

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

**ALIANTE GAMING, LLC d/b/a
ALIANTE CASINO and HOTEL**

Respondent,

and

Case No. 28-CA-145644

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 AND BARTENDERS
UNION LOCAL 165, affiliated with UNITE
HERE**

Charging Party.

**LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 AND BARTENDERS UNION LOCAL 165'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION**

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Pursuant to Rule 102.46 of the Rules and Regulations of the National Labor Relations Board, Charging Party the Local Joint Executive Board of Las Vegas submits its answering brief to the exceptions and supporting brief filed by Respondent Aliante Gaming, LLC d/b/a Aliante Casino and Hotel (hereafter “Respondent” or “Aliante”) to Administrative Law Judge Gerald M. Etchingham’s proposed decision in the captioned unfair labor practice case.¹

OVERVIEW

Substantial evidence supports the Administrative Law Judge’s determination that Respondent violated section 8(a)(3) of the National Labor Relations Act by discharging employee Lourdes Flores (hereafter, “Flores”) on January 26, 2015. The General Counsel met its *prima facie* burden under the framework set out in *Wright Line*, 251 NLRB 1083 (1980), by demonstrating to a preponderance of the evidence that Flores engaged in union activity; that the Respondent was aware of Flores’ union activity; and that Respondent harbored union animus. Respondent failed to meet its burden that it would have discharged Flores absent her protected activity.

Substantial evidence supports the ALJ’s finding that the Respondent’s explanation for discharging Flores was so transparently implausible that it could only have been a pretext for discrimination. This, coupled with the fact that Respondent’s witnesses uniformly lacked credibility, made the conclusion inescapable: Respondent was motivated by union animus when it discharged Flores. The ALJ’s factual findings and

¹ The Local Joint Executive Board of Las Vegas consists of the Culinary Workers Union Local 226 and the Bartenders Union Local 165. The Local Joint Executive Board will be referred to for convenience sake as the “Union” in the Brief.

proposed legal conclusions are without error. The Board should deny the exceptions, and adopt the ALJ's proposed ruling.

RESPONDENT'S EMPLOYEES AND JOB TITLES INVOLVED

- Terry Downey is the Respondent's General Manager.
- Rich Danzak ("Danzak") is Respondent's Vice President for Human Resources. He sits on Respondent's Executive Team.
- Heidi Heath is Respondent's "Team Member Relations and Risk Manager." She reports to Danzak.
- Barbara Kelly also works in Respondent's Human Resources Department. She answers to Danzak.
- Michelle Huntzinger, formerly known as Michelle Garcia, is Respondent's Vice President for Hotel Operations. She is also a member of the Executive Team. She is in charge of Respondent's hotel operations, which includes its Internal Maintenance ("IM") Department and its Housekeeping Department.
- Elizabeth Barahona is manager of Respondent's IM Department. She reports directly to Huntzinger. The IM Department employs approximately 14 porters on each of three shifts, as well as a small number of utility porters. Tr. 167. These employees clean and perform light maintenance throughout Respondent's facilities.
- Kevin Sparks is a supervisor in the IM Department and is in charge of the night shift. He reports directly to Barahona.

- Patricia Rosales is a relief-supervisor in the IM Department. She reports directly to Barahona.²
- Jason Washburn is a porter in the IM Department.
- Cara Welk is Respondent's Director of Security.
- Charles Rand is a supervisor in the Security Department. He reports directly to Welk.
- Max Vasquez is a security guard within the Security Department and serves occasionally as a Spanish language interpreter.
- Lourdes Flores was until the time of her discharge a porter in the IM Department.

FACTS

I. Background to the Union's organizing campaign at Aliante.

Aliante is a casino resort located outside Las Vegas. It was formerly owned and operated by Station Casinos ("Station"), which owns a dozen or so casino properties in the Las Vegas area. In 2011, the Respondent assumed ownership of the property after it was spun-off during Station's Chapter 11 bankruptcy reorganization. For the first year, Station continued to manage the property. In 2012, Respondent assumed full control of operations. ALJD 2; Tr. 592.

The Union has engaged in an organizing campaign among Station employees for several years. This has involved protests, acts of civil disobedience, mass arrests, and

² Rosales works as a supervisor several days a week. Her Section 2(11) status is undisputed. Respondent successfully asserted an attorney-client privilege to any questions concerning conversations she had with its counsel based on her role as a member of management. Tr. 539.

publicity in television and print media. Tr. 590. Danzak acknowledged that Respondent opposed union organizing at Aliante after the spin-off, and that Respondent wanted to remain non-union. Tr. 590.³

In early 2014, the Union started organizing at Aliante. It submitted a card check recognition demand to Respondent in February 2014. Tr. 529. A new wave of organizing activity followed. On February 7, 2014, Danzak discussed handbilling on the property with Welk. CP #6, p. 6; Tr. 817. Welk reported to Danzak the next day that “they are still being handed out.” *Id.* Other managers and agents reported union activity to Danzak or other Human Resources representatives. CP #6, pp. 1, 2, 5, 6, 7, 10, 11. Danzak relayed instructions to discard union material that was left in the cafeteria. CP #6, p. 1; ALJD 5.

The Respondent maintains an electronic bulletin board where managers can post comments about hotel operations. On or around February 9, 2014, Huntzinger wrote: “I’m concerned about the recent (seemingly spike) in union activity . . . bums me out that we have TMs who beleive (sic) that’s a better way. I’m sure it’s the same tactics as w/ Stations, but it feels more personal since we aren’t part of that big corporation anymore. . . it’s dissappointing (sic) that our TMs are being solicited on their breaks & at their homes.” CP #6, p. 9. On the same day, Downy responded: “I agree, I’m very

³ Station Casino was found guilty of myriad unfair labor practices after lengthy proceedings. See *Station Casinos, LLC, Aliante Gaming, LLC, d/b/a Aliante Station Casino & Hotel, Boulder Station, Inc., d/b/a Boulder Station Hotel & Casino, Np Palace, LLC, d/b/a Palace Station Hotel & Casino, Charleston Station, LLC, d/b/a Red Rock Casino Resort Spa, Santa Fe Station, Inc., d/b/a Santa Fe Station Hotel & Casino, Sunset*, 358 NLRB No. 153 (Sept. 28, 2012) (hereafter, “*Station Casinos, LLC*”).

concerned. @RichDanzak and I have been talking about it. I wasn't aware they have been contacted at home." *Id*; ALJD 7.

On February 10, 2014, Danzak followed up on Downey's February 9 message with an email to Heath and Kelly, asking if they had heard about pro-union employees conducting house visits. CP #6, p. 8. Heath responded that she had not heard about such activity recently, but identified by name employees whom she knew to support the union in the past. *Id*. Heath explained that she had advised employees then to call the police and file harassment charges if they were not interested in hearing about the Union. *Id*.

In April 2014, Respondent discharged union supporter Lourdes Cruz. ALJD 5-6. In June 2014, it discharged union supporter Fernanda Chavez. ALJD 7. These proceedings were the subject of proceedings before the NLRB in Cases Numbers 28-CA-126480 and 28-CA-131592.⁴ Hearings were held in Las Vegas on October 14 – 16, December 1 – 2, 2014. During the proceedings, Respondent settled the charge involving Chavez and reinstated her in December 2014, approximately a month before the discharge at issue here.⁵ On March 17, 2015, Administrative Law Judge Kenneth Chu ruled that Respondent had illegally fired Cruz in retaliation for her union activity, a decision that is on review before the Board.⁶ ALJD 5; 6-7.

Respondent continued to receive reports of union activity throughout the summer of 2014. Danzak claimed that several employees separately approached him, Heath and

⁴ *Aliante Gaming LLC d/b/a Aliante Casino and Hotel*, Case No. 28-CA-126480 (March 17, 2015.)

⁵ *Id.*, footnote 3; Tr. 408-409.

