

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

ARBOR RECYCLING, ARBOR LITE
LOGISTICS, A SINGLE EMPLOYER,

Respondent,

and

AMALGAMATED LOCAL 1931,

Charging Party.

Case Nos.: 2-CA-180470
2-CA-186760
2-CA-186930
2-CA-188504
2-CA-195794

**POST-HEARING BRIEF ON BEHALF OF RESPONDENTS
ARBOR RECYCLING, INC. AND ARBOR LITE LOGISTICS, INC.**

Alan I. Model, Esq.
LITTLER MENDELSON, P.C.
One Newark Center, 8th Floor
Newark, New Jersey 07102
Telephone: (973) 848-4700

Attorneys for Respondents
Arbor Recycling, Inc.
Arbor Lite Logistics, Inc.

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF FACTS	3
A. Background.....	3
B. Guance’s Discharge	4
C. Urbaez’s Discharge.....	6
III. LEGAL ARGUMENT.....	9
A. The Legal Standard.....	10
B. The General Counsel Failed To Prove The Company Violated Section 8(a)(3) Of The Act By Discharging Rafael Guance	12
1. The General Counsel Did Not Prove that the Company had Knowledge of Guance’s Alleged Union Activity to Support a Violation under Wright Line	12
2. The General Counsel Failed to Prove that the Company Harbored Union Animus to Support the Section 8(a)(3) Allegation	15
3. Even Assuming it Had Knowledge of Guance’s Union Activity and Harbored Union Animus, the Company Would Have Discharged Guance Due to His Lying to Manager Vallejo	17
4. The General Counsel Did Not Prove that the Company’s Legitimate Business Reasons for Discharging Guance Were Pretextual	18
C. The General Counsel Failed To Prove The Company Violated Section 8(a)(3) Of The Act By Discharging Jose Urbaez	20
1. The General Counsel Did Not Prove that the Company had Knowledge of Urbaez’s Alleged Union Activity to Support a Violation under Wright Line	20
2. The General Counsel Failed to Prove that the Company Harbored Union Animus to Support the Section 8(a)(3) Allegation	21

TABLE OF CONTENTS
(CONTINUED)

	PAGE
3. Even Assuming it Had Knowledge of Urbaez’s Union Activity and Harbored Union Animus, the Company Would Have Discharged Urbaez for his Subpar Performance	21
4. The General Counsel Did Not Prove that the Company’s Legitimate Business Reasons for Discharging Urbaez Were Pretextual	24
D. The General Counsel Failed To Prove The Company Violated Section 8(a)(1) Of The Act	28
IV. CONCLUSION.....	40

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>American Gardens Management Co.</i> , 338 NLRB 644 (2002)	10
<i>Berton Kirshner, Inc.</i> , 209 NLRB 1081 (1974)	38
<i>Bryant & Cooper Steakhouse</i> , 304 NLRB 750 (1991) enf'd, 995 F.2d 257 (D.C. Cir. 1993)	14
<i>Caribe Ford</i> , 348 NLRB 1108 (2006)	10
<i>CEC Chardon Electrical</i> , 302 NLRB 106 (1991)	10
<i>Daikichi Sushi</i> , 335 NLRB 622 (2001), enf'd. mem. 56 Fed.Appx. 516 (D.C. Cir. 2003)	19
<i>Dick Gore Real Estate</i> , 312 NLRB 999 (1993)	35
<i>Elmhurst Extended Care Facilities</i> , 329 NLRB 535 fn. 8 (1999)	5
<i>Eddyleon Chocolate Co.</i> , 301 NLRB 887 (1991)	34
<i>Kmart Corporation</i> , 320 NLRB 1179 (1996)	12
<i>Liberty Homes, Inc.</i> , 257 NLRB 1411 (1981)	11, 18
<i>Manno Electric</i> , 321 NLRB 278 (1996)	10
<i>Millard Processing Services</i> , 304 NLRB 770 (1991)	35
<i>NLRB v. Kentucky River Community Care</i> , 532 U.S. 706 (2001)	34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>NLRB v. Savoy Laundry</i> , 327 F.2d 370, 371 (2d Cir. 1964)	17
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)	34
<i>Office of Workers' Compensation Programs v. Greenwich Collieries</i> , 114 S.Ct. 2552 (1994)	11
<i>Retlaw Broadcasting Co.</i> , 310 NLRB 984 (1993)	11, 17
<i>Ryder Dist'n Resources, Inc.</i> , 311 NLRB 814 (1993)	11, 17
<i>Sunset Line & Twine Co.</i> , 79 NLRB 1487 (1948)	35
<i>Super Tire Stores</i> , 236 NLRB 877 (1978)	11, 18
<i>Torbitt & Castleman, Inc.</i> , 320 NLRB 907 (1996)	19
<i>Town & Country Supermkts</i> , 340 NLRB 1410 (2004)	38
<i>Volair Contractors, Inc.</i> , 341 NLRB 673 (2004)	35
<i>Wright Line</i> , 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir, 1981), cert. denied 455 US. 989 (1982)	<i>passim</i>

I. STATEMENT OF THE CASE

At issue before Your Honor are the separate discharges of Rafael Guance and Jose Luis Urbaez. Guance lied to his manager about an accident and was discharged for his lying. Urbaez was a subpar mechanic who the Company suspended and finally discharged. Neither of these employees engaged in Union activity of which the Company was aware at the time of their separate discharges.

Yet, in order to keep the Union's hopes alive of organizing Arbor's workforce, the Union filed unfair labor practice charges. The General Counsel proceeded to hearing without evidence in support of the alleged violations. Evidently, the General Counsel's plan of prosecution was to rely upon the testimony of Guance and Urbaez, and also try to paint Arbor as a bad actor through the prosecution of many Section 8(a)(1) allegations.

There is no dispute that Guance lied to Manager Vallejo about getting into an accident. Guance admitted at hearing that he lied to Vallejo. The General Counsel seeks to resuscitate Guance's job by claiming he had engaged in Union activity of which the Company was aware and, thus, terminated Guance for such Union activity, not his admitted lying to Vallejo. Guance's testimony about his professed Union activity was not credible. He claimed that Vega, an Arbor agent (not manager or supervisor) observed him sign a union card. Yet, neither the Union nor Region could confirm the existence of that card. Beyond that, Guance's testimony that he signed the card in broad daylight in front of Arbor's facility in August 2016 is unbelievable since the Union did not solicit cards other than on limited dates in July 2016. Furthermore, Guance, who admitted he lied to his manager and was fired for such lying, continued to lie at hearing under oath. Guance lied that he did not speak English, although he clearly testified in response to questions asked in English and holds a CDL license which

requires him to speak English. Guance's testimony was so unbelievable that the General Counsel did not even bother to recall Guance as a rebuttal witness to counter the Company's evidence through Vallejo and Vega that confirmed Guance was discharged for lying.

There is no dispute that Urbaez was a poor performing mechanic. He was suspended for 10 days in March 2016 due to insubordination. Immediately after suspending Urbaez, Vallejo sought to recruit a replacement mechanic. The replacement mechanic was interviewed on July 1. Urbaez's poor performance continued, including his October 6 failure to fix driver Moya's truck. Four business days later on October 12, the Company extended an offer to the replacement mechanic, and on March 14 the replacement mechanic was hired and Urbaez was discharged for his poor performance. The un rebutted evidence of Vallejo, Vega and Moya confirm that Urbaez was a poor performer. Urbaez's own testimony includes recaps of separate discussions he claimed to have had with Vallejo, Mercado and Vega about his poor performance. The General Counsel's theory of violation is not supported in the record. To establish Union activity and Company knowledge, Urbaez did not contend that any manager saw him sign a union card: incredibly, he testified that about four weeks after signing a union card he sought out and volunteered to Vallejo in July 2016 that he signed a union card. Even if Urbaez's testimony in this regard was believable, Vallejo's denial of such a meeting should be credited over Urbaez's testimony given Urbaez's overall lack of credibility. In fact, Urbaez chose to lie at the hearing that the signature on his March 2016 suspension did not belong to him because it only stated "Jose Luis" although he signed other work documents "Jose Luis" alone, just as on the suspension notice. Many other problems exist in Urbaez's testimony including why he waited almost four weeks from when he signed his union card on June 2 to volunteer such information to Vallejo in July, and his claim that he was never counseled about his poor performance before

his discharge (although he was suspended and his own testimony contains snippets of Vallejo, Mercado and Vega questioning his work performance). Regardless, the record is clear that the Company solicited and interviewed Urbaez's replacement before Urbaez allegedly volunteered his Union activity to Vallejo in July 2016.

The General Counsel also failed to meet its burden of proof to establish any violations of Section 8(a)(1), as discussed herein.

