

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

VOLVO GROUP NORTH AMERICA, LLC	)	
	)	
Respondent,	)	
	)	
And	)	Case 15-CA-179071
	)	Case 15-CA-184912
	)	Case 15-CA-195183
Walter Evans,	)	Case 15-CA-204842
	)	
Charging Party	)	

**RESPONDENT’S POST-HEARING BRIEF**

Now comes Volvo Group North America, LLC, Respondent herein (“Respondent” or “Volvo”), and files its Post-Hearing Brief as follows:

**STATEMENT OF CASE**

This case arises out of a series of four unfair labor practice charges filed against Respondent by Walter Evans (“Evans”), an individual, who was employed as a Warehouse Operator at the Company’s Byhalia, Mississippi manufacturing facility. (GC-1).<sup>1</sup> On April 30, 2018, the Regional Director for Region 15 issued a Third Amended Complaint alleging violations of Sections 8(a)(1), (3), (4), and (5) of the Act. (GC-1). Respondent filed a timely

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<sup>1</sup> Citations to record evidence will be provided using abbreviations and page or exhibit numbers for the references. References to the hearing transcript will be indicated with T. followed by the page number or numbers; references to the hearing exhibits will be indicated with JX-, GC-, or RX- followed by the number for Joint Exhibits, General Counsel Exhibits, and Respondent Exhibits respectively; references to the transcript and exhibits in the underlying arbitration record that is in evidence in its entirety in this record will be indicated with “Arb.” and the page numbers or the arbitration transcript or arbitration exhibit abbreviations and numbers.

answer, denying the material allegations of that complaint and raising certain affirmative defenses. (GC-1). A hearing was conducted in Memphis, Tennessee on July 30 and 31, August 1 and 2, and September 13, 2018, before Administrative Law Judge Sharon L. Steckler.

The third consolidated complaint is drafted in a confusing manner; however, it appears to make the following allegations:

- (1) Evans concertedly complained to Respondent about safety issues on August 31, 2015; October 8, 2015; and December 9, 2015,<sup>2</sup> and he was issued a written warning on March 23, 2016 in retaliation for these protected concerted activities, as well as because he assisted the Union and engaged in other unspecified concerted activities.
- (2) Evans wrote a letter to Manager Kevin Bush on April 12, 2016, setting forth concerted complaints of unfair treatment of employees by supervisors, and Respondent suspended Evans on May 3, 2016 and terminated him on May 11, 2016 in retaliation for the three prior safety complaints, the April 12, 2016 letter, and because he assisted the Union and engaged in other unspecified concerted activities.
- (3) On March 20, 2017, Respondent again terminated Evans in retaliation for the three prior safety complaints, the April 12, 2016 letter, because he assisted the Union and engaged in other unspecified concerted activities, and because he filed unfair labor practice charges on June 27, 2015, and September 23, 2016.
- (4) Since about March 16, 2017, Respondent has unilaterally changed the enforcement of its buzzer system rules regarding when employees may stop work prior to breaks, lunch, and the end of their work shift.

Much of the difficulty in addressing the first three allegations stems from the scatter gun approach taken by the General Counsel in regard to Evans' allegedly protected concerted activities. Thus, while he pinpoints certain alleged activities by Evans, the General Counsel also alleges that Evans raised a host of other complaints over the course of his employment, some

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<sup>2</sup> While Evans did in fact raise certain safety issues, it is difficult to connect any of these complaints to the three dates alleged in the complaint.

specific and others of a more generalized nature. Given that Evans was a constant complainer about many issues, it is difficult to separate the wheat from the chaff in determining which activities in fact constituted protected concerted activity for mutual aid or protection. Also, because there is not even a single allegation of any threat, promise, or interrogation by Respondent and no probative evidence of animus toward any of Evans' alleged concerted activities, it is next to impossible to connect any specific disciplinary action to any specific activity or activities by Evans. As will be discussed hereafter, the absence of any probative evidence of animus toward Evans' activities or charges and the lack of specificity in many of his complaints is fatal to the General Counsel's allegations regarding Evans.

## **STATEMENT OF FACTS**

### **A. Background**

In 2014, Respondent opened a 1.2 million square foot Logistics Center in Byhalia, Mississippi. The employees from the phased-out Memphis Logistics Center were relocated to Byhalia and UAW Local 2406 was recognized as the exclusive bargaining representative of the employees. (RX-4). The collective bargaining agreement in effect at Memphis was renegotiated and extended until December 16, 2020. (JX-1). It is undisputed that Respondent maintained certain published rules of conduct and that it generally followed a progressive discipline system for employees covered by the CBA. (GC-57).

Evans transferred from the Company's Logistics Center in Columbus, Ohio to Byhalia on May 11, 2015, as a Warehouse Operator. (JX-3; RX-4). During his Byhalia orientation Evans was given a copy of the rules of conduct and the safety rules. (RX-4; Arb. CX-1 & 11). Evans was

trained on the safe operation of a lift truck on May 12, 2015 and retrained when he returned to work following his first termination on August 1, 2016. (Arb. CX-6 &15)

**B. Evans's Alleged Protected Activities**

As noted above, Evans testified to a litany of activities in which he engaged during the course of his employment. Evans, without question, was a chronic complainer, and he raised numerous issues, some specific and others nonspecific, both with management and with the Union. Indeed, it appears from his testimony that his issues with the Union exceeded those that he had with Respondent. In general, Evans did not believe that the Union was responsive to his, as well as other employees', issues. As was evident from his demeanor at the hearing, Evans has a personality that does not necessarily endear himself to others. Throughout the proceeding he sought to control the questioning of witnesses by the General Counsel, and came across at times as a "know-it-all" who was always right and whose problems were always the fault of someone other than himself. This is not to suggest that Evans is a bad person or that he was always wrong, merely that many persons might find him difficult to deal with.

While his personality may have made Evans an irritant to his leads and supervisors (as well as Union representatives), some of whom viewed him as generally disruptive of their meetings by injecting issues unrelated to the topic at hand, there is no meaningful evidence that any of his activities caused these leads and supervisors to retaliate against Evans. (T. 132, 862-63, 865, 878. 879, 887). Indeed, management was generally responsive to the complaints and issues raised by Evans.

On July 6, 2015 Evans filed grievance 2015-10 regarding denial of overtime opportunity and use of temporary employees. (T. 180-87; GC-4). Evans testified that he and a group of third

shift employees believed they had been denied overtime opportunities and that subsequently a conflict developed between the original grievants and the Union committeemen, Kerrick Adams and Chris Hudson. (T. 180; GC-4). Evans testified that Arthur Braggs, who was a regular (non-lead) employee at the time, was somehow included in the grievance and that Evans was told by the Union committeemen that the grievance was settled. However, the Union committeemen purportedly declined to show the settlement to the original grievants. (T. 183-84) According to Evans, Respondent offered to settle by paying only Braggs and Adams, but the original group objected. (T. 183-84). Subsequently, the Company, through then Inbound Manager Don Mouledoux, ultimately offered to spread the money that had been proposed for Adams and Braggs among all the grievants, but this offer was deemed unacceptable by the original grievants. (T. 185). Neither Evans nor any other witness provided any clear indication of how this grievance ultimately ended. (See T. 185-86). Braggs testified generally that he did not recall being involved in any grievance about third shift overtime that Evans filed. Braggs testified that he filed a grievance about a work opportunity on a Fourth of July holiday and that he and Adams got paid double time for working that day. (T. 890-96).

In October 2015, Evans raised issues regarding third shift employees not receiving a shift-differential. Evans testified that he raised the issue with Mouledoux at roundtable meetings. (T. 202-03). According to Evans, the Company subsequently agreed to institute a third shift premium and a memo was posted about the agreement for the shift differential between Union officials and Curt Youngdale, a corporate labor relations manager in Respondent's Greensboro, North Carolina headquarters. (T. 202-04). There is no evidence that Respondent exhibited any animus based on Evans raising this issue.

