

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ADVANCED MASONRY ASSOCIATES, LLC  
d/b/a ADVANCED MASONRY SYSTEMS

and

Cases 12-RC-175179  
12-CA-176715

BRICKLAYERS AND ALLIED CRAFTWORKERS,  
LOCAL 8 SOUTHEAST

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT ADVANCED MASONRY ASSOCIATES, LLC'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION AND STATEMENT OF THE CASE**<sup>1</sup>

On May 10, 2017, Administrative Law Judge Michael A. Rosas (“ALJ Rosas” or “the ALJ”) issued his Decision and Report in this case. Respondent Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (Respondent) and the Counsel for the General Counsel each filed Exceptions and supporting briefs on June 7, 2017. Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief to Respondent’s Exceptions.<sup>2</sup>

In short, Respondent, a construction-industry subcontractor specializing in block- and brick-laying, suspended and then discharged two masons during the critical pre-election period, allegedly for violating Respondent’s fall protection rules. One of the masons, Luis Acevedo (Acevedo),<sup>3</sup> was a visible and vocal supporter of Bricklayers and Allied Craftworkers, Local 8 Southeast (the Union). Within two weeks prior to his discharge, Acevedo had told the company’s Safety Director, Aleksei Feliz (Feliz) that an unlawful threat he made to the masons’ wages was a lie in front of a group of half a dozen other employees. Respondent also suspended and discharged Acevedo’s work partner, Walter Stevenson (Stevenson), even though Stevenson was not a Union member, in an attempt to mask the discrimination against Acevedo. Respondent contends that it has always maintained and strictly enforced its “zero tolerance”

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<sup>1</sup> A more complete statement of the facts can be found in the Brief in Support of Counsel for the General Counsel’s Exceptions to the Decision of the Administrative Law Judge.

<sup>2</sup> ALJ Rosas’s Decision and Report is referenced herein as ALJD (page:line). General Counsel’s Exhibits are referenced as GCX (number); Respondent’s Exhibits are referenced as RX (number); Charging Parties Exhibits are referenced as CPX (number); Regional Director’s Exhibits are referenced as RDX (number); and references to the Joint Stipulations are noted as JS (paragraph). The hearing transcript is referenced as Tr. (page number). Respondent Advanced Masonry Associates, LLC’s Exceptions and to the May 10, 2017 Decision of the Administrative Law Judge and its Brief in Support are referred to collectively herein as “Respondent’s Exceptions.” Counsel for the General Counsel’s Exceptions to the Decision of the Administrative Law Judge and its Brief in Support are referred to collectively herein as “General Counsel’s Exceptions.”

<sup>3</sup> Respondent’s Exception 2 parallels General Counsel’s Exception 2, addressing the ALJ’s inadvertent use of the surname “Alvarez” instead of “Acevedo” throughout the decision. Counsel for the General Counsel notes that ALJ Rosas also called Acevedo “Mr. Alvarez” during his testimony at the hearing. Tr. 435. Counsel for the General Counsel joins in Respondent’s Except 2 only insofar as it seeks to have this mistake corrected wherever it appears in the ALJD.

policy for fall protection violations, but asserts that it distinguished between violations observed by its own supervisors and those reported by to Respondent by its general contractors. ALJ Rosas appropriately rejected this argument as implausible, found that the distinction is not reflected in Respondent's written policies, and concluded that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by suspending and discharging Acevedo and Stevenson because of Acevedo's union activities. [ALJD 19:7-20:32].

ALJ Rosas also properly found that Respondent, by Safety Director Feliz, violated Section 8(a)(1) of the Act sometime in early May 2016 by threatening a group of Spanish-speaking masons with lower wages if the Union won the upcoming representation election, as alleged in paragraph 6 of the Complaint.<sup>4</sup> [ALJD 17:15-18]. The ALJ properly found that Respondent, by foreman Brent McNett (McNett), further violated Section 8(a)(1) of the Act on May 16, 2016,<sup>5</sup> when he told employees that it probably would not be good for wages if the Union won the election. [ALJD 17:39-41].

Respondent's Exceptions advance several meritless arguments seeking to have the Board overturn all of ALJ Rosas's adverse credibility determinations, findings, and conclusions. Respondent misstates Board precedent with respect to its contention that the ALJD is so damaged by the ALJ's inadvertent errors that the Complaint must be dismissed in its entirety. For the reasons detailed below, except to the very limited extent noted in this brief, Respondent's Exceptions should be denied.<sup>6</sup>

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<sup>4</sup> A Conformed Amended Complaint incorporating amendments to the original Complaint issued by the Regional Director on January 11, 2017, and by oral motion at the hearing was admitted in evidence as (GCX 1(r)). The Conformed Amended Complaint is referred to herein as the Complaint. Respondent's Answer (GCX 1(m)) denied all alleged unfair labor practices.

<sup>5</sup> All dates hereinafter are in 2016 unless otherwise noted.

<sup>6</sup> While not specifically addressed elsewhere in this brief, Counsel for the General Counsel opposes Respondent's Exception 37 since, as Respondent acknowledges, it has been the Board's longstanding practice to invalidate an election result based on unfair labor practices that occur during the critical period between the filing of a representation petition and the conduct of an election.

## II. ARGUMENT AND CITATION TO AUTHORITY

- A. **ALJ Rosas properly determined both that Acevedo and Stevenson’s testimony was more credible than that delivered by Respondent’s witnesses, and that Gerardo Luna’s testimony did not reinforce Feliz’s discredited testimony. Respondent’s Exceptions 3, 4, 10, 15, 33, 34 are without merit.**

The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convincingly demonstrates that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). In making credibility determinations, administrative law judges may rely on a number of factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014). The Board has cited with approval an ALJ’s discrediting of current employees who testify on behalf of the employer, reasonably inferring that the employee may be reluctant “to incur the Respondent’s disfavor.” *Classic Sofa, Inc.*, 346 NLRB 219, 220 at n. 2 (2006).

