

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

STRATOSPHERE GAMING LLC d/b/a
STRATOSPHERE CASINO, HOTEL & TOWER

and

Case 28-CA-140123

JOSE ESCOTO,
An Individual

Stephen P. Kopstein, Esq.,
for the General Counsel.
Paul Trimmer, Esq. (Jackson Lewis, LLP),
for the Respondent.

DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. On November 3, 2014, Jose Escoto (Escoto), an individual, filed an unfair labor practice charge alleging a violation of the National Labor Relations Act (Act) by Respondent that was docketed by Region 28 of the National Labor Relations Board (Board) as Case 28-CA-140123.¹ Based on an investigation into this charge, on October 5, 2016, the Board's General Counsel, by the Acting Regional Director for Region 28 of the Board, issued a complaint and notice of hearing alleging that, by discharging Escoto, Respondent violated Section 8(a)(3) and (1) of the Act. On October 18, 2016, Respondent filed an answer denying all alleged violations of the Act.

I heard this matter on December 12, 2016, in Las Vegas, Nevada, and I afforded all parties a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, and argue orally on the record. General Counsel and the Respondent filed post-trial briefs in support of their positions by January 24, 2017.

After carefully considering the entire record, including my observation of the demeanor of the witnesses, I find that Respondent did not violate the Act by discharging Escoto as alleged in the complaint.

¹ All dates are in 2014, unless otherwise indicated.

PRELIMINARY PROCEDURAL ISSUES

1. Deferral Not Appropriate

Region 28 initially deferred the charge in this matter to the grievance-arbitration procedure in the collective-bargaining agreement between Respondent and the Culinary Workers Union, Local No. 226, affiliated with Local Joint Executive Board of Las Vegas, which is affiliated with Unite Here International (Union). The Union withdrew the grievance without reaching a settlement and prior to arbitrating the grievance, and Region 28 resumed processing the Board charge. (Tr. 41-45; R. Exh. 8.)² Respondent made a motion at hearing that the matter be deferred to the Union's determination to withdraw the grievance without arbitrating or settling it. There is well-established precedent for deferring Board charges to parties' grievance-arbitration procedure when that procedure has or will end in a final and binding settlement or arbitrator's decision involving the conduct alleged as violations of the Act. See *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 10 (2014); *Wonder Bread*, 343 NLRB 55 (2004), citing *Collyer Insulated Wire*, 192 NLRB 837, 839 (1971); *Alpha Beta Co.*, 273 NLRB 1546 (1985), rev. denied 808 F.2d 1342, 1345-1346 (9th Cir. 1987); and *United Technologies Corp.*, 268 NLRB 557 (1984). Respondent cited no authority for deferring a Board charge to a grievance-arbitration procedure when the union has decided not to proceed to arbitration and has not reached a settlement of the grievance. Finding no such authority and no resolution of the allegations of the charge, I denied the motion. Respondent's brief raises no argument for why deferral is required; therefore, I reaffirm my ruling denying the motion.

2. Respondent's Due Process Argument Fails

Respondent asserted at hearing that its due process rights would be violated if General Counsel failed to produce, pursuant to *Jencks v. U.S.*, 353 U.S. 657, 662 (1957), statements given by Escoto to the Nevada Equal Rights Commission (NERC) concerning his discharge by Respondent. Respondent insisted that General Counsel was responsible for obtaining these documents directly from the Equal Employment Opportunity Commission (EEOC), which contracts with the NERC to perform this work, citing Board Casehandling Manual § 10394.7; *Trailways, Inc.*, 237 NLRB 654, 656 (1978); and *Harvey Aluminum*, 335 F.2d 749 (C.A. 9, 1964). Respondent further contends that its receipt of copies of these documents supplied to General Counsel by Escoto failed to meet General Counsel's duty to provide the *Jencks* material. I reject Respondent's arguments based upon the circumstances in this case for the reasons I discuss below.

General Counsel and Respondent attempted to acquire the documents directly from the EEOC and NERC. Respondent requested them pursuant to the Freedom of Information Act without success. (Tr. 30; R. Exh. 4.) Respondent made General Counsel aware of Respondent's inability to acquire these documents and its position that these documents constitute *Jencks* materials and should be provided to Respondent's Counsel after Escoto testified. (R. Exhs. 1 and 2.) Counsel for General Counsel then attempted to obtain the documents. He spoke with officials at the local EEOC office who informed him that the documents were within the control of the NERC and that under the circumstances the EEOC did not have the authority to require the NERC to give it access to the documents. (GC Exh. 4.)

² Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

Counsel for General Counsel contacted the NERC and was told that the NERC would provide the documents only pursuant to an order from a Nevada state court.

5 Although these documents were in the physical custody of the NERC, a Nevada state agency, Respondent contends that they were in the control of General Counsel, because the EEOC, another federal government agency, could exercise control over the documents. As evidence of this assertion, Respondent cited specific provisions in the contract for services between the EEOC and the NERC, which outline under what circumstances the EEOC has access to review the documents and procedures involved in the performance of their contract. (R. Exh. 3, p. 10, Sec. C.III.B.9 and Sec. E.1.B.; p. 16, Sec. H.1; p. 17, Sec. H.3.; addendum-Worksharing Agreement, p. 4, Sec. IV.) Section H.3 of this contract states that “the [EEOC] shall have access to all case files created and developed in the performance of this contract at all reasonable times when they are in the possession of the [NERC].” The “at all reasonable times” language in Section H.3 must be interpreted in the context of the contract which is limited to carrying out the EEOC’s mission and policing its contract with the NERC. See (R. Exh. 3, addendum-Worksharing Agreement, p. 4 Section IV). The language of the contract does not contemplate the instant situation where the state agency would be required to provide documents to the EEOC because a different federal government agency sought access to them. The contract provisions, which allow the EEOC to have access to the documents for particular purposes, evidence that the EEOC’s control over the documents is limited.

