

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

WYATT FIELD SERVICE COMPANY

and

CASE 16-CA-26356

CHRISTOPHER GAYTAN, an Individual

*Jamal Allen, Esq.*, for the General Counsel.  
*G. Mark Jodon, Esq.* and *Timothy A. Rybacki, Esq.*,  
for Respondent.

DECISION

Statement of the Case

**MARGARET G. BRAKEBUSCH**, Administrative Law Judge. This charge was filed by Christopher Gaytan (Chris Gaytan), an individual, on August 11, 2008.<sup>1</sup> On December 30, 2008, the Regional Director for Region 16 of the National Labor Relations Board (Board) issued a Complaint and Notice of Hearing based upon the allegations contained in Case 16-CA-26356. The complaint alleges that Wyatt Field Service Company (Respondent) terminated Chris Gaytan and Mark Gaytan on July 25, 2008, because they engaged in concerted protected activities. Respondent filed a timely answer denying the pertinent allegations.

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

Findings of Fact

I. Jurisdiction

Respondent, a Texas corporation, is engaged in business as a heavy mechanical

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<sup>1</sup> All dates are in 2008 unless otherwise indicated.

contractor. During the past fiscal year, Respondent provided services valued in excess of \$50,000 to LyondellBasell Chemical Company (herein Lyondell), an enterprise directly engaged in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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## II. Alleged Unfair Labor Practices

### A. Background

10 As a heavy mechanical contractor, Respondent provides maintenance turn-around services for the petroleum refinery industry. In March 2008, Respondent began preparation for a “maintenance turnaround” that was scheduled to begin on or about July 20 or 21, 2008, at the Lyondell refinery in Pasadena, Texas. A turnaround is a procedure in the refining industry wherein the refining process is temporarily shut down in order that particular  
15 components in a processing unit can be repaired or replaced. Before the repair or replacement begins, the unit is shut down for a few days and the unit is made safe to operate for the employees performing the turnaround.

20 The maintenance turnaround was scheduled for Lyondell’s coker unit, a unit that is used near the end of the oil distillation process. The coker units produce coke; a charcoal-like substance. The Lyondell coker unit includes four coker drums measuring 24 feet in diameter and approximately 80 feet tangent to tangent. Altogether, the coke drums are approximately 120 feet in total overall height. Situated on top of each drum is a derrick that operates the drill stems that cut the coke inside the coke drum. The derricks measure as much as 220 feet  
25 from grade. The drums are large cylinders with a cone at the bottom that allows the coke to transfer from the drum to rail cars. Respondent contracted with Lyondell to remove the derricks from the top of the coke drum, cut the bottom portion (cone and skirt) from the drums, remove the upper sections of the drums, and then position them on newer lower sections that Respondent had already assembled. In order to replace the cones and skirts of  
30 the drums, Respondent planned to lift the derricks and the platform on which they rested in one lift. The structure to be lifted was approximately 40 feet wide, 120 feet long and 150 feet tall. The total lift was expected to weigh approximately 1.1 million pounds. The removal of the derricks and the removal and replacement of the cones and skirts for the drums required crews of riggers and operators who utilized specific construction cranes that could  
35 accommodate the specialized lifting and moving process.

40 While an operator is responsible for operating the specific crane, a rigger is the ground man for the crane. Using various apparatus, the riggers attach the objects to be lifted by the crane and then direct and guide the operators through the transport process.

45 Approximately nine months before the scheduled turnaround, Respondent reserved the TC-36000 crane from Deep South, a company that provides crane and rigging equipment. Approximately 240 tractor-trailer loads were required to transport the Deep South crane to the Lyondell facility. The size of the crane required approximately two and one-half to four weeks for its assembly. Respondent planned to use the Deep South crane to lift the entire derrick structure in one lift and to then lift the coker drum in one lift as well.

Thomas Turnbull (Turnbull) was Respondent’s Project Manager for the maintenance turnaround at Lyondell and Johnny Edward Shumate (Shumate) was Respondent’s General Construction Superintendant. Kenneth Juneau (Juneau) worked on the Lyondell project as Rigging Foreman. Respondent also employed James Jernigan (Jernigan) as a General Foreman and Steven Patrick Tackaberry (Tackaberry) as Senior Safety Supervisor.

**B. The Beginning of the Turnaround Project and the Hiring of Chris and Mark Gaytan**

On July 7, 2008, Respondent hired brothers Chris and Mark Gaytan as riggers on the Lyondell project. Both of the Gaytan brothers previously worked for Respondent on other jobs. Chris Gaytan first worked for Respondent as a boilermaker on a turnaround in Corpus Christi, Texas, in 2006. Mark Gaytan worked for Respondent on three previous jobsites beginning in 2003. When Mark Gaytan was employed on Respondent’s Corpus Christi turnaround, he was Respondent’s rigging foreman. There was no evidence that either Chris Gaytan or Mark Gaytan left their previous employment with Respondent for any reason other than the completion of the projects for which they were hired.

Juneau supervised both Gaytans on the Lyondell project. Juneau’s crew consisted of approximately seven to eight riggers and four operators. In addition to the Deep South crane that was scheduled for use, Juneau’s crew used a variety of other cranes including, a rough terrain 75-ton crane, a Galion 15-ton crane, and a Drott carrydeck crane. The crew additionally used an 888 crane that was leased to Respondent from a company identified as Essex.

**C. The Discovery of the “Bird Nest”**

The cables that are used in the operation of a crane are required to be wound tightly around a drum. A “bird nest” is a rigging term to describe loose cable that is not wrapped tightly underneath the cable wraps. Because the underlying cable is loose or slack, there is the potential for the load to shift or drop unexpectedly during the lift. If the load is heavy enough, the rig’s shock-load may even break the cable. The bird nest is repaired by simply stretching out the cable from the drum until the cable is straightened, and then rewinding the cable around drum. On July 9, 2008, Mark and Chris Gaytan discovered a bird nest in the drum of the 888 crane and reported it to Juneau. Because the bird nest was discovered late in the day on July 9, 2008, the riggers did not begin the repair until the following day.

**D. The Discovery of the “Bird Cage”**

On Thursday, July 10, 2008, the employees began the process of booming down the crane and stretching out the cable in order to repair the bird nest. Both Mark Gaytan and Chris Gaytan testified that in the course of doing so, they discovered that the cable had a “bird cage” in addition to the bird nest. Respondent’s Vice President of Engineering; Michael Norton identified the National Center for Construction Education and Research (NCCER) as an organization that not only provides training for various crafts, but also provides certification tests for rigging fundamentals. Respondent’s Senior Safety Supervisor Steven

Tackaberry acknowledges that the NCCER manual is one of the authoritative sources for rigging. The NCCER manual describes “bird caging” as damage that occurs “when a load is released too quickly and the strands are pulled or bounced away from the supporting core. The wires in the strands cannot compensate for the change in stress level by adjusting inside the strands. The built-up stress then finds its own release out through the strands.” The manual provides that any sign of bird caging is “cause to remove the rope from service immediately.” Mark Gaytan testified that while a bird nest is a safety issue, there is a simple fix. The problem can be corrected by simply pulling out the cable and then rewinding. With a bird cage, however, there is actually damage to the cable that requires replacement of the cable.

After reporting the bird cage to Juneau, it was Chris and Mark Gaytan’s understanding that a representative from Essex would come to the job site to inspect and replace the cable. Although the boom of the 888 crane was down for the remainder of the day, no one from Essex came to the job site. At the end of the day, Superintendent Shumate radioed Juneau and told him to roll back the cable. At Juneau’s direction, the employees boomed up the crane and re-wound the cable. In rewinding the cable tightly, the bird nest was repaired. Chris Gaytan testified that the bird cage, however, remained buried underneath the wound cable.