A trier of fact may also draw the “strongest possible adverse inference” against a party that fails to present a material witness presumed to be favorable to it, sometimes called the “missing witness rule.” *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995); *Douglas Aircraft Company*, 308 NLRB 1217, 1217 fn. 1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). This is particularly true where the “missing” witness is the respondent’s agent, “within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed the witness would have testified adversely to the party.” *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006), citing *Automated Business Machines*, 285 NLRB 1122, 1123 (1987).

The witness testimony offered by Acevedo and Stevenson was forthright, consistent, and logical. Respondent's witnesses, on the other hand, failed to present a consistent, coherent version of the events of May 16, or any other relevant day. Although they all toed the party line with respect to Respondent's overarching narrative – two masons broke a “zero tolerance” safety rule and were therefore suspended and discharged – the details of that event and the decision-making process vary widely and, at key moments, lacked specificity, deeply undermining Respondent's theory of the case. Notably, moreover, one of Respondent's principals and owners, Richard Karp, was present throughout all five days of the hearing, but never testified about the conversation he and his brother, principal and owner Ron Karp, had with Safety Director Feliz about discharging a union supporter. For these reasons, set forth in greater detail below, ALJ Rosas was correct to credit Acevedo and Stevenson over Respondent's witnesses, and the Board should not disturb his credibility resolutions. [ALJD 10 n. 32, 11 n. 36, 12 n. 40, 13 n. 44, 13 n. 46, 14 n. 48, 14 n. 49].

*i. Aleksei Feliz*

Respondent's key witness with respect to the discharges of Acevedo and Stevenson, Safety Director Feliz, presented testimony that was not only internally inconsistent, but also frequently contradicted by Respondent's other witnesses, leaving the impression that he would say whatever he felt sounded most helpful to the case from moment to moment. The ALJ properly discredited Feliz's testimony with respect to the enforcement of Respondent's safety policies and the discharges of Acevedo and Stevenson and also properly discredited his testimony with respect to the anti-Union speech he made to the Spanish-speaking masons at the University of Tampa (UT) job site. [ALJD 11 n. 36, 14 n. 51].

One of the first things that Feliz testified about was that he “knew there was [a union] election going on,” but that he “had nothing to do with it.” [Tr. 44]. He later expanded upon that, saying:

...I knew that there was a situation going on with the Union, which to be honest I'm not privileged to those details. It doesn't entail my department, but I knew that there was some situation going on with the Union and a vote was going to be made...

[Tr. 91]. This, Feliz claimed, is the reason he had to call “senior management,” Ron and Richard Karp, to discuss discharging Acevedo on May 16 – yet he was also adamant that he did not need “permission” to discharge employees, because “[t]hat comes with the position. That’s what I do.” [Tr. 119].

Furthermore, testifying about his speech to the Spanish-speaking masons about the election, sometime between May 2 and May 13, Feliz said, “That’s really when my involvement in this thing, this situation began,” contradicting his testimony a few moments prior that on May 16, he was “not privileged to those details [about the Union situation],” when he decided with the Karps to discharge Acevedo/and or an unnamed Union supporter.<sup>7</sup> [Tr. 92]. Respondent’s witness, current employee Gerardo Luna (Luna), testified that this speech lasted 20 to 30 minutes, indicating that Feliz possessed far more knowledge about the Union and the election process than he was willing to admit at the hearing. [Tr. 849]. Luna admitted that Feliz “mentioned some things about wages, but nothing about offering extra wages for people who would be with or not with the Union” – but Luna would not say what, exactly, Feliz did say. [Tr. 847]. Luna also admitted that Feliz told the masons “the reasons why AMS did not want to continue with the Union,” and “the reasons why the Company did not want us to be with them.”

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<sup>7</sup> Respondent excepts to the ALJ’s finding that Feliz did name Acevedo during the call with the Karps. The General Counsel neither joins in nor opposes this Exception 19, because it is irrelevant. The undisputed facts are that the discharge of a union member and supporter during the critical pre-election period was not only discussed on the call with the Karps, it was the sole purpose of the call.

[Tr. 847-848]. Due to Luna's decade-long tenure with Respondent [Tr. 846], his "corroboration" of Feliz's denial that he threatened to reduce employees' wages during the speech was appropriately discredited by ALJ Rosas. *Classic Sofa, Inc.*, supra. As Acevedo credibly testified, what Feliz said about wages during the meeting was that if the masons voted "yes" for the union, they wage rate would "go down to \$18-something, \$18 and change." [ALJD 17:11-14; Tr. 411].

Respondent contends that Feliz simply could not have said such a thing, because he harbored no anti-union animus, as evidenced by the fact that he had hired Union masons in the past. This argument is fatally flawed: Respondent's past relationship with the Union was over by early May 2016, and it was then actively campaigning amongst its employees to avoid having to recognize and bargain with the Union. (The same is true for all of Respondent's managers: their pre-campaign outlook and actions have no bearing on the events surrounding the election itself.) Respondent even sent a notice to the masons alerting them to the termination of the bargaining relationship they "may have" been a part of. [GCX 7(h)]. Feliz's threat is consistent with the message in the anti-Union literature that Respondent sent to employees weekly during the pre-election period in their paycheck envelopes and in mailings to their home addresses: literature emphasizing the monetary cost of the Union, which goes so far as to show the Union digging into masons' pockets for their money. [GCX 7(a) through 7(m), Tr. 128, 176, 691-692].<sup>8</sup> The ALJ appropriately credited Acevedo over Feliz, and appropriately found that Luna did more to confirm the threat had occurred than to corroborate Feliz. [ALJD 11 n. 36]. The ALJ also made appropriate factual findings regarding the background of Respondent's relationship with the Union. Respondent's Exceptions 3 and 10 should be denied by the Board. [ALJD 8:21-24, 10:33-11:4, 11 n. 36].

