

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

ARAKELIAN ENTERPRISES,
INC., D/B/A ATHENS SERVICES

and

TEAMSTERS LOCAL 396

Cases 31-CA-223801
31-CA-226550
31-CA-232590
31-CA-237885

TEAMSTERS LOCAL 396'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

INTRODUCTION 1

STANDARD OF REVIEW 1

ARGUMENT IN SUPPORT OF EXCEPTIONS 2

 Pacoima Facility Unfair Labor Practices 2

 I. The ALJ Erred in Dismissing the General Counsel’s Allegation that Athens Threatened Casildo Garcia in Violation of the Act. 2

 Torrance Facility Unfair Labor Practices 6

 II. The ALJ Erred in Dismissing the General Counsel’s Allegation that Athens Interrogated Employee Michael Bermudez About Support for the Antiunion Petition. 6

 III. The ALJ Erred in Dismissing the General Counsel’s Allegation that Athens Discriminatorily Discharged Employee Bermudez. 11

 A. Factual Overview 11

 B. Credibility Determination 16

 C. *Wright-Line* Analysis 19

 1. Anti-union animus was a motivating factor. 19

 2. Athens failed to meet its burden. 22

 Sun Valley Facility Unfair Labor Practice..... 23

 IV. The ALJ Erred in Dismissing the General Counsel’s Allegation that Athens Discriminatorily Disciplined Union Supporter Damien Weicks..... 23

 A. Background Facts 23

 B. Credibility Determinations..... 27

 C. *Wright-Line* Analysis..... 30

CONCLUSION..... 31

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Brink’s, Inc.</i> , 360 NLRB 1206 (2014)	19
<i>Camaco Lorain Mfg. Plant</i> , 356 NLRB 1182 (2011)	19, 21
<i>CC1 Ltd. Partnership v. NLRB</i> , 898 F.3d 26 (D.C. Cir. 2018)	22
<i>CNN America, Inc.</i> , 361 NLRB 439 (2014)	19
<i>Doral Building Services</i> , 273 NLRB 454 (1984), enfd. mem. 786 F.2d 1175 (9th Cir. 1986)	4
<i>Golden State Foods Corp.</i> , 340 NLRB 382 (2003)	22
<i>Harvey’s Resort Hotel</i> , 234 NLRB 152 (1978)	20
<i>Jewish Home for the Elderly of Fairfield County</i> , 343 NLRB 1069 (2004)	6
<i>Parts Depot, Inc.</i> , 332 NLRB 670 (2000)	11
<i>Permaneer Corp.</i> , 214 NLRB 367 (1974)	1
<i>RC Aluminum Indus., Inc.</i> , 343 NLRB 939 (2004)	1
<i>Ronin Shipbuilding</i> , 330 NLRB 464 (2000)	19
<i>Rossmore House</i> , 269 NLRB 1176 (1984)	11
<i>Screen Print Corp.</i> , 151 NLRB 1266 (1965)	20

Shamrock Foods Co.,
366 NLRB No. 107 (June 22, 2018) 21

Shamrock Foods Co.,
366 NLRB No. 117, slip op. (2018)..... 11, 22

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

Westwood Health Care Ctr.,
330 NLRB 935 (2000) 11

Wright Line,
251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981) 19, 30

Pursuant to Section 102.46(a) of the National Labor Relations Board’s Rules and Regulations, Charging Party Teamsters Local 396 submits this Brief in Support of Its Exceptions to the Decision and Order (“Decision”) issued on December 30, 2019 by Administrative Law Judge (“ALJ”) Jeffrey D. Wedekind.

INTRODUCTION

Charging Party Teamsters Local 396 represents sanitation drivers, mechanics and other classifications in bargaining units at three Los Angeles area Athens Services yards: the Pacoima facility, the Torrance facility, and the Sun Valley facility. Teamsters Local 396 and Athens Services began bargaining a first collective bargaining agreement in November 2017. Between March and June 2018, Athens Services issued discipline (and a termination) to members of the union’s bargaining committee at each of the three yards. Athens also solicited the assistance of a bargaining unit employee in a nascent decertification drive, closed a common space at the Pacoima yard in retaliation for union activity, unlawfully surveilled its employees, and promulgated a rule prohibiting its employees from speaking with union representatives while in uniform.

Despite the overwhelming evidence of all of these violations, the Administrative Law Judge (“ALJ”) found for the General Counsel only on its allegations that Athens violated § 8(a)(1) by surveilling and creating the impression of surveillance and by promulgating the unlawful rule prohibiting uniformed employees from communicating with union representatives, and that it violated § 8(a)(5) by failing to bargain over the effects of closing a lunch room. But in dismissing other allegations in the General Counsel’s complaint, the ALJ overlooked record evidence, made credibility determinations without any cogent, objective basis, and ignored established law.

STANDARD OF REVIEW

The Board reviews the ALJ’s findings of fact *de novo*. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-45 (1950), *enfd*, 188 F.2d 362 (3d Cir. 1951); *RC Aluminum Indus., Inc.*, 343 NLRB 939, 939 n. 1 (2004). While the Board generally affords deference to credibility determinations based on the demeanor of the

witnesses, even those determinations cannot be rubber-stamped. *Permaneer Corp.*, 214 NLRB 367, 369 (1974) (an ALJ “cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word ‘demeanor’”). The Board must review the record in its entirety and determine whether the clear preponderance of all the relevant evidence supports the ALJ’s credibility determinations. *Standard Dry Wall Products, Inc.*, 91 NLRB at 545. When it does not, those findings must be reversed. *Id.*

ARGUMENT IN SUPPORT OF EXCEPTIONS

Pacoima Facility Unfair Labor Practices

I. **The ALJ Erred in Dismissing the General Counsel’s Allegation that Athens Threatened Casildo Garcia in Violation of the Act.**

Casildo Garcia has worked as a driver’s helper since 2016. He testified that in March or April 2018, he was exiting the Pacoima facility when he encountered Tomas Solis, the assistant general manager at the facility. Solis told Garcia, in Spanish, that he wanted Garcia to sign a piece of paper stating he would not join the Union. Tr. 39:12-13; ALJD, at 4.¹ Garcia asked Solis what would happen if he did not sign the document. Solis responded that “he would take [Garcia’s] neck.” Tr. 40:2. Garcia, naturally, took this to mean that his job was at risk. Tr. 40:5. Garcia testified that he responded to Solis by saying, “I would wait and see if he took my neck.” Tr. 40:9.

Solis denied, in general terms, that this conversation ever took place. Tr. 1858:1—1863:17; ALJD, at 4. Solis stated that he would not have asked Garcia to sign an anti-union petition because he is not responsible for having employees sign employment policies. Tr. 1860:8-17. Of course, this was not an “employment policy” but an anti-union petition. Solis admitted that he had received legal training on how to operate during a union organizing drive. Tr. 1849-1850; ALJD, at 4. He recognized that what Garcia described was no run-of-the-mill “employment policy”

¹ Citations to the record are as follows: the ALJ’s decision is cited as “ALJD, [Page]”; the hearing transcript as “Tr. [Page]:[Lines]”; the General Counsel’s exhibits as “GC Ex. [Number]”; and Respondent’s exhibits as “R. Ex. [Number].”

and that asking an employee to sign it would be neither “neutral” nor lawful. His testimony that he would not have asked Garcia to sign such a document because “employment policies” were handled by supervisors and HR personnel was feigned ignorance. The ALJD did not address this evasiveness in assessing the relative credibility of the witnesses.

