

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

SCHUFF STEEL COMPANY

and

**Case 20-CA-204378
JD (SF)-29-18**

DEREK DIXON, an Individual

**SCHUFF'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S
EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS**

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I. STATEMENT OF THE CASE¹

This case was heard before Administrative Law Judge Amita Baman Tracy on April 23 and 24, 2018 in San Francisco, California. The Complaint in this matter alleges that Schuff Steel Company (“Schuff” or “Respondent”) violated Section 8(a)(1) of the National Labor Relations Act (“Act”) when it laid off Charging Party Derek Dixon (“Dixon” or “Charging Party”) for allegedly engaging in concerted activity.

Judge Tracy issued her decision and recommended order (“ALJD”) in this case on September 18, 2018. On October 10, 2018, Counsel for the General Counsel (“CGC”) filed an Unopposed Motion for an Extension of Time to File Exceptions.² On November 13, 2018, CGC filed Exceptions and a Brief in Support of Exceptions to the ALJD.

Counsel for the General Counsel’s Exceptions and Brief in Support (“Exceptions Brief”) is a remarkable and extensive collection of unsubstantiated assertions and misrepresentations of the record. CGC’s unrelenting attack on Judge Tracy’s well-reasoned and amply supported decision should not be countenanced by this Agency. The Exceptions are a transparent attempt by CGC to deflect attention from the core of Judge Tracy’s decision: the Judge simply found Schuff’s witnesses to be more credible. The credible evidence of record unquestionably supports

¹ References herein are as follows: __ ALJD __ refers to the Judge Tracy’s decision and corresponding pages and lines; “Tr. __: __” refers to the hearing transcript and corresponding page numbers and lines, “Jt. Ex. __” refers to the Joint Exhibits; “G.C. Ex. __” refers to the CGC’s Exhibits; “R. Ex. __” refers to Respondent’s exhibits.

² In seeking Respondent’s consent to the Motion, CGC indicated that it was unlikely he would file Exceptions, stating, among other things, that Judge Tracy’s credibility findings made an appeal a “longshot” and suggesting that an appeal wasn’t worth the “time and resources.” CGC requested the extension because of a pre-planned vacation.

Judge Tracy's conclusion that Charging Party's separation was for legitimate business reasons and was wholly unrelated to any alleged protected activity.

CGC's misstatements are too numerous to list and blatant at times. For instance, CGC repeatedly claims Judge Tracy did not base her credibility findings on the demeanor of the witnesses, when she clearly explained:

The General Counsel and Respondent each presented two witnesses for testimony: Dixon and Marcial for the General Counsel, and Chinn and Swartz for Respondent. Respondent's witnesses provided reliable, comprehensive, and concrete testimony regarding the events at issue in this matter. The demeanor of both Swartz and Chinn remained calm, patient, and confident....

On cross-examination, Swartz did not waiver....

Chinn also testified persuasively although he had no involvement or knowledge of the decision to lay off Dixon. Based upon my observations of Chinn and Swartz' demeanor as well as the entire record, I can only conclude that they provided credible and reliable testimony, and were far more believable than Dixon and Marcial as to the complaint allegations.

8 ALJD 15-36.

CGC makes numerous assertions that have no support in the record, including, *inter alia*, claiming that Mr. Swartz was not Charging Party's supervisor, was not the decision maker, and did not lay off employees for taking extended breaks. However, all of these matters are undisputed in the record. CGC has no basis in the record or authority to revisit these undisputed facts at this juncture.

CGC's inappropriate Exceptions Brief is similar to his inappropriate conduct on the morning of the first day of the two day trial in this matter. It is undisputed in the record that CGC counseled a witness he intended to call to make changes to his prior sworn affidavit, including, notably, deleting a sworn statement that Charging Party was warned about taking extended breaks. CGC's questionable conduct is only emphasized by his weak "claim" in the

Exceptions Brief that he gave Mr. Marcial “witness instructions” that informed him to tell the truth. CGC then argues the deletion was not “significant”, yet CGC repeatedly challenges that Charging Party was warned and/or terminated for taking extended breaks.³

Judge Tracy showed remarkable restraint in not striking the entirety of Marcial’s testimony and sanctioning CGC for his conduct. CGC rewarded that restraint with an unsubstantiated and unfounded attack on Judge Tracy’s careful and excellent decision.

II. QUESTIONS PRESENTED⁴

CGC filed 33 exceptions to the ALJD. The limited issues presented by the CGC’s exceptions are as follows:

- A. Whether Judge Tracy’s factual findings are properly supported by the record.
- B. Whether Judge Tracy’s credibility determinations should be sustained.
- C. Whether Judge Tracy’s legal conclusions are grounded in Board precedent.

III. STATEMENT OF FACTS

On June 12, 2017, Respondent, a unionized, leading steel fabricator and erector, laid Charging Party Derek Dixon and Robert Wright⁵ off for taking extended breaks and breaks away

³ CGC boldly contends that Marcial’s alteration of his prior sworn testimony (on the central issue of this case) is not a basis to discredit Marcial. Not surprisingly, CGC cites no authority for his claim that the Board should disregard Marcial’s prior inconsistent (sworn) statement. Exceptions Brief at 36.

⁴ CGC failed to articulate any questions presented in his brief. Respondent has summarized the CGC’s exceptions in its Questions Presented.

⁵ CGC attempts to bury the clearest evidence that Schuff laid off Dixon for taking extended breaks and not any alleged protected activity—the contemporaneous lay off of Robert Wright for the exact same reason. Indeed, CGC does not even address the undisputed facts concerning Mr. Wright in the single paragraph (in a 49 page brief) he devotes to addressing Schuff’s defense under *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

from the point of work while on the Facebook Project. The Facebook Project was a massive undertaking. It required approximately 150 to 250 employees on any given day and entailed the erection of 15,000 tons of steel. Tr. 250:7-13; 265:17-266:11. The project was the equivalent to one year of work to be completed in 55 days. Tr. 250:7-13; 265:17-266:11. As Area Superintendent Randall Chinn described, it was a project “nobody else wanted to do [] so we took the job and did it successfully.” Tr. 250:14-17.

