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1 **I. Paragraphs 6(a), 6(e) and 9: Adam Arellano’s Discharge**

2 Paragraph 6(a) alleges “[a]bout February 13, 2017, Respondent discharged its employee
3 Arellano.” Apex admitted Paragraph 6(a).

4 Paragraph 6(e) alleges Apex “engaged in the conduct described above in [Paragraph 6(a)]
5 because the named employees assisted the Union and engaged in concerted activities, and to
6 discourage employees from engaging in these activities.” Apex denied Paragraph 6(e).

7 Paragraph 9 alleges “b[y] the conduct described above in paragraph 6, Respondent has
8 been discriminating in regard to the hire or tenure or terms or conditions of employment of its
9 employees, thereby discouraging membership in a labor organization in violation of Section
10 8(a)(1) and (3) of the Act.” Apex denied Paragraph 9.

11 **A. The Evidence**

12 The preponderance of evidence does not support that Apex discharged Arellano due to his
13 alleged Union activities or to discourage same. To the contrary, the record supports Apex had a
14 reasonable and good-faith basis to discharge Mr. Arellano for misconduct. Apex COO Glen
15 “Marty” Martin¹ testified that he was informed Mr. Arellano directed Veronica Hernandez falsely
16 report a workplace injury. TR, p. 58, ll. 10-25; p. 59, l. 1. This incident was the basis for Mr.
17 Arellano’s discharge:

18 Q. ... So the, all of the working there insubortion [sic] -- excuse me,
19 “insubordination, dishonesty, and willful or careless destruction of
20 company assets,” that all refers to this incident where Mr. Arellano
allegedly encouraged a coworker to commit workers’ comp fraud?

21 A. Yes.

22 Q. Okay. Now, was he discharged for any other reason other than
that incident?

23 A. That was really it.

24 TR, p. 58, ll. 1-9.² Marty also wrote an email to Union Business Representative Charles “Ed”
25 Martin on February 14, 2017 regarding the incident, explaining:

26 _____
27 ¹ Glen “Marty” Martin and Charles “Ed” Martin are referred to by first name due to the
coincidence of having the same last name.

28 ² Transcript page and line references will be TR, p. __, l. __. General Counsel’s and Apex’s

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To be clear Adam [Arellano] was terminated for misconduct suggesting workers comp fraud with Veronica Hernandez. Fraud, or illegal activity is a zero tolerance problem.

GCX 13a and 13b.

Veronica Hernandez testified Mr. Arellano advised her to falsely claim her eye injury occurred while she was working at Apex, even though she informed him she did not know how it occurred:

Q. ... You said he saw your eye?

A. Yes.

Q. Okay. Did he say anything at that time?

A. He asked me what happened in your eye.

Q. Okay. What did you say in response?

A. That I didn't know what happened, because that was true.

Q. Okay. Did he say anything else at that time?

A. **He told me to inform my supervisor to send me to the doctor and to say that it happened at work.** And I told him that --

...

My answer was no, because it didn't quite happen at work exactly.

...

So then he said that to say that it had happened at work, and I said, no, because if I was sent to the doctor, the doctor will notice that there is no liquid in my eyes because when we use those chemicals, we are required to use protection, the glasses and gloves. So then I would look like a liar.

TR, p. 594, ll. 21-25; p. 595, ll. 1-17 (emphasis added).

Ms. Hernandez' testimony is consistent with her written statement which states Mr. Arellano suggested she claim her eye injury occurred at work *after* she advised she did not know the cause of her injury:

To date, 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**

Exhibits will be CGX __ and RX __ respectively.

1 **to my bosses, to be sent to a doctor, company doctor, because something had**
2 **happened there with a chemical...** But I responded that nothing had happened
3 here.

4 TR, p. 599, ll. 21-25; p. 600, ll. 1-3 (emphasis added), translating GCX 34a. Ms. Hernandez
5 testified she wrote this statement herself and no one told her what to say. TR, p. 598, ll. 4-10. Her
6 supervisor, Cristina Linares, confirmed Ms. Hernandez wrote the statement and Ms. Linares did
7 not tell her what to say. TR, p. 486, ll. 22-25.

8 On cross-examination, Ms. Hernandez again confirmed Mr. Arellano instructed her to
9 falsely claim her eye injury occurred at work:

10 Q. ... Does the statement there in front of you accurately reflect
11 your entire conversation with Adam on that day regarding the
12 injury?

13 JUDGE SOTOLONGO: No, no, the injury, the injury. The eye
14 condition in other words.

15 THE WITNESS: Yes, **because he said to mention that it**
16 **happened at work, that something went into my eye at work.** At
17 that time, I told him that I couldn't do that, because to be honest, I
18 didn't know what happened, and I could not just do that because
19 actually the eye wasn't even hurting.

20 TR, p. 602, ll. 5-15 (emphasis added).

21 **B. Argument**

22 Where the General Counsel alleges an employer's violation of Sections 8(a)(1), (3), or (4)
23 of the Act that turns on the employer's motivation in terminating its employee, the Board employs
24 a two-step causation test. *Wright Line*, 251 NLRB 1083, 1089 (1980) (applying test to cases
25 involving alleged violations of 8(a)(1) and (3)), *enfd. on other grounds*, 662 F.2d 899, 904 (1st
26 Cir. 1981), *cert denied*, 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462
27 U.S. 393, 402-03, 103 S.Ct. 2469, 2475, 76 L.Ed.2d 667 (1983) (approving causation test
28 articulated in *Wright Line*).

 Under the *Wright Line* test, the burden initially rests with the General Counsel to "make a
prima facie showing sufficient to support the inference that protected conduct was a 'motivating
factor' in the employer's decision [to discharge the employee]." *Wright Line*, 251 NLRB at 1089.
If the General Counsel is able to make this showing, "the burden will shift to the employer to

1 demonstrate that the same action would have taken place even in the absence of the protected
2 conduct.” *Id.* Both showings must be made by a preponderance of the evidence. 29 U.S.C. §
3 160(c) (providing that Board may not take affirmative action against charged employer unless it
4 finds that the employer is engaged in unfair labor practices “upon the preponderance of the
5 testimony”); *Transportation Management*, 462 U.S. at 403–04 (upholding Board’s decision to
6 apply preponderance standard against employer).

7 “[I]t is well settled that the employer is not to be held guilty of an unfair labor practice
8 because of action reasonably taken to protect his property or preserve discipline against the
9 unlawful conduct of employees.” *Maryland Drydock Co. v. NLRB*, 183 F.2d 538, 539 (4th Cir.
10 1950). Employers “may not discharge an employee because of his union activity; but they may
11 and should apply their usual rules and disciplinary standards to a union activist just as they would
12 to any other employee.” *Wright Line*, 662 F.2d at 901. An employer may discharge an employee
13 for cause. *NLRB v. Knuth Brothers, Inc.*, 537 F.2d 950 (7th Cir. 1976) (“Section 10(c), 29 U.S.C.
14 s 160(c), of the Act protects the employer's right to protect its business interests and, if necessary,
15 to discharge an employee for cause”).

16 **1. The CGC Failed to Make a Prima Facie Case that Protected Conduct**
17 **Was a Motivating Factor for Mr. Arellano’s Discharge**

18 The evidence clearly reflects that the General Counsel failed to make its prima facie
19 showing that Apex terminated Mr. Arellano because of an antiunion motive. There is simply no
20 evidence in the record to support Apex discharged Mr. Arellano because he “assisted the Union
21 and engaged in concerted activities” or to “discourage employees from engaging in these
22 activities.”

23 **2. The Preponderance of Evidence Demonstrates Apex Had a Reasonable**
24 **and Good-Faith Basis to Discharge Mr. Arellano for Cause**

25 Assuming *arguendo* the CGC made a prima facie showing sufficient to support the
26 inference that protected conduct was a motivating factor in the Apex's decision to discharge Mr.
27 Arellano, the record supports Apex discharged Mr. Arellano for cause. The allegations contained
28 in Paragraph 6(e) pertaining to Mr. Arellano are directly contradicted by Ms. Hernandez’

1 testimony and written statement. Ms. Hernandez clearly and consistently asserted Mr. Arellano
2 directed her to falsely claim her eye injury occurred at work after she advised she did not know
3 where or how the injury occurred. In other words, Mr. Arellano instructed Ms. Hernandez to
4 commit fraud. This clearly posed a significant risk of exposing Apex to liability. The
5 preponderance of evidence supports Apex had a reasonable and good-faith basis to discharge Mr.
6 Arellano. This evidence is highlighted by Ms. Hernandez' testimony which directly contradicts
7 Mr. Arellano's testimony and the CGC's allegations:

8 **i. Ms. Hernandez Was a Credible, Independent Witness**

9 Ms. Hernandez is an independent witness with no possible motive to be untruthful. There
10 is no evidence that she has anything to gain by making up a story regarding her interaction with
11 Mr. Arellano. Ms. Linares, who supervised Ms. Hernandez for two years, testified she never knew
12 Ms. Hernandez to be a dishonest person or to make things up. TR, p. 486, ll. 12-17. Further, Ms.
13 Hernandez' testimony was entirely consistent with her written statement which was made at the
14 time of the incident. Conversely, Mr. Arellano's testimony is inconsistent with Ms. Hernandez'
15 testimony, which means both accounts of the event cannot be true. *If the ALJ finds Apex committed*
16 *a violation regarding Paragraph 6(e) as it pertains to Mr. Arellano, the ALJ must necessarily*
17 *reject Ms. Hernandez' testimony and find she committed perjury.* There is simply no factual basis
18 to support such a conclusion. The ALJ should accept Ms. Hernandez' credible testimony in
19 reaching his decision.

20 **ii. Mr. Arellano's Testimony Was Dubious and Should be Rejected**

21 In contrast to Ms. Hernandez, Mr. Arellano has everything to gain by being untruthful. He
22 is an interested party who stands to regain his employment at Apex with approximately ten months
23 of back pay. The stakes are high for Mr. Arellano. As discussed below, his testimony is riddled
24 with inconsistencies.

25 First, Mr. Arellano's Good Samaritan act rings hollow. The CGC and charging parties will
26 no doubt argue Mr. Arellano assumed Ms. Hernandez' injury occurred at work and that he was
27 merely concerned for her well-being. This argument is belied by Ms. Hernandez' testimony. Ms.
28

1 Hernandez clearly and unequivocally stated Mr. Arellano directed her to “say it happened at work”
2 *even after she advised she did not know where the injury occurred.* TR, p. 594, ll. 21-25; p. 595,
3 ll. 1-6. If Mr. Arellano was simply acting out of concern, he would not have ordered her to “say
4 it happened at work,” and certainly not after Ms. Hernandez advised she did not know the origin
5 of her injury. Mr. Arellano’s version of events is inconsistent with Ms. Hernandez and should be
6 rejected.

7 Second, Mr. Arellano’s testimony regarding his next encounter with Ms. Hernandez is also
8 suspicious. He claimed to speak with Ms. Hernandez the following Monday after the incident and
9 that “she told me that she didn’t write any workers’ compensations statement against me, and she
10 didn’t know what it was about.” TR, p. 505, ll. 13-16. Mr. Arellano doubled-down on this
11 specious position on redirect examination:

12 Q. ... What, if anything, did Ms. Hernandez say about a statement,
13 giving a statement?

14 A. She said that she did not write any statement or that she knew
15 about any statements written against me.

16 TR, p. 525, ll. 19-23.

17 This testimony is directly contradicted by Ms. Hernandez who testified that Mr. Arellano
18 confronted her about the statement she had written:

19 Q. Ms. Hernandez, after you wrote this statement, did you ever
20 speak to Adam Arellano again?

21 A. He came, I’m not sure if it was the next day, to the area where I
22 was sorting the clothes. And **he said that a statement was given
23 to him** where he had information of what I -- of what he said, and I
24 said yes. And then he asked if I had knowledge that with that, I was
25 going to be brought up to court. And I said, regardless, it’s just a
26 statement of what happened.

27 TR, p. 598, ll. 11-19.

28 It is not possible for both witnesses’ accounts to be true. One of them perjured themselves.
Given that Ms. Hernandez has no motive to lie and Mr. Arellano has everything to gain by a
favorable result, the ALJ should be highly skeptical of Mr. Arellano’s testimony. This is not
simply a matter of something being lost in translation. Ms. Hernandez and Mr. Arellano had over

1 a hundred conversations over a period of five years. TR, p. 521, ll. 12-25; p. 522 ll. 1-4. When
2 asked how often she communicated with Mr. Arellano, she testified she would “normally
3 communicate” with him and saw him often. TR, p. 594, ll. 3-7. They conversed in Spanish. TR,
4 p. 594, ll. 8-10. Mr. Arellano also testified Ms. Hernandez never told him that she was offended
5 or angry about something he said or did to her. TR, p. 523, ll. 4-8. The record contains no facts
6 upon which to conclude that Ms. Hernandez made this story up. All of this evidence supports that
7 Ms. Hernandez’ version of events is accurate. Mr. Arellano simply has no credibility and his
8 version of events should be disregarded.

9 **C. Conclusion**

10 Accordingly, the ALJ should dismiss Paragraphs 6(e) and 9 of the Complaint.

11 **II. Paragraphs 6(b), 6(e) and 9: Charles Walker Discharge**

12 Paragraph 6(b) alleges on “February 15, 2017, Respondent discharged its employee
13 Charles Walker.” Apex admitted Paragraph 6(b).

14 Paragraph 6(e) alleges Apex “engaged in the conduct described above in [Paragraph 6(b)]
15 because the named employees assisted the Union and engaged in concerted activities, and to
16 discourage employees from engaging in these activities.” Apex denied Paragraph 6(e).

17 Paragraph 9 alleges “b[y] the conduct described above in paragraph 6, Respondent has
18 been discriminating in regard to the hire or tenure or terms or conditions of employment of its
19 employees, thereby discouraging membership in a labor organization in violation of Section
20 8(a)(1) and (3) of the Act.” Apex denied Paragraph 9.

21 **A. The Evidence**

22 The evidence supports that Apex discharged Mr. Walker as part of a layoff. Marty testified
23 Mr. Walker’s position was eliminated. TR, p. 205, l. 25; p. 206, ll. 1-2. Marty clarified the reason
24 for the shift elimination and layoff was due to a recently completed plant expansion:

25 Q. Why did you want to -- why did Apex want to eliminate some
26 of the engineering positions?

27 A. We have to always be very careful about our labor. We’re 100
28 percent service business. So we’re always watching it, and we had
just completed a big expansion. So we had much more capacity in

1 the plant, and we were able to shorten our shifts, and that means
2 we're able to reduce engineering. We had already been working in
the fall a little bit on reduced schedule, and we wanted to right-size
the staff now that everything's done.

3 TR, p. 261, ll. 5-14. This testimony is consistent with Marty's email to Ed sent on February 10,
4 2017, prior to the layoff, explaining the reasoning for the proposed layoff:

5 This winter season, Since the week of September 12th, 2016 we have reduced hours
6 in engineering as the business [demanded], our expansion came on line, and special
construction related projects stopped. Production reduced hours again late January,
7 and we have not reacted to the change. Our management is critical, as labor
constitutes our single highest cost in the business. We instituted a freeze on changes
8 until the NLRB election was over to avoid any issues with the voting, or our
staffs['] rights. We are still on a 24 hour schedule in engineering, well beyond
9 everyone else in the company changing shifts.

10 We have completed a large expansion giving us the capacity to complete our work
in a shorter day. Our busiest days, as you can imagine are Sunday Monday and
11 Tuesday. We no longer require a graveyard shift.

12 RX 24, APEX 0013. Marty testified Mr. Walker was laid off because he was the last one hired
and last in seniority of the engineers. TR, p. 263, ll. 24-25; p. 271, 16-22.

13 Speciously, Mr. Walker testified that during the meeting he was discharged, Marty said he
14 "didn't want the Union in." TR, p. 579, ll. 18-19; p. 580, ln. 5. Mr. Walker's testimony is directly
15 contradicted by Marty:

16 Q. ... I direct your attention to the meeting where Mr. Walker was
17 laid off.

18 A. Yes.

19 Q. Can you describe what happened at that meeting?

20 A. Yeah. I brought Charlie in, and I told him that we were
21 eliminating his position and he was being laid off, and that was it. I
handed him the termination form.

