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

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

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

18  
19 **RESPONDENT APEX LINEN SERVICE INC.’S BRIEF IN SUPPORT OF**  
20 **EXCEPTIONS TO JOHN T. GIANNOPOULOS’ DECISION**

21 Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations  
22 Board (“Board”), Respondent Apex Linen Service LLC, successor to Apex Linen Service Inc.  
23 (“Apex”) submits its Brief in support of Apex’s Exceptions to Administrative Law Judge (the  
24 “ALJ”) John T. Giannopoulos’ decision (the “ALJ Decision”).  
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1 **I. STATEMENT OF THE CASE**

2 **A. Procedural Background**

3 Based on charges filed by the International Union of Operating Engineers, Local 501  
4 (“Union”) alleging violations of Section 8(a)(1), (3), (4) and (5) of the National Labor Relations  
5 Act (the “Act”) and the Third Consolidated Complaint filed by the Regional Director on February  
6 8, 2019 and Amendment filed March 29, 2019, the trial on this matter was heard before the ALJ  
7 over a seven-day period starting on April 16, 2019 and concluding May 31, 2019. The ALJ  
8 concluded Apex violated Section 8(a)(1), (3), (4) and (5) of the Act.  
9

10 **B. Statement of Facts**

11 **1. Apex, the Engineers and the Union**

12 Apex is a commercial laundry company that cleans sheets, towels, uniforms and other linen  
13 for hotels, casinos and restaurants. TR, p. 23, l. 25; p. 24, ll. 1-5; p. 231, ll. 3-9.<sup>1</sup> Apex began  
14 operations in August 2011. TR, p. 461, ll. 13-17. Apex’s Las Vegas plant is approximately  
15 100,000 square feet. TR, 230, ll. 22-25; p. 231, ll. 1-2. At the time of the hearing, Apex had  
16 approximately 350 employees. TR, p. 403, ll. 9-11. Apex employs an engineering department to  
17 maintain the machines and equipment in its facility. TR, p. 24, ll. 6-10. At the time of hearing  
18 there were 14 engineers, up from 10 engineers in March 2018. TR, p. 60, ll. 19-25; p. 61, l. 1.  
19

20 On February 6, 2017, a representation election was held among Apex’s engineer employees  
21 (“the Unit”)<sup>2</sup>, and on February 15, 2017, the International Union of Operating Engineers, Local  
22

23  
24 \_\_\_\_\_  
<sup>1</sup> Transcript page and line references will be TR, p. \_\_, l. \_\_. General Counsel’s and  
Respondent’s Exhibits will be GCX \_\_ and RX \_\_, respectively.

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

1 501, AFL-CIO (“Union”) was certified as the exclusive collective-bargaining representative of the  
2 Unit. (Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing  
3 (“Third Consolidated Complaint”), ¶ 8(b); Apex’s Amended Answer to Order Further  
4 Consolidating Cases, Third Consolidated Complaint and Notice of Hearing (“Amended Answer  
5 to Third Consolidated Complaint”) at ¶ 8(b)).

## 6 **2. Prior NLRB Hearing and 10(j) Petition**

7  
8 Apex and the Union’s history has been one of challenges. Several days after the February  
9 6, 2017 election, the Union filed fourteen separate charges against Apex throughout 2017, all  
10 alleging a plethora of unfair labor practices. Later that year, the General Counsel (“GC”) and Apex  
11 litigated those allegations in a NLRB hearing before ALJ Ariel Sotolongo (the “2017 Case”).<sup>3</sup> The  
12 allegations in the 2017 Case encompassed a wide-range of issues, including Apex’s 2017  
13 discharges of employees Adam Arellano and Joseph Servin and layoff of employees Charles  
14 Walker. Proceedings in the 2017 Case concluded on December 6, 2017 and the parties submitted  
15 their post-hearing briefs in January 2018.  
16

