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

APEX LINEN SERVICE, INC.

CASE NO. 28-CA-177062

Respondent,

and

CULINARY WORKERS UNION, LOCAL  
226, affiliated with UNITE HERE  
INTERNATIONAL UNION

Charging Parties.

**REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING  
BRIEF TO RESPONDENT’S EXCEPTIONS**

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1 Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations  
2 Board (“Board”), Respondent Apex Linen Service, Inc. (“Apex”) submits this Reply<sup>1</sup> to Counsel  
3 for the General Counsel’s Answering Brief to Respondent’s Exceptions (“Answering Brief”).<sup>2</sup>

4 **I. LEGAL ARGUMENT**

5 **A. Counsel for the General Counsel’s Arguments Regarding Inconsistencies in**  
6 **Immaterial Testimony Are Irrelevant.**

7 Witnesses are human beings, not robots, and cannot be expected to testify with perfect  
8 recall, memory or accuracy. Consistent with this truth, Courts have consistently held that minor  
9 and/or immaterial inconsistencies in testimony should not result in an adverse credibility  
10 determination. *See, e.g., Smallfield v. Home Ins. Co. of N.Y.*, 244 F.2d 337, 341 (9th Cir. 1957)  
11 (“It is the general rule that error in a witness’s testimony on collateral matters cannot be shown to  
12 impeach him”); *see also, Ren v. Holder*, 648 F.3d 1079, 1086 (9th Cir. 2011) (holding witnesses’  
13 inability to recall precise dates was a “manifestly trivial” inconsistency and “an extremely poor  
14 test of how truthful a witness’s substantive account is”); *see also de Leon-Barrrios v. INS*, 116 F.3d  
15 391, 393 (9th Cir. 1997) (“Generally, minor inconsistencies and minor omissions relating to  
16 unimportant facts will not support an adverse credibility finding”).

17 Here, the CGC quibbles over immaterial inconsistencies in the testimony of Martin and  
18 Bran to distract from the material, undisputed facts that favor Apex. The undisputed facts are that  
19 Hugo Chuc (“Chuc”) wore a button supporting the Union for several months and was not  
20 terminated. Chuc also attended protests at two of Apex’s customers’ locations and was not  
21 terminated. It was only in June of 2016 – *eight months after wearing the Union button and three*  
22 *months after attending protests* – that Apex terminated Chuc for cause when he burned a potential  
23

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24 <sup>1</sup> Section 102.46(b)(1) of the Rules and Regulations of the Board provides that a party  
25 opposing an exceptions brief has 14 days to file an answering brief. The Culinary Workers Union  
26 Local 226 affiliated with Unite Here Int’l Union (the “Union”) failed to file an answering brief  
and therefore waived its ability to do so. As set forth in Apex’s Exceptions Brief, the Union failed  
to comply with the ALJ’s order to produce evidence. The Union therefore concedes the merits of  
Apex’s position.

27 <sup>2</sup> Pursuant to Section 102.46(h), Apex’s Reply is limited to matters raised the Answering  
28 Brief and as such, Apex does not intend to reiterate the positions set forth in its Exceptions Brief.

1 customer's blankets. Chuc admitted to burning the blankets. His story that these blankets burned  
2 in the washer, *burned in water*, is incredible and unbelievable.<sup>3</sup> Witnesses with dozens of years'  
3 experience in the industry state this has never occurred, but that the burning occurred in the dryer  
4 by Chuc. Chuc did concede that the blankets were more damaged after he dried them in the dryer.  
5 It is also uncontested that no other items from this potential customer's linens were damaged in  
6 the wash using the same cycle during this test run. Chuc was only terminated *after* he damaged  
7 these blankets. Chuc's termination is consistent with Apex's termination of other employees for  
8 damaging goods or sabotaging Apex. The record provides numerous examples of this, including  
9 Pablo Juarez ("Juarez"), who damaged goods in the wash<sup>4</sup>, employees who intentionally tried to  
10 make a new supervisor look bad, and a supervisor who surreptitiously went into Apex's  
11 administrative offices and photographed Apex's contracts. Chuc knew this was a test run for a  
12 new account – worth millions of dollars – and Apex did not get this account after the test run in  
13 which Chuc burned the blankets.

