

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**DAVID SAXE PRODUCTIONS, LLC and
V THEATER GROUP, LLC, Joint Employers**

and

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE
TECHNICIANS, ARTISTS, AND ALLIED
CRAFTS OF THE UNITED STATES AND
CANADA, LOCAL 720, AFL-CIO**

**Cases 28-CA-219225
28-CA-223339
28-CA-223362
28-CA-223376
28-CA-224119**

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Case 28-RC-219130

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RESPONDENTS' EXCEPTIONS**

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I. INTRODUCTION

The decision and recommended order issued by Administrative Law Judge Mara-Louise Anzalone (the ALJ) in this matter is overwhelmingly supported by the entire record of the 23-day hearing. The ALJ found that Respondents, in quick response to a growing union campaign, took successive action in an attempt to quash the effort. When discharging ringleader, employee Leigh-Ann Hill, did not quell the swell of union support, Respondents opted to discharge a group of employees in mass, while also rushing through a retroactive wage increase. And, Respondents' unlawful conduct continued as the campaign spread from Respondents' theater operations to its warehouse operations, as Respondents discharged warehouse employee Scott Leigh days after Respondents learned he was soliciting union authorization cards. Respondents filed nearly 200 exceptions to the ALJ's decision, the breadth of which seek to overrule the ALJ's credibility findings. Counsel for the General Counsel (CGC) urges the Board to reject Respondents' exceptions while granting the General Counsel's separately-filed limited cross-exceptions.

II. THE ALJ'S FINDINGS ARE UNBIASED AND REST ON CREDIBILITY DETERMINATIONS THAT THE BOARD SHOULD AFFIRM

The overwhelming majority of Respondents' exceptions rest on its implicit and direct attempts to overturn the ALJ's credibility resolutions. Despite the Board's well-settled policy not to overrule an administrative law judge's credibility findings unless the clear preponderance of all relevant evidence demands otherwise,¹ Respondents contend that "the Board is duty-bound to make an independent evaluation" of credibility in this matter, particularly related to testimony central to its defense of the most egregious conduct found unlawful by the ALJ including

¹ *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Respondents' decision to discharge employees *en masse*, in response to union organizing efforts." (R. Br. 46; *See also* R. Br. 9, 12, 13, 14-15, 33, 37, 44-45, 47, 50, 54, 62, 63, 67 (seeking an "independent evaluation" of testimony related to numerous allegations)).

Peppered throughout their brief, Respondents seek this unprecedented scrutiny of the ALJ's credibility resolutions (and resulting findings of fact) by repeatedly invoking one of the following meritless contentions, or combination thereof: (1) The ALJ relied on factors other than demeanor or otherwise failed to sufficiently explain her findings; (2) The ALJ ignored or rejected testimony despite arguable corroboration; (3) The ALJ's findings were improper and demonstrate bias, in large part, because the ALJ credited the GC's witnesses while rejecting the majority of testimony presented by Respondents. (R. Br., citations above).

As a general matter, although necessary to prevail in its high-stakes endeavor to unravel the ALJ's findings, Respondents' attempts to overturn nearly every credibility resolution baked into the ALJ's decision do not withstand a fraction of the scrutiny it now demands from the Board. First, Respondents' repeated claim that certain credibility resolutions are not based on demeanor, requiring the Board's independent evaluation is erroneous in fact and law. (R. Br. 46). Although the Board "*may* proceed with an independent evaluation" of credibility findings that are "based on factors other than demeanor," the Board is certainly not duty-bound to do so as Respondents suggest. *See Starcraft Aerospace Inc.*, 346 NLRB 1228, 1231 (2006) (emphasis added).² Moreover, contrary to Respondents' position, the ALJ discussed her evaluation of

² In fact, even this proposition appears to be dicta as the Board stated in *Starcraft Aerospace Inc.*, "even if the policy of *Standard Dry Wall* extends to credibility resolutions based on factors other than demeanor, we find . . . that the clear preponderance of the evidence is contrary to the judge's credibility resolutions[.]" 346 NLRB at 1231.

witness demeanor (along with a host of other factors) when resolving material facts, and throughout her decision.³

For example, the ALJ painted a vivid picture of DeStefano's demeanor, one of Respondents' key witnesses whose testimony was rejected nearly in full. Describing her observations of DeStefano, the ALJ found her to be "dramatic," "histrionic," "prone to embellishment and exaggeration," "rehearsed," and "[a]ppearing at times to draw on her skills as a thespian." (ALJD 25:30; 33:7; 35:9; 36:20; 37:31; 45:43). Accordingly, and as further discussed herein, to the extent that Respondents suggest that the ALJ's findings require heightened scrutiny because she did not ground her findings on demeanor, the ALJ's colorful decision simply does not align with Respondents' contentions.

Second, in support of overturning the ALJ's credibility findings, Respondents argue that certain testimony should have been credited because other record evidence lends corroboration. (R. Br. 46-51). However, under *Standard Dry Wall*, the Board should reject Respondents' cherry-picking of the record to bolster flatly rejected testimony because the clear preponderance of the record (as a whole) supports the ALJ's credibility resolutions and the resulting facts. By way of example, Respondents challenge the ALJ's rejection of DeStefano's testimony that she was only granted authority to discipline employees (or even document their performance problems) after Pendergraft's departure in mid-February which is integral to Respondents' defense of the discharge allegations (ALJD 33:4-12) by pointing out arguably corroborative documents. (R. Br. 47-49; citing GC32, R28, GC18). Respondents go so far as to suggest that the Board should reverse the ALJ's findings on this issue because DeStefano's testimony, coupled with the documents cited, shows an undisputed fact. (R. Br. 47, 48 n.42, 49 n.43).

³ A more comprehensive review of the ALJ's findings is included throughout CGC's Answering Brief, herein.

However, Respondents' position hardly passes the laugh test as the record is full of documentary evidence contradicting DeStefano's claim that she was essentially barred from issuing discipline or documenting employees' performance problems prior to Pendergraft's departure. (*e.g.* GC33 (DeStefano email to Pendergraft and others announcing that she issued verbal warnings and sent corresponding disciplinary forms to HR); RX34 at 5 (termination record created by DeStefano); RX37 at 12 (termination record created by DeStefano, also showing DeStefano as audio tech employee's "primary supervisor"); RX36 (disciplinary form created and issued by DeStefano)). In fact, in discussing her rejection of DeStefano's testimony, the ALJ specifically noted how "Respondent's own business records undercut [DeStefano's] claims," identifying a written warning DeStefano issued to an employee. ALJD 33:14-16 (referring to RX37; see also Tr. 2600:2- 2606:5). As this example plainly shows, Respondents' selective presentation of record evidence is wholly insufficient to disturb the ALJ's credibility resolutions, and the Board should reject Respondents' exceptions that are similarly supported by cherry-picked portions of the record.⁴

Finally, in support of overturning the ALJ's credibility resolutions (and to portray the ALJ's overall decision as the "product of bias"), Respondents contend that by crediting GC witnesses, while rejecting the majority of its witnesses' testimony – especially that of Saxe and DeStefano – the ALJ's findings were "improper." (R. Br. 46-47, 52). Although an ALJ may credit some, but not all of a witness's testimony, the Supreme Court has rejected the notion that to credit one party's witnesses and discredit the other is evidence of bias, even if (as

⁴ Respondents' exceptions to other specific findings resting on credibility are discussed throughout, below, although this is a striking example of how, contrary to Respondents' exceptions, the ALJ made crucial findings not only by considering the demeanor of a witness that appeared before her on four separate occasions during the trial, but by reconciling such testimony with, often, conflicting evidence.

Respondents' complain of here) all factual conflicts are resolved in one litigant's favor. *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660 (1949). As the Court explained,

[T]he facts disputed in litigation are not random unknowns in isolated equations – they are facts of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, . . . the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next.

Here, although the ALJ rejected, in large part,⁵ Respondents' key witnesses' testimony, this alone is insufficient to “impugn the integrity of [the judge's] competence.” *Id.* Rather, the ALJ's rejection of testimony central to Respondents' defenses exemplifies how chiseling one facet of its poorly constructed foundation naturally resulted in the crumbling of Respondents' house as a whole. Thus, as further discussed below in response to Respondents' numerous exceptions, the ALJ's findings are not a product of bias or indiscriminate evaluation of the record as Respondents contend. The ALJ's credibility resolutions should be upheld.

III. THE BOARD SHOULD AFFIRM THE ALJ'S FINDING THAT STAGE MANAGERS MECCA AND SOJACK ARE SUPERVISORS

A. The ALJ's Findings and Relevant Facts

The ALJ concluded that Stage Managers Daniel Mecca and Stephen Sojack are each supervisors within the meaning of Section 2(11) of the Act. (ALJD 7:13-32). The ALJ based her conclusion on DeStefano's “unequivocal” testimony showing that Mecca and Sojack effectively recommend discipline, which is primary indicia of 2(11) status under *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007), and similar cases cited by the ALJ. (ALJD 6:20-27, 7:13-32; Tr. 627:6-629:14). As noted by the ALJ, DeStefano testified that she regularly relies upon the recommendations of Mecca and Sojack in issuing discipline without conducting

⁵ Notably, the ALJ did not discredit DeStefano's testimony wholesale. For example, the ALJ relied on her testimony in finding that Daniel Mecca and Steven Sojack are supervisors. See ALJD 7:25-32.

any independent investigation (ALJD 7:25-28). The ALJ's findings of secondary indicia, bolstering her conclusion, are also supported by the record. (ALJD 7:29-32 (e.g., Tr. 1949 (offices); Tr. 3108 (meetings); Tr. 3183-3184 (treated like management))).

B. Respondents' Exceptions Targeting Supervisory Status are Meritless

Respondents except to the ALJ's finding that Mecca and Sojack are statutory supervisors. In sum, Respondents argue that DeStefano's admissions are insufficient.⁶ (R. Br. 7-8). In doing so, Respondents grossly minimize DeStefano's testimony by characterizing it as "respond[ing] affirmatively" to a "broad and leading" question from CGC that did not specify which stage managers were at issue. (R. Br. 7). However, a review of DeStefano's testimony shows that not only is it crystal clear that Mecca and Sojack were the subject of the questioning (Tr. 627:10-22), but that DeStefano offered – primarily in her own words – far more than a simple affirmative response. To wit, DeStefano testified that: (1) she expects Mecca and Sojack to police work rules like she would if she were there, and report safety and performance issues (Tr. 627:6-628:10); (2) they "absolutely" may⁷ recommend whether to issue discipline (Tr. 628:11-13); (3) although they have the ability to issue discipline themselves, she usually does (based on what they report to her) because they do not have time (Tr. 628:14-18); and (4) she values their opinion regarding discipline and "usually" follows their recommendations without looking into

⁶ The Board should reject Respondents' reliance on *Operating Eng'rs Local Union No. 3*, 324 NLRB 1183, 1187-88 (1997), to support its assertion that even if Mecca and Sojack recommended discipline, they would not be considered supervisors under the Act. (R. Br. 8). In that case, the Board affirmed an ALJ's finding that a discriminatee who conducted interviews and made hiring recommendations was not a supervisor on the basis that (unlike here) a next level supervisor "conducted his own interviews and made an independent evaluation of job applicants." *Id.* at 1188. As the ALJ considered in her analysis, DeStefano acts on Mecca and Sojack's recommendations without independent investigation. (ALJD 7:13-30).

⁷ Respondents' focus on the use of the word "may" in one of several questions (R. Br. 7), but a review of DeStefano's testimony on this issue makes clear that Mecca and Sojack do not have illusory authority. Rather, as discussed above, they actually recommend discipline, as expected of them.

the basis “unless there’s like some weird extraneous thing” or “if something is ridiculous.” (Tr. 628:22-629:14). Notably, although Mecca and Sojack were questioned about other primary indicia of supervisory status, neither offered any testimony on whether they effectively recommend discipline. (Tr. 3168-3169; 3192-3195). As such, DeStefano’s testimony is undisputed. And, contrary to Respondents’ contention, her testimony alone⁸ supports the ALJ’s finding of supervisory status, which the Board should affirm.