22 Q. You heard his testimony regarding your mentioning the Union
23 during that meeting?

24 A. Yes, I did.

25 Q. **Did you ever mention the Union during that meeting?**

26 A. **No, I did not.**

27 TR, p. 585, ll. 5-17 (emphasis added).

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B. Argument

Apex incorporates its discussion of the *Wright Line* analysis set forth in the previous section. *Wright Line*, 251 NLRB at 1089.

1. The CGC Failed to Make a Prima Facie Case that Protected Conduct Was a Motivating Factor for Mr. Walker’s Layoff

Here, there is simply no credible evidence in the record that would allow the CGC to meet his burden of proof. Mr. Walker’s testimony, that Marty allegedly said he “didn’t want the Union in” when he discharged Mr. Walker, is so outlandish it cannot reasonably be believed. Mr. Walker’s testimony is gratuitously self-serving and uncorroborated by any other evidence in the record. *Indeed, it is telling that the CGC did not follow up on this testimony during his examination with Mr. Walker.* The CGC also did not reference Mr. Walker’s alleged statement in the Complaint, nor did he move to amend his Complaint to include this allegation. Mr. Walker’s testimony is spurious and should be rejected in its entirety. Further, Marty denied making this statement. There is no credible evidence to support Apex discharged Mr. Walker due to union animus.

2. The Preponderance of Evidence Demonstrates Apex Laid Off Mr. Walker for Business Reasons

Even if the CGC made a prima facie showing that Apex terminated Mr. Walker for his alleged union activities (which he did not), the evidence demonstrates Apex would have still implemented the layoff even in the absence of the protected conduct. From at least February 10, 2017, Apex has consistently explained it laid off Mr. Walker due to the completion of a major plant expansion. The expansion allowed Apex to operate more efficiently and eliminated the need for Mr. Walker’s position. Mr. Walker was selected for layoff because he was the last one hired and therefore had the lowest seniority. Accordingly, the evidence proves Apex would have laid off Mr. Walker regardless of his alleged union activities.

C. Conclusion

The ALJ should therefore dismiss Paragraphs 6(e) and 9 as of the Complaint.

1 **III. Paragraphs 6(c), 6(d), 6(e) and 9: Joseph Servin Discharge**

2 Paragraph 6(c) alleges “[a]bout April 4, 2017, Respondent discharged its employee Joseph
3 Servin (Servin).” Apex denied Paragraph 6(c).

4 Paragraph 6(d) alleges “[a]bout April 4, 2017, Respondent discharged its employee
5 Servin.” Apex denied Paragraph 6(d).

6 Paragraph 6(e) alleges Apex “engaged in the conduct described above in [Paragraph 6(b)]
7 because the named employees assisted the Union and engaged in concerted activities, and to
8 discourage employees from engaging in these activities.” Apex denied Paragraph 6(e).

9 Paragraph 9 alleges “b[y] the conduct described above in paragraph 6, Respondent has
10 been discriminating in regard to the hire or tenure or terms or conditions of employment of its
11 employees, thereby discouraging membership in a labor organization in violation of Section
12 8(a)(1) and (3) of the Act.” Apex denied Paragraph 9.

13 **A. The Evidence**

14 The record demonstrates Mr. Servin was discharged for poor performance, poor
15 attendance, and solicitation during work hours, not Union animus. Marty testified “Joseph had
16 missed several days, had no-call/no-show on multiple occasions at this point. And it was a long,
17 painful process that we had gone through to try and get him to get back to performance.” TR, p.
18 106, ll. 202-25; p. 107, l. 1. Marty went on to elaborate on Mr. Servin’s lack of performance:

19 Q. Your reasons were the attendance?

20 A. Mainly the attendance, the lack of performance, and the general
21 attitude had completely changed and was still a problem.

22 Q. What do you mean by “lack of performance”?

23 A. Well, we had a lot of situations where a 5-minute repair would
24 turn into an hour-long repair consistently with Joseph. It was
25 frustrating the entire crew and causing extra down time, causing
26 excessive down time. It’s a very fast-paced environment, and
27 everybody needs to work together.

28 TR, p. 108, ll. 6-15.

Marty also clarified the change in Mr. Servin’s attitude and attendance issues:

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Q. And you mentioned that Mr. Servin's attitude had changed. What do you mean by that?

A. He was very cavalier. So we had changed schedules, and he told Gene, I'm not coming to work on Saturday, just like that. And Gene said, we need you to come to work, you know, you have to come to work. So those are the types of exchanges that we were having.

And I had called a meeting to try and reverse that and involved Ed, and I tried to just communicate that to him. And he wanted to argue with me rather than, you know, hear what I was saying in that meeting. So he was just -- he had just become not happy with his situation or something. I can't really explain.

TR, p. 109, ll. 22-25; p. 110, ll. 1-9.

Mr. Servin confirmed distributing Union buttons during work hours. TR, p. 536, ll. 11-18. Marty testified that Mr. Servin was observed soliciting Union material on the plant floor during working hours. TR, p. 111, ll. 6-11; p. 117, ll. 18-19. Marty confirmed that all solicitation during working hours is against Apex policy, regardless of whether it involves Union materials or other items:

Q. Now, I want to ask you about, a little bit about what goes on at the plant. Are you aware that employees, besides Mr. Martin -- excuse me, Mr. Servin, have handed things out at work?

A. **They shouldn't.** I'm not aware of anything like that.

Q. How about your secretary? She occasionally does these -- Juanna Misraje, she'll occasionally do fundraisers where she sells candy bars; is that correct?

A. I've seen that. Yes.

Q. Okay. Have you ever bought one?

A. I have.

Q. **Okay. Now, is she permitted to do that on company time?**

A. **No.**

TR, p. 113, ll. 5-17 (emphasis added).

Keith Marsh, Apex's Director of Engineering, clarified the specific reasons for discharging Mr. Servin were poor performance, poor attendance, and solicitation during company time. Specifically, Mr. Marsh testified Apex was not "getting journeyman-level quality work out of Joseph" and his "work was starting to take longer than it should have." TR, p. 293, ll. 19-20; ll.

1 23-24. Mr. Marsh also explained Mr. Servin “started to call out” regarding his scheduled shifts,
2 “something along the lines of 10 shifts out of his 15 or so. He had called off, left early, didn’t make
3 it.” TR, p. 294, l. 8; ll. 11-12. Mr. Servin’s short notice call-offs were “a pattern” by the time he
4 was discharged. TR, p. 318, l. 19. Further, he confirmed Mr. Servin was observed “handing out
5 some -- what appeared to be union paraphernalia.” TR, p. 320, ll. 20-21. This incident was
6 captured on video surveillance which Mr. Marsh observed. TR, p. 331, ll. 23-24; p. 322, ll. 10-19.

7 Eugene Sharron, Apex’s Chief Engineer, corroborated Marty and Mr. Marsh’s testimony
8 regarding Mr. Servin’s lack of performance when testifying regarding his role in Mr. Servin’s
9 discharge:

10 Q. And was that in the form of providing input as to what work
11 issues [Mr. Servin] was having? Or what was your role?

12 A. Well, at first, I was protecting Joseph. He, for whatever reason,
13 I can’t even tell you why, but his conduct, he was -- he stopped
14 working. He would really take forever to do a job. He was really
15 taking time. And I kept telling him, you know, you need to start
16 working. And I kept it from my bosses. And I would cover him as
17 much as I could. But then finally it got to the point where he was
18 just taking way too long to do a job.

19 TR, p. 373, ll. 22-25; p. 374, ll. 1-6. Mr. Sharron testified Mr. Servin “was calling in sick, you
20 know, quite reasonably almost clockwork every Saturday.” TR, p. 381, ll. 22-23.

21 **B. Argument**

22 Apex incorporates its discussion of the *Wright Line* analysis set forth in the first section.
23 *Wright Line*, 251 NLRB at 1089.

24 **1. The CGC Failed to Make a Prima Facie Case that Protected Conduct 25 Was a Motivating Factor for Mr. Servin’s Discharge**

26 The CGC failed to establish Apex discharged Mr. Servin for engaging in protected conduct.
27 Indeed, the record supports Mr. Servin was inexpressive regarding his Union support, even lying
28 to Mr. Sharron when Mr. Sharron asked him if he knew about the upcoming election. TR, p. 528,
ll. 16-23. While Mr. Servin testified he wore Union materials after the election, the CGC never
connected the dots. The CGC (and Charging Parties) failed to present any evidence Apex
discharged Mr. Servin *because* he engaged in protected activity. Accordingly, there is no factual

1 basis to conclude, by the preponderance of the evidence, Apex discharged Mr. Servin because he
2 “assisted the Union and engaged in concerted activities, and to discourage employees from
3 engaging in these activities” as alleged in the Complaint

4 **2. The Preponderance of Evidence Demonstrates Apex Had a Reasonable**
5 **and Good-Faith Basis to Discharge Mr. Servin was Discharged for Poor**
6 **Performance and Poor Attendance**

6 “[I]t is well settled that the employer is not to be held guilty of an unfair labor practice
7 because of action reasonably taken to protect his property or preserve discipline against the
8 unlawful conduct of employees.” *Maryland Drydock Co. v. NLRB*, 183 F.2d at 539 (referencing
9 the Court’s earlier decision in *Joanna Cotton Mills v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949),
10 where the Court held that the employer was not guilty of an unfair labor practice when the
11 employee had adopted a “defiant and insulting attitude towards his foreman and had circulated a
12 petition asking for his [the foreman’s] discharge”).

13 [T]he employer should not be branded with the guilt of an unfair labor practice and
14 required to reemploy, with back pay, this defiant and insulting employee **merely**
15 **because it has done what any other employer would reasonably have done**
16 **under the circumstances. We must not forget that the National Labor**
17 **Relations Act ‘does not interfere with the normal exercise of the right of the**
18 **employer to select its employees or to discharge them...’**

19 *Id.* at 540 (quoting *Joanna Cotton Mills v. NLRB*, 176 F.2d at 753) (emphasis added). Employers
20 “may not discharge an employee because of his union activity; but they may and should apply their
21 usual rules and disciplinary standards to a union activist just as they would to any other employee.”
22 *NLRB v. Wright Line*, 662 F.2d 899, 901 (1st Cir. 1981); *see also Midwest Regional Joint Bd.,*
23 *Amalgamated Clothing Workers of America v. NLRB*, 564 F.2d 434, 440 (D.C.Cir. 1977) (“[a]bsent
24 a showing of anti-union motivation, an employer may discharge an employee for a good reason, a
25 bad reason, or no reason at all without running afoul of the labor laws.”); *see also Marathon*
26 *LeTourneau Company Longview Div. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983) (“An employer
27 is free to discharge any employee for unacceptable work attitude or performance”).

28 Further, employers have the right to discharge an employee for cause pursuant to 29 U.S.C.
§ 160(c). *See, e.g., NLRB v. Knuth Brothers, Inc.*, 537 F.2d at 956 (“Section 10(c), 29 U.S.C. §
160(c), of the Act protects the employer's right to protect its business interests and, if necessary,

1 to discharge an employee for cause”); *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 679 (9th Cir. 1984)
2 (citing *Stein Seal Co. v. NLRB*, 605 F.2d 703, 709 (3d Cir. 1979) (“An employee cannot hide
3 behind the cloak of unionism for insubordination that would not be tolerated from others.”); *News-*
4 *Texan, Inc. v. NLRB*, 422 F.2d 381, 385 (5th Cir. 1970) (“it is well settled that Section 7 of the
5 [NLRA] does not authorize employees to act in disregard of the rights of their employer to maintain
6 discipline and efficient production”).

7 Employers also have the right to discharge an employee who engages in conduct in
8 violation of company policy or who is disruptive and insubordinate. *See, e.g., Atlantic Steel*
9 *Company*, 245 NLRB 814, 816-17 (1979) (finding the employer did not engage in an unfair labor
10 practice when it discharged an employee who engaged in insubordination by using profanities on
11 the production floor within the earshot of his supervisor and had a previous disciplinary record);
12 *NLRB v. Gen. Indicator Corp.*, 707 F.2d 279, 283 (7th Cir. 1983) (finding the employer had the
13 right to discharge an employee who engaged in “wrongful conduct” and had a pattern of
14 “disruptive and insubordinate behavior”).

15 Once an employer sets forth a legitimate motive for dismissal, “the burden that a discharge
16 was unlawfully motivated is on the Board.” *NLRB v. First Nat. Bank of Pueblo*, 623 F.2d 686,
17 692 (10th Cir. 1980).

18 Here, there is voluminous evidence to support Mr. Servin was discharged for poor
19 performance and poor attendance. Marty, Mr. Marsh, and Mr. Sharron all testified consistently
20 that Mr. Servin failed to meet expectations regarding the performance of his job duties. They also
21 testified regarding Mr. Servin’s poor attendance. Pursuant to the above authority, Apex was within
22 its right to discharge Mr. Servin for these reasons.

23 **3. The Preponderance of Evidence Supports Mr. Servin Was Discharged** 24 **for Solicitation During Working Hours**

25 There is overwhelming authority for the position that an employer may prohibit union
26 solicitation on its property during working hours and discharge an employee who violates such a
27 policy. *See, e.g., Boeing Airplane Co. Wichita Division v. NLRB*, 140 F.2d 423, 435 (10th Cir.
28 1944) (“the [NLRB] does not proscribe the right of an employer to forbid by rule or regulation,

1 solicitation on its property and its discharge of an employee for violation thereof” so long as it
2 relates to the efficient operation of the plant); *Ridgewood Management Co. v. NLRB*, 410 F.2d
3 738, 740 (5th Cir. 1969) (“A no-solicitation rule which is operative only during working hours is
4 valid if it is premised upon the necessity to maintain discipline and production, and if the
5 prohibition is not adopted for a discriminatory purpose”); *Serv-Air, Inc. v. NLRB*, 395 F.2d 557,
6 560 (10th Cir. 1968) (“A no-solicitation rule which only regulates employee activity during
7 working hours is valid unless adopted or used for a discriminatory purpose”); *Midland Steel*
8 *Products Co. v. NLRB*, 113 F.2d 800, 805 (6th Cir. 1940) (finding discharge of employee for
9 violation of rule by soliciting on the premises for union was not unlawful); *NLRB v. Empire*
10 *Furniture Corp.*, 107 F.2d 92, 95 (6th Cir. 1939) (discharge of employee soliciting members for
11 union during working hours was not an unfair labor practice).

12 Here, there is no dispute regarding that fact that Mr. Servin was observed soliciting union
13 materials during work time. Mr. Servin freely admitted distributing Union buttons during working
14 hours. TR, p. 536, ll. 11-18. This was in violation of Apex’s rules as set forth in its Employee
15 Handbook, which contains a rule against solicitation during working hours. CGX 2 at p. 23-24
16 (Rule 5-9). While the CGC will likely argue other Apex employees have allegedly soliciting for
17 fundraisers, Marty confirmed such conduct is against Apex policy. Moreover, there is nothing in
18 the record to suggest, much less prove, that Apex management was aware of any such solicitation
19 during working hours. There was no double-standard applied to Mr. Servin.

20 As set forth above, Apex is permitted to maintain a rule against solicitation during working
21 hours and may discharge an employee for violating same. Therefore, the evidence supports Mr.
22 Servin was discharged for a rule violation rather than due to any protected activity.

23 C. Conclusion

24 Based on the above, the ALJ should dismiss Paragraph 6(c), 6(e) and 9 of the Complaint.
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1 **IV. Paragraphs 7(p) and 10: Opportunity to Bargain Regarding Discharges**

2 Paragraph 7(p) alleges “Respondent engaged in the conduct described in paragraphs 6(a)
3 through (d) [...] without affording the Union an opportunity to bargain with Respondent with
4 respect to this conduct and the effects of this conduct.”

5 Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has
6 been failing and refusing to bargain collectively and in good faith with the exclusive collective
7 bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex
8 denied Paragraph 10.

9 **A. The Evidence**

10 **1. Attempted Negotiations Regarding Mr. Walker**

11 The following timeline illustrates Apex’s attempt to negotiate with the Union prior to Mr.
12 Walker’s discharge and the Union’s refusal to do so (all dates are from 2017):

- 13 • On February 7, Marty emailed Ed requesting bargaining over a schedule change and layoff.
14 RX 24 at APEX 0011.
- 15 • On February 8, Ed replied by requesting 13 categories of documents, including but not
16 limited to “a list of any schedule changes for any bargaining unit employee in the past 3
17 years including dates of changes” and “a copy of all policies or procedures with respect to
18 employment of employees.” RX 24 at APEX 0010. The same day, Marty replied stating
19 this is was a lengthy list to put together one day before their scheduled meeting. RX 24 at
20 APEX 0009-10.
- 21 • On February 10, Marty emailed Ed attaching over 1,300 pages of responsive documents to
22 Ed’s request, including, (i) the current engineering schedule, (ii) the proposed engineering
23 schedule; (iii) the employee handbook, (iv) termination reports covering January 2011
24 through February 2017, and (v) engineering department employee census, and (vi) time
25 card report from 2013 through February 2017, which showed all hours worked by the
26 engineers during this period. RX 14 (containing voluminous attachments); *see also* RX 24
27 at APEX 0012 (attachments omitted).