Due to the magnitude of the Facebook Project, Respondent strived to keep production efficient and on schedule to meet the customer’s expectations. Tr. 250:7-17. To stay on target, Respondent had to lay off employees almost daily for various issues. Tr. 285:3-22. General Foreman G.W. Swartz explained some of the ironworkers would take longer breaks, walk around, go out to the parking lot, or generally did not produce well. Tr. 285:3-22. Swartz testified that extended breaks were a constant problem on the Facebook Project. Tr. 324:2-22. “Just, you know, we had 250 guys on that job. You’d have guys from all over the place, and some people kind of were just there to get a paycheck.”⁶ Tr. 324:20-22. At the hearing, Swartz testified in detail regarding at least eight break-related layoffs in May and June that he could easily recall. Tr. 289:24-305:22; R. Ex. 6 & 11-17.⁷ There is no dispute in the record that employees were laid off for taking extended breaks. Tr. 289:24-305:22; Ex. R-6 & 11-17.

⁶ Respondent does not consider a layoff a disciplinary action and it is undisputed that under the Ironworkers contract, ironworkers could immediately seek a position on another crew or project. Tr. 259:20-260:20; 306:10-19.

⁷ Swartz estimated he laid off over 20 individuals in June 2017. “I don’t have an exact estimate, but in the month, it was probably 20-something.” Tr. 287:2-5. Respondent submitted all separation notices for June 2017 in response to CGC’s Subpoena Duces Tecum. Rather than challenge this undisputed evidence at trial, CGC attempts to conduct cross examination on paper, claiming for the first time that Swartz’s undisputed testimony regarding the numerous layoffs for extended breaks was false. Exceptions Brief at 17.

It is also undisputed that Swartz was a statutory supervisor. Tr. 252:3-253:11; R. Ex. 6; 3 ALJD 15-20. All the crew foreman on the Facebook Project reported to Swartz. Tr. 301:3-5. Crew foremen were non-supervisory employees covered by the CBA with the Ironworkers. Tr. 256:3-21; 261:2-4. Swartz, General Foreman Matt Erickson, and Lyle Arnold, the superintendent of the project, were the only three individuals with the authority to hire, fire, or discipline employees. Tr. 252:3-253:11; 271:21-274:5; 277:10-14; 284:20-25.

Swartz credibly testified about his general practice regarding layoffs for extended breaks. Tr. 289:24-305:22. Crew foremen would report to him any ironworkers taking extended breaks or breaks away from their point of work. Tr. 289:24-305:22. Swartz would then try to independently confirm the report through personal observation, and he would ultimately decide whether to lay off the ironworker. Tr. 289:24-305:22.

The record evidence and credible testimony demonstrate Swartz used this same process for Dixon and Wright. Swartz received reports from crew foremen Charles Kelly and Alex Flores that Dixon and another ironworker on his crew, Robert Wright, were taking extended breaks and breaks away from their point of work. Tr. 301:17-20; 304:19-22; 305:18-306:6; 341:18-24. Both foremen reported they verbally warned Wright and Dixon. Tr. 341:8-344:9. After receiving these reports, Swartz made an effort to visually confirm Dixon and Wright were taking extended breaks and/or breaks away from their point of work. Tr. 301:17-25. Although he did not see Wright, Swartz did observe Dixon away from his point of work between the lunchtime and afternoon break. Tr. 302:1-16; 303:18-304:9.⁸ After Swartz independently

However, as found by Judge Tracy, Mr. Swartz was “steadfast” under the aggressive cross examination conducted by CGC. 8 ALJD 23-27.

⁸ Again, CGC attempts to conceal and asks the Board to ignore the fact that there was no visual confirmation of Wright’s extended breaks and yet he was also laid off,

confirmed Dixon was taking extended breaks away from his point of work, he received another report from Kelly that Dixon continued to take inappropriate breaks. Tr. 343:16-344:9. At this point, Swartz made the decision to lay off both Dixon and Wright. Tr. 340:22-341:3; 346:35-347:15; R. Ex. 6 & 17. There is no dispute that Swartz was the decision maker regarding Dixon's layoff. Tr. 340:22-341:3; 346:35-347:15.

Unknown to Swartz, Dixon had allegedly protested the discharge of an unnamed apprentice approximately a week before his June 12, 2017 layoff. Tr. 64:2-16; 69:1-8; 75:4-21; 300:11-301:2; 307:16-21. At the hearing, Dixon unconvincingly stated that he ran into an apprentice who Kelly instructed to leave the project. Tr. 64:2-16; 69:1-8. Dixon did not know the apprentice's name, and even at trial could not provide basic information about the identity of the apprentice. Tr. 73:19-25; 80:17-24; 300:19-301:16. Dixon claimed he confronted Kelly and that Kelly told Dixon the apprentice could not perform the work. Tr. 75:4-21. Dixon alleged that Kelly told Dixon if he was unhappy with the decision, he could leave the project too. Tr. 75:4-21. Dixon admitted he did not believe Kelly had authority to hire, fire, or discipline the ironworkers. Tr. 126:1-21. This was confirmed based on Dixon's testimony that he ignored Kelly's comment that he could leave the project himself and instead took the issue to Foreman Marcel Rodriguez. Tr. 75:4-21. Rodriguez told Dixon he would handle the situation. Tr. 78:2-9; 78:12-20; 80:1-5. Dixon observed Rodriguez talk to Kelly and assumed the apprentice had been re-assigned to a different crew. Tr. 80:6-16. Assuming Rodriguez addressed the issue, Dixon did not see the apprentice again or follow-up on the situation. Tr. 80:17-24. Dixon

notwithstanding the undisputed fact that Wright engaged in no alleged protected activity. Judge Tracy specifically relied on this in crediting Schuff's legitimate reason for Dixon's lay off. 15 ALJD 30-34.

alleged Wright and another Schuff employee, Larry Coleman (Coleman), witnessed this incident, yet CGC failed to call either as witnesses. Tr. 77:17-20; 242:7-15.⁹

Swartz credibly testified that he learned about Dixon's complaint concerning the unnamed apprentice one week before the hearing. Tr. 300:11-301:2; 307:16-21. Dixon admitted he did not complain about the apprentice issue to an on-site Union steward, Human Resources, or the safety representative. Tr. 133:19-134:1. Although Judge Tracy gave Dixon the benefit of his account regarding the unknown apprentice, she found that Swartz credibly testified he did not know of Dixon's purported concerted activity when he made the decision to lay off Dixon and Wright. Tr. 300:11-301:2; 307:16-21; 7 ALJD 5-25.