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<sup>8</sup> The Complaint does not allege, and the ALJ did not find, that the literature violated Section 8(a)(1) of the Act.

Feliz's testimony regarding the events of May 16, when Acevedo and Stevenson were suspended, also does not comport with the accounts presented by other supervisors and agents of Respondent. Feliz testified that he first heard about the situation at the UT job site from Respondent's Safety Coordinator, Fernando Ramirez, who called him after receiving a call from foreman McNett stating "that two employees were found in a fall protection violation, not using the equipment properly." [Tr. 89]. However, McNett testified that he called Feliz first, not Ramirez, and Ramirez testified that he was not notified until about 11:00 a.m., when Feliz called him. [Tr. 535, 570, 631]. Feliz also testified that he did not know which employees were tied off improperly until late in the day, when Ramirez brought him the "book" with the signatures from the Westshore Yacht Club (Westshore) job site training. [Tr. 42-43, 89-91]. Ramirez, on the other hand, recalls being asked by Feliz on their initial call whether the employees had received training, and, when he asked Feliz for the employees' names so he could check, Feliz provided them. [Tr. 536].

With respect to his conversation with "senior management" about the discharges, Feliz's more detailed testimony about the call describes only what was said to him by Richard Karp, and identifies no other participants:

A: Correct. My report to senior management, especially to Mr. Karp, Richard Karp, was that I had documentation that two employees had been trained and provided the fall protection equipment that they needed to do their jobs, they were found not using that equipment properly or not tie off [sic] in a manner that they've been trained, and in light of that I was going to terminate those two employees, but I wanted to make sure that's the decision *he* wanted me to make considering what was going on.

Q: And we know that apparently it was confirmed that you should make that decision because we wouldn't be here maybe today, because they were terminated, right?

A: Yeah, correct. I mean I think Mr. Karp put it the best way. *He's* like our policy is the same policy for everyone regardless of what's going on. *He's* telling

me, *he* told me if you feel confident that you've been -- that those two employees were properly trained, then *I* trust you, you make that decision, and yes, move forward with that decision.

[Tr. 93-94] (emphasis added). This version completely omits Ron Karp, who claims to have also been in on the decision-making process (though his recollection of the details also left much to be desired, as will be discussed below). [Tr. 873-874]. Although not expressly stated in the ALJD, it appears that ALJ Rosas appropriately drew an adverse inference against Respondent for failing to present Richard Karp to testify about the contents of this critical conversation. *Roosevelt Memorial Medical Center*, supra; *Flexsteel Industries, Inc.*, supra.

Feliz would not say anything that he felt might hurt Respondent or paint him in a bad light, even when it had little or nothing to do with the case. For instance, although the documentation regarding the discharge of employee Robert Harvey (Harvey) says to see the attached time sheet and that Harvey was “causing problems at the hotel,” Feliz maintained several times that the only “problem” at the hotel was that Harvey was “not reporting for work.” [RX 29; Tr. 913-914, 926].

Q: What problems was Mr. Harvey causing at the hotel?

A: He was not reporting to work.

Q: That's it?

A: Yeah. He's causing problems because I'm paying for a hotel room for an employee that is not reporting to work. So to me, that's a problem at the hotel.

[Tr. 926]. However, HR Administrator Yolanda Phelps (Phelps) later testified that she only writes down on Respondent's Reason for Leaving Forms what the supervisor reporting the termination says to her. [Tr. 944, 971-972]. With respect to Harvey, Phelps testified that Feliz told her that he was “causing issues at the hotel.” [Tr. 944]. She could not recall, 16 months after the fact, what the specific “issues” were, but she said, “I remember that the hotel was upset

and had let him [Feliz] know, and I just wrote it down.” [Tr. 944]. Phelps also contradicted Feliz’s testimony that he had “helped produce many of the records” in response to subpoenas issued by the General Counsel and by the Petitioner; she testified that no one else helped her with responding to the subpoenas, that she “compiled that information all alone.” [Tr. 916, 976-979]. These examples establish that Feliz was a thoroughly unreliable witness, and the ALJ was right to credit the consistent and forthright testimony of Acevedo when the two conflicted. [ALJD 11 n. 36].

*ii. Ron Karp*

Co-owner Ron Karp’s testimony regarding the discharges of Acevedo and Stevenson gave only the broad strokes outlining the telephone conversation between himself, his brother Richard, and Feliz. Ron Karp was incapable of recalling specific details of who said what, when the call took place, or even whether there was one call or two and whether it was Feliz or Ramirez whom he and Richard spoke to about the discharges. [Tr. 879-881]. Although Karp asserted generically that the three of them discussed the situation and decided to enforce Respondent’s safety policies, he was unable to say precisely what his individual input was. [Tr. 874].

Additionally undermining his credibility, Ron Karp signature appeared in place of the foremen on the Reason for Leaving Forms regarding masons George Reed and Mark France, whose election ballots were challenged by Respondent. Ron Karp testified, however, that he does “not often” sign such forms, was not familiar with the people or facts reflected on the forms – in keeping with his testimony that he has minimal involvement in day-to-day operations – and could not recall who asked him to sign them. [Tr. 875-876]. Ron Karp went on to testify that his reason for signing them was “to keep the files consistent” so there would not be an unsigned

document produced in response to the trial subpoenas.<sup>9</sup> [Tr. 891]. Nonetheless, Brandon Carollo's and Timothy Golphin's Reason for Leaving Forms, and Jaswin Leonardo's Employee Termination Report, were not signed by any foreman or manager. [GCX 8(a), RX 33, 34]. The entirety of Ron Karp's testimony was conclusory and, like Feliz, left the impression that he would, under oath, say whatever seemed necessary to protect his company and present it in the best possible light.

