

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19**

**INTERNATIONAL UNION, SECURITY, POLICE &
FIRE PROFESSIONALS OF AMERICA (SPFPA) AND
ITS LOCAL 5.**

**Charging Party Union
-and-**

| Case Nos. | |
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| | 19-CA-232786 |
| | 19-CA-233141 |
| | 19-CA-234438 |
| | 19-CA-237861 |
| | 19-CA-241689 |

XCEL PROTECTIVE SERVICES, INC.

Respondent Employer

Charging Parties' Post-Hearing Brief

This post-hearing brief in the above-captioned matters is submitted by and through the attorneys of the Charging Parties, International Union, Security, Police & Fire Professionals of America, (SPFPA) and its Local 5 (Union), Mark Salopek, Steve Mullen, and Daniel Lien.

For the reasons discussed below, the Employer has violated the Act by, *inter alia*, its discharge of Mark Salopek on October 27, 2018, its constructive discharge of Stephen Mullen on July 17, 2018, and its interrogation of Daniel Lein concerning his Section 7 activities and illegal retaliatory action against Lein, and repeated failure to respond fully to 8(a)(5) information requests concerning Salopek's discharge.

Employer Violated the Act by its Discharge of Salopek

The Employer violated the Act by its discharge of Mark Salopek on October 27, 2018.¹ Under *Wright Line* and its progeny, a charging party makes a prime facie showing of a violation

¹ Unless otherwise indicated, all dates in 2018.

where it is shown that “(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.” *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

After making this showing, the burden passes to the employer, who can rebut the showing where it can show that by a preponderance “that the same adverse employment action would have taken place even in the absence of the protected conduct.” *ManorCare Health Services-Easton*, 356 N.L.R.B. 202, 225 (2010). Salopek’s discipline meets each of the three (3) *Wright Line* criteria and the Employer cannot rebut this showing by a preponderance.

As to the first *Wright Line* criterion, Salopek’s email complaint to former CEO John Morgan on June 28 was protected concerted activity within the meaning of the Act, as it related to workplace safety while gravel pit qualifications occurred. GC-Ex. 3 and 4. By expressing concern for gun safety matters, the June 28 complaint was inherently concerted. *See e.g., N. W. Rural Elec. Coop.*, 366 NLRB No. 132 (2018)(enforcing an ALJ order finding that safety complaints are inherently concerted activity). The July 9 in-person complaint to Pulley about worksite safety, gravel pit ranges, and weapons qualifications brought with Dan Lein and Mullen to Base Commander Rocky Pulley was, likewise, protected concerted activity. Tr. 463. Likewise, the email sent on July 9 to Installation Security Officer (ISO) Michael Jones by Mullen on behalf of Salopek, Mullen, Shryver, and Lein uses the plural “we” in multiple locations, indicates that multiple employees are complaining, and relates to the safety of range qualifications. Jt. Ex.8 (Bates No. 1478). The email was also a collaborative effort, as portions of it were “copied and pasted” from Salopek’s email to Morgan dated June 28 and reviewed briefly by Salopek before the email was sent to Jones. Tr. 464-65.

It is immaterial that certain of the complaints in emails were misdated and/or ultimately unsubstantiated, specifically the one relating to a qualification held in May 2018, when it was in fact held in February 2018. Under longstanding precedent, the Act's protections apply to all concerted complaints, irrespective of underlying merit. *See e.g., NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 16, 82 S. Ct. 1099, 1103 (1962)(stating that so long as activity is concerted, the underlying merits of the decision to engage in such activity is irrelevant when determining protected status); *Odyssey Capital Group, L.P., III*, 337 N.L.R.B. 1110 (2002)(“[i]nquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected.”).

Moreover, Salopek had a good faith basis to bring his complaints. As a threshold matter, the Navy, in its investigation, *did discover* that a unit employee, Emily Coler, was allowed to stand post with weapons for which she lacked qualifications, of which Rake informed Filibeck in their October 25 meeting. Tr. 626. The Navy also discovered that, as alleged by Salopek, certain qualifying ranges were not held at Bangor, as required by the Navy and that certain range qualification documents had been improperly altered by the Employer. Tr. 963. It also should be concluded that in February 2018, Salopek did observe supervisor Lt. Powless altering targets to aid the passage of qualifications. Salopek so testified and the Employer failed to credibly rebut this allegation either by adducing testimony from Powless or any other means. Tr. 108. Even if this alteration did not violate Navy regulations, it was not dishonest or otherwise improper to complain of such alteration. It is reasonable to believe that such alteration made qualification easier, meaning that mediocre marksmen could obtain qualifications who could not do so otherwise and that such mediocre marksmen would endanger bargaining unit employees' and the public if they needed to discharge a weapon. If these employees were allowed to fail their

qualifications, they would not, of course, discharge weapons and the bargaining unit and public would be safer. It was not dishonest or otherwise worthy of discipline to so conclude. Tr. 679 (Lein: [If] [y]ou can't handle the weapon safely and you cant shoot the weapon safely, you should probably get another job.”)

