

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

St. Paul Park Refining Co. LLC, d/b/a
Andeavor

Case Nos.: 18-CA-205871
18-CA-206697

Respondent,

and

Richard Topor, an Individual,

Charging Party.

**POST-HEARING BRIEF ON BEHALF OF
ST. PAUL PARK REFINING CO. LLC**

Marko J. Mrkonich, Esq. (MN# 0125660)
Alice D. Kirkland, Esq. (MN # 0396554)
LITTLER MENDELSON, P.C.
1300 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: 612.630.1000

***ATTORNEYS FOR RESPONDENT
ST. PAUL PARK REFINING CO.***

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I. Statement of the Case

Charging Party Richard “Rick” Topor (“Topor” or the “Charging Party”) failed to respond to a high priority alarm for over four hours on September 15, 2017, putting the refinery, its personnel, and the community in danger. This was misconduct on an unprecedented scale, and Topor refused to take responsibility. Over the preceding nine months, management had been working tirelessly to coach Topor to improve his performance; all the while Topor repeatedly made excuses, displayed critical misunderstandings of the chemical processes under his control, and refused to accept the superior knowledge of supervisory employees. When Topor ignored the alarm on September 15, once again made numerous excuses, and refused to accept responsibility, the futility of offering Topor another chance became clear. SPPRC had offered Topor numerous chances to preserve his employment throughout 2017 and for its efforts only narrowly avoided an operational and environmental disaster. Consequently, offering him yet another chance after the ignored alarm appeared to management to be unacceptably dangerous. Given the severity of Topor’s misconduct, Refinery Manager Rick Hastings concluded that he could not, in good conscience, allow Topor to continue working at St. Paul Park Refining Co. LLC (“SPPRC” or the “Company”), without subjecting other employees, the refinery, and the surrounding area to unnecessary risk of harm, and terminated his employment.

The General Counsel alleges that Topor’s termination and his mid-year performance review were issued in violation of Section 8(a)(1) of the National Labor Relations Act (the “Act”) and seeks reinstatement and back-pay. The General Counsel’s theory appears to be that SPPRC terminated Topor’s employment and issued what he describes as a “negative” review, not because of his failure to respond to the alarm or his

history of failing to meet Company performance expectations, but because he engaged in alleged protected concerted activity on November 4, 2016 – nearly a year earlier.

On November 4, 2016, Topor had refused to participate in a discussion with his supervisors regarding how to properly address a safety concern and received a 10-day suspension and final written warning as a result. Both the suspension and final written warning were sustained by a neutral arbitrator who found Topor to not be a credible witness. The National Labor Relations Board (the “Board”), however, ruled that by issuing this disciplinary action, SPPRC violated Section 8(a)(1) of the National Labor Relations Act (the “Act”), and ordered that the discipline be removed from Topor’s employment record. SPPRC appealed the Board’s ruling, and that appeal is currently pending before the Court of Appeals for the Eighth Circuit.

The contested validity of Topor’s suspension and final written warning is, however, ultimately irrelevant to the disposition of the instant matter. The evidence presented over the course of a seven-day hearing demonstrated conclusively that neither the issuance of a mid-year review nor the termination of Topor’s employment was an unfair labor practice. SPPRC would have terminated Topor’s employment based on the discrete events of September 15 regardless of the validity of any previous discipline or protected concerted activity. A reasoned analysis compels a finding for SPPRC. The General Counsel’s complaint must be dismissed.¹

¹ SPPRC requested that this matter be deferred to the arbitration process, but the Region denied that request and, therefore, the instant complaint was filed and hearing was held before the ALJ in June and July 2018.

II. Statement of Facts

A. Refinery Operations

SPPRC operates an oil refinery in St. Paul Park, Minnesota. The refinery takes raw crude oil and transforms it into products such as asphalt, gasoline, jet fuel, and propane. (Tr. 20). Miles of piping filled with volatile materials, often under intense heat and pressure, run throughout the refinery. (Tr. 21). Safety, therefore, is of paramount concern. (Tr. 21, 1535-36, 1623).

SPPRC has four operations crews working rotating twelve hour shifts to keep the refinery operating 24 hours a day, seven days a week, 365 days a year. (Tr. 17, 22, 41). Shifts officially run from 6 to 6, but operators generally exchange shifts sometime between 5:30 and 6. (Tr. 41). The operators are organized as members of Teamsters Local 120. (R. Ex. 6).

Each crew of operators has at least one field operator, one console operator, and one Vacancy Relief Operator (“VRO”). (See Tr. 24-26). Field operators work outside on the equipment, while console operators control the process by tracking data received from instrumentation on monitors inside the Central Control Room (“CCR”). (Tr. 25). VROs are qualified and trained to perform both the field and console operator jobs in their units and can fill in at any position when other operators are absent. (Tr. 319, 860-61). They are, however, much more than “vacancy relief.” As the senior operators on their crews, VROs train junior operators and act as informal crew leaders. (Tr. 681-82, 860-61, 1486-87).

B. Topor’s Employment at SPPRC

SPPRC employed Topor for thirteen years before terminating his employment on September 21, 2017. (Tr. 974). For the last eight years of his employment, Topor served

as a VRO on Crew 4 in the North Reformer. (Tr. 977-78, 1154).

At the time of Topor's termination, he reported directly to Gary Regenscheid, Central Control Room ("CCR") Shift Supervisor and Lead Shift Supervisor for Crew 4, and Dale Caswell, Shift Supervisor for Crew 4, responsible for the reformer and blending areas.² (Tr. 20). Topor worked under Regenscheid's supervision for eleven years before the termination of his employment and under Caswell's for a year and a half. (See Tr. 652, 800, 980).

Regenscheid and Caswell both reported to Briana Jung, the Operations Superintendent for the Reformer area, at the time Topor's employment was terminated. (Tr. 812). Jung reported to Michael Whatley, the Operations Manager, who in turn reported to Richard Hastings, then the Refinery Manager and highest level of authority on-site.³ (Tr. 16).

C. Performance Expectations

SPPRC expects all of its operators to monitor and troubleshoot the process units to which they are assigned and to continuously improve their knowledge of the chemical processes and associated equipment within those units. (See R. Ex. 115, Tr. 325-26, 678-79). In the nine months immediately preceding the termination of his employment, Topor consistently failed to meet these expectations. That continued failure was particularly disturbing given Topor's years of experience and VRO position and his refusal to admit to any shortcomings.

² There is a total of three shift supervisors associated with every crew. The third supervisor on Crew 4 was Frank Torralba. Mr. Torralba was responsible for the crude and FCC units. (Tr. 680-681).

³ Hastings left the refinery in December 2017. (Tr. 261). He is now the refinery manager at another Andeavor facility in Bismarck, North Dakota. (Tr. 261). The current Refinery Manager is Thomas Chavez. (Tr. 261). In July 2018, Whatley left the Company to accept a position as a refinery manager with another company. (Tr. 1478).

1. VROs

VROs are the most senior bargaining unit members in the refinery. (Tr. 319, 859-860). All VROs are expected to demonstrate a full understanding of the systems and chemicals under their control, and to use that knowledge to lead troubleshooting efforts to resolve issues that their crews encounter. (See Tr. 678-679, 860, 1493-94; R. Ex. 94, p. 13). The expectation that VROs lead troubleshooting efforts means that they are expected to use their experience and process knowledge to proactively deal with issues that arise by engaging in methodical testing to assess the system involved. (Tr. 678-79, 860).

Topor regularly failed to meet these expectations. Often, he would attempt to justify these failures by stating that he was in a different position at the time of the offending conduct. (See Tr. 1093, 1121-22, 1126, 1528-29). But, as Topor was repeatedly informed, regardless of whether a VRO is on the schedule as a VRO or assigned to another position, he or she is *always* required to meet the expectations associated with the VRO designation. (Tr. 1487, 1529).

2. Console Operation

As a VRO, Topor was qualified and regularly scheduled to work as a Console Operator.⁴ (Tr. 975, 979, 1054). Console Operators are responsible for remotely monitoring and manipulating the process units within their assigned areas of the refinery. (See R. Ex. 94). They are trained to recognize any abnormal situation within their units, assess the situation, and to direct the implementation of the correct response. (Tr. 736; R. Ex. 94, p. 12 (stating that console operators are expected to '[m]aintain[] current

⁴ Console operators receive training on how to operate the console and must complete it successfully in order to be deemed qualified for the position. (R. Ex. 96).

understanding of the process and associated control systems/strategies,” to “[p]roactively identif[y] abnormal conditions and troubleshoot[] to determine the appropriate response)).

Console Operators work in the CCR, where most of the electronics and control equipment used to operate the refinery is housed. (Tr. 25, 1362). Five console operators work a typical shift – one for each console. (Tr. 26-27). The consoles correspond to five areas of the refinery; FCC/CAT⁵, Crude, Blending, North Reformer/Hydrotreater⁶, and South Reformer. (Tr. 26-27).

Physically, each console consists of a large desk with about eight computer monitors. (Tr. 1027, 1182-84; *see* R. Ex. 114). The consoles have specialized keyboards with buttons that correspond to particular portions of the unit. (*See* R. Ex. 114). When pressed, these buttons display diagrams illustrating the corresponding portions of the unit, which contain live information regarding operations within the diagrammed area. (Tr. 1185-1187, 1400).

Console operators are expected to continuously monitor the computer system throughout their shifts and to rotate through the schematic screens regularly while on shift. (Tr. 136-37). Most console operators, including Topor, keep an “alarm summary” screen visible on one of their monitors at all times. (Tr. 468, 1162; *See* R. Ex. 120 (sample alarm summary screen⁷)). The “alarm summary” screen is a real-time list of active alarms. (Tr. 467, 1413, 1416). Active alarms are those which have either not been

⁵ “FCC” and “CAT” are used interchangeably to refer to the same unit. (Tr. 976).

⁶ Topor worked on what is referred to by operators as the “North Reformer Board” and by Wheatley as the “Hydrotreater Board.” (*See* Tr. 1363-64).

⁷ The alarm summary is a dynamic list and it cannot be reproduced for times in the past. (Tr. 1413-15). Instead, reports that are pulled for information regarding what occurred in the past appear as “event summaries.” (Tr. 1413-14).

acknowledged by the console operator or those where the conditions that triggered them have not been rectified. (Tr. 467, 1413, 1416).

When an alarm is triggered, a unique sound will activate that indicates both which board has an alarm and the priority of the alarm. (Tr. 1398). Written information about the alarm will simultaneously appear at the top of the alarm summary screen for the unit beside a blinking symbol which, by its color, will indicate the priority level of the alarm. (Tr. 1244, 1376, 1415-16). Additionally, a light on the keyboard key associated with the relevant portion of the unit will begin flashing. (Tr. 1376, 1415-16). Like the symbol on the alarm summary, the color of the light on the keyboard will vary depending on the priority level of the alarm. (Tr. 1030, 1418).

An operator may silence the noise associated with an active alarm by hitting the “silence,” “acknowledge,” or “acknowledge all” buttons on the console keyboard when an alarm sounds. (Tr. 1030, 1376-77). Pushing “silence” will only stop the audible alarm, whereas pushing “acknowledge” or “acknowledge all” will cause the audible alarm to stop and the colored indicator on the alarm summary screen and the corresponding light on the keyboard to stop flashing. (Tr. 1030, 1059, 1376). Once an alarm is acknowledged, the symbol on the alarm summary screen and the light on the keyboard will each remain a solid alarm color until the condition that caused the alarm is rectified. (Tr. 466-467, 1376).

Console operators are responsible for responding promptly to active alarms within their area. (Tr. 232-33, 736; R. Ex. 94, p. 13). Although operators may occasionally step away from their consoles and miss the audible portion of an alarm, that does not relieve

them of their responsibility to resolve the alarm.⁸ (Tr. 237). Appropriately responding to an alarm often requires that action be taken out in the field. (*See* Tr. 27). In such a case, the console operator is responsible for notifying a field operator and directing him or her to take the required action(s). (Tr. 27).

D. Topor's Performance Reviews

Throughout Topor's employment with SPPRC, operators have generally received two performance reviews each year: a mid-year review and an annual review. (*See* Tr. 677-678).⁹ Performance reviews are typically drafted by one of an employee's direct supervisors, as assigned by management. (Tr. 807). Each Operations Superintendent reviews and approves the reviews completed by his or her direct reports before they are delivered to the operators. (*See* Tr. 814-15). Regenscheid has conducted Topor's performance reviews since 2006.¹⁰ (Tr. 664).

Topor inaccurately testified at hearing that he never received a "poor" performance review prior to 2017. (Tr. 652-53). On the allegedly "poor" review Topor received in 2017, his overall performance was rated as 2 out of 3, meaning that it "generally [met] expectations." (G.C. Ex. 12(a)). This, however, was neither the first

⁸If an operator is away from his or her console when an alarm activates, a fellow console operator may quiet the associated noise by either silencing or acknowledging that alarm and notifying the affected operator upon their return. (Tr. 1058-59).

⁹The format and timing of these reviews has changed over the years, as refinery ownership has changed. (*See* Tr. 330-31, 675).

¹⁰Caswell began supervising Topor's fieldwork about a year and a half before the termination of his employment, but has not taken over responsibility for drafting Topor's reviews. Regenscheid has continued to conduct Topor's reviews because: (1) he had been doing Topor's reviews for years and has knowledge of his abilities (Tr. 681), (2) he has a background in the reformer area and is therefore better suited to evaluating a senior reformer operator than Caswell, who has a background in blending (Tr. 420, 1490), and (3) management wants the work of completing reviews to be divided evenly between supervisors, which resulted in the CCR Shift Supervisor conducting reviews for some employees who do not spend the majority of their time in the CCR. (Tr. 1488-90).

time Topor received a rating of 2 (“generally meets expectations”) *nor* the first time he claimed that a performance review with which he disagreed was the “first” negative review he had ever received. (*See* R. Ex. 13, 15).

