UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

TRINITY PROTECTION SERVICES, INC.,	
and	
MICHAEL ROMO, An Individual	Case 20-CA-34660
and	
DAVID B. FAIR, An Individual	Case 20-CA-34729
and	
TOM SMITH, An Individual	Case 20-CA-34730

RESPONDENT TRINITY PROTECTION SERVICES, INC.'S ANSWERING BRIEF TO EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

After five days of trial, and after hearing the testimony (and observing the demeanor) of eleven witnesses, it was clear from the record-evidence that this case was about the Charging Parties' deception and misconduct (including a scheme to extort Trinity). The record-evidence established that Trinity learned that Michael Romo, Thomas Smith and David Fair were alleged to have harassed a female employee into "taking a hit for the team" by wearing a sexy dress and luring Trinity's Director of Operations "into a bad situation." It also established that Fair omitted material information from his federal background documents, and that the Department of Homeland Security considered those omissions to be "deceptive." Trinity terminated the Charging Parties on those grounds; Trinity produced both witness and documentary evidence to prove that it did so, and the Administrative Law Judge held that, in doing so, Trinity did not violate Section 7 of the Act. As a result, the ALJ dismissed the General Counsel's complaint.

The Board should adopt the ALJ's order in its entirety (and affirm the factual findings contained in it), both because the order was based on key credibility determinations to which the Board traditionally defers and because it was properly based on the record evidence in the case, much of it uncontroverted.

The ALJ's holding was founded on its credibility determinations. The ALJ found that the Charging Parties were not credible, rejecting their testimony as "untrue" (ALJ at 18:19), "not credible on its face," (ALJ at 11:18-19) and "lying."(ALJ 23:5). The ALJ found that the Charging Parties' anger, bias and desire to retaliate against Trinity prevented them from offering the "unvarnished truth." (ALJ at 10-12). The credibility determinations were insurmountable, especially given that the record-evidence provided little support for the General Counsel's aggressive arguments. In fact, the ALJ found that

> [d]espite the confused record and the peculiar circumstances surrounding Norris, as well as counsel for the General Counsel's

> broad credibility challenges aimed at Brooks and Norris, his charge that Hodges was committing misconduct of his own in which Respondent was complicit, together with his unwarranted request that I draw adverse inferences, I find that credibility issues actually lean the other way.

(ALJ at 17:6-10).

Given that the Board has an "established policy" to defer to the ALJ's credibility determinations, the General Counsel had the burden to show those determinations were "inherently incredible or patently unreasonable." The General Counsel did not and could not sustain that burden. The ALJ did not believe the Charging Parties because of their demeanor while testifying – including the "anger they displayed" (ALJ at 17:10) – and because on *every key point*, other witnesses and documents corroborated the Trinity witnesses' testimony and contradicted the Charging Parties' testimony.

The ALJ's credibility findings are sufficient alone for the Board to accept the ALJ's recommendation to dismiss the complaint. But they are also accompanied by a well-developed factual record. That record shows that the General Counsel failed to sustain its burden to make a prima facie case of concerted protected activity, knowledge and animus.

The General Counsel did not prove concerted protected activity. It showed only that the Charging Parties griped to a few friends about a "routine equipment shortcoming" (ALJ at 17:20) that occurred before they were hired, was quickly resolved, and had nothing to do with their future work conditions. But as the Board has repeatedly held, griping does not constitute protected activity.

The General Counsel did not prove knowledge. The ALJ held: "[t]here is no knowledge that the employees had engaged in activity constituting mutual aid and protection." (*Id.* at 22:19-24). That is not surprising since the General Counsel's *own* witnesses say that the Charging Parties kept their discussions about their activities confidential from Trinity. In fact, the ALJ

specifically found that two of the Charging Parties did *not* tell Trinity about those discussions (ALJ at 18:14-15 ("nor did Romo or Smith say they had mentioned it either to Brooks or Hodges")), a finding to which the General Counsel did *not* except. While the General Counsel tried to infer knowledge, the ALJ properly rejected as lacking credibility the testimony upon which the General Counsel relied. For example, when the Charging Parties testified that Hodges and Brooks threatened the class on May 13 for their alleged discussions about the OIG, the ALJ correctly found that "nothing that Brooks said that morning mentioned the OIG at all[,]" (ALJ at 21:1-2) and that no witnesses said that Hodges made such threats. (ALJ at 20:30).

The General Counsel did not prove animus. The ALJ held: "the record does not disclose any animus which might suggest that Respondent had an illegal motive behind its discharge." (*Id.* at 22:19-24) In fact, the record established that, if Trinity did learn of the Charging Parties' protected activity, it *still* pushed to hire them – including on at least five documented occasions – and only stopped when it later learned of their misconduct.

Because it was that misconduct, and not any protected activity, that led to the discharge of the Charging Parties, Trinity has met any burden that may shift to it under *Wright Line*. Trinity had a reasonable belief that the Charging Parties had engaged in misconduct, including harassing a female employee into trying to extort it. Trinity's reasonable belief was formed after a multi-day, multi-witness, multi-statement investigation and was evidenced in at least five contemporaneously-sent internal emails. Those same internal emails show that Trinity terminated them *because* it believed the Charging Parties had committed misconduct. Those emails do not say, suggest or even hint that Trinity terminated them because of any protected activity. As a result, the ALJ held, properly, that "[t]here is nothing here that points to protected conduct as being part of Respondent's decision making process." (ALJ at 23:9-10).

For these reasons, the Board should adopt the ALJ's order and dismiss the General Counsel's complaint in its entirety.

FACTUAL BACKGROUND

In March 2009, Trinity learned that its contract with Federal Protective Services ("FPS") would soon include servicing the Federal Aviation Administration air traffic control facility known as the Northern California TRACON ("FAA"), which is located at Mather Field in Rancho Cordova outside Sacramento, California. Trinity would begin servicing FAA on April 1, 2009. In preparation for that April start date, and consistent with Trinity's corporate growth strategy, Trinity interviewed and decided to hire eight guards that were already working at FAA, including the three Charging Parties (Thomas Smith, Michael Romo and David Fair. (Hollis at 912:21-913:9). Prior to that, those guards were working for another security company called Diamond Detective Agency (the "Diamond Guards").

Trinity informed FPS, an agency within the Department of Homeland Security, of its intent to hire these guards. Daryl Brooks ("Brooks"), Trinity's Project Manager, worked diligently to coordinate the multi-stage background clearance process and the completion of the FPS training. (Brooks at 99:19-99:21, 101:10-102:5). Brooks sent several emails to FPS indicating Trinity's intent to hire the Diamond Guards, providing additional background information in order to facilitate that process and urging FPS to complete the training so that the guards could work at FAA as soon as possible. (Hollis at 913:14-914:1, 933:10-933:13).

Trinity initially thought that the Diamond Guards would not need to complete the 120 Hour FPS Training Course. (Brooks at 101:23-102:5). FPS did, however, require the Diamond Guards to pass its shooting qualifications test. Trinity allowed the Charging Parties to borrow guns (while they were still Diamond employees) to practice the course of fire on March 15,

2009. (*Id.* at 188:23, 188:25). The Charging Parties claim that they told FAA about issues that they experienced with these guns. They did not tell Trinity they had said anything to FAA.

The Charging Parties took their qualification test on March 17, 2009. (*Id.* at 235:18-236:1-7). The other Diamond Guards took their test on April 10, 2009. (*Id.* at 236:8-12). At those two shoots, all of the Diamond Guards passed. (*Id.* at 236:13-15). But Trinity then learned that FPS would still require these guards to complete 120 hours of FPS training before they would be eligible to work at FAA. (*Id.* at 101:24-102:1-6).

As it had done in the past, Trinity contracted with a third party training class to train the Diamond Guards. (Hollis at 919:2-11). For this group of new-hires, Trinity chose a training school run by Action Security Training Institute ("ASTI"), which was owned and taught by Dannie Hodges. (*Id.* at 922:12-14; Fair at 804:17-18; Rollins at 895:2-8).

Training started on April 13, 2009. Over the course of the next three to four weeks, Brooks continued to provide FPS with the background and clearance-related documents needed for the guards to immediately begin work after they completed the FPS training. (Hollis at 930:15-931:24; 931:25-933:13; 933:20-933:25). The last phase of the FPS training needed to be taught by FPS, not ASTI. FPS did not want to use its resources to train a class of only eight guards and wanted to wait until more guards needed that same segment of the training. (*Id.* at 925:11-20). Trinity did not like this delay and fought hard to persuade FPS to complete the training so that the Diamond Guards could return to work, including the Charging Parties. (*Id.* at 925:21-926:1-7).

In May 2009, Trinity unexpectedly discovered information about three of the eight guards that presented significant ethical issues and threats to its business. With respect to Fair, and as a result of a run-in that Fair had with another Trinity guard (Officer Chere Heyermann) in early May, Trinity learned that he was the owner of two companies that had federal contracts

with FAA: a janitorial company and a landscaping company. (*Id.* at 936:12-936:17; 938:3-940:6).

Trinity considered this to be both a conflict of interest and a violation of the FPS Statement of Work. The FPS Statement of Work stated that any employment that constitutes a "real or apparent conflict of interest" is cause for immediate removal of Trinity from its contract with FPS. (GC-14, Pgs. 60-63, No. 35). Fair had omitted information about these two companies and their contracts with FAA from two Trinity documents and his federal background documents ("SF85P"). (Fair at 260:24-262:23). Trinity initially told Fair it was prepared to retain him if he canceled his existing contracts with FAA and accurately updated his SF85P. (*Id.* at 852:23-853:12, 854:3-4, 854:22-855:5; GC-32). Fair objected, and left the meeting without doing either. After FPS confirmed that Fair's omissions from his SF85P were considered "deceptive," Trinity believed that Fair was not suitable to work on the FPS contract. (Brooks at 325:14-325:21; May Jo at 1050:1-1050:9). As a result, Trinity terminated Fair. (Hollis at 938:3-940:6).