CGC presented two witnesses in an attempt to support the allegations in the Complaint, Dixon and Mario Marcial, Jr. (Marcial), a welder on the Facebook Project and friend of Dixon. Judge Tracy found both Dixon and Marcial's testimony to be inconsistent and inherently unreliable. 8 ALJD 6-9 ALJD 32. As Judge Tracy notably pointed out, Marcial told an uncorroborated and rather bizarre and unbelievable story that Rodriguez randomly approached him and "ranted" about Dixon's encounter with the never identified apprentice. 5 ALJD n. 17. Moreover, Marcial's relationship with Dixon and the circumstances surrounding his sworn statement severely undermined any claim Marcial presented credible testimony. 9 ALJD 15-35. Marcial admitted that: his father, Mario Marcial Sr., had been friends with Dixon for many years (Tr. 187:15-188:1); Dixon spoke to Marcial the night before the hearing (Tr. 208:9-24); Dixon

⁹ Given CGC's new and completely unsubstantiated claim that Schuff did not lay off employees for taking extended breaks, his failure to call Wright in particular cannot be ignored. *International Automated Machs., Inc.*, 285 NLRB 1122, 1123 (1987) (citing 2 Wigmore, Evidence § 286 (2d ed. 1940); McCormick, Evidence § 272 (3d ed. 1984)).

accompanied Marcial to review, revise, and sign his sworn statement (Tr. 229:25-230:10); and Dixon treated Marcial to lunch on the first day of hearing (Tr. 229:25-230:10).

Marcial further testified that he originally gave a statement to the NLRB on August 2, 2017, but he did not review, revise, or sign the statement until the very morning of the hearing, April 23, 2018. Tr. 212:10-25; Ex. R-8. That morning, Marcial, in the presence of Charging Party (after conferring the night before) revised his statement to assert that Dixon had *not* been warned about taking extended breaks, which directly contradicted his original affidavit. Tr. 211:20-218:11. At the hearing, Judge Tracy expressed serious concern regarding Marcial's revisions. Tr. 212:22-218:11. After weighing Marcial's testimony and demeanor, Judge Tracy addressed her concerns in her Decision, stating "[a]ll of these facts lead me to the conclusion that I simply cannot rely upon Marcial's testimony." 9 ALJD 15-35.¹⁰

As for Dixon, it is undisputed that he did not include any mention of the alleged unnamed apprentice incident in his initial charge. Tr. 106:14-25; 109:17-110:13. After withdrawing his first charge, Dixon filed a second charge and his new sworn statement contradicted his prior sworn testimony. Tr. 106:14-25; 109:17-110:13; 108:3-12. At the hearing, Dixon was unable to identify details of when he spoke to NLRB investigators, Tr. 63:12-15; 81:5-13; 89:13-18; 101:18-102:17; 127:9-21; 138:15-142:15, or when and where he spoke to Marcial Sr. and Jr. about his layoff. Tr. 169:4-23; 172:6-173:13. CGC also failed to present any evidence even suggesting that Swartz's reason for laying off Dixon (and Wright) was false or a pretext for discrimination. Judge Tracy reasonably concluded, based on her assessment of Dixon's

¹⁰ In addition to his testimony, Marcial was displayed physically evasive demeanor at the hearing and avoided eye contact with counsel. Judge Tracy noted Mr. Marcial's demeanor on the stand and found that his testimony "appeared to be rehearsed". 9 ALJD 15-16.

credibility, “Dixon’s testimony that he was never told about taking extended breaks....is simply not believable.” 9 ALJD 12-13.

IV. ARGUMENT

Notwithstanding CGC’s protracted attempt to ‘muddy’ the water and his repeated disparagement of Judge Tracy’s analysis, this is a straightforward case in which credibility determinations led to the reasoned conclusion that CGC failed to meet his burden to prove that Schuff’s decision to lay off Dixon was motivated by animus toward his protected concerted activities in violation of Section 8(a)(1) of the Act.

A. Judge Tracy’s Factual Findings are Amply Supported by the Record.

CGC takes exception to nine of Judge Tracy’s factual determinations. Contrary to CGC’s assertions, there are no grounds for reversing any of Judge Tracy’s amply supported factual findings. Respondent rebuts CGC’s exceptions to factual findings as follows:

1. It is undisputed that Swartz was Dixon and Wright’s supervisor. Tr. 252:3-253:11; 284:20-25; 301:3-5; R. Ex. 6; 3 ALJD 15-20. Swartz, Erickson, and Arnold were the only three individuals on the Facebook Project with the authority to hire, fire, layoff, or discipline employees. Tr. 252:3-253:11; 284:20-25. Although CGC attempted to present evidence that Kelly was Dixon’s statutory supervisor, CGC abandoned his efforts after Dixon admitted that he did not believe Kelly had the authority to hire, fire, or discipline employees. Tr. 126:1-21. CGC did not, because he could not, present any evidence that Rodriguez was the decision maker regarding Dixon’s layoff at the hearing. Instead, CGC attempts in the Exceptions Brief to circumvent the credible testimony regarding Swartz’s decision to layoff both Dixon and Wright. Tr. 301:17-302:1-16; 304:19-22; 305:18-306:6; 340:22-341:24; 346:35-347:15; R. Ex. 6 & 17.

2. As indicated above, there is no dispute that Swartz was Dixon and Wright's supervisor, and CGC did not present any evidence that Rodriguez had any involvement in the decision to lay them off. Tr. 252:3-253:11; 284:20-25; 301:3-5; R. Ex. 6; 3 ALJD 15-20.

3. Judge Tracy's finding that Dixon was warned for taking extended breaks is supported by Swartz's credible testimony. Tr. 341:8-344:9.

4. Contrary to CGC's misrepresentation of the testimony, Swartz personally observed Dixon taking an extended break away from his point of work. Tr. 301:21-302:16; 344:10-346:17. Specifically, Swartz saw Dixon standing around in a rest area, with no apparent agenda and not waiting next to the bathroom, between the lunch and afternoon break. Tr. 344:10-346:17.

