UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. PAUL PARK REFINING CO. LLC, d/b/a ANDEAVOR Charged Party/Respondent, and **RICHARD TOPOR** Charging Party/Petitioner.	: : : : : : : : : : : :	CASES 18-CA-205871 and 18-CA-206697

ST. PAUL PARK REFINING COMPANY'S MOTION FOR RECONSIDERATION OF THE BOARD'S AUGUST 30, 2019 DECISION AND ORDER

Pursuant to Section 102.48(d)(1) of the National Labor Relations Board's ("Board") Rules and Regulations, Respondent St. Paul Park Refining Company LLC ("SPPRC" or "the Company") hereby moves the Board to reconsider its August 30, 2019 Decision and Order in the above referenced matter (the "8/30/19 Decision").

The Board's 8/30/19 Decision contained erroneous and unsupported findings of fact and conclusions of law that merit reconsideration by the Board, particularly in light of the Eighth Circuit's September 11, 2019 decision to deny enforcement of the Board's order in *Southern Bakeries*, 366 NLRB No. 78 (2018), upon which the 8/30/19 Decision specifically and critically relies. *Southern Bakeries, LLC v. NLRB*, Nos. 18-2370, 18-2568, 2019 U.S. App. LEXIS 27376. Contrary to the rulings by the administrative law judge and Board in this matter, the Eighth Circuit's *Southern Bakeries* decision holds that an employer can properly rely on an existing

disciplinary warning to support more serious subsequent discipline, even if the prior discipline is later held to be unlawful.[1]

I. BRIEF PROCEDURAL HISTORY

SPPRC discharged Charging Party Richard Topor ("Topor") from employment on September 21, 2017, because he ignored a high priority alarm for more than four hours. Ten months earlier, on November 16, 2017, Topor had received a final written warning and suspension for insubordination and violations of Company work rules and policies. The legality of the final written warning and suspension (hereinafter referred to simply as "the Final Written Warning") and its impact on SPPRC's later decision to terminate Topor's employment are at the heart of the Board's decision in the instant matter. Three additional legal proceedings involving Topor and SPPRC are also relevant to the current dispute, and all have overlapped with one another. To assist the Board in evaluating the motion for reconsideration, SPPRC provides the following brief timeline of key events in all four proceedings:

- November 14, 2016 – SPPRC issued Topor the Final Written Warning after an investigation confirmed that he behaved insubordinately and violated Company work rules and policies. Topor filed an unfair labor practice charge regarding his placement on administrative leave pending investigation and the discipline he received. He also filed a grievance contesting the same decision.

- February 3, 2017 – Topor filed a second unfair labor practice charge. The charge asserted that SPPRC retaliated against him by subjecting him to a mandatory drug test, issuing him a "negative" annual review, giving him verbal coaching, and denying him a bonus. The Region did not pursue Topor's allegations that the annual review and coaching he received were retaliatory. (Tr. 1215).

- April 21, 2017 – The General Counsel consolidated Topor's pending unfair labor practice charges and issued a Complaint and Notice of Hearing. (G.C. Ex. 1(i)). The Complaint alleged that the issuance of the Final Written Warning violated Sections 8(a)(1) and 8(a)(3). The General Counsel did not pursue Topor's claims related to the annual review, drug test, or verbal coaching.

[1] This request for reconsideration is based specifically on the reasons and arguments contained in this motion and in all of the prior filings and presentations made by SPPRC, all of which are expressly adopted and incorporated by reference into this motion.

- July 12-14, 2017 – ALJ Charles Muhl presided over an unfair labor practice hearing regarding the April 21, 2017 Complaint. *St. Paul Park Ref. Co., LLC, d/b/a W. Ref.*, No. JD-102-17, 2017 WL 6523941 (Dec. 20, 2017).

- September 8, 2017 – Topor filed an unfair labor practice charge alleging SPPRC violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) by issuing him multiple performance reviews in August 2017. (G.C. Ex. 1(a)).

- September 21, 2017 – SPPRC terminated Topor's employment after an investigation confirmed that he failed to perform his job responsibilities when he ignored a high priority alarm for over four hours, exposing the refinery, its personnel, and the surrounding community to a serious risk of harm. At the time of the discharge, no decision had been issued on the lawfulness of the Final Written Warning.

- September 22, 2017 – Topor filed an unfair labor practice charge claiming the termination of his employment violated Sections 8(a)(1), 8(a)(3), and 8(a)(4). (G.C. Ex. 1(c)).