Instead, the ALJ rejected Garcia’s testimony based on alleged “inconsistencies” in it that were chimerical.² The First, the ALJ claimed that Garcia had testified that “he was not a member of the Union, knew little of it, and was ‘neither for it or against it.’” ALJD, at 4. The ALJ then claimed that there was an inconsistency between this purported testimony and evidence that “Garcia was not as uninformed and uninterested regarding the Union as he professed.” ALJD, at 4. For this, the ALJ cited the fact that Garcia regularly visited a union tent erected outside of the Pacoima facility in 2018 and talked to union representatives.

But there is no inconsistency between Garcia stating in *August 2019*—on the stand, in front of his current employer, during testimony about his employer’s anti-union activity—that he is neutral about the union and not active in it, and Garcia’s speaking with union representatives *in 2018*. Here is the exchange to which the ALJ refers:

Q: *Are you an active union member?*

A: No. I’m neither for it or against it.

Tr. 38:5-7. Garcia’s unwillingness to be forced to reveal the nature of his support for the union in front of his employer more than a year after the events in question cannot possibly be a basis for discrediting his testimony about those events. There is no inconsistency between Garcia speaking with union representatives a year earlier and being non-committal about his support for the Union in August 2019 while on the stand and facing his employer. It is not surprising that an employee would be uncomfortable in having to disclose whether he is an active union member

² The ALJ did not base his credibility determination on demeanor, but on purported, objective “inconsistencies” in his testimony.

in front of an employer credibly accused of unfair labor practices. In fact, if—as the ALJ appeared to believe—Garcia did support the union, he would be even more concerned about making that support clear to his employer on the stand.

Nor is there any inconsistency between Garcia stating that he is not an active union member, and is neither for or against the union, and his having received a ride from a union representative to the hearing. Tr. 45:21-46:23; *see* ALJD, at 4. Garcia testified that he received a ride from someone from the union because he did not know how to get to the hearing location. Tr. 46:5-6. He testified—uncontradicted and without further questioning—that he did not know the name of the person who drove him to the hearing (he pointed him out by appearance in the hearing room) and that he did not even know if he worked for the union, only that he got the ride from the union building. Tr. 46:5-23. Garcia testified under command of a subpoena. Tr. 48:13-16. Again, there is no inconsistency between any of Garcia’s testimony about what happened in August 2019 and the fact that he spoke with union representatives at a tent outside the Pacoima facility in 2018.

Nor is there any “troubling inconsistency” between Garcia’s testimony that Solis did not respond after Garcia told him that he would “wait until Solis took his neck” (Tr. 40:9) and his testimony that Solis said that “anybody who didn’t sign was going to have their neck taken.” Tr. 48:24—49:1; *see* ALJD, at 4-5. *See, e.g., Doral Building Services*, 273 NLRB 454, 454 fn. 3 (1984), *enfd. mem.* 786 F.2d 1175 (9th Cir. 1986) (minor inconsistencies do not diminish employees’ credibility, nor do they render credible the testimony offered by respondent’s witnesses). Since Solis was asking Garcia to sign an anti-union document, and Garcia had no special relationship with Solis, it was more than reasonable for Garcia to assume that the threat he received applied to anyone who did not sign it.

The ALJ decided that it “seem[ed] unlikely [Garcia] would not have mentioned such a remarkable incident to [the union]” given “how frequently Garcia spoke to union representatives after his shift.” But there is no evidence that Garcia had contact with union representatives at the time in question (March or April 2018). The testimony to which the ALJ referred was that of a union representative,

who merely stated that Garcia “was a regular that stopped by, and he always stops by on his way home.” Tr. 821:22-23. This union representative did not testify, and there is no evidence in the record, that Garcia was a regular in March or April of 2018 or that he spoke with union representatives at that time. In any case, Garcia *did* mention the incident to the union later, which is the reason that unfair labor practice charges were filed in July 2018.

Finally, the ALJ concluded that “Garcia testified that [he did not inform the union of the incident] because there were other people standing around, suggesting that he thought they would inform the Union.” ALJD, at 5. But this is a mischaracterization of Garcia’s testimony. Here is the relevant exchange, on cross-examination by Athens’ lawyer:

Q: Okay. And when did you first tell the Union about this interaction?

A: I didn’t tell anyone at the Union anything.

Q: Okay. Who did you tell about it?

A: I—no one. They called me. Because there were other people standing around. I don’t know who they were because I was just paying attention to Tomas.

Q: Who called you?

A: Who called me?

Q: Yes.

A: I was called by—the lawyer called me.

Tr. 47:23—48:8; see also Tr. 55:2-3 (“Q: Did you tell any coworkers about what happened with Tomas? A: I hadn’t told anyone about it.”).

Garcia was not suggesting that he had not called the union because he thought other people would. That was an unsupported conclusion that the ALJ made up. Garcia was answering—directly and forthrightly—how the information about the incident could have reached the union.

Garcia’s testimony on whether others were present during the incident was also consistent. He testified on direct as follows:

Q: Was anyone else *part of this conversation*?

A: Right there, I don't know. I was just paying attention to [Solis].
Tr. 40:25—41:1. On cross, Garcia testified that he did not know the identities of those who might have *observed* the interaction, stating that “there were other people standing around. I don't know who they were because I was just paying attention to Tomas.”

There is no inconsistency between Garcia stating that he was unaware of whether anyone else *participated* in the conversation with Solis because he was focused on what Solis was saying, and Garcia testifying that he was not aware of the identities of those who *observed* his conversation with Solis because he was focused on what Solis was saying.

Each of the ALJ's bases for discrediting Garcia's testimony is unsupportable. Since there is no dispute that if Solis said what Garcia testified he did, Athens would have violated Section 8(a)(1), the ALJ erred in dismissing this allegation in the General Counsel's complaint. *See Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1091-1096 (2004).

Torrance Facility Unfair Labor Practices

II. The ALJ Erred in Dismissing the General Counsel's Allegation that Athens Interrogated Employee Michael Bermudez About Support for the Antiunion Petition.

Michael Bermudez worked at the Torrance (or LA South or LASO) facility, as a sanitation truck driver, between January 2016 and June 11, 2018. He was one of three employees at the facility who served on the union bargaining committee. ALJD, at 20. There is no dispute that Bermudez's managers were aware of his role on the union bargaining committee.

On March 20, 2018, Bermudez was at the H.R. office after his shift when Operations Manager Matt Martinez asked him to come into General Manager Michael Leidelmeyer's office. Bermudez's field supervisor, Kam Naeole was also there. Leidelmeyer told Bermudez that another supervisor, Carlos Altamiano, had reported seeing him on his cell phone while operating his truck. Bermudez denied that this was the case. ALJD, at 20; Tr. 498:11; Tr. 503:14-15. Leidelmeyer then

called Altmiano, who stated again that he had seen Bermudez on a cell phone. Bermudez again denied that this was the case. ALJD, at 20-21.

Bermudez testified that Leidelmeyer told Bermudez that he wanted to fire him, but that Martinez and Naeole did not, and that he was going to put Bermudez on a six-month probation and give him a final warning. Tr. 505:20-22. Bermudez's testimony was undisputed that Leidelmeyer had a discipline form beside him as he interrogated Bermudez. Tr. 498:4—506:18, 1908:25—1915:4; Tr. 2001:1—2009:15, Tr. 2070:4—2079:7.

Bermudez testified that after Leidelmeyer had made this statement, he changed the subject and asked what Bermudez thought of the union. Bermudez gave specific testimony about Leidelmeyer's words. Leidelmeyer told Bermudez that "he's going to need me to spread the gospel, the Athens gospel, of how well I've been treated there. And also he said there was going to be an anti-certification union [sic] that's coming out, that he needed my help." Tr. 508:21-24. When Bermudez complained that if he did this "I'm going to feel paranoid, like I always have to watch my back," (Tr. 509:1-4), Leidelmeyer recited the names of co-workers who were "allies." Tr. 510:2-5. These were people whom Bermudez knew to be opposed to the union. Bermudez again refused to help Leidelmeyer.

