

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

LHOIST NORTH AMERICA OF
ALABAMA, LLC, A SUBSIDIARY
OF LHOIST NORTH AMERICA,

Case No. 10-CA-221731

Respondent,

and

UNITED STEELWORKERS,

Charging Party.

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

A. OVERVIEW

On June 1, 2018, Lhoist employee and USW Local President Desilyn “Floyd” Avery participated by cell phone in an unemployment hearing for former Lhoist employee Willie May. Although Avery’s normal break time was from 9:00 a.m. to 9:15 a.m., he claims he started his break at 9:12 (meaning his break ended at 9:27) and then was on the phone for the hearing from 9:21 until 9:52, or 25 minutes past the end of his break. Despite the fact that Avery was already on a “Last Chance Agreement” for multiple violations of the attendance policy, Avery did not ask his supervisor for permission to take additional time off after his break, he did not tell his supervisor after the call that he had taken an additional 25 minute break, and he did not talk to his supervisor or otherwise take any action to correct his time card so that he did not get paid for the additional 25 minutes of time he did not work. These facts are not in dispute. Lhoist, consistent with its policies, terminated Avery for not seeking permission or telling his supervisor and for falsifying his time records (aka “stealing time”).

After a two-day hearing, ALJ Steckler concluded that Lhoist violated Sections 8(a)(1) and (3) of the Act by terminating Avery’s employment because Avery engaged in protected concerted and union activity and Lhoist harbored anti-union animus. The ALJ’s decision is flawed on multiple levels, but much of it stems from a complete misunderstanding of the law on credibility, evidence, and adverse inferences, among other things. For example, the ALJ begins her analysis of credibility with the most ridiculous and biased presumption: “I generally discredit the testimony of Respondent’s witnesses unless it is an admission against interest or corroborated by other reliable evidence.” O. 17:34-35. She then generally discredited much of Lhoist’s witnesses’ testimony on the basis that she considered Lhoist counsel’s questions leading because they were

capable of being answered “yes” or “no.” She also discredited testimony that was unrefuted without any basis in law or fact. These conclusions and others not only tainted the entire decision, but showed a clear bias in favor of the Union and General Counsel. In fact, as set forth in attached Ex. 1, the ALJ made countless conclusions or inferences that were in favor of the Union and against Lhoist. To paraphrase the D.C. Circuit’s finding in *Sutter East Bay Hospitals v. N.L.R.B.*, 687 F.3d 424, 437 (D.C. Cir. 2012), “the ALJ treated conflicting [and even non-conflicting] evidence here with an almost breathtaking lack of evenhandedness.” *Id.* at 437.

These conclusions formed the basis for the ALJ’s *Wright Line* analysis that missed the boat on almost every count. First, Floyd’s participation in the unemployment hearing was not protected activity because he lost the protection when he failed to return to work after the break and failed to get permission or subsequent approval for taking off 25 minutes during paid work time.

Second, there is no record evidence of union animus. The alleged animus identified by ALJ Steckler either was barred by the statute of limitations, was not substantiated by the record, was based on her misconstruing the record, or was based on her reliance on unlawful inferences regarding credibility.

Third, the record evidence does not support the finding that the alleged protected concerted or union activity was a substantial or motivating factor for terminating Avery. Among other things, ALJ Steckler relied on many red herrings such as claiming that Avery was terminated for violation of a cell phone policy (which she found did not exist because it was not in writing), holding that the investigation of Avery was too truncated (when the critical facts were admitted), finding that Lhoist gave shifting explanations for Avery’s termination (when they were always the same as the language found in the termination letter), and finding evidence of disparate treatment based on employees who were not similarly situated. There is simply no evidence that Avery was terminated

for anything other than taking off 25 minutes from work without permission and without correcting his time records.

Finally, even though Lhoist demonstrated that it would have taken the same action against Avery absent any protected activity, the ALJ failed to make a finding that the reasons provided by Lhoist for taking such action were a pretext for unlawful discrimination or retaliation.

Most astonishingly, the ALJ concluded that it didn't really matter that Avery took off for 25 minutes (with pay) because there was no evidence that this affected production, despite the fact that Avery admitted there is always work to do, he rushed back to his job when the call ended, and he worked two hours of overtime on that very day. This decision must be overruled and the case must be reassigned to another ALJ.

B. SUMMARY OF FACTS

1. Lhoist's Montevallo, Alabama Operations And Staffing

Lhoist operates two quarries and three limestone manufacturing plants in Alabama, one of which is located in Montevallo. Avery worked for Lhoist for 27 years at Montevallo and was a member of the Union for the entirety of his employment. Avery served as Vice-President for the last eight years of his employment and as Union Steward for approximately 15 years before that. He filled in as acting President in 2018. T. 34.¹ At the time of Avery's termination, he worked as a Slurry Operator at the Montevallo plant. T. 24.

Many of Avery's job duties related to making and loading slurry, such as mixing, sampling, handling and loading trucks with slurry. The process usually takes 4-6 hours, but does not require constant attention and is only done once or twice a week. T. 25-26. In keeping with the job

¹ Citations to the hearing transcript are denoted by T. __; the ALJ's Order is identified by O. __; J. __ refers to Joint Exhibits; R. __ refers to Respondent's Exhibits; G.C. __ refers to General Counsel's Exhibits.

descriptions' listed functions of "performs all other tasks not specifically indicated" and "other duties as assigned", Avery also operated the water truck every day and performed bagger work and other laborer work on a regular basis to fill the time when he is not actively mixing slurry. T. 24, 70, 121, 137-39; R. 11; G.C. 3. Although there is no water truck classification, employees drive the water truck every day unless it is raining and it runs all day during the summer months. T. 162. The baggers also regularly need help with their workload, which can be rough, hard work during the summer. T. 138.

Everyone agrees that there is always some type of work that can be performed at Lhoist, and specifically by Avery. T. 138, 403, 405. When he was not actively mixing slurry or loading a truck, Avery performed other tasks that needed to be completed as reflected in the Slurry Operator job descriptions. T. 24, 70, 121, 137-39. There was so much work that Avery regularly worked (and was paid for) overtime hours, incurring 91 hours and 15 minutes of overtime between April 1, 2018 and the date of his termination on June 11, 2018 (or a little more than 9 hours a week on average). T. 135-36, 405, 430-31, 433; R. 9. These facts are not in dispute even though Avery denied regularly working overtime. T. 143.