17 On November 21, 2017, after proceedings had commenced in the 2017 Case, the NLRB  
18 Regional Director for Region 28, Cornele A. Overstreet, filed a Petition for Preliminary Injunction  
19 against Apex pursuant to 29 U.S.C. § 160(j) (“10(j)”) in the United States District Court District  
20 of Nevada. (ECF No. 1 filed in *Overstreet v. Apex Linen Service Inc.*, Case No. 2:17-cv-02923-  
21 APG-CWH<sup>4</sup>). Apex filed its Response to the Petition on December 5, 2017. (ECF No. 11). After  
22 hearing held on January 5, 2018, District Court Judge Andrew P. Gordon entered an Order  
23 Granting in Part Petition for Temporary Injunction (“10(j) Order”) on February 12, 2018. GCX 4.  
24

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

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

1 The 10(j) Order required Apex to, among other things, offer reinstatement to Arellano, Servin and  
2 Walker. GCX 4, p. 27, ll. 25-27; p. 28, ll. 1-3. On February 22, 2018, pursuant to the 10(j) Order,  
3 Apex offered reinstatement to Arellano, Servin and Walker. GCX 35; GCX 40; TR, p. 1166, ll.  
4 13-20.

5 On June 6, 2018, ALJ Sotolongo entered his Decision. While Apex prevailed on several  
6 of the allegations, ALJ Sotolongo found the discharges of Arellano, Servin and Walker were  
7 unlawful, and ordered Apex to reinstate them. On July 23, 2018, the Board adopted ALJ  
8 Sotolongo's findings and conclusions as set forth in the Decision. The 10(j) Order then dissolved  
9 pursuant to the operation of law. (*See also* ECF No. 55, vacating the 10(j) Order).  
10

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

### 18 **3. The Collective Bargaining Agreement (“CBA”)**

19 Apex and the Union entered into a CBA on or about July 20, 2018. CGX 3. Union  
20 Business Representative, Charles “Ed” Martin (“Ed”),<sup>5</sup> was the Union's primary negotiator and  
21 provided the first draft of the CBA. TR, p. 511, ll. 5-13. The draft CBA was typical of the contracts  
22 the Union had in place with other employers. TR, p. 511, ll. 14-17. Initially, Apex Chief Operating  
23 Officer, Glenn “Marty” Martin (“Marty”) was Apex's primary negotiator for the CBA. TR, p.  
24 422, ll. 9-15; p. 512, ll. 18-25. Ed and Marty began having substantive discussions regarding the  
25

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26  
27 <sup>5</sup> Ed Martin and Glenn Edward “Marty” Martin will be referred to by their first names due  
28 to the coincidence of having the same last name.

1 CBA in May 2017. TR, p. 512, ll. 14-17. Joe Dramise, Apex’s president, was not involved in  
2 negotiations in May 2017. TR, p. 512, ll. 21-23.

3 Several weeks before Apex and the Union concluded their negotiations and signed the  
4 CBA, Dramise stepped in and replaced Marty as Apex’s lead negotiator. TR, p. 458, ll. 14-17.  
5 Dramise made the decision to assume CBA negotiations on Apex’s behalf because he was  
6 frustrated with how long negotiations were taking. TR, p. 459, ll. 1-11; TR, p. 358, ll. 24-25; p.  
7 359, ll. 1-8. Also, Dramise was concerned because Apex was experiencing problems and  
8 disharmony among its engineers. TR, p. 459, ll. 15-25; p. 460, ll. 1-12. Dramise hoped that having  
9 a CBA in place “would eliminate a lot of the confusion that we were having and problems that we  
10 were having in our department at that point in time.” TR, p. 460, ll. 9-11. Dramise and Marty had  
11 many conversations about Dramise’s desire for a “fresh start” with the Union once the CBA was  
12 signed. TR, p. 370, ll. 5-9.

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

25 Dramise hoped that entering into the CBA would allow for a fresh start between Apex and  
26 the Union by resolving the disharmony among the engineers and by establishing a framework for  
27 the relationship going forward. TR, p. 459, ll. 15-25; p. 460, ll. 1-12.

28

1 The parties ultimately reached an agreement and executed the CBA on or about July 20,  
2 2018. GCX 3. The final CBA was largely drafted by the Union. TR, p. 512, ll. 3-7. The Union  
3 intended the CBA to be a complete agreement which governed the relationship between the Union  
4 and Apex. TR, p. 518, ll. 6-13; p. 519, ll. 12-18.

