

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

DELTA WESTERN, INC.,

and

Cases 19–CA–217975

LEO ESTRADA DACIO,
an individual.

Ryan Connolly, Esq.,
for the General Counsel.
Christopher L. Hilgenfeld, Esq. (Davis Grimm Payne & Marra),
for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, ADMINISTRATIVE LAW JUDGE. Leo Estrada Dacio, an individual (the Charging Party or Dacio), filed the original charge in this case on April 5, 2018,¹ an amended charge on May 4, and a second amended charge on June 29. The Regional Director at Region 19 issued the original complaint on September 24 and issued an amended complaint on January 4, 2019 (collectively the complaint). (General Counsel Exhibits 1(g) and 1(n).)² The Respondent Delta Western, Inc.³ (Respondent or Employer) answered the complaint on October 5, and amended its answer on January 9, 2019, generally denying that its failure to re-hire Dacio in January and March 2018 was due to his union or protected concerted activities. (GC Exhs. 1(i) and 1(p).)

¹ All dates in 2018 unless otherwise indicated.

² Abbreviations used in this decision are as follows: “Tr.” for the transcript; “GC Exh.” for General Counsel’s exhibit; “GC Br.” for the General Counsel’s brief; “R. Exh.” for Respondent’s exhibit; and “R. Br.” for the Respondent’s brief. Although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

³ The complaint also named North Star Petroleum, Inc. as a joint employer but the amended complaint eliminated North Star Petroleum, Inc. as a party to this action. Thus, North Star Petroleum, Inc. is no longer a party to this matter. Tr. 11–12; GC Exh. 1(n).

This case involves the Respondent’s discharge of Charging Party Dacio on November 30, 2017, after he failed a random drug test and had tested positive for both amphetamine and methamphetamine. (R. Exhs. 7 and 9.) In January, after Dacio completed a return-to-work program in Anchorage, Alaska, with a substance abuse specialist selected by Dacio, no open position was posted by Respondent until March when Dacio applied. Rather than admitting his failed drug test in connection with his job termination in November 2017, Dacio wrote in his March 13 job application that he had an “unjust termination of employment” and Dacio further explained that he “was still working with [Respondent] up to 11/30/2017 when [he] was suddenly terminated . . . [and that he] went to Anchorage, AK to have [his] case cleared and it was cleared on 01/25/2018.” (Tr. 173–174; R. Exh. 11 at 2 and 6.) Dacio’s statements are untrue.

Respondent also denies that Dacio was engaged in union or protected concerted activities of any kind near the time when he was discharged in November 2017 or in January or March 2018, when he was not rehired by Respondent. More importantly, even if Dacio was engaged in union or protected activities of any kind, Respondent argues, that its refusal to rehire Dacio in March 2018 was based entirely on Dacio’s prior violation of Respondent’s drug and alcohol policy—his failed drug test—and Dacio’s failure to accept responsibility or accountability for these actions in his March 13 job application for a DOT driver dock attendant position handling very dangerous and hazardous volatile petroleum products in a harsh environment. Respondent’s decision not to rehire Dacio was unrelated to any union or protected concerted activity as the union Dacio helped organize in 2014–2015 was de-certified by July 18, 2016, and there is no evidence of any additional union activities or union support attributable to Dacio after July 18, 2016.

This case was tried in Unalaska, Alaska, on February 6, 2019. Closing briefs were submitted by the General Counsel and the Respondent on March 29, 2019.

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that at all material times, it was a State of Washington corporation with offices and places of business in Dutch Harbor and Anchorage, Alaska (Dutch Harbor facility and Anchorage facility, respectively), other Alaska location terminals, and Seattle, Washington (Seattle facility), has been engaged in the retail sale and distribution of petroleum and petroleum-related products. Respondent further admits, and I find, that in conducting its operations described above during the 12 months ending January 4, 2018, Respondent provided services valued in excess of \$50,000 to points outside the State of

⁴ The transcript in this case is mostly accurate, but I correct the transcript (Tr). as follows: Tr. 89, line (l.) 23: “GC Exh. 3” should be “R. Exh. 3;” Tr. 138, l. 8: “employer” should be “employee;” Tr. 140, l. 21: “Mr. Dacio” should be “Mr. Tajon;” Tr. 141, l. 5: “Mr. Dacio” should be “Mr. Tajon;” Tr. 147, l. 18: “No admission” should be “With no objection;” Tr. 162, l. 22: “leave” should be “lead;” Tr. 173, l. 20: “RDOT policies” should be “our or Respondent’s DOT policies;” and Tr. 174, l. 17: “DOAT” should be DOT.”

Washington. I further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's General Business Operations and Its Employee Drug Use Policy

5 Respondent is engaged in the delivery and transportation of petroleum products—fuel, gas, and lubricants throughout Alaska. Its products are very dangerous, volatile, and highly hazardous and subject to various safety rules and regulations issued by the United States Department of Transportation in the State of Alaska (DOT). Respondent's corporate office is in Anchorage and it also has 4 field terminals in southeast Alaska and 4 in western Alaska
10 including one in Dutch Harbor, Unalaska, Alaska. (Tr. 130.)

At Respondent's Dutch Harbor facility, Respondent delivers the petroleum products and gas to fishing boats and vessels at docks and Respondent's terminal, Respondent's small gas station, the airport, and residences throughout the community. Respondent has one fuel dock with three stations to fuel boats. Respondent also has fuel trucks that drive to other docks to fuel
15 boats. (Tr. 192–193.)

Respondent driver dock attendant employees deliver this fuel to Respondent's residential and commercial customers at Dutch Harbor. (Tr. 131, 193.) It is a DOT-regulated position that requires a CDL class B license with an X endorsement to operate fuel trucks and the flatbeds that are governed under DOT safety regulations. *Id.* The driver/dock attendant also services the Coast
20 Guard boats and ships and the position also receives product and has related paperwork for all tasks. *Id.*

Dacio held the position of driver dock attendant when he started work with Respondent in November 2008 and was later promoted to night lead driver dock attendant in 2013 or 2014. (Tr. 31.) Respondent's Dutch Harbor facility runs 24 hours and the night shift at Respondent that
25 Dacio worked goes from 4 p.m. to at least 1 a.m. (Tr. 34, 193.)

Dacio is a college-educated individual with a 3.0 grade point average at a school in the Philippines. (Tr. 107.) While English is his second language, Dacio communicated well and easily in English and read and understood English as part of his position filling out paperwork as the night lead driver and meeting with Respondent's customers who only spoke English. (Tr. 72,
30 107.)

As a driver dock attendant and as night lead driver, Dacio handled hazardous materials for Respondent as a normal and common part of his job. (Tr. 83.) Dacio was trained on the proper methods of handling hazardous materials and he was also trained regarding the static electricity issues involved in a fuel tank and Dacio admitted that a fuel tank can explode "if there
35 is static electricity in the fuel tank." (Tr. 83.)

Dacio also admits that there are a lot of dangerous aspects to the job as a driver dock attendant. (Tr. 84.) The position requires a high amount of accountability and responsibility in the job. Id. Dacio further admits that part of the accountability in the job is accepting when an employee is wrong and acknowledging that they have been wrong. Id.

As a driver dock attendant, Dacio is required to report all major incidents even if an accident does not occur directly with Respondent's pipeline. (Tr. 84.) He also admits that failing to report an incident can lead to termination. (Tr. 85.)

Dacio was hired by Respondent at its Dutch Harbor facility in November 2008 before he was terminated on November 30, 2017, for failing a random drug test. (Tr. 31, 68; R. Exh. 9.) In 2008, Respondent's Dutch Harbor facility employed less than 8 total employees. (Tr. 35.) When Dacio stopped working at Respondent's Dutch Harbor facility in November 2017, Respondent had 15 employees. (Tr. 35-36, 131.) There is a site manager, a marketing manager, 2 office staff people, a foreman, a night lead, and the remaining 9 employees at Respondent's Dutch Harbor location are driver dock attendants. (Tr. 131.)

Dutch Harbor is in Unalaska, Alaska, and is one of the westernmost of Alaska's Aleutian Islands near the Bearing Sea. Large fishing operations take place seasonally in Dutch Harbor from January to April mostly for cod and pollack and from May to October/November for other fish. I take administrative notice and have personal experience that Dutch Harbor has a harsh environment where the weather can easily cause dangerous driving conditions and communications are spotty and staying vigilant and accountable while working under these conditions is necessary and most prudent.

