11-1700-5893-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Joseph Mitchell,

Complainant,

v.

Northern States Power Company
and International Brotherhood of
Electrical Workers, Local No. 160,

Respondents.

FINDINGS OF FACT, CONCLUSIONS, AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on May 25-June 15 and August 8-22, 1994, in Courtroom 3 of the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing issued by the Chief Administrative Law Judge on October 9, 1991. In accordance with an Order of the Administrative Law Judge dated April 20, 1994, the Complainant's charges against both Respondents were consolidated for hearing. This Decision encompasses the Complainant's claims with respect to both Respondents.

Calvin Scott, Attorney at Law, 217 West Nebraska, Suite 301, St. Paul, Minnesota 55117, appeared on behalf of the Complainant, Joseph Mitchell. Cheri L. Brix, Attorney at Law, 414 Nicollet Mall, Minneapolis, MN 55401, appeared on behalf of Respondent Northern States Power Company ("NSP" or "the Company"). Maurice W. O'Brien, Attorney at Law, Gordon-Miller-O'Brien, 1208 Plymouth Building, 12 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of Respondent Electrical Workers Local No. 160 ("Local 160" or "the Union").

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-14.69.

STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are as follows:

(1) Whether Respondent NSP discharged the Complainant or otherwise discriminated against him in the terms, conditions, and privileges of his employment at NSP because of his race in violation of Minn. Stat. § 363.03, subd. 1(2)(b) and (c);

(2) Whether Respondent Local 160 discriminated against the Complainant because of his race in violation of Minn. Stat. § 363.03, subd. 1(1)(a), (c), and (d); and

(3) What relief should be ordered to remedy any statutory violations that occurred.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

BACKGROUND INFORMATION

1. The Complainant, Joseph Mitchell, is a fifty-one-year-old African-American male. Mr. Mitchell worked for NSP for eighteen years. He was a member of Local 160 during much of that time and was included in the bargaining unit covered by the Metro West Region Collective Bargaining Agreement. T. 3050; Jt. Ex. 2 at 7-8, Ex. 31.

2. Local 160 represents approximately 2,600 members, about 1,465 of whom work for NSP. T. 2592. All NSP employees holding bargaining unit positions automatically become Local 160 members after they complete their six-month probationary period on the job. T. 2811. Local 160's officers and Board members are elected by the members; all members may seek and hold those positions. T. 2797.

3. Mr. Mitchell was employed as a Material Handler In-Charge ("MHIC") in the Hazardous Waste Warehouse at the Chestnut Service Center from December 5, 1988, until January 23, 1991. T. 3050, 3159. Mr. Mitchell does not allege that he was discriminated against in any positions he held with NSP other than the MHIC position. T. 4152. Prior to becoming an MHIC in the Hazardous Waste Warehouse, Mr. Mitchell was a Warehouseman in Charge ("WIC") in the Stores Department of the Chestnut Service Center. He received the WIC position based on his qualifications and abilities. T. 4170-73. WICs were previously called Section Supervisors. T. 828, 2040, 3057-59, 3961-62; Ex. 2b at 52.

4. The Hazardous Waste Warehouse falls within the NSP's Stores or Materials Management Department or Section. T. 2594-95. The Stores Section warehouses materials and equipment used in power generation and distribution. T. 2593. The Stores Section includes: (1) the heavy crew, responsible for heavy lifting; (2) the tool area, responsible for inventory and upkeep of tools and equipment; (3) truck driving operations, responsible for delivering materials to NSP divisions; and (4) the warehousing operation, responsible for warehousing materials used in power production and distribution. The Hazardous Waste Warehouse has a separate management team in part due to the unique nature of the regulations under which it operates. T. 2592-95.

5. NSP has Stores Section warehouses in Shorewood, Edina, Brooklyn Center, Chestnut and Maple Grove, all of which fall under Local 160's jurisdiction. NSP also has four warehouses in St. Paul that fall under the jurisdiction of Local 23 of the International Brotherhood of Electrical Workers. T. 2595.

6. There are no formalized job descriptions within NSP for Union positions. T. 1448, 4173, 4355.

7. There is no foreman classification in the Hazardous Waste Warehouse. T. 1970, 2539-40, 2545-46, 2720, 2732-33, 3271-72, 4140-41.

8. David Andersen, a white male, is employed by NSP as a Senior Labor Relations Representative. Prior to January, 1994, his title was Administrator of Industrial Relations. His job involves handling day-to-day interactions with the local unions, including handling grievances and negotiating reorganizations. T. 725-26.

9. Steve Miller, a white male, has been employed by NSP since 1964. His initial employment with the Company involved financial- and business-related work. In May, 1988, he became the Manager of Hazardous Materials Services for the Hazardous Waste Warehouse at the Chestnut Service Center. In that position, he focused upon compliance, setting goals, maintaining the budget, contracting, and supervising Lyle Salmela. Mr. Miller was not responsible for supervising bargaining unit employees on a day-to-day basis. T. 1240-41, 1385-89; Ex. 120.

10. Lyle Salmela, a white male, is employed by NSP as Supervisor of Hazardous Materials Services at the Hazardous Waste Warehouse located at the Chestnut Service

Center. Mr. Salmela has been employed by NSP for thirty-one years. As of the date of the hearing, he had spent fourteen years in the Environmental Department and seven years in hazardous waste activities. He has a BS in engineering and is a registered environmental manager. T. 1827-28, 1890. Prior to approximately September, 1989, Mr. Salmela held the title of Compliance Consultant or Compliance Officer in the Hazardous Waste Warehouse. T. 1251, 1353-54. In May, 1988, Mr. Miller directed Mr. Salmela to supervise the union employees working in the Hazardous Waste Warehouse. T. 1251, 1353, 1387-88.

11. Bernie Kolnberger, a white male, was employed by NSP from December, 1988, until February, 1992, in the Hazardous Waste Warehouse of Chestnut Service Center. He was initially employed in the Hazardous Waste Warehouse as a lead material handler. After the Complainant was sent home by NSP in July, 1990, Mr. Kolnberger was upgraded to the MHIC position and, after the Complainant was terminated in January, 1991, the MHIC position was posted and Mr. Kolnberger became the MHIC. Mr. Kolnberger was employed by NSP as an Inventory Planner (a non-union position) from February, 1992, to April, 1993. He has been employed since April, 1993, as a procurement agent in NSP's Purchasing Department. T. 973, 978-79, 1005.

12. Connie Clark, a white female, was employed by NSP from January 3, 1989, until April, 1992, as a Material Handler and a Lead Material Handler in the Hazardous Waste Warehouse at Chestnut Service Center. In April, 1992 (after Mr. Kolnberger, Bill Monroe, and Shawn Daly left the MHIC position), Ms. Clark became the MHIC in the Hazardous Waste Warehouse. She is currently employed in the MHIC position. T. 1127-29, 1163-64, 1185, 1233.

13. Dave Ring, a white male, has been Local 160's Business Manager and Financial Secretary since 1983. T. 2968. John Ness and Dennis Ganley are business representatives for Local 160. T. 2591, 2770, 4483.

14. Bill Baird, a white male, has been a business agent for Local 160 since September of 1980. He also holds the title Assistant Business Manager. As a Union business agent, he is a full-time employee of Local 160 and is not employed by NSP. Before becoming a business agent, Mr. Baird had been a lineman for NSP for 13 years. Mr. Baird is the primary representative for the Stores Section bargaining unit members. T. 2591, 2592, 2603.

15. Union stewards are bargaining unit members and NSP employees who try to provide first line help to other members faced with work issues. The stewards are volunteers and are not paid by the Union. T. 2407, 3729, 3730; Jt. Ex. 1 at 31.

16. At the conclusion of Local 160's contract negotiations, the Union distributes new contracts to all members. T. 387, 594-95, 598-99.

17. Pursuant to NSP’s Positive Discipline Policy, informal and formal steps may be taken to address such employee problems as attendance, work performance, and

conduct. The informal steps that may be taken under the policy include positive contacts and coaching/counseling sessions. If a written entry in the Employee Development Record is to be made from a coaching/counseling session, the policy provides that "the employee should be reminded of his/her right to have a union representative present." The Positive Discipline Policy states that "[i]t will continue to be the policy at Northern States Power Company that an employee's file is always open for review by that employee." Ex. 144.

18. The formal steps under NSP's Positive Discipline Policy include the following steps with respect to Union employees:

a. Step One - Oral Reminder: the supervisor is to discuss the problem with the employee in a private meeting and write a summary of the conversation, with a copy "available" to the employee; a written summary of the conversation and/or a copy of the Employee Development Record is to be sent to the Manager of Industrial Relations, who will transmit the information to the Union;

b. Step Two - Written Reminder: (to be used when an employee's commitment to improve is not met within the six months following an oral reminder or an employee commits a serious offense regardless of whether any previous discipline has occurred): a written memorandum is to be issued to the employee summarizing the formal conversation between a supervisor and an employee, and a copy is to be routed through the Department Head to the Personnel Department;

c. Step Three - Decision-Making Leave: (to be used when an employee's commitment to improve is not met during the nine months following a written reminder or an employee commits a very serious offense whether or not previous discipline has occurred): after consultation with the Industrial Relations Department, the supervisor discusses the problem with the employee and places the employee on a decision-making leave with pay the following day to decide whether they are willing to make the required commitment to continue working for NSP; after the employee makes his/her decision, the action is summarized in a letter to the employee and a copy of the letter is to be routed through the Department Head to the Personnel Department; the Industrial Relations Department is to inform the Union both verbally and in writing of the action taken.

Under the policy, employees are deemed to be "entitled to the appropriate representation during any steps of formal discipline" and the Industrial Relations Department is to be notified before any meeting which may involve a business agent of a local union. Ex. 144.

<u>UNION GRIEVANCE PROCEDURE</u>

19. The Union contract has a three-step grievance procedure. The three-step procedure has remained unchanged in successive collective bargaining agreements between Local 160 and NSP for over 30 years. T. 838, 2596, 2713, 4362; Ex. 201, Article II.

20. Step 1 entails oral discussion. An employee with a grievance is expected to contact his immediate supervisor with or without the assistance of the Union in an effort to settle the complaint before proceeding to Step 2. Ex. 201, Article II, Section 1(a). Unresolved Step 1 grievances may be reduced to writing and turned into the Union Hall as Step 2 grievances. T. 2596; Ex. 201, Article II, Section 1(b).

21. The Union may file Step 2 written grievances on its own initiative without the Union member saying specifically that he or she wants to file a written grievance. T. 2590-91. However, a member wishing to pursue a Step 2 written grievance is generally expected to initiate the written grievance by notifying a union steward or business agent of his/her interest in pursuing a grievance to Step 2. T. 392-93, 2413, 2522-23. In order to process a Step 2 grievance, members need only request a form from their union steward or work with the steward in filling out the form for submission to the union hall. T. 2412-13, 2522-23, 3636-37. Grievances unresolved at Step 2 may be processed by the Union to the third step of the grievance procedure, arbitration. Ex. 201, Article II, Section 1(c).

22. Step 2 grievances received at the Union Hall are assigned a Step 2 grievance number by staff persons at the Union Hall. Step 2 grievances are registered serially and assigned a number in the Union's grievance register by Local 160 staff persons who also enter a general description of the nature of the greivance. The register does not reflect Step 1 grievances; it only records Step 2 grievances (i.e., Step 1 grievances that are unresolved and are reduced to writing and turned in to the Union Hall). T. 2596-97; see Ex. 38.

23. A great majority of member grievances are resolved at Step 1 of the grievance procedure. A small percentage of member complaints are pursued by the members to the written Step 2. Very few grievances are processed through Step 3 arbitration. T. 840-41, 4363.

24. Members pursuing a Step 1 grievance may request assistance or representation from a union steward or union business agent. T. 2408-09.

25. Mr. Mitchell, like some other Union members, typically contacted Mr. Baird directly instead of contacting his union steward concerning Step 1 grievance issues. T. 2603-05. From time to time, Mr. Mitchell spoke with other business agents as well. T. 2604.

26. Mr. Mitchell knew how to process a Step 2 written grievance. T. 2412, 2606. He reviewed the collective bargaining agreements from time to time throughout his

employment and familiarized himself with the contract procedures from time to time. T. 3629-30.

DUTIES OF WIC IN THE INTERIM AND NEW HAZARDOUS WASTE FACILITIES

27. Prior to the opening of NSP's new Hazardous Waste Facility in approximately June, 1988, hazardous waste was stored in NSP's interim Hazardous Waste Facility. The Interim Facility was located at the Chestnut Service Center and consisted of numerous buildings. Hazardous waste was stored in multiple locations, and some of the waste was managed by other departments. The new Hazardous Waste Facility brought all of the hazardous waste into a central location under one roof. T. 299-300, 315; Ex. 139.

28. Kevin Mulloy was employed by NSP as a Warehouseman in Charge ("WIC") of Material Processing at the interim Hazardous Waste Warehouse facility located in NSP's Chestnut Service Center from September, 1986, until approximately April, 1988. In April, 1988, Mr. Mulloy began working (still as a WIC) in the new Hazardous Waste Facility. He remained in the new facility until December 5, 1988, when he left to become a relief foreman on the heavy crew. From June, 1985 until September, 1986, before becoming a WIC, Mr. Mulloy was a lead warehouseman for the Hold for Use Department, with duties that included hazardous waste processing and packaging. Mr. Mulloy was never assigned to work as a MHIC in the new Hazardous Waste Facility. After December 5, 1988, he was never assigned as a regular employee to work in the Hazardous Waste Facility, other than a two-day stint when he was asked to fill in in the Hazardous Waste Facility because they were short of staff. T. 148-49, 283-84, 289-92, 306.

29. Robert Wrobleski was employed by NSP as a Lead Warehouseman at the Interim Facility, Hazardous Waste Warehouse, Chestnut Service Center, from June, 1987 until December, 1988. Mr. Wrobleski worked with Mr. Mulloy. He never worked in the new Hazardous Waste Facility after December 5, 1988. T. 507, 618-19, 635.

30. While a WIC in the Interim Facility, Mr. Mulloy was responsible, inter alia, for "coordinat[ing] and perform[ing] the physical tasks associated with the hazardous waste activities of the General Office Stores Department **. . .** includ[ing], but not limited to, the packaging, labeling, manifesting, storage and record keeping of all waste processed by the General Office Stores Department." T. 292-293; Ex. 134C.

31. Mr. Mulloy's duties as WIC included the following tasks:

a. working with different kinds of hazardous wastes, including PCB capacitors, PCB oils and drums, toxic wastes covered by the Resource Conservation Recovery Act ("RCRA"), flammables, mercury, waste mercury, and cleaning up PCB spills;

b. pumping oil, tankers, and transformers with a suction hose weighing 80 to 150 pounds;

c. manual recordkeeping responsibilities relating to the tracking of waste, including entering manifest information in a log book and reconciling manifest errors;

d. taking off the top of drums, inspecting the contents, and repackaging, solidifying, sealing, weighing, and labeling drums of hazardous waste;

e. climbing on top of drums of hazardous waste and cleaning out drums by bending over into them;

f. handling capacitors weighing 40 to 140 pounds and weighing, labeling, and placing PCB capacitors in temporary storage;

g. taking chemical samples to the lab;

h. working with drums that weighed up to 700-800 pounds;

I. picking up 50 pound bags of floor dry;

j. loading and unloading trucks;

k. conducting off-site visits to non-NSP customers off NSP property, in order to take waste samples or pick up waste;

l. working on a daily basis and side by side with the Lead Warehouseman; and

m. handling problems that come up on a daily basis such as identifying waste, tracking information and talking to customers.

T. 284-89, 293-96, 300-04, 311, 326, 409, 415, 417, 420, 423-25, 481, 511, 515-16, 684, 1918, 4199, 4346.

32. Mr. Wrobleski, the Lead Warehouseman in the Interim Facility, and Mr. Mulloy, the WIC, worked together closely. They performed the same job duties and

worked on the floor together every day. Mr. Mulloy was available if Mr. Wrobleski needed help, and they worked together doing the same duties between sixty to seventy percent of the time. Mssrs. Mulloy and Wrobleski both also spent time in the office on paperwork. Mr. Mulloy did more paperwork than Mr. Wrobleski. Mr. Wrobleski preferred physical work to clerical work. T. 409, 511, 515-16, 628-33, 675, 705.

33. There was a continuous evolution in the nature of the WIC duties and the split between physical and administrative work. Mr. Mulloy's testimony at Mr. Mitchell's arbitration proceeding, in which he stated that his duties were 75 to 80% administrative in nature, did not focus upon any particular timeframe during his employment as WIC. T. 159-60, 362; Ex. 1 at 230. In September of 1986, when Mr. Mulloy started the WIC position, his duties were approximately 80% physical and 20% administrative. After Mr. Wrobleski joined him as Lead Warehouseman in December of 1987, Mr. Wrobleski was able to pick up a large portion of Mr. Mulloy's physical activities, and Mr. Mulloy's position became approximately 60% administrative and 40% physical. By the time the new Hazardous Waste Facility opened in June of 1988, Mr. Mulloy spent, on average, 50-60% of his time on administrative duties and 40-50% of his time on physical tasks. When Mr. Mulloy left the WIC position in December of 1988, 75 to 80% of his time was spent on administrative paperwork, including doing inspections, labeling, and tightening drums. The remaining 20% of his duties included such matters as conducting off-site visits. In contrast, Mr. Wrobleski's duties in December of 1988 did not involve 75 to 80% administrative paperwork. T. 295-98, 303, 360-63, 412-17, 444, 483, 632-33.

34. At times, Mr. Mulloy was assigned to special, one-time projects, such as preparing special reports, putting together the operational procedures for the oil handling and pumping system for the new facility, putting together the emergency response flowchart for the Part B permit, writing technical manuals for the permit, getting the Interim Facility started during the period from April, 1988, to June, 1988, and preparing to leave the Interim Facility in November, 1988. During those periods, he spent more time on paperwork and handled tasks that were over and above what a WIC would normally do, due to his expertise in the area of hazardous waste. T. 298-304, 325, 360-62, 412-15, 421, 705-07, 2028.

35. The WIC is a union position which did not have any supervisory responsibilities with respect to the Lead Warehouseman. T. 354-55, 1272, 1402. Mssrs. Mulloy and Wrobleski were supervised by Lyle Salmela, whose title at that time was Compliance Consultant. While Mr. Mulloy was WIC in the interim Hazardous Waste Warehouse, he made many of the day-to-day decisions regarding questions that Mr. Wrobleski had in the warehouse if he thought it was appropriate for him to handle the matter. At times, Mr. Mulloy decided that Mr. Salmela should first be contacted regarding a particular issue. On other occasions, Mr. Wrobleski made decisions regarding the warehouse. No one told Mr. Mulloy that he should make decisions for the warehouse; he took it upon himself to do so. Mssrs. Miller and Salmela periodically overruled Mr. Mulloy with respect to decisions he made regarding the Hazardous Waste Warehouse. Mr. Mulloy provided Mr. Wrobleski with work direction when Mr. Wrobleski first began to work in the Hazardous Waste Facility. Later, Mr. Wrobleski took it upon himself to complete the

work that needed to be done and Mr. Mulloy gave him help if he needed it. T. 184-85, 323-26, 408, 431-33, 435-40, 510, 548, 633, 669, 680-81, 684.

36. The WIC job posting indicates that candidates for the position "must be capable of heavy lifting." Ex. 134C. On average, lifting was 5% of Mr. Mulloy's duties while he worked as a WIC. Although a good share of the lifting could be eliminated if you used the equipment in the new facility, it would not be possible to eliminate all lifting from the WIC position. Some lifting is required in using the lifting equipment available in the new facility. Some days, 80% of Mr. Mulloy's work involved physical labor and he was unable to do any administrative work. T. 169-75, 446-49.

37. Several of Mr. Mulloy's job duties as WIC involved physical activity. Inspections sometimes required him to climb on top of drums stacked ten feet off the ground to see if they were properly labeled and ensure that they were not leaking. Inspections of transformers involved a lot of climbing, crawling, bending, and twisting. Physical duties were also associated with operating the emergency equipment, including a twisting motion to open and close valves. To clean up spills, it was necessary to get down on the floor, crawl around, bend, twist, and lift. Repetitive bending, twisting, or lifting was also involved when Mr. Mulloy packaged and processed waste. He had to remove the top of a drum and inspect the contents by inserting a probe. It sometimes was necessary to use a hammer to pound a probe all the way to the bottom of a drum in order to check all the layers in the drum for moisture. Pumping oil from a tanker also involved bending and twisting because the hose connections under the tanker were below waist level. T. 288-89, 302-03, 309-10, 312, 449-53.

38. If either Mr. Mulloy or Mr. Wrobleski had had a permanent restriction which prohibited them from lifting anything over 25 pounds or engaging in repetitive bending, lifting, or twisting, neither of them would have been able to perform in their jobs. T. 296-97, 459, 626-27.

<u>1988 REORGANIZATION AND COMPLAINANT'S ASSIGNMENT TO THE MHIC JOB</u>

39. Article 15 of Local 160's contract with NSP provides that the parties to the contract may engage in bargaining over midterm modifications of the contract if they mutually agree to do so. Agreements reached regarding midterm modifications of the contract are referred to as "Exhibit B's." Article XI, Section 2 of Local 160's contract with NSP provides that midterm modification Exhibit B's are incorporated into the collective bargaining agreement. T. 2599-2600; Ex. 201 at 41.

40. In 1988, Local 160 and NSP engaged in midterm bargaining concerning reorganization of the Stores Department. The result of those negotiations was incorporated into the contract as an Exhibit B. T. 2600. During this bargaining, the Company and the Union agreed to give the gender-neutral titles of Material Handler in Charge, Lead Material Handler, and Material Handler to the Warehouseman In Charge, Lead Warehouseman, and Warehouseman positions. T. 741-42. Initial staffing of the hazardous waste area was also discussed during the negotiations. T. 2602; Exs. 70,

102B-I. This was a consequence of Local 160 and NSP attempting to consolidate or eliminate certain job titles. T. 828.

41. One of the major goals of the October 7, 1988, Reorganization Agreement was to eliminate eleven distinct sectional work areas with respect to warehouse job titles and the job duty specialization of each classification from section to section and instead create one big section. In addition, flexibility was increased, by identifying and clearly reinforcing that everybody was expected to do everything and that all classifications were working classifications. T. 735-37, 827-29, 916, 3051, 4065; Exs 70, 102B-I.

42. The language included in the October 7, 1988, Reorganization Agreement specifying that "all classifications are working classifications" and that "all classifications will perform the duties of a Material Handler when not performing tasks normally associated with their own classification" means that everyone is expected to be able to do everything with respect to the Hazardous Waste Warehouse, i.e., that all material handler classifications are working classifications and there are no distinct job duties associated with the MHIC position. T. 305-06, 732-36, 980, 4064-65, 4155-57; Ex. 70, 102B-I.

43. The Union negotiating committee members recommended the proposed terms and conditions of the Reorganization Agreement to the Stores' employees in October, 1988, which included the language that stated that all Stores employees would be expected to perform the duties of the entry level job of Material Handler (Warehouseman). Ex. 102A. Mr. Mitchell and other bargaining unit members in the Stores area received a lump sum payment of $3,000 to accept the changes made during the 1988 Reorganization. T. 305-06, 3338-40, 3883, 3987, 4068-69, 4166-67; Exs. 102W, 102X.

44. Mr. Mitchell received the job of MHIC in the Hazardous Waste Warehouse as a result of a polling which was developed during the 1988 reorganization. It was a lateral move for Mr. Mitchell, since he was already a WIC. The change to MHIC merely reflected a change in title. He was given the job because he was the senior person who signed the poll. The polling was based on straight seniority; ability and qualifications were not considered. T. 1399, 1245-46, 4170-73; Ex. 102V.

45. In a memorandum to Mr. Miller dated September 21, 1988, Mr. Salmela asked Mr. Miller to see if he could do anything to maintain either Mr. Mulloy or Mr. Wrobleski or someone like them in the facility in order to keep some continuity of expertise in the facility. T. 1438-39; Ex. 121T-U. This memorandum prompted Mr. Miller to have a conversation with Mr. Mulloy in approximately late September, 1988, before the time when Mr. Mitchell became the MHIC. During the conversation, Mr. Miller asked Mr. Mulloy if he would consider staying on in the in-charge hazardous waste position. Mr. Miller made this request despite the fact that there was a personality conflict between Mssrs. Miller and Mulloy. Mr. Miller indicated that he was concerned about who would come into the facility under the polling and was concerned about getting an inexperienced person in the Hazardous Waste Facility. During this conversation, Mr. Mulloy said to Mr. Miller, "If you think I'm a problem, wait until the person who takes my place comes in." While Mr. Mulloy

did not specifically mention Mr. Mitchell's name, he assumed that Mr. Miller understood who would be taking the MHIC job because of all the talk that had gone on. T. 191-92, 198-204, 339-40, 365-70, 1354, 1438-39; Jt. Ex. 1 at 240-42. Mr. Miller did not say anything during this conversation about wanting to "get rid of" Mr. Mitchell or wanting to keep Mr. Mitchell out of the job. T. 340, 1242.