5 The following CBA provisions are germane to this case:

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

7 Like most collective bargaining agreements, the CBA contained an integration or “zipper”  
8 clause, stating that it was a complete agreement by the parties regarding all matter subject to  
9 negotiation:  
10

11 WHEREAS, the parties have, by negotiation and collective bargaining, **reached**  
12 **complete agreement on wages, hours of work, working conditions and other**  
13 **related, negotiable subjects to be incorporated into a new labor agreement**  
14 **which shall supersede all previous verbal or written agreements applicable to**  
15 **the employees in the bargaining unit**, defined herein which may have existed  
16 between the Employer and the union or between the predecessor of the Employer,  
17 if any, and the Union.

18 GCX 3 at p. 1 (emphasis added).

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

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

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

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

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

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

///

12.01 Rights to Manage.

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

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

Any grievance over whether the action of the Employer is contrary to the terms of this Agreement may be taken up under the provisions of Article 14.

CGX 3, pp. 26-27 (emphasis added).

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

The CBA provides that Apex "may establish and enforce reasonable rules, policies and procedures applicable to employees, provided that such rules, policies and procedures do not conflict with the provisions of this Agreement." CGX 3, p. 27. Apex maintains an employee handbook ("Handbook") which sets forth its workplace rules. RX 3. Section 5-1 of the Handbook

1 governs workplace conduct. RX 3, pp. APEX\_010355-56. While there have been updates to the  
2 Handbook over the years, there was no dispute that the one at RX 3 was the version relevant to  
3 these proceedings. Some of the workplace conduct rules applicable to this case include:

- 4 5. Violation of safety rules and policies.
- 5 8. Insubordination or disobedience of a lawful management directive.
- 6 14. Willful or careless destruction or damage to Company assets or to the  
7 equipment or possessions of another employee.
- 8 15. Wasting work materials.
- 9 20. Unsatisfactory job performance.
- 10 21. Any other violation of company policy.

11  
12 RX 3, p. APEX\_010356.

13 Per the CBA, “it shall be the responsibility of the employee to be familiar with such rules,  
14 policies and procedures.” CGX 3, p. 27.

15  
16 The Union has not contested the applicability of the Employee Handbook and is not  
17 claiming that the CBA somehow supersedes it. TR, p. 536, ll. 3 – 6. The legality of the Handbook  
18 is not in dispute. The GC did not bring any allegations pertaining to the Handbook in this case.  
19 (*See generally*, Third Consolidated Complaint; *see also*, TR, p. 935, ll. 10-17). For instance, the  
20 GC did not allege the Handbook is vague or unenforceable. It is critical to note that both the GC  
21 and the Union have had a copy of the Handbook for years. In fact, the Handbook was the subject  
22 of the 2017 Case. Although the GC had initially brought voluminous allegations regarding the  
23 Handbook in the 2017 Case, all but one<sup>6</sup> were withdrawn following the NLRB’s decision in *Boeing*  
24 *Co.*, 365 NLRB No. 154 (2017). In any event, there are no allegations regarding the validity or  
25

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26  
27 <sup>6</sup> The allegation pertaining to Section 5-4 (“Use of Social Media”) of the Handbook was  
28 not withdrawn. This section does not relate to any allegation in this case.

1 legality of the Handbook before the Court in this case.

2 **(iv). Employees' Duty to Comply with Safety Rules**

3 The CBA requires employees to follow Apex's safety rules and allows Apex to discipline  
4 employees, up to and including discharge, for safety rule violations:

5  
6 29.02 Employees are required to comply with all safety rules, policies and  
7 practices established by the Employer from time to time, and to cooperate with the  
8 Employer in the enforcement of safety measures. Violations of any such rules,  
policies and procedures shall be grounds for disciplinary action up to and including  
discharge.

9  
10 CGX 3, p. 40.