- December 8, 2018 – The General Counsel issued an order consolidating Topor's September 8, 2017 and September 22, 2017 unfair labor practice charges and filed a Complaint alleging that the termination of Topor's employment and the issuance of multiple adverse performance reviews in August and September of 2017 violated Sections 8(a)(1) and 8(a)(3). Prior to hearing, the General Counsel dropped the Section 8(a)(3) claim.

- December 14, 2017 – Arbitrator Douglas Knudson presided over a grievance arbitration hearing regarding whether SPPRC had just cause to issue the Final Written Warning.

- December 20, 2017 – ALJ Muhl issued a recommended decision and order finding that the Final Written Warning violated Section 8(a)(1) but not Section 8(a)(3). In his decision, ALJ Muhl found Topor's testimony credible.

- January 17, 2018 – SPPRC filed exceptions to the decision of ALJ Muhl.

- March 27, 2018 – Arbitrator Knudson issued an award denying the grievance challenging the Final Written Warning and finding that SPPRC had just cause to issue that discipline. In contrast to ALJ Muhl, Arbitrator Knudson specifically found Topor's testimony not credible.

- May 8, 2018 – The Board affirmed and adopted ALJ Muhl's decision regarding the Final Written Warning. *St. Paul Park Ref. Co., LLC d/b/a W. Ref.*, 366 NLRB No. 83 (May 8, 2018).

- June 8, 2018 – SPPRC filed a petition with the Eighth Circuit Court of Appeals seeking review of the Board's 5/8/18 Decision regarding the Final Written Warning.

- June 11-14 and July 24-26, 2018 – ALJ Arthur Amchan presided over an unfair labor practice hearing regarding allegations that the termination of Topor's employment and midyear performance reviews in 2017 violated Section 8(a)(1). At the beginning of the hearing, ALJ Amchan granted the General Counsel's motion asking that he adopt *all* findings and conclusions reached by ALJ Muhl in the 5/8/18 Decision – including ALJ Muhl's credibility assessments – over SPPRC's objections. (*See* General Counsel's Motion in Limine; Order Granting General Counsel's Motion in Limine). ALJ Amchan excluded from the record the arbitration award from Arbitrator Knudson sustaining the Final Written Warning and finding the testimony of Topor not credible.

- October 5, 2018 – ALJ Amchan issued a decision and order concluding that the termination of Topor's employment violated Section 8(a)(1). ALJ Amchan expressly relied upon the Board's 5/18/18 Decision and stated that his decision would be null and void if the Eighth Circuit were to reverse the earlier Board decision. ALJ Amchan also specifically relied upon the Board's decision in *Southern Bakeries, LLC*, 366 NLRB No. 78 (2018), to support his conclusion that SPPRC had the burden to show it would have discharged Topor without the Final Written Warning having been issued (even though at the time of the discharge, the Final Written Warning had not been ruled unlawful). *St. Paul Park Ref. Co. d/b/a Andeavor*, No. JD-65-18, 2018 WL 4859356 (Oct. 5, 2018).

- December 3, 2018 – SPPRC filed exceptions to ALJ Amchan's decision and order. The General Counsel did not file a brief in response and did not take exception to ALJ Amchan's conclusion that, if the Eighth Circuit reversed the 5/18/18 Decision, his decision would be null and void.

- July 8, 2019 – The Eighth Circuit affirmed the Board's decision that the Final Written Warning was issued in violation of Section 8(a)(1). *St. Paul Park Ref. Co., LLC v. NLRB*, 929 F.3d 610 (8th Cir. 2019).

- August 30, 2019 – The Board issued the 8/30/19 Decision affirming and adopting ALJ Amchan's proposed decision and order. The Board concluded that SPPRC violated Section 8(a)(1) by terminating Topor's employment and issuing him mediocre midyear reviews approximately ten months after Topor allegedly engaged in protected concerted activity. *St. Paul Park Ref. Co. d/b/a Andeavor*, 368 NLRB No. 62 (Aug. 30, 2019).

II. ARGUMENT

A. Legal Standard

Section 102.48(d)(1) of the Board's Rules and Regulations provides that "a party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." Further pursuant to this Rule, a "motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." 29 C.F.R. § 102.48(d)(1).

Pursuant to 29 C.F.R. § 102.49 of the Board's Rules and Regulations, "until a transcript of the record in a case shall have been filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it." *See also* 29 U.S.C. § 160.

