

**No. 18-1201**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CIRCUS CIRCUS CASINOS, INC.  
d/b/a CIRCUS CIRCUS LAS VEGAS,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent,

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ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD IN CASE NUMBER 28-CA-120975

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**PETITIONER'S FINAL OPENING BRIEF**

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Paul T. Trimmer  
Daniel I. Aquino  
JACKSON LEWIS P.C.  
300 South Fourth Street  
Suite 900  
Las Vegas, Nevada 89101  
Telephone: (702) 921-2460  
Email: paul.trimmer@jacksonlewis.com  
daniel.aquino@jacksonlewis.com

**CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW**  
**AND RELATED CASES**

Petitioner Circus Circus Casinos, Inc. is a resort hotel/casino located in Las Vegas, Nevada. It is a wholly owned subsidiary of MGM Resorts International. Circus Circus does not issue debt or equity securities to the public nor does it have subsidiaries which issue shares or debt to the public. MGM Resorts International is publicly traded on the New York Stock Exchange.

Circus Circus has petitioned the Court to review and set aside the National Labor Relations Board's Decision and Order in *Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas and Michael Schramm*, Case No. 28-CA-120975, entered on December 30, 2014, reported as 266 NLRB No. 110 (June 15, 2018).

**TABLE OF CONTENTS**

**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES** .....iv

**STATUTES AND REGULATIONS** ..... vii

**GLOSSARY**..... viii

**JURISDICTIONAL STATEMENT**..... 1

**STATEMENT OF THE ISSUES**.....2

**STATEMENT OF THE CASE**.....5

A. Background Facts .....6

    1. Circus Circus’ Facilities Department Is Committed To  
    Maintaining Rooms and Attractions To Ensure The  
    Safety Of Its Guests And Employees.....6

    2. Under The Collective Bargaining Agreement Governing  
    The Terms And Conditions of Schramm’s Employment,  
    Compliance With Safety Policies And Practices Was  
    Mandatory. ....7

    3. Circus Circus Maintains A Rigorous Safety Program In  
    Order To Ensure Employee Safety And Compliance  
    With OSHA Regulations.....8

B. The Events Giving Rise To The Case .....10

    1. Schramm Was Hired As A Temporary Carpenter In  
    September 2013 .....10

    2. The November 21, 2013 Safety Meeting And  
    Subsequent Events.....11

    3. On December 10, 2013 Schramm Refused To Complete  
    The Medical Evaluation Required By The Respiratory  
    Protection Program.....15

4.	Schramm’s Suspension And The Company’s Investigation.....	17
a.	Schramm was placed on suspension pending investigation on December 10th .....	17
b.	The Company investigated Schramm’s conduct at the exam and conducted a due process meeting on December 13, 2013 .....	19
C.	Schramm Was Terminated For His Refusal To Take The Required Medical Examination .....	22
D.	Procedural History And The Decisions Below .....	23
	<b>STANDARD OF REVIEW</b> .....	29
	<b>SUMMARY OF ARGUMENT</b> .....	29
	<b>ARGUMENT</b> .....	32
A.	The Board’s Determination That Circus Circus Violated Section 8(a)(1) Of The Act By Threatening Schramm With Discharge Is Not Supported By Substantial Evidence .....	32
1.	Schramm And Tenney’s Testimony Was Insufficient To Meet The Burden Of Proof.....	33
2.	The ALJ Unreasonably Disregarded All Testimony Rebutting Schramm And Tenney’s Narrative.....	37
3.	The General Counsel Did Not Carry Its Burden Of Proof To Show A Threat Occurred, And The ALJ Improperly Shifted This Burden To Circus Circus.....	39
B.	The Board’s Misapplied <i>Wright Line</i> In Determining That Circus Circus Violated Section 8(a)(1) Of The Act By Suspending And Terminating Schramm .....	42
C.	The Board Erred In Adopting The ALJ’s Finding That Circus Circus Violated Schramm’s <i>Weingarten</i> Right.....	47

1. The ALJ’s Finding That Schramm Requested A Union Representative Prior To The December 10th Meeting Was Not Supported By Substantial Evidence .....47

2. The ALJ’s Finding That Circus Circus Violated *Weingarten* Following Schramm’s Reference To The Unavailability Of Union Representation Was Contrary To Law .....49

D. The Board Erred In Denying Circus Circus’ Request To Reopen The Record To Submit Evidence Conclusively Showing That Tenney, The Only Witness Who Corroborated Schramm’s Allegation Of A Threat, Lied Under Oath.....51

E. The Board’s Recommended Order To Reinstate Schramm With Seniority Violates Section 10(e) Of The Act And Cannot Be Enforced.....53

**CONCLUSION.....54**

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

### CASES

<i>Bellagio, LLC v. NLRB</i> , 854 F.3d 703 (D.C. Cir. 2017) .....	42
<i>Bird Engineering</i> , 270 NLRB 1415 (1984) .....	47
<i>C&amp;S Distributors</i> , 321 NLRB 404 (1996) .....	40
<i>Cambro Mfg. Co.</i> , 312 NLRB 634 (1993) .....	47
<i>Circuit-Wise, Inc.</i> , 308 NLRB 1091 (1992) .....	51
<i>Coca-Cola Bottling Co.</i> , 227 NLRB 1276 (1977) .....	50
<i>Daikichi Corp.</i> , 335 NLRB 622 (2001) .....	40
<i>Detroit Newspaper Agency v. NLRB</i> , 435 F.3d 302 (D.C. Cir. 2006) .....	45
<i>E.B. Malone Corp.</i> , 273 NLRB 78 (1984) .....	36
<i>Fort Dearborn Co. v. NLRB</i> , 827 F.3d 1067 (2016) .....	47, 51
<i>General Die Casters, Inc.</i> , 358 NLRB 85 (July 25, 2012) .....	51
<i>Healthcare Emples. Union, Local 399 v. NLRB</i> , 463 F.3d 909 (9th Cir. 2006) .....	31

<i>Highlands Medical Center,</i> 276 NLRB 1997 (1986) .....	47
<i>Jackson Hosp. Corp. v. NLRB,</i> 647 F.3d 1137 (D.C. Cir. 2011) .....	29, 38, 42
<i>Jochims v. NLRB,</i> 480 F.3d 1161 (D.C. Cir. 2007) .....	29
<i>KBM Electronics, Inc.,</i> 218 NLRB 1352 (1975) .....	41
<i>L&amp;BF, Inc.,</i> 333 NLRB 268 (2001) .....	46, 47
<i>Lakeland Bus Lines, Inc. v. NLRB,</i> 347 F.3d 955 (D.C. Cir. 2003) .....	3, 4
<i>Miranda v. Arizona,</i> 384 U.S. 436 (1966) .....	50
<i>Montgomery Ward &amp; Company,</i> 273 NLRB 1226 (1984) .....	50
<i>Nelson MFG. Co.,</i> 138 NLRB 883 (1962) .....	53
<i>Neptco, Inc.,</i> 346 NLRB 18 (2005) .....	42
<i>NLRB v. J. Weingarten, Inc.,</i> 420 U.S. 251 (1975) .....	3, 24, 26, 28, 31, 47, 49, 50, 51
<i>NLRB v. Joseph Antell, Inc.,</i> 358 F.2d 880 (1st Cir. 1966) .....	41
<i>NLRB v. Thill, Inc.,</i> 980 F.2d 1137 (7th Cir. 1992) .....	53

<i>NLRB v. Transportation Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	2
<i>NLRB v. Wright Line</i> , 251 NLRB 1083 (1980), <i>enfd.</i> 662 F.2 899 (1st Cir. 1981) .....	2, 30, 42, 43, 44, 46
<i>Point Park Univ. v. NLRB</i> , 457 F.3d 42 (D.C. Cir. 2006) .....	3, 32, 52
<i>Precoat Metals</i> , 341 NLRB 1137 (2004) .....	39
<i>SCA Services of Georgia</i> , 275 NLRB 830 (1985) .....	40
<i>Southwestern Bell Telephone Co.</i> , 227 NLRB 1223 (1977) .....	51
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	53
<i>Sutter E. Bay Hosps. v. NLRB</i> , 687 F.3d 424 (2012).....	2, 30, 43
<i>Teamsters Local Union Nos. 822 &amp; 592 v. NLRB</i> , 956 F.2d 317 (D.C. Cir. 1992).....	47
<i>Two Wheel Corp.</i> , 218 NLRB 486 (1975) .....	53
<i>W. Irving Die Casting of Ky.</i> , 346 NLRB 349 (2006) .....	40

## **Statutes**

29 U.S.C. § 160.....	1
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## **Regulations**

29 C.F.R. § 1910.134 .....	8, 9, 46
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## **STATUTES AND REGULATIONS**

### 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of [29 U.S.C. § 158(a)(3)].

### 29 U.S.C. § 158:

#### (a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; ...
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

## GLOSSARY

“ALJ” means administrative law judge.

“ALJD” means Administrative Law Judge Decision.

“Charging Party” and “Schramm” refer to Michael Schramm.

“Decision and Order” or the “Decision” means the National Labor Relations Board’s December 30, 2014 Decision and Order in *Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas and Michael Schramm*, Case No. 28-CA-120975, reported at 266 NLRB No. 110.

“NLRA” or the “Act” means Section 8(a)(1) of the National Labor Relations Act.

“NLRB,” the “Board” or “Respondent” means Respondent National Labor Relations Board.

Unless otherwise noted, page/line transcript citations refer to the Hearing Transcript<sup>1</sup> from the unfair labor practice hearing which took place October 20-22, 2014. Respondent’s hearing exhibits are referred to as “RX --” and General Counsel’s hearing exhibits are referred to as “GCX --.”

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<sup>1</sup> Petitioner will be submitting a Deferred Appendix pursuant to the Court’s briefing schedule, and will submit a brief with cites to the pages in that compendium at that time.

