

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

**SERVICE EMPLOYEES  
INTERNATIONAL UNION LOCAL 1107**

**Case No. 28-CA-209109**

**and**

**JAVIER CABRERA, an individual**

**RESPONDENT'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

Sean W. McDonald, Esq.  
The Urban Law Firm  
4270 S. Decatur Blvd, Ste A-9  
Las Vegas, NV 89103  
T: 702-968-8087  
F: 702-968-8088  
smcdonald@theurbanlawfirm.com  
*Counsel for Respondent, SEIU Local 1107*

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES..... iii

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS ..... 2

    A. Background of Local 1107’s Operations and Imposition of Trusteeship..... 2

    B. Background on Javier Cabrera’s Employment with Local 1107 ..... 3

    C. Cabrera’s Misconduct Giving Rise to Investigation and Discipline..... 4

        1. The Together We Rise Campaign and Cards and Debrief Sheets ..... 5

        2. The October 17, 2017 No-Call, No-Show ..... 8

        3. Prior Discipline Considered..... 10

    D. Reasons Local 1107 Terminated Cabrera from Employment ..... 11

    E. Charging Party Javier Cabrera does not deny his misconduct..... 13

    F. The alleged union animus. .... 13

III. LAW AND ARGUMENT..... 14

    A. Witness Credibility ..... 15

        1. Barry Roberts’s testimony is not credible..... 15

        2. Javier Cabrera’s self-serving testimony regarding union animus should be rejected. .... 18

        3. The General Counsel offered no other corroborating evidence of the supposed animus Martin Manteca harbored against Cabrera or the Staff Union. .... 19

        4. Javier Cabrera’s explanations to try to justify the misconduct continued to shift, even during the hearing..... 21

    B. Local 1107 Did Not Violate Section 8(a)(3) of the Act. .... 21

        1. Analytical Framework ..... 21

        2. Local 1107 was not motivated by an unlawful animus to terminate Cabrera; but even if it was, Local 1107 demonstrated it would have terminated Cabrera anyway. .... 27

3.	The Charging Party admits he was dishonest and engaged in misconduct. ....	32
C.	Local 1107 Did Not Violate Section 8(a)(1) of the Act. ....	33
IV.	CONCLUSION.....	33
	CERTIFICATE OF SERVICE .....	35

## TABLE OF AUTHORITIES

### Cases

<i>Airborne Freight Corp. v. NLRB</i> , 728 F.2d 357 (6th Cir. 1984).....	25
<i>Aliante Station Casino &amp; Hotel</i> , 358 NLRB 1556 (2012) .....	15
<i>Am. Armored Car</i> , 339 NLRB 103 (2001) .....	25
<i>Ancor Concepts</i> , 323 NLRB 742, <i>enforcement denied</i> , 166 F.3d 55 (2d Cir. 1999) .....	22
<i>Asarco, Inc. v. NLRB</i> , 86 F.3d 1401 (5th Cir. 1996).....	23, 30
<i>Bali Blinds Midwest</i> , 292 NLRB 243 (1989) .....	24
<i>C&amp;S Distributors</i> , 321 NLRB 404 (1996) .....	20
<i>Carleton Coll. v. NLRB</i> , 230 F.3d 1075 (8th Cir. 2000).....	25
<i>Cellco P’ship v. NLRB</i> , 892 F.3d 1256 (D.C. Cir. 2018).....	26, 28
<i>Cent. Freight Lines, Inc. v. NLRB</i> , 653 F.2d 1023 (5th Cir. 1981).....	23
<i>Centre Prop. Mgmt. v. NLRB</i> , 807 F.2d 1264 (5th Cir. 1987).....	25
<i>Chart House</i> , 223 NLRB 100 (1976).....	27
<i>Cine Enters.</i> , 301 NLRB 446 (1991), <i>enforced</i> , 978 F.2d 715 (9th Cir. 1992) .....	24
<i>Clark &amp; Wilkins Indus.</i> , 290 NLRB 106 (1988), <i>enforced</i> , 887 F.2d 308 (D.C. Cir. 1989).....	26

<i>Coca-Cola Bottling Co.</i> , 232 NLRB 794 (1977), <i>enforced in part</i> , 616 F.2d 949 (6th Cir.), <i>cert. denied</i> , 449 U.S. 998 (1980).....	26
<i>Contractor Servs.</i> , 324 NLRB 1254 (1997) .....	22
<i>Conye Textile</i> , 326 NLRB 1187 (1998) .....	25
<i>Daikichi Sushi</i> , 335 NLRB 622 (2001) .....	15
<i>Double D Construction</i> , 339 NLRB 303 (2003) .....	15
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	23
<i>Edward G. Budd Mfg. Co. v. NLRB</i> , 138 F.2d 86 (3d Cir. 1943) .....	24
<i>Elec. Data System Corp.</i> , 305 NLRB 219 (1991), <i>enforced</i> , 985 F.2d 801 (5th Cir. 1993).....	24
<i>Finnegan v. Leu</i> , 456 U.S. 431 (1982).....	24
<i>Florida Steel Corp. v. NLRB</i> , 529 F.2d 1225 (5th Cir. 1976).....	23
<i>Forest Park Ambulance Serv.</i> , 206 NLRB 550 (1973) .....	26
<i>Fresno Bee</i> , 337 NLRB 1161 (2002) .....	25
<i>G&amp;H Prods. v. NLRB</i> , 714 F.2d 1397 (7th Cir. 1983).....	25
<i>GHR Energy Corp.</i> , 294 NLRB 1011 (1989) .....	25, 28
<i>Golden Flake Snack Foods</i> , 297 NLRB 594 (1990) .....	24
<i>Green v. Armstrong Rubber Co.</i> , 612 F.2d 967 (5th Cir. 1980), <i>cert. denied</i> , 449 U.S. 879 (1980).....	27
<i>GSX Corp. v. NLRB</i> , 918 F.2d 1351 (8th Cir. 1990).....	25

<i>Holo-Krome</i> , 293 NLRB 594 (1989) .....	24
<i>Hyatt Hotels Corp.</i> , 296 NLRB 259 (1989) .....	25
<i>Laidlaw Corp.</i> , 171 NLRB 1366 (1968), <i>enforced</i> , 414 F.2d 99 (7th Cir. 1969), <i>cert. denied</i> , 397 U.S. 920 (1970).....	24
<i>Laro Maint. Corp. v. NLRB</i> , 56 F.3d 224 (D.C. Cir. 1995).....	25
<i>Liberty Mut. Ins. Co. v. NLRB</i> , 592 F.2d 595 (1st Cir. 1979) .....	26
<i>Lively Elec.</i> , 316 NLRB 471 (1995) .....	23
<i>Lucky Stores</i> , 269 NLRB 942 (1984) .....	25, 28
<i>MECO Corp. v. NLRB</i> , 986 F.2d 1434 (D.C. Cir. 1993).....	25, 26
<i>Merchs. Truck Line v. NLRB</i> , 577 F.2d 1011 (5th Cir. 1978), <i>enforcing</i> 232 NLRB 676 (1977) .....	26
<i>Mistletoe Express Serv.</i> , 295 NLRB 273 (1989) .....	25
<i>Montano Electric</i> , 335 NLRB 612 (2001) .....	25
<i>NKC of Am.</i> , 291 NLRB 683 (1988) .....	25
<i>NLRB v. Coca-Cola Bottling Co.</i> , 333 F.2d 181 (7th Cir. 1964).....	26
<i>NLRB v. Great Dane Trailers</i> , 386 U.S. 26 (1967).....	22
<i>NLRB v. Jones &amp; Laughlin Steel Corp.</i> , 301 U.S. 1 (1937).....	24
<i>NLRB v. Magnusen</i> , 523 F.2d 643 (9th Cir. 1975).....	26
<i>NLRB v. Mueller Brass Co.</i> , 509 F.2d 704 (5th Cir. 1975).....	23

<i>Operating Eng'rs Local 370</i> , 341 NLRB 822 (2004) .....	23
<i>Precoat Metals</i> , 341 NLRB 1137 (2004) .....	20
<i>Radio Officers (A.H. Bull Steamship Co.) v. NLRB</i> , 347 U.S. 17 (1954).....	22
<i>Republic Aviation v. NLRB</i> , 324 U.S. 793 (1945).....	24
<i>Retail Clerks Local 770 (Carl A. Palmer)</i> , 208 NLRB 356 (1974) .....	22
<i>SCA Servs. of Ga.</i> , 275 NLRB 830 (1985) .....	20
<i>Schaeff Inc. v. NLRB</i> , 113 F.3d 264 (D.C. Cir. 1997).....	25
<i>Serv. Emps. Local 1</i> , 344 NLRB 1104 (2005) .....	23
<i>Sutter E. Bay Hosps. v. NLRB</i> , 687 F.3d 424 (D.C. Cir. 2012).....	26
<i>Sw. Merch. Corp. v. NLRB</i> , 53 F.3d 1334 (D.C. Cir. 1995).....	25
<i>Valmont Indus., Inc. v. NLRB</i> , 244 F.3d 454 (5th Cir. 2001).....	26
<i>W Irving Die Casting of Ky.</i> , 346 NLRB 349 (2006) .....	20
<i>W. Exterminator Co. v. NLRB</i> , 565 F.2d 1114 (9th Cir. 1977), <i>enforcing in part</i> 223 NLRB 1270 (1976) .....	23
<i>Wellington Mill Div. v. NLRB</i> , 330 F.2d 579 (4th Cir.), <i>cert. denied</i> , 379 U.S. 882, <i>denying enforcement to</i> 141 NLRB 819 (1963).....	24
<i>Wells Dairy</i> , 287 NLRB 827 (1987), <i>enforced</i> , 865 F.2d 175 (8th Cir. 1989).....	26
<i>Wright Line, Wright Line Div.</i> , 251 NLRB 1083 (1980), <i>enforced</i> , 662 F.3d 899 (1st Cir. 1981), <i>cert. denied</i> , 455 U.S. 989 (1982).....	24, 25, 26

*Wyman-Gordon Co. v. NLRB*,  
654 F. 2d 134 (1st Cir. 1981) ..... 27, 29

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

**SERVICE EMPLOYEES  
INTERNATIONAL UNION LOCAL 1107**

**Case No. 28-CA-209109**

**and**

**JAVIER CABRERA, an individual**

**RESPONDENT’S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Dickie Montemayor conducted a hearing regarding Javier Cabrera’s (Charging Party) unfair labor practice charge and the General Counsel’s Complaint on February 26–28 and March 1, 2019, in Las Vegas, Nevada. As set forth in more detail below, the General Counsel failed to establish that Service Employees International Union, Local 1107 (Local 1107, Union, or Respondent) violated Section 8(a)(3) or Section 8(a)(1) of the Act. The Complaint should be dismissed in its entirety.

