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I. INTRODUCTION

Charging Party, International Brotherhood of Teamsters, Local 63 (“Local 63” or the “Union”) submits this Answering Brief in response to Gardner Trucking’s (“Gardner” or the “Respondent”) Exceptions and Respondent’s Exceptions Brief.

On April 11, 2018, Administrative Law Judge Andrew S. Gollin (ALJ Gollin) issued his decision (ALJD/Decision) in this matter, making his findings and conclusions of law. ALJ Gollin determined that Respondent violated Section 8(a)(1) of the Act when its president and his son separately interrogated employees regarding employees’ union activities, membership, and sympathies. Respondent also violated Section 8(a)(3) and (1) of the Act when it discharged Respondent employees Raymond Correa, Richard Dell’Orfano, Tony Nava, Leopoldo Rojo, Gilbert Sanchez, and Michael Talbot (Discriminatees), because of the employees’ union activities, and to discourage others from engaging in those activities.

On August 9, 2018, Respondent Employer Gardner Trucking filed exceptions to the Decision, accompanied by a supporting brief. In its 42 exceptions, Respondent argues that ALJ Gollin erred in reaching findings on a number of substantive and non-substantive issues. Notably, Respondent failed to comply with the minimal procedural requirements for filing exceptions by not submitting any argument concerning the alleged errors reached by ALJ Gollin. Thus, exceptions 1, 2, 3, 16, 19, and 42 should all be disregarded as failing to satisfy Section 102.46 (d)(1)-(2) of the Rules and Regulation of the National Labor Relations Board.

Respondent also claims ALJ Gollin erred in reaching findings that Respondent violated Section 8(a)(1) by interrogating employees and violated Section 8(a)(3) by terminating the Discriminatees because of the employees’ Union activities and/or to discourage others from engaging in those activities, including his credibility determinations.

Significantly, every single allegation in this case rests on credibility determinations. It is well settled that “[t]he ALJ’s assessment of credibility is entitled to great weight and deference, since he had the opportunity to observe the witness’s demeanor.” *Infantado v. Astrue*, 263 Fed. Appx. 469, 475 (6th Cir. 2008) (citations omitted). On the whole, for the reasons set forth below, the ALJ found the Counsel for the General Counsel’s witnesses credible and the Respondent’s witnesses less so. Because the allegations in this case turn on questions of credibility, the Decision should not be disturbed.

This case presents a classic “nip in the bud” situation wherein Respondent, Gardner Trucking, Inc., immediately took adverse action against employees upon learning of Union organizing activity at its facility. It succeeded in defeating the Union organizing drive but its react first, justify later approach resulted in trampling, interfering with, restraining, and coercing employees in the exercise on the Section 7 rights of its employees in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act).

Judge Gollin’s finding that the elements supporting a prima facie case are met in this instance is proper. The Discriminatee’s Union organizational efforts were well known to Respondent. The Respondent interrogated the discriminatees about their Union activities and sympathies and suspended two of them for distributing Union flyers. Almost as soon as the Union flyers were circulated around the facility, Respondent honed in on the employees working in the tire shop and those associated with the tire shop holding mandatory meetings with this group, running background checks on employees in this group, and discharging six of these employees while treating other similarly situated employees more favorably.

ALJ Gollin’s determination that Respondent exhibited anti-union animus is accurate. Gardner’s president, Tom Lanting’s statements to discriminatee Tony Nava that the tire shop employees make him look bad and suggestion that Nava fabricate reasons to get rid of them,

evidence Tom Lanting's true feelings towards employees he believed supported the Union. He harbored a deep resentment towards these employees and wanted to make them pay for having the nerve to support the Union. Additionally, the timing of the discharges, pretextual reasons for the discharges, and disparate treatment all support a finding of unlawful animus.

Additionally, ALJ Gollin correctly found that the reasons advanced by Respondent for the terminations do not stand scrutiny. Respondent claimed it ran the background checks as a result of tire theft that occurred three months prior. The timing of the background checks and the group singled out by Respondent do not support this rationale. The Respondent did not complete a background search on employees who worked the day of the theft. Rather, it searched employees who moved in the yard and had access to equipment. In addition to leaving out a large group of yard employees, the mechanics, Respondent's *access to equipment* justification simply does not pass muster since hundreds of Respondent employees have access to the gates, tractors, and trailers. Respondent also claims an anonymous letter prompted the background checks because it was concerned about employees' criminal backgrounds. This reason is even more implausible because Respondent has a history of accepting employees who have a criminal history. Respondent did not run background checks on non-driver employees and even if it did it would not have learned any information that the discriminatees did not disclose to Respondent during the application process. Moreover, given Respondent's widespread practice of hiring employees with criminal backgrounds the anonymous letter did not provide Respondent with any new information warranting the checks completed. Finally, if Respondent was truly concerned with uprooting the criminal element it would have certainly used a more dependable method instead of the limited searches completed by its then Human Resources Director. ALJ Gollin properly found that General Counsel made a prima facie showing of unlawful motivation on the part of Respondent for its action against the discriminatees. Additionally, since the Respondent's reasons for taking

such action are unsubstantiated and pretextual, Respondent failed to meet its *Wright Line* burden by demonstrating that it would have taken the same action against the discriminatees absent their Union activities.

Underlying Judge Gollin's Decision is his credibility determinations of the various witnesses who testified in this matter. For example, concerning Respondent's president, Tom Lanting, Judge Gollin found he was "guarded, defensive, and he appeared less than forthright. His testimony was often evasive, inconsistent, and non-responsive." Thus, Judge Gollin did not credit Tom Lanting's denial of certain conversations—one of which constituted illegal interrogation.

Respondent's Exceptions and Brief in Support of Exceptions ("Respondent Brief") raise little, which has not been addressed and resolved by the Decision. Pursuant to Section 102.46 (d)(1)-(2), the Union files this Answering Brief. In this Answering Brief, the Union respectfully urges the Board to affirm ALJ Gollin's well-founded and correct conclusions and findings addressed herein and to reject Respondent's exceptions as without merit.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. The Parties

Gardner Trucking ("Respondent") is a trucking company that handles and delivers general freight including corrugated cardboard to customers. Hearing Transcript ("TR") 981:13-21, ALJD 3:10--13. Respondent operates out of nine locations in California, Oregon, Arizona, and Texas. TR 980:4-13. Their main and original location is in Ontario/Chino, 9032 Merrill Ave, Ontario, CA 91762 ("Facility"). Respondent Exhibit ("RX") 3-5. Respondent's current President and former owner is Tom Lanting. TR 977:13-14; ALJD 3:33. Tom Lanting started Respondent in the mid-1980s. TR 978:19-21. On September 9, 2016, Tom Lanting sold Gardner Trucking to Cedar Rapids Steel Transport (CRST). TR 995:13-15, 1005:15-18, ALJD 11:42-43.

Teamsters Local Union No. 63, International Brotherhood of Teamsters (“Union”) is a labor union who commenced an organizing drive at Respondent’s Facility in December 2016. TR 69:1-74:5. ALJD 3:8-9.

Discriminatees Michael Talbot (“Talbot”), Leopoldo Rojo (“Rojo”), Gilbert Sanchez (“Sanchez”), Raymond Correa (“Correa”), Tony Nava (“Nava”), and Richard Dell’Orfano (“Dell’Orfano”) are all former Respondent non-driver employees who were discharged between January 5, 2017 through January 13, 2017. ALJD 20:10-13. Discriminatees Talbot, Rojo, Sanchez, and Correa were all tire technicians who worked in Respondent’s tire shop in December 2016. TR 138:2-16 (Talbot); TR 330:3-16 (Rojo); TR 487:24-488:16, 523:12-17 (Sanchez); TR 845:6-13 (Correa). Dell’Orfano worked for Respondent as a forklift driver and Nava worked in the mechanic shop inputting work orders until late December 2016 when he was promoted to a lead position whose duties entailed overseeing tire shop employees. TR 815:11-15 (Dell’Orfano); ALJD 5:22-24.

B. The Discriminatees Were Engaged In Union Activity

Talbot, Correa, Nava, Rojo, and Sanchez all engaged in discussions concerning contacting the Union to seek representation. TR 161:9-164:19 (Talbot), 346:2-24 (Rojo), 439:5-22 (Nava), 514:9-23 (Sanchez), 857:19-860:5 (Correa); ALJD 13:26-30. The Union was contacted and scheduled a December 27, 2016 information meeting at the Union hall in Rialto, CA. TR 74:11-23; ALJD 13:30-31. Nava, Rojo, and Talbot all attended the December 27, 2016 Union meeting. TR 165:6-166:25 (Talbot), 347:18-348:10 (Rojo), 440:16-441:18 (Nava); General Counsel Exhibit (“GX”) 9; ALJD 13:31-33. Following this meeting another meeting was scheduled on Saturday, December 31, 2016 at the Union hall in Rialto at 10:00 am. TR 74:11-23; ALJD 13:36. Sanchez and Talbot also attended the December 31, 2016 Union meeting. TR 174:19-175:25 (Talbot), 515:12-18, 516:24-517:4 (Sanchez); GX 10.

