

Nos. 15-13224 & 15-14018

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**G4S REGULATED SECURITY SOLUTIONS,
A Division of G4S Secure Solutions (USA) Inc.,
f.k.a. The Wackenhut Corporation**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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f.k.a. The Wackenhut Corporation,)	
)	Nos. 15-13224
Petitioner/Cross-Respondent)	15-14018
)	
v.)	Board Case Nos.
)	12-CA-026644
NATIONAL LABOR RELATIONS BOARD,)	12-CA-026811
)	
Respondent/Cross-Petitioner)	
)	

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Abruzzo, Jennifer, Deputy General Counsel for the Board
2. Block, Sharon, former Board Member
3. Cates, William N., Administrative Law Judge
4. Cherof, Edward M., Attorney for Petitioner/Cross-Respondent
5. Cohen, David, Regional Attorney for Region 12 of the Board
6. Dheenan, Usha, Supervisory Attorney for the Board
7. Diaz, Margaret J., Regional Director, NLRB Region 12

Case No. 15-13224 & 15-14018
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8. Dreeben, Linda, Deputy Associate General Counsel for the Board
9. Ferguson, John H., Associate General Counsel for the Board
10. Frazier, Thomas, Charging Party
11. 4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA) Inc., f.k.a. The Wackenhut Corporation, Petitioner/Cross-Respondent
12. Griffin, Jr., Richard F., Board General Counsel, former Board Member
13. Hayes, Brian E., former Board Member
14. Hirozawa, Kent Y., Board Member
15. International Union, Security, Police and Fire Professionals of America (SPFPA), Party in Interest
16. Jackson Lewis, P.C., Attorneys for Petitioner/Cross-Respondent
17. Jason, Meredith, Managing Supervisor for the Board
18. Mack, Cecil, Charging Party
19. Miscimarra, Phillip A., Board Member
20. National Labor Relations Board, Respondent/Cross-Petitioner
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STATEMENT REGARDING ORAL ARGUMENT

In accordance with 11th Circuit Rule 28-1(c), the Board expresses its belief that oral argument would not be of material assistance to the Court, as this case involves the application of well-settled legal principles to established facts. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

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NATIONAL LABOR RELATIONS BOARD

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**ON PETITION FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation (“G4S”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Decision and Order (“D&O”) issued by the Board on June 25, 2015, and reported at 362 NLRB No. 134. The

Board's Decision and Order is final under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 151 et seq., 160(e), (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). G4S's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the Act because the unfair labor practices occurred in Florida. *Id.* § 160(e), (f).

STATEMENT OF ISSUES

1. Does substantial evidence support the Board's finding that Thomas Frazier and Cecil Mack are not supervisors under Section 2(11) of the Act?
2. Does substantial evidence support the Board's finding that G4S violated Section 8(a)(1) of the Act by suspending and discharging Frazier and Mack because of their protected activities?

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that G4S violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by suspending and discharging employees Thomas Frazier and Cecil Mack (together, "the discriminatees") because they engaged in concerted activities protected under Section 7 of the Act, *id.* § 157. G4S raises two defenses: (1) Frazier and Mack are supervisors who do

not benefit from the Act's protections; and (2) even if Frazier and Mack are statutory employees, G4S acted pursuant to a legitimate business reason in disciplining them. The Board's findings are summarized below.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

A. G4S's Management Hierarchy and Staffing

G4S provides guard and security services at the Turkey Point Nuclear Power Plant ("the Plant") in Miami/Dade County, Florida, pursuant to a contract with the Plant operator, Florida Power & Light ("FPL"). (D&O 1, Remand 7; GCX 32, Tr. 36-37, 315.)¹ G4S's highest-ranking position at the Plant is Project Manager Michael Mareth. (Remand 8; Tr. 316.) Next in line is Operations Coordinator Juan Rodriguez, who directly oversees five captains. (Remand 8; ERX 13, Tr. 82, 163-64, 316.) Each captain leads a team of 7 lieutenants and about 37 security officers. (Remand 8; ERX 13, Tr. 81-82, 83, 197, 316.) At any given time, there are four teams performing security services and one team in training. (Remand 8; Tr. 156, 316.)

¹ In this brief, "D&O" refers to the Board's Decision and Order, 362 NLRB No. 134 (June 25, 2015), which appears in Volume III of the Certified List of Agency Record ("CL"), at No. 24. "Remand" refers to the Board's Decision and Order Remanding, 358 NLRB No. 160 (Sept. 28, 2012), CL Vol. III No. 12. "Supp." refers to the Board's Supplemental Decision and Order, 359 NLRB No. 101 (Apr. 30, 2013), CL Vol. III No. 21. "Tr." refers to the hearing transcript, CL Vol. I. "GCX" and "ERX" refer to the exhibits of the General Counsel and G4S, respectively, CL Vol. II. "Br." refers to the G4S's opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Lieutenants are former security officers who receive 2 weeks of training designed to improve their interpersonal and presentation skills. (Remand 9; Tr. 111.) When they become lieutenants, they sign various documents, including a Supervisory Requirements form, a Leadership Pledge and a Management Challenge form, all of which describe the lieutenants' duties and refer to them as supervisors. (Remand 9; ERXs 1-3, 7-9.)

G4S operates in a heavily regulated industry, and various federal regulations define lieutenants' job duties. (Remand 9; Tr. 237, 340.) G4S maintains a number of procedures and protocols mandated by the Nuclear Regulatory Commission, including its Safety Conscious Work Environment ("SCWE") and Corrective Action programs. (Remand 7; ERXs 19-21, Tr. 350, 380.) Other documents governing lieutenants' work duties include Nuclear Administrative Procedures, Fitness for Duty and Post Instructions policies, progressive-discipline and attendance policies, and numerous Security Force Instructions. (GCXs 17, 18, 31 at 4-6, 33, 35-37, Tr. 83, 92, 153-54, 159-60, 293, 417.)

B. Facts Pertaining to Lieutenants' Alleged Supervisory Authority

1. Discipline

G4S applies a four-step, progressive-discipline system. (Remand 10; GCX 17, Tr. 323.) This 11-page policy identifies a wide array of offenses categorized in three levels (I, II and III), with Level I being the most serious. (D&O 2, Remand 2

n.4, 10; GCX 17.) Lieutenants cannot impose discipline for Level I violations, which are terminable offenses. (D&O 2 n.6, Remand 10; GCX 17 at 3-4, Tr. 322.) G4S also maintains a 15-page attendance policy, which specifies the procedure to follow for 12 types of absences and, where applicable, the discipline to impose.² (D&O 2, Remand 2 n.4, 10; GCX 18.) Policy violations are documented on disciplinary notices, which are signed by lieutenants. (D&O 2 & n.6, Remand 2, 10; ERX 16.)

2. Promotions

G4S's promotions are determined by a multimember board and consist of five stages: (1) a written examination; (2) interview and oral questions with the promotion board; (3) review of performance appraisals, attendance records, achievements, and disciplinary history; (4) review of educational background; and (5) review of additional factors and selection of a finalist, whose promotion requires the concurrence of the project manager. (Remand 3; ERX 17 at 3-4.) Each lieutenant completes quarterly and annual evaluations for about five security officers. (Remand 3, 10; ERX 4, Tr. 205-06, 295, 328.) According to Mareth, these evaluations were "considered" in connection with the promotion of four unnamed security officers. (Remand 3, 10; Tr. 329-30.) According to Frazier, a

² See, e.g., GCX 18 at 5 (sanctions for up to 3 unexcused, illness-related absences in a year); *id.* at 6-8 (applicable procedure for fatigue-related absences); *id.* at 9-10 (sanctions for up to 4 tardies in a year); *id.* at 14-15 (sanctions for catch-all unexcused absences); *id.* at 15 (sanctions for no notice of absence).

security officer who repeatedly receives poor evaluations “might not” receive a promotion. (Remand 3; Tr. 220.)

3. Assignment

At the start of a shift, the team captain assigns each security officer to a particular post and records these assignments on a post assignment sheet. (Remand 3, 11, 14; Tr. 198-99, 291.) The captain also determines the sequence in which security officers rotate through each post. (Remand 11; Tr. 199-200.) Security officers occasionally request to switch posts based on personal preference. (Remand 3, 11; Tr. 217, 292.) According to Frazier, lieutenants can approve post switches without consulting with their captain. (Remand 3, 11; Tr. 218-19, *but see* 292.)

4. Responsible direction

FPL’s Security Force Instruction manual provides that lieutenants must ensure that security officers remain alert and attentive, that they properly maintain post reports and perform their duties as required in a safe environment. (Remand 9, 14; GCX 33 at 9.) Lieutenants are to promptly correct security officers’ deficiencies, including improper behavior, attitude, or inattentiveness. (*Id.*) Some performance evaluations reflect that lieutenants were counseled for failing to properly train their subordinates. (Remand 4, 10, 14; ERX 18 at 3, 7, Tr. 331-32.)

C. The Discriminatees' Protected Conduct and Discharges

G4S hired Frazier and Mack as security officers in 1989 and 2002, respectively, and they became lieutenants in 2003. (Remand 8, Supp. 3; Tr. 153, 155, 271-72.) As lieutenants, they raised a multitude of concerns on behalf of security officers regarding their working conditions. (Supp. 3; GCX 27-28, Tr. 164-73, 177-83, 249-55, 274-77.) These complaints included, among others, inadequate bathrooms, lack of water, uncomfortably hot and bulky vests, standing in the sun for long periods of time, uncomfortable chairs, favoritism, and unfair treatment. (Supp. 3; Tr. 165-66, 169-71, 173, 250, 253, 275.)