5. Swartz testified that he received reports Dixon and Wright were taking extended breaks and breaks away from their point of work. 301:17-20; 304:19-22; 305:1-306:6; 341:18-24; 342:3-343:15. The report from Flores alleged a break away from point of work. Tr. 305:1-17.

Q. What did Alex say?

A. Basically he told me - - he came down on the afternoon break and that Mr. Dickson [sic] and Mr. Wright were sitting in his bolt pile taking his afternoon lunch - - or afternoon break.

Q. Did he give further detail?

A. Besides that he just said that he told them to leave and they just told him they would leave when they wanted to. And then that was it.

Tr. 305: 8-17.

6. Despite CGC's best efforts to misrepresent the record and undermine Judge Tracy's factual findings, Judge Tracy accurately summarized Swartz's testimony that employees were laid off every day on the Facebook Project for lack of production, which included taking extended breaks. 6 ALJD 16-7 ALJD 6; Tr. 324:2-22. Moreover, Swartz described in significant details layoffs for extended breaks that he could recall easily. 6 ALJD

16-7 ALJD 6; 7 ALJD n. 22; Tr. 289:24-305:22; R. Ex. 6 & 11-17. When pressed for additional details by CGC, Swartz remained consistent and reliable in his testimony.

Q. Did you mention all the ones that you were aware of on the project, in your testimony, going through those lay off documents?

A. The ones I recognize directly, but there was multiple cases where everything kind of got brought up to me. We would lay an individual off. But those were just names that popped up, where I personally visualized them right then and they stuck in my mind.

Tr. 324:6-13. Furthermore, there were more than 20 layoffs in June 2017 on the Facebook Project. Tr. 287:2-5.

7. It is undisputed that layoffs were not disciplinary. Tr. 259:20-260:20; 306:10-19. Additionally, Swartz, Erickson, and Arnold, were the only individuals with the authority to hire, fire, layoff, or discipline employees. Tr. 252:3-253:11; 284:20-25.

Furthermore, CGC did not present any evidence that Kelly was a supervisor with the authority to discipline Dixon (or Wright).

8. It is undisputed that the separation notices do not identify when an employee is laid off for taking an extended break. R. Ex. 6 & 11-17; Tr. 289:24-305:22. Swartz credibly testified about how the separation notices are generated, how he treats reports of employees taking extended breaks, and his overall decision making process regarding layoffs. Tr. 287:6-305:22. As noted above in response to Exception No. 6, Swartz provided credible testimony regarding eight layoffs for extended breaks, but he laid off more than 20 employees in June 2017. Tr. 287:2-5.

9. Judge Tracy accurately summarized Marcial's testimony "Rodriguez, who had never spoken to him except when he was hired and on his first day of work, approached Marcial and another employee." 5 ALJD n. 17; *cf.* Tr. 196:8-13; 29:20-30:2.

B. Judge Tracy’s Credibility Determinations Must be Sustained.

CGC’s argument regarding Judge Tracy’s credibility determinations is severely misplaced and appears largely fabricated. A credibility determination may rely on various factors, including the context of the witnesses’ testimony, the witnesses’ demeanor, the weight of the respective evidence, established or admitted facts, and reasonable inference that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Suhi*, 335 NLRB 622, 623 (2001). Judge Tracy unequivocally stated that she based her credibility findings on all these factors, including, notably, the witnesses’ demeanor. 8 ALJD 15-36. “It is the Board’s established policy not to overrule an administrative law judge’s resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces [the Board] that the resolutions are incorrect.” *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951).

1. Chinn and Swartz were Credible Witnesses and Judge Tracy Properly Credited Their Testimony.

Judge Tracy found, and the record demonstrates, Chinn and Swartz provided “reliable, comprehensive, and concrete testimony,” and they remained “calm, patient, and confident” even under rigorous cross-examination. 8 ALJD 15-36. Despite the significant amount of detail Swartz provided in his testimony, Swartz remained consistent and unwavering in his testimony. 8 ALJD 15-36. For example, Swartz described how separation notices were processed (Tr. 287:10-288:11) and his general decision making process for laying off employees (Tr. 287:6-305:22). He also provided testimony on specific instances of employees laid off for taking extended breaks, including Dixon, Wright, John Hernandez, Anthony Romprey, Joshua McKenna, Jesse Peters, and Garrett Denning. Ex. R. 6 & 11-16; Tr. 287:6-299:15. Even CGC

could not suppress his admiration of Swartz's ability to provide details about the crew foremen on such a large project. Tr. 314:14-315:11.

Despite CGC's best efforts to recast Swartz's testimony, Swartz testified both Flores and Kelly reported that Dixon was taking extended breaks and/or breaks away from his point of work. Tr. 301:17-20; 304:19-22; 305:18-306:6; 341:18-24. Swartz stated he saw Dixon taking a break away from his point of work, during a non-break period, and Dixon did not seem to be waiting for the restroom. Tr. 301:17-302:16; 303:18-304:9.

As to CGC's unsubstantiated assertion that there was an "apparent breach of the chain-of-command," the record is clear that the various crew foremen reported any break issues to Swartz, regardless of whether the employee was on his crew. Tr. 289:24-305:22. As described above, the Facebook Project was a large-scale project with upwards of 250 employees. Tr. 250:7-13; 265:17-266:11. Swartz frequently laid employees off to give them an opportunity on a different or project and to keep the Facebook Project on schedule. Tr. 306:10-23.

In his brief, CGC argues that Swartz gave self-serving testimony about meetings where he would mention issues with extended breaks, and there is "no evidence that Dixon or Marcial attended those meetings." Exceptions Brief at 28. However, the record supports Swartz's testimony that he met daily with the crew foreman and held weekly meetings with all the Schuff employees. Tr. 203:5-24; 283:5-24; 320:20-324:1. Moreover, Dixon and Marcial themselves testified that they attended Swartz's safety meetings (where the warnings about breaks were provided). Tr. 41:21-25; 50:8-51:13; 185:2-22; 201:3-13.¹¹

¹¹ But for CGC's encouragement to Marcial to revise his original affidavit, Marcial would have agreed Dixon received regular warnings against taking extended breaks. Tr. 213: 3-8.