11 **(v). Apex's Right to Issue Discipline and Discharge  
Employees**

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

15 **The Employer will follow the principles of progressive discipline.** Except for  
16 reasons other than dishonesty; drunkenness; drinking on duty; using or being under  
17 the influence of a controlled substance; willful misconduct; or participation in a  
18 proven, deliberate slowdown, work stoppage or strike in violation of this  
19 Agreement; refusing to submit to testing for drug and alcohol pursuant to Section  
20 13.04; unlawful possession, sale or use of a controlled substance at any time on the  
21 Employer's premises; or **abusive, serious, improper behavior** or discourtesy  
22 toward a customer, co-worker; **the Employer will first give the employee a  
written warning notice of his/her unsatisfactory conduct or performance** and  
23 allow the employee a reasonable opportunity to correct any deficiency, **provided  
the parties understand that infractions of an extreme nature may be subject  
to the employee receiving a final written notice.** Disciplinary notices shall  
become null and void six (6) months after the date of issue. Final disciplinary  
notices shall become null and void twelve (12) months after the date of issue.

24 GCX 3, p. 28 (emphasis added).

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\* \* \*

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

A. **Because of the CBA.**

Q. Can you be more specific?

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

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

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

**(ii). Charlie Walker**

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

**II. STATEMENT OF QUESTIONS**

1. Did the ALJ err in failing to consider probative and uncontroverted evidence of Servin's bias toward Apex?

**Exception: 1**

2. Did the ALJ err in finding that Apex subjected Arellano and Servin to disparate treatment by because it did not issue discipline to other employees for similar offenses?

**Exceptions: 2, 3, 4, 6, 7, 8, 10, 11, 13, and 16**

3. Did the ALJ err in finding that Apex held its engineers to a higher standard and more strictly enforced its work rules upon executing the CBA?

1           **Exceptions:** 9, 12, 14 and 15

2           4.       Did the ALJ err by finding there is no evidence Marsh informed any employees  
3 about the “safe zone” on Apex’s roof?

4           **Exception:** 5

5       **III.   LEGAL STANDARDS**

6           **A.     The *Wright Line* Analysis**

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

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

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

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

22 The Supreme Court of the United States recently reaffirmed that collective bargaining  
23 agreements must be interpreted “according to ordinary principles of contract law,” rejecting the  
24 “*Yard-Man*” standard, which improperly gave perpetual effect to silent durational clauses. *CNH*  
25 *Indus. N.V. v. Reese*, 583 U.S. \_\_\_, 138 S.Ct. 761, 764 (2018) (quoting *M&G Polymers USA, LLC*  
26 *v. Tackett*, 574 U.S. \_\_\_, 135 S.Ct. 926, 190 (2015)). Under this approach, contract terms should  
27  
28

1 be given their ordinary meaning, and when the terms are clear, the intent of the parties must be  
2 ascertained from the contract itself. *E.g. Klamath Water Users Protective Ass'n v. Patterson*, 204  
3 F.3d 1206, 1210 (9th Cir.1999). “Whenever possible, the plain language of the contract should be  
4 considered first.” *Id.* (citations omitted).

#### 5 **IV. ARGUMENT**

##### 6 **A. The ALJ Erred by Ignoring Probative, Uncontroverted Evidence of Servin’s** 7 **Bias**

8 The ALJ may not ignore probative evidence. *See e.g., Buchanan Marine, L.P.*, 363 NLRB  
9 No. 58 (2015) (dissenting opinion) (“the Board should not disregard unrebutted evidence merely  
10 because it could have been stronger, more detailed, or supported by more specific examples”)  
11 (internal quotations and citations omitted). An ALJ’s credibility determinations can be overturned  
12 under extraordinary circumstances, including “a clear showing of bias by the ALJ, *utter disregard*  
13 *for uncontroverted sworn testimony*, or acceptance of testimony which on its face is incredible.”  
14 *Central Transport, Inc. v. NLRB*, 997 F.2d at 1190 (emphasis added); *see also, Amalgamated*  
15 *Clothing and Textile Workers Union, AFL-CIO, CLC v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir.  
16 1984) (same); *see also, Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 219 (7th Cir. 1992)  
17 (credibility determinations may be overturned “where the Board utterly disregards sworn  
18 testimony.”)

19  
20  
21 The Supreme Court of the United States has instructed that the Board “is not free to  
22 prescribe what inferences from the evidence it will accept and reject, but must draw all those  
23 inferences that the evidence fairly demands.” *Allentown Mack Sales and Service, Inc. v. NLRB*,  
24 522 U.S. 359, 378-79, 118 S.Ct. 818 (1998).