**I. INTRODUCTION**

Service Employees International Union, Local 1107 did not violate Section 8(a)(3) or Section 8(a)(1) when it terminated Javier Cabrera from employment. Local 1107 had substantial and weighty reasons to terminate Cabrera from employment. No single incident of misconduct caused his termination; rather, it was the confluence of several discreet acts of misconduct, which came in quick succession to one another, coupled with Cabrera’s evident dishonesty, both in completing work records and during Local 1107’s pre-termination investigatory process, which led to Cabrera’s termination. Indeed, Cabrera does not deny any of the misconduct found against him. He admits that he knew at the time of his misconduct what was expected of him, but he decided to act contrary to those expectations. Rather than accept the consequences of his repeated failures to follow instructions, Cabrera instead alleged that he was fired for engaging in

protected concerted activities or because he was the president of the Nevada Service Employees Union Staff Union (Staff Union), a union that represents a bargaining unit comprised of the staff of Local 1107.

Because the General Counsel ultimately fails to meet his burden that Local 1107 terminated Cabrera from employment because he engaged in or assisted others to engage in protected concerted activities or to discourage employees from engaging in those activities, or because it discriminated against Cabrera on account of his status as the Staff Union's president, the ALJ should find in Respondent's favor and dismiss the Complaint in its entirety.

## **II. STATEMENT OF FACTS**

### **A. Background of Local 1107's Operations and Imposition of Trusteeship**

Local 1107 was placed into an emergency trusteeship on April 28, 2017. (R. Ex. 1 (International notice summarizing reasons for emergency trusteeship and announcing appointment of trustees); Tr. 518:14–21 (Luisa Blue, the appointed trustee, testifying about circumstances leading up to Local 1107's trusteeship)).<sup>1</sup> The trusteeship was imposed after Local 1107's President, Cherie Mancini, and Executive Vice President, Sharon Kisling, were removed from office due to misconduct in violation of the SEIU Constitution and Local 1107 Constitution. (Tr. 77:19–25 (Manteca discussing his understanding of why Local 1107 was placed into trusteeship)). The reasons for the emergency trusteeship included “an on-going and serious breakdown in internal union governance and democratic procedures at Local 1107”; “leadership conflicts and in-fighting [which] caused great instability in the Local and interfered with its carrying out its collective bargaining responsibilities properly and effectively”; “Local 1107's failure to communicate adequately with Local membership”; and a “communication breakdown in the Local [which] impeded staff oversight, leaving Local staff without clear direction on the work they are required to perform, to whom they should report and from whom

---

<sup>1</sup> Citations to the transcript of proceedings are to page and line number. Citations to the General Counsel's exhibits are to GC Ex. #. Citations to Respondent's exhibits are to R. Ex. #. For clarity of the record, there are intentional gaps in the sequence of Respondent's exhibits. (Tr. 583:17–22 (statement of Respondent's counsel)).

they will receive feedback,” which confusion “impedes the proper and efficient functioning of the Local and detracts the staff” from serving the needs of the membership, among other reasons. (R. Ex. 1 at SEIUNV0662). As a consequence of the trusteeship, all of Local 1107’s officers, Executive Board members, trustees, and representatives were immediately removed from office and the Local’s Constitution and Bylaws was suspended. (*Id.* at SEIUNV0663).

By operation of the trusteeship, all management functions that were previously vested in other offices at the Local Union were immediately vested in a Trustee and Deputy Trustee, Luisa Blue and Martin Manteca, respectively. (*Id.*). They were appointed by SEIU International President Mary Kay Henry on April 28, 2017. (*Id.*; Tr. 74:20–21 (Manteca) (discussing his appointment date); 519:3–5 (Blue) (discussing her appointment date)). Manteca was placed in charge of the day-to-day affairs of Local 1107, overseen by and in consultation with Luisa Blue, the trustee. (Tr. 78:1–6; 524:11–21). The purpose of a trusteeship is to correct issues and to restore the local union to local control. (Tr. 170:1–5 (Godfrey); 514:10–517:5 (Blue testifying about the nature of trusteeships and reasons they are imposed; 521:9–522:22 (same with respect to Local 1107 in particular)).

Upon taking office, their immediate tasks were to take custody of the Local Union, secure facilities, bank accounts, and files and address collective bargaining obligations and pending grievances; staffing concerns were a low priority. (Tr. 79:9–24 (Manteca testifying about his goals and tasks as deputy trustee); 525:7–528:6 (discussing what she found at Local 1107 and her immediate concerns upon taking control of Local 1107); 528:19–6 (Blue testifying that immediately after the trusteeship was imposed their attention was not on rank and file staff).

#### **B. Background on Javier Cabrera’s Employment with Local 1107**

Javier Cabrera was employed as an organizer with Local 1107 since at least 2005.<sup>2</sup> (Tr. 341:25–342:1; 342:15–18). Including experience prior to working for Local 1107, Cabrera had

---

<sup>2</sup> Cabrera initially testified that he was with Local 1107 since June 2012, but that is contradicted mere moments later in his testimony when he said he was a member of the Staff Union since 2005. (*Compare* Tr. 341:25–342:1 *with* 342:15–18).

been an organizer for several unions for 27 years. (Tr. 342:15–18). Cabrera was a member of the Nevada Service Employees Union Staff Union (Staff Union), a union that represents a bargaining unit comprising solely the staff of Local 1107 and had been since 2005. (Tr. 344:5–8). He was president of the Staff Union since 2008. (Tr. 344:15–17).

Organizers are responsible for organizing new members and current members. (Tr. 150:8–151:10 (Manteca testifying about functions and duties of organizers)).

At times relevant to this matter, Davere Godfrey was in charge of field operations as the field coordinator. (Tr. 170:20–25). Barry Roberts and Helen Sanders, who functioned as immediate supervisors to Javier Cabrera, reported to Davere Godfrey, who in turn reported to Martin Manteca. (Tr. 86:1–5 (Manteca testify to management structure); 171:1–13 (Godfrey corroborating management structure)). For a short period of time only a few weeks before Cabrera’s termination, Grace Vergara-Mactal was being transitioned into the field director role, and she also had supervisory authority over Cabrera. (Tr. 284:1–285:9). She was not at Local 1107 between the imposition of the trusteeship and then. (Tr. 283:22–24).

### **C. Cabrera’s Misconduct Giving Rise to Investigation and Discipline**

Three discrete events or circumstances gave rise to Local 1107’s determination that it needed to investigate Cabrera and to consider whether discipline should issue: (1) Cabrera’s alleged falsification or incomplete submission of Together We Rise cards, (2) the falsification of debrief sheets regarding his daily work, and (3) his no-call, no-show from work on October 17, 2017. (Tr. 100:10–13 (Manteca testifying as to the initial reasons for an investigatory meeting into Cabrera’s alleged misconduct)). When initial cause to investigate further was found, Manteca directed Davere Godfrey to conduct an investigatory meeting with Cabrera. (Tr. 114:13–25). Counsel for Local 1107 accompanied Godfrey to this meeting, in particular because the Staff Union was being represented by an attorney who had already sued Local 1107 in other cases. (Tr. 102:22–103:4 (“[T]he Staff Union decided to retain Michael Mcavoyamaya, . . . and [he] had filed several lawsuits against the Local. So I was concerned with future litigations. That’s why I thought it was in the best interest of the Local to have a lawyer present.”); 144:2–

145:15 (Manteca testifying about his concerns about existing and future litigation and his desire to ensure he was receiving timely legal advice)).

Ultimately, Local 1107 substantiated the above misconduct and fired Cabrera for these reasons, for poor performance generally, and for additional dishonesty that became apparent during the investigatory process. (GC Ex. 4; R. Ex. 23 (complete termination letter memorializing reasons for termination); Tr. 147:21–148:1 (Manteca testifying that misconduct was substantiated); 148:18–19 (Manteca) (“In my experience, when someone falsifies documentation, that’s dishonesty.”); 252:22–23 (Godfrey testifying Cabrera “was dishonest about the debrief sheets that he had submitted”). Martin Manteca, the deputy trustee, exercised the decision to terminate Cabrera in consultation with Luisa Blue, the trustee. (Tr. 98:15–20 (Manteca); 536:5–10, 537:3–25 (Blue)).

1. *The Together We Rise Campaign and Cards and Debrief Sheets*

Cabrera was assigned, along with other Local 1107 organizers, to gather cards for the Together We Rise (TWR) campaign undertaken by the Service Employees International Union and its affiliates and local unions. (Tr. 118:8–119:1 (Manteca testifying about the campaign)). Local 1107 participated in the campaign. (*Id.*). Additional information and some training materials about the campaign were admitted as General Counsel Exhibit 6.

As part of the campaign, organizers were instructed to gather consent cards from members of bargaining units represented by Local 1107. The form of the card is contained within General Counsel’s Exhibit 20. The cards would constitute member action to sign up for the campaign. From a legal perspective, the card also constituted a member’s consent for the Union to send automated text messages, emails, and other mass communications to the member regarding the campaign. (GC Ex. 20 (noting legal consent language at the bottom of the card, near the person’s signature); Tr. 122:9–16 (Manteca testifying as to the legal significance of the cards)). Because of the legal significance of these cards and the scope of the campaign, Local 1107 employees were given extensive training on the expectations for the TWR cards during the campaign. (Tr. 184:1–186:8 (Godfrey testifying about trainings); 544:25–545:12 (Blue

discussing training of the staff)). Cabrera was present for at least one training session, (Tr. 224:5–11), and he otherwise admits he was trained on the campaign, (Tr. 376:7–8).