**JURISDICTIONAL STATEMENT**

Circus Circus has petitioned the Court to review and set aside the National Labor Relations Board's Decision and Order in *Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas and Michael Schramm*, Case No. 28-CA-120975, entered on December 30, 2014, reported as 266 NLRB No. 110 (June 15, 2018). The Board's Decision and Order is final and appealable, and the Court has jurisdiction over the appeal pursuant to 29 U.S.C. § 160(f).

## **STATEMENT OF THE ISSUES**

1. To demonstrate that an employee was disciplined for engaging in protected concerted activity under the Board's *Wright Line* test, the General Counsel must first establish a *prima facie* case that the employee was subjected to an adverse employment action and that the employee's protected conduct was a motivating factor. 251 NLRB 1083 (1980), *enfd. NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). If this *prima facie* case is established, the employer must "produce evidence of a 'good' reason for the discharge." *Id.* at 904-907. In doing so, the employer is only required to show that it reasonably believed that misconduct was committed, and that its subsequent actions were consistent with its policies and practices. *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (2012).

The first issue before the Court is whether the Board's finding that Circus Circus violated the Act by both threatening and then discharging Schramm is contrary to prevailing law or not supported by substantial evidence given that a) the only evidence that a threat occurred was the testimony of two witnesses: Fred Tenney, who falsely testified that he made an entry about the threat in Circus Circus' electronic record keeping system ("HotSOS") and Schramm himself, whose subsequent actions (including failing to report the alleged threat to his shop steward) were inconsistent with a threat having occurred; b) the Board unreasonably

disregarded the testimony of six witnesses who stated the threat did not happen; and  
c) Schramm was suspended and terminated solely because he refused to complete a mandatory medical evaluation.

2. Under the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), employees may refuse to submit to an interview by employer representatives, without a union representative being present, if the employee reasonably believes that the interview may result in discipline. This right arises "only in situations where the employee requests representation." *Id.*

The second issue before the Court is whether the Board's finding that Circus Circus violated Schramm's *Weingarten* right by allegedly denying his request for a representative at an investigatory is contrary to prevailing law or not supported by substantial evidence given that a) Schramm did not affirmatively request union representation; and b) his alleged reference to union representation was insufficient to invoke *Weingarten*.

3. The Board's denial of a request to reopen the record constitutes an abuse of discretion where the Board's "findings of fact are not supported by substantial evidence in the record considered as a whole." *Point Park Univ. v. NLRB*, 457 F.3d 42, 51-52 (D.C. Cir. 2006) (citing *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 961 (D.C. Cir. 2003)). A court "may not find substantial evidence 'merely on the basis of evidence which in and of itself justified [the

agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Id.* (citing *Lakeland*, 347 F.3d at 962).

The third issue before the Court is whether the Board's refusal to reopen the record for Circus Circus to submit HotSOS records for November 2013 is contrary to prevailing law given that a) after Tenney testified that he had recorded the alleged “threat” in HotSOS on November 21, 2013, Circus Circus introduced Tenney's HotSOS records from that date, showing no threat was recorded; b) the ALJ nonetheless concluded the threat could have occurred on a different day, citing November 27, 2013 as a possible date; and c) the supplemental records that Circus Circus sought to introduce (which were not available during the hearing) showed that Tenney did not record a threat in HotSOS during the entire month of November, precluding the ALJ's finding that Tenney did not perjure himself.

4. The fourth issue before the Court is whether the Board's Order reinstating Schramm with “seniority” should be denied enforcement because its remedial provisions exceed the Board's authority under Section 10(e) of the Act and otherwise constitute an abuse of discretion given that Schramm indisputably was a temporary employee with no seniority.

## **STATEMENT OF THE CASE**

The Charging Party, Michael Schramm, was hired as a temporary carpenter at Circus Circus Hotel and Casino to work on door and window guards. This case arises, in part, from a November 21, 2013 safety meeting where Schramm and an Operating Engineer named Fred Tenney discussed concerns about exposure to marijuana smoke from hotel guests. Schramm claims that Chief Engineer Rafe Cordell made a specific threat to discharge Schramm in response to these concerns, which Tenney claims he witnessed and memorialized in Circus Circus' electronic record keeping system ("HotSOS"). However, no record of this entry exists, and six witnesses—several of whom are non-management members of different bargaining units in the Engineering Department—rebutted Schramm's contention that any threat occurred.

On December 10, 2013, Schramm refused a medical examination mandated by Circus Circus' Respiratory Protection Program. This program is necessary to screen employees who must wear respirator masks because they are exposed to asbestos and pursuant to OSHA regulations. Schramm loudly refused to be evaluated and left the testing area. The contractor performing the tests (Concentra) reported Schramm's refusal to Circus Circus. Schramm was placed on suspension pending investigation of the incident.

At Schramm's due process meeting on December 13, 2013, he was offered the opportunity to complete the required medical evaluation. However, he stated that if he took the test, he intended to falsify results so that he would not have to wear a respirator mask. Schramm did not request Union representation at this meeting. Schramm was terminated for his refusal to participate in the mandatory medical evaluation.

Sections A and B below set forth the relevant record testimony and evidence. Section C describes the proceedings below, including the Board's Decision and Order.

**A. Background Facts.**

**1. Circus Circus' Facilities Department Is Committed To Maintaining Rooms And Attractions To Ensure The Safety Of Its Guests And Employees.**

Circus Circus Hotel and Casino has more than 3,700 guest rooms, a circus-like entertainment area, the Midway, three outdoor pools, a convention center, and the Adventuredome. [JA 176]. The rooms and attractions are maintained and repaired by Circus Circus' Facilities Department, headed by Chief Engineer, Rafe Cordell. [JA 36]. Cordell has been employed by Circus Circus for more than 20 years, and spent a significant amount of that time as a member of the Operating Engineers bargaining unit. [JA 78-79]. He served as a shop steward for approximately seven years and was also a member of the Carpenters Union. [JA 78-

80]. The Department has 176 employees, many of which are represented by trade unions including the International Union of Operating Engineers Local 501 (“Operating Engineers”), the Southwest Regional Council of Carpenters Union (the “Union”), and the Laborer, Teamster and Painter Unions. [JA 37; JA 40-41].

Circus Circus distributes its Employee Handbook to employees upon hire, which contains General Rules of Conduct identifying “serious violations” that result in discipline up to and including immediate termination. [JA 262]. Serious violations include: “Refusal or failure to follow instructions or perform work as assigned or countermanding supervisors’ orders without authorization (insubordination)” (Rule 4) and “Failure or refusal to submit to physical examination or to a blood, urine or other test ordered by Circus Circus Las Vegas or Slots of Fun” (Rule 12). *Id.*; [JA 559] (Schramm’s New Hire Orientation Certification); [JA 878] (Schramm’s Acknowledgement).

**2. Under The Collective Bargaining Agreement Governing The Terms And Conditions Of Schramm’s Employment, Compliance With Safety Policies And Practices Was Mandatory.**

Circus Circus has a collective bargaining agreement (“CBA”) with the Union. [JA 181]; [JA 82-84]. The CBA permits Circus Circus to hire temporary carpenters (who lack seniority or other status) and obligates both Circus Circus and its employees to comply with safety rules and regulations. *Id.* Article 27.02 of the Agreement provides: “Employees are required to comply with all safety policies and

practices established by the Employer from time to time, and to cooperate with the Employer in the enforcement of safety measures.” *Id.*, [JA 214]. Failure to comply with this rule warrants summary termination under the CBA’s express terms.

Temporary carpenters, like Schramm, are assigned to discrete projects. In Schramm’s case, he worked on door and window guards. [JA 43-44]. For safety and regulatory compliance, temporary carpenters must complete all of the same safety and other training as full-time carpenters. *Id.*; *see also* [JA 219; 231; 668; 686; 690; 404-407].

**3. Circus Circus Maintains A Rigorous Safety Program In Order To Ensure Employee Safety And Compliance With OSHA Regulations.**

Facility Department employees are exposed to workplace hazards. Due to its age, the building contains significant amounts of asbestos which can become exposed and airborne wherever structural work is performed. [JA 231; 630]. Circus Circus therefore maintains a rigorous Workplace Safety Program, requiring employees to “follow and obey every safety rule and regulation.” [JA 220; 605].

In order to comply with OSHA’s General Duty Clause and applicable OSHA regulations, Circus Circus also maintains a Respiratory Protection Program. [JA 400; 231]. This program includes a requirement that employees are certified and fit tested for respirators. *See* [JA 231] (discussing 29 C.F.R. § 1910.134).

Circus Circus conducts respiratory compliance checks yearly, and in 2013 the process started in July. [JA 411; 668; 686]. Circus Circus' Safety Manager, Karl Beeman, initiated the annual examination process. [JA 414; 668; 686]. All members of the Department were required to go through the process, including temporary employees and those employees who had already been found to have a medical condition that precluded the use of a respirator. *Id.* There were no exceptions or exemptions. [JA 421; 690].

The process is governed by OSHA regulation 29 C.F.R. § 1910.134. It sets forth mandatory obligations for employers who require employees to wear respirators. [JA 696]. The first step consists of a medical questionnaire and medical evaluation, both of which are mandatory. [JA 55-56; 427; 701] (citing 1910.134(e)), [JA 702; 430-431]. The questionnaire is a government generated form, and an employee must complete all sections. [JA 670; 702] (citing 1910.134(e)(2)-(e)(4)(i)). Those questions include: "Do you have ... claustrophobia?" and "Have you ever had ... anxiety?" [JA 671; 673]. Question No. 9 apprises employees of their right to speak to a health care professional about the completed questionnaire. *Id.*

After the medical questionnaire is completed, the health care provider selected by Circus Circus (a company called Concentra) reviews it. [JA 427-430]. If the employee has conditions which may potentially disqualify him from using a

respirator or go through the testing process, such as COPD, the health care provider selects the employee for a medical evaluation. [JA 416; 420-421]. The medical evaluation involves a blood pressure check, height and weight, and a conversation with the doctor. *Id.* Whenever an employee participates in this process, he is allowed to see the doctor and ask questions about the process. *Id.* Before doing so, however, the employee must complete the form and the baseline evaluation. *Id.*; [JA 231]. This enables the doctor to accurately assess the employee and have a meaningful conversation.

