

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

ST. PAUL PARK REFINING CO. LLC  
d/b/a ANDEAVOR

Respondent

and

RICHARD TOPOR, An Individual

Charging Party

Cases 18-CA-205871  
18-CA-206697

GENERAL COUNSEL'S POST-HEARING BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE

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## I. INTRODUCTION<sup>1</sup>

General Counsel pleads that Respondent St. Paul Park Refining Co. LLC d/b/a Andeavor (referred to as “Respondent,” “SPPR” or “the refinery”) violated Section 8(a)(1) of the Act by issuing to Richard Topor (Charging Party) a series of rapidly varying, inconsistent and negative performance reviews over a course of a single month (August 11-September 12, 2017) and then terminating Topor on September 21, 2017 after having unlawfully issued a final warning and suspension to him in November 2016.<sup>2</sup>

The record is lengthy and refining industry procedures can be complex. General Counsel asserts that Respondent exploits the complexity by obfuscating facts in an attempt to deflect attention from its disparate and retaliatory actions; manipulated and incomplete investigations; red herrings; shifting defenses; and unsubstantiated claims.

In this brief, General Counsel will review, against the backdrop of the Board’s May 2018 finding of Respondent’s animus against Topor in *St. Paul Park Refining Co., LLC d/b/a Western*

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<sup>1</sup> This case was heard before Administrative Law Judge Arthur Amchan in Minneapolis, Minnesota on June 11-14 and July 24-26, 2017.

There were some amendments to the Complaint and Answer (GC Ex. 1(e)), effectuated at the hearing.

- General Counsel amended paragraph 4 of the Complaint, without objection, to plead as agents of Respondent at relevant times: Mark Rasmussen, supervisor; Craig Wheatley, control supervisor; and Thomas Chavez, refinery manager. (Tr. 6)
- General Counsel withdrew the 8(a)(3) allegations of the Complaint, consistent with the Board’s findings in *St. Paul Park Refining Co., LLC d/b/a Western Refining*, 366 NLRB No. 83(May 8, 2018). (Tr. 6-7)

<sup>2</sup> *St. Paul Park Refining Co., LLC d/a/a Western Refining*, 366 NLRB No. 83 (May 8, 2018). ALJ Amchan granted General Counsel’s Motion in Limine, ruling that the Board decision issued in 366 NLRB No. 83 (May 8, 2018) is binding. (Tr. 7.)

*Refining*, 366 NLRB No. 83 (May 8, 2018):

- Topor’s admitted performance error on September 15, 2017;<sup>3</sup>
- Respondent’s reactions to that mistake, including its mischaracterization of the error, its pretextual investigation, and its animus-driven termination decision;
- Respondent’s pretextual piling-on of a voluminous number of alleged reasons for the termination of a 13-year employee to whom no lawful discipline had ever been issued; and
- Respondent’s series of multiple, unprecedented and inconsistent performance reviews issued to Topor in the six weeks prior to his termination on September 21, 2017.

It is General Counsel’s position that Topor’s September 21 termination is unlawful under two analyses: (1) that Respondent relied, at least in part, on the unlawful final warning and suspension in terminating Topor and (2) that Respondent’s *Wright Line* defense necessarily fails because the reasons it offers for the termination are false and therefore pretextual. These alternative arguments are briefed below in Sections II. F. and G.<sup>4</sup>

On the basis of the record and General Counsel’s argument, General Counsel respectfully urges the Administrative Law Judge to find that Respondent has violated the Act as alleged and to issue an appropriate recommended Order and Decision remedying these violations.<sup>5</sup>

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<sup>3</sup> All dates are in calendar year 2017 unless otherwise specified.

<sup>4</sup> *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf’d on other grounds 662 F. 2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB Transportation Management Corp.*, 461 U.S. 393 (1983).

<sup>5</sup> General Counsel’s proposed remedy and a proposed Notice to Employees are provided in Section III and Appendix A of this brief, respectively.

## **II. EVIDENCE AND ARGUMENT**

### **A. Respondent's business operations and Richard Topor's work history**

Respondent operates an oil refinery which refines raw crude oil into various products for subsequent sale, e.g., finished finished products such as asphalt, gasoline, diesel, jet fuel and propane. (Tr. 14, 20)<sup>6</sup>

Teamsters Local 120 ("the Union") represents a unit of multiple job classifications at the refinery, including that of Vacancy Relief Operator (VRO), the job classification held by Topor prior to his termination. At the time of the allegations in this case, the collective bargaining agreement in effect between Respondent and the Union has an effective period of January 1, 2017-December 31, 2020. (Resp. Ex. 6.) There are about 200 employees in the Local 120 bargaining unit (Tr. 258, 318, 976-77.)

As of September 2017, Richard Hastings was the refinery manager, the highest-ranking management position on-site at the refinery. Hastings left the refinery in South St. Paul in December 2017, moving to a North Dakota facility. (Tr. 942, 1619-20.) He was replaced as refinery manager by Thomas Chavez. (Tr. 261.) Other management personnel relevant and involved in this case include vice-president of operations management Michael Whatley; operational improvement lead Dave Barnholt; process control supervisor Craig Wheatley; human resources director Timothy Kerntz; human resources business partner Christa Powers; lead shift supervisor Gary Regenscheid; reformer operations superintendent Briana Jung; shift supervisor Dale Rasmussen; and shift supervisor Dale Caswell (Tr. 258-61, 317, 650-51, 759, 811, 941-42, 1360-61, 1433-34. )

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<sup>6</sup> Respondent, operating under the name of Andeavor as of the hearing herein in June and July 2018, has undergone a series of changes in ownership and name over the years, so is variously referenced in the record as St. Paul Park Refining (SPPR), Western Refining, Northern Tier, Tesoro and Andeavor. At the time of the hearing, Respondent anticipated a sale in the near future to Marathon. (Tr. 172-83.)

Richard (Rick) Topor worked for Respondent for over 13 years, including the VRO position for the north reformer since 2008. Topor worked on “crew 4” and worked 12-hour shifts (Tr. 22, 974.) The north reformer is an area where products are purified for gasoline and jet fuel via various units and processes. (Tr. 18-19, 22, 24.)

At the time of his unlawful 2016 final written warning/suspension and his 2017 termination, Topor was immediately supervised by both Regenscheid, when performing console duties in the Central Control Room (CCR) and Caswell, when performing outside field operator work. The majority of Topor’s work was spent in the field. (Tr. 978.)

Topor served as union steward for Local 120 for both the north and south reformer areas for three years and was on the Union negotiating team for the most recent contract. He was steward at the time of both his unlawful final warning/suspension in November 2016, as well as when he was terminated. (Tr. 977.)

The north reformer area in which Topor worked includes field units, in which field or “outside operators” work out in the units themselves in a hands-on manner, manually manipulating the equipment in the field. (Tr. 22, 25.) The north reformer area also includes console (“Board”) operator work. The north reformer operators work inside the central control room (CCR), along with board operators from the other refinery areas of the south reformer, crude, blending and cat/FCC areas. (Tr. 26, 1362-63.) Five board operators per shift who work with the instrumentation on the consoles in the small CCR (about 30x40’), and communicate with the field operators by radio or phone as necessary. (Tr. 23, 27.) The console operators are seated about 6-8’ apart from each other, arranged in a circular fashion so they can easily hear and talk with each other throughout the shift. (Tr. 183-84, 424-25.)

It is undisputed that the VRO position, including that held by Topor, is the most senior and highly qualified operator position at the refinery. The VRO fills vacancies as they arise at the refinery and is looked up to by refinery personnel as the leader of his crew, because of his level of experience and knowledge. (Tr. 27-28.) The VRO is qualified to work in all field units as well as the console in the CCR. (Tr. 25-28, 975, 979.)

As Timothy Kerntz, human resources director at relevant times testified, the VRO is the top job in the progression, is trained on all jobs and can “pretty much do it all – whatever is asked,” whether in the field or on the console. The VRO identifies refinery production issues and engages in troubleshooting of issues, and directs field operators to address identified issues. (Tr. 318-22; 412; Resp. Ex. 94, p. 18.)

In the performance of VRO duties, as Kerntz testified, the VRO does not necessarily personally execute refinery functions, but rather “proactively troubleshoots equipment and generates work requests as needed.” (Tr. 326.)<sup>7</sup>

**B. *St. Paul Park Refining Co. LLC d/b/a Western Refining*, 366 NLRB No. 83 (May 8, 2018)**

After a hearing in July 12, 2017 before ALJ Charles Muhl and the issuance of an ALJD on December 20, 2017, the Board issued a Decision and Order in 366 NLRB No. 83 on May 8, 2018. Per the ruling of ALJ Arthur Amchan in the instant case granting General Counsel’s Motion in Limine, the rulings in the prior Board case are binding. (Tr. 7.)

In the prior case, the Board affirmed the ALJ’s findings, inter alia, that the final written warning and suspension issued to Topor in November 2016 were unlawfully issued; that the

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<sup>7</sup> This testimony by Kerntz is telling because Topor is criticized (as briefed below) of “only” identifying problems and then proposing remedial action by other refinery personnel.

evidence supported findings that Respondent harbored animus toward Topor's protected concerted activity; and that Respondent's witnesses were uncreditworthy.

**1. The unlawfulness of the final written warning and suspension issued to Richard Topor in November 2016**

After having found protected activity and animus in 366 NLRB No. 83 (knowledge was uncontested), the Board – affirming ALJ Muhl's rulings, findings and conclusions – found that the final written warning and suspension issued by Respondent to Topor in November 2016 were unlawful under the Act.

Specifically, the Board concluded that Respondent failed in its argument that it had a reasonable belief that Topor engaged in misconduct and acted on that belief by issuing the final warning and suspension. Respondent's attempts to support its *Wright Line* burden by demonstrating “a reasonable belief that Topor engaged in misconduct and that any employee would have been fired for the same misconduct” failed. 366 NLRB, slip at p. 16. (Appendix B.)<sup>8</sup>

Applying largely the same rationale that General Counsel submits is equally applicable here, the Board (adopting the ALJD) concluded:

Because of Respondent's inadequate investigation, [we] cannot find it had a reasonable belief Topor engaged in the alleged misconduct . . . . Even if [we] did find the belief reasonable, the preponderance of the evidence fails to establish the Respondent would have suspended Topor absent his protected activity. . . . the Respondent did not demonstrate it actually exercised the authority in the past and treated employees similarly when they engaged in the same misconduct. It also did not show that it never before encountered a similar situation. . . . In this case, the Respondent introduced no evidence that it previously disciplined employees for [the same alleged misconduct] . . . . The Respondent possesses all of that information and could have presented it. The only inference that can be drawn is that such evidence would not have shown the Respondent treated Topor similarly to other employees in the past. . . . For all these reasons, [we] conclude the Respondent's 10-day unpaid suspension of Topor, its

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<sup>8</sup> *Wright Line, A Div. of Wright Line Inc.*, 251 NLRB 1083 (1980), enf'd 662 F. 2d 899 (1<sup>st</sup> Cir.), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 91983).

issuance of a final written warning to him, and the associated denial of his quarterly bonus violate Section 8(a)(1) of the Act.

366 NLRB No. 83, slip at 16-17 [citations omitted].

## **2. Respondent's animus toward Richard Topor's protected concerted activity**

Finding that Respondent harbored animus toward Topor's protected concerted activity, the Board – and adopting the ALJD – held:

Animus can be demonstrated by direct evidence or inferred from the totality of the circumstances. A discriminatory motive may be established by a variety of circumstantial facts, including the timing of the employer's adverse action in relationship to the employee's protected activity, as well as whether the asserted reasons for the adverse action are a pretext. *Pretext may be demonstrated by asserting a reason that is false and by an indifferent or inadequate investigation into the alleged misconduct . . . .* Applying these principles here, I conclude the Respondent harbored animus toward Topor's protected activity.

366 NLRB No. 83, slip at p. 15 [emphasis added][citations omitted].

## **3. Respondent's lack of credibility regarding its adverse actions against Richard Topor in November 2016**

In making his credibility resolutions – all of which were adopted by the Board – ALJ Muhl identified and resolved what he characterized as “three significant credibility disputes,” all resolved against Respondent. Noted in making these resolutions against Respondent were inconsistencies among witnesses, hesitancy of demeanor, a lack of recall, abbreviated answers, the use of leading questions, the hedging of answers, and a difference in responses on direct versus cross examinations. A review of the record now before the ALJ reveals the presence of these same components – to an even greater degree, General Counsel would submit.

Credibility determinations require consideration of a witness' testimony in context, including demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations.

366 NLRB no. 83, slip at p. 9 [citations omitted].

**C. Respondent issued multiple and discriminatorily inconsistent performance reviews to Richard Topor between August 11 – September 12, 2017**

**1. The August 11, August 24 and September 12 reviews**

Except for a handful of performance reviews that issued in early January 2017 for a few bargaining unit employees for calendar year 2016, there were no evaluations – not one, mid-term or annual – that issued for the next seven months, until August 11. That one was for Rick Topor, and no evaluation was issued for any other employee prior to September 12. (GC Ex.14, GC Ex. 24, GC Ex. 25, GC Ex. 26.)

August 11

On August 11, Rick Topor received the first of four performance reviews he would receive over the next four weeks in a bizarre, unprecedented, inconsistent, and unsettling month of unorthodox meetings, unusual management involvement and disconnects of ratings and text.

Prior to 2017, Topor typically had two reviews per year: a midterm review, usually issued around the end of June (in a check-the box format, with a cap on what bargaining unit employees could be ranked) and an annual review, usually issued the first part of the year following the reviewed calendar year. (Tr. 329-30, 994-95.)

On August 11, Topor was called into Whatley’s office, where Regenscheid, Jung and Brandon Riley, as union representative, were also present. Once inside, Topor saw a document unlike any review document he had seen before in his 13 years with the refinery. (Tr. 999-1000.)

He was handed a three-page, single-spaced typed document entitled “Rich Topor Mid-Year performance review – 8/11/17.” Jung proceeded to read the entire document, verbatim, cautioning Topor that he could ask no questions until the reading was completed. (Tr. 1001.)

The document Topor was handed was similar to that in evidence as GC Ex. 18, but with a notable difference: The document he had been handed had ratings typed off to the side of each of the three lower-case bold-faced categories: “Job Skills and Ability to Learn,” “Team Work and Initiative,” and “Work Quality and Ability to Follow Work Instructions.” The ratings for each: “Below Expectations,” a rating which Topor had never received in his 13 year-career at the refinery. Otherwise, to Topor’s recollection, the content of this review was the same as the version he had been given and had written notes on at the August 11 meeting. (Tr. 998-99; GC Ex. 18; GC Ex. 12(a)-(m); Resp. Ex. 13-17.)

As Jung read the mid-year review, Topor heard about alleged performance deficiencies – e.g., work involving electrical conduit on a hydro distillate heater (HDH) compressor on April 5, 2017, more than four months earlier – about which he had never been approached or talked to. Similarly, the document included commentary regarding the restart of the Penex unit on June 1, 2017, more than 2½ months earlier, something else about which Topor had not been coached or even approached. (Tr. 1001-02.)

The Board has held that an employer’s delayed reaction to alleged employee misconduct can be strong evidence that Respondent is lying in wait for an opportunity to target an employee against whom it harbors animus, for the purpose of taking adverse action in retaliation against protected concerted activity. See, e.g. *Cooper Tire and Rubber Co.*, 299 NLRB 942 (1990), enf’d as modified on other grounds, 957 F. 2d 1245 (5<sup>th</sup> Cir. 1992), rehearing denied, 968 F. 2d 18 (5<sup>th</sup> Cir. 1992), cert. denied 506 U.S. 985 (1992):

All of this leads me, inescapably, to the conclusion first that the Company was lying in wait for [the employee] to break a rule and that this [discipline] . . . was applied in a discriminatory manner. In the absence of any reason offered by the Company why the discipline was so applied, I find that the reason was [the employee’s] union activity.

299 NLRB at 954. Although Respondent’s hostility toward Topor can hardly be considered “latent,” given its unrelenting course ever since the November 2016 safety stop, see also *Marcus Management, Inc.*, 292 NLRB 251 (1989):

[T]here is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will.

292 NLRB at 262.

In addition to the newly raised, specifically alleged concerns, the mid-term review also contained generalized complaints about Topor’s purported problems with troubleshooting, issue mitigation (a phrase heavily used in the previous Board case), a lack of concern about safety, a failure to work independently, and – in direct contradiction of that criticism – a failure to follow his supervisor’s direction. (GC. Ex. 18.)

Feeling understandably ambushed by this strangely formatted review with previously undiscussed details and scattershot complaints, Topor wrote some notes on the document he had been given so he would have some questions ready to ask after the reading. (Tr. 1002.) While he was doing this, Whatley – visibly showing signs of being upset – reached out, stopped the note-taking and told Topor to return the review. (Tr. 1002.) According to Whatley’s own testimony, he told Topor that “the time for taking notes is over.” (Tr. 953-54.)

Topor did not want to return the review and said so, explaining that it was his mid-term review, and he had always been able to keep a copy. Whatley again insisted that it be returned, and Topor complied. (Tr. 1002-03.) This was the first time that Whatley, the vice-president of operations management, had ever been personally involved in a review meeting with Topor. Topor thought it was strange, so he contacted human resources director Kerntz by email on August 14, copying union representative Chris Riley, and asked to have a meeting about the mid-

term review with Kerntz. In this email, Topor also asked to have a copy of the review. (GC Ex. 58.)<sup>9</sup>

On August 16, Topor and Brandon Riley had finished up a routine grievance meeting with Respondent when Whatley asked them to stay after. Whatley took the two of them aside and apologized for not allowing notes to be taken on August 11. Whatley promised Topor and Riley that they would be receiving the document and the notes taken on it. (Tr. 1008-09, Tr. 954-55.)

In the meantime, Kerntz had responded to Topor's Aug. 14 email requesting a meeting with an agreement to meet, indicating to Topor that he "will make sure that you get a copy of your review." At no time until September 14 did Respondent use the phrase "talking points," as it repeatedly did at the hearing, when referring to the expressly entitled "Mid-Year performance review." (GC. Ex. 18; Resp. Ex. 59; Tr. 1005-06.) Kerntz and Topor agreed, via email, to meet once Topor got a copy of the mid-year review, which Kerntz promised would be coming to Topor in "the next few days," as soon as Jung "submits it." (Resp. Ex. 59.)

Ten days later, on August 25 – still not having received the mid-term review, despite having had another meeting about it on August 24 (discussed below) – Topor again emailed Kerntz and requested a meeting. (Resp. Ex. 59.) A meeting was scheduled for September 8, with Topor, Kerntz, and stewards Dean Benson and Brandon Riley. Topor, frustrated about the factually inaccurate content of the mid-term review, discussed the elements of the review and also commented that he felt he was being harassed at work, despite his 13 years of experience at the refinery.

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<sup>9</sup> Topor filed an Ethics and Compliance report with the refinery headquarters for harassment and retaliation since the November 4, 2016 safety stop for which he had been unlawfully warned and suspended, and specifically concerning the ongoing harassment and the August 11 mid-term review. (GC Ex. 7.)

Kerntz followed up the meeting with a detailed email, which included references Topor had made to the NLRB hearing convened in 2016 and his fears that the company was trying to get him fired. This email – about a single bargaining unit employee’s mid-term performance review – was copied to two of Respondent’s counsel. (Resp. Ex. 111.)

Six days after Kerntz’s email containing his narrative about the June 8<sup>th</sup> mid-year performance review meeting (that Topor had requested) was sent to refinery attorneys, Kerntz emailed Topor a copy of the “talking points” that Topor had seen at the August 11 performance review meeting. Kerntz added that Jung had given to let him know that Jung “believes” she “may have” shredded the copy of the August 11 mid-year review that had Topor’s notes on it. For the first time, in this email a week after legal counsel became overtly involved in Topor’s individual reviews, Respondent referred to the “Rick Topor Mid-Year performance review – 8/11/17” as Jung’s “talking points.” (Resp. Ex. 64; GC Ex. 18, GC Ex. 19.)

Topor responded to this with an email dated September 17, in which he pointed out that the version of the Aug. 11<sup>th</sup> mid-year review provided to him was different than the version he had in Whatley’s office, and was missing some information. Topor asked for another meeting with Kerntz, and included in this email detailed responses to the areas of the review which had been found to be unsatisfactory. (Resp. Ex. 64.)

During the back and forth discussions about the shredded August 11 mid-year performance review, Topor continued to receive multiple, and varying iterations of performance reviews. The content of the reviews and the ratings became rapidly moving targets, to which Topor diligently continued to respond with written responses (which he requested to be put into his personnel files but never were) and in-person conversations with management. Topor’s diligence and meticulous approach to countering the asserted complaints about his performance

were motivated by his perception that he was being harassed and targeted for termination, as referenced above. At no time, in any review prior to August 2017 had Topor ever received the lowest-ranked rating. In fact, a review of Topor's evaluations and reviews back to 2010, as provided by Respondent, reveals that it was rare for him to receive anything less than the highest possible rating. (GC Ex. 12(a)-(m).)

August 24

On August 24, Topor received another performance review, this one entitled a "Performance Off-Cycle Review," dated August 24 and signed by Michael Whatley "for Gary Regenscheid" as "reviewer" and Michael Whatley, a second time, as "approver." (GC Ex. 12(b).)

In this Off-Cycle review – the first review for which Topor had ever had Whatley as the "reviewer" rather than one of his supervisors (Regenscheid or Caswell) – there was additional commentary about which he had never previously heard. His performance ratings contained two unprecedented "unsatisfactory" ("1") ratings, for "Team Work and Initiative" and "Work Quality and Ability to Follow Instructions." A review of the voluminous performance evaluations in evidence reflects that for the majority of them, the narrative commentary consists of a single line or two, if that. (GC 12(b), GC Ex. 14, GC Ex. 24, GC Ex. 25.) Yet Topor's Off-Cycle review contains detailed commentary about specific, routine work projects as well as character attributes.

When asked why he signed Topor's review as "reviewer" and couldn't wait for Regenscheid to return from a one-week vacation on about September 11, Whatley claimed that there was an urgency to get the reviews out. (Tr. 665.)<sup>10</sup> Puzzlingly, however, a review of

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<sup>10</sup> Even Regenscheid testified that he didn't understand why Whatley and Jug had signed the August 24 review, and that he had said so to Topor. (Tr. 655-56.)

Respondent's evaluations provided for the record reflect that *no other performance evaluation was issued any earlier than September 12.* (GC Ex. 14, 24, 25.)<sup>11</sup> Apparently, the urgency pertained only to Topor.