Because the cards have legal significance, Local 1107 employees were instructed that the cards must be filled out and signed by the members themselves. (Tr. 124:10–13, 125:7–8). Employees were further instructed that filling out the cards themselves and writing that a member’s signature was “on file” was not acceptable. (Tr. 124:10–13 (Manteca) (“I directed that you are never to fill out cards for members. You hand the card to the member, and the member or potential member fills them out because we get legal challenges all the time on those cards.”); 215:7–16 (Godfrey corroborating testimony); 223:5–20 (same)). This instruction was given repeatedly, (Tr. 125:7–8; 223:21–224:4; 324:8–19), at least once in response to a question posed by Javier Cabrera, (Tr. 215:7–216:3).<sup>3</sup> Getting members or potential members to sign membership cards or TWR cards “is a basic function of being an organizer, the most basic function we have,” as Manteca testified. (Tr. 151:9–10). Given it was a basic function, Manteca expected a long-tenured organizer such as Cabrera “to be competent, extremely competent . . . to sign up members,” (Tr. 151:14–17), but Cabrera did not meet those basic expectations, (Tr. 151:18–22). Grace Vergara-Mactal reflected those expectations. (Tr. 330:14–16), as did Luisa Blue, (Tr. 540:16–543:1 (Blue testifying about her expectations for organizers like Cabrera)).

Employees were also instructed to fill out debrief sheets, creating a record Local 1107 used to track each organizer’s progress and whether organizers were meeting expectations in making contacts with bargaining unit members and getting cards signed, and whether Local 1107 as a whole was meeting the expectations of the national campaign. (Tr. 538:8–540:11 (Blue testifying about the functions of the debrief sheets). The debrief sheets essentially functioned as a record of an organizer’s daily work. (Tr. 539:15–21).

---

<sup>3</sup> Cabrera, for his part, denies these instructions ever happened. (Tr. 376:9–378:21). This dispute may be immaterial, however, because Cabrera eventually testified on cross-examination that he understood the expectations about how the cards should have been filled out. (Tr. 443:20–448:11).

While the campaign was underway, Local 1107 staff overseeing organizers in campaign tasks took note of several suspicious cards that were being submitted that were not signed and appeared to be filled out in the same handwriting. (Tr. 304:1–19). Grace Vergara-Mactal, who only recently came to work for Local 1107 during the trusteeship and transitioning to be field director, brought these concerns to Manteca. (Tr. 100:10–101:5; 305:8–9, 15–20 (testifying about when Vergara-Mactal first learned of TWR cards and debrief sheets issue regarding Cabrera and reported it to Manteca); Tr. 284:1–13 (Vergara-Mactal testifying about her role at Local 1107 during the trusteeship)). The cards were attributed to Cabrera. (Tr. 304:1–19; 307:4–17). The suspect cards are contained in GC Exhibit 20. In total, 27 TWR cards were submitted without proper signatures, contrary to the explicit and repeated instructions Cabrera received during training. (R. Ex. 23).

While Local 1107 was reviewing the cards Cabrera submitted, it also reviewed the debrief sheets he submitted. One debrief sheet submitted for October 18, 2017, indicated that Cabrera made 12 contacts at Clark County bargaining units, 4 at the Department of Family Services and 8 at the Department of Social Services. (GC Ex. 18). However, there were no matching cards for those contacts. (R. Ex. 23). Further investigation into those cards, through contact with members at issue, revealed that none who were contacted by Local 1107, during its investigation, had any interaction with Cabrera, contrary to what Cabrera had reported. (Tr. 204:1–4; 236:24–25). Cabrera later revealed during the investigatory interview that he forgot to bring TWR cards with him on that day and he had members provide their names, email addresses, and cell phone numbers on a sign-in sheet he created. (R. Ex. 23; GC Ex. 17 (sign-in sheet created by Cabrera)). Cabrera said he planned to get their signatures on cards at a later event. (R. Ex. 23). During the investigatory meeting, Cabrera further indicated that he thought the sign-in sheet sufficed as proper authorization, despite the explicit directives that members were to fill out the cards and members' original signatures were required on the TWR cards. (R. Ex. 23).

Of note, the TWR cards are functionally no different from union membership cards in general; both contain member contact information, workplace, job title, and require the member's signature, and both carry legal significance, though for different reasons. (Tr. 149:12–15 (Manteca testifying about the similarities between membership cards and TWR cards)).

Another debrief sheet submitted for October 24, 2017, indicated 9 contacts for that day, 2 for Regional Transportation Commission employees and 7 for Social Services employees. (GC Ex. 19). The seven Social Services employees listed were the same that were listed on the October 18 debrief sheet. Local 1107's pre-termination investigation revealed that Cabrera reported to Grace Vergara-Mactal on the day he turned in the October 24 debrief sheet that he made nine contacts. (Tr. 306:8–19 (Vergara-Mactal testifying about personally debriefing Cabrera)). Unbeknownst to Vergara-Mactal at the time, however, was the fact that Cabrera had already received credit for seven of those contacts, thus falsifying the true number of contacts he made on October 24. (Tr. 316:6–25 (Vergara-Mactal testifying about her findings on the cards)). Seven unsigned TWR cards for the same seven employees were also turned in on October 24.

## 2. *The October 17, 2017 No-Call, No-Show*

On October 16, 2017, Cabrera was out of the office on approved sick leave for a toothache. (Tr. 303:10–12). Late at night, at 11:13 p.m., Cabrera emailed his supervisors, Davere Godfrey and Grace Vergara-Mactal, that he had a dental procedure scheduled for 9 a.m. the next day. (GC Ex. 9 & 25; 194:12–195:21; 301:24–302:12). In his email, Cabrera indicated that he would need to be out of the office for approximately 90 minutes for a dental procedure. He also stated that he might not be able to attend a scheduled stop at the Department of Family Services' North facility and requested cover for that meeting. (GC Ex. 9 & 25). The visit at DFS was scheduled for 11 a.m. to 1 p.m. on October 17. (R. Ex. 23). The purpose for the visit was to distribute copies of collective bargaining agreements, member IDs, COPE Cards (political contribution forms), membership cards, and TWR cards. (R. Ex. 23). Cabrera was also scheduled to conduct a similar visit at the Public Defender's Office that same day from 1:30 to 2:30 p.m. (R. Ex. 23). Finally, Cabrera was scheduled for phone bank duties at the union hall from 3 to 5

p.m. that day. (R. Ex. 23). Cabrera's testimony and three-week plan generally corroborates this. (Tr. 381:23–383:2; GC Ex. 15). The 11:13 p.m. October 16 email made no mention of needing coverage for the Public Defender's Office visit. (GC Ex. 9 & 25; Tr. 321:2–9). He never communicated to his supervisors that he would need to be out the entire day. (Tr. 322:2–19).

Vergara-Mactal responded to the email the same night, indicating that she would see Cabrera tomorrow, i.e. on October 17. (GC Ex. 9 & 25; Tr. 321:2–9). Aside from the limited time he was permitted to be absent for his dental appointment, Cabrera was a no-show for the rest of the day on October 17. (Tr. 225:7–228:1 (Godfrey testifying about the circumstances surrounding Cabrera's absence from work on October 17)). Not only that, but Davere Godfrey discovered that one of the events Cabrera was responsible for on October 17 had not been timely and properly set up. (Tr. 212:3–213:1; 228:2–230:25 (Godfrey testifying about improperly set up event and management's expectations as to timeliness); GC Ex. 16 (email from Cabrera asking for space at 11:02 p.m. the night before the event); Tr. 448:8–21; 449:18–450:22 (Cabrera testifying that he understood the expectation was to set up events well in advance but that he disregarded the instruction)).

When asked about this no-call, no-show during the investigatory meeting, Cabrera indicated it was his belief that Vergara-Mactal's response email released him from work for October 17. (R. Ex. 23). When he was confronted with the fact that Vergara-Mactal specifically indicated in her response email that Helen Sanders, Local 1107 Lead Organizer, would be attending the Public Defender's Office visit with Cabrera, his explanation changed. (R. Ex. 23). He then claimed that the late hour of Vergara-Mactal's email caused him to misunderstand. (R. Ex. 23). Though, of note, this explanation was changed in Cabrera's hearing testimony, claiming that he didn't read the email until the next morning and for that reason believed that Vergara-Mactal's email was indicating consent for Cabrera to be off the entire day on October 17. (Tr. 384:21–23).

Cabrera also explained that he was on prescription medications for his dental problems, which he asserted affected his cognitive abilities that evening. (R. Ex. 23). Local 1107 requested

Cabrera provide the relevant prescriptions so it could verify he was on medication. (Tr. 235:9–236:16 (Godfrey); GC Ex. 22 (Godfrey email requesting additional info and Cabrera’s response); Tr. 410:11–411:8 (Cabrera testifying about the request); GC Ex. 23 (the responsive documents)). Cabrera obliged, but the materials received indicated that Cabrera’s prescriptions were not prescribed and filled until October 17 or later. (GC Ex. 23; R. Ex. 23). In sum, Local 1107 concluded Cabrera’s explanations lacked credibility, and indeed Local 1107 he was caught in two material dishonest statements during the course of the investigatory interview. (R. Ex. 23).