Respondent relies on the Ninth Circuit’s opinion in *Harvey Aluminum* in asserting that General Counsel has control over the documents. The facts of that case are distinguishable from the instant case. In *Harvey Aluminum*, the federal Departments of Labor and Justice, physically possessed the relevant documents, so the General Counsel only had to compel federal agencies to produce the documents. *Id.* at 755. Here, the General Counsel would have to compel another federal agency to compel a state agency to produce the documents. Therefore, I find that the instant case is distinguishable from *Harvey Aluminum*, and that the documents in the possession of the NERC are not within the control of General Counsel.

Furthermore, I find insufficient evidence that Respondent was prejudiced by not receiving the documents at issue directly from the EEOC or the NERC. Escoto provided General Counsel with his copies of the documents that he gave to the NERC and those copies were provided to Respondent. The documents consisted of a copy of the signed charge of discrimination, a copy of the employment discrimination complaint, an intake document, and a signed statement from Mr. Escoto date stamped by the NERC on August 13.³ (Tr. 32–33.) The documents provided by Escoto are all the documents one would expect in an employment discrimination charge, and Respondent raised no issue of apparent missing documents. Additionally, Respondent raised no issues of illegibility or apparent tampering or deletions on the documents that were provided. Although given leeway to do so, Respondent did not solicit any testimony from Escoto concerning the documents he provided. (Tr. 35.) Instead, Respondent asserts that the documents provided by Escoto are unreliable because Escoto’s credibility is generally at issue in the hearing. I find this assertion baseless. The fact that an individual’s credibility is at issue in a hearing does not alone make the individual’s testimony or assertions that he has produced relevant documents unreliable.

Finally, as discussed more fully below, I find that Respondent’s discharge of Escoto did not violate the Act. Therefore, Respondent was not prejudiced by not receiving the *Jencks* statements submitted to the NERC directly from the NERC or the EEOC. See *Trailways, Inc.*,

³ All the documents were dated August 13.

237 NLRB at 656 (holding Respondent was not prejudiced by the General Counsel's failure to produce any EEOC documents related to the discharges at issue because the alleged discriminatees were found to be discharged for cause). Based upon the foregoing, I deny Respondent's request to dismiss this matter due to a lack of due process.

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FINDINGS OF FACT

Jurisdiction and Labor Organization Status

Respondent is a limited liability company with an office and place of business located in Las Vegas, Nevada (the facility), where it engages in the operation of a hotel and casino which provides food, lodging and entertainment to its customers. In conducting its operations, Respondent annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Nevada and derives gross revenues in excess of \$500,000. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1c and 1e.) Respondent also admits, and I find, that the Union has been a labor organization with the meaning of Section 2(5) of the Act. (GC Exh. 1c and 1e.) Based on the foregoing, I find that this dispute affects commerce, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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UNFAIR LABOR PRACTICES

1. Background

Only two witnesses were called to testify concerning the allegations of the complaint, Charging Party and alleged discriminatee, Jose Escoto, and Respondent's corporate vice president for human resources, Fred Houghland. There is little disagreement in their testimony as to the facts leading up to Escoto's discharge. Escoto had been employed by Respondent for 14 years. (Tr. 15.) For the 10 years prior to his discharge he worked as a food server at Respondent's Top of the World Restaurant, a fine dining establishment. (Tr. 16.) Escoto was also a member of the Union. (Tr. 16; GC Exh. 1c and 1e; R. Exh. 17.) The Union has maintained a bargaining relationship with Respondent since at least 1996. The parties engaged in contract negotiations for a successor agreement in early 2014. They reached a tentative agreement by March 15 that resulted in the most recent collective-bargaining agreement (CBA), which remains in effect until 2018. (Tr. 80; R. Exh. 17; GC Exh. 3.)

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Respondent regularly disciplined food service employees for erroneously entering food orders into its electronic ordering system, Infogenesis, causing Respondent to suffer a loss in revenue because the food is discarded. With less frequency, Respondent also disciplines employees for numerous other rule violations, including poor customer service. (GC Exh. 5.) Escoto, like numerous other food service employees, had been disciplined for errors in entering food orders resulting in lost revenue and other performance issues.

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The record reflects the discipline that food service employees received during the period from January 1, 2013, through December 12, 2016. (GC Exh. 5.) These disciplines were subject to article 6 of the CBA, which calls for progressive discipline including written warnings with opportunity to correct the deficiency prior to suspension or discharge, except for specified more egregious conduct. Article 6 does not specifically outline the steps that constitute

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progressive discipline. (R. Exh. 17, Article 6.01).⁴ Houghland had been Respondent's corporate vice president for human resources for the last eight years. Among other duties, he was responsible for discipline and discharge decisions and representing Respondent in grievance processing. He bases his discipline/discharge decisions upon the information he receives from managers, who work directly with the employees. He considers the severity of the employee's conduct and the employee's years of service. Long-term employees, who have not engaged in more egregious conduct, as Escoto was considered, are afforded more steps in the progressive discipline process. These steps generally include at least a verbal warning, a written warning, then 1, 3, and 5-day suspensions before discharge. (Tr. 80, 83-85; GC Exh. 5.) Houghland agreed with Escoto's testimony that pursuant to the CBA, management could not consider discipline that occurred more than 12 months prior to a subsequent conduct in determining the appropriate discipline for the subsequent conduct. (Tr. 82-84; R. Exh. 17, article 6.04.)