While the ALJ recognized that if true, Leidelmeyer's interrogation and request for assistance would violate Section 8(a)(1), he posited five reasons for discrediting Bermudez's testimony and crediting Leidelmeyer's, Martinez's, and Naeole's testimony that no such request for help or mention of the decertification had occurred. None of these explanations for discrediting Bermudez's testimony make sense.

First, the ALJ pointed out that Leidelmeyer, Martinez, and Naeole disputed Bermudez's account. This is unsurprising since the employer is being accused of violating the law. Moreover, the ALJ made *no effort whatsoever* to assess inconsistencies in the employer witnesses' testimony. The most important of those inconsistencies involved the degree to which Leidelmeyer cautioned Bermudez about discipline during the course of the meeting. Martinez and Naeole both

testified that Leidelmeyer reviewed Bermudez’s disciplinary record with him and cautioned him that he was on a last and final warning. Tr. 1913:1-3 (Naeole) (“Michael Leidelmeyer intervened again. He indicated that—he reminded Michael of his safety history, and that the incident could be a terminal incident, and that he was going to get back to him.”); 2005:7-9 (Martinez) (“Michael Leidelmeyer reminded him of his final warning for safety, and asked him to be careful because if he has another safety violation, he could be terminated.”). But Leidelmeyer, who was seeking to hew to the employer’s line that no discipline had been issued at the meeting, denied that he had reviewed Bermudez’s safety record or existing final warning at all:

Q: Okay. Did at any point in this conversation, did you have any discussion about his—where he sat within the safety disciplinary track?

A: I don’t believe so.

Tr. 2075:13-16.

The ALJ claimed that Bermudez’s account of the meeting was not credible because “the Company’s progressive discipline system does not even include a 6-month probationary period.” ALJD, at 21. But this is demonstrably untrue. As the ALJ admitted elsewhere, the disciplinary system *does* have a 6-month probationary period for time/attendance infractions. ALJD, at 21; Jt. Exhs. 57, 58. Elsewhere, the ALJ stated that there was no six-month probation period for safety violations. But, there is no evidence that Leidelmeyer was aware of the distinction between the normal, six-month probation period for time/attendance and the normal, 2-year probation period for safety infractions. In fact, Leidelmeyer testified that “we don’t have a six-month probation,” something that the record demonstrates is untrue. Tr. 2078:24-2079:1. Rather, it was an HR official, Lupe Guerrero, who testified to Athens’ unwritten practice of applying a six-month probation (or “look back”) period to attendance violations, and a 2-year period to safety violations. Tr. 1571:7-21.

The written disciplinary policy makes clear that the “progressive discipline” system Athens maintains is not formal or binding, and that Athens may impose whatever level of discipline it sees fit under the circumstances:

The Company has a system of progressive discipline that may include verbal warnings, written warnings, and suspension. The system is not formal, and the Company may, in its sole discretion, utilize whatever form of discipline is deemed appropriate under the circumstances, up to, and including, immediate separation of employment.

Jt. Exh. 57, at 2; see ALJD, at 22 n. 47.

Thus, there is no inconsistency between Bermudez’s testimony and Athens’ actual disciplinary policy, either as it exists or as the record evidence shows Leidelmeyer to have understood it.

Next, the ALJ claimed that there was inconsistency between Bermudez’s testimony that Leidelmeyer told him that he would receive probation and a final warning for the cell phone incident and the fact that Bermudez was already on a final warning. ALJD, at 21-22. But Leidelmeyer denied saying anything about Bermudez’s safety record and did not testify that he was aware of it during the meeting.³ Nor does the Athens “progressive discipline” policy mandate any specific disciplinary outcome. Athens retains discretion over the discipline it issues. The ALJ stated that there was no evidence “that the Company ever issued the same or lesser discipline to an employee for another violation in the same disciplinary category or track.” ALJD, at 22 n. 47. But the ALJ recognized that in Bermudez’s case, a draft discipline had been prepared for him on a behavioral issue after he had been issued a final warning previously. ALJD, at 22 n. 47.

The ALJ claimed that the fact that Bermudez was not ultimately disciplined undermines his testimony. But Bermudez’s testimony was that Leidelmeyer told him what the discipline was “going to be” not what it was. Tr. 505:20-22 (“I seen a document next to him. I did see it, and he was telling me that this was going to be the final warning, that I was going to be on a six-month probation.”). Bermudez

³ As discussed, Leidelmeyer’s testimony was contradicted by Naeole and Martinez.

never testified that he was given the final warning or that he was told so sign it, as was the employer's practice. There is nothing inconsistent between Leidelmeyer telling Bermudez what he was "going to do" during a conversation in which Bermudez's firing was discussed and Leidelmeyer asked Bermudez to support the decertification campaign, and Leidelmeyer ultimately deciding not to discipline him the next day.

Finally, the ALJ decided that it was suspicious that Bermudez did not tell the union about the incident. ALJD, at 22. Bermudez explained that he was concerned about retaliation if he spoke with the union, which is unsurprising given that he was on a final warning with the company and had just been accused by a supervisor of something that he did not do.

The ALJ thought that Bermudez's testimony that he was concerned about bringing the threat he had received from Leidelmeyer to the union's attention was inconsistent with the fact that two months later, he allowed the Union's President to read a statement during a bargaining session. But at the time that he was interrogated, according to employer witnesses, he had expressed that "he was just an observer at the bargaining sessions, had no input in them, and they were hurting him financially because he was missing work to attend them." ALJD, at 23 n. 50. Bermudez also testified that he was new to unions and it was a "learning process." Tr. 507:24.

There is no inconsistency between Bermudez fearing retaliation if he brought his concerns to the union in March, when he was facing discipline on his own and his enthusiasm for the union was "waning" due to the slow pace of bargaining (ALJD, at 23 n. 50),⁴ and having the Union's President read his statement during a bargaining session (at which the Union's lawyer was present) two months later.

⁴ Citing the employer's own testimony that Bermudez had confided in Martinez that he was not happy with serving on the bargaining committee, the ALJ properly rejected Athens' argument that it was improbable that Leidelmeyer would have approached Bermudez about supporting the decertification petition. ALJD, at 23 n. 50.

Nor is there an inconsistency between Bermudez allowing the Union's President to raise, on his behalf, a statement concerning a different Athens employee—a driver named Bernie Estrada—being forced to obtain decertification signatures by Athens, and his confronting his employer directly about a threatened discipline.

In short, the ALJ's rationales for discrediting Bermudez's testimony do not hold up. The ALJ did not analyze or take into account the inconsistencies between the three employer witnesses on the core issue of what discipline Leidelmeyer threatened during the March 20 meeting. The clear preponderance of the evidence supported Bermudez's version of the March 20 meeting. Athens violated Section 8(a)(1) by interrogating Bermudez about his union support and in the context of soliciting his assistance in the decertification of the union. *See Rossmore House*, 269 NLRB 1176, 1178 (1984); *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 16-17 (2018); *Parts Depot, Inc.*, 332 NLRB 670, 673 (2000) ("Where the interrogation is accompanied by threats or other violations of Section 8(a)(1), as this one was, there can be no question as to the coercive effect of the inquiry."); *Westwood Health Care Ctr.*, 330 NLRB 935, 941 (2000) (questioning against "a background of hostility" supports finding violation).