Robin Marquez (Marquez) started work with Respondent in 2011 as a driver dock attendant. (Tr. 112.) Marquez later succeeded Dacio in the position of night lead driver in December 2017 after Dacio was terminated for his failed drug test. (Tr. 112-113.) Marquez agrees that in the driver dock attendant position, safety, reliability, and accountability are all important. (Tr. 123.)

Tim Hunter (Hunter) is Respondent's Dutch Harbor facility site and operations manager for 12 years and Respondent's most senior employee on the island for Respondent. (Tr. 34, 191-192.) Manager Hunter's duties include running the facility, watching out for the infrastructure, assisting in recruitment, hiring and disciplining Dutch Harbor employees, making sure that Respondent has the proper number of employees, taking care of customers, and running things safely and efficiently. (Tr. 192.) Manager Hunter opined that safety is Respondent's number one priority. Id.

Liane Myers (Myers) is Respondent's head of human relations (HR) and its HR director since 2014 after she was an HR manager from 2001-2013.⁵ (Tr. 129-131.) Myers is responsible or involved with supervising all of Respondent's HR department matters, recruiting, hiring,

⁵ Myers took a leave of absence from Respondent from June 2013 through December 2013. Tr. 130-131.

disciplining employees, benefits, and distributing Respondent's policies to employees. (Tr. 129131, 133.)

5 Respondent's hiring process is conducted online since at least 2014 and begins when there is a job vacancy with Respondent posting a requisition on its online applicant tracking system. (Tr. 132.) Before a vacant position is posted online, however, a draft requisition is routed by email from Myers to the hiring manager, the position supervisor, and the Respondent's president for their input and approval. Id.

10 Once a requisition is approved, by email, Respondent will post it active on the applicant tracking system and that automatically feeds employment websites such as Indeed, Glassdoor, and the Veterans' Job Bank. (Tr. 132.) Respondent also posts job openings in Dutch Harbor locally at the Alaska Department of Labor, the local job bank, Craigslist, and TV and radio advertising. Id.

15 Myers is always part of Respondent's hiring process along with the local hiring manager which in Dutch Harbor is Manager Hunter. (Tr. 132, 203.) They also work together when disciplining employees at Dutch Harbor. (Tr. 133.) Hunter does not see all employment applications as Myers makes the first review to streamline the process for the managers. (Tr. 203–204.) Myers and Hunter decide who gets interviewed, however, and who Respondent eventually hires for open positions at Respondent in Dutch Harbor. Id.

20 Respondent also has a zero tolerance drug and alcohol policy that is distributed to all employees when they are first hired and signed off by all employees acknowledging that they have knowledge of and will comply with Respondent's drug and alcohol policy at all times. (Tr. 137; R. Exh. 6.) Basically, this policy mirrors the same policy from the DOT and provides that:

25 because Respondent's work is handling, moving, and transporting hazardous petroleum products, all employees are not to use any drugs or alcohol that are not pre-approved by a physician and known to Respondent.

(R. Exhs. 2–6.)

30 Employees are tested for drug and alcohol prior to employment, randomly at least once a year during employment, post-accident, and on a reasonable suspicion. (Tr. 137.) Dacio was aware of these policies and that all unapproved and illegal drug use at Respondent was prohibited. (Tr. 87, 92.)

35 Dacio was also aware that if he was taking a prescription drug, he was required by Respondent and the DOT to have his doctor fill out a form and submit it to Respondent for approval prior to use. (Tr. 92.) In fact, in May 2015, Dacio filled out Respondent's form under its drug and alcohol policy and had his dentist return it to Respondent saying that Dacio was being prescribed Norco for pain for an upcoming dental procedure, that the Norco will adversely affect Dacio's ability to safely perform his work duties, Dacio should not be permitted to work in a safety-sensitive position while taking the Norco medication, and that Dacio can go back to work if he is not taking the Norco. (Tr. 139; R. Exh. 8.) Moreover, Dacio knew that by failing to

follow this preapproval medication procedure, one would be in violation of Respondent's drug and alcohol policy. (Tr. 93.)

B. Dacio's work at Respondent and His Union Activities in 2013-January 2016

5 Dacio was referred by the International Longshore Workers Union (ILWU) to organize the Inland Boatmen's Union of the Pacific (IBU) with coworkers Marquez and Manolito (Mo) Reyes⁶ (Reyes) in 2013. (Tr. 36–37, 98–99, 110.) At that time, Dacio, Marquez, and Reyes got their coworkers to sign authorization cards to get the IBU elected as the workers' representative at Respondent. (Tr. 38.)

10 On February 7, 2014, prior to the election that brought the IBU in at Respondent as the representative of its employees, Respondent, by Brian Bogan and Respondent's president Kirk Payne, sent Respondent's employees a letter which tried to persuade employees not to vote in favor of bringing in the IBU as the employees' representative through a union election. (Tr. 40–42; GC Exh. 2.)

15 On February 16, 2014, in response to this February 7 Respondent letter, the organizing group of employees including Dacio, Marquez, and Reyes, sent Manager Hunter their own letters styled: "February 7, 2014 Letter; Unfair Practices Strike" which communicated to Manager Hunter that the employees are filing an unfair labor practice claim against Respondent for the February 7 letter, they are going on strike for not more than 2 days, and demanded that Respondent commit to the organizing group in writing that the company will stop trying to
20 intimidate them and will treat them fairly as they continue to work with the IBU to improve their wages and working conditions. (Tr. 41–46; GC Exh. 3.)

Two more February 16, 2014 letters from the same group to Manager Hunter and Respondent presented an unconditional offer to return to work and reinstatement of unfair labor practice strikers and demanded recognition of the IBU. (Tr. 46–48; GC Exhs. 4 and 5.)

25 I take administrative notice that the IBU won its election at Respondent on April 18, 2014, in Case 19–RC–124272. (Tr. 39.) Myers was aware of the Union organizing campaign when Respondent became a unionized facility in 2014. (Tr. 150.) She also knew that the IBU is affiliated with the ILWU. Id.

30 After the IBU election, Dacio attended most of the 15–20 bargaining sessions with co-worker Marquez and 2 IBU representatives. (Tr. 50–53.) Respondent's bargaining committee was comprised of 2 representatives of the Respondent. (Tr. 52.) Dacio continued to be active for the IBU either as the subject of a charge filed against Respondent on October 16, 2014, or as the signor of a charge filed against Respondent on January 21, 2016. (Tr. 62; GC Exhs. 7 and 8.)

⁶ Dacio and Myers admit that Reyes was terminated for creating a very dangerous condition by using a shop-vac in Respondent's volatile tank farm and the potential issue of static electricity from the shop-vac causing an explosion in the tank farm. Tr. 83, 99, 133. Myers denies that Reyes' union activities played any role in his termination at Respondent. Tr. 133.

Both in 2014 when the IBU was attempting to unionize at Respondent and again in 2016 when a reelection campaign was going forward, the Respondent campaigned against being unionized. (Tr. 188–189.)

5 On May 6, 2016, Respondent filed a petition for election in case 19-RM-175493 and the Union was later voted out as the representative of Respondent’s employees as of July 18, 2016. (Tr. 65-66.) Myers knew of this and is unaware of any union support or affiliation regarding Dacio as it relates to the IBU union *after* the July 18, 2016 decertification. (Tr. 150–151.)
 10 Consequently, I find that Dacio’s renewed union activity known to Respondent occurred on or before the July 18, 2016 decertification of the Union as no further evidence of Dacio’s later union organizing or any new union activities were presented at hearing. (Tr. 65, 126.)

C. Dacio’s April 2017 Driving Incident That Did Not Result in His Termination

15 Manager Hunter and Dacio worked together at Dutch Harbor for 9 years. (Tr. 194.) Hunter describes Dacio as a very friendly person, well-liked by people and Respondent’s customers. (Tr. 195.) Hunter further opines that Dacio was prompt at work. *Id.* I observed Dacio being very friendly, more accommodating than most witnesses during breaks in hearing, and communicating easily at hearing.

20 Manager Hunter also opined that Respondent had some challenges with Dacio as a night lead driver dock attendant because Dacio did not want to bring or discuss any bad news. (Tr. 195.) Hunter thought that Dacio would overlook things or keep incidents to himself rather than report them if something bad happened to Dacio or someone else at work. *Id.*

25 For example, one incident where Dacio did not want to report bad news occurred on March 31, 2017. Dacio later received a written warning from Manager Hunter and Myers for failing to notify his supervisor of a potentially dangerous incident that occurred on March 31, 2017, during the night shift when an APL truck drove off the road and landed on its side perilously close to Respondent’s adjacent pipeline and damaged Respondent’s guard rail. The overturned truck came within a few feet of hitting Respondent’s pipeline which could have exploded had the truck struck the pipeline. (Tr. 86, 151–152, 195–197; R. Exh. 1.)