46. At some time before Mr. Mitchell became the MHIC in the Hazardous Waste Warehouse, Mr. Miller had a conversation with Mike Maki. During this conversation, Mr. Miller asked Mr. Maki how he could "get rid of" Mr. Mitchell. Mr. Maki told Mr. Mulloy and Mr. Mitchell about the conversation. T. 205-07, 2690-91, 3113-14; Joint Ex. 1 at 242-44.

47. Mr. Miller tried to convince Mr. Mulloy to stay on in the in-charge position based on Mr. Mulloy's good performance and the fact that Mr. Miller was relying on Mr. Mulloy in that job. T. 340. Mr. Miller had never met or seen Mr. Mitchell before December 5, 1988. There is no evidence that Mr. Mitchell's race motivated Mr. Miller's comments to Mssrs. Maki and Mulloy. T. 1399.

DUTIES OF MHIC IN THE NEW HAZARDOUS WASTE FACILITY

48. A new group of Union employees was assigned to the new Hazardous Waste Warehouse as Material Handlers when Mssrs. Mulloy and Wrobleski left in early December, 1988. Mr. Mitchell became the MHIC. Bernie Kolnberger became the Lead Material Handler**.** Shortly thereafter, on January 3, 1989, Connie Clark was added to the Hazardous Waste Warehouse staff as Material Handler. T. 979, 1128-29, 1185, 3052, 4343.

49. The MHIC position is a separate union position from that of Lead Material Handler and Material Handler. Employees in the MHIC position receive higher pay than the Lead Material Handler and Material Handler. There is, however, no special significance attached to the fact that one pay rate is higher than the other in terms of job duties. T. 738-39, 856, 917, 1132-36, 1188-89**;** Exs. 2A at 51, 70.

50. Mr. Mitchell, as MHIC, was not a journeyman because he had not been required to serve an apprenticeship. In addition, the 1988 Reorganization Agreement governed the staffing of the Hazardous Waste Warehouse. Consequently, Article VII, Section 10 of NSP's Collective Bargaining Agreement with the Union did not apply to Mr. Mitchell's situation and there was no requirement that a foreman be designated in the Hazardous Waste Warehouse. T. 2540, 2545.

51. NSP bargaining unit employees, including MHICs in hazardous waste, are not and never have been supervisors. T. 354, 637-38, 927, 984, 1036, 1247, 1251-52, 1272, 1879-80, 1914, 4142-43.

52. All MHICs are supervised by a manager. Job duties of Union employees, including the MHIC, are determined by management. T. 1002-03, 1440, 1448, 4173, 4224, 4355-56.

53. The responsibilities of Lyle Salmela, Supervisor of Hazardous Materials Services, included supervising the day-to-day work of the material handlers in the warehouse and setting up codes pertaining to waste profiles and chemical composition. The material handlers, including the MHIC, could easily obtain access to the codes kept by Mr. Salmela. T. 1272, 1830, 1903-1908, 3097-99, 4346-48.

54. The nature of the MHIC job in the Hazardous Waste Warehouse was dynamic; it changed as hazardous waste changed and as the facility changed. T. 151-52, 186-87, 997-98, 1085. Although the title of WIC changed to MHIC, the job duties did not remain the same. T. 1271-72.

55. The new Hazardous Waste Facility was more elaborate and differed in several respects from the Interim Facility. After the new facility opened in 1988, there was a significant increase in the physical job duties of all the material handlers, including the MHIC. T. 319-22, 627-28, 1394-95, 2028-29; Ex. 133. Certain increases in recordkeeping also were experienced in the new facility. Certain efficiencies in recordkeeping were, however, achieved after the staff of the Hazardous Waste Warehouse began to use a computer in approximately April of 1989. T. 152-53, 295-96, 321-22, 455, 637, 996-97, 1044-45, 1176-77, 1143, 1443, 1900.

56. The new centralized Hazardous Waste Facility differed from the Interim Facility in its environment and equipment. With respect to the environment, the new facility had diked areas, a PCB handling area, a central staging area, separate containment rooms for the storage of flammables and corrosives, a room for storing equipment, private office space, a truck and tanker loading and unloading area, a pumping system, PCB holding tanks, non-PCB tanks, and waste water tanks. T. 315-18, 528, 1391-96, 1867-73, 1891-95. With respect to equipment, the new facility had a bridge crane, 100 GPM air pumps, a drum crusher, crate, equipment, and battery storage. T. 528, 1393, 1894-97. In addition, as discussed in the previous finding above, a computer was added to the new facility shortly after it opened which decreased the amount of time spent on paperwork. T. 322, 1443, 1900. Mr. Kolnberger had taken computer courses in college and was the liaison between the computer programmer and the Hazardous Waste Warehouse. For that reason, his employee identification number was selected as the code to access the computer. Everyone who worked in the Warehouse who wanted to use the computer was required to use the same code (Mr. Kolnberger's employee identification number) to gain access. Mr. Kolnberger's identification number is published in the NSP telephone book and was available to everyone in the department. T. 1059, 3302-05.

57. The new facility is unique to the utility industry. It is heavily regulated by the Minnesota Pollution Control Agency under the Resource Recovery Act and under the Environmental Protection Act (EPA), as compared to the Interim Facility. Consequently, employees at the Hazardous Waste Warehouse are held to a higher standard than regular warehouse employees.. They receive specialized training regarding the chemical and technical aspects of the materials and how to appropriately lift and move materials and

operate cranes. In addition, there are certain risks associated with this work, such as an inadvertent release of toxic material, which can adversely affect human health or the environment and may also result in adverse publicity and criminal prosecution. T. 707, 1185-88, 1891-93, 1901-02, 4200-06, 4210; Exs. 106, 107.

58. Mr. Mitchell received all necessary training for his MHIC position. T. 1916-19, 3052-56, 3126-29, 3311-26, 4345-46; Ex. 143A.

59. For the Hazardous Waste Warehouse to be in compliance with applicable laws and rules, warehouse employees must track from what source the waste comes; document the names of generator sites and their distinct EPA identification numbers; check waste codes and shipping codes; document where the waste is being stored; track the treatment or disposal method used regarding the waste, including documenting when the waste goes out to a disposal facility; and keep logs of waste inspections. T. 4204-06; Exs. 106, 107.

60. If the Hazardous Waste Warehouse is out of compliance with applicable laws and rules, fines of up to $10,000 per incident or fines of up to $25,000 per day per violation may be imposed. T. 1892, 4206-07; Exs. 106, 107.

61. There were no duties specific to the MHIC position alone; the MHIC, Lead Material Handler, and Material Handler in the Hazardous Waste Warehouse were expected to perform the same job duties. T. 731-32, 738-39, 918-19, 980-82, 990-91, 1036-37, 1132-36, 1149-50, 1188-89, 1201-03, 1246-47, 1318-19, 1390, 1490-91. As the senior person, the MHIC was given the prerogative to choose to do much of the administrative work in the Hazardous Waste Warehouse. Thus, the MHIC could choose to do something other than physical tasks in particular instances. T. 980-81, 1036-37, 1121, 1150, 1169, 1316-17, 1322-23. The administrative duties performed by the MHIC should not have taken, on average, more than 3-4 hours per day. T. 1023, 1117-19, 1121, 1137-40, 1188-89, 1192-93, 1256, 1260, 1263, 1317-18, 1350-52, 1417-20, 1427-28, 1443, 1913, 1956, 2020. Physical activity was associated with certain portions of the administrative work. For example, the inspections involved climbing, crawling, bending and twisting. T. 288-89, 303-04, 415-16, 2129-30.

62. The MHIC duties, as performed by Mr. Mitchell, included daily inspections of the building and machinery for regulatory compliance, handling calls and questions concerning waste shipments, assigning trucks to pick up waste, scheduling dates when waste could be received based on workload and available storage space, organizing the bringing and sending of hazardous waste, preparing manifests, ensuring that waste samples were sent to the NSP laboratory in a timely fashion and that toxicity levels were included on manifests, retrieving and inputting computer data, and directing the clean-up of waste spills. Prior to his back injury, Mr. Mitchell admitted that he was also responsible for performing some physical labor required in the warehouse in a backup capacity to the other warehouse employees when they were sick, on vacation, or at lunch. T. 3451-54, 3458-63, 3466-67, 3607, 3609-11, 3622-23; Jt. Ex. 1 at 184-91.

63. In accordance with the 1988 Reorganization Agreement, Mr. Mitchell, as MHIC, was obligated to perform physical duties of the material handlers after the administrative duties were completed. Thus, if Mr. Mitchell chose to do administrative tasks for a part of his workday, he was then obligated to perform physical tasks for the remainder of the work day. T. 735-37, 827-30, 1350-52, 1956, 3348-3350, 3611; Jt. Ex. 2 at 43; Ex. 70.

64. Lifting items weighing more than 25 pounds and numerous other physical tasks were associated with the MHIC position, as well as with its predecessor WIC position. T. 168-76, 286, 288-89, 293-94, 309-10, 446-49, 1021, 1055-58, 1108, 1146-48, 1165-70, 1871-74; Ex. 134C-D. The MHIC and WIC positions also involved repetitive bending and twisting. T. 286-87, 312, 449-53, 631-32, 1112-17, 1503.

65. As MHIC, Mr. Mitchell performed the following physical tasks prior to his back injury: (a) filling drums using 50-pound bags of floor dry; (b) loading and unloading trucks; (c) handling batteries, including moving them on and off pallets; (d) pumping oil with a wand; (e) operating the drum crusher; (f) doing equipment maintenance; (g) using the forklift and overhead crane; (h) putting labels on tanks; (i) sweeping the floor and cleaning up the facility; and (j) inspecting the facility. T. 1166, 1169, 1263, 1265, 1400-01, 1417-18, 1915-16. Mr. Mitchell admitted that he did physical work as an MHIC before his injury. T. 3350-52, 3622-23, 3841-43.

66. The MHIC always was given the first opportunity to work on off-site jobs. T. 1103-06. Mr. Mitchell went on a few off-site visits with Mr. Kolnberger. T. 1104. Off-site jobs frequently involved manual labor. T. 3436-37, 3439, 4351; Jt. Ex. 1 at 199. The majority of the off-site visits in the Hazardous Waste Warehouse occurred after Mr. Mitchell was injured in March, 1990. Mr. Mitchell would not have been able to perform the physical work typically associated with off-site jobs due to his physical restrictions and would not have been able to supervise these off-site jobs because Mssrs. Salmela and Heuer served as job and safety supervisors. T. 4351-52.

COMPLAINANT'S PERFORMANCE AS MHIC

67. On May 13, 1989, Mr. Mitchell, along with the other Hazardous Waste Warehouse employees, was commended by Mr. Miller for doing good work. The memorandum was written following the first formal agency inspection to give everyone credit for doing a good job. T. 2132-33, 2096-98, 3129-31; Ex. 74.

68. Mr. Mitchell's job performance during the time he was employed as a MHIC got progressively worse. T. 1864-66, 1979-81.

69. Mr. Mitchell was frequently missing from his MHIC work station. Often the other Hazardous Waste Warehouse employees would not know his whereabouts. Sometimes he would be seen wandering the warehouse. Because he was difficult to locate, Mr. Mitchell was given a beeper so he could be found when needed. However, he

refused to turn it on. T. 943-44, 947, 953-54, 1024, 1030, 1042-43, 1089-90, 1155-58, 1190-92, 1206-10, 1235-36, 1295-97, 1404, 1471, 1926-28, 4081; Exs. 121E, 142A-B.

70. Mr. Mitchell refused to wear the Company-provided uniform and change clothes on his own time as was standard procedure at NSP, refused to regularly wear a hard hat and safety shoes, and was inattentive and appeared to be sleeping at safety meetings. On one occasion when another NSP employee (Ray Marjamaki) suffered a heart attack and exhibited symptoms which were discussed at a recent safety meeting, Mr. Mitchell failed to follow the advice given at the safety meeting regarding the proper handling of potential heart attack victims. T. 929-30, 1404-06, 1413-14, 1466-67, 1471-72, 1837, 1927, 4087-88, 4358; Exs. 104N, 121E**.** Other employees who failed to wear hard hats, including Mr. Kolnberger, Mr. Salmela, and Ms. Clark, were verbally reprimanded. There is no evidence that these other employees continued to violate the hard hat rule after they were reprimanded. T. 1013, 1030-31, 1198-99, 1449, 1836, 4358.

71. Sometime during or after February of 1990, Mr. Salmela and Mr. Miller sent a memorandum to the Union requesting that Mr. Mitchell be counseled by the Union regarding his tendency to cruise around Chestnut Service Center without being available to perform work in the Hazardous Waste Warehouse; his poor attendance and failure to stay awake at safety meetings (specifically, his sleeping at the heart attack session and at a safety talk given by Mr. Pappenfus and his arrival at another safety session one-half hour late); his failure to wear safety toe shoes and a hard hat despite numerous reminders; and the need for him to take a proactive role as MHIC, i.e., learn how to take responsibility, organize work tasks, and take the lead in getting work done. T. 1926-28, Exs. 142 A-B.

72. During the time that Mr. Mitchell, Mr. Kolnberger, and Ms. Clark were employed in the Hazardous Waste Warehouse, Mr. Kolnberger and Ms. Clark did much of the work. They covered for Mr. Mitchell and made it look like he was doing his job when, in fact, he really was not. They frequently doublechecked and re-did his work. T. 1029-30, 1042-43, 1070, 1089-90, 1172, 1194-95, 1209-10, 1235.

73. Bell & Associates, a consulting firm utilized by NSP, recommended that employees use a log book to sign in and sign out. From March 21, 1990, to July 25, 1990, Mr. Mitchell worked 71 days and used the log book only 43 days. With the exception of Mr. Mitchell, everyone else in the Hazardous Waste Warehouse used the log book routinely. Mr. Salmela had discussions with Mr. Mitchell regarding his failure to use the log book. The log book continued to be used in the Hazardous Waste Warehouse after Mr. Mitchell left. T. 1485, 1943-45; Exs. 121E, 121J, 142DD, 145.

74. None of the Hazardous Waste Warehouse employees were supposed to park behind the facility. Mr. Miller spoke to several employees, including Mssrs. Salmela, Mitchell, and Kolnberger and Ms. Clark about parking behind the facility. These discussions were in the nature of verbal coaching and counseling sessions under NSP's Positive Discipline policy. T. 1197-98, 1449, 1838, 1951-52. Mr. Mitchell parked behind the facility more than any other Hazardous Waste employee and continued to park there after he repeatedly had been told not to do so. T. 1012-13, 1030-33, 1197-98, 1282-84,

1449, 1836-38, 1951, 4358. Mr. Kolnberger rarely parked behind the facility, and never parked there again after he was told not to. T. 1032-33, 1197-98. After Ms. Clark was told not to park behind the facility, she never again parked there. T. 1197-98.

75. Mr. Salmela and other NSP managers discussed work performance and/or safety issues with Mr. Mitchell on numerous occasions, including the following:

a. On several occasions, Mr. Salmela and/or Mr. Miller discussed with Mr. Mitchell the fact that he was not available on the floor of the Hazardous Waste Warehouse to do his job. Mr. Mitchell was told that he was needed on the floor, it was important that he do his work, and that he had to be available at his work station. T. 1295, 1297.

b. A January 4, 1990, meeting between Mr. Salmela and Mr. Mitchell was prompted by Mr. Mitchell's decreasing work output. Mr. Mitchell was told that he needed to improve the productivity of the Department. He was also told that he was in charge of record keeping and should ensure that there was a record of all waste in the facility within eight hours of receipt or shipment and that he should be available in the shop eight hours per day, notify others any time he left and carry a beeper, assist with tasks when necessary to assure the "buddy system" or as needed, and delegate any activities away from the facility to a material handler. He was reminded that, as MHIC, he would be expected to know day-to-day activities. Mssrs. Salmela and Mitchell agreed that a 60-day organizer chart would be moved to Mr. Mitchell's office and that a work priority form would be utilized when necessary. T. 1922-26; Ex. 142 E-F.

c. On March 6, 1990, Mr. Mitchell was told that he needed to wear a hard hat and safety toe shoes while performing any type of work. Mr. Mitchell had been observed the previous day loading batteries with the bridge crane while not wearing a hard hat. He was also reminded that he needed to take responsibility as MHIC, talked to about his unavailability, asked where his beeper was, and asked what he was doing about non-compliant conditions, such as the lids being off drums, the drums not being labeled, and the waste not being packed. T. 1928-29; Ex. 142G-H.

d. On March 7, 1990, a meeting was held at which Mssrs. Andersen, Miller, Salmela, Mitchell, Ness, and Baird were present, as well as Calvin Scott (Mr. Mitchell's attorney) and Jack Sjoholm (an NSP attorney). The company called the meeting for the purpose of discussing discipline of Mr. Mitchell. The meeting was prompted by the problems discussed with Mr. Mitchell on March 6, 1990, as well as the fact that Mr. Salmela found several non-compliance conditions in the facility. At the meeting, Mr. Mitchell was told that he needed to be in charge of the work to be done in the facility, perform his work in a safe manner, and operate the facility to achieve compliance with the permit and applicable regulations. Several

issues were discussed, including Mr. Mitchell's failure to wear safety shoes or a hard hat, his sleeping at safety meetings, his failure to pay attention to detail, lack of compliance with regulations, and tardiness. He again was talked to about leaving the Hazardous Waste Warehouse, not being available when needed, not taking the initiative to organize work and see that it was being done, and not doing his share of the work. These problems had been discussed with Mr. Mitchell previously on January 4, 1990, and February 28, 1990. Regarding the hard hat issue, Mr. Mitchell noted that Mr. Salmela did not wear a hard hat in the facility. Mr. Salmela felt that supervisors did not have to wear a hard hat, but union employees did. The other company representatives informed Mr. Salmela that he did have to wear a hard hat. For that reason, Mr. Salmela withdrew the discipline he had intended to impose on Mr. Mitchell. The meeting ended with Mr. Mitchell being coached and counseled, which is an informal step under NSP's positive discipline program. T. 928-30, 931-32, 938-39, 943-44, 947, 950-51, 1404, 1928-33; Exs. 142K-Q, 142S, 144.

e. On April 6, 1990, Mr. Mitchell was advised about specific non-compliance situations and paperwork errors for which he needed to take responsibility. T. 1936-39, 1946, 2007, 2012; Ex. 142 X.

f. On May 15-16, 1990, Mr. Salmela questioned why Mr. Mitchell had not signed the appropriate box on a manifest form after the Pollution Control Agency sent back the transmittal slip noting the absence of a signature. This placed the company in non-compliance with applicable requirements. Mr. Mitchell at first refused to take responsibility even though he had processed the paperwork and was in fact the person who prepared the document. He later accepted responsibility for not signing the document. T. 1938-39, 2007, 2012; Exs. 142Y-Z, 142AA.

g. On July 5, 1990, Mr. Miller found Mr. Mitchell under the tanks without a hard hat. When asked why he was not wearing a hard hat, Mr. Mitchell said that no one was around. Ex. 142 EE.

h. On approximately July 10, 1990, Mr. Mitchell prepared a manifest in advance and improperly signed his name in the space reserved for the transporter of hazardous waste, rather than signing in the space reserved for the facility owner or operator. When Mr. Kolnberger or Ms. Clark got ready to process the manifest with the truck driver, they found that it had been signed in the wrong place. It was necessary to void the manifest prepared by Mr. Mitchell and prepare a new one. Mr. Mitchell was talked to about this incident. T. 2009-09, 2092; Ex. 142FF.

76. All of these actions were positive contacts or coaching and counseling sessions under the NSP Positive Discipline Policy. Although the March 7, 1990, meeting

started out as an oral reminder (the first formal step under the Positive Discipline Policy), it ended up being treated as a coaching/counseling session. T. 2074-76; Ex. 104M; see Finding 76(d) above.

77. The Coaching/Counseling Checklist forms used by NSP do not call for the signature of bargaining unit employees. See, e.g., Ex. 142S.

78. It is the policy of Mr. Salmela and other NSP supervisors that supervisor's notes are not regularly shared with bargaining unit employees. T. 2127, 4138. Mr. Salmela and Mr. Miller placed notes and other documents pertaining to Mr. Mitchell's performance in Mr. Mitchell's file without showing them to Mr. Mitchell. T. 1473-74, 2006-19, 2094. Mr. Mitchell had not previously seen several of these documents. T. 3116-32.

79. NSP's Positive Discipline Policy requires that, if a written entry in the Employee Development Record will be made from a Coaching/Counseling session, the employee should be reminded of his right to have a union representative present. Mr. Salmela did not adhere to this policy when he prepared Exs. 142KK and MM-NN. T. 1473, 2093; Ex. 144 at page 14. He did, however, talk to Mr. Mitchell about the information contained in his notations. T. 2007, 2011-12.

80. NSP employees are notified that they have access to their personal employee files. T. 2080.

81. On July 13, 1990, Roger Heuer requested a copy of a manifest for oil delivered on July 9, 1990. Mr. Mitchell had filed it but was unable to find it for over one week. Mr. Heuer went through the files and found the manifest in ten minutes. Ex. 142EE.

82. On July 17, 1990, Ms. Clark returned to the Hazardous Waste Warehouse at 3:30 p.m. and found the lights out and all the doors locked. Mr. Mitchell was not around and had not signed out. Mr. Mitchell returned to the office area shortly before 4:00 p.m. Ex. 142EE.

83. On July 18, 1990, Mr. Salmela asked Mr. Mitchell to recover three manifests for Roger Heuer before Mr. Mitchell left on vacation. Mr. Mitchell did not comply with this request. T. 1946-47; Ex. 142GG.

84. At the end of July, 1990, many significant errors in the computer log records and hard copy log records were discovered by Mr. Kolnberger and Ms. Clark while Mr. Mitchell was on vacation. These errors included improper notations of the types of waste, incorrect storage locations, missed information, and errors in manifest document numbers, dates of shipment, and disposal sites. Mr. Mitchell had made 118 errors in 32 computer entries. All of these errors would have been non-compliance issues if they had been found during an agency audit. T. 1027-28, 1071-74, 1947-50, 2018; Ex. 146. There is no question that Mr. Mitchell was responsible for these errors because he was responsible for

keeping all of the hard copy and computer logs during the time period of June 4, 1990, through July 13, 1990, he was working nearly exclusively on the computer at that time due to his light duty status, and the computer errors were also tied to discrepancies in the hard copy logbook written in Mr. Mitchell's handwriting. T. 1027-28, 1071, 1193-94, 2015-18. Mr. Mitchell's errors were corrected by Mr. Kolnberger and Ms. Clark during regular and overtime duty. T. 1028-29.

COMPLAINANT'S INJURY OF MARCH 8, 1990

85. On March 8, 1990, Mr. Mitchell injured his back on the job. T. 1682, 3155. Mr. Kolnberger and Ms. Clark were away from Chestnut Service Center on that date and Mr. Mitchell was alone in the warehouse when a truck came in with a load of bins full of capacitors. T. 330-32, 1286, 3621-22. Mr. Salmela was in his office, 20 feet away from the staging area. T. 1527. The truck was unloaded with help from Kevin Mulloy, who was then on the heavy crew. T. 330-32. After the truck was unloaded, Mr. Salmela told Mr. Mitchell that the waste must be processed. T. 3156. Mr. Mitchell then sought and was given permission to bring his concern about the processing of the waste up the chain of command to Mr. Miller. T. 3156. Mr. Mitchell asked Mr. Miller if he could have two additional people to help him. He had never before asked for additional help. T. 1504, 1547-49, 3156. Mr. Mitchell told Mr. Miller that he was going to call his attorney. T. 1414; Ex. 121F. Mr. Miller told Mr. Mitchell, "If you need help to do a safe operation, then we will get it." T. 1517. Two NSP employees who worked outside the Hazardous Waste Warehouse (Bob Kiehl and Bill Fergy or Bill Monroe) assisted Mr. Mitchell. T. 2416-17, 3156-57.

