

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In the Matter of:

ENCINO MEDICAL CENTER

and

SEIU, UNITED HEALTHCARE WORKERS –
WEST

Case No. 31-CA-066945

**EMPLOYER'S ANSWERING BRIEF IN OPPOSITION TO EXCEPTIONS TO THE
SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

On March 19, 2013, the National Labor Relations Board (“NLRB” or “Board”) issued an Order Remanding the Decision dated July 26, 2012 of Administrative Law Judge Gerald A. Wacknov (“ALJ”) in this matter (“Opinion”). The Opinion concluded that Encino Hospital Medical Center (“Encino” or “Company” or “Hospital”) did not violate the National Labor Relations Act (“NLRA” or “Act”) when Encino discharged Patricia Aguirre (“Aguirre”) as alleged by Service Employees International Union, United Healthcare Workers-West (“Union” or “SEIU-UHW”). On April 9, 2013, Encino petitioned the United States Court of Appeals District of Columbia Circuit (“D.C. Circuit”) for a Writ of Mandamus objecting to the Board’s Order Remanding the Opinion and asking the D.C. Circuit to halt the Board’s Order. Encino sought mandamus on the grounds that the Board is without constitutional authority to act because the Board lacks a constitutionally valid quorum of members under Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). Although Encino’s Writ of Mandamus is pending, the ALJ issued a Supplemental Decision on May 21, 2013 (the “Supplemental Decision”) and the Union has filed Exceptions. Without waiving its objections to the Board’s Order Remanding or the Writ of Mandamus, Encino hereby responds to the Union’s Exceptions to the ALJ’S Supplemental Decision as follows:

As a preliminary matter, Encino contends that the Board’s Order Remanding in this matter is moot and the proceedings in this matter should be dismissed because the NLRB lacks a quorum. Specifically, under the National Labor Relations Act (“NLRA” or the “Act”), all authority is vested in the Board, and while others may act on the Board’s behalf by statute or delegation, the Board lacks a quorum because the President’s recess appointments are constitutionally invalid. Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). The Company reserves the right to continue to challenge the authority of the Board and its agents or delegates at all stages of the proceeding if they continue to act in the absence of a lawfully constituted quorum.

The ALJ's Supplemental Decision concluded that Encino did not violate the Act as alleged by the Union. The Union has excepted to the Supplemental Decision on forty-three separate grounds. The Union's exceptions are without merit and should be dismissed. Encino did not violate the NLRA, on any basis. The preponderance of the evidence at trial demonstrated that Encino would have terminated Aguirre regardless of any alleged protected activity. Moreover, counsel for the General Counsel of the Board ("Board Counsel") and the Union failed to present a preponderance of evidence demonstrating Aguirre's termination was based on unlawful motives or pretext.

At the core of the Union's Exceptions are attacks on the ALJ's credibility findings which the Board must reject. In short, the ALJ simply did not believe certain Union witnesses regarding critical issues. NLRB precedent establishes that an ALJ's credibility determinations are entitled to a high degree of deference. The ALJ had provided a thorough reasoning for the credibility findings. The Board cannot overrule the ALJ's credibility findings absent such factors as: (1) proof that the credibility findings are an extreme departure from the record evidence and cannot rationally be supported in any way; or, (2) where there is a clear showing of bias by the ALJ, an utter disregard for uncontroverted sworn testimony; or, (3) the acceptance of testimony which on its face is incredible. Board Counsel and the Union cannot meet these high standards.

The ALJ correctly found that Aguirre had received a suspension and five disciplinary warnings for misconduct and performance problems in the final 18 months of her employment. Although Counsel and the Union allege Aguirre's discharge was discriminatory, the Union never filed unfair labor practice charges alleging any of Aguirre's previous discipline were discriminatory or somehow violated the Act when they were issued in the 18 months prior to her discharge. Conversely, the ALJ correctly determined that there was insufficient evidence to show Aguirre's termination met the standard for a prima facie case under the Wright Line standard. The ALJ correctly found the evidence insufficient to prove the Union's and Board Counsel's allegation that Aguirre was terminated for Union activity.

Many of the Union's exceptions incorrectly take issue with the ALJ's decision to credit the testimony of Barbara Back ("Back"), the Human Resource Manager, in its entirety. Moreover, the ALJ devoted a significant amount of the Supplemental Decision to explaining his reliance on Back's testimony. The ALJ found that Back candidly and credibly testified to the basis for Aguirre's termination and that Back was a "particularly forthright" witness. The Supplemental Decision makes repeated references to indicia of Back's credibility and acknowledges Back was frequently corroborated by other witnesses. Given the ALJ's high regard for Back's credibility, the ALJ was justified in crediting the rationale that Aguirre was terminated for dishonesty and other reasons.

The ALJ's decision not to credit the testimony of Richard Ruppert and Aguirre, to the extent it was inconsistent with Back's testimony, was correct and should be upheld. That is a natural and logical consequence of the ALJ's high regard for Back's testimony. Moreover, the ALJ provided clear and reasoned explanations for his failure to credit Ruppert's testimony on multiple key issues. Again, the Union has offered nothing to undermine the substantial deference afforded to the ALJ's findings.

The ALJ concluded that Bob Bills ("Bills"), the Encino Chief Executive Officer, and Back never observed Aguirre's photograph on Union flyers. The Union has excepted to this finding based on unproven speculation that Back must have seen such flyers at some point. The ALJ correctly found there was no evidence Back ever frequented areas of the Encino where such flyers were posted. Longstanding Board precedent prohibits finding knowledge based on speculation alone.

While the Board Counsel and Union focus on Aguirre's attendance at the public hearing regarding the sale of Victor Valley Hospital (the "Victor Valley Hearing"), they ignore the evidence regarding Kenton Smartt, another Encino shop steward. The evidence at trial showed that Smartt also attended the Victor Valley Hearing. Smartt's appearance was noted on a Union flyer. Smartt was not disciplined or terminated after he attended the Victor Valley Hearing. Yet, the Union does not address this evidence in its Brief in Support of Exceptions. Nor is there merit

to the Union's exception that Bills made comments demonstrating knowledge of Aguirre's Union activity. The ALJ properly rejected suspect testimony that Bills made statements about employees having testified adversely to Encino at the Victor Valley Hearing. The testimony was not corroborated by any of the multiple witnesses who were also present at the time of Bills' alleged statements. Even if proven, Bills' statements do not demonstrate knowledge that Aguirre testified. Credible evidence showed nearly fifty other individuals testified at the hearing, including at least one Encino employee. Bills and Back did not even attend the hearing. It is also significant that the ALJ properly found that Back alone made the decision to terminate, not Bills. The Union has offered no evidence that Bills did anything but consult with Back in her decision to terminate.

There is also no basis for the Union's exceptions to the ALJ's failure to find Aguirre engaged in any other notable Union activity. The ALJ correctly found the credible evidence showed Aguirre was but one of three union stewards for months prior to her termination. Further, she had no meaningful interaction with Back regarding Union matters. The two other stewards had the same level of authority in the Union as Aguirre and actually met with Back on multiple occasions for Union business. Aguirre and Back both testified that Aguirre had never met with Back for Union business.

Per the Board's Order Remanding, the ALJ also properly addressed the Union's argument that Aguirre's dishonesty constituted Union activity. The ALJ correctly explained that manipulative dishonesty carried out in a deliberate, unprovoked manner does not meet the standard for protected misconduct established by Board precedent. Aguirre's dishonesty was not an uncontrolled outburst during a heated exchange and it was not provoked by unlawful conduct. The Union has failed to explain its exception to the ALJ's finding that Aguirre lying about a senior manager was not protected conduct. Nor has the Union offered a coherent explanation for credible evidence that Aguirre repeatedly denied acting as anything more than a friend to her coworker during the terminable incident, rather than a Union steward.

Thus, the ALJ's decisions are entirely supported by the evidence. The Board should dismiss the Exceptions and adopt the ALJ's Supplemental Decision.

