UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

SCHUFF STEEL

and

Case 20-CA-204378

DEREK DIXON, an Individual

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the Board), Counsel for the General Counsel files this Brief in Support of its Exceptions to the Decision of Administrative Law Judge Amita Baman Tracy (the Judge) dated September 18, 2018, in the above-captioned matter.

I. INTRODUCTION & BACKGROUND[1]

Following four days of hearing, the Judge issued her decision, erroneously concluding that the General Counsel failed to prove that Schuff Steel (Respondent) discriminatorily laid off journeyman ironworker Derek Dixon (Dixon) because of his protected concerted activity in violation of Section 8(a)(1) of the Act and dismissed the underlying Complaint. ALJD 1 and 16. In doing so, the Judge correctly found that Dixon had engaged in protected concerted activity when he went to his first-line foreman, Charles Kelly (Foreman Kelly), to speak on behalf of an unidentified apprentice on Dixon's gang (the Apprentice) about the "altered working conditions"[2] that Foreman Kelly had just tried to impose on the Apprentice, and when Kelly reacted with hostility, to speak about it to Dixon and Kelly's admitted supervisor, Marcel Rodriguez (Supervisor Rodriguez).

However, the Judge thereafter erroneously concluded that Foreman Kelly's and Supervisor Rodriguez' knowledge of Dixon's protected concerted activity could not be imputed to Respondent, that even assuming that Respondent was aware of Dixon's protected concerted

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[1] Citations to the Judge's decision shall be "ALJD" followed by the page number(s). Citations to the Transcript shall be "Tr." followed by the page number(s). Citations to the Joint Exhibits, the General Counsel's Exhibits, and Respondent's Exhibits shall be "Jt. Ex.," "GC Ex.," and "Resp. Ex.," respectively, followed by the page number(s). Citations to the General Counsel's Brief to the Administrative Law Judge shall be "GC Brief" followed by the page number(s).

[2] The record shows that these "altered working conditions" were Foreman Kelly telling the Apprentice to get off the jobsite. Tr. 69; GC Brief 25 and n.9. As discussed below, the Judge's nebulous phrasing here is the result of one of many erroneous decisions to exclude out-of-court statements, not offered for their truth, but to provide relevant context and explain the subsequent conduct of the listener, in this case the very genesis of Dixon's protected concerted activity, as inadmissible hearsay.

activity, the General Counsel failed to meet its burden to prove that animus toward Dixon's protected concerted activity was a motivating factor in Respondent's decision to lay him off, and that even assuming the General Counsel met its burden of proving discriminatory motive, Respondent proved that it would have "terminated" Dixon even if he had not engaged in protected concerted activities under the guise of break time abuse. ALJD 14-16.

In order to reach those legal conclusions, the Judge relied on a vicious cycle of erroneous factual findings and evidentiary rulings, which led to erroneous credibility resolutions, which in turn led to further erroneous factual findings and legal conclusions. The Judge erroneously found that hearsay reports that Dixon had taken extended breaks and been warned for doing so, purportedly given to General Foreman Swartz by none other than Foreman Kelly, were actually true. The Judge then erroneously relied on that finding to discredit the General Counsel's two witnesses, Dixon and fellow ironworker Mario Marcial (Marcial) and to credit Respondent's only percipient witness, Immediate General Foreman Swartz, on that critical issue. The Judge also erroneously completely discounted the glaring fact that Respondent did not call Supervisor Rodriguez, Foreman Kelly, or Foreman Alex Flores (Foreman Flores), the key players for Respondent in the case, and that Respondent presented no documentary evidence to contradict the testimony of the General Counsel's witnesses or to support the testimony of its own witnesses, leaving the General Counsel's witnesses' testimony regarding their interactions completely uncontradicted, unrebutted, and credible.

Because the Judge's credibility resolutions at issue were not primarily based not on demeanor, but rather on erroneous findings of fact and evidentiary rulings, and because those credibility resolutions are inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, the

Board should deviate from its general policy, review the Judge's credibility resolutions and the resulting findings of fact and legal conclusions that flowed from them de novo, and overrule them. *See Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 635-36 (2011), enfd. 498 Fed. Appx. 45 (D.C. Cir. 2012); *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951).

II. STATEMENT OF THE CASE

A. Respondent's Facebook Project and Organizational Structure

Schuff Steel (Respondent) is a steel fabrication and erection company that builds steel buildings and other structures. Tr. 27-28. Between April and July 2017,[3] Respondent performed work on a major construction project for Facebook (the Facebook Project), employing up to 250 Ironworkers, most of whom it hired through the Ironworkers Union Local 377 hiring hall in San Francisco. Tr. 28; 250-54; 266-69; 284-85; GC Ex. 4. The Facebook Project was massive, extending about a half mile long and a quarter mile wide, and it was divided, or "sequenced," into six work areas labeled A, B, and C, North or South. Tr. 42; 251-52; 311; 316-17; GC Ex. 4. There were no physical barriers between the areas, and ironworkers assigned to one area often worked alongside ironworkers in the bordering area. Tr. 317. There were numerous workers from other trades also working on the project in the same areas as the ironworkers, including plumbers, electricians, laborers, painters, and carpenters, with up to a hundred workers in a given area at a given time. Tr. 46-47.

Respondent grouped its ironworkers into crews called "gangs" based on their specialized skillsets: production welding, detailing, raising/erection, plumb-up, and bolting. Tr. 31-32; 268-70. Area Superintendent Randall Chin was in charge of the entire Facebook Project, as well as

[3] All dates are from calendar year 2017, unless otherwise noted.

several other major projects around Northern California, and was one of Respondent's only two witnesses called at the hearing. Tr. 250; 262. Chin testified about the scope of the Facebook Project, but acknowledged that he knew nothing about Dixon or the circumstances surrounding his layoff, rendering his testimony of little value to the case. Tr. 263-64.

Superintendent Chin's team included Superintendent Lyle Arnold, who was responsible for the entire project and oversaw "Immediate" General Foremen G.W. Swartz (General Foreman Swartz) and Matt Erickson, each of whom was in charge of hiring, firing, layoffs, and overseeing the day-to-day operations of the gangs for whom they were responsible, with Erickson generally focused on the gangs in Area A and Swartz generally focused on the gangs in Areas B and C. Tr. 252-53; 271-74; 280; 284-85; 323. These two "immediate" general foremen, in turn, oversaw different groups of "scope-specific" general foremen, who were responsible for a particular scope of ironwork on the project, including James Server (safety and bolting), John Alvarez (steel erection), Miguel Rodriguez (plumb and align), Marcel Rodriguez)(welding)(the aforementioned Supervisor Rodriguez), and Jack Hunter (plumb/align). Tr. 253; 274-76. These "scope specific" foremen in turn oversaw the regular foremen who worked directly with the gangs. *Id.* Alleged discriminatee Dixon and fellow journeyman Mario Marcial (Marcial), both production welders, were directly overseen by regular welding foreman Charles Kelly (the aforementioned Foreman Kelly), and above Foreman Kelly, by scope-specific welding general foreman, Supervisor Rodriguez. Tr. 28-30; 39; 68; 175-76; 180; 182; 184; 188.

"Immediate" General Foreman Swartz was the other witness called by Respondent. During the hearing, Swartz testified that he was the one who decided to lay off Dixon off. Tr. 339-40. Swartz admitted during cross-examination that he had never actually met or interacted with Dixon prior to the hearing, which was not surprising given Supervisor Rodriguez, Foreman

Kelly, and Dixon welding gang did not report to Swartz.[4] Tr. 28-30; 39; 93; 313-315; 339-40. A common theme throughout these exceptions is Respondent's failure to call Rodriguez or Kelly to testify.

Swartz' main responsibilities were handling logistics, ordering equipment, dealing with the other trades, and providing general oversight for each of the Scope-specific general foremen who reported to him. Tr. 282-83; 301; 313-16. He spent half of his workday in his office trailer, and the rest making at least four laps around the massive project, typically on foot, checking with the foremen[5] about the workers' hours for payroll purposes. Tr. 311-32. He designated daily work assignments to the foremen, who then designated the work to the ironworkers on their respective gangs. Tr. 283. Swartz and the other Immediate General Foreman, Matt Erickson, were responsible for layoffs on the project. Tr. 284-85. Respondent did not call Erickson to testify.

Alleged discriminatee Dixon, one of the General Counsel's two witnesses in the case, has been a journeyman ironworker since 1998. Tr. 25-28; 134. Dixon had worked various projects for Respondent in the past, and learned about the Facebook Project from fellow ironworkers, one of whom put him in touch with Supervisor Rodriguez, who eventually called Dixon to come up for dispatch to the project through the hiring hall. Tr. 28-30; 101; 134; 254; 258. Respondent officially hired Dixon onto the project and assigned him to work as a production welder on Foreman Kelly's gang on May 23. Tr. 28-30; 93; Resp. Ex. 6. Foreman Kelly gave his gang

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[4] The Scope-specific general foremen that reported to Swartz included Erick Kinsel (raising gang), Miguel Rodriguez (form-up), Mike Latherg (bolt-up), Ray Montano (safety), and Alex Flores (bolt-up). Tr. 313-15. For Area B were Alex Reyes/Jimmy Chan (welding), Chip Erickson (bolt-up), Ray Montano (safety), Alex Flores (bolt-up), Unidentified (plumb-up), Dave Meddis (erection), and Dave Keller (raising). Tr. 313-15. Swartz testified that Foreman Kelly started as a regular production welder in Area A, then transferred to be a regular foreman in Area C, but provided no further detail. 314-15.

[5] Presumably the Scope-specific general foremen, but the record is frequently unclear as to whether Swartz is referring to "Scope-specific" foremen or to regular foremen.

their daily work assignments at morning meetings and otherwise provided general support to the welders on his gang. Tr. 36-38. As noted, Kelly reported to Supervisor Rodriguez, who Dixon saw frequently at the morning meetings giving Kelly instructions for his gang. Tr. 39. There were about twelve welders in Dixon's gang, including three apprentices. Tr. 33-34. Dixon worked various locations on the project, sometimes forty feet high in an aerial boom, sometimes at ground level, and sometimes underneath the structure. Tr. 45-46; 52-54.

The General Counsel's other witness, journeyman welder Mario Marcial (Marcial), had also worked for Respondent in the past, and was dispatched to and started work on the Facebook Project around the first week of June, and continued to work there until around the end of July when he was laid off due to lack of work. Tr. 176-80. Like Dixon, Marcial worked as a production welder on the project, but on front-line welding foreman Alex Flores' (Foreman Flores) gang who, like Foreman Kelly, reported to Supervisor Rodriguez. Tr. 168; 175-76; 180; 182; 184; 188.