1. Topor’s 2015 Annual Review

On January 1, 2016, Topor received an annual review covering October 1, 2014 to September 30, 2015. (*See* R. Ex. 15). He received an overall rating of 2. (R. Ex. 15). The review was prepared by Regenscheid and approved by Dave Barnholt, then the Operations Superintendent for the reformer area. According to the “employee comments” section of the review, Topor was dissatisfied and felt he should have been rated a 3 (“meets expectations”). (R. Ex. 15). Regenscheid considered the rating appropriate as Topor’s performance had room to improve. (Tr. 677).

2. Topor’s 2016 Annual Review

On December 4, 2016, Topor received an annual review for the period beginning October 1, 2015 through the end of 2016.¹¹ (R. Ex. 13). That review was prepared by Regenscheid and approved by Jung, who had recently replaced Barnholt as Operations Superintendent for the reformer. (R. Ex. 13; Tr. 17-18, 812-13). In the review Topor was rated a 3 (“meets expectations”) – the highest ranking available to a bargaining unit member. (R. Ex. 13).

Although Topor received the highest possible overall rating on this review, he complained, “I have never had a review in my 12 year career that was so negative,” and alleged that the review was adversely affected by the events of November 4, 2016.¹² (R.

¹¹ During a period of leadership change at the refinery, the year used for review purposes changed. (Tr. 33).

¹² Notably, when the General Counsel filed a Complaint regarding the events of November 4, 2016, it did not contest the contents of this review.

Ex. 13). Specifically, Topor was upset that the review noted a need to develop the ability “to independently [assess] and troubleshoot unit problems and risks and propose potential solutions” and “to take a more active role leading the crew members to investigate, address and overcome issues that are discovered.” (R. Ex. 13).

E. Topor’s Performance in 2017 Failed to Meet SPPRC Expectations Despite Management’s Extensive Attempts to Coach for Improvement

Throughout 2017, Topor repeatedly demonstrated a troubling lack of proactivity, poor process knowledge, and an unwillingness to accept direction from management. Between January 2017 and the termination of his employment in September 2017, various supervisors attempted to coach Topor to help him improve his performance, but to no avail. Despite frequent meetings with top management throughout 2017, where Topor was provided with specific examples of how his performance was failing to meet expectations, Topor remained convinced that his performance and knowledge was fine and he did not need coaching. When prodded, Topor would occasionally state that he intended to improve his performance, only to effectively undercut and retract such statements shortly thereafter.

1. January – Topor failed to meet SPPRC’s expectations for troubleshooting and received coaching on how to meet those expectations in the future

On January 9, 2017, the technical services department reported that the contents of the HDH stripper had not been sampled in some time and expressed uncertainty about whether the stripper was functioning properly. (Tr. 866). Shift supervision tasked Topor with investigating the situation by taking a sample. (See Tr. 866; R. Ex. 27).

Topor reported back to supervision that he could not take a sample because the sample station and its associated piping were frozen. (Tr. 738-39). Topor knew, or

should have known, after thirteen years at the reformer, and eight years as a VRO, how to thaw out the equipment so a sample could be taken, but he made no effort to do so or to ask for advice. (Tr. 696, 738). Instead, he submitted a work request for the maintenance department to defrost the system, emailed supervisor Corey Freymiller about the condition of the sample station, and waited for responses. (R. Ex. 29). He also reported that the sample cylinder (or “bomb”) was in disrepair, but did not take independent action to have it repaired or to obtain a new one. (Tr. 1491).

On January 11, 2017, Regenscheid, Caswell, and another shift supervisor, Dave Hetland, met with Topor to discuss how his handling of their request for a sample failed to meet the Company’s expectations for a VRO. (Tr. 868, R. Ex. 27; R. Ex. 29; R. Ex. 30). The supervisors informed Topor that what he claimed was troubleshooting – emailing a supervisor and submitting a work request for a task properly completed by the operations department – did not constitute “troubleshooting” in the eyes of management. (See R. Ex. 29). They informed Topor that “he need[ed] to start troubleshooting items like this *in an operational manner*” by, for example, pressure testing the system, and directed him to begin defrosting the system so it could be properly assessed, while noting that he should have been able to “take the initiative and begin troubleshooting and problem solving without having to be asked.” (R. Ex. 27-30).

Jung and Whatley were concerned when they learned of Topor’s failure to work proactively on the sample station. (Tr. 868, 1492-93). Both expected Topor, as a VRO, to at least *try* to independently overcome the obstacles he encountered, instead of simply reporting that the station was frozen and passively waiting for others to act in response.

(Tr. 493-94).¹³ Instead, supervision had to direct Topor to defrost the piping, which he should have done without specific direction, and, given the delay, the majority of the troubleshooting work on the sample station had to be done by another crew on a later shift. (Tr. 1086, 1259-60).

Topor continued to believe that such behavior was appropriate for a VRO, despite the coaching given at the time of the incident, throughout the remainder of his employment, and despite management's sworn testimony to the contrary at hearing. (*See* Tr. 1080-84).

2. April – Topor failed to meet expectations by independently following clear supervisory directives

Early on the morning of April 5, 2017, Regenscheid learned that an electrical conduit had slid down and exposed wiring on one of the HDH compressors. (Tr. 698). The exposed wiring was vibrating and electricians were concerned that, if the electrical shorted out, it could take the unit down and cause a serious environmental incident. (Tr. 699).

Around 8:15 a.m., Regenscheid informed Topor of the emergency situation and instructed him to reduce the rate of the compressor to take it offline as soon as possible, so that it could be repaired. (R. Ex. 37). Although this task could have been done in about two hours, when Regenscheid returned at 1 p.m., Topor had only reduced the unit about half as much as necessary.¹⁴ (*See* Tr. 699 (stating that he would have expected a VRO to have it down by about 10 a.m.), 702 (“we can safely do a thousand barrels every half hour in that unit”)). When Regenscheid questioned why the unit had not been further

¹³ According to Regenscheid, most VROs would have taken care of these issues without having to be asked. (Tr. 696:18-22).

¹⁴ The unit was initially running at 20,500 barrels per day and needed to be reduced to 16,000 BPD to be taken offline. At 1 p.m., the unit was at 18,500 BPD. (Tr. 699).

reduced, Topor responded that he was reducing the rate at 500 barrels per day (“BPD”) per hour, “as we’re supposed to.” (Tr. 699-700).

By stating that he was doing what he was “supposed to,” Topor was apparently referring to a memo Whatley previously wrote and distributed, which suggested, *as a general rule of thumb*, that reductions in rate should be limited to 500 BPD per hour. (Tr. 1507-08). This memo, however, applied to *normal* operating conditions and specifically noted that directions from supervisors would supersede such general advice. (Tr. 1507-08). As a very experienced console operator and VRO, Topor should have known better than to follow this standard rule of thumb in an emergency. (Tr. 699-700). Not only had Regenscheid specifically instructed him to reduce rate quickly, but, given the conditions in the unit, he should have independently realized that reducing rate at only 500 BPD per hour was inappropriate. (Tr. 1508).

Even when Regenscheid reminded Topor that the rate could and should be reduced much faster given the emergency situation, Topor dawdled, such that, in order to ensure the unit reached a safe state as soon as possible, Regenscheid had to sit with Topor and instruct him on each specific move to make until the compressor could be taken offline. (R. Ex. 37; Tr. 699-700, 731). That state was finally reached occurred at 3:30 pm, over seven hours after he was asked to do so. (R. Ex. 37).

Topor’s actions on this date meant the unit was left in a dangerous state for approximately five hours longer than necessary. (Tr. 706, 1505). And, because the maintenance work could not begin until the unit was offline, the crew ultimately had to work overtime to complete the repair. (Tr. 737-38). To this day, Topor maintains that his behavior was appropriate, that this was not an emergency situation, and that, if it

became an emergency, the Company could have simply shut the compressor off at the push of a button. (Tr. 1016-18). Topor's self-justifications, of course, ignore the fact that he had been specifically instructed to reduce the compressor as quickly as possible, and that the same memo he cites in the defense of his dawdling specifically states that supervisory direction would override the normal reduction rate.

Unable or unwilling to distinguish the results of his actions from pure luck, or to acknowledge the importance of supervisory direction and the Company's business objectives, Topor testified at the hearing that he was unaware the maintenance crew had to stay late in order to repair the conduit as a result of his delay, but noted that it did not matter to him, because, "[w]hat matters to me is that I took the compressor down safely, and we had no incidents with any of the other units, and the job got completed. And the compressor got back on the next shift, and everything was fine. That's what matters to me." (Tr. 1268).

3. May 4 – Topor failed to meet expectations by demonstrating deficient process and chemical knowledge

On May 4, Jung asked Topor to go into the field, review some newly constructed piping (the 34-E-5 bypass piping), and determine whether the piping was ready to be put in to service. (See Tr. 1509; R. Ex. 47). Topor reported back that there was a "dead leg"¹⁵ in the system and that a bleeder valve would need to be installed before the piping could be put into service so as to ensure the piping could be properly drained when out of service. (Tr. 823, 1509).

Based on Topor's years of experience, Whatley and Jung did not doubt his assessment and decided, without looking at the piping firsthand, to have a bleeder valve

¹⁵ A "dead leg" is defined as a section of pipe that has no flow when the process is in service. (Tr. 1510-11).

installed. (Tr. 823-24, 1509). When they discovered a valve installation would take three to five days, Topor's crew was not tasked with putting the piping into service that shift, as they otherwise would have been. (Tr. 1268-70, 1509).

The following morning, during the reformer safety meeting, Whatley mentioned the 34-E-5 bypass piping and asked an operator to show him the dead leg so he could understand the system and the plan to address both the dead leg and drainage issues. (Tr. 1510). Bruce Nelson, the North Reformer VRO on shift at the time, responded that he had already put the piping into service that morning. (Tr. 1510, 1514, 1533). Nelson informed Whatley that there was actually no dead leg and that the piping could easily be emptied without a bleeder by utilizing a common practice at the refinery: boiling the contents of the piping and redirecting the resulting vapor to a low-pressure system. (Tr. 1510, 1514).

Surprised that Topor's report the day before had been directly contrary to what fellow VRO Nelson had discovered and then easily accomplished, Whatley went out to look at the piping himself. (Tr. 1510). He confirmed there was no dead leg and that the pipe could indeed have been cleared without a bleeder. (Tr. 1510). Consequently, Whatley was concerned that Topor had incorrectly assessed the situation and that he appeared not to understand either what a dead leg was or how the chemicals in the subject piping behaved. (Tr. 1515-16). Topor's conviction that a bleeder was required in this situation demonstrated a major gap between expectations and performance, which Whatley found particularly concerning in a thirteen (13) year employee. (*See* Tr. 886-87, 1524).

4. May 12 – Topor refused to accept coaching regarding his deficient process and chemical knowledge, resulting in a poor performance letter

After discovering Topor's assessment of the 34-E-5 bypass piping was clearly incorrect, Whatley and Jung set up a coaching meeting with Topor for May 12, 2017, with the goal of motivating him to improve his process understanding and performance. (Tr. 1516-17, R. Ex. 40). During the coaching meeting, Whatley and Jung explained the expectations associated with the VRO position and described how Topor's conduct in recent months had failed to meet those expectations. (Tr. 885-89, 1517-18; R. Ex. 40). In particular, Whatley and Jung emphasized Topor's failure to meet SPPRC's expectation that, as a VRO, Topor act as a leader of his crew, understand the chemistry of the process, and troubleshoot issues without the need for direct intervention by a shift supervisor. (Tr. 885-89).

Further, Whatley and Jung explained how, in both the 34-E-5 bypass and HDH sample point incidents, Topor's poor performance had shifted work from his crew to others. (Tr. 1517-18). Specifically, they described how, but for Topor's failure to properly understand the 34-E-5 system, his crew would have been tasked with putting the piping in service. (Tr. 1517-18; R. Ex. 40). They explained that, because Topor inaccurately reported problems with the piping, management had unnecessarily put the project on hold for three to five days, and the task was done by the next crew after they discovered Topor's error. (Tr. 1518; R. Exs. 39-40). They further explained how, methodically thinking through and thoroughly understanding the piping system and chemicals within, and then taking the initiative to put the piping into service, Nelson met the Company's expectations for VRO performance where in contrast Topor had failed. (Tr. 1518; R. Exs. 39-40).

Topor was not receptive to such coaching. (Tr. 1516-17; R. Ex. 40). He responded to the detailed discussion of expectations and concerns by communicating to his superiors that, given his 13 years of experience as an operator, he felt he “didn’t need any of [Whatley’s] assessment of his qualifications or expectations; [] he knew his job, and his self-assessment was really all that mattered.” (Tr. 1518). Even as Whatley and Jung explained to him how his understanding of the system was incorrect, Topor obstinately maintained that he knew the process very well. (Tr. 1518).

In light of Topor’s refusal to accept criticism and agree to work toward improvement, Whatley drafted a letter to document Topor’s poor performance. (Tr. 1518-19, R. Ex. 41). Whatley delivered this letter on May 15, with hope that the letter might do what the coaching session did not and would motivate Topor to work with management to improve. (Tr. 1523).

5. May 20 – Topor ostensibly agreed to accept performance coaching in exchange for the removal of the poor performance letter

After presenting Topor with the poor performance letter, Whatley reconsidered. (Tr. 1524). He did not want to discipline Topor, or damage his career – he simply wanted Topor to agree to work with him to improve his performance. (Tr. 1524). He therefore decided to try talking to Topor once more before submitting the letter to HR (for Topor’s file), and went to the refinery on a Saturday to talk to him. (Tr. 1524).

Whatley met with Topor briefly on Saturday, May 20. (R. Ex. 82). Whatley informed Topor that, although he had drafted the poor performance letter, he did not want to issue discipline, he simply wanted to help him improve. (Tr. 1524). Whatley asked Topor to commit to working towards improvement and offered, in exchange for a

commitment to improve, to give Topor the original, signed copy of the poor performance letter instead of putting it in his file. (Tr. 1524-25).