On Friday, July 11, 2008, Chris Gaytan was again assigned to the 888 crane. Shumate instructed Juneau to use the crane to lift a skid pan. Although Chris Gaytan questioned the safety of using the 888 crane for the lift, Juneau responded: “Well, I’m just doing what I’m told, you know.” The 888 crane was used for the skid pan lift and for other lifts until late into the following week. The following week, the 888 crane was scheduled to lift two 19,000 pound compressors. Chris Gaytan testified that the maximum lift for the crane was only 26,000 pounds, even with a cable in good condition. On Wednesday, July 16, Gaytan discussed his concerns about using the crane’s damaged cable with fellow rigger Jose Rodriguez. During the conversation, Rodriguez mentioned that he was familiar with a safety inspector with CDI Engineering; a third party firm that conducted safety inspections at the Lyondell facility. Gaytan and Rodriguez agreed that they needed a third party to come in and evaluate the situation with the 888 crane. The following morning, Rodriguez told the Gaytan brothers and other members of the crew that the CDI Engineering inspector had “red-tagged” the crane and shut it down the previous evening because of the condition of the cable. During a regular safety meeting later that morning, Safety Supervisor Tackaberry confirmed that the crane was shut down for repair. Mark Gaytan testified that twice during the course of the morning, Juneau talked with the employees about the inspection and the shut down of the crane. In one conversation, he made the comment: “they found us out” ... and in a later conversation, he commented: “They caught on to us; they caught on to the cable; they shut us down, so now we’re going to have to go and fix it.”

Later that same morning, the day shift inspector for CDI Engineering also inspected the 888 crane cable. Both Gaytan brothers testified that upon inspecting the condition of the cable, the inspector cursed and questioned how long Respondent had been operating the crane in such condition. When the employees told him that they had been operating the crane in this condition since the previous week, the inspector appeared “upset” and instructed Juneau to contact Essex about repairing the cable. The inspector opined that the approximate cost of

repair would be \$10,000. When Essex again failed to come out to the site, Shumate ordered Juneau to repair the cable without further waiting. The rigging crew pulled all of the cable from the drum and Chris Gaytan cut out the damaged portion of the cable. The undamaged cable was then re-spoiled.

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### **E. The Deep South Crane Collapse**

On July 18, 2008, and only one day after the repair of the 888 crane cable, the Deep South TC-36000 crane collapsed. Four employees of Deep South were killed in the accident and seven other employees were injured. All of the maintenance turnaround activities were suspended for the remainder of the day. The turnaround operation was closed during the weekend following the crane collapse. Respondent’s employees reported back to work on Monday, July 21, 2008, only to attend a safety meeting in the morning. On Wednesday, July 23, 2008, employees finally returned to work. During the afternoon, employees were transported by vans from the coker unit to meet with grief counselors provided by Lyondell. Later in the afternoon, Respondent held a meeting for its employees in the lunch tent. At that point in the day, Respondent was the only contractor with employees on the site. The other contractors had already sent their employees home for the day.

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### **F. The July 23, 2008 Safety Meeting**

Senior Safety Supervisor Tackaberry began the meeting by telling employees that Respondent had received complaints about the Lyondell grief counselors. Respondent’s corporate safety official; Danny Vara, told employees that Respondent would bring in their own grief counselors for the employees. Vara went on to tell employees that while the crane collapse was a tragedy, they needed to remain focused. Vara urged the employees to bear with the situation and to stay focused. Chris Gaytan recalled Vara telling employees that ultimately the turnaround would be accomplished and they were all there to make money. Chris Gaytan spoke up and questioned how employees could “make money” and remain focused with the distraction of the fallen crane that remained on the job site. Tackaberry took the microphone and told employees that Respondent was there for the employees. He went on to state that if any craftsmen on the job site had a problem with safety concerns; they could stop a job or an unsafe act. Tackaberry assured the employees: “Let us know, and we’ll make it happen.”

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At that point in the meeting, Chris Gaytan stood up and introduced himself. He explained that he was a rigger on the 888 crane. Gaytan stated that he disagreed with Tackaberry’s comment. Gaytan explained that only a week prior to the collapse of the Deep South crane, a major problem was found with the 888 crane. He described how the employees had first found the bird nest and then discovered the bird cage. He recounted that after he initially reported the problem to his foreman, the matter had gone all the way to Superintendent Johnny Shumate. Gaytan explained that while a bird cage requires cable repair, the cable was not repaired. Gaytan told the employees that he had found a safety issue and brought it to the attention of his supervisor. When supervision ignored the report, he had continued to run the crane in that condition, putting everyone’s lives in danger. Gaytan told the employees that he wanted to apologize to every single one of them because he had

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“compromised their lives.” Gaytan commented on the fact that Respondent had a policy of zero tolerance for employees’ failure to take safety precautions. Gaytan recalled that he told employees:

5                    Now, here it is with the cable. Okay? And it should have been removed from service, and it got overrode by the project superintendent. As far as I’m concerned, he put everybody’s life in that radius of the crane in danger, everybody in the radius of that — you talk about this crane, you know, 2- or 300-foot boom. It can go any side of — anywhere on the coker, you know.

10                    Gaytan recalled that he asked: “Where’s the zero tolerance in that?” Gaytan went on to state that the crane had not been shut down until he and another rigger reported it to the third party inspection company. Mark Gaytan testified that his brother did not identify Rodriguez as the rigger who made contact with CDI Engineering. Another employee in the meeting asked  
15                    about the cable’s condition with respect to OSHA standards and inquired about the operator’s opinion on the cable. Gaytan countered that while the operator had not inspected the cable, the riggers had seen the condition of the cable. Gaytan then asked all of the riggers who had seen the damaged cable to stand. Only Mark Gaytan and Jose Rodriguez stood. Three of the other riggers who had witnessed the cable declined to stand. Gaytan asked his brother and  
20                    Rodriguez if they had seen the cable. Mark Gaytan replied that the cable had been damaged and should not have been used in that condition. There is no evidence that Rodriguez said anything in response to Gaytan’s comment.

25                    A foreman who is identified only as “Jack,” insisted that Gaytan could have stopped the use of the cable. Chris Gaytan responded by asserting that he had followed the chain of command; with the matter going first to his foreman and then to the superintendent. Gaytan asked the foreman what else he could have done, short of tying himself to the crane. Chris Gaytan recalled that the meeting was becoming “pretty heated.” Danny Vara interjected that the issue with the cable had been addressed and that it was “perfectly fine” to operate. Chris  
30                    Gaytan responded that Vara had not seen the cable. He asked Vara if he would operate a crane with a bird-caged cable that was severely crushed, kinked, and containing broken strands. Before Vara responded, Juneau stood up and asserted that under OSHA standards, a crane is safe to operate as long as there are at least three to four good wraps of cable around the drum. At that point in the meeting, Respondent’s Piping Superintendent Fred Lopez took  
35                    the microphone and introduced himself. During his remarks, he stated that he wanted to meet with the “two riggers” after the meeting; referencing Chris and Mark Gaytan.

40                    After the conclusion of the meeting, Lopez met with the Gaytan brothers and asked them additional questions about what had occurred with the 888 crane. When Chris Gaytan returned home that evening, he used his personal computer to check OSHA’s inspection criteria for cranes and derricks. Gaytan found a section in the regulations pertaining to the removal of service for a bird-caged cable. He printed the information and took it with him to work the following day. Gaytan attempted to give the printed materials to Juneau; telling him that the materials documented what he had been saying about the bird cage. Juneau refused to  
45                    accept the materials stating that he knew that it was a “messed-up deal” and that he had simply done what he had been told to do.

## G. The Layoff of Chris and Mark Gaytan

5 On Friday, July 25, 2008, the riggers met with Juneau for their toolbox safety meeting. During the meeting, Juneau told the riggers that he did not want them to start looking for other jobs and explained that Respondent had a “plan B” to complete the turnaround without the use of the Deep South crane. Juneau told the riggers that “plan B” involved removing the steel from the top deck above the coker drums in order that the drum could be raised. The cones would then be cut in place and bull-rigged from the bottom.

10 Mark and Chris Gaytan worked a full day on July 25, 2008. Toward the end of the shift, Juneau approached Mark Gaytan and asked Gaytan which day he and his brother planned to take off over the weekend. When Mark Gaytan confirmed that he and his brother would take off Saturday, Juneau responded that he would then take off Sunday. Mark Gaytan testified that because of his past supervisory experience, Juneau depended upon him to take care of things in his absence.

