

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH
DIVISION OF JUDGES**

HORIZON SCRIPTED TELEVISION, INC.

and

Case 28-CA-184635

CORAL GONZALEZ-INZA, AN INDIVIDUAL

Larry A. Smith, Esq. and Rodolfo Martinez, Esq.,
for the General Counsel.

Jonathan M. Turner, Esq. and Melvin L. Felton, Esq.
(Mitchell Silberberg & Knupp LLP),
for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Coral A. Gonzalez-Inza, an individual (Charging Party or Gonzalez-Inza), filed the original charge in Case 28-CA-184635 on September 20, 2016. The General Counsel issued the consolidated complaint on December 14, 2016 (complaint), and the Respondent Horizon Scripted Television, Inc. (Respondent or Horizon) answered the complaint on January 18, 2017.

This case involves Respondent's unlawful discharge of the Charging Party on April 5, 2016,¹ soon after the Charging Party alerted Respondent to a safety concern in Respondent's construction mill. Respondent denies the essential allegations in the complaint.

This case was tried in Santa Fe, New Mexico, on May 9 and 10, 2017. Closing briefs were submitted by the General Counsel and the Respondent on June 28, 2017. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties admit and I find that the Respondent, a corporation, is engaged in the business of developing scripted television programming at its facility in Santa Fe, New Mexico, where it annually purchases and receives goods valued in excess of \$50,000 directly from

¹ All dates are 2016 unless otherwise indicated.

suppliers outside the State of New Mexico. The Respondent further admits, and I further find, that its business activities were such that it meets the Board’s nonretail jurisdictional standards and it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(c); GC Exh. 1(h) at 1.)²

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II. UNFAIR LABOR PRACTICES

A. *The Respondent’s Operations*

10 The Respondent operates a production facility in Santa Fe, New Mexico. (Tr. 30.)
 Respondent produces a television series, “Longmire,” from this production facility. Longmire is
 a “modern western,” and recently completed its sixth season of production. (Tr. 31, 124.)
 Longmire’s annual production season generally runs for about 4 months, from mid-March to
 mid-July, and then breaks until the following year. (Tr. 40.) Each season, Respondent employs a
 15 production crew, divided into “on-production” and “off-production” groups and then broken
 down into various departments. (Tr. 33–34, 271–272.)

“Off-production” employees are members of the noncamera crew, such as set-builders
 and set-strikers. “On-production” employees are involved with the work performed while the
 20 cameras are rolling. (Tr. 271–272.) Individual crew members are further divided into core crew,
 who work full time during production season, and “day players,” who are called to work on an
 as-needed basis. (Tr. 65.)

The construction department, which is part of the off-production team and which hires
 25 both core crew and day players, employs about 26 people: prop makers, painters, plasterers,
 laborers, construction drivers, and medics. (Tr. 27–28.) While the construction department may
 work in a number of different locations throughout New Mexico, depending on the needs of each
 episode, the crew does most of its building at a permanent structure known as the “mill.” (Tr.
 56.)

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During the production season, Respondent employs anywhere from two to six medics to
 observe the construction crew and to provide medical assistance, as needed. (Tr. 31.) Respondent
 hires its medics pursuant to a collective-bargaining agreement with the International Alliance of
 Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the
 35 United States, its Territories and Canada, AFL–CIO, Local 480 (IATSE Local 480 or the union),
 with whom it has had a relationship throughout the years that Longmire has been in production.
 (Tr. 276.) The collective-bargaining agreement (CBA) between Respondent and IATSE Local
 480 incorporates provisions on health and safety, including that Respondent “will not require any
 employee to perform any work that the employee reasonably considers to present a clear and
 40 present danger to his or her health and safety,” and that Respondent “will strictly conform with

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent’s exhibit; “GC Exh.” for General Counsel’s exhibit; “GC Br.” for the General Counsel’s brief; and “R. Br.” for the Respondent’s brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

all recognized industry health and safety standards and all applicable health and safety rules and regulations.”³

5 Medics are responsible for performing first aid, CPR, defibrillation, and other medical services to the crew, as needed. Medics also help conduct safety meetings, known as “toolbox talks.” (Tr. 90.) Medics typically bring their own equipment to set and must be near the production area at all times. (Tr. 39–40.) Respondent employs strict criteria to determine how many medics must be present each day. (Tr. 222.) The requisite number of medics varies according to factors such as the following: the proximity of the construction crew to a hospital, 10 whether the crew is using power tools, whether the crew is working more than 6 feet off the ground, whether there are 10 or more people on location, whether the crew is using heavy machinery, and whether the crew is working near water. (Tr. 223–224.) There is always at least one “mill medic” working full-time during production season—though in Season 4, the Charging Party was one of at least two core medics working full time—and additional medics are called in 15 as day players, as needed.⁴ (Tr. 65–67.) Mill medics generally work about 55 hours per week. (Tr. 105.) Medics are expected to stay on site until the last worker leaves. (Tr. 112.)

In order to determine how many medics work on a given day, the general foreman, Mark Gutierrez (Gutierrez), a fellow union member and the Charging Party’s supervisor, assesses the 20 upcoming construction environment for his department and creates a calendar with a count of how many medics are needed. Gutierrez publishes this calendar on a board in the mill. The main or #1 mill medic then follows Gutierrez’ instructions and contacts additional medics to call in. (Tr. 57; R. Exh. 1.) There are about five different medics that typically work with the show. When Gutierrez determines that additional medics are necessary, the mill medic will first call 25 within the familiar medic group. If none of these known medics are available to come in, the mill medic will then turn to the union medic list. (Tr. 56, 127.) Sometimes Gutierrez is able to determine Longmire’s medic needs far in advance, and sometimes Gutierrez is unable to determine the show’s medic needs until just the day before a build. (Tr. 127.) On average, the show requires about three medics per day but in 2015 through at least April 5, 2016, Gutierrez 30 required at least two medics on Longmire each day. (Tr. 129.)

For the last three seasons of Longmire, Mark Gutierrez has worked as the construction department’s general foreman. (Tr. 27.) As general foreman, Gutierrez oversees the building of movie sets, and describes himself as the “go-to-guy” between the construction department and 35 the art department. (Tr. 29.) Gutierrez receives general direction from the art department, which provides him with a breakdown of each upcoming Longmire episode. Gutierrez then distributes

³ GC Exh. 3 at 24-25.

⁴ While management articulated a distinction between “core crew” and “day players,” I find there is no difference between the two in this case as applied to medics. Bethel, as Respondent’s Season 4 and 5 main or #1 mill medic, testified persuasively that he always called the same person—the Charging Party—when he needed a “#2” medic, Tr. 64–65, 128, and Respondent’s medic schedule projected a need for at least 2 medics almost every day in March and April. R. Exh. 1. As stated above, in 2015 during the entire Season 4 of Longmire, at least 2 medics were required everyday and Charging Party was treated as a full-time “core crew” member. Consequently, I find that the Charging Party was a full-time “core crew” member in her short stint as a Season 5 #2 medic, just as she was in her prior year, as Respondent expected her to be present daily. See R. Exh. 1.

that information—blueprints, drawings, locations—throughout construction, and oversees the ultimate completion of each project. (Tr. 28.) Though Gutierrez is general foreman of the entire construction department, he primarily works with the laborers, carpenters, and medics. Gutierrez coordinates with the other construction disciplines—such as paint and plaster—through their department heads. (Tr. 28.)

Gutierrez' direct supervisor is Robert Fritz (Fritz), Longmire's construction coordinator and another union member. Fritz' office is directly in the art department, which oversees the construction department. (Tr. 89, 216.) Fritz has been the construction coordinator for Longmire since Season 4. (Tr. 216.) In this role, Fritz takes the art department's design vision for each episode, proposes a budget for it, and once that budget is approved, oversees the department as they "build out" each episode. (Tr. 218.) In addition to directly supervising Gutierrez, Fritz also directly supervises Jessica Yackey (Yackey), Longmire's production buyer. In addition to her other accounting duties, Yackey also coordinates the construction department's timecard process. (Tr. 218.) Each week, Fritz codes employees' invoices and timecards, and then Yackey accounts for them. (Tr. 218.) Fritz has ultimate hiring and firing authority for the construction department, and Gutierrez assists with layoff decisions.⁵ (Tr. 55, 303.)

Fritz' direct supervisor is Pat McKee (McKee), the co-executive producer and unit production manager of Longmire. (Tr. 269.) McKee has been with the show since its first season, and has been in the television industry since 1982. (Tr. 270.) At the beginning of each season, McKee puts together a crew, the members of which may differ from season to season. (Tr. 271.) While the season is in progress, McKee works with the show's script to break it into a schedule, figure out where the locations are going to be, and figure out what equipment the show is going to need. (Tr. 271.) McKee oversees all production management during the making of each Longmire episode. (Tr. 271.)

⁵ I find that Fritz was also a supervisor under § 2(11) of the Act. The Act defines a "supervisor" as: "[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C.A. § 152(3) (West 2012); § 152(11). The traditional three-part test for determining supervisory status is: (1) whether the employee holds the authority to engage in any 1 of the 12 listed supervisory functions in § 152(11); (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds such authority in the interest of the employer. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573–574 (1994); accord *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The statutory functions listed in § 152(11) must be exercised with "independent judgment." *Oakwood*, 348 NLRB at 687. "[T]o exercise 'independent judgment,' an individual must at a minimum act . . . free of control of others and form an opinion or evaluation by discerning and comparing data," with a certain degree of discretion that rises above "the routine or clerical." *Id.* at 692–693. Once the individual exercises the function with the requisite "independent judgment," the Board will accord supervisory status to the putative supervisor. Here, it is undisputed, and I find, that Fritz exercises his statutory functions with independent judgment: Fritz holds general hiring and firing authority over the employees within the construction department, in addition to supervising Gutierrez and Yackey directly, and he discharges these duties as an agent and with the interest of his employer. See § 152(11); *id.*

From August 2, 2015, to July 30, 2016, Fritz and Gutierrez were paid by Respondent according to the terms of the February 1, 2016 collective-bargaining agreement between the Respondent and the union (CBA) at a rate individually negotiated between them and Respondent.⁶ The Charging Party and other medics working on Longmire received an hourly wage of \$28.93 under the same CBA.⁷

For the last three seasons of Longmire, Dave Bethel (Bethel), another union member, has been the show's main or #1 mill medic. (Tr. 125–126.) Bethel has worked with Longmire since the show's pilot, though he did not work with Longmire during season three. (Tr. 125.) As the "#1" mill medic on site, Bethel is responsible for carrying out Gutierrez' staffing orders to bring in additional medics after Gutierrez determines the show's need for a given day. (Tr. 127.) As Respondent's #1 mill medic during Seasons 4 and 5 of Longmire, Bethel would contact Gonzalez-Inza as the #2 mill medic from 2015 until April 5, 2016, when instructed by Gutierrez to bring in a second medic to Longmire. (Tr. 64–65, 128.)