B. Dixon Engages in Protected Concerted Activity by Standing Up for an Apprentice

After the morning meeting on the Saturday before June 12, the day he was laid off, Dixon was walking to the restroom when he noticed an apprentice from his gang (the Apprentice) exiting the project through the nearby gate, tools in hand. Tr. 64: 69. Dixon recognized the Apprentice from his gang meetings but did not know his name. Tr. 64; 69. Dixon approached the Apprentice and asked him where he was going, since the workday had just started. Tr. 64, 68-69. The Apprentice responded that Foreman Kelly told him to go home and that he did not need him on the jobsite. Tr. 69.[6] Dixon told him to hold on and not go anywhere so that Dixon

[6] As discussed below, this is an example of an out-of-court statement that falls outside the definition of hearsay, as counsel for the General Counsel offered it not for its truth, but to provide context, show notice or knowledge, or explain the listener's subsequent conduct.

could go find Foreman Kelly and talk to him about keeping him on the project. Tr. 69. Kelly happened to be walking nearby, and Dixon approached him, asking "hey Chuck, what's going on with the Apprentice?" Tr. 69; 75. Kelly responded, "he's not worth a shit, he can't do this, he can't do that." Tr. 69-75.[7] Dixon responded that if he can't do anything, then it's our job as journeymen to teach him, not just throw him away; we can send him to another gang if you are not happy with him. Tr. 75. Kelly replied, "if you don't like it, you can go too." Tr. 75.[8] Dixon said he was not going anywhere, but would talk to Supervisor Rodriguez about putting the Apprentice in another gang instead of laying him off. Tr. 75.

For the next few minutes, Dixon talked about the incident with fellow welder Robert Wright,[9] who was standing nearby, when he saw Supervisor Rodriguez cruising by in his golf cart. Tr. 76-77; 143-44. Dixon stopped Rodriguez and said, "Hey, Marcel, Chuck [Kelly] is trying to get rid of this . . . apprentice in our gang." Tr. 78. Dixon explained that Kelly had just told the Apprentice to go home and said he wasn't worth a shit. Tr. 78. Dixon mentioned that on other jobs where an apprentice was not doing well, they would put him on a different gang, not get rid of him, and asked Rodriguez what he thought about moving the Apprentice to a different gang. Tr. 78. Rodriguez said, "Yeah, I know the Apprentice, I'll handle it." Tr. 78. Rodriguez then took off in the cart towards Kelly and appeared to yell at him, but out of Dixon's earshot. Tr. 78-79. Dixon did not speak with the Apprentice after that, but heard that the Apprentice was still working for Respondent on a different gang. Tr. 80; 97.[10]

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[7] *See* n. 5, *supra.*

[8] *See* n. 5, *supra.*

[9] The General Counsel subpoenaed Wright to testify, but he did not appear. Tr. 242.

[10] *See* n. 5, *supra.*

C. Supervisor Rodriguez Rants about Dixon's Protected Concerted Activity

Marcial first met Supervisor Rodriguez on his first day on the Facebook Project during the first week of June, and they discussed how Marcial came onto the project and whether Marcial would be working for Rodriguez or another gang. Tr. 182-84, 194. Marcial did end up working under Rodriguez on Foreman Flores' gang, and would see Rodriguez driving around the jobsite in a golf cart. Tr. 182-84; 194, 210. Within about a week of meeting Rodriguez, around the Friday before Dixon's layoff, Marcial had a memorable encounter with Rodriguez as he and a fellow welder, known only as Eddie, were working on the ground level welding washers onto the base plates of some columns. Tr. 289-304; 324-25; 328.

As Marcial and Eddie were waiting for an apprentice to bring them materials, Supervisor Rodriguez approached on foot from the south, alone and visibly upset. Tr. 188-89; 191-92; 198-99; 206; 210-11. Out of the blue, Rodriguez began to rant about the incident with Dixon, Kelly, and the Apprentice, giving Marcial the impression that the incident occurred earlier that day, although Rodriguez did not specify when it had occurred. Tr. 192-96; 210. Rodriguez said that they wanted to get rid of an apprentice because Foreman Kelly thought he was no good, but Dixon had complained that it was not right, and had asserted that the Apprentice was being mistreated because he is black (as is Dixon). Tr. 192-96. Rodriguez said, what does Dixon care about an apprentice, he should mind his own business and do some work. Tr. 194-95. He said that the foreman is not racist at all, that they just moved the Apprentice to a different part of the jobsite, and that he was not going to have this bullshit on the jobsite. Tr. 192-93; 195-96. Rodriguez added that he had heard that Dixon sued people left and right over racial issues and was always pulling the race card. Tr. 192-93. Rodriguez said that the foreman was scared to even talk to Dixon about taking extended breaks because he would make it a racial issue. Tr.

193-94; 211. Rodriguez added that he had told the foreman to document Dixon's breaks to see how long he was taking, and that was how they were going to lay off Dixon. Tr. 193-94; 211. Neither Marcial nor Eddie said anything in response to Rodriguez. Tr. 194.

Rodriguez then looked in the direction of Eddie's hardhat, which had an Ironworkers Local 433 sticker on it (Dixon's home local), and as suddenly as he had appeared, he abruptly shut up and walked away. Tr. 194-95; *see also* Tr. 28-30; 101; 134; 254; 258. Marcial asked Eddie if he knew Rodriguez, and he said, no, adding that that was kind of random! Tr. 196-98.[11] Marcial testified that before this outburst, he had only spoken with Rodriguez on the day he was hired around a week earlier. Tr. 194.

The next Monday, Marcial's father, who was also a production welder on the project and a friend of Dixon's, told him that Dixon had just been laid off. Tr. 176-77; 199. While Marcial and Dixon's father were friends, Marcial and Dixon were merely casual acquaintances through him, and had socialized outside of work only once before the time of the hearing. Tr. 165-69. Marcial then told his father about Rodriguez' rant about Dixon on the previous Friday, and said that he had planned on giving Dixon a "head's up" that Rodriguez said they were going to get rid of him for taking extended breaks, but did not get around to it. Tr. 199-200. Marcial believed that he told Dixon about it the next day. Tr. 200.[12] At the next Tuesday meeting, one of the superintendents (Marcial was not sure of his name) said that everyone needed to watch their breaks as they had just off two laid two guys on Monday for taking extended breaks. Tr. 200-01. Marcial testified that he had not heard any mention of extended breaks on the Facebook Project prior to Rodriguez' rant. Tr. 201-02.

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[11] *See* n. 5, *supra*. The witness described Eddie's response before the Judge sustained Respondent's counsel's objection, so the General Counsel asked to use it as an offer of proof. Tr. 196-98.

[12] As discussed in the credibility section, Dixon had a different recollection about when he learned about the rant.

D. Supervisor Rodriguez Lays Off Dixon

Around 3 p.m. on Monday, June 12, Supervisor Rodriguez waved Dixon down from the aerial lift in which he was working and said he was laying him off. Tr. 81-82. Welder Robert Wright had been working alongside Dixon, and Rodriguez told him that he was also being laid off. Tr. 82. Dixon asked why, what's going on? Tr. 82. Rodriguez responded that it was out of his hands and had something to do with taking extended breaks. Tr. 82. Dixon protested that he had never taken any long breaks, and didn't understand where this was coming from. Tr. 82. Rodriguez said that they were cracking down, and that Robert [Wright] is getting laid off for the same thing, as are four other guys from another section of the building. Tr. 82; 144. As Dixon was collecting his tools, he saw Foreman Kelly and said, "Hey man, do you know anything about this, what's going on?" Tr. 83-84. Kelly replied that he did not, but he heard somebody took a picture of Dixon taking a long break. Tr. 83-84; 97.[13] Dixon said that it was not true, shook Kelly's hand, thanked him for the work, and left the jobsite. Tr. 84-85.

Dixon testified emphatically that he did not take extended breaks while on the project. Tr. 85-86. Nor was he ever warned, counseled, or told anything about allegedly taking extended breaks. Tr. 86-87. He regularly saw Foreman Kelly and Supervisor Rodriguez while he was on break. Tr. 87. Notably, he never noticed General Foreman Swartz during his breaks. Tr. 87.

E. Respondent's Purported Break Policy

There were no written rules regarding break times on the Facebook Project. Tr. 317-19. The governing collective-bargaining agreement provides for a ten-minute break for every four hours worked, and a thirty minute meal break, but Respondent's practice on the project was to allow a ten-to-twenty minute break around 10:00 a.m., a thirty minute lunch around noon, and a

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[13] *See* n. 5, *supra*. Respondent produced no such photographs during the hearing.

ten minute break around 3:00 p.m., the latter of which is to be taken at the point of work. Tr. 54-55; 98-100; 148-50; 186 (Marcial's morning breaks were twenty minutes); 306; 317-20; Resp. Ex. 10 at 22-24. According to General Foreman Swartz, the regular foremen had discretion in starting and stopping breaks. Tr. 320. Each gang typically took their breaks at the same time, often close to their work area, or they could visit the lunch truck during the morning and lunch break. Tr. 54; 150; 186. If a welder was working on the ground level, or in an aerial lift at the time of the 3 p.m. break, they would take their afternoon break on the ground. Tr. 98-100.

Dixon typically took his break within ten-fifteen feet of where he was working, unless he was in an aerial lift, in which case he would come down from the lift to take his break. Tr. 58-59. On Dixon's gang, either Foreman Kelly or an apprentice would typically signal the start and end of breaks by turning the generators powering the welding equipment off and back on. Tr. 55. On Marcial's gang, an apprentice or Foreman Kelly would announce the beginning and end of breaks. Tr. 186-87. On occasion, such as when nobody turned off the welding generators, welders would be engrossed in their work and, not realize that a break had started, would work through the start of the break. Tr. 56-58; Tr. 202-04. That happened to Dixon on a couple of occasions, and when it did, he informed Foreman Kelly, either directly or through an apprentice, that he had worked through a break and was taking it late, as permitted by Respondent. Tr. 56-58. Similarly, Marcial worked through his break at least once a week, usually realizing it after somebody yelled, "hey, are you a rat?" or, "it's break time," and he would take his full break late. Tr. 203-04. Marcial did not make it a point to tell the foreman after missing the start of a break, though it was usually Foreman Flores who yelled at him for doing so. Tr. 203-04.

The only evidence that extended breaks were an issue on the project before Dixon's layoff came from General Foreman Swartz, who provided self-serving and certainly exaggerated testimony that since starting the Facebook Project in March, he personally reminded the 150-plus workers and foremen under his supervision what the break times were "pretty much" every day during morning meetings. Tr.321-24. Swartz acknowledged that, despite these near-daily reminders, long breaks and "lollygagging around" was fairly common. Tr. 285; 324. It is worth noting that there is no evidence that Dixon or Marcial attended the morning meetings with Swartz. Neither Dixon nor Marcial had any recollection of the foremen, general foremen, or anyone else mentioning any problems with breaks on the Facebook Project, let alone extended breaks, at least prior to his layoff for Dixon, and prior to Rodriguez' rant for Marcial. Tr. 86-87; 201-02. Thus, the only evidence that extended breaks were an issue was Swartz' conclusory testimony that long breaks and "lollygagging" were common among the ironworkers on the Facebook Project. Tr. 285; 324.