For evident reasons, there is no record evidence to support the Complaint allegations.

II. STATEMENT OF FACTS

A. Background

Arbor Lite Logistics is a trucking company that picks up bottles and cans. Arbor Recycling is a recycling company that sorts, compacts, and processes the bottles and cans picked-up by Arbor Lite Logistics (Tr. 26)¹. Arbor Lite Logistics and Arbor Recycling stipulated that they operate as a single employer solely for purposes of the underlying NLRB case (Tr. 10)². Arbor operates out of two buildings in the Bronx, New York (1111 Grinnell Place and 1120 Grinnell Place) and one building in Bayshore, New York (135 Pine Aire Drive) (Tr. 27).

Arbor's owner is Ralph Martucci. At all times relevant to the Complaint allegations, David Vallejo, Wellington Mercado and Sammy Lopez were Section 2(11) supervisors who worked at the Grinnell Place buildings. David Vega assists Vallejo on the day shift. The Parties stipulated to Vega's Section 2(13) agency status. He does not possess Section 2(11) authority,

¹ References to the: Transcript are (Tr. __); General Counsel exhibits are (GC.Ex. __); and Respondent exhibits are (R.Ex. __).

² The companies are hereinafter collectively referred to as "Arbor" for ease of reference.

and the hearing record does not reflect otherwise. At the Bayshore facility, Rocco Mongelli was the manager in charge, and the Parties stipulated to his Section 2(11) status.

Arbor employs drivers who go out on routes, sometimes with the assistance of helpers. Once the trucks are full of recyclables, they return to the Grinnell Place and Pine Aire Drive buildings. Arbor's warehouse employees unload and process the recyclables. Arbor employs one mechanic to work at the Grinnell Place buildings to perform daily inspections, maintenance, and minor repairs of its trucks to ensure they are street-worthy. Arbor outsources significant truck repairs to local mechanics.

B. Guance's Discharge

Guance worked for Arbor for 15 months before his discharge on September 7, 2016³. The facts surrounding Guance's discharge are indisputable.

On September 6, Guance was assigned to work as a helper on a truck driven by Oliver Germosen. When leaving the parking lot at customer El Ramida in Brooklyn, Germosen drove the truck into a yellow bollard, causing significant damage to the driver's side bumper and light. Germosen and Guance concocted a story that their truck was hit by another truck, which they told Vega (assistant to manager Vallejo) by phone that night.

On the morning of September 7, Vega and manager Vallejo arrived at work early and examined the damage to the truck. Vega believed the damage was not indicative of another truck hitting Arbor's truck but, rather, that the Arbor truck had hit a "pillar or something". Vega then spoke with Guance when he arrived at work, pointing out to him that it did not look like another truck had hit the Arbor truck. Guance insisted that another truck had done so, calling it a "hit and run" accident (Tr. 519-520).

An investigation ensued. Guance was summoned to Vallejo's office. Vallejo asked Guance what happened to the truck and Guance responded that they were involved in an accident when another vehicle hit them (Tr. 460). Guance testified "I told him that another truck from Hinski had crashed into us" (Tr. 95). Vallejo believed that Guance was lying based on his observation of the damage, knowledge that the truck had serviced El Ramida the day before, and his experience with the yellow bollards at El Ramida (Tr. 459-462; R.Ex. 6). The observed damage and yellow paint on the bumper was indicative of the Arbor truck having hit the yellow bollard, in contrast to the extensive damage that would have been caused had another truck collided with the Arbor truck (R.Ex. 5). Vallejo asked Guance to leave his office and then summoned Germosen to his office.

When Vallejo asked Germosen what happened to the truck, Germosen "actually told me that coming out of El Ramida he hit one of those poles" (Tr. 463). Vallejo suspended Germosen for causing the damage to the truck since this was Germosen's third accident (Tr. 463-464).

After Germosen confirmed that there had been no crash, Vallejo called Guance back into his office to give him a chance to tell the truth. Vallejo told Guance that "I knew what happened. That if he wants to keep his job, he might as well come on clean and tell me what happened. I want to hear it from him" (Tr. 464). Despite Vallejo having given Guance the opportunity to tell the truth, Guance stuck to his lie that another truck had collided with the Arbor truck (Tr. 464). Vallejo decided to terminate Guance because he lied. At his termination meeting, Vallejo presented Guance with a Record of Termination that said "Helper lie about an

³ All dates hereinafter are 2016 unless otherwise noted.

accident” as the explanation for termination. Vallejo reviewed this document with Guance and Guance signed it in Vallejo’s presence (Tr. 465; GC.Ex.7).

Vega spoke with Guance after he was discharged and asked him why he would lie when “an accident is an accident”. Guance responded that he needed to keep his “street code,” meaning “he’s not going to tell on nobody” (Tr. 521).

It is undisputed that the accident occurred. It is also undisputed that Guance lied about the accident. On cross-examination, Guance admitted that he lied to Vallejo. [“Q. So, I’ll ask you again. In that first meeting did you lie to Vallejo and Vega about the accident, yes or no? A. Yes” (Tr. 108)]. Guance continued to lie when he met with Vallejo for the second time and Vallejo gave him another chance to tell the truth. This is consistent with the testimony of Vallejo and Vega (Tr. 464, 517). Guance further testified that Vallejo said he “was going to fire me because I had given a fake report” and Guance’s Record of Termination confirms that the reason for the discharge was “Helper lie about an accident” (Tr. 96, 101-102; GC.Ex. 7). The only possible conclusion is that the record evidence, in its entirety, establishes that Guance was discharged for lying about the accident. Indeed, all witnesses who testified about Guance’s termination – Guance, Vallejo and Vega, all testified that the reason for discharge was that he lied about an accident (Tr. 464, 517). At hearing, Guance testified that Vallejo said he “was going to fire me because I had given a fake report” and Guance’s Record of Termination corroborated that as the sole reason for his termination, which Guance understood when he signed the document (Tr. 96, 101-102; GC.Ex. 7).

C. Urbaez’s Discharge

Urbaez worked for Arbor for just more than 12 months before his discharge on October 14. As the sole mechanic, Urbaez was to report to 1120 Grinnell Place at 5:00 am, inspect the

trucks that were domiciled there overnight, and perform any needed minor repairs (e.g., check lights, check the oil, cover holes in the trailer) so that the trucks were ready to go out on routes when the drivers reported at 7:00 am (Tr. 426, 474). If Urbaez failed to perform his duties on time, then drivers were delayed on their routes. When Urbaez identified more significant problems, Arbor sent the trucks to outside mechanics.

Urbaez was, at best, a mediocre mechanic. He took a long time to perform repairs and had very limited mechanical knowledge (Tr. 428, 476, 524). His superiors repeatedly counseled Urbaez about taking much longer than was necessary to complete jobs (Tr. 476). Vega testified that “[t]hings that would take you 20 minutes to do, it would take him forever to do” (Tr. 524). Vallejo testified that Urbaez did a “mediocre job” as a mechanic, and was “not working quickly enough”, “it was a lot of times that he used to take a long time just fixing everything and killing time . . . Whatever job that used to be a regular job, five-minute job, ten-minute job, it used to take him -- he used to make it to three-hour job basically.” (Tr. 476). Driver Gustavo Moya testified that Urbaez was not a good mechanic “[b]ecause what I would see every time he would work, he would take too long doing any job and things. And personally for me, he wasn’t so -- no.” (Tr. 428).

On March 4, Arbor suspended Urbaez for 10 days after he refused a direct order from Vallejo to get parts for a truck (Tr. 477-479, 526, 540; R.Ex. 10). At the disciplinary meeting, Vallejo presented Urbaez with a counseling record that said: “Employee shows blatant disregard for supervisor’s directions, has a poor work attitude/ethic. Shows disrespect towards supervisors

and fellow employees” (Tr. 477-479; GC.Ex. 16). Urbaez signed the counseling record, acknowledging he had received it.⁴

After suspending Urbaez, Vallejo began searching for a mechanic to replace Urbaez (Tr. 489, 492).⁵ Vallejo texted a mechanic he knew named Alejandro Lopez to see if he was interested in employment with Arbor. On July 1, before the date Urbaez allegedly volunteered to management that he had signed a union card, Lopez came to the Bronx for an interview about the mechanic’s position (Tr. 496).

On October 6, Urbaez failed to replace a light bulb in driver Moya’s truck by the start of the 7:00 am shift (Tr. 429, 481-482, 527). As a result, Moya was delayed three hours before he could leave the yard on his route (Tr. 430, 481-482, 537; R.Ex. 8). Moya testified that his truck was not ready on time and that Urbaez told Moya to cover for him with management by saying (if asked) “that he was working on the truck” (Tr. 430).