Although not artfully articulated, Houghland also expressed that discipline that occurred more than a year before the conduct at issue, although not to be specifically considered, still remained "live" as a foundation for subsequent discipline issued within the year timeframe to be considered. (Tr. 101-107.) For example, if an employee engaged in misconduct and, within the last 12 months, had received a 3-day suspension for the same or similar misconduct, the employee would be subject to a 5-day suspension, even though the written warning and 1-day suspension that were the foundation of the 3-day suspension did not occur within 12 months of the misconduct at issue. In essence, Houghland was asserting that the progressive discipline built off of the last level of discipline, which occurred within 12 months of the misconduct at issue. Escoto took exceptions to the appropriateness of this interpretation, but General Counsel submitted no evidence to controvert Houghland's testimony as to his practice of applying article 6 of the CBA.

As discussed above, Escoto had received several disciplines before the May 2 incident that gave rise to his discharge at issue in this case. (GC Exh. 5.) On June 4, 2012, Respondent issued Escoto a verbal counseling for incorrectly entering into the Infogenesis an order for a cocktail that was not needed, resulting in a loss of revenue for Respondent. (R. Exh. 9.) On June 23, 2012, Respondent issued Escoto a corrective counseling form for attributing a check to the wrong table at which the customers had already paid in cash. (R. Exh. 10.) On January 15, 2013, Respondent issued Escoto a written warning for incorrectly entering a food order that resulted in a loss of revenue for Respondent, because the ordered food could not be served to another customer. (R. Exh. 11.) On January 21, 2013, Respondent issued Escoto a second written warning for opening the wrong bottle of wine that resulted in lost revenue. (R. Exh. 12.) On April 1, 2013, Escoto was issued a 1-day suspension for entering the wrong food item into Infogenesis that resulted in lost revenue. (R. Exh. 13.)

On February 8, 2014, Escoto entered the wrong type of steak into the ordering system resulting in lost revenue for Respondent. Because his 1-day suspension was within the last 12 months, he was issued the next level of discipline, a 3-day suspension, on February 14, for which he was suspended from work from February 15 through 17. On March 5, Escoto delivered mixed drinks to the wrong table before serving the drinks to the right customers, who then rejected the drinks, resulting in lost revenue. (R. Exh. 15.) Again, Escoto was issued the next level of discipline, a 5-day suspension, because his earlier suspensions occurred within 12

⁴ Apparently, art. 6 of the CBA had remained unchanged from the previous collective-bargaining agreement. Although neither of the witnesses explicitly expressed this to be true on the record, there is no contention to the contrary and both witnesses testified concerning the provisions as if they had remained unchanged throughout the relevant period.

months of March 5. (R. Exh. 15.) Escoto admitted that he received each of these disciplines and stressed that most of his disciplines were because Respondent had suffered a loss of revenue. (Tr. 47-51, 55.)

5 Escoto grieved each of these suspensions, but there was no contention that the grievances were resolved in his favor. Houghland was aware of these grievances. (Tr. 52-54, 86.)

10 In addition to filing grievances over the disciplines he received, Escoto testified he had joined a group grievance requesting that food servers be scheduled for 8-hour shifts instead of 6-hour shifts. (Tr. 60.) The record is silent as to when this grievance was filed and whether Houghland was aware of it. Ultimately, the grievance requesting 8-hour shifts was not successful. (Tr. 60.)

15 Before Escoto received the 5-day suspension on March 5, Escoto had engaged in other union activities. In late February or early March 2014, Escoto helped organize and participated in an employee march to spur Respondent to the bargaining table to negotiate the current CBA. Hundreds of employees participated in the march which ended at Respondent's offices. (Tr. 16-17.) A local television news station interviewed Escoto about the purpose of the march. (Tr. 17.) No evidence was presented that any member of management witnessed Escoto's participation in the march, was aware of his efforts to organize the march, or was aware of his television interview. Furthermore, there is no evidence that any manager, supervisor, or agent of Respondent ever expressed any animus towards Escoto or any employee for participating in the march.

25 Although the record does not reflect the exact dates that negotiations for the current CBA took place, they occurred over about 3 days in early March 2014. (Tr. 18-19.) The Union's negotiation team consisted of approximately 20-30 employees and Union representatives. The Union submitted a list of employee negotiation committee members to Respondent. Neither Houghland nor Escoto could definitively testify as to whether Escoto's name was included on that list, and no documentation was submitted into the record. (Tr. 59, 97.) Regardless, Escoto requested to be off work to attend the negotiations and did so at least during one of the bargaining sessions. During the union caucuses, Escoto spoke in favor of proposing that the contract require an 8-hour shift instead of the 6-hour shift for food servers. The bargaining committee employees, including Escoto, attended the bargaining discussions with Respondent. None of the employees spoke in the meetings with Respondent representatives present. The Union representatives spoke on behalf of the employees. Escoto sat in the front row during the negotiations that he attended, and Houghland admits seeing him, along with the other employee bargaining committee members. (Tr. 58-61, 97-98.)

