

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

SOUTHERN BAKERIES, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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SUMMARY OF THE CASE AND ORAL ARGUMENT STATEMENT

In a prior decision, the National Labor Relations Board found that Southern Bakeries, LLC (“the Company”) unlawfully disciplined Lorraine Marks Briggs because of her protected union activity, and ordered the Company to expunge any reference to the unlawful discipline from its files and not to use it against her in any way. On review, this Court upheld the Board’s finding and enforced that portion of the Board’s order. *S. Bakeries, LLC v. NLRB*, 871 F.3d 811, 824-25, 828 (8th Cir. 2017). Under settled law, if prior discipline was unlawfully motivated, then any subsequent adverse actions relying on that discipline are themselves unlawful. Applying that principle here, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by issuing Marks Briggs three adverse employment actions. Separately, the Board found, based on credited testimony, that the Company violated Section 8(a)(1) of the Act by instructing Cheryl Muldrew not to discuss her discipline with co-workers and later telling her she was being discharged in part for doing so.

Given the established law and ample supporting evidence, the Board respectfully submits that argument is unnecessary. If the Court desires argument, the Board asks to participate and submits that 10 minutes per side will suffice.

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v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Southern Bakeries, LLC (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on May 1, 2018, and reported at 366 NLRB No. 78. (Add. 1-

12.)¹ The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). Venue is proper because the unfair labor practices occurred in Hope, Arkansas. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by issuing Lorraine Marks Briggs a last chance agreement, discharging her, and marking her ineligible for rehire based on prior unlawful discipline.

29 U.S.C. §§ 157, 158(a)(3) and (1)

NLRB v. RELCO Locomotives, Inc., 734 F.3d 764 (8th Cir. 2013)

Opportunity Homes, Inc. v. NLRB, 101 F.3d 1515 (6th Cir. 1996)

Dynamics Corp., 296 NLRB 1252 (1989)

Celotex Corp., 259 NLRB 1186 (1982)

¹ “Add.” refers to the Addendum to the Company’s opening brief (“Br.”). “A.” refers to the joint appendix and “SA.” refers to the supplemental appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by telling Cheryl Muldrew not to discuss her discipline with other employees and later telling her that she was being discharged in part for discussing her prior discipline.

29 U.S.C. §§ 157, 158(a)(1)

Inova Health Sys. v. NLRB, 795 F.3d 68 (D.C. Cir. 2015)

Verizon Wireless, 349 NLRB 640 (2007)

Caesar’s Palace, 336 NLRB 271 (2001)

Westside Cmty Mental Health Ctr., Inc., 327 NLRB 661 (1999)

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. The Board’s Decision in *Southern Bakeries I* and the Court’s Decision on Review

In a prior unfair-labor-practice case, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by issuing employee Lorraine Marks Briggs a May 30, 2013 final written warning (A. 713), also known as a “last chance agreement,” because of her protected union activity. *Southern Bakeries, LLC*, 364 NLRB No. 64, 2016 WL 4157598, at *1 (Aug. 4, 2016) (“*Southern Bakeries I*”). The Board’s remedial order required the Company, among other things, to expunge any reference to the unlawful 2013 last chance agreement from

its files and notify Marks Briggs in writing that the unlawful discipline would not be used against her “in any way.” *Id.* at *10.

On review, this Court enforced that portion of the Board’s remedial order. *S. Bakeries, LLC v. NLRB*, 871 F.3d 811, 824-25, 828 (8th Cir. 2017). On the issue of Marks Briggs’ 2013 last chance agreement, the Court held that the “evidence [was] sufficient to support the Board’s determination that Southern was motivated by anti union animus” in disciplining Marks Briggs, and that the Company “did not prove otherwise.” *Id.* at 825.

B. The Present Case

Based on unfair-labor-practice charges filed by Marks Briggs, Cheryl Muldrew, and the Bakery, Confectionary, Tobacco Workers, and Grain Millers Union (“the Union”), the Board’s General Counsel issued a consolidated complaint alleging in relevant part that the Company committed multiple violations of Section 8(a)(3) and (1) of the Act. (Add. 5; A. 401-07.) After a hearing, an administrative law judge found that the Company violated Section 8(a)(3) and (1) by issuing Marks Briggs a last chance agreement in 2015, discharging her, and marking her ineligible for rehire based in part on the 2013 last chance agreement found unlawful in *Southern Bakeries I*. (Add. 5-8, 10.) The judge further found that the Company violated Section 8(a)(1) by instructing Muldrew not to discuss her discipline with other employees and later telling her that she was being

discharged in part for discussing it. (Add. 8, 10.) On review, the Board affirmed those findings to the extent consistent with its Decision and adopted the judge's recommended Order with modifications. (Add. 1-4.)

II. THE BOARD'S FINDINGS OF FACT

A. Background; Relying on the Prior Unlawful Discipline, the Company Issues Marks Briggs Another Last Chance Agreement, Discharges Her, and Marks Her Ineligible for Rehire

The Company operates a commercial bakery in Hope, Arkansas. (Add. 5; A. 417.) When it acquired the bakery in 2005, it recognized the incumbent Union as the exclusive collective-bargaining representative of the production and sanitation employees. In July 2013, the Company withdrew recognition from the Union. (Add. 1, 5; A. 175, 214.)

