

**Nos. 18-11931; 18-12449**

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**ADVANCED MASONRY ASSOCIATES, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC	:	
d/b/a ADVANCE MASONRY SYSTEMS	:	
	:	
Petitioner	:	Nos. 18-11931
	:	18-12449
v.	:	
	:	Board Case Nos.:
NATIONAL LABOR RELATIONS BOARD	:	12-CA-176715, et al.
	:	
Respondent	:	

**AMENDED CERTIFICATE OF INTERESTED  
PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Acevedo, Luis, Discriminatee
2. Advanced Masonry Associates, LLC, Petitioner
3. Bricklayers and Allied Craftworkers Local 8 Southeast, Charging Party
4. Cohen, David , Regional Director, Region 12, NLRB
5. Collins, Valerie L., Attorney, NLRB
6. Dreeben, Linda, Deputy Associate General Counsel, NLRB
7. Ferrell, Amy, Assistant to Regional Director, NLRB

8. Hearing, Gregory A., Thompson, Sizemore, Gonzales & Hearing, P.A.
9. Jason, Meredith, Managing Supervisor, NLRB
10. Karp, Ronald D., Advanced Masonry Associates, LLC d/b/a Advanced  
Masonry Systems
11. Kaplan, Marvin, Board Member, NLRB
12. Kyle, John W., Deputy General Counsel, NLRB
13. Leonard, Caroline, Field Attorney, NLRB
14. McFerran, Lauren, Board Member, NLRB
15. Morrison, Denise C., Supervisory Field Examiner, NLRB
16. Pearce, Mark Gaston, Board Member, NLRB
17. **Ring, John F., Board Chairman, NLRB\***
18. Robb, Peter B., General Counsel, NLRB
19. Rosas, Michael A., Administrative Law Judge
20. Smith, Marvin Jay, Bricklayers and Allied Craftworkers, Local 8  
Southeast
21. Stevenson, Walter, Discriminatee
22. Thomas, Charles J., Thompson, Sizemore, Gonzales & Hearing, P.A.

23. Vol, Kira Dellinger, Supervisory Attorney, NLRB
24. Walker, Kimberly C., Kimberly C. Walker, P.C., counsel for Bricklayers and Allied Craftworkers, Local 8 Southeast
25. Zerby, Christopher, Supervisory Attorney, NLRB

Additions to the list of interested persons and entities are indicated in bold and with an asterisk.

/s/ Linda Dreeben  
Linda Dreeben  
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Dated at Washington, D.C.  
this 20th day of September, 2018

## **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Local Rule 28-1(c), the National Labor Relations Board agrees with the Petitioner that an oral argument may be of assistance to the Court in its review of this case.

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Advanced Masonry Associates, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on April 13, 2018, and reported at 366 NLRB No. 57.

(D&O 1-20.)<sup>1</sup> The Board had jurisdiction pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties. The Company petitioned for review of the Board’s Order on May 9, 2018, and the Board cross-applied for enforcement on June 12, 2018. Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Company transacts business in this Circuit and the unfair labor practices occurred in Florida.

### **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) by threatening employees with a wage reduction if the Union prevailed in the representation election.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and

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<sup>1</sup> “D&O” references are to the Board’s Decision and Order. “GCX,” “UX,” and “CX” refer, respectively, to the exhibits introduced by the General Counsel, the Charging Party Union, and the Company. “J. Stip” references are to the joint stipulation. “Tr.” references are to the hearing transcript. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

discharging Luis Acevedo and Walter Stevenson, and by more strictly enforcing its fall-protection policy against them, all because of Acevedo's union activities.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

Acting on a charge filed by the Bricklayers and Allied Craftworks Local 8 Southeast ("the Union"), the Board's General Counsel issued a complaint alleging that the Company had committed several unfair labor practices after the Union petitioned to represent the Company's employees. (D&O 9; GCX 1(i), (o).)

Following a hearing, an administrative law judge found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by twice threatening that employees' wages would go down if they selected union representation. (D&O 16-17.) The judge also found that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Luis Acevedo and Walters Stevenson because of Acevedo's union activity. (D&O 17-20.)

On review, the Board affirmed the violations found by the judge, with the exception of the second Section 8(a)(1) threat violation, based on a statement by foreman McNett. (D&O 1, 3-4.) The Board declined to address that unfair-labor-practice finding because an additional threat violation would be cumulative and would not affect the remedy. (D&O 1 n.3.) Moreover, contrary to the judge, the Board found that the Company had also violated Section 8(a)(3) and (1) by more

strictly enforcing a safety policy against Acevedo and Stevenson because of Acevedo's union activity. (D&O 1, 4-5.)

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. Background: the Company's Operations; the Union's Organizing Campaign**

The Company is a commercial-construction subcontractor that provides masonry services at jobsites throughout Florida. (D&O 9.) Brothers Richard and Ron Karp are the Company's principals and owners; their corporate headquarters is located in Sarasota, Florida. (D&O 9.) Foremen supervise crews performing work at each site. (D&O 9; Tr. 33, 126, 166, 445, 611, 636, 1060.) The crews consist of masons, and laborers who assist them with scaffold building, heavy lifting, and grout mixing.

From May 1, 2004, to April 30, 2016, the Company and the Union maintained a bargaining relationship pursuant to Section 8(f) of the Act, 29 U.S.C. § 158(f), which permits a construction-industry employer and a union to enter into a prehire bargaining agreement before the union has established majority support among the employer's employees, and even before the employer has hired any employees.<sup>2</sup> After the Company announced that it did not plan to renew their 8(f) agreement, the Union filed a petition to represent the Company's employees and

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<sup>2</sup> See *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983).

bricklayers pursuant to Section 9(a) of the Act, 29 U.S.C. § 159(a), which establishes exclusive representation and bargaining relationships based on majority employee support for a union. (D&O 12.) The parties' stipulated election agreement was approved on May 6, and the Board mailed the ballots for a representation election to the bargaining-unit employees on May 26. (D&O 12, 16.) After resolving various ballot challenges, the Board determined that the majority of employees had voted for representation (25 to 16) and certified the Union as the employees' exclusive, Section 9(a) representative on May 8, 2018.<sup>3</sup> *See* 366 NLRB No. 164, at \*2 (Aug. 17, 2018).

#### **B. The Company's Safety Policies and Procedures**

The Company's safety policies and procedures are detailed in an employee handbook. The handbook lays out general safety rules and requires employees to "[a]lways wear or use appropriate safety equipment as needed. Wear appropriate personal protective equipment, like . . . fall protection, when working on an operation which is potentially hazardous." (D&O 9; CX 2.) The handbook further

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<sup>3</sup> Those representation decisions are not presently before the Court. *See Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940) (representation proceedings excluded from appellate review afforded by Section 10 of the Act (29 U.S.C. § 160)); *accord Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964). The Company has since refused to recognize the Union in a "test of certification" designed to preserve its right to challenge the representation decisions, and the Board found that refusal unlawful in a final order reported at 366 NLRB No. 164.

provides that violations of safety rules can result in “disciplinary action, including termination.” (D&O 9; GCX 2(c), CX 2, Tr. 78-79.)