B. Reconsideration Is Warranted Because Of Material Errors By The Board Revealed By The Eighth Circuit's Recent *Southern Bakeries* Decision

Reconsideration is particularly necessary and appropriate in this matter because ALJ Amchan and the Board reached their decisions based on Board precedent that was valid at the time of their decisions but which the Eighth Circuit has since overruled. Indeed, *Southern Bakeries*, 346 NLRB No. 64 (2016), was cited as the primary support for the ALJ's central conclusion – subsequently adopted by the Board – that Topor's termination violated Section 8(a)(1) simply because the Board concluded the termination letter indicated that SPPRC had considered Topor's Final Written Warning when deciding to terminate his employment. Less than two weeks after the Board issued its decision adopting the ALJ's conclusions, however, the Eighth Circuit reversed this aspect of *Southern Bakeries.* *See* 2019 U.S. App. LEXIS 27376.

The Eighth Circuit's action plainly constitutes extraordinary circumstances warranting reconsideration, because, by reversing *Southern Bakeries*, the court rejected the very same reasoning used by the Board in the present matter.[2]

The Board's conclusion that Topor's termination was unlawful because it was based in part on the Final Written Warning is, pursuant to *Southern Bakeries*, incompatible with the Act's specific guarantee, per 29 U.S.C. §160(c), that the Board will not require employers to reinstate employees who have been discharged for cause. Under *Southern Bakeries*, the Final Written Warning was not unlawful at the time the termination decision was made. As a result, the Board's conclusions, which admittedly depend upon the conclusion that the Final Written Warning is unlawful, are in error and should be reconsidered and reversed.

C. Statement Of Material Errors That Should Be Reconsidered By The Board

In addition to the Eighth Circuit's rejection of the primary basis for the Board's ruling as set forth above, the Board's 8/30/19 Decision committed the following material errors that constitute extraordinary circumstances warranting reconsideration, as further explained below:

- The Board wrongly concluded that SPPRC terminated Topor's employment and issued him "adverse" midyear performance review(s) because of his November 4, 2016 alleged protected concerted activity, in violation of Section 8(a)(1).

- The Board improperly failed to require the General Counsel to meet the initial burden of proof before shifting the burden to SPPRC to rebut a finding of Section 8(a)(1) discrimination.

- The Board incorrectly relied upon language in the termination letter, as well as language in a disciplinary recommendation letter, referring to Topor's final written warning, as proof that SPPRC's decision to terminate Topor's employment was unlawfully motivated, despite the fact that the legality of Topor's Final Written Warning was still being litigated at the time of his termination.

[2] As the Board is aware from earlier proceedings in this case, all facts pertaining to this matter arose within the geographic jurisdiction of the Eighth Circuit. SPPRC therefore will be entitled to petition for review from the Board's adverse decision in the Eighth Circuit, and fully intends to do so if the Board denies this motion for reconsideration.

- The Board wrongly concluded that the General Counsel met its *Wright Line* burden by establishing that SPPRC was aware Topor engaged in protected concerted activity in November 2016 and "evinced animus" toward that protected activity by "subjecting him to closer scrutiny beginning in January 2017 and continuing through July 2017."

- The Board incorrectly found that SPPRC never provided Topor with coaching or an "unsatisfactory" performance review prior to November 2016.

- The Board wrongly concluded that the performance coaching that took place between January and July of 2017, as well as the "adverse" performance evaluations issued in August and September of 2017, were part of a "campaign of retaliation against Topor" for engaging in alleged protected concerted activity on November 4, 2016.

- The Board improperly required SPPRC to prove that it would have taken the same alleged adverse actions against Topor in the absence of his alleged protected concerted activity of November 4, 2016, despite the General Counsel's failure to carry his predicate burden, and erroneously concluded that SPPRC failed to prove the same.

- The Board erroneously concluded that, because SPPRC did not prove it treated "similar incidents involving other operators' errors comparably," the Company failed to establish that it would have taken the same actions in the absence of protected concerted activity. No evidence established the existence of any similar incidents.

- The Board erroneously concluded that Topor was treated differently from similarly situated employees who did not engage in the same protected concerted activity. In fact, the Region identified no employees who engaged in comparable misconduct with whom to compare Topor.

- The Board erroneously concluded that the credited testimony and Topor's termination letter establish that SPPRC relied in part on Topor's prior unlawful discipline as a basis for his discharge. The discipline was not "unlawful" at the time of the discharge and the evidence established that the same discharge decision would have been made without respect to Topor's disciplinary history.

- The Board improperly deferred to ALJ Amchan's alleged credibility findings and decision to exclude the arbitration award from the record, despite ALJ Amchan's failure to expressly make any credibility findings of his own and his express, and improper, decision to adopt credibility findings made by ALJ Muhl in a different hearing addressing different issues. (*See* G.C.'s Motion in Limine (May 3, 2018) (seeking adoption of all conclusions reached by ALJ Muhl) and Order Granting G.C.'s Motion in Limine (May 22, 2018)).