*iii. Fernando Ramirez*

Safety Coordinator Ramirez's testimony that he presented Acevedo and Stevenson with their signatures in the orientation/training book "in a nice way" was directly contradicted by Acevedo's testimony that Ramirez did not speak to him at all prior to presenting him with the discipline form to sign. [Tr. 426, 536]. Ramirez also testified that there were only five or six masons present for the February 9 training, whereas Respondent's records reflect that in fact sixteen or seventeen masons were present. [Tr. 516, 556; RX 7]. Ramirez admitted that he didn't remember exactly how many were present that day, because "it happened a while ago." [Tr. 603]. Ramirez also recalled that the training took place in a "parking lot," while Stevenson said that it had happened "in a field by the Conex" and Acevedo said that it happened "on the ground." [Tr. 131, 416, 515]. Furthermore, while Ramirez testified that his safety training presentation typically lasts about one hour and fifteen minutes, both Acevedo and Stevenson stated that it took no more than half an hour. [Tr. 131, 415, 515].

Because of these discrepancies, Ramirez's testimony regarding Respondent's safety training program is solely probative of how the trainings ought to be conducted, not how Ramirez actually conducted the specific training on February 9. Ramirez himself acknowledged

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<sup>9</sup> Documents responsive to the General Counsel's subpoenas duces tecum were produced on the morning of the first day of the hearing.

that many of the masons who come to work for Respondent are experienced masons who have “been on construction jobs a long time,” and Respondent’s witnesses emphasized over and over the importance of speed to Respondent’s masonry work. [Tr. 565, 614, 719, 784, 805, 889]. As was thoroughly established at the hearing, one of Respondent’s foremost mantras is that delays are expensive; anything that distracts the masons from laying block or brick is frowned upon. [Tr. 614, 719, 784, 805, 889]. Under these circumstances, it is reasonable to infer that Ramirez would truncate the safety presentation by tailoring it to only the essential equipment required for the particular job. At the Westshore job site, this would have meant training on the Miller ties, which both Acevedo and Stevenson recalled, while omitting all but a “don’t” instruction for tying off to scaffolding. [Tr. 133-136, 415-416, 558; GCX 20]. The ALJ therefore appropriately found that Acevedo and Stevenson had not been trained “hands on” on how to tie off to a scaffolding at the February 9 Westshore training, and correctly rejected Respondent’s argument that Acevedo and Stevenson were untruthful when McNett asked them about it on May 16. [ALJD 12:8-9]. Respondent’s attempt to renew this argument in its exceptions is not supported by the record. The Board should reject Respondent’s Exceptions 4 and 15.

*iv. Mario Morales and Brent McNett*

Foremen Morales and McNett testified that Morales notified McNett about seeing Acevedo and Stevenson working without harnesses by calling him on the phone. [Tr. 624, 766]. However, McNett testified that, in response to being so informed, he told Morales to “tell them it’s a good thing I didn’t catch them,” and instructed Morales to “make sure they [got] tied off properly.” [Tr. 624]. According to McNett, Morales replied that he was going to have them get tied off. [Tr. 624]. Morales, on the other hand, testified that he told McNett he had already told them to go get their harnesses, and that they were already on their way back from the parking lot,

and McNett said, “Okay, I’ll take care of it.” [Tr. 766]. Morales was not disciplined for not “making sure they tied off properly.” [Tr. 673].

Morales later testified that he actually was not “a hundred percent” sure whether he had spoken to McNett in person or on the phone, although in July of 2016, shortly after the events in question, he recalled in his affidavit that he had done so in person, in front of the Conex.<sup>10</sup> [Tr. 766-768]. Morales also volunteered that his “memory ain’t all that great.” [Tr. 769]. Morales was certain that he had talked to McNett, however, and that McNett had said he would “take care of it.” [Tr. 766, 768].

McNett testified that he tells employees that “AMS gets paid to lay the block/brick one time. If we have to go back and fix it, they do not get paid again.” [Tr. 614]. Acevedo testified that he has heard McNett say “all the time” to motivate the workers that if “anybody make[s] a mistake, they going to – you going to repair on your own time with no pay.” [Tr. 418]. Although counsel asked McNett to clarify who “they” was in the sentence, and McNett claimed that it was AMS, not the employees, there is no evidence that the employees ever received that clarification or understood there to be a distinction. [Tr. 614-615]. McNett did not seem overly concerned with ensuring that workers got paid for their time; he testified that he tells employees they will not be paid for Mondays unless they sign in on the Toolbox Talk sheet. [Tr. 612].

On the whole, Respondent’s witnesses presented self-serving and, at times thoroughly incredible testimony. To the extent their versions of events conflict with the documentary evidence and the more consistent testimony of Acevedo and Stevenson, ALJ Rosas was right to discredit them. [ALJD 4 n. 8, 4 n. 10, 5 n. 14, 5 n. 16, 6 n. 17, 10 n. 32, 11 n. 36, 11 n. 37, 12 n.

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<sup>10</sup> The “Conex” is the secure trailer used by Respondent’s employees to store their equipment when they leave the job site. [Tr. 129].

40, 13 n. 44, 13 n. 46, 14 n. 48, 14 n. 49]. Respondent's Exceptions 33 and 34 should, accordingly, be rejected, and his credibility resolutions should be adopted by the Board.

**B. ALJ Rosas properly found that both Feliz and McNett threatened employees with lower wages if the Union prevailed in the representation election, and that McNett regularly disparaged the Union. Respondent's Exceptions 9, 11, and 35 are without merit.**

As discussed above, it was appropriate for ALJ Rosas to discredit testimony by Feliz and Luna denying that Feliz threatened that masons' wages would go down if the Union won the upcoming representation election. As ALJ Rosas correctly found, Acevedo's testimony that Feliz said that, if they voted "yes for union," wages would "go down to \$18-something, \$18 and change," per hour was credible. [ALJD 10:27-37; Tr. 411]. Masons' wages at the time were at least \$22 per hour. [Tr. 411]. The ALJ therefore appropriately found that this statement by Feliz was an unlawful threat that wages would be reduced if Respondent's relationship with the Union persisted, in order to chill employees' support for the Union. [ALJD 17:11-15]. Respondent's Exceptions 9 and 35 must therefore be denied.