Evans also raised safety issues regarding placement of heavy items on racks in the warehouse in 2015. (T. 194-200). According to Evans's testimony, he had experience with racks from the other Volvo facility where he had worked and he first told Inbound Supervisor Robert Buckingham, and Inbound manager Don Mouledoux, that placing heavy items on the top level of the racks presented a safety issue in the warehouse. Buckingham generally indicated that the racking issue was out of his hands ("above his pay grade") and that higher officials were considering it. Evans acknowledged, however, that the Company ultimately made changes in an attempt to resolve safety concerns. (T.194-201). Specifically, Respondent (1) created a special 3-man loading team for putting away heavy items, (2) placed weight ratings on the racks, and (3) installed heavy-duty, weight bearing beams at one end of the racks for the heavy items. (T. 201-202).

Buckingham testified that Evans, as well as other employees, raised complaints to him about the safety hazard of heavy parts being placed high on racks. (T. 755-69). As Buckingham considered the complaints to be legitimate, the Company investigated and took steps to change the rack system to take care of the safety issues. (T. 767-69). Thus, it is undisputed that the Company responded to Evans's complaint about the rack system by changing its practices to avoid the safety problems Evans identified and there was no indication of animus related to Evans reporting the safety issues. (T. 194-200).

Evans testified that he became the third shift alternate committeeman for the Union on or about October 18, 2015. (T. 177-79; GC-3). However, there was an internal Union "ongoing battle," and apparently Chris Hudson and Kerrick Adams challenged Evans' role or position. (T.

178-79). There is no evidence that Respondent became involved in, or cared one way or the other about, any internal Union politics.

On November 15, 2015, Evans filed grievance 2015-17 regarding overtime opportunities not being given by seniority. (T. 190-91; GC 5; GC-6). According to Evans' testimony, the grievance was filed over a number of issues that employees were complaining about, including overtime opportunities not being given by seniority. Evans testified that the grievance was directed initially to Buckingham, but that Mouldoux became involved in the process. (T.186-90). The Company answered on January 5, 2016, denying the grievance, and Evans rejected that answer on January 6, 2016. (GC-6). According to Evans, after Mouldoux became involved, the grievance was to some extent resolved, with the Company putting a seniority system in place for overtime assignments that it used "most of the time." (T.190-91). No Company witness testified regarding that grievance and there is no evidence of any animus by Respondent toward Evans based on this grievance.

Evans testified that he distributed Union literature throughout his employment, but primarily in 2015 and 2016. (T. 191-93, 368-69; GC-9; GC-28). In particular, he distributed packets of literature that are in evidence as GC-9 and GC-28. The literature is largely unremarkable, and primarily addresses generic issues such as Weingarten rights and various political issues. (T. 192-94; GC-9; GC-28). Evans on at least one occasion had some Union shirts printed, which he distributed to Union members. (T. 365-67; GC-27). There is no evidence that Company management was even aware of Evans' role in these activities. Likewise, there is no evidence the Company responded in any way to these activities, let alone in a way that would indicate animus against Evans.

Apparently some time in 2015, Evans filed a complaint with OSHA regarding heavy materials stacked high on shelves, and forklift drivers using telephones and leaving the forklifts blocking aisles. Evans testified that he was notified that OSHA conducted an investigation of the facility. He did not dispute that, by letter dated June 14, 2016. OSHA informed him that OSHA found no safety violations and that no changes were required in Company operations after his complaint. Evans apparently admits that OSHA notified him of its conclusions by letter dated August 23, 2016. (GC-24; T. 356-58). Again, there is no evidence that the Company reacted to the OSHA complaint in any way, if at all, other than “business as usual,” let alone in any way that would indicate animus against Evans. (GC-24; T. 356-58).

On or about April 12, 2016, Evans wrote a letter to Kevin Bush complaining primarily about a DAR he had received for wasting time. Evans offered a litany of “defenses” to the allegations, most of which focused on complaints about Braggs. In addition to these personal complaints, Evans noted that other employees had issues with Braggs, and that Braggs was targeting other employees, that Braggs’ conduct with female employees constituted sexual harassment, and that he created a hostile and adversarial working environment.

Evans testified that he gave the letter, which was in a manila envelope and contained a packet of materials, to the receptionist to give to Bush and mailed a copy of the letter to Manager Tess Thomas at Volvo headquarters because she had told employees in town meetings that if they had any issues, they could contact her and she would look into them. (T. 314-18). Bush testified that when he picked up the envelope and saw that it was from Evans, he gave the package to the human resource representative at the time, Leslie Thompson, without ever reading

it. (RX-1; T. 1031-32).<sup>3</sup> Tess Thomas testified that she did in fact receive the letter and materials, but simply filed them away, believing the issues were covered by the Byhalia grievance procedure. (RX-1, T. 265-66, 273-77). It was not until the Respondent was gathering documents responsive to the General Counsel's subpoena that she found the letter in her files. (T. 265-66). There is no evidence that the Company exhibited any animus toward Evans based on this letter.

Thereafter, Evans filed a series of grievances and unfair labor practices charges in response to disciplinary actions taken against him by Respondent. These grievances and charges are discussed in conjunction with the specific DARs that are the subject of the General Counsel's complaint. In general, however, the grievances were processed through the grievance procedure in a cordial manner, and resolutions were reached between Respondent and the Union on some, but not all, of Evans' grievances.

### **C. Respondent's Disciplinary Rules and Policies**

As noted, Respondent maintains published rules of conduct, safety rules, and a progressive discipline policy. (GC-57). The rules of conduct set out a five-step progressive procedure for violations of the first 13 numbered rules of conduct, which generally focus on conduct that is potentially correctable. The five steps are: 1. Verbal Reminder (with a notation to the personnel record); 2. Written Reminder; 3. Written Warning; 4. Disciplinary Layoff (30 days); 5. Discharge. (GC-57). Under the rules of conduct, the "extent of corrective disciplinary action taken for violations of these rules will depend on the seriousness and/or frequency of the

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<sup>3</sup> Thompson left the Company a month or two later and was replaced by Lonny Otto. (T 898). It is not clear what she did with the letter, as it was never located at the facility.

violation and the individual's prior disciplinary record." Of the first 13 numbered Rules of Conduct, the following are relevant here:

5. Failure to comply with safety rules, regulations, and common safety practices, to include failure to wear mandatory personal protective equipment and/or uniforms.
8. Wasting time during scheduled working hours.
9. Using abusive language toward any person.
13. Performing careless or poor workmanship.

Rules of conduct 14 through 21, are for more serious offenses. Their violation carries a one calendar week disciplinary layoff without pay. As relevant here, Rule 20 prohibits "Threatening, harassing, intimidating, interfering, or coercing any other employee at any time including brandishing of any instrument with the intent of causing bodily harm. (GC-57).

The Company's safety rules are in evidence as GC-58. They were revised in January 2015 and employees are trained in and know the Safety Rules. As relevant here, the safety rules include the following directives:

- Do not back into aisles [Applicable for operation of Order Selectors].
- Sound horn at all intersections and when approaching aisle ends.
- Only stable and safely arranged loads should be carried.
- Know the forklift traffic patterns in your facility.
- Treat blind corners as "Stop Signs". Running these stop signs is just as much a hazard as walking into a street with cross traffic.
- Stop at all cross aisles.

(GC-58).

**D. Unchallenged DARs Issued To Evans**

Evans received error notifications for careless workmanship on October 8, 2015 and again on November 11, 2015. Two days later, on November 13, 2015, Evans again was issued an error notification and was counseled to be more careful in his work. Evans apparently responded by filing a “personal grievance” on November 15, 2015, complaining about the job assignment process, the overtime selection process, the safety rules and the disciplinary process. (Arb. T. 27-32). There is no evidence as to how the grievance was resolved.

On November 18, 2015, December 4, 2015, December 9, 2015, December 11, 2015, and December 15, 2015, Evans again received error notifications for careless workmanship. The error notifications were issued by different managers in different areas of the facility and in different roles. (Arb. T. 32-34).