A few days later, Trinity learned that Fair had harassed another Trinity guard (Marcia Norris) by trying to get her to participate in a conspiracy to extort Trinity. (Brooks at 72:4-7). Officer Norris reported that in March 2009, while she was in the guardhouse with Fair and Romo, and while they were all still employed by Diamond, Fair suggested that she "take one for the team" by going out with Trinity's former Director of Operations, Cliff Ward. (*Id.* at 68:9-18; 71:11-25; Norris at 454:1-456:1-13). He suggested Norris lure him into a bad situation and blackmail Trinity to secure their employment. (ALJ at 13:9-11, 16-18; Norris at 418:3-418:11, 456:23-457:2; Brooks at 70:19-73:1; Exh. GC-8).

Trinity investigated Norris's allegations. Norris reported to Brooks that Romo stood-by and listened when Fair described the "team's" plot to extort Trinity. (Norris at 419:21-420:8;

Exh. 8). She testified that the "team" included not only Romo but also Smith. (Norris at 456:23-457:2). She provided Trinity with a written statement explaining that Fair and Romo were together when Fair offered to buy her a nice dress for a date with Ward, and suggested that she lure him into a bad situation in order to gain leverage against Trinity. (*Id.*). In internal emails, Brooks reported back to Hollis that Norris had said that all three Charging Parties were involved, and he provided Hollis with her written statement. (R-15).

Trinity interviewed Romo and Smith twice, and obtained two written statements from each of them. Both Romo and Smith were rude, aggressive and unprofessional during their interviews. (Brooks at 274:1-292:1-17; Rollins at 886:1-893:10-18). Trinity spoke with Officer Rumrill and corroborated Officer Norris's descriptions of how "they" (meaning, Romo, Fair and Smith) treated her. (Hollis at 947:1-19). Officer Rumrill explained to Brooks that "Officer Norris got the worst from those 3." (R-13; Brooks at 297:21-298:5; Hollis at 947:10-19). Greg Hollis, Trinity's CEO:

- Received emails from Brooks describing his meetings and observations of Officer Norris, Romo and Smith;
- Received and reviewed written statements from Romo and Smith;
- Received and reviewed Norris's statement describing the sexual harassment scheme; and
- Received and reviewed an email from Brooks conveying what Officer Rumrill said about the way that "those [three]" treated Officer Norris.

(Hollis at 942:23-949:12, 949:16-951:8).

After considering all of this information, and hearing that Romo and Smith had been deceptive during the investigation process, Hollis reasonably believed Officer Norris's allegations about how "they" wanted her to take one for the "team," concluded that the "team" could not be trusted, and terminated the remaining members of the "team:" Romo and Smith (Fair had already been terminated). (*Id.* at 949:3-949:15).

The ALJ carefully considered the facts, the testimony and the documents. He made findings of fact, and he made credibility determinations that led him to decide that the General Counsel did not prove its prima facie case, and that if it had, Trinity would have satisfied its burden under *Wright Line*. In sum, the ALJ found the following:

- "[The Charging Parties] needed to exercise better patience than they showed to Brooks as he began to focus on allegations of misconduct – Fair's disclosure gap and Smith and Romo's faceoff over Norris's accusation." (ALJ at 16:45-47).
- "Their livid behavior in the May meetings with Brooks actually overshadows nearly everything that went before." (*Id.* at 16:47-17:1).
- "[The Charging Parties] allowed their built-up emotions to overrun their good sense and this litigation is the result." (*Id.* at 17:3-4).
- "They present as a club exclusive to themselves." (*Id.* at 17:14).
- "Frankly, where they disagree with Brooks, I find myself trusting Brooks's version over theirs." (*Id.* at 17:14-15).
- "Yet, in the final analysis, the General Counsel's point of view is not based on anything the employees were known to have done. Its proof has fallen short. The subtext so clear to the General Counsel is in truth only surmise, based on what it sees as a temporal connection; that is not enough. There is no knowledge that the employees had engaged activity constituting mutual aid and protection, and, the record does not disclose any animus which might suggest that Respondent had an illegal motive behind its discharge." (*Id.* at 22:19-24).

ARGUMENT

I. THE BOARD SHOULD AFFIRM THE ALJ'S RULINGS, FINDINGS AND CONCLUSIONS. (Exceptions 1-56)

A. The ALJ's Credibility Determinations Were Well-Supported By The Evidence. (Exceptions 13, 37, 38, 45-49, 52, 53, 56)

"Credibility determinations by the ALJ are given great deference, and are upheld unless they are *inherently incredible or patently unreasonable*." *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995) (emphasis added). The Board has an "established policy" "not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces the [Board] that they are incorrect." *Dietrich Industries, Inc.*, 353 NLRB

57, 57 n.2, citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Board findings contrary to an ALJ's credibility resolutions will be subject to critical appellate scrutiny. *Penasquitos Village Inc. v. NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977).

The Board typically looks at three factors to assess whether an administrative law judge's factual findings are supported by substantive evidence: (1) the judge's observations regarding witness demeanor; (2) whether the testimony upon which that factual finding is based is corroborated by other witnesses; and (3) whether the testimony is corroborated by documentary evidence. For example, in *Dietrich Industries, Inc.*, the Board affirmed the ALJ's findings that a business owner's assertions about discharging employees and denying raises and retroactive payments were pretextual. *Dietrich Industries, Inc.*, 353 NLRB 569, 572 (2008). The ALJ's rationale for discrediting the owner's testimony included the ALJ's observation of the owner's demeanor, documentary evidence that contradicted the owner's testimony, and the substantial mutual corroboration of other witnesses compared to the owner's summary denial of his conduct. *Id.* at 572-73. The Board found that the ALJ's credibility determinations were well-supported and affirmed the ALJ's findings. *Id.* at 573.

Here, in his detailed opinion, the ALJ made several credibility determinations:

- "Despite the confused record and the peculiar circumstances surrounding Norris, as well as counsel for the General Counsel's broad credibility challenges aimed at Brooks and Norris, his charge that Hodges was committing misconduct of his own in which Respondent was complicit, together with his unwarranted request that I draw adverse inferences, *I find that credibility issues actually lean the other way*." (ALJ at 17:6-10) (emphasis added).

- "Indeed, where those three [Charging Parties] put up a united front, rather than seeing mutual corroboration, I see long-time friends and business partners sticking up for one another. They present as a club exclusive to themselves. *Frankly, where they disagree with Brooks, I find myself trusting Brooks's version over theirs."* (*Id.* at 17:12-15) (emphasis added).

- "The anger displayed by the Charging Parties evidences a clear bias and amounts to a call for retaliation for perceived mistreatment *rather than an effort to provide the unvarnished truth*." (*Id.* at 17:10-12) (emphasis added).

- "That suggests *embellishment* on Romo's part because Norris . . did not recall Brooks being mentioned at all. Accordingly, Romo's testimony must be rejected as untrue." (*Id.* at 16:19) (emphasis added).

- "Instead, the evidence, indeed, *the only credible evidence*, is that Respondent discharged them because they failed to respond to reasonable requests for either additional background information, as in Fair's case, or because they behaved unprofessionally during the investigation of Norris's charges, both their refusal to engage and respond and because of the defensively hot nature of their responses." (*Id.* at 22:26-30) (emphasis added).

These credibility determinations were all supported by substantial evidence. The ALJ properly credited the testimony of the Trinity witnesses and discredited the testimony of the Charging Parties based on: (a) witness demeanor; (b) the fact that the Trinity witnesses' testimony was *corroborated* by other witnesses or documents, or in many instances, both; and (c) the fact that the Charging Parties' testimony was *contradicted* by other witnesses or documents. The General Counsel has not shown that those credibility determinations were "inherently incredible or patently unreasonable" or incorrect based on a "clear preponderance of the evidence."

1. The ALJ Properly Made Several Credibility Determinations Based On Witness Demeanor.

Weight is typically given to the administrative law judge's credibility determinations based on demeanor because the administrative law judge "sees the witnesses and hears them testify." *Penasquitos Village Inc.*, 565 F.2d at 1078. Specifically, "all aspects of the witness's demeanor – including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication – may convince the observing trial judge that the witness is testifying truthfully or falsely." *Id.* at 1078-79. These factors are "unavailable to a reader of a transcript, such as the Board or the Court of Appeals." *Id.*

The U.S. Supreme Court has recognized the importance of a witness' demeanor and the deference given to the administrative law judge's findings:

> [D]emeanor. . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

NLRB v. Walton Manufacturing Co., 369 U.S. 404, 408, citing *Dyer v. MacDougal*, 201 F.2d 265, 269 (2d Cir. 1952).

Here, the ALJ specifically based his credibility determinations on witness demeanor. He found the three Charging Parties *not* credible for that reason. He specifically detailed the "anger" they "displayed" as clear evidence of "bias." (ALJ at 17:11). He mentioned how, when earlier being investigated, they were "livid," (*Id.* at 16:47); one of them "lost his temper," (*Id.* at 23:5); and two of them gave "defensively hot" responses. (*Id.* at 22:29-30).

The ALJ's credibility determinations based on witness demeanor were well-supported and not "inherently incredible or patently unreasonable." The Board should give great "weight" to those determinations.

2. The ALJ's Positive Credibility Determinations Concerning Trinity Witnesses Were Supported By The Evidence.

The ALJ correctly determined that Trinity's witnesses (including most notably, Hollis and Brooks) *were* credible. On every critical point, the testimony of Brooks and Hollis was corroborated by other witnesses, contemporaneously-created documents, or both. That is made clear by the table below.