IV. RESPONDENTS ENGAGED IN EGREGIOUS, UNLAWFUL CONDUCT IN RESPONSE TO EMPLOYEES’ ORGANIZING EFFORTS

A. Respondents Unlawfully Discharged Employee Leigh-Ann Hill

Respondents discharged employee Leigh-Ann Hill on March 2, 2018, marking the first in a series of successive actions that the ALJ found was in response to employees’ union organizing efforts. Although the ALJ analyzed Hill’s discharge separately from Respondents’ decision to discharge a group of eight employees approximately two weeks later (ALJD 17:6-24:14; 31-52), Respondents appear to lump Hill’s discharge with the others when challenging the ALJ’s findings (R. Br. 4-6, 23-29). As discussed below, the ALJ’s findings related to Hill’s discharge are supported by the record, and Respondents’ exceptions should be rejected.

1. The ALJ’s Findings and Relevant Facts

Applying *Wright Line*,⁹ the ALJ found that Respondents violated Section 8(a)(3) and (1) by discharging Hill in retaliation for her union and other protected, concerted activities. (ALJD 20:35-24:14). As noted by the ALJ, testimony related to the events leading up to Hill’s

⁸ Respondents also argue that Mecca and Sojack’s testimony indicates that they are not supervisors, in part, by highlighting Mecca’s testimony in which he said he does “pretty much the same thing” as the stagehands. (R. Br. 8, citing Tr. 3167:14-16). However, curiously omitted from Respondents’ highlighted snippet of vague, yet arguably favorable testimony, is Mecca’s next line of testimony in which he states that his duties differ from those of a stagehand because he is “in charge during the show.” (Tr. 3167:18-19). The Board should reject Respondents’ position, and as noted elsewhere, should not take Respondents’ representations of the record at face value.

⁹ 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

discharge varied significantly among those that offered testimony: decision maker DeStefano's testimony was at odds with nearly every other witness that testified about the decision (ALJD 19:21-30) and with Hill's testimony about her protected activity and the supposed basis for discharging her (ALJD 17:24-18:5). The ALJ credited Hill's version of events for several reasons, including Hill's demeanor (ALJD 18:7-10 (finding her intense, yet precise and not prone to embellishment while also remaining calm, factual and non-combative during cross-examination)) and corroborating contemporaneous statements (ALJD 18 n.13).

The ALJ found that CGC established a prima facie case as follows. Hill's protected activity came in two related forms. First, Hill, along with future discriminatees, "engaged in substantial union organizing activities, both at the theater and online. Hill became involved in the union campaign early on in mid-February when employee Stephen Urbanski talked to her about it. Then, within a week, Hill spoke to about 10 stagehands at the workplace. (ALJD 13:41-47). Around that same time, Hill joined an online Facebook group chat on February 21 in which she enthusiastically posted about her pro-union stance and started taking the lead in terms of adding new members and offering to reach out to certain employees. That same day, on February 21, Hill added Stage Manager Mecca and stagehand Courtney Kostew (who happened to be Stage Manager Estrada's girlfriend) to the group. (JX2). Mecca testified that he saw the online conversation, recognized names of the participants, and knew the gist of the discussion was that employees were complaining about Respondents and "having issues." (ALJD 14:1-17). Employees continued to use the group chat to organize a meeting with union representatives. Hill also spoke with Mecca in-person at the theaters during the last week of February about the union campaign.¹⁰ (Tr. 1025:1026).

¹⁰ As noted below, the ALJ mistakenly attributed this testimony to employee Glick.

Hill's other protected activity occurred on March 1, the day before she was discharged. Hill's credited testimony shows that she met with DeStefano and requested two upcoming days off so that she could work a side gig. DeStefano approved her request. It is at this point that Hill sounded off to DeStefano about employees' low morale and dissatisfaction with wages, echoing concerns central to the organizing efforts. (ALJD 22:23-28; JX2; Tr. 1027-1029, 1084-1086).

Regarding knowledge, the ALJ found that Respondents were "on notice that [Hill] was one of the group chat's initial members" by imputing Mecca's knowledge to Respondents. (ALJD 22:26-31). The ALJ aptly pointed out that imputing knowledge is appropriate under *State Plaza Inc.*, 347 NLRB 755, 757 (2006), because Mecca never denied telling DeStefano or others in upper management about the organizing efforts. (ALJD 22 n.17). Notably, the ALJ also discredited DeStefano's testimony related to when she first learned about employees' union activity (ALJD 15:38-16:2, 15 n.10). The ALJ further supported her finding of knowledge on other factors including evidence showing that Respondents used veiled references to Hill's protected activity. (ALJD 22:26-39).

Regarding animus, the ALJ found that several factors established the GC's burden including: (1) Respondents' use of veiled language (ALJD 22:41-23:10); (2) the "stunningly obvious timing" (ALJD 23:12-22); and (3) shifting and unsupported reasons which was "also highly suggestive of pretext" (ALJD 23:24-41).

Shifting the burden to Respondents, the ALJ found that Respondents "missed the mark widely." (ALJD 24:1-11). As noted by the ALJ, Respondents' defense depended on DeStefano's testimony as to the events leading up to Hill's discharge – testimony explicitly discredited (ALJD 17-18). Specifically, DeStefano claimed that she discharged Hill because Hill declared that she got another job and would no longer be able to adhere to the schedule going

forward. (Tr. 322; 325-326; 507-508; 2587). Further supporting her finding that this account was fictionalized, the ALJ recognized that the original version of Hill's termination form did not mention anything about Hill's supposed other job affecting scheduling (instead citing "poor attitude"), but that DeStefano added "+ secondary employment" to the form before producing it to CGC, in what appears to be an obvious belated attempt to square Respondents' defense to the documentary evidence. (ALJD 24:1-11; 19:41-20:14; GC78; Tr. 2124-2127).

2. Respondents' Exceptions Related to Hill's Discharge are Meritless

a. Respondents Rely on Discredited Testimony as the Basis for Its Exceptions

In presenting the facts surrounding Hill's discharge, Respondents insist that the ALJ should have adopted DeStefano's version of events and offer various arguments as to why the Board should overturn the ALJ's decision to discredit her. (R. Br. 25-29). As discussed, every argument set forth by Respondents fails to show any basis, under *Standard Dry Wall*, to overturn the ALJ's credibility finding. First, Respondents point out several portions of Hill's testimony in which she offered loosely related information about her employment status with other companies to bolster DeStefano's discredited version of material facts. (R. Br. 27). As noted in Section II above, overruling a credibility finding requires far more than pointing out arguably corroborative (or arguably contrary (R. Br. 28)) record evidence. The Board should similarly flatly reject Respondents' argument that DeStefano should be credited because her version of events is "more probable" in light of the few overlapping facts between the different versions. (R. Br. 27-28).

Second, Respondents erroneously assert that the ALJ "rejected DeStefano's testimony on her interactions with Hill without specific explanation." (R. Br. 27). However, as noted above, the ALJ explained why she credited Hill over DeStefano; The ALJ credited Hill's testimony primarily based on Hill's demeanor, including the fact that even in response to Respondents'

counsel's cross-examination, Hill "remained calm, factual and non-combative." (ALJD 18:7-10). Plainly, there is no basis to overturn the ALJ's findings about what happened leading up to Hill's discharge which severely undermines Respondents' proffered reason for doing so. Accordingly, the Board should affirm the ALJ's findings.

b. Hill Engaged in Protected Activity and Respondent Knew About It

Respondents except to the ALJ's finding that Hill engaged in protected activity concerted activity,¹¹ arguing that Hill merely raised individual gripes. (R. Br. 28-29). However, the record shows that Hill raised the complaints both in substance and form so as to echo the main issues central to the union campaign which supports a finding that her complaints were both concerted and for mutual aid. The Board should affirm the ALJ's findings related to protected activity.

Regarding the ALJ's finding that Respondents' knew of Hill's union activity, Respondents generally address the ALJ's finding that Mecca knew about the online organizing efforts. (R. Br. 15-16). Respondents contend that Mecca's testimony merely establishes that he had access to the online chat group, not that Mecca knew of its contents. In support of this, Respondents highlight a fraction of Mecca's testimony on the issue in which he initially denied knowing who was included in the group chat because he declined the invitation to join, suggesting he did not view its contents. (R. Br. 15, citing Tr. 3172:17-23). However, Mecca's own testimony supports the ALJ's finding that he knew far more than that. As the ALJ found, Mecca eventually admitted that he saw who was involved in the group, and enough content to know that there was, what he described as "drama," which piqued his interest. Significantly, in terms of the content, Mecca testified that he "couldn't say verbatim" what he saw, but that the

¹¹ It appears that Respondents do not except to the ALJ's finding that Hill engaged in protected union activity. (R. Br. 25-29). The Board should affirm this finding.

gist of it involved employees' complaints about Respondents. (Tr. 3173-3174; 3184-3186). Accordingly, the Board should affirm the ALJ's finding that Mecca was well-aware of the protected activity unfolding in the group chat.

Respondents also contend that even if Mecca knew about the employees' protected activity through the group chat or other means,¹² the ALJ should not have imputed his knowledge to Respondent. (R. Br. 16). Respondents assert that because "the record indicates Mecca did not report any information to upper management," imputing knowledge is improper. (R. Br. 16). As noted above, the ALJ's finding to impute Mecca's knowledge is supported by Mecca's failure to deny that he reported what he knew. Respondents attempt to skirt around this glaring gap in the record by claiming there is "ample testimony" establishing that "knowledge was first reported through Estrada, not Mecca[.]" (R. Br. 17, citing Tr. 2614; 3473; 3101; 3174). However, the "ample evidence" that Respondents cite to, in large part, is discredited testimony from DeStefano and Saxe in which they insisted that they did not learn about the union effort until April when Estrada reported a particular incident. (Tr. 2614; 3473; ALJD 15 n.10). And, although the ALJ credited Estrada's version of this incident, which he testified happened in February (ALJD 15:25-16:2), Estrada never offered testimony as to whether he was the "first in time" to report union activity to upper management. Thus, Respondents' reliance on Estrada's testimony to support its round-about attempt to fill this evidentiary gap is equally misplaced. Accordingly, the Board should affirm the ALJ's finding that Mecca knew about employees' organizing efforts and his knowledge should be imputed to Respondents because Mecca never

¹² Notably, Hill also testified that she spoke with Mecca at the theater about joining the campaign during the last week of February. It appears that the ALJ mistakenly attributed this testimony to another discriminatee, Jasmine Glick. (ALJD 16:39-17:4, quoting and citing portions of Hill's testimony (Tr. 1025-1027); see also JX2 at 3 (Hill offering to speak with Mecca about the efforts)). This record evidence further supports the ALJ's finding that Mecca knew about Hill's involvement with the campaign.

denied reporting it up the chain and, as discussed above, there is no credited record evidence suggesting otherwise.

c. The ALJ Did Not Rely on a “Privileged” Document

Respondents except to the ALJ’s finding that DeStefano, among others involved in Hill’s discharge, offered shifting (and false) reasons. (R. Br. 23, 29). First, Respondents assert that the ALJ should not have relied on the doctored termination form in which DeStefano added “+secondary employment” because DeStefano added the notation “to assist Respondents’ counsel during the production of documents.” (R. Br. 23). Invoking the work product privilege, Respondents claim that the document was “mistakenly produced and should be disregarded.” (R. Br. 23). It is no surprise that Respondents failed to cite any record evidence to support these bald claims because there is none. There is absolutely no testimony in the record remotely suggesting that DeStefano added the notation to assist counsel or even that it was mistakenly produced. (See Rule 502(b)(1) of the Federal Rules of Evidence (FRE)). Moreover, even though Respondents’ counsel objected to the admission of the doctored document, he only did so on grounds that it was *irrelevant* because the original version was already in the record, despite CGC plainly stating that the document was offered to show shifting reasons. (Tr. 2124-2127). Respondents’ complete failure to raise the issue of inadvertent disclosure during the course of the numerous following days on the record shows that Respondents did not promptly take reasonable steps to rectify the error (if there was one), thus constituting a waiver under FRE 502(b)(3).¹³

¹³ Respondents’ final hour claims that GC78 is somehow privileged and was mistakenly produced is even more puzzling given that Respondents called Jen Sarafina as a witness, the attorney charged with assisting Respondents with the document production. Sarafina testified about various issues related to Respondents’ document production but no testimony was elicited from her about GC78 which had long since been admitted into the record. (Tr. 3835-3844). Even assuming *arguendo* that DeStefano’s conduct falls under any privilege (of which there is no record evidence), Respondents’ failure to question Sarafina about the disclosure further shows that Respondents did not take reasonable steps to rectify the error, thus waiving any so-called privilege. (FRE 502(b)(3)).