Without admitting that his performance was lacking, Topor responded that he was “interested in improving” and requested that Whatley provide specific examples of how his conduct did not meet expectations. (Tr. 1524-25; R. Ex. 82). Although Topor did not express the level of commitment that Whatley had been hoping for, Whatley still promised to return the letter and to hold coaching sessions using specific examples. (Tr. 1525-26).

6. May 15 and May 31 – Topor once again failed to meet expectations with respect to troubleshooting and was coached on how to do so

As promised, Whatley and Jung made a conscious effort to collect specific examples of when Topor’s performance failed to meet expectations for use at future coaching sessions. (Tr. 893, 1484).

On May 31, Jung and Whatley held a coaching and mentoring session with Topor to discuss a recent example of Topor’s performance failing to meet expectations with respect to troubleshooting. (Tr. 892-93, 1526-27; R. Ex. 45). Specifically, they referred to Topor’s conduct the week of May 15, 2017, when Caswell requested that Topor troubleshoot the high burner pressure on the DDS charge heater, and Topor responded by merely providing Caswell with a list of things that could be tried to resolve the problem, but did not actually proactively engage in any of the recommended actions himself. (Tr. 892-93; R. Ex. 45).

Whatley and Jung specifically informed Topor that developing a list did not constitute troubleshooting. (Tr. 1526-27; R. Ex. 45). They explained that they expected he actually take the steps he recommended and provide the information gained as a result.

(Tr. 1526-27; R. Ex. 45). Despite this clear instruction, Topor refused to concede that he needed to improve his performance in such a manner. (R. Ex. 82).

7. June 8 – Topor rejected the validity of all previous coaching efforts by submitting written responses to Human Resources

On June 8, 2016, before Whatley had an opportunity to return the poor performance letter to Topor as he had promised to do on May 20, Topor drafted a response and submitted it to HR, along with a request that it be placed in his personnel file, thus effectively submitting the poor performance letter into his file himself. (G.C. Ex. 31). Despite the fact that Whatley and Jung provided an extensive explanation of why there was no dead leg or need for a bleeder valve in the 34-E-5 piping, *as fellow VRO Nelson had proactively found and demonstrated*, Topor completely rejected their explanation, and, in his written response, reiterated his belief that a bleeder valve was necessary. (G.C. Ex. 13). To this day, Topor refuses to accept management's explanation to the contrary. (*See* Tr. 1102-1104, 1106-07, 1109). Such intransigence continues even in light of the fact that Nelson found no dead leg or need for a bleeder valve, and successfully put the piping into service.

At the same time he delivered the response to the poor performance letter, Topor gave Christa Powers in HR copies of multiple other emails he had sent to himself, “responding” to other coaching sessions. (*See* Tr. 1087, 1116-17, 1124-25; G.C. Exs. 30-32; R. Ex. 46). Each and every response indicated disagreement with the conclusions of management and a complete refusal to critically examine his own performance or knowledge base. (*See*. G.C. Exs. 30-32; R. Ex. 46). Topor requested that those, too, be put in his personnel file. (Tr. 1125). Per his request, HR maintained Topor's “responses”

in files related to Topor but did not insert them into his official “personnel file,” as that term is used at SPPRC. (Tr. 1449).

8. June 12 – Despite Topor’s rejection of all coaching, Whatley returned the poor performance letter and, once again, unsuccessfully attempted to gain Topor’s commitment to improvement

On June 12, Whatley called Topor to a meeting with himself, Jung, Powers, and Chris Riley, the union business agent. (Tr. 1529). Whatley opened the meeting by returning the signed poor performance letter to Topor, as promised,¹⁶ and again expressing his lack of interest in issuing formal discipline. (Tr. 898, 1115, R. Ex. 50). Whatley explained to Topor that the “expectations and examples” discussed in previous coaching sessions were not intended “to point fingers,” and that he had no desire to make Topor “feel bad,” while reiterating that Topor’s performance was lacking in comparison to that of other VROs, and that he wanted to help Topor improve. (R. Ex. 50). Whatley expressed a desire to see Topor develop, stating “[t]he company has 13 years invested in you and we want to see you grow that. We want you to have the opportunity to meet our expectations.” (G.C. Ex. 33; Tr. 1281-82). To that end, Whatley offered Topor the opportunity to suggest a format for coaching that he thought would work better than regular meetings with Whatley. (Tr. 1531). Topor refused to suggest anything in response. (Tr. 1444-45). Instead, he demanded examples of his failure to meet expectations. (Tr. 1444-45). Whatley emphasized that Topor had been given examples previously and would continue to be given examples as they arose, but that the present

¹⁶ It is important to note, however, that by this time Topor had already sent the poor performance letter to HR himself, along with a note that he did not agree with the basis for that discipline (which was ultimately rescinded and would not have otherwise been mentioned in any of Topor’s HR files had he not done so himself). (R. Ex. 50)

meeting was intended only to address Topor's willingness to engage in the coaching program. (Tr. 896, 1531-32; R. Ex. 50).

Topor continued to resist cooperation and, eventually, Chris Riley called Topor out in the hall for a private discussion. (Tr. 1249; R. Ex. 50). Shortly thereafter, Riley called Powers out for an individual conversation as well. (Tr. 1445-47; R. Ex. 50). During their conversation, Riley expressed to Powers his frustration with Topor and lack of progress being made in the meeting, and assured Powers that he was trying to get Topor to commit to improving. (Tr. 1445-47; R. Ex. 50). Specifically, Riley informed Powers that, while out in the hall, he had advised Topor to begin following Whatley's instructions, stating, "if [you] want[] to go route A and the Ops Manger is telling you route B, then you better take route B." (Tr. 1447; R. Ex. 50). By the end of the meeting, after additional back and forth, Topor stated that he was committed and wanted specific examples to support future coaching. (R. Ex. 50).

Exposing the insincerity of his stated commitment, Topor then provided a written response to the meeting on June 16. (G.C. Ex. 33). In his response, Topor attempted to twist Whatley's decision to remove the poor performance letter from his file from a benefit Whatley conferred upon him in exchange for his commitment to participate in a coaching program, into a reason he should not be required to participate in coaching at all. (*See* G.C. Ex. 33). Specifically, Topor complained that it was unfair that "[w]ith the removal of my May 15, 2017 Poor Performance letter during the meeting, I have no Poor Performance letters in my personnel file but, I am still scheduled to have regular performance improvement meetings." (G.C. Ex. 33).

9. July – Topor failed to meet expectations by again failing to independently follow supervisory directives

On the morning of July 27, 2017, Regenscheid reviewed with operators the procedure for dealing with high flare flow or high H2S in the flare and management's expectation that if a flaring event occurs, it should become everyone's first priority to resolve. (R. Ex. 55; Tr. 747).

Although Topor was working as a console operator on July 27, had thus heard Regenscheid's directive, and received notice around 8 a.m. to begin investigating ongoing flaring, he failed to ensure that the resolution process was appropriately prioritized in the field. (Tr. 693, 747, 750). Topor should have directed the field operator in the North Reformer to begin the resolution process immediately, and it should have been completed within an hour and a half or two hours. (Tr. 747-50). Instead, Topor chose not to communicate the initial directive until 11:30 a.m., three (3) hours after he had received notice of the need to resolve the flaring. (R. Ex. 55). When Regenscheid arrived to check on the status of the procedure at 1 p.m., Topor reported that he did not know the status and that Rennert, the North Reformer field operator assigned to the task, was at lunch. (Tr. 693, 750).

Jung and Regenscheid thereafter did not discipline Topor for ignoring Regenscheid's instruction on flaring, but instead simply coached Topor on the importance of executing the flare procedure quickly, and on his failure to appropriately and effectively communicate with his crew. (Tr. 693-94, 903; R. Ex. 33).¹⁷ Topor provided a written response to this coaching session on August 15, stating that he

¹⁷ Topor was not the only console operator who failed to appropriately guide the flare investigation process, nor was he the only one coached. Regenscheid and Jung notified both Topor and his fellow console operator, Jack Kariesch, that their performance failed to meet expectations. (Tr. 693-94; R. Ex. 33).

disagreed with Jung and Regenscheid's assessment that he failed to communicate effectively with the field and that, if Jung and Regenscheid wanted the process completed faster, they could have brought in additional operators. (G.C. Ex. 35).

F. Topor's 2017 Performance Reviews and Related Complaints

During the summer of 2017, operations management prepared mid-year performance reviews for bargaining unit personnel. (*See* Tr. 1546). These mid-year reviews were conducted using the same format as previous annual reviews; operators were rated on a scale from 1 ("unsatisfactory performance") to 3 ("meets expectations"), both with respect to their overall performance and with respect to particular skill areas. At the time, it was Whatley's practice to meet personally with every individual receiving less than a 3 to help ensure that they clearly understood the basis for their rating as well as the expectations they were not meeting. (Tr. 832, 836-37, 908, 1540-41).¹⁸

As he had since 2006, Regenscheid prepared a review on Topor, then sent it to Jung for approval. (Tr. 664). Jung and Regenscheid agreed that Topor's performance would be rated below a 3 and, as a result, Whatley scheduled a meeting with Topor and his supervisors to discuss the rating, and to conduct some additional coaching, before officially issuing the review. (Tr. 1484-85).

1. August 11 – A pre-review coaching session was held to ensure that Topor was aware of expectations and had specific examples of conduct that did not meet those expectations

On August 11, Whatley, Jung, and Regenscheid met with Topor for a pre-review meeting and coaching session. (Tr. 831-32, 907, 953, 1484-85, 1541). This meeting was *not* a review. During the meeting, Jung read from a set of talking points, entitled "Rick

¹⁸ There were at least five operators, including Topor, who were rated below 3 and thus met with Whatley. (Tr. 1485-86, 1542:25-1543:5). One such employee was P.J. Gabrielson, whose supervisor, Mark Rasmussen, testified that Whatley met with Gabrielson due to his rating. (Tr. 782).

Topor Mid-Year Performance Review.”¹⁹ (Tr. 832, 863, 908; *see* Tr. 953-54; G.C. 18). Those talking points were taken from a *draft* review that Jung had prepared in order to address the coaching provided to Topor in which Regenscheid had not been involved. (Tr. 906-07). As was his custom, Topor rejected the validity of everything Jung read, and responded by saying “I think my performance was fine.” (Tr. 1543-44). Brandon Riley, who was present as Topor’s Union representative, complained, on Topor’s behalf, merely that the “review” was entirely negative. (Tr. 842).

2. Topor complained that the pre-review meeting was unfair and requested his mid-year review

After the pre-review meeting, Topor emailed HR Director Tim Kerntz with numerous complaints. (R. Ex. 58). First, he complained that he was surprised by the contents of his “review,” and that “a review should never be a surprise to an employee,” thus conveniently ignoring the weeks of coaching meetings, and that the purpose of the pre-review meeting was to provide Topor the notice he sought. (R. Ex. 58). Second, he complained that Jung, Whatley, and Regenscheid were not capable of giving him a “fair and honest review” due to their involvement with the incident on November 4, 2016, his suspension and final warning, the associated OSHA filing and NLRB hearing, and the fact that they did not supervise him on a regular basis. (R. Ex. 58). And, finally, he complained that he was not allowed to keep the document Jung passed out at that

¹⁹ Topor was handed a copy of the talking points, but as the meeting concluded, Whatley asked that Topor return it, as it was not yet a final draft. (Tr. 1541-42). Topor then directed Riley to start copying the document. (Tr. 1542). Believing that Topor intended to have Riley copy the entire document by hand and that there was insufficient time to do so, Whatley informed them that “the time for taking notes is over.” collected the talking points, and told Topor he would receive a copy of his review through ExponentHR, the electronic review system, once it was finalized. (Tr. 660, 837, 954, 1542). A few days later, Whatley apologized to Topor and Riley for telling them to stop taking notes and for taking away the document containing Topor’s notes. He offered to retrieve and return the document to Topor, but was unable to locate it. (Tr. 954-957).

meeting, on which he had taken notes. (R. Ex. 58). He closed by “formal[ly]” requesting his “official midterm review.” (R. Ex. 58).

3. Whatley delivered Topor’s review, per Topor’s request

On August 24, 2017, Whatley met with Topor to deliver his official mid-year review.²⁰ (Tr. 1547-48). Although Whatley did not normally present reviews to operators, he chose to deliver Topor’s review because: (1) Topor specifically requested his formal review in correspondence with HR on August 14; (2) he did not want too much time to pass between the pre-review meeting and the issuance of the official review; and (3) Regenscheid, who would normally deliver the review, was on an extended vacation, while Jung was busy with operator interviews. (Tr. 665, 843, 945-46, 1545-47).

The review Whatley delivered differed slightly from the draft version used as talking points at the preliminary meeting. (*Compare* G.C. Ex. 18 *and* G.C. Ex. 12(b)). Based on Riley’s observation during the pre-review meeting that Topor’s review was entirely negative, Jung and Whatley had revised Topor’s official review between August 11 and August 24 to ensure that it included positive comments regarding Topor’s performance. (Tr. 842-43, 909, 1548).

During this second meeting, Topor clearly expressed his disagreement with the review and, when Whatley again sought a “commitment to improve” at the end of the meeting, Topor did not reply. (R. Ex. 82; Tr. 1548-49).

²⁰ The header on the review document states that this is a “Performance Off-Cycle Review.” That header is meaningless except as an indication of when the review was created in the system. At some point, the official window for creating a performance review closed and the only option available was to create an “off-cycle” review. (Tr. 910-11).

