

1 John M. Naylor  
Nevada Bar No. 5435  
2 Andrew J. Sharples  
Nevada Bar No. 12866  
3 NAYLOR & BRASTER  
1050 Indigo Drive, Suite 200  
Las Vegas, NV 89145  
4 (t) (702) 420-7000  
(f) (702) 420-7001  
5 jnaylor@naylorandbrasterlaw.com  
asharples@naylorandbrasterlaw.com  
6

7 *Attorneys for Respondent Apex Linen Service Inc.*

8 **UNITED STATES OF AMERICA**  
9 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
10 **REGION 28**

11 APEX LINEN SERVICE INC.,  
12 Respondent,  
13 and  
14 INTERNATIONAL UNION OF  
15 OPERATING ENGINEERS LOCAL 501,  
AFL-CIO,  
16  
17 Charging Party.

Case Nos. 28-CA-216351  
28-CA-218085  
28-CA-222251  
28-CA-225805  
28-CA-226407  
28-CA-226917  
28-CA-226924  
28-CA-226939  
28-CA-227970  
28-CA-227973  
28-CA-233003

18  
19 **RESPONDENT APEX LINEN SERVICE INC.'S BRIEF**  
20 **TO THE ADMINISTRATIVE LAW JUDGE**

21 Apex Linen Service Inc. ("Apex") submits its post-hearing Brief to the Administrative Law  
22 Judge ("ALJ").  
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1           **I.       INTRODUCTION**

2           The charges in this case can be divided into two broad categories, those that occurred prior  
3 to the execution of the collective bargaining agreement in June 2018 and those that arose after the  
4 signing of the collective bargaining agreement. Overall the charges also center on the treatment  
5 of Mr. Adam Arellano and Mr. Joseph Servin, two of the 10 engineers that Apex had at the time.

6           About five months before the execution of the collective bargaining agreement, Apex  
7 reinstated Mr. Arellano, Mr. Servin and Mr. Walker pursuant to 10(j) preliminary injunction. The  
8 claims from that time period almost immediately followed the reinstatement. One of them is  
9 illustrative of the frustration that Apex has had when attempting to resolve the issues between it  
10 and the Union. Upon reinstatement, Apex asked Mr. Servin, Mr. Arellano and Mr. Walker to  
11 either sign a confidentiality and non-compete agreement or, alternatively acknowledge they were  
12 bound by the one they previously signed when they first started at Apex. They basically refused  
13 to do so. The charge was brought. Had the parties reviewed the agreements – both new and prior  
14 – they would have found that they differed in only one material respect. The new agreement was  
15 actually more favorable to Mr. Arellano, Mr. Walker and Mr. Servin than the one they had  
16 originally signed years ago. Nevertheless, rather than work through the issue, a charge was  
17 brought.  
18

19           Apex wanted a more productive relationship with the Union. To that end, Joe Dramise,  
20 the one of the founders and the chief executive officer of Apex took over the negotiation of the  
21 collective bargaining agreement in about May 2018. Prior to that time, Marty Martin, who is  
22 Apex’s chief operating officer, led the negotiations. Frustrated with their pace (it had been over a  
23 year since the Union was certified), Mr. Dramise took over the negotiations and removed Mr.  
24 Marty Martin from the process. After a few weeks of brief negotiations, the collective bargaining  
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1 agreement was executed. As Mr. Dramise testified, Apex was hoping that this would be a fresh,  
2 more productive start to the relationship.

3 That fresh start never materialized. Charges recommenced almost before the ink on the  
4 collective bargaining agreement was dry. They started with the claim that Apex had not bargained  
5 over the job classification of Mr. Walker. As proven below using the contemporaneous  
6 documentation, Mr. Dramise spoke directly with the Union in detail about this subject at the time  
7 the collective bargaining agreement was signed. The GC, however, still pressed ahead with a  
8 charge.  
9

10 The charges center on the allegation that Apex's actions were motivated by Mr. Arellano,  
11 Mr. Servin, and Mr. Walker's Union affiliation. The GC has failed to meet his burden.

12 Apex will analyze the pre-collective bargaining agreement claims first, followed by an  
13 analysis of the post-collective bargaining claims.

## 14 **II. FACTUAL OVERVIEW**

### 15 **A. The Witnesses**

16 For ease of reference, the following is a list of the witnesses who testified:  
17

18

19 <b>Witness</b>	<b>Title/Position</b>	<b>Citation for Job Titles</b>
20 Adam Arellano	Alleged Discrimitee, Former Apex Engineer and Co-Shop Steward	TR, p. 928, ll. 24-25; p. 929, l. 1
21 Joseph "Joe" Dramise	Apex Chief Executive Officer	TR, p. 435, ll.16-24
22 Keith Marsh	Apex Director of Engineering	TR, p. 22, ll. 20-21
23 Charles "Ed" Martin	Union Business Representative	TR, p. 471, ll. 17-18
24 Glenn Edward "Marty" Martin IV	Apex Chief Operating Officer	TR, p. 351, ll. 4-5
25 Joseph Servin	Alleged Discrimitee, Former Apex Engineer and Co-Shop Steward	TR, p. 1008, ll. 15-16
26 Eugene "Gene" Sharron	Apex Chief Engineer	TR, p. 556, ll. 22-23

27  
28

**B. Apex, the Engineers and the Union**

Apex is a commercial laundry company that cleans sheets, towels, uniforms and other linen for hotels, casinos and restaurants. TR, p. 23, l. 25; p. 24, ll. 1-5; p. 231, ll. 3-9.<sup>1</sup> Apex began operations in August 2011. TR, p. 461, ll. 13-17. Apex's Las Vegas plant is approximately 100,000 square feet. TR, 230, ll. 22-25; p. 231, ll. 1-2. Apex currently has approximately 350 employees. TR, p. 403, ll. 9-11. Apex employs an engineering department to maintain the machines and equipment in its facility. TR, p. 24, ll. 6-10. There are currently 14 engineers, up from 10 engineers in March 2018. TR, p. 60, ll. 19-25; p. 61, l. 1.

On February 6, 2017, a representation election was held among Apex's engineer employees ("the Unit")<sup>2</sup>, and on February 15, 2017, the International Union of Operating Engineers, Local 501, AFL-CIO ("Union") was certified as the exclusive collective-bargaining representative of the Unit. (Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing ("Third Consolidated Complaint"), ¶ 8(b); Apex's Amended Answer to Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing ("Amended Answer to Third Consolidated Complaint") at ¶ 8(b)).

**C. Prior NLRB Hearing and 10(j) Petition**

Apex and the Union's history has been one of challenges. Several days after the February 6, 2017 election, the Union filed fourteen separate charges against Apex throughout 2017, all

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<sup>1</sup> Transcript page and line references will be TR, p. \_\_, l. \_\_. General Counsel's and Respondent's Exhibits will be GCX \_\_ and RX \_\_, respectively.

<sup>2</sup> The "Unit" is defined as "[a]ll full-time, regular part-time and extra board Engineers and Utility Engineers employed by the Employer at its facility located in Las Vegas, Nevada; excluding, all other employees, office clerical employees, guards and supervisors as defined in the Act. (Third Consolidated Complaint, ¶ 8(a); Apex's Amended Answer to Third Amended Complaint, ¶ 8(a)).

1 alleging a plethora of unfair labor practices. Later that year, the General Counsel (“GC”) and Apex  
2 litigated those allegations in a NLRB hearing before ALJ Ariel Sotolongo (the “2017 Case”).<sup>3</sup> The  
3 allegations in the 2017 Case encompassed a wide-range of issues, including Apex’s 2017  
4 discharges of Adam Arellano and Joseph Servin and layoff of Charles Walker. Proceedings in the  
5 2017 Case concluded on December 6, 2017 and the parties submitted their post-hearing briefs in  
6 January 2018.

7  
8 On November 21, 2017, after proceedings had commenced in the 2017 Case, the NLRB  
9 Regional Director for Region 28, Cornele A. Overstreet, filed a Petition for Preliminary Injunction  
10 against Apex pursuant to 29 U.S.C. § 160(j) (“10(j)”) in the United States District Court District  
11 of Nevada. (ECF No. 1 filed in *Overstreet v. Apex Linen Service Inc.*, Case No. 2:17-cv-02923-  
12 APG-CWH<sup>4</sup>). Apex filed its Response to the Petition on December 5, 2017. (ECF No. 11). After  
13 hearing held on January 5, 2018, District Court Judge Andrew P. Gordon entered an Order  
14 Granting in Part Petition for Temporary Injunction (“10(j) Order”) on February 12, 2018. GCX 4.  
15 The 10(j) Order ordered Apex to, among other things, offer reinstatement to Arellano, Servin and  
16 Walker. GCX 4, p. 27, ll. 25-27; p. 28, ll. 1-3. On February 22, 2018, pursuant to the 10(j) Order,  
17 Apex offered reinstatement to Mr. Arellano, Mr. Servin and Mr. Walker. GCX 35; GCX 40; TR,  
18 p. 1166, ll. 13-20.

19  
20 On June 6, 2018, ALJ Sotolongo entered his Decision. While Apex prevailed on several  
21 of the allegations, ALJ Sotolongo found the discharges of Mr. Arellano, Mr. Servin and Mr.  
22 Walker were unlawful, and ordered Apex to reinstate them. On July 23, 2018, the Board adopted  
23 ALJ Sotolongo’s findings and conclusions as set forth in the Decision. The 10(j) Order then  
24

25  
26 <sup>3</sup> Case Nos. 28-CA-192349, 28-CA-192774, 28-CA-193126, 28-CA-193231, 28-CA-  
27 196285, 28-CA-196459, 28-CA-197069, 28-CA-197182, 28-CA-197190, 28-CA-198033, 28-CA-  
28 202027, 28-CA-202209, 28-CA-203269 and 28-CA-193128.

<sup>4</sup> Going forward, all ECF citations will refer to this case.

1 dissolved pursuant to the operation of law. (*See also* ECF No. 55, vacating the 10(j) Order).

2 Notably, the GC never moved the District Court for an order to show cause as to why Apex  
3 should not be held in contempt. The GC’s internal procedures strongly urge the regions to monitor  
4 compliance and investigate possible contempt. *See* Section 10(j) Manual User’s Guide, Office of  
5 the General Counsel, September 2002, §§ 10.4 and 10.5, *see also* TR, p. 1031, ll. 16 – 25, p. 1032,  
6 ll. 1 - 15. At the hearing, the GC confirmed he had not proceeded with a contempt action. TR, p.  
7 16, l. 25; p. 17, ll. 1-14.

8 **D. Apex’s Attempts to Reach a Fresh Start with the Union**

9 **1. The Collective Bargaining Agreement (“CBA”)**

10 Apex and the Union entered into a CBA on or about July 20, 2018. CGX 3. Union  
11 Business Representative, Charles “Ed” Martin (“Ed”),<sup>5</sup> was the Union’s primary negotiator and  
12 provided the first draft of the CBA. TR, p. 511, ll. 5-13. The draft CBA was typical of the contracts  
13 the Union had in place with other employers. TR, p. 511, ll. 14-17. Initially, Apex Chief Operating  
14 Officer, Glenn “Marty” Martin (“Marty”) was Apex’s primary negotiator for the CBA. TR, p.  
15 422, ll. 9-15; p. 512, ll. 18-25. Ed and Marty began having substantive discussions regarding the  
16 CBA in May 2017. TR, p. 512, ll. 14-17. Joe Dramise, Apex’s president, was not involved in  
17 negotiations in May 2017. TR, p. 512, ll. 21-23.

18 Several weeks before Apex and the Union concluded their negotiations and signed the  
19 CBA, Mr. Dramise stepped in and replaced Marty as Apex’s lead negotiator. TR, p. 458, ll. 14-  
20 17. Mr. Dramise made the decision to assume CBA negotiations on Apex’s behalf because he was  
21 frustrated with how long negotiations were taking. TR, p. 459, ll. 1-11; TR, p. 358, ll. 24-25; p.  
22 359, ll. 1-8. Also, Mr. Dramise was concerned because Apex was experiencing problems and  
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<sup>5</sup> Ed Martin and Glenn Edward “Marty” Martin IV will be referred to by their first names  
28 due to the coincidence of having the same last name.

1 disharmony among its engineers. TR, p. 459, ll. 15-25; p. 460, ll. 1-12. Mr. Dramise hoped that  
2 having a CBA in place “would eliminate a lot of the confusion that we were having and problems  
3 that we were having in our department at that point in time.” TR, p. 460, ll. 9-11. Mr. Dramise  
4 and Marty had many conversations about Mr. Dramise’s desire for a “fresh start” with the Union  
5 once the CBA was signed. TR, p. 370, ll. 5-9.

6 Mr. Dramise and Marty testified that once Mr. Dramise took over, the parties reached a  
7 final agreement in about two or three weeks. TR, p. 458, ll. 18-22; p. 423, ll. 6-10. Ed testified it  
8 was approximately “six weeks or a month” from the time Mr. Dramise stepped in to when the  
9 CBA was signed. TR, p. 516, ll. 9-16. Regardless of the timeframe, it is uncontroverted that Mr.  
10 Dramise directly assumed negotiations on Apex’s behalf, replacing Marty as Apex’s negotiator.  
11 TR, p. 422, ll. 21-22; p. 458, ll. 23-25; p. 516, ll. 17-23. Ed testified that the negotiation process  
12 was “smoother” once Mr. Dramise became involved. TR, p. 515, ll. 18-21. Once Mr. Dramise  
13 took over negotiations, Marty did not have any further involvement in negotiating the CBA. TR,  
14 p. 423, ll. 2-5, 11-13; p. 516, ll. 17-19.

15  
16  
17 The parties ultimately reached an agreement and executed the CBA on or about July 20,  
18 2018. GCX 3. The final CBA was largely drafted by the Union. TR, p. 512, ll. 3-7. The Union  
19 intended the CBA to be a complete agreement which governed the relationship between the Union  
20 and Apex. TR, p. 518, ll. 6-13; p. 519, ll. 12-18.

21 The following CBA provisions are germane to this case:

22  
23 **(i). The Integration or “Zipper” Clause**

24 Like most collective bargaining agreements, the CBA contained an integration or “zipper”  
25 clause, stating that it was a complete agreement by the parties regarding all matter subject to  
26 negotiation:

27 **WHEREAS, the parties have, by negotiation and collective bargaining, reached**  
28 **complete agreement on wages, hours of work, working conditions and other**

1 **related, negotiable subjects to be incorporated into a new labor agreement**  
2 **which shall supersede all previous verbal or written agreements applicable to**  
3 **the employees in the bargaining unit**, defined herein which may have existed  
between the Employer and the union or between the predecessor of the Employer,  
if any, and the Union. GCX 3 at p. 1 (emphasis added).

4 The Union agreed that the CBA was to be a complete agreement, defining the relationship  
5 between it and Apex:

6 BY MR. NAYLOR: So turning to -- back up for a second on the CBA. So from  
7 the Union's perspective, the collective bargaining agreement was supposed to be a  
8 complete agreement governing the relationship between the Union and Apex; is  
that correct?

9 [Ed Martin]: Yes, that would be accurate.

10 Tr. p. 518, ll. 6 – 11. *See also* Tr. p. 518, ll. 12 – 25, p. 519, ll. 1 – 15.

11 **(ii). Management Rights Clause**

12 Under the CBA, Apex enjoys a broad management rights clause which gives it substantial  
13 autonomy and control in governing its employees and business operations:

14 12.01 Rights to Manage.

15 Rights to Manage. Except as expressly modified or restricted by a specified  
16 provision of the Agreement, all statutory and inherent managerial rights,  
17 prerogatives, and functions are retained and vested exclusively in the Employer,  
18 including but not limited to, the rights, **in accordance with its sole and exclusive**  
19 **judgment and discretion**: to determine the number of employees to be employed;  
20 to hire employees, **determine their qualifications and assign and direct their**  
21 **work; to formulate, implement and enforce rules of conduct; to promote,**  
22 **demote, transfer, lay-off, recall to work, and retire employees; to discipline**  
23 **employees and determine the level of discipline**; to determine the amount and  
24 forms of compensation for employees; to maintain the efficiency of their  
25 operations; to determine the methods, means, and facilities by which operations are  
26 conducted; to set the starting and quitting times and to set the number of hours to  
27 be worked; to set the standards of productivity and the services to be rendered; **to**  
28 **use independent contractors to perform work or services**; to subcontract,  
contract out, close down, or relocate the Employer's operations or any part thereof;  
to expand, reduce, alter, combine, transfer, assign, or cease any job, department,  
operation or service; to control and regulate the use of machinery, facilities,  
equipment, and other property of the Employer; to introduce new or improved  
research, production, service, distribution, and maintenance methods, materials,  
machinery, and equipment; to determine the number, the location and operation of  
departments, divisions, and all other units of the Employer; to issue, amend and

1 revise policies, rules, regulations and practices; and to take whatever action is either  
2 necessary or advisable to determine, manage and fulfill the mission of the Employer  
and to direct the Employer's employees.