In early fall 2013, Henry Simms began distributing that year's questionnaires to *all* Department employees. [JA 458-462; 473]. Initially, employees were driven to Concentra if testing was required. To streamline the process, Circus Circus elected to bring Concentra on-site to its convention area, starting in December 2013. [JA 712]. Simms stated that no one had *ever* refused to complete the exam during his thirty year career at Circus Circus. [JA 474-476].

## **B. The Events Giving Rise To The Case.**

### **1. Schramm Was Hired As A Temporary Carpenter In September 2013.**

Schramm was hired as a temporary carpenter on September 12, 2013. He was OSHA certified, meaning that he previously received some specialized training in OSHA requirements. [JA 311-315; 547]. Upon hire, he received copies of the

Employee Handbook, the Safety Program, his Job Description, and other documents relating to asbestos exposure. [JA 219; 553; 559; 311-323]. Schramm worked on door and window jams. [JA 43-44].

## **2. The November 21, 2013 Safety Meeting And Subsequent Events.**

As one might expect, Circus Circus hotel guests, from time to time, smoked marijuana in their rooms, and employees in the Facilities Department and other departments could smell its odor. [JA 52-53]. During a weekly safety meeting on or about November 7, 2013, an Operating Engineer (represented by the International Union of Operating Engineers, Local 501) named Fred Tenney contacted Assistant Chief Aaron Nelson about the supposed prevalence of the marijuana odor. [JA 265-266; 490]. Nelson recalled that two other Operating Engineers also spoke about the issue. [JA 492]. Tenney explained that employees are “permitted to raise and ask questions during such meetings.” [JA 143]. Nelson said he would get back to Tenney about the issue. [JA 145].

On November 18, 2013, Tenney and the Operating Engineers filed a formal grievance. [JA 265-268]. The grievance was discussed during the safety meeting that occurred three days later on November 21, 2013. There were two different accounts of that meeting. According to Tenney and Schramm, it began with Tenney raising his grievance and asking whether Cordell intended to do anything about it. [JA 148-149]. Schramm and Tenney further claim that they told Cordell they were

concerned about marijuana exposure and the possibility that they may test positive on a drug test. *Id.* According to them, Cordell responded by saying that it was unlikely that they would test positive. According to Tenney, Cordell also told them that if they had a problem, call security first, and if security is unresponsive, call your Senior Watch.<sup>2</sup>

Schramm and Fred Tenney asserted that Cordell “turned red and said ... well maybe we just won’t have a need for you.” [JA 148]. They further claimed that Cordell’s statement prompted Tenney to state “that sounds like a threat to me” and that Schramm then echoed “that didn’t sound like a threat, that was a threat.” *Id.* Tenney testified that he noted the supposed threats in the Company’s HOTSOS system with the line: “Rafe threatened carpenter.” [JA 148].

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<sup>2</sup> Schramm’s testimony deviates from Tenney’s in a significant way at this point. Tenney said that Cordell told them to try security first and then progress to Senior Watch if security did not help solve the problem. [JA 146]. Schramm, in contrast, claims that Cordell retracted his instruction to call security and said to call *only* the supervisor on duty. [JA 333; 283-285]. This may seem like a minor discrepancy, but given the ALJ’s assertion that Schramm and Tenney’s testimony was credible because it was consistent, and given the fact that Schramm and Tenney talked several times about the case while it was pending, the discrepancy is important and indicates that the testimony is unreliable.

The other witnesses do not remember this dramatic exchange, and when confronted with Schramm and Tenney's version of events, they said it is not true.<sup>3</sup>

- Simms, who attends each safety meeting and is a member of the bargaining unit, stated that Tenney led the conversation and that he could not recall Schramm saying anything of substance. [JA 467-470]. He denied that the issue was “contentious” as between Cordell and anyone else. [JA 469].
- Nelson confirmed that Tenney and Schramm spoke about marijuana smoke, just like other employees had done before, but he was certain that the conversation was calm. [JA 494-499]. He stated that Schramm raised his voice but that Cordell did not. [JA 496-497]. Cordell was not “upset or looking agitated.” [JA 497]. When asked about Tenney and Schramm's claim that Cordell made a threat and that they loudly reacted to it, Nelson stated “I honestly don't recall him saying that.” [JA 498]. Nelson also stated that Cordell did not abruptly leave, the meeting ended normally. [JA 498-499].
- Tim Cole, another member of the Operating Engineers bargaining unit who was present at the meeting confirmed the accounts offered by Nelson and Simms. [JA 799-802]. He stated that Cordell responded to Tenney and Schramm in a normal way and that the meeting ended normally, without any of the drama described by Tenney and Schramm. *Id.* He stated that Cordell had his usual demeanor, and was certain that Cordell's face did not turn red. *Id.*

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<sup>3</sup> Several of the Company's witnesses did not appear to recall the November 21st meeting with the same level of specificity that Schramm and Tenney possessed on the main issues in the General Counsel's narrative. As discussed below in Section V.B, that does not mean they are less credible. They were clearly talking about the same meeting. Schramm was certain that he spoke up in one meeting attended by Cordell. [JA 280-284]. The witnesses all recalled the meeting because the marijuana issue was raised. Had Cordell actually threatened Schramm, they would have recalled that too because it would have made the meeting unusual. As the Board has noted in other contexts, the workplace is a hotbed of discussion. It is frankly inconceivable that Cordell could have erupted in anger in the way that Schramm and Tenney described and that none of the other witnesses would have heard or recalled it.

- Cordell’s testimony was similarly clear. Both when he was being treated as a hostile witness by the General Counsel and on the Company’s redirect, he was open about the nature of his discussions with Schramm and Tenney, and emphatic when he denied telling Schramm something to the effect of that the Company would no longer have a use for him. [JA 804-808].
- Brian Machala, a line level member of the bargaining unit, also contradicted Schramm and Tenney. [JA 817-825]. His recollection was very sharp. He was able to identify others who were present (Tenney for example, frequently said certain individuals “would have” been sitting in certain places because he had no actual recollection of the event). He confirmed that both Tenney and Schramm spoke, and denied that Cordell was upset. *Id.* He also mentioned that Cordell was receptive to the concerns, stating that he “would write a procedure.” [JA 820]. He was forthcoming in stating that Cordell looked “fine” but seemed a little frustrated because he kept repeating himself. [JA 821-825]. He recalled nothing else. *Id.* Given his recollection, he would have recalled if Schramm or Tenney said anything about threats. The absence of that testimony suggests that Schramm and Tenney cannot be credited.
- Finally, Gerardo Tejada described the meeting. He is a member of the Teamsters bargaining unit. [JA 838-847]. He recalled Schramm by face and job title, not name. [JA 841]. He recalled that Cordell’s demeanor was normal and that he was answering Schramm and Tenney’s questions. [JA 838-847]. He was clear that Cordell did not become upset and stated that if anything, it was Schramm who was upset. *Id.*

At the hearing, the Company introduced Tenney’s HOTSOS records from November 21st into evidence. [JA 855]. The relevant entry is on page 6. It contains a reference to the meeting and marijuana smoke. *Id.* **Critically, it has no reference to “threat” or carpenters.** *Id.* It states: “informed supervisors @ safety meeting that I get headaches when hallway is full of marijuana smoke. ... Asked Rafe. Aaron, and Tim for procedure on Marijuana smoke. Rafe said call senior watch.” *Id.*

On or about December 6, 2013, Cordell issued a new policy for handling marijuana smoke complaints. [JA 267] Thereafter, he continued to meet with the Operating Engineers about Tenney's grievance because Tenney and the union insisted that the Company modify aspects of its security policy. [JA 119-121].

**3. On December 10, 2013 Schramm Refused To Complete The Medical Evaluation Required By The Respiratory Protection Program**

As noted above, the Company's annual respiratory safety certification program was ongoing throughout the fall of 2013. Because it was cumbersome to drive employees to Concentra, the Company arranged for Concentra to come on-site for a number of days in December 2013, including December 9th and 10th. [JA 713] (schedule).

Schramm's appointment was at 2:00 p.m. on December 10th. *Id.* However, that morning, Brandon Morris told Schramm to go early: "If you could, it would increase the flow of work and it would be better. So if you can go at – right after lunch, go and see if the doctor can fit you in. And I said, 'Okay.'" [JA 293]. Schramm arrived for his appointment with Concentra and the technician attempted to take his vitals. *See* [JA 260; 261] (evidencing the information reported to the Company). Before the technician could complete this process, however, Schramm refused to allow the meeting to continue. Schramm admitted at the hearing that he "did not ask" the Concentra employees what was going to happen. [JA 386]. And,

he refused even after they told him it was limited to height, weight, blood pressure, and other simple tests like that. [JA 386]. The technician informed Schramm that he would need to complete the process with the technician (height, weight and vitals) before he would be seen by the doctor. [JA 340-341]. Nonetheless, Schramm was, in his own words, “hell-bent” on exempting himself from the examination. [JA 386].