D. Argument Summary

Southern Bakeries establishes that it was improper for the Board to rely upon the Eighth Circuit's 2019 ruling that Topor's Final Written Warning was unlawful to conclude that Topor's 2017 discharge violated Section 8(a)(1). The Board should conduct a complete review of the record and reverse its prior decision. The General Counsel did not meet the requirements to prove an 8(a)(1) violation and the ALJ and the Board improperly shifted to SPPRC the burden to prove its innocence under an inappropriately heightened standard. Regardless, the record unequivocally confirms that SPPRC *did* prove its innocence and shows that the Board's reliance upon the ALJ's conclusions to find causation under Section 8(a)(1) were factually and legally erroneous.

E. The Eighth Circuit's *Southern Bakeries* Decision Requires The Board To Reexamine Its Conclusion That Any Reliance On The Final Written Warning By SPPRC Rendered Its Subsequent Actions Unlawful

The General Counsel brought a Section 8(a)(1) complaint against SPPRC based on allegations that SPPRC issued Topor "adverse" performance evaluations, in August and September of 2017, and terminated his employment, in September of 2017, in retaliation for his alleged protected concerted activity on November 4, 2016. (G.C. Ex. 1(e); Tr. 7 (granting G.C.'s motion to withdraw 8(a)(3) allegations). Because SPPRC disputes the allegations regarding its motivation for terminating Topor's employment and for issuing him a critical mid-year performance review, [3] these claims are properly evaluated under the *Wright Line* burden-shifting test. *See Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

[3] Contrary to the Board's findings, Topor did not receive multiple performance reviews, but rather multiple version of a single performance review. Moreover, regardless of whether multiple performance reviews or multiple versions of a single performance review were issued, the issuance of those documents was not an adverse action sufficient to support a claim that SPPRC violated Section 8(a)(1).

Pursuant to *Wright Line*, in order to prove SPPRC violated Section 8(a)(1) by issuing Topor "adverse" performance evaluations and terminating his employment, the General Counsel must prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the adverse action. *See e.g., id.*; *Southern Bakeries*, 2019 U.S. App. LEXIS 27376; *Nichols Aluminum, LLC v. NLRB*, 797 F. 3d 548, 554 (8th Cir. 2015). In order to do so, the General Counsel must establish that (1) Topor engaged in protected activity; (2) the employer knew of that protected activity; (3) Topor suffered an adverse employment action; and (4) there is a causal nexus between the protected activity and the adverse employment action. *See, e.g., In re Am. Gardens Mgmt. Co.,* 338 NLRB 644, 645 (2002); *In re Tracker Marine, LLC*, 337 NLRB 644, 646 (2002). If, and only if, the General Counsel meets that burden, will the burden shift to SPPRC to "exonerate itself by showing that it would have taken the same action for a legitimate, nondiscriminatory reason regardless of the employee's protected activity." *Nichols Aluminum,* 797 F.3d at 554 (citing *Carleton Coll.,* 230 F.3d at 1078) (quotations omitted). This analysis is designed to "protect[] the rights of employees while preserving an employer's right to discharge an employee for a valid cause." *Id.* (quoting *NLRB v. Fixtures Mfg. Corp.,* 669 F.2d 547, 550 (8th Cir. 1982); *Transp. Mgmt. Corp.,* 462 U.S. 393 (1983).

1. The Eighth Circuit Decision In *Southern Bakeries* Establishes That A Complete *Wright Line* Analysis Is Required In This Case

In its 8/30/19 Decision, the Board did not examine whether the General Counsel established each of the required elements to prove SPPRC acted with an unlawful motivation. Instead, the Board adopted the ALJ's conclusion, drawn in reliance on the Board's previous decision in *Southern Bakeries*, 366 NLRB No. 78 (May 1, 2018), that the mere references to Topor's Final Written Warning contained in the termination letter and in the disciplinary

recommendation prepared by Kerntz obviated the need for a step-by-step analysis. According to the Board, because Topor's termination was expressly predicated upon his Final Written Warning (a finding that SPPRC disputes) and because the Eighth Circuit later held that the Final Written Warning was unlawful under Section 8(a)(1), Topor's termination was unlawful by some form of transitive property.[4] In other words, the decisions of the ALJ and the Board are premised on the legal proposition that prior discipline subsequently deemed unlawful cannot be considered. The Eighth Circuit holding in *Southern Bakeries*, however, rejects that very premise. The entire foundation of the Board and ALJ rulings must be reexamined and reversed.