The day after the first Union meeting on December 27, 2016, Union flyers were distributed at the Facility by employees of Respondent concerning another Union meeting scheduled for December 31, 2016. ALJD 13:40-41; Joint Exhibit (“JX”) 11. Talbot estimated that he distributed approximately 15-20 flyers to Respondent employees he saw on December 28, 2016. TR 186:16-187:19; Joint Exhibit (“JX”) 11; ALJD 13:48-49. On December 28, 2016 Dell’Orfano received copies of the flyer as well and he distributed them to the coworkers in his area. TR 796:2-22, 799:16-801:6; ALJD: 13:50-14:2.

C. The Respondent Had Knowledge Of The Discriminatees’ Union Activities

As soon as Respondent was informed about the Union flyer it swiftly acted to address what Tom Lanting described as “the problem”. TR 1022:4-7.

Despite being outside of the scope of his job duties, Jordan Lanting (a driver recruiter), Tom Lanting’s son and a Respondent manager, commenced a widespread search of the Facility for the flyers. TR 1264:19-20; ALJD 14:4-15:14. He started in the parking lot and removed flyers from the windshield of cars. TR 1214:3-10; ALJD 14:8 Jordan Lanting also searched the parts counter area and the area in the back of the Facility where the forklift/clamp drivers worked. TR 1649:11-24, 805:2-806:11; ALJD 14:4-15:14.

After sweeping the parking lot, Jordan Lanting was told by another Respondent manager, Gary Villalobos (“Villalobos”), that the flyers were coming from the tire shop. TR 1215:18-21; ALJD 14:8-10. Jordan Lanting then proceeded to the tire shop and searched it for the flyers. ALJD: 14:13-14. He found flyers in one of the lockers in the tire shop and he interrogated the employees present about the origin of the flyers. TR 196:18-20; ALJD 14:14-20. Discriminatees Talbot, Rojo, Sanchez, and Correa were all present. TR 194:16-25 (Talbot), 353:13-355:8 (Rojo), 518:2-523:8 (Sanchez); 865:6-867:8 (Correa). ALJD 14:11-13. Talbot told Jordan Lanting it was

illegal for him to ask that question. TR 196:21-22, 865:17-19. ALJD 14:16-17.

Jordan Lanting left the tire shop and reported his findings to Respondent's former Director of Human Resources, Kathleen Moldenhauer ("Moldenhauer"). TR 1219:4-9, 1516:16-20; ALJD 14:22-23. Moldenhauer, armed with Respondent's employee handbook, immediately headed to the tire shop with Jordan Lanting. TR 1219:20-25; ALJD 14:23-25. Moldenhauer searched the lockers and also questioned employees concerning ownership of the lockers. TR 1517:1-18; ALJD 14:25-27. When questioned at the hearing, Jordan Lanting and Moldenhauer had no reasonable explanations for questioning the tire shop employees. TR 1273:13-15, 1658:13-25. Moldenhauer then proceeded to the parts counter and interrogated another employee, Mike Garcia, concerning the Union flyer. TR 1518:9-22; ALJD 14:33-36.

As part of Jordan Lanting's search, he also searched Discriminatee Dell'Orfano's work area. TR 805:2-806:11; ALJD 15:9-14. Jordan Lanting was hurriedly looking around Dell'Orfano's work area and asked Dell'Orfano if he saw any of the Union flyers. *Id.* Dell'Orfano confirmed he had and then questioned Jordan Lanting concerning the functions of a union. *Id.* Jordan Lanting responded that the Respondent does not need a union. *Id.*

This same day Nava observed the Union flyer at the facility in the mechanic shop. ALJD 19:18-26; TR 444:3-21. After he saw the flyer while in his office, Jordan Lanting stood in the doorway to Nava's office and uncrumpled the flyer. TR 445:17-446:15. Jordan Lanting began speaking to an unknown individual located outside of Nava's office. Nava could not see who the individual was that Jordan Lanting was speaking to but at the end of the conversation Jordan Lanting stated, "It wasn't Tony because Tony is a good guy." TR 446:18-447:11.

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D. Respondent Suspends Tire Shop Employees, Including Talbot and Rojo, For Violating Its No-Solicitation Policy

Within hours of Respondent's Union flyer investigation, it sent home Talbot and Rojo for allegedly violating its solicitation policy.¹ ALJD 15:18-20. Later that evening Moldenhauer called Talbot and Rojo and informed them that they were no longer suspended and should return to work the next morning. TR 210:6-18, 367:2-25; ALJD 15:20-22. They did so and participated in a group meeting with Tom Lanting, Moldenhauer, and Respondent manager Walter Ramirez ("Ramirez"). TR 368:20-369:9; ALJD 15:24-29. The suspended employees were told that they would be made whole for lost wages. *Id.* After the meeting, Rojo and the other employees returned to work. TR 371:5-11.

E. Respondent Unlawfully Interrogates Tony Nava Concerning His Union Sympathies

On or about December 30, 2016, Ramirez approached Nava to have a conversation with Tom Lanting outside of the Human Resources building. ALJD 18:14-22, 33:5-11; TR 453:23-456:17. Nava briefly waited for Tom Lanting to arrive. *Id.* The conversation included Ramirez, Nava, and Tom Lanting. *Id.* Tom Lanting told Nava that he heard he wanted to climb the ladder. TR 455:18-20. Nava responded that he would like to do so one day. TR 455:20-21. Ramirez stated that he would like for Nava to continue inputting work orders, but that he would also like him to oversee the yard because Nava does a good job. TR 455:21-456:1. Tom Lanting then put his hand out and said, "Tony, do I have your loyalty?" TR 456:5-9. Nava shook Tom Lanting's hand and responded that he never planned on leaving Respondent. *Id.*

¹ Respondent employees Matthew Talbot, Mike Garcia, and Mark Garcia were also sent home on December 28, 2016. TR 207:3-19.

F. Respondent Holds A Captive Audience Meeting December 30, 2016

On the morning of Friday, December 30, 2016, Respondent held a manager meeting. During this meeting, Respondent planned to hold a mandatory meeting with employees who worked in the yard. ALJ 35:1-8; TR 1786:7-16. Respondent then held the mandatory meeting with all Facility yard employees, including tire and mechanics shop, yardmen, and forklift operators. TR 1523:3-7; ALJD 17:11-18:8, 35:108. Tom Lanting told the employees in attendance that he was not concerned about criminal backgrounds. ALJ 17:11-21; TR 223:2-22 (Talbot), 372:13-373:4 (Rojo), 450:22-25 (Nava), 809:10-25 (Dell’Orfano), 883:12-23 (Correa), 1784:23-1785:13 (Moldenhauer). He stated he did not support the Union. *Id.* He also discussed an upcoming Union meeting scheduled for Saturday December 31, 2016. ALJD 18:1-8; 35:1-8. A question was asked concerning overtime work on December 31, 2016. *Id.* Tom Lanting responded that there was plenty of work to do and overtime was available if people wanted to work, but it was not required. *Id.* He stated that if employees had to go to the Union meeting, or if they had somewhere else to go, they could. *Id.*

G. Tom Lanting Questions Nava About Tire Shop Employees On December 31, 2016

Respondent was open December 31, 2016 and employees, including Nava and Dell’Orfano, reported to work. On that day, Tom Lanting came into Nava’s office in the shop and asked, “How many tire guys showed up to work today?” ALJD 19:18-26. Nava responded that one or two had. *Id.* Lanting said, “The tire shop makes you look bad. If the new owners were to come in here today, they’d fire you.” *Id.* Lanting continued, “If you don’t like these tire shop guys, just go to HR, lie to them, tell them they threatened you.” *Id.* Lanting then said, “I have lunch with judges, police officers, district attorneys. Who do you think they’re going to believe, me or these tire shop guys? I’m the meanest person, Tony, you ever want to meet. I love

animals more than people.” *Id.* Nava did not respond to any of Tom Lanting’s statements except for his initial question. *Id.*

H. Respondent Discharges Discriminatees Talbot, Sanchez, Rojo, Nava, Correa, and Dell’Orfano

Respondent contends that after it received an anonymous letter on December 19, 2016, it decided to run criminal background checks. TR 1480:25-1481:12. Moldenhauer and Tom Lanting decided it would terminate anyone who was discovered to have falsified their application. TR 1486:1-13. Moldenhauer ran background checks on approximately twenty people all within the classifications of security guards, tire technicians, yardmen, forklift operators, and leads “because they were – the moved about the yard and had access to the equipment, the gates.” TR 1485:16-18, 1485:23-25. Moldenhauer started this investigation within days of discovering the Union flyer and activity. TR 1700:17-21.