II. STATEMENT OF FACTS.

A. Procedural Facts.

The parties presented evidence in a hearing before ALJ Wacknov on April 30th and May 1, 2012 in Los Angeles, California. The parties submitted post-hearing briefs on or before July 5, 2012. The ALJ issued his initial Opinion in this matter on July 26, 2012 finding that Encino did not violate the Act. (Opinion, 7). The ALJ found that Encino's key witness, Barbara Back was credible as to all issues. (Opinion, 4, fn. 3-4, 6, fn. 6). Significantly, the ALJ found that Back, who was responsible for the termination of Aguirre, was "particularly forthright" and credited her testimony "in its entirety." (Opinion, 6, fn. 6). The ALJ further found that Christina Armenian ("Armenian") and Carmen Soto ("Soto") were credible witnesses with no reason to fabricate testimony. (Opinion, 4, fn. 3-4). In contrast, the ALJ discredited the testimony by Aguirre herself, as well as Richard Ruppert, Aguirre's Union representative. (Opinion, 6, fn. 5). The ALJ also made a number of other favorable findings of fact based on the testimony of key witnesses for Encino, as described below.

The Region filed exceptions to the ALJ's Decision on August 23, 2012. On March 19, 2013, the Board issued an Order Remanding the initial Opinion to the ALJ, ordering the ALJ to issue a Supplemental Decision addressing a number of issues specified by the Board. ("Order Remanding"). On May 21, 2013, the ALJ issued the Supplemental Decision again finding no violation by Encino. ("Supplemental Decision"). On June 18, 2013, the Union filed Exceptions to the ALJ's Supplemental Decision. Notably, the Union did not serve Encino with the Exceptions until June 20, 2013.

B. Background.

Aguirre began working at Encino as a Lab Technician/Phlebotomist after transferring from a laboratory assistant position at the Medical Center of North Hollywood in or around 1998. (Hearing Transcript ["Tr."], 40:15-22; 43:24-44:1). Aguirre received Encino's current

handbook on or about March 31, 2010. (Tr. 399:14-21; R. Exh. 16). Additionally, Encino made available to Aguirre online the Hospital's Standards of Conduct and Corrective Action policy. (Tr. 399:22-400:2).

Encino was previously owned by Tenet Healthcare until approximately 2008 when it was purchased by Prime Healthcare Services Foundation. ("Prime Foundation"). (Tr. 40:9-14). Prime Foundation is independently managed by a board of directors. (Tr. 389:5-14). It is not owned or managed by Prime Healthcare Services, Inc. ("Prime Healthcare"). (Tr. 40:9-14). Encino's management is not influenced or controlled by Prime Healthcare. Neither Prime Foundation nor Prime Healthcare are parties to this action. (Tr. 68:21-69:2, 75:13-19). Neither entity played a role in the decision to terminate Aguirre. (Tr. 84:15-21).

C. Aguirre's History of Misconduct and Performance Issues In the 18 Months Preceding Her Discharge.

Aguirre was terminated after receiving a suspension and five disciplinary warnings for misconduct and performance problems in the final 18 months of her employment. She received written and verbal warnings, attended counseling sessions, and was suspended for three days. Aguirre continued to engage in misconduct until she was ultimately discharged. Aguirre also received discipline prior to her final 18 months of employment. However, these were not considered by the Company in making a determination regarding her termination.

1. Aguirre's HIPAA Violation and Warning.

On or around October 13, 2010, Aguirre received a written warning for using her personal cellular phone to photograph a patient at the Hospital. (R. Exh. 8). Photographing patients is both a violation of Encino policy and the federal Health Insurance Portability and Accountability Act ("HIPAA"). (R. Exh. 8). Aguirre also received 3 days suspension. (R. Exh. 8).

2. Warning for Specimen Labeling Errors.

Aguirre also had repeated issues mislabeling patient specimens, which places patients' health at risk and delays treatment. On or about March 17, 2011, Aguirre mislabeled a patient

specimen in violation of Encino policy and national safety standards. (R. Exh. 9). Aguirre made the same mistake again on April 5, 2011. (R. Exh. 9). On or about May 12, 2011, Aguirre received a written warning documenting both incidents. (R. Exh. 9). The warning advised Aguirre that further failure to meet standards would result in further discipline, up to and including termination. (R. Exh. 9).

3. Warnings for Inappropriate Conduct, Including Throwing Biohazard Supplies at a Mentally Disabled Employee.

On or about May 5, 2011, Aguirre harassed a coworker who was attempting to perform his job duties and threw biohazardous lab supplies at him. The employee was a mentally disabled employee who worked at Encino. (R. Exh's. 8-13). In May, 2011, Aguirre received a written warning for several instances of misconduct. (R. Exh's. 8-13). On or about May 3, 2011, Aguirre deliberately disrupted a meeting between Human Resources, and others. (R. Exh's. 8-13). Aguirre also interfered with a security guard and nursing supervisor in the performance of their job duties. (R. Exh's. 8-13). Aguirre received disciplinary warnings for these incidents. Again, these warnings advised Aguirre that future failure to comply with Encino standards would result in further discipline, up to and including termination. (R. Exh's. 9-13). The reason for the actions was set forth as "[i]nappropriate employee conduct." (R. Exh's. 9-13). Moreover, Aguirre was asked to show "immediate improvement." (R. Exh's. 9-13).

4. Aguirre's Manipulation and Lying to Human Resources.

On or about September 23, 2011, Aguirre approached Armenian, a Human Resources Assistant, regarding a former coworker, Iris Arce ("Arce"). (Tr. 331:11-12, 333:12-21, 356:7-17). Armenian had only been employed by Encino for approximately a year. (Tr. 332:19-20). Armenian's mother is a member of the Union and has worked at Encino for approximately 16 years. (Tr. 332:25-333:11). Back was not in the office at that time. Human Resource Coordinator Soto was the only other individual present in the office. Aguirre lowered her voice to a whisper and asked Armenian if Armenian knew about a hearing involving Arce. (Tr. 333:12-21, 356:7-

17). Armenian did not know and directed Aguirre to ask Soto in the adjacent cubicle. (Tr. 333:21-6).

Aguirre immediately approached Soto and asked if Soto knew who would be attending the hearing. (Tr. 356:18-23). Aguirre told Soto "Barbara [Back] told me that you or Bob [Bills] would be attending the hearing." (Tr. 334:2-10, 336:24-337:5, 356:18-23). Soto replied that she had no information about the hearing and suggested that Back herself might know. (Tr. 334:7-10, 357:3-6). Soto referred Aguirre's question to Back, and Back explained that no such conversation had ever taken place - Aguirre had given them false information. (Tr. 337:6-10, 357:24-359:10, 401:1-12). At trial, both Soto and Armenian provided consistent accounts of these exchanges and the ALJ credited the testimony of both witnesses. (Opinion, 4, fns. 3-4; Supplemental Decision, 3, fn. 4, 4, fn. 5). The ALJ's finding that Armenian had no reason to fabricate her testimony is particularly sound, as Armenian gave uncontroverted testimony that her mother is a union member and has been employed at Encino for years. (Tr. 332:25-333:11).

D. Aguirre's Termination and Grievance.

Following Aguirre's September 23rd attempt to manipulate Soto and Armenian by lying, Back conducted a complete investigation. (Tr. 401:13-402:6). Back's investigation included interviewing Armenian and Soto as the only witnesses to the incident. (Tr. 147:11-148:25). Back also conducted a complete review of Aguirre's personnel file and spoke with Aguirre's supervisor, Lab Manager, Erlinda Roxas ("Roxas"). (Tr. 401:13-402:6, 406:9-17). When reviewing Aguirre's file, Back reviewed the numerous disciplinary actions accumulated by Aguirre over the previous 18 months. (Tr. 406:9-25). Back concluded that Aguirre had lied and fabricated a conversation with Back in order to obtain information about Arce. (Tr. 402:7-404:1). While multiple individuals were informed of and provided input into the decision, Back was ultimately responsible for overseeing the entire process. Back also made the final decision to terminate.

Back scheduled a meeting with Aguirre to discuss Aguirre's misconduct. (Tr. 402:7-404:1). Aguirre met with Back and Roxas on or about October 11, 2011. (Tr. 90:3-4, 94:18-21).