Testimony on Key Point	Corroborated By Other Witnesses?	Corroborated By Documents?
Brooks testified that, at a Starbucks on May 13, 2009, Marcia Norris told him that David Fair told her to "take one for the team" to "secure jobs for these individuals." (Brooks at 70:19-72:2).	Yes. Norris testified that she spoke with Brooks and told him that Fair told her to "buy a "sexy dress," and "meet up with Mr. Ward, go out with him." (Norris at 418:6-418-11, 456:12-18).	Yes. Norris provided a written statement (GC-8). In it, she wrote that Fair wanted her to go out with Ward because otherwise "we will not be hired on by Trinity." (GC-8).
During this Starbucks conversation, Brooks said that, in response to his question about who are we talking about (e.g., who was the "team"), Norris said Romo, Fair and Smith. (Brooks at 72:3-6).	Yes. Norris testified, that "team" meant Romo, Fair, and Smith. (Norris at 456:23-457:2).	Yes. In a May 13, 2009 internal email (sent from Brooks to Hollis), Brooks wrote down that "she gave me the names of the officer's [sic] that are involved…Thomas Smith, Michael Romo and David Fair." (R-15).
Brooks reasonably believed that Norris had implicated Romo, Fair and Smith. (Brooks at 72:3-12, 283:24-283:4).	Yes. Hollis shared that reasonable belief. (Hollis at 948:23-949:15).	Yes. In a May 22, 2009 internal email, Hollis wrote "Thomas and Romo were named by Norris. We will not be picking them up." (R-14).
Brooks reasonably believed that Romo, Fair and Smith did not treat Norris well. One Trinity guard (Art Rumrill) told Brooks that they had mistreated her. (Brooks at 297:21-298:5).	Yes. Hollis testified that he received a report of Rumrill's conversation with Brooks before terminating Romo and Smith. (Hollis at 947:1-19).	Yes. In an internal email, Brooks reported to Hollis what Rumrill had said. Rumrill had said that with regard to Romo, Fair and Smith, "Ms. Norris got the worst from those 3." (R-13).
Brooks testified that when he saw that Fair had not listed his janitorial or landscaping contracts in his Trinity documents, he asked May Joe (a Department of Homeland Security employee) to see if he had done so on the forms he had given to the government, including a form called the SF85P. (Brooks at 262:11-263:3).	Yes. Joe confirmed that Brooks had contacted her and wanted her to send the requested information. (Joe at 1044:19-1045:8). Fair admitted that he did not list the contracts. (Fair at 795:7-797:11).	Yes. In a May 11, 2009 email, Brooks emailed Joe to check Fair's EQUIP Application. (R-7) Yes. In his employment package, under the section Prior Employment, Fair did not list those businesses. (GC-11).

Testimony on Key Point	Corroborated By Other Witnesses?	Corroborated By Documents?
Brooks testified that Joe sent the SF85P to him and that it did not Fair's landscaping business. (Brooks at 264:24-266:3, 267:22-268:18).	Yes. Joe confirmed that Fair did not list his landscaping business on his SF85P as required. (Joe at 1047:13-17, 1049:9-16).	In a May 11, 2009 email, Joe emailed Fair's SF85P to Brooks, and it did not list his janitorial or landscaping businesses. (R-7)
Brooks testified that Joe also told him that Fair leaving out his outside employment "was considered deception." (Brooks at 325:14-21).	Yes. Joe testified that she discussed Fair's "deception" with Brooks. (Joe at 1050:1-9).	Yes. In a July 14, 2009 email Brooks wrote to Joe that Fair was not working for Trinity any longer because of "deception." (R-37).
Brooks testified that, during his initial meeting with Romo to investigate the allegations made by Norris, he believed Romo was "lying to him." (Brooks at 275:20-276:2).	Yes. On cross-examination, Romo admitted as follows: "Q: Mr. Romo you left Trinity's building without telling Brooks everything you knew at the time didn't you? A: Yes." (Romo at 648:20-23).	Yes. Romo initially wrote a statement that said only "I have nothing to discuss until this matter is finished. I don't have any info to give you at this time." (R-9).
Brooks testified that, when Trinity investigated Romo, Romo was "very unprofessional" "and was reluctant to discuss any knowledge he may have had in regards to sexual harassment." (Brooks at 274:274:1-276:2).	Yes. Rollins (another officer present at the time) testified that Romo was "agitated" and "evasive," his voice was "escalating, loud," and he was "pointing at Brooks." (Rollins at 888:3-5, 889:15-19, 891:21-23, 892:21-25).	Yes. In a May 22, 2009 email, Brooks wrote Romo "would not go near the allegations that I brought up before him, he stayed away from the entire situation" and "all he said about that was he did not know anything about it and he was not writing another statement about anything." (R-14).

Testimony on Key Point	Corroborated By Other Witnesses?	Corroborated By Documents?
Brooks testified that, when Trinity investigated Smith, Smith was similarly "irate," hostile and evasive, was "a little bit out of control," and told another Trinity guard to "keep your mouth shut, you don't know what you're talking about." (Brooks at 286:20-21, 287:12-15, 292:3-293:5)	Yes. Rollins said that Smith was "loud, agitated" and told the officer to "shut up." (Rollins at 890:24-892:3). (Brooks at 286:20-21, 287:12-15, 292:3-293:5)	Yes. In a May 22, 2009 internal email, Mr. Hollis wrote Smith was "angry," "was lying," and said Brooks "should not have hired Norris she has always been a problem." (R-14).
Brooks and Hollis testified they did not know about whatever conversations the Charging Parties (and other guards) may have had about the deficiencies in ASTI's training class. (Hollis at 923:11-923:22, 949:20-949:23; Brooks at 309:9-309:16).	Romo admitted that those conversations occurred hours away from Trinity and 200 to 300 yards away from Hodges. (Romo: 579:19-579:23, 580:20-581:4). The parties stipulated that Brad Cantrell did not notify Trinity about the Charging Parties' complaints. (Stipulation at 1023:21-1024:9).	

In short, the ALJ trusted Brooks's testimony over the Charging Parties' testimony because it was more plausible and corroborated by other witnesses or documents. (ALJ at 17:14-15 ("Frankly, where the [Charging Parties] disagree with Brooks, I find myself trusting Brooks's version over theirs.")). The ALJ made credibility determinations in favor of Brooks on several key points, including that: (i) Brooks did not know about the Charging Parties' complaint to the OIG (*Id.* at 21:13-16); (ii) as a result of the Charging Parties' evasiveness and hostility during his investigation, "Brooks no longer trusted any of the three" (*Id.* at 23:6); (iii) Brooks's conclusion that Romo lied to him during the investigation was reasonable (*Id.* at 14:36-37), including because Romo's "curt" statement that "I don't have any info to give you at this time" insinuated that Romo was "in possession of pertinent information but [was] withholding it until a later time"

(*Id.* at 14:34-37); and (iv) Brooks had "received a report from their fellow officer Rumrill that Norris had gotten the "worst from those three" (meaning the Charging Parties) (*Id.* at 23:8-9). These credibility determinations were proper. They certainly were not "inherently incredible or patently unreasonable."

3. The ALJ's Negative Credibility Determinations Concerning The Charging Parties Were Supported By The Evidence.

The ALJ's credibility determinations of the Charging Parties – that their testimony was, among other things, "untrue," (*Id.* at 18:19), "not credible on its face" (*Id.* at 11:19), and "lying," (*Id.* at 23:5) – were well-supported by the evidence. Unlike the Trinity witnesses, the Charging Parties' testimony was contradicted by other witnesses' testimony and unsupported by documentary evidence.

In many situations, the Charging Parties' testimony was inconsistent or not credible on its face. Norris testified (and gave a statement) that Fair told her to "take one for the team" and "get[] a sexual harassment suit against Trinity" by "meet[ing] up with Mr. Clifford Ward, go out with him." (Norris at 456:4-456:15). Fair categorically denied saying or doing anything like that. (Fair at 810-22-811:8). Fair's testimony is not surprising—given that he has every incentive to deny making such incriminating statements—but is not believable. Much like the Board rejected the owner's "summary denial" of his conduct in *Dietrich Industries, Inc.* – particularly when contradicted by other witnesses – the Board should reject Fair's unsupported testimony.

Similarly, Romo's credibility is in doubt. Norris provided a written statement—and again testified under oath—that Romo simply stood by and did nothing while listening to Fair tell her to "dress up and lure [a Trinity supervisor] into a bad situation" (GC-8). Romo denied that. He stated that Norris had a conversation with Ward where Fair was *not* present. (Romo at 605:6-605:16). But curiously, Romo's statement tracks nearly word-for-word the statement that Norris

provided to Trinity. How did he know what Norris said when, according to his testimony, he had not seen Norris's written statement? Romo knew what would be in Officer Norris's statement because *he* was a witness to Norris's conversations with Ward *and* Fair.

Romo and Smith admitted on cross-examination that they were untruthful in documents they submitted to Trinity about the training class *and* during the investigation. Romo was torn and conflicted about telling Brooks the truth:

> Q: Unlike the other charging parties I'm asking you, you had information that you could have given Brooks at that time, correct?
>
> A: Yes I could have given him information.
>
> Q: You felt torn about what to tell him at that time, didn't you?
>
> A: Correct.

(*Id.* at 645:24-646:11).

> Q: Mr. Romo, you left Trinity's building without telling Brooks everything you knew at that time, didn't you?
>
> A: Yes.

(*Id.* at 648:20-23). A close evaluation of Romo's testimony during cross-examination reveals other subtle examples of Romo's untruthfulness. When asked about his statement to Brooks that he "wanted more information" about Norris's allegations, Romo changed his testimony from initially telling Brooks that "I didn't know," to "I wanted more information before I filled out his voluntary statement," to "I told him I didn't have nothing to do with it." (*Id.* at 641:6-641:16). Because Romo did not know the extent to which Norris implicated him in Fair's comments to her, he did not know whether to tell the truth—and consequently harm his friend, Fair—or find some other way to get away from the consequences of his connection to what Fair said to Norris about taking a hit for the "team."