III. The ALJ Erred in Dismissing the General Counsel's Allegation that Athens Discriminatorily Discharged Employee Bermudez.

A. Factual Overview

In fact, Bermudez's concerns about speaking up at the May 30 bargaining session were completely justified because Athens fired him days later. The ALJ erred in concluding that the General Counsel had not met its burden in demonstrating that this termination was discriminatory.

Following his March 2018 interrogation by Leidelmeyer, Martinez and Naeole, Bermudez had experienced hostility from them. On several occasions, Naeole commented, "what's up superstar? You're a superstar now." Tr. 684:19-24. This was a clear reference to Bermudez's role on the union bargaining committee. On another occasion, Leidelmeyer called Bermudez a "stupid shop steward." Tr. 686:1-10.

On June 2, 2018, Bermudez received his normal route assignment from his supervisor Kam Naeole, during the morning shift. ALJD, at 23. Although it was a heavy trash day, since it was the week following Memorial Day, Bermudez did not receive any special instructions on that day. Tr. 521:15—522:15. Naeole told Bermudez that he would call him later during the shift to see how he was doing. ALJD, at 24. Naeole testified that he told Bermudez to call him during the shift if his truck was “getting heavy.” ALJD, at 24 n. 51. But the ALJ discredited this testimony and found “significant problems” with Naeole’s June 4 statement concerning Bermudez’s termination and other hearing testimony about the events. ALJD, at 11 n. 51.

The ALJ also recognized that at Athens, “there was no precise way for the drivers to know when their truck was overweight.” ALJD, at 11 n. 51. As the ALJ found:

The amount of trash was not itself a reliable indicator (the trash could be heavy or light). And Athens had not installed an onboard weight scale or sensor on this trucks to let the driver known when the load had reached 12 tons. Nor did it teach drivers how to know or feel the difference between an empty truck and full truck.

ALJD, at 24 n. 51.

On June 2, 2018, Bermudez set off on his route with his helper, Oscar Mejia. Around 11:00 a.m., Bermudez spoke with Naeole on a two-way radio. Bermudez was about 90% of the way through his route, but he believed that his truck was getting heavy. Bermudez’s truck was still “packing”—meaning that it was still loading trash. ALJD, at 24. Bermudez had been told by Naeole that “as long as it keeps packing, just keep packing.” Tr. 523:20—524:5. Luis Prado, a helper who worked for Athens for 13 years, similarly testified that it is common practice to keep loading trash until the driver cannot pack any more trash into the truck. Tr. 714:18-21.

Naeole testified that during the two-way radio call with Bermudez, she told him that she would send out another driver named Jacinto Pimental who was also in the Redondo Beach area, and that Bermudez and Pimental would do a “truck

switch”—i.e. “Pimental would take Bermudez’ truck to the dump and Bermudez would finish the route with Pimental’s truck.” ALJD, at 25. Naeole also testified, and wrote in a statement, that when he spoke to Bermudez, Bermudez stated that his truck was full and no longer packing. Tr. 1935-1936; GC Ex. 5.

Bermudez denied that Naeole had told him that he should do a “truck switch” with Pimental, stating only, “Keep going, there’s going to be another truck on its way.” Tr. 525:10-11. He also denied that he was full when he called, and testified that he was still packing at that point. Tr. 525-526.

For unsustainable reasons, the ALJ credited Bermudez’s testimony that he never told Naeole that he was full, and no longer packing, during their 11:00 a.m. call, but credited Naeole’s testimony that he had instructed Bermudez to do a truck switch with Pimental, despite discrediting nearly every other key element of Naeole’s testimony. This unsupported credibility determination is discussed below.

As Bermudez was waiting for the other truck to arrive, he continued to run his route, since his truck was still packing. When Pimental arrived about a half hour later, there was only a small portion of Bermudez’s route left—approximately 1 block. ALJD, at 25; Tr. 520:20—530:2-19; 709:4—710:11. Because his truck was still packing, Bermudez continued along his route, approximately a half block from the intersection where Naeole had told him to expect help to arrive.

The ALJ described what happened next:

Pimental and his helper, Luis Prado, arrived shortly thereafter and pulled up behind [Bermudez]. Bermudez and Pimental then both got out of their trucks and discussed what to do. They agreed that, instead of switching trucks, Pimental would just finish the route in his own truck. Bermudez therefore returned to his truck, intending to drive it to the dump. ALJD, at 25 (emphasis added). In other words, the ALJ recognized that Pimental and Bermudez came to a joint plan of action that they would not switch trucks.

Before Pimental and Bermudez set off on their ways, however, Naeole called again. He was out in a pickup truck, collecting electronic and household appliance waste in the same area and had noticed both trucks parked near the intersection, with Bermudez’s truck parked a half block away. He called Bermudez and asked

him why Bermudez and Naeole had not switched trucks. ALJD, at 26. Bermudez responded that they had not switched trucks because, “you didn’t tell me to switch trucks, you just told me there was going to be another driver on the way to help.” Tr. 534:11—535:12.

Naeole then called Pimental and asked him why he and Bermudez had not switched trucks. ALJD, at 26. Naeole claimed that Pimental blamed the failure to switch on Bermudez. ALJD, at 26. Naeole testified that he told Pimental, “you should have called me.” Tr. 1943:3. Because there was only a half-block left on Bermudez’s route, Naeole told Pimental to finish the route with his own truck, Pimental did so and Bermudez drove to the dump. ALJD, at 26.

Bermudez received a receipt at the dump stating that his truck was overweight. R. Ex. 27. Bermudez had, several times in the past, had an overweight truck without any issues. Tr. 527:20—529:4. Athens’ witnesses put forth no evidence that any driver had ever been disciplined for having an overweight truck. And Luis Prado, a 13-year employee, testified that Athens did not discipline drivers for overweight trucks. Tr. 716:1-3. This is consistent with the ALJ’s finding that Athens did not have onboard scales or provide any other means for drivers to know the weight of their vehicles.

Nonetheless, after Naeole complained to Operations Manager Martinez that Bermudez had been “insubordinate” for not doing a truck switch, Martinez informed Leidelmeyer, who told Martinez to obtain Bermudez’s “dump receipt” showing how much Bermudez’s truck weighed. ALJD, at 26. Athens ultimately based Bermudez’s termination, in part, on his having a “grossly overweight” vehicle. GC Exh. 13.

Leidelmeyer, Martinez and Naeole conferred about what action should be taken, and Leidelmeyer concluded that Bermudez should be terminated. ALJD, at 27. Leidelmeyer reached this conclusion without having spoken to Bermudez. Leidelmeyer called Pimental directly and asked him what had happened, but Leidelmeyer did not call Bermudez. ALJD, at 27. Leidelmeyer failed to interview Bermudez before coming to the conclusion that Bermudez should be fired even

though Naeole had informed him Pimental had not switched trucks either and had blamed Bermudez for the failure to do so. ALJD, at 26-27. It is undisputed that Pimental received no discipline whatsoever for his failure to switch trucks, not even a verbal warning or counseling.

Leidelmeyer involved Athens Executive Vice President Cesar Torres in the decision on termination. ALJD, at 27. Torres, who was aware of Bermudez's participation on the bargaining committee, scheduled another "investigatory" meeting at which union representatives could be present, to take place on June 7. ALJD, at 27.