### 3. *Prior Discipline Considered*

In deciding to terminate Cabrera, Local 1107 management considered prior discipline that had been issued by prior management personnel before the imposition of the trusteeship. Manteca had learned of an incident involving an unlawful recording that Cabrera had made of a management-side caucus meeting that took place during a meeting between Local 1107 and the Las Vegas Convention and Visitors Authority (LVCVA), an employer that is signatory to a collective bargaining agreement with Local 1107, in which Cabrera was involved. Apparently, Cabrera had left a recording device that was surreptitiously recording a management-side-only meeting. (*See* GC Ex. 3). Such a recording is unlawful in Nevada. (*Id.*; Tr. 141:15–24). The prior director of organizing, Peter Nguyen, had issued a verbal warning<sup>4</sup> to Cabrera for the incident, but that information was not documented or known to Manteca, (Tr. 88:23–94:8 (Manteca testifying about his involvement regarding the prior discipline and memorializing the discipline that had already been given); 354 6–11 (Cabrera confirming incident occurred prior to the trusteeship)), as Manteca first learned about it in a letter from LVCVA complaining about the incident, (Tr. 139:25–141:2, 141:15–24 (Manteca testifying as to events surrounding his becoming aware of Cabrera’s unlawful recording of a management meeting and the grave concerns expressed by the LVCVA to Local 1107); R. Ex. 62 (the LVCVA letter to Manteca)).

---

<sup>4</sup> Cabrera asserts that the verbal warning given to him was an *informal* verbal warning, (Tr. 353:10–12), but there is no such category of discipline recognized in the Staff Union CBA, (GC Ex. 5 at p. 10) (noting “verbal warning”). Cabrera admitted as much on cross-examination. (Tr. 434:6–8).

When Manteca later learned of the prior discipline, after receiving Cabrera's explanation of the prior discipline that occurred before the trusteeship, Manteca directed there be made a record of it. (Tr. 88:23–94:8; GC Ex. 3). Davere Godfrey corroborates Manteca's account. (*See* Tr. 186:9–191:9). Of particular note, Cabrera admits this misconduct, but claims it was merely a mistake (Tr. 352:12–13; GC Ex. 3). He testified he believed the letter given to him about the incident amounted to being disciplined twice for the same even, though he never filed a grievance over it, despite having a grievance process available to him. (Tr. 367:9–368:13; 437:8–17).

At Local 1107, no other employees were disciplined for misconduct because no other employees engaged in any misconduct that was similar to or as severe as the misconduct Cabrera engaged in. (Tr. 46:1–47:5 (Roberts) (no other discipline on TWR campaign or debrief sheets); 95:20–96:12 (Manteca testifying about an incident involving LaNita Troyano involving a membership card, but noting the investigation was inconclusive and no discipline resulted); 174:17–176:19 (Godfrey testifying about the same incident and noting the investigation uncovered no wrongful conduct on Troyano's part); 222:2–223:4 (same); GC Ex. 8 (document memorializing Troyano investigative meeting)).

Two other alleged targets of discriminatory animus, Susan Smith and LaNita Troyano, were both still on staff and apparently not disciplined by the trustees. (Tr. 57:12–58:3 (Roberts) (discussing no discipline being issued to Smith and Troyano); 265:5–18 (Smith testifying as to her disciplinary history during trusteeship, but noting a writing warning was expunged); 265:19–25 (Smith discussing her disciplinary history prior to the trusteeship); 269–24–272:12, 272:22–275:21 (same)). Indeed, Manteca's uncontroverted testimony was that no other non-supervisory personnel were terminated during Manteca's tenure as deputy trustee. (Tr. 110:4–9).

#### **D. Reasons Local 1107 Terminated Cabrera from Employment**

After conducting an investigation, Davere Godfrey walked Martin Manteca through his findings. (Tr. 133:19–25 (Manteca); Tr. 235:3–25 (Godfrey)). Ultimately, Local 1107 concluded that the allegations Cabrera falsified or improperly completed TWR cards and falsified his debrief sheets were substantiated, constituting dishonest and insubordinate conduct. (GC Ex. 4;

R. Ex. 23). Local 1107 further concluded that Cabrera had no credible explanation for his no-call, no-show on October 17, reflecting poor performance. (R. Ex. 23). Further, as became known only during the course of the investigatory interview, Local 1107 concluded that Cabrera furthered a pattern of dishonest conduct by lying during the course of the investigation, in several demonstrable and material respects. (Tr. 236:8–16 (Godfrey discussing Cabrera’s false answers given during investigatory meeting); Tr. 259:22–261:2 (same)). Manteca placed great emphasis on the dishonesty aspects in his testimony. (Tr. 134:9–14 (“[I]t was very well recorded that he was dishonest about [several] issues.”)). So did Godfrey, who personally interacted with Cabrera during the investigatory meeting. (Tr. 237:14–21 (“He was dishonest during the investigatory [meeting].”)). Although she did not make a recommendation to Manteca regarding Cabrera’s ultimate discipline, (Tr. 320:17–321:1), Vergara-Mactal did agree with the decision, (Tr. 334:19–335:9 (Vergara-Mactal discussing reasons why she agreed with the termination, noting Cabrera’s dishonesty and lack of trustworthiness)). Further, Luisa Blue also concluded Cabrera was not a truthful employee. (Tr. 543:4–544:5 (Blue testifying about Cabrera’s dishonesty and why that is a concern to an employer); 549:11–20 (discussing the severity of dishonest conduct by employees warrants termination)).

Blue in particular testified that in her review of the materials before her on Cabrera’s termination, she found the reasons offered by her subordinates for termination to be consistent, well documented, and substantiated. (Tr. 547:24–548:7). Further, she explicitly denied having any knowledge of or indication that Cabrera’s status as Staff Union president or his engaging in protected union activity played any part in his termination. (Tr. 550:21–551:2; 551:23–552:1 (Blue testifying she saw no other reason for the termination other than the substantiated misconduct)). Critically, Blue testified that she would have made the decision to fire Cabrera even if union animus was a factor motivating the termination. (Tr. 552:2–14). And finally, Blue testified that she never instructed Martin Manteca to fabricate reasons to fire Cabrera and that she has no reason to believe the reasons Cabrera was fired were fabricated, nor would she tolerate such behavior. (Tr. 552:18–553:2).

Cabrera never denied any of the misconduct during the investigatory meeting. (Tr. 240:6–9; 553:3–8). Local 1107 noted the duties and responsibilities of professional organizers involve great flexibility, require exercise of independent judgment, and require field work with little to no direct supervision. (R. Ex. 23). As such, an organizer’s conduct, good or bad, reflects on Local 1107 and affects its reputation and credibility with the community, members, and employers. (R. Ex. 23). Given the findings of its investigation, Local 1107 reasonably concluded that misconduct had occurred and, based upon its findings, it had lost the trust and confidence it placed in Cabrera. As such, Local 1107 terminated Cabrera from employment. (R. Ex. 23).

**E. Charging Party Javier Cabrera does not deny his misconduct.**

During his live testimony, Cabrera never denied any of the misconduct found against him. In a some cases, he expressly admitted the misconduct. (Tr. 420:3–4 (“Actually, there is nothing there because I did fail to do that.”); 448:6–11 (“Q. You understood that it was unacceptable to submit cards that weren’t signed by members, correct? A. Yes. Q. But you submitted cards that were not signed by members anyway, correct? A. Yes.”); 458:25–460:11 (Cabrera testifying that he understood the obligation to truthfully and accurately report his work on debrief sheets, but he failed to, resulting in false statements); 460:12–461:7 (admitting false statement to Grace Vergara-Mactal in personal, oral debrief on October 24). Even on redirect examination, Cabrera confirmed that he never denied misconduct regarding the debrief sheets. (Tr. 475:10–24).

**F. The alleged union animus.**

Barry Roberts, a former employee of SEIU who was assigned to Local 1107 during a portion of the trusteeship, testified that Martin Manteca, the deputy trustee who had day-to-day control over Local 1107’s affairs during the trusteeship, instructed Roberts and two other supervisors “to figure out a way to get rid of Javier because he was the Local—he was the staff president, LaNita Troyano because she was the leader of the pack, . . . Debbie Miller because she was close to—she used to work with Cherie Mancini who was the former president of the Local, and Gloria Madrid because he didn’t trust her.” (Tr. 41:13–19). There is no evidence in the record

that any of the other three were ever disciplined or targeted for discipline because of their union activities or for any other unlawful reason.

Javier Cabrera asserted that on May 8, 2017, he overheard a statement by Martin Manteca to others, none of whom Cabrera could identify, “stating to whoever was there that I need to get rid of Javier Cabrera because he is the Staff Union president and he’s going to be an obstacle for what I—what I want to do here. I also want to get rid of LaNita Troyano because she is very close to Cherie Mancini and she is well liked in the Sunrise Hospitals.” (Tr. 355:15–358:7; 358:1–7). Cabrera testified he was alone when he overheard this supposed exchange, and he couldn’t see who was present with Manteca or who he was speaking to. (Tr. 358:9; 437:25–438:8). Cabrera stated that he believed he was being targeted, but he didn’t explain he believed he was being targeted because of protected activity. (Tr. 362:1–3). Cabrera asserted that Roberts corroborated the alleged statement by Manteca two days later. (Tr. 362:6–363:9). Cabrera was certain about the May 8 date, claiming he took notes of the interaction, but he couldn’t find them. (Tr. 363:18–364:1). Finally, Cabrera testified as to overhearing a remark before his disciplinary meeting that he attributed to be a remark about himself—that “we got him this time”—though he didn’t know for sure who she was speaking about or to whom. (Tr. 424:18–425:8).

Martin Manteca flatly denies ever having directed any person to “find a reason to fire Mr. Cabrera.” (Tr. 87:20–88:15 (Manteca testifying on General Counsel questioning that he never instructed supervisors to find reasons to fire or discipline Javier Cabrera or anyone else for that matter, to actively search for violations of rules, or to focus their efforts on certain personnel); 310:20–21 (Vergara-Mactal denying looking for a reason to fire Cabrera); 496:7–10 (Godfrey denying being instructed to find an excuse to terminate Javier Cabrera); 496:17–25 (Godfrey denying ever been given an instruction to fabricate reasons to fire Cabrera).

### **III. LAW AND ARGUMENT**

The General Counsel bears the burden of establishing each element of its contentions that the Respondent violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). That “burden never shifts, and . . . the discrediting of any of Respondent’s evidence does not,

without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case." *Id.*; see also *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing."). As set forth below, the General Counsel did not meet his burden in this case. Alternatively, if the General Counsel has made out a prima facie case, Respondent contends that it has successfully rebutted the prima facie case by demonstrating that it would have made the same decision in the absence of any protected activity or status.