Bethel works closely with Doug Acton (Acton). Acton was one of the first medics hired by Longmire's production team, and in turn, Acton referred Bethel to take Acton's place as #1 mill medic on Longmire starting in 2014. Bethel is paid as a medic under the CBA. The two are good friends and long-term business partners. (Tr. 86, 150.) Acton is also a mill medic who has worked with Longmire both on and off-production, and had been a "key medic" with Longmire in the past. (Tr. 56, 223.) However, during Seasons 4 and 5 at least, Acton had more of an outside role with Longmire, as a kind of liaison between upper production management and the medics hired by Respondent pursuant to the CBA.⁸ (Tr. 130.) Though Bethel is responsible for referring specific additional medics like Gonzalez-Inza, Acton may have participated from time-to-time in conversations about medics with Respondent's upper management and Bethel in 2015 and 2016. (Tr. 223.) Acton is the president of IATSE Local 480, and was the president during Season 5 of Longmire. As stated above, Gutierrez, Fritz, Bethel, Acton, and Gonzalez-Inza are all members of the IATSE Local 480 union. (Tr. 56, 94, 133, 220.)

1. Horizon's disciplinary procedures

Horizon did not proffer a written disciplinary policy for its construction department. Gutierrez testified that, typically, the company will attempt to counsel a delinquent employee in order to change the undesirable behavior. (Tr. 38.) If a disciplinary issue persists, Gutierrez may call in Fritz, who speaks to people "on a case-by-case basis." (Tr. 90.) Gutierrez testified that a persistent problem may go from Fritz "to production and higher up from there, if need be." (Tr. 89.) Beyond these one-on-one conversations, Gutierrez was not familiar with any kind of progressive discipline process. (Tr. 38–39.) McKee also confirmed that for Longmire, Horizon "[does] not really suspend people;" they prefer to counsel employees about "getting better." (Tr. 294.) For example, McKee testified that he was once asked to go to an anger management class. (Tr. 294.) Gutierrez admitted that termination is not the first outcome when there is a disciplinary issue. (Tr. 38.)

⁶ GC Exh. 3, at 79.

⁷ Id. at 82.

⁸ Acton did not testify at this hearing, though General Counsel attempted to contact him. (Tr. 215.)

McKee testified that Longmire does not like to “terminate” employees; rather, they will typically just decline to bring a particular person back after a season ends. (Tr. 278.) Fritz ultimately has hiring and firing authority for the construction department, and Gutierrez assists with layoff decisions.⁹ (Tr. 55, 303.) Gutierrez, however, admits that he has disciplined laborers and carpenters on Longmire by terminating them. (Tr. 54–55.)

B. *The Charging Party*

As stated above, Gonzalez-Inza is a medic. She worked for two seasons as the #2 mill medic in Longmire’s construction department, in 2015 and then again in 2016. (Tr. 39, 64–65, 128, 154.) Gonzalez-Inza’s last day working as a medic on Longmire was April 2, 2016, and on April 5, 2016, she was notified that her employment had ended. (Tr. 154.) During Season 4, which ran from mid-March 2015 through mid-July 2015, Gonzalez-Inza was a full-time #2 mill medic and worked through the entire season. (Tr. 45, 64.) During Season 5, which ran from mid-March 2016 through mid-July 2016, Gonzalez-Inza worked for part of the season as the “#2” mill medic until April 5 when she received word of her discharge. (Tr. 64–65, 128.)

1. Gonzalez-Inza’s protected, concerted activity

On Thursday, March 31,¹⁰ Gonzalez-Inza entered the mill from the loading-dock entrance. (Tr. 155.) As she passed the stake bed truck, Gonzalez-Inza noticed two prop-makers, Martin Patterson (Patterson) and Billy Wolfsblood (Wolfsblood), engaged in hot-wire Styrofoam cutting. (Tr. 155–156.) Hot-wire Styrofoam cutting involves using a heated wire to break down large blocks of Styrofoam into smaller blocks, which the construction workers then cut and shape into different props. (Tr. 11–12, 36–37.) Because this procedure melts the Styrofoam and creates a toxic gas, employees are required to wear personal protection equipment (PPE’s), a kind of breathing protection, during the process. (Tr. 11–12, 37, 156, 158.) Gonzalez-Inza noticed that neither prop-maker was wearing protection. (Tr. 159.) She also noticed that another PPE-less employee, utility technician Alex Twibell (Twibell), had gotten very close to the cutting—“almost on top of [it]”—and was talking to Wolfsblood. (Tr. 156.) Gonzalez-Inza testified that she took a deep breath, grabbed Twibell by the arm, and pulled him away from the cutting and onto the stake bed truck. (Tr. 157.) It was Gonzalez-Inza’s un rebutted testimony that, as she was telling Twibell why his actions had been dangerous, Gutierrez walked onto the dock and said, “is everything okay, Coral?” Gonzalez-Inza responded, “it is now.” (Tr. 157.) Gonzalez-Inza testified that Gutierrez then walked away toward the lunchroom, “cuss[ing] a little” about how two men had stopped working when they saw him.¹¹ (Tr. 157.)

⁹ Gutierrez testified that Bethel and Acton have exclusive authority to lay off construction medics, and that he, Gutierrez, has no authority in this regard but may express “preferences” as to whether medics come back to the show. This testimony was not credible, for reasons that will be discussed later in the decision.

¹⁰ Gutierrez testified that he thought this incident happened on the last Tuesday in March, but Gonzalez-Inza and Twibell more reliably agreed that it took place on Thursday, March 31.

¹¹ Twibell essentially confirmed Gonzalez-Inza’s telling of the events, though he did not mention whether he had been speaking to Wolfsblood. Twibell could not remember whether Patterson and Wolfsblood were wearing PPE’s, but confirmed that he had not worn a mask. (Tr. 120–122.)

Gonzalez-Inza then walked after Gutierrez, but was intercepted by Gertrude East (East), a painter on the set. (Tr. 157.) East agreed that the situation was very dangerous, and the two workers took Gutierrez aside. (Tr. 157–158.) East told Gutierrez that neglecting to wear masks “can kill you,” and that she had turned on the exhaust fans in the room. Gonzalez-Inza explained that she had just pulled Twibell out of harm’s way and that the cutters also weren’t wearing PPE’s. (Tr. 158.) Gonzalez-Inza testified that Gutierrez cut them off to respond, “I’ll tell them now,” before turning his back to the women and heading toward the platform. Gonzalez-Inza described Gutierrez’s tone toward them as “flippant.”¹² (Tr. 159, 161.)

Gutierrez testified that he then went to the platform to find the workers, and saw Patterson, who had stepped outside to smoke a cigarette, without his mask. Gutierrez asked Patterson, “are you wearing your mask?” Patterson responded, “yeah, when I’m cutting.” Gutierrez then reminded Patterson to keep his safety glasses and his mask on. (Tr. 74–76.)

On May 5,¹³ OSHA visited Horizon’s mill in response to the Styrofoam cutting incident. (Tr. 66–67.) Gutierrez testified to being surprised that OSHA had come to the mill. During the visit, Gutierrez spoke with Bethel and Acton, trying to “point a finger on what had happened.” (Tr. 78.) Gutierrez testified that it was during this group conversation that he recalled the incident with Gonzalez-Inza. (Tr. 78.) Gutierrez testified that, after the visit, OSHA’s only noted concern was that a switch plate in the back of the room had been left uncovered. “Nobody got in trouble.” (Tr. 104.) The parties stipulated during trial that Gonzalez-Inza had submitted an anonymous complaint to OSHA on April 27, though it is uncertain whether this anonymous complaint led to the May 5 visit. (Tr. 267.)

2. Alleged concerns with Gonzalez-Inza’s employment

Horizon Managers Gutierrez, Fritz, and McKee all testified that, during seasons four and five, Gonzalez-Inza exhibited some “behavioral issues” that caused them varying degrees of annoyance and concern. McKee referred to Gonzalez-Inza as “a bit of a character.” (Tr. 286.)

a. Timecard processes

Gutierrez testified to a recurring issue with Gonzalez-Inza’s timecards. In Season 4, Gutierrez handled the timecard process. This involved handing out timecards to each employee, who would visually inspect their cards, confirm their hours for the week, sign off, and hand the cards back to Gutierrez. Gutierrez would then turn all the cards in to accounting, and the construction buyer, Jessica Yackey, would “handle the rest.” (Tr. 44–45.) Gutierrez testified that Gonzalez-Inza preferred to personally deliver her timecard to the accounting department.¹⁴ Gutierrez testified that this was “fine,” but that “it just took a really long time to get back.” (Tr.

¹² Gutierrez testified to saying “I’ll go check on them, they both have masks, I’ll go see what’s going on.” He confirmed that East said, “you shouldn’t breathe in those fumes,” and testified that the conversation took “less than a minute.” (Tr. 68, 75, 108.)

¹³ Though there was some confusion amongst witnesses as to the precise date of the OSHA visit, the counselors stipulated during trial that OSHA came on May 5 to inspect the mill. (Tr. 267.)

¹⁴ Gonzalez-Inza opined that she preferred to personally hand in her timecards because she wanted to minimize the number of people who had access to her personal information. (Tr. 186.)