30 Respondent’s reporting policy requires immediate reporting for incidents or near misses and this policy is regularly communicated to Dacio and other employees at daily crew change meetings. (Tr. 86, 151–152; R. Exh. 1.) All leads, like Dacio, and the foreman are expected to call the facility manager if anything out of the ordinary like this March 31, 2017 incident happens in and around the facility. *Id.*

35 Dacio told Manager Hunter that he did not think it was necessary to investigate this situation or report this incident to Hunter, including the road closure, because the police arrived at the scene of the incident. (Tr. 86, 151–152; R. Exh. 1.) Finally, Dacio submitted his end of shift report for March 31 stating that all items are secure. The written warning concluded by instructing Dacio that “[a]s the lead, we [Respondent] require you to be proactive in notifying

your supervisor of incidents and near misses . . . [i]t is better to overreport than to assume it is not necessary to inform management.” Id.

5 Manager Hunter opined that he has terminated an employee for failing to report an incident, Edmund Camacho, but Hunter did not terminate Dacio for failing to report this March 31, 2017 incident. (Tr. 196–197.)

10 Manager Hunter also recalled that Dacio would fail to report other bad news like minor fuel spill incidents that Dacio just did not think were important enough to report. (Tr. 197.) Hunter also said that he would talk to Dacio about this daily and have safety meetings where there was a frequent subject line reminding Dacio to call and report all incidents even if Dacio thought they were minor. Id.

No evidence was presented at hearing that shows that this April 4, 2017 written warning issued by Respondent to Dacio had any relationship to Dacio’s prior union activities or any protected concerted activities.

15 ***D. Dacio’s Failed November 3, 2017 Random Drug Test Proving His Undisputed Illegal Methamphetamine and Amphetamine Use Leading to His Valid November 30, 2017 Termination for a Positive Drug Test***

20 On November 3, 2017, Respondent’s third party independent contractor vendor, the Ken George Co., administers its random drug tests pursuant to DOT regulations and selected Dacio randomly for testing and a urine sample was drawn at approximately 12:40 p.m. (Tr. 137, 194; R. Exh. 7.) Dacio estimated that over his years working at Respondent, he and his co-workers would get randomly drug tested on average of one time per year. (Tr. 66.)

25 No evidence is alleged by the General Counsel or was presented at hearing that shows that Third Party Vendor Ken George Co.’s selection of Dacio for a random drug test on November 3, 2017, had any relationship to Dacio’s prior union activities or any protected concerted activities. In addition, Respondent plays no role and has no control over when or which Respondent employee the Ken George Co. selects to randomly test. (Tr. 137, 157, 194, 197.)

30 If a random drug test comes back to Ken George Co. positive, the medical review officer verifies the positive test results and is required to contact the employee to obtain their explanation for the positive test results or provide prescription information before they release the positive test results to Respondent. (Tr. 138, 153–154.)

35 The medical review officer tries to contact the employee a certain number of times to outreach and try to allow an employee who has tested positive to provide an explanation as to whether there is a legitimate or medically prescribed reason for the positive test. (Tr. 137–138.) Myers or another HR employee are contacted if the medical review officer cannot get through to the employee to get other contact information to allow the employee to explain the positive test results before the positive test results are officially released to Respondent. Id.

40 If an employee is taking a legally prescribed medication, Myers is informed by the medical review officer that results of the random drug test are negative. (Tr. 138.) Myers further explained that if an employee is taking a legally prescribed medication that might impact their

ability to perform safety sensitive duties, such as a prescription that says do not operate machinery or do not drive under the influence of this drug, they fill out a form or they give their doctor a form that says whether or not the doctor releases him or her to work while using the prescribed medication. (Tr. 138–139.) Here, the medical review officer spoke with Dacio and asked him to provide any valid prescription Dacio had regarding his failed drug test but Dacio was unable to provide the medical review officer with a current prescription. (Tr. 69-72.)

The November 22, 2017, results from First Advantage, the medical review officer who analyzed Dacio’s urine sample and issued a controlled substance test report of this Ken George Co. random drug test, showed that Dacio tested positive for two metabolite substances—methamphetamine and amphetamine. (Tr. 90–92, 153; R. Exh. 7.) At times, the General Counsel and Dacio do not argue against the validity of Dacio’s failed November 2017 drug test.⁷

Dacio claimed at hearing that he had obtained an amphetamines prescription legally when he was on vacation in the Philippines with his wife in 2014. (Tr. 72, 93.) Unbelievably, Dacio says his wife asked Dacio to go see a doctor who allegedly prescribed amphetamines for his heart condition and this amphetamine prescription had been continuously renewed from 2014 until he tested positive in November 2017. *Id.*

Dacio admits, however, that he did not follow Respondent’s drug policy by getting his doctor to submit a form saying that Dacio was taking prescribed amphetamines prior to his testing positive for this substance in November 2017.⁸ (Tr. 93, 140.) In addition, Dacio admits that he did not report to Respondent that he was taking amphetamines at work in 2017 and neither Myers nor Manager Hunter were aware that Dacio was using amphetamine or methamphetamine before Dacio’s failed drug test in November 2017. (Tr. 95, 175, 197–199.) Manager Hunter clearly and without hesitation recalled that Dacio never told him that he was using amphetamines while he was working for Respondent. (Tr. 197.)

As a result of testing positive for using methamphetamine and amphetamine, Respondent terminated Dacio’s employment on November 30, 2017, which is consistent with Respondent’s zero tolerance drug policy and its routine and regular custom and practice of terminating employees who test positive for illegal and unauthorized controlled substance use. (Tr. 100–101, 152; R. Exhs. 3–7, 9.) Manager Hunter told Dacio that he had failed his random drug test on November 3 and issued Dacio a notice of termination which states that Dacio was terminated due to his positive drug test. (Tr. 100; R. Exh. 9.) Myers joined the termination meeting between Dacio and Manager Hunter via telephone and Myers informed Dacio of his COBRA rights,

⁷ The General Counsel’s closing brief puts forth an inconsistent version of alleged facts saying that Dacio was somehow surprised with testing positive on November 3, 2017, and that Dacio did not know how he could have failed a drug test, yet he tested positive for both amphetamine and methamphetamine. Dacio later admits to his unauthorized use of amphetamine while working at Respondent in 2017, his awareness of Respondent’s zero tolerance drug policy requiring pre-approval of using all controlled substances, and has no valid explanation for the methamphetamine substance in his urine on November 3, 2017. GC Br. 6–7. In contrast, see Tr. 93, 95, 140, 175, 197–199; GC Exh. 9 at 1; R. Exh. 7.

⁸ If Dacio had submitted a doctor’s prescription for amphetamine, it would have been in his medical file at Respondent. Tr. 140. No such prescription is in Dacio’s medical file at Respondent. *Id.*

asked that he turn in his keys and uniform and asked that he clean out his locker. (Tr. 101, 155–156.)

Dacio’s response to Hunter at the termination meeting was to say that he was not a drug addict and that he thought the failed drug test was invalid.⁹ (Tr. 198.) Myers responded to Dacio confirming Manager Hunter’s earlier statements to Dacio about his failed drug test and Myers repeated that Dacio failed the drug test and was terminated as of November 30, 2017. (Tr. 198–199.)

Either Manager Hunter or Myers also handed Dacio a list of various DOT-approved Substance Abuse Professionals (SAP Professionals) from Myers in a November 30 letter that Dacio could select from to meet with and be evaluated after testing positive so he could become eligible to be rehired. (Tr. 68–69, 72–73 156–158; R. Exh. 10.) The list included Kelly J. Wright (SAP Wright) who Dacio later selected as the person to meet in Anchorage for an evaluation. (R. Exh. 10.) The SAP Professional conducts an evaluation of the terminated employee and plays no role or responsibility in the actual drug testing of a former Respondent employee. (Tr. 158.) All DOT employees who test positive receive the same kind of list of SAP Professionals as Dacio received on November 30 at his termination meeting. *Id.*

Manager Hunter also told Dacio that Dacio should really try and fix this situation by attending a session with an SAP Professional as soon as possible because Manager Hunter said he could not afford to lose more people and that Respondent was understaffed already. (Tr. 68, 73, 101–102.) Dacio told Hunter that he agreed to go through the evaluation process. (Tr. 73.) Myers convincingly explained, however, that SAP Professionals who evaluate Respondent’s employees who test positive for improper drug use do not “clear” the employee from his or her positive or failed drug test. (Tr. 158.)