CGC argues “Swartz’ demeanor may have been calm, confident, and consistent” yet “the Judge’s credibility resolutions were not primarily based on demeanor...” Exceptions Brief at 29. This is a perfect example of CGC’s willingness to make any unsubstantiated, nonsensical attack on the Judge’s decision. As described above, Judge Tracy expressly made credibility determinations based on her evaluation of Chinn and Swartz’s demeanor, 8 ALJD 15-36. It cannot reasonably be disputed that her credibility findings were amply supported by overwhelming record evidence and, accordingly, they should be sustained. *V & W Castings*, 231 NLRB 912, 913 (1977) (credibility findings based on a judge’s assessment of (*inter alia*) witness demeanor should not be disturbed).

2. Judge Tracy Properly Discredited Dixon and Marcial’s Self-Serving, Inconsistent, and Implausible Testimony.

In contrast to the credible testimony from Swartz and Chinn, Dixon and Marcial’s testimony was uncorroborated, inconsistent, and as Judge Tracy noted, plainly rehearsed. Dixon was frequently evasive and self-serving in his testimony. For instance, the following exchange is Dixon’s response to a question about the layoff process:

Q: Mr. Dixon...you’ve also been laid off by other steel companies, right?
A: Yeah. And most of the time, when those layoffs occur, it’s at the end of the project.
Q: Okay. But not all the time?
A: Most of the time.
Q: Okay. But there have been times when you’ve been laid off by other steel companies before the end of a project, right?
A: Not a lot of times.
Q: But it has happened; yes or no?
A: It has happened.
Q: Has happened?
A: Yeah.

Tr. 137:2-23.

Additionally, Dixon could not identify specific details in multiple instances, such as, when he spoke to NLRB investigators or the date of his layoff, Tr. 63:12-15; 81:5-13; 89:13-18;

101:18-102:17; 127:9-21; 138:15-142:15, or when and where he spoke to Marcial Sr. and Jr. regarding his layoff, Tr. 169:4-23; 172:6-173:13. In contrast, Swartz sat through rigorous cross-examination by CGC (which lasted almost double the amount of time spent on direct), yet his testimony remained consistent and detailed. Tr. 287:6-299:15.

Judge Tracy correctly found that much of Dixon's testimony was uncorroborated. For instance, Dixon claimed that Coleman and Wright witnessed his interaction with Kelly, yet CGC failed to call Kelly,¹² Coleman, or Wright at trial to corroborate Dixon's testimony. Tr. 77:17-20; 242:7-15. Judge Tracy also reasonably concluded that Dixon's "overall testimony [was] self-serving and implausible." 8 ALJD 38. Notably, despite Dixon's attempt to characterize the interaction with Kelly about the apprentice as significant, it is undisputed the matter was resolved and closed. 9 ALJD 1-4.¹³

Thus, while Judge Tracy still accepted Dixon's testimony that he spoke to Kelly and Rodriguez about the tenure of the apprentice, she quite reasonably discredited Dixon's testimony regarding breaks when it directly contradicted Swartz's vastly more credible testimony. 9 ALJD 6-14.

Marcial's testimony proved even more problematic. "In fact, Marcial's testimony was simply too good to be true, and appeared to be rehearsed." 9 ALJD 15-16. Marcial alleged approximately a week after the incident with the unnamed apprentice, Rodriguez approached

¹² It is undisputed in the record that Kelly was a non-supervisory employee.

¹³ If considered in the light of Dixon's 3 different versions of why he was laid off, including a prior withdrawn ULP charge, Judge Tracy was kind in referring to Dixon's testimony as "implausible" instead of fabricated. Tr. 106:14-25; 109:17-110:13 (Dixon's claim of engaging in protected concerted activity was not even included in his initial affidavit).

him and began complaining about Dixon's support of the apprentice and explained how he intended to have Dixon laid off. Tr. 192:4-195:8. The ALJD accurately summarized Marcial's testimony regarding this incident and declined to credit it. 5 ALJD n. 17. In particular, Judge Tracy found it improbable that Rodriguez, who barely knew Marcial, would confess his alleged misdeeds. 5 ALJD n. 17. Not only did Judge Tracy find Marcial's testimony lacked credibility, but she could not ignore the fact that CGC elicited the revision of Marcial's affidavit in full view of Schuff's responses to the allegations in the Complaint and in the course of preparing him for trial. 9 ALJD 15-32; Tr. 212:22-218:11.

CGC's behavior regarding Marcial's sworn statement cannot be disregarded. In his brief, CGC dismisses relevant facts that undermine Marcial's credibility:

- Marcial's father was friends with Dixon for many years (Tr. 187:15-188:1);
- Marcial met with Dixon the night before the hearing (Tr. 208:9-24);
- The Board attempted to reach Marcial 15-20 times to review his affidavit, but he could not be bothered and blamed it on procrastination (Tr. 234:12-16);
- Marcial reviewed his affidavit in front of Dixon the morning of the hearing and crossed out a significant statement (Dixon *had* been warned about taking extended breaks) (Tr. 229:25-230:10);
- Marcial had lunch with Dixon the day of the hearing, and Dixon paid for lunch. (Tr. 188:6-7).

CGC unconvincingly claims he offered Marcial a "Witness Pointer" sheet, which Marcial failed to review until after signing his affidavit. Exceptions Brief at 35. CGC also asserts that Marcial's deletion of "Dixon had been warned about this several times" is consistent with his testimony. Exceptions Brief at 35. However, CGC conveniently sidesteps the fact that Marcial's affidavit was the result of a phone interview with a Board agent and offers no explanation as to how this statement was included in the original affidavit. Exceptions Brief at 34; Tr. 229:1-13.

Additionally, the timing and substance of the events described by Dixon and Marical do not coincide. Dixon alleged he spoke on behalf of the unnamed apprentice approximately a

week before his June 12, 2017 layoff. Tr. 64:2-16; 69:1-8. Yet approximately a week later on June 9, Marcial testified Rodriguez approached him and complained.¹⁴

- Dixon felt it was a racial issue (Tr. 194:2-6);
- Kelly was “scared” to tell Dixon about taking extended breaks (Tr. 194:2-6);
- He had been told Dixon sued others over racial issues and he was “not going to have this bullshit on the job site.” (Tr. 195:18-24); and
- He would remove Dixon from the worksite due to his extended breaks. (Tr. 195:18-24).