At the June 7 meeting, Bermudez was given Naeole's written statement. ALJD, at 27. Bermudez disputed all of the key elements of Naeole's statement, stating that Naeole had never told him that his route was being adjusted in order to balance and reduce tonnage of his load; that Naeole had never told Bermudez to call him if he was getting heavy; and that he had never told Naeole when they talked by radio on June 2 that his truck was no longer packing. Tr. 540:13—542:15. In fact, the ALJ found "significant problems" with Naeole's statement and his hearing testimony on the events. ALJD, at 24 n. 51. Bermudez presented a handwritten statement on the events on June 2. In his written statement, Bermudez again asserted: "Kam [Naeole] never told me to stop working until the spare truck arrived nor did he tell me to switch trucks." GC Exh. 6; ALJD, at 27.

Leidelmeyer also told Bermudez that he was supposed to know when his truck was overweight, even though—as the ALJ found—there was no way for Athens drivers to know whether their trucks were overweight and even though there is no evidence of Athens drivers being disciplined for having overweight vehicles, including Bermudez on previous instances when his vehicle was overweight. ALJD, at 28. Bermudez responded that there was no way for him to know whether his vehicle was overweight, and that he believed that he was being targeted for his union activity. ALJD, at 28. Leidelmeyer ended the meeting saying that Bermudez was suspended pending investigation. ALJD, at 28.

Sometime on June 7 after the meeting, Pimental provided Athens a very short written statement. ALJD, at 28. The statement said that Naeole had told him to go to the intersection of Huntington and Phelan and trade trucks with Bermudez. The statement said that when he arrived, Bermudez told him that he still had space to pick up more trash and they did not do the trade. Instead he finished Bermudez’s route. ALJD, at 28; GC Exh. 30. The written statement did not blame Bermudez for the failure to switch vehicles, nor did it state that Pimental had informed Bermudez that Naeole had instructed them to switch trucks. GC Exh. 30. Athens did not call Pimental as a witness at the hearing.

On June 11, 2018, Ledelmeyer and Martinez met with Bermudez. They gave him a termination notice. The notice stated that Bermudez had violated company policy on June 2 by engaging in an “act of insubordination resulting in an extremely overweight trash load of 14.36 tons.” ALJD, at 28; GC Exh. 13.

B. Credibility Determination

The ALJ improperly credited Naeole’s testimony that he instructed Bermudez to switch trucks with Pimental when they spoke by two-way radio at 11:00 on the morning of June 2.

First, the ALJ discredited nearly every other aspect of Naeole’s testimony on the events of June 2. The ALJ discredited Naeole’s testimony that he had he told Bermudez at the pre-shift on June 2 to call him when his truck was “getting heavy.” ALJD, at 24 n. 51. He also discredited Naeole’s testimony that Bermudez told him during that 11:00 a.m. two-way radio call that his truck was full and he was no longer packing. ALJD, at 25, n. 52. In fact, the ALJ stated that there were “significant problems with other aspects of Naeole’s June 4 statement and hearing testimony about the events.” ALJD, at 24 n. 51.

Yet, on the key question of whether Naeole had, in fact, instructed Bermudez to do a “truck switch”—something that Naeole himself admitted was a “rare” occurrence (Tr. 1938:9)—the ALJ credited Naeole’s testimony over Bermudez’s. ALJD, at 25 n. 52.

The *only* rationale that the ALJ gave for crediting Naeole’s testimony on this key issue, when his testimony on the other key issues in the termination were not credible, was Pimental’s June 7 written statement, which the ALJ claimed was “corroborative” of Naeole’s testimony that he instructed Bermudez to switch trucks during the two-way radio call. But as the ALJ admitted, Pimental’s June 7 written statement did not say that Naeole had instructed *Bermudez* to switch trucks, only that he had instructed *Pimental* to do so. ALJD, at 31; GC Exh. 30. The statement says nothing about Naeole instructing Bermudez to stop working, wait for another truck, or switch trucks. Given the fact that the ALJ had discredited Naeole’s testimony on all other key aspects of the events on June 2, it was improper to credit his testimony based on Pimental’s statement, which provides no corroboration for Naeole’s version of events.

Moreover, Naeole himself admitted that in at least one formulation of his instruction to Bermudez, he told Bermudez exactly what Bermudez testified Naeole told him at 11:00 that morning. Tr. 1934:17—1935:11 (Naeole’s testimony that he told Bermudez that he “was going to send another driver to help him” without explaining what that other driver was going to do). The ALJ did not cite this testimony, even though it corroborates what Bermudez testified Naeole told him that day.

The ALJ’s conclusion that Pimental’s cursory, June 7 statement “corroborated” Naeole’s testimony that he told Bermudez to switch trucks—despite the fact that it did no such thing—is particularly alarming given that an actual, live witness corroborated Bermudez’s version of events. Both Luis Prado, a 13-year Athens employee, and Bermudez testified that Pimental had told Prado on the ride from the facility to the intersection where Bermudez was located that he (Pimental) did not want to switch trucks. Tr. 708:20-23 (“I remember Jacinto asked me—he had said—Jacinto had said, I don’t want to switch trucks. Can you do me a favor and can you call Kam, and let him know I don’t want to switch the trucks?”). Bermudez testified that when Pimental and Prado arrived at the intersection, Prado told him that Pimental did not want to help him. Tr. 531:10-1. It is also

consistent with Bermudez's testimony that when Pimental saw that there was only a half-block left on Bermudez's route, Pimental offered to finish Bermudez's route, rather than switch trucks. Tr. 658:3-9. And it is consistent with the ALJ's *own determination* that when Pimental and Bermudez met at the intersection, they "discussed what to do" and "[t]hey *agreed* that, instead of switching trucks, Pimental would just finish the route in his own truck." ALJD, at 25.

The ALJ discredited Bermudez's and Prado's testimony for two unsustainable reasons. First, the ALJ stated that Prado's testimony should not be credited because "he was a union supporter." ALJD, at 25, n. 53. But the ALJ did not discredit any Athens managers, including Naeole's testimony on the very matter, because they were "Athens supporters," even though these managers' job is to represent Athens' interests. The mere fact that a witness supports the union cannot be a basis for a negative credibility determination, any more than the mere fact that a witness is a manager can support one.

Second, the ALJ concluded that Prado's and Bermudez's testimony should be discredited because Bermudez did not raise the fact that Pimental had suggested completing Bermudez's route when the two met at the intersection. ALJD, at 25 n. 53. But it is undisputed that none of the Athens managers ever confronted Bermudez with Pimental's alleged statement that it was Bermudez who refused to switch trucks during the investigation process. The ALJ did not recognize, much less analyze, why Naeole (and then Leidelmeyer) did not confront Bermudez with Pimental's accusation that Bermudez was to blame if that had occurred. Yet the ALJ concluded that Bermudez's failure to raise a fact that he could have no idea was relevant to his defense was a basis for discrediting his testimony.

Bermudez was being threatened with discipline for failing to switch trucks and for having an overweight truck. His defense to this accusation was that Naeole had never told him that he needed to switch trucks with Pimental. His consistent testimony was that Pimental arrived at the intersection, they talked, and Pimental offered to finish his route.

The ALJ's biased approach becomes even clearer when Bermudez's "failure" to blame the failure to switch on Pimental is compared with *Pimental's failure to blame it on Bermudez* in his post-incident statements. There is no evidence that Pimental raised Bermudez's alleged culpability in his phone conversation with Leidelmeyer on June 2, when Leidelmeyer was conducting a disciplinary investigation. Tr. 2081:12-16. Nor is there is anything in Pimental's June 7 statement that suggests that Bermudez was the cause of the decision not to switch trucks. GC Exh. 30. There is no basis for the ALJ to discredit Bermudez's "failure" to blame Pimental, when Pimental's post-incident statements do not put the blame on Bermudez either.