Marks Briggs worked for the Company and its predecessor for more than 24 years. (Add. 5; A. 84.) In early October 2015, Production Manager Tony Hagood saw her pick a piece of topping off some apple swirl bread and eat it while she was working on the production line. (Add. 1, 5; A. 88-90, 387-88, 596, 598.) Hagood filled out a disciplinary action form and submitted it to human resources. (Add. 5; A. 388-89.) Travis Eric McNiel, only recently hired as Human Resources Manager, consulted with Vice President and General Manager Rickey Ledbetter about disciplining her. (Add. 5; A. 249-53, 259.) Ledbetter informed McNiel that there was already a last chance agreement in Marks Briggs' record—namely, the

2013 last chance agreement that was found unlawful in *Southern Bakeries I*. (Add. 5; A. 253-55.) On October 16, 2015, they issued her another last chance agreement, the equivalent of a final written warning, noting that “Group B” rules 3 and 13 of the employee handbook proscribe eating outside of designated break areas and ignoring good manufacturing rules.² (Add. 1, 5; A. 249, 257, 317, 431-33.) In the 2015 last chance agreement, the Company stated that “[a]fter a management review of the facts surrounding the incident and your previous record for rule violations, your behavior does not call for immediate discharge.” (Add. 1, 5-6; A. 433.) The “previous record for rule violations” could only have referred to the 2013 last chance agreement that was found unlawful in *Southern Bakeries I*, given that her record contained no other discipline or prior rule violations. (Add. 1, 6; A. 126.)

On February 8, 2016, while the bread production line was idle, Marks Briggs left her workstation without permission and walked toward a washstand located in another area. (Add. 1, 6; A. 84, 96-99, 149.) Employees Eugene Hopson and Ashley Hawkins were standing nearby, engaged in conversation. (Add. 1, 6; A. 99, 183, 370-71.) As Marks Briggs approached the washstand, she passed very close to Hawkins and their shoulders made contact, prompting Hawkins to say,

² The employee handbook distinguishes between “Group A” and “Group B” rules, the latter of which proscribes less severe conduct. (Add. 2; A. 710-12.)

“excuse you.” Hopson did not notice any contact. (Add. 1, 6; A. 100-01, 183, 204, 372-73.)

Afterward, Hawkins complained to Hagood that Marks Briggs had purposely bumped into her. (Add. 6; A. 183, 390.) Hagood escorted Hawkins to human resources, where McNiel interviewed her and, later on, Hopson and Marks Briggs. (Add. 6; A. 391, 605, 609, 658.) During the ensuing investigation, Marks Briggs told McNiel that Hawkins had deliberately bumped into her, explaining that Hawkins was angry with her because she had previously told a supervisor that Hawkins had eaten a breadstick from the production line. (Add. 6; A. 605, 607.)

On February 19, the Company presented Marks Briggs with a document stating that she was being discharged for harassment or creating a hostile or unpleasant work environment, leaving her workplace without permission, and insubordination, violations of “Group A” rules 3, 5, 6, and 22 listed in the employee handbook. (Add. 6; A. 434-37.) The discharge document further provided that a “review of your work history includes two (2) previous final warnings ‘Last Chance Agreements,’” specifically citing Marks Briggs’ 2015 last chance agreement as well as the 2013 last chance agreement that was found unlawful in *Southern Bakeries I*. (Add. 2, 6; A. 436.) Under the heading “DECISION,” the Company concluded by stating that its discharge decision was

“taking into account the ‘Last Chance Agreements’ given to you on May 30, 2013 . . . and October 17, 2015.” (Add. 2, 6-7; A. 437.)

On March 4, 2016, Hagood completed the Company’s Termination Checklist Settlement for Marks Briggs’ discharge. In the remarks section of the box labeled “Termination Classification,” he wrote:

Violation of 2nd Last Chance Agreement
Intimidation of Another Associate
Do Not Rehire

(Add. 2, 7; A. 392, 438.)

B. The Company Instructs Muldrew Not To Discuss Her Discipline, then Later Tells Her She Is Being Discharged in Part for Doing So

Muldrew worked for the Company and its predecessor for 16 years. (Add. 8; A. 7.) On January 14 or 15, 2016, the Company suspended her pending an investigation into allegations that she had threatened another employee and eaten a peppermint on the production line. (Add. 8; A. 11, 568-74.) On January 21, the Company again suspended her pending an investigation into new allegations that she had made threatening comments about the employee who reported the earlier incident. (Add. 8; A. 17-19, 578-84.)

During a January 21 meeting, Human Resources Manager McNiel told Muldrew not to discuss her discipline with anyone. (Add. 8; A. 18-20.) On January 27, the Company decided to discharge her, and issued her a discharge document stating that an employee had reported her making threatening comments

and “discussing the confidential situation from the previous week.” (Add. 8; A. 584.) The same day, McNiel also told Muldrew she was being discharged for making the comments and discussing her prior discipline. (Add. 8; A. 19-21, 42, 57-58.)

III. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members McFerran, Kaplan, and Emanuel) found that the Company violated Section 8(a)(3) and (1) of the Act by issuing Marks Briggs a last chance agreement, discharging her, and marking her ineligible for rehire, in reliance on the prior disciplinary action that was found unlawful in *Southern Bakeries I*. The Board also found that the Company violated Section 8(a)(1) of the Act by instructing Muldrew not to discuss her discipline with other employees and later telling her that she was being discharged in part for discussing her prior discipline. (Add. 3.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. Affirmatively, the Order requires the Company to offer full reinstatement to Marks Briggs and to make her whole for any loss of earnings or benefits suffered as a result of the discrimination against her. The Order also requires the Company to remove any reference in its files to Marks Briggs’

unlawful last chance agreement, discharge, and do-not-hire notation, and to notify her in writing of the expungement and that those adverse actions will not be used against her in any way. Finally, the Company must post a remedial notice. (Add. 3.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by issuing Marks Briggs the 2015 last chance agreement, discharging her, and marking her ineligible for rehire. Under settled law, if prior discipline was unlawfully motivated, then any subsequent adverse employment actions relying on that prior discipline are themselves unlawful, unless the employer establishes that it would have taken the same action even absent the prior unlawful discipline. Previously, this Court in *Southern Bakeries, LLC v. NLRB*, 871 F.3d 811 (8th Cir. 2017), upheld the Board's finding that the Company was unlawfully motivated when it issued the 2013 last chance agreement to Marks Briggs. In this case, the record evidence fully supports the Board's finding that each of the Company's present adverse actions squarely relied on the unlawful 2013 last chance agreement, and thus are themselves unlawful.

The Board reasonably found that the Company failed to prove its affirmative defense that it would have taken the same adverse actions against Marks Briggs absent its reliance on the prior unlawful discipline. The Company presented no evidence that it had ever previously issued a last chance agreement to an employee solely for violating its rules against eating on the production line. Instead, the record demonstrates that employees who abrogated the same rules as Marks Briggs routinely received less severe discipline. In addition, although the Company

discharged Marks Briggs for the washstand incident, charging her with harassment, insubordination, and leaving her work area without permission, the record evidence establishes that employees who engaged in similar conduct were not terminated. The few examples of discharge cited by the Company involved employees who engaged in more serious, and therefore dissimilar, misconduct. With respect to the do-not-hire notation, it is admittedly contrary to the Company's practice to mark an employee ineligible for rehire.

2. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act when McNiel instructed Muldrew not to discuss her discipline with coworkers and later told her that she was being discharged partly for discussing it. That finding is supported by Muldrew's credited testimony, which is corroborated by the Company's own documentation. Although it challenges the administrative law judge's reasonable decision to credit Muldrew over McNiel's denials, the Company fails to meet its heavy burden of showing that the judge's ruling shocks the conscience.

STANDARD OF REVIEW

The Court's review of the Board's fact-finding is limited in scope. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779-80 (8th Cir. 2013). The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *S. Bakeries*, 871 F.3d at 820. As fact-finder, "the Board is permitted to draw reasonable inferences and may select between conflicting accounts of the evidence." *S. Bakeries*, 871 F.3d at 820. In evaluating whether the Board's credibility determinations are supported by substantial evidence, the Court "afford[s] great deference to the findings of the [judge] and the Board and will not overturn them unless they shock the conscience." *RELCO*, 734 F.3d at 787. The Court also "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003); *see also S. Bakeries*, 871 F.3d at 820 (same).

ARGUMENT**I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ISSUING MARKS BRIGGS A LAST CHANCE AGREEMENT, DISCHARGING HER, AND MARKING HER INELIGIBLE FOR REHIRE****A. An Employer Violates Section 8(a)(3) and (1) of the Act by Relying on Prior Unlawful Discipline in Taking Adverse Employment Actions Against an Employee**

Among other rights, Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations.” 29 U.S.C. § 157. In turn, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Accordingly, it is beyond cavil that an employer violates Section 8(a)(3) and (1) of the Act by taking an adverse employment action against an employee, such as discipline or discharge, because of their protected union activity.³ *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983); *S.*

³ Because a violation of Section 8(a)(3) interferes with employee rights under the Act, it derivatively violates Section 8(a)(1) of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

Bakeries, 871 F.3d at 824-25; *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966-70 (8th Cir. 2005).

In *Southern Bakeries I*, the Board—applying the test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *Transportation Management*—found that the Company violated Section 8(a)(3) and (1) of the Act by issuing Marks Briggs the 2013 last chance agreement because of her protected union activity. 2016 WL 4157598, at *1. Specifically, the Board found that the Company knew Marks Briggs had engaged in union activity, that union animus motivated it to issue the 2013 last chance agreement, and that the Company failed to prove it would have taken the same action even absent her union activity. 364 NLRB No. 64, slip op. at 30-31. To remedy that unfair labor practice, the Board ordered the Company to expunge the 2013 last chance agreement from its records, and not use it as a basis for future discipline. 2016 WL 4157598, at *10. This Court upheld the Board’s finding and enforced its order in relevant part. *S. Bakeries*, 871 F.3d at 824-25, 828.

In the present case, the Company—contrary to the directives of the Board and this Court in *Southern Bakeries I*—relied on the unlawful 2013 last chance agreement as a basis for taking further adverse actions against Marks Briggs. It is

settled, however, that “[a]n adverse employment decision is unlawful if it relies upon and results from a previous unlawful action.” *RELCO*, 734 F.3d at 787; *see also Dynamics Corp.*, 296 NLRB 1252, 1252 (1989) (“a legitimate basis for discharge or suspension cannot be established by unlawful disciplinary warnings” previously issued), *enforced*, 928 F.2d 609 (2d Cir. 1991). An employer’s reliance on prior unlawful discipline as a basis for a current adverse employment action necessarily taints the present adverse action, as the justification for the employer’s present action rests at least partially on the unlawful motivation inherent in the prior unlawful disciplinary action. *See RELCO*, 734 F.3d at 786-88; *accord Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1521 (6th Cir. 1996) (discharge for insubordination unlawful where employee would not have been discharged but for prior, unlawfully motivated suspension); *Dynamics*, 296 NLRB at 1254 (discharges unlawful where “linked” to unlawfully issued prior warnings, which constituted violations of Section 8(a)(3)); *Celotex Corp.*, 259 NLRB 1186, 1186 & n.2 (1982) (suspension unlawful where employer relied on prior unlawful warning).