#### **A. Witness Credibility**

Credibility determinations rely on a variety of factors, including the consistency of the witness's testimony, demeanor, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Aliante Station Casino & Hotel*, 358 NLRB 1556, 1572 (2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Here, the Administrative Law Judge (ALJ) should pass on the credibility of two crucial witnesses for the General Counsel's case: Barry Roberts and the Charging Party himself, Javier Cabrera. For the reasons explained below, the ALJ should reject the testimony of these witnesses, especially as concerns the alleged animus.

##### *1. Barry Roberts's testimony is not credible.*

The General Counsel's proof of union animus hinges on the testimony of two witnesses, the Charging Party and Barry Roberts, an employee who was assigned to Local 1107 in the immediate aftermath of the trusteeship over Local 1107. The ALJ should reject Roberts's testimony for two reasons. First, Roberts has an admitted bias against trusteeships imposed by parent unions over their local unions—the exact circumstance facing Local 1107 here. Second, his testimony on union animus is too nebulous to be credited and doesn't make sense given the timing and context of the alleged statement.

With respect to bias, Roberts testified on cross-examination that he does not like trusteeships. (Tr. 66:14–18). This is important because Local 1107 was under a trusteeship. As

such, Roberts has a motive to undermine trusteeships and decisions made by trustees. Now that he is no longer within the employ of SEIU, he also can exaggerate testimony consequence free.

With respect to the alleged statements demonstrating an unlawful bias held by Martin Manteca, the Deputy Trustee who was appointed to manage the day-to-day affairs of Local 1107 under trusteeship, the statements are not credible. First and foremost, Roberts testified that Manteca harbored animus right from the beginning of the trusteeship. (Tr. 41:8–19; 51:5–13, 53:3–9, 53:22–54:4 (discussing when trusteeship was imposed in relation to the alleged statement evidencing animus)). This itself makes no sense because, having never worked with anyone at Local 1107 before, Manteca would not have had any knowledge of Local 1107’s staff immediately upon the imposition of the trusteeship. (*See* Tr. 79:3–4 (Manteca testifying “I had never met any of the employees [of Local 1107] prior to April 28th.”); 79:5–8 (Manteca testifying he had no one in mind to remove from office or employment when he took office as deputy trustee)). Further, Manteca testified that he had no knowledge of employees’ prior disciplinary history with Local 1107, as would be expected having no knowledge of or experience with Local 1107’s employees before he became deputy trustee. (Tr. 115:14–21 (Manteca testifying he had no knowledge of prior discipline before his arrival as deputy trustee)). Roberts does not (nor does any other witness for that matter) fill in that chasm with any information or explanation. Rather, the General Counsel calls on the ALJ to infer without any evidence whatsoever that Manteca had marching orders to terminate from employment certain staff that he had never met or worked with. The invitation to accept this inference is a bridge too far given the totality of the evidence.

But there is an additional timing issue that undermines Roberts’s version of events. Roberts testified that Martin Manteca’s direction allegedly came in the initial week of the trusteeship, but Manteca testified that he couldn’t remember Barry Roberts being present at Local 1107 until a month or two later. (*See* Tr. 81:17–82:12 (Manteca testifying about when Helen Sanders and Barry Roberts appeared at Local 1107)). Further, Cabrera’s account of when the alleged Manteca statement happened is not consistent with Roberts’s account. (*See* Tr.

363:18–24 (Cabrera); 41:8–19; 51:5–13, 53:3–9, 53:22–54:4 (Roberts)). Nor are the two accounts, Roberts’s and Cabrera’s the same.

Relatedly, the General Counsel attempts to ascribe to Manteca and Blue any prior disciplinary animus that former Local 1107 management may have harbored before the trusteeship. But this theory, too, is unavailing because there is no evidence in the record that demonstrates Manteca or Blue would have had any knowledge of or information about prior disciplinary history at Local 1107 in their minds when deciding how to take control of Local 1107’s affairs and to correct the underlying issues that led to the imposition of the trusteeship in the first place. Instead, the General Counsel would have the ALJ charge the trustees with institutional memory that they never possessed. Because the General Counsel did not offer evidence showing the trustees did have in their minds prior discipline, the ALJ should not charge them with the sins of their predecessors, whatever those sins may have been. For that reason, the ALJ should decline any inference that Blue or Manteca were motivated by any misconduct that occurred prior to the trusteeship absent express evidence to the contrary.

Indeed, to the contrary to the theory of animus, Roberts testified that Manteca ensured supervisory personnel familiarized themselves with the Staff Union collective bargaining agreement. (Tr. 71:3–14 (explaining Roberts understood Manteca wanted supervisors to be familiar with the CBA)). This is indicative of an intent to uphold union obligations, not to undermine them.

Second, Roberts gives reason to indicate that he misunderstood the nature of any supposed instruction from Manteca with respect to Cabrera, explaining that “normally under a trusteeship, they normally wipe out the entire staff” so as to “operate the union in [the trustee’s] style,” (Tr. 44:15–19), that the trustees normally “take out the head honchos first thing first, and then they normally interview each of the staff and figure out who they want to keep, who they don’t,” (Tr. 68:8–11). Roberts understood that during a trusteeship, it is natural for senior level management to have in place employees the manager can trust to be faithful and loyal to the manager’s way of doing business. (Tr. 56:24–57:3). Coupled with the timing issue noted above,

in light of this understanding of trusteeships, it is inherently contradictory that Manteca would've already been in a position—on virtually day one of the trusteeship—to target Cabrera for termination. As Manteca testified, corroborated by Luisa Blue, the Trustee over Local 1107, dealing with staff concerns was a rather low priority. (Tr. 79:9–24 (Manteca testifying about his goals and tasks as deputy trustee); 525:7–528:6 (discussing what she found at Local 1107 and her immediate concerns upon taking control of Local 1107); 528:19–6 (Blue testifying that immediately after the trusteeship was imposed their attention was not on rank and file staff)). Further, it would naturally take time to evaluate staff, so it simply is not credible that Manteca would be gunning to fire three low-level staffers—Cabrera, Troyano, and Smith—from day one, much less motivated because of any alleged union animus.

Third, Roberts was no longer assigned to and working at Local 1107 by the time the events giving rise to Cabrera's termination occurred. (Tr. 49:17–23 (Roberts) (explaining he left Local 1107 shortly after the Mandalay Bay shooting on October 1, 2017)). Thus, he had no involvement with the events leading up to Cabrera's termination and cannot testify about whether any alleged unlawful animus in fact played a role in Cabrera's termination. (Tr. 51:1–3).

Fourth, if the alleged unlawful instructions to find a reason to fire Manteca were in fact true and alarming to Roberts, he could have reported his concerns to superiors above Manteca, but he chose not to. (Tr. 59:22–60:17, 60:24–61:13 (noting he never complained to anyone about Manteca's alleged unlawful instructions to fire Cabrera for union activity)).

2. *Javier Cabrera's self-serving testimony regarding union animus should be rejected.*

Once Barry Roberts's testimony regarding union animus is discounted, the only testimony remaining that demonstrates any alleged union animus harbored by Local 1107 management is the testimony of Javier Cabrera, the Charging Party. In addition to suffering from the same nebulous quality, Cabrera's testimony on animus should be rejected because it is entirely self-serving. Additionally, it does not make sense that Cabrera did not share this

information with anyone other than Barry Roberts, especially if he was really concerned about being a target for an unlawful reason. (*See* Tr. 468:10–469:9).<sup>5</sup>

Cabrera is skilled in coming up with every excuse in the book to avoid accepting his own substantial misconduct. Local 1107 found as much when it reasonably determined that Cabrera lied to Local 1107 during the investigatory process leading up to his termination. Further, Cabrera admittedly lied on his debrief sheets about the work he was performing, directly lied to his then-supervisor Grace Vergara-Mactal about the work he performed on the same day it was allegedly done, and lied about being under the influence of prescription medication as an excuse for misreading a simple email permitting him to be off from work for a morning but not the whole day.

Finally, Cabrera’s testimony revealed that he gave potentially untruthful testimony in his Board affidavit. He testified in his affidavit that his only prior discipline by Local 1107 was regarding the LVCVA recording incident, but Cabrera testified at the hearing that was in fact not true. (Tr. 472:4–19).

In sum, Cabrera and the General Counsel would have the ALJ believe that Cabrera is “transparently dishonest”—one who lies until he gets caught, then manufactures the next lie. Because Cabrera is demonstrably dishonest, the ALJ should reject the self-serving testimony from Cabrera regarding animus and not credit his excuses trying to justify his misconduct.

3. *The General Counsel offered no other corroborating evidence of the supposed animus Martin Manteca harbored against Cabrera or the Staff Union.*

Aside from these two witnesses, one of whom is admittedly biased against trusteeships, and the other who has a motivation to create excuses to overturn his termination, the General Counsel introduced no other affirmative evidence establishing union animus. Taking at face value Roberts’s testimony that he was instructed in a group setting with other Local 1107

---

<sup>5</sup> Cabrera thought he may have discussed the matter with Smith, but she did not offer any corroborating testimony on this point under the General Counsel’s questioning. The natural inference is that he did not share the information with her.

management personnel to find reasons to fire Cabrera and because of his status as the Staff Union's president and to target those who may have been loyal to the removed president, Cherie Mancini, it is telling that no other supervisor who was present for such meetings—e.g., Davere Godfrey or Helen Sanders (Tr. 40:10–11)—offered any evidence that in any way corroborated Roberts's and Cabrera's testimony on the union animus allegedly harbored by Martin Manteca or other management personnel involved in Cabrera's termination. (Tr. 496:7–498:19 (Godfrey denying being given any instructions regarding Cabrera or Cherie Mancini); 499:21–25 (Godfrey denying hearing any concerns expressed by Manteca regarding the Staff Union)). Nor did Grace Vergara-Mactal corroborate the supposed instruction to be looking for reasons to fire Cabrera. (Tr. 310:20–21).