C. *Wright-Line* Analysis

1. Anti-union animus was a motivating factor.

The ALJ recognized that there was no dispute that all of the supervisors and manager involved in Bermudez's termination knew that he was a union supporter and member of the bargaining committee. ALJD, at 29. *See Wright Line*, 251 NLRB 1083, 1088-89 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

The ALJ did not make a clear finding on whether anti-union animus was a motivating factor in Athens' termination of Bermudez. *See* ALJD, at 29-31. Instead, he ruled that even if such animus existed, Athens' termination of Bermudez was reasonable. ALJD, at 31.

The Board will consider circumstantial evidence to infer discriminatory motive or animus, such as (1) timing or proximity in time between the protected activity and adverse action; (2) disparate treatment in implementation of discipline; and (3) inappropriate or excessive penalty. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Ronin Shipbuilding*, 330 NLRB 464 (2000); *CNN America, Inc.*, 361 NLRB 439 (2014) (*citing W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995)); *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014). Here, there is both direct evidence of anti-union animus toward Bermudez and circumstantial evidence that Athens was motivated by discriminatory animus in its termination decision.

Direct evidence of anti-union animus. Bermudez testified—and neither Leidelmeyer nor Naeole disputed—that both had made sarcastic comments to him about his support to the union. Naeole on more than one occasion made fun of Bermudez’s involvement with the union—and his participation on the bargaining committee—by mockingly calling him a “superstar.” Tr. 684:19-24. Leidelmeyer called Bermudez a “stupid shop steward” while passing him in the yard. Tr. 686:1-10.

The ALJ recognized that sarcastic comments like this are evidence of animus. ALJD, at 29; *Harvey’s Resort Hotel*, 234 NLRB 152, 152 (1978) (supervisor’s statement to shop steward that he was “stupid for getting involved in union activities”); *Screen Print Corp.*, 151 NLRB 1266, 1276 (1965). The ALJ discounted Bermudez’s testimony that Leidelmeyer called him a “stupid union steward” as evidence of animus because it purportedly lacked detail. But the testimony was precisely as detailed as the testimony in *Harvey’s Resort Hotel*, 234 NLRB 152, in which the Board overruled an ALJ determination that supervisors telling a union steward that he “was stupid for getting involved in union activities” did not demonstrate anti-union animus.

Timing of the adverse action. The ALJ recognized that the timing of Bermudez’s termination, just days after he spoke up at the May 30 bargaining session, was “suspicious.” ALJD, at 30. But he ultimately discounted it as evidence of anti-union animus because he concluded that Leidelmeyer, Martinez, and Naeole were unaware that the Union President had read Bermudez’s statement at the May 30 bargaining session. ALJD, at 30. This is highly improbable, given that Bermudez made allegations about unlawful activity at the Torrance facility, Leidelmeyer was the General Manager of the facility, and at the May 30 bargaining session, Athens’ lawyer had promised to “investigate” the Bermudez’s allegations. Tr. 2436:24—2438:12.

The ALJ concluded that although Torres knew of Bermudez’s statement at the May 30 bargaining session when he decided to terminate him just a week later, Torres’ “had no alternative under the Company’s progressive disciplinary policy to

terminate him.” ALJD, at 30. But as already explained, Athens’ own discipline policy says that it is not “formal” and that “the Company may, in its sole discretion, utilize whatever form of discipline is deemed appropriate under the circumstances[.]” Jt. Exh. 57.

Most importantly, Athens *issued no discipline at all* to Pimental, the other driver who had disobeyed Naeole’s instruction that the trucks be switched. Athens’ failure to discipline Pimental—who had indisputedly and admittedly been given a direct instruction by Naeole to switch trucks—proves that Athens both had a choice about whether to discipline Bermudez at all and made that choice based on his antipathy toward Bermudez’s union activity.

Disparate disciplinary treatment. The ALJ made no attempt whatsoever to address the most glaring evidence of anti-union animus imaginable: the fact that another driver who was accused of doing the same thing as Bermudez on the same day—disobeying an order to switch trucks—was given no discipline at all and was not even subject to a disciplinary interview. Tr. 1973:6-22. Disparate disciplinary treatment of similarly situated employees, only one of whom is a known union supporter, is the essence of § 8(a)(3) discrimination. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Shamrock Foods Co.*, 366 NLRB No. 107 (June 22, 2018).

Naeole testified that when he called Pimental about why the truck switch did not happen, Pimental said “Michael didn’t want to.” Tr. 1943:1. But this is not consistent with Athens’ only two attempts to get information from Pimental. There is no indication that Pimental blamed Bermudez for the failure to switch trucks during Leidelmeyer’s June 2 phone call with him. Tr. 2081:12-16. Nor did Pimental include anything about Bermudez being responsible for the failure to switch trucks in his June 7 written statement. This is particularly notable because Leidelmeyer’s phone call on June 2 and the June 7 written statement were being demanded by the General Manager in the context of disciplinary proceedings in which Pimental was implicated. Surely if Bermudez had truly been the reason for the failure to switch trucks, Pimental would have included this in his statement, thereby clearing himself of the same disciplinary fate. Nor is there any evidence

that Leidelmeyer or Naeole confronted Bermudez with Pimental's alleged claim that Bermudez had been the reason for the failure to switch trucks.

Moreover, Naeole admitted that he believed Pimental had violated his instructions, saying that he told Pimental, "you should have called me." Tr. 1943:3. Yet, despite failing to comply with Naeole's instruction to switch trucks, and failing to call Naeole when he did not do so, Pimental never received any discipline—not even a verbal warning or counseling—and was never put under any kind of disciplinary investigation.

Cursory investigation of Bermudez. An employer's cursory investigation or failure to interview the discriminatee before reaching a conclusion on discipline may support an inference of animus and discriminatory motive. See, e.g., *Shamrock Foods*, 366 NLRB No. 117, slip op. at 28 (2018); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); see also *CC1 Ltd. Partnership v. NLRB*, 898 F.3d 26, 33 (D.C. Cir. 2018).

Leidelmeyer's anti-union animus was demonstrated by his failure to interview Bermudez before reaching the conclusion that he should be terminated for insubordination. See ALJD, at 27. Although Athens managers understood that both Pimental and Bermudez had been involved in the failure to switch trucks, Leidelmeyer interviewed only Pimental before concluding that Bermudez alone had been "insubordinate" should be terminated. ALJD, at 27. Leidelmeyer's "interview" with Pimental by phone lasted only a couple of minutes and was in broken English because Leidelmeyer does not speak Spanish. Tr. 2081:12-16.

Athens Vice President Torres did instruct Leidelmeyer to hold a meeting on June 7 with the union and Bermudez before issuing the discipline. ALJD, at 27. But the ALJ recognized that Leidelmeyer had already reached a conclusion on discipline, and Torres did not participate in the June 7 meeting and Leidelmeyer remained the decision maker on Bermudez's termination.

2. Athens failed to meet its burden.

The ALJ concluded that even if there was sufficient evidence of anti-union animus, Athens had met its burden because "it would have terminated him

regardless.” ALJD, at 31. The ALJ based this conclusion entirely on his determination that “there is no substantial record evidence that the Company had not disciplined employees who were known by management to have committed such prohibited conduct in the past [i.e. insubordination].” ALJD, at 31-32.

But there was such evidence, and the ALJ disregarded it. Pimental did not follow an undisputed, direct instruction from Naeole to switch trucks—and indeed, failed to notify Naeole that he had had not done so—yet he did not receive any discipline at all, or even a disciplinary investigation. Even if the ALJ were correct in crediting Naeole’s testimony that he gave Bermudez a direct instruction to switch trucks—even though much of the rest of Naeole’s testimony was not credible—the ALJ’s failure to address Athens’ decision not to even consider discipline for Pimental was a grave and reversible error.