45.) Gutierrez also testified that, occasionally, Gonzalez-Inza would turn in her timecard without having gotten all the necessary signatures. Accounting would not accept an incomplete timecard, and Gutierrez testified that Gonzalez-Inza would then be “really hard to get in touch with.” (Tr. 88.) Gutierrez testified that accounting had, on at least one occasion, reached out to him to ask, “do you guys not understand your process?” (Tr. 88.) Gutierrez also testified that he spoke to Bethel and Acton about Gonzalez-Inza’s timecards “maybe four” times during Season 4, (Tr. 61.), but that similar issues carried on through Season 5.¹⁵ (See Tr. 46.) Gutierrez has never seen someone discharged for timecard issues. (Tr. 51.)

10 Fritz also testified that Gonzalez-Inza was “adamant about handling all her own paperwork.” (Tr. 228.) According to Fritz, in Season 5, the accounting department wanted the medics’ timecards to be handled as a group so that Fritz could sign off on them all at once. However, Gonzalez-Inza would carry her timecard into accounting herself, and “was really hard to get ahold of around payroll time.” Fritz testified that this created a “nuisance” for him, because he would then need to come back to accounting to manually sign Gonzalez-Inza’s timecard. Fritz testified that Gonzalez-Inza had been counseled about this issue during Season 4 (though he did not name the person who counseled her), and that the department had also spoken to Bethel about it. (Tr. 228.) Gonzalez-Inza denied that she had ever been counseled about a timecard issue, and Bethel was neither asked to corroborate Respondent’s account nor independently did so. (Tr. 162–163.)

25 Gonzalez-Inza testified that she understood the timecard procedure to be the following: On Friday, the company would give timecards to the employees. The employees would look over and then sign the timecards. Employees would then give timecards back to “whoever was available at the time . . . [Yackey], [Gutierrez], [Fritz] if he was available,” including taking the timecard directly to payroll, if need be. Gonzalez-Inza further testified that nobody ever communicated to her that her process was problematic. (Tr. 178–181.)

30 On Sunday, April 3, Gonzalez-Inza went directly to the accounting office to turn in her weekly timecard. She could not find Yackey, so she instead went to Kim Smith (Smith)’s office, to submit her timecard directly to payroll. Smith took the timecard, but was annoyed with Gonzalez-Inza. Smith told Gonzalez-Inza that she “wasn’t to be bothered” and that all timecards should be submitted to Yackey. Gonzalez-Inza felt that Smith had been “abrupt” with her, so she reported the incident to Bethel by telephone.¹⁶ (Tr. 180–183, 188.) That same day, April 3, Smith sent the following email to Yackey:

¹⁵ Gutierrez was not credible when he testified to Gonzalez-Inza’s paperwork process, as his characterization of this issue changed throughout his testimony. At the beginning of his testimony Gutierrez noted that there were only a “few incidents” in Season 4 and that Gonzalez-Inza’s methods were “fine,” but toward the end of his testimony he noted that the timecards had been a “weekly issue.” (Tr. 44, 88.)

¹⁶ Smith and Gonzalez-Inza apparently had prior negative interpersonal interactions. Indeed, Smith seems to be a notoriously disagreeable person. – Bethel also referred to her as “very mean” and mentioned that he had once called Smith to ask about his hourly rate: “she kind of climbed all over me.” (Tr. 141, 143.)

[To: Yackey],

[Gonzalez-Inza] turned in her timecard today...interrupting my Sunday, complaining that you weren't around Saturday to take it. I had a conversation with you about having them in on Friday...on Thursday. Was this communicated to her? Her timecard is a disaster as well. Again, this woman is a HUGE problem. Should I speak to Fritz? [or Bethel]? Or just go ahead and [sic] have a conversation with Brendan? Thank you!

[From: Smith], Payroll¹⁷

Yackey forwarded this email to Fritz, also on April 3, adding the following:

Hi Fritz!

Here is the email I almost sent...

I will refrain because I don't want to give you a headache Monday but feel free to respond to "looney bin"....

[To: Smith],

[unsent email] You are welcome to speak with [Bethel] as he is the medic who requested her timecard Friday and received no response. As far as not being able to find me, I worked Saturday and my office has not moved. On the subject of having a day interrupted, you are on the clock Sunday's working are you not?? I however am not being paid for my time today and do not understand why bringing a payroll accountant a timecard on a work day is a major inconvenience. Medics and drivers are separate departments and there really isn't anything else we can do but offer to turn in their paperwork with ours as a courtesy.

[From:] Jessica Yackey
Construction Buyer¹⁸

Fritz' April 3 response to Yackey was "[m]ake [Bethel] deal with her."¹⁹ Fritz later testified that, from this email thread, he understood Yackey to be communicating that "once again, [Gonzalez-Inza] had not followed the agreed-upon procedure for the timecards."²⁰ (Tr.

¹⁷ R. Exh. 3.

¹⁸ Id.

¹⁹ Id.

²⁰ During trial, the parties' attorneys stipulated that Fritz did not "know" what Gonzalez-Inza knew about payroll, but that he had a "belief" about what Gonzalez-Inza knew about payroll. Fritz' belief was that Gonzalez-Inza knew that payroll did not like to be disturbed on Sunday, because payroll works with confidential information. (Tr. 237, 240–241.)

Respondent Counsel and Gonzalez-Inza had a back-and-forth during trial about whether Gonzalez-Inza knew that payroll's desk paperwork was confidential, and Gonzalez-Inza insisted that she couldn't speak to confidentiality because she was not looking at the paperwork on payroll's desk. (Tr. 181–183.) However, Gonzalez-Inza did note that on one of the days that she went to Smith's office, she saw an open drawer with her own sensitive information and handwriting, and that seeing this information made Gonzalez-Inza uncomfortable. (Tr. 131.)

241–242.) Fritz also testified that he intended his “make [Bethel] deal with her” comment as an instruction that Yackey should ask Bethel to counsel Gonzalez-Inza.

5 The following Monday, April 4, Fritz testified that he told Acton that it was a problem for Gonzalez-Inza to go into the payroll trailer, and asked Acton to counsel Gonzalez-Inza against doing so. Fritz testified that he did not ask Acton to fire Gonzalez-Inza. (Tr. 246, 248.)

b. The Lake Espanola incident

10 On Saturday, April 2, one day before the Kim Smith incident, the Longmire construction crew was building floating boat docks on Lake Espanola. That week, the crew had a special safety meeting about the hazards of working with water, during which they talked about the heavy tool bags they would be moving near the lake, the procedures for retrieving anyone who fell, and procedures for hypothermia. (Tr. 80.) Gonzalez-Inza was one of the medics stationed on
15 that location, and on this day she remained in her car, facing the lake.²¹ (Tr. 82–83.) Gutierrez testified that he was driving in between locations on the lake property, and he drove up behind Gonzalez-Inza’s car. From his car, Gutierrez could see that Gonzalez-Inza had some kind of foil visor or blanket across her windshield. Gutierrez pulled up next to Gonzalez-Inza’s car, waved to get her attention, and gestured that Gonzalez-Inza should keep her eyes on the lake. Gutierrez
20 testified that Gonzalez-Inza gestured back to him in a way that said, “yes, I’m looking, I’m looking.”²² (Tr. 80–83.) Gutierrez testified that he was concerned because, as far as he could see, Gutierrez-Inza’s foil visor covered her entire windshield. When he returned to the mill, Gutierrez brought up the incident with Bethel and said that Gonzalez-Inza had been “sleep[ing]” in her car. Bethel spoke to Gonzalez-Inza, who denied that she had been sleeping. Gonzalez-Inza told
25 Bethel that her foil visor had been up because some of her medicine is temperature-sensitive, and she needed to keep her medical kit cool.²³ (Tr. 146.) Bethel relayed this to Gutierrez, who responded, “that’s fine, her kit can be in the shade, but her eyes have to be on my guys.”²⁴ (Tr. 83–84.)

30 Gutierrez has never seen someone discharged for simply being in their car. However, during Season 5, Gutierrez was involved in the discharge of a construction employee who had been found sleeping in their car when they should have been at work. (Tr. 53–54.)

²¹ Gutierrez testified that medics watch from their cars on location “all the time.” (Tr. 50.) Gonzalez-Inza testified that nobody has ever told her not to remain in her car during the workday. (Tr. 164.)

²² Gonzalez-Inza essentially confirmed Gutierrez’ telling of the events, though she noted that nothing in Gutierrez’ manner indicated to her that she should not be in her car. She also added that Gutierrez passed her in his car twice: once as she was in the car putting up her visor, and again as she was standing outside of the car. (Tr. 198.)

²³ Bethel testified that he believed that Gonzalez-Inza had her foil visor up to keep the medicine from getting hot. (Tr. 146.) Additionally, Gonzalez-Inza testified that it was her common practice to have the visor up, and that she tells people “all the time” that it is important to keep the medicine cool. (Tr. 203.)

²⁴ Gutierrez testified that Bethel initiated this conversation. However, Bethel credibly testified that Gutierrez broached the conversation with Bethel first. Additionally, during trial, Gutierrez did not mention his comment to Bethel about Gonzalez-Inza having been “sleeping” in her car, indeed, Gutierrez’s testimony about his hand-gesture conversation with Gonzalez-Inza indicates that he knew she had been awake. (See Tr. 82–83.)

c. Talking to other employees about non-work matters

Employees on the Longmire set are allowed to talk to their coworkers, even about nonwork subjects. (Tr. 46–47, 67.) Gutierrez testified that Gonzalez-Inza had a habit of engaging other employees in non-work discussions. (Tr. 46.) Gutierrez testified that this talkative behavior started in Season 4 and continued through Season 5. (Tr. 47.) Gonzalez-Inza’s chattiness “never came down to any kind of discipline,” but Gutierrez mentioned that he had a couple of conversations with her about “just let[ting] the guys work.” Gonzalez-Inza denied that she had ever been counseled for chattiness. (Tr. 162–163.)

