

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES – SAN FRANCISCO**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1107**

**and**

**Case 28-CA-209109**

**JAVIER CABRERA, an Individual**

**GENERAL COUNSEL’S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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**I. INTRODUCTION**

**“Get rid of Javier Cabrera because he is the Staff Union President and he’s going to be an obstacle for what I want to do here.”** This was the directive issued from the Deputy Trustee for Service Employees International Union Local 1107 (Respondent) to his subordinates regarding Charging Party Javier Cabrera. The statement was made shortly after he took control over Respondent’s facility after an imposition of a trusteeship. Respondent was ultimately successful in finding a way to discharge Cabrera, based on a trumped-up investigation into seemingly minor infractions, which were dealt with more leniently when other employees engaged in similar conduct but who happen not be the President of the Nevada Service Employees Union Staff Union (Staff Union), which represented employees at Respondent’s facility.

Cabrera was a long-time union organizer with a career spanning over 27-years. He was also a long-time employee of Respondent and a long-time protector of his coworkers’ rights and working conditions. He served as the Staff Union President for over nine years until he was discharged. As Staff Union President, Cabrera filed numerous grievances on behalf of members

leading up to his discharge, some of which specifically called out management officials by name. Respondent ultimately discharged Cabrera based on an overzealous investigation into his job performance, resulting in disparate treatment in terms of discipline, and the failure to abide by the bargained-for progressive disciplinary procedure. Respondent's own statements and conduct show significant animus towards Cabrera and the Staff Union for being an obstacle in management's way during the trusteeship. Counsel for the General Counsel (CGC) respectfully requests that the relief sought in the Complaint be granted.

## **II. BACKGROUND<sup>1</sup>**

### **A. Respondent's Operations**

#### **1. Respondent's organizing functions**

Respondent's entire staff included about 20 employees. Tr. 185. The field staff, which included organizers, included about nine or ten employees. Tr. 185. Generally, Respondent's organizers were assigned to specific areas and their job duties included talking to members daily, identifying and developing leaders, representing employees, identifying potential stewards and training them, ensuring that membership grows, and ensuring the political programs get carried out. Tr. 150. Organizers also visited worksites, assessed support for Respondent, and identified potential issues with management mistreating members or violating contracts. Tr. 578. Additionally, they conducted membership meetings, participated in bargaining sessions, signed up new members, conducted contract ratifications, participated in social events from Respondent, participated in turnouts for bargaining sessions, attended political events Respondent conducted,

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<sup>1</sup> GCX\_\_\_ refers to General Counsel's Exhibit followed by the exhibit number; RX\_\_\_ refers to Respondent's Exhibit followed by exhibit number; "Tr. \_\_\_" refers to the transcript page of the unfair labor practice hearing held on February 26, 2019, through March 1, 2019.

and conducted employee trainings and orientations. Tr. 579. However, employees were never told about any legal repercussions for getting the cards filled out incorrectly. Tr. 378.

To help schedule their events, organizers used one-week plans that were created with their leads. Tr. 379. Respondent later implemented 3-week plans. Tr. 380. These plans were very fluid and changed depending on the situation and the events being scheduled. Tr. 379.

Additionally, organizers filled out debrief sheets at the end of their day to document the contacts they made that day. Debrief sheets are filled out at the end of the day and document how many people an organizer contacted, how many people signed cards, how many petitions were signed, and how many contract books were given away. Tr. 47.

As part of an organizer's duties to sign up or engage new members, they collected membership cards and Together We Rise (TWR) cards. Tr. 151. Membership cards are sent to employers to verify union membership and Respondent keeps them on file. Tr. 182. TWR cards were used to obtain employees correct contact information and were kept on file too. Tr. 182. The TWR campaign started nationally on about June 16, 2017,<sup>2</sup> and ended in late-December 2017 or early 2018. Tr. 118, 121, GCX6. The main goal of the TWR campaign was to prepare for the Supreme Court decision in *Janus*, which did not affect Nevada since it was a right to work state. Tr. 298. More generally, TWR cards were for members to recommit themselves to the union to build a new union movement. Tr. 119. Indeed, by signing a TWR card it only showed a commitment to Respondent but did not provide any benefits. Tr. 120. The TWR card had a short statement on them and requested member contact information. Tr. 119. Respondent communicated with members through emails and text messages even if they did not have TWR cards signed. Tr. 123. Respondent only started collecting TWR cards about September 2017. Tr.

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<sup>2</sup> All dates are 2017, unless noted otherwise.

183. There were about two trainings that covered TWR cards with Respondent's management and staff. Tr. 184.

## **2. Respondent's facility**

Respondent's facility comprised of a single level layout. GCX13. Respondent's facility included cubicle work areas for the organizers, Respondent's President and other executive offices, a large conference room, two smaller conference rooms, and other internal offices. GCX13.<sup>3</sup> There is a hallway between the large conference room and the two smaller conference rooms. GCX13. Respondent's management personnel would conduct meetings in the large conference rooms and in the executive offices. Tr. 360-361.

## **3. Respondent's supervisory hierarchy**

Prior to the imposition of a trusteeship on April 28, Cherie Mancini was Respondent's President. Tr. 51-52. Barry Roberts was an International Representative assigned to Respondent's facility at the time and he reported to Peter Nguyen, whose title was Organizing Director. Tr. 361. Nguyen reported to Mancini. Tr. 51-52.

After the imposition of the trusteeship on April 28, Luisa Blue was appointed Trustee over Respondent. Tr. 518; RX1. As Trustee, Blue had the final say on decisions that were made regarding Respondent's operations. Tr. 524. Blue continued to maintain her position as the International Union Vice President. Tr. 512. On the same date, Martin Manteca was appointed Deputy Trustee over Respondent. Tr. 74. As Deputy Trustee, Manteca was usually at Respondent's facility and supervised the day-to-day activities. Tr. 524. Manteca was in that position from April 28 to June 15, 2018. After the imposition of the trusteeship, Roberts and Helen Sanders reported to Davere Godfrey, whose title was Field Coordinator or Director, on a

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<sup>3</sup> GCX13 is marked with a M where the large conference room is, a star where one of the smaller conference rooms was located, and a blue circle where the cubicle work area was located.

day-to-day basis. Tr. 86, 169, 171, 220. Roberts also reported directly to Manteca. Tr. 39.

Godfrey reported directly to Manteca. Tr. 86.

Starting in mid-October, Grace Vergara began working at Respondent's facility. Tr. 203, 284. She previously worked at Respondent's facility in the past in 2000, 2005, 2013, and then 2017. Tr. 283. Vergara was still working for the International Union from mid-October until the beginning of November, when she became full-time staff of Respondent as the Field Director. Before November, Vergara had direct reports including, Leads Sanders and Yvette Saenz, and the organizers that reported under them. Tr. 285. Leads had a very fluid role and were assigned staff and oversaw their work. Tr. 300. They oversaw organizers' day-to-day work, work plans, provided support to the staff, and made sure Respondent's program were carried out in the field. Tr. 300.

When the trusteeship began, Manteca would conduct daily and weekly meetings with management personnel. Tr. 86. He would regularly meet with Godfrey, Sanders, Roberts, and other individuals from the International Union, including Blue. Tr. 361. Godfrey appeared to be Manteca's right-hand man. Godfrey's working relationship with Manteca went back to July 2014. Tr. 169. Godfrey was also involved in three or four other trusteeships since 2009. Tr. 169.

#### **B. Collective Bargaining Relationship and Union Activity**

Respondent and the Staff Union have a collective bargaining agreement (CBA). GCX5. Cabrera worked for Respondent as an organizer from June 2002 to October 30, 2017, the date of his termination. Tr. 342.<sup>4</sup> The Staff Union represented about 15 employees in the bargaining unit as of October. Tr. 345. Cabrera was a member of the Staff Union from 2005 until his

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<sup>4</sup> Respondent previously discharged Cabrera in 2015 but he was reinstated through mediation. Tr. 343, GCX11.

termination. Tr. 344. He was the Staff Union President from 2008 until his termination. At the time of his termination, Cabrera had been a union organizer in general for 27 years. Tr. 342.

In addition to President, the Staff Union had three other positions: Vice President, Secretary/Treasurer, and Chief Steward. Tr. 344. Susan Smith was the Vice President. Tr. 345. Cabrera participated in the negotiations for the CBA along with Smith. Tr. 345.