3 The Employer's failure to exercise any right, prerogative, or function reserved to  
4 it, or the Employer's exercise of any such right, prerogative, or function in a  
5 particular way, shall not be considered a waiver of the Employer's right to exercise  
the same in some other way not in conflict with the express provisions of this  
Agreement or the past practices of the plant.

6 Any grievance over whether the action of the Employer is contrary to the terms of  
7 this Agreement may be taken up under the provisions of Article 14. CGX 3, pp.  
8 26-27 (emphasis added).

9 **(iii). Apex's Workplace Rules and Employee Handbook**

10 The CBA provides that Apex "may establish and enforce reasonable rules, policies and  
11 procedures applicable to employees, provided that such rules, policies and procedures do not  
12 conflict with the provisions of this Agreement." CGX 3, p. 27. Apex maintains an employee  
13 handbook ("Handbook") which sets forth its workplace rules. RX 3. Section 5-1 of the Handbook  
14 governs workplace conduct. RX 3, pp. APEX\_010355-56. While there have been updates to the  
15 Handbook over the years, there was no dispute that the one at RX 3 was the version relevant to  
16 these proceedings. Some of the workplace conduct rules applicable to this case include:

- 17
- 18 5. Violation of safety rules and policies.
  - 19 8. Insubordination or disobedience of a lawful management directive.
  - 20 14. Willful or careless destruction or damage to Company assets or to the  
21 equipment or possessions of another employee.
  - 22 15. Wasting work materials.
  - 23 20. Unsatisfactory job performance.
  - 24 21. Any other violation of company policy.
- 25

26 RX 3, p. APEX\_010356.

27 Per the CBA, "it shall be the responsibility of the employee to be familiar with such rules,  
28

1 policies and procedures.” CGX 3, p. 27.

2 The Union has not contested the applicability of the Employee Handbook and is not  
3 claiming that the CBA somehow supersedes it. TR, p. 536, ll. 3 – 6. The legality of the Handbook  
4 is not in dispute. The GC did not bring any allegations pertaining to the Handbook in this case.  
5 (*See generally*, Third Consolidated Complaint; *see also*, TR, p. 935, ll. 10-17). For instance, the  
6 GC did not allege the Handbook is vague or unenforceable. It is critical to note that both the GC  
7 and the Union have had a copy of the Handbook for years. In fact, the Handbook was the subject  
8 of the 2017 Case. Although the GC had initially brought voluminous allegations regarding the  
9 Handbook in the 2017 Case, all but one<sup>6</sup> were withdrawn following the NLRB’s decision in *Boeing*  
10 *Co.*, 365 NLRB No. 154 (2017). In any event, there are no allegations regarding the validity or  
11 legality of the Handbook before the Court in this case.  
12

13 **(iv). Employees’ Duty to Comply with Safety Rules**

14 The CBA requires employees to follow Apex’s safety rules and allows Apex to discipline  
15 employees, up to and including discharge, for safety rule violations:  
16

17 29.02 Employees are required to comply with all safety rules, policies and  
18 practices established by the Employer from time to time, and to cooperate with the  
19 Employer in the enforcement of safety measures. Violations of any such rules,  
20 policies and procedures shall be grounds for disciplinary action up to and including  
21 discharge.

22 CGX 3, p. 40.

23 **(v). Apex’s Right to Issue Discipline and Discharge Employees**

24 The CBA allows Apex to discipline and/or discharge its employees subject to the  
25 progressive discipline provision in the CBA, which, among other things, required disciplinary  
26 actions to be in writing:  
27

---

28 <sup>6</sup> The allegation pertaining to Section 5-4 (“Use of Social Media”) of the Handbook was not withdrawn. This section does not relate to any allegation in this case.



1 such positions. GCX 3, p. 35 (emphasis added).

2 As provided for by the plain language of the CBA, a Utility Engineer is a trainee while a  
3 Maintenance Engineer can work on their own.

4 **2. Apex Transitioned Marty Out of His Role of Dealing with the Union**  
5 **and the Engineers**

6 Mr. Dramise's decision to directly negotiate the CBA was not the only change Apex made  
7 to restart its relationship with the Union. Of particular significance, Keith Marsh replaced Marty  
8 regarding management of the engineers. TR, p. 401, l. 25; p. 402, ll. 1-3; GCX 5, p. 1 (Mr. Marsh's  
9 email to Ed dated September 25, 2018) and p. 3 (Mr. Dramise's email to Ed dated September 19,  
10 2018). Marty did not have any role in issuing the verbal warnings or discipline to Mr. Servin or  
11 Mr. Arellano outlined in CGX 11 (Mr. Arellano verbal warning regarding ordering Mosca wiring  
12 harness), GCX 12 (Mr. Arellano verbal warning regarding ordering Barmop motor), GCX 13  
13 (Arellano discipline regarding rooftop safety violation), GCX 16 (Mr. Servin discipline regarding  
14 Iron 2 stacker slide table incident), GCX 17 (Mr. Arellano discipline regarding Press 1 cooling  
15 valve incident), GCX 18 (Mr. Arellano discipline regarding turning off REMA vacuum), GCX 19  
16 (Mr. Servin discipline regarding insubordination) and GCX 20 (Mr. Servin discipline regarding  
17 AP2 Double Buck incident). TR, p. 401, ll. 11-17, 20-25; p. 402, ll. 1-9; p. 403, ll. 15-24; p. 405,  
18 ll. 6-20. Mr. Marsh also replaced Marty as the Union's contact for responding to the Union's  
19 information requests. CGX 5, p. 4 (Mr. Dramise's email to Ed dated September 18, 2018); TR, p.  
20 359, ll. 15-24; p. 360, ll. 4-9. Once Mr. Dramise stepped in to CBA negotiations, he rarely spoke  
21 to Marty about anything pertaining to the Union. TR, p. 453, ll. 10-15.

22 **3. The CBA Did Not Result in a Fresh Start as Apex Hoped**

23 Mr. Dramise hoped that entering into the CBA would allow for a fresh start between Apex  
24 and the Union by resolving the disharmony among the engineers and by establishing a framework  
25 for the relationship going forward. TR, p. 459, ll. 15-25; p. 460, ll. 1-12. Indeed, even Ed said  
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1 that the process seemed to go much smoother once Mr. Dramise took over. Tr. p. 515, ll. 18 – 21.

2 However, Apex’s expectations were not realized. As Mr. Dramise testified:

3 [Mr. Naylor]: And you were hoping -- to pick up on what you just said is that you  
4 were hoping that that [the CBA] would resolve everything, did that in fact happen?

5 [Mr. Dramise]: That is correct. No. I thought it was. We got more  
6 complaints. We got more issues. And it -- no, it was not good. We had employees  
7 that were good employees of the Company that all of the sudden became less  
8 productive, more embolden not to follow direction. There’s a lot of issues that  
9 occurred over that period of time, and it was affecting the functionality of our  
10 business.

11 TR, p. 460, ll. 13-22. Mr. Dramise contemporaneously expressed these concerns to Ed in an email  
12 dated September 19, 2018, saying, “since we secured a contract with you, things have gotten worse  
13 not better” and “[t]his is consuming significant amount of time dealing with a few individuals that  
14 do not want to honor the contract you and I had agreed upon.” GCX 5, p. 3 (Mr. Dramise’s email  
15 to Ed dated September 19, 2018).

## 16 **E. Summary of the Allegations**

### 17 **1. Mr. Servin and Mr. Arellano**

18 Despite the fact that the Unit consisted of 10 engineers at the time, almost every allegation  
19 in this case centers around Mr. Servin and Mr. Arellano. For reference, Mr. Servin is the engineer  
20 wrote that he planned “to make [Apex’s] lives hell for the pure pleasure of it lol.” RX 57 (first  
21 page of text messages after “Exhibit 1” marker); *see also* TR, p. 1143, ll. 3-7 (Mr. Servin admitting  
22 authoring that text message). Mr. Servin believes he is special and exempt from certain work. Mr.  
23 Servin, a highly experienced engineer, also claimed that he had no knowledge of Apex’s policy  
24 against substandard work. TR, p. 1142, ll. 23-25; p. 1143, ll. 1-2. Neither the Union nor the GC  
25 challenged this policy, and under the CBA it was Mr. Servin’s responsibility to be familiar with it.  
26 CGX 3, p. 27.

27 Mr. Arellano took a similar view of his responsibilities. He views himself to be the most  
28

1 experienced engineer that Apex has, yet he claims to have no knowledge of company policy against  
2 substandard work. TR, p. 888, ll. 17-18. Like Mr. Servin, he also believes he is exempt from  
3 certain responsibilities. For example, he testified that if he saw someone improperly feeding linen  
4 into a machine in a manner that would cause a jamb, he had no responsibility to take corrective  
5 action. Basically, he was entitled to walk by and wait for the service call:

6 BY MR. HIGLEY: Did [Gene Sharron] tell Mr. Servin that he had any duties  
7 with regard to the operators of the machines?

8 [Mr. Arellano]: He did say that we're responsible for the folds on the  
9 machines, and if we see the operators feeding the machine improperly, that that was  
10 our responsibility.

11 Q. And did Mr. Servin or you respond to that comment?

12 A. Yes.

13 \* \* \*

14 Q. What did you say?

15 A. **I said that's not our responsibility.**

16 \* \* \*

17 Q. Okay. And why did you say that's not your -- or why did you say that's not  
18 your responsibility?

19 A. **Because of the CBA.**

20 Q. Can you be more specific?

21 A. **In the contract, it outlines our work.**

22 TR, p. 878, ll. 8-25 (emphasis added).  
23

24 Given their attitudes, it is not surprising that the bulk of the claims revolve around them.  
25 However, it is important to note that Apex never singled-out Arellano and Servin. Apex issued  
26 discipline to other engineers as well. *E.g.* RX 39 (Disciplinary Action Form dated September 4,  
27 2018 issued to engineer Joe Tuttle regarding overfilling a salt tank).  
28

1                                   **2. Charlie Walker**

2                   Few of the allegations pertain to Charlie Walker individually. Mr. Walker is currently  
3 employed at Apex. TR, p. 1166, ll. 2-5. As Mr. Sharron testified, he appears to be doing just fine.  
4 TR, p. 1300, ll. 8-11. There is no evidence that Mr. Walker has ever been subjected to discipline.

5                   **III. LEGAL STANDARD**

6                   **A. The GC Must Prove Unlawful Motive Respect to Apex’s Actions**

7                   Where, as here, the GC alleges an employer’s violation of Sections 8(a)(1), (3), or (4) of  
8 the Act that turns on the employer’s antiunion motivation in disciplining, suspending and/or  
9 terminating its employee, the NLRB uses a well-established two-step causation test. *Wright Line*,  
10 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899, 904 (1st Cir. 1981), *cert*  
11 *denied*, 455 U.S. 989 (1982); *see also NLRB v. Overseas Motor, Inc.*, 721 F.2d 570, 571 (6th Cir.  
12 1983) (extending the *Wright Line* analysis to allegations under Section 8(a)(4)). Under the *Wright*  
13 *Line* test, it is the GC’s burden to “make a prima facie showing sufficient to support the inference  
14 that protected conduct was a ‘motivating factor’ in the employer’s decision [to discipline or  
15 discharge the employee].” *Wright Line*, 251 NLRB at 1089. A preponderance of the evidence  
16 standard applies. 29 U.S.C. § 160(c).

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18  
19                   In 2015, the Eighth Circuit reiterated that the GC’s burden requires him to prove a nexus  
20 between an employee’s discipline or discharge and an employer’s antiunion animus. *Nichols*  
21 *Aluminum, LLC v. NLRB*, 797 F.3d 548, 555 (8th Cir. 2015) (finding the Board misapplied *Wright*  
22 *Line* where it held the GC need not establish a nexus between the employee’s discipline or  
23 discharge and employer’s antiunion animus). To meet the nexus requirement, the GC must prove  
24 ‘but for’ causation: that, but for employee’s union activities or membership, the employee would  
25 not have been disciplined or discharged. *Id.* at 554; (quoting *Concepts & Designs, Inc. v. NLRB*,  
26 101 F.3d 1243, 1245 (8th Cir. 1996) and *Mead and Mount Construction Co. v. NLRB*, 411 F.2d  
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1 1154, 1157 (8th Cir. 1969)). Critically, while an employer’s hostility to a union is a significant  
2 factor in considering whether an employer had a discriminatory motive, “*general hostility toward*  
3 *the union does not itself supply the element of unlawful motive.*” *Nichols*, 797 F.3d at 554-555;  
4 (quoting *Carleton College v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000) and *GSX Corp. of*  
5 *Missouri v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) (emphasis added)).

6 If, *and only if*, the GC is able to make his prima facie showing, “the burden will shift to the  
7 employer to demonstrate that the same action would have taken place even in the absence of the  
8 protected conduct.” *Wright Line*, 251 NLRB at 1089; *see also Ready Mixed Concrete Co. v. NLRB*,  
9 81 F.3d 1546, 1550 (10th Cir. 1996) (“[b]y shifting the burden the employer’s justification  
10 becomes an affirmative defense”). Employers “may not discharge an employee because of his  
11 union activity; but they may *and should* apply their usual rules and disciplinary standards to a  
12 union activist just as they would to any other employee.” *Wright Line*, 662 F.2d at 901 (emphasis  
13 added). To meet its defense burden under *Wright Line*, the employer must show it “had a  
14 reasonable belief that the employee committed the offense, and that it acted on the belief when it  
15 discharged [the employee].” *SBM Site Services, LLC*, 367 NLRB No. 147, \*3 (2019) (quoting  
16 *McKesson Drug Co.*, 337 NLRB 935, 937 n.7 (2002)). Where the employer demonstrates it had  
17 such a reasonable belief, it must show it would have taken the same action absent the employee’s  
18 protected conduct. *Id.*

19  
20  
21 In an effort to prove unlawful motive, the GC on several occasions attempted to elicit Mr.  
22 Sharron’s personal opinions regarding the Union. For example, when cross-examining Mr.  
23 Sharron, the GC unsuccessfully attempted to ask for Mr. Sharron’s personal views about the  
24 Union. TR, p. 677, ll. 14-21. Elsewhere, the GC obtained testimony from Mr. Sharron regarding  
25 his discussions with members at some time prior to the incidents at issue in this case. TR, p. 674,  
26 ll. 16-25; p. 675, ll. 1-25; p. 676, ll. 1-25; p. 676, ll. 1-25; p. 677, ll. 1-8. Mr. Sharron’s personal  
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28

1 opinions do not demonstrate intent on the part of Apex.

2 Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (“NLRA”)   
3 implements the First Amendment by requiring that “any views, argument or opinion, shall not be   
4 ‘evidence of an unfair labor practice’” so long as such express does not contain any “threat of   
5 reprisal or force or promise of benefit.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct.   
6 1918, 1942, 23 L.Ed.2d 547 (1969). *Gissel* explained that “[a]ny assessment of the precise scope   
7 of employer expression... must be made in the context of its labor relations setting.” *Id.*; *see also*,   
8 *id.*, 395 U.S. at 618, 89 S.Ct. at 1918, continuing:

10 Thus, an employer is free to communicate to his employees an of his general views   
11 about unionism or any of his specific views about a particular union, so long as the   
12 communications do not contain a “threat of reprisal or force or promise of benefit.”

13 *See also, Rogers Electric, Inc.*, 346 NLRB No. 53, \*3 (2006), in which the Board noted that §8(c)   
14 protects “[i]ntemperate’ remarks that are merely expressions of personal opinion are protected by   
15 the free speech provisions of Section 8(c).”

16 Further, the NLRA does not prohibit employers from asking non-coercive questions:

17 If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive   
18 questions of their employees during such a campaign, the Act would directly collide   
19 with the Constitution. What the Act proscribes is only those instances of true   
20 “interrogation” which tend to interfere with the employees’ right to organize.

21 *Rossmore House*, 269 NLRB No. 198, \*3 (1984). *Rossmore House* further stands for the   
22 proposition that Section 8(a)(1) prohibits interrogation *only if* it is coercive or interferes with   
23 employee rights:

24 It is well established that interrogation of employees is not illegal per se. Section   
25 8(a)(1) of the Act prohibits employers only from activity which in some manner   
26 tends to restrain, coerce or interfere with employee rights. To fall within the ambit   
27 of § 8(a)(1), either the words themselves or the context in which they are used must   
28 suggest an element of coercion or interference.

*See also, Springfield Hospital*, 281 NLRB No. 76, \*1 (1986) (finding that asking why an employee   
supporting the union was insufficient to establish coercion necessary to find a violation of the   
NLRA).

1                   **B.       The CBA Is Subject to Ordinary Contract Interpretation Rules**

2                   The Supreme Court of the United States recently reaffirmed that collective bargaining  
3 agreements must be interpreted “according to ordinary principles of contract law,” rejecting the  
4 “*Yard-Man*” standard, which improperly gave perpetual effect to silent durational clauses. *CNH*  
5 *Indus. N.V. v. Reese*, 583 U.S. \_\_\_, 138 S.Ct. 761, 764 (2018) (quoting *M&G Polymers USA, LLC*  
6 *v. Tackett*, 574 U.S. \_\_\_, 135 S.Ct. 926, 190 (2015)). Under this approach, contract terms should  
7 be given their ordinary meaning, and when the terms are clear, the intent of the parties must be  
8 ascertained from the contract itself. *E.g. Klamath Water Users Protective Ass'n v. Patterson*, 204  
9 F.3d 1206, 1210 (9th Cir.1999). “Whenever possible, the plain language of the contract should be  
10 considered first.” *Id.* (citations omitted).