Smith also admitted he gave a statement to Trinity that was not true. (Smith at 736:22-737:10). In fact, all three Charging Parties admitted that, in payroll documents they signed and

provided to Trinity, they padded their hours in order to be paid more than they should have. (Romo at 638:5-20; Smith, 731:10-22; Fair at 845:2-15 (stipulating that Fair would give the same answers)).

The ALJ's decision to discredit the Charging Parties' testimony – particularly given that their testimony contradicted several other witnesses; their testimony was not corroborated by other witnesses or documents; and they admitted they lied several times in the past – was well-supported by the evidence. These credibility determinations were not "inherently incredible or patently unreasonable."

B. The ALJ Correctly Ruled That The General Counsel Did Not Make Its Prima Facie Case. (Exceptions 1-56)

1. The General Counsel Did Not Prove Concerted Protected Activity. (Exceptions 1, 5, 7-9, 11-18, 26, 54, 55, 56)

The ALJ held that the General Counsel failed to prove its prima facie case because it failed to prove both that Trinity *knew* that the Charging Parties engaged in concerted protected activity, and the Trinity had *animus* towards that activity. (ALJ at 22:21-24). While it is unclear whether the ALJ based its decision on whether or not the Charging Parties actually engaged in concerted protected activity, the ALJ certainly could have based its decision on that ground. (*Id.* at 21:20-22:20). The evidence makes clear that the Charging Parties did *not* engage in any such activity.

The General Counsel alleges that the Charging Parties engaged in two forms of protected concerted activity: (1) sometime in mid-March, they allegedly made a "complaint" to FAA managers (Brad Cantrell and Larry Marinel) about "unsafe guns" they were given for a practice and qualification shoot; and (2) on April 23, they and other guards discussed reporting certain issues in their ASTI training to OIG. On their face, both incidents sound like they *may* have

engaged in protected activity. But a close examination of the facts and circumstances show that they did *no* such thing because they have grossly mischaracterized what they did and why.

a. The Charging Parties' Casual Remarks About A Benign Equipment Issue Was Not Protected Activity.

The law is clear: there is no protected activity unless the employees are actually trying to *improve* work conditions (as opposed to simply *griping* about them). *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565; *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 840 (2d Cir. 1953) (holding that an employee's "mere griping" is far too "inchoate" and an "employee's complaint, if addressed to other employees, is not, without more, the sort of activity which Congress intended to protect"). "Purely personal griping and complaining about working conditions is not an activity protected by section 7 of the National Labor Relations Act." *NLRB v. Deauville Hotel*, 751 F.2d 1562, 1571 (11th Cir. 1985). Analyzing the context in which the activity occurs is essential to assessing whether it is for the mutual aid or protection of employees. *See Earle Indus. Inc. v. NLRB*, 75 F.3d 400, 405, 407 (8th Cir. 1996).

The ALJ held that, while a gun jamming report may be a section 7 matter "in the abstract," it was likely not a section 7 matter in the particular circumstances of this case. (ALJ at 17:34-18:1). As the evidence shows, what the Charging Parties *actually* did was make an offhand remark about a benign equipment shortcoming to a few of their friends. The ALJ found that the subject of the complaint was a "routine equipment shortcoming" (*Id.* at 17:20) that was "trivial and momentarily annoying." (*Id.* at 5:20). The Charging Parties were not motivated at all by safety ("safety seems to have been an afterthought") (*Id.* at 17:42-18:1), and by the time of the "report," the issues has already been "promptly addressed." (*Id.* at 17:34-35). As a result, he did not find this "report" to be protected Section 7 activity. His finding was well-supported by the evidence.

First, whatever issues the Charging Parties experienced had nothing to do with Trinity work conditions. On March 15, while still employed by *Diamond*, they borrowed weapons from Trinity and took an "opportunity to practice [their] shooting skills" on their own. (Romo at 539:14-20). But, as the ALJ noted, "misfiring weapons at a range has no bearing on what would have happened later when the guards assumed their posts" (ALJ at 17:37-38), particularly since "there is no evidence that the guns they were issued for practice and qualification would have been the guns issued to them as permanent weapons." (*Id.* at 17:39-40).

Second, while the Charging Parties try to characterize their actions as a report to the FAA, it was really an offhand remark. Smith admitted that Cantrell and Marinel visited them in the guardhouse, as they often did, and "asked how [the shoot] went." (Smith at 678:13-679:1). Smith explained "that we had a problem with the three weapons." (Smith at 678:24-679:1). There was nothing else notable about this conversation.

While the General Counsel tried to argue that the Charging Parties were acting out of alleged concerns about "safety," the ALJ correctly rejected that premise, noting that "safety was *not* part of their dialog with Marinel and Cantrell." (ALJ at 17:41-42). There is no evidence that *anyone* raised issues or concerns about safety. In fact, the timing of the report indicates that the Charging Parties were not motivated by safety. While the Charging Parties testified that they made the report to Cantrell and Marinel shortly after the March 17 qualification shoot, the evidence establishes that they spoke with Marinel and Cantrell weeks later, in April. (*Id.* at 4:41-5:1-4). Had the Charging Parties truly been motivated by safety, they would have raised whatever concerns they had immediately instead of waiting weeks to do so.

Whatever Smith and Romo said to Cantrell and Marinel was just a casual comment made in one of their many daily conversations. Cantrell admitted that he interacted with the Charging Parties sometimes as much as twelve times a day. (Cantrell at 493:23-494:1). That is not

surprising because they were all friends. According to one security guard, they were all good friends (Norris at 435:20-24), and Fair had a lot of communications with Cantrell that were more "social than work." (*Id.* at 436:25-437:2). They appeared to socialize outside of work regularly. Another security guard testified that Fair and Cantrell would (in the same car) "go off the installation, off the facilities and come back on frequently the same shift." (Heyermann at 877:9-14). She said that she "recognized a pattern, that often Mr. Cantrell would be leaving with [Mr. Fair.] (*Id.* at 877:14-16).

Lastly, the Charging Parties comment to Cantrell and Marinel was not protected because they were not seeking any remedy. *The M Resort, LLC*, 2009 NLRB LEXIS 347, at *40 (Nov. 5, 2009) (to qualify as concerted protected activity, propounding party must show the activity "seeks a specific remedy or result"). Neither the Charging Parties, nor Marinel or Cantrell, testified that the Charging Parties were seeking help or action on their behalf. The ALJ, observing Marinel's demeanor, noted that "Marinel, after hearing of the incident was far more concerned about the quality of guard service being provided to the FAA." (ALJ at 5:21-22). In other words, Marinel was more worried about, and was acting for, the FAA, *not* for the Charging Parties. That was why he mentioned what Romo and Smith told him at the same time he was discussing "other items" pertaining to FAA's contract with FPS. (Marinel at 771:8-771:14). There is no testimony from any witness that Marinel acted on (or was asked to act on) behalf of the Charging Parties.

In short, the Charging Parties are overstating what they said and why. The Charging Parties' statement about "gun issues" was an offhand remark about a routine issue, simply griping among friends and colleagues. It is not protected activity.[1]

[1] The main case relied upon by the General Counsel – *George Farm Bureau Mutual ins. Co.*, 333 NLRB 850 (2001) – is factually distinguishable. Unlike this case, the employees in that case (footnote continued)

b. The Charging Parties' Complaints About Training Were Not Concerted Activity And Were Not Directed At Trinity.

The General Counsel alleges that the Charging Parties also engaged in concerted protected activity when, on April 23, they discussed their frustrations about training and decided to make a report to OIG. The ALJ noted that "it is an open question concerning whether filing a complaint with a government OIG qualifies as protected concerted activity as defined by Section 7 of the Act." (ALJ at 21:20-21). The ALJ never decided that issue, and the Board need not either.

What is clear is that the Charging Parties were complaining about ASTI, *not* Trinity. The Charging Parties testified that they gathered during training while at the gun range to "express their frustrations" about a training class that was mandated by the federal government (FPS), and conducted by a third party, ASTI. According to Fair:

> On the 23rd [April], Danny Hodges called us all together to inform us that was going to be our last day of training. And he told us that FPS, the reason for this, FPS was not going to graduate a class this small or give a test for a class this small. And that we would not resume training until they got another class started and got them caught up to where we were in the class. Then after he finished that, everybody was upset, we were wondering about, hey, what can we do, you know, we've got to make money, feed our families, we have bills to pay, how long would this take. And he was telling us he didn't have any idea…

(Fair at 808:23-809:13).

Fair did not testify that these concerns pertained to Trinity, or anything that Trinity did, was aware of, or was in a position to change. Similarly, Romo testified that the guards talked about their frustrations regarding training and how they could talk to different people about what

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filed an official complaint to the relevant state agency (a report to the George State Insurance Commissioner) about their supervisor's commission of insurance fraud, a "serious work concern that they could reasonably expect to affect their positions and their terms and conditions of employment." As detailed above, that is not the situation here.

was going on with it. (Romo at 580:20-581:21). There is no testimony or evidence connecting the nature of those concerns with anything that *Trinity* had done or had an ability to control.

This is not an employer-imposed training or an employer-controlled training. Unlike a typical Police Academy for newly hired police officers, or a boot camp for military officers, Trinity did not control the FPS Training Course or ASTI. The subject matter of the training was dictated by the FPS Statement of Work; Trinity had no ability to tell ASTI what to teach or when to operate. (Hollis at 921:1-921:17). In other words, even if the Charging Parties were frustrated with their experience at *ASTI*, their frustrations were not sufficiently related to their employer-employee relationship with *Trinity*. Section 7 of the act does not apply here.