35 After about 2 or 3 days of bargaining, a tentative successor agreement was reached on Saturday, March 15. The tentative agreement, which was ultimately executed, did not provide for 8-hour shifts for food servers for which Escoto had lobbied. (Tr. 60.) That same evening, the Union posted a news release on its website entitled "Tentative Agreement for a New Union Contract Reached with the Stratosphere Las Vegas." Escoto was interviewed for this news release:

45 I am very excited we got a new contract that protects our benefits and will help bring more workers back to food and beverage jobs at the hotel," said Jose Escoto, a Stratosphere food server and a member of the negotiations committee. "It is also great that housekeepers will get some help cleaning extra dirty rooms. (GC Exh. 3.)

Overall, the press release expressed the Union's pleasure with reaching an agreement with the Stratosphere and spoke of taking action to help employees at other local casinos to spur their companies to the bargaining table. (GC Exh. 3.) Houghland openly admitted that he had seen the Union's website posting and that he was aware that the Union occasionally does such posts. (Tr. 101.) Despite this evidence of knowledge, the record contains no evidence of animus towards Escoto or any other employee because this or other union or protected activity.

2. Events Leading to Escoto's Discharge

No evidence was submitted concerning any significant events between March 15 and May 2, the date when Escoto made errors for which Respondent claims he was discharged. On May 2, Escoto admits that he inadvertently entered into the Infogenesis system orders for shrimp cocktails when the customers ordered oysters. Escoto realized his mistake and informed the kitchen workers and/or the pantry clerk of his error and asked them to use the shrimp cocktails for another order. (Tr. 57.) Approximately an hour and 45 minutes later when he was closing out the customers' bill, he asked Assistant General Manager Mary Hernandez to void the shrimp cocktails from the bill. Escoto testified that it was customary to continue waiting on customers and to deal with a void whenever a manager was available but did not specifically testify about why a manager was not available during the hour and 45 minutes involved in this situation. No other evidence was submitted to show that food servers with some regularity wait as much as an hour and 45 minutes to report errors.

After Escoto reported his error to Hernandez, Hernandez and Escoto discussed incident. Also, Hernandez likely discussed the matter with the pantry clerk that Escoto contended could verify the shrimp cocktails were used on another customer order, but no clear account of these conversations was solicited from Escoto. Neither Hernandez nor the pantry clerk was called to testify. Despite the limited testimony concerning these conversations, it is clear from Escoto's testimony that he contends his mistake in entering the order for shrimp cocktails did not result in a loss of revenue for Respondent.⁵ (Tr. 37-38.)

Although Hernandez was not called to testify, emails that she sent to Houghland regarding these issues state that she was unable to verify that the shrimp cocktails she voided from the customer's bill were not wasted because of the time lapse of nearly 2 hours between the time the error was made and the time it was brought to her attention. Houghland testified that on the morning of May 3, he received an email that Hernandez sent on May 2, at 10:17 p.m. concerning this matter. (R. Exh. 18.) The email states:

Jose [Escoto] explained to me, Mary, he rang in two shrimp cocktails, but he was supposed to ring in two orders of oysters. He is claiming no loss of revenue because the pantry resold them. I did not have a way to verify if the items were resold because Jose waited approximately 2 hours after the incident to tell me about the error. I was notified by Jose around 6:15pm, the guests were sat at 4:30pm. Jose's last discipline was a 5 day suspension for a similar offens[e]. How should I proceed?⁶

⁵ On p. 57, at line 21 it states that Escoto answered in response to a question about the shrimp cocktail, "Because I had already told her it was wasted, yes." The words "was wasted" instead of wasn't wasted was either a transcription error or an inadvertent error in pronunciation by Escoto as he consistently insisted that the shrimp cocktail had not been wasted. He further stated that was the question that Hernandez wanted to know and she had asked the pantry clerk herself, but the record is silent as to what the pantry clerk's response was.

⁶ In this and other passages quoted directly from Hernandez' emails, she refers to Escoto only by his first name Jose. Also, she refers to herself in third person as "Mary" and in first person.

At 8:29 a.m. on May 3, Houghland responded by email stating:

Put him on SPI [Suspension Pending Investigation]. (R. Exh. 18.)

At 8:33 a.m. on May 3, Hernandez replied:

Copy. In addition, after I sent this email he proceeded to ring in two monsters, but the guest wanted red bull. The monsters were not opened, however still need to be voided for his error. I have the checks for both incidents. (R. Exh. 19.)

Then at 8:45 a.m., Hernandez sent an email to Houghland requesting clarification on the basis of the suspension:

Number 19-failure to perform to company standards? And 57?⁷

At 10:29 a.m., Houghland confirmed with a one word email stating, "Yes." (R. Exh. 19.)

At about 4:45 p.m., on May 3, Escoto was called into an investigatory meeting with Hernandez, General Manager Eric Adams, and Shop Steward Walter Guzman. Escoto's testimony as to what occurred in this meeting is as follows:

We walked in the, you know, the purpose of the meeting was supposed to be investigative, as I understand. And when I walked into the meeting, she, Mary Hernandez initially asked me to tell her about the void. And I really didn't know how to elaborate on that because it was a void, it happens on a regular basis of which I've had many and everyone else working there has had many. So I didn't know how to elaborate on her question. She looked over to the side and handed me over a typed up suspension. And so she asked me again about the void and I didn't see the necessity or the purpose to elaborate on something on which she had already decided to suspend me for. And I asked her why she was doing that; I said, I told her that, you know, if they were looking for reasons to terminate me, they surely could find a better reason other than a void which is done so often on a regular basis. And I told them they were grasping at straws. I told them that, you know, I again questioned why they were doing this and why they would choose this particular reason. I said you guys both seem smart. And I looked over at Mary Hernandez and I said at least you do. My voice was definitely elevated a little bit. I was very upset about being suspended over a void. And, to my knowledge, no one in the last 14 years has ever been terminated or suspended or written up for a void. And I, myself, have done I would say 40 or 50 a year. Never once had I been written up for a void. And so yes, definitely, I was upset. And they told me to calm down and eventually they said that if I didn't, I would be escorted out of the building by Security. At that moment, Walter Guzman, the shop steward, told me that I should leave and so I gathered my things and I left. (Tr. 21-23.)