Tejada and Edward Romero were at Concentra at the same time. As they explained, Schramm was loud, refusing to proceed with the examination. Romero is a line level laborer represented by the Teamsters. [JA 828]. He recognized Schramm by sight. *Id.* He stated that Schramm repeatedly said he “didn’t want to take the test,” [JA 829-830]; “I’m not going to take the test. I don’t need to.” [JA 830]; and, “Why do I need to take this? I’m not going to take it.” [JA 832]. Romero testified that Schramm continued doing this for several minutes while Romero was behind the curtain himself. *Id.*

Tejada testified similarly:

We all went in there and we were in one room doing a breathing test. Uh-huh. And then we were told after that we had to go do a physical with the nurse. Well, he refused to do it. And said, Why do I have to take a physical? Why do I have to take a physical?” And he walked out and didn’t -- he refused to do it. When he said, “I’m not going to do it,” or words to that effect, where were you? I was like probably not even five feet away from him. I mean I was like right close to him. I was pretty close. We were --

because we all go in the room all together. And then as we were -- we were out in the hallway first, and then we went in. When he found out he had to take a physical, he refused to do it. And then he walked out.

[JA 848].

In describing Schramm's behavior Tejada said:

He got really red and angry in the face. And he kept repeatedly saying he wasn't going to take the physical. That, "Why do I have to take a physical for? What for? I'm not taking no physical. ... And then he ... just ... walked out.

[JA 850].

Concentra contacted Beeman, [JA 437-439], and Simms, [JA 477], and apprized them of the situation. [JA 260; 261]. They in turn contacted Cordell. [JA 440; 260; 261]. Cordell, informed that Schramm had "refused to go through the evaluation" contacted Morris and asked him to bring Schramm to the Department office. [JA 62; 98-99].

#### **4. Schramm's Suspension And The Company's Investigation**

##### **a. Schramm Was Placed On Suspension Pending Investigation On December 10th.**

Although Schramm claimed during the hearing that he had left the testing area in hope of enlisting Morris' assistance, Schramm did not mention the issue to Morris when they met. [JA 770]. Morris then brought Schramm to Cordell's office.

According to Morris, “it was right around the time that [Schramm] should have been taking the exam.” [JA 769].

Once in the office, Cordell told Schramm that he was being placed on suspension pending investigation because he had refused to complete the physical evaluation. [JA 771] (Morris); [JA 63-69] (Cordell); [JA 99-100]; *see also* [JA 177] (SPI notice) and [JA 1079] (SPI submission). Cordell advised Schramm to contact his Union and to be ready for a due process meeting that would be scheduled in the next few days. *Id.*

Schramm did not, at that point, claim that he would go take the test or claim that his test time had not yet expired.<sup>4</sup> [JA 67-69]. To the contrary, as Morris explained, Schramm began questioning the Concentra physician’s credentials: “Michael, you know, had said, well, who is this doctor? I don’t know who this doctor is. I know my body better than them. Who are they to say whether I’m physically fit

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<sup>4</sup> The ALJ suggested that Schramm offered to take the exam during this meeting. All of the other witnesses, including Morris, said otherwise. There was absolutely no reason for Morris to lie and his recollection was just as specific as Schramm’s. Schramm was contradicted at every turn by every witness other than Tenney. There was no evidence of a mass conspiracy. Even if the ALJ personally believed that Schramm’s demeanor was convincing, on what basis could she have discredited every single other witness and found that the General Counsel met his burden of proof?

or not, you know?” [JA 771]. The meeting ended, and Morris and Schramm went outside. Morris provided Schramm with Union contact information, but he could not confirm that Schramm actually contacted the Union. [JA 773].

After the meeting, Cordell called Richard Williams, the Carpenter Union’s business agent, and made him aware that Schramm had been placed on SPI “for refusing to go through the mandatory physical examination.” [JA 99-101]. Williams responded by stating that SPI was not necessary and invited Cordell to simply lay Schramm off so that Schramm would be eligible for rehire. *Id.* Cordell noted that they would proceed with a due process and Williams stated that he would attend if Schramm in fact called him. [JA 100].

**b. The Company Investigated Schramm’s Conduct At The Exam And Conducted A Due Process Meeting On December 13, 2013.**

Employee Relations Specialist, Airth Colin, scheduled a due process meeting with Schramm on December 13, 2013 to gather additional information. [JA 519-522]. She and Schramm exchanged a number of calls, and when they finally spoke, she followed the same procedure she had followed in the approximately fifty

cases that she had previously handled: she advised Schramm of the meeting and instructed him to contact the Union if he wished to have representation.<sup>5</sup> *Id.*

The meeting took place as scheduled. *Id.* Employee Relations Specialist Sondra Mower, Cordell, and Schramm attended. [JA 523-524]. The meeting began with Colin explaining that there were three possible outcomes. Schramm **did not** request a steward.<sup>6</sup> [JA 106; 505-510] (Mower). Nor did he mention that he supposedly had called his Union.<sup>7</sup> Instead, Schramm responded by

getting into everything that had happened the day that he was taking his respirator exam. ... He was talking really loud and fast, and I asked him to calm down, to slow down and speak softer because he was really loud. I didn't want someone to think that there was an issue and come in, and he told me that he couldn't slow -- slow down, but he did lower his voice. ... And he just said that he had just wanted to see the doctor, that he had fears, and that he wanted to talk to the doctor about before he went any further. He said

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<sup>5</sup> Schramm claimed he spoke to Sondra Mower. Both Colin and Mower contradicted that testimony and they were corroborated by the Company's phone records. [JA 1080]. Another example of how whenever Schramm's testimony is put to the test for corroborating documents it fails.

<sup>6</sup> Colin took notes of this meeting. [JA 457]. They are not verbatim, but they corroborate the fact that Schramm did not mention the Union until after the meeting was over. As Colin explained, he mentioned it in the office after he completed his statement. At that time, Colin was no longer taking notes.

<sup>7</sup> Schramm's testimony about calling his Union is inconsistent. He testified that he told the Company that he had "called the Union **three** times, I said nobody showed up, I'm here without representation." [JA 301]. When asked to describe the calls, however, Schramm only described **two** calls to the Union. [JA 299; 301]. The inconsistency confirms that Schramm is willing to embellish even small details when he believes it might make his story more impactful.

that he wanted to talk to the doctor to find out if he needed to lie the pre-exam before the exam. ... He said that he wanted to alter the questions so that -- to not -- so that he would fail the test. He didn't want to have to wear a respirator. He wanted the results to come to the point where ... he wouldn't have to wear the respirator.

[JA 524]; *see also* [JA 69-79] (Cordell); [JA 505].

This conversation went on for several minutes. Schramm was asked if he had informed Cordell or any other member of management about his phobia or requested an accommodation. Schramm stated that he did not inform anyone or seek an accommodation. The Company then offered to let him complete the test, but he never agreed to do so. [JA 71; 71-72; 73-74; 544]. He also stated several times that if he did retake the test, he wanted to know how to lie or falsify the results so he would fail.<sup>8</sup> Schramm “said he would do it, but he would lie and at that point, [Cordell] couldn't allow him to take the test and lie. ... [You] have to be honest and forthcoming.” [JA 73; 528-533; 545].

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<sup>8</sup> The ALJ claimed this testimony “appeared to be fabricated”. There was no legitimate basis for this aspersion. Colin's notes contain this statement, and although they have some crossed out words, there are several crossed out words in the document. Moreover, Schramm's testimony that he was “hell-bent” on avoiding the respirator test and obtaining an exemption, whether he passed or failed the examination, confirms Colin, Cordell and Mower's testimony. He would not complete the test in good faith; rather, he would do whatever it took to manipulate the results.

At the conclusion of the meeting, Schramm “thanked” the Company for hearing him out. [JA 107; 536]. He said he would complete a statement, [JA 536-537], and mentioned that he had called the Union but that the Union did not call him back. *Id.* The meeting at that point was already over. *Id.* All involved had left the conference room, and no further questions were asked. *Id.* Schramm completed his statement and left. [JA 178].

**C. Schramm Was Terminated For His Refusal To Take The Required Medical Examination.**

Circus Circus considered Schramm’s case over the next several days. Cordell called Richard Williams, and discussed the matter in more detail. [JA 77; 107-108]. Williams reiterated his request that Cordell code a separation as a layoff so that Schramm would be eligible for rehire if he changed his mind about the exam. *Id.*

Colin and the Human Resources team evaluated Schramm’s conduct and the case. [JA 539-544]. They arrived at the same conclusion: Schramm’s conduct violated Rules of Conduct 4 and 12. [JA 539-541; 724; 262]. He was insubordinate and refused to complete a required physical exam, even stating he intended to falsify results. *Id.* This behavior was unprecedented – Cordell had never seen an employee engage in such behavior – but there were prior discharges for violating Rule of Conduct 12 when employees refused to take drug tests. *Id.*; [JA 855]. Circus Circus therefore made the decision to terminate Schramm’s employment. At the Carpenters

Union's request, Cordell classified the termination as a layoff, "project ended." [JA 180]. Schramm was therefore eligible for rehire. [JA 107-108].

Circus Circus met with Schramm on December 20, 2013. The meeting was attended by Colin, Cordell, Mower, Schramm, and Schramm's shop steward, Jerry Mong.<sup>9</sup> [JA 109-111; 543-544]. As with the due process meeting, Schramm did not offer to complete the medical evaluation. [JA 544-545]. During the meeting Mong asked Schramm if "he had requested a shop steward." [JA 508]. Schramm **did not** claim at that time that he was denied representation at the prior meeting. *Id.* To the contrary, he simply said that no one called him back. *Id.* Mong then asked Schramm why he had not contacted a steward. [JA 728]. Schramm did not respond. *Id.* Schramm was terminated at this meeting.

#### **D. Procedural History And The Decisions Below.**

Schramm filed an unfair labor practice charge on January 22, 2014, alleging that Circus Circus restrained and coerced him from engaging in union and concerted activities.

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<sup>9</sup> Prior to the meeting, Schramm spoke to Mong in the Circus Circus Carpenter's shop, and as Mong testified without contradiction or rebuttal, that Schramm admitted that he did not take the medical evaluation for personal reasons; "he didn't want anybody to know his personal history ... it was against his constitutional right[s]." [JA 786-790].