Judge Tracy determined that it was unlikely (and unworthy of belief) that Rodriguez would approach Marcial, an individual he did not know, and complain about events from a week prior, as well as divulge plans for removing Dixon from the Facebook Project. 5 ALJD n. 17.

Furthermore, Dixon’s testimony and the documentary evidence lacked any suggestion (much less an allegation) that Rodriguez seemed bothered by Dixon speaking for the apprentice or that Dixon felt the issue with the apprentice was a racial issue. In fact, Dixon *testified* he was satisfied with Rodriguez’s apparent handling of the issue. Tr. 80:6-16.

Significantly, Dixon admitted he understood that when he filed his first charge, he was expected to give a statement explaining everything that happened in the workplace and anything he thought was wrong about his termination. Tr. 108:3-12. Dixon, however, excluded any account about the unnamed apprentice, the key allegation in the Complaint. Tr. 106:14-25; 109:17-110:13. Dixon testified that he believed his first and second charges were the same charge. Tr. 123:6-124:14. The record is clear that Dixon withdrew the first charge in order to assert a new theory of recovery in the second charge. Tr. 123:6-124:14. Conveniently, Dixon appears to have tailored his account to fit CGC’s legal theory. R. Ex. 1 & 3. His first charge

¹⁴ As Judge Tracy noted, Marcial alleged Rodriguez was complaining about an incident that occurred that same day, June 9, regarding Dixon. 5 ALJD n.17.

alleges Rodriguez was concerned about Dixon filing charges against Respondent, but his second charge alleges Employer Representative Will Trujillo was upset about an incident regarding the unidentified apprentice. Tr. 160:4-164:20; R. Ex. 1 & 3.

After weighing the record evidence as well as Marcial and Dixon's demeanor, Judge Tracy properly concluded that she could not rely upon Marcial and Dixon's testimony. Neither CGC's false claim that Judge Tracy did not consider demeanor nor his scattershot attempt to re-litigate this case against the undisputed record provide any basis to overturn Judge Tracy's measured, reasoned findings on witness credibility.

C. Judge Tracy's Evidentiary Rulings Must be Adopted.

Similar to his arguments at trial, CGC devotes significant energy alleging, in a rather insulting manner, that Judge Tracy does not understand the hearsay rule. Exceptions Brief at 20-22. In reality, Judge Tracy was correct in her evidentiary rulings excluding testimony and even permitted CGC to make proffers and present hearsay testimony regarding critical portions of Charging Party's claims in order to create a complete record. Tr. 74:3-21; 154:17-156:1. Again and again, CGC attempted to introduce inadmissible hearsay through the guise that he was not relying on it "for the truth of the matter asserted." Judge Tracy properly sustained some of Respondent's objections to hearsay.

Judge Tracy: So what is the point afterwards of what they spoke to each other about?

Mr. Peterson: So in my mind, it bolsters the credibility of the - - it helps you understand the context of this story. That's the - -

Judge Tracy: And I'm supposed to believe what they said, which is, again, the problem with the hearsay, that you're telling me not to believe it, but to believe it. So again, I'm going to sustain the objection.

Tr. 197:17-25. The record is clear that CGC simply failed to present hearsay admissible under any proper exception to the Rule. *See* Fed. R. Evid. 801-03.

Judge Tracy reserved numerous evidentiary hearings for her decision, after allowing CGC the benefit of the presentation of additional evidence and arguments. 5 ALJD n.14. Aside from hearsay exceptions under Fed. R. Evid. 801-803, Judge Tracy agreed with CGC that hearsay evidence may be admissible in some circumstances.

In *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) the Board noted that courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force, and if corroborated by something more than the slightest amount of other evidence.

5 ALJD n. 14. However, Dixon and Marcial's overwhelmingly uncorroborated testimony was not inherently reliable and therefore, while Judge Tracy considered much of the testimony, she found it was entitled to little evidentiary weight. 5 ALJD n. 14 (citing *W.D. Manor Mechanical Contractors, Inc.*, 357 NLRB 1526 (2011)).

1. **Credible record evidence clearly supported the Judge's finding that Dixon took extended breaks, breaks away from his point of work, and he was warned about them.**

Contrary to CGC's assertions, the record supports Judge Tracy's findings that Dixon took extended breaks and/or breaks away from his point of work, and that he was chastised for his break violations. 7 ALJD 8-20 and n.4. Swartz credibly testified that he received reports from Flores and Kelly that Dixon and Wright were taking extended breaks and breaks away from their point of work. Tr. 304:19-305:22. Swartz's testimony did not constitute hearsay, and notably, CGC made no hearsay objection. Tr. 304:19-305:22.¹⁵

¹⁵ Even if CGC had made a timely objection, the evidence of the reports was not hearsay, as it was introduced not for the truth of the matter, but for the effect on the listener, Swartz. *Bates v. Medtronic, Inc.*, 2016 BL 38113, 2016 FEP Cases 38113 (C.D. Cal. Feb. 03, 2016).

2. Judge Tracy properly excluded Dixon’s testimony about his interactions with Kelly.

Judge Tracy credited Dixon’s testimony that he spoke to Kelly and Rodriguez about the unnamed apprentice. 8 ALJD 37- 9 ALJD 4. She appropriately excluded Dixon’s testimony that Kelly ordered him to leave the workplace as uncorroborated hearsay. 8 ALJD 37- 9 ALJD 4. Judge Tracy’s credibility determinations regarding Dixon and Marcial’s testimony foreclosed any reliance on Kelly’s alleged statements to Dixon. In any event, Judge reasonably concluded that the interaction with Kelly was “resolved and closed.”