20 After his conversation with Juneau, Mark Gaytan began talking with employees Abe Ramos and Mark Moreno. As he was speaking with these employees, he saw General Foreman James Jernigan approach Juneau. After speaking with Jernigan, Juneau called Mark Gaytan away from the other employees. Juneau told Gaytan: “Mark, you know how much I like you and your brother, but they’re telling me that I’ve got to let you go.” Juneau went on to state that he had been told that he had to lay off the Gaytans because of the Deep South crane collapse and Respondent’s decision to cut back on riggers. Mark Gaytan testified that he initially thought that Juneau was joking. Juneau explained to Gaytan however, that he was serious and that he had to let Gaytan and his brother go. Mark Gaytan then asked Juneau if he had to cut back on riggers, why not layoff Daryl Cheney who had the least rigging experience. Gaytan also suggested that he could layoff Mark Moreno who had problems with absenteeism and tardiness and who planned to quit the following Monday. Juneau simply responded: 30 “This is above me, I’m sorry. I want you to know I have nothing to do with this.”

## III. Factual and Legal Conclusions

### A. Applicable Case Authority

35 Section 7 of the Act guarantees employees “the right to self-organization, to form, or assist labor organizations and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978). The Board has long held that an employer violates Section 8(a)(1) of the Act by terminating the employment of an employee because the employee engaged in protected concerted activity. *Rinke Pontiac Co.*, 216 NLRB 239, 241, (1975). Counsel for the General Counsel asserts that Respondent selected Chris Gaytan and Mark Gaytan for layoff because of their protected, concerted 45 activity of complaining about the safety conditions of Respondent’s 888 crane and in doing so Respondent violated Section 8(a)(1) of the Act.

In order to demonstrate a violation, General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that protected concerted activity was a motivating factor in Respondent’s decision to lay off Chris and Mark Gaytan.

5 A prima facie case of discrimination is established where it is found that: (1) the employee engaged in protected concerted activities; (2) the employer possessed knowledge or a suspicion of that protected activity; (3) the employer imposed some kind of adverse action toward the employee; and (4) the employer possessed some animus toward the employee for having engaged in such protected activity. *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286, 1294 (2005). The Board initially set out this criteria in its decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

### B. Whether Chris and Mark Gaytan Engaged in Protected Concerted Activity

15 In applying the *Wright Line* analysis, the first prong of the test is a determination of whether the Gaytan brothers engaged in protected concerted activity. In its earlier decisions in what has become known as *Meyers I* and *Meyers II*,<sup>2</sup> the Board defined when an individual engages in concerted activity for other mutual aid or protection. In order for an employee’s activity to be concerted, the employee must be engaged in, with, or on behalf of, other employees, and not acting solely by, or on behalf of the employee himself. *Meyers Industries*, 268 NLRB at 497. The Board’s definition of protected concerted activity also includes an individual activity where, “individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries*, 281 NLRB at 887. There is no dispute that Chris

20 Gaytan openly spoke out in the safety meeting on July 23, 2008. The other employees listened as he told management how he had been required to operate a crane that he felt was unsafe because of the bird cage in the cable. He apologized to the other employees for putting their safety at risk. While Chris Gaytan gave the more lengthy discussion about the crane’s safety issues, Mark Gaytan joined with him in confirming the condition of the cable and its need for repair. As Counsel for the General Counsel points out in his brief, Chris Gaytan

25 referenced the safety of every employee who was working within the radius of the 888 crane. Gaytan’s comments were made at an employee meeting that was held specifically to address employee concerns about safety and in the aftermath of a crane collapse that had killed and injured other employees on this same job site. Clearly, Gaytan’s complaint about

30 Respondent’s failure to respond to safety concerns affected all of Respondent’s employees.

Respondent asserts that the cable of the 888 crane was not damaged to the extent argued by Gaytan in the July 23, 2008, meeting. There is, in fact, a good deal of record testimony by Respondent’s supervisors concerning their efforts to determine the extent of

40 damage and their efforts to verify that the crane was still safe to operate after the initial discovery of the cable flaw on July 9, 2008. While Chris Gaytan’s description of the damaged cable was corroborated by the testimony of Mark Gaytan and fellow employee Mark Moreno, protection would not be denied to him even if he were mistaken about the condition

45 <sup>2</sup> *Meyers Industries*, 268 NLRB 493, 497 (1984) and *Meyers Industries*, 281 NLRB 882 (1986).

of the cable. *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995). An employee’s mistaken belief about his rights under the terms and conditions of his employment does not invalidate the protected nature of concerted activity involving those rights. *JMC Transport*, 272 NLRB 545, fn. 11 (1984). Additionally, employees do not lose the protection of the Act, even when they base their accusations on information that may not be accurate or complete. *Tyler Business Services*, 256 NLRB 567, 568 (1981), enfd. denied on other grounds, 680 F.2d 338 (4<sup>th</sup> Cir. 1982). The truth or falsity of a communication is immaterial and it is not the test of whether the action is protected. *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 fn. 12 (1982), affirmed 742 F.2d 1438 (1993). The total record evidence demonstrates that even if the cable did not have the extent of damage as described by Gaytan in the July 23, 2008, meeting, Gaytan believed that employee safety was endangered and that employees were at risk for using the cable in such condition. Accordingly, I find that both Mark Gaytan and Chris Gaytan were engaged in protected concerted activity when they talked about their safety concerns during the July 23, 2008, meeting.

**C. Respondent’s Knowledge of the Gaytans’ Participation in the Meeting**

The record reflects that supervisors Juneau, Tackaberry, Jernigan, Vara, and Lopez were all in attendance at the meeting on July 23, 2008. There is no dispute that Chris Gaytan’s comments were made in direct response to statements made by Tackaberry and Vara. While Project Manager Turnbull was not present for the meeting, he was informed of Chris and Mark Gaytan’s comments concerning the safety of the cable for crane 888. General Superintendent Shumate testified that both foreman Jernigan and Piping Superintendent Lopez informed him of what occurred in the meeting and told him that the Gaytans raised questions concerning alleged safety violations involving the 888 crane. Thus, there is no dispute that Respondent was fully aware of the protected concerted activity engaged in by Mark and Chris Gaytan.

**D. The Link between the Layoff and the Employees’ Protected Concerted Activity.**

Overall there is no dispute that Chris and Mark Gaytan spoke out in the safety meeting about the safety of the 888 crane cable. Inasmuch as their comments were made within days of the fatal collapse of the Deep South crane, there is little doubt that their concerns and complaints had an impact upon Respondent’s management. Respondent argues, however, that the General Counsel has not carried its burden of proof to establish a prima facie case under the Board’s *Wright Line* analysis. Respondent contends that the General Counsel has not demonstrated that there was a motivational link or nexus between the employees’ protected activity and their layoff. Respondent submits that none of supervisors responsible for their layoff admitted that the Gaytans’ comments in the July 23, 2008, meeting played a role in the decision to select them for layoff.

Respondent argues that the only basis for the General Counsel to argue that there is a causal link between the Gaytans’ criticism of the Respondent at the July 23, 2008, meeting and their layoff on July 25, 2008, is the temporal proximity or the timing between the two events. Respondent submits, however, that the timing of the layoffs is not significant arguing that “all events in this case occurred in a very compressed and compact time period.”

Respondent contends that with the collapse of the Deep South crane and with OSHA’s temporary shutdown of the 888 crane, Respondent needed five to six fewer riggers on the job site as of July 25, 2008. General Counsel, however, argues that the Gaytans made their concerted complaints at the company meeting on July 23, and two days later they were laid  
5 off without any advance notice. Counsel for the General Counsel submits that such evidence supports an inference of animus based on the close nexus of the timing of the two events. The overall evidence supports General Counsel’s argument. While Respondent contends that five to six fewer riggers were needed on July 25, 2008, Respondent did not layoff five or six riggers. Respondent laid off only the Gaytan brothers; the two employees who had accused  
10 Respondent of ignoring safety concerns in the July 23, 2008, meeting. Thus, while Respondent maintains that the timing of their layoff was merely coincidental, I find that the layoff within 48 hours of their protected concerted activity is significant in demonstrating Respondent’s animus. *Southern Alleghenies Disposal Services*, 256 NLRB 852, 853 (1981).