Union Negotiator and representative Ruppert attended as Aguirre's representative. (Tr. 90:3-4, 94:18-21). At the meeting, both Aguirre and Ruppert were provided opportunities to speak and explain Aguirre's conduct. (Tr. 404:5-20, 405:4-15). Aguirre simply denied she made the statements and provided no other witnesses or individuals to interview. (Tr. 404:5-405:3, 407:18-24). Aguirre did not take responsibility, express remorse, or pledge to improve.

1. Encino's Investigatory Practice.

At trial, Encino presented credible testimony that once Back investigates an incident she provides the employee at issue an opportunity to respond to the results of the investigation. (Tr. 408:7-10, 441:6-12). Back testified that her practice is to afford such an opportunity because the termination might be halted if the employee provides new information. (Tr. 408:7-10). Based on the additional information received, Back may change her course of action depending on what the employee at issue has to say. (Tr. 441:6-12). However, Aguirre offered no additional information beyond repeated denials of misconduct, nor did Aguirre identify any additional witnesses who might provide information on her behalf. (Tr. 404:21-23, 407:18-24). The meeting concluded with Back informing Aguirre that she was terminated for a prolonged course of progressive discipline culminating in manipulation and lying to the Company in an attempt to obtain information for a friend. (Tr. 89:25-90:2, 96:23-97:5, 404:2-407:18-24). The record evidence included a written email summary of the meeting by Roxas. (GC Exh. 25).

2. Aguirre Repeatedly Denied Acting as a Union Representative.

Back's own credible testimony also established that Aguirre's termination was not solely for manipulation and lying. Rather, when asked what disciplinary action she considered in her decision, Back responded that she was limited to only the previous 18 months of disciplinary records. (Tr. 406:9-407:6). In contrast, Aguirre's own account of the explanation for her termination was substantially less credible. When asked to recount precisely what was explained as the basis for termination, Aguirre admitted "my mind was somewhere else...[Back] said 'I am terminating you for lying against Standard of Conduct No. 400.3' or something like that." (Tr. 96:23-97:5). Aguirre is presently the only shop steward or bargaining team member to be

terminated since Back became Human Resources Director despite numerous active supporters from both unions at Encino. (Tr. 390:13-15).

During the meeting on October 11, 2011, Aguirre twice expressed that she was acting only as a friend to Arce, and not carrying out her union duties. During Aguirre's admissions, Ruppert held up his hand in an attempt to stop Aguirre from speaking. (Tr. 210:18-22). Ruppert raised his voice over Aguirre's at that time to stop Aguirre from telling the truth. (Tr. 405:4-15). As he spoke, Aguirre continued to say she was only acting to support a friend while shaking her head. (Tr. 405:4-15). At trial, Aguirre and Ruppert both evasively responded to questioning about Aguirre's repeated denials. Back credibly testified to the contrary, and the ALJ expressly ruled that Back's testimony should be credited over both Aguirre's and Ruppert's to the extent theirs was inconsistent.

The Union filed a grievance on behalf of Aguirre on or about October 11 alleging unlawful termination for union activity. (Tr. 199:18:-200:4). Aguirre and Maggie Macias ("Macias") met with Back and Roxas for a grievance meeting on or about October 28, 2011. (Tr. 286:15-18, 289:22-24, 410:21-25). At the meeting, Aguirre again denied that she was fulfilling her union duties by lying about Back and claimed she was only acting on behalf of Arce as a friend. (Tr. 405:16-24, 410:21-9). Aguirre made this admission over Macias's attempts to silence her. (Tr. 405:16-24, 410:21-411:9). At trial, Aguirre denied ever making such an assertion, while Back testified to the contrary. The ALJ has expressly credited Back's testimony over Aguirre's where they are inconsistent.

E. Encino's Disciplinary Policy and Procedure.

Encino utilizes a progressive discipline policy. (Tr. 372:1-10). Discipline can proceed in sequence, such as verbal warning, to written warning, to suspension or final warning, and ultimately to termination. (Tr. 372:1-10; 373:4-16). To illustrate, depending on the findings of a disciplinary investigation, Encino may terminate, suspend, or issue written or verbal warnings in any order, regardless of prior discipline. (Tr. 376:12-377:12). Encino's credible evidence showed that even if discipline may be issued in a progressive manner, Encino policy does not require a

final warning prior to termination. (Tr. 396:19-21). Instead, Encino may terminate without a final warning where the situation or underlying conduct is sufficient to warrant immediate termination. (Tr. 396:19-397:6). Moreover, the ALJ expressly found that suspension and final warnings represent the same level of progressive discipline. (Opinion, 6). Accordingly, a termination following suspension is the equivalent of a termination following a final warning. (Opinion, 6).

1. **The ALJ Rejected Richard Rupert's Allegation That Encino Begins a New Disciplinary Track for Each Type of Violation.**

Board Counsel and the Union failed to present credible evidence that Encino's discipline is based on independent progressive tracks. (Tr. 204:20-207:25). There was no written policy or agreement establishing a system of independent progressive discipline per type of violation or issue. (Tr. 204:20-207:25). The expired CBA contains no provisions establishing such a rule for progressive discipline. (Tr. 205:17-207:25). Credible testimony instead showed that when an employee engages in multiple varieties of misconduct, Encino does not provide an independent progressive discipline "track" for each variety of conduct violation or problem. (Tr. 378:16-380:6, 386:18-387:4, 397:7-398:23). Encino approaches all disciplinary issues comprehensively. (Tr. 378:16-380:6, 386:18-387:4, 397:7-398:23). At trial, Richard Ruppert testified that Encino did begin new disciplinary tracks for each type of violation. However, this was clearly contradicted by the majority of evidence to the contrary, including some testimony by Ruppert.

2. **Encino Consistently Applied Its Disciplinary Procedures.**

The evidence also showed Encino has applied the same disciplinary procedure consistently to other employees and, in some cases, Aguirre was provided more opportunities than other employees. (Tr. 420:8-13). On or about June 30, 2011, Brian Zazua was terminated with no prior final warning. (Tr. 418:14-16; R. Exh. 18(a)). Anthony Haney was terminated on or about October 21, 2011 for violation of Encino's Standards of Conduct policy. (R. Exh. 18(b)). Bilal Habib ("Habib"), a former Encino security guard, was terminated for falling asleep in the Hospital lobby two days in a row. (Tr. 418:20-419:4; R. Exh. 18(h)). Habib received no prior

verbal or written warnings. (Tr. 418:20-419:4; R. Exh. 18(h)). Monica Balgos (“Balgos”) was terminated on or about December 25, 2011 for walking off the job. (Tr. 419:12-20; R. Exh. 18(p)). Balgos’s only prior written warning involved an unrelated incident. (Tr. 418:20-419:4; R. Exh. 18(g)). Sean Silva (“Silva”) was disciplined for scanning incorrect patient information and taking unauthorized breaks. (Tr. 421:13-16; R. Exh. (f)). He also received verbal warnings for low productivity, turning in incomplete paperwork, taking unauthorized breaks, and clocking out while continuing to work. (Tr. 421:4-12; R. Exh’s. (e), (g)). Silva was eventually terminated as well. (Tr. 421:17-18; R. Exh. (c)). Tommy Felshaw (“Felshaw”) was terminated in or around October 2009 for displaying violent behavior and other problems. (Tr. 424:17-25; GC Exh. 28, p. 2). He previously received warnings for excessive absenteeism and insubordination. (Tr. 424:17-25; GC Exh. 28, p. 3-4).

F. Aguirre Never Met with Back Regarding Union Business Prior to Her Discharge.

Encino is a mature union employer with approximately 400 employees represented by two unions, including SEIU-UHW and 121RN. (Tr. 266:11-17, 331:17-332:18, 369:18-22). The credible evidence established that Aguirre engaged in minimal Union activity during Back’s employment. In fact, Back worked exclusively with two other Union Shop Stewards.