NLRB Region 28's Regional Director issued an administrative complaint on June 30, 2014. The Complaint contained the following allegations:

- In paragraph 5(b), the General Counsel contended that Circus Circus threatened Schramm in "late November 2013" for complaining about exposure to marijuana smoke.
- In paragraph 5(c), the General Counsel contended that Circus Circus violated Section 8(a)(1) by suspending Schramm on December 10, 2013.
- In paragraph 5(d), (e) and (f), the General Counsel asserted that Circus Circus denied Schramm's request for representation at an investigatory interview.
- In paragraph 5(g), the General Counsel contended that Circus Circus violated Section 8(a)(1) because it discharged Schramm on December 20, 2013.

The General Counsel never amended these allegations.

Administrative Law Judge Mary Miller Cracraft heard the case on October 20-22, 2014. ALJ Cracraft issued her decision on December 30, 2014. She found that Circus Circus violated Section 8(a)(1) of the Act in three ways: (1) threatening Schramm for engaging in concerted activity; (2) denying Schramm's *Weingarten* rights; and, (3) suspending and discharging Schramm due to protected, concerted activity. [JA 897-901].

On February 10, 2015, Circus Circus moved to reopen the record to submit HotSOS records from the entirety of November 2013. *See* [JA 906]. At the hearing, Circus Circus had submitted HotSOS records from November 21, 2013, the date that Tenney specifically testified he recorded the threat into HotSOS. Circus

Circus had no reason to investigate whether Tenney documented a threat on a different day given Tenney's specific testimony, particularly since Tenney's entries for the month of November totaled over 12,000 pages.

The additional records were necessary because the ALJ had concluded that Tenney was simply mistaken about the November 21, 2013 date, even though Tenney himself had testified with certainty. The records proved that Tenney had perjured himself. He *never* made a HotSOS entry reflecting a threat during the entire month of November. [JA 914]. [JA 1061]. The Board denied Circus Circus' motion, claiming that the records were "not newly discovered, nor were they unavailable at the time of the hearing," and that it was "not adequately explained why, with reasonable diligence, the evidence could not have been presented at the hearing." [JA 1066].

Circus Circus excepted to the ALJ's decision on February 12, 2015, noting, among many other things that the ALJ's finding was based on a number of indefensible and unsupported evidentiary inferences. For example, the ALJ failed to discredit the testimony of Tenney, the *only* witness other than Schramm himself who claimed that a threat happened, despite Tenney falsely testifying that he recorded a HotSOS entry reflecting the threat. The ALJ recounted Tenney's testimony as follows:

Although Teeney testified that he made a Hot SOS memorandum regarding the statement at the time of the

meeting, Teeney could not recall the date of the meeting when Cordell stated that maybe Respondent did not need Schramm's services. Teeney testified variously that the meeting occurred at the end of November, before Thanksgiving, possibly the 21st.

Teeney testified that he created Hot SOS tasks for each meeting. The only meetings for which Respondent introduced Teeney's safety meeting notes were for the meetings of November 21 and December 6. It is equally possible that the meeting at issue took place earlier than November 21 at a different safety meeting. It is also possible that Teeney, who made memos to the November 21 meeting, simply mis-remembered the substance of his memo. There is no evidence that employees are able to access past memoranda so no evidence that Teeney was able to refresh his recollection.

Thus, under the circumstances that it is possible that Teeney misremembered the substance of his Hot SOS memo or that his memo is appended to a different meeting, I find the absence of a Hot SOS memo to the effect that a threat was made on November 21 or December 6 does not negate the credible testimony that a threat was made.

[JA 888].

Circus Circus also excepted to the ALJ's finding of a *Weingarten* violation.

The ALJ recounted Schramm's testimony and analyzed the issue as follows:

Schramm told the due process meeting participants that he had called the Union three times but the Union had not called him back and he was at the meeting without representation. This statement constitutes a request for representation. Subsumed in the statement is a reasonably understood request to have someone present at the meeting.

[JA 898].

Circus Circus further noted that the ALJ, in finding that Circus Circus violated Section 8(a)(1) of the Act by suspending and discharging Schramm. The ALJ ignored Schramm's refusal to take the exam and ignored the undisputed testimony of multiple witnesses. She focused on Schramm's subsequent explanation instead, stating:

Respondent claims that Schramm's discharge was not motivated by any protected, concerted activity and puts forth a legitimate business reason for the discharge. Respondent asserts that it would have discharged Schramm in any event because of his refusal to take the respirator mask exam. I find this ground for discharge pretextual. Respondent's RPP specifically provides that an employee has the right to discuss the content of the questionnaire with the contract doctor prior to completing the questionnaire but Schramm was not afforded this opportunity. Respondent was aware of Schramm's request to see the doctor before completing the questionnaire and denied Schramm an opportunity to return to take the test. Thus, when he was suspended, it was still within his appointment time and Schramm told Cordell that he would take the exam right away. Cordell refused and was not interested in the substance of Schramm's conversation. These facts indicate that Respondent was predisposed to discharge Schramm and the motivation had nothing to do with Schramm's respirator test. If the true concern of Respondent was testing Schramm, he would have been allowed to speak to the doctor prior to testing or, at a minimum, sent back for testing while he was within his testing period.

[JA 891].

The Board affirmed the ALJ's ruling on June 15, 2018 in a split decision. Chairman Ring dissented from Members Pearce and McFerran with respect to the majority finding that a *Weingarten* violation occurred. In his view, the evidence did not establish such a violation:

In Chairman Ring's view, the judge and the majority err in finding that Schramm's statements during his December 13, 2013 disciplinary interview amounted to a legally sufficient request. As the majority's discussion reveals, Schramm's efforts to secure a union representative were directed to the Union, not the Respondent. To the latter, Schramm said only that he had unsuccessfully tried to contact the union hall to obtain a representative and that he was attending the meeting without one. He did not tell the Respondent that he would like a representative, or ask the Respondent whether he needed or should have one. He did not request an alternative representative, even though his shop steward worked right across the hallway. Nor did he seek a delay so that a representative could be found. Thus, Chairman Ring would find that Schramm did not make a request that would trigger a Sec. 7 right to a *Weingarten* representative.

[JA 1063].

The Board amended the ALJ's remedy to require that Circus Circus compensate Schramm for his reasonable search-for-work and interim employment expenses, but otherwise confirmed the ALJ's ruling in its entirety. Circus Circus petitioned to vacate the Board's Decision on July 31, 2018.

### **STANDARD OF REVIEW**

Although the Board is, in general, entitled to deference, the Court will not affirm Board decisions that are not supported by substantial evidence, nor will it affirm decisions where the Board has applied the law incorrectly. *See Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011) (vacating Board decision because it was not supported by substantial evidence). In that regard, this Court has noted that it will not uphold an order of the Board when it has “erred in applying established law to the facts of the case.” *Jochims v. NLRB*, 480 F.3d 1161, 1167 (D.C. Cir. 2007).

### **SUMMARY OF ARGUMENT**

The Board’s conclusion that Circus Circus violated the Act by threatening Schramm is not supported by substantial evidence and is contrary to law. Tenney, the only witness to corroborate Schramm’s testimony that a threat occurred, demonstrably lied under oath about recording this threat in HotSOS. The ALJ overlooked this lie by positing that Tenney may have been mistaken about the date or otherwise misremembering facts, when his testimony reflects certainty about the facts he misrepresented. Likewise, the ALJ unreasonably discredited or disregarded the accounts of six witnesses whose testimony rebutted the existence of a threat. In adopting the ALJ’s reasoning, the Board flipped the burden of proof. It did not

require the General Counsel to prove by a preponderance of the evidence that a threat had been made. It required Circus Circus to disprove Schramm and Tenney's fabricated testimony.

The Board's finding that Circus Circus violated Section 8(a)(1) by suspending and terminating Schramm should also be vacated. The General Counsel did not establish a *prima facie* case that Schramm was disciplined due to his protected activity. The ALJ based her decision on a threat that never occurred. More importantly, Even if the General Counsel carried his burden to prove a *prima facie* case, the ALJ misapplied *Wright Line* when assessing Circus Circus' reasons for suspending and terminating Schramm. Circus Circus was only required to show that it reasonably believed that misconduct was committed, and that its subsequent actions were consistent with its policies and practices. *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (2012). Circus Circus carried this burden by demonstrating that the information available created a reasonable belief that Schramm refused to take a mandatory medical examination, and that Circus Circus previously terminated employees who violated that same rule.

The ALJ did not apply this standard. Nor did she hold the General Counsel to his burden of proof. She blindly credited Schramm – without corroboration – and disregarded specific, eyewitness testimony from multiple witness. She then engaged in an analysis of what she would have found relevant to the decision (based on her

interpretation of Schramm's subsequent explanations) and ruled based on her own business judgment, which is improper. *Healthcare Emples. Union, Local 399 v. NLRB*, 463 F.3d 909, 921-922 (9th Cir. 2006) (whether business reasons cited by employer are good or bad is irrelevant). The ALJ did not account for Concentra's report (corroborated by Tejada and Romero), which gave Circus Circus a reasonable belief that Schramm refused a mandatory examination.

The Board's determination that Circus Circus violated Schramm's *Weingarten* rights should also be vacated. Every witness except for the self-interested Schramm stated that Schramm **never** referred to or requested Union representation at the beginning of the due process meeting. Moreover, even if Schramm's testimony is credited, his reference to the unavailability of Union representation does not trigger *Weingarten*. The majority should have reversed the ALJ on this basis, as Chairman Ring indicated in his dissent.

The Board's refusal to reopen the record to allow Circus Circus to submit November 2013 HotSOS records also should be reversed. These records, which were not available during the hearing, showed that Tenney *never* made an entry about a threat during this time, and directly contradicted the ALJ's finding that Tenney could have been mistaken about the exact date of his entry regarding the threat. Had these HotSOS records been submitted, the ALJ would not have been able to avoid the conclusion that Tenney lied under oath. The Board was required

to reopen the record for supplementation of this evidence. *Point Park Univ. v. NLRB*, 457 F.3d 42, 51-52 (D.C. Cir. 2006) (Board must take into account contradictory evidence or evidence from which conflicting inferences could be drawn).