As Staff Union President, Cabrera was involved in the grievance process. Tr. 345. Article 11 of the CBA outlined the grievance and arbitration process. GCX5.<sup>5</sup> Article 7 of the CBA outlines the parties' six-step progressive disciplinary procedure. GCX5. From the start of the trusteeship in April to his discharge in October, Cabrera and the Staff Union filed numerous grievances. Tr. 345, GCX12. Cabrera would either file and deliver them to Respondent himself or ask Smith to file and deliver them. Tr. 346, 350. Trustee Blue testified that she was aware of grievances that Cabrera and the Staff Union filed, and specifically recalled a grievance related to the International Union staff treating the staff at Respondent's facility unfairly. Tr. 530-531. Blue also participated in all the Step 2 meetings on grievances filed. Tr. 531. Manteca would conduct the Step 1 meetings. Tr. 531.

### **C. Credibility Determinations**

#### **1. CGC's witnesses should be credited**

Significant weight is given to an Administrative Law Judge's (ALJ) credibility determinations because the ALJ actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including their expressions, physical posture and

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<sup>5</sup> Respondent did not raise deferral as an affirmative defense in its Answer, nor did it argue for deferral at the hearing. Deferral is an affirmative defense that is waived if not timely raised. See *Bci Coca-Cola Bottling Co. of Los Angeles & Wayne Abrue*, 359 NLRB 988, 989 (2013) (citing *SEIU United Healthcare Workers-West*, 350 NLRB 284, 284 fn. 1 (2007) (finding that the employer did not raise the deferral argument in its answer to the complaint or during the hearing and therefore it was waived)).

appearance, manner of speech, and non-verbal communication, may convince the ALJ that the witness is testifying truthfully or falsely. Credibility determinations may also be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Medeco Security Locks*, 322 NLRB 664 (1996); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Accord V&W Castings*, 231 NLRB 912, 913 (1977), *enfd.* 387 F.2d 1006 (9th Cir. 1978).

As discussed below, CGC's witnesses should be credited over the testimony of Respondent's witnesses where they conflict. CGC subpoenaed Roberts to testify at the hearing under 611(c) examination. Roberts worked for the International Union but was stationed at Respondent's facility as a Senior Organizer from October 2016 to early October 2017. Tr. 38-39, 49. The parties stipulated that Roberts was a supervisor and agent within the meaning of the Act from about April 28, 2017, through the date he left his assignment at Respondent's facility. GCX2. Roberts testified consistently throughout CGC's 611(c) examination and Respondent's cross/direct examination. During Respondent's cross-examination, Roberts credibly testified about other employees that Manteca named that he wanted to get rid of in addition to Cabrera, for various other reasons. Tr. 56. For example, Manteca stated that he wanted to get rid of Debbie Miller for being connected to former President Mancini and Gloria Madrid because he did not trust her. Tr. 55-56. It would be a stretch to argue that Roberts fabricated testimony about what Manteca said about Cabrera and other employees for no reason at all. Rather, it is far more likely that Roberts accurately testified about what Manteca told him during management meetings, i.e., to get rid of Cabrera because he was the Staff Union President. Respondent counsel's attempt to discredit Robert's testimony by pointing out that he did not report Manteca to the International or anyone else after he made those comments is unpersuasive. Tr. 60-61. To

the contrary, the fact that Roberts did not report Manteca supports Roberts' testimony that he feared retaliation, "Then that shit would turn right around and bite me in the ass is what that would have done." Tr. 61, 68. Roberts testified pursuant to CGC subpoena and was no longer employed by Respondent or the International Union at the time of his testimony. Thus, no longer having a reason to fear retribution, Robert's testimony was credible and forthright.

Cabrera testified at the hearing on behalf of CGC. His testimony was consistent on direct and cross-examinations. For example, on direct he indicated that he received an informal verbal warning and stated that that level of discipline was not even listed in the CBA. Cabrera then testified consistently on cross-examination when he was asked if it was in the CBA. Tr. 434. Similarly, Cabrera testified consistently on cross-examination regarding having mistakenly recorded an investigatory meeting instead of a bargaining session. Tr. 435. Moreover, he testified consistently about his understanding regarding the expectations in obtaining membership and TWR cards, which was consistent with his plan to get the TWR cards at issue resolved later. Tr. 448, 458. He also testified consistently about when he began taking over the counter medication and prescription medications during the investigatory process leading up to his discharge. Tr. 464. Nothing in Cabrera's testimony casts doubt on his credibility, even in his responses to Respondent counsel's blatant mischaracterizations of the facts and testimony of the case.

Susan Smith also testified at the hearing on behalf of CGC. Smith worked for Respondent as an organizer from September 2008 to September 2018. Tr. 264. Smith was the Staff Union Vice President for five or six years. Tr. 264. The scope of Smith's testimony was narrow and related to the Staff Union's practice in filing grievances and the prior disciplines issued to her. Smith's testimony was limited and direct. There is no reason why her testimony should not be

fully credited. In sum, CGC's witnesses' testimony should be fully credited as true and reliable evidence, particularly when in conflict with Respondent's witnesses' testimony.

## **2. Respondent's witnesses should not be credited**

Martin Manteca testified pursuant to 611(c) examination. Manteca's testimony was inconsistent and evasive at best—and fabricated at worst. Manteca testified, in contradiction to Respondent's other witnesses, that the other International Representatives did not arrive until much later after the trusteeship began. Tr. 82. He stated that Godfrey arrived two or three weeks after Manteca arrived, and that Roberts and Sanders arrived one or two *months* after the trusteeship began. Tr. 80-81. However, Godfrey testified that he arrived at Respondent's facility on April 29, April 30, or May 1, 2017. Tr. 168. Additionally, Roberts testified he was already working at Respondent's facility since October 2017. Tr. 38. Manteca's testimony to the contrary is fabricated to make it seem like he could not have had the early management meetings where he identified Cabrera specifically as one of the employees to get rid of. Manteca testified that part of his role was to manage staffing and make assessments of employees. But he later testified that he never discussed disciplining or discharging any employees during management meetings. Tr. 88. Additionally, Manteca falsely claimed that they stopped an investigatory meeting with Cabrera after he informed them he had already been disciplined for the conduct at issue. Tr. 89. However, in fact, they proceeded with the meeting and gathered additional information from Cabrera about what happened and his previous discipline. Manteca first testified that he only attended one investigatory meeting, with Cabrera, but later testified that he attended a second investigatory meeting with LaNita Troyano. Tr. 94.

Notably, Manteca testified that Godfrey recommended that Cabrera be fired after Respondent's investigation had been conducted. Tr. 106. Godfrey, however, testified that he

recommended a suspension. Tr. 248. Manteca testified that he followed the six-step progressive disciplinary procedure in the CBA in his disciplinary meetings. Tr. 107. The record evidence shows, however, that Respondent skipped several steps of progressive discipline in Cabrera's discharge. Yet, Manteca's testimony in response to questions about skipping steps in progressive discipline was evasive and non-committal. Tr. 110-111. For example, when asked whether he skipped the steps of written warning, final written warning, and suspension without pay, Manteca responded "That could be, yeah, maybe but I believe that yeah, I think that might have been what happened." Tr. 111. Manteca later backtracked and said Cabrera's conduct fell under the "severe actions" exception to progressive discipline after Respondent's counsel had him read the language of that article in the CBA. Tr. 138. Manteca again testified in response to leading questions from Respondent's counsel about the potential legal liability related to TRW and membership cards. Tr. 149-150. Such choreographed, and breadcrumb testimony has no weight and should not be credited.

Manteca also testified that the TWR campaign had not ended. Tr. 121. However, according to Respondent's other witness Vergara, it did end about two or three months after she arrived at Respondent's facility in mid-October 2017. Tr. 297. Respondent's attempts to show the importance of this campaign are undermined by the fact that its second-most senior manager, Manteca, did not even know it had ended.

