

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

**APEX LINEN SERVICE INC.**

**and**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 501, AFL-CIO**

**Cases 28-CA-192349  
28-CA-192774  
28-CA-193126  
28-CA-193231  
28-CA-196285  
28-CA-196459  
28-CA-197069  
28-CA-197182  
28-CA-197190  
28-CA-198033  
28-CA-202027  
28-CA-202209  
28-CA-203269**

**and**

**ADAM ARELLANO, an Individual**

**Case 28-CA-193128**

**GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

Nathan A. Higley  
Counsel for the General Counsel  
National Labor Relations Board, Region 28  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, NV 89101  
Telephone: (702) 820-7467  
Facsimile: (702) 388-6248  
Email: [nathan.higley@nlrb.gov](mailto:nathan.higley@nlrb.gov)

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. STATEMENT OF BACKGROUND FACTS ..... 1

III. KEITH MARSH AND EUGENE SHARRON ARE SUPERVISORS AND AGENTS OF RESPONDENT (COMPLAINT PARAGRAPH 4) ..... 3

    A. FACTS ..... 3

    B. AUTHORITY ..... 4

    C. ARGUMENT ..... 4

IV. RESPONDENT MAINTAINED AN UNLAWFUL SOCIAL MEDIA PROVISION (COMPLAINT PARAGRAPH 5(a)(iii)) ..... 5

    A. FACTS ..... 5

    B. AUTHORITY ..... 5

    C. ARGUMENT ..... 6

V. RESPONDENT INTERROGATED AND THREATENED EMPLOYEES, INFORMED THEM IT WOULD BE FUTILE TO SELECT THE UNION, AND GAVE THEM THE IMPRESSION OF SURVEILLANCE (COMPLAINT PARAGRAPHS 5(b)-(c) and (e)) ..... 7

    A. FACTS ..... 7

        i. Respondent Learned of the Organizing Campaign ..... 7

        ii. Sharron Investigated the Campaign ..... 7

        iii. Servin’s and Arellano’s Testimony About Sharron’s Pre-election Conduct ..... 8

    B. AUTHORITY ..... 9

    C. ARGUMENT ..... 12

        i. Credibility ..... 12

        ii. Sharron Unlawfully Interrogated Employees (Complaint Paragraphs 5(b)(1) and 5(c)(1)) ..... 12

        iii. Sharron Made an Unlawful Threat and Statements of Futility (Complaint Paragraphs 5(b)(2) and (3)) ..... 13

        iv. Impression of Surveillance (Complaint Paragraphs 5(c)(2) and 5(e)) ..... 13

VI. RESPONDENT THREATENED EMPLOYEES (COMPLAINT PARAGRAPH 5(d)) ..... 14

    A. FACTS ..... 14

        i. Events According to Respondent ..... 14

        ii. Events According to Arellano and Servin ..... 15

    B. ARGUMENT ..... 16

**VII. RESPONDENT VIOLATED ARELLANO’S WEINGARTEN RIGHTS AND DISCHARGED HIM BECAUSE OF HIS UNION SUPPORT (COMPLAINT PARAGRAPHS 5(f)-(h) and 6(a))** ..... 17

**A. FACTS** ..... 17

*i. Background* ..... 17

*ii. Arellano’s Union Support* ..... 18

*iii. Arellano’s Interaction with Hernandez According to Hernandez* ..... 19

*iv. Arellano’s Interaction with Hernandez According to Linares* ..... 20

*v. Arellano’s Interaction with Hernandez According to Marty* ..... 22

*vi. Respondent’s Decision to Terminate Arellano* ..... 23

*vii. Arellano’s Termination* ..... 25

*viii. Arellano’s Testimony* ..... 25

**B. AUTHORITY** ..... 27

**C. ARGUMENT** ..... 29

*i. Credibility* ..... 29

**a. Marty** ..... 29

**b. Linares** ..... 29

**c. Hernandez** ..... 30

**d. Marsh** ..... 30

**e. Arellano** ..... 31

*ii. Respondent Had Knowledge of Arellano’s Union Support* ..... 31

*iii. Respondent’s Claimed Reason for Terminating Arellano is Pretextual* ..... 32

**VIII. RESPONDENT DISCHARGED WALKER BECAUSE OF HIS UNION AND OTHER CONCERTED ACTIVITY (COMPLAINT PARAGRAPH 6(b))** ..... 35

**A. STATEMENT OF FACTS** ..... 35

*i. Walker’s Background* ..... 35

*ii. Respondent’s Layoff Practice and Walker’s Termination* ..... 36

*iii. Respondent’s Subsequent Hiring Decisions* ..... 37

**B. ARGUMENT** ..... 39

*i. Walker’s Union Activity* ..... 39

*ii. Respondent’s Reason for Discharging Walker was Pretextual* ..... 39

**IX. RESPONDENT THREATENED AND DISCHARGED SERVIN ON APRIL 4 BECAUSE OF HIS PROTECTED ACTIVITY (COMPLAINT PARAGRAPHS 5(i)(2) and 6(c) and 7(v))** ..... 41

**A. STATEMENT OF FACTS** ..... 41

*i. Respondent’s Cell Phone Use Policy* ..... 41

*ii. The March 25 Incident* ..... 42

*iii. The April 4 Incident* ..... 42

*iv. Servin’s Termination* ..... 43

B.	AUTHORITY .....	47
C.	ARGUMENT .....	47
i.	<i>Credibility</i> .....	47
a.	Marsh .....	48
b.	Marty .....	48
c.	Dramise .....	48
d.	Servin .....	48
ii.	<i>Servin’s Protected Activity</i> .....	48
iii.	<i>Respondent Discharged Servin for His Protected Activity</i> .....	49
X.	<b>RESPONDENT DISCHARGED SERVIN ON MAY 2 BECAUSE OF HIS UNION ACTIVITY (COMPLAINT PARAGRAPH 6(d))</b> .....	51
i.	<i>Decision to Discharge Servin</i> .....	51
ii.	<i>Reasons for Servin’s Discharge According to Marsh</i> .....	52
a.	Servin’s Attendance .....	52
b.	Servin’s Cell Phone Use .....	53
c.	Solicitation and Distribution .....	54
d.	Marsh’s Additional Testimony .....	55
iii.	<i>Sharron’s Testimony about Servin’s Discharge</i> .....	56
a.	The Pregnancy Absence .....	57
b.	The Earache Absence .....	58
c.	Respondent’s Call-off Policy .....	59
iv.	<i>Reasons for Servin’s Discharge According to Marty</i> .....	60
a.	Servin’s Attendance .....	60
b.	Solicitation .....	62
v.	<i>Arellano’s Testimony about Solicitation</i> .....	63
vi.	<i>Servin’s Testimony</i> .....	63
a.	The Pregnancy Absence .....	64
b.	The Earache Absence .....	64
c.	Claims about Performance .....	64
B.	AUTHORITY .....	65
C.	ARGUMENT .....	65
i.	<i>Marsh’s Testimony</i> .....	65
ii.	<i>Sharron’s Testimony</i> .....	68
iii.	<i>Marty’s Testimony</i> .....	71
XI.	<b>RESPONDENT DISCHARGED ARELLANO, WALKER AND SERVIN WITHOUT BARGAINING WITH THE UNION (COMPLAINT PARAGRAPHS 6(o)-(p))</b> .....	72
A.	STATEMENT OF FACTS .....	72
i.	<i>Arellano’s Discharge</i> .....	72
ii.	<i>Walker’s Discharge</i> .....	73

iii.	<i>Servin’s Discharge</i> .....	73
B.	AUTHORITY .....	73
C.	ARGUMENT .....	74
<b>XII.</b>	<b>RESPONDENT CLOSED THE ENGINEER LUNCH ROOM BECAUSE ENGINEERS VOTED FOR THE UNION (COMPLAINT PARAGRAPH 6(f))</b> .....	<b>75</b>
A.	STATEMENT OF FACTS .....	75
i.	<i>Respondent’s Testimony</i> .....	75
ii.	<i>Additional Testimony by Arellano and Servin</i> .....	77
B.	AUTHORITY .....	79
C.	ARGUMENT .....	79
<b>XIII.</b>	<b>RESPONDENT UNILATERALLY CLOSED THE ENGINEERS’ LUNCH ROOM, CHANGED THEIR WORK SCHEDULES, USED THIRD PARTY WORKERS TO PERFORM BARGAINING UNIT WORK, CHANGED ITS CELL PHONE POLICY AND UNLAWFULLY REFUSED TO RELEASE SERVIN (COMPLAINT PARAGRAPHS 7(i)-(p) and (v))</b> .....	<b>80</b>
A.	STATEMENT OF FACTS .....	80
i.	<i>Closure of the Break Room</i> .....	80
ii.	<i>Schedule Changes</i> .....	81
iii.	<i>Respondent’s New Cell Phone Policy</i> .....	83
iv.	<i>Subcontracting</i> .....	84
v.	<i>The Union’s Request that Respondent Release Servin</i> .....	86
B.	AUTHORITY .....	86
C.	ARGUMENT .....	89
i.	<i>Closure of the Break Room</i> .....	89
ii.	<i>Schedule Changes</i> .....	89
iii.	<i>Respondent’s New Cell Phone Policy</i> .....	90
iv.	<i>Subcontracting</i> .....	90
v.	<i>The Union’s Request that Respondent Release Servin</i> .....	90
<b>XIV.</b>	<b>RESPONDENT REFUSED TO PROVIDE RELEVANT INFORMATION REQUESTED BY THE UNION (COMPLAINT PARAGRAPHS 7(d)-(h))</b> .....	<b>91</b>
A.	STATEMENT OF FACTS .....	91
i.	<i>Complaint Paragraph 7(d)(i) “A list of current bargaining unit employees including their...date of completion of any probationary period.”</i> .....	91
ii.	<i>Paragraph 7(d)(ii) “Copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use.”</i> .....	92
iii.	<i>Complaint Paragraph 7(d)(iii) “A list of employees who have had schedule changes, including dates and job classifications at time of schedule changes.”</i> .....	94

iv.	<i>Complaint Paragraph 7(d)(iv) “A copy of all policies or procedures with respect to employment of employees.”</i>	95
v.	<i>Complaint Paragraph 7(e)(ii) “A copy of Mr. Arellano’s employee evaluations.”</i>	95
vi.	<i>Complaint Paragraph 7(f)(i) “Information responsive to the question of what was behind Respondent’s decision to lay-off employees and change employees’ schedules.”</i>	96
B.	<b>AUTHORITY</b>	97
C.	<b>ARGUMENT</b>	98
<b>XV.</b>	<b>RESPONDENT DEALT DIRECTLY WITH ENGINEERS IN CHANGING THEIR WORK SCHEDULES (COMPLAINT PARAGRAPHS 7(q) and (u))</b>	98
<b>XVI.</b>	<b>RESPONDENT BARGAINED IN BAD FAITH (COMPLAINT PARAGRAPHS 7(r)-(t))</b>	99
A.	<b>STATEMENT OF FACTS</b>	99
B.	<b>AUTHORITY</b>	103
C.	<b>ARGUMENT</b>	103
<b>VI.</b>	<b>CONCLUSION</b>	105

**TABLE OF AUTHORITIES**

<i>Acme Die Castings</i> , 315 NLRB 202, 209 (1994) .....	87, 97
<i>Aero-Motive Manufacturing Co.</i> , 195 NLRB 790, 792 (1972) .....	97
<i>Amersig Graphics, Inc.</i> , 334 NLRB 880, 885 (2001) .....	97
<i>Allied Chemical &amp; Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157, 178 (1971) .....	87
<i>Associated Constructors</i> , 325 NLRB 998, 1009 (1998) .....	99
<i>Bates Paving &amp; Sealing, Inc.</i> , 364 NLRB No 46 slip op at 2 fn. 7 (2016).....	47
<i>Baton Rouge Water Works Company</i> , 246 NLRB 995, 997 (1979).....	27
<i>Becker Group, Inc.</i> , 329 NLRB 103, 113 (1999).....	27
<i>Berkshire Nursing Home, LLC</i> , 345 NLRB at 225 (citing <i>NLRB v.</i> <i>McClatchy Newspapers, Inc.</i> , 964 F.2d 1153, 1162 (D.C. Cir. 1992) .....	88
<i>Biewer Wisconsin Sawmill</i> , 312 NLRB 506, 506 (1993) .....	4, 29
<i>Bottom Line Enterprises</i> , 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994) .....	87
<i>Broadway</i> , 267 NLRB 385, 400 (1983) .....	11
<i>Burnup &amp; Sims</i> , 379 U.S. 21, 23 (1964) .....	47, 51
<i>Caterpillar Logistics, Inc.</i> , 362 NLRB No. 49 slip op. at 2 (2015).....	11, 28
<i>Cox Fire Protection</i> , 308 NLRB 793 (1992).....	11, 38
<i>Crane Company</i> , 244 NLRB 103, 111 (1979) .....	103
<i>Crittendon Hospital</i> , 342 NLRB 686, 686 (2004) .....	88
<i>Crittendon Hospital</i> , 343 NLRB 717, 720 (2004) .....	97
<i>Cumberland Farms</i> , 307 NLRB 1479, 1479 (1992).....	10, 26
<i>Detroit Newspaper Agency</i> , 317 NLRB 1071 (1995) .....	97
<i>Director, Office of Workers' Comp. Programs v. Greenwich Collieries</i> , 512 U.S. 267, 278 (1994) .....	28
<i>El Paso Electric Co.</i> , 355 NLRB 544, 545 (2010).....	99
<i>Evans Bros. Barber &amp; Beauty Salons</i> , 256 NLRB 121, 128 (1981).....	11
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203, 215 (1964).....	87
<i>Fitzgerald Mills Corp.</i> , 133 NLRB 877, 881 (1961) .....	103
<i>Gardner Engineering</i> , 313 NLRB 755, 755 (1994) .....	10, 38
<i>General Electric Co.</i> , 332 NLRB 919 (2000) .....	11
<i>Gravure Packaging, Inc.</i> , 321 NLRB 1296, 1304 (1996).....	28
<i>Hilton Hotel Corp.</i> , 287 NLRB 359 (1987) .....	3
<i>KAG-West, LLC</i> , 362 NLRB No. 121, slip op at 2-3 (2015).....	79
<i>Kajima Engineering &amp; Construction</i> , 331 NLRB 1604, 1620 (2000) .....	88
<i>Kentucky Fried Chicken</i> , 341 NLRB 69, 84 (2004).....	88
<i>Kurziel Iron of Wauseon</i> , 327 NLRB 155, 156 (1998) .....	99
<i>Masland Industries</i> , 311 NLRB 184, 197 (1993).....	28

	<u>PAGE</u>
<i>Mediplex of Danbury</i> , 314 NLRB 470, 471 (1994) .....	10
<i>Meyers Industries (Meyers II)</i> , 281 NLRB 882, 887 (1986) .....	47
<i>Berkshire Nursing Home, LLC</i> , 345 NLRB 220 (2005) .....	88
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967) .....	97
<i>NLRB v. American National Insurance Co.</i> , 343 U.S. 395, 402 (1952) .....	103
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575, 618 (1969) .....	10, 28
<i>NLRB v. J. Weingarten</i> , 420 U.S. 251, 256-257 (1975) .....	27
<i>NLRB v. McClatchy Newspapers, Inc.</i> , 964 F.2d 1153, 1162 (D.C. Cir. 1992) .....	88
<i>NLRB v. Transportation Management</i> , 462 U.S. 393, 395, 403 n.7 (1983) .....	28
<i>NLRB v. Rain-Ware, Inc.</i> , 732 F.2d 1349, 1354 (7th Cir. 1984) .....	28
<i>Nichols Aluminum, LLC</i> , 361 NLRB No. 22, slip op. at 3 (2014) .....	28
<i>Operating Engineers, Local 501</i> , 199 NLRB 551 (1972), remanded and reversed on other grounds, 217 NLRB 207 (1975) .....	3
<i>Overnite Transportation Co.</i> , 296 NLRB 669, 671 (1989), enfd. 983 F.2d 815 (7th Cir. 1991) .....	103
<i>Public Service Co. of Oklahoma (PSO)</i> , 334 NLRB 487 (2001) .....	103
<i>Pennco, Inc.</i> , 212 NLRB 677 (1974) .....	98
<i>Peter Vitale Co.</i> , 310 NLRB 865, 874 (1993) .....	11, 21
<i>Quality Building Contractors</i> , 342 NLRB 429, 431 (2004) .....	97
<i>RBE Electronics of S.D.</i> , 320 NLRB 80, 81 (1995) .....	88
<i>Reeves Bros., Inc.</i> , 320 NLRB 1082, 1082-1083 (1996) .....	10
<i>Register Guard</i> , 344 NLRB 1142, 1144 (2005) .....	11
<i>Register-Guard</i> , 339 NLRB 353, 354 (2003) .....	47, 87
<i>Robert Orr/Sysco Food Services</i> , 343 NLRB 1183 (2004) .....	28
<i>Rockford Manor Care Facility</i> , 279 NLRB 1170, 1172 (1986) .....	88
<i>Rossmore House</i> , 269 NLRB 1176, 1177 (2003) .....	9, 10
<i>Samaritan Medical Center</i> , 319 NLRB 392, 398 (1995) .....	97
<i>Santa Barbara News-Press</i> , 358 NLRB 1415 (2012) .....	86
<i>Seaport Printing &amp; Ad Specialties, Inc.</i> , 351 NLRB 1269, 1270 (2007) .....	87
<i>Supervalu, Inc.</i> , 351 NLRB 948, 949 (2007) .....	87
<i>Taft Broadcasting Co.</i> , 238 NLRB 588, 589 (1978) .....	28
<i>The Boeing Company</i> , 365 NLRB No. 154 (2017) .....	5, 26
<i>The Sheraton Anchorage</i> , 362 NLRB No. 123, slip op. at 5-6 (2015) .....	16
<i>Titanium Metals Corp.</i> , 340 NLRB 766, 774 (2003), enf. in part, 392 F.3d 439 (D.C. Cir. 2004) .....	27
<i>Total Security Management Illinois I, LLC</i> , 364 NLRB No. 106, slip op at 1 (2016) .....	73, 98
<i>Tricil Environmental Management</i> , 308 NLRB 669 (1992) .....	65
<i>Washington Fruit &amp; Produce Co.</i> , 343 NLRB 1215, 1237 (2004) .....	65

*Westwood Health Care Center d/b/a Medicare Associates,*  
330 NLRB 935, 939 (2000) .....10, 27

*Wright Line,* 251 NLRB 1083, 1089 (1980) enfd. on other grounds 662 F.2d 899  
(1<sup>st</sup> Cir. 1981) cert. denied 455 U.S. 989 (1982) .....28, 79

## **I. INTRODUCTION**

In order for Your Honor to find that Apex Linen Service, Inc. (Respondent) did not violate the National Labor Relations Act (the Act), Your Honor must credit Respondent's testimony, which is contrary to the record evidence and rife with internal inconsistencies. Your Honor would need to ignore undisputed testimony about Respondent's pre-election conduct and longstanding Board law about the requirements of bargaining. The record demonstrates that Respondent engaged in coercive pre-election conduct, unlawfully discharged all of the visible union supporters, and thereafter refused to bargain with employees' collective-bargaining representative. Counsel for the General Counsel (CGC) respectfully requests that Your Honor find that Respondent violated the Act as alleged in the Complaint and order an appropriate remedy as outlined below.

## **II. STATEMENT OF BACKGROUND FACTS<sup>1</sup>**

Respondent operates a nearly 100,000-square-foot laundry facility in Las Vegas, Nevada. Tr. 26-27, 226.<sup>2</sup> Respondent began to occupy the facility in March 2011 and began servicing accounts in August 2011. Tr. 43, 229, 244. At the time of hearing, Respondent was processing approximately 118,000 pounds of laundry per day and employed approximately 250 employees. Tr. 27. The facility operates during various hours seven days per week. Tr. 28. Respondent has at least 13 contracts for laundry services, some of which are valued at over \$1 million annually. Tr. 29, 229.

---

<sup>1</sup> Except where noted, all facts in this brief are drawn from testimony offered by Respondent's witnesses or admitted exhibits. In all instances where facts are drawn from CGC's witnesses, the testimony will be clearly identified with the name of the witness.

<sup>2</sup> References to the Transcript are Tr. \_\_\_, showing page or pages. GCX \_\_\_ refers to General Counsel's Exhibits. RX \_\_\_ refers to Respondent's Exhibits.

Glen Edward “Marty” Martin (Marty),<sup>3</sup> Respondent’s chief operating officer, has an ownership stake of 3.84% in the company and has been with Respondent since it was formed. Tr. 6, 24-25, 229. Marty reports to Joseph Dramise (Dramise), Respondent’s president and chief executive officer, who has an ownership stake of 26% in the company. Tr. 6, 168, 339, 353. Marty and Dramise are two of Respondent’s 10 or 11 owners and two of the four members of its board of directors. Tr. 24, 201.

Among others, Respondent employs engineers, who are tasked with repairing and maintaining machinery in the facility. Tr. 31. On February 6, 2017,<sup>4</sup> a Board election was held among Respondent’s engineers<sup>5</sup> to determine whether they wished to be represented by the International Union of Operating Engineers Local 501, AFL-CIO (Union). Tr. 35; see GCX 3. It was the first Board election among any of Respondent’s employees. Tr. 38, 353. The majority of engineers voted for the Union, and the Union certified as the representative of the bargaining unit on February 15. Tr. 412; GCX 4. At the time of the election, there were about 11 engineers. Tr. 38. There were fewer at the time of the hearing. Tr. 38-39. Respondent began hiring engineers in June or July of 2011 and has retained several of them since that time. Tr. 43. The engineers are Respondent’s only employees represented by a union. Tr. 38. Charles “Ed” Martin (Ed)<sup>6</sup> is a Union business representative. Tr. 403.

---

<sup>3</sup> In assigning this short name for purposes of this brief, CGC does not intend any disrespect or improper informality; rather, because both key witnesses in this case have the surname “Martin,” this alternate short name is necessary. The record showed that Marty is the name he prefers.

<sup>4</sup> All dates hereafter are 2017 unless otherwise noted.

<sup>5</sup> Although the record establishes that there are two classifications within the engineering department (see Tr. 30; GCX 3), for the sake of simplicity, this brief will refer to engineering department employees as “engineers” except in instances where the distinction is relevant.

<sup>6</sup> See footnote 3. Charles Martin goes by “Ed.” Tr. 142. Ed was the Union’s organizer for this campaign. Tr. 411. He filed the representation petition, GCX 3, with the Board. Tr. 411. Ed has presented himself to Respondent as the Union’s bargaining representative. Tr. 413.

The facility has surveillance cameras throughout, which are always operating, and some of which capture audio. Tr. 61, 65, 116. Marty is able to access the cameras from his office, home, and phone and does so frequently. Tr. 64. Tr. 64. Marty spends 50% of his work time on the work floor and 25% of his time in his office. Tr. 227.

Respondent uses a company called AdvanStaff to manage most of its human resource functions. Tr. 56, 219.

### **III. KEITH MARSH AND EUGENE SHARRON ARE SUPERVISORS AND AGENTS OF RESPONDENT (COMPLAINT PARAGRAPH 4)<sup>7</sup>**

#### **A. FACTS**

Keith Marsh (Marsh), Respondent's sole Director of Engineering,<sup>8</sup> is responsible for managing the engineering department. Tr. 289. Though his testimony was peppered with qualifying phrases, like "usually," and "in a way," Marsh admitted that he has authority to suspend employees and to order them to be removed from the facility, though he stated any such action would result in discussion with Sharron and Marty, and he would defer to Marty. Tr. 291.

---

<sup>7</sup> Certain allegations raised by the Complaint are undisputed or otherwise did not need to be litigated and are not addressed substantively herein. In particular, although denied in its Answer, at hearing, Respondent stipulated to the facts alleged in Paragraph 1 of the Complaint. Tr. 26. Paragraphs 2(a) and 2(c) were admitted in Respondent's Answer, and Paragraphs 2(b) and 2(d) were admitted in Respondent's Amended Answer. Although Respondent did not admit to Paragraph 3, CGC presented evidence showing that the Union in this case is a labor organization under Section 2(5) of the Act. Tr. 403-405. Your Honor stated that further record evidence was unnecessary and agreed to take judicial notice of case law establishing this fact. Tr. 413-415. To that end, CGC cites, as examples, *Hilton Hotel Corp.*, 287 NLRB 359 (1987), and *Operating Engineers, Local 501*, 199 NLRB 551 (1972), remanded and reversed on other grounds, 217 NLRB 207 (1975). In addition, Your Honor noted that, given the record evidence that Respondent did not challenge the certification of the Union, GCX 4, and the admitted fact that Respondent has bargained with the Union, it was unnecessary to present additional evidence in support of Complaint Paragraphs 7(a)-(c), which allege that the bargaining unit is an appropriate unit and that the Union is its exclusive collective-bargaining representative. Tr. 30, 32-34, 37, 410-415. Finally, Respondent stipulated at hearing that Glen Edward "Marty" Martin (Marty) and Joseph Dramise (Dramise) are supervisors and agents within the meaning of the Act. Tr. 12.

<sup>8</sup> Marsh first claimed to be an employee of AdvanStaff. Tr. 288. Further inquiry, however, revealed that the basis for his claim was that AdvanStaff performs hiring functions for Respondent and issues Marsh's paycheck. Tr. 288. Marsh is supervised by Marty; he has no supervisor at Advanstaff. Tr. 288. He acknowledged that he is paid from Respondent's funds. Tr. 288. He further acknowledged that he is the director of engineering for Respondent. Tr. 289. Marsh acknowledged that engineers view Marsh as a supervisor. Tr. 290. Marsh considers himself a supervisor "in a way." Tr. 291. But he does consider himself part of Respondent's "leadership." Tr. 301.

He also has authority to grant employees' leave requests, which he usually does only in the absence of the chief engineer. Tr. 297. He might also direct workers to perform certain work if he perceives the need. Tr. 290. He regularly assigns overtime. Tr. 297-298.