At 5:44 p.m., Hernandez emailed Houghland her account of the meeting which is fairly consistent with Escoto's account. Hernandez lists the same individuals as attendees at the meeting and states:

⁷ Houghland testified that Rule 57 is a "failure to adhere to any policy or procedure established within a department or in the hotel." (Tr. 84.)

Mary ask[ed] Jose Escoto if he'd like to write a statement about the shrimp cocktail missing last evening, 5/2/14. Jose replied, "no, I already told you what happened." Mary explained the incident is considered an 'error and it doesn't have to result in a loss of [revenue], therefore an SPI would be issued this evening. Jose stated, "get on with the paper work." Mary read the PIN [See R Exh. 16] out loud and signed. The PIN was then passed along to Jose. While signing Jose said, "I will take my week paid vacation." He then stood up, looked at Eric and I stating, "We will see if you guys are here when I get back." Eric asked what that meant. Jose continued to repeat himself, but changed his tone and would say it under his breath. Mary explained to Jose he could not make threatening statements. Jose then said, "you guys are hungry and desperate." He continued on, "grasping for straws?" He then went on to say you two seem intelligent, while at least you (looking at Mary), why are you doing this?" Jose was asked to stop by Mary. Eric then told Jose the conversation was over. Mary explained he needed to leave property and not return until further notice from HR. Jose continued to rant. Eric stated he was to leave or security would be called to escort him out. Walter advised Jose to leave and he did following Walters prompt. (GC Exh. 2; R. Exh. 16.)

Houghland signed the discipline placing Escoto on suspension pending investigation on May 7 and ordered his discharge. (R. Exh. 16.) There sometimes was a delay between the issuing of a discipline and Houghland's receipt of the paperwork to sign. (Tr. 90-92.) Escoto's other disciplines reflect a 1 to 4 day delay between their issuance and Houghland signing them. (R. Exhs. 11, 12, 13, 14, 15.) On about May 7, an individual from Respondent's human resources department contacted Escoto by telephone and informed him that he had been separated from the company. (Tr. 22, 23.)

Respondent makes no claim that it took any action to further investigate Escoto's May 2 conduct. Instead, Houghland testified that he had made a tentative decision to discharge Escoto when he sent the email directing Hernandez to place Escoto on suspension pending investigation. The investigatory meeting that followed was customarily conducted as a precaution in the anticipation of a grievance over the discharge and was Respondent's attempt to provide due process to employees before finalizing the discharge decision. In Houghland's experience every employee he had placed on suspension pending investigation had ultimately been discharged. (Tr. 87.) There is no evidence to contradict Houghland's testimony in this regard. Indeed Escoto had been disciplined several times before and there was no evidence that he was ever placed on suspension pending investigation concerning those earlier disciplines. Furthermore, Escoto had acted as a witness for other employees when they were questioned about conduct but had no knowledge of where they were in the disciplinary process or whether Respondent had determined to place them on suspension pending investigation before the interview. (Tr. 64, 66.)

After his discharge Escoto filed the charge with the NLRB in the instant matter and a charge with the NERC. Escoto admitted in the statements that he gave to each of these institutions that Respondent fired him because of the error he made in entering the order for the shrimp cocktails. While testifying Escoto repeatedly pointed out that most of the disciplines he received before the May 2 incident involved errors that resulted in lost revenue for Respondent. He also testified that no revenue was lost in connection with his error of entering the shrimp cocktails order on May 2. From his testimony, it is evident that Escoto believed that Respondent had improperly discharged him because he had erred in entering the shrimp cocktails order even when that error did not result in lost revenue for Respondent. Indeed,

nothing in the record reflects that Respondent ever claimed to have discharged Escoto for any other reason, including his conduct in the May 3 meeting.

3. Credibility

I found both Escoto and Houghland to be credible witnesses, although their views of the incidents at issue come from very different perspectives. Escoto admitted to the discipline he received prior to the May 2 incident. Although he was defensive about whether his error in entering orders for the shrimp cocktails on May 2 had resulted in lost revenue for Respondent and his belief that he should not have been discharged when only a void was involved, he provided consistent and straight forward answers to questions on direct and cross examination.

Respondent argues in its brief that Escoto's credibility cannot be fully assessed because General Counsel failed to obtain the statements that Escoto gave to the NERC. I find no merit to this argument. As discussed above, General Counsel met its burden under *Jencks* to provide witness statements in its possession. Furthermore, Respondent solicited no testimony from Escoto nor provided any other evidence that caused doubt as to the validity and completeness of the NERC documents provided to it as *Jencks* statements. I find no basis to doubt Escoto's credibility as Respondent asserts.

As stated above, I also credit Houghland's testimony. He readily admitted to knowledge of Escoto's grievances over prior discipline, of Escoto's role as a bargaining committee member, and to having seen the Union's website posting that quoted Escoto about the outcome of contract negotiations. He maintained a calm demeanor and directly answered questions posed to him. Houghland's demeanor did not call into question his credibility, and no evidence was presented to contradict his testimony.