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- 1 • Ed acknowledged receipt and said he would review the materials. RX 24 at APEX 0012.
- 2 • On February 17, Marty sent a follow-up email to Ed, asking for comments regarding the
- 3 proposed layoff and schedule change. GCX 26f. Despite being provided with 1,300 pages
- 4 of responsive materials, Ed emailed Marty asserting the information was “incomplete,”
- 5 although he did not refer to any specific documents he believed were outstanding. *Id.* Ed
- 6 also refused to open negotiations until the unnamed documents were provided. *Id.* Ed also
- 7 failed to explain how such documents were relevant to the proposed layoff. *Id.*
- 8 • On February 23, Marty emailed Ed to confirm he had no input regarding the proposed
- 9 schedule change and layoff. GCX 26f. Ed responded by accusing Apex of making
- 10 unilateral changes without supplying the requested documents, although he did not refer to
- 11 any specific documents he believed were outstanding. *Id.* Marty stated he believed that
- 12 Apex provided all requested documents and asked which documents Ed believed were
- 13 outstanding. GCX 26d. Ed responded by referring to previous correspondence, but did
- 14 not list any specific documents. GCX 26c and d.
- 15 • On February 24, Marty emailed Ed noting that on February 10, Apex had provided
- 16 documents for 20 of the requested categories. GXC 26a and b. Of the remaining four,
- 17 Apex had no documents for two of the categories and subsequently supplied documents
- 18 for the remaining two (disciplinary reports and OSHA logs). *Id.* Ed never responded. *Id.*
- 19 Apex laid off Mr. Walker on February 15, 2017 as admitted in Apex’s Answer to the
- 20 Complaint.

2. Negotiations Regarding Mr. Arellano

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22 The record supports that Apex and the Union negotiated regarding Mr. Arellano’s

23 termination. Marty testified he invited Ed to come to Apex in order to negotiate. TR, p. 65, ll. 14-

24 19. Marty, Apex CEO Joseph Dramise and Ed met on February 9, 2017 as documented in Marty

25 email to Ed dated February 13, 2017. GCX 13d. Ed acknowledged meeting with Marty and Mr.

26 Dramise where they “discussed the company’s stated position regarding Mr. Arellano and offered

27 at least two alternatives to termination, both of which were dismissed.” GCX 13c.

28

1 Marty testified regarding what occurred at the meeting with the Union regarding Mr.
2 Arellano's conduct. Specifically, Marty testified that he met with Ed and discussed what Mr.
3 Arellano did, Apex's evidence, and the Union's proposed alternatives to termination:

4 Q. Yeah. Sorry to interrupt, but my question, modified question is
5 just with regard to Mr. Arellano's termination. What do you recall
6 discussing?

6 A. We explained what happened. We showed him basically the
7 evidence of what happened and what we had. We -- that we thought
8 it was justified in terminating. He thought it was not and suggested
9 alternatives. We didn't agree with those alternatives ultimately.
10 And that was really it.

11 ...

10 Q. At the time of that meeting, had you actually made the decision
11 to terminate Mr. Arellano?

12 A. No.

13 ...

14 Q. But during that meeting, you made it clear that termination was
15 a possibility?

15 A. Yes, absolutely. That's what I thought was necessary.

16 TR, p. 79, ll. 11-18; ll. 23-25; p. 80, ll. 9-11.

17 Apex discharged Mr. Arellano on February 13, 2017, as admitted in Apex's Answer to the
18 Complaint. After he was terminated, Apex proposed reinstating Mr. Arellano in a good faith effort
19 to resolve some of the outstanding issues between Apex and the Union. RX 20. Marty testified
20 he met with Ed and discussed reinstating Mr. Arellano at the same wage and position:

21 Q. ... And, Marty, did you ever discuss with Ed the possibility of
22 rehiring Mr. Arellano?

23 A. We did.

24 Q. And do you recall when that conversation took place?

25 A. It was this summer. So I was trying to get back on track. We
26 were meeting -- trying to meet weekly, and I asked him if we hired
27 Adam back, if that would be -- if he would accept that.

27 Q. Were you willing to hire him back at the same pay rate?

28 A. Yes.

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Q. Were you willing to hire him back at the same position?

A. Yes.

TR, p. 235, ll. 4-15; *see also* RX 20.

Despite Apex's attempt to negotiate, the Union refused consider reinstatement unless "everyone" else was also rehired and the offer was made in writing:

Q. Did Ed respond to you?

A. He said that he wouldn't just let me hire just Adam back.

Q. What did you -- did he say anything else with respect to hiring Mr. Arellano back?

A. Yeah, he said, well, write it down and send it to me, and I said, well, what's the point of that if you already told me you won't do it, and that was the extent of it. My attorney was there with us.

JUDGE SOTOLONGO: ... If I understand you correctly, you asked him if -- you proposed to hire Mr. Arellano back at the same wage rate he had before --

THE WITNESS: Yes.

JUDGE SOTOLONGO: -- and position?

THE WITNESS: Yes.

JUDGE SOTOLONGO: And his response was no, not only him. Was there any more said, or did that mean that he would only consider a package rehire with the other people that had been discharged? Was it said in those words, in other words? Was that how you understood it?

THE WITNESS: He said that you need to hire everyone back and pay back wages. That's the only thing we'll consider. You know our position. It's been clear.

JUDGE SOTOLONGO: Was this in a context of trying to settle the case?

THE WITNESS: That's what my attempt was. I said I wanted to discuss the unfair labor charges. He said he wasn't interested in discussing them, and that was it.

TR, p. 235, ll. 16-25; p. 236, ll. 1-20.

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3. Negotiations Regarding Mr. Servin

Marty testified that he initiated a meeting with Ed regarding Mr. Servin’s unsatisfactory attitude and attendance issues. TR, p. 109, ll. 22-25; p. 110, ll. 1-9. Mr. Marsh confirmed this meeting occurred in early 2017 and involved Mr. Servin, Ed, Marty, Mr. Sharron and himself where they addressed Mr. Servin’s performance issues. TR, p. 295, ll. 12-22; p. 296, ll. 11-12. Mr. Servin acknowledged attending this meeting with his Union representatives. TR, p. 537, ll. 8-15. Mr. Servin corroborated the discussion regarding his performance and attendance issues:

Q. Okay. Do you know what the purpose of that meeting was?

A. Marty wanted to discuss my work and to start a fresh slate is how he put it.

Q. What concerns, if any, did the Company express during that meeting?

A. The first, there was an incident on a Saturday where I had multiple machines down, and the amount of time it took me to get them up and running. Also the fact that I had been taking my lunch breaks was a concern...

TR, p. 537, ll. 18-25; p. 538, l. 1.

B. Argument

1. The Union’s Refusal to Negotiate Regarding Mr. Walker Constitutes Waiver

Once an employer provides notice to a union regarding a proposed change to the terms and conditions of employment, “it is incumbent upon the union to act with due diligence in requesting bargaining.” *NLRB v. Pinkston–Hollar Const. Services, Inc.*, 954 F.2d 306, 310 (5th Cir. 1992). Any less diligence amounts to a waiver by the bargaining representative of its right to bargain. *Id.* “[A] union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain.” *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 51 (2nd Cir. 1983).

Here, the correspondence between Marty and Ed clearly demonstrates the Union stonewalled any attempt to negotiate prior to Apex laying him off. After Marty attempted to open negotiations, Ed requested voluminous and irrelevant documents before agreeing negotiate. Even

1 after providing over 1,300 pages of responsive documents, Ed still refused to negotiate. When
2 Marty asked what other documents Ed needed, Ed gave evasive and vague responses. Ed simply
3 did not provide any answers that would allow Marty to know what Ed wanted him to provide.
4 Apex is a seasonal business that needs to react quickly to changes. The Board has recognized that
5 because economic constraints are often the impetus for layoffs, “we will require that negotiations
6 concerning this decision occur in a timely and speedy fashion.” *Lapeer Foundry & Mach.*, 289
7 NLRB 952, 954 (1988). Accordingly, the Union waived its right to negotiate regarding Mr.
8 Walker’s layoff.

9 While a union may request documents in advance of negotiations, an “employer’s duty to
10 bargain collectively does not, however, impose an unlimited duty to produce requested
11 information. ***The information must be relevant.***” *Norris, a Dover Resources Co. v. NLRB*, 417
12 F.3d 1161, 1169 (10th Cir. 2005) (emphasis added). Here, a cursory review of the documents the
13 Union requested reveals they have no relevance to Apex’s proposed layoff. Some of the irrelevant
14 document requests include, but are not limited to the following:

- 15 • “A copy of all current company policies, practices and/or procedures bargaining
16 unit members are expected to follow.” GCX 26a.
- 17 • “A copy of all departmental policies, practices and/or procedures that bargaining
18 unit members are expected to follow.” GCX 26b.
- 19 • “Copies of all OSHA 300 Logs from December 1, 2013 through now.” GCX 26b.
- 20 • “Copies of all OSHA Forms 301 from December 1, 2013 through now.” GCX 26b.
- 21 • “Copies of all safety committee minutes from December 1, 2013 through now.”
22 GCX 26b.
- 23 • “A copy of all policies or procedures with respect to employment of employees.”
24 GCX 26b.

25 Clearly, none of the above document requests have any conceivable relevance to Apex’s
26 proposed layoff. For example, OSHA logs have absolutely no bearing on Apex’s business decision
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1 to implement a layoff.³ Apex had no duty to produce irrelevant documents. The Union’s refusal
2 to negotiate without the irrelevant documents constitutes waiver of bargaining with respect to Mr.
3 Walker’s layoff.

4 2. Apex Negotiated with the Union Prior to Discharging Mr. Arellano

5 The preponderance of evidence supports Apex negotiated with the Union prior to
6 discharging Mr. Arellano. Marty, Mr. Dramise and Ed met on February 9, 2017 and discussed the
7 incident involving Mr. Arellano. GCX 13d. Ed acknowledged this meeting and confirmed they
8 discussed “the company’s stated position regarding Mr. Arellano” and that the Union “offered at
9 least two alternatives to termination...” GCX 13c. These facts support Apex met its duty to
10 bargain in good faith. That the Union is dissatisfied with the result of the negotiation is immaterial.
11 Indeed, the Supreme Court of the United States has directed that “[t]he NLRA requires an
12 employer and a union to bargain in good faith, but it does not require them to reach agreement.”
13 *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616, 106 S.Ct. 1395, 1399, 89
14 L.Ed. 616 (1986).

15 In the alternative, should the ALJ find Apex did not fulfil its bargaining obligation by way
16 of the February 9, 2017 meeting, Apex was legally permitted to discharge Mr. Arellano prior to
17 bargaining. The NLRB has found that when exigent circumstances exist, such as when the
18 employee engaged in unlawful conduct, an employer may unilaterally terminate an employee
19 without bargaining:

20 [A]n employer may act unilaterally and impose discipline without providing the
21 union with notice and an opportunity to bargain in any situation that presents
22 exigent circumstances: that is, where an employer has a reasonable, good-faith
23 belief that an employee’s continued presence on the job presents a serious,
24 imminent danger to the employer’s business or personnel. The scope of such
25 exigent circumstances is best defined going forward, case by case, but **it would**
26 **surely encompass situations where (for example) the employer reasonably and**
27 **in good faith believes that an employee has engaged in unlawful conduct that**
28 **poses a significant risk of exposing the employer to legal liability for the**
employee’s conduct, or threatens safety, health, or security in or outside the
workplace. Thus, our holding today does not prevent an employer from quickly
removing an employee from the workplace, limiting the employee’s access to

17. ³ Apex still produced OSHA logs to the Union despite their obvious lack of relevance. RX

1 coworkers (consistent with the employer’s legal obligations) or equipment, or
2 taking other necessary actions to address exigent circumstances when they exist.

3 *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, *11 (2016) (“*Total Security*
4 *Management*”) (internal citations omitted) (emphasis added).

5 Here, by directing Ms. Hernandez to commit workers’ compensation fraud, Mr. Arellano
6 engaged in unlawful conduct constituting exigent circumstances sufficient to forego the normal
7 bargaining process. The record also reflects Apex attempted to negotiate with the Union after Mr.
8 Arellano’s discharge, although the Union refused to consider reinstatement. RX 20; TR, p. 235,
9 ll. 16-25; p. 236, ll. 1-20. Accordingly, assuming *arguendo* Apex did not negotiate prior to his
10 termination, it was not required to do so pursuant to *Total Security Management*.

11 **3. Apex Negotiated with the Union Prior to Discharging Mr. Servin**

12 The proofs are voluminous that Apex was dissatisfied with Mr. Servin’s work performance
13 and attendance. Marty, Mr. Marsh and Mr. Servin all confirmed a meeting where they discussed
14 these issues. Again, that the Union was dissatisfied with the result of the negotiation is immaterial.
15 *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. at 616, 106 S.Ct. at 1399. Apex
16 attempted to start with a “fresh slate” regarding Mr. Servin’s employment at Apex, but as discussed
17 throughout this brief, his poor performance and attendance problems persisted and lead to his
18 discharge from the company.

19 **C. Conclusion**

20 Based on the above, Paragraphs 6(a) through 6(d), 7(p) and 10 should be dismissed.

21 **V. Paragraphs 5(f), 5(g), 5(h) and 8: Adam Arellano’s Alleged Request for Union** 22 **Representative**

23 Paragraphs 5(f), 5(g), 5(h) allege Apex denied Mr. Arellano’s request to be represented by
24 the Union during an interview, that Mr. Arellano had reasonable cause to believe the interview
25 would result in disciplinary action being taken against him, and that Apex conducted the interview
26 despite his request. Apex denied Paragraphs 5(f), 5(g) and 5(h).

27 Paragraph 8 alleges “[b]y the conduct described above in Paragraph 5, Respondent has
28 been interfering with, restraining and coercing employees in the exercise of the rights guaranteed
in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” Apex denied Paragraph 8.

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A. The Evidence

As discussed in Section I of this brief, Apex discharged Mr. Arellano for cause resulting from an incident where he encouraged a fellow employee, Ms. Hernandez, to falsely report a workplace injury. Marty testified he never asked Mr. Arellano about this incident prior to discharging him. TR, p. 68, ll. 11-13. Marty further testified he did not ask Mr. Arellano any questions at the meeting where he was discharged:

Q. Okay. He said then, toward the beginning of the meeting, that he was invoking his Weingarten rights, correct?

A. That was the first thing he said. Yes.

Q. All right. And did you feel comfortable understanding what that meant?

A. I have a basic understanding of them. Yes.

Q. Okay. Now, but at that point, I mean, from the moment he walked in the room, even before he walked in the room, even before he said, now I invoke my Weingarten rights, you had already decided to discharge him?

A. We had already -- this -- we had called him into the office to communicate that he had been terminated. That's what the purpose of it was. So we had already, had been in communication with Ed. So --

JUDGE SOTOLONGO: So the decision had been made, and this meeting was for the purpose of informing Mr. Arellano that he was being terminated?

THE WITNESS: Yes.

TR, p. 82, ll. 4-21.

Marty gave Mr. Arellano the option to write a statement about the incident. TR, p. 83, ll. 6-10; 13-14. Mr. Arellano declined to write a statement. TR, p. 83, ll. 6-12; p. 524, ll. 6-8.

Mr. Arellano confirmed that Marty asked him if he wanted to write a statement *after* he was discharged and that he understood writing a statement was optional:

Q. Mr. Arellano, your last day at Apex, you testified that you were called to the conference room and that Marty Martin informed you that you had been terminated, correct?

A. Yes.

1 Q. Okay. And it was after that that he handed you a statement,
correct?

2 A. Yes.

3 Q. Okay. And he asked you if you wanted to make a statement or
4 sign something, correct?

5 A. To those terms yes.

6 ...