⁶ *Aliante Gaming LLC d/b/a Aliante Casino and Hotel*, *supra*, n. 4.

Kelly with questions about union authorization cards that they were being asked to sign. Tr. 595. In response, Danzak orchestrated a series of meetings in late September for the ostensible purpose of explaining to employees' their "rights" with respect to such cards. ALJD 8-9. He designed the meeting in a way to isolate pro-union employees. On September 19, 2014, he wrote an email to other managers including Huntzinger and Barahona that stated: "Last Friday we discussed holding small group meetings with Team Members to ensure they are aware of what a union card is along with the legal implications of signing their rights away." CP #4, p. 5. The letter went on: "We would like to arrange meetings with groups containing non-union supporters before we get to groups with heavy culinary interest when possible to isolate the two. This gives the non-union supporters a better opportunity to listen and ask questions about protecting their identity." *Id.*

Danzak identified four departments with whose employees "we need to meet with immediately." These were the housekeeping, IM, buffet, and stewarding departments. *Id.* Danzak testified that these were areas where employees had expressed uncertainty about the issue of authorization cards. Tr. 603-604. In reality, Danzak admitted that he targeted areas where the Union "seemed to be demonstrating support and success in getting people signed up." Tr. 610; ALJ 9.

In response to Danzak's email, Barahona jumped into action. She responded the same day: "If you would like to Start with the IM Team. Tomorrow it will be a perfect time for my Day Shift. I will provide you with the list of the TM's that I would like for them to Attend that I'm 99% positive that they are non-Union supporters." CP #4, p. 6.

She listed six names for day shift and six for swing shift. *Id.* She fed Danzak other names over the ensuing days. CP #4, p. 13, CP #4, p. 16. Barahona acknowledged that she could have provided a list of pro-union supporters had she been asked to. ALJD 9; Tr. 182-183.⁷

Barahona claimed that she only knew if an employee was a union supporter by whether the employee wore a union button, but that claim was not credible. Tr. 183; ALJD 16. She testified that nobody on day shift in the IM Department wore a union button, and yet she was able to identify six out of fourteen porters on that shift whom she “99% sure” were “non-Union supporters.” Tr. 167; CP #4. Her explanation that she simply listed the employees scheduled to work the next day was not credible. There are nine porters scheduled on a given day; accordingly, there were at least three porters scheduled whom Barahona knew to exclude from her list of “non-Union supporters” even they they did not wear pro-union insignia. Tr. 168. It is obvious that Barahona was keeping score.

Danzak held between five and ten meetings with groups of employees at the end of September. The content of each meeting was the same and is set out in a script that he and his attorneys drafted. Tr. 178; 574; 596-597; CP #5, p. 10-12. Danzak testified that he stuck to the script and that it represents a fair summary of what he said. Tr. 597.

⁷ Barahona is a veteran of fighting the Union. In 2012, the NLRB found that she had violated the Section 7 rights of Station employees at Aliante by threatening them that their terms and conditions of employment could worsen if they signed a union authorization card. *See* discussion *infra*, pp. 38-39.

The script is replete with anti-union rhetoric. ALJD 8-9. To take only a couple examples (and every line is an example), it states: “For the last few months, we have heard that a small group of union pushers have been trying to sell the idea of bringing a union in here is a good idea—EVEN IF WE DON’T AGREE WITH THEM.” CP #5, p. 10. “So—we have allowed the union pushers to set up their recruiting desks in the TDR and we have not spoken up to tell all of you the OTHER SIDE OF THE STORY.” CP #5, p. 10.

Danzak insinuated that the Union might make nefarious, and indeed illegal, use of employees’ personal information if employees were to provide it. Referring to a sample union authorization card, the script warned employees: “Before anyone ever decided to hand over your personal identify information or give your legal signature to an outside Union, you need to be 100% certain that you know exactly what could happen.” CP #5, p. 11. It goes on: “A few weeks ago we announced a new benefit for Aliante employees. We have a program to enroll you all in an IDENTITY PROTECTION program so that no one can ever get into your bank account or do anything else to steal your identify. . . . But look at the card!. . . They want you to write down your social security number on a piece of paper. . . . Once you give the paper to a stranger from The Union, how do you know what could happen to that information?” CP #5, p. 12.

Danzak’s sessions were obviously not designed to provide employees with unbiased information concerning the “pros and cons” of unionization in order to allow them to make up their minds unfettered. It was a bare-fisted effort to fight off the Union by seeking to marginalize its supporters (describing them as a “small” minority trying to

“sell” the Union to the majority), deceitfully misrepresenting that the “union pushers” were engaged in their “recruiting” only because Respondent “allowed” them to (and not because they have a Section 7 right to), and attempting to raise fear among employees about what might happen if employees signed a union authorization card (that is, the Union might raid their bank accounts.)

If Respondent’s witnesses had been candid about the undisputable purpose of these meetings, they might have salvaged something of their credibility. But they could not bring themselves to call a spade a spade. Danzak insisted that the information shared at the meetings was “*extremely neutral*.” Tr. 576. This testimony showed him to be either dishonest or delusional. His meetings were acutely partisan and designed to push the limits of what is lawful in an effort to instill distrust in the Union. Remarkably however, Respondent continued to insist that Danzak’s message was imparted “in as neutral a manner as possible.” Respondent’s Brief, p. 32.

Barahona was no more candid about the purpose of the meetings. She described them as “positive” in tone. She testified: “[I]t was positive, because some people, they feel afraid they don’t sign because, you know, they don’t understand what union means. So he explained that [t]o us, and they told them that—you know, that—don’t be afraid. So if you want to sign, just go ahead and read what you’re signing. And then you can be part of the Union if you want. If not—then everybody was you know, happy with the meeting, because a lot of them, they don’t know what is in the paper. Probably, they just go and sign it.” Tr. 171. Notwithstanding, Barahona insisted incredibly that she had never even *heard* that anyone had been signing any union cards. Tr. 171-172.

Sparks showed himself equally willing to toe the line. He represented that Danzak was simply “letting you know that if you wanted to join the Union, that was all right. If you didn’t, it was all right. But nobody force each other or nobody was forced into signing up or—you know, it was your choice, if—you know, whatever you wanted to do.” Tr. 79.

Respondent continued to monitor union activity on the property in the weeks following its anti-union meetings. On October 9, 2014, the Union staged a large rally at Red Rock Casino, one of the Station properties, and the event caught the eye of Respondent’s managers. Danzak forwarded a news article to Kelly and Heath about it on October 8, 2014. CP #4, p. 11. Moreover, despite Respondent’s efforts to dissuade employees from signing authorization cards, Respondent was aware that cards continued to be circulated. Rumors had circulated of employees soliciting signatures, and in fact, these rumors only intensified into late 2014. Tr. 548-550; 605.

In December 2014, Security Supervisor Curtis Walker took a photograph of two employees seated in the TDR with a sign in favor of the union. ALJD 9. Walker emailed the photograph to Security Director Welk with a copy to Rand. CP #2. Welk replied that the employees were fine so long as they were on break. She did not suggest that there was anything wrong with Walker engaging in surveillance of employees by photographing them as they solicited support for the Union. ALJD 9.

II. Flores’ employment at Aliante.

Flores worked a total of seven years for Station Casinos and for Aliante. According to Sparks, she was a good employee who always dealt honestly and

straightforwardly with him. Tr. 72. Respondent offered no evidence to suggest that she was ever dishonest or had any motive to be dishonest. ALJD 4.