Gutierrez has never seen someone discharged for talking to other employees while working, but has seen people discharged for slowing down productivity. (Tr. 52.)

d. Telling employees when to go on break

Gutierrez testified that, on two occasions, he witnessed Gonzalez-Inza call for break time. Gutierrez noted that there is a difference between calling for “roll-up”—which is the point at which workers begin rolling up their tools and cleaning their work stations—and calling for “break”—which is the point at which workers go home, anywhere from 15–45 minutes after roll-up. (Tr. 48–49.) Gutierrez said that he personally witnessed Gonzalez-Inza calling for break—when it was actually time to roll up—at least once in Season 4 and at least once in Season 5. (Tr. 49.) Gutierrez referred to this as a “nuisance,” as it was not her job to call for either of those things, and because Gonzalez-Inza’s inappropriately calling for roll-up created a “mad dash” to get out of the building. (Tr. 93–94.)

When questioned about these incidents, Gonzalez-Inza denied them and confirmed that she does not have the authority to tell people when to go on break. However, she testified that when a foreman would yell “break,” employees in the mill would yell back “break” if they were on the other side of the building (“we heard it, we understand, we’re going on break”). Gonzalez-Inza said that if she heard someone yell “break,” she would echo it back. (Tr. 164, 166–167.)

Gutierrez has never seen someone discharged for telling workers when to go on break or roll up. (Tr. 53.)

e. Miscellaneous items

In addition to the items above, management also testified to a number of behavioral concerns and annoyances with Gonzalez-Inza, including the following:

- Fritz testified vaguely as to exact dates that he once saw Gonzalez-Inza offer inappropriate safety advice to an employee. A worker was using a table saw with his safety glasses on his head, not on his eyes. Fritz testified that he saw Gonzalez-Inza yell at the worker mid-cut to put on his glasses, which, Fritz said, is dangerous because “all your attention should be focused on the cut.” Fritz said that after seeing this, he counseled Gonzalez-Inza not to approach anyone using a table saw or any saw while the cutting was in process; she should wait to advise

the employee to put their safety glasses on after the cut had been made. Fritz did not recall precisely how Gonzalez-Inza responded, but he believed that she was receptive to his warning. (Tr. 226-227.) However, Fritz testified that he later saw Gonzalez-Inza similarly approaching an employee who was working with a chop saw. Fritz said that he asked Bethel to counsel her because Gonzalez-Inza was “not [his] employee” and because he wanted Bethel to “take responsibility” for Gonzalez-Inza so that she would adjust her behavior. (Tr. 256-257.)

- McKee testified that once at the beginning of Season 4 in 2015, Gonzalez-Inza brought him a steak out of the blue at the end of a day offsite at a ranch. (Tr. 274.)
- Fritz testified that Gonzalez-Inza would sometimes take Gutierrez’s parking spot, which was “only a problem when [he] would come back and not have a parking spot.” (Tr. 230.)
- Fritz testified that, “[on] more than one occasion I would drive in with my window rolled down and I do [sic] hear her shout, ‘Fritz is here,’ like ‘run.’” (Tr. 230.)

Fritz testified that he did not counsel Gonzalez-Inza on the parking incident and on the “Fritz is here” comments because he “didn’t want to acknowledge what she was doing,” though the events bothered him, and he mentioned them to Bethel. (Tr. 231.) Bethel was not asked to corroborate any of these accounts.

C. Gonzalez-Inza’s Disciplinary History and Termination

Gutierrez testified that, prior to April 2016, Gonzalez-Inza had been “counseled” for talking to other employees about nonwork matters and Gutierrez recalled that Fritz had “talked to her” about this one incident. Gutierrez was not aware of any discipline for the time card issues, “just verbal discussions” (though he did not note any specific discussions). Gutierrez was not aware of any other disciplinary incidents with Gonzalez-Inza. (Tr. 63–64, 66.)

Conversely, Gonzalez-Inza testified that she never received any verbal warning, written warning, suspension, or discharge prior to April 2016. She testified that Bethel once told her to “please move your car,” but that nobody from management ever counseled her about talking to other employees. Additionally, Gonzalez-Inza confidently noted that on April 5, production supervisor Brandon Finnigan (Finnigan) called Gonzalez-Inza about a discrepancy on her timecard, but she corrected the discrepancy right away. (Tr. 162–163.)

Fritz testified that, toward the end of Season 4 in 2015, he spoke with Acton about his concerns with Gonzalez-Inza’s behavior. Fritz said that he asked Acton not to invite Gonzalez-Inza back to Season 5, “as a personal preference.” (Tr. 224–225, 232.) However, in response to counsel’s later question, “had you ever asked [Acton], at any time, to take [Gonzalez-Inza] off the show?” Fritz answered “no.” (Tr. 251.) Fritz testified that he revisited this conversation with Acton and McKee at the beginning of Season 5.²⁵ Fritz said that he was not specific with Acton at that time as to what his behavioral concerns were.

²⁵ Gutierrez testified that he “couldn’t recall” whether he had said anything to Acton or Bethel about whether to bring Gonzalez-Inza back for Season 5. (Tr. 86.)

When Gonzalez-Inza came back to Longmire as the same #2 mill medic in Season 5,²⁶ Fritz testified that Bethel told him it was because she was the only medic available: “there were a lot of shows going on in Albuquerque at the time,” and there were a limited number of union medics. (Tr. 233.) Fritz testified that he then asked Bethel to counsel Gonzalez-Inza about not being as “interactive” as she had previously been. (Tr. 233.) However, according to Fritz, these unspecified behavioral issues continued through Season 5.²⁷ (Tr. 234.)

Gonzalez-Inza’s last scheduled day of work was Saturday, April 2. (Tr. 172.) On Sunday, April 3, Gonzalez-Inza spoke with Bethel on the telephone and requested the upcoming medic schedule. Bethel told Gonzalez-Inza that they did not yet have it. On April 4, Bethel repeated by text that he did not yet have the schedule. On April 5, Bethel called Gonzalez-Inza and told her, “they [Horizon’s managers Fritz and Gutierrez] don’t want you to come back.” (Tr. 162.) During the following conversation, Bethel told Gonzalez-Inza that he heard she was “problematic” and that there were “personality issues.” (Tr. 173–174.)

Bethel recalled that Acton, “who dealt mostly with [Respondent’s managers in] the production office,” told him to communicate to Gonzalez-Inza that the show would not be bringing her back. Bethel never heard anything directly from the company, but Acton told him that the problem was “personality issues” and that “it came down from [Horizon’s managers] above.”²⁸ (Tr. 130, 138.) Bethel testified that he told Gonzalez-Inza the following:

It was pretty much what – I was kind of just relaying what [Acton] and I had, you know, talked with her on the loading dock. It was – you know, I was told that you’re no longer working on the show and, you know, apparently from – and I – I think I let her know it was – [Acton] said “personality issues” with some people,

²⁶ Gonzalez-Inza’s first day of Season 5 employment was March 10. (GC Exh. 2, *passim*.)

²⁷ Fritz was not credible when he testified that he asked Acton not to invite Gonzalez-Inza back for Season 5, when he testified that Bethel said Gonzalez-Inza was “the only medic available,” and when he testified that he asked Bethel to counsel Gonzalez-Inza at the beginning of Season 5. First, Fritz directly contradicted himself by saying that he asked Acton to remove Gonzalez-Inza “as a personal preference” and by then denying that he had ever done so. Second, Respondent did not ask Bethel to corroborate any of this testimony, though Respondent crossed Bethel twice. Third, Bethel credibly testified that nobody ever asked him for a specific medic by name or ever asked that a specific medic be “[a]id off” from the show. (Tr. 137.) Fourth, Gonzalez-Inza credibly testified that she was never counseled for these “behavioral issues.” Fifth, though there was no testimony directly contradicting Fritz’ alleged Season 5 medic shortage, Bethel credibly testified to the stability of Longmire’s medic-hiring process. According to Bethel, the average number of daily construction medics in Season 5 was three, and Longmire has a pool of about five medics who typically work with the show. If none of the familiar medics are available, Bethel turns to the union list. (Tr. 127–129; R. Exh. 1.) This testimony indicates that Longmire would typically have a surplus of medics available, should one of their regular five medics need to be terminated.

²⁸ Bethel later clarified that he understood “it came down from above” to refer either to Horizon’s production office or to the construction department. Bethel testified that he and Acton are “pretty good friends” and he would have assumed that Acton would have given him “the scoop on who, what, and why,” but that Acton did not give him any further details. Bethel did not press the subject, and just assumed that Gonzalez-Inza had been “let go” by Horizon. (Tr. 149–150.)

and I – I didn’t tell her what people or about what because I didn’t know. But like I say, I knew I needed to call her so I’m sure she was scheduled, you know, probably the next day [on April 6].²⁹ But I don’t remember what more she asked me because I – like I said, I really didn’t have all of the information, and I, you know, still don’t. (Tr. 140.)

Gonzalez-Inza confirmed that Bethel did not provide her any specifics as to why she was not wanted back. (Tr. 173–174.)

In response, at 11:55 a.m. on April 5, Gonzalez-Inza sent an email to Horizon’s management³⁰ entitled “Non-Grounds for dismissal.” Gonzalez-Inza wrote, “I have been informed that I have committed a number of infractions that result in not working 2016 ‘Longmire’ as a medic. It is particular [sic] disturbing that I have not been spoken to, in order, to hear my part of the events: various assumptions have been made, incorrectly.”³¹ Gonzalez-Inza then described the payroll visit events of April 3, mentioned the timecard discrepancy conversation with Finnigan, and discussed the April 2 lake car visor incident. Gonzalez-Inza concluded, “I fail to see how these unaddressed/unresolved, minor incidents can it be [sic] grounds for dismissal. I am deeply concerned & saddened by the treatment.”³² Gonzalez-Inza opined that at this time, she also believed the Styrofoam incident also had something to do with her termination, though she did not mention it in her email because she had already reported that event to management. (Tr. 175–176.)

That same day at 12:19 p.m. on April 5, McKee forwarded Gonzalez-Inza’s email to Finnigan with the note, “WTF is this about?”³³ Finnigan responded, “[t]rying to find out... Waiting for a return call from Fritz.” Half an hour later, at 12:54 p.m., Finnigan followed up with:

Just talked with Fritz... It seems as though Fritz and [Gutierrez] have had several discussions with [Gonzalez-Inza] over the course of last season and this season in regards to what her expectations were and what was being done and shouldn’t be done.