By the same token, the ALJ appropriately credited Acevedo over McNett and found that, as Acevedo testified, throughout their time on the UT job site, McNett would badmouth the Union, repeatedly asserting that the Union stole money from the masons, money that they deserved. [ALJD 11:6-8 and n. 37, 17:35-37; Tr. 407-408, 854]. These statements, made two or three times a week, echoed the anti-Union literature disseminated by Respondent at that time. [Tr. 408; GCX 7(c), 7(d), 7(g), 7(i) through 7(k)]. McNett admitted that the Union campaign came up during one of his routine Monday-morning "Toolbox Talks," and that he told employees his "theory on mason wages."<sup>11</sup> [Tr. 648]. Stevenson testified that McNett said at

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<sup>11</sup> The ALJ found that McNett made this statement at the May 16 Toolbox Talk. [ALJD 11:6-8]. The ALJ also found that this meeting was led by both McNett and Morales; Respondent's Exception 12 seeks to remove Morales from that finding. Both McNett and Morales were foremen of the UT job site, and that it is therefore plausible that

the Toolbox Talk that he “couldn’t say a whole lot about” the Union, but that it probably “won’t be good for wages” if the Union won. [Tr. 129-130]. The ALJ appropriately found that McNett therefore “essentially corroborated Stevenson’s version of what he said at the [May 16] meeting regarding the impact that unionization would have on wages,” thereby violating Section 8(a)(1) of the Act. Respondent’s Exception 11 is therefore wholly without merit and should be denied by the Board.<sup>12</sup>

**C. ALJ Rosas properly found that Morales witnessed Acevedo’s interaction with Union representative Bontempo and subsequently questioned Acevedo about it. Respondent’s Exceptions 6 through 8 are without merit.**

Although foreman Morales testified that he did not ask Acevedo any questions about his interaction with Union representative Michael Bontempo (Bontempo) at the UT job site, Morales stated that he had left the work site at 3:30 to get home on the day about which he was questioned. [Tr. 760]. Morales testified that he had received a call from Bontempo “after quitting time” and was already in the car, and that this was after the Notice of Election was posted on the job site. [Tr. 761]. However, Acevedo stated that on the day Bontempo came, they worked overtime, and Bontempo’s records indicate that the visit occurred no later than April 23. [Tr. 403, RX 58]. Bontempo visited the UT job site several times while Acevedo was still employed, so Morales was apparently remembering a different visit than the pre-petition visit about which Acevedo testified. His denial of the interrogation, specifically limited to the post-election visit he recounted, was therefore meaningless, and appropriately discarded by the ALJ. [ALJD 10 1-3 and n. 32]. In light of the additional credibility considerations described above, it was therefore correct for ALJ Rosas to credit Acevedo’s uncontested account of the pre-election

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Morales was visible at the head of the meeting while McNett did the lion’s share of the talking, and that a reasonable person would understand that the unlawful message was coming from both of them.

<sup>12</sup> Respondent did not file an exception to the ALJ’s conclusion of law that McNett made the alleged threat to wages and violated Section 8(a)(1) of the Act, as it did in Exception 35 with respect to Morales.

visit and his conversation with Morales the next morning. Respondent's Exceptions 6, 7, and 8 should be denied, and ALJ Rosas' factual findings regarding the Bontempo visit and its aftermath should be affirmed and adopted. For the reasons set forth in the General Counsel's Exceptions, the ALJ's subsequent legal conclusion regarding the coercive nature of that aftermath should be reversed, and a violation found by the Board based on the facts found by the ALJ.

**D. ALJ Rosas properly found that Respondent's suspensions and discharges of Acevedo and Stevenson violated Section 8(a)(1) and (3) of the Act and that Acevedo's discharge had an impact on the outcome of the representation election.**

*i. Standard of Review*

In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).<sup>13</sup>

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<sup>13</sup> The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

Evidence that may establish a discriminatory motive – i.e., that the employer’s hostility to protected activity “contributed to” its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee’s protected activities (*see, e.g., Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was “after her” because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (*see, e.g., Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee’s protected activities and the discipline (*see, e.g., Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer’s animus has led to unlawful actions (*see, e.g., Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, *passim* (2000), *enfd. mem.* 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer’s asserted reason for the employee’s discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (*see, e.g., Lucky Cab Company*, 360 NLRB

No. 43 (2014); *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), *enfd. sub nom. NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6<sup>th</sup> Cir. 1997)).

Once the General Counsel has established that the employee’s protected activity was a motivating factor in the employer’s decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 (“the Board’s construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation”). The employer has the burden of establishing that affirmative defense. *Id.*

Here, it is undisputed that Respondent had knowledge of Acevedo’s protected, concerted activity. Respondent’s Exceptions regarding the ALJ’s finding that it unlawfully suspended and discharged Acevedo and Stevenson ignore the ALJ’s well-supporting determinations regarding Respondent’s animus against the Union, its disparate treatment of Acevedo and Stevenson, and the close timing between of Acevedo’s vocal opposition to Feliz’s anti-Union campaign speech and the suspensions and discharges. [ALJD 9:25-37]. Based on these factors, and especially noting the strong evidence of disparate treatment, ALJ Rosas appropriately rejected Respondent’s *Wright Line* defense that it would have discharged Acevedo and Stevenson notwithstanding Acevedo’s union activities, and properly found that Respondent’s suspension and discharge of Acevedo and Stevenson violated Section 8(a)(1) and (3) of the Act. [ALJD

19:44-20:32]. The Board should reach the same conclusion, for the reasons further explained herein.