Davere Godfrey also testified inconsistently and evasively when called as CGC's 611(c) witness. Godfrey testified that Roberts arrived at Respondent's facility in May 2017, sometime after him. Tr. 171. But, as noted above, Roberts had already been working at Respondent's facility. Godfrey and Vergara testified, in direct contradiction to Manteca, that during his time at Respondent's facility, no one else had done a no-call no-show. Tr. 192, 311. Manteca testified

that it occurred monthly. Moreover, Godfrey unbelievably and repeatedly testified that he could not have instructed Cabrera to go back to the members and get the TWR cards signed by them or have them fill out new cards altogether. Tr. 251-252. Godfrey's refusal to acknowledge even undisputed facts or conclusions shows why he should not be credited.

Grace Vergara also testified pursuant to 611(c) examination. Vergara's testimony was not forthright or clear. For example, in response to the question of why she did not call Cabrera instead of individual members to ask about the TWR cards, she stated "The call of the members happens in the -- late evening. So I think -- I felt that, you know, knowing that the events happened where I found the cards, not knowing that -- I didn't know that he was given notification for the investigatory for no call, and then the next day, when Paul [Respondent's counsel] get to the office and I was in looking at the cards and preparing for and doing an investigation of the card, I felt that when he -- because Davere [Godfrey] told me at that time, the evening around 4, 3 o'clock, when we were all together, he informed me that Mr. Cabrera rescheduled his meeting, and then few minutes later, he sent an email saying, oh, that is a duplicate. The cards that I gave you was a duplicate from the 18th. I felt that there's something wrong. So I did the further investigation and asked Yvette [Saenz]. So, yes, I had suspicion, and that's why I asked Yvette to do a random call to the member." Tr. 309. Later, she stated she knew Cabrera had filled out the cards, but then called members just to make sure. Tr. 309. Vergara's testimony merely attempts to hide the fact that Respondent was trying set Cabrera up for termination, rather than identify and correct any issues.

Finally, Luisa Blue testified on behalf of Respondent. During her testimony on direct, she stated that, without having TWR cards signed Respondent, would not be able to use members' phone numbers for text messaging. Tr. 535. However, on cross-examination, she later admitted

that Respondent could text them if they had signed up online. Tr. 564. Members could also sign sign-in sheets with similar language at the bottom to give permission to Respondent to send them text messages. Vergara's testimony again tries to paint the TWR cards as important legal documents, despite being just a temporary "recommitment" campaign. Blue also testified that she thought the progressive disciplinary procedure was being followed for Cabrera, despite Respondent skipping several steps of discipline. Tr. 568-569. After acknowledging that lesser disciplines would have been appropriate for employee conduct regarding TWR cards and debrief sheets, Blue then stated that because Cabrera had a lot of experience an action plan or lesser discipline should not be afforded to him, "He should know better. He's got the experience." Tr. 569. Blue then admitted there is no experience requirement included in the progressive disciplinary procedure in the CBA. Tr. 569. Notably, on Respondent counsel's redirect, he then had Blue read the CBA article (like he did with Manteca) stating that there is an exception to progressive discipline if there were severe actions taken by the individual. Tr. 581-582. Such hand-holding testimony should not be credited, especially when compared to Blue's candid and forthright testimony to the contrary on CGC's cross-examination.

#### **D. Respondent's Transition to Trusteeship**

##### **1. Trusteeship**

Generally, when the International Union places one of its locals in trusteeship, the International President decides to place a local in trusteeship and the local's board and officers are suspended. Tr. 75. Locals can be placed in trusteeship for various reasons, including violation of the International Union's bylaws, unlawful conduct by officers, or mismanagement. Tr. 75.

Respondent was placed into trusteeship on Friday, April 28. Respondent's President Mancini, Organizing Director Nguyen, and Finance Director Robert Clark were removed from

office. Tr. 52, 83-84. All three were management personnel employed by Respondent. Tr. 52. Manteca and Blue made the decisions to fire these individuals. Tr. 84. Over the weekend, Manteca, Blue, and other International Representatives took over control of Respondent's operations and secured its assets. Tr. 80. Manteca testified that while he was reviewing documents after the trusteeship was imposed, he became aware that Cabrera and Smith were previously discharged and reinstated pursuant to a settlement agreement. Tr. 116-117. Notably, Vergara was working at Respondent's facility when Smith and Cabrera were previously terminated. Tr. 268, 318. Manteca also found out that Respondent's employees were represented by the Staff Union during this time. Tr. 87. While he was securing Respondent's facility he found the collective bargaining agreement for the Staff Union.

The week following the start of the trusteeship, Manteca met with Respondent's employees and informed them that Respondent had been placed in trusteeship and asked them to describe the work they did there. Tr. 81. According to Manteca, his role in the trusteeship was to address the crisis, refocus the local on the work of the members, and build a stronger local. Tr. 78. Blue testified that when she met with Respondent's employees early in the trusteeship they said they had not received training, and she testified that she took training and the development of staff very seriously because they have to carry out their work. Tr. 545.

## **2. Respondent targeted Cabrera**

Once the trusteeship was in place, Manteca would hold daily meetings with other management personnel. Tr. 40. As time went on, such meetings would occur two or three times a week. Tr. 40. Roberts testified that these meetings initially included Manteca, Godfrey, Sanders,

and himself.<sup>6</sup> They would normally meet in Manteca's office or one of the conference rooms at Respondent's facility. Tr. 40.

In early May, Manteca held a meeting with the International Union staff, including Roberts, in the big conference room at Respondent's facility. Tr. 41. Cabrera remembers the meeting occurring about May 8. Tr. 355. Cabrera was getting ready for his day that morning and he needed to retrieve documents from the large conference room, but the documents were also in the smaller conference room next to it. Tr. 357. Cabrera walked down the hallway and heard Manteca's voice coming from the main conference room. Tr. 357-358. Cabrera then heard Manteca state, **"Get rid of Javier Cabrera because he is the Staff Union President and he's going to be an obstacle for what I want to do here."** Tr. 358. Manteca also said he wanted to get rid of LaNita Troyano because she was very close to Cherie Mancini and is well liked at Sunrise Hospitals. Tr. 358. Cabrera was still by himself in the hallway and then went in to the other conference room to retrieve his paperwork that he needed, and then he went back to his workstation. Tr. 358. Cabrera did not file any complaints or report Manteca for what he said because Cabrera feared retaliation. Tr. 476.

Roberts, Respondent's former supervisor, testified that he was present at the meeting where Manteca made statements about Cabrera. According to Roberts, during this meeting, Manteca ordered those present to figure out a way to get rid of Cabrera because he was the Staff Union President. Tr. 41. Manteca instructed them to find a reason to terminate Cabrera because there had been a number of grievances that were filed. Tr. 66. Manteca did not provide additional reasons, but just said that was what needed to be done. Tr. 41.

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<sup>6</sup> Roberts, Godfrey, and Sanders are admitted supervisors and agents of Respondent. GCX1(i), GCX2.

Cabrera was not surprised by what he overheard Manteca say because he knew that he was being targeted. Tr. 362. Early in the trusteeship, Roberts had a conversation with Cabrera at Respondent's facility near Cabrera's workspace. Tr. 362. Cabrera remembers this conversation taking place about May 10, 2017. Tr, 362. Cabrera asked Roberts to confirm what he had overheard Manteca saying in the conference room that he wanted to get rid of Cabrera because he was the Staff Union President. Tr. 43, 363. Roberts confirmed that he was in the room when Manteca said the comments and confirmed what Manteca said in the meeting by nodding his head and saying yes. Tr. 43, 363.

After the initial meeting in early May, Manteca would conduct additional meetings with Roberts, Godfrey, and Sanders at least once a week to inquire about what they had found or if they had gotten anything. Tr. 42. Indeed, the closer it got to the end of the International Representatives' time at Respondent's facility, Manteca kept bearing down. Tr. 42. Manteca specifically told Godfrey that before he left for his next assignment, Godfrey had to figure out a way to get rid of Cabrera. Tr. 42-43. Godfrey left his assignment at Respondent's facility on November—just a week after Cabrera was discharged. Tr. 168, 220.

After receiving Manteca's directives, Godfrey began picking and choosing who he would check in on and make field visits to, and he told Roberts that he would have to check in on the "problem employees," even though that just meant the targeted employees. Tr. 63. Godfrey told Roberts that he would drive over where Cabrera was assigned to work to see if Cabrera was working but did not mention doing that for other employees. Tr. 69. Cabrera also testified that he saw Godfrey driving in the parking lots at his worksites and felt that he was being more closely supervised. Tr. 424.