In fact, the contrary is true. Prior to the advent of the Union's organizing drive, Respondent confided in Flores enough that Respondent gave her the position of a job coach. Her task was to train newly hired employees to work in accordance with Respondent's expectations. Tr. 268. Barahona had recommended her for this duty because she was a "good worker." Tr. 136. This is consistent with Barahona's prior assessments of Flores' work. In May 2012, during the period in which Station managed the property after the spin-off, Barahona wrote in a job evaluation that she would like to see Flores perform as a relief supervisor in the near future. GC #9b; ALJD 4.⁸

Flores' role as a job coach led to her only prior discipline. This occurred in April 2014, a couple months after the Union's organizing drive started. As a job coach, Flores was supposed to receive a higher rate of pay for the duty, but she was not receiving it. She trained one employee without saying complaining about the lack of extra pay. After training a second employee, Flores complained to Barahona. Tr. 311. Barahona promised to look into it, but never did anything. Tr. 269; 312. Respondent then asked Flores to train a third employee. Flores complied, but continued to complain that she was not being paid at the correct rate. She went so far as to complain directly to Huntzinger. Tr. 270. When Respondent instructed Flores to train a fourth employee, Flores refused to do so. In April 2014, Respondent issued her a written warning for disobeying. Tr. 83;

⁸ Barahona claimed that she made recommendations like this for every employee. Tr. 139. That seems unlikely.

313. After that, Respondent finally paid her what she was owed, but it stopped asking her to train new employees. Huntzinger and Barahona obviously saw Flores in a new light. ALJD 4-5.

Flores signed a union authorization card in early 2014. Tr. 271. Sparks knew that Flores favored the Union. ALJD 7. During a conversation in the IM store room in August 2014, Flores raised the issue of Chavez's discharge, which had occurred in June. Flores told Sparks that it was not fair that Respondent had fired Chavez, and asked him what he thought about it. Tr. 412. Sparks did not respond. Flores then asked Sparks what he thought of the Union. Sparks replied that he could not say anything it, but effectively told her that if she thought joining the Union was good, he was okay with it. Tr. 413; 418. As a result of this conversation, Sparks had direct reason to know where Flores stood on the question of unionization. ALJD 7.

Flores attended union meetings at the Culinary Union hall as well as events that the Union organized. Tr. 275. One of these was the rally at Red Rock casino in October about which Danzak had distributed a press report to Heath and Kelly. Flores talked openly with her coworkers in the TDR on multiple occasions about the rally in the two or three days leading up to it. Tr. 415-416. After attending the rally, she talked openly to coworkers about what had happened. Tr. 417.

Flores not only signed a union authorization card herself, she took an active role in convincing other employees to sign cards. Tr. 272-274. Florentino Martinez is a prominent union supporter in the IM Department on the graveyard shift. Flores offered to help Martinez distribute cards, and he provided them to her. Tr. 343. Flores and

Martinez were part of a group of four employees on the graveyard shift who engaged in this activity. Tr. 347. Martinez and Flores would sometimes talk to employees together about signing cards, and sometimes Flores would talk to employees alone. Tr. 345.

Flores signed up ten employees on authorization cards during 2014. Tr. 274.

Persuading employees to sign authorization cards is an involved process. It sometimes requires speaking with them several times to convince them. Tr. 333; 335. And for every employee whom Flores could persuade to sign a card, there were others whom she could not. Tr. 335. These conversations regularly took place in the Team Dining Room (or "TDR"), an area that is frequented by employees, supervisors, and security personnel. Tr. 348.

Even after Respondent held its meetings in late September seeking to instill fear in employees about signing authorization cards, Flores continued to try to convince co-workers to sign. Tr. 334-335. She obtained roughly three or four more cards during this period. Tr. 274. The last one she obtained was in December 2014, when Flores and Martinez convinced an employee in the cafeteria to sign. Tr. 345.

Relief supervisor Rosales knew that Flores was distributing union authorization cards. She never actually saw Flores distribute an authorization card or talked personally with her about the Union, but she had heard (and understood) that Flores was one of four or five workers on the graveyard shift who were soliciting signatures. Tr. 549-550.

Rosales herself had been a member of the Union years before with a different employer

and her demeanor towards it was undisguisedly negative. Tr. 547.⁹

III. Events leading to Flores' discharge.

A. Jason Washburn's accident.

The events leading to Flores' discharge occurred on the night of January 15, 2015. At around 11:00 p.m., Flores and her co-workers were bustling about the room used by the IM Department to distribute supplies, equipment and work assignments. As Flores stood talking to Martinez, Washburn tripped uncontrolledly over a vacuum cleaner that a co-worker was pulling. The image was captured on the surveillance video. G.C. Exh. 16. It shows that at approximately 11.02 p.m., a woman pushing a barrel and vacuum clean passed between the area where Washburn and Flores were standing. As the woman passed, Washburn turned to walk in Flores' direction, and he stumbled on the vacuum cleaner.

Flores was standing with her back towards Washburn. As he fell, one can see on the video Washburn's right hand extend towards Flores as he tried to catch his balance. The following screen shot shows this momentarily before Washburn's body blocks the view:

⁹ Rosales later tried to walk back her testimony, claiming that she confused references to "Ms. Flores" to "Mr. Martinez." That was not credible, as the ALJ correctly found. ALJD n. 13. Both the questions and the answers were clear. Tr. 550. In fact, she was asked about both "Mr. Martinez" and "Ms. Flores" in the same question, so it was not plausible that she confused the two. As discussed below, Rosales was decidedly partisan towards Respondent. Accordingly, her testimony *against* the Respondent's interest deserved particular weight.



Flores immediately turned in obvious surprise. She reacted by turning in response to Washburn's contact before other workers reacted to the clattering of the vacuum cleaner on the floor.

Washburn caught his balance before falling to the floor. Flores gently hit him with the towel she was holding in her right hand. By this time, everyone has turned around and was looking to see what has happened. Washburn reacted clownishly by raising his arms and walking away with them in the air as if to say "I'm guilty." He then returned and put his hand on his heart, clearly feeling the adrenaline of the moment. Meanwhile, Flores transferred some towels she was holding from her right hand to her left hand, and put her right hand on her back. As she was talking for a few seconds with Washburn, her right hand was behind on her body at the level of her lower back. ALJD 11. She was clearly holding her back because Washburn had hit her.



There were conflicting witness accounts about what Flores said.¹⁰ Flores testified she exclaimed: “Jason you hit me.” Tr. 321. That testimony is credible and consistent with the video images.

Washburn testified that Flores said nothing at the moment he fell. Rather, he claimed that it was not until a few minutes later that Flores said “you scared me.” Tr. 497. But Washburn acknowledged that he was focused on trying to stop himself from falling on his face. He was both startled and embarrassed by the incident. His recollection was obviously unreliable.

Rosales claimed that she saw the incident clearly. She testified that she saw Washburn fall, but that he never made contact with Flores. Rosales testified that Flores said: “Jason, you *almost* hit me.” Tr. 526.

¹⁰ The video has no audio.

Rosales' testimony was not plausible, and the ALJ properly discredited it.

ALJD 11. With respect to what she claims she *saw*, Washburn's fall happened in the matter of less than a second. The notion that Rosales had such clear recall of every detail of the unexpected event is implausible. With respect to what she claims she *heard*, her testimony was also incredible. Flores' back was turned to Washburn when he fell.

Flores would not have known whether Washburn almost hit her unless he did hit her.

ALJD 11.

Rosales' dogged insistence on details she could not reasonably have recalled substantially undermined her credibility. That credibility went out the window in the next moment when Respondent's counsel had to coach her through her testimony. Counsel asked Rosales whether Flores appeared "upset" by what had happened. Rosales responded "yeah." (Tr. 526.) That was obviously not the answer counsel wanted. He suggested leadingly that perhaps Flores appeared only "a *little* upset?" (*id.*, emphasis added.) Rosales answered on cue, "uh-huh." Respondent's counsel then suggested that perhaps Flores was being "playful." Rosales immediately blurted out, "*playful.*" Tr. 527 (emphasis added). Rosales was there simply to say what her Employer wanted her to say. That is why Rosales wrote a statement on January 26, 2015 that fit exactly what Heath and Barahona wanted her to say. She would say anything.