- ii. *ALJ Rosas properly concluded that Respondent selectively, i.e., discriminatorily, enforced its fall protection policy against Acevedo and Stevenson as compared to both other employees who were disciplined and other employees who were not disciplined by Respondent for fall protection violations, and thereby violated Section 8(a)(1) and (3) of the Act. Respondent's Exceptions 5, 17, 20 through 26, 28 through 32, 36, and 38 are without merit.*

Respondent's Exceptions to ALJ Rosas's conclusions regarding its suspension and discharge of Acevedo and Stevenson rely on three incredible premises: first, that its "zero tolerance" fall protection policy is limited only to situations where the violation is personally observed by one of Respondent's foremen or safety personnel; second, that the suspension of mason Bryant despite this rule was the result of an administrative fluke, involving several failures of foremen and safety personnel to communicate with each other for over a month; and third, that, in practice, the severity of a particular violation was never taken into account when deciding how the employee should be disciplined.<sup>14</sup>

ALJ Rosas appropriately rejected Respondent's contention that it merely adheres to the general contractor's safety policy's punishment recommendations when the general contractor reports a fall protection violation by one of Respondent's employees. ALJ Rosas correctly noted that this purported exception to its "zero tolerance" policy is not reflected anywhere in Respondent's written safety policy materials or its employee handbook. [ALJD 3 n. 6; RX 2, 3, and 4; GCX 2(a)]. Due to the nature of Respondent's work, it would appear that there is virtually always a general contractor above it; such a policy would create an enormous ambiguity for

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<sup>14</sup> In its Exception 16, Respondent also excepts to the ALJ's finding that the number on the upper right hand corner of the Employee Warning Notice indicates the "severity" of the offense. [ALJD 13:7-8]. Counsel for the General Counsel notes that the record testimony reflects that, like many forms of a similar nature, the numbers appear to refer to the progressive discipline step assigned to the offense, leading up to a "final." [Tr. 142, 429].

Respondent's employees, who routinely follow work from job site to job site, performing work pursuant to Respondent's relationships with different general contractors from site to site. In reality, Respondent's employees saw "zero tolerance" in print or heard it bandied about by foreman, but the practical application of it was non-existent, regardless of the status of the individual witnessing the violation. Employees like Brandon Carollo (Carollo), Richard Haser (Haser), and Bryant, were suspended, sometimes in front of coworkers, following their fall protection violations, regardless of whether they were reported to, or personally observed by, Respondent's foremen or safety staff.<sup>15</sup> [ALJD 14:21-15:17, 19:25-42; GCX 3, 4(a), 8(d) and (e); Tr. 434].

Tim Golphin amd Jaswin Leonardo

The sole employee discharged for a first documented fall protection offense prior to May 16, Tim Golphin (Golphin), had a more severe, compound violation of Respondent's safety policies than Acevedo and Stevenson. Golphin's violation was witnessed only by another rank and file employee, who reported it to McNett. [ALJD 15:1-3; Tr. 636-637]. Golphin's failure to tie off and his simultaneous talking on his cell phone were both noted on his Reason for Leaving Form, indicating that Respondent considered both infractions serious enough to factor into the decision. [RX 33]. Jaswin Leonardo (Leonardo), the employee discharged ten days after Acevedo and Stevenson, was observed not tied off, and also dismantling scaffolding unsafely, without using a ladder. [ALJD 19:39-42; RX 34]. Like Golphin, both reasons were given equal weight on his discharge paperwork. [RX 34]. It was therefore appropriate for the ALJ to find

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<sup>15</sup> Respondent's Exception 27 addresses the ALJ's oversight in his summation of the other fall protection violations in the record in omitting the undisputed fact that Acevedo, as well as Ramirez, witnessed Bryant's failure to attach his harness to his anchor at the Westshore project. Counsel for the General Counsel joins in this Exception, as it is relevant that, as both Acevedo and Ramirez testified, the incident demonstrated to Acevedo that Respondent was merely sending Bryant home for the day as punishment for his violation. [Tr. 434, 547-548].

that they “were each guilty of severe compound violations – failing to anchor their safety harnesses while simultaneously engaging in another safety violation.” [ALJD 19:39-42].

For this reason, it was appropriate for ALJ Rosas to conclude that Golphin and Leonardo were not valid comparators to Acevedo and Stevenson. Acevedo and Stevenson were discharged after attaching their harnesses to the incorrect part of the scaffolding on their first attempt, on the first morning that fall protection was required by their foremen – after the masons had already been working for over a week on the floor-to-ceiling columns on the interior of the UT fitness building. [Tr. 137-139, 149, 154, 158-159, 396, 621, 670-671].

Tim Bryant

Respondent relied on Feliz’s testimony to paint Bryant’s continued employment after his March 8 fall protection violation as a mere administrative oversight, the result of a misunderstanding between Feliz and Ramirez. Respondent then added an extra layer to the farce it was constructing, asserting that Westshore foreman Coy Hale (Hale) was also unaware of the violation because he was off the project that day at the doctor, tending to a broken foot, implying that had he been aware, he would have immediately discharged Bryant himself. [Respondent’s Exceptions at p. 24]. This theory falls apart with even minimal scrutiny. As discussed above, Feliz’s testimony was generally not credible as it related to the material events, and ALJ Rosas was right to discount it. [ALJD 15:10-14 and n. 54]. Although Feliz claimed that he thought Bryant had already been discharged for his fall protection violation, Bryant remained employed until April 19, over a month after the violation. [GCX 4(b)]. Safety Coordinator Ramirez knew that he had only suspended Bryant; Ramirez knew that he had emailed Feliz about the violation; Ramirez knew that he had received no response from Feliz with regard to what action to take.

Ramirez did not follow up with Feliz, and both Ramirez and Feliz continued to visit the job site every week or two to check the safety conditions. [Tr. 25, 545-546].