Topor, whose concern about his job was intensifying, wrote a characteristically substantive email to Kerntz on September 4, explaining that he had received his August 24 Off-Cycle review – his second in two weeks – and that he was concerned that he was unable to get a fair review because of the past retaliation against his November 2016 safety stop and the resulting NLRB hearing. He also pointed out to Kerntz that “[a] review should never be a surprise and everything in your review should have already been discussed with you.” Topor asked for a meeting with Kerntz to discuss the issues and also requested that the email be placed in his personnel file.<sup>12</sup> (GC Ex. 13.)

The inundation of Topor with performance reviews continued further, as yet another iteration of a review dated August 24 was produced. This one, rather than being called a “Performance Off-Cycle Review,” is titled a “Performance Review,” although it encompasses the same time period, January 1, 2017-July 1, 2017. (GC Ex. 12(a).)

In a bizarre twist, this second review also dated August 24 contains exactly the same narrative text as the first August 24<sup>th</sup> Performance Off-Cycle Review except it's called a mid-year “Performance Review” – but the unsatisfactory ratings have changed, without any revisions at all in the correlating narrative. The unsatisfactory ratings assigned for “Team Work and Initiative” and “Work Quality and Ability to Follow Work Instructions,” are now, in this second

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<sup>11</sup> HR director Kerntz confirmed, on the stand Respondent confirmed on the stand that a performance evaluation is considered “issued” when the reviewed employee has received and signed it. (Tr. 411.)

<sup>12</sup> Although the refinery's personal policies expressly provide the opportunity for employees to place things in request the placement of items in their personnel file, and Topor regularly did so in direct communications with Powers (as reflected in this record), Powers testified at the hearing that, in fact, she did not comply with Topor's requests. (GC Ex. 36; Tr. 1471.)

version of an August 24<sup>th</sup> review, graded as “2” – “Generally Meets Expectations.” (GC Ex. 12(a).)

Additionally, rather than Gary Regenscheid being named as the “reviewer,” as on the August 24<sup>th</sup> Off-Cycle review (even though Whatley signed it twice, both on his own behalf as “approver” and on Regenscheid’s behalf as “reviewer”), the second August 24<sup>th</sup> review – the mid-year performance review – has Briana Jung as “reviewer,” with Whatley still listed as “approver.” Both Jung and Whatley electronically signed the second August 24<sup>th</sup> review. (GC Ex. 12(a).)

Specific alleged performance issues are identified in both of the August 24<sup>th</sup> reviews: a Penex start-up issue on June 1; allegations that work is “pushed off” on other crews (e.g., an HDH foul water sample; a 34-E-5 bypass issue; and removal of some exposed electrical conduit on April 5). The most robustly postured allegations are discussed below in the context of Respondent’s multiple “coaching” sessions with Topor in 2017, and were all raised in both August 24<sup>th</sup> reviews and the August 11<sup>th</sup> mid-year performance review. (GC Ex. 12(a), GC Ex. 12 (b); GC Ex. 18.)

And yet – Respondent wasn’t done. On September 12, Regenscheid, back from his one-week vacation, brought out yet a fourth evaluation, electronically signed by Whatley and Jung on August 24 and signed by hand by Regenscheid on September 12. When Regenscheid delivered the evaluation to Topor on September 12, he commented to Topor that some positive things he had put in that had been removed were put back in again. (Tr. 656; GC Ex. 22.)

This is the only Topor review from 2017 that Respondent did not produce as one of its own exhibits at the hearing. Respondent argued that this was mistakenly “redelivered” to Topor

because after Regenscheid returned from vacation, he had not realized that this one had already been issued.

What Respondent glosses over when presented with this document as a GC exhibit is that: (1) Topor had actually never received the August 24<sup>th</sup> version that was electronically signed by Whatley and Jung; (2) Topor was actually unaware that his two unsatisfactory ratings had been transformed into #2 ratings on the unissued second August 24<sup>th</sup> version; and (3) the title for the review signed and delivered by Regenscheid on September 12 had reverted, again, to “Performance Off-Cycle Review,” like the version signed by Whatley with the two #1 ratings. (GC Ex. 12(b).)

So as of September 12, this is what Topor had for the six-month review period of 1/1/17-7/1/17:

1. 8/11: a shredded Mid-Year Performance Review, in an unprecedented format with all below-satisfactory rankings (GC Ex. 18);
2. 8/24: a Performance Off-Cycle Review, maintained in Respondent’s records as “Status: Drafted,” signed by Whatley (twice) and issued to Topor with two #1 – Unsatisfactory Performance” rankings (GC Ex. 12 (b));
3. 8/24: a Performance Review, wrongly identified in Respondent’s personnel records as “Status: Delivered” [it wasn’t], signed by Jung and Whatley but not issued to Topor, with the two #1 Unsatisfactory ratings upgraded to #2’s, while the narrative is unchanged (GC Ex. 12(a)); and
4. 9/12: a Performance Off-Cycle Review, maintained in Respondent’s records as “Status: Approved,” signed by Jung, Whatley and Regenscheid; the first time Topor saw that his two #1’s from 8/24 (GC Ex. 12 (b)) had been changed to #2’s. (GC Ex. 22.)

## **2. Respondent's proffered reasons for the issuance of multiple and inconsistent reviews are pretextual and evince unlawful motive**

It is human nature to want to make sense of things, to be able to extract from them a sense of order and purpose. But even Respondent can't articulate a plausible reason that four performance evaluations were prepared for Topor over a four week period, with varying results – even when the narrative remained unchanged.

General Counsel submits that the performance review roller-coaster was, under the most charitable construction, human resources incompetence. However, what is more likely – General Counsel argues – is that this unprecedented onslaught of reviews was a conscious and pretextual manipulation to resurrect months-old performance details as faux performance deficiencies; create a high level of frustration for the disciplined and organized Topor; and generally add to a paper trail that, along with unlawful disciplines, relentless coachings/meetings, false workplace accusations, and disparate workplace treatment would hopefully eventually lead to a termination opportunity.

Respondent has offered no creditworthy, legitimate explanation for these multiple reviews for Topor at a time when no other review had been issued to any other employee between early January 2017 and September 12, 2017. (GC Ex. 14; 24, 25, 26.)

Incredibly, HR director Krentz testified that he wasn't even aware Topor had been the subject of four reviews in 2017. (Tr. 404.) The only reasonable explanation is that the reviews were adverse actions against Topor taken in retaliation against the same protected concerted activity that motivated Respondent, driven by animus, to issue a final warning and suspension the preceding winter in November 2016.

### **D. The missed alarm of September 15, 2017**

On September 15, Richard Topor made a mistake at work.

This is the mistake: he inadvertently missed responding to an alarm that had been silenced on his console when he was working his 14th consecutive 12-hour shift. Topor does not deny that he made a mistake, and General Counsel does not deny he made a mistake.

Granted, Topor worked at a refinery, an industry that can certainly be dangerous and accordingly employs skilled and vigilant employees, particularly in the most highly skilled and experienced operator position at the refinery, that of VRO. But the fact still remains that a refinery is staffed by humans and humans make mistakes. The overarching realities of this mistake include:

- There was no damage to property as a result of Topor's mistake.
- There was no injury to personnel as a result of Topor's mistake.
- There was no loss of production whatsoever as a result of Topor's mistake.

*And Respondent never claims that there was any damage, injury or loss of production.*

As well-established in the record and briefed herein, Topor did not run the north reformer – or his shift – on his own. There was a supervisor, physically present and only feet away, in the CCR (Regenscheid); there were four other console operators in the CCR; and there were multiple field operators out in the unit. (Tr. 22-27, 183-84, 424-25, 1362-63.)

Topor's mistake allegedly was noticed at shift change by operator P. J. Gabrielson, about four hours later after the alarm was missed at 1:33 a.m. on September 15. Gabrielson, a pivotal player in Respondent's narrative for the events of September 15, was notably absent from Respondent's roster of witnesses despite his current employee status.

Throughout the hearing, Respondent failed to call multiple witnesses whose testimony would have been expected to support its assertions. Those failures will be identified throughout this brief as they arise. Further, Respondent failed to question Topor's immediate supervisors

Regenscheid and Caswell about Topor's performance in the manner which would be anticipated from long-term immediate supervisors (although they *were* conspicuously omitted from the deliberations leading up to Topor's termination).

It is within an administrative law judge's discretion to draw adverse inferences based on a party's failures to call witnesses who can be reasonably assumed to be favorably disposed to the party and to its version of events. As it logically follows that a party would want witnesses who could substantiate its accounts and assertions, drawing adverse inferences regarding factual questions on which witnesses would have been likely to have knowledge is appropriate when the witnesses are not called or no claims are made of unsuccessful attempts to produce them. See e.g., *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 n. 1 (1977), supplemented by 245 NLRB 1245 (1979); *International Automated Machines Inc.*, 285 NLRB 1122, 1123 (1987), enf'd 861 F.2d 720 (6th Cir. 1988).

As held by the Board in its adoption of the ALJD in *NC-DSH, LLP d/b/a Desert Springs Hospital Medical Center*, 363 NLRB No. 185 (2016):

[T]he key in determining whether an adverse inference should be drawn against a party for not calling a witness is whether the witness could reasonably be expected to corroborate its version of events . . . . the witness does not necessarily need to be an agent and within the party's authority or control . . . .

Thus, in *Ready Mix Concrete Co.*, 317 NLRB 1140, 1141-1142 (1995), Judge Mary Cracraft drew an adverse inference against the respondent-employer when it did not call quality control personnel to corroborate a supervisor's account of an incident over the dischargee's version. In *DPI New England*, 354 NLRB 849, 858 (2009), Judge Paul Bogas suggested an adverse inference against a respondent-employer for its failure to call any individuals who had purportedly complained against the dischargee (two of them were current supervisors, but the others were not).

363 NLRB slip at p. 5.

After Topor’s mistake was noticed, the necessary field action was taken (a vessel, described in detail below, was drained) and no consequences resulted – other than Topor’s termination. General Counsel is not asserting that the absence of consequences to property or production excuse the fact that Topor made a mistake and missed an alarm. But it *does* reflect Respondent’s determination to jump onto a single and isolated human error – and not an uncommon one – as a pretextual excuse to terminate Topor. Despite Respondent’s unpersuasive, unsupported and animus-driven claims that Topor “ignored” the alarm, there is no evidence that the earnest and diligent Topor acted with any intention or malice.

Respondent slings serial and hyperbolized arguments (without support) – e.g., that the error was intentional, that the error constituted gross negligence, that the error was a part of a pattern of incompetence, that the error exposed the refinery (and even the “community”) to an explosion and flying shrapnel – in what emerges as a desperate attempt to justify its termination of Topor on the heels of the unlawful final warning/suspension issued in November 2016, as found by the Board in *St. Paul Park Refining*, 366 NLRB No. 83 (May 8, 2018)(as referenced above in Section II.B.)

General Counsel will now brief in this section (1) a description of the alarm that was missed and its significance and (2) the mischaracterization by Respondent of the missed alarm and the manipulated and incomplete investigation that formed the alleged basis of Topor’s termination.

### **1. The alarm that was missed and its significance**

On September 15, when Rick Topor arrived at the refinery at about 5:30 p.m. – the evening after the shift on which the alarm was missed – to begin his 15<sup>th</sup> consecutive 12-hour shift without a day off, he was told by operator Gabrielson that he [Topor] had missed an alarm

on his console in the north reformer during his prior shift, which had ended at 5:30 a.m. that morning. (Tr. 41, 1026, 1036-37.)<sup>13</sup> He found this out during routine operator communications at shift change. (Tr. 1038-39.) As a VRO and board operator – and one known and rewarded for being safety-conscious – Topor wanted to know how this had happened and immediately pulled up information from refinery data to try to figure out how it had happened. (Tr. 801, 1054; GC Ex. 2(a), 2(b).)

According to Topor’s un rebutted testimony, Gabrielson [inaccurately] told Topor that there was a 98% level of liquid in the DDS (diesel de-sulfurizing unit) makeup interstage knockout drum/vessel as a result of the missed alarm.<sup>14</sup> The DDS unit takes diesel fuel and sends it through a unit to remove sulfur and get it “on-spec” for product sales (Tr. 38-39.)

A knockout “drum” and “vessel” are the same thing, with the terms used interchangeably. (Tr. 50, 1046.) The knockout’s function is to remove liquids (e.g., water, oil and product) from the hydrogen stream so liquid does not get into the compressor. (Tr. 45-49.) That is what needs to be avoided: liquid in the compressor. That is when damage to the unit and, possibly, a production shutdown can occur.

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<sup>13</sup> As both a former employee and steward, Topor is well familiar with Respondent’s detailed, written “fatigue policy,” although the refinery appeared to try to dodge knowledge of it. (Resp. Ex. 98.) For outages, of which a turnaround is one, there are 14 maximum 12-hour shifts allowed to be scheduled under the policy before the requirement of a minimum of 35 hours off between “worksets” is triggered. (Tr. 1038, 1053-54, 1353; Resp. Ex. 98.) Topor’s shift that began September 15 at 5:30 p.m. was his 15<sup>th</sup> shift, and therefore triggered the restrictions under the fatigue policy, though they were not implemented. Topor was scheduled, and worked, two additional consecutive 12-hour shifts after his 14<sup>th</sup> shift was complete. While Respondent, per its demonstrated proclivity, sought to place blame for this on Topor, the policy itself expressly places responsibility for compliance squarely upon identified managers and supervisors. (GC Ex. 8; Resp. Ex. 98, p. 4; Tr. 156-57, 221, 225, 289, 1354-55.) See, e.g., Resp. Ex. 98, p. 3: The Operations Superintendent (Jung) “Shall be responsible for managing fatigue through proper scheduling . . . .” The Refinery Leadership Team and the PSM Superintendent are also assigned responsible for administering the fatigue policy under the terms of the policy itself.

General Counsel and Charging Party do not assert that Respondent’s violation of its fatigue policy scheduling requirements excuse Topor’s missed alarm. But, again, it is yet another component of this situation that – General Counsel asserts – would never have led to a termination for any other operator.

<sup>14</sup> In fact, as fully briefed in great detail below, there was in fact a 98% liquid level in one of the two *level indicators* for the DDS knockout drum, not 98% in the knockout drum itself and certainly not in the compressor.

As noted earlier, Gabrielson was not produced as a witness to support Respondent's claim of the nature of Topor's mistake or its ramifications, despite Gabrielson's availability at the time that Respondent was presenting its case in chief. Accordingly, it is not established whether Gabrielson's misstatement was due to his failure to understand the unit or whether he was repeating to Topor a misrepresentation made to him by someone else. (Tr. 1044-45, 1608.)

Topor had been working on his console (the hydrotreater console) in the north reformer unit in the CCR for the overnight shift of September 14-15 when – as he later learned, according to company records – an alarm had come in at 1:33 a.m. for the first-stage liquid level indicator of the DDS knockout, triggered by a 50% fluid level in the level indicator/float chamber. Records also showed that it was silenced/acknowledged about 14 seconds later and, quizzically, also acknowledged about two hours later *in the field* in which the DDS knockout is located. (Resp. Ex. 102, 103.)

As a console operator in the north reformer, Topor was responsible for monitoring alarms on the north reformer console that signaled the need for action on equipment in the field. As previously mentioned, when an alarm came in, the process was that Topor alerted field operators by phone or radio to take the necessary action to address or remedy the subject of the alarm.

When at the north reformer console, Topor had before him multiple screens to monitor, and when an alarm is triggered, there are both audible (a loud beeping) and visual (a flashing light) indicators. (Tr. 98-99, 112.) Upon hitting the "ACK" [acknowledge] button on the keyboard of the console, an operator both silences the alarm and stops the flashing light. (Tr. 464, 1324.) However, a solid light remains on the screen until the required action triggering the alarm is accomplished (unless they are false tank alarms on the north reformer console, in which

case the solid lights remain despite the fact that the north reformer console operator has authority to fix the problem causing the false/nuisance alarm).

The colors of the light reflect the level of the alarm: blue for a low-priority alarm; yellow for a high-priority alarm; and red for an urgent/high-high alarm. (Tr. 1030.) As Topor testified, there were sometimes so many active alarms on his summary screen – up to 40-50 active alarms at a time, including nuisance alarms – that his screen was “like a Christmas tree.” (Tr. 1034.)

Again, when an alarm requires follow-up action, it is not the board operator but rather the outside field operators who perform the required functions. They find out about the work that needs to be done in response to the alarm through radio or phone contact from the console operator. (Tr. 68-69, 1031.)

Topor’s shift of Sept. 14-15 was unusual and more complicated than usual in multiple aspects. In addition to his regular level of monitoring alarms (of which there were about 50 active that shift), Topor was occupied with time-consuming work involving the placement of recycled butane into a unit called the Penex unit.<sup>15</sup> This process carries with it the risk of butane overload and a resulting decrease in purity. Topor alerted his supervisor, Gary Regenscheid, of this risk and Topor implemented the necessary process with required incremental changes and monitoring. By the end of his shift at 5:30 a.m. on 9/15, Topor had – with Regenscheid’s knowledge, approval and participation – been able to send some of the recycled butane out to storage to help with the purity issue. At the shift change, Topor alerted Gabrielson about the Penex butane situation at shift change. (Tr. 1039-41.)

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<sup>15</sup> The Penex unit takes lighter material and produces a higher octane product to blend with gasoline. (Tr. 39.) It can be a volatile and dangerous unit and is, in fact, the unit involved in the safety stop that Topor called in November 2016, for which he was unlawfully warned and suspended. *St. Paul Park Refining Co.*, 366 NLRB No. 83 (May 8, 2018).

In addition to the alarms and the Penex butane issue, the DDS was either still in or just coming out of turnaround (even management testifies varyingly on this). A turnaround is a form of outage, a scheduled shutdown for the purpose of planned maintenance. (Tr. 39-40, 984-85.) Operations management vice-president Whatley testified that the turnaround was *not* yet complete in that it was still at a stage that commonly triggered alarms when things did not run normally during the start-up process after being shut down, during the post-turnaround transitional period. (Tr. 40-41, 329, 1043, 1557-59.)

Although Respondent contends that the turnaround was essentially over as of Topor's 9/14 shift, implying that there was no longer a need for special post-turnaround vigilance and experience, in fact staffing was still doubled-up per turnaround staffing protocol because while production may have resumed, there were still transitioning hiccups during the 9/14-15 shift. (Tr. 1043-44.)

In addition to the Penex butane issue and the turnaround transition during Topor's September 14-15 shift, the hydrogen plant was down. While the DDS knockout drum does not often show a liquid level in it, when hydrogen purity suffers during a hydrogen plant shutdown, there can be an accumulation of some liquid in the knockout that is not normally found. (Tr. 241-42, 1045, 1323.) The hydrogen unit being down on September 14 – and the resulting vulnerability of the DDS knockout to liquid accumulation – was an event completely separate from the barely-completed turnaround/shut-down of the DDS unit and the Penex butane matter. (Tr. 1201).<sup>16</sup>

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<sup>16</sup> The final enumerated step for the DDS unit start-up after the turnaround was signed off on the refinery's detailed procedural paperwork during the night shift of September 13. However, the doubled-up turnaround staffing was maintained for at least two more shifts after this, no doubt because the extra staffing has proven to be warranted for post-turnaround "hiccups." (Tr. 76-77, 242-43, 1205; 1558; Resp. Ex. 68, 88.)

Whatley conceded that the hydrogen unit was not in operation during part of the DDS start-up and recollected that this was still an issue as of September 14-15. As Whatley noted, there is “much more likelihood that you will have entrained liquid in the hydrogen stream.” (Tr. 1570.)

A final complicating element of the September 14-15 shift was an ongoing one for the north reformer console, of which refinery management had been well aware for four years.

As referenced earlier, there are five different consoles in the CCR, one of which is the blending console. The blending console was created about four years ago and at that time became responsible for monitoring and responding to the tank farm alarms that used to sound on the north reformer console. However, although the blending console was created years ago, tank farm alarms continued to sound on the north reformer console, even though the north reformer console operators had no authority or ability to act on those “false” or “nuisance” tank farm alarms. (Tr. 141-45, 472-73, 1032-33.)

The false/nuisance tank alarms, at the time of Topor’s termination, tended to come in clusters of 4-6 at a time, and it was not unusual for the north reformer console operator to acknowledge the cluster of tank alarms in one action. (Tr. 435, 1033-34) While Topor never definitively figured out how he missed the September 15 alarm, it is not impossible that the real north reformer DDS knockout alarm had been mistakenly acknowledged as part of one of these clusters of tank alarms, as in fact reflected in Respondent’s event summary. (Tr. 1056; Resp. Ex. 71, 102-03.)

The distracting presence of these nuisance tank farm alarms on the north reformer console has been acknowledged by the refinery as far back as 2014, when the issue was raised in the form of a “Pass-Up Concern.” The documentation of “Pass-Up Concerns” is a system by

which refinery personnel can raise issues and concerns. (Tr. 210.)<sup>17</sup> Very notably, in a matter of fewer than four weeks after Topor’s termination, the presence of nuisance alarms on consoles was specifically presented as a safety concern at the refinery’s October 2017 “Safety Sequential” meeting in a segment entitled, “Are your alarms alarming?”

- If you have nuisance alarms, especially safety alarms, which “chatter” or remain in the alarm condition, report the problem to your instrument and automation engineers and management and work with them to fix the problem.
- If you have alarms that do not require a response, work with your engineers and management to eliminate them . . . .

(GC Ex. 16.)

Significant (and effective) increased effort was made, *after* Topor’s termination, to remove/reduce nuisance tank alarms from the north reformer console. (Tr. 209-11, 436-37, 561, 1577-78; GC Ex. 16.)

Again, neither GC nor Topor asserts that the presence of nuisance alarms; the hydrogen plant shutdown; the turnaround transition; or the Penex butane dangers “excused” the missed DDS knockout alarm. But nothing happens in a vacuum, and this human error – a single first-level indicator alarm missed after someone other than Topor silenced and/or acknowledged it – happened in the context of a shift with a lot going on. The myriad of circumstances and the challenging context of the missed alarm *are* relevant in assessing whether Respondent’s claims that Topor’s error constituted gross incompetence or negligence establish a non-pretextual basis for Topor’s termination.

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<sup>17</sup> Respondent’s Pass-Up Concern records on the nuisance alarms inaccurately reflect that the matter was “closed out” in 2014; the presence of the alarms on the north reformer console continued years beyond that, with company knowledge. (Tr. 316, 1035, 1078; GC Ex. 21.)

**2. Respondent's overt mischaracterizations about the nature and significance of the missed alarm and its incomplete, distorted investigation evince pretext and unlawful motive**

Prior to September 15, Topor had never missed an alarm, or at least he was never aware of doing so and had never been accused of doing so during his 10 years as a Board operator. He had never before been coached, much less disciplined, for *any* of his years of work in monitoring and responding to alarms, which was the primary work and responsibility of the board console operator position. (Tr. 1179-80, 1314.)