7 Q. ... So it was optional, correct?

8 A. Yes, I believe so.

9 TR, p. 523, ll. 14-23; p. 524, ll. 4-5.

10 **B. Argument**

11 Section 7 of the NLRA provides an employee has the right to the presence of union
12 representative during any management inquiry that the employee reasonably believes may result
13 in discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262, 95 S.Ct. 959, 966, 43 L.Ed.2d 171
14 (1975). In rendering its decision the Supreme Court of the United States clarified its reasoning:

15 A single employee confronted by an employer investigating whether certain
16 conduct deserves discipline may be too fearful or inarticulate to relate accurately
17 the incident being investigated, or too ignorant to raise extenuating factors. **A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.** Certainly his presence need not
18 transform the interview into an adversary contest. Respondent suggests nonetheless
19 that union representation at this stage is unnecessary because a decision as to
20 employee culpability or disciplinary action can be corrected after the decision to
21 impose discipline has become final. In other words, respondent would defer
22 representation until the filing of a formal grievance challenging the employer's
determination of guilt after the employee has been discharged or
otherwise disciplined. At that point, however, it becomes increasingly difficult for
the employee to vindicate himself, and the value of representation is
correspondingly diminished. The employer may then be more concerned with
justifying his actions than re-examining them.

23 *Id.* at 262-64, 966-67 (emphasis added).

24 Here, it is clear that *Weingarten* is inapplicable. Apex did not conduct an inquiry that could
25 have resulted in discipline. The decision to implement discipline had already been made. The
26 purpose of the meeting was merely to advise Mr. Arellano of the decision that had previously been
27 made. In other words, an investigation did not occur at the meeting. As a result, the presence of
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1 a Union representative would not “assist the employer by eliciting favorable facts, and save the
2 employer production time by getting to the bottom of the incident occasioning the interview”
3 because the decision to discharge was already made.

4 Giving Mr. Arellano the opportunity to write a statement did not transform the meeting
5 into an inquiry. The undisputed facts reveal Mr. Arellano understood he was terminated *prior* to
6 having been given the option to write a statement. TR, p. 523, ll. 14-20. The Court expressly
7 grounded its decision on an understanding that an “employer is free to carry on his inquiry without
8 interviewing the employee, and thus leave to the employee the choice between having an interview
9 unaccompanied by his representative, or having no interview.” *Id.* at 258, 95 S.Ct. 959; *see also*,
10 *Midwest Division-MMC, LLC v. NLRB*, 867 F.3d 1288, 1298 (D.C.Cir. 2017). Here, Mr. Arellano
11 understood he had a choice. Accordingly, Mr. Arellano did not reasonably believe the meeting
12 could result in discipline. That Mr. Arellano chose not to write a statement forecloses any
13 argument that the discharge meeting constituted an inquiry where he could be subject to discipline.

14 **C. Conclusion**

15 Based on the above, the ALJ should dismiss Paragraphs 5(f), 5(g), 5(h) and 8.

16 **VI. Paragraphs 5(b)(1), 5(b)(2), (b)(3), 5(c)(1), 5(c)(2), 5(e) and 8: Alleged Threats by Eugene Sharron**

17 Paragraphs 5(b)(1), 5(b)(2), (b)(3), 5(c)(1), 5(c)(2), and 5(e) allege Apex Chief Engineer
18 Eugene Sharron interrogated employees prior to the Union election and made various comments
19 regarding the Union. Apex denied Paragraphs 5(b)(1), 5(b)(2), (b)(3), 5(c)(1), 5(c)(2), and 5(e).

20 Paragraph 8 alleges “[b]y the conduct described above in Paragraph 5, Respondent has
21 been interfering with, restraining and coercing employees in the exercise of the rights guaranteed
22 in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” Apex denied Paragraph 8.

23 **A. The Evidence**

24 Ed represented “Gene Sharron is not management, he is a member of the bargaining unit
25 as per the election results.” GCX 13c. Mr. Sharron testified that he asked fellow employees “if
26 they were brining the Union in.” TR, p. 364, ll. 18-19. Mr. Arellano confirmed Mr. Sharron asked
27 him if he wanted to unionize:
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Q. ... Do you recall what Mr. Sharron said?

A. Yes. He asked me if -- he said you guys want the Union? And I replied, I came from a union company, and he said, I came from a union company, too, and I don't want the Union. And then he said, I'm going to call everyone and ask them, see if they want the Union.

TR, p. 491, ll. 9-14. Mr. Servin also confirmed that Mr. Sharron asked him if he knew about the Union election, to which Mr. Servin responded untruthfully:

Q. Do you recall what Mr. Sharron said?

A. He asked if I knew anything about the Union trying to force their way into Apex.

Q. And what did you say?

A. I told him that I didn't know anything about it at the time.

Q. Did you know anything about it?

A. Yes, I did.

TR, p. 528, ll. 16-23. Mr. Servin further alleged the following exchange took place:

Q. Did Mr. Sharron tell you anything, make any comments about the Union?

A. Yes, he told me that if the Union came in, they would take -- they're just interested in taking my money, and I'd only get \$25 on my check, and that's all they'd be interested in, just taking my money.

TR, p. 529, ll. 3-8. Mr. Servin also testified Mr. Sharron asked him "[h]ow I would vote" to which he stated he did not know. TR, p. 530, ll. 2-5.

B. Argument

Section 8(a)(1) of the NLRA makes it illegal "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title." Section 8(c) of the NLRA implements the First Amendment by requiring that "any views, argument or opinion, shall not be 'evidence of an unfair labor practice'" so long as such express does not contain any "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969). *Gissel* explained that "[a]ny assessment of the precise

1 scope of employer expression... must be made in the context of its labor relations setting.” *Id.*;
2 *see also, id.*, 395 U.S. at 618, 89 S.Ct. at 1918, continuing:

3 Thus, an employer is free to communicate to his employees an of his general views
4 about unionism or any of his specific views about a particular union, so long as the
communications do not contain a “threat of reprisal or force or promise of benefit.”

5 *See also, Rogers Electric, Inc.*, 346 NLRB No. 53, *3 (2006), in which the Board noted that §8(c)
6 protects “[i]ntemperate’ remarks that are merely expressions of personal opinion are protected by
7 the free speech provisions of Section 8(c).”

8 Further, the NLRA does not prohibit employers from asking non-coercive questions:

9 If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive
10 questions of their employees during such a campaign, the Act would directly collide
with the Constitution. What the Act proscribes is only those instances of true
11 “interrogation” which tend to interfere with the employees' right to organize.

12 *Rossmore House*, 269 NLRB No. 198, *3 (1984). *Rossmore House* further stands for the
13 proposition that Section 8(a)(1) prohibits interrogation *only if* it is coercive or interferes with
14 employee rights:

15 It is well established that interrogation of employees is not illegal per se. Section
16 8(a)(1) of the Act prohibits employers only from activity which in some manner
tends to restrain, coerce or interfere with employee rights. To fall within the ambit
of § 8(a)(1), either the words themselves or the context in which they are used must
17 suggest an element of coercion or interference.

18 *See also, Springfield Hospital*, 281 NLRB No. 76, *1 (1986) (finding that asking why an employee
19 supporting the union was insufficient to establish coercion necessary to find a violation of the
20 NLRA).

21 Here, as an initial matter, the Union represented Mr. Sharron is not management but a
22 bargaining unit member. GCX 13c. Accordingly, any argument Mr. Sharron’s alleged statements
23 were made on behalf of Apex or represent Apex is directly contradicted by the Union’s own
24 statement. Mr. Sharron’s statements did not bind Apex in any way.

25 In any event, Mr. Sharron merely inquired if employees were interested in unionizing.
26 Merely inquiring as to whether an employee is interested in voting for a union is non-coercive. It
27 does not contain a “threat of reprisal or force or promise of benefit.” There is no evidence Mr.
28 Sharron coerced anyone or interfered with their right to organize by simply asking if they intended

1 to vote for the Union. Mr. Servin’s allegation, that Mr. Sharron asked him how he would vote,
2 does not violate the NLRA. In *Springfield Hospital, supra*, the NLRB found that an employer
3 asking why they supported the union was not actionable under §8(a)(1):

4 We disagree with the judge's finding that the Respondent violated Section 8(a)(1)
5 of the Act when Patient Accounts Manager Fotter questioned employee Israel why
6 she was a union supporter and why she was “doing this to him.” Israel wore a union
7 button and actively assisted in the Union's organizing campaign. The conversations
8 took place in the open at Israel's receptionist station. In these circumstances we
conclude that Fotter's inquiry would not have reasonably coerced Israel in the
exercise of her rights under the Act. *Rossmore House*, 269 NLRB 1176 (1984).
Therefore we shall dismiss this allegation.

8 *Id.* at *1.

9 Here, Mr. Sharron did not even go as far as to ask why Mr. Servin supported the Union,
10 only *if* he did. There is simply no authority to support that this inquiry violated any provision of
11 the NLRA.

12 With respect to Mr. Sharron’s specific statements made during his inquiries, the testimony
13 only reveals two specific statements he allegedly made:

- 14 1. “I came from a union company, too, and I don’t want the Union.”
- 15 2. “If the Union came in, they would take -- they’re just interested in taking my money,
16 and I’d only get \$25 on my check, and that’s all they’d be interested in, just taking my money.”

17 Neither alleged statement violates the NLRA.

18 **1. “I came from a union company, too, and I don’t want the Union” Does**
19 **Not Violate the NLRA**

20 Mr. Sharron’s alleged statement does not violate the NLRA. First, assuming Mr. Sharron
21 is an employer and/or manager under the NLRA, his statement is not coercive nor does it contain
22 a threat of reprisal or promise of a benefit. It is clear that Mr. Sharron was merely expressing his
23 personal opinion based on his prior experience. This opinion is protected by the First Amendment
24 in accordance with the holdings of *Gissel, Rogers Electric*, and *Rossmore House*.

1 2. **“If the Union came in, they would take -- they’re just interested in**
2 **taking my money, and I’d only get \$25 on my check, and that’s all**
3 **they’d be interested in, just taking my money” Does Not Violate the**
4 **NLRA**

5 As an initial matter, the CGC nor Charging Parties bothered to ask Mr. Sharron about this
6 alleged statement during their respective examinations. The only evidence Mr. Sharron made this
7 statement comes from Mr. Servin, an interested party who stands to gain employment and
8 approximately seven months of back pay should he prevail in this lawsuit. In any event, Mr.
9 Sharron’s alleged statement does not contain a threat of reprisal or force or promise of benefit.
10 Indeed, Mr. Sharron did not threaten that he or Apex would deduct any money from any
11 employee’s wages. Mr. Sharron merely expressed his personal opinion which is protected by the
12 First Amendment in accordance with the holdings of *Gissel*, *Rogers Electric*, and *Rossmore House*.

13 **C. Conclusion**

14 The ALJ should dismiss Paragraphs 5(b)(1), 5(b)(2), (b)(3), 5(c)(1), 5(c)(2), 5(e) and 8 of
15 the Complaint.

16 **VII. Paragraph 5(d) and 8: Alleged Threats by Joseph Dramise**

17 Paragraph 5(d) alleges Apex CEO Joseph Dramise “threatened [Apex] employees with loss
18 of benefits and unspecified reprisals if they selected the Union as their bargaining representative.”
19 Apex denied Paragraph 5(d).

20 Paragraph 8 alleges “[b]y the conduct described above in Paragraph 5, Respondent has
21 been interfering with, restraining and coercing employees in the exercise of the rights guaranteed
22 in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” Apex demoes Paragraph 8.

23 **A. The Evidence**

24 The evidence does not support the allegations set forth in Paragraph 5(d). Mr. Dramise
25 testified the purpose of the February 1, 2017 meeting was merely to advise the engineers of the
26 upcoming vote and that Apex would negotiate a contract in good faith should the engineer vote to
27 unionize:

28 Q. And what was the purpose of that meeting?

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A. The purpose of that meeting was to let them know that we were aware of a vote coming up and that the contract would have to be renegotiated with the Union at that point.

Q. Okay. And what contract were you referring to?

A. The Union contract that I hadn't seen at that point in time. We were assuming that there was going to be a contract that we were going to have to negotiate.

TR, p. 339, ll. 23-25; p. 340, ll. 1-5.

On cross-examination, Mr. Dramise denied making any threats or otherwise discussing benefits or cancelling current contracts:

Q. Did you say anything to the members regarding cancelling existing contracts?

A. No.

Q. Did you say anything at the meeting regarding benefits?

A. No. There were no specifics at all discussed, just a general statement.

TR, p. 358, ll. 4-9.

Mr. Sharron corroborated Mr. Dramise's account of what occurred at the meeting:

Q. Okay. What do you recall Joseph Dramise saying during that meeting, if anything?

A. He just pretty much told them 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.

Q. Okay. Do you -- did he give any elaboration as to what he meant about his contract?

A. Just meaning whatever we had as far as our time earned, and your time PTOs, was all now going to be upon union, and also their pay, whatever the Union came up with.

TR, p. 370, ll. 9-18.

Mr. Arellano and Mr. Servin testified they attended the February 1, 2017 meeting. Mr. Arellano testified Mr. Dramise stated "if the votes were in favor of the Union, the we would no longer be honored our schedules, benefits, vacation, vacation time [sic]." TR, p. 494, ll. 13-15. Mr. Servin testified Mr. Dramise stated if the engineers voted to unionize "he couldn't keep our

1 same days off, our hours, our pay; anything that he had given us in the past wasn't guaranteed
2 anymore." TR, p. 531, ll. 17-19.

3 **B. Argument**

4 The record does not support that Mr. Dramise threatened anyone with "loss of benefits and
5 unspecified reprisals" for supporting the Union. Mr. Dramise merely expressed that a contract
6 would have to be negotiated with the Union should it be elected as the employees' bargaining
7 representative. Certainly, Apex would have to negotiate a contract with the Union should its
8 employees vote to unionize. This necessarily means Apex and the Union would have to negotiate
9 terms and conditions of employment, which necessarily includes schedules, benefits, vacation
10 time, hours and pay. Mr. Dramise's conveyance of that fact does not constitute a threat of "loss
11 of benefits and unspecified reprisals" as alleged. Mr. Dramise denied making any threats or even
12 discussing specific benefits. This allegation is entirely without evidentiary support.

13 **C. Conclusion**

14 Based on the above, the ALJ should dismiss Paragraphs 5(d) and 8 of the Complaint.

15 **VIII. Paragraphs 5(i)(1), 5(i)(2), 7(v), 7(p) and 8: Cell Phone Policy**

16 Paragraph 5(i) alleges "[a]bout April 4, 2017, Respondent, by Dramise, at Respondent's
17 facility: (1) orally promulgated and since then has maintained a rule prohibiting its employees from
18 taking photos on the shop floor; and (2) threatened its employees with discharge if they engaged
19 in protected concerted activity." Apex denied Paragraphs 5(i)(1) and 5(i)(2).

20 Paragraph 7(v) alleges "[a]bout April 4, 2017, Respondent changed its policy regarding
21 use of cell phones on the shop floor." Apex denied Paragraph 7(v).

22 Paragraph 7(p) alleges "Respondent engaged in the conduct described in [Paragraph 7(v)]
23 without affording the Union an opportunity to bargain with Respondent with respect to this
24 conduct and the effects of this conduct." Apex denied Paragraph 7(p).

25 Paragraph 8 alleges "[b]y the conduct described above in Paragraph 5, Respondent has
26 been interfering with, restraining and coercing employees in the exercise of the rights guaranteed
27 in Section 7 of the Act in violation of Section 8(a)(1) of the Act." Apex denied Paragraph 8.

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A. The Evidence

Mr. Dramise has no recollection of the above allegations:

Q. I want to call your attention to April 4th of this year. Do you recall speaking with employee Joseph Servin about his use of his cell phone?

A. In regards to what matter?

Q. His use of his cell phone during work time and that being a problem for the Company.

A. Me personally? No. I do not remember that.

...

Q. Okay. Did anyone, during that meeting, give Servin instructions about the proper use of his phone?

A. I don't recall.

TR, p. 341, ll. 14-20; p. 349, ll. 3-5.

Mr. Marsh testified that at the April 4 meeting, Mr. Servin “was informed that he was not to take documentation via his personal cell phone.” TR, p. 315, ll. 19-20. Mr. Marsh did not testify Mr. Dramise was the one who informed Mr. Servin. Mr. Marsh did not testify that anyone threatened Mr. Servin with discharge or threatened any other employee “with discharged if they engaged in protected concerted activity.” Mr. Marsh testified the reason Mr. Servin was informed regarding his use of personal phone was because Apex was concerned with sensitive information being transmitted offsite. TR, p. 316, ll. 2-5. Mr. Servin did not testify that Mr. Dramise, nor anyone else orally prohibiting its him or anyone else from taking photos on the shop floor or threatened him or anyone else with discharge if they engaged in protected concerted activity.