On December 18, 2015, Evans dropped an engine to the floor from his Selector equipment. It was “his second incident within the past hour.” Supervisor Buckingham investigated the incident and determined that Evans had failed to properly transport a load, failed to report an incident, and then presented a false statement about how the engine was flipped. As a result, Evans was issued a verbal reminder (Step 1). (GC-10; T. 205-07). No grievance was filed. At the hearing, Evans asserted that he did not agree with the DAR and claimed that the engine fell off when he took a turn. (T. 207-08). He asserts that in remedial safety training after the incident, even his trainer, Glen Dobson, did not know how to move that type of engine safely and that Buckingham had to instruct both of them how to do it. (T. 207-15).

In February 2016, Evans's supervisor, Arnold Ayikwei, witnessed problems with Evans' performance in placing items in locations in the facility. When asked for an explanation of his conduct, Evans, in a lengthy response, denied responsibility; he claimed "there may be a system error in play here." (GC-11; T. 216-19). On February 24, 2016, as a result of that problem, Ayikwei issued Evans a written reminder (Step 2) for violation of rule 13, performing careless or poor workmanship. (T. GC-11; T. 216-19). No grievance was filed. At the hearing, Evans testified that he did not agree with the DAR because the Company's location system mixes up Mack and other part locations. (T. 217-20).

**E. March 2016 – Written Warning for Wasting Time-Step 3**

On March 22, 2016, Evans' Team Leader, Arthur Braggs, a non-supervisory employee, was looking for Evans in order to resolve some discrepancies in placement of items by Evans that Braggs observed in the DPX system. Braggs testified that he found Evans in the break room at approximately 1:35 a.m., well before Evans' scheduled 2:00 a.m. lunch break time. Evans was watching TV. Braggs testified that he reported his observation to Inbound Supervisor Robert Buckingham by email.<sup>4</sup> According to Braggs, he and Buckingham had observed Evans taking unscheduled breaks multiple times prior to this incident. For this day, Evans' work record on the DPX system showed a large period of gap time between times of logging into the DPX system and recording work -- stopping at approximately 1:32 a.m. and then beginning again at 2:57 a.m. (T. 730-31, 763, 843-44, 865, 883, 888, 1062, 1114-15; GC-13 GC-44).

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<sup>4</sup> Braggs similarly observed and reported another employee, Tavares King, for precisely the same type of work rule violation on March 4, 2016. (RX-3).

Evans disputed Braggs' account. Evans testified that he was not in the break room at 1:35 a.m. and that Braggs was lying. According to Evans, he was not in the break room until shortly before the 2 am break period (at about 1:54 to 156 a.m.), that he was not watching television, but was getting water, and that there were 10 to 15 other employees in the room. (T. 235-38). Evans asserted that the lunch break was from 2 to 2:30 a.m., but after the lunch break was over the DPX log did not show work again until 2:57 a.m. because he had to walk back to his equipment and then remove plates and skids and possibly do some "emballage" work. (T. 236). Evans testified that at some point after knowing what Braggs had reported to Buckingham, he (Evans) responded with a lengthy written rebuttal protesting his innocence and claiming Braggs was lying. (T. 1007-13, 1053-54; GC-12).

As a result of this report from Evans, and because Evans had been coached on prior occasions, Buckingham issued Evans a written warning (step 3), for violation of Rule 8, wasting time during scheduled work hours. Bush testified that in his review of the situation he credited Bragg's account that Evans was in the break room before break time. Bush also observed a "very unusually long" period of gap time based on the DPX records. (T. 1113-15). Based on the investigation and the history of Buckingham having coached Evans previously, he reviewed Buckingham's decision in the matter and chose not to overrule Buckingham's decision. (T. 723, 735-36, 749, 754-55, 774-75, 1050-53, 1113-15, 1120; GC-12; GC-57; GC-58). Other Byhalia employees have been counseled and/or disciplined for comparable rule violations. (RX-3; GC-40, p. 1; Arb. CX-2; GC-57; GC-58; T. 875-77, 880-82, 887; 1102-05).

**F. May 2016 – Initial 30-Day Suspension for Safety Rule Violation.**

On April 21, 2016, Evans was moving a pallet containing windshields when he dropped the pallet it to the floor, thereby causing damage to the winshields. (GC-18; T. 319-21, 1018-21). Supervisor Ayikwei investigated the incident and concluded that Evans had acted negligently and unsafely in lifting the load, thereby violating rule 5. (GC-16; GC-18; T. 1018-21). Evans disputed that he had acted unsafely. (T. 319-23, 337). Ayikwei, who is of African heritage and has a thick accent, wanted Bush to be present when the DAR was issued to Evans. As Bush was on vacation at the time, the meeting with Evans did not occur until May 3, 2016. At that time, Bush met with Evans and Union representative Roderick Simpson and issued a Step 4, 30-day suspension (“DLO”), for violation of rule 5. Evans vigorously disputed this DAR, and, as discussed below, in the course of his disputing it, he engaged in conduct that would lead to his termination.

**G. May 2016 – Initial Termination for Abusive and Threatening Language.**

On May 3, 2016, it is undisputed that as they stepped out of the meeting into the open Main Office, a heated exchange occurred between Evans and Bush in the presence of Simpson and Candid Patino, a contract security guard. (T. 288, 980, 1026-29; Arb. JX-3, CX-8 at 59, 65). Evans disputes making any threats, but admits that he said something to the effect of, “the reason things are all fucked up around here is because of people like you.” (T. 339-44). Bush testified that Evans used profane language and that there was a threat included. (T. 1025, 1028, 1084, 1087-92). Patino, in a written statement provided shortly after the incident, indicated that Evans had used threatening language towards Bush. (JX-3, CX8; T. 985-90). Patino wrote:

I am writing this statement on the suspension on today of Walter Evans. I witnessed Kevin Bush having a meeting with Walter Evans explaining to

him his suspension. Upon dismissal, Walter Evans became very upset. He started cursing and pointing his finger at Mr. Bush. Walter Evans stated that this isn't over, you think you can get away with this this, no I'm going to get your ass. You think you can do this shit and get away with it. I will see you in court. Better yet, I will see you in 30 days and we will handle it then. I'm going to get your ass. He was asked to leave the property. He continue to say these things as he walked out and that he wanted to file a grievance now. He was very upset and in a rage. He left the property and stated this over again while leaving.

It is undisputed that Bush then promptly reported the incident to Youngdale and Thomas by email. Company management conducted an investigation of the misconduct and ultimately concluded that Evans had violated Rule 9, using abusive language, and Rule 20, threatening, harassing and intimidating another employee. (T. 1082-85, 1087-93; GC-19; GC-48). Two days after the meeting and incident, the Union filed a grievance over the 30-day suspension, contending that the incident was technically an "accident" rather than a safety violation. (GC-34). On May 11, 2016, Respondent notified Evans by letter that his employment had been terminated effective as of May 3 (GC-19): "The purpose of this letter is to notify you that the Company has determined that your words and actions following your disciplinary hearing on May 3, 2016 constitute violations of Work Rules #9, and #20 of the Byhalia CDC Rules of Conduct. Accordingly, in light of your active discipline record, your employment with Volvo is hereby terminated effective May 3, 2016."

On May 12, 2016, the Union filed a grievance denying that Evans used abusive language or that he threatened, harassed or intimidated another employee. (GC-35). On June 27, 2016, Evans filed Charge No. 15-CA-179071. In the Charge, Evans asserted that his suspension and termination in May 2016 were in retaliation for his union and/or other protected concerted activities. (GC-1(a)).

## **H. July 2016 – Grievance Settlement Results In Evans Being Reinstated**

On July 8, 2016, the two grievances regarding Evans' 30-day suspension and his termination were heard by Company and Union representatives at the third step of the CBA's Grievance Procedure. In that procedure, the Union, on Evans' behalf, agreed to the Company offer to (1) rescind the 30-day Suspension for the alleged safety violation that resulted in an accident, as the supervisor had failed to document the alleged safety violation, and (2) reduce the termination of employment to a 30-day suspension penalty for the rule 9 and 20 violations. By this settlement, Evans was reinstated and placed back at Step 4 of the progressive discipline policy. The Union is Evans' legal representative under the Act to make such an agreement regarding the discipline.<sup>5</sup> (GC-21; GC-22; GC-35; T. 260-64, 288, 1116-17).