Accordingly, the Board should reject Respondents' last-ditch claims that are wholly unsupported by any record evidence and unsustainable under the plain language of the Rules of Evidence.

d. Contrary to Respondents' Exceptions, the Record Shows that Respondents Offered Shifting and False Reasons for Hill's Discharge

Respondents except to the ALJ's finding that Respondents offered shifting reasons for Hill's discharge, which supports the finding of animus and pretext. (R. Br. 23-25, 29). In doing so, Respondents generally contend that: (1) the ALJ should have excused information within all of the discriminatees' termination forms because DeStefano was an inexperienced supervisor (R. Br. 24); (2) only DeStefano's testimony is relevant because she was the decision maker (R. Br. 25); and (3) by offering "multiple reasons," Respondents did not offer shifting reasons (R. Br. 25). As discussed below, the Board should reject Respondents' exceptions on these issues.

First, in an effort to diminish every reason DeStefano set forth within the various termination forms in the record, Respondents argue that the ALJ should have essentially given no weight to the personnel records maintained by a seemingly sophisticated employer that were reviewed by an experienced human resource manager simply because DeStefano herself was relatively inexperienced. Respondents offer no authority supporting its suggestion. Rather, Respondents cite various portions of DeStefano's testimony in which she lamented about how she disliked having to tell employees why they were being fired so she often attempted to soften the blow. (R. Br. 24). Needless to say, this storyline fails to explain why Respondents' business records or DeStefano's statements within the documents are unreliable. In fact, Respondents point out the very evidence that shows DeStefano was instructed to carefully state the reason for each discharge within the forms. (GC10 at 3). Unfortunately, many of the reasons DeStefano included in those forms are proven fabrications, which cannot be excused by inexperience.

B. Respondents Unlawfully Granted Employees a Wage Increase in the Midst of a Growing Union Campaign

1. The ALJ's Findings and Relevant Facts

Respondents challenge the ALJ's finding that Saxe's retroactive wage increase, implemented in the early morning hours when a sizeable number of employees attended a second union meeting, violated Section 8(a)(3) of the Act. (ALJD 26-29; R. Br. 56-57). The ALJ's findings on this issue are well-supported by the record as follows.

After Hill was discharged on March 2, employees kicked their efforts into high gear. Employees continued to talk about the campaign online and in the theaters, eventually scheduling a second union meeting for March 13. (JX2). Not-so-coincidentally, Respondents scheduled a last-minute work call for employees to assist with a stage repair project for the same night after holding a production meeting amongst upper management, including the stage managers which was unusual. (ALJD 24-25; GC59). Notably, in the days leading up to March 13, Estrada told at least one employee that he was going to "put an end to this union shit." (ALJD 24; Tr. 1943-1944). Several employees were noticeably absent from the work-call, opting to attend the meeting instead. (ALJD 25-26)

It is against this backdrop that Saxe, shortly after midnight, while many employees were either at the union meeting or repairing the stage, sent an email to his head of payroll listing 19 theater employees (and 14 wardrobe employees) along with old and new pay rates for each, stating "please pay the following people on THIS payroll (so that their new rate went in last week . . .)." (ALJD 26; GC15). Additional evidence shows the pay increase was unplanned, including Estrada's testimony that the wage increase was unexpected (Tr. 833 (describing it as "crazy")) and Carrigan's testimony that Respondents incurred a monetary penalty in order to rush it through on the day of the payroll deadline. (ALJD 26:40-27:2).

In finding the retroactive wage increase unlawful, the ALJ analyzed the conduct under *Wright Line*, also recognizing that “where an employer grants benefits during an organizing campaign without showing a legitimate business reason, the Board will infer [an unlawful] motive.” (ALJD 28:1-10, citing *ManorCare Health Service-Easton*, 356 NLRB 202, 222 (2010)). The ALJ found that such an inference is well-supported by the record. First, the ALJ noted the ample evidence supporting a finding that Respondents knew of the union campaign (e.g., employees disclosing campaign to stage managers; statements from Estrada; Estrada reporting union activity to Saxe; Mecca’s knowledge of the online chat group). (ALJD 28). Second, the ALJ found that “evidence strongly supports an inference that the organizing campaign was in fact what motivated Respondents’ decision to increase wages,” citing several factors including, in part, the “astonishing timing” which also came shortly after Hill’s wage complaint to DeStefano. (ALJD 28:43-29:8). Finally, the ALJ found that Respondents failed to offer a credible explanation for the unexpected wage increase. In doing so, the ALJ found that Saxe’s explanation – that the increase was a planned effort to standardize wages, which Pendergraft failed to follow through on previously – did not withstand scrutiny in light of evidence showing that: it was Saxe who failed to follow through on Pendergraft’s prior proposal to change wages; Saxe was recently considering a completely different wage structure; and, although Saxe commissioned Carrigan to study the wage issue for months, he did not consult with her before rushing through the early morning payroll changes. (ALJD 29:1-21).

2. Respondents’ Exceptions are Meritless

Respondents except to the ALJ’s finding that Saxe’s retroactive wage increase was unlawful by double-downing on the proffered business reason that the ALJ thoroughly debunked. (R. Br. 56-57). In doing so, Respondents point out portions of record evidence

supporting Saxe’s initial testimony that he implemented the wage increase to standardize rates out of fairness.¹⁴ (R. Br. 56). However, most of the record cited by Respondents is Saxe’s own testimony and the emails he sent ordering the payroll changes. The ALJ considered that evidence finding that, even if Saxe had, at times, considered making wage changes in the vein of standardization, the record shows that Saxe failed to settle on any sort of plan to actually do so and was considering a completely different way to restructure wages (from hourly to a flat rate) just one week prior. Thus, as the ALJ found, the central question is why Saxe abruptly decided to act just after midnight while employees were meeting with union representatives. Saxe struggled to explain the timing of the pay raise but ultimately blamed Pendergraft’s inaction. (ALJD 27:10-24). However, Saxe’s scapegoat storyline was discredited because records showed that it was Saxe – not Pendergraft – who failed to act on a wage change proposal that Pendergraft penned and pitched to Saxe. Accordingly, the Board should reject Respondents’ exceptions arguing that the wage increase was lawful based on its proffered legitimate business reason.

The Board should similarly reject Respondents’ arguments that (1) Respondents lacked knowledge of the union campaign until April and (2) “there is no testimony establishing any link between the wage increase and the discouragement of union activities.” (R. Br. 57). The ALJ expressly discredited the testimony Respondents cite to show that Saxe and DeStefano did not learn about the campaign until April¹⁵ (ALJD 15 n.10), and, contrary to Respondents’ suggestion, direct evidence is not necessary to prove that Respondents were unlawfully

¹⁴ Respondents also except to the ALJ’s finding that the wage increase was \$2 per hour across-the-board, when in fact there was some variance. (R. Br. 57). Given Respondents complete failure to explain the inexplicable timing of the wage increase (even if some of the individual wage increases varied from \$2), the ALJ’s generalization of the amount is immaterial and the Board should reject Respondents’ exceptions on this point.

¹⁵ This issue is addressed more fully in Section IV.C., below.

motivated. In sum, Respondents' exceptions related to the wage increase wholly fail to show the ALJ got it wrong. The Board should affirm the finding.

C. Respondents' Mass Discharge Violated the Act

As a brief overview of the landscape underpinning the ALJ's mass discharge finding, Saxe and DeStefano met between March 14 and 15 and decided to discharge eight employees, who were all connected to the ongoing union activity in some way. Respondents' followed through on that decision over the next couple weeks, informing the employees of their discharge on various days beginning on about March 18 until April 2. Discussed below, Respondents except to nearly every aspect that led the ALJ to conclude Respondents' conduct was unlawful.

1. The ALJ Appropriately Analyzed Respondents' Conduct as a Mass Discharge

Relying on precedent established decades ago, which has been continuously reaffirmed by the Board and enforced by the circuits, the ALJ recognized that, like here, where an employer "is shown to have engaged in a mass discharge for the purpose of discouraging employees from engaging in union activity, or retaliating against them for such activity, the General Counsel need not establish each individual employee's union activity and knowledge, or that all union adherents were laid off." (ALJD 47:15-32, citing *Delchamps, Inc.*, 330 NLRB 1310, 1317 (2000), *Weldun Int'l*, 321 NLRB 733, 734 (1996), *enfd. mem. in part* 165 F.3d 28 (6th Cir. 1998)); *see also* *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992), *aff'd in relevant part* 2 F.3d 1162 (D.C. Cir. 1993) *ACTIV Industries, Inc.*, 277 NLRB 356, 356 n.3 (1985); *Pyro Mining Co.*, 230 NLRB 782 n.2 (1977)). "The rationale underlying this theory is that general retaliation by an employer against the workforce can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters." (ALJD 47:23-26 (quoting *Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985))).

Thus, “the General Counsel’s burden is to prove that the mass discharge decision itself was ordered to discourage union activity or in retaliation for the protected activity of some,” rather than to show a specific correlation between each dischargee’s union activity and his [or her] discharge.” (ALJD 47:25-32); *ACTIV Industries, Inc.*, 277 NLRB at 356 n.3.

Respondents claim that the ALJ “incorrectly applied the mass discharge theory to this matter[.]” (R. Br. 4). Respondents argue that the ALJ’s application of this theory is at odds with “the statutory mandate in Section 10(c) of the Act prohibiting the Board from ordering reinstatement of an employee who has been discharged for cause and established precedent that the Board cannot substitute its judgment for that of the employer[.]” (R. Br. 5). Respondents go further, without any applicable authority cited,¹⁶ claiming that the ALJ’s “indiscriminate application” of the theory operated “as a dragnet snaring legal activity and rendering it illegal, thereby eviscerating the *Wright Line* test.” (R. Br. 5).

Respondents’ muddled argument suggests that the ALJ’s focus on the mass discharge decision, rather than the separate defenses Respondents set forth for each, was impermissible because, without a discerning eye, it is possible Respondents could have had a legitimate reason for discharging at least one of the employees. However, this completely misses the mark because, as explained above, the mass discharge theory is about an employer’s decision to cut the workforce as a means of retaliation for the union activities of some, and not necessarily the ones that get snared by the cut. Thus, in these situations, an outsized focus on an employer’s proffered reasons for selecting each employee for discharge – as Respondents urge here – is no more than a red-herring.

¹⁶ *NLRB v. Ogle Protection Serv.*, 375 F.2d 497, 505 (6th Cir. 1967), cited by Respondents, does not support its position. That case involves a single discharge allegation that went unenforced because the court found that there was insufficient evidence to show that the employer was motivated by protected activity. Respondents’ other citation to *Corriveau & Routhier Cement Block v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969) is equally unavailing.