In February 2010, G4S initiated a Leadership Effectiveness Review (“LER”) program to assess the job performance of its lieutenants and captains. (Supp. 3; Tr. 41, 392.) The LER rated performance in three areas: supervisor effectiveness, communication, and setting high standards for team performance. (Supp. 3; GCXs 7, 13.) Mareth recommended that G4S terminate five lieutenants deemed to have failed their LERs, including Frazier and Mack. (Supp. 3; Tr. 46-47, 393.)

1. Frazier's discharge

On February 12, 2010, Frazier found out that he had been suspended from duty and that he was to meet with Mareth on February 15. (Remand 8, Supp. 3, 4; Tr. 185-88.) At that meeting, Mareth informed Frazier that he was being discharged because he did “not effectively support management” and “would not

effect change going forward.” (Supp. 4; Tr. 189.) Frazier replied that he always followed applicable policies and procedures even if he did not agree with them, and that it was not right to fire him just because he was “a voice” for security officers and other lieutenants. (Supp. 4; Tr. 190-91.) Mareth did not respond to Frazier’s statement and did not mention the LER program or cite any performance-related issue as the reason for his discharge. (Supp. 4; Tr. 191.) Frazier’s termination notice states, without elaboration, that he was discharged for “Failure to meet satisfactory leadership expectations.” (Supp. 4; GCX 19.)

Frazier’s LER rates his performance as unsatisfactory. (Supp. 3; GCX 7.) Frazier’s effectiveness rating includes the following comments: “Tom . . . openly criticizes management decisions at team briefings. . . . He doesn’t see himself as part of management, and therefore is not leading us into the future.” (Supp. 3; GCX 7 at 1.) Other sections of the LER criticize Frazier for his perceived excessive “sensitivity to individuals” and failure to balance this with “the need of the organization.” (Supp. 3; GCX 7 at 1 & 2.) Frazier did not have any discussion with G4S’s management about his LER; he was unaware of its existence until the trial. (Tr. 106-07, 196-97.)

2. Mack’s discharge

On January 25, 2010, Mack went to help resolve employees’ delayed entry into the Plant because of malfunctioning screening equipment. (Supp. 4; Tr. 277-

79.) After solving the problem, Mack talked with FPL's site security manager, Brett Rittmer, whose actions caused the backup, about how to prevent future incidents. (Supp. 4; Tr. 278-82.) Mack and Rittmer then went to a nearby office, where they continued discussing the incident in lighthearted terms in the presence of two G4S security officers. (Supp. 4; Tr. 281-82.)

Three days later, on January 28, Mack's team Captain, Quentin Ferrer, summoned him to a meeting with Operations Coordinator Rodriguez. (Supp. 4; Tr. 282.) Ferrer and Rodriguez asked Mack if he had "cursed" in front of Rittmer, which he denied. (Supp. 4; Tr. 282-83.) They asked him to write a statement to that effect. (Supp. 4; Tr. 283.) Mack wrote a report that he gave to Mareth, and also provided a copy to Ferrer. (Supp. 4; GCX 34, Tr. 283.) Ferrer read the report, tore it up, and said to Mack, "[O]kay, it sounds good." (Supp. 4; Tr. 283.) Mack then returned to his shift. (*Id.*)

On January 31, Ferrer told Mack that he was being suspended because of the "bullshit incident" with Rittmer. (Supp. 4; Tr. 284.) A few days later, Mack called Mareth, who confirmed that Mack was on suspension pending investigation into whether he used foul language in front of FPL personnel. (*Id.*) On February 22, Mack attended a meeting with Mareth, Rittmer, and Rodriguez, who was also

present at the scene of the alleged incident.³ (Supp. 4; Tr. 285-86.) Mack asked Rittmer why he did not immediately raise the issue when it occurred, and Rittmer responded that he “had his vacation on his mind” at the time. (Supp. 4; Tr. 285.) Mack also asked Rodriguez why he did not speak up to defend Mack since he knew Mack did not curse. (Supp. 4; Tr. 286.) Rodriguez responded that he could not say one way or another whether Mack had cursed, but that Mack “did seem calm” during the exchange. (*Id.*) Mareth noted that there were conflicting versions of the incident, but told Mack that G4S was terminating him for using foul language. (Supp. 4; Tr. 287.) Mareth did not mention the LER program or cite any performance-related issue as the reason for Mack’s discharge. (Supp. 4; Tr. 289, 309-10.)

Mack’s termination notice states, in relevant part, “Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process management completed a review of Cecil’s personnel file. As a result of the review it is management’s perspective that Cecil’s performance does not meet satisfactory job performance or behavior standards.” (Supp. 4; GCX 22.)

³ G4S obtained statements from several individuals as part of its investigation. According to Rittmer, Mack referred to the lines of waiting employees as a “cluster fuck,” but did not display loud or aggressive behavior. (Supp. 4; G4S Ex. 34 at 3.) One FPL employee described Mack as “overly ‘assertive’” but did not mention any profanity. (Supp. 4; G4S Ex. 34 at 4.) Another FPL employee said that Mack described the situation as a “cluster fuck” loudly enough for others to hear. (Supp. 4; G4S Ex. 34 at 2.) Three G4S security officers gave statements that did not mention Mack using foul language. (Supp. 4; GCX 38 at 1-3.)

Mack's LER results rated his performance as unsatisfactory. (Supp. 4; GCX 13.) Mack's effectiveness rating is exactly the same as Frazier's, except for the addition of two sentences: "He doesn't see himself as part of management, and as viewed by one [security officer], 'Is on the security officer's side.' Cecil finds it difficult to demonstrate a balanced view." (Supp. 4; GCX 13 at 1.) Mack's communication rating criticizes him for having an "over alignment with security officer concerns and too little attention to the remainder of his duties [sic] (customer focus and lack of support for management decisions)," and for being "more of a 'team member' than a team leader." (*Id.*) Like Frazier, Mack was unaware of his LER result and did not have any discussion about it with G4S's management. (Tr. 106-07, 289-91.)

II. PROCEDURAL HISTORY

On charges filed by the discriminatees, the Board's General Counsel issued a complaint alleging that G4S suspended and discharged them in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). (Remand 7; GCXs 1(a), (d), (g).) On June 27, 2011, following a hearing, Administrative Law Judge William N. Cates ("the judge") issued a decision finding that the discriminatees were statutory supervisors and recommending that the complaint be dismissed. (Remand 7-14.)

On September 28, 2012, the Board (Chairman Pearce and Member Block, Members Hayes, dissenting) issued a Decision and Order Remanding (“Remand Order”) finding that Frazier and Mack were statutory employees. (Remand 1-4.) Accordingly, the Board remanded for the judge to consider whether the discriminatees were discharged for engaging in protected concerted activities. (Remand 4; Supp. 3.) Member Hayes dissented on the supervisory finding. (Remand 4-6.)

On November 16, 2012, the judge issued a supplemental decision finding that G4S violated Section 8(a)(1) of the Act as alleged. (Supp. 3-7.) On April 30, 2013, the Board (Chairman Pearce, Members Griffin and Block) issued a Supplemental Decision and Order (“Supplemental Decision”) affirming the judge’s findings and adopting his recommended order. (Supp. 1.)

On May 9, 2013, G4S filed a petition for review in the United States Court of Appeals for the D.C. Circuit. *Petition for Review, G4S Regulated Security Solutions v. NLRB*, No. 13-1171 (D.C. Cir. May 9, 2013). On June 26, 2014, the Supreme Court issued *NLRB v. Noel Canning*, ___ U.S. ___, 134 S. Ct. 2550 (2014), which invalidated the President’s recess appointments to the Board, including Members Griffin and Block. Thereafter, the Board set aside the Remand Order and the Supplemental Decision, and the D.C. Circuit dismissed the case. (D&O 1.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On April 25, 2015, after considering de novo the record, the judge's decision and supplemental decision and the exceptions thereto, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra, dissenting) issued the Decision and Order currently under review. The Board found that the discriminatees were not supervisors, based on the rationale set forth in the Remand Order and additional analysis. (D&O 1-3 & n.3, Remand 1-4.) The Board further found that G4S unlawfully suspended and discharged the discriminatees, for the reasons stated in the Supplemental Order. (D&O 1, Supp. 1-6.) Member Miscimarra dissented, stating that he would have found Frazier and Mack to be statutory supervisors. (D&O 4-7.)

The Board's Order requires G4S to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (D&O 4.) Affirmatively, the Board's Order requires G4S to reinstate the discriminatees, make them whole for losses suffered as a result of G4S's actions, and remove any reference to their unlawful suspension and discharge from its files. (*Id.*) The Order also requires G4S to post a remedial notice to employees. (*Id.*)

SUMMARY OF ARGUMENT

This case presents two issues for the Court's review. The first is whether substantial evidence supports the Board's finding that G4S failed to show Frazier and Mack are supervisors under Section 2(11) of the Act. If the Court agrees with this determination, the Court must then consider whether substantial evidence supports the Board's finding that G4S suspended and discharged the discriminatees in violation of Section 8(a)(1) of the Act.