Fritz is calling [Gutierrez] to get more information in regards to what transpired this last weekend out at the lake.

As far as her discrepancy on her time card... that is something minor and doesn’t pertain to this situation. She put down an incorrect out time compared to the out time provided by the department on their Daily Log.

²⁹ Indeed, Respondent’s calendar confirms that there were three medics slated to work for April 7. (R. Exh. 1.)

³⁰ Including McKee, Brad Davis (Davis), Finnigan, and Fritz.

³¹ R. Exh. 4.

³² Id.

³³ R. Exh. 6.

Should I get Labor Relations involved?³⁴

The next morning, at 7:11 a.m. on April 6, Gutierrez sent the following email to Fritz:

5 Hey [Fritz], so It looks like were having some of the same issues we've had on
 season 4 of Longmire concerning the Medic [Gonzalez-Inza]. The procedure of
 medic's time [sic] and time cards has not changed since last season. I know I've
 had this discussion with [Gonzalez-Inza] and [Bethel] our lead medic and any of
 10 our day player medics to turn In [sic] hours through Roberta to avoid any
 confusion or conflicts. This process hasn't seemed to be a problem with anyone,
 but [Gonzalez-Inza]. She seems to avoid phone calls or any contact at weeks end
 when its time [sic] to turn in hours and complete our paper work process.

15 Season 5 of Longmire [sic] and we are having this same discussion. Our
 procedure has not changed. In fact, it is a lot easier since we now have our
 construction buyer [Yackey] who is on full time and makes herself fully available
 to turn receive hours and have time cards filled out and signed in a timely manner.
 Since this has been an ongoing problem I do believe that [Gonzalez-Inza] would
 20 rather not comply with our process and the wishes of myself, yourself, [Yackey],
 the accounting department, and her immediate supervisor Dave Bethel our lead
 medic. The excuse of "she couldn't be reached" only happens when hours are
 due. [Gonzalez-Inza] has showed that she would rather be in full control of her
 own time and personally walk in her own time card directly to accounting and not
 25 comply with our process. As you can see this slows our department down and
 takes time away from our work schedule and our department focus. I thought that
 I would make you aware of this issue and distraction since you are my supervisor
 and coordinator of the construction department and also the person who reviews
 and signs off on our time cards. Thank you,

30 Mark Gutierrez
 General Forman [sic] of Construction Dept.³⁵

35 McKee testified that he was surprised to receive Gonzalez-Inza's April 5 email, because
 he had no prior knowledge of the events she mentioned, and because he prefers to have a role in
 the hiring or firing of personnel. (Tr. 279, 282.) After receiving Gonzalez-Inza's email, McKee
 asked Fritz to explain management's dissatisfaction with Gonzalez-Inza, and then consulted with
 Horizon's labor relations department.³⁶ (Tr. 285–286.) McKee testified that labor relations
 confirmed Horizon was "within [their] rights" not to call Gonzalez-Inza back, because she had
 40 been a daily hire and there was no contractual guarantee of future employment. (Tr. 285–286,
 292; GC Exh. 3.) McKee also testified that, during subsequent conversations about Gonzalez-

³⁴ Id.

³⁵ R. Exh. 5.

³⁶ I reject as untrue and inadmissible hearsay Fritz' further testimony on this subject that Acton told Fritz that he had taken Gonzalez-Inza off the Longmire schedule, and that he was going to put her "on another show." (Tr. 250.)

Inza's termination, no conversation about safety complaints ever came up. (Tr. 290.) McKee said that the Styrofoam incident did not come up until the OSHA visit in May. (Tr. 291.)³⁷

5 Gutierrez testified that, after Gonzalez-Inza was not called back to Longmire, other day-player medics were brought in to fill her place. However, Gutierrez's testimony on this point was somewhat erratic. The exchange was as follows:

General Counsel: There was still a need for a medic day player after [Gonzalez-Inza] left, right?

10 **Gutierrez:** Not on that set.

General Counsel: Okay, so after [Gonzalez-Inza] left, was another – another medic was brought in, wasn't there?

Gutierrez: Yes.

General Counsel: And how many medics were brought in?

15 **Gutierrez:** I'd have to look at a calendar. I can't answer that.

General Counsel: But she was essentially replaced with another medic; is that right?

Gutierrez: I don't know.

General Counsel: Was there another day player brought in?

20 **Gutierrez:** There was [sic] a few day players that were brought in. Some people are there. Some people start on other shows. It's hard to, you know . . . a medic will be on our show one day and they'll go work on another show another day and we won't see the medic. Day players are hired on a day to day basis. Somebody to fill the spot for a medic that was needed. I can't say that she was replaced with someone else. I don't know who that would have been. I can't answer that.³⁸

25 (Tr. 66-67.)

1. Respondent's shifting characterization of Gonzalez-Inza's discharge

30 In its November 2016 response to the investigation of the instant charge, Respondent denied that Gonzalez-Inza was discharged, claiming instead that she had been "laid off" pursuant to Respondent's CBA with IATSE Local 480.³⁹ Respondent noted that, had "[Gonzalez-Inza] been discharged for disciplinary reasons, she would have received a letter of discipline."⁴⁰ Respondent claimed that Gonzalez-Inza was replaced for "various performance-related issues for which she was counseled on multiple occasions during the [prior season]," and noted that
35 "[w]hile the Company arguably had cause to discipline or discharge [Gonzalez-Inza], it refrained

³⁷ In response to Respondent's question about whether McKee could have ordered Gonzalez-Inza reinvited to the show, McKee said: "I would have been able to do it. . . I did not [because] these are the guys [Fritz and Gutierrez] that I've given this job to do . . . there's a lot of work to be done here. And if you come back to me and say, this—this person's working here is not moving us in the direction of getting the work done . . . I've got to support them, unless I see something that feels unjust, capricious, some behavior on their part that—that—that doesn't pass my smell test. But if it's not that, I'm not, I—you know, I'm not going to—I'm not going to sort of mandate who they hire." (Tr. 287–288.)

³⁸ Gutierrez' calendar confirms that he had indicated a need for three medics every day for the eight work days following April 5. (R. Exh. 1.)

³⁹ GC Exh. 2 at 1.

⁴⁰ Id.

from doing so . . . [i]nstead, it was hoped that her layoff would effectively address the Company's concerns."⁴¹

5 In its January 2017 answer to the complaint and notice of hearing, Respondent alleged that Gonzalez-Inza was not unlawfully discharged, but was "laid off for legitimate business reasons."⁴² At hearing and in its June 2017 posthearing brief, Respondent claimed that IATSE Local 480, not Respondent, laid off Gonzalez-Inza. (Tr. 21–24, 55–56; R. Br., passim.)

10 It should be noted that, throughout the hearing, no person claimed direct responsibility for terminating Gonzalez-Inza. Gutierrez testified that he does not know why Gonzalez-Inza was not terminated for her previous infractions, and incredibly, testified that he does not know precisely why she was terminated on April 5. (Tr. 41–42, 70–71.) However, when asked whether he has "knowledge" about why Gonzalez-Inza was terminated, Gutierrez credibly mentioned that he has knowledge about "a few incidents that happened," including, most significantly, the following: "issues with turning in of timecards," "I guess going into the Accounting Department, turning in paperwork that was not signed off in the construction department," "*there was a situation with the Styrofoam cutting that was brought to my attention,*" and "there was the incident at the lake." (Tr. 42–43.) (Emphasis added.)

20 Bethel recalled that nobody from Horizon's management ever told him to lay off Gonzalez-Inza, but Bethel forcefully added that Acton had gotten the order from somebody "above" in Horizon's upper management. (Tr. 130, 137–138.) McKee testified that he had been surprised by Gonzalez-Inza's departure, and was annoyed that he had not been consulted. (Tr. 297.) Less believable, only Fritz testified that a specific person, Acton, had made the decision to stop calling Gonzalez-Inza to the show. (Tr. 250.) Acton, however, was not present at trial.

II. CREDIBILITY

1. Adverse inference

30 Neither the Respondent nor the General Counsel called Acton to testify at this trial, though General Counsel attempted, and failed, to produce him. Respondent argues that Acton's absence warrants an adverse inference against General Counsel:

35 The General Counsel did not call Acton to testify, even though it was readily apparent . . . that Acton was a key witness to establish any admissions by Horizon supervisors or managers regarding what Acton was asked to do and why, and whether such admissions revealed that unlawful considerations factored into the request made to Acton. Horizon respectfully submits that the General Counsel's failure to call Acton gives rise to an adverse inference that no such admissions would have been made."⁴³

⁴¹ Id. at 2.

⁴² GC Exh. 1(h) at 3.

⁴³ R. Br. at 21–22.

Respondent then concludes:

5 [T]he absence of testimony from Acton still leaves only the unrebutted testimony from Fritz as to what Acton was asked to do with Gonzalez-Inza. Horizon respectfully submits that Fritz' uncontroverted testimony on this issue; i.e., that Acton counsel Gonzalez-Inza regarding timecard compliance and to refrain from disrupting the production accountant's work over the weekend, is therefore conclusive.⁴⁴

10 Respondent's adverse-inference theory lacks introspection. Acton is Respondent's employee of many years and coordinates medics, in a supervisory capacity,⁴⁵ from within the production department. For both of these reasons, Acton may reasonably be assumed to be favorably disposed toward Respondent. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (internal citations omitted), *enfd.* 861 F.2d 720 (6th Cir. 1988) ("while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management"). Further, that Respondent employs Acton makes it particularly within Respondent's power to call Acton to trial. I therefore draw an adverse inference against Respondent, as "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue." *Id.*

25 Thus, I infer that if Acton had been called, he would have testified adversely to the claim that he, Acton, ignored Fritz' directive and unilaterally terminated Gonzalez-Inza. Respondent did not provide any explanation as to why Acton did not testify, did not show that Acton was unavailable, and did not demonstrate that it tried to subpoena him to hearing. See *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); accord *Graves v. United States*, 150 U.S. 118, 121 (1893) ("if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable").