Moldenhauer completed the background checks and ran two particular situations by Tom Lanting. Respondent lead mechanics Leo Velasco (“Velasco”) and Tomas Morales (“Morales”) both answered “yes” to the criminal convictions question but failed to list any convictions on the application. Respondent decided not to take any adverse action against Velasco and Morales because the Respondent failed to catch the omission when the applications were submitted. TR 1708:21-1709:4, 1709:12-18, 1712:1-22, 1713:10-1714:7. Respondent also did not take any adverse action against Respondent employee Larry Flores (“Flores”), who answered “no” and failed to disclose a DUI conviction, and Daniel Solis (“Solis”), who answered “yes” and failed to list all of his convictions. GX 15, pgs. 2, 17; see also JX 14, paragraph 2, GX 17, pgs. 3, 11. Ultimately, Respondent terminated ten employees for falsifying their applications, six of which are the Discriminatees. GX 5, 6-8.

I. The Hearing and Decision

On November 28-30, 2017 and January 9-11, 2018, in Los Angeles, California, an evidentiary hearing was held before ALJ Andrew S. Gollin. After the hearing on the unfair labor practices, and briefing by the parties, on April 11, 2018, Judge Gollin issued his Decision. In regards to the unfair labor practice allegations, the ALJ found that: Respondent violated Section 8(a)(1) of the Act when Tom Lanting and Jordan Lanting separately interrogated employees regarding employees' union activities, membership, and sympathies; and Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Correa, Dell'Orfano, Nava, Rojo, Sanchez, and Talbot, because of the employees' union activities, and to discourage others from engaging in those activities.² ALJD 2:1-5.

The ALJ ordered Respondent to cease and desist from the actions determined to be unfair labor practices and ordered notice posting. ALJD 46:6-8, 48:4-16. He also ordered reinstatement of Correa, Dell'Orfano, Nava, Rojo, Sanchez, and Talbot and ordered Respondent to make them whole for any loss of earnings and other benefits caused by their discriminatory terminations. ALJD 46:10-15.

As set forth fully below, the Respondent's exceptions should be dismissed.

III. LEGAL ARGUMENT

A. Respondent Did Not Comply With The Procedural Requirements Of Section 102.46

Section 102.46(b) of the Board's Rules and Regulations sets forth the minimum requirements for Board consideration of a party's exceptions to an administrative law judge's decision, including the setting forth of those specific portions of the judge's decision to which it

² ALJ Gollin dismissed the allegations concerning the interrogation, suspension, and termination of discriminatee George Garcia.

excepts, with supporting legal or record citations or appropriate argument. See *Rocket Industries*, 304 NLRB 1017 (1991). Respondent does not address Exceptions 3, 16, 19, and/or 42³ in its Exceptions Brief. The Exceptions and the Exceptions Brief do not set forth any argument or citation of authority in support of these exceptions, so these exceptions should be disregarded. Additionally, broad general exceptions, which do not clearly identify the issues, are not acceptable. See *Sunshine Piping, Inc. v. United Assoc. of Journeymen & Apprentices*, 351 NLRB 1371, 1371, fn1 (N.L.R.B. Dec. 31, 2007)(bare exceptions wherein the Respondent presented no argument should be disregarded); see also *New Concept Solutions, LLC*, 349 NLRB No. 106, slip op. at 1 fn. 2 (2007); *Howe K. Sipes Co.*, 319 NLRB 30 (1995). Respondent's broad general exceptions (Exceptions 1 and 2) do not meet the minimum requirements and should be disregarded. Finally, Respondent's Exception 15 concerning payment for the tire theft is immaterial as it does not form the basis of any legal conclusions by the Judge. Thus, it should be disregarded.⁴

B. The Board Must Give Deference to The ALJ's Credibility Determinations

The Board has long granted substantial deference to the credibility determinations made by Administrative Law Judges, as reflected in the Board's established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the judge was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). A careful review of the record evidence illustrates that there is no such basis for reversing ALJ Gollin's findings. *Kag-West*, 362 NLRB No. 121, fn. 1 (June 16, 2015).

³ Moreover, ALJ Gollin did not order the IBT to do anything by way of his Decision. Thus, Exception 42 should be disregarded. Also, Rendon, Ceja, and Herrera are admitted agents within Section 2(13) of the Act. JX1, JX 14; TR 921-23; ALJD 3:39-42.

⁴ If not disregarded, it should still be dismissed because payment of a deductible does not mean Respondent's insurer did not then remit money to the customer.

It is well settled that an ALJ's decision is entitled to deference and great weight. The ALJ's findings are particularly important where, as here, the credibility of witnesses plays a key component of the findings:

Weight is given to the administrative law judge's determinations of credibility for the obvious reason that he or she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records' . . . We simply observe that the special deference deservedly afforded the administrative law judge's factual determinations based on testimonial inferences will weigh heavily in our review of a contrary finding by the Board. In our view, this position is mandated by the Supreme Court's instruction that 'the significance of [the administrative law judge's] report, of course, depends largely on the importance of credibility in the particular case.

Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977); see also *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

The Board should, therefore, rely upon the credibility resolutions reached by ALJ Gollin after his careful consideration of the appropriate factors, including the witnesses' demeanor.⁵

C. ALJ Gollin Correctly Found That Respondent's Witnesses Were Not Credible

Credibility determinations may be based on witness demeanor, weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Allied Mechanical*, 349 NLRB No. 117, fn. 4 (May 31, 2007); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In general, in considering the trustworthiness of the testimony of the key witnesses, the Discriminatees were properly credited over Respondent's decision-makers Tom Lanting and Moldenhauer.

By way of example, on one of the most key aspects of this case—the background checks, the Respondent's main witnesses contradicted one another. Tom Lanting tried his best to distance

⁵ In assessing the witnesses' credibility, ALJ Gollin relied primarily on demeanor. ALJD 2, fn. 3.

himself from the background checks. He testified that he had no idea who Moldenhauer was running the background checks on or why. TR 1089:6-17. He also denied speaking with Moldenhauer about the background checks. *Id.* Moldenhauer sharply contradicted this testimony. Moldenhauer and Tom Lanting did discuss running the background checks and terminating anyone who falsified the job application. TR 1486:1-13. This conversation was prior to Moldenhauer running background checks because no one was identified as falsifying the application when Tom Lanting and Moldenhauer discussed the consequences for falsification. *Id.* Moldenhauer also consulted Tom Lanting after she ran the background checks concerning a few select employees. TR 1708:21-1709:4, 1709:12-18, 1712:1-22. Tom Lanting and Moldenhauer clearly did not get their story straight which was not lost on the Judge.

ALJ Gollin stated, “I found Tom Lanting’s demeanor was guarded, defensive, and he appeared less than forthright. His testimony was often evasive, inconsistent, and non-responsive.” ALJD 18:26, fn.32. ALJ Gollin properly discredited Tom Lanting’s testimony denying his role in the background checks, his interrogations of Nava and Dell’Orfano, as well as his December 31, 2016 conversation with Nava. ALJD 18, fn. 32; 19, fn. 33, fn.34; 26, fn. 40.

With respect to Moldenhauer several parts of her testimony lacked credibility as well. By way of example, she testified that did not conclude that any tire shop employee violated the distribution policy. TR 1779:1-4. However, she admitted that Jordan Lanting told her which locker he found the flyers in and she asked Talbot to identify who used the locker at issue. TR 1517:3-16, 1658:13-22, 1777:8-17. Talbot informed her that he used the locker and his brother Matthew Talbot and Rojo used the locker as well. TR 1653:16-19. Moldenhauer then admitted to calling Talbot after his suspension to return to work and sat in during the meeting where they were told they would be made whole. TR 210:6-18, 368:20-369:9. Clearly, Moldenhauer

concluded that Talbot (as well as the others suspended) violated the distribution policy but she claimed otherwise despite clear evidence to the contrary.

Additionally, Moldenhauer's explanation of selecting the group to perform background checks on was not believable. She testified she selected to run background checks on 20 employees because they had access to the yard and equipment. TR 1481:6-12, 1485:16-18, 1485:23-25. With respect to the equipment, Moldenhauer testified she focused on the trucks and trailers, yard goat/truck, forklifts, and gates. TR 1791:23-1792:4. However, justifying the search group based on access to this equipment is also illogical because almost everyone who works at Respondent has access to the equipment identified by Respondent. One key starts every truck so everyone issued a key or who had the ability to make a copy of the key had access to the trucks and trailers. TR 1184:11-17, 1641:4-7. Additionally, there are only two gates at the facility, one in the front and one in the back. Security guards had access to front gate. TR 1775:3-1776:1. The back area was blocked by a container but when that container was moved, anyone at the facility would have access to the back "gate". TR 1776:2-1771:1. Moldenhauer also did not run background checks on 25-30 mechanics who work in the yard but ran checks on the lead mechanics. TR 1626:18-22, 1719:25-1720:5, 1638:23-1639:14. If lead mechanics had access to the equipment and yard surely all mechanics met that same criteria. However, this group was not included in Respondent's search group. Moldenhauer's testimony on key aspects of this case was properly discredited by ALJ Gollin.

D. ALJ Gollin Correctly Found That Respondent Interfered With, Restrained, And Coerced Employees In Violation of The Exercise Of Rights Guaranteed In Section 8(A)(1) Of The Act

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, including

“the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157; see 29 U.S.C. § 158(a)(1).