The Company also maintains a separate, more detailed fall-protection policy, which it provides to employees at their initial safety orientation. That policy mandates that when an employee is working at an elevation of 6 feet or higher on a scaffold where a fall risk exists, the employee must use appropriate protective equipment. (D&O 9-10; GCX 2(a), Tr. 71-73, 152, 518.) Specifically, it requires a body harness with a safety strap and a retractable lifeline (retractor), and instructs employees not to connect two safety straps, or a retractor and a strap, to each other. (D&O 9; GCX 2(a)(b), Tr. 74.) In-person trainings on jobsites provide employees with further details regarding the correct combinations of safety equipment to use in various situations, and how to “anchor” their equipment properly to their work area. Finally, the fall-protection policy warns that the Company has “zero tolerance” towards violations. (D&O 9-10; GCX 2(a), Tr. 71-72.)

Safety policies are monitored on a companywide basis by Safety Director Aleksei Feliz and Safety Coordinator Fernando Ramirez. Both Feliz and Ramirez travel between the Company’s various jobsites to check safety conditions, and Ramirez conducts safety trainings for company employees. (D&O 10; CX 5-6, J. Stip. 1-2, Tr. 25-26, 513.) In addition to those visits, Feliz and Ramirez identify safety topics for foremen to cover in weekly, mandatory meetings called “toolbox

talks.” (D&O 10; Tr. 79, 611-13, 755-57.) The foremen also continuously monitor and ensure safe working conditions and equipment on each jobsite. (D&O 10; Tr. 33, 126, 166, 445, 611, 636, 812-13.)

**C. The Company Hires Employees Luis Acevedo and Walter Stevenson, and Provides Them with Safety Training**

The Company hired employees Luis Acevedo, who was referred by the Union, and Walter Stevenson, who was not a union member, in January 2016, and assigned them to its Westmore Yacht Club (“Westmore”) jobsite. (D&O 11; Tr. 125, 392-93.) Two weeks after they began work, Safety Coordinator Ramirez came to the jobsite to conduct a safety orientation, which both Acevedo and Stevenson attended. (D&O 11; GCX 2(c), Tr. 69-70, 414, 515.) The 75-minute orientation explained the Company’s general safety standards and included a 30-minute presentation about the fall-protection policy. (D&O 11; GCX 2(a).)

During that presentation, Ramirez demonstrated how to wear a harness properly, as well as several methods employees could use to fasten their harnesses to their work areas, discussing how to create floor anchors and when to use a long or short safety strap, or a retractor. (D&O11; GCX 2(a), 20, 24, Tr. 133-34, 415-16, 558.) He did not demonstrate, or have employees practice, correct ways to attach a harness to scaffolding. (D&O 11; Tr. 133-34, 415-16, 515, 558.) Rather, referring to an illustration, Ramirez told employees to use straps and retractors when tying harnesses to scaffolding to ensure at least 3 feet of clearance from the

ground in case of a fall, and warned them not to hook a retractor directly to a scaffold. (D&O 11; CX 7, GCX2(a)-(b), Tr. 414-17, 523-28.) Ramirez also explained that a safety strap and retractor could be used in combination when an employee's anchoring point was above his shoulders, if the employee looped the strap. (D&O 11; Tr. 132-36, 415-17, 462, 530.) Finally, Ramirez answered questions about the fall-protection policy, including from Acevedo and Stevenson, and warned employees that the Company had "zero tolerance" for violations of the policy. (D&O 11; GCX 2(c), Tr. 532.)

#### **D. Acevedo Openly and Actively Supports the Union**

While working at the Westmore jobsite, Acevedo was an active union supporter. He met with the Union's representative during the representative's visits to the site, wore union shirts and stickers, and spoke with other employees about the advantages of the Union, including insurance and retirement benefits. (D&O 13; Tr. 399, 404.) When Acevedo's union dues were not deducted from his check, he asked his foreman about it. (D&O 13; Tr. 399-400.) After his foreman was unable to determine why the dues were not being deducted, Acevedo elevated his concern to Feliz, who addressed it. (D&O 13; GCX 13, Tr. 400.)

In mid-April, the Company transferred Acevedo and Stevenson to a new jobsite at the University of Tampa ("UT"). (D&O 12; Tr. 125, 395.) At the UT jobsite, Acevedo continued his union activities. He acquired a second union shirt,

which enabled him to wear his union shirts most work days, more than any other employee. (D&O 12-13; Tr. 405-06.) He also continued to meet with the Union's representative during the representative's visits to the site, and to speak with other employees about the benefits of the Union. Acevedo's union activity "did not go unnoticed." (D&O 13; Tr. 406-07.) For example, foreman Mario Morales saw Acevedo signing papers the representative brought to the jobsite. (D&O 13; Tr. 405-07.)

**E. Safety Director Feliz Tells Employees That Wages Will Decrease if the Union Wins the Election**

In early May, company owner Richard Karp spoke to employees, with Safety Director Feliz translating for the Company's Spanish-speaking employees, to explain the upcoming representation election and encourage employees to vote. (D&O 13; Tr. 410-11, 846-47.) When asked whether wages would go down if the employees decided not to unionize, Karp responded that wages were determined by the market. (D&O 13; Tr. 410-11.)

Later in the day, Feliz spoke with eight employees, including Acevedo. (D&O 13; Tr. 129-30, 412, 648.) Feliz explained why the Company opposed the Union and urged the employees to "vote no, no union, because the Union is taking our money." (D&O 13; Tr. 410-12, 846-47.) He also informed them that a union victory would result in a \$4-per-hour wage decrease. Acevedo disputed Feliz's assertion, resulting in a silent glare from Feliz. (D&O 13 n.36; Tr. 412.)

**F. On May 16, the Company Suspends Acevedo and Stevenson for Violating the Fall-Protection Policy, Their First Offense**

Foremen Brett McNett and Mario Morales supervised the crew at the UT jobsite. The employees at the site worked in pairs, initially laying a brick veneer over the new 40- to 50-foot-high exterior wall of the building. (D&O 12; Tr. 126-27, 153, 396, 421.) They were not required to wear harnesses or tie off during that outside work because they used scaffolding without a fall risk. (D&O 12; Jt. Stip. 8, Tr. 395-96, 617-18, 670.) As the exterior work was completed, the Company moved its employees, including Acevedo and Stevenson, to work on stairs and tall columns in the building's interior. The Company did not conduct any general safety orientation, like the one at the Westmore jobsite, for employees at the UT jobsite. (D&O 12; Jt. Stip. 8-9.)

On May 16, employees attended a morning safety meeting led by the general contractor and a toolbox talk conducted by foremen McNett and Morales. (D&O 14; CX 14, Tr. 137-38, 148-49, 153, 621, 153.) McNett reminded employees of the Company's fall-protection policy and emphasized the requirement that employees be tied off at elevations higher than 6 feet where there was a fall risk. (D&O 14; Tr. 137-38, 148-49, 153, 621.) McNett noted that some employees were being transferred from the outside area of the jobsite to the inside area. He also noted that safety equipment was largely unnecessary outside, due to closed scaffolds, but was required on the inside scaffolds because they were all

open and over 6-feet high. (D&O 14 n.38; Tr. 137-38, 148-49, 153, 621.) McNett warned the employees that anybody not properly tied off would be fired.

(D&O 14; Tr. 137-38, 148-49, 153, 621.) Neither McNett nor Foreman Morales explained, or demonstrated, how to properly tie off harnesses to the type of scaffolding used on the UT site's interior work areas. (D&O 14; 415-16.) During the same meeting, foreman McNett, "who regularly disparaged the Union," informed employees at the site that unionization "won't be good for wages." (D&O 13; Tr. 129-20, 648.)