ANALYSIS

The complaint alleges that Respondent's discharge of Escoto violated Section 8(a)(3) and (1) of the Act, but General Counsel did not assert a traditional *Wright Line* theory of an 8(a)(3) violation at hearing or in its brief in this matter.⁸ Instead General Counsel contends Respondent unlawfully discharged Escoto in retaliation for his conduct while he was engaged in protected concert activity under an *Atlantic Steel* analysis.⁹ The *Atlantic Steel* analysis is appropriate when it is undisputed that the employer took action against an employee for the employees' conduct while engaging in protected activity. See *Murtis Taylor Human Services*, 360 NLRB No. 66, slip op at 21 (2014). As discussed more fully below, I do not find that the employer took action against Escoto because of his conduct at the May 3 meeting. Therefore, I also performed a *Wright Line* analysis in deciding that Escoto's suspension and subsequent discharge did not constitute a violation of Section 8(a)(3) or (1) of the Act.

1. *Atlantic Steel* Analysis

Relying upon *Atlantic Steel*, General Counsel asserts that Escoto was wrongfully discharged for his conduct while engaged in protected concerted activity at the May 3 meeting and that his conduct was not so opprobrious to cause him to lose the protection of the Act. Prerequisites to applying an *Atlantic Steel* analysis are findings that the employee was engaged

⁸ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983).

⁹ *Atlantic Steel*, 245 NLRB 814, 816 (1979).

in protected concerted activity when the conduct occurred and that Respondent discharged him due to that conduct. Although I agree with General Counsel that Escoto was engaged in protected concerted activity during the May 3 meeting, I do not find that Respondent discharged him because of his conduct during the meeting. I find, as Respondent contends, that

5 Houghland intended to discharge Escoto when he directed Hernandez to place Escoto on suspension pending investigation absent some information that would cause him to decide otherwise, and Escoto's statements at the investigatory meeting failed to raise a reason for Houghland to reconsider his decision.

10 To meet the first prerequisite, General Counsel contends that Escoto was engaged in protected concerted activity because the May 3 meeting was investigatory with a union shop steward representing Escoto. It is established law that having union representation at an investigatory meeting is protected activity.¹⁰ General Counsel also asserts that Escoto was further engaged in protected activity by impliedly informing Hernandez and Adams at the

15 meeting that he was contemplating filing a grievance by his statements.¹¹ Although I do not rely solely on the statements cited by General Counsel, I do find Escoto's statements to Hernandez and Adams informed them that he was grieving their decision to discipline him as provided for in the CBA.

20 The Board has long held, under its "*Interboro doctrine*," that "an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activit[y]" and therefore accorded the protection of § 7 [of the Act]." *NLRB v. City Disposal Systems, Inc.*, 465 US 822 (1984). See also *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), *enfd.*, 388 F.2d 495 (2nd 1967); *Bunney Bros. Construction Co.*, 139 NLRB 1516, 1519 (1962). The CBA

25 contains provisions regarding discipline and grievance-arbitration procedures.¹² Therefore, Escoto was engaged in protected concerted activity by asserting his grievance.

Although Escoto engaged in protected concerted activity during the May 3 meeting, I find the evidence does not support that Respondent discharged him due to his conduct while

30 engaging in this activity. With regard to Escoto's assertion of his *Weingarten* rights, the record contains no evidence that Respondent in anyway interfered with or was opposed to Escoto's

¹⁰ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

¹¹ General Counsel's brief does not cite any legal support or contain any argument as to why Escoto's statements would constitute protected activity. Despite this lack of argument, I find that they were protected activities for the reasons stated herein.

¹² In *NLRB v. City Disposal Systems, Inc.*, the Supreme Court upheld the Board's finding that an employee was engaged in protected concerted activity through his individual refusal to drive a truck that he in good faith believed was unsafe, because he was asserting a collective-bargaining provision regarding safety; even though, he never directly mention the provision. Similarly, Escoto was asserting a right grounded in the CBA by disputing his suspension at the May 2 meeting even though he never specifically stated he was filing a grievance under the CBA. Escoto's comments occurred in the context of an investigatory meeting in the presence of a union shop steward, Respondent was issuing him a suspension, and Escoto's statements clearly evidenced his disagreement with that suspension. The fact that Escoto never referred to his disagreement with the discipline as a grievance is immaterial. Art. 6.01 of the CBA, Cause for Discharge, requires discipline or discharge to be for just cause. Art. 21.03 of the CBA, Procedure for Adjusting Grievances, allows employees to attempt to settle grievances directly with their immediate supervisor with or without the assistance of a union shop steward before reducing the grievance to writing as a formal grievance. (R. Exh. 17, pgs. 8 and 48.) Because Art. 21.03 specifically allows employees to attempt to resolve disputes with their supervisors, Escoto's objections to the validity of his suspension were an assertion of his rights under the CBA.

exercise of these rights. The evidence implies that Respondent arranged for the union shop steward to be present at the meeting. Most importantly, none of the reported statements or conduct of the participants at the meeting evidenced any dispute over *Weingarten* rights. Therefore, I find insufficient evidence that Respondent discharged Escoto due to any conduct that arose out of the exercise of his *Weingarten* rights at the meeting.

