op. at 20, LL. 16-17; Jt. Exh. 21).

The letter does not state that Respondent reviewed the CATS/OMS tickets of other technicians or whether Respondent sought to confirm what Reed said about smart meter problems in Houston. (Jt. Exh. 10). Respondent's letter claims that Reed's Senate testimony was "false and you knew, or should have known, at the time it was false." (Jt. Exh. 10). Greer's letter acknowledges that Reed gave his testimony after having a disagreement with Kyle Davis concerning contract negotiations but calls "this fact" irrelevant. (Jt. Exh. 10).

Respondent did not offer Reed any opportunity to review some of the requested information until Greer notified Reed, by letter dated January 14, 2013, that he was terminating Reed's employment. (JD slip op. at 18, LL. 38-39; Jt. Exh. 9). At hearing, despite denials that the handwritten documents were official records, Greer admitted that the handwritten documents Reed sought were on Oncor paper and Reed would likely have been terminated if he had any of the documents in his possession. (Tr. 875, LL. 15-25). Greer also belatedly admitted that no harm would have occurred had Respondent waited to terminate Reed after he provided the information to Reed. (Tr. 878, LL. 11-15).

As directed in Greer's termination letter, Reed contacted Manager Donna Jackson (also known as Donna Smith in this proceeding) after receiving the termination letter and met with her to review certain documents. Reed met with Jackson at Respondent's North Service Center around March 2013, about two months after Reed was terminated. (JD slip op. at 22, LL. 14-16; Tr. 201 passim; 1275-1276 passim). She presented Reed with CATS tickets to review, which are documents generated by dispatchers rather than handwritten by troublemen; Reed told her that he was not familiar with this type of document; the ALJ correctly found that "the only reasonable conclusion would have been that his request for trouble tickets referred to something else." (JD slip op. at 22, LL. 26-28; 202 passim, Tr. 1249-1253 passim). Reed was seeking handwritten

tickets. (Tr. 201, LL. 24-25). Although Jackson admitted that she knew about handwritten service tickets, she made no effort to ascertain what Reed meant or look for any other documents. (JD slip op. at 22, LL. 30-42; Tr. 1268, L. 8).

About 14 months after it terminated Reed, on April 22, 2014, Respondent permitted Reed to review a portion of the documents he requested on December 18, 2012. (JD slip op. at 24, LL. 35-36; Tr. 212 passim). Reed reviewed approximately eight of eleven drawers of service tickets. (JD slip op. at 25, LL. 4-5; Tr. 213, LL. 2-25). No one offered Reed the opportunity to review the remaining three drawers. (JD slip op. at 25, LL. 8-10; Tr. 213, LL. 20-25).

Reed asked for copies of the information, but Respondent only permitted him to have redacted copies. (JD slip op. at 25, fn 54; Tr. 203, LL. 2-11). Although Respondent allowed Reed to review part of his handwritten trouble tickets more than one year after he requested to do so, it did not provide to him the line number of the Code of Conduct he is alleged to have violated, and it did not provide all documents reviewed and/or created in connection with its investigation of Reed's alleged misconduct[5].

J. Despite Its Representations, Prior to Terminating Reed, Respondent was Confronted with Smart Meter Problems, Including Fires and Lawsuits

Although Respondent continues to assert in its Exceptions that Reed's testimony before the Senate Committee was false, the record is replete with evidence concerning smart meter safety issues. In addition to troublemen discussing problems with supervisors and documenting the problems long before Reed's termination, Respondent was confronted with various smart meter problems, including installation problems and lawsuits filed alleging fires starting as a result of smart meters. Greer testified that, in August 2010, in the City of Arlington, Texas,

[5] The Judge found only that Respondent refused to provide all documents reviewed and/or created in connation with its investigation of Reed's alleged misconduct. The General Counsel is not excepting to this finding but reviews the facts as background relevant to the Judge's finding of animus.