14 These are the uncontroverted, material facts. The Counsel for General Counsel ("CGC")  
15 points out immaterial differences in collateral testimony to distract from these uncontested facts –  
16 highlighting the weaknesses of the CGC's actual case. The material facts are uncontested and are  
17 not a "post-hoc justification." (Counsel for General Counsel's Answering Brief to Respondent's  
18 Exceptions ("Answering Brief") at 19). Apex had good cause to terminate Chuc's employment.  
19 Nevada is an "at-will" state, meaning "an employer may discharge an employee for good cause,  
20 bad cause, or no cause at all without violating the National Labor Relations Act as long as the  
21 motivation is not to punish protected union activity." *Local Union No. 2812, Lumber Production*  
22 *and Indus. Workers v. Missoula White Pine Sash Co.*, 734 F.2d 1384 (9th Cir. 1984); *see also*  
23 *American Bank Stationery v. Farmer*, 106 Nev. 698, 701, 799 P.2d 1100, 1101 (1990) ("all

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24 <sup>3</sup> In the Answering Brief, the following statements of the CGC must be stricken as the CGC  
25 offers no citation to any testimony or evidence: "After washing the blankets, he [Chuc] noted  
26 damage, not burns. He brought the damage to Respondent's attention. He was then ordered to dry  
27 them." (Answering Brief at 18). Chuc does not testify that he brought the damaged blankets to  
28 anyone's attention until *after* he dried them. (Tr. at 165, ln. 15 – 166, ln. 12).

<sup>4</sup> As explained in more detail below, even the CGC concedes that the ALJ erroneously  
found Apex did not terminate Juarez. Apex did terminate him. (Answering Brief at 12).

1 employees in Nevada are presumed to be at-will employees”). Simply put, Chuc was terminated  
2 for his performance – burning a potential customer’s goods – and not for supporting the Union.  
3 This is uncontested in the record.

4 **B. CGC Admits that Bran Did Speak with Chuc Relating to this Incident, Thus Refuting**  
5 **the ALJ’s Finding That Bran Did Not Speak with Chuc.**

6 In the CGC’s recitation of facts, the CGC concedes that Bran spoke with Chuc regarding  
7 the burned blankets. (Answering Brief at 4). Bran met with Chuc after Chuc burned the blankets  
8 but per Bran, Chuc said nothing. However, Bran still did speak with Chuc – he cannot force Chuc  
9 to respond. (*Id.*). Thereafter, the CGC notes that Bran met with Chuc again at the end of his shift  
10 to suspend him and Chuc stated he was not in agreement. (*Id.* at 5). Thus, even the CGC must  
11 concede that the ALJ’s finding that Bran did not speak with Chuc prior to his termination is  
12 erroneous. (Decision of Gerald M. Etchingham (“ALJ Decision”), at 8, lns. 30-34;15, lns. 14-17)  
13 (finding that when Bran terminated Chuc, “[t]his [was] the only conversation that Bran had with  
14 Chuc regarding the damaged linen”).

15 Incredulously, the CGC tries to argue that Apex “might have known Chuc’s complaint [as  
16 to why the blankets burned] if it had involved him in the investigation.” (Answering Brief at 19).  
17 As set forth above, when Bran gave Chuc the warning and then later suspended him, Chuc barely  
18 spoke and provided no explanation. *Apex cannot force Chuc to talk.* Had Chuc sought to provide  
19 his side of the story, he had multiple opportunities to do so and failed to. Apex cannot be faulted  
20 for that.

21 **C. CGC Concedes that the ALJ Erred in Finding Apex Did Not Terminate Another**  
22 **Employee, Juarez, for Damaging Customer Linens.**

23 As the CGC concedes, Apex *did* suspend and discharge Juarez for damaging a customer’s  
24 goods, stating “it does appear the ALJ erred in this regard.” (Answering Brief at 12). The ALJ  
25 repeatedly found, incorrectly, that Apex did not terminate Juarez, but only gave him a written  
26 warning. (ALJ Decision at 4, ln. 24; 14, lns. 9-10). ALJ concluded, incorrectly, that “the record  
27 shows that the suspension and discharge [of Chuc] were not consistent with the Respondent’s  
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1 previous application of its disciplinary policy. Under similar circumstances, Juarez *received only*  
2 *a written warning* for damaging colored blankets owned by the Cosmopolitan Hotel.  
3 Respondent’s actions demonstrate *blatant disparate treatment of Chuc. This departure by*  
4 *Respondent from its prior discipline policy is further evidence of animus.*” (*Id.* at 20, lns. 3-7)  
5 (emphasis added).

6 The ALJ’s holding is premised on a false finding. Juarez was terminated. The CGC agrees  
7 with Apex in this regard that the ALJ erred.<sup>5</sup> This termination of Juarez is a critical issue in this  
8 case as the ALJ impresses upon the “fact” that the termination of Chuc was “abnormally-severe”  
9 and an “excessive penalty,” despite the fact Apex’s termination of Chuc is consistent with its past  
10 practice, e.g. treatment of Juarez and other employees who attempted to sabotage Apex. *See supra*  
11 at I.A. The whole premise that Apex treated Chuc inconsistently and departed from its “prior  
12 discipline policy” is false and as such does not support the finding that Apex violated the NLRA.