2. The Board Should Reconsider The Record To Determine Whether, In Light Of *Southern Bakeries*, The General Counsel Met His Initial Burden Under *Wright Line*

The ALJ in this case concluded that the burden shifted to SPPRC to disprove the existence of a violation simply because the termination letter referenced the Final Written Warning. The ALJ concluded that the existence of the reference demonstrated that "the General Counsel sustained his initial burden under *Wright Line* . . . by showing that [SPPRC] was aware that Topor engaged in protected concerted activity in November 2016 and evinced animus toward Topor's protected concerted activity by subjecting him to closer scrutiny beginning in January 2017 and continuing through July 2017." *Southern Bakeries*, however, makes clear that the existence of a subsequent order invalidating prior discipline does not establish an improper motive for a discharge decision (or other adverse employment action) that references the discipline in question. 2019 U.S. App. LEXIS 27376 at *12-13 ("applying *Wright Line*, the

[4] Indeed, the ALJ went so far as to state that if the final written warning and suspension were deemed lawful by the Eighth Circuit, there would be no violation of the Act. 368 NLRB No. 62, at 2, n. 12. This is an express recognition that if SPPRC was entitled to rely on the Final Written Warning at the time of the discharge decision, as a matter of law the discharge does not violate the Act. Based on this logic and the Eighth Circuit ruling in *Southern Bakeries*, SPPRC was entitled to rely on the Final Written Warning, and both the ALJ's decision and the Board's order must be reversed.

Board erred in concluding that the prior final written warning, *standing alone*, satisfied the General Counsel's burden to prove a prima facie case of discriminatory discipline.").

The ALJ and the Board lack evidentiary support for their finding that "the General Counsel sustained his initial burden under *Wright Line*," because the Eighth Circuit ruling in *Southern Bakeries* makes clear that the mere existence of a prior disciplinary record does not meet the burden to show protected activity was a substantial or motivating factor in the termination. *See id.* It is equally clear that the General Counsel otherwise failed to present direct evidence sufficient to meet the initial burden. This is particularly true in light of the language in the termination letter (which specifically states that SPPRC did *not* base its decision to terminate Topor on the Final Written Warning (*see* G.C. Ex. 4 ("Even aside from the final warning, the combination of this recent safety-related performance failure and your failure to improve your performance despite the many repeated coaching efforts from your supervisors warrants your termination")); the time lapse between the issuance of the Final Written Warning and Topor's termination; and the undisputed testimony by the decision-maker who terminated Topor's employment that he did not rely upon the Final Written Warning to determine that termination was appropriate and that he would have made the same decision regardless of whether Topor had discipline on his record at the time or not.[5] (*See* Tr. 1638-40).

a. The Board Should Reconsider Whether The General Counsel Has Properly Established Causation In Light Of *Southern Bakeries* And The Full Record

The Board should adopt the Eighth Circuit's interpretation of the law and require that the General Counsel affirmatively prove causation in Section 8(a)(1) challenges to termination

[5] The credibility of Refinery Manager Richard Hastings was not impugned during the hearing and ALJ Amchan made no findings on the subject. Moreover, Hastings did not testify at the hearing before ALJ Muhl (Tr. 1655), such that, to the extent ALJ Amchan's reliance upon Muhl's credibility findings was appropriate (which SPPRC disputes), it does not establish a basis for discrediting Hastings' account.

decisions. Only this step avoids falling into a trap that prevents employers from terminating employees for just cause because they might later be found to have engaged in protected concerted activity and thereby insulated themselves from routine workplace expectations. These are the same concerns that motivated the Board's original adoption of the *Wright Line* test, but for which the Board's decision in *Southern Bakeries* failed to account. *See Wright Line*, 251 NLRB 1083, 1086-1091; *Southern Bakeries*, 2019 U.S. App. LEXIS 27376 at *10-11 ("the Board lost sight of the General Counsel's burden to prove an 8(a)(1) and 8(a)(3) violation" and the requirement that causation be proven "preserves the employer's right under the NLRA to suspend or discharge an employee 'for cause'").