4. September 7 – Topor complained of harassment and hostile work environment, based on the pre-review meeting and the formal delivery of the review by Whatley

Around 4:15 p.m. on September 7, Kerntz, Topor, Riley, and Dean Benson, the Chief Union Steward, met at Topor's request to discuss his review(s).²¹ (R. Ex. 111). Topor reported that he felt harassed and subjected to a hostile work environment. (R. Ex. 58). Specifically, he claimed that Jung, Regenscheid, and Whatley were all liars who were "setting him up," and that nothing in his review was factual, apart from the statement that "Rick reports to work on time and per the schedule." (R. Ex. 111, *see* 352, 354). Topor further claimed that he had never previously received a negative review, that he was the only operator who had received a midterm review, and that he was the only operator receiving performance coaching; each of those assertions was false. (Tr. 356, R. Ex. 111). Consistent with his attitude in Whatley's coaching sessions with him, Topor refused to accept that there could be anything he needed to improve upon, stating, "I am not changing. I am a good operator." (Tr. 361).

5. Kerntz thoroughly investigated Topor's complaints of harassment and hostile work environment

Kerntz personally investigated Topor's harassment and hostile work environment claims.²² (Tr. 362). Because Topor mentioned specific concerns regarding Whatley and Regenscheid, Kerntz interviewed both as part of his investigation. (Tr. 362).

²¹ Topor emailed Kerntz again, stating that his "midterm review never came through" but that he had participated in a meeting with Whatley about an "off cycle review." (R. Ex. 59). He requested a meeting in this email but failed to set it up. Then, on September 4, Topor sent Kerntz a response to his review and again requested a meeting. (G.C. Ex. 13). A meeting was then scheduled for September 7.

²² Topor requested that an independent investigator be brought in to investigate his allegations of harassment and hostile work environment. Kerntz agreed to consider the possibility, but ultimately determined that it was unnecessary. (R. Ex. 111, 361-62). Complaints of harassment and hostile work environment are routinely investigated by the Human Resources Department. (Tr. 352, 364). Because Topor came directly to Kerntz, he chose to do it himself. (Tr. 364).

On September 8, Kerntz interviewed Regenscheid. In particular, Kerntz asked Regenscheid about the compressor incident on April 5, which Topor alleged should not have been noted negatively in his review, as he claimed that Regenscheid had been asking him to do something unsafe. (R. Ex. 61; Tr. 367). Regenscheid explained the whole process to Kerntz, in detail, and provided him with a write up he prepared shortly after the event regarding Topor's performance. (R. Ex. 37; Tr. 368-69).

Then, on September 11, 2017, Kerntz interviewed Whatley regarding Topor's performance review and his performance throughout 2017. (R. Ex. 63). Whatley clearly explained Topor's shortcomings that formed the basis for the review. (*See* R. Ex. 63). Whatley specifically addressed the April compressor incident and his assessment supported Regenscheid's assertion that Topor should have known better and had behaved inappropriately. (*See* R. Ex. 63).

Whatley also dispelled the idea that Topor was the only operator who had received a mid-year review and performance coaching. Whatley sent Kerntz a list of other operators who had received coaching from himself and the superintendents (*see* R. Ex. 11, 63), and confirmed that, not only had others received mid-year reviews, but Whatley was present during meetings for all those individuals rated below a 3, not just Topor. (Tr. 375). Whatley explained that no other individual received coaching as frequently or as extensively as Topor did, because other than Topor and one other individual, everyone "accepted our evaluation of performance and agreed to work toward correction or improvement." (R. Ex. 11). Whatley noted that while he continued to try to work with Topor, disciplinary action had been taken against the other operator who similarly refused to cooperate. (R. Ex. 11).

6. September 12 - Regenscheid inadvertently delivered Topor's review for a second time

On September 12, unaware that Whatley had delivered Topor's review in his absence, Regenscheid met with Topor in his office to deliver the review as he had in previous years. (Tr. 654-55, 846-47, 947, 1552).

The review Regenscheid delivered on September 12 was identical to that delivered by Whatley on August 24, except that the numerical ratings were better. Where Topor received a "1" on August 24 he received a "2" on September 12. (*Compare* G.C. 12(b) *and* G.C. Ex. 22). Jung had previously made these rating changes pursuant to a discussion she had with Whatley after the August 11 pre-review meeting, at which they agreed to change the numerical rankings for "team work and initiative" and "work quality and ability to follow instructions" from 1 to 2, in the hopes that Topor would be more inclined to try to improve his performance before the end of the year if he felt he did not have quite such a large gap to bridge. (Tr. 843-44, 947, 949-50, 1550-51). The changes had not yet been entered in ExponentHR, however, at the time Whatley printed out the review to deliver to Topor on August 24, and thus appeared to be new changes when Regenscheid delivered the review in September. (Tr. 949-952). Regenscheid downloaded the review he gave to Topor from ExponentHR, and thus had the final version following the Jung/Whatley change. (*See* G.C. Exs. 22 (dated 9/12/17), G.C. 12(b) (dated 8/18/17))

7. September 18 – Kerntz informs Topor that there is no evidence of harassment or hostile work environment

On September 18, Kerntz informed Topor that he had completed an investigation into his claims of harassment and hostile work environment and had found no evidence to substantiate them. (Tr. 382). Despite the lack of evidence, Kerntz asked Topor if there

was anything that he felt would help resolve the situation, such as moving to a new crew. (Tr. 278-79; R. Ex. 77). Topor adamantly stated that he was “not going anywhere,” and provided no additional suggestions. (Tr. 279; R. Ex. 77). Topor rejected Kerntz’s suggestion that he reach out to his supervisors to try to understand what he could do to meet their expectations going forward, stating that he has “been here for 13 years and is an excellent operator.” (R. Ex. 77; Tr. 382).

G. September 15 - Topor failed to respond to a high-priority alarm

Topor worked the overnight shift as a console operator starting the evening of September 14. (Tr. 1026). At 1:33 a.m. on September 15, a high priority alarm activated, indicating that there was a high liquid level in the DDS compressor interstage knockout drum. (Tr. 1182).

1. The DDS knock-out drum alarm indicated the existence of a dangerous situation, which should have been addressed immediately

The DDS unit is a high pressure unit, through which hydrogen is circulated in order to remove sulfur from gasoline products. (Tr. 44-45). Hydrogen is added to the process at the beginning of the unit, removed at the end of the unit, and circulated for reuse. (Tr. 44). To ensure that the hydrogen is pure before it is sent back into the system, the gas passes through a series of “knockout” vessels before it is compressed. In these vessels, liquid entrained in the gas cools, condenses, and drops out of the gas. (Tr. 45). The liquid then collects in the bottom of the vessel as the hydrogen gas travels out the top into the compressor. (Tr. 52). The compressor raises the pressure of the hydrogen such that it can be put back into the front end of the process and reused, and the liquid that collects in the drum is manually drained from the vessel. (Tr. 46, 52). Proper functioning of knockout vessels is critical to the refinery’s safe operation, because

compressors cannot compress liquid. (Tr. 1632). If liquid were to travel into a compressor, it could lead to a catastrophic failure and explosion, akin to that of a grenade. (Tr. 45, 1632-33).

Level instruments are placed inside the drums to measure the liquid levels and the readings from those instruments are visible on a monitor to the relevant console operator in the CCR. (Tr. 61). Instruments do not generally run the full height of the drum, but are carefully placed by engineers in the area that needs monitoring and controlling so as to send a signal to initiate operator action before the liquid causes a compressor failure. (Tr. 77-8, 88-89, 235-36, 1321). Refinery personnel routinely refer to the level on the instrument as the level in the vessel. (Tr. 196, 1660).

On the knockout drum in question – the “interstage” drum – the level instrument sits just below the inlet nozzle, because that is the area where measurement is most important. (Tr. 78, 88-89). The closer the liquid level gets to the inlet line, the greater the risk of liquid travelling into the compressor. (Tr. 89-90, 1651). Liquid does not need to rise to the level of the inlet line to cause a major safety issue; the gas entering the vessel through the inlet may sweep liquid up from below and into the compressor once the liquid reaches a high level. (Tr. 89, 1630-31).

When the high level alarm sounds, it means that there is a potential that liquid could start carrying over into the compressor. (Tr. 193, 1650). The high level alarm sounds at approximately 50% of the level indicator. (Tr. 193). If nothing is done when the alarm sounds, the liquid level will simply continue to rise. Once the reading from the level instrument reaches 100%, or whatever the maximum percentage is for the particular instrument, it will continue to present that reading, even as additional liquid collects. (Tr.

79-80). Due to the calibration process, 98% was effectively 100% on the level in the interstage knockout at issue here. (Tr. 79-80).

2. The alarm activated and was ignored for the remaining four hours of the overnight shift

The high level alarm in the interstage knockout drum activated at 1:33 a.m. on September 15. (Tr. 98, R. Ex. 71). When the alarm activated, an audible alarm would have sounded at Topor's console, the alarm would have appeared at the top of the alarm summary screen next to a colored symbol, and lights on the compressor diagram screen would have illuminated, as well as lights on Topor's keyboard. (Tr. 99). Fourteen seconds after the alarm activated, someone hit the "acknowledge all" button on the keyboard. (Tr. 1387-88). Hitting that button would have stopped the sound and any associated flashing, but the priority alarm indicators would have remained lit, and the alarm identity would have remained on the alarm summary screen. (Tr. 99-100, 112, 1376).

Despite sitting at the console, on duty, for approximately four hours after the alarm activated, while surrounded by the visual cues designed to alert him to the active high priority alarm, Topor did not respond in any way.²³ (*See* R. Ex. 66; Tr. 1313 (Topor stating that he does not normally leave the chair while working as a console operator.))

²³ No additional action took place with respect to this alarm during Topor's shift, except that, at 3:49:47 a.m., someone hit "acknowledge all" on the console in the satellite. (Tr. 100). Although there is no way of knowing who hit the button, it is clear that field operators were not responsible for instructing and ensuring the knockout drum alarm received an appropriate response. As the North Reformer console operator, this responsibility lay solely with Topor. The action taken on the console in the satellite would not have had any impact on Topor's console in the CCR, and the priority alarm would have remained on his alarm summary and lit on his keyboard. (Tr. 130).

3. The day shift operator discovered the alarm and responded immediately

Around 5:30 a.m., operator P.J. Gabrielson arrived to replace Topor on the console. (Tr. 1038; R. Ex. 66). Before Topor departed, the two had a required shift turnover meeting,²⁴ during which Topor was supposed to report to Gabrielson any outstanding issues. (Tr. 1041). Topor did not notify Gabrielson of the knockout drum alarm during this meeting. (Tr. 1041). After Topor left, Gabrielson looked at the console and *immediately* noticed that the high priority, high level alarm for the interstage knockout drum which had been active for four hours, and that the level indicator was reading 98%. (Tr. 784; R. Ex. 66). Gabrielson immediately called the field operator on duty and instructed that the vessel be drained, then reported the situation to his supervisor, Mark Rasmussen. (Tr. 767-71, 784).²⁵

According to Rasmussen, Gabrielson appeared very concerned about the potential consequences of the extended period of inattention to the alarm, and showed Rasmussen a trend line to illustrate the situation. (Tr. 784-785). The trend record showed the alarm lit and sounded at 1:30 a.m. and that the vessel was not drained until Gabrielson came on shift at about 5:30 a.m. (Tr. 784).

H. SPPRC Conducted a Thorough Internal Investigation into the Missed Alarm

Because the alarm in question was designed to predict a “very dangerous, potentially catastrophic event,” Whatley called for a full investigation to determine how it

²⁴ Console operators are required to monitor alarms and “effectively communicate[] relevant information at shift change” per the Job Performance Profile. (R. Ex. 95).

²⁵ At the same time, Gabrielson reported an issue with the Penex and the purity level of product. Although this issue was investigated and addressed alongside the alarm issue, because Topor’s conduct was deemed appropriate with respect to that issue, it is not relevant to the termination of Topor’s employment and will not be discussed in this brief. (See R. Ex. 66). It is important to note, however, that another issue was examined during the same investigation and Topor’s actions were deemed appropriate, as evidence that SPPRC conducted this investigation in good faith.

was allowed to remain unaddressed for so long. (Tr. 1557). Upon learning that Topor was working the console at the relevant time, Whatley decided, in consultation with Kerntz, that the investigation should be conducted by someone entirely unconnected to the pending legal proceedings related to Topor's November 2016 discipline.²⁶ (Tr. 383). Dave Barnholt was selected to conduct the investigation due to his background in the reformer, as well as his detachment from the ongoing legal matters. (Tr. 42). Although Barnholt was aware that Topor had been suspended in late 2016, Barnholt was unaware of the reasons behind that suspension. (Tr. 43).

Already scheduled to work the weekend of September 16-17 for turnaround duties, Barnholt conducted much of his investigation that weekend. (Tr. 60). First, Barnholt reviewed the radio traffic during Topor's shift and discovered there had been no call from the console to the field instructing the drainage of the drum in question. (R. Ex. 66). Next, Barnholt interviewed Gabrielson, who noted that when he mentioned the high level to Topor at the next shift change, Topor appeared surprised. (R. Ex. 66). Because his preliminary review of the incident led Barnholt to suspect that personnel negligence was involved, Christa Powers, the HR representative for operations, joined the investigation. (Tr. 44, 1434-35).

Together, Barnholt and Powers reviewed relevant documentary evidence and interviewed six additional people believed to have relevant personal knowledge, including: Gary Regenscheid, Mark Rasmussen, Scott Schulte, Jason Christner, and Rick Topor. (R. Ex. 66). Barnholt and Powers also sought the assistance of Craig Wheatley, the controls group supervisor, to ensure they reviewed the correct alarm data and

²⁶ As the Operations Superintendent for the area in question, Jung would normally have been assigned to conduct the investigation.

understood it properly, and visited the CCR to review what the alarm summaries looked like and to see the indicators that would have been available to alert Topor to the alarm on September 15. (Tr. 72-73, 103-105).