The Board has noted that the General Counsel's failure to corroborate isolated witness testimony is sufficient, on its own, to find that the General Counsel did not meet his burden of proof. *See, e.g., Precoat Metals*, 341 NLRB 1137, 1150 (2004) (“absence of corroboration is a factor, in some instances a most persuasive one, for determining whether testimony should or should not be credited.”) (citing *SCA Services of Georgia*, 275 NLRB 830, 832–33 (1985)); *see also W Irving Die Casting of Ky.*, 346 NLRB 349, 352 (2006) (citing *C&S Distributors*, 321 NLRB 404, 404 n.2 (1996)) (holding that the General Counsel's failure to call available percipient witnesses weighed against a finding that the General Counsel had met his burden). Davere Godfrey and Grace Vergara-Mactal were both placed under subpoena by the General Counsel, but Helen Sanders was not.

Here, the rational conclusion to be drawn from this lack of corroboration is simple: the supposed unlawful instructions to target Cabrera because he was the Staff Union president simply never happened—it was made up by Cabrera and Roberts after Cabrera's termination as an excuse to try to block Cabrera's termination and to disrupt the trusteeship. For these reasons, the ALJ should decline to credit the testimony of Barry Roberts and Javier Cabrera with respect to union animus against the Staff Union.

4. *Javier Cabrera's explanations to try to justify the misconduct continued to shift, even during the hearing.*

Contrary to the contemporaneous documentary evidence and other testimony, Cabrera asserted for the first time during the hearing in this matter that he never asserted to Local 1107 management that he was under the influence of prescription medication on October 16, 2017, as an excuse for misreading Vergara-Mactal's email. (Tr. 420:24–421:11; 462:5–16). This assertion is belied by the contemporaneous evidence gathered or created during Local 1107's pre-termination investigatory process. Local 1107 management would have had no reason to ask Cabrera to produce records of prescription medications unless Cabrera had asserted that he was under the influence of prescription medication during the investigatory meeting. (*See* R. Ex. 23; Tr. 235:9–236:16 (Godfrey)). This is further evidence that Cabrera's testimony must be considered with extreme skepticism, especially concerning his explanations for his misconduct.

But Cabrera also offers shifting explanations about his debilitating his toothache was, apparently in an attempt to excuse his admitted misconduct. Local 1107 does not doubt toothaches can be quite painful. But Cabrera would have the ALJ believe that he had the presence of mind and clarity of thought to send an email at 11:02 p.m. the night before an event was to take place to secure a space for the event, (GC Ex. 16), only minutes later at 11:13 p.m. to call off work the next morning for his dental appointment, (GC Ex. 9 & 25), and then drive himself to the dentist in the morning (Tr. 421:23–24), all the while neglecting to notice the timestamp of when Vergara-Mactal's responsive email was sent—a task a regular user of email would be competent in performing, as email timestamps are at the top of every email, along with sender and recipient information. (*See* Tr. 454:12–24 (Cabrera discussing his familiarity with email)). Cabrera's excuses here once again strain credulity, are self-serving, and should be disregarded.

**B. Local 1107 Did Not Violate Section 8(a)(3) of the Act.**

1. *Analytical Framework*

Section 8(a)(3) provides it is an unlawful labor practice for an employer

to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

*Radio Officers (A.H. Bull Steamship Co.) v. NLRB*, 347 U.S. 17, 42–43 (1954). Thus, in most cases, the employer’s reason for discriminating will determine whether it has committed an unfair labor practice. Only if the discrimination is motivated by an antiunion purpose and has the foreseeable effect of either encouraging or discouraging union membership is there a violation of Section 8(a)(3). *Retail Clerks Local 770 (Carl A. Palmer)*, 208 NLRB 356 (1974). Where the conduct at issue has a “comparatively slight” adverse effect on employee rights and the employer has come forward with evidence of legitimate and substantial business interests, antiunion motivation must be proved in order to sustain a Section 8(a)(3) violation. *NLRB v. Great Dane Trailers*, 386 U.S. 26 (1967). In cases where “it can reasonably be concluded that the employer’s discriminatory conduct was ‘inherently destructive’ of important employee rights,” the General Counsel need not specifically prove antiunion motivation, despite evidence of proper business motivation. *Id.* at 34. In *Great Dane*, during an economic strike the employer denied strikers vacation benefits, but paid vacation benefits to employees who were working during the strike, finding that such discriminatory conduct involving an entire class of workers, distinguished only by their union activity, was inherently destructive of important employee rights.

The Board has generally recognized two classes of inherently destructive conduct: (1) actions distinguishing among workers based on participation in a protected activity, *see, e.g., Contractor Servs.*, 324 NLRB 1254 (1997), and (2) actions that discourage collective bargaining by making it appear to be a futile exercise in the eyes of employees, *id.*; *see also Ancor Concepts*, 323 NLRB 742, *enforcement denied*, 166 F.3d 55 (2d Cir. 1999). Based on the evidence adduced by the General Counsel, he does not appear to be advancing either theory in this case. In any event, the Ninth Circuit has held that use of the *Great Dane* analysis is

“inappropriate” in reviewing an “isolated discharge of a single employee.” *W. Exterminator Co. v. NLRB*, 565 F.2d 1114, 1117 (9th Cir. 1977), enforcing in part 223 NLRB 1270 (1976).

Given there is no record evidence in this case other bargaining unit employees were terminated by Trustee Blue and Deputy Trustee Manteca, Respondent submits resort to a *Great Dane* theory is inapposite in this case. *Accord Asarco, Inc. v. NLRB*, 86 F.3d 1401 (5th Cir. 1996) (employee not insulated from discharge merely because he was first to be terminated for violating three policies simultaneously and because of his status as union president). A violation of the Act is not established simply because an employee is first to be disciplined under existing policy. *See Cent. Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1026 (5th Cir. 1981). The NLRA does not provide immunity to an employee because of his status as union president. *See Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (holding that union membership cannot protect flagrant insubordination where the employer’s discipline was not motivated by antiunion animus); and *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 711, 713 (5th Cir. 1975) (noting that the NLRA was not intended “to insulate every union activist from investigation and discipline for violation of company rules”). “To hold otherwise would give to the union president a license to disregard his employer’s rules and would leave the employer with no legal recourse to correct an inexcusable wrong.” *Asarco, Inc.*, 86 F.3d at 1410. Further, breaches of a collective bargaining agreement usually do not constitute inherently destructive conduct. *Lively Elec.*, 316 NLRB 471 (1995).

In cases where a union takes adverse action against its own employees for engaging in activities that are protected by Section 7, the Board applies a balancing test to determine whether the union-employer violated the Act. *Operating Eng’rs Local 370*, 341 NLRB 822, 824–25 (2004); *Serv. Emps. Local 1*, 344 NLRB 1104, 1105–07 (2005). This test is expressly derived from the balancing test applied to employers who, in other contexts, have interfered with Section 7 rights. *See Operating Eng’rs Local 370*, 341 NLRB at 824 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573–74 (1978) (striking balance between employees’ Section 7 right to distribute newsletter on employer’s property against employer’s property rights) and *Republic Aviation v.*

*NLRB*, 324 U.S. 793, 797–98 (1945) (striking balance between Section 7 right of employees to solicit or distribute at workplace against equally undisputed right of employers to maintain discipline in their establishments). Union management must have the power to have in their employ agents to carry out management’s policies. *See Finnegan v. Leu*, 456 U.S. 431 (1982).

Most claims of unlawful discrimination arise out of employer decisions concerning discipline, whom to hire and fire, and changes to terms and conditions of employment. Such conduct does not violate Section 8(a)(3) if the conduct is not motivated by a desire to penalize or reward employees for union activity or the lack of it. In cases of this type, except for cases of mixed motives, the employer’s motive is determinative. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wellington Mill Div. v. NLRB*, 330 F.2d 579 (4th Cir.), *cert. denied*, 379 U.S. 882, *denying enforcement to* 141 NLRB 819 (1963); *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). An employer has the right to take disciplinary action for good cause related to the maintenance of order and efficiency in its operations.

At its core, the Board must determine what motivated an employer’s decision to discipline. Under *Wright Line*, the initial focus is on the existence of protected activity, knowledge of that activity by the employer, and union animus. *Wright Line, Wright Line Div.*, 251 NLRB 1083 (1980), *enforced*, 662 F.3d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). “[I]n assessing whether a prima facie case has been presented . . . a judge must view the General Counsel’s evidence in isolation, apart from a respondent’s proffered defense.” *Bali Blinds Midwest*, 292 NLRB 243, 243 n.2 (1989); *see also Cine Enters.*, 301 NLRB 446 (1991), *enforced*, 978 F.2d 715 (9th Cir. 1992). *But see Holo-Krome*, 293 NLRB 594 (1989) (*Wright Line*’s “precise and formalized framework” does not prevent consideration of employer’s reasons as part of prima facie case). (In *Elec. Data System Corp.*, 305 NLRB 219 (1991), *enforced*, 985 F.2d 801 (5th Cir. 1993), the ALJ suggested that *Hillside Bus* and *Bali Blinds* had been overruled by *Golden Flake Snack Foods*, 297 NLRB 594 (1990).) The D.C. Circuit, for example, has suggested that the prima facie terminology be discarded because the General Counsel has the

obligation throughout the case to persuade the Board that the discriminatory conduct was based on union animus. *Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1340 n.8 (D.C. Cir. 1995); *see also Schaeff Inc. v. NLRB*, 113 F.3d 264, 266 (D.C. Cir. 1997). “While hostility to [a] union is a proper . . . factor for the Board to consider when assessing whether the employer’s motive was discriminatory . . . general hostility toward the union does not itself supply the element of unlawful motive.” *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990), cited in *Carleton Coll. v. NLRB*, 230 F.3d 1075 (8th Cir. 2000). “[T]he Act is violated only when an employer with anti-union animus discharges an employee he would not have fired ‘but for’ the employee’s union activity.” *Wright Line*, 662 F.2d at 906 n.12.