Where it is established that an employer relied at least in part on prior unlawful discipline in taking an adverse employment action, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the prior unlawful discipline. *See, e.g., Opportunity Homes*, 101 F.3d at

1521; *Dynamics*, 296 NLRB at 1254; *Celotex*, 259 NLRB at 1186 & n.2, 1191-92.

Under this analysis, a reviewing court will uphold the unfair-labor-practice violation if substantial evidence supports the Board's finding that the employer based the adverse employment decision at least in part on the unlawful prior discipline, unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the prior discipline. *See* cases cited at pp. 16-17.

Finally, it is well established that an employer bears the burden of proving its affirmative defense. *TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 463-64 (8th Cir. 1983) (per curiam) (citing *Transp. Mgmt. Corp.*, 462 U.S. at 400-02). Moreover, it is not enough for an employer to put forth *a* reason for the adverse action. *Rockline*, 412 F.3d at 970. Instead, “[i]t must be *the* justification.” *Id.* (emphasis in original). Evidence that an employer disparately disciplined an employee undermines its asserted defense. *See, e.g., Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016); *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000); *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007).

B. The Company Violated Section 8(a)(3) and (1) of the Act by Issuing Marks Briggs the 2015 Last Chance Agreement, Discharging Her, and Marking Her Ineligible for Rehire Based on Her Prior Unlawful Discipline

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by issuing Marks Briggs the 2015 last chance agreement, discharging her, and marking her ineligible for rehire because “each of those actions[] inseparably relied on prior discipline that violated Section 8(a)(3) and (1).” (Add. 1.) As shown below, substantial evidence supports the Board’s finding that those adverse actions were unlawful because they relied on the indisputably unlawful 2013 last chance agreement. In addition, substantial evidence supports the Board’s finding that the Company failed to show it would have taken those actions even absent its reliance on the unlawfully imposed prior discipline.

1. The Company plainly relied on the prior unlawful last chance agreement in taking further adverse actions against Marks Briggs

Preliminarily, the Board’s prior finding—upheld by this Court—that the Company’s 2013 last chance agreement issued to Marks Briggs was unlawfully motivated and, therefore, violative of Section 8(a)(3) and (1), is beyond dispute. *See S. Bakeries*, 871 F.3d at 824-25, 828, *enforcing S. Bakeries I*, 2016 WL 4157598, at *1. Consequently, the Board appropriately applied settled precedent establishing that where, as here, prior discipline was unlawfully motivated, then

any subsequent adverse employment actions relying on that prior discipline are themselves unlawful. (Add. 2.)

Substantial evidence supports the Board's finding that "the October 2015 last chance agreement, the February 2016 discharge, and the subsequent do-not-hire notation all partially relied on the unlawful May 2013 last chance agreement." (Add. 2.) First, the 2015 last chance agreement specifically relied on Marks Briggs' "previous record for rule violations" in determining that her "behavior does call for immediate discharge." (Add. 1, 5-6; A. 433.) As the Board found, the explicit reference to her previous record "could only mean her unlawful May 2013 last chance agreement, since the record contains no other prior rule violations." (Add. 1; A. 126.) Any further doubt as to that reference is dispelled by the fact that during the meeting in which the Company decided to issue the 2015 last chance agreement, Vice President and General Manager Ledbetter specifically mentioned to Human Resources Manager McNiel that Marks Briggs' record already contained a last chance agreement. (Add. 5; A. 253-55.) Plainly, Ledbetter was referring to the unlawful 2013 last chance agreement.

Moreover, Marks Briggs' February 2016 discharge document likewise "expressly relied" on the unlawful 2013 last chance agreement, as the Board found. (Add. 2.) Thus, the Company stated in her discharge document that her work history "includes two (2) previous final warnings 'Last Chance Agreements'" and

recited the facts underlying the 2013 last chance agreement. (Add. 2, 6; A. 436.)

Further underscoring the Company's reliance on the unlawfully imposed 2013 discipline, the discharge document reiterated, under the "DECISION" heading, that the Company was "taking into account the 'Last Chance Agreements' given to you on May 30, 2013 . . . and October 17, 2015."⁴ (Add. 2, 6-7; A. 437.)

Lastly, in deciding to designate Marks Briggs as ineligible for rehire, the Company also relied on her unlawful prior discipline. (Add. 2.) The internal checklist for her discharge squarely stated that it was for a "Violation of 2nd Last Chance Agreement." (Add. 2, 7; A. 438.) Plainly, the first such agreement was the unlawful 2013 last chance agreement, which the Company failed to expunge as required by *Southern Bakeries I*. And by its terms the checklist's do-not-hire notation relies on Marks Briggs receiving two last chance agreements, including the unlawful one in 2013. Moreover, as the Board found, "Hagood confirmed in his testimony that Marks Briggs' prior last chance agreements were a reason he made the do-not-rehire notation." (Add. 2, 7; A. 393, 438.)

Challenging the Board's findings as to these adverse actions, the Company repeatedly argues (Br. 23, 25, 26, 31, 36, 38) that Production Manager Hagood and

⁴ The discharge document's facial reliance on the 2013 last chance agreement speaks for itself, and therefore belies McNiel's discredited claim that it did not have (Br. 31) "any impact" on the decision to discharge Marks Briggs.