Barnholt and Powers also offered Topor multiple opportunities to explain to them what occurred the morning of September 15. (*See* R. Ex. 66, 81). Topor continually deflected responsibility for the ignored alarm by producing numerous unconvincing excuses for his failure to act upon the alarm. (*See* Tr. 240; R. Ex. 66, 81). His excuses not only failed to explain Topor's inaction, but also betrayed an unwillingness to truly accept responsibility or examine his own conduct, and a complete misunderstanding of the chemical process and functioning of the equipment involved, as well as the danger posed by ignoring the high priority alarm and liquid level. (Tr. 133).

1. The investigators concluded Topor's failure to respond to the alarm was unjustified and that Topor refused to take responsibility for his failure

Barnholt and Powers ultimately concluded that Topor failed to pay appropriate attention and inexcusably failed to respond to the high priority alarm, despite multiple opportunities over four hours to identify and act upon it. (R. Ex. 66, 81). Together, Barnholt and Powers drafted an investigation report containing their findings, which they sent Whatley and Hastings. (Tr. 61, 1452-53; R. Ex. 66). In support of their findings, they specifically noted that the high priority alarm would have remained visible on the alarm summary screen and the compressor screen, and the alarm indicator lights would have remained lit on the keyboard, for a full four hours between the time the alarm activated and the end of Topor's shift, and that there was no excuse for Topor's failure to pay appropriate attention to his console. (R. Ex. 66, 81). Barnholt and Powers specifically rebutted and rejected each of Topor's attempts to excuse his failure based on

other events occurring at the time and the existence of other alarms, and specifically noted that Topor inaccurately informed them that the DDS was in startup during his shift. (R. Ex. 66, 81). In fact, they concluded that Topor should have been particularly alert to the potential for liquid in the drum, given his own statement that the drum would not usually fill except when the hydrogen plant was down, as it was on the 15th. (R. Ex. 66, 81). Topor knew that with the hydrogen plant down during his shift there was a likelihood of liquid collecting in the drum, yet once the liquid level alarm lit he still ignored it and did not act during the remaining four hours of his shift. (R. Ex. 81).

2. September 21 – Barnholt and Powers meet with Topor, at his request and re-affirm their conclusions

On September 20, the day after Barnholt and Powers submitted their report, Topor emailed them reiterating numerous excuses for his failure to act upon the alarm, stating that he now realized how serious the investigation was, and asking that they come out to the unit to see the knock out drum, the alarm summary, and all the tank alarms from that day. (Tr. 142, R. Ex. 79). They agreed to meet with Topor the next morning. (Tr. 148).

During this meeting, Topor showed Barnholt and Powers printed summaries of the alarms and complained that there were four pages of alarms for his board during that shift. (R. Ex. 81). Barnholt, however, pointed out that the newest alarms remain at the top of the screen.²⁷ (R. Ex. 81). Next, Topor brought up Incident 4222, and asked Barnholt to review it. (R. Ex. 81). Barnholt determined, however, that the incident was not similar. (Tr. 146). Topor then claimed that one of the field operators should have independently looked at the vessel and noticed the level. (R. Ex. 81). Barnholt

²⁷ During Topor's overnight shift on September 14-15 (between 5:30 p.m. and 5:30 a.m.), only forty-one alarms were activated. (See R. Ex. 130). That is a relatively low number for a twelve hour period, and most were not high priority alarms. (See R. Ex. 130, Tr. 1374).

specifically investigated this claim and learned that field operators are not required check the levels in that drum. (Tr. 155; R. Ex. 80). Instead, they rely on the console alarm “since the drum is empty the majority of the time, except when the Hydrogen plan is down.” (R. Ex. 80). Finally, Topor stated that “the level instrument is much smaller than the vessel and at the rate the level rose that shift, it could have taken days to fill the drum with liquid before it carried over to the compressors” and thus there really was no danger. (Tr. 134; R. Ex. 81). This, Barnholt was aware, was a complete misunderstanding or misstatement of the system and danger at issue. (Tr. 134-35). The investigators remained firm in their conclusion that Topor’s failure to respond to the alarm was inexcusable. (Tr. 148-49, R. Ex. 81).

Afterwards, Barnholt and Powers supplemented their report with an additional page including the conclusion that “it is clear that he does not accept full responsibility for the event and Mr. Topor still did not provide any valid reason for not responding to the high priority alarm.” (Tr. 154, R. Ex. 81). Barnholt recommended that the investigation result in disciplinary action. (Tr. 203, 207-08).

I. The Decision to Terminate Topor’s Employment

1. Kerntz recommends the termination of Topor’s employment to Refinery Manager Rick Hastings

After reviewing both the initial investigation report and the supplemental report completed by Barnholt and Powers, Kertnz sent Hastings a memorandum recommending the termination of Topor’s employment, as well as a summary, prepared by Whatley, detailing important events related to Topor’s performance throughout 2017, the

investigation report, and the investigation supplement.²⁸ (Tr. 385-90; R. Ex. 17). Referring to the coaching efforts that took place throughout 2017, Kerntz stated that “Rick’s management has tried mightily to improve his performance overall, and as a VRO. He has been mostly resistant and when he did on occasion agree to a need to work on improvements and to accept the coaching, he then later rejected any need for it,” before concluding that “[t]his most recent event of the DDS alarm demonstrates that his attitude toward his job duties and the actual performance thereof likely presents a danger to other employees and to our facilities; given his level of experience and VRO position that is especially concerning.” (G.C. Ex. 17). Kerntz’s decision to recommend termination was not dependent upon the validity of the 2016 suspension and final warning. (Tr. 387, 391).

2. Hastings concludes that the termination of Topor’s employment is the appropriate response

The decision to terminate Topor’s employment was ultimately made by the Refinery Manger, Rick Hastings, in consultation with Tim Kerntz and Michael Whatley. (Tr. 390-91, 1626-27, 1634-36). Hastings was alerted to the missed alarm the day after the incident, but did not participate in the investigation process. (Tr. 1624-25). When the investigation was complete, Hastings reviewed the investigation documentation and Kerntz’s recommendation, and additionally consulted with Whatley and an HR representative. (Tr. 1626-27). Based on the investigation report and Topor’s statements regarding the liquid level in the knock out drum, Hastings concluded that Topor did not properly understand the process he was dealing with, that “he was counting on luck as opposed to good, common facts to make decisions that were imperative to the safe

²⁸ Those documents were not physically attached to the memorandum (R. Ex. 17) that references them as attachments, but they were delivered to Hastings along with the memorandum. (Tr. 388-89).

operation of the refinery”, and accordingly decided to terminate Topor’s employment. (Tr. 1631-32, 1635-37).²⁹

Hastings explained his decision:

[A]s a refinery manager, I feel the responsibility lies on me for the safe and efficient operation of the refinery. And I could not feel good putting somebody back who, you know, really didn’t show the aptitude, the understanding, and the willingness, to operate within our guidelines, and somebody who was willing to say, [w]ell it’s not an incident because nothing happened. That’s an arrogance that’s only going to lead to failure. . . luck is not a strategy for how you operate a potentially hazardous, you know, business like an oil refinery.

(Tr. 1638).

Hastings was not involved in the unfair labor practice or labor arbitration proceedings related to the suspension and never had one-on-one dealings with Topor. (Tr. 390, 1624). He did not consider Topor’s suspension and final warning or any of his related legal action when making the decision, and would have terminated Topor’s employment regardless of his record. (Tr. 1640).

The termination letter issued to Topor specifically stated

Your performance has failed to meet company standards and has also placed your fellow employees and Company facilities at risk. This includes, but is not limited to, your failure, while on a final written warning, to respond to a high priority alarm while working as a console operator on September 14, 2017 as you have admitted. *Even aside from the final warning*, the combination of this recent safety-related performance failure and your failure to improve your performance despite the many repeated coaching efforts from your supervisors warrants your termination.”

(G.C. Ex. 4 (emphasis added)).

²⁹ Hastings considered the possibility of issuing a lesser form of discipline but did not feel anything less was appropriate, given the stakes. (Tr.1637-38).

J. The Hearing

A seven day hearing took place on June 11-14 and July 24-26, 2018. The ALJ heard testimony from Dave Barnholt, Tim Kerntz, Briana Jung, Michael Whatley, Craig Wheatley, Gary Regenscheid, Mark Rasmussen, Dale Caswell, Christa Powers, Rick Hastings, Brandon Riley, Jason Christner, Dean Benson, and Rick Topor.

1. Witness Testimony

a. Dave Barnholt

Dave Barnholt, Operations Superintendent over the crude and FCC areas during the relevant period, who was also a former Operations Superintendent for the reformer and blending areas (Tr. 15), testified in detail regarding the investigation that he conducted with the assistance of HR Business Partner Christa Powers. He explained how the information gathered during the investigation led to the conclusion that Topor had ignored an alarm for which he was solely responsible, and how Topor's conduct during the investigation process demonstrated a defiant refusal to accept responsibility for his actions, despite the fact that Topor used words designed to suggest otherwise. Barnholt explained the significant danger created by Topor's failure to respond to the alarm, and his concern at discovering that Topor did not understand the risk of liquid entering the compressor, unlike the other operators he spoke with during the investigation. Barnholt testified that, based on the findings of the investigation, he had recommended disciplinary action be taken. (Tr. 203). Barnholt was entirely uninvolved in the events that led to Topor's prior discipline and the associated legal proceedings, and thus those events could not have influenced his investigation or his recommendation in any way. (*See* Tr. 43).

b. Briana Jung

Briana Jung, the Operations Superintendent for the reformer area, testified regarding the extensive attempts she, Whatley, and the shift supervisors who report to her, took to coach and mentor the Charging Party throughout 2017, in lieu of taking disciplinary action, and the defiance they received in response. Jung testified that, to her knowledge, no other operator has ever been given as many coaching sessions and chances to improve performance as was Topor. (Tr. 915).

Jung's testimony illustrated the care taken during the mid-year review process to ensure that Topor was given specific examples, as he had requested, of where his performance failed to meet company standards. She further testified regarding the decisions she made, in consultation with Whatley, to increase Topor's performance ratings and to add positive feedback to Topor's review. (Tr. 842-44). Jung also explained that although Topor's 2017 performance reviews had two different titles; "performance review" and "performance off-cycle review," the titles held no substantive significance, and were merely a product of the computer system used to produce the reviews. (See Tr. 910-11, 918-19).

Additionally, Jung testified that that she was unaware of any other operator who ignored a high priority alarm and thus allowed unit equipment (here the compressor) to remain in a dangerous state for four hours, as Topor did. (Tr. 914-15).

c. Gary Regenscheid

Gary Regenscheid, Central Control Room Shift Supervisor for Crew 4, testified regarding the Company's performance expectations both for VROs and for operators working as console operators, and Topor's failure to meet those expectations. In particular, Regenscheid testified that console operators are required to respond to all

alarms immediately, and yet Topor failed to do so during the final four hours of his shift. (Tr. 736). Additionally, he testified regarding his personal involvement in coaching Topor to improve his performance in January 2017 after he failed to properly troubleshoot a sample station, and how Topor had ignored Regenscheid's explicit directions in both April and July of 2017. (Tr. 695-707, 732-33, 744-50).

With respect to the 2017 mid-year review process, Regenscheid testified credibly that the August 11 meeting was a pre-review coaching session and that, when he met with Topor to deliver his review on September 12, 2017, he was unaware that Whatley had previously delivered it on August 24, 2011. (Tr. 655-56).

d. Mark Rasmussen

Mark Rasmussen, Central Control Room Shift Supervisor for Crew 1, testified that he was informed around 5:30 a.m. on September 15 that the high priority alarm for the knock out drum had been left unaddressed for four hours when console operator P.J. Gabrielson came to him deeply concerned about the extended delay and state of the compressor knock out drum liquid level. (Tr. 767-69). Rasmussen testified that he brought the information he received from Gabrielson to management, and spoke with the investigators during the investigation. (Tr. 771).

Rasmussen also corroborated Regenscheid's testimony that console operators are both trained and expected to respond to alarms immediately. (Tr. 783). Rasmussen also testified that he is unaware of any occasion where an operator failed to respond to a high priority alarm for four hours when a potential safety issue was involved. (Tr. 783).

Rasmussen is a former union member and coworker of Topor, both at the refinery and at a previous employer. (Tr. 760-61, 786). There was no evidence of bias or interest

presented to call his credibility in to question. Rasmussen was not involved with Topor's prior discipline or related legal proceedings in any way.

e. Christa Powers

Christa Powers testified regarding her involvement in the investigation into Topor's failure to respond to the alarm on September 15, including what took place during Topor's multiple meetings with investigators. Her testimony regarding the investigation process and the methodology used to assemble the investigation report corroborated that of Barnholt.

Powers also testified to a conversation with Chris Riley on June 12, wherein the business agent admitted that he, on behalf of the union, had been attempting to convince Topor to follow Whatley's directions. (Tr. 1446-47).

f. Tim Kerntz

Tim Kerntz testified regarding his knowledge of the extensive coaching efforts operations management undertook in 2017, Topor's refusal to cooperate with management, Topor's baseless complaints of harassment and hostile work environment, and of the thorough investigation he conducted into those complaints, through which he uncovered absolutely no evidence of harassment or discrimination. Kerntz further testified that he recommended Topor's employment be terminated after the investigation confirmed Topor's failure to respond to the high level alarm in September 2017, because of the danger created and because Topor's behavior over the preceding nine months provided no basis upon which to believe Topor would genuinely work to improve, nor any assurance that Topor would not repeat the very same conduct, but with disastrous results next time. (*See* Tr. 273-80, 356-78, 385-87).

g. Michael Whatley

Michael Whatley, Operations Manager, testified regarding his extensive efforts to coach and mentor Topor throughout 2017, his concern regarding the gap between his expectations and Topor's performance, and how his genuine desire to see Topor improve without disciplinary action, motivated his actions throughout 2017. In particular, Whatley detailed numerous unsuccessful attempts to explain to Topor the chemical processes in his unit, and in particular why there was no dead leg on the 34-E-5 bypass piping, and how throughout Topor had generally refused to engage or to accept the need to improve his knowledge and performance. (*See, e.g.*, 1515-19, 1532-33).