Eugene Sharron (Sharron) is Respondent's sole chief engineer. Tr. 361. He has worked for Respondent since before it began operations. Tr. 391. He is responsible for supervising the engineers. Tr. 50. He has authority to discipline engineers and has done so in the past. Tr. 362. Sharron drafts engineers' schedules and assigns them work. Tr. 296, 362. He has authority to grant engineers' leave requests. Tr. 128, 363. In addition, Sharron has the authority to assign engineers overtime. Tr. 363. Marsh and Sharron hold equal authority with Respondent. Tr. 290.

## **B. AUTHORITY**

Section 2(11) of the Act identifies a supervisor as "any individual having authority, in the interest of the employer, to ...suspend, lay off, ...discharge, assign, ...or discipline other employees, or responsibly to direct them, ...or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." In *Biewer Wisconsin Sawmill*, 312 NLRB 506, 506 (1993), the Board stated that one of the indicia is sufficient to establish that an employee is a supervisor. Section 2(13) of the Act states that, in determining whether a person acts as an agent, it is not necessary that the specific acts performed be authorized or subsequently ratified by the employer.

## **C. ARGUMENT**

The admitted testimony establishes that both Marsh and Sharron meet several of the primary indicia establishing supervisory status, as they have the authority to discipline, suspend, assign, and responsibly direct employees. With even one of these primary indicia being

sufficient to establish supervisory status, Marsh and Sharron are supervisors within the meaning of the Act. In addition to the testimony cited above, which is directly only point, Respondent's witnesses testified at multiple points during the hearing about actions taken by Marsh and Sharron establishing that they functioned as supervisors of Respondent. CGC respectfully requests that Your Honor so find.

**IV. RESPONDENT MAINTAINED AN UNLAWFUL SOCIAL MEDIA PROVISION (COMPLAINT PARAGRAPH 5(a)(iii))<sup>9</sup>**

**A. FACTS**

GCX 2 establishes, and Respondent's Answer admits, that Respondent maintained the following provision in its employee handbook:

5-4. Use of Social Media

While an employee's free time is generally not subject to any restrictions by the Company, with the exception of the limited restrictions above, the Company urges all employees to *refrain from posting information regarding the Company that could embarrass or upset co-workers or that could detrimentally affect the Company's business.* Employees must use their best judgment. Employees with any questions should review the guidelines above and/or consult with their manager. When in doubt, don't post. Failure to follow these guidelines may result in discipline, up to and including termination.

GCX 2, page 21 (emphasis added).

**B. AUTHORITY**

In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board set forth a new standard for evaluating the lawfulness of employers' work rules. The Board held that, when evaluating a rule that does not explicitly interfere with Section 7 rights, but, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, it will balance the nature and

---

<sup>9</sup> CGC respectfully moves to withdraw the allegations in Complaint Paragraphs 5(a)(i)-(ii) and 5(a)(iv)-(viii), all but the final paragraph of the rule in Complaint Paragraph 5(a)(iii), and Complaint Paragraph 5(i)(1), in view of the Board's establishment of a new standard for evaluating the lawfulness of employers' work rules as discussed *infra*, and guidance issued by the General Counsel in Memorandum GC 18-02, "Mandatory Submissions to Advice" (Dec. 1, 2017).

extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule. *Id.* at slip op. at 3. In his dissenting opinion in *The Sheraton Anchorage*, 362 NLRB No. 123 (2015), Board Member Miscimarra found that a similar rule, barring “behavior” that “publically embarrasses” an employer to have a substantial impact on employees’ rights under the Act, stating:

On its face, that portion of the rule subjects an employee to discharge without warning based on *any* type of behavior that is “publicly embarrassing” to the Respondent. Of course, a central aspect of the Act is the right of employees to engage in “concerted” actions that publicize particular labor disputes and, potentially, cause public embarrassment to the employer. For example, handbilling to inform customers that an employer pays substandard wages and benefits is quintessential Section 7 activity. Employees engaged in such activity intend to publicly embarrass an employer as a means to gain an advantage in negotiations or to otherwise secure employer concessions. Thus, the Respondent’s prohibition of any activities that cause public embarrassment goes directly to a central aspect of the Act’s protection.

*Id.* at slip op. at 5-6.

### **C. ARGUMENT**

Applying the balancing framework adopted by the Board, when reasonably interpreted, Respondent’s rule directly interferes with the right of employees to engage in communications critical of Respondent in the course of a labor dispute, as such critical communications are often a source of public embarrassment and often may negatively impact an employer’s business. For example, the public may not want to patronize an employer that pays substandard wages or violates labor or employment laws. The substantial impact of Respondent’s rule on the core Section 7 right to disseminate communications critical of an employer in the course of a labor dispute certainly outweighs any business interest Respondent may have in maintenance of this rule. In fact, Respondent presented no evidence whatsoever concerning its reasons for adopting or maintaining this rule governing employees’ personal, non-business use of social media. CGC

therefore respectfully requests that Your Honor find that Respondent's maintenance of the rule is unlawful.

**V. RESPONDENT INTERROGATED AND THREATENED EMPLOYEES, INFORMED THEM IT WOULD BE FUTILE TO SELECT THE UNION, AND GAVE THEM THE IMPRESSION OF SURVEILLANCE (COMPLAINT PARAGRAPHS 5(b)-(c) and (e))**

**A. FACTS**

*i. Respondent Learned of the Organizing Campaign*

Marty first became aware of the Union campaign when a Union representative visited Respondent's facility and informed him that Respondent's engineers wished to organize. Tr. 39, 214. Marty had no prior knowledge by, for example, seeing engineers wearing Union buttons. Tr. 39. The same day the Union representative visited, in order to investigate the Union representative's claim, Marty asked Sharron if there was, in fact, a campaign, and Sharron stated that he knew nothing about it.<sup>10</sup> Tr. 39, 212-213, 214. Sharron thus learned of the organizing campaign. Tr. 363-364. Sharron told Marty he believed there was no campaign but assured Marty he would find out. Tr. 213-215. Marty understood Sharron would need to speak to the engineers to do so. Tr. 216-217. This happened a day or two before Respondent received the Union's petition for representation and a few weeks before the election. Tr. 41, 214, 364. Marty also informed Marsh of the campaign, but Marsh could not recall when this occurred. Tr. 298.

*ii. Sharron Investigated the Campaign*

Sharron admits that, after his discussion with Marty, he spoke with engineers Adam Arellano (Arellano) and Joseph Servin (Servin) in person about the Union. Tr. 42-43, 45, 365. Sharron asked each of them if they were joining the Union, and both said no. Tr. 365. Sharron

---

<sup>10</sup> Marty first stated he could not remember his first conversation with Sharron about the Union. Tr. 213. He later agreed that the conversation in question was the first conversation. Tr. 213. He could not provide an estimate of how long the conversation lasted. Tr. 213. He remembered it was brief. Tr. 215.

also spoke with all of the other engineers, asking each, individually, by phone or in person, if he or she was interested in the Union. Tr. 364. All of the engineers told him they were not interested in the Union. Tr. 366. Sharron stated he believed them and concluded that no employees wanted the Union. Tr. 366-367. According to Sharron, he reported to Marty that there was no interest in the Union. Tr. 367.

In contrast, Marty testified that the day after his initial conversation with Sharron, Sharron called him and informed him that there was interest in the Union among the engineers. Tr. 40, 215, 217. Sharron explained that he had learned this by asking the engineers. Tr. 42, 215-216, 217. Marty stated that Sharron was upset at being excluded from the campaign. Tr. 42. Dramise also stated that Sharron informed him that there was an organizing campaign and that the engineers had not told him about it. Tr. 359.

Sharron stated that he only changed his belief that there was no interest in the Union on the day of the election. Tr. 367. He later testified that Arellano approached him prior to the election and informed him that he supported the Union. Tr. 368.

***iii. Servin's and Arellano's Testimony About Sharron's Pre-election Conduct***

Servin testified that on January 24, around 10:00 a.m., in Bay 9 at Respondent's facility, Sharron asked him if he knew anything about the Union trying to force its way in, and he said he knew nothing.<sup>11</sup> Tr. 528. Sharron then stated that the Union was only interested in Servin's money and, if it came in, Servin would end up with just \$25 on his paycheck. Tr. 529. He then asked Servin how he would be voting. Tr. 529. Servin said he did not know. Tr. 530.

Later, in early February, Sharron approached Servin on the floor of the facility and informed him that Respondent had determined that there were three people who would vote in

---

<sup>11</sup> Servin answered untruthfully because he had been warned he could be fired. Tr. 528-529.

support of the Union because the Union needed support from 30% of the engineers. Tr. 533-534. Respondent believed the Union supporters to be Arellano, Charles Walker (Walker), and Rico Magtibay.<sup>12</sup> Tr. 534. Sharron explained that the Union needed three individuals, and it had to be those three. Tr. 535. Regarding why Respondent suspected Arellano, Sharron stated only that Arellano was a strong union supporter.<sup>13</sup> Tr. 534. Sharron did not explain how he knew. Tr. 535.

Arellano testified that on January 25, Sharron spoke with him in the parts room, with Marsh and former chief engineer Kevin Scott, who was performing inventory, present. Tr. 490. Sharron asked Arellano if he wanted the Union, and Arellano said he did. Tr. 491. Sharron then said he was going to call the other engineers to see if they wanted the Union. Tr. 491.<sup>14</sup>

## **B. AUTHORITY**

In *Rossmore House*, 269 NLRB 1176, 1177 (2003), the Board set forth its test for determining if employer interrogation of its employees about their union activities violates Section 8(a)(1) of the Act. The Board's test considers the totality of the circumstances, including whether the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Id.* In making this determination, the Board considers the so-called "*Bourne*"<sup>15</sup> factors": (1) the background, i.e. is there a history of employer hostility and discrimination? (2) the nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) the identity of the questioner, i.e.

---

<sup>12</sup> "Rico" refers to Rico Magtibay. Tr. 237

<sup>13</sup> They suspected Walker because he was often worried about losing his job and Rico because he was recently injured. Tr. 534.

<sup>14</sup> Sharron appears to deny saying this, although a reasonable reading of the transcript suggests that Sharron understood CGC's question to be whether Sharron told Arellano and Servin that he would call other engineers to find out how *Arellano* and *Servin* felt about the Union as opposed to how the other engineers felt. See Tr. 366.

<sup>15</sup> *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

how high was he or she in the company hierarchy? (4) the place and method of the interrogation, e.g. was the employee called to the boss's office or was there an atmosphere of unnatural formality? (5) and the truthfulness of the reply. *Westwood Health Care Center d/b/a Medicare Associates*, 330 NLRB 935, 939 (2000). In *Rossmore House*, the Board found the fact that the employees being interrogated were open, active union supporters weighed against a finding of unlawful interrogation. *Id* at 1178. In *Cumberland Farms*, 307 NLRB 1479, 1479 (1992), however, the Board found unlawful interrogation because the fact that the employees were open union supporters was outweighed by other factors. The Bourne factors are not to be mechanically applied; rather, they are useful indicia not requiring strict evaluation of each factor. *Westwood Health* at 939. When there have been multiple instances of interrogation, a proper analysis must include all of the incidents. *Id* at 940. It is well established that an employer's questioning an employee about other employees' union sentiments is unlawful. *Gardner Engineering*, 313 NLRB 755, 755 (1994).

In evaluating whether a would-be threat violates of Section 8(a)(1), the Board must determine whether the statement is a threat of retaliation in response to protected activity. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The Board looks at the totality of circumstances. *Id*. The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) stated that an employer's prediction concerning an adverse impact of unionization must include an explanation based on objective facts beyond the employer's control, in order to be lawful. Otherwise, employees are given the impression that it is the employer's own hostility against the union will cause the adverse impact. *Id*. Therefore, predictions of adverse consequences from unionization that go beyond the facts will be interpreted as threats of reprisal. *Reeves Bros., Inc.*, 320 NLRB 1082, 1082-1083 (1996). A threat need not be one of job loss in

order to be unlawful. A threat to exercise authority unfavorably in response to protected concerted activity is unlawful. See *Cox Fire Protection*, 308 NLRB 793 (1992).

It is unlawful for an employer to tell employees that it would be futile to select a union as their bargaining representative. See *General Electric Co.*, 332 NLRB 919 (2000). In *Evans Bros. Barber & Beauty Salons*, 256 NLRB 121, 128 (1981), the employer violated Section 8(a)(1) of the Act when it stated that the union could not do the employees any good because the employer could not afford it.

The test for determining “whether an employer has created the impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance.” *Register Guard*, 344 NLRB 1142, 1144 (2005). This is an objective one and must include whether the employer’s conduct, under the circumstances, would tend to interfere with, restrain or coerce employees in the exercise their Section 7 rights.

*Broadway*, 267 NLRB 385, 400 (1983). “It is well settled that an employer creates an impression of surveillance by telling employees that it is aware of their union activity without disclosing the source of that information, because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through employer monitoring.” *Caterpillar Logistics, Inc.*, 362 NLRB No. 49 slip op. at 2 (2015) (internal citations and quotations omitted). In *Peter Vitale Co.*, 310 NLRB 865, 874 (1993) the Board found that an employer created an unlawful impression of surveillance when it told employees which ones were union supporters, when the employees in question had not openly demonstrated their support for the union.

**C. ARGUMENT**

*i. Credibility*

For the most part, Sharron was straightforward in his testimony. However, Sharron's claim that he knew of no support for the Union prior to the day of the election is contradicted by Marty's testimony and Sharron's own. Marty testified that, the day after his initial conversation with Sharron, Sharron reported that there was interest in the Union. The record indicates no endeavors apart from Sharron's questioning employees whereby he might have discovered interest in the campaign. Further, Sharron testified that Arellano informed him that he supported the Union prior to the election. Therefore, Sharron's claim that he was unaware of any support for the Union prior to the election is false. By contrast, Servin's and Arellano's testimonies demonstrated no inconsistencies. Both presented detailed accounts, demonstrating accurate recollection with no indication of embellishment. To the extent Sharron's testimony conflicts with others', CGC respectfully requests that Your Honor not credit Sharron's testimony.

*ii. Sharron Unlawfully Interrogated Employees (Complaint Paragraphs 5(b)(1) and 5(c)(1))*

Many of the key facts regarding these allegations are not in dispute. After Sharron found out about a purported organizing campaign, he informed his superior that he would investigate. He did so by asking each of the engineers if they were interested in the Union.

Regarding the *Bourne* factors:

- (1) There is no evidence of Respondent's hostility toward the Union because, up until this point, Respondent was unaware.
- (2) Respondent's actions subsequent to the election make it clear that one of Respondent's reasons for seeking this information was to take action against Union supporters. The day after the election, Respondent closed the engineers' lunch room. Within about a week, it fired the two Union supporters.

- (3) Respondent does not have an extensive hierarchy. Sharron is equal in authority to Marsh, and both rank just below Marty. As set forth below, Sharron and Marsh have significant involvement in discharge decisions.
- (4) What record evidence exists regarding the context of the interrogations demonstrates that Sharron had face-to-face confrontations with employees, sometimes alone and sometimes in the presence of other supervisors.
- (5) According to Respondent none of the engineers was a typical open, active union supporter, and all of them falsely reported that they were not interested. The exception is Arellano, who testified that he told Sharron, upon being questioned, that he supported the Union.

With four of the five factors weighing in favor, and when taken as a whole, the record establishes that Sharron's actions constituted unlawful interrogation. CGC respectfully requests that Your Honor so find.

***iii. Sharron Made an Unlawful Threat and Statements of Futility (Complaint Paragraphs 5(b)(2) and (3))***

Sharron provided no factual basis for his statement that Servin would wind up with only \$25 on his paycheck. Without this explanation, Servin was left to assume that this detrimental effect would result from Respondent's own actions. His statement explicitly ties the detrimental effect to union representation. In the same conversation, Sharron informed Servin that the Union was only interested in his money, implying that the Union would do nothing for him. On this basis, CGC respectfully requests that Your Honor find that Respondent unlawfully threatened employees and informed them that it was futile to support the Union.

***iv. Impression of Surveillance (Complaint Paragraphs 5(c)(2) and 5(e))***

When Sharron informed Servin that Respondent suspected Arellano of supporting the Union because he was a union supporter, he gave no factual basis for his belief, which could lead Servin to believe that Respondent had discovered this information through surveillance. In a separate conversation, Sharron told Arellano that he was going to call all of the other engineers

to ascertain their sentiments regarding the Union. Having just spoken to Arellano about his position on the Union, this statement could give Arellano the impression that Sharron's conversations with other employees might endeavor to uncover Arellano's involvement.

These conversations took place in the context of an upcoming Union election in which employees were trying to keep their support for the Union secret. In addition, as outlined above, Sharron had interrogated employees, made threats, and informed Servin that supporting the Union was futile. In this context, his claim that Respondent knew that Arellano was a Union supporter and his statement that he would call the other engineers gave an impression of surveillance that would tend to interfere with an employee's union activity. CGC respectfully requests that Your Honor so find.

## **VI. RESPONDENT THREATENED EMPLOYEES (COMPLAINT PARAGRAPH 5(d))**

### **C. FACTS**

#### *i. Events According to Respondent*

Sharron informed Dramise that an organizing campaign was in progress among Respondent's engineers. Tr. 359. Sharron suspected Arellano was a Union supporter. Tr. 368. After learning of the campaign, Dramise met with Marty.<sup>16</sup> Tr. 352. Dramise instructed Sharron to set up a meeting on February 1.<sup>17</sup> Tr. 369. The meeting occurred that same day. Tr. 339.

---

<sup>16</sup> He later testified that his only conversations about the organizing campaign were with Sharron, Servin, and Arellano. Tr. 359. He stated that Respondent did not discuss the campaign much "because of the situation." Tr. 359.

<sup>17</sup> This is according to Sharron. Dramise could not recall if he requested the meeting. Tr. 341.

Besides Dramise and Sharron,<sup>18</sup> only Arellano and Servin attended the meeting.<sup>19</sup> Tr. 339.

According to Sharron, the purpose of the meeting was for Dramise to let engineers know that his position depended on the Union. Tr. 371. Dramise testified that his purpose was to let engineers know that Respondent was aware of the upcoming election and that if engineers voted for the Union, “the contract would have to be renegotiated with the Union.”<sup>20</sup> Tr. 339-340. According to Sharron, Dramise stated that “if we got in a union, that it was going to be a new contract with the Union, and his contract was vull and noid (sic) after that.” Tr. 370. Arellano and Servin were quiet and did not speak. Tr. 357, 358, 370.

Sharron stated he was not instructed thereafter to arrange similar meetings with other engineers. Tr. 370. Dramise likewise testified he had no other meetings with engineers before or after this meeting. Tr. 341.

*ii. Events According to Arellano and Servin*

Arellano testified that, although he would only see Dramise at the facility about once per month, on February 1, Sharron took the unusual step of calling him on the radio while he was working in the dry cleaning department and instructing him not to leave at the end of his shift because Dramise wanted to meet with him. Tr. 491-492, 494. Later, Servin instructed Arellano by radio to come to the meeting. Tr. 493. Arellano went to the conference room, where he found Servin, Sharron and Dramise. Tr. 491, 494. Dramise stated that if engineers voted in

---

<sup>18</sup> According to Dramise, Marsh was present. Tr. 340. However, Marsh had no recollection of having a conversation involving Servin about the subject of unions. Tr. 299. He testified that he would recall if it had occurred. Tr. 299-300.

<sup>19</sup> Dramise could not recall why Arellano and Servin, specifically, attended the meeting. Tr. 340.

<sup>20</sup> Later, under examination by Respondent’s counsel, Dramise testified that he told Arellano and Servin that they would “have to negotiate a new contract with the Union.” Tr. 357. Dramise claimed that his use of the term “contract” referred to a union contract. Tr. 340.

favor of the Union, they would no longer have their schedules, benefits, or vacations honored.<sup>21</sup>

Tr. 494. Arellano and Servin both said “okay.” Tr. 495-496. The meeting, which lasted only about five minutes was Arellano’s only meeting with Dramise, then ended. Tr. 494-495.

Servin testified that, on February 1, Sharron informed him that Dramise wanted to meet with him and Arellano and that if Servin saw Arellano, he should instruct Arellano not to leave until the meeting took place. Tr. 530. Sharron later called Servin to the conference room by radio. Tr. 530-531. When he arrived, Sharron and Dramise were present. Tr. 531. Arellano arrived a moment later. Tr. 531. Dramise said that if the Union came in, Dramise would no longer be able to honor their contracts,<sup>22</sup> and that, Dramise could not maintain their schedule<sup>23</sup> or pay and that anything Dramise had given them would no longer be guaranteed. Tr. 531.

Arellano and Servin both said “okay.” Tr. 533. Servin was afraid to say anything else. Tr. 533.

The meeting, which lasted a maximum of 10 minutes, then ended. Tr. 533.

No one ever told Arellano or Servin why Dramise had wanted to meet with them. Tr. 496, 533.

## **B. ARGUMENT**

Dramise’s testimony that he told Arellano and Servin that the contract would have to be “renegotiated” summarizes the issue. His explanation that he was referring to a union contract makes no sense, because there is no union contract to be renegotiated. “Renegotiate”

---

<sup>21</sup> At the time, Arellano was working his schedule of choice. Tr. 495. It was a day shift, he had obtained by bidding for it. Tr. 495. He was awarded the shift due to his seniority. Tr. 495.

<sup>22</sup> Servin testified that Dramise used the word “contract.” Tr. 532. He understood this to mean terms or conditions of employment. Tr. 532. Servin was hired on the condition that he would have a day shift with weekends off and that Respondent would pay for his health insurance. Tr. 531. He considered those matters conditions of employment. Tr. 532.

<sup>23</sup> On being hired, Servin was promised weekends off and that he would work a day shift. Tr. 532. At one point during his employment, he had been assigned to work a shift other than day shift. Tr. 532. During that time, he was scheduled from 1 a.m. to 11 a.m. Tr. 533. He reminded Marty and Dramise that he had been promised a day shift and weekends off. Tr. 533. Respondent hired another engineer, which allowed Servin to go back to day shift. Tr. 533. This occurred years before his discharge. Tr. 533.

clearly refers to a contract in existence. Dramise's later testimony that Arellano and Servin would have to negotiate a "new" contract further establishes this point. In addition, Dramise's testimony was inconsistent regarding who discussed the organizing campaign with and who was in attendance at the meeting; his claim that Marsh was at this meeting is uncorroborated by any witness, including Marsh. Finally, Sharron's testimony corroborates Servin's and Arellano's – that if the Union won the election, Dramise's contract would be nullified. To the extent his testimony conflicts with the other three witnesses', Your Honor should discredit Dramise.

Arellano and Servin testified clearly and consistently that Dramise told them that their schedules and other benefits would no longer be honored. Schedules were of particular importance to these two senior engineers, as both held their schedules of choice at the time. Dramise's statement explicitly tied these detrimental effects to the effect of union representation. The statement was coming directly from Respondent's chief executive officer, who presumably had the authority to effectuate these detrimental changes. Under the totality of circumstances, Dramise's statement communicated to Respondent's employees that they would suffer adverse consequences for supporting the Union. CGC respectfully requests that Your Honor so find.

**VII. RESPONDENT VIOLATED ARELLANO'S WEINGARTEN RIGHTS AND DISCHARGED HIM BECAUSE OF HIS UNION SUPPORT (COMPLAINT PARAGRAPHS 5(f)-(h) and 6(a))**

**D. FACTS**

*i. Background*

Arellano, who began working for Respondent as an engineer on August 16, 2011, was Respondent's second most senior engineer.<sup>24</sup> Tr. 42, 489. Marty considered him a talented employee. Tr. 43. At the time of his discharge on February 13, he had no discipline, and there

---

<sup>24</sup> Servin was first. Tr. 489.

were no significant issues with his work. Tr. 45. Arellano's last employee evaluation was conducted by Sharron in September 2013.<sup>25</sup> Tr. 45; see GCX 6. In that evaluation, Arellano was rated as "exceeds expectations" in all categories.<sup>26</sup> GCX 6(a). The evaluation contains only positive commentary and states in two locations that Arellano had the potential to become a supervisor. See GCX 6. On one occasion, he was named employee of the month, a designation no other engineer had received.<sup>27</sup> Tr. 43, 489-490.

*ii. Arellano's Union Support*

Arellano offered testimony about his involvement with the Union. He had been a Union member while working for a former employer. Tr. 496. In July 2016, he contacted the Union. Tr. 496. He went to the Union hall and asked how to be represented. Tr. 496. There, he obtained the phone number for Jose Soto (Soto)<sup>28</sup> and called him to set up an appointment. Tr. 496. During his first meeting with the Union, Arellano signed an authorization card. Tr. 499. He then asked all the other engineers to text him their schedules. Tr. 497. Arellano scheduled meetings with the Union in manner to allow all engineers to attend. Tr. 497, 498. He also ensured that all engineers were aware of union meetings. Tr. 496-497. The first meeting with all engineers present took place in August 2016 at the Union hall. Tr. 497, 500. There was a total of six meetings between August 2016 and January. Tr. 497-498. All the engineers attended the meetings and asked questions. Tr. 498. All the engineers expressed support for the Union. Tr. 497. After the fourth meeting, the Union decided the engineers were ready for the next phase, which was to secure signed authorization cards. Tr. 498. Thus, about a month before the

---

<sup>25</sup> Marty testified that Respondent ceased giving employee evaluations in 2013. Tr. 45.

<sup>26</sup> "Exceeds expectations" is the fourth highest of five possible ratings. See GCX 6.

<sup>27</sup> The award was given once per month to one of Respondent's 250 employees. Tr. 44. The practice ceased over a year prior to the present hearing. Tr. 44.

<sup>28</sup> Jose Soto is the director of organizing for the Union. Tr. 447.

election, the Union gave blank authorization cards to Arellano, and, the same day, Arellano texted the other engineers to meet at one engineer's house and secured signed authorization cards from all of them. Tr. 498-501. This was about a month before the election. Tr. 501. Arellano began wearing a Union button on the day of the election. Tr. 501.