During the relevant time period, Stacey Barry was Lhoist's Senior Human Resources Director, East Region and Emily Berkes (now Kelly) reported to Barry and was the Senior Human Resources Manager, East Lime. T. 13-14. At the Montevallo plant, Terry Beam was Floyd Avery's direct supervisor and he reported to Production Manager Grant McCallum. T. 152-53, 240-41.

2. Lhoist's Attendance Policies And Union Leave Provisions

Lhoist's attendance policies require that all employees notify their supervisor of an absence as soon as possible or at least one (1) hour prior to the scheduled start time. R. 1. This policy covers unexpected absences that were not previously scheduled. This particular policy is a notice

requirement and is not a procedure for requesting time off. It also requires employees to be at work doing their job during their scheduled working hours:

Presence during your scheduled working hours is essential to Chemical Line's success. Chemical Line depends on each of us to report to work regularly as scheduled. You have the obligation to be prepared to start work at your scheduled starting time.

R. 1. "A tardy arrival, early departure or other shift interruption is considered one half occurrence."

R. 1. The policy is clear that *prescheduled* times away for work, including Union Leave, are not treated as an occurrence. R. 1.

Lhoist's Attendance and Punctuality Policy states "it is of utmost importance that Employees make every effort to be at work, on time, and to perform all scheduled work."

R. 5 at 16.² Avery admitted that the policy reflects Lhoist's expectations of its employees. T. 100.

In addition, a failure to report to work or properly report an absence is also considered a No Call/No Show. R. 5 at 16. The first No Call/No Show usually results in a Final Written Warning. R. 5. A second No Call/No Show may result in termination. R. 5 at 16. Avery testified that he was familiar with and understood the policy. T. 78-80.

The Time Reporting for Non-Exempt Employees Policy requires that all employees keep accurate records of their working hours. G.C. 8. "Time worked is all the time actually spent on the job performing assigned duties." R. 5 at 29. Avery acknowledged that employees should not be paid for personal business. T. 103. Most notably, **employees are required to "obtain their**

² Avery received and retained a copy of the Lhoist Employee Handbook. T. 97; R. 6. The handbook specifically states that it "applies to all employees of the Company, including any employee whose terms and conditions of employment are governed by a Collective Bargaining Agreement" to the extent the terms of the CBA do not conflict. R. 5 at 5. He inexplicably claims that Barry told him that it didn't apply to hourly employees, yet Avery was given a copy of the handbook, signed an acknowledgement, retained a copy and agreed that its contents reflected the Company's expectations. T. 98-104; R. 6. Barry denies that the Company ever took the position that the handbook did not apply to Avery. T. 307.

supervisor’s approval for any non-routine or unscheduled breaks as well as any leave.”

G.C. 8. The Policy further states:

Misrepresenting working hours or tampering with the time clock or other Employees’ time record are extremely serious offenses. Employees found to have engaged in any of these prohibited activities are subject to immediate discipline, up to and including termination of employment.

R. 5 at 29. Avery understood these requirements and agreed that misrepresenting working hours is a serious offense. T. 100-04. Along these same lines, Lhoist’s General Conduct and Safety Rules, of which Avery was aware, notes that falsification of company information or records is a severe offense. R. 7.

As set forth above, the attendance policy did not apply to approved Union leaves of absence. Union leave was addressed in Section 16.3 of the CBA. Prior to October 2017, Section 16.3 of the CBA provided:

Union Leave. Employees attending union conventions or **meetings** will be allowed leave of absence without pay provided that no more than five (5) total employees are absent at the time and provided one (1) weeks’ notice is given to the Company in advance of leave.

Employees on Union Leave will receive their regular pay for the period of the leave. The Company will be reimbursed by the Union for wages paid during Union Leave.

R. 10. (emphasis added). This provision was amended in October 2017 CBA to further identify specific types of meetings already covered by 16.3:

Union Leave. Employees attending union conventions or meetings, third step grievance meeting(s), arbitration hearing(s), and labor negotiations will be allowed unpaid leave of absence at the Company’s discretion and within the limitations of its operating needs and requirements, without pay provided that no more than five (5) total employees are absent at the time and the request for leave shall be in writing by either an international or local Union officer provided one (1) weeks’ notice is given to the Company in advance of leave. The Union will be responsible for paying these employees their wages for this union leave of absence.³

³ Strangely, the ALJ would not consider participation in any of these union activities to be protected concerted activity. O. 26:1-7.

As in years past, Avery was involved in contract negotiations in 2017. The parties reached impasse and the terms and conditions were implemented on October 30, 2017. Although the Union filed a charge alleging that the unilateral implementation was unlawful, the Region found no merit and the charge was withdrawn/dismissed. T. 76-78. *See also* Case No. 10-CA-213733. The parties subsequently reached an agreement and the current CBA took effect in 2019. T. 84.

This is a separate requirement for scheduling leave for Union business and is in addition to the general notice and attendance policies discussed above. This provision remains in the current CBA, which was negotiated and agreed to by the parties.

In contrast, Section 4.1(c) of the CBA provides for compensation by the Company for time lost when the Company calls a meeting to meet with employee(s) in accordance with Article 4, Union Committee and Meetings (which specifically excludes third step grievance meeting(s), arbitration hearing(s), union meeting(s) and conference(s), and labor negotiations). J. 3. This is exactly why over the years, Barry and Berkes would call Avery with questions or ask him to attend disciplinary meetings. These activities were initiated by the Company and the time spent engaging in these activities was paid by the Company.

3. Avery's Disciplinary History

Avery had a number of attendance problems beginning on January 3, 2017 when he was a No Call/No Show. He received a Final Written Warning for this offense advising him that a second No Call/No Show offense may result in termination of employment, which is in keeping with Lhoist's policies.⁴ J. 4; R. 1. Avery claimed that had thought that he was supposed to be off on that

⁴ Avery inexplicably claims that he thought that the possibility of termination only applied if the second offense occurred within one (1) year. T. 91. No Lhoist policy contains any such limiting language, nor did his Final Written Warning or Last Chance Agreement. J. 4, 5; T. 307-07. In addition, Lhoist's Performance Management policy specifically reserves the right for Lhoist to

day, but the request form clearly shows that he was to return to work on January 3. R. 12, 13. There is no indication in the Final Written Warning that it would only be in effect for one year.⁵ Avery signed the warning and did not file a grievance over it. J. 4; T. 91-92.