According to her own testimony, Flores felt pain in her back the moment of the incident. It started going through her back and up her neck. Tr. 303. There is no reason to doubt her sincerity. The video shows that her back and neck twisted suddenly in response to Washburn's trip and contact with her. Whether it was the force of the

Washburn's contact that caused the injury or the sudden torque of her spinal column that strained muscles, it should have been obvious to any unbiased observer that something *real* had happened. But Respondent has no unbiased observers. They have only determined anti-union combatants waiting to seize upon any excuse by which they might credibly get rid of employees whom they suspected of disloyalty.

B. Flores' reporting of the incident.

Flores did not immediately report her injury to Sparks. She felt it might subside or that she might control the pain with painkillers. This was by no means an unusual response for an employee to have, and Heath acknowledged as much. Tr. 321. Muscle strains frequently intensify over time. Moreover, Flores was clearly not inclined to turn the event into some kind of "issue." She was reluctant to take action in response to it at every turn. But over the next two hours while she was working, the pain grew. She decided that she should say something to Sparks.

At about 1.30 a.m., Flores told Sparks what had happened. According to Starks, Flores was not certain whether Washburn had struck her or the vacuum had struck her. Tr. 46. Starks called Washburn over to ask. Washburn did not remember making contact with Flores, but said that if he had done so, he apologized. Tr. 46; 304. The conversation was non-confrontational, but Washburn noticed that Flores looked upset. Tr. 514.

Flores was still reluctant to make any formal report. She told Sparks that she preferred to take medication. Tr. 327. But Sparks insisted that she file a report, and Washburn said it would be a good idea. Tr. 47; 305. Flores decided to do so, but decided she would do so after her meal break. She was concerned that if Security sent her for a

medical examination, she might have to spend hours there without the opportunity to eat. Tr. 305.

After Flores finished her break, she contacted Sparks. Sparks accompanied Flores to the Security Office. The Security Office consists of a room where video surveillance equipment is maintained and a separate room where persons may be interviewed. Tr. 59. Upon entering the Security Room, Sparks explained that Flores had been injured, and Rand asked what had happened. Flores explained that Washburn had fallen with the vacuum cleaner. She explained that she was not sure what exactly had transpired, but that she felt something hit her back when Washburn fell. Tr. 306; 110.

Rand asked Flores to come into the video room to help identify where on the surveillance video the incident could be seen. Tr. 59. Flores reviewed the video, and pointed out where the incident happened. Tr. 59; 60-61. She only saw the video once and was asked no questions about it. She then went to the interview room where Vasquez was there to help go over paper work.

Flores signed an injury report. GC #1. It is obvious that Rand had filled the report out. It was in English and the handwriting in the body of the report is identical to the handwriting in General Counsel Exhibit 5, which is Rand's own handwritten report. GC #5. Moreover, Flores first name is misspelled. GC #1. The only part that Flores filled out appears to be her telephone number.

While Flores spoke with Vasquez, Rand and Sparks returned to the video room and reviewed the video again. Tr. 74. Rand acknowledged that the video was not conclusive. When asked whether he had seen Washburn make contact with Flores when

he tripped, Rand responded that there was “no apparent contact,” but at the same time allowed that “*I can’t verify that for sure.*” Tr. 113 (emphasis added). Rand acknowledged that the position of Washburn’s body prevented a clear view as to whether he made contact with Flores:

Q. But you’re not sure that Mr. Washburn didn’t strike her, because, in fact, you can’t see, correct?

A. I can’t. *That would be an assumption.*

Tr. 119 (emphasis added.)

In addition to reviewing the video, Rand interviewed Washburn. Washburn wrote a statement confirming that he did not remember hitting Flores as he tripped. He did not negate the possibility that he might have done so. GC #6.

Rand advised Flores that if she wanted to see a doctor, she needed to go immediately because otherwise it would be too late. Tr. 327; 116. Flores was again reluctant to go, but she did not want to lose the opportunity to have her back checked out. Tr. 308; 489. She went to Concentra, Respondent’s medical provider, and saw a Dr. Sushil Anand. Dr. Anand examined Flores and diagnosed her with a cervical and lumbosacral strain. GC #8. He prescribed medication and imposed lifting restrictions, while referring her for physical therapy. *Id.* Concentra provided Flores with a copy of the physician’s report. *Id.* She returned it that morning to Supervisor Rose Jimenez, who submitted it the same day to the Human Resources office. Tr. 127-128.

C. Respondent’s investigation.

Heath learned about the incident when she found an injury report in her box upon

arriving to work on January 16, 2015. The report consisted of Rand's report, a supervisor's report of injury, a body diagram and related documents. Tr. 189. Heath received a copy of Dr. Anand's report by email from Concentra about three hours later. Tr. 197.

Heath reviewed the video and the medical report. She spoke with Rand, and then had a meeting with Danzak and Kelly. They decided that Flores' statement (written by Rand) was inconsistent with what the video showed and they questioned why Flores had waited some two hours to report it. They made the decision to place Flores on suspension-pending-investigation immediately. Tr. 194; 200; 566-567. Sparks issued Flores the suspension notice that night.

Respondent's managers reviewed the video at different times over the next couple days. They came to a group agreement that there was no contact to be seen. But upon reviewing the video during the hearing, Heath admitted that in her own description was problematic. She acknowledged that Flores reacted to the falling vacuum cleaner *before* anyone else reacted to the clatter of it hitting the ground and that that Washburn's hand actually obstructed any view of the point of contact. Tr. 381. Nonetheless, Heath reached at least a preliminary decision by Tuesday, January 20, 2015 to discharge Flores. Tr. 148.

Barahona reviewed the video with Heath, and pointed out that Rosales was present. Barahona had previously discussed the incident with Rosales when Barahona returned from vacation. Heath instructed Barahona to obtain a statement from Rosales. Barahona did not obtain that statement until January 26, 2015. GC #7.

The Employer held what it describe as a “due process” meeting with Flores on January 21, 2015. Present were Heath, Flores and a supervisor named Jesse Carranco, who served as interpreter. Tr. 204. Normally, accident investigations are supposed to be conducted in a manner to allow the employees “to tell the story as they wish without actual interrogation.” Tr. 385. But Heath acknowledged that the meeting was “interrogatory in nature.” Tr. 385. Heath acknowledged that it was “a very heated conversation.” Tr. 230. She confronted Flores aggressively with a series of accusatory questions, and by her own admission, repeatedly cut Flores off as she tried to answer them. Tr. 364. Heath also lied to Flores, falsely telling her that Heath had multiple statements about what had happened when in fact she only had one (Washburn’s). Tr. 361. She lied to Flores about what *that* statement said, asserting that Washburn stated affirmatively that he had not touched her when in fact his statement merely said he did not recall touching her. Tr. 372. Heath also claimed she had a statement from Rosales that she did not actually have. Tr. 364. She claimed the same with respect to Rand, falsely stating that she had a statement from him alleging that Flores had looked surreptitiously at the video when she was not supposed to. Tr. 366. That version turned out to be a lie, but Heath didn’t care. She took Flores’ denial that she had done anything wrong in looking at the video as proof of her own untruthfulness without any further inquiry. Tr. 370. By the end of her “due process” meeting—and in reality before it had even started—, Heath had decided that Flores would likely be fired. Tr. 374; ALJD 14.

On January 23, 2015, Heath wrote Sparks an email describing the accusations against Flores. Sparks tried to dispel Heath’s misconceptions. For example, Heath

claimed that Cruz wanted to “confront” Washburn, but Sparks clarified that “[w]e just had a conversation trying to find out what happened. A confrontation makes it seem like they we’re ready to battle, it wasn’t like that at all.” GC #4a. Heath wrote that Flores denied that Rand told her to wait outside the video room. But Sparks corroborated Flores’ version of events. *Id.* He tried to dispel Heath exaggerated tone, but obviously to no avail.