Human Resources Manager McNiel did not know about or harbor animus toward Marks Briggs' prior union activity, and that the Board improperly (Br. 25) "bypassed" those aspects of the *Wright Line* analysis and "skipped" to the Company's burden of proving its affirmative defense. The Company's arguments miss the mark entirely.⁵ This is not a case, as the Company would have it, where the Board needed to determine under *Wright Line* whether union activity was a motivating factor in the 2015 and 2016 adverse actions. Thus, the Board did not need to examine Hagood or McNiel's personal knowledge or animus.⁶ Instead, the Board applied its *Wright Line* test in *Southern Bakeries I* and found the Company's initial discipline of Marks Briggs—the 2013 last chance agreement—unlawfully

⁵ Contrary to the Company's further suggestion (Br. 31), it is immaterial that the Board did not also find the Company violated Section 8(a)(4) of the Act by taking adverse actions against Marks Briggs. (Add. 2.) A violation of that section turns on whether the employer was motivated by "animus toward use of the Board's procedures." *Voith Indus. Servs., Inc.*, 363 NLRB No. 109, 2016 WL 683208, at *1 n.2 (Feb. 17, 2016). The Board's dismissal of the Section 8(a)(4) complaint allegation has no bearing on the question here, which is whether the Company violated Section 8(a)(3) and (1) of the Act by basing its adverse actions on prior unlawful discipline.

⁶ In any event, company officials plainly knew about Marks Briggs' union activity in *Southern Bakeries I*. Indeed, Vice President and General Manager Ledbetter, who decided, together with Human Resources Manager McNiel, to issue the last chance agreement and discharge her, was present when she testified at the hearing in the first case. (A. 87, 223, 249-55, 258-59, 285, 318-19, 358.) As for Production Manager Hagood, his involvement was limited to ministerial tasks such as submitting her disciplinary action form to human resources. (A. 258-59, 285, 388-89, 392.)

motivated and a violation of Section 8(a)(3) and (1). This Court agreed with the Board's *Wright Line* analysis and upheld that finding. *See* pp. 3-4, 15. Thus, for all intents and purposes, it is the law of the case that the 2013 last chance agreement was unlawfully motivated, and therefore should have been expunged and not used against Marks Briggs "in any way." *S. Bakeries I*, 2016 WL 4157598, at *10.

The Company's attempt (Br. 26) to distinguish *Dynamics* and *Celotex*—cases cited by the Board (Add. 2)—"because they relate to attendance policies" or involved disciplinary actions that were "stacked together" is wholly unpersuasive. The legal principle that an employer may not rely upon prior unlawful discipline in taking an adverse action against an employee is not limited to attendance-based discipline, or to circumstances where several unlawful disciplinary actions were "stacked together" as a basis for taking a subsequent adverse action.⁷ To the contrary, a violation is shown where an employer relies, even in part, on a single instance of prior unlawful discipline in taking a present adverse action against an employee. *See, e.g., Opportunity Homes*, 101 F.3d at 1521 (discharge for insubordination unlawful where employer relied on unlawful prior suspension for

⁷ In any event, the record shows that the Company "stacked" its adverse actions by predicating the second last chance agreement on the prior unlawful one, and then basing the discharge on both agreements.

inappropriate behavior). Accordingly, the Board's analysis is not, as the Company complains (Br. 24), "untethered" from the Act.

2. The Company failed to prove that absent its reliance on the prior unlawful discipline, it would have disciplined and discharged Marks Briggs

Before the Board, the Company argued as an affirmative defense that even absent its reliance on the unlawful 2013 last chance agreement, it would have issued Marks Briggs the 2015 last chance agreement, discharged her, and marked her ineligible for rehire. The Board reasonably rejected this defense, finding that the Company "failed to prove that it would have issued the same discipline even had it not relied on the unlawful May 2013 last chance agreement." (Add. 2.) As shown below, contrary to the Company's arguments (Br. 26, 33, 38), the Board was not compelled to accept its defense.

a. The 2015 last chance agreement

The Board had ample grounds for finding that the Company failed to meet its burden of proving that it would have issued Marks Briggs the 2015 last chance agreement for eating a piece of bread topping even if it had not relied on the unlawful 2013 last chance agreement. The Company claims (Br. 26-30), as it did before the Board, that it was entitled to issue her a last chance agreement in 2015 because eating on the production line violates "Group B" rules 3 and 13. (Add. 2; A. 431-33, 711-12.) As the Board noted, however, under the employee handbook,

“Group B” violations are “less severe” than others, and the Company “offered no evidence that it had ever given an employee a last chance agreement solely for a Group B violation.”⁸ (Add. 2; A. 335, 710-12.)

To the contrary, as the record evidence shows, the Company issued less severe first written warnings to other employees charged with violating Group B rule 3 by eating in a work area. (*See* A. 447, 449, 453-54, 456, 530, 534, 693-97, 699-700, 703 ¶ 5, 717, 719.) Likewise, employees charged with violating Group B rule 13, failing to “observe facility safety or good manufacturing rules,” received less severe discipline, ranging from a verbal warning (A. 451), to written warnings (A. 534, 538, SA. 5-9), to a suspension where it was a second violation (SA. 3). Moreover, two employees charged with violating the same rules as Marks Briggs only received written warnings. (A. 534, 699-700.) Thus, the Board reasonably found that the “unlawful May 2013 last chance agreement appears to be the only explanation for the severity of Marks Briggs’ October 2015 discipline.” (Add. 2.)