Fed up with Urbaez’s incompetence and finally able to identify a replacement mechanic, Vallejo offered Lopez the mechanic’s position on October 12 (Tr. 496). Lopez completed his new hire paperwork on October 14 (Tr. 493). With replacement mechanic Lopez lined-up to begin working, Arbor discharged Urbaez on October 14 for his poor performance. At the discharge meeting, Vallejo told Urbaez that his discharge was due to his poor performance, the way he interacted with others, and his “time killing” (Tr. 485). The resulting Termination of

⁴ At the hearing, Urbaez lied, claiming that he never received this suspension document. The document bears his signature and Vallejo witnessed Urbaez sign it (Tr. 479). Urbaez claimed that the signature line showed that he had not received the document: it only stated “Jose Luis”, whereas Urbaez claimed that he only signed documents using his complete name, which is “Jose Luis Urbaez Olaberia”. When presented with other work documents that he had signed that bore just the name “Jose Luis”, Urbaez similarly claimed that he did not sign those documents either (R.Ex. 2).

⁵ While Urbaez was suspended, Arbor used its outside contractor to repair its trucks.

Record corroborated that Urbaez was discharged for these reasons (GC.Ex. 5). On Monday, October 17, Lopez commenced working for Arbor in the Bronx (Tr. 492-493).

Below is the timeline of events for Your Honor’s ease of reference:

Date	Event
March 4	Urbaez suspended for 10 days for insubordination
March 6	Vallejo texts replacement mechanic Lopez ⁶
July 1	Lopez came to the Bronx for his interview
Early/Mid-July	Urbaez claims to have told Vallejo he signed a card
October 6	Urbaez is late in getting Moya’s truck done which delayed his departure by three hours
October 12	Job made offer extended to Lopez
October 14	Lopez comes to the Bronx to fill out new hire paperwork and is hired
October 14	Urbaez discharged
October 17	Lopez starts work as the Bronx mechanic

III. LEGAL ARGUMENT

Arbor’s business reasons for discharging Guance (lying about an accident) and discharging Urbaez (poor performance) are established in the record. The General Counsel’s efforts to prosecute these claims under Section 8(a)(3) fail given the absence of record evidence that Guance and Urbaez engaged in union activity of which the Company was aware, the absence of record evidence that Arbor harbored union animus, and the absence of a causal nexus between the alleged union activity and the discharge decisions. Furthermore, the General Counsel failed to prove that the reasons given for discharging Guance and/or Urbaez were pretextual. Knowing the weakness in its proofs to undermine the legality of the discharge decisions, the General Counsel went to hearing on 14 Section 8(a)(1) allegations to paint the

⁶ The record evidence is that after suspending Urbaez in March, Vallejo solicited replacement mechanic Lopez. The specific March 6 date is not formally in evidence as Your Honor rejected R.Ex.9, which is a compilation of the text messages between Vallejo and Lopez detailing their discussions on the timeline. Notwithstanding your rejection of this exhibit (which is in the Rejected Exhibits file), Vallejo’s testimony established the relevant dates that wholly support the Company’s position.

picture that Arbor is a bad actor. To do so, the General Counsel rested on the incredible testimony of Guance and Urbaez, and the biased testimony of Union representatives Vogt and Lubrano. Guance's and Urbaez's stories were tenuous on direct examination and completely unraveled on cross-examination. Vogt's and Lubrano's testimony did not prove the Complaint violations, and was evidently proffered to disparage Arbor.

Given the General Counsel's failure to prove its case under NLRB precedent, the Complaint must be dismissed in its entirety.

A. The Legal Standard

In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the NLRB restated and refined its *Wright Line*⁷ test for determining whether there has been a violation of Section 8(a)(3) of the Act in so-called mixed motive cases. Under the test, the NLRB has always required the General Counsel to persuade that anti-union sentiment was a substantial or "motivating factor" in the challenged employer decision. The classic elements commonly required to make out a *prima facie* case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge of it, and employer animus. *Caribe Ford*, 348 NLRB 1108 (2006). See *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991) ("[I]n the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred."). The General Counsel "must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Generalized animus towards union activity is insufficient to satisfy this burden. Without proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence of union activity — the allegation must fail.

If the General Counsel establishes a *prima facie* case, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2552, 2557-2558 (1994). Furthermore, it is well-established in Board law that the *Wright Line* test is a subjective standard that focuses on the genuineness of the employer's stated reason for the action(s) taken, not on the correctness of the action(s) taken. *See e.g., Retlaw Broadcasting Co.*, 310 NLRB 984, 992 (1993). It is not for the Board to evaluate whether or not the reasons asserted make sound business sense. An employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. *See Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993) (“[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change”); *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that “Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position”).

Where the employer meets its burden of persuasion that it would have taken the action regardless of the employee's protected activity, the General Counsel is required to demonstrate that such affirmative defense(s) are pretextual and that the alleged discriminatory conduct would

⁷ 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir, 1981), *cert. denied* 455 US. 989 (1982).

not have taken place but for the employee's protected activity. *Kmart Corporation*, 320 NLRB 1179, 1180 (1996).

Throughout this burden shifting analysis, the ultimate burden remains on the General Counsel to prove the elements of an unfair labor practice by a preponderance of the evidence. Indeed, despite the commonly used jargon of “*prima facie*” case, the *Wright Line* analysis mandates that the General Counsel possess at all times the overall burden of persuading the factfinder that the employer engaged in unlawful discrimination.

B. The General Counsel Failed To Prove The Company Violated Section 8(a)(3) Of The Act By Discharging Rafael Guance

1. The General Counsel Did Not Prove that the Company had Knowledge of Guance's Alleged Union Activity to Support a Violation under *Wright Line*

The General Counsel failed to prove that Guance engaged in union activity of which the Company had knowledge and such Union activity was a substantial or motivating factor in the termination decision.

As for Guance, the “evidence” of his union activity and Arbor's alleged knowledge of it is his testimony that he received a union card while on the street on Grinnell Place in August while Vega was across the street observing him (Tr. 79-82). Once dissected on cross-examination, it was clear that Guance's story was pure fiction. Guance testified that he met with Union agents and received a union card on Grinnell Place “two weeks after August”. However, the Union representatives confirmed that they visited Grinnell Place up until July 25 and then returned in January 2017 (Tr. 301, 302, 310, 322, 332-333). Making matters worse for Guance, his claim that he signed the Union card is further discredited by the fact that neither the Union nor the NLRB has a card signed by Guance (Tr. 111, 231-232, 341-342). Guance's claim that he signed a union card is further discredited by the fact that there is no proof that Vega observed

Guance. Even if Vega was outside smoking as alleged, he was on the other side of Grinnell Place, half a block away from Guance (Tr. 86). Vega credibly testified that he never observed Guance speaking with the Union in July or August (Tr. 522). Moreover, Guance's testimony that Vega and Vallejo separately spoke with him about signing a union card is unbelievable. Even if credited over Vega's and Vallejo's denials, Guance's alleged discussion with Vega was about Vega cautioning him not to sign a card, which is permissible under § 8(c) of the NLRA. Stated differently, if Vega had knowledge that Guance signed a card, then he would not have allegedly cautioned Guance not to sign a card. Guance's alleged discussion with Vallejo in December simply did not occur (Tr. 90, 466-467).

The record further warrants discrediting Guance because he is an admitted liar. Guance lied to Vallejo, which resulted in his discharge. Given the chance by Vallejo to change his story, Guance continued to lie. [Tr. 108: Q. So, I'll ask you again. In that first meeting did you lie to Vallejo and Vega about the accident, yes or no? A. Yes.]

Guance also lied at the hearing under oath before Your Honor. He lied about signing a union card as proven by the contradictory testimony (of Vogt, Lubrano and Vega) and the absence of a signed union card. What's more, Guance lied at hearing that he does not read or speak English in order to create concern that he did not understand why he was terminated.

JUDGE CHU: General Counsel asked whether you understood, read or write in English. Ask him that. And, your answer was no; is that correct?

THE WITNESS: Exactly. Yes.

JUDGE CHU: So, General Counsel asked you to look at Exhibit 7.

THE WITNESS: This exhibit? Yes.

JUDGE CHU: How do you know what that document said?

THE WITNESS: I didn't know what that document said.

JUDGE CHU: Who told you you were terminated?

THE WITNESS: David Vallejo.

JUDGE CHU: And, what did he say to you?

THE WITNESS: He said that that document was about the accident and

after I signed, he told me that that report, I mean, that I am fired.

(Tr. 99-100).

THE WITNESS: He tells me, David Vallejo tells me that he fired me for a fake report for the accident that happened the day before.

JUDGE CHU: So, he knows the reasons why he was discharged.