Importantly, with respect to the first issue, the question for the Court is whether the Board reasonably found, on this evidentiary record, that G4S *failed to carry its burden* of showing that Frazier and Mack are statutory supervisors. Under established law, evidence that is conclusory, generalized, inconclusive or contradictory does not meet that burden. Instead, there must be specific evidence or examples that employees *actually possess* supervisory authority. Most of G4S's evidence consists of Project Manager Mareth's testimony, which is conclusory and provides no specific evidence or examples of actual supervisory authority. Moreover, G4S failed to call any witness with first-hand knowledge of how lieutenants exercise their responsibilities, and whether they do so with independent judgment as defined under the Act. Unable to succeed on its record, G4S resorts to accusing the Board of violating or ignoring various legal standards and precedents.

As shown below, however, the Board's finding that G4S failed to show that Frazier and Mack are statutory supervisors is sound and grounded in established case law.

Substantial evidence also supports the Board's finding that G4S suspended and discharged the discriminatees in retaliation for their statutorily protected conduct of seeking to improve working conditions for security officers and lieutenants. The Board's analysis varies somewhat for each individual, but both findings are entitled to enforcement.

Mareth specifically told Frazier that he was being discharged for "not effectively support[ing] management" and did not dispute Frazier's assertion that his termination was motivated by the fact that he was "a voice" for security officers. Mareth offered no performance-based rationale for Frazier's discharge and did not mention the LER at any time. Moreover, Frazier's LER accused him of criticizing management decisions, privileging the needs of his fellow employees at the expense of his employer's, and not seeing himself as a part of management. Accordingly, the Board reasonably found that G4S discharged Frazier because of his protected conduct. G4S misapprehends Board law when it argues that the Board should have used its motive analysis to analyze Frazier's discharge. This is because the Board found, and substantial evidence supports, that G4S's sole motive for discharging Frazier was his protected conduct.

The Board used its burden-shifting, motive framework to analyze Mack's discharge because Mareth told Mack that he was being terminated for using profanity. Mack's LER, which criticized him for substantially the same reasons as Frazier's, shows that G4S harbored animus against Mack's protected conduct. G4S's asserted rationale for discharging Mack was the incident in which he allegedly cursed in front of an FPL employee. The credited evidence surrounding the incident, however, showed that Mack did not curse and that, even if he did, it was not a terminable offense. Accordingly, the Board correctly found that G4S used the incident as a pretext to fire Mack in retaliation for his protected conduct.

STANDARD OF REVIEW

The Board bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786, 110 S. Ct. 1542, 1549 (1990). Thus, when the Board engages in the "difficult and delicate responsibility of reconciling conflicting interests of labor and management, the balance struck by the Board is subject to limited judicial review." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267, 95 S. Ct. 959, 969 (1975) (quotation marks and citation omitted). Courts must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' . . . even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399, 116 S. Ct. 1396, 1401 (1996) (quoting

Bayside Enters., Inc. v. NLRB, 429 U.S. 298, 302, 304, 97 S. Ct. 576, 580-81 (1977)).

This Court affords “considerable deference to the Board’s expertise in applying the . . . Act to the labor controversies that come before it.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will sustain the Board’s factual findings if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 464-65 (1951); *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987). The “substantial evidence” test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377, 118 S. Ct. 818, 828 (1998). Under this test, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488, 71 S. Ct. at 465; *see also Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985). As this Court has noted, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board

is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).⁴

The fact that the Board’s final determinations may differ from those of the administrative law judge does not alter this Court’s deferential review of the Board’s conclusions. *Visiting Nurse Health Sys.*, 108 F.3d at 1360. Furthermore, it is not this Court’s role to “re-weigh the evidence or make credibility choices.” *TCB Sys., Inc. v. NLRB*, 448 F. App’x 993, 997 (11th Cir. 2011) (quoting *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983)). Rather, if the evidence is conflicting, this Court is “bound by [the Board’s credibility] determinations unless they are ‘inherently unreasonable or self-contradictory.’” *Assoc. Rubber Co. v. NLRB*, 296 F.3d 1055, 1060 (11th Cir. 2002) (quoting *NLRB v. IDAB, Inc.*, 770 F.2d 991, 996 (11th Cir. 1985)).

ARGUMENT

The threshold issue in this case is the Board’s finding that Frazier and Mack are statutory employees. The Act protects statutory employees, but not statutory supervisors. *See* 29 U.S.C. §§ 152(3), 157. Therefore, if the Court agrees that lieutenants are statutory employees, it must then determine whether the Board reasonably found that the discriminatees were unlawfully suspended and

⁴ Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

discharged. However, if the Court finds that G4S proved that they are statutory supervisors, the legality of the discharges becomes moot.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT G4S FAILED TO CARRY ITS BURDEN OF SHOWING THAT FRAZIER AND MACK ARE SUPERVISORS

Section 2(11) of the Act defines the term “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). These powers are listed in the disjunctive, so possession of any one is enough to make an individual a supervisor, as long as its exercise involves independent judgment. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713, 121 S. Ct. 1861, 1867 (2001). As the party asserting supervisory status, G4S bears the burden of demonstrating it by a preponderance of the evidence. *Id.* at 711-12, 121 S. Ct. at 1866.

Under judicially-approved Board law, a showing of supervisory status cannot rest on generalized or conclusory testimony, even if such testimony is un rebutted. *See Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006); *accord, e.g., Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012); *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999).

As the party bearing the burden of proof, G4S was required to present specific evidence or examples of the putative supervisors' actual responsibilities. *See, e.g., Golden Crest Healthcare Ctr.*, 348 NLRB at 731; *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 489 (6th Cir. 2003) (employer failed to present specific evidence supporting manager's general statements about employees' duties).

G4S concedes that the lieutenants do not possess most of the supervisory indicia contained in Section 2(11) of the Act. It contends, however, that lieutenants are statutory supervisors because they have the authority to discipline, assign, and responsibly direct security officers, and the authority to promote security officers because lieutenants write their evaluations. Substantial evidence supports the Board's finding that G4S failed to carry its burden on each of these claims.

A. G4S Failed To Show that Lieutenants Discipline Security Officers Using Independent Judgment

The Board found that G4S did not carry its burden to show that lieutenants have the authority to discipline security officers. (D&O 2, Remand 2.) The Board found also that, even if lieutenants possess such authority, G4S failed to show that they exercise independent judgment when issuing disciplinary notices. (*Id.*) As explained below, the Board's finding is based on a careful review of the evidence and is consistent with established precedent.

1. G4S failed to establish that lieutenants possess the authority to discipline security officers

The Board found that G4S's evidence was insufficient to show lieutenants possess the authority to discipline security officers. (D&O 1-3.) G4S disputes this finding, relying almost exclusively on Project Manager Mareth's testimony.⁵ (Br. 24-27.) As shown below, Mareth's testimony lacks the detail and specificity needed to carry G4S's burden.

Mareth's testimony lacks the specific evidence or examples necessary to show that lieutenants possess actual disciplinary authority over security officers. As the Board found, and the hearing transcript supports, Mareth's testimony consists mostly of conclusory statements in response to leading questions from counsel.⁶ (D&O 2.) Other testimony is slightly more developed, but still devoid of specific evidence or examples. (*Id.*)

⁵ In its opening brief, G4S does not rely on job descriptions and other forms signed by lieutenants upon obtaining their rank (Supervisory Requirements form, Leadership Pledge and Management Challenge forms (ERXs 1-3, 7-9)). As noted by the Board (Remand 2 n.5), "paper authority" of this sort, without more, does not establish supervisory status. *Golden Crest Healthcare Ctr.*, 348 NLRB at 731; *accord Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012).

⁶ Q. Do lieutenants have any role in disciplining security officers?

A. Yes, they do. (D&O 2 n.4; Tr. 322.)

Q. Do lieutenants . . . exercise any discretion in issuing discipline under this policy?

A. Yeah, they have the ability to do that, yes. (D&O 2 n.4; Tr. 324.)

For instance, when asked to describe the lieutenants' role in G4S's disciplinary process, Mareth stated, without more, that lieutenants can discipline security officers because they are superior in rank. (Tr. 322.) He also testified in general terms about disciplinary notices in the record (Tr. 326-29), but conceded that he was not involved in their issuance (Tr. 329). And when questioned about one notice in particular, Mareth admitted he had no personal knowledge about how it was issued, including whether the lieutenant who signed it discussed the matter with his captain beforehand. (Tr. 407.)

Contrary to G4S's suggestion (Br. 25-27 & n.11), the Board did not "discredit" Mareth's testimony. First, the Board made clear it was not reviewing the judge's credibility findings. (D&O 1 n.2, Remand 2 n.2.) Second, the Board found that Mareth's testimony, together with the documentary evidence in the record, was "insufficient to establish the [lieutenants'] supervisory status." (D&O 1 n.2.) In other words, the Board credited Mareth's statements, but found that they lacked the specificity needed to show supervisory status. (D&O 2 & n.4, Remand

Q. Could a lieutenant on his or her own decide not to issue discipline in some situation where they could issue discipline?