On July 21, 2016, because of allegations that Patino may have been improperly influenced regarding the statement that she gave, Tess Thomas called Patino. According to Thomas, "[s]he said she had not been influenced and that she felt that her statement was fully accurate." (T. 300-01). In an email to herself the next day, Thomas summarized the call. It reflects that Thomas told Patino that someone had implied that Patino had been influenced regarding her statement and asked if that was true. Patino replied that "it absolutely wasn't true." Patino indicated that, after the incident, Bush asked her to write up a statement and she went into a room and wrote it. In an effort to make sure Patino felt comfortable, Thomas told her she would not get in trouble if she was influenced and that there would be no repercussions if her

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<sup>5</sup> The UAW and the Company also agreed that Evans' official date of reinstatement would be June 3, 2016 and Evans received full back pay. (Arb. CX-10).

statement turned out to be inaccurate. Patino indicated that no one influenced what she wrote or saw what she wrote until she gave it “to Leslie” (in Human Resources). She then told Thomas that “Rod” (a union representative) tried to get a statement from her later and he said, “I hope you weren’t influenced.” According to Patino, Rod said “Walter was only stating his opinion, and that he had a right to do that.” Patino then said, “He [Rod] was the one trying to influence me on what to say.” Thomas in her email concluded by noting, Patino “confirmed multiple times during the phone call that no one influenced the statement she provided and that it is accurate.” (JX-3, p. 65).

#### **I. March 2017-Termination for Backing Out into an Aisle-Step 5**

As far as can be determined from the record, Evans’ employment following his reinstatement was uneventful for almost 8 months. Upon his reinstatement, Evans had been awarded a job in outbound, where he had a different group of supervisors. On the morning of March 17, 2017, however, Evans backed his lift truck out of an aisle and into the middle of the main north-south aisle of the facility in direct violation of the following Safety Rule:

- Do not back into aisles.

(GC-58; GC-29). There is no dispute that Evans violated the safety rule by backing into an aisle. What is disputed is the reason that he did so and whether this was the motivation for his subsequent termination.

The Company witnesses’ accounts of the facts are generally consistent and as follows. On the morning of March 17, 2017 at approximately 8:30 a.m., a morning escalation meeting was occurring in the “Pilot Area,” which is located near the center of the facility, near the Emballage Area, west of the main two-way north/south aisle. (T. 903, 1033-39, 1094, 1110; GC-61).

Present at the meeting were Inbound Manager Kevin Bush, Inbound Team Leader Deadrick Simelton, Safety Supervisor Burt Barton, Outbound Supervisor Bobby Clark, and Quality Supervisor Randy Sheeley. As this meeting was taking place, Bush pointed out to the group that an “order selector” was backing out of Aisle 128 and into the main north/south aisle. The observed conduct was “probably less” than 75 feet from the witnesses and their vision was unobstructed. Several of the group recognized that it was Evans backing into the aisle. (T. 691, 697-98, 714, 793, 831-36, 837, 1110). Evans’s direct supervisor, Clark, left the group meeting immediately and walked over to speak with Evans. Safety Supervisor Barton followed moments later and immediately took photographs of the aisle with his cellular phone. The photographs were taken looking east down Aisle 128 and showed an unobstructed aisle with only a lift truck on the far side of another north/south aisle. No cones of any type were visible in the aisle. (T. 691, 697-98, 700, 1099; Arb. CX-14).

Clark subsequently approached Lonny Otto with Inbound Manager Bush just before a 9:30 a.m. managers meeting was to convene. (T. 905). They related to Otto that there had been a safety incident earlier that morning, and Otto agreed that they would talk after the manager’s meeting. Following that meeting, Clark and Bush met with Otto and they explained what they had observed during their 8:30 a.m. meeting. They furnished Otto with the names of the other witnesses. Otto responded by asking the two to provide written statements. He then contacted Barton, Simelton and Sheeley and requested statements from them, thus getting a statement from each of the five managers at the meeting who had seen Evans back out of the aisle. (T. 701, 717-19, 835-36, 902, 905-06; Arb. JX-3, CX16).

Otto then contacted Richard Green, First Shift Union Committee Person, and requested that Green bring Evans to his office to discuss the incident. Otto, whose first day of employment had been the day that Evans was reinstated from his initial termination, had never met Evans. Green notified Evans and they met with Otto around 11:00 a.m., just before Evans' scheduled lunch break. (T. 913-19 Arb. CX-17 & 18). In the meeting, Evans told Otto that instead of Aisle 128 as reported by the managers, he (Evans) had been in Aisle 126, which he claimed was blocked by two other equipment operators. Evans told Otto that he backed out of the aisle because he did not want to create a further safety incident by blocking someone else's egress from the aisle. Otto requested that Evans provide a written statement. Evans agreed to do so, but asked if it could be after lunch. Otto agreed. (T. 913-16).

After lunch, Evans provided a written statement of his version of events, admitting that he had backed out of an aisle, which he claimed was Aisle 126. (GC-29; GC-30; T. 915-16). Evans asserted that another lift truck in the aisle had flipped an emballage over and the top two sleeves were in danger of falling and that a second lift truck was already trapped between the accident and Evans. He testified that based upon his training, experience and OSHA regulations, he chose to blow his horn and back into the main aisle of the facility. (GC-29; GC-30; T. 915-16).

Otto's investigation concluded after speaking with Evans and the other known witnesses, reviewing and considering all written statements, photographs, Evans' Pick Record for March 17, 2017, and walking the area of the incident. (GC-51; Arb. JX-3, CX-12, 13, 14, 16, 17, 18; T. 906). Otto alone determined that Evans had in fact violated Rules 5 and that discipline was appropriate. (T. 964). He prepared his Investigation Summary related to the rule violation that

same day. (GC-51; T. 920-23). Otto then reviewed Evans's discipline file and found that Evans was already at Step 4 of the Progressive Discipline Policy as a result of the previous settlement and thus was now facing Step 5, termination of employment. (T. 929). (T. 919, 920-23, 963-64).

On the following Monday, March 20, 2017, Evans and Union representative Green were informed of Evans' termination. (GC-31; T. 925-26). Byhalia managers and supervisors had no input into that decision. (T. 924-25, 964). Other Byhalia employees have been disciplined for backing out of aisles and other Safety Rule violations involving operation and driving of order selectors and fork lifts. (GC-39, p. 42-45, 70; GC-40; GC-41, pp.1-2; T. 811-14, 937-39, 1041, 1096-97, 1102-04). Evans' grievances, charges, and complaints were not a factor in Otto's decision on the discharge. (T. 921-22, 928, 963-64).

On March 21, 2017, Evans filed Charge No. 15-CA-195183. In this Charge, Evans asserted that the Company discriminated against him by discharging him on March 20, 2017 in retaliation for his union and other protected concerted activities and because he had filed prior charges with the Board. (GC-1(o)). Evans amended this Charge multiple times, adding and then removing a Section 8(a)(5) allegation related to the Company's buzzer system for permitting employees to prepare for break times and the end of shifts. (GC-1(s) & (u)).

The following day, March 22, 2017, the Union filed a grievance challenging Evans' termination as a violation of the CBA. (GC-32). On May 26, 2017, Respondent provided its third-step answer to the Union, denying the grievance and asserting that Evans was discharged with just cause. (Arb. CX-21, p. 3). The grievance was not resolved and the Union moved forward to arbitrate the grievance. (RX-4).

**J. December 18, 2017- Arbitration Award Denying Grievance**

On October 4, 2017, the Union and the Company arbitrated the grievance challenging Evans's termination under the CBA. The Company had the burden of proving that Evans was terminated from employment with "just cause." In his decision, the Arbitrator recited the list of disciplinary steps the Company had used for Evans and then concluded as follows:

... the Arbitrator finds that the Company satisfied its burden of proof showing that Evans violated the safety rule prohibiting backing into aisles, which the Arbitrator concludes is a reasonable rule in light of the potential hazard, in particular considering the large size of order selectors (resembling a massive mutated fork lift) and the damage they could cause. As a result, he finds that Evans violated Rule of Conduct 5. As this was step 5 in the progressive discipline of Evans, his termination was for just cause.