11  
12                   **IV.     THE CLAIMS**

13                   **A.       Claims Relating to Mr. Arellano, Mr. Servin and Mr. Walker Which Are**  
14                   **Based on Apex’s Actions Before the CBA Was Signed**

15                   The claims discussed below are common to Mr. Arellano, Mr. Servin, and Mr. Walker and  
16 are all based on actions that took place after reinstatement and before the signing of the CBA.  
17 These claims are generally based on alleged violations of the Preliminary Injunction, however, the  
18 GC elected to bring there in this forum rather than return to U.S. District Court. TR, p. 18, ll. 6-  
19 22; p. 1031, ll. 16-25; p. 1032, ll. 1-15 (ALJ’s admonishment that the GC should have attempted  
20 to adjudicate reinstatement issues with the District Court pursuant to the 10(j) Order). The 10(j)  
21 Order was dissolved upon the entry of ALJ Sotolongo’s decision on June 6, 2018. (ECF No. 55,  
22 vacating the 10(j) Order; *see also Barbour v. Central Cartage, Inc.*, 583 F.2d 335, 336-337 (7th  
23 Cir. 1978); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975).

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1                   **1. Apex Requested that Mr. Arellano, Mr. Servin, and Mr. Walker Sign**  
2                   **a Confidentiality Agreement and Non-Compete Agreement That was**  
3                   **More Favorable to Them Than What They Had Originally Signed**  
4                   **Years Ago**

5                   Upon returning to Apex in March 2018, Mr. Arellano, Mr. Servin and Mr. Walker went to  
6                   a company called AdvanStaff where they signed forms signifying their acknowledgment of Apex's  
7                   Confidentiality Policy and Apex's Non-Compete policy or affirm that the ones they signed  
8                   previously were still in effect. *E.g.*, GCX 36, TR. p. 372, ll. 3 – 9. AdvanStaff is Apex's third-  
9                   party that handles the administration of its employees. TR, p. 217, ll. 1-4. The GC alleges that  
10                  this constituted an unfair labor practice because Apex allegedly made Mr. Arellano, Mr. Servin  
11                  and Mr. Walker sign these documents because of their ties to the Union and that they had testified  
12                  in the prior proceedings. (*See* Third Consolidated Complaint at ¶¶ 6(a), 6(o) and 7); *see also* GCX  
13                  4.

14                  The GC failed to meet the burden of proof because he did not introduce any evidence to  
15                  demonstrate that Mr. Arellano, Mr. Servin and Mr. Walker had to sign off on a Confidentiality  
16                  Policy or Non-Compete Agreements that were different from what they had signed before. The  
17                  GC introduced the prior Confidentiality Policy and Non-Compete Agreement for Mr. Arellano,  
18                  which Mr. Arellano executed in 2011. GCX 34. One might assume, and the GC may argue, that  
19                  the 2011 agreement is the same agreement that Mr. Servin and Mr. Walker originally signed when  
20                  they first started at Apex. A comparison of the two Confidentiality Policies (the one from 2011,  
21                  which is GCX 34 to the one at issue, which is GCX 36) reveals that the policies for both periods  
22                  are virtually identical, and that there were only an insignificant number of non-substantive  
23                  changes, i.e., wordsmithing. *Cf.*, GCX 34 and 36; *see also*, Attachment 1 to this Brief (detailing a  
24                  redline comparison of the text of GCX 34 and 36).<sup>7</sup> There was only one substantive change, that  
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28                  <sup>7</sup> The undersigned transferred the text of GCX 34 and GCX 36 into separate Word

1 was actually **more favorable to Mr. Arellano, Mr. Servin and Mr. Walker** than version they  
2 had signed years ago. *Id.* Indeed, the time period for the non-compete provision was reduced  
3 from 18 months to 12 months. *Id.*

4 An unfair labor practice must be proven by the preponderance of the evidence. 29 U.S.C.  
5 § 160(c). The finding of a violation under Section 8(a)(1) and/or (3) of the Act “normally turns  
6 on whether the discriminatory conduct was motivated by an antiunion purpose.” *NLRB v. Great*  
7 *Dane Trailers, Inc.*, 388 U.S. 26, 33, 87 S.Ct. 1792 (1967); *see also Southcoast Hospitals Group,*  
8 *Inc. NLRB*, 846 F.3d 448, 454 (1st Cir. 2017) (recognizing *Great Dane’s* application to 8(a)(1)  
9 claims). The threshold question is whether the adverse effect of the alleged discriminatory conduct  
10 is “inherently destructive” of important employee rights. *Great Dane*, 388 U.S. at 34. If so, the  
11 Board may presume unlawful motive. If the Board instead finds the employer’s conduct fell short  
12 of the “inherently destructive” category, i.e., that adverse effect on the employee is “comparatively  
13 slight,” then the burden shifts to the employer to “come forward with evidence of legitimate and  
14 substantial business justifications for the conduct.” *Id.* If the employer does so, the burden shifts  
15 back to the NLRB to present “specific evidence” of the employer’s intent to discourage Union  
16 membership. *Id.*

19 Here, it is axiomatic that Mr. Arellano, Mr. Servin and Mr. Walker signed a non-compete  
20 agreement *which is more favorable* than what they were originally bound to. This fact alone  
21 negates any argument that the alleged discriminatory conduct is “inherently destructive” to any  
22 employee rights. To the contrary, the signing of a more favorable confidentiality agreement cannot  
23 be considered an attempt to discourage Union activity or retaliation for participating in prior Board  
24 proceedings. Moreover, Apex had a legitimate reason to have Arellano, Servin and Walker sign  
25

26  
27 \_\_\_\_\_  
28 documents and ran a redline comparison which is attached as Attachment 1.

1 the paperwork, or alternatively, agree they were bound by previous agreement. As Marty testified,  
2 they were being reinstated by Court Order, and in order to accomplish the reinstatement, they  
3 needed to re-enroll with AdvanStaff. TR, p. 371, l. 25; p. 1-9; p. 373, ll. 24-25; p. 374, ll. 1-6. It  
4 was therefore the GC's burden to prove, by "specific evidence," that Apex intended to discriminate  
5 against Arellano, Servin and Walker. Simply put, there is not a shred of evidence supporting that  
6 Apex had a discriminatory intent. If Apex intended to discriminate against Arellano, Servin and  
7 Walker, why would it offer them better terms that they had previously?  
8

9 **2. The Appropriate Keys Were Supplied, However, Apex Frequently Had**  
10 **A Shortage of Radios**

11 The GC alleges that Apex committed an unfair labor practice by not giving Mr. Arellano,  
12 Mr. Servin and Mr. Walker radios when they returned to work in March 2018. (*See* Third  
13 Consolidated Complaint at ¶¶ 6(b), 6(o) and 7). As with the confidentiality agreement and non-  
14 compete policy, the GC alleges that this was unlawful because Apex denied them the radios due  
15 to their Union ties and their testimony in the prior proceedings. *Id.* However, the evidence does  
16 not establish unlawful motive but rather establishes that Apex did not have and currently does not  
17 have enough radios to go around to everyone that typically uses them. Apex regularly purchases  
18 new radios and sends radios out for repair. TR, p. 1253, ll. 8-10. Apex introduced voluminous  
19 emails, quotes and purchase orders spanning from 2016 through 2019 detailing radio purchases  
20 and repairs over that period. RX 58; TR, p. 1253, ll. 22-25; p. 1254, ll. 1-6. These include radios  
21 used by all of the engineers. TR, p. 1254, ll. 7-9. The uncontroverted testimony was that in March  
22 2018, the same time Mr. Arellano, Mr. Servin and Mr. Walker were reinstated, Mr. Marsh was  
23 shorthanded because he had sent seven radios to a vendor for repair. RX 29; TR, p. 314, l. 25; p.  
24 315, ll. 1-10. In fact, in March 2018, Apex only had about 35 radios compared to its current  
25 inventory of 50. TR, p. 318, ll. 8-13. When Apex does not have enough radios to go around,  
26 Apex's policy was to have employees share them. TR, p. 319, ll. 3-16. Apex assigned Mr.  
27  
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1 Arellano, Mr. Servin and Mr. Walker their own radios in August and September 2018. RX 29 at  
2 pp. APEX\_010313, 010314 and 010315.

3 The GC has alleged that the failure to give Mr. Arellano, Mr. Servin and Mr. Walker a full  
4 set of keys was motivated by their affiliation with the Union. (*See* Third Consolidated Complaint  
5 at ¶¶ 6(b), 6(o) and 7). They were, however, given sufficient keys, e.g., a lockout/tagout key, a  
6 group tagout key, and a master lock key to the facility. Tr. 58, ll. 8 – 10. The GC provided no  
7 evidence to support this claim and therefore has not met his burden.  
8

9 As with the confidentiality agreements, there is no evidence of discriminatory intent. As  
10 an initial matter, “denying” radios and keys to Arellano, Servin and Walker is not “inherently  
11 destructive” of any employee rights. *Great Dane*, 388 U.S. at 34. Any adverse effect of denying  
12 radios and keys, to the extent there is any, would fall into the “comparatively slight category. *Id.*  
13 There is no conspiracy here. The evidence proves that Apex did not have enough radios to go  
14 around. The radios are constantly in and out of the repair shop. There is no evidence that Apex  
15 deliberately withheld radios to Arellano, Servin and Walker as some ill-conceived retribution for  
16 engaging in Union activity, to discourage same, or because they filed charges and/or participated  
17 in Board hearings. Further, Apex *did* eventually issue radios and keys to Arellano, Servin and  
18 Walker. The GC failed to meet his burden of proof by showing Apex intended to discriminate  
19 against Arellano, Servin and Walker.  
20

### 21 **3. Picking Up Trash Was Within the Engineers’ Scope of Duty**

22 The GC alleged Apex discriminated against Mr. Arellano, Mr. Servin and Mr. Walker by  
23 assigning them to pick up trash. (*See* Third Consolidated Complaint at ¶¶ 6(e), 6(o) and 7). As  
24 before, the GC argued that Apex assigned this duty due to Mr. Arellano, Mr. Servin and Mr.  
25 Walker’s ties to the Union and their participation in the prior proceedings. *Id.* These allegations  
26 are without merit. The uncontroverted testimony is that Apex’s business generates trash which  
27  
28

1 blows around its lot and neighboring lots. TR, p. 82, ll. 1-21; p. 83, ll. 3-11. On at least one  
2 occasion, Clark County, Nevada issued a warning to Apex regarding the trash. TR, p. 274, ll. 17-  
3 21. Apex routinely assigned its engineers to pick up trash on its lot and its neighboring lots. TR,  
4 p. 273, ll. 20-25; p. 274, ll. 1-16; p. 575, ll. 13-15. Apex assigned its engineers to pick up trash on  
5 neighboring lots because the trash originates from Apex. TR, p. 274, ll. 11-16.

6 In June 2018, Nevada OSHA closed off access to the roof until Apex instituted a fall  
7 protection system (see Section D 1 below regarding the Weightanka system), and Mr. Marsh wrote  
8 a note to Mr. Arellano, Mr. Servin and Mr. Walker advising that the roof was closed. GCX 9; TR,  
9 p. 80, ll. 6-14; p. 81, ll. 4-7. Mr. Arellano, Mr. Servin and Mr. Walker had been working on the  
10 evaporative coolers on the roof from the time they were reinstated in March 2018 until OSHA  
11 ordered it to be closed without advance warning. TR, p. 43, ll. 8-13; p. 50, ll. 13-17; p. 256, ll. 2-  
12 5. Apex needed to find other work for Mr. Arellano, Mr. Servin and Mr. Walker to perform. TR,  
13 p. 84, ll. 12-19. Mr. Marsh's note to Mr. Arellano, Mr. Servin and Mr. Walker listed three  
14 alternative assignments: (1) patrol the west, south and east sides of the building for trash, (2) when  
15 daylight, pick up trash that blew across the street, and (3) clean the evaporative cooler panels that  
16 were already down off the roof and work on portable evaporative coolers. GCX 9; TR, p. 81, ll.  
17 8-25; p. 82, ll. 1-25; p. 83, ll. 1-20.

18 The GC alleged the trash pick-up assignment was designed to discourage Mr. Arellano,  
19 Mr. Servin and Mr. Walker from engaging in Union activity and to retaliate against them for  
20 testifying in Board hearings. (See Third Consolidated Complaint, ¶ 6(o) and ¶ 7). However, there  
21 is no evidence of discriminatory intent in the record. While picking up trash may not be a desirable  
22 assignment, there is no evidence it is "inherently destructive" of any employee rights. *Great Dane*,  
23 388 U.S. at 34. Apex met its burden of demonstrating a legitimate and substantial reason for  
24 assigning Arellano, Servin and Walker, *as well as its other engineers*, to pick up trash. It is  
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1 uncontroverted that loose trash from Apex’s plant blows around its lot and adjacent lots, and that  
2 Clark County issued a warning to Apex about this problem. Additionally, there is no evidence  
3 Apex singled-out Arellano, Servin and Walker. Apex has assigned trash pick-up to its engineers  
4 for at least three years. TR, p. 273, ll. 24-25; p. 274, ll. 1-6. Finally, the trash pick-up was an  
5 *alternative* assignment. In addition to picking up trash, Marsh’s note also gave Arellano, Servin  
6 and Walker the option of continuing to work on evaporative cooler panels (that were off the roof)  
7 and working on the portable evaporative coolers. GCX 9. In any event, the GC failed to meet his  
8 burden. There is no evidence in the record that the trash pick-up assignment was done to  
9 discourage Union participation or as retaliation.  
10

11 **4. Maintenance of the Evaporative Coolers on the Roof Was Within the**  
12 **Scope of Duty for The Engineers**

13 The GC alleged Apex committed an unfair labor practice by assigning Mr. Arellano, Mr.  
14 Servin and Mr. Walker to work on the evaporative coolers located on the roof of Apex’s facility.  
15 (*See* Third Consolidated Complaint at ¶¶ 6(b), 6(e), 6(o) and 7). The GC alleged that Apex assigned  
16 this work because of their Union ties and their participation in the prior proceedings. *Id.* The GC  
17 failed to meet his burden of proving these allegations.  
18

19 Apex uses evaporative coolers, aka swamp coolers, to cool its plant. TR, p. 254, ll. 6-18;  
20 RX 28. There are 25 evaporative cooler units located on the roof of Apex’s facility. TR, p. 43, ll.  
21 5-7; RX 13. The units are about four feet tall and about three feet by three feet wide. TR, p. 242,  
22 ll. 23-25; p. 243, ll. 1-2; p. 243, ll. 10-12. Each unit has eight panels; two per side. TR, p. 46, l.  
23 25; p. 47, ll. 1-3; p. 244, ll. 8-10; RX 28. The coolers work by drawing air from the outside through  
24 the panels, evaporating water through the pads located at the bottom of the unit and pushing cool  
25 air into the plant below. TR, p. 254, ll. 19-25; p. 255, l. 1.  
26

27 The coolers require seasonal maintenance twice a year referred to as “startup” and  
28 “shutdown.” “Startup” refers to the beginning of the season and involves checking the units’ belts,

1 bearings, pumps, pads and other components. TR, p. 252, ll. 1-9. Mineral deposits from calcified  
2 water build up on the panels and need to be scraped, vacuumed and cleaned. TR, p. 46, ll. 3-6;  
3 TR, p. 252, ll. 5-9. Startup work involves removing and cleaning the panels, removing the spring  
4 retainers, removing the pad, inserting a new pad, ensuring the metering tips were providing water,  
5 ensuring the pumps were working, as well as checking belts, bearings and other components. TR,  
6 p. 244, ll. 11-25; p. 245, ll. 1-4. Startup usually begins around the end of March. TR, p. 255, ll.  
7 17-21. "Shutdown" refers to the end of the season and usually occurs in November. TR, p. 255,  
8 ll. 22-25.

10 Prior to 2017, in addition to having its own engineers perform maintenance, Apex  
11 contracted with third-party mechanical vendors to perform the startup and shutdown work. TR, p.  
12 251, ll. 8-12. The vendors would send two or three employees perform the work. TR, p. 252, ll.  
13 1-4. For startup, it would take them approximately two or three weeks to service all 25 coolers  
14 and bring them online. TR, 255, ll. 10-21.

16 In 2017, Mr. Marsh was dissatisfied with Apex's vendor because they tried to add costs  
17 that were not required, so he decided to have Apex's engineers perform the work instead. TR, p.  
18 55, ll. 1-8; p. 251, 8-25. In 2017, Apex engineer DJ Henderson performed the cooler maintenance.  
19 TR, p. 55, ll. 1-10; p. 56, ll. 10-14. When Mr. Henderson left the company midway through the  
20 season, Apex used its other engineers to complete the work on a rotational basis. TR, p. 55, ll. 1-  
21 10; 55, ll. 55; p. 56, l. 1.