Starting in early October, Cabrera began maintaining a diary because he had heard rumors that Vergara was coming back to Respondent's facility. Tr. 373, GCX14. The Staff Union also had concerns with the attitudes of the International Union leaders who were mistreating employees at Respondent's facility. Tr. 373. In mid-May, Cabrera and Smith even mentioned to Manteca and Blue that they did not want it to turn into the Brian Sheppard and Vergara era, meaning that during their time in leadership around 2014-2015, Respondent's facility was very stressful because management was treating staff really bad. Tr, 373. Cabrera then asked Manteca to stop and talk to his leaders and have them treat employees with dignity and respect. Tr. 374, GCX14(a). Cabrera's diary reflects that Cabrera felt more closely supervised, including by one of the three leads he was assigned in October, Keani Christianson. Tr. 374-375; GCX14.

**E. Respondent Discharged Javier Cabrera**

**1. August 2 investigatory meeting**

On April 12, prior to the trusteeship, Cabrera had a meeting with the Las Vegas Convention and Visitors Authority (LVCVA). Tr. 350,354. Cabrera attended an investigatory meeting for one of Respondent's members from the LVCVA and Cabrera was the representative for that investigatory meeting. Tr. 350-351. When Cabrera arrived, he placed his cell phone and things on the table and they began the meeting. During the meeting Cabrera asked to caucus with the member and they left the room. Cabrera left his phone on the table in the room and talked to the member outside the room. Tr. 351. When he returned to the room, a LVCVA manager had his phone and asked if he was recording. Cabrera checked his phone and confirmed that it was recording and said that the meeting was not a bargaining session so he would delete it and show everyone he deleted it. Tr. 351. During that same time period, Cabrera was engaged in

bargaining the contract for the LVCVA that was expired or about to expire. Tr. 351. It was agreed by LVCA management and the Respondent that the parties were going to record all the negotiation sessions. Tr. 351. Cabrera was in charge of recording and at the end of each session, he would email a copy of the recording to the parties. Tr. 351-352. Negotiations were occurring between one and three times per week and were conducted in the same room where the investigatory meeting took place. Tr. 352. Cabrera recognized it was a mistake since the meeting was investigatory and not a bargaining session, and immediately reported the incident to his supervisor at the time Nguyen. Tr. 352. Cabrera informed Nguyen that he had made a mistake and recorded the meeting and said he did it by accident since he was used to recording the bargaining sessions there. Tr. 353. Nguyen agreed that if was not bargaining so he could not record without permission. Tr. 353. Nguyen said that because of Cabrera's prompt reaction and reporting it to him, Cabrera would only receive an **informal verbal warning** and said he did not want it to happen again. Tr. 353. Blue testified that if Cabrera voluntarily came forward to his supervisor in that situation, that it would be an act of honesty and integrity to do so. Tr. 570. Vergara also testified about the need for organizers to have honesty and integrity in their roles. Tr. 334-335.

About August 2, nearly four months after the incident, Cabrera attended an investigatory meeting regarding the LVCVA recording incident. Tr. 94, 140, 364, RX62. Manteca participated in this investigatory meeting, even though he only participated in one other investigatory meeting during his tenure at Respondent's facility. Tr. 89. Smith attended the meeting as Cabrera's Staff Union representative and took notes. Tr. 266, GCX10. Paul Cotsonis, Respondent's legal counsel, and Godfrey were also in attendance. Tr. 365. During the beginning of the meeting, Cabrera informed them that he had already been given an informal verbal warning by his

previous supervisor for the incident. Tr. 89. Nevertheless, Respondent continued with investigatory meeting. Tr. 188, 365-366. The meeting lasted about 10-15 minutes. Tr. 366.

After the investigatory meeting ended, Respondent provided Cabrera with a document dated August 11, stating that he received a verbal warning—instead of an informal verbal warning—for his conduct back on April 12, 2017. GCX3. This document was drafted by Respondent’s counsel Cotsonis. Tr. 89. Godfrey delivered the document to Cabrera. Tr. 366. Instead of being an informal verbal warning, the document stated that "Mr. Cabrera was further advised that future infractions and/or misconduct may result in further progressive discipline up to and including termination." GCX3. Manteca included this language despite having no idea whether Nguyen actually told Cabrera any future infractions and/or misconduct may result in progressive discipline up to and including termination. Tr. 93. Yet, Manteca then testified that the document was just to *memorialize* the discipline that was previously issued to Cabrera in April by Nguyen and would be placed in his personnel file. Tr. 92. Manteca apparently wanted it in Cabrera’s personnel file, so he could use it later when Cabrera was discharged. When he received the document, Cabrera informed Godfrey that it was not supposed to be an investigatory meeting and that the document should state informal verbal warning, not verbal warning, and that the last paragraph was trying to set him up being terminated. Tr. 367. Cabrera asked Godfrey to take it back to their counsel to change it, but he never received a revised version. Tr. 365.

## **2. The “No-Call, No-Show”**

On October 15, Cabrera notified Godfrey that he would not be returning to work the following day on October 16 due to a severe toothache. GCX9, Tr. 197, 383. Cabrera had been dealing with a toothache medical condition since about October 12 but the first day he called off was October 16. He did not work on October 16 and was out sick. Cabrera then sent an email the

night of October 16 to Vergara and Godfrey informing them that he had a dental procedure the following day on October 17 and asked them to find coverage for his event planned in the morning. Tr. 191, 302, GCX9. Cabrera had three scheduled events planned for October 17. Tr. 381-382, GCX15. Vergara did not respond to Cabrera's email until 11:48 p.m. on October 16 and Cabrera did not read it until the morning of October 17. Tr. 384. When he read it the morning of October 17, Cabrera took Vergara's statement "see you tomorrow" to mean that he had October 17 off, not just the morning. Tr. 385. After receiving Cabrera's email, Vergara asked Godfrey to find coverage for the events that day and Godfrey and Sanders were successful in obtaining coverage. Tr. 195-196, 302. Based on his misreading of Vergara's email, Cabrera thought he had the rest of the day off and did not go to the afternoon event or the phone banking event at Respondent's facility. Tr. 391. Manteca was made aware that Cabrera had a dentist appointment and emailed his supervisor about it. Tr. 156.

Despite Cabrera's absence, all three planned events took place as scheduled on October 17. Tr. 196. Godfrey was reluctant to acknowledge that he was aware of Cabrera's medical condition prior to October 16, but ultimately testified that Cabrera had previously notified him he had a toothache. Tr. 198. Godfrey then testified that he did not become aware the Cabrera was possibly a no-call no-show until the end of the day on October 17. Tr. 225, 244. However, Godfrey contacted Randy Peters the morning of October 17 to fill in for Cabrera's *afternoon* event, even though Godfrey testified that he did not know that Cabrera was not going to show up for his afternoon events. Tr. 253, 256. In response to CGC pointing out his inconsistent testimony, Godfrey then stated that Cabrera had a history and they could not depend on him and that was why they had Peters on standby: "Well, with Javier, I mean Javier had a little bit of -- it was a little bit of a history where Javier would maybe not -- we couldn't really depend on. So we

wanted to make sure we were covered toward the end. So we had Randy on stand by, just in case he wouldn't -- not in case he didn't -- it wasn't about him not showing. It was really to make sure we were engaging the members was Randy's original piece, but him ending up securing us the room just happened to be secondary. That happened to be like a bonus.” Tr. 256.

For the morning event planned on October 17, Cabrera had emailed his contact to reserve a room for the event. Cabrera sent the email the day prior—while he was out sick— requesting access to the facility for the meeting the following day. GCX16. Cabrera had worked with that contact for about 16 years. Tr. 386. He had previously requested rooms from her over the phone and through email, it was not unusual to request a room from her the day before an event, and there had never been any issues reserving rooms with her. Tr. 387.

Cabrera performed some work on October 17 as well. Tr. 389. His diary entry states, “I was out sick but I was very active on the phone and email helping my leads to get to meetings that I had in my calendar.” GCX14(c). He sent emails and text messages to his supervisors regarding the events scheduled for that day with his work phone. Tr. 389-390. He even sent a text message to his lead, Sanders, before the afternoon event to make sure she got to the event. Tr. 390, 414, GCX23 at bates 183. Notably, Cabrera is a salaried employee and, therefore, is not paid hourly. Tr. 390. Cabrera’s understanding of his work hours was that he was an exempted employee and he worked when needed, so if he worked 16 hours in one day he would only get paid for 8 hours and not get paid overtime. Tr. 390. Additionally, he did not get paid extra when he worked the weekends. Tr. 391.