Prior to the election, and prior to Arellano's informing Sharron that he supported the Union, Sharron suspected that Arellano supported the Union. Tr. 368. He had no suspicions about anyone else. Tr. 368. At some point before the election, Arellano informed Sharron that he supported the Union. Tr. 368. Marty and Dramise testified that Sharron reported to them about the organizing campaign. Tr. 40, 359 (respectively).

Cristina Linares (Linares) is Respondent's dry cleaning manager.<sup>29</sup> Tr. 464. Arellano had been an employee of Respondent since Linares was hired. Tr. 482. He regularly repaired dry cleaning machinery. Tr. 466. Linares testified that she saw Arellano wearing a union button.<sup>30</sup> Tr. 485. She saw other engineers wearing union buttons as well. Tr. 484. This was before the election. Tr. 484, 485. Linares also saw people outside Respondent's facility for the vote. Tr. 484. She knew that an election was held.<sup>31</sup> Tr. 485.

***iii. Arellano's Interaction with Hernandez According to Hernandez***

Veronica Hernandez (Hernandez) is currently employed as a dry cleaning operator for Respondent. Tr. 591. On a date in February, two or three hours after Hernandez arrived at work at 4:00 a.m., she began to experience redness in her eye, and, later, found blood in her eye. Tr. 591-593. Arellano encountered Hernandez at work that day, and, as he often does, helped her

---

<sup>29</sup> Linares supervises Hernandez as one of 49 dry cleaning employees. Tr. 465. She has worked for Respondent since April 2016. Tr. 479-480.

<sup>30</sup> However, she first stated she was unaware that engineers were organizing a Union. Tr. 482. She explained that engineering is not her department. Tr. 483.

<sup>31</sup> However, the observations just noted all occurred prior to the incident on which Respondent based its decision to terminate Arellano (see below). Tr. 485.

with opening a bottle, a task that should be done while wearing protective glasses and gloves. Tr. 593-594, 596, 601, 603. Arellano noticed the redness of Hernandez' eye and asked what happened. Tr. 594. Hernandez said she did not know. Tr. 595. Arellano told her to report a work injury to her supervisor so that she could be sent to the doctor. Tr. 595, 602. Hernandez said "no," because "it didn't quite happen at work exactly."<sup>32</sup> Tr. 595. The conversation then ended. Tr. 602.

Later that day, Linares, who is Hernandez' supervisor, arrived at work, and spoke with Hernandez who "mentioned what [Arellano] had said." Tr. 591, 596, 604. After speaking with Linares, Hernandez clocked out for the end of her shift. Tr. 600. Linares asked if Hernandez could provide a statement, and Hernandez agreed to do so and drafted a statement one or two days after the incident. Tr. 597, 600-601; GCX 34(a). Hernandez' statement reads: "To date (sic 'today') this morning, I said hi to Adam, and he asked me about my eye. I answered, I did not know what was happening. And he said to announce this to my bosses, to be sent to a doctor, company doctor, because something had happened there with a chemical. But I responded that nothing had happened here." Tr. 599-600. Hernandez testified that GCX 34(a) accurately captures her conversation with Arellano.<sup>33</sup> Tr. 597, 602.

*iv. Arellano's Interaction with Hernandez According to Linares*

Linares testified as soon as she arrived for work at 8:00 a.m., Hernandez reported to her that she had blood in her eye; that Arellano had asked her; that she told Arellano she was not

---

<sup>32</sup> Hernandez then testified about what would happen if she went to the doctor, that he would notice a lack of liquid in her eye and that employees are required to wear glasses and gloves when they handle chemicals. Tr. 595. The record is unclear whether she said this to Arellano or if these were her thoughts.

<sup>33</sup> Hernandez also gave testimony about a conversation she had with Arellano after the incident. See Tr. 598. According to Hernandez, the day after the incident, Arellano came to her and "said that a statement was given to him where he had information of what – of what he said, and I said yes. And then he asked if I had knowledge that with that, I was going to be brought up to court."

sure because she did not wake up with that condition; and that Arellano told her to report that the condition arose at work. Tr. 467.

Hernandez explained to Linares that she had woken up normal and that, at some point, her eye had turned red. Tr. 468. She was unsure of the source of the injury. Tr. 468. Linares did not ask Hernandez whether she went anywhere between leaving home and reporting for work. Tr. 480-481. She did not ask whether Hernandez might have done something to cause the injury before work. Tr. 481. When first asked whether Respondent ever discovered the source of Hernandez' injury, Linares first told Union's counsel to ask Hernandez. Tr. 481-482. When asked again, she admitted that Respondent never discovered the source. Tr. 482.

Linares admitted that Hernandez' eye was red, that employees use chemicals on the job and are expected to wear protective eyewear, and that employees are trained on how to respond to eye injuries. Tr. 468, 480-481. In fact, Article 5-14 of Respondent's handbook specifically requires: "Any workplace injury, accident, or illness must be reported to the employee's Supervisor as soon as possible, regardless of the severity of the injury or accident." GCX 2, pages 25-26. Linares agreed that if an employee has a potential injury, she should see a doctor. Tr. 481.

Based on Hernandez' report, Linares concluded that Arellano engaged in misconduct by telling Hernandez to report an injury she was not sure occurred at work. Tr. 468. Within a couple hours of speaking to Hernandez, Linares reported the matter to Marty via e-mail.<sup>34</sup> Tr. 469. Linares first testified that she did not visit with Marty. Tr. 469. She then recalled that Marty called her to his office, where she reported the incident. Tr. 470. She first testified that

---

<sup>34</sup> As CGC pointed out during the hearing, that e-mail had not been produced. See Tr. 478. Respondent's counsel expressed some doubt that it existed but agreed with the ALJ to perform a search. Tr. 478. No such e-mail was produced.

she could not remember what Marty told her. Tr. 470. She then recalled that Marty told her to get a written statement from Hernandez and that it was the first thing he said. Tr. 470-471.

Linares testified that she called Hernandez to her office and obtained a written statement from Hernandez right away. Tr. 471, 476. Linares admitted that GCX 34(a) fully encompasses what Hernandez reported. Tr. 471-472. Linares interpreted GCX 34(a) to state that Arellano had encouraged Hernandez to file a false workers compensation claim. Tr. 472. Specifically, Arellano told Hernandez to report that her injury happened at work after knowing that the injury did not occur at work.<sup>35</sup> Tr. 473-474.

**v. *Arellano's Interaction with Hernandez According to Marty***

Marty testified that, after he arrived at work at 8 a.m., Linares reported to him that Hernandez was upset and had reported to Linares that Arellano had asked about her eye, and, after she said she must have gotten something in it at home, advised her to report that the redness in her eye was caused by a chemical at work, which Hernandez did not think that was right. Tr. 58, 65.

Marty instructed Linares to obtain a statement, which she eventually did. Tr. 59, 67. Linares orally translated Hernandez' statement for Marty, who admitted that all of his knowledge of the incident was based on Linares' report and Linares' translation Hernandez' statement.<sup>36</sup>

---

<sup>35</sup> When CGC suggested that the statement does not indicate that Arellano knew that Hernandez' injury did not occur at work at the time he recommended she report a work injury, Linares suggested CGC ask Hernandez about the issue. Tr. 474.

<sup>36</sup> Marty also reviewed surveillance footage. Tr. 60. The footage had no audio. Tr. 61. Reviewing surveillance footage is Marty's standard procedure. Tr. 64. His review revealed that a conversation between Arellano and Hernandez took place. Tr. 63. He watched just enough footage to verify that fact. Tr. 64. Marty had no hopes of learning anything else by reviewing the footage. Tr. 64. It also showed Arellano gesture toward his eye, which is something Marty would expect in a conversation about an eye injury. Tr. 63. Ultimately, the surveillance added nothing to his investigation. Tr. 63.

Tr. 61, 69, 478. Marty admitted that he never spoke to Hernandez or Arellano<sup>37</sup> Tr. 59, 70. He never spoke to Arellano. Tr. 68, 70.

*vi. Respondent's Decision to Terminate Arellano*

Marty made the decision to terminate Arellano. Tr. 50. He drafted and signed a termination form for Arellano on February 9, and testified that he planned to terminate Arellano at that time, but, later, testified that he was still considering whether to terminate him on February 13. Tr. 50-51, 53, 75; GCX 7, 13.

Marty admitted that he based his decision to terminate Arellano strictly on information Linares provided, including Hernandez' report. Tr. 62. Although Respondent has had incidents with employees encouraging others to lie in order to get other employees in trouble, Marty chose to credit Hernandez' report, as conveyed by Linares, without speaking with Arellano about what happened. Tr. 69.

Marty stated that engineers' ethics are of special concern because they are in a position to cause great damage to Respondent, and that the incident involving Hernandez immediately gave rise to concerns that Arellano would be willing to damage equipment. Tr. 77, 84-86. When

---

<sup>37</sup> Marty asserted that he did not speak to Hernandez because she "speaks exclusively Spanish." Tr. 59. Marty does not speak Spanish, but admitted that he could have spoken with her through a translator, but chose, instead, to rely on Linares' debriefing. Tr. 61-62. Linares testified that Hernandez understands English and speaks some English, though she speaks with Linares in Spanish. Tr. 468. Marty asserted that he did not speak with Arellano because he received a Board charge and because he started by speaking with the Union about it, since Arellano was represented by the Union, and, then, because Arellano However, she communicates with Linares in Spanish. Tr. 468. Marty asserted he had not spoken with Arellano because he received a Board charge, because he started by contacting the Union about it, and because Arellano "was off after, you know, this basically happened." Tr. 68-69.

asked about why Respondent did not discharge him until February 13 given this concern, Marty gave various explanations.<sup>38</sup> Tr. 54, 67-68, 77, 85-86.

At some time around Arellano's discharge, Respondent, specifically Marsh and Scott, investigated whether Arellano had sabotaged Respondent's equipment, but their investigation revealed no such conduct. Tr. 72, 81. Marty testified repeatedly that the sole reason for Arellano's discharge was the incident with Hernandez. Tr. 57, 58, 71, 72-73, 75, 77. However, Arellano's termination form specifically cites "willful or careless destruction of company assets" as a reason for Arellano's discharge. Tr. 72; GCX 7. Although Marty states that this was a reference to the incident involving Hernandez, because worker's compensation fraud damages Respondent, he later testified that, as late as February 13, Respondent was still investigating potential sabotage and was "up and down." Tr. 57-58, 75. Further, on February 13, Marty drafted and signed a letter stating that Arellano had, on February 8,<sup>39</sup> failed to follow instructions regarding an electrical issue, which placed all of the plant's equipment at risk. Tr. 72; GCX 14. The document states that Arellano was terminated to "prevent any further damage." GCX 14. Marty testified that, at the time he drafted the document, he was considering whether to

---

<sup>38</sup> Specifically, Marty said, "We're reacting to what's going on. We're asking advice from our HR, we're investigating, so tough to say. But -- yeah, tough to say. I'd have to look back." Tr. 77. When asked whether he believed he was not permitted to prevent Arellano from entering the property, Marty stated, "I mean, I guess we could have done a lot of different things, but we didn't. I mean, he was off up until this point. So --" Tr. 86. When asked why Marty did not terminate Arellano on Thursday, February 9, Marty stated that Arellano was not at work. Tr. 54. He later gave the reason that Respondent "had a lot going on at this period. We were just gathering all the information. We were starting negotiations. We had just finished the election. We were trying to get back to some normal operations. And frankly, I was -- didn't know how to do a lot of this stuff at this point. So we were asking questions of our attorney. I knew I had to discuss this with the Union. So -- and frankly, Adam was also off, so that gave us several days before he'd be back to work. And then we hadn't addressed it, so the combination of those factors." Tr. 67-68. He also offered that "it was just the reality of the situation. So--" Tr. 85. He later explained that February 13 was "when we were able to walk him out." Tr. 85.

<sup>39</sup> Contrary to the statement, Marty testified that the electrical problem occurred the week before the incident with Hernandez. Tr. 72.

discharge Arellano and that his purpose was to document the reasons for discharging Arellano.<sup>40</sup> Tr. 75. Marty acknowledged the document poses an inconsistency with Respondent's claimed reason for discharging Arellano. Tr. 75.

**vii. Arellano's Termination**

On February 13, at around 8:00 a.m., Marty met with Arellano, with Marsh and Scott as witnesses, in Respondent's conference room. Tr. 80-81, 300. According to Marty, the first thing Arellano said was that he wished to invoke his *Weingarten* rights.<sup>41</sup> Tr. 82. Marty then told Arellano that he could write a statement, but he was discharged. Tr. 83. Marty gave Arellano a form to use for his statement, and Marty wrote the word "refused" on the form. Tr. 83, 477, 510; GCX 34(b).

**viii. Arellano's Testimony**

At the time of his discharge, Arellano was assigned to a project on dry cleaning machinery, in preparation for a new account. Tr. 492. Specifically, he was rebuilding valves on the Unipress, hand press, and shirt press machines, an assignment he received about a month earlier. Tr. 492-493.

On February 10, Arellano learned from Ed that Respondent planned to terminate him for misconduct. Tr. 502. He explained that Arellano had been accused of committing worker's compensation fraud regarding an eye injury. Tr. 502.

---

<sup>40</sup> In e-mail correspondence on February 13, in the context of discussing Arellano's discharge, Marty wrote that Respondent had "a tremendous amount of assets at risk." Tr. 71; GCX 13(d). At the time of the correspondence in GCX 13(d), Arellano had been terminated and removed from the facility. Tr. 84. Later in that chain of correspondence, he referred to an electrical problem that had caused \$11,000 in damage. GCX 13(c). On February 14, he wrote that Arellano had failed to follow instructions regarding an electrical problem and that, although errors are not terminable offenses, the timing of Arellano's error was suspicious. GCX 13(a). Marty testified that this correspondence merely intended to remind Ed that they had discussed the electrical issue. Tr. 72-73.

<sup>41</sup> Marsh, on the other hand, was "one hundred percent sure" that Arellano did not mention his *Weingarten* rights and no discussion of *Weingarten* rights took place. Tr. 302.

Arellano realized that Respondent must be referencing his discussion with Hernandez about her eye. Tr. 502. Arellano testified that Hernandez had approached him, holding a jug of stain cleaner and asked Arellano to open it. Tr. 503. Arellano exchanged pleasantries with Hernandez and then took channel lock pliers from his toolbox and opened the jug. Tr. 503. During their interaction, he noticed that her eye was red and asked what happened to it. Tr. 503. Hernandez said something probably got into it because it was bothering her. Tr. 503. Arellano said that if it happened at work, she should report it. Tr. 503. He explained that even if she did not see a doctor, her report would ensure that there was a record so that she could visit the doctor later if her eye became infected. Tr. 503. Hernandez then told her that she did not think the injury happened at work. Tr. 503. Arellano said “okay.” Tr. 503. He told Hernandez that if she was handling chemicals, she should be wearing safety glasses. Tr. 503-504.

Arellano’s understanding of Respondent’s policy is that employees must report injuries, even if the injury is just a scratch, so that the injury is documented. Tr. 505. Arellano’s testimony establishes that there is a risk of eye injury at Respondent’s facility, due to debris, such as metal shavings and lint, in the air, and due to the handling of chemicals.<sup>42</sup> Tr. 503-505.

On February 13, four hours into his shift, at 8:00 a.m., Arellano was informed that Marty wanted to speak with him. Tr. 506. When Arellano reported, Marty, Marsh, and Scott were present. Tr. 506. Marty asked Arellano if he knew why he was there. Tr. 507. Arellano responded that he did. Tr. 507. Marty said he assumed the Union had informed him. Tr. 507. Arellano then stated he was invoking his *Weingarten* rights. Tr. 507. Marty said that *Weingarten* rights did not apply because Respondent had already decided to terminate him. Tr.

---

<sup>42</sup> Like Hernandez, Arellano testified that he had a conversation with Hernandez after the incident. This occurred on the following Monday. Tr. 505. Arellano asked her if she had written a workers’ compensation statement against him. Tr. 505. Hernandez told him that her supervisor had approached her and asked what Hernandez and Arellano were talking about on the day of the incident but denied writing a statement. Tr. 505, 525.

507. He then provided Arellano a pen and paper and asked him if he wanted to provide his side of the story. Tr. 507, 509. Arellano reiterated that he would not without a Union representative present. Tr. 507. Marty then instructed Arellano to turn in his radio. Tr. 507.<sup>43</sup>

#### **E. AUTHORITY**

Employees are entitled, on request, to have a representative present during interviews which the employee reasonably believes might lead to discipline. *NLRB v. J. Weingarten*, 420 U.S. 251, 256-257 (1975). The Board has stated that *Weingarten* rights apply to investigatory or disciplinary interviews, which does not include meetings called for the “sole purpose” of informing employees that they have been disciplined or discharged. *Baton Rouge Water Works Company*, 246 NLRB 995, 997 (1979) (emphasis in original). In that regard, the Board held in *Baton Rouge* that “if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision,” *Weingarten* rights are applicable. *Id.*; see *Becker Group, Inc.*, 329 NLRB 103, 113 (1999). For example, if an employer informs employees that they are discharged and then seeks information to bolster that decision, *Weingarten* rights attach. See *Titanium Metals Corp.*, 340 NLRB 766, 774 (2003), *enf. in part*, 392 F.3d 439 (D.C. Cir. 2004).

In order to establish unlawful discrimination under Section 8(a)(3), the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer’s

---

<sup>43</sup> At hearing, Respondent raised an issue regarding subpoenas. Although Respondent made no requests of Your Honor in connection with the issue, in anticipation that some request may be made in briefs, CGC sets forth the following: Arellano acknowledged receiving RX 27 in the mail. Tr. 518. He was present at court on October 10 in response to the subpoena. Tr. 524. Although, the record does not reflect his identity, Arellano was in the hearing room prior to Your Honor’s sequestration order. See Tr. 16. He brought with him the documents requested in the subpoena. Tr. 524. In addition, he had the documents with him at the time he provided testimony. Tr. 525. Aside from receiving the subpoena, Respondent made no request to receive the documents. Tr. 524-525. Your Honor may note that CGC requested production prior to beginning its case in chief. See Tr. 6. Your Honor asked three times before CGC’s case in chief whether there were any preliminary matters. See Tr. 6, 8, 12.

hostility to that activity “contributed to” its decision to take an adverse action against the employee. *Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982); *Nichols Aluminum, LLC*, 361 NLRB No. 22, slip op. at 3 (2014) (see fn. 7 discussing the Board’s approach of the multi-factor test under *Wright Line* and its dismissal of the view that a fourth ‘nexus’ factor is also required). Under *Wright Line*, the existence of a violation turns on an analysis of the employer’s motivation. *Gravure Packaging, Inc.*, 321 NLRB 1296, 1304 (1996).

Inference of animus and discriminatory motive may be drawn from circumstantial evidence, *Gravure Packaging* at 1304, because an employer will rarely baldly assert that it has discharged an employee due to the employee’s union activity. *Wright Line* at 1083. Animus may be inferred from the record as a whole, including the timing of the adverse action. See *Masland Industries*, 311 NLRB 184, 197 (1993) (“Timing alone may suggest anti-union animus as a motivating factor in an employer’s action.”) (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)). Circumstantial evidence of unlawful motivation might also include disparate treatment of employees similarly situated, inconsistencies in the proffered reasons for the adverse action, or deviations from past practice. *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004). When an employer presents shifting defenses for its actions, this too may be evidence of unlawful motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978).

## **C. ARGUMENT**

### ***i. Credibility***

#### **a. Marty**

Every witness's account of the incident but Marty's establishes that Hernandez did not know the source of her injury. Only Marty stated that Hernandez positively identified the source of her injury. This key detail is uncorroborated, at best, and possibly fabricated. His characterization of his actions in regard to Arellano's *Weingarten* request is similarly dubious. His claim that he only mentioned that Arellano could give a statement and whether he did was unimportant is belied by the fact that he had a form ready and saw fit to write the word "refused," not a word typically associated with an option presented in an offhanded manner. In addition, Marty showed a tendency to provide long, unresponsive answers to direct questions. He frequently volunteered testimony beyond question posed. See e.g. Tr. 73-74. He was admonished to limit his testimony to the question asked. Tr. 94, 221.

#### **b. Linares**

Linares' testimony is contradicted by Hernandez' as well as her own. Her claim that Hernandez sought her out to report the incident immediately is contrary to Hernandez', who stated that Linares approached her toward the end of her shift. Her claim that Hernandez provided a statement the same day of the incident is also contrary to Hernandez', who stated it did not happen until one or two days later.

Linares was not forthcoming regarding her knowledge of the organizing campaign; after an initial denial of any knowledge and a subsequent attempt to avoid the question, she admitted to knowledge of several facts, including Arellano's union support. In a similar manner, she denied visiting with Marty about the incident and stated that she communicated only in e-mail.

Shortly thereafter, she recalled the meeting and its details, but the e-mail never surfaced. At best, Linares' recollection is questionable.

Linares also deflected questions. When the Union's counsel posed a direct question to her regarding the extent of her investigation into the incident, Linares directed him to ask Hernandez. She had to be asked again to provide an answer. When CGC challenged Linares' interpretation of GCX 34, she likewise directed counsel to ask Hernandez and appeared flustered.

**c. Hernandez**

Although generally credible, Hernandez demonstrated an eagerness to assert her credibility when it was not being challenged, stating without prompting that what she reported was true. She was demonstrably nervous about the subject of the chemicals at issue, denying that she was holding the bottle and offering unprompted testimony about the requirement that employees use gloves and glasses. Her testimony about the conversation she had with Arellano the day after the incident is dubious; it is unlikely that Arellano would testify about receiving a statement since he was unaware of any such statement until his later conversation with the Union, and he did not see Hernandez' statement until he was discharged. While Hernandez and Arellano agree that they discussed a possible statement, Hernandez' version has little basis in the facts.

**d. Marsh**

Marsh had a tendency to unnecessarily qualify his responses, acknowledging that a fact was possible and later providing definite testimony on the subject. See e.g. Tr. 300-302. In addition, he stated he was "one hundred percent sure" that Arellano never mentioned his

*Weingarten* rights. This testimony is contradicted by Arellano and Marty. If nothing else, Marsh's recollection is unreliable.

**e. Arellano**

Arellano's testimony was clear, straightforward and responsive to questions from all parties present. At no point was he defensive or argumentative. His demeanor was calm, and he demonstrated accurate recall of the events including contextual details. To the extent other witnesses' testimony is contrary to Arellano's, CGC respectfully requests that Your Honor credit Arellano.

**ii. Respondent Had Knowledge of Arellano's Union Support**

According to his own testimony, Sharron learned that Arellano was a Union supporter prior to the election. Given the fact that Sharron actively sought to determine whether engineers supported the Union as well as the fact that Dramise and Marty both learned about the campaign from Sharron, it is likely that Sharron informed them of Arellano's position.

Dramise's claim that Arellano's attendance at the meeting on February 1 is therefore somewhat dubious. It is especially so when considering that neither before nor after his meeting with Arellano did Dramise seek to meet with any other engineer. Dramise's message during that meeting, at best, did not encourage Arellano to support the Union. If Dramise hoped to discourage support for the Union, it seems he completed his efforts after holding that meeting.

Even if Dramise did not pointedly direct Sharron to have Arellano attend the meeting, Arellano's testimony establishes that Sharron did. The most reasonable explanation for Sharron's directing Arellano not to clock out before meeting with Dramise is that Sharron desired to have Arellano, specifically, in attendance. Servin's testimony corroborates Arellano's, as Sharron asked Servin to pass this instruction on to Arellano. If Sharron's purpose was, as he

testified, merely to have all the engineers present attend, it would not have mattered if Arellano were present.

Linares testified that she saw Arellano wearing a Union button.

***iii. Respondent's Claimed Reason for Terminating Arellano is Pretextual***

The most significant factor in this analysis is what Hernandez reported. Respondent's claim that Arellano encouraged Hernandez to file a false workers' compensation claim requires two facts: that Hernandez' injury did not occur at work and that Arellano, knowing this, advised her to file a workers' compensation claim. Neither fact is present here.

GCX 34(a) demonstrates that, at the time Arellano advised Hernandez to report a work injury, she had not informed him that she did not believe the injury happened at work. She did so after his suggestion. Granted, GCX 34(a) is not as concise as it could be in this regard. But Hernandez testified clearly to this fact. On the contrary, in testifying that the injury did not occur at work, Hernandez seemed unsure. Any party seeking to know the facts could have easily discovered them by asking Hernandez.

Marty, who made the decision to terminate Arellano, did not. He admittedly did not meet with Hernandez. Perhaps it is understandable that he believed she did not understand English – although Linares testified that she does understand English and speaks some – but it is odd that he did not opt to simply have Linares interpret. Further, he did not face this same barrier when it came to speaking with Arellano. Instead, he relied on a secondhand report and an oral translation of a written statement, both of which do not show the fact that would be crucial to an allegation of wrongdoing: that Arellano knowingly told Hernandez to falsely report a workers compensation claim. This minimal investigation demonstrates that Respondent was not looking for facts, but for an excuse to discharge Arellano. Instead, Marty claimed that Hernandez

positively reported that she received her injury at home, and Arellano told her to report a work injury anyway. Every other witness testified to *facts* indicating the contrary.

Linares was equally derelict in her investigation. She admitted that she made no effort to discover the source of Hernandez' injury. The admonition contained in Respondent's handbook that employees promptly report even a minor workplace injury seems to set forth a policy of extreme caution regarding workplace injuries. Either the spirit of that admonition was lost on Linares, or she was likewise unconcerned with uncovering facts. In contrast, Arellano's encouraging an employee holding a bottle of chemicals in a possibly debris-filled atmosphere to report an injury whose source was unknown and which arose hours after she arrived at work seems more in keeping with Respondent's policy.

Marty might have suspected Hernandez' injury was related to a workplace condition when he saw her holding a bottle of chemicals without protective attire on the surveillance video. Or Respondent might have suspected Hernandez got debris in her eye as Arellano performed pre-maintenance work on the machines, which tended to blow lint and metal shavings into the air, a risk against which Arellano was wearing safety glasses. Granted, Respondent may not have known this, but only because it did not talk Arellano.