35 More importantly, as discussed herein, I reject Respondent's argument that Acton remained a key mill medic or key witness after 2014 when Bethel took Acton's place as #1 medic on Longmire. To say Acton is this missing link for the General Counsel's case in chief is to ignore my factual findings that Bethel was Gonzalez-Inza's immediate supervisor who received any complaints about her from Gutierrez and Fritz. Acton remained as only the union president, a liaison between Longmire medics and upper management, and friend of Bethel but outside the chain of command over Gonzalez-Inza in 2015-2016.

⁴⁴ *Id.* at 22–23.

⁴⁵ Though Acton is not an admitted supervisor under the Act.

2. Hearsay

Fritz' testimony was that Acton claimed responsibility for dismissing Gonzalez-Inza from the show.⁴⁶ Bethel's testimony was that Acton said he received the termination order "from above." Though only General Counsel objected during Fritz' testimony, while Respondent did not similarly object during Bethel's testimony, both statements constitute hearsay. Fed.R.Evid. 801(d)(2).

Bethel's statements are admissible because as Gonzalez-Inza's immediate supervisor, they are an admission against interest under Fed.R.Evid. 801(d)(2) by an opposing party supervisor.⁴⁷ Alternatively, Bethel's statements are admissible due to the lack of objection by opposing counsel. Fed.R.Evid. 103(a); *Keller Construction, Inc.*, 362 NLRB No. 153, slip op. at 8 (2015), citing *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979). Further, hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than "the slightest amount of other evidence." *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("the Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance").

This is the proper circumstance. For the reasons above and the additional reasons outlined below, I admit and credit Bethel's testimony that Acton claimed the order came "from above." Similarly, even if Fritz' statements were admissible, I reject as untrue Fritz' testimony that Acton claimed unilateral responsibility for terminating Gonzalez-Inza.

3. Witness credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony; the witness' demeanor; and 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. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enf. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above at 622.

Gonzalez-Inza testified in a straight-forward no-nonsense manner confident in her abilities as a #2 mill medic and part-time safety team leader at Respondent until April 5. Gonzalez-Inza was much more believable than Gutierrez and Fritz as to her spotless employment record at Respondent and her recollection of key events in 2015 and 2016.

⁴⁶ I reject Fritz' statement that Acton claimed responsibility for dismissing Gonzalez-Inza from the show as untrue. See Section II.3. at p. 21 hereafter.

⁴⁷ Gutierrez admits that the management hierarchy above Gonzalez-Inza was Bethel as her immediate supervisor, Gutierrez as construction foreman, Fritz as Gutierrez' manager, and McKee as upper management for Respondent. (Tr. 64-65, 83-84, 128, 180-183, 231, 241-242, 256-257; R. Exh. 3; and R. Exh. 5.)

Under foreman Gutierrez and supervising medic Bethel in the management/employee dynamics, all employees were very reluctant to forcefully state in a clear voice that Gonzalez-Inza was terminated or laid off for any proper cause. Indeed, beyond management's word of mouth, there is sparse evidence against the General Counsel's position that Gutierrez or Fritz discharged Gonzalez-Inza *after* March 31 for her protected concerted activity *on* March 31. I further find that in this case Respondent has created a culture of silence where nonsupervisory employees are encouraged not to bite the hand that feeds them for fear of losing their jobs.

Fritz was a highly suspect witness when it came to the subject of Gonzalez-Inza's discipline and discharge. As discussed in fn. 27, *supra*, Fritz first claimed that he asked Acton not to rehire Gonzalez-Inza "as a personal preference," and then claimed that he never made any such requests to Acton. Fritz additionally attributed to Bethel the statement that, but for the Season 5 medic shortage, Gonzalez-Inza would not have been rehired in 2015. However, Bethel's testimony about Longmire's medic-rotation process effectively rebutted Fritz' statements. Longmire employed an average of three medics a day and relied on a group of about five known medics for their shortlist. When those known medics were unavailable, Bethel would turn to the union medic list to find personnel. Had Gonzalez-Inza been as problematic during Season 4 as Fritz implied, Longmire appears to have had ample opportunity and staff to replace her, yet they invited her back for Season 5. Further, the fact that Respondent never asked Bethel to corroborate the statement it attributed to him, despite crossing Bethel twice, detracts from the weight I afford to Fritz' testimony. The large absence of confirming evidence in support of Fritz' statements combined with a wealth of evidence contradicting his testimony forces me to reject his lone testimony that Acton had made the decision to stop calling Gonzalez-Inza to the show.

Conversely, I find highly credible Bethel's statement that Acton claimed the termination came "from above," and I credit it against Fritz' conflicting testimony that Acton claimed responsibility. First, Bethel's statement is rationally probative in that Bethel had no reason to lie in testifying against the interests of his employer of 7 years. Indeed, the Board has long recognized that testimony by current employees which contradicts employer statements "is apt to be particularly reliable," because such employees are testifying directly against their pecuniary interests. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 10 (2016), citing *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), *enf. denied* 607 F.2d 1208 (7th Cir. 1979). Second, the statement is corroborated by other events surrounding Gonzalez-Inza's discharge, discussed *infra*. Finally, Bethel supplemented his statement by mentioning his surprise that Acton did not give him "the scoop on who, what, and why" Gonzalez-Inza was being terminated. Acton's opaqueness gives rise to the inference that Acton either did not know why Gonzalez-Inza was being let go as Acton has been out of the loop of Longmire's everyday events since having been replaced by Bethel as the #1 mill medic in 2014 or, the reason was not one Acton felt he could share with Bethel.

I also do not credit Gutierrez's testimony that Bethel and Acton have exclusive authority to lay off construction medics, and that he, Gutierrez, has no authority in this regard but may express "preferences" as to whether medics come back to the show. The Longmire construction community was clearly small and tight-knit, with the supervising staff freely sharing employee concerns and annoyances amongst themselves (such as Gutierrez false complaint to Bethel that Gonzalez-Inza was "sleep[ing]" in her car on April 2). Management's presentation of its own

disciplinary hierarchy was convoluted, particularly when it came to medics—for example, Gutierrez testified that he would typically counsel delinquent employees, and that Fritz would also counsel employees if a problem persisted. Fritz testified that at times he counseled Gonzalez-Inza, but also testified that he usually asked Bethel to counsel her because he wanted Bethel to “take responsibility” for her. Bethel, a supervising medic and Gonzalez-Inza’s immediate supervisor,⁴⁸ confirmed none of this, and Gonzalez-Inza denied it all. Further, Finnigan’s April 5 email to McKee, sent *after* Gonzalez-Inza was terminated, notes that “[i]t seems as though Fritz and [Gutierrez] have had several discussions with [Gonzalez-Inza] over the course of last season and this season in regards to what her expectations were and what was being done and shouldn’t be done,” and “Fritz is calling [Gutierrez] to get more information in regards to what transpired this last weekend out at the lake.” This post-termination discussion about reasons to terminate Gonzalez-Inza indicates a collaborative process between Gutierrez and Fritz. Coupled with the fact that Respondent provided absolutely no documentation demonstrating any disciplinary actions ever taken against Gonzalez-Inza, I do not credit the notion that Respondent’s firing processes are as rigidly procedural as Gutierrez indicated. I find that it is much more likely that Respondent’s small community of supervisors freely discuss their employee complaints, and in this case Gutierrez and Fritz took all collective problems they could construct after the March 31 protected concerted activity by Gonzalez-Inza to combine and reach a decision to terminate her.

I further find that Acton has been out of the loop of Longmire’s everyday events since having been replaced by Bethel as the #1 or “key” mill medic in and after 2014. As a result, statements attributed to Acton by Fritz and Gutierrez are not believable and rejected particularly given the overwhelming evidence that whenever Respondent’s management had concerns about Gonzalez-Inza in 2015 and 2016, management would go to Bethel as Gonzalez-Inza’s immediate supervisor rather than Acton. (Tr. 64-65, 83-84, 128, 180-183, 231, 241-242, 256-257; R. Exh. 3; and R. Exh. 5.)

III. UNLAWFUL DISCHARGE OF GONZALEZ-INZA

The question is whether the Respondent terminated Gonzalez-Inza in violation of § 8(a)(1) of the Act. Under § 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. 29 U.S.C. § 157. Adverse actions, such as termination,⁴⁹ taken against an employee because of this protected activity, violate § 8(a)(1) of the Act. *Id.*

In the mixed-motive context of this case, the Board applies the burden-shifting analysis set forth in *Wright Line* to determine whether an employee’s discharge is unlawful. 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must prove by a preponderance of the evidence that the employee’s protected activity was a motivating factor in discharging the employee. The General Counsel’s evidence

⁴⁸ Though not an admitted supervisor under the Act.

⁴⁹ Respondent repeatedly attempts to draw a distinction between being “terminated” and being “laid off,” but both constitute adverse employment action that may violate the Act. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962); *In re TKC*, 340 NLRB 923, 925 (2003), *citing id.*

must show that the employee engaged in protected activity, that the employer knew about the protected activity, and that the employer harbored animus toward the protected activity. *Club Monte Carlo Corp.*, 280 NLRB 257, 261–262 (1986), *enfd.* 821 F.2d 354 (6th Cir. 1987). Proof of an employer’s motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); *Ronin Shipbuilding*, 330 NLRB 464 (2000).

If the General Counsel successfully demonstrates that the protected activity was a motivating factor for the discharge, the burden then shifts to the employer to show that it would have discharged the employee even absent the employee’s protected activity. *Wright Line*, above at 1089. An employer does not meet its burden merely by showing that it had a legitimate business reason for its action. Rather, it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016), citing authorities. If the evidence establishes that the proffered reasons for the employer’s action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The complaint paragraphs 4–6 allege that since March 1, the Charging Party has engaged in discussing concerns of safety issues with other employees at Respondent’s workplace and that these protected concerted activities resulted in Respondent discharging her on April 5 in violation of Section 8(a)(1) of the Act.⁵⁰ Specifically, the General Counsel alleges that on March 31, Gonzalez-Inza engaged in concerted activity by “protecting employees from hazardous fumes, and complain[ing] of a workplace safety hazard,”⁵¹ and that she was accordingly terminated shortly thereafter.⁵² Respondent concedes that Gonzalez-Inza engaged in protected concerted activities, but denies that these activities related to her termination. Respondent further argues that it cannot be held responsible for Gonzalez-Inza’s termination, because the union, not Respondent, terminated the Charging Party.⁵³

A. *The General Counsel’s Prima Facie Case*

1. Gonzalez-Inza engaged in protected, concerted activity

To be protected under § 7, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). The concept of “mutual aid or protection” focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). “Concerted” activity “directly involves the furtherance of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612, 613 (1980). The Board has long recognized that discussing safety concerns with coworkers and

⁵⁰ GC Exh. 1(c) at 2.