Cabrera’s toothache medical condition was partially taken care of on October 17 at his dental procedure but he had to have another procedure done by a specialist a few days later. Tr. 388. Cabrera was initially prescribed medication at his October 17 dental procedure but later had

to change medications on October 23 due to complications in response to the medication. Tr. 389, 413-414, GCX23. Prior to October 17, Cabrera was taking over-the-counter medications. Tr. 389. Cabrera returned to work the following day on October 18 but remained on his medication as prescribed. Tr. 391.

### **3. October 26 investigatory meeting**

On October 24, Godfrey informed Cabrera that he was going to have an investigatory meeting on October 25. Tr. 200-201. Initially, Godfrey only planned on discussing the no-call no-show with Cabrera. Tr. 200.

After Godfrey notified Cabrera that they were going to have the meeting, other issues were brought up by Vergara regarding TWR cards and debrief sheets. Tr. 201. Previously, on October 18, Cabrera went to several events, including new employee orientation, the health district, and social services for contract distribution and TWR cards, and then phone banking afterwards. Tr. 391. Cabrera mistakenly brought the wrong bag for his social services event with the TWR cards. Tr. 394. Based on Cabrera's prior training with Respondent, and other unions, he did not want to cancel the event but instead improvised and planned to fix anything that needed to be fixed later. Tr. 394. Accordingly, Cabrera had the employees sign in on a sign-in sheet with their name, email, and phone number. Tr. 395; GCX17. Cabrera wrote on the sign in sheet, "submit their personal info on card then get them to do survey [survey on TWR card] at picture day cause I did not bring cards today, they are in another box," and he initialed and dated the annotation "10-18-17." GCX17. Cabrera then turned in a debrief sheet for October 18 that included the names of the individuals he talked to and who signed the sign-in sheet. Tr. 397, GCX18 at 2.

The following week, Vergara debriefed the staff on October 24 and Cabrera gave her his debrief sheet for that day. Tr. 294. Cabrera turned in a debrief sheet that included the names of the individuals who were on the debrief sheet from October 18. Tr. 399, GCX19. Along with the October 24 debrief sheet, Cabrera also submitted with it the TWR cards that he filled out himself, but did not sign, for the individuals on the sign-in sheet and that he intended to get completed cards from later. Tr. 399; GCX20. Cabrera submitted the cards with the October 24 debrief sheet because he was unsure of whether he submitted the cards with the info on October 18. Tr. 401. His diary entry for that date states, "I had in my desk some TWR cards from SS [social services] that I couldn't remember if I had turn them in from last Wednesday (10-18-17). I checked my records and couldn't find any so I submitted them again just to make sure these people were accounted for." GCX14(d). Cabrera stated he would rather have the information submitted twice than not at all and that if he did submit it twice he could just tell management he submitted it twice. Tr. 402. Cabrera could not have submitted the cards without putting them on a debrief sheet. Tr. 402.

Despite having only been working at Respondent's facility again for about two weeks, Vergara inserted herself in the investigation of Cabrera by investigating the TWR cards he submitted with his debrief sheet. Tr. 292-294. On October 24, after the debrief, Vergara inspected the cards and concluded that Cabrera filled out seven TWR cards but did not sign them. Tr. 304. The TWR cards were brought up during the senior debrief later that night on October 24. Tr. 201. Vergara told Godfrey and Manteca that some of the cards Cabrera submitted were off and the handwriting looked similar and looked like Cabrera's handwriting. Tr. 203, 305.

At about 4:54 p.m. on October 25, Cabrera emailed Vergara and told her he might have submitted duplicate names on debrief sheets and offered to explain. Tr. 405, GCX21. Cabrera emailed Vergara right after he realized that he had submitted duplicate reports. Tr. 405. Notably, Respondent was not aware of any issue with the debrief sheets until Cabrera brought it to their attention. Tr. 205-206. After being informed, Godfrey and Vergara compared the two debrief sheets at issue and concluded that they “did not add up.” Tr. 206. Sometime after he sent his email, Cabrera overheard Lead Saenz by the copier saying, “[W]e got him now,” in an excited voice. Tr. 477. Although Cabrera did not know who she was referring to, no one else was fired around the time he was. Tr. 477.

Vergara found out that Cabrera was going to have an investigatory meeting on October 25. Respondent launched a full-scale investigation into the cards and on the evening of October 25. Vergara directed Saenz to call members listed on the TWR cards to see if they had filled them out. Tr. 204, 304-305, 308. But no one called or talked to Cabrera about the TWR cards, despite his offer to explain in his email. After Vergara completed the investigation, her and Godfrey informed Manteca the night of October 25. Tr. 315. Vergara raised the issue of Cabrera being dishonest in his reporting, despite Cabrera bringing the issue to her attention. Tr. 316. Godfrey even had a conversation with Respondent’s counsel in preparation for the investigatory meeting the following day. Tr. 234. Manteca told Vergara to give it all to Godfrey and he would take care of it. Tr. 317. Manteca instructed Godfrey to have the investigatory meeting with legal counsel present. Tr. 100. Yet, throughout this intense investigation, no members had even complained to Respondent about the TWR cards that Cabrera submitted, which were not signed or dated. Tr. 254.

Cabrera requested that the October 25 investigatory meeting be moved to October 26 because his Staff Union representative was not available. Tr. 210, 407. Present at the investigatory meeting was Godfrey, Steve Sorenson, Cabrera's representative, and Cabrera. Tr. 407. During the investigatory meeting, which was originally only about the no-call no-show, Respondent brought up Cabrera's no-call no-show, his failure to setup a meeting properly for the morning event on October 17, the TWR cards he filled out, his debrief sheets with duplicate names, and cards he collected that had "on file" on them. Tr. 211-212, 407.

During the meeting, Cabrera explained that he was dealing with the toothache and that he thought he was given the day off based on Vergara's email. Tr. 408. They presented the emails to Cabrera and pointed out that Vergara's email stated that Sanders would be attending the afternoon event with Cabrera. Tr. 408. At that time, Cabrera realized he had misread Vergara's email because it said, "see you tomorrow," and he read it on October 17. Tr. 408.

Cabrera also explained what happened with the debrief sheets that he submitted. Tr. 408. He explained that he did not have his bag with the TWR cards when he went to the social services event, but improvised and produced a sign-in sheet, and planned on going back another day to do picture IDs. Tr. 408. He told them he was not sure if he submitted the cards on October 18, so he submitted them on October 24 to be safe. Tr. 408.

Additionally, Cabrera explained that he had emailed the contact person for the scheduled event on October 17 the night before. Tr. 408. Godfrey testified that he did not know about Cabrera's working relationship with the person he requested the room from for the morning event on October 17 or how he reserved the room in the past. Tr. 214. Cabrera's April discipline from Nguyen did not come up during the October 26 meeting. Tr. 408. The meeting ended with Cotsonis telling Cabrera that they would get back to him with a decision. Tr. 409.

After the investigatory meeting at 12:03 p.m., Godfrey submitted an information request to Cabrera. Tr. 236, 410, GCX22. Godfrey requested three items of information and gave Cabrera a deadline of 3:00 p.m. to provide the requested documents, including: “(1) Copy of the Oct 18th Sign in sheet presented during the investigatory meeting; (2) Please provide the prescriptions of medications, indicated that were prescribed by your dentist on Oct 14th. As well as any medications prescribed thereafter through the 24th of October, including any other prescribed medication from any other health care provider during this period that you believe affected your cognitive abilities; and (3) Please provide the text messages between you and Helen Sanders on October 17 regarding the Public Defenders meeting that day as well as your text, email correspondences with Ms. Sanders on October 18 as we discussed during your investigatory interview.” GCX22. Cabrera provided all the requested information. Tr. 411. During his tenure as Staff Union President, Cabrera was not aware of Respondent sending an employee a request for information like the one he received. Tr. 411. After Cabrera produced the documents requested, Godfrey told him to wait in his cubicle. Tr. 416. Godfrey then returned an hour later and told Cabrera to return to work on Monday (the following day, Friday, was a holiday). Tr. 416. Cabrera asked if he should be ready to work on Monday, and Godfrey said yes. Tr. 416.