Marty explained that he did not need to talk to Arellano because he trusted Hernandez. Setting aside the fact that he did not speak with Hernandez, Marty explained that Hernandez was a good, long-time employee, with nothing to gain from a false report. The same thing can be said about Arellano. In fact, Marty did say that Arellano was a long-time, talented employee with no disciplinary history. He stood to gain nothing from Hernandez' making a false workers' compensation claim.

The timing in this case is suspicious in more ways than one. It is undisputed that Respondent discharged Arellano a week after the Union election. Equally suspicious is Marty's testimony about why Respondent waited until February 13 to discharge Arellano. Marty claimed repeatedly that Arellano was not at work following Respondent's discovery of the incident. This is not true. The incident occurred on Tuesday, February 7. Arellano worked Monday through Thursday. Arellano was present at the facility for two days after Marty was informed about the incident. Indeed, Marty acknowledged that Arellano returned to work on Monday, February 13. His claim that he could not terminate Arellano because he was not present February 9 is baseless. This similarly contradicts Marty's claim that he did not have the opportunity to speak with Arellano. His testimony about his other reasons is undecipherable.

If Respondent was, as Marty's claims, concerned that Arellano would make further efforts to harm Respondent, it is baffling that it gave him two full days on February 8 and 9 and another half day on February 13 to do so. He offered no substantive explanation for why he did not prevent Arellano from returning to work. Given that Respondent's entire investigation consisted of hearing a secondhand report, listening to a translation of one paragraph, and reviewing surveillance footage in which Respondent only expected to see two people talking; it is more likely that Respondent was using this time to seek additional bases to support its decision to discharge Arellano, for example, its abandoned claim that Arellano had sabotaged Respondent's equipment. It is clear that Respondent planned to also accuse Arellano of deliberately damaging equipment. What is unclear is when it abandoned the plan. But references to equipment damage show up on communication with the Union, an internal memorandum, and Arellano's discharge paperwork. Marty's explanations for these notations are, in some instances, extremely attenuated.

Finally, with regard to the termination meeting, Arellano requested a *Weingarten* representative. Even if Respondent had, as it claimed, decided to terminate Arellano, Board law required Respondent to refrain from soliciting a statement from Arellano. Respondent acknowledges that presented Arellano with the option of making a statement. The evidence as a whole, including GCX 34(b) and Arellano's testimony, establish that Respondent's wording on the matter was a request.

Initially, Respondent correctly suspected that Arellano was the key Union supporter. Its suspicions were later confirmed. In order to discharge him, Respondent performed a minimal investigation, ignored or misconstrued Hernandez' oral and written reports and otherwise bent the facts to indicate some wrongdoing by Arellano, and acted in a manner inconsistent with a party truly concerned about a saboteur. Respondent's reason for discharging Arellano was pretextual. CGC respectfully requests that Your Honor find that Respondent discharged Arellano because of his union activity.

## **VIII. RESPONDENT DISCHARGED WALKER BECAUSE OF HIS UNION AND OTHER CONCERTED ACTIVITY (COMPLAINT PARAGRAPH 6(b))**

### **A. STATEMENT OF FACTS**

#### ***i. Walker's Background***

Walker was employed by Respondent as an engineer. Tr. 86, 576. Servin testified that Respondent suspected Walker of being one of three Union supporters. Tr. 534. He was the sole observer at the Union election.<sup>44</sup> Tr. 86. Marty stated that whether Walker's presence at the election indicated that Walker supported the Union, would require an assumption. Tr. 87. When

---

<sup>44</sup> Marty later seemed confused on this point. He stated he could not remember if anyone besides Walker was designated as an observer. Tr. 87. He could not recall if Respondent had designated an observer and mentioned an employee, Juanna. Tr. 86-87. Walker testified that he was the sole observer. Tr. 577. He became the observer pursuant to a request for volunteers at the Union hall. Tr. 578.

asked if he made any assumption, Marty stated he did not know what to think. Tr. 87. Sharron also knew that Walker was the observer at the election. Tr. 369. Like Marty, he stated he drew no conclusion regarding Walker's Union affiliation. Tr. 369.

***ii. Respondent's Layoff Practice and Walker's Termination***

GCX 22(b) demonstrates that Respondent wished to perform layoffs on February 7, the day after the Union election. Walker was terminated on February 15. Tr. 86. Walker testified that he met with Marty and Sharron in Respondent's conference room. Tr. 578. According to Walker, Marty told Walker that he was laying Walker off and had wanted to do so for a while. Tr. 579. Walker testified that Marty stated during that conversation that he did not want the Union in. Tr. 579. But he added that it had nothing to do with Walker's layoff. Tr. 580. In testimony, Marty denied this. Tr. 585.

According to Marty, Walker's termination was a layoff and was not due to any misconduct. Tr. 88. Walker had the lowest seniority among engineers. Tr. 89, 264, 271. Respondent considered Walker rehirable. Tr. 92. Engineers had worked reduced schedules since autumn of 2016. Tr. 91, 209, 303. Marty testified that he preferred to lay employees off instead of reducing hours. Tr. 209-210. The employees, however, expressed their preference for a shared reduction in hours. Tr. 209-210. All engineers shared in the reduction equally. Tr. 209. Marty testified that engineers were upset with the reduction in hours. Tr. 91. He stated that Joe Tuttle complained to him about the reduction in December 2016. Tr. 211. No one else was present at the time, and Marty made no note of the complaint and could not recall anyone else complaining. Tr. 212. Marty stated that he opted to terminate Walker instead of reducing hours

in order to avoid complaints. Tr. 210, 211. Prior to this, Respondent had not performed layoffs since at least January 2016.<sup>45</sup> Tr. 89.

Marty made the decision to terminate Walker and filled out Walker's termination form, GCX 15. Tr. 91. GCX 15 states "position eliminated" as the reason for his termination. GCX 15. According to Marty, this "initially" referred to the time of Walker's shift. Tr. 205-206. In e-mail communication with the Union, Marty stated that Respondent no longer required a graveyard shift.<sup>46</sup> GCX 9(a). Walker and other engineers worked the graveyard shift.<sup>47</sup> Tr. 205-206, 576. In that same message, Marty states that Jaime Valdovimos<sup>48</sup> Magana and Leonardo Porter would also be laid off.<sup>49</sup> GCX 9(a). Neither employee was laid off. Tr. 89.

### *iii. Respondent's Subsequent Hiring Decisions*

Since Walker's layoff, Respondent has approached the Union about hiring additional engineers. Tr. 92; GCX 17. According to Marty, he and Ed met in person, and Ed informed him that he did not feel comfortable sending anyone. Tr. 92-93. Marty later testified that the Union

---

<sup>45</sup> Marty testified that layoffs occur due to various factors, mostly due to "productivity in pounds." Tr. 89-90. He explained that seasonal volume was a factor. Tr. 90. There is typically an increased need for engineers during the summer. Tr. 90. He also mentioned capital projects "that they focus on" and stated that an expansion project from 2016 was being concluded. Tr. 90. However, Marty later testified that engineers do not typically help with capital projects because they are busy with their own work. Tr. 242. He added that engineers have a different scope of work and capital projects usually require a contractor's background. Tr. 242. Marty added that Respondent never really knows how much work Respondent will have in a given day. Tr. 91.

<sup>46</sup> Marty explained that Respondent had expanded and, with increased capacity, did not require such long shifts. Tr. 261. This allowed them to reduce engineers' hours. Tr. 261.

<sup>47</sup> According to Servin, there were three shifts at that time: morning, swing and graveyard. Tr. 567.

<sup>48</sup> Walker testified that "Jaime" worked a graveyard shift. Tr. 576.

<sup>49</sup> According to Walker, as Sharron was escorting him from the building, he told Walker that he would have to do so two more times. Tr. 579-580.

requested that Respondent rehire Walker. Tr. 93, 207. Marty replied by stating that Walker was not qualified as an engineer.<sup>50</sup> Tr. 94, 95.

Ed testified that Marty informed him via e-mail that Respondent was hiring two utility engineers, and he wanted to discuss the matter with the Union. Tr. 408. Marty testified that, in addition to e-mail, they discussed the subject at an in-person meeting. Tr. 225. The Union stated that if Walker was not considered an engineer, he should be hired back as a utility engineer. Tr. 207-208. According to Ed, Marty raised the issue of wages and asked Ed what he would expect Walker's wage to be. Tr. 408-409. Marty testified that he proposed via e-mail having Walker return to work at \$15 per hour. Tr. 224. Ed testified that he told Marty that the Union's position was that Respondent should bring Walker back at his former wage. Tr. 409. Marty first testified that he told Ed he would consider the proposal.<sup>51</sup> Tr. 208. He later testified that Ed declined his proposal. Tr. 224. Marty testified that the parties had no other discussion on the subject.<sup>52</sup> Tr. 208. According to Marty, Respondent considered rehiring Walker, but opted not to because the Union wished to have Walker rehired at the same rate of pay he received at the time of his discharge.<sup>53</sup> Tr. 207. Three to four weeks prior to December 4 (the date this testimony was given), Respondent hired two utility engineers. Tr. 206. One was hired from outside the company, and the other was promoted from the production department. Tr. 207.

---

<sup>50</sup> Marty explained that Respondent created a distinction between engineers and "utility engineers" during the process leading up to the election. Tr. 88, 207. Walker fell in between those classifications in terms of skill and pay. Tr. 88.

<sup>51</sup> This matches Ed's testimony that Marty said he would speak with Dramise, consider the matter and get back to Ed. Tr. 409.

<sup>52</sup> Ed testified that he e-mailed Marty a week or two after this discussion, and Marty stated he was still considering the matter. Tr. 410. Ed stated that Marty did not contact Ed again about the matter. Tr. 409. A few weeks after the discussion, Ed learned that Respondent had hired two new utility engineers. Tr. 410. Ed testified that he again asked Marty if Respondent would rehire Walker, and Marty replied that Respondent would not. Tr. 410.

<sup>53</sup> At the time he was employed, Walker earned \$25 per hour. Tr. 207. Utility engineers were being paid \$15 per hour. Tr. 207, 224.

## **B. ARGUMENT**

### ***i. Walker's Union Activity***

According to Servin, Respondent suspected from the outset that Walker was a Union supporter. This suspicion was undoubtedly confirmed when Respondent learned that Walker was an observer at the election. Whether or not Walker was there on behalf of the Union, it was clear he was involved. Further, Marty's claim of ignorance on the subject appears feigned. He altered his first statement that Walker was the only observer at the election. His claim that Respondent might have designated Juanna, a secretary, as an observer because she was outside the election area is flimsy. Marty's lack of sophistication on these matters is not entirely genuine; for example, he needed no explanation when Arellano invoked his *Weingarten* rights.

### ***ii. Respondent's Reason for Discharging Walker was Pretextual***

Respondent had not laid off an employee since at least January 2016, over a year prior. Any claim that the layoff was seasonal is therefore belied by Respondent's own admission. Respondent explained that Respondent had recently expanded and had an increased capacity. This does not readily explain why fewer engineering work hours were required. Presumably, Respondent had the same amount of equipment, if not more. If shifts were altered, there would nevertheless be unchanged demand for engineering work.

Respondent's decision to layoff Walker was a departure from its past practice. Up until this point, Respondent had reduced engineers' schedules in accordance with their request rather than have an engineer be laid off. Marty testified that he laid off Walker at this time in order to avoid employee complaints, but he only recalled one (undocumented) complaint from Joe Tuttle. Assuming this is true, the record indicates that Joe Tuttle was apt to lodge complaints.

Respondent's claim would have Your Honor believe that it acted contrary to the will of the group at large in order to avoid hearing an additional complaint from a single employee.

Other parts of Respondent's explanation are likewise questionable. Respondent announced it would lay off two other employees, but it never did. The record contains no explanation for this inaction. Respondent's statement that Walker's "position was eliminated" is not self-explanatory. Walker worked a graveyard shift, but so did at least one other engineer. This vague description apparently refers specifically to Walker.

Finally, although it is not an independent allegation, Respondent's unwillingness to rehire Walker is telling. Respondent admitted that Walker engaged in no misconduct and was eligible for rehire. In the first instance, although Respondent previously employed him as an engineer, Respondent stated he was not qualified to work again as an engineer. Accepting that as true, Respondent also had the opportunity to rehire him as a utility engineer. Respondent's claim that Walker's skills put him in between a utility engineer and an engineer means that his skills were not an issue. Rather, Respondent was unwilling to pay Walker his former wage. If Walker earned a certain wage at the time he was laid off, it is unknown why Respondent would not consider him worth that wage months later.

Respondent's suspicions that Walker was a Union supporter were confirmed the day of the election. He was discharged a little over a week later, and none of Respondent's claimed justifications stand the test of reason. CGC respectfully requests that Your Honor find that Respondent discharged Walker due to his union activity.

**IX. RESPONDENT THREATENED AND DISCHARGED SERVIN ON APRIL 4 BECAUSE OF HIS PROTECTED ACTIVITY (COMPLAINT PARAGRAPHS 5(i)(2) and 6(c) and 7(v))**

**D. STATEMENT OF FACTS**

Servin was a senior engineer for Respondent. Tr. 95-96, 527. Servin testified that he began working for Respondent on June 1, 2011, and, as the first engineer hired, was first in seniority. Tr. 527. Sharron testified that, after the election, Servin informed him that he supported the Union. Tr. 368. According to Servin, he began wearing a union button on the day of the election. Tr. 535. He testified that he demonstrated his support by putting Union stickers on his toolbox a week after the election. Tr. 535-536. He stated that he substituted a pocket protector that stated “contract now” for the button a few weeks. Tr. 535. According to Servin, he also carried buttons and stickers in the top of his toolbox and handed them out on breaks or before or after his shift if anyone asks. Tr. 536. He has also done so during working hours. Tr. 536.

***i. Respondent’s Cell Phone Use Policy***

Marty and Marsh knew that Servin would text supervisors using his personal phone about work issues, sometimes attaching photos to his messages. Tr. 96, 304. All engineers do this whenever there is a major issue. Tr. 372, 373. Sharron testified that the practice is very useful. Tr. 372. He appreciates it because it keeps him informed. Tr. 373. Marsh would receive a text from Servin every few weeks. Tr. 305. Servin testified that he sent photos about work issues to

Sharron and Marsh with regularity in order to illustrate what the issue was. Tr. 540-541. In general, Respondent has no problem with the practice.<sup>54</sup> Tr. 97, 305, 306, 315-316, 373.

**ii. The March 25 Incident**

On March 25, Servin informed Marsh that there was a problem with the temperature of some linens. Tr. 305, 541. He informed Marsh that employees had complained that the linen was extremely warm. Tr. 305. Servin testified that he was concerned about the issue because when sheets get too hot, they can blister the production employees, which he knew having been blistered. Tr. 541. As Servin explained, Respondent had recently raised its boiler pressure. Tr. 541. Marsh instructed him to check the temperature.<sup>55</sup> Tr. 305. Servin verified the temperature using a contact thermometer and conveyed that information to Marsh via text. Tr. 306, 541. Marsh saw no problem with Servin's actions. Tr. 306. Servin testified that the temperature was 120 degrees, and they resolved the issue by turning down the temperature on the chambers in the tunnel. Tr. 541.

**iii. The April 4 Incident**

On April 4, Servin brought the same issue to Marsh's attention. Tr. 98, 306. He sent Marsh a photo. Tr. 306. The photo showed Servin holding a thermometer to some linen. Tr. 307, 540. The temperature was between 120 and 130 degrees. Tr. 307. Marsh did not see the temperature as a problem. Tr. 307. Marsh then approached Servin together with Marty. Tr. 98, 307. Marty had seen Servin via surveillance camera taking pictures of the sheets. Tr. 98, 99. He

---

<sup>54</sup> However, Marty later stated that engineers are not supposed to text and send photos to supervisors, but Respondent has never had problems with the issue. Tr. 97-98. He claimed that Respondent's handbook prohibits the practice. Tr. 98. However, GCX 2 provision 5-5 of Respondent's handbook, titled "Personal and Company-Provided Portable Communication," only states, in relevant part: "The use of smart phones or any other personal communication device to *covertly* record, scan and / or photocopy is strictly prohibited and a violation of company policy that will lead to disciplinary action, up to termination." GCX 2 at 21-22 (emphasis added).

<sup>55</sup> When CGC asked Marsh what Servin reported, he answered, "And I believe the outcome of that, after discussing, was we – we drop –" Tr. 305.

could tell Servin was inserting something into the sheets, but he could not tell what it was and he did not know why Servin was doing it. Tr. 99. When Marty and Marsh approached Servin, Marty saw that the object Servin was holding was a thermometer, but he still did not know the purpose behind Servin's actions. Tr. 99. Marty asked what Servin was doing. Tr. 100. Servin informed them of the temperature. Tr. 307. He stated he was concerned about the temperature of the sheets. Tr. 100. Marsh considered the linen to be within a normal range of temperature. Tr. 308. Neither Marty nor Marsh informed Servin that the temperature was not a problem. Tr. 307. Marsh did tell Servin that no further adjustments would be made. Tr. 308. According to Servin, Marty told him that the temperature was not an issue, and he went to work on another machine, Iron 1. Tr. 541-542.

***iv. Servin's Termination***

Within the hour, Marty instructed Marsh to call Servin to the conference room, which he did. Tr. 100, 309, 542. According to Servin, he asked Marsh what the meeting was about, and Marsh told him that he knew what it was about. Tr. 542. Marty planned to terminate Servin. Tr. 100. Marty did not know who Servin was communicating with.<sup>56</sup> Tr. 101, 103. But he believed Servin had malicious intentions in taking the photos. Tr. 101, 102. When CGC asked what Marsh's purpose in calling Servin to the conference room was, Marsh explained that he was informed by management that Servin was going to be terminated for using his phone contrary to Respondent's policy. Tr. 309. He later stated that, at the point of being instructed to tell Servin

---

<sup>56</sup> Regarding his reason for considering termination, Marty stated: "We -- this had been going on for a while. We've -- we had been having issues with Joseph in performance and also in -- mainly in attendance and performance. So I, again, didn't know what his intention was, who he was sending these pictures to, and what kind of a problem he was causing me." Tr. 101. When asked about the attendance and performance issues, Marty stated that his issue with Servin was one of trust. Tr. 101. He later stated that the sole incident driving his plan to terminate Servin was the photo incident. Tr. 102.

to attend the meeting, he did not “entirely” know its purpose. Tr. 311. He then stated that he knew nothing about the purpose of the meeting. Tr. 311.

Marsh acknowledged that he knew why Servin had been using his phone. Tr. 310. He stated that this matter was part of Respondent’s “initial conversation about [Servin’s] potential termination.” Tr. 310. Dramise,<sup>57</sup> Marty and Marsh attended the meeting. Tr. 101, 311, 341, 343, 542. Dramise does not normally participate in employee terminations. Tr. 345. At the outset of the meeting, Marty informed Servin that he would be terminated.<sup>58</sup> Tr. 311, 542. Respondent assumed Servin was sending photos outside the company. Tr. 311, 343. Marty gave Servin a termination paper.<sup>59</sup> Tr. 312, 344, 542; see GCX 11.<sup>60</sup>

Dramise asked Servin what he was photographing. Tr. 102, 312, 543. According to Marty, Servin explained that he was taking photos with the thermometer to show the temperature of the sheets. Tr. 102, 344, 43. Dramise asked why. Tr. 102-103, 543. According to Servin, Dramise also asked who Servin sent the photos to. Tr. 543. Marty did not recall how Servin responded.<sup>61</sup> Tr. 103. According to Marsh, after Dramise asked what Servin was taking photos of, Marsh spoke up. Tr. 312. Marsh stated that he had received a text from Servin on that issue that morning. Tr. 312. Marsh stated that the meeting was sidelined when he stated that Servin had texted him. Tr. 310. When CGC asked why Marsh did not raise the issue until the meeting

---

<sup>57</sup> Dramise first stated that he could not recall the meeting. Tr. 342-343. Subsequent questioning refreshed his recollection. Tr. 343. For example, at first, Dramise could not recall the purpose of the meeting or why he was included. Tr. 342. He then recalled that his staff called him to the meeting. Tr. 346. And his involvement was deemed appropriate since the Union was involved. Tr. 345.

<sup>58</sup> Contrary to Marsh and Servin, Marty testified that he never told Servin he was terminated. Tr. 101.

<sup>59</sup> While Marsh and Dramise both stated this, Dramise later corrected that Marty might just set it on the table in front of Servin. Tr. 344, 348. Servin was sitting at the middle of the conference table. Tr. 348. Marty denied giving the GCX 11 to Servin. Tr. 101, 104.

<sup>60</sup> According to Servin, GCX 11 is a photo of the termination paper. Tr. 543-544. Servin testified that he took the photo while Dramise and Marty were out of the room to have proof of the meeting’s events. Tr. 544.

<sup>61</sup> He then recalled that Servin said, “Look, I sent it to [Marsh].” Tr. 103.

had commenced, Marsh stated that he had brought it up “before the conversation happened.” Tr. 310. He then offered unsolicited testimony, naming who attended the meeting and “possibly others,” stating that Servin had texted him a photo, but Respondent assumed he was sending photos outside the company, that Respondent did not check or “interrogate” his phone, but Respondent assumed one was sent to Marsh because Marsh had a record on his phone, and Respondent did not know if there were other texts. Tr. 310. When CGC repeated the question, Marsh again stated that he did not inform Respondent that Servin had texted him until after the meeting began. Tr. 310.

Servin also informed them that he had sent the pictures to Marsh. Tr. 103, 313, 543. Marty learned that Servin had sent the photo to Marsh. Tr. 102, 103. He brought out his phone and showed it to Marsh, Marty and Dramise.<sup>62</sup> Tr. 313, 543. His text showed that he sent the text to Marsh. Tr. 103-104.

Marty and Dramise then left the room.<sup>63</sup> Tr. 104, 543. They discussed what course of action to take. Tr. 104. Based on Servin’s response, they concluded that Servin had done nothing wrong and did not merit termination.<sup>64</sup> Tr. 101, 103, 104, 346. When Your Honor asked why Respondent believed the photos were sent outside the company, Marsh first stated

---

<sup>62</sup> Dramise stated that Servin did not show him the text he sent. Tr. 347. He was unsure if Servin showed anyone else. Tr. 347. If so, he did not look. Tr. 348.

<sup>63</sup> According to Marsh, after Servin showed his phone to the group, he was asked to step outside. Tr. 314. Marsh, Dramise and Marty remained in the room. Tr. 314. The three of them discussed whether there was any evidence that Servin had sent the photos outside the company or that he had used his phone inappropriately. Tr. 314. Then the three of them agreed that there was no problem with Servin’s sending the photo to Marsh. Tr. 314. Because there was not a “clear-cut case,” Respondent opted not to terminate Servin. Tr. 314.

<sup>64</sup> For his part, Dramise stated he opted to give Servin the benefit of the doubt. Tr. 346. When CGC asked whether Dramise’s reason for rescinding Servin’s termination was Servin’s explanation, Dramise said, “It wasn’t even the explanation. Other than – well, yes, in a sense, it was. He stated it was for purposes of work.” Tr. 347. For Dramise, Servin’s claim was enough, and no proof was required. Tr. 348.

that Respondent was concerned who it was being sent to.<sup>65</sup> Tr. 313. He then stated that Respondent had no evidence that Servin was sending the photos outside the company. Tr. 313-314. When CGC asked Dramise whether there was any basis to believe Servin had engaged in any wrongdoing, Dramise first repeated that he gave Servin the benefit of the doubt. Tr. 346. He then stated that his staff believed Servin had done something wrong. Tr. 346. When CGC asked what the basis of his staff's belief was, Dramise stated that they never explained. Tr. 346. Had Servin sent the photo to anyone but a supervisor, he would have been terminated. Tr. 103, 314.

Respondent informed Servin that he was not terminated. Tr. 315, 347, 543. Marty took back GCX 11. Tr. 348. Servin asked for a copy of GCX 11, but Marty immediately destroyed it. Tr. 104, 315, 348, 543. Up until this time, Servin had been using his personal cell phone to "take documentation." Tr. 315. Until this occasion, Respondent had no problem with his doing so. Tr. 315-316. During this meeting he was informed that doing so was against Respondent's policy. Tr. 315. Because Respondent was now concerned that Servin might be sending the information outside the company, Servin's practice of taking photos using his phone was "no longer seen as appropriate." Tr. 316. Marty stated Dramise instructed Servin not to take photos.<sup>66</sup> Tr. 105. Marsh stated that Servin was instructed not to use his phone at all. Tr. 316. It was a short meeting. Tr. 348. The practice of texting photos to supervisors is still in place among Respondent's engineers. Tr. 372-373. Sharron has not been instructed to tell engineers to cease the practice. Tr. 373. Likewise, Marsh has never informed other engineers they cannot use their phones. Tr. 328.

---

<sup>65</sup> Marsh also stated that Servin was using his phone on company time and "creating documentation" and texting. Tr. 313.

<sup>66</sup> Dramise could not recall anyone giving Servin instructions about phone use. Tr. 349.

## **E. AUTHORITY**

Protected concerted activity includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986).

In *Burnup & Sims*, 379 U.S. 21, 23 (1964), the Court held that an employer violates the Act if it knowingly discharges an employee for who is engaging in protected activity, and the employee was not, in fact, guilty of that misconduct. The statement became a threat when the Employer told Servin that this was the reason he was being was being discharged.

In *Bates Paving & Sealing, Inc.*, 364 NLRB No 46 slip op at 2 fn. 7 (2016), the Board held that a statement prohibiting protected activity when made in conjunction with a discharge becomes a threat.

When a union and employer are engaged in negotiations for a collective-bargaining agreement, the employer’s obligation to refrain making changes to mandatory subjects of bargaining requires more than merely providing notice and an opportunity to bargain; rather the employer must refrain from any implementation, absent overall impasse on bargaining for the agreement as a whole. *Register-Guard*, 339 NLRB 353, 354 (2003).