"[W]e had two installations that—where the installation of the meter, you know, the meter base causing a fire to a home." (JD slip op. at 26, LL. 29-32; Tr. 802, LL. 15-25, 805, L. 16). The problem was of enough concern that it "caused the—the city of Arlington or the fire department to stop our deployment so they could take a look and see what's going on." (Tr. 802, LL. 23-25; 803, LL. 1-10). This pause in deployment took place in August 2010. (Tr. 805, L. 16).

Respondent and Landis + Gyr, the manufacturer of the smart meters used by Respondent, entered into a settlement agreement with the State Farm Lloyds Insurance Company on November 8, 2013, concerning the aforementioned July 7, 2011, fire at the Chaney residence (GC Exh. 6, 8). The ALJ correctly found that, "presumably, the problem arose with the smart meter itself" because Landis + Gyr indemnified Respondent. (JD slip op. at 17, LL. 7-9).

Respondent's Associate General Counsel Stewart acknowledged that around October 2012, one of Respondent's litigators, Dan Altman, told him that there were two or three lawsuits alleging that smart meters were responsible for causing fires. (JD slip op. at 17, LL. 4-7; Tr. 1609, 1615-16, 1619 passim). Two of them were ultimately settled. (JD slip op. at 17, L. 7; Tr. 1616, LL. 8-17).

K. Reed Requests Additional Information to Demonstrate that He Told the Truth in His Texas State Senate Testimony (March 25, 2013 request)

On March 25, 2013, Reed submitted an additional information request concerning his discharge. (JD slip op. at 20, LL 31-32; Jt. Exh. 11). The information request was related to a grievance the Union filed on January 17, 2013 concerning Reed's termination. (Jt. Exh. 22). In this information request Reed sought information pertaining to smart meter safety issues, including customer claims for damage; the Employer's responses thereto (including documents concerning repairs made to metering equipment); and documents related to Reed's training, performance and termination. (JD slip op. at 20-22 passim; Jt. Exh 11).

Reed requested the information because he believed it would exonerate him from Respondent's unfounded accusations. (Tr. 233, L. 3). He also requested it to demonstrate that Respondent was aware of its problems with smart meters and that it knew Reed was telling the truth in his Texas Senate testimony. (Tr. 234, LL. 4-6). Respondent did not respond to this request and did not furnish any of the requested information. (JD slip op. at 22, L. 11; Tr. 236, L. 25).

III. THE RECORD SUPPORTS THE JUDGE'S CONCLUSIONS AND FINDINGS

In its Exceptions, Respondent contests many of the Judge's factual findings, credibility resolutions, application of Board case law, conclusions of law and the Judge's recommended remedy and order. The Judge's findings of fact, credibility resolutions, application of Board case law, conclusions of law and recommended remedy and order are supported by the record evidence and Board law and should be affirmed.

A. Respondent's Exceptions to Credibility Resolutions are Unfounded and Should be Disregarded

Under the Board's well established policy as set forth in *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), an administrative law judge's credibility resolutions will not be overturned unless the clear preponderance of all the relevant evidence demonstrates that the administrative law judge is incorrect. In the instant case, the Judge's credibility resolutions are supported by the record evidence. The fact that Respondent would not reach the same conclusions regarding its own witnesses' credibility does not mean that there is sufficient evidence to demonstrate that the ALJ was incorrect. Therefore, Respondent's exceptions regarding credibility are baseless and should be disregarded.

B. The Judge Correctly Found that Reed was Engaged in Protected Concerted Activity and/or Union Activity

The Respondent argues that the Judge erred in finding that Reed's testimony before the Texas State Senate Committee was concerted activity and also erred in concluding that this testimony was protected. Contrary to the Respondent's assertions, the Judge correctly found that Reed was engaged in activity protected by the Act in two separate ways: serving as the Union's chief negotiator in contractual discussions and by giving testimony before the Texas State Senate about matters pertaining to worker safety. (JD slip op. at 31-32). The Judge found correctly found that Reed's Texas State Senate testimony was protected concerted activity because Reed held an official position with the Union, expressly referred to his role as a union official while signing in to testify and actually testifying, referred to communication with officials of IBEW Local 66 in his testimony and because the evidence showed that Reed had previously been in touch with a legislative aide on the subject of smart meters in his official capacity as a union official. (JD slip op. at 31-32). The Judge could also have found additional bases for determining that Reed's Texas State testimony was protected concerted activity. These bases will be detailed in this section.