Whatley testified that Topor's failure to respond to the high priority alarm on September 15, put the people in the refinery, the environment, and the community at risk of catastrophe and that he recommended Topor's employment be terminated, because he was genuinely concerned about the continued safe operation of the refinery if Topor was allowed to continue working. (Tr. 1564-67).

h. Rick Hastings

Most importantly, Rick Hastings, the Refinery Manager in 2017, credibly testified that he reviewed the investigation report and related documentation and was particularly struck by the danger that Topor's continued employment would create, and consequently concluded that termination was the only safe, viable course of action. (Tr. 1635-38). Hastings testified that he did not make the decision to terminate Topor's employment lightly, but felt it was necessary for the continued safe operation of the Refinery, for the safety of refinery personnel, and for the safety of the community. (Tr. 1635-38). Hastings emphatically testified that he had no personal relationship with Topor, and that

his decision was completely unrelated to any of Topor's prior discipline. (Tr. 1624, 1638-40).

i. Craig Wheatley

Craig Wheatley, the Process Control Supervisor at SPPRC, is in charge of managing the computer systems used to operate the plant. (Tr. 1361). Wheatley explained the operations in the CCR and the indicators that are visible to a console operator when an alarm is active, both before and after the "acknowledge" or "acknowledge all" buttons are pressed. (Tr. 1367-78, 1392-93, 1397-1400) His testimony is especially significant, as it proves that despite Topor's protestation that he must not have been at his console when the alarm initially activated, he would have noticed the alarm thereafter, upon his return had he been paying an appropriate level of attention to his console, and certainly during the four hours still remaining on his shift. Wheatley's testimony further established that, despite Topor's claims during the investigation, Topor's console was not particularly busy the night he missed the alarm. (Tr. 1373-74).

j. Brandon Riley

Brandon Riley, a Union steward, was present at multiple meetings between Topor and management. Riley testified that he had personally missed alarms while working as a console operator, but *did not* testify that management was aware, or should have been aware, of those missed alarms, nor that any safety hazard was caused by such alleged missed alarms. (Tr. 434-35).

k. Dean Benson

Dean Benson, the Chief Union Steward, was present at multiple meetings between Topor and management. His testimony was not credible. Benson's testimony

regarding the meeting on September 18, at which he, Topor, and Brandon Riley were present, conflicted with testimony given by both Riley and Topor. (*See* Tr. 375, 499-500, 643-44, 1319-20). Whereas both Riley and Topor testified that the union members present discussed the possible termination of Whatley's employment at that meeting, Benson denied that the topic ever came up. (Tr. 375, 499-500, 643-44, 1319-20). Benson also testified, again non-credibly, that mid-year reviews were not regularly conducted at SPPRC, despite the admission of numerous mid-year reviews into the record. (*See* Tr. 526, G.C. Ex. 14).

l. Jason Christner

Jason Christner was the field operator on Crew 4 working in the North Reformer when Topor ignored the alarm on September 15. Christner testified that he was initially afraid he had somehow missed an instruction from the console operator to take action, and that he was aware of the significant danger presented by liquid entering a compressor. Christner also testified that he has previously failed to respond to alarms for extended periods, but, critically, did not testify that management was aware, or should have been aware, that he did so. (Tr. 534-35).

m. Rick Topor

Rick Topor's own testimony clearly illustrated the defiant, arrogant, and obstinate attitude that management witnesses testified he consistently exhibited throughout 2017. During his testimony, Topor repeatedly claimed to know better than his superiors at the Refinery, about how things worked and what was and was not safe. Topor denied that any of the coaching sessions provided by management in 2017 addressed a legitimate criticism of his performance, and maintained, without any objective support, that in each case where management claimed his performance was lacking it was actually above

reproach and not in need of improvement. (*See* G.C. Exs. 30-35).

With respect to his conduct on September 15, Topor vacillated between stating that he was willing to take ownership of his error and offering numerous excuses for his failure to respond to the alarm. (*See, e.g.*, 1159-60, 1236-38, 1242-44; R. Ex. 66). Topor attempted to relieve himself of responsibility for the safety risk posed by the continually increasing liquid level in the knockout drum throughout his shift, by testifying, contrary to the testimony given by every other management and union witness asked about the subject, that the high level on the level instrument in the knockout drum did not represent a serious safety risk, because the drum itself was not yet full. (*Compare* Tr. 1075, 1321-22 and 134, 1557, 1660-61).

n. P.J. Gabrielson

Significantly, P.J. Gabrielson, the operator who came on shift on September 15 and immediately noticed the high priority alarm light on the keyboard and listed on the alarm summary, and who then accordingly immediately instructed a field operator to drain the knock out drum was *not* called to testify by the General Counsel. Accordingly, the General Counsel never put on a credible witness to explain how Topor could have reasonably ignored the ongoing high priority alarm light and summary for four hours, yet Gabrielson immediately noticed it and took urgent action within minutes of assuming control of the console board.

2. Key Exhibits

**a. Topor's Responses to Coaching in 2017
(G.C. Exs. 30-34)**

Topor wrote and submitted responses to each of the coaching sessions he received in 2017, in which he disagreed with the basis for each. Topor's written "responses" to

coaching from management illustrated Topor's unwillingness to accept criticism or to examine his performance critically. Accepting Topor's accounts of the incidents and his assessment of his own performance as accurate would require finding that numerous management witnesses repeatedly lied, both in documentation created at the time of the incidents, and on the stand, under oath. There is no basis for such a finding. Instead, Topor's misguided responses support management's account of his attitude in 2017. These responses demonstrate that Topor not only failed to meet Company expectations, but also refused to accept that he made a single error, throughout the year, despite what experienced members of management told him on multiple occasions. They further demonstrate that refinery management had no basis to believe that his performance would improve after the events of September 15, 2017.

**b. The Investigation Report and Supplement
(R. Exs. 66, 81)**

Barnholt and Powers collaboratively prepared an investigation report based on the notes they each took during the investigation. The report describes each interview conducted and the documentation reviewed. The report clearly demonstrates that the investigation was thorough and that management considered and rejected each of the excuses that Topor raised during the hearing.³⁰ When reviewed in conjunction with the supplemental report created after Powers and Barnholt met with Topor again on September 21, the report demonstrates how the information gained during the

³⁰ Topor raised for the first time during the hearing the claim that he was fatigued on September 15, a claim not ever mentioned to Company investigators Barnholt and Powers. If Topor was feeling fatigued, it was his obligation under Company policy to report the same to management, but he did not do so. (Tr.157; R. Ex. 98). Barnholt, therefore, did not specifically investigate Topor's claim that he was fatigued at the time he missed the alarm. Barnholt did, however, review SPPRC's fatigue policy during the investigation, independent of any complaint from Topor, and determined that the policy did require any particular action from the Company, given that Topor had not yet claimed he was fatigued. (See Tr. 156-57).

investigation provided the basis for the Company's conclusion that Topor inexcusably ignored the high priority alarm on September 15.

**c. The Termination Letter
(G.C. Ex. 4)**

The termination letter issued to Topor explicitly states that the Company considered the possibility that Topor's suspension and final written warning might be invalidated by the Board, assessed the situation as though that discipline was not in Topor's record, and came to the conclusion that, regardless of the existence of any previous discipline in Topor's record, termination of Topor's employment was the appropriate response given the severity of the facts.

III. Legal Argument

A. Summary of Argument

The evidence presented at the hearing established that throughout 2017, SPPRC attempted to work with and coach Topor to improve his performance, only to be met with rejection, excuses and defiance. Based on clear and indisputable performance issues, SPPRC issued Topor a mediocre mid-year performance review in August 2017 and, after Topor negligently and inexcusably put the refinery at risk by ignoring a high priority alarm for more than four hours, determined that the best course to ensure safety of facilities, employees, and the public was to terminate Topor's employment in September 2017. The termination was for legitimate, non-discriminatory, and non-retaliatory reasons. SPPRC's actions resulted from Topor's own deficient performance, and his repeated refusal to accept responsibility for his actions or the need for improvement. The decision was not motivated by animosity toward any allegedly protected concerted activity. Indeed, management consistently chose not to discipline Topor in 2017 in favor

of instead merely coaching him, in the hope that his performance would be improved. Discipline would have been justified as to several of the incidents prior to September 15, and yet Whatley, in particular, chose otherwise. Such reticence and informal coaching in lieu of discipline are not hallmarks of animus. The General Counsel failed to prove an 8(a)(1) violation under *Wright Line* based on either the termination of Topor's employment or the issuance of his mid-year performance review, and the Complaint must be dismissed.

B. The Standard for Unfair Labor Practice Challenges

When the motivation for an adverse employment action is in dispute, unfair labor practice charges are evaluated under the *Wright Line* burden-shifting test. *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980). Pursuant to *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that: (1) the employee engaged in protected activity; (2) the employer knew of that protected activity; (3) the employee suffered an adverse employment action; and (4) the protected activity was a motivating reason for the adverse action. *E.g., In Re Am. Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002). If the General Counsel meets that burden, however, SPPRC may “exonerate itself by showing that it would have taken the same action for a legitimate, nondiscriminatory reason regardless of the employee's protected activity.” *Nichols Aluminum, LLC v. NLRB.*, 797 F.3d 548, 554 (8th Cir. 2015) (citing *Carleton Coll. v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000) (citation omitted)) (internal quotations omitted).

The *Wright Line* test is a subjective standard that focuses on the genuineness of the employer's stated reason for the actions taken, not on the correctness of the actions taken. *See e.g., Retlaw Broadcasting Co.*, 310 NLRB 984, 992 (1993). An ALJ is not

“to question the reasonableness of any managerial decision nor to substitute [his] opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient.” *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444-445 (5th Cir. 1978); *see also Alexandria Ne LLC & Teamsters Local 401 a/w Int'l Bhd. of Teamsters, Afl-Cio*, 342 NLRB 217, 219 (2004) (harsh treatment is not itself evidence of unlawful motivation).

C. SPPRC Did Not Commit An Unfair Labor Practice When it Terminated Topor’s Employment

SPPRC terminated Topor’s employment in September 2017 for a legitimate, non-discriminatory, and non-retaliatory reason: Topor repeatedly failed to meet performance expectations and had consistently refused to accept coaching and direction from management throughout 2017, such that, when he ignored and failed to respond to a high-priority alarm on September 15, 2017, and refused to either accept responsibility or indicate an understanding of the risk created thereby, the Company could not, in good conscience, continue to employ him. The General Counsel failed to make the required showing that Topor’s termination was motivated by animosity toward protected concerted activity.

1. Topor Did Not Engage In Protected Concerted Activity In November 2016 And Reliance Upon The Board’s Contrary Finding Will Subject Any Decision To A Risk Of Reversal

The General Counsel has claimed that the relevant protected concerted activity in this case was Topor’s refusal to engage in discussions with his superiors regarding a safety concern, on November 4, 2016, which the Board recently deemed protected concerted activity. *See St. Paul Park Ref. Co., LLC d/b/a W. Ref. & Richard Topor*, 366 NLRB No. 83 (May 8, 2018). SPPRC maintains, however, that Topor’s refusal to participate in

conversation with his supervisors was *not* protected concerted activity, and has filed an appeal, which is currently pending before the Federal Court of Appeals for the Eighth Circuit. *See St. Paul Park Refining Co., LLC d/b/a W. Ref. v. NLRB*, 18-2256 (8th Cir. Sept. 11, 2018). To the extent the ALJ relies upon the Board's holding in the previous case to find Topor engaged in protected concerted activity or that SPPRC demonstrated animus to such activity in 2017, any decision in favor of the General Counsel will be automatically invalidated should the Eighth Circuit reverse.

2. There Is No Causal Connection Between The Alleged Protected Concerted Activity And The Termination Of Topor's Employment In September 2017

Topor's employment was terminated as a result of his woefully deficient performance when he completely ignored and failed to respond to a high priority alarm for four hours, despite numerous visual and other indicators on the console alerting him that the alarm was active.

To establish his *prima facie* case, the General Counsel must prove that Topor's protected concerted activity was a substantial motivating factor in SPPRC's late 2017 decision to terminate his employment, by a preponderance of the evidence. *See NLRB v. Transportation Management*, 462 U.S. 393, 399-403 (1983) abrogated on other grounds by *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 268; 114 S.Ct. 2251, 2257-58 (1994) (the General Counsel's burden of proof is a burden of persuasion, not merely of production). Proof of unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Manor Care of Easton, Pa, LLC, d/b/a Manorcare Health Servs.--Easton, & Serv. Employees Int'l Union Healthcare Pa.*, 4-CA-36064, 2009 WL 196092 (Jan. 23, 2009).

a. There Is No Direct Evidence Of A Causal Connection Between Topor's Alleged Protected Concerted Activity And The Termination Of His Employment

There is no direct evidence in the record to support a finding that Topor's termination was motivated, even in part, by the protected concerted activity he allegedly engaged in on November 4, 2016. All the evidence that directly bears upon the reason for the termination of Topor's employment supports the Company's position that Topor's failure to respond to the high priority alarm, his repeated attempts to shed responsibility for his own poor performance, and his inability or unwillingness to understand the hazardous chemical system under his control, caused him to lose his job.