During direct examination, General Foreman Swartz gave a general summary of each of the other ironworkers he recalled laying off for taking extended breaks, which totaled six, not including Dixon and Wright, and introduced each of their Separation Notices, none of which listed any reason for the layoff. Tr. 289-304; 324-25; 328; Resp. Exs. 11-17. His practice in each case was to first either talk to the offender himself or to tell the offender's foreman to talk to the offender, then to issue a varying number of informal warnings or transfer them to another gang, and finally, to lay them if that did not correct their behavior. Tr. 289-304; 324-25; 328.

During cross-examination, General Foreman Swartz elaborated on how he handled each of these extended break-takers. He caught John Hernandez taking a break two days in a row and confronted him both times, the first time giving him a warning and the second time telling him

he had just given him a warning so now he was going to lay him off (no prior reports from foremen). Tr. 329-30. He testified that General Foremen Flores and John Alvarez reported talking to Romprey about taking extended breaks, once two weeks after his hire, then a week later, and possibly a third time, before Swartz himself noticed Romprey was not working, saw him walking lackadaisically while talking on his phone, and told foreman Alvarez to let him know the next time it happened. Tr. 331-33. The next day, Alvarez told Swartz Romprey was doing the same thing, so Swartz decided to lay him off. Tr. 333. Swartz himself observed Denning coming back from the parking lot ten minutes late, confronted him about it, and told General Foreman Alvarez to keep an eye on him. Tr. 333-34. Within a day or two, Alvarez reported that Denning was doing the same thing, so Swartz decided to lay him off. Tr. 334-35.

Swartz testified that Foreman Flores reported that he had spoken to Jesse Hernandez about taking extended breaks, and two days later told Swartz he was doing it again, so Swartz moved him to Foreman Alvarez' trucking gang. Tr. 336-37. After Alvarez reported warning Hernandez again for taking extended breaks, Swartz decided to lay him off, although Swartz did not personally observe Hernandez taking extended breaks. Tr. 337-38. Swartz himself observed McKenna and Peters sitting around between break times, told them to "get their asses up," and told their foreman, Eric Kinsel, to keep an eye on them. Tr. 338-39. After Kinsel reported two more times that they were still taking extended breaks and slowing down the erection gang, Swartz confronted them again and told them that if they did not want to abide by the rules, they were not going to stay on the project. Tr. 339. When they responded by throwing "hissy fits," he laid them off. Tr. 339. Swartz recalled no other layoffs for taking extended breaks on the project. Thus, apart from these six instances and Dixon's and Wright's lay-off, there is no specific evidence that extended breaks were a problem or the cause of lay-offs on the project.

F. General Foreman Swartz Explains the Purported Reasons for Dixon's Layoff

During direct examination, Swartz testified that he made the decision to lay off Dixon about June 12, after purportedly receiving reports from Foreman Kelly and Foreman Flores about Dixon taking extended breaks and then purportedly catching Dixon in the act once himself. Tr. 299-304. More specifically, Swartz testified that on one occasion, Flores told him that he saw Mssrs. Dixon and Wright *during* their 3:00 p.m. afternoon break on some "bolt kegs" in Area C, and that it was inappropriate for welders to be taking their break in the bolt-up area, without elaboration. Tr. 305. It is worth noting that this supposed incident occurred *during* their afternoon break, not an extended break, and that Dixon also worked in Area C. Tr. 289; 299;305. He further testified generally that Foreman Kelly told him he would notice Dixon "kind of wandering around, being unresponsive whenever he came and talked to him." Tr. 305. Thereafter, he claimed he personally observed Dixon, alone, between the lunch and afternoon break near the rest area for Area B, taking what he believed was an extended break. Tr. 302. During this direct examination, Swartz did not provide foundational dates or further detail about these purported reports or the circumstances surrounding them, or about his single personal observation of Dixon taking what he believed to be an extended break. Tr. 301-09.

During cross-examination, Swartz was pressed for more detail. He confirmed that he never actually met or interacted with Dixon on the lone occasion he claimed he was taking an extended break, or at any other point prior to the start of the hearing. Tr. 339-40. He claimed he only became aware of Dixon's existence on the project the week before he laid Dixon off, when Foreman Kelly came to Swartz' office and said he saw Dixon and Wright on the ground taking a long afternoon break, so he yelled at them to get off break, but they "kind of blew him off," but Kelly did not provide any further detail. Tr. 340-42. Swartz claimed that a few days later,

Foreman Flores stopped him while he was making his rounds, and said that Dixon and Wright were sitting on his "bolt pile" *during* the afternoon break, and that when he told them to leave, they said they would leave when they wanted to. Tr. 342-43. Swartz claimed that he received another report the day before he decided to lay off Dixon and Wright, again from Foreman Kelly, who purportedly stopped Swartz during his rounds and told Swartz that Dixon and Wright were still taking long breaks, but Swartz neither received nor sought further detail. Tr. 343-44. Later, Swartz claimed that Kelly actually made the second report on the same day that he laid off Dixon. Tr. 347. He asserted that he personally saw Dixon taking what he believed to be an extended break when he observed him standing near the restrooms in the break area amongst workers from other trades about an hour before the afternoon break on the day before he laid him off. Tr. 344-45; 348-49. He admitted that the workers were free to use the restroom whenever they needed, even if not during a designated break time, and acknowledged that he did not approach Dixon or speak to him at all about what he was doing there. Tr. 346.

Swartz asserted that the only reason he laid off Dixon was the purported extended break issue, and it had nothing to do with any reduction in force. Tr. 347. Swartz testified that he chose to lay Dixon off, rather than disciplining or discharging him, based on a "looking out for a brother-type of thing," so that Dixon could go on to another job, another project, or collect unemployment. Tr. 306. In response to leading questions from Respondent's counsel, Swartz asserted that at no point did he have any discussions with Supervisor Rodriguez about Dixon at all, let alone about his alleged break time abuse or the decision to lay him off. Tr. 307. He also conveniently denied ever hearing any complaints from Dixon or anyone else about an apprentice's removal from the project until a week before the hearing. Tr. 300-01; 307-08.

Again, Rodriguez was Dixon's supervisor, but was not under Swartz' supervision, and Swartz offered no explanation for not involving Rodriguez in Dixon's layoff. Tr. 282-83; 301; 313-16.

III. EXCEPTIONS TO THE JUDGE'S FACTUAL FINDINGS [EXCEPTION NOS. 1-9]

The Judge made a number of erroneous factual findings that helped feed a loop of erroneous credibility resolutions and legal conclusions.

A. Supervisor Rodriguez Was Dixon's Supervisor, Not General Foreman Swartz

The Judge erroneously identified General Foreman Swartz as Dixon's and co-worker Robert Wright's supervisor. ALJD 3:17; 6:12 and n.20. As noted above, both Dixon and Wright reported to Foreman Kelly and Supervisor Rodriguez, neither of whom were under Swartz' supervision. Tr. 282-83; 301; 313-16. Mistakenly identifying the lines of supervision and failing to question why Rodriguez was not involved in the decision to lay off one of his subordinates contributed to the Judge's erroneous credibility resolutions and legal conclusions.

B. Foreman Flores' Hearsay Report Was Not About Extended Breaks

The Judge erroneously found that Foreman Flores reported to General Foreman Swartz that he had seen Dixon and Wright taking a break in his area during a "non-break period." ALJD 7:14. Rather, Flores' purported report about Dixon pertained to him being in Flores' work area *during* the afternoon break, and had nothing to do with him taking an extended break, which Swartz confirmed was the only reason for Dixon's layoff. Tr. 305; 342-43; 347.

C. General Foreman Swartz Did Not Observe Dixon Taking an Extended Break

The Judge erroneously found that General Foreman Swartz specifically sought to observe, and did himself in fact observe, Dixon taking an extended break after receiving the purported reports from Foremen Kelly and Flores. ALJD 7:16-17; 15:43-44. While he may have *sought* to observe Dixon taking an extended break, the only thing Swartz could testify to

was that he observed Dixon away from his work area during working time, which he admitted during cross-examination was next to the restroom. Tr. 342-49. Swartz' failure to confront Dixon to confirm whether he was, in fact, taking an extended break, or to observe him for a sufficient length of time to reasonably conclude that he was taking an extended break, makes it impossible to reach the conclusion that Dixon was taking an extended break. For all Swartz knew, Dixon could have been using the restroom, as workers were permitted to do throughout the working day, or it could have been one of those situations where Dixon had accidentally worked through a break and took it later, also a permitted practice on the jobsite.

D. There Were Six Other Purported Layoffs for Taking Extended Breaks in June, Not Twenty

The Judge erroneously found that Respondent laid off approximately twenty workers for taking extended breaks in June 2017 alone. ALJD 3:6; 6-19-7:4 and n. 22; 15:13-15. The Judge also erroneously found that there was unspecified documentary evidence corroborated General Foreman Swartz' testimony about such layoffs. ALJD 8:23-25. In fact, the only evidence of any layoffs for taking extended breaks at all came from the recollection of General Foreman Swartz, as the layoff notices themselves give no reason for the layoff. Resp. Exs. 11-17.

General Foreman Swartz did estimate that there were about twenty-something layoffs on the Facebook *in total* during the month of June, as opposed to layoffs specifically for taking extended breaks. Tr. 287. As far as layoffs *specifically for taking extended breaks*, Swartz could only recall a grand total of seven, other than Dixon's, throughout the length of the entire Facebook Project, six of which occurred in June and one of which occurred in May. Tr. 289-304; 324-25; 328-30. Respondent provided absolutely no other examples of layoffs for taking extended breaks or corroboration for Swartz' testimony. In sum, of the 250 Ironworkers on the Facebook Project between April and July 2017, there is evidence of a grand total of seven

layoffs (other than Dixon) issued to employees for taking extended breaks. While six of them purportedly occurred in June, six is a far cry from the Judge's figure of twenty.

E. The "Warnings" Purportedly Issued by Foreman Kelly Are either Disciplinary or They Are Not

On the one hand, the Judge found that the purported warnings Foreman Kelly supposedly issued to Dixon for taking extended breaks (as discussed below, the only evidence that these warnings were actually issued are based on hearsay that is inadmissible for its truth) were not disciplinary in nature, but "akin to reminders," a finding on which she relied to conclude that Kelly was not a statutory supervisor or agent. ALJD 7, 9, 11, and 15. On the other hand, the Judge incongruently found that Kelly had warned for taking extended breaks, crediting General Foreman Swartz' hearsay testimony over Dixon's denials, and that Swartz relied on reported warnings from Foreman Kelly and other foremen who Respondent asserts are not themselves supervisors, to issue layoffs, even when he did not independently investigate or observe the misconduct himself. ALJD 9:16; 14:32-15:33.