86. The lid on the capacitor bin with which Mr. Mitchell was working at the time of his injury was made out of steel and weighed about 150-200 pounds. Mr. Mitchell and Mr. Kiehl tried to physically lift the lid off of the bin in order to visually inspect the capacitors inside. The other employee had gone at that time to get a sling to help them lift the lids off. Mr. Mitchell injured his back when he attempted to manually lift the lid. It was Mr. Mitchell's decision to use additional people to physically lift the capacitor lid instead of using the readily available lifting equipment, i.e. the sling straps and overhead crane. Mr. Mitchell could have used the overhead crane and/or sling straps to lift the lid. It was proper procedure to use this equipment to lift the lids. One person could accomplish this task safely by using the overhead crane and/or slings. Mr. Mitchell was trained in the use of the overhead crane and it was available for his use. T. 1415-17, 1515-16, 1526, 1530, 2418.

87. Mr. Mitchell's injury would have been avoided if he had used proper equipment. T. 3305-06.

88. Other Union employees, including Ms. Clark and Mr. Kolnberger, have also worked on the floor of the Hazardous Waste Facility alone. T. 1542-1543.

89. On March 12, 1990, Mr. Salmela filled out the first report of injury relating to Mr. Mitchell's March 8, 1990, injury. T. 1934; Ex. 142T.

90. On approximately March 14, 1990, Local 160 learned of Mr. Mitchell's injury from NSP. Union Business Agent John Ness called Mr. Mitchell on March 14, 1990, spoke with him about his injury, and wished him well. Mr. Mitchell said he would contact the Union when he felt better and had questions. Ex. 214.

91. It is NSP's policy to return an injured employee to his pre-injury job if the employee is physically able to do the job. If an NSP employee is injured and loses time from work, and his doctor says he can return to work without restrictions, the employee typically returns to his pre-injury job. If the employee's doctor says that he may return to some type of work but he has some temporary restrictions that prohibit him from going back to his pre-injury job, NSP attempts to find suitable light duty work for the employee to do. T. 1608-10.

92. Mr. Mitchell was absent from work until he returned to work on temporary light duty on March 19, 1990. While on light duty, Mr. Mitchell was not supposed to lift over ten pounds or bend, stoop, pull, or push. T. 1363, 1417, 1421, 1936, 1995; Ex. 121H.

93. Mr. Mitchell worked from March 19, 1990, to July 31, 1990, under light duty restrictions. While on temporary light duty, Mr. Mitchell did administrative work and manifests, logged material on handwritten schedules, and inputted data into the computer. Given Mr. Mitchell's temporary physical restrictions, there were no jobs that he could do on the floor of the Hazardous Waste Warehouse. T. 1519-1520; Ex. 121H.

COMPLAINANT'S REASSIGNMENT

NSP Reassignment Program

94. The purpose of the NSP Job Reassignment Program is to provide employees who have permanent mental or physical restrictions with suitable new positions where they can be successful and physically safe. T. 1627-28, 1687.

95. An employee's entry into the Job Reassignment Program is triggered by the determination that the employee is mentally ill or has permanent physical restrictions which render him or her incapable of performing the pre-injury job. T. 1627, 1663-65, 1678-79, 1788-89.

96. Permanent partial disability results in a rating that shows the permanent disability to the body because of the injury; permanent physical restrictions involve lifting, bending stooping, squatting, and other restrictions placed on what an employee can do. A permanent partial disability rating has nothing to do with whether an injured employee has permanent restrictions or can be returned to his or her pre-injury job. It is permanent physical restrictions which can render an employee unable to perform his pre-injury job. T. 1661, 4435-36, 4445-46. The injured employee's treating physician dictates permanent physical restrictions. T. 1680.

97. The NSP Job Reassignment Policy applies to all NSP employees, both Union and non-Union employees, who suffer permanent physical restrictions which prohibit them from performing their pre-injury job. NSP will attempt to find these employees work, will offer one job and, if an employee refuses the job or one is not found within ninety working days, the employee may be terminated. T. 1631-32, 1686-88; Ex. 110. As of the hearing in this matter, NSP had never terminated any employee due to their entry into job reassignment. T. 1688, 1793.

98. Under NSP's approach, NSP management determines if an employee with permanent physical restrictions can perform his pre-injury job and also decides whether or not an employee with restrictions is able to be accommodated. T. 1611-12, 1628, 1640-41, 1678-79, 4328, 4337-38, 4433-34.

99. NSP first places reassigned employees in temporary jobs while they search for permanent jobs. Historically, all employees placed in temporary jobs in the Reassignment Program have later been placed in permanent jobs. T. 1816.

100. NSP's obligation under the Job Reassignment Program is to make one job offer to the employee that is consistent with his physical restrictions. NSP is not obligated to offer the employee a Union position. Most often, bargaining unit employees who are injured and who go through job reassignment end up in non-Union positions because the great majority of Union positions are physically demanding. T. 1689-92, 1793, 2810; Ex. 110.

101. When an injured employee finds a temporary light duty assignment, the employee's wages stay the same as that of the pre-injury position and the employee stays at that rate until a raise is given or he is offered a permanent full-time position. T. 1732-33. When an employee is permanently placed as a result of job reassignment, the employee's wages are frozen at the current rate until the mid-point of the salary range of the new job catches up. T. 1726-28.

102. Job reassignment is usually difficult for employees. It is frequently hard for the employee to give up his job when injured, especially if a high rate of pay and many years of service are involved. T. 4328.

Events of June-August, 1990

103. In a letter dated June 20, 1990, Mr. Mitchell's treating physician notified NSP that Mr. Mitchell had a herniated disc and had permanent physical restrictions. These permanent restrictions included a lifting restriction of twenty-five pounds and no repetitive bending, lifting, or twisting. T. 1427, 1663; Ex. 114F-G.

104. Mr. Mitchell, as an employee with permanent physical restrictions that included a 25-pound lifting restriction and no repetitive twisting, bending or lifting, was not capable of performing the physical work required of an MHIC in the Hazardous Waste Warehouse. T. 626-27, 1165-68, 1189-90, 1336-37, 1427-28, 1451, 1895-1900, 1955-56, 3622-23, 3841-42, 4349-51; Jt. Ex. 2 at 39.

105. Mr. Mitchell was also was unable to competently perform the administrative tasks associated with the MHIC position, as evidenced by his log and computer errors that created a non-compliance situation for the facility. T. 1193-94, 1430-31, 1464-66, 1949-51, 2015-18.

106. Upon learning of Mr. Mitchell's permanent physical restrictions, Karly Gilman, Associate Workers' Compensation Analyst for NSP, wrote a memorandum to Mr. Salmela dated June 25, 1990. In the memorandum, Ms. Gilman asked Mr. Salmela to review Mr. Mitchell's permanent physical restrictions with his management to determine if they could continue to accommodate Mr. Mitchell in his job as MHIC and, if they were unable to do so, request that Mr. Mitchell be placed in the Job Reassignment Program. T. 1663-65; Ex. 114G.

107. In late June, 1990, after receiving word of Mr. Mitchell's permanent physical restrictions, Mr. Salmela concluded that no permanent light duty position existed in the Hazardous Waste Warehouse. Mr. Salmela and NSP management determined that Mr. Mitchell's permanent physical restrictions coupled with his inability to competently perform administrative tasks rendered him incapable of performing the MHIC job. Accordingly, they requested in a memorandum dated June 28, 1990, that Mr. Mitchell be placed in the NSP Job Reassignment Program. The decision was made at a meeting at which representatives of the Human Resources, Industrial Relations, Hazardous Waste

Warehouse, and Law Departments of NSP were present. T. 1428-31, 1942-43, 4094-97; Exs. 15A, 104X-Y, 109H, 142II.

108. In a memorandum to Mr. McCallum, Supervisor of Workers' Compensation, dated July 27, 1990, Mr. Salmela indicated that there was no longer any light duty work in the Materials Management Services Section that Mr. Mitchell could perform. The memorandum did not mention Mr. Mitchell's performance problems. Exs. 15C, 121M.

109. At the end of July, 1990, Mr. Mitchell was removed from his job and sent home to await reassignment because of his permanent restrictions and performance-related problems**.** T. 837, 1328, 1521, 1936, 4094-97. Mr. Mitchell continued to receive benefits and wages after he was sent home. T. 1689. When Mr. Mitchell was sent home, he was not told that the decision to send him home was based in part on performance-related problems (specifically, the discovery of the computer errors). T. 2107, 2774-75, 3131-32. Mr. Miller decided not to tell Mr. Mitchell the performance-related reasons for his being sent home because he wanted to wipe the slate clean so that Mr. Mitchell had a better chance of landing a new job within NSP. T. 1431-32.

110. It is unusual for an employee injured on the job to be sent home. Employees are generally kept at work if at all possible and something is found for them to do. T. 2775.

111. During Mr. Mitchell's absence from the MHIC position after he was sent home, Mr. Kolnberger was upgraded to MHIC. T. 1004-05, 1338.

Events of September-November, 1990

112. In September of 1990, Mr. Mitchell spoke with Union Business Agent Ness, stating that NSP had set up a meeting to talk about job reassignment. Mr. Ness asked Mr. Mitchell if he could attend the meeting with him. Mr. Ness has attended similar meetings with other union members. Mr. Ness and Mr. Mitchell met with Jane Clearwaters, NSP's in-house Qualified Rehabilitation Consultant ("QRC"), and Karly Gilman on September 5, 1990. T. 1754, 1777-78, 1805, 3705, 4486.

113. A QRC is not supposed to be an advocate for the injured worker, but rather is supposed to take a neutral, objective position. T. 4266-67, 4296-98.

114. Mr. Mitchell started accumulating thirty consecutive days off of work due to his back injury on July 31, 1990. The R1 Work Status Report form was filled out on August 31, 1990. In that form, NSP indicated that Ms. Clearwaters had been assigned and authorized to serve as Mr. Mitchell's QRC. T. 1682-83, 1717-19, 1759-60, 1775-77; Ex. 114H-I.

115. At the September 5, 1990, meeting, Ms. Clearwaters advised Mr. Mitchell that he was being placed in the Job Reassignment Program and explained NSP's Job Reassignment Program. Thus, Mr. Mitchell was formally placed in NSP's Job

Reassignment Program on September 5, 1990. Mr. Mitchell made no objection to being placed in job reassignment. Ms. Clearwaters also explained at the September 5 meeting that Mr. Mitchell had the right to select a personal QRC and went over a form entitled "Rights and Responsibilities of the Injured Worker" which includes a discussion of this right. Mr. Mitchell told Ms. Clearwaters at the end of the meeting that he wanted to think about whether he wanted her to serve as his QRC and that he would get back to her. Ms. Clearwaters prepared an R2 Rehabilitation Plan form at the meeting, which indicated that Mr. Mitchell's vocational goal was to return to work with the same employer, same job, or return to work with the same employer, different job. She fills out R-2 forms the same way for every employee in order to show the State that NSP is interested in keeping the employee at NSP. This R-2 form was never approved by Mr. Mitchell or NSP's Workers' Compensation Department. T. 1754-56, 1760-61, 1775-80, 1805-06, 3705, 4486-88; Exs. 17B, 109A-B, 109C-F.

116. Ms. Clearwaters considered herself to be acting as Mr. Mitchell's QRC until she heard otherwise from him and attempted to work with Mr. Mitchell. T. 1667, 1760-61. In a letter dated September 18, 1990, Ms. Clearwaters notified Mr. Mitchell that she was referring him for vocational evaluation on September 24-27, 1990, at the Self Potential Resource Center in St. Paul in order to assist her in placing Mr. Mitchell in another job within NSP. She further indicated that she would "continue to work with [Mr. Mitchell] through the job reassignment process. . . ." Exs. 17, 109G. Ms. Clearwaters wanted a vocational evaluation conducted in order to determine what transferable skills Mr. Mitchell had. T. 1762, 1782. Mr. Mitchell did not appear for the vocational evaluation. T. 1782.

117. On September 17, 1990, Mr. Miller offered Mr. Mitchell an Investment Recovery Specialist position, which was a temporary light duty position with NSP involving segregating telephone communication equipment and preparing it for sale. The position was created specifically to provide Mr. Mitchell with an opportunity to come back to a job that he was physically able to do. Mr. Miller called Mr. Mitchell at home and told him about the position after Mr. Miller was assured by NSP Workers' Compensation that the job would be within Mr. Mitchell's restrictions. Mr. Mitchell told Mr. Miller that he wanted to take the following day as a vacation but would report to work the next day. T. 1432-34, 1500-01, 1683-84, 1788, 4285; Exs. 21, 137E-F, 222.

118. Mr. Mitchell called the Union on September 17, 1990, and Union Business Agent Ness returned the call on September 18, 1990. Mr. Mitchell advised Mr. Ness that Mr. Miller had called him at home and told him about light duty work NSP had for him to do. Mr. Mitchell said that his attorney had advised him to stay home and do nothing until his attorney returned to town the following week. Mr. Ness asked Mr. Mitchell if he wanted him to check out the situation or wait for his attorney. Mr. Mitchell directed Mr. Ness not to get involved at that time, and said that he preferred to let his attorney handle the matter. Ex. 221.

119. In a letter to Mr. Mitchell dated September 19, 1990, Mr. Andersen noted that Mr. Mitchell had failed to appear for the Investment Recovery Specialist job and stated that Mr. Mitchell's failure to report for work would have disciplinary consequences. Exs.

104DD, 222. Union Business Agent Ganley called Mr. Mitchell on September 19, 1990. T. 2809-10; Ex. 223. In view of NSP's threat to take disciplinary action, Mr. Ganley advised Mr. Mitchell to return to the offered light duty position or, if he couldn't do that, go back to his doctor. T. 2810-11. Mr. Ganley knew that the Job Reassignment policy required only that NSP make one job offer within the employee's physical restrictions. T. 2810. Mr. Ganley told Mr. Mitchell that he ran the risk of termination if he refused NSP's job offer. T. 2810; Jt. Ex. 2 at 113-115. Mr. Mitchell told Mr. Ganley that he intended to speak to his attorney before he came back to work. T. 2811.

120. Between September 20, 1990 and October 23, 1990, Mr. Baird tried to contact Mr. Mitchell by phone a half dozen times with no response from Mr. Mitchell. T. 2668, 2813. On October 23, 1990, Mr. Baird sent Mr. Mitchell a certified letter stating that the Union had been trying to reach him by phone without success and requesting Mr. Mitchell to contact the Union. Ex. 226. Between October 23, 1990 and November 6, 1990, the Union heard no response from Mr. Mitchell. T. 2668. On November 6, 1990, Mr. Baird sent Mr. Mitchell another certified letter requesting Mr. Mitchell to contact the Union "so appropriate decisions can be made as to your wishes as they relate to your employment with Northern States Power Company." T. 2668, 2813; Ex. 228. Mr. Mitchell did not contact the Union until November 21, 1990. T. 2668-69; Ex. 229.

121. Mr. Mitchell never reported to work for the Investment Recovery Specialist job. T. 1433-34. An on-site video job analysis was performed on the Investment Recovery Specialist position in November of 1990 at the insistence of Mr. Mitchell. Mr. Mitchell's treating physician ultimately determined that the Investment Recovery Specialist job did not meet Mr. Mitchell's restrictions. T. 1683-84, 4314-15; Ex. 75.

122. By letter dated October 4, 1990, Ms. Clearwaters was notified that Mr. Mitchell objected to NSP's selection of a QRC and was exercising his right to select his own QRC. T. 1759-60; Exs. 16, 109J, 225.

123. Because Mr. Mitchell failed to report for the Investment Recovery Specialist position, NSP filed a Notice of Intention to Discontinue Benefits and discontinued Mr. Mitchell's workers' compensation benefits in September, 1990. On October 15, 1990, the Workers' Compensation Division of the Minnesota Department of Labor and Industry denied the request of NSP to discontinue Mr. Mitchell's temporary total disability benefits. The Division determined that there were not reasonable grounds to discontinue benefits based upon its findings that, prior to the job offer being made, NSP was aware that Mr. Mitchell had chosen a QRC to provide rehabilitation services but chose not to involve the QRC in the proposed return to work scheduled for September 19; the fact that the September 19 letter to Mr. Mitchell did not describe the physical requirements of the job; and NSP had failed to present adequate information at the administrative conference justifying the conclusion that the work was within Mr. Mitchell's physical limitations. T. 1613-22, 1716-17; Ex. 33. Mr. Mitchell's benefits and wages were then reinstated. Ex. 166.

124. In October of 1990, Mr. Mitchell contacted Mark Raderstorf, who was then an independent QRC, and employed him as his personal QRC. Mr. Raderstorf is not affiliated with NSP. T. 3161-62, 4262, 4264-65, 4268-69-69, 4325-26, 4330. In accordance with the usual custom, NSP paid for Mr. Raderstorf's services while he was working with Mr. Mitchell. T. 4295-96. Mssrs. Mitchell and Raderstorf met on October 18 and again on November 1, 1990. T. 4271; Ex. 137G-K. They worked together until Mr. Raderstorf was terminated by Mr. Mitchell on or about December 17, 1990. T. 4289-90, 4321-22; Ex. 24. During these meetings, Mr. Raderstorf explained to Mr. Mitchell his rights and responsibilities and clarified the QRC role. T. 4272. Mr. Mitchell was advised by Mr. Raderstorf of his responsibility as an injured worker to cooperate with rehabilitation, show up for assigned meetings, and communicate with his QRC. T. 4281. Mr. Mitchell expressed an enthusiastic interest in being a pastor to Mr. Raderstorf and told him that he hoped to be a full-time pastor some day. T. 4276-78. He did not, however, say that he wanted to quit his job at NSP in order to go into full-time ministry. T. 4324.

125. Based upon his discussions with Mr. Mitchell about his job responsibilities as MHIC and his present physical capabilities, it was apparent to Mr. Raderstorf that Mr. Mitchell would not be able to return to his former MHIC job due to the lifting and bending involved. Mr. Raderstorf prepared an R-2 Rehabilitation Plan form with respect to Mr. Mitchell which indicated that Mr. Mitchell's vocational goal was to return to work with NSP in the same job modified or return to work with NSP in a different job. Mr. Mitchell signed this R-2 on November 1, 1990, and it was subsequently approved by Ms. Gilman of NSP as Claim Representative. T. 4279-80, 4303; Ex. 137A-D. The R2 form prepared by Mr. Raderstorf was the only one prepared regarding Mr. Mitchell that was also signed by Mr. Mitchell and by an NSP representative.

126. Mr. Mitchell told Mr. Raderstorf that the MHIC job was a supervisory position that did not entail physical work and continually expressed interest in returning to that job. T. 4305-08. Mr. Raderstorf received written verification from NSP that the job was not supervisory and that the MHIC was expected to perform all of the functions associated with the Hazardous Waste Warehouse. T. 4311-12. Based upon information obtained from Ms. Gilman, Mr. Raderstorf determined that it would not be feasible for Mr. Mitchell to return to the MHIC job modified. T. 4298-4302. Mr. Raderstorf took NSP's statements about the non-supervisory nature of the MHIC position "as fact." T. 4307-08. Mr. Raderstorf did, however, request that a job analysis be performed of the MHIC job in an attempt to resolve the conflicting viewpoints of NSP and Mr. Mitchell. T. 4319-20. NSP did not agree to perform a job analysis on the MHIC position at that time. T. 4306.

127. Mr. Mitchell contacted the Union on November 21, 1990. T. 3715; Ex. 229. Mr. Ness asked Mr. Mitchell to come to the Union Hall. T. 2813. Mr. Mitchell agreed to meet with the Union on November 26, 1990, but did not show up. Ex. 230. The Union rescheduled a meeting with Mr. Mitchell for November 27, 1990. T. 2813. In this meeting, Mr. Mitchell advised the Union that he had a QRC from outside the company and an attorney working for him and watching his case. Mr. Mitchell stated that he and his attorney were taking the position that he was able to perform the MHIC position. He said that he was just going to "go with the flow and see where it takes him for now." Ex. 230.

Local 160 offered its services with respect to job reassignment issues, but Mr. Mitchell declined those services. T. 2813.

Events of December, 1990-January, 1991

128. On December 7, 1990, Mr. Mitchell asked Mr. Baird to process a grievance regarding job reassignment on his behalf. T. 3700-01. The Union submitted a written (Step 2) grievance to NSP on the same date. Exs. 231, 232.

129. Ms. Clearwaters contacted Mr. Raderstorf in late November concerning another temporary light duty job offer for Mr. Mitchell as a Micrographics Operator in the Microfiche Department of NSP. Ex. 23. A job analysis was conducted in early December regarding this position, and the position was approved by Mr. Mitchell's physician as being within his physical restrictions. It was also approved by Mr. Raderstorf. Exs. 22, 104II, 137M-N.

130. Mr. Raderstorf made arrangements for Mr. Mitchell to attend a vocational assessment with Self-Potential Rehabilitation Center in St. Paul on December 17, 1990. Mr. Mitchell failed to attend this evaluation. T. 4287-88; Ex. 137L.

131. Mr. Mitchell terminated Mr. Raderstorf's services as his personal QRC by letter dated December 17, 1990. Ex. 24.

132. NSP extended a formal job offer to Mr. Mitchell regarding the Micrographics Operator position on or about December 21, 1990. T. 1791-92, 1810-11; Exs. 104II, 109Q, 235. Mr. Mitchell was requested to return to work on January 9, 1991. Ex. 104II.

133. By letter dated December 27, 1990, Mr. Mitchell notified NSP that he had selected a new QRC, Theodore C. Lockett. Ex. 25. In early January, 1991, Mr. Lockett asked Ms. Gilman for permission to perform a job analysis on Mr. Mitchell's MHIC job, and said that it would be difficult for him to put together a sound rehabilitation plan for Mr. Mitchell without performing a detailed job analysis of the MHIC position. Ex. 26A-B. NSP denied the request. T. 1626.

134. Mr. Lockett submitted a new R-2 Rehabilitation Plan form which specified the following vocational goals: return to work same employer, same job; return to work different employer, similar job; and return to work different employer, different job. This R-2 was never approved by NSP's Workers' Compensation Department. Ex. 31.

135. Mr. Mitchell did not accept the Micrographics Operator position and did not report for work on January 9, 1991, as requested. T. 1435, 1792; Ex. 10411.

136. Mr. Andersen sent Mr. Mitchell a letter dated January 16, 1991, in which he noted that Mr. Mitchell had been told to return to work on January 9, 1991, but had not reported to work or contacted NSP as of January 16, 1991. Mr. Andersen notified Mr.

Mitchell that he would be terminated if he did not return to work on or before January 23, 1991. T. 922; Ex. 10411.

137. Prior to his termination, Mr. Mitchell refused to accept or respond to registered mail sent to him by NSP and the Union. T. 834-35, 2813, 4132-33; Exs. 10411, 163A, 163K-L.

COMPLAINANT'S TERMINATION

138. NSP terminated Mr. Mitchell on January 23, 1991. The decision to terminate Mr. Mitchell was primarily based on his failure to report to work on at least three separate occasions during the period of September, 1990, through January, 1991. T. 791, 834-35, 921-22, 4117-19, 4122-23, 4190; Exs. 4, 104MM, 104NN, 237, 241.

139. Other NSP employees have been terminated for failure to report to work. Between 1985 and the date of the hearing, five members of Local 160 were terminated from NSP. Two of these five Union members were African-American and three were Caucasian. T. 4132.0

140. Mr. Mitchell refused to follow the standard policy of "obey now/grieve later" even though he was advised to do so by his local Union representative who also warned him that he could be fired if he did not cooperate with the Company. T. 2809-11, 2819-21, 3373, 3712-13, 3812-13.

141. Had Mr. Mitchell accepted either of the two positions that NSP offered him through the Reassignment Program, NSP would have continued a search for another permanent and more suitable position. T. 1816.

142. After Mr. Mitchell was terminated, NSP informed Mr. Lockett that it believed that it was unnecessary to complete the job analysis of the MHIC position. Jt. Ex. 1 at 103. The issue was discussed at an administrative conference before the Workers Compensation Division of the Department of Labor and Industry. The Division ordered that the job analysis be performed, and Mr. Lockett proceeded, with the assistance of his colleague, Odell Wilson. T. 1626; Exs. 30, 118A, 118B.