No evidence is alleged by the General Counsel or was presented at hearing that shows that this November 30 termination of Dacio issued by Respondent had any relationship to Dacio’s prior union activities or any protected concerted activities. (Tr. 157.)

On December 10, 2017, as a result of being understaffed, Manager Hunter first discussed with Marquez taking the vacant night lead driver position with Respondent. (Tr. 113–114; R. Exh. 39.) The next day, Respondent vice-president (VP) Jim Fleming and Manager Hunter again spoke to Marquez in Hunter’s office as they offered Marquez that Respondent needed to fill the night lead driver position, but Marquez was hesitant to accept because he thought he needed additional training to take the job. (Tr. 114–115.) Marquez was also reluctant to take the position because he thought Dacio was coming back to his old position once he completed the DOT classwork and related paperwork in Anchorage. (Tr. 115–116, 202.)

VP Fleming responded telling Marquez that he was the only employee certified for the position because of the number of years he had worked on the night shift and also because

⁹ Once again, I reject Dacio’s claim that the November 3, 2017 random drug test is invalid because even Dacio admits to SAP Professional Wright that he was using amphetamine without submitting the proper form signed by his physician which approved his use of this controlled substance. In addition, Dacio presented no evidence to invalidate his methamphetamine use in November 2017. Tr. 93, 95, 140, 175, 197–199; GC Exh. 9 at 1; R. Exh. 7.

Respondent was short-handed and needed to fill the night lead position vacant since Dacio's termination on November 30, 2017. (Tr. 114–115.)

5 On December 11, 2017, Marquez was promoted by Manager Hunter to the night lead dock driver position, effective on December 17, 2017, and Respondent also posted a vacancy for one seasonal driver dock attendant position that had just opened up with Marquez' promotion. (Tr. 161–163, 201; R. Exh. 39.) Respondent does not use an open online posting application process for employee promotions. (Tr. 162.) Marquez, like Dacio, had actively supported the Union in 2013–2014. (Tr. 110, 122.) I find that Marquez' prior union support or affiliation played no part in his promotion in December 2017.¹⁰ (Tr. 162, 202.)

10 Also, on December 11, 2017, Respondent posted online its vacant seasonal driver dock attendant position, driver 17-11 requisition, that had opened up with Marquez' promotion to night lead.¹¹ (Tr. 163, 202.) The vacant position opened on December 12, 2017, and Respondent received a list of applications soon thereafter in early December after submitting a requisition to

¹⁰ Myers admits she is aware of just one instance in the past 7 years when an employee was re-hired without needing to re-apply and submit an employment application. This occurred in August 2013 with the former union activist Marquez' re-hiring while Myers was out on a leave of absence from June 2013-December 2013 and not yet part of Respondent's hiring team, after Marquez had been terminated for failing a drug test and he completed the SAP Professional evaluation in Anchorage. Tr. 130-131, 135–136; R Exh. 17. Marquez, like Dacio, had been terminated from his driver dock attendant position on June 5, 2013, when he failed a DOT regulation random drug test in May 2013 also administered by the Ken George Co. Tr. 116–122; GC Exh. 10; R Exh. 17. On July 16, 2013, Respondent's interim HR Manager Daniel Elban (Elban) wrote to Marquez and gave him the names, addresses, and telephone numbers of 2 SAP Professionals in Anchorage where the DOT SAP Professional evaluations take place to contact for an evaluation. GC Exh. 10. Respondent also advanced Marquez funds that Marquez later repaid to fly to Anchorage for the evaluation where Marquez completed the SAP fitness-for-duty return-to-work program later in 2013. Id. Marquez later returned to work as a driver dock attendant in August 2013 after completing the evaluation in Anchorage and without needing to go online to respond to a vacant position for re-hiring. Tr. 121. Manager Hunter opined that Marquez was rehired after his failed drug test and his termination because Marquez successfully completed his return-to-work program but, rather than denying the validity of his failed drug test, Marquez took ownership of his situation and Marquez did not deny the fact that he had failed a drug test and never claimed to be unjustly terminated for his failed drug test. Tr. 206–207; R Exh. 17. Respondent did not have Myers working with Respondent when Marquez was rehired by Respondent in August 2013 and at this time its procedures for rehiring did not include a terminated employee having to wait for a vacant position posting online using online postings as existed with Myers' influence before June 2013 and in and after January 2014 once Myers returned from her leave of absence and was promoted to HR Director in 2014. Tr. 129–131. While re-hiring Marquez without Marquez having to submit an online application for re-hire as was contrary to Respondent's usual custom and practice before and after the last half of 2013, I find that this one example is an anomaly and a simple mistake due to Myers' absence from Respondent and it does not prove that Respondent discriminated against Dacio by requiring his online application for re-hire in March 2018 and, in fact, this argument runs counter to the argument that Dacio's prior union activities influenced Dacio not being re-hired in March 2018 while Marquez' similarly frequent union activities from 2013-2016 led to Marquez being re-hired and promoted. Since Myers was promoted to HR Director in 2014, Respondent requires employment applications for all rehiring and hiring for posted vacant positions. Tr. 136.

¹¹ Manager Hunter decides whether a posted position is seasonal or full-time. Tr. 184–185. A seasonal position is usually January through April and May through October or November based on the 2 fishing seasons in Dutch Harbor. A full-time position is year round.

post the position online and elsewhere.¹² (Tr. 163–167; R. Exhs. 40 and 41.) This vacant posted driver dock attendant position was filled as the job eventually went to Eric Moore who had been interviewed by Manager Hunter and Myers who decided to hire Moore in mid-January and later sent Moore a job offer letter dated January 24, 2018. (Tr. 165–167, 202; R. Exh. 42.) Moore accepted the job offer soon thereafter.

E. Dacio’s Successful Completion of the DOT Psychological Testing in January 2018

The DOT requires that an employee in Dacio’s position who has failed a drug test must undergo an evaluation with an SAP professional if they intend to return to work in a DOT safety-sensitive position such as Respondent’s driver attendant position.

Dacio knew of other former Respondent employees who had been similarly terminated for a failed drug test who had eventually returned to work for Respondent and Dacio wanted to do the same.

Dacio eventually contacted SAP Wright for an evaluation and one was set up for the end of January 2018, the earliest that Dacio could get a return flight from Anchorage. (Tr. 68, 73–74.) Wright wanted Dacio to send him the prescription for amphetamines that Dacio said he had received to get the amphetamines he had tested positive for in November 2017. (Tr. 69.) Dacio told Wright that the prescription was so old, he no longer had it but volunteered to send Wright the unused amphetamines. *Id.* At hearing, Dacio did not know when or if his 2014 amphetamine prescription expires. (Tr. 94–95.)

Also, late in December 2017, Dacio called Manager Hunter to inform him that he would be traveling to Anchorage for his DOT SAP Professional return-to-work program and do drug rehabilitation so that Dacio could get his driver’s license reinstated and be eligible to apply to Respondent as a re-hire. (Tr. 199–200.) Manager Hunter recalled that he did not give Dacio any indication at this time that if Dacio completed a return-to-work program, Dacio would be automatically re-hired by Respondent. (Tr. 200.)

On January 23, 2018, SAP Wright faxed an initial letter to Myers at Respondent informing her that he had met Dacio for an evaluation earlier that day and Wright recommended that Dacio complete Level 0.5 Early Intervention, per *The American Society of Addiction Medicine Criteria*, Third Edition, and Wright also provided Dacio a list of referrals for Anchorage and Wasilla, Alaska, for Dacio to call and find a provider that fit his schedule and for Dacio to schedule the class. (Tr. 159; R. Exh. 37.) Wright’s letter continues saying that he will schedule a follow-up evaluation with Dacio upon his successful completion of the recommended class and receipt of a written progress report from the provider. *Id.* The January 23, 2018 letter from Wright concludes telling Myers that she will be notified by Wright of Dacio’s completion

¹² Dacio did not apply for this seasonal driver/dock attendant position also known as driver 17–11 requisition posted on December 11, 2017, as he was ineligible to apply for the position when it was open due to his failed drug test and loss of his valid DOT CDL Class B license in November 2017. Tr. 190.

status, follow-up testing plan, continuing care needs, and other requirements for continued care. Id.

As a result, Myers did not think that Dacio had completed the SAP Professional evaluation as of January 23, 2018, as according to Wright, Dacio had not completed the class Wright recommended or returned to Wright for a follow-up evaluation. (Tr. 159.) Thus, Dacio was not yet eligible to be re-hired by Respondent as of January 23, 2018. Id.