13 **D. CGC’s Conjecture As to Others Apex Could Have Spoken With Regarding the Chuc**  
14 **Incident Carries No Weight.**

15 The CGC’s argument on page 20 of the Answering Brief that Apex *could* have spoken with  
16 others regarding the incident is mere speculation. The uncontroverted testimony is that Chuc  
17 worked alone and those who were involved, e.g. Chuc and the management, were spoken to. (TR  
18 31, ln. 20 – 32, ln. 3). The fact remains the Apex conducted a full and complete investigation into  
19 this incident and the CGC’s speculation that Apex could have interviewed others is just that –  
20 speculation.

21 **E. CGC Ignores the Multitude of Legal Authority Supporting Apex’s Exceptions and**  
22 **With the Exception of Citations to Three Cases, the CGC Cites to No Legal Authority**  
23 **Supporting its Positions.**

24 Although it is axiomatic that legal contentions must be supported by authority, this  
25 principle is nonetheless supported by the Board rules. Specifically, Section 102.46(b)(2) of the

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26 <sup>5</sup> The CGC tries to downplay this erroneous factual finding by noting that Apex only  
27 terminated Juarez after giving him a warning. When Juarez was given the first warning, it was  
28 *before* any damage occurred, e.g. he had not damaged any laundry. Juarez was then terminated,  
like Chuc, after the actual damage occurred. (TR at 49, ln. 22 – 51, ln. 4).

1 Rules and Regulations of the Board requires an answering brief to “present clearly the points of  
2 fact *and law relied on in support of the position taken on each question.*” (Emphasis added).  
3 This duty derives from a general rule of appellate advocacy. *See, e.g., United States v. Edwards,*  
4 69 F.3d 419 (10th Cir. 1995) (“The brief of the appellant<sup>6</sup> shall contain ... an argument.... The  
5 argument shall contain the contentions of the appellant with respect to the issues presented, and  
6 the reasons therefor, with *citations to the authorities*, statutes and parts of the record relied on.”)  
7 (quoting Fed. R.App. P. 28(a)(5)) (emphasis added).

8 Here, the CGC provides no contrary authority and as such, concedes the import and  
9 application of the legal authority relied upon by Apex in its Exceptions Brief. Apex requests that  
10 the portions of the CGC’s Answering Brief that fail to comply with Section 102.46(b)(2) and  
11 *United States v. Edwards* be stricken. Those unsubstantiated portions of the Answering Brief  
12 include, but are not limited to:

- 13 • “Administrative law judges are not required to cite the record in support of their findings  
14 on matters such as witness demeanor. ... Rather, the ALJ was charged with making  
15 credibility determinations based on his evaluation of witnesses’ testimony and the record  
16 as a whole, in addition to his observations of the witnesses’ demeanor.” (Answering Brief  
17 at 25).
- 18 • “Although, CGC did not object to the leading question at hearing, counsel acts at its peril  
19 when improperly using leading questions, as it may diminish the credibility of the  
20 response.” (*Id.* at 32).
- 21 • “Respondent argues that the Decision’s ordered remedy of reinstatement is inappropriate  
22 because it requires the reinstatement of Chuc, who it claims was discharged for cause. ...  
23 Should the Board adopt the Decision, the remedy should be left undisturbed in this regard.”  
24 (*Id.* at 34).

25 Each of these legally unsupported statements must be stricken.

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27 <sup>6</sup> An appellee’s brief must also conform to these requirements. Fed. R.App. P. 28(b).  
28

1 **F. CGC Concedes the ALJ Erred in its Finding Regarding Monzon’s Role.**

2 On page 25 of the Answering Brief, the CGC appears to admit that the ALJ incorrectly  
3 found Monzon was Quintana’s supervisor, however, in an effort to downplay the ALJ’s error,  
4 much like it did with the ALJ’s glaring error regarding the termination of Juarez, the CGC simply  
5 states “this fact likewise appears to have played no role in the Decision.” However, this “fact”  
6 was in the ALJ Decision and presumably must have had some role or otherwise impacted the ALJ  
7 Decision. If it did not, this begs the question of exactly which “facts” set forth in the ALJ Decision  
8 played an actual role in the ALJ’s ruling? What other “facts” are superfluous? Apex would have  
9 to presume the ALJ would not set forth these “facts” if they did not play a role in the ALJ Decision.  
10 The CGC cannot downplay the errors in the ALJ’s findings by simply stating they “played no  
11 role.”