⁸ Contrary to the Company’s assertion (Br. 27-28), the Board did not determine that such evidence was “the only way” for the Company to prove its affirmative defense. The Board simply stated a fact: The Company did not offer any evidence that it had ever issued last chance agreements to employees for violations of less severe Group B rules. Such evidence would have been relevant to its asserted defense that it would have issued Marks Briggs a last chance agreement in 2015 even absent its reliance on the unlawful prior discipline.

Attempting to rebut this evidence, the Company asserts that “none of those comparators ate product directly off the line.” (Br. 29 n.2.) The Board, however, reasonably rejected the assertion that eating off the line was more serious than other instances of eating other food or chewing gum on the line, reasoning that the governing food safety code—relied on by the Company—did not make that distinction. (Add. 6 n.2; A. 651-53.) The Board also found it “counterintuitive” that eating or chewing on the line, which naturally entails employees touching their mouths while working with product, was “less likely to result in product contamination than picking the topping off of apple swirl bread.” (Add. 6 n.2; A. 454, 456, 530, 532, 534.) In any event, when comparing employees as the Board has done here, the “search [is] for a substantially similar employee, not for a clone.” *RELCO*, 734 F.3d at 788.

b. Marks Briggs’ February discharge

Similarly, the Board had ample grounds for finding that the Company failed to meet its burden of proving that it would have discharged Marks Briggs for the washstand incident even if it had not relied on the unlawful 2013 last chance agreement. The Company’s stated reasons (Br. 33-38) for the discharge were harassment and insubordination contrary to a company-wide directive and in violation of rules 5 and 6, and leaving her work area in violation of rules 3 and 22. (Add. 2; A. 436.) Those infractions constitute “Group A” violations which, the

Board acknowledged, “often result in termination” according to the employee handbook. (Add. 2; A. 710.) As the Board found, however, the record showed that in practice “most employees who have engaged in harassment or leaving their work areas have not been discharged for their actions, even under more severe circumstances than were present here.” (Add. 2.)

Specifically, the record reveals 14 instances where the Company determined that an employee violated rule 5 by engaging in harassment/threatening behavior or creating a hostile work environment, and yet issued in each instance only a final written warning or last chance agreement. (*See* SA. 13-35, 38-40, 45-48, 52-54, 58-64, 80-82, 86-89.) Similarly, on 9 occasions the Company determined that an employee had violated rules 3 and/or 22 by leaving their work area or the facility without permission, but it only issued them final written warnings or last chance agreements.⁹ (*See* A. 475-90, SA. 36, 49-51, 55-57, 69-72, 76-79, 83-85.) Finally, despite having determined that five employees were insubordinate in violation of rule 6, the Company only issued them final written warnings or last chance agreements. (*See* A. 491-95, SA. 41-44, 49-51, 65-67, 69-72.) Thus, ample evidence supports the Board’s finding that employees who violated the same rules

⁹ Additional examples include the Company issuing last chance agreements to an employee who violated rules 3 and 6 by telling a coworker she could leave the facility despite lacking the authority to do so (A. 496-500), and to an employee who violated rule 22 by failing to arrive at work for two days (SA. 73-75).

as Marks Briggs routinely received less severe discipline and were not discharged. On this record, the Board reasonably found that it was “unable to conclude that absent the [Company’s] reliance on the prior unlawful discipline, the comparatively minor actions by Marks Briggs would have prompted her discharge instead of some lesser disciplinary measure, such as a first, lawful last chance agreement.” (Add. 2.)

The Company gains no ground by citing (Br. 33-35) 12 examples where employees were discharged for engaging in more serious misconduct than Marks Briggs. *See, e.g., Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998) (to carry burden, employer must show “similar treatment of . . . employees who have acted similarly”); *Miss. Transp., Inc. v. NLRB*, 33 F.3d 972, 980 (8th Cir. 1994) (same). Thus, the Company mistakenly cites 4 instances (A. 458-69) where employees were discharged in part for violating Group A rules 3 and/or 22 (leaving work area)—ignoring the ample evidence supporting the Board’s finding (Add. 6 n.3) that their situations were not comparable to Marks Briggs’ discharge. As the Board reasoned, “[m]ost, if not all, of these employees did not leave their work area briefly when the production line was down, as did Briggs.” (Add. 6 n.3.) Instead, they engaged in more serious misconduct. One employee ignored a supervisor’s direct instruction to report for an assignment and instead proceeded to take a nap in a trailer. (A. 458-60.) Another employee did not like his assignment,

ceased working, and refused several direct orders to return to work. (A. 461-63.)

Moreover, “[s]everal others left the plant completely.” (Add. 6 & n.3; A. 464-69.)

The examples cited by the Company where it discharged employees for insubordination also involve conduct dissimilar to that of Marks Briggs, whose conduct involved disregarding a general anti-harassment directive. Thus, the Company points to employees who, unlike Marks Briggs, refused direct, specific orders to report for or return to work (A. 458-63), and repeatedly refused a supervisor’s direction to perform a task (A. 540). In addition, Marks Briggs’ alleged harassment/creation of a hostile work environment—walking between two coworkers and bumping into one of them—is entirely dissimilar to the instances cited by the Company. In one, a male employee repeatedly displayed videos and photos of nude people to female coworkers. (A. 470-72.) In another, an employee refused to perform a task and repeatedly swore at, and was belligerent towards, a supervisor. (A. 540.) In yet another instance, the employee used profanity and “displayed intimidating behavior” toward a coworker after having been previously disciplined for using profanity and shoving boxes off a conveyor at a coworker. (A. 542-45.) That the Company discharged employees for those egregious offenses does not show it would have taken the same adverse action against Marks Briggs for the washstand incident even absent her prior unlawful discipline.