After the investigatory meeting, Godfrey spoke with Manteca extensively about what happened during the meeting. Tr. 133. Manteca reviewed the debrief sheets and cards that Vergara felt were falsified. Tr. 100-101. **Godfrey recommended to Manteca that Cabrera be issued discipline of suspension, at a minimum.** Tr. 248. Initially, Godfrey testified that he did not recommend any discipline but later testified that he did. Tr. 248. In response to a question about his inconsistent testimony, Godfrey stated “No, when he -- if he -- I didn't go in -- I did not

go in and recommend how to discipline -- how we should discipline him. I just made sure I produced all the facts from the investigation and presented it to Martin.” Tr. 248. But then he again testified that he did recommend suspension at a minimum. Tr. 249. Nevertheless, Manteca did not adopt Godfrey’s recommendation of suspension but instead fired Cabrera. Godfrey was also involved in other discharges when he participated in other trusteeships. Tr. 169.

#### **4. Javier Cabrera’s discharge**

On the morning of Monday, October 30 Cabrera was discharged. Tr. 416. Godfrey took Cabrera to one of the offices where Cotsonis was present. Tr. 416. Cotsonis said that they were giving him a termination notice and told him to read it. Tr. 416, GCX4, RX23. Cabrera then proceeded to read the document and tried to say there were discrepancies in the document but Cotsonis just said that it was not the time for that. Tr. 417. After changing language in the termination notice regarding his PTO balance and receiving his last check, Cabrera was escorted to get his belongings and to the door. Tr. 419.

Cabrera’s termination notice is five pages long, single spaced. RX23, GCX4. It contains a laundry list of reasons and purported justifications why Cabrera was being terminated. Respondent’s legal counsel drafted the document in conference and conversations with Godfrey. Tr. 106. Manteca reviewed and approved the document. Tr. 106. Manteca and Blue made the ultimate decision to fire Cabrera. Tr. 98. Blue was only present at Respondent’s facility one or two days per week, so Manteca was more familiar with Cabrera’s job performance than Blue. Tr. 99. Manteca testified that Cabrera was discharged for three reasons: (1) poor performance; (2) dishonesty; and (3) falsifying reports. Tr. 99.

Blue agreed with the decision to discharge Cabrera because he was “dishonest and could not carry out his work.” Tr. 549. However, Blue was not made aware of various circumstances

regarding the various reasons cited for Cabrera's discharge. For example, she did not know he voluntarily came forward to his supervisor about the LVCVA recording and was tasked with recording the bargaining sessions during that time (Tr. 571); she did not know he had a medical condition at the time of his "no-call no-show" (Tr. 573); and she did not know that he brought up the debrief sheet issues voluntarily to Vergara (Tr. 575). Notably, as Manteca instructed him to do, Godfrey found a way to get rid of Cabrera before his next assignment as Cabrera was discharged just one week before Godfrey left his assignment at Respondent's facility. Cabrera's diary entry for October 30 simply ends with, "I'm terminated [sad face]." GCX14(e).

#### **5. Other Employees were Treated More Leniently**

The record evidence shows there were no investigatory meetings for any other employees relating to TWR cards, debrief sheets, or no-call no-shows. Tr. 101-102. Other than Cabrera's discharge, no other rank and file employees were discharged by Respondent during Manteca's tenure. Tr. 110. Manteca testified that there were two or three verbal warnings issued during his time as deputy trustee. Tr. 109. There were no written warnings issued. Tr. 109. And there were no final written warnings issued. Tr. 109. There were no disciplinary suspensions without pay. Tr. 109.

LaNita Troyano had an investigatory meeting related to a membership card that was submitted to Respondent where the employee whose signature appeared on the card told his employer he did not sign the membership card. Tr. 96. The employee was stating that somebody committed fraud and he had not signed the card. Tr. 96. Despite the serious allegations raised, Manteca and Godfrey determined that there was inconclusive evidence, and no one was disciplined in any way for the incident. Tr. 95-96, 176. Contrary to Manteca's statement that the members should fill out the card themselves, Troyano collected a card that was filled out by

someone other than the member. Yet, unlike Cabrera, no discipline was issued. Also contrary to Manteca's testimony, Godfrey testified that it was common practice that members would collect cards from other members, and then return them to Respondent's organizers. Tr. 176-177. If this is true, then there is no way to enforce Manteca's "rule" that members can only complete their own card. Troyano's incident is an example of Respondent's seemingly made up and inconsistent policies.

During Troyano's investigatory meeting, Manteca instructed Troyano not to discuss her personnel matters with other members of the staff of member of the Staff Union. Tr. 97. Indeed, Manteca testified that it was Respondent's practice that the employee could not discuss personnel matter with other staff because they "wanted to make sure that [Respondent] wanted to protect stewards from being wrongfully accused of submitting fraudulent card (sic) to the Union." Tr. 98. Godfrey also corroborated this practice and testified that he told Troyano not to discuss HR or personnel matters with staff members or the Staff Union. Tr. 180. Godfrey stated it was normal practice to tell employees that during investigatory meetings, especially while they are in the investigation process. Tr. 180. Notably, Respondent's counsel Cotsonis was not present in her investigatory meeting even though he attended Cabrera's meeting on the same day. Tr. 102. Rather than protecting Respondent, the practice of prohibiting employees from discussing HR or personnel matters with staff members or the Staff Union merely shows Respondent's animus towards protected activity and discussing matters with the Staff Union and a likely violation of the Act.

Smith testified about the different levels of discipline she received prior to Manteca's arrival at Respondent's facility. She received a verbal in 2014, she was terminated and reinstated in 2015, and received a final written warning in 2017, and a suspension in 2017. Tr. 265. She

also testified that in the summer of 2018 she received a written warning that was later expunged. Tr. 265. Smith even testified that her final written warning was issued, in part, for exposing Respondent to liability for potential breach of the duty of fair representation towards its members. Tr. 275. Yet she was still provided with a lesser discipline than suspension or discharge. Cabrera, on the other hand, only received a verbal and then was discharged.

Manteca testified that during his time as deputy trustee for Respondent, other employees besides Cabrera did no-call no-shows. Tr. 113. He stated that sometimes other people did no-call no-shows because they might have been in an accident, had an emergency, kids, delayed plane, or had “other issues.” Tr. 113-114. Yet, Manteca testified no other employees had been disciplined for no-call no-shows. Tr. 113. Manteca testified that on average there was about one no-call no-show per month. Tr. 114.

Additionally, the evidence shows that another organizer, John Archer, had an investigatory meeting for not meeting his goals in the field, which included goals related to collecting cards and having conversations with member leaders. Tr. 173-174, 242. Such contacts are noted on debrief sheets. Tr. 174. Based on the investigation, Archer only received a coaching. Tr. 173. Again, Cabrera’s discharge was five steps beyond the coaching level of discipline.

Godfrey testified that he was aware of other organizers putting the name of a member on one debrief sheet and the same member on later debrief sheet, but there was no discipline in any way. Tr. 209-210. Roberts testified that in the beginning nobody was filling out debrief sheets correctly, but nobody was discharged, suspended, or disciplined for it. Tr. 46-47.

Manteca testified that if an organizer collected a card from a member and the card had “on file” on it where the member’s information would go, Respondent would ask that organizer to next time get the information to just make sure that they had the correct information, but it

would not be a disciplinary action. Tr. 153-154. Regarding “on file” being written on a card, Godfrey also testified that they would send the cards back to the organizer and get it all filled out. Tr. 215. Roberts remembered employees collecting cards where the member wrote “on file” instead of filling out the information requested but stated that nobody was disciplined over that. Tr. 46. Roberts testified the members would normally put “on file” on the card when the member was re-signing a membership card. Tr. 48. In those cases, the members had already filled out all their information, so they would just put their name, sign it, and put that the information was already on file. Tr. 48. Cabrera, however, was the only one that was disciplined in any way for collecting cards that said “on file.” Tr. 216. The other organizers were sent back to the members to get the cards correctly filled out and were coached with a simple conversation. Tr. 217. There was also no written policy on how to get TWR cards filled out. Tr. 125.