2. The General Counsel Did Not And Cannot Prove Knowledge. (Exceptions 1, 2, 3, 6, 8-10, 26, 28-50, 54-56)

Knowledge is a "basic element" of an unlawful discharge. *Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994). As part of its prima facie case, the General Counsel was required to prove that "the employer was . . . aware of the discharged employees' protected activities." *Id.* Without knowledge, there can be no "discriminatory motivation," and the complaint must be dismissed. *Id.*

Although knowledge can be inferred by circumstantial evidence, an "inference" of knowledge is not necessarily sufficient. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253 (2006). The Board has conducted a "totality of the circumstances" test to determine whether the knowledge requirement is met. *Montgomery Ward & Co.*, 316 NLRB at 1254 (finding that Respondent had knowledge because it: (1) learned of a union organizing campaign; (2) displayed anti-union animus when telling its new hires that that they did not need the union; (3) urged employees not to sign union cards; and (4) graphically threatened employees that there "would be blood on the floor" before there would be a union). The Board has also considered the timing between the discipline and

the alleged protected activity. *Id.*; *see Best Plumbing Supply*, 310 NLRB 143, 144 (1993) (finding that the employer terminated the employee 30 minutes after he expressed a pro-union position in an employer-called meeting that was aimed at preventing unionization).

Inferences must be based on proven facts, not other inferences. *Raysel-IDE, Inc.*, 284 NLRB 879, 880 (1987) (rejecting the ALJ's inference of knowledge based on a series of prior unsupported inferences). If knowledge is inferred by circumstantial evidence, an employer can overcome that inference if it can show that its decision was motivated by some intervening event that would justify disciplinary action. *See Dallas & Mavis Specialized Carrier Co.*, 346 NLRB at 253. The Board has declined to infer knowledge based solely on *some* temporal relationship between protected activity and an adverse action against an employee. *Id.* at 255-56.

The ALJ correctly ruled that the General Counsel failed to prove knowledge. The ALJ's decision is well-supported by the record, including the utter lack of any direct evidence of knowledge and specific inconsistencies in the Charging Parties' testimony that made their stories "confusing and often improbable." (ALJ at 17:17-26). The General Counsel was required to prove that Trinity knew of: (1) the Charging Parties' discussions or actions related to gun jams; and (2) the Charging Parties' discussions or actions related to the ASTI training program. As the evidence shows, and as the ALJ concluded, the General Counsel did not prove either.

a. Trinity Did Not Know About The Alleged Reports to the FAA.

The ALJ correctly concluded that the General Counsel failed to prove Trinity knew that Romo and Smith spoke with Marinel and Cantrell about guns jamming. The General Counsel did not produce any direct evidence of Trinity's knowledge, relying only on unsupported inferences.

(i) There is No Direct Evidence Proving Knowledge.

There was no direct evidence from *any* witness that Trinity *knew* of the "reports" to the FAA about gun-jams. Brooks testified that he was unaware of any such reports. (Brooks at 241:23-242:8). That testimony was uncontroverted. The ALJ found that neither Smith nor Romo testified that they told anyone from Trinity or ASTI about those discussions with the FAA. (*Id.* at 18:14-15 (concluding "nor did Romo or Smith say they had mentioned it either to Brooks or Hodges")). While the Charging Parties testified they did tell Marinel and Cantrell, neither Cantrell nor Marinel ever told any of that information to Trinity. With regard to Cantrell, the Parties stipulated that Cantrell did not tell Brooks about Romo's or Smith's statements. (Stipulation at 1023:14-17). With regard to Marinel, as the ALJ properly found, he never testified that he told Brooks about those statements. (ALJ at 18:13). All of this evidence supports the ALJ's conclusion that "[Brooks] didn't know the FAA was involved[.]" (*Id.*)

(ii) There is No Circumstantial Evidence Sufficient to Prove Knowledge.

"Inferences are not an adequate substitute for evidence." *Dallas Mavis Specialized Carrier Co.*, 346 NLRB at 256. The Board has declined to infer knowledge where the inference was based on another inference (instead of actual testimony or an exhibit). *Id.*; *Raysel-IDE, Inc.*, 284 NLRB at 880. The Board has also refused to infer knowledge based on circumstantial evidence where the evidence actually supported the reasons asserted for the discharge. *See Boardwalk Regency Corp*, 344 NLRB 984, 998 (2005); *U.S. Corrections Corp*., 310 NLRB 431, 439 (1993); *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351, 1360 (8th Cir. 1990).

The ALJ properly rejected the General Counsel's efforts to infer knowledge based on loosely-connected evidence. The General Counsel attempts to infer knowledge based on: (1) a single email from an FPS officer sent on April 17; (2) rebutted testimony about Hodges's alleged

comments to the class. But as the ALJ held, this is all speculation and guesswork. Indeed, the ALJ found that *none* of this circumstantial evidence proved knowledge. (ALJ at 22:18-24).

1) The April 17 Email Does Not Prove Knowledge.

The April 17, 2009 email between Le Lieu and Brooks does not prove or infer knowledge. That email stated only:

> Reports were made that new weapons issued to the incumbent guards at FAA had problems during gun qualifying. It was reported that weapons jammed when they were going through the course of fire. Please advise?

(*Id.* at 5:46-48). As the ALJ found, that email did not establish *any* connection to Romo or Smith, and it did not provide Brooks with notice that a report had been made to Cantrell or Marinel. (*Id.* at 5:50-6:3, 6:13-36). The ALJ stated:

> [Le Lieu] did not say who had made the reports, nor did she say when the incidents had supposedly occurred-having at least three and probably four choices – the two in mid-March and one covering the April 10 shoot (and probably a preceding training shoot for the April shooters). Yet she is clearly referring to a qualification shoot.

(*Id.* at 5:49-6:4).

Brooks *could not* know from that email: (1) who made the "reports"; or (2) at which qualification shoot this jamming supposedly occurred (there were two: one on March 17 and another on April 10). That is consistent with Brooks's testimony, as he testified he *did not* know to which shoot she was referring. (Brooks at 243:1-243:16). Brooks also testified that there were three authority figures at each qualifications shoot to ensure the safety and integrity of the shoots. (*Id.* at 237:5-238:12). And there were also approximately 100 other guards trying to qualify during those shoots. (*Id.* at 547:4-548:8; Exh. 2).

The ALJ credited Brooks's testimony because it was corroborated by his email response at the time. In that email, he responded: "the FAA Officer's did not have any issues with their

weapons on the qualification line at the Chabot Range on the day that they qualified. They all passed without having any weapon issues. No weapons were replaced for them during the course of fire or on the range for that day." (GC-19).

Brooks's response and testimony proved that Brooks did not know to what Le Lieu was referring, and that based on what he knew, he believed that she was mistaken. In other words, Brooks believed that *everyone* had passed the tests and therefore none of the Diamond Guards had any problems with their weapons on March 17 or April 10. Based on that evidence, the ALJ concluded, correctly, that Brooks's "response demonstrates that he was unaware of any weapons issue that affected anyone qualifying;" he "did not take much interest in the matter;" it was "old news," and "Brooks had heard nothing further about the [issue from the practice shoot] and presumed that the matter had long since been laid to rest." (ALJ at 6:13-14, 19, 23-26).

The General Counsel's argument that the Board should infer knowledge from this email is inconsistent with Board precedent. The facts do not support the inference that Le Lieu's email provided Trinity with sufficient information to know that Romo and Smith had discussed gun-issues with the FAA a month earlier. Indeed, the ALJ held that this email did not prove knowledge. (*Id.* at 18:9-13).

2) Hodges's Statement Does Not Prove Knowledge. (Exceptions 2, 4-25, 54-56)

Hodges's alleged statement – he supposedly told the training class that somebody had spoken to the FAA about gun issues out at the range – similarly does not prove knowledge. It does not do so for two reasons: Hodges likely never made that statement, and even if he did, his statement and whatever he knew cannot be imputable to Trinity as Hodges was not Trinity's agent.

As the ALJ concluded, the Charging Parties' testimony concerning the statement allegedly made by Hodges is unreliable. Romo testified that, on *April 15* (two days *before* Lieu's

email to Brooks), Hodges made that statement. The ALJ rejected that testimony as untrue.[2] (*Id.* at 18:19). The ALJ noted that, even under the General Counsel's theory of the case, the record evidence established that the *first* time that anyone from Trinity may have known about reports to the FAA was *April 17* (the date of Lieu's email to Brooks). (*Id.* at 18:9-11). Therefore, Romo's testimony that Hodges threatened the class on April 15, 2009 – two days *before* Trinity could have known about any such reports – is not credible. The ALJ held:

> First, there is a significant chronology flaw in the General Counsel's evidence. There is no evidence that Brooks knew anything about such a report/complaint until April 17. That is the day DHS's Le Lieu made her email inquiry to Brooks about gun jamming. Her email was the first that Brooks had any inkling that anyone outside the Company had mentioned the gun jamming to anyone. Even then he didn't know that the FAA was involved.

(*Id.* at 18:9-13). The ALJ went on to explain that, "[s]o how could Hodges on April 15 be telling the class that Brooks was upset about it? It had not yet happened." (*Id.* at 18:15-16). The General Counsel clearly failed to prove that it did.

Even if Hodges did somehow know about those gun reports, his knowledge is not imputable to Trinity. Hodges was *not* Trinity's agent. The ALJ soundly resolved this question and held that:

> Clearly Hodges did not hold any, nor was he perceived to have any, agency status with Respondent, actual or apparent. Therefore, nothing he said or knew can be imputed to Respondent.

(*Id.* at 20:17-19) (emphasis added).

That holding – that Hodges and ASTI were *not* Trinity's "agents" within the meaning of Section 2(13) of the Act – was proper and more than amply supported by the factual record.

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[2] The General Counsel tries to characterize Romo's testimony on this issue as an "honest mistake." The ALJ (after having observed Romo testify) disagreed, finding Romo not credible.

Most notably, *no witness* ever testified that they believed or thought that Hodges was Trinity's agent or otherwise authorized to speak on its behalf.