Despite this Final Written Warning and previous reminders⁶ that the CBA required one (1) week's notice for an employee missing work due to Union business, Avery again failed to notify the Company or his supervisor that he needed to be off of work to attend an arbitration on January 22, 2018, committing a second No Call/No Show offense. R. 2, 3, 4; T. 3, 92. Although Lhoist could have terminated Avery at that time for violating Lhoist's Attendance Policy yet again,⁷ the Company suspended him for one day and placed Avery on a Last Chance Agreement, which Avery signed and agreed to. J. 2. The Agreement specifically referenced Lhoist's Attendance Policy and Section 16.3.⁸ This Agreement remained in effect on June 1, 2018.⁹ J. 2.

Pursuant to the Last Chance Agreement, Avery agreed that he would abide by the policy requiring him to notify his supervisor if he needed to miss work "as soon as possible or at least one (1) hour prior to [his] scheduled start time" and that he would give the Company one week's

combine or skip steps in its general progressive discipline process. R. 5 at 22. The policies contain no indication that a No Call/No Show offense is expunged after one year.

⁵ As discussed in the argument in more detail, the ALJ incorrectly weighed testimony on this fact, among others, in her decision which contributed to the plethora of misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

⁶ Avery claims to have been actively involved in negotiations and claimed that the members did not like Section 16.3. This assertion is curious since he asked Berkes where the notice requirement was contained in the CBA. R. 3.

⁷ Even though Lhoist was flexible in its application of the policy here, the ALJ erroneously concluded Respondent did not show that it made exceptions. O. 26:21-22.

⁸ Avery testified that Barry told him that the unidentified "higher ups" wanted to terminate him at this time. Barry, the decision-maker then and for termination, believed that Avery deserved one more chance. T. 39-40.

⁹ Stipulations of fact are controlling and conclusive. *See U.S. v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 889 (D.C. Cir. 2010).

notice if he needed to be away from work to tend to Union business. J. 2, 5. Avery further agreed that a subsequent No Call/No Show violation would result in his immediate termination. He also agreed that a violation of **any** Company policies¹⁰, rules, or regulations, including those outlined in the General Conduct and Safety Rules and attendance policy within 12 months would also result in his termination. J. 5. In other words, and to be specific, he agreed that he would be terminated if he failed to obtain his supervisor's approval for any non-routine or unscheduled breaks or if he misrepresented his working time. G.C. 8; R. 5 at 29.

4. Events Leading To Avery's Suspension And Termination

On June 1, 2018, Avery was working in his regular job as a slurry operator. T. 24, 41. Although he was scheduled to take a break from 9:00 a.m. until 9:15 a.m., he claims that he did not begin his break on that day until 9:12 a.m. T. 44,114. This means that his break should have ended at 9:27 a.m.¹¹ T. 44, 129. However, at 9:21, Avery received a call from a Hearing Officer with the state unemployment office. T. 111. (The unemployment hearing was scheduled to begin at 9:15—conveniently, the precise time Avery decided to start his break.) R. 8 at 2.

At the outset of the hearing, before Avery was called at 9:21, the Hearing Officer asked the Claimant, former Lhoist employee Willie May, whether anyone else would be appearing with him. Claimant May responded: "It's supposed to been a Mr. Floyd. I gave him all the information, but I know he's at work now. He said he should be on, he should be on break at 9:15."¹² I gave him all

¹⁰ Additionally, Lhoist had an unwritten cell phone policy which, as McCallum testified, was announced to employees by Beam. As discussed in the argument in more detail, the ALJ misstated this fact, among others, in her decision which contributed to the plethora of misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

¹¹ Employees do not clock out for their paid 15-minute breaks, so there is no documentation of the time that Avery started his break on June 1. T. 412.

¹² Avery testified at the NLRB hearing that May knows the normal break times (i.e., 9:00-9:15) so it is odd that May advised the unemployment Hearing Officer that Avery would be on break and available at 9:15. T. 126.

the phone number and the code to call in.” R. 8 at 3-5; T. 125. (Avery considered May to be honest.) T. 122. The Hearing Officer asked Claimant May if he wanted to reschedule the hearing in the event that Avery, Claimant May’s representative, was not available because he was working. R. 8 at 3-4. The Hearing Officer then put Claimant May on hold and connected with Lhoist’s representative and witness. R. 8 at 4-5. After putting Lhoist’s representatives on hold as well, the Hearing Officer called Avery at 9:21. G.C. 5. The Hearing Officer identified himself and confirmed that Avery was serving as Claimant May’s representative and that he would be available until 10:00. R. 8 at 6-7. T. 129. The following excerpt from the transcript shows the initial conversation in which Avery said he would be available for another 39 minutes:

17 AHO: Good morning. This is Trey Lackey from the State of Alabama, Department of Labor. Is a
18 person by the name of Floyd there?
19
20 CW: Yes, this is who? (BACKGROUND VOICES – UNINTELLIGIBLE)
21
22 AHO: This is Trey Lackey. I’m the Administrative Hearing Officer for an unemployment case
23 involving Mr. Willie May.
24
25 CW: Yes, sir. Yes, sir.
26
27 AHO: Uh, and he had said that you were, uh, potentially going to be serving as a representative today.
28
29 CW: Yes, sir. Yes, sir.
30
31 AHO: Now, the hearing is scheduled to take place between now and 10 a.m.
32
33 CW: Okay.
1
2 AHO: Are you gonna be available to be present for that whole part of the hearing?
3
4 CW: At, yes, on, on the phone, right?
5
6 AHO: In other words, you’ll be here through 10 o’clock, correct?
7
8 CW: Yes.
9

R. 8 at 6-7. The Hearing Officer connected Avery to May and then joined all parties to the call, stating “Let me go ahead and bring the employer off of hold and we’ll get this started.” R. 8 at 8; T. 131. Avery was not aware that any Company representative was on the line when agreed to participate in the hearing as Claimant May’s representative. R. 8 at 6-8. T. 131.

Lhoist Senior HR Director Stacey Barry participated in the hearing as the Company’s witness. J. 2; R. 8 at 4-6; T. 228. The Company did not request that Avery participate in the hearing and had no knowledge that he was going to do so. T. 120, 313. Nor was Avery compelled by subpoena or other legal process to participate in the hearing. T. 60, 132. Avery could not have known that Barry was on the call until the Hearing Officer connected the parties. T. 130-131.

The hearing lasted until 9:52, which means that Avery used a minimum of 25 minutes of paid working time, as he admittedly performed no company work during the call, after his break ended to participate in the hearing (if Avery began his break at 9:00, he would have used 37 minutes of working time after the end of his break). G.C. 5; T. 128-29, 131-132. Following the call, Avery (in his own words) “jumped on the water truck” and “resumed work.” T. 122-24. As Avery explained, the water truck runs all day during the summer. T. 162. In fact, on that day—June 1, 2018—Avery reported more than two hours of overtime. R. 9, 14; T. 135-36, 405, 430-31, 450.