As to the second criterion, the Employer knew of Salopek’s concerted activity before discharging him on October 27. The then-CEO would decided to discharge Salopek in October 2018, Michael Filibeck, knew of the activity by his conversation with Rake on October 25. As testified to at hearing, on October 25, Rake stated to Filibeck that Salopek and other employees embarked on what Rake allegedly termed a “junket” on July 9 to bring their group gun safety, gravel pit range, and weapons qualification complaints to Commander Rocky Pulley. Tr. 996-98. On the same date, Rake read his Report to Filibeck, which excerpted the portion of Mullen’s July 9 email to ISO Jones stating: “Myself and three other officers, Mark Salopek, Dan Lein and Jake Schriver are coming forward with a safety issue concerning weapons qualifications. This is in regards to a gravel pit to qualify. This has happened on several occasions.” Jt. Ex.8 (Bates Stamp 1478); Tr. 998. Before discharging Salopek, Filibeck discussed the Report with Terry and Powless and before discharging Salopek. Tr. 1015. Before this meeting, Terry had received a copy of the July 9 email from Mullen to Jones that generated the Report, had discussed Salopek’s June 28 email with John Morgan, and had received complaints regarding range at an area gravel pits in 2016, and in a backyard in 2017, and the alteration of targets in early 2018, without limitation. Tr. 106-09. This prior inherently concerted activity which led to the Report was doubtless discussed between Filibeck and Terry before Salopek was discharged.

Powless, was likewise “just a fountain of information regarding Mr. Salopek,” a fountain, doubtless, of knowledge about Salopek’ s Section 7 activity, dating back as far as 2014 and

including service as a steward and on multiple bargaining committees, concerted safety complaints, and other terms and conditions of employment. Tr. 81; Tr. 1015.²

As to the third criterion, Salopek's concerted activity motivated Filibeck's decision to terminate him. The preponderance of evidence shows that Filibeck discharged Salopek on October 27 because Rake requested his removal. This request was motivated by Salopek's Section 7 activity. Filibeck knew this by his conversations with Rake on October 25 and his later conversations with Terry and Powless. As Section 7 activity motivated the request, it was unlawful to discharge him based upon it.

Simply put, the Employer cannot rely on a "devil made me do it" defense to Salopek's discharge. The Board has held repeatedly that where an employer disciplines an employee based on that employee's persona non grata status and that status is owing to the employee's Section 7 activity known to the employer, the employer has violated the Act. *See e.g., Paragon Systems*, 362

² It is true that the record does not expressly disclose that all Salopek's prior concerted complaints were made to Powless directly, some were made to Lux, and still others to Terry. *See e.g.*, Tr. 459-461 (June 2018 complaint to Lux about unsafe gravel pit qualifications on behalf of another employee); Tr. 94-96 (2015 complaint to Terry on a women employee's behalf concerning women employees' work clothes); Tr. 106 (2016 complaint to Terry on behalf of another employee, Shroeder, regarding range being held at gravel pits).

However, under the so-called "small plant" doctrine, such knowledge should be inputted to Powless and, by extension, Filibeck, considering that the worksite only has about 40 employees. *See e.g., Bill's Coal Co. v. NLRB*, 493 F.2d 243 (10th Cir. 1974)(stating that "it is a reasonable inference that evidence of union activity brought to the attention of a subordinate management official will in turn be brought to the attention of higher management officials."); *Cf. Allied Medical Transport*, 360 N.L.R.B. 1264 (2016) (institutional knowledge of Section 7 activity imputed to decision maker where other supervisors know of such activity); *Pinkerton's Inc.*, 295 NLRB 538 (1989)(same).

This is particularly true considering that there is no record testimony rebutting this inference. *See Ready Mix Concrete Co. v. NLRB*, 81 F.3d 1546 (10th Cir. 1996)(Board drawing adverse inference from employer's failure to call a supervisory employee knowledge of Section 7 activity in order for such supervisor to testify that he did not relay this knowledge to his superior.)

NLRB 1561 (20105)(Member H. Johnson, concurring) (“Respondent’s reliance on the Federal government’s report recommending discharge of its employees was pretextual, based on the evidence that the Respondent’s officials knew about and shared the antiunion animus against the employees evinced by the Federal agent who recommended their discharge); *Bowling Transportation, Inc.*, 336 N.L.R.B. 393 *enf.* 352 F.3d 274 (6th Cir. 2003) (“Although [a third party client of respondent] was not charged with any unfair labor practices, its barring of [the discriminatees] from the property because of their protected concerted activity was for an unlawful reason. Thus, the [r]espondent relies on the action of another employer taken for an unlawful reason as its *Wright Line* defense. This it cannot do.”); *First Student*, Case No. 34-CA-12705, 2011 BL 489275 (2011)(ALJ decision); *Cf. See Jeff MacTaggart Masonry, LLC d/b/a JM2*, 363 N.L.R.B. No. 149, fn. 3 (2016)(Member Miscimarra indicating that “cat’s paw” theory can be used to show violation of the Act). Accordingly, the Navy’s requested removal does not provide a legitimate reason for discharging Salopek, or “clipping” him, as Filibeck put it at hearing. Tr. 1018.