On January 26, 2015, Rosales provided her own statement. By this time, she had spoken about the matter with Barahona more than once. The way Rosales wrote her statement demonstrates that she was fully informed of what the conflicting accounts were: it reads more like an argument than a factual account. She insisted that Washburn “managed to get his balance back with out hurting any team member.” She writes that “since I was rite in front of the incident where it happened I was able to clearly see that Jason never hit Lourdes.” GC #7. She does not indicate that Flores told Washburn that “you almost hit me.”

On January 26, 2015, Respondent discharged Flores for allegedly falsifying her report of injury. GC #11. Heath’s reasoning was dumbfounding. Tr. 217-219. She did not contest the veracity of the physician’s report finding that Flores had suffered a back strain; she admitted she had no reason to dispute it. Tr. 217-219; 376. She also conceded that Flores might even have *sincerely believed* that either Washburn or the vacuum cleaner had injured her back:

Q. Could—did you entertain the possibility that in the sudden jerking motion that she’s making and the actual cervical strain that she suffered, she may have perceived that she had physical contact with

this thing that was happening right there? Did that occur to you?

A. That could have happened. I would agree to that.

Q. And if she said, “my perception is that I was hit by a vacuum cleaner or a coworker or one thing or the other, because I’ve got this pain, sudden sharp pain,” she[’]d be telling the truth as she perceived it. You would agree[?]?

A. I would agree.

Q. And she wouldn’t be falsifying anything, right? I mean, she made the report and said, “Here’s what I think happened,” correct?

A. I would agree.

Q. Okay. So I’d put two and two and two together. And to me, I get six. But when you put two and two and two together, you got something different, which is she is lying. How is that?

A. The decision was made because she did not offer any other reason for her injury. She said she was struck by either the team member o[r] the vacuum.

Q. And you allow, as you testify her[e], that she may have sincerely believed that, correct?

A. She may have.

Tr. 218-219. Heath did not care whether Flores sincerely believed she had been hit by Washburn. She wielded the term “dishonesty” in a manner that gave no quarter to the genuineness of Flores’ belief. Heath concluded that Flores’ statement did not match what Heath purportedly witnessed on the video, regardless whether Flores may honestly have believed that Washburn caused her injury. That was “dishonesty” that merited discharge.

Danzak’s explanation was more polished, but no less disingenuous. Like Heath, he did not dispute that Flores was injured. Tr. 582. He just simply did not accept that the injury occurred as she claimed, although he had no reason to suspect that the injury

occurred in some other way. Tr. 584. He refused to consider any innocent explanation for what he professed was an inconsistency between what Flores reported and what he claimed the video showed. Tr. 625. Like Heath, he was satisfied there was reason enough to fire Flores because he declared the video did not show Washburn make contact with her.

But none of Respondent's managers had any convincing explanation for ignoring what the video clearly showed: Washburn's hand reaching towards Flores, Flores turning around abruptly, and Flores holding her back. Nor did they deny that Washburn's body obstructed a clear view of what happened immediately after his hand extended towards Flores. That was not for want of opportunity. Adding up the number of times they claim they reviewed the video—and on a high-definition monitor no less—they must have seen it fifty times or more among them. But they claimed not to have seen what to an unbiased observer should have been obvious after just a *single* careful viewing: Flores was telling the truth.

LEGAL ARGUMENT

I. The ALJ's credibility findings are sound and should not be disturbed.

The ALJ made several important credibility findings in support of his decision. He found Flores to be a credible witness. ALJD, p. 16. He credited her “frank and forthright” testimony as to the incident in question over that of Washburn and Rosales. *Id.* That decision was imminently reasonable based upon Flores' demeanor as a witness and her straightforward testimony.

The ALJ found Barahona to be “evasive and non-credible” when testifying about

her knowledge of union sentiments within the IM Department. He wrote: “it is very apparent that Barahona was proud to be at the forefront at Aliante and kept tract, documented, and forwarded up the management chain of command which employees she believed were anti-union and pro-union supporters especially with respect to the porters like Flores who she was most familiar with at Respondent as a supervisor.” *Id.*

The ALJ found incredible the various denials of Danzak, Heath, Rand, Barahona and Sparks that they knew of Flores’ union activity in 2014. “I find this testimony unpersuasive and not credible, and conclude that the record amply supports the conclusion that I make, that Respondent was aware of Flores’ union activities in 2014.” ALJD, p. 17. Danzak’s credibility in particular suffered from his dogged insistence that his presentations to employees in September were neutral in tone. They were clearly anything but neutral.

The ALJ discounted the credibility of Rosales based upon her evasive demeanor and contradictory testimony. ALJD, n. 13. The ALJ found Rosales’ attempt to retract her clear testimony that she had understood that Flores was one of the employees who distributed authorization cards to be non-credible. He accurately described the both counsel’s questions and Rosales’ answers as “clear,” noting Rosales had been asked about Flores and Martinez in the same sentence and answered without confusion. *Id.* One can add to this the fact that Respondent’s counsel had to coach Rosales through her testimony whenever she got off line. *See discussion supra.*

The ALJ also found Sparks’ not credibility. He founds that Sparks was not being honest when he claimed he did not know whether Flores favored the Union given Flores’

unrefuted testimony that she discussed it with him, and the ALJ further found Sparks' not credible when he denied knowing why Flores had been previously disciplined after she refused to train employees with the commensurate pay. ALJD 4, 7, 8; 82; 412-418.

Respondent attacks the ALJ's credibility findings. It argues that the most "glaring" example of this is the ALJ's decision to credit Flores, whose testimony Respondent describes hyperbolically as "outright manufactured." Respondent's Brief, p. 20. Similarly, Respondent complains that the ALJ relied on Rosales' contradictory and shifting testimony to discredit her, and complains of the ALJ's discrediting of its other witnesses.

The Board should reject Respondent's efforts to revive the credibility of its properly discredited witnesses. It is, of course, the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Here, the clear preponderance of the evidence establishes only that the ALJ's credibility assessments were correct, and not the contrary. There was ample evidence to support the ALJ's credibility determinations and Respondent's exceptions to those determinations should be rejected.

II. The ALJ correctly applied *Wright Line* to determine that Respondent discharged Flores based upon her union activities.

Allegations of discrimination which turn on employer motivation are analyzed under the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d

899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in *NLRB v.*

Transportation Management Corp., 462 U.S. 393, 399-403 (1983).

To establish a violation of Section 8(a)(3) and (1) under *Wright Line*, the General Counsel must make an initial showing that the employee's union activity was a motivating factor in the employer's adverse action against that employee. To meet that burden, the General Counsel must show that the employee engaged in union activity, that the employer was aware of that activity, and that the employer had animus toward protected conduct. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). Contrary to Respondent's position, there is no additional "nexus" element to the General Counsel's prima facie case. *Wal-Mart Stores, Inc.*, 352 NLRB 815, fn. 5 (2008) (citing *Gelita USA, Inc.*, 352 NLRB 406, 407 fn. 2 (2008)); *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008); also see *Praxair Distribution, Inc.*, 357 NLRB No. 91 fn. 2 (2011).

Once the General Counsel establishes its *prima facie* case, the burden of persuasion shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. To meet its *Wright Line* burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

A. The ALJ correctly ruled that the General Counsel established a *prima facie* case of discrimination in violation of Section 8(a)(3).