15 Respondent additionally argues that Rodriguez also engaged in protected concerted activity and yet he was not laid off. There is, however, only one action by Rodriguez that could be argued as known protected concerted activity. During Chris Gaytan’s comments in the meeting, Gaytan asked the riggers to stand if they had seen the damaged cable. Only Rodriguez stood in addition to Mark and Chris Gaytan. The other riggers had either not been  
20 present to see the cable or declined to stand at Gaytan’s request. There is no evidence that Rodriguez did anything else in the July 23, 2008, meeting other than to stand when Gaytan asked his question. Respondent also asserts that it was Rodriguez who complained to the CDI Engineering inspector and brought about the shutdown of the 888 crane. While there is no dispute that Rodriguez did so, there is no evidence that Respondent was aware of his having  
25 done so at time of the layoff. In his critical comments about Respondent and the safety risk of the cable on July 23, 2008, Gaytan simply referred to contacting the CDI Engineering inspector along with “another rigger.” There is no evidence that Chris Gaytan or anyone else identified Rodriguez as “the other rigger” in the July 23, 2008, meeting.

30 Respondent also points to Chris Gaytan’s testimony concerning Superintendent Lopez to demonstrate Respondent’s lack of animus. There is no dispute that following the July 23, 2008, meeting, Lopez asked to speak with Mark and Chris Gaytan to find out more about their safety concerns. While Lopez did not testify, both Gaytan brothers described Lopez’s response as interested and concerned. Respondent argues that as a superintendent, Lopez was  
35 at the same supervisory level as Shumate and thus his sympathetic response undermines General Counsel’s theory of Respondent animus. While it is apparent that there was an interested and perhaps sympathetic response from Lopez, there is also no evidence that Lopez had any involvement whatsoever in the decision to lay off riggers or in the selection of riggers for layoff.  
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Respondent additionally argues that General Counsel’s theory of discriminatory selection for layoff is undermined by the fact that Chris and Mark Gaytan “engaged in the same type of conduct on two occasions prior to the July 23 tent meeting without being subject to any adverse action for their behavior.” Specifically, Respondent asserts that the Gaytans  
45 engaged in “similar concerted activity” regarding safety issues on July 9 and July 14 without any negative repercussions. The record, however, reflects a pronounced distinction in the

conduct of the Gaytans on July 23, 2008, as compared to their conduct on July 9 and July 14, 2008.

5 Respondent asserts that while Mark Gaytan testified that he and his brother discovered the kinked cable for the 888 crane on July 9, 2008, and brought it to Juneau’s attention, no adverse action was taken against these employees for reporting the kink in the cable. In contrast to Respondent’s argument, however, Shumate testified that he first learned of the kink from the crane operator. Shumate asserted that based upon this report, he inspected the cable, photographed the cable, and consulted with Essex about the safety of the cable. Mark  
10 Moreno testified that all of the riggers dealing with the 888 crane complained about the condition of the cable. Thus, Mark and Chris Gaytan were among numerous individuals who voiced concerns and were involved in the repair of the cable. The fact that they were not disciplined for reporting the kink in the cable on July 9, 2008, is not significant.

15 On July 14, 2008, the crane was taken out of service to repair the kink in the cable. Respondent did so after the CDI Engineering nighttime inspector examined the cable and determined that it could not be used without repair. Respondent argues that Chris and Mark Gaytan were not disciplined for “their role” in having the 888 crane taken out of service for repair. There was, however, no evidence that on July 14, 2008, Respondent had any  
20 knowledge of Chris and Mark Gaytan’s involvement in requesting the CDI Engineering inspection. Shumate specifically testified that he did not know who requested the inspection. From Shumate’s testimony, it is apparent that it was only after Chris Gaytan spoke out in the July 23, 2008, meeting that Respondent became aware that Chris Gaytan (and another unnamed rigger) took responsibility for causing the inspection. Thus, the record does not reflect that Respondent was aware that Chris and Mark Gaytan engaged in similar conduct on  
25 July 9 and July 14.

The significant events in this case are relatively straightforward. There is no evidence of threats, intimidation, or other direct evidence of animus. The Board, however, has found  
30 that inferences of animus and discriminatory motive may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense and the failure to adequately investigate alleged misconduct all support such inferences. *Washington Nursing Home*, 321 NLRB 366, 375 (1996). Interestingly, in this case, there is evidence of suspicious timing, a failure to investigate  
35 alleged misconduct, and a pretextual reason given for selecting the Gaytans for the July 25, 2008, layoff.

As discussed above, the record evidence reveals that it was only after the July 23, 2008, meeting that Respondent became aware of Chris Gaytan’s involvement in bringing  
40 about the CDI Engineering inspection. This knowledge may have been especially disturbing when it was followed by the Gaytans’ accusations that by continuing to operate the 888 crane, Respondent had endangered employee lives. Such a public accusation had even more effect when made so close in time to the employee deaths resulting from the Deep South crane collapse. Within 48 hours, both Gaytans were laid off. Thus, the suspicious timing is an  
45 important factor in this case.

Counsel for the General Counsel also points out that Respondent provided false reasons for selecting the Gaytans for layoff. In Respondent’s statement of position given during the investigation of the unfair labor practice charge, Respondent asserted that Chris and Mark Gaytan were selected for layoff because they had recent safety violations at the Lyondell refinery. In the statement, Respondent contends that on their first day on the job, they received documented verbal warnings regarding the need to have with them specific personal protective equipment upon entering the facility. Respondent’s Project Manager Thomas Turnbull admitted in his testimony, however, that the documents that were alleged to be verbal warnings to Chris and Mark Gaytan were actually not discipline at all. The documents were simply counseling sheets that all riggers had to complete on their first day of employment.

Additionally, in its position statement, Respondent also contended that the Gaytans were selected for layoff because they were involved in a “near miss” incident that occurred on July 12, 2008. The incident report accompanying the position statement cites both Mark and Chris Gaytan as the riggers who were assigned to transport a piece of 70 foot pipe over the pipe rack and toward the west side of the Coker structure. The report documents that in the process of the pipe transport, the pipe came into contact with the elevator tower. There was no equipment damage and there is no evidence that any discipline was issued to the employees. The only corrective action documented in the report was a “safety stand down” with the riggers in which the riggers were told that they must have control of the load at all times when swinging something as big as the pipe they were transporting.

In a pre-trial affidavit, Shumate testified that he personally spoke with Mark and Chris Gaytan about the July 12, 2008, incident. In his testimony at hearing, however, Shumate admitted that he had not spoken with Mark Gaytan about the incident because Mark Gaytan was not even at work in July 12, 2008. Shumate admitted that the employees involved in the “near miss” incident had been Chris Gaytan and Mark Moreno; another rigger. Thus, the safety violations upon which Respondent relies for the selection for layoff were shown to be erroneous. Thus, contrary to Respondent’s assertions, Mark and Chris Gaytan received no disciplinary warning on their first day of employment. Additionally, both brothers were not involved in the incident on July 12, 2008. Although Chris Gaytan was one of the riggers involved, his brother was not. Respondent’s effort to blame both Gaytans and no other employees for this incident is suspect and an apparent attempt to legitimize their selection for layoff. It is well settled that, where an employer’s asserted reason for an adverse action is false, an inference may be drawn that the true motive is an unlawful one that the employer is attempting to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966). Thus, Respondent proffered both the incident of July 12, 2008, and also the alleged disciplinary warnings of July 7, 2008, as a basis for their layoff selection. Respondent’s information concerning both these incidents proved to be false.

In the pre-hearing position statement, Respondent also alleged that on July 24, 2008, Christopher Gaytan “entered a tent, shouted that another crane was falling and then ran out of the tent.” Respondent submits that such conduct caused panic and was unacceptable. Construction Superintendent Shumate testified that he had heard about the tent incident from either Rigging Foreman Juneau or General Foremen Jernigan. He had not been present at the

time. He also acknowledged, however, that he had already decided to layoff Christopher Gaytan before hearing about the incident. Juneau did not observe Gaytan’s alleged conduct. He testified that employee Cynthia Shaw pointed toward Gaytan and made the statement: “That guy over there come in hollering that the boom was falling.” Juneau could not recall what occurred prior to her making the statement to him. There is no evidence that Juneau spoke with Gaytan or any other employees to verify Shaw’s statement or to obtain any additional information. General Foreman Jernigan testified that an employee whose first name was Cynthia told him: “That crazy fool come in there and said that the rig was falling. Can you believe that?” Jernigan recalled that when he asked her who she meant by “crazy fool,” she had said “Chris.”