In addition to missing the mark, Respondents' contention that the ALJ indiscriminately considered the circumstances surrounding the discharges is close to fiction. The ALJ painstakingly discussed the details of each employee's discharge, including his/her protected activity and Respondents' proffered reasons for discharging each, while resolving any disputed material facts by way of credibility resolutions. (ALJD 31-47). Then, as discussed more fully below, the ALJ set forth numerous factors supporting her findings of knowledge and animus, highlighting the "conspicuous lack of a convincing rationale for the discharge actions" while discussing specific examples. (ALJD 48-49). Simply, Respondents grossly mischaracterize the meticulously paved path leading to the ALJ's conclusion that Respondents discharged employees – *en masse* – to quash an unrelenting union campaign.

2. The ALJ's Finding of Knowledge is Well-Supported by the Record

a. Overview of the ALJ's Findings and Record Evidence

The ALJ found that the "credible evidence overwhelmingly establishes that Respondent discharged eight employees shortly after learning that a union organizing campaign was underway at the theaters, in retaliation for the protected conduct for at least some – if not all – of them." (ALJD 47:36-39). Reaching this conclusion, the ALJ found that CGC set forth ample evidence of Respondents' knowledge of the campaign, and even the employees who supported it. Specifically, the ALJ highlighted: (1) the "dramatic timing"; (2) Mecca's knowledge of the online chat group; (3) Saxe, DeStefano, and Estrada's knowledge of employee Graham soliciting cards; (4) employees inviting stage managers to the March 13 union meeting; (5) the work call that overlapped with the union meeting; and (6) Estrada's reaction when employee Michaels left the work call early. (ALJD 48:1-15). Although not specified in this portion of the ALJ's analysis, the record is teeming with other credited evidence such as: (1) Estrada's vow to "put an

end to the union shit” five days prior (Tr. 1944); (2) DeStefano and Saxe holding an “unusual” meeting with the stage managers on March 13 (ALJD 25); and (3) Estrada warning Kostew that organizing could lead to mass firings (JX2 at 25; GC58).

b. Respondents’ Exceptions Targeting Knowledge are Meritless

Respondents except to many findings related to the breadth of evidence supporting the ALJ’s conclusion that Respondents were aware of employees’ union organizing efforts before deciding to discharge the group of eight employees. (R. Br. 5-17). Specifically, Respondents challenge the ALJ’s findings that: (1) a series of policy and procedures meetings indicates knowledge (R. Br. 6); (2) critical events involving Stage Manager Estrada (an admitted supervisor) supports knowledge (R. Br. 8-13); (3) Stage Manager Mecca’s knowledge of union activity imputes to Respondents¹⁷ (R. Br. 15-16); and (4) the work-call that overlapped with the union meeting served to identify union adherents (R. Br. 17). As discussed below, the Board should reject Respondents’ exceptions on these points, primarily because Respondents’ arguments are grounded in misrepresentations of the record and attempts to overturn credibility.

i. *The Board Should Affirm the ALJ’s Findings Related to the Policy and Procedures Meetings*

Respondents except to the ALJ’s finding that a series of policy and procedures meetings, beginning on February 12 and continuing through February 28, supports a finding of knowledge. (R. Br. 6). In doing so, Respondents misconstrue the ALJ’s finding and misrepresent the record. First, Respondents contend that the ALJ “determined that [the meetings] *were* ‘an early preemptive response to a nascent organizing campaign.’” (R. Br. 6 (emphasis added), citing

¹⁷ CGC’s response to Respondents’ exceptions related to Mecca’s knowledge are addressed in Section IV.A.2.b, above, as this factor was specifically relied on when addressing Hill’s discharge. As noted elsewhere, Respondents grouped Hill’s discharge with its exceptions to the mass discharge. For the sake of clarity, CGC’s response to Respondents’ exceptions attempt to delineate the ALJ’s separate findings on these allegations to the extent possible given the structure of Respondents’ brief.

ALJD 15). That is not quite right. The ALJ found that because DeStefano's testimony was inconsistent as to why the meetings were initiated (and notably, against the backdrop of early organizing efforts), the ALJ found "it significantly more likely that Respondent rolled out the meetings . . . as an early . . . response[.]" (ALJD 15:15-23). Thus, the ALJ did not go as far as Respondents contend. Rather, the ALJ's finding serves to highlight one of many instances in which DeStefano's testimony was unreliable, and to add one of numerous circumstances that point in the direction of knowledge given the whole record.

Second, Respondents contend that the meetings could not have been a response to the campaign because "the record reflects that the first action associated with the . . . campaign occurred on February 19" with the Facebook group chat which is after the first policy and procedure meeting on February 12. (R. Br. 6). However, that is not what the record or the ALJ's decision reflects. (ALJD 13; Tr. 1024-1027; 1100-1102). Although several employees testified that they did not become involved in the campaign until they were added to the Facebook group chat which was created on February 19, at least employees Hill and Urbanski were discussing a plan to unionize prior to that in the workplace. (Tr. 1024-1027; 1100-1102). Shortly after that, and before joining the Facebook group chat, David Devito (a former supervisor) enlisted Hill¹⁸ to spread information about the campaign to the other stagehands, which she did. (Tr. 1024-1027). Notably, Devito is Urbanski's roommate and personal friends with Franco (one of the eight discharged). (ALJD 13). Accordingly, the record does not show that the "first action" in the campaign was the February 19 creation of the group chat as Respondents assert. Thus, the ALJ's finding that it is more likely that the policy and procedures meetings were in response to

¹⁸ Hill's testimony shows that before she joined the group chat (February 21), Devito contacted her directly and solicited her to reach out to the other stagehands. (Tr. 1024-1027) (ALJD 13:40-47).

nascent organizing than for the different reasons DeStefano provided is wholly consistent with the record and the Board should, respectfully, reject Respondents' exceptions on this issue.

ii. The Board Should Affirm the ALJ's Finding of Knowledge Related to the Direct Evidence that Estrada Reported Union Activity to DeStefano in February

Respondents except to the ALJ's finding that Stage Manager Estrada, an admitted supervisor, reported to DeStefano who reported to Saxe, that he observed employee Zachary Graham (one of the eight discharged) soliciting support for the union in late February. (R. Br. 8-13). Respondents acknowledge that "Estrada's knowledge [related to this incident] is an issue of credibility." (R. Br. 8). Respondents argue, at length, that the ALJ should have credited DeStefano and Saxe who corroborated the incident, but testified that it occurred in April, instead of Respondents' other witness, Estrada, who placed the event in February.

The ALJ credited Estrada's testimony regarding the timing of the incident on the basis that: (1) Estrada's testimony was corroborated by employee John Lam's testimony; (2) DeStefano and Saxe's testimony was unconvincing; and (3) credited testimony from employee Langstaff (one of the eight discharged) about a related incident with Estrada lends credence to the timing. (ALJD 15:25-26:15). In light of the ALJ's reasoning for crediting Estrada over Saxe and DeStefano, which is largely based on her observations of DeStefano and Saxe's demeanor and additional corroborating record evidence, the Board should reject Respondents' attempts to overturn this finding. As discussed in Section II above, unless the preponderance of record evidence demands otherwise, the Board should affirm the ALJ's finding.

Central to the various arguments Respondents set forth to overturn the ALJ's finding is its contention that Estrada could not have seen Graham soliciting cards in late February because other record evidence suggests that the actual card signing did not happen until later. (R. Br. 9-

11). Respondents' position misses the mark on several fronts. First, although Respondents point to evidence showing that cards were being passed around in March, there is no evidence showing when the very first attempts to get cards signed occurred. (Tr. 1552:19-1553:4). And, although Respondents point out Graham's testimony that he did not start campaigning until after he attended a union meeting on March 1, Graham clearly testified that after the union meeting he went straight to the theaters and started soliciting support for the union. Graham "talked to everyone just about everywhere [at the theater]." (Tr. 1651). The difference between late February and the first day of March is insufficient to show that overturning the ALJ's credibility finding is warranted. In fact, the ALJ acknowledged that this incident may indeed have come to Respondents' attention in early March. (ALJD 16:4-6).

Second, Respondents' gripe about the ALJ's reliance on employee Lam's testimony as corroboration. In doing so, Respondents highlight snippets of Lam's testimony asserting that it is inconsistent with Estrada's in a variety of ways, including the timeframe. (R. Br. 10). For example, Respondents cite a phrase within Lam's testimony to suggest that the incident happened about the time that Graham was discharged in late March and another portion where Lam said he was confused about the timing. However, a review of Lam's testimony – in context with other record evidence – shows that it is wholly consistent with the ALJ's finding that Estrada observed Graham soliciting for the union in late February/early March. When asked about timing, Lam testified that although he did not know exactly when it happened, it was "the same time" that Graham came to the theaters with a broken arm. Lam recalled the timing because it was when he asked Graham "what happened to his arm." (Tr. 994). Graham broke his arm on February 21, and frequently came by the theaters after that, including on March 1 (Tr. 1653). Accordingly, Lam's testimony falls right in line with Estrada's.

Regarding Lam’s testimony, Respondents also point out that Lam testified that he told Estrada that Graham was handing out “flyers” and not “union cards” and that Graham was in the front of the theaters¹⁹ and not the parking garage, which Respondents apparently suggest is sufficient record evidence to overturn the ALJ’s finding.²⁰ (R. Br. 10). Not only is Respondents’ showing insufficient to disturb the findings, but the asserted facts are inconsequential. In fact, whether Graham had cards (or potentially flyers) in his hands when Estrada observed him, misses the point. Material to this case is that Estrada observed Graham soliciting union support in late February/early March – not the actual means in which he did so. The record indisputably shows that by Graham’s conduct, Estrada knew it was union activity and reported it to DeStefano.²¹ Unfortunately for Respondents, Estrada let slip that it happened in February which is corroborated by Lam’s testimony and a plethora of additional record evidence including statements Estrada made to other employees within the same timeframe (discussed below).

For the sake of brevity, any other arguments set forth by Respondents in support of overturning the ALJ’s finding that Estrada reported Graham’s union activity to DeStefano (who admittedly reported it to Saxe) in late February/early March should be rejected. (R. Br. 8-13). The finding is grounded in credibility and corroborating evidence as discussed above. As such,

¹⁹ Estrada also described the location as “out front” at times. (Tr. 3101:20-23; 3103:10-11).

²⁰ Similarly, Respondents also suggest that because Estrada could not recall who reported Graham’s activity to him, that either Lam’s testimony cannot serve as corroboration or Estrada should not have been credited because of a faulty memory. (R. Br. 11). Even if these were grounds for not affirming the ALJ’s credibility finding (which it is not), Estrada identified Lam as the one who likely reported Graham’s activity to him. (Tr. 3103:1-7, referring to “John” aka Tam “John” Lam (Tr. 810)). Moreover, although not specifically mentioned by the ALJ, Estrada’s statement is particularly reliable as a statement against interest.

²¹ Estrada initially testified that he learned that Graham was “talking to people” about the union. (Tr. 3101:16-23). Tripping over words, Estrada later said that someone reported to him that either Graham was handing out cards or that he was “talking to people about the union.” (Tr. 3101:20-3102:3102:7). Subsequent testimony from Estrada is continuously framed by Respondents’ counsel’s questions that refer to “passing out union cards.” (Tr. 3102:10-3106:3).

the ALJ's findings should be affirmed under *Standard Dry Wall*, as discussed more fully in Section II above. Significantly, this finding provides direct evidence of Respondents' knowledge of the campaign before its egregious reactions to it.²²

iii. The Board Should Affirm the ALJ's Findings that Estrada's Conduct Shows Knowledge

Respondents except to the ALJ's findings related to two other incidents involving Estrada in early March supporting a finding of knowledge. (R. Br. 13-14). Similar to most of their other exceptions, Respondents seek an independent evaluation of competing testimony by the Board to challenge the ALJ's credibility findings underpinning these incidents. There is absolutely no basis to do so and the Board should flatly reject these exceptions (again, see Section II above).