Finally, as the Company acknowledges (Br. 35-36), in 5 cases it rescinded its initial discharge decisions based on mitigating evidence, deciding instead to issue last chance agreements. (*See* A. 473, 475-500.) Consequently, as to those employees the final, dispositive discipline was—unlike here—not discharge. On this record, it cannot be said that the Board was compelled to find that the Company would have discharged Marks Briggs absent its reliance on the unlawful 2013 last chance agreement.¹⁰

c. The do-not-rehire notation

In its passing defense of the do-not-hire notation on Marks Briggs' termination checklist, the Company argues that it is “undisputed” that Hagood made the notation “consistent with his past practice from his previous employer.” (Br. 38.) As the Board found, “the record contains no other examples of the [Company] making a similar notation on any other termination documents.” (Add. 2; A. 287, 552-62.) Moreover, as the Board emphasized, Hagood admitted to making the notation in part “[b]ecause of her previous violations”—the indisputably unlawful 2013 last chance agreement as well as the 2015 last chance agreement, which in turn was partly predicated on the 2013 discipline. (Add. 2; A.

¹⁰ The Company errs in contending (Br. 27-31) that the Board downplayed the “seriousness” (Br. 28, 30, 31) of Marks Briggs' conduct. The Board accepted as true that she violated several rules but found that employees who engaged in similar conduct received less severe discipline. (*See* Add. 1-2, 6-7.)

393, 438.) Accordingly, the Board reasonably concluded (Add. 2) that the Company “failed to show that it would have taken this [the 2015] action even without reliance on the prior unlawful discipline.”

3. The Company’s remaining challenges are meritless

The Company gains no ground with its remaining arguments. Thus, the Company erroneously asserts (Br. 27, 30, 31, 37-38) that the Board improperly (Br. 37) acted as a “super-personnel” department, “second-guess[ing]” “management discretion” over appropriate discipline. The Company, however, is the party claiming (Br. 26-30, 33-38) that even absent the prior unlawful discipline, it would have taken the same adverse actions against Marks Briggs under its policies and practices. Thus, the Company itself put those policies and practices at issue in this proceeding. *See TLC Lines*, 717 F.2d at 463-64 (employer bears burden of proving its affirmative defense). In doing so, the Company opened them to examination. *Wilking v. Cty. of Ramsey*, 153 F.3d 869 (8th Cir. 1998), cited by the Company (Br. 37), is not to the contrary. In a different statutory context, it simply notes that when an employer raises as an affirmative defense that it would have taken the same adverse action, the court may properly determine whether the proffered defense “truly was the reason for” the action. *Id.* at 873. That is what the Board did here.

There is likewise no merit to the Company's assertion that the Board, in analyzing its affirmative defense, improperly "ignore[d]" Hagood and McNiel's attempts to correct "past potential lax enforcement of policies." (Br. 36.) Even if the Company wanted to correct lax enforcement, that would not prove it would have given Marks Briggs a last chance agreement (as opposed to a first written warning) for eating, and discharged her (instead of issuing a final written warning or valid first last chance agreement) for the encounter with Hawkins, absent its reliance on her prior unlawful discipline.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INSTRUCTING MULDREW NOT TO DISCUSS HER DISCIPLINE WITH OTHER EMPLOYEES AND LATER TELLING HER THAT SHE WAS BEING DISCHARGED IN PART FOR DISCUSSING HER PRIOR DISCIPLINE

A. Absent a Legitimate and Substantial Business Justification, an Employer Cannot Prohibit Employees from Discussing Discipline

Among other rights, Section 7 of the Act guarantees employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. As acknowledged by the Supreme Court, the Board has long "recognized the importance of freedom of communication to the free exercise of organization rights." *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The Board, with judicial approval, thus has read Section 7 to protect employees' right to discuss the terms and conditions of their employment with other

employees. *See, e.g., RELCO*, 734 F.3d at 790-91 (employees engaged in protected concerted activity under Section 7 when discussing rumor about coworker's discharge). *Accord Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007).

An employee's Section 7 right to discuss the terms and conditions of their employment with other employees extends to conversations about workplace discipline and investigations. *Caesar's Palace*, 336 NLRB 271, 272 (2001). Discipline, the Board has observed, is an "undeniably significant term[] of employment." *Westside Cmty Mental Health Ctr., Inc.*, 327 NLRB 661, 666 (1999) (quotation marks omitted). *See also Banner Estrella Med. Ctr. v. NLRB*, 851 F.3d 35, 41-43 (D.C. Cir. 2017) (describing disciplinary action as "quintessential" information Section 7 permits employees to discuss). As the Board has explained, "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). Accordingly, "settled Board precedent" holds that Section 7 of the Act protects the rights of employees "to discuss discipline or disciplinary investigations with fellow employees." *Inova*

Health Sys. v. NLRB, 795 F.3d 68, 85 (D.C. Cir. 2015) (citing cases). *See also Caesar's Palace*, 336 NLRB at 272.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). In accordance with employees’ Section 7 right to discuss discipline and disciplinary investigations, “[a]n employer may prohibit such discussion only when a ‘substantial and legitimate business justification’ outweighs the ‘infringement on employees’ rights.’” *Inova*, 795 F.3d at 85 (quoting *Caesar's Palace*, 336 NLRB at 272). To meet its burden of justifying requests for confidentiality, an employer must show that confidentiality was “necessary based on events peculiar to” the particular investigation. *SNE Enters., Inc.*, 347 NLRB 472, 493 (2006), *enforced*, 257 F. App’x 642 (4th Cir. 2007). Absent such a showing, an employer violates Section 8(a)(1) by prohibiting employees from discussing discipline. *Inova*, 795 F.3d at 85.