143. The job analysis performed by Mr. Lockett examined the "physical demands of the work environment for the Hazardous Waste Material Handler position" as performed by a two-person crew (Bernie Kolnberger and Connie Clark) rather than the three-person crew that existed at the time Mr. Mitchell worked in the facility. T. 3179-80; Exs.118A, 118B, 119. The report completed by Mr. Lockett notes, based on information provided by Mr. Kolnberger, that batteries weighing between 50 pounds and more than 120 pounds must be moved manually and lifted in an awkward manner; drums weighing from 300 to 600 pounds each had to be placed on dollies, requiring approximately 40 foot pounds; an oil-filled wand weighing 40 to 50 pounds must be used; crushed barrels weighing 48 to 58 pounds must be lifted out of the barrel crusher and placed on a pallet for storage; floor dry can be dispensed using a smaller container, rather than lifting and pouring a 50-pound

bag; capacitors weighing about 80 pounds must be moved and shifted into place for an electric sling, requiring a significant level of pushing and pulling and some lifting from floor level; drums weighing on average between 300 to 400 pounds had to be maneuvered into position to allow them to be opened and floor dry to be applied; and transformers had be maneuvered into place and pumped out with a wand and a hose weighing approximately 70 pounds. At the end of his report, Mr. Lockett indicated that "[t]he dispute over what tasks Mr. Mitchell performed while functioning in this position, in this consultant's opinion, is still in question." Ex. 118A at 5.

144. Prior to Mr. Mitchell's situation, NSP had never performed an on-site job analysis of an employee's pre-injury job. It is also unusual for NSP to perform on-site job analyses of light duty jobs. T. 1672, 1684-85.

145. Local 160 pursued a grievance through arbitration on Mr. Mitchell's behalf which challenged his reassignment and termination. T. 4450; Jt. Ex. 1; Ex. 284.

146. On June 11, 1992, the Arbitrator issued his Opinion and Award. The Arbitrator's Opinion and Award called for reinstatement of Mr. Mitchell but did not require NSP to place Mr. Mitchell in his former MHIC position. Ex. 101. Instead, the Arbitrator indicated that Mr. Mitchell "shall be offered a job placement which is mutually acceptable to the parties, based on reasonableness." The Arbitrator stated as follows:

> If the grievant returns to work for the Employer, he should be placed in an appropriate position agreed upon by the parties. Because there is not enough evidence or information, no recommendation can be made as to what an appropriate position is for the grievant. The premise upon which such a selection and determination must be made is the standard of reasonableness. If the parties cannot agree on what an appropriate placement is, the arbitrator will determine it.

Id. at 45. There is no evidence that the parties ever sought to have the Arbitrator determine an appropriate placement for Mr. Mitchell. The Arbitrator concluded that "a substantial part of [the MHIC position] was of a heavier-duty physical nature" and that the job was "beyond the grievant's currently stated medical restrictions. Therefore, without some sort of modification, the [MHIC] position is not a proper position for the grievant." Id. at 39. Although the Arbitrator found that there was no requirement under the collective bargaining agreement that the employer attempt to modify the MHIC job and that he lacked authority to order any job modification for Mr. Mitchell, he recommended that NSP determine whether it would be feasible to modify the MHIC position to fit within Mr. Mitchell's restrictions. Id. at 40-41, 46. Alternatively, the Arbitrator recommended that NSP review its hazardous waste storage operations to determine whether Mr. Mitchell could be returned to that work area. Id. at 41, 46

147. In a letter dated June 25, 1992, NSP notified the Union that Mr. Mitchell would be reinstated by NSP on July 13, 1992. In the letter, Mr. Andersen stated that NSP

was not agreeable to modifying the MHIC job responsibilities to fit Mr. Mitchell's permanent restrictions due to the limited personnel allocation for the Hazardous Waste Section and said there were no other positions available to Mr. Mitchell in the Hazardous Waste Section. Upon reinstatement, the letter indicated that Mr. Mitchell would be placed in a temporary light duty position where he would remain while a job search was conducted within the Company to find a suitable placement consistent with his permanent work restrictions, in accordance with the Reassignment Policy. NSP indicated that it would extend the ninety-day job search provision of the policy for ninety days from the date of reinstatement on July 13, 1992. NSP further indicated that Mr. Mitchell would be compensated at the 1992 wage rate for MHIC ($18.42 per hour) effective July 13, 1992, and would receive no back pay prior to that date. Ex. 104YY-ZZ. Mr. Mitchell did not report to work in response to this letter.

148. On or about July 9, 1992, NSP commenced a federal court action to vacate the Arbitrator's award. Ex. 263. Local 160 counter-claimed for federal court enforcement of the arbitration award. Ex. 264. Mr. Mitchell is the only Union member that Local 160 has represented in a federal court lawsuit. T. 855.

149. On February 16, 1993, Judge Rosenbaum issued an Order in the federal court action filed by NSP in which he denied NSP's motion for summary judgment and granted Local 160's motion. Ex. 268.

150. On March 5, 1993, NSP requested updated medical information regarding Mr. Mitchell in connection with the reinstatement order. Exs. 104AAA, 269, 270. Counsel for Mr. Mitchell responded in a letter dated March 15, 1993, that the medical restrictions imposed previously by Mr. Mitchell's physician were permanent, and that Mr. Mitchell expected that any acceptable job placement would place him over Mr. Kolnberger and Ms. Clark. Ex. 156.

151. On March 9, 1993, Local 160 demanded that NSP comply with the Arbitrator's award and also demanded backpay for Mr. Mitchell. Ex. 272. Mr. Baird contacted NSP and asserted that NSP owed Mr. Mitchell backpay from the period of the Arbitrator's award through NSP's challenge of the award in Federal Court. T. 4378. In response to the Union's demand, NSP sent Mr. Mitchell two checks in the total approximate amount of $13,800. Mr. Mitchell refused to accept these checks. T. 3820, 3952-53; Ex. 104OOO-RRR.

152. In a letter dated March 24, 1993, NSP informed the Union that Mr. Lockett's analysis and that of Jean Westberg, General Manager of NSP's Supply and Operation Services, indicated that the physical demands of the MHIC job were outside Mr. Mitchell's permanent physical restrictions. The letter again stated that the Company was not willing to modify the MHIC responsibilities to fit Mr. Mitchell's permanent restrictions and that there were no other positions available to Mr. Mitchell in the Hazardous Waste Section. NSP indicated that Mr. Mitchell would be reinstated to a temporary light duty position effective March 29, 1993, and again explained that a job search and skills assessment would be conducted upon Mr. Mitchell's reinstatement to find suitable placement for him in

NSP, in accordance with the Job Reassignment Policy. The Company indicated that it was willing to extend the ninety-day job search for ninety working days from March 29, 1993. The letter further indicated that Mr. Mitchell would receive a back pay check for the time period commencing July 13, 1992 (see Finding 147, above). Ex. 104CCC-DDD.

153. In a letter dated March 29, 1993, NSP notified Mr. Mitchell that it had informed the Union of its intention to reinstate Mr. Mitchell to active employment on March 29, 1993. Ex. 104EEE. When Mr. Mitchell failed to report to work as requested, NSP sent a letter by messenger to Mr. Mitchell's address of record on Second Avenue and was told that no one had lived at that address for two years. An NSP representative then called Mr. Mitchell on March 30, 1993, and was assured by the party who answered the phone that Mr. Mitchell would return the call. NSP tried several times thereafter to call Mr. Mitchell, but only reached his answering machine. NSP then hand-delivered a letter to Mr. Mitchell's address on Thirteenth Avenue notifying him that he was to report to Mr. Salmela on April 5, 1993, for assignment to a light duty position in accordance with NSP's Job Reassignment Policy. Ex. 157.

154. On April 2, 1993, Local 160's counsel notified Mr. Mitchell's counsel that the Union had not been able to reach Mr. Mitchell and that Mr. Mitchell had not responded to a certified letter from the Union requesting counsel to direct Mr. Mitchell to contact the Union. Ex. 275.

155. On April 7, 1993, NSP notified Mr. Lockett that NSP had instructed Mr. Mitchell to report to work for temporary light duty assignment within his physical restrictions. The letter stated that, once Mr. Mitchell returned to work and NSP had had "the opportunity to review his capabilities and restrictions (if there have been any changes), Mr. Mitchell [would] be assigned to a permanent position in accordance with NSP's Job Reassignment Program." Exs. 104FFF, 276. NSP indicated that Mr. Mitchell would, upon his return to work, be assigned to the position of Micrographics Clerk and pointed out that a similar position, that of Micrographics Operator, which was more physically demanding than Micrographics Clerk was analyzed by Mr. Raderstorf on December 6, 1990, and approved by Mr. Mitchell's treating physician. NSP requested that Mr. Lockett perform an on-site analysis of the Micrographics Clerk job and obtain the approval of Mr. Mitchell's physician. Id.

156. In a letter dated April 13, 1993, counsel for NSP informed counsel for the Union that she had been told by Mr. Lockett that Mr. Mitchell had elected not to return to employment with NSP. Counsel for NSP asked the Union to notify her by April 19, 1993, if this information was inconsistent with Mr. Mitchell's intentions. Ex. 104III-JJJ.

157. On April 16, 1993, counsel for Local 160 requested a meeting with NSP and Mr. Mitchell to discuss reinstatement. Ex. 279. On the same day, counsel for Local 160 asked Mr. Mitchell's counsel to join in a meeting with NSP to resolve all reinstatement issues and urged Mr. Mitchell not to reject reinstatement. Ex. 280. On April 22, 1993, NSP agreed to meet with Local 160 and Mr. Mitchell to resolve outstanding reinstatement

issues. Exs. 104LLL, 281. Neither Mr. Mitchell nor his counsel have ever responded to Local 160's request to meet to resolve reinstatement issues. T. 3418-19.

158. Mr. Mitchell does not intend to return to work at NSP unless he can return to the MHIC position. T. 3226-28, 3393-95, 3818-19, 3982-83, 3939-40.

159. Mr. Mitchell is the only NSP employee who has disputed the Company's decision to place him or her into job reassignment. All other employees entering job reassignment via assignment to a temporary light duty job have eventually been assigned to a permanent position. Mr. Mitchell repeatedly refused to cooperate with the Job Reassignment Program. Because of his failure to cooperate, NSP lacked information about his transferable skills and abilities. T. 1645-48, 1793-94, 1799, 1814-16.

160. Mr. Mitchell continues to receive workers' compensation payments from NSP. T. 4411-13, 4421-24; Ex. 165.

161. Mr. Mitchell received full wages and benefits from NSP until the date of his termination. T. 834-35, 1689; Ex. 104WW.

162. Mr. Mitchell has performed duties as a pastor since 1980. Mr. Mitchell and his wife, Betty Mitchell, view his pastoral duties as a calling. T. 2926, 3225, 3728. During the time that Ms. Mitchell has known him, Mr. Mitchell has always expressed an interest in being a pastor. T. 2926. He feels fulfilled and satisfied performing his current pastoral duties. T. 2927, 3728, 4277. Since leaving NSP, Mr. Mitchell has been devoting his full time to his duties as a pastor. T. 2928. He is able to spend more time on his calling now that he is no longer working for NSP. T. 2927-28. He is working full-time at something he has wanted to do for a long time and has not been looking for more lucrative work. T. 2928, 3954.

163. Mr. Mitchell has been under contract to receive pay for performing pastoral duties on a full-time basis since August of 1991. T. 3907. In August of 1991, he began receiving $1,200 per month. T. 3907. His church also provides him with the use of a van and other benefits. T. 3927; Ex. 98.

HANDLING OF COMPLAINANT'S JOB-RELATED CONCERNS

March, 1989, Grievance

164. In March of 1989, Mr. Mitchell processed a Step 2 grievance. Mr. Mitchell's handwriting appears on the grievance form. Mr. Mitchell wrote the Step 2 grievance in the office of the Chestnut warehouse. He sat down with a union steward, Mr. Kiehl, when he wrote the grievance. Mr. Mitchell's Step 2 grievance alleged that non-union people were performing Hazardous Waste area duties. Mr. Baird handled this grievance. T. 2606, 2608, 3634, 3637; Ex. 202.

165. It is the policy of Local 160's Executive Board that all grievance records and letters between the Union and NSP are copied to the member. All correspondence concerning Mr. Mitchell's March, 1989, Step 2 grievance was copied to Mr. Mitchell. T. 2609-11.

166. Upon receiving Mr. Mitchell's March, 1989, grievance, the Union assigned it grievance number 4478. The same day that the Union received Mr. Mitchell's Step 2 grievance, Mr. Baird notified NSP and requested a resolution. Exs. 38, 202, 203.

167. On April 3, 1989, NSP responded with its explanation of the underlying facts. The Union requested a meeting with NSP in a letter dated April 12, 1989. NSP notified the Union on April 27, 1989, that the grievance had "been resolved in a mutually agreeable fashion" within the work area. The Union indicated in a letter to NSP dated May 8, 1989, that it understood that the management team had agreed to abide by the Labor Agreement in the future by using Industrial Waste Section employees for all overtime assignments in that area, and stated that no meeting was necessary if that was the mutually agreeable fashion to which the NSP letter referred. A copy of this letter was sent to Mr. Mitchell. Exs. 204, 205, 206, 207. Mr. Mitchell did not contact the Union after the resolution of the grievance, nor did he request arbitration of the grievance. He never claimed to be dissatisfied with the Union's representation or the resolution that the Union achieved. T. 2611.

Job Description Issue

168. The Union represented Mr. Mitchell in a Step 1 grievance in May of 1989. T. 2612. Mr. Baird received from Mr. Mitchell or his Union steward, Robert Kiehl, a job description provided to Mr. Mitchell by NSP and annotated by Mr. Mitchell. T. 2613-14; Exs. 104C-D, 142C-D. Mr. Mitchell objected to the description of his duties contained in the job description. T. 2612, 3652-53.

169. After reviewing Mr. Mitchell's grievance, Mr. Baird notified NSP of Mr. Mitchell's concerns and requested a meeting to address the issue. Ex. 104B, 208. NSP responded, explaining that the job description "was a requirement the company had to fulfill" to secure a permit to operate the hazardous waste facility and was not intended to change any bargaining unit member's duties. The Union provided Mr. Mitchell with copies of the correspondence. T. 2615; Ex. 209.

170.Mr. Mitchell never complained about the Union's representation, nor did he request that the Union process his grievance further. T. 2615.

February, 1990, Meeting ("Pappenfus Meeting")

171. In February of 1990, Mr. Mitchell spoke with Mr. Baird about an overtime issue. He complained that he was not asked to work overtime and asserted that Ms. Clark worked overtime on a Saturday and Sunday even though she was on light duty, and Mr. Kolnberger was on vacation Friday but worked overtime on Saturday. Mr. Mitchell said

that he had not been aware that any of this was going on until after the fact and said he had a big problem as MHIC not knowing what was going on in his area of responsibility. T. 2615, 3659; Ex. 210. Mr. Baird contacted NSP and requested a meeting. T. 2616; Ex. 210. Management immediately set up a meeting in February, 1990, to discuss these issues. T. 797-800, 923-24, 3210-11.

172. On February 8, 1990, a meeting was held regarding Mr. Mitchell's overtime concerns. Exs. 159A, 211. The meeting was attended by Mssrs. Mitchell, Kiehl, Baird, Miller, Salmela, Andersen, and Mike Pappenfus, a general manager with NSP who was Mr. Miller's supervisor. T. 797-98, 2617; Exs. 159A, 211. The attendees discussed the fact that overtime had been scheduled on a Sunday. NSP contended that Roger Heuer talked to Mr. Mitchell about it on the previous Friday and said, "I assume you'll be giving a sermon at the time the overtime is to be worked." During the meeting, Mr. Mitchell did not dispute that this statement was made. Ex. 159A. Mr. Mitchell said he wasn't interested in working the Sunday overtime because of his church commitments, but wanted NSP to offer it to him anyway so he could reject it and it could then be passed on to other employees. T. 926. He also complained that Mr. Kolnberger had not told him about his vacation plans. Ex. 159A. He indicated that he wanted some commitment from management to improve communication and his involvement in the whole process. Ex. 211. NSP representatives at the meeting acknowledged that there were some problems in that area and stated that they would strive to make overtime assignments in a proper fashion. T. 926; Ex. 211. Mr. Mitchell said that he felt there had been great strides made over the past several months regarding the bettering of communication. Ex. 159A. Mr. Miller told Mr. Mitchell that the running of the Hazardous Waste area with respect to such issues as overtime and vacation was Mr. Mitchell's responsibility. Id. Mr. Andersen told Mr. Mitchell that Mr. Salmela, not Mr. Mitchell, was the Supervisor and that Mr. Salmela would make the supervisory decisions, not Mr. Mitchell. T. 927-28. Mr. Mitchell also discussed the need to have two trained and qualified people working in the Hazardous Waste area during overtime for safety reasons. Exs. 159A, 211. Mr. Pappenfus said that he would check this out and let Mr. Mitchell know what they would be doing in the future. Id. Mr. Pappenfus said he would also look into off-site job planning involvement by the MHIC. Ex. 159A. Mr. Mitchell said he was satisfied with the results of the meeting. Ex. 159A; see also T. 2617; Ex. 211.

173. Mr. Mitchell did not complain about the Union's representation at this meeting, nor did he request the Union to process his complaint further. T. 2618. Mr. Mitchell never mentioned the subject of race discrimination at this meeting. T. 923-24, 934, 4079; Exs. 159A-C.

174. Because Mr. Pappenfus was terminated by NSP shortly after this meeting, he never discussed any of the issues arising from the February 8, 1989, meeting further with Mr. Mitchell. Ex. 160C.

175. Pursuant to proper practice, overtime was to be offered first to the most senior employee. Mr. Mitchell was offered overtime at times during his employment as MHIC. He usually refused overtime assignments. T. 1033-34, 1081-82.

March, 1990, Meeting

176. Mr. Baird was contacted by NSP's Industrial Relations Department on March 7, 1990, and was told that there was going to be a disciplinary meeting regarding Mr. Mitchell. Mr. Baird was not contacted by Mr. Mitchell, but attended the meeting nevertheless on Mr. Mitchell's behalf, together with Local 160 Business Agent John Ness. T. 2619; Ex. 213. The other attendees included Mssrs. Mitchell, Miller, Salmela, Andersen, Calvin Scott (Mr. Mitchell's attorney), and Jack Sjoholm (an attorney with NSP). T. 3664; Exs. 160A, 213. Mr. Mitchell had notified his attorney, Mr. Scott, about the meeting and had asked him to come. During the meeting, Mr. Scott asserted that he was Mr. Mitchell's representative and had a heated discussion with Mr. Sjoholm about that. T. 907, 931, 3664; Exs. 160A, 213.

177. The meeting was intended to be the first step in Positive Discipline. T. 932; Ex. 121A. During this meeting, Mr. Mitchell's supervisors raised a number of concerns, including concerns about Mr. Mitchell not wearing a hard hat when operating the overhead crane, not wearing safety shoes, sleeping at safety meetings, not following compliance rules, not responding to the beeper and his whereabouts being unknown, and being tardy at the start of the day. T. 943, 953, 4081, 4085-87; Exs. 121A-D, 160A-D, 213. see also Finding 75(c). The attendees discussed the fact that Mr. Salmela was not wearing his hard hat and the fact that there had been no previous mention of Mr. Mitchell sleeping in safety meetings. Mssrs. Sjoholm and Anderson told Mssrs. Miller and Salmela that it was not the case that just the Union physical employees had to wear hard hats, but that everyone had to wear them. Ex. 160C. Parking behind the Hazardous Waste Warehouse was not discussed at the February 8, 1990, meeting or the March 7, 1990, positive discipline meeting. T. 4079-4084; Ex. 142S.

178. At the March 7, 1990, meeting, Mr. Mitchell raised the issue of his pay for two hours he was home on a "MAT day." T. 3668. A "MAT day" is a Mutually Agreed To Holiday, i.e., a holiday an employee is allowed to take any time during the year, with the approval of management. All employees have two MAT days every year. Normally employees schedule MAT days in advance to ensure that there is adequate coverage in the department. T. 969, 1034. White it is not unusual for an NSP employee to call in and want to take a MAT day that day, employees who do that are subject to the manager saying that they cannot take a MAT day that day because they are needed on the job. T. 969-70. The Collective Bargaining Agreement requires that MAT days "may be scheduled after reasonable notice has been given to the department head and mutual agreement as to the date on which they may be scheduled." T. 1955; Ex. 201, Art. V, Sec. 16(b) and (j)(2). The department head of the Hazardous Waste Warehouse was Mr. Miller. T. 1955. Pursuant to proper practice in the Hazardous Waste Warehouse, MAT days were to be coordinated with the employee's supervisor beforehand. T. 931-32, 1034, 1847, 1849; Ex. 121I. Mssrs. Wrobleski and Mulloy always arranged MAT days with Mr. Salmela in advance of taking those days off. T. 1850-52.

179. On the occasion at issue, Mr. Mitchell had not sought advance approval of a MAT request but had merely called his work station in the morning, talked to Mr. Salmela, and requested that he be allowed to take a MAT day that day. Mr. Salmela said that Mr. Mitchell could have the day off. Mr. Miller told Mr. Salmela that Mr. Mitchell could not have the day off because that was not the policy in the department. Mr. Miller then called Mr. Mitchell at home to tell him to return to work because the MAT day was not arranged in advance. Mr. Mitchell returned to work. Mr. Mitchell initially was not paid for the two hours that he had been at home. T. 1301-07, 1848. Mr. Miller had previously told Mr. Mitchell that he could not call in for a day off on the day he was expected to work. T. 1301.

180. After discussion at the March 7, 1990, meeting, NSP agreed to pay Mr. Mitchell two hours of compensation for the two hours he had been home on the day he attempted to take a MAT day and agreed to treat the March 7th meeting as a counseling session and not as a step under NSP's positive discipline policy. T. 932, 950-52; Ex. 212. Mr. Salmela was reprimanded for violating departmental policy by telling Mr. Mitchell he could have a MAT day on the day in question. T. 1487, 1849-52.

181. Mr. Mitchell never complained about the representation the Union provided at the March 7 meeting. He never asked the Union to process a grievance concerning that meeting. T. 929, 933, 2619-20.

182. Mr. Mitchell did not discuss issues of race discrimination at the March, 1990, meeting. T. 923-24, 934, 4082; 160A-K.

Computer Training

183. In late March or early April of 1990, Mr. Mitchell asked Mr. Baird to help him secure computer training. Mr. Baird spoke with Mr. Andersen about the matter. He told him that NSP had better do something about getting Mr. Mitchell training on CRT data entry and retrieval. Mr. Anderson said that he would contact Mr. Mitchell's supervisor, Mr. Miller, to set up the training. Mr. Mitchell received both PC orientation and ELF training in June of 1990. He received the computer training due to the Union's representation. T. 2626-2628; Exs. 143A, 143Y, 143Z, 143BB-DD.

184. In late June or early July of 1990, Business Agents Baird and Ness visited Mr. Mitchell on the job to see how he was doing with his computer training. Mr. Ness and Mr. Baird found Mr. Mitchell in the warehouse where he demonstrated some of his computer training. He showed Mssrs. Ness and Baird how to call up and disperse information. Id. Mr. Mitchell was excited about the training. T. 2628-29, 4484-85.

Telephone Call while at Home in May, 1990

185. Three close relatives of Mr. Mitchell (a niece, a sister, and his father) passed away during late 1989 and early 1990, causing him to require time off work. T. 3147-54; Ex. 216.

186. On May 7, 1990, at 7:30 a.m., Mr. Mitchell called Mr. Salmela and said that he would not be in to work that day. He asked for that day off; he did not ask for any other days off. Mr. Salmela was unclear if Mr. Mitchell wanted a sick day or a vacation day. Mr. Miller directed that the day be recorded as a sick day. On Tuesday, May 8, 1990, Mr. Mitchell did not show up for work and did not call in. Mr. Miller called him at home at 10:00 a.m. and asked him what his plans were. Mr. Mitchell said that he wanted a vacation day. Mr. Miller granted the request to "give [Mr. Mitchell] a break," even though allowing a vacation day that was not scheduled in advance was a deviation from his normal practice. Mr. Mitchell returned to work on Wednesday, May 9, 1990. Mr. Miller reviewed with Mr. Mitchell the decision to record Monday, May 7, as a sick day. Mr. Mitchell wanted Monday to be recorded as a vacation day, and that change was made. T. 1425-26, 1459-60, 1536-37; Ex. 121L.