The evidence in the record does not support a finding that the General Counsel actually *proved* causation in this case. In fact, the connection between Topor's prior discipline and the challenged termination is even more attenuated than in *Southern Bakeries.* The termination letter in *Southern Bakeries* explicitly stated that the prior discipline was part of the reason for the employee's termination and did not address what the employer would have done in the absence of such previous discipline. By contrast, SPPRC specifically stated that it would have made the same discharge decision even if Topor had not received the Final Written Warning. (*See* G.C. Ex. 4 ("Even aside from the final warning, the combination of this recent safety-related performance failure and your failure to improve your performance despite the many repeated coaching efforts from your supervisors warrants your termination")).[6]

[6] The ALJ's reference to *Dynamics Corp.*, 296 NLRB 1252 (1989) *enf'd* 928 F. 2d 609 (2d Cir. 1991), in addition to *Southern Bakeries* does not alter this conclusion, because *Dynamics* involved prior discipline that was not in litigation at the time of the discharge decision. In addition, the *Dynamics* discipline was imposed pursuant to a formal progressive discipline policy not at issue in Topor's situation.

(1) The Board Should Reconsider The Record To Determine Whether, In Light Of *Southern Bakeries,* The General Counsel Established The Requisite Knowledge To Prove Causation

The Board's statement that SPPRC was aware of Topor's protected concerted activity is overly simplistic and glosses over the General Counsel's failure to establish that the actual *decision-maker* possessed the relevant knowledge, as it was required to do. *See Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493 (2003) (denying enforcement and concluding that the mere existence of animus on the part of a non- decision-maker "sheds no light" on the issue of whether animus motivated the adverse action). With respect to the termination of Topor's employment, the undisputed evidence establishes that refinery manager Hastings was the decision-maker, that Hastings was not involved in the performance coaching and feedback sessions throughout 2017, and that Hastings was unaware of the specific facts underlying the Final Written Warning at the time Hastings decided to terminate Topor's employment. (*See* Tr. 1624, 1648). To the extent the alleged campaign of closer scrutiny in 2017 is evidence of animus, because the undisputed testimony establishes Hastings was not involved in *any* of the coaching, discipline, or performance reviews that preceded the termination of Topor's employment, it "does not constitute substantial, or even relevant, evidence that [] animus caused [Topor's] discharge." *See id.; compare Southern Bakeries*, 2019 U.S. App. LEXIS 27376 at * 10-12 (discussing the significance of the decision-maker's lack of detailed awareness regarding the prior discipline as evidence that causation and improper motivation do not exist).

(2) The Board Should Reconsider The Finding That The Temporal Proximity Between The Alleged Increased Scrutiny And The Protected Concerted Activity Can Establish Causation

The record does not support the Board's conclusion that SPPRC had never coached Topor or expressed dissatisfaction with his performance before November 2016 and afterward

subjected him to "increased scrutiny." In fact, Topor received coaching throughout his employment, and SPPRC presented admissible evidence proving so, including documentation from 2005-2014; (R. Ex. 128), earlier performance reviews (R. Exs. 13, 15); and documentation and testimony regarding coaching conducted in September 2016. (*See* Tr. 857-59, R. Ex. 26). The ALJ, however, wrongly refused to admit SPPRC's evidence that management conducted coaching sessions with Topor as early as 2005 into the record as hearsay evidence[7] and disregarded the documented coaching that took place in September 2016 as the "only blot" on his record.

Contrary to the Board's conclusion, however, the ALJ's decision to exclude and disregard the evidence of prior coaching does not justify a finding that coaching only began in after November 4, 2016.[8] Whether the ALJ believes the coaching was warranted is not the question – the only relevant question is whether the evidence supports a conclusion that it was caused by Topor's protected concerted activity and, given that the coaching practice began well before Topor even claims to have engaged in protected concerted activity, it does not. *See Sears*, 349 F.3d at 506 ("Where, as here, an employee's discharge purportedly stems from a series of disciplinary incidents or warnings that predate the employee's union activities, the timing of that discharge rarely if ever constitutes substantial evidence" of animus).

---

[7] The ALJ's decision to exclude the documentation of other previous coaching efforts on hearsay grounds is incompatible with the longstanding acceptance that "hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *RJR Commc'ns, Inc.*, 248 NLRB 920, 921 (1980) (quoting *NLRB* v. *Imparato Stevedoring Corporation*, 250 F.2d 297 (3d Cir. 1957)). Regenscheid's testimony corroborated the contents of the document to the extent it established he coached Topor prior to 2017 and the testimony of Christa Powers established that coaching records were kept in the same format when the Company was under previous ownership and that she gathered the document from Company records. (*See* Tr. 675-77, 683-84, 732-35, 1475-60).

[8] Notably, the Board and the ALJ concluded that the first coaching event took place in January 2017, two months after Topor engaged in the protected concerted activity. This large temporal gap between the protected concerted activity and the first alleged evidence of animus is, in and of itself, evidence of the *absence* of a retaliatory motive. *See NLRB v. Kay Elecs., Inc.* 410 F.2d 499, 502 (8th Cir. 1969) (two months between union activity and discharge "weighs heavily against" a finding of causation).