The ALJ correctly found that the General Counsel proved a *prima facie* case of discrimination by showing: 1) that Flores engaged in union activity; 2) that the employer was aware of that activity; and 3) Respondent had animus towards union conduct. The Charging Party will examine these elements in turn:

1. Flores engaged in protected union activity.

There is no dispute in the evidentiary record that Flores engaged in protected activity. In roughly reverse chronological order, this consisted of:

- Distributing union authorization cards and collecting them from her co-workers. Flores collected ten sign cards 2014, the most recent on in December 2014. Tr. 271-274. In carrying out these activities, Flores worked in conjunction with Martinez, an employee widely known to support the union. She also accompanied him while he handed out authorization cards. Tr. 272.
- Repeatedly trying to persuade co-workers to sign union authorization cards in the TDR. The evidence establishes for every worker who agreed to sign a card, Flores spoke to some two to five employees whom she could not convince to do so. Tr. 333.
- Attending union meetings, most recently in December 2014. Tr. 275.
- Attending a union rally at Red Rock in October, and discussing it openly with co-workers in the TDR before and after the rally occurred. Tr. 415-

417.

- Expressing support for union supporter Chavez by complaining to Sparks that it was unfair that Respondent had fired her. Tr. 410-414.
- After the Union's organizing drive started, demanding that she receive the pay to which she was entitled for performing training duties, and then refusing to perform this extra duty in protest when she was not paid. Tr. 310-313.
- Signing a union authorization card. Tr. 270.

Based on the foregoing evidence, the ALJ correctly found General Counsel has established the first element of the *Wright Line* inquiry. ALJD, pp. 18-19. Flores engaged in conduct squarely protected by the Act.

2. Respondent was aware of Flores' union activity.

The ALJ correctly ruled that the General Counsel established that Respondent was aware of Flores' support for the Union. ALJD, pp. 21-25. There was both direct evidence and persuasive circumstantial evidence that support a strong inference of knowledge.

In *Montgomery Ward & Co.*, 316 NLRB 148, 1253 (1995), *enf.* 97 F.3d 1448 (4th Cir. 1996), the Board explained that knowledge of an alleged discriminatee's union activity may be established either directly or indirectly.

[A] prerequisite to establishing that [employees] were wrongfully discharged is finding that the Respondent knew of their union activities. *Mack's Supermarkets*, 288 NLRB 1082, 1101 (1988). This "knowledge" need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn.

Greco & Haines, Inc., 306 NLRB 634 (1992); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985); *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). Indeed, the Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment. *Greco & Haines*, supra; *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979); *General Iron Corp.*, 218 NLRB 770, 778 (1975).

Id. at 1253.

The Board has singled out the contrived nature of the reason for discharge as a strong factor for inferring knowledge of union activity:

[T]he Board has inferred knowledge [of an employee's union activity] where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. *Whitesville Mill Service Co.*, supra; *De Jana Industries*, 305 NLRB at 849; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." See generally *General Films*, 307 NLRB 465, 468 (1992).

Id. See also *Frye Electric, Inc.*, 352 NLRB 345, 352 (2008) (calling the pretextual nature of the employer's purported rationale an "equally powerful inferential factor" from which to conclude an employer had knowledge of an employee's union activity.)

The Board examines factors in combination to determine whether to infer knowledge of an employee's union activity. It wrote in *Montgomery Ward & Co.*:

The factors on which the Board relies when inferring knowledge do not exist in isolation, but frequently coexist. For example, in *BMD Sportswear Corp.*, 283 NLRB 142, 142-143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988), the Board reversed the judge and found that the General Counsel had established that alleged discriminatees were unlawfully laid off, even in the absence of direct evidence that the employer knew of their union activities. There the respondent had demonstrated antiunion animus, discriminated against other employees, proffered unsubstantiated reasons for the layoff,

and the layoffs were proximate to the start of the union organizing campaign. See also *Active Transportation*, 296 NLRB 431, 432 (1989), *enfd.* 924 F.2d 1057 (6th Cir. 1991).

Montgomery Ward & Co., 316 NLRB at 1253; *see also Pan-Osten Co.*, 336 NLRB 305, 308 (2001) (ruling that, despite the fact that there was no evidence of the employer's specific knowledge of employee's union activities, a reasonable inference of knowledge could be drawn based on the employer's general knowledge of union activity among its employees and its demonstrated hostility toward such activities preceding employee's discharge); *Regional Home Care, Inc.*, 329 NLRB 85, 86 (1999) (ruling that the respondent knew or suspected that the alleged discriminatees were union supporters because of its demonstrated antiunion animus, the timing of the actions against them, and the pretextual nature of its explanations.)

Here, Respondent's knowledge of Flores' union activity is established both by direct and strong circumstantial evidence.

First, Flores' conversation with Sparks about the Chavez discharge directly revealed her sentiments to him regarding the Union. Tr. 407-414. Counsel for Respondent did nothing to challenge Flores' account (as for example, recalling Sparks to rebut the claim). Rather, he simply clarified that Sparks did not threaten Flores in response to her evident support for the Union. Tr. 417-419. But that is not the point. The important thing is that Sparks clearly had knowledge of where Flores stood. ALJD 7.

Second, although Rosales never personally witnessed Flores distribute union authorization cards, she had heard that that was the case. Tr. 549-550. Rosales

associated Flores with a handful of employees including Martinez who were proponents of union cards on the graveyard shift. Her testimony was highly plausible given the small size of the department on graveyard, and the fact that Respondent obviously took reports of card distribution seriously (seriously enough to have organized a series of meetings about the problem). Rosales' admission that she heard rumors Flores was soliciting signatures for the union is imminently credible, and should be credited. ALJD 10.

Third, although Flores did not wear a union button, she spoke in open support of the Union in the TDR and other places where employees gather. She shared news about the Red Rock casino rally both before and after it occurred. She engaged in multiple conversations with coworkers trying to convince them to sign authorization cards. These conversations took place mainly in the TDR, an area frequented by both managerial and non-managerial employees. As these conversations were not conducted in secret, it is reasonable to infer that they did not *stay* a secret. *See Fyre Electric, supra*, 352 NLRB at 351 (“I readily infer that it was probable that their conversation was overheard and became the subject of discussion among other persons associated with the Company”) [citing *See Verizon Wireless*, 349 NLRB 640, 643 (2007) (where employee’s comments were made in a work area occupied by coworkers, “[i]t is thus reasonable to assume that others likely overheard.”)]. ALJD 23.

The inference that Respondent was aware that Flores supported the union is particularly strong, as the ALJD found, in light of the fact that Respondent actively monitored union support. Respondent’s managers and agents scrutinized union activity in the TDR and reported it to Danzak, Welk and Heath. CP #1, #2; #6. As late as

December 2014, its security guards illegally photographed employees engaged in protected activity in the TDR. CP #2. Barahona in particular was keenly attuned. She could readily distinguish union supporters from “non-union supporters” by name. She was the first among her peers to volunteer to have employees in her department undergo training as to their “rights.” She spoke routinely with Rosales, both in general and specifically about the Flores incident in question. The proposition that Barahona was unaware of Flores’ disposition towards the Union is implausible, and the ALJ correctly rejected it.

Fourth, the fact that Flores had complained about not getting paid the correct rate for training new employees in April 2014—and then actually refused to perform the work until she was paid right—is another factor that weighs in favor of a finding of knowledge. It is obvious from her demeanor on the witness stand that Flores has an agreeable and considerate disposition. She had never been disciplined before. So the fact that she complained about not being paid right—and went so far as to refuse to work until her rights were honored—could not have gone unnoticed, coming as it did shortly after the Union started organizing.

Fifth, and perhaps prominent among the reasons, the wholly contrived rationale provided by Respondent for the discharge lays to rest any doubt as its knowledge that Flores’ union activity. Heath’s explanation that it did not matter that Flores might sincerely have believed that Washburn hit her was astounding. Having accused Flores of “dishonesty,” it was obvious that her honesty was not really at issue. It was enough that Heath have concluded that Flores’ statement was technically “wrong” to seal Flores’ fate,

whether intentionally wrong or not. Danzak was of the same mind. He made clear that it was not his job to think about innocent explanations that might fit with the facts as he contended they were. “Wrong” in Danzak’s view meant that Flores was lying. Danzak had no need to inquire further.