None of the foregoing facts is in dispute. It is also undisputed that Avery did not inform his supervisor that he would be participating in the hearing or request to do so, much less ask that he be allowed to take additional time off from work to do so. T. 48, 119, 374. He did not subsequently inform his supervisor¹³ or anyone else that he had participated in the hearing or that

¹³ Terry Beam, Avery’s supervisor, was not at work on June 1, 2018. T. 372-73, 378. Another supervisor was filling in for Beam, and Beam’s supervisor was also at work that day. T. 373.

he had extended his break for an additional 25 minutes, nor did he claim he had engaged in excused Union business during working hours. T. 48,119. Finally, Avery did not correct his time record to account for the 25 minutes he had spent in the hearing that exceeded his break time, nor did he ask anyone in supervisor or human resources to assist him with changing his time record. T. 119-20, 430, 439-40, R. 9, 14. Avery had multiple avenues to correct his time, but did not do so. T. 439-40. Avery admits each of these facts.

5. Lhoist's Investigation

After the hearing, Barry asked HR Manager Emily Berkes (now Kelley) if Avery had requested time off to participate in the hearing. T. 280, 411. Barry did not direct Berkes to investigate, but since Barry asked her a question to which she did not know the answer, Berkes investigated the situation. T. 444.

Berkes first contacted Grant McCallum¹⁴, the production manager at the Montevallo plant and Beam's supervisor, and asked him if Avery was working that day. T. 445. McCallum spoke with Avery on June 5th and Avery confirmed that he had participated in the hearing, but claimed that he had done so during his break even though he did not get permission from a supervisor. T. 51-52; 374. McCallum conveyed this information to Berkes, who explained to him that the hearing had lasted longer than his allotted break. T. 445-46. McCallum then met with Avery a second time on June 7th and asked him to write a statement which he provided the next day. T. 52-53, 374-75.

¹⁴ As discussed in the argument in more detail, the ALJ misstated this fact, among others, in her decision which contributed to the plethora of misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

6/7/18

On Friday June 1, 2018 while on my break I received a phone call at 9:21 am from an Agent of the Unemployment Office. The call was in regards to Willie May filing for Unemployment. The Agent said that Willie told him to call me. He then told me that he had Willie, Stacey Barry, and someone else from the company who I don't recall her name on the other line waiting to be conferenced in for a hearing on the matter of Willie's Unemployment. I assumed that I was supposed to participate being that Human Resources was involved and that I was called. I've never been involved in this before.

Floyd Avery

McCallum advised he was suspended for handling personal matters on company time¹⁵ pending a final determination. T. 55, 392. Berkes reviewed the statement and asked very to meet with her and McCallum at the regional office later that same afternoon. T. 56-57, 446. Jon Wilson ("Wilson"), Union president, was present as well. T. 57. Berkes asked Avery about the circumstances surrounding his participation in the hearing. T. 57-60. This time, Avery admitted that he had participated in the hearing during working hours. T. 62. Avery also admitted that he had spoken with May within the last several days prior to the hearing. T. 58. Avery essentially admitted he stole the time by telling Berkes "if it was all about the time, then dock it". T. 62.

¹⁵ As discussed in the argument in more detail, the ALJ misinterpreted this fact, among others, in her decision which contributed to the plethora of misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

Following her investigation, and in keeping with Company practice, Barry, Berkes, McCallum, the plant manager, the vice-president of human resources, the regional operations director, and an in-house counsel met via conference call¹⁶ to consider the situation and ensure the ultimate decision was proper. T. 284-85, 310. The group determined that termination was in order. T. 284-85.

6. Avery's Termination Meeting

Berkes met with Avery on June 11th and presented him with a termination letter.¹⁷ T. 64-65; J. 6. The termination letter reflects the Company's determination that Avery failed to inform his supervisor that he was to participate in the hearing during working hours; failed to inform his supervisor that he had exceeded his break time at the conclusion of the hearing; and failed to correct his time records. J. 6. In the letter, Lhoist pointed out that Avery could have been terminated in January, but was given a last and final chance, as set forth in the Last Chance Agreement. That agreement makes clear that Avery agreed he would be terminated if he violated any of Lhoist's policies, rules, or regulations. J. 5. Among the rules and policies Avery violated were the requirements that he obtain his supervisor's approval for any non-routine or unscheduled breaks that he not misrepresent his working time. G.C. 8; R. 5 at 29. Because the ALJ misconstrued the termination letter and accused Lhoist of changing the reasons for Avery's termination, the following is an excerpt of the relevant part of the letter:

¹⁶ As discussed in the argument in more detail, the ALJ misstated the details related to whether notes were taken, among others, in her decision which contributed to the numerous misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

¹⁷ Union President Jon Wilson and Anastasia were also present. T. 65. As discussed in the argument in more detail, the ALJ misinterpreted this letter, among others, in her decision which contributed to the plethora of misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

Lhoist North America (LNA or the Company) has conducted a review and investigation of your most recent incident that occurred on June 1, 2018. Based on our investigation, it appears that you failed to properly notify your leadership of your intentions of participating in an unemployment hearing call on June 1, 2018 while still on work time. You admitted that you never made an effort prior to or immediately after the call to notify your supervisor that you were on this call when you were supposed to be working. Your normal break time is 9:00 – 9:15. You provided your phone log showing that you received a call at 9:21 and were on this call for thirty-one (31) minutes. This far exceeded your break time, regardless of when you claim your break began (you claim you were late taking your break and started break at 9:12). When you were asked to provide documentation showing if you were required to attend this unemployment hearing, you were not able to provide any documentation of why you needed to be on this call. Instead, you claimed that you did not know anything about the call and only became involved when your phone rang from an unknown number and you decided to answer it and participate in the unemployment hearing. You claim that you were not sure if you were called as a witness or representative. However, our investigation indicates that you were not sworn in as a witness, did not act as a witness, and instead acted as a representative for Willie May during the hearing. You never requested leave or time off to attend the hearing. In fact, even after the hearing you did not contact your supervisor or management about attending the hearing by phone during working hours, missing work, or correcting your time clock punches. You only came forth after you were asked and questioned by the Production Manager. You clearly had no intentions of ever notifying management about falsely reporting your time while getting paid for this time off of the job. Your actions and behavior show a failure to follow policies and a lack of honesty, and are clearly not in line with Lhoist values of Respect, Integrity, and Courage.