THE WITNESS: That's the reason that he gave me at that moment.

JUDGE CHU: Did he give you a different reason some other time?

THE WITNESS: No.

JUDGE CHU: So, that's the only reason he gave.

THE WITNESS: What he said, yes.

JUDGE CHU: So, even though you cannot read this, you knew what this was.

THE WITNESS: No. I don't know what it is.

JUDGE CHU: He doesn't know what he signed.

THE WITNESS: Yes. That's what it is, I don't know what I signed cause he said that that was regarding the accident.

(Tr. 101-102)

It was evident, however, from Guance's responding to counsel's questioning in English before the translator was done translating that he understands English. Moreover, Guance holds a commercial driver's license, which requires that he "can read and speak the English language sufficiently" [Tr. 96-97; R.Ex. 11 at §391.11(a)].

Thus, there is no credible evidence in the record that Guance engaged in union activity and that the Company was aware of such activity. Nothing in the record establishes (or hints for that matter) at Arbor's having knowledge about Guance's participation signing a union card or otherwise engaging in union activity. Thus, there is no direct evidence of union activity to show motivation leading to his termination to establish a *prima facie* case under Section 8(a)(3). *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991) enf'd, 995 F.2d 257 (D.C. Cir. 1993). There is also no evidence to infer that the Company had knowledge of Guance's union activities.

The only way the General Counsel can continue to prosecute this claim is to ask Your Honor to ignore the record evidence and assume Guance engaged in union activity of which the

Company was aware. Obviously, that cannot be done. For the General Counsel to seek to establish Guance's alleged union activity, Your Honor would have to credit Guance that the Union representatives were present on Grinnell Place in August even though the Union representatives did not testify they were present in August. Similarly, Your Honor would have to ignore the fact that Guance testified he signed a card in August, but neither the Union nor the NLRB has such card. Lastly, the General Counsel would ask Your Honor to credit Guance's tale that Vega saw him get a card from the Union in August over the credible testimony that Arbor management and employees regularly work in the street on Grinnell Place and Vega's credible denial of having seen Guance with the Union.

In sum, the General Counsel wants Your Honor to believe that Guance was terminated in retaliation for his Union activity. Unfortunately for the Union, Your Honor presides over a court of law, not a fiction writing class. Accordingly, the record evidence does satisfy the General Counsel's burden for a Section 8(a)(3) claim, and this Complaint allegation warrants dismissal.

2. The General Counsel Failed to Prove that the Company Harbored Union Animus to Support the Section 8(a)(3) Allegation

Even assuming Arbor had knowledge of Guance's Union activity, the record does not contain evidence that Arbor harbored union animus. Indeed, an honest read of the record shows nothing Arbor has said or done is anti-union. Absent record evidence of union animus, it is anticipated that the General Counsel will cast aspersions that Arbor engaged in a "nip in the bud campaign" and required employees to attend meetings to hear anti-union rhetoric.

Regarding the "nip in the bud" claim, this brief sets forth the facts that Guance and Urbaez did not engage in Union activity of which the Company was aware and that they were discharged for legitimate business reasons (Guance for lying and Urbaez for poor performance). Of course this is not the classic "nip in the bud" scenario where a bad acting employer fires

known union activists. Simply put, it appears that Guance and Urbaez were not union activists, certainly Arbor had no knowledge if they were, and they got themselves fired for their own doing (lying and poor performance).

As to the portrayal of mandatory meetings of anti-union rhetoric, the General Counsel's own witness undermined this claim. Bayshore employee Giscard Bourgeois testified in detail about the informational meetings the Company scheduled for employees to learn about the pros and cons of unionization. Arbor engaged labor consultants to lead these meetings, with Martucci attending at times. Bourgeois' testimony shows that the consultants gave facts and opinions about the Union, and detailed over and over the voting procedures (Tr. 148-157). Confirming the propriety of these meetings, the General Counsel does not contend that a single statement said at these meetings by the consultants or Martucci violated Section 8(a)(1). All such statements by the consultants and Martucci were lawful under Section 8(c) of the Act. Therefore, absent a Complaint allegation or any record evidence to call into question the lawfulness of what was said at these informational meetings, the General Counsel cannot contend in good faith that such meetings evidence Union animus – they do not.

Given the General Counsel's failure to establish Union animus, the Section 8(a)(3) claims fail as a matter of law.

3. Even Assuming it Had Knowledge of Guance's Union Activity and Harbored Union Animus, the Company Would Have Discharged Guance Due to His Lying to Manager Vallejo

Assuming, *arguendo*, that Guance engaged in union activity of which Arbor was aware and that union activity was a motivating factor in Arbor's decision to discharge him, it is

nonetheless indisputable on the record that Arbor would have discharged Guance regardless of his supposed union activity.

Guance was discharged for lying to his manager, Vallejo, about getting into an accident. Guance admitted at hearing that he lied twice to Vallejo--when initially confronted and after Vallejo had spoken with Germosen and sought to give Guance another chance to tell the truth. To protect his "street code", Guance perpetuated the lie. These facts are undisputed in the record. It is also undisputed that Guance was told in-person and in his Record of Termination, which he signed (GC.Ex. 7), that Arbor discharged him for lying about an accident. It is outrageous for the General Counsel to contend otherwise and in doing so here ignores its duty of candor to Your Honor.

Arbor acted within its rights to discharge an employee who lied about an accident. It is well-established that the *Wright Line* test focuses on whether the employer's stated reason for the action(s) taken is genuine. *See Retlaw Broadcasting Co.*, 310 NLRB 984, 992 (1993). It is not for the NLRB to evaluate whether or not the reasons asserted make sound business sense. An employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. *See Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993) ("[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change."), *citing NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enforcing in part 137 NLRB 306 (1962); *see also Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the NLRB should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that "Board

law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position").

It is without question that the Company has the right to prohibit employees from lying to management to cover-up workplace accidents. Lying is lying. Guance caused his own termination.

Accordingly, this allegation warrants dismissal.

4. The General Counsel Did Not Prove that the Company's Legitimate Business Reasons for Discharging Guance Were Pretextual

Any claim by the General Counsel that the Company's reasons for discharging Guance were pretext to mask discrimination is simply incredible. As discussed above, there is no record evidence that the Company harbored animus towards the Union (or Guance). Guance admitted at hearing that he lied to Vallejo and was fired for that reason. The resulting disciplinary report and the testimony of Vallejo, Vega and Martucci confirm that Guance was discharged for lying. Clearly, Arbor's defense has not shifted nor is there an iota of evidence showing that Arbor asserted a different reason for discharging Guance.

The General Counsel is expected to advance a handful of arguments to create doubt in Your Honor's judgment of the clear record evidence.

First, the General Counsel's anticipated contention that Guance and Germosen both "committed the same offense" but that only Guance was fired evidences disparate treatment against Guance due to his Union activity fails. Guance and Germosen did not commit the same violation. When brought into manager Vallejo's office to discuss the alleged accident, Guance lied (which he admitted at hearing). In contrast, Germosen told the truth. While Guance was

discharged for lying, Arbor suspends rather than discharges employees for accidents.⁸ Had Arbor sought to terminate Guance for his Union activities, Vallejo would not have given him a chance to come clean in lieu of discharging him. But when presented with a chance at redemption, Guance chose his “street code” and machismo over being honest and keeping his job. Clearly, the decision to discharge Guance had everything to do with his lying and nothing to do with his alleged activity on behalf of and/or in support of the Union.

Second, the GC will also claim that the record does not prove Germosen was suspended. But the record does prove that Germosen was suspended (Tr. 463-464). Had the General Counsel sought to rebut this evidence, the General Counsel could have subpoenaed Germosen as a witness. Moreover, the absence of a written suspension report does not undermine Vallejo’s and Vega’s credible testimony. Although the General Counsel may ask for an adverse inference for the Company’s failure to call Germosen as a witness, there was no reason for the Company to call Germosen as the un rebutted evidence is that Germosen was suspended. Regardless, an adverse inference does not apply to an employee such as Germosen. *See Daikichi Sushi*, 335 NLRB 622, 622 fn. 4 (2001), *enfd. mem.* 56 Fed.Appx. 516 (D.C. Cir. 2003); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), *enfd. in relevant part* 123 F.3d 899, 907 (6th Cir. 1997).

As stated above, the record is absence of pretext to counter the Company’s legitimate business reasons for discharging Guance, and the allegation warrants dismissal.

⁸ The uncontested record evidence is that Arbor does not discharge employees who have accidents, which is why Germosen was not discharged. Vallejo and Vega testified without contradiction in this regard (Tr. 464-65, 505-06, 521). The record further indicates, by way of example, that driver Robert Pino got into an accident on July 16, 2016 and was disciplined short of discharge (Tr. 505-06; GC.Ex. 25B).