1. There Were Numerous Employees Who Worked on Behalf of the Union Who Have Not Been Terminated.

The evidence at trial demonstrated to the ALJ that Aguirre was one of many supporters of the Union for the entire period in question. Moreover, the evidence showed that there were a number of other employees who worked on behalf of the Union and who played active roles in the Union. By approximately October 2010, Encino’s SEIU-UHW local team consisted primarily of three shop stewards: Aguirre, Kenton Smartt, (“Smartt”), and Cathy Begelfer (“Begelfer”). (Tr. 109:1-12; 238:7-14, 302:16-22). The Union also designated Smartt and Begelfer, as well as Sara Acevedo as “bargaining employees” to participate in the bargaining sessions. (Tr. 111:24-112:6, 20-21). Pam Curry (“Curry”) was designated as an additional bargaining employee, shop

steward, and a department leader prior to her replacement by Begelfer in 2011. (Tr. 162:12-163:6; 208:17-20; 209:2-10, 265:13-22). Curry was a shop steward at the same time as Aguirre. (Tr. 284:1-3). Smartt and Begelfer were still shop stewards at the time of trial. (Tr. 265:24-266:1, 267:10-13). In 2012, the Union also designated Jorge Chavez (“Chavez”), Ray Reyes (“Reyes”), and Rico Martinez (“Martinez”) as bargaining employees. (Tr. 112:7-10; 209:2-18). The Lead Negotiator position is held by Richard Ruppert. (Tr. 389:19-25). The Union also has a Contract Action Team consisting of twenty-one union members which works with the Union regarding collective bargaining with Encino. (Tr. 276:5-12; GC Exh. 3).

Beyond Aguirre, no other shop stewards or bargaining members have ever been terminated during Back’s employment nor was there any evidence at trial that any other shop stewards or bargaining members have ever been terminated by Encino. (Tr. 115:10-25, 162:12-163:8, 163:10-164:11, 390:13-24; 393:8-19).

2. In 2011, Aguirre Never Met with Back Regarding Grievances.

At trial, Aguirre labeled herself a “union leader”. (Tr. 67:8-16, 73:22-74:3, 116:17-18, 166:23-24, 183:1-6, 235:16-21, 302:25-303:4). However, she admitted that in 2010 and 2011 there was no “chief shop steward” designation in existence and none of the three shop stewards held such a designation. (Tr. 116:12-13, 19-24). During this time, there is no evidence that Aguirre even referred to herself as a “chief shop steward.” (Tr. 116:12-13, 19-24). Aguirre admitted she had no actual authority over Smartt or Begelfer, the other two stewards. (Tr. 166:11-22). Aguirre never directed grievances or assignments to Smartt or Begelfer. (Tr. 166:13-16). Aguirre has also admitted she was not a “lead steward” at all in the last years of her employment and that she was only a lead steward previously because there were no other stewards at that time. (Tr. 166:25-167:14).

In 2011, Smartt and Begelfer had multiple meetings with Back. In contrast, Aguirre never met with Back regarding grievances in 2011. (Tr. 267:14-268:5, 273:11-15, 276:14-21, 395:3-14). Macias, Smartt, and Begelfer have also attended workplace meetings with Back. (Tr. 273:21-274:24, 393:24-9). Smartt is authorized to write his own grievances. (Tr. 276:14-19,

286:4-5). Numerous other employees have also attended multiple bargaining sessions with Encino. (Tr. 299:5-300:11, 389:19-390:4).

Both Back and Aguirre testified at trial that Aguirre had never met with Back for any grievances. (Tr. 121:7-16, 395:5-14). Moreover, there was no evidence that Aguirre had ever interfaced personally with Back in any way to carry out union activities. (Tr. 121:7-16, 395:5-14). There was no evidence to undermine Back's denial that she and Aguirre had never met personally for Union business, that they had only attended bargaining sessions together. Aguirre did assert at trial that she had conducted Union business with the previous H.R. Director, Gail Brow ("Brow"). (Tr. 54:3-14). However, Brow was not called to testify at trial and was not present in the final months of Aguirre's employment. (Tr. 55:7-20). There was no evidence at trial that Brow had any role in the decision to terminate Aguirre since Brow was no longer employed by Encino.

3. Victor Valley Hospital Hearing.

Aguirre attended the Victor Valley Hearing and advocated against the sale. (Tr. 96:1-7). However, Smartt, another Encino shop steward, also attended the Victor Valley Hearing. (GC Exh. 6; 69:22-70:4). Smartt's appearance was noted on a Union flyer. (GC Exh. 6; 69:22-70:4). Yet, there was no evidence that Smartt was ever terminated or disciplined by Encino. There was no evidence that any of Encino's management attended the Victor Valley Hearing. (Tr. 66:6-67:16, 124:18-125:4, 185:10-24). Nor were any Encino personnel involved in Aguirre's termination present at the Victor Valley Hearing. (Tr. 123:19-124:10). Accordingly, there was no evidence at trial that Aguirre's alleged participation in the Victor Valley hearing was ever observed or noted by the individuals involved in her termination. The ALJ heard testimony that Bob Bills discussed the Victor Valley Hearing at a subsequent bargaining session. However, there was no evidence that Bills ever knew of or acknowledged Aguirre's testimony. Moreover, the ALJ properly rejected uncorroborated, implausible testimony that Bills even mentioned employee testimony at all.

4. Union Bulletins & Flyers.

At trial, Board Counsel and the Union also failed to establish that any member of Encino management involved in Aguirre's termination received or reviewed the Union's handouts involving Aguirre prior to her discharge. Evidence at trial indicated that shortly after the Victor Valley Hearing, the Union allegedly posted flyers on the Union bulletin boards at Encino which included Aguirre's photograph in recognition for her opposition to the sale and her support of the Union. (Tr. 86:6-12, 19-25, 240:10-15; GC Exh. 6). However, the Union also admitted it has posted several other handouts featuring photographs of many other union members. (Tr. 114:18-22; GC Exh's. 2-5). Credible testimony also established that Encino management is not provided copies of each union flyer. (Tr. 145:18-22). Nor did any evidence show that any Encino managers involved in Aguirre's termination saw Aguirre's photograph on any Union flyers prior to her termination. (Tr. 279:7-281:23, 385:19-25).

5. Bargaining Sessions.

Aguirre and several other Union members also attended bargaining sessions with Encino management. (Tr. 88:7-11). At these sessions, Encino was typically represented by Bills, Back, and Encino's counsel, Mary Schottmiller. (Tr. 187:24-188:4).

On or about September 22, 2011, there was a bargaining session. The Union was represented by Ruppert, Macias, Smartt, Aguirre and Begelfer. (Tr. 88:21-25, 299:22-300:13). Encino was represented by Bills, Back, and Schottmiller. (Tr. 88:18-20). At trial, evidence was presented indicating that Bills remarked during the session that Prime Foundation lost the Victor Valley sale and that Victor Valley Hospital might go bankrupt as a result. (Tr. 89:1-6, 10-14). However, the credible evidence showed those comments to be the extent of his actions. Ruppert admitted that Bills did not reference Aguirre, cast blame on her, or specifically identify her in any way. (Tr. 227:4-11). Nor did Bills ever express an intent by Encino or any other entity or individual to take action against Aguirre, the Union or its membership. In fact, Bills' comments were of such a general nature, that the Union did not respond to the comments and the parties

began to collectively bargain a new contract during the bargaining session. (Tr. 190:4-11, 249:19-23, 302:3-6).

Subsequent to the meeting, a flyer was allegedly circulated which stated that the Union was “trying to destroy” jobs, but the flyer was dated prior to Bills’ comments at the bargaining session. (Tr. 230:14-24). The distributor of the flyer is currently unknown. (Tr. 230:18-231:2; 263:23-264:2). Encino took no known further action in response to the Victor Valley Hearing outcome against Aguirre or Smartt. (Tr. 228:14-229:22).