B. Argument

The CGC and Charging Parties have failed to introduce sufficient evidence to support the allegations set forth in the Complaint. There is no evidence Mr. Dramise orally promulgated any rule prohibiting Apex employees from taking photos on the shop floor and “threatened employees with discharge if they engaged in protected concerted activity.” Without such evidence, the CGC has failed to meet his burden of proof and the allegations should be dismissed.

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C. Conclusion

Based on the above, the ALJ should dismiss Paragraphs 5(i)(1), 5(i)(2) and 8 of the Complaint.

IX. Paragraphs 7(d), 7(e), 7(f), 7(g), 7(h) and 10: Union’s Document Requests

Paragraphs 7(d), 7(e) and 7(f) all allege the Union made various document requests to Apex via email. Apex stated in its Answer that the emails speak for themselves and Apex denies any inconsistent characterization of same.

Paragraph 7(g) alleges “[t]he information requested by the Union, as described in paragraphs 7(d) through 7(f) is necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of the Unit. Apex denied Paragraph 7(g).

Paragraph 7(h) alleges “[s]ince about February 24, 2017, Respondent, by Martin, has failed and refused to furnish the Union with the information requested by it as described above in paragraph paragraphs [sic] 7(d) through 7(f).” Apex denied Paragraph 7(h).

Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex denied Paragraph 10.

A. The Evidence

The Union made various document requests to Apex as follows (all dates are from 2017):

- On February 7, Marty emailed Ed requesting bargaining over a schedule change and layoff. RX 24 at APEX 0011.
- On February 8, Ed replied by requesting 13 categories of documents, including but not limited to “a list of any schedule changes for any bargaining unit employee in the past 3 years including dates of changes” and “a copy of all policies or procedures with respect to employment of employees.” RX 24 at APEX 0010. The same day, Marty replied stating this is was a lengthy list to put together one day before their scheduled meeting. RX 24 at APEX 0009-10.

- 1 • On February 10, Marty emailed Ed attaching over 1,300 pages of responsive documents to
2 Ed's request, including, (i) the current engineering schedule, (ii) the proposed engineering
3 schedule; (iii) the employee handbook, (iv) termination reports covering January 2011
4 through February 2017, and (v) engineering department employee census, and (vi) time
5 card report from 2013 through February 2017, which showed all hours worked by the
6 engineers during this period. RX 14 (containing voluminous attachments); *see also* RX 24
7 at APEX 0012 (attachments omitted).
- 8 • Ed acknowledged receipt and said he would review the materials. RX 24 at APEX 0012.
- 9 • On February 17, Marty sent a follow-up email to Ed, asking for comments regarding the
10 proposed layoff and schedule change. GCX 26f. Despite being provided with 1,300 pages
11 of responsive materials, Ed emailed Marty asserting the information was "incomplete,"
12 although he did not refer to any specific documents he believed were outstanding. *Id.* Ed
13 also refused to open negotiations until the unnamed documents were provided. *Id.*
- 14 • On February 23, Marty emailed Ed to confirm he had no input regarding the proposed
15 schedule change and layoff. GCX 26f. Ed responded by accusing Apex of making
16 unilateral changes without supplying the requested documents, although he did not refer to
17 any specific documents he believed were outstanding. *Id.* Marty stated he believed that
18 Apex provided all requested documents and asked which documents Ed believed were
19 outstanding. GCX 26d. Ed responded by referring to previous correspondence, but did
20 not list any specific documents. GCX 26c and d.
- 21 • On February 24, Marty emailed Ed noting that on February 10, Apex had provided
22 documents for 20 of the requested categories. GXC 26a and b. Of the remaining four,
23 Apex had no documents for two of the categories and subsequently supplied documents
24 for the remaining two (disciplinary reports and OSHA logs). *Id.*

25 The Union also requested various documents pertaining to Mr. Arellano on February 13,
26 2017. GCX 13d-e. However, this was *after* Apex and the Union negotiated regarding Mr.
27 Arellano's discharge. 13c-d. Ed acknowledged meeting with Marty and Joe where they
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1 “discussed the company’s stated position regarding Mr. Arellano and offered at least two
2 alternatives to termination, both of which were dismissed.” GCX 13c. This meeting occurred on
3 February 9, 2017. GCX 13d.

4 **B. Argument**

5 Once an employer provides notice to a union regarding a proposed change to the terms and
6 conditions of employment, “it is incumbent upon the union to act with due diligence in requesting
7 bargaining.” *NLRB v. Pinkston–Hollar Const. Services, Inc.*, 954 F.2d at 310. Any less diligence
8 amounts to a waiver by the bargaining representative of its right to bargain. *Id.* “[A] union cannot
9 simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse
10 the employer of violating its statutory duty to bargain.” *NLRB v. Island Typographers, Inc.*, 705
11 F.2d at 51 (2nd Cir. 1983). An “employer’s duty to bargain collectively does not, however, impose
12 an unlimited duty to produce requested information. *The information must be relevant.*” *Norris,*
13 *a Dover Resources Co. v. NLRB*, 417 F.3d at 1169 (emphasis added).

14 Here, it is clear from the above timeline that the Union has inundated Apex with document
15 requests that were irrelevant to Apex’s proposed layoff and schedule change. As discussed in
16 Section IV, B, 2 of this brief, the Union requested a laundry list of documents that had no possible
17 relevance to Apex’s proposed layoff of Mr. Walker. Similarly, the information regarding Mr.
18 Arellano was irrelevant because the parties had already negotiated regarding his termination by
19 the time the Union requested the materials.

20 Further, the voluminous nature of the Union’s document requests which fluctuated across
21 multiple email threads reveals the Union was being purposely difficult. This is evidenced by that
22 fact that any time Marty asked Ed to confirm what he was allegedly missing, Ed would vaguely
23 refer to prior correspondence without specifically identifying what documents he purportedly
24 wanted. This made it impossible to comply with the Union’s request. In any event, the lack of
25 relevancy forecloses the CGC’s argument that Apex acted improperly.

26 **C. Conclusion**

27 Based on the above, the ALJ should dismiss Paragraphs 7(g), 7(h) and 10 of the Complaint.
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1 **X. Paragraphs 6(f), 7(i), 7(o), 9 and 10: Former Lunchroom**

2 Paragraph 6(f) alleges “[a]bout February 7, 2017, Respondent closed the engineer
3 lunchroom being used by employees in the Unit.” Apex denied Paragraph 6(f).

4 Paragraph 7(i) alleges “[a]bout February 7, 2017, Respondent closed the engineer
5 lunchroom being used by employees in the Unit.” Apex denied Paragraph 7(i).

6 Paragraph 7(o) alleges “[t]he subjects set forth above in [Paragraph 7(i)] relate to wages,
7 hours, and other terms and conditions of employment of the Unit and are a mandatory subject for
8 the purposes of collective bargaining.” Apex denied Paragraph 7(o).

9 Paragraph 9 alleges “[b]y the conduct described above in paragraph 6, Respondent has
10 been discriminating in regard to the hire or tenure or terms or conditions of employment of its
11 employees, thereby discouraging membership in a labor organization in violation of Section
12 8(a)(1) and (3) of the Act.” Apex denied Paragraph 9.

13 Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has
14 been failing and refusing to bargain collectively and in good faith with the exclusive collective
15 bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex
16 denied Paragraph 10.

17 **A. The Evidence**

18 Apex was constructing a new break room with the intent of consolidating all other break
19 room in the facility, including the parts room that was used as a break room by the engineers. TR,
20 p. 231, ll. 18-23. The table and chairs in the parts room belonged to Mr. Dramise. TR, p. 168, ll.
21 9-10. The decision to convert the parts room being used by the engineers as a break room was
22 made in 2011, but Apex did not have the funding for the project at that time. TR, p. 350, ll. 5-16.
23 Apex did not receive the funding until 2015. TR, p. 350, ll. 17-18. Apex employees had used
24 break room scattered throughout the facility, and the intent was to construct a new breakroom for
25 all employees to use. TR, p. 351, ll. 13-22. Apex planned to have all employees use the new break
26 room at least a year before it was completed. TR, p. 159, ll. 3-4. The new break room was
27 completed in November 2016. TR, p. 164, ll. 10-13. The parts room was closed as a break room
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1 in February 2017 after Apex acquired the shelving it needed to complete the area as a parts room.
2 TR, p. 169, ll. 24-25; p. 170, ll. 1-8. Marty also testified Apex did not want to do anything to
3 disturb the upcoming Union election. *Id.*

4 It was common knowledge that the parts room would be closed as a break room once the
5 new break room was completed, and the engineers were specifically informed of this. TR, p. 163,
6 ll. 8-19. Marty specifically conversed with some engineers about the change. TR, p. 163, ll. 20-
7 25. Mr. Dramise testified he discussed the change with each of the engineers:

8 Q. ... Prior to this year, did you ever have any discussions with any
9 of the engineers about the break room?

10 A. I probably, over time -- I didn't call them all in, in a board
11 meeting and tell them about it, but everybody knew exactly what
12 was going on. And I had that opportunity to talk to each and every
13 one of them over the course of the, you know, what was a 1-year or
14 1 ½-year period, between the time that we started to negotiate the
15 expansion and we finally finished. So yes.

13 Q. And when you use the phrase, told everybody "what was going
14 on," what do you mean by that?

15 A. We were building a new break room, adding equipment,
16 basically summarized everything that we were doing, and that
17 everybody would be moving to the new -- in this case, since we're
18 focused on the break room, everybody would be moving to the new
19 break room.

18 Q. Did you have a conversation with Mr. Walker about this?

19 A. I believe I spoke with everybody at some point in time over the
20 course of that year. Engineering was a big part of this expansion.
21 Obviously, being what they do, they were very familiar with what
22 we were doing and how we are doing it.

21 Q. So prior to the beginning of 2017, did you tell the engineers,
22 either individually or as a group, that --

23 A. Individually.

24 Q. Did you tell them that the break room would be turned into a
25 parts room?

25 A. It was already a parts room, but we told them that they would be
26 losing their lunch room and getting a bigger, better, more improved
27 lunch room that we were building.

27 TR, p. 356, ll. 5-25; p. 357, ll. 1-10

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1 Apex held a meeting on January 11, 2017 and discussed the plan to convert the parts room
2 being used as a break room to a dedicated break room. TR, p. 234, ll. 2-15. That meeting involved
3 the chief engineers. TR, p. 268, ll. 2-7. Mr. Marsh took handwritten notes at the January 11, 2017
4 meeting and transmitted them to Marty via email. GCX 38a-c. Mr. Marsh’s notes state “lunch
5 room – remove”. GCX 38c. Mr. Marsh recalled employees were told that the parts room would
6 be repurposed within three months of the transition. TR, p. 336, ll. 19-23.

7 **B. Argument**

8 **1. The Change Was Not a Mandatory Subject of Bargaining**

9 Pursuant to NLRA Sections 8(a)(1) and (5), it shall be an unfair labor practice for an
10 employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed
11 in section 7” or “to refuse to bargain collectively with the representatives of his employees, subject
12 to the provisions of section 9(a).” 29 U.S.C. § 158(a)(1), (5). Section 9(a) states that
13 “Representatives designated or selected for the purposes of collective bargaining by the majority
14 of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of
15 all the employees in such unit for the purposes of collective bargaining in respect to rates of **pay,**
16 **wages, hours of employment, or other conditions of employment...**” (emphasis added).

17 Not every matter is subject to bargaining. To be a mandatory subject of bargaining, the
18 matter must be a “material, substantial, and significant” change. *Crittenton Hosp.*, 342 NLRB 686
19 (2004) (finding a change in the dress code policy was not “material, substantial, and significant”
20 and as such, it was not subject to mandatory bargaining). The matter must be “plainly germane to
21 the ‘working environment’” and “not among those ‘managerial decisions, which lie at the core of
22 entrepreneurial control.’” *Verizon N.Y., Inc. v. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004).

23 Here, removing the table from the parts/supply room is not a mandatory subject of
24 bargaining as it is not a “material, substantial, and significant” change. Apex never approved the
25 use of the parts/supply room as a break room by certain employees and the change instituted
26 amounts to the removal of a table – not a material, substantial and significant change in working
27 environment. This was a managerial decision to: institute the use of the new break room by all
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1 employees; address the disorganized inventory in the parts/supply room; address the food mess
2 being left in the parts/supply room; and had the added benefit of shortening responses to floor
3 calls.

4 **2. The Decision to Make the Change Was Made Prior to the Union**
5 **Election in the Normal Course of Business**

6 During an organizational drive, an employer may make changes that are done in the
7 “normal course of business.” *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1008 (D.C. Cir. 1981) (“[A]
8 benefit granted in the normal course of the business of an employer, without any motive of
9 inducing employees to vote against the union, does not violate the Act.”).

10 Here, this change decided and announced in advance of the election and Union
11 representation. The employees knew prior to the election that Apex was going to remove the table
12 as it had constructed a new break room for use by all employees. Apex did not institute a unilateral
13 change after the election without notice. Apex put the employees on notice prior to the election,
14 and then an employee happened to remove the table after the election. This was done as part of
15 Apex’s normal course of business. Apex has not committed an unfair labor practice.

16 **C. Conclusion**

17 Based on the above, Paragraphs 6(f), 7(i), 7(o), 9 and 10 should be dismissed.

18 **XI. Paragraphs 7(m), 7(o), 7(p) and 10: Union’s Request to Release Mr. Servin from**
19 **Work to Attend Bargaining Session**

20 Paragraph 7(m) alleges Apex “refused to honor the Union’s request to the release an
21 employee [sic] in the Unit from work to attend a bargaining session.” Apex denied Paragraph (m).

22 Paragraph 7(o) alleges “[t]he subjects set forth above in [Paragraph 7(m)] relate to wages,
23 hours, and other terms and conditions of employment of the Unit and are a mandatory subject for
24 the purposes of collective bargaining.” Apex denied Paragraph 7(o).

25 Paragraph 7(p) alleges Apex “engaged in the conduct described in [Paragraph 7(m)]
26 without affording the Union an opportunity to bargain with Respondent with respect to this
27 conduct and the effects of this conduct.” Apex denied Paragraph 7(p).

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1 Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has
2 been failing and refusing to bargain collectively and in good faith with the exclusive collective
3 bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex
4 denied Paragraph 10.

5 **A. The Evidence**

6 On April 17, 2017, Ed emailed Marty Martin to request that Mr. Servin be released from
7 work on April 27, 2017 to attend contract negotiations between Apex and the Union. CGX 31d.
8 Marty offered to hold contract negotiations on May 1, 2017, a day Mr. Servin was not scheduled
9 to work. CGX 31c. Ed refused to move negotiations from April 27, 2017. *Id.* Marty advised that
10 if negotiations are to proceed on April 27, 2017, Apex would expect Mr. Servin will be working
11 his shift as scheduled. *Id.* Marty further advised that if Mr. Servin wished to attend contract
12 negotiations on April 27, 2017 (or any other day he was scheduled to work), he should follow the
13 company’s procedure for requesting paid time off. CGX 31a.

14 **B. Argument**

15 As a threshold matter, Paragraph 7(p) is directly contradicted by the above email exchange
16 and should be summarily dismissed. In any event, Apex’s offer to move negotiations to Mr.
17 Servin’s day off proves it did not violate Section 8(a)(1) and/or (5). In *Indiana and Michigan Elec.*
18 *Co.*, 229 NLRB 576 (1977), the NLRB considered this very issue under distinguishable facts:

19 We find that the Respondent’s refusal to grant members of the Union’s negotiations
20 committee uncompensated leave to permit them to engage in bargaining during
21 working hours, **while at the same time refusing the Union’s request to bargain**
22 **during nonworking hours**, is an unlawful interference with the Union’s selection
23 of its bargaining representatives.

24 *Id.* at 576 (emphasis added). In rendering its decision, the NLRB recognized employers’ practical
25 concerns regarding releasing employees for negotiation during working hours:

26 Alternatively, the Employer is free to acquiesce in the Union’s request to bargain
27 during nonworking hours in order to reduce the amount of uncompensated leave
28 for travelers and to minimize the effects of the unavailability during their regular
working hours of emergency troubleshooters.