187. On May 11, 1990, Mr. Baird received from Mr. Mitchell a copy of a memo dated May 7, 1990, from Mr. Mitchell's supervisor, Mr. Salmela, which contained an eleven-line annotation supplied by Mr. Mitchell concerning the above vacation issue. T. 2620; Ex. 14, 216. Although Mr. Mitchell also sent NSP a copy of this memo, the copy provided to NSP contained an abbreviated (five-line) version of Mr. Mitchell's annotation that did not include references to harassment and inhumane treatment. T. 4145-47; Ex. 161A.

188. On May 11, 1990, Mr. Baird sent a letter to NSP on Mr. Mitchell's behalf, demanding corrective action concerning the vacation issue. Ex. 217. NSP responded, attaching a memorandum from Mr. Miller to Mr. Andersen dated May 18, 1990, in which Mr. Miller indicated that he had agreed to change the sick day to a vacation day, in accordance with Mr. Mitchell's request. Ex. 219. The Union sent Mr. Mitchell a copy of the correspondence it had received from NSP. T. 2621. Mr. Mitchell did not register any complaint about the resolution of this issue and acknowledged that the situation was handled to his satisfaction. T. 2621, 3683.

Mr. Mitchell's Memorandum Alleging Racist Treatment

189. On or about May 19, 1990, NSP began negotiating with Complainant's lawyer about Complainant's separation from NSP. T. 4382. On May 21, 1990, the Union received a memorandum from Mr. Mitchell expressing his concerns about a April 24, 1990 meeting (see Ex. 215) that Mr. Mitchell had had with his supervisors. Mr. Pappenfus of NSP also received the memorandum from Mr. Mitchell on May 21, 1990, and sent a copy to Mr. Andersen on May 22, 1990. Mr. Andersen received his copy on May 24, 1990. T. 2622, 4379; Exs. 104 O-Q, 218. In the memorandum, Mr. Mitchell indicated, inter alia, that, "As in times past, I have solicited the support of Local I.B.E.W. concerning the racist and inhumane treatment I have received as an employee and member of Local 160." He also stated that, in his opinion, his back injury "was caused by allowing a MINORITY to sign the posting while denying him the authority the position dictates." Exs. 6, 104P-Q, 218 (emphasis in original).

190. The memo received by the Union on May 21, 1990, was the first indication the Union had that a meeting was held on April 24th and that Mr. Mitchell was concerned about the meeting. T. 2622-23. The Union grievance procedure has a 15-day time limit for filing first step grievances. Ex. 201, Article II, Section 1(a). These time limitations may, however, be waived by mutual consent. T. 2623.

191. The Union requested a meeting with NSP to address the concerns raised in Mr. Mitchell's memo. T. 2625; Ex. 220. The Union spoke with NSP on several occasions about Complainant's concerns and persisted in their effort to schedule a meeting on Mr. Mitchell's behalf. T. 4375. The meeting was eventually scheduled after several attempts. Mr. Andersen cancelled the meeting on October 10, 1990, because Mr. Mitchell would not respond to NSP directives that he return to work. T. 4376.

TREATMENT OF OTHER EMPLOYEES FOLLOWING BACK INJURIES

192. Kevin Mulloy, who is white, injured his back while an employee of NSP first in 1986, while moving furniture in his house, and again in 1991, while on the job as a relief foreman in the heavy crew. T. 143, 207-09, 214, 342-44, 344-46. He suffered a relapse in early 1992. T. 223-27. After the 1986 injury, Mr. Mulloy returned to light duty work for a short period of time with some restrictions on bending and lifting. He did not suffer any permanent disability or permanent physical restrictions based on the 1986 injury and was eventually able to return to work as Lead Warehouseman in Construction Credits. He was not placed in job reassignment. T. 209, 245-46, 342-44, 426.

193. After his injury in May of 1991, Mr. Mulloy returned to work in his pre-injury job in a light duty status. He had temporary restrictions on lifting, carrying, bending, pushing, and pulling. Mr. Mulloy suggested to his supervisor at the time that he could take care of scheduling and dispatching the heavy crew, and, a week or two later, his supervisor told him that he could start doing those duties. He worked within his restrictions as a dispatcher of the heavy crew and mobile transformers and his title remained relief foreman, heavy crew. T. 221, 234-35, 344-46. Mr. Mulloy worked in that position close to a year. During that time, he was continuing therapy and the final prognosis regarding his back had not been issued. T. 236-39. On December 4, 1991, Mr. Mulloy’s temporary light duty restrictions became permanent restrictions. His permanent restrictions involved repetitive lifting, sitting for over a period of time (35 to 45 minutes), bending and stooping restrictions, and a lifting restriction. Due to his permanent physical restrictions, he could not perform his pre-injury job of relief foreman for the heavy crew. As a result, he was talked to about reassignment in February or March of 1992 and was placed in the NSP Job Reassignment Program. T. 212-13, 235, 233-36, 242-45, 344-47. Mr. Mulloy fully cooperated with NSP's Job Reassignment Program, and worked with Ms. Clearwaters as his QRC to find a permanent position. He attended a three-day vocational assessment. T. 233-35, 241-43, 349-51, 406-07, 478-79, 493-95.

194. Like other NSP employees, Mr. Mulloy had ninety working days to find a permanent position, consistent with the Job Reassignment Policy. T. 240-41, 346-47. Mr. Mulloy immediately started putting his resume together and sent his resume out to NSP

departments trying to find another job. T. 233-34. Through Ms. Clearwaters, he heard about an opening in the Women and Minority Business Development Department, interviewed for the position, and received the job. T. 241-42, 349-51, 479, 494. Mr. Mulloy accepted the job offer made to him by NSP, even though he found it to be "the lesser of two evils," he believed that there were no emotional or financial benefits to the job, he had some resistance and unhappiness with the whole situation, he lost the opportunity for overtime work, overtime pay, and promotion, he moved from a Union to a non-union position, his wages were frozen, and he lost his Union seniority. T. 242-45, 348-49, 351-54. Mr. Mulloy never refused to return to a temporary light duty position or any other work assignment made by the Company. T. 360, 4435.

195. Robert Wrobleski, who is a white NSP employee, first injured his back in 1985 while he was on duty at NSP and employed as a floater in the warehouse, and suffered a second injury in 1987 or 1988. T. 523-24, 550-52, 600-03, 611-16. He eventually underwent surgery. T. 606. After his injuries, Mr. Wrobleski worked light duty. T. 559-65, 613, 711. His light duty assignment during 1988 extended from July 25, 1988, through September 30, 1988. Ex. 8 at 3. Mr. Wrobleski has no permanent physical restrictions. T. 562, 608-09, 711, 1953, 4435. After Mr. Wrobleski's light duty restrictions were lifted, he returned to work at full capacity in his pre-injury job. T. 608-09. Mr. Salmela did not request job reassignment for Mr. Wrobleski because he did not have permanent physical restrictions. T. 1953-54.

196. Howard Crone, a white NSP employee, suffered a back injury while employed and on duty at NSP in 1986. T. 2147, 2148; Ex. 32A. After his injury, he returned to work with restrictions. T. 2154, 2156-57. He had no performance problems and cooperated with the company. T. 2158-59. Mr. Crone suffered permanent physical restrictions (a 50-pound lifting limit, a 30-pound carrying limit, and no repetitive bending, twisting, or stooping). T. 2159-60; Ex. 32C. His doctor eventually released him to return to his regular job. T. 4433. He asked his supervisor if he could try to do his pre-injury job (Electrical Mechanic) and it worked out. T. 2160. Mr. Crone returned to his pre-injury job because he was still capable of performing that job. He thus was not placed in the Job Reassignment Program. T. 2158, 2160-63, 4433. After his injury, Mr. Crone put in a bid for a change in assignments to "the Crazy 8" crew in order to avoid underground residential work which required work with a shovel, pick, or jackhammer. Based on his seniority, he received the change in assignment to the Crazy 8 crew. T. 2149-50, 2162, 2164. The work periodically becomes too heavy; on those occasions, he asks for help. There are four to six people on a crew, so plenty of help is available. T. 2165.

197. Richard Cullen is a white NSP employee who suffered a back injury while on duty and employed as a Street Light Inspector for NSP in 1989. T. 2175, 2176; Ex. 32F. As a result of his injury, Mr. Cullen sustained a 14% permanent partial disability to the whole body. T. 2180; Ex. 32G-H. After his injury, Mr. Cullen had surgery and then returned to work on light duty with temporary lifting restrictions (no strenuous work) for a period of time. With the approval of his doctor, he rode around with another driver and assisted him by helping out with whatever he could. T. 2180-82, 2183, 2192. He eventually returned to his regular work with the approval of his doctor. T. 2192, 2194-95.

Mr. Cullen never had any permanent physical restrictions. T. 2183-84, 2201. He can fully perform his job and do everything that he could do prior to his back injury as far as his back is concerned. He cooperated with NSP during and after his injury. He thus was not placed in job reassignment. T. 2183-84, 2193, 2195, 2199, 2201.

198. Robert Provost, a white NSP employee, suffered three back injuries while working at NSP. His second back injury occurred in 1987 while he was on duty and employed at NSP as a maintenance man. T. 2327, 2329-35, 2338; Ex. 32J. In the opinion of Mr. Provost's chiropractor, the 1987 injury resulted in a 21% permanent partial disability of his whole body. T. 2338, 2355; Ex. 32K. In the opinion of another chiropractor who evaluated Mr. Provost at the request of NSP, the 1987 injury did not result in any permanent disability. T. 2349-50, 2354; Ex. 130C-G. Mr. Provost was not given any permanent physical restrictions. T. 2338, 2350-51. He worked light duty for two to three weeks after his 1987 injury. During his light duty work, he had other employees "pinch hit" for him on a few jobs, such as those involving heavy lifting or twisting or bending. T. 2340-41. Mr. Provost eventually returned to his pre-injury job with his doctor's approval. T. 2338-40, 2347, 2348. Mr. Provost's doctor stated that he would medically be able to resume his former employment, even though his condition "will probably worsen as time goes on." Ex. 32M. After his return to his regular job, Mr. Provost asked for help if he could not do something on his own. T. 2347, 2357-58. Later, when he had recovered to his fullest, he worked at his full capacity. T. 2357, 2362. Mr. Provost cooperated with NSP after his injuries in order to return to work. T. 2352. No one at NSP asked him about reassignment. T. 2342.

199. Robert Kiehl, a white employee of NSP, first injured his back on the job while employed by NSP in 1986. T. 2367, 2368-2372, 2401. He suffered a recurrence of this injury in 1988. T. 2369, 2402. After each injury, he returned to work in a light duty capacity for a few weeks. T. 2369-70. He was employed as a Warehouseman in Charge at the time of his 1988 injury. As light duty, he answered telephones and did paperwork and filing. There was normally enough work to continue for a full day when he was on light duty; he normally did not have days when he did not do anything. T. 2369-71. The work he performed on light duty was a departure from the work he usually did, which was the same work (lifting things and filling orders) that the other warehouse people did. T. 2371. He does not have permanent physical restrictions as a result of his back injuries and was not placed in the NSP Job Reassignment Program. T. 2401-02.

200. James Sallis, an African-American male, was employed by NSP in 1976 and worked there until 1987. He has known Mr. Mitchell since 1976, when they were both meter readers. T. 2208, 3543-44, 3553, 3585. Mr. Sallis was first injured in 1978 and suffered several injuries between 1978 and approximately June, 1985, some of which involved lost time from work. T. 3553-57, 3558-65. In November of 1985, Mr. Sallis' doctor imposed upon him permanent physical restrictions, which made it impossible for him to perform his pre-injury job. As a result, Mr. Sallis continued working light duty in the meter reading office and was placed in NSP's Job Reassignment Program. T. 3569-72, 3574; Exs. 158M-P. An R-2 form signed by Mr. Sallis, his QRC, and an NSP claim representative in late March, 1986, stated that his vocational goal was to return to work

with the same employer in a different job. The R-2 form noted that Mr. Sallis "has a 30 lb. weight restriction w/ no prolonged sitting and standing. The Dr. (Nagib) has recommended sedentary work. Therefore, Mr. Sallis will require a job change and I will work with him on internal job placement @ NSP. . . ." T. 3571-72; Ex. 158V-Y. In March, 1986, Mr. Sallis attended a one-week vocational evaluation to determine his transferable skills. T. 3570, 3573-74, Exs. 158U, Z, AA. Mr. Sallis was eventually offered an office job in the Electric Marketing Department on April 21, 1986, contingent upon completion of a two-week trial period. He was unable to successfully perform this job. On May 19, 1986, Mr. Sallis was placed in an office job in the Customer Business Office as a Customer Account Trainee. This job required the successful completion of a job training course. Mr. Sallis did not pass the course. T. 3575, 3579-80, 3583-84; Exs. 158CC-EE, LL, NN, OO, 283R. Mr. Sallis was terminated by NSP in June, 1986. T. 3584; Ex. 283A.

201. On July 18, 1986, Local 160 met with NSP seeking reinstatement for Mr. Sallis. On July 22, 1986, Local 160 requested to arbitrate Mr. Sallis' grievance. In arbitration, the Union sought reinstatement and full backpay for Mr. Sallis. Exs. 283D-F. The Union asserted that Mr. Sallis should be reinstated to a position in the marketing department, which Mr. Sallis believed most suitable to him. T. 2269. In preparation for the arbitration, Local 160 referred Mr. Sallis to a psychologist for vocational assessment, requested comparative data from NSP concerning other employees placed in job reassignment, and submitted arbitration briefs and letters on behalf of Mr. Sallis. T. 2259, 2263; Exs. 283G, H, N and O. In December, 1986, Mr. Sallis' doctor, Dr. Roger Farber, indicated that, in his opinion, Mr. Sallis was incapable of performing his meter reading duties given the condition of his back. Ex. 283M.

202. The Union prevailed in the arbitration and provided Mr. Sallis with a copy of the arbitration decision which was issued on January 29, 1987. The Arbitrator determined that the four hours of training provided to Mr. Sallis for the marketing position was inadequate and ran counter to NSP's vocational assessment of Mr. Sallis, which indicated a need for a longer training period for Mr. Sallis and also emphasized his lack of confidence and low level of performance under stressful conditions. The Arbitrator ordered NSP to either return Mr. Sallis to the marketing position or return him to some other job opening reasonably compatible with his vocational strengths and limitations. The Company was also ordered to provide Mr. Sallis with an adequate training and trial period. The arbitration award did not require NSP to place Mr. Sallis in a union position. T. 2280; Ex. 283R. As a result of the arbitration award, NSP reinstated Mr. Sallis. In a letter dated February 18, 1987, NSP directed Mr. Sallis to report to work on February 23, 1987, for a temporary work assignment in the General Office Safety Department, and indicated that the Company was in the process of finding a position for him under the Job Reassignment Program. Ex. 158QQ. The positions held by Mr. Sallis after his reinstatement were non-union positions. T. 2284. In June of 1987, Mr. Sallis negotiated separation from NSP, with the assistance of private counsel. T. 2284-86. The Union was not a party to those negotiations. T. 2285.

203. NSP has assigned other bargaining unit employees to non-union jobs through the Job Reassignment Program. There are African-American bargaining unit

employees who have participated in the NSP Job Reassignment Program and cooperated with the program and the Company. These employees have been assigned to temporary light duty work as a result of job reassignment, have later been offered a permanent job, and are still employed by NSP. T. 1814, 4434-35.

204. The parties waived the requirement set forth in Minn. Stat. § 363.071, subd. 2 (1990), for personal service on the Respondent and service by registered or certified mail on the Complainant and agreed that service by first class mail on both parties would be sufficient. T. 7-8.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 363.071 and 14.50 (1990).

2. The Notice of and Order for Hearing was proper as to form, content, and execution, and all other relevant substantive and procedural requirements of law and rule have been satisfied.

3. Respondent NSP is an "employer" within the meaning of Minn. Stat. § 363.01, subd. 17 (1990). Respondent Local 160 is a "labor organization" within the meaning of Minn. Stat. § 363.01, subd. 22 (1990). The Complainant, Joseph Mitchell, was an "employee" within the meaning of Minn. Stat. § 363.01, subd. 16 (1990), and a member of a labor organization within the meaning of Minn. Stat. §§ 363.03, subd. 1(1) (1990).

4. The Minnesota Human Rights Act prohibits covered employers from discharging or discriminating against an employee with respect to terms, conditions, or privileges of employment because of race, except when based on a bona fide occupational qualification. Minn. Stat. § 363.03, subd. 1(2) (1990).

5. The Minnesota Human Rights Act prohibits covered labor organizations from denying full and equal membership rights to members or from discriminating against a member with respect to race, except when based on a bona fide occupational qualification. Minn. Stat. § 363.03, subd. 1(1) (1990).

6. The U.S. Supreme Court first set forth a framework for the analysis of Title VII discrimination charges based on race in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas case and its progeny, the Complainant has the burden to establish a prima facie case of discrimination creating a rebuttable inference of discrimination. If the Complainant establishes a prima facie showing, the burden of production shifts to the Respondent in each of the consolidated cases involved here, who must articulate legitimate, nondiscriminatory reasons for the actions alleged to be discriminatory. If the Respondents articulate legitimate, nondiscriminatory reasons for

their actions, the Complainant may present evidence showing that the reasons articulated are a mere pretext for discrimination or are otherwise unworthy of belief. The McDonnell Douglas analytic framework must be followed in cases arising under the Minnesota Human Rights Act as well. See, e.g., Sigurdson v. Isanti County, 386 N.W.2d 715, 719-20 (Minn. 1986).

7. The burden of proof in an action involving violations of the Minnesota Human Rights Act remains, at all times, with the Complainant, who must establish by a preponderance of the evidence that the Respondents engaged in unlawful discrimination. Sigurdson, 386 N.W.2d at 720 n. 12.

8. The Complainant failed to establish by a preponderance of the evidence that NSP discriminated against him on the basis of his race in discharge, his placement in the Job Reassignment Program, or in other terms, privileges, or conditions of his employment.

9. The Complainant failed to establish by a preponderance of the evidence that the Union denied him full and equal membership rights or otherwise discriminated against him on the basis of his race.

10. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based on the foregoing Conclusions, IT IS HEREBY ORDERED:

The charges of discrimination filed by the Complainant with the Minnesota Department of Human Rights with respect to NSP and Local 160 as well as the Complaint filed in this proceeding should be and they are hereby DISMISSED WITH PREJUDICE.

Dated this _____ day of May, 1995.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Angela D. Sauro
Court Reporter
Kirby A. Kennedy & Associates

MEMORANDUM

Joseph Mitchell, the Complainant in this matter, was employed by Northern States Power Company ("NSP" or "the Company") from 1973 until January 23, 1991. He was a member of Local 160 of the International Brotherhood of Electrical Workers ("Local 160" or "the Union") during his employment with NSP. In March of 1991, Mr. Mitchell filed two

separate charges with the Minnesota Department of Human Rights alleging that NSP and the Union had discriminated against him on the basis of his race. After the charges were pending without resolution before the Department of Human Rights for more than 180 days, the Complainant requested a hearing before an Administrative Law Judge. Mr. Mitchell's charges against NSP and the Union were consolidated for hearing in this matter. This Decision addresses Mr. Mitchell's claims regarding both Respondents.

Mr. Mitchell alleges that NSP and the Union have violated provisions of the Minnesota Human Rights Act ("MHRA") that specify that it is an unfair employment practice for an employer to discharge an employee or otherwise discriminate against an individual because of race with respect to terms, conditions, or privileges of employment (Minn. Stat. §§ 363.03, subd. 1(2)(b) and (c)) and render it an unfair employment practice for a labor organization to deny full and equal membership rights to a member, to discriminate against a member with respect to terms, conditions, or privileges of employment, or otherwise discriminate against a member (Minn. Stat. § 363.03, subd. 1(1)(a), (c), and(d)). He contends that NSP discriminated against him while he was holding his last position with the Company, that of Material Handler in Charge ("MHIC") in the Hazardous Waste Warehouse, in the terms, conditions, and privileges of his employment by harassing him and treating him differently, denying him the job duties and responsibilities associated with the MHIC position, unfairly disciplining him, and refusing to allow him to continue working in the MHIC position following his back injury in March 1990. In addition, Mr. Mitchell alleges that NSP discriminated against him in his eventual discharge from the Company by improperly offering him the ultimatum of either returning to work in unacceptable light duty jobs or termination. Mr. Mitchell further contends that the Union discriminated against him during the time he held the MHIC position by not representing him as it did white employees and by failing to pursue various work-related complaints, including complaints that he was being denied the full duties of his MHIC position.[1] All of Mr. Mitchell's claims against both Respondents are asserted under the disparate treatment theory.

While this contested case was pending, an arbitration proceeding was held regarding Mr. Mitchell's reassignment and termination. In his Award, the Arbitrator sustained the Union's grievance on behalf of Mr. Mitchell and ordered that Mr. Mitchell be reinstated to his employment with NSP. The Arbitrator concluded that the MHIC position "as constituted at the time the grievant held it, is beyond the grievant's currently-stated medical restrictions" and determined that the remaining issue is "whether it is feasible to modify the job to fit the grievant and whether the Company should be required to modify the position." Award at 39. Resinstatement was ordered because the Arbitrator believed that Mr. Mitchell "was sincerely mistaken in his position(s) regarding his right to reinstatement to his [MHIC] position" and because NSP had "an obligation to reasonably show [the grievant and the Union] that its assessment [that the grievant was not physically qualified to return to the MHIC position] was correct," in this instance by conducting the job analysis requested by Mr. Mitchell. Id. at 42, 43-44. The Arbitrator ordered that the grievant be placed "in an appropriate position agreed upon by the parties" using the criterion of "reasonableness" and made no recommendation regarding an appropriate position due to the lack of sufficient information. Id. at 45-46. The Arbitrator determined

that Mr. Mitchell should receive no back pay. Id. at 46. Despite several efforts by NSP and the Union to bring Mr. Mitchell back to work at NSP following judicial affirmance of the Arbitrator's award, Mr. Mitchell never returned to work at NSP. He does not intend to return to work unless NSP offers him the MHIC position. T. 3393. Mr. Mitchell continued to pursue his discrimination claim and presented his case in a lengthy (25-day) hearing.

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 in interpreting the provisions of the MHRA. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). See, e.g., Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 & n.4 (Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986); Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978).

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the Complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the Respondent unlawfully discriminated against the Complainant. The burden of producing evidence then shifts to the Respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the Complainant. The Respondent's burden is light at this stage; it is not required to prove that it was actually motivated by the reason offered. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The issue is whether there is evidence that the Respondent's actions were related to a legitimate business purpose. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). If the Respondent demonstrates a legitimate, nondiscriminatory reason, the burden of production shifts back to the Complainant to demonstrate that the Respondent's claimed reasons are a mere pretext for discrimination. Id.; McDonnell Douglas, 411 U.S. at 803; Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989); Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. 1983). The Complainant may sustain this burden either directly, by persuading the fact-finder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the explanation proffered by the employer is unworthy of credence. Sigurdson, 386 N.W.2d at 720; Miller v. Centennial State Bank, 472 N.W.2d 349, 354 (Minn. Ct. App. 1991). Indirect proof of discrimination is permissible to show pretext, since "'an employer's submission of a discredited explanation for firing a member of the protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.'" Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). The burden of proof remains at all times with the Complainant, who bears the ultimate burden of persuading the fact-finder by a preponderance of the evidence that the Respondent intentionally discriminated against him. Sigurdson, 386 N.W.2d at 720; Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 509, 510 (Minn. 1981). Even if the trier of fact finds

the reasons offered by the employer not to be credible, the Complainant does not automatically prevail. The Complainant must still satisfy the ultimate burden of persuasion and show intentional discrimination. St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 2753-54 (1993).

I. Credibility of the Complainant

As a preliminary matter, the Administrative Law Judge notes that Mr. Mitchell's testimony frequently diverged in critical respects from that of other witnesses (NSP employees and Union officials) concerning such matters as the frequency and substance of Mr. Mitchell's contacts with the Union, the nature of Mr. Mitchell's performance and duties in the MHIC position, and NSP's treatment of Mr. Mitchell compared to other employees. As reflected in the Findings of Fact, the Administrative Law Judge has generally credited the testimony of the NSP and Union witnesses in such instances. These credibility findings were based upon the relative demeanor of the witnesses during the hearing and their apparent memory of the incidents in issue, particularly where their testimony was corroborated by contemporaneous documentation. Unlike the NSP and Union witnesses, Mr. Mitchell was often guarded, vague, and evasive in his responses to Respondents' questions during the hearing. For example, in a lengthy colloquy with counsel for the Union, Mr. Mitchell admitted that a grievance form bears his handwriting and denied that the grievance form was given to him or was in his possession; after several more questions, described how he filled the grievance form out in the Warehouse office; and then, after a few more questions, asserted that he had never seen a grievance sheet and that Union members have no access to grievance forms and cannot file grievances. T. 3636-38. In response to another question posed by counsel for the Union, Mr. Mitchell said, "I can answer yes to that. I could also answer no, but I will answer yes." T. 3625. Mr. Mitchell contended, without providing any specific details, that he had "continually" had discussions with Union Business Agent Bill Baird about the fact that Mr. Salmela went on off-site visits with Mr. Kolnberger and Ms. Clark (T. 3435) and that he "continually pleaded, begged, written, called, [and] talked to whoever [he] could talk to in the Union" concerning returning to the MHIC position (T. 3822), in contrast with detailed testimony by Union witnesses regarding the date and substance of each conversation with Mr. Mitchell and various unsuccessful attempts to contact Mr. Mitchell, supported by contemporaneous notes.