Employee Charlyn Williams was sitting in the lunch tent with a number of other employees at the time of the alleged incident. She recalled that a fellow employee, who was sitting with her, received a text message concerning the collapse of a crane in Oklahoma. Williams testified that as she was reading the text, employee Cynthia Shaw made the statement that something had happened. When Williams looked up from the text, she saw Chris Gaytan walk out of the tent with Jose Rodriguez. Williams testified that Shaw suggested that they go outside to see what had happened. The group of four to five employees who were sitting together walked outside. Williams recalled that it had been Shaw who told the group of employees that a crane had fallen. Williams testified that this was upsetting to her because she had also witnessed the collapse of the Deep South crane. When she began to panic, someone in the group of employees assured her that the crane had not fallen and that employees were simply working on the crane’s boom. Williams recalled that when the employees returned to the lunch tent, there were other employees sitting in the lunch tent who had never left.

Chris Gaytan recalled that he had been sitting in the lunch tent with Jose Rodriguez when employee Lettie Gomez brought over her cell phone with the text message about the collapse of the Oklahoma crane. After showing him the text message, Gomez joined a group of employees who were sitting approximately 12 feet away. After Gomez left the table, employee Rick Martinez entered the lunch tent and joined Gaytan and Rodriguez. Martinez told them: ‘Man, I don’t know what’s up with the job; man, its cursed or something.’ When Gaytan asked what he was talking about, Martinez told them that the 500-ton Turner crane had a problem with the hydraulic cylinder and the boom had been lowered to the ground. He told them to go outside and check it out for themselves. Gaytan and Rodriguez walked out of the tent, followed by Williams, Shaw, and other employees who worked with them. Gaytan estimated that when they left the tent, approximately 30 or 40 people remained in the tent. Gaytan testified that when Shaw walked out of the tent and looked toward the crane being repaired, she stated: “See, I told you; it happens in threes.” When Williams asked Shaw what happened, Shaw told her: “The crane fell; you don’t see?” Gaytan recalled that Williams then became hysterical. Gaytan recalled that he went over to Williams and told her to calm down. He told her that the crane had not fallen; the boom was simply lowered to the ground. Gaytan recalled that he and Rodriguez then returned to the lunch tent and nothing else occurred.

Gaytan testified that after he finished work on July 25, 2008, he went to the lunch tent to wait for the bus to take him to the parking lot. As he was waiting in the tent, someone from

Respondent’s safety department, who was identified only as Johnathan, joined him. Johnathan told him that he had been instructed to ask Gaytan about an incident occurring the previous day and involving a discussion about a crane falling. Gaytan explained what occurred the previous day and he described his discussions with Gomez, Martinez, Shaw, and Williams. After Gaytan described the incident, Johnathan told him that his explanation made sense. He did not ask Gaytan to give him a written statement and he took no notes during the conversation.

There was no evidence that any other inquiries were made of Gaytan or of any other employees concerning this incident prior to Gaytan’s layoff on July 25, 2008. Williams testified, however, that a couple of weeks after Gaytan’s layoff, she was approached by Safety Manager Tackaberry and asked to give a statement about the incident. Williams testified that she told Tackaberry that she never heard Gaytan say anything about the crane falling. She recalled that Tackaberry responded by stating: “Maybe by the time you write, you’ll remember something.” Later the safety official identified as Johnathan asked her to draft a statement concerning the incident. Her written statement was consistent with the testimony given at hearing. Her written statement confirmed that it had been Shaw who stated that the crane had fallen.

Counsel for the General Counsel argues that Respondent did not conduct a complete and thorough investigation of this incident as no statement was obtained from Gaytan and the only statement obtained from Williams was written after Gaytan’s layoff. Respondent attached a copy of Williams’ statement to its August 26, 2008, statement of position. Additionally attached to Respondent’s position statement were hand-written accounts that were alleged to have been written by employees Cynthia Shaw and Michael Waldon. While both Shaw and Waldon assert in their statements that a man came into the tent and reported that a crane had fallen, neither Shaw nor Waldon identify the individual as Gaytan. Waldon’s statement is not dated; however, Shaw’s statement is dated July 15, 2008. While Respondent included these statements and referenced the incident in its position statement, there is no record evidence that Respondent investigated the incident beyond Johnathan’s discussion with Gaytan that occurred only minutes before Gaytan learned of his layoff. Even the investigation that was conducted after Gaytan’s layoff did not substantiate that Gaytan made the comment that Respondent alleges. Based upon the written statements of Williams, Shaw, and Waldon, any such statement could just as easily have been made by Martinez or another employee. It is apparent that any investigation by Respondent was conducted after Gaytan’s layoff and it was undertaken only to justify its reason for his layoff. It is also significant that Respondent did not call Shaw, Waldon, or any other employee or supervisor to testify that they specifically heard Gaytan make this comment to employees as alleged. Rigging Foreman Juneau was the only supervisor who claimed to have been in the area during the time that the alleged statement was made. Juneau testified that he had been outside the tent and Shaw had approached him, pointed to Gaytan, and asserted that Gaytan had told her that the rig was falling. Juneau testified that he didn’t know what brought about Shaw’s comments to him. Juneau admitted, however, that he did not say anything to Gaytan to verify or follow-up Shaw’s statement and he made no notes concerning the incident. When asked on cross-examination why he said nothing to Gaytan if Gaytan had engaged in such brazen or crass conduct, Juneau replied: “Have you ever had that feeling that you just don’t want to talk to

somebody sometimes?” General Foreman Jernigan confirmed that he had not been present when the statement was allegedly made by Gaytan. Jernigan recalled that he arrived at the lunch tent shortly after the incident occurred. He testified that Shaw reported to him that Gaytan made the comment about the fallen crane. Jernigan recalled that he could not believe  
 5 that Gaytan or any other employee would have made such a comment especially in light of the recent Deep South crane collapse. Jernigan admitted however, that he never said anything to Gaytan to inquire as to whether he made such a statement.

The argument may be made that the Respondent viewed the alleged statement by  
 10 Gaytan to be serious inasmuch as the accompanying employee statements were included with Respondent’s position statement to the Region. The evidence, however, reflects that no significant investigation was conducted prior to Gaytan’s layoff. The only investigation of any significance occurred after Gaytan’s layoff and in the course of responding to the unfair labor practice charge. It is well settled that an employer’s failure to conduct a meaningful  
 15 investigation of the alleged wrongdoing of the employee under scrutiny is a factor that indicates discriminatory intent. *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

Based upon the record as a whole, I find that Counsel for the General Counsel has  
 20 established a prima facie case that Mark and Chris Gaytan’s protected conduct was a motivating factor in their selection for layoff. Once the General Counsel establishes a *prima facie* case that protective conduct was a motivating factor in the employer’s selection of Chris and Mark Gaytan for layoff, the burden shifts to Respondent to demonstrate that the same action would have taken place in the absence of their protected conduct. *Fluor Daniel*, 304  
 25 NLRB 970 (1991).

**E. Does the Evidence Support a Finding that Respondent Would Have Laid Off Mark and Chris Gaytan in the Absence of their Protected Activity?**

Respondent asserts that even if the General Counsel has met the burden of proving a  
 30 *prima facie* case, Respondent would have laid off the Gaytans even in the absence of the protected conduct. As discussed above, Respondent cited three areas of alleged misconduct by Mark and Chris Gaytan in the position statement as bases for selecting these employees for layoff. As also discussed above, I have found that Respondent’s reliance upon these incidents of alleged misconduct establish an inference of discriminatory motive. While Respondent  
 35 asserted its reliance upon these incidents as a basis for layoff during the Region’s investigation of the charge, Respondent expanded its reasons for the layoff during the unfair labor practice hearing. During the hearing and in its brief, Respondent submits that the layoff was based on what it terms Chris Gaytan’s “bad attitude” in addition to “performance and safety issues.” Shumate testified that on July 21, 2008, he told Juneau that Respondent would  
 40 not need as many riggers and that they were going to decrease their manpower. Shumate asserted that when he asked Juneau who he wanted to layoff, Juneau identified Chris Gaytan, citing Gaytan’s attitude. Respondent also called Juneau to corroborate the discussion. Juneau testified that he told Shumate that Chris Gaytan should be the first rigger to be laid off. Juneau contended that he also told Shumate about a problem that he had with Gaytan on  
 45 Gaytan’s first day on the job. Juneau asserted that when he informed Gaytan of a particular rigging practice, Gaytan “got in his face,” telling Juneau that he was a rigger and that he knew

what he was doing. In his testimony at hearing, Juneau described Gaytan’s attitude as “always very abrupt.” Shumate asserted that after speaking with Juneau on July 21, 2008, the “biggest part” of his decision for layoff was already made.