Id. The NLRB further noted if an employer refuses to give employees time off for negotiations,
“it is obligated to make itself available for negotiations at a time-even outside working hours-when

1 the representative can attend.” *Id.*

2 Here, consistent with the holding in *Indiana and Michigan Elec. Co.*, Apex reasonably
3 offered to move negotiations to a day Mr. Servin was not working. This offer was made
4 specifically to accommodate Mr. Servin’s request to attend negotiations. An employer only
5 violates Section 8(a)(1) and/or (5) if it refuses to grant uncompensated leave *and* refuse to bargain
6 during nonworking hours. *Indiana and Michigan Elec. Co.* at 576. Apex made itself available for
7 negotiations during Mr. Servin’s nonworking hours. That the Union refused this reasonable
8 solution does not result in a violation of the Act. Apex’s offer to bargain during Mr. Servin’s
9 nonworking hours renders the CGC unable to prove Apex violated Section 8(a)(1) and/or (5).

10 **C. Conclusion**

11 The ALJ should dismiss Paragraphs 7(m), 7(o), 7(p) and 10 of the Complaint.

12 **XII. Paragraphs 7(j), 7(l), 7(n), 7(q), 7(u) and 10: Work Schedule Changes**

13 Paragraph 7(j) alleges “[a]bout February 18, 2017, Respondent changed work schedules of
14 employees in the Unit.” Apex denied Paragraph 7(j). Apex admitted it implemented a change to
15 the engineering work schedule that went into effect on or about February 15, 2017.

16 Paragraph 7(l) alleges “[a]bout April 7, 2017, Respondent changed work schedules of
17 employees in the Unit.” Apex denied Paragraph 7(l). Apex admitted it implemented a change to
18 the engineering work schedule that went into effect on or about March 29, 2017.

19 Paragraph 7(n) alleges “[a]bout July 5, 2017, Respondent changed work schedules of
20 employees in the Unit.” Apex admitted it implemented a change to the engineering work schedule
21 that went into effect on July 5, 2017 which was formulated and agreed to by the affected employees
22 approximately two weeks prior.

23 Paragraph 7(q) alleges “[a]bout June 21, 2017, Respondent bypassed the Union and dealt
24 directly with its employees in the Unit by agreeing to change work schedules of employees in the
25 Unit.” Apex denied Paragraph 7(q).

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1 Paragraph 7(u) alleges “[a]bout March 29, 2017, Respondent bypassed the Union and dealt
2 directly with its employees in the Unit by agreeing to change work schedules of employees in the
3 Unit.” Apex denied Paragraph 7(u).

4 Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has
5 been failing and refusing to bargain collectively and in good faith with the exclusive collective
6 bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex
7 denied Paragraph 10.

8 **A. The Evidence**

9 Marty explained Apex’s schedule change procedure allowed its engineers to submit their
10 schedule change requests directly to Mr. Sharron who would accommodate them:

11 Q. Can you tell the Judge what your understanding of the schedule
12 change is?

13 A. My understanding was that they requested it, and they worked it
14 out amongst themselves, and we allowed it.

15 Q. So who did they work with? Whom did they work it out?

16 A. They have always, with Gene and Keith, Gene Sharron and Keith
17 Marsh. If there’s something that changes in their personal lives,
18 they’ve always requested changes and been able to work amongst
19 themselves.

20 TR, p. 239, ll. 1-9.

21 Marty went on to testify that this schedule change process for the engineers was Apex’s
22 customary practice due to the relatively small size of the crew:

23 Q. ... Could you describe the -- well, was there a general way that
24 these types of schedule changes were handled in the Company?

25 A. Yes. We have a small crew. There’s not a lot of guys, and to
26 cover vacations or to cover things that come up in personal lives,
27 they’ve always done that. That’s one of the reasons I couldn’t
28 provide a clear time every time we changed the schedule.

...

... And we have much more structured with the other crews because
there’s so many people, but engineering, there was a lot of, hey, I’m
going on vacation, can you cover me next Tuesday? And I would
never get involved in those types of arrangements.

1 TR, p. 239, ll. 14-21; p. 240, ll. 7-11.

2 Marty explained the purpose of April and July schedule changes were to accommodate its
3 employees. TR, p. 239, ll. 1-4; p. 246, ll. 11-25; p. 247, l. 1.

4 **B. Argument**

5 Apex did not have a duty to negotiate with the Union prior to implementing the schedule
6 changes because they were made in accordance with the status quo. In *Raytheon Network Centric*
7 *Systems*, 365 NLRB No. 161 (December 15, 2017), the NLRB held employer actions do not
8 constitute a “change” sufficient to trigger bargaining if they are similar in kind and degree with an
9 established past practice consisting of comparable unilateral actions, regardless of whether a labor
10 agreement was in place when the past practice was created. *Id.* at *1. Critically, the NLRB held
11 this principle applies regardless of whether a collective bargaining agreement existed when the
12 disputed actions were taken.

13 Henceforth, regardless of the circumstances under which a past practice developed—
14 i.e., whether or not the past practice developed under a collective-bargaining
15 agreement containing a management-rights clause authorizing unilateral employer
16 action—an employer’s past practice constitutes a term and condition of employment
that permits the employer to take actions unilaterally that do not materially vary in
kind or degree from what has been customary in the past.

17 *Id.* at *16.

18 Here, Apex and the Union do not have a collective bargaining agreement in place. The
19 record also supports that it was Apex’s custom and practice to allow its engineers to work out
20 schedule changes with Mr. Sharron. Marty testified the engineers have “always done that.” TR,
21 p. 239, l. 19. This means that conditions of employment are to be viewed dynamically and that
22 the status quo against which Apex’s change is considered must take into account any regular and
23 consistent past pattern on change. Apex was simply following its past practice when it implemented
24 the schedule changes which was permissible under *Raytheon*.

25 **C. Conclusion**

26 Based on the above, the ALJ should dismiss Paragraphs 7(j), 7(l), 7(n), 7(q), 7(u) and 10
27 of the Complaint.

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1 **XIII. Paragraphs 7(k) and 10: Alleged Contracting Out**

2 Paragraph 7(k) alleges “[b]eginning about February 19, 2017, Respondent used third party
3 workers to perform work customarily performed by employees in the Unit.” Apex denied
4 Paragraph 7(k).

5 Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has
6 been failing and refusing to bargain collectively and in good faith with the exclusive collective
7 bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex
8 denied Paragraph 10.

9 **A. The Evidence**

10 Marty testified AJ Industries West, Inc. (“AJ Industries”) “is a subcontractor that does
11 laundry and uniform system equipment service and installation” work at Apex. TR, p. 182, ll. 1-
12 4; 13-14. Marty explained AJ Industries typically performs projects that Apex does not have the
13 resources to do itself or out of the scope of its engineers:

14 Q. What do they typically do?

15 A. Typically capital projects, installation, special projects, anything
16 we don’t have³ the resources to do.

17 Q. Can you tell me what a capital project is?

18 A. Well, for example, they did a lot of the installation of our new
19 equipment in 2016. So they’ve come in and installed washer, install
20 rails, install -- they’re a contractor.

21 Q. So in what scenario would Apex elect AJ Industries to perform
22 work instead of its engineers?

23 A. If we were -- there’s several instances. So if it’s something out
24 of the scope of what our normal engineers do, like an installation,
25 we would bring them in. If we didn’t have the available manpower,
26 we would bring them in. If we didn’t have -- if we’re looking to get
27 it done in a short window, we would bring it in. If there are special
28 tools or warranty, anything like that, they would come in and do
work.

TR, p. 183, ll. 1-17.

Marty later clarified why AJ Industries performs these tasks instead of Apex’s engineers:

Q. Would you typically -- would Apex typically have its engineers
complete capital projects?

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A. No, we really try not to.

Q. Why not?

A. We try to staff the Company correctly so that they're busy with what they're supposed to be doing on running the shifts, keeping the equipment up and running, and it's just a completely different scope. You have to have a contractor's background, typically, too.

TR, p. 242, ll. 15-23.

Marty also testified AJ Industries sells equipment to Apex and performs warranty work:

Q. Could you describe what kind of warranty work they would do?

A. Well, they're distributors for almost all of our equipment. So if we would have a bearing fall, for example, on a washing machine, they would come out and repair it, and it would be covered under warranty, and that would maintain our warranty moving forward.

JUDGE SOTOLONGO: So then you purchase or acquire any new from them or through them.

THE WITNESS: Yes.

JUDGE SOTOLONGO: And if anything goes wrong that is covered by the warranty, then they take care of it?

THE WITNESS: Yes, and they have a service team and parts warehouse and all that, yeah, separate from us.

TR, p. 241, ll. 17-25; p. 242, 1-5.

Marty testified AJ Industries will also perform overflow work when unforeseen circumstances require additional staffing:

Q. I also believe that you testified that AJ Industries employees helps -- handles overflow.

A. Yes.

Q. Can you explain what you meant by that?

A. So one of the issues we deal with is we have operating shifts, and when the equipment's all running, you really can't do a whole lot of work. So it doesn't make a lot of sense for us to schedule more engineers during that time, but if something were to break or really overwhelm us, we can call in subcontractors to get it back and running where we don't have the staffing to do that.

TR, p. 242, ll. 24-25; p. 243, ll. 1-9.

1 Marty confirmed Apex's relationship with AJ Industries dates back to the inception of the
2 company and that AJ Industries supplied 100% of Apex's equipment. TR, p. 243, ll. 10-18.

3 While Mr. Servin testified he frequently observed AJ Industries employees at Apex, he
4 admitted "AJ Industries employees are in there all the time, **but they're doing other projects**, and
5 the engineers are like usually working on separate projects at the same time." TR, p. 564, ll. 13-
6 16. Mr. Servin also confirmed AJ Industries will give Apex engineers "an extra set of hands"
7 "when we get really busy." TR, p. 564, ll. 18-20. Mr. Servin claimed Mitchell Pangelinan, an AJ
8 Industries employee, covered Mr. Arellano's shift and performed work Mr. Arellano would
9 normally perform. TR, p. 565, ll. 3-12.

10 On cross-examination, Mr. Servin admitted he did not have personal knowledge of
11 instances where AJ Industries employees covered Apex engineers' shifts while he was not there:

12 Q. So if an AJ Industries employee person showed up for a shift,
13 the only way you would learn about it is if somebody else told you.
Is that correct?

14 A. Yes.

15 Q. So you don't have personal knowledge as to whether an AJ
16 Industries person did or didn't cover those shifts where you were at
home or somewhere else. Is that correct?

17 A. Yes, if I wasn't there, I wouldn't have knowledge of who was
18 there.

19 Q. So you'd have to get that information from someone else?

20 A. Yes.

21 TR., p. 568, ll. 6-16.

22 Importantly, Mr. Servin conceded AJ Industries had been performing overflow work prior
23 to the Union election and Mr. Arellano's discharge:

24 JUDGE SOTOLONGO: ... Did you ever witness AJ employees
doing this "overflow" work?

25 THE WITNESS: Yes.

26 JUDGE SOTOLONGO: And that was before the election and after
27 the election?

28 THE WITNESS: Yes.

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JUDGE SOTOLONGO: All right. Let me ask you this for my understanding. Would it be fair to say that after the termination of Mr. Arellano, which occurred February 13th, I believe, **is that when you started noticing AJ employees doing the work that would normally be done by him?**

THE WITNESS: **No, it would -- prior to the election right --**

JUDGE SOTOLONGO: Yes.

THE WITNESS: -- they cut the engineering staff to 30 hours a week, and they brought AJ in to make up the difference in the hours.
JUDGE SOTOLONGO: So they were doing that work even before the election?

THE WITNESS: Even before the election, they were bringing them in and -- because we were only working 30 hours a week, they were working in the plant.

JUDGE SOTOLONGO: Approximately when were your hours cut to 30 hours a week?

THE WITNESS: It was probably late October, November, December of 2016.

JUDGE SOTOLONGO: Okay. **Well, this is before the Union petition was filed.**

THE WITNESS: **Yes.**

TR, p. 571, ll. 24-25; p. 572, ll., 1-25; p. 573, ll. 1-2.

B. Argument

1. The Work AJ Industries Performs Which is Not Customarily Performed by the Unit is Not Subject to Mandatory Bargaining

In a case with distinguishable facts, the Supreme Court of the United States examined the issue of contracting out in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) (“*Fibreboard*”). The employer in *Fibreboard* notified the union that it intended to subcontract out all of its maintenance work upon the expiration of the union’s expiring contract. *Id.* at 205-07, 400-02. The employer determined it could save a substantial amount of money by reducing labor costs. *Id.* at 206, 400. On appeal, the Supreme Court held that while the replacement of bargaining unit employees with non-unit employees is a mandatory subject of bargaining, bargaining is only required when the non-unit employees are contracted to perform the same work under similar conditions as the bargaining unit employees:

1 We are thus not expanding the scope of mandatory bargaining to hold, as we do
2 now, that the type of ‘contracting out’ involved in this case—the replacement of
3 employees in the existing bargaining unit with those of an independent contractor
4 ***to do the same work under similar conditions of employment***—is a statutory subject
of collective bargaining under [29 USC § 158(a)(5)]. ***Our decision need not and
does not encompass other forms of ‘contracting out’ or ‘subcontracting’ which
arise in daily in our complex economy.***

5 *Id.* at 215, 405 (emphasis added).

6 As emphasized above, the plain language of the Supreme Court’s decision supports that it
7 is narrow: the duty to bargain over contracting out is triggered only when the contracting involves
8 the performance of “the same work under similar conditions of employment.” Critically, the
9 Supreme Court expressly refused to broadly hold that all subcontracting agreements are subject to
10 mandatory bargaining. Thus, whether bargaining is mandatory depends on the specific facts of
11 the case. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 n. 22, 101 S.Ct. 2573, 69
12 L.Ed.2d 318 (1981) (“In this opinion we of course intimate no view as to other types of
13 management decisions, such as ... other kinds of subcontracting, ... which are to be considered on
14 their particular facts.”) In doing so, the court should consider whether the matter is “peculiarly
15 suitable for resolution within the collective bargaining framework” and “amenab[le] ... to the
16 collective bargaining process.” *First National Maintenance*, 452 U.S. at 680, 101 S.Ct. at 2581
17 (quoting *Fibreboard*, 379 U.S. at 211, 214, 85 S.Ct. at 403).

18 Here, the uncontroverted testimony established that AJ Industries performs capital projects,
19 installation, warranty work, and special projects. There is simply no evidence in the record to
20 support that any of the aforementioned tasks is “work customarily performed by employees in the
21 Unit.” To the contrary, Marty testified AJ Industries performs work “out of the scope of what our
22 normal engineers do”. TR, p. 183, ll. 10-17. The work AJ Industries performs is therefore not
23 “the same work under similar conditions of employment” under *Fibreboard*.

24 To the extent AJ Industries performs overflow work that is similar to Apex’s engineers,
25 such work is only on a limited basis in the event “something were to break or really overwhelm
26 us” when Apex does not otherwise have the staffing to respond. TR., p. 243, ll. 3-9. As discussed
27 in the next section, such overflow work is consistent with the status quo.

28

1 **2. Apex’s Relationship with AJ Industries Is in Accordance with the**
2 **Status Quo and Did Not Result in Any Loss of Employment or Hours**
3 **to Apex’s Engineers**

4 The NLRB applied *Fibreboard in Westinghouse Electric Corp. (Mansfield Plant)*, 150
5 NLRB 1574 (1965). In *Westinghouse*, the NLRB dismissed a complaint where subcontracting was
6 done in accordance with the status quo and “[i]t does not appear that the subcontracting engaged
7 in during the period in question materially varied in kind or degree from that which had been
8 customary in the past. Nor has it been shown that the subcontracting engaged in had any significant
9 impact on unit employees’ job interests.” *Id.* at 1576; *see also, Raytheon, supra*, 365 NLRB at
10 *16 (“an employer’s past practice constitutes a term and condition of employment that permits the
11 employer to take actions unilaterally that do not materially vary in kind or degree from what has
12 been customary in the past”).

13 **i. Apex’s Use of AJ Industries Is the Status Quo**

14 Here, the uncontroverted testimony proves Apex has been utilizing AJ Industries, including
15 for overflow work, since its inception in August 2011. There is simply no factual basis to refute
16 this. Even Mr. Servin testified that Apex had been using AJ Industries for overflow work prior to
17 the Union petition was filed. TR, p. 572, l. 25; p. 573, ll. 1-2.