Of course, warnings or counseling that affect an employee's job status or may lay the foundation for future discipline constitute a form of discipline. *Oak Park Nursing Care Ctr.*, 351 NLRB 27, 29 (2007). If the Judge was correct that Foreman Kelly did issue the warnings and that Swartz could rely on warnings from front-line foremen to lay off employees without independent investigation, as he appears to have done with Dixon and admitted doing when he purportedly laid off Jesse Hernandez for taking extended breaks without independently investigating reports he received from front-line foremen Flores and Alvarez, and as the Judge noted he had also done with respect to Wright,[14] then those warnings alone can lead to discipline and establish that the front-line foremen, like Kelly, had supervisory authority. *Oak Park*

[14] ALJD 15:32-33.

Nursing Care Ctr., 351 NLRB at 29. As discussed elsewhere, the evidence fails to show that Foreman Kelly's purported warnings to Dixon actually occurred, and the General Counsel's case does not depend on finding Kelly to be a statutory supervisor. However, assuming they did occur and Swartz relied on him, then Kelly is a statutory supervisor, and his supervisory status can then be used to show Respondent's knowledge of Dixon's protected concerted activities, as discussed below. Regardless, these confused and conflicting findings impacted the Judge's decision to discredit Dixon and the assessment of Foreman Kelly's supervisory status.

F. Supervisor Rodriguez Had Spoken with Marcial Prior to Ranting about Dixon's Protected Concerted Activity

The Judge mistakenly found that Supervisor Rodriguez had never spoken to Marcial prior to Rodriguez' rant, and used that finding to support her conclusion that Marcial's uncontradicted testimony "defies belief." ALJD 9:22-25. In doing so, the Judge overlooked her own correct recitation of Marcial's uncontradicted testimony that he had met and spoken with Supervisor Rodriguez on his first day on the Facebook Project, which was around a week earlier. ALJD 5:21 n. 17; Tr. 182-84, 194. There is no doubt that Rodriguez' rant was odd, but the facts that Rodriguez was Marcial's supervisor and that the two had just met around the week before when Marcial started work makes it less far less odd and removes one of the bases the Judge relied on to discredit Marcial, as addressed later in this brief.

IV. EXCEPTIONS TO THE JUDGE'S EVIDENTIARY RULINGS [EXCEPTION NOS. 10-20]

The Judge made a number of erroneous evidentiary rulings, particularly regarding the application of the hearsay rule. The Judge also erroneously declined to make adverse inferences against Respondent over its failure to call even one single witness with first-hand knowledge to contradict the testimony of the General Counsel's two witnesses or corroborate the testimony of

Respondent's only percipient witness. These errors further contributed to the loop of erroneous credibility resolutions, factual findings, and legal conclusions.

A. The Judge Misapplied the Hearsay Rule

Unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." 29 U.S.C. § 160(b); National Labor Relations Board's Rules and Regulations ("Board Rules"), 29 C.F.R. § 102.39. The Federal Rules of Evidence ("Federal Rules") define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and generally exclude the admission of hearsay, absent certain exclusions and exceptions. *See* FED. R. EVID. 801-03. The Federal Rules specifically exclude from the definition of hearsay certain prior statements made by a witness and admissions made by a party-opponent or its agents, and provide for twenty-three exceptions for certain out-of-court statements, such as business records, statements that show the then-existing state of mind of the speaker (such as intent, plan, or motive), and other inherently reliable out-of-court statements, which make such out-of-court statements admissible for their truth. *See* FED. R. EVID. 801(d)(1) and (2) and 803(1)-(23).

Additionally, as indicated by the language of the rules and the evidentiary rulings of the Board and courts, out-of-court statements that would otherwise appear to be hearsay fall outside of the definition of the hearsay rule and are admissible if they are offered for a purpose other than their truth. *See, e.g., Wells Aluminum Corp.*, 319 NLRB 798, 814 at n. 46 (1995), revd. on other grounds by 113 F.3d 1236 (6th Cir. 1997)("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted and the statement is not hearsay"). As succinctly put by the Court of Appeals for the Seventh Circuit, out-of-court statements are commonly admitted for the purpose of showing their effect on the listener:

> A witness's statement is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the *witness* was thinking[] at the time or what motivated him to do something. In those circumstances, the out-of-court statement is not being offered as evidence that its contents are true. *Talmage v. Harris,* 486 F.3d 968, 975 (7th Cir. 2007) ("The key issue is ... the effect of the [out-of-court statement] on [the party's] state of mind. The truth or falsity of the [statement] is irrelevant to the latter question, and thus [it] did not fall within the definition of hearsay."); *United States v. Hanson,* 994 F.2d 403, 406 (7th Cir.1993) ("An out of court statement that is offered to show its effect on the hearer's state of mind is not hearsay.")

United States v. Leonard-Allen, 739 F.3d 948, 954 (7th Cir. 2013), as amended on denial of reh'g and reh'g en banc (Aug. 29, 2013). *See also Salem Hospital Corp.*, 363 NLRB No. 56, slip op. at 1 n.1 (2015)(reports to union organizer about employer's plans to close certain units were not hearsay because they were offered to show the effect on the hearer, not to prove the truth of the matter asserted).

Other examples of admissible non-hearsay uses of out-of-court statements offered by the General Counsel here include to establish notice and knowledge, and to provide clarification and context for related statements or conduct. *See Wisconsin Steel Indus., Inc.,* 318 NLRB 212, 214 and n. 41 (1995)(statements were not hearsay because they were relied on to establish knowledge); *United States v. Collicott*, 92 F.3d 973, 981 n. 7 (9th Cir.1996)(out-of-court statements are admissible to provide clarification and context for other statements and not for the truth of the matter asserted); *United States v. Whitman*, 771 F.2d 1348, 1352 (9th Cir.1985) (no error where informant's recorded statements were only offered 'to show that they were made,' and to put the statements in context, rather than for their truth). Out-of-court statements may also be admitted as "verbal acts" with independent legal significance, such as the exercise of supervisory authority. *See Carpenters Local 257 (Dat Const.)*, 290 NLRB 538, 539 n. 2 (1988)(telling an employee to "go to work Monday with your tools" is not hearsay, but admissible as the verbal act of offering someone a job), citing *Creaghe v. Iowa Home Mutual Casualty Co.*, 323 F.2d 981, 985 (10th Cir. 1963); *General Tire of Miami Beach v. NLRB*, 332

F.2d 58, 60 (5th Cir. 1964) ("The verbal act, as any other act, may be proved by one who heard it, saw it, or felt it").

1. The Judge Relied on Hearsay to Find That Dixon Took Extended Breaks and Was Warned About It

The Judge erroneously relied upon the out-of-court statements that General Foreman Swartz testified he had received from Foremen Kelly and Flores about Dixon taking excessive breaks and being warned for doing so for their truth, specifically that Dixon had taken extended breaks and had been warned by Kelly and Flores for doing so.[15] ALJD 7:8-20 and n. 24. The Judge further erroneously relied on an out-of-court statement that Marcial deleted from his affidavit about Supervisor Rodriguez stating in his rant that Dixon had been warned for taking breaks as further evidence that Dixon had been warned for taking breaks. ALJD 9:27-31.

Respondent could have called Kelly, Flores, and Rodriguez to testify, subject to cross-examination, about their purported interactions (or lack thereof) with General Foreman Swartz, but did not. Moreover, Respondent offered no corroborative evidence for Swartz' testimony about these reports. Nevertheless, the Judge found these out-of-court statements to be true, and explicitly relied on them, and them alone, to credit Swartz' testimony and to discredit Dixon's otherwise uncontradicted testimony on the critical issue of whether Dixon had taken extended breaks and been warned for doing so. The Judge's reliance on these out-of-court statements for their truth was serious error that goes to the very heart of the case and must be corrected.

2. The Judge Excluded Out of Court Statements Offered to Provide Relevant Context and to Explain the Listener's Subsequent Conduct

[15] The Judge could have credited Swartz that the reports were made and considered them to provide context and explanation for Swartz' subsequent conduct and assess witness credibility, but did not. *See, e.g.*, *United States v. Leonard-Allen*, 739 F.3d at 954.

The Judge erroneously excluded from evidence Dixon's testimony about the Apprentice's report that Foreman Kelly told him to get off the jobsite and about Kelly's response to Dixon that he did not know why he was being laid off, but had heard someone had taken a picture of him taking an extended break. ALJD 4:30 and n. 12-13; 5:4-5 and n. 14; 6:15 and n.21. While these were indeed out-of-court statements, neither were offered for their truth, but rather to provide relevant context and explain subsequent behavior, a perfectly legitimate and quite helpful use of such statements.

Ultimately, the Judge did correctly found that Dixon had engaged in protected concerted activity based on Dixon's assumption that the Apprentice was leaving the worksite after being asked to do so by Foreman Kelly, which prompted Dixon to speak on behalf of the Apprentice to Foreman Kelly and then to Supervisor Rodriguez about Kelly's actions. ALJD 4 and nn. 12 and 13; ALJD 5 and n. 14; ALJD 13. Had the Judge properly admitted the Apprentice's and Kelly's comments to Dixon for those purposes, it would have provided useful context and made it much easier to understand what initiated Dixon's protected concerted activity, why he went to Kelly to in the first place, and why he went to Rodriguez after Kelly proved to be hostile. Kelly telling the Apprentice to get off the jobsite was also a verbal act indicative of supervisory authority.

Foreman Kelly's response to Dixon that he did not know why he was being laid off, but heard someone had taken a picture of him taking an extended break (again, no such pictures materialized), and his failure to bring up the warnings he himself purportedly issued Dixon the prior week after Dixon said he had never taken an extended break should have been admitted for context and to assess Kelly's state of mind and the veracity of Swartz' testimony about the reports. Kelly was either lying in his purported reports to Kelly about warning Dixon, or he

never gave the reports to Kelly. Kelly's response to Dixon also provides useful context to assess Swartz' credibility about what Kelly purportedly told him and did not tell him about Dixon.

B. Respondent's Failure to Call Supervisor Rodriguez Warrants the Strongest Possible Adverse Inference

The Judge erroneously found it unnecessary to take an adverse inference over Respondent's failure to call Supervisor Rodriguez to testify. ALJD 9-10. As summarized by the administrative law judge with Board approval in *Vista del Sol Healthcare*:

> The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. *See Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Vista Del Sol Healthcare, 363 NLRB No. 135 (Feb. 24, 2016).