23 In 2018, Mr. Marsh decided the coolers should be completely torn down and rebuilt to  
24 ensure their continued longevity and operation. TR, p. 55, ll. 11-15. For the first time, in addition  
25 to the startup work described above, the work would also involve applying an epoxy to coat the  
26 water pans to prevent leakage. TR, p. 43, ll. 14-16; p. 49, ll. 16-20; p. 49, l. 1; p. 50, ll. 1-3; p. 72,  
27 ll. 21-25; p. 378, l. 25; p. 379, ll. 1-4. Coating the pans with epoxy was the only aspect of the  
28

1 cooler startup work that was different from previous years. *Id.* The epoxy is an asphalt emulsion;  
2 a thick, black paste. TR, p. 247, ll. 13-16. It is applied by taking it out of the can with either a  
3 paint brush or putty knife and spreading it over the bottom of the pan. TR, p. 247, ll. 13-19. The  
4 pan surface area is approximately seven or eight square feet. TR, p. 247, l. 25; p. 248, ll. 1-5; *see*  
5 *also* ALJ 1. Of this surface area, there is a 2 foot by 2 foot opening in the middle of the pan that  
6 would not be coated. TR, p. 248, ll. 13-17.

7  
8 Upon their reinstatement and return to the plant on March 29, 2018, Apex assigned Mr.  
9 Arellano, Mr. Servin and Mr. Walker to perform startup work on the coolers, including applying  
10 the epoxy seal to the water pans. TR, p. 43, ll. 8-13; p. 50, ll. 13-17; p. 256, ll. 2-5. In working  
11 on the units, Mr. Arellano would take the panels off and send them to Mr. Walker to replace the  
12 medium and clean off the scaling. TR, 946, ll. 8-14. Next, Mr. Arellano would check the motor,  
13 then the belt, then the electrical wiring. TR, p. 947, ll. 9-25; p. 948, ll. 1-4. It took Mr. Arellano  
14 about 15 minutes to remove and inspect the belt, and another 15 minutes to inspect the wiring.  
15 TR, p. 949, ll. 16-22. Mr. Arellano also removed and inspected the water pipes, which took about  
16 an hour. TR, p. 950, ll. 9-21. Mr. Arellano testified it took an additional **two days** to scrape the  
17 pans which were approximately 7 or 8 square feet. TR, p. 951, ll. 20-25; p. 252, ll. 1-9. Then Mr.  
18 Arellano applied the epoxy to the pan, which took about an hour. TR, p. 951, ll. 16-19. According  
19 to Mr. Arellano, each single unit took a minimum of two and a half days and a maximum of a  
20 week to complete. TR, p. 1004, ll. 12-23.

21  
22 In the first two weeks of their roof duty, Mr. Arellano, Mr. Servin and Mr. Walker  
23 completed work on only one or two units. TR, p. 256, ll. 23-25. On April 12, 2018, Apex and the  
24 Union met to discuss Mr. Arellano, Mr. Servin and Mr. Walker's slow work. TR, p. 72, ll. 10-16.  
25 Mr. Marsh, Marty, Ed, Mr. Arellano and Mr. Servin attended the meeting. *Id.* At the meeting,  
26 Mr. Marsh expressed to Ed his concerns regarding how long the work was taking:  
27  
28

1 [Mr. Naylor]: What did you tell Mr. Martin?

2 [Mr. Marsh]: We discussed the efficiency of three workers spending what  
3 appeared to be an inordinate amount of time to bring the equipment to what we  
4 were request [sic], which was to tear it down, clean it, detail it, paint it, and bring it  
back online.

5 Q. What was your purpose of talking to [Ed] about this?

6 A. With two units a week or two units for the time period allotted, roughly a  
7 unit a week, it was going to -- the season would be over before we got through the  
8 equipment. We expected a -- from our experience we expected a much faster turn  
on the equipment.

9 TR, p. 257, ll. 1-12. In response, Ed said Mr. Arellano, Mr. Servin and Mr. Walker were not  
10 trained on the equipment and this type of work was not a specialty that they were used to. TR, p.  
11 257, ll. 13-17. Marsh pointed out that vendors had previously performed the same work much  
12 faster. TR, p. 257, ll. 17-18. At the end of the meeting, Mr. Marsh asked Ed what he could expect  
13 from Mr. Arellano, Mr. Servin and Mr. Walker going forward regarding their work on the coolers.  
14 TR, p. 257, ll. 20-22. Ed did not provide an answer. TR, p. 257, ll. 22-25. Ed did not request any  
15 additional training for the engineers regarding the evaporative coolers. TR, p. 258, ll. 5-7.  
16 Similarly, neither Mr. Arellano, Mr. Servin or Mr. Walker requested training from Marsh  
17 regarding their work on the coolers. TR, p. 258, ll. 8-15; p. 259, ll. 14-22. Furthermore, Ed  
18 testified that during this time period he harbored safety concerns regarding the work on the roof,  
19 however, he did not mention them to Apex:  
20

21 [Mr. Naylor]: Now, they started working on the roof in March of 2018. Correct?

22 [Mr. Ed Martin]: Yes.

23 Q. About the last week in March.

24 A. Yes.

25 Q. And you were concerned at that point in time because of the lack of fall  
26 protection. Correct?

27 A. Yes.  
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Q. Did you every tell anybody at Apex about it in March of 2018?

A. I did not. I discussed it with the members who reported it to management at Apex.

Q. But you never took it upon yourself to say something to Apex. Correct?

A. That's correct.

Q. And did you ever say anything to Apex in April of 2018?

A. No.

Q. But you knew they were still working up on the roof; is that correct?

A. That's correct.

Q. In May, did you ever say anything to Apex?

A. No.

Q. They were still working up on the roof, though. Correct?

TR, p. 548; ll. 23-25; p. 549; 1-22.

Apex generated an Employee Counseling Statement documenting the April 12, 2018 meeting. GCX 7. However, the Employee Counseling Statement was not signed. GCX 7. It was subsequently purged from employee files. TR, p. 409, ll. 17-23. Similarly, while Apex issued a Disciplinary Action Form to Mr. Servin regarding his lack of production on the coolers, Mr. Servin never signed it and Apex subsequently purged it from his employee file. CGX 10; TR, p. 409, ll. 17-23.

At one point, Apex assigned another engineer, Jesus "Chuy" Martinez, to perform work on a cooler in order to establish a frame of reference for how long the work should take. TR, p. 419, ll. 1-3. Mr. Martinez performed a complete service of one unit, including scraping the pan and coating it with epoxy, in approximately 12 hours. TR, p. 420, ll. 14-25; p. 421, ll. 1-3; p. 421, ll. 15-21. When OSHA ordered Apex to close its roof in early June 2018, about 20 of the 25 cooler

1 units had been completed. TR, p. 256, ll. 10-25.

2 Here, the GC would have the ALJ believe that the roof work was invented as some kind of  
3 pretext to punish Mr. Arellano, Mr. Servin and Mr. Walker for supporting the Union. This position  
4 ignores the fact that Apex has done the evaporative cooler maintenance every year and has had its  
5 engineers perform the work exclusively since at least 2017. Just because Mr. Arellano, Mr. Servin  
6 and Mr. Walker may not have previously been assigned to this work does not constitute an unfair  
7 labor practice. Under the *Great Dane* analysis, assigning engineers to maintain the evaporative  
8 coolers on the roof of its facility is not “inherently destructive” of any employee rights, and to the  
9 extent it has any adverse effect at all, it would have to be considered “comparatively slight.” *Great*  
10 *Dane*, 388 U.S. at 34. Apex has a legitimate business interest in keeping its equipment operational  
11 and its plant cool. This position is supported by the uncontroverted facts that the coolers require  
12 ongoing maintenance and that Apex assigns its engineers to perform such work as a matter of  
13 routine. This shifts the burden to the GC, who failed to present any evidence demonstrating that  
14 Apex assigned the evaporative cooler duty to Arellano, Servin and Walker with discriminatory  
15 intent necessary to meet his burden of proof.  
16  
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18 **5. Maintenance of The Portable Coolers Was Within the Engineers’ Scope of**  
19 **Work**

20 The GC alleges that Apex assigned Mr. Arellano, Mr. Servin and Mr. Walker to work on  
21 the plant’s portable, evaporative coolers, which were located within the plan. (*See* Third  
22 Consolidated Complaint ¶ 6(e)). The GC alleges that Apex assigned them to this work because of  
23 their Union ties. (*Id.* at ¶ 6(n)).

24 The uncontroverted evidence is that other engineers had worked on those units, which had  
25 been purchased within the prior two years. TR, p. 1212, ll. 15-25. Of course, engineers had not  
26 worked on them before because Apex did not own any. *Id.* Engineers who worked on them in the  
27 prior two years include Mr. Marsh and others as a shared effort. TR, p. 1213, ll. 5-9. The GC  
28

1 simply failed to present any evidence that Mr. Walker, Mr. Servin, and Mr. Arellano had been  
2 assigned this task due to their Union affiliation.

3 **B. Claims Relating to Mr. Walker Arising After the Signing of the CBA**

4 **1. The Contemporary, Documentary Evidence Proves That Apex**  
5 **Bargained Over Mr. Walker's Job Classification**

6 The GC claims that Apex committed an unfair labor practice by failing to negotiate with  
7 the Union over the issue of Mr. Walker's job classification. (See Third Consolidated Complaint  
8 at ¶¶ 8(d), 8(e), 8(f), and 12). The GC's claim fails because Apex did bargain with the Union over  
9 this.

10 Of all of the charges, this is one of the most puzzling. Contrary to the GC's allegations,  
11 Apex and the Union did, in fact, bargain over Mr. Walker's classification. Mr. Dramise  
12 specifically discussed this with Ed during contract the negotiation of the CBA. Mr. Dramise had  
13 to remind Ed of this after the Union filed a grievance:  
14

15 Ed, I'm going to have to turn this over to Keith, since we secured a contract with  
16 you, things have gotten worse not better. This is consuming significant amount of  
17 time dealing with a few individuals that do not want to honor the contract you and  
18 I had agreed upon. Marty is not involved any more on a contract level since I  
19 engaged with you to secure a new contract. **We talked about Charles Walker**  
20 **when we developed this contract and I recommended that all engineers be**  
21 **tested under your standards and we could place each member in the barging**  
22 **unit in their appropriate skill level, you said you did not want to do that, you**  
23 **wanted to keep it the way it was. So with that being said 'Charles Walker was**  
24 **classified as a Engineer and we have kept it that way.** (GCX 5 (emphasis  
25 added)).

26 Ed admitted that in his response to this email he did not dispute Mr. Dramise's account of  
27 their conversations. TR, p. 527, ll. 11-25; p. 528, l. 1. Later, during the hearing, Mr. Dramise  
28 recounted this conversation in detail during his examination by the GC:

29 [Mr. Higley]: Okay. So you had -- in the course of reaching the  
collective bargaining agreement, the contract, you spoke with Ed Martin about  
Charles Walker's classification. And he --

1 [Mr. Dramise]: Correct.

2 Q. Pardon me. And the Union's position was that he should be  
3 classified as a utility engineer.

4 A. I would, I would have to read that. Let me tell you what I do  
5 remember. What I do remember is that we were talking about Charles's  
6 classification, and he was classified as an engineer with Apex when we -- when the  
7 Union came in. And I said we needed to keep him at the same classification going  
8 in. Then there was some discussion about his ability as an engineer. And just  
9 previous to talking to that point, Ed and I were talking about the training programs  
10 with the Union and the evaluation programs. And Ed said that, well, I think this  
11 individual, Charlie, should be not an engineer but -- I'm not sure what the lower  
12 classification is. But --

13 JUDGE GIANNOPOULOS: An apprentice?

14 [Mr. Dramise]: Apprentice. And I said since you have the training  
15 program and the testing program, why don't we test all our engineers and find out  
16 where they fall, whether they're apprentice or they're an engineer. And Ed didn't  
17 want to do that.

18 [Mr. Higley]: Do you recall though that Ed's position was that Walker  
19 should be a -- I'll say a utility engineer.

20 A. Well, I -- he wanted Ed as a utility engineer, but I wanted to keep  
21 him exactly what he was when he was with Apex Linen and that was an engineer.

22 TR, p. 438, ll. 11-258; p. 439, ll. 1-13. Ed did not dispute this version of events.<sup>8</sup> TR. p.  
23 524, ll. 3 – 25, p. 525, ll. 1 – 25, p. 526, ll. 1 – 17 (on p. 526, the GC objects based on Ed's repeated  
24 statements that he does not recall the specifics of his conversation with Mr. Dramise regarding Mr.  
25 Walker.).

26 The GC's position rests on an agreement that Ed allegedly had with Marty to transition Mr.  
27 Walker to the position of utility engineer, which the CBA defines as a trainee position. GCX 3, p.  
28 35. However, those discussions with Marty ended weeks prior to the execution of the CBA during

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<sup>8</sup> To the extent that the GC might argue that GCX 24(b) is an agreement as to job classifications, that is incorrect. GCX 24(b) is a list of Unit members sent by Marty to Ed. Ed testified that at the time this list was sent, he was negotiating with Mr. Dramise, not Marty and that the purpose of the list was to only gather names for the upcoming contract ratification vote. TR. p. 517, ll. 9 – 23.

1 the time period that Mr. Dramise took over the negotiations. GCX 5, p. 3 (email from Dramise  
2 dated September 19, 2018); TR, p. 424, ll. 10-18. Ed does not dispute this. TR, p. 527, ll. 22-25;  
3 p. 528, l. 1. At that point, Mr. Dramise discussed the matter in detail with Ed Martin, telling Ed  
4 that he considered Mr. Walker to be an experienced engineer. Ed disagreed, suggesting that Mr.  
5 Walker's qualifications were "not top tier" and that he should be classified as a Utility Engineer  
6 which the CBA defines as strictly a trainee position. TR, p. 472, ll. 20-25; p. 473, ll. 1-15; *see also*  
7 GCX 3, p. 35. Ed testified that he does not consider a Utility Engineer to be a trainee position,  
8 however, he cannot escape the plain language of the CBA and ignore it:  
9

10 [Mr. Naylor]: Now, utility engineer is strictly a trainee position; is that correct?

11 [Mr. Ed Martin]: No, sir.

12 \*\*\*

13 [Mr. Naylor]: Okay. So if you could go to section 16.02, I think it's B, the  
14 definition of a utility engineer in the collective bargaining agreement. Do you see  
15 that?

16 Mr. [Ed Martin]: Yes, sir.

17 Q. It states a utility engineer works under the direct and immediate supervision  
18 of a chief or maintenance engineer. Do you see that?

19 A. Yes, sir.

20 Q. This classification is distinguished from that of a maintenance engineer not  
21 so much by the work performed as by the supervision received. Do you see that  
22 sentence?

23 A. Yes, I do.

24 Q. Okay. And then it also goes on to say this is strictly a trainee classification;  
25 is that correct?

26 A. That is correct.

27 TR, p. 528, ll. 6-8; p. 529, 8-22; *see also*, GCX 3, p. 35 ("This classification is distinguished from  
28 that of the Maintenance Engineer not so much by the work performed as by the supervision

1 received. **This is strictly a trainee classification.**") (emphasis added).

2 In order to resolve the issues, Mr. Dramise asked whether the engineers should be evaluated  
3 by the Union to determine their skill levels, but Ed flatly rejected this approach. TR, p. 438, ll.  
4 15-25; GCX 5. Therefore, after discussing the matter with Ed and after the execution of the CBA,  
5 Apex decided that Mr. Walker would be classified as a Maintenance Engineer. GCX 5.

6 Mr. Walker himself later validated this decision when, after the execution of the CBA, he  
7 bid on a Maintenance Engineer's shift. RX 1; *see also* TR, p. 1180, ll. 5-9 (Walker confirming his  
8 signature). This was of great benefit to Mr. Walker. As pointed out by the GC during his  
9 examination of Mr. Dramise, Mr. Walker's classification under the CBA resulted in a pay raise.  
10 TR, p. 442, ll. 6-9; GCX 3, p. 35. If Apex was truly discriminating against Mr. Walker, why would  
11 it give him a pay raise?  
12

13 Here, Apex certainly had the authority under the CBA to evaluate Mr. Walker's  
14 qualifications and assign him work. The CBA must be interpreted "according to ordinary  
15 principles of contract law." *CNH Indus. N.V. v. Reese*, 583 U.S. \_\_\_, 138 S.Ct. at 764 (2018).  
16 Contract terms should be given their ordinary meaning, and when the terms are clear, the intent of  
17 the parties must be ascertained from the plain language of the contract itself. *Klamath Water Users*  
18 *Protective Ass'n v. Patterson*, 204 F.3d at 1210. With respect to bargaining unit members, the  
19 CBA expressly states that Apex has the authority to "determine their qualifications and assign  
20 and direct their work." CGX 3, p. 26. Also, classifying Mr. Walker as a Maintenance Engineer  
21 made sense. Mr. Walker considers himself to be experienced, having worked as one for his entire  
22 career. TR, p. 1181, ll. 4-10. Simply put, he did not fit into the Utility Engineer classification. Ed  
23 Martin tried to justify assigning Mr. Walker as a Utility Engineer, testifying that it was not a trainee  
24 position. TR, p. 528, ll. 6-25; p. 529, ll. 8-22. His testimony, however, belies the plain language  
25 of the CBA, which states that "This is strictly a trainee classification." GGX 3, p. 35. Subsequent  
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1 events have proven this to be the correct decision. Mr. Walker has been a Maintenance Engineer,  
2 and, by all accounts, he has been doing just fine. TR, p. 1300, ll. 8-11.