In conclusion, the arbitrator denies the grievance in this case and rules against the union on the issue of whether Evans was discharged for just cause as required by article 19, section 1 of the applicable collective bargaining agreement. To that extent, the union is a loser" within the meaning of Article 20.

(RX-4).

**L. Facts Relevant to the Refusal to Bargain Allegation in Paragraphs 10 and 11(d) of the Third Amended Complaint**

When Respondent opened the Byhalia facility, it implemented a buzzer system to give employees notice of break and lunch periods and the end of such periods. In 2016, an advance notice period buzzer was added and set "by the Company" originally at 5 minutes before the break or lunch. Sometime in 2017, Respondent changed the advance notice period of the buzzer from 5 minutes to 3 minutes and informed the employees on or about March 17, 2017. (T. 454-56; 681-82, 1045-47, 1063, 1099, 1101).

Evans complained at a town meeting about the buzzer times time being changed from 5 to 3 minutes in advance of breaks. (GC-63). Plant Director Onur Orcun, who was leading the meeting, explained that it was not a change in terms and conditions of employment because nothing [in the CBA] regulated the buzzer system. No grievance was filed by any employee or the Union and the Union did not complain about it or request bargaining. (GC-63).

## **ARGUMENT**

### **A. The Legal Framework for the Section 8(a)(3) & (4) Allegations**

The allegations regarding the discipline and termination of Evans' employment arise under sections 8(a)(3) and (4) of the Act. The legal framework is similar under both sections. *Newcor Bay City Division of Newcor, Inc.*, 351 NLRB 1034, n. 4 (2007). The General Counsel is required to establish "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," at which point, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981). Although sometimes stated in varying terms, the elements of the General Counsel's case include proof that (1) the employee(s) engaged in activity protected by the Act, (2) the respondent was aware of such activity, (3) the alleged discriminatee(s) suffered an adverse employment action, and (4) a nexus exists between the employee's protected activity and the adverse employment action. *Newcor Bay, supra*, 351 NLRB at 1036; *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp.*, 337 NLRB 726, 726 (2002).

In analyzing the record evidence, the Board must consider the record in its entirety and not just the evidence that supports the General Counsel. The Board “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack v. NLRB*, 522 U.S. 359, 378 (1998). The evidence in support of a particular conclusion “must be substantial, not speculative, nor derived from inferences upon inferences.” *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 639 (5th Cir. 2003). “The Board may not raise suspicion to status of fact or base inferences upon mere speculation, ... and findings of the Board must rest on evidence, not on surmise or suspicion.” *Baird-Ward Printing Co.*, 109 NLRB 546, 567 (1954).

“The ultimate burden remains, however, with the General Counsel.” *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Thus, “a finding that the General Counsel has met the initial Wright Line burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in [the employer’s decision] does not mean that the [decision] was in fact ‘unlawfully motivated.’” *Tom Rice Buick*, 334 NLRB 785, n. 7 (2001). Although the employer bears the burden of establishing its “affirmative defense” by a preponderance of the evidence, the evidence that will suffice to establish this defense is not unduly onerous. “Nothing in the Board's Wright Line decision indicates that the employer's burden cannot be met by using circumstantial, as opposed to direct, evidence,” *Centre Property Management v. NLRB*, 807 F.2d 1264, 1269 (5th Cir. 1987), and “[t]he Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it.” *Merrillat Industries*, 307 NLRB 1301, 1303 (1992).

**B. The General Counsel Failed To Establish Animus Toward Any Protected Activity By Evans Or Any Nexus To His Disciplinary Actions.**

There is no question that Evans engaged in a number of activities that are protected by section 7. Certainly the grievances and unfair labor practice charges that he filed qualify as protected activity. And Respondent does not dispute that to the extent that he distributed Union literature and t-shirts and raised safety or other group-related complaints, such activities were protected by §7. At the same time, however, there may have been “complaints” or “issues” raised by Evans that were purely personal in nature and that would not constitute concerted activity for mutual aid or protection. For example, the April 12, 2016 letter that Evans wrote to Bush is largely a personal diatribe about Arthur Braggs. This related to what may have been a personality conflict between Braggs and Evans dating back to before Braggs became a leadperson. Much of Evans’ testimony was so generalized that it is not completely clear which activities General Counsel may rely upon. Without knowing precisely what issue or complaint the General Counsel may rely upon, Respondent cannot concede that “all” of Evans’ activities were protected by the Act.

It also is undisputed that Respondent was aware of many of Evans’ concerted activities. Thus, the grievances and charges that he filed, and the specific complaints and issues that he raised directly with Respondent were known to Respondent. Certain other activities, however, such as his distribution of Union literature and t-shirts was not witnessed by Respondent, and thus the General Counsel has failed to establish knowledge of such activities. Similarly, as discussed in greater detail below, while Tess Thomas received and read Evans’ April 12, 2016 letter to Kevin Bush, she did not share it with the Byhalia management team. And Bush testified

that when he saw the package from Evans, he simply gave it to Leslie Thompson without reading it.

The record further reflects that Evans was issued multiple disciplinary actions that qualify as adverse employment actions. Indeed, these are the DARs that are alleged to have been retaliatory. Where the General Counsel's prima facie case falters, however, is his complete inability to establish any animus by Respondent toward any protected activity by Evans or any nexus between any specific protected activities by Evans and the challenged disciplinary actions. In most § 8(a)(3) and (4) cases, the General Counsel seeks to establish animus by establishing other independent violations of § 8(a)(1) such as threats, interrogations, promises, and acts of surveillance. Here, however, no such allegations have been made, or proved. While proof of independent violations of the Act is not the sole means by which animus may be proved, the absence of such violations certainly tends to negate its presence.

Animus toward Evans' activities is also belied by Respondent's responses to the complaints that he raised and the grievances he filed. The various safety concerns that he raised regarding the racks and heavy loads were taken seriously and addressed through a variety of corrective actions. Further, the record fails to demonstrate that Respondent discouraged, or viewed negatively, employee complaints regarding safety. To the contrary, Respondent appeared to place great emphasis on safety.

As for the various grievances filed by Evans, the record reflects that Respondent and the Union have a positive, long-standing relationship, as well as a vibrant and effective grievance-arbitration procedure. Indeed, the grievance procedure resulted in Respondent agreeing to withdraw the May 3, 2016 DAR regarding the load that Evans dropped. This resulted in his

ensuing termination for abusive and threatening conduct being rescinded and reduced back to a 30-day suspension. It seems odd that Respondent would agree to such a settlement if, as the General Counsel contends, Respondent bore animus toward his alleged protected concerted activities and was determined to rid itself of Evans.

Further, for the most part, Evans' alleged "union" activities involved Evans' disagreement with the manner in which the *Union* was representing him and perhaps other employees. There is little evidence of any pro-union activities by Evans. Although he was apparently an alternate union steward in late 2015, there is no evidence that he did anything as a union steward that raised any ire on the part of Respondent. Evans also testified that he distributed packets of Union literature in 2015 and 2016, but this literature, which was introduced into the record by the General Counsel, was so generic as to be completely bland and non-inflammatory. None of these activities cast any aspersions on Respondent or its management. And as noted, Respondent was largely unaware of any "union" activities by Evans.

As for the April 12, 2016 letter from Evans to Bush, most of the letter constituted personal complaints by Evans regarding Arthur Braggs. Buried in the letter are a few isolated assertions regarding Braggs allegedly creating a hostile working environment. Even assuming that the letter in whole or in part constituted protected activity, the record fails to demonstrate any animus on the part of Respondent as a result of the letter.