Shortly after the meeting, Morales observed that Acevedo and Stevenson, who were paired to work together, were on an inside scaffold and were not wearing their safety harnesses. (D&O 14; 139, 158, 422, 424, 625-27.) Morales asked them whether they had attended the toolbox talk, at which McNett had instructed employees to tie off when exposed to falls over 6 feet. (D&O 14; 139, 158, 422, 424, 625-27.) Acevedo replied that he had attended the meeting but stated that he had not been tied off when working at higher elevations on the exterior of the building. (Tr. 423-24.) Morales explained that employees were not required to tie off while working on the building's exterior because there was no fall risk, and instructed both men to tie off. (D&O 14; Tr. 422, 625-26.)

Both Acevedo and Stevenson donned their harnesses and each tied off improperly to the scaffold where they were working. (D&O 14; Tr. 422, 625-26.)

Acevedo used an overlong retractor-strap combination to attach his harness to the scaffold. (D&O 14; Tr. 422, 625-26.) Stevenson used his retractor incorrectly by attaching it directly to the scaffold. (D&O 14; Tr. 139, 158, 424, 626-27.)

Meanwhile, Morales informed McNett that Acevedo and Stevenson had not been wearing safety equipment while working on indoor scaffolds. (D&O 14; Tr. 623-25.) McNett responded, “tell them it’s a good thing I didn’t catch them and make sure they get tied off properly.” (Tr. 624.) He then went to check on them and, finding them improperly tied off, immediately scolded them for the safety violation. (D&O 14; Tr. 423, 625.) McNett asked Acevedo and Stevenson if they had received fall-protection training. (D&O 14; Tr. 423-24.) Both Acevedo and Stevenson stated that the Company had never trained them on how to tie off while working on a scaffold. (D&O 14; Tr. 423-24, 628-29.) When McNett properly secured Acevedo and Stevenson’s equipment, Acevedo asserted that the method McNett used—tying them off to the scaffold—was against Occupational Safety and Health Administration (OSHA) regulations. (Tr. 423-24, 628.) In response, McNett walked away. (D&O 14; Tr. 423-24, 628.)

After confronting Acevedo and Stevenson, McNett called Feliz and told him about the incident, citing specifically the employees’ claim that the Company had never trained them how to properly tie off to scaffolding. (D&O 14; Tr. 75, 80, 89.) After confirming that they had come from the Westshore jobsite, Feliz told

McNett that all of the employees at that jobsite had been trained, and that he would dismiss the employees involved if they had in fact received the relevant training. Feliz then instructed Ramirez to go to the Westshore site to ascertain whether Acevedo and Stevenson had been trained on tying off when they worked there. (D&O 14; 75, 80, 89, 536.) Ramirez found records from the February safety training he had conducted, confirming that both Acevedo and Stevenson had signed the attendance sheet. (D&O 2, 14; Tr. 90, 517.)

After reporting back to Feliz that Acevedo and Stevenson had been trained, Ramirez traveled to the UT jobsite. With McNett, he confronted the two employees, who admitted that they had received the relevant training. (D&O 2, 14; Tr. 426-27, 632.) Ramirez then recontacted Feliz and, acting on his orders, suspended both employees for tying off incorrectly. (D&O 14; GCX 5, 6, Tr. 139, 426-27, 539-40, 632-33.) The suspension paperwork, labeled a “warning notice,” stated that “the employee was not [tied off] properly” and indicated that the incident was a level “1” offense on a scale increasing from “1” to “2” to “3” to “FINAL.” (D&O 14; GCX 5, 6, Tr. 139, 426, 539-40, 633.) When informed of their suspensions, both employees referenced the method McNett had used to fix their straps that morning. Acevedo again challenged whether tying off to a scaffold was correct and whether safety equipment was necessary on the indoor scaffold. (D&O 15; Tr. 423-24, 628.) Stevenson asked, “Why weren’t we told

that [particular method] before we got up there? You just said tie off.” (D&O 14; Tr. 140-41.) McNett replied, “It’s not in my hands. I was told to send you home, and you’re in review.” (D&O 14; Tr. 141.) The suspensions were the first discipline of any kind that either Acevedo or Stevenson received while working for the Company. (D&O 14; GCX 5, 6, Tr. 139, 141-42, 427, 429.)

**G. After Consulting with the Company’s Owners because of Acevedo’s Union Activities, Feliz Discharges Acevedo and Stevenson**

Feliz was authorized to determine Acevedo’s and Stevenson’s discipline, up to and including discharge. (D&O 2; Tr. 92.) Because he knew that Acevedo supported the Union, and in light of the upcoming representation election, Feliz decided instead to call the Company’s owners to discuss the incident before imposing discipline beyond the suspension. (D&O 14; Tr. 91-93.) During that conversation, the final decision was made to discharge both Acevedo and his work partner Stevenson. (D&O 14; Tr. 91-93, 874.)

The next day, Acevedo arrived at work and McNett told him he had been fired. (D&O 14; Tr. 141, 428-29.) In response to Acevedo’s request for an explanation, McNett said that the discharge was based on Acevedo’s violation of the fall-protection policy. (D&O 15; Tr. 429, 634.) Acevedo again argued that the Company’s preferred tie-off method violated OSHA regulations. (D&O 14-15; Tr. 428-29.) Acevedo returned to the parking lot, called Stevenson, and told him

that they had been fired. Stevenson went to the jobsite anyway and spoke with McNett, who told him that the termination decision had come “from above, it’s not me.” (D&O 15; Tr. 141.)

Prior to May 16, the Company had disciplined several employees with warnings or suspensions, but not with terminations, for first or second violations of the Company’s fall-protection policy. (D&O 3, 15, 17-18; GCX 3, 4(a), 4(c), 8(a), 8(d), 8(e), CX 34, Tr. 389-90, 433-34, 546-47, 636-37, 899.) Also prior to that day, Acevedo and Stevenson had worked inside at the UT site on scaffolds without harnesses and no one had instructed them to don safety equipment. (D&O 14; Tr. 139, 154, 418, 424-25.) On May 16, some other employees were not wearing their safety harnesses, and those employees who were using safety equipment were tied off in different ways, not all according to McNett’s instructions. (D&O 14 n.40, 15 n.44; Tr. 160, 424-25.) No other employee was disciplined for tying off improperly at the UT site that day.

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts, the Board (Chairman Kaplan; Members Pearce and McFerran) found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), when Safety Director Feliz threatened that wages would decrease if the Union won the election. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by suspending and discharging employees Luis Acevedo and Walter Stevenson, and by more strictly enforcing its fall-protection policy against them, all because of employees' union activities. (D&O 1-5.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (D&O 6-7.) Affirmatively, the Order requires the Company to: offer full reinstatement to Acevedo and Stevenson to their former jobs or, if those positions no longer exist, to substantially equivalent positions; make them whole for any loss of earnings or benefits suffered as a result of the unlawful discrimination; compensate them for any adverse tax consequences of receiving a lump-sum backpay award; remove from its files any references to their unlawful suspensions and discharges, and notify them in writing that the suspensions and discharges will not be used against them in any way. (D&O 7.) The Board's Order further requires the Company to

post a remedial notice in English and Spanish at its active jobsites, and to mail copies of the notice to employees who worked at the jobsites involved during the relevant period. (D&O 7.)