1. **After Weighing The Evidence, Including The Credibility Of The Witnesses, The ALJ Correctly Determined That Respondent Interrogated Employees About Their Union Activities**

It is unlawful for an employer to interrogate employees about their union sympathies or those of their co-workers. The “task is to determine whether, under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Healthcare Center*, 330 NLRB 935, 940 (2000). To assess whether an interrogation is coercive, the Board considers such factors as whether proper assurances were given during the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and the truthfulness of the reply. *Metro One Loss Prevention Services*, 356 NLRB No. 20 (2010); *Stabilus, Inc.*, 355 NLRB 836, 850 (2010). Under this test, either the words themselves, or the context within which they are used, must suggest an element of interference or coercion. *Stabilus, Inc.*, *supra* at 850.

a) *ALJ Gollin Correctly Found That Respondent Via Jordan Lanting Interrogated Employees About Their Union Activities In The Tire Shop*

On December 28, 2016 Jordan Lanting, recruiter/manager for Respondent, interrogated employees concerning the Union flyers in Respondent’s tire shop. ALJD 32:11-13. See *United Services Automobile Assn.*, 340 NLRB 784, 785-86 (2003), *enfd.* 387 F.3d 908 (D.C. Cir. 2004) (Board finds that employer violates Section 8(a)(1) by interrogating employees about the distribution of flyers). See ALJD 32:22-24.

Jordan Lanting was notified of the Union flyer and proceeded to investigate the tire shop after he was notified by a supervisor that the flyers may have come from the tire shop. TR 1215:18-21. When Jordan Lanting entered the tire shop several employees were on a break and he asked them “what’s going on?” TR 194:11-15, 196:7-197:4. At that time, Talbot, his brother Matthew Talbot, Rojo, Sanchez, and Correa were present. TR 194:16-25 (Talbot), TR 353:13-355:8 (Rojo), TR 518:2-523:8 (Sanchez); TR 865:6-867:8 (Correa). Jordan Lanting began looking around the tire shop looking through things and turning boxes over. TR 196:12-13, 353:13-355:8, 518:2-523:8, 865:9-13. Eventually he looked inside one of the lockers and found flyers inside. TR 194:16-25, 353:13-355:8, 518:2-523:8, 865:6-867:8. Jordan Lanting asked the group “what’s this all about?” referring to the flyer. ALJD 32:20-21; TR 196:18-20, 243:9-244:15. Talbot responded to Jordan Lanting that it was illegal for him to ask that question. ALJD 32:25-26; TR 196:21-22, 865:17-19.

Respondent claims Jordan Lanting did not ask about the flyer. Respondent Brief at 49. However, the record shows that Jordan Lanting admitted he did not remember what exactly was said during his raid of the tire shop so his testimony is suspect per his own admission. ALJD 14, fn 22; TR 1217:17-24. He denied any discussion concerning “illegal” conduct or the Union. TR 1240: 14-1241:4. On the other hand, multiple witnesses testified that he asked questions concerning the flyer and the Union. ALJ Gollin’s finding that Jordan Lanting did question employees is based on the record and reasonable inferences.

Jordan Lanting’s questioning undoubtedly tends to coerce employees to feel restrained from exercising Section 7 rights. Respondent cites *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985) in support of its argument that Jordan Lanting’s questioning was not coercive. However, in that case the Board highlighted the fact that “it did not reasonably appear from the nature of these questions that Easterly [employer agent] was seeking to obtain information from

Rothweiler [employee] on which she might in turn take adverse action against employees” and noted that the employer’s agent had a friendly relationship with the employee at issue and the conversation in question was casual and amicable. *Id.* at 1218. There are no similarities in this instance. ALJ Gollin correctly determined that Jordan Lanting, the president’s son (who had no responsibility over non-driver employees in the tire shop) was seldom in the shop and his visit that day “was neither random nor casual.” ALJD 32:13-17. Not only did Jordan Lanting not give assurances during the questioning, he was clearly on a mission to take adverse action against anyone involved with the flyers. Discriminatee Rojo described him storming into the tire shop and “ransacking” it looking through things and turning boxes over. TR 353:13-355:8. Considering Jordan Lanting is the son of Tom Lanting, Respondent’s President, his presence in the tire shop and “ransacking” of the items therein send a more serious message to employees given his authority. Jordan Lanting then proceeded to interrogate Correa, Sanchez, Talbot, and Rojo directly about the Union since as ALJ Gollin noted the flyer was “clear on its face.” ALJD 32:20. This interrogation occurred a day after the first Union meeting and three days before the next Union meeting.

Given this conduct, ALJ Gollin’s factual determinations based on Jordan Lanting’s credibility should be upheld because Respondent violated Section 8(a)(1) when it interrogated employees in the tire shop because Jordan Lanting’s questioning, under the totality of the circumstances, had a reasonable tendency to interfere, restrain, or coerce employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

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b) *ALJ Gollin Correctly Found That Respondent Via Tom Lanting Interrogated Discriminatee Nava About His Union Sympathies*

On or about December 30, 2016, Nava engaged in a conversation outside of Human Resources, set up by Ramirez, with Tom Lanting and Ramirez. ALJD 18:14-22, 33:5-11. Tom Lanting told Nava that he heard he wanted to climb the ladder at Gardner. *Id.*; TR 455:18-20. Nava responded that he would like to do so one day. *Id.*; TR 455:20-21. Ramirez stated that he would like for Nava to continue inputting work orders but that he would also like him to oversee the yard because Nava does a good job. *Id.*; TR 455:21-456:1. Tom Lanting then put his hand out and said, “Tony, do I have your loyalty?” *Id.*; TR 456:5-9. Nava shook Tom Lanting’s hand and responded that he never planned on leaving Gardner. *Id.*

Tom Lanting’s interrogation is coercive under these circumstances. The questioner (Tom Lanting, President of Respondent); the question posed by Lanting (“do I have your loyalty?”); the environment in which it was posed (one-on-one with another manager, Ramirez, present); the timing (days after Union activity was discovered), all highlight that the interrogation interfered with Nava’s rights under the Act. ALJD 32:37-33:5. Against the backdrop of the organizing campaign, President Lanting’s questioning of Nava about his loyalty was coercive as it was veiled interrogation about whether Nava was loyal to Respondent or to the Union. Tom Lanting did not provide any assurances prior to or during the questioning. Nava only had one option—go along with what Tom Lanting wanted to hear—he was a company man who was interested in moving up the ladder.

Respondent argues that Tom Lanting’s questioning was not coercive citing *Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). However, Tom Lanting’s conversation with Nava was not a casual conversation among friends- Nava was

all alone with his supervisor and Tom Lanting. Respondent’s contention that the conversation did not relate to the Union whatsoever given the context as noted by ALJ Gollin—a day after Jordan Lanting made his “good guy” comment and after the December 30th mandatory meeting—is disingenuous.⁶ ALJD 32:37-33:5. ALJ Gollin’s conclusion that Tom Lanting asked for Nava’s loyalty and that such a comment under all the circumstances resulted in an illegal interrogation is correct.

E. ALJ Gollin Correctly Determined that Respondent’s Fabricated “Justifications” For The Discriminatees’ Terminations Violated Section 8(a)(3)

An employer violates the Act when it discriminates against employees for engaging in Union or other protected concerted activities, and has no other basis for the adverse employment action, or the reasons proffered are pretextual. *Wright Line*, 251 NLRB 1083 (1980),

To establish that an employer unlawfully disciplined an employee, the General Counsel must show, by a preponderance of the evidence, that the protected activity was a motivating factor in the employer’s decision to discharge that employee. *In re Caruso Elec. Corp.*, 332 NLRB 519, 522 (discussing *Wright Line*, 251 NLRB 1083 (1980) enf’d. 662 F.2d 899 (1st Cir. 1981)). “The elements commonly required to support such a showing [that protected conduct was a motivating factor] are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.” *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Once the General Counsel has made this required showing the burden shifts to the employer to demonstrate, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected union activity. *Id.*

⁶ At the mandatory meeting Tom Lanting expressed his belief that the employees did not need the Union. ALJD 33:1.

In establishing a prima facie case of unlawful motivation, proof of such discriminatory motivation can be based on direct evidence of such union animus or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 123 (2004). To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Id.* citing *Embassy Vacation Resorts*, 340 NLRB 94 (2003).

1. **ALJ Gollin Correctly Determined Talbot, Correa, Dell’Orfano, Nava, Rojo, and Sanchez Engaged In Union Or Protected Concerted Activities⁷**

ALJ Gollin correctly found that that the Discriminatees engaged in a variety of Union or protected/concerted activities prior to their discharges. ALJD 34:27-32. Talbot, Correa, Dell’Orfano, Nava, Rojo, and Sanchez all engaged in discussions amongst themselves and with other Respondent employees at Respondent’s facility concerning contacting the Union to seek representation and/or attending Union meetings. TR 161:9-164:19 (Talbot), 346:2-24 (Rojo), 439:5-22 (Nava), 514:9-23 (Sanchez), 632:14-633:8, 636:13-638:2, 640:2-641:11, 794:16-795:3, 797:15-798:5 (Dell’Orfano), 857:19-860:5 (Correa).