12 **G. Both the ALJ and CGC Minimize Apex’s Impeachment of CGC’s Key Witness, Chuc.**

13 Much like the ALJ, the CGC attempts to downplay the clear impeachment of Chuc stating  
14 “Had he wished to improperly bolster his case, he would have testified in the opposite manner...”  
15 (Answering Brief at 27). Apex does not know why Chuc testified untruthfully – he could have  
16 been nervous or misunderstood the questions posed to him at the time of his affidavit or at the trial  
17 or he could have sought to “improperly bolster his case.” The reason is not important. What is  
18 important is that Chuc lied, either in his affidavit or on the stand. It could have been unintentional  
19 or intentional. Apex does not know. What Apex does know is in either the affidavit or on the  
20 stand, Chuc did not testify truthfully, begging the question of what other items he did not testify  
21 to truthfully. The transcript shows clear impeachment of Chuc, but the ALJ then discounts it as “a  
22 truthful more reasoned answer.” That is false. Whether intentional or not, Chuc did not testify  
23 truthfully on this point, which directly goes to his credibility.

24 **H. CGC Concedes That It Presented No Evidence Chuc Provided an Affidavit.**

25 Again, the CGC agrees with Apex that there was no evidence that Chuc had provided an  
26 affidavit in support of Case 28-CA-173178. (Answering Brief 28). But then the CGC tries to  
27 downplay it by saying there is “implicit evidence that he participated with the Board as he had  
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1 filed a charge in case 28-CA-173178, which often leads to a charging party’s providing an  
2 affidavit.” Regardless of whether that is true or not, there is no evidence that Apex knew this had  
3 occurred or would likely have occurred.

4 **I. CGC Agrees that the Surveillance of the Protests Is Irrelevant, But Yet ALJ Allowed**  
5 **Testimony on That Issue Anyway.**

6 The CGC agrees that whether “surveillance occurred [at the protests] is irrelevant,” but the  
7 ALJ allowed testimony of the purported “surveillance” by Silverstein at the protests. (Answering  
8 Brief at 30). The CGC cites to no legal authority contradicting Apex’s position that this irrelevant  
9 evidence should have been excluded. *See* Exceptions Brief at 19. Again, Apex stipulated that  
10 these protests occurred, but yet the ALJ repeated allowed testimony as to these protests and the  
11 alleged “surveillance,” e.g. photos taken at the protests, over Apex’s objections. The ALJ erred in  
12 allowing this testimony.

13 **J. CGC Fails to Offer any Factual Support or Legal Authority Contradicting Apex’s**  
14 **Position Relating to the Improper Striking of Bran’s Response to a Leading Question.**

15 The CGC argues the ALJ did not strike Bran’s testimony in response to a leading question.  
16 Not true. ALJ clearly stated he struck Bran’s “yes” response because it in response to a leading  
17 question: “I reject this testimony as being the result of a leading question.” (ALJ Decision at 14,  
18 n. 17). Apex cited to case law demonstrating why it is improper to strike this response and CGC  
19 has cited to no contrary authority. As such, the CGC is conceding Apex’s position.

20 **K. CGC’s Reliance on *Human Development Assoc.* Is Misplaced.**

21 The CGC misapprehends the holding of *Human Development Assoc.*, 348 NLRB 676  
22 (2006). While the ALJ in *Human Development* considered the General Counsel’s failure to call a  
23 former Board member as a witness, the ALJ expressly declined to draw an adverse inference. This  
24 is because of the established rule that applies to parallel situations in which an employer does not  
25 call a *former* supervisor as a witness, which is the portion of the opinion applicable to this case.  
26 Of critical importance, the ALJ in *Human Development* recognized “[i]t is well settled Board law  
27 that it is inappropriate, *and in fact error*, to draw an adverse inference from an Employer’s failure  
28

1 to call a former supervisor or owner as a witness...” *Id.* at 684 (emphasis added).

2 The plain language of this holding leaves no doubt that the ALJ erred in concluding as a  
3 matter of law that an adverse inference could be made from Apex’s “failure” to call former Apex  
4 supervisor Quintana as a witness in this matter. As the record indicates, Quintana was no longer  
5 employed by Apex at the time of the hearing.<sup>7</sup> (TR p. 29, ln. 20 – p. 30, ln. 9).

6 **II. CONCLUSION**

7 For the foregoing reasons, Respondent Apex respectfully requests that the Board refuse to  
8 adopt the ALJ’s findings and recommended Order, and instead dismiss the unfair labor practice  
9 complaints against Apex in this matter.

10 Dated this 26th day of September 2017.

11 NAYLOR & BRASTER

12  
13 By: /s/ Jennifer L. Braster  
14 John M. Naylor  
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23  
24  
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26  
27 <sup>7</sup> The CGC also assumes, without any citation to the record, that “contact information for  
28 Quintana was likely only a couple months old, dating from the last day of his employment.”  
(Answering Brief 34). Again, the CGC’s shear speculation is irrelevant.

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**CERTIFICATE OF SERVICE**

This is to certify that on this 26<sup>th</sup> day of September 2017, the undersigned, an employee of NAYLOR & BRASTER, electronically filed the foregoing **REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS** via the E-Filing system on the NLRB’s website and a copy was emailed and mailed to:

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