Finally, the Board's proposed remedial order for Schramm to be reinstated with "seniority" cannot be enforced because it is contrary to Board precedent and violates Section 10(e) of the Act. Schramm was a temporary employee whose job assignment would have ended with the completion of the project. The ALJ only had the authority to order Schramm to be reinstated as a temporary employee to the end of the door jam project, not to award reinstatement with any type of seniority. The Board's remedial order should be vacated.

### **ARGUMENT**

#### **A. The Board's Determination That Circus Circus Violated Section 8(a)(1) Of The Act By Threatening Schramm With Discharge Is Not Supported By Substantial Evidence.**

The Board's finding that Schramm was threatened is not supported by substantial evidence. This finding's **only** supporting evidence is the testimony of Schramm and Tenney. The fact that there were more than 20 employees in the room and the General Counsel could find only one other witness should have been telling, because as the Board has acknowledged, the absence of corroboration weighs against a finding that the General Counsel has met its burden of proof. The

weakness of the General Counsel case is compounded by the facts that: 1) six witnesses specifically contradicted Schramm and Tenney, 2) Tenney perjured himself regarding the HotSOS entry, and 3) Tenney and Schramm, despite the fact that they discussed their testimony before the hearing, gave inconsistent accounts of the meeting. It is true that credibility determinations are usually subject to deference. But this is not a credibility issue. At some point, the ALJ's personal belief that two witnesses are credible cannot survive the complete lack of corroboration and contradiction by both contemporaneous documents (the absence of HotSOS) and six other witnesses. That does not satisfy the burden of proof. The ALJ could have and should have called other witnesses.

**1. Schramm And Tenney's Testimony Was Insufficient To Meet The Burden Of Proof.**

Tenney, the **only** witness to corroborate Schramm's testimony that a threat occurred, offered false testimony about recording the threat into HotSOS. Tenney gave detailed testimony describing the HotSOS entry in which he supposedly noted, on November 21, 2013, that "[Cordell] threatened carpenter." [JA 148]. He specifically stated that he made this HotSOS entry using his Blackberry device under his user name, within the work order he created for the meeting. [JA 168-169]. However, Tenney's actual HotSOS records from November 21, 2013 prove that Tenney mentioned **no** such threat. [JA 860]. The specificity and certainty of

Tenney's testimony, which was contradicted by the absence of any mention of a threat in the HotSOS records, mandates the conclusion that he lied under oath.

The ALJ, and by extension the Board, excused Tenney's intentional fabrication for two reasons, neither of which are reasonably defensible or factually supported. First, the ALJ asserted that Tenney was unsure about the date of the meeting and may have appended the threat to a different HotSOS entry in November. [JA 888]. She concluded that since Circus Circus had failed to provide HotSOS records for the remainder of November 2013, it was possible that Tenney simply forgot. *Id.*

But this was simply an improper assumption that his testimony was true. Moreover, Tenney's testimony reflects absolute certainty that the threat occurred at the last Thursday safety meeting *before* Thanksgiving, which was November 21, 2013. [JA 172] (stating "It was a Thursday safety meeting, and it was the last safety meeting before Thanksgiving," making the date November 21, 2013). He maintained this certainty under *questioning from the Administrative Law Judge*. [JA 163] (he knew it was the last weekly safety meeting before Thanksgiving); [JA 171-172] (answering the ALJ and stating that he was sure of the date because he "was there"). Further, while Circus Circus' production of the November 21, 2013 HotSOS records should have been sufficient to prove Tenney lied under oath given

his specific testimony regarding the date, Circus Circus obtained all of Tenney's records from November 2013. They also showed that Tenney made no such notation of a threat. [JA 914].

Second, the ALJ asserted, without factual support, that Tenney's memory may have frayed as a further explanation for his fabrication. [JA 887-888]. Again, this is more than charitable, and it excused the General Counsel from meeting his burden of proof. Moreover, the testimony does not warrant such generosity. Tenney's certainty as to the exact date of the threat, the exact manner in which he entered the threat into HotSOS, and the specific content of his alleged entry simply do not permit a finding that his memory had frayed. Indeed, while the ALJ capriciously cited to Tenney's frayed memory to avoid the conclusion he lied under oath, elsewhere she relied on her determination that Tenney's recollection of the meeting was excellent and "true to the facts." [JA 886].

Moreover, Schramm testified that he spoke to Tenney about the incident, that Tenney stated "I remember the day you were threatened," and went so far as to claim that Tenney told him the *exact log number* of his HotSOS entry. [JA 357-358]. Tenney also spent several hours the weekend before the hearing preparing with Counsel for the General Counsel *at Tenney's house*. [JA 151-152]. There is no

factual support for the ALJ's conclusion that Tenney's memory had faded on this issue, and a reasonable finder of fact *must* conclude that he lied under oath about his HotSOS entry.

Turning to Schramm, his testimony was, in many respects, inherently implausible. For example, while Schramm claimed that Cordell threatened him on November 21 and that he believed the threat was serious, [JA 329-332], Schramm did not report the threat to his shop steward Mong during a conversation later that day specifically addressing his concerns about marijuana smoke. *Id.* Schramm did not mention the threat during his December 13th meeting with HR, did not raise it in his December 13th statement, and did not raise it at the meeting on December 20th when he was terminated. If such a serious threat actually occurred, Schramm certainly would have mentioned it at some point during this process as a cause of his suspension and termination. *See, e.g., E.B. Malone Corp.*, 273 NLRB 78, 80 (1984) (it was "inconceivable" that an employee would have failed to raise a potentially exculpatory fact during his "discharge interview").

Even worse, in a search to find something to corroborate her personal belief that Schramm and Tenney were credible, the ALJ grasped on grounds that are neither reasonably defensible nor supported by the record. The ALJ stated that Schramm and Tenney were credible because they had not heard each other's testimony. But the implication of this assertion, that the two witnesses arrived at their recollections

independently, is contradicted by the record. *See* [JA 356-358] (Schramm describing multiple conversations with Tenney about the Charge, their version of events, and whether Schramm was pursuing legal action). Tenney stated specifically that Schramm contacted him as a witness when he filed the unfair labor practice charge and that they had discussed the supposed “events” in detail, and Schramm confirmed that he and Tenney had a “private discussion about [bringing a claim] to OSHA.” [JA 333]. The ALJ also credited Schramm and Tenney’s testimony due to their recollection and the synchronicity of their testimony. But their testimony was filled with logically incompatible statements. For example, their descriptions of their relative seating positions were identical, and thus impossible—each stated that the other was seated directly in front and to the left of himself. [JA 155-156; 341].

**2. The ALJ Unreasonably Disregarded All Testimony Rebutting Schramm And Tenney’s Narrative.**

Six witnesses—Cordell, Aaron Nelson, Henry Simms, Brian Machala, Tim Cole, and Gerardo Tejada—rebutted Schramm’s claim that he was threatened by Cordell in the November 21st meeting. Despite the extremely memorable nature of the alleged threat, *none* of these witnesses recall Cordell becoming red in the face or threatening Schramm. Although the ALJ, and by the extension the Board, had no problem with Tenney and Schramm’s inability to recall dates with specificity, she hypocritically discounted the testimony of Tejada, Cole, Simms, and Nelson for the same reason. [JA 886] (“They could not identify when the meeting they attended

took place.”). Moreover, Schramm’s assertion that he had a dialogue with Cordell about marijuana smoke at only **one** of these meetings, when the alleged threat occurred, when combined with the witnesses’ recollection of the marijuana discussion, confirms that the witnesses were present. [JA 280-284]. *Id.*<sup>10</sup> How could the ALJ reasonably discredit multiple witnesses’ consistent testimony based on uncertainty about the date of the meeting, yet *credit* Tenney’s demonstrably false testimony, and find that the General Counsel met his burden of proof, on this same basis?

Further, while the ALJ found that Machala was present at the relevant safety meeting, she dismissed his and other witnesses’ testimony for lack of specificity on the basis that “this was just another weekly safety meeting,” but for Tenney and Schramm it was “a memorable occasion.” [JA 886]. This is, as this Court noted in *Jackson Hospital*, “speculation without a jot of evidentiary support in the record.” 647 F.3d 1142. If Cordell actually threatened Schramm in the alleged manner, these witnesses would certainly have recalled that occurring because it would have made the meeting extremely unusual. Indeed, Cole testified that Cordell’s usual

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<sup>10</sup> See Cole [JA 799-802] (recounting the same meeting that was described by Schramm and Tenney, but rejecting the notion that Cordell turned “red” or otherwise became upset); Tejada [JA 838-842] (discussing the meeting and Rafe’s presence); [JA 844] (denying that Cordell turned red and stating, in contradiction to Schramm, that he had “never seen him explode”); Nelson [JA 497] (describing the interchange between Schramm and Cordell and noting that Cordell never became upset).

demeanor, which was “very smiling and happy,” was no different at the meeting, and his face never turned red. [JA 802]. Machala, the only witness to specifically recall any frustration by Cordell at that meeting, did not recall Cordell’s face turning red in anger. [JA 821-825]. It is inconceivable that Cordell could have erupted in anger in the way that Schramm and Tenney described, threatened an employee with termination in front of 15 to 20 other employees, and that none of the other witnesses would have heard or recalled it.