3. There Is No Basis For An Adverse Inference Regarding Rodriguez.

CGC argues that Rodriguez is “obviously a critical player.” Exceptions Brief at 24. However, Rodriguez’s testimony would only be relevant to two alleged interactions: Dixon’s complaint about the unnamed apprentice and Marcial’s story that Rodriguez took issue with Dixon’s support of the apprentice. Judge Tracy credited Dixon’s testimony that he spoke to Rodriguez about the issue with the apprentice. 10 ALJD 6-10. As to the alleged conversation between Marcial and Rodriguez, Judge Tracy declined to rely on Marcial’s incredible testimony for the reasons described in the credibility section, above. Thus, Judge Tracy had no reason to consider applying an adverse inference against Respondent.¹⁶

D. Judge Tracy Correctly Found CGC Failed to Prove Respondent Violated Section 8(a)(1) of the Act.

CGC failed to establish a *prima facie* violation of Section 8(a)(1) of the Act. To establish a discharge violated Section 8(a)(1), General Counsel must show the employee was engaged in concerted activity, the employer knew of the concerted nature of the employee’s activity, the

¹⁶ Furthermore, it is undisputed that Swartz had no discussion with Rodriguez regarding Dixon and that Rodriguez had no involvement in the decision to lay off Dixon and Wright for taking extended breaks away from their point of work. 14 ALJD 10-11.

concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001). As Judge Tracy correctly found, CGC failed to show Schuff knew about Dixon's protected, concerted activity or that Schuff's decision to layoff Dixon was motivated by animus of the employee's protected concerted activity. 13 ALJD 44-15 ALJD 48.

1. Respondent Had No Knowledge of Dixon's Protected Concerted Activity.

Judge Tracy found that Swartz credibly denied knowledge of Dixon's alleged protected concerted activity. *State Plaza, Inc.*, 347 NLRB 755, 756-57 (2006) (credible denial of knowledge of union activities defeats Section 8(a)(1) allegation). Further there is no basis to impute Rodriguez or Kelly's alleged knowledge to Respondent.

2. Swartz Credibly Denied Knowledge of Dixon's Alleged Protected Concerted Activity.

Judge Tracy found Swartz's testimony "reliable, comprehensive, and concrete." 8 ALJD 16-19. As a result, Judge Tracy credited Swartz's testimony, including his testimony that neither Kelly nor Rodriguez reported Dixon's support of the apprentice and he had no knowledge of any complaints by Dixon regarding the unknown apprentice, or any other alleged protected, concerted activity. Tr. 307:12-15. In fact, Swartz candidly admitted he had only learned of Dixon's complaint a week before the hearing. Tr. 301:14-16. Instead of relying on the credible testimony in the record, CGC makes grand (and unsubstantiated) conspiratorial accusations, based on inadmissible hearsay, that Kelly and Rodriguez *must* have reported Dixon's alleged complaint. Exceptions Brief at 41. Regardless, Swartz's credible testimony shows he did not know about Dixon's alleged protected concerted activity.

a. **Kelly's Alleged Knowledge Cannot Be Imputed to Schuff.**

A statutory supervisor is an individual who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, discharge, or discipline other employees, "or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not a merely routine or clerical in nature, but requires the use of independent judgment." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v Kentucky Community Care*, 532 U.S. 706 (2001)).

It is undisputed that Kelly did not have authority to exercise any of the supervisory duties enumerated in the Act. Tr. 252:3-253:11; 271:21-274:5; 277:10-14; 284:20-25. All the crew foremen reported to Swartz. Tr. 301:3-5. Swartz would provide the assignments and the crew foreman would split the work up among the ironworkers. Tr. 301:3-5; 313:14-24. *See Cablevision Systems Co*, 251 NLRB 1319, 1323 (1980) (foremen not supervisors where they provided routine directions and passed out assignments provided by office staff and exercised no independent judgment). Dixon himself admitted he did not believe Kelly had such authority. Tr. 126:1-21. The evidence does not show that Kelly had any other responsibility or input into decisions to hire, terminate, or discipline employees. 11 ALJD 12-24. The record is clear that Kelly was a working foremen, and CGC failed to show otherwise.

Additionally, CGC provided no evidence that Dixon reasonably believed that Kelly was speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426-427 (1987) (the appropriate question is whether the employee would reasonably believe the alleged agent was reflecting company policy and speaking and acting on behalf of management). Again, the record clearly shows that Dixon ignored Kelly's alleged comment to leave the jobsite and did not report it to a supervisor. Tr. 75:4-21; 133:19-134:1. Moreover, Dixon *admitted* Kelly lacked the authority to remove him from the worksite. Tr. 126:1-21. Thus, Judge Tracy's finding that

Kelly was not a statutory supervisor or agent under the Act is supported by Board precedent and the record, and her conclusion should be upheld.

b. Judge Tracy Correctly Rejected CGC's "Cat's Paw" Theory.

Judge Tracy considered CGC's "cat's paw" argument and correctly declined to impute Kelly and Rodriguez's purported knowledge to Respondent. 14 ALJD 18-30. Under *Staub v. Proctor Hosp.*, 562 U.S. 411, 420-21 (2011), "[a]n employer is not liable when adverse action is recommended by an employee because of illegal animus if the decision maker undertakes an independent assessment." CGC premises his argument on inadmissible hearsay which Judge Tracy did not credit. Exceptions Brief at 42. Specifically, CGC argues that Rodriguez's "rant" and Kelly telling Dixon to leave the project demonstrated animus. Then, with no apparent support in the record, CGC goes on to infer that Rodriguez and Kelly "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."

However, the record is clear and far more straightforward than CGC's far-fetched conspiracy theory. Swartz provided credible testimony for his decision to lay off Dixon. Flores and Kelly reported Dixon and Wright were taking extended breaks and/or breaks away from their point of work. Tr. 301:17-20; 304:19-22; 305:18-306:6; 341:18-24. Swartz independently observed Dixon taking a break away from his point of work. Tr. 301:23-302:16; 344:10-346:17. Soon after, Swartz received another report Dixon was taking an extended break. Tr. 343:16-344:9. Swartz made the decision to lay off both Dixon and Wright. Tr. 340:22-341:3; 346:25-347:15; R. Ex. 6 & 17. Swartz credibly denied knowledge of Swartz's complaint regarding the unnamed apprentice. Tr. 307:12-15. The record fails to show animus by Rodriguez, and CGC did not carry his burden as to Kelly's alleged supervisory status. 14 ALJD 18-30. Thus, CGC's claim regarding Kelly and Rodriguez's knowledge is, at best, a red herring, as Swartz admittedly

conducted an independent assessment of Dixon. Accordingly, there is no “cat’s paw” and Judge Tracy’s finding should not be disturbed.