(3) The Board Should Reconsider Its Conclusion That Evidence Of Ongoing Litigation Can Be Used To Prove Animus Toward Protected Concerted Activity Under Section 8(A)(1)

Finally, the ALJ cited the fact of the ongoing litigation regarding earlier discipline as evidence of causation because it allegedly "kept whatever hostility management had towards him [Topor] raw throughout 2017." There is, however, no evidence to support this supposition and, in the absence of a Section 8(a)(4) claim, such a finding is not relevant to the existence of a prohibited motive under Section 8(a)(1). In fact, in *Southern Bakeries*, the Board rejected the ALJ's conclusion that the simple fact that disciplinary action was taken while litigation was pending did not provide *any* of the evidence of animus necessary to prove a Section 8(a)(4) violation, and the Eighth Circuit agreed with that conclusion. *See* 366 NLRB No. 78 at *3. It logically follows that, if the mere existence of litigation proceedings is not evidence of animus under Section 8(a)(4), which deals directly with retaliation for participation in Board proceedings, then it cannot constitute evidence of animus under Section 8(a)(1), which does not.

3. The Board Wrongly Shifted The Burden To SPPRC And Baselessly Applied A Heightened Standard

After concluding that the General Counsel had met his burden, the Board purported to assess whether SPPRC demonstrated that it would have made the same decision without considering the Final Written Warning. SPPRC presented ample evidence establishing that it would have terminated Topor's employment in September 2017, regardless of the Final Written Warning. The Board, however, did not engage in a reasoned analysis but simply rejected that evidence and concluded that SPPRC failed to prove "that it would have discharged Topor in the absence of his protected activity, because "credited testimony"[9] and the language in the termination letter "establish that [SPPRC] relied in part on Topor's prior unlawful discipline as a

[9] As further discussed below, the Board did not specify to what "credited testimony" it was referring.

basis for his discharge," and because SPPRC did not prove it treated "similar incidents involving other operators' errors comparably." 368 NLRB No. 62 at *1, n. 2.

The Board erred by requiring SPPRC to provide evidence it treated "similar incidents involving other operators' errors comparably," given the absence of evidence that other employees actually committed similar misconduct.[10] *See, e.g., Armstrong Mach. Co., Inc. & United Food & Commercial Workers Union, Local 6, AFL-CIO, Clc*, 343 NLRB 1149, 1177 (2004) .("An employer's ability to mount a successful *Wright Line* defense does not depend on proof that another employee committed exactly the same offense and got exactly the same discipline"). In fact, such evidence does not exist in this case because, contrary to the ALJ's conclusion that other individuals were treated differently, [11] no evidence indicates any other employee ignored a high priority alarm for four hours the way Topor did. *See, e.g., Crown Bolt, Inc.*, 343 NLRB 776, 787 (2004) (finding that the respondent proved it would have taken the same action based on the logical explanation for the decision provided and the absence of proven

[10] The Board cites *Sears* to support this requirement, but that case does not stand for the proposition for which it is cited. *See* 337 NLRB 443 (2002), *enf. denied* 349 F.3d 492 (7th Cir. 2003). The portion of the *Sears* decision which the Board cites in support for this requirement discusses the standard for proving animus, and not the standard for evaluating whether an employer has proven that it would have taken the same actions *regardless* of any animus. 337 NLRB at 444-45.

[11] The Board improperly refers to Topor ignoring the high priority alarm for more than four hours as an "error," when the evidence established it was a much more serious matter. No evidence identifies any other operator who ignored a high priority alarm for a similar length of time. The General Counsel presented testimony and evidence of only two incidents involving other operators engaged in allegedly comparable misconduct. (*See* Post-Hearing Brief of G.C. at 28-29 (briefly referencing Incident 42222 and an incident in the SDA unit as allegedly comparable). These events were so clearly unlike the Topor situation, however, that ALJ Amchan did not rely upon them to assess whether SPPRC engaged in disparate treatment. Instead, ALJ Amchan referred to unrelated disciplinary documentation buried deep in the record and not the subject of testimony to speculate that disparate treatment occurred. (*See* Tr. 265-69 (the only discussion of G.C. Ex. 3 on the record, which identifies G.C. Ex. 3 as containing copies of all discipline issued to operators in 2016-2017, but does not discuss any individual documents contained therein)). ALJ Amchan failed to explain the basis for his unsupported conclusion that the individuals involved were similarly situated to Topor or engaged in similar misconduct. The only evidence that ALJ Amchan pointed to was the use of similar language regarding the dangerous potential associated with employee misconduct in the termination notice issued to Topor and the disciplinary notices issued to other employees. This is insufficient to establish that that the individuals to whom ALJ Amchan refers were appropriate comparators to Topor. *See, e.g., Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 628, n.2 (1993) (it is the General Counsel's burden to establish that the circumstances are sufficiently similar to allow a meaningful comparison).