But of course it was clear that Flores was *not* wrong. The video in no way contradicts Flores’ belief that Washburn made contact with her and in fact, strongly corroborates it. Respondent was obliged to close its eyes to the clear evidence to get the result it wanted. Respondent’s contention that its mistaken assessment of the evidence was nonetheless made in good faith lacks merit. Respondent did not act in good faith. Respondent approached the investigation with the mindset that it wanted to find Flores guilty. Heath gave her a due process interview in which she lied to Flores about the statements Heath possessed, and in which she lied to Flores about what the one statement she did have actually said. Heath interrupted Flores, cut her off, and yelled at her.

In the end, it is overwhelmingly obvious that Flores was truthful about what happened to her. It is equally obvious that Respondent was disposed to finding her to have lied. It is no surprise that its explanation for the discharge is so facially contrived as a result. The baseless reason for the discharge establishes a compelling inference that Respondent knew of Flores’ union activity.

Against all this, Respondent argues that, even if low-level supervisors like Sparks, Rosales or even Barahona were aware of Flores’ attitude towards the Union, upper-level decision-makers such as Danzak were not. Respondent’s Brief, p. 26. There are two responses to this.

First, this argument does nothing to answer the conclusion that Respondent's reason for Flores' discharge is "so baseless, unreasonable, [and] contrived as to itself raise a presumption of wrongful motive." *Montgomery Ward & Co.*, 316 NLRB at 1253. This is not a case of upper level decision-makers who themselves harbored no union animus reviewing evidence that on its face looked plausible. Danzak and Heath were fierce opponents of the Union's organizing efforts according to the credited evidence. Both Danzak and Heath decided that it did not matter whether Flores might have sincerely thought her injury was caused by Washburn and they ignored the evidence that clearly established her truthfulness. Heath carried out Flores' due process interview like a bloodletting. The fact that Danzak and Heath could articulate no plausible rationale for their decision is compelling support for the inference that *they* knew what Sparks and Rosales knew.

Second, information acquired by Sparks and Rosales about Flores' attitude with respect to the Union is imputable to the Respondent as a matter of law. ALJD 22; *State Plaza, Inc.*, 347 NLRB 755, 756 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001); *Woodlands Health Center*, 325 NLRB 351, 361 (1998); *Ready Mix Concrete Co.*, 317 NLRB 1140, 1143-1144 (1995), *enfd.* 81 F.3d 1546, 1552 (10th Cir. 1996). The Respondent offered no affirmative evidence to establish that knowledge should not be imputed to its decision-makers. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983); *State Plaza, Inc.*, 347 NLRB at 756-757 (2006) (supervisor's knowledge of union activities is imputed to the employer unless credited testimony establishes the contrary). Instead, Respondent merely relies upon its witnesses' unconvincing denials that they

knew *anything* about *anyone*'s attitude towards the Union who did not wear a button. Those denials do not answer the strong evidence that Respondent's decision-makers had reason to know of Flores' attitude towards the Union.¹¹

For all the foregoing reasons, the ALJ correctly found that the General Counsel established that Respondent had knowledge of Flores' support for the Union.

3. Respondent harbored union animus.

The ALJ correctly found that Respondent harbored union animus. To do so, the General Counsel did not need to show employer engaged in conduct that actually violated the Act. Rather, Board law dictates that even *lawful* opposition to union representation during a union campaign serves as evidence of animus under *Wright Line*. *Sunshine Piping, Inc.*, 351 NLRB 1371, 1387 (2007) (“while an employer's expression of its views or opinions against a union without an explicit threat of reprisal cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer”); *see also Tejas Electrical Services*, 338 NLRB 416, 416 fn. 5 (2002); *Mediplex of Stamford*, 334 NLRB 903, 903 (2001); *In Re Sunrise Health Care Corp.*, 334 NLRB 903, 903 (2001); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, LCC*, 327 NLRB 222 (1998), *enf. denied* 240 F.3d 931 (11th Cir. 2001); *Gencorp*, 294 NLRB 717 fn. 1, 731 (1989); *Holo-Krome Co.*, 293 NLRB 594, 595 (1989); *Sun Hardware Co.*, 173 NLRB 973 fn. 1 (1968) *enfd.* 422 F.2d 1296 (9th Cir. 1970);

¹¹ The evidence establishes that Barahona selected “non-union supporters” on some other basis than their use of a button. *See* discussion *supra*, pp. 7. It establishes that Sparks knew Flores supported the Union despite her not wearing a button. *See* discussion *supra*, pp. 11-12.

General Battery Corp., 241 NLRB 1166, 1169 (1979).

Here, Respondent's opposition to the Union took the form of both the lawful and the unlawful. It all serves to establish animus.

Respondent held a series of meetings in late September 2014 to instill its message among employees that the "union pushers" were a "small" number of employees and that they were not to be trusted. As discussed above, the script of the meeting demonstrates the strong animus that underlay the meetings. Again, any example one might choose demonstrates this, including this one: "[T]he Union is asking you to turn over your legal rights to stand up for yourself to them. The way this reads, you sign over your rights to the Union, but there is nothing on this legal document that guarantees you that you will ever get anything in returned for handing over your legal rights." CP #5, p. 11.

These meetings established Respondent's animus beyond dispute. The self-serving testimony of Respondent's witnesses to the effect that the meetings were purely informational and "extremely neutral" merely established that they are willing to say *anything* to prevail in this proceeding.

Lest employees forget what they just heard, Danzak distributed a take-home handbill at the meetings to drive his point home. It stated: "Before you ever agree to give up your individual signature and social security number with no guarantees of what could happen with your personal information, you need to get WRITTEN GUARANTEES from the Union: What exactly can they DELIVER to Aliante Team Members? Promises of 'we will do our best' or 'we will for you' are not enough to get your personal identify information from you." CP #5, p. 13.

Danzak's September 2014 meetings were part of a culture of opposition to the Union that permeated all levels of management. Respondent's security agents engaged in surveillance of employees engaged in the TDR in December 2014, surreptitiously photographing them while they were conducting outreach to co-workers. While Welk indicated that it "fine" that employees exercise these Section 7 rights, she took no issue with her security staff violating those very rights by photographing employees engaged in protected, concerted activity. This was one of several documented instances in which managers, supervisors, and security guards reported to upper management about protected activity. They clearly felt they were supposed to.

Each of the players' involved in the decision to discharge Flores has displayed animus towards the Union. Danzak's animus is already established through the script he helped to author and that he delivered to employees. Moreover, he admitted elsewhere in his testimony that he is opposed to unionization. He prefers a non-union system where, for example, Respondent need only submit its discharge decisions to an internal review board before which Respondent wins *every time* over a real grievance procedure where a neutral arbitrator will decide. Tr. 59-591. On this point at least Danzak was credible.

Respondent's other managers have each displayed their animus. In February 2014, Huntzinger complained that she was "concerned about the recent (seemingly spike in union activity. It bums me out that we have TMs who believe (sic) that's a better way. . . . it's dissappointing (sic) that our TMs are being solicited on their breaks & at their homes." Downey responded: "I agree, I'm very concerned." CP #6, p. 9. In light of Downey's concern, Danzak inquired if any "TMs have been targeted at home and by

whom?” GC #14. Heath responded that in the past “I spoke with TMs and advised them to tell them they weren’t interested if they didn’t want and let them know that they could call the police and file harassment charges.” GC #14.¹²

Barahona has her own track record. In *Station Casinos LLC*, Judge Carter found, and the Board affirmed, that Barahona violated employees’ Section 7 rights in 2010 when working as a manager for the Aliante property. Judge Carter wrote:

a. Findings of fact.