Regarding the first incident, based on employee Alanzi Langstaff's testimony (one of the eight discharged) the ALJ found that in late February/early March Graham was pitching Langstaff on supporting the union as they walked out the entrance to the parking garage attached to the theater (the same location Estrada admitted to observing Graham, see section above). Langstaff said he would sign a card, and Graham told him to get one from employee Jasmine Glick (also one of the eight discharged). During the exchange, Langstaff noticed Estrada observing them. Graham left, and as Langstaff walked back into the theaters, Estrada held open the door and told him, "I'd be careful being seen talking to [Graham] if I were you."²³ (ALJD 16:4-15; Tr. 1825-1827, 1872). Estrada denied making the statement to Langstaff which the ALJ discredited by comparing the demeanor of each witness. (ALJD 16 n.16 (describing her

²² Respondents appear to argue that not only should the ALJ not impute Mecca's knowledge, but that ALJ should not have imputed Estrada's knowledge because there is no evidence that either reported their observations to DeStefano or Saxe (R. Br. 16). However, Estrada admitted to reporting Graham's activity to DeStefano and DeStefano (although saying it happened in April instead) admitted that when Estrada reported Graham's activity to her, she reported to Saxe (who testified similarly). Thus, because there was no need to impute Estrada's knowledge based on this direct evidence, the ALJ never did.

²³ The ALJ found that this statement violated Section 8(a)(1) of the Act and also relied on it in finding animus.

observation that Langstaff initially struggled to recall Estrada’s precise language and finding Estrada awkward and appearing uncomfortable)). For the most part, Respondents challenge this finding²⁴ by offering their own observations of Langstaff contending that he struggled and seemed “well-rehearsed.” (R. Br. 13). Respondents’ observations are no substitute for the ALJ’s.

Regarding the second incident Respondents challenge, the ALJ found that on either March 10 or 11, Estrada told employee Josh Prieto that he was “going to put an end to this union shit.”²⁵ (ALJD 24:26-34). The ALJ based her finding on Prieto’s credited testimony, discrediting Estrada’s denial. Among other reasons, the ALJ credited Prieto because he “was cooperative on cross-examination and did not present as prone to exaggeration,” as compared to Estrada to “appeared extremely agitated whenever questioned on the subject[.]” (ALJD 24:30-35). Clearly, there is no reason to overturn this finding despite Respondents efforts to do so (R. Br. 14). Accordingly, the Board should affirm the ALJ’s findings that these incidents occurred, which further support a finding of knowledge (and animus).

iv. The Board Should Affirm the ALJ’s Finding that the March 13 Work Call Identified Union Adherents

Respondents challenge the ALJ’s finding that scheduling a last-minute work call to overlap with the second union meeting (which stage managers had been invited to) operated as a de facto poll of employees’ union sympathies. (R. Br. 17; ALJD 25). In doing so, Respondents argue that: (1) “this work call . . . was only intended for Saxe Theater stagehands and would not have included any audio or lighting technicians”; and (2) there is no evidence to show that

²⁴ Respondents also complain that Graham did not testify about this incident. However, Graham had already walked away when Estrada made the statement. Further, Graham did corroborate Langstaff’s account by this testimony that he went to the theaters after the first union meeting and spoke with all the stagehands (which would include Langstaff) about joining the union. (Tr. 1651:4-1653:20).

²⁵ Record evidence also shows that on about this same day, Kostew, Estrada’s girlfriend, told Prieto that Estrada warned her that union organizing could lead to a mass discharge. (ALJD 18:20-29; GC58; 1941-1944). This is just one of many pieces of record evidence that shows Estrada’s knowledge.

Respondents knew about the union meeting.²⁶ (R. Br. 17). However, although there was testimony that *typically* audio and lighting technicians do not assist with stagehand work calls (and that certain techs did not get an invite to the March 13 call such as Bohannon (Tr. 1219:4-5; 1419:16-18)), the record shows that stagehands were not the only ones solicited for this particular project. (Tr. 963; 975 (Lam testifying that he participated in the work call); Tr. 491 (DeStefano testifying that stagehands and technicians stayed)).

Regardless, even if some of the discriminatees were not solicited for the call, it does not diminish the ALJ's finding that Estrada was specifically on notice that: (1) Graham stopped by the theater on the way to the union meeting and even invited Estrada to attend; (2) Michaels ditched the final hours of the work call; and (3) Suapaia rejected the offer to stay and help. (ALJD 25:37-26:5). Moreover, even if some employees were not solicited for the work call, it does not mean that the work call did not operate as a de facto poll of the ones that were. Accordingly, the Board should affirm the ALJ's finding that the work call served as a means of identifying certain union adherents, and the circumstances of the overlapping work call support a finding of knowledge regarding the union campaign in general.²⁷

3. The ALJ's Finding of Animus is Grounded in the Record and Authority

a. Overview of the ALJ's Finds and Record Evidence

The ALJ found that the “dramatic timing” of the mass discharge ‘hard on the heels’ of Respondents’ learning of the organizing campaign ‘strongly supported an inference of animus

²⁶ Respondents’ knowledge is addressed at length above. Additionally, credited evidence shows that Mecca (who attended the production meeting with DeStefano and Saxe on March 13 in which Saxe ordered the work call for that night (ALJD 25:4-10; GC59) and that Mecca questioned employee Glen about what happened at the union meeting (ALJD 29:30-37; Tr. 1892:10-1893:2), showing that Mecca knew about the union meeting.

²⁷ As discussed in Section IV.C.1 above, it is of no consequence even if Respondents did not learn or have suspicion of each employee’s specific union activity in a mass discharge case such as this. Though notably, the ALJ found such was the case here.

and discriminatory motivation.” (ALJD 28:10-15, quoting *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063, 1065 (2009)). In addition, the ALJ found that a host of other factors supports a finding of animus, including: (1) the proportion of union adherents within the group of employees discharged (ALJD 48:17-35); (2) contemporaneous violations and Estrada’s vow to “put an end to the union shit” (ALJD 48:38-49:12); (3) Respondents’ veiled language directed at most of the employees who were discharged (ALJD 49:4-12); (4) the “abrupt and slap-dash manner in which the discharges were carried out” (ALJD 49:14-25); (5) Respondents’ blatant attempts to document fabricated performance issues, often after the fact (ALJD 49:19-25); (6) the “conspicuous lack of a convincing rationale for the discharge actions” given that many of the proffered reasons were “transparent fabrications” (i.e. pretext) (ALJD 49:27-40); and (7) Respondents’ failure to provide consistent reasons for many of the discharge decisions (ALJD 49:41-45). Indeed, as the ALJ’s findings acknowledge, CGC presented substantial evidence of Respondents unlawful motivation not only regarding the mass discharge decision itself, but even as it relates to each discriminatee. (ALJD 51:35-52:4; 51 n. 49 (finding that even under *Wright Line* each discharge was unlawful)).

b. Respondents’ Exceptions to the ALJ’s Finding of Animus are Meritless

Despite the impressive showing of animus found by the ALJ, Respondents claim that there “is no evidence Respondents harbored any union animus[.]” (R. Br. 17). Respondents specifically target several findings underpinning the ALJ’s conclusion that Respondents were unlawfully motivated in deciding to discharge the group of eight employees, including the ALJ’s findings that: (1) 100 percent of those discharged were union adherents (R. Br. 18-19); (2) Respondents’ continuous references the employees’ “attitudes” and concerns about potential contagion were veiled references to union support (R. Br. 19-21); (3) the manner in which the

discharges were carried out or documented is not supported by a legitimate reason (R. Br. 21-23); and (4) Respondents offered shifting rationales (R. Br. 23-25). Further, in addressing the ALJ's finding of animus, Respondents contend that for each discharge, the ALJ's findings are contrary to its version of events. (R. Br. 25-44). As discussed below, the Board should reject Respondents' exceptions as they are largely based on misrepresentations of the record and attempts to overturn the ALJ's credibility resolutions.

i. The Board Should Affirm the ALJ's Finding that Respondents Discharged a Homogenous Group of Union Adherents

Respondents except to the ALJ's finding that Respondents discharged a homogenous group of union adherents, which is "the most striking evidence" of Respondents' animus. (R. Br. 18). Respondents contend that this "is inherently false" because another on-call stagehand (Melnichenko) was also terminated at the same time and his union sympathies are unknown. (R. Br. 18, citing R55). Respondents' assertion is laughable and only further highlights the obscene ways in which DeStefano attempted to cover her tracks (both in documents and through testimony at the hearing). As background, Respondents attempted to show that DeStefano decided to discharge Michael Gasca (one of the eight) because she no longer needed on-call employees (one of many rationales set forth at various times). To bolster her testimony, DeStefano claimed that she also discharged Melnichenko at the same time, for the same reason. (Tr. 2717-2718). However, Respondents' assertions about Melinchenko – *including that he was even discharged* – were thoroughly debunked. DeStefano testified that he had not worked for Respondents since before she even started working there. (Tr. 432-435). In fact, DeStefano said that at the time she documented his termination, he likely did not even know that he was still in the payroll system. (Tr. 435). Even the document that Respondents cite in its outrageous attempt

to show that Melinchenko was discharged along with the others, R 55, states that he “quit” and had not worked since September 2017.

Respondents also attack the ALJ’s finding that homogenous group of union adherents was discharged by (1) minimizing some of the discriminatees’ union activity, (2) surmising that their union sympathies were heightened after the union promised to get them reinstated (citing no record evidence); and (3) pointing out that other union adherents were not discharged. (R. Br. 18-19). None of this, even if the wild conjecture was true, changes the credited record evidence that each discriminatee engaged in union activity (many spearheading the effort) prior to the mass discharge. Accordingly, the Board should flatly reject Respondents’ exceptions.

ii. The Board Should Affirm the ALJ’s Finding that Respondents’ Veiled References Show Animus

The ALJ found that Respondents’ “outsized concern over the individual dischargees’ poor ‘attitudes’ and potential contagion of the wider workforce” further evidenced Respondents’ unlawful motivation regarding the mass discharge.²⁸ (ALJD 49:4-12; see also ALJD 22:41-23:10; 74:18-31; 75:14-24). Respondents except to this finding arguing that there was no proof that Respondents used the various language identified by the ALJ (“attitude,” “troublemaker,” etc.) “in a manner ‘synonymous with lawful union activity[.]’” (R. Br. 20-21, citing *Guarantee Savs. & Loan*, 274 NLRB 676, 679 (1985)). In doing so, Respondents highlight several portions of testimony to show that Saxe, DeStefano, and others referenced employees’ poor attitude and concern of it spreading in relation to “various performance deficiencies.” (R. Br. 20-21, primarily citing Respondents’ witnesses’ testimony setting forth alleged performance issues).

²⁸ The ALJ similarly found that Respondents’ references to Hill’s “attitude” provided additional evidence of animus in light of the fact that Hill was well-regarded prior to her union activity. (ALJD 22:41-23:10, crediting Stage Manager Sojack’s testimony and DeStefano’s email). Respondents address this finding by pointing out other portions of the record, effectively attempting to overturn the ALJ’s credibility resolution. (R. Br. 28 n.28). Under *Standard Dry Wall*, as discussed in Section II, the Board should reject Respondents’ exceptions related to Hill.