Moreover, the record contains corroborated and unrebutted testimony that it is not uncommon for alarms to be missed. Topor testified that he has come in for shifts to discover active alarms still on the screen for which the preceding shift operator had not acted or directed field operators to take corrective action. When Topor discovered these, his practice was to contact the field operator about the necessary corrections. He did not need to, and he did not, notify or involve management. (Tr. 1042-43.)

As VRO, Topor was actively involved in training console operators, and he emphasized to the operators whom he trained that they should take a detailed look at the board when they come in "because people miss things." (Tr. 1041-43.) It was also Topor's practice, for himself when working as a field operator, to make a round of the equipment in the unit before the end of a shift *even if the unit was not on the list of equipment to be checked during routine "radar rounds."* (Tr. 145.) Topor also silenced alarms "all the time" on other consoles during his shift when an operator had to step away from his board, as do all operators on a routine basis for bathroom breaks, a trip to the kitchen or a need to perform work away from the console. (Tr. 1058-59, 1313.)

Current bargaining unit employees Brandon Riley and Jason Christner also testified that they have both missed alarms and have first-hand knowledge of other operators having not only missed alarms, but continuing to operate in active alarm mode. (Tr. 434, 556-59.) Christner testified that he has personally left a high alarm unattended for over four hours, with supervisory knowledge. (Tr. 560.)

It is well-established under Board law, and logically so, that current employees testifying against their employer's interests (and possibly their own) should be credited over conflicting management testimony. See, e.g., *Reno Hilton Resorts Corp. d/b/a Reno Hilton*, 319 NLRB 1154 (1995); *Liston Brick of Corona, Inc., d/b/a Liston Aluminum*, 296 NLRB 1181 (1989), *enf'd* 936 F. 2d 578 (9<sup>th</sup> Cir. 1991).

Christner testified to personal knowledge he has, as the operator of a unit impacted by a shutdown that actually resulted in a loss of production. He acquired this information during the routine turnover process that operators implement during a shift change. This involved a DU unit (distillate unifier) shutdown in the south reformer. Christner is not aware that the operator involved was subjected to an investigation; at least Christner was never questioned as any part of an investigation, even though he was as a south reformer operator for Topor's missed alarm. (Tr. 548-49.)

Another unit shutdown due to a compressor trip happened in the HDH unit in 2014 and that one was actually assigned an "Incident" number (#42222) under the refinery's KMS ("Knowledge Management System") information system. No discipline resulted from that investigation. (GC Ex. 23; Tr. 615-16, 670-72.)

More recently, in the summer of 2017, the SDA unit experienced a lengthy shutdown (1-2 weeks) as a result of having been run in alarm. After an investigation, no discipline resulted. (Tr. 216-17.)

In contrast, Topor's missed alarm resulted in no shutdown, no property damage, no injury, no loss of production, and was not assigned an "Incident" number under the KMS system. (Tr. 180.) Yet, Topor was terminated.

Respondent's insistent mischaracterization of the nature and significance of the missed alarm – by management, engineers, operators and other personnel, all of whom do, or certainly *should*, know the facts – can only be explained by a determination to place Topor and his error in the worst possible light for the purpose of creating a pretext for his termination.

For example, in presenting company documentation regarding the alarms on the north reformer console on the shift in issue, Respondent presented only filtered selective alarms, not the actual alarms as seen by Topor on his monitor (Tr. 94-97, 102-04, 1027-29; Resp. Ex. 71.) Even Topor – the north reformer VRO console operator for ten years, who was entrusted to train other board operators – was not even able to discern, when questioned about the filters applied on data allegedly summarizing his alarms on September 14-15, to what the "filter applied" caveat referred. (Tr. 1356.)

The DDS knockout drum has *two* level indicators, with dual, redundant alarms. The trigger for the first-level alarm – the alarm missed by Topor on September 15 – neither constitutes an urgent emergency alarm, nor indicates that there was a danger of explosion or flying shrapnel. (Tr. 1322.) Unlike some knockouts at the refinery, the DDS knockout does *not* have a "low" alarm, but rather only "high" and "high-high" alarms. (Tr. 191.) Therefore, the "high" alarm, the alarm missed by Topor, is the first-level alarm on the DDS knockout.

Respondent, through its counsel's questioning, exploited the fact that the entry-level alarm for the DDS knockout has "high" in its name, thereby creating an innuendo that this was an emergency, urgent alarm. This unit has redundant alarms. Why does it have redundant alarms? General Counsel submits it has redundant alarms because human error is a reality and human error is anticipated; a redundant alarm gives operators a second chance to catch the need to drain a knockout or perform another field function, specifically in case the first alarm is missed.

The latter of the DDS knockout's two redundant alarms was never triggered on September 14-15, either on Topor's shift or after Gabrielson took over the console on the 15<sup>th</sup>. (Tr. 192, 1047, 1067.) The high-high alarm would have triggered only if the liquid in the level indicator had gone *above* 98%, something which didn't happen. (Tr. 1050-51.) If the high-high level had triggered, it would have indicated that the knockout drum had reached a liquid level of about ½-¾ liquid level in the knockout. (Tr. 1052.)<sup>18</sup>

When the first alarm triggered at 1:33 a.m. on September 15, under manufacturing engineering guidelines there would have been about 50% liquid *in the level indicator*, a device that functions similarly to a float in a toilet that rises when liquid level rises.) (Tr. 1048.) The level indicator shows a liquid level in the flow chamber – NOT in the knockout vessel and most certainly not in the compressor. (Tr. 1048.) Liquid in the compressor is the big concern in responding to a level indicator alarm in the DDS knockout. That is the bottom line of what is to be avoided. The high alarm does not indicate that *any* liquid has gone into the compressor. (Tr. 192-93.)

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<sup>18</sup> Topor is familiar with the high and high-high alarms, the settings for which are established by the manufacturer. He has been present when a high-high alarm has gone off. (Tr. 1053.)

A critical misrepresentation in Respondent's reaction to and investigation of Topor's missed alarm involves the mischaracterization of the liquid levels: specifically, how much liquid was where, and what it meant.

General Counsel emphasizes these misrepresentations by Respondent about the "98% level" in investigatory and human resources documents because it's critical to understanding the pretextual nature of Respondent's alleged reason for the termination. This is a case where Respondent doesn't even rely on real facts as a pretext; it actually misrepresents them to create pretext.

To add yet another complication to Respondent's many kitchen-sink reasons offered for the termination: the alarm missed by Topor was actually silenced/acknowledged by someone in the refinery when the level indicator high alarm triggered at a 50% level. It's unknown who, and the Respondent presents no evidence that it made any effort whatsoever to try to find out this clearly relevant detail. (A 50% liquid level in the level indicator correlates to about a 1/3 level of liquid in the knockout drum.)

After Topor missed the alarm and whoever acknowledged the alarm in the field failed to act, the liquid level continued to rise to a 98% level by the time of the shift change at about 5:30 a.m. on September 15. A 98% level in the indicator instrumentation correlates to a level of about 50% in the vessel – most certainly NOT 98% *in the vessel*. As emphasized earlier, the level indicator is NOT the same as the drum or the vessel. (Tr.194-95, 1048-52.)

Throughout the entirety of Respondent's "investigatory report," *the only report submitted to Richard Hastings, who made the termination decision*, the critical and wildly inaccurate claim that the knockout vessel was at a 98% level was attributed (via hearsay) to Regenscheid, Rasmussen, Christner and Gabrielson. (Tr. 1333-36; Resp. Ex. 66; Resp. Ex. 67.)

Barnholt, Caswell, Jung and Regenscheid, at a minimum, would know full well the difference between a liquid level in a vessel and liquid in a level indicator. (Tr. 1338.)

Gabrielson was not called as a witness by Respondent even though he is the operator who noticed the missed alarm; who had first-hand knowledge of the condition of the console at shift change on September 15; and who first notified Topor of the missed alarm. According to the hearsay information attributed to Gabrielson in Resp. Ex. 66, he apparently doesn't know the difference between first level indicator being at 98% and the knockout vessel being at 98%. General Counsel suggests that Respondent has an operator on its hands with far more problematic performance deficiencies than those pretextually attributed to Topor.

Notably, Kerntz, who made the termination recommendation to Hastings, could not even testify that if had ever seen the investigation report (Resp. Ex. 66) before he made the recommendation, even though he was allegedly not involved in the investigation and therefore had no independent insights of his own. On what did he base his recommendation, then, if not the same animus attributed to him in the unlawful final warning/suspension? (Tr. 384; GC Ex. 10; Resp. Ex. 66.)

Another indication of animus in Respondent's investigation is that the subject line of the six-paged typed investigative report appears to address the isobutane purity issue on the Penex as much as the missed alarm, even though the alleged concern about the isobutane became a non-issue once Regenscheid stated that he had no problems with Topor's performance. (Resp. Ex. 66.) Kerntz, who made the termination recommendation to Hastings, conceded that he was already aware, prior to the termination decision, that the isobutane purity issue was no longer being investigated. (Tr. 140-41.)

A major issue with crediting Respondent's typewritten investigatory notes, as provided to Whatley and Hastings on September 19 – and which allegedly reflect the rationale for Topor's termination – is that they do not even accurately reflect the undated handwritten notes from which they purportedly were created. (Resp. Ex. 66; Resp. Ex. 67.)

For example:

- Resp. Ex. 66 implies that there was an in-person interview with Regenscheid, Barnholt and Powers (which one would expect since he was Topor's immediate supervisor in the CCR and was working on the shift in question). However, the handwritten notes seem to reflect that the information was gleaned from a telephone conversation with Jung, primarily about the movement on the butane purity issue. In the handwritten notes, Regenscheid is noted as reporting that he felt the recycled butane project was handled okay, and that in fact he thought Topor was "improving." (Resp. Ex. 67.) In the typewritten version, the word "improving" is left out and the report given to Whatley and Hastings says only that Topor is "being honest" and "doing his best." (Resp. Ex. 66.) In both versions, Regenscheid states that he was unaware that the DDS drum "was full" (the report's word, not apparently Regenscheid's) until Jung had "informed him" of what Gabrielson had told her.
- The summary of the Barnholt/Powers investigatory meeting with operations supervisor Mark Rasmussen provided to Whatley and Hastings with the written report stated that Gabrielson had told Rasmussen that "things were a mess," with the "drum" at 98% and "an issue" with low butane purity. (Resp. Ex. 66.) In the handwritten notes, there is not even a complete sentence about what Gabrielson (in double hearsay from Gabrielson to Rasmussen to Barnholt/Powers) had allegedly said to Rasmussen about the knockout drum. (Resp. Ex. 67.)
- The typed investigatory report provided to Whatley and Hastings on September 19 also included an "investigation" with Gabrielson, which the handwritten notes reveal to have consisted merely of a telephone call made by Barnholt to Gabrielson on the latter's private cell phone on his day off, 3½ days after the missed alarm. (Resp. Ex. 66; Resp. Ex. 67.) According to the typewritten notes – but not the handwritten notes – Gabrielson inaccurately characterizes the "drum" as at 98%. Further, the typewritten report to Whatley and Hastings claiming that Gabrielson told Rasmussen that he had found a "mess" when arriving for his 9/15 shift is noticeably absent from Gabrielson's own alleged

comments, which – to the contrary – include the observation that “everything else on unit looked good.” (Resp. Ex. 66; Resp. Ex. 67.) Gabrielson was not called by Respondent to provide a direct, non-hearsay version of what happened on September 15.

- Scott Schulte – also not called by Respondent as a witness – was the temporary foreman for the DDS on the evening of September 14. In the typewritten report, Schulte is quoted as noting that if liquid got into the compressor, “it would cause big damage.” However, Barnholt’s allegedly contemporaneous notes (consisting of four handwritten lines) from his investigation with Schulte contain nothing about danger to the compressor and in fact contain comments (deleted from the typewritten version) that Schulte knew nothing about any liquid level in the DDS. (Resp. Ex. 66; Resp. Ex. 67.)
- Jason Christner is attributed in the typewritten investigatory report as being unaware that there was a high level of “98% liquid” in the drum, however in the handwritten notes he merely says that he wasn’t aware of a “high level,” with no specified percentage. In both the handwritten and the typewritten version, Christner explains that the missed alarm may have been missed because it may have come in as part of an alarm cluster. (Resp. Ex. 66; Resp. Ex. 67.)
- Finally, in the investigation report’s summary of the investigation with Topor, both the handwritten and typewritten versions clearly set forth that Topor said missing the alarm was “on me;” however, only the typewritten version includes Topor’s asserted admission that he “definitely missed it” or that “I need to do better.” (Resp. Ex. 66; Resp. Ex. 67.)

Topor’s desire to augment the investigation with a visit with Powers and Barnholt to the field area so he could show them the unit and knockout vessel in-person culminated in a field visit together on September 21, after Topor had sent an emailed request on September 20, following the September 18 meeting briefly summarized immediately above. (GC 79; Tr. 130-32, 142, 1064-66.) However, the meeting that resulted from this initiation by Topor was apparently just a placcation, because none of the insights or information shared made it into the shallow and inaccurate final investigative report, dated September 19, on which Hastings allegedly based his termination decision, as recommended by Kerntz. (Tr. 62; Resp. Ex. 66.)

One of the more telling revelations in the record about the quality of the investigation is Barnholt's admission that – even as the delegated investigator of the missed alarm – he had no data to demonstrate that the knockout drum was at 98%, he was aware that there was no fluid in the compressor (or certainly not enough to cause any damage), and – perhaps most remarkably – he didn't even know that there were redundant alarms on the DDS knockout and that Topor had missed only the first one. (Tr. 80-87.)

Just the fact that Barnholt was assigned the investigation at all was aberrant. Barnholt testified that he could not think of another situation in which he has investigated anyone outside his area of supervision for a non-Incident other than Topor. (Tr. 180-82.)

There is repeated innuendo by Respondent that Topor's error in missing the alarm was intentional or malicious, e.g., the animus-laden question from Respondent's counsel to Topor, “[H]ow did you *avoid* knowing about it [the alarm] for four hours?” (Tr. 1179 [emphasis added]) and the reckless and unsupportable reference by Whatley to Topor “*ignoring*” the alarm (Tr. 1560 [emphasis added].) On cross, Whatley admitted that he had no evidence that Topor had intentionally ignored the alarm, as opposed to missing it. Moreover, Whatley also acknowledged that employee intention can be a factor in the refinery's deliberations concerning employee errors. (Tr. 1574.)

Respondent, no doubt in an effort to divert attention away from its reliance on the unlawful November 2016 final warning/suspension as a/the basis for Topor's termination, argues that the missed lower-level alarm was such a grave safety-related concern that it warranted termination despite the fact that there is no evidence that Topor had ever missed an alarm before.

Respondent's admitted nonchalance at the time of its discovery of the missed alarm betrays its alleged reliance on the missed alarm as cause for termination once it perceived –

General Counsel argues – that it should take this opportunity as an arguably lawful basis to terminate a high-functioning, well-respected VRO.

Oddly, during the August 24<sup>th</sup> performance review at which Topor received two “Unsatisfactory” ratings, for “Team Work and Initiative” and “Work Quality,” Whatley communicated (and documented) three compliments about Topor’s work performance, including one that directly contradicts these criticisms in noting that Topor “is viewed by his crew as an established leader because they all look up to Rick for questions and direction.” (GC Ex. 37.)

Notably, the missed alarm *did not even come up at the morning meeting on September 15*, when operational issues and events are discussed. And Gabrielson had already found the missed alarm on the north reformer console by then. Whatley concedes that he only found out about the missed alarm from “sort of a hallway conversation” about remarks that he can’t remember with someone he can no longer identify. (Tr. 1556-57.)

The circumstances under which Barnholt became the “lead investigator” of an investigation over a non-incident are suspect.<sup>19</sup> While Respondent asserts the investigation was delegated to Barnholt for a more “independent” approach because he wasn’t involved in the prior litigation involving Topor (a reference to the meritorious NLRB litigation), in fact Barnholt is a direct report to Whatley, and hardly independent, particularly since it was Whatley who hand-picked Barnholt for the investigation and Barnholt didn’t even make a recommendation. (Tr. 16, 383, 1574-75; Resp. Ex. 67 [final page].)

The missed alarm – which was allegedly the subject of Whatley’s passing and already-forgotten hallway remarks with “someone” about “something” – scarcely had an impact on Barnholt, either. Barnholt testified that he doesn’t remember what Whatley told him about the

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<sup>19</sup> Human resources director Kerntz testified that it was uncommon for an Incident report to be filed over a matter in which “human error” was involved. (Tr. 388.)

missed alarm on September 15, and that it may have even been 1-2 days later before it was mentioned to him. As Barnholt testified, Whatley said something about a compressor having a high alarm and not being responded to, and also something about “some moves around the Penex area.” (Tr. 38, 42.) This testimony about initial management response to the missed alarm hardly comports with the major crisis it was later claimed to be.<sup>20</sup>

Whatley wasn’t just a casual passer-by in the hall after the operations meeting: he was the vice-president of operations management. This is hardly the reaction one would expect from an alleged safety threat that could result in an explosion or flying shrapnel. General Counsel strongly submits that the only reasonable conclusion to draw from this testimony is that Respondent’s concern and reliance on the missed alarm as the basis for terminating a 13-year operator with the highest-ranking and most respected position in the unit is a false, manufactured and inflated pretext for finally being able to terminate this employee against whom its unlawful animus has been legally established in the prior Board case.

After the shift on which Topor had missed the first-level alarm on the DDS knockout drum, he continued to work for yet two more consecutive 12-hour shifts, an incongruity given Respondent’s exaggerated concerns. (Tr. 1351.)<sup>21</sup> It was not until September 18 that he was called in by management for questioning about the missed alarm. Present for this meeting were Dave Barnholt, Christa Powers and, as union rep, Brandon Riley.

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<sup>20</sup> As briefed in detail herein, the compressor had no alarm, high or otherwise. It is the *level indicator* on the DDS knockout that had the dual alarms.

<sup>21</sup> When questioned about why Topor was retained for two more 12-hour shifts after he had missed the alarm, Respondent’s merely responds that Topor didn’t “volunteer” to be taken off the schedule when volunteers were solicited for a staffing reduction post-turnaround. That begs the question of why Respondent wouldn’t have removed Topor from the schedule immediately if they feared an explosion with shrapnel. The fact that Topor declined relinquishing 24 hours of paid work hours, hours for which he was already scheduled, has nothing to do with assessing the legitimacy of Respondent’s asserted apprehension that he was performing in an unsafe manner when he missed the alarm on September 15. (Tr. 1352, 1358.)

This was the first time that anyone in management had raised the matter with Topor – there had not even been an intervening conversation with his immediate supervisor Regenscheid, with whom he directly worked in the small CCR room. (Tr. 1055.)<sup>22</sup> When Barnholt opened the meeting by asking Topor if he knew why he was there, Topor – according to his own testimony – immediately replied that it was because he had missed an alarm. (Tr. 1056.)

In fact, as referenced above, Topor had initiated his own investigation into the missed alarm before Respondent even did. Topor takes pride in his work and wanted to know why he missed it. As Topor responded to cross-examination by Respondent’s counsel:

You know, I would really like to know why I missed the alarm. It was a human error. I made a mistake. I did not see the alarm.

(Tr. 1208.) This clearly is not the testimony of a man who is denying an error or exhibiting nonchalance or a lack of concern about it. The record evidence repeatedly reinforces that Topor realizes he made an error by missing the alarm and took responsibility for it. (See, e.g., Resp. Ex. 66; Resp. Ex. 67.) He took full responsibility, and stated so under oath on the record, for missing the alarm and for consequently not calling out to the field to direct a field operator to look at the DDS knockout vessel. (Tr. 1314-15.) Human resources director Kerntz conceded that Topor never denied missing the alarm and that, in fact, Topor had admitted to doing so. (Tr. 433.) As Topor testified:

I took full responsibility. I said, I missed the alarm. It was a human error. I missed the alarm. The alarm – I’m responsible for that console. That’s my console. I’m the only person that was working that console that night. That alarm is my responsibility.

(Tr. 1248.)

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<sup>22</sup> As noted above, even Whatley – who made the termination recommendation to Hastings – testified that he learned of the missed alarm only from a “hallway conversation”. (Tr. 1578.)

In the refinery, an “Incident” is a term of art: an event which is entered into the company’s “KMS” (Knowledge Management System) and followed by an investigation. It is undisputed that there was no Incident entered for Topor’s missed alarm, an incongruity given the Respondent’s assertions that mayhem could have resulted. General Counsel submits that no Incident was entered because there was no loss of production, no compressor trip and no damage to the compressor that resulted from this no-uncommon error of missing an alarm. (Tr. 283-84, 434, 1062, 1326-27; GC Ex. 5; GC Ex. 23.)

Moreover, Respondent presented no evidence that there were any “C-Notes” for Topor’s missed alarm, even though C-Notes are the Respondent’s system for noting things of significance that happened on a shift. (Tr. 408-09; Resp. Ex. 93, p. 2.)

Respondent’s counsel, on cross-examination, asked Topor in an accusatory manner if he had asked the operators on duty on the Sept. 14-15 shift who had acknowledged the alarm, thereby silencing the audible component and stilling the flashing light element. (Tr. 1311.) But the real question, GC submits, is why didn’t the *refinery* ask the operators on duty who acknowledged the alarm, when they did so, if they alerted Topor to the fact they had acknowledged an alarm on his board, what field operator in the satellite in the unit acknowledged the alarm two hours after it came in, and why didn’t that operator initiate a draining of the knockout unit, since he was in the field – or at least go out to the unit and look at the liquid levels in the sight gauge? (Tr. 128, 177-78.) Topor works – more often than not – in the field operator function, and he testified without rebuttal that a field operator’s range of concerns is not – or at least should not be – limited to things only on a radar round checklist. (Tr. 1339.)

It was widely known by high-level management that someone in the field had acknowledged the alarm at 3:49 a.m. that Topor had missed at 1:33 a.m. on September 15. At a

minimum, Barnholt and Wheatley knew about it, and it was the subject of testimony and record documentary evidence at the hearing. (Tr. 244; Resp. 71.)

An operator in the field can easily assess the actual liquid level in a level indicator on the knockout drum by looking at the clear gauge on the drum. Additionally, read-outs are readily available both in the field and in the CCR. (Tr. 51.) So – while it is concededly Topor’s job to have caught that alarm – the reality is that someone *in the field* acknowledged the alarm at 3:49 a.m., and yet nothing was done about the alarm until about 5:57 a.m., after the shift change in the north reformer.