III. ARGUMENT

A. The ALJ’s Credibility Determinations Were Correct and the Record Supports His Findings.

The ALJ’s credibility determinations were correct and supported his findings. Board precedent clearly establishes that an ALJ’s credibility determinations are entitled to a high degree of deference. They cannot be overruled absent proof that they are an extreme departure from the record evidence and cannot rationally be supported in any way. Standard Drywall Products, Inc., 91 NLRB 544 (1950), *enfd*, 188 F.2d 362 (3rd Cir. 1951). Alternately, there must be a clear showing of bias by the ALJ, an utter disregard for uncontroverted sworn testimony, or the acceptance of testimony which on its face is incredible. NLRB v. Advance Transp., 979 F.2d 569, 573 (7th Cir. 1992). Findings may be overturned when they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony. NLRB v. Gordon, 792 F.2d 29 (2nd Cir. 1986). There has been no credible evidence to meet any of these standards. Even if Board Counsel and the Union disagree with the ALJ’s findings in this matter, there is nothing in the evidence to suggest any of these components are at play here.

1. The ALJ Provided Ample Support for His Correct Opinion that Back was a Particularly Fortright Witness Whose Testimony Should be Credited.

Many of the ALJ’s findings are supported by the testimony of Barbara Back and several other witnesses. Accordingly, the Supplemental Decision devotes a significant amount of

reasoning to explain the ALJ's high regard for Back's testimony and his correct decision to credit all of her testimony. (Supplemental Decision, 5, fn. 7, 12). The ALJ assessed Back as a "particularly forthright witness" who convincingly testified to "her high regard for and insistence upon honesty" when discussing Encino's decision to terminate Aguirre for lying. (Supplemental Decision, 5, fn. 7, 12, 15, fn. 16). The ALJ further explained that he carefully assessed Back's demeanor and candor during her testimony about the significance of an employee who is dishonest. (Supplemental Decision, 15, fn. 16). As the ALJ explained, Back presented as a candid, unrehearsed witness. Accordingly, Back's testimony properly earned the ALJ's unequivocal support. Conversely, the Union and Board have pointed to nothing in the record to support the exceptions to Back's testimony or undermine her credibility as a witness.

2. The ALJ Also Provided a Clear and Reasoned Explanation for His Failure to Credit Richard Ruppert's Testimony.

The ALJ was justified in disregarding the testimony of Ruppert to the extent it conflicts with Back's testimony. Thus, the ALJ properly found components of Ruppert's testimony not credible. The ALJ also explained alternate bases for his decision to discredit Ruppert's testimony on a number of key issues. To illustrate, the ALJ provided a reasoned explanation for his rejection of Ruppert's testimony that Bob Bills made statements acknowledging that employees had testified at the Victor Valley Hearing. As the ALJ explained, four witnesses testified about the meeting with Bills, but only Ruppert claimed that Bills had made any such statement. (Supplemental Decision, 8). The ALJ did not dismiss Ruppert's testimony merely because it was not corroborated, as indicated in the Union's objection. The ALJ did not credit Ruppert's testimony because it was not corroborated as to a critical fact which other witnesses would have observed. The ALJ concluded that, had Bills actually made such a statement, the other witnesses who were present at both meetings would have corroborated Ruppert's testimony. Aguirre would have been especially likely to mention such statements had she heard Bills make them. The Union has offered no facts to undermine the ALJ's reasoned analysis Ruppert's credibility.

3. The ALJ Correctly Found Christina Armenian and Carmen Soto to be Credible Witnesses.

The ALJ also correctly found the testimony of Armenian and Soto to be credible regarding the terminable incident. (Supplemental Decision, 3 n. 4, 4 n. 5). The ALJ correctly noted that neither witness had a reason to fabricate testimony and both appeared credible. Indeed, there was no evidence presented at trial that Armenian or Soto had any reason to fabricate their testimony, as they had no personal stake in the outcome of the trial. Further, the evidence at trial showed Armenian is part of a union family and her mother has been a Union employee at Encino for many years. The Union has cited to no evidence which would support its exception to the ALJ's credibility determinations regarding Armenian or Soto. The Union did not even discuss Armenian and Soto's credibility in its supporting brief.

B. The ALJ Correctly Found that Board Counsel and the Union Failed to Prove a Prima Facie Case Under Wright Line

The ALJ correctly held that Board Counsel and the Union failed to prove a prima facie case under the Wright Line standard because the evidence was insufficient to show knowledge of Union activity, Union animus or an anti-Union motive for Aguirre's termination. Under the standard established in Wright Line, A Division of Wright Line, Inc., Board Counsel must establish by a preponderance of the evidence that: (1) the employee was engaged in union or other protected activity; (2) the employer had knowledge of such activity; (3) the employer harbored anti-union animus; and, (4) the employees' union and/or protected activity was related to the discharge. 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981). Specifically, Board Counsel must show the alleged "activity was a substantial or motivating reason for the employer's action." Id. If Board Counsel meets this burden, the employer must then establish that the discharge would have taken place even in the absence of the union conduct. Efficient Medical Transport, 324 NLRB 553, 555 (1997). Here, the ALJ correctly found that the evidence did not meet this standard.

1. **The ALJ Correctly Determined That the Record Evidence Was Insufficient to Prove the Company Had Knowledge of Aguirre's Alleged Union Activities.**

The Supplemental Decision correctly addresses and rejects each of Board's and Union's theories that Encino had knowledge of Aguirre's alleged Union activities. As the ALJ explained, even if there was evidence that Aguirre engaged in Union activity, there was insufficient proof that anyone responsible for terminating Aguirre knew of Aguirre's involvement at the time of termination. Back never met with Aguirre regarding Union grievances.

a) **There Was Insufficient Evidence that Encino Had Knowledge of Aguirre's Testimony at the Victor Valley Hearing.**

The ALJ correctly found that, regardless of whether Aguirre testified at the Victory Valley Hearing, there was no proof that Back or other managers ever knew about it. Moreover, the Board and Union cannot explain the fact that Smart, a second shop steward, attended the Victor Valley Hearing but was not terminated.

(1) **The ALJ Correctly Found Insufficient Evidence to Show Back, Bills, or any other Company Management Knew of Aguirre's Testimony.**

Board Counsel and the Union presented no evidence that Bills or Back ever obtained knowledge of Aguirre's testimony. The ALJ correctly rejected the theory that Bills implied having such knowledge during comments about the Victor Valley testimony at a bargaining session with the Union. Even Aguirre failed to provide testimony to corroborate Ruppert's account of the session. Further, it is undisputed that no Encino managers involved in the termination even attended the hearing.

(2) **The ALJ Properly Acknowledged that Bills' Alleged Comments About the Victor Valley Testimony Would Not Actually Prove Knowledge That Aguirre Specifically Testified.**

The Union's exceptions on this issue misinterpret the Supplemental Decision. The ALJ did not fail to credit testimony that Bills mentioned the Victor Valley Hearing at a bargaining session. The ALJ only failed to credit testimony that Bills mentioned specific employees having testified. The ALJ correctly noted that Ruppert's testimony would, at most, establish that Bills had knowledge of employee testimony. Even if Ruppert's testimony were credible, it would not show Bills had knowledge of Aguirre testifying specifically.

The ALJ was also correct to reject testimony by Kenton Smartt that Bills "glanced" in Aguirre's general direction during Bills' comments about the hearing as if to suggest Bills was referring to Aguirre's testimony. (Supplemental Decision, 9). The ALJ found this testimony vague and imprecise, noting that it was also not corroborated by other witnesses. Even Aguirre failed to give corroborating testimony. (Supplemental Decision, 9). As the ALJ explained, surely Aguirre would have testified to Bills having "glanced" at her if Bills had somehow singled her out during his remarks. Moreover, the ALJ properly concluded that glancing in Aguirre's general direction was too vague to credibly establish knowledge.

(3) **Credible Evidence Showed Aguirre Did Nothing at the Victor Valley Hearing to Set Her Apart from Another Union Shop Steward Who Attended.**

Notably, nearly fifty other individuals also testified at the Victor Valley Hearing, including Smartt, another Encino employee and Union Shop Steward. Smartt's appearance was documented in a Union flyer distributed at the Hospital. There is no evidence Smartt was treated improperly as a result of his attendance. Other than Aguirre's testimony, there was nothing about her appearance at the hearing to draw the attention of Back or Encino management. This is especially significant in light of the fact that Bills and Back did not even attend the hearing.

b) There Was Insufficient Evidence to Show Encino Had Knowledge of Aguirre Appearing on Union Flyers.