Presumably, the General Counsel relies upon the timing of the various DARs issued to Evans in relation to his alleged protected activities. Timing, of course, may, depending upon the circumstances, tend to establish a nexus between protected activity and discipline that ensues shortly thereafter. The problem with this contention in this case, however, is that in many

instances, the timing is not particularly striking and in others, it is simply a reflection of the fact that throughout most periods of his employment, Evans was raising some issue or pursuing some grievance that may arguably have constituted protected concerted activity. Indeed, the whole timing issue is a bit like chasing after a greased pig. Under the General Counsel's theory of the case, any DAR issued to Evans at any point in time could be viewed as retaliatory for some type of protected activity by Evans.

Most of the DARs are not particularly close in timing to any specific discrete incident or issue involving Evans. The March 23, 2016 written warning for wasting time is not close in time to any discrete event or incident. The General Counsel sought to connect Evans' 30-day suspension and initial termination to his April 12, 2016 letter to Kevin Bush. Even assuming, *arguendo*, that parts of the April 12 letter constituted protected concerted activity, there is literally nothing in the record that would support an inference that the 30-day suspension and the initial termination were motivated in any respect by the April 12 letter. Tess Thomas credibly testified that she opened and read the letter, but filed it away without forwarding it or following up with Byhalia management. Bush credibly testified that he saw that the envelope was from Evans and he simply turned it over to the Human Resource representative at the time. When the Regional Director first issued a complaint referencing this letter, Respondent sought to locate it, but could not find it anywhere. Only when the General Counsel issued a subpoena prior to the hearing did Respondent finally locate the letter in Thomas's files. Lonny Otto, who had replaced as Human Resource Manager, searched the files at the Byhalia facility, but could never locate it. (Tr. 928-929).

But even if Bush did, contrary to his testimony, read the April 12, 2016 letter, there is nothing in that letter that would likely cause Bush to be particularly upset. The complaints that Evans raised related exclusively to Arthur Braggs and were not directed at Bush. Further, the DAR that initially caused Evans' 30-day suspension was initiated by supervisor Ayikwei, not Bush, and there is no evidence that Ayikwei was aware of the April 12 letter. As for the initial termination, it stretches credulity beyond the breaking point to suggest that this decision was somehow motivated by the April 12 letter, rather than Evans' conduct during the May 3, 2016 meeting regarding his suspension. While the precise scope of Evans' conduct on that day is disputed, it is beyond question that there was a heated exchange in which Evans made statements that, at a minimum, challenged Bush's integrity.

Finally, the final termination of Evans in March 2017 is not close in timing to anything other than Evans' ongoing unfair labor practice charges and his statement at a meeting the day before regarding the changes to the buzzer system being improper. As for Evans' statements in the meeting, they were largely innocuous and Orcun exhibited no animus toward Evans for making comments. Regarding the charges, they had been pending since mid-2016. In similar circumstances, the Board has declined to draw any inference when the date selected by the General Counsel on which to measure timing is self-serving. Thus, in *Newcor Bay City Division of Newcor, Inc.*, 351 NLRB 1034 (2007), the General Counsel alleged that the employer violated section 8(a)(4) by subcontracting unit work in retaliation for the Union's filing of a prior unfair labor practice charge. In support of this allegation, the General Counsel argued that the announcement of the outsourcing decision in October came only a few weeks after the General Counsel issued a complaint on September 28 alleging that the employer had unlawfully

implemented new terms of employment without reaching a good-faith impasse. In rejecting this contention, the judge opined:

Even assuming that Respondent made no earlier announcement, I am reluctant to infer unlawful motivation because this time period, selected by the General Counsel, is relatively short. The Union filed the initial charge in that case on June 16, 2004. If that date is used, then the interval becomes about three and one-half months. In the absence of some other persuasive evidence of unlawful motivation, I am reluctant to infer much from that long an elapsed time.

Arguably, Respondent might be more upset by the issuance of a complaint—resulting in an unfair labor practice hearing— than by filing of a charge. However, deciding which would bother an employer more entails a bit of conjecture. In any event, I do not believe drawing an inference from timing would be appropriate here and shall not do so.

*Id.* at 1039-40. *See also, Kennametal, Inc.*, 358 NLRB 921, 930 (2012) (“The Board has declined to draw an inference of discrimination when the Acting General Counsel picks a self-serving date in an effort to show that the timing of an adverse action is suspicious”).

Given the absence of any evidence of probative animus by Respondent and the lack of any “striking” timing, the General Counsel faces a very steep hill to climb in establishing a prima facie case. Most of his evidence in this regard sought to challenge the underlying merits of each DAR and whether each DAR was consistent with past practice. It must be remembered, however, that it is not the role of the Board to determine whether “just cause” existed for each DAR. That is what the parties’ grievance/arbitration procedure is for. In that regard, the record reflects that Evans did not file a timely grievance regarding the March 2016 DAR for wasting time. He did grieve his May 2016 suspension for a safety violation and his termination for threatening and abusive conduct. During the grievance process, Respondent and the Union

agreed to settle these two grievances by rescinding the safety violation DAR and reducing the termination back to a Step 4, 30-day suspension. Thereafter, Evans was reinstated and paid backpay. Evans also grieved his final termination in March 2017. The parties could not resolve the grievance, and it proceeded to arbitration, with the arbitrator issuing a decision finding that Evans was terminated for just cause and denying the grievance. Regardless of whether the Board “defers” to the grievance settlement and the arbitration award, it is significant that the contractual dispute resolution process functioned as it should and produced results which were, at least for contractual purposes, “final and binding.”

Further, it is well settled that the Board “ ‘cannot substitute its judgment for that of the employer’ and decide what constitutes appropriate discipline.” *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171 n. 6 (2000); *see George L. Mee Memorial Hospital*, 348 NLRB 327, 332 (2006). Absent proof of pretext, the General Counsel’s burden is to establish actual disparity, i.e., that “similarly situated” employees received lesser discipline. *Pacific Maritime Assoc.*, 321 NLRB 822, 824 n. 7 (1996). In circumstances where cause for discipline has been established, the Board does not question management’s exercise of discretion in deciding the appropriate level of punishment, at least absent “blatant disparity.” *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991), *enfd*, 980 F.2d 1449 (11<sup>th</sup> Cir. 1992) (Table). A “blatant” disparity is a disparity of such proportion “as to admit of no other interpretation than that the employer bore animus against the protected activity.” *Tomatek, Inc.*, 333 NLRB 1350, 1364 (2001). It is disparity that is “completely obvious, conspicuous, or obtrusive especially in a crass or offensive manner.” *Merriam-Webster’s Online Dictionary*.

As discussed below, while there are disputed facts regarding each of the challenged DARs, there is no evidence that the underlying events were fabricated or obvious pretextual. In each circumstance, there was conduct by Evans which arguably violated Respondent's rules and for which other employees have been disciplined. Further, there is no credible evidence of blatant disparity and considerable evidence of other similarly situated employees being disciplined.

Also, assuming that the General Counsel established a prima facie case with respect to one or more of the DARs, Respondent established its Wright Line defense. On each occasion, Evans engaged in conduct which violated an established rule of conduct and for which other employees had been disciplined. Indeed, the General Counsel offered into evidence countless DARs issued to other employees for violations of the same rules for which Evans was disciplined.

### **C. The March 23, 2016 Written Warning**

The third consolidated complaint does not allege that the DARs issued to Evans in December 2015 (verbal) and February 2016 (written) were unlawful. Accordingly, those DARs may not be challenged and are presumed to be lawful. Thus, the first DAR that must be addressed is the March 23, 2016 written warning for wasting time. Evans concedes that he was in the break room early. His defense, however, is that he wasn't in there as early as Braggs placed him there. In support of this position, he contends that he could not have traveled from where he made his last pick to the breakroom in 3 minutes. The evidence, however, is conflicting. as Braggs and Buckingham both testified that it was in fact possible, particularly at 1:30 a.m. in the morning, when there are only a few employees working and little, if any traffic. Also, although

Evans fixated on whether it was precisely 1:35 a.m. when Braggs observed him in the break room, that is really not the question. Whether he was in the break room at exactly 1:35 a.m. or whether it was a few minutes later hardly makes any difference. The clock on the wall in the break room was not a digital clock and it was not synchronized with the computer system. Thus, it is entirely possible that the break room clock was off by a few minutes. Evans acknowledged that Braggs looked at the clock when he saw Evans. And in his email to Buckingham, Braggs noted that he observed Evans at 1:35 a.m. There is no obvious reason why Braggs would fudge the time, as Evans was early whether the time was 1:35 a.m., 1:40 a.m., 1:45 a.m., or 1:50 a.m.