Regarding TWR cards, Vergara testified that if an organizer obtained an incorrectly filled out card, she would do non-punitive coachings at the time that she received the cards (something she did not do at the debriefing with Cabrera, or later on). Tr. 313, 328-329. Vergara would tell organizers to go back and get missing information or if the card said, “on record.” Tr. 313. Vergara also testified that no other employees had been disciplined for missing a phone banking session. Tr. 328. Manteca testified that there was no time limit for submitting TWR cards because Respondent was always building their list. Tr. 122. Manteca acknowledged that if an organizer got a TWR card from a member, but it was not signed, Respondent would want and ask that organizer to go back and get it signed. Tr. 122-123. That is, unless your name is Javier Cabrera, apparently.

Godfrey was aware of other employees requesting time off for medical visits. Tr. 247. However, Godfrey never requested that employees produce documents about their medical visits

or prescriptions except for Cabrera. Tr. 247. Godfrey also never requested that an employee produce their text messages to their leads. Tr. 247.

Vergara testified that she participated in an investigatory meeting with Melody Rash. Tr. 290. Rash was ultimately *suspended* for failing to schedule an important arbitration with FMCS (federal mediation), in two different cases. Tr. 290-291. It was her job to schedule the arbitrator for cases and they had to be done in a very timely manner. Tr. 290. She missed a deadline, which if that happens, management will not agree to arbitrate, and it would have an adverse effect on Respondent's members. Tr. 291. Rash was a non-bargaining unit employee and was a confidential assistant to Manteca. Tr. 291. Because of Rash's conduct, Respondent's members lost their arbitration claim and there was a potential of a duty of fair representation claims against Respondent. Tr. 291-292. Vergara stated that she decided on the suspension level of discipline "Because we believed that the offense was egregious enough. It's impacted our members, and it's an important task that she missed." Tr. 330. Despite these dire consequences—not just hypothetical ones like Cabrera's issues—Respondent only suspended her. Tr. 290.

### **III. ARGUMENT**

#### **A. Respondent Discharged Javier Cabrera because of his Union Activities**

##### **1. Legal standard**

Section 8(a)(3) of the Act is intended to protect employees' Section 7 right to form, join, or assist labor organizations, or to refrain from doing so, without as a result being subjected to retaliation by their employers. The legal standard for evaluating whether an adverse employment action violated the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Transportation Management Corp.*, 462 U.S. 393 (1983). To establish that an employer's adverse action is violative, *Wright Line* requires the General Counsel to initially show that the employee's protected activities was a

motivating factor in the employer's decision to take the adverse employment action. *Id.* Once that is established, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse action even in the absence of the protected activity. *Id.* An employer must not only establish a legitimate reason for its action, but must persuade, by a preponderance of the evidence that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). The *Wright Line* analysis applies to Section 8(a)(3) analyses as well. *Kennametal, Inc.*, 358 NLRB 921, 928 (2012) (citing *Verizon*, 350 NLRB 542, 546-547 (2007)).

The General Counsel's overall burden of persuasion is identical to its initial burden under *Wright Line*. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd. mem.* 127 F.3d 34 (5th Cir. 1997). In meeting its burden of persuasion, the General Counsel must establish that the discriminatee engaged in protected activity, that the employer had knowledge of this activity, and that the employer carried out the adverse employment action because of their protected activity.

The causal link between the protected activity and the adverse employment action, however, may be sustained with evidence that is short of direct evidence of motive. *J.S. Troup Electric, Inc.*, 344 NLRB 1009, 1015 (2005) (citing *Vulcan Waterproofing Co.*, 327 NLRB 1100, 1109-1110 (1999); *Roadway Express*, 327 NLRB 25, 26 (1998); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988).

With respect to knowledge, it is "well established that, in the absence of direct evidence, an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn." *Pan-Oston Co.*, 336 NLRB 305,

308 (1988). Knowledge may be inferred based on circumstantial evidence such as timing of alleged discriminatory actions, general knowledge of its employees' union activities, animus, and disparate treatment. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); see also *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002); *Metro Networks*, 336 NLRB 63, 65 (2001) (inferring knowledge for several independent reasons, including contemporaneous 8(a)(1) violations, general awareness of union activity, the timing of the discharges relative to union activity, and the pretextual nature of the reasons alleged for the discharges).

Animus “may be inferred from the record as a whole, including timing and disparate treatment.” *Kennametal, Inc.*, 358 NLRB 921, 928 (2012) (citing *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011)). Evidence that may establish a discriminatory motive – i.e., that the employer’s hostility to protected activity “contributed to” its decision to take adverse action against the employee – includes:(1) statements of animus directed to the employee or about the employee’s protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB 363, 363 (2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was “after her” because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee’s protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees,

it fired an employee who had signed a card); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (agreeing with the ALJ’s finding that the employer violated Section 8(a)(3) based on the abruptness of the discipline and its timing which were “persuasive evidence” of motive)); (4) the existence of other unfair labor practices that demonstrate that the employer’s animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer’s asserted reason for the employee’s discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB 271, 274 (2014); *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

## **2. Cabrera engaged in union activities**

Cabrera engaged in extensive union activities during his employment with Respondent and leading up to his discharge. He was a long-time member and President of the Staff Union. He helped negotiate the parties’ CBA. He also participated in the grievance process. He and the Staff Union filed numerous grievances, including grievances filed after the imposition of a trusteeship. Notably, several of the grievances filed specifically referenced Manteca and International Union staff by name. Even in in-person meetings, Cabrera told Manteca that he

needed to tell his staff to start treating Respondent's employees with dignity and respect. In sum, Cabrera engaged in significant union activities.

**3. Respondent had knowledge of Cabrera's union activities**

Respondent had direct knowledge of Cabrera's union activities. It was commonly known and undisputed that Cabrera was the Staff Union President. Indeed, Manteca referenced Cabrera's status as the Staff Union President when he directed his subordinates to "get rid of him." Additionally, Cabrera and the Staff Union filed numerous grievances against Respondent during Manteca's tenure and Cabrera would file them directly with Respondent or have Smith file them directly with Respondent. Respondent acknowledges receiving and being aware of the grievances that the Staff Union filed. Manteca is also directly aware of the statement made by Cabrera to him in grievance meetings. Accordingly, Respondent had knowledge of Cabrera's union activities.

**4. Respondent took an adverse employment action against Cabrera**

Respondent fired Cabrera on October 30 after conducting an extensive, overzealous, investigation into Cabrera's work performance and alleged misconduct. Starting on October 17 when he informed his supervisors he had a dental appointment, through October 26, when he had an investigatory meeting where they discussed a laundry list of items that Respondent had dug up. The decision to fire Cabrera was made by the highest-ranking management officials at Respondent's facility. By its conduct, Respondent took an adverse employment action against Cabrera.

**5. Respondent discharged Cabrera because of his union activities**

Evidence of Respondent's discriminatory motive is demonstrated by Manteca's statement that he wanted to get rid of Cabrera because he was the Staff Union President, i.e. because of his

protected activity. See, e.g., *Austal USA, LLC*, 356 NLRB 363, 363 (2010) (finding unlawful motivation where supervisors told activist that management was “after her” because of her union activities). In *Food & Commercial Workers Local 1357*, 273 NLRB 299 (1984), the Board found that a union (acting in its capacity as an employer) discharged its employee in violation of Section 8(a)(3) for her union activities when she engaged in a strike with other employees and spoke out against the union. In that case, like here, the union’s supervisors made statements showing animus towards the charging party, including the statement by the union’s secretary-treasurer that the president was “going to make an example of you, that nobody would ever strike against him again.” *Id.* at 299. Manteca’s statement that he wanted to get rid of Cabrera because he was the Staff Union President and he was going to be an obstacle and because he filed grievances, shows even more targeted animus than the statement made in *Food & Commercial Workers Local 1357*.