Surprisingly, given that Respondent cites Topor’s missing of one alarm as a basis for a lawful termination, the refinery never made *any* effort to find out who that acknowledger was; if that operator made any effort to bother to look at the sight gauge out in the unit or do any follow-up with other refinery personnel, or – rather – just acknowledge it and ignore it, rather than go drain the knockout in the field unit in which the operator was already working. (Tr. 100.)<sup>23</sup>

As Barnholt readily testified under questioning by General Counsel, while the field operators aren’t “required” to look at the sight gauges out in the field, this doesn’t mean that they can’t – or shouldn’t do so – particularly given the Respondent’s repeated allegiance to safety first. (Tr. 74.) In addition to the alarm and the sight gauge, the liquid levels are also transmitted on the CCE monitor, which is visible to supervisor Regenscheid. (Tr. 51.)

It is undisputed that Regenscheid was the top guy in charge in the CCR during the September 14-15 shift, and that he had the ability to see the same console screens at which the console operators in the CCR were looking. (Tr. 184-85.) If someone in the field acknowledged a “high-level” alarm on the DDS knockout more than two hours after it triggered, why didn’t that

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<sup>23</sup> To remove any liquid that has accumulated in the knockout drum and has been discovered through an alarm or a visual inspection of the sight gauge out in the field, the field operator simply opens some valves to drain the liquid. (Tr. 51-52.)

operator call Topor? Look at the gauge? Call Regenscheid? Do anything? And why wasn't the Respondent the slightest bit interested in finding out who that was? The answer can only be nonchalance toward the alleged threat of the liquid; pervasive poor performance at the refinery; or – more likely – a goal of transforming Topor's not-uncommon error into a terminable offense.

If Respondent's portrayal of the refinery operations is to be believed, Topor was the only one with *any* responsibility in the entire refinery to ensure that unit malfunctions were noticed and acted upon. This is a lot of responsibility for an operator whose performance – if Respondent's arguments are to be believed – was supposedly so shoddy that he had to be subjected to almost non-stop criticism, coaching, charting and evaluation throughout 2017, starting only weeks after he had filed his charge on November 9, 2016 in the prior Board case, and continuing relentlessly until his termination in September. (Appendix B.)

As briefed below, Respondent claims Topor had performed in a sub-par fashion throughout 2017 (i.e., after his unlawful final warning and suspension of November 2016). Yet, considering Respondent's assertions of Topor's poor performance, it nevertheless is eager to place the full responsibility for a missed alarm in a unit start-up after a turnaround shutdown – and in the midst of an unanticipated hydrogen plant shut-down increasing the risks of liquid in the knockout vessel as well – on this single, allegedly under-performing operator.

None of these questions is posed for the purpose of asserting that Topor did not miss an alarm on his board on September 15. However, the refinery is a complex and potentially dangerous operation, and given the Respondent's repeated emphasis on the value of initiation and troubleshooting by its personnel, questions are raised about the authenticity of Respondent's concern about the missed alarm, when there are investigatory avenues so obviously not explored.

Respondent's inadequate investigation played a big part in the holding that Topor was unlawfully warned and suspended in the prior Board case. The absence of an adequate investigation provides a basis for finding that an employer has failed to meet its *Wright Line* burden. *St. Paul Park Refining*, 366 NLRB. No. 83, slip at 16, citing *Alstyle Apparel*, 351 NLRB 1287, 1287-88 (2007); *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004).

#### **E. Richard Topor's termination on September 21, 2017**

As the alleged author of the termination letter dated September 21 (quoted below), Kerntz – when questioned on the stand to identify the reasons for the termination – testified (after what can only be assumed careful preparation for the hearing) that “the list goes on and on with the reasons why.” (Tr. 273, 275.)

A list that “goes on and on” is by definition, of course, never-ending. This hyperbolic claim of an infinite number of reasons for Topor to be terminated reveals nothing of substance, but reveals much about pretext. An HR director – who made the termination recommendation – should be able to identify the reasons for the first termination of any operation since at least 2015.<sup>24</sup>

This is a large, sophisticated refinery in a complicated industry that has data of every sort at hand to support assertions of operator performance deficiencies other than the undated, unattributed, rambling, hearsay-riddled narratives (emailed internally at all hours) that fill the record here. General Counsel submits that a list that “goes on and on” is a list that is manufactured for a purpose, and that purpose was to terminate Rick Topor in retaliation against

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<sup>24</sup> There is not even any evidence that there were any terminations prior in 2015 or earlier. However, the disciplinary records available for admission into the record encompassed only January 1, 2016 - October 17, 2017. (GC Ex. 3; Tr. 265-70.)

the same protected activity for which Respondent unlawfully warned and suspended him just months earlier.

Topor received no discipline – NONE – in his 13 years with the refinery until his unlawful final warning and suspension in mid-November 2016. (Tr. 283 [Kerntz].) As referenced earlier, for ten years he was a VRO, the most respected and highest-ranking unit operator job in the refinery. Respondent tapped him to be the temporary foreman for a lengthy 2016 turnaround and, as testified by Jung, Topor not only did a good job but received an award for that work. (Tr. 923, 936.)

Yet, Respondent terminated Topor only ten months after his unlawful suspension *and only 15 days* after post-hearing briefs were submitted on September 6 in 18-CA-187896 and 18-CA-192436, the prior Topor case affirmed by the Board at 266 NLRB. No. 83. (Appendix B, p. 3.)

### **1. Respondent's stated reasons for Richard Topor's termination**

On September 20, shortly before midnight, HR director Kerntz wrote an email to Hastings recommending that Topor be terminated “unless he [Topor] offers something which would fully excuse his recent failure to perform.” (GC Ex. 10.)

Because Respondent's investigatory report reflected a lack of understanding (or a conscious mischaracterization) of the percentage and location of the liquid level on the DDS knockout and the redundant alarms, Topor – as referenced above – requested an opportunity to walk through the unit with Barnholt and Powers to talk to them about the equipment and the process. While Barnholt and Powers agreed to do so with Topor, the decision was clearly already made, given the speed with which it was implemented that same day.

Between his 11:31 p.m. email to Hastings on September 20 and the termination letter on September 21, Kerntz sent to Hastings yet another communication, a two-page document dated September 21 with three attachments that purports to detail the reasons for Kerntz's recommendation that Topor "be terminated immediately before the refinery experiences an even more serious incident" (the "serious incident" a reference to missed first-level alarm on September 15 that was designed to alert the unit that some liquid had accumulated in the level indicator for the DDS knockout drum that needed to be drained.) (GC Ex. 17.)

Attached to this document which – according to Hastings – constituted the entirety of the information considered by him in making the termination decision, were three documents: Barnholt's typed report (Resp. Ex. 66.), a summary of Barnholt's field visit with Topor (Resp. Ex. 81), and a summary of alleged coachings of Topor by refinery management (Resp. Ex. 82). Among the critical facts therefore *not* known by Hastings when he decided to terminate Topor was that there are dual alarms for the DDS knockout. (Tr. 1672.)

GC Ex. 17 and its three attachments speak for themselves and need no verbatim repetition here. Given that these are the documents that the decision-maker reviewed, General Counsel will review the alleged performance deficiencies addressed in these documents.<sup>25</sup> Before turning to that review, however, there are a few critical things to point out about Kerntz's September 21<sup>st</sup> termination recommendation sent to Hastings:

- Kerntz emphasizes to Hastings the fact that Topor had received the [unlawful] final written warning and suspension: "I should also note that he received a Final Written Warning and suspension in November 2016 for failing to follow supervisory instructions and insubordination;"

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<sup>25</sup> Notably, none of Topor's detailed written responses to the many "coachings" he received in 2017, as provided to Christa Powers along with his ignored requests that she place them in his personnel file, was provided to Hastings for his deliberations. This is evidenced by Hasting's testimony that he reviewed only Kerntz' September 21 recommendation and its three attachments. (GC Ex. 17; Resp. Ex. 66; Resp. Ex. 81; Resp. Ex. 82.)

- Kerntz falsely represents that Topor’s had received an unsatisfactory rating in his August performance review when, in fact, the ratings had been changed to all “2”s and above, information which Kerntz withheld from Hastings;
- Kerntz falsely represents to Hastings that “numerous other employees” also received “contemporaneous reviews” at the time Topor received his August review when in fact, there was not a single other employee who received an evaluation any earlier than September 12, as briefed above;
- Kerntz *continues* (even after the September 21 walk-around of Barnholt and Powers with Topor) to misstate that the DDS knockout drum was “full.” As fully briefed above at length, the drum was *never* full or at 98%. When the missed alarm was noticed, only the first alarm had sounded, the *level indicator* was at 98% and the drum had, at the most, a 50% liquid level;<sup>26</sup>
- Kerntz asserts to Hastings that Topor “repeatedly ignored” the alarm on September 15, even though there is no evidence to support any allegation that Topor “ignored” it (i.e., noticed it and chose not to act), rather than having non-intentionally missed it;
- Kerntz misrepresents that Topor “sees no reason to change or improve,” despite repeated instances – even documented by Respondent – that Topor expressed an interest in improving and solicited (without success) suggestions on how to do that.<sup>27</sup>

(GC Ex. 17.)

Respondent’s insistent mischaracterizations of Topor’s 2017 work performance and the missed alarm, including to the termination decision-maker, provide overwhelming evidence that the proffered reasons given for Topor’s termination are false and therefore pretextual.

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<sup>26</sup> Kerntz falsely claims in a 2:12 p.m. email to Hastings and Whatley on September 21 that he would “set up a calendar invite for us to discuss” the September 21 field walk-around with Topor. This was not done, as Topor was terminated less than two hours later. (Resp. Ex. 81.)

<sup>27</sup> Even in Resp. Ex. 82, an attachment on GC Ex. 17, Regenscheid reports that “Rick stated that he is trying to improve and will continue to try to do a better job as a VRO.” Regenscheid repeated this perception – *as Topor’s immediate supervisor* – to Barnholt during the investigation of the missed alarm, as well. (Resp. Ex. 66.)

Within about 16 hours after the 11:31 p.m. email to Hastings on September 20, Kerntz issued a termination letter to Topor announcing the following basis for the discharge:

This is to inform you that your employment is being terminated effective today, September 21, 2017. The basis for your discharge is that 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.

(GC Ex. 4 [emphasis added].)

**2. Respondent's assertions that Topor failed to meet company standards or to improve despite repeated coaching efforts in 2017**

In addition to the missed alarm, which Kerntz testified constitutes the “safety-related performance failure” referenced in the termination letter and which has already been fully briefed above, Respondent asserts that Topor was also terminated for “failure to improve your performance despite the many repeated coaching efforts from your supervisors.” (Tr.

Respondent repeatedly references Topor's unlawful final written warning and suspension in its termination paperwork. As briefed below at Section II.F., even partial reliance on the unlawful final written warning and suspension renders Topor's termination tainted and also unlawful.

Respondent likely recognizes that the exaggerated and exploited missed alarm non-Incident is an unpersuasive basis, on its own, for an immediate leap to termination of a 13-year employee and an experienced VRO. So Respondent's third prong to legitimize Topor's termination is a series of alleged performance “coachings” to which Topor purportedly responded unsatisfactorily.

Identifying exactly what these “coaching efforts” have been is challenging, not only for General Counsel and Topor, but even for some of Respondent’s own agents (e.g., Regenscheid, who completely confused two different flare search situations under examination by Respondent’s counsel (Tr. 692-95).)

Given that Respondent provided to its decision-maker, Hastings, a summary of alleged coaching sessions and Hastings purportedly relied on that summary in deciding to terminate Topor, General Counsel will work from that list in responding to the alleged poor performance. (Resp. Ex. 82.)

*January 2017: HDH Foul Water Sample*

Respondent asserts that Topor exhibited sub-par performance in the way that he handled a directive to take an HDH foul water stripper sample. (Resp. Ex. 81.)

The HDH (hydro distillate heater) is a unit by which ammonia salt by-products are washed away, resulting in a by-product of foul water. Although a sample had not been taken for 1-2 years, Topor was instructed to do so. When he went out to the sample station – being January in Minnesota – it is not surprising that he found frozen conditions. (Tr. 1079-80.) The water was completely blocked in and the sample station and piping were frozen. Topor – who was working in the field that day – informed operator Christner that the sample couldn’t be taken. On the next day, with temps still at minus 10 degrees, the situation was still frozen. To complicate matters further, the station was leaking and repairs were needed for holes in the piping.

Topor emailed supervisor Corey Freymiller to inquire about the repair status for the station piping, and learned that there had been a 6-8 year old work request for station repair. (Tr. 1081-82; GC Ex. 31.) In addition to his email to Freymiller, Topor also emailed Regenscheid,

who in turn contacted Jung. (Tr. 1083.) In the process of trying to accomplish this job, Topor also learned that the “sample bomb” (a metal contained for a high-pressure sample) was in disrepair, in fact was completely in pieces in the lab. Topor informed Regenscheid, who took the sample bomb for repair.

Respondent’s suggestion that Topor was negligent in not starting the process to thaw the 100-150’ of piping in the station is moot; it is unrebutted that no sample can be taken until this sample bomb is repaired. (Tr. 1084-85.) At no time did this situation result in any discipline or, indeed, any negative feedback from Regenscheid to Topor. (Tr. 1084.) It was another day of the challenges of running a refinery, particularly in a Minnesota winter, and Respondent’s exploitation of normal workday interactions as “coaching” evinces pretext.

Nevertheless, still smarting from the unlawful final warning and suspension of only two months earlier and well aware of Respondent’s animus toward him, Topor crafted a response to the foul water situation and requested that it be placed in his personnel file. (GC Ex. 30; Tr. 1086-87.)

*February 2017: Penex Startup Delay*

Respondent asserts that Topor exhibited sub-par performance in the manner in which he performed an assignment of working on a Penex startup. (Resp. Ex. 81.)

Respondent’s facile recitation of this situation in its coaching “summary” sent to Hastings with the termination recommendation is grossly insufficient to convey the complex events of that day.

The HDH knockouts were full of foul water on the shift in question. This is a problem because if they become too full, the compressor will shut down. As the hydrogen gas from the HDH is essential to the unit, that would result in a loss of production. The knockout drain lines

were frozen, so the required draining was a challenge. On the same shift, the Penex unit was down and was being bypassed, and there was a “flare event” (a flare is an emission of waste gases that needs to be closely monitored) that required flare searches. (Tr. 1091-93.)

A field operator was pulled out of the unit to start checking for flares. When that operator left the unit, Topor left the CCR and went to cover a field operator position. Later that shift, when the Penex was being started up, Topor returned to the console operator job. This left, in Topor’s assessment as VRO, the unit dangerously short of field operators for the Penex start-up, which turned into a “reactor runaway” situation, in which the temperature rises dangerously high (1100 degrees) and required an emergency bypass. (Tr. 1093-94.)

As the Penex reactor runaway situation arose, Topor was in the CCR, and only one field operator was in the unit outside. Topor was directed, from the console, to put on a second compressor to cool down the Penex, but there were no operators outside to oversee that dangerous process.<sup>28</sup>

During all this, Topor met with field supervisor Dale Caswell and Jung to tell them that they were shorthanded in the field and that a possible Penex runaway was emerging. Apparently agreeing with Topor that time was of the essence (and it was, the Penex did rise from 380 degrees to 1100 degrees), Jung called another operator (Scott Schulte, not called by Respondent as a witness) to fill in. (Tr. 1095-96.)

At the end of the shift, Topor was pulled in for a meeting with Whatley and Jung, one of the series to which he was subjected throughout 2017. During this meeting, Topor remarked that they were shorthanded in the field and that they should not do so and that if a procedure is

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<sup>28</sup> Topor’s testimony that the Penex is probably the most dangerous unit in the refinery is unrebutted. The Penex is used to increase octane through isobutane production. (Tr. 1094-95.)

changed a MOC (a “management of change,” indicating a mandatory documentation if a change is being made in a prescribed procedure, e.g., staffing) is needed. (Tr. 1096-97.)

Whatley’s “investigation” of this shift resulted in a conclusion that Topor had been in appropriate communication with his supervisor Regenscheid, who was aware that the Penex start-up delay was caused by the need to drain the HDH knockout to prevent a compressor trip. (Resp. Ex. 81.) Nevertheless, in another demonstration of animus and pretext, Respondent included this in the summary of coachings provided to Hastings.<sup>29</sup> General Counsel submits that Topor’s actions on this shift demonstrate precisely the safety-consciousness and proactive initiative that Respondent continually argues that Topor lacked.

May 2017: 34-E-5 Bypass

Respondent asserts that Topor exhibited sub-par performance in the handling of a perceived drainage blockage in a bypass project in the field. (Resp. Ex. 81.)

As Topor was walking a job on May 12, he noticed a 15’ long pipe design in a bypass project that he thought presented a “deadleg,” situation, i.e., a situation where there was no avenue for drainage of liquid out of a line. As Topor testified, he felt it was so obvious a deadleg that “a layperson could see it.” (Tr. 1103.)

If present, a deadleg could result in blockage, leakage, a crack in piping, and a loss of containment with a resulting environmental hazard and fine. This observation indicated an

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<sup>29</sup> While not warranting much briefing, Respondent elicited testimony at the hearing about an overheard use of the word “fuck” by Topor at the refinery, directed at no one but rather in solo response to a frustrating situation. At the time, Topor did not realize that Jung or any other manager was in the satellite. In the meeting with Whatley and Jung about the Penex startup delay, Topor apologized for the profanity. This appears to be another instance of Respondent piling-on after-the-fact, as it is not referenced in any of the materials submitted to and reviewed by Hastings when he made his decision to terminate Topor. (Tr. 1097-99.)

initiative and anticipation on Topor's part based on his years of experience and skill. (Tr. 1101-02.)<sup>30</sup>

Topor called day foreman Javier Rodriguez (not called by Respondent as a witness) to talk about it. Topor suggested that they could either put a "bleeder" on the inlet block valve or a "bleeder ring" between the pipe flange and the block valve as ways to drain. Rodriguez didn't have any ideas for dealing with it, but said he would talk to Jung, Whatley and others, adding that a contractor was on-site and ready to perform a function in the area where a bleeder appeared to be needed. (Tr. 1103-04.)

As the shift progressed, Topor wasn't able to reach Rodriguez to see what he had found out from Jung, so Topor (showing initiative) contacted Jung himself. When he reached her, she already knew about the situation. Topor asked Jung what she wanted to do about it, since the contractor was waiting for direction, and Jung told Topor to "hold on the project." Topor documented the interaction in the C-Notes for the day. (Tr. 1104.)

Three days later, on May 15, Topor received a "poor performance letter" from Whatley for allegedly disagreeing with the conclusions of his supervisors about the deadleg issue, even though it was Jung who had told him to hold the project and that, as soon as a managerial decision had been made that a deadleg situation was not presented, he implemented the directed procedure. (Tr. 1105-06; Resp. Ex. 47.)<sup>31</sup>

On the next day, Topor brought the [undated] poor performance letter to a regular grievance meeting he routinely attended and afterwards asked Kerntz to talk to him about it.

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<sup>30</sup> Topor testified without rebuttal that when Marathon owned the refinery, employees were rewarded for finding deadlegs, rather than criticized. (Tr. 1102.)

<sup>31</sup> Topor wrote a response to the poor performance letter and the May 15 meeting, presented it to Powers, and requested that it be put in his personnel file, per the refinery's personnel policies. (Tr. 1116-17; GC. Ex. 31; GC Ex. 36.) As Powers admitted on the stand, she put none of Topor's documents in his personnel file, even though he requested that they be placed there. (Tr. 1471.)

Topor explained the events of May 12 to Kerntz, and he literally drew a picture for Kerntz of the piping and the deadleg, because Kerntz wasn't aware of the equipment or process. (Tr. 1107-

10.) Kerntz said that he would have Hastings look into it, to which Topor replied:

Tim, I'll tell ya, I'm being honest with you. I think I'm being – workforce, everything that I do is being questioned. And I feel like I'm being retaliated against. And I really want you to take a look at this.

(Tr. 1110.)

On Saturday, May 20, Topor was working when Whatley approached him and asked to talk. Topor wanted to have a steward with him; there were none around, but Christner attended the conversation as a witness. Whatley told Topor that he would retract the poor performance letter and it would not be placed in his file if Topor would agree to be open to improvement. (Tr. 1111-12.)

When Topor said that he wanted to find a bargaining unit witness to be there as they spoke (no stewards were available), Whatley discouraged him from bringing one in, adding "We're friends, we work together. You know, there's no reason Jason [Christner] needs to be here." (Tr. 1112.)

Whatley then proceeded to say that if Topor didn't make such a commitment to improve, he "had another letter for me in his pocket." (Tr. 1112.) Topor reacted with assurances to

Whatley:

And you know – and I go, "Mike, you know, everybody can improve their performance. I can improve my performance, everybody. I learn things new every day. You know what I mean?" . . . . That's exactly what I said. And then I asked him, "Well, how do you think that I need to improve my performance? And Michael Whatley said, "You know, I'm going to have to get back to you on that."

(Tr. 1112-13.)<sup>32</sup>

July 2017: Flare Compliance Event

Respondent, in the summary presented to Hastings for his deliberations on the termination recommendation, expresses concern over Topor's alleged "disagreement" with supervisors and managers rather than an actual flare compliance event, but as it is nominally raised in Resp. Ex. 81, General Counsel will briefly address it, although General Counsel submits that after-the-fact testimony and documentation about an alleged occurrence which was not placed before the decision-maker at the time the termination decision was made has only arguable probative value.

On July 27, Topor was running the north reformer console when a flaring event presented itself, which was not at all unusual. There is a specific procedure to be followed for flare searches: the board operator notifies the field operators to check sources for possible emission flares. Per this standard procedure, Topor called out to his operators. Jack Kariesch (not called by Respondent as a witness) was on the blending, which was the unit in charge of the procedure. (Tr. 1145-46; Resp. Ex. 55.)

Topor and Kariesch both were called in for a meeting with Jung and Regenscheid in the CCR concerning the manner in which the flare search was executed. No discipline resulted.

Topor wrote a response and provided it in person to Kerntz. (GC Ex. 35; Tr. 1147-48.)

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<sup>32</sup> Even in the summary that Kerntz provided to Hastings (the authorship of which is unattributed, per much of Respondent's documentary evidence) – for which multiple attachments referenced within the document are not attached – Whatley reports that on May 20 during their conversation at the refinery, "Rick replied that he was open to learning and opportunity for improvement." (Resp. Ex. 81.)

**F. Respondent's termination of Richard Topor is unlawful because it relies, at least in part, on an unlawful final written warning and suspension**

Respondent references the existence of Topor's unlawful final written warning and suspension in multiple documents, including Topor's termination letter. There is no reasonable doubt that it was on Respondent's radar throughout 2017. Evidence of even partial reliance on underlying unlawful discipline in issuing a termination taints the termination and renders it unlawful as well.

General Counsel submits that Respondent's references to the unlawful discipline and suspension (despite its frequent "even if" couching), and the disproportionate nature of the termination in relation to Topor's not-uncommon mistake, warrant a finding that the termination is tainted by the underlying final written warning and suspension.<sup>33</sup> Topor's termination is unlawfully motivated by animus against the same protected concerted activity that motivated the final written warning and suspension in November 2016.