I also find insufficient evidence to conclude that Respondent discharged Escoto because of his conduct and statements while asserting his grievance at the May 3 meeting. Shortly after the meeting, Hernandez sent Houghland an email summarizing the meeting. The main details of this summary are consistent with Escoto's testimony. During the meeting, Escoto expressed his disbelief that Respondent could discipline him for an error in ordering that he contends did not result in a loss of revenue, but he refused to discuss the events of May 2 with Hernandez. Hernandez disagreed with him and proceeded to issue the suspension pending investigation. Escoto became agitated and made a series of heated statements questioning Hernandez' and Manager Adam's intelligence for making an error in disciplining him. Escoto then expressed his belief that they could be discharged for their mistake and he would ultimately be returned to work. Hernandez became displeased with his conduct and instructed him to leave or be escorted out. No relevant, intervening events occurred between Houghland's receipt of Hernandez's emailed summary of the May 3 meeting and his decision on May 7 to direct the discharge of Escoto.

General Counsel points to the large portion of the emailed summary recounting Escoto's displeasure with receiving the suspension and the lack of action between the receipt of the emailed summary and Houghland's direction to discharge Escoto as evidence that Respondent discharged Escoto because of his conduct at the meeting. Significantly, General Counsel failed to provide any evidence that Respondent has ever taken the position that it discharged Escoto for his conduct in the May 3 meeting. Instead, Respondent contends it discharged Escoto for his error in entering food orders on May 2 as progressive discipline for related performance errors. In line with Respondent's contention, Escoto reported to the Board and the NERC that Respondent discharged him for his ordering errors on May 2.

General Counsel contends that, because Hernandez' emailed summary is mostly about Escoto's statements expressing his displeasure with receiving the suspension pending investigation, and Respondent took no other actions after the meeting, Respondent must have discharged Escoto for his statements. By Escoto's own account, Hernandez' summary is generally accurate. Most of the meeting did consist of him disputing their right to suspend him after he refused to discuss the events of May 2. Accordingly, the amount of Hernandez' summary dedicated to Escoto's outburst does not show that Respondent specifically focused on this conduct in making its decision to discharge Escoto.

Furthermore, General Counsel fails to focus on an important aspect of the summary. Hernandez informed Houghland in the email that Escoto refused to discuss the incidents that occurred on May 2, and therefore, raised no issue for Respondent to pursue further before discharging him. General Counsel also ignores Houghland's testimony that when he directed Hernandez to place Escoto on suspension pending investigation, he was affording Escoto the last step of due process in preparation for a likely grievance over his discharge. Houghland was aware of Escoto's disciplinary history for similar offenses and was preparing to discharge him. Houghland testified that it was his practice to withhold a discharge determination until after a suspension pending investigation meeting, because that was the employee's last chance to raise an issue that would alter the discharge decision. At the May 3 meeting, Escoto refused to discuss the May 2 events let alone provide any explanation that would have persuaded

Houghland to take a different course. When Houghland received the May 3 disciplinary paper work on May 7, he followed through with the discharge that he had already set in motion. Houghland stated that he gave no consideration for Escoto's outburst at the May 3 meeting, as it was not particularly egregious behavior and one can expect an employee to be upset in such situations. I credit Houghland's testimony in this regard because his demeanor remained unchanged throughout this testimony. Indeed, Escoto's statements were insulting to Hernandez and Adams but they were not obscene or physically threatening. Houghland fully expected Escoto to file a grievance over his discharge and that is why the suspension pending investigation meeting occurred. Accordingly, I do not find that Houghland retaliated against Escoto for expressing his grievance at the May 3 meeting.

General Counsel produced no evidence to controvert Houghland's testimony that he followed his practice in preparation for a grievance over a discharge by directing Hernandez to place Escoto on suspension pending investigation and that he had always followed through with the discharge in such situations. General Counsel did not cross-examine Houghland on this issue or present any other contrary evidence. Nor did General Counsel solicit any testimony or present any evidence that Houghland normally conducted a more thorough investigation beyond an investigatory meeting before following through with a discharge. Although Escoto had been disciplined before and had served as a witness for other employees when their performance had been questioned, Escoto testified that he had never been involved when an employee was issued a suspension pending investigation. This lends truth to Houghland's testimony that this was a procedural safeguard that he took before an employee was discharged. I do not find that Respondent discharged Escoto for his conduct while he engaged in protected activity at the May 3 meeting.

Because the evidence does not support a finding that Respondent discharged Escoto because of his conduct while engaged in protected concerted activity at the May 3 meeting, the *Atlantic Steel* analysis is not the appropriate framework for analyzing this case. Therefore, although this theory was not asserted by General Counsel other than that the complaint alleges a violation of Section 8(a)(3) and (1) of the Act, it is appropriate to analyze this case under *Wright Line*.

2. Wright Line Analysis

Under the *Wright Line* framework, General Counsel has the burden to present evidence that proves by a preponderance of the evidence that an employee's union or other protected activity was a motivating factor in an employer's adverse employment action, by producing evidence that the employee engaged in "union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014); enfd. 801 F.3d 767 (7th Cir. 2015). If General Counsel meets this burden then the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Id.*; *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000).

General Counsel established that Escoto engaged in protected union activity and that Respondent was aware of at least some of that activity but failed to meet its burden to show that Respondent was unlawfully motivated by animus towards this activity in discharging Escoto. Escoto participated in protected activity by grieving his discipline, assisting in organizing and participating in the employee march, participating in contract negotiations, and giving a quote

that was published on the Union's website. Houghland readily admitted that he was aware of Escoto's grievance filing activity, his participation as an employee bargaining member, and his quote in the Union's posting. Although it is hard to imagine that Hernandez was unaware of at least Escoto's grievance filing activity, I find no direct evidence in the record of Hernandez being aware of Escoto's protected activities.