25 For example, in *Spentonbush/Red Star Companies v. NLRB*, 106 F.3d 484 (2nd Cir. 1997)  
26 (“*Spentonbush*”), an employer tugboat and barge company appealed a Board decision finding it  
27 violated the Act by excluding its boat captains from the bargaining unit. *Id.* at 486-87. The  
28

1 employer contended captains were properly excluded because they were supervisors. *Id.* At the  
2 ALJ hearing, the employer submitted evidence outlining its captains' duties and authority,  
3 evidence that had the tendency to establish that the employer's boat captains were supervisors and  
4 thus properly excluded from the bargaining unit. *Id.* Despite this evidence, the ALJ assigned:

5  
6 no probative weight to the many and varied conclusory materials proffered by [the  
7 employer], including personnel folder notations, otherwise unsupported, that some  
8 captains had disciplined crew members or recommended discipline, and including  
9 operation manual provisions, which apparently went unread and which stated that  
10 its tugboat captains had full responsibility over the other crew members.

11 *Id.* at 490 (quoting ALJ decision, 319 NLRB 988, 1000 (1995)).

12 On appeal, the Second Circuit admonished the ALJ for failing to consider this highly  
13 relevant and probative evidence:

14 This evidence was probative and should have been considered. *The ALJ's*  
15 *disregard of it is another example of the practice followed all too often by the*  
16 *Board of rejecting evidence that does not support the Board's preferred result.*  
17 Moreover, because the exposition of the captains' authority contained in the  
18 company's Operation Manual simply restated the duties and prerogatives that  
19 existed under the law, the ALJ's statement that he disregarded the Manual is  
20 meaningless unless he also disregarded the law that it summarized.

21 *Spentonbush*, 106 F.3d at 490. (emphasis added). In short, an ALJ cannot ignore uncontroverted,  
22 probative evidence.

23 Here, the ALJ failed to consider Servin's bias towards Apex. Servin's bias is clearly  
24 demonstrated by his promise promised "to make [Apex's] lives hell for the pure pleasure of it lol."  
25 RX 57 (first page of text messages after "Exhibit 1" marker). It is uncontroverted that Servin  
26 authored this text. In fact, he admitted it. TR, p. 1143, ll. 3-7. Despite this, the ALJ decision does  
27 not even mention Servin's text or reference RX 57. The ALJ dedicated an entire section of the  
28 decision to the credibility of Sharron and Marsh (ALJ Decision at pp. 55-56) but did not make any  
findings regarding Servin's credibility, despite his written vow to harm Apex. The ALJ's decisions

1 as to credibility were one-sided and he ignored any credibility determinations that would  
2 necessarily have to sway in favor of Apex. The ALJ therefore erred by failing to consider  
3 probative, uncontroverted evidence.

4 **B. The ALJ Erred by Finding that Apex Subjected Arellano and Servin to**  
5 **Disparate Treatment Because Other Employees Were Not Subject to Written**  
6 **Discipline for Similar Offenses**

7 As set forth in detail above, the *Wright Line* standard provides employer can “*and should*  
8 apply their usual rules and disciplinary standards to a union activist just as they would to any other  
9 employee.” *Wright Line*, 662 F.2d at 901 (emphasis added). The employer need only show it “had  
10 a reasonable belief that the employee committed the offense, and that it acted on the belief when  
11 it discharged [the employee].” *SBM Site Services, LLC*, 367 NLRB No. 147 at \*3.

12 With respect to the discipline issued to Arellano and Servin, the ALJ repeatedly found that  
13 Apex did not meet its burden under *Wright Line*. The ALJ found the discipline would not have  
14 been issued but-for that Arellano and Servin engaged in protective activity. (*E.g.*, ALJ Decision  
15 at p. 39, Ins. 19-22 regarding Arellano’s discipline for failing to properly use the Weightanka  
16 equipment). Specifically, the ALJ predicated his conclusions by finding that Apex failed to  
17 produce evidence that other employees were disciplined for similar offenses. (ALJ Decision at p.  
18 31, Ins. 28-31 (regarding Arellano’s discipline for unnecessarily ordering parts); p. 32, Ins. 1-3 and  
19 p. 32, Ins. 4-5 (regarding Arellano’s discipline for failing to correctly diagnose and repair the  
20 “bagger motor”); and p. 39, Ins. 8-13 (regarding Arellano’s safety violation)). In other words, the  
21 ALJ focused on how Apex treated others rather than on whether Apex had a reasonable belief the  
22 employees acted inappropriately.<sup>7</sup>  
23  
24  
25

26 \_\_\_\_\_  
27 <sup>7</sup> Indeed, for Arellano’s safety violation, the ALJ found “[i]t is undisputed that Arellano  
28 was working... without being anchored to a Weightanka. *Because of this, Respondent could have*  
*validly disciplined Arellano.*” (ALJ Decision at p. 37, Ins. 36-38) (emphasis added).