On January 25, 2018, Wright faxed a final letter to Myers regarding Dacio which mentions that Wright conducted a follow-up evaluation of Dacio on January 25, 2018, and that Dacio had completed the recommended counseling services from January 23–25, 2018 and completed the education program at Aeon Counseling, LLC on January 25, 2018. (Tr 159–160; R. Exh. 38.) The final letter continues saying that while Myers for Respondent ultimately decides whether to re-hire Dacio or not, she should make sure that Dacio produce a negative Return-to-Duty drug screen prior to returning to a safety-sensitive position. Id. The final letter concludes saying that Dacio must also follow Wright’s mandatory drug screening schedule for the next 2 years after Dacio produces his negative drug screen and is rehired by Respondent. Id.

On or about January 26 or 30, 2018, Dacio called Hunter to let him know that Dacio had completed the SAP Professional evaluation and had first become eligible to be re-hired by Respondent as a driver/dock attendant as of January 25, 2018, when SAP Professional Wright issued his report regarding Dacio’s fitness for duty after meeting with Dacio face-to-face on January 23, 2018, for 80 minutes and Dacio completing a 2-day class. (Tr. 74–79, 161; GC Exh. 9.)

Dacio opined that Wright’s initial SAP Clinical Assessment Summary dated January 23, 2018, “cleared” him to return to work at Respondent.¹³ (Tr. 75, 200–201; GC Exh. 9.) The initial letter report concludes, among other things, that Dacio has no substance use disorder diagnosis and he is considered a “zero [risk] for Relapse Potential” especially since this November 3, 2017 incident is the first time that Dacio has failed a drug test or has had any problems related to drugs or alcohol. (GC Exh. 9 at 1.) Dacio admitted to SAP Wright that he had used amphetamines at work 2–3 times in 2017 due to being tired during shift changes before testing positive on November 3, 2017. (Tr. 76, 94; GC Exh. 9 at 1.)

However, neither SAP Wright’s initial letter report nor his later final letter report make reference to Dacio’s testing positive in November 2017 for using the illegal substance of methamphetamine because the report is only based on what Dacio told Wright in January 2018 and Dacio did not mention to Wright his methamphetamine use despite the unchallenged failed test results showing that Dacio tested positive for both amphetamines and methamphetamines. (Tr. 91–92; R. Exh. 7.)

Hunter responded to Dacio informing him that it was great that Dacio completed the SAP Professional evaluation, but Hunter also informed Dacio that Respondent did not have any currently open driver dock attendant position for re-hire as Respondent had just completed a seasonal hiring earlier in the month. (Tr. 77–79; 160–161, 200–201.) Dacio next telephoned

¹³ This is untrue as Dacio confuses SAP Wright’s initial January 23 letter report with SAP Wright’s final January 25 letter report. Neither letter report, however, “clears” Dacio of his November 2017 failed drug test.

Myers who confirmed to Dacio that there were no vacant positions at Respondent at that time at the end of January 2018. Id.

Moreover, Manager Hunter was shocked to hear from Dacio that Dacio's attitude and belief was that Dacio would automatically just come back to work at Respondent after his failed drug test and completed return-to-work program, just the same as a current non-disciplined employee would return to work from a long vacation. (Tr. 201.) Manager Hunter convincingly opined that based on his conversation with Dacio in late January, Dacio failed to realize the seriousness of his situation having been terminated from work at Respondent for a failed drug test and needing to apply online if a new position with Respondent came open. Id.

Dacio's laissez-faire attitude about his November 2017 failed drug test concerned Manager Hunter "[j]ust with the seriousness of the type of material we [Respondent] handle, being fuel, gasoline, diesel, the hazardous—the—the dangers associated with hauling hazardous substances." (Tr. 201.)

As indicated above, when Myers was handling the hiring process with facility managers for Respondent before her 2013 leave of absence and from January 2014 to the present, Respondent's regular custom and practice is to not accept employment applications until a job opening is available and gets posted in various ways such as on Indeed, Glassdoor, and local advertisements in Dutch Harbor. (Tr. 160, 170, 200.) Respondent requires that all applicants for an open position must apply online by filling out and submitting an application whether they are initial applications or rehire applications. (Tr. 200, 204.) Manager Hunter opined that once Dacio successfully completed his DOT return-to-work program and became eligible for re-hire at Respondent in late January, Dacio, like others terminated for failing a drug test, would need to go through a rehire process by applying online "just like anyone else." (Tr. 160, 170, 200; R. Exhs. 20-35.)

Respondent normally receives applications for rehire from various former employees and not just from employees terminated for failing a drug test. These former employees are also required to wait until a vacant position is posted and they must apply online to possibly be rehired. (Tr. 200.)

F. Dacio's Reapplication for Employment at Respondent in March 2018

Because one employee was resigning from his position for personal reasons and another was transferring to another location at Respondent's Bethel Terminal away from Dutch Harbor, Respondent had 2 driver/dock attendant positions come open in March 2018 as employees Art Guiang and James Sackett were leaving their Dutch Harbor driver/dock attendant positions with Respondent. (Tr. 80–81, 168–169, 203; R. Exhs. 15 and 16.)

By March 13, 2018, Respondent had posted 2 vacancies for driver dock attendant at Dutch Harbor. (Tr. 168, 203; R. Exh. 13.) Respondent received a number of applications in response to its posting of the 2 open driver/dock positions in Dutch Harbor. (Tr. 171; R. Exh. 43.)

Myers explained that rehiring an applicant for an open posted position at Respondent is no different than how Respondent hires new employees with no prior experience at Respondent as each must apply online and go through the application process. (Tr. 133–134.) DOT requires

an online application to ask for an applicant's 10-year history of prior employment, and the disclosure of prior speeding and other driving violations to be eligible to work a DOT-regulated position like driver dock attendant. (Tr. 134–135; see also R. Exh. 19 (DOT Regulation 49 CFR 391.21—Application for Employment).)

5 Employees who were terminated and required to submit an employment application
online with Respondent to be rehired include: Mr. Tajon terminated on April 3, 2015 and who
submitted a re-hiring application on September 9, 2015. (Tr. 140–141; R. Exhs. 20 and 21);
David Whittington who was terminated on August 26, 2016, and submitted an employment
application online with Respondent to be re-hired on October 13, 2016 (Tr. 141–142; R. Exhs.
10 22 and 23); Dan Reed who was terminated on November 13, 2015, and submitted an
employment application online with Respondent to be rehired on February 27, 2018 (Tr.
142–143; R. Exhs. 24 and 25); Tyman Comstock who was terminated on November 13, 2015,
and submitted an employment application online with Respondent to be rehired on September
14, 2016 (Tr. 143–144; R. Exhs. 26 and 27); Sariah Ady who was terminated on August 23,
15 2015, and submitted an employment application online with Respondent to be rehired on April
17, 2017 (Tr. 144–146; R. Exhs. 28 and 29); Elizabeth Rolon who was terminated on March 4,
2016, and submitted an employment application online with Respondent to be rehired on June 6,
2016 (Tr. 147; R. Exhs. 30 and 31); Rachel Gulanes who was terminated on November 10, 2014,
and submitted an employment application online with Respondent to be rehired on August 17,
20 2018 (Tr. 141–142; R. Exhs. 32 and 33); and Ryan Del a Rosa who was terminated on February
26, 2016, and submitted an employment application online with Respondent to be rehired on
April 19, 2017 (Tr. 147; R. Exhs. 34 and 35). Myers confidently opined that none of the
terminated employees' union activities or support played any role in the requirement that they
had to submit a rehire employment application. (Tr. 148.)

25 Dacio submitted his application for rehiring online to Respondent on March 15, 2018.
(Tr. 106–108, 172; R. Exh. 11.) Myers and Manager Hunter were involved in the decision
whether to interview or re-hire Dacio and all the other driver/dock attendant applicants in March
2018. (Tr. 173.) Myers forwarded Dacio's application to Manager Hunter and they discussed it
over the telephone and the material inconsistencies contained in the application. (Tr. 186–187,
30 204–205; R. Exh. 11 at 2 and 5.)

Even though Dacio admits that he had just been fired for testing positive for the illegal
substances of methamphetamine and amphetamine, he claimed in his application for re-hire that
he had been subject to an "unjust termination of employment" by Respondent on November 30,
2017. (Tr. 107–109, 187; R. Exh. 11 at 2 and 5.) Dacio also claimed that his employment "was
35 suddenly terminated" on November 30, 2017, and that his case had been "cleared" on January
25, 2018. Id. Myers reminded Manager Hunter that the true reason that Dacio left employment
with Respondent in November 2017 was his failed drug screen and that Respondent does not
"suddenly terminate" its employees. (Tr. 187.) As referenced above and as occurred in Dacio's
case, a medical review officer contacts the failed drug test employee to see if there is a legitimate
40 medical reason for the failed test. (Tr. 137–139, 153; R. Exh. 7.)