Even assuming Respondent's explanation of "the Bryant incident" is true, it amounts to the same thing: Respondent does not take safety as seriously as it purports to. Thus, it appears that Feliz and Ramirez did not check every employee's tie-off on every single visit, and overlooked the fact that Bryant was still working at the Westshore job site for over a month after his supposed "dismissal" and the "zero tolerance" policy was a sham. Further evidence of disparate treatment was reflected later in Ramirez's testimony. He stated, "every time I do an inspection and I found any problems or issues about anything, I report back to [Feliz by email]." [Tr. 572]. However, Ramirez could not remember whether he sent an email about Acevedo and Stevenson to Feliz, compelling further inferences that their discharges were handled outside the norm of Respondent's policies. [Tr. 572]. The ALJ therefore appropriately found that Bryant's mere suspension was a "glaring example of... disparate treatment" demonstrating clearly that there was no actual enforcement of "zero tolerance." [ALJD 15:10-13, 19:26-31].

*Brandon Carollo and Richard Haser*

Carollo, meanwhile, was given two chances before finally being discharged by McNett upon his third violation at the Bethune job site. Despite the contention in Respondent's Exceptions, the ALJ did appropriately cite Respondent's response to the Florida Department of Economic Opportunity Reemployment Assistance Program (unemployment compensation) to support his conclusion that Respondent did not actually hold its employees to the "zero tolerance" standard. Feliz himself wrote, in response to the question, "What are the consequences of violating the rule or policy (warnings, suspension, or discharge)?" "Warnings + Dismissal" [sic]. [GCX 8(c)]. When Phelps typed up the response, she wrote, in response to the

same question, “First and second warnings, third discharge.” [GCX 8(b)]. Respondent included the two previous warning notices Carollo had received with its response, and never once used the words “zero tolerance” or submitted its “zero tolerance” written policies to the State of Florida. [ALJD 19:31-36; GCX 8(b) and (c)].

Additionally, Richard Haser, another mason on the Bethune project, was not suspended until his second violation. The only record in evidence of *any* discipline Haser faced for fall protection violations is a handwritten note in a foreman’s log; although it was the same job site where Carollo was suspended on two occasions after his violations were reported by the general contractor, Hensel Phelps (HP), no HP forms or Respondent Employee Warning Notices were advanced by Respondent to demonstrate its consistent treatment of fall protection violations. It is permissible to draw adverse inferences against the party that would be in control of such evidence but fails to produce it, and the Board should draw that inference here against Respondent, as it appears the ALJ did. See, e.g., *Southern Pride Catfish*, 331 NLRB 618 (2000); *Seafarers (American Barge Lines)*, 244 NLRB 641 (1979).

#### Other UT Masons

The ALJ appropriately credited Acevedo and Stevenson in finding that the masons had not been wearing personal fall protection while working at elevations over six feet at the UT job site. [ALJD 13 n. 44]. Both Acevedo and Stevenson consistently testified that not only was May 16 the first day they were instructed to wear fall protection, but also that they had been working inside on the floor-to-ceiling columns for about a week and a half by that point. [Tr. 137-139, 149, 154, 158-159, 396, 621, 670-671]. It is undisputed that some of the first floor columns were already completed, and the masons were working on second floor columns on May 16. [Tr. 127, 396, 620]. On May 16, Acevedo noticed that the other masons were tied on to the

scaffold in different ways, “because everybody thinks different,” but that no one was tied up using the “cinnamon bun” method that McNett demonstrated. [Tr. 424-425]. It is undisputed that McNett did not change any other mason’s tie-off at the same time he corrected Acevedo and Stevenson. [Tr. 675-676].

Additionally, McNett testified that he had never seen an Activity Hazard Analysis for the UT job. [Tr. 701]. The AHA was the “training book” used by Respondent to record attendance at training by all employees and describing the particular safety considerations on a job. [GCX 2(a) through (c); Tr. 29-30]. As with the incomplete records regarding Richard Haser’s fall protection violations, the ALJ appropriately drew adverse inferences against Respondent for this lack of documentation and appropriately concluded that there no similar dedicated safety training occurred at the UT jobsite. [ALJD 8:1-2].

Taking all these facts into consideration, it was appropriate for the ALJ to conclude both that other masons worked at elevations above six feet without fall protection, and that Respondent “ignored others who were not in compliance” and thus “selectively enforce[d] the [fall protection] policy” against Acevedo and Stevenson. [ALJD 13 n. 44, 19:20-23, 19:44-47].

For these reasons, the ALJ appropriately found that Respondent was not enforcing its fall protection violation with the “zero tolerance” it trumpeted until Acevedo and Stevenson violated it. Acevedo was a visible, vocal Union supporter, and Respondent’s management seized upon the opportunity to cut a certain “yes” vote from the voter rolls. Furthermore, Respondent thereby sent an unlawful message to others who might support the Union by discharging Acevedo for a nominal violation of its suddenly “zero tolerance” fall protection policy. Respondent, on May 10, had just submitted its first *Excelsior* voter list. [CPX 2]. By 1:48 p.m. on May 17, Respondent had already removed Acevedo and Stevenson – and only Acevedo and Stevenson –

from the voter list and resubmitted it to both the Region and the Union. [CPX 3]. With the razor-thin margin of the vote to come – indeed, which ended in a tie prior to the decision of the ballots – it was more than reasonable for ALJ Rosas to conclude that the elimination of Acevedo’s “yes” vote had an outcome on the election, and that Stevenson was collateral damage to Respondent’s unlawful culling of one of the Union’s most certain supporters.<sup>16</sup> Respondent’s Exceptions 5, 17, 20 through 26, 28 through 32, 36, and 38 are meritless and should, accordingly, be denied by the Board.<sup>17</sup>

*iii. ALJ Rosas properly found that Acevedo told McNett that it was against OSHA regulations to tie off to scaffolding on May 16, and properly excluded Respondent’s citation to an OSHA advice letter as proof that it is always acceptable to tie off to scaffolding. Respondent’s Exceptions 13 and 14 are without merit.*

Respondent’s Exceptions 13 and 14 attempt to reframe this case as a referendum on whether Acevedo and Stevenson were in compliance with the fall protection policy. It is not. It is undisputed that Acevedo and Stevenson were, at some point on the morning of May 16, tied off “improperly,” as was reflected on their warning notices. [GCX 5, 6]. The allegations against Respondent center, instead, on its disparate punishment of Acevedo and Stevenson for that offense, for which a multitude of evidence was entered into the record and appropriately interpreted by ALJ Rosas.