However, Respondents' position ignores the ALJ's reasoning for finding that Respondents used veiled language. The ALJ did not consider Respondents' continued references to "attitude" in a vacuum. Rather, the ALJ found, under the circumstances, and particularly because claims that the group of eight suffered from various performance issues were proven untrue or that conduct once condoned suddenly became terminal offenses, that Respondents were using coded language. (ALJD 49:5-39). Thus, Respondents' challenge, by pointing out the various discredited performance issues, fails to undermine the ALJ's reasoning. Accordingly, the Board should affirm the ALJ's inference that Respondents' references to "attitude" operated as the "classic euphemism for union organizing activity." (ALJD 49:5-6); *Guarantee Savs. & Loan*, 274 NLRB 676, 679 (1985) (recognizing that circumstances dictate whether inference of veiled language is appropriate); *Hertz Corp.*, 184 NLRB 445, 446 (1970) (inferring that term "troublemaker" referenced protected activity because employee was well-regard).

iii. The Board Should Affirm the ALJ's Finding that Respondents' Slap-Dash Method and False Documentation Shows Animus

The ALJ found that the already strong inference of animus "is further validated by the abrupt and slap-dash manner in which the discharges were carried out" (ALJD 49:14-16). Respondents except to this finding by accusing the ALJ of bias and highlighting discredited testimony. (R. Br. 21-23). Respondents appear to argue that the ALJ's conclusion shows bias because the ALJ failed to accept DeStefano's claims that prior to Pendergraft's departure she did not have the ability to document employees' performance issues or take corrective action and just prior to the mass discharge, DeStefano became "the new sheriff in town." (R. Br. 21-22, n.21). However, as discussed at length in Section II, the ALJ specifically discredited DeStefano's testimony on this point, which is supported by documentary evidence showing that DeStefano, in fact, had the authority and acted on it.

Moreover, even if DeStefano was the “new sheriff in town,” the slap-dash manner that she implemented the mass discharge would still support the ALJ’s finding of animus. As background, on March 14 or March 15, DeStefano and Saxe decided to discharge the group of employees. Then, late in the evening on March 15, DeStefano sent a series of emails (one for each discriminatee) recounting alleged misconduct seeking Saxe’s advice on what to do. As the ALJ noted, Respondents failed to offer a plausible explanation for this sequence of events. (ALJD 31-32; 49:14-18). On its face, this shows Respondents’ effort to mask that a decision to discharge each employee had already been made.

The ALJ’s finding is similarly supported by DeStefano leaving Carrigan (human resources) out of the process.²⁹ (ALJD 49:16-21). Respondents argue that the record does not support this finding by pointing out portions of the record showing Carrigan is merely a paper-pusher not involved in decision-making. (R. Br. 23). However, records show that Carrigan is involved in overseeing at least whether a discipline or discharge is warranted (a common function of most human resource managers). (R88 at 7-8, Pendergraft referencing how Carrigan advised against discharge).

Similarly, regarding Respondents’ discharge documentation, the ALJ found that Respondents’ “post-discharge attempts to ‘document’ employees’ alleged poor performance . . . are additional evidence that Respondent’s proffered reasons for discharging the employees are pretext fabricated to disguise an unlawful motive.” (ALJD 49:19-25). Respondents contend that the ALJ failed to cite any record evidence. However, in making the finding, the ALJ referenced employees Glick, Langstaff, and Franco, and for good reason. The record shows that in each

²⁹ The ALJ also relied on the lack of consulting with Estrada, which is supported by the record. Although there is some evidence that Estrada recommended discharging employees Michaels and Langstaff as Respondents point out (R. Br. 23), the record also shows that DeStefano discharged Graham (Estrada’s right-hand man) without giving Estrada any advance notice. (ALJD 44:36-45:2; 43:21-24).

case, Respondents took steps to document the supposed performance issues or misconduct underpinning its proffered reason for discharge, after-the-fact, often by soliciting statements from witnesses months later. (Glick (ALJD 35:16-26); Langstaff (ALJD 39:4-11; GC26); Franco (ALJD 40:22-39; GC20)). Accordingly, and for the reasons discussed above, the Board should affirm the ALJ's finding that Respondents' slap-dash manner and ex-post-facto effort to document employees' alleged misdeeds provide additional support of animus and pretext.

iv. The Board Should Affirm the ALJ's Finding that Respondents Offered Shifting Reasons Showing Animus

Respondents except to the ALJ's finding that it presented shifting reasons discharging most of the employees. (R. Br. 23-25; ALJD 49:41-50:11). In doing so, Respondents contend that (1) DeStefano's statements to employees and within personnel records are unreliable because of her inexperience³⁰ (R. Br. 24); (2) reasons given by anyone other than the "ultimate decisionmaker," DeStefano, do not constitute a shift³¹ (R. Br. 25); and (3) DeStefano offered "multiple" not "shifting" reasons. (R. Br. 25). So, on the one hand, Respondents contend that only DeStefano's statements matter because she was the "ultimate decisionmaker," but on the other hand, Respondents would have the ALJ disregard her statements as unreliable. In Respondents world, it would be impossible to determine whether there even was a reason to discharge any of the employees at the time of discharge. The Board should reject this attempt to invalidate record evidence that fully supports the ALJ's finding of shifting reasons.

³⁰ Respondents argument based on DeStefano's lack of experience is more fully addressed above in Section IV.A.2.d as Respondents invoked the same argument for Hill's discharge.

³¹ To the extent that other witnesses such as Saxe and Carrigan testified about the reasons for discharge, their testimony, contrary to Respondents' claims, addressed what they knew or were told about the reasons for discharge, not their personal opinions as to theoretical legitimate reasons. (R. Br. 25). Such testimony is highly probative.

Moreover, Respondents' attempt to portray DeStefano's testimony as offering "multiple," rather than shifting reasons is unavailing. As noted by the ALJ, DeStefano's proffered reasons to discharge employee Gasca is a prime example. As discussed above, at times, DeStefano claimed to discharge him because she was eliminating on-call employees (padding the record with Melnichenko's "discharge" record, see Section IV.C.3.b.i). But admittedly, when she initially sought Saxe's approval to discharge Gasca (on the basis of his attitude and supposed performance issues), the reason "turned into an on-call thing" (apparently after DeStefano mentioned Melnichenko as another on-call employee, although, in fact, he had quit long ago). (Tr. 425-437; ALJD 42:4-9). Thus, not only does this show shifting reasons for Respondents' rationale, but also false reasons. For the sake of brevity, the circumstances showing shifting reasons for each discharge cannot be recounted, but other examples include Lanagstaff (bullying v. attendance) and Franco (eliminating position vs. performance). Accordingly, the Board should affirm the ALJ's finding that shifting and false reasons are further evidence of Respondents' animus in discharging the group of eight.

v. The "Facts" Set Forth by Respondents for Each Discharge are Largely Based on Discredited Testimony or Otherwise Unsupported by the Record

Respondents include a section for each discharged employee within the group of eight, recounting the version of events that purportedly support Respondents' proffered reasons for discharging them, broadly claiming that the "facts" are contrary to the ALJ's findings. (R. Br. 25-44). In each case, Respondents set forth a version of events incompatible with the ALJ's credibility findings in a blatant showcase of revisionist history. As discussed in Section II, the ALJ's findings, which are rooted in credibility, should be upheld unless the preponderance of evidence demands otherwise. There simply is not enough space to address each of Respondents'

(mis)representations of the so-called facts that are at odds with the ALJ's findings or otherwise unsupported by the record, but some notable examples are discussed below.

The ALJ made specific findings of fact related to the circumstances of each employee's discharge, largely by crediting the discriminatees' testimony over Respondents' witnesses. For example, the ALJ found that employee Glick did not suffer from the performance issues DeStefano put forward, crediting Glick because she "appeared to listen carefully to questions, had a good recall of specifics, and presented as matter-of-fact, noncombative on cross-examination." (ALJD 34 n. 28). Respondents point out that Glick admitted to being late and using her cell phone, supporting some of the reasons put forth by Respondents for her discharge (R. Br. 30). However, Respondents fail to acknowledge that Glick denied being previously reprimanded for such conduct as DeStefano alleged which is central to the ALJ's finding. (ALJD 34; Tr. 1424-1433). Respondents further misrepresent Glick's testimony asserting that Glick admitted that her cell phone use "caus[ed] her to miss cues." (R. Br. 30, citing Tr. 1430, 1426). A review of Glick's testimony reveals that she never admitted to missing cues. And, although DeStefano testified that Glick missed plenty of cues, the ALJ found this testimony suspect as it was not corroborated in any way; DeStefano's post-discharge statement about Glick states that by using her cell phone, Glick "could" have missed cues – not that she did. (ALJD 35; GC81).

As another example, Respondents' version of events related to employee Bohannon is at odds with the ALJ's findings based on credited testimony in significant ways. Respondents claim that Bohannon was discharged as a result of performer Gerry McCambridge's complaint that Bohannon ruined his show, but the ALJ discredited material portions of Saxe's testimony because McCambridge testified differently. (ALJD 36). Respondents recite the following: "In fact, McCambridge even pled that Bohannon be terminated." (R. Br. 31, citing Saxe's

testimony). However, McCambridge denied ever doing so, testifying that it was not his place to make such a request. (Tr. 3160; ALJD 36). Respondents also contend that the ALJ erroneously concluded that Bohannon was not one of the audio techs that McCambridge lacked confidence in, claiming that the ALJ relied on an Instagram message that McCambridge did not have independent recollection of. (R. Br. 32). However, the ALJ relied on McCambridge's testimony: McCambridge testified that for the less skilled techs he operates the equipment with a remote himself, but others will operate the equipment using a space bar ("it's either one or the other") (ALJD 36 Tr. 3154-3155). Bohannon operated the equipment with the space bar, which served as the basis for the ALJ's finding. (ALJD 36; Tr. 3154:8-10). As many examples have so far shown, the Board should reject Respondents' attempts to rewrite history.

4. The ALJ Found that Respondents Failed to Meet its *Wright Line* Burden

a. Overview of the ALJ's Findings Related to Respondents' Defense

After finding that CGC overwhelming met the burden in showing that Respondents' mass discharge was unlawfully motivated, and alternately, that the *Wright Line* burden was met for each discharge, separately, the ALJ considered Respondents' defense, concluding that Respondents failed to meet its burden. (ALJD 50-51). Specifically, the ALJ considered Respondents' position that the mass discharge "grew out of a plan to 'restructure' its theater operation that was hatched in January (i.e., before the onset of the campaign)" (ALJD 50:19-24). As noted by the ALJ, Saxe and DeStefano's testimony regarding its plan to restructure was mired with inconsistencies and contradictions.

For example, they did not agree “on when – and how – the ‘restructure’ came to be.” (ALJD 50:31-33). Saxe claimed³² that in January he and DeStefano compiled a list of employees to be discharged, but aside from placing blame on Pendergraft (vaguely), could not explain why Respondents waited until March to follow through. (ALJD 50:30-51:5; Tr. 130; 190; 258-260). In contrast, DeStefano initially claimed that she devised the plan to restructure after Pendergraft’s departure in February and was adamant that she never discussed who to discharge with Saxe prior. DeStefano claimed that the restructure addressed inefficiencies as she thought she could eliminate some positions. (ALJD 51:16-26). Later, when testifying as Respondents’ witness, DeStefano shifted her narrative to fall closer in line with Saxe’s testimony regarding the timeline and whether certain employees had ever been selected for discharge on the basis of poor performance (rather than efficiency as initially claimed), but the ALJ found this testimony “highly coached and unconvincing.” (ALJD 51:16-26, citing Tr. 457-458; 475-479-2570-2571, 2770, 3468-3469). The ALJ highlighted that Respondents did not produce any documents that corroborated its version(s) of the restructuring plan. (ALJD 50:25-29; 51:16-26).

Ultimately, as the ALJ found, Respondents’ narrative “collapsed under its own weight.” (ALJD 51:28-39). “Saxe and DeStefano’s efforts resulted in an untenable narrative whereby they, for months, secretly schemed to overhaul Respondents’ workforce by identifying poor performers [without contemporaneous documentation] then, approximately two weeks after learning [of the organizing efforts] summarily discharged them[.]” (ALJD 51:28-34). Further, given that DeStefano had recently ranked several of the discriminatees highly, Respondents’ attempts to blame Pendergraft were insufficient to explain Respondents’ conduct. (ALJD 51).