C. The General Counsel Failed To Prove The Company Violated Section 8(a)(3) Of The Act By Discharging Jose Urbaez

1. The General Counsel Did Not Prove that the Company had Knowledge of Urbaez's Alleged Union Activity to Support a Violation under Wright Line

As for Urbaez, the “evidence” of his union activity and Arbor’s alleged knowledge of it is his testimony that he went to Vallejo’s office in July to volunteer to him that he had signed a card (Tr. 238-241). In other words, since there is no claim that an Arbor agent saw him with a card, Urbaez contended that he took the illogical step of volunteering to his manager that he signed a card. Aside from its implausibility, Urbaez’s claim that he went to Vallejo to confess to signing a card is belied by his own testimony. Urbaez signed his union card on June 2 (GC.Ex. 14) but, for reasons unknown and unexplained, waited at least four weeks before allegedly confessing to Vallejo that he had done so. When pressed on cross-examination, Urbaez refused to acknowledge this four-week delay. He then changed his testimony to say that he went to Vallejo eight days after signing the card (Tr. 241). Vallejo and Vega both credibly denied that they were ever present when Urbaez came to confess to signing a union card (Tr. 477-78). Neither Vallejo nor Vega had any inkling that Urbaez supported the Union or signed a card (Tr. 487-88, 529).

The record further warrants discrediting of Urbaez, who lied at the hearing to cover-up his poor work performance. The most flagrant lie is Urbaez’s denial that he had previously been suspended: he claimed that he had never seen or signed his suspension document because the signature line only stated “Jose Luis” and “all my signatures, I sign with both - - both last names and here it isn’t” (Tr. 218; GC.Ex. 16). Other invoices that Urbaez signed showed, despite his denial, that he did so solely as “Jose Luis” as well (R.Ex. 2; Tr. 269, 272-273). Similarly, before his October 14 discharge, Urbaez claimed that he had never been counseled for refusing to

perform work (Tr. 215, 1.16-18). The reality is that Urbaez was suspended on March 4 for his refusal to do work. (Tr. 477-479, 526, 540; R.Ex. 10; GC.Ex. 16). Urbaez also denied that he had ever been told that his work performance was poor (Tr. 215, 1.19-22) even though Vallejo and Vega had previously told him that he had failed to perform adequately (Tr. 476). Ultimately, in his own testimony, Urbaez conceded that his supervisors had complained to him about his delay in getting work done. [Tr. 197-199 (Vega told him he was taking too long to do the work); Tr. 200-202 (Vallejo told him he was taking too long to do the work); Tr. 255-256]. Urbaez also testified that while working at Arbor he never refused to do work, yet he was suspended for 10 days for this very reason (Tr. 216, l. 1-5; GC.Ex. 16). Lastly, Urbaez claimed to have lit himself on fire while at work, yet he never filed a report, showed any signs of injury, or missed work due to such fire (Tr. 262). Of course, Vallejo and Vega never heard about the alleged fire (Tr. 486-487, 528).

2. The General Counsel Failed to Prove that the Company Harbored Union Animus to Support the Section 8(a)(3) Allegation

For the reasons set forth in Section III.B.2 above regarding Guance, the General Counsel failed to provide union animus to support the Section 8(a)(3) allegations regarding Urbaez. On this basis, the Complaint allegation should be dismissed.

3. Even Assuming it Had Knowledge of Urbaez's Union Activity and Harbored Union Animus, the Company Would Have Discharged Urbaez for his Subpar Performance

Assuming, *arguendo*, that Urbaez engaged in union activity of which Arbor was aware and that union activity was a motivating factor in Arbor's decision to discharge him, the record is clear that Arbor would have discharged Urbaez regardless of any such union activity.

Urbaez was a poor mechanic. All Arbor employees who testified with respect to Urbaez's performance -- Driver Moya, manager Vallejo, and agent Vega--were consistent on this

point. Vallejo said Urbaez did a “mediocre job” as a mechanic, and was “not working quickly enough”, “it was a lot of times that he used to take a long time just fixing everything and killing time . . . Whatever job that used to be a regular job, five-minute job, ten-minute job, it used to take him -- he used to make it to three-hour job basically” (Tr. 476). Vega said Urbaez “killed a lot of time and you know, things that would take you 20 minutes to do, it would take him forever to do” (Tr. 524). Driver Moya testified that Urbaez was not a good mechanic “[b]ecause what I would see every time he would work, he would take too long doing any job and things. And personally for me, he wasn’t so -- no” (Tr. 428). Despite Urbaez’s pleas to the contrary, the record is replete with testimony that Urbaez failed to perform his mechanic duties timely or efficiently. His subpar performance hampered operations, including, for example, when Moya’s truck was delayed by three hours because Urbaez failed to do a quick repair fixing a light. To make matters worse, Urbaez tried to get Moya to lie to management that he had been working on the truck (Tr. 430).

It is also unrebutted in the record that after Arbor suspended Urbaez for 10 days in March for refusing a work order, Arbor began searching for a replacement mechanic. Just days after Urbaez was suspended, Vallejo contacted mechanic Lopez to see if he might be interested in working at Arbor. Vallejo interviewed Lopez on July 1 (before Urbaez allegedly volunteered to management that he signed a union card) to see if he would be a good fit. Then, after Urbaez failed to fix Moya’s truck on October 6, Vallejo took the next step and offered Lopez a job four days later. Lopez accepted the offer and completed his new hire paperwork on October 14. Once Arbor finalized hiring Lopez, it discharged Urbaez (that very same Friday) on October 14. Lopez started at Arbor the following Monday, October 17.

Urbaez’s testimony did not undermine the credible record evidence detailed above.

Rather, Urbaez's testimony was full of denials and excuses to create a distraction from his subpar performance that resulted in his termination. Not only did Urbaez's denials and excuses fail to hide his poor performance, his testimony showed that he is not all credit-worthy.

First, the record evidence is clear that Urbaez was suspended in March 2016 for 10 days after refusing Vallejo's direct work order. Urbaez implausibly denied ever having seen this suspension document and being counseled because the signature on the warning said "Jose Luis" whereas he always signs in his complete name Jose Luis Urbaez Olaberia (Tr. 218). Any layperson can tell that the "Jose Luis" signed on this warning is the exact same handwriting Urbaez used on his own work documents. Regardless of the suspension document, Urbaez denied that he was ever suspended from March 4 to March 14 (Tr. 249-250).

Second, to further compound his lying, when presented with other work documents that only bore "Jose Luis" as the signature, Urbaez shockingly claimed that those work documents were not his either (Tr. 268-269).

Third, despite the record evidence that Urbaez was a poor mechanic who had been counseled and disciplined leading up to his discharge, Urbaez denied that he had ever been counseled about his poor performance (Tr. 251). GC. Ex. 16 and the testimony of Vallejo establish that Urbaez had indeed been counseled about his subpar performance in March. Moreover, Urbaez's own testimony on direct examination contained admissions that he had been spoken to about his performance given his undue delay in doing his repairs (Tr. 195, 198, 200-201, 251-252, 252-254, 255-257).

Based on the credible record evidence, the only findings that can be reached are that Urbaez was a poor performer who the Company suspended in March, the Company took steps to replace Urbaez in March, interviewed his replacement on July 1 (before any alleged knowledge

of Urbaez's alleged union activity), and decided after Urbaez botched the repair on Moya's truck to offer employment to Lopez and replace Urbaez. The NLRB does not have the right to second-guess these legitimate business decisions. Accordingly, this allegation warrants dismissal.

4. The General Counsel Did Not Prove that the Company's Legitimate Business Reasons for Discharging Urbaez Were Pretextual

The record evidence wholly supports Arbor's defense that it would have terminated Urbaez's employment even if it had knowledge of his alleged Union activity. The General Counsel's arguments of pretext will fail.

First, the General Counsel's anticipated claim that Arbor invoked "shifting defenses" is mistaken. All of the record evidence--testimony of Vallejo, Vega, and Ralph Martucci--is consistent as to the reasons for Urbaez's discharge. Nonetheless, to create an issue, the General Counsel will claim that Martucci testified that Urbaez was discharged only for refusing to do his work (Tr. 42-3); whereas, Vallejo testified that Urbaez was discharged for "poor performance and the way that he used []to interact with other employees and the time killing situation." (Tr. 486). This argument is intellectually insulting. Martucci's testimony that Urbaez was fired for refusing to do his work is consistent with Vallejo's testimony and encompasses the reasons for discharge set forth in the Record of Termination: "Lack of job performance. Negative attitude when told to perform job assignments. Being disrespectful to co-workers" (GC.Ex. 5)⁹.