### STANDARD OF REVIEW

This Court affords “considerable deference to the Board’s expertise in applying the . . . Act to the labor controversies that come before it.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will “defer to the Board’s conclusions of law if they are based on a reasonable construction of the Act.” *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987). The Court will also sustain the Board’s factual findings if they are supported by “substantial evidence on the record considered as a whole.” *Evans Servs.*, 810 F.2d at 1092 (quoting 29 U.S.C. § 160(e)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). The Board’s reasonable inferences from the evidence will not be displaced even if the Court might have reached a different conclusion had the matter been before it *de novo*. *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-29 (11th Cir. 1985).

Of particular relevance here, the Court is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1126 (11th Cir. 2008) (internal quotation omitted). And the Court accords

“extreme deference” to credibility determinations made by hearing officers and adopted by the Board. *NLRB v. Dixie Lime & Stone Co.*, 737 F.2d 1556, 1560 (11th Cir. 1984). It is “bound by the credibility choices of the [administrative law judge]’ unless they are ‘inherently unreasonable,’ ‘self-contradictory,’ or ‘based on an inadequate reason.’” *NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1005 (11th Cir. 2015) (quoting *Goya Foods*, 525 F.3d at 1126) (alteration in original). Finally, the same standard of review applies whether the Board upholds, or reaches a different conclusion from, the administrative law judge. *NLRB v. Gimrock Const., Inc.*, 247 F.3d 1307, 1311 (11th Cir. 2001) (To “differ with the [judge] on inferences and conclusions to be drawn from the facts is the Board’s prerogative.”) (citation omitted)).

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act when Safety Director Feliz warned a group of employees that the Company would reduce wages if the Union won the representation election. Under established law, such a threat violates the Act because of its clear coercive effect on employee free choice. The Company principally attacks the Board’s finding on the basis of credibility but has failed to show that the administrative judge’s findings were “inherently unreasonable,” “self-

contradictory,” or “based on an inadequate reason.” *Goya Foods*, 525 F.3d at 1126).

Substantial evidence further supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Acevedo and Stevenson, and by applying its fall-protection policy more strictly against them, because of Acevedo’s union activities. Applying its well-established *Wright Line* framework, the Board properly found that Acevedo’s union activities were a motivating factor for those adverse actions against the two employees. Acevedo was undisputedly involved in union activity, of which the Company was aware. Moreover, the close temporal proximity of the adverse actions to Acevedo’s union activity, to the representation election, and to the unlawful threat by Feliz—who later determined Acevedo’s and Stevenson’s discipline—supports the Board’s finding of unlawful motivation, as does the Company’s disparate treatment of similarly situated employees and pretextual explanation for its actions. Significantly, the Company failed to show that it had ever before discharged an employee for a comparable first-time fall-protection violation. Before the Court, the Company unsuccessfully challenges various credibility determinations and tries to explain away its disparate treatment of Acevedo and Stevenson. It also presses its affirmative defense that it disciplined and discharged Acevedo and Stevenson

for violating its fall-protection policy but that defense necessarily fails in light of the Board’s well-supported finding of pretext.

## ARGUMENT

### I. **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT WHEN IT THREATENED EMPLOYEES THAT WAGES WOULD BE REDUCED IF THE UNION WON THE REPRESENTATION ELECTION**

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations . . . and . . . the right to refrain from any or all such activities . . . .” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements those guarantees by making it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. 29 U.S.C. § 158(a)(1); *see NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1421 (11th Cir. 1998). Coercive conduct—including statements threatening reprisal, such as a reduction in employee wages, in response to union activity—violates Section 8(a)(1). *Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB*, 705 F.2d 1537, 1542 (11th Cir. 1983); *see, e.g., UNF West, Inc.*, 363 NLRB No. 96 (Jan 20, 2016), *enforced*, *UNF West v. NLRB*, 844 F.3d 451 (5th Cir. 2016) (employer may not threaten its employees with a loss of wages depending on the outcome of a representation election); *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 114-15 (1997) (same). In determining whether an employer’s

statement violates Section 8(a)(1), “the test is not whether [it] actually ha[s] the effect of restraining or coercing employees, but whether [it] would tend to have such an effect.” *Weather Tamer Inc. v. NLRB*, 676 F.2d 483, 488 (11th Cir. 1982), and cases cited; *see also NLRB v. Gaylord Chem. Co.*, 824 F.3d 1318, 1333 (11th Cir. 2016). That determination is made by considering the totality of the circumstances. *Gaylord Chem.*, 824 F.3d at 1333.

The Board’s finding (D&O 1 n.3, 16-17) that the Company unlawfully threatened employees with wage reductions is amply supported by the credited testimony of Acevedo. Feliz, an admitted supervisor (indeed, Safety Director), told a group of employees that they should vote against the Union because the Union was taking their money. He then warned the employees that if the Union succeeded in the representation election, their hourly rates would be reduced from \$22 to \$18 per hour. When employee Acevedo, a known union supporter, questioned that assertion, Feliz responded with a “silent glare.” (Tr. 412.) The explicit threat of decreased wages as a result of union activity, delivered by a high-level supervisor as he urged employees to oppose the Union, plainly had a reasonable tendency to deter employees’ Section 7 activity. *See President Riverboat Casinos*, 329 NLRB 77, 77 (1999) (supervisor’s comment that “wages might be reduced as a result of a vote for unionization” was

unlawful). Moreover, that tendency was compounded by Feliz's negative response to Acevedo, the one employee who questioned the threat.

Unsurprisingly, the Company (Br. 11, 32-34) does not challenge the Board's legal holding that Feliz's statement was unlawfully coercive. Instead, citing Feliz's own denial, it disputes the Board's factual finding that he made the admittedly unlawful threat. More specifically, the Company challenges (Br. 33-34) the Board's credibility determination (D&O 1, 13 n.36), which accepted Acevedo's version of Feliz's remarks. The Company fails, however, to meet its heavy burden to show that the determination is not supported by reasonable considerations, much less that crediting Acevedo was "inherently unreasonable" or "self-contradictory." *McClain*, 138 F.3d at 1422.<sup>4</sup>

To the contrary, in addition to his observation of the witnesses' demeanor (D&O 9), the judge gave two reasons for crediting Acevedo's account of the threat

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<sup>4</sup> Arguably, the Company does not actually, or sufficiently, challenge the unfair-labor-practice finding based on Feliz's threat, which it fails to mention in its statement of issues (Br. 2) and disputes only in a subsection (Br. 32-34) of its argument challenging the Section 8(a)(3) violations. Should the Court find that the Company did not preserve its challenge to the Section 8(a)(1) threat violation, the Board would be entitled to summary enforcement of the violation. *See NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999) (summarily enforcing portions of Board's order employer failed to challenge); *see also Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306-07 (11th Cir. 2012) (argument insufficiently raised in opening brief is waived) Fed. R. App. P. 28(a)(9)(A) (argument must contain party's contentions with citation to authorities and record).

over Feliz's denial (D&O 13 n.36). First, Acevedo's testimony was persuasively specific and, second, Feliz's denial (Tr. 104) that he said anything to the employees about wages was directly contradicted by the Company's own witness, Gerardo Luna. Luna, a long-time company employee, admitted that Feliz spoke with the employees that day about wages. (Tr. 46-47, 106, 847-48.) Testimony of current employees is particularly reliable because "these witnesses are testifying adversely to their pecuniary interest." *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *see also Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false"). Moreover, as the Board noted, Luna "testified at the behest of his employer." (D&O 17.)