**3. The General Counsel Did Not Carry Its Burden Of Proof To Show A Threat Occurred, And The ALJ Improperly Shifted This Burden To Circus Circus.**

Several further facts show the General Counsel did not carry his burden of proof to show a threat occurred, in addition to the testimony above. First, the General Counsel cannot have satisfied his burden of proof with an individual who knowingly perjured himself on a material issue, as Tenney did. After Tenney’s testimony was discredited, the General Counsel let the HOTSOS records which impeached Tenney go unchallenged and un rebutted. Tenney was not recalled to say he misremembered or that perhaps he was unsure. The ALJ’s decision to excuse Tenney from a material fabrication about the meeting at issue, and still credit his testimony as corroboration, cannot be justified.

Second, the lack of credible corroboration for Schramm’s testimony (aside from Tenney’s testimony, which should never have been credited) cannot be

ignored. *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, 832-833 (1985)). Indeed, there were several other witnesses who could have corroborated Schramm’s testimony about the November 21 meeting if it were true, including Andrew Saxton, who is a former employee and who has remained in contact with Schramm. [JA 326; 338; 356]. But the General Counsel did not call or subpoena any of them. The failure to call other witnesses to corroborate Schramm’s version of events weighs heavily against any finding that the General Counsel satisfied his burden of proof. *See, e.g., W. Irving Die Casting of Ky.*, 346 NLRB 349, 352 (2006) (*citing C&S Distributors*, 321 NLRB 404, fn. 2 (1996)). In fact, given the close relationship between Saxton and Schramm, the failure to call Saxton warranted an adverse inference. *See Daikichi Corp.*, 335 NLRB 622, 623 (2001) (entering adverse inference).

Third, Schramm testified that Tenney gave him the HotSOS work order number and that he still had the work order number “in his records.” [JA 356-358]. If that were true, one would expect the General Counsel to recall Schramm during the hearing to provide that work order number, and remove any doubt about the existence of the record. The General Counsel’s conspicuous failure to call Schramm and Tenney to dispute the HotSOS records creates even further certainty that Tenney

fabricated his testimony. Indeed, the General Counsel did not even recall Tenney to state that his HotSOS record may have been “appended to a different meeting” as suggested by the ALJ, and her finding on that point was unsupported by the record. Nonetheless, the ALJ somehow found that the General Counsel met his burden of proof with respect to the threat because Circus Circus failed to rebut testimony that the General Counsel never offered.

Finally, the ALJ’s reliance on the absence of HotSOS records for the entirety of November 2013 improperly shifted the burden to Circus Circus to prove a threat did *not* occur. The ALJ shifted the burden of eliminating all possibility that the threat was made to Circus Circus, which was contrary to law. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975) (the General Counsel’s burden to establish each element of its contention “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.”); *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) (“The mere disbelief of testimony establishes nothing”).

**B. The Board's Misapplied *Wright Line* In Determining That Circus Circus Violated Section 8(a)(1) of the Act By Suspending And Terminating Schramm.**

The ALJ's finding that Circus Circus violated Section 8(a)(1) of the Act by suspending and terminating Schramm was erroneous. The General Counsel failed to establish a *prima facie* case. With respect to the SPI, this Court has previously found that brief administrative suspensions for the purpose of investigation do not constitute adverse employment actions and therefore cannot establish a violation of Section 8(a)(1) of the Act. *See Bellagio, LLC v. NLRB*, 854 F.3d 703, 711 (D.C. Cir. 2017).

Even if that were the case, the mere fact that Schramm allegedly engaged in protected activity in the month before his suspension and subsequent termination is not, on its own, sufficient. *See Neptco, Inc.*, 346 NLRB 18, 20 (2005) (“mere coincidence [in time] is not sufficient evidence of [union] animus”). There is **no** intrinsic connection between Schramm's comments during the November 21 meeting and his subsequent suspension and termination. Both events arose independently in a way that neither Circus Circus nor anyone else could have predicted. *See Jackson Hospital Corp.*, 647 F.3d 1142 (vacating Board decision for unjustifiably inferring the existence of a conspiracy). This is especially true where, as outlined above, the alleged threat in relation to Schramm's complaint never actually occurred. The General Counsel cannot meet his burden under *Wright Line*

because, in the absence of the alleged threat, the evidence is not “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” *Wright Line*, 251 NLRB at 1089.

Assuming for the sake of argument that a *prima facie* case was made, employers can defeat an unfair labor practice allegation by producing “evidence of a ‘good’ reason for the discharge.” *Wright Line*, 662 F.2d at 904-907. The employer satisfies this if two elements are met: 1) “management reasonably believed those actions [constituting the misconduct] occurred,” and 2) “the disciplinary actions taken were consistent with the company’s policies and practice.” *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d at 435-36. The first element is solely focused on the employer’s reasonable belief, and if met, “then [the employer] could meet its burden under *Wright Line* regardless of what actually happened.” *Id.* The ALJ erroneously failed to engage in the two-part *Sutter* analysis.

First, the information available to Circus Circus clearly created a reasonable belief that Schramm intentionally refused to take the mandatory test. Concentra representatives, who were corroborated by Tejada and Romero, informed Beeman and Simms that Schramm flatly refused to participate in the required process, who

in turn conveyed this information to Cordell. [JA 437-439; 440; 477; 260; 261]. Cordell was informed that Schramm “refused to go through the evaluation.” [JA 62].<sup>11</sup>

The ALJ engaged in a detailed factual inquiry of what may have actually happened at Concentra on December 10, wherein she disregarded the testimony of Romero and Tejada while crediting Schramm’s hearing testimony about “his intentions” in refusing to take the examination and what he told management in subsequent meetings. [JA 890]. She then based her legal conclusions on her interpretation of these facts, which was error. [JA 900-901].

An employer may “rel[y] on reports” reflecting the employee’s conduct, and “[w]hether the ALJ believes the reports are accurate or **whether [the employee] actually engaged in the [conduct] is largely immaterial to whether [the employer] reasonably believed she did.**” *Sutter*, 687 F.3d at 436 (emphasis added). Rather than analyzing what Circus Circus reasonably believed, the ALJ erroneously attempted to piece together what actually happened, an inquiry which *Sutter* explicitly stated is improper. 687 F.3d at 435-36. (“Rather than applying the *Wright*

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<sup>11</sup> Concentra’s report gave Circus Circus a reasonable belief as to Schramm’s refusal, whether its contents were true or not. However, the report was clearly accurate. Witnesses Romero and Tejada unequivocally testified that Schramm loudly refused to proceed with the examination with Concentra on December 10. [JA 829-830; 832; 848]. Further, Schramm was, **in his own words**, “hell-bent” on exempting himself from the examination. [JA 386].

*Line* test by examining [management’s] reasonable beliefs and how those beliefs might have informed his disciplinary decisions, the ALJ simply reached factual conclusions as to what actually happened”). The ALJ based her decision on events that arose after Schramm’s initial refusal to take the test, such as Schramm’s attempts to explain why he refused the test, even unilaterally referencing the ADA based on conditions Schramm subsequently revealed. [JA 894-895; 900]. These issues are irrelevant because Circus Circus’ reasonable belief that Schramm intentionally refused the test was already established (based on Concentra’s report) prior to these events. *Sutter* requires no further investigation on the employer’s part, and no further inquiry by a factfinder—once this reasonable belief is established, the employer may then take any action consistent with its policies and practices based on this belief. 687 F.3d at 436 (the “failure to investigate the matter in a specific way seems to be the foundation for the ALJ’s conclusion, but an employer is not required to investigate in any particular manner”) (citing *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006)).<sup>12</sup>

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<sup>12</sup> Even if Schramm’s subsequent statements were relevant, they would not alter Circus Circus’ reasonable belief and decision. During Circus Circus’ investigation, Schramm stated that he intended, if allowed to take the test, to lie or otherwise falsify the results in order to avoid wearing a respirator mask. [JA 73; 528-533; 545]. Schramm himself conceded that he planned to do whatever it took, including intentionally failing tests, to obtain an exemption. [JA 354-355]. Circus Circus could not allow Schramm to take the test if he intended to lie. [JA 73-74].

Second, the ALJ did not analyze whether Circus Circus' disciplinary action was consistent with its policies and practice as required by *Sutter*. Simms testified that no one had ever refused to complete the exam during his thirty-year career at Circus Circus, which reflects the blatant and extraordinary nature of Schramm's actions. [JA 474-476]. In the absence of identical comparators, Circus Circus presented evidence that three other employees were suspended and terminated when they violated Rule 12 by failing to submit for a mandatory drug analysis. [JA 539-541; 716]. Circus Circus' decision to suspend and terminate Schramm was entirely consistent with its policies and practices. The ALJ's inquiry and finding was inconsistent with the required analysis, not defensible, and should not have been adopted by the Board.

Indeed, in another case involving employees who refused to complete medical evaluations related to respirator use, the Board held that the employees' refusal to complete the test – even if that refusal was based on protected activity protesting safety conditions – warranted termination and dismissal under *Wright Line*. *L&BF, Inc.*, 333 NLRB 268, 269-272 (2001) (employer was obligated to conduct medical evaluations and fit testing under OSHA regulation 29 C.F.R. § 1910.134, and it was justified in terminating employees who did not take the exam). The Board offered a detailed rationale for its holding in *L&BF*, which wholly applies here:

In refusing the demand to undergo testing, the employees were attempting to remain on their jobs while refusing to

work on terms lawfully prescribed by Respondent. *Bird Engineering*, 270 NLRB 1415, fn.3 (1984). “It is well established that a partial refusal to work constitutes unprotected activity. Both the Board and the courts have repeatedly condemned employees’ refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs. As the Board has said, to countenance such conduct would be to allow employees ‘to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment.’” *Highlands Medical Center*, 276 NLRB 1997 (1986). See also *Cambro Mfg. Co.*, 312 NLRB 634 (1993). The employees refused to obey their employer’s lawful request in so doing, they were attempting to set their own terms and conditions of employment, activity that is not protected by the Act.