On December 28, 2016, Talbot, Rojo, Sanchez, and Correa were all present during Jordan Lanting’s interrogation and search of the tire shop. ALJD 34:36-38; TR 194:16-25 (Talbot), 353:13-355:8 (Rojo), 518:2-523:8 (Sanchez); 865:6-867:8 (Correa). Respondent takes issue with this finding since the exact time of Jordan Lanting’s visit and Sanchez and Correa’s arrival were

⁷ Respondent generally alleges that Respondent did not have knowledge of Union activities but does not set forth any argument concerning the Union activities of Talbot or Rojo.

not specified on the record. Respondent Brief at 22. However, ALJ Gollin properly credited Sanchez and Correa's specific testimony concerning their presence in the tire shop at the time Jordan Lanting searched for the Union flyers. ALJD 14:12-13, fn 21; TR 518:2-523:8 (Sanchez testified specifically that he observed Jordan Lanting searching for and finding the Union flyers); 865:6-867:8 (Correa testified he observed Jordan Lanting search the tire shop, find the flyers, and question employees). Rojo also testified that Sanchez and Correa were present during the search and interrogation and Correa confirmed that Sanchez was present. TR 354:13-14 (Rojo); TR 866:10-12 (Correa). Talbot, Rojo, Sanchez, and Correa all engaged in protected activity and Respondent was clearly aware of this conduct. Talbot and Rojo were suspended for distributing Union flyers.⁸

On December 31, 2016 Dell'Orfano reported to work at Respondent's facility and when he was leaving he approached the Lantings who were standing next to each other in front of the tire shop. ALJD 19:30-37; TR 811:9-814:3. Dell'Orfano greeted them and Tom Lanting asked if he was going home. *Id.* Dell'Orfano stated that he was but he had planned to attend the Union meeting but he was not able to leave in time. *Id.* Dell'Orfano then asked Tom Lanting what the Union does because he wanted to go "check it out". *Id.* Tom Lanting responded that all unions do is what you can do for yourself, all they do is take your money from you. *Id.* Respondent does not argue that this conversation did not occur, rather that this conversation does not mean that he supported the Union or that Moldenhauer knew about this conversation.⁹ Clearly an employee

⁸ Talbot estimated that he distributed approximately 15-20 flyers to Respondent employees he saw on December 28, 2016. TR 186:16-187:19.

⁹ Tom Lanting denied having this conversation but ALJ Gollin did not deem him credible. ALJD 19-20, fn 34. Moreover, ALJ properly drew an adverse inference from Respondent's failure to question, and objection to General Counsel's questioning of Jordan Lanting on cross-examination, concerning the December 31, 2016 conversation with Dell'Orfano. *Id.*

indicating a desire to attend a Union organizing meeting is not looked upon favorably by Respondent after holding a captive audience meeting the day before advocating against the Union. ALJD 18:3-4. This was especially true in Dell'Orfano's case who was already told by Jordan Lanting December 28, 2016 that the Union "don't help us. We don't need them" in response to Dell'Orfano's inquiry regarding what a Union does. ALJD 15:9-14; 19, fn 34. Clearly, Dell'Orfano engaged in protected activity that the Respondent was directly aware of via the December 31st conversation.

Sanchez and Talbot attended the December 31, 2016 Union meeting and did not report to work. TR 174:19-175:25(Talbot), 515:12-18, 516:24-517:4 (Sanchez); GX 10. Correa was also not at work December 31, 2016. TR 878:1-4.

2. **ALJ Gollin Correctly Found That Respondent Had Knowledge Of Talbot, Correa, Dell'Orfano, Nava, Rojo, and Sanchez's Union Or Protected Concerted Activities**

Respondent's knowledge is established by direct and circumstantial evidence together with reasonable inferences. Barragan testified that after the Union meeting, "once everybody came back, people started talking, so and so went, so and so went." TR 1159:13-17, 1198:20-24. The week after the meeting "everybody was saying the whole shop was there, a few drivers were there." TR 1186:5-19. When questioned about the Union meeting, Barragan stated that, "It was the talk of the – you know, the whole yard." Barragan also spoke about the Union meeting with his supervisors *prior to the meeting*. TR 1198:9-1199:9.

With respect to the Union flyers on December 28, 2016, once Respondent had notice it instantly sprang into action. After Jordan Lanting was told there were flyers in the parking lot and in the trucks, he immediately went to the parking lot to take them off the cars. TR 1214:3-10. Jordan Lanting was told by Villalobos that he thought the flyers may have come from the tire shop.

TR 1215: 18-21. Jordan Lanting then searched the tire shop and interrogated Talbot, Rojo, Sanchez, and Correa. TR 194:16-25 (Talbot), 353:13-355:8 (Rojo), 518:2-523:8 (Sanchez); 865:6-867:8 (Correa). Jordan Lanting then reported his findings to Moldenhauer who reported the events multiple times to Tom Lanting that day. TR 1019:7-21, 1219:20-25, 1516:14-20, 1519:1-5, 1649:11-24. Moldenhauer went to the tire shop and told employees that they cannot distribute the flyers during working hours. TR 1516:21-24. She also interrogated the employees about who used the locker and she was told Talbots, Rojo, and one other individual. TR 1517:1-18. Moldenhauer also admitted to interrogating Mike Garcia at the parts counter about the flyer. TR 1518:9-22. Moldenhauer obviously thought these employees were distributing the flyers during working hours or she would not have taken the steps she did.

Jordan Lanting's observations impute knowledge on Respondent concerning these Union activities and who was involved. Out of the Discriminatees, Talbot and Rojo were suspended that day for distributing the Union flyer so there is no question Respondent, at least at one point, believed they had distributed the flyers.¹⁰ TR 364:16-365:10; TR 204:12-206:11. Barragan confirmed that the facility was buzzing concerning the Union flyers. He had conversations with multiple employees and management concerning the flyers. TR 1117: 20-1118:6. He also saw the flyers in the yard, in the bathroom, in the breakroom, and in the dispatch office. TR 1173:1-25.

¹⁰ Moldenhauer claimed that she had no knowledge that Talbot created and distributed the flyers. TR 1495:5-7. However, she testified that Jordan Lanting told her flyers were being distributed in the tire shop and she believed that was a violation of the distribution policy. TR 1516:14-24. This prompted her to search the tire shop and question Talbot about the locker where Jordan Lanting found the flyers. TR 1517:1-25. Talbot admitted to her that he used the locker. *Id.* Additionally, she called Talbot after his suspension and told him to return to work and sat in during the meeting where they were told they would be made whole. TR 210:6-18, 368:20-369:9. There would be no reason to grab the policy, question Talbot, or suspend him for violating the policy if Respondent did not believe Talbot engaged in the protected activity at issue.

He talked to dispatchers about the flyer, “Yes, after we saw them everywhere then everybody was talking about them.” TR 1174:4-15.

Respondent was also aware of Dell’Orfano’s discussions about the Union and intent to attend the Union meeting because on December 31, 2016, Dell’Orfano spoke directly about it with Jordan and Tom Lanting. TR 805:2-806:11, 811:9-814:3. That same day Tom Lanting tried to discern who was at the Union meeting by questioning Nava about attendance in the tire shop as described below. ALJD 35:9-11, 36:8-14.

Finally, Respondent suspected Nava of copying Union flyers when Villalobos questioned him and Jordan Lanting stood in Nava’s doorway, uncrumpled the Union flyer and discussed whether Nava was responsible. TR 445:17-446:15-447:11. Tom Lanting also directly questioned Nava about his Union sympathies as explained above. In sum, ALJ Gollin properly found, based on preponderance of the evidence, that Respondent’s knowledge is established by direct and circumstantial evidence.

Respondent repeatedly contends that knowledge is lacking because Moldenhauer testified that she had no knowledge of Union activities (besides Talbot and Rojo). Respondent Brief at 23. However, Respondent ignores ALJ Gollin’s determination that Tom Lanting was involved in the decision to terminate the Discriminatees.¹¹ ALJD 26, fn. 40. Thus, Moldenhauer’s particular knowledge is not relevant. Moreover, Respondent’s knowledge is imputed via the knowledge of its agents- which include Moldenhauer, Tom Lanting, Jordan Lanting, and Alex Alzola.¹² See *Pinkerton’s, Inc.*, 295 N.L.R.B. 538 (1989) (knowledge of a supervisor is attributable to the employer where the employer does not negate imputing such knowledge).

¹¹ Respondent did not contest this finding in its Exceptions.

¹² Tom Lanting, Alex Arzola, and Moldenhauer are/were admitted supervisors and agents within Section 2(11) and (13) of the Act. GX 14; TR 916-921; ALJD 3:39-40.