Supervisor Rodriguez is obviously a critical player with important factual knowledge in this case. Much of Dixon's, Marcial's, and General Foreman Swartz' testimony focused on their interactions (or lack thereof) with Rodriguez. Respondent's failure to call Rodriguez to testify left Dixon's and Marcial's testimony about their interactions with him completely unrebutted, and General Swartz' testimony about his interactions with him completely uncorroborated, as Respondent presented no other supporting evidence. At the time of the hearing, Rodriguez was employed by Respondent, and therefore under Respondent's control,[16] and Respondent offered

[16] Tr. 348. The Judge erroneously claimed that the General Counsel requested an adverse inference for Respondent's failure to call Foreman Kelly. *See* ALJD 9:34-35; *cf.* GC Brief 9 n.1. As neutral non-party witnesses, adverse

no explanation for its failure to call him to testify subject to cross-examination. There can be no question that Rodriguez may reasonably be assumed to be favorably disposed to Respondent. Therefore, his conspicuous absence warrants the "strongest possible adverse inference" that he would have corroborated Dixon and Marcial's testimony regarding their interactions with him, and would not have corroborated General Foreman's assertion that the two never spoke about Dixon's layoff or his protected concerted activity. Parties should not be rewarded for hiding the truth, and the Judge erred by failing to draw the requested adverse inference here.

V. EXCEPTIONS TO THE JUDGE'S CREDIBILITY RESOLUTIONS [EXCEPTION NOS. 21-27]

The Judge primarily relied not on the witnesses' demeanor, but on a number of erroneous findings of fact and evidentiary rulings to credit General Foreman Swartz and to discredit Dixon and Marcial, which permits the Board to take the rare step of reviewing the Judge's credibility findings and the record as a whole de novo. *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 635-36 (2011), enfd. 498 Fed. Appx. 45 (D.C. Cir. 2012)(*Stevens Creek*)(because the Board could not conclude that the judge's credibility resolutions were based primarily on demeanor, it proceeded with an independent evaluation of the record de novo), citing *Canteen Corp.*, 202 NLRB 767, 769 (1973) and *El Rancho Market*, 235 NLRB 468, 470 (1978) (reversing judge's credibility findings where, although the judge generally referred to demeanor, it did "not appear that . . . [the findings] were based on his observations of the witnesses' testimonial demeanor"). To the extent the Judge relied on demeanor evidence, the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inference drawn from the record as a whole permits the Board to proceed to an independent

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inferences are not warranted against either Respondent or the General Counsel with respect to Kelly, Eddie, Larry Coleman, or Robert Wright. *Levingston Shipbuilding Co.*, 249 NLRB 1, 11 (1980).

evaluation of credibility. *Stevens Creek, supra* at 635. As summarized by the *Stevens Creek* Board:

> It is well settled that the "Board is reluctant to overturn the credibility findings of an Administrative Law Judge," *Bralco Metals, Inc.*, 227 NLRB 973, 973 (1977), and "only in rare cases" will it do so. *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001). This is particularly true when credibility findings are based on a judge's assessment of the demeanor of a witness. *V & W Castings*, 231 NLRB 912, 913 (1977). However, the "Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor . . the Board itself may proceed to an independent evaluation of credibility.'" *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979)(quoting *Electrical Workers Local 38*, 221 NLRB 1073, 1074 (1975)). Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *E.S. Sutton Realty*, supra at 407 fn. 9 (quoting *Humes Electric, Inc.*, 263 NLRB 1238 (1982)).

Id. As observed by the Board in *Jewel Bakery*,

> [T]he Board has repeatedly stated that the "ultimate choice between conflicting testimony rests not only on the witnesses' demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." The Board has not applied its *Standard Dry Wall* policy so as to make inviolable an administrative law judge's credibility resolutions, including those based on demeanor. In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony on critical matters and have mistakenly characterized the state of the record, the Board has accorded less weight to the factor of demeanor. Thus, the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence.

268 NLRB 1326, 1327 (1984) (finding the judge's decision omitted reference to relevant testimony on critical matters without explanation, reached conclusions based on testimony not placed in context, and contained statements and findings unsupported by the record evidence).

One Trial Examiner eloquently explained demeanor and its role as follows:

> Accordingly, the one who hears and sees the witnesses testify must, *where the conflicting versions are diametrically opposed*, often necessarily depend on subtle interpretations, delicate nuances and indefinable impressions derived from observing the witnesses testifying which the cold record does not convey. Of course, the record often reveals, exclusive of so-called demeanor testimony, where the truth lies. It is only where, at the end of the trier of the facts' deliberations, that his resolutions of credibility still remain

balanced in doubt that recourse must often be had to the witnesses' demeanor.

Auto. Workers Local 212 (Chrysler Corp.), 128 NLRB 952, 969 (1960)(emphasis added).

A. The Judge Erroneously Credited General Foreman Swartz' Testimony

The Judge erroneously credited all of General Foreman Swartz' testimony, finding that it was credible, reliable, supported by unspecified documentary evidence, that his demeanor "remained calm, patient, and confident," and that his testimony credibly contradicted Dixon's testimony that he had never taken an extended break nor been warned for doing so, while erroneously failing to find that parts of it were unbelievable and self-serving. ALJD 8-10.

Again, General Foreman Swartz' only first-hand knowledge of Dixon was the one occasion on which he claims he saw him near the restrooms and assumed, without inquiring, as was his usual practice, that Dixon was taking an extended break, as he acknowledge he had never spoke with him directly. That may be true, but as discussed above, it is insufficient to establish that Dixon was actually taking an extended break at the time, let alone warned for doing so, and does not contradict Dixon's testimony in any way.

As Swartz acknowledged, the only source of his knowledge of Dixon even being on the project, and of his belief that Dixon had taken extended breaks and been warned for doing so, came from reports he received from Foreman Kelly.[17] As discussed above, the Federal Rules of Evidence recognize the danger in relying on such out-of-court statements for their truth and treats them as inadmissible hearsay for that purpose, absent an exception not present here. *See* FED. R. EVID. 801-03. Yet rather than excluding the reports for their truth, the Judge explicitly relied on Swartz' testimony about receiving those reports, and only those reports, to credit Swartz (and to discredit Dixon) on the critical issue of whether Dixon had taken extended breaks

[17] As discussed above, Foreman Flores' purported report pertained to Dixon's location during a break, not taking an extended break.

and been warned for doing so. The Judge's decision to primarily rely on inadmissible hearsay to credit Swartz' testimony was serious error and must be overturned, along with the resulting credibility resolutions, factual findings, and legal conclusions.

Apart from the Judge's misplaced reliance on hearsay to credit Swartz' testimony, there is absolutely no evidence to corroborate Swartz' self-serving testimony that they were even made, given Respondent's failure to call Kelly. Even if they were made, there is reason to doubt their veracity, given that they came from the individual who initiated Dixon's protected concerted activity and responded to Dixon's advocacy on behalf of the Apprentice with pure hostility, giving Kelly an obvious incentive to make false reports against Dixon. Kelly's statement to Dixon indicating that he had no idea why he was being laid off, and his failure to correct Dixon's assertion that he had never taken an extended break, casts even further doubt on the veracity of those reports, assuming they were made.

Swartz' convenient and self-serving denial of being aware of any complaints lodged by Dixon at the time he decided to lay off Dixon are equally hard to believe, particularly because the reports about Dixon's purported break abuse came from the very foreman who initiated Dixon's protected concerted activity. Similarly, Swartz' assertions that he never spoke with Rodriguez about Dixon, and that he made the decision to lay off Dixon without advising or consulting Supervisor Rodriguez, make no sense whatsoever, because Rodriguez was Dixon's supervisor and not even under Swartz' supervision, an apparent breach of the chain-of-command for which Swartz provided no explanation. It is hard to believe that neither Kelly nor Rodriguez informed Swartz about Dixon's protected concerted activity. Swartz also gave vague, generalized, self-serving, certainly exaggerated testimony about meetings about what the break

times were occurring almost every day. Respondent offered no evidence that Dixon or Marcial attended these meetings, even assuming that they did occur.

Ultimately, if true, Swartz' testimony about receiving the reports about Dixon from Foreman Kelly, about having no interaction with Supervisor Rodriguez regarding Dixon's layoff, and about having no discussions with either regarding Dixon's protected concerted activity, should have been easily corroborated by Kelly and Rodriguez, thereby avoiding the hearsay rule and permitting counsel for the General Counsel to cross-examine them. Again, Respondent called neither, leaving Swartz' testimony about the foremen's reports and his lack of communication with Rodriguez about Dixon completely unsupported, uncorroborated, and unbelievable, adverse inference or no.

In sum, Swartz' demeanor may have been calm, confident, and consistent, but his testimony was void of first-hand knowledge, uncorroborated, and did not contradict the testimony of the General Counsel's witnesses. Because the Judge's credibility resolutions were not primarily based on demeanor, but rather erroneous factual findings and evidentiary rulings, and because the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inference drawn from the record as a whole show that Swartz' testimony on important points was not credible, the Board should proceed to an independent evaluation of Swartz' credibility. *Stevens Creek, supra* at 635-36.

B. The Judge Erroneously Discredited the Testimony of Dixon and Marcial

The Judge erroneously discredited parts of Dixon's testimony, finding that it was self-serving, unbelievable, and credibly contradicted by General Foreman Swartz' testimony, and erroneously failed to find that it was not contradicted by any percipient testimony or documentary evidence. ALJD 8-10. The Judge also erroneously discredited all of Marcial's

testimony, finding that it was too good to be true, improbable, rehearsed, self-serving, and contradicted in part by Dixon's testimony, and erroneously failed to find that it was completely uncontradicted by any of Respondent's witnesses or by any documentary evidence. ALJD 9-10; 14. In contrast with the Judge's credibility resolution with respect to General Foreman Swartz (and Superintendent Chin, for that matter), the Judge did not describe either Dixon's or Marcial's demeanor, or specify that it was a basis for her credibility resolution. ALJD 8-10.

1. Dixon's and Marcial's Testimony Was Truthful and Consistent

As detailed above, both Dixon and Marcial provided foundational detail about the timing, location, and content of their interactions with Foreman Kelly and Supervisor Rodriguez, as well as their experiences with Respondent's break policy. They were consistent and forthright on both direct and cross-examination, non-evasive during cross-examination, and honest about details that they could not recall. Marcial's testimony about Rodriguez' outburst corroborated Dixon's testimony about his advocacy on behalf of the Apprentice, and was admissible both for the non-hearsay purposes of showing Rodriguez' knowledge of Dixon's protected concerted activity, as an admission of a party-opponent, and under the state-of-mind exception under the hearsay rule. *See Wisconsin Steel Indus., Inc.,* 318 at 214 and n. 41; FED. R. EVID. 801(d), 803(3).