"In determining whether a person is acting as the agent of another, the Board applies the common law principles of agency as set forth in the Restatement 2d of Agency." *Allegany Aggregates, Inc.*, 311 NLRB 1165, 1165 (1993). "[A]gency may be established, inter alia, under the doctrine of apparent authority, when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question." *Id.* "The test for determining whether an employee is an agent of the employer is whether, under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World v. Union Independiente de Supermercados y Tiendas Por Departamentos*, 286 NLRB 425, 426-27 (1987). It is the General Counsel's burden to show agency. *Pan-Oston Co.*, 336 NLRB 305 (2001).

As the ALJ held, the General Counsel did not meet its burden. (ALJ at 23:19-20). Trinity did not do or say *anything* to lead anyone to believe that Hodges was authorized to speak or act for it, and the General Counsel did not produce any evidence that proved otherwise. Notably, the General Counsel did not obtain *any* testimony from Hodges because it decided not to call Hodges as a witness.

Officer Norris, who attended the ASTI class with the Charging Parties, confirmed that Trinity (specifically, Brooks) did not say that Hodges had authority to speak on Trinity's behalf. She also testified that she understood that: (1) ASTI was its own business, and not Trinity's agent; (2) that when Hodges was working for ASTI, he was acting in his capacity as its instructor, not on behalf of Trinity; and (3) when Hodges spoke to the class, he was *not* speaking for Trinity. (Norris at 452-454:10).

Romo corroborated Norris's testimony that Brooks never made any representations about Hodges's authority. (Romo at 566:13-566:18). Neither Fair nor Smith testified that Brooks made any statements to the class that Hodges had authority to act or speak for Trinity. In other words, *none* of the Charging Parties disputed Norris's testimony.

The evidence was quite clear that Hodges was *not* Trinity's agent. Hodges had his own company (ASTI) at a separate location miles away from Trinity's offices. (Rollins at 895:2-8). He was hired to complete a specific course—a 120-hour FPS training class—and help the Trinity security guards pass a test. (Hollis at 920:17-922:14). And the Charging Parties knew he was not authorized to speak on Trinity's behalf. As the ALJ concluded, "they knew Hodges was making racist remarks, which the African-American management[3] would not have authorized; was using entertainment films as a substitute for training, which they must have known was not authorized; and may have been falsifying documentation, again conduct which they reasonable knew could not have been authorized." (ALJ at 19:31-35).

The ALJ's findings on these points are undisputed. In fact, the Charging Parties *affirmatively* testified to each of these points. Romo and Smith testified that Hodges used the "N-word" (Romo at 552:21-24; Smith at 687:5-6; Fair at 805:16-20), showed them action movies and concerts during training class (Romo at 551:21-552:4; Smith at 686:20-25; Fair at 804:19-24) and told them to falsify the records that they gave to Trinity, including by writing down that they were falsely present for training (and therefore they would be paid) for eight hours. (Romo at 638:5-20; Smith at 728:3-729:1; Fair at 845:2-15). In other words, Hodges was apparently encouraging them to *cheat* Trinity by padding their hours. He was not acting on Trinity's behalf, and everyone – including the Charging Parties – knew that.

[3] Both Hollis, Trinity's CEO, and Brooks are African-American.

Notwithstanding this undisputed evidence, the General Counsel seems to suggest that Hodges was Trinity's agent because (i) Hodges allegedly made comments to that effect during class; and (ii) Trinity supposedly delegated hiring authority to Hodges. Neither position has any merit. What Hodges allegedly said about his own authority is irrelevant. It is blackletter law that the statements of the putative agent (here, Hodges) cannot be used as evidence of an agency relationship. *Precipitator Services Group, Inc.*, 349 NLRB 797, 801 (2007) (citing *MPG Transport Ltd.*, 315 NLRB 489, 493 (1994)); *Nevada Sec. Innovations, Ltd.*, 2003 NLRB LEXIS 809, *16 (Dec. 22, 2003).

There is no evidence that Trinity delegated any hiring decisions to Hodges. Rather, what the *undisputed* evidence showed is that, before the government would allow a Trinity guard to work as a security guard at a government facility, the government required that guard to pass a training program that the government itself approved. (Hollis at 919:5-22). Because Trinity had no in-house training, Trinity had previously used three independent training schools that the government had earlier approved, one of which was ASTI. (Hollis at 919:25-920:16). Trinity hired the employees; the training school hired the trainers; and Trinity paid the training school for the training. (Hollis at 922:2-10).

With regard to the hiring of the three Charging Parties, the evidence establishes that: before hiring the Charging Parties, Brooks (not Hodges) interviewed them (Brooks at 96:19-97:1, 535:9-11)); on March 30, 2009, Trinity extended the Charging Parties a "contingent offer of employment" (Brooks at 94:6-23; Exhibits GC 9-10)); the offers were "contingent" not only on the guards passing a training class but also several other conditions, including "your passing a background investigation and required medical testing;" (Exhibits GC 9-10); and the training conducted by Hodges was conducted *after* this contingent offer of employment. (Romo at 534:4-11). In other words, it was Trinity (not Hodges) who interviewed the applicants, decided

whom to hire, and provided the offers of employment, and it did all of those things *before* Hodges even started his training. Trinity did not delegate *any* hiring authority to Hodges.[4]

The cases cited by the General Counsel – *Transportes Hispanos*, 332 NLRB 1266 (2000) and *Southern Pride Catfish*, 331 NLRB 618 (2000) – are clearly distinguishable. In *Transportes Hispanos*, the Board held that the respondent employer had delegated hiring authority to a former manager by (i) allowing the former manager to decide which prospective employees to hire; (ii) conducting no interviews or independent investigation of those prospective employees; and (iii) having those prospective employees return job applications not to it but to the former manager. *Transportes Hispanos*, 332 NLRB at 1266. As detailed above, *none* of those facts exist here. Furthermore, the respondent in that case had admitted in its answer that that former manager *was* its agent "at all material times." In its answer, Trinity denied that Hodges was its agent.

In *Southern Pride Catfish*, 331 NLRB 618 (2000), the Board held that a pastor was an agent of the respondent because the respondent (ii) invited the pastor to speak on multiple occasions; (ii) knew before they invited him that he would tell the employees that they did not need a union; (iii) was present at the meetings when he made those statements but said nothing; and (iv) allowed him to speak at the employer's own facilities. *Id.* at 619-620. Again, none of those facts exist here either. Hodges did not speak with any of the employees at Trinity's offices but rather at his own training class seven miles away. (Romo at 534:8-23). When Hodges did speak with them (including on April 15), there is no evidence that Brooks or anyone else from

[4] The General Counsel's ratification argument is also meritless. Trinity is bound by the FPS Statement of Work. There, FPS clearly requires the instructor to inform the contractor of behavior indicating that the student may not be suitable for a position as a guard at a federal facility. (Exh. GC-6, pg. J-89). FPS expects Trinity to then take the appropriate disciplinary steps. Trinity terminated Romo and Smith after conducting its own investigation.

Trinity was even present. In fact, as Smith admitted on cross-examination, Hodges conducted a training class for several days for sometimes eight hours a day, and Brooks was *not* present at training class during that entire time. (Smith at 732:11-15).

b. Trinity Did Not Know About The April 23 Discussions Regarding Filing a Complaint About Training.

In addition to failing to prove that Trinity knew of the gun jam reports to the FAA, the General Counsel also failed to prove that Trinity knew the Charging Parties had discussed complaining to the OIG about ASTI's training program. The General Counsel offered no document that showed, and no witnesses who testified, that Trinity knew about those discussions. All they rely upon is a *single* statement by Brooks – made on a different topic *several weeks after those discussions* – that the trainees should not discuss contractor-specific business with Cantrell and Marinel. In other words, they rely on a statement that said nothing about training, Hodges, OIG, or qualification shoots.

That statement certainly does not show that Trinity knew what the Charging Parties were trying to keep secret. All Brooks said is that the Diamond Guards must follow the chain of command, a policy found in DHS' Standards of Conduct. That comment had absolutely no relationship to the Charging Parties' alleged discussions about reporting the training class to the OIG. In fact, Norris testified, twice, that Brooks never said to the class they should refrain from making complaints, or anything else that can be connected to their discussions about the OIG. (Norris at 371:16-372:10, 453:7-453:12). Brooks' statement, if anything, was a non-sequitur, a statement made for the sole purpose of finding a way to meet with Norris without raising suspicions. (ALJ at 12:11-13) (stating "Brooks went to the ASTI facility and, needing some cover to pull Norris from the classroom so he could talk to her confidentially, made a short speech about what he characterized as "background issues" (the need to follow the chain of command")).

Not surprisingly, the ALJ did not put much stock in the General Counsel's reliance on Brooks' statement. It noted "[o]f course nothing Brooks said that morning mentioned the OIG at all. Indeed, they have not shown that Brooks had any knowledge of what the Charging Parties had done." (*Id.* at 21:1-2). It made sense that Trinity did not know of what the Charging Parties had discussed because the Charging Parties *concealed* those discussions from Trinity and Hodges. According to Romo, on April 23, while at the Chabot Gun Club in Castro Valley (two and a half hours from Trinity), the Diamond guards "expressed their frustrations" about the training class "on the other side of the range…probably a good maybe 200, 300 yards away" from Hodges. (Romo at 579:19-579:23; 580:20-581:4). Hodges was well out of earshot of their discussion. That testimony is uncontroverted. After the Charging Parties had that discussion at the range, they apparently told no one else about it.[5]

In Pizza Crust, the Board refused to infer knowledge because it found that the alleged discriminatees were instructed by the union to keep their organizing activities covert. *See Pizza Crust Company of Pennsylvania, Inc.*, 286 NLRB 490, 495 (1987). The Board held, "[s]uch an instruction would greatly diminish, if not completely extinguish, the chance that an employer would find out about union activity until the union involved chose to make that activity known." *Id.* Similarly, here, the covert nature of the Diamond Guards' discussions (more than two hours away from Trinity, and 200 to 300 yards away from Hodges) effectively ensured that Trinity did *not* know about those discussions.