3. CGC Did Not Establish That Dixon’s Alleged Protected Activity was A Motivating Factor in His Layoff.

As Judge Tracy found in her well-reasoned decision, CGC failed to meet his burden to prove Respondent’s animus toward Dixon’s protected concerted activity motivated Schuff to lay Dixon off. 14 ALJD 31- 15 ALJD 48 (citing *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982)). Although improper motivation may be inferred from several factors, the only factor that could arguably support CGC’s theory is the timing of events. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000) (knowledge of employee’s union activities, employer’s hostility toward the union, and timing of employer’s action are appropriate factors for consideration). However, as found by Judge Tracy, timing alone is not sufficient to demonstrate animus in the instant case.

As discussed above, this case hinges on the credibility of witness testimony. Judge Tracy explained at length why Marcial’s testimony was “completely unreliable” and therefore discredited. 15 ALJD 35-41. For his part, Dixon offered no purported evidence of animus. CGC’s timing argument was simply overwhelmed by the extensive documentary and testimonial evidence demonstrating that Schuff laid off Dixon for break violations.

First, there is no dispute that the Facebook Project was demanding in scale and schedule, and Respondent was constantly laying off employees who were not producing adequately. Tr. 250:7-13; 265:7-266:11; 285:3-22. In fact, Swartz himself laid off over 20 employees in June 2017 alone, including Wright and Dixon. Tr. 287:2-5. Swartz, Erickson, and Arnold were the only individuals with authority to hire, fire, layoff, or discipline employees. Tr. 252:3-253:11; 284:20-25; 325:15-25. Swartz regularly received reports from crew foremen regarding break

violations. Tr. 289:24-305:22; 301:3-5. Swartz would attempt to confirm the reports, and then he would decide if he should lay off the employee. Tr. 302:1-16; 344:10-346:17. His credited testimony reflects, in detail, at least eight instances in June 2017 when Swartz laid off employees for break violations. Tr. 289:24-305:22. Swartz followed this same process when he received reports that Dixon and Wright were taking extended breaks and/or breaks away from their point of work. Tr. 301:17-20; 304:19-22; 305:18-306:6; 341:18-24.

Swartz credibly testified that Wright and Dixon were admonished for break violations. Tr. 341:8-344:9. Swartz saw Dixon taking an unscheduled break away from his point of work. Tr. 302:1-16; 344:10-346:17. He then received another report about Dixon's break violations and decided to lay both Wright and Dixon off. Tr. 343:16-9; 340:22-341:3; 346:25-347:15; R. Ex. 6 & 17. Notably, Dixon received more favorable treatment than Wright, who Swartz did not personally observe taking an inappropriate break. Tr. 344:10-344:18. Critically, Swartz was not aware of Dixon's alleged protected, concerted activity. Tr. 300:11-301:2.

Additionally, CGC did not present any evidence that Respondent harbored animus toward protected concerted activity. Respondent is a long-time employer of ironworkers and signatory to the CBA between the Western Steel Council and the Union. R. Ex. 10. Chinn provided credible testimony as to the importance of administering the CBA and investigating claims of any form of discrimination. Tr. 264:9-265:8.

CGC has not and cannot show that Dixon's layoff was anything other than a legitimate, lawful layoff for his break violations, or that he was treated different from other employees who violated the same policy. Judge Tracy's conclusion that CGC failed to meet his burden should be sustained.

E. Counsel For General Counsel's Improper Argument Casts No Doubt On Schuff's *Wright Line* Defense.

In perhaps the most unfounded portion of the Exceptions Brief, CGC provides a collection of string citations concerning employers' failure to follow uniform progressive discipline policies and other inapplicable precedent. Exceptions Brief at 49. This case does not involve a progressive discipline policy or a "zero tolerance" policy. This case involves a fast-paced construction project where employees were regularly laid off for taking extended breaks and other productivity issues. Though he repeatedly attempts to do so, CGC cannot simply disregard the record evidence because it does not fit his theory of a violation.

Judge Tracy properly applied the *Wright Line* burden-shifting framework to Dixon's layoff. Under *Wright Line*, assuming General Counsel makes a *prima facie* showing that the employee's protected activity was a motivating factor in his layoff, the burden shifts to Respondent to demonstrate the same layoff would have occurred in the absence of protected conduct. *Healthcare Emps. Union*, 463 F.3d 909, 919 (9th Cir. 2006) (quoting *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982)). Here, the record demonstrates that Swartz had a good faith basis to believe Dixon was taking extended breaks and breaks away from his point of work. Thus, even assuming Dixon engaged in protected, concerted activity, Respondent did not tolerate break violations and would have laid him off in any event. *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-37 (D.C. Cir. 2012) (employer with a reasonable belief employee engaged in misconduct meets its *Wright Line* burden regardless of employee's arguable protected activity).

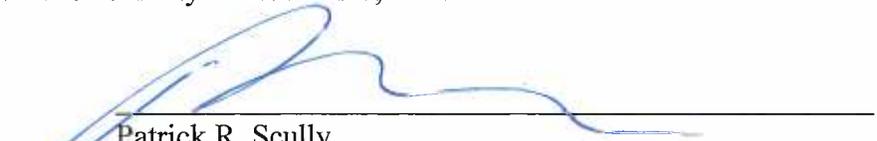
CGC's mischaracterization of a purported "variable practice" is devoid of transcript citation. Exceptions Brief at 49. There was no record evidence of moving employees who took extended breaks to "a different gang," or retaining them in employment in any way.

Unfortunately, CGC does not hesitate to disregard his failure to introduce evidence casting doubt on Schuff's *Wright Line* defense. Judge Tracy's patience with CGC's shenanigans appears only to have emboldened him in this appeal. He now asks the Board reject the only evidence of record—that Dixon would have been laid off in any event—and wrongly conclude that Schuff retaliated against Dixon for protected concerted activity. Such a conclusion is contrary to law and reason.

V. CONCLUSION

CGC's Exceptions cannot be sustained by the record or the law. Based on the foregoing, Respondent respectfully requests that the Board affirm the decision of the ALJ in its entirety.

Respectfully submitted this 27th day of November, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2018, a true and correct copy of the foregoing **SCHUFF'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS** was E-filed with the NLRB E-Filing System and served via email, to the following:

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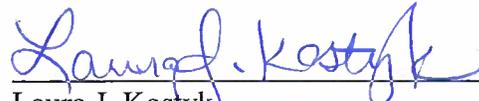
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