## **C. ARGUMENT**

### *i. Credibility*

#### **a. Marsh**

Marsh continued the practice outlined above, providing vague or qualified responses followed more definite ones. See Tr. 311, 312. After providing a non-responsive answer to a

direct question by CGC about timing, Marsh volunteered a long-winded, further non-responsive recitation of facts, which he later contradicted. See Tr. 310. Marsh provided an additional non-responsive answer at Tr. 305. Marsh's recollection of events, for example with regard to Respondent's deliberations regarding Servin's termination,, are contradicted by every other witness who provided testimony on the subject and demonstrate a lack of accurate recollection.

**b. Marty**

Consistent with his testimony at other points in the record, Marty provided long, indefinite answers. See Tr. 101-102. In addition, Marty's testimony of the actions he performed during the meeting is contradicted in more than one instance by Dramise, Marsh and Servin.

**c. Dramise**

Dramise's testimony was generally straightforward. On a couple of points, however, he demonstrated weak recollection.

**d. Servin**

In keeping with other testimony, Servin testified openly in response to questions from all parties. His was able to recall minute details such as the order in which people entered the conference room (see Tr. 542), the temperature of the sheets, and the machine he was working on at the time of the events.

**ii. Servin's Protected Activity**

Initially, Servin kept his union support a secret. This is evinced by Sharron's confiding in him the identities of those individuals Respondent suspected supported the Union. However, Sharron testified that Servin directly informed him that he supported the Union after the election. Just as Sharron proactively informed management about union support before the election, it is likely he did so afterward. Servin thereafter became an open Union supporter, wearing pro-

union adornments on his clothing and property and carrying Union material to be distributed, which he regularly did. The engineering department includes approximately 11 individuals; it is likely that Servin's activity was common knowledge. In addition, in light of Respondent's pervasive surveillance system, which it used to discover Servin's activity involving the linen on this occasion, it is likely that Respondent was aware of Servin's pro-union stance.

In addition, the action for which Servin was discharged was taking the temperature of sheets and recording it by taking a photo with his phone. Servin's purpose in doing this was to report the condition to his supervisor and guard against the risk that production employees might be burned. Health and safety are classic group concerns. It is difficult to imagine any purpose Servin might have had in documenting the temperature other than the one he claimed. His purpose should have been apparent to Respondent at the outset since Servin had explicitly expressed his concern to Marsh a week prior. On that occasion, Marsh worked with Servin to resolve it, implicitly acknowledging that it was a matter of concern. Even assuming Respondent was unaware of Servin's intentions, all doubt must have been erased when Marty and Marsh approached Servin, and he openly explained his actions.

***iii. Respondent Discharged Servin for His Protected Activity***

Marty's claim that he never informed Servin that he was discharged is contradicted by Marsh and Servin. His claim that he did not give Servin the termination paper is contradicted by every other witness who testified about this incident as well as GCX 11, which proves that Servin had possession of the document. Ultimately, even Marty acknowledged that his intent in holding the meeting was to discharge Servin.

Marty testified that he had an issue of trust with Servin. He did not explain the source of this distrust, but it apparently arose somewhat recently, as Marty admitted knowing that Servin

had taken photos in the plant and texted them in the past. It is reasonable to conclude that the source of his newfound distrust was Servin's recent union affiliation.

Respondent's claim that it has a rule generally prohibiting cell phone use is unsupported by any evidence. CGC could locate no such rule in GCX 2. Even so, Respondent admitted that this alleged rule is not enforced. Respondent admitted that engineers regularly took photos of conditions in the plant and sent them to their supervisors. Respondent endorses the practice. There is no evidence that any other employee has been disciplined for taking similar action. Setting aside the evidence to the contrary, to the extent Respondent maintained a rule prohibiting employees from using cell phones, Respondent enforced the rule here in a blatantly disparate manner.

It is apparent that Marty was intent on discharging Servin. He drafted the termination paper. He was the sole outlier regarding the reason for Servin's termination, although he eventually settled on Servin's phone use as the cause. It is likewise telling that Dramise, not Marty, asked questions during the meeting and caused Servin's actions to come to light before the group. This occurred after Marty informed Servin he was fired or handed Servin his termination paper. Although the meeting was brief, Marty displayed no intent to investigate the matter.

Respondent's decision to discharge Servin is baffling. Even if Respondent somehow did not understand Servin's explanation when Marty and Marsh approached him on the floor of the facility, Marsh was already aware of Servin's purpose in taking a photo of the temperature, having received Servin's text. It thus becomes apparent why Marsh vacillated on the question of when he informed Respondent of the text Servin sent him. Admitting that he told Respondent

beforehand would establish that Respondent terminated Servin with full knowledge of his actions and their purpose.

Even if Your Honor rejects the claim that Servin was discharged due to his union activity, Respondent is still liable under *Burnup & Sims*. As argued above, Servin was engaged in protected activity, Respondent was aware of the activity, and discharged him because of it. Respondent presented no evidence that Servin was engaged in any misconduct. Indeed, Respondent rescinded its termination for that reason.

Further, by coupling the discharge – though rescinded – with its comments that Servin’s phone use was unacceptable, Respondent gave effect to its words and thereby threatened him. This is especially true when considering that Respondent repeated its instruction after the rescission.

Finally, there is no evidence that Respondent bargained with the Union prior to changing its policy regarding cell phone use.

CGC respectfully requests that Your Honor find that Respondent made an unlawful threat and unlawfully discharged Servin and unilaterally changed its cell phone use policy. CGC acknowledges that an appropriate remedy for this discharge would include only a notice posting provision.

**X. RESPONDENT DISCHARGED SERVIN ON MAY 2 BECAUSE OF HIS UNION ACTIVITY (COMPLAINT PARAGRAPH 6(d))**

*vii. Decision to Discharge Servin*

On a later date, Marty decided to terminate Servin. Tr. 106. The decision was reached by a group comprised of Marty, Sharron and Marsh. Tr. 139, 292. Marsh determined the

reasons in collaboration with Marty and Sharron, with Marsh having final say.<sup>67</sup> Tr. 139, 292. Marsh filled out Servin's termination paper, GCX 18. Tr. 105. GCX 18 bears Marsh's signature. Tr. 106. This was his role as director of the department, and he generally fills out termination paperwork. Tr. 317.

***viii. Reasons for Servin's Discharge According to Marsh***

Marsh testified that the content of GCX 18 is based on "everything that could be brought together in the discovery." Tr. 317. By that, Marsh meant to document the conversations he had with Sharron and Marty, "issues with clocking," and other issues. Tr. 317. Marsh sought to summarize them in GCX 18. Tr. 317. In doing so, he used "any facts and any information that [he] could bring together." Tr. 317. When asked how many reasons Marsh had for Servin's discharge, referring to GCX 18, he stated there were two. Tr. 317-318. Those reasons were attendance (or short-notice call-off) and use of a personal communication device. Tr. 294, 318.

**a. Servin's Attendance**

Marsh's knowledge of the attendance issue is based on information from Sharron, who is Servin's supervisor. Tr. 126. In March, Sharron informed Marsh that Servin was not working Saturday shifts. Tr. 294. Marsh stated that Servin missed 10 out of 15 Saturday shifts. Tr. 294. Marsh stated that Sharron had documented these occurrences. Tr. 294. Regarding Servin's alleged short-notice call-off, Marsh stated that Servin had, on several occasions, called off work within a few hours of his start time. Tr. 318, 329. Marsh stated, however, that employees do not get fired for this; they get spoken to. Tr. 318. Servin was fired because it was a pattern. Tr. 318.

---

<sup>67</sup> When CGC asked if Marsh recommended Servin's discharge, he stated the team "discussed several things." Tr. 292. When asked again, he stated that he "agreed with the team" that Servin should be discharged. Tr. 292. Marsh then said, "I can't say there is a particular discussion." Tr. 292. He then said that Marty started the discussion. Tr. 292. Later, he testified that Dramise made the decision to terminate Servin, and that direction was communicated to him through Marty. Tr. 316.

The final incident was when he called off on a Saturday. Tr. 329-330. Marsh stated that the problem with this incident is that another employee had to cover for Servin. Tr. 330. Marsh then restated that Servin's problem was that he called off work within a few hours of his start time. Tr. 319. He then stated that the determining factor is whether an employee has good cause to call-off, not whether they provide short notice. Tr. 319. Marsh stated that if an employee had facts supporting the reason for his call-off, Respondent would perform a review. Tr. 319. Marsh does not know what Servin's reason for calling off was. Tr. 330. However, Servin's reason would not have mattered, because it was part of a pattern, and Respondent suspected he had no legitimate basis. Tr. 330. Marsh did not investigate the matter. Tr. 330. Any investigation would have been performed by Sharron.<sup>68</sup> Tr. 330.

**b. Servin's Cell Phone Use**

GCX 18's notation that Servin's used his personal communication device refers to Servin's use of his cell phone. Tr. 319-320. When CGC asked what occasion it referred to, Marsh stated "all kind." Tr. 320. Marsh first stated that after Servin was instructed not to use his phone, he was not seen using his phone and he no longer texted Marsh. Tr. 320. He then said he did not know if Servin was still using his phone. Tr. 320. When CGC asked why he included it on GCX 18, Marsh stated that "it was brought up" as a reason. Tr. 320. When CGC asked when it was brought up, Marsh then said that there was a surveillance video of Servin using his phone. Tr. 320, 321, 327.

Marty showed Marsh the video. Tr. 328, 330. It appeared that Servin was texting. Tr. 321. Respondent did not know who he was texting. Tr. 321, 322. Respondent did not find out.

---

<sup>68</sup> Marsh did not discuss this issue with Servin. Tr. 318. This would have been Sharron's role. Tr. 318. According to Marsh, Sharron did. Tr. 318. Sharron so informed him. Tr. 319. At first, he could not say how many times Sharron spoke with Servin about the issue. Tr. 319. He later stated that Sharron spoke to Servin on three occasions. Tr. 319.

Tr. 322. In explaining why Respondent did not seek to discover who Servin was texting, Marsh stated because it was “just one piece of the puzzle.” Tr. 323. When CGC asked whether it was not important enough to investigate, Marsh said, “It’s his personal phone. That’s not my business.” Tr. 323. When CGC pointed out that it factored into Servin’s discharge, Marsh said that Servin was violating Respondent’s handbook, Respondent’s rules, and directives<sup>69</sup> Respondent had given Servin. Tr. 323. When CGC pointed out that Respondent had asked Servin whom he had texted on a prior occasion, Marsh repeated that it was none of Respondent’s business. Tr. 324. It was enough that Servin was using his phone at all to constitute an infraction. Tr. 321, 324. Marsh is aware that other employees use their phones.<sup>70</sup> Tr. 321-322, 324-325. They have not been disciplined. Tr. 322. Marsh claimed the reason is that their texts were business-related. Tr. 322. Marsh first stated that engineers have company phones. Tr. 322. He then admitted that engineers did not have company phones at the time of Servin’s discharge. Tr. 322. He then admitted again that Respondent does not investigate each person seen to use his phone. Tr. 322. Servin is the only employee about whom cell phone use has been brought to Marsh’s attention. Tr. 321.

### **c. Solicitation and Distribution**

Marsh testified that, before the election, he did not know who supported the Union. Tr. 298. When asked if he presently knew who supported the Union, Marsh first stated that it made no difference to him. Tr. 298-299. He then stated that he did not know. Tr. 299. The same surveillance video that showed Servin using his phone showed him handing out Union materials. Tr. 320. Marsh saw Servin hand a Union button and notebook to engineer Jesus Martinez. Tr.

---

<sup>69</sup> According to Marsh, Servin had been “re-informed” of Respondent’s handbook’s prohibition against using his phone. Tr. 326. Marsh claimed that this prohibition applies to all employees and that any phone use is prohibited, not just taking photos or sending texts. Tr. 326. Marsh stated that Respondent’s policy bans use of cell phones for any reason during work hours. Tr. 327, 328.

<sup>70</sup> Marsh stated he could not recall if other employees were texting him at this time. Tr. 325, 326.

331. Marsh first stated that he believed Jesus Martinez was also addressed about the incident. Tr. 331. Marsh eventually admitted that there was no factual basis for his claim, and it was an assumption. Tr. 331-332. Respondent would not have disciplined Servin if he had handed out something other than Union material because, as it was explained to Marsh, Union material carries a different weight and violates Respondent's policy. Tr. 333. Marsh has seen Juanna Mizrahi selling candy bars at work. Tr. 333. This sale is in connection with a fundraiser or similar endeavor. Tr. 334. The candy bars are on her desk, and if people ask her, she sells them one. Tr. 334.

After stating that the surveillance video showed Servin using his phone and soliciting, Marsh added that the video showed Servin taking an additional break. Tr. 329. When CGC asked Marsh if that infraction was noted on GCX 18, he stated it would fall under "performance" or "violation of company policy" or "other." Tr. 329. Under the "other" category, Marsh wrote "solicitation & distribution." GCX 18, Tr. 329. He stated that the additional break was another "part of the puzzle." Tr. 329. He later agreed that it was not significant enough to note. Tr. 329.

#### **d. Marsh's Additional Testimony**

Regarding Servin's performance, Marsh stated that he, Marty, and Sharron believed Servin was taking too long to complete his work. Tr. 298. Servin did not have this problem before early 2017. Tr. 294. Marsh stated that, of several meetings preceding Servin's discharge, the first occurred after the Union won the election.<sup>71</sup> Tr. 295. It took place in Respondent's

---

<sup>71</sup> When asked when the first meeting occurred, Marsh stated that the first meeting concerned performance issues. Tr. 293. He then stated that he did not know when it happened. Tr. 293. He estimated early 2017. Tr. 293. He offered no testimony about any other meetings.

conference room.<sup>72</sup> Tr. 303. During that meeting, Servin complained that the engineering department was understaffed. Tr. 303-304. He stated there was insufficient time for repairs, and the department needed more help. Tr. 304. Marty responded that business conditions required a short staff until business picked up. Tr. 304. Marsh never addressed Servin's performance outside of that meeting. Tr. 295.

***ix. Sharron's Testimony about Servin's Discharge***

Sharron had a little involvement with Servin's termination. Tr. 373. After offering testimony about Servin's performance<sup>73</sup> and on CGC's prompting, Sharron agreed that Servin's attendance was an issue. Tr. 376. Sharron claimed that Servin failed to work on six out of twelve Saturdays. Tr. 376. Servin's schedule was changed to include Saturdays after Arellano was terminated. Tr. 376. Both Arellano and Servin had weekends off prior to Arellano's termination. Tr. Tr. 376. After Arellano's termination, Sharron changed the engineers' schedules. Tr. 376.

Sharron first stated that, of the Saturdays Servin called off, he considered "a couple" improper. Tr. 377. Sharron then stated that all of the call-offs were improper because Servin was scheduled to work. Tr. 377. Sharron then stated that two call-offs were particularly improper – one involving his daughter's pregnancy and another involving Servin's earache. Tr. 377.

---

<sup>72</sup> He stated that was the first time Servin's performance was "officially" addressed. Tr. 295. He stated Sharron "unofficially" addressed it by discussing the matter with Servin. Tr. 295. When asked if he was present, he first stated it is not his role. Tr. 296. He then affirmed he was not present during any such discussion. Tr. 296. He was only aware of these "unofficial" discussions because Sharron told him they occurred. Tr. 296.

<sup>73</sup> According to Sharron, Servin stopped working. Tr. 374. He stated Servin took too much time to complete tasks. Tr. 374. This problem began in February, and it worsened after Arellano was terminated. Tr. 374. Sharron acknowledged that the engineering department has always complained about being understaffed. Tr. 374. Sharron stated that he addressed Servin's performance between one and two dozen times. Tr. 374. When CGC asked whether Sharron had any other concerns about Servin, he stated that Servin had become reclusive. Tr. 374. This began in February just before the election. Tr. 374.

**a. The Pregnancy Absence**

With regard to the incident relating to his daughter's pregnancy, Servin was scheduled to work at 8:00 a.m. Tr. 381. He gave Sharron 10 hours' notice. GCX 10. When CGC first asked Sharron what was improper with Servin's call-off related to his daughter's pregnancy, Sharron did not answer the question. See Tr. 378. When CGC asked again, Sharron stated that on the day after Servin's call off, Sharron discovered that Servin's daughter was in false labor. Tr. 378. He concluded, based on that fact that Servin could have reported to work the next day. Tr. 378. Sharron stated that he was sure Servin was not at the hospital all night, but he did not know. Tr. 378. However, he was sure that Servin could have worked. Tr. 378. Sharron never disciplined Servin for calling off. Tr. 377, 382.

According to Sharron, Servin called him the next day. Tr. 380. He reported that his daughter had not given birth. Tr. 379, 380. He claimed that he spoke with Servin for an hour about the incident. Tr. 379. He stated that Servin did not say much else during the hour-long conversation – only that he did not want to work Saturdays. Tr. 379. Sharron never asked Servin how long he was at the hospital. Tr. 379. Sharron did not ask Servin why he stayed home even though his daughter had not given birth. Tr. 380. Sharron assumed Servin was not there all night. Tr. 379. His assumption was based on the fact that Servin's daughter did not give birth. Tr. 379-380. Sharron concluded that Servin's call-off was improper. Tr. 380. Sharron did not reach this conclusion after his phone call with Servin; he reached it on the Monday following the call-off. Tr. 381, 382. On that day, Sharron claims to have admonished Servin that his frequent call-offs were improper, and Servin needed to report to work. Tr. 377, 381, 382. He did not, however, tell him that the recent call-off was improper. Tr. 382. According to Sharron, "He was calling in sick, you know, quite reasonably almost clockwork

every Saturday.” Months later, Sharron heard that Servin did not go to the hospital but rather stayed home and watched his grandkids. Tr. 379.

**b. The Earache Absence**

With regard to the earache, Sharron stated he did not know what happened. Tr. 377. The impropriety was that Servin did not inform Sharron that he was taking time off. Tr. 377. This occurred the week after the incident with Servin’s daughter. Tr. 382. Servin reported that he had problems with his ear. Tr. 382. Sharron was aware that Servin had an issue with his ear on a prior occasion. Tr. 383. Servin always provided medical documentation showing that he received treatment for health issues. Tr. 383. The text message exchange regarding this call-off is in GCX 19. Sharron read GCX 19 to mean that Servin would not be able to see his doctor until Tuesday. Tr. 384. However, Servin’s response on the day after resolved Sharron’s misunderstanding. Tr. 384-385. Sharron concluded that the call-off was not improper. Tr. 385. When Servin reported for work the next Tuesday, he brought a doctor’s note. Tr. 385; see GCX 36. Sharron then reasserted that there was some impropriety. Tr. 386. Sharron pointed out that, in GCX 19, Servin claims to be on medication. Tr. 386. Sharron wondered where Sharron would have obtained medication if he had not been able to see his doctor. Tr. 386. Sharron stated that he still believes Servin was lying about the reason for his absence. Tr. 386. Sharron did not interpret Servin’s texts to mean that Servin’s doctor ordered him not to return to work until Tuesday. Tr. 387. GCX 36 is dated Thursday, April 27. After CGC pointed to this fact, Sharron admitted that he had evidence that Servin did see a doctor on the day he claimed. Tr. 387.

He then stated there were other problems with Servin’s absence. Tr. 387. Sharron stated that Servin had attended a Union meeting on the Friday he was out sick, April 28. Tr. 387.

Sharron stated that “other guys” had told him so. Tr. 387. When CGC asked him who, Sharron first said “other employees.” Tr. 387. When CGC asked again, Sharron said, Joe Tuttle and Jesus Martinez. Tr. 387. Based on Sharron’s belief that Servin attended a Union meeting on April 28, he still believed Servin’s call-off was improper. Tr. 388. To date, he still believes Servin attended a Union meeting on April 28. Tr. 388. Ultimately, he stated that nothing besides Servin’s attendance at the Union meeting made his call-off improper. Tr. 390. He had no reason not to believe Joe Tuttle and Jesus Martinez. Tr. 388. He stated that Joe Tuttle and Servin always got along. Tr. 388. He later admitted that the two of them had differences, an admission consistent with Servin’s testimony. Tr. 388-389; 551-553. He added that Joe Tuttle complains about Servin. Tr. 389. Jesus Martinez typically does not work on Servin’s shift and does not typically interact with him. Tr. 552-553.

**c. Respondent’s Call-off Policy**

Respondent’s policy regarding leave is that employees must call in a reasonable time beforehand. Tr. 375. Sharron considers 12 hours reasonable, but employees have called in with as little as 1.5 hours’ notice. Tr. 375. Sharron understands that people cannot control when they get sick and he accepts employees’ leave requests. Tr. 375. In an emergency, Sharron always accommodates employees’ leave requests. Tr. 376. Sharron has never denied a leave request. Tr. 376. The only issue is arranging coverage. Tr. 376. Respondent’s paid leave time makes no distinction between sick leave and vacation leave. Tr. 375. Employees may also take unpaid leave. Tr. 376.

**x. *Reasons for Servin's Discharge According to Marty***

Marty did not review GCX 18 until after it was completed, and he never officially approved it.<sup>74</sup> Tr. 106. He provided no input to Marsh in completing the form. Tr. 113. Marty's role in determining the reasons for Servin's discharge was minor. Tr. 139. Marty stated that Servin had performance issues.<sup>75</sup> Tr. 106-107. But ultimately, he was terminated due to his attendance.<sup>76</sup> Tr. 107.

**a. *Servin's Attendance***

Regarding Servin's attendance, Marty stated that Servin had missed multiple days of work and had several no-call/no-shows. Tr. 106. Marty stated that Servin had past attendance issues but the final incident involved a large block of time. Tr. 121. At first, Marty did not respond to the question of whether Servin's past attendance issues were terminable offenses. See Tr. 120. He then confirmed that the final incident was the terminable offense and that, but for that offense, he would not have been terminated.<sup>77</sup> Tr. 120, 121. Regarding the final incident, Marty stated that Servin had not merely called in sick; rather he sent a cryptic message that did

---

<sup>74</sup> Marty took issue with Respondent's termination forms generally in that they do not provide enough room to fully explain the basis for termination. Tr. 106. He stated that Marsh failed to include all the reasons for Servin's discharge on GCX 18. Tr. 106. Marsh should have checked the "no-call/no-show" box on GCX 18. Tr. 107.

<sup>75</sup> Marty later stated that Servin's lack of performance and his attitude were factors in his termination. Tr. 108. Regarding Servin's performance, Marty stated Servin took too long to perform repairs. Tr. 108. His knowledge was based on departmental reports and his own observation. Tr. 108. Marty acknowledged that he has no engineering background. Tr. 108-109. He later stated that other engineers, Joe Tuttle and Jesus Martinez, complained about Servin's performance. Tr. 109. Jesus Martinez' and Servin's shifts do not overlap. Tr. 334-335. None of the complaints were documented. Tr. 109, 110. Regarding Servin's attitude, Marty first stated that Servin was unwilling to work with other engineers. Tr. 108. Servin's attitude had become "very cavalier." Tr. 109. During a meeting involving the Union, Servin argued rather than listened. Tr. 110. This change in attitude occurred in early February. Tr. 110.

<sup>76</sup> Although Marty offered substantial testimony about Servin's attendance (see Tr. 106-107, 109-110, 120-125, 127), it appears that Marty's knowledge is secondhand. See Tr. 109-110, 124-125. Your Honor may find it more informative to review Sharron's testimony on this subject. Nevertheless, CGC summarizes Marty's testimony regarding Servin's attendance below.

<sup>77</sup> Marty later stated, however, that he considered the prior incident involving Servin's daughter (discussed above) in deciding to terminate him. Tr. 124.

not match what was really occurring.<sup>78</sup> Tr. 120. According to Marty, Servin falsely reported he was going to the doctor on a particular day but then stated he would not visit the doctor until another day, then failed to report for work without providing updated information. Tr. 120. When asked for details, Marty responded that Servin stopped reporting for work. Tr. 120-121.

The past incidents involved Servin not working Saturday shifts. Tr. 122. Marty stated that Servin told Sharron that he would not work on Saturday. Tr. 109-110. Marty testified about a particular incident in which Servin called in due to his daughter's medical condition, and his reason was allegedly untrue. Tr. 123. Sharron reported that Servin falsely stated that his daughter was in labor, and the truth was that his daughter needed a babysitter. Tr. 124. According to Marty, Servin's misconduct was not a failure to call off properly; rather, his stated reason for calling in was false. Tr. 125. Marty's information about this incident came primarily from Sharron. Tr. 124. Marty believes Sharron spoke to Servin about the incident, but he did not know if Sharron asked Servin for documentation. Tr. 124-125. Marty first stated that Servin's past infractions had been documented. Tr. 122. He later stated that the incident with Servin's daughter was not documented anywhere. Tr. 124.

Respondent maintains a policy regarding what notice employees are required to provide when they call off work. Tr. 127. Marty could not say what the policy is, but he stated that is "absolutely strictly enforced." Tr. 127. He then stated that managers do not always effectively implement the policy.<sup>79</sup> Tr. 127. Marty did not answer whether managers fail to enforce the policy. Tr. 127-128. He explained that enforcement of this policy is more important in

---

<sup>78</sup> Despite inquiry from CGC, Marty did not reveal how he became aware of the attendance issue. See Tr. 119-120.

<sup>79</sup> He explained, however, that supervisors sometimes apply paid time off retroactively. Tr. 122. He stated that supervisors had done so even when the attendance issue should have been considered an infraction. Tr. 122. Marty stated that to determine whether he would still discipline an employee even when a supervisor had retroactively applied paid time off would require further consideration. Tr. 123.

engineering, but not more strictly enforced. Tr. 128. Servin's notice as represented in GCX 19 does not represent a violation of the policy. Tr. 129.