Second, the General Counsel's anticipated claim that Arbor did not take issue with Urbaez's slowness or subpar work performance until after becoming aware of his Union activity ignores the unrebutted record evidence. In Urbaez's own words, Vallejo, Mercado and Vega

repeatedly peppered him as to why it was taking him so long to get his work done (Tr. 195, 198, 200-201, 251-252, 252-254, 255-257). This testimony is un rebutted. The General Counsel's anticipated claim that Arbor failed to produce any disciplinary records or other documentary evidence that Urbaez was a poor performer or disrespected his coworkers is nonsensical. Documentary evidence is not needed when credible testimony is un rebutted. No credible record evidence exists to counter the testimony of Vallejo, Vega and Moya as to Urbaez's poor performance (Tr. 428, 476, 524). Regardless, Urbaez's 10-day suspension for refusing to do his job and his Record of Termination are part of the record. Urbaez's effort to deny receipt of his Record of Termination through his ludicrous claim that "Jose Luis" is not his signature is telling.¹⁰

Third, to the extent the General Counsel argues that the timing of Urbaez's discharge should lead to an inference of pretext, the record says otherwise. In making four giant assumptions that (1) Urbaez is creditworthy, (2) Vallejo is not creditworthy, (3) Urbaez told Vallejo in July that he signed a Union card, and (4) Urbaez was a solid performer, the delay in time between Urbaez's July proclamation of his Union activity and his October termination shows that Vallejo chose not to take action against Urbaez for his alleged union activity. Put differently, Vallejo's non-action upon learning of Urbaez's union activity shows he did not intend to discriminate. Had Vallejo wanted to discharge Urbaez for union activity, then he would have done so in July rather than waiting four months until October. Forgetting about

⁹ It cannot be expected that Martucci, as the owner, would know all the specifics of Urbaez's subpar performance when Urbaez was terminated by Manager Vallejo. Simply stated, owners do not know all details of all personnel decisions in workforces of this size.

¹⁰ Urbaez "doth protest too much", to quote *Hamlet* by William Shakespeare.

these four assumptions needed to make that point, the truth is that Vallejo was not aware of any union activity by Urbaez and acted solely based on Urbaez's poor performance. As stated elsewhere in this brief, Vallejo solicited and interviewed replacement mechanic Lopez by July 1, then decided to make an offer to Lopez after Urbaez failed to fix Moya's truck on October 6. The October 6 failure was the proverbial "last straw" that, four business days later on October 12, led Vallejo to formally extend a job offer to Lopez. Lopez filled out his new hire paperwork on October 14 and was hired the same day Vallejo discharged Urbaez. These facts are unrebutted in the record. The timing proves that the Company's actions towards Urbaez were wholly related to his poor performance and lining up a replacement mechanic. No evidence of pretext exists.

Similarly, any claim by the General Counsel to challenge Arbor's claim that it sought a replacement mechanic before knowing about Urbaez's union activity must be rejected. Vallejo testified that he first communicated with replacement mechanic Lopez in March 2016 after he suspended Urbaez. Vallejo also testified that Lopez came to the Bronx for an interview on July 1. This proves without rebuttal, that Lopez was indeed solicited and interviewed before Urbaez allegedly went to Vallejo's office in July to volunteer he signed a card (which did not happen anyway) (Tr. 238, 244, 490-496). The unrebutted record evidence also shows that Arbor could not discharge Urbaez until it had a replacement mechanic lined-up because Arbor needed to have a mechanic on-site at Grinnell Place to inspect and make small repairs to trucks from 5:00 am to 7:00 am every morning so that the trucks could go on their routes without delay (Tr. 489). Outside mechanics are used for larger jobs, as it would not make practical and economic sense to have every truck inspected, and if needed repaired, on a daily basis by an outside mechanic.

Fourth, the General Counsel will claim that Urbaez worked a lot of overtime, which leads to the inference that Arbor was satisfied with his performance. This is comical. Overtime was necessary because Urbaez dawdled and “killed time,” as multiple witnesses testified on the record without rebuttal. Vallejo said Urbaez did a “mediocre job” as a mechanic, and was “not working quickly enough”, “it was a lot of times that he used to take a long time just fixing everything and killing time . . . Whatever job that used to be a regular job, five-minute job, ten-minute job, it used to take him -- he used to make it to three-hour job basically.” (Tr. 476). Vega said Urbaez “killed a lot of time and you know, things that would take you 20 minutes to do, it would take him forever to do.” (Tr. 524). Driver Moya testified that Urbaez was a bad performer “[b]ecause what I would see every time he would work, he would take too long doing any job and things. And personally for me, he wasn’t so -- no.” (Tr. 428). Moreover, as stated above, Urbaez’s own testimony repeatedly referenced being talked to by Vallejo, Vega and Mercado that he wasn’t getting his work done (Tr. 195, 198, 200-201, 251-252, 252-254, 255-257). Notably, the General Counsel chose not to put on any evidence on rebuttal to undermine this testimony about Urbaez’s wasting of time. It necessarily follows that Arbor was justified in its legitimate business decision to terminate Urbaez, who was a subpar mechanic, when it was able to onboard his replacement mechanic.

Accordingly, the General Counsel has failed to prove any evidence of pretext to counter Arbor’s legitimate business reason for discharging Urbaez.

D. The General Counsel Failed To Prove The Company Violated Section 8(a)(1) Of The Act

The General Counsel attempted through its numerous Complaint allegations to paint the picture that Arbor engaged in horrendous acts of surveillance, interrogation and threats towards its employees. The record does not support these allegations.¹¹

Complaint Paragraph 8 Allegations

Complaint Paragraph 8 alleges that Arbor “threatened employees with discharge because of their support for the Union” through Vega in or about July 2016, Vallejo in or about July 2016 and on October 7, and Mercado in or about August. The record evidence does not support these claims.

As to Paragraph 8(a)’s¹² claims pertaining to Vega, the General Counsel will likely rely on Urbaez’s testimony about a conversation he claimed to have had with Vega in July (Tr. 197-199). Even assuming Urbaez was credible (which he was not), this alleged conversation pertained to Urbaez’s failure to timely perform his job. In that regard, Urbaez testified that Vega initiated the conversation to ask if he “was going to take too long to finalize that job” to which Urbaez said “it’s a lot of work for just one person, and it requires more days.” Urbaez claimed that Vega said “I should take advantage of that job that I had because I wasn’t going to last too long working -- I wasn’t going to be much long time working for that company [sic].” Clearly, Urbaez and Vega were discussing his poor work habits and Vega’s comments reflect concern that if he continues with such poor habits he will not keep his job. Not pleased with Urbaez’s

¹¹ As the General Counsel decided not to amend the Complaint to conform with the record, there is no basis for the General Counsel to prosecute additional alleged violations of Section 8(a)(1). Similarly, Your Honor’s decision is limited to whether the General Counsel has met its burden of proving the allegations contained in the Complaint and litigated during the course of the hearing.

testimony in this regard, the General Counsel prodded Urbaez to remember to inject the union threat into his testimony. Still, Urbaez did not initially follow her lead. [Q. Did he say why? Why you weren't going to be working there much longer? A. Because that was a one-day job and I already had three days.] The General Counsel then resorted to asking a leading question about the union, to which Urbaez finally got the message:

Q. Did David mention the union?

A. At the end, yes. That I had signed the card -- I mean, the card.

Q. Did he say -- in what reference? What did he say about signing the card?

A. He said take advantage of this job you have right now because I had signed the card for the union. And that I wasn't going to be for too long in that company.

(Tr. 197-199)

Urbaez's overall lack of credibility and his flagrant changing of his testimony only in response to leading questions warrant the discrediting of these claims. By comparison, Vega testified consistently and without hesitation throughout his testimony. Vega's specific denial that he never told Urbaez to take advantage of the job and that he wouldn't last long working in the Company because he signed a union card must be credited instead. (Tr. 529). This allegation should be dismissed.

As to Paragraph 8(b)'s claims pertaining to Vallejo, the only "evidence" in the record is Urbaez's testimony that he went to Vallejo's office to tell him he signed a card and asked Vallejo if it "could cause me any problems?" Urbaez claims that Vallejo responded "that would depend. That would depend on the point of view of the company" (Tr. 186-187). Urbaez further testified that Vallejo said "When I said that, that I had filled it out, and if there was a problem.

¹² For ease of reference, each allegation within each Complaint paragraph is identified in order. For example, the first allegation under Complaint Paragraph 8 pertaining to Vega in July 2016 is "8(a)".