*L&BF*, 333 NLRB at 72. Without any explanation, the Board held the complete opposite in this case. “[A]n unexplained divergence from [the Board’s] precedent would render a Board decision arbitrary and capricious.” *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1074 (2016) (citing *Teamsters Local Union Nos. 822 & 592 v. NLRB*, 956 F.2d 317, 320 (D.C. Cir. 1992)).

**C. The Board Erred In Adopting the ALJ’s Finding That Circus Circus Violated Schramm’s *Weingarten* Right.**

**1. The ALJ’s Finding That Schramm Requested A Union Representative Prior To The December 10th Meeting Was Not Supported By Substantial Evidence.**

In *NLRB v. J. Weingarten*, 420 U.S. 251, 256-60 (1975), the Supreme Court held that an employee is entitled to representation during an interview by employer

representatives if the employee reasonably believes that the interview may result in discipline. In order to invoke this right, the employee must affirmatively request representation. *Id.* at 257.

The record shows that Schramm did not even mention the issue of Union representation until after the December 10th meeting concluded. Three individuals, in addition to Schramm, attended this meeting: Mower, Colin, and Cordell. [JA 70; 390]. Mower testified that Schramm did not request a Union representative at the meeting, and only referred to representation at the end of the meeting when he stated he contacted the Union but never got a response. [JA 506]. No questioning occurred after that point, as the meeting was adjourning. *Id.* Cordell testified that Schramm did not request Union representation during the meeting. [JA 808-809]. Colin's notes, taken contemporaneously during this meeting, do not reflect that Schramm requested Union representation. [JA 547]. Even Schramm's own Union steward Jerry Mong, who discussed these events with Schramm in detail after the fact, stated his understanding that Schramm had *never* asked for his representation. [JA 791].

Schramm testified that, at the beginning of the meeting, he stated: "I called the Union three times, I said nobody showed up, I'm here without representation." [JA 301]. While he later claimed that he explicitly "told Sondra I wanted the Union here," the ALJ did not credit this testimony, [JA 354; 895], and a variety of circumstances rebut or call into question Schramm's testimony. Schramm conceded

“I know enough to contact the Union. . . . I’ve been an active member for many years. I understand it.” [JA 344]. Likewise, Schramm’s written statement regarding this meeting does not mention the Union’s alleged failure to contact him or any denial of his *Weingarten* rights, whereas Schramm was careful to place abbreviations on his discharge notice: “WOC – Without Counsel” and “UD – Under Duress.” *See* [JA 178; 180].

The only support for the claim that Schramm requested Union representation during the December 10 meeting is his own inconsistent and self-serving testimony, which even the ALJ did not fully credit. All other testimony rebuts Schramm’s claim. Considering the record as a whole, the only reasonable conclusion is that Schramm did not refer to Union representation until *after* the December 10 meeting, and thus his *Weingarten* rights were not violated.

**2. The ALJ’s Finding That Circus Circus Violated *Weingarten* Following Schramm’s Reference To The Unavailability Of Union Representation Was Contrary To Law.**

Even if Schramm’s reference to Union representation was, as the ALJ found, made at the beginning of the meeting, it was not legally sufficient to trigger *Weingarten*. When

an employee requests a representative who is unavailable, the employer can deny the request and is not required to postpone the interview, secure an alternative representative, or otherwise take steps to accommodate the employee’s specific request. **The Board has held that in such circumstances the employer has the ... obligation**

**to request an alternative representative in order to invoke the *Weingarten* protections.**

*Montgomery Ward & Company*, 273 NLRB 1226, 1227 (1984) (emphasis added) (citing *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977)). “[T]here is nothing in the Supreme Court’s opinion in *Weingarten* which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible.” *Coca-Cola*, 227 NLRB at 1276-1277. The right to conduct such interviews “without delay is a legitimate employer prerogative.” *Id.* at 1276.

Indeed, Schramm’s statement (“I called the Union three times, I said nobody showed up, I’m here without representation”) is not the type of affirmative request for representation required by Board precedent. *Weingarten* is not *Miranda v. Arizona*, 384 U.S. 436 (1966). A statement that he lacked representation is not a request for representation, nor is it a request that the employer stop the interview. However, even if interpreted as an affirmative request, this statement is a request **coupled with the indication that the requested representation is unavailable.** *Montgomery Ward* and *Coca-Cola* explicitly state that under these circumstances, Schramm was required to request alternate representation in order to invoke *Weingarten* protections, which he did not do.

While the Board has found that an employee is not required to use “magic words” to invoke *Weingarten*’s protection, the cases cited in the ALJ’s decision, and indeed, the Board’s leading precedent on the issue, all involve an employee who made an affirmative request that “somebody” be present to assist, which Schramm did not do. *See, e.g., Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977) (employee invoked by saying “I would like to have someone there that could explain to me what was happening”); *Circuit-Wise, Inc.*, 308 NLRB 1091, 1108-1109 (1992) (employee’s request for “someone” to be present during an interview was sufficient to invoke the *Weingarten* right); *General Die Casters, Inc.*, 358 NLRB 85 at 36-41 (July 25, 2012) (employee statement that he may “need to get someone else in here” because he had been given a warning for something he did not understand was sufficient).

The Board acts arbitrarily and capriciously when it engages in “an unexplained divergence from [its own] precedent.” *Fort Dearborn Co.*, 827 F.3d at 1074. It was error for the majority to adopt the ALJ’s finding that Circus Circus violated Schramm’s *Weingarten* rights.

**D. The Board Erred In Denying Circus Circus’ Request to Reopen the Record To Submit Evidence Conclusively Showing That Tenney, The Only Witness Who Corroborated Schramm’s Allegation Of A Threat, Lied Under Oath.**

The Board’s denial of a request to reopen the record constitutes an abuse of discretion where its “findings of fact are not supported by substantial evidence in the

record considered as a whole.” *Point Park Univ. v. NLRB*, 457 F.3d 42, 51-52 (D.C. Cir. 2006). A court “may not find substantial evidence merely on the basis of evidence which in and of itself justified [the agency’s decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Id.* (quotations omitted).

The Board erred in denying Circus Circus’ request to reopen the record to submit HotSOS records from the entirety of November, which showed that Tenney *never* made an entry about a threat during this time. [JA 914]. These HotSOS records directly contradicted the ALJ’s finding that Tenney could have been mistaken about the exact date of his entry regarding the threat, which is the sole basis on which she avoided the conclusion that Tenney lied under oath.

Plainly, hearing records should not be reopened lightly. Litigation would never end. But at the same time, Circus Circus does not have the burden of proof in this case. The Government does. Nor is Circus Circus obligated to establish a record that is free of reasonable doubt by searching through 12,000 pages of records as to the entire month of November 2013. This was not a situation where an employer was negligent in supplying evidence. To the contrary, it provided all HotSOS records relevant to the testimony presented at the hearing. Circus Circus requested that the record be reopened *only* because the ALJ went outside the record and used

her own supposition and speculation to credit a witness who specifically and intentionally perjured himself. The Board should have granted Circus Circus' motion to do so.

**E. The Board's Recommended Order To Reinstatement Schramm With Seniority Violates Section 10(e) Of The Act And Cannot Be Enforced.**

The Board's proposed remedial order for Schramm, a temporary employee, to be reinstated with "seniority" cannot be enforced. It is contrary to Board precedent and violates Section 10(e) of the Act. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142-1143 (7th Cir. 1992); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (orders must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences" of the identified unfair labor practice); *Two Wheel Corp.*, 218 NLRB 486, 487 (1975) (modifying ALJ remedial order because employee was a temporary employee); *compare Nelson Mfg. Co.*, 138 NLRB 883 (1962) (reinstating temporary employee to full time position because employer had specifically informed the employee that it intended to keep him on as a full time employee).

As the ALJ found, Schramm was a temporary employee who was assigned to a specific project involving door guards. [JA 881; 275-278]. The ALJ lacked the authority to order Circus Circus to reinstate a temporary employee who had no seniority under the applicable collective bargaining agreement to a full-time position with seniority. *See* [JA 213] (limiting hiring to 180 days); [JA 83]. Schramm was a

temporary employee whose job assignment would have ended with the completion of the project, and the ALJ had no authority to order anything beyond reinstatement as a temporary employee to the end of the door jam project, and if the project were complete, back pay through the project completion date.

### **CONCLUSION**

For the reasons set forth above, Circus Circus' Petition to Vacate the Board's June 15, 2018 Decision and Order should be granted.

Dated this 16th day of May, 2019.

JACKSON LEWIS P.C.

By:           /s/ Paul T. Trimmer          

Paul T. Trimmer  
300 South Fourth Street  
Suite 900  
Las Vegas, Nevada 89101  
Telephone: (702) 921-2460  
Facsimile: (702) 921-2461  
*Attorneys for Employer*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, I certify that this Final Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Final Opening Brief contains **12,771** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Final Opening Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Final Opening Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 16th day of May, 2019.

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer

Paul T. Trimmer  
300 South Fourth Street  
Suite 900  
Las Vegas, Nevada 89101

**CERTIFICATE OF SERVICE**

In addition to filing this **FINAL OPENING BRIEF** in the above captioned matter via the Court's electronic filing system, we hereby certify that copies have been served this 16th day of May, 2019, by First Class Mail or email, upon:

Cornele A. Overstreet  
National Labor Relations Board  
Region 28  
2600 N. Central Avenue, Suite 1400  
Phoenix, Arizona 85004-3019

Linda Dreeben  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570-0001

Michael Schramm  
3125 West Warm Springs Road  
Unit 1627  
Henderson, Nevada 89014

Daniel M. Shanley  
DeCarlo & Shanley, P.C.  
533 S. Fremont Ave., 9th Floor  
Los Angeles, California 90071-1706

Richard Williams  
Southwest Regional Council of Carpenters  
Local 1977  
501 North Lamb Boulevard  
Las Vegas, Nevada 89110

/s/ Paul T. Trimmer  
An Employee of Jackson Lewis P.C.