Respondent skipped several levels of progressive discipline by discharging Cabrera. It is important to note that Cabrera had only been given an informal verbal warning prior to his discharge. See *Teksid Aluminum Foundry*, 311 NLRB at 723 (finding a violation where the employer skipped a verbal warning in its progressive discipline system). Furthermore, Respondent never gave Cabrera the opportunity to be placed on a corrective action plan to try to improve his behavior. See *Lucky Cab Company*, 360 NLRB at 274 (finding animus where the employer failed to provide discharge warnings to discriminatees, as it had to other employees). Finally, even following Respondent’s own guidelines, Cabrera should not have been discharged because the severity of his conduct was not high, the frequency of his conduct was not high because these were the only incidents of alleged misconduct, and he had been an employee since 2002. Godfrey himself even recommended the lower discipline of a suspension instead of a

discharge. However, Cabrera was discharged nonetheless. See *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1215, 1237 (2004) (finding a violation for an unlawfully enhanced warning because of protected union activity). The ALJ should find that Respondent clearly bore animus towards Cabrera based on it skipping multiple levels of progressive discipline.

Evidence of past employer practice shows that alleged discriminatee himself is being treated more severely than in past for same or similar conduct or more severely than other employees who were not engaged in union-related activity. Compare *Kentucky River Medical Center*, 355 NLRB 643, 646 (2010) (other employees involved in the incident were discharged, and employer policy for distribution of medicine different than policy for administration of blood transfusion.) See also *Bally's Atlantic City*, 355 NLRB 1319, 1319-1322 (2010) (employer did not meet its burden of showing that it would have discharged employee even in absence of union activity). A strong showing of anti-union motivation, as demonstrated here, makes Respondent's rebuttal burden substantial. *Id.* at 1321. The failure to announce a zero-tolerance policy to employees regarding TWR cards, debrief sheets, or even "no-call no-shows," undermines Respondent's likely defense that it would have discharged Cabrera in the absence of his union activity. Godfrey acknowledged that they did not tell employees they would be fired for improperly collecting TWR cards during trainings.

Respondent did not treat Cabrera as it did other employees in terms of issuing discipline. Respondent issued employees various levels of discipline to other employees. For example, Troyano received no discipline at all for collecting a membership card that fraudulently signed; Smith received various levels of discipline including verbal warnings, final warnings, suspensions, and written warnings, even for conduct that subjected Respondent to possible DFR claims; no one else was disciplined for no-call no-shows even though they happened once a

month on average; Archer received a coaching for not meeting his goals in terms of collecting cards and making contacts on his debrief sheets; other organizers collected cards that stated “on file” on them but were merely asked to back and get them filled out correctly and were not disciplined; Respondent did not request medical documents from employees other than Cabrera; and another employee Rash failed to submit two cases for arbitration resulting in members losing their claims but only received a suspension. The list goes on, but Cabrera did not receive the same treatment when he was discharged instead of being disciplined pursuant to progressive discipline. See *JAMCO*, 294 NLRB 896, 905 (1989) (finding that a clear departure from past practice was evidence of discriminatory intent). Respondent’s animus is evidenced by the fact that it did not issue Cabrera lesser discipline as it had for other employees who engaged in similar, or even far worse, alleged misconduct.

Respondent initially only intended to have an investigatory meeting with Cabrera in October for his alleged no-call no-show. However, by the time the investigatory meeting happened, Respondent had dug up a laundry list of items to confront Cabrera about. Cf. *Lucky Cab Company*, 360 NLRB at 274 (finding pretext based on shifting explanations where the employer provided new reasons supporting the discharge). Indeed, Respondent engaged numerous management officials to help out in the investigation and bolster the accusations against Cabrera, i.e. Godfrey sent him an information request, Vergara went back to the files and compared debrief sheets and inspected his TWR cards; Saenz called random employees identified on the TWR cards to interrogate them about their interactions with Cabrera; and Respondent’s counsel Cotsonis had various conversations with Godfrey in preparation for an investigatory meeting. Respondent did all this without even talking to Cabrera about any of the issues raised. *NLRB v. Dorothy Shamrock Coal Company*, 833 F.2d 1263 (7th Cir. 1987); *Adco*

*Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993) (finding attempt to bolster claim by distorting facts was evidence of pretext). Respondent's shifting justifications from the time Cabrera was initially asked to have an investigatory meeting on October 24 to the time he was discharged shows clear animus. Respondent's blatant attempts to find any and all reasons to discharge Cabrera thinly veils its real motive for his discharge—his protected union activity.

Several of the reasons provided for Cabrera's discharge reek of pretext. Where an employer's asserted reason for an adverse action is false, the Board may infer that employer is concealing an unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466. Respondent cannot rely on false or pretextual reasons to support its affirmative defense that it would have taken action in the absence of protected activities. *Lucky Cab Company*, 360 NLRB at 276. Respondent's "fail[ure] to provide a clear, consistent and credible explanation" for Cabrera's level of discipline supports a finding of pretext. *NLRB v. Inter-Disciplinary Advantage, Inc.*, 312 F. App'x 737, 751 (6th Cir. 2008); *see also Healthcare Emps. Union, Local 399 v. NLRB*, 463 F.3d 909, 922 (9th Cir. 2006) ("Where the employer's asserted justification is shifting and unreliable, its case is weakened, and the conclusion that the true reason was for union activity is correspondingly strengthened." (quoting *NLRB v. Nevis Indus., Inc.*, 647 F.2d 905, 910 (9th Cir. 1981))). Here, Respondent argued that Cabrera was dishonest, where in fact he was the one that brought the April 2 recording incident to his supervisors' attention; he was the one to bring the duplicate debrief sheets to his supervisors' attention; and he never denied any of the conduct in the October 26 investigatory meeting and provided reasonable explanations for such conduct. Respondent also listed insubordination as being a reason for Cabrera's discharge,

yet they can point to no written or verbal directive that Cabrera refused to do. Indeed, Cabrera was forthcoming and transparent throughout his interactions with his supervisors.

**6. Respondent would not have discharged Cabrera absent his union activities.**

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.* When there is a strong showing of unlawful motivation, the respondent's defense burden is substantial. *Inova Health System*, 360 NLRB 1223, 1228 (2014) (citing, e.g., *Bally's Atlantic City*, 355 NLRB at 1321); Cf. *Lucky Cab Company*, 360 NLRB at 766 ("an employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation).

Even Blue testified that she believed Cabrera was asked to go back to the people listed on the TWR cards and contact them again, "I would just think that would be the next step." Tr. 565. Well, CGC agrees, and the fact that it was not the next step shows Respondent's unlawful motive in trying to find a reason to fire Cabrera. Blue also testified that the issue with the cards would be something where a coaching or action plan would be appropriate. Tr. 566. Then if the conduct continued, a written warning and suspension would be appropriate. Tr. 567. And if it continued still, then a termination would be appropriate. Tr. 567. Obviously, Cabrera was not afforded

those opportunities. The ALJ should reject any assertion that Respondent would have discharged Cabrera in the absence of his protected union activity.

#### **IV. CONCLUSION**

Based on the foregoing reasons and the record evidence considered as a whole, CGC respectfully submits that Respondent has violated Sections 8(a)(1) and (3) of the Act as alleged in the Complaint. Through its conduct, Respondent infringed upon the rights of its employees to engage in union activities without interference, restraint, or coercion. The ALJ should find and recommend that the Board fashion an appropriate remedy which would require Respondent to: offer reinstatement to Cabrera; remove the unlawful discipline from his personnel file; pay him for his backpay and expenses incurred because of his unlawful discharge; and post and distribute an appropriate Notice to Employees at its facility, a proposed copy of which is attached. The ALJ should order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Phoenix, Arizona, this 5<sup>th</sup> day of April 2019.

Respectfully submitted,

/s/ Fernando Anzaldua

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## CERTIFICATE OF SERVICE

I hereby certify that GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in Service Employees International Union Local 1107 Case 28-CA-209109 was served via E-Gov, E-Filing, and Electronic Mail, on this 5<sup>th</sup> day of April 2019, on the following:

### **Via E-Gov, E-Filing:**

Honorable Gerald M. Etchingham  
Administrative Law Judge  
National Labor Relations Board  
Administrative Law Judge Division  
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*/s/ Fernando Anzaldúa* \_\_\_\_\_

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**NOTICE TO EMPLOYEES**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

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

**WE WILL NOT** fire you because of your membership or support for the Nevada Service Employees Union Staff Union.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** offer **JAVIER CABRERA** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

**WE WILL** pay **JAVIER CABRERA** for the wages and other benefits he lost because we fired him.

**WE WILL** remove from our files all references to the discharge of **JAVIER CABRERA** and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

**SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1107**

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

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

**By:** \_\_\_\_\_

(Representative)

(Title)

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