The ALJ correctly rejected the theory that Back knew of Aguirre's Union activities because Back had observed Aguirre's photograph on various Union bulletins in the Hospital. The ALJ found that there was insufficient evidence to show anyone responsible for Aguirre's termination ever observed her appearance on Union flyers. The Union and Board could only offer speculation that Back had seen such flyers from evidence that other managers sometimes entered areas of the Hospital where the flyers were posted.

Knowledge of union activities cannot be speculative. Rather, Counsel must show actual knowledge of union activities. Zachary Co., 266 NLRB 1127, 1130 (1983). Without employer knowledge of Union conduct, a termination must be upheld, even where the basis is ambiguous or questionable. Titus Electronic Contracting, Inc., 355 NLRB No. 222 (2010). While circumstantial evidence may support an inference of knowledge, that inference must be reasonably supported by the evidence. Montgomery Ward & Co., Inc., 316 NLRB 1248, 1253 (1995). Here, the Union's entire basis in asserting employer knowledge is based on speculative conclusions drawn unreasonably from circumstantial facts.

As the ALJ explained, there was no evidence that Bills or Back ever frequented the areas where the handouts were posted. The Union only presented evidence that other Hospital personnel frequented those areas. The Union's exception that the ALJ failed to credit testimony that managers entered areas where flyers were posted ignores the lack of evidence that Bills or Back ever entered those areas. Additionally, the record evidence shows that flyers bearing Aguirre's photograph would have been posted alongside numerous other flyers which did not feature Aguirre. There was no evidence that any of the Aguirre flyers would have somehow stood out to Back, Bills, or anyone else to get their attention. The ALJ had no basis to find knowledge from the flyers and correctly ruled for Encino on the issue.

c) **There Was Insufficient Evidence that Aguirre Held Any Prominent Role in the Union Sufficient to Draw Encino's Attention.**

The ALJ also concluded there was insufficient evidence to support the Union's claims that Aguirre was a Union figurehead at Encino in the eyes of the individuals who terminated Aguirre. The ALJ considered credible testimony by Back that Aguirre had never met with Back in any Union capacity beyond Aguirre's attendance at bargaining sessions with the Company. (Supplemental Decision, 6). Although Aguirre claims to have held grievance meetings with Back's predecessor, Brow the ALJ correctly declined to consider this evidence. Back, not Brow made the decision to terminate Aguirre.

(1) **There Were Three Union Shop Stewards Who Enjoyed the Same or Greater Status as Aguirre From 2010 Until the Time of Aguirre's Termination.**

Testimony by both parties showed that Aguirre was one of multiple Union Shop Stewards from 2010 until the time of her termination, along with Kenton Smartt and Kathy Begelfer. (Tr. 115:10-25, 162:12-163:8, 163:10-164:11, 390:13-24). Notably, this period coincides with the period of disciplinary actions against Aguirre.

Multiple witnesses also dubiously attempted to testify that Aguirre held a position of leadership in the Union as a "leader" or "Chief Shop Steward." (Tr. 67:8-16, 73:22-74:3, 116:17-18, 166:23-24, 183:1-6, 235:16-21, 302:25-303:4). Upon further questioning, witnesses for both parties made clear that Aguirre was actually only one of several figures in the Union at Encino. Aguirre labeled herself a "union leader" at Encino (Tr. 67:8-16, 73:22-74:3, 116:17-18, 166:23-24, 183:1-6, 235:16-21, 302:25-303:4) but she also made admissions to the contrary. Aguirre admitted that in 2010 and 2011 there was no "chief shop steward" designation in existence and none of Encino's three shop stewards held such a designation. (Tr. 116:12-13, 19-24). There is no evidence that Aguirre ever even referred to herself as a "chief shop steward" outside of her testimony. Aguirre conceded she was simply the leader "more so" than other stewards and that

she had no actual authority over Smartt or Begelfer, the other two stewards. (Tr. 166:11-22). Aguirre never directed grievances or assignments to Smartt or Begelfer. (Tr. 166:13-16). Aguirre also admitted she was not a “lead steward” at all in the last years of her employment and that she was only a lead steward previously because there were no other stewards at that time. Union Representative Maggie Macias admitted the “chief steward” is really just “the most experienced steward.” (Tr. 236:24-237:1).

(2) **In 2011, Aguirre Never Conducted Grievance Meetings or Business with Back or Others Who Made the Decision to Terminate Her.**

The ALJ also acknowledged the evidence of Aguirre’s other Union conduct was insufficient to establish any significant leadership role. While Board Counsel and the Union claim Aguirre handled the “majority” of grievances, Aguirre herself admitted she never once handled grievances with Back. Aguirre also admitted she never met with Back in her capacity as a Union member or leader aside from general attendance at some bargaining sessions. In 2011, Smartt and Begelfer had multiple meetings with Back, while Aguirre had none. (Tr. 267:14-268:5, 273:11-15, 276:14-21, 395:3-14). Smartt is authorized to write his own grievances. (Tr. 276:14-19, 286:4-5). The Union’s exception that the ALJ failed to consider that Smartt and Begelfer wrote only few or no grievances again misses a crucial point: Smartt and Begelfer had the same level of authority as Aguirre and engaged with Back far more prominently than Aguirre did. To that end, the Union offers nothing to support its exception to the ALJ’s conclusion that Aguirre’s interaction with Back as to grievances was “nonexistent.” Both Back and Aguirre testified that Aguirre has never met with Back about grievances. Moreover, the Union’s exception that the ALJ failed to consider Back’s short tenure before Aguirre’s termination does not actually weaken any of the ALJ’s findings. Indeed, the Union’s Supporting Brief offers no explanation as to the significance of this exception.

Aguirre also never met with any other member of management who had any role in making Encino’s decision to terminate Aguirre in 2011. Back credibly testified to meeting with

Smartt, Begelfer and Macias on a variety of Union matters. Smartt and Begelfer were not terminated or disciplined despite their Union activity.

The only credible evidence of an interaction with Back was Aguirre's attendance at bargaining sessions. However, the Union "Contract Action Team" which participated in bargaining was comprised of 20 individuals other than Aguirre. Multiple other Union members attended the bargaining sessions. There was no evidence Aguirre made herself known at bargaining sessions beyond merely attending.

The Union's exception that the ALJ ignored evidence that Aguirre had emailed Back about grievances is also meritless because there is no credible testimony to establish that fact. Back repeatedly denied any knowledge of such an email at the hearing and the Union provided no other evidence to prove the communication ever occurred. (Tr. 451:2-452:4).

2. **The ALJ Correctly Determined that the Record Evidence Was Insufficient to Show Encino Terminated Aguirre Based on Union Animus.**

The ALJ also provided a significant analysis of the Board's failure to prove Encino harbored Union animus toward Aguirre. Although the ALJ determined that Encino held animus against the Union for the Union's attempts to put the Hospital out of business, the ALJ concluded that there was no evidence that Aguirre was a target of that animus. Smartt and Begelfer were not discharged despite playing a leading role for the Union and Smartt also attended the Victor Valley Hearing. As discussed above, the ALJ considered the lack of evidence that Aguirre played any notable role within the Union which might have made her a target for animus. The ALJ recognized credible testimony that there was no evidence Aguirre played any notable role in bargaining sessions beyond merely attending them. Aguirre never attended any Union meetings with Back other than the bargaining sessions. Thus, the ALJ reasonably concluded that any animus Encino might harbor was not shown to be directed toward Aguirre more than it would have been directed toward any other Union employee. The ALJ further noted that there was no evidence Encino had taken action against any of the more prominently active

Union employees. Accordingly, the ALJ rightly held that the Board failed to prove the presence of animus in Aguirre's termination

C. The ALJ Correctly Found That Aguirre's Dishonesty Was a Lawful Basis for Her Termination.

The ALJ also correctly determined that the record evidence established that Encino had a lawful basis for terminating Aguirre. The testimony and evidence showed Aguirre had a history of misconduct and performance issues in her final eighteen months of employment and that she was terminated after a disturbing incident of dishonesty and manipulation. Aguirre's disciplinary history prior to termination was undisputed. The Union never filed grievances over past discipline. The ALJ correctly found that Back terminated Aguirre for dishonesty following a prolonged history of progressive discipline.