3 As for the decision itself, Apex did not have to accede to Ed's request. The Supreme Court  
4 of the United States has directed that "[t]he NLRA requires an employer and a union to bargain in  
5 good faith, *but it does not require them to reach agreement.*" *Golden State Transit Corp. v. City*  
6 *of Los Angeles*, 475 U.S. 608, 616, 106 S.Ct. 1395, 1399 (1986) (emphasis added). Here, as  
7 discussed above, the extensive discussions regarding his classification, Mr. Walker's election to  
8 bid on a Maintenance Engineer's shift, and his subsequent performance, demonstrate Apex and  
9 the Union negotiated the classification, and raise questions as to why this was even a claim in the  
10 first place.

12 Basically, Apex entered into the discussions, engaged in good faith in the discussions and  
13 made a decision (which Mr. Walker himself validated). The continued assertion of this claim,  
14 coming on the heels of the signing of the CBA and now about one year old, is demonstrative of an  
15 attitude of bad faith. The ALJ should dismiss Complaint Paragraphs 8(d), 8(e), 8(f), and 12.

## 17 **2. The Alleged July 5, 2018 Meeting**

18 Even though it does not form the basis of any of the claims, Apex must comment on Mr.  
19 Walker's testimony regarding his July 5, 2018 conversation with Mr. Sharron. Mr. Walker  
20 testified that Mr. Sharron threatened him on that date. TR, p. 1177, ll. 24-25; p. 1178, ll. 11-17.  
21 The allegations, which are quite serious, do not form the basis of any of the claims in the Third  
22 Consolidated Complaint, and no other witness corroborated Mr. Walker's testimony. To that  
23 extent, they should not be considered as a separate claim. *E.g. CPL (Linwood) LLC*, 367 NLRB  
24 No. 14, \*3 (2018) (reversing the ALJ's finding of a violation where the GC's failed to allege the  
25 claim).

27 Mr. Sharron never threatened Mr. Walker, and the circumstances are bear this out. Most  
28

1 importantly, Mr. Sharron flatly denied ever threatening Mr. Walker:

2 [Mr. Sharron]: Yeah. Charlie, he's a little slow. So I sort of try to -- I wouldn't say  
3 protect him, but I cater to him a little more than others.

4 [Mr. Naylor]: Would you --

5 A. For the last -- well, for the last I'd say close to 8 months, he's really stepped  
6 up. So I'm sort of proud of him in a way.

7 Q. Have you ever told him during a conversation that you were going to use  
8 the collective bargaining agreement against him to get him fired?

9 A. No. I would never say that to any of my employees.

10 Q. Did you ever tell him that you were going to use the collective bargaining  
11 agreement against any union member to get them fired?

12 A. No. I would never do that.

13 Q. Did you ever tell Mr. Walker that you were going to impose or use some  
14 sort of one, two, three strikes you're out policy against him to get him fired?

15 A. No.

16 Q. Did you say anything like that to him about any other union members?

17 A. No.

18 Q. Did you ever tell Mr. Walker that you were going to make sure that his  
19 pension got taken away?

20 A. No. No.

21 Q. Did you tell Mr. Walker that you were going to somehow take away the  
22 pension of any other union member?

23 A. No. It doesn't make any sense. No.

24 Q. Did you ever tell Mr. Walker that you were going to take away his Social  
25 Security benefits?

26 A. No.

27 Q. I'm sorry. You're going to have to speak up, okay?

28 A. No.

1 JUDGE GIANNOPOULOS: Yeah, speak up, sir. Sorry.

2 BY MR. NAYLOR: Did you ever tell Mr. Walker that you were going to  
3 somehow take away the Social Security benefits of other union members?

4 A. No.

5 TR, p. 1300, ll. 12-25; p. 1301, ll. 1-17. The uncontroverted testimony of Mr. Sharron was that  
6 he worked closely with Mr. Walker and helped him when he could. TR, p. 1300, ll. 5-7. Mr.  
7 Sharron said that he was proud of Mr. Walker's work performance. TR, p. 1300, ll. 8-11. These  
8 are hardly the types of comments that would come from someone who severely threatened Mr.  
9 Walker.

10 No other witness called by the GC corroborated Mr. Walker's allegation. Given the serious  
11 nature of these allegations, one would have expected Mr. Walker to tell someone associated with  
12 the Union or the NLRB about them. Ed, however, did not offer any testimony on this point. It is  
13 inconceivable that had Union known anything about these allegations that it would do nothing. It  
14 is also inconceivable that had the GC known about these allegations, now about a year old, it would  
15 not have included them in at least one of the several amendments to the Complaint. The only other  
16 alleged witness to this conversation is incarcerated. TR, p. 1302, ll. 3-7.

17  
18 It therefore appears that Mr. Walker's recollection of events is faulty at best. Indeed, he  
19 testified that he knew about the CBA but was not really familiar with it. TR, p. 1180, ll. 16-17.  
20 This is despite the plain language of the CBA which requires the bargaining unit members to be  
21 familiar with its terms. CGX 3, p. 27. Also, Mr. Walker testified that he did not have anyone at  
22 the Union to talk to and did not believe that the Union ever had shop stewards at Apex. TR, p. 16-  
23 25; p. 1182, l. 1. Everyone knew that Mr. Arellano and Mr. Servin were the shop stewards. TR,  
24 p. 928, ll. 24-25; p. 929, l. 1; TR, p. 1008, ll. 15-16. Given the totality of the circumstances, this  
25 conversation did not happen in the manner in which Mr. Walker recalled it and it carries no weight  
26 in these proceedings.  
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1           **C.       Claims Relating to Mr. Servin**

2                   **1.       Mr. Servin Has a Severely Negative Attitude Toward Apex and Its**  
3                   **Management**

4           Mr. Servin’s own words expose his negative attitude. As he told his fellow engineers “now  
5 I can just make their lives hell for the pure pleasure of it lol [sic].” RX 57 (first page of text  
6 messages after “Exhibit 1” marker).

7           Mr. Servin thinks he is unique among the engineers. For example, he testified on direct-  
8 examination that he was given a “special assignment” to service the bearings on the trolleys, and  
9 that he had “never done that before.” TR, p. 1062, ll. 6-15. His complaint was not that engineers  
10 had never done this work before, but rather it was that **he** had never been asked to do it before.  
11 TR, p. 1136, ll. 15-25; p. 1137, l. 1. The uncontroverted testimony by Mr. Marsh, however, was  
12 that all Apex engineers perform maintenance on the trolley bearings:  
13

14           [Mr. Naylor]: ... who performs that work?

15           [Mr. Marsh]: Anybody available does in engineering.

16           Q.       Could you name some of the people who have done it in the past?

17           A.       I’ve done it. Rico, Nestor, Kevin has done some. Joseph [Servin] has done  
18 some. Joe Tuttle has done some. I know Chuy has done some. I’m not sure about  
19 try, but I think Troy’s done some. But all -- everybody on staff gets asked to help  
20 out when they can.

21           Q.       Now, when you say -- are any of those people that you’ve mentioned  
22 **maintenance engineers?**

23           A.       Yes, they are.

24 TR, p. 1213, l. 1; p. 1214, ll. 1-11 (emphasis added). In other words, Mr. Servin believes he should  
25 be exempt from performing normal engineering duties, and if he is assigned such work, it must be  
26 retaliation. This position is delusional and, more importantly, unsupported by evidence.

27           Similarly, Mr. Servin testified that after the roof was closed, Mr. Sharron assigned him to  
28 pick up garbage for the remaining “couple hours” of his shift. TR, p. 1044, 16-21. He testified

1 that he picked up garbage “by myself.” TR, p. 1044, ll. 20-22. As with the trolley bearings, Mr.  
2 Servin is insinuating the trash assignment was intended as some kind of punishment. However,  
3 Marsh testified Apex routinely assigns its engineers to pick up trash on Apex’s lot and neighboring  
4 lots. TR, p. 273, ll. 20-25; p. 274, ll. 1-16. Mr. Sharron corroborated this, testifying that all  
5 engineers pick up trash. TR, p. 575, ll. 13-15. Again, there is no evidence supporting the claim  
6 that the trash detail was retaliatory.

7  
8 Mr. Servin also covertly recorded a video of the Iron 2 heim joint with his cell phone  
9 approximately two weeks after he was disciplined for failing to tighten the hardware. TR, p. 1076,  
10 ll. 18-25; 1084, ll. 22-25; p. 1085, ll. 1-7. This relates to a specific disciplinary action that is  
11 described in more detail at Section C 2, below. Despite the fact that the video apparently showed  
12 a defective condition with the heim joint, Mr. Servin’s intent was to “defend” himself because *he*  
13 filed a grievance against Apex. TR, p. 1086, ll. 15-20. Mr. Servin took the secret video two weeks  
14 after he was disciplined for this incident. TR, p. 1141, ll. 8-10. Despite the fact that the secret  
15 video purportedly showed a defect, Mr. Servin did not show it to his supervisors or anyone else at  
16 Apex. TR, p. 1141, ll. 11-18. Of course, he did show it to his co- shop steward, Mr. Arellano.  
17 TR, p. 1141, p. 19-25; p. 1142, ll. 1-2.

## 19 **2. Mr. Servin’s Secret Video of The Belt Guide**

20 Mr. Servin was disciplined for his substandard work on the belt guide, which is part of a  
21 machine called the stacker, also referred to as the Belt Guide. RX 16 is a photograph of the Belt  
22 Guide. The GC did not that this disciplinary action was a “change in policy.” Rather, the GC only  
23 alleges that Apex disciplined Mr. Servin because he assisted the Union and engaged in protected  
24 Union activities and participated in Board proceedings. (*See* Third Consolidated Complaint at ¶¶  
25 6(h), 6(m), 6(n), 6(o), 7 and 12). This is not true. Apex disciplined Mr. Servin for shoddy work.  
26

27 The stacker is a machine folds and stacks into bundles sheets, towels and other flat pieces  
28

1 of laundry. TR, p. p. 295, ll. 8-18. An integral part of that what was variously called the “belt  
2 guide,” RX 15, RX 16 and RX 42 at the hearing. For purposes of this brief, Apex will refer to it  
3 as the Belt Guide. The Belt Guide slides back and forth on the underside of the machine. TR, p.  
4 298, l. 25; p. 299, ll. 1-5. RX 15 is a photograph of the Belt Guide in a static position. In RX 15,  
5 the photographer is lying on his back, looking up. TR, p. 297, ll. 7-10.

6 A metal rod is connected to the center of the Belt Guide, and that metal rod causes the Belt  
7 Guide to move back and forth. TR, p. 298, ll. 18-22. This action is seen in the video, which is RX  
8 43. The metal rod is connected to the Belt Guide by what is called a Heim Joint. TR, p. 300, ll.  
9 16-19. Photographs of the Heim Joint are at RX 44 and RX 45. The actual, physical Heim Joint  
10 depicted in RX 44 and RX 45 is in evidence as RX 56. RX 56, a physical example of the Heim  
11 Joint, is identical to the Heim Joint at issue in this case. A Heim Joint is a ball joint that is attached  
12 to the Belt Guide. TR, p. 862, ll. 21-24. The Heim Joint is attached to the end of the metal rod,  
13 and the Heim Joint is bolted to the Belt Guide with a bolt and nylon lock nut. TR, p. 300, ll. 9-12.  
14 There is some play to the Heim Joint where it is bolted to Belt Guide because the hole for the bolt  
15 in the Heim Joint runs through a small, metal sphere, which is designed to move. TR. p. 863, ll.  
16 16 – 20. This can be observed by looking at the spherical portion of the Heim Joint, RX 36. This  
17 metal sphere is held in place by a brass colored collar in the Heim Joint. RX 36. The sphere and  
18 brass collar or bushing can be readily seen in Exhibit RX 44. The movement of the sphere is  
19 evident in the Heim Joint itself, a physical example of which is Exhibit RX 56. The Heim Joint  
20 allows back and forth movement as well as some lateral movement for the metal rod. TR, p. 1509,  
21 ll. 1 – 7; RX 56.

22 On August 30, 2018, Mr. Arellano was tasked with fixing the Belt Guide. TR, p. 862, ll.  
23 8-18. He could not finish the job before the end of his shift, and at that point Mr. Servin took over.  
24 TR, p. 862, ll. 19-20; p. 982, ll. 14-25; p. 983, ll. 1-4. Mr. Servin completed the job by removing  
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1 the old Belt Guide and replacing it with a new one. Mr. Servin then reported to Mr. Sharron that  
2 the job was complete and the machine was back online. TR, p. 624, ll. 22-24. Mr. Servin did not  
3 mention a worn Heim Joint to Mr. Sharron. TR, p. 624, ll. 24-25.

4 As it turned out, Mr. Servin did not tighten the bolts completely – he did not tighten the  
5 bolt at the Heim Joint or the pairs of bolts at each end of the Belt Guide. TR, p. 300, ll. 4-8; TR,  
6 p. 625, ll. 9-13; *see also* RX 43 (video showing loose hardware). As a result, within two hours,  
7 the new Belt Guide came lose, was damaged, and had to be replaced. TR, p. 724, 14-18.  
8 Specifically, the bolt holes of the Belt Guide became distorted (“egged out” is the industry term)  
9 and could no longer be bolted into place. The parties and the ALJ inspected the actual, damaged  
10 belt guide at the hearing, and photographs of it, showing the egged-out holes, are at RX 42. The  
11 damaged Belt Guide cost \$500. RX 11. Mr. Servin was subsequently disciplined. GCX 16.

12  
13 Mr. Arellano and Mr. Servin explanation of what happened is inconsistent with the  
14 contemporaneous documentary and physical evidence. According to Mr. Arellano, the Heim Joint  
15 was damaged when he left at the end of his shift. TR, p. 863, ll. 9-12. Mr. Servin also said that  
16 the Heim Joint was damaged and that prevented him from properly tightening it to the Belt Guide.  
17 Mr. Servin said that no spare Heim Joint was available, so he had to leave the damaged one in  
18 place, and that is what caused the Belt Guide to come loose. TR, p. 1142, ll. 14-19.

19  
20 So far, the story does not comport to the contemporaneous, written record. The work order  
21 that Mr. Arellano and Mr. Servin themselves completed said nothing about a damaged Heim Joint,  
22 the lack of a replacement part or the inability to completely tighten it due to the damage. RX 62a-  
23 b; RX 63. Indeed, Mr. Servin and Mr. Arellano said nothing about the Heim Joint in their  
24 completed work order. *Id.* One would expect such highly qualified engineers to make a note of  
25 these problems. Furthermore, as previously noted Mr. Servin was concerned about “defending”  
26 himself. One would expect him to make sure that the contemporaneous documentation would  
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28

1 accurately reflect what happened. It is also worth noting that the GC did not recall either Mr.  
2 Servin or Mr. Arellano to the testify about this work order and its contents **which they wrote**.

3 Apex could reasonably expect either one of its two most experienced engineers to mention  
4 a key, damaged part like the Heim Joint that could not be immediately replaced. Mr. Servin did  
5 not list this explanation on the discipline form. GCX 16. If the Heim Joint was damaged and  
6 Arellano and Servin knew about it, they concealed that knowledge by not noting it on any of the  
7 documentation.

8  
9 Mr. Servin's man defense is what could be described as his secret video. Mr. Servin  
10 produced at trial a video of the Heim Joint that he claims he made about two weeks after the repairs.  
11 GCX 51. According to Mr. Servin, the video shows the damaged Heim Joint still in place. Mr.  
12 Servin, who had previously told the bargaining unit members in writing that he wanted to make  
13 management's life a "living hell" did not tell anyone about the video other than the Union. TR, p.  
14 1141, ll. 11-25. In other words, he concealed the film from Apex waiting to reveal it at the hearing.  
15 He then testified that the damaged Heim Joint was finally replaced at about the time he made the  
16 secret video.  
17

18 The contemporary record does not hear this out. Under *Wright Line*, the GC is tasked with  
19 making an initial showing that Apex's decision to issue discipline to Servin was motivated by  
20 protected conduct. *Wright Line*, 251 NLRB at 1089. The GC did not present any such evidence.  
21 It is unclear how the GC intends to meet his burden based on what was introduced at the hearing.  
22 It is almost as if the GC believes it is sufficient to argue that because Servin was a Union member,  
23 any discipline issued to him must have been motivated by discrimination. Such a position plainly  
24 ignores the GC's burden set forth above, which requires him to make an affirmative showing that  
25 'but for' Servin's union activities or membership, he would not have been disciplined or  
26 discharged. *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554. The facts do not support such a  
27  
28

1 conclusion.