Nor could the Employer have *removed* Salopek consistent with the Act. A Navy-requested removal need not result in an actual removal. In 2015, Rake requested that Salopek be removed from the contract at Indian Island because he allegedly left open the door to the armory, which was communicated to Filibeck during his October 25 meeting with Rake. Tr. 553-54; Tr. 62. Upon receiving this request, Terry intervened on Salopek’s behalf and persuaded the Navy to agree to merely demoting Salopek from a lieutenant to a bargaining unit employee. *Id.* This did not cause the Employer to “lose” its contract with the Navy. Even though it was possible to persuade the Navy to rescind a requested removal, neither Terry nor Filibeck so much as lifted a finger in this direction before Salopek’s discharge on October 27.

Just as importantly, the Navy's requested removal was invalid. The request was not from the Contracting Officer, Melissa Burriss, and nor was it in writing, both of which are required for a removal request to be effective. Tr. 550-51; Tr. 559. As a nearly 30-year supervisory employee in the business of government security contracts having received as many as twelve (12) government requested removals, Filibeck undoubtedly knew that Rake's so-called removal request was deficient and that it did not need to be acted upon. Tr. 1003; Tr. 1010. Any doubt on this point must be resolved in Salopek's favor, considering that Filibeck was present during the entirety of Rake's testimony that removals required Contracting Officer approval and needed to be in writing. If this were not the case, Filibeck would have so testified. He did not. Accordingly, extant Board law and record evidence support a prima facie showing under *Wright Line*.

The Employer cannot rebut this showing. The Employer has failed to produce evidence that the Navy required that Salopek be terminated. To the contrary, uncontradicted witness testimony from Rake shows that the Navy *cannot require discharge* of any employees. It can only request their removal. Tr. 571-73.

As to Salopek's alleged dishonesty and lack of candor, there is no evidence and nor is it in fact the case that Salopek was dishonest. He based his complaint to Pulley and to Morgan and his review of Mullen's email to Jones on his witnessing alteration of targets in early 2018 and on hearsay from other unit employees. Tr. 106; Tr. 108; Tr. 127; 129; Tr. 131; Tr. 141; Tr. 151. It is axiomatic that it is not dishonest to rely upon hearsay. How else would many investigations into alleged misconduct ever get started? Is it, for example, "dishonest" for a Section 2 (3) employee to give an affidavit to a Board agent stating that he believes there has been a violation of the Act based on his conversations with other employees?

Just as importantly, as of the hearing date, the Employer had failed to discipline another employee, Emily Coler, for her written misrepresentations to Rake that she had qualified on certain weapons when the Rake later reached the conclusion in his Report that she had not. Tr. 960; Tr. 1029-30; R 2. Failing to discipline Coler for such dishonesty on the one hand while disciplining Salopek for merely imagined dishonesty on the other is disparate treatment in extremis that can only be explained by the Employer's animus toward Salopek's protected concerted activity.

Salopek's alleged "going outside the chain of command" offense is pretextual. There is no evidence that going outside the chain of command was an offense. The most credible testimony on change of command offenses from Daniel Lien, a retired Navy officer, establishes that Salopek committed no such offense. Tr. 727-28. On July 9 Pulley demanded that Salopek, Lein, and Mullen make their safety complaints and, afterward, instructed them on the "chain of command" requirements on July 9, specifically to contact ISO Jones and to advise Terry that complaints were forthcoming. which instructions were followed to the letter. Tr. 331 ([Pulley] didn't ask. He -- he told us.); Tr. 687; Tr. 463-64. It cannot be a violation of "chain of command" or any other work rule to follow a direct order from the principal at Indian Island.

In addition, the Employer's own employee handbook states that going through the chain of command is "encouraged." GC-2. Job requirements are not "encouraged," they are mandatory. Therefore, chain of command was not one. In further addition, there is no record evidence that employees ever received training in "chain of command." This shows that observing chain of command was not, in fact, a job requirement, violation of which would cause employees' discharge. If it were, employees would have received training.

Discharging Salopek for his alleged chain of command offense would also be disparate treatment for his Section 7 activity. Lein was not discharged for this offense, although, based on

evidence adduced at trial, he was as “guilty” of it as Salopek. He joined Salopek in the July 9 in-person complaints and was also mentioned in the July 9 email to ISO Jones. However, Lein, as a new hire, lacked Salopek’s extensive prior history of prior concerted activity and, unlike Salopek, had never served on the Local’s bargaining committee. Tr. 82-93. It is this difference in history that explains the Employer’s more favorable treatment of Lein. This is particularly true considering that at the time of the putative chain of command offense, Lein was a “in-hire” employee not covered by the just cause provisions of the then-applicable CBA. Tr. 760; Jt. Ex. 16 at 6.³

Moreover, at all relevant times, Salopek was subject to a post order stating: “if [an employee] is aware of a safety violation and you do not report it and someone is injured, [the Navy will] hold [the employee] personally responsible.” Tr. 158. Salopek complied with this post order by making his concerted complaints about safety. If, by complying with this order, Salopek violated another order relating to chain of command putatively prohibiting his complaints, the Employer would not have disciplined him.

Accordingly, there has been a prima facie showing under *Wright Line* that the Employer is unable to rebut by a preponderance. Therefore, it must be concluded that the Employer violated the Act by discharging Salopek.