J. 6. See also T. 428-29. Notably, the letter does not mention Section 16.3 of the CBA, which the ALJ wrongfully concluded was the reason for Avery's termination. The letter also does not mention anything about a violation of Lhoist's unwritten cell phone policy, which is the source of another red herring and misstatement by the ALJ.

7. Avery's New Excuses

At the hearing Avery attempted to come up with new excuses for his actions. First, he claimed that Lhoist or the government made him attend the unemployment hearing. T. 48, 161. But, Avery's statement on June 7 said the opposite: "The Agent said that Willie told him to call me." G.C. 4.

Second, Avery claimed that his conduct was excusable because he really did not have any work to do at the time of the call. But by his own testimony, Avery “jumped on the water truck” and “resumed work” immediately after the call. T. 122-24. In fact, on that day—June 1, 2018—Avery reported more than two hours of overtime. R. 9, 14; T. 135-36, 405, 430-31.

The ALJ failed to recognize the actual reason Avery was terminated: failing to get permission to take a break and stealing time. Instead, she has created a false narrative that Avery was terminated for violating a cell phone policy.¹⁸ This is nothing more than a red herring used by the General Counsel and the ALJ in her decision to distract from the legitimate reasons Lhoist terminated Avery. In fact, Avery himself admitted he was not terminated for violating a cell phone policy, and his termination letter is completely devoid of any reference to such a policy. Yet the ALJ and the General Counsel, as discussed throughout this brief, have used this unwritten policy to create a reason for termination unsupported by any evidence or logic.

II. QUESTIONS PRESENTED

1. Whether the ALJ erroneously concluded that Respondent violated Section 8(a)(1) when it terminated Desilynn “Floyd” Avery for stealing company time and failing to subsequently correct or seek assistance in correcting his theft of time? (Exceptions 1 through 91)¹⁹

2. Whether the ALJ erroneously concluded that Respondent violated Section 8(a)(3) when it terminated Desilynn “Floyd” Avery for stealing company time and failing to subsequently correct or seek assistance in correcting his theft of time? (Exceptions 1 through 91)

¹⁸ As discussed in the argument in more detail, the ALJ omitted details of the policy in her decision which contributed to the plethora of misstatements or misinterpretations that prejudiced Lhoist and eventually led to her adverse decision.

¹⁹ The ALJ’s misstatements, misrepresentations, and erroneous conclusion of law that she used to find against Respondent on every point are inextricably intertwined such that each exception applies to each issue.

3. Whether the ALJ erroneously concluded that Respondent overbroadly applied Section 16.3 of the Collective Bargaining Agreement? (Exceptions 1 through 91)

III. ARGUMENT

A. STANDARD OF REVIEW

In reviewing the ALJ's decision, the Board must conduct a de novo review of the entire record, including the inferences and legal conclusions drawn therefrom. *Standard Dry Wall Products*, 91 NLRB 544 (1951), *enf'd* 188 F.2d 362 (3d Cir. 1951). Although the Board sometimes appears reluctant to overturn credibility determinations made by the ALJ, credibility determinations must be overturned where the preponderance of all the relevant evidence demonstrates the determinations were incorrect. *Id.* at 545. In addition, courts have held that credibility decisions that are not based on demeanor are entitled to little weight. *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d. 495, 501 (2d Cir. 1967).

While the ALJ is not required to address each piece of evidence, the findings of fact as a whole must demonstrate that the ALJ considered conflicts created by the record evidence. “[T]he Board is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *Sutter*, 687 F.3d at 437. This means that the Board must consider “contradictory evidence and evidence from which conflicting inferences can be drawn” and consider “whatever in the record fairly detracts from [the] weight” of the ALJ's decision. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487 (1951). As set forth below, a fair review of the evidence requires not only overturning credibility determinations but also setting aside the decision of the ALJ.

The thrust of this case turns on a few very simple, undisputed facts. Avery violated three terminable company policies in less than three years, the last of which happened while he was on a Last Chance Agreement. On June 1, 2018, he decided to walk away from his work duties and

participate in a lengthy unemployment hearing without seeking supervisory approval without correcting his time record so that he would be paid for 25 minutes of time he did not work. Lhoist's policies require employees to get approval for extended or unscheduled breaks, and they also prohibit misrepresenting time worked. These straightforward facts preclude any fair trier of fact from concluding that Lhoist terminated Avery because he was engaged in protected concerted activity or protected union activity. But through a tangle of record misstatements, a whole cloth legal standard, and an astonishing track of one-sided inferences, the ALJ reached a series of suspect legal conclusions that require reversal.

B. The ALJ ERRED IN FINDING A VIOLATION OF SECTIONS 8(a)(1) and (3)

1. The ALJ Misapplied *Wright Line*

The ALJ's determination that Lhoist violated Sections 8(a)(1) and (3) is simply wrong and contrary to established law. Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights, which includes concerted activities for mutual aid and protection. Section 8(a)(3) prohibits discrimination based on the exercise of these same rights. Thus, employers cannot discipline employees based on conduct protected by the Act. *Circus Circus Casinos, Inc. v. N.L.R.B.*, - F.3d - , 2020 WL 3108276, *3 (D.C. Cir. 2020).²⁰ However, there are a myriad of reasons that an employer can discipline or terminate employee that are not related to protected activities. *See Id.*

The Board does not have authority to regulate all behavior in the workplace and it cannot function as a ubiquitous 'personnel manager,' supplanting its judgement on how to respond to unprotected, insubordinate behavior for those of an employer. It is well recognized that an employer is free to lawfully run its business as it pleases.

²⁰Since the ultimate complained of employment action is termination rather than suspension, Lhosit's use of the word termination as the description of the adverse action encompasses suspension as well.

This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.

Epilepsy Found. of Ne. Ohio v. N.L.R.B., 268 F.3d 1095, 1105 (D.C. Cir. 2001) (citation omitted). Accordingly, the Board cannot exercise its authority as “a pretext for interference with the [employer’s] right of discharge.” *Circus Circus*, 2020 WL 3108276 at *7 (quoting *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937)).

When an employer terminates an employee citing a legitimate reason, the General Counsel must establish a prima facie case under the *Wright Line* burden shifting framework to prove that animus against protected activity was a motivating or substantial factor in the employer’s decision. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf’d* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Int’l Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO v. N.L.R.B.*, 127 F.3d 1300, 1306 (11th Cir. 1997). To do so, the General Counsel must establish, by a preponderance of the evidence, that: (1) Avery engaged in protected activity; (2) Lhoist was aware of the activity;²¹ and (3) Lhoist exhibited animus or hostility toward that activity, such that the protected activity was a substantial or motivating reason for the action. *See* Advice Memorandum, *Comprehensive Healthcare Mgmt. Servs., LLC*, Case No. 06-CA-209251 (May 3, 2018) (citing *Wright Line*, 251 NLRB at 1089).