Respondent asserts that Reed did not engage in protected concerted activity because his actions were individual in nature. Respondent's reliance on *Meyers I and II*[6] and related cases is misplaced because those cases concern employee actions taken prior to the involvement of a union. By contrast, when a union official acts on behalf of the Union, something as simple as filing a grievance is protected concerted activity, regardless of whether the grievance concerns

[6] *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); *Meyers Industries*, 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).

one individual or a group. *See Roadmaster Corp.,* 288 NLRB 1195, 1197 (1988) enf'd 878 F.2d 448 (7th Cir. 1989).

However, speech need not even concern working conditions for it to be considered protected concerted activity. *See Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385-1386 (9th Cir. 1976) (finding that the employer unlawfully terminated employees for writing a letter to legislators to oppose a measure that would have eased visa restrictions for foreign engineers). The Board found the sending of the letter to be protected concerted activity although it did not concern a matter under the employer's control and would impact the employees represented by the union only indirectly. The Court of Appeals, in affirming the Board, stated that the employees "had a legitimate concern insomuch as it might affect their job security." The Court affirmed the Board's finding that a discharge and threat related to the letter violated the Act.

Similarly, in *Alaska Pulp Co.,* 296 NLRB 1260, 1262 (1989), the Board found that the employer unlawfully discharged an employee because he engaged in protected concerted activity by writing a letter and testifying before Congress regarding an issue inimical to the interests of the employer.

The General Counsel's witnesses testified extensively about the Union's interest in smart meters along with how smart meters have affected and continue to affect employees' working conditions. For example, Levy stated that the Union's concerns with smart meters included how they would affect employees' jobs, including worker safety. (Tr. 51, LL. 12-18). Childers also spoke about the hazardous conditions sometimes caused by working with smart meters. (Tr. 267, LL. 16-21; 274, LL. 9-20). Matters affecting safety are working conditions. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 10 (2014).

Lucero and Reed spoke about having to inform customers of their financial responsibility for the meter base and having to pay for their own electrician. Lucero notes that bargaining unit employees must ultimately face the customer and tell them that they need to get an electrician "and we get blamed for it because you are right there." (Tr. 90, LL. 8-11).

The frequency and nature of employee interaction with customers is part of employees' working conditions. *See Davis Supermarkets, Inc.* 306 NLRB 442, 455 (1992) (noting customer contact as a factor to consider in whether an employee's terms and conditions of employment were onerous enough to meet the definition of an unlawful constructive discharge). *See also Elm Tree Baking Co.,* 139 NLRB 4, 22 (1962) (listing the level and nature of customer contact as working conditions). In his Texas State Senate testimony, Reed stated that he had to face a customer who had not had electrical problem in the past but who now had to pay for her own repairs. (Jt. Exh. 1; corroborated GC Exhs. 3, 20).

Employers who require employees to work with new products and technologies affect employees' working conditions. *See Osco Drug,* 294 NLRB 779,788 (1989) (finding new technology used by employees to be a working condition). Dennis Waugh discussed complaints he made about problems with smart meters and that supervisors impliedly stated that Respondent was going to use them, so employees would have to figure out how to work with them. (Tr. 1546, LL. 22-23). Based on the testimony of the General Counsel's witnesses, the Judge correctly concluded smart meters have affected bargaining unit employees' working conditions, both directly and indirectly, from job loss (Tr. 831-833 passim) to customer interaction (Jt. Exh. 1; corroborated GC Exhs. 3, 20; Tr. 90, LL. 8-11) to safety concerns. (JD slip op. at 32, LL. 15-21; Tr. 267-274 passim). Even Respondent's supervisors Anderson and Efflandt confirmed "an

increase in the number of burned up meter bases as the smart meters were deployed." (JD slip op. at 32, LL. 19-21).