Dixon was forthright in acknowledging that he did not know the name of the Apprentice he stood up for, and that he did not believe Supervisor Rodriguez had any problem with his advocacy on the Apprentice's behalf after he told Dixon he would take care of it, and that initially he did not make the connection between being falsely accused of taking excessive breaks and his intercession on behalf of the Apprentice, all admissions that did not serve his interests. He explained why he later doubted his assessment about Rodriguez' having no problem with Dixon's complaint about Kelly's handling of the Apprentice: the reports he received from other employees that Rodriguez was actually upset with Dixon for sticking up for

the Apprentice, mistakenly believed that Dixon had a history of making racial discrimination claims, and had vowed to get rid of him. Tr. 111; 160-63.

Both were also forthright about how they knew each other through Marcial's father, who was friends with Dixon, that they had socialized outside of work on one occasion, that they spoke the day before and the morning of the hearing (but not about their testimony), that Dixon was in the room the morning of the hearing when Marcial first reviewed and signed his affidavit (although they did not discuss it), and that they had lunch together on Dixon's dime on the first day of the hearing. Tr. 165-69; 177; 187-88; 207-09; 230.

As should be expected with any witness, both had some confusion about dates and other matters in their accounts, particularly about when and how Dixon learned about Rodriguez' rant. But mere confusion as to details is not enough to render a witness's account unreliable. *See, e.g., NLRB v. International Longshoremen's & Warehousemen's Union*, 283 F.2d 558, 563 (9th Cir. 1960); *Doral Building Services*, 273 NLRB 454 fn. 3 (1984); *Wayne J. Griffin Electric, Inc.*, 335 NLRB 1362, 1374–75 (2001)(occasional discrepancies with such matters as dates). Such discrepancies are nothing more than "the fallibility of memory" concerning collateral aspects of their testimonies. *NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1227 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970).

Moreover, the Judge's finding that Dixon and Marcial's testimony sounded rehearsed is belied by and incongruent with her reliance on inconsistencies between their testimonies, which she also used to discredit them. For example, the Judge contrasted with Dixon's testimony that he never told Kelly race was a factor with Marcial's testimony that Supervisor Rodriguez ranted that Kelly told him Dixon did bring up the Apprentice's race to discredit Marcial's testimony about the rant. ALJD 5-6 n. 17. Obviously, Rodriguez' report about what Kelly reported to him

is inadmissible hearsay if relied on for its truth, and should be no basis to discredit anyone. Kelly could have lied to Rodriguez about Dixon bringing up race, or just told Rodriguez what his assumption was about Dixon's motives. Moreover, the fact that Marcial did acknowledge that Rodriguez said that Kelly was afraid to warn Dixon shows that Marcial was not trying to hide the fact that Rodriguez mentioned warnings for extended breaks. It also makes Marcial's explanation as to why he deleted the other comment about Rodriguez saying that Dixon had been warned for taking extended breaks even more credible, particularly since it is inconsistent with Rodriguez' statement that Kelly was afraid to warn Dixon for taking extended breaks.

2. Respondent Presented No Admissible Evidence to Contradict Dixon or Marcial's Testimony

Dixon's testimony focused on his interactions with Foreman Kelly and Supervisor Rodriguez on behalf of the Apprentice, his practice of complying with break times, the lack of even a mention from any foreman or general foreman indicating that Respondent had any issue with Dixon's or anyone else's breaks on the project, his statements to both Supervisor Rodriguez and Foreman Kelly upon his layoff that he had never taken extended breaks and their responses indicating that they did not know anything about it and failure to correct him, and the reports he received from other welders about Respondent's possible reasons for falsely accusing him of taking extended breaks. Marcial's testimony focused on Supervisor Rodriguez' rant days before Dixon's layoff. Swartz' testimony focused on reports he claimed Kelly gave to him about warning Dixon, and reports he claimed he did not receive from Kelly or Rodriguez about Dixon's protected concerted activity.

Again, Respondent called neither Foreman Kelly nor Supervisor Rodriguez to testify. Nor did Respondent provide a single piece of written or photographic evidence of Dixon's alleged extended breaks or lollygagging, or any records that he had been warned even once for

doing so. The absence of any testimony or evidence leaves the General Counsel's witnesses' testimony about their interactions (or lack thereof) with Kelly and Rodriguez completely unrebutted, and certainly enhances their credibility. It also leaves General Foreman Swartz' testimony completely about his interactions (or lack thereof) with Kelly and Rodriguez completely uncorroborated.

Respondent called neither Rodriguez nor Kelly, and presented no other evidence to rebut any of Dixon and Marcial's testimony, further enhancing their credibility, which remains completely unrebutted and should be credited. Making the appropriate adverse inference against Respondent for its failure to call Rodriguez makes that obvious conclusion even easier to make. *See Vista Del Sol Healthcare*, 363 NLRB No. 135, *supra.*

3. Dixon's and Marcial's Affidavits Were Truthful and Consistent with their Respective Testimony

a. Dixon's Affidavits

Respondent's counsel attempted to create smoke and mirrors over Dixon's filing of two charges concerning the same layoff, his confusion regarding the substantive difference between the charges, his omission of the incident with the Apprentice in the first charge and affidavit, and the process through which he went in filing and withdrawing charges. Tr. 104-10; 119-24; 146-48; 160-65; Resp. Exs. 1 and 3; GC Exs. 1(a), 1(d), and 14. As Dixon explained, he is not an expert in labor law, but he always thought the layoff for taking extended breaks was bogus because he had not taken extended breaks, as he protested to Supervisor Rodriguez when he told him about his layoff, though initially he was not sure exactly why Respondent had targeted him. 104-10; 119-24; 156; 160-65. At first, Dixon suspected it was related to the rumors he had heard about him supposedly filing charges against Respondent or using racial slurs against Rodriguez, which was the basis of his first charge and affidavit. Tr. 108-11; 160-62; Resp. Exs. 1 and 3.

Supervisor Rodriguez' reference during his outburst to Marcial about Dixon suing people left and right certainly supported Dixon's early suspicions. Tr. 192-93. Respondent's counsel pressed Dixon at length about whether he had filed charges or grievances against Respondent in the past, further demonstrating that Dixon's suspicion was not unfounded. Tr. 103-110; 113-19. He also reasonably explained his confusion about the differences between the two charges and his failure to include the incident with the Apprentice in his earlier charge and affidavit, which are no basis for discrediting his testimony. Tr. 104-110; 121-24; 138; 152-56; 160-63; 192-93; GC Exs. 1(a) and 14.

b. Marcial's Affidavit

Respondent's counsel similarly went to great lengths to call into question the circumstances surrounding Marcial's affidavit, implying that he had falsified his testimony and violated the sequestration order, among other horribles, and made an overruled motion to have Marcial's testimony stricken. Tr. 213-227.[18] Marcial's testimony during cross-examination and redirect proved those accusations to be baseless. Marcial confirmed that, about August 2, he was interviewed for the affidavit over the phone by a Board agent while at his father's house in San Diego (Marcial lives in Tijuana) when his father, who shares his name, was away. Tr. 209-13; 228-29. He explained that although he gave a statement over the phone to a Board agent on August 2, and although various Board agents and counsel for the General Counsel made around fifteen-to-twenty attempts by email or phone to contact him about reviewing, signing, and returning the affidavit, he did not get around to reviewing his statement for the first time until the morning of the hearing when counsel for the General Counsel presented it to him in the Regional

[18] Contrary to Respondent's counsel's assertions, had Marcial not reviewed, signed, or otherwise adopted or approved the affidavit, it would not have been producible under *Jencks*. *See Stride-Rite Corp.*, 228 NLRB 224, 226 fn. 3 (1977), citing *Jencks* v. *United States*, 353 U.S. 657 (1957)(Notes and memoranda of witness interviews taken in lieu of affidavits during the investigation are not statements subject to *Jencks* production unless they have been *read, signed or otherwise adopted or approved* by the witness).

Office library/conference room. Tr. 211-13; 227-30; 236. He explained that despite the Board's attempts to reach out to him, he simply did not bother to review or revise his statement until he was presented with it the morning of the hearing, blaming it on simple procrastination. Tr. 234-36. He did not provide any other affidavits to the Board. Tr. 229.

Marcial was forthcoming with the fact that Dixon was in the conference room as he reviewed his affidavit, but he maintained throughout that he did not talk with Dixon about the case or his statement at that time or any other time before or during the hearing. Tr. 207-09; 230; He was also truthful about the "Witness Pointer" sheet that counsel for the General Counsel provided him before he reviewed his affidavit, although he reviewed and signed his affidavit before reviewing the pointers. Tr. 231-32; 240-41; Resp. Ex. 9. It is worth noting that the first of the pointers states in bold, capital letters, **"ALWAYS TELL THE TRUTH,"** and pointer 19 says to "testify about the facts as you remember them, not just because they are in your affidavit." Resp. Ex. 9 at points 1 and 19.

As Marcial reviewed his affidavit, he initialed the bottom of each page and the two changes he made. Tr. 211-13; 227-28; Resp. Ex. 8. He explained that he crossed out the line, "Dixon had been warned about this several times and that" because it was not accurate; Rodriguez did not say that as he vented about Dixon, the Apprentice, and the racial component. Tr. 235-36; Resp. Ex. 8 at 4 line 4. Marcial testified that he also deleted the line about "building a washer" at the time Rodriguez approached, because it was also not accurate; they were actually "welding a washer," as reflected in Marcial's handwritten change. Tr. 236; 237-38. Marcial's deletion of the line about Rodriguez saying "Dixon had been warned about this several times" is consistent with his testimony in both the hearing and his affidavit stating that Rodriguez said Dixon's foreman was too scared to talk to Dixon about breaks. Tr. 235-37; Resp. Ex. 8 at 4 lines

1-9. He did not hide the fact that Rodriguez said that Foreman Kelly was afraid to talk to Dixon about extended breaks because Dixon would make it a racial issue, or that Rodriguez said he had told Kelly to document Dixon's breaks to see how long he was taking, both of which do not serve Dixon's interests.

Respondent's counsel's assertion that Marcial's deletion went to the very heart of the case is best viewed as hyperbolic exaggeration, and the Judge's characterization of the deletion as "significant" and decision to rely on it for its truth (as discussed earlier) are both misplaced, given it was an out-of-court statement inadmissible for its truth. The overblown focus on the deletion only serves to highlight Respondent's inability to prove with admissible evidence that it had ever given Dixon a single warning for taking extended breaks, let alone caught him red-handed.

In sum, Marcial's delay in reviewing and signing his affidavit, the changes he made to it when he reviewed it for the first time, and Dixon's mere presence in the room as he did so provide no basis to discredit Marcial's testimony.