Once Myers and Hunter saw that Dacio was claiming "unjust termination" and accepting
no responsibility and no accountability for his November 2017 failed drug test, Respondent
decided not to interview or rehire Dacio for the DOT regulated position of driver/dock attendant
in Dutch Harbor in March 2018. (Tr. 173, 186, 205–207.) Moreover, Hunter persuasively opined

that Dacio was not taking his failed drug test as seriously as one would reasonably expect after testing positive for illegal methamphetamine and amphetamine use and was treating his attempt at rehiring as though he had just taken time off for vacation and was ready to return to work and was owed his former position at Respondent. (Tr. 201, 206.)

5 Myers also opined that the reason she chose not to interview Dacio for the vacant driver/dock attendant position was because of the “reason that he [Dacio] put for leaving our employment previously.” (Tr. 173.) Myers recalled that Dacio’s written explanation in his application to be re-hired that his reason for leaving his night lead position with Respondent was because he had an “unjust termination of employment [on November 30, 2017]” and to Myers
10 this false explanation from Dacio was a “deal breaker” for Myers “[b]ecause it wasn’t accurate. It showed that he [Dacio] didn’t take accountability for failing his drug screen or responsibility to follow our [Respondent’s] DOT policies” and Dacio did not merit an interview.¹⁴ (Tr. 173, 187–188; R. Exh. 11 at 2.)

15 Myers also did not think Dacio was being accurate in his further representation of what happened in his employment application where Dacio writes that he “was suddenly terminated and that his case was cleared.” (Tr. 174; R. Exh. 11 at 5.) Myers further opines that Dacio’s failed drug test has not been cleared as it remains as a failed November 2017 drug test. Id. Finally, Myers adds that even if Dacio is legally prescribed amphetamine, he was still in violation of Respondent’s drug and alcohol policy by not submitting a prescription form signed
20 by his physician just like he did previously when he was prescribed Norco for pain after a dental procedure in May 2015. (Tr. 93, 139, 175; R. Exh. 8.)

In contrast to Dacio’s rehire employment application, Tracy Bolard (Bolard) worked at Respondent’s Yakutat terminal and was terminated for failing a drug screen test and Bolard, like Dacio, was required to go through the rehire application process. (Tr. 148.) Bolard was rehired at
25 Respondent’s Dutch Harbor terminal as a driver dock attendant after he submitted a re-hire employment application on July 26, 2006, which provides on page 2 that when Bolard describes his work history in Yakutat from 1991–2005 and his reasons for leaving, he explains: “Failed DOT test.” (Tr. 148–149; R. Exh. 18.) Bolard did not question the legitimacy of his failed drug test in his application for reemployment.

30 Consequently, I further find that Myers and Hunter agreed not to rehire Dacio in March 2018 based on his false statements in his application, his laissez-faire attitude toward failing a random drug test, and Dacio’s failure to accept responsibility or accountability for his failed drug test. Furthermore, Myers convincingly explained that Dacio’s prior union activities or affiliation

¹⁴ Myers never considered that Dacio did not understand the employment application question asking for his reason for leaving Respondent in November 2017 as Myers has never had any communications problems with Dacio. Tr. 173.

played no part in Respondent’s decision not to rehire Dacio and Respondent did not discriminate against Dacio when it decided not to rehire Dacio. (Tr. 151, 175.)

Dacio heard nothing from Respondent after he submitted his application to be rehired in March 2018. (Tr. 81–82.)

5 Respondent hired both driver/dock attendant positions from the list—Dario LaFranks was offered the position on May 16, 2018, and Richard James Custodio was offered the second vacant position on January 30, 2019. (Tr. 175–176, 181, 183; R. Exhs. 43, 49, 52, 74, and 77.) Both LaFranks and Custodio were formerly members of the ILWU Union. (Tr. 183–184.) Myers admitted that LaFranks and Custodio being former members of the ILWU Union played no role
10 in Respondent’s decision to hire them. (Tr. 184.)

Myers also recalled that Mr. Tasi was not hired because he did not have enough adequate experience or a CDL Class B driver’s license. (Tr. 175–176; R. Exh. 44.) Myers further explained that Mr. Smith was not hired as he mentioned several ethnicities in Myers’ telephone interview of him and Myers also received a negative email from a work reference at another
15 company where Smith worked for one month before he was terminated for a DUI. (Tr. 175–176; R. Exhs. 45–47.)

Myers also was familiar with applicant Eric Jones who was a former employee at Respondent who applied for a rehire. (Tr. 182; R. Exh. 70.) Myers did not interview Mr. Jones and did not offer to rehire him. (Tr. 182.) Myers opined that even though Mr. Jones was a former
20 employee at Respondent, Myers did not feel obliged to interview Jones and Respondent did not treat Jones any differently than it treated Dacio here by not rehiring them.¹⁵ (Tr. 182–183.) Myers further opines that during the entire employment application process beginning in March 2018 for driver 18–5 requisition, Myers did not treat Dacio any differently than Myers treated all of the other applicants for the 2 open driver/dock attendant positions. (Tr. 184.)

25

ANALYSIS

I. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn
30 from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB at 622. My
35 credibility findings are generally incorporated into the findings of fact set forth above.

The witnesses who testified at the hearing were: Dacio, Marquez, Myers, and Hunter. For the most part, I found Marquez, Myers, and Hunter to be honest, confident in their recollection of

¹⁵ See also R. Exhs. 49–77 as more employment applications and Myers’ notes of interviews connected to these various applicants who were not hired by Respondent for the 2 posted driver/dock attendant position in March 2018.

events and understanding of the questions asked at hearing, and reliable witnesses who provided consistent, plausible, and logical testimony. They answered the questions asked of them, without evasiveness, deceit, or exaggeration. The only qualm I had with Marquez' testimony is that I find that the preponderance of evidence supports a finding that his initial meeting with Manager Hunter to discuss Respondent's offer to Marquez of the night lead position occurred on December 10 rather than on December 16 as this is confirmed by Respondent's promotion of Marquez on December 11, 2017, effective on December 17, 2017, and Respondent's December 11 posting of the vacant driver dock attendant 17-11 requisition as I find that Respondent did not post Marquez' open position until Respondent had knowledge that Marquez was accepting the promotion Respondent first offered on December 10, 2017.

Dacio, on the other hand, was frequently, evasive and nonresponsive, particularly on cross examination. (e.g., Tr. 84-86, 93-97, and 102-105.). His testimony was unsupported, specious, and inconsistent. One example concerned Dacio's alleged explanation for his secret and illegal use of methamphetamines and amphetamines at work in violation of Respondent's drug and alcohol policy. Initially, he testified that in a December 2014 visit to the Philippines with his wife, she recommended that Dacio see a physician for an alleged non-specific heart condition and that a Philippines doctor prescribed him amphetamines to regularly use for his heart condition. (Tr. 72.) While unlikely that any physician would prescribe amphetamine, a known stimulant for a heart condition, more importantly, Dacio failed to produce any reliable evidence to support this alleged prescription or his continued ability to renew the prescription in the United States for approximately 3 years from 2014-2017. Dacio never provided Respondent with a copy of any valid amphetamine prescription in compliance with the Respondent's drug and alcohol policy despite Dacio's understanding and compliance in May 2015 with the same policy when he needed dental work and he expected to be prescribed Norco for pain. (95-96; R. Exh. 8.) Dacio also gave a copy of this Norco prescription to Manager Hunter in May 2015. (Tr. 95-98.)

Moreover, Dacio later materially changed his explanation for his amphetamine use at Respondent saying, probably more truthfully, that he was illegally using amphetamines without a valid prescription to help him stay awake while working. (Tr. 76.) Dacio also admitted to SAP Professional Wright that he used amphetamines to help him stay awake at work during shift changes. (Tr. 76; GC Exh. 9 at 1.) Once again, no valid doctor's prescription to Dacio for amphetamine use to help him stay awake at work was ever produced and Dacio did not comply with Respondent's zero tolerance drug policy by failing to provide such a doctor's prescription ahead of his expected use.