As a threshold matter, Acevedo credibly testified that he argued with McNett about whether tying off to scaffolding was against OSHA regulations twice – first on the morning of

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<sup>16</sup> Respondent excepts to the ALJ’s failure to state that Respondent prevailed in the election due to the fact that 16 votes were cast for the Union, and 16 votes were cast against it. The outcome-determinative challenged ballots, some of which the ALJ recommended should be opened, preclude a finding that either party has prevailed until there is a final Board order in this case and challenged ballots are counted. Respondent cites no specific supporting authority for its Exception 1 at any point except for a blithe recitation that it is “as a matter of law and Board precedent,” and its Exception 1 should therefore be denied by the Board.

<sup>17</sup> Although Counsel for the General Counsel excepted to the same text of the ALJD that is the subject of Respondent’s Exception 18, it did so for different reasons than Respondent, which are set forth in greater detail in General Counsel’s Exceptions at p. 22.

May 16, when McNett came to correct his tie-off, and again at lunch time, when McNett and Ramirez came to send him home for the day. [Tr. 423-424, 428-429]. McNett confirmed that OSHA regulations were mentioned “later in the day.” [Tr. 622, 628]. Respondent’s Exception 13 is torpedoed by the testimony of Respondent’s own witness, and should be summarily denied.

Secondly, Respondent presented Acevedo with a copy of the 1996 OSHA advice letter cited to in its Exceptions during its cross-examination of him, in an attempt to undermine his confidence about the accuracy of his assertions to McNett on May 16, but Respondent never sought to admit that document into evidence. [Tr. 473-474]. The letter had no impeachment value whatsoever, as it did not have any probative value about Acevedo’s actual words spoken to McNett, and the ALJ appropriately disregarded it.

Even if the Board chooses to consider the 1996 OSHA advice letter, Respondent’s claims that the OSHA advice letter justifies its ordering employees to tie off to scaffolding was proper is undermined by the contents of the letter itself. In short, the letter states that not all scaffolding is created equal, and only scaffolds with appropriate counterweights in place will assist in the prevention of dangerous or fatal falls.<sup>18</sup> Specifically, it states that a scaffold anchorage system must be “capable of resisting the forces involved should there be a fall,” noting that the scaffold must counterweight 5,000 pounds per employee. As Acevedo testified, he was aware that the scaffold used on the interior of the UT job site had only “like 50 pounds on the scaffold, 50 bricks on each side,” and was therefore insufficient to tie off to: “So if I fall down, I would’ve taken the scaffold with me, all the scaffold and the bricks [we work laying] and the planks [we were standing on] with me.” [Tr. 475]. None of Respondent’s many witnesses contradicted this credible testimony about the weight on the scaffolding or any other factors contributing to its

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<sup>18</sup> A copy of the letter may be found online at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=22077](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22077).

structural integrity – which was irrelevant to the ALJ’s findings and conclusions in the first place. Respondent’s Exception 14 therefore must also be denied by the Board.

**E. Respondent’s reliance on *Jewel Bakery* is misplaced and inherently flawed. Respondent’s request that the entire Complaint be dismissed is without merit and should be denied.**

In *Jewel Bakery*, 268 NLRB 1326 (1984), the Board reversed an ALJ and dismissed a complaint. Respondent decontextualizes choice phrases from the decision to propose, at the end of its Exceptions brief, that the entire Complaint in this case be dismissed because the ALJD, in its opinion, evinces “a failure of [the] judge to explicitly review and meaningfully consider all of the relevant evidence.” *Jewel Bakery* does not stand for the proposition that an ALJD may be so riddled with typos as to warrant being completely thrown out, as Respondent essentially contends. Respondent’s argument for complete dismissal is unfounded and misconstrues Board precedent, and should be rejected.

The ALJ in *Jewel Bakery* wrote a decision, barely 1,500 words in length, addressing a Section 8(a)(3) discharge allegation and an independent Section 8(a)(1) allegation. The Board, finding that an examination of the entire record led it to alternate conclusions, dismissed both allegations, and, thus, dismissed the complaint. ALJ Rosas’ detailed discussion of the facts and well-reasoned analysis in his decision in this case runs to 20 pages before his analysis of the Objections to the representation election even begins. While Respondent may disagree with ALJ Rosas’ reading of the record and his interpretation of the evidence, it advances no convincing arguments that his credibility determinations, factual findings, or legal conclusions are against the clear weight of the evidence in the record. *Jewel Bakery* is inapposite and Respondent’s argument that full dismissal of the Complaint is warranted should be denied.

### **III. CONCLUSION**

Counsel for the General Counsel respectfully urges that the Board deny Respondent's Exceptions 1, 3 through 11, 13 through 15, 17, 20 through 26, 28 through 36, and 38 for the reasons described herein, and to adopt the full range of remedies set forth in the Order and Notice to Employees recommended by ALJ Rosas, with the amendments proposed by the General Counsel in its Exceptions. Counsel for the General Counsel further seeks any other relief the Board determines to be appropriate to remedy Respondent's unlawful conduct.

The General Counsel respectfully urges the Board to deny Respondent's Exceptions as opposed herein.

Dated: June 21, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document, Brief in Support of Counsel for the General Counsel's Answering Brief to Respondent Advanced Masonry Associates, LLC's Exceptions to the Decision of the Administrative Law Judge, was served on June 21, 2017 as follows:

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