⁵¹ Tr. 36–37, 120–122, 155–161; GC Exh. 1(c) at 2; R. Br. at 19.

⁵² *Id.*

⁵³ See R. Br. at 19–20.

employers is protected, concerted activity, particularly when those safety concerns are similarly expressed in the employer’s collective bargaining agreement. See *M.D.V.L., Inc.*, 363 NLRB No. 190, slip op. at 1, fn. 2 (2016), citing authorities; *Wabash Alloys*, 282 NLRB 391, 391 (1986), citing *City Disposal Systems*, 465 U.S. 822 (1984).

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Gonzalez-Inza engaged in protected, concerted activity under the Act—and behaved in accordance with her protected CBA rights—when she pulled Twibell away from the Styrofoam fumes, when she discussed her safety concerns with East, and when she reported her safety concerns to Gutierrez on March 31. See General Counsel Exhibit 3 at 24–25; see also *Wabash Alloys*, above (finding that an employee’s “invocation of a right provided by the collective-bargaining agreement qualifies this conduct to be concerted activity protected by Section 7 of the Act”). Respondent concedes that Gonzalez-Inza’s actions constituted protected, concerted activity.⁵⁴

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2. Respondent knew about Gonzalez-Inza’s protected, concerted activity

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Respondent denies that it knew about Gonzalez-Inza’s protected, concerted activity, for two reasons: first, Respondent argues that only Gutierrez knew about the Styrofoam incident, and Gutierrez was not involved in the decision to terminate Gonzalez-Inza. Second, Respondent argues that Respondent *itself* did not terminate Gonzalez-Inza; rather, by Acton, the union unilaterally terminated its own employee. I reject both of these arguments.

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First, Gutierrez is an admitted supervisor under § 2(11) of the Act.⁵⁵ It is well established that a supervisor’s knowledge of protected, concerted activities is imputed to an employer in the absence of credible evidence to the contrary. *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs Int’l Services*, 335 NLRB 972, 973 (2001). As previously discussed, I do not credit Gutierrez’ statement that he has no authority to fire construction medics. Longmire supervisors freely shared their employee concerns with one another among their small construction community, and Gutierrez’s posttermination communications with Fritz and Finnigan provided two of the reasons (paystub procedure and the car incident) for which Respondent later claimed that Gonzalez-Inza had been terminated.

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Second, for reasons previously stated, I do not credit Fritz’ testimony that Acton claimed responsibility for terminating Gonzalez-Inza, and I credit Bethel’s testimony that Acton claimed the decision came “from above” within Respondent’s management. While Acton and Bethel may have communicated the firing to Gonzalez-Inza, the termination order originated from within Respondent with Fritz and Gutierrez. Further, McKee, who is also an admitted supervisor under the Act,⁵⁶ confirmed that he had final authority over Gonzalez-Inza’s termination. When asked whether McKee could have ordered Gonzalez-Inza re-invited to the show, McKee responded: “I would have been able to do it . . . I did not [because] these are the guys [Fritz and Gutierrez] that I’ve given this job to do . . . I’ve got to support them.”⁵⁷

⁵⁴ R. Br. at 19.

⁵⁵ GC. Exh. 1(h) at 2.

⁵⁶ GC Exh. I(h) at 2.

⁵⁷ It is for this reason that Respondent’s final argument—that Gutierrez testified to telling nobody about the Styrofoam incident—misses the mark. Gutierrez did not want to work with Gonzalez-Inza for a

Given the rebuttable presumption that a supervisor's knowledge of protected activities is imputed to the employer, and given Gutierrez's active role in Gonzalez-Inza's termination process, I find that the General Counsel has carried its burden by a preponderance of evidence in demonstrating that Respondent had knowledge of Gonzalez-Inza's protected activities. See *Club Monte Carlo Corp.*, 280 NLRB at 261.

3. Respondent harbored animus toward the protected, concerted activity

"The General Counsel must make a showing sufficient to support a conclusion that [animus toward] the protected conduct was a motivating factor in the employer's decision to suspend or discharge." *Id.* at 261–262. Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence. *Lucky Cab Co.*, 360 NLRB 271, 274–275 (2014); *Abbey Transportation Services*, 284 NLRB 698, 701 (1987). Persuasive evidence of pre-textual reasons for discharge strongly supports a finding of animus. *Relco Locomotives, Inc.*, 358 NLRB 229 229 (2012), *enfd.* 734 F.3d 764 (8th Cir. 2013); *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004).

First, when asked if he had knowledge "as to why [Gonzalez-Inza] no longer works [at Respondent]," Gutierrez testified that he knew about "a few incidents that happened," including the following: "issues with turning in of timecards," "I guess going into the Accounting Department, turning in paperwork that was not signed off in the construction department," "*there was a situation with the Styrofoam cutting that was brought to my attention*," and "there was the incident at the lake." (Emphasis added.) It is telling that Gutierrez saw fit to include the protected activity—but not some of the actual reasons given for the Charging Party's discharge, such as her chattiness—in this list of "incidents" surrounding Gonzalez-Inza's termination. Currently, the Board does not require that General Counsel demonstrate a causal "nexus" between an employee's protected activity and an employer's adverse action. *Nichols Aluminum, LLC*, 361 NLRB No. 22, slip op. at 9, fn. 7 (2014), *set aside* 797 F.3d 548 (8th Cir. 2015). However, Gutierrez' open admission of a causal link between the Styrofoam incident and the discharge suffices to demonstrate such a nexus. See *North Hills Office Services, Inc.*, 346 NLRB 1099, 1166 fn. 11 (2006).

Further, I conclude that the strong evidence of pretextual reasons for discharge supports a finding of animus toward Gonzalez-Inza's protected activity. I analyze the evidence below.

number of reasons, among them Gonzalez-Inza's protected activity, and Gutierrez contributed to the termination decision. McKee essentially admitted to rubber-stamping his employees' decision, and the Board does not protect uninvolved employers who green light the animus-laden decisions of their inferiors. See *Dobbs Int'l Services*, above at 973 (whether the general manager knew of employees' protected activity was immaterial insofar as the supervisors, who were involved in the adverse action, knew of employees' protected activity).

a. *Shifting characterization of the termination*

Horizon's prehearing position was that Gonzalez-Inza was laid off for performance-related reasons as a conscious alternative to discipline or discharge:

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R. Email (2016): [Gonzalez-Inza] was replaced on "Longmire" on April 2, 2016 due to various performance-related issues for which she was counseled on multiple occasions during the last season of the Production (Season 5), as well as the prior season (Season 4) . . . [w]hile the Company arguably had cause to discipline or discharge [Gonzalez-Inza], it refrained from doing so as described earlier. Instead, it was hoped that her layoff would effectively address the Company's concerns.⁵⁸

Horizon's posthearing position is that IATSE Local 480 laid off Gonzalez-Inza⁵⁹ for reasons unknown, but speculative:

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R. Br. (2017): Acton's decision to lay off Gonzalez-Inza from Longmire constituted a legitimate exercise of discretion on the Union's behalf . . . the General Counsel's failure to call Acton leaves all parties to speculate as to what Acton meant by his statement that Gonzalez-Inza was "not wanted back."⁶⁰

These shifting positions are indicative of animus. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (finding animus in the employer's raising a new explanation for discharge at hearing, and noting that "an employer's shifting explanation for disciplinary action taken supports an inference of pretext").

b. *False explanations for the termination*

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Respondent's reasons for discharging Gonzalez-Inza are that the Charging Party: (1) refused to comply with timecard procedure, which culminated in a tense encounter with payroll; (2) distracted other workers; (3) maintained a cover on her car windshield while the Charging Party stayed inside her vehicle; and (4) told other employees when to go on break.⁶¹ I analyze each explanation below.

i. Timecard processes

Gutierrez testified that he was unaware of any discipline for Gonzalez-Inza's timecard discrepancies, but that there had been "verbal discussions." Additionally, Respondent's witnesses shifted in their characterization of Gonzalez-Inza's behavior. Gutierrez began his

⁵⁸ GC Exh. 2 at 2.

⁵⁹ It is irrelevant that Respondent's CBA did not guarantee future employment to day players such as Gonzalez-Inza. As Respondent acknowledges, a discharge may be permissible by the terms of a collective-bargaining agreement, but unlawful if done with a motive that violates the Act. See R. Br. at 24.

⁶⁰ R. Br. at 21, 24.

⁶¹ GC Exh. 2 at 2.

testimony by noting that there had been “a few incidents” with Gonzalez-Inza’s timecards in Season 4, and ended his testimony by noting that the timecards were a “weekly issue,” requiring that he speak to Bethel and Acton “maybe four” times, and that this behavior continued into Season 5. Additionally, Fritz testified that he brought up Gonzalez-Inza’s dismissal both at the
 5 end of Season 4 and at the beginning of Season 5. And yet, despite these overwhelming behavioral issues and repeated discharge conversations, Gonzalez-Inza was invited back for Season 5. Fritz did note that he requested that Bethel counsel Gonzalez-Inza to be “less interactive” than she had previously been.

10 If the Season 4 timecard issue had been as problematic as management claimed, Gonzalez-Inza would have at least been counseled, if not disinvited from Season 5. However, management was unable to name a single specific incident of timecard counseling, and the Charging Party was invited back for Season 5. Indeed, Smith’s April 3 email suggests that, on that date, nobody had yet spoken with the Charging Party: “I had a conversation with you
 15 [Yackey] about having [the timecards] in on Friday . . . on Thursday. Was this communicated to her?”⁶² Fritz’ response was “[m]ake [Bethel] deal with her,”⁶³ which is still not yet evidence of direct counseling, and Respondent did not ask Bethel to corroborate. This evidence bolsters Gonzalez-Inza’s testimony that she never received any verbal warning, written warning, suspension, or discharge prior to April 2016.