He said there's no problem. That would depend on the point of the view of the company” (Tr. 187). Based on this testimony, even if credit-worthy, it does not support a violation of the Act. Indeed, Vallejo allegedly assured Urbaez that it would not be a problem. Assuming the General Counsel harps on the phrase “that would depend on the point of view of the company”, such phrase is vague at best, and any vagueness was cured by the prior statement one breath earlier “there’s no problem.” This allegation should be dismissed.

The General Counsel’s proofs of an alleged threat of discharge in October by Vallejo are limited to Urbaez’s testimony that, after he caught himself on fire in the yard, Vallejo came to the yard to interrogate and threaten him. Specifically, Urbaez claims that Vallejo laughed at him and said “you filled out the card for the union, right? . . . that could be the reason -- the reason of my firing -- to be fired from the company.” After Urbaez allegedly responded “I asked -- that I had spoken to him before regarding that, regarding the union, that he had said that there was no problem,” Vallejo retorted “that depends of the point of view of the company will take that.” (Tr. 204-205). None of this scenario is believable. The story about Urbaez getting caught on fire is pure fiction. Urbaez never filed a report, showed any signs of injury, or missed work due to such fire (Tr. 262). Vallejo and Vega never heard about the alleged fire (Tr. 486-487, 528). Of course, had Urbaez actually caught himself on fire, Vallejo would have taken care of him, not laughed, interrogated, and threatened him as alleged. Besides, as discussed in response to Paragraph 10, Vallejo would not have asked Urbaez if he signed a card in October as Urbaez claimed to have admitted to Vallejo months earlier in mid-July that he signed a card. This allegation should be dismissed.

As to Paragraph 8(c)’s allegations pertaining to Mercado, the General Counsel may seek to rely upon Urbaez’s testimony about a discussion with Mercado in the yard (Tr. 195-197).

Urbaez claims that Mercado approached him and “asked if I still had a lot to finish fixing a generator -- a generator plant – electricity generator.” Then Mercado asked “if today if the union was going to ... bring something to eat, like food.” At the end of this discussion, Mercado allegedly said “one by one that had signed the card with the union, we're going to be out of the company inside of in [sic].” This testimony is not credible, nor reliable. As discussed above, Urbaez had no problem lying under oath (e.g., that he signed document with “Jose Luis” that he had been spoken to about his performance, etc.). The above testimony is unreliable because Urbaez did not testify when it allegedly occurred and it is vague, at best. This allegation should be dismissed.

Complaint Paragraph 9 Allegations

Complaint Paragraph 9 alleges that Arbor “threatened employees with unspecified reprisals because of their support for the Union” through Vallejo in about July 2016 and Vega in about August 2016. The record evidence does not support these claims.

As to Paragraph 9(a)’s claims pertaining to Vallejo, the General Counsel will rely on Urbaez’s testimony that in July 2016, Vallejo approached him in the yard and “asked me how much longer I needed to -- to fix the outside part of a trailer, and I told him it takes time to fix it, because I was alone working.” Later in this discussion, Urbaez claimed that Vallejo implied that for signing a card “that could be a reason to be suspended from my work.” “I mean, taking out, being thrown out of the company.”) (Tr. 200-202). Vallejo credibly testified that he never told Urbaez he could be suspended from work or thrown out of the company for signing a card (Tr. 488).

Considering Urbaez’s overall lack of credibility, Vallejo’s testimony should be credited over that of Urbaez. In addition, Urbaez’s testimony about this alleged discussion is not

plausible because there would be no reason for Vallejo to approach Urbaez to ask him if he signed a union card (as Urbaez claimed he did on this occasion) when, according to Urbaez, he previously went to Vallejo's office to tell him that he signed a card. Clearly, Urbaez is getting caught up in the web of his own lies. This allegation should be dismissed.

As to Paragraph 9(b), the General Counsel's case is limited to Guance's testimony about two interactions with Vega. Guance testified that on an unspecified date in August when he was outside "talking to coworkers about it and how conditions could be better, don't remember names of coworkers, then Vega arrived. . . . We didn't say anything to Vega but Vega said to all of us "That we should be careful in signing the card that the representative of the union gave us" (Tr. 87). Guance also claimed that, 4-5 days later, in August 2016, Vega "told me that I have to be careful signing that because with that I could have problems with the company. I asked why and he said, don't worry." No one else was present for this conversation (Tr. 89). Vega denied these discussions occurred (Tr. 522-523). Guance must not be credited in any of his testimony, as the record evidence proves he is a habitual liar who got fired for lying and then lied at the hearing. Vega's straight-forward and candid testimony supports crediting his denial. Even assuming Guance could somehow be credited, the allegation to "be careful in signing" a card is lawful under Section 8(c) of the Act. Also, even if Vega said Guance "could have problems with the company," any possible negative inference Guance may have gleaned from such statement was remedied when Vega told him "don't worry." These allegations should be dismissed.

Complaint Paragraph 10 Allegations

Complaint Paragraph 10 alleges that Arbor interrogated about their Union support by Vega in or about August 2016 and Vallejo in or about August and October 2016. Once again, the record evidence does not support these claims.

As to Paragraph 10(a), the record does not contain any evidence, credited or not, that could be viewed as Vega interrogating an employee.

As to Paragraph 10(b), the record does not contain any evidence as to an alleged interrogation in August 2016. Neither Guance nor Urbaez testified in this regard.

As to Paragraph 10(c), the allegation that Vallejo responded to a fire and asked Urbaez if he “filled out the card for the union” is not believable. The discussion in defense of Complaint Paragraph (b) above sets forth the reasons for dismissing this allegation.

Complaint Paragraph 11 Allegations

Complaint Paragraph 11 alleges that Arbor engaged in surveillance of employees by taking a videotape or standing by employees engaged in Union activities. Once again, there is no basis to find a violation.

These allegations must be viewed in the context of Arbor’s operations. Almost every witness who testified – for the General Counsel and Arbor, confirmed that Arbor’s management team and employees regularly work outside on Grinnell Place. Arbor’s two buildings (1120 Grinnell and 1111 Grinnell) are on opposite sides of Grinnell Place. Arbor’s management team and employees regularly use the street and sidewalks to conduct their daily job duties and cross the street from one building to the other.¹³ Business Agent Vogt testified that supervisors work in the street between the two buildings and employees and supervisors go back and forth between the buildings (Tr. 78). Many other witnesses corroborated these indisputable facts (Tr. 123, 184, 377, 444; R.Exs. 4a-e). Accordingly, the presence of Arbor’s management team outside on Grinnell Place while other employees and Union representatives may also have been

present does not amount to unlawful surveillance. *See e.g., Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (A supervisor’s routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance.).

As to Paragraphs 11(a) and (b), the General Counsel’s proofs consist of Lubrano’s testimony that on July 18 on Grinnell Place “two supervisors who we came to know as Sammy Lopez and Glasen (phonetic), I believe, began hanging out within 5 to 10 feet of us watching the employees talk to us” does not amount to unlawful surveillance (Tr. 302). Even if true that Lopez was outside on Grinnell Place, his mere presence does not amount to unlawful surveillance due to the undisputed fact that management and employees regularly work on Grinnell Place. The same holds true for the allegations pertaining to Glesio “Doe” (a/k/a Souto Hinder Brando) (hereinafter “Glesio”). Even if Glesio was present on Grinnell Place, he was there to perform his duties. Furthermore, the record shows that Glesio was a Section 2(3) employee of Arbor, not a Section 2(11) supervisor or 2(13) agent as the General Counsel alleges. Despite the General Counsel’s assertions to the contrary that Glesio is a Section 2(11) supervisor and/or Section 2(13) agent of Arbor, the General Counsel has failed to meet its burden of proving such status. There is no credible evidence that Glesio was a supervisor or agent. Rather, the record evidence is that Glesio worked as a warehouse employee who helped direct backing trucks into the garages and noted down the loads of such trucks (Tr. 37, 277). The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686

¹³ The management office, employee bathroom, and employee break area are located only in 1120 Grinnell Place. Accordingly, management and employees must go back-and-forth across Grinnell Place all during the workday.

(2006). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535 fn. 8 (1999). Conclusory statements without supporting evidence do not establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673 (2004). Also, the burden of proving agency status is on the General Counsel. See e.g., *Dick Gore Real Estate*, 312 NLRB 999 (1993); *Millard Processing Services*, 304 NLRB 770 (1991); *Sunset Line & Twine Co.*, 79 NLRB 1487 (1948).

As to Paragraph 11(c), the General Counsel's case is based on GC.Ex 10, which is a picture taken by Lubrano of Mercado on July 25. The General Counsel, however, was not able to adduce any evidence that employees were present or recorded by Mercado.

Business Agent Vogt could not state that employees were present when this photograph was taken or that the photo was anything other than a selfie taken by the picture-taker himself.

JUDGE CHU: And, your testimony was that he's taking a picture?