A. Yeah, certainly they could. They could ignore a situation all together. (Tr. 324.)

Q. Do lieutenants ever issue disciplinary actions?

A. Yes. (Tr. 326.)

Q. Do lieutenants always have to consult with their superior before issuing discipline?

A. No, they don't have to. (Tr. 328.)

2 & n.3.) Finally, G4S's claim (Br. 25) that the Board discredited Mareth because he never worked as a lieutenant and is several levels removed is simply untrue.

The Board only made a common-sense observation that, given Mareth's position and experience, it was "not surprising[]" that he could only offer generalized and conclusory testimony.⁷ (D&O 2.) *See Frenchtown*, 683 F.3d at 307, 310 (holding that generalized testimony about charge nurses' purported authority to issue discipline was insufficient to carry employer's burden); *see also infra* note 18.

Notwithstanding G4S's claim (Br. 23-24), the evidence of this case bears no comparison to *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332 (11th Cir. 2012). In *Lakeland*, the Court determined that licensed practical nurses ("LPNs") were statutory supervisors in their function as team leaders. *Id.* at 1334. Two witnesses testified about a specific incident in which one witness personally observed an LPN carry out a subordinate's termination. *Id.* at 1338 & n.5. One witness also had experience working as a team leader, and she provided first-hand evidence of that position's authority to independently discipline subordinates, including a particular example in which she wrote up a subordinate for failing to complete her work, sent her home and recommended that she be discharged (which she was). *Id.* at 1339 & n.7.

⁷ Mareth's testimony about disciplinary notices—where he spoke in general terms but admitted he had no personal knowledge of the actual circumstances in which they were issued—typifies his lack of specificity. (Tr. 326-29, 407.)

Any such evidence is absent from this record. G4S's only witness, Mareth, had no personal experience working as a lieutenant and admitted he had no first-hand knowledge of the disciplinary process. (Tr. 407.) Moreover, the discriminatees' testimony, cited by G4S as corroboration (Br. 26), suffers from the same deficiencies as Mareth's.⁸ (Tr. 202, 204, 219, 227, 296-97.) Finally, and contrary to G4S's claims (Br. 22, 29-30), the Board did not reject any evidence of discipline by lieutenants as "sporadic." *Cf. Lakeland*, 696 F.3d at 1338.

2. G4S failed to show that lieutenants exercise independent judgment when issuing disciplinary notices

The Board found that, even if lieutenants can discipline security officers, G4S failed to show that this authority requires the use of independent judgment within the meaning of the Act. As explained below, the evidence put forth by G4S is insufficient to carry its burden under the Act.

The Board has, with this Court's approval, construed independent judgment under Section 2(11) of the Act to require showing that an individual can "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Lakeland*, 696 F.3d at 1339. Additionally, the act in question

⁸ For example:

Q. You do admit that you had the authority to issue oral and written warnings, correct?

A. That is correct. (Tr. 219; *see also* Tr. 227 (same).)

must involve “a degree of discretion that rises above the routine or clerical.” *Oakwood Healthcare*, 348 NLRB at 693 (quotation marks and citations omitted); *accord Lakeland*, 696 F.3d at 1339. Furthermore, “a judgment is not independent if it is dictated or controlled by detailed instructions . . . set forth in company policies or rules,” unless such policies allow for discretionary choices.⁹ *Oakwood Healthcare*, 348 NLRB at 693; *accord Lakeland*, 696 F.3d at 1339.

Consistent with *Oakwood Healthcare*, and based on substantial evidence, the Board found that G4S’s disciplinary notices do not establish that lieutenants use independent judgment to issue discipline. (D&O 2.) Seven of the eight notices in evidence involve violations of G4S’s attendance policy, which is exhaustively detailed and prescribes specific procedures and discipline for every conceivable type of absence. (D&O 2; ERX 16 at 1-2, 4-8, GCX 18.) This Court has held that attendance violations “can be identified as violations without the exercise of independent judgment.” *Lakeland*, 696 F.3d at 1339 (no call/no shows). Moreover, the attendance policy provides that lieutenants are “responsible for . . . [e]nsuring that all authorized and unauthorized absences are documented,” leaving no discretion to ignore violations. (GCX 18 at 2.)

⁹ The Board’s interpretation of “independent judgment” stems partly from the legislative purpose of distinguishing between true supervisors with “genuine management prerogatives,” and employees—such as leadmen—who enjoy the Act’s protections despite performing “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81, 94 S. Ct. 1757, 1765 (1974) (quoting S. Rep. No. 80-105, at 4 (1947)).

The only remaining notice in the record was for causing damage to a vehicle, which was deemed unsatisfactory performance “in the opinion of management.” (D&O 2 n.6; ERX 16 at 3.) G4S’s disciplinary policy specifically states that “careless or reckless driving” is a Level II offense that requires a written warning.¹⁰ (GCX 17 at 3-4.) Thus, there is no evidence that the issuing lieutenant had any discretion to decide which level of discipline to impose, let alone whether to impose discipline at all. (D&O 2 n.6.) To the contrary, these notices support the Board’s finding that, assuming and to the extent lieutenants exercise disciplinary authority, their actions are dictated by detailed rules and policies.¹¹ *See Oakwood Healthcare*, 348 NLRB at 693; *Lakeland*, 696 F.3d at 1339.

The Board determined that Mareth’s inconclusive testimony fails to bridge these evidentiary gaps. (D&O 2.) Mareth admitted he had no personal involvement in the preparation of any disciplinary notices or knowledge about the manner in which they were issued. (Tr. 329, 407.) As a result, he was unable to

¹⁰ Mareth stated that the category of “failure to meet satisfactory job performance or behavior in the opinion of management” may fall either under Level II or III, but he failed to provide examples or explain which factors would be considered in making this determination. (GCX 17 at 9, Tr. 401.)

¹¹ Some of G4S’s arguments misrepresent the Board’s reasoning. For instance, the Board did not find that G4S failed to carry its burden because it did not “enter a sufficient number” of disciplinary notices into evidence (Br. 30), or because they were “too old” (Br. 28). The Board merely compared the evidence in this case to the more substantial record involving the same position and location in *Wackenhut Corp.*, 345 NLRB 850 (2005), where the Board also found that G4S—then operating as the Wackenhut Corporation—failed to carry its burden. (D&O 3.)

explain the procedures and protocols that govern lieutenants' disciplinary actions. (D&O 2.) Nor could he explain the lieutenants' thought process when they issue disciplinary notices, including how they decide whether to ignore an infraction, or which factors they consider in determining whether a violation is better addressed by a coaching, an oral counseling, or a written warning. Presumably, the lieutenants who signed the disciplinary notices in the record could have offered such evidence—but G4S chose not to have them testify.¹² (D&O 2-3.)

Despite its claims to the contrary (Br. 25), G4S also failed to show that lieutenants can issue discipline without consulting their superiors. Most of Mareth's testimony on this point is conclusory, as shown above.¹³ In the *only* example Mareth provided, the lieutenant conferred with his captain before issuing the discipline. (Tr. 324.) One of Frazier's evaluations similarly instructs him to have his captain review any discipline "prior to giving it to the [Security] Officers."¹⁴ (D&O 3; GCX 9.) The Board has long held that judgment is not

¹² In noting that neither Frazier nor Mack issued any of the notices in the record (D&O 2), the Board simply underlined that they could not provide any insight into the notice-issuance process. The Board did not, as G4S claims (Br. 29, 45), use this observation as grounds to find that they were not supervisors.

¹³ *See supra* note 6, Tr. 324, 328.

¹⁴ G4S takes issue (Br. 32) with the Board's reading of Frazier's evaluation and claims it is a "directive to issue discipline as the duties of his position require." (Br. 32 (quoting D&O 6 (Member Miscimarra, dissenting)).) Even if this is so, this directive expressly instructs Frazier to run every disciplinary notice by his captain prior to issuance. The Board reasonably inferred that, in practice, G4S's

independent within the meaning of Section 2(11) if a putative supervisor confers with a superior before issuing discipline. *See Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 492 (1989) (talking to supervisor before imposing discipline, even for information purposes, negates independent judgment because it affords the supervisor a chance to review, approve, or countermand the proposed action).

The evidence also does not support G4S's claim (Br. 28, 30-31) that the progressive disciplinary policy merely serves as guidance for lieutenants in deciding whether and which discipline to impose. The policy identifies dozens of possible violations by level of seriousness and prescribes the order in which discipline must be imposed, from step 1 (oral counseling) to step 4 (termination).¹⁵ (GCX 17 at 2-3, 6-9.) Moreover, the policy specifically states that, "[w]hen it is not practical to follow these guidelines or if an unlisted event occurs, *the Project Manager/DA* will consult with [G4S] for guidance." (GCX 17 at 6 (emphasis added.)) In other words, the final decision in unclear cases is reserved to the project manager (Mareth), and only after consultation with his superiors at G4S. Finally,

standard disciplinary procedure includes having captains review notices beforehand, and G4S did not offer any contrary testimony from a lieutenant. This Court will not overturn the Board's plausible inferences even though it might have made a different finding if deciding the case de novo. *Purolator Armored*, 764 F.2d at 1428.

¹⁵ G4S's (Br. 31) argument that deciding if a security officer at a nuclear facility is asleep involves independent judgment is, to say the least, a stretch. As this Court recognized in *Lakeland*, being able to tell if someone is asleep or absent from his post does not require the kind of independent judgment necessary to find supervisory status under the Act. 696 F.3d at 1339-40.

all attendance-related violations are governed by G4S's exhaustively detailed attendance policy. (GCX 18.) None of this supports finding that lieutenants exercise discretion in meting out discipline.