If the General Counsel can establish these elements, the burden shifts to the Company to show that it would have taken the same action even if the employee had not engaged in protected activity. *Int’l Broth. of Boilermakers*, 127 F.3d at 1306. The employer must show that it “reasonably believed” that the employee engaged in the misconduct and that its decision was consistent with company policy and practice. *Sutter*, 687 F.3d at 435-46. The employer’s defense

²¹ Lhoist does not contend that it lacked knowledge of Avery’s participation in the unemployment hearing, but it denies Avery’s participation was protected activity

does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *See Merillat Indust.*, 307 NLRB 1301, 1303 (1992). Indeed, as the Board has recently clarified, a finding of pretext alone does not compel a finding that discrimination motivated Avery’s suspension and discharge, especially where there is countervailing evidence. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, at 3-5 and n. 17 (2019) (citations omitted). “[W]here pretext alone furnishes the whole of the General Counsel’s case, the possibility that something other than union activity motivated the discharge means that the General Counsel may have failed to sustain that burden.” *Id.* at 4, n. 11. Instead, a finding of unlawful discrimination may only be inferred in appropriate circumstances. *Id.*

The burden of establishing a violation by a preponderance of the evidence never shifts from the General Counsel. Here, the General Counsel cannot establish the first and third elements of his prima facie case. Even if he could, Lhoist has shown that it would have taken the same action in the absence of the alleged protected conduct.

a. The ALJ Erred In Finding That Avery Engaged In Protected Concerted Activity

Avery’s participation in the unemployment hearing, whether as a witness or a representative, was not protected concerted activity. To be protected under the Act, the conduct must be both protected and concerted. *See N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 840 (1984). Concerted activity can lose its protection under certain circumstances.

While the Board has found that attendance as a witness at a former employee’s unemployment compensation hearing was protected concerted activity, such is not always the case. *See Supreme Optical Co., Inc. v. N.L.R.B.*, 628 F.2d 1262, 1263 (6th Cir. 1980) (“[W]e do not believe that the attendance at an unemployment compensation hearing is always protected activity.”). If an employee attends or testifies in a hearing in contravention of the employer’s lawful

rules, then the employee's conduct is not protected. *See Vokas Provision Co. v. N.L.R.B.*, 796 F.2d 864, 879 (6th Cir. 1986) (no violation where employer terminated six employees for attending NLRB hearing without permission or subpoena); *Wackenhut Corp.*, 268 NLRB 112 (1983) (employee who testified at department of labor hearing did not engage in protected activity because employee did so without a subpoena in violation of her employer's lawful rule); *Supreme Optical*, 682 F.2d at 1263 (noting outcome based on fact that employer had given employees permission to participate). The ALJ's Order only addresses whether participation in an unemployment hearing is concerted. O. 23:10-38. It does not discuss or analyze whether Avery's activity lost protection due to the circumstances.

Avery's participation was not protected. It is undisputed that the Company did not request Avery's participation and Avery did not seek permission to attend the hearing, which was scheduled to take place during his working hours.²² Avery was not compelled by a subpoena to attend and give testimony. Indeed, Avery was not sworn in as a witness and did not testify. Instead, he participated because he had talked with May about representing him, May wanted him as his representative because Avery had been working with him on his termination, and he made himself available at the time set for the hearing. R. 8 at 2-4, 6-8. Avery acknowledged this during the call. R. 8 at 6-8. Not coincidentally, Avery altered his break time from 9:00 to 9:12 to be available exactly at the time of the hearing and he told the Hearing Officer that he would be available until

²² The ALJ cites *N.L.R.B. v. Faulkner Hospital* for the proposition that providing a terminated employee with a statement to use in his unemployment proceeding is protected concerted activity. 691 F.2d 51, 54-55 (1st Cir. 1982). In *Faulkner Hospital*, it was determined that the guard did not leave his post and that guards left their station for personal matters for longer periods of time without being disciplined. This is not the case with Avery. Avery admittedly was on break when he received the call and did not return to work until the call was over. Further, there is no evidence that any other employee has ever engaged in non-work activities for such a long period of time following their break. T. 339, 397-98. The General Counsel did not establish disparate treatment regarding break times.

10:00. Despite the fact that Avery knew he could be on the phone for up to 33 minutes longer than his break, he did not ask his supervisor or Human Resources if he could extend his break to participate in the call, and, in fact, he never informed his supervisor of his participation in the call. And despite the fact that Avery acknowledges that misrepresenting time worked is a serious matter, he did not correct his time record either (resulting in being paid for time he did not work). Avery's concerted activity lost protection when he chose to violate Lhoist's lawful rules. *See Vokas Provision*, 796 F.2d at 870 (Supreme Court recognizes that "working time is for work" and employers may make and enforce reasonable rules unless rule is adopted for a discriminatory purpose) (citations omitted).

b. The ALJ Erred In Finding Lhoist Had Animus Towards Avery's Participation In The Unemployment Hearing

The General Counsel did not satisfy his burden to establish animus towards Avery's participation in the hearing. Thus, he failed to establish that Avery's alleged protected concerted activity was a substantial or motivating factor in his suspension and termination. *See Tschiggfrie Properties, Ltd. v. N.L.R.B.*, 896 F.3d 880, 886 (8th Cir. 2018) (citations omitted). Simple animus or animus in general toward the union is not enough to satisfy this burden. *Id.*

i. There Is No Direct Evidence Of Animus

The ALJ claims to find direct evidence of animus by concluding that Berkes drafted portions of Avery's termination letter because Lhoist believed that Avery engaged in "union activity" and because McCallum told Avery that he was suspended due to his "union activities." O. 24:8. The ALJ intentionally misstates the record.

At the hearing, Berkes made clear that Avery was not being terminated because he engaged in union activities. In response to whether she informed Avery that he was being terminated for participating in union activities, she testified "[n]o." T. 440. According to Berkes, Avery was

terminated for “falsifying his time records.” T. 440. Further, Avery himself testified that “[s]he said that I took a phone call and – from the unemployment office and that I was doing Union business **on company time.**” T. 42. This is not direct evidence of animus; rather, this is Lhoist’s appropriately measured response to Avery violating serious company policies tantamount to walking away from work and stealing time.