1. The ALJ Correctly Accepted Back's Testimony that Aguirre's Dishonesty Was a Serious Act of Misconduct Warranting Termination.

The ALJ supported his conclusion that Aguirre's misconduct was a valid basis for termination with a thorough discussion of the severity of Aguirre's misconduct. The ALJ concluded there was sufficient evidence to show Back sincerely considered Aguirre's misconduct to be a serious violation which warranted termination based on Aguirre's prolonged history of progressive discipline.

Courts have found employers justified in terminating for similarly manipulative, dishonest activity. Banner Biscuit Co. v. NLRB, 356 F.2d 765, 768, 770 (8th Cir. 1966) (termination justified by evidence of "usurp[ing] authority," "disrespect to superiors," "creat[ing] an atmosphere of distrust, fear and suspicion...by simulated gossip and whispering," and "spreading false rumors."); NLRB v. Red Top Cab & Baggage Co., 383 F.2d 547, 554 (5th Cir. 1967); Elko Gen. Hosp., 347 NLRB 1425, 1427 (2006). Here, the ALJ described Aguirre's dishonesty as "rather uncommon and ostensibly indefensible behavior that could not be credibly denied." Further, the ALJ correctly relied on Encino's "Standards of Conduct" policy, which

prohibits falsification of any records “or giving false testimony or witness.” The Union’s brief in support of its exceptions makes no reference to any facts or argument which might undermine the ALJ’s correct assessment of Aguirre’s misconduct as severe. Moreover, the ALJ’s conclusion that blatant falsehood about a senior member of management is unacceptable misconduct certainly does not strain the limits of credulity.

In determining that Encino had a valid basis for terminating Aguirre, the ALJ properly placed a great deal of reliance upon testimony by Back. The ALJ amply justified this reliance by devoting significant verbiage to explaining the ALJ’s correct assessment of Back as a key and highly credible witness whose testimony clearly supported Encino’s lawful basis for terminating Aguirre. The ALJ recognized that Back was a “particularly forthright witness” who credibly testified to “her high regard for and insistence upon honesty.” Accordingly, the ALJ consistently discredited testimony of other witnesses to the extent it conflicted with Back’s testimony. Moreover, the ALJ properly regarded Back’s highly credible testimony as critical to determining the factual issues, since Back was instrumental in investigating and recommending Aguirre’s discharge.

The ALJ correctly concluded that Back reasonably interpreted Encino policy to prohibit the kind of manipulative dishonesty demonstrated by Aguirre. The ALJ also correctly found that, when asked why Aguirre’s conduct warranted termination, Back sincerely expressed that she was “genuinely taken aback” by Aguirre’s misconduct. The ALJ found Back’s “demeanor and candor” during that testimony showed the testimony was “spontaneous, straightforward, and obviously candid and unrehearsed.” Further, the ALJ credited Back’s testimony that Aguirre’s conduct was unacceptable because Aguirre was dishonest and manipulated junior employees. The Union’s exception to that reliance is without merit and the Union has offered no evidence or argument to support its position.

2. **Aguirre's Dishonesty Was Properly Found to be a Non-Pretextual Basis for Termination.**

The ALJ then provided an analysis of his finding that Aguirre's misconduct was a non-pretextual basis for termination. The Supplemental Decision addressed the Board's concerns about so-called inconsistencies in Back's testimony about the termination procedure which caused the Board to suspect pretext. The ALJ reconciled Back's supposedly inconsistent statements that: (a) Back interviews employees before taking disciplinary action; (b) that Back decided to terminate Aguirre before speaking with her; and (c) that Back was prepared to rescind the termination decision if Aguirre could explain the misconduct allegations. The ALJ concluded Encino's reason for termination was non-pretextual and that Back's testimony was consistent.

First, the ALJ correctly refuted the Board's assertion that Back testified she told Ruppert that he need not interview witnesses at the termination meeting because the decision to terminate had already been made and was "final." The Board's Order Remanding expressed concerns that Back contradicted herself because she also testified that that she always interviews the employee at issue before making a final decision. The ALJ explained that the former testimonial statement at issue was not actually a statement by Back. Rather, the statement cited by the Board came from a written summary of the termination meeting by Roxas, who was present as a witness. Contrary to the Union's exception, the ALJ's failure to consider the summary was justified. Roxas admitted she was drawing from memory only and that she did not take notes during the meeting. The ALJ correctly concluded that Back never testified to stating the decision was final.

Instead, the ALJ correctly relied on Back's credible testimony that she told Aguirre and Ruppert that there was "not going to be any change to the [termination] decision." Back only stated "no" when Ruppert requested to interview witnesses. The ALJ concluded that Back refusing to "change" the decision, rather than describing it as a "final" decision was completely consistent with her testimony that disciplinary decisions are subject to change based on input from the employee at issue. There is nothing unreasonable about the ALJ's interpretation.

Moreover, while the Union has excepted to the ALJ's interpretation, the Union points to no evidence to support the exception.

While Aguirre was not interviewed prior to the decision, Back still gave Aguirre an opportunity to change the decision and explain her case at the termination meeting. To that end, the ALJ also considered that the evidence showed the meeting was not perfunctory and presented a legitimate opportunity for Aguirre to make her case. The Board has traditionally found investigations perfunctory where the employer fails to speak with the employee at all before taking action. Camelot Terrace, Inc., 354 NLRB 226, 229-230 (2009) (employer conducted perfunctory investigation by failing to get defendant employee's side of the story and interviewing employees who supported defendant differently from other witnesses) (abrogated by New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010)). While a perfunctory investigation of discipline prior to adverse action may support an inference of discriminatory motive, there was simply nothing perfunctory about Back's investigation here. Back did not terminate Aguirre until after giving Aguirre a chance to respond. Critical to this review is that Aguirre did nothing but deny her misconduct. In light of Aguirre's denial, any analysis regarding an alleged perfunctory investigation is moot.

The ALJ also explained that the failure to interview Aguirre prior to making a decision itself was insufficient to show pretext. The ALJ correctly noted that the misconduct at issue was atypical, since it directly involved the HR director and HR staff and that Back had no reason to disbelieve the reports by her own staff. The Company's atypical disciplinary procedure was warranted on that basis. Moreover, in cases involving allegedly insufficient investigations, the Board looks only to the actual adverse action. See, e.g., New Orleans Cold Storage & Warehouse Co., 326 NLRB 1471, 1477 (1998) (termination unlawful where employer failed to investigate alleged misconduct); PCC Structurals, Inc., 330 NLRB 868, 896 (2000) (discipline unlawful where discipline received no prior opportunity to explain falsity of alleged misconduct). The Board has not found an investigation to be insufficient merely because the employee was interviewed too close to the time of the termination.

3. **The ALJ Correctly Dismissed the Union and Board's Argument that Encino's Disciplinary System Creates Separate Progressive Discipline Tracks for Different Types of Misconduct.**

The ALJ's Supplemental Decision correctly held that Encino's practice of progressive discipline was appropriate. Moreover, the ALJ correctly dismissed the Union and Board's assertion that Encino's policy is to impose progressive discipline on separate "tracks" by escalating discipline independently for each type of misconduct or policy violation. These conclusions were supported by the credible evidence. Conversely, the Union has not cited to any credible evidence which would support its theory of Encino's disciplinary policy.

Multiple witnesses for Encino testified that Encino's disciplinary policy considers employees' disciplinary history in the aggregate rather than escalating different types of discipline along individual tracks. For example, an employee who receives a written warning for absenteeism could receive the next step of progressive discipline for violation of safety rules. The employee would not start a separate disciplinary track anew for each type of violation. Barbara Back credibly denied that Encino policy has ever called for independent disciplinary tracks based on the type of violation. Contrary to the Union's exception, the ALJ was justified in accepting Back's account of the policy and it is also important to note the Union failed to provide any supporting written evidence or examples of such a policy.