Serving as a high ranking union official and on the bargaining committee is union activity and discharge on this basis violates Section 8(a)(3) of the Act. *See Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. at 17 (2011). It is not in dispute that Reed testified in response to Respondent's stance at bargaining, and that he signed in to testify as a union official at the Texas State Senate Hearing. (JD slip op. at 34, LL 26-28; R. Exh. 16). Reed states that he testified before the Committee as a "public campaign" because he realized that the negotiations were not going anywhere and the bargaining atmosphere was hostile. (Tr. 151, LL. 16-21). Greer's termination letter to Reed acknowledges that Reed gave his testimony after having a disagreement with Kyle Davis concerning contract negotiations. (Jt. Exh. 10). Finally, Reed testified at the request of Richard Levy, Legal Director of the Texas AFL-CIO and an attorney who represents IBEW Local 69. (JD slip op. at 13, LL. 5-11; Tr. 47, LL. 9-18).

C. The Judge Correctly Found that Reed did not Lose the Protection of the Act

Contrary to the assertions raised by the Respondent in its Exceptions, the Judge correctly found that Reed did not lose the protection of the Act in his testimony about smart meters because the evidence did not support Respondent's contention that Reed made statements that were deliberately false and/or made with reckless disregard for the truth even if some of Reed's statements were not made with precision. (JD slip op. at 34, LL. 13-17 and 24-29). The Judge also found substantial record evidence to support Reed's testimony, such as troubleshooters' more frequent reports of burned up meter bases and that fires did, on at least some occasions, result from the meter bases burning up and consequently burning up the meters. (JD slip op. at

34, LL. 34-39). Under Board law, it is clear that Reed did not lose the protection of the Act by testifying about smart meters.

Section 7 extends to employees' efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside of the immediate employee-employer relationship. *Washington Hospital Center Corp.,* 360 NLRB No. 103, slip op. at 6 (2014) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Statements are protected when it is clear from the context that they are related to a labor dispute and/or employees' terms and conditions of employment. *Brockton Hospital*, 333 NLRB 167, 1374-1374 (2001). *See also Allied Aviation Service of New Jersey*, 248 NLRB 229, 231 (1980). Previous sections of this brief have addressed the relationship of Reed's testimony to the Union's labor disputes with Respondent concerning smart meters as well as the parties' labor dispute during bargaining for a successor contract.

Protected statements only lose the protection of the Act when they are disloyal or maliciously false. *Valley Hospital Medical Center, Inc.,* 351 NLRB 1250, 1251 (2007) (finding that the *Jefferson Standard* line of cases did not apply because the statements were not disloyal). Under the *Jefferson Standard* line of cases, communication can lose the protection of the Act when such communication is disloyal, meaning a "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *See id.*

To lose the Act's protection as an act of disloyalty, an employee's public criticism must evidence "a malicious motive." *Richboro Community Health Council,* 242 NLRB 1267, 1268 (1979). Statements made with malice are made with knowledge of their falsity or with reckless disregard for their truth or falsity. When an employee communicates what he believes to be true,

reasonably relying on the reports of others, the inaccuracy of what is reported does not remove the relayed communication from the protection of the Act. *See KBO, Inc.* 315 NLRB 570, 571 (1994). Moreover, as long as protected concerted activity is not unlawful, violent, in breach of contract or disloyal, employees engaged in such activities generally do not lose the protection of the Act simply because their activities contravene an employer's policy. *Communication Workers Local 9509*, 303 NLRB 264, 272 (1991). In the instant case, Reed's testimony did not have a malicious motive. His testimony did not criticize Respondent's product (electrical delivery); testimony shows that Reed's testimony concerned products used by Respondent. Landis + Gyr is the manufacturer of the AMS meter used by Respondent and Itron is the manufacturer of the meters used by CenterPoint Energy in Houston.