**b. Solicitation**

GCX 18 also mentions solicitation and use of a personal communication device. Marty stated that inquiry on those matters would need to be directed to Marsh. Tr. 108. He later stated that, although he did not know what the personal communication device comment meant, regarding solicitation, on one occasion, he saw Servin via surveillance handing out Union material during work time. Tr. 111. Servin was on the production floor. Tr. 117. He handed the Union materials to two individuals who were on working time, but Marty could not recall their identities. Tr. 117. When asked how he knew they were not on break, he first explained that they were not in the break room. Tr. 117-118. Then he stated that they had just come off break and after noting the incident, he reviewed surveillance footage and saw Servin leave the break room before handing out the material. Tr. 118. He asked Marsh to investigate. Tr. 111. Respondent did not investigate why they were given the Union materials, whether they asked for them, and Marty could not say whether either of the individuals who received the Union materials was disciplined. Tr. 117. Marty admitted that he did nothing to address the incident. Tr. 118. It was not documented anywhere. Tr. 118-119. Marty stated that Respondent would not discipline an employee for this action.<sup>80</sup> Tr. 112. When asked why it was on GCX 18,

---

<sup>80</sup> He then stated that employees are not permitted to hand out anything at work, and he is unaware of any who have. Tr. 113. However, he then stated that Juanna Misraje sells candy bars at work, and he has bought one, but this is only permitted on break. Tr. 113. However, he then stated that Respondent does not permit employees to sell or hand out items in the lunch room. Tr. 113. However, he then stated that employees have taken up collections for other employees in the lunch room. Tr. 114. Ultimately, he stated that employees should not discuss matters such as collections on working time. Tr. 114. He stated he was unaware of any incident in which an employee had done so. Tr. 114. However, he then stated he was sure that employees had been cited for soliciting at work. Tr. 115. However, he could not recall anyone. Tr. 115. He explained that, with 250 employees, it is not something he would be involved in. Tr. 116.

Marty pointed out that he had not filled out GCX 18. Tr. 112. The problem, Marty reiterated, was attendance and performance. Tr. 119.

*xi. Arellano and Servin's Testimony about Solicitation*

Employees sell things at work. Tr. 516, 554. For example, an employee near the service office, sells candy bars to support a school. Tr. 516, 554. Respondent's receptionist, who sits in the main office, does the same. Tr. 516-517, 554. They would both sell the items from their work stations. Tr. 517, 554. Arellano and Servin both would buy items from them. Tr. 517, 554. A dry cleaning lead sells items in the parking lot. Tr. 516-517. In addition, a supervisor, Leo, sold cell phones at work, wherever he was at the time. Tr. 554. In addition, employees put out cans in the lunch room for donations. Tr. 555. Servin and Arellano were unaware of anyone being reprimanded for any of these practices, and Respondent presented no evidence of discipline for any of these practices. Tr. 517-518, 554-555.

*xii. Servin's Testimony*

Servin was assigned to work Saturdays after Respondent discharged Arellano and Walker. Tr. 547, 548. That began around February 15. Tr. 548; see also the Complaint and Answer. Until then, Servin worked four 10-hour shifts. Tr. 567. He had weekends off. Tr. 376. He only missed two Saturdays during that time, one for his daughter and one for his ear infection. Tr. 547, 548. Servin's understanding of Respondent's call-off policy is that there is no problem as long as the employee gives notice, and the shift is covered. Tr. 550.

**a. The Pregnancy Absence**

GCX 10 is a text Servin sent to Sharron. Tr. 546. At the time, Servin's daughter was in labor. Tr. 546. She needed Servin to watch her son while she went to the hospital. Tr. 546; see GCX 10. Her labor was premature, and the doctor was able to halt it. Tr. 546. Servin was

babysitting his grandson until 4 a.m. when she picked up her son from Servin. Tr. 546. As a result, he did not go to work the next day. Tr. 546.

On his first day back to work, Servin was working on the tunnel dryer controls. Tr. 546-547. Sharron approached him and congratulated him on having a grandchild. Tr. 546-547. Servin explained that the labor was premature, but it was stopped. Tr. 547. They had no other conversations about the incident. Tr. 547. He was never notified that his call-off related to his daughter's pregnancy was a problem. Tr. 548.

**b. The Earache Absence**

Servin has been receiving treatment for an ear infection since February. Tr. 547. However, he has only called off work once due to the issue. Tr. 547. Sharron has sent Servin home because of his ear infection. Tr. 547. Sharron noticed Servin was unwell and, noting that he could not hear out of one ear, invited Servin to take paid time off. Tr. 550.

GCX 19 is the text Servin sent related to his ear infection. Tr. 548-549. He intended to work his scheduled shift at the time he sent the text. Tr. 549. He saw a doctor the morning he sent his text. Tr. 549; see GCX 36(a). The doctor prescribed him antibiotics and pain medication. Tr. 550. He had no conversation with Sharron outside of GCX 19. Tr. 549. No one from Respondent told him his call-off was a problem. Tr. 549.

**c. Claims about Performance**

Regarding his performance, Servin acknowledged that, in late March, Ed contacted him and stated that Respondent wanted to meet with him to discuss an allegation that Servin was not doing his work properly. Tr. 537. Ed, Jose Soto, Marty, Sharron, and Marsh met in a conference room at Respondent's facility. Tr. 537. Respondent expressed concern about an incident when, on a Saturday, multiple machines were down and Servin allegedly took too long to get them

running. Tr. 537. Respondent was also concerned that Servin was taking his lunch breaks. Tr. 538.

Servin testified that it was normal for him to run from one service call to the next. Tr. 538. He explained that the engineers were often working alone, trying to handle the entire facility. Tr. 539. In Servin's opinion, the engineering department had been understaffed since its inception, but it was worse without Arellano. Tr. 540. According to Servin, there was no difference in his performance in March or the months prior. Tr. 538. In response to Respondent's concern, Servin complained that Respondent had just fired an engineer and laid off another, so things were going to start slipping through the cracks. Tr. 538. Servin believes he complained that Respondent was understaffed. Tr. 539. The parties discussed no matters other than Servin's performance and the fact that he was taking breaks. Tr. 539. The Union representatives said they would discuss the break issue another time. Tr. 539.

## **B. AUTHORITY**

In *Tricil Environmental Management*, 308 NLRB 669 (1992), the Board found an employer violated the Act when it suspended an employee for taking sick leave. The Board found that the employer's actions were not in keeping with its normal practice, and the suspended employee presented evidence he was sick. *Id* at 669. An employer commits a violation by enhancing discipline in response to union or protected activity. *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1237 (2004).

## **C. ARGUMENT**

### ***i. Marsh's Testimony***

Respondent's reasons for discharging Servin are so widespread and varied, they almost defy analysis. Respondent's process in this regard is probably best described by Marsh, who

drafted Servin's termination paper and stated that he noted "everything that could be brought together" and "any facts and information that [he] could." The multitude of reasons listed on GCX 18 along with the tangle of vague and inconsistent testimony in support of those reasons indicate Respondent's desire to give its decision the appearance of legitimacy. None them withstand scrutiny.

Marsh demonstrated trouble elaborating the exact reasons why Servin was discharged. After resorting to his practice of testifying in generalities – e.g. Respondent "discussed several things" – he eventually settled on two reasons: attendance and use of a personal communication device. Regarding attendance, Marsh's testimony that Servin was absent for 10 out of 15 Saturdays is a gross exaggeration in two respects. First, Sharron, from whom Marsh obtained his information, testified that Servin was absent for 6 out of 12. Second, there were only 11 Saturdays between the time Servin's schedule was changed to include Saturdays and the date of his discharge.

Evidence of further embellishment is evident in the fact that Marsh claimed Respondent had trouble arranging coverage for Servin. Sharron, who was involved in the attendance issue, testified to no such fact. As Marsh testified, he generally does not deal with scheduling or arrange coverage.

Marsh had trouble providing a consistent answer about what the attendance issue was. Marsh first stated that Servin made a short call-offs. He then admitted that employees do not get fired for this but stated that Servin's infractions formed a pattern. After then stating that arranging coverage was a problem, he returned to his explanation that Servin made short call-offs. He then stated that lack of good cause for the call-offs was the problem. He then admitted that Respondent would investigate whether there was good cause, and he did not know whether

Servin had good cause. He then returned to his explanation that Servin's behavior showed a pattern, so his explanation would not have mattered; it was inherently suspect.

Marsh demonstrated the same problems when explaining Servin's alleged violation of Respondent's policy regarding personal communication devices. When CGC asked Marsh what incident the notation on GCX 18 referenced, he answered with the generality of "all kind." After stating that Servin was not seen using his cell phone after receiving the April 4 instruction not to and did not know if he had, he then offered extensive testimony about surveillance footage Marty had shown him. When he was pressed on questions of Respondent's investigation into the matter, he provided a number of non-explanations: Servin's cell phone use was a piece of a puzzle, Servin's cell phone use is not Respondent's business, other employees are not disciplined because their texts are all business-related although Respondent does not investigate other employees. In addition, Marsh explicitly pointed to Respondent's handbook as prohibiting the use of cell phones. Again, a review of GCX 2 reveals no such rule.

Then, adding to his initial statement that attendance and cell phone use were the two causes of Servin's discharge, he noted GCX 18's mention of solicitation and distribution. At the outset, it must be noted that Marsh testified early on that he had no knowledge of who supported the Union and thereafter testified regarding the identities of two people seen distributing and receiving Union material. On the subject of distribution, Marsh acknowledged that, at least one other employee sells things at work. Employees might distribute other materials as well, but Respondent views the distribution of union material differently, specifically prohibiting it.

Marsh then alleged another reason for Servin's termination, this one not mentioned on GCX 18: Servin took an additional break. He then acknowledged that it was not noted on GCX 18 and admitted that it was not important enough to note.

Marsh testified at two points that Servin's varied infractions were part of a puzzle. The only puzzle in this matter is which explanation Marsh intended to rely on. Marty testified that Marsh was the authority on the reasons for Servin's discharge. Marsh was unable to present one cohesive explanation. Besides the fact that this failure indicates that Respondent's reasons are pretextual, one of the stated reasons – violation of Respondent's distribution policy – is blatantly unlawful. To the extent that Your Honor relies on Marsh's testimony in this matter, CGC respectfully requests that Your Honor discredit it and find, as the evidence indicates, that Servin was discharged for his protected activity.

*ii. Sharron's Testimony*

It should be noted that Respondent's paid leave quantity makes no distinction between sick leave and vacation leave. Barring any extraneous difficulty posed by an absence, an employee's reason for his absence should not matter. Further, Respondent offers unpaid leave, and Sharron has never denied a leave request.

Unfortunately, Sharron abandoned his forthright manner of testifying when it came to Servin's alleged misconduct. Sharron's testimony about Servin's absences was initially only slightly embellished. As stated above, he testified that Servin missed 6 out of 12 Saturdays when there were only 11 Servin could have missed. However, Sharron went on to state that Servin missed every Saturday. In addition, after stating that only two of the absences were problematic, he stated that all of them were.

Regarding the two problematic absences, Sharron's testimony demonstrates a failure to investigate. He assumed, based on the fact that his daughter did not give birth, that Servin was not long engaged the night before and could have reported to work. It is fairly common knowledge that childbirth is an uncertain process, possibly involving extended or premature

labor. The record does not reveal whether Sharron is aware of this, but it does demonstrate that he failed to make any inquiry into the matter, including any circumstances that might have warranted Servin's calling off work.

Sharron did testify that he spoke to Servin about the matter. However, his testimony was that, during an hour-long phone conversation with Servin, Servin said nothing more than that he did not want to work Saturdays. Either Sharron did most of the talking, or Servin explained at length his dislike of Saturday work. Sharron's testimony offers little other explanation, because he stated it was not until Servin returned to work the following Monday that he reprimanded him for calling off. Sharron explanation that he did not conclude that Servin engaged in any misconduct until that Monday is equally difficult to understand. He offered no testimony about new facts he discovered between Sunday and Monday that might have led to this conclusion. It was only later, according to Sharron that he did not go to the hospital but instead watched his grandkids. However, a reasonable interpretation of Servin's communication to Marsh regarding the incident (see GCX 10) supports that fact.

Sharron's testimony about Servin's absence due to his ear infection also involves a misreading of Servin's texts. Sharron testified that he interpreted Servin's Thursday text in GCX 19 as stating that Servin would not be able to see his doctor until the following Tuesday. If Servin were suffering from a condition that required he see a doctor, it is odd that Sharron would expect him to report to work the next day. In addition, Servin committed to bring in a doctor's note the same day. One can only guess how Sharron expected Servin to bring in a doctor's note if he had not seen a doctor.

In any case, Sharron first testified that Servin's text the following day resolved his misunderstanding, and he concluded the call-off was not improper. This might have made

Sharron's earlier statement that this call-off was problematic, except that Sharron returned to his earlier claim that the call-off was improper, now citing the fact that Servin reported in GCX 19 that he had obtained medication. If nothing else, this fact should have informed Sharron that he had misread the message. As Sharron stated in testimony, how else would Servin have obtained medication? Sharron's vacillating testimony indicates either he viewed GCX 19 in a manner indicating and obstinate commitment to his original interpretation, or he was performing this analysis for the first time on the stand.

When CGC pointed out Servin's doctor's note GCX 36, which Sharron acknowledged receiving and which demonstrates that Servin saw a doctor on the day he claimed and was advised not to return to work as he claimed, finally appeared to acknowledge his call-off was not improper. Then, for the first time, he mentioned hearing a report that Servin attended a Union meeting on the day of his absence. The record demonstrates this is not true, and Sharron took no action to verify it. This, despite the fact that one of the people reporting this alleged wrongdoing was someone who Sharron knew – although he initially denied it – did not like Servin. Ultimately, Sharron settled on this belief as support for his claim that Servin's call-off was improper.

Sharron's testimony that Servin's absences were improper was either so flimsily-based or tortured in their attenuation as to defy any credibility. To the extent Your Honor looks to Sharron's testimony with regard to Servin's discharge, CGC respectfully requests that Your Honor discredit it and find Respondent's claimed reasons to be pretextual.

*iii. Marty's Testimony*

Marty's testimony should bear the least weight because he admitted he had little involvement in determining the reasons. It may not be surprising, therefore, that there were problems with the testimony he provided. CGC will be brief.

Despite citing attendance as the main reason for Servin's discharge, Marty vacillated about which attendance issues factored into his determination. Unfortunately, CGC could not verify whether Respondent's claims about Servin's absences were supported by documentary evidence. The time cards contained in RX 14 stop at January 23, just weeks short of Servin's schedule change. Similarly, despite claims that the attendance infractions were documented, no such documents were produced.

Regarding performance, Marty's claim that Jesus Martinez complained about Servin's performance leaves one to wonder what Jesus Martinez might have had to complain about, since he and Servin worked opposite shifts. Marty apparently did not inquire. CGC respectfully requests that Your Honor discredit Marty's limited testimony.

Taken as a whole, Respondent's testimony shows an employer committed to discharge its employee by any means available. None of the reasons withstands scrutiny, and one is clearly unlawful. Servin's testimony again demonstrates sharp recall and forthcoming responses. Further, it is corroborated by documentary evidence and, in most factual instances, by Respondent's own testimony. CGC respectfully request that Your Honor find that Respondent discharged Servin due to his protected activity.

**XI. RESPONDENT DISCHARGED ARELLANO, WALKER AND SERVIN WITHOUT BARGAINING WITH THE UNION (COMPLAINT PARAGRAPHS 6(o)-(p))**

**D. STATEMENT OF FACTS**

*iv. Arellano's Discharge*

Marty contacted Ed to inform him of the Hernandez incident. Tr. 61; see GCX 9(b). On February 9, the two met to discuss the incident.<sup>81</sup> Tr. 78, 150. In GCX 9, Respondent also set a due date of “the end of” February 13. During the February 9 meeting, Marty explained what happened and claims he showed Ed evidence justifying Arellano’s termination. Tr. 79. The record does not reveal what evidence Marty showed Ed. Marty stated that Arellano’s termination was a possibility. Tr. 80. Ed did not believe termination was warranted, and he proposed an alternative. Tr. 79. Marty described the alternative as Ed’s proposing Arellano not be terminated. Tr. 80. In e-mail correspondence, Ed stated that he provided Marty with two alternatives to termination. GCX 13(a),(c). The record does not reveal what alternatives Ed suggested. Respondent did not agree with those alternatives. Tr. 79. At the time of the meeting, Respondent had not decided whether to discharge Arellano. Tr. 79-80. This was the only meeting on the subject. Tr. 79. Marty was unsure whether he notified the Union prior to discharging Arellano. Tr. 80.

Ed testified that on February 13, Arellano informed him that he had been discharged. Tr. 405. No one else informed him. Tr. 405. Ed did not consider the parties’ meeting sufficient bargaining.<sup>82</sup> Tr. 405-406.

---

<sup>81</sup> Regarding the date of the meeting, GCX 9 is an e-mail from Marty to Ed dated February 10, and it makes reference to a meeting the day prior regarding the issue. See also GCX 13(d).

<sup>82</sup> The parties have subsequently discussed the possibility of reinstating Arellano and Walker as part of a settlement of the alleged unfair labor practices. See Tr. 235-237. This occurred sometime in the summer of 2017. Tr. 235. They also discussed other unfair labor practice charges. Tr. 268-269. There was no discussion of rescinding changes to the break room or schedule. Tr. 272.

**v. Walker's Discharge**

GCX 22(b) shows that Respondent advised the Union on February 7 that it planned to perform layoffs and requested the Union's input by February 10. In response, on February 8, the Union requested various items of information on the subject of layoffs stated that it would not meet until it received them. See GCX 22(a). As stated above, however, the parties did meet the following day. There is no evidence that the parties made any progress in bargaining or that Respondent provided the information the Union requested. Rather, as RX 24, page 8, makes clear, the Union's explicitly did not agree to the layoff. Nevertheless, the following day, on February 10, Respondent informed the Union it intended to layoff Walker and gave the Union a three-day deadline over the weekend to provide input. GCX 9. As GCX 13(c)-(d) demonstrates, the Union reiterated its request for information on February 13 regarding layoffs. There is no evidence of any meetings or bargaining-related bargaining prior to February 15 when Walker was discharged. According to Ed, he did not learn of Walker's discharge until Walker informed him it had occurred, and Respondent did not offer to bargain over it. Tr. 406.

**vi. Servin's Discharge**

There is no evidence that the Union was notified of Servin's April 4 or May 2 discharge. Ed learned of Servin's termination when Servin called him. Tr. 410. No one from Respondent offered to bargain prior to Servin's discharge. Tr. 410.

**E. AUTHORITY**

In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op at 1 (2016), the Board held that an employer whose employees have gained union representation but are not yet covered by a collective-bargaining agreement must provide notice and an opportunity to bargain over discretionary discipline before imposing it. The employer is obligated to engage in

“full bargaining to agreement or impasse.” *Id* at 12 fn. 29. Agreement or impasse need not be reached before the discipline is imposed. *Id* at 8-9. Rather, if the parties do not reach agreement initially, the employer may impose the discipline but thereafter must continue a course of good faith bargaining. *Id* at 9. The Board specified that if the employer engages in bargaining only after imposing the discipline, this does not cure the violation. *Id* at 13.

### **C. ARGUMENT**

It is undisputed that Respondent contacted the Union about Arellano’s possible discharge and even met to discuss the matter. However, this discussion took place while Arellano’s termination was only a possibility. Under most portions of Marty’s testimony, Respondent had not made the decision to discharge Arellano by February 9. What alternatives the Union presented were therefore unlikely to be substantive proposals. The same is true for any of Respondent’s counterproposals, though the record does not indicate that it made any. Ultimately, Respondent discharged Arellano without notice that it had made the firm decision to do so.

Similarly, although Respondent provided notice that it intended to layoff Walker, the Union had previously protested any action without information allowing it to bargain. Instead, Respondent gave the Union a three-day deadline falling over a weekend, then, ignoring the Union’s repeated request for information, terminated Walker without further notice to the Union. This does not constitute adequate bargaining.

As stated above, there is no evidence Respondent provided notice to the Union prior to either or Servin’s discharges.

The record does not indicate that Respondent engaged in any significant bargaining prior to discharging any of these individuals, and CGC respectfully requests that Your Honor so find.

**XII. RESPONDENT CLOSED THE ENGINEER LUNCH ROOM BECAUSE ENGINEERS VOTED FOR THE UNION (COMPLAINT PARAGRAPH 6(f))**

**D. STATEMENT OF FACTS**

*iii. Respondent's Testimony*

Prior to February 7, engineers had been using the engineers' break room,<sup>83</sup> near Respondent's parts storage area in Bay 8 at Respondent's facility for a number of years. Tr. 160, 169, 229-230, 510; GCX 29. Respondent was aware that most of the engineers would take their breaks in this room, preferring it because it was farther from the plant. Tr. 169, 510. Respondent kept a refrigerator in the break room, and Dramise supplied a table and chairs. Tr. 168-169, 511, 514.

Marty stated that engineers had been informed in advance that their break room, would be closed. Tr. 162-163. He was unsure of how the engineers were notified but stated it was common knowledge. Tr. 163, 164. He then stated that the information had been communicated through pre-shift meetings. Tr. 163. Marty admitted that he did not convey the information. Tr. 163. However, he conversed with some engineers, who knew the break room would be closed. Tr. 163. Dramise testified that, over the course of one and a half years, he spoke to each individual engineer and told him that Respondent would be building a new lunch room, and all employees would be moved to it. Tr. 356, 357. He testified that he told all engineers that they would be losing their break room. Tr. 357. Nothing was posted in the break room to announce the closure in advance. Tr. 164.

---

<sup>83</sup> The record contains extensive discussion about the engineers' break room and a general-use lunch room. For the sake of convenience, this brief will refer to the engineers' break room as the "break room" and the general-use lunch room as the "lunch room."

As of February 7, Respondent was “transitioning the purpose” of the engineers’ break room. Tr. 335-336. Dramise designed the conversion of the break room to a parts room. Tr. 350. He decided to do so in 2011 but did not have funding at that time. Tr. 350. Respondent received the funding in 2015. Tr. 351. At that time, Respondent made upgrades but performed no work on the break room. Tr. 351. Respondent was planning the transition in early January.<sup>84</sup> Tr. 336; GCX 38. Marsh’s notes from an engineering meeting on January 11 reflect that, during the meeting, Respondent discussed the removal of the break room and the installation of the “Big Foot System” in its place, and the materials and contractors required to accomplish this. Tr. 233-234; GCX 38. No engineers were present during that meeting. Tr. 268.

Respondent stated its reason for closing the break room on February 7 is that construction on the lunch room was completed. Tr. 162, 352. Marsh explained that after the completion of the lunch room, the break room was “extra.” Tr. 336. Construction of the lunch room was completed around November 2016. Tr. 162, 164. Respondent opted not to close the break room in November 2016, after finishing the lunch room, because it did not have the parts and shelving to perform the construction to convert the room. Tr. 169-170. In addition, Respondent did not want to make the changes while the election was pending. Tr. 170. Respondent received the parts in February. Tr. 170.

There were other break rooms in the facility. Tr. 170. Marty was unsure of how many, but estimated that there were three break rooms in February.<sup>85</sup> Tr. 170-171. Dramise stated that, at one time, there were break rooms all over the facility. Tr. 351. According to Dramise, after Respondent finished construction on the lunch room, Respondent eliminated all other break

---

<sup>84</sup> GCX 28 is an e-mail sent by Marty. Tr. 158. Marty’s intent in sending it was to demonstrate to the Union that Respondent had planned to convert the break room into a parts room a year prior to its conversion. Tr. 158-159.

<sup>85</sup> He explained that break rooms “pop up” when someone puts a table somewhere. Tr. 170.

rooms. Tr. 351. Dramise could not say when the other break rooms were eliminated, but they were phased out as construction on the new lunch room progressed. Tr. 352. He stated that there are currently no other break rooms. Tr. 351. In contrast, Marty acknowledged the existence of a room with a fridge and a sink near the dry cleaning department and management's offices. Tr. 171. That room is portrayed in GCX 30.<sup>86</sup> Tr. 172-173.

The break room is currently used as a parts room. Tr. 159-160. Marsh could not say when the actual conversion took place. Tr. 336. Marty acknowledged it was sometime after the election. Tr. 161. Marsh guessed it was sometime in February or March or within three months of its closure. Tr. 336.

*ii. Additional Testimony by Arellano and Servin*

Arellano and Servin testified that, on February 7, the day after the Union election, there was a note on the break room's white board telling engineers to take their lunch in the lunch room. Tr. 515, 557. In addition, the table and chairs had been removed. Tr. 515, 557. According to Servin, there were no changes besides the removal of the table and chairs. Tr. 557. Arellano was not aware that the break room was scheduled to be closed before that date.<sup>87</sup> Tr. 515. Neither Servin nor Arellano knew when the lunch room was completed because engineers did not use it. Tr. 515-516, 559-560. Servin guessed it opened sometime around November 2016. Tr. 560.

According to Arellano, engineers began using the break room in 2012 when Sharron told engineers that they could use it. Tr. 512. Before then, engineers did not have their own break

---

<sup>86</sup> Marty did not consider it a break room. Tr. 171. He explained that that room is used by managers and not dry cleaning employees, who use the lunch room. Tr. 171, 172. Ed testified that Respondent told him that the room portrayed in GCX 30 was the dry cleaning break room. Tr. 426-427.

<sup>87</sup> Ed testified that engineers informed him that they were aware that their break room had been scheduled to be remodeled at some point. Tr. 428. According to the engineers, whether the break room would remain a break room after the remodel was previously undetermined as Respondent had not decided on a configuration. Tr. 429.

room. Tr. 512. Arellano testified that the break room also had a bathroom. Tr. 511. He acknowledged that there were other break rooms in the facility, but engineers viewed this break room as theirs<sup>88</sup> and preferred it because they enjoyed privacy and the leisure of taking a break without being called away to work. Tr. 511. The lunch room is in a different part of the plant. Tr. 516. It is a long distance from the break room. Tr. 516, 559. The break room is farther from the production area. Tr. 559. There are 10 total bays. Tr. 559. The production department occupies Bays 1, 2 and 3. Tr. 559. The break room was in Bay 9. Tr. 559. Like Arellano, Servin testified that the lunch room does not afford engineers the same peace and quiet. Tr. 558. Supervisors from other departments interrupt engineers' breaks to request that they perform work. Tr. 558. Supervisors would only occasionally bother them in the break room. Tr. 558-559. In addition, employees are under surveillance cameras in the lunch room. Tr. 558. Marty testified that he has access to the lunch room surveillance cameras. Tr. 587.