Mareth's testimony similarly fails to substantiate this claim. For instance, Mareth testified that lieutenants can impose any discipline short of termination (Tr. 322), but the progressive disciplinary policy reflects that lieutenants cannot issue suspensions (GCX 17 at 3-4). Mareth further stated that lieutenants can choose if a particular violation warrants an oral counseling (step 1) or a written warning (step 2), but the policy expressly reserves that privilege for the project manager.¹⁶ (GCX 17 at 4, Tr. 325.) Such contradictions, which G4S created, are not for the Board to resolve. *See N.Y. Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997) ("Whenever there is inconclusive or conflicting evidence . . . , the Board will find that supervisory status has not been established"). Mareth also testified that lieutenants have "some latitude" to decide if an infraction constitutes a Level I, II or III violation (Tr. 379-80), but it is undisputed that lieutenants cannot impose Level I terminable offenses (D&O 2 n.6). Moreover, Mareth did not explain what degree of latitude lieutenants might have, or how lieutenants would proceed to determine the proper

¹⁶ GCX 17 at 4 ¶ 9 states: "Exceptions - This disciplinary policy process [i.e., steps 1 (oral counseling) through 4 (termination)] will be followed in most instances of employee non-compliance. However, based on the severity and circumstances of the infraction(s), the Project Manager/DA may begin the disciplinary action at any level or offense with the exception of the Level 1 infractions which may result in immediate termination."

level for a given infraction, except to say that it would depend on the “severity” of the conduct at issue. (Tr. 379-80.)

Finally, G4S has not shown (Br. 31) that lieutenants can choose *not* to issue discipline even in cases that mandate some sanction. (D&O 3.) Initially, the notion that lieutenants have discretion to choose whether to issue discipline is belied by G4S’s own claim that it discharged the discriminatees in part specifically because they failed to discipline security officers.¹⁷ (Br. 29.) Moreover, although Mareth stated conclusorily that lieutenants have such discretion (Tr. 324), he later testified that lieutenants are required to take action if they observe a safety violation, either by providing coaching (for low-level infractions) or issuing discipline (in higher-level cases). (Tr. 379) Despite what G4S may argue (Br. 25), Mareth’s safety-violation scenario does not involve independent judgment as defined under the Act because the lieutenants’ action is entirely dictated by the nature of the offense under G4S’s disciplinary policy. *See Oakwood Healthcare*, 348 NLRB at 693 (“[J]udgment is not independent if it is dictated or controlled by detailed instructions . . . set forth in company policies or rules”).

¹⁷ The discriminatees’ LERs contain slightly different versions of the following language: “Often, he minimizes and tolerates tardiness to post assignments and foul language to avoid dealing with the behavior of certain team members. He also does not deal effectively with troublemakers is not open to coaching or direction which gets in the way of productivity.” (GCXs 7 at 2, 13 at 1.)

3. The Board’s findings and application of its legal principles are consistent with longstanding Board precedent and this Court’s *Lakeland* decision

In its brief, G4S repeatedly attacks the Board for purportedly applying an “unspecified,” “artificial,” or “elevated” burden of proof when analyzing G4S’s evidence regarding the lieutenants’ disciplinary authority. (Br. 18, 21, 24, 25.) This argument confuses the Board’s standard of review with G4S’s evidentiary burden. The Board correctly summarized G4S’s burden as follows: “[T]o prove supervisory status by a preponderance of the evidence, a party must present detailed, specific evidence and cannot rely on conclusory testimony or evidence that is inconclusive or otherwise in conflict.” (D&O 3 (citations omitted).) In other words, G4S must show that an employee “*actually possesses*” the supervisory authority at issue. *Golden Crest Healthcare Ctr.*, 348 NLRB at 731 (emphasis added). Courts also recognize that this is the proper evidentiary standard.¹⁸

The standard applied by the Board when analyzing the lieutenants’ disciplinary authority here is no different from that applied in *Wackenhut Corp.*,

¹⁸ See, e.g., *Dole Fresh Vegetables*, 334 F.3d at 489 (enforcing Board order where employer failed to present specific evidence supporting manager’s general statements about employees’ duties); *Beverly Enters.-Mass.*, 165 F.3d at 963 (“[A]bsent exercise, there must be other affirmative indications of authority [and s]tatements by management purporting to confer authority do not alone suffice.” (citation omitted)); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 874 (6th Cir. 1995) (“[T]he Board is not required to accept an employer’s self-serving declarations” (quoting *NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982))).

345 NLRB 850 (2005), which also found that lieutenants at the same plant were not supervisors. And while some things may have changed since *Wackenhut* (D&O 3), one thing has not: the employer. Yet despite G4S's prior experience litigating this very issue, the Board found that the *Wackenhut* record was "considerably more substantial" than in this case. (D&O 3.) Indeed, G4S failed to call any lieutenants to testify at the hearing about their disciplinary authority (or any other supervisory indicia), even after the Board expressly identified that as one reason G4S failed to prevail in *Wackenhut*.¹⁹

Instead of offering more specific evidence of disciplinary authority after its loss in *Wackenhut*, G4S expends great effort attacking the Board's evidentiary standard. Not only is this standard consistent with well-established precedent,²⁰ it also fulfills the Board's statutory mandate to ensure employees are not denied their rights simply based on their employer's say-so.²¹ Moreover, the terms used in

¹⁹ In *Wackenhut*, as in this case, the Board found that the employer failed to show that lieutenants used independent judgment to mete out discipline because their authority was constrained by detailed rules and regulations, and because the employer failed to call any lieutenants to testify about their discretion in disciplinary matters. 345 NLRB at 855.

²⁰ See, e.g., *Lynwood Manor*, 350 NLRB 489, 490 (2007) (declining to find supervisory status absent specific evidence of factors weighed or balanced in performing allegedly supervisory function); *Austal USA, LLC*, 349 NLRB 561, 561 n.6 (2006) (quoting examples of conclusory statements); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1056-57 (2006) (citing examples of generalized or inconclusive testimony).

²¹ See, e.g., *Beverly Enters.-Mass.*, 165 F.3d at 963 ("Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers

supervisory-determination cases (*e.g.*, supervisor, independent judgment, discipline, to assign, etc.), have very specific meanings under the Act, of which laypersons may not be aware. That is why Frazier’s positive response (Br. 26) when G4S’s counsel asked if he had “the authority to issue oral and written warnings,” *see supra* note 8, does not mean he possessed disciplinary authority within the meaning of the Act. Requiring specific and detailed evidence of actual supervisory authority, as opposed to generalized or conclusory testimony, avoids these pitfalls and protects against stripping employees of their rights unless the Act’s requirements are truly met.

B. G4S Failed To Show that Lieutenants Have the Authority To Promote Security Officers Through Evaluations

G4S claims (Br. 35-37) that lieutenants can promote security officers via the evaluations they complete. The ability to evaluate employees is not an indicium of supervisory authority under Section 2(11) of the Act. *Pac. Coast M.S. Indus. Co.*, 355 NLRB 1422, 1423 n.13 (2010); *see also* 29 U.S.C. § 152(11). Therefore, under established Board law, “when an evaluation does not, *by itself*, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.” *Williamette*

of their organizational rights.” (citation omitted)); *Oil, Chem. & Atomic Workers Int’l. Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[B]eyond [management’s] statements or directives themselves, what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”).

Indus., 336 NLRB 743, 743 (2001) (citation omitted). G4S failed to show such a link between promotions and evaluations.

Ample evidence supports the Board's finding that evaluations are but one small component of G4S's promotional process. (Remand 3.) The promotions board conducts a five-stage process, which includes a written examination, an oral interview, and a thorough review of each candidate's personnel file, educational history, and other relevant skills and qualifications. (Remand 3; ERX 17 at 3-4, ¶¶ 4.10-15.) Only the third step, review of the applicant's personnel file, involves consideration of evaluations, along with attendance, discipline, and work achievements. (ERX 17 at 3 ¶ 4.10, 4 ¶ 4.13.) Furthermore, even the finalist who survives this gauntlet is not guaranteed a promotion, as the final decision is within the project manager's exclusive purview. (ERX 17 at 3 ¶ 4.16-17.) The exhaustive nature of this procedure supports the Board's finding that evaluations do not, by themselves, affect the promotions of security officers.

Nothing in Mareth's testimony calls into question the reasonableness of the Board's determination. Mareth's testimony consists, once again, of conclusory responses to leading questions.²² (Remand 3.) Mareth did not shed any light on

²² The sum total of Mareth's testimony regarding the role of evaluations in the promotions process is as follows:

- Q. Do the evaluations created by lieutenants have any role in promotions?
A. Yes, they do. The evaluations are used in the promotional process, our Regulated Security Solutions promotional process.

the weight given to evaluations by the promotions board, much less on how evaluations might, by themselves, affect the advancement of security officers. (Remand 3.) *Compare Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 3 (Oct. 31, 2014) (no supervisory status found where record contained no evidence of weight given to evaluations in awarding wage increases and showed only that evaluations “play[ed] a role” and were “one of the criteria considered”), with *Legal Aid Soc. of Alameda Cnty.*, 324 NLRB 796, 796 (1997) (finding that managing attorneys were supervisors because the record reflected that their evaluations were the sole basis of the executive director’s decisions to retain or terminate paralegals).