³² At other times, Saxe refused to acknowledge that there ever was a point in time when they decided to discharge the group of employees. (Tr. 188-191).

b. Respondents' Related Exceptions are Meritless

Respondents do not directly address the ALJ's finding that it failed to meet its burden under *Wright Line* regarding the mass discharge as summarized above. Rather, Respondents generally argue that the ALJ failed to consider the impact of Pendergraft's mismanagement and DeStefano's lack of experience. (R. Br. 2-4). In doing so, Respondents set forth a narrative in which Pendergraft failed to hold employees accountable and forbid DeStefano from doing so.³³ (R. Br. 2). Then, regarding the plan to restructure, according to Respondents, "On January 31, DeStefano reported that Pendergraft was assigning extra hours to production employees, exposing wasted money spent in an overstaffed department." (R. Br. 2, only citing GC32). Following, Respondents suggest that "Saxe asked DeStefano to restructure the department to eliminate the unnecessary hours and underperforming employees." (R. Br. 2-3, citing discredited testimony (e.g. Tr. 3469 (ALJD 51:24-26))). Respondents continue, stating that "*as a result*, DeStefano began assessing personnel needs." (R. Br. 3, only citing R29).

Interestingly, Respondents' version of when and how the restructure plan originated is as disagreeable as the ALJ found DeStefano and Saxe's testimony on this issue to be. The two documents cited by Respondents (GC32 and R29) are incompatible with its narrative: DeStefano's email (R29), which was presented at the hearing as the restructuring plan (Tr. 2579-2580), which Respondents now describe as the beginning of DeStefano's personnel assessment, was sent to Carrigan on January 30, so it could not have been the result of DeStefano's January 31 report "exposing" Pendergraft. Notably, that plan does not show eliminating positions.

³³ The issue of whether DeStefano was forbidden from documenting employee performance issues or issue discipline has been addressed throughout, above. (See Section II, Section IV). As noted, the ALJ acknowledged DeStefano and Pendergraft's dysfunctional relationship, but ultimately discredited DeStefano's exaggerated claims that she was barred from even documenting issues, let alone issue discipline.

Continuing with its narrative, Respondents recount how Pendergraft was fired on February 21 for a myriad of misdeeds, none of which relate to his performance supervising production employees. (R. Br. 3). Then, according to Respondents, DeStefano was “thrust into his supervisory role and within weeks enacted a plan to restructure the department.” (R. Br. 2). To that end, Respondents claim that DeStefano met with Saxe on March 15 and decided to discharge the group of eight, primarily based on DeStefano’s review of Respondents’ “needs and assessing the work performance of employees over the prior several months[.]” (R. Br. 3). Respondents claim that she sent the slew of emails to Saxe (i.e., the emails seeking advice) after they already decided to discharge the group “due to the breadth of facts involved[.]” (R. Br. 3). Respondents contend that this series of events show that DeStefano acted lawfully because “[a] new supervisor’s assessment of employees does not establish animus or pretext.” (R. Br. 4).

However, Respondents’ narrative fails to overcome the ALJ’s findings. First, as touched on above, its attempt to sanitize the record evidence into a coherent narrative is belied by the documents Respondents set forth as support. Second, as the ALJ discussed, Saxe and DeStefano’s testimony as to when and how the restructure plan originated, including what the plan even was, is rife with inconsistencies, some of which expressly discredited. Thus, even by highlighting cherry-picked portions of the record as it has, Respondents are unable to resuscitate a tenable narrative. Third, and most crucial, Respondents’ narrative wholly ignores the fact that DeStefano ranked several of the employees she discharged higher than other employees about a month before the mass discharge (Glick (GC83) Michaels (R30), Graham (R30), Hill (GC84)) and described another as a “great audio tech” as late as March 1 (Bohannon (GC19; see also GC13 at 3)). Thus, Respondents’ “new sheriff in town” theory does not explain DeStefano’s sudden poor assessment of at least some of the union adherents within the group, in contrast to

some of her glowing assessments prior to the union campaign. Accordingly, the Board should affirm the ALJ's finding that the record shows pretext and that Respondents failed to meet its burden in showing that it would have discharged employees, *en masse*, regardless of employees' protected union activity.

D. Respondents Unlawfully Rewarded Anti-Union Employee, Kostew

The ALJ found that Respondents violated Section 8(a)(3) of the Act by rewarding employee Courtney Kostew with cue calling duties, applying a *Wright Line* analysis. (ALJD 52-54). Respondents' exceptions related to this allegation are somewhat muddled and do not appear to address several facts central to the ALJ's finding. (R. Br. 45-55). Specifically, Respondents broadly assert that the ALJ's "factual conclusions regarding Kostew indicate bias." (R. Br. 54). Then, Respondents erroneously claim that the ALJ concluded that "all of Kostew's actions were manipulative and in exchange for cue caller duties[.]" (R. Br. 54). However, the ALJ did not find that Kostew exchanged anything for the reward. Rather, as noted, the ALJ applied *Wright Line*, which focuses on Respondents' conduct and Respondents' underlying motivations.

Respondents also conflate the ALJ's findings related to the unlawful cue calling reward with a wholly separate finding that Kostew delivered an election-eve speech as Respondents' agent months later.³⁴ (R. Br. 55; ALJD 61-64). In doing so, Respondents accuse the ALJ of setting forth a conspiracy theory by which Respondents enlisted Kostew to frustrate the organizing effort and was rewarded in exchange, claiming that there is no evidence that

³⁴ Kostew's election-eve speech was not alleged as an unfair labor practice. The ALJ addressed the conduct to resolve objections filed by the Charging Party. CGC has not addressed the ALJ's findings of objectionable election conduct as burden of those issues rest with the Charging Party. CGC notes however, that the ALJ's findings are supported by the record and to the extent Respondents' seek to overturn findings based on credibility, the Board should reject such exceptions under *Standard Dry Wall*. Further, in addressing the ALJ's agent finding, CGC notes that Respondents mischaracterize the basis for the finding – the ALJ did not find Kostew an agent based on her romantic relationship with Estrada. (ALJD 62-64; R. Br. 68)

Respondents “enlisted” her for anything. (R. Br. 55). First, Respondents’ characterization of the ALJ’s findings and reasoning is otherworldly. Second, the record shows that Respondents in fact enlisted her to frustrate the campaign by having her solicit volunteers, at Saxe’s behest, for the March 13 work call that overlapped with the union meeting. (GC59; Tr. 897-907).

Regarding the material³⁵ facts underlying the ALJ’s conclusion of unlawful reward, Respondents only seem to contest whether the cue calling assignment was a reward and suggest that DeStefano selected Kostew for legitimate reasons. (R. Br. 55). However, the ALJ’s findings on these points are supported by documentary evidence. (ALJD 52-54; GC61). Accordingly, the Board should affirm the ALJ’s finding that Respondents’ conduct violated the Act.

E. Respondents’ Statements and Conduct Violated Section 8(a)(1) of the Act

1. The Board Should Affirm the ALJ’s Finding that Estrada Threatened Employees and Created the Impression of Surveillance

The ALJ found that in late February/early March, Estrada told Langstaff, “I’d be careful being seen talking to [Graham] if I were you” immediately after Estrada observed Langstaff talking with Graham,³⁶ concluding that Estrada created the impression of surveillance and constituted an unlawful threat. The ALJ applied an objective standard in finding both violations. (ALJD 16:4-15). The Board should reject Respondents’ exceptions because (1) Respondents attempt to overturn the ALJ’s credibility resolution to favor Estrada’s denial (see Section II above); and (2) Respondents attempt to impose a subjective standard. (R. Br. 61-62).

³⁵ Respondents address, at length, several findings related to the ALJ’s characterizations of Kostew’s posts within the Facebook group chat, essentially arguing that the Board should independently evaluate Kostew’s testimony. (R. Br. 54). However, the ALJ’s findings about what transpired in the group chat is based on the group chat and ultimately immaterial to the ALJ’s findings of Respondents’ unlawful conduct. Moreover, even if the Board were to independently evaluate Kostew’s credibility, the Board should consider the numerous times that Kostew was impeached with prior inconsistent statements. (*e.g.*, Tr. 896-903; GC59).

³⁶ See Section IV.C, above.

2. The Board Should Affirm the ALJ's Finding of Unlawful Interrogation

The ALJ found that Mecca unlawfully interrogated employee Glen shortly after the March 13 union meeting. Based on Glen's credited testimony, the ALJ found that Mecca approached him and asked if he "knew anything about this union meeting." Glen revealed that he went to the meeting and asked if Mecca was interested, to which Mecca responded that he did not want anything to do with the union. In finding Mecca's questioning coercive, the ALJ reasoned that by asking if Glen knew "anything" about the meeting, Mecca implicitly called on Glen to disclose what occurred. (ALJD 29:30-30:30). The Board should reject Respondents' exceptions because: (1) Respondents attempt to overturn the ALJ's credibility resolution (see Section II above); (2) Respondents contend that Mecca is not a supervisor (see Section III above); and (3) Respondents argue that Mecca's statement was not designed to elicit information about union activity because it was not accompanied by other conduct to suggest such. (R. Br. 61-62). However, Mecca's follow up statement that he wanted nothing to do with the union further suggests that he was eliciting information about what happened and who was involved in the meeting because clearly Mecca did not otherwise have an interest. Accordingly, the Board should affirm the ALJ's finding.

3. The Board Should Affirm the ALJ's Finding that Saxe Created the Impression of Surveillance and Solicited Grievances

The ALJ found that shortly before the May 17 election, Saxe approached employees Glen and Tupy and told them that he knew they were pro-union. As the conversation continued, Saxe said that he knew Glen was pro-union because of Glen's girlfriend (Glick, one of the eight discharged). The ALJ concluded that Saxe's conduct created the impression of surveillance because although Tupy was a vocal union supporter, Saxe indicated that he knew Glick was pro-union, but did not explain the source of his information. (ALJD 55-56). The Board should reject

Respondents' exceptions because (1) Respondents attempt to overturn the ALJ's credibility resolution to favor Saxe's version (see Section II above); and (2) Respondents fail to address the ALJ's finding that Saxe failed to explain how he knew *Glick's* union sentiments. (R. Br. 63-64).

Similarly, the ALJ found that on the same day, Saxe approached employee Prieto and told him that he heard Prieto was a good worker and pro-union. As the conversation continued, Saxe asked Prieto if he had ever tried to contact Saxe about anything, including "any changes." Prieto responded, saying that he had tried to get a raise and Saxe responded that he had not heard anything about that. The ALJ concluded that Saxe created the impression of surveillance by stating he knew Prieto was pro-union without explaining the source of that knowledge, and that Saxe solicited grievances, implicitly promising to address Prieto's grievance in light of several factors including that Saxe's comment came on the heels of a captive audience speech where Saxe promised to change his ways. (ALJD 56-57). The Board should reject Respondents' exceptions because (1) Respondents attempt to overturn the ALJ's credibility resolution; and (2) Respondents' argument that Saxe equivocated in his response to Prieto does not render Saxe's conduct lawful. (R. Br. 61-62).

4. The Board Should Affirm the ALJ's Finding that DeStefano Created the Impression of Surveillance

On May 16 and 17, DeStefano sent text messages to employees reminding them that Respondents had arranged shuttle transportation from the theaters to the polling location which was available for them for election. DeStefano also sent individual text messages to employees Glen and Tupy on May 16 (and potentially one or two others), who were not scheduled to work when the shuttle transportation went to the polling site the following day. In each message, DeStefano sought confirmation as to whether they would be taking advantage of the shuttle. (ALJD 58:1-14; GC40; GC41; GC71; Tr. 556-562; 2754-2755; 2789). Relying on *B&K*

Builders, Inc., 325 NLRB 693, 694 (1998), the ALJ found that DeStefano’s text messages to Tupy and Glen created the impression of surveillance because a reasonable employee “would understand that management was monitoring their voting plans.” (ALJD 58:16-29).