The Company misreads the record by claiming that "the [judge] prohibited [company] counsel from questioning Luna more closely about this point" and then "improperly answered it himself." (Br. 33 n.3.) After Luna had already acknowledged that Feliz spoke about wages during the meeting, company counsel asked, "Did Mr. Feliz tell the employees that the Company would lower their wages if they voted for the Union?" (Tr. 847.) Rejecting that question as leading, the judge emphasized that he wanted to hear what Luna himself remembered, but

invited company counsel to continue the same line of questioning: “You can nudge him a little bit, but we’ll play it by ear. I want to see what he really recalls.” (Tr. 848). *See Greyston Bakery, Inc.*, 327 NLRB 433, 440 n.12 (1999) (leading questions “may impair the probative value of a witness’ testimony”); *Soltech, Inc.*, 306 NLRB 269, 270 (1992) (observing that “some testimony elicited in response to leading questions has little probative weight because it amounts to mere agreement with statements by counsel rather than persuasive testimony by the witness”); *see also* Board Case Handling Manual §10394.2 (“In order to enhance the credibility and reliability of the witness, direct, nonleading questions should generally be used.”)<sup>5</sup> Instead of following that suggestion, counsel changed the subject and did not question Luna further about what Feliz had said about wages. (Tr. 848-49.) And while the Company is correct that Luna claimed Feliz made no threats, that is of little significance since the judge used Luna’s testimony to corroborate Acevedo’s assertion that Feliz discussed wages with the employees during the meeting.

The Company also attacks Acevedo (Br. 25, 33-34) as generally untruthful, citing other aspects of his testimony. Notably, the judge did not discredit any of

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<sup>5</sup> Contrary to the Company’s contention (Br. 33 n.3), the judge did not err in ruling that the Company’s question was leading. A leading question is one that forecasts the expected answer, as did the Company’s question to Luna. *See* 81 Am. Jur. 2d Witnesses 716 (Leading questions are “those which suggest to the witness the answer desired.”).

Acevedo's testimony. Rather, he commented on Acevedo's "selective memory in failing to recall whether fall protection was discussed" during McNett's May 16 toolbox talk. (D&O 14 n.39.) And even if the judge had discredited Acevedo on that point, "nothing is more common in all kinds of judicial decisions than to believe some and not all" that a witness says. *See NLRB v. Universal Camera*, 179 F.2d 749, 754 (2d Cir. 1950) (L. Hand, J), *affirmed*, 340 U.S. 474 (1951).

Based on Acevedo's "detailed testimony" and Luna's corroboration of a key point, as well as the judge's own assessment of the witnesses' demeanor, the judge reasonably credited Acevedo's testimony that Feliz threatened employees that their wages would decrease if they elected the Union to represent them. (D&O 13.) Substantial evidence thus supports the Board's finding that Feliz's threat violated Section 8(a)(1) of the Act.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING ACEVEDO AND STEVENSON, AND BY MORE STRICTLY ENFORCING ITS FALL-PROTECTION POLICY AGAINST THEM**

**A. An Employer Violates the Act by Taking Adverse Action Against an Employee for Engaging in Union Activities**

Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), provides that it shall be an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” An employer thus violates Section 8(a)(3) and (1) by suspending or discharging an employee for engaging in protected union activity.<sup>6</sup> See *McClain*, 138 F.3d at 1421, 1423 (discharge); *Southwire Co. v. NLRB*, 820 F.2d 453, 459, 463-64 (D.C. Cir. 1987) (suspensions). Similarly, an employer violates Section 8(a)(3) and (1) when it more strictly enforces a policy in response to employees’ union activities. *Print Fulfillment Servs. LLC*, 361 NLRB 1242 (2014); accord *McClain*, 138 F.3d at 1426 (noting that courts have long recognized that “a change in existing rules in retaliation for union activity violates [the Act]”).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board’s test, articulated in *Wright Line, a Division of*

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<sup>6</sup> A violation of Section 8(a)(3) produces a “derivative” violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

*Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), for determining whether an employer took adverse action based on union animus or had a lawful reason for its conduct. *Purolator Armored.*, 764 F.2d at 1428. Under that test, a reviewing court must determine whether substantial evidence supports the Board's finding that union activity was a "motivating factor" for the discipline. *Transp. Mgmt.*, 462 U.S. at 401; *McClain*, 138 F.3d at 1424.<sup>7</sup> Where union activity is shown to be a motivating factor, the adverse employment action is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would nonetheless have taken the same action in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 401-03; *McClain*, 138 F.3d at 1424.

Because direct evidence is often impossible to obtain, the Board may instead rely on circumstantial evidence and inferences reasonably drawn from the totality

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<sup>7</sup> The Company has framed its first argument (Br. 27-31) as a challenge to whether the General Counsel met his initial burden before the Board to establish that Acevedo's union activity motivated the Company's decisions to suspend, discharge, and more strictly enforce its fall-protection policy against Acevedo and Stevenson. The question before this Court, however, is whether substantial evidence in the record supports the Board's finding of such unlawful motivation, and its finding that the Company failed to prove that the same adverse actions would have been taken even in the absence of union activity. *Transp. Mgmt.*, 462 U.S. at 395. In any event, the analysis showing that Acevedo's union activity unlawfully motivated the Company's adverse actions against both employees (Parts II.B & II.C) demonstrates that the General Counsel met his burden.

of the evidence to determine the true motives underlying an employer's actions. *See, e.g., NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *McClain*, 138 F.3d at 1424; *Purolator Armored*, 764 F.2d at 1429. For example, evidence that an employee engaged in union activity of which the employer was aware, and that the employer harbored animus towards that activity, suffices to show an unlawful motivating factor. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying Transp. Mgmt.*, 462 U.S. at 395, 403 n.7; *accord, e.g., Willamette Indus., Inc.*, 341 NLRB 560, 562 (2004). Moreover, the Board, with approval from this Court, routinely has found that contemporaneous violations of the Act serve as evidence of an employer's unlawful motivation. *See, e.g., Goya Foods*, 525 F.3d at 1127; *McClain*, 138 F.3d at 1424-25. The same is true of the timing of the adverse action, particularly its proximity to union activity. *See McClain*, 138 F.3d at 1424 (explaining that "the timing of the adverse action in relation to union activity" may "support an inference of anti-union motivation").

Both disparate treatment—when an employer treats the disciplined union supporter more harshly than other employees who engaged in similar or worse conduct—and departure from the employer's typical practice tend to show pretext, and thus also support a finding of antiunion motivation. *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (employer's false reason supported

finding of unlawful motive); *McClain*, 138 F.3d at 1424 (“employer’s deviation from past practice” supports inference of anti-union motivation); *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1015 (9th Cir. 1999) (employer’s inconsistent enforcement of policy supports finding of unlawful motive). Such pretext evidence is also relevant to assessing the employer’s defense. *See Transp. Mgmt.*, 462 U.S. at 400-03; *McClain*, 138 F.3d at 1424. Indeed, if the employer’s proffered explanation is pretextual—that is, either false or not in fact relied upon—the violation is deemed proven. *See McClain*, 138 F.3d at 1424 (citing *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1479 (6th Cir. 1993)); *Purolator Armored*, 764 F.2d at 1428); *see also Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (an employer’s proffered rationale “need not be accepted if there is a reasonable basis for believing it furnished the excuse rather than the reason for . . . retaliatory action”) (internal quotation omitted).