Sun Valley Facility Unfair Labor Practice

IV. The ALJ Erred in Dismissing the General Counsel’s Allegation that Athens Discriminatorily Disciplined Union Supporter Damien Weicks.

A. Background Facts

Damien Weicks has worked as a bin painter at Athens’ Sun Valley facility since August 2017. ALJD, at 32. He is one of approximately 15 bargaining-unit employees at that facility. ALJD, at 32. At the time of the events in question, he was a known union supporter and had been attending union negotiating sessions as a member of the bargaining committee. ALJD, at 32. Prior to the events in question, he had never received any discipline during his tenure at Athens. Tr. 387:1-5, 416:25—417:2.

As a bin painter, Weick’s job is to re-paint trash bins after they are cleaned by the bin washers. He picks out about seven bins at a time, moves them with a forklift to his booth, where he repaints them. If the bins are not properly cleaned, then he cannot do his job because the paint will not affix to the bin. If that happens, Weicks has to return the dirty bin to the wash line. Tr. 390:8—394:5; 1476:13-18.

In March 2018—at a time when Weicks was actively participating in the union’s bargaining committee—a welder at the facility, Brendan Farris, was called into HR Manager Lupe Guerrero’s office. Tr. 597:7—600:13. HR Manager Guerrero asked Farris the following:

She asked me if I had witnessed or talked to Damian and heard him promoting the Union . . . She asked me if I seen him or witnessed him promoting the Union. And then asked me if I felt that he was creating a hostile work environment.

Tr. 599:2-6. Guerrero denied having this conversation with Farris. Tr. 1625–1628.

On April 17, 2018, Weicks was involved in a dispute with two coworkers who were bin washers, employees Miguel Lozano and Nelson Zelaya. Weicks testified that he took seven bins from the clean line to his booth and donned his equipment. As he started painting, he found that there was debris on one of the bins and he returned the bin to the wash line. As Weicks was returning the bin, Lozano and Zelaya were about five yards away. Lozano saw Weicks returning the bin to the wash line, and Lozano said out loud, “this motherfucker.” Tr. 394:12-397:18; *see* ALJD, at 33.

Weicks took seven more bins to his booth to paint them. He then went to the clean line to pick up more bins and noticed that the same dirty bin he had previously returned was in the clean line, even though it was dirty. He knew that it was the same bin because it had the same color and was dirty in the same way. As he returned the bin to the wash line, Lozano again said, “Man, this motherfucker.” Tr. 397:20-401:7. Weicks testified that this happened two more times: he would pick up the same dirty bin and return the bin to the wash line, and Lozano would swear at him, calling him “this motherfucker” or “fool.” Tr. Tr. 397:20-401:7.

At this point, Weicks testified, he approached his Lead, Luis Rubio, at the staging area and complained: “I said Luis, I said, I keep taking this waste bin back. Miguel is mad. He keeps cussing. I said there’s going to be an issue.” Tr. 402:2-3. Weicks testified that Rubio did not respond at that point and that Weicks went back to his work. Tr. 402:13-15.

Rubio agreed that Weicks had approached him to complain about having to return a bin to the wash line, but testified that Weicks had not mentioned Lozano cussing, had stated that he had returned the bin only twice, and claimed that he had asked Weicks whether he had explained to Lozano and Zelaya why he was returning the dirty bin to the wash line. Rubio testified that Weicks told him that it was obvious why he was returning the bin to the wash line and he should not have to explain to Lozano and Zelaya. Tr. 1510-1511. Rubio testified, contrary to Weicks, that Weicks said nothing about there being any verbal conflict between him and Lozano and Zelaya. Tr. 1511:24—1512:2.

Weick's discipline resulted from a subsequent meeting with Rubio and Lozano that day. Rubio testified that after Weicks complained to him, he approached Lozano and Zelaya, who agreed that they had not properly washed the bin that Weicks returned but that they denied that Weicks had spoken to them about it. ALJD, at 33. Rubio testified that he decided to bring Weicks, Lozano and Zelaya together. ALJD, at 33.

In between loads, Weicks noticed Lozano standing at the entrance to the paint booth. Lozano told Weicks that Rubio wanted to speak with him. Tr. 401:5—402:23; ALJD, at 33. All agree that Weicks, Rubio, Lozano and Zelaya met at the wash line. ALJD, at 33.

Weicks testified that at this meeting, Rubio asked him, "what happened?" Tr. 404:18. Weicks testified that he "explained to him about the waste bin. I said, Luis, the waste bin is dirty, and I just kept returning it. I said, when I return it, Miguel cussing and everything, so I just left it." Tr. 404:18-20. Weicks testified that he specifically told Rubio that Lozano called him a "motherfucker." Tr. 405:12. Rubio asked Weicks why Weicks did not explain to Lozano why he was returning the dirty bin to the wash line. Tr. 405:18-20. It was in this context that Weicks stated: "I don't want to talk to him; he's below me." Tr. 405:22-23. Weicks testified that in saying this, he was responding to Lozano's calling him names and cussing at him, and that saying that "he's below me" referred to the fact that he did not want

to get into an altercation with Lozano, but wanted to go to management to resolve the dispute:

Q: What did you mean [by] that statement?

A: Because due to the fact that Miguel was cussing and I just kept ignoring him. . . . That's what I mean by like I don't want to talk to him. And I specifically told Luis, I'll go to management.

Tr. 405:25—406:8.

Rubio, by contrast, testified that during the meeting, Weicks said that Lozano and Zelaya were “beneath him” and that he refused to communicate them during the course of his work, saying that he would only speak with management. Tr. 1513:7-9.

Athens witness Julio Portes supplied testimony that corroborated Weicks' version of what happened, but the ALJ did not cite this testimony or acknowledge that it supported Weick's version of events. Portes was another bin painter at the facility. He testified that on April 17, he “saw the commotion that they were having on the wash bay side.” Tr. 1478:14-15. He testified, “I saw Damian, and Miguel [Lozano], and Nelson [Zelaya] pointing at each other and just bickering.” Tr. 1478:17-18. He also testified that Lozano and Zelaya were upset. Tr. 1478:21-22. Notably, Portes testified that this was *not* the meeting at which Lead Luis Rubio was present, and, in fact, that Rubio was not present when this altercation occurred. Tr. 1485:19-21. In other words, Portes testified—contrary to Rubio and consistent with Weicks—that Weicks, Lozano and Zelaya had a verbal altercation at the bin-wash area.

HR Manager Lupe Ramirez Guerrero testified that she interviewed Lozano and Zelaya about the incident, Tr. 1603-1608, but Athens did not call Lozano or Zelaya at the hearing and did not obtain any written statement at the time it disciplined Weicks.

After Rubio's meeting, Rubio, and HR Manager Guerrero decided to discipline Weicks for stating that Lozano and Zelaya were “below him.” ALJD, at 34. HR Manager Guerrero and the facility's general manager, Enrique Gonzalez, held a

disciplinary meeting with Weicks. ALJD, at 34. Weicks testified that at this meeting, he told the managers that he had had to bring the bin back four times and that Lozano had cussed at him, and he explained his “below him” comment:

I explained to him the waste bin was dirty, and I explained to him that I went over to our lead, Luis Rubio, and I explained, there’s going to be an issue with the bin. Next, we said, well, what happened with you? . . . I told him, I told Miguel Lozano, I said, I don’t want to talk to you. You’re below me.

Tr. 410:8-14. Weicks testified that GM Gonzalez stopped him at that point and said, “that’s where I’m having a problem with you.” Tr. 411:1-2. Weicks testified that Gonzalez said that Weicks could “not use words like that at this facility.” Tr. 411:6.