4. There Are No Other Bases to Discredit Dixon's and Marcial's Testimony

There is nothing legally significant about witnesses being casual acquaintances, close friends, in an employer-employee relationship, or even family members, or about them eating and socializing before and during a hearing, other than the inference that they may be biased in favor of one another. However, that bias matters not, so long as the witnesses do not discuss their testimony with one another, which both Dixon and Marcial consistently testified they did not do. Tr. 168; 207. Dixon and Marcial did not violate the sequestration order, and their social relationship and interactions before and during the hearing are not grounds for discrediting their

testimony, any more than Respondent's ongoing employment relationship with its own witnesses is grounds for discrediting their testimony.

VI. EXCEPTIONS TO THE JUDGE'S LEGAL FINDINGS AND CONCLUSIONS [EXCEPTION NOS. 28-34]

In erroneously concluding that the General Counsel failed to prove that Respondent laid off Dixon for unlawful reasons in violation of Section 8(a)(1) and dismissing the Complaint, the Judge erroneously concluded that the General Counsel failed to meet its burden to show that Dixon's protected activity was a motivating factor in his layoff, and erroneously concluded that even if it had done so, Respondent proved that it would have "terminated" Dixon even if he had not engaged in protected concerted activity. ALJD 13-16. As recently outlined by the Board in *Heart & Weight Inst. & Myeasha Strain*:

> The framework for analyzing alleged violations of Section 8(a)(1) turning on employer motivation is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (not reported in Board volumes). Under *Wright Line,* the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.
>
> Under *Wright Line,* if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).
>
> If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is

> no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

366 NLRB No. 53 (Mar. 30, 2018).

As set forth below, the General Counsel has made out a *prima facie* showing that Dixon's protected, concerted activity motivated Respondent's decision to lay him off. Because the evidence further shows that Respondent's proffered defense that it laid Dixon off for taking extended breaks was a false pretext to get rid of him, Respondent has failed by definition to show that it would have taken the same action absent Dixon's protected, concerted activity. Alternatively, even assuming that Dixon had taken extended breaks, Respondent cannot meet its burden of persuasion to show that it would have laid him off anyway, absent Dixon's protected, concerted activity.

A. The General Counsel Met Its Burden to Show that Dixon's Protected Concerted Activity Was a Motivating Factor in Respondent's Decision to Lay Dixon Off

1. Sticking Up for the Apprentice Was Protected, Concerted Activity

As the Judge correctly found, Dixon engaged in protected, concerted activity when he confronted Foreman Kelly about his attempt to remove the Apprentice from the project job, and again when he reported Kelly's attempted removal to Supervisor Rodriguez. ALJD 13. Section 7 of the National Labor Relations Act (the Act) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Under Section

8(a)(1) of the Act, an employer may not "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights.

Activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Five Star Transportation, Inc.*, 349 NLRB 42, 43 (2007), citing and quoting *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The phrase "for mutual aid or protection" is construed broadly to mean any concerted activities by employees that "bear a relationship to their interests as employees." *Raleys & Independent Drug Clerks Association*, 348 NLRB 382, 412 (2006), citing *Eastex, Inc. v. NLRB,* 437 U.S. 556, 567 (1978).

Complaints about supervisor treatment, favoritism and preferential treatment are directly related to working conditions, and as such, they fall within the rubric of protected concerted activity. *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46 (July 14, 2016)(complaints about unfair removal protected); *In re Astro Tool & Die Corp.* 320 NLRB 1157, 1162 (1996), citing, *Brother Industries*, 314 NLRB 1218 (1994); *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987); *Calvin D. Johnson Nursing Home*, 261 NLRB 289 fn. 2 (1982) (see also cases cited there), enfd. 753 F.2d 1078 (7th Cir. 1985). Absent bad faith, employees retain the protection of the Act when they protest employer actions even if the employees' are mistaken about the employers' actions. *Laguardia Assoc., LLP*, 357 NLRB 1097, 1099 (2011)(protesting impending layoffs protected, even if employees were mistaken about impending layoffs), citing *Wagner-Smith Co.*, 262 NLRB 999, 999 fn. 2 (1982) *First W. Bldg. Servs.,* 309 NLRB 591, 605 (1992)(complaints about reasonably perceived contract violations protected even if perception is mistaken).

Dixon was clearly acting concertedly on behalf of the Apprentice, and with the Apprentice's apparent authority, when he challenged Kelly's attempt to remove the Apprentice and asked admitted supervisor Rodriguez to overrule Kelly's attempt to remove the Apprentice. The attempted removal of the Apprentice clearly related to the Apprentice's terms and conditions of employment, whether or not Kelly actually possessed the authority to remove the Apprentice himself. Even if Kelly is not a statutory supervisor, and if Dixon mistakenly believed Kelly had the authority to remove the Apprentice, Dixon's belief was not unreasonable. Dixon's complaint on the Apprentice's behalf made to admitted supervisor Rodriguez about Kelly's attempted removal of the Apprentice was also protected, concerted activity.

2. Respondent Knew of Dixon's Protected, Concerted Activity

The Judge erroneously failed to impute Supervisor Rodriguez' knowledge of Dixon's protected concerted activity to Respondent. ALJD 14. If the Judge is correct that Swartz laid off Dixon and other employees based solely on reports he received from front-line foreman such as Foreman Kelly, then she also erroneously found Kelly not to be a statutory supervisor, and in turn failed to impute his knowledge of Dixon's protected concerted activity to Respondent. ALJD 10-11; 14. Although Respondent has sought to conceal its knowledge by failing to call key witnesses and making self-serving denials, the evidence nevertheless revealed it.

a. Knowledge Should Be Imputed to Respondent Because Swartz' Denial Is Not Credible

It is well-established that a supervisor's knowledge of union activities is imputed to the employer, absent a credible denial of such knowledge by management. *State Plaza, Inc.*, 347 NLRB 755, 756-57 (2006); *Dobbs International Services, Inc.*, 335 NLRB 972, 973 (2001); see also *Clark & Wilkins Industries, Inc.*, 290 NLRB 106, 106 (1988), enfd. 887 F.2d 308 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990). Both Foreman Kelly and Supervisor Rodriguez knew

of Dixon's protected, concerted activity, as it was directed directly at them. As discussed above, Swartz' self-serving, uncorroborated denials that he spoke with neither about Dixon's protected concerted activity, and that he did not speak with Supervisor Rodriguez at all about Dixon's layoff, without explanation as to why he laid off an employee who did not even fall under his direct reports, are simply not credible, and cannot be used to break the chain of knowledge.

Swartz claimed that Foreman Kelly was his initial source of information about Dixon, and that Kelly twice told him that Dixon was taking extended breaks. If Kelly did speak directly to Swartz about Dixon on two separate occasions around the same time as the incident with the Apprentice, it is more likely than not that Kelly also passed on Dixon's advocacy on behalf of the Apprentice to Swartz, even if Swartz did not view that as a "complaint lodged" by Dixon. *See* Tr. 307. Swartz' denying knowledge of a "complaint lodged" by Dixon, or of any complaints about the removal of an apprentice, is not the same as denying that he had learned that Dixon had spoken to Kelly and/or Rodriguez about Kelly's attempt to remove the Apprentice. *See State Plaza Hotel & Hotel & Rest. Employees Union, Local 25, AFL-CIO*, 347 NLRB 755, 757 (2006)(managers denial of "knowledge of employee dissatisfaction in connection with union activity" not the same as denial of knowledge "that he learned the substance of " the discriminatee's protected, concerted activity of asking another manager [who did not testify] for assistance bringing employee complaints to the parent corporation, therefore not a credible denial of knowledge of that protected, concerted activity, which the Board then imputed to the employer).

Because Respondent's denials of knowledge of Dixon's protected, concerted activity are not credible, Rodriguez' knowledge should be imputed to Respondent. *See State Plaza, Inc.*, 347 NLRB 755, *supra*.

b. Knowledge Should Be Imputed Under the "Cat's Paw" Theory

Moreover, knowledge should be imputed to the Employer under the "cat's paw" theory articulated by the Supreme Court in *Staub v. Proctor*:

> In *Staub*, the Supreme Court held that an employer is liable for employment discrimination if a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action. *Id.* at 422. In such a case, the discriminatory animus of the supervisor who influenced, but did not make, the ultimate employment decision would be deemed a motivating factor in the employer's action.

See JM2, 363 NLRB No. 149 (Mar. 22, 2016), citing 562 U.S. 411, 422 (2011).

Again, Respondent should not be allowed to shield itself by failing to call Rodriguez and Kelly to support Swartz' incredible assertions that he had no communication with Kelly or Rodriguez about Dixon's protected concerted activity or with Rodriguez about Dixon's layoff. Both undisputedly knew about Dixon's protected concerted activity. Rodriguez revealed his animus towards it in his rant to Marcial and Eddie in which he also expressed a plan to get rid of Dixon by having his foreman document him taking extended breaks. Foreman Kelly also expressed animus by telling Dixon if he didn't like how he handled the Apprentice, he could leave, too. It should be easily inferred that both acted on that animus, communicated that animus to Swartz, and set in motion the chain of events that ultimately led to Dixon's layoff under the pretext of extended breaks. The Board should not be fooled by Swartz' feigned ignorance and find that Respondent had knowledge of Dixon's protected, concerted activity through Rodriguez, regardless of whether he was truly involved in the decision to lay off Dixon, and also through Foreman Kelly, if he is found to have actually issued the purported warnings, which would make him a statutory supervisor. *See JM2*, 363 NLRB No. 149, *supra*.

c. Knowledge Should Be Inferred Through Circumstantial Evidence

Finally, it is also well-established that knowledge need not be established directly, and instead may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Montgomery Ward & Co.,* 316 NLRB 1248, 1253–55 (1995), citing *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985); *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). For example, the Board has inferred knowledge based on such circumstantial evidence as the timing of the discriminatory action, animus, and disparate treatment. *Montgomery Ward & Co.,* 316 NLRB at 1253, citing *Greco & Haines*, supra; *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979); *General Iron Corp.*, 218 NLRB 770, 778 (1975). Knowledge will also be inferred when the stated reasons for the adverse action are baseless, unreasonable, contrived, or suspiciously weak:

> The Board has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. *Whitesville Mill Service Co.*, supra; *De Jana Industries*, 305 NLRB at 849; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." See generally *General Films*, 307 NLRB 465, 468 (1992).
>
> The factors on which the Board relies when inferring knowledge do not exist in isolation, but frequently coexist. For example, in *BMD Sportswear Corp.*, 283 NLRB 142, 142-143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988), the Board reversed the judge and found that the General Counsel had established that alleged discriminatees were unlawfully laid off, even in the absence of direct evidence that the employer knew of their union activities. There the respondent had demonstrated antiunion animus, discriminated against other employees, proffered unsubstantiated reasons for the layoff, and the layoffs were proximate to the start of the union organizing campaign. See also *Active Transportation*, 296 NLRB 431, 432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991).