The Board has held, often and unequivocally, that advanced levels of discipline can't be lawfully justified by the existence of lower-level discipline that was unlawfully issued. See, e.g., *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170 (2017); *Relco Locomotive Inc.*, 358 NLRB 298 (2012), enfd 734 F. 3d 764 (8<sup>th</sup> Cir. 2013); *10 Elliot Square Court Corp. d/b/a Elliott Development Square*, 320 NLRB 762 (1996), enfd 104 F. 3d 345 (2<sup>nd</sup> Cir. 1996); *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995); *Fermont, A Div. of Dynamics Corporation of America*, 296 NLRB 1252, 1253-54 (1989), enfd 928 F. 2d 609 (2<sup>nd</sup> Cir. 1991); *Premier Rubber Co.*, 272 NLRB 466 (1984).

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<sup>33</sup> Disproportionate discipline may support a finding of discriminatory motive. See, e.g., *St. Paul Park Refining*, 366 NLRB No. 82 (May 8, 2018), slip at 17, citing *Abbey's Transportation Services, Inc.*, 284 NLRB 698, 700 (1987); *Tamper, Inc.*, 207 NLRB 907, 933 (1973).

**G. Respondent's *Wright Line* defense necessarily fails because its multitude of proffered reasons for terminating Richard Topor are false, pretextual and evince unlawful motive**

While under a traditional *Wright Line* analysis in an 8(a)(1) case, after General Counsel shows that (1) an employee engaged in protected concerted activity; (2) the employer was aware of that activity, and (3) the employer harbored animus toward that activity, the burden then shifts to Respondent to prove that it would have terminated Topor even in the absence of Topor's protected concerted activity, its animus toward that activity and – in this case – even without the existence of a final written warning and suspension. General Counsel submits that under a traditional *Wright Line* analysis, Topor's termination (and adverse reviews) is demonstrably unlawfully motivated. All the elements of a standard *Wright Line* analysis are satisfied and established in *St. Paul Park Refining*, 366 NLRB No. 83 (May 8, 2018).

However, Respondent's purported motivations for its adverse actions against Topor in this case are unsupportable, counterintuitive, manufactured, shifting and manipulated. General Counsel strongly asserts that this is a case in which there is no need to proceed to the second prong of the *Wright Line* analysis, on the basis that Respondent's proffered reasons for the termination (and the reviews) are false and pretexts.

[A] finding of pretext necessarily means that the reason advanced by the employer either did not exist *or were in fact not relied upon*, thereby leaving intact the inference of wrongful motive established by the General Counsel.

*Limestone Apparel Corp*, 255 NLRB 722, 722 (1981), enf'd 705 F. 2d 799 (6<sup>th</sup> Cir. 1982) [emphasis added]. Accord *United Rentals, Inc.*, 350 NLRB 951 (2007):

[If] the evidence establishes that the reasons given for the employer's action are pretextual – that is, either false or not in fact relied upon – the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second

part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd 705 F. 2d 799 (6<sup>th</sup> Cir. 1982).

*United Rentals*, 350 NLRB at 951. See also *Auto National, Inc. and Village Motors, LLC d/b/a Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enf'd 801 F. 3d 767 (7<sup>th</sup> Cir. 2015).

### **III. CONCLUSION AND REMEDY**

On the basis of the foregoing and the record as a whole, General Counsel respectfully submits that the record evidence and the law establish that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as alleged. Accordingly, Counsel for General Counsel requests that the Administrative Law Judge issue a recommended order requiring Respondent to cease issuing adverse performance evaluations and cease terminating employees in retaliation against their protected concerted activities.

Counsel for the General Counsel also respectfully requests that the Administrative Law Judge include in his recommended order the requirement that Respondent make Richard Topor whole for all losses he has suffered as a result of his termination and that all references to his termination be revoked from his personnel files and records, with written notification to him that this has been done.

Counsel for General Counsel further requests that the Administrative Law Judge order that Respondent revoke from Richard Topor's personnel files and records the August 11, August 24 and September 12 performance evaluations/reviews, with written notification to him that this has been done.

Finally, Counsel for General Counsel respectfully requests that the Administrative Law Judge include in his recommended order the requirement that Respondent post appropriate notices within 14 days after service by the Region; preserve and, within 14 days of request, make

available to the Board or its agents for examination or copying all personnel records, social security payment records, timecards, personnel records and all other records necessary to determine the amount of backpay due; and preserve and, on request, make available to the Board or its agents for reexamination and copying all awards, reports and other documents necessary to analyze Respondent's compliance with the terms of the Administrative Law Judge's recommended Order.

s/ Florence I. Brammer  
Counsel for General Counsel  
National Labor Relations Board  
Region Eighteen  
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E-mail: [Florence.Brammer@nlrb.gov](mailto:Florence.Brammer@nlrb.gov)

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

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

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

**WE WILL NOT** issue adverse performance reviews/evaluations in retaliation against your protected concerted activity.

**WE WILL NOT** terminate you in retaliation against your protected concerted activities.

**WE WILL NOT** in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** offer immediate and full reinstatement to Richard Topor to his former position, or, if that position no longer exists, to a substantially equivalent position, without any adverse consequences to his seniority or other working conditions.

**WE WILL** make Richard Topor whole for any loss of earnings and other benefits resulting from his unlawful termination on or about September 21, 2017, plus interest.

**WE WILL** compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 18, within 21 days of the date the amount of backpay and other monetary losses are fixed, a report allocating the backpay award to the appropriate calendar years.

**WE WILL**, within 14 days from the date of the Order, remove from our files any and all references to all performance reviews/evaluations dated August 11, 2017, August 24, 2017; and September 12, 2017; and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that these unlawful performance reviews/evaluations will not be used against him in any way.

**WE WILL**, within 14 days from the date of this Order, remove from our files any and all references to the unlawful termination of Richard Topor on September 21, 2017, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that this unlawful termination will not be used against him in any way.

**ST. PAUL PARK REFINING CO. LLC  
d/b/a ENDEAVOR**

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

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

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

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

Federal Office Building  
212 Third Avenue South, Suite 200  
Minneapolis, MN 55401-2657

**Telephone:** (612)348-1757  
**Hours of Operation:** 8 a.m. to 4:30 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**St. Paul Park Refining Co., LLC d/b/a Western Refining and Richard Topor.** Cases 18–CA–187896 and 18–CA–192436

May 8, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On December 20, 2017, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief,<sup>1</sup> the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>2</sup>

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions and

<sup>1</sup> The Respondent also filed a motion to reopen the record to enter an arbitration award in which an arbitrator ruled that the Respondent justifiably disciplined Topor. We deny the motion, as the Respondent has not demonstrated that the award constitutes evidence that is newly discovered or previously unavailable. See Sec. 102.48(c)(1) of the Board's Rules and Regulations; *Reebie Storage & Moving Co.*, 313 NLRB 510, 510 fn. 2 (1993) (denying a motion to reopen the record to admit an arbitration award because the motion sought "to adduce evidence about an alleged event that occurred after the close of the hearing"), enf. denied on other grounds 44 F.3d 605 (7th Cir. 1995).

<sup>2</sup> Member Emanuel took no part in the consideration of this case.

<sup>3</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) of the Act by taking adverse actions against employee Richard Topor because of his union activities, or to the judge's decision not to order the Respondent to reimburse Topor for consequential damages as part of the remedy for the 8(a)(1) violation found against him. Member McFerran notes that there were no exceptions to the judge's application of *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to the allegations that Topor's discipline violated Sec. 8(a)(1).

The Respondent filed bare exceptions to the judge's dismissal of its motion to reopen the record to admit correspondence it received from Minnesota OSHA (MNOSHA) and to the judge's finding that it violated Sec. 8(a)(1) by threatening employees with termination, surveillance, and stricter enforcement of work rules due to their union activities. Because the Respondent has not presented any argument in support of these exceptions, we find in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations that these exceptions should be disregarded. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018); *Holsum*

to adopt the recommended Order as modified and set forth in full below.<sup>4</sup>

ORDER

The National Labor Relations Board orders that the Respondent, St. Paul Park Refining Co., LLC, d/b/a Western Refining, St. Paul Park, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with termination, surveillance, and stricter enforcement of work rules because of their union activity.

(b) Suspending employees because they engage in protected concerted activity.

(c) Issuing employees final written warnings because they engage in protected concerted activity.

(d) Denying quarterly bonuses to employees because they engage in protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Richard Topor whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of, final written warning to, and denial of a quarterly bonus to Richard Topor, and within 3 days thereafter, notify

*de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enf. 456 F.3d 265 (1st Cir. 2006).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by taking adverse actions against Topor because he engaged in protected concerted activity, we find, in agreement with the judge, that Topor's decision to call a safety stop was the logical outgrowth of his earlier concerted discussions regarding the safety of a job he was asked to perform. In view of that finding, we find it unnecessary to pass on the judge's additional finding that Topor's conduct also constituted protected concerted activity under *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), and *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enf. 388 F.2d 495 (2d Cir. 1967).

<sup>4</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found and substitute a new notice to conform to the Order as modified.

him in writing that this has been done and that these unlawful acts will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in St. Paul Park, Minnesota, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2018

\_\_\_\_\_  
Mark Gaston Pearce, Member

\_\_\_\_\_  
Lauren McFerran, Member

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

\_\_\_\_\_  
Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten you with termination, surveillance, and stricter enforcement of work rules because of your union activity.

WE WILL NOT suspend you because you engage in protected concerted activity.

WE WILL NOT issue you a final written warning because you engage in protected concerted activity.

WE WILL NOT deny you a quarterly bonus because you engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Richard Topor whole for any loss of earnings and other benefits resulting from the discrimination against him.

WE WILL compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of, final written warning to, and denial of a quarterly bonus to Richard Topor, and WE WILL, within 3 days thereafter, notify him in writing that this has been

done and that these unlawful acts will not be used against him in any way.

ST. PAUL PARK REFINING CO., LLC D/B/A  
WESTERN REFINING

The Board's decision can be found at [www.nlr.gov/case/18-CA-187896](http://www.nlr.gov/case/18-CA-187896) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Florence I. Brammer, Esq.*, for the General Counsel.  
*Marko J. Mrkonich, Esq.* and *Alice O. Kirkland, Esq.* (*Littler Mendelson, P.C.*), of Minneapolis, Minnesota, for the Respondent.

#### DECISION

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case principally alleges that St. Paul Park Refining Co., LLC (the Respondent) unlawfully suspended Charging Party Richard Topor for his protected concerted activity. The alleged activity is Topor's claim of a right to refuse to work under dangerous circumstances. On November 4, 2016, supervisors assigned Topor the task of injecting hydrochloric acid from a cylinder into a machine used in the Respondent's oil refining operations. The job required Topor to increase pressure in the cylinder by placing it in a water bath and heating the water. When doing so, Topor had to insure the cylinder wall temperature did not exceed 125 degrees, or risk the possibility of the acid exploding. During discussions about the job, Topor disagreed with his supervisors as to the safety of having other acid cylinders in the same area as the one being heated. When his supervisors proposed a solution to mitigate the safety concern, Topor did not concur. As a result, Topor called a safety stop and asked that a safety representative be called to address the dispute. Instead of calling that representative, the Respondent sent him home. It later issued him a final written warning and 10-day suspension for his conduct, and then denied him a quarterly bonus based upon that discipline. As discussed fully herein, I find that Topor was engaged in protected concerted activity when he called a safety stop, and that the Respondent's adverse actions towards him based on that activity violate Section 8(a)(1).

#### STATEMENT OF THE CASE

On November 9, 2016, Richard Topor (the Charging Party) initiated this case, by filing the original unfair labor practice charge in Case 18-CA-187896 against St. Paul Park Refining Co., LLC d/b/a Western Refining (the Respondent). On January 30 and February 2, 2017, Topor filed amended charges against the Respondent in that case. On February 3, 2017, Topor filed a new charge against the Respondent in Case 18-CA-192436. On April 21, 2017, the General Counsel, through the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued a consolidated complaint against the Respondent in those two cases. The complaint alleges the Respondent violated the National Labor Relations Act (the Act) by placing Topor on administrative leave on November 4, 2016; issuing him a final warning and 10-day suspension on November 14, 2016; and withholding his quarterly bonus on January 17, 2017, all due to his union and protected concerted activity. The consolidated complaint alleges that the Respondent's adverse actions towards Topor independently violate both Section 8(a)(1) and (3) of the Act. On May 5, 2017, the Respondent filed an answer to the complaint, denying the substantive allegations and asserting numerous affirmative defenses. On June 23, 2017, the General Counsel issued an amended consolidated complaint, adding an allegation that the Respondent violated Section 8(a)(1) at some point during the period of September through November 2016 by threatening employees with termination, stricter enforcement of work rules, and surveillance, because of contract negotiations. On July 7, 2017, the Respondent filed an answer to the amended consolidated complaint, denying the additional allegation. From July 12 to 14, 2017, in Minneapolis, Minnesota, I conducted a trial on the complaint. Thereafter, on September 6, 2017, the parties filed posthearing briefs.

On the entire record and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent operates an oil refinery in Saint Paul Park, Minnesota. In conducting its business operations during the past 12 calendar months, the Respondent purchased and received, at its Saint Paul Park facility goods valued in excess of \$50,000 directly from points outside the State of Minnesota. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answers to the complaints. I also find, as the Respondent admits, that the International Brotherhood of Teamsters, Local No. 120 (the Union or Teamsters Local 120) is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

At its refinery, the Respondent processes crude oil into various products, including gasoline and asphalt, for subsequent sale. The Company has 450 employees there, including 160 in operations. The operations employees work on a "DuPont"

schedule, with four crews, two 12-hour shifts, and 24/7 operations for 365 days each year. The operating unit involved in this case works in the “north reformer” area of the refinery, a central hub for product processing. The Union represents employees in certain job classifications, including in the operations department. The classifications in the department are vacancy relief operator (VRO), console operator, field operator, and utility. Topor has worked for the Respondent for 13 years, including since 2008 as a VRO in the north reformer. At material times, Topor was assigned to crew 4, and his shift was from 6 a.m. to 6 p.m. His VRO job duties are to assist all crew members with their jobs and to fill in for anyone on the crew who is absent. Gary Regenscheid, the lead shift supervisor for crew 4, and Dale Caswell, a shift supervisor in the reformer area, are Topor’s direct supervisors. Topor also served as a Union steward for the past 3 years.

The relevant collective-bargaining agreement between the Respondent and the Union ran from January 1, 2014 to December 31, 2016. In July 2015, the parties began negotiations for a successor contract. Topor was on the Union’s bargaining team. Among the Respondent’s negotiators were Michael Whatley, the manager of operations, and Timothy Kerntz, the director of human resources. In September 2015, the parties reached a tentative extension of the agreement. However, bargaining unit employees did not ratify the extension. Topor did not support that agreement and spoke with some of the 40 employees he represented about what he felt was good and bad about it.

Contract negotiations did not resume until November 29, 2016, after the Respondent suspended Topor.<sup>1</sup> At some point in the 3 months before then, Regenscheid spoke with Michael Rennert, a field operator who works on crew 4 with Topor. The two were in the “satellite” building, where the Respondent sometimes holds work meetings and which otherwise serves as a gathering place and break room for employees. The satellite has a table, kitchen, computers, and operations consoles for employee use. Regenscheid said to Rennert “Don’t be surprised if a few people get fired, and they start searching lunchboxes when you go out the gate and have the dogs sniffing cars.” Rennert asked him why they would do that. Regenscheid responded “Your contract is coming up.” Rennert said, “Do you really think that they would do that?” Regenscheid said, “Yeah, I do.” No one else was present for this conversation.<sup>2</sup>

#### *A. Contract Provisions and Policies Addressing Workplace Safety*

The Respondent’s refinery operations present numerous po-

<sup>1</sup> All dates hereinafter are in 2016, unless otherwise noted.

<sup>2</sup> As to this conversation, I credit Rennert’s testimony. (Tr. 87–89.) Throughout his testimony, including about this conversation, I found his demeanor to be confident and relaxed. He came across as a particularly believable witness. Rennert testified with specificity and consistency about the events he could recall and was frank about those he did not. Moreover, Regenscheid did not explicitly deny the conversation occurred or Rennert’s account of what Regenscheid said. (Tr. 576.) Instead, in response to a somewhat leading question, Regenscheid denied making any statements to bargaining unit members about the 2016 negotiations to the best of his knowledge.

tential safety hazards to employees. Unsurprisingly, then, both the collective-bargaining agreement and the Respondent’s employee handbook address workplace safety. Article 22 of the contract<sup>3</sup>, entitled: “Safety,” states in full:

##### Section 22.1

The Employer shall furnish a safety manual to all employees covered by this Agreement.

##### Section 22.2

Should any employee be of the opinion that an unsafe condition exists, it shall be their obligation to immediately inform their Company Representative of such fact and to that end the Employer will examine the facts so as to determine the safety factors and whether the job should proceed.

The Respondent’s employee handbook<sup>4</sup> states in relevant part as to safety:

#### 1.11 HEALTH, SAFETY & ENVIRONMENT POLICY

A safe work environment is the shared responsibility of the Company and its Employees at all levels of the organization. The Company is committed to maintaining a safe environment in compliance with federal, state, and local safety laws, rules, and regulations. Employees must follow safety rules and exercise caution in all of their work activities. Safety is the responsibility of every Employee. The Health, Environmental, Safety, and Security Department can assist and advise Employees on safe work practices, but we are each responsible for performing our jobs safely.

Employees are required to immediately report any unsafe conditions to their supervisors. Not only supervisors, but Employees at all levels of the Company are expected to identify unsafe issues, report them to Management, and assist in the correction of unsafe conditions as promptly as possible. The safety representative will issue a notice to correct any safety concerns and follow-up will be carried out to ensure compliance. Safety violations may result in disciplinary action, up to and including termination.

The Respondent also maintains a “safety stop” policy,<sup>5</sup> which defines a stop as:

A process that gives any [Respondent] employee or contractor the authority to stop a job and discuss potential risks along with appropriate mitigation measures.

The policy also sets forth responsibilities related to safety stops:

#### 1.1 Responsibilities

1.1.1 All SPPRC employees and contractors are responsible for stopping unsafe actions or work without fear of reprisal. The leadership of the job is required to listen and address the concerns brought forward by the person asking that a job be

<sup>3</sup> GC Exh. 2.

<sup>4</sup> GC Exh. 3, pp. 18–19. The Respondent’s handbook and other policies are applicable to unionized employees via the management-rights clause in the collective-bargaining agreement. GC Exh. 2, p. 39, art. 28.

<sup>5</sup> GC Exh. 15.

stopped due to perceived safety risks.

#### 1.1.2

If a safety stop is called, the specifics of that event should be documented via the STOP Report so that personnel not directly involved will have access to accurate information of why the work was stopped and how the situation was resolved.

1.1.3 The worker who stops a job due to safety concerns may do so without fear of reprisal, since they are upholding the Refinery's core value of safety.

This policy also contains a 1-page bulletin describing a safety stop and when an employee could call one. The bulletin advises employees to “[p]lease use your ability to stop work that you feel is unsafe. Everyone is empowered (expected) to call a safety time out so that we can address concerns before proceeding.” Among the situations the bulletin identifies as appropriate for a safety stop are if a procedure was new or nonstandard, as well as if the procedure has the potential for causing injury or harm. The bulletin also states that the Respondent will not take any punitive actions against employees for stopping a job. The bulletin contains a screenshot of the Respondent's electronic stop report. Among other things, the computer form asks the employee to “[d]escribe the situation and why a stop was called,” as well as “[w]hat was done to resolve the issue(s).” Employees can submit the safety stop form electronically.

#### *B. The Events of November 4 Leading to the Respondent Sending Topor Home and Placing Him on Administrative Leave*

The Respondent's “Penex” machine plays a central role in the events giving rise to Topor's suspension. In layman's terms, the Penex unit performs multiple refining functions, utilizing a catalyst to produce necessary chemical reactions. The Penex machine is shut down once every 5 years or so for maintenance. When maintenance is completed, the unit must be restarted. The Respondent documented how to perform the restart in its “PEXEX Startup with Reactors Bypassed” procedure. The Respondent uses the term “procedure” to denote a written document detailing the steps which must be followed to safely perform a work task. Once a procedure has been established, any change to it requires a written procedure step change form (the “step change form.”) The changes must be signed off on by three individuals, including supervisors and employees in “tech service,” the department which provides technical support and assistance to the refinery's operating units.<sup>6</sup>

The last time the Respondent shut down and restarted the Penex was several years ago. Topor was the leader on that job. One of the tasks he performed was to inject hydrochloric acid (HCl) from a cylinder into the Penex unit. This step is done to remove moisture from the machine, which otherwise would damage the catalyst in the unit upon its restart. To inject the acid into the Penex, the pressure in the cylinder containing the acid must be higher than the pressure in the Penex. When he previously performed this function, Topor placed an HCl cylinder

on top of a scale, insured that the pressure in the cylinder was higher than the Penex, then opened up the cylinder valves so that the acid would flow into the Penex. The scale enabled Topor to monitor how much acid had been injected into the unit. He injected multiple cylinders of HCl into the Penex using this method, without incident. When doing so, Topor did not utilize heat or steam. The method by which Topor performed the HCl injection conformed to the Respondent's then existing procedure.

In September, the Respondent again initiated the Penex turnaround process. The shutdown of the machine occurred that month and then, in the middle of October, the startup process began. The first HCl injection from a cylinder to the Penex took place on October 31. This time, though, the Respondent utilized a somewhat different process to perform the acid injections than the one Topor had the last time the operation occurred. To increase the pressure in the HCl cylinder above that in the Penex, a water bath was utilized. An operator would fill a steel bucket with water, place an acid cylinder inside the bucket, then use a hose to point and deliver steam to the outside of the bucket. The steam heated the water inside the bucket, thereby increasing the temperature and pressure in the HCl cylinder. The operator also was required to monitor the temperature of the HCl cylinder wall, using a temperature gun. That gun was pointed at the cylinder to get a temperature reading. The target temperature was between 110 and 120 degrees. The maximum temperature which could not be exceeded was 125 degrees. Corey Freymiller, then the Respondent's supervisory maintenance planner in the reformer, oversaw the Penex turnaround process in the fall of 2016. In addition, Eric Rowe, a unit process engineer in the tech service department who has a chemical engineering degree, provided technical support and assistance for the process. Rowe's position is nonsupervisory, but not in the bargaining unit. From October 29 to November 2, certain operators successfully injected multiple HCl cylinders into the Penex using the heated water bath. However, the Respondent's procedure was not yet updated to reflect this revised method.