B. The Company Unlawfully Told Muldrew Not to Discuss Her Discipline with Other Employees and that She was Being Discharged Partly for Discussing Her Discipline

Substantial evidence supports the Board’s finding (Add. 1, 8) that the Company unlawfully instructed Muldrew not to discuss her discipline with coworkers, and later told her that she was being discharged in part for talking about her prior discipline. Thus, Muldrew’s credited testimony establishes that during a

meeting on January 21, 2016, Human Resources Manager McNiel said he had learned that Muldrew, who had been suspended, was “discussing [her] suspension.” (Add. 8; A. 18.) He squarely told her that she “shouldn’t have been discussing” it and should “[n]ot . . . discuss the disciplinary action with anyone.” (Add. 8; A. 18, 20.) Her credited testimony also shows that in a January 27 meeting, when Muldrew asked why the Company was discharging her, McNiel responded that it was for making threatening comments and “discussing [her] discipline.” (Add. 8; A. 19-21, 42, 57-58.) Muldrew’s testimony is also corroborated by her discharge document, which likewise states that an employee had reported her making threatening comments and “discussing the confidential situation from the previous week.” (Add. 8; A. 584.) As the Board correctly reasoned, “the confidential situation” she “discuss[ed]” had to mean the disciplinary action against her because “there [was not] any other confidential information to which the January 27 discharge document could be referring.” (Add. 8.)

On this record, and given the Company’s complete failure to present a substantial and legitimate business justification for restricting her communications, the Board reasonably found (Add. 8) that the Company violated Section 8(a)(1) of the Act by instructing Muldrew not to discuss her discipline and telling her that was a reason for her discharge. *See, e.g., Inova*, 795 F.3d at 85 (employer

unlawfully “direct[ed] Miller not to discuss her suspension with anyone else”); *Intermet Stevensville*, 350 NLRB 1349, 1355 (2007) (employer unlawfully instructed employee “not to discuss her discipline with anyone”).

C. The Company’s Challenges Are Without Merit

There is no merit to the Company’s (Br. 39-41) credibility-based challenge to the Board’s finding. The Company relies on McNiel’s testimony that he never told Muldrew not to discuss her discipline, and never said she was being discharged for breaching that directive. The administrative law judge, however, reasonably discredited McNiel’s denials (Add. 8), and the Company utterly fails to meet its heavy burden of showing that the judge’s credibility ruling “shock[s] the conscience.” *RELCO*, 734 F.3d at 787. As shown (pp. 33-34), the judge reasonably credited Muldrew’s testimony—that McNiel told her not to discuss her discipline, and that she was being discharged in part for doing so—which was corroborated by the Company’s discharge document.

As for McNiel, the judge appropriately discredited his denial because he had shown himself to be an untrustworthy witness on another matter where his testimony likewise could not be squared with company records. As the judge explained, McNiel was “not a credible witness generally.” (Add. 6.) Thus, he claimed that the Company did not consider Marks Briggs’ 2013 last chance agreement in issuing the 2015 last chance agreement. As the judge found,

however, this testimony was plainly incredible, given the documentary evidence establishing that the Company in fact relied on the unlawful 2013 discipline. (A. 254-55, 431-33.) In any event, where testimony conflicts, it is axiomatic that the Board, as a fact-finder, “is permitted to draw reasonable inferences and may select between conflicting accounts of the evidence.” *S. Bakeries*, 871 F.3d at 820. *Accord Int’l All. of Theatrical Stage Emps., Local Union No. 151 v. NLRB*, 885 F.3d 1123, 1130-31 (8th Cir. 2018).

The Company also does not advance its cause by arguing (Br. 40) that the Board “ignored” purported “corroborating evidence” by three employees that McNiel’s “standard practice” when speaking with employees does not include instructions not to discuss discipline. To begin, none of the three employees were present during the January meetings between McNiel and Muldrew. Thus, their testimony sheds no light on what actually transpired. In any event, unlike Muldrew, two of the employees (Lollis and Phillips) were not the recipients of discipline; thus, there would have been no occasion for McNiel to instruct them not to discuss their discipline (let alone to tell them they were being discharged in part for discussing it). As for the third employee (Marks Briggs), she was not specifically questioned about whether *McNiel* had told her not to discuss discipline, and she plainly had no knowledge about the interactions between him and Muldrew.

The Company's remaining contentions (Br. 41) may be disposed of succinctly. To begin, motive is not required to establish a violation of Section 8(a)(1). *See Advanced Life Sys. Inc. v. NLRB*, 898 F.3d 38, 44-45 (D.C. Cir. 2018); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998). Nor does it matter that the complaint did not also allege Muldrew's discharge was unlawful, as the Board specifically noted. (*See Add. 8 n.10.*) Simply put, whether her discharge was unlawful has no bearing on the substantial evidence establishing that the Company plainly violated Section 8(a)(1) by telling her not to discuss her discipline with coworkers and that she was being discharged in part for breaching that directive.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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October 2018

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

SOUTHERN BAKERIES, LLC)

Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

Nos. 18-2370 & 18-2568

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben

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Dated at Washington, DC
this 24th day of October 2018