Even if the ALJ were not convinced by Berkes’ and Avery’s testimony, the ALJ should have considered the unambiguous language in the termination letter which speaks for itself. The letter indicates that Avery was being terminated because he violated company policy by failing to notify his supervisors that he participated in the unemployment hearing while on company time then failing to correct his time records. J. 6. This is not evidence of animus, direct or otherwise, and deserved the ALJ’s full and fair consideration.

The ALJ’s finding regarding McCallum’s testimony is even more ludicrous. The ALJ found that McCallum “weakly denied” that he told Avery he was being suspended for conducting union business and concluded “I credit Avery’s detailed discussion that McCallum told him he was suspended because he was on union business.” O. 18:34-39. This is not an accurate statement of Avery’s testimony or the record.

Foremost, Avery, whose testimony the ALJ wholly credited, unequivocally testified in relation to that suspension discussion that McCallum informed him he was being suspended “because I was doing Union business **on company time.**” T. 55. This is a critical distinction that is germane to elements of this case and the ALJ should have recounted the entirety of this testimony in citing the record and reaching this and other legal and credibility conclusions.

Likewise, McCallum’s testimony regarding the suspension meeting is consistent with Avery’s testimony regarding the same and with Berkes’ testimony regarding the basis of Avery’s

termination. During the hearing, McCallum testified, point blank, that he did not inform Avery that he was being suspended for participating in union activities. T. 375. This testimony is consistent with Avery testifying that Berkes informed him that he was being suspended and investigated because he “took a phone call and – from the unemployment office and that I was doing Union business **on company time.**” T. 42.

Based on the above, the record indicates that Avery, McCallum, and Berkes were in agreement that Avery was being suspended and investigated because he was conducting union business **on company time**, not solely because Avery was conducting union business as the ALJ states in the Order. This is further evidenced by the fact that when confronted with his suspension and ultimate termination, Avery offered to have his time docked. T. 62.

The ALJ’s selectively omitted words show that when read in context and as a whole there clearly is not direct evidence of discrimination.

ii. There Is No Indirect Evidence Of Animus And The ALJ’s Findings Are Erroneous And Unsupported By The Record

In the absence of direct evidence, circumstantial evidence of animus toward a protected activity can be shown by

- (1) delay in the discharge after knowledge of the offense,
- (2) departure from established procedures for discharge,
- (3) failure to warn the employee prior to discharge,
- (4) failure to tell the employee the reason for the discharge at the time of discharge,
- (5) changes in position in explaining the reason for discharge,
- (6) timing of the discharge (e.g., discharge immediately after the employer gains knowledge of the employee’s union activity), and
- (7) disparate treatment of co-workers.

The Developing Labor Law 7-19, 20 (John E. Higgins, Jr. et al. eds., 7th ed. 2017) (collecting authorities). None of these factors exists in this case.

Instead, the ALJ cited six factors she claims demonstrate animus. Again, the ALJ misses the target on all six. The first two points are combined here for discussion.

A) The Record Is Devoid Of Expressions Of Hostility Toward Union Activities

The ALJ found the following statements as expressions of hostility:

- The alleged direct evidence discussed above
- Berkes' statement that Avery had engaged in the same conduct as in January 2018, which implies that he was engaged in union activity
- Barry's alleged statement that the "higher ups" wanted him terminated in January 2018 for the contractual violation
- Barry's alleged "go file a charge" statement

O. 24:25-45.

A review of the record as a whole shows that none of the above demonstrate animus. There is ample authority holding "an employer's speech that does not threaten reprisal or force, or promise a benefit, in relation to union activities is unqualifiedly privileged under [§ 8(c) of] the Act...Consequently, speech protected by that section cannot be used by the General Counsel to establish an employer's anti-union animus." *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733,744 (4th Cir. 1998) (citing *Alpo Petfoods, Inc. v. N.L.R.B.*, 126 F.3d 246, 252 (4th Cir. 1997)) (alterations in original); see also *BE & K Constr. Co. v. N.L.R.B.*, 133 F.3d 1372, 1375-77 (11th Cir. 1997); *Holo-Krome Co. v. N.L.R.B.*, 907 F.2d 1343, 1345-47 (2d Cir.1990); *Ross Stores, Inc. v. N.L.R.B.*, 235 F.3d 669, 676 (D.C. Cir. 2001) (Henderson, J., concurring).

Further, while the ALJ may consider conduct outside of the 10(b) period²³, there are still limits as to what can be considered and whether it demonstrates animus. Although events occurring outside of the period may be used to shed light on the current allegations, by no means can actions

²³ The ALJ's discussion of Lhoist's affirmative defenses is somewhat confusing. O. 33. Lhoist does not contend that the suspension or termination were not the subject of timely charge. Regardless, the ALJ's discussion of the affirmative defense reflects a fundamental misunderstanding of the regulatory scheme that she is charged with interpreting. See Bench Book § 3-550; 3-600 "Affirmative defenses must be pled in an answer *or timely raised at the hearing.*"

outside the 10(b) period be litigated as violations as the General Counsel attempted to do here.²⁴ Events occurring even four months before the alleged discriminatory action are too remote in time to support a finding of animus. *Sears, Roebuck & Co. N.L.R.B.*, 349 F.3d 493, 506 (7th Cir. 2003). *See also* Advice Memorandum, *Zuffa, LLC d/b/a/ Ultimate Fighting Championship*, Case No. 04-CA-219498 (Sept. 13, 2018) (comments made approximately eight months prior to discharge too remote to prove animus).

Berkes' statement that Avery had engaged in the same conduct as in January is an accurate statement of the situation. Avery was placed on a Last Change Agreement (which he did not grieve) in January 2018 because he was a No Call / No Show for the second time, in violation of the attendance policies, when he undisputedly participated in an arbitration without giving the required notice. Animus cannot be inferred from Berkes' determination that Avery had repeated the same admitted misconduct.

Similarly, to infer animus from Barry's alleged statement that unidentified "higher ups" wanted to terminate Avery in January 2018 would require an inference that these anonymous individuals wanted to terminate him for union activity rather than his repeated attendance violations. A finding of animus or hostility would require an inference upon an inference, which should not stand. *N.L.R.B. v. Lampi, LLC*, 240 F.3d 931, 936 (11th Cir. 2001). This "statement" is also too remote in time to be considered as proof of animus. Any conclusion of animus is both unfounded and speculative.