*a) ALJ Gollin Correctly Found That The General Counsel Met Its
Burden Concerning Employer Knowledge*

Respondent argues that a finding that the Respondent targeted a group is not appropriate because the complaint does not allege Respondent took retaliatory activity to punish employees as a group. Respondent Brief at 23. Respondent cites no legal authority in support of its argument. Clearly allegations concerning employer knowledge includes knowledge deemed sufficient by standards set forth in the governing Board law. In reality, Respondent disagrees with established board precedent which provides that there is no requirement that General Counsel make individualized findings regarding the employer's knowledge of each employee's union activity, if an employer takes "adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group "to discourage union activity or in retaliation for the protected activity of some. *Electro-Voice, Inc.*, 320 NLRB 1094 fn. 4 (1996) (quoting *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985) and citing additional cases therein)." ALJD 35:20-37 (additional citations omitted). Since Respondent discharged Talbot, Sanchez, Correa, Nava, Dell'Orfano, and Rojo as part of an attempt to punish the employees as a group, to discourage union activity, and to retaliate for the protected activity of some, the General Counsel is not obligated to establish a correlation between each employee's protected activity and his discharge. ALJD 35:39-37:4. Respondent cites no legal authority in argument against this precedent. Instead Respondent argues that it was not attempting to punish employees or send a message because the time to do that was when "employees violated company policy by distributing flyers." Respondent Brief at 24. Such an argument is puzzling because Respondent did send a message then by suspending employees for distributing flyers. The fact that they were ultimately made whole only shows that Respondent realized its conduct violated

the law. ALJ Gollin properly cites and applies governing law and his finding that Respondent had the requisite knowledge is properly supported by the evidence and law.

3. ALJ Gollin Correctly Found Respondent Had Anti-Union Animus

Anti-union animus is a question of fact and may be inferred from either direct or indirect evidence. *See Lippincott Indus., Inc. v. NLRB*, 661 F.2d 112, 116 (9th Cir. 1981). Here, there is both direct and indirect evidence of anti-union animus. ALJD 36:6. ALJ Gollin found direct evidence of animus based on Nava's testimony concerning his December 31st conversation with Tom Lanting. He stated,

After Lanting learned how few of the tire technicians showed up to work, and may have gone to the Union meeting, Lanting told Nava, "The tire shop makes you look bad. If the new owners were to come in here today, they'd fire you." Lanting said, "If you don't like these tire shop guys, just go to HR, lie to them, tell them they threatened you." Lanting then said, "I have lunch with judges, police officers, district attorneys. Who do you think they're going to believe, me or these tire shop guys? I'm the meanest person, Tony, you ever want to meet. I love animals more than people." ALJD 36:8-14.

This statement highlights Tom Lanting's anger towards the tire shop employees he believed attended the Union meeting. ALJ Gollin's finding of direct animus should be upheld.

Respondent also claims that since Tom Lanting told employees they could attend the Union meeting no animus towards the protected activity was proven.¹³ Respondent Brief at 27-28. In order to maintain this argument Respondent contended that Tom Lanting's rant to Nava concerning the tire shop employees who were not at work December 31 did not occur. Respondent relies upon the testimony of Tom Lanting who denied having the conversation and his attendance at the facility December 31. Respondent Brief at 27-28. Respondent conveniently ignores portions of Tom Lanting's testimony wherein he claimed he did not remember if he was at the facility on December

¹³ Respondent's argument concerning Tom Lanting's anti-union comments should be rejected since that did not form the basis for ALJ Gollin's finding of animus. ALJD 36:6-29.

31, 2016. TR 1030:11-13. Respondent also ignores the testimony of two other witnesses (in addition to Nava) who independently corroborated Tom Lanting's presence at the Facility December 31, 2016. TR 376:2-3 (Rojo); 460:1-9 (Nava); 811:9-814:3 (Dell'Orfano). ALJ Gollin properly accessed the credibility of Tom Lanting as described in detail above. This finding should be undisturbed.

Indirect evidence of animus also exists as a result of the timing of the discharges. ALJD 36:19-29. The timing of an employer's adverse action gives rise to an inference of animus. See generally *Hewlett Packard Co.*, 341 NLRB 492, 498 (2004) (suspicious timing may strongly indicate unlawful motive); see *Golden Day Sch., Inc. v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981) (timing of discharge was indicia of discriminatory motive); *Bethlehem Temple Learning Ctr.*, 330 NLRB 1177, 1178 (2000).

Here, Respondent discharged Talbot, Correa, Dell'Orfano, Nava, Rojo, and Sanchez approximately two weeks after it became aware of the Union activity at the facility. TR 160:19-20 (Talbot), 330:23-331:6 (Rojo), 429:10-13 (Nava), 523:12-17 (Sanchez), 786:12-13 (Dell'Orfano), 857:7-8 (Correa). Respondent made the decision to target the Discriminatees within days of learning of the Union activity as Dell'Orfano's background appears to have been printed on January 4, 2017 (JX 7, pgs. 34-92) and Talbot's background check was run January 8, 2017 at 9:58 pm (JX 3, pg. 33). Moldenhauer testified she began to run the background checks in late December which would establish an even more suspect temporal connection between the Union activity and the adverse action. TR 1700:17-21. Respondent's timing in discharging the Discriminatees strongly suggests animus.

Respondent argues that timing was not critical relying on *BHC NW Psychiatric Hosp., LLC*, 365 NLRB No. 79 (2017) ("*BHC*") claiming that this case is "no different". Respondent Brief at 30. In *BHC*, a union supporter was discharged for her behavior in connection with a tour

group which included screaming and yelling at a hospital supervisor (who was leading the tour), questioning the visitors directly about their presence on several separate occasions, and using profanity in front of the tour in the parking lot saying her supervisor does not “do shit” and she was getting the fuck out of here”. While this behavior occurred the day after a bargaining session the ALJ found, and the Board upheld, a finding that her union conduct was not a motivating factor in the discharge. The discriminate, DiGiacomo attended bargaining sessions November 10 and 11 but that did not invoke an adverse response from the employer-in fact it relented in its position November 10th on November 11th and bargained as requested by DiGiacomo. Additionally, the employer met with her to address a complaint she made about management at the November 11 bargaining session. The ALJ also found DiGiacomo’s testimony “unreliable”, “embellished”, and contradictory of her affidavit. Concerning her parking lot conversation, he stated, “I specifically reject as implausible, self-serving post-hoc rationalizing and fabricated DiGiacomo's testimony that, in her parking lot confrontation, she mentioned staffing problems, DeShields' alleged intimidation, or the need for DeShields to notify her before bringing the tour visitors to her unit. *17, at fn. 10. Thus, the ALJ determined that the motivating factor for the discharge was an independent set of circumstances apart from any protected activity—DiGiacomo’s unprovoked misconduct with the tour group. *Id.* at *26. Also, the decision maker had no role in bargaining.

There are little similarities between *BHC* and this matter. Here, Respondent took swift adverse action upon learning of the union activity—searches, interrogations, suspensions, and ultimately discharges. There is a clear link between the adverse action the discriminatees faced as a result of their union activity. There was no independent set of circumstances. The only reason Respondent looked at the applications was due to the Union and protected activity. Moreover, ALJ Gollin found the discriminatees credible which was not the case in *BHC*. Additionally, Moldenhauer was deeply integrated with Respondent’s adverse actions against the discriminatees

and did not make the decision alone as she consulted Tom Lanting. ALJ Gollin properly considered timing in this case and *BHC* does not compel a contrary finding.

4. ALJ Gollin Correctly Determined Respondent’s Reasons For Discharging Talbot, Correa, Dell’Orfano, Nava, Rojo, and Sanchez Are Pretextual

An employer violates the Act by firing “an employee for having engaged in protected activities when there is no legitimate reason for the discharge, or the reasons offered are only pretexts.” *Ready Mixed Concrete Co. v. N.L.R.B.*, 81 F.3d 1546, 1550 (10th Cir. 1996). Respondent asserts that it discharged Correa, Dell’Orfano, Nava, Rojo, Sanchez, and Talbot because they falsified their employment applications by failing to disclose their criminal backgrounds. ALJD 36:31-34. Respondent learned of this information after Moldenhauer conducted background checks online. *Id.*

Respondent claims it decided to run the background checks because: (1) Respondent experienced a tire theft at its facility in October 2016; and (2) Respondent received an anonymous letter on December 15, 2016 which raised concerns about employees with criminal convictions working at the Respondent’s facility. TR 1480:25-1481:12; RX 18. Both of these reasons for running the background checks are disingenuous. ALJ Gollin correctly concluded that Respondent’s rationale for running the background checks—the December 15 anonymous letter and the October 8 tire theft—are pretextual. ALJD 37:5-7.

a) ALJ Gollin Correctly Found That The Background Checks Did Not Result From The Anonymous Letter

Regarding the anonymous letter, it is all too convenient that the Respondent received a letter (supposedly at just about the same time it learned of the Union activity at its facility) that it then relied upon for discharging Union supporters. Respondent purportedly relied upon this letter

to justify the background checks but it failed to show any convincing evidence concerning the time it received this letter and who the author was. RX 18. The letter was allegedly left in Moldenhauer's office in an envelope with Moldenhauer's name on the outside. TR 1477:6-8. However, the letter is addressed to "sirs". RX 18. Moldenhauer claimed she received the letter December 19 but Respondent produced no additional evidence confirming that date. Tom Lanting did not even know what the letter stated. He testified that Moldenhauer told him she got a letter stating "that we have a thief there." He told her to "look at it and see what you find out, what your findings are." TR 1015:9-21. Tom Lanting did not testify as to when this conversation occurred or when he allegedly saw the letter. ALJD 37:12-17. Moreover, the letter did not state what Tom Lanting testified Moldenhauer mentioned. ALJ Gollin properly determined that Moldenhauer's uncorroborated testimony concerning her receipt of the anonymous letter was too suspect to be credited. ALJD 37:19-20.