Montgomery Ward & Co., 316 NLRB at 1253 (internal footnotes omitted)(inferring employer knowledge from confluence of circumstances).

Here, as set forth below in describing the evidence of Respondent's animus, Respondent's knowledge of Dixon's protected, concerted activity should be readily inferred through the pretextual nature and suspicious timing of Dixon's layoff, which was "baseless, unreasonable, and contrived." *See Montgomery Ward & Co.*, 316 NLRB at 1248, *supra.*

3. Respondent Harbored Animus towards Dixon for Engaging in Protected, Concerted Activity

The General Counsel can establish the element of animus with evidence that the employer's proffered explanation for the adverse action is a pretext,[19] the suspicious timing of the adverse employment action,[20] and statements and actions showing the employer's general and specific animus,[21] all of which are present here. "Direct evidence of unlawful motivation is often unavailable; such motivation may be established by circumstantial evidence and the inferences drawn from that evidence." *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 663 (2007), citing *Rogers Electric*, 346 NLRB 508, 518 (2006); *see also Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir.1966)("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving."); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). This is one of those rare cases where there is not only ample circumstantial evidence of Respondent's animus, but also direct evidence.

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[19] *See Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966)(with evidence of pretext, the factfinder may not only properly infer that there is some other motive, but "that the motive is one that the employer desires to conceal—an unlawful motive—"; *Wright Line*, 251 NLRB at 1088, n.12 ("The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case.").

[20] *See, e.g., Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)("Timing alone may suggest anti-union animus as a motivating factor in an employer's action").

[21] *See NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-75 (6th Cir. 1993)(anti-union statements, even if lawful, serve as background evidence of animus); *but see NLRB v. Lampi, LLC*, 240 F.3d 931, 936 (11th Cir. 2001)(lawful anti-union statements cannot be used as *direct* evidence of animus).

a. The Circumstantial Evidence Reveals Respondent's Animus

The Judge erroneously found that the only circumstantial evidence of Respondent's animus towards Dixon's protected concerted activity was the timing of events, and erroneously failed to find that Dixon's layoff was pretextual and the product of a sham investigation, deviation from past practice, and disparate treatment. ALJD 14-15.

i. The Claim That Dixon Took Extended Breaks and Was Warned For It Was a Pretext

The Judge relied on the critically erroneous finding that Dixon had been warned about taking extended breaks to make other erroneous findings and conclusions, including the findings that the reason for the layoff was not pretextual, that Dixon was not treated differently than others who had been warned before being laid off for taking extended breaks, and that Respondent's investigation into Dixon's alleged break abuse was adequate. ALJD 9; 14-15.

The evidence shows that Respondent's claim that Dixon took multiple extended breaks and was warned for doing so is merely a pretext. The pretextual nature of an employer's explanation can be established by evidence of disparate treatment, departure from past practice, the employer's failure to investigate the employee's alleged misconduct, and/or the employer's proffer of a non-discriminatory explanation that is not true. *See, e.g.*, *Metro Transport*, 351 NLRB 657, 663 (2007)("an inference of unlawful motivation may be drawn where the employer's stated reasons for its challenged employment action are found to be pretextual. Departure from past practice may also support an inference of unlawful motivation.")(internal citations omitted).

Again, Dixon credibly denied ever taking an extended break on the Facebook Project, let alone being warned for doing so, including on the day he was laid off when he told both Rodriguez and Kelly that he had not done so and both claimed ignorance. Respondent presented

no documentary evidence or admissible testimony that Dixon had ever taken an extended break, let alone been warned for doing so. The only evidence Respondent offered came through Swartz, who testified that during the week before he laid off Dixon, he received two reports from Foreman Kelly that Dixon was taking extended breaks, which are inadmissible for their truth.

Swartz admitted that there was only one occasion on which he personally saw Dixon taking what he assumed to be an extended break when he saw Dixon standing by the bathroom the day before he laid him off. However, Swartz admitted that he did not approach Dixon to investigate whether he was, in fact, taking an extended break, rather than using the restroom, as employees were free to do at any time, regardless of whether they were on break, and that he did not give Dixon a warning.

Swartz' failure to investigate whether Dixon was actually taking an extended break, and his reliance on one report from an asserted non-supervisory employee that Dixon had actually received a warning for taking an extended break, stand in stark contrast to his treatment of other suspected extended-break takers. Swartz testified that his practice was to confront ironworkers that he believed were taking extended breaks, and either give them a number of warnings, or instruct the offender's foreman to do so. He did neither with Dixon. If the offending worker did not improve after receiving multiple warnings (the number varied), Swartz would sometimes move them to a different gang, and sometimes lay them off. His deviation from past practice in Dixon's case is further evidence of pretext and Respondent's unlawful motive. *See Birch Run Welding & Fabricating,* 761 F.2d 1175, 1181 (6th Cir. 1985) (noting that "an employer's deviation from past practice" is persuasive evidence of an unlawful motive); *Transp. Mgmt. Corp.* 462 U.S. at 404 (highlighting employer's departure from its usual practice); *Hunter Douglas, Inc. v. NLRB,* 804 F.2d 808, 814 (3d Cir.1986) (same), cert. denied, 481 U.S. 1069

(1987); *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1016 (5th Cir. 1978)(same); *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir.)(unpublished), cert. denied 502 U.S. 814 (1991).

Dixon's credible denials of taking extended breaks, Respondent's inability to present evidence that Dixon had actually taken or been warned for taking extended breaks, Swartz' failure to warn Dixon or give him additional chances, as he had done with others, and Swartz' inadequate, indifferent investigation into Dixon's breaks further demonstrates that the proffered reasons for laying off Dixon are false and pretextual. *Affinity Medical Center*, 362 NLRB No. 78, slip op. at 1 fn. 4 (2015)(Pretext may be demonstrated by asserting a reason that is false and by an indifferent or inadequate investigation into the alleged misconduct); *Clinton Food 4* Less, 288 NLRB 597, 598 (1988)(termination of vocal union supporter based on complaints from two customers unlawful where employer failed to investigate or consider employee's positive work history).

This pretext not only further demonstrates Respondent's animosity toward Dixon, but also gives rise to the inescapable conclusion that Respondent's animus toward Dixon was the driving force behind the decision to lay him off. *See Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d at 470 (with evidence of pretext, the factfinder may not only properly infer that there is some other motive, but "that the motive is one that the employer desires to conceal—an unlawful motive—"); *Wright Line*, 251 NLRB at 1088, n.12 ("The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case.").

ii. The Timing of the Layoff

The timing of the Respondent's decision to lay off Dixon the week after he engaged in protected, concerted activity, as found by the Judge, is further evidence of its animus. *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 837-838 (9th Cir. 1981); *Reno Hilton Resorts v.*

NLRB, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

b. Rodriguez' Rant Is Direct Evidence of Animus

The Judge relied on erroneous credibility resolutions to find that the evidence failed to establish supervisor Rodriguez' direct animus towards Dixon's protected concerted activity. ALJD 16. Rodriguez' rant after Dixon informed him that he did not approve of Foreman Kelly's attempt to run the Apprentice off the job, rhetorically asking what Dixon cared about the Apprentice, and stating that Dixon should mind his own business, is direct evidence of animus. Rodriguez' comments about getting Foreman Kelly to document Dixon taking extended breaks and to use that information to lay him off if further evidence of, not only animus, but an explicit plan to remove the employee advocate from the jobsite.

B. Respondent Cannot Show That It Would Have Laid Off Dixon Had He Not Engaged In Protected Concerted Activity

The Judge erroneously concluded that, even assuming the General Counsel met its initial burden to show that Dixon's protected concerted activity was a motivating factor in his layoff, Respondent proved that it would have "terminated" Dixon even if he had not engaged in protected concerted activity. ALJD 16. Given the pretextual nature of Respondent's claim that it laid off Dixon because he had taken extended breaks, as set forth above, Respondent has, by definition, failed to show that it would have taken the same action against Dixon, absent his protected, concerted activity. *Heart & Weight Inst. & Myeasha Strain,* 366 NLRB No. 53, *supra* ("If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform

the second part of the *Wright Line* analysis."); *Road Trucking Company, Inc.*, 342 NLRB 895, 897 (2004)(same).

Moreover, in light of Respondent's variable practice of issuing multiple warnings to employees for taking extended breaks, and then sometimes transferring them to a different gang, and sometimes laying them off, Respondent cannot show that it *would* have laid Dixon off, even if it could otherwise show that it *could* have. *See Rose Hills Mortuary, L.P.*, 324 at 414 (employer could not show that it had uniform progressive discipline system that it was obliged to follow); *See Bally's Atlantic City*, 355 NLRB 1312 (2010)(failure to announce zero-tolerance policy dooms employer defense). Again, an employer cannot carry its burden merely by showing that it also had a legitimate reason that *could have* justified the discipline; rather, it must persuade that it *would have* issued the discipline absent the protected conduct "by a preponderance of the evidence." *Hunter Douglas, Inc.*, 277 NLRB 1179, 1179 (1985), review denied, enfd. 804 F.2d 808 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987), citing *Wright Line*, 251 NLRB 1083; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); and *Transp. Mgmt. Corp.*, 462 U.S. 393.

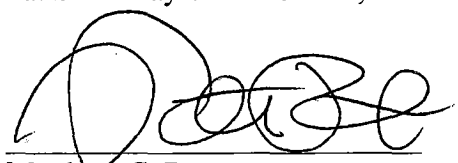
As is the case here, where an employer fails to satisfy its burden of persuasion, or if its proffered justification fails to withstand scrutiny, a violation of the Act is established. *Hunter Douglas, Inc.*, 277 NLRB at 1179, citing *Bronco Wine Co.*, 256 NLRB 53 (1981); *Shattuck Denn*, 362 F.2d 466, 470 (9th Cir. 1966); *Parts Depot, Inc.*, 332 NLRB 670, 671-72 (2000), enfd. mem., 24 F. App'x 1 (D.C. Cir. 2001).

VII. CONCLUSION

Apart from the Judge's erroneous findings of fact, evidentiary rulings, credibility resolutions, and legal conclusions, the record as a whole shows that the General Counsel met its burden to show that Dixon's protected concerted activity was the motivating factor in

Respondent's decision to lay off Dixon, and Respondent cannot show that it would have done so absent his protected concerted activity. For all the foregoing reasons, the Board should accept the General Counsel's exceptions, reverse the Judge's errors, and conclude that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint.

Respectfully submitted this 13th day of November, 2018.



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