#### 1. Topor and Rennert's request for a step change form

The work morning of November 4 began as usual with the Respondent's “toolbox,” or staff, meeting in the satellite to discuss the work of the day. A crew change occurred that morning and Topor returned to work after a 3-day absence. Prior to the meeting, Freymiller told Caswell that he wanted the last bottle of HCl injected that morning by 9:30 a.m. He also told Caswell that he and Rowe would come out and help with any issues, given that it was a new crew working that day. Then at the toolbox meeting, Caswell assigned Rennert the task of injecting the HCl. Rennert had not previously performed this task during his career. After the morning meeting ended, Rennert and Topor met at the Penex unit to discuss the job. Topor did not see a scale there, which he used the last time he injected HCl. Rennert asked Topor if he thought it would be safe to steam a compressed gas cylinder. Topor told him no, that he had never heard of that being done before. He told Rennert to call Caswell and ask for a procedure. Rennert did so. Caswell told him he was not aware of a procedure and

<sup>6</sup> GC Exh. 7. Hereinafter when the word “procedure” appears in this decision, it conforms to the Respondent's use and definition of the word in its refinery operations.

would be right down. At approximately 9:30 a.m., Freymiller, Rowe, Caswell, Rennert, and utility operator Jacob Johnson met and spoke at the Penex unit. Rennert told them he did not know how to perform the job, so Freymiller, Caswell, and Rowe demonstrated how to do it. Rennert then stated he was all right with it.<sup>7</sup>

However, by 10:30 a.m., the HCl injection still had not been completed. Despite his earlier assurance, Rennert remained concerned about the safety of the job, in particular whether heating the acid cylinder could result in an explosion. Rowe went to the satellite to check on the status and spoke with both Rennert and Topor about the steaming process. The three reviewed a written report prepared by a company called UOP, which manufactures the Penex unit.<sup>8</sup> Topor and Rennert then raised specific concerns with Rowe, who took notes of their discussion.<sup>9</sup> The concerns included whether a personal protective suit with respiratory gear (PPE) needed to be worn; how to execute the water bath with the steel bucket to heat the cylinder; how to monitor the pressure of the cylinder so that the HCl would inject into the Penex unit; and how to monitor the temperature in the cylinder. Topor stated it would be impractical to try and heat the water in the bucket while wearing PPE. Rowe responded that they were supposed to use a steam hose to heat the water. Topor also questioned the accuracy of cylinder temperature readings from a temperature gun, which both Topor and Rennert felt did not provide consistent readings. Following this discussion, Topor asked for a procedure on how to do the job. Rowe then went to work on writing a step change form to the Respondent's existing procedure.<sup>10</sup>

At 1:30 p.m., Rowe met with Freymiller and Brianna Jung, the Respondent's operations superintendent in the reformer area. The three reviewed Rowe's draft step change form, made certain changes to it, and ultimately signed off on the new process for heating the HCl cylinder. The first step of the revised procedure stated: "Verify other HCl cylinders are not in the area near the HCl cylinder that will be heated."<sup>11</sup>

<sup>7</sup> The findings of fact in this paragraph are based on the testimony of Caswell (Tr. 170–172, 181–184), Freymiller (Tr. 603–605), Rennert (Tr. 78–80, 115–119), Rowe (Tr. 491–493), and Topor (Tr. 262–263, 268–270). On material points, their testimony contained no contradictions. To the extent a credibility determination is required, I credit Topor's testimony with respect to his discussions with Rennert at the Penex. His recall was thorough and detailed and his demeanor was indicative of reliable testimony. As to the discussions at the Penex unit, I credit Caswell's account, given that he exhibited the strongest recall of the discussion there. Moreover, his testimony was largely corroborated by his and Freymiller's subsequent statements provided during the Respondent's investigation into Topor's November 4 conduct. (R. Exhs. 13 and 14.)

<sup>8</sup> GC Exh. 6.

<sup>9</sup> R. Exh. 9.

<sup>10</sup> These findings of fact are based on Topor's testimony, which I credit. (Tr. 270–277.) Again, Topor was thorough and detailed in his account. In contrast, both Rennert (Tr. 120–123) and Rowe (Tr. 494–501) exhibited spotty recall when testifying about the conversation. Nonetheless, to the extent they did remember, the testimony was consistent. Moreover, Topor's testimony is corroborated by the contemporaneous notes taken by Rowe. (R. Exh. 9.)

<sup>11</sup> GC Exh. 14.

## 2. The disagreement between Topor and his supervisors

Between 3 and 3:30 p.m., Topor observed Jung and Regenscheid outside the satellite. Regenscheid called him over, told Topor he had a job for him, then handed him the step change form.<sup>12</sup> Topor asked the two to go into the satellite, so he could read the form. They did so. At that point, Rennert and employees Joshua Johnson and Duke Morales also were present. Topor began reviewing the document. When he read the first step about verifying that other HCl cylinders were not "in the area," Topor said he had a concern, because there were multiple cylinders out in the unit and they needed to move them. Regenscheid then left the satellite to look at the unit. Topor asked for a copy of the safety data sheet (SDS) for HCl, which describes the hazards of that chemical and how to use it safely.<sup>13</sup> Johnson and Morales were on the computers, so Johnson told Topor he would look up the SDS. Jung then went to assist Johnson with that process, although they never obtained the SDS that day. Regenscheid returned to the satellite and told Topor he wanted to mitigate the hazard by putting insulation blankets around the cylinders not being used. Topor countered that the procedure said the cylinders have to be taken out of the unit. He then said he did not think Regenscheid's proposal was safe and he wanted to do a safety stop. Regenscheid repeated that Topor should use insulation to mitigate the hazard and Topor repeated that he was calling a safety stop and wanted to call the safety department down to see if it was safe. Topor and Regenscheid were both speaking loudly during this exchange. At that point, Jung and Regenscheid left the satellite. Topor got on a computer and began filling out the safety stop paperwork.

As Jung and Regenscheid walked to the Penex, they discussed whether they should send Topor home if, as they perceived, he continued to be unwilling to engage in a conversation about mitigating his safety concerns. Jung told Regenscheid they needed to consider doing so under those circumstances. At the Penex, Regenscheid explained to Jung his insulation blanket suggestion. Jung then called Topor on her radio to get him out to the unit. Her first two radio calls to him spanned 16 seconds. Topor responded 13 seconds after Jung's second call. She asked Topor to come out and take a look. Topor responded that he first was going to put in the safety stop information and call safety, then would be right out. At that point, Regenscheid got on the radio and told Topor personnel were working on this. He added that Topor should come out and look at it now. Topor again responded he was doing the safety stop first and Regenscheid repeated he should come out. Topor then asked if Regenscheid did not want him to fill out the safety stop information. Regenscheid responded that he could do it later on.

Topor then met Jung and Regenscheid at the Penex. He pointed to the multiple bottles in the cage and said the procedure stated they have to remove the additional bottles. He added that, if they were going to do something else, it would require a step change to the step change form they just did. Regenscheid again responded that they could mitigate the hazards

<sup>12</sup> The record evidence does not make clear why Regenscheid decided to assign this task to Topor now, instead of Rennert.

<sup>13</sup> GC Exh. 8.

by putting insulation around the cylinders. Topor told them he called a safety stop because he felt the job was unsafe, they were pressuring him to do the job, and they were refusing to follow the safety stop process. He said he wanted safety down there. At that point, Regenscheid looked at Jung and said, "Can I?" When Jung responded yes, Regenscheid told Topor he needed to get his stuff and go home, he was done for the day. Topor started walking away and heard Regenscheid call him. However, he continued on to the satellite, because he did not want the situation to escalate any further. Regenscheid asked Topor for the step change form back, but Topor did not hear the request. Regenscheid later drove Topor from the satellite to a building where he could change clothes. The two did not speak during that ride. Later that same day, Topor left Kerntz a voice message. He told Kerntz he had called a safety stop and two supervisors were pressuring him to do a job he felt was unsafe and refused to allow the stop process. He identified Jung and Regenscheid as the supervisors.<sup>14</sup>

### C. The Respondent's November 14 Suspension of Topor

That same afternoon after sending Topor home, Jung contacted Whatley, the manager of operations and her supervisor, and reported what happened. Whatley advised her they would have to conduct an investigation and she, Regenscheid, and Rowe needed to document what occurred. He told her to call Christa Powers, a human resources generalist for the Respondent, tell her what happened, and ask her if there was anything else they needed to do that night. Jung then called Powers, who told Jung to write up a statement of what she remembered. Powers also told her to obtain statements from Regenscheid, Rowe, Freymiller, and Caswell.<sup>15</sup>

<sup>14</sup> The findings of fact in this section (II.B.2) are based upon Topor's testimony (Tr. 280–291, 320–331, 339–342), which I credit. I discuss this credibility resolution in greater detail below in section II.E, including the Respondent's contentions that Topor twice pointed his finger at Regenscheid and refused to return the step change form to Regenscheid. For now, I note that, on most critical points, witness testimony did not conflict concerning the discussions that afternoon. In addition to Topor, Jung (Tr. 405–420), Regenscheid (Tr. 555–568), Joshua Johnson (Tr. 140–148), Morales (Tr. 203–206), and Rennert (Tr. 83–86, 90–91) testified in this regard. The witnesses all agreed that Topor expressed concern about other cylinders being in the area of the one being heated and wanted the other cylinders moved. They also concurred that Regenscheid repeatedly asked Topor to mitigate the problem with insulation blankets and Topor stated multiple times in response that he was calling a safety stop. Finally, the witnesses agreed both individuals were speaking loudly at each other during the conversation.

<sup>15</sup> The General Counsel's complaint alleges that Powers was the Respondent's Section 2(11) supervisor and 2(13) agent. The Respondent denies the allegations in its answer. The Board applies the common-law principles of agency in determining whether an individual is acting with apparent authority on behalf of an employer, when that individual makes a particular statement or takes a particular action. *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001). At the hearing, Kerntz testified that the duties Powers performed related to the investigation into Topor's conduct were "within the authority of her responsibilities" for the Respondent. (Tr. 25.) The record evidence also establishes that Powers directed Jung to provide her own statement and obtain others as part of the investigation. She was present and took notes during all of the

Almost immediately thereafter still on November 4, Jung and Regenscheid wrote up accounts of their afternoon discussions with Topor.<sup>16</sup> Regenscheid began his by stating, "[t]his pertains to issues with Rick Topor refusing to do assigned work." He acknowledged Topor's request for a safety representative on sight and stated Tim Olson, an emergency response technician, had been called ahead of time and was there. Regenscheid concluded by saying "I feel that [Topor] utilizes safety stops and procedures to not have to perform work and takes no initiative to correct the issue if it causes work for him. I also feel [Topor] was being insubordinate to me by refusing to do the work to correct the issue." At 4:07 p.m., Regenscheid emailed his one-paragraph statement to Jung. About an hour and a half thereafter, Jung emailed her statement to Powers, with Regenscheid's statement attached to it. Jung stated that she chose to send Topor home because he was "unwilling to discuss with [Regenscheid] and I the mitigation and work through the potential options to inject the HCl in the system, which is viewed as insubordination." Jung also included the names of other individuals who were present both in the satellite and in the field. In addition to Olson, Jung identified Brian Bestler, Jacob Johnson, and Rennert as having been in the satellite. She also identified Olson and Rennert as having been in the field. At 5:39 p.m., Kerntz sent an email to Jung, cc'ing Whatley, Powers, and Regenscheid, asking if it made sense to place Topor on administrative leave to allow them to investigate further. At 6:09 p.m., Jung responded that she agreed with that move. Jung did not work the next 2 days.

On Saturday, November 5, Rennert returned to work. Early that morning, Regenscheid told him he wanted to go out and take a look at the HCl cylinder and see if they could heat it up and get more out of the cylinder into the system. Rennert responded: "To be honest with you Gary, this scares the crap out of me and I don't want to do it, but if you are going to do the same thing to me that you did to Rick, then I will do it." The two proceeded to the Penex unit, where Rennert again said he did not want to do it. Regenscheid then told Rennert not to worry about it. Rennert was not disciplined as a result of this interaction.<sup>17</sup>

On the morning of Monday, November 7, Jung returned to work and spoke with Kerntz and Powers about what happened the previous Friday. Thereafter, Jung sent the two an email modifying her prior statement. Jung added the following language, portions of which are italicized here for emphasis:

As we were searching for the HCL SDS, [Gary Regenscheid] came back into the satellite. He told [Rick Topor] that they could use insulation blankets to mitigate the situation. Rick said he would follow the procedure and wanted them moved. Gary again told Rick that he should use insulation blankets to mitigate the situation and—*It was at this point that Rick turned around and stood up in Gary's face and pointed at Gary and loudly said he was calling a safety stop. "Rick said he was calling a safety stop." Gary loudly stated the follow-*

investigatory interviews. Thus, I find that Powers actions during the investigation of Topor were made as the Respondent's 2(13) agent.

<sup>16</sup> R. Exh. 11.

<sup>17</sup> Tr. 89–90, 441–442.

*ing to Rick*—Gary then told Rick that he could move the other 3 cylinders to the opposite of the cage and put an insulation blanket between the cylinders to mitigate the situation and Rick *again was standing and pointing at Gary and stated the following*—“Rick said he was not doing anything until safety comes down and looks at the situation and he was calling a safety stop because he did not feel it was safe.”

In the original version of the email, Jung highlighted the last three sentences in this text with different colors.<sup>18</sup>

Also on November 7, Kerntz began his investigation into Topor’s conduct. By that time, Jung, Regenscheid, Caswell, Freymiller, Rowe, and Olson all had provided written statements.<sup>19</sup> Kerntz decided to interview all of those individuals except Freymiller, plus Topor. He did not interview Rennert, Bestler, or Jacob Johnson, despite their being included on Jung’s list of potential witnesses. He also did not end up interviewing Joshua Johnson or Morales. Powers attended the interviews and took handwritten notes.

On November 9, Kerntz interviewed Topor. Two union representatives and Powers also were present. At the start of the interview, Kerntz asked Topor to give his version of what occurred that day. At some point, Kerntz asked him if he had pointed and raised his voice loudly to Regenscheid. Topor stated he would never do that to a supervisor. When Kerntz asked if Jung and Regenscheid asked Topor to come out and mitigate the situation, Topor responded that he was calling a safety stop. Topor kept repeating that response to Kerntz. Kerntz asked Topor if he refused to return the step change form, after Regenscheid told him to give it back. Topor denied doing so, but admitted he had the form at home. Topor also initially denied speaking to Rowe that day, but immediately corrected the response to say he did and it was a short conversation.<sup>20</sup>

On November 10, Powers emailed a final “incident investigation” report to Whatley and Richard Hastings, the Respondent’s refinery manager and Whatley’s superior.<sup>21</sup> Whatley had left on vacation on November 5 and did not return until November 14. The report detailed the accounts of the events provided by Regenscheid, Jung, Olson, Rowe, Topor, and Caswell. For Olson, the report first stated that Olson was in the satellite when Regenscheid returned from the field. It then detailed Olson’s recollection of the conversation: “When Gary returned he stated loudly ‘Nope this is how we can mitigate, by using an insulated blanket.’ Rick said, ‘No, follow the procedure.’ Rick then called a safety stop and wanted to get safety involved.” The report then included a second entry regarding a follow-up call with Olson. That note stated: “Asked Tim if he witnessed

Rick getting loud and pointing his finger at Gary. Tim said he did not see this occur. It could have happened after he left. Tim left the control room before Gary and Briana.” The report’s “Investigation Conclusion” section stated in full:

The evidence in this case supports that Mr. Topor failed to follow his supervisor’s instructions and/or directives on multiple occasions during his shift on Friday, November 4th. This conclusion is drawn despite Mr. Topor’s claim that he was exercising his right to use the Safety Stop Process. The facts show that multiple efforts were made throughout the shift to address Mr. Topor’s safety concerns, and yet he refused to cooperate when confronted by Operations Superintendent Briana Jung and Supervisor Gary Regenscheid.

Witnesses testified that Mr. Topor was insubordinate towards Supervisor Gary Regenscheid while in the Reformer Satellite. More than one witness observed Mr. Topor abruptly get out of his chair, raised his voice loudly at Gary while pointing at his face and stating that he was going to fill out a safety stop process prior to discussing the issue further.

Furthermore, Mr. Topor was not truthful during the investigation process. Specifically, Mr. Topor denied that Process Engineer Eric Rowe spent extensive time reviewing details of the UOP Step Procedure with him after he (Topor) asked for further clarification of the operating procedure. Mr. Topor also denied the allegation that he loudly raised his voice and pointed at a Supervisor while in the Reformer Satellite. Mr. Topor denied the allegation that he outright refused to discuss the situation, and denied that he failed to comply with Supervisor Regenscheid’s instruction to return the step change paperwork to him prior to leaving the property.

When Whatley returned on November 14, he discussed the situation with Kerntz. Whatley determined that Topor would be given an unpaid suspension for time served to that date and a final written warning. In a meeting with Topor that same day, Whatley delivered the news to him. The written disciplinary form<sup>22</sup> given to Topor stated in relevant part:

**REASON FOR CONFERENCE:**

On Friday, November 4, 2016 you were suspended for the balance of your shift for inappropriate behavior and insubordinate conduct towards your Supervisors. You were then placed on an administrative leave pending further investigation of the incident.

The investigation revealed that you violated several company rules and/or policies while working on Friday, November 4th. Specifically, you have been cited for the following:

- Failure to follow instructions and/or directives on several occasions throughout your shift during which you refused to discuss mitigation steps as directed by your supervisors to formulate solutions relative to tasks that you were assigned.
- Insubordination when you raised your voice and pointed at a supervisor while in the Reformer Satellite.
- Unauthorized removal of Company property when you

<sup>18</sup> GC Exh. 26.

<sup>19</sup> R. Exhs. 11, 13–15. The Respondent introduced all of these statements into the record except for Olson’s, a conspicuous absence. Jung’s original emailed statement included, next to Olson’s name as a witness, that a “copy of his recollection of the situation [is] attached.” However, it was not introduced into evidence. Olson also did not testify at the hearing.

<sup>20</sup> I address the Respondent’s contention that Topor lied during this investigatory interview in the credibility section (II.E) below.

<sup>21</sup> GC Exh. 25.

<sup>22</sup> GC Exh. 17.

failed to return the step change paperwork to your supervisor after being instructed to do so.

–Failure to be accurate and truthful when questioned during the investigation.

Until November 2016, the Respondent never had disciplined Topor during his 13-year career.

Article 17 of the collective-bargaining agreement between the Respondent and the Union sets forth certain offenses that “will result in discharge on the first offense regardless of past work record and standing in discipline process.” The list includes insubordination, defined as a failure to follow a direct work order, and dishonesty. The Respondent’s “Work Rules” applicable to union employees similarly contains a list of offenses serious enough to warrant immediate discharge without regard to an employee’s past record or progressive discipline.<sup>23</sup> The list includes insubordination, dishonesty, and unauthorized removal of company property. The specific example of insubordination provided in the rules is failure to follow supervisory instructions or perform assigned work. The Respondent considered terminating Topor, but decided not to do so because of his tenure at the refinery and lack of prior discipline.<sup>24</sup>

On November 16, Topor filed a complaint with the Occupational Safety and Health Division (MNOSHA) of the Minnesota Department of Labor and Industry. The complaint alleged that the Respondent discriminated against him for exercising his rights under the Minnesota state occupational safety and health law. On June 22, 2017, MNOSHA sent Topor a letter stating: “The investigation has produced evidence more persuasive in your favor and accordingly, the Department has determined that your rights under the OSHA Act were violated and your complaint has merit.” The letter also indicated the department would notify the Respondent of the “decision” and seek a settlement in which Topor’s suspension would be removed from his personnel file and he would be compensated for the time suspended.<sup>25</sup>

#### *D. The Respondent’s Denial of a Quarterly Bonus to Topor*

Roughly 3 months after Topor’s discipline, the Respondent denied him a quarterly bonus. Pursuant to the Respondent’s bonus policy for bargaining unit employees, payouts are made quarterly based upon an evaluation of performance metrics. Employees who are disciplined face reductions in their potential bonus. For a final written warning or suspension, the policy calls for a 100-percent reduction. Because Topor was issued a final written warning and 10-day suspension on November 14, the Respondent denied him a quarterly bonus in January 2017.<sup>26</sup>

#### *E. Witness Credibility*

As previously noted, my findings of fact above are premised, in part, on the resolution of three significant credibility disputes. I now will discuss those resolutions in detail.

Credibility determinations require consideration of a wit-

ness’ testimony in context, including demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

Two disputes involve the discussions between Topor, Jung, and Regenscheid on the afternoon of November 4. As to the overall testimony regarding these discussions, I found Topor to be a believable witness. His testimony was consistent and his demeanor confident, even when challenged extensively during cross-examination. Topor occasionally was nonresponsive to questions, but that lone factor is insufficient to render his testimony untrustworthy, especially where Rennert, Joshua Johnson, and Morales corroborated it. In contrast to Topor, Regenscheid’s demeanor was hesitant when testifying about these discussions. He also acknowledged a lack of full recall and provided rapid, abbreviated responses to many questions on direct. Furthermore, inconsistencies between the testimony of Jung and Regenscheid detracted from their credibility. These included which of the two was speaking with Topor in the satellite and whether Regenscheid and Topor disagreed over the need to move the cylinders out of the area before Regenscheid left for the Penex the first time. Jung’s testimony also was elicited with many leading questions and she frequently hedged her responses with qualifiers.

The first specific credibility dispute is whether Topor pointed his finger in the face of Regenscheid during their discussion in the satellite on November 4. Jung (Tr. 411–412) and Regenscheid (Tr. 562–563) testified that he did so while standing and his finger was within 6 inches to 2 feet of Regenscheid. However, Topor denied this occurred. (Tr. 297–298.) I credit Topor’s denial, because it was corroborated by Joshua Johnson (Tr. 147–148) and Morales (Tr. 206). Joshua Johnson was present for the entire interaction in the satellite and it appears Morales was present at the point when the supervisors allege Topor pointed at Regenscheid. Both are current employees and Morales has worked for the Respondent for almost 2 decades. They have no interest in this proceeding and no potential source of bias was identified at the hearing. The Board has long recognized that testimony by current employees which contradicts employer statements “is apt to be particularly reliable,” because such employees are testifying directly against their pecuniary interests. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 10 (2016). I also found Johnson’s demeanor when testifying about the events in the satellite to be assured and his responses forthright, including on cross-examination. The Respondent did not produce a neutral witness who saw Topor point his finger at Regenscheid, despite other employees being present in the satellite when this allegedly occurred. Moreover, multiple factors detract from the claim made by Jung and Regenscheid. First, neither supervisor stated that Topor pointed his finger at Regenscheid in their initial statements written that

<sup>23</sup> R. Exh. 26.

<sup>24</sup> Tr. 687–689.

<sup>25</sup> GC Exh. 19.