Any doubt on this point must be resolved in Salopek’s favor, considering the Employer’s shifting defenses of its discharge and the clear showing made at hearing that all its lawful reasons proffered for discharge were pretextual. “Shifting defenses or reasons for an employer’s adverse employment action are persuasive evidence of discriminatory motive; it also serves as evidence of

³ Like Salopek, Mullen also had a prior history of service on the Local’s bargaining team and concerted safety complaints predating Lein’s hire date, *infra*. This difference in history means that any employer attempts to rely on after-acquired evidence arguments sounding in alleged chain of command violations must fail. Accepting such arguments is tantamount to approving disparate treatment based on union activity. This runs afoul of the Act.

animus and pretext.” *Rainbow Med. Transportation, LLC & Henleigh Koyawena*, 365 NLRB No. 80 (2017); *Lucky Cab Co.*, 360 NLRB No. 43, slip. op. at 4 (2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), citing *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), *enfd.* 881 F.2d 542 (8th Cir. 1989).

The Respondent has shifted its reasons for the Salopek discharge on multiple occasions. In his original conversation with Salopek on October 27, Filibeck stated only that the discharge was motivated by a chain of command violation, lack of candor, and dishonesty. Tr. 202. There was no mention of a Navy-requested removal or any other reasons later volunteered as supporting discharge.

Later, in the so-called “change of status” document drafted by Terry at Filibeck’s direction after Salopek’s discharge, an allegation of a chain of command violation makes its first appearance. Tr. 203; Jt. Ex. 5 (Bates No. 1285.) Later still, in a position statement to OSHA in January 2019, the Employer’s then-attorney volunteered yet more reasons for the discharge, many of which plainly constitute protected concerted activity: that Salopek was a “malcontent” in the workplace, “undermined management,” was “dishonest,” and “incit[ed] discontentment among the guards, had “a poor attitude, wr[o]t[e] reports all against female persons,” did not “ [conform] to company regulations and policies and [lied] to the government on official documents.” Jt. Ex. 18.

The facts underlying the stated reasons for discharge include one paragraph stating that the Employer came to believe around June 28 that Salopek had allegedly misadvised another employee about his entitlement to new boots per the then-applicable collective bargaining agreement. *Id.* at

2.⁴ Another paragraph states that on July 9 “Salopek and three other officers submitted a letter to the CO of the base, stating that XCEL had falsified weapons qualification documents[.]” *Id.* at 2.

It must be concluded that the Employer’s reasons for discharge given in its OSHA position statement are accurate. 29 USC § 666 (g) provides for six months of imprisonment or a \$ 10,000 fine for “knowingly mak[ing] any false statement, representation, or certification in any application, record, report, plan, or other document filed” with OSHA. In addition, the Employer appears to hold itself to a very high standard when making representations to the U.S. Government. At hearing, Filibeck attempted to defend his unlawful discharge of Salopek for incorrectly alleged dishonesty in his complaints to the Navy by stating: “if you’re going to make an allegation officially in writing you better make sure it’s correct, because there is [sic] repercussions to that.” Tr. 1020. Therefore, the OSHA statement alone requires finding that the Employer violated the Act by discharging Salopek.

There was yet more shifting in its original Answer to the Region’s complaint, filed in April 2019. The Employer claimed, for the very first time, that Salopek was discharged because the

⁴ Hearing testimony by Salopek and un rebutted by the Employer shows that there was no such misadvisement. Tr. 98-102. It would not matter if there any, either. Even when an employee mistakenly advises another of rights under a collective bargaining agreement, that advisement is protected concerted activity.

Moreover, while record testimony is somewhat unclear whether Salopek actually advised another employee about the collective bargaining agreement or merely about the Employer’s practice of issuing new boots, this too is immaterial. Where an Employer forms even a mistaken belief that an employee has engaged in Section 7 activity, the Act prohibits any adverse employment action motivated by that mistaken belief. *See Hyundai Motor Manufacturing Alabama, LLC*, 314 N.L.R.B. No. 166 (2018)(finding discharge violative of the Act when motivated by mistaken belief that employee had reneged in Section 7 activity) *citing U.S. Service Industries, Inc.*, 314 NLRB 30, 30-31 (1994); *Monarch Water Systems, Inc.*, 271 NLRB 558, 558 fn. 3 (1984)), *enf. 80 F.3d 558 (D.C. Cir. 1996); United States Service Industries, Inc.*, 314 NLRB 30 (1994). Whether correct or incorrect, the Employer believed that Salopek misadvised about the collective bargaining agreement motivated his decision to discharge. Therefore, it violated the Act.

Navy “revoked his security clearance,” but omits any mention of complaints exclusively against “female persons,” “poor attitude,” “inciting discontentment,” “chain of command violation,” among other prior-stated reasons for discharge. GC-Ex. 1 (x) at 1.

In its First Amended Answer, the Employer alleges yet another new reason for discharge, that “the Navy instructed Xcel to discharge him for falsifying complaint documents.” GC Ex. 1 (y) at 2. Curiously, the Amended Answer does not so much as mention many of the reasons for discharge stated in the Employer’s earlier Change of Status document, its OSHA position statement, or its original Answer.