5 Respondent contends that it should be no surprise that Juneau and Shumate would select Chris Gaytan as the first rigger to be laid off because of his “run in” with Juneau on the first day of the job and because of his involvement in the “near miss” incident on July 12. Respondent also asserts that the General Counsel offered no evidence to dispute that the conversation between Juneau and Shumate occurred on July 21. While Shumate and Juneau  
 10 corroborated each other concerning this self-serving conversation, no one else is alleged to have participated in the conversation or to have overheard this alleged conversation. Thus, there is no direct evidence disputing its existence. The total record evidence, however, does not support a finding that the decision to lay off Chris Gaytan was made on July 21 as Shumate alleges. It is conceivable that during a conversation on July 21, Juneau may have mentioned his July 7, 2008, conversation with Chris Gaytan. It is also possible that Juneau may have shared with Shumate his annoyance because of Gaytan’s comments or attitude. I do not, however, credit Shumate’s testimony that his decision to layoff Gaytan was made at that point. The alleged “attitude” incident was not of such import that it warranted discipline by either Juneau or Shumate. Additionally, even though Shumate alleges that such alleged  
 20 incident was significant enough to warrant Gaytan’s layoff, Gaytan was not laid off until July 25, 2008. More significantly, although Shumate testified that his selection of Gaytan for layoff was largely made after talking with Juneau on July 21, 2008, there was no reference to this incident in Respondent’s August 26, 2008, statement of position to the Region. The overall record indicates that Shumate added this basis for layoff during his testimony to further justify Gaytan’s unlawful layoff and to fabricate a decision date to precede Gaytan’s  
 25 protected activity. As discussed below, there are a number of factors that indicate that Chris and Mark Gaytan would not have been laid off in the absence of their protected conduct.

**1. Respondent’s shifting reasons for the layoff**

30 Project Manager Turnbull testified that the layoff was based on Respondent’s need to reduce the rigging staff after the collapse of the Deep South crane. He asserted that the decision to layoff the Gaytans was based upon informal conversations involving Turnbull, Shumate, and Juneau. Turnbull could not recall, however, what was said or when the  
 35 conversations occurred. He acknowledged that when he provided a sworn affidavit to the Board during the initial investigation of the unfair labor practice charge, he testified that the Gaytans were selected for layoff because they received disciplinary warnings on the first day of employment. He admitted, however, that the alleged disciplinary warnings were actually documents that all new employees were required to sign when beginning their employment.  
 40 He also admitted that in his previous affidavit he testified that the Gaytans were selected for layoff because of their involvement in the July 12, 2008, near miss incident. Turnbull acknowledged, however, that the incident involved Chris Gaytan and Mark Moreno and that Mark Gaytan did not work on July 12, 2008.

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**2. Respondent utilized a different process for selecting employees for layoff**

Shumate testified that normally he is not involved in selecting employees for layoff. He asserted that he normally tells the foreman that he needs to lay off a certain number of employees and the foreman selects the specific employees. Both Turnbull and Shumate acknowledged that with respect to the Gaytans’ layoff, however, they were directly involved in selecting the Gaytans and the decision was not left to Juneau as the rigging foreman. Shumate testified that he specifically called Juneau and told him that Mark and Chris Gaytan were the employees who were to be laid off. Turnbull admitted that other than the Gaytans, he was not personally involved in the selection of any other riggers for layoff. Turnbull did not explain why he was involved in selecting the Gaytans for layoff when he would otherwise not have been involved in the process. Juneau confirmed that he never recommended to Turnbull that Respondent layoff Mark Gaytan. Juneau further testified that prior to their layoff; he had not known that Chris and Mark Gaytan were being laid off. Respondent presented no evidence to show why Shumate and Turnbull became personally involved in the layoff selection process for Mark and Chris Gaytan.

**3. Respondent did not consider employees’ attendance record**

Shumate acknowledged that in selecting employees for layoff, the foreman normally considers the employees’ attendance record, as well as their work performance. Juneau also confirmed that when he selects employees for layoff, he considers employees’ attendance as well as their skills and experience. Counsel for the General Counsel asserts that in the instant case, Respondent deviated from its normal practice and selected the Gaytans for layoff and retained an employee with chronic absenteeism issues. Mark and Chris Gaytan testified, without contradiction, that during their employment with Respondent, they were never late or absent from work. Mark Moreno testified that during the same time period, he had been absent from work and he had been late two to three times. It is also significant that Mark Moreno was the rigger who was involved in the “near miss” incident that was alleged to be a basis for Chris Gaytan’s layoff. Additionally, Mark Gaytan testified, without contradiction, that he told Juneau on July 25, 2009 that Moreno was going to quit the following Monday. Mark Gaytan asked Juneau why Moreno could not be laid off since Moreno was planning to quit anyway. Gaytan recalled that Juneau simply replied: “This is above me, and I am sorry. I want you to know that I have nothing to do with this.” Moreno confirmed that he voluntarily quit his employment on July 29, 2008, and that he had told Chris and Mark Gaytan that he was going to do so during the previous week. Thus, the undisputed record testimony confirms that Mark Moreno had attendance problems and the Gaytans did not. Moreno was involved in the July 12, 2008, near miss incident to the same extent as Chris Gaytan. Additionally, Juneau was informed on July 25, 2008, that Moreno intended to quit his employment with Respondent the following Monday. Not only was Moreno not selected for layoff, there is no evidence that he was even considered for layoff before he quit the company.

**4. Respondent did not consider employees’ skills and experience**

General Counsel also submits that Respondent selected the two most experienced riggers for layoff and yet retained an inexperienced employee with little or no prior rigging

experience. Juneau asserted that he takes employees’ skills and experience into consideration when selecting employees for layoff. He admitted, however, that he did not layoff off Daryl Cheney even though Cheney was new to rigging and was not as skilled as either Mark Gaytan or Chris Gaytan. Mark Moreno testified, without contradiction, that Juneau told the employees that Cheney had no experience and asked the employees to watch over him to prevent his hurting himself or others. Juneau acknowledged that he told the other riggers to keep an eye on Cheney. Juneau also admitted that he specifically asked Chris Gaytan to watch over Cheney because Gaytan was more experienced. Mark Gaytan recalled only one occasion when he saw Cheney attempt to rig a piece of steel. Gaytan recalled that the choker was upside down and the shackle was backward. Chris and Mark Gaytan testified without contradiction that Juneau primarily used Cheney as a gofer to retrieve shackles and rope and to set up the barricades. Juneau acknowledged that Mark Gaytan had a good deal of experience doing complex rigging work. He also admitted that because of Mark Gaytan’s work experience, he had planned to make Mark Gaytan the leadman on the Deep South crane.

**5. Respondent did not establish that the crane collapse required the Gaytans’ layoff**

Shumate testified that both Mark Gaytan and Chris Gaytan were assigned to work on the Deep South crane that collapsed. He also identified riggers Adam Massey and John Webb as assigned to the 888 crane prior to the collapse. Shumate testified that following the crane collapse, Respondent had too many riggers and thus it was necessary to layoff two riggers. Although Shumate’s testimony supported Respondent’s argument that the Gaytans’ were the likely choice for the layoff after the loss of the Deep South crane, his testimony was contradicted by Juneau. Juneau testified that at the time of the collapse, he had assigned Chris Gaytan to work with John Webb on the 888 crane. He also confirmed that he had assigned Mark Gaytan, Jose Rodriguez, Abel Gomez, and Mark Moreno to work on the Deep South crane. Thus, if the selection for layoff were based in part on the assignment of riggers to specific cranes, Chris Gaytan would not have been earmarked for layoff and employees Rodriguez, Gomez, and Moreno would have been likely choices for layoff because their assigned crane was no longer available.