18 **ii. There Is No Competent Evidence Apex’s Use of AJ Industries**
19 **Resulted in the Loss of Employment or Hours to Apex’s**
20 **Engineers**

21 To the extent Mr. Servin claims AJ Industries work increased after Mr. Arellano’s
22 termination, his testimony is not competent evidence. First, Mr. Servin admitted he has no
23 personal knowledge of AJ Industries performing overflow work other than when he saw it
24 personally. TR, p. 568, ll. 10-16. Also, it is undisputed Mr. Servin was discharged on May 2,
25 2017, so he could not possibly have any personal knowledge of AJ Industries performing overflow
26 work after that date. With respect to his personal observation that AJ Industries work increased
27 after Mr. Arellano was discharged, there is no evidence whatsoever that the alleged increase in
28 work came at the expense of any Apex employee’s employment or hours. To the contrary, Mr.
 Sharron confirmed he did not utilize any of AJ Industries employees to cover shifts after Mr.

1 Arellano’s termination. TR, p. 372, ll. 6-8. As in *Westinghouse*, this allegation requires dismissal
2 without any evidence in support of the allegation.

3 **C. Conclusion**

4 Paragraphs 7(k) and 10 of the Complaint should be dismissed.

5 **XIV. Paragraphs 7(s)(1), 7(s)(2), 7(s)(3), 7(t) and 10: Bargaining**

6 Paragraph 7(s) alleges “[d]uring the period described above in paragraph 7(r), Respondent:
7 (1) failed to make bargaining proposals to the Union; (2) failed to make bargaining
8 counterproposals to the Union’s bargaining proposals; and (3) failed to cloak its representatives
9 with authority to enter into binding agreements.” Apex denied Paragraphs 7(s)(1), 7(s)(2), and
10 7(s)(3).

11 Paragraph 10 alleges “[b]y the conduct described above in paragraph 7, Respondent has
12 been failing and refusing to bargain collectively and in good faith with the exclusive collective
13 bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.” Apex
14 denied Paragraph 10.

15 **A. The Evidence**

16 **1. Contract Negotiations**

17 The following timeline demonstrates Apex’s attempt to negotiate a labor agreement with
18 the Union as well as intermittent charges filed by the Union:

- 19 • The Union began its relationship with Apex by filing Charge 28-CA-192349 on February
20 2, alleging Apex “interrogated the employees about their union activities...” GCX 1(a).
- 21 • On February 8, the Union filed Charge 28-CA-192774, alleging Apex “unilaterally
22 chang[ed] the lunch/break room location...” GCX 1(c).
- 23 • On February 13, the Union filed Charge 28-CA-193126 accusing Apex of “terminating
24 Adam Arellano in retaliation for union support...” GCX 1(e).
- 25 • On February 15, the Union filed Charge 28-CA-193231 accusing Apex of laying off
26 “Charles Walker because of his union activities...” GCX 1(i).
- 27 • Also on March 8, the Union filed Charge 28-CA-193128 alleging Apex denied Adam
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1 Arellano “his right to Union representative during an investigatory interview.” GCX 1(k).

- 2 • On March 29, the Union filed Charge 28-CA-192349 accusing Apex of “making unilateral
3 changes to employees work schedules and refusing to timely provide” information. GCX
4 1(o).
- 5 • On March 30, Ed forwarded a 48-page PDF of the proposed labor agreement (“Proposal”).
6 RX 18 at APEX 0002-0051. The Proposal obviously was not tailored to Apex because it
7 referenced “MGM Resorts International” and changing “light bulbs in the guest rooms.”
8 RX 18 at APEX 0046-47.
- 9 • On April 4, the Union filed Charge 28-CA-196285 accusing Apex of “threatening the
10 discipline of Joseph Servin...” GCX 1(q).
- 11 • On April 6, Marty requested the Proposal in a format where he could make redline changes.
12 RX 18 at APEX 0057. Ed rejected Marty’s request for a Word copy of the Proposal, citing
13 “[w]e have not established a relationship where we are comfortable sharing this document
14 in that format as of yet.” RX 18 at APEX 0056.
- 15 • Also on April 6, the Union filed Charge 28-CA-196459 accusing Apex of “changing the
16 engineer’s work schedule...” GCX 1(s).
- 17 • On April 7, Marty requesting that Ed provide wage information which was not included in
18 the Proposal. RX 18 at APEX 0056. Ed stated he would not provide economic data until
19 other issues were negotiated. RX 18 at APEX 0055. Marty advised economic terms were
20 important because they “directly relate to [many] terms like, paid time off, leave or
21 benefits” and were necessary to “make forward progress” in negotiations. RX 18 at APEX
22 0054. Ed again refused to provide any economic terms until they negotiated other parts of
23 the Proposal. *Id.*
- 24 • On April 18, the Union filed Charge 28-CA-197069 alleging Apex’s Employee Handbook
25 is “overly broad.” GCX 1(u).
- 26 • On April 19, the Union filed Charge 28-CA-197190 alleging Apex “refus[ed] to release
27 Joseph Servin from work duties to attend contract negotiations.” GCX 1(y).

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- 1 • Also on April 19, the Union filed Charge 28-CA-197182 alleging Apex “contracted out to
2 AJ Industries work the Engineers would normally be doing...” GCX 1(w).
- 3 • On April 27, Marty sent an email to Ed memorializing their in-person meeting, and
4 requesting the remainder of anything the Union wished to be a part of the Proposal. RX
5 18 at APEX 0064. Marty was “concerned” that “[l]eaving them out and adding them later
6 will create confusion and potential for a misunderstanding.” *Id.* Marty further noted “[t]he
7 financial parts of this document are critical pieces to our decisions making and “[w]e will
8 not make much progress without knowing how much everything costs.” *Id.* Ed responded
9 and again refused to provide economic terms until he received wage rates for the bargaining
10 unit members and other documents. RX 18 at APEX 0063. Marty had previously provided
11 all of the information Ed requested in this email on February 24. RX 18 at APEX 0058-
12 62.
- 13 • On May 2, the Union filed Charge 28-CA-192349 accusing Apex of “making unilateral
14 changes to employees’ work schedules...” GCX 1(ac).
- 15 • Also on May 2, the Union filed Charge 28-CA-198033 accusing Apex of “terminating
16 Joseph Servin in retaliation for union support...” GCX 1(aa).
- 17 • On May 19, Marty resent the information Ed requested. RX 18 at APEX 0058-62.
- 18 • On May 23, the parties met in person regarding the Proposal. TR, p. 195, ll. 11-15.
- 19 • On June 6, Marty emailed Ed, requesting the parties resume their weekly meetings. RX 18
20 at APEX 0079. Ed did not respond until June 19. RX 18 at APEX 0078.
- 21 • On July 7, 2017, the Union filed Charge 28-CA-202027 accusing Apex of “Changing the
22 engineer’s work schedule...” GCX 1(ae).
- 23 • On July 11, the parties met in person regarding the Proposal. TR, p. 195, ll. 1-2. Hours
24 after the meeting, the Union filed Charge 28-CA-202209 alleging Apex failed to bargain
25 collectively “by not providing any proposals or counter proposals during contract
26 negotiations.” GCX 1(ag).
- 27 • The parties met again in July and discussed the Proposal. TR, p. 198, ll. 23-25; p. 199, l.
28

- 1 1. Marty provided a letter stating Apex’s position on many of the Proposal’s terms. GCX
2 33a-e.
- 3 • On July 11, hours after the meeting, the Union filed Charge 28-CA-203269 “failing to
4 provide a representative with authority to bargain on behalf of Employer.” GCX 1(ak).
 - 5 • The parties continued discussing the Proposal in August. TR, p. 205, ll. 10-17.
 - 6 • On August 30, 2017, the Union filed Charge 28-CA-202027 accusing Apex of “changing
7 employees’ work schedules without bargaining...” GCX 1(am).
 - 8 • On August 31, Petitioner filed his Order Consolidating Cases, Consolidated Complaint and
9 Notice of Hearing in the underlying administrative hearing. GCX 1(at).
 - 10 • Marty forwarded a draft counterproposal to Ed during the week prior to the resumed
11 hearing. TR, p. 197, ll. 14-18. The ALJ may take judicial notice this would have been the
12 week of November 27 to December 1. Ed acknowledged receiving the counterproposal.
13 TR, p. 433, ll. 20-22. Marty testified “[t]he proposal we sent was something that could be
14 signed and executed.” TR, 198, ll. 10-16.

15 **2. Marty’s Authority to Enter into an Agreement**

16 Marty testified that he had authority to negotiate a labor agreement with the Union subject
17 to final approval by Apex’s board of directors. This included the authority to state what terms
18 Apex agreed to or did not agree to:

19 Q. ... Could you at that point, during negotiations let’s say, during
20 your last July meeting, when you gave this document, General
21 Counsel’s Exhibit 33, did you have authority as you sat there to say
22 the matters that the Company doesn’t disagree to, we agree to?

22 A. Yes.

23 Q. And would that have been binding on the Company?

24 A. Yes.

25 ...

26 Q. Did you have to get authorization from the board to generate
27 General Counsel’s Exhibit 33?

28 A. No, I did not.

1 Q. So did you have authority to state that some of the proposals
were not acceptable?

2 A. Yes.

3 TR, p. 202, ll. 6-14; 21-25; p. 203, l. 1.

4 Marty further explained he had authority to reach a meeting of the minds with the Union
5 subject to final approval of Apex's board of directors:

6 JUDGE SOTOLONGO: Let me ask you this. Have you had -- this
7 is perhaps a hypothetical question, but perhaps you can answer.
8 Assuming you had reached a meeting of the minds with Mr. Ed
9 Martin about certain proposals, before you could have signed off
and said you had agreed on everything, and before you had signed
off on it making it formal, you would have had to tell -- go to the
board to seek final approval. Would that be correct?

10 THE WITNESS: Yes, that would be correct. Yeah.

11 JUDGE SOTOLONGO: So in other words, until the board gave its
12 final approval, none of the proposals that you had indicated agreeing
with would be final?

13 THE WITNESS: Technically, yes. Yeah, I guess that's correct.
14 There's no one in a better position to negotiate this through. I mean
15 I'm an owner and the COO. So I don't know that the board would
16 ever, you know, say no, if I'm telling them that this is I think fair
and I already agreed to this. I can't do that because that's what I
would say at that point, but technically that's what our corporate
documents require.

17 TR, p. 203, ll. 13-25; p. 204, ll. 1-7

18 Mr. Dramise confirmed "Marty has been the current person as chief operating officer on
19 [the proposal]." TR, 349, ll. 18-22.

20 **B. Argument**

21 **1. The Record Supports Apex Bargained in Good Faith**

22 The NLRA imposes a mutual obligation of good faith bargaining on both employers and
23 labor unions. 29 U.S.C. § 158(a)(5); 29 U.S.C. § 158(b)(3). With respect to negotiating a labor
24 agreement, good faith confers the "obligation of the parties to participate actively in the
25 deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort
26 must be made to reach a common ground." *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686
27 (9th Cir. 1943). "When determining whether an employer failed to bargain in good faith, we
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1 examine “the employer's conduct in the totality of the circumstances in which the bargaining took
2 place.” *NLRB v. Hardesty Company, Inc.*, 308 F.3d 859, 865 (8th Cir. 2002) (quotations and
3 citations omitted). “Because the statutory standard of ‘good faith’ bargaining is determined by the
4 facts of each case, whether or not a party has failed to live up to this duty falls squarely within the
5 province of the Board's expertise.” *Fallsbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 734 (D.C. Cir.
6 2015) (citing *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C. Cir. 1969)).
7 Further, in determining whether a party has met its good faith bargaining obligations, the NLRB
8 will examine the totality of the party’s conduct, both at and away from the bargaining table. *E.g.*,
9 *Overnite Transp. Co.*, 296 NLRB 669, 671 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991).

10 Here, the Union failed negotiate in good faith, not Apex. The Union’s inexplicable refusal
11 to provide Apex with a Word version of the proposed agreement only serves to needlessly delay
12 negotiations. In 2017, it is hardly unreasonable to expect the Union to provide a Word version
13 that Apex could mark with its redline changes. The Union could then do the same and the process
14 would continue until they arrive at terms acceptable to both sides. This would greatly expedite the
15 process. The Union’s refusal to extend this simple and innocuous courtesy demonstrates bad faith.
16 Further, the Union has engaged in bad faith by continuously filing charges during ongoing
17 negotiations without even attempting to raise the issues before hand. Apex (and its counsel) must
18 necessarily expend its time and resources to address these charges that would otherwise be directed
19 toward completing the agreement. This constant influx of charges during negotiations
20 demonstrates that the Union is far more interested in filing charges than negotiating a contract.
21 The Union acted in bad faith while Apex acted in good faith.

22 Further, Apex submitted a complete draft counterproposal to the Union on December 1,
23 2017. The Union has failed to provide any response as of the filing of this brief.

24 **2. Marty Has Authority to Negotiate a Labor Agreement and Does Not** 25 **Need “Final Authority” to Enter into an Agreement**

26 The CGC’s allegation, that Apex “failed to cloak its representatives with the authority to
27 enter into a binding agreement,” is not a legally valid charge. NLRB precedent instructs “an
28 employer is not required to be represented by an individual possessing final authority to enter into

1 an agreement” so long as it does not inhibit the progress of negotiations. *Wycoff Steel, Inc.*, 303
2 NLRB 517, 525 (1991) (emphasis added) (citing *Carpenters Local 1780*, 244 NLRB 277, 281
3 (1979)); *see also Great Southern Trucking Co. v. NLRB*, 127 F.2d 180, 185, certiorari denied, 317
4 U.S. 652, 63 S.Ct. 48, 87 L.Ed. 524 (4th Cir. 1942) (“Nor is there any duty on the part of the
5 employer to be represented in the bargaining negotiations by a person or persons with competent
6 authority to enter into a binding agreement with the employees”). Accordingly, Paragraph 7(s)(3)
7 is facially defective and should be summarily dismissed.

8 Regardless, Marty, who is an owner and the COO of Apex, has the authority to negotiate a
9 labor agreement subject to final approval by Apex’s Board of Directors and in fact has provided
10 the Union with a counterproposal, after the arduous and unnecessary task of retyping the Union’s
11 proposal in an editable format. The fact that Marty requires final approval from the board of
12 directors has no relevance to his ability to negotiate an agreement in good faith. There is simply
13 no evidence to find Marty does not have authority to negotiate.

14 **C. Conclusion**

15 Based on the above, the ALJ should dismiss Paragraphs 7(s)(1), 7(s)(2), 7(s)(3), 7(t) and
16 10.

17 **XV. Paragraphs 5(a)(i) through (viii) and Paragraph 8: Apex’s Employee Handbook**

18 As alleged in Paragraphs 5(a)(i) through (viii), Apex maintained various rules in its
19 Employee Handbook (“Handbook”). Apex admitted that Paragraphs 5(a)(i) through (viii) contain
20 excerpts of its Handbook.

21 On January 16, 2018, the CGC advised “all but one portion of Complaint Paragraph 5(a)
22 will be withdrawn. The portion remaining will be [Paragraph] 5(a)(iii).”⁴ That portion, which
23 pertains to Apex Rule 5-4, is discussed below.

24 _____
25 ⁴ A copy of the CGC’s email is attached as Exhibit “A”. While Apex realizes this email
26 chain is not part of the administrative record, Apex respectfully requests the ALJ consider this
27 extrinsic evidence for the purpose of judicial economy and paring down the allegations at issue.
28 Apex removed over 10 pages of content from its brief based on the CGC’s representation. If the
ALJ is unable to consider the CGC’s email as evidence that he is withdrawing allegations, Apex
respectfully requests an additional 24 hours to supplement its brief to reinsert its discussion in
opposition to these allegations.

1 Paragraph 8 alleges “[b]y the conduct described above in paragraph 5, Respondent has
2 been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed
3 in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” Apex denied Paragraph 8.

4 **A. The Evidence**

5 There is no evidence in support of the allegations set forth in Paragraph 8 as they relate to
6 the Handbook. Marty authenticated CGC 2 as Apex’s Employee Handbook. Upon its admission
7 into evidence, The CGC stated “[t]hat is all the question you’ll be asking about the handbook rules
8 [sic].” TR, p. 30, ll. 9-10. Indeed, virtually no other testimony exists regarding the handbook.