Lacking any evidence to support its argument, G4S resorts to an assumption: “if only lieutenants issue evaluations, it stands to reason that those evaluations must receive strong consideration in the promotion process – there is little else to consider.” (Br. 36.) This is contrary to its established multifactor promotions process, of which evaluations are but a small part. (*See* ERX 17 at 3-4.) G4S also resorts once more to claiming that the Board applied an incorrect standard. (Br.

...

Q. Do you know if lieutenants [sic] evaluations of security officers have ever been considered in connection with the promotion decision for a security officer?

A. Yes, they are.

(Tr. 329, 330.) Mareth then lists four security officers for whom evaluations were “considered” (Tr. 330), without explaining how their evaluations affected their promotions.

35-36.) Yet this standard is not a new one, as the Board’s decision makes clear. (Remand 3 (citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999) (supervisory status will be found only if evaluation, *by itself*, affects wages or job status of evaluated employee); *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993) (same)).) The Board’s standard ensures that conjecture of the type engaged in by G4S is not sufficient to deprive employees of their statutory rights. *See Beverly Enters.-Mass.*, 165 F.3d at 963 (explaining that evidence of actual authority, not conclusory assertions by management officials, is necessary to “avoid unnecessarily stripping workers of their organizational rights”). Finally, the cases on which G4S relies to minimize its burden (Br. 36) are factually inapposite.²³

C. G4S Failed To Show that Lieutenants Assign with Independent Judgment When Approving Security Officers’ Requests to Switch Posts

Like “independent judgment,” the meaning of “assign” under the Act is considerably more complex than in common parlance. As construed by the Board,

²³ In *Entergy Systems & Service, Inc.*, evaluations did not determine promotions. 328 NLRB 902, 902-03 (1999). Instead, crew leaders had the authority to recommend crew members for a promotion, which became effective if all other crew leaders concurred; thus, a single crew leader could block a promotion by withholding approval. *Id.* Similarly, in *Loretto Heights College*, program directors not only evaluated teachers but could recommend their promotion, hiring, or switching their status from full to part-time. 205 NLRB 1134, 1135-36 (1973). Finally, in *Burns International Security Services, Inc.*, sergeants—the rank equivalent to lieutenants in this case—evaluated security guards *and* sat on the board of promotion. 278 NLRB 565, 570 (1986). There is no evidence that G4S’s lieutenants possess any of these authorities.

the term “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689; *accord Lakeland*, 696 F.3d at 1347. In this context, the terms “place,” “time,” and “work” are construed broadly, as part of the employee’s “terms and conditions of employment.” *Oakwood Healthcare*, 348 NLRB at 689. For example, attributing a significant overall task to an employee, e.g., restocking shelves on a regular basis, is an “assignment” within the meaning of the Act, but giving ad hoc instructions to restock shelves is not. *Id.* Moreover, the act of assigning must involve the exercise of independent judgment, for instance by weighing an employee’s training and skills against those necessary to perform a particular job. *Id.* at 693.

It is undisputed that captains assign security officers to their posts for every shift. (Remand 3; Tr. 198-99, 291.) Therefore, G4S’s only argument is that lieutenants use independent judgment to approve security officers’ requests to switch assigned posts. (Br. 33.) The Board, noting that these decisions are based on the expressed personal preferences of security officers, correctly found that the “sparse” testimony did not show independent judgment on the part of lieutenants. (Remand 3 (citing *Children’s Farm Home*, 324 NLRB 61, 64 (1997)).) For instance, there is no evidence that lieutenants consider the particular skills, training

or experience of security officers when approving post switches. *See Oakwood Healthcare*, 348 NLRB at 693. Finally, and contrary to G4S’s suggestion (Br. 33), there is no evidence that these switches are between “plum” and “bum” assignments, or that they otherwise affect security officers’ terms and conditions of employment. *See id.* at 689. Frazier testified only that security officers request switches based on personal preference (Tr. 218-19), not based on an objective measure of the relative desirability of each post. Therefore, the Board correctly determined that lieutenants do not assign security officers within the meaning of the Act.

D. G4S Failed To Show that Lieutenants Responsibly Direct Security Officers

Under applicable Board law, responsible direction exists when a person has “men under him” and decides “what job shall be undertaken next or who shall do it,” but only “provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 691 (other quotation marks and citation omitted). Of particular relevance here, direction is only “responsible” if “the person directing and performing the oversight . . . [is held] accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 691-92; *accord Lakeland*, 696 F.3d at 1344.

The Board found that G4S failed to provide any specific evidence that lieutenants can incur adverse consequences if security officers do not adequately perform their work. (Remand 4.) G4S disputes this finding, but the evidence on which it relies (Br. 37-38) is either conclusory or off-point. The only testimony on this issue came from Mareth, who stated in general terms that lieutenants are accountable for the failings of security officers.²⁴ Mareth did not, however, mention any specific instance in which this has happened, nor did he provide any detailed example of the circumstances in which this would occur.

²⁴ Mareth's only testimony on this issue was:

Q. Are lieutenants responsible for the quality of the performance of the security officers that report to them?

A. Yes, they are.

...

Q. . . . What could happen to a lieutenant who does not do a good enough job of ensuring the quality of performance of the security officers under his or her command?

A. The lieutenant could be issued discipline. They could be issued coaching. They could be issued discipline. They could be demoted. Ultimately they could be terminated.

...

Q. Could a lieutenant be disciplined if he or she did not do a good enough job of ensuring that the security officers under his or her command were doing quality work?

A. Yes.

(Tr. 330-31, 335.)

G4S also cites evidence that four lieutenants were counseled for failing to conduct training drills. (Br. 38, ERX 18 at 3, 7.)²⁵ “The proper inquiry, however, is whether the purported supervisor is at risk of suffering adverse consequences for the actual performance of others, not his own performance in overseeing others.” *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012) (citations omitted). G4S must show that lieutenants can incur adverse consequences if security officers do not adequately perform their tasks. Instead, G4S submits that lieutenants can be disciplined for failing to adequately perform *their own* duty of conducting drills. The latter simply does not prove the former. *Cf. Lakeland*, 696 F.3d at 1346 (employer provided testimony that LPN would be disciplined if subordinates fail to perform tasks properly).

Finally, G4S argues that the Board failed to consider that, “if a lieutenant fails to properly train subordinates, the lieutenant is in fact directly responsible for any substandard performance that may result.” (Br. 38.) However, responsible direction does not turn on whether a subordinate’s failures can be attributed to that person’s supervisor. Instead, the test is whether the employer takes the extra step of holding supervisors accountable for the performance of their subordinates. *Oakwood Healthcare*, 348 NLRB at 691-92. Therefore, even if “the training

²⁵ For two of the lieutenants in question, there is no evidence that they failed to properly conduct drills. The forms simply instruct them to conduct all drills going forward. (G4S Ex. 18 at 1-2.)

officer [is] the direct cause of the subordinate officer’s shortcomings” (Br. 38), that is not enough to show responsible direction under the Act.²⁶

E. G4S Errs in Relying on Secondary Indicia of Supervisory Status

G4S argues that secondary indicia support finding that the lieutenants are statutory supervisors. (Br. 40.) Secondary indicia are referred to as such because they are not included among the 12 primary indicia, which Congress saw fit to write into Section 2(11) of the Act. For this reason, the Board has long held that secondary indicia are insufficient to establish supervisory status unless the evidence supports finding at least one of the primary indicia as well. *Dole Fresh Vegetables*, 334 F.3d at 487-88 (citing cases); *E & L Transp. Co. v. NLRB*, 85 F.3d 1258, 1270 (7th Cir. 1996). Because G4S failed to show that lieutenants possess any primary supervisory authority, the Board properly rejected G4S’s reliance on secondary indicia to satisfy its burden. (Remand 4 n.8.)

²⁶ Contrary to G4S’s claim (Br. 39), the Board made no finding as to whether lieutenants exercise independent judgment when directing the work of security officers. (Remand 3.) Therefore, this portion of G4S’s argument is beside the point. In any event, G4S’s reliance (Br. 39) on *Dunkirk Motor Inn, Inc.*, 211 NLRB 461 (1974), is misplaced because that case pre-dates *Oakwood Healthcare*, 348 NLRB at 686, in which the Board clarified its interpretation of the statutory phrases “assign,” “responsibly direct,” and “independent judgment” following the Supreme Court’s decision in *Kentucky River*, 532 U.S. at 706, 121 S. Ct. at 1861.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT G4S SUSPENDED AND DISCHARGED THE DISCRIMINATEES IN RETALIATION FOR THEIR PROTECTED CONDUCT

Because G4S's lieutenants are statutory employees covered by the Act, the ultimate question is whether substantial evidence supports the Board's finding that Frazier and Mack were discharged in retaliation for their protected conduct.

(D&O 1, Supp. 1, 6.) As shown below, it does.

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). Thus, an employer violates Section 8(a)(1) when it disciplines or discharges an employee for engaging in conduct that is protected under the Act. *See Rockwell Int'l Corp. v. NLRB*, 814 F.2d 1530, 1534-35 (11th Cir. 1987). Here, ample record evidence supports the Board's finding that Frazier and Mack were engaged in protected, concerted activity and that G4S suspended and discharged them because of that activity.