Reed's testimony was not intended to reduce Respondent's income. It is clear from the record that Respondent's deployment of smart meters was nearly complete at the time of Reed's testimony. Reed based his testimony on the reports of fellow union officials, co-workers and a public official who was stipulated to be an expert in fire protection. Therefore, the instant case is not similar to a case such as *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003) (finding that an employee who sent an e-mail to co-workers regarding the presence of Anthrax had not verified the truthfulness of information she overheard; therefore, her discharge was lawful). Reed deliberately verified the accuracy of his testimony through others, including a public official, prior to testifying.

Respondent's reliance in its Exceptions on *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390 (2006) is also misplaced. In *Kvaerner*, the Board found that deferral to an arbitrator's decision was appropriate because the decision was not clearly repugnant to the Act. Consequently, the Board's finding here "was not whether we would find 'reckless disregard' but

rather whether the General Counsel has shown that the finding is palpably wrong or clearly repugnant to the Act." *Kvaerner*, 347 NLRB 390, 393. With regard to the specific facts in *Kvaerner*, the Board found that the employee therein made statements about the employer which were not based on "any checking of the facts." *Kvaerner*, 347 NLRB 390, 393. Based on these facts and findings, it is clear that *Kvaerner* is both distinguishable factually and procedurally, so as to provide no support for the Respondent's position as urged in its Exceptions.

Statements are not disloyal when they are not intended to injure an employer's business but instead to improve working conditions. *Valley Hospital,* 351 NLRB at 1254. In the instant case, Reed's goal was to improve working conditions through bargaining, not to injure Respondent's business. Therefore, Reed's testimony did not lose the protection of the Act and Respondent unlawfully discharged him.

D. The Judge Properly Applied *Wright Line* but Could Have also Applied *Phoenix Transit System*

Contrary to Respondent's assertions in its Exceptions, the Judge correctly found that Respondent made two disparaging statements that demonstrated express animus toward Reed for engaging in collective-bargaining activities thereby supporting a the conclusion that Respondent unlawfully discharged Reed (JD slip op. at 32, LL. 32-41). The Judge also found that Respondent exhibited animus by failing to conduct a full and fair investigation and by refusing to provide Reed with information solely in its possession which Reed claimed would exonerate him from the accusation that he lied in testifying about smart meters. (JD slip op. at 32-34 passim). Finally, the Judge found that Respondent acted with animus by terminating Reed rather than imposing lesser discipline. (JD slip op. at 34, LL. 5-11). This section will demonstrate that the Judge properly found that Respondent harbored animus toward Reed's protected conduct.

Calling a union official a liar in conjunction with the official's protected activity demonstrates animus. *See United States Postal Service,* 352 NLRB 923, (2008) (finding "open and unmistakable animus" in calling a union official a troublemaker and a liar after reading an unfair labor practice charge). In the instant case, Reed states that Davis called him a liar in the context of his union activity (bargaining) and then essentially called him a liar with respect to his Texas State Senate testimony. (Tr. 183, LL. 18-22; 185, LL. 14-16; 1533, L. 25; 1534, LL. 1-2; Jt. Exh. 10). Both with respect to Reed's involvement in bargaining for a new contract and his speech on behalf of the Union at the Texas State Senate hearing, the Employer's branding of Reed as a liar or as someone who does not tell the truth demonstrates animus.

Evidence that an employer's reasons for discharge are pretextual supports a finding of animus. Such evidence includes disparate treatment, failure to interview and/or allow a discriminatee to dispute the basis for the discharge, and false reasons for the discharge. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014). Interviews or investigations that are more "inquisitorial" that truth-seeking demonstrate "an unwillingness to get at the truth" and instead demonstrate an effort to "provide it with some cover in the event the discharges were subsequently challenged." *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 500 (2007). The Board has also found an overly formal investigation to be evidence of pretext. *See Allstate Power Vac, Inc.,* 357 NLRB No. 33, slip op. at 5 (2011) (finding that departures from an employer's normal disciplinary procedures, including photographing employees when it had not done so in the past, handling the investigation within a higher level of the corporate structure than usual and creating transcripts of interviews, undermined the employer's *Wright Line* defense).