9 **B. Argument**

10 As demonstrated above, the record is sparse regarding any reference to the Handbook.
11 There is no dispute CGX 2 is Apex’s Handbook. What is in dispute is whether the Handbook
12 violates Section 8(a)(1) of the Act. However, the CGC nor the Charging Parties introduced any
13 evidence whatsoever that would support the allegations set forth in Paragraph 8. The ALJ is
14 without any factual basis to find in favor of the CGC or the Charging Parties. The CGC has
15 therefore failed to meet his burden under 29 U.S.C. § 160(c).

16 To the extent any further discussion is warranted, the NLRB recently adopted a balancing
17 test approach to employer rules in *The Boeing Company*, 365 NLRB NO. 154, 2017 WL 6403495
18 (December 14, 2017) (“*Boeing*”). This approach, which expressly overturned *Lutheran Heritage*
19 *Village-Livonia*, 343 NLRB 646 (2004), focuses on balancing an employer’s business justification
20 and the invasion of employee rights under the Act. *Boeing* at *4:

21 Under the standard we adopt today, when evaluating a facially neutral policy, rule
22 or handbook provision that, when reasonably interpreted, would potentially
23 interfere with the exercise of NLRA rights, the Board will evaluate two things: (i)
the nature and extent of the potential impact on NLRA rights, and (ii) legitimate
justifications associated with the rule.” *Id.* at *4. (Italics in original).

24 The NLRB then set forth three categories of employer rules: Category 1, which includes
25 rules the NLRB has designated lawful to maintain; Category 2, which includes rules that warrant
26 individualized scrutiny regarding whether it interferes with NLRA rights balanced with an
27
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1 employer's legitimate justification; and Category 3, which includes rules the NLRB will designate
2 as unlawful.

3 Here, Rule 5-4 is facially neutral and would therefore constitute either a Category 1 or
4 Category 2 rule under *Boeing*. Both categories are analyzed under similar criteria. Category 1
5 rules are lawful because "(i) the rule, when reasonably interpreted, does not prohibit or interfere
6 with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is
7 outweighed by justifications associated with the rule." *Boeing* at *4. Category 2 rules consider
8 "whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse
9 impact on NLRA-protected conduct is outweighed by legitimate justifications." *Id.* In other
10 words, the test is whether the rules interfere with NLRA rights and if so, whether the potential
11 impact of the interference is outweighed by the employer's justification.

12 Per the CGC's January 16, 2018 email to Apex's counsel, the only rule at issue is Handbook
13 Rule 5-4 which states as follows:⁵

14 **5-4. Use of Social Media**

15 Apex Linen Service, Inc. respects the right of any employee to maintain a blog or
16 web page or to participate in a social networking, Twitter or similar site. However,
17 to protect the Company interests and ensure employees focus on their job duties,
18 employees must adhere to the following rules:

19 Employees may not post on a blog or web page or participate on a social
20 networking, Twitter or similar site during working time or at any time with
21 Company equipment or property.

22 All rules regarding confidential and proprietary business information apply in full
23 to blogs, web pages, social networking, Twitter and similar sites. Any information
24 that cannot be disclosed through a conversation, a note or an e-mail also cannot be
25 disclosed in a blog, web page, social networking, Twitter or similar site.

26 Whether an employee is posting something on his or her own blog, web page, social
27 networking, Twitter or similar site or on someone else's, if the employee mentions
28 the Company and also expresses either a political opinion or an opinion regarding
the Company's actions, the poster must include a disclaimer. The poster should
specifically state that the opinion expressed is his/her personal opinion and not the
Company's position. This is necessary to preserve the Company's good will in the
marketplace.

⁵ The portion the Region takes issue with appears in italics. Apex is presenting the rule in its entirety for proper context and understanding.

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Employees should be respectful of their potential readers and colleagues and refrain from using discriminatory comments, personal insults, libel or slander when commenting about the Company, their superiors, co-workers or the Company’s competitors.

Any conduct that is impermissible under the law if expressed in any other form or forum is impermissible if expressed through a blog, web page, social networking, Twitter or similar site. For example, posted material that is discriminatory, harassing, obscene, defamatory, libelous or threatening is forbidden. Company policies apply equally to employee blogging. Employees should review their Employee Handbook for further guidance.

Apex Linen Service, Inc. encourages all employees to keep in mind the speed and manner in which information posted on a blog, web page, social networking, Twitter or similar site can be relayed and often misunderstood by readers. 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.

Here, there is no evidence Rule 5-4 prohibits or interferes with the exercise of NLRA rights. The CGC and Charging Parties failed to introduce any evidence to suggest that a rule which urges employees not to embarrass or upset co-workers violates the NLRA. Further, Apex does not consider NLRA-protected activity to “embarrass or upset co-workers” or “detrimentally affect [Apex’s] business.”

Analyzing the second part of the *Boeing* analysis, Apex has a legitimate business interest in maintaining Rule 5-4. Apex strives to promote a professional, congenial workplace that is free of discrimination and/or harassment. Apex is puzzled that the CGC would take issue with such an innocuous rule. This rule – which only pertains to comments about Apex – is reasonably and narrowly tailored to meet Apex’s legitimate business interest in promoting a safe and respectful workplace and does not impact NLRA rights.

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C. Conclusion

Based on the above, the ALJ should dismiss Paragraphs 5(a)(i) through (viii) and Paragraph 8 of the Complaint.

Dated this 17th day of January 2018.

NAYLOR & BRASTER

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of NAYLOR & BRASTER and that on this 17th day
3 of January 2018, I caused the document **APEX LINEN SERVICE INC.'S BRIEF TO THE**
4 **ADMINISTRATIVE LAW JUDGE** to be served through the NLRB E-Filing system addressed
5 to:

6 Hon. Ariel L. Sotolongo
7 Administrative Law Judge
8 NLRB – Division of Judges
9 901 Market Street, Suite 300
10 San Francisco, CA 94103-1779

11 A true and correct copy was served via e-mail to:

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23 A true and correct copy was served via U.S. Mail in a sealed envelope addressed to:

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26 North Las Vegas, NV 89085-4402

27 /s/ Amy Reams
28 An Employee of NAYLOR & BRASTER

EXHIBIT “A”

Andrew Sharples

From: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Sent: Tuesday, January 16, 2018 4:16 PM
To: Andrew Sharples
Cc: Jennifer Braster; John Naylor
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

The issue is probably moot, as I don't think the Region would agree to settle that single allegation at this stage. That said, I don't have authority to say 'yes' or 'no,' so I'll check.

From: Andrew Sharples [mailto:asharples@nblawnv.com]
Sent: Tuesday, January 16, 2018 4:13 PM
To: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

So if Apex removed the bolded portion, the Region would find it acceptable?

From: Higley, Nathan A. [mailto:Nathan.Higley@nlrb.gov]
Sent: Tuesday, January 16, 2018 4:09 PM
To: Andrew Sharples <asharples@nblawnv.com>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

The bold portion is the key, and most of the rest is context. But other content, such as the wording "When in doubt, don't post" and the fact that actions in violation subject an employee to discipline also play in.

Nathan

From: Andrew Sharples [mailto:asharples@nblawnv.com]
Sent: Tuesday, January 16, 2018 4:05 PM
To: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Thanks Nathan. So does the region take issue with the entire quoted portion of 5-4, or just the sentence that appears in bold?

Andy

From: Higley, Nathan A. [mailto:Nathan.Higley@nlrb.gov]
Sent: Tuesday, January 16, 2018 3:47 PM
To: Andrew Sharples <asharples@nblawnv.com>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Sorry for the late notice. This message is to confirm that the Region is making the withdrawals I indicated below.

From: Higley, Nathan A.
Sent: Tuesday, January 16, 2018 10:14 AM
To: 'Andrew Sharples' <asharples@nblawnv.com>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

No worries. I haven't received final word, but I believe all but one portion of Complaint Paragraph 5(a) will be withdrawn. The portion remaining will be on paragraph of 5(a)(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.

Nathan

From: Andrew Sharples [<mailto:asharples@nblawnv.com>]
Sent: Tuesday, January 16, 2018 10:08 AM
To: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Sorry for the multiple emails, but I meant to ask for comments by 1:00 p.m. today. This is simply to ensure we have enough time to revise our brief depending on what charges are being dropped.

Andy

From: Andrew Sharples
Sent: Tuesday, January 16, 2018 10:03 AM
To: 'Higley, Nathan A.' <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Nathan:

Last Wednesday you stated you will probably be dropping some allegations. As you know, our revised briefs are due tomorrow. Can you please let us know which allegations will be dropped so we can pare down/finalize our brief accordingly?

Thanks,
Andy

From: Higley, Nathan A. [<mailto:Nathan.Higley@nlrb.gov>]
Sent: Tuesday, January 16, 2018 9:10 AM
To: Andrew Sharples <asharples@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Thanks for the update.

From: Andrew Sharples [<mailto:asharples@nblawnv.com>]
Sent: Tuesday, January 16, 2018 9:09 AM
To: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

It looks like the judge is running late so it may be closer to 9:45.

From: Higley, Nathan A. [<mailto:Nathan.Higley@nlrb.gov>]
Sent: Tuesday, January 16, 2018 9:08 AM
To: Andrew Sharples <asharples@nblawnv.com>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Sounds good. Thanks.

From: Andrew Sharples [<mailto:asharples@nblawnv.com>]
Sent: Tuesday, January 16, 2018 9:07 AM
To: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Hi Nathan:

John is attending an uncontested hearing at the RJC and will be at your office around 9:30 or so.

Thanks,
Andy

From: Higley, Nathan A. [<mailto:Nathan.Higley@nlrb.gov>]
Sent: Tuesday, January 16, 2018 8:55 AM
To: Andrew Sharples <asharples@nblawnv.com>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Hi, Andrew. Sorry for the late response. I've haven't checked my e-mail since Friday afternoon. Yes, I'd be happy to meet in person. My schedule's flexible.

Nathan
702-820-7467

From: Andrew Sharples [<mailto:asharples@nblawnv.com>]
Sent: Friday, January 12, 2018 5:02 PM
To: Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Cc: Jennifer Braster <jbraster@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Hi Nathan:

We would like to meet in person to discuss settlement. John has a hearing downtown Tuesday morning and would be able to meet as early as 9:30 a.m. at your office. Otherwise we could schedule something later in the day. Please let us know.

Andy

From: Higley, Nathan A. [<mailto:Nathan.Higley@nlrb.gov>]
Sent: Wednesday, January 10, 2018 5:26 PM
To: Andrew Sharples <asharples@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018

Not sure Ms. Gomez intended to include the entire communication chain between judges, but since the cat's out of the bag, yes, we'll probably be dropping some of the allegations. Along with *Boeing*, the NLRB's newly-appointed general counsel sent out a memo reprioritizing litigation. As you might guess, complaints are getting revised and pulled. Unfortunately, in my spot on the totem pole, I have to wait and see what others decide to do. Once I do get word, I'll let you know, and we can pare down the briefs.

With another week to file, perhaps we can step back and revisit settlement? In my experience, unions and employers get invested in litigation, and they start to focus on a judicial result rather than a practical one. Since my job is to try cases, I'm guilty of the same focus. But I also have the least at stake; if I win, it's a feather in my cap (or it was an easy case) but not much else. Same thing if I lose.

I can only speculate about what the judges involved might order, and I'm in no position to advise you, but considering the potential for some unwelcome requirements, maybe it's worth taking another look at settlement. Let me know if there's interest. If not, no hard feelings.

Nathan

From: Gomez, Doreen E.
Sent: Wednesday, January 10, 2018 5:00 PM
To: asharples@naylorandbrasterlaw.com; jnaylor@naylorandbrasterlaw.com; Higley, Nathan A. <Nathan.Higley@nlrb.gov>
Subject: FW: Apex Linen , 28-CA-192349, EOT to File Briefs granted for 1 week from today 1/10 to 1/17/2018
Importance: High

Counsel: Regrettably I am experiencing network connection problems and am unable to issue the order granting the extension of time to file briefs from Jan. 10 to Jan. 17. The below email correspondence is the best I can provide at the moment – an order granting the extension will issue tomorrow, barring any further technical problems.

Doreen Gomez, MSA
NLRB, Div. of Judges

From: Etchingham, Gerald M.
Sent: Wednesday, January 10, 2018 4:50 PM
To: Sotolongo, Ariel L. <Ariel.Sotolongo@nlrb.gov>
Cc: Gomez, Doreen E. <Doreen.Gomez@nlrb.gov>; Lee, Vanise J. <Vanise.Lee@nlrb.gov>
Subject: Re: Apex Linen , 28-CA-192349, Respondent opposes any request for EOT File Briefs

Great.

Doreen please grant the one-week requesting finding good cause over R's opposition to the EOT request.
Thx,

JE

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From: Sotolongo, Ariel L.
Sent: Wednesday, January 10, 2018 4:47:09 PM
To: Etchingham, Gerald M.
Cc: Gomez, Doreen E.; Lee, Vanise J.
Subject: RE: Apex Linen , 28-CA-192349, Respondent opposes any request for EOT File Briefs

I agree—the reason for the requested extension is that GC is re-considering part(s) of the complaint in light of *Boeing* (I assume) and other recent cases—in other words, they may be dropping some allegations, which would accrue to R’s benefit... The extension should be granted

From: Etchingham, Gerald M.
Sent: Wednesday, January 10, 2018 4:43 PM
To: Gomez, Doreen E. <Doreen.Gomez@nlrb.gov>; Sotolongo, Ariel L. <Ariel.Sotolongo@nlrb.gov>
Subject: Re: Apex Linen , 28-CA-192349, Respondent opposes any request for EOT File Briefs

I misread it & didn’t know R opposes the one-week extension. I would still grant it but final say is up to Judge Sotolongo. Maybe make it 4 more days so GC & CP gets holiday weekend as extra time. What say you Ariel?

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From: Gomez, Doreen E.
Sent: Wednesday, January 10, 2018 4:34:12 PM
To: Sotolongo, Ariel L.; Etchingham, Gerald M.
Subject: FW: Apex Linen , 28-CA-192349, Respondent opposes any request for EOT File Briefs

Judges Sotolongo, Etchingham: I’ve attached GC’s request w/R/opposition. Again, since my computer is not able to access NxGen, the best I can offer is to get something out first thing tomorrow morning.
Doreen

From: John Naylor [<mailto:jnaylor@nblawnv.com>]
Sent: Wednesday, January 10, 2018 4:27 PM
To: Gomez, Doreen E. <Doreen.Gomez@nlrb.gov>; Andrew Sharples <asharples@nblawnv.com>
Subject: RE: Apex Linen , 28-CA-192349, Respondent opposes any request for EOT File Briefs

Dear Ms. Gomez:

Thank you for your email. Respondent initially opposed the request because the General Counsel did not provide any reason for the extension.

Respondent continues to oppose the request after reviewing the motion. Some of the charges that are the subject of this proceeding date back to February 2017. The hearing commenced on October 10, 2017, and that session only lasted several hours. Proceedings were then recessed until December 4, 2017 due to circumstances beyond the parties’ control. The hearing concluded on December 6, 2017. The two NLRB decisions that have a direct impact on the issues in the case were issued shortly after that: *The Boeing Company*, 365 NLRB NO. 154, 2017 WL 6403495 (December 14, 2017) and *Raytheon Network Centric Systems*, 365 NLRB No. 161 (December 15, 2017). The General Counsel has previously taken the position that there should not be any further delay here, and to that end requested an accelerated

briefing schedule and hearing date in a related proceeding before the U.S. District Court. Respondent agrees that these matters should be resolved expeditiously and believes that there has been ample time to consider the new case law.

Respectfully,
John M. Naylor

John M. Naylor
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This email communication and any attachment are attorney privileged and confidential. If you are not the intended recipient or have received this message in error, please notify us immediately by replying and delete the communication. Thank you.

From: Gomez, Doreen E. [<mailto:Doreen.Gomez@nlrb.gov>]
Sent: Wednesday, January 10, 2018 4:06 PM
To: Andrew Sharples <asharples@nblawnv.com>; John Naylor <jnaylor@nblawnv.com>
Subject: Apex Linen , 28-CA-192349, Respondent opposes any request for EOT File Briefs
Importance: High

Counsel for Respondent: Today, 1/10/2018, General Counsel request of EOT to file briefs from 1/10 to 1/17, a one week extension. It appears you oppose any request for EOT file briefs. Do you care to state your opposition here?

Doreen E. Gomez, MSA
NLRB Division of Judges
San Francisco CA
T: 628-221-8824