Also, Evans' testimony regarding the time he was in the break room was simply not credible. While there was a dispute as to exactly how long it would take Evans to get from his last pick to the break room, there is nothing in the record that would support a finding that it would take 20 minutes to travel this distance.

Further, the warning issued to Evans was not for going to break early, but for wasting time. In addition to being in the break room well before his break started, it is undisputed that his lunch ended at 2:30 a.m., and that he did not make another transaction until 2:57 a.m. There is no plausible explanation for the post-break gap in time. Notably, numerous employees have been disciplined for wasting time. (GCX 38).

Finally, there is a dearth of evidence of any probative evidence of animus on the part of Braggs and Buckingham toward any protected activity by Evans. Although both Buckingham and Braggs testified that they felt that Evans disrupted their meetings from time to time, there is little evidence of the subject matter of the complaints raised by Evans in these meetings, and there is no evidence that either Buckingham or Braggs threatened Evans or indicated anything

other than mere annoyance at the fact that their meetings were being hijacked by Evans. The General Counsel must do more than show that Evans made complaints. He must provide sufficient details regarding such complaints to permit the Board to determine whether the specific complaints raised constitute protected concerted activity for mutual aid or protection.

**D. Brags And Simelton Were Not Statutory Supervisors Or Agents**

A word is in order regarding the General Counsel's allegation that Brags and Simelton were either statutory supervisors or agents, which Respondent has denied. It is not clear that this determination makes any legal difference, given that there is no probative evidence that either Brags or Simelton harbored animus toward Evans because of any protected activities, much less that any such animus caused them to do anything regarding Evans. In any event, the burden of establishing supervisory status is on the party asserting such status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007). Any absence of evidence is construed against the proponent of supervisory status. *Community Education Centers, Inc.*, 360 NLRB 85, 90 (2014); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn.2 (1999).

Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *See NLRB v. Kentucky River*, 532 U.S. at 712-13; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994). The Board analyzes each case in order to differentiate between (1) the

exercise of independent judgment and (2) the giving of routine instructions; between (1) effective recommendation and (2) forceful suggestions; and between (1) supervision in fact and (2) the mere appearance of supervision. The authority of “effective recommendation” means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. *See DIRECTV US*, 357 NLRB 1747, 1748-49 (2011); *Children's Farm Home*, 324 NLRB 61 (1997). The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. *See Oakwood Healthcare, Inc.*, 348 NLRB at 693 (2006); *JC. Brock Corp.*, 314 NLRB 157, 158 (1994). Finally, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *See Shaw, Inc.*, 350 NLRB at 357, fn. 21; *Oakwood Healthcare, Inc.*, 348 NLRB at 693; *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001).

It is uncontroverted that team leads do not have the authority to hire, fire, transfer, suspend, lay off, recall, or promote employees. There also is insufficient evidence to establish that leadpersons such as Braggs and Simelton independently assign work, reward, discipline, adjust grievances, or responsibly direct employees. By all appearances, the leads are experienced employees who keep the work flowing and serve as conduits between the supervisors and the various work teams. The Board has consistently refused to find supervisory status when the alleged supervisor's role in discipline is found to be merely reportorial. *See Williamette Industries*, 336 NLRB 743, 744 (2001); *see also The Republican Company*, 361 NLRB No. 15, slip op. at 7 (2014); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

In *Oakwood Healthcare*, the Board elucidated the definition of responsible direction, holding that for direction to be "responsible," the person performing the oversight must be

accountable for the performance of the task by another, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not done properly. *Oakwood*, 348 NLRB at 691-92; *Croft Metals*, 348 NLRB at 722; *see also D & Ambulette Service*, 359 NLRB 580, 581 fn. 1 (2013) (requiring a showing that putative supervisor has authority to take corrective action and can suffer adverse consequences for performance errors of others). Here, there was no evidence that the team leads suffer any consequences for the poor performance of any members of their teams. Instead, the evidence shows that they monitor and are to report performance issues, but they are not directly charged with stopping the problem through disciplinary or other punitive measures or with rewards for improved performance. (T. 110, 121-22, 125-26, 127, 129, 811-12, 822-23, 827-831, 887).

The record fails to establish that the team leads are statutory supervisors. Further, they are not agents in any sense that has legal significance in this case. The leads have no role in the grievance process and are under no obligation to report union activity by employees. Nor do they make disciplinary decisions. At most, the leads are agents only insofar as they carry out their assigned work responsibilities.

#### **E. May 3, 2016, 30-Day Suspension And Grievance Settlement**

The initial 30-day suspension that was issued to Evans on May 3, 2016, was initiated by Supervisor Ayikwei and was based on his belief that the accident in which Evans dropped a load of windshields was a result of negligent or unsafe conduct by Evans. As it turned out, however, Ayikwei had failed to adequately document any unsafe or negligent act by Evans. As a result, during the grievance procedure, Respondent agreed to rescind this particular DAR and make Evans whole, which it in fact did. As this constituted a complete remedy for Evans, it is difficult

to see why the Board would not defer to this grievance settlement, and Respondent contends that it should defer.<sup>6</sup>

But independent of deferral, although the parties determined that the DAR was not sufficiently supported to stand—hence the agreement to rescind it—there is nothing that would support a finding that the DAR was motivated in any part by Evans’ protected activities. There is no evidence of any animus toward Evans on the part of Ayikwe, and he was not even aware of the April 12 letter from Evans to Bush. All that the record reflects is that Ayikwe did not adequately document any violation. This was a failing on his part, but not one that was borne out of animus.

**F. May 11, 2016 Termination And Grievance Settlement**

Extensive evidence was presented regarding the circumstances surrounding Evans’ initial termination in May 2016. While this evidence was not entirely consistent, Respondent relied primarily upon the written statement provided by the one person who was at least somewhat neutral, i.e. Candid Patino, the security guard. Patino was not employed directly by Respondent, but worked for a third-party security firm that provided security services to Respondent. Her primary role was to assist in situations where employees needed to be escorted out of the facility.

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<sup>6</sup> Respondent recognizes that the ALJ is bound by the Board’s decision in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), which reversed longstanding precedent. Because Respondent’s contract predates this decision, the Board should apply the well-established *Spielberg/Olin* deferral standards. In this regard, Respondent relies on the arguments that it raised in its motion to dismiss, which was denied by the Board without prejudice. Further, Respondent intends, if necessary, to ask the Board to overrule *Babcock*.

By all accounts, Patino was stationed between Bush and Evans when the “incident” occurred and was in the best position to hear what was being said.

During the course of the hearing, Patino resigned her position with the security firm. She also was experiencing severe medical issues. When she declined to appear voluntarily, Respondent was forced to subpoena her. When she testified, more than two years after the events in question, she stated that she had no meaningful recall of the events of that day. However, she testified that her statement was true at the time it was written and that no one influenced her in what she wrote. In fact, preparing a statement of this type was standard protocol for her. Insofar as the General Counsel contends that her statement is hearsay and cannot be used to establish the truth of the matters asserted, the statement is admissible as a business record. It also constitutes past recollection recorded. In any event, the issue before the Board is not to determine whether her statement was completely accurate. The critical issue is Respondent’s motivation, and in this regard, the more relevant question is whether Respondent reasonably and honestly believed the statement to be accurate. This question can only be answered in the affirmative. Patino was the security guard on the scene. Her job was to witness, assist, and document as necessary. While her statement is far more detailed than Bush’s statement, that is a reflection of the fact that Bush was a party to the heated discussion, more emotionally involved, not as close to Evans as Patino, and not present the entire time that Patino escorted Evans out of the facility. In these regards, Patino was a more reliable witness to the events than Bush. Also, when the Union raised questions regarding whether Patino had been influenced, Tess Thomas reached out to Patino and verified that Patino was not influenced by anyone and that her statement was accurate.