1           The problem with the ALJ’s approach is that it ignores the fact that the CBA was relatively  
2 new having been executed on July 20, 2018. CGX 3. The CBA was a complete agreement that  
3 superseded all previous agreements. *Id.* at p. 1 (“witnesseth” paragraph). The CBA established a  
4 progressive discipline which required disciplinary actions to be in writing. *Id.* at p. 28 (Section  
5 13.01). This section also provided that “disciplinary notices shall become null and void six (6)  
6 months after the date of issue.” *Id.* Therefore, pursuant to the CBA, which Apex and the Union  
7 bargained for in good faith and agreed to, all discipline from July 20, 2018 on had to be in writing.  
8 The ALJ is punishing Apex for following the provisions of the CBA.  
9

10           Further, Apex presented evidence that it issued written discipline to other engineers. Apex  
11 administered written discipline to Joe Tuttle for overfilling a salt tank. RX 39 (*see also* TR, p.  
12 186, Ins. 21-23). Another engineer, Nestor Flores, was issued written discipline for destroying a  
13 locked cash box. (TR, p. 184, Ins. 16-18, p. 186, Ins. 14-20). This negates a finding that Apex  
14 singled-out Arellano and Servin. Similarly, there is no evidence that engineer Charles Walker was  
15 ever subjected to discipline despite the ALJ’s finding that Walker “engaged in activities in support  
16 of the Union” along with Arellano and Servin. (ALJ Decision at p. 7, Ins. 20-21).  
17

18           There is simply an insufficient basis for the ALJ to conclude Apex’s discipline to Arellano  
19 and Servin was unlawful based on disparate treatment. The Board should overrule the ALJ’s  
20 findings with respect to the written discipline issued to Arellano and Servin. The Board should  
21 also overrule the ALJ’s findings that Arellano and Servin’s discharges were unlawful as Apex  
22 relied on the discipline in making its decision to discharge the employees.  
23

24           **C.       The ALJ Erred in Finding that Apex Held its Engineers to a Higher Standard  
25                   Once the CBA Was Signed and More Stringently Enforced its Work Rules**

26           The ALJ erroneously concluded that Apex somehow treated its engineers more harshly  
27 upon execution of the CBA. (*E.g.*, ALJ Decision at p. 61, Ins. 23-26; p. 67, Ins. 11-13; p. 72, Ins.  
28 43-45; and p. 73, Ins. 30-33). Similar to the above section, the ALJ is casting aside the CBA which

1 Apex and the Union agreed to. In doing so, the ALJ is not only ignoring the plain language of the  
2 CBA<sup>8</sup>, but also the intent of the parties. The Union’s Business Manager testified the Union  
3 intended to be a complete agreement which governed the relationship between the Union and  
4 Apex. TR, p. 518, ll. 6-13; p. 519, ll. 12-18. Apex’s CEO testified Apex intended the CBA would  
5 allow for a fresh start between Apex and the Union and establish a framework for the relationship  
6 going forward. TR, p. 459, ll. 15-25; p. 460, ll. 1-12.

7  
8 Under the CBA, Apex enjoyed a broad right to, in its “sole and exclusive judgment and  
9 discretion... discipline employees and determine the level of discipline...” CGX 3, p. 26. The  
10 CBA also set forth the standard by which Apex was allowed to discipline employees, which  
11 specifically provided all discipline needed to be in writing. CGX 3 at p. 28. The ALJ is improperly  
12 assuming that because Apex started issuing written discipline after the execution of the CBA, that  
13 Apex started holding its engineers to a higher standard. The ALJ’s ruling therefore holds Apex to  
14 a standard far beyond the plain language of the CBA, even though the ALJ did not find the CBA  
15 was ambiguous. This is improper as contract terms should be given their ordinary meaning, and  
16 when the terms are clear, the intent of the parties must be ascertained from the contract itself.  
17 *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d at 1210. Apex began issuing written  
18 discipline to its engineers because that is what the CBA required.