In the instant case, Respondent demanded information from Reed that it knew was not in his possession, failed to interview him or other bargaining unit employees and supervisors, brushed off concerns with fires and lawsuits concerning smart meter fires as having to do with the meter base rather than the meter, and significantly delayed giving Reed some of the information he requested and refused outright to furnish the rest. Respondent also failed to give more than a cursory review to the tickets it found and never looked at the handwritten tickets that could have exonerated Reed. Here, the investigation with Reed was unusually formal: Respondent usually interviewed all bargaining unit personnel who might be disciplined, but for those who failed to report to work; [7] it communicated by letter; the investigation was conducted by the highest ranking officials; and the COO, instead of his supervisor, notified Reed by letter that he was terminated. Finally, Respondent erroneously relies on its history of terminating those who intentionally lied, drawing an inapplicable comparison between their lies and Reed's reasonable, protected speech. Taken together, the record evidence clearly shows that Respondent acted with animus in terminating Reed.

Counsel for the General Counsel's Brief to the ALJ analyzed Reed's discharge under both *Wright Line* and *Phoenix Transit System*[8]. The Judge's application of *Wright Line* was appropriate. However, it would have also been appropriate to find that Reed's discharge was unlawful under a *Phoenix Transit* theory. Respondent terminated Reed because his Texas State Senate testimony concerning safety issues with smart meters was purportedly false. Insofar as Respondent acknowledges that it discharged Reed for his testimony before the Senate Committee, the very conduct General Counsel alleges to be protected Union and/or concerted

[7] In *Lucky Cab Co.*, supra, slip op. at 4, employees were not even allowed to dispute the allegations of misconduct in an interview, which led the Board to find discriminatory motivation.
[8] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Phoenix Transit System*, 337 NLRB 510 (2002), enf'd 63 Fed Appx 524 (D.C. Circuit 2003).

activity, an analysis under *Phoenix Transit System*, 337 NLRB 510 (2002), enf'd 63 Fed Appx 524 (D.C. Circuit 2003) may also be appropriate. See also *Carey Salt Company*, 360 NLRB No. 38, fn 4 (2014); *Allied Aviation Fueling of Dallas LP*, 347 NLRB 248, fn 2 (2006).

In *Phoenix Transit*, it was undisputed that the employer therein terminated employee and union officer Weigand because he wrote articles in a union newsletter concerning the employer's handling of employee sexual harassment complaints. Similarly, in the instant case, it is undisputed that Respondent terminated Reed because, in his capacity as a union representative and employee of Respondent, he testified at a Texas Senate committee hearing concerning smart meters; a matter pertaining to employee safety and working conditions.

In circumstances like in the instant case, where an employer's adverse action is "intertwined with the union and the protected concerted activity" a violation may be found based on this causal link. *Felix Industries*, 331 NLRB 144, 146 (2000); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611-612 (2000). Accordingly, an analysis under *Wright Line*, supra may not be necessary. Because Respondent terminated Reed for testifying in his capacity as a union representative and employee about a matter pertaining to employees' terms and conditions of employment, protected activity under Section 7 of the Act, the only issue is whether Reed lost the protection of the Act. As explained above, Counsel for the General Counsel submits that Reed did not lose said statutory protection.

E. The Judge Correctly Found that Respondent Unlawfully refused to Furnish Relevant Information Requested by the Union

Contrary to Respondent's Exceptions, the Judge correctly found that Respondent failed and refused to provide relevant information requested by the Union. Specifically, the Judge found that Respondent failed to provide 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 alleged

misconduct. (JD slip op. at 28, LL-43-45). The Judge also correctly found that Respondent violated Section 8(a)(5) of the Act by failing to furnish the Union with all of the information it requested in its March 25, 2013 request (JD slip op. at. 30, LL. 14-16).[9]

Generally, an employer is under a statutory obligation to provide information, upon request, to a labor organization, which is the collective bargaining representative of its employees, if there is a probability that the information is necessary and relevant for the proper processing of the labor organization's duties in representing bargaining unit employees. *Detroit Edison v. NLRB,* 440 U.S. 301 (1979). The standard for relevance is a liberal discovery-type standard; the information must be of some bearing upon the issues between the parties and of "potential or probable" use to the labor organization in carrying out its statutory responsibilities. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). Information concerning bargaining unit employees is presumptively relevant. *Id.* When the information concerns non-bargaining unit employees, it must be proven that either (1) the union demonstrated the relevance of the non-unit information or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. *Id.* at 1258.