2 To the contrary, all the facts support that Apex issued discipline to Mr. Servin because his  
3 failure to properly tighten the belt guide violated Apex’s policy against “careless destruction or  
4 damage to Company assets,” and “unsatisfactory job performance.” RX 3 at p. APEX\_010356.  
5 The CBA allows Apex complete autonomy “to discipline employees and determine the level of  
6 discipline.” GCX 3 at p. 26. It is uncontroverted that the Heim Joint and Belt Guide bolts were  
7 loose. It is uncontroverted that the failure to tighten the hardware resulted in damage to the  
8 machine. As described in detail above, Mr. Servin and Mr. Arellano’s excuse for why the incident  
9 occurred does not hold water and given Servin’s obvious animosity toward Apex by way of his  
10 promise of retribution, his account is dubious at best.  
11

12 **3. Mr. Servin’s Substandard Repair Of the AP-2 Lighting (“Double**  
13 **Buck”)**

14 On September 18, 2018, Apex disciplined Mr. Servin for his substandard work on a  
15 machine called the AP-2 Lighting, also known as a “Double Buck.” TR, p. 307, ll. 2 – 5. It is  
16 basically a shirt press. TR, p. 307, ll. 10 – 19, p. 1106, ll. 25, p. 1107, ll. 1 – 3. Photographs of it  
17 are admitted as RX 19, RX 20 and RX 21. The machine works through a series of vacuums that  
18 hold the shirt in place while it is pressed. One can see a shirt in place on the machine at RX 19  
19 and RX 21. TR, p. 307, ll. 20 – 23.  
20

21 Mr. Servin responded to a call on the machine complaining that one of the vacuum lines  
22 was not working. TR. p. 205, ll. 22 – 25, p. 206, ll. 1 – 2. Mr. Servin allegedly repaired the  
23 problem, and he told Mr. Marsh that the unit was working before leaving his shift. Mr. Marsh  
24 described that the machine failed almost immediately after Mr. Servin had left:  
25

26 [Mr. Marsh]: At the end of his [Mr. Servin’s] shift, I did get a chance very briefly  
27 to talk to him. He said he had returned the equipment to service, turned it over to  
28 the next engineer as far as the repairs he made and then he left for the day. Shortly  
thereafter I continued to hear calls coming in for the unit not functioning. I went  
back out there and the unit was non-operational. It wasn't working the way it was

1 anticipated to be working. After a little investigation, we found that the onboard  
2 vacuum motor was still secured off, so the equipment was returned to service  
3 without vacuum. And also the collar clamp that Joseph was working on the repair  
4 needed additional help in order to function reliably. TR, p. 206, ll. 5-16.

5 Mr. Marsh determined that Mr. Servin failed to properly install a coupling on the line that  
6 he was repairing. Mr. Marsh was there when Mr. Servin found the problem:

7 [Mr. Higley]: You say you -- in this document you say you found the original air  
8 leak. How do you know that it was the original air leak?

9 [Mr. Marsh]: Because when Joseph was troubleshooting, I had happened to stop  
10 by to see what the issue was and it was discovered with him.

11 Q. Okay. So you actually witnessed the air leak.

12 A. Yes, sir. TR, p. 208, ll. 6-13.

13 When Mr. Marsh returned to the machine after hearing subsequent complaints about it still  
14 being down, he found that Mr. Servin failed to install the coupling on the hose that he had been  
15 working on:

16 [Mr. Higley]: So Servin had attempted to address the air leak. He had -- he put a  
17 coupling on. Correct?

18 [Mr. Marsh]: Yes, sir.

19 Q. And so it had fallen off. Were you able to determine why it fell off?

20 A. I believe it probably either wasn't installed properly or it didn't hold. Maybe  
21 he didn't push it in all the way. I don't know.

22 Q. You determined it was due to substandard work on his part that it fell off.

23 A. Yes, sir.

24 Q. Are you certain that that is why. You just said it could have fallen off.

25 A. It's a push to connect. It's a plastic hose. It pushes in. It locks in place. It had fell  
26 off, then it wasn't pushed in place.

27 Q. Okay. So --

28 JUDGE GIANNOPOULOS: The coupling was not on the hose where the vacuum  
was.

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THE WITNESS: Correct. The coupling was for the collar clamp.

Q. BY MR. HIGLEY: So it took an engineer to turn the vacuum back on.

A. Yes. So the next engineer happened to be Ivan Virgen. He came troubleshoot the equipment, found the coupler that was on the collar clamp hose was off. And then we continued to troubleshoot until we found that the vacuum pump was turned off at the circuit panel.

TR, p. 208, ll. 1.

Thus, not only was the very connector that the very connection Mr. Servin was working on was not connection, it was also discovered that he had left the power to the machine turned off at the circuit breaker. TR, p. 205, ll. 5 – 22. The GC suggested that the production staff, i.e., the workers who actually did the laundry and pressing, could have turned the machine on at the circuit breaker. The GC, on cross-examination, however, drove home the point that the production staff would not know how to turn the equipment on at the circuit breaker:

[Mr. Higley]: And that's something I mean an operator wouldn't know, to look at the panel.

[Mr. Marsh]: The operator wouldn't touch the panel. The engineers would be the ones to troubleshoot circuit breakers, power supply.

TR, p. 209, ll. 4 - 8.

As a result of Mr. Servin's unacceptable work, the equipment was down 90 minutes and Apex late on a delivery:

[Mr. Higley]: You also called this, looking at General Counsel Exhibit 20, work slowdown. Why did you use that term?

[Mr. Marsh]: We ended up losing just a hair over 90 minutes of production time. And we were late with a delivery that night due to the fact that this machine was offline. When I have an engineer, especially an experienced engineer who says the equipment is ready to return to service, we work towards that. Being that the machine didn't return to service and we had to go back through the troubleshooting and the repair, it wasn't a helpful situation for production.

TR, p. 201, 5 – 14.

1 Mr. Servin, the man who wanted to make the lives of Apex management hell, does not  
2 dispute that the coupling fell off, but rather blamed it on the **possibility** that the vacuum hose was  
3 brittle. TR, p. 1111, ll. 13 - 23. He testified that “All the hoses in the machine are brittle. They're  
4 -- they need to be replaced.: TR, p. 1111, ll. 11 – 12. This does not contradict what Mr. Marsh  
5 actually saw.

6 As with the Belt Guide incident discussed in the previous section, it is unclear how the GC  
7 intends to carry his burden of proof under *Wright Line*. The testimony and documentary evidence  
8 fail to support the inference that the discipline issued to Servin arising from this incident was  
9 motivated by Mr. Servin’s protected activity. The GC’s failure to make a prima facie case should  
10 result in dismissal of this allegation.  
11

12 To the extend any further discussion is necessary, Apex met its *Wright Line* burden by  
13 showing it had a reasonable, neutral reason for issuing the discipline. It is uncontroverted that Mr.  
14 Servin returned the Double Buck to service where it failed due to Servin’s failure to install the  
15 coupling and leaving the power off at the circuit breaker. This failure to properly repair the  
16 machine, which resulted in a lengthy and costly production shutdown, violated Apex’s policy  
17 against “careless destruction or damage to Company assets,” and “unsatisfactory job  
18 performance.” RX 3 at p. APEX\_010356. The CBA allows Apex complete autonomy “to  
19 discipline employees and determine the level of discipline.” GCX 3 at p. 26. Apex with within  
20 its broad autonomy under the CBA to issue discipline pursuant to the progressive discipline clause  
21 set forth in Article 13. GCX 3 at p. 28.  
22  
23

#### 24 **4. The Disciplinary Action Against Mr. Servin For Insubordination Was** 25 **Appropriate**

26 Apex disciplined Servin for insubordination on or about September 19, 2018 for an incident  
27 that occurred on September 6, 2018. (*See* Third Consolidated Complaint at ¶6(k)); GCX 19. The  
28 GC alleged that this discipline was the result of Mr. Servin’s affiliation with the Union. (*See* Third

1 Consolidated Complaint at ¶¶ 6(k), 7 and 12). That is untrue. The genesis of the discipline was  
2 Mr. Servin’s unwillingness to take any initiative and fix equipment that he sees is down without  
3 having to specifically be told to do so. One should remember that Mr. Servin considers himself to  
4 be in a special class, meaning that he does not have to do certain tasks, such as fixing portable air  
5 conditioners and repairing bearings on the trolleys that handle the bags of laundry. (See Section  
6 “C(1)” above).

7  
8 The matter started when Iron 2 was down due to a jam. TR, p. 1326, ll. 21-25; p. 1328, ll.  
9 7-11. Mr. Servin walked by it without attempting to fix it. TR, p. 1348, ll. 3-11. Mr. Sharron  
10 knew this because Marty, who was watching the machines on a camera, asked Mr. Sharron why  
11 Iron 2 was not operating. TR, p. 649, ll. 11-13. At that moment, Marty was in his office, which  
12 is located apart from the plant floor, and Mr. Sharron happened to be nearby. TR, p. 1349, ll. 12-  
13 23. Mr. Sharron reviewed the camera feed with Marty and saw that Mr. Servin walked by Iron 2  
14 without attempting to fix it. TR, p. 1348, ll. 15-25. When Mr. Sharron discovered this (having  
15 received a call from Marty asking why the machine was down and not being fixed), Mr. Sharron  
16 found Mr. Servin and Mr. “Chuy” Martinez in Bay 9, and stated they cannot walk by a machine  
17 when it is down. TR, p. 1350, ll. 20-25; p. 1351, ll. 1-3. Mr. Servin said that Iron 2 working. TR,  
18 p. 1327, ll. 21-25; p. 1328, ll. 1-6. It clearly was not working. RX 59. When Mr. Sharron and  
19 Mr. Servin walked back to Iron 2 together, another engineer, Kevin McCann, was already working  
20 on it. TR, p. 1328, ll. 7-11. Mr. Sharron was simply trying to make the point that as an engineer,  
21 Mr. Servin could not walk by jammed equipment without fixing it. TR, p. 1328, ll. 16-20.

22  
23  
24 At that point, Mr. Servin fell back on what was to become his regular response, i.e., Apex  
25 could not “pick” on him or Mr. Arellano. TR, p. 1325, ll. 21-25. Mr. Servin then attempted to  
26 divert the discussion by complaining other members of the bargaining unit, including comments  
27 about when they showed up, what shoes they were wearing, and the like. TR, p. 1328, ll. 21-25;

28

1 1329, ll. 1-7; p. 1330, l. 25; p. 1331, ll. 1-0 and 14-25; p. 1347, ll. 8-12.

2 As Mr. Sharron put it, “All I want is the machines fixed.” TR, p. 1331, l. 25. Mr. Sharron  
3 kept repeating that all he wanted Mr. Servin to do was to repair Iron 2. TR, p. 1334, ll. 18-25; p.  
4 1335, ll. 9-21; p. 1336 7-9; p. 1366, ll. 11-24. Mr. Servin said he would not until he had looked at  
5 the tapes of the incident. TR, p. 1335, l. 25; p. 1336, ll. 1-14. Ultimately, Mr. Servin would not  
6 do the work, and Mr. Arellano completed the job by replacing the missing panel. RX 61; TR, p.  
7 1337, 5-7; p. 1347, ll. 8-12.

8  
9 Fixing the machine was relatively straightforward – clear the jamb, press an overload reset  
10 button and press the start button. TR, p. 1328, ll. 7-18. Mr. Servin would not do that. Instead, he  
11 wanted to watch the video of himself clocking in and out and continued arguing about the shoes  
12 that other bargaining unit members wore. This is consistent with Mr. Arellano’s attitude that it is  
13 “not [my] responsibility” to address operators he sees feeding a machine improperly. TR, p. 878,  
14 ll. 8-25.

15  
16 Applying the *Wright Line* analysis, the GC failed to present evidence showing a nexus  
17 between discipline to Mr. Servin for this incident and some sort of antiunion animus. To the  
18 contrary, Apex was reasonable and justified in issuing written discipline to Mr. Servin in  
19 accordance the CBA, which allows, Apex “to discipline employees and determine the level of  
20 discipline.” CGX 3, pp. 26-27. Apex has a policy against “Insubordination or disobedience of a  
21 lawful management directive,” which is set forth in its Handbook.<sup>9</sup> RX 3 at p. APEX\_010356.  
22 This incident is a textbook example of insubordination. It is clear from Mr. Sharron’s voluminous  
23 testimony that he directed Mr. Servin to fix the jam on Iron 2 multiple times. It is also clear from  
24 the video that Mr. Servin did not fix the machine as directed. RX 59, RX 60 and RX 61. As Mr.  
25

26  
27 <sup>9</sup> As discussed above, neither the Union or GC have challenged the Handbook in this  
28 proceeding.

1 Sharron aptly put it, “What would you call it? I call it insubordination. Is there another word?”  
2 TR, p. 1366, ll. 23-25. In Mr. Servin’s own words, not working on a machine when directed  
3 “would be insubordinate. I’d get terminated for that.” TR, p. 1096, ll. 15-17.

4 **D. Claims Related to Mr. Arellano**

5 **1. Mr. Arellano Violated Apex’s Safety Rules by Not Wearing Fall**  
6 **Protection**

7 The Complaint alleges Apex disciplined Mr. Arellano for a safety violation because he  
8 engaged in Union activity, filed charges and testified in Board hearings, as well as with intent to  
9 discourage Union activity and interfere with his rights under the NLRA. (See Third Consolidated  
10 Complaint at ¶¶ 6(g), 6(n), 6(o), 7, 9, and 11). The facts do not support this. After OSHA ordered  
11 Apex to close its roof, Apex purchased a Weightanka, a portable anchoring fall-protection system  
12 that consists of metal plates on a crossbeam with rubber coated feet. TR, p. 286, ll. 1-5. To use  
13 the Weightanka, the user puts on the harness, puts the lanyard on the back of the dorsal hook,  
14 attaches the rope lanyard onto the Weightanka, and clips in. TR, p. 287, ll. 4-10. The rope is 18  
15 feet long. TR, p. 287, ll. 19-23. On Apex’s roof, there is a Weightanka near the safe zone, where  
17 the hatchway onto the roof is located where a user can tie in upon going up to the roof. TR, p.  
18 286, l. 25; p. 287, ll. 1-15. If the user wishes to move to another part of the roof, he would take  
19 another Weightanka unit, move it to the desired location, transfer the tie-off lanyard, and leapfrog  
20 to the next position. TR, p. 287, ll. 24-25; p. 288, ll. 1-11. This process involves moving and  
22 stacking a sufficient amount of metal plates to support the user’s weight. TR, p. 286, ll. 21-24.  
23 Apex submitted the Weightanka system to OSHA as part of its remediation program. RX 51.

24 Mr. Marsh provided training to Apex engineers on how to use the Weightanka which  
25 included OSHA-required items for fall protection. TR, p. 284, ll. 18-20. The training also involved  
26 how to set up and use the Weightanka system. TR, p. 284, ll. 18-24. Mr. Marsh provided the  
27 Weightanka instruction manual to engineers as part of the training. TR, p. 144, ll. 18-20; p. 285,  
28

1 ll. 10-13. CGX 15. Engineers working on the roof were required to assemble the Weightanka  
2 prior to commencing work. TR, p. 160, ll. 5-10. Mr. Arellano attended and completed the  
3 Weightanka training on August 1, 2018, as evidenced by the fact that he signed the training log.  
4 RX 7 at p. 3; TR, p. 958, ll. 18-25; p. 959, ll. 1-9 (Mr. Arellano admitting he attended the training).  
5 Mr. Arellano did not ask any questions during the training despite having the opportunity to do so.  
6 TR, p. 285, ll. 22-25; TR, p. 959, ll. 13-17.

7  
8 On August 14, 2018, Mr. “Chuy” Martinez and possibly Mr. Kevin McCann told Mr.  
9 Sharron they heard Mr. Arellano say he was not going to wear his safety gear while working on  
10 the roof. TR, p. 608, ll. 23-25; p. 609, ll.1-2. The next day, Mr. Sharron went to the roof to see if  
11 Mr. Arellano was wearing his safety gear. TR, p. 609, l. 25; p. 610, ll. 1-4. Sure enough, Mr.  
12 Sharron observed Mr. Arellano wearing the Weightanka harness, **but his rope was not connected**  
13 **to the system.** TR, p. 610, ll. 9-14. Mr. Sharron took photos of Mr. Arellano to document the  
14 incident. TR, p. 608, ll. 8-10; GCX 14. The photos are part of the disciplinary form at RX 7, and  
15 clearer, color copies are at GCX 14. Apex issued written discipline to Mr. Arellano for his failure  
16 to use the safety equipment. CGX 13; RX 7.

17  
18 As an initial matter, the GC has presented no evidence supporting the allegations that Apex  
19 issued discipline to Mr. Arellano because he engaged in Union activity or to discourage same. The  
20 GC also failed to present any evidence Apex issued this discipline or discriminated against  
21 Arellano because he filed charges and/or testified in Board proceedings. The GC did not establish  
22 a nexus between Arellano’s discipline and/or discharge and any union animus. As a result, the GC  
23 failed to make his prima facie showing under *Wright Line*.