**6. Respondent’s argument concerning the change in processing the turnaround**

A good deal of testimony was devoted to the issue of how the crane collapse affected the availability of work for the Respondent at the work site. Turnbull testified that Respondent did not have a “plan B” in place prior to the crane collapse. Turnbull also testified that after the crane collapse, Respondent did not know how, or if, the job would proceed and thus, the need for riggers decreased dramatically. Both Turnbull and Shumate testified that the “Plan B” option for completing the project had not even been proposed at the time that the Gaytans were laid off. Respondent also contends that there was a period when the 888 crane was idled after the collapse because OSHA erected a barricade around the collapsed crane and the barricade blocked access to the 888 crane.

Certainly, it is reasonable that an accident of this magnitude was not anticipated by Respondent and there was a time period for reassessing the project. Despite the fact that such a period of reassessment and restructuring was reasonable, the overall evidence does not

indicate, however, that the Gaytans would have been laid off in the absence of their protected activity. In contrast to the need for a layoff, Shumate’s testimony reflects that Respondent was actually concerned with keeping employees after the collapse. Shumate acknowledged that Lyondell only shut down the job for approximately three to four days after the collapse.  
 5 He recalled that after the employees returned to work, representatives of Lyondell assembled all of the employees and told them to stay until an alternative plan was reached. He asserted that employees were already quitting because of the collapse and that Lyondell did not want to lose employees from the project. He also added that he wanted to keep employees in case Respondent decided the direction in which to go and resume the project.

10 Respondent’s Vice President of Engineering, Michael Norton, testified that on the day after the collapse, he and other Respondent representatives met with a representative of Lyondell. The Lyondell representative confirmed that the project was going to continue and that Lyondell wanted Respondent to continue the project with Lyondell.

15 Chris Gaytan recalled that when Juneau met with the employees in the toolbox meeting on July 25, 2008, he urged employees not to look for other jobs. Gaytan testified that Juneau told employees that Respondent was going to use “Plan B” for the project. This would require pulling the columns and the cones from the bottom and the skirts from the side.  
 20 Gaytan testified that the employees understood that this procedure would be the only other option for completing the project. Mark Moreno also testified that the riggers were told on July 25, 2008, that the project would continue by cutting out the cones and bull rigging them to another crane in lieu of the original plan that had involved lifting the derricks and the drum with the Deep South crane. The record reflects that Moreno’s last day to work was July 26,  
 25 2008, and thus any information that he received about completing the project using Plan B would have occurred prior to July 26, 2008. Additionally, Juneau conceded that prior to the Gaytans’ layoff; he may have told employees that Respondent was going to use bull rigging to complete the turnaround as a substitute for the lifting procedure of the Deep South crane.

30 Thus, crediting the testimony of Chris Gaytan, Moreno, Norton, and Juneau, it is apparent that as of July 25, 2008, Lyondell wanted Respondent to continue the project and Respondent was working out the details of an alternate means of accomplishing the turnaround.

35 **7. Respondent did not demonstrate that the crane collapse required fewer riggers**

40 Despite the fact that Respondent selected the Gaytans for layoff on July 25, 2008, Respondent hired Winston Caraker and Ron Dreier as riggers within days of the layoff. Although the two new riggers first appeared on the job site on August 4, 2008, the record evidence reflects that their employment process began several days earlier. The employment records for Ron Dreier reflect that Respondent offered him the job on July 31, 2008. Dreier specifically listed in his employment application that he left his prior job on July 31, 2008, in order to work for Respondent. Winston Caraker’s employment records reflect that he completed the site specific testing required for all new employees on August 1, 2008. Thus,  
 45 the undisputed evidence reflects that within only a few days after the Gaytans’ layoff, Respondent offered employment to two new riggers. Respondent presented no evidence to

show how or when contact was made with these applicants who replaced the Gaytans.

**8. Respondent did not demonstrate a basis for selecting both Gaytans’ for layoff**

5 As discussed in an earlier section of this decision, there was a good deal of testimony by Respondent’s witnesses about why Chris Gaytan was selected for layoff. Respondent asserted that because of his attitude and involvement in the July 12, 2008 “near miss” incident, he was the natural choice for a layoff. In contrast, however, Respondent presented nothing to show a basis for the layoff of Mark Gaytan.

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There is no dispute that prior to the project at Lyondell; Mark Gaytan had worked for Respondent on three previous jobs. On one of the jobs, Gaytan had worked as a rigging foreman. On another job, Gaytan held positions as both crane operator and rigger. On the day that he was laid off, Juneau talked with Mark Gaytan about which day he would take as his day off during the weekend. Gaytan testified: “Kenneth Juneau asked me, what day are you going to take off, so I can take the opposite day off. If you take off Saturday, I’ll take off Sunday.” Gaytan asserted that Juneau depended upon him (Gaytan) to fill in for him on Juneau’s day off. Juneau did not dispute Mark Gaytan’s testimony. Additionally, Juneau not only confirmed that he never recommended Mark Gaytan for lay off, but he also admitted that he had planned to make Mark Gaytan a leadman for the Deep South crane.

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Respondent’s only explanation for its layoff of Mark Gaytan was given by Turnbull. Turnbull testified that Mark Gaytan was laid off because Mark Gaytan and Chris Gaytan were “traveling buddies.” He asserted that “most of the time” when an employee is laid off, his traveling buddy will quit. He asserted that Respondent needed to layoff two employees and so Mark Gaytan was selected for layoff as well as Chris Gaytan. In light of the existing circumstances, Turnbull’s explanation is totally incredible. It is implausible that Respondent would layoff one of its most experienced and skilled riggers on a supposition that he would probably quit. The assertion of this fragile and non-sensical basis for layoff simply adds greater support to a finding that Mark Gaytan would not have been laid off in the absence of his protected activity.

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**9. Summary**

As discussed above, I find that General Counsel has established a prima facie case of unlawful motivation in selecting Chris and Mark Gaytan for layoff. Respondent maintains, however, that even if it is found that General Counsel established a prima facie case of an unlawful motive, the record supports a finding that Respondent has met its burden under *Wright Line*. Respondent asserts that it had a legitimate reason for the layoffs. Respondent submits that the July 18, 2008, crane collapse reduced the number of riggers that were needed on the Lyondell project. Respondent also asserts that Chris Gaytan was a logical choice because of his involvement in the July 12, 2008, “near miss” incident and because of his attitude and working relationship with his foreman.

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Once a prima facie case has been established, however, the Respondent does not meet its burden merely by showing that it would have had a reasonable basis for the Gaytans’

5 layoff. The Respondent must affirmatively show that these employees' layoff would have taken place in any event. *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7<sup>th</sup> Cir. 1991). As the Board has explained, an employer cannot carry its burden under the *Wright Line* analysis by merely showing that it also had a legitimate reason for its action. The employer must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the evidence." *Centre Property Management*, 277 NLRB 1376 (1985).

10 Additionally, the Board has also determined that if an employer's reason for its action is pretextual, no "substantive objective" is served by even moving to the second step of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). In essence, a finding of pretext defeats any attempt by an employer to show that it would have taken the same action in the absence of the employee's protected activity. Once there is a finding that the reasons given for the employer's action are pretextual — that is either false or not in fact  
15 relied upon — the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Respondent argues that the Board cannot substitute its own business judgment for Respondent's decision to select the Gaytans for layoff. While the Board has taken such a position, the Board has also emphasized that the crucial factor is not whether the  
20 business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.*, 343 NLRB 408, 412 (2004).

25 The total record evidence in this case supports a finding that Respondent's asserted reasons for its layoff of Mark and Chris Gaytan were not, in fact, relied upon by the Respondent. This conclusion is based upon a number of factors as referenced above. One of the most significant factors supporting this conclusion is the shifting and false explanations given by Respondent in defense of its action. In initially responding to the unfair labor practice charge, Respondent asserted in a written position statement that Chris and Mark  
30 Gaytan were selected for layoff because they both received disciplinary warnings on their first day of employment. In a pre-trial affidavit, Turnbull also testified that the Gaytans had been disciplined on their first day on the job and received disciplinary write-ups. During the hearing, however, Turnbull admitted that the alleged warnings were actually counseling sheets that all riggers were required to complete on their first day of employment and there were no such disciplinary actions for the Gaytans. Turnbull asserted that he gave this  
35 incorrect information because he had simply not been aware that this was a new part of the employee hiring process. Turnbull's explanation is not credible. There is no dispute that normally Turnbull is not even involved in selecting the riggers for layoff. And yet, in this once instance in which he actively participated, he purported to rely upon a reason that was shown to be false. If, in fact, he had relied upon these alleged disciplinary actions as a true  
40 basis for the layoff selection, he would have certainly found that all employees have the same documentation in their files as a part of the employment process. His initial claim that he relied upon these alleged disciplinary actions more plausibly indicates that Turnbull used this documentation in an attempt to fabricate a basis for the layoff and to hide the true motive for the layoff selection.