**B. Acevedo’s Union Activity Was a Motivating Factor for the Company’s Adverse Actions against Stevenson**

Before the Board (D&O 3, 18), and the Court (Br. 29), the Company conceded that Acevedo engaged in protected union activity and that it had knowledge of Acevedo’s union activity.<sup>8</sup> As demonstrated below (Part II.C),

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<sup>8</sup> The Company conceded this point for good reason: Acevedo told the Company he was a Union member when he was hired, complained when the Company failed to deduct union dues from his paychecks, and wore t-shirts and stickers at work

substantial evidence supports the Board's finding (D&O 2-4, 17-18) that Acevedo's union activity was a motivating factor for the Company's decisions to suspend him, discharge him, and apply its fall-protection rule more strictly against him. The circumstances surrounding Acevedo's and Stevenson's discipline further prove that the Company was similarly unlawfully motivated when taking the adverse actions against Stevenson.

Union activity is a "motivating factor" when an employer discharges an employee based on *another* employee's union activity, whether as collateral damage or "as part of an effort to camouflage the discriminatory discharge of a known union activist." *Armcor Indus., Inc.*, 217 NLRB 358, 358 (1975), *enforced in relevant part*, 535 F.2d 239 (3d Cir. 1976); *see also Adam Wholesalers*, 322 NLRB 313, 314 n.7, 329-30 (1996) (finding 8(a)(3) violation where respondent pretextually disciplined coworker accompanying principal union organizer; coworker's warning stemmed from being "with the wrong person at the wrong time"). Although the unaffiliated employee is a "pawn in an unlawful design, rather than a direct target," his discipline is no less unlawful. *Dawson Carbide Indus.*, 273 NLRB 382, 389 (1984), *enforced*, 782 F.2d 64 (6th Cir. 1986). The Board will find such collateral discrimination when an employer takes action

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that proclaimed his support for the Union's organizing campaign. (Tr. 60, 391-92, 404-05, 411-12.)

against two employees who perform the same job, only one of whom is an active union supporter, at the same time and for the same unsupported reason. *Armcor*, 217 NLRB at 358; *see also Excel Case Ready*, 334 NLRB 4, 26-27 (2001). And it is well established that, under such circumstances, a particularized showing that the Company discharged each individual employee for union activities is not necessary. *Dillingham Marine & Mfg. Co. v. NLRB*, 610 F.2d 319 (5th Cir. 1980);<sup>9</sup> *see also Bay Corrugated Container*, 310 NLRB 450 (1993), *enforced*, 12 F.3d 213 (6th Cir. 1993); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 255-56 (4th Cir. 1997) (collecting cases). In such cases, union activity is, in effect, the motivation for both discharges.

Here, although it is undisputed that Stevenson did not engage in union activity, substantial evidence supports the Board's finding that the Company took adverse actions against Stevenson for the same unlawful reason it acted against Acevedo. Stevenson and Acevedo were partnered to work together on the day in question, and every decision with respect to their discipline was made at the same

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<sup>9</sup> Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

time and explained in the same way. *See Armcor Indus.*, 217 NLRB at 358; *Adam Wholesalers*, 322 NLRB at 314 n.7, 329-30.<sup>10</sup>

Contrary to the Company's argument (Br. 46-47), those facts are sufficient for the Board reasonably to infer that Acevedo's union activity motivated the adverse actions against him and played the same role in the adverse actions against Stevenson. They also belie the Company's attempt (Br. 46-47) to use its discipline of Stevenson to justify its discipline of Acevedo, as does the Company's failure on May 16 to discipline other improperly tied-off employees who did not happen to be partnered with Acevedo (discussed below, p. 35).

**C. Acevedo's Union Activity Was a Motivating Factor for the Company's Adverse Actions against Him**

Several categories of evidence in the record collectively provide ample support for the Board's finding that the Company harbored animus and towards Acevedo's union activity, which was a motivating factor for its adverse actions against him (and thus Stevenson): close temporal proximity to union activity and the representation election, as well as to Feliz's threat, itself an unfair labor

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<sup>10</sup> Moreover, Felix consulted the Company's owners before deciding to discharge either employee, admittedly because he feared that a decision to discharge Acevedo would look suspicious in light of Acevedo's union activities and the imminent union election. *See Ambrose Distrib. Co.*, 150 NLRB 1642, 1646 (1965), *enforced*, 358 F.2d 319 (9th Cir. 1966) (evidence of unlawfulness is bolstered when the employer previously has expressed concern that taking action against the union supporter would appear suspicious).

practice; disparate treatment of similarly situated employees; and the Company's pretextual explanation for its actions.<sup>11</sup>

### **1. Timing and a contemporaneous violation of the Act demonstrate union animus**

As the Board detailed (D&O 3, 13), the timing of Acevedo's and Stevenson's discipline and discharges was highly suspicious for a few different reasons. It occurred just over a week before the ballots were mailed to employees. *See Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685-86 (8th Cir.1996) (timing supports finding of unlawful motive when termination was 24 days before election); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994) ("timing of [the discharges], just two weeks before the scheduled union election, gives further credence to the charge of anti-union animus"); *Redwing Carriers, Inc.*, 224 NLRB 530, 531 (1976)

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<sup>11</sup> The Company mistakenly asserts (Br. 30-31) that because it has had a long and harmonious relationship with the Union, the Board erred in finding that the adverse actions against Acevedo and Stevenson resulted from union animus. That argument disregards the applicable *Wright Line* standard, which assesses whether union activity was a motivating factor for specific actions. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (finding animus even where the employer had not expressed hostility towards unionization generally); *Awery Bakeries, Inc.*, 197 NLRB 705, 711 (1972) ("[T]he past history of amicability in the bargaining relationship does not disprove the evidence of discriminatory intent and motivation vis-a-vis [the discriminatee]."). Factually, moreover, the Company's claim of a harmonious relationship with the Union is somewhat dubious, based on its admitted (Br. 25, 29) anti-union campaign, though the Board found it unnecessary to rely on such evidence in assessing the Company's motivations. (D&O 3 n.8.)

(discharge one week before election supports animus). Even more striking, the suspension and discipline were imposed just days after the Company committed another unfair labor practice, when Feliz unlawfully told employees that their wages would be reduced if the Union won the representation election. *See McClain*, 138 F.3d at 1424 (concurrent violations of the Act support an animus finding). As the Board explained, that threat is “particularly probative” because, shortly after issuing it, Feliz himself was involved in the decision to suspend and discharge Acevedo and Stevenson. (D&O 3.) And, notably, when Feliz made the unlawful threat, Acevedo alone challenged him, in front of other employees, earning Feliz’s displeasure.

While the Company argues that the Board placed “too much emphasis on timing” (Br. 31), it fails present any authority for its position that timing—particularly proximity to a representation election and to another unfair labor practice committed by one of the decisionmakers whose motive is in dispute—is not a significant factor in determining motive. Instead, the Company attempts to draw attention from the suspicious timing of its adverse actions by pivoting to challenge other aspects of the Board’s analysis without ever truly joining issue on timing.<sup>12</sup> In fact, as the Board aptly noted (D&O 3, 14), timing alone can be

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<sup>12</sup> Specifically, the Company asserts (Br. 31-32) that it cannot be penalized for neutrally applying established personnel policies (a point refuted by evidence of disparate treatment discussed below, *see* Part II.C.2), and denies (Br. 32-34) that

sufficient to demonstrate animus. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). And this Court has given heavy weight to the timing of an employee’s discharge in determining motive. *See, e.g., Rockwell Intl. Corp. v. NLRB*, 814 F.2d 1530, 1536 (11th Cir. 1987); *NLRB v. S. Florida Hotel & Motel Assoc.*, 751 F.2d 1571, 1583 (11th Cir. 1985). Contrary to the Company’s assertion, therefore, the Board rightly accorded significance to timing in its motive analysis, in addition to other types of evidence, discussed below.