24  
25 To the extent the ALJ finds the GC made a prima facie showing, Apex would have taken  
26 the same action even in the absence of protected conduct. Apex has a policy against violating  
27 safety rules. RX 3 at p. APEX\_010356. The CBA provides that Arellano had a duty to familiarize  
28

1 himself with Apex's rules, including Apex's safety rules. CGX 3, p. 27.<sup>10</sup> The CBA also required  
2 Mr. Arellano to follow Apex's safety rules CGX 3, p. 40.<sup>11</sup> Under the CBA's Management Rights  
3 Clause, Apex has broad authority "to discipline employees and determine the level of discipline."  
4 GCX 3 at p. 26. It was reasonable for Apex to believe Mr. Arellano committed violation of its  
5 safety rules. It is uncontroverted that Arellano was working on the roof without a safety harness.  
6 Arellano did not deny the fact that he was not tied in. TR, p. 852, ll. 18-20. This is a serious  
7 violation and Apex had just cause to administer discipline.  
8

9 Mr. Arellano's claim that he was assembling the Weightanka at the time the photo was  
10 taken is contradicted by the photographic evidence. The photos clearly show Arellano was  
11 working on the evaporative cooler and not assembling the Weightanka. The Weightanka weights  
12 are not visible in the photo. TR, p. 837, ll. 20-24; CGX 14c-d. The evaporative cooler panels are  
13 off the unit and laid out on the floor. CGX 14c-d. The ALJ noted water is visible on the ground.  
14 TR, p. 838; ll. 8-11; *see also* CGX 14c-d. This leads to the inference that Mr. Arellano was  
15 washing the panels. Mr. Arellano is looking at the unit and not the Weightanka plates. *Id.*  
16 Furthermore, Mr. Arellano's shift began at 4:00 a.m., and the photos were taken at 5:41 a.m. TR,  
17 p. 611, ll. 15-24. Even taking into account time to punch in and get to the roof, Mr. Arellano had  
18 to have been working for some time without being tied in. Simply put, Mr. Arellano was busted  
19 and did not want to admit it. Apex simply applied its usual rules and disciplinary standards which  
20 are set forth in the Employee Handbook and the CBA.  
21

22 Similarly, the facts show that Apex did not change its disciplinary practices. The  
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24 <sup>10</sup> "[I]t shall be the responsibility of the employee to be familiar with such rules, policies  
25 and procedures" CGX 3 at p. 27.

26 <sup>11</sup> "Employees are required to comply with all safety rules, policies and practices  
27 established by the Employer from time to time, and to cooperate with the Employer in the  
28 enforcement of safety measures. Violations of any such rules, policies and procedures shall be  
grounds for disciplinary action up to and including discharge." CGX 3, p. 40.

1 Handbook, which has been in effect since at least 2015, considers a violation of safety rules  
2 unacceptable, and the CBA, *which the Union agreed to*, plainly requires employees to comply with  
3 Apex's safety rules, and provides that violation of safety rules "shall be grounds for disciplinary  
4 action up to and including discharge." RX 3, p. APEX\_010356; CGX 3, p. 40. There is no merit  
5 to the allegation that Apex changed its disciplinary practices.

## 6 **2. Mr. Arellano Improperly Turned Off the REMA Vacuum**

7  
8 On September 18, 2018, Apex disciplined Mr. Arellano for turning off a REMA vacuum  
9 machines that was allegedly not in use. RX 18. The GC alleges that Apex changed its disciplinary  
10 practices, and disciplined Mr. Arellano due to his Union affiliation. (*See* Third Consolidated  
11 Complaint at ¶¶ 6(j), 6(n), 6(o), 7, 9, and 11). This is untrue.

12 About the time of incident at issue, Apex had just installed a new dry cleaning area in Bay  
13 8. In Bay 8, workers perform dry cleaning and pressing operations for articles such as uniforms.  
14 TR, p. 313, ll. 16-18. The same operations take place in the adjoining bay, Bay 7. TR, p. 313, ll.  
15 19-21. The dry cleaning area includes pressing machines, which use steam to press the clothing.  
16 TR, p. 313, ll. 22-25; p. 314, ll. 1-2. The purpose of the REMA vac is to draw the steam and  
17 moisture away from the machines, vent what it can through the ceiling, and collect the rest in a  
18 tank:  
19

20 [Mr. Naylor]: As I understand the Rema vac, it basically takes the moisture out,  
21 vents what it can up through the ceiling, up through the roof of the building. But  
22 then some of it condenses and ends up in a tank or collects in a bucket which has  
to get emptied; is that correct?

23 [Mr. Arellano]: Yes.

24 TR, p. 998, ll. 4-9.

25 At the time of the incident, dry cleaning was being done in Bay 7, but Bay 8 was not fully  
26 operational. TR, p. 998, ll. 13-17. Arellano knew that they exhaust vents to the REMA vacs in  
27 Bays 7 and 8 were tied together. TR, p. 998, ll. 21-25; p. 999, ll. 1-7. Mr. Arellano also admitted  
28

1 to turning off the REMA vac in Bay 8. TR, p. 999, ll. 8-11. Mr. Arellano further admitted that he  
2 had no knowledge of the consequences of his actions. TR, p. 999, ll. 23-25; p. 1000, ll. 1-2

3 The problem is that by turning off the REMA vac machine in Bay 8 while Bay 7 was  
4 operating, the moisture from Bay 7's REMA vac will back up into Bay 8 and damage the presses.  
5 One must remember that Mr. Arellano styles himself as the most experienced engineer that Apex  
6 had. TR, p. 931, ll. 18-21. He knows how the machinery works.

7  
8 At the time Mr. Arellano turned off the new REMA vacuum in Bay 8, it was in use, going  
9 through a process called "burning out." That meant that Apex was testing it as a new piece of  
10 equipment:

11 [Mr. Higley]: Now, the purpose of the vacuum, the Rema vacuum anyway is to  
12 remove the condensation or remove the steam that the Unipress machine uses in its,  
13 in its operation. Correct?

14 [Mr. Marsh]: Yes, sir.

15 Q. And the operators of the machine use a pedal to open that vacuum port and  
16 remove the steam. Correct?

17 A. There's also a standing vacuum for residual bleed-off from the machines. Yes,  
18 sir.

19 Q. So are you talking about two different vacuums?

20 A. No. It's the same vacuum. There's always vacuum on the machine to remove  
21 residual condensate buildup. There is a foot switch which allows additional  
22 vacuum or a stronger vacuum force to be applied so they can position the clothes  
23 before they press it.

24 Q. And then the steam that is vacuumed out is then expelled through an exhaust  
25 system.

26 A. It's collected in the Rema vacuum, allowed to condensate in the base, and then  
27 the moist warm air is exhausted to atmosphere.

28 JUDGE GIANNOPOULOS: Like through some sort of exhaust vent or just –

THE WITNESS: Steel pipe through to the rooftop.

JUDGE GIANNOPOULOS: It goes up to the roof. All right.

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THE WITNESS: Yes, sir.

[Mr. Higley]: Now, the equipment in question that Arellano is being disciplined for was in Bay 8.

A. Yes, sir.

The equipment was actually in use:

[Mr. Higley]: And Bay 8 at that time, the equipment there was not in operation. Correct?

[Mr. Marsh]: That's not true, sir.

Q. Okay. It was being used then?

A. It was in the process of being installed and burning in.

\* \* \*

Q. So it was, it was I guess operable, but it was not being used at the time.

A. We were burning it in to ensure that all the equipment was ready to come online.

JUDGE GIANNOPOULOS: So what -- I really don't know what burning in means.

THE WITNESS: Generally speaking, once equipment is installed you bring it to temperature or you bring it to over expected operational temperatures. You check for leaks, operations.

JUDGE GIANNOPOULOS: Testing.

THE WITNESS: Testing. And you ensure --

JUDGE GIANNOPOULOS: Okay. You were testing the equipment to make sure it worked properly.

THE WITNESS: Yes, sir.

TR, p. 191, ll. 1-25; p. 192, ll. 1-7; p. 192, ll. 18-25; p. 193, ll. 1-7.

Here, Mr. Arellano tried to make a distinction between the equipment being used by the production staff (i.e., the drycleaners) and the equipment being turned on for the burning out process. The uncontradicted evidence was that it was on for the burning out process. Mr. Arellano

1 held himself out as the most experienced, best engineer that Apex has. Mr. Arellano, however,  
2 turned off a piece of equipment, the REMA vac, without so much as making any effort to check  
3 what was going on with it. He knew that the equipment was new, and as Apex's most experienced  
4 engineer, he would have known of the process for new equipment. Instead of checking into the  
5 situation, he simply acted. This type of tunnel vision is not that which one might expect from the  
6 most experienced engineer on the staff. This is similar to Arellano's approach to his  
7 responsibilities on the production floor. As the Court will recall, Mr. Arellano testified that if he  
8 walked by a member of the production staff who was incorrectly using a piece of equipment, he  
9 had no obligation to correct that person. In his view, he could simply walk by even if the  
10 production person was doing something that would cause the equipment to malfunction.  
11

12 Pursuant to the *Wright Line* analysis, it was the GC's burden to demonstrate that the  
13 discipline issued to Mr. Arellano resulting from this incident was motivated by anti-union animus.  
14 *Wright Line*, 251 NLRB at 1089. The record lacks any such evidence. The GC did not introduce  
15 any evidence establishing a nexus between Mr. Arellano's union activities or membership and the  
16 subsequent discipline and discharge. *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554.  
17

18 Regardless, Apex would have disciplined Mr. Arellano in the absence of any protected  
19 conduct. Apex had a reasonable belief that Mr. Arellano violated its policy against "careless  
20 destruction or damage to Company assets," and "unsatisfactory job performance." RX 3 at p.  
21 APEX\_010356.  
22

### 23 **3. Mr. Arellano Performs Substandard Work by Failing to Turn a Valve 24 Back On After A Repair Causing a Major Shut Down**

25 The NLRB alleges that one of the disciplinary actions against Mr. Arellano on September  
26 18, 2018 was unfair because it represented a change in disciplinary policy, and it was imposed due  
27 to Mr. Arellano's union activities. (*See* Third Consolidated Complaint at ¶¶ 6(j), 6(n), 6(o), 7, 9  
28 and 11). Neither is true.

1 Press 1 is essentially a large, cylindrical washing machine that is about 85 feet long. TR,  
2 p. 990, ll. 12-14. Basically, soiled laundry is put in one end and clean, damp laundry comes out  
3 of the other end. TR, p. 990, ll. 15-17. The machine rocks back and forth using a hydraulic system.  
4 TR, p. 990, ll. 18-21. Oil circulates through that hydraulic system, and circulating water is used  
5 to keep that oil from overheating. TR, p. 989, ll. 21-25.

6 The water runs to the machine by means of a vertical copper pipe that is connected by a  
7 valve with a red handle to a plastic tube. The handle can be seen in RX 48. In Exhibit RX 48, the  
8 water flows down the copper pipe, past the valve with the red handle into the plastic tube. TR, p.  
9 989, ll. 14-20. The plastic tubing is connected to a solenoid valve that regulates the flow of the  
10 water. From the solenoid valve, the water flows into a heat exchanger that transfer the heat from  
11 the oil to the water. TR, p. 993, ll. 9-18. From there, the heated water flows away from the system  
12 to where it is cooled. *Id.*

13  
14 Mr. Arellano claimed that the solenoid was missing one of its parts called a diaphragm,  
15 which resulted in water freely flowing through the system. TR, p. 993, ll. 19-24. He wanted to  
16 install a diaphragm, and, to do so, he had to turn off the water at the valve with the red handle  
17 depicted in RX 48. TR, p. 988, l. 25; p. 989, ll. 1-3. The valve with the red handle is about 3 to 4  
18 feet away from the solenoid valve that he was working on, which is depicted in RX 47. TR, p.  
19 995, ll. 14-16. He did the work, and then his shift ended. TR, p. 996, ll. 16-19. He admitted that  
20 he does not remember whether he turned the handle with the red valve back on to reestablish the  
21 water supply. TR, p. 996, ll. 20-22.

22  
23  
24 Mr. Arellano's work on Tunnel 1 had additional problems. In addition to the valve with  
25 the red handle, Mr. Arellano turned off a second valve in the line that had a white handle and is  
26 depicted in R17. TR, p. 711, ll. 23-25; p. 712, ll. 1-11. He also left that in the off position,  
27 preventing the water flowing through the system cooling the oil. *Id.* Additionally, he failed to  
28

1 reconnect the pipe to the solenoid coil. TR, p. 713, ll. 21-25; p. 714, l. 1. Therefore, even had he  
2 turned the valves back on, the water-cooling system would not have worked properly. TR, p. 713,  
3 ll. 8-11. The problem is that he did not, and the oil overheated, causing Tunnel 1 to shut down for  
4 at least an hour. TR, p. 293, ll. 23-25; p. 294, ll. 1-3; p. 637, ll. 15-20.

5 This incident also points how Arellano shades the truth. Presumably in an effort to show  
6 that Sharron is biased against him due to his affiliation with the Union, Arellano inaccurately  
7 recounted a conversation with Mr. Sharron that followed Servin's insubordination incident.  
8 Several days after the incident, Mr. Arellano and Mr. Servin pulled Sharron aside, in near Tunnel  
9 1. TR, p. 879, ll. 12-24. They asked Mr. Sharron what they could do to create a better working  
10 relationship. TR, p. 879, l. 25; p. 880, l. 1. According to Mr. Arellano, Mr. Sharron got upset and  
11 told him that he was not planning to discipline for the valve incident, but now he would. TR, p.  
12 880, ll. 23-25; p. 881, ll. 1-2. Mr. Sharron denied that he ever said this, and he pointed out that the  
13 disciplinary form for the Press 1 valve incident was drafted on September 6, 2018, the day of the  
14 incident:  
15  
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17 [Mr. Naylor]: Switch now, Mr. Sharron, to some testimony that we heard  
18 regarding a conversation that you had with Mr. Arellano and Mr. Servin while  
19 standing between tunnel 1 and tunnel 2. Do you recall that conversation with them?

20 [Mr. Sharron]: Yes, I do.

21 Q. Can you describe it?

22 A. I was doing my walkthrough through the plant and I happened to be coming  
23 through tunnel 2 and 1. There is a set of steps. I was headed for the steps to go  
24 over. Adam and Joseph are coming back at me. They asked me if they could have  
25 a conversation with me as a friend to friend. I said sure. And actually Joseph was  
26 the one that asked me. He said, Gene, what do you expect from us? And I said,  
27 well, I expect you to do your work like you did before and go on home. I mean  
28 that's all I've asked. I'm not asking anything more.

Q. Was this -- you recall the incident which Mr. Servin was disciplined for  
insubordination?

A. Yes.

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Q. Did this conversation happen after that?

A. Oh, yes.

Q. How long after?

A. I'm saying 2 weeks maybe, a week, 2 weeks.

Q. During this conversation, did you say to Mr. Arellano that -- something like I wasn't going to write you up for closing the [valve] or that I am going to do that now?

A. No.

TR, p. 1314, ll. 7-25; p. 1315, ll. 1-9; *see also* RX 8 (dated September 6, 2018) (though not particularly clear, this appears to be the matter referenced in paragraph 5 of the Third Consolidated Complaint). As pointed out in his testimony, Mr. Sharron had already made that decision and no reason to make such a statement – the decision had already been made, and the process had already started. *Id.*

Once again, the GC failed to meet his burden under *Wright Line*, as there is no evidence that Apex disciplined Mr. Arellano because of any protected activity such that ‘but for’ his union activities or membership, Apex would not have issued discipline or discharge. *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554. The facts do support, however, that Apex exercised its discretion to issue discipline under the progressive discipline section of the CBA. GCX 3 at p. 28. Based on the above facts, it was reasonable for Apex to believe Mr. Arellano violated its policy against “careless destruction or damage to Company assets,” and “unsatisfactory job performance.” RX 3 at p. APEX\_010356.

**4. The Mosca Wiring Harness Incident and The Bagger Motor Incident**

On August 16, 2018, Apex disciplined Mr. Arellano for not properly doing his job in connection with the Mosca wiring harness machine. GCX 11. The Mosca wiring harness is a device that is used wrap and seal a plastic band around a stack of linens or towels. RX 46 and

1 RX 50 are photographs of the machine. The machine heat seals the two ends of the plastic band  
2 around the stack. It is not uncommon is for workers to install a “jumper,” which is a small wire  
3 that bypasses a circuit and allow the hearing element to remain hot. As Mr. Sharron explained:

4 [Mr. Naylor] ... we’ve heard testimony to the effect of that you would never see  
5 a jumper used on a Mosca. Do you agree with that?

6 [Mr. Sharron]: No. I’ve seen jumpers on Moscas before.