[5] That is easy to believe because, as discussed above, the Charging Parties admitted to deceiving Trinity and *hiding* training-related issues from Trinity. *See Goldtex, Inc.,* 14 F.3d at 1011 (termination of two employees was not unlawful because "as far as [their] managers knew, [the two employees] may have opposed the union.").

3. The General Counsel Did Not Prove Animus. (Exceptions 1, 2, 3, 7-10, 26, 28-50, 54, 55)

The ALJ's conclusion that the General Counsel failed to prove animus is well-supported by the record evidence.[6] (ALJ at 22:21-24). The ALJ's findings and the evidence upon which those findings are based are consistent with the facts of other Board decisions similarly finding that the General Counsel failed to prove animus. *See Jackson Hospital Corporation*, 2008 NLRB LEXIS 232, at *38, *48 (July 29, 2008); *Boardwalk Regency Corp*, 344 NLRB No. 122 (2005); *U.S. Corrections Corp*., 310 NLRB 431, 439 (1993); *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351, 1360 (8th Cir. 1990).

In *Jackson Hospital Corporation*, the ALJ found that the General Counsel's failure to prove that animus was a "crucial link in the motivational chain." *Jackson*, 2008 NLRB LEXIS 232, at *39. In that case, the CEO of the hospital accepted the recommendation to terminate the Charging Party based on an investigation that included the input from a witness that had union animus. The ALJ looked beyond the input from the investigator with union animus and evaluated the other aspects of the investigation that led to the discharge. The ALJ found that the CEO's decision was based on the findings from a reasonable investigation (examining records, interviewing employees, giving the accused an opportunity to present his side of the story), not animus. *Id.*, at *44-48.

Similarly, here, the ALJ found that "the record does not disclose any animus which might suggest that Respondent had an illegal motive behind its discharges." (ALJ at 22:22-24). The ALJ unambiguously explained why he believed that Trinity terminated the Charging Parties:

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[6] The General Counsel argued that Trinity's Chain of Command policy is evidence of Trinity's animus. The ALJ rejected this argument and properly found that this allegation is not a part of the General Counsel's complaint, and that there was no evidence that any of the Charging Parties ever saw Trinity's policy. (ALJ at 9, n. 17). The General Counsel did not list it amongst its 56 exceptions, so the Board should disregard this argument.

> [T]he evidence, indeed, the only credible evidence, is that Respondent discharged them because they failed to respond to reasonable requests for either additional background information, as in Fair's case or because they behaved unprofessionally during the investigation of Norris's charges, both their refusal to engage and respond and because of the defensively hot nature of their responses. Neither of these circumstances is something which the Act is designed to protect.

(ALJ at 22:26-31.)

Those reasons have nothing to do with any animus towards Section 7 activity. As detailed below, the ALJ's finding of no animus was well-supported by the evidence.

a. The Totality of the Circumstances Proves That Trinity Did Not Have Animus Against Protected Activity.

Even if Trinity knew of the protected activity (which is dubious), it did not have any animus towards that activity, as Trinity still sought to hire the Charging Parties after they had engaged in that protected activity. The evidence showed that Trinity had "an urgent necessity" to return each of the Diamond guards to their post at FAA, including the Charging Parties. (ALJ at 16 n.30). Trinity was working diligently to hire each of the Charging Parties, even *after* the time-period they were allegedly involved in protected activities. Hollis testified that between April 20, 2009 (after the Charging Parties allegedly made reports about gun jams to FAA) and May 8, 2009 (after the alleged discussions about complaining about training to the OIG), he and Brooks were frequently communicating with FPS urging it to complete the training for each of the Diamond Guards, including the Charging Parties. Trinity presented *five* different documents establishing this fact:

1. Exhibit R-31: April 20th email evidencing Brooks's efforts with FPS to facilitate the Diamond Guards' return to work at FAA. (Hollis at 926:14-927:9).

2. Exhibit R-32: April 23rd email in which Brooks updated Trinity's Human Resources department with information needed for Fair to be paid as a Trinity guard once he completed training. (*Id.* at 928:3-928:16).

3. Exhibit R-33: April 28th email in which Brooks requested FPS to train the Diamond Guards so that they can complete their training. (*Id.* at 930:15-931:4).

4. Exhibit R-34: May 7th email repeating the request for FPS to complete the training for the Diamond Guards, *including the Charging Parties*. This email was sent after Hollis spoke with FPS about their refusal to train the Diamond Guards due to their small class size, and after directing Brooks to formally contact FPS and resubmit the request. (*Id.* at 931:25-933:13; 933:20-933:25).

5. Exhibit R-35: May 8th email listing *each of the Charging Parties* as participants in the final segment of the FPS training, again after Trinity had diligently and persistently requested FPS to complete the training for the Diamond Guards so that each of them could begin working as guards for Trinity. (*Id.* at 935:1-936:4).

Trinity only stopped trying to hire the Charging Parties in mid-May, when it was alerted that they had engaged in misconduct, including a plot to extort it. In *Dallas & Mavis Specialized Carrier Co.*, the Board was persuaded by the fact that the employer terminated the Charging Parties immediately after their improper acts. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB at 256. Similarly, here, the evidence establishes that Trinity terminated the Charging Parties immediately after completing its investigations of their improper conduct.

Trinity's lack of animus to any protected activity is confirmed by the fact that Trinity did not seek to terminate *all* employees who engaged in any protected activity. According to the Charging Parties, *seven* Diamond Guards discussed filing reports with the OIG about the training. Why would Trinity single out only *three* of them? If Trinity had animus against

protected activity, why did it not find reasons to terminate the *other* Diamond Guards as well? That inquiry was critical to a finding of no animus in *Dallas & Mavis Specialized Carrier Co.*, where the Board found that even though the employer had reason to believe that many of its employees were involved in union activity, "there [was] no evidence showing why it would know or suspect the involvement of any particular employee." *Id.* (holding that because the employer did not discharge a known union activist for refusing the same direct order as the discriminatees, the Board could not prove knowledge or that the discharges were motivated by animus).

C. Trinity Met Its Burden Under *Wright Line*. (Exceptions 1, 3, 6, 8-10, 26, 28-50, 54-56)

Under *Wright Line*, the General Counsel must show that the alleged protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), *approved NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If the General Counsel has met its burden, then the burden shifts to Trinity to demonstrate that it would have taken the same action even in the absence of the protected conduct. *Id.*

Under *McKesson Drug Co.*, Trinity can meet that burden by proving that: (1) Trinity had the reasonable belief that the Charging Parties "committed the alleged offense," and (2) Trinity "acted on that belief when it discharged [them.]" *McKesson Drug Co.*, 337 NLRB 935, 937 (2002). The ALJ found that, to the extent any burden shifted to Trinity, Trinity met that burden. Specifically, it held that "these employees' behavior led to the discharges…" (ALJ at 23:1-3). In support of this decision, the ALJ found that:

> Fair had no good reason to refuse to supplement his background information as requested and Romo had responded to Brooks's information request first by lying and then by seeming to blame the victim all while he lost his temper. Smith was perhaps more a victim of Romo's behavior since Brooks no longer trusted any of

> the three. Fair had already been fired, but was implicated in the Norris matter and Norris had orally implicated Smith. Moreover, Brooks had received a report from their fellow officer Rumrill that Norris had gotten the 'worst from those three.

(*Id.* at 23:3-9).

As will be detailed below, that finding was proper and well-supported by the evidence. *See GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351, 1360 (8th Cir. 1990) (discussing the substantial evidence in the record establishing that the employer did not commit an unfair labor practice); *see also U.S. Corrections Corp*., 310 NLRB 431, 439 (1993) (finding that the "General Counsel's circumstantial case collapse[d] when considered against the conduct that gave rise to their discharges.").

1. Based On A Thorough Investigation, Trinity Reasonably Believed the Charging Parties Had Committed Wrongdoing.

Trinity had a reasonable, good faith belief that Fair had committed misconduct. It had *written proof* that Fair had not listed his janitorial or landscaping contracts in his Trinity employment documents or its federal documents. (R-5-R-7). That is exactly what those documents showed. Trinity thoroughly investigated those issues. It checked its own documents; it contacted the government to obtain the documents Fair submitted to it; and it interviewed and met with Fair. (Brooks at 257:6-15, 260:24-261:13, 262:11-270:19). Hollis instructed Brooks to meet with Fair and ask him to choose between his contracting business and working for Trinity. (Hollis at 936:12-940:9). Brooks explained to Fair that the Statement of Work did not allow any Trinity guards to have an actual or apparent conflict of interest. Fair was unwilling to decide between the two options, and he left the meeting without doing so. Brooks discussed this information with DHS, and learned that Fair failed to disclose the contract-related information in his federal background documents. (Brooks at 256:11-20; 262:11-263:11). Brooks then

confirmed that Fair's omissions were deemed deceptive. (Joe at 1047:3-1047:12; 1049:9-1049:12; 1050:7-1050:9). FPS's May Joe corroborated Brooks's testimony on these points. *Id*

Trinity had a reasonable belief that Romo and Smith had also engaged in wrongdoing. What is the best evidence of what its beliefs were at the time? *Its own contemporaneously-sent internal emails.* The truest indication of what an employer *actually* believed is what it was saying and writing privately amongst its representatives. For that reason, the employer's internal emails are typically the most harmful evidence against an employer. Here, though, those internal emails *help* Trinity's case. They confirm that Trinity reasonably believed that all three Charging Parties had done something wrong. In at least five internal emails (contained in the email chains found on R-13, R-14, and R-15), Brooks or Hollis reiterated their belief that Norris had accused all three Charging Parties of misconduct. The General Counsel does not suggest, nor could it do so credibly, that Trinity employees lied to each other when they wrote those emails. The General Counsel really has no answer for those emails. The uncontroverted evidence shows that, in multiple private emails, Trinity confirmed that it *did* reasonably believe that all three Charging Parties had harassed Norris.