Respondent argues that the ALJ improperly discredited Moldenhauer because her testimony regarding receiving the letter on December 19th and evidence relating to the letter was uncontroverted. Respondent Brief at 34. However, Respondent's premise for this argument is incorrect because there was evidence that disputed Respondent's contention regarding receipt of the letter and timing of the receipt. As noted by ALJ Gollin it is unclear if a letter even existed December 19th let alone when it was received. ALJD 37:7-19. The anonymous letter, on its face, is suspect. ALJ Gollin did not error by concluding that Moldenhauer's uncorroborated testimony should not be credited.

Respondent takes issue with ALJ Gollin's inferences of animus based on the Respondent's inadequate investigation, departure of past practices by completing background checks on non-drivers, not using a background service, and limited the search to surrounding counties. ALJD 38:30-40; Respondent Brief at 34-45. Respondent claims that it did not use a background check

service because written consent is necessary in order to use a third party. Respondent Brief at 35. Respondent's new argument should be rejected because it offered no evidence at the hearing indicating that this was the reason Moldenhauer deviated from past practice and completed the checks herself. Respondent then argues that less criminal convictions would be discovered by limiting the searches, so Respondent's method does not show bias. Respondent Brief at 35. Respondent's argument is short sighted. The main impetus of highlighting the inadequate background investigations is to further show that Respondent's true motive in conducting the searches was to stamp out Union activity, not to uncover employee falsifications—if that was the case it would have searched all non-drivers and it would have conducted the searches fairly and objectively. ALJ Gollin correctly found that the circumstances surrounding the background checks show animus in this case.¹⁴

Despite clearly forming the basis for rejecting Respondent's rationale for running the background checks, Respondent ignores ALJ Gollin's findings concerning the lack of evidence regarding the timing of the receipt of the anonymous letter. Instead, Respondent argues that since the anonymous letter states that there are employees who have convictions "you do not know about" Respondent did learn new information via the letter which prompted the background checks. Respondent Brief at 29. Respondent again ignores the finding that Moldenhauer and Tom Lanting were not surprised by the information in the letter because they had reason to suspect employees had criminal backgrounds since they knew of Alex Arzola's Mongol affiliation and

¹⁴ Respondent does not argue that ALJ Gollin improperly found that Moldenhauer's reaction to some of the discriminatee's explanations for leaving the application blank further shows the lack of objectivity Respondent had in completing the investigation. ALJD 39:1-15. Respondent does argue that Respondent did not permit application omissions. Respondent Brief at 31-32. However, ALJ Gollin simply analyzed Respondent's response to such contentions by the discriminatees. ALJD 39:1-15. Even so, 3 discriminatees (Talbot, Sanchez, and Rojo) were all told by Alex or Danny Arzola to leave the question blank. TR 340:3-16, 340:15-17, 341:25-342:7, 344:1-10, 344:13-24, 395:1-3 (Rojo), 499:12-500:10, 500:17-25, 501:1-12 (Sanchez); 142:9-16 (Talbot).

that he had hired other members of the Mongols to work at the facility. ALJD 37:27-38:6. Tom Lanting testified that Arzola “was just hiring whoever he wanted, he was bringing people in, we didn’t know anything about them, where he was getting them, and he needed to clean house.” TR 1482:10-14. Moldenhauer and Tom Lanting knew or suspected that the Mongols were a criminal group before receiving the anonymous letter. ALJD 37, fn 54. Thus, the anonymous letter allegedly received December 19, 2016 provided Respondent no new information that compelled Moldenhauer to run the background checks.

*b) ALJ Gollin Correctly Found That The Background Checks
Did Not Result From The Trailer Theft*

Respondent argues that ALJ Gollin incorrectly found that the decision to run the background checks was not prompted by the October trailer theft. ALJ Gollin based his finding on the following factors: (1) the months that passed between the tire theft and background checks; (2) the anonymous letter did not provide any additional information concerning the tire theft; (3) Respondent’s knowledge that the theft was likely committed by or with the assistance of someone working at the Chino facility; (4) despite Tom Lanting suspecting Alex Arzola was involved, Respondent did not investigate which of its employees were involved; and (5) and Moldenhauer’s failure to link the background checks to anyone present during the tire theft. ALJD 38:8-28.

Respondent only takes issue with ALJ Gollin’s last basis. Respondent states, “Moldenhauer did not attempt to connect particular employees to the trailer theft because she was not tasked with finding out who committed that act. Rather, Moldenhauer’s sole role was to determine whether those who had criminal convictions reported those convictions on their applications.” Respondent Brief at 29. However, Moldenhauer testified that tire theft was one of the reasons she ran the checks. TR 1779. Logically then, if Respondent picked the group to try and encompass those involved with the theft it would have first checked that these individuals

were actually working the day of the theft. It did not. TR 1779:5-9. Instead, it claimed that the group of individuals investigated were targeted because they had access to the yard.¹⁵ TR 1481:6-12.

c) ALJ Gollin Correctly Found That Respondent Did Not Have to Discriminate Against All Union Supporters

Respondent, citing no legal authority, also relies on the fact that it discharged six employees but did not discharge all employees who supported the Union or engaged in Union activities. Respondent Brief at 32. It argues that despite knowing that Mathew Talbot and Mike Garcia engaged in Union activities it did not discharge them. Ignoring the fact that it would be difficult to discharge employees for falsifying applications when they did not falsify them, Respondent also infers evidence not on the record concerning the attendance of 30 employees at the Union meetings and whether the other employees discharged for falsification were in fact Union supporters. Just because charges were not filed on their behalf does not mean they were not known Union supporters. Regardless, ALJ Gollin properly rejected this argument because the Board has found that an employer's failure to discriminate against all union supporters does not establish that its actions toward the few were lawfully motivated. ALJD 35, fn. 52.

Additionally, Respondent argues that it treated employees "even-handedly" citing to *Gold Coast Restaurant Corp.*, 304 NLRB 750 751 (1991) ("*Gold Coast*"). Respondent Brief at 33. Respondent's reliance on *Gold Coast* is misplaced. In that case, one union leader and two union supporters (Guidice and Gippetti) were discharged within 1 week of signing authorization cards. The Board, solely analyzing whether timing alone was sufficient to find inference of knowledge and finding of pretext. *Id.* at 751. In this case, Guidice and Gippetti were no different than several

¹⁵ Respondent initially represented to the board that this group was chosen because they were most likely to have committed the theft "based upon the investigation". GX 3, pg. 6. However, the investigation report did not conclude any particular classification were responsible. JX 10.

other employees who were not discharged. They signed cards on the same day as other employees, had been long-time union members, and discussed the union at work just like many other employees. Since the Board could not distinguish them from the other employees it could not infer employer knowledge or pretext. *Id.* In this case however, there is a clear distinction between the discriminatees fired and those not fired. There was no evidence that Matthew Talbot or Mike Garcia falsified their employment applications. Respondent Brief at 32-33.¹⁶ Thus, the current situation presents a completely different situation than the one facing the Board in *Gold Coast* where no distinction could be made between union supporters who were retained versus those who were fired. Respondent's reliance on this case should be rejected. ALJ Gollin's finding that Respondent's actions were unlawful even if not all employees engaging in protected activity and/or Union supporters were discharged should be confirmed.

d) ALJ Gollin Properly Found Disparate Treatment

Moldenhauer completed the background checks and ran two particular situations by Tom Lanting. Respondent lead mechanics Leo Velasco ("Velasco") and Tomas Morales ("Morales") both answered "yes" to the criminal convictions question but failed to list any convictions on the application. Respondent decided not to take any adverse action against Velasco and Morales because Respondent failed to catch the omissions when the job applications were accepted. TR 1708:21-1709:4, 1709:12-18, 1712:1-22, 1713:10-1714:7. Respondent decided not take any adverse action against Respondent employee Larry Flores ("Flores"), who answered "no" and

¹⁶ Respondent uses Mike Garcia as an example of someone who was not terminated but Moldenhauer testified that she did not even run a background check on him. TR 1794:24-25. Seemingly, Respondent wants "credit" for continuing to employ a Union supporter despite not even taking the steps necessary to determine if he falsified his employment application as it did with tire shop employees.

failed to disclose a DUI conviction, and Daniel Solis (“Solis”), who answered “yes” and failed to list all of his convictions. GX 15, pgs. 2, 17; see also JX 14, paragraph 2, GX 17, pgs. 3, 11.