**2. The Board’s well-supported finding that the Company more strictly enforced its fall-protection policy against Acevedo and Stevenson indicates that animus was a motivating factor**

There is abundant evidence in the record that the Company more strictly enforced its fall-protection policy than it had in the past when it suspended, then discharged, Acevedo and Stevenson for their first violation of the policy—which was their first discipline for any reason. As the Board found (D&O 3-4, 15, 17-18), the Company has imposed discipline short of discharge for other employees’ first and second fall-protection violations, and did not warn or otherwise discipline

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Feliz made the unlawful threat (proven above, *see* Part I). Although the Company also purports to challenge (Br. 34-36) the Section 8(a)(1) violation based on McNett’s threat of wage loss, the Board did not pass on that additional unfair-labor-practice finding by the judge, because it “would be cumulative and would not materially affect the remedy.” (D&O 1 n.2.) Nor did the Board rely on McNett’s statement in finding that animus motivated the Company’s adverse actions against Acevedo and Stevenson.

other employees who were improperly tied off on the day Acevedo and Stevenson were suspended. *See Tracer Protection Servs.*, 328 NLRB 734, 735 (1999) (discharging employee for violation other employees had committed without discharge evidences unlawful motivation); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989) (same). The Company's efforts to explain that disparate treatment are unsupported and unpersuasive.<sup>13</sup>

The record reveals that, unlike its treatment of Acevedo and Stevenson on May 16, the Company did not discharge several other employees for first and second violations of the fall-protection policy. In what the judge deemed to be a "glaring example of such disparate treatment," Timothy Bryant, an employee who had been working for months without receiving any safety training at all, attended the same safety orientation as Acevedo and Stevenson in February 2016. (GCX 2(c), 4(b).) Just one month later, Safety Coordinator Ramirez observed Bryant "laying block on a leading edge," 18 feet off the ground, without a harness, and unconnected to his anchor point. (GCX 4(a), 4(c), Tr. 433-34, 546-47). Bryant was suspended. (Tr. 548.)

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<sup>13</sup> The Company challenges (Br. 47-49) the Board's factual finding that it more strictly enforced the fall-protection policy against Acevedo and Stevenson. As detailed here, however, ample evidence of disparate treatment supports the Board's finding, negating the Company's sole defense to the Section 8(a)(3) and (1) violations based on stricter enforcement.

Other employees similarly received only warnings or suspensions for violating the Company's fall-protection policy. Richard Haser, for example, was sent home and required to attend a safety orientation for working while not properly tired off. A notation in the foreman's daily log noted that it was Haser's second offense. (GCX 3, Tr. 389-90.) And Brandon Carollo was suspended for his first violation, and again for his second violation. Carollo was ultimately discharged for a combined offense of his third fall-protection violation and insubordination. (D&O 3; GCX 8(a)-(e), Tr. 542-43, 571-72, 638-40, 899.)

Moreover, when Carollo requested unemployment benefits after his discharge, the Company explained to Florida's unemployment agency—consistent with the examples above—that he had been discharged after his third violation of its fall-protection policy. Significantly, in that filing, the Company described “the consequences of violating the [fall-protection] rule or policy” as “first and second warnings, third discharge.”<sup>14</sup> (GCX 8(b).) The language of the warnings the

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<sup>14</sup> While the Company insists (Br. 45-46) that the unemployment forms “simply recited the facts of Carollo's discharge,” it concedes (Br. 46) that the “policy” it identified on the forms was that “[t]he claimant was on a scaffold over 6 feet off the ground and was not tied off securely as OSHA rules require” (GCX 8(b)), a nearly verbatim recitation of its fall-protection policy). *See* GCX 2(a). And the Company does not now suggest that Carollo did not in fact violate that policy three times. At the very least, the forms suggest that the Company imposes progressive discipline for violations of the policy; nowhere do the forms state that the policy requires discharge for a first offense or offer any explanation for why the Company twice only warned Carollo for violating what it now insists is a “zero tolerance” policy. (GCX 8(b).)

Company issued to Acevedo and Stevenson when it suspended them on May 16 also suggests a policy of progressive discipline, classifying their violations as “level 1” offenses on a scale of 1-3 and “final.” (D&O 14; GCX 5, 6.)

Finally, the Board’s animus finding is supported by the Company’s disparate treatment of Acevedo and Stevenson on the day they were suspended. That day, other masons working nearby were also tied off incorrectly or not at all. But the Company took no disciplinary action against those other employees, even short of discharge. (D&O 14 n.40, 15 n.44; Tr 158-60, 424-25.)

The Company, understandably, does not suggest that its failure to discipline other employees who violated the fall-protection policy on May 16 would not amount to evidence of disparate-treatment supporting the Board’s finding of animus. Instead, it challenges (Br. 39-40) the Board’s crediting of Acevedo’s and Stevenson’s testimony establishing that other employees were tied off incorrectly on the same day as their violations. That credibility determination was supported by the judge’s observation (D&O 9) of all of the witnesses’ demeanors. In addition, the judge cited (D&O 14-15 nn.40 & 44) the greater specificity of the employees’ testimony, which described (Tr. 425) how some masons were tied off to the scaffolds and others to the cross-bracers, in contrast to the overly conclusory and generalized nature of the foremen’s contrary testimony (Tr. 625, 769). And the Company’s arguments do not meet the high burden required to overturn a

credibility determination. *See Allied Med. Transp.*, 805 F.3d at 1005 (court will only disturb credibility determinations if they are “inherently unreasonable, self-contradictory, or based on an inadequate reason”) (internal quotation marks omitted).

Contrary to the Company’s contention, Acevedo’s and Stevenson’s testimony was not contradictory. Both employees testified that prior to the May 16 toolbox talk—including that same morning, no employees wore fall-protection equipment on the indoor scaffolds of the UT jobsite. (Tr. 139, 154, 418, 424-25.) Acevedo further testified that after McNett instructed employees to tie off on the indoor scaffolds during that toolbox talk, employees tied off in different, incorrect ways. (Tr. 424-25.) While the Company is correct that Stevenson stated “nobody had harnesses on that morning,” the Company omits the critical detail that Stevenson was referring to the period of time *before* the toolbox talk, and that he corroborated Acevedo’s testimony that most employees tied off after the talk. (Tr. 154-56.) The Company’s observation that Acevedo did not describe or identify the specific employees who were using their safety equipment incorrectly on May 16 does not call into question his description of how they secured their equipment.<sup>15</sup>

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<sup>15</sup> The Company’s challenge to the Acevedo’s and Stevenson’s overall credibility is unpersuasive for the reasons discussed above (*see* Part I).

The Company attempts to explain away its failure to discharge several other employees for their first fall-protection violations by claiming (Br. 42, 44-45) that it only discharges employees when the violation is witnessed by a Company representative, as opposed to a general contractor's representative. But the Board reasonably rejected that explanation, which is inconsistent with the record and with the importance the Company attaches to its fall-protection policy. The most obvious factual inconsistency is the Company's failure to discharge employee Bryant, even though his violation of the fall-protection policy was witnessed by Safety Coordinator Ramirez. To circumvent that glaring example, the Company claims it intended to discharge Bryant, but did not because Bryant "cannily" disregarded his own termination, and because of a largely absent foreman and administrative errors. (Br. 43.) The Board reasonably concluded that the Company's "convoluted defense is simply not credible." (D&O 3.) Notably, accepting the Company's story means believing that Bryant returned to work as usual after allegedly being fired, and continued to work for several weeks without the Company noticing.