According to Servin, GCX 39 depicts the break room two months after the day it was closed. Tr. 555. The fridge, microwave, counter, and sink were all still present in the room until April. Tr. 557. In April, the fridge, microwave, and toaster oven were removed. Tr. 557. At the time of Servin's discharge, about three months after the break room was closed, there was a desk in the break room as well as two or three shelves with manuals on them. Tr. 556. There was nothing else in the room. Tr. 556. It last appeared as depicted in GCX 39 sometime in April. Tr. 556.

---

<sup>88</sup> Arellano identified the microwave shown in GCX 29 as his. Tr. 513. The coffee maker and radio also belonged to him. Tr. 514. The toaster oven in GCX 29 belonged to Servin. Tr. 514, 557. Arellano brought in his own property as soon as engineers received permission to use the room. Tr. 514.

## **E. AUTHORITY**

In *KAG-West, LLC*, 362 NLRB No. 121, slip op at 2-3 (2015), the Board held that an employer's decision to withhold a wage increase for employees who voted for a union was unlawful under *Wright Line*.

## **C. ARGUMENT**

The benefit of engineers' having the break room is clear: it provided a well-furnished personal space. The record demonstrated that engineers brought in their own appliances and treated the space as their own. In the break room, they could rest away from the production area, where they were often obligated to interrupt their breaks at the behest of supervisors from other departments. Finally, the break room did not have the surveillance cameras of the lunch room, which Respondent demonstrably used in other areas of the facility to track, among other things, their union activity.

The timing of the closure is suspicious in multiple respects. It was closed the day after engineers voted to be represented by the Union. Marsh explained that the break room was "extra," but with the existence of a prior lunch room, plus myriad other break rooms, according to Respondent, the break room was always extra. Presumably, if the only thing impeding the conversion of the break room was the completion of the lunch room, then the break room should have been closed in November 2016, when the lunch room was completed.

Respondent's claim that it closed the break room because it had just received the materials necessary to start construction is belied by Servin's testimony that the fixtures remained in the break room. GCX 39, which portrays the break room after construction began in April, shows that minimal construction had occurred by then, months after the closure. Further, Servin testified that by the time of his discharge in May, there was a desk and a few shelves.

Clearly, whatever urgency Respondent felt in closing the break room did not carry over to its urgency in converting it.

Finally, Respondent's claim that it considered all other break areas excessive and closed them subsequent to completion of construction of the lunch room is belied by Respondent's admission that the break area portrayed in GCX 30. Respondent testified that managers use GCX 30. They presumably prefer to have their own break area for some of the same reasons engineers' did.

Respondent's reasons for closing the break room are belied by the record. In light of the pretextual reasons provided by Respondent, CGC respectfully requests that Your Honor find that Respondent's decision.

**XIII. RESPONDENT UNILATERALLY CLOSED THE ENGINEERS' LUNCH ROOM, CHANGED THEIR WORK SCHEDULES, USED THIRD PARTY WORKERS TO PERFORM BARGAINING UNIT WORK, CHANGED ITS CELL PHONE POLICY AND UNLAWFULLY REFUSED TO RELEASE SERVIN (COMPLAINT PARAGRAPHS 7(i)-(p) and (v))**

**D. STATEMENT OF FACTS**

According to Ed, he is the Union's main negotiator.<sup>89</sup> Tr. 447, 448. Ed testified that Marty was in attendance at all of the bargaining meetings. Tr. 449-450. Marty is the only person from Respondent with whom Ed has bargained. Tr. 451. Ed stated that the parties have never discussed the collective-bargaining agreement by phone. Tr. 451-452. They have never communicated by text. Tr. 452.

*i. Closure of the Break Room*

Respondent did not notify the Union prior to closing the break room. Tr. 160, 424-425, 428. When the Union discovered the change, it requested an opportunity to bargain. Tr. 161.

---

<sup>89</sup> Although other individuals from the Union have attended some meetings with Respondent. See Tr. 448-449.

Respondent invited the Union to view the break room along with other areas of its facility, and the Union did so. Tr. 161, 425. Ed testified that, during his tour of the facility, he saw three break rooms. Tr. 425. The Union never agreed to the conversion of the break room into a parts room. Tr. 161-162, 427. According to Ed, Respondent offered no alternative to converting the break room. Tr. 428. The parties reached no agreement on the subject. Tr. 162, 427.

*ii. Schedule Changes*

Sharron drafts the engineers' schedules, which are then reviewed by Marsh and Marty.<sup>90</sup> Tr. 296. Schedule changes typically occurred at the request of employees.<sup>91</sup> Tr. 177, 239, 241. After Arellano's termination, Sharron had a problem with shift coverage. Tr. 371. At the time, Respondent was scheduling engineers to provide 24 hour daily coverage. Tr. 371. Sharron dealt with the coverage problem by changing the engineers' schedules. Tr. 372.

The parties met after the communications in GCX 22. Tr. 173. This occurred on February 10. Tr. 174. Part of the purpose of the meeting was to discuss a possible schedule change. Tr. 174. The parties did discuss the matter, but they did not reach an agreement. Tr. 174. The parties had no other meetings on the subject. Tr. 175-176. After February 10, Respondent changed the engineers' schedule. Tr. 175. Marty could not recall how many engineers' schedules were changed. Tr. 175. He later recalled that only two employees' schedules were changed. Tr. 178. Regarding bargaining with the Union, Marty explained that they "weren't getting anywhere. So we made the change." Tr. 175.

Ed testified that he became aware of this schedule after the fact. Tr. 429. Respondent had informed the Union that it would change the engineers' schedule. Tr. 430. Respondent did

---

<sup>90</sup> Marty approves all official, permanent or deny the schedules. Tr. 240, 296. He typically does so based on Sharron's and Marsh's recommendations. Tr. 297.

<sup>91</sup> This is due to the fact that the engineering department has few employees. Tr. 239. There are between eight and eleven engineers. Tr. 240. Other departments require a more structured process because they are larger. Tr. 240.

not inform the Union what the schedule change would be, and it did not inform the Union when the schedule change would take effect. Tr. 430. Respondent gave no details other than that they were considering it. Tr. 430.

The schedule change referenced in Paragraph 7(l) of the Complaint occurred on April 8. Tr. 176. Marty did not remember notifying the Union of the change. Tr. 177. Marty explained that Respondent did not offer to bargain with the Union because the employees wanted to trade shifts, so the change was viewed as beneficial to employees. Tr. 177. Respondent's counsel supplied that the schedule change involved employees Tuttle and Magtibay. Tr. 238. Marty could not recall if this schedule change was made due to a request from employees. Tr. 178. Marty later recalled that Tuttle and Magtibay arranged the schedule change between themselves and made their request to Sharron and Marsh. Tr. 239. He could not recall whether the request was approved and brought to him by a chief engineer. Tr. 241. Ed testified that he became aware of this schedule change after the fact. Tr. 430. Respondent gave him no notice. Tr. 430-431.

Respondent's counsel supplied that the schedule change referred to in Paragraph 7(n) of the Complaint affected Jesus Martinez, Rico Magtibay, and Ivan Virgen. Tr. 245-246. For his part, Marty could not recall how many employees' schedules were changed on July 5. Tr. 179. At first, he could recall no details about that schedule change. Tr. 179. He later recalled several. According to Marty, this schedule was requested by the engineers. Tr. 223, 246. Specifically, two of the engineers, Jesus Martinez and Rico Magtibay, agreed to swap shifts. Tr. 246, 247. Ivan Virgen was promoted. Tr. 246. No other engineers' schedules were affected. Tr. 247. Sharron brought the proposed schedule to Marty, and Marty approved it. Tr. 247.

Marty stated that Respondent notified the Union of this schedule change by giving the proposed schedule to engineering employee, Joe Tuttle (Tuttle). Tr. 179-180. Marty claimed that Tuttle is a Union representative, “like a steward.” Tr. 179-180. Respondent did not contact Ed regarding the change. Tr. 180. Marty claimed that the Union had informed him that Tuttle was a Union representative. Tr. 180. This was not done in writing. Tr. 221. He later stated that he did not notify the Union of the change. Tr. 247. Ed stated he became aware of this schedule change after the fact. Tr. 431. Respondent gave him no notice of the change. Tr. 431.

The parties met at least twice to discuss how schedule changes should be conducted. Tr. 180, 222. The first meeting lasted one hour and the second last a half hour. Tr. 222. Marty estimated that this happened in conjunction with the July schedule change. Tr. 181. No written proposals were exchanged. Tr. 222. The parties did not “fully agree on anything.” Tr. 181. Marty later testified that the parties reached an agreement during their second meeting, but it was not reduced to writing. Tr. 223. Marty explained that the Union requested that Respondent allow shifts to be bid in order of seniority, and Respondent did so. Tr. 181, 223. However, this was already Respondent’s practice. Tr. 279.

RX 24 is a series of communications between Ed and Marty. Tr. 263. The purpose of RX 24, page 3 was to bargain over the schedule change. Tr. 260. Respondent claims it attached the engineers’ schedule and proposed eliminating positions and redrafting the schedule. Tr. 260-261. Ed responded on RX 24, page 2.

### ***iii. Respondent’s New Cell Phone Policy***

On April 4, Respondent informed Servin that use of his cell phone at work was against Respondent’s policy. Tr. 105, 315, 316, 348. Up until that time, the practice was permitted. Tr.

97, 305, 306, 315-316. Marsh was unaware if the Union was ever told about this prohibition. Tr. 328.

*iv. Subcontracting*

AJ Industries (AJ) is a subcontractor owned by Dramise that performs installation and service of laundry equipment. Tr. 182, 392. AJ employees typically perform “capital projects,”<sup>92</sup> special projects, installation and anything Respondent does not have the resources to perform.<sup>93</sup> Tr. 183. They also perform warranty work. Tr. 241, 242. They are the distributor for almost all of Respondent’s equipment. Tr. 241, 242. They supplied all of Respondent’s equipment. Tr. 243. Respondent’s engineers perform maintenance on the machines. Tr. 395.

AJ has performed capital projects, warranty work and has supplied equipment to Respondent since Respondent’s inception. Tr. 243, 392. A typical warranty on Respondent’s equipment lasts from three to five years. Tr. 270. Marty testified that for warranty work, AJ charges for labor but not parts.<sup>94</sup> Tr. 270. Warranty work should be noted on AJ’s invoices. Tr. 273-274. AJ performs work at Respondent’s facility on a weekly basis. Tr. 185.

The process of contracting AJ begins when a chief engineer informs Marty that the department has a need. Tr. 184-185. Marty is involved in the decision of whether or not to contact AJ. Tr. 185. Marty does not agree to contact AJ without knowing what work they will be performing. Tr. 185. Marty or Dramise would then contact AJ. Tr. 185. Marty is actively involved in managing AJ employees when they perform work at Respondent’s facility. Tr. 185.

---

<sup>92</sup> A capital project is any addition to the facility. Tr. 242.

<sup>93</sup> Typically AJ does not perform work Respondent’s engineers perform. Tr. 182. When they do, it is referred to as overflow work. Tr. 242-243. That refers to engineering work for which Respondent does not have sufficient manpower. Tr. 183, 243.

<sup>94</sup> Sharron testified that when AJ repairs a machine under warranty, there is no charge to Respondent for either parts or labor. Tr. 394-395.

AJ generates invoices for their work. Tr. 185. Marty does not closely review the invoices.<sup>95</sup> Tr. 185. Sharron reviews and signs AJ invoices. Tr. 395. There is no mention of warranty work on the invoices in GCX 37. Tr. 274. Shop cleaning is work typically performed by Respondent's engineers. Tr. 274, 396. It does not fall under warranty work, capital projects, or installation of new equipment. Tr. 274, 396. It could fall under overflow work. Tr. 274. AJ would only perform this work if it fell under overflow or if a "big walk-through" was scheduled. Tr. 396. Sharron first stated that there probably was a walk-through at the time of GCX 37. Tr. 397. He then stated he did not recall the date. Tr. 397. Fixing a dryer leak could be warranty work. Tr. 273-274. But it is work typically performed by engineers. Tr. 274. Marty was unsure what the notation on GCX 37 of miscellaneous repairs referred to. Tr. 276. "Miscellaneous" is not typically noted on an AJ invoice. Tr. 276. Sharron stated that the miscellaneous labor was not warranty work. Tr. 398-399. He opined that it was most likely a special project. Tr. 399.

Two of AJ's employees are former employees of Respondent. Tr. 390. One is Mitchell Pangelinan (Pangelinan). Tr. 183, 391, 561. The other is Sharron's brother, Edward Sharron. Tr. 391. At AJ, those two perform the same work they did for Respondent except that Respondent's engineers perform all of their work inside Respondent's facility. Tr. 391. Sharron denied that AJ was used to help with coverage. Tr. 372.

After Arellano's termination, Servin witnessed an increase in AJ's work for Respondent. Tr. 573. Servin testified that Respondent brought in AJ to help fill the shortfall. Tr. 540. Servin acknowledged that AJ employees are often at Respondent's facility. Tr. 562. GCX 40 is a picture of Pangelinan working on a press.<sup>96</sup> Tr. 561. At the time GCX 40 was taken, Servin and

---

<sup>95</sup> Marty was not aware of what specific work is represented in GCX 37. Tr. 187.

<sup>96</sup> Pangelinan wore a shirt with an AJ logo. Tr. 574; GCX 40. Respondent's engineers wear a different uniform. Tr. 574.

Pangelinan were working together on seals. Tr. 562. Servin acknowledged that this work might ordinarily be performed by AJ. Tr. 562-563. However, AJ usually works on other projects, only working alongside Respondent's employees when they are handling overflow.<sup>97</sup> Tr. 564, 571-572. According to Servin, what was "way out of the ordinary" on this occasion is that Pangelinan was brought in to cover Arellano's shift for an entire work week. Tr. 563, 564. AJ has not been used to cover engineers' shifts in the past. Tr. 571. Arellano worked the day shift with Servin. Tr. 573. Servin observed Pangelinan perform work that Arellano would normally perform, answering floor calls and troubleshooting machines. Tr. 565, 568. Servin testified that in February, Respondent posted the engineers' schedule.<sup>98</sup> Tr. 570. After Arellano's discharge, no other name was inserted for Arellano's shift. Tr. 570. Ed testified that Respondent never informed him that it would change the manner in which it utilized AJ employees. Tr. 432. Respondent never offered to bargain over any changes. Tr. 432.

*v. The Union's Request that Respondent Release Servin*

In GCX 31, Ed requested that Servin be released from work to attend a bargaining session. It was the first time Ed made this request. Tr. 189, 190. There was no discussion of this subject outside GCX 31. Tr. 190, 432. Servin was not released from work. Tr. 191, 432.

**E. AUTHORITY**

In *Santa Barbara News-Press*, 358 NLRB 1415 (2012), the Board found an employer's decision to employ outside employees to be unlawful even though the employer had a past practice of doing so. Section 8(d) of the Act defines mandatory bargaining subjects as "wages, hours, and other terms and conditions of employment," which includes issues that "settle an

---

<sup>97</sup> For example, in late 2016, when Respondent cut engineers' hours to 30 per week, Respondent brought in AJ to manage some of the shortfall. Tr. 572.

<sup>98</sup> In addition, Servin testified that Pangelinan informed him that he was brought in to cover Arellano's shift. Tr. 573.

aspect of the relationship between the employer and employees” in the bargaining unit. *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).

In *Supervalu, Inc.*, the Board explained that even matters of concern to individuals outside the bargaining unit may be a mandatory subject of bargaining. 351 NLRB 948, 949 (2007) (explaining the Board’s use of the “vitally affects” test).

For example the Board has found that an employer violated Section 8(a)(5) of the Act when it failed to bargain before assigning bargaining-unit work to non-bargaining-unit workers. *Seaport Printing & Ad Specialties, Inc.*, 351 NLRB 1269, 1270 (2007) (finding that the employer was obligated to bargain with the union over staffing decisions even in the wake of a hurricane). Subcontracting bargaining unit work is a mandatory subject of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964). This is true even when no member of the bargaining unit suffers a loss of hours or is laid off as a result of the decision to subcontract. *Acme Die Castings*, 315 NLRB 202, 209 (1994). Even slight departures from an employer’s past practice will prevent the employer from relying on past practice as a defense. See *id.*

When a union and employer are engaged in negotiations for a collective-bargaining agreement, the employer’s obligation to refrain making changes to mandatory subjects of bargaining requires more than merely providing notice and an opportunity to bargain; rather the employer must refrain from any implementation, absent overall impasse on bargaining for the agreement as a whole. *Register-Guard*, 339 NLRB 353, 354 (2003).

The Board recognizes two exceptions to the rule: “when economic exigencies compel prompt action, and when a union, in response to an employer’s diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining.” *Id.* (quoting *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994)).

However, the Board has narrow view of the economic exigencies exception, limiting it to “extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action.” *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). A union may also waive its bargaining rights, but such a waiver is not to be lightly inferred; it must be demonstrated by the union's clear and explicit expression. *Rockford Manor Care Facility*, 279 NLRB 1170, 1172 (1986). Finally, a unilateral change to an otherwise mandatory subject may not be unlawful if it is not “material, substantial, and significant.” *Crittendon Hospital*, 342 NLRB 686, 686 (2004). For example, in *Berkshire Nursing Home, LLC*, the employer did not violate the Act by changing its parking policy, resulting in a four-minute increase to employees’ walk from their cars to the facility entrance. 345 NLRB 220 (2005).

The Board has held that a change affecting just one employee can result in a violation of Section 8(a)(5). See, e.g., *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004). This is because a unilateral change “minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *Berkshire Nursing Home, LLC*, 345 NLRB at 225 (citing *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (D.C. Cir. 1992)). Indeed, a unilateral change relegates a union “to the status of a supplicant” at the bargaining table, “a position incompatible with the purposes and policies of the Act.” *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000).

**C. ARGUMENT**

*i. Closure of the Break Room*

Respondent does not claim that it provided notice to the Union that it would close the break room and there is no evidence that it did.

*ii. Schedule Changes*

Despite evidence that the parties met once prior to the February 18 schedule change to discuss the subject, Respondent admits that it changed the schedule because bargaining was not progressing in a manner satisfactory to Respondent. There is no evidence of proposals or other substantive bargaining. There is no evidence of impasse. Rather, as alleged in the Complaint Paragraphs 7(d) and 7(f), the Union's information requests on the subject were still outstanding. Further, Respondent's testimony about the minimal extent of the schedule change is cast in doubt by its own testimony elsewhere; Sharron rewrote the engineers' schedule to accommodate Arellano's absence, and at least Servin's schedule was changed.

Regarding the April 8 schedule change, Respondent could not recall providing notice of the change and admittedly never bargained. The fact that employees agreed with the schedule change does not excuse the failure to bargain.

Regarding the July 5 schedule change, Respondent claims to have provided notice to the Union by giving it to employee, Joe Tuttle. Ed was the sole Union bargaining representative. At no other point does the record mention Joe Tuttle's serving as a Union representative in any capacity. Ed denied ever notice of the revised schedule. Even if he had, it would have been notice of a schedule change after the fact and would not have complied with the requirement to provide notice and bargain prior to making changes. Respondent's testimony that it attached a schedule to RX 24, page 3, is not reflected on the document. The alleged attachment is not

identified anywhere in the record. What RX 24, page 8, does reveal is that the Union refused to agree to any schedule changes before receiving information. As argued above, that missing information is the subject of Complaint Paragraph 7(d) and (f). Respondent's testimony that it reached agreement with the Union that it would abide by seniority in posting engineers' shifts for bid is disingenuous. The record showed that this was already Respondent's practice.

***iii. Respondent's New Cell Phone Policy***

Respondent's cell phone policy change arose with arguable spontaneity at Servin's April 4 termination meeting. There is no evidence the Union was notified of this change to its policy at any point.

***iv. Subcontracting***

On the subject of subcontracting Servin's testimony was limited to his observation. However, his testimony established that an AJ employee was brought in to cover the shift and act as one of Respondent's regular engineer, which he had never observed. There is some support for this certain items of GCX 37, as Respondent admitted that it was work normally performed by Respondent's engineers but could not be positively identified as overflow work or was otherwise unidentifiable. Although the record establishes that AJ employees helped with overflow work, Respondent did not establish that AJ employees fill shifts for Respondent's engineers. In this manner, no matter how minor or temporary, Respondent departed from its past practice and was obligated to bargain with the Union over the change.

***v. The Union's Request that Respondent Release Servin***

The parties' communication over the release of Servin is brief. As Servin's certified collective-bargaining representative, Respondent was obligated to bargain with the Union over its request to release Servin. GCX 31 demonstrates that Respondent's sole action was to state

that Servin would need to lodge his request individually, implicitly refusing to discuss the matter further with the Union.

In every instance cited above, Respondent failed to fulfill its duty to bargain in good faith or impasse prior to implementing changes, and CGC respectfully requests that Your Honor so find.

**XIV. RESPONDENT REFUSED TO PROVIDE RELEVANT INFORMATION REQUESTED BY THE UNION (COMPLAINT PARAGRAPHS 7(d)-(h))<sup>99</sup>**

**D. STATEMENT OF FACTS**

In general, the Union's information requests were made via e-mail. Tr. 146. According to Ed, this is the Union's typical practice. Tr. 453.

RX 14 is an e-mail from Marty to Ed explaining what information he was providing and what information he was unable to provide. Tr. 249. On GCX 26, Marty wrote the wording beneath the request paragraphs such as "sent 2-10." Tr. 151. In GCX 25(b), Marty stated that he would provide certain documents. He stated this because he believed he would be able to, but he was not able to provide all of the information he stated he would. Tr. 258-259. He did not tell the Union that, contrary to his written response, some of the documents did not exist. Tr. 259.

*i. Complaint Paragraph 7(d)(i) "A list of current bargaining unit employees including their...date of completion of any probationary period."*

Marty received GCX 21 around February 6. Tr. 141. Marty admitted that Respondent did not supply the Union with anything that indicated the dates that employees completed probation. Tr. 146, 253-254. Employees have a probationary period. Tr. 147. But Respondent

---

<sup>99</sup> In its Answer, Respondent essentially admits that the information requests were made, as alleged in the Complaint. The Answer denies that the Union is entitled to the information or denies that the Respondent failed to furnish it.

does not record the dates of completion. Tr. 146, 254. Respondent never informed the Union of this fact. Tr. 147, 418.

Ed testified that his reason in requesting employees' completion of probation dates was in order to determine their seniority, any changes in engineers' positions, and whether engineers receive uniform treatment. Tr. 419.

*ii. Paragraph 7(d)(ii) "Copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use."*

*Paragraph 7(e)(i) "A copy of all training records for Mr. Arellano."*

In GCX 24(a), Respondent explained that the manuals<sup>100</sup> the Union requested were too voluminous to provide. Respondent never offered the Union an alternate means of viewing the manuals.<sup>101</sup> Tr. 147, 418. The parties had no further discussion about the manuals after the e-mail exchange in GCX 24. Tr. 147. In response to this request Respondent provided its handbook, GCX 2. Tr. 254.

Marty admitted that Respondent does not have good training records. Tr. 152-153. He then stated that there are none. Tr. 153. He then clarified that he was unaware of any training records in existence at the time the Union made its request. Tr. 153. Upon receiving the Union's request, he asked the chief engineers to look for the records. Tr. 153. They reported that there were none. Tr. 153. At first, Marty testified he could not recall informing the Union that they do

---

<sup>100</sup> GCX 26(a) contains a request for "copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use." For the sake of simplicity, I will refer to those documents as "manuals." Ed testified that "work distribution system" referred to Respondent's system of tracking work assignments, such as a ticket-writing system utilized by some employers. Tr. 419. This would allow the Union to evaluate engineers' workload and investigate whether engineers have been disciplined or commended for their work. Tr. 420.

<sup>101</sup> The Union has requested access to Respondent's facility. Tr. 147. The Union's request was in connection with a request to access the break room to have meetings. Tr. 582. Respondent denied the request. Tr. 147. Marty stated that Respondent does not allow third parties or non-employees in its break room. Tr. 583. He later admitted that AJ employees are permitted to use Respondent's break rooms. Tr. 587.

not exist. Tr. 153. He later recalled doing so. Tr. 217. That communication was based on what Sharron and Marsh had told him. Tr. 217. Since that time, Marsh has located training records. Tr. 153, 218. Marsh did not tell Marty where he found the records. Tr. 219. One record was located in the spring of 2017. Tr. 219. Since then, additional records have been located. Tr. 220. Marty is unsure of how many training records are in existence. Tr. 153. Marty never told Ed that training records were located. Tr. 220.

When asked whether Respondent has provided the training records to the Union, Marty stated that he has asked the Union whether they have everything they need. Tr. 153-154. Ed has responded with specific requests. Tr. 154. On that basis, Marty believed he had provided everything he was required to. Tr. 154. Marty clarified that after the e-mail exchange in which Marty asked Ed whether he had all the records he needed, the two met, and Ed never raised the issue of training records. Tr. 154-155. Marty admitted that if he discovered training records, providing them to the Union would not be his first thought. Tr. 155. When asked whether Marty interpreted the Union's failure to repeat its request as a sign of lack of interest, Marty stated he believed his last e-mail communication on the subject was acceptable. Tr. 155. Ed is the only Union official with whom Marty has had regular contact. Tr. 220. He is the only Union representative who has requested information. Tr. 220.

Ed testified that his reason for requesting Arellano's training records was to see if Arellano had a negative record. Tr. 421. According to Ed, Respondent indicated that Arellano's skills were at issue in connection with his discharge. Tr. 421. The Union has not received Arellano's training records. Tr. 416. Respondent informed him that none exist. Tr. 416. Respondent has never informed him otherwise. Tr. 417.