<sup>26</sup> R. Exh. 20; GC Exhs. 5 and 18.

same day. (R. Exh. 11.) Although Jung later amended that account on her next workday (R. Exh. 12), Regenscheid never supplemented his statement. Finally, Jung highlighted portions of her revised statement in different colors, but could not provide an explanation for why she did this at the hearing. (GC Exh. 26; Tr. 436–438.) I view this lack of recall as inherently improbable, suggesting she did not want to disclose the actual reason for it and doing so would not have helped the Respondent’s case. On this record, I conclude that Topor did not point his finger at Regenscheid during the initial discussion in the satellite.

For these same reasons including witness demeanor, I do not credit Regenscheid’s testimony claiming that Topor pointed his finger at Regenscheid a second time that same afternoon. (Tr. 568.) Regenscheid testified that, after he drove Topor back to the main control room, Topor pointed his finger at Regenscheid as Topor exited the vehicle and told Regenscheid he was going to HR and filing harassment charges against Regenscheid. In contrast, Topor testified that the two said nothing to each other during the ride. (Tr. 290, 341–342.) Regenscheid’s claim of a second finger pointing appears nowhere in his or any other witness’ contemporaneous statement. In addition, Topor did immediately call Kerntz and reported his disagreement over the supervisors’ handling of the safety stop request. Yet he did not file any harassment complaint against Regenscheid, at that or any subsequent time. I also do not credit Jung’s testimony that she informed Whatley on November 4 that she sent Topor home, in part, due to his actions towards Regenscheid, presumably including the finger pointing. (Tr. 420–421.) Again, that claim appears nowhere in Jung’s statement written that same afternoon. What is clear from the supervisors’ testimony as affirmed by their contemporaneous statements is that the decision to send Topor home was based upon his calling of a safety stop and refusal to discuss mitigation with them until an independent safety representative evaluated the situation.

The second credibility dispute concerns whether Topor refused Regenscheid’s request that Topor return the step change form, after Regenscheid told him to go home. Jung (Tr. 419–420) and Regenscheid (Tr. 567) testified that Topor did so, while Topor (Tr. 289–290, 297–298) denied hearing the request. Topor specifically testified that he heard Regenscheid call for him after he started walking away, but nothing more. He stated he had a copy of the step change form in his back pocket. In contrast, Regenscheid testified that, when he told Topor to go home, Topor was holding a copy of the step change procedure form in his hand. Regenscheid asked Topor for the form back, so he could put it in the procedure book. Regenscheid held out his hand for the form. Topor then folded the form, said no, and began walking to the satellite. Jung corroborated Regenscheid’s testimony on all material points. I resolve this conflict by relying on the testimony of the only neutral witness to hear this part of the conversation—Rennert. (Tr. 86.) Rennert testified that he heard Regenscheid ask Topor for the form back, but Topor was 20 yards away from Regenscheid at the time and there was a lot of noise in the area. When providing this testimony which corroborated Topor’s account, Rennert exhibited the same confidence and reliable demeanor as he did throughout the hearing. In addition, the Respondent

did not challenge Rennert’s testimony on this point during cross-examination. Finally, Jung’s and Regenscheid’s contemporaneous statements again made no mention of Topor refusing to return the step change form. Therefore, I conclude that Regenscheid asked Topor to return the step change form, but Topor did not hear the question.

The last significant credibility determination is whether Topor lied during the Respondent’s investigatory interview of him. On first glance, this appears to be a straightforward analysis, because Kerntz was the only witness who provided specific testimony about that interview. (Tr. 679–685.) Kerntz testified Topor lied when he denied pointing his finger at Regenscheid; denied refusing to give the step change form back; initially denied speaking with Rowe that day, but then changed his answer and stated they had a short conversation; and refused to directly answer if he had refused his supervisors’ request to mitigate the situation, instead saying he called a safety stop.<sup>27</sup> On direct, Topor confirmed the interview occurred, but did not describe it. (Tr. 296–297.) Then during cross-examination when asked repeatedly whether he recalled Kerntz’ questions and his responses, Topor largely answered that he did not. (Tr. 358–363.)

Nonetheless, although it is uncontroverted, Kerntz’ testimony concerning his interview of Topor raised several red flags undermining its credibility. First, Kerntz did not appear to have strong recall and used qualifiers at times in his responses. The testimony was elicited with many partially leading questions containing reminders of discussion topics, rather than Kerntz identifying them in response to open-ended questions. Second, his testimony substantially mirrored, and in some cases was identical to, the question and answer write-up in the Respondent’s investigative report, except that he left out parts that were not favorable to the Company. The most significant example of this concerns whether Topor denied pointing his finger and yelling at Regenscheid. Kerntz testified that Topor responded he would never do that to a supervisor, which Kerntz deemed to be nonresponsive. Kerntz then testified he asked Topor two more times and got the same response. But the report says that, when Kerntz asked him again, Topor flat out denied having done so. Third, the Respondent had an opportunity to present corroborating evidence, but did not do so. Powers was present for the interview and testified at the hearing, but not about this meeting. (Tr. 614–642.) Moreover, the record establishes that she was taking notes at the meeting, but the Respondent did not introduce those notes, as it did for the meeting where Topor was notified of his suspension. (R. Exh. 25.) Finally, Kerntz’s demeanor when testifying on this topic was uncertain. The overall picture I was left with after this testimony was that Kerntz exaggerated Topor’s alleged misconduct and details

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<sup>27</sup> Kerntz also did not testify consistently in this regard. During counsel for the General Counsel’s 611(c) examination, the only alleged lies Kerntz identified as bases for Topor’s discipline were the ones dealing with the step change form and pointing a finger at Regenscheid. (Tr. 68–69.) Then on direct, Kerntz added that Topor allegedly did not give him a “straight answer” concerning whether Jung and Regenscheid called him on the radio. (Tr. 680.) However, the Respondent’s investigatory report did not include that allegation in its conclusions as to how Topor lied. (GC Exh. 25.)

from the interview were missing.

With this backdrop, I will examine each of the alleged lies. Based upon my two earlier credibility determinations, I concluded that Topor did not point his finger at Regenscheid and did not refuse to return the step change form. Thus, his denials of those accusations in the investigatory interview were truthful. I likewise conclude that Topor did not lie by telling Kerntz he called a safety stop, when Kerntz asked him whether he refused his supervisors attempts to mitigate the situation. Although it may not be a direct answer to the question, Topor nonetheless was being truthful about what he actually said in response to his supervisors' request to mitigate the situation. In addition, by telling Kerntz he had called a safety stop, he indirectly conveyed that he refused their proposed mitigation. Finally, I find that Topor's initial denial of his conversation with Rowe was a dishonest assertion. However, he immediately corrected it and admitted they had spoken.

#### Analysis

The General Counsel's complaint alleges the Respondent's adverse actions towards Topor independently violate both Section 8(a)(1) and (3). Those actions include putting him on administrative leave; issuing him a final written warning; giving him a 10-day unpaid suspension; and denying him a quarterly bonus.

#### I. THE RESPONDENT'S MOTION TO REOPEN THE RECORD

On October 19, 2017, following the hearing, the Respondent filed a motion to reopen the record. On October 24, 2017, the General Counsel filed a response opposing the motion and, on October 31, 2017, the Respondent filed a reply brief. The Respondent seeks to introduce written correspondence it received from MNOSHA, dated September 29, 2017. The letter confirms only that MNOSHA conducted a safety inspection of the Respondent's St. Paul Park facility on June 6, 2017, and the inspection resulted in no proposed citations. The Respondent also moves to introduce (1) an affidavit from Kerntz, in which he asserted the inspection related, in part, to the HCl injection process at issue in this case; (2) an affidavit from Scott Conant, the Respondent's safety supervisor, describing hearsay testimony he could provide of a conversation he had with a MNOSHA representative; and (3) an undated copy of MNOSHA's Referral of Alleged Safety or Health Hazards sent to the Respondent, indicating the agency received a complaint over the improper storage of HCl cylinders.

After the close of a hearing but prior to the issuance of a decision, Section 102.35(a)(8) of the Board's Rules and Regulations grants administrative law judges the authority to rule on motions to reopen the record. However, that section does not set forth the circumstances in which a judge should exercise that discretion. Such guidance is supplied by Section 102.48(c)(1) of the Rules, addressing how the Board evaluates motions to reopen the record following the issuance of a Board decision, as well as Board decisions interpreting that rule. The Board requires that any evidence sought to be adduced be "newly discovered," which does not include events that occurred after the violations in question. See, e.g., *Security Walls, Inc.*, 365 NLRB No. 99, slip op. at 7 (2017), citing *Harry Asato Painting, Inc.*, 2015 WL 5734974 (2015) and *Allis-*

*Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987). This is so, even though the text of Section 102.48(c)(1) identifies "evidence which has become available only since the close of the hearing" as a category which could be presented at a reopened hearing. *Id.* at 7 fns. 16–17. The section also requires the movant to show that the evidence it seeks to introduce would require a different result in the case.

The Respondent has not made either required showing. The MNOSHA letter is an event occurring after the close of the hearing, which does not qualify as newly discovered evidence. Furthermore, the Respondent makes no argument as to how the alleged fact of MNOSHA not finding a safety violation related to the storage of the HCl cylinders would affect the outcome in this case. The Respondent has not put forth a defense premised upon Topor's safety concern being invalid. Accordingly, I deny the Respondent's motion to reopen the record.<sup>28</sup>

#### II. DID THE RESPONDENT'S SUSPENSION OF AND OTHER ADVERSE ACTIONS IMPOSED UPON TOPOR VIOLATE SECTION 8(A)(1)?

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" [of the Act]. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. "[A] respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.*, 350 NLRB 974, 979 (2007), quoting *Meyer Industries (Meyers I)*, 268 NLRB 493, 497 (1984). In this case, the General Counsel contends that Topor was disciplined in retaliation for his protected concerted activity on November 4.

#### A. The Appropriate Legal Framework

The first question which must be addressed in evaluating the General Counsel's Section 8(a)(1) allegations is what legal standard applies. The General Counsel argues Topor's conduct on November 4 was protected concerted activity and he did not lose the protection of the Act by engaging in opprobrious conduct. Therefore, the General Counsel analyzes the case using the Board's framework in *Atlantic Steel*, 245 NLRB 814 (1979). In contrast, the Respondent asserts that this case involves a dispute over its motivation for disciplining Topor. As a result, the Respondent analyzes the 8(a)(1) allegations pursuant to *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989

<sup>28</sup> On December 8, 2017, the General Counsel issued a new consolidated complaint in Cases 18-CA-205871 and 18-CA-206697, both also involving the Respondent and Topor. The complaint alleges the Respondent, in August 2017 after the hearing in this case closed, unlawfully issued Topor adverse performance evaluations and, on September 21, 2017, unlawfully discharged Topor. These actions again are alleged as independent 8(a)(1) and (3) violations. Also on December 8, 2017, the General Counsel filed a motion to consolidate the new cases with this matter. Via separate written order, I denied that motion. As described in greater detail in the order, I found that granting consolidation was not appropriate, largely because it would result in an unacceptably long delay in the issuance of my decision in this case.

(1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Respondent also contends *Atlantic Steel* does not apply, because this case does not involve misconduct by Topor in his role as a union steward.

*Wright Line* applies to 8(a)(1) and (3) cases where an employer's motive for an adverse action is at issue. *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 1 fn. 3 (2015). In contrast, the *Atlantic Steel* framework applies to cases where no dispute exists that an employer took action against an employee, because of the employee's protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002). In such single motive cases, the only issue is whether the employee's conduct lost the protection of the Act. *Felix Industries*, 331 NLRB 144, 146 (2000). The situation here is akin to the one the Board faced in *Fresenius USA Manufacturing, Inc.*, 362 NLRB No. 130 (2015). In that case, a union supporter anonymously scribbled vulgar, offensive, and arguably threatening statements on several union newsletters, in an attempt to encourage employees to support the union in an upcoming decertification election. Following complaints about the statements, the employer conducted an investigation, during which it interviewed the employee who wrote the statements. The employee admittedly lied on two occasions, once during and once subsequent to his interview. The employer suspended and discharged the employee for both the statements and for dishonesty during the investigation. In finding those actions lawful, the Board applied *Wright Line*.<sup>28</sup>

This case is on all fours with *Fresenius*. Three of the reasons asserted by the Respondent for Topor's suspension arose out of Topor's conduct on November 4, which the General Counsel claims was protected. They were the failure to follow supervisory instructions to discuss mitigation of safety concerns; insubordination by Topor raising his voice and pointing his finger at Regenscheid; and unauthorized removal of the step change form. Had the Respondent's adverse actions been based only on these reasons, applying *Atlantic Steel* would have been appropriate. However, the Respondent's additional reliance on Topor's alleged unprotected conduct of lying during the investigation puts its motivation in dispute. Moreover, the Respondent does not concede that Topor engaged in protected concerted activity on November 4, and the General Counsel does not admit that Topor engaged in misconduct that day. Thus, I agree

<sup>28</sup> The question of whether to apply *Wright Line* or *Atlantic Steel* often is a difficult one, as the case history in *Fresenius* makes clear. An earlier, three-member panel of the Board issued the original decision in the case and all three, including a dissenter, agreed that *Atlantic Steel* applied. 358 NLRB 1261 (2012). The Board then evaluated whether the employee's comments were so egregious as to cause him to lose the protection of the Act. The majority held that they were not. The majority also found that the employer could not rely upon the employee's subsequent dishonesty, because the employee was not required to respond truthfully to questions in the investigation that sought to uncover his protected activity. *Id.* at 1263 fn. 6. However, that decision was vacated due to the U.S. Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), because two members of the Board panel were not validly appointed by the President. Following remand, an entirely different, three-member panel of the Board reconsidered the case de novo, applied *Wright Line*, and determined the employer's discharge of the employee for dishonesty was lawful.

with the Respondent that *Wright Line* is the appropriate framework to apply. *Alton H. Piester, LLC*, 353 NLRB 369, 372 fn. 25 (2008) (where employer relied on events other than conduct that was protected, *Wright Line* analysis was proper).<sup>29</sup>

#### B. *Wright Line* Analysis

Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor for an employer's adverse action. In cases involving 8(a)(1) discipline, the General Counsel satisfies the initial burden by showing (1) the employee's protected concerted activity; (2) the employer's knowledge of the concerted nature of the activity; and (3) the employer's animus. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014); *Walter Brucker & Co.*, 273 NLRB 1306, 1307 (1984). If the General Counsel meets the initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even in the absence of the employee's protected activity. *Mesker Door Inc.*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

##### 1. Did Topor engage in protected concerted activity on November 4?

The General Counsel first asserts that Topor engaged in traditional protected concerted activity on November 4, by acting in concert with or on behalf of other employees about safety concerns. The "mutual aid or protection" clause of Section 7 guarantees employees "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). In order to find an employee's activity to be "concerted," the Board requires the conduct be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers II*, 281 NLRB at 887. Moreover, while no group action may have been contemplated, activity by a single individual is concerted,

<sup>29</sup> Neither party contends this case should be evaluated pursuant to *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

where the concerns expressed by the employee are a logical outgrowth of concerns previously expressed by a group. *Summit Regional Medical Center*, 357 NLRB 1614, 1617 fn. 13 (2011); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991).

The record evidence firmly establishes that Topor was engaged in protected concerted activity on November 4. That morning, Topor and Rennert discussed the safety of injecting HCl into the Penex using steam and a water bath to heat the HCl cylinder. Thereafter, the two employees raised their safety concerns with Rowe, leading to Topor's request for a procedure. In his initial conversation with Jung and Regenscheid in the satellite that afternoon, Topor read the procedure and raised an additional concern that other cylinders needed to be moved out of the area where the cylinder to be heated was located. The concerns resulted in Topor calling a safety stop and requesting that a safety department representative intervene. When the three later conversed at the Penex unit, Topor reiterated his desire to have the other cylinders removed and repeated that he was calling a safety stop. Topor's expressions of safety concerns satisfies Section 7's requirement that his conduct be for mutual aid and protection. *NLRB v. Washington Aluminum Co.*, 370 U.S. at 14-15; *Daniel Construction Co.*, 277 NLRB 795, 795 (1985). His discussion with Rennert and Rowe in the morning obviously was concerted, since it involved multiple employees. Even though Topor individually stated his safety concerns in the afternoon, his expression was the logical outgrowth of the earlier discussions he had with Rennert and Rowe that morning about the safety of the job. *Dynatron/Bondo Corp.*, 324 NLRB 572, 585 (individual's refusal to wear dirty respirator she considered to be unsafe was concerted activity, because it was a logical outgrowth of earlier complaints by employees); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-1039 (1992) (individual employees' refusals to work overtime was concerted activity, because it was a logical outgrowth of group protest weeks earlier concerning a reduction in their work schedule).

In its brief, the Respondent essentially ignores whether Topor engaged in protected concerted activity at any point prior to or during his discussion with Jung and Regenscheid the afternoon of November 4. Instead, the Respondent focuses solely upon Topor's refusal to discuss mitigation efforts with the two supervisors and argues the refusal was not protected. I find no merit to this contention. Topor's refusal to discuss mitigation was intertwined with his calling of a safety stop. Although the Respondent tiptoes around this issue in its brief, Topor was refusing to work by doing so. Such a refusal in the face of a legitimate safety concern is protected concerted activity, irrespective of the fact that Jung and Regenscheid felt the job could be performed safely with insulation blankets. See, e.g., *Odyssey Capital Group, L.P., III*, 337 NLRB 1110, 1111 (2002) (employees' refusal to perform work in apartment due to concern over asbestos exposure was protected concerted activity, notwithstanding their supervisors believing no such risk existed); *Burle Industries, Inc.*, 300 NLRB 498, 498 fn. 1, 503 (1990) (employee who urged other workers to leave work area if they felt ill due to chemical fumes was engaged in protected concerted activity, despite supervisors insisting work area was safe); *Brown & Root, Inc.*, 246 NLRB 33, 36-37 (1979) (pipe-

fitters cutting and threading pipe 100 miles off the Mississippi shore engaged in protected concerted activity when they refused to work due to concern over using electrical equipment while it was raining, even though supervisors believed it was safe for them to return to work after the rain eased). In addition, I reject the Respondent's attempt to consider the refusal to discuss mitigation in isolation, which would require me to turn a blind eye to everything leading up to Topor's refusal. That action cannot be considered in a vacuum. *Emarco, Inc.*, 284 NLRB 832, 834 (1987); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 586-587 (7th Cir. 1965). Rather, the sequence of events for the entire day must be considered. Topor engaged in protected concerted activity throughout the day, including his discussion with Rennert at 9:30 a.m. over their safety concerns with the job, his presentation with Rennert of those concerns to Rowe at 10:30 a.m., and his expression of an additional safety concern to Jung and Regenscheid at 3:30 p.m. The culmination of this protected activity was Topor's calling of a safety stop. His concomitant refusal to discuss mitigation with Jung and Regenscheid cannot be separated from that protected concerted activity.

For all these reasons, I conclude that Topor was engaged in traditional protected concerted activity throughout November 4.

The General Counsel also contends Topor's conduct was protected concerted activity, pursuant to the decisions in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), and *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). Under *Interboro*, an individual's assertion of a right grounded in a collective-bargaining agreement is protected concerted activity, even where the individual is acting alone. When asserting the right, an employee need not be correct that a breach of the collective-bargaining agreement has occurred. The employee likewise need not file a formal grievance, invoke a specific provision of the contract, or even refer to the contract. The activity is concerted if the employee honestly and reasonably invokes rights which have been collectively bargained.

The determination of whether *Interboro* applies here begins with the contract language. As previously noted, the safety article in the parties' collective-bargaining agreement states in relevant part:

Should any employee be of the opinion that an unsafe condition exists, it shall be their obligation to immediately inform their Company Representative of such fact and to that end the Employer will examine the facts so as to determine the safety factors and whether the job should proceed.

This plain language makes it an employee's "obligation" to report an unsafe condition. Without question, then, Topor exercised a contractual right when he repeatedly informed Jung and Regenscheid on the afternoon of November 4 of his opinion that performing the HCl injection with other cylinders in the area was unsafe. Even though he did that individually, the conduct constitutes *Interboro* protected concerted activity.

The remaining issue is whether Topor's calling of a safety stop and refusal to discuss mitigation likewise was *Interboro* protected. This is a tougher question, because the collective-bargaining agreement does not reference safety stops and the

safety stop policy is not otherwise incorporated into the contract. The Respondent contends *Interboro* does not apply, pointing to the safety provision's lack of a right to refuse to work based on a safety concern. However, the Respondent cites to no case law supporting this argument and certain Board decisions run to the contrary. In *Wheeling-Pittsburgh Steel Corp.*, 277 NLRB 1388, 1389 (1985), the collective-bargaining agreement stated:

An employee, who believes he is being required to work under conditions which are unsafe beyond the normal hazard inherent in the job, may notify his Supervisor who shall make an immediate investigation. If the employee is not satisfied with the results of the investigation, he shall be permitted to call to the job a Union safety representative.

Additional language in the provision was silent as to whether the employee could stop working until the safety representative arrived. The Board found that a single employee who was suspended for refusing to work on a job the employee believed was unsafe until a union safety representative looked at it was engaged in protected concerted activity. 277 NLRB at 1388 fn. 2. The Board affirmed the judge's conclusion that this language gave an employee the arguable right to do so, even though the provision said nothing about the right to refuse to work. Similarly, in *Anheuser-Busch, Inc.*, 239 NLRB 207, 211 (1978), cited by the General Counsel, the contract provision stated:

No employee shall be discharged or disciplined for refusing to work on a job if his refusal is based upon the claim that said job is not safe, or might unduly endanger his health, until it is determined by the Employer that the job is or has been made safe, or will not unduly endanger his health. Any dispute concerning such determination is subject to the grievance procedure.

The Board affirmed the judge's finding that this provision gave employees the arguable right to refuse to perform work, even after a supervisor deemed the job safe. Accordingly, a single employee there who refused to perform an assigned task he believed posed an explosion risk was engaged in *Interboro* protected concerted activity, despite a supervisor assessing the job to be safe.

In light of this precedent, I conclude that Topor's calling of a safety stop and refusal to perform the work until a safety representative inspected the job was protected concerted activity under *Interboro*. I find that Topor reasonably invoked a contract right when doing so. The parties' safety provision is silent as to the situation presented in this case, where Topor disagreed with his supervisors' assessment that the job could be performed safely. Admittedly, the provision states the Respondent was to determine if a job was safe and should proceed. But the provision in *Anheuser-Busch* also suggests an employee had to perform the job once the supervisor deemed it safe. Despite the language, the employee there engaged in *Interboro* protected concerted activity when he refused to perform a job, after the employer's representative deemed it safe. Moreover, just as here, the contract language in *Wheeling-Pittsburgh Steel Corp.* made no mention of employees being able to refuse to work. It

only explicitly granted employee's the right to call a union safety representative. Nonetheless, an employee engaged in *Interboro* protected concerted activity by refusing to work until the representative arrived. Here, Topor insisted upon talking to a different company representative than Jung and Regenscheid concerning his belief the job they wanted him to perform was unsafe. The contract language reasonably could be construed to give him that right, since it does not identify which "Company Representative" to whom an employee is obligated to report a safety concern. It also arguably gave Topor the right to refuse to perform the job until his chosen representative inspected the job. Therefore, Topor's calling of a safety stop and request for a safety representative to inspect the job was protected concerted activity under *Interboro*.