20 Finally, Gutierrez’ April 6 email to Fritz indicates that the Charging Party’s timecards did not become a material issue until *after* she was terminated on April 5. Gutierrez wrote,

25 [S]o It [sic] looks like were [sic] having some of the same issues we’ve had on season 4 of Longmire concerning the Medic Coral . . . I thought that I would make you aware of this issue and distraction since you are my supervisor and coordinator of the construction department and also the person who reviews and signs off on our time cards.⁶⁴

30 The tone of this email, and the notion that Gutierrez would need to make Fritz “aware of this issue,” directly contradict Fritz’ testimony that Gonzalez-Inza’s behavior had been a repeated “nuisance” to him throughout Season 5. Further, raising the issue to Fritz on April 6 should have been a moot point, because Gonzalez-Inza was terminated on April 5. Yet Respondent chose to document this new material concern anyway.

35 Respondent’s attitude toward Gonzalez-Inza’s timecards is highly indicative of animus. See *Metropolitan Transportation Services*, 351 NLRB 657, 658–660 (2007) (finding, even while acknowledging that Respondent had no written progressive disciplinary system, that Respondent’s willingness to “jump on” the employee’s past missteps to justify a discharge, absent a single “formal reprimand” for those missteps, revealed that Respondent’s stated reason
 40 for discharging the employee was pretextual).

⁶² R. Exh. 3.

⁶³ Id.

⁶⁴ R. Exh. 5.

ii. The Lake Espanola incident

By Gutierrez' testimony, his conversation with Gonzalez-Inza about this incident took place entirely through hand gestures. Also by Gutierrez' testimony, Respondent did not discipline Gonzalez-Inza for observing from her car and does not make a practice of disciplining medics for observing from their car.

Additionally, despite being one of Respondent's reasons for termination, the April 2 Lake Espanola incident did not become a noteworthy issue until *after* Gonzalez-Inza was dismissed. After the Charging Party's email on April 5, Finnigan wrote, "Fritz is calling [Gutierrez] to get more information in regards to what transpired this last weekend out at the lake."⁶⁵

Finally, it is noteworthy that Gutierrez testified at trial to his April 2 lake conversation with Gonzalez-Inza, while never once mentioning that he thought the Charging Party had been asleep in her car. Conversely, Bethel's credible testimony was that Gutierrez, in initiating the car conversation with Bethel, grumbled about Gonzalez-Inza having been "asleep" on the watch. This testimony raises the inference that Gutierrez did not make that same "asleep" claim at trial because the claim was untrue. Gutierrez casually disparaged Gonzalez-Inza's work ethic to Bethel, and then shifted his claim at trial to note that he had merely been concerned about whether Gonzalez-Inza could see through her window.

Respondent's behavior toward the Lake Espanola incident is indicative of animus. Id.

iii. Talking to other employees about non-work matters

By Gutierrez and Fritz' testimony, Respondent never disciplined Gonzalez-Inza for talking to other employees, save Gutierrez noting his conversations with the Charging Party about "just let[ting] the guys work." While Gutierrez and Fritz testified that they asked Bethel to counsel Gonzalez-Inza on a number of occasions, Respondent declined to corroborate this testimony through Bethel, and Gonzalez-Inza credibly denied that she had ever been counseled in this way.⁶⁶

Respondent's behavior toward Gonzalez-Inza's chattiness is indicative of animus. Id.

iv. Telling employees when to go on break

Gutierrez testified that, once in Season 4 and once in Season 5, he witnessed Gonzalez-Inza telling other employees when to go on break. In addition to confirming that Gonzalez-Inza was never counseled or disciplined for these events, Gutierrez noted that he has never seen someone terminated for inappropriately calling break.

Even assuming that Gonzalez-Inza did inappropriately call break twice, the sudden material nature of this infraction is indicative of animus. Id.

⁶⁵ R. Exh. 6.

⁶⁶ Though she independently testified that Bethel had once asked her to move her car.

c. *Failure to allow Gonzalez-Inza to respond to allegations of misconduct*

By all credible accounts, Gonzalez-Inza was minimally, if at all, counseled as to the behaviors that allegedly doomed her. Bethel was told to terminate the Charging Party but was not told why, so he could not pass these reasons on to Gonzalez-Inza. That she responded by email attempting to defend her perceived infractions, when she was not given any such opportunity by Respondent, is unsurprising.

An employer's failure to give an employee the opportunity to explain the circumstances for which she is being disciplined supports a finding of employer pretext. *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 861 (2006); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). Here, Respondent's failure to allow Gonzalez-Inza the opportunity to respond to the allegations of misconduct is indicative of animus.

d. *Timing of the discharge*

The Board has long held that a close timing between an employee's protected activity and an employer's adverse action is indicative of employer animus toward the protected activity. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *ManorCare Health Services-Easton*, 356 NLRB 202, 225 (2010). Here, none of the reasons that Respondent gave for termination were material enough to warrant discipline—most if not all did not even warrant counseling—until after March 31.

Respondent, citing *Syracuse Scenery & Stage Lighting Co.*, notes that "timing, while relevant, is not controlling, when as here there is an intervening causal factor." R. Br. at 28, citing 342 NLRB 672, 675 (2004) ("[w]hile the employees' [protected] activities and the discharges did occur within a relatively brief time period, so, too, was there a close proximity in time between the employees' blatant misconduct and the Respondent's decision to terminate them. Under these circumstances, the factor of timing is too weak a foundation upon which to base a finding of pretext"). However, in *Syracuse Scenery*, the "blatant misconduct" was that the employees in question left work early without permission on four consecutive days, submitted fraudulent timesheets to secure payment for hours not actually worked, and then lied about the misconduct when confronted. *Id.* at 342. Here, Gonzalez-Inza submitted a paystub to a payroll administrator, who then informed the Charging Party that she "wasn't to be bothered."

Respondent's attempt to analogize the *Syracuse Scenery* intervening event to Gonzalez-Inza's April 3 payroll event is unpersuasive. By Respondent's account, it would strain credulity to even characterize the payroll event as "misconduct," as it is unclear from Smith and Fritz' subsequent emails whether Gonzalez-Inza had ever been counseled on payroll procedure. Moreover, Finnigan's email opine that Gonzalez-Inza's timecard discrepancy was "*minor*." (R. Exh. 6.) As such, I find that the close timing between Gonzalez-Inza's protected activity and Respondent's adverse action is indicative of animus. *Lucky Cab Co.*, above at 274; *ManorCare*, above at 225.

B. *Respondent's showing that it would have discharged Gonzalez-Inza in any event*

Once the General Counsel carries its burden in showing by a preponderance of the evidence that Gonzalez-Inza's protected activity played a motivating role in her termination, the burden then shifts to Respondent to show that it would have terminated Gonzalez-Inza in the absence of such conduct. See *Boothwyn Fire Co. No. 1*, slip op. at 7. As Respondent's explanations for the termination were pretextual, Respondent fails to meet this burden. Id; *Golden State Foods Corp.*, 340 NLRB at 385.

Further and finally, Gutierrez openly admitted during trial that the "situation with the Styrofoam cutting that was brought to my attention" factored into Gonzalez-Inza's termination. Respondent therefore cannot prove that they would have terminated the Charging Party absent this protected activity. Therefore, I find that Gonzalez-Inza's discharge was motivated by her March 31 protected, concerted activity in violation of her rights under Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By terminating employee Coral Gonzalez-Ina on April 5, 2016, for engaging in protected, concerted activity, Respondent violated Section 8(a)(1) of the Act and interfered with, restrained, and coerced Gonzalez-Inza in the exercise of the rights guaranteed in Section 7 of the Act.
3. The above unfair labor practice affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDIES

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist from such practices and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having concluded that the Respondent is responsible for the unlawful discharge of employee Coral Gonzalez-Inza, the Respondent must offer her immediate reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Coral Gonzalez-Inza whole, with interest, for any loss of earnings and other benefits that she may have suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Also, Respondent must compensate Coral Gonzalez-Inza for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 9 (2016). Search-for-work and interim employment expenses shall be

calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, the Respondent shall compensate Coral Gonzalez-Inza for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for her. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall also be required to expunge from its files any and all references to the written warning, suspension, and discharge, and to notify Coral Gonzalez-Inza in writing that this has been done and that none of these unlawful disciplines will be used against her in any way.

The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. *Id.* at 13.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended⁶⁷

ORDER

The Respondent, Horizon Scripted Television, Inc., a corporation, with a facility in Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully discharging or otherwise discriminating against Respondent's employees because they openly complained about workplace safety issues to other employees and supervisors; and

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Coral Gonzalez-Inza immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make employee Coral Gonzalez-Inza whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, as set forth in the remedy section of this decision.

(c) Compensate employee Coral Gonzalez-Inza for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to her, it will be allocated for her to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify employee Coral Gonzalez-Inza in writing that this has been done and that the loss of employment will not be used against her in any way.

⁶⁷ If no exceptions are filed as provided by Sec. 102.46 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.

5 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

10 (f) Within 14 days from the date of this order, post at its facilities in and around Santa Fe, New Mexico, copies of the attached notice marked "Appendix."⁶⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by
15 email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees
20 employed by the Respondent at any time since April 5, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

25 Dated, Washington, D.C., August 7, 2017



Gerald Michael Etchingham
Administrative Law Judge

⁶⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

YOU HAVE THE RIGHT to join with your fellow employees in concerted activities. These activities include

- Speaking to your coworkers about your wages, hours, and other terms and conditions of employment.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT discharge you because you engage in concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer **CORAL GONZALEZ-INZA** immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and/or privileges previously enjoyed.

WE WILL make **CORAL GONZALEZ-INZA** whole for the losses she suffered as a result of her unlawful discharge.

WE WILL, within 14 days, expunge and physically remove from our files any references to the discharge of **CORAL GONZALEZ-INZA** that we imposed on her on about April 5, 2016, and notify her, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against her or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

HORIZON SCRIPTED TELEVISION, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-184635 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602)416-4755.