**iii. Complaint Paragraph 7(d)(iii) “A list of employees who have had schedule changes, including dates and job classifications at time of schedule changes.”**

Marty testified that, at the time the Union won the election, Respondent had no written policies regarding schedule changes. Tr. 276-277. Marty asserted that Respondent had unwritten policies. Tr. 277. Marty then repeated that Respondent had no policies in place regarding schedule changes. Tr. 278. He made the same assertion in GCX 26(b), Respondent stated that it had no policies regarding schedule changes. Tr. 277. He explained that he did so because Respondent had no written policies that had been communicated to employees, which is how he interpreted the Union’s request. Tr. 279. Respondent’s practice was to allow employees to bid for their shifts according to their seniority. Tr. 279. In Marty’s view, a scheduling practice is different from a policy. Tr. 279.

When asked whether Respondent provided evidence of past schedule changes, Marty responded that he did the “best I could.” Tr. 174-175. Respondent retained time records for employees, but it was Respondent’s practice to discard old schedules after a change was made not records of past schedule changes. Tr. 175, 271. Respondent sent the time records to the Union on February 10 along with the engineers’ current schedule and a proposed schedule. Tr. 175, 249; see RX 14. These, and other documents, comprised over 1300 pages. Tr. 249. The time cards would not show a schedule change. Tr. 271, 418. There was no communication beyond what is contained in GCX 23 and what the parties discussed at the February 10 meeting. Tr. 176.

Ed testified that his purpose in requesting schedule information was to see what Respondent’s practice was in making schedule changes, how often changes occurred, what

business reasons Respondent had for making the changes, and any correlation between schedule changes and discipline. Tr. 420.

**vii. *Complaint Paragraph 7(d)(iv) “A copy of all policies or procedures with respect to employment of employees.”***

Regarding Respondent’s this request, Respondent has provided nothing beyond GCX 2. Tr. 150. The introduction page of Respondent’s handbook, GCX 2, refers to “separate company document[s].” Marty testified that an example of such a document would be an equipment training document. Tr. 147-148. The “summary plan description” on page 14 of GCX 2 is a benefits description. Tr. 148-149. The benefits descriptions are contained in other documents, not in GCX 2. Tr. 149. Marty did not recall providing them to the Union but stated Respondent could easily access them. Tr. 149. Ed testified that he has not seen Respondent’s healthcare insurance plans. Tr. 418-419.

**v. *Complaint Paragraph 7(e)(ii) “A copy of Mr. Arellano’s employee evaluations.”***

***Complaint Paragraph 7(e)(iii) “Copies of all evidence, written statements, video/audio recordings used to determine to terminate Mr. Arellano’s employment.”***

When CGC first asked Marty if he provided evidence of Arellano’s discharge, he expressed uncertainty regarding the question. See. Tr. 156. The second time the question was posed, Marty stated that the parties met. Tr. 156. The third time he was asked, he stated he did not know. Tr. 157. He admitted to not providing a copy of Hernandez’ statement to the Union.<sup>102</sup> Tr. 157. After the communication reflected in GCX 13, dated February 14 at 8:27 a.m., there was no further communication between the parties regarding this request. Tr. 157.

---

<sup>102</sup> It is apparent that Union got Hernandez’ statement from Arellano. Arellano testified he got two pieces of paper on being discharged. Ed’s e-mail in GCX 13(d)? states that the statement was provided to him by Arellano. Ed testified that he did not receive it from Employer.

Marty stated that Respondent had provided information “through this process,” but he was unsure whether the information was provided to the Union or to the NLRB. Tr. 157.

Ed testified that the request reflected in GCX 13(e) is the Union’s standard request when it comes to discharges. Tr. 422. It allows the Union to bargain over the discharge. Tr. 422. Ed’s purpose in requesting Arellano’s evaluations was to see if he had received past discipline or commendations. Tr. 422. The Union has not received any of Arellano’s employee evaluations. Tr. 417. Respondent has not told the Union whether they exist. Tr. 417. Ed testified that the Union has not received any information in response to its request for “copies of all evidence, written statements, video/audio recordings used to determine to terminate Mr. Arellano’s employment.” Tr. 417; see GCX 13(e). For example, the Union has not seen the surveillance video alleged to support Arellano’s discharge. Tr. 417. The Union has received GCX 34(a), but Respondent did not supply it. Tr. 417. Rather, it was obtained from Arellano. Tr. 417.

*vi. Complaint Paragraph 7(f)(i) “Information responsive to the question of what was behind Respondent’s decision to lay-off employees and change employees’ schedules.”*

*Complaint Paragraph 7(f)(ii) “Evidence to support the claim that business need requires layoffs/schedule changes.”*

*Complaint Paragraph 7(f)(iii) “Copies of all outside contractor’s invoices for maintaining/installing/servicing laundry equipment in the plant for the past 5 years.”*

The Union requested various pieces of information relating to the subject of layoffs. See GCX 13(c)-(d). Ed testified that the Union’s purpose was to enable it to bargain over the subject. Tr. 422. In addition, the Union wished to determine whether the layoff of Walker was retaliatory or whether there was a business need. Tr. 423. Ed testified that the Union has not received evidence to support Respondent’s claim that business needs justified the layoff. Tr. 424. Ed testified that he requested contractor invoices because it had been informed that

Respondent was using AJ employees to perform bargaining unit work. Tr. 423. The Union has not received any such invoices. Tr. 424.

The Union's purpose in requesting all of this information was to aid it in negotiating a collective-bargaining agreement. Tr. 421.

#### **E. AUTHORITY**

In order to comply with its duties under Section 8(a)(5) an employer must provide information that is potentially relevant and of use to the union in its performance of its duties as collective-bargaining representative. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995) citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) (discussing whether an employer has an obligation to furnish information to allow a union to decide whether to process a grievance). There need only be a "probability that the desired information [is] relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.* at 437. Generally, information pertaining to employees within a bargaining unit is presumptively relevant. *Quality Building Contractors*, 342 NLRB 429, 431 (2004). An employer objecting that requested information need not be produced bears the burden of proof. *Crittendon Hospital*, 343 NLRB 717, 720 (2004).

An employer is obligated to furnish any information properly requested by a union as promptly as practical. *Aero-Motive Manufacturing Co.*, 195 NLRB 790, 792 (1972). An unreasonable delay in furnishing information is as much a violation as an outright refusal. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001). In determining whether an employer's response to an information request was unlawfully delayed, the Board considers the totality of the circumstances, including the "complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392,

398 (1995). In *Pennco, Inc.*, 212 NLRB 677 (1974), the Board found that an employer violated the Act when it took no action to respond to the union's information request for over a month, and then responded only to furnish incomplete information.

In *Total Security Management, supra*, the Board held that an employer's duty includes providing the union with relevant information if a timely request is made. *Id* at 8. As the Board stated, "The aim is to enable the union to effectively represent the employee by, for example, providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action." *Id*.

#### **F. ARGUMENT**

The facts in these allegations are mostly undisputed. All of the information below relates to the bargaining unit, and its relevance is easily ascertained. Some of the information, such as information about schedule changes or information about work distribution systems, would allow the Union to bargain over schedule changes or Servin's alleged performance problems. In all instances above, Respondent either did not supply the information, did not inform the Union that the information did not exist, or did not provide the Union an alternate means of viewing voluminous documents.

CGC acknowledges that Respondent cannot supply non-existent information, but in instances where the information does not exist, CGC requests that Your Honor order an appropriate notice posting to reflect Respondent's unlawful refusal to inform the Union.

#### **XV. RESPONDENT DEALT DIRECTLY WITH ENGINEERS IN CHANGING THEIR WORK SCHEDULES (COMPLAINT PARAGRAPHS 7(q) and (u))**

The Board's criteria for finding direct dealing are: (1) the employer communicated directly with represented employees; (2) the communication was for the purpose of establishing or changing terms and conditions of employment or undercutting the Union's role in bargaining;

and (3) the communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010). In *Associated Constructors*, the Board found that an employer violated the Act by directly dealing when the employer implied to a represented individual that he would receive a favorable wage. 325 NLRB 998, 1009 (1998). By contrast, in *Kurdziel Iron of Wauseon*, the Board found a lack of direct dealing when an employee initiated a conversation with the employer and insisted on a response. 327 NLRB 155, 156 (1998). The Board placed particular emphasis on the fact that the employee was acting in his role as a union negotiating committee member, and not as an employee. *Id.*

As set forth above, and Respondent arranged the schedule changes of April 7 and July 5 directly with employees. It did not involve the Union in any way during the process.

**XVI. RESPONDENT BARGAINED IN BAD FAITH (COMPLAINT PARAGRAPHS 7(r)-(t))**

**D. STATEMENT OF FACTS**

Ed testified that the parties' first bargaining session took place in March. Tr. 432. There have been between five and ten sessions in total since that time. Tr. 191, 432. During the first meeting, the Union provided a proposed collective-bargaining agreement. Tr. 191, 432. This was a physical copy. Tr. 433. RX 18, pages 3 to 51 is the Union's first proposal.<sup>103</sup> Tr. 264, 433. There was information missing from this proposal. Tr. 192. RX 18 contains no wage or benefit information. Tr. 434. Marty requested an electronic copy of the document, specifically a

---

<sup>103</sup> For the sake of simplicity, the brief will refer to those pages of the document as RX 18.

“working copy.”<sup>104</sup> Tr. 192. His purpose in doing so, besides convenience, was to show the bargaining progress on the document itself. Tr. 192-193. He did not consider the option of making handwritten notes. Tr. 193. He acknowledged that he could have. Tr. 193. About two weeks later, the Union provided an electronic copy of the document in PDF format. Tr. 192, 344. Ed testified that Marty stated Respondent would not bargain until the information missing in RX 18 was filled in. Tr. 434.

According to Ed, he filled in the missing wage and benefit information and provided a new proposal. Tr. 434. That new proposal is GCX 32. Tr. 435. Not all of the information missing in RX 18 is supplied in GCX 32. Tr. 435. Ed testified that the information missing could not be supplied until Respondent provided information the Union had requested. Tr. 435. Ed explained that the Union filled in all of the terms it could with the information it had. Tr. 435. For example, information in Article 21 of GCX 32 (see page 42) is missing because, according to Ed, the Union had not received Respondent’s summary plan descriptions or health insurance costs. Tr. 435, 436.

---

<sup>104</sup> As the record makes clear, by “working copy,” Respondent meant a document in an editable format such as Microsoft Word. The Union did not provide a Word copy of the document to Respondent. Tr. 192. According to Ed, Marty stated Respondent required a copy in Microsoft Word format before it would respond. Tr. 433-434, 454. Respondent acknowledged that it can convert PDF documents into editable documents, but it is not easy. Tr. 205. Marty explained that it is a “messy” process requiring format adjustments. Tr. 205. Respondent performed this conversion around August. Tr. 205.

Ed’s practice is to provide collective-bargaining agreements in physical form and PDF format. Tr. 460. Ed explained that he did not provide a copy of GCX 32 in Word to guard against the risk that Respondent could present a proposal to employees in a manner not reflecting the Union’s actual proposal, or the employer could make changes that would be hard to detect. Tr. 460-461. He acknowledged that if a document were retyped, it could pose the same risk as if the Union provided a Word copy, but the risk would be lower. Tr. 461-462.

Based on Respondent’s counsel’s statements at hearing in connection with this subject, CGC anticipates Respondent may argue that the Union has bargained in bad faith. In that regard, Respondent has filed no Board charges against the Union. Tr. 461.

The parties met again on May 23. Tr. 193. There, the Union provided GCX 32. Tr. 193, 195. The parties met again on July 11 and July 18.<sup>105</sup> Tr. 195. Up until that date, Respondent was reviewing the proposal, including with the Union. Tr. 196. During his meetings with the Union, Marty provided oral responses to the Union's proposals. Tr. 196-197. He explained what he liked or did not like about the proposals. Tr. 197. According to Ed, the parties reviewed each article in GCX 32. Tr. 434. That occurred in June or July. Tr. 434-435. Ed testified that Marty stated Respondent would not accept or reject any proposal. Tr. 434. Ed stated that Respondent would not make counteroffers or enter tentative agreements. Tr. 434. After a full review of GCX 32, Marty stated only that Respondent would get back to the Union. Tr. 436.

Marty had authority to disagree with the Union's proposals.<sup>106</sup> Tr. 202, 203. Those disagreements were binding on Respondent. Tr. 202. He received no formal assignment of this authority. Tr. 203. On July 26, Respondent provided a response to the Union's proposal. Tr. 196. That response is GCX 33. Tr. 195. GCX 33 contains no counterproposals. This was Respondent's first written response to the Union's proposals. Tr. 196. Marty could not recall if the parties had met since July 26. Tr. 204.

Marty explained that Ed asked for agreement,<sup>107</sup> and Marty stated there was too much "still moving" to agree. Tr. 199. The parties have discussed tentative agreements. Tr. 199. Marty first stated that no tentative agreements were reached. Tr. 197. He then testified that he

---

<sup>105</sup> In RX 20, Marty proposed the parties have a weekly meeting to discuss collective-bargaining and the unfair labor practice charges. Tr. 265. The parties agreed to a weekly meeting. In RX 20; Tr. 271-272. They attempted to do so for a time. Tr. 272.

<sup>106</sup> That is, Marty did not need authority from the Respondent's board before generating GCX 33. See below regarding Respondent's board.

<sup>107</sup> According to Ed, he asked Marty if he would tentatively agree to any provisions in GCX 32. Tr. 436, 439.

tentatively agreed<sup>108</sup> to everything not disagreed to, but the provisions are interrelated, and there were pieces missing.<sup>109</sup> Tr. 199. Marty then testified that Ed has never asked Respondent to enter into a tentative agreement. Tr. 200.

Marty testified that he told Ed that once the parties got “further along in the process, we need to get Board approval.”<sup>110</sup> Tr. 199. According to Marty, the board would need to give approval before an agreement with the Union could be reached. Tr. 201. This is required by Respondent’s corporate documents. Tr. 203. No proposals would be final until then. Tr. 203. In contrast, Dramise stated that Respondent did not need board approval before entering a collective-bargaining agreement. Tr. 349. According to Dramise, he would consult the board out of respect rather than out of requirement.<sup>111</sup> Tr. 349. Regarding the process of obtaining approval from Respondent’s board, Marty stated that he would make a recommendation to the board. Tr. 200-201. Marty is on the board, and the board typically follows his recommendation. Tr. 201. The other individuals on the board are Dramise, Bert Arnlund, and John Smagala. Tr. 201.

At the time of hearing, Marty had not taken the Union’s proposal to the board. Tr. 201. In Marty’s opinion, doing so would be premature until Respondent has done “its best.” Tr. 201. The agreement would then be presented to the board by Marty and Dramise. Tr. 201. Sometime

---

<sup>108</sup> When CGC asked whether Marty actually gave oral agreement, Marty expressed uncertainty about the meaning of the phrase “tentative agreement” and explained that he agreed “in concept.” Tr. 199-200.

<sup>109</sup> There is no writing reflecting this. Tr. 202. According to Marty, no party proposed that tentative agreements be reduced to writing. Tr. 202.

<sup>110</sup> According to Ed, In July, after a full discussion of GCX 32 was complete, Marty stated that he had no authority to agree on any article. Tr. 437. Ed testified that Marty then told him that he would need to take the Union’s proposal to Respondent’s board for review. Tr. 438. Marty denies telling Ed he had no authority to enter into tentative agreements. Tr. 199.

<sup>111</sup> Dramise stated that Marty had authority to negotiate a collective bargaining agreement. Tr. 354, 355. Marty is generally authorized to make decisions without consulting Dramise. Tr. 354. He stated, however, that Marty would have needed his approval before reaching an agreement. Tr. 354, 355. But he never informed Marty of this. Tr. 354. Dramise’s instructions to Marty were to negotiate the best deal he could. Tr. 354.

in the week of November 26, Respondent sent its own proposal. Tr. 197, 433. That proposal is the first full contract Respondent has sent. Tr. 198. It is the only written response Respondent has provided besides GCX 33. Tr. 198. Ed testified that, to date, the parties have no tentative agreements. Tr. 438.

#### **E. AUTHORITY**

Parties in a collective bargaining relationship are required to approach negotiations with “more than a willingness to enter upon a sterile discussion of union management differences.” *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table. *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enfd.* 983 F.2d 815 (7th Cir. 1991). This conduct includes delaying tactics. *Crane Company*, 244 NLRB 103, 111 (1979). The objective is to determine whether a party is “unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001).

Although the absence of authority of a representative to enter a binding agreement is not, by itself, bad faith, it is a factor to be considered. *Fitzgerald Mills Corp*, 133 NLRB 877, 881 (1961). In *Fitzgerald Mills Corp*, the Board found that the respondent’s failure to provide representatives authorized to reach agreement was a violation of Section 8(a)(5). *Id.*

#### **F. ARGUMENT**

There is no dispute that the parties have met with some regularity to bargain over the contract. Respondent’s unlawful behavior lies in its failure to engage in substantive bargaining. Despite multiple meetings and despite having possession of a large proposal from the Union

since March, Respondent provided no definite response until four months later, when its response was simply to refuse agreement to any of the Union's provisions.

Respondent's first argument that it could not bargain because the Union had left blank items such as wage information in its initial proposal is unreasonable on its face. It is further unreasonable in light of the fact that Respondent had not supplied certain information essential to the Union's ability to fill this information in. Nevertheless, the Union supplied a more complete draft in May.

Respondent then argued that it could not bargain with the PDF copy the Union provided, but required a Word copy. Setting aside the fact that Board law has no such requirement and the fact that Respondent had other means of noting its changes, such as a pen, Respondent took until August to make this conversion. Proper software allows a simple conversion from PDF to Word. Allowing that Respondent may not have such software, Respondent admits that a cut-and-paste option is available, although, as Respondent also stated, it would require some formatting corrections. The claim that Respondent would have to retype the entire document overlooks these simple options, and none of them explains the four-month delay. Further, none of these factors excuses Respondent's failure to make a single proposal or counterproposal until late in November.

All told, Respondent took nearly eight months to make a single proposal of its own. With little time lacking before Union's one-year post-certification period, it does not have a single tentative agreement to show for its diligent efforts.

In that regard, Marty's testimony regarding tentative agreements is informative. He acknowledged that Ed requested agreement, but denied that he ever requested tentative agreements. At hearing, he expressed some confusion about the meaning of "tentative

agreement.” Ed’s testimony that he has requested tentative agreements is more credible, as this is common practice in collective-bargaining. Common sense would dictate that parties trying to reach a multi-provisional contract would attempt to reach agreement in parts rather than as a whole.

Ed testified it was not until July that Marty revealed he had no authority to enter tentative agreements. Although Marty denied this, he admitted that he stated he had no authority to enter into an agreement without first gaining approval from Respondent’s board, an assertion contradicted by Dramise. In any case, Marty has not yet done so. His testimony indicates that he will not seek approval for any agreement until Respondent has achieved an entire agreement he views as acceptable for recommendation. At the rate Respondent has progressed so far, that could easily be years from now.

Respondent’s near complete failure to collectively-bargain is contrary to Board law, and CGC respectfully requests that Your Honor so find.

## **VI. CONCLUSION**

Many of the facts in this case indicate that Respondent was merely ignorant of the law; Respondent admitted to several facts that constitute violations. In other instances, Respondent displayed a will to conceal its unlawful intent. Currently, Respondent has violated almost every section of the Act it can and has thereby harmed its employees who have rightfully chosen to

seek collective-bargaining representation. CGC respectfully requests that Your Honor so find and issue an order addressing these violations.

A proposed notice to employees is attached.

Dated at Las Vegas, Nevada this 17<sup>th</sup> day of January 2018.

*/s/ Nathan A. Higley*

Nathan A. Higley  
Counsel for the General Counsel  
National Labor Relations Board, Region 28  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, NV 89101  
Telephone: (702) 388-6062  
Facsimile: (702) 388-6248  
E-Mail: [nathan.higley@nlr.gov](mailto:nathan.higley@nlr.gov)

**(To be printed and posted on official Board notice form)**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

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

**WE WILL NOT** maintain the following rules in our Employee Handbook:

(iii) 5-4. Use of Social Media

While an employee's free time is generally not subject to any restrictions by the Company, with the exception of the limited restrictions above, the Company urges all employees to refrain from posting information regarding the Company that could embarrass or upset co-workers or that could detrimentally affect the Company's business. Employees must use their best judgment. Employees with any questions should review the guidelines above and/or consult with their manager. When in doubt, don't post. Failure to follow these guidelines may result in discipline, up to and including termination.

**WE WILL NOT** interrogate you about your union membership, activities, or sympathies.

**WE WILL NOT** tell you that it would be futile to select the Union as your exclusive bargaining representative.

**WE WILL NOT** threaten you with loss of wages, loss of benefits, and unspecified reprisals for selecting the Union as your exclusive bargaining representative.

**WE WILL NOT** threaten you with discharge for engaging in protected concerted activity.

**WE WILL NOT** monitor your union activities.

**WE WILL NOT** deny your request to be represented by a Union representative during interviews that you reasonably suspect may lead to discipline.

**WE WILL NOT** discharge you because you assist the Union or engage in concerted activities.

**WE WILL NOT** take away your benefits because you selected the Union as your exclusive bargaining representative.

**WE WILL NOT** refuse to bargain in good faith with the International Union of Operating Engineers Local 501, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit (the Unit):

All full-time, regular part-time and extra board Engineers and Utility Engineers employed by the Employer at its facility located in Las Vegas, Nevada; excluding, all other employees, office clerical employees, guards and supervisors as defined in the Act.

**WE WILL NOT** refuse to make proposals, counterproposals, or fail to cloak our representatives with the authority to enter into binding agreements.

**WE WILL NOT** use workers from outside of the Unit to perform the same work Unit employees perform without affording the Union prior notice and a meaningful opportunity to bargain over the decision and its effects and until either an agreement or bona fide impasse has been reached.

**WE WILL NOT** refuse to provide the Union with information that is relevant and necessary to its role as the collective-bargaining representative of the Unit.

**WE WILL NOT** change your schedules, close lunchrooms, or change other working terms and conditions of employment without affording the Union prior notice and a meaningful opportunity to bargain over the decision and its effects and until either an agreement or bona fide impasse has been reached.

**WE WILL NOT** use subcontractors to perform the same work as employees in the Unit without affording the Union prior notice and a meaningful opportunity to bargain over the decision and its effects and until either an agreement or bona fide impasse has been reached.

**WE WILL NOT** refuse to honor the Union's request to release employees in the Unit from work to attend bargaining sessions.

**WE WILL NOT** bypass the Union and deal directly with you regarding your working terms and conditions of employment.

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

**WE WILL** rescind the above-described Use of Social Media rule; and **WE WILL** furnish you with inserts for the current employee handbook that advise that the rule has been rescinded; or **WE WILL** publish and distribute a revised employee handbook that does not contain the rule.

**WE WILL**, upon request, allow you to be represented by a Union representative during interviews that you reasonably suspect may lead to discipline.

**WE WILL** offer Adam Arellano, Charles Walker, and Joseph Servin immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

**WE WILL** pay Adam Arellano, Charles Walker, and Joseph Servin for the wages and other benefits they lost because we fired them.

**WE WILL** remove from our files all references to the discharges of Adam Arellano, Charles Walker, and Joseph Servin and **WE WILL** notify them in writing that this has been done and that the discharges will not be used against them in any way.

**WE WILL**, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit employees.

**WE WILL** cease and desist using workers from outside of the Unit to perform the same work Unit members are performing until such time as the Union has been afforded a meaningful opportunity to bargain to an agreement or bona fide impasse over the use of these workers and its effects on the Unit.

**WE WILL** make proposals and counterproposals to the Union in the course of negotiations, and we will cloak our bargaining representatives with authority to enter into binding agreements.

**WE WILL** provide the Union the information it requested on February 6, 13 and 18, 2017.

**WE WILL** restore the engineer lunchroom and employees' schedules.

**WE WILL** make whole Unit employees for wages or other benefits they lost because of the changes we made to terms and conditions of employment without bargaining with the Union.

**WE WILL** honor the Union's request to release employees in the Unit from work to attend bargaining sessions.

**APEX LINEN SERVICE INC.**

\_\_\_\_\_  
(Employer)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Las Vegas Resident Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)

300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, NV 89101  
Hours of Operation: M-F 8:30am to 5:00pm

Telephone: (702) 388-6416  
Fax: (702) 388-6248

## CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Apex Linen Service, Inc., Cases 28-CA-192349, et al., was served via E-Gov, E-Filing, and E-Mail, on this 17<sup>th</sup> day of January 2018, on the following:

### **Via E-Gov, E-Filing:**

Honorable Ariel L. Sotolongo  
Administrative Law Judge  
NLRB Division of Judges, San Francisco Branch  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

### **Via Electronic Mail:**

John Naylor, Attorney at Law  
Andrew J. Sharples, Attorney at Law  
Naylor & Braster, PLLC  
1050 Indigo Drive, Suite 200  
Las Vegas, NV 89145-8870  
Email: [asharples@naylorandbrasterlaw.com](mailto:asharples@naylorandbrasterlaw.com)  
[jnaylor@naylorandbrasterlaw.com](mailto:jnaylor@naylorandbrasterlaw.com)

Adam N. Stern, Attorney at Law  
The Myers Law Group  
9327 Fairway View Place, Suite 100  
Rancho Cucamonga, CA 91730-0969  
Email: [laboradam@aol.com](mailto:laboradam@aol.com)

Adam Arellano  
8137 Chimney Bluffs Street  
North Las Vegas, NV 89085-4402  
Email: [adamarellano@cox.net](mailto:adamarellano@cox.net)

*/s/ Dawn M. Moore*

---

Dawn M. Moore  
Administrative Assistant  
National Labor Relations Board  
Region 28 - Las Vegas Resident Office  
Foley Federal Building  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, Nevada 89101  
Telephone: (702) 820-7466  
Facsimile: (702) 388-6248  
E-Mail: [Dawn.Moore@nlrb.gov](mailto:Dawn.Moore@nlrb.gov)