ALJ Gollin determined this to be evidence of disparate treatment concerning discriminatees Dell’Orfano and Correa. ALJD 39:17-35. Dell’Orfano was terminated even though he marked “yes” to the criminal convictions question and listed an evading offense in 2007 and a DUI in 2015. JX 7, pg. 5. Dell’Orfano was treated disparately in comparison to Morales and Velasco because Morales and Velasco marked “yes” and did not provide any details about their convictions on their applications. Respondent was willing to accept responsibility for not requiring Morales and Velasco to write down their convictions but unwilling to accept responsibility for less egregious conduct in Dell’Orfano’s case (Dell’Orfano did disclose the convictions he could recall). Dell’Orfano was also treated disparately from Solis who did not disclose all offenses on his application but was not terminated for falsification. There is no legitimate reason Respondent treated Dell’Orfano differently than it had in the past and different than Morales, Velasco, Solis, and Flores.¹⁷

Respondent, via a footnote, claims that ALJ Gollin improperly found disparate treatment against Dell’Orfano because ALJ Gollin omitted “the fact that Moldenhauer repeatedly asked Dell’Orfano to return so they could discuss options.” Respondent Brief at 33, fn. 22. Respondent is wrong. ALJ Gollin did consider Respondent’s request to speak with Dell’Orfano but found the requirement that Dell’Orfano further speak with Respondent to be further evidence of disparate treatment since Respondent did not invoke the same requirements on Velasco, Solis, or Morales. ALJD 39:32-35.

¹⁷ Respondent attempted to place blame on Dell’Orfano by focusing on Dell’Orfano’s lack of follow-up after his interview with Moldenhauer. TR 826:18-827:18. However, nothing Dell’Orfano said during his meeting caused Moldenhauer to reconsider his case and seek Tom Lanting’s opinion as she did with Velasco and Morales. TR 1720: 21-24.

Concerning Correa, ALJ Gollin considered his treatment unfair as compared to Larry Flores. ALJD 39:37-41. Larry Flores filled out an application in December 2015 and marked “no” to the criminal convictions question. GX 15, pg. 2; see also JX 14, paragraph 2. However, as the January 4, 2017 background search disclosed Flores had a misdemeanor driving under the influence offense he plead guilty to in 2008. GX 15, pg. 17. Flores was not terminated for falsifying his job application. See list of employees terminated in GX 5, 6-8. Correa was discharged because he checked the “no” box regarding his prior criminal convictions, even though he had misdemeanor convictions. Larry Flores also checked the “no” box under the same or similar conditions. (GC Ex. 15, pg. 9, 16–17). Flores, however, was not discharged, and Respondent provided no explanation for why not.

Respondent now claims Correa was discharged because he omitted offenses that were closer in time than Flores’ and more numerous. Respondent Brief at 33, fn. 22. Respondent presented no evidence concerning its analysis of the nature of offenses or the timing of the offenses in reaching a determining on discharge or not. In fact, Respondent introduced evidence to the contrary. Moldenhauer testified concerning deciding to discharge Dell’Orfano that the deciding factor between discharging him and retaining the other two forklift drivers was whether there were criminal convictions present. TR 1794:10-19. Notably, she did not mention number of convictions or the timing of those convictions. *Id.* Respondent puts forth another pretextual rationale for terminating Correa at this late juncture. This argument should be rejected because it was not made initially and it is not supported by the evidence. Respondent treated Dell’Orfano and Correa disparately and Judge Gollin’s conclusions regarding the same is proper.

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5. ALJ Gollin Correctly Concluded Respondent Failed To Show It Would Have Taken The Same Action But For The Discriminatees Protected Activity

ALJ Gollin determined that the General Counsel proved, by preponderance of the evidence, that the employees' protected activity was a motivating factor in Respondent's decision to discharge Correa, Dell'Orfano, Nava, Rojo, Sanchez, and Talbot. ALJD 40:1-8. He also determined that Respondent's proffered defenses were pretextual. *Id.* Thus, Respondent fails by definition to show that it would have taken the same action but for the protected activity, and there is no need to perform the second part of the *Wright Line* analysis. See *Austal USA, LLC*, 356 NLRB at 364. *Id.* Respondent did not file an exception to this determination. However, it still maintains that it properly discharged the Discriminatees for falsifying their applications.

a. ALJ Gollin Properly Credited Talbot, Rojo, and Sanchez Concerning Their Applications

Respondent's Exceptions 4-13 are dedicated to contending that the ALJ's factual findings concerning Talbot, Rojo, and Sanchez's employment applications and process should be overturned. However, ALJ Gollin concluded that the preponderance of the credited evidence establishes that Talbot, Rojo, and Sanchez's testimony concerning the hiring process are credible.¹⁸

In mid-January 2016 Talbot went to the Facility to ask for an application and he was directed to Danny Arzola, who was shop manager for Respondent. TR 139:7-17. Talbot asked Danny Arzola about a tire technician and Danny Arzola interviewed him right then. TR 140:20-23. Danny Arzola also gave Talbot a job application to fill out. TR 142:5-6. Talbot, upon seeing the question about criminal convictions on the job application, disclosed to Danny Arzola that he

¹⁸ ALJ Gollin's findings of fact are based on his review and consideration of the entire record. ALJD 2, fn.3. Thus, they are compilation of credible testimony and evidence and logical inferences drawn therefrom. *Id.*

did have a felony on his record. TR 142:7-16. Danny Arzola instructed Talbot to leave that question blank because Respondent did not run background checks. *Id.* Danny Arzola offered Talbot the job and Talbot accepted. TR 143:2-5.

Talbot completed the job application and returned it to Danny Arzola the next morning. TR 143:12-15; 145:14-17, JX 3, pgs. 2-8. Talbot left the criminal background question blank as directed by Danny Arzola. TR 144:18-145:6. Talbot did not mark the “no” box on this application and is unaware of who did mark this box on the application produced by Respondent (JX 3, pgs. 2-8). TR 144:22-145:3. Danny Arzola told him to put in his notice to his current employer. TR 145:20-24. Talbot met with a Human Resources employee about two to three weeks after he started working for Respondent. TR 151:7-21. He reviewed his application and confirmed that the “no” box remained blank. *Id.* ALJ Gollin credited Talbot’s denial concerning marking the box because he, along with Rojo and Sanchez all had similar experiences when applying at Respondent. ALJD 6, fn. 8. They were all told to leave the criminal question blank, they all left the question blank, and the box was marked in the version relied upon by Respondent. ALJD 6, fn. 8. Also, ALJ Gollin appropriately observed that the mark at issue on Talbot’s application looks dissimilar to the other marks on his application supporting the conclusion that he did not make the mark alleged. *Id.*

Respondent fails to address the obviously different mark on Talbot’s application. Instead it incorrectly asserts that Talbot “contends that human resources completed the blanks left in the application” and he did not explain why they did this. Respondent Brief at 37. This is not true and is not supported by any citations to the record. In fact, Talbot admitted he did not know who made the marking. TR 145:2-3. Respondent further contends that since Talbot knew Respondent was felon friendly it did not make sense for him to leave the application blank. This of course ignores the reality of the situation. Why would a new applicant question direction given to leave

the question blank? Danny Arzola instructed Talbot to do so and he did. Respondent did not call Danny Arzola to testify or discredit Talbot's testimony in any way. ALJ Gollin's findings on this issue are supported by the testimony and evidence on the record.

Rojo and Sanchez were both instructed by Alex Arzola to leave the criminal background question blank on their employment applications. TR 340:3-16 (Rojo); TR 501:1-12 (Sanchez). Sanchez and Rojo both left the question blank as directed. TR 342:3-5 (Rojo); TR 500:17-25 (Sanchez). Respondent produced applications that had the "no" box marked. ALJ Gollin properly credited Rojo and Sanchez's testimony on this issue because, like Talbot, they were instructed to leave the question blank. ALJD 8, fn. 11, ALJD 9, fn. 13. Also, in Sanchez's case he left another question blank that was filled in as well but the marks used on the two questions do not look like the marks he made on the application. ALJD 9, fn. 13. Respondent did not call Alex Arzola to testify so Rojo and Sanchez's testimony on this issue was uncontroverted. Respondent also does not mention the different marks on Sanchez's application. ALJ Gollin's findings on this issue are supported by the testimony and evidence on the record. Thus, Respondent's exceptions 4-13 should be dismissed.

IV. CONCLUSION

Based on the foregoing, Charging Party respectfully requests that the Board dismiss Respondent's exceptions addressed herein and affirm the decision of ALJ Gollin finding that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act as described above and alleged in the Consolidated Complaint.

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Dated: August 23, 2018

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Hayes Ortega". The signature is fluid and cursive, with the first and last names being the most prominent.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of August 2018, I e-filed the Teamsters Union Local No. 63's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision with the Office of the Executive Secretary of the NLRB on the NLRB's e-filing system, and served a copy of this Brief by electronic mail upon the following:

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