disparate treatment); *Flexsteel Indus., Inc.*, 315 NLRB 44, 46 (1994) (respondent proved it would have taken the same action in absence of protected activity where treatment differed from allegedly comparable situation, but disparate treatment was justified by factual differences).

The extensive testimony from both management and union witnesses regarding the hazardous nature of the industry, the importance of responding to a high priority alarm, the need to follow established policies and procedures, the speed and urgency with which the next shift responded to the condition, and the potential that Topor's performance failure could have resulted in an explosion clearly established that Topor's conduct violated the Company's standards and those of the industry. When combined with the direct evidence in the form of the statement in the termination letter and Hastings' testimony that the termination was based on the events of September 14-15, 2017, the evidence is more than sufficient to meet SPPRC's rebuttal burden. *See Armstrong*, 343 NLRB at 1177 (the provision of evidence "detailed enough to show how much the offending conduct transgressed its own standards," or those of the industry, may suffice to prove employer would have taken the same action absent protected concerted activity).

F. The Board Erred By Concluding That The ALJ Did Not Improperly Rely On The Credibility Determinations Of Another Factfinder

It is "inappropriate for an administrative law judge to rely on credibility findings made in another case." *See Electrical Workers (Nixdorf Computers Corp.*), 252 NLRB 539, 539, n.1 (1980). An ALJ is expected to make credibility assessments based upon his firsthand observations and "must minimally articulate his reasons for crediting or rejecting" evidence in his decision. *Sears*, 349 F.3d at 514 (citation omitted). ALJ Amchan, however, improperly adopted ALJ Muhl's credibility findings based upon the conduct and testimony of witnesses in a hearing that ALJ Amchan did not attend, before ALJ Amchan personally heard and observed the witnesses testify. ALJ Amchan then compounded the error by failing to articulate any reason for

crediting or rejecting testimony in the matter he actually heard, beyond including in his decision a boilerplate statement that his findings of fact were based "[o]n the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent." *See, e.g.*, *Mercedes-Benz U.S. Int'l, Inc. (Mbusi)*, No. 10-CA-226249, 2019 WL 3407173 (July 26, 2019) (including the aforementioned boilerplate phrase); *Rhode Island Disability Law Ctr.*, No. 1-CA-39121, 2002 WL 187508 (Feb. 1, 2002) (same); *Superior Welding, Inc.*, No. 14-CA-24709, 1998 WL 1984915 (Mar. 27, 1998) (same).

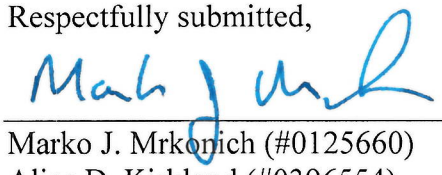
ALJ Amchan's reliance upon ALJ Muhl's credibility findings was particularly inappropriate in this matter, given the highly divergent assessments of credibility made by the two factfinders – ALJ Muhl and Arbitrator Knudson – who heard Topor's Final Written Warning claims and ALJ Amchan's refusal to admit the arbitration decision into evidence and consider those credibility findings. ALJ Amchan did not "base[] his resolutions on the demeanor of the witnesses and the record as a whole." Allowing ALJs to insulate their factual findings from review by reference to unspecified credibility findings unacceptably undermines the legitimacy of Board proceedings and creates due process concerns. Such boilerplate credibility language cannot be allowed to substitute for actual evidence.

III. CONCLUSION

For the reasons stated above, and in SPPRC's previous filings in these proceedings, which are incorporated herein by reference, the Board should grant SPPRC's Motion, reconsider its 8/30/19 Decision, and dismiss the General Counsel's Complaint in its entirety.

Date: September 27, 2019

Respectfully submitted,



Marko J. Mrkonich (#0125660)
Alice D. Kirkland (#0396554)
LITTLER MENDELSON, P.C.
1300 IDS Center
80 South 8th Street
Minneapolis, MN 55402.2136
Telephone: 612.630.1000
Facsimile: 612.630.9626

ATTORNEYS FOR CHARGED PARTY/RESPONDENT

4846-0318-5574.4 080755.1059