Although it may be settled that parties are not entitled to pre-arbitration discovery (*See California Nurses Association (Alta Bates Medical Center)*, 326 NLRB 1362 (1998)), the duty of a party under the Act to supply information relevant to the enforcement of an existing bargaining agreement or to an outstanding grievance is not extinguished because the request for such information is made pending an arbitration hearing. *Montgomery Ward & Co.*, 234 NLRB 588, 589 (1978); *Jewish Federation Council*, 306 NLRB 507 fn. 1 (1992).

[9] The Judge's recommended Remedy and Order do not include requiring Respondent to furnish the requested information.

Here, the Union's information requests relate to determining reasons for discipline and grievances. Information about employees within the bargaining unit is presumptively relevant. *In re DaimlerChrysler Corp.*, 331 NLRB 1324, 1325 (2000) (Brame, dissent) (cites omitted), enfd. 288 F.3d 434 (D.C. Cir. 2002). Information about discipline is important to the Union to determine whether to proceed to arbitration or forego its efforts when the grievance may not be meritorious. 331 NLRB at 1324-1325.

1. December 18, 2012 Request

The bases for Reed's December 18, 2012 request for all documents reviewed and/or relied upon in Respondent's investigation of Reed's alleged misconduct are well-documented throughout this brief. Board law axiomatically holds that information relied upon as a basis for disciplining a bargaining unit employee is necessary and relevant. The Union never received this information. Respondent unlawfully refused to furnish documents reviewed and/or relied on in terminating Reed. *See DaimlerChrysler*, supra.

2. March 25, 2013 Requests

As with the information Reed requested on December 18, 2012, this information would show that Reed was not guilty of the misconduct Respondent accused Reed of committing. Where not presumptively relevant, Reed has shown that he needed the information to demonstrate that what he said before the Texas Senate Committee was true; the Union's need for the information is clear on its face.

As noted above, Respondent's duty to furnish information is not extinguished simply because the matter reaches arbitration, particularly where the information is necessary and relevant regardless of the stage of the grievance. Respondent unlawfully refused to furnish the items requested in the Union's March 25, 2013 request and, in fact, did not respond at all.

Respondent has not argued that the information is not relevant. With respect to claims filed for damage to customers' homes and/or equipment, such information was clearly within Respondent's custody and would have demonstrated that Reed's testimony was truthful. With regard to information regarding electrical contractors, this information would have established Respondent's knowledge of problems with smart meters and would confirm the truthfulness of Reed's testimony. With regard to CATS, OMS and service ticket, such information could have been of use to Reed prior to his discharge to demonstrate the truthfulness of his statements, but it was not provided to him until more than a year after his discharge. With regard to training on whether meter bases are part of customers' homes, this could show that Respondent was aware of problems with meters and/or meter bases and that this caused damage to customers' homes by definition. Information concerning the rules allegedly violated by Reed and who made the decision is relevant because the Union is entitled to know why Reed was discharged. The information concerning Reed himself, including his work record and/or awards, is presumptively relevant and would show that he was a good employee. Because Respondent did not furnish the information, and in fact, did not respond at all, Respondent violated Section 8(a)(5) of the Act.

IV. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel requests that the Board deny Respondent's Exceptions in their entirety, affirm the Judge's findings of fact and conclusions of law and adopt the Judge's recommended Order in full. Counsel also requests any further relief the Board deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions has been served this 27th day of February, 2015, via electronic mail, upon each of the following:

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