A. Substantial Evidence Supports the Board’s Finding that Frazier and Mack Engaged in Protected, Concerted Activities

The Board correctly found that the discriminatees engaged in protected conduct. The “mutual aid or protection” clause of Section 7 protects the right of employees to engage in “legitimate activity that could improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567, 98 S. Ct. 2505, 2513 (1978). Such “legitimate activity” includes raising group complaints about workplace-related issues to the employer. *See Rockwell*, 814 F.2d at 1535 (questioning work conditions during meeting with management is protected conduct); *see generally Meyers Indus.*, 281 NLRB 882, 885-87 (1986). The discriminatees raised to G4S a myriad of concerns, on multiple occasions, about the security officers’ conditions of employment, including inadequate bathroom facilities, lack of water, bulky vests, time spent standing in the sun, uncomfortable desk furniture, favoritism, and unfair treatment. (Supp. 3; Tr. 165-66, 173, 250, 253, 275.) This evidence amply supports the Board’s finding that the discriminatees’ “raising of complaints on behalf of the security officers constituted protected concerted activity.” (Supp. 5)

The fact that these actions do not involve striking or consulting with Board agents does not render their protected status any less “unambiguous,” as G4S suggests. (Br. 42.) Under the Act, it matters little if an employee fails to “give full allegiance to management” by initiating a strike over wages or by expressing

shared frustration about working conditions. The critical factor is not the chosen mode of action, but the ultimate objective: acting together to improve terms and conditions of employment. *See Meyers Indus.*, 281 NLRB at 887 (clarifying that definition of concerted activity encompasses “individual employees bringing truly group complaints to the attention of management.”). In this sense, the discriminatees’ actions undeniably constitute protected activity under Section 7 of the Act.

B. Substantial Evidence Supports the Board’s Finding that G4S Suspended and Discharged Frazier in Retaliation for his Protected Conduct

The Board found that Frazier’s discharge was inherently unlawful because G4S fired him for engaging in conduct protected by the Act. (D&O 1, Supp. 1 n.2, 5.) Substantial evidence supports this determination.

When an employer takes adverse action against an employee for activity that the Board has found itself to be protected, the discharge is *per se* unlawful and no showing of motive or animus is necessary. *Burnup & Sims, Inc.*, 256 NLRB 965, 965 & n.1 (1981); *accord Allied Aviation Fueling of Dallas LP*, 347 NLRB 248, 249 n.2 (2006), *enforced*, 490 F.3d 374, 379 (5th Cir. 2007); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), *enforced*, 63 F. App’x 524 (D.C. Cir. 2003). It is therefore unnecessary in such cases to apply the Board’s motive analysis set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), and approved by the Supreme Court

in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469 (1983). See, e.g., *Allied Aviation*, 347 NLRB at 249 n.2 (employer motive is not at issue when employer admits employee was discharged for activity the Board found was protected); *Mast Advert. & Pub., Inc.*, 304 NLRB 819, 819-20 (1991) (same); *accord Caval Tool Div.*, 331 NLRB 858, 864 (2000) (“where protected concerted activity is the basis for an employee’s discipline, the normal *Wright Line* analysis is not required”), *enforced* 262 F.3d 184, 191 (2d Cir. 2001) (affirming Board’s analysis regarding suspension of employee for challenging new break policy at meeting).

Here, Mareth admitted to Frazier that he was being fired because he did “not effectively support management.” (Supp. 4; Tr. 189.) Mareth made no attempt to rebut Frazier’s assertion that he was fired for acting as “a voice for the security officers and other lieutenants and it was not right for him to be terminated,” and did not give him any non-protected reason for his discharge. (Supp. 4.) Frazier’s LER also demonstrates that G4S felt he did not “see himself as part of management” given his persistent lobbying for security officers. (Supp. 3; GCX 7 at 1.) Together, Mareth’s statement and the LER constitute substantial evidence that G4S fired Frazier for his protected concerted activities. (Supp. 1 n.2, 5.)

G4S is mistaken to argue (Br. 41-43) that the Board should have analyzed Frazier's discharge under *Wright Line*.²⁷ The *Wright Line* analysis applies where motive is in question; here, the Board found "motive is not at issue" for Frazier's discharge. (Supp. 1 n.2.) In this case, the Board found that Mareth's testimony, together with Frazier's LER, showed by a preponderance of the evidence that Frazier was discharged because G4S viewed his protected conduct to be against the interests of management. (Supp. 1 n.2, 5.) In these circumstances, it was therefore "neither necessary nor appropriate" to analyze Frazier's discharge under *Wright Line*. (Supp. 1 n.2.) *See, e.g., Caval Tool*, 262 F.3d at 191 (rejecting challenge to Board's analysis).

G4S also errs in claiming the Board failed to consider, or only relied on certain parts of, Frazier's LER. (Br. 45-46, 51-52). To the contrary, the Board considered the LER and properly viewed it as supporting evidence for the unlawful discharge, rather than the affirmative defense G4S claims it is. The Board's Decision also reflects that it considered *all* of the circumstances surrounding Frazier's discharge, something G4S fails to do. For instance, G4S does not contest that Mareth told Frazier he was fired because he failed to "effectively support management" and "openly criticize[d] management decisions," or that Mareth

²⁷ As explained *infra* pp. 47-54, and despite what G4S might believe (Br. 41-43), the Board did in fact apply *Wright Line* in analyzing Mack's discharge. (Supp. 1 n.2.)

failed to bring up Frazier’s LER at the discharge meeting. Nor does G4S dispute that Mareth did not give Frazier a performance-related reason for his discharge, even after Frazier said he was being wrongly terminated for being “a voice” for security officers. Finally, and despite G4S’s suggestion to the contrary (Br. 51-52), *each* LER category includes a comment criticizing Frazier for his perceived lack of loyalty to G4S management and excessive sensitivity to the needs of employees: Category 1 (supervisory effectiveness) states that Frazier “openly criticizes management decisions at team briefings” and “doesn’t see himself as part of management”; Category 2 (communication) states that Frazier “fails to balance the need of the organization with his sensitivity to individuals”; and Category 3 (setting high standards) states that Frazier’s “natural sensitivity to individuals is an overused strength with negative impact.” (Supp. 3; GCX 7 at 1-2.)

As this analysis demonstrates, the Board considered the totality of the evidence in the record and reasonably found that G4S suspended and discharged Frazier in retaliation for his protected activity. In light of this determination, there was no need for the Board to consider alternative rationales for G4S’s action.

C. Substantial Evidence Supports the Board’s Finding that G4S Failed To Meet Its *Wright Line* Burden of Showing that Mack Would Have Been Suspended and Discharged Even in the Absence of Protected Conduct Because G4S’s Proffered Reason Was Pretextual

The Board found that G4S’s asserted reason for discharging Mack, the cursing incident, was actually a pretext and that the true reason was his repeated

advocacy on behalf of security officers. (Supp. 1 n.2, 6.) Substantial evidence supports this determination.

To analyze the disputed motive underlying Mack’s discharge, the Board applied the *Wright Line* burden-shifting framework. (Supp. 1 n.2, 6.) Under *Wright Line*, 251 NLRB at 1083, the Board’s General Counsel bears the initial burden to show, by a preponderance of the evidence, that an employer’s animus toward an employee’s protected conduct was a motivating factor in the employer’s decision to take adverse action against that employee. *Transp. Mgmt.*, 462 U.S. at 400-01, 103 S. Ct. at 2474; *NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1007 (11th Cir. 2015). To succeed, the General Counsel must show that the employee engaged in protected conduct, that the employer knew of the employee’s activity, and that the employer’s animus was a “motivating factor in its decision to take adverse action.” *Allied Med. Transp.*, 805 F.3d at 1007; *see also Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The burden then switches to the employer to prove, as an affirmative defense, that it was motivated by legitimate business reasons and that it would have taken the same action even in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 399-400, 401, 103 S. Ct. at 2473-74; *Allied Med. Transp.*, 805 F.3d at 1007. However, if the General Counsel shows, as here, that the employer’s reasons are pretextual—that is, either false or

not in fact relied upon—the violation is deemed proven. *Allied Med. Transp.*, 805 F.3d at 1007; *NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

1. G4S harbored animus against Mack’s protected conduct, which motivated G4S’s decision to suspend and discharge him

As discussed *supra* pp. 43-44, substantial evidence supports that Mack engaged in protected conduct by advocating in favor of security officers, and that G4S was aware of Mack’s activities. G4S disputes the Board’s finding that Mack’s protected activity was a motivating factor in its decision to suspend and terminate him. (Br. 43.)

Because direct evidence of animus is often impossible to obtain, courts have long recognized that the Board may rely on circumstantial evidence and inferences reasonably drawn from the totality of the evidence to determine the true motives underlying an employer’s actions. *See, e.g., NLRB v. Link-Belt Co.*, 311 U.S. 584, 602, 61 S. Ct. 358, 367 (1941); *McClain of Ga.*, 138 F.3d at 1424. As part of this analysis, the Board may consider other, contemporaneous violations of Section 8(a)(1) as evidence of an employer’s unlawful motivation. *See, e.g., NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1127 (11th Cir. 2008); *Purolator Armored*, 764 F.2d at 1429. Finally, given the circumstantial nature of the evidence, this Court is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive.” *Goya Foods*, 525 F.3d at 1126 (citation omitted).