19  
20 Further, the legality of Apex’s Employee Handbook was not in dispute in this case. TR, p.  
21 536, ll. 3 – 6. The operative Third Consolidated Complaint did not assert any allegations regarding  
22 the handbook.

23  
24 There is simply no evidence that Apex acted inconsistent with or beyond the CBA or its  
25 Employee Handbook. Accordingly, the Board should overrule the ALJ’s findings with respect to  
26

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27 <sup>8</sup> The CBA must be interpreted “according to ordinary principles of contract law...” *CNH*  
28 *Indus. N.V. v. Reese*, 583 U.S. at 138.

1 the written discipline issued to Arellano and Servin. The Board should also overrule the ALJ's  
2 findings that Arellano and Servin's discharges were unlawful as Apex relied on the discipline in  
3 making its decision to discharge the employees.

4 **D. The ALJ Erred by Finding Marsh Failed to Notify Employees About the "Safe**  
5 **Zone" on Apex's Roof**

6 The ALJ ignored the preponderance of the evidence when he found "there is no evidence  
7 that Marsh informed any of the employees about a 'safe zone.'" (ALJ Decision at p. 32, lns. 37-  
8 38). The preponderance of the evidence shows that Marsh provided training to Apex engineers on  
9 how to use the Weightanka which included OSHA-required items for fall protection. TR, p. 284,  
10 ll. 18-20. The training also involved how to set up and use the Weightanka system. TR, p. 284,  
11 ll. 18-24. Marsh provided the Weightanka instruction manual to engineers as part of the training.  
12 TR, p. 144, ll. 18-20; p. 285, ll. 10-13. CGX 15. Arellano attended and completed the Weightanka  
13 training on August 1, 2018, as evidenced by the fact that he signed the training log. RX 7 at p. 3;  
14 TR, p. 958, ll. 18-25; p. 959, ll. 1-9 (Arellano admitting he attended the training). While the  
15 training log does not specifically reference a "safe zone," it does state that the training covered:  
16

- 17 • Nature of Fall Hazards;
- 18 • Procedures to Minimize Hazards;
- 19 • Setup and Use of Fall Protection Systems;
- 20 • Correct Use of Fall Systems and Equipment (Weightanka, Harness, Lanyard); and
- 21 • Equipment Hazards.

22  
23 RX 7 at p. APEX\_010244. Accordingly, the preponderance of the evidence supports that Marsh  
24 covered the "safe zone" in this comprehensive training. The ALJ erroneously concluded that  
25 because Marsh did not specifically testify that he told Arellano about the safe zone that "there is  
26  
27  
28

1 no evidence that Marsh informed any of the employees about a ‘safe zone.’” This conclusion  
2 ignores the detailed training log presented in the case.

3 Additionally, neither the CGC nor Union presented any evidence contradicting that the  
4 training did not consist of the topics listed in the log. They may have disliked *how* the information  
5 was presented. It is also uncontroverted, though, that Arellano did not ask any questions during  
6 the training despite having the opportunity to do so. TR, p. 285, ll. 22-25; TR, p. 959, ll. 13-17.

7  
8 The Board must overrule the ALJ’s conclusion regarding the “safe zone” that ignores this  
9 clear preponderance of evidence.

10 **V. CONCLUSION**

11 For the reasons stated above, Apex requests that the Board refuse to adopt the ALJ’s  
12 findings and recommended Order, and instead dismiss the alleged unfair labor practices.

13 Dated this 25th day of June 2020.

14  
15 NAYLOR & BRASTER

16  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of NAYLOR & BRASTER and that on this 25th day of June 2020, I caused the document **RESPONDENT APEX LINEN SERVICE INC.’S BRIEF IN SUPPORT OF EXCEPTIONS TO JOHN T. GIANNOPOULOS’ DECISION** to be served through the NLRB E-Filing system and a true and correct copy was served by e-mail to:

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