Finally, I take administrative notice that methamphetamine is an illegal substance that cannot be prescribed by a physician and the undisputed yet unexplained presence of methamphetamine in Dacio's failed November 2017 random drug test further harms Dacio's credibility. (R. Exh. 7.) SAP Wright's report is based only on what Dacio told him in January and Dacio omits any reference to his testing positive for methamphetamine which I find to be a material omission by Dacio. (GC Exh. 9; R. Exh. 7.) I further find neither Myers nor Manager Hunter were aware that Dacio was using methamphetamine or amphetamine while working at Respondent until they received the November 22, 2017 results of the November 3, 2017 random drug test from the Third Party Vendor Ken George Company who administered monthly random drug tests for Respondent's employees. As a result, I further find that Dacio is not telling the

truth when he says that he informed Manager Hunter before November 2017 of his amphetamine prescription and could not recall if he told Manager Hunter this at hearing despite Dacio's affidavit saying: "I don't believe I told the employer about this [amphetamine] medication before the [failed November 2017] drug test." (Tr. 93, 103–104, 137; R. Exh. 7).

5 **II. Respondent's Reasonable Business Decision Not to Re-Hire Dacio in January or March 2018**

10 Complaint paragraphs 4–5 allege that on or about January 25, 2018, Respondent refused to rehire, consider for hire, or hire Dacio because its employee Dacio assisted the union and engaged in concerted activities, and to discourage employees from engaging in these and other union and/or protected concerted activities assumingly in violation of Sections 8(a)(1) and (3) of the Act. (GC Exh. 1(g) at 4; GC Br. at 15-28.)

15 While it is true that Dacio and Marquez were an active union organizers and Respondent was well aware of their union activities and union support from 2013 through July 18, 2016, when the Union was voted out at Respondent, there is no evidence showing that Dacio was involved in any new union activities or union support from July 18, 2016, through the time that Respondent made its reasonable business decision not to re-hire Dacio in March 2018.

20 Instead, I find that Dacio acted unprofessionally, irresponsibly, and failed to properly admit and account for his failed drug test when he applied to be re-hired with Respondent in March 2018. I find that Dacio's earlier union activities and union support had absolutely no bearing on Respondent's decision not to rehire Dacio.

25 Dacio had been disciplined in April 2017 for not being accountable in his position where his job took him near hazardous, volatile petroleum products on a regular basis in a harsh environment on Dutch Harbor where the weather can easily cause dangerous driving conditions. Rather than take seriously the April 2017 written warning, Dacio next violated Respondent's zero tolerance drug policy by testing positive for amphetamine and methamphetamine without submitting a prior physician-approved form for use of these controlled and illegal drugs or supplying Respondent with a truthful explanation for his use of these substances.

30 The last straw was Dacio's continued refusal to act responsibly and admit in his re-hire application to Respondent that he had been terminated on November 30, 2017, for a failed drug test. Instead, Dacio lied and wrote that he had been the subject of an "unjust termination of employment" and that his employment with Respondent "was suddenly terminated" on November 30, 2017, but that his case had been cleared on January 25, 2018. (Tr. 107–109, 187; R. Exh. 11 at 2 and 5.)

35 In the mixed-motive context of this case, the Board applies the burden-shifting analysis set forth in *Wright Line* to determine whether an employee's discharge is unlawful. 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a motivating factor in refusing to re-hire the employee. The General
40 Counsel's evidence must show that the employee engaged in union or protected activity, that the employer knew about the protected activity, and that the employer had harbored animus

toward the protected activity. *Club Monte Carlo Corp.*, 280 NLRB 257, 261–262 (1986), *enfd.* 821 F.2d 354 (6th Cir. 1987). If the General Counsel meets this burden, the burden then shifts to the employer to show that it would have refused to re-hire the employee even absent the employee’s union or protected activity. *Wright Line*, 251 NLRB at 1089.

5 [T]he question in a discriminatory hiring case is why the applicant was not taken
into the employer’s work force. That question presupposes that there were
appropriate openings in the employer’s work force available to the applicant. In a
discriminatory hiring case, therefore, the General Counsel must show that
10 antiunion animus was a motivating factor in the decision not to hire, and that there
was at least one available opening for the applicant. The showing of an available
opening entails a showing that the applicant had experience or training relevant to
the announced or generally known requirements of the opening. *GM Electrics*, 323
NLRB 125, 128 *fn.* 13 (1997) (the General Counsel showed availability of jobs for
15 applicants by evidence that applicants were “journeyman electricians” who applied
for “journeyman electrician” positions).

FES (A Division of Thermo Power), 331 NLRB 9, 12 (2000), *suppl.* 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3d Cir. 2002).

A. *Dacio’s Prima Facie Case*

1. Union or protected concerted activity

20 To be protected under § 7, employee conduct must be both “concerted” and engaged in
for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB
151, 153 (2014). The General Counsel alleges that from 2013 through, at most, July 18, 2016,
Dacio assisted the Union and engaged in protected union activities and union support by helping
organize the union, helping get the union elected in 2014, attending bargaining sessions with
25 Marquez and others in 2014–2016, filing charges, and opposing a decertification campaign.
Marquez also was involved in much the same union activities through July 18, 2016.

On the entire record, I find that Respondent stipulated, and the General Counsel
demonstrated that Dacio engaged in protected union activities from 2013 through July 18, 2016,
when he organized, assisted the Union’s election, negotiated for the Union, and opposed the
30 Union’s decertification with Marquez and other Respondent union supporters.

2. Knowledge of protected concerted activity

It is not inconsistent that Respondent had knowledge of Dacio’s alleged union activities
from 2013—July 18, 2016. I find that the General Counsel has carried its burden in
demonstrating that Respondent had knowledge of Dacio’s 2013 through July 18, 2016 union
35 activities against Respondent. See *Club Monte Carlo Corp.*, 280 NLRB 257 at 261.

3. Animus to protected concerted activity

“The General Counsel must make a showing sufficient to support a conclusion that
[animus toward] the protected conduct was a motivating factor in the employer’s decision to
suspend or discharge [or refuse to re-hire].” *Id.* at 261–262. Evidence of animus can be either

direct¹⁶ or circumstantial. In *ManorCare Health Services—Easton*, 356 NLRB 202 (2010), the Board relied on the following five factors to divine the employer’s discriminatory motive or animus: (1) the proximity of ManorCare’s discipline to the employee’s alleged protected activities; (2) ManorCare’s unlawful interrogation and threats toward the employee; (3) 5 ManorCare’s failure to repudiate the employee’s assertion that her discipline was motivated by animus; (4) ManorCare’s failure to investigate the employee’s alleged conduct; and (5) ManorCare’s deviation from its typical policy in disciplining the employee. *Supra* at 356 NLRB 202, 204 (2010). Assuming, as stated above, that the General Counsel presented sufficient evidence of protected concerted activity, I find that the General Counsel has not met its 10 additional burden of demonstrating that such activity was a motivating factor in the decision not to re-hire Dacio.

Here, the record failed to establish any animus on the part of the Respondent toward Dacio. This, as well as other factors noted above, persuade me that the General Counsel has failed to prove, *prima facie*, that Respondent acted with an illegal motive when it elected not to 15 re-hire Dacio in January and March 2018.

First, unlike the employer in *ManorCare*, the gap between Dacio’s alleged protected activities (2013—July 18, 2016) and the decision not to rehire Dacio on or after March 15, 2018, was much wider (years), while the gap between Dacio’s misconduct (March 15, 2018) and the decision not to rehire him (March 25, 2018) was very close (days). See *id.* at 225. 20 Here, Dacio’s last protected union activity was on or before July 18, 2016. While Dacio was having discipline issues with Respondent in April 2017 when a written warning was justifiably issued and again when he was terminated on November 30, 2017, for good cause associated with his failed random drug test showing he used both amphetamine and methamphetamine illegally without proper authorization in violation of Respondent’s zero tolerance drug policy, 25 the only alleged adverse action at issue here is Respondent’s refusal to re-hire Dacio in January and March 2018.

I find that Dacio was ineligible to apply for re-hire when Respondent posted the vacant driver dock attendant position on December 12, 2017 and Respondent decided to hire Moore as a seasonal employee before Dacio became eligible to be re-hired on or about January 25, 2018.¹⁷ 30 In addition, the General Counsel argues that “Respondent here knew precisely when the employee it was seeking to avoid hiring would be available, so it engineered its staffing to avoid a vacancy when Dacio finished his return-to-work program.”

I disagree and reject this argument as wholly speculative as Respondent did not know as of December 12, 2017 *precisely* when Dacio would be available as no one has a timetable until 35 the terminated employee is evaluated by the SAP Professional in Anchorage which for Dacio

¹⁶ I find the General Counsel’s reference in his closing brief to a settled unfair labor practice claim in case 19-CA-139040 in support of his argument for Respondent’s animus toward Dacio is inadmissible to prove animus especially where there is no evidence to support an admission of liability or other proof that Respondent is a recidivist employer. GC Br. at 5.