The employer may rebut allegations by showing that prohibited motivations played no part in its actions. *NKC of Am.*, 291 NLRB 683 (1988); *see also Laro Maint. Corp. v. NLRB*, 56 F.3d 224 (D.C. Cir. 1995); *MECO Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993); *Hyatt Hotels Corp.*, 296 NLRB 259 (1989); *Mistletoe Express Serv.*, 295 NLRB 273 (1989). Even where an employer cannot rebut a prima facie case, it may still show that the same personnel action would have taken place for legitimate reasons regardless of the employee’s protected activity. *See, e.g., Centre Prop. Mgmt. v. NLRB*, 807 F.2d 1264 (5th Cir. 1987); *Airborne Freight Corp. v. NLRB*, 728 F.2d 357 (6th Cir. 1984) (declining enforcement of Board order in case where there was no evidence of leniency toward other employees accused of dishonesty from which it could be inferred that terminated employee’s protected conduct was a motivating factor in his discharge, and rejecting the Board’s substitution of its subjective judgment for the employer’s business judgment that the employee’s offense warranted termination); *G&H Prods. v. NLRB*, 714 F.2d 1397 (7th Cir. 1983); *Am. Armored Car*, 339 NLRB 103 (2001); *Fresno Bee*, 337 NLRB 1161 (2002); *Montano Electric*, 335 NLRB 612 (2001); *Conye Textile*, 326 NLRB 1187 (1998).

Because it is the employer’s motivation that is at issue, the employer need not prove the employee actually engaged in conduct on which the discipline is based, but must show that it acted pursuant to a reasonably held good faith belief regarding the employee’s conduct. *GHR Energy Corp.*, 294 NLRB 1011 (1989); *Lucky Stores*, 269 NLRB 942 (1984). “An employer is

entitled to make and enforce his own rules, however foolish they may appear to the Board, as long as he does not base personnel decisions on union status.” *Wright Line*, 662 F.3d at 909 n.9 (citing *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 603 (1st Cir. 1979)). The ALJ may not “tak[e] on the company’s business judgment chair” and substitute his view of business judgment for that of the employer. *Cellco P’ship v. NLRB*, 892 F.3d 1256, 1262 (D.C. Cir. 2018) (citing *MECO Corp. v. NLRB*, 986 F.2d 1434, 1438 (D.C. Cir. 1993); *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435–36 (D.C. Cir. 2012)).

Finally, the Board is expressly prohibited by Section 10(c) of the Act from issuing orders of reinstatement or backpay where an employee has been “discharged for cause.” Among those grounds which courts have regarded as justification for denying reinstatement include employee dishonesty. *NLRB v. Magnusen*, 523 F.2d 643 (9th Cir. 1975); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (even if employee had been illegally fired, he should not have been reinstated because of a pattern of falsification and deceit during employment and false testimony at the hearing).

In determining whether the conduct in question is unlawfully motivated, the Board will rely on circumstantial evidence as well as direct evidence to infer discriminatory motivation on the part of the employer. It will consider circumstantial evidence such as: (1) delay in the discharge after knowledge of the offense, *Merchs. Truck Line v. NLRB*, 577 F.2d 1011 (5th Cir. 1978), *enforcing* 232 NLRB 676 (1977); (2) departure from established procedures for discharge, *Wells Dairy*, 287 NLRB 827 (1987), *enforced*, 865 F.2d 175 (8th Cir. 1989); (3) failure to tell the employee the reason for the discharge at the time of discharge, *Forest Park Ambulance Serv.*, 206 NLRB 550 (1973); (4) changes in position in explain the reason for the discharge, *Coca-Cola Bottling Co.*, 232 NLRB 794 (1977), *enforced in part*, 616 F.2d 949 (6th Cir.), *cert. denied*, 449 U.S. 998 (1980); (5) timing of the discharge (e.g., discharge immediately after the employer gains knowledge of the employee’s union activity), *see Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001) (finding “the link of timing . . . missing”); *Clark & Wilkins Indus.*, 290 NLRB 106 (1988), *enforced*, 887 F.2d 308 (D.C. Cir. 1989); and (6) disparate treatment of

coworkers, *see Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980), *cert. denied*, 449 U.S. 879 (1980) (an inference of union animus based upon disparate treatment can be made if the only difference between two differently treated employees is the illegitimate criteria at issue [i.e., union activity]). Absence of prior warnings is not sufficient to establish discriminatory motive. *Chart House*, 223 NLRB 100 (1976).

2. *Local 1107 was not motivated by an unlawful animus to terminate Cabrera; but even if it was, Local 1107 demonstrated it would have terminated Cabrera anyway.*

Local 1107 was not motivated by any antiunion animus to terminate Javier Cabrera. Rather, Local 1107 was motivated solely by its legitimate expectations as an employer to have individuals in its employ who are honest, trustworthy, competent, and satisfactory performers. But even assuming that there is sufficient evidence to establish an improper motivation, the documentary evidence submitted abundantly demonstrates the legitimate and weighty expectations Local 1107 had in expecting Cabrera to be honest, trustworthy, competent, and a satisfactory performer. Cabrera had a long tenure with Local 1107—approximately 14 years—and 27 years as an organizer generally. Thus, Local 1107 legitimately may expect commensurately better conduct from him than from newer, less experienced employees. As with all employees, Local 1107 has a strong interest in making sure it can trust its employees and that its employees will be honest in all their dealings with the employer. Employers are certainly not required to keep dishonest employees among the ranks, and Section 8(a)(3) does not alter such a legitimate employer expectation. *Wyman-Gordon Co. v. NLRB*, 654 F. 2d 134, 143 (1st Cir. 1981) (“[T]ermination is an appropriate and common response to employee dishonesty.”).

Here, prior to the investigatory interview, Local 1107 considered whether to discipline Cabrera for falsifying employer records and member consent cards in a manner contrary to express instruction, for his no-call, no-show, and for poor performance. However, despite this misconduct, which was proven true through the investigatory process—and which misconduct Cabrera admitted during his hearing testimony in this very case—his repeated lying during the

investigatory process and his ever-shifting excuses for the misconduct gave additional cause for Local 1107 to terminate Cabrera from employment. “It is . . . a legitimate business judgment—a not unusual one—that an employee lying during an investigation is a serious threat to management of the enterprise.” *Cellco P’ship*, 892 F.3d 1256, 1262 (D.C. Cir. 2018). And recall Local 1107 need not prove the employee actually engaged in conduct on which the discipline is based, but must show merely that it acted pursuant to a reasonably held good faith belief regarding the employee’s conduct. *GHR Energy Corp.*, 294 NLRB 1011 (1989); *Lucky Stores*, 269 NLRB 942 (1984). Here, Local 1107 ably meets that burden, indeed proving that misconduct in fact occurred, and that Cabrera was dishonest during his investigatory meeting.

None of the General Counsel’s theories of unlawful discrimination withstand scrutiny. In this case, there is no evidence in the record demonstrating an unusual delay between knowledge of the offenses and the Cabrera’s discharge from employment. Rather, the evidence demonstrates the investigatory apparatus was put into motion immediately after management gained knowledge of the offenses—first, the October 17, 2017 no-call, no-show, and then by October 24, with the submission of false debrief sheets and improper TWR cards—which were discovered independently of each other. The investigatory meeting was held on October 26, and Cabrera was ultimately terminated from employment on October 30, 2017. The timeline of events does not signal any unusual or inordinate delay between the offenses and discipline.

There is no credible evidence in the record demonstrating any material departure from established procedures for discharge. The misconduct that was alleged against Cabrera was investigated, Cabrera participated in an investigatory meeting to allow him an opportunity to respond to allegations against him and to explain, and no decisions regarding discipline were made until the investigation was completed. The General Counsel argues that it was a departure from normal disciplinary procedures, including progressive discipline, to terminate Cabrera without first adhering to escalating forms of discipline, including written warnings, a final written warning, suspension, and ultimately termination. However, dishonesty alone (including falsification of employer records) is usually sufficient cause to terminate an employee, especially

when the misconduct has direct bearing on the employee's work or when it arises in an investigatory process. *Wyman-Gordon Co.*, 654 F. 2d at 143 (“[T]ermination is an appropriate and common response to employee dishonesty.”). Inherent in any employment relationship is an employee's duty to act honestly with his employer, but this duty is especially heightened during disciplinary investigations, where the entire purpose of the process is to find facts and arrive at the truth. But again, it was not any one incident that ultimately led to Cabrera's termination. Rather, it was the combination of misconduct, in a short span of time, which ultimately resulted in Cabrera's termination. In these circumstances skipping steps of progressive discipline under the collective bargaining agreement was not only lawful, but it was expressly permitted by the CBA. (GC Ex. 5 at p. 10 (“Unless circumstances warrant severe actions, the Employer will use a system of progressive discipline.”)). Manteca testified that he found the circumstances of Cabrera's incidences of misconduct, when taken together, warranted severe action. (Tr. 138:9–20). Luisa Blue agreed. (Tr. 569:13–23; 581:21–582:10 (Blue testifying that dishonesty is a severe act that warrants immediate termination notwithstanding a progressive discipline obligation)).

There is no evidence that Local 1107 failed to tell Cabrera the reasons for his termination. Indeed, the termination notice itself well documents and explains the reasons for Cabrera's termination, and those reasons were unquestionably communicated to Cabrera.

Local 1107's reasons for terminating Cabrera have been consistent over time. As reflected by the live witness testimony and the termination notice, Local 1107's reasons for Cabrera's termination have not shifted or changed over time. This is strong evidence that Cabrera was terminated for the reasons given to him at the time of his termination, not for some other latent, unlawful reason.

There is no evidence tending to suggest Local 1107 terminated Cabrera from employment shortly on the heels of learning about his engaging in protected activity. Management personnel testified that they were aware of the Staff Union and that Cabrera was the president of the Staff Union, almost from the outset of the trusteeship. No adverse action was taken against Cabrera in

reaction to his filing grievances. Rather, the disciplinary machinery started moving only in response to supervisors' discovery of Cabrera's misconduct—misconduct that he admits.