Moreover, Mr. Mitchell's responses at the contested case hearing were often inconsistent with his earlier arbitration and deposition testimony on key issues, despite his statements that he would "stand by" his prior testimony. See, e.g., T. 3393-95, 3437-39, 3682, 3729-30. For example, Mr. Mitchell admitted during his deposition testimony that he could not perform all floor activity duties in the Hazardous Waste Warehouse when he had physical restrictions, yet asserted at the contested case hearing, "I am able to do all of those things with my restrictions." T. 3353; Jt. Ex. 2 at 39. He also admitted during his deposition testimony that, every time he filled out a grievance report or directed someone to pursue a grievance at the Union, they did that, yet failed to answer a virtually identical question posed at the hearing, claiming that he did not understand it. T. 3638-39; Jt. Ex. 2 at 146. While Kevin Mulloy's testimony at the hearing concerning the nature of his duties

while he was employed as a Warehouseman in Charge ("WIC') in the hazardous waste facility at times also varied from his testimony during the arbitration proceeding, he explained the reasons for the differences in a clear and persuasive way. Questions directed to Mr. Mulloy at the contested case hearing more specifically focused on his work during particular time periods during his employment, in contrast to the questions posed to him during the arbitration proceeding. It thus was possible to reconcile and understand the differences in Mr. Mulloy's testimony at the two proceedings. It is not possible to do the same with the inconsistencies in Mr. Mitchell's testimony.

Mr. Mitchell's testimony was also unbelievable in several other respects. For example, Mr. Mitchell testified that he had never had coaching and coaching sessions with Mr. Salmela and asserted that neither Steve Miller nor Lyle Salmela had told him between December 1988 and July 1990 that he was having performance problems (T. 3114-15; 3131-33), despite testimony and documentation from Mr. Salmela indicating that he had had several conversations with Mr. Mitchell concerning his job performance prior to July 1990, and testimony from Mr. Mitchell's wife, Betty Mitchell, indicating that Mr. Mitchell had told her that he was receiving a lot of reprimanding at work and was going through one disciplinary meeting after another (T. 2829). In addition, although it is clear that Mr. Mitchell received letters mentioning the Job Reassignment Program and it is evident that he was told that he was being placed in Job Reassignment at least by September of 1990, Mr. Mitchell testified that, "[i]n 16 years I have never heard the phrase job reassignment." T. 3993. Mr. Mitchell's claim at the hearing that he had told the Union before the arbitration proceeding about a conversation that he had had with Mr. Maki was belied by the fact that Mr. Mitchell failed to mention the Maki conversation during his deposition two days after the arbitration proceeding and testified at his deposition that he had no complaints about how the Union had handled the arbitration. T. 3722-28. Mr. Mitchell's truthfulness was also drawn into question by his apparent failure to disclose certain income he had received from the Showers of Blessings Church to the accountant preparing his 1991 and 1992 tax returns. T. 3912-20; Exs. 84-85.

For all of these reasons, the Administrative Law Judge has determined that Mr. Mitchell is not a credible witness, and that it is appropriate to credit the testimony of the NSP employees and Union officials where it conflicts with that of Mr. Mitchell.

II. Complainant's Claim Against NSP

A. Alleged Discrimination in Terms, Conditions, and Privileges of Employment

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged. A prima facie case of race discrimination in terms, conditions, and privileges of employment is established by showing that:

(1) The employee is a member of a protected class;

(2) The employee was qualified and employed by the employer; and

> (3) The employee was treated unfairly in his terms, conditions, and privileges of employment compared to similarly-situated non-minority employees.

These elements apply to Mr. Mitchell's claims that he was discriminated against in the terms, conditions, and privileges of his employment with NSP, including his assertions that the Company harassed him and otherwise treated him differently than white employees, did not give him the job duties and responsibilities that white employees were given, and disciplined him more harshly than white employees. While these elements also apply to Mr. Mitchell's claim that the Company treated him differently than white employees by sending him home and placing him in job reassignment following his back injury, that claim is factually tied to his discharge claim and will be discussed in conjunction with that claim.

The Complainant established a prima facie showing (or at least an arguable prima facie showing) with respect to certain of his allegations of differential treatment.[2] Mr. Mitchell is an African-American and thus is a member of a protected class. NSP argues that the Complainant has not established the second element of the prima facie case because he was not qualified to perform either the physical or administrative functions of his job as MHIC. In making this argument, NSP apparently is focusing on the period following Mr. Mitchell's injury and the determination that he had permanent physical restrictions. Because the allegations of discrimination in terms and conditions of employment under consideration predate his injury, however, it is appropriate to determine whether Mr. Mitchell possessed the minimum qualifications for the MHIC job prior to his injury. Mr. Mitchell was already employed as a Warehouseman in Charge ("WIC") at the time that he became MHIC. He received the WIC position based on his qualifications and abilities. The WIC title was changed to MHIC at the time of the 1988 Reorganization. Mr. Mitchell received the MHIC position in the Hazardous Waste Warehouse solely on the basis of seniority, in accordance with the general approach applied to almost all of the positions filled as part of the 1988 Reorganization. It thus is evident that, at least prior to his injury, Mr. Mitchell was minimally qualified for the MHIC position.

With respect to the third element of the prima facie case, Mr. Mitchell demonstrated that he was treated differently with respect to certain conditions of his employment compared to similarly situated, non-minority employees: (1) he was required to wear a beeper, unlike his white co-workers; (2) he was called at home by NSP managers, unlike his white co-workers; (3) he was not offered first choice of overtime on one occasion, and his white co-workers worked the overtime; (4) he was involved in more discussions with NSP managers in which his job performance was criticized than his white co-workers; and (5) he did not engage in the same job duties or exercise as much responsibility in his job as his white predecessor, Kevin Mulloy. The nature of each of these instances of differential treatment will be discussed below, along with an analysis of whether NSP has satisfied its burden of production by proffering legitimate, nondiscriminatory reasons for these differences in treatment and whether the Complainant showed that the reasons advanced by the Company are a mere pretext for discrimination.

1. Beeper

The primary reason advanced by the Company for requiring Mr. Mitchell to wear a beeper was that Mr. Mitchell was frequently unavailable at his work station and his whereabouts were unknown. The Company asserts that there was no valid work-related reason for these absences. Mr. Mitchell's supervisor, Lyle Salmela, and his co-workers, Connie Clark and Bernie Kolnberger, testified that Mr. Mitchell was often absent from the Warehouse. Ms. Clark and Mr. Kolnberger found it necessary to do Mr. Mitchell's work for him. Written documentation introduced at the hearing supports the Company's position that there was a problem with Mr. Mitchell's availability and that he was given a beeper to wear in an attempt to ensure that he could be located. The Company thus articulated legitimate, nondiscriminatory reasons for its request that Mr. Mitchell wear a beeper. Mr. Mitchell has not persuaded the Administrative Law Judge that the explanations asserted by NSP are unworthy of belief. There is no evidence that any other employee had similar problems with availability. Mr. Mitchell's assertion that he was gone from the Warehouse for work-related reasons and was unfairly singled out and required to wear a beeper is not credible in light of the consistent testimony and documentation to the contrary from other witnesses. Mr. Mitchell has not introduced any other evidence that would support a conclusion that the reason proffered by the Company for requiring him to wear a beeper is a mere pretext for discrimination.

2. Calls at Home

The Complainant demonstrated a prima facie case of discrimination by showing that he was called at home by Mr. Miller on two occasions and that no other employee was ever called at home. In response to the Complainant's allegations regarding the MAT day incident, NSP emphasized that the Collective Bargaining Agreement requires that MAT days be scheduled "after reasonable notice has been given to the department head [in this case, Mr. Miller] and mutual agreement as to the date on which they may be scheduled." Ex. 201, Art. V. Sec. 16(b) and (j)(2). Mr. Andersen indicated that, while NSP employees generally schedule their MAT days in advance, it was not unusual within NSP for employees to call in and ask to take a MAT day that day. He emphasized, however, that call-in requests were always subject to being denied by the manager if the manager determined that the employee was needed on the job. T. 969-70. The Company witnesses further testified that, pursuant to proper practice in the Hazardous Waste Warehouse, MAT days were to be coordinated with the employee's supervisor beforehand. Mr. Mitchell's assertion that he had in fact arranged to take a MAT day by talking to Mr. Salmela the day before and obtaining his approval is not credible in light of the convincing testimony of Mssrs. Miller, Salmela, and Andersen that Mr. Mitchell did not talk to Mr. Salmela about the MAT day request until he called in on the morning of the day he wanted to take as a MAT day. In their telephone conversation, Mr. Salmela told Mr. Mitchell that he could have the day off. After Mr. Miller learned of this, he called Mr. Mitchell at home and ordered him to report to work. Mr. Miller reprimanded Mr. Salmela for violating departmental policy by telling Mr. Mitchell that he could have a MAT day on

the day in question. Mr. Mitchell initially was not paid for the two hours that he had been at home, but was later compensated for this time after he raised the issue at his March 7, 1990, meeting.

Mr. Mitchell contended that he was the only individual who was required to schedule MAT days in advance. He said that he knew that Mr. Kolnberger did not have to schedule his MAT days in advance because, in some situations, trucks would show up to pick up oil that had already been "keyloaded" for Mr. Kolnberger to pump and, when Mr. Kolnberger was not present in the Warehouse, "that was a signal . . . that this was not prior done." T. 3110. This appears to be sheer speculation on Mr. Mitchell's part, and is not persuasive in light of the testimony of Mssrs. Miller and Salmela concerning the policy, the uncontradicted testimony that Mssrs. Mulloy and Wrobleski always arranged MAT days in advance, and Mr. Kolnberger's testimony that it was necessary to notify his supervisor and make sure that there was adequate coverage within the department before taking a MAT day. The Company thus articulated legitimate, nondiscriminatory reasons for calling Mr. Mitchell at home and directing him to return to work with respect to the MAT day incident. Mr. Mitchell has not demonstrated that these reasons are pretextual. There is no convincing evidence that any other employee in the Hazardous Waste Warehouse was given MAT days without making arrangements in advance, nor is there any evidence that the MAT day policy was unfairly applied to Mr. Mitchell. The memoranda upon which the Complainant relies indicating that vacation requests are to be approved by the immediate supervisor are of questionable application to MAT days and, in any event, were issued after the MAT day requested by Mr. Mitchell. See Exs. 71-72.

Mr. Mitchell also demonstrated that Mr. Miller called him at home in May, 1990. The evidence introduced by the Company showed that Mr. Mitchell called in on Monday, May 7, 1990, at 7:30 a.m. and asked for that day off, but did not ask for any other days off. Mr. Salmela was unclear if Mr. Mitchell was sick on Monday or wanted it to be a vacation day. Mr. Miller directed that the day be recorded as a sick day. On Tuesday, May 8, 1990, Mr. Mitchell did not show up for work and did not call in. Mr. Miller called him at home at 10:00 a.m. and asked him what his plans were. Mr. Mitchell said that he wanted a vacation day. Mr. Miller granted the request in order to "give [Mr. Mitchell] a break," even though allowing a vacation day that was not scheduled in advance was a deviation from his normal practice. Mr. Mitchell returned to work on Wednesday, May 9. Mr. Miller then reviewed with Mr. Mitchell the decision to record May 7 as a sick day. Mr. Mitchell indicated that he wanted Monday to be recorded as a vacation day, and that change was made.

NSP articulated legitimate, nondiscriminatory reasons for calling Mr. Mitchell at home on this occasion. Although Mr. Mitchell apparently had just returned from his father's funeral in Arkansas the Sunday before and was undoubtedly grieving the loss of his father at the time, it nevertheless is reasonable for an employer to call an employee for clarification of the situation when the employee fails to appear for work and has not made his intentions clear regarding that work day. There is no evidence that any other employee in the Hazardous Waste Warehouse ever failed to call in at the beginning of the work day if he or she was not planning to come to work. There is also no evidence that any other

employee failed to make clear whether days off were requested as sick or vacation days. Under these circumstances, Mr. Mitchell has not shown that he was unfairly or improperly called at home or that the reasons proffered by the Company are a mere pretext for discrimination.

3. Overtime

Although the Complainant's evidence on this issue was very minimal, he arguably made out a prima facie case that the Company improperly failed to offer him weekend overtime on one occasion despite the fact that he was the most senior employee. The issue was discussed at the February 8, 1990, "Pappenfus meeting." It appears from contemporaneous notes of that meeting that Mr. Mitchell did not dispute that Mr. Heuer mentioned the Sunday overtime to Mr. Mitchell on the previous Friday and said, "I assume you'll be giving a sermon at the time the overtime is to be worked." Ex. 159A. Based upon the Union's notes of the meeting, however, it appears that overtime was also worked on Saturday and that Mr. Mitchell complained that the Saturday overtime had not been offered to him. Exs. 210, 211. Several witnesses testified that overtime is generally offered to employees in order of seniority. In fact, Mr. Mitchell himself pointed out in connection with his testimony on damages that he has suffered financially by not working as an MHIC because "as in-charge person you get first choice of that overtime, which affords you to make extra money, which affords you to take your family on vacation" and claims that he has not been able to afford to take his family on vacation since his termination. T. 3228. The Complainant thus admitted that the general Company policy was to offer the MHIC (if senior) the first choice to perform overtime work. At most, it appears that a mistake was made on one occasion. Mr. Mitchell told the Union and Company representatives at the February, 1990, meeting that he was satisfied with the results of the meeting, and there is no convincing evidence that he experienced any further problems with overtime assignment. The Complainant has not borne his burden to show that the Company's articulation of its general policy regarding overtime assignment was pretextual or that the Company was motivated by racial animus if it did, in fact, fail to offer him first choice of overtime on the occasion in question.

4. Discussions regarding Job Performance

Mr. Mitchell also established a prima facie showing that he was treated differently than his white co-workers by being called into numerous discussions with his superiors in which his job performance was criticized. NSP introduced evidence that these meetings were held to discuss deficiencies in Mr. Mitchell's job performance. and were in the nature of informal positive contacts or "coaching and counseling" sessions[3] rather than formal disciplinary sessions under NSP's Positive Discipline Policy. The performance deficiencies discussed included Mr. Mitchell's frequent absences from his work station, his decreasing work output and the Department's lack of productivity, his lack of knowledge of the day-to-day activities in the Hazardous Waste Warehouse, his failure to wear a hard hat and safety shoes, his failure to take responsibility as MHIC, non-compliance with applicable laws and regulations, paperwork errors, his sleeping at safety meetings, his failure to pay attention to detail, his tardiness, his failure to take the initiative to organize

work and see that it was being done, and his failure to do his share of the work. Mr. Mitchell continued to have problems with availability, violate the hard hat rule, and park behind the facility even after he received oral reprimands for that conduct. While white employees were also coached and counseled regarding parking behind the facility and their failure to wear hard hats, there is no evidence that any other employee was as unresponsive to these discussions as Mr. Mitchell or that any other employee exhibited performance problems. The Company thus articulated legitimate, non-discriminatory reasons for discussing performance deficiencies with Mr. Mitchell. Mr. Mitchell has not persuaded the Administrative Law Judge that the reasons proffered by the Company were not true or were otherwise pretextual.[4]

5. Nature of Job Duties

Mr. Mitchell also made a prima facie showing that he did not engage in the same job duties or exercise as much responsibility in his job as his white predecessor, Kevin Mulloy. It appears, based upon the testimony at the contested case hearing, that Mr. Mulloy overstated the nature of his responsibilities as WIC in the Hazardous Waste Warehouse during the arbitration proceeding when he indicated that he was the first line for "all" decision making regarding the operation of the facility and was responsible for "all" the recordkeeping, "all" the communications between NSP departments concerning compliance with the permit, and handling "any" problem that came up during the day regarding unidentified waste, tracking information, answering questions of internal NSP customers, and certain other functions. Jt. Ex. 1 at 226-27. Moreover, Mssrs. Salmela and Miller testified that the MHIC was not a supervisor and could not properly direct the work of the Lead Material Handler or the Material Handler. T. 1247, 1879-80. Even bearing these points in mind, however, it is evident that Mr. Mitchell did not engage to as great an extent in a number of activities in which Mr. Mulloy engaged, including handling substantive issues within the Warehouse, communicating with individuals employed outside the Hazardous Waste Warehouse, and going on off-site[5] jobs. It is also evident that, when the percentage of time spent on administrative duties by Mr. Mitchell is compared to the percentage of time spent by Mr. Mulloy just before he left the Hazardous Waste Warehouse in December, 1988, such duties did not consume as great a percentage of Mr. Mitchell's time.

The Company articulated several legitimate, nondiscriminatory reasons for these differences. First, the Company demonstrated that there was a continuous evolution in the nature of the WIC and MHIC duties and that the duties changed as hazardous waste changed and as the facility changed. There were no negotiated job descriptions and no job duties that were specifically tied to the MHIC position alone; rather, as was made clear during the 1988 Reorganization, the MHIC, the Lead Material Handler, and the Material Handler were expected to perform the same job duties. Second, the Company showed that there was a significant increase in the physical job duties of all of the material handlers, including the MHIC, after the new facility opened in 1988 and that, although increases in recordkeeping were also experienced in the new facility, efficiences in recordkeeping were achieved after the Hazardous Waste Warehouse staff began to use a computer in approximately April of 1989.

Third, the Company showed that the nature of the split between physical and administrative work as performed by Mr. Mulloy varied quite dramatically from time to time during his employment as WIC; Mr. Mulloy took the initiative and seized certain responsibilities and made certain decisions within the Warehouse that were not within his job duties; and Mr. Mulloy developed expertise in the hazardous waste area as one of the first employees charged with working in that area and, as a result, was given special, one-time projects (such as preparing special reports and writing certain operational procedures and technical manuals) that increased the administrative component of his job, particularly during the early months of operations in the new Hazardous Waste Warehouse. Mr. Mitchell did not demonstrate that he had expertise similar in nature to Mr. Mulloy's. Fourth, regarding off-site visits, it is evident that Mr. Heuer offered Mr. Mitchell the opportunity to go on off-site visits and Mr. Mitchell occasionally went on such visits. Because off-site visits frequently required physical labor and the bulk of the off-site visits took place after Mr. Mitchell's back injury occurred, Mr. Mitchell's physical restrictions would have precluded him from participating in off-site visits. Finally, as discussed above, Mr. Mitchell's problems with poor performance, errors, and unavailability at his work station, coupled with his failure to take appropriate responsibility in his position as MHIC, were offered as an additional reason why the nature of the duties exercised by Mr. Mitchell differed from those exercised by Mr. Mulloy. The Complainant did not convince the Administrative Law Judge that the Company was intentionally withholding information from him that was necessary to perform the MHIC job or otherwise demonstrate that the reasons advanced by the Company were not true or were a pretext for discrimination.

Thus, although the Complainant demonstrated a prima facie case of discrimination in certain terms, privileges, and conditions of employment, NSP articulated legitimate, nondiscriminatory reasons for the differential treatment, and Mr. Mitchell has not proven that discrimination was the real reason for the Company's actions.

B. Alleged Discrimination in Reassignment and Discharge

Mr. Mitchell asserts that NSP treated him differently than white employees by sending him home and placing him in job reassignment following his back injury and by discharging him when he failed to report for a temporary job offered to him. Because these claims are based upon the same set of underlying facts, they will be discussed together. As mentioned above, Mr. Mitchell's claim of differential treatment in being sent home and placed in job reassignment is properly viewed as alleged discrimination in terms, conditions, and privileges of employment, and thus is subject to the prima facie case requirements set forth in subsection A above.

It is necessary to establish the following elements to demonstrate a prima facie case of race discrimination in discharge under the Minnesota Human Rights Act:

(1)The employee is a member of a protected class;

(2) The employee was qualified for the position held;

(3) The employee was discharged; and

(4) After the employee's discharge, the employer assigned a nonmember of the protected calss to do the same work.

Rademacher v. FMC Corporation, 431 N.W.2d 879, 882 (Minn. App. 1988). Accord (under Title VII) Whiting v. Jackson State University, 616 F.2d 116, 121 (5th Cir. 1980); Flowers v. Crouch Walker Corp., 552 F.2d 1277 (7th Cir. 1977); c.f. Osborne v. Cleland, 620 F.2d 195, 197-98 (8th Cir. 1980) (requiring as the fourth element that the employee show that the employer sought people with the employee's qualifications to fill his former job).

It is evident that Mr. Mitchell is a member of a protected class who was discharged, and that he was eventually replaced as MHIC by Bernie Kolnberger, a white male, thus satisfying the first, third and fourth prongs of the discharge prima facie case requirement. He also demonstrated that he was treated differently than white employees who sustained back injuries because he was sent home after approximately three and one-half months of light duty work in the Hazardous Waste Warehouse to await job reassignment. In contrast, the Complainant showed that white employees who sustained back injuries were not sent home but rather remained working in a light duty capacity until (a) their condition improved, or (b) their temporary restrictions became permanent such that they were unable to perform their pre-injury job, they were placed in job reassignment, and permanent reassignment was made. It is unusual for an NSP employee injured on the job to be sent home. Employees are generally kept at work if at all possible, and something is found for them to do. Mr. Mitchell was not told at the time that he was sent home that one of the reasons for sending him home was his poor performance in the administrative portion of his job. In addition, when Mr. Mitchell was placed in reassignment, he was initially offered temporary positions while Mr. Mulloy was offered a permanent position. The Complainant thereby satisfied the third prong of his "terms and conditions" prima facie case requirement with respect to differential treatment following his back injury.

The Complainant argues that he has also shown that he was physically qualified after his injury to perform the MHIC position (which is the position he held at the time of his discharge due to his failure to accept the Micrographics Operator position), thereby satisfying the second prong of the prima facie case requirement applicable to his claims of discrimination in discharge and terms and conditions of employment. The Complainant bases his argument on his own testimony that his MHIC administrative duties did not require him to lift more than twenty-five pounds or do repetitive bending, lifting, or twisting; the fact that his doctor felt that he could perform the job following his injury; Mr. Mulloy's testimony during the arbitration proceeding that all lifting could be eliminated by using the equipment in the Warehouse; the testimony of several witnesses that the MHIC could choose to do something other than physical tasks; and the testimony of Mssrs. Mulloy and Wrobleski at the arbitration proceeding that there were enough administrative duties to comprise a job. In the Judge's view, it is doubtful that Mr. Mitchell should be deemed to have produced sufficient evidence to satisfy even his prima facie burden to show that he

possessed the minimum qualifications for the MHIC position at the time he was sent home, placed in the Job Reassignment Program, or discharged given the weight of the contrary evidence introduced by the Company concerning the nature of the MHIC duties, the impact of his physical restrictions, and his performance problems with respect to the administrative portion of the MHIC job. This evidence is discussed in detail below, in connnection with the Company's evidence of legitimate, nondiscriminatory reasons for the reassignment and discharge.

Even assuming, arguendo, that Mr. Mitchell made a sufficient showing regarding his claim of differential treatment following his back injury and discrimination in reassignment and discharge to establish a prima facie case of discrimination in terms and conditions of employment and discharge, the Company rebutted the resulting inference of discrimination by articulating legitimate, nondiscriminatory reasons for its treatment of Mr. Mitchell. First, the Company showed that, as part of the 1988 Reorganization, it was clarified that all classifications were responsible for all jobs in the Hazardous Waste Warehouse. Although the MHIC could choose to do administrative duties rather than physical duties, the administrative duties of the MHIC during Mr. Mitchell's employment in the new facility took, on average, a maximum of three to four hours per day to perform. Thus, the MHIC was unable to fill his or her entire day with the performance of administrative duties alone. Second, NSP demonstrated that both the administrative and the physical duties associated with the MHIC position required the performance of manual labor, much of which involved lifting more than twenty-five pounds and/or repetitive bending, twisting, and lifting. The nature and extent of these physical duties are described in the Findings of Fact and will not be repeated here. Mr. Mitchell's claim that he did not have to lift more than twenty five pounds or do repetitive bending, lifting, stooping or twisting before or after his injury (T.3182-84, 3794-96), was not credible given persuasive testimony to the contrary from other witnesses and his own admissions that he had performed physical work as an MHIC before his injury.