The lack of evidence of animus on the part of the decisionmaker, in particular, supports the absence of a discriminatory motive. *In Re Sunrise Health Care Corp.*, 334 NLRB 903, 909 (2001). Here, there is no evidence Rick Hastings, or any SPPRC agent, ever raised the subject of Topor's previous suspension and final warning to him in 2017, much less that they indicated that they held the events of November 4, 2016 against him. The evidence shows that SPPRC took great care to ensure the events of November 4, 2016, did not inappropriately affect the decisions with respect to the events of September 2017. The Company specifically worked to make sure that the investigation into the missed alarm was conducted by a party knowledgeable about the reformer but not about Topor's prior discipline or legal proceedings. Then, when the investigation was completed, SPPRC took care to specifically exclude the prior discipline from the process of determining the appropriate response to Topor's misconduct, and SPPRC specifically determined that termination was the appropriate course of action without respect to whether Topor's record contained any other discipline. Those involved in the decision to terminate Topor's employment (Hastings, Whatley, and Kerntz) testified that his alleged

protected concerted activity and the associated legal proceedings were completely irrelevant to their decision to support termination.

Further, the record reflects that after the disputed 2016 discipline was issued, management discussed the events of November 4, 2016, the resulting discipline, or the associated legal proceedings with Topor, only on the two occasions when Topor himself raised the subject. For instance, in December 2016, Topor brought up the events during his annual performance review, and, in response, Regenscheid indicated his desire to leave the incident behind and move forward. Second, Topor referenced the incident and the associated NLRB proceedings repeatedly when complaining to Kerntz about his 2017 mid-year reviews. He never claimed, however, that his supervisors mentioned those events during the reviews, nor did he provide any reasonable basis to support his asserted belief that the assessment was impacted by this previous conduct. Indeed, it was not.

b. Circumstantial Evidence Cannot Establish a Causal Connection Between Topor's Alleged Protected Concerted Activity And The Termination Of His Employment

Lacking direct evidence to support his case, the General Counsel may argue that circumstantial evidence establishes the required causal connection. The following types of circumstantial evidence can support drawing an inference of unlawful motivation: (1) inconsistencies between the proffered reasons for discipline and other actions of the employer; (2) disparate treatment of certain employees compared to other employees with similar work records or offenses; (3) deviations from past practice; (4) proximity in time of the discipline to the protected activity; and (5) whether alleged misconduct was adequately investigated. *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1184 (2004); *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005); *In Re Medic One, Inc.*, 331

NLRB 464, 475 (2000). None does so here. Additionally, evidence of generalized animus is insufficient to support a finding of causation, which means that any finding of animus in another matter cannot be transported into this case and deemed to provide the evidence of illegal motivation required for the General Counsel to meet his burden. *See, e.g., Nichols Aluminum*, 797 F.3d at 554.

**(i) There is Insufficient Temporal Proximity
Between Topor’s Alleged Protected Concerted
Activity and the Termination of His Employment
to Prove a Causal Connection**

The *absence* of temporal proximity between Topor’s alleged protected concerted activity and the termination of Topor’s employment weighs heavily against finding a causal connection between the two.

Temporal proximity alone cannot support prove a causal relationship, but the *absence* of temporal proximity may provide evidence to support the *absence* of one. *See, e.g., Denver Fire Reporter & Protective Co.*, 119 NLRB No. 137, 1194 (1957) (“Proximity in time, without more, does not of course establish a causal relationship); *Laidlaw Env’tl. Servs.*, 314 NLRB 406, 406 (1994)(the passage of about a year between the protected activity and allegedly retaliatory activity indicates the lack of a retaliatory motive).

The alleged protected concerted activity took place on November 4, 2016. Topor’s employment was terminated in September 2017, nearly a year later. During the intervening months, Topor repeatedly received coaching instead of discipline regarding his deficient performance from various supervisors,³¹ and then ignored and failed to

³¹ Had SPPRC been motivated to terminate Topor because of his alleged protected activity and ensuring legal proceedings, it had more than ample opportunity to do so throughout 2017. Its failure to end Topor’s employment or otherwise discipline him earlier demonstrates a lack of causal connection between the

respond to a high priority alarm for four hours without justification. The passage of ten months between the protected activity at issue and the adverse employment action suggests the absence of a causal connection between the two events. *See id.* Topor’s negligence and failure to respond to the high priority alarm, in contrast, occurred only six days before his employment was terminated. The timing of events thus suggests that Topor’s failure to respond to the alarm motivated the termination decision – not the alleged protected concerted activity.

**(ii) The Thorough Investigation Weighs Heavily
Against Any Attempt to Prove a Causal
Connection**

SPPRC undertook a careful, neutral and detailed investigation into the missed alarm and the results of that investigation bolster the Company’s explanation for the termination of Topor’s employment.

An investigation can defeat an inference of animus, so long as it is not a sham. *E.g., International Baking Corp.*, 348 NLRB 1133, 1154-1155 (2006) (employer’s investigation did not support inference of animus where there was no evidence that employer sought to shape or distort its inquiry or engage in sham fact gathering). An employer does not even need to interview the subject of the investigation in order for its effort be considered “adequate.” *Wal-Mart Stores, Inc. & United Food & Commercial Workers Int’l Union.*, 349 NLRB 1095, 1104 (2007) (“interviewing the subject employee is not a requirement for an adequate investigation”) (citing *Frierson Building Supply Co.*, 328 NLRB 1023 (1999)).

events of 2016 and the September 2017 termination. *See, e.g., Snap-on-Tools, Inc.*, 342 NLRB No. 2, Slip op. p. 5-6 (2004) (finding no causal connection where the protected activity was separated from the termination by nearly two months and the event for which she was purportedly terminated was closer in time).

Here, SPPRC conducted an extensive investigation and not only interviewed Topor but repeatedly engaged with him. Barnholt and Powers interviewed every individual thought to be involved in the missed alarm incident and reviewed numerous documents. They offered Topor multiple opportunities to speak with them and explain his actions, and evaluated each explanation he offered. Ultimately, the evidence they collected led them to the conclusion that Topor's behavior was both unjustified and unprecedented employment misconduct, and management consequently determined that disciplinary action was warranted. There is absolutely no credible evidence in the record to suggest that the investigation conducted by Barnholt and Powers was inadequate or anything other than a genuine attempt to discern what occurred on September 15, 2017.

The General Counsel feebly attempted to claim the investigation was a sham during the hearing, but failed to prove anything of the sort. Specifically, the General Counsel attacked the use of language in the investigation report indicating that the vessel was "full" or "98% full" when, in fact, the level instrument was, "full" or "98% full," claiming this statement was false, given that a significant portion of the drum was not filled with liquid. Testimony from multiple witnesses established, however, that operators frequently refer to a vessel as "full" when the *level instrument* is at its maximum. (Tr. 196-98, 1660). Indeed, Gabrielson's urgent instruction to the field to empty the drum, and his report to his supervisor about his deep concern that the alarm had not been responded to previously by Topor, underscores and supports the gravity assigned to the incident by management and in the investigation. The evidence clearly indicates that the language used in the report was not intended to be misleading. Most critically, it did not mislead the decisionmaker who reviewed the investigation. Hastings fully understood that the drum itself was not full and still determined that, based on the

results of the investigation, there was a significant safety risk negligently caused by Topor, and that termination was appropriate. (See 1636-38, 1650-52, 1660-61).

(iii) SPPRC Has Provided A Consistent And Reasonable Explanation For The Termination Of Topor's Employment, Unconnected To Any Protected Concerted Activity

SPPRC has provided a consistent explanation for Topor's termination ever since the decision was made, and the documents in evidence are fully congruent. Just as inconsistent explanations can provide circumstantial evidence of animus, a consistently offered explanation can serve as evidence of its absence to support a claim that the employer acted for the stated reason. See *Wal-Mart Stores, Inc. & United Food & Commercial Workers Int'l Union.*, 349 NLRB 1095, 1105 (2007) (citing respondent's consistent explanation as evidence against finding an 8(a)(1) violation).

SPPRC has always maintained that Topor's employment was terminated as a result of his failure to respond to the high level alarm on September 15, 2017, coupled with his poor performance and refusal to respond to coaching throughout 2017. That rationale was included in the termination letter and each SPPRC witness involved in the termination decision testified to the same. Topor's previous suspension was entirely irrelevant to the decision, and the fact that SPPRC has never wavered in its explanation supports that conclusion. In short, there is no evidence of pretext.

(iv) The General Counsel Cannot Point to a Deviation from Past Practice or Disparate Treatment to Prove a Causal Connection

Ignoring and failing to respond to a high-priority alarm for four hours was uniquely severe misconduct. Thus, although the General Counsel may wish to argue that evidence of disparate treatment, or a deviation from a consistent past practice, supports a

finding of causation, there are simply no similarly situated individuals who can provide a point of comparison for Topor. *See St. George Warehouse, Inc. & Merch. Drivers Local No. 641, Int'l Bhd. of Teamsters.*, 349 NLRB 870, 879 (2007) (stating that where a charging party engaged in unprecedented conduct there are no similarly-situated individuals with whom to compare them and thus no means of proving disparate treatment); *See, e.g., Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 674 (2004); *Hoffman Fuel Co.*, 309 NLRB 327, 329 (1992) (No inference of unlawful discrimination arises from differences in treatment between or among employees who are not similarly situated).

The General Counsel might try to argue that the console operators involved in Incident 4222 and the SDA unit shutdown were similarly situated comparators who received better treatment than Topor, but the evidence presented failed to support such an argument, or to establish that the individuals involved in these events were similarly situated to Topor. In fact, the record contains little of the information required to inform such an analysis of whether the individuals were similarly situated, and it was the General Counsel's burden to provide such evidence and to prove his theory. Decision-makers have not been identified, work histories have not been detailed, and the underlying events, which The General Counsel alleges are comparable, have not been fully explained. *See Merillat Industries*, 307 NLRB 1301 (1992) (the length of service to the company may differentiate one employee from another); *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 674 (2004) (whether an employee took responsibility for his wrongdoing may differentiate him from an employee who did not); *R.L. White Co., Inc.*, 262 NLRB 575, 602 (1982) (without a similar history of discipline, or non-

disciplinary warnings, employees cannot be deemed similarly situated). To the extent these events are discussed in the record, the evidence proves that the situations and the actions of the operators involved were fundamentally different from what occurred on September 15, when Topor's gross negligence alone created a highly dangerous situation.

Incident 4222 involved liquid carrying over to a compressor, but did not involve either operator negligence or an ignored high-priority alarm. Instead, Incident 4222 occurred while operators were actively engaged in attempting to fix a problem caused by a contractor accidentally hitting a button in the field that prevented the transmission of information regarding the alarm on the unit. (Tr. 670-72, 786-88). Thus, the actions of the operators involved are not comparable to Topor's complete inaction in response to an active alarm. With Incident 4222, process changes were made to ensure something similar did not happen in the future, but no discipline was necessary as no Company operator was negligent, inattentive, in denial, or the cause of a safety hazard. (Tr. 788).

The incident in the SDA unit, on the other hand, did involve a unit running while an alarm was active and unaddressed, which ultimately led to a shut-down of the unit. The alarm in question, however, was a low-level alarm in a new unit— rather than a high-priority alarm in an established unit. SPPRC investigated the incident and determined that no disciplinary action was warranted. (Tr. 215-16). Testimony from Union witness Dean Benson regarding the incident specifically illustrated key differences between the SDA unit issue and Topor's conduct – a low oil level does not pose a safety risk comparable to that posed by an unaddressed high liquid level in the interstage knock out drum. The oil in the SDA is used to heat the process and, critically, its maintenance does

not raise the risk of a catastrophic damage to the refinery, its personnel, or the surrounding community, unlike an excess of liquid in the DDS unit compressor drum.

To the extent the General Counsel argues that, because these incidents resulted in lost production, they are objectively “worse” than what occurred on September 15, the General Counsel misunderstands the reasons SPPRC deemed Topor’s error so severe and why the conduct of the other operators did not pose a similar concern. The *actual* consequences of Topor’s failure to act were not the deciding factor – as Topor repeatedly pointed out, and fortunately no one was injured as a result of his negligence. Rather, it was the degree to which Topor’s inaction deviated from the Company’s expectations, coupled with his performance history and lack of interest in improving either his knowledge and performance, that led SPPRC to terminate his employment. There is absolutely no evidence to suggest that Incident 4222 or the SDA unit incident involved similarly severe negligence and resultant safety hazard, by a similarly experienced operator, who had repeatedly demonstrated over the preceding months a lack of expected process knowledge, and an unwillingness to accept coaching from his superior.

SPPRC further expects that the General Counsel might point to Topor’s testimony that he has previously discovered missed alarms at shift change, and the testimony of bargaining unit members Riley and Christner, that they have personally missed alarms in the past and are aware of other unit members who have as well, to suggest that past practice is that missed alarms do not lead to discipline. None of them testified, though, that management was ever notified of any such missed alarms. In the absence of evidence that SPPRC management was *aware* of such allegedly missed alarms the circumstances cannot be deemed comparable. *Clark Equip. Co.*, 250 NLRB 1333, 1339

(1980) (without evidence that the employer knew of similar conduct by other employees, there can be no proof of disparate treatment).

3. SPPRC Would Have Terminated Topor's Employment Regardless of the Alleged Protected Concerted Activity

The record provides no support for an argument that Topor's employment was terminated for any reason other than his failure to respond to a high-priority alarm on September 15, coupled with his repeated refusals to accept coaching from management throughout 2017. Thus, the General Counsel's allegations must fail, and examination of whether SPPRC would have terminated Topor's employment in the absence of the alleged protected concerted activity is unnecessary. *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993) (deciding that "[b]ecause we find that the evidence does not support a finding of retaliatory motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities"); *Yusuf Mohamed Excavation, Inc.*, 283 NLRB 961, 962-64 (recommending that Section 8(a)(3) allegations be dismissed based on the General Counsel's failure to make out a *prima facie* case).

SPPRC has, however, proven that its decision to terminate Topor's employment in light of his negligence and failure to respond to the alarm, his failure to understand the process and to recognize the hazard he created, and his refusal to accept coaching or responsibility would have been the same regardless of any alleged protected concerted activity.