Substantial evidence supports the Board’s finding that G4S acted on an improper motive. (Supp. 5-6.) G4S’s animus is in full display in Mack’s LER, which states, “He doesn’t see himself as part of management, and as viewed by one [security officer], ‘Is on the security officer’s side.’” (Supp. 4; GCX 13 at 1.) The LER also faults Mack for criticizing management decisions at team briefings and for being “more ‘a team member’ than a team leader.” (*Id.*) Frazier’s unlawful discharge and surrounding circumstances provide further evidence of animus as a contemporaneous unfair labor practice. *See McClain of Ga.*, 138 F.3d at 1424-25. Mareth’s acknowledgment that Frazier was fired for failing to “effectively support management,” and the fact that Mack’s LER contains language similar to Frazier’s, support the Board’s finding that G4S’s decision to suspend and then discharge Mack was motivated by his protected conduct.

Although G4S claims there must be a nexus between the protected activity and the adverse employment action (Br. 43-44 & n.13), this Court has never found the *Wright Line* analysis to require such a showing.²⁸ *See, e.g., Allied Med. Transp.*, 805 F.3d at 1007; *McClain of Ga.*, 138 F.3d at 1424. Instead, this Court recognizes that, in that analysis, “the Board is not required to establish substantial evidence that conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was reasonably

²⁸ It is unsurprising, therefore, that the only precedent G4S can rely on for its argument is an out-of-circuit case. (Br. 43-44 n.13.)

equal to the lawful motive prompting conduct,’ and that discharge would not have occurred in the absence of protected activity.” *NLRB v. Brewton Fashions, Inc., a Div. of Judy Bond*, 682 F.2d 918, 923 (11th Cir. 1982) (quoting *NLRB v. Aero Corp.*, 581 F.2d 511, 514-15 (5th Cir. 1978)) (other quotation marks omitted).²⁹ In any event, as discussed above, Mareth’s statements at Frazier’s discharge meeting and Frazier’s LERs provide a clear evidentiary link between the discriminatees’ protected conduct and their discharges.

2. G4S suspended and discharged Mack solely because he allegedly cursed in the presence of FPL personnel; G4S never mentioned performance issues

G4S told Mack he was being suspended and discharged for using profanity in front of FPL personnel. When Captain Ferrer first announced that Mack was being suspended, he said it was because of the “bullshit incident” that had occurred six days earlier. (Supp. 4; Tr. 284.) Mareth later confirmed that Mack was suspended pending investigation into whether he used foul language in front of Rittmer. (*Id.*) And at Mack’s discharge meeting on February 22, Mareth told Mack that he was being terminated for using foul language. (Supp. 4; Tr. 287.)

²⁹ In this case, the discriminatees did not engage in “union activity,” strictly speaking, but their protected conduct is functionally equivalent under Section 7 of the Act. *See* 29 U.S.C. § 157 (protecting employees’ right to form, join, or assist labor organizations . . . *and* to engage in other concerted activities for the purpose of . . . mutual aid or protection” (emphasis added)).

G4S's after-the-fact claim that Mack was fired for performance reasons holds no water. (Br. 45-46, 50-52.) G4S only now mentions the cursing incident as an afterthought (Br. 16-17), and ignores the import of that event.³⁰ It is undisputed, however, that Mareth told Mack he was suspended pending investigation into the cursing incident, and not for some performance-related reason. It is also undisputed that Mareth did not mention Mack's LER at any time, either during his three-week suspension or at his discharge meeting, and did not cite any performance-related issue as the reason for Mack's termination. (Supp. 4; Tr. 289, 309-10.) And like Frazier, Mack was unaware of his LER result until the trial. (Tr. 106-07, 289-91.)

3. Substantial evidence supports the Board's finding that G4S used the cursing incident as pretext to suspend and discharge Mack

The Board found that Mack did not curse when talking to Rittmer and that, even if he did, his conduct would have merited at most a documented oral counseling under G4S policy. (Supp. 1 n.2, 6.) G4S does not dispute the Board's finding of pretext—indeed, as noted above, G4S barely mentions the cursing incident at all. Accordingly, the Court should deem any future challenge on this point waived. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir.

³⁰ *Cf. Am. Ambulette Corp.*, 312 NLRB 1166, 1169 (1993) (“The Board has consistently held that shifting reasons or defenses for an employee’s [sic] termination of an employee establish a pretextual reason and under such circumstances an employer fails to meet its *Wright Line* burden.”).

2014) (“[A]n appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.” (citations omitted)); *see also* Fed. R. App. P. 28(a)(8)(A) (appellant’s opening brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

In any event, substantial evidence supports the Board’s finding. Mack was the only person at the incident who testified, and the judge credited his testimony that he did not curse. (Supp. 4; Tr. 280-81.) Although there were multiple witnesses, only Rittmer and one other person claimed they heard Mack curse, and Rittmer claimed implausibly that the reason he did not immediately complain was because “he had vacation on his mind.” (Supp. 4, 6; ERXs 34 at 2-4, GCX 38 at 1-3, Tr. 285-86.) Moreover, Mack had no prior discipline for using foul language, and G4S’s disciplinary policy identifies the “use of abusive or offensive language” as a Level III (lowest-level) violation warranting only a documented oral counseling for a first offense. (GCX 17 at 2-3, 9, Tr. 288.) On these facts, the Board reasonably found that Mareth could not have had a good-faith belief that Mack cursed at Rittmer and that, even if the incident occurred, it would not merit an immediate discharge. (Supp. 1 n.2, 6.)

Based on these findings, the Board reasonably found that G4S's asserted basis for suspending and discharging Mack—the profanity incident—was pretextual, *i.e.*, it was either false or not the real motivation for Mack's discharge. (Supp. 1 n.2, 6.) Therefore, and contrary to G4S's argument (Br. 43 n.12, 51-52), the Board correctly declined to pursue the rest of the *Wright Line* analysis. (Supp. 1 n.2.) Indeed, once “the evidence establishes that the reasons given for the Respondent's action are pretextual . . . the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Rood Trucking Co.*, 342 NLRB 895, 898 (2004) (quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)).

D. G4S's Remaining Arguments Fail To Rebut the Board's Findings

G4S claims that it suspended and discharged the discriminatees solely because of subpar ratings on their LERs, just as it did with three other lieutenants, so the Board should have found the discharges lawful. (Br. 42, 49-50.) As explained *supra* pp. 46-47 and 52, when Mareth fired Frazier and Mack, he never mentioned their LERs; indeed, they first learned of their LER ratings at trial. Where G4S never relied on those LER ratings as a basis to terminate the discriminatees, its comparison to other lieutenants' LERs is immaterial. In short, the LERs only support the violations by revealing unlawful animus; they do not

absolve G4S. Therefore, G4S's reasons for discharging the other lieutenants, whose protected concerted activity (if any) is not at issue, are irrelevant.

G4S also cites its SCWE program and other procedures as evidence that it had no inclination to discharge the discriminatees because of their efforts to improve the security officers' working conditions. (Br. 46-48.) Substantial evidence supports the Board's finding that G4S viewed the discriminatees' actions not simply as reporting issues under the SCWE, but as not seeing themselves "as part of management." (Supp. 5; GCX 7 at 1, GCX 13 at 1.) G4S clearly disapproved of the way Frazier "openly criticize[d] management decisions at team briefings" and his perceived failure to balance his "sensitivity to individuals" with "the need of the organization." (Supp. 3, 5; GCX 7 at 1 & 2.) Mareth bluntly told Frazier he was discharged for "not effectively support[ing] management," and did not dispute Frazier's assertion that the real reason was because he was "a voice" for security officers. (Supp. 4; Tr. 189-91.) G4S similarly disliked the fact that Mack was viewed by some as "on the security officer's side." (Supp. 4, 5; GCX 13 at 1.) G4S's model of "us" (management) versus "them" (security officers) clashes with its self-portrait of an employer democratically encouraging all concerns to be aired without repercussions. In light of this evidence, G4S's claim, that it did not criticize but actually "applauded" Frazier and Mack for their efforts (Br. 47), especially strains credulity.

Finally, G4S's asserted "good-faith belief" (Br. 44) that Frazier and Mack were supervisors does not protect against the Board's finding. It is well-established under Board law that an employer "acts at its peril" when it infringes upon the Section 7 rights of individuals who may later be found to be protected under the Act. (Supp. 5 (quoting *Shelby Memorial Home*, 305 NLRB 910, 910 n.2 (1991).) Here, even assuming G4S discharged Frazier and Mack believing that they were statutory supervisors, they are actually statutory employees, and the conduct for which they were suspended and discharged was protected under the Act. Therefore, and contrary to G4S's claim (Br. 44-45), the act-at-its-peril principle in *Shelby Memorial Home* does apply, and G4S's belief about the discriminatees' status is no defense.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying G4S's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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December 2015

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FOR THE ELEVENTH CIRCUIT

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f.k.a. The Wackenhut Corporation,)	
)	Nos. 15-13224
Petitioner/Cross-Respondent)	15-14018
)	
v.)	Board Case Nos.
)	12-CA-026644
NATIONAL LABOR RELATIONS BOARD,)	12-CA-026811
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,590 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2007.

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Dated at Washington, DC
this 21st day of December 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 21st day of December 2015