At hearing, two (2) additional reasons for discharge made their first appearance: Rake’s request that Salopek be removed from the contract and photos posted to the Internet by Salopek allegedly disclosing classified materials. As stated *supra*, the requested removal was not valid. Nor is there evidence that such photos were indeed classified. Salopek, based on his extensive security industry experience credibly testified that they were not classified. Tr. 436. Indeed, before taking the photos in about 2016, Salopek asked the then Base Commander whether they were classified, who replied in the negative, a view shared by John Morgan and Michael Terry. Tr. 434-36. Furthermore, when Salopek initially posted these photos in about 2016 to LinkedIn, he advised each of Morgan and Terry that he had done so. Tr. 1094-97. Terry looked at these photos and never indicated they were classified or inappropriate. Tr. 1095. Nor did Rake ever state in his written Report that these photos motivated his requested removal of Salopek. In fact, in the only written communication to the Employer about such photos, Rake was apparently indifferent to the photos, stating that the Employer “should not push” Salopek to remove the photos if he refused. Notwithstanding this indifference, Salopek immediately complied with a request from Powless to

remove the photos in about September 2018.⁵ Tr. 314-16. Obviously, Employer witness testimony on this point at hearing was a make-weight attempt to obfuscate the unlawful reasons for its discharge.

Finally, it must be borne in mind that where an employer proffers reasons for a discharge ultimately shown to be pretextual, this supports an inference that the employer's animus against Section 7 rights motivated the discharge. At hearing, no credible evidence was adduced that, as claimed in the Employer's OSHA position statement, Salopek wrote ten (10) reports "all against female persons," that there was any chain of command violation, or that Salopek was dishonest. Likewise, there was no credible evidence that the Navy requested that Salopek be discharged, or that he lost his security clearance. Indeed, Navy witness Richard Rake repeatedly denied either was true.

It should not be lost that security clearances are different from the so-called Common Access Card (CAC.) While the Navy did revoke Salopek's CAC, this was caused by the Employer's unlawful discharge of Salopek. GC Ex. 10 and 11. The discharge did not cause the CAC to be revoked. Absent the Employer's discharge, Salopek would have retained his CAC and been able to work both at Indian Island and the Employer's other worksites. GC Ex. 10 and 11. There is no indication that, but-for the Employer's discharge Salopek would have lost his CAC. Rake testified without contradiction that CACs are only revoked where an employee poses "safety issues." Tr. 633. There is no indication that Salopek posed "safety issues." To the contrary, he made the workplace safer by reporting safety issues.

⁵ Nor is Salopek's alleged reposting of the photos to another website for his as-yet inactive security company motivate Filibeck's discharge of Salopek. The website was only posted on January 1, 2019, months after Salopek's discharge. Nor is it after-acquired evidence limiting Salopek's remedies, for the reasons stated *supra*.

In addition, Filibeck reluctantly admitted during his testimony that if he had merely responded to the Navy's requested removal by transferring Salopek to another site with an Xcel contract, Salopek would not have lost his CAC card. Tr. 1006. Remarkably, Filibeck admitted that he did not transfer Salopek because of his protected concerted activity: "if [Salopek] is going to do [the kind of activity reported by Rake on October 25] [at Indian Island], he's going to do it [at another Employer worksite.]" Tr. 1005.

Nor would a transfer have been impractical. In a display of yet more animus towards Salopek and Mullen's protected concerted activity, Filibeck testified that, other than Indian Island, the Employer's worksite nearest to Seattle, the Cascade Locks, is located some "10,080 miles away." Tr. 981. The Charging Parties ask that the Administrative Law Judge to take administrative notice that the Cascade Locks are only about 208 miles away from Seattle. *See* <https://www.mapquest.com/directions/from/us/wa/seattle/to/us/or/cascade-locks>; *Adt, LLC*, 368 NLRB No. 118 (2019) (Board affirming an ALJ decision in which the ALJ took judicial notice of route distances using mapquest); NLRB Bench Book Section 16-201 (January 2019). Doubtless, this misrepresentation as to distance was in bad faith. 10,008 miles is over twice the distance between Seattle and Tokyo.

Accordingly, all the allegedly lawful reasons for Salopek's discharge proffered by the Employer were pretextual. Any one of these alleged reasons provides an independently sufficient basis for drawing an inference that Salopek was discharged for his concerted complaint. This inference should and must be drawn.

This is true notwithstanding the Board's recent decision in *Electrolux Home Products, Inc.*, 368 N.L.R.B. No. 34 (2019). In that decision, the Board stated that it is permissible to draw an inference that Section 7 activity was a motivating factor for discharge so long as "the surrounding

facts tend to reinforce that inference.” *citing Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966.) Here, surrounding facts do support such an inference, specifically, but without limitation, the Employer’s shifting reasons for its discharge of Salopek, its multiple pretextual bases for discharge, and, in addition, the Employer’s other unfair labor practices in this case, particularly Filibeck’s violation of the Act by his later unlawful failure and/or delay when responding to Local representative Scott Harger’s information requests concerning the Salopek discharge, *infra. See e.g., Amptech, Inc.*, 342 N.L.R.B. 1131 (2004)(finding that unfair labor practices committed shortly around time of an alleged 8 (a)(3) violation that the alleged violation was motivated by anti-union animus); *Novartis Nutrition Corp.*, 331 NLRB 1519, 1520 (2000)(same). *Richardson Bros. South*, 312 N.L.R.B. 534 (1997) (same).

For these reasons, Salopek’s discharge violated the Act.