¹⁷ The General Counsel argues that hiring Moore as a seasonal employee instead of as a full-time employee was more expensive to Respondent and more favorable to Moore. GC Br. at 8. I find that this is speculation and unproven as it may be less expensive to hire a seasonal employee who is not on Respondent’s payroll all year long and may be more likely to face a layoff compared to a full-time employee when viewed over many years. Also, Respondent may own its own employee housing so it is unnecessary to pick up Moore’s housing expense.

was not until January 23 and 25, 2018. (See GC Exh. 10 (“We will not have a timeline until after the first meeting and evaluation by the SAP”); see also Tr. 159-160; R Exh. 38 (Dacio had completed the recommended counseling services from January 23–25, 2018, and completed the education program at Aeon Counseling, LLC on January 25, 2018). Moreover, the prior re-hiring of Marquez after his June 5, 2013 termination did not occur until more than 2 months later in late August 2013 and many re-hired employees referenced in this case did not get re-hired for many months or even years after they were terminated. (Tr. 118, 121, 140-148; R Exhs. 20-35.) As a result, I find that Respondent did not know when Dacio would be eligible for re-hiring until January 25, 2018 at the earliest.

The General Counsel also contends that a temporal thread links all of Dacio’s union activities from 2013 through July 18, 2016 to the March 2018 refusal to rehire Dacio, arguing that Respondent’s anti-union animus from at least July 2016 should be extended to Respondent’s March 2018 decision not to rehire Dacio. However, this characterization of the timeline strains credulity.

In *ManorCare*, the discipline occurred days after the employee’s protected activity. 356 NLRB at 225. Here, I find that the time period from July 18, 2016, or earlier, to March 2018 is too attenuated to use as evidence of animus. Instead, the decision not to rehire Dacio in March 2018 was not very close but, instead, took place “years” after he participated in union activities and supported the union. See also *Lucky Cab Co.*, 360 NLRB 271, 274 (2014)(Board has long held that a close timing between an employee’s protected activity and an employer’s adverse action is indicative of employer animus toward the protected activity). I therefore find that the proximity of the alleged protected union activity to the adverse action here is too great and not indicative of animus and it does not support an inference of any discriminatory failure to re-hire.

Second, unlike the employer in *ManorCare*, Respondent did not threaten Dacio for his protected conduct. See 356 NLRB at 226. The record simply does not support such a finding here.

Third and fourth, unlike the employer in *ManorCare*, Respondent here extensively investigated and discussed its decision not to rehire Dacio based on his refusal to accept accountability and responsibility for his failed November 3, 2017 drug test and Respondent conducted the investigation and the March 2018 hiring of the 2 driver dock attendants in strict accordance with Respondent’s recruiting and hiring policies. See 356 NLRB at 227. There is no valid dispute that Dacio tested positive for amphetamine and methamphetamine in November 2017 and his termination on November 30, 2017, and Respondent’s refusal to re-hire Dacio in March 2018 because of his failure to take responsibility and account for his failed drug test when he re-applied on March 15, 2018 were fully justified.

Respondent’s HR department by Myers, and the Dutch Harbor facility manager Hunter conducted a review of Dacio’s March 15, 2018 employment application where, ultimately, they determined that Dacio was not properly accounting and taking responsibility for his failed drug test in November 2017 so exercising a reasonable business judgement, Myers and Manager Hunter decided against rehiring Dacio in March 2018 because of his inaccurate statements contained in his March 15, 2018 application for rehire. (R. Exh. 11.) I also find that Myers’ and Hunter’s discretionary decision not to interview or re-hire Dacio in March 2018 was reasonable and not suspect under the circumstances given Respondent’s zero tolerance drug policy and the

dangerous conditions at Dutch Harbor which require professionalism and accountability from employees.

There is also no dispute that Dacio had been disciplined previously for a failed drug test in November 2017 and failing to account, report, and take responsibility to report a very dangerous incident that occurred very near Respondent's pipeline on March 31, 2017. (R. Exhs. 1 and 7.)

Further, the record shows that Respondent has disciplined other employees for failing to report near incidents and for failing drug tests. Consequently, I find that the General Counsel did not establish disparate treatment such that other employees under similar circumstances were treated more leniently than Dacio was treated. See *Storer Communications*, 287 NLRB 890, 899-900 (1987) (Disparate treatment where discriminatee's warning was more severe than warnings issued other employees).

Finally, there were no shifting reasons for Respondent's decision not to re-hire Dacio in March 2018 or that the nondiscriminatory explanation defies logic or is clearly baseless. The sole reason for Dacio's discharge was his failed drug test in November 2017. (R. Exhs. 7 and 9.) The sole reason for Respondent's decision not to rehire Dacio in March 2018 when he recovered his DOT CDL Class B license on January 25, 2018, and was finally eligible to be rehired, was Dacio's denial of the failed drug test, his refusal to be accountable and responsible for his illegal actions using unauthorized and illegal substances in violation of Respondent's zero tolerance drug policy, and Dacio's unprofessional attitude toward his failed drug test. (GC Exh. 9; R. Exh. 11 at 2 and 5; 38.)

Thus, in summary, the record supports a finding that Dacio engaged in protected union activities and union support on or before July 18, 2016. Assuming such activity, while the record also supports a finding that Respondent knew Dacio was engaged in this protected union activities, the record does not support a finding that Respondent harbored animus toward Dacio's union activities. Respondent did not discharge Dacio in April 2017 as it could have and had done to other employees for failing to report a near incident if it harbored animus toward Dacio's prior union activities. In addition, Respondent promoted Marquez, a fellow union supporter, in December 2017 which one would not reasonably expect if Respondent harbored animus for Marquez' prior union activities. Moreover, I further find that the General Counsel has not established any retaliatory or discriminatory motivation through Respondent's conduct prior to its decision not to rehire Dacio in March 2018. The General Counsel has also failed to show by a preponderance of the credible evidence that any protected union activity engaged in by Dacio was a motivating factor in Respondent's decision not to re-hire Dacio in March 2018. It is therefore recommended that the complaint be dismissed.

B. Respondent's showing that it would not have re-hired Dacio in any event.

Assuming, arguendo, that General Counsel carried its burden in showing by a preponderance of the evidence that Dacio's protected union activity played a motivating role in Respondent's decision not to rehire Dacio, the burden would then shift to Respondent to show that it would not have rehired Dacio in the absence of such conduct. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. 7 (2016).

I further find that Respondent has proven that it would not have re-hired Dacio because of his March 2018 application (R. Exh. 11), even in the absence of any alleged protected concerted or union activities. Myers and Manager Hunter reasonably agreed that Dacio's March 15, 2018 employment application contained statements that showed that Dacio did not properly account for or take full responsibility for his conduct in 2017 which they understood to create risk to Respondent for conduct which violated Respondent's policies as Dacio failed to report a serious near incident which almost created a pipeline explosion and Dacio also tested positive for using unauthorized and illegal amphetamine and methamphetamine in violation of Respondent's drug policy which Dacio had previously honored and followed. Dacio's March 15, 2018 employment application continued along this track for Dacio of not being accountable or responsible for his past violative conduct when accountability is very important to Respondent in such as dangerous and harsh environment involving handling and delivering volatile petroleum products in dangerous conditions. Respondent refused to rehire or hire other applicants for this same unprofessional, irresponsible, or unqualified reasons. Marquez and Bolard were rehired because they fully acknowledged their prior failed drug tests and wanted to move forward with Respondent rather than continue to question the validity of a failed drug test, believe it was "unjust" and hold a grudge for their earlier terminations.

In addition, the fact that Dacio did not even attempt to take advantage of his opportunity to be rehired without admitting that unauthorized amphetamine and methamphetamine use at work are valid grounds for termination at an employer like Respondent who has a zero tolerance drug policy because of the nature of their business and the surrounding conditions demonstrates that Respondent had reasonable non-retaliatory justification for not rehiring Dacio after he submitted his March 15, 2018 application. Accordingly, I find that Respondent has proven that it would not have re-hired Dacio after reviewing his March 15, 2018 application for re-employment even in the absence of any alleged protected union or concerted activity. I therefore find that the General Counsel failed to prove that Respondent refused to rehire, consider for hire, or hire Dacio for unlawful or discriminatory reasons, and Respondent did not violate Sections 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Delta Western, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent did not violate the National Labor Relations Act in any manner alleged in the amended complaint.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended¹⁸

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed in its entirety.

Dated: Washington D.C., May 30, 2019

A handwritten signature in black ink, appearing to read "Gerald M. Etchingham". The signature is written in a cursive style with a horizontal line underneath it.

Gerald Michael Etchingham
Administrative Law Judge