Excepting to this finding, Respondents completely misconstrue the record. Respondents contend that “DeStefano’s texts only reminded employees of the transportation to the election site,” and that the finding is unsupported because DeStefano did not ask how or why they planned to vote a certain way. (R. Br. 65). Respondents ignore the text messages sent to Tupy and Glen which sought confirmation as to whether they would be taking advantage of the shuttle, and only cite to the record showing that DeStefano sent similar messages to other employees that were limited to a reminder (R. Br. 65). Notably, the ALJ did not find that the reminder messages violated the Act, nor were those messages alleged. Rather, by seeking confirmation of whether Tupy and Glen planned on using the shuttle service, a reasonable employee would understand that Respondents were monitoring whether or not they intended to exercise their rights to participate in the election. Accordingly, the Board should affirm the ALJ’s finding that Respondents unlawfully created the impression of surveillance.

F. Respondents’ Unlawful Adverse Actions Following the Election

1. The Board Should Affirm the ALJ’s Finding that Respondents Reduced Glen and Tupy’s Hours in Violation of Section 8(a)(3)

a. Overview of the ALJ’s Findings and Record Evidence

On June 1, just two weeks after the election, Respondents changed audio tech Glen and lighting tech Tupy’s show call start time from 7:30 p.m. to 8:00 p.m., leaving less time to run equipment checks and perform other pre-show tasks before the audience door opened at 8:15 p.m. or the 8:00 p.m. sound check. DeStefano, after questioned by Glen about the change, stated, “[t]here was a restructure and everyone is coming in at certain times now.” (ALJD 69:8-

25; GC72). Applying the *Wright Line* burden shifting analysis, the ALJ found that CGC showed that Respondents were unlawfully motivated by Glen and Tupy's protected activity. In finding animus, the ALJ relied on: (1) timing; (2) Saxe singling them out before the election (see Section IV.E.3 above); and (3) DeStefano's reference to the "restructure," lingo often "used to describe the purge of union adherents." The ALJ also acknowledged that Tupy, a known union supporter, was originally selected for the mass discharge. Finding that Respondents failed to meet its burden, the ALJ noted that although DeStefano testified that other employees' schedules also changed, Respondents failed to corroborate the claim in any way, and that DeStefano offered an additional rationale related to prior instances of changing work call start times that wholly failed to address the change to Tupy and Glen's show call. (ALJD 70:8-20).

b. Respondents' Exceptions are Meritless

Respondents except to the ALJ's finding arguing that because, by its account, Respondents changed everyone's hours, it could not have been discriminatory. (R. Br. 58). In doing so, Respondents point out DeStefano's testimony and a snippet of Tupy's testimony to show corroboration. (R. Br. 58). A review of Tupy's testimony shows that he heard from unidentified stagehands (time period unknown) that their hours were cut. (Tr. 1813:13-17). This hearsay testimony from Tupy does not show when in time or what kind of change to scheduling he heard about through the grapevine. This is important because DeStefano testified about many different changes to scheduling over a vast period of time that occurred for various reasons.³⁷ (Tr. 2722-2729; 2736). While some of those changes affected other employees, such as changes

³⁷ Respondents also completely ignore the June 1 change (which is the only change at issue), describing the change as going from 7:30 p.m. to 7:45 p.m. (R. Br. 58). However, the undisputed facts show that Glen and Tupy's time changed from 7:30 p.m. to 8:00 p.m. and stayed that way until June 20 when Tupy protested to DeStefano and she agreed to let Tupy and Glen arrive at 7:45 p.m. going forward. This set of facts are central to the allegation related to Tupy's discipline which is addressed below. (ALJD 70:35-442).

to work calls before the election, Respondents' attempt to highlight or muddle these separate actions fail to address why Tupy and Glen's show call was changed in such a way as to ensure they would not have time to set up the equipment.³⁸ Moreover, if other employees were affected by the same show call schedule change at issue here, Respondents could have easily produced records such as schedules, text messages like the one DeStefano sent Glen informing him of the change to his schedule, or timekeeping records. Accordingly, the ALJ appropriately refused to accept DeStefano's testimony a face value as the only evidence set forth to meet Respondents' *Wright Line* burden.

2. The Board Should Affirm the ALJ's Findings that Respondents Denied Urbanski Light Duty and Subjected Him to Closer Supervision

Respondents except to the ALJ's findings that various actions targeting "troublemaker" Urbanski, who spearheaded the campaign and also served as the union's election observer, violated Section 8(a)(3) of the Act, including: (1) denying Urbanski light duty; (2) subjecting him to closer supervision upon returning to full duty; and (3) requiring him to obtain written consent prior to performing tasks. (R. Br. 59-61; ALJD 71:16-76:4). Respondents argue that there is no evidence of animus and reassert the same defenses that were considered, yet rejected, by the ALJ. (R. Br. 60-61). The ALJ's findings are supported by documentary evidence and should be upheld. (GC89; GC90; GC91; GC92 (Saxe email identifying Urbanski as "troublemaker" and planning "intervention"); GC95; GC42; GC43; GC37; GC100; GC101).

³⁸ Respondents also completely ignore the June 1 change (which is the only change at issue), describing the change as going from 7:30 p.m. to 7:45 p.m. (R. Br. 58). However, the undisputed facts show that Glen and Tupy's time changed from 7:30 p.m. to 8:00 p.m. and stayed that way until June 20 when Tupy protested to DeStefano and she agreed to let them arrive at 7:45 p.m. going forward. (ALJD 70:35-442). This sequence of events is central to the ALJ's finding that on June 20, Respondents unlawfully disciplined Tupy for not adhering to the schedule. (ALJD 70:25-71:15). The Board should reject Respondents' exceptions to the discipline violation because, contrary to Respondents' assertions (R. Br. 59), there is a paper trail along with credited testimony to support the ALJ's finding that DeStefano padded Tupy's file with a backdated, undelivered written warning and then deliberately waited to issue the June 20 discipline despite reaching an accord with Tupy about his start time that same day. (GC47, GC49, GC48, GC50, GC70; ALJD 70-71).

Further, as this conduct occurred after all of Respondents' other unlawful conduct, the record is teeming with evidence of animus. Accordingly, the Board should affirm these findings.

G. Respondents Unlawfully Discharged Warehouse Employee and Union Adherent Scott Leigh After Saxe Interrogated Leigh About Soliciting Union Cards

1. Overview of the ALJ's Findings and Record Evidence

Prior to the election, the union campaign spread to Respondents' warehouse operations, the same facility where Saxe works daily. On April 10-11, warehouse employee Scott Leigh (Leigh) solicited union cards from a majority of other warehouse employees at the facility. On April 13, Saxe questioned Leigh about whether he was signing people up for free union training. Applying the *Bourne* factors, the ALJ found that Saxe's questioning constituted unlawful interrogation and that Saxe also created the impression of surveillance. (ALJD84:1-85:36).

Four days later, on April 17, Respondents discharged Leigh, telling him the basis was that "he was unreliable, had excess absences and a had a poor attitude." (ALJD 87). Under *Wright Line*, the ALJ found Leigh's discharge unlawful, with several factors showing animus such as: (1) Saxe's questioning; (2) timing; and (3) fabricated documentation, among others. The ALJ further found that Respondents' defense was pretext. (ALJD87-88).

2. Respondents' Exceptions are Meritless

Respondents except to the ALJ's findings that Saxe unlawfully interrogated Leigh or created the impression of surveillance by arguing that the ALJ should not have credited Leigh's testimony over Saxe's sanitized version. (R. Br. 71-72). As with every other credibility finding challenged by Respondents, the Board should affirm the ALJ's finding.

Addressing Leigh's discharge, Respondents (1) set forth a narrative not supported by the credited evidence regarding Leigh's supposed performance issues (R. Br. 69-70); (2) deny knowledge of any union activity (R. Br. 70); and (3) contend that the ALJ is biased, essentially

because the ALJ did not accept its documents at face value. (R. Br. 70-71). The Board should reject Respondents' exceptions because: (1) the facts resting on credibility should be upheld; (2) as noted by the ALJ, supervisor Hunt, who was the only witness that could have offered non-hearsay testimony on several issues did not appear; and (3) the flurry of disciplinary records (showing Respondents' signatory file padding methods) support the ALJ's findings.

V. THE BOARD SHOULD AFFIRM THE ALJ'S PROCEDURAL³⁹ AND SPECIAL REMEDY RECOMMENDATIONS

A. The Board Should Adopt the ALJ's Recommended Special Remedies

Based on the nature and pervasiveness of Respondents unfair labor practices, the ALJ recommends several special remedies sought by the General Counsel, including: (1) posting an explanation of rights;⁴⁰ (2) a reading of the explanation of rights, along with the Board notice; and (3) a broad cease-and-desist order. (ALJD 93:15-94:15). Regarding the reading and broad order, the ALJ also recognized Respondents as a recidivist.⁴¹ Contrary to Respondents' exceptions (R. Br. 55-56, 74), the notice reading and broad cease-and-desist order are wholly appropriate based on the egregiousness of Respondents' conduct – often at the hands or direction

³⁹ Respondents contend that the ALJ erroneously severed the representation case in this matter. (R. Br. 74). The ALJ did not sever the case. Rather, the ALJ *recommended* to the Board (upon its review) that case 28-RC-219130 be severed and remanded to the Regional Director to address the challenged ballots. (ALJD 3; 96). Accordingly, the Board should disregard Respondents exception.

⁴⁰ Respondents do not address the ALJ's finding that posting an explanation of rights is warranted in its brief. This finding is separate from the notice reading remedy and not based on recidivism, which Respondents challenge. (ALJD 93:20-28). Accordingly, the Board should summarily adopt this recommendation.

⁴¹ Respondents except to the ALJ's finding of recidivism, arguing that the prior case involving Respondents, *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016) is pending before the Board on remand. (R. Br. 55-56). However, not all allegations are still pending because several findings of unlawful conduct were not raised to the circuit. *David Saxe Productions, LLC, v. NLRB*, 888 F.3d 1305 (D.C. Cir. 2018). In fact, five violations, which were committed by Saxe, himself, have been resolved by the Board (various threats, disparagement, prohibiting protected activity). Saxe is a recidivist and the Board should further reject Respondents' argument that the ALJ's finding demonstrates bias (R. Br. 56).

of the highest ranking official, Saxe, alone. *Stern Produce Company, Inc.*, 364 NLRB No. 61, slip op. at 6-7 (2019).

B. The Board should Reject Respondents' Subpoena Related Exceptions

Respondents except to the ALJ's ruling, made prior to the hearing, quashing certain portions of various subpoenas issued to the discriminatees. (R. Br. 72-74). The Board should reject these exceptions as the ALJ's order sets forth appropriate bases for the ruling, which was also addressed on the record at various times.⁴² (*e.g.*, Tr. 2993). Moreover, until now, and aside from complaining about the "unfairness of the process," Respondents have not taken any steps to challenge the ALJ's ruling and even expressly stated that they were not challenging the order. (Tr. 2992-2994). Regardless, Respondents do not seek any remedy to address its exceptions, even if the Board found merit. Accordingly, the Board should reject Respondents' subpoena related exceptions.

VI. CONCLUSION

Respondents' blatant campaign to frustrate its employees' right to freely choose union representation cannot be countenanced. CGC respectfully urges the Board to affirm the ALJ's findings and order all appropriate remedial relief.

Respectfully submitted,

/s/ Sara S. Demirok

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⁴² The ALJ explained, "I made it very clear why I was quashing certain paragraphs. And in large part I was quashing certain paragraphs because the stated reason for relevance wasn't there." (Tr. 2993)

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions in David Saxe Productions, LLC and V Theater Group, LLC, Cases 28-CA-219225, et al., was served via E-Filing and E-Mail, on this 29th day of October 2019, on the following:

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