The Employer Violated the Act by its Constructive Discharge of Mullen

The Employer violated the Act by its constructive discharge of Mullen. Like with Salopek, Mullen’s situation clearly meets the first two (2) *Wright Line* criteria. As to the first criterion, Mullen did engage in protected concerted activity. Mullen’s July 2017 complaint with another employee, Robert Armstrong, to Terry that employees were being qualified on non-Navy weapons and at non-Navy approved ranges was plainly protected concerted activity. Tr. 448-50. Mullen’s complaints with Salopek and another employee, Ben Gentry, in about June 2018 to supervisor Lt. Lux in front of a base armory about improper and unsafe gravel pit range qualifying was protected concerted activity. Tr. 459-461. Mullen’s group complaint to Pulley on July 9 and follow-up email to ISO Jones were, likewise, concerted.

Like with Salopek, that some of his complaints may have been misdated or in error is irrelevant. This does not make them less concerted. In any event, some complaints *were* well

founded, partially those relating to Coler and alteration of range locations stated in qualifications documents. Moreover, he plainly had a good faith belief that the gun range and qualifications were improper, because he resigned his position as an alternate lieutenant in May 2018 because he “just did not want to be a party” to “the unsafe weapons qualifications and due to the altering of time sheets.” Tr. 457.

As to the second criterion, the Employer this protected concerted activity when, On July 9, Terry received a phone call from ISO Jones and Salopek concerning the in-person complaint to Pulley and received the email to Jones on the same date. Tr. 878-89; Tr. 887; ER. Ex. 8. The Employer also knew of the concerted activity by Morgan’s unlawful interrogation of Mullen on July 9 about the Pulley complaint, which interrogation was conducted in front of Terry. Tr. 475-76.

As to the third criterion, Mullen’s protected concerted activity was a motivating factor in the Employer’s decision to constructively discharge Mullen by failing adequately to police harassment against him by unit employees Tom Cunningham and Kevin David and to notify him that it had undertaken such efforts.

There is longstanding support for a constructive discharge theory. “If the employer’s action is taken for unlawful reasons and forces the employee to resign, a constructive discharge has occurred.” *Am. Licorice Co.*, 299 NLRB 145, 148 (1990); *See also Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976)(framing inquiry in terms of whether an employer imposed a burden on employee that caused a change in working conditions.)

Almost immediately after complaining to Pulley on July 9, Cunningham-who was mentioned in Mullen’s concerted complaints as not having proper weapons qualifications- stormed into base training room where Mullen was sitting and began “yelling” at him to demand an

apology, calling Mullen “a fucking rat” and “a fucking [skell]”⁶ while “waiving [a shotgun] across [Mullen’s] legs and ... thighs.” Tr. 468-69; Tr. 476. Mullen demanded that Cunningham point the shotgun in another direction. Tr. 469. Cunningham refused and continued yelling at Mullen. At the time, Mullen believed that Cunningham had “c[o]me in [from his patrol] specifically to yell at him (Mullen)” and that there was no work-related reason why Cunningham was carrying the shotgun. Tr. 470; Tr. 473-74. The Employer first became aware of Cunningham’s loud harassment against Mullen as it occurred, since Terry and John Morgan were talking over a speaker phone within earshot of the incident, with Terry in the line of sight of the site of the harassment. Tr. 466.

Mullen did not report to work for the next three days, as he was not scheduled to work. Tr. 477. On July 10, Mullen received a text message from Kevin David, who was mentioned in Mullen’s concerted complaints as lacking proper weapons qualifications. The text message read: “So I’m on your little fucking list, your [sic] a fucking idiot & don’t know what you have stepped in. Better call your butt buddy Mark. Slander with no proof dumb ass. Stupid leading stupider.” GC. Ex. 6.

Mullen called a Navy investigator, Steve Manson, minutes after receiving the text to complaint of the harassment and left a voicemail describing the harassment. Tr. 481. Mullen then called Lux to report the harassment on the same day. Tr. 481-82. At the time of their call, Lux already knew about the text message and advised Mullen to contact local law enforcement about it. Tr. 482. Mullen did contact local law enforcement, which advised him that no action could be taken, because the text message was merely a “veiled threat.” Tr. 488. As the Employer had failed to police any harassment against Mullen, Mullen called off work on July 13. During a call with

⁶ Mullen believed this term to be offensive and “derogatory.” Tr. 474.

Powless that day, Mullen explained that he would be unable to report to work until the Employer addressed harassment against him. Tr. 489. Powless merely replied “okay.” *Id.*

Given this lack of response, Mullen wrote an email to Terry on July 14 complaining of the Cunningham incident occurring July 9- of which he was doubtless already aware- and David’s threatening text message sent on July 10. Jt. Ex. 7 (Bates No. 1454). Mullen noted that “[Cunningham] was agitated and it look [sic] he was not thinking of safe gun control” and that “[harassment] has caused me a great deal of stress, to the point that I have not been able to return to work. This is not acceptable behavior from fellow employees. I would like you to look into this administratively.” *Id.* Terry received and read this email the very same day, in late morning. Tr. 907-08. He discussed this email with John Morgan the very same day. Tr. 909-910. There is no indication Morgan advised Terry to indicate to Mullen that the described harassment would be policed.