45 Evidence of Respondent's discriminatory motive is also reflected in Respondent's

initial claim that Mark Gaytan was selected for layoff because both he and his brother were involved in the July 12, 2008 near miss incident. The record reflects, however, that Mark Gaytan was not involved in the incident and did not even work on the day of the incident. Thus, two of the asserted reasons for the Gaytans' layoff were shown to be patently false.

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The falsity of Respondent's asserted reasons for layoff are also shown in the Respondent's shifting explanations as to who selected the Gaytans for layoff. The record reflects that in a pre-trial affidavit, Shumate testified that he had simply notified Juneau that Respondent needed to lay off two employees and Juneau selected Mark and Chris Gaytan. During the hearing, however, both Turnbull and Shumate testified that while they are normally not involved in selecting employees for layoff, they were both involved in selecting the Gaytans for layoff. Both Shumate and Turnbull admitted that normally employees are selected for layoff by the rigging foreman. During his testimony at hearing, however, Shumate acknowledged that he had called Juneau and told him that Mark and Chris Gaytan were the employees who would be laid off. Neither Shumate nor Turnbull explained why they were involved in selecting the Gaytans for layoff when they would not otherwise have been involved.

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In contrast to the testimony of Shumate and Turnbull, Juneau testified that he never recommended to Turnbull that either Chris or Mark Gaytan be laid off. He specifically testified that he made no recommendations for the layoff of Mark Gaytan and he had planned to promote Mark Gaytan to a leadman position. Juneau also testified that he was first notified of their layoffs late in the day on July 25, 2008. He could not recall whether he was notified by Shumate or another higher level supervisor. He confirmed, however, that at the time that he was notified, he had not been aware that these employees were selected for layoff.

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As discussed above, I find the Respondent's alleged reasons for the layoff to be pretextual. Even if the evidence supported a finding that there was a dual motive in Respondent's layoff, Respondent has not demonstrated that the Gaytans would have been selected for layoff in the absence of their protected activity. With respect to Mark Gaytan, there was no credible evidence advanced to show why he was selected for layoff. He had no disciplinary warnings or attendance problems and he was one of the most skilled riggers on the job. His skills and abilities were such that Juneau relied upon him to fill in for him on Juneau's days off. Mark Gaytan had been not only a rigging foreman for Respondent, but had also worked as both a rigger and a crane operator on previous jobs.

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At the time of the layoff, Chris Gaytan had received no disciplinary actions and had no attendance problems. While he had been involved in a near miss accident on July 12, 2008, there is no evidence that he received any disciplinary warning or write-up for this incident. Chris Gaytan came to the job with previous work experience with Respondent and was acknowledged to be a skilled rigger. His skills were sufficient to warrant Juneau's giving him the responsibility to watch out for the newest rigger on the job. Despite all of their skills, abilities, and their lack of attendance problems, Chris and Mark Gaytan were selected for layoff within 48 hours of their protected activity. There is no dispute that Mark Moreno was also involved in the near miss incident and he had been late and absent from work. Even when Juneau had reason to believe that Moreno planned to quit the job the next week, Moreno

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was not selected or even considered for layoff. Additionally, the employee with the least amount of experience who required monitoring by the Gaytans and other riggers was not selected or apparently even considered for layoff.

5            Additionally, there are other bases for finding that Respondent has not demonstrated that the Gaytans would have been laid off on July 25, 2008. There was a great deal of testimony by Respondent’s witnesses concerning how the crane collapse affected the viability of the job and how the change in the process reduced the number of riggers needed on the job. The record evidence, however, reflects that on the day following the crane collapse,  
10 Respondent’s Vice President of Engineering was told that Lyondell wanted Respondent to continue the project and Lyondell wanted Respondent to continue the job. As discussed above, there is credible testimony that confirms that both Lyondell and Respondent encouraged employees to remain on the job and discouraged them from quitting after the crane collapse. Respondent asserts that the crane collapse changed the process of the  
15 turnaround and fewer riggers were needed for the job. Despite this assertion, however, no other employees were laid off other than the Gaytans. Additionally, within only a few days of the layoff, Respondent began the process of hiring two new riggers. One of the new riggers was specifically hired away from his previous job to take the position with Respondent.

20            Accordingly, Respondent has not demonstrated that the Gaytans would have been laid off had they not spoken out about safety concerns in the July 23, 2008, meeting. The total record evidence supports a finding that Respondent selected Chris and Mark Gaytan for layoff because of their protected concerted activity and in violation of Section 8(a)(1) of the Act.

25            **Conclusions of Law**

1.        Wyatt Field Service Company, Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30            2.        By discriminatorily selecting Chris Gayton and Mark Gaytan for layoff, Respondent violated Section 8(a)(1) of the Act.

35            3.        The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

**Remedy**

40            Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, to remedy the unlawful layoffs of Chris Gaytan and Mark Gaytan, I shall recommend that Respondent be ordered to make whole Chris Gaytan and Mark Gaytan for any loss of earnings suffered by them as a result of the discrimination against them, by payment of a sum of money equal to what they normally would have earned as wages had they not been laid off, less net earnings, if any, during such  
45 time period, to be computed with interest in accordance with *Horizons for the Retarded*, 283 NLRB 1173 (1987). Counsel for the General Counsel requests an order requiring Respondent

to reimburse these employees for all backpay owed plus interest compounded on a quarterly basis. In its decision in *National Fabco Manufacturing, Inc.*, 352 NLRB No. 37, slip op at fn. 4 (March 17, 2008), the Board addressed a similar request by the General Counsel. Referencing a previous decision in *Rogers Corp.*, 344 NLRB 504 (2005), the Board explained: “Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.” Accordingly, I deny Counsel for the General Counsel’s request for an order requiring compound interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>3</sup>

**ORDER**

The Respondent, Wyatt Field Service Company, Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or discharging employees in order to discourage employees from engaging in concerted protected activities.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff of Chris and Mark Gaytan, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

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

(c) Within 14 days from the date of the Board’s Order, make whole Chris Gaytan and Mark Gaytan for any loss of wages and benefits that they suffered as a result of

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<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Respondent’s unlawful layoff on July 25, 2008.

5 (d) Within 14 days after service by the Region, post at its facility in  
Houston, Texas copies of the attached notice marked “Appendix.”<sup>4</sup> Copies of the notice, on  
forms provided by the Regional Director for Region 16, after being signed by the  
Respondent’s authorized representative, shall be posted by the Respondent immediately upon  
receipt and maintained for 60 consecutive days in conspicuous places including all places  
10 where notices to employees are customarily posted. Reasonable steps shall be taken by the  
Respondent to ensure that the notices are not altered, defaced, or covered by any other  
material. In the event that, during the pendency of these proceedings, the Respondent has  
gone out of business or closed the facility involved in these proceedings, the Respondent shall  
duplicate and mail, at its own expense, a copy of the notice to all current employees and  
former employees employed by the Respondent at any time since July 25, 2008.

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

20 Dated, Washington, D.C., June 30, 2009.

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**Margaret G. Brakebusch**  
**Administrative Law Judge**

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<sup>4</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice  
reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED  
PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN  
ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

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**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

10 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- 15 Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

20 **WE WILL NOT**, layoff, discharge, or otherwise discriminate against any of you for engaging in protected concerted activities.

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

25 **WE WILL**, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful layoff of Chris Gaytan and Mark Gaytan, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the layoff will not be used against them in any way.

30 **WE WILL**, within 14 days from the date of the Board’s Order, make whole Chris Gaytan and Mark Gaytan for any lost wages and benefits because of their discriminatory layoffs on July 25, 2008.

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**WYATT FIELD SERVICE COMPANY**

(Employer)

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Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

45 The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and