Finally, the General Counsel also argues Topor engaged in "inherently concerted" activity on November 4 by asserting safety concerns in a dangerous industry. Employee discussions concerning two terms and conditions of employment—wages and job security—are inherently concerted, and protected, regardless of whether they are engaged in with the express object of inducing group action. *Hoodview Vending Co.*, 359 NLRB 355 (2012), reaffd. 362 NLRB No. 81 (2015). However, the Board, as yet, has not ruled that safety discussions constitute inherently concerted activity. The Board's rationale for finding discussions about wages and job security inherently concerted was that the topics are vital terms and conditions of employment and the "grist" of which concerted activity feeds. However, that description could apply to any number of additional terms and conditions of employment. Certainly safety, health insurance, and retirement benefits might all be deemed vital. Yet, some boundary must exist on the universe of working conditions important enough to come under the inherently concerted umbrella. For this reason, I conclude any expansion of the doctrine is better suited for the Board itself and I decline to find Topor engaged in inherently concerted activity.<sup>31</sup>

<sup>31</sup> If *Atlantic Steel* had been applicable to this case, I would find that Topor's conduct on the afternoon of November 4 was not sufficiently egregious to lose the Act's protection. By and large, this result is due to my findings that Topor did not engage in much of the misconduct alleged by the Respondent. His calling of a safety stop and refusal to discuss mitigation was protected concerted activity. Topor did not point his finger at Regenscheid and did not hear Regenscheid's request for the step change form. That leaves only Topor speaking in a loud voice to Regenscheid. The first *Atlantic Steel* factor looks to the place of the discussion, which I find favors protection. The conversation took place in the satellite, a meeting and break area. No disruption to the Respondent's operations occurred. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Although a limited number of other employees were present, conversations between supervisors and employees over safety concerns were commonplace at the refinery. Therefore, hearing such a discussion, even if it was loud, did not undermine supervisory authority. The subject matter of the discussion factor also favors protection. Topor's comments addressed employee safety in a facility with a much higher degree of risk than a typical workplace. The safety of employees operating in a dangerous industry goes to the heart of the Act's concerns. The third factor, the nature of the outburst, also favors protection. Topor did not use profanity, threaten Regenscheid, or make any threatening physical movement. An employee's brief, verbal outburst weighs in favor of protection. *Kiewit*

2. Did the Respondent harbor animus towards Topor's protected concerted activity?

The Respondent does not contest its knowledge of the concerted nature of Topor's activity.<sup>32</sup> Therefore, the final question as to the General Counsel's initial burden is whether the Respondent harbored animus towards the activity. Animus can be demonstrated by direct evidence or inferred from the totality of the circumstances. *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993). A discriminatory motive may be established by a variety of circumstantial factors, including the timing of the employer's adverse action in relationship to the employee's protected activity, as well as whether the asserted reasons for the adverse action are a pretext. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Shambaugh and Son, L.P.*, 364 NLRB No. 26, slip op. at 1 fn. 1 (2016). Pretext may be demonstrated by asserting a reason that is false and by an indifferent or inadequate investigation into the alleged misconduct. *Affinity Medical Center*, 362 NLRB No. 78, slip op. at 1 fn. 4 (2015).

Applying these principles here, I conclude the Respondent harbored animus towards Topor's protected activity. First and foremost, the Respondent sent Topor home and put him on administrative leave on November 4, due to his calling of a safety stop and refusal to discuss mitigation that afternoon. Without question, the Respondent was hostile towards the conduct, since it sent Topor home as a result of it. This direct link alone is sufficient to sustain the General Counsel's initial burden. Although the supervisors viewed Topor's conduct as insubordination, it actually was protected activity under the law.

Nonetheless, a discussion of the Respondent's inadequate investigation also is warranted, since it likewise provides strong support for an animus finding. At the point he concluded his interviews, Kerntz had conflicting accounts from the supervisors and Topor concerning whether Topor pointed his finger at Regenscheid and refused to return the step change form to him. He had one neutral employee, Olson, who said he never saw Topor point his finger at Regenscheid. He also had Jung's statement identifying Rennert and three other employees as being present either in the satellite or in the field for the interactions between Topor and his supervisors. Despite the dispute

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*Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). Topor may have been loud, but Regenscheid was as well. I also note, when he testified at the hearing, Topor's normal tone of voice was robust. A raised voice in these circumstances is understandable. In any event, speaking loudly (or angrily pointing a finger at a supervisor, had Topor actually done so) does not result in an employee losing the Act's protection. *U.S. Postal Service*, 360 NLRB 677, 683 (2014); *Syn-Tech Window Systems, Inc.*, 294 NLRB 791, 792 (1989). The final factor does not favor protection. Topor's alleged misconduct was not provoked by an unfair labor practice. Overall, then, three of the four *Atlantic Steel* factors weigh in favor of protection. Therefore, I conclude that Topor did not lose the protection of the Act on November 4 by speaking too loudly to Regenscheid.

<sup>32</sup> The record evidence establishes this knowledge. Both Topor and Rennert expressed concerns to their supervisors about the safety of heating the HCl cylinder. Then during the investigation, Rowe submitted a statement to management setting forth in detail his discussion with Topor and Rennert about their safety concerns. The Respondent had this knowledge prior to its decisions to suspend Topor, issue him a written warning, and deny him a quarterly bonus.

from the conversation participants as to what occurred and other potential avenues of investigation, Kerntz simply credited the supervisors' versions. In particular, the failure to interview Rennert, whom Jung had identified as being present both in the satellite and at the Penex, stands out as something that defies explanation. During direct examination, Kerntz's unconvincing explanation for this backs that conclusion:

Q: Did you interview any bargaining unit people, other than Mr. Topor?

A: We did not.

Q: Is there a reason?

A: Well, we evaluated and contemplated. When we do investigations, we look at several things, and we contemplated whether it would make sense to interview bargaining unit people in this particular case. Based on the facts, we decided that there wasn't relevant information, that they weren't pertinent to the discussions that were had.

Then on cross-examination, Kerntz attempted to claim no awareness of other potential witnesses to Topor's conduct, despite having received Jung's statement identifying them:

Q: In fact, no one said that they [saw] Mr. Topor point or get loud at Mr. Regenscheid, except for Briana Jung and Gary Regenscheid, isn't that right?

A: I don't think anybody else was—to our knowledge—was present, so—in part of that discussion, so I can't really answer that. What I do know is those two were.

Q: You didn't know Mike Rennert was present?

A: No. That they were part of that discussion, they may have been in the vicinity, but wasn't aware that they were in that part of that discussion.

When confronted with Jung's email, Kerntz stated:

So it says, "Others present outside of Rick Topor, Gary Regenscheid, Briana Jung who were present at both locations." And that in the satellite, it has listed a whole bunch of names, and then, in the field, it has these folks. But we were not aware, based on the information we had, that they were part of the discussions or, you know, in the direct vicinity of that. I have not had that information, and I don't know that anybody ever suggested that, either.

Kerntz was unaware of whether any of the listed employees were "in the direct vicinity," because he never asked any of them if they were. The only way the other employees had no "relevant information" was if Kerntz already had decided to credit Jung's and Regenscheid's version of what occurred. Indeed, Kerntz admitted this at the hearing:

Q: According to Ms. Powers' summary, Mr. Topor did not deny returning the paperwork, did he?

A: Well, on the top [of the Respondent's investigatory report] it says—I asked, "Did Gary ask you for the procedure back before you left?" He indicated, "No."

Q: He indicated he never heard a request for it back, didn't he?

A: I don't know exactly what his response was, but I have account from—

Q: Okay—

A:—two supervisors.

Q:—okay—

A:—that said otherwise.

...

A: . . . What I can tell you is that, you know, we made a decision based on the information we had. We had a clear account from two supervisors that I feel are very credible. They were very consistent in their accounts of what happened, and that is what we went with.

As these collective responses<sup>33</sup> make clear, Kerntz did not pursue a clear avenue for resolving the conflicting accounts of the supervisors and Topor. I conclude the Respondent conducted an inadequate investigation from November 7 to 9, designed simply to substantiate its supervisors' versions of what occurred and justify their sending Topor home on November 4. In these circumstances, the Respondent's lack of an objective and complete investigation is circumstantial evidence of pretext, establishing animus towards Topor's protected concerted activity. See, e.g., *Woodlands Health Center*, 325 NLRB 351, 364–365 (1998) (failure to interview two residents whom employee was alleged to have abused indicative of inadequate investigation); *Sheraton Hotel Waterbury*, 312 NLRB 304, 322 (1993) (failure to interview other witnesses to alleged insubordination supported finding of unlawful motivation).<sup>34</sup>

Finally, the Respondent's asserted reasons for disciplining Topor included that he pointed his finger at Regenscheid and refused to return the step change form. Because I have determined neither of those things occurred, the asserted reasons are false and pretextual.

For all these reasons, I conclude the General Counsel has established the Respondent harbored animus towards Topor's protected activity.

3. Did the Respondent establish it would have suspended Topor, irrespective of his protected conduct?

Having found protected activity, knowledge, and animus, I conclude the General Counsel has met the initial burden under *Wright Line*. Thus, the burden shifts to the Respondent to prove that it would have suspended Topor, even absent his protected activity. The only argument the Respondent makes in this regard is that it had a reasonable belief Topor engaged in misconduct and acted on that belief. An employer can meet its *Wright Line* burden where it demonstrates a reasonable belief the employee engaged in misconduct and the employer would

<sup>33</sup> Tr. 678, 698, 702, 704–705.

<sup>34</sup> In drawing this conclusion, I have heeded the Board's directive that the fact an employer does not pursue an investigation in some preferred manner before imposing discipline does not necessarily establish an unlawful motive. *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004). However, the record here demonstrates the Respondent could have uncovered additional, critical evidence had it conducted a deeper investigation. See *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 436 (D.C. Cir. 2012). Indeed, it only needed to interview Rennert to do so. Following Topor's interview, the Respondent had four additional days where it could have spoken to Rennert, because Whatley did not return from vacation until November 14.

have terminated any employee for the same misconduct. *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004); *Rockwell Automation/Dodge*, 330 NLRB 547, 549–550 (2000). Where such a reasonable belief is demonstrated, the employer still retains the obligation to show it would have, not could have, taken the same action, absent the employee's protected conduct. *6 West Limited Corp.*, 330 NLRB 527, 528 (2000), citing *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998); *Centre Property Management*, 277 NLRB 1376, 1376 (1985).

Because of the Respondent's inadequate investigation, I cannot find it had a reasonable belief Topor engaged in the alleged misconduct. See, e.g., *Alstyle Apparel*, 351 NLRB 1287, 1287–1288 (2007) (employer did not meet its *Wright Line* burden, where it conducted limited investigation into employee misconduct); *Midnight Rose Hotel*, 343 NLRB at 1005 (failure to conduct fair investigation defeated claim that employee engaged in theft); cf. *Rockwell Automation/Dodge*, supra (employer had reasonable belief that employee falsified work report form, where employee stated during the investigation that he would have reached the same conclusion if he viewed the situation from the employer's perspective).

Even if I did find the belief reasonable, the preponderance of the evidence fails to establish the Respondent would have suspended Topor absent his protected activity. The Respondent relies solely on the authority granted to it by the collective-bargaining agreement and its work rules to discharge employees for a first offense of insubordination, dishonesty, or unauthorized removal of company property. Such standards for disciplining employees, due to the same misconduct Topor was alleged to have committed, support the Respondent's position. *Bronco Wine Co.*, 256 NLRB 53, 54 fn. 10 (1981). But the Respondent did not demonstrate it actually exercised the authority in the past and treated employees similarly when they engaged in the same misconduct. It also did not show that it never before encountered a similar situation. Going back to *Fresenius USA Manufacturing*, the Board concluded the employer there met its *Wright Line* burden by showing its discharge of the employee was consistent with discipline it imposed for similar violations in the past. 362 NLRB No. 130, slip op. at 2. In particular, the employer previously terminated two other employees for dishonesty during an investigation. The Board noted: “[D]epending on the evidence in a particular case, employers may satisfy their *Wright Line* burden in these circumstances, for example, by demonstrating that dishonesty served as an independent (if not sole) reason for prior terminations, or that a practice of discipline for similar acts of dishonesty exists.” See also *Rockwell Automation/Dodge*, supra (employer sustained *Wright Line* burden by showing it previously discharged two employees who committed the same misconduct). In this case, the Respondent introduced no evidence that it previously disciplined employees for insubordination, theft of company property, or dishonesty. The Respondent possesses all of that information and could have presented it. The only inference that can be drawn is that such evidence would not have shown the Respondent treated Topor similarly to other employees in the past. Consequently, the Respondent only demonstrated it could have disciplined Topor, not that it would

have. That showing is insufficient to sustain its *Wright Line* burden.<sup>35</sup>

For all these reasons, I conclude the Respondent's 10-day unpaid suspension of Topor, its issuance of a final written warning to him, and the associated denial of his quarterly bonus violate Section 8(a)(1) of the Act.

### III. DID THE RESPONDENT'S SUSPENSION OF AND OTHER ADVERSE ACTIONS IMPOSED UPON TOPOR VIOLATE SECTION 8(A)(3)?

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The General Counsel contends that the Respondent's adverse actions towards Topor also violate Section 8(a)(3), because they were motivated by his union activities in support of Teamsters Local 120. This allegation likewise must be evaluated under the *Wright Line* standard.

With respect to the General Counsel's initial burden, the record evidence establishes that Topor engaged in union activity of which the Respondent was aware. Topor served as a union steward for 3 years at the time of the hearing. He also was a part of the Union's negotiating team during the initial round of successor contract negotiations in the late summer or early fall of 2015, prior to his suspension. The Respondent plainly was aware of these activities, given Topor's roles and the involvement of Whatley and Kerntz in the negotiations.<sup>36</sup>

However, I find the evidence insufficient to establish the Respondent harbored animus towards Topor's union activity from 2015. No evidence of specific animus was presented. Furthermore, Topor's opposition to the contract extension occurred at least one year before his suspension. The extreme remoteness in time of his union activity to the adverse actions belies the claim that the Respondent harbored animus towards it. *Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (2 months between union activity and warning was too remote in time to show animus); *Laidlaw Environmental Services*, 314 NLRB 406, 406

<sup>35</sup> In reaching these conclusions, I find the Respondent could rely upon Topor's dishonest assertion, when he initially denied speaking to Rowe during Kerntz' investigatory interview of him. The Respondent's decision to place Topor on administrative leave and to conduct an investigation was based on facially valid reports of alleged misconduct submitted by Jung and Regenscheid to Kerntz. Employers have a legitimate business interest in investigating such complaints. *Fresenius USA Mfg.* 362 NLRB No. 130, slip op. at 1-2. Kerntz' questioning of Topor was narrowly tailored to the events in question. Even though the questioning addressed Topor's protected concerted activity, the inquiry was related to Topor's job performance and the employer's ability to operate its business. The Board's concern over revealing an employee's private union activity is not present here and revealing protected concerted discussions with supervisors about job safety does not raise the same privacy concerns. Consequently, Topor did not have a right to respond untruthfully to Kerntz's questions. Nonetheless, I further note, because Topor made only one dishonest assertion that he immediately corrected, his infraction was minor and an intent to deceive was lacking.

<sup>36</sup> Although Topor also opposed extending the existing contract, the record does not make clear whether the Respondent's negotiators were aware of that fact.

fn. 1 (1994) (antiunion statement made to employee 7 to 8 months prior to his suspension was too remote in time to show animus).

In support of its animus argument, the General Counsel first alleges that Regenscheid violated Section 8(a)(1), during his one-on-one conversation with Rennert sometime between September and November 2016. To review, Regenscheid stated to Rennert therein "Don't be surprised if a few people get fired, and they start searching lunchboxes when you go out the gate and have the dogs sniffing cars." Rennert asked him why they would do that. Regenscheid responded "Your contract is coming up." Rennert said, "Do you really think that they would do that?" Regenscheid said, "Yeah, I do." The test of whether a statement is unlawful under Section 8(a)(1) is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction. *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011). A statement that an employee who also served as a union bargaining representative is going to be watched, caught, and fired after the unit's rejection of a company's contract proposal is an unlawful threat. *Fort Dearborn Co.*, 359 NLRB 199, 199 (2012), reaff'd. 361 NLRB 924 (2014). Similarly here, Regenscheid suggested the Respondent would increase its surveillance of and even discharge employees due to contract negotiations. His statements would reasonably tend to interfere with employees' exercise of Section 7 rights and violate Section 8(a)(1). Nonetheless, the statements were not directed at Topor, but at Rennert, who was not involved in the union, and the statements involved conduct wholly unrelated to that which led to Topor's suspension. Accordingly, and in agreement with the Respondent, I find this lone threat made to one employee is insufficient to sustain the General Counsel's animus burden. See *Snap-On Tools*, 342 NLRB at 9; *ASC Industries, Inc.*, 217 NLRB 323, 323 (1975).

The General Counsel also argues that animus is established based upon the disproportionate level of discipline given to Topor. Disproportionate discipline may support a finding of discriminatory motive. See, e.g., *Abbey's Transportation Services, Inc.*, 284 NLRB 698, 700 (1987) (animus demonstrated in part by record evidence that discharges of discriminatees were disproportionately severe compared to how other employees had been treated in the past); *Tamper, Inc.*, 207 NLRB 907, 933 (1973) (grossly disproportionate treatment of discriminatee when compared to employer's general policy on discipline supported animus finding). I find the record evidence insufficient to establish the Respondent's discipline of Topor was disproportionate. The Respondent could have discharged Topor for his alleged misconduct, because the parties' contract called for termination for an employee's first offense of dishonesty. Rather than discharging him, the Respondent instead imposed the lesser discipline of a suspension and final written warning. Moreover, the General Counsel did not offer any disciplinary records of the Respondent showing that other employees had been treated with greater leniency in the past.

I also find no merit to the General Counsel's claim of disparate treatment. The argument relies upon the fact the Respondent did not discipline Rennert, who has no position in the Union, for refusing to heat up the HCl cylinders the day after Topor was sent home for the same refusal. Even if this did consti-

tute disparate treatment, it is an example involving a lone employee insufficient to support a finding of discriminatory motive. *Synergy Gas Corp.*, 290 NLRB 1098, 1103 (1988) (one aberrant occurrence in failing to enforce discipline rules not indicative of disparate treatment). Beyond that and given the sequence of events, Regenscheid's response to Rennert simply suggests he did not want to experience the same scenario with Rennert that he did the day before with Topor. It is not indicative of treating Rennert differently because he was not involved with the Union.

As a result, I conclude the General Counsel has not met the initial burden of demonstrating the Respondent's adverse actions towards Topor were motivated by his union activity. I recommend dismissal of the 8(a)(3) allegation.

#### CONCLUSIONS OF LAW

1. Respondent St. Paul Park Refining Co., LLC, d/b/a Western Refining, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local No. 120, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) At some point between September and November 2016, threatening employees with termination, surveillance, and stricter enforcement of work rules due to their union activity;

(b) On or about November 14, 2016, issuing Richard Topor a final written warning and 10-day unpaid suspension due to his protected concerted activity; and

(c) On or about January 17, 2017, denying Richard Topor a quarterly bonus due to his protected concerted activity.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. The Respondent has not violated the Act in the other manners alleged in the complaint.

#### REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular and to remedy the unlawful suspension and denial of a quarterly bonus to Richard Topor, I shall order the Respondent to rescind the suspension and make Topor whole for any loss of earnings and other benefits attributable to the unlawful conduct, including restoring his quarterly bonus. Backpay for Topor shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 18 a report allocating Topor's backpay to the appro-

appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.<sup>37</sup> The Respondent also shall be required to remove from its files any and all references to its unlawful actions and to notify Topor in writing that this has been done and the discipline will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>38</sup>

#### ORDER

The Respondent, St. Paul Park Refining Co., LLC, d/b/a Western Refining, St. Paul Park, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with termination, surveillance, and stricter enforcement of work rules, due to their union activity.

(b) Suspending, issuing a final written warning to, and denying a quarterly bonus to employees, due to their protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Richard Topor whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension of, final written warning to, and denial of a quarterly bonus to Richard Topor and, within 3 days thereafter, notify him in writing that this has been done and that these unlawful acts will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

<sup>37</sup> The General Counsel's complaint sought a requirement that Topor be reimbursed for "consequential damages," as part of the remedy. However, the General Counsel makes no argument in the post-hearing brief as to why I should award this remedy. I am aware that, in this case and others, the General Counsel is seeking a change in Board law. *Seeking Reimbursement for Consequential Economic Harm*, OM 16-24 (July 28, 2016), available at <http://pps.nlr.gov/link/document.aspx/09031d458219114a>. Such a change must come from the Board, not an administrative law judge. Accordingly, I decline to include the requested remedy in my recommended order.

<sup>38</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its St. Paul Park, Minnesota facility copies of the attached notice marked "Appendix."<sup>39</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2016.<sup>40</sup>

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., December 20, 2017.

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

<sup>39</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>40</sup> This date normally reflects the date of the first unfair labor practice. *Excel Container, Inc.*, 325 NLRB 17 (1997). The first unlawful act in this case was Regenscheid's statements to Rennert which violated Sec. 8(a)(1). However, Rennert could not pinpoint the exact date when his conversation with Regenscheid occurred, stating instead that it was between September and November 2016. Accordingly, I find September 1, 2016, to be the appropriate date to use in this context.

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with termination, surveillance, or stricter enforcement of work rules, due to your union activity.

WE WILL NOT suspend you, issue you a final written warning, or deny you a quarterly bonus, due to your protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Richard Topor whole for any loss of earnings and other benefits resulting from his unlawful suspension and denial of a quarterly bonus, plus interest.

WE WILL compensate Richard Topor for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful suspension of, final written warning to, and denial of a quarterly bonus to Richard Topor, and WE WILL, within 3 days thereafter, notify him in writing that this had been done and that these unlawful actions will not be used against him in any way.

ST. PAUL PARK REFINING CO., LLC

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case 18-CA-187896](http://www.nlrb.gov/case-18-CA-187896) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE were served by electronic mail on the 1st day of October 2018, on the following parties:

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/s/ Florence I. Brammer

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