The General Counsel argues that Cabrera was disparately treated. But the facts adduced during the hearing do not bear out that conclusion. No other employee of Local 1107 engaged in the same or similar misconduct to Cabrera, and no employee was caught in multiple incidences of misconduct in a short span of time. No evidence demonstrated that other similarly situated employees engaged in similar misconduct but received less harsh treatment from management, the only difference between the two being engaging in protected activity or having union status. Because the General Counsel has not identified a proper comparator, the disparate treatment theory must fail.

The closest comparative evidence is the Troyano incident involving a membership card. However, Local 1107's investigation revealed no culpable conduct on Troyano's part; rather, any misconduct was attributed to a member of Local 1107, not to any staff of Local 1107. As such, there is no evidence to demonstrate she engaged in equally culpable misconduct as Cabrera did. This is evidence of consistent investigatory and disciplinary treatment of employees, not of an overzealous façade of an investigation trumped up to fire Cabrera because of his union activities or his status as Staff Union president. That Cabrera was the only—even the first—employee to be disciplined for violations of policy does not insulate him from discipline. *Asarco, Inc. v. NLRB*, 86 F.3d 1401 (5th Cir. 1996) (employee not insulated from discharge merely because he was first to be terminated for violating three policies simultaneously and because of his status as union president).

There is no credible evidence in the record of other employees having failed to show up for duty without notice or credible explanation, in effect no-calling, no-showing for the scheduled work. (*See* Tr. 192:8–12 (Godfrey testifying he experienced no other no-call, no-show with any other employees at Local 1107)).

There is no evidence in the record of other employees having falsified their debrief sheets, the record of each employee's work for the day, by including work on the day's sheet that

was not in fact performed on that day. Likewise, there is no evidence in the record of employees lying to their supervisors during oral debriefings.

There is no evidence in the record of other employees having failed to properly obtain and have members complete the TWR cards, despite repeated instructions to the contrary. Rather, the uncontradicted evidence indicates that only Cabrera had the same problems with the TWR cards over time, whereas other employees corrected deficiencies after initial counselings. (Tr. 238:13–239:25 (Godfrey testifying about differences between Randy Peters, who had a similar issue but corrected his deficiencies, and Cabrera, who repeatedly made the same errors despite repeated instruction); 325:16–21 (noting only Cabrera had persistent problems with TWR cards)).

There is no evidence in the record of other employees having lied during investigatory meetings but who were not terminated—indeed, there is no record evidence of any other employee ever having lied during an investigatory meeting.

What the record does demonstrate is Cabrera stood out for all of the wrong reasons and Local 1107 management properly exercised its wide business judgment to determine that Cabrera was not performing at the level expected of a long-tenured organizer. What the record does demonstrate is no other employees engaged in incidences of misconduct that, when considered together, warranted harsh discipline, even termination.

Even if one were to assume Local 1107 management did in fact harbor antiunion animus against Cabrera and the Staff Union, the timing of the alleged statements harboring animus are too distant from the adverse action in this case to support a conclusion that the unlawful animus was the but-for cause of the termination. It simply strains credulity for the ALJ to believe that Local 1107 was so motivated by a union animus that it waited five months for Cabrera to choose all on his own to engage in misconduct before acting on the supposed animus. Moreover, Blue in particular testified that in her review of the materials before her on Cabrera's termination, she found the reasons offered by subordinates for termination to be consistent, well documented, and substantiated. (Tr. 547:24–548:7). Further, she explicitly denied having any knowledge of or

indication that Cabrera’s status as Staff Union president or his engaging in protected union activity played any part in his termination (Tr. 550:21–551:2; 551:23–552:1 (Blue testifying she saw no other reason for the termination other than the substantiated misconduct)).

Critically—and fatally to the General Counsel’s case—Blue testified that she would have made the decision to fire Cabrera even if union animus was a factor motivating the termination. (Tr. 552:2–14). And finally, Blue testified that she never instructed Martin Manteca to fabricate reasons to fire Cabrera and that she has no reason to believe the reasons Cabrera was fired were fabricated, nor would she tolerate such behavior. (Tr. 552:18–553:2). Given the totality of the testimony, the General Counsel fails to meet his burden to prove that the “but for” cause of Cabrera’s termination was his union president status or for engaging in protected activity.

3. *The Charging Party admits he was dishonest and engaged in misconduct.*

Lastly, and perhaps most damning to the General Counsel’s case, is that the Charging Party admits the misconduct that collectively formed the basis for his termination. Rather than accept the consequences for repeated misconduct, Cabrera offers excuses on excuses. Indeed, he even admits he was dishonest and that he understood he had an obligation to be honest with his employer. (Tr. 461:8–11).

First, Cabrera documented on his October 24, 2017 debrief sheet work that did not in fact take place on that day—even though the forms are filled out contemporaneously with the day’s work. His excuse is he wasn’t sure if he had submitted that work for credit before or not, so he decided to resubmit it. (Tr. 403:4–12). But this excuse lacks credibility as Cabrera testified that he had in his possession his debrief sheets from just a week earlier, (Tr. 455:17–456:13), and none of that explains how he could not accurately and truthfully report work he performed on the very same day he allegedly performed it. He admittedly knew he was under an obligation to truthfully and accurately report on the daily debrief sheets work that was actually performed on that day. (Tr. 454:25–455:12; 456:21–460:11). But he failed to do so.

Second, he lied to his supervisor that evening about the work he performed that day. (Tr. 460:12–461:7 (admitting false statement to Grace Vergara-Mactal in debrief on October 24)). It

is unreasonable to infer that Cabrera simply forgot what he did earlier the same day. Rather, the supposed mistaken duplication of the names on the debrief sheets is more credibly explained by Cabrera's motivation to show he was doing what he was supposed to be doing. But because he knew he was in fact not doing the work he was supposed to be doing, he instead was motivated to mislead and to make dishonest statements on his work records and to his supervisor to make it appear as if he was doing what he was supposed to be doing.

Third, he lied during the investigatory meeting about being on prescription medication as an excuse for his no-call, no-show. And worse, he then lied during the hearing about what explanations he offered during his pre-termination investigatory meeting. In all, on the whole record, the inescapable conclusion is Local 1107 did not violate Section 8(a)(3) of the Act.

**C. Local 1107 Did Not Violate Section 8(a)(1) of the Act.**

For the same reasons articulated above, Local 1107 did not engage in conduct designed to interfere, restrain, or coerce employees in the exercise of rights to form, join, or assist a labor organization, to refrain from such activities, or to engage in other protected concerted activity. Because the General Counsel failed to establish a violation of Section 8(a)(3), the allegation alleging a violation of Section 8(a)(1) necessarily fails as well.

Cabrera manifested conduct that is inconsistent with Local 1107's legitimate and substantial interests as an employer and, thus, Local 1107 properly terminated his employment. Cabrera's union activities or union status played no role in his firing. But even if animus did play a role, Local 1107 would have made the same decision to fire Cabrera. In these circumstances, there is no violation of Section 8(a)(1) of the Act.

**IV. CONCLUSION**

Local 1107 discharged Cabrera from employment because it found that Cabrera falsified and improperly filled out TWR cards and falsified his debrief sheets, which was dishonest and insubordinate conduct. Local 1107 further concluded that Cabrera had no credible explanation for his no-call, no-show, reflecting poor performance. Further, as came to light during Cabrera's investigatory interview, Local 1107 found that he furthered a pattern of dishonest behavior by

lying during the investigation in several demonstrable and material respects. The duties and responsibilities of professional organizers involve great flexibility, require exercise of independent judgment, and require field work with little to no direct supervision. As such, an organizer's conduct, good or bad, reflects on Local 1107 and affects its reputation and credibility with the community, members, and employers. In that light, Local 1107 considered the prior misconduct involving the illegal recording, which had already harmed Local 1107's reputation with one of its signatory employers.

Taken all together, given the findings of its investigation, Local 1107 had, *at a minimum*, a good faith belief—and, indeed, as demonstrated, *substantial proof*—to conclude that Cabrera engaged in dishonest, insubordinate conduct. Dishonesty to an employer is serious, but it's totally intolerable when it arises during an investigatory process when an employee's duty to be truthful with his employer is at its peak. As such, Local 1107 properly concluded that it had lost the trust and confidence it placed in Cabrera, and his termination from employment was accordingly for cause. And because the termination was for cause, the Charging Party is not entitled to an award of reinstatement or backpay.

For the foregoing reasons, the General Counsel has failed to establish a violation of the Act. The Complaint should be dismissed in its entirety.

Dated: April 5, 2018.

**THE URBAN LAW FIRM**

By: /s/ Sean W. McDonald  
Sean W. McDonald, Esq.  
4270 S. Decatur Blvd, Ste A-9  
Las Vegas, NV 89103  
T: 702-968-8087  
F: 702-968-8088  
smcdonald@theurbanlawfirm.com  
*Counsel for Respondent, SEIU Local 1107*

**CERTIFICATE OF SERVICE**

I hereby certify that **RESPONDENT’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Case 28-CA-209109, was filed and served via E-Gov, E-Filing, and Email, on April 5, 2018, as indicated below on the following:

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

Honorable Dickie Montemayor,  
Administrative Law Judge  
NLRB – Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1735

**Via Email:**

Fernando J. Anzaldua, Esq.  
National Labor Relations Board  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004  
Fernando.Anzaldua@nlrb.gov  
*Counsel for the General Counsel*

Michael Mcavoyamaya, Esq.  
4539 Paseo Del Ray  
Las Vegas, NV 89121  
mmcavoyamayalaw@gmail.com  
*Counsel for Charging Party*

/s/ Sean W. McDonald  
Sean W. McDonald, Esq.  
The Urban Law Firm  
4270 S. Decatur Blvd, Ste A-9  
Las Vegas, NV 89103  
T: 702-968-8087  
F: 702-968-8088  
smcdonald@theurbanlawfirm.com  
*Counsel for Respondent, SEIU Local 1107*