Trinity's beliefs were reasonable because it had conducted a thorough investigation. An employer's investigation of alleged misconduct can show that the discharge was based on its reasonable belief that the employee engaged in wrongdoing. *See Boardwalk Regency Corp.*, 344 NLRB 984, 999 n. 43 (2005) (employer's investigation, including providing the Charging Party with a chance to be heard, evidenced a lawful motive and defeated arguments seeking an inference of knowledge and animus); *see also Washington Fruit and Produce Co.*, 343 NLRB 1215, 1221 (2004) (an investigation was "thorough and complete" where the employer terminated an employee after obtaining a written statement).

Trinity's investigation of Norris's allegations was more than sufficient. It conducted a multi-day, multi-witness, multi-statement investigation. Trinity first interviewed Norris and obtained a written statement from her. Norris' statement was extremely detailed – in seven paragraphs, she recounted specific dates, statements and conduct committed by Fair on at least three occasions. (GC-8). But the statement did not implicate only Fair. It specifically named "Michael Romo," and repeatedly used the term "team." (*Id*.).[7] Norris' reaction during the investigation was also telling. She had a "saddened look on her face" and was "crying," in other words, she acted like someone who had been harassed. (Brooks at 70:19-25).

Trinity's investigation of Romo and Smith was fair, complete and revealing. It interviewed each of them *twice*. It obtained *two* written statements from each of them. (R-9-R-12) And everything they said and did during those investigations led Trinity to believe they were guilty.

Romo initially provided only a cryptic two-sentence statement – "I have nothing to discuss until this matter is finished. I don't have any info to give you at this time." (R-9). That statement raised more questions than it answered. What would Romo discuss when the matter was "finished?" What information did he have but was refusing to give "at this time?" Why was he refusing to give that information? The ALJ found that "[Romo's] answer insinuates that he is in possession of pertinent information but is withholding it until a later time. From that, Brooks concluded, reasonably, that Romo was essentially lying." (ALJ at 14:36-37). In other words, Romo's statement indicated he was being both uncooperative and evasive, and his conduct during the investigation only corroborated that. According to another witness, during the investigation, Romo appeared "agitated," "evasive" and "escalating." (Rollins at 888:3-5,

[7] Both Norris and Brooks understood the reference to "team" to include Romo, Smith and Fair. (*See* Norris at 456:23-457:2, 441:24-445:5).

889:15-19, 891:21-23, 892:21-25). Nothing he said or did re-assured Trinity; in fact, it seemed to *confirm* that Romo had done something wrong. Trinity presented evidence that that is *exactly* what it thought. In an internal email to his supervisor, Brooks specifically said "Thomas [Smith] and [Michael] Romo there is something wrong there and I just can't pin point it." (R-14).

Smith's conduct also made him seem guilty. When Trinity interviewed him, he was "hostile and evasive," "out of control," and told a Trinity employee to "shut up." (Rollins at 890:24-892:3; Brooks at 286:20-21, 287:12-15, 292:3-293:5). He also blamed Norris for everything. During the investigation, as Trinity's own internal emails show, Smith said Brooks "should not have hired Norris she has always been a problem." (R-14).

The General Counsel nevertheless tries to argue that Trinity should not have reasonably believed that Smith was involved. They rely on the fact that Norris testified that she described only Romo and Fair (not Smith) as being present when Fair made his first statement that Norris should "take one for the team." But Norris made clear who was the "team:" "[j]ust Fair, Smith and Romo, I mean that's what I considered, you know, to be the team. (Norris at 456:23-457:2). Norris also testified that she felt that Smith would raise his voice when speaking to her, pointed his finger in her face, spoke to her with an aggressive tone, changed her schedule arbitrarily and for the purpose of harassing her, and spoke to her disrespectfully and disregarded her concerns. (*Id.*). Additionally, Brooks and Norris both testified that Norris repeatedly described to Brooks the way "*they*" treated her. Norris explained that when she worked at Diamond with the Charging Parties, "*they*" treated her disrespectfully. (*Id.* at 441:24-445:5).

Brooks reasonably understood "they" and "team" to include Smith. (Brooks at 70:19-72:6). That is what he heard, and that is what he wrote to Hollis. In fact, his email to Hollis about his conversation with Norris includes facts that he could have gotten *only* from Norris. For example, in that email, he stated that Norris said, "David [Fair] told her that she was deep trouble

because he knew she was the snitch bitch that told Trinity that he had a landscape company." (R-36). Norris testified that she did hear that Fair called her a "snitch." (Norris at 444:13-444:15). How would Brooks have known that unless he heard her say it during that conversation?

Furthermore, Trinity had *other* evidence that led it to reasonably believe that Smith was involved: Trinity also interviewed Art Rumrill, another Diamond guard. Rumrill confirmed that "Officer Norris got the worst from those 3," and he specifically named those "3": "Romo, Fair *and* Smith. (R-13).

In short, after completing its multi-day, multi-witness, multi-statement investigation, Brooks and Hollis evaluated the evidence and believed that Norris was credible and that Romo and Smith were not. In fact, Romo and Smith's unprofessional conduct during their investigation provides *additional* sufficient grounds for Trinity to terminate them. As the ALJ held, they "behaved unprofessionally during the investigation of Norris's charges, both their refusal to engage and respond and because of the defensively hot nature of their responses." (ALJ at 22:27-30). The Charging Parties were armed security guards entrusted with the responsibility to protect and safeguard federal buildings for the Department of Homeland Security. They were justifiably expected to act with self-control, professionalism, and respect at all times. As the Board has itself noted, "self-control is a critical qualification for performing the duties of a correction officer." *U.S. Corrections Corp.*, 310 NLRB at 439, n.34 (1993). When a security guard therefore acts without that self-control, and in fact, acts "beyond the edge of tolerable behavior," the employer may terminate him. *Id.* Such a discharge may be proper even if the record revealed (which it does *not* here) that the employer expressed animus against the union. *Id*.

2. Trinity Terminated the Charging Parties Based Only On Its Reasonable Beliefs.

Trinity terminated the Charging Parties based on its reasonable belief that they had committed misconduct. Trinity's decision-making process on this issue was transparent. That process was all reflected in internal emails, including a May 21 email between Brooks and Hollis, in which Hollis clearly stated his rationale for *not* hiring Romo and Smith: Trinity would not "pick up" Romo and Smith because they were "named" by Norris. (R-14). And with respect to Fair, his deception in his federal background documents left Trinity no choice but to terminate him, especially given that FPS confirmed its view that Fair's omissions were deceptive.

That evidence is uncontroverted. The General Counsel offered no documents and no internal emails that suggested that Trinity terminated them for *other* reasons. The General Counsel offered no documents and no internal emails that suggested that Trinity terminated them for engaging in any protected activity, whether it related to reports about gun jams or training issues. If Trinity had actually terminated them for those reasons, wouldn't that have somehow seeped into at least *one* internal email?

No internal emails mentioned any protected activity because Trinity did not know about it and did not terminate the Changing Parties because of it. The ALJ accepted Hollis's testimony that he was unaware of any protected activity, and that protected activity was not a motivating factor in his decision to terminate the Charging Parties. (ALJ at 15:43-16:1; *see also* Hollis at 997:1-998:7).

CONCLUSION

The Board should adopt the ALJ's decision in its entirety. That decision was not only proper and based on credibility determinations to which the Board typically defers, it was the *only* decision warranted by the record evidence.

Trinity's case was based on *facts.* That included (i) Norris' complaint to Trinity that the Charging Parties harassed her into getting involved in a "sexual harassment scheme" and (ii) Fair's failure to list his federal contracts (at the very site at which he would work as a security guard) in his background documents. Those facts were well-supported, both by witnesses (most notably, Norris, who testified that Fair had harassed her and that the "team" meant all three Charging Parties, and May Joe, who testified that she had discussed with Brooks that Fair's failure to list those contracts in his background documents was "deceptive") *and* documents, including Norris' written statement and five internal emails that revealed Trinity's decision-making process to terminate the Charging Parties.

The Charging Parties' case was based on *fiction*. Its case consisted of either unconvincing denials of other witnesses' testimony (such as Fair denying he ever said anything to Norris about taking a "hit for the team") or naked assertions that events occurred when they could *not* have occurred (e.g., Romo's claim that Hodges threatened the class on April 15). The ALJ rightly found the Charging Parties were not credible (both based on their demeanor and the substance of their testimony) and held that the General Counsel had not met its prima facie case.

Most notably, the ALJ found that the General Counsel had not closed the considerable gap between showing what the Charging Parties did and what Trinity *knew* that they did. The General Counsel could not close that gap, both because it failed to obtain testimony from key witnesses (such as Hodges or the other Diamond guards) and because the Charging Parties essentially admitted that they did everything they could to ensure Trinity was unaware about what they did. Their efforts were successful.

The ALJ's credibility determinations were well-supported; the General Counsel failed to prove a prima facie case; and Trinity has met whatever *Wright Line* burden it has. The Board should adopt the ALJ's order and recommendation to dismiss the General Counsel's complaint.

DATED AT San Francisco, California, this 31st day of January, 2011.

By: /s/ Na'il Benjamin

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is One Ferry Building, Suite 200, San Francisco, California 94111-4213.

On January 31, 2011, I served true copies of the following document(s) described as

RESPONDENT TRINITY PROTECTION SERVICES, INC.'S ANSWERING BRIEF TO EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

on the interested parties in this action as follows:

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BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address pdymond@cpdb.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 31, 2011, at San Francisco, California.

//s//
Paulann Dymond