From July 14 to 17, the Employer gave no indication to Mullen that it had undertaken any action to police the harassment complained of in Mullen’s multiple calls to supervisors and in his July 14 email. Faced with a total lack of perceived Employer response to harassment against him, Mullen later resigned from the Employer by email on July 17, stating “I am separating by employment.. [t]he reason is for work place harassment and threats”. Jt Ex. 4; Tr. 793-94. callously replied: “You will also need to turn in or destroy the corporate credit card information that you used for CPR/First Aid training. Also, you are required to read and sing a security debriefing.” *Id.*

About five (5) years before Terry, Morgan and other supervisors learned of Mullen’s protected concerted activity on July 9, Mullen had advised Terry, the then-site manager, and other unit employees of the lurid circumstances of his medical retirement as a California corrections employee, specifically that another employee caused him to be crushed by a large metal door. Tr.

223-29; Tr. 231-32. Accordingly, when Terry learned harassment against Mullen on July 9 and July 14, he knew that Mullen had a particular sensitivity to workplace harassment and threats, that he was, essentially, an egg-shell employee. His and John Morgan's failure to indicate to Mullen that any action had be undertaken to police harassment against Mullen was a constructive discharge.

This is true notwithstanding the Employer's taking witness statements from Cunningham and another employee present during Cunningham's harassment, Norm Simons, about Cunningham's harassment and the Employer's posting an excerpt of its anti-harassment policy on a workplace bulletin board without explanation. Predictably, Cunningham denies improper conduct. Simon's statement is not probative of what happened on July 9, as it states that he was looking down as the harassment occurred.

The circumstances surrounding this refusal adequately to address harassment against Mullen and to communicate to him that such was being taken seriously was motivated by animus toward Mullen's protected concerted activity. Any employee with Mullen's work history of being crushed in a door by another employee would have quit his job when faced with his employer's outward indifference to his fate in the workplace and the hands of other employees, especially Cunningham who, prior to July 9, exhibited a propensity for violent outbursts against his fellow employees, including Ben Gentry. Tr. 1084.

This refusal and failure to communicate occurred in very short temporal proximity to Mullen's protected concerted activity and there is no other evidence that some other reasons caused the change. It occurred against a background of anti-union animus, specifically, but without limitation, Morgan's interrogation of Mullen regarding his group complaint to Pulley, Terry's later refusal to respond to the Local's information requests regarding Salopek's unlawful discharge

submitted by Local representative Scott Harger, and by Terry's conduct toward Lein, especially his interrogation of Lein about his concerted complaint to Pulley on July 9, *infra*.

Finally, the Employer lacks any after-acquired evidence defense,⁷ although it is anticipated that it will strenuously argue that such defenses exist because Mullen allegedly abandoned his South Patrol post on July 9 when making a complaint in Pulley's office and because he allegedly would have failed his PRT test that he was due to retake within about a week of his July 17 resignation.

As to the alleged post abandonment, the totality of record testimony shows that Mullen's concerted complaint to Pulley lasted about 15-20 minutes⁸ and occurred within the area covered by South Patrol. Tr. 688 (Lein: "I would say [the complaint lasted] ten minutes, 15 minutes tops. It seemed a lot longer because it was kind of tense."); Tr. 308 (Salopek: "It couldn't have been more than 30 minutes."); Tr. 331 ("Actu- -- you know, sir, that's -- maybe 30 minutes -- maybe."); Tr. 464 (Mullen: Maybe 20, 30 minutes."); Tr. 516: (Mullen agreeing that "this meeting with the commanding officer took 20 to 30 minutes."); Tr. 164-65 (Mullen within patrol area).

This would not have caused his discharge. Employees on South Patrol would routinely stop patrolling for periods longer than 30 minutes at a time to relieve guards at the main gate, during which officers on South Patrol would not be on patrol, all without a superior's permission or relief.

⁷ The offenses alleged against Salopek would not have actually resulted in discipline against Mullen, either, for the reasons explained *supra*.

⁸ Filibeck's testimony that Rake represented the complaint took a "couple of hours" must be discredited. Tr. 997. It is hearsay and contradicted by the testimony of three (3) witnesses who actually made the complaint. Moreover, Filibeck's attribution to Rake the term "junket" to describe the complaint is evidence that he bears intense animus toward Mullen. Rake never used this term in his Report. He never used it during testimony. Nor could anyone who knows the meaning of "junket" use that term to describe the July 9 complaint. Accordingly, it must be concluded that Filibeck's attribution of the term was false. This impugns his testimony as to the length of the complaint.

Tr. 748-756. Guards were permitted to “stop driving” while one patrol to wash their vehicle for 15 minutes, again all without a superior’s permission or relief. Tr. 701. Likewise, South Patrol employees would routinely take lunch breaks while on patrol, all without supervisors’ authorization and would sit in a “truck station” located on base for extended periods. Tr. 752-53; Tr. 749-750. Mullen missed none of the routine checks of various locations on South Patrol because of his concerted complaint. Tr. 463-64. Therefore, the Employer would not have discharged Mullen for this alleged offense.