As described, moreover, the events of May 16 also undercut the Company's contention that all violations witnessed by a company representative result in discharge. Foremen Morales first witnessed Acevedo's and Stevenson's fall-protection violation but instructed them to don safety equipment rather than

disciplining them. McNett's comment to Morales, "it's a good thing I didn't catch them," implied that he would have disciplined the employees, suggesting, at best, that the Company inconsistently applied its purported zero-tolerance policy depending on which company representative witnessed the violation. And, of course, Morales' and McNett's failure to discipline other employees on May 16 also undermines the Company's position.

More fundamentally, the company-witness explanation borders on senseless in the face of the Company's insistence on the importance of the fall-protection policy and zero tolerance of any violations. Essentially, the Company's position is that it trusts general contractors' accounts of violations enough to discipline an employee, but not to discharge the employee. That the Company disciplines an employee at all under those circumstances demonstrates that it has accepted that the violation has occurred; the Company provides no explanation for why, in that case, it would not apply its purported zero-tolerance policy to the violation. Nor does it acknowledge the logical, but incongruous, consequence of its supposed non-company-witness exception: it could have reliable knowledge that an employee had repeatedly violated the policy and be powerless to discharge the offender.

Finally, the Company complains (Br. 41-42) that the Board improperly questioned its business judgment in rejecting its claim that it has discharged

employees for first-time fall-protection violations analogous to Acevedo's and Stevenson's. But, as described, substantial evidence supports the Board's finding that "no other employees were discharged for failing to tie off properly as a first offense." (D&O 18.) As the Board explained, the circumstances of the employees the Company relies upon to support its argument, Timothy Golphin and Jaswin Leonardo, are not comparable. Specifically, both Golphin and Leonardo engaged in "severe compound safety violations." (D&O 3, 18.) Golphin, for instance, was both talking on his cell phone and not tied off at all, while working at an elevation of 38 to 40 feet. (D&O 3, 18; CX 33, Tr. 636-37.) Notably, his discharge form gave equal weight to his failure to tie off and to his use of his cell phone while working. (D&O 3, 18; CX 33.) Similarly, the Company discharged Leonardo after Ramirez observed him not using fall protection, and then improperly dismounting the scaffold by stepping on the cross-braces instead of using a ladder. (D&O 3, 18; RX 34.)

The Board's observation that the nature of Golphin's and Leonardo's violations distinguishes them materially from Acevedo and Stevenson is not equivalent to questioning the Company's business judgment or prerogatives. The Board did not find that the Company *could not* reasonably maintain a policy of discharging employees for the least, isolated, initial violation of the fall-protection policy. The Board simply found that the Company failed to prove that it in fact did

so. While the Company is correct that Golphin's and Leonardo's cases would fit such a rule, it fails to acknowledge that they also fit the picture established by the rest of the evidence. Considered together, all of the comparator employees' cases demonstrate that, in fact, it takes more than a single failure to tie up to warrant discharge as the Company has actually applied its fall-protection policy.

*See NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143 (2d Cir. 1990) (employer's failure to discipline other employees for similar or more egregious misconduct supports inference of unlawful motive rather than good-faith business judgment); *accord McClain*, 138 F.3d at 1426 (employer's past leniency in enforcing its anti-drug policy and its previous willingness to allow employees who tested positive for drugs to be retested demonstrated unlawful motive rather than legitimate business reason).

**3. The Company's pretextual explanation for its adverse actions against Acevedo and Stevenson demonstrates union animus**

The Company insists that it disciplined and discharged Acevedo and Stevenson pursuant to a zero-tolerance policy for fall-protection violations, which required it to terminate any employee for his first violation. As detailed above, however, the record does not support the existence of such a policy. Several other employees were given discipline short of discharge for first and second fall-protection violations; notably, employees in violation of the same policy as

Acevedo and Stevenson, on the very same day, were not disciplined. Moreover, no other employee has been discharged—like Acevedo and Stevenson—for not being tied off properly as a first offense without an aggravating, compound violation. That disparate treatment indicates that the Company’s invocation of “zero tolerance” to justify its adverse actions against Acevedo and Stevenson is pretextual. *See NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 924-25 (11th Cir. 1982) (disparate treatment supports conclusion that asserted legitimate reason for discharge was pretext).

As the Board explained, that pretext finding is buttressed by the fact that Feliz made the “unprecedented and suspicious decision to contact” the Company’s owners before determining Acevedo’s and Stevenson’s discipline (D&O 3), admittedly because he was aware that Acevedo was a vocal union supporter and that the representation election was imminent (D&O 15 n.45; Tr. 91-93.) It was only after Feliz and the owners discussed Acevedo’s pro-union status and activities that the suspensions were definitively escalated to discharges. The Company argues (Br. 37-38) that it was Feliz’s typical practice to suspend pending discharge to carefully consider his disciplinary decision, and that the content of Feliz’s conversation with the owners proves the Company’s lack of animus. But it never challenges the Board’s key findings that it was unprecedented and suspicious for Feliz to contact the owners for help making disciplinary decisions, which he

typically made on his own, and that he did so specifically because of Acevedo's union activities.

Based on the Company's disparate treatment of employees and application of its purported zero-tolerance policy, and on Feliz's unusual decision to call the owners before finalizing Acevedo's and Stevenson's discipline, the Board reasonably found (D&O 3, 18) that the Company's asserted basis for suspending and discharging Acevedo and Stevenson—the fall-protection policy—was pretextual, *i.e.*, it was either false or not the real motivation for the discharges. In combination with the suspicious timing of the two employees' discipline, the disparate treatment of similarly situated employees, and the contemporaneous unlawful threat, that pretextual explanation amply supports the Board's finding that union activity was a motivating factor in the Company's decision to discipline and enforce its fall-protection policy more strictly against Acevedo and Stevenson.

**D. The Company Failed To Establish Its Affirmative Defense That It Would Have Disciplined Acevedo and Stevenson Absent Acevedo's Union Activity**

As demonstrated, substantial evidence supports the Board's finding that Acevedo's union activity was a motivating factor in the Company's adverse actions against him and Stevenson. Considered as a whole, the record further supports the Board's finding (D&O 4) that the Company failed to prove that it would have suspended or discharged the two masons in the absence of that

activity. Indeed, as the Board explained, its finding that the Company's explanation for the two employees' disciplines was pretextual compels rejection of that defense. *See McClain*, 138 F.3d at 1424.

Thus, in rejecting the Company's *Wright Line* defense, the Board did not give "short shrift" (Br. 41) to the Company's various fall protection safety procedures and trainings. There is no dispute that the Company had a stringent fall-protection policy that Acevedo and Stevenson did not follow on May 16, despite ample training. The fatal problem with the Company's argument is that the record belies its contention that it enforced the policy against Acevedo and Stevenson consistent with its past practice. Instead, the record proves that the Company invoked the policy to justify adverse actions motivated by union activity. Accordingly, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act when it suspended and discharged Acevedo and Stevenson, enforcing its fall-protection policy more strictly against them, because of Acevedo's union activity.

## CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

September 2018

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ADVANCED MASONRY ASSOCIATES, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 18-11931
	*	18-12449
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-176715
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,756 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC  
this 20th day of September, 2018

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	*
Respondent/Cross-Petitioner	*
	*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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Dated at Washington, DC  
this 20th day of September, 2018