SPPRC anticipates that the General Counsel might argue that, because SPPRC did not provide any evidence of other individuals terminated for missing an alarm, the Company cannot prove it would have taken the same action had Topor not engaged in

protected activity. But, SPPRC is not required to produce evidence that it has acted the same way in the past in order to justify its decision, or to prove a negative. Where, as here “the record does not show that any other employees violated those policies under comparable circumstances,” the lack of such evidence is not persuasive. *Midwest Terminals of Toledo Int'l, Inc. & Int'l Longshoremens Ass'n, Local 1982, AFL-CIO & Don Russell*, 365 NLRB No. 138 (Oct. 11, 2017); *E.g., Armstrong Mach. Co., Inc. & United Food & Commercial Workers Union, Local 6, AFL-CIO, Clc*, 343 NLRB 1149, 1177 (2004) (“An employer's ability to mount a successful *Wright Line* defense does not depend on proof that another employee committed exactly the same offense and got exactly the same discipline”); *see St. George Warehouse, Inc. & Merch. Drivers Local No. 641, Int'l Bhd. of Teamsters* (“A particular form of discipline is not necessarily unlawful solely because an employer has imposed it for the first time”) (citation omitted). Instead, in the absence of evidence of disparate treatment, the fact that the decision to terminate Topor’s employment was logical and reasonable in light of the thorough investigation can stand as proof that the Company would have made the same decision. *See Crown Bolt, Inc.*, 343 NLRB 776, 787 (2004) (finding that the respondent proved it would have taken the same action based on the logical explanation for the decision provided and the absence of disparate treatment).

The General Counsel may also claim, speculatively, that Topor should have received lesser discipline and would have, had he not engaged in protected concerted activity. In the absence of evidence of disparate treatment, however, the severity of the discipline imposed is irrelevant and should not be evaluated by the ALJ, as to do so would require the ALJ to engage in the prohibited substitution of “his own subjective

impression of what he would have done were he in the Respondent's position." *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978); *In Re Gb Tech, Inc.*, 16-CA-22799, 2003 WL 22296443 (Oct. 2, 2003) (rejecting argument that because employer could have imposed lesser discipline but chose not to do so, there is evidence of animus, stating "It is not for me to second-guess an employer's disciplinary policy, but only to make sure that it has not been applied to discriminate against those who engaged in protected activities."); *Yusuf Mohamed Excavation*, 283 NLRB at 964. (stating that "Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position").

The un rebutted record evidence, not speculation, demonstrates that SPPRC would have terminated Topor's employment in September 2017 regardless of the events of November 2016, the associated discipline, and any related legal proceedings. Management reasonably determined that it was simply unsafe to permit Topor's employment to continue given the demonstrated level of risk he posed to the refinery and the public; there simply is *no* evidence in the record to the contrary. The General Counsel's claim that the termination violated Section 8(a)(1) must be dismissed.

D. SPPRC Did Not Commit an Unfair Labor Practice When It Issued Topor's Performance Review in August/September of 2017

The issuance of Topor's mid-year review was not an adverse employment action. It was intended only to help him improve his performance and was entirely distinct from any alleged protected activity. The General Counsel failed to meet his burden to prove an 8(a)(1) violation with respect to the issuance of the mid-year performance review.

1. Neither the Performance Review(s) Nor the Meetings Regarding the Performance Review(s) Constitute Adverse Employment Action

The *Wright Line* requirement of an “adverse employment action” means that the General Counsel must show that some harm has occurred to the charging party’s employment status in order to maintain an 8(a)(1) claim. *In Re Colburn Elec. Co.*, 334 NLRB 532, 540 (2001); *In Re Mississippi Action for Progress, Inc.*, 26-CA-20650, 2002 WL 31386007 (Oct. 18, 2002)(taking away access to benefit to which an employee is not yet entitled is not adverse action). Specifically, “the government must establish by a preponderance of the evidence that the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse.” *Ne. Iowa Tel. Co. & Teamsters 421, Affiliated with the Int'l Bhd. of Teamsters*, 346 NLRB 465, 476 (2006).

The General Counsel’s claim that the Company’s conduct with respect to Topor’s mid-year performance review in 2017 violated 8(a)(1) fails initially due to the absence of a cognizable adverse action. Receiving an overall rating of 2 (“generally meets expectations”) on a mid-year performance review, and sitting in three meetings regarding that performance review, in no way altered the terms or conditions of Topor’s employment. Neither the review nor the meetings had any impact on Topor’s pay or benefits or altered his day to day life or future at the refinery. To the extent that the General Counsel claims the adjustments to Topor’s review constitute changes to the terms and conditions of his employment, he cannot establish that the changes *adversely* altered those conditions, as required under *Wright Line*, because Topor’s review only improved over time. Moreover, there is no evidence of what term or condition was supposedly altered. No pay, no status, or anything else was affected by the review or the

meetings held about it. Finally, the claim that the review process somehow showed animus is rebutted by the fact that, as a result of each meeting, Whatley and Jung made changes to the draft review due to comments by union rep Riley and so as to encourage Topor going forward.

2. There is No Causal Connection between Topor's Alleged Protected Concerted Activity and the Performance Review(s) Meetings Regarding Performance Reviews(s) in 2017

There is no evidence of a causal connection between Topor's receipt of an increasingly positive mid-year performance review in August and September of 2017, or the meetings he had with management about that review, and the alleged protected concerted activity he engaged in nearly a year before.

Topor was not treated differently from similarly situated individuals who did not engage in protected concerted activity when he was issued a mid-year review in 2017, nor did the Company depart from past practice to issue it to him. *See, e.g. Electronic Data Systems Corp.*, 305 NLRB 219 (1991) (evidence of disparate treatment may support a finding of causation). A large number of other operators received mid-year reviews as well, just as they had in previous years. *See* G.C. Ex. 14.

SPPRC anticipates that the General Counsel might argue that Whatley's presence in a pre-review meeting with Topor and his personal delivery of Topor's review is evidence of disparate treatment, sufficient to raise an inference of animus. But, again, the record evidence does not support such a claim. In fact, the evidence suggests that Topor was treated consistently with similarly situated coworkers in this respect. Whatley, Jung, and Kerntz all testified that it was Whatley's practice to meet personally with every operator who was receiving a mid-year review rating below a 3 ("meets expectations") for coaching purposes. Whatley testified as to the specific operators with whom he met

in this capacity, and Rasmussen corroborated his account with respect to Rasmussen's direct report, P.J. Gabrielson. Further, there is no evidence to suggest that Whatley's decision to meet with Topor for a pre-review meeting, or to deliver his review, in any way related to Topor's alleged protected concerted activity.

SPPRC expects the General Counsel might further attempt to raise an inference of animus by pointing to the changing *titles* on Topor's mid-year review and the issuance of multiple versions of that review. There is, however, an innocuous explanation for the changing titles (*see* Tr. 910-11, 918-19) and there is no evidence to suggest that the changing titles and ratings are, in any way, related to the events of November 2016.³² To the extent the titles were referenced at hearing, they were a mere distraction and simply a reflection of the desperation of the General Counsel to find something, anything, to support his specious claim of animus.

3. The Same Performance Review(s) and Related Meetings with Management Would Have Occurred Absent the Alleged Protected Concerted Activity

Although the General Counsel's failure to carry its burden relieves SPPRC of any

³² SPPRC anticipates that the General Counsel might attempt to paint Whatley and Jung as villains and cast Whatley's request that the talking points be returned at the end of the August 11 meeting, coupled with Jung's failure to retain the same, as evidence of animus. The facts, however, do not support such a finding.

By focusing on the fact that Whatley took Topor's notes and Jung disposed of them, the General Counsel attempted to distract the ALJ with a "red herring." What occurred with these notes is entirely disconnected from the decision to terminate Topor's employment, and there is no evidence to suggest otherwise. In fact, Whatley apologized for his impatient conduct only days after taking the notes, and attempted to retrieve and return them to Topor. Whatley was only unable to do so because Jung no longer had them. Jung had shredded the document because, as she credibly testified, it is her standard practice to shred private personnel documents rather than keep hard copies in her office, as her office is not private. In fact, Topor did not testify that there was anything of particular relevance on the document which would suggest animus or which Jung would have been particularly motivated to dispose of.

There is absolutely no evidence to suggest a connection between Jung's decision to shred the document and the decision to terminate Topor's employment weeks later. The undisputed evidence establishes that Jung was not even consulted with respect to the decision to terminate Topor's employment. The draft review copy incident was merely a proverbial "tempest in a teapot", and any attempt to inflate the incident to the level of illegal animus is ridiculous.

requirement to prove it would have taken the same actions absent his alleged protected activity, examination of this factor further requires a decision in the Company's favor.

The contents of Topor's 2017 review dealt with his performance during the review period and specifically addressed his conduct beginning in 2017. The review did not relate to his alleged protected activity in 2016 and, in fact, specifically listed the 2017 incidents upon which it was based.

The entire course of events related to Topor's reviews can be innocuously explained, and, given that there is no evidence to suggest that anything about the reviews, or the conduct specifically discussed therein, was related to Topor's alleged protected activity, it follows that SPPRC would have engaged in the same conduct regardless of whether the protected activity did or did not occur.

Topor's performance in 2017 led Jung and Regenscheid to initially rate his overall performance below 3. (G.C. 12(a)). Their decision to rate him a 2 overall, led Whatley to meet with him for a pre-review meeting on August 11. (Tr. 832, 836-37, 908, 1540-41). During the August 11 meeting, Riley remarked that the pre-review draft contained no positive information and so, after the meeting, management added some positive comments to the review. (Tr. 482, 842-43, 909, 1548). Shortly after the pre-review meeting, Topor requested his formal final of the review, so Whatley met with him to issue it on August 24, when Regenscheid and Jung were unavailable. (R. Ex. 58; Tr. 665, 843, 945-46, 1545-47). Whatley then forgot to notify Regenscheid that he had delivered the review such that, when Regenscheid returned from vacation and followed the direction he received to deliver performance reviews, he also delivered a review to Topor. (Tr. 1552). Topor's alleged protected concerted activity was not connected to

this sequence of events in any way and, in fact, never came up at all during this process, except when Topor raised the subject.

Topor would have received the same performance review, and had the same associated meetings, regardless of any protected concerted activity. The General Counsel has completely failed to prove an illegal motivation – all of SPPRC’s actions with respect to the mid-year review process were innocuously explained on the record.

E. The General Counsel’s Case Rests Entirely on Topor, Who Was Not a Credible Witness on His Own Behalf

A credibility determination may rely on a variety of factors, including the extent of a witness’s recollection, the existence or lack of corroborating testimony, and an assessment of the witness’s responsiveness to leading questions. *See In Re Case Corp.*, 33-CA-12845, 2001 WL 1635475 (Dec. 14, 2001); *In re Fantasia Fresh Juice Co.*, 355 NLRB 754, 760 (2001), *Peoples Serv. Drug Stores, Inc.*, 154 NLRB 1516, 1544 (1965). Additionally, a witness’s “candor or lack thereof; their apparent fairness, bias or prejudice; their interest or lack thereof; their ability to know, comprehend, and understand the matters about which they have testified; whether they have been contradicted or otherwise impeached; the interrelationship of the testimony of witnesses and the written evidence presented; and the consistency and inherent probability and plausibility of the testimony,” may also properly be considered. *El Paso Nat. Gas Co.*, 193 NLRB 333, 343 (1971); *see also Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citation omitted).

In assessing Topor’s credibility as a witness, his testimony must be reviewed with a critical eye towards his self-interest. The vast majority of Topor’s testimony was uncorroborated and self-serving. Significant portions of Topor’s testimony were

contradicted by multiple other witnesses and contemporaneous written records, such that crediting the testimony would require the rejection of all other evidence on the subject. For instance, Topor claimed that neither Hetland nor Caswell coached him regarding the sample station incident in January 2017. (Tr. 1260-61). Documentary evidence from both supervisors, however, contradicts his testimony, as did testimony by Jung and Regenscheid regarding the same events. Additionally, Topor testified that Whatley never told him his assessment of 34-E-5 bypass piping was wrong and that there was no dead leg. Multiple contemporaneous documents in the record, created by various different witnesses, as well as testimony from Whatley and Jung establish that Whatley did, in fact, describe to Topor why his assessment was incorrect on multiple occasions.

Topor was not candid or credible on the stand. Much of his testimony consisted of evasions and of explanations that were not requested. *See Victor's Cafe 52, Inc.*, 321 NLRB 504, 512–13 (1996)(discrediting testimony, in part because witness did not answer questions directly but instead gave explanations that were not asked for). He repeatedly refused to answer the questions asked on cross-examination to such an extent that the ALJ had to instruct him to answer on multiple occasions.

Topor repeatedly testified regarding the operations of the refinery, its chemical processes, and procedures. That testimony, however, should not be credited in light of the consistent testimony from managers that Topor failed to meet their expectations with regard to understanding the systems, and the fact that Topor's assessments were frequently wrong, as directly demonstrated by his co-workers Nelson (the dead leg) and Gabrielson (the ignored high priority alarm and resultant safety hazard). Management personnel testified consistently that the danger associated with liquid entering the

compressor is severe and arises well before the vessel is full. Topor's assertion to the contrary is completely unsupported by anything other than his self-serving speculation.

On the whole, Topor's testimony was sufficiently non-credible that it provided support not for the General Counsel's case, but instead clearly illustrated Topor's attitude of arrogance, obstinance, and defiance, which led him to refuse to accept management's assessment of his errors and deficient performance, any need to improve his process knowledge and performance, and ultimately contributed to the termination of his employment.

IV. Conclusion

The General Counsel has failed to carry its burden to prove the Company violated Sections 8(a)(1). SPPRC terminated Topor's employment based on his failure properly respond to a high priority alarm on September 15, 2017 and his 2017 performance record. Topor's actions on November 4, 2016, the discipline issued as a result, and the associated legal proceedings, were completely irrelevant as the hearing record demonstrates. Therefore, the Company respectfully requests that judgment be entered in its favor and the Complaint be dismissed in its entirety.

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