Thomas Callahan testified that, under any circumstances, acceptable discipline may include verbal warnings, written warnings, suspension, or termination wherever appropriate. (Tr. 383:8-384:8). Callahan further testified that an employee "would not have to do the same thing to move to the next [disciplinary] level." (Tr. 379:2-12). The Union bizarrely attempts to support its interpretation of Encino's disciplinary policy by pointing to Callahan's testimony that escalation of discipline depends on all of the circumstances. The Union's own brief would seem to support the ALJ's conclusion that Encino's disciplinary policy permits any form of discipline based on individual circumstances.

The Union and Board Counsel presented no credible evidence to refute Encino's testimony about the disciplinary policy. The Union's own witness, Richard Ruppert, could offer no more than vague and contradictory descriptions of Encino's disciplinary policy which frequently undermined the Union's argument. Ruppert could only vaguely claim that the independent disciplinary tracks theory of the policy had been explained to him by former H.R. Director Brow. (Tr. 203:19-205:16). But there was no documentation of this discussion. Moreover, Ruppert admitted that he is not familiar with Encino's disciplinary policy. (Tr. 201:13-20). Ruppert also contradicted his testimony, admitting that the disciplinary policy can vary depending on the charges. (Tr. 202:2-5). Additionally, the ALJ had no reason to accept Ruppert's testimony over Back's. Significantly, an adverse inference should have been drawn against the Union and Board Counsel for failing to call Brow as a witness or provide any documentary evidence to support its position.

The ALJ also justifiably ignored the discipline of other employees which the Union alleges shows a practice of escalating discipline independently for different types of misconduct. The Union and Board Counsel failed to provide witnesses who could establish that such discipline was in accordance with the alleged practice. The fact that Encino has disciplined other employees is not dispositive to prove the nature of the alleged Encino's policy. This is especially true where witnesses found to be credible by the ALJ explicitly rejected the Union's theory of Encino's disciplinary policy.

Further, many of the exhibits cited by the Union do not actually show a practice of independently escalating progressive discipline. Anthony Haney's disciplinary history ranges from incidents of sexual harassment, to insubordination, to anger management issues. There is nothing in the record to show that Haney's discipline reflected individually escalated "tracks." Similarly, Tommy Felshaw's history summarizes discipline for both excessive absenteeism and violent behavior. Again, the Union points to no evidence which would clarify that these disciplines were independently escalated. Sean Silva's disciplinary warnings show Silva was previously written up for a variety of misconduct, including low productivity, extended lunches,

conducting an incomplete vascular exam, and scanning the wrong patients. Yet, Silva's termination notice does not state a reason for termination, and there was no evidence suggesting that he was terminated based on some individual "track." The evidence presented shows only that Silva had a history of misconduct that took a variety of forms prior to his termination. Similarly, the discipline for Layla Nichols shows many varieties of performance problems and misconduct. No evidence at trial showed Nichols was terminated based on an individual "track" of progressive discipline for any particular type of misconduct or poor performance.

It is also important to note that any arguments that Encino departed from some established practice are weakened because there is no evidence that Encino has ever encountered an employee who fabricated a conversation with a senior manager to manipulate more junior personnel. Consequently, the Union cannot in good faith point to a past practice from which Encino could depart. The Union's argument effectively envisions a scheme in which no disciplinary action could ever be lawful without a prior occurrence of identical disciplinary action. Accordingly, no discharge for previously unheard of misconduct could ever be lawful under such a scheme. This logical fallacy was recognized by the Board in PHC-Elko, Inc., 347 NLRB 1425, 1427 (2006) ("To say that an employer must show a prior instance of similar misconduct would preclude an employer from disciplining an unprecedented wrong, regardless of how egregious that wrong might be.").

D. The ALJ Properly Addressed and Rejected the Theory That the Terminable Incident Constituted Union Activity.

Per the Board's Order Remanding, the ALJ also analyzed the Board Counsel's alternate theory that Aguirre's misconduct itself was actually Union activity and her termination was, therefore, unlawful. The ALJ correctly explained that manipulation and lying about senior members of management is unprotected, even if it has some relation to Union activity. The ALJ based his reasoning on the holding in Atlantic Steel Co., 245 NLRB 814 (1979) that obscene verbal outbursts or provocation may be protected where the conduct is not opprobrious under the

circumstances. The ALJ found that making false statements about senior management did not meet the standard for protected conduct under Atlantic Steel.

The ALJ reasoned that Aguirre's misconduct was premeditated, not a spontaneous reaction to inappropriate conduct by Encino. The misconduct did not occur in context of any animated or acrimonious exchange in which Aguirre might have arguably lost control. The ALJ concluded that there was simply no connection to Aguirre's duplicitous conduct and charge to represent a fellow Union member. These characteristics placed Aguirre's misconduct far outside of the requirements of protected misconduct in Atlantic Steel.

Intentional lying to employees about high level managers to obtain information about a former employee has never been held protected by the NLRB. The Union cites no authority to support such a position which might certify manipulation and lying as protected Union activity especially where the individual expressly stated they were acting as a friend, not in their union capacity. Moreover, the Board looks negatively even upon Union-related misconduct if undertaken deliberately, with an intent to do wrong. Trus Joist MacMillan, 341 NLRB 369, 370 (2004). In particular, deliberate falsity has been repeatedly held beyond the protection of the Act, even where part of the *res gestae* of otherwise protected conduct. E.g., Ogihara Am. Corp., 347 NLRB 110, 113 (2006) (employee letter to employer complaining about supervisor lost protection of Act where employee deliberately sent letter using a false name). Here, even if Aguirre's lie was part of Union activity, it was simply too egregious to merit protection. Aguirre's conduct clearly shows that she acted deliberately and secretively. Moreover, Aguirre abused the inexperience of less senior members of Human Resources, manipulating them to disclose information. The evidence at trial also clearly precluded a finding of the final element, as there was no unfair labor practice which might have provoked Aguirre's misconduct.

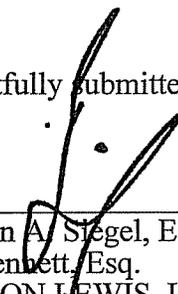
On multiple occasions, Aguirre stated she was acting as a friend to Arce, not a union steward, when she engaged in manipulation and lying. The ALJ correctly declined to find knowledge of Union activity based on Aguirre's alleged assistance to Arce. As the credible evidence repeatedly demonstrated, Aguirre denied having engaged in Union activity in that

endeavor on multiple occasions. Aguirre repeatedly declared she was acting as a friend. The ALJ correctly made an express finding confirming Aguirre's denial of Union activity at the termination meeting based, in part on Back's credible testimony, and the lack of credibility of key Union witnesses on the issue. In particular, Aguirre repeatedly gave evasive answers when asked whether she assisted Arce as a friend or a Union steward.

IV. CONCLUSION

For the foregoing reasons and as stated herein, Encino requests that the Board deny the Union's Exceptions to ALJ Wacknov's Supplemental Decision and affirm that Encino did not violate the NLRA on any basis.

Respectfully submitted,



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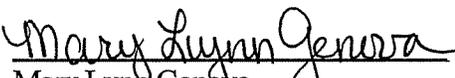
Attorneys for Respondent
Encino Hospital Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2013, I caused the foregoing *EMPLOYER'S ANSWERING BRIEF IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE* to be E-filed with Lester A. Heltzer, Executive Secretary, Office of the Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington DC 20570 using the CM/ECF system.

I further certify that I caused a copy to be served upon the following:

<p><u>Via U.S. Mail</u> Gerald A. Wacknov Administrative Law Judge National Labor Relations Board Division of Judges 901 Market Street, Suite 300 San Francisco, CA 94103-1779</p>	<p><u>Via Email</u> Simone Pang National Labor Relations Board Region 31 11150 West Olympic Boulevard Suite 600 Los Angeles, CA 90064-1824 Direct Dial 310-235-6169 Fax 310-235-7420 simone.pang@nlrb.gov</p>
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 Mary Lynn Genova