Accepting Patino's statement as accurate, as Respondent lawfully was entitled to do, it cannot be seriously questioned that Evans made threats and engaged in abusive conduct toward Bush that was sufficient to warrant discipline:

He started cursing and pointing his finger at Mr. Bush. Walter Evans stated that this isn't over, you think you can get away with this, no I'm going to get your ass. You think you can do this shit and get away with it. I will see you in court. Better yet, I will see you in 30 days and we will handle it then. I'm going to get your ass. He was asked to leave the property. He continue to say these things as he walked out and the he wanted to file a grievance now. He was very upset and in a rage. He left the property and stated this over again while leaving.

Further, because at the time, Evans had just received a Step 4 DLO, termination was the next step. There is insufficient evidence to find that Respondent acted for retaliatory reasons. Subsequently, of course, Respondent and the Union agreed to reduce the termination to a 30-day suspension and to reinstate Evans with backpay. Again, Respondent contends that the Board should defer to this grievance settlement. But, as discussed above, even without deferral, the General Counsel failed to carry his burden of proof.

#### **G. March 20, 2017 Termination**

Considerable testimony was elicited regarding the events that resulted in Evans' final termination, both in the arbitration proceeding and in this proceeding. The arbitrator concluded that Respondent terminated Evans for violating Rule 5 and that it established just cause for his termination. This hearing was fair and regular, the facts were generally parallel to those presented in this hearing, and the Respondent and the Union have a positive relationship. In these circumstances, deferral is appropriate. But irrespective of whether deferral is warranted to the decision itself, it is clear that the Board must defer to the arbitrator's critical finding of fact that

Evans did in fact back out of aisle 128, rather than aisle 126. This is important because it is undisputed that aisle 128 was not blocked in any fashion, and that there was no plausible justification for Evans to back out of this aisle. In *Aramark Services, Inc.*, 344 NLRB 549, n. 1 (2005), the Board specifically held that the judge, in addressing the deferral issue, “incorrectly rejected the arbitrator’s credibility findings and substituted his own.” Thus, the Board relied upon the arbitrator’s findings of fact.

Even independent of the arbitrator’s factual findings, the credible evidence completely undermines Evans’ testimony regarding backing out of aisle 126 rather than aisle 128. According to Evans, he was looking to make a pick at aisle 127-57. Because the aisles run in opposite directions, he could not enter directly into aisle 127 from the main aisle on which he was travelling. So he went down aisle 126 with the intent of cutting through to aisle 127, but found the aisle blocked. However, he testified generally that a smart driver who needs to come up an aisle in the opposite direction would go down a two-way aisle such as aisle 129 because no picking is occurring on this aisle and traffic flows in both directions. The driver would then cut through one of the tunnels to the aisle he is looking for. But when questioned as to why he did not make the smart move and go down aisle 129, which he approached, and instead chose to bypass aisle 129, as well as aisle 128 (which travelled in the same direction as aisle 126), and go all the way to aisle 126, Evans became visibly flustered and defensive: “You have a choice. You have a choice. Either way. I mean, I did it. I mean, I cut down there. So what. So what. I backed out. Yes, I did. Everyone backs out.” (T. 578-584). Respondent submits that Evans fabricated his story about backing out of aisle 126 in order to justify his actions. He knew that Barton had taken pictures of aisle 128 and that nothing was blocking the aisle. Respondent further submits that

Evans went into aisle 128 with the intent of backing out into the main aisle and into aisle 127 in order to make a pick at 127-57, which was at the very end of the aisle.

Regardless of Evans' reasons for entering aisle 128, the fact remains that he backed out of the aisle and was observed by Kevin Bush and a group of managers, in direct violation of a safety rule. While there was general testimony that drivers backed out of aisles "all the time," it is clear that they did not do so when supervisors or managers were in the area. Further, if in fact there were supervisors who might overlook a safety violation such as backing out of an aisle, Kevin Bush was not one of them. In fact, Bush had a reputation as a stickler for following the rules. (T. 666-67, 463-66, 653-54, 677-79). Indeed, the record reflects that Bush was personally involved in issuing a number of safety-related disciplines, including for backing out of an aisle, going in the wrong direction in an aisle, and running a stop sign. (T. 1039-1045, GCX- 39).

The General Counsel also relies on safety supervisor Barton's testimony at the arbitration hearing, in response to a question from the Union representative, that he observed another employee (Dominique Hill) backing out of an aisle the same morning as Evans backed out of aisle 128, and that the employee purportedly almost ran him over. Barton allegedly told Bush about this incident, but no action was taken. This testimony by Barton was a complete surprise to Respondent at the arbitration. At no point during the investigation did Barton ever mention this to Otto, and Bush denied that Barton made any such statement to him. The entire circumstances surrounding this testimony by Barton reeks. As became apparent at the hearing, Barton was on thin ice for performance reasons with Respondent and was on a last chance agreement that would eventually result in his termination shortly after the arbitration concluded. (T. 929-932). At some point in September, Barton encountered Evans and provided this information to him, which

Evans in turn reported to the General Counsel and the Union. (T. 593-595). Apart from the suspicious circumstances under which Barton provided this information to Evans, his testimony on this point simply does not ring true. First, it makes no real sense. If Barton observed such a safety violation, it was his job to address it. There was no need for him to report it to Bush. And in fact, the record reflects that Barton did issue various safety DARs. Second, Bush simply was not the type of manager who would overlook a clear safety violation. If Barton had told Bush about this alleged violation, Bush would either have told Barton to do his job and address it, or Bush would have addressed it himself. Third, Bush was involved in a discipline that was issued to Dominique Hill when he was observed by Otto running a stop sign. Bush identified Hill to Otto and wrote an email to Hill's supervisor, which resulted in Hill receiving a DAR on March 15, 2017. (T. 1040-1041). This discipline was issued a mere two days before Bush observed Evans backing out of aisle 128. It is beyond belief that Bush would initiate discipline against Hill on March 15 for running a stop sign and then, two days later, ignore a report that Hill had backed out of an aisle. For reasons known only to himself, Barton testified untruthfully at the arbitration regarding Hill.

Assuming, arguendo, that a prima facie case was established, it was an exceedingly weak prima facie case. For all of the reasons discussed above, Respondent overwhelmingly established its *Wright Line* affirmative defense.

#### **H. The Company's Changes to the Timing of Buzzers for Advance Notice of Break and Lunch Periods Did Not Violate Section 8(a)(1) and (5)**

The General Counsel does not allege that the actual change in the buzzer notification warning from 5 minutes to 3 minutes constituted an unlawful unilateral change. Rather, he alleges that Respondent began more strictly enforcing the rule. The evidence to support this

allegation is exceedingly weak. The vast majority of employees had always waited for the buzzer to stop work. However, it appears that from time to time, some employees would start abusing the system by lining up early. When management would become aware of such abuse, it would remind employees to wait for the buzzer. There is no substantial evidence that Respondent began issuing more DARs for leaving early for break. But even if it did, it is doubtful that this constitutes a substantial and material change requiring bargaining. After all, the rule itself is not challenged, and Respondent issued DARs for all kinds of rule violations. Whether it was lax at times and stricter at other times is impossible to quantify. Further, this is the type of issue that the Union was free to raise if it so desired by filing a grievance if it believed that any employee was being unfairly disciplined. In fact, however, the Union raised no such challenge and never requested to bargain over enforcement of the buzzer policy. It is more than a bit strange that it is an individual, rather than the Union, who filed this charge. Respondent contends that the General Counsel failed to carry his burden of proof and that this allegation should be dismissed.

### **CONCLUSION**

For the reasons above, Respondent requests that the Third Consolidated Complaint be dismissed in its entirety.

Respectfully submitted, this 9<sup>th</sup> day of November, 2018.

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## CERTIFICATE OF SERVICE

I certify that this day I served the foregoing Brief on the following persons by electronic mail:

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