Third, the Company introduced evidence showing that NSP management determined that Mr. Mitchell was unable to perform the physical labor associated with the MHIC job after the Company was notified by Mr. Mitchell's physician in late June, 1990, that Mr. Mitchell had permanent physical restrictions that prohibited him from lifting more than 25 pounds and from engaging in repetitive bending, lifting, or twisting. Mr. Mitchell's supervisors concluded at that time that no permanent light duty position existed in the Hazardous Waste Warehouse due to the nature of the duties to be performed and the limited number of personnel available to perform them, and requested that Mr. Mitchell be placed in the Job Reassignment Program. Fourth, the Company showed that management in the Hazardous Waste Warehouse discovered while Mr. Mitchell was on a vacation in July, 1990, that his problems with paperwork errors were continuing and that he had made a significant number of errors in his computer and log entries. These errors, if discovered during an audit, would have exposed NSP to serious penalties. As a result, NSP decided to send Mr. Mitchell home to await reassignment based upon the determination that (a) he was unable to perform the physical portion of the MHIC position due to his physical restrictions, and (b) he was unable to perform the administrative portion of the MHIC position due to the frequency and severity of his errors. Finally, NSP

demonstrated that Mr. Mitchell was discharged after he failed to report to work in the Micrographics Operator position offered to him on December 21, 1990.[6] The Company showed that, even though this position was found to be within Mr. Mitchell's medical restrictions, Mr. Mitchell's failed to report on January 9, 1991, failed to return to work or contact the Company as of January 16, 1991, and failed to return to work on January 23, 1991, even though he was warned that his failure to do so would result in his termination. NSP witnesses further testified that the Company normally terminates employees much more quickly when they fail to report to work.

The Complainant did not persuade the Administrative Law Judge that the reasons advanced by the Company with respect to his treatment following his back injury, his reassignment, or his ultimate discharge were false or were a pretext for discrimination. As evidence of pretext, Mr. Mitchell emphasized that he was merely told that there was no more light duty work for him to perform when he was sent home in July 1990. Mr. Miller explained, however, that he had decided not to tell Mr. Mitchell about the performance-related reasons for sending him home because he wanted to "wipe the slate clean so that he [Mr. Mitchell] had a better chance of landing a new job within NSP." T. 1432. While it may have been a better approach for the Company to have been completely honest with the Complainant regarding the reasons for sending him home, the fact-finder in a human rights case may not properly question the reason for the Company's action where that reason is true and is not pretextual. See Gill v. Reorganized School District R-6, 32 F.3d 376, 379 (8th Cir. 1994) ("We are not concerned with the correctness or wisdom of the reason given for [the defendant employer's] decision, but only 'whether [the reported incident] was the real reason for [plaintiff's] termination, and not a pretext for age discrimination'") (citation omitted). Moreover, because the Complainant's supervisors had talked to Mr. Mitchell about many of his performance problems on several past occasions, Mr. Mitchell was in fact aware of their general concerns about his recordkeeping errors even if he did not know that they had discovered the recent computer mistakes.

The Company also showed that Mr. Mitchell was offered temporary positions during the reassignment process because he failed to attend two scheduled vocational assessments or otherwise cooperate with NSP during the process and, as a result, the Company lacked information concerning his transferable skills. NSP staff working in the workers compensation area emphasized that it is beneficial and very important to get employees back to work after an injury, even in a temporary position. In contrast, Mr. Mulloy put together a resume and sent it out to various NSP departments, showed interest in obtaining a new position within NSP, and otherwise cooperated and worked with NSP in finding such a position. The evidence showed that Mr. Mitchell, through private counsel, began negotiating his separation from NSP even before he was sent home from the MHIC position, that he failed to respond to Company and Union contacts and attempts to have him return to work, and that he generally refused to consider returning to work at NSP in any position other than the MHIC position.

The Complainant pointed out that, during the arbitration proceeding, Mssrs. Mulloy and Wrobleski testified that, based on their knowledge of the in-charge job in the Hazardous Waste Warehouse, there were enough administrative duties to comprise a

job. Ex. 1. at 237; 256. The arbitration testimony of Mssrs. Mulloy and Wrobleski, however, focused on the time period when they were working in the new Hazardous Waste Warehouse and reflected the large amount of time Mr. Mulloy spent on administrative tasks while getting the new facility up and running, including many duties that were not ordinarily part of the duties of the MHIC. The Complainant also emphasized that Mr. Mulloy testified at the arbitration proceeding that manual labor on the floor of the Warehouse was only between five and ten percent of his duties while he worked as a WIC, lifting was less than five percent of his duties, and that five percent could be eliminated by using proper lifting equipment. Ex. 1 at 231, 234. Mr. Mulloy clarified this testimony at the contested case hearing, however, by stating that, although a good share of the lifting coulld be eliminated if the equipment in the new facility were used, some lifting is required in using the lifting equipment available in the new facility. He explained that, during his testimony at the arbitration proceeding, he had not been thinking about the lifting involved in utilizing the lifting equipment. For example, to use the trolley, it was necessary to use a chain hook-up that weighed 35 to 40 pounds. T. 448. In addition, Mr. Mulloy testified at the hearing that, on some days, 80% of his work involved physical labor and he was unable to do any administrative work, that he worked side by side with Mr. Wrobleski on a daily basis, and that there was something physical they did together nearly every day. T. 169-75, 409, 446-49. Consistent testimony provided by those with more recent experience with the new facility after the computer was added, including Mssrs. Miller, Salmela, Kolnberger, and Clark, placed the average amount of time spent by the MHIC on administrative duties at three to four hours per day or even less. Moreover, several witnesses testified in convincing detail about particular job duties involved in the MHIC position that would be impossible to perform if the MHIC had a permanent restriction which prohibited him or her from lifting anything that weighed more than 25 pounds or engaging in repetitive bending, lifting, or twisting.[7]

The Complainant also argued as evidence of pretext that, despite the Company's claim that Mr. Mitchell should be reassigned because three physically capable employees were needed in the Hazardous Waste Warehouse (Ex. 15B), the Warehouse has continued to function with just two employees since Mr. Mitchell was sent home. Based on the testimony of Company witnesses, it is evident that there has been some uncertainty and debate over the staffing of the new facility since the time it opened, with some people suggesting that two Union employees were sufficient and others urging that three employees were required. Because the Hazardous Waste Warehouse was a new facility during Mr. Mitchell's employment, NSP managerial personnel were not sure what the full needs of the facility would be or how efficient the facility would be, and were trying to find out what the proper staffing requirements were. Since Mr. Mitchell was sent home, they have found that the Warehouse functions well with just two Union employees. T. 1321-22, 1366-68, 1437-38, 1477, 1481-84. The Judge finds the Company's explanation of the situation to be convincing. The key issue in the decision to place Mr. Mitchell in the Reassignment Program was his inability to perform the MHIC job, not the number of qualified employees in the facility. As discussed above, the Company demonstrated that Mr. Mitchell was incompetent to perform either the physical or the administrative aspects of the job. The fact that two employees are capable of handling the work load does not render Mr. Mitchell any more suitable for the job. Moreover, because it appears based on

the testimony of Mr. Mitchell's co-workers that Mr. Mitchell was not performing his full share of the work in the facility even prior to his injury, it is not particularly surprising that the Warehouse was able to continue to operate with only two employees after his departure.

As further evidence of pretext, the Complainant also asserted that several white NSP employees continued to work on a light duty basis in their pre-injury jobs following back injuries.[8] While it is true that several white employees spent a lengthy amount of time in light duty positions, all of these employees except Mr. Mulloy were eventually released by their doctors to perform their pre-injury jobs at full capacity. While some of the individuals to whom Mr. Mitchell attempts to compare himself sustained some permanent partial disability as a result of their injury, permanent partial disability is irrelevant to the question of whether an employee can perform a particular job and does not, in itself, trigger job reassignment at NSP. None of the alleged comparatives had performance problems. Only Mr. Mulloy suffered permanent physical restrictions such that he was unable to perform his pre-injury job. Mr. Mulloy, like Mr. Mitchell, was placed in the Job Reassignment Program. Mr. Mitchell thus was treated the same as Mr. Mulloy, i.e., he was placed in job reassignment after permanent physical restrictions were imposed that, in the opinion of NSP management, made it impossible for him to continue to be accommodated in his pre-injury job.

Mr. Mitchell also attaches a great deal of importance to the fact that the Company refused to permit an on-site job analysis of the MHIC position to be performed prior to his termination despite repeated requests by Mr. Mitchell and his personal QRCs. An on-site analysis of the position was eventually performed after Mr. Mitchell's termination, after the Company was required to do so as part of a workers' compensation proceeding. It is unfortunate that such an analysis was not performed because, had Mr. Mitchell been convinced that an objective outsider agreed that the MHIC position was not appropriate for an individual with his physical restrictions, perhaps he would accepted the fact that he had to be reassigned and his termination may have been averted. The Company's failure to perform such an analysis prior to Mr. Mitchell's termination is not, however, reflective of racial discrimination. The undisputed evidence at the hearing established that NSP has never on any other occasion permitted an on-site job analysis to be performed regarding an employee's pre-injury job. Moreover, when the on-site analysis was finally performed by Ted Lockett, Mr. Mitchell's personal QRC, after Mr. Mitchell's termination, it confirmed that Mr. Mitchell could not have performed the MHIC duties with his restrictions if his MHIC job duties were in fact similar to the duties presented to the QRC.[9] While Mr. Lockett expressed some uncertainty concerning the issue, the overwelming weight of the evidence presented at the hearing persuades the Administrative Law Judge that the MHIC position held by Mr. Mitchell actually did involve the job duties demonstrated by Mr. Kolnberger to the QRC who conducted the on-site analysis, and that Mr. Mitchell's claim that the position involved solely administrative duties is unfounded.

Finally, the Complainant argued that NSP's treatment of two other African-American employees, James Sallis and Rory Russell, provides further evidence of racial bias and pretext. As discussed in the Findings, Mr. Sallis suffered several injuries and

eventually received permanent physical restrictions in 1985 that made it impossible for him to perform his pre-injury job. He continued working light duty in the meter reading office and was placed in the Job Reassignment Program. He attended a vocational evaluation and was eventually offered an office job in the Electric Marketing Department, contingent upon completion of a two-week trial period. He was unable to successfully perform this job. He then was placed in an office job in the Customer Business Office as a Customer Account Trainee. This job required the successful completion of a job training course. He did not pass the course and was terminated by NSP in June, 1986. He later filed a discrimination charge. Mr. Sallis was ordered reinstated by an arbitrator, who determined that the four hours of training provided to Mr. Sallis for the marketing position was inadequate given the findings of NSP's vocational assessment that Mr. Sallis needed a longer training period and suffered from a lack of confidence and low level of performance under stressful conditions. Mr. Sallis was reinstated to another non-union position and eventually negotiated a separation from NSP.

Rory Russell has been a friend of Mr. Mitchell's since the early 1980's and is also a pastor. They have common acquaintances and family connections. Mr. Russell worked for NSP from December, 1980, to August, 1986.[10] In approximately May, 1986, Mr. Russell bid on a foreman job on the Heavy Crew in the General Storeroom at the Chestnut Service Center. T. 2038, 2041-44, 3468-73; Ex. 282A. He testified that he did not receive the position even though he was the most senior person who bid on the job because NSP and the Union had a "long-standing practice" that they "did not want African American males or females to be over whites." T. 2041.. He further alleged that was harassed by two less senior co-workers who wanted the foreman position and was told by them that he might get hurt on the foreman job. T. 2046. He asserted that his manager, Harry Bray, told him that he did not have sufficient experience for the foreman position and that the Company was thinking about dismantling the crew. T. 2041-44, 2067-68. The Company's position thus was that Mr. Russell was not qualified for the position. T. 3475, 4170. Mr. Russell testified that he told his supervisors approximately two weeks later that he was going to quit since they were not going to let him have the posting, that Harry Bray (his manager) told him he did not want him to quit and urged him to go to NSP's downtown office, and that he did so and eventually decided to take a leave of absence to go on a vacation.

The Union met with the Company concerning the situation on July 23, 1986, and an agreement was reached under which the Company agreed to pay Mr. Russell the foreman rate and all annual increases as long as he stayed in the Stores Department. The Company agreed to investigate the alleged discrimination in the Stores Department and requested that Mr. Russell not file his discrimination charge unless he was not satisfied with the results of the Company investigation. Mr. Russell requested and the Company agreed that he would be permitted to take vacation and authorized leave until August 18, 1986. Despite Mr. Russell's denial that he had ever talked to Mr. Ring, it is evident that he was contacted by Mr. Ring and agreed to this resolution. T. 4366-70; Exs. 282B-D. As a result of the Company's investigation, a white supervisor (Mr. Bray) was removed from his position. T. 3483-84, 4132-33. Mr. Russell never returned to NSP after his leave of absence. The Company sent him a letter dated August 21, 1986, stating that he had been terminated. T. 2068-69, 3473, 3494-95, 3519; Ex. 282E. Although the Union

had not heard from Mr. Russell, it sent a letter to the Company dated August 27, 1986, advising the Company that the Union did not agree with Mr. Russell's termination and stating that Mr. Russell had a fear of returning to employment with the Company as a result of his local management. Exs. 282F, K-M.

Mr. Mitchell contends that the Company's treatment of Mr. Sallis mirrored its treatment of Mr. Mitchell in that only Mr. Mitchell and Mr. Sallis were ever reassigned and terminated. However, Mr. Sallis' treatment has little, if any, relevance to Mr. Mitchell's situation. Mr. Sallis worked in a different work area, had different job duties, worked under different management personnel, and was terminated more than four years before Mr. Mitchell. While they were both offered non-union jobs as part of the Job Reassignment Program, there was ample testimony that that was a common outcome for minority and non-minority employees in job reassignment, since Union jobs tend to involve physical duties. In addition, neither Mr. Sallis nor Mr. Mitchell was terminated directly as a result of reassignment. The circumstances triggering their terminations from the Company's employment in fact were quite different: Mr. Sallis failed to pass a job training course, while Mr. Mitchell failed to report for work. Mr. Mitchell also argues that the accuracy of Mr. Russell's assessment of NSP as a place where there is a "long-standing practice" that they "did not want African American males or females to be over whites" is borne out by NSP's treatment of Mr. Mitchell. The Company asserted that there is no such practice or policy and that the Company denied Mr. Russell the foreman position because he lacked the necessary qualifications for the job. Because there are black employees at NSP in leadership positions, it is apparent that NSP does not have a policy of not allowing blacks to hold positions of higher rank than whites.. T. 4143. Thus, Mr. Russell's testimony regarding his personal experience in a promotional situation involving different job duties and different management personnel does not provide an adequate basis for a conclusion that Mr. Mitchell's difficulties in the MHIC position are due to a long-standing policy on the part of NSP that African-Americans will not be permitted to be in positions that are superior to whites.

The Complainant's allegations concerning Mssrs. Sallis and Russell, at best, merely suggest that other African-Americans formerly employed by NSP feel that they were victims of racial discrimination and may have racial discrimination claims of their own to make. Their situations were distinct from the Complainant's in terms of time, work area, and managment personnel involved. They were never in a position to assess Mr. Mitchell's performance during his job as MHIC or the impact of his physical restrictions. Thus, their testimony does not constitute evidence that the Company treated Mr. Mitchell unfairly. See Daig Corp. v. Reich, Fin. & Com. 25, 27 (Minn. App. August 1, 1994) (in affirming trial court's finding that the plaintiff failed to establish a prima facie case of sex discrimination, the Minnesota Court of Appeals stated that the plaintiff's evidence that at least two other female former employees felt that they were the victims of sex discrimination "suggest only that other females presently or formerly in the employ of respondent might have gender bias complaints of their own to make; they do not constitute evidence that respondent treated appellant unfairly") (emphasis in original).

Accordingly, the Administrative Law Judge concludes that Mr. Mitchell's refusal to report to work in a job that was appropriately within his physical restrictions despite ample opportunity to do so and several warnings from the Company provided a legitimate basis for his termination from employment. Mr. Mitchell has not satisfied his burden to show that he was discriminated against on the basis of his race with respect to his reassignment and discharge following his back injury.

C. Alleged Direct Evidence of Discrimination

The Complainant relied on three additional matters as a basis for his assertion that Mr. Miller intentionally discriminated against Mr. Mitchell. First, in approximately late September of 1988, before Mr. Mitchell became the MHIC, Mr. Miller asked Mr. Mulloy if he would consider staying on in the in-charge hazardous waste position, despite the fact that there was a personality conflict between Mssrs. Miller and Mulloy. Mr. Miller told Mr. Mulloy that he was concerned about who would come into the facility under the polling. Mr. Mulloy said to Mr. Miller, "If you think I'm a problem, wait until the person who takes my place comes in." While Mr. Mitchell's name was not specifically mentioned, Mr. Mulloy assumed that Mr. Miller understood who would be taking the MHIC job because of all of the talk that had gone on. Second, at some time before Mr. Mitchell became the MHIC, Mr. Miller had a conversation with Mike Maki during which he asked Mr. Maki how he could "get rid of" Mr. Mitchell.[11] Third, the Complainant alleged that Connie Clark, one of Mr. Mitchell's co-workers, told Fatima Franzen (another NSP employee) on twelve to fourteen separate occasions that "some guy" had told Ms. Clark that Mr. Miller had said shortly after Mr. Mitchell became MHIC that he was going to get rid of Mr. Mitchell because he was black.

The Administrative Law Judge is not convinced that the third statement ever was made. Ms. Franzen was demoted by the Company and no longer works there. She has a pending charge against NSP alleging race, color, sex, and national origin discrimination and retaliation based upon her employment outside the Hazardous Waste Warehouse as a Lab Specialist A . She is an obviously disgruntled former employee of the Company who made no attempt to appear to be objective with respect to her view of the Company but instead used the hearing to deliver a broad and generalized indictment of the Company. Based upon her demeanor at the hearing, the Administrative Law Judge did not find her to be a credible witness. Ms. Clark emphatically and convincingly denied ever making such a statement to Ms. Franzen. Accordingly, the Judge has disregarded Ms. Franzen's testimony regarding the alleged hearsay statement.

As reflected in the Findings, the Administrative Law Judge has determined that the first two alleged conversations in fact occurred. These two conversations do not, in themselves, reflect any racial discrimination or racial bias. Mr. Miller had never met or seen Mr. Mitchell before December 5, 1988. Based on persuasive evidence provided at the hearing, it is clear that Mr. Miller tried to convince Mr. Mulloy to stay on in the in-charge position because Mr. Mulloy performed well in that position and Mr. Miller wanted to be able to continue to rely on him in that job. Mr. Miller was concerned about getting an inexperienced person in the Hazardous Waste Warehouse. Mr. Miller's comments to Mr.

Maki asking how he could "get rid of" Mr. Mitchell could be interpreted to merely reflect Mr. Miller's interest in retaining an experienced employee rather than an interest in avoiding the placement of Mr. Mitchell in the MHIC position. Because the Complainant stipulated that his discrimination claim related only to his treatment in the MHIC position, there was little evidence relating to Mr. Mitchell's performance in prior positions. However, there was evidence that, in prior positions, Mr. Mitchell closed his eyes or slept on the job, operated a forklift while walking alongside it, and was unavailable at the job site. T. 334-39, 639-40, 651-63, 4191. Mr. Andersen testified that Mr. Mitchell had "always had a terrible reputation" in the Warehouse. T. 4191. These prior problems and poor reputation may also explain why Mr. Miller may have been reluctant to have Mr. Mitchell come into the MHIC position. Moreover, Mr. Miller offered Mr. Mitchell an opportunity to return to a temporary position in the Hazardous Waste Warehouse in September of 1990, while he was awaiting job reassignment, and Mr. Miller informed his supervisor in November of 1990 that he wanted Mr. Mitchell "back to work as soon as possible" in yet another job for which Mr. Miller thought he would qualify. Ex. 121N. These actions undermine the Complainant's suggestion that Mr. Miller was motivated by an intention to "get rid of" Mr. Mitchell. While Mr. Miller's remark to Mr. Maki was obviously in poor judgment, it does not intrinsically reflect any racial bias.

There is no credible evidence tending to suggest that Mr. Miller's comments to Mssrs. Mulloy and Maki were motivated by race, or that Mr. Miller ever made the statement alleged by Ms. Franzen. These statements thus do not provide persuasive direct evidence of racial discrimination on Mr. Miller's part, nor do they convince the Judge that the reasons proffered by the Company are false or a pretext for discrimination.

Accordingly, even assuming that the Complainant succeeded in establishing a prima facie case that the Company discriminated against him in discharge and in certain terms, conditions, and privileges of employment, it is concluded that the Complainant did not show that the nondiscriminatory reasons proferred by NSP for his treatment during employment or his discharge were factually false or a mere pretext for discrimination and did not otherwise satisfy his ultimate burden to demonstrate that the Company intentionally discriminated against him.

III. Complainant's Claim Against the Union

In order to establish a prima facie case of race discrimination against a union, the parties agree that the following elements must be demonstrated:

(1) The employee is a member of a protected class;

(2) The employee was a member of the bargaining unit whose exclusive representative is the union; and

(3) The employee asked for representation and the union either refused to represent him or provided representation that

> was different than that provided similarly situated white union members.

Due to the entry of summary judgment for the Union with respect to the Complainant's claims of discrimination in reassignment and discharge, the relevant time period with respect to the Complainant's claims involving the Union runs from December 1988, when Mr. Mitchell became a MHIC, to September 5, 1990, when Mr. Mitchell was formally notified that he had been placed in NSP's Job Reassignment Program.

There is no dispute that the Complainant is a member of a protected class and was a member of the bargaining unit whose exclusive representative was Local 160, thereby satisfying the first two prongs of the prima facie case requirement. The parties do, however, disagree regarding whether the Complainant has satisfied the third prong. In support of his contention that he has done so, the Complainant places his primary reliance upon the grievance register maintained by the Union. The Complainant contends that the Union filed a number of Step 2 (written) grievances on behalf of its white Union members with respect to issues similar to those about which Mr. Mitchell complained, but points out that the Union handled the bulk[12] of Mr. Mitchell's complaints as Step 1 (oral) grievances and never advanced them to the Step 2 stage. Accordingly, the Complainant contends that Mr. Mitchell received different representation than that provided similarly-situated white union members.

There are several difficulties with the Complainant's argument. First, the Union grievance log, which only records Step 2 grievances, does not provide sufficient information about the employees' complaints or their ultimate resolution to enable the Administrative Law Judge to make a meaningful comparison between the nature and handling of Mr. Mitchell's concern and the nature and handling of another employee's Step 2 grievance. Accordingly, the register alone does not permit the Judge to reach the conclusion that Mr. Mitchell and the other employee were similarly-situated or that the other employee was treated more favorably by the Union. As the Judge noted in the earlier summary judgment decision in this case, "The evidence provided by Mr. Mitchell regarding the grievances filed on behalf of other employees is sketchy in that the Union log merely provides a shorthand description of the employee's complaint and minimal (and sometimes no) information about the eventual disposition of the grievance." Ruling on Respondents' Motions for Summary Judgment at 17. Because some of the grievances reported in the log did appear to reflect the fact that Step 2 grievances were filed by the Union relating to other employees' concerns about overtime, vacation, job duties, and relationships with supervisors, and because the Union had not provided affidavit or other evidence explaining why Step 2 grievances were filed in these situations and not for Mr. Mitchell, the Judge found that the Complainant had provided evidence sufficient to raise a genuine issue of material fact regarding whether the Union provided Mr. Mitchell representation that was different than that provided similarly situated white Union members. Despite the fact that the Complainant was told that this evidence was sketchy and presented a close question at the summary judgment stage, the Complainant did not change his approach at the hearing, but rather continued to rely in large part on the Union log. In a few instances, the log was supplemented with some of the grievance documents

or testimony, but in all instances it still was not possible to determine whether the concerns presented were sufficiently similar to Mr. Mitchell's concerns or whether the Union member given the Step 2 grievance in some fashion received better representation or a more favorable result.