This analysis is unchanged by testimony from Rake and Filibeck that the Navy may have recommended Mullen’s removal for this alleged post abandonment. As a threshold matter, it should be discredited. It was vague and unspecific. Tr. 592; Tr. 996. Even incorrectly crediting this testimony, it must be borne in mind that the Employer cannot hide behind a “devil made me do it excuse.” As of October 27, Filibeck knew of Mullen’s protected concerted activity occurring July 9 and as of that date he knew that any recommended removal was motivated by such activity. Accordingly, acting on that request by so much as transferring Mullen would have violated the Act, to say nothing of discharging him. Moreover, if, in the unlikely event a requested removal did issue, the Act would have required the Employer to argued to the Navy that it rescind its request, as it had for Salopek in 2015. Failing that, the request could have been responded to by simply transferring Mullen to another Employer worksite.

Speculation that Mullen may not have passed his PRT test shortly after his discharge and therefore would have lost his job within about a week of his resignation is just that, speculative. Record evidence shows that Mullen failed his PRT in 2016 because of a knee injury long-healed by the date of his termination. Tr. 217-18. After the injury healed, he passed the test when retaking it. Tr. 215-16. Mullen also failed the test in 2017, but succeeded on his second attempt. Tr. 221.

There is no indication that Mullen would have been unable to do the same when retaking his PRT in late July 2018.

Accordingly, the Employer's anticipated after-acquired evidence defenses must be rejected *in toto*.

Employer Violated the Act by its Conduct Toward Lein

Terry's interrogation of Lein concerning his conversation with Harger concerning wage rates during the "in-hire" period on or around September 24 also violated the Act. Tr. 693-99. Discussions about wages and are inherently protected concerted activity. This is all the truer considering that the discussion was with a union representative, Scott Harger. Employers violate the Act by such interrogations.

The Employer violated the Act on October 27 when it assigned Lein box-moving and carwashing duties that guards did not usually perform. Tr. 697-699. As this was in close temporal proximity to Filibeck's meeting with Rake concerning Lein's concerted complaints to Pulley occurring July 9, it must be inferred that the unusual duties were in retaliation for Filibeck's learning of his protected activity from Rake and Terry on October 25 and 26, respectively. There is no other intervening cause so much as suggested by the record. This, combined with the Employer's other anti-animus, and in particular, Terry's interrogation of Lein's July 2018 in-person complaint to Pulley requires drawing the inference that it was in retaliation for his protected activity on July 9. Tr. 727; Tr. 737.

Terry's threat in January 2019 to prevent employees from leaving early once finishing "arm down" duties was direct evidence of anti-union animus because someone had complained concerning guard mount pay. Tr. 710-723; 742. These complaints concerned pay established by a collective bargaining agreement, and were therefore inherently concerted.

For these reasons, it must be concluded that the Employer violated the Act by its interrogation of Lein in September 2018, chaining his work duties, and its threat to prohibit employees from leaving their shift early after they finished “arming down.”

Employer Violated the Act by its Refusal to Respond to the Union’s Multiple Requests for Information

Uncontradicted evidence establishes that SPFPA Local 5, by its representative Scott Harger submitted multiple information requests to Employer representative Filibeck and Terry beginning in November and ending in December 2018. Jt. Ex. 3; Jt. Ex 5 (Bates Stamp 1273). Filibeck received each of these requests and failed timely to honor them. Each of these requests were relevant to processing the Salopek grievance, assessing its merits, and the advisability of settlement. Multiple of these requests are still outstanding. Those requests that have been responded to were responded to far outside the reasonable deadlines for producing information set by SPFPA Local 5.

Uncontradicted evidence also establishes that SPFPA Local 5’s representative, attorney Rich Olszewski, submitted multiple information requests to Employer representative, attorney Jason Bowles beginning in January 2019 and continuing until May 2019. Tr. 833-46. Some of these requests were duplicative of Harger’s earlier requests, as none had been responded to by January 2019.

Like with Harger’s requests, each of the requests was for information relevant to processing the Salopek grievance, assessing its merits, and the advisability of settlement. Multiple of these requests are still outstanding. To extent that some of these requests were responded to, such response was far outside deadlines for producing information set by Olszewski.

For these reasons, it must be concluded that the Employer violated the Act by its delay and/or failure to respond to Harger’s and Olszewski’s relevant information requests.

Conclusion

For the above-stated reasons, the Employer has violated the Act by its actual discharge of Salopek, its constructive discharge of Mullen, its conduct toward Lein, and by its refusal and/or delay to provide information relevant to the Salopek discharge.

To remedy the discharge violations, the Charging Parties respectfully request an order for immediate reinstatement of Salopek and Mullen to the Employer's nearest worksite, with full back and all consequential damages, plus interest. To remedy its unlawful refusal and or/delay to provide relevant information, the Charging Parties request that there be an order that the Employer honor all outstanding information requests.

To remedy the unlawful discharges, refusal and/or delay to provide information request, and its unlawful conduct toward Lein, the Charging Parties request that an appropriate Notice Posting be sent to all former employees of Xcel at Indian Island by regular mail and email at that it be posted to a bulletin board at Indian Island.

It is also requested that this Notice be posted to the Employer's website and that is be read aloud by an Employer representative in-person to an audience of Xcel's former employees employed at Indian Island. Reading the Notice aloud is an appropriate remedy considering the highly egregious and multiple unfair labor practices of this Employer.

Respectfully submitted,

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