THE WITNESS: Yes.

JUDGE CHU: Who's he taking a picture of?

THE WITNESS: Other organizing members of our campaign.

JUDGE CHU: How do you know that?

THE WITNESS: Because I was standing just to the north side of the location where we were standing.

JUDGE CHU: How far was the north side of the location?

THE WITNESS: Twenty feet.

JUDGE CHU: What's the building behind them, do you know?

THE WITNESS: The building behind is their other location which is across the street.

JUDGE CHU: How do you know he was taking a picture and not a selfie of himself?

THE WITNESS: Could be possible.

JUDGE CHU: You don't know, right?

THE WITNESS: No.

(Tr. 59). Similarly, Union President Lubrano, who snapped the photo showing Mercado holding up his cell phone, could not recall that any employees were present at the time he took the picture.

Q. Well, you took this picture. Where were you standing when you took it? Were you standing next to that table of food?

A. I don't recall exactly whether the table was behind me, but this -- he was in front of me in the street when I took the photo.

Q. Is he in the middle of the street, or is he -- or is he more on the side of 1120; can you tell, or do you recall?

A. From the photograph, it appears he's more in the middle of the street.

Q. And do you know who was standing with you at the time; whether Union people or employees?

A. Probably both; but I can't say for certain.

Q. So you don't know if any Union representatives were standing with you at the time?

A. When I took this photo?

Q. Yes.

A. They would have been behind me.

Q. Were any employees -- do you know if any employees were standing with you at the time you took this picture?

A. At that exact moment, I can't say.

(Tr. 380-81). Thus, this allegation should be dismissed.

As to Paragraph 11(d), this allegation appears to be based on Guance's testimony that in August 2016, Vega was across Grinnell Place street about 20 feet away "looking at it him and other workers in 'an irregular way'" (Tr. 80). Guance further testified that Vega was there smoking, had never been in that spot smoking before, and observed when the Union was handing cards to employees (Tr. 83). Guance also failed to recall the names of the employees allegedly with him at the time (Tr. 121). Vega denied this occurred (Tr. 522). Guance's testimony is not credible given his proclivity to lie. More specifically to this allegation, the Union representatives Vogt and Lubrano testified they were present in June and July, and then again resurfaced in January 2017, which further undermines Guance's claim (Tr. 49, 52, 301, 302, 322, 332). Vega's honest denial should be credited over Guance's fiction. Thus, this allegation should be dismissed.

In addition, the General Counsel amended the Complaint at hearing to allege that, on July 19, Vega engaged in surveillance of employees. The General Counsel relies upon GC. Ex. 9

(also GC. Ex. 20), which is a picture of Vega on Grinnell Place on July 19. The record evidence disproves the General Counsel's claim that Vega engaged in surveillance.

There is **no** record evidence that Vega took video or photos of any employees. Union Business Agent Vogt testified that he was present when the photo was taken -- he is in the photo -- and **only union organizers** were present at that time (40 minutes before the day shift began at 7:00 am).

Q. What was identified as General Counsel's 9, you're looking towards Mr. Vega and Mr. Vega is looking away from you. Do you know what he was looking towards?

MR. MODEL: Objection, Your Honor. How is he going to know what another person is looking at?

JUDGE CHU: Speculation. He would not know.

THE WITNESS: No. I do not know.

*** *** ***

Q. On July 19, at 6:22 am, was anything in front of you?

A. There were other organizers at the location at that time.

Q. Just organizers?

A. Yes.

(Tr. 57-58). Lubrano, who took the picture in evidence, was also not able to testify that Vega photographed or filmed employees at that time.

Q. So you can't tell what Vega is taking a picture of; can you? Or what he's even doing with his phone?

A. Other than he appears to be taking photos and videotaping, -- no, I couldn't say exactly what he was doing.

Q. And there are no employees -- there are no employees that are standing around, at least that we can see in this picture; right?

A. Not in this picture; no.

Q. And when you were taking General Counsel 20, you were -- you were by yourself; right?

A. You mean where I -- exactly where I was standing? Yes.

Q. Right. There were no -- there were no employees with you; correct?

A. I couldn't tell from the photo if there's anybody behind me.

Q. There was no one standing with you at the time; was there?

A. Not in front of me; no.

(Tr. 378-79). To the contrary, the uncontested record evidence establishes that Arbor's workers (other than a few managers and the sole mechanic) report to work at 7:00 am and, therefore, would not have been present on the street 40 minutes earlier when GC.Ex. 9 was taken of Vega (Tr. 425, 474). Moreover, Vega testified that he used his phone to record that Lubrano along with two Union organizers were trying to block a night-time driver (Franklin) from returning to the facility and parking his truck. Vega "started filming for safety reasons so they won't say that Franklin hit them for any reason because they were trying to stop the truck" (Tr. 530). Assuming *arguendo* employees were recorded while engaged in Union activity (which was not the case with Vega), Board precedent permits photographing and videotaping where the employer plausibly seeks to make a record of unlawful conduct by the union or unprotected activity by the employees. *See, e.g., Town & Country Supermkts*, 340 NLRB 1410 (2004)(photographing picketers as they blocked entrances and impeded vehicles in order to acquire evidence in support of an injunction did not violate the Act); *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974) (no unlawful surveillance, where employer was documenting trespass by union organizers during handbilling, called police regarding trespass, and did not photograph subsequent handbilling not involving order enforced by trespass). Accordingly, this allegation should be dismissed.¹⁴

Complaint Paragraph 12 Allegations

¹⁴ The General Counsel will argue that Vega's safety explanation is not substantiated in the record. The General Counsel will also contend that Arbor's failure to produce the recording made by Vega cuts in favor of General Counsel's witness. The reality is that Vega's testimony was not rebutted and stands. Voght and Lubrano testified on behalf of the General Counsel without rebutting Vega's testimony, and the General Counsel did not recall either Voght or Lubrano to counter Vega's safety concerns. Given the fact that Lubrano remained present throughout the hearing and could have been recalled to refute Vega's safety concerns, he was not called to do so. Similarly, the absence of Vega's actual recording being placed in the record does not undermine his testimony.

In Complaint Paragraph 12, the General Counsel alleges that, in July 2016, Arbor through Glesio threatened employees with loss of wages and benefits because of their support for the Union. This allegation fails for three main reasons. First, Urbaez's testimony is not credible as previously discussed. Second, the record reflects that Glesio is a 2(3) employee, thus, no potential liability could extend to Arbor for anything he may have said. As stated above in defense to Paragraphs 11(a) and (b), the General Counsel failed to establish that Glesio is a 2(11) supervisor or 2(13) agent. Third, even if Urbaez could be believed and Glesio was a 2(11) supervisor or 2(13) agent, the statements attributed to him that employees "were going to be dumbasses because we had to pay the union to represent us. That could also provoke the lowering -- the diminishing of our salary" are not unlawful threats (Tr. 193-194). At worst, these statements told employees that if they pay dues they would have less money. For these reasons, this allegation should be dismissed.

Complaint Paragraph 14 Allegations

The General Counsel contends that "[i]n or about late January and/or late February 2017, Respondent, by its agent, Mongelli, instructed its employees to sign a petition revoking their support for the Union." The record evidence, however, tells a different story. Employee Giscard Bourgeois testified that the manager of the Bayshore facility, Rocco Mongelli, "said there was a document for me to sign in the office" (Tr. 158-159). Bourgeois did not testify that Mongelli threatened him or otherwise coerced him into signing the document. Therefore, these allegations should be dismissed.

IV. CONCLUSION

Based upon the record evidence, as well as the factual and legal analyses set forth herein, Counsel for the General Counsel has failed to carry its requisite burden of proof for establishing

that Arbor violated Section 8(a)(3) in discharging Guance and Urbaez or Section 8(a)(1) for the enumerated Complaint allegations. It is respectfully requested that all Complaint allegations are dismissed.

Respectfully submitted,

LITTLER MENDELSON, PC
Attorneys for Respondents

By: /s/ Alan I. Model
Alan I. Model

Dated: September 8, 2017

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this date, I caused the original of the foregoing Respondent's Post-Hearing Brief to the Administrative Law Judge to be served upon Administrative Law Judge Kenneth W. Chu, via e-file and Federal Express, at the following:

Original and 3 copies to:

The Honorable Kenneth W. Chu
National Labor Relations Board, Division of Judges
26 Federal Plaza, 17th Floor
New York, New York 10278

One **Copy** to:

Ruth Weinreb, Esq.
National Labor Relations Board, Region 29
26 Federal Plaza, Room 3614
New York, New York 10278-0104

Dated: September 8, 2017

/s/ Alan I. Model

Alan I. Model

Firmwide:149869929.6 092266.1000