Second, and more importantly, the Complainant's approach reflects a fundamental misunderstanding of the three-step Union grievance procedure. There was ample testimony at the hearing concerning the fact that the great majority of the complaints of Union members are resolved at the Step 1 oral discussion stage. Because resolution at Step 1 provides the most expeditious relief for the Union member, it is the preferred approach. Grievances that are unresolved at Step 1 may be reduced to writing and turned into the Union Hall as Step 2 grievances. Although, in accordance with the collective bargaining agreement, the Union may file Step 2 grievances on its own initative, T. 2590-91, members wishing to pursue Step 2 written grievances are generally expected to initiate the written grievance by notifying a union steward or business agent of their interest in pursuing a grievance to Step 2.

Mr. Mitchell's complaint in March, 1989, about non-Union workers performing the duties of those in the Hazardous Waste Warehouse was processed as a Step 2 grievance. The grievance was eventually resolved by the Company agreeing to abide by the collective bargaining agreement in the future by using Industrial Waste Section employees for all overtime assignments in that area. A copy of the letter setting forth this resolution was sent to Mr. Mitchell. Mr. Mitchell did not contact the Union or request arbitration of the grievance. He never told the Union that he was dissatisfied with the Union's representation or the outcome, and he never brought any similar problems to the attention of the Union in the future. Mr. Mitchell has not established even a prima facie case of discrimination with respect to this grievance.

It is evident that the remainder of the concerns raised by Mr. Mitchell prior to May 21, 1990, were, at least as far as the Union knew, resolved at the Step 1 level. As mentioned above, the Judge has credited the testimony of Mr. Baird and other Union witnesses regarding the frequency and substance of Mr. Mitchell's contacts with the Union. Based upon this testimony, it is evident that Mr. Mitchell raised a number of specific issues with the Union, primarily by directly contacting Mr. Baird rather than going through his union steward.[13] While some of these issues may, after the fact, be viewed as falling in the general category of allegations by Mr. Mitchell that he was being denied the MHIC job duties, Mr. Mitchell did not describe them in that fashion when he contacted the Union. Instead, Mr. Mitchell's concerns prior to May 21, 1990, were raised in the form of specific complaints about non-Union workers performing Hazardous Waste area duties, a purported job description, the assignment of overtime, being called back to work while on a MAT day, computer training, and being called at home while on vacation. He also did not mention racial discrimination by the Union or Company until his memorandum alleging racist and inhumane treatment was received on May 21, 1990. Thus, it did not appear to the Union representatives, nor would it reasonably appear to anyone else under the same circumstances, that Mr. Mitchell continuously complained about race discrimination or a pattern of unfair denial of duties prior to May 21, 1990. As set forth in the Findings, the

Union responded to the work issues raised by Mr. Mitchell prior to May 21, 1990, by notifying the Company of Mr. Mitchell's concerns, scheduling meetings to discuss these concerns, attending and participating in those meetings even when not invited by Mr. Mitchell, confirming resolutions in letters to the Company, and sending copies of all correspondence to Mr. Mitchell. All of these work-related concerns were resolved at the Step 1 stage, as are most concerns raised by Union members. Although the Complainant contends that the issue of Mr. Mitchell receiving calls at home was raised on two occasions and that the Union thus cannot reasonably believe that that concern was resolved, the calls occurred in two separate contexts: the first call, in approximately March, 1990, occurred because Mr. Miller wanted to order Mr. Mitchell back to work from an improperly requested MAT day; the second call, in May, 1990, occurred because Mr. Mitchell had not shown up for work and had not called in and Mr. Miller wanted to know what his plans were. In each instance, Mr. Mitchell's specific complaints regarding the non-payment of two hours on the MAT day and the treatment of May 7 as a sick day were remedied by the Company providing the pay and changing the sick day to a vacation day. Thus, the specific concerns he raised on each of those occasions were resolved, at least to Union's knowledge. Mr. Mitchell never told the Union that he was dissatisfied with the Union's representation or the outcome. With respect to these claims, Mr. Mitchell has not demonstrated a prima facie case that the Union either failed to represent him or that white employees who processed a Step 2 grievance regarding potentially similar situations received more favorable representation or a better outcome.

The Complainant arguably established a prima facie case with respect to the Union's handling of the race discrimination issue he expressed in a memorandum received by the Union on May 21, 1990. In the memorandum, Mr. Mitchell expressed concerns about a April 24, 1990, meeting (about which the Union had no knowledge) and indicated that he believed he had received "racist and inhumane treatment . . . as an employee and member of Local 160." He also stated that, in his opinion, his back injury "was caused by allowing a MINORITY to sign the posting while denying him the authority the position dictates." Exs. 6, 104P-Q, 218 (emphasis in original).[14] Based upon the credible evidence provided at the hearing, this was the first time that Mr. Mitchell had notified the Union or the Company that he believed he had been treated unfairly due to his race.[15] On June 4, 1990, the Union requested a meeting with NSP to address several matters, including the concerns raised in Mr. Mitchell's memorandum. The Union spoke with NSP on several occasions about Mr. Mitchell's concerns and persisted in its effort to schedule a meeting to address these concerns. T. 4375. The meeting was eventually scheduled, after several attempts, for October 11, 1990. NSP cancelled the meeting the day before because Mr. Mitchell would not respond to NSP directives that he return to work. T. 4376. The collective bargining agreement provides that a grievance may be reduced to writing if no settlement is reached in Step 1 within fifteen working days of the date of the alleged violation or within the agreed time limits. Ex. 201. Mr. Baird acknowledged that the Union could file written grievances on behalf of a Union member. Thus, when delays were experienced in scheduling the meeting, the Union could have exercised its discretion to advance Mr. Mitchell's concern to Step 2. There was, however, no showing by the Complainant that the Union filed Step 2 grievances on behalf of white employees under similar circumstances or that employees processing Step 2 grievances receive quicker

meetings with the Company or a more expeditious resolution of their concerns than employees processing Step 1 grievances.

Despite these shortcomings in Complainant's proof, even if it is assumed, arguendo, that the Complainant demonstrated a prima facie case of race discrimination, the Union rebutted any resulting inference of discrimination by articulating several legitimate, nondiscriminatory reasons for the manner in which it handled the concerns addressed by Mr. Mitchell in his May 21, 1990, memorandum. First, the Union showed that a Union member who wishes to pursue a Step 2 written grievance is generally expected to initiate the written grievance by notifying a union steward or business agent of his or her interest in pursuing a grievance to Step 2. In order to process a Step 2 grievance, members need only request a form from their union steward or work with the steward in filling out the form for submission to the Union. The Union demonstrated that Mr. Mitchell knew how to process a Step 2 grievance, as evidenced by his March, 1989, processing of a Step 2 grievance alleging that non-bargaining unit people had performed bargaining unit work, and his December, 1990, request that the Union prepare a grievance regarding his reassignment. The March, 1989, Step 2 grievance was processed early in Mr. Mitchell's employment as an MHIC. It is also evident that Mr. Mitchell periodically received updated labor contracts. These contracts have contained the same three-step grievance procedure for more than thirty years. Mr. Mitchell's claim that he was unfamiliar with how to process a Step 2 grievance is unbelievable under these circumstances. The Union thus contends that, pursuant to customary practice in Local 160, Mr. Mitchell had an obligation to expressly direct the Union to pursue grievances.

Second, the Union demonstrated that Mr. Mitchell had decided to seek and take direction from his personal attorney and had failed to involve the Union in several workplace issues dating from as early as March, 1990. Thus, Mr. Mitchell did not notify the Union of the March 9, 1990, disciplinary meeting; did not inform the Union of his injury in March, 1990; did not contact the Union after he was feeling better as he promised shortly after his injury; did not involve the Union in the April 24, 1990, meeting that was the subject of his May 21, 1990, memo; told Mr. Ness of the Union in September, 1990, that he should not get involved with respect to NSP's offer of reassignment because he preferred to let his lawyer handle matters; told Mr. Ganley on September 20, 1990, that he intended to deal with the Company through his attorney; and, despite numerous calls and letters sent by the Union, did not contact the Union again until November 21, 1990, when he declined the Union's offer of help and said that he would follow his attorney's advice and "go with the flow."

There is no evidence that Mr. Mitchell ever requested the Union to pursue a grievance regarding race discrimination, or that he complained about the delay in scheduling a meeting to discuss his concerns.[16] In addition, there is no evidence that the Union has ever processed a Step 2 grievance without being directed to do so by a Union member. It is well established that a Union is not expected to act on behalf of a Union member in the absence of express direction from the member. As the U.S. Supreme Court stated in Republic Steel v. Maddox, 379 U.S. 650, 653 (1964):

> [T]here can be no doubt that the Employee must afford the Union the opportunity to act on his behalf . . . . It cannot be said in the normal situation that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

Accord Mechmet v. Four Seasons Hotels, Inc., 825 F.2d 1173 (7th Cir. 1987) ("if the worker does not ask its Union to press a grievance for him he can hardly complain that it has failed to represent him"). Moreover, under the facts of this case, the Union's uncertainty regarding whether Mr. Mitchell wished the Union to pursue a grievance is understandable given the fact that Mr. Mitchell on several occasions rebuffed its efforts to get involved on his behalf. The Union showed that it responded to Mr. Mitchell and provided representation on each occasion that he contacted the Union and that it continued its efforts to represent him even after he informed the Union that his personal attorney was handling matters. The Administrative Law Judge thus concludes that the Union advanced legitimate, nondiscriminatory reasons for its handling of Mr. Mitchell's May 21, 1990, memorandum alleging race discrimination.

As evidence of pretext, Mr. Mitchell generally alleged that the Union has a pattern of not representing its African American members. In support of its argument, the Complainant emphasized that, Dennis Ganley has been a business representative for eight years but is aware of only one grievance having to do with race discrimination which was filed in 1990. T. 2788-89 There is, however, no evidence that the Union was ever requested to process other grievances claiming race discrimination. Several Union officials testified that Local 160 has never refused to process a race discrimination grievance that a Union member wished to pursue. T. 2797, 3003. Moreover, the evidence at the hearing showed that the Step 1 grievance pursued by the Union on behalf of Rory Russell included arguments that NSP's position was racially motivated. T. 4371; Ex. 282B. As part of the resolution of that grievance, NSP promised to investigate whether discrimination influenced the promotion decision, and a supervisor ultimately was removed from his position. Thus, the Union pursued a race discrimination issue in the past on behalf of Rory Russell. In addition, even though the Union had not heard from Mr. Russell, the Union posted an objection to NSP's decision to terminate Mr. Russell and attempted to preserve Mr. Russell's seniority rights. Ex. 282F The Union also pursued Mr. Sallis' and Mr. Mitchell's terminations to arbitration and won reinstatement on their behalf. The Union raised the issue of disparate treatment in Mr. Mitchell's arbitration proceeding. Such actions on the part of the Union undermine the Complainant's contention that the Union fails to represent African-Americans.

As additional evidence of pretext, the Complainant relies on Mr. Russell's testimony that he "observed that Mr. Ring [the Union's Business Manager] rode around with a confederate flag draped over his back seat." T. 2050. On cross examination, however, Mr. Russell admitted that he had never ridden in Mr. Ring's car, could not describe the make or model, and revealed that the only basis for his belief that it was Mr. Ring's car was that another unnamed employee told him it was. T. 3525-28, 3535-36.

Moreover, Mr. Ring was not the Business Manager of the Union at the time Mr. Russell alleged he saw the flag. This testimony is not credible[17] and does not provide a basis for a finding of pretext. Finally, the mere fact that the Union's officials happen to be Caucasian does not provide persuasive evidence of pretext. The Union's officers are elected by the members. All members are free to run for office. The Union's members include numerous minority individuals.

The Administrative Law Judge thus finds that, even if it is assumed for the sake of argument that the Complainant demonstrated a prima facie case of discrimination with respect to the handling of the race discrimination concerns expressed in his May 21, 1990, memorandum, the Union has articulated legitimate, nondiscriminatory reasons for its handling of the complaint. The Complainant has not shown that these reasons are not true or are otherwise a mere pretext for discrimination. Because there has been no showing that the Union refused to pursue complaints of race discrimination on behalf of members or the Union refused to process members' race discrimination claims despite specific requests to do so, the present case does not resemble the fact patterns involved in Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) or Woods v. Graphic Communications, 925 F.2d 1195 (9th Cir. 1991).

IV. Conclusion

This case presents a very unfortunate situation. The Complainant was discharged after eighteen years of service with NSP. The Complainant admitted during his deposition that he is unable to perform the MHIC duties due to his permanent physical restrictions, yet insists that the MHIC position is the only NSP position to which he will return. His termination could have been avoided if he had taken the Union's advice and returned to work, then grieved the reassignment. The Complainant obviously holds a genuine belief that he has been treated unfairly by the Company and the Union. He has, however, failed to show any convincing evidence of race discrimination other than his subjective belief. This is not sufficient where adequate nondiscriminatory reasons have been presented by the Company and the Union for his treatment and there is no persuasive evidence of pretext. See, e.g., Hornsby v. Conoco, Inc., 777 F.2d 243, 246 (5th Cir. 1985); Winkley v. El Paso Natural Gas, 48 Fair Empl. Prac. Cas. (BNA) 641 (W.D. Tex. 1988). Mr. Mitchell has not established in the record of this proceeding that he was the victim of race discrimination. His claims, therefore, must be dismissed.

B.L.N.

[1] In his charge of discrimination filed with the Human Rights Department and in this contested case proceeding, Mr. Mitchell also alleged that the Union discriminated against him in the representation provided to him in connection with his reassignment from the MHIC position and eventual discharge by NSP. Prior to the hearing, the Union's Motion for Summary Disposition was granted with respect to Mr. Mitchell's allegations relating to his reassignment from the MHIC positon and his ultimate discharge from that position. Ruling Regarding Respondents' Motions for Summary Judgment (Dec. 21, 1993). Mr. Mitchell was found to have raised genuine issues of material fact with respect to his allegations that the

Union had not adequately represented him with respect to various other complaints about his treatment while he was an NSP employee.

[2] The Complainant failed to establish a prima facie case regarding many of his claims of differential treatment. For example, while Mr. Mitchell complained that he was unfairly required to utilize the sign-in and sign-out log, it was clear from the evidence that everyone in the Warehouse was required to use the log, in accordance with the recommendation of an outside consultant. There was no evidence that anyone other than the Complainant failed to use the log. Mr. Mitchell's allegation that the Company discriminated against him by virtue of its failure to have a foreman in the Hazardous Waste Warehouse was also unavailing, since the 1988 Reorganization Agreement did not include a foreman classification in the Warehouse and that there was no foreman before, during, or after Mr. Mitchell's employment. Mr. Mitchell also claimed that he was treated unfairly on the date of his injury when he was required to process waste even though he was the only employee present in the Warehouse who had been specially trained in the handling of hazardous waste. It became evident at the hearing that the staffing of the Hazardous Waste Warehouse has been a matter of disagreement over time between NSP management and the Union employees, with the Union employees generally contending that requiring one person to handle waste is an unsafe practice or violates the permit obtained by the facility. Regardless of the validity of the Complainant's argument that more than one trained individual should have been present in the facility when physical work was being performed, the evidence established that white Hazardous Waste employees have also worked alone on the floor of the facility. T. 1174-76, 1543, 1553. In fact, prior to Mr. Mitchell's employment in the Warehouse, a white Hazardous Waste employee (Robert Wrobleski) was injured when he was ordered to process waste while working alone in the Warehouse. T. 329-30, 611-12. The evidence was also insufficient to establish even a prima facie case with respect to Mr. Mitchell's allegation that he was required to "babysit the office" while Mr. Kolnberger and Ms. Clark went to lunch. Mr. Mitchell admitted that part of his duties included backing people up at lunch. T. 3622. He further testified that Mssrs. Miller and Salmela asked him to stay in the office while Mr. Kolnberger and Ms. Clark went to lunch because they believed that the MHIC should be in the office during the lunch period to handle telephone calls or truck arrivals. T. 3153-55. Mr. Kolnberger testified that Mr. Mitchell was always on a different lunch hour than he prior to joining the Hazardous Waste Department and that Mr. Mitchell wished to carry those hours forward when he became MHIC. T. 1014. There is no evidence that Mr. Mitchell was not precluded from taking his lunch at an earlier or later time, or that the WIC before Mr. Mitchell or the MHICs after Mr. Mitchell were treated differently. Mr. Mitchell also did not establish a prima facie case that he was treated differently with respect to the provision of a QRC after his injury, in light of persuasive evidence that NSP offered the services of its in-house QRC, Jane Clearwaters, within the time frame required by law and that Ms. Clearwaters notified Mr. Mitchell of his right to retain a personal QRC. Further, there was no convincing evidence that Mr. Salmela ordered Mr. Mitchell to switch places with Ms. Clark so that she could do administrative work. Mr. Salmela testified persuasively that he did not interfere with the MHIC choosing the job he was going to perform as long as the work got done. T. 1887-89. Mr. Mitchell's testimony alleging that Mr. Salmela directed him to allow Ms. Clark to come into the office was not credible, particularly in light of Mr. Mitchell's apparent attempt to evade the Union's cross-examination concerning this point. T. 3615-18.

[3] The March 7, 1990, meeting was initially intended by NSP management to be the first formal step in Positive Discipline, but was later treated as a counseling session.

[4] Mr. Salmela did not remind Mr. Mitchell of his right to have a union representative present in all circumstances in which he made a written entry in the employee development record after a coaching/counseling session. This was contrary to NSP's Positive Discipline Policy. There was, however, no evidence that Mr. Salmela treated non-minority employees differently in this regard. Moreover, given Mr. Mitchell's actions while he was employed as a MHIC, it appears that he knew of his right to union representation.

[5] Off-site visits by Hazardous Waste employees are visits to customers who are not internal NSP customers involving travel to property which is not NSP property. T. 481, 3434. These visits are typically made for the purpose of taking samples or picking up hazardous waste. T. 327-28, 423-25. During the

arbitration proceeding and contested case hearing, counsel for the Complainant and witnesses occasionally referred to such jobs as "on-site" jobs. T. 1153, 3433-35, 3439-40.

[6] Mr. Mitchell cannot be faulted for refusing to accept the Investment Recovery Specialist position offered to him in the fall of 1990, since that position was eventually found by Mr. Mitchell's physician not to meet his physical restrictions. There is, however, no evidence that this job was offered to Mr. Mitchell in bad faith; Mr. Miller and the NSP Workers Compensation Department believed the job to be within Mr. Mitchell's restrictions. It appears that Mr. Mitchell's physican simply preferred to have Mr. Mitchell return to the MHIC position which he had decided, based on Mr. Mitchell's view of the position, "required no manual labor whatsoever." Ex. 75.

[7] For example, Mssrs. Wrobleski and Mulloy performed the same job duties and worked on the floor together every day. T. 409, 511, 515-16, 628-33, 675, 705. Mr. Miller observed Mr. Mitchell when he was MHIC doing all the functions that everyone else did in the Hazardous Waste Warehouse, including crushing barrels, sweeping the floors, moving batteries on and off a pallet, pumping oil with the wand, driving the forklift, and putting in floor dry to top off the barrels. In Miller's estimation, at least 75% of Mr. Mitchell's time was spent physically handling and moving material. T. 1418-19. The current MHIC in the Hazardous Waste Warehouse, Connie Clark, works with the Material Handler on the floor doing physical labor. The duties she performs as MHIC have not changed from her duties as Lead Material Handler. T. 1221-23, 1139. The same is true for Mr. Kolnberger with respect to his job duties as Lead Material Handler and MHIC. T. 1035.

[8] As discussed in the Findings of Fact, Mr. Mitchell compared his treatment to that of Kevin Mulloy, Robert Wrobleski, Howard Crone, Richard Cullen, Robert Provost, and Robert Kiehl. He also made vague assertions during the hearing concerning Scott McCracken and Donald Bloomberg, who were Meter Readers at NSP. Mr. Bloomberg suffered from lupus and eventually retired with a medical disability. There is no evidence that either of them suffered work-related injuries such that they filed worker's compensation claims, nor is there evidence that they had permanent physical restrictions that rendered them unable to perform their pre-injury jobs.

[9] Based upon what Mr. Mitchell told him about his MHIC job duties, Mr. Mitchell's prior personal QRC, Mr. Raderstorf, had also determined that the MHIC job responsibilities and Mr. Mitchell's physical restrictions were not compatible due to the lifting and bending involved. T. 4279.

[10] Mr. Russell's testimony included general allegations that, "throughout his employment," i.e., from 1980 to 1986, he and other African-American employees, including Mr. Mitchell, were asked to work jobs that white employees were not asked to work. Specifically, Mr. Russell claimed that they were asked to work with transformers containing PCBs in 1982-83. T. 2054-57. He also alleged that Mr. Mitchell, Jimmy Beard (another African-American employee) and he met with Mike Miller, a African-American employed in the Company's affirmative action department, in 1983 to express their concerns that they were being treated unfairly by being asked to work jobs that no one else was asked to work. Mr. Russell asserted that Mike Miller said that the problem did not exist. T. 2054-57. These allegations, even if true, are too remote in time to be relevant to Mr. Mitchell's complaints about his treatment in the MHIC position in 1988 and, in any event, do not involve Steve Miller or Lyle Salmela or situations that are analogous to those of which Mr. Mitchell complains.

[11] NSP argues in its post-hearing brief at 23-24 that the alleged conversation with Mr. Maki must be disregarded by the Administrative Law Judge as a result of the parties' stipulation that the Complainant's "argument relative to discrimination begins in December of 1988 when he became a MHIC." The Administrative Law Judge does not agree that the stipulation precludes the Judge from considering remarks made by Mr. Miller which arguably suggested that Mr. Miller did not want Mr. Mitchell in the MHIC positon, even though the alleged remarks predated Mr. Mitchell's actual arrival in the MHIC position.

[12] It is evident that a Step 2 grievance was processed on behalf of Mr. Mitchell in December, 1990, regarding his reassignment. After Mr. Mitchell was terminated in January, 1991, this grievance was

expanded to include the discharge issue as well. The Union took the grievance to arbitration and later obtained federal court enforcement of the arbitrator's award in federal court. As noted above, summary judgment was granted to the Union with respect to the adequacy of its representation of the Complainant regarding his reassignment and discharge. The Complainant claims that an earlier Step 2 grievance written by Mr. Mitchell in March 1989 complaining that non-union people were performing Hazardous Waste area duties should not be deemed to have been processed by the Union on behalf of Mr. Mitchell, but rather should be viewed as having been a grievance on behalf of all of the employees of the Hazardous Waste Warehouse. Although the grievance was written for the benefit of all of the employees in Hazardous Waste, Mr. Mitchell was clearly the individual who initiated and wrote up the grievance. The Administrative Law Judge does not agree with the Complainant's view that the March, 1989, Step 2 grievance was not in actuality processed on behalf of Mr. Mitchell.

[13] Mr. Mitchell did not offer any credible evidence that he ever complained to the Union about the failure to upgrade him to foreman. Even if he had complained, there was no foreman classification in the Hazardous Waste Warehouse.

[14] Article II of the collective bargaining agreement specifies a fifteen-day time limit for filing Step 1 grievances. Assuming that Mr. Mitchell's complaint stemmed from the April 24, 1990 meeting, the fifteen-day period had already expired prior to the time that Mr. Mitchell made the Union aware of his concern. However, there was testimony at the hearing that the time limitations set forth in the collective bargaining agreement are flexible between the Company and Union and are subject to waiver by mutual consent.

[15] None of the other attendees at the February and March, 1990, meetings in which Mr. Mitchell was involved supported Mr. Mitchell's claim that he mentioned at those meetings that he was being treated unfairly compared to his white co-workers. Mr. Mitchell's testimony in that regard thus is not believable. The Complainant also argues that he complained of race discrimination in an earlier memorandum sent to the Union dated May 11, 1990, In that memorandum, Mr. Mitchell merely referred to the fact that he considered Mr. Mitchell's call to him at home in May and the issue regarding the vacation or sick day to be "harassment of the cruelest kind." Ex. 14. This can hardly be viewed as adequate to put the Union on notice that Mr. Mitchell was alleging that he was the victim of race discrimination.

[16] In fact, Mr. Mitchell admitted that every time he asked the Union to pursue a grievance, it did so, and every time he filled out a grievance report or directed someone at the Union to pursue a grievance report, it did that also. T. 3630, 3639.

[17] The Judge's assessment of Mr. Russell's credibility was adversely affected by his denial that he had ever spoken with Mr. Ring and his insistence that he had not approved the manner in which the Union and the Company resolved his promotion grievance, despite convincing evidence to the contrary.