General Counsel failed to meet its burden to show that Respondent was unlawfully motivated by animus toward Escoto's activity in deciding to suspend and subsequently discharge him. The record contains no evidence of Respondent expressing animus over Escoto's or any employee's grievance filing activity. The record is silent as to any animus expressed by Respondent about the employees' march to spur contract negotiations. To the contrary, Respondent shortly thereafter, met with the Union and came to an agreement on a successor contract after only a few days of bargaining. Similarly, General Counsel produced no evidence of animus directed at any employee because of the employee's participation on the Union's bargaining committee. I find no evidence in the record of expressed animus by any Respondent supervisor or agent toward protected activity in general or toward Escoto's protected activity.

Similarly, I find insufficient evidence that Hernandez acted out of animus towards Escoto's protected activity in reporting his errors on May 2. As discussed above, the record does not give a full account of the discussion on May 2 between Escoto and Hernandez concerning whether the shrimp cocktails were wasted. The record is even less clear as to Hernandez's discussion with the pantry clerk, if any, about this subject. What the record does reflect is that Hernandez told Houghland in her May 2 email that she was not able to verify whether the shrimp cocktails at issue were sold to other customers because of Escoto's delay in reporting the error to her. Besides Escoto's vague testimony that it is customary to continue serving customers and report errors when managers are available, there is no evidence of other incidents where Escoto or other employees had waited similar lengths of time before reporting an error. Thus, I find no evidence that Hernandez' assessment that she could not verify whether the shrimp cocktails had been wasted was inaccurate or constituted disparate treatment. When Hernandez sent her follow-up email at 8:33 a.m. on May 3 noting that Escoto had made another ordering error, she stated that monster drinks that he served had not been opened/wasted. Her verification in this second incident that no revenue was lost is not the actions of someone unlawfully motivated to cause Escoto to be discharged by untruthfully stating that she could not verify whether a loss of revenue occurred in the earlier incident. Hernandez' emails must be viewed as her accounts of the events as she saw them, as there is insufficient evidence that she was unlawfully motivated to do otherwise, and they are reasonable recitations of the situations based upon the evidence in the record, including Escoto's testimony.

I find insufficient evidence, and General Counsel raised no argument, that Houghland acted out of discriminatory motive in deciding to place Escoto on suspension pending investigation. Nor does General Counsel set forth a coherent argument for inferring animus based upon disparate treatment, and I find none in the record.¹³ In light of the circumstances

¹³ General Counsel does assert that Houghland did not always follow the progressive discipline that he outlined and points to the discipline history of employee Aguirre. (GC Exh. 5.) The records reflect and Houghland testified that Aguirre has been discharged twice but, for other reasons not made clear in the record, was returned to work. (Tr. 112.) At the end of the discipline record, Aguirre had again progressed to a 5-day suspension. Without more specific evidence with regard to Aguirre's circumstances, I find it impossible to substantiate a disparate treatment argument as to Escoto's discipline record.

surrounding the decision to place Escoto on suspension pending investigation, including Escoto's history of being disciplined for similar performance issues and Respondent's practice of issuing discipline to other employees for poor job performance, I decline to infer animus from the disciplinary action alone.

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I also find insufficient evidence to infer that Respondent harbored unlawful animus towards Escoto based upon his conduct at the May 3 meeting for the reasons I set forth above in finding Respondent did not discharged Escoto for his conduct at the May 3 meeting.

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Upon review of the entire record, General Counsel failed to produce sufficient evidence to meet its burden under *Wright Line* of showing that Respondent acted out of unlawfully animus in discharging Escoto. See *ITT Federal Services Corp.*, 355 NLRB 998 (2001) (no violation found in light of no evidence of antiunion animus despite clear knowledge of the discriminatees' union activities). Therefore, the burden does not shift to Respondent to demonstrate that it would have taken the same action absent the protected conduct.

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Even if I could find that the General Counsel met the initial burden of proving unlawful motivation, I also find that Respondent has shown it would have discharged Escoto in the absence of his protected activity. Respondent requires customer oriented performance standards of its employees and had an established practice of disciplining employees for failing to meet these standards. Escoto had breached these standards on numerous occasions and had been issued multiple disciplines, including 1, 3 and 5-day suspensions. On May 2, Escoto had again made order errors and Hernandez reported to Houghland that she could not verify whether these errors had cost Respondent revenue. I credit Houghland's testimony that when he directed Hernandez to issue Escoto the suspension pending investigation, he was taking the steps to discharge Escoto for these recurrent errors and absent Escoto raising some issue requiring a different result he ultimately intended to discharge him. Finding none, Houghland finalized Escoto's discharge for repeated errors on May 7. Thus, I find that Respondent established that it would have discharged Escoto absent his protected activity.

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CONCLUSION OF LAW

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The General Counsel has not proved by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

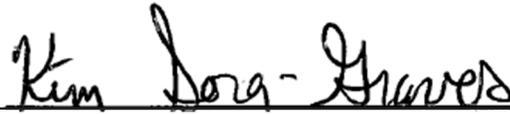
¹⁴ If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed in its entirety.

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Dated, Washington, D.C. February 23, 2017

A handwritten signature in black ink that reads "Kim Sorg-Graves". The signature is written in a cursive style and is positioned above a horizontal line.

Kimberly Sorg-Graves
Administrative Law Judge

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