HR Manager Guerrero testified, by contrast, that Weicks had not provided any explanation for why he would say that Lozano and Zeleya were beneath him. Tr. 1612:1-5; Tr. 1678-1679. Athens issued Weicks a written warning saying that he had created a “hostile work environment” by “stat[ing] that several employees were beneath him and he only talks to management.” ALJD, at 34.

B. Credibility Determinations

The ALJ made two unsustainable credibility determinations. First, the ALJ concluded that former employee Brendan Farris was not credible (and that HR Manager Guerrero was) for two, unsustainable reasons.⁵ First, the ALJ pointed out that Athens HR Manager Guerrero disputed Farris’s account. ALJD, at 35. But it is always the case when a credibility determination must be made that there are conflicting stories of what occurred. The fact that Guerrero had differing testimony is not a rational basis for *discounting* Farris’s testimony, it is the reason that the ALJ had to make a credibility determination in the first place.

Next, the ALJ stated that Farris’s testimony was not corroborated by any other direct or indirect evidence. ALJD, at 35. But Guerrero’s testimony was not

⁵ Again, the ALJ did not base his credibility determination on demeanor, only on facts discernable from the record.

corroborated by any direct or indirect evidence either. The ALJ discredited Farris's testimony because, he claimed, Farris had a "prior friendship" with Weicks. ALJD, at 35. But that characterization does not accurately reflect the record, in which Farris testified only that he "sometimes" had lunch with Weicks:

Q: You guys would have lunch together and hang out together?

A: Sometimes when it—when we—when we had lunch at the same time, we'd talk for a little bit. But normally, he spends his lunches talking to his wife, and I would spend mine talking to my girlfriend. But sometimes, yeah.

Tr. 603:7-11. Farris stated that he was closer to Weicks than "most" of the others in the yard, but there was no testimony that he and Weicks were friends outside of work. In fact, Farris testified under subpoena, from another state. The fact that he was "friendly" with Weicks at work was no basis for discrediting his testimony.

The ALJ also discredited Farris's testimony based on the fact that he had been discharged by Athens. ALJD, at 35. But the ALJ cited no precedent for the Board basing a credibility determination on the fact that a witness had been discharged by the company he was testifying against. If that were Board doctrine, then § 8(a)(3) discriminatees would always begin with their testimony discredited. Nor did the ALJ consider whether HR Guerrero, whose testimony he credited that she had not asked Farris about Weick's union activities, was "disinterested." Obviously, because she was being accused of going something that violates the law, Guerrero was quite interested.

Farris's testimony was important because it demonstrated that Guerrero considered Weick to be causing a "hostile work environment" at the facility with his union activity, and Weick was ultimately disciplined for creating a "hostile work environment."

The ALJ also made reversible errors in crediting Rubio's and Guerrero's testimony about their interactions with Weick over Weick's. Rubio and Guerrero testified that Weick had never mentioned any provoking conduct by Lozano and Zelaya, and had said that they were "beneath him" without any other reference, as

a stand-alone statement that Weicks considered himself to be superior to them. But there were multiple problems with crediting this testimony over Weicks' testimony that the ALJ did not consider, much less resolve.

First, the ALJ failed to consider the corroboration for Weicks' version of events supplied by Athens witness Julio Portes, who testified that there had been a "commotion" between Weicks, Lozano, and Zelaya outside of the presence of Rubio, in which the three were pointing fingers at each other and "bickering." This testimony—by a witness hostile to the General Counsel's case—confirmed Weicks' testimony that there had been an altercation between him, Lozano, and Zelaya at the wash line, that Lozano had called him "this motherfucker," and that this provocation led to his statement that Lozano and Zelaya were "beneath him," that he did not want to become engaged in the altercation, but would go to management instead.

Second, the ALJ could not find any "apparent reason" for why Lozano would call Weicks "this motherfucker" when Weicks returned the dirty bin to the wash line. ALJD, at 33 n.64. But the ALJ failed to consider Portes' testimony that tensions in the yard had arisen after Weicks became a union supporter and member of the union bargaining committee. Tr. 1478:2-4 ("Once he became the rep for the Union, his whole attitude changed towards us. He became isolated and to himself."). Lozano's and Zelaya's resenting Weicks because of his role with the Union is consistent with Rubio's testimony that Weicks complaint to Rubio that Lozano and Zelaya were "management boys" who got preference and believed that *they* were better than everyone else. ALJD, at 33.

The ALJ's other reasons for discrediting Weicks' testimony that he was reacting to provocation from Lozano and Zelaya and that he communicated this to Rubio and Guerrero were also unsustainable and internally inconsistent. The ALJ discredited Weicks' testimony because "both Rubio and HR Manager [Guerrero], who subsequently interviewed Weicks, testified that he never mentioned that Lozano referred to him as a "motherfucker" or a "fool" or otherwise cursed at him when he questioned Weicks about what had happened. ALJD, at 33 n. 64. But in

the same footnote, the ALJ stated that profanity was common at the facility, and “[t]hus, even if Lozano did refer to Weicks as a ‘motherfucker’ or ‘fool’ when he dropped off the dirty bin, Weicks may very well not have mentioned it to Rubio or [Guerrero].” ALJD, at 33-34 n. 64. These contradictory statements cannot be the basis for a negative credibility finding.

The ALJ discredited Weicks’ testimony because Weicks testified that Lozano and Zelaya had never previously complained about him returning a bin. ALJD, at 33 n. 64. But Weicks did not merely return a bin once. He returned it at least twice (in Rubio’s telling) and *four times* in his own telling. Athens witness Julio Portes testified that he had *never* had to return a bin more than once, much less four times. Tr. 1483:25—1484:8. This fact makes it likely that Lozano and Zelaya were doing so on purpose, in order to aggravate Weicks.

Finally, the ALJ noted that Rubio and Guerrero had created written statements during the disciplinary process, while Weicks had not. ALJD, at 33 n.64. But this does not support a credibility finding. Rubio and Guerrero did not obtain any written statements from Lozano and Zelaya, even though their testimony about what happened was central to the disciplinary decision. In fact, Lozano refused to provide a written statement, concerned about how it might look to other employees. Tr. 1676:11-13. Guerrero admitted that Weicks did not provide a written statement during the disciplinary process and that there was nothing unusual about a disciplined employee not wanting to give their employer a written statement. Tr. 1680:11-16.

C. *Wright-Line* Analysis

Once Farris’s testimony and Weicks’ testimony that he told Rubio and Guerrero that he was responding to provocations from Lozano and Zelaya is properly credited, the *Wright Line* analysis is straightforward.

Rubio, GM Gonzalez, and HR Manager Guerrero were all aware of Weicks’ active union support and role on the bargaining committee. Guerrero demonstrated anti-union motivation by questioning Farris about Weicks’ union activity and whether it “created a hostile work environment.” And their decision to discipline

Weicks' for saying that Lozano and Zelaya were "beneath him" ignored the fact that the statement meant that it was "beneath him" to respond to their provocations and that he would go to management instead about them. The managers' anti-union animus is also demonstrated by the fact that Weicks alone was disciplined, while Lozano and Zelaya—who had taunted Weicks—were not. Such disparate treatment is strong evidence of anti-union animus.

Finally, when Farris and Weicks' testimony is credited, it becomes clear that Rubio's and Guerrero's justifications for the discipline were pretextual and that there was no basis at all for disciplining him.

CONCLUSION

For the foregoing reasons, the ALJ's decision was flawed and the General Counsel's allegations of unlawful activity described in this brief should have been sustained.

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Respectfully submitted,



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