Mayra Gonzalez signed a union card on or about February 18, 2010, doing so while she was in the employee dining room. Several coworkers observed Gonzalez sign her union card, as did Assistant Housekeeping Manager Elizabeth Barahona, who was at a nearby table. (Tr. 554.) On April 1, Gonzalez attended a preshift meeting in the housekeeping department. At the meeting, Barahona stated (in English) that employees should be careful what they sign because if they signed a union card they might get in trouble or receive more rooms to clean. (Tr. 554.) Barahona added that if the Union came in, employees might receive less money. (Tr. 554-555.) Although she had read Sound Bytes at other meetings, Barahona did not read from any written material while making her remarks on April 1. (Tr. 563-564.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Barahona threatened employees with unspecified reprisals, additional work, and losing benefits if they selected the Union as their bargaining representative. (GC #2(c), par. 5(g).) I have credited Gonzalez’ testimony. Gonzalez was a poised witness who provided short and detailed

¹² Heath’s advice—although not the subject of this complaint—violates section 8(a)(1) of the Act. *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001). *Jerry Ryce Builders, Inc. & Illinois Dist. Council No. 1, Int’l Union of Bricklayers & Allied Craftworkers, AFL-CIO*, 352 NLRB 1262, 1268 (2008) (employer violated act by telling employees to call the police if they saw union supporters on the jobsite).

testimony about the events in dispute, and remained poised and confident in her testimony during cross-examination. I also note that although Gonzalez requested (through counsel) that the interpreter be available to provide assistance if needed, Gonzalez testified in English without difficulty (and thus I infer that she was able to understand Barahona's remarks even though they were made in English). Barahona's remarks to the employees at the meeting were objectively coercive. Barahona was aware from both her observations and the ongoing Sound Byte campaign that the union organizing campaign was in progress. The remarks that Barahona offered about the Union had a reasonable tendency to be coercive because the remarks effectively were warnings to employees that the terms and conditions of their employment could worsen (in the form of additional work, lower pay, or other unspecified "trouble") if they signed union cards.

Station Casinos, LLC, supra, 358 NLRB No. 153, at *440.

Based on all the foregoing, the General Counsel established the third element of the *Wright Line* inquiry. The ALJ correctly so found.

B. Respondent failed to establish that it would have discharged Flores absent her support for the Union.

The ALJ correctly found that reasons provided for Respondent for discharging Flores were so self-evidently far-fetched that they could only have been pre-textual. Accordingly, he properly found that Respondent could not satisfy its burden on the second part of the *Wright Line* analysis because, as the Board has consistently held, a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 5 (2011), *enfd. sub nom. Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012); *Rood Trucking, Co.*, 342 NLRB 895, 898 (2004); *Golden State Food Corp.*, 340 NLRB 382, 385 (2003).

The ALJ did not, as Respondent avers, act as a "super human resources

department” in deciding whether Respondent made a good or bad business decision in discharging Flores. He simply applied black letter law when he emphasized the facial implausibility of the Respondent’s explanation for Flores’ discharges because Board law has long recognized the speciousness of the reasons for discharge is a relevant factor in finding pretext. *Keller Manufacturing Co.*, 237 NLRB 712 (1978), *enfd. in part, enf. den. in part without opinion*, 622 F.2d 592 (7th Cir. 1980) (where the employer's reason for termination “given is implausible, then that fact tends to prove an attempt to disguise the true, and unlawful, motive.”); *see also J.S. Troup Elec.*, 344 NLRB 1009 (2005) (Board will infer an unlawful motive if the employer's action is “baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive”).

There is no room for doubt that Respondent’s reasons for discharge were patently baseless, and therefore facially pretextual. First, the video evidence fully supports Flores’ account of what happened to her. Washburn’s hand clearly extended towards Flores back, she turned abruptly, and later held her back. Respondent’s managers saw all this numerous times, in high definition. Their explanation for purportedly not seeing what is there were specious and untrustworthy.

Second, even if the video were not as conclusive as it appears to be regarding what transpired, it is at the very least plainly consistent with Flores’ sincere *understanding* that Washburn made contact with her. Rand testified that, while he saw “no apparent contact,” he “can’t verify for sure” by looking at the video exactly what happened. Tr. 113. To do so would be “an assumption.” *Id.* But Danzak and Heath resolved every doubt they could muster against Flores. They saw the same video that Rand saw, but the

“assumption” they made was that Flores was *lying* about her injury. They offered absolutely no reason why she might do so, and there is no reason found in the evidence. She was not eager to report the incident in the first place, as Sparks made clear. She was reluctant to go to Concentra, as Rand and Vasquez made clear. She had no history of dishonesty, as everyone made clear. She was a good employee who did her job well and stuck to the rules.

Third, Heath’s testified incredibly that it did not even *matter* whether Flores sincerely believed that Washburn hit her. According to Heath, Flores was dishonest whether her belief was sincere or not. That testimony was simply bewildering. The concept of “dishonesty” is not some term of art whose vagaries are subject to debate. By any common understanding of the word, it means that Flores must have *intentionally* misled Respondent by stating a claim that she *knew* to be false when she made it. Confronted with the reality of what the video showed, Heath appeared to suggest that “dishonest” can mean “mistaken” or even “sincerely mistaken.” That is hogwash, and the only conclusion to draw from it is that Heath was not credible. The sole dishonesty in this case is the way in which Respondent’s managers approached the matter.

The ALJ correctly viewed the spurious explanation for Respondent’s discharge of Flores within the overall context of events. Those events continued to unfold in dynamic fashion throughout 2014 as Respondent tried to get control of the Union’s organizing efforts. It had grown concerned enough about the Union’s success in signing employees up in the IM Department that it targeted these employees for its anti-union meetings in late September. The Union’s solicitation efforts persisted notwithstanding. At the same

time, during the fall of 2014, Respondent was forced to go to hearing over the Cruz and Chavez ULP charges. Chavez walked back into the workplace in December, a self-evident boost to the Union's prestige. Respondent's feelings towards the Union were clearly as raw by December 2014 as they had been in February 2014. It seized upon the opportunity to discharge an employee whose loyalties it mistrusted in an obvious act of opportunism.

It is beyond belief that Respondent would have treated Flores as a liar under normal circumstances. Its own rules required it to approach employee injuries evenhandedly, and not as some sort of criminal inquisition. But Heath flaunted those rules. She treated Flores like a delinquent, lying to her about the evidence and cutting her off when she tried to explain herself. Respondent had never treated an employee this way for reporting an injury. Nor had it ever scrutinized the circumstances of an employee's injury with such hostility. Again, there is no apparent reason why. Flores was an honest employee. She was clearly injured. She had no reason to make up her injury. The baseless and contrived nature of Respondent's accusations provides clear evidence that the purported reason for the discharge is pretextual. Respondent was able to muster no explanation for its actions that made a modicum of sense. The reason for that is because the true reasons for the discharge were some other than what Respondent pretends. Respondent failed to meet its burden to rebut the General Counsel's case. Board law as elaborated in numerous cases compels the conclusion that the complaint allegations should be sustained. *See Montgomery Ward*, 316 NLRB at 1253; *Pan-Osten Co.*, 336 NLRB at 308; *Regional Home Care, Inc.*, 329 NLRB at 86; *Frye Electric, Inc.*, 352

NLRB at 352.

CONCLUSION

For all the foregoing reasons, the ALJ correctly ruled that Respondent discharged employee Lourdes Flores in response to her support for the Union in violation of Section 8(a)(3) of the Act. The Board should reject Respondent's exceptions, and adopt the decision of the ALJ.

Dated: January 22, 2016

Respectfully submitted,

By: /s/Eric B. Myers

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Attorneys for Charging Party

**PROOF OF SERVICE
STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO**

I am employed in the city and country of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 1400, San Francisco, CA 94105.

I hereby certify that a true and correct copy of the foregoing document entitled **LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION LOCAL 165'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail on this 22nd day of January 2016 as follows:

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

Executed on January 22, 2016 at San Francisco, California.

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