7 Q. Can you describe what you would use a jumper for on a Mosca?

8 A. Well, if you’re testing to see if there’s something wrong. You can use a  
9 jumper that way. Once you’re coming off -- excuse me, I know the Mosca you’re  
10 talking about. There is a timer on the heater that melts the strap...

11 TR, p. 1302, ll. 8-17

12 A jumper was frequently used to speed up the machine’s operation by bypassing the timer,  
13 as Mr. Sharron explained:

14 [Mr. Naylor]: We’ve also heard testimony, Mr. Sharron, that whenever you see a  
15 jumper on a Mosca, that indicates that there is something wrong with the Mosca.  
16 Do you agree with that?

17 [Mr. Sharron]: No.

18 Q. Why not?

19 A. Well, because the timer is there. It doesn’t mean there’s nothing wrong with  
20 it. They just wanted it faster. I mean I don’t -- saying there is something wrong  
21 with it is not correct.

22 \* \* \*

23 [Mr. Sharron]: That melts the strap when the strap comes through and presses the  
24 product. And sometimes it's not fast enough for the crew that is using it so they'll  
25 jump the timer out. We've actually gone in and tried to manipulate the time, but it's  
26 in the board so you can't do it. So some of the guys would do -- would jump the 1  
27 timer off on it.

28 JUDGE GIANNOPOULOS: So the timer wouldn't work?

THE WITNESS: Right.

JUDGE GIANNOPOULOS: Okay.

THE WITNESS: So what it is, it slows down the heating process.

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JUDGE GIANNOPOULOS: The timer slows down the heating process.

THE WITNESS: Yes.

JUDGE GIANNOPOULOS: So they wanted to get it faster.

THE WITNESS: Faster.

JUDGE GIANNOPOULOS: So they would, they would just bypass in essence the timer.

THE WITNESS: Right. And I've seen it happen. Right now none of them have it on there right now. But that's what they used it for.

JUDGE GIANNOPOULOS: Okay.

TR, p. 1303, ll. 18-25; p. 1304, ll. 1-2, p. 1302, ll. 22 – 25, p. 1303, ll. 1 – 17.

Mr. Arellano, by his own account the most experienced engineer at Apex, claims to not have known this. TR, p. 931, ll. 18-21. Mr. Arellano found such a jumper on one of the Mosca machines and immediately decided that it meant there was a problem with the machine. TR, p. 807, l. 25; p. 808, ll. 1-3. Mr. Arellano, however, knew of jumpers on other machines. TR, p. 969, ll. 23-25; p. 970, ll. 1-4. In this instance, however, Mr. Arellano decided something was wrong without checking the machine, and recommended that another wiring harness be ordered. Sharron troubleshooted the machine and found that there was no problem and nothing wrong with the jumper. TR, p. 587, ll. 12-23.

About the same time, Mr. Arellano also had an issue with the bagger machine. That machine bags small items, such as hand towels into plastic bags. TR, p. 978, ll. 13-18. One of the motors, referred to as a shaker motor, shakes the machine so that the hand towels settle into the bag before it is sealed. TR, p. 978, l. 1; p. 979, ll. 1-4. Mr. Arellano found that a fuse on the machine was blown and assumed, without checking it, that the shaker motor was broken. GCZ 12 (Mr. Arellano's written comments). He removed it, placed it in Mr. Sharron's office with the

1 recommendation that a new one be ordered. TR, p. 979, ll. 21-23; p. 981, ll. 1-6. Another engineer  
2 checked the machine, found no problem with it, reinstalled it, and returned the machine to service.  
3 TR, p. 981, ll. 11-15.

4 Mr. Sharron wrote Mr. Arellano up for both incidents for wasting corporate resources.  
5 GCX 11; GCX 12.

6 Under *Wright Line*, the GC was required to prove Apex issued discipline for these incidents  
7 because he engaged in protected activity. *Wright Line*, 251 NLRB at 1089. It is unclear how the  
8 GC will argue he met his burden here, as the facts support that Mr. Arellano unnecessarily  
9 attempted to order parts in contravention of Apex's policy against "wasting work materials." RX  
10 3 at p. APEX\_010356. It is uncontroverted that Apex had discretion to issue discipline pursuant  
11 to its right to manage under the CBA, which allows Apex "to discipline employees and determine  
12 the level of discipline." GCX 3 at p. 26. The evidence supports that Mr. Arellano tried to  
13 needlessly order parts for the Mosca and Mop Bagger. It was reasonable for Apex to believe Mr.  
14 Arellano violated its policy and issue the discipline for each respective incident.  
15  
16

17 **E. Claims Regarding the Union's Request for Information**

18 The GC alleges that Apex failed to give requested information to the Union. Most of these  
19 relate to policies of Apex. As noted, and never contradicted by the GC, that the Union has long  
20 possessed a copy of the Employee Handbook which contains the policies of the company. TR, p.  
21 220, ll. 9-21. As noted above, neither the GC nor the Union have contested the lawfulness of any  
22 of the current policies. The Union also asked for the Social Security numbers of the members,  
23 however, at least one member has told Apex that he did not want that information released. TR,  
24 p. 367, ll. 20-25; p. 368, ll. 1-6. Finally, another request related to contract work with AJ  
25 Industries. As noted above, however, the CBA specifically allows Apex to subcontract work out.  
26 GCX 3 at p. 26. Simply put, the GC has not established that the Union is entitled to repeatedly  
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1 request the same information, obtain Social Security numbers from people who do not want to  
2 them released and subcontractor information.

3 **F. The GC Failed to Prove Mr. Arellano and Mr. Servin's Discharges Were**  
4 **Unlawful, and Apex Was Justified in Discharging Both Employees**

5 **1. Apex Was Justified in Suspending and Discharging Mr. Arellano**

6 Apex suspended Mr. Arellano after the REMA vac incident. GCX 18. After he was  
7 suspended, Mr. Marsh reviewed Mr. Arellano's file, including all disciplinary action issued, which  
8 he supplied to Apex's HR department. TR, p. 216, ll. 20-25. Mr. Marsh additionally sought input  
9 from AdvanStaff. TR, p. 217, ll. 1-11. Mr. Marsh, Mr. Sharron, Mr. Marty Martin and Mr.  
10 Dramise met and decided to discharge Mr. Arellano. TR, p. 218, ll. 4-18. Mr. Marsh testified that  
11 the decision to discharge Mr. Arellano was based on his failure to follow the rules set forth in the  
12 Handbook:  
13

14 [Mr. Higley]: Okay. You didn't find any new information in the course of your  
15 investigation. It was all just a review of the documents you had.

16 [Mr. Marsh]: The only new information we came across, and this is sort of a  
17 contingent point on all of our disciplinary action. We're always requested to  
18 provide policies and procedures for why we're disciplining the employees. I was  
19 told that the Union was in possession of our employee handbook. And while that's  
20 not a ruling contract they had that information which we rely on for a form of policy  
21 and procedure. **At that point it was determined that we had even more so  
22 grounds, even more reason to terminate him for failing to meet some of those  
23 policies and procedures.**

24 TR, p. 219, ll. 12-24 (emphasis added). Apex terminated Mr. Arellano on September 27, 2018.  
25 GCX 21.

26 Here, the same analysis that applied to Mr. Arellano's disciplinary incidents also applies  
27 to his suspension and discharge. *Wright Line*, 251 NLRB at 1089. As discussed in detail in Section  
28 D above, the GC failed to make a prima facie showing that Apex's decision to discipline Mr.  
Arellano was motivated by anti-union sentiment. Likewise, Apex presented evidence that it had a  
reasonable, neutral reason for issuing that discipline applied acted in accordance with the CBA

1 and the Handbook. The same reasoning applies to Mr. Arellano's suspension and discharge. Mr.  
2 Arellano's actions caused him to be written up three times in less than 30-days. GCX 13 (safety  
3 violation on August 15, 2018); GCX 17 (Press 1 valve incident on September 5, 2018); GCX 18  
4 (REMA vac incident on September 12, 2018). The CBA gives Apex broad authority "to discipline  
5 employees and determine the level of discipline." GCX 3 at p. 26. Mr. Arellano's three violations  
6 in less than 30-days provided Apex with just cause to terminate his employment pursuant to the  
7 CBA.

## 9 2. Apex Was Justified in Discharging Mr. Servin

10 Apex discharged Mr. Servin on December 18, 2018. GCX 22. As with Mr. Arellano, the  
11 decision was made by Mr. Marsh, Mr. Marty Martin, Mr. Sharron and Mr. Dramise. TR, p. 221,  
12 ll. 21-24. Mr. Servin was terminated for poor performance, and specifically the amount of time it  
13 was taking for him to effectuate repairs:

14 [Mr. Higley]: What issues did Marty notice?

15 [Mr. Marsh]: We had repairs taking longer than expected. We had equipment  
16 downtime that was beginning to affect production. And it seemed Marty's opinion  
17 from what he expressed to me, it seemed that when the days that Joseph wasn't  
18 working things appeared to be operating smoother. So I was asked to take a review.

19 TR, p. 222, ll. 23-25; p. 223, ll. 1-4. Mr. Marsh reviewed work orders from Mr. Servin that seemed  
20 to have longer than expected repair times.

21 Q. BY MR. HIGLEY: So in studying you said multiple work orders, about  
22 how many did you look at?

23 [Mr. Marsh]: Probably 15 or 20 work orders were reviewed over 4 separate days  
24 for say 5 or 6 different repairs that had what seemed to be longer than required  
25 repair times.

26 Q. Okay. How are you able to discern that from the work order?

27 A. Time spend, time that the engineer puts down as far as what they've spent  
28 on the repair. Two of the units I was actually involved in because I walked out to  
the floor to see what was going on.

1 TR, p. 225, ll. 1-11. Mr. Marsh explained why this was unacceptable:

2 [Mr. Higley]: So if the Company doesn't have a minimum or a standard, I mean  
3 how do you determine whether or not their work is acceptable?

4 [Mr. Marsh]: Experience doing the work ourselves. For instance how long does  
5 it take to repair a flat tire. Takes me half an hour. Might take him 45 minutes.  
6 Might take him an hour. At 2 hours you would say what's wrong. At 2½ hours,  
7 you would go [what the] hell.

8 TR, p. 226, ll. 19-25; p. 227, l. 1.

9 Here, the same discussion above regarding Mr. Arellano applies to Mr. Servin. Apex  
10 addressed every disciplinary incident set forth in the Complaint and demonstrated under *Wright*  
11 *Line* that (1) the GC failed to meet his prima facie burden of showing the discipline was motivated  
12 by anti-union animus and (2), that Apex acted reasonably in believing Mr. Servin committed the  
13 violations of Apex's work rules and took action consistent with the CBA. The facts show that Mr.  
14 Servin committed two serious violations in less than a week's time: the failure to tighten the Belt  
15 Guide hardware (GCX 16) occurring on August 30, 2018 and the insubordination incident  
16 occurring on September 6, 2018. Pursuant to the CBA, these disciplinary notices remained in  
17 effect for six months. GCX 3 at p. 28. Additionally, Mr. Servin was taking too long to effectuate  
18 repairs. That is consistent with his promise "to make [Apex's] lives hell for the pure pleasure of  
19 it lol." RX 57 (first page of text messages after "Exhibit 1" marker). Accordingly, it was  
20 reasonable for Apex to terminate his employment.

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1 **V. CONCLUSION**

2 For the reasons stated above, Apex requests that the Board find in Respondent's favor on  
3 all charges.

4 Dated this 19th day of July 2019.

5  
6 NAYLOR & BRASTER

7  
8 By: /s/ Andrew J. Sharples

9 John M. Naylor  
10 Nevada Bar No. 5435  
11 Andrew J. Sharples  
12 Nevada Bar No. 12866  
13 1050 Indigo Drive, Suite 200  
14 Las Vegas, NV 89145

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16 *Attorneys for Apex Linen Service Inc.*  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of NAYLOR & BRASTER and that on this 19th  
3 day of July 2019, I caused the document **RESPONDENT APEX LINEN SERVICE INC.’S**  
4 **BRIEF TO THE ADMINISTRATIVE LAW JUDGE** to be served through the NLRB E-Filing  
5 system addressed to:

6 Hon. John Giannopoulos  
7 NLRB Division of Judges  
8 901 Market Street, Suite 485  
9 San Francisco, CA 94103-1779

9 *Administrative Law Judge*

10 A true and correct copy was served by e-mail to:

11 Nathan A. Higley  
12 National Labor Relations Board  
13 300 Las Vegas Boulevard South, Suite 2-901  
14 Las Vegas, NV 89101  
15 Email: nathan.higley@nlrb.gov

15 *Counsel for the General Counsel*

16 Justin M. Crane  
17 The Myers Law Group  
18 9327 Fairway View Place, Suite 100  
19 Rancho Cucamonga, CA 91730  
20 Email: jcrane@myerslawgroup.com

19 *Counsel for the Charging Party*

21 /s/ Amy Reams  
22 An Employee of NAYLOR & BRASTER  
23  
24  
25  
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# **ATTACHMENT A**

Attachment A:

Comparing GCX 34 (Confidentiality & Non-Compete Agreement Arellano signed in 2011) with GCX 36 (Confidentiality and Non-Compete Agreement Arellano signed in 2018)

Employees will, in the course of their duties, be apprised of certain business matters and affairs of the Company regarding its clients and the management of its business. The duties performed by each Employee of the Company place each Employee in a position of trust and confidence with respect to certain trade secrets and other proprietary information relating to the business of the Company and not generally known to the public. These trade secrets include, but are not limited to, the Company's price lists, advertising and promotional ideas ~~and~~, strategies, customer lists, formulas, patterns, devices, processes, compilations of information, records, and specifications which are owned by the Company and which are regularly used in the operation of the Company (hereinafter "confidential information"). Employee will not, either during the term of Employee's employment or any time thereafter, directly or indirectly:

Disclose or furnish, directly or indirectly, to any other person, firm, agency, corporation, client, business, or enterprise, any confidential information acquired by Employee during his or her employment with the Company.

Individually or in conjunction with any other person, firm, agency, company, corporation, client, business, or ~~corporation~~enterprise, employ or cause to be employed any confidential information in any manner whatsoever, except in furtherance of the business of the Company.

Without written consent of the Company, publish, deliver, or commit to being published or delivered, any copies, abstracts, or summaries of any files, records, documents, drawings, specifications, lists, equipment, and similar items relating to the business of the Company, whether prepared by the Employee or otherwise coming into the Employee's possession, except to the extent required in the ordinary course of the Company's business.

All files, records, documents, drawings, specifications, lists, equipment, and similar items relating to the business of the Company, whether prepared by Employee or otherwise coming into the ~~employee's~~Employee's possession, shall remain the exclusive property of the Company and shall not be removed from the premises of the Company under any circumstances whatsoever without prior written consent of an officer of the Company.

Attachment A:

Comparing GCX 34 (Confidentiality & Non-Compete Agreement Arellano signed in 2011) with GCX 36 (Confidentiality and Non-Compete Agreement Arellano signed in 2018)

Employee agrees that during the tenure of his or her employment with the Company, he or she will be exposed to a significant amount of confidential information concerning the Company's business methods, operations, and customers, and that such information might be retained by him or her in memory, and that the protection of the Company's exclusive rights to such confidential information and trade secrets can best be ensured by means of a restriction on his or her activities after termination of employment. Accordingly, Employee agrees that for a period of twelve (12) months following termination of employment, whether voluntary or involuntary, and with or without cause, Employee shall not, directly or indirectly (on behalf of the Employee or any third person), engage in any competitive activities with the Company's business or any customers or clients for whom the Company provides service ~~for a period of eighteen (18) months. Employer.~~ Employee further agrees this restriction includes, but is not limited to, soliciting, accepting business forms, competing for or otherwise diverting or attempting to solicit, compete for or divert any customers or employees of the Company.

Employee further agrees that any breach of this Agreement pertaining to confidential information, protected trade secrets and ~~non-not~~ solicitation may cause the Company irreparable injury and damages in an amount difficult to ascertain. Accordingly, in addition to any other relief and damages to which the Company may be entitled, Employee agrees that the Company shall be entitled to temporary and permanent injunctive relief by any competent court.

This ~~Agreement~~agreement shall be governed by the laws of the State of Nevada. Nothing in the Agreement changes the at-will nature of the employment relationship of the parties. This Agreement does not guarantee continuation of employment of any period after hire date. Employee understands he or she is free to terminate his or her employment at any time for any reason, with or without notice. Similarly, the Company may terminate the employment relationship at any time with or without cause or notice.

Upon termination of the Employee's employment, Employee agrees to immediately return to the Company all property of the Company in the same condition as when received by the Employee

Attachment A:

Comparing GCX 34 (Confidentiality & Non-Compete Agreement Arellano signed in 2011) with GCX 36 (Confidentiality and Non-Compete Agreement Arellano signed in 2018)

(normal wear and tear excepted) including, but not limited to, all files, records, documents, drawings, specifications, lists, equipment and supplies, promotional materials, and similar items related to the business of the Company.

This agreement is binding and applies to all employees in a co-employment relationship with ~~AdvanStaff~~Advanstaff HR, unless, a more restrictive agreement is set forth by the worksite employer.