²⁴ The ALJ apparently misunderstands Lhoist's argument that the prior disciplinary actions could not be litigated as opposed to providing background information. To be sure, the prior disciplines are necessary to paint the whole picture, but that does not mean that the validity of the disciplines – which were never grieved – can be litigated outside of the 10(b) period and without notice to Lhoist. To do so would be a violation of due process.

Finally, Barry's alleged statement(s) "go file a charge", allegedly made in the beginning of 2018 during unspecified grievance meetings do not show animus. T. 198, 200-01, 208. Wilson and Avery's testimony about these meetings was vague as to when these conversations took place and what was being discussed. Barry testified in much more detail regarding the meeting. T. 317-20. Barry testified that he did not make any such a statement, but Michael Smith, the Union's business agent, did. One particular meeting occurred on March 7, 2018, a time when the Union had filed 10 or 12 charges. The attendees were going over the pending grievances and Barry concluded with his usual response that the Company would provide an answer in 10 days in accordance with the CBA. Smith did not like that answer and said, "well, we'll just file a Board charge." T. 319-20. Barry responded to the effect of you have to do what you have to do. T. 319-20. Smith made this threat on more than one occasion. T. 320. Notably, although Smith was present at the trial, the Union did not call him as a witness to rebut Barry's testimony. If there is one adverse inference in this case that warranted recognition, it was that Smith's silence affirmed Barry's testimony. Of course, the ALJ did not recognize a single adverse inference against the Union while recognizing innumerable inferences against the Respondent.

Neither version of the events, both of which can be viewed as Barry acknowledging the Union's right to file a charge if the grievance was not resolved, would be a violation of the Act. As such, the remark cannot now be used to demonstrate animus in this case.

B) Substantial Record Evidence Indicates That Avery's Termination Was Not Based On A "Truncated" Investigation Or Speculation

The ALJ opinion concludes that animus is present because Lhoist completed a "truncated" investigation and because it speculated that Avery had notice of the unemployment hearing without having a copy of the transcript. O. 25. Again, this is not an accurate reflection of the record.

To start, Avery provided Lhoist with all of the information it needed to determine whether he violated company policy and, as a consequence, his Last Chance Agreement. Avery testified that he was aware of the Employee Handbook which prohibits under threat of immediate termination misrepresenting working time and the General Conduct and Safety Rules Handbook which prohibits falsifying company records. T. 104-05, 107-08. Avery explained that he did not notify anyone of the unemployment call before *or after* he participated in the call. T. 119. Avery provided Berkes a screenshot of his call log showing the duration of the call. T. 60. Avery testified that he was not doing any work on behalf of the company during the 25 minutes he spent on the call beyond his allotted break time. T. 132. Avery wrote a statement regarding his involvement in the hearing. T. 54. Avery testified that Lhoist should not have paid him for conducting personal business. T. 103. Avery testified that he asked Berkes to dock his time for participating in the call. T. 62.

Whether Berkes or McCallum took notes, prepared a summary, checked with Avery's supervisors about whether Avery's break affected his work, or Avery had advance written notice of the call, or Lhoist had a copy of the call transcript prior to the termination is immaterial to the scope of the investigation in light of Avery's own actions.

It is astounding that the ALJ could find that Lhoist's investigation was somehow faulty when Avery himself admitted to his misconduct. What more did Lhoist need to do?

Moreover, there is clear authority, both from Board law and circuit case law, that Lhoist had no obligation to investigate in a specific manner. *Sutter*, 687 F.3d at 436 (rejecting ALJ's reliance on failure to investigate in a certain way because "an employer is not required to investigate in any particular manner, especially when the Board can point to no evidence that

would have been uncovered after a deeper investigation”) (citing *Detroit Newspaper Agency v. N.L.R.B.*, 435 F.3d 302 (D.C. Cir. 2006)). This is because

it is not within the province of the Board to tell an employer how to investigate allegations of employee misconduct. The fact that an employer does not pursue an investigation in some preferred manner before imposing discipline does not establish an unlawful motive for discipline . . . and [the Board] decline[s] to infer from the employer’s failure to undertake such a further investigation that the employer had an alternate unlawful motive for the discipline.

Chartwells, Compass Group, USA, Inc., 342 NLRB 1155, 1158 (2004).

Lhoist’s investigation was appropriate under the circumstances. After the hearing concluded, Barry asked Berkes whether Avery had requested time off to participate. T. 280, 411. Berkes did not know the answer, so she investigated the situation.

Berkes first spoke with McCallum the production manager (and Beam’s supervisor) and asked him if Avery was off work.²⁵ T. 445-46. McCallum did not know the answer. At Berkes’ request, McCallum spoke with Avery. Avery told him that he had been on his break during the call. T. 51-52, 374. Avery did not tell him that his break ended well before the call concluded. McCallum reported back to Berkes who directed him to obtain a statement from Avery. Avery provided the statement the next morning which makes clear that he participated in the call during working hours. G.C. 4. According to the statement, Avery believed that May told the hearing officer to call him.²⁶

Upon review of the statement, Berkes met with Avery and the Union president at Lhoist’s regional office. T. 56-57. As Avery testified, Berkes asked him about the circumstances surrounding his participation in the hearing. T. 57. Avery admitted that he had been on the call

²⁵ The ALJ incorrectly determined that no supervisors were questioned. O. 25:19-20.

²⁶ This is yet another example where the ALJ recounts events and omits the fact that Avery confirmed his availability until 10:00 a.m. prior to learning that Company representatives were on the line.

during working hours and told Berkes to dock his time if that was the issue. T. 62. As with all terminations, a management call was held, which included in-house counsel, to discuss. The group determined that termination was in order due to Avery's repeated violations.

Despite the fact that Avery admitted to engaging in non-work related activities while on the clock, the ALJ took issue with several aspects of Lhoist's investigation. O. 25. First, the ALJ apparently believes either Berkes or McCallum should have taken notes or that they took notes but were hiding them. Neither conclusion is supported by the record. When asked whether she wrote an email report of the investigation, Berkes testified that she *believed* that she wrote an email. T. 468. Even though there is no evidence that such an email actually exists, the ALJ also questioned why such an email was not introduced at trial. O. 11:21-22. She further asserts that "none of the participants in the group management call allegedly took any notes." O. 25:14-15. Only McCallum was asked if he took notes during the call, yet other people were on the call as well, including legal counsel. T. 376.

Lhoist objected to requests for this type of information citing privilege. G.C. 7 at 10. The General Counsel did not challenge this assertion. Lhoist cannot now be the victim of an adverse inference based on the withholding of privileged information. *Doe ex. Rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000). Moreover, there is no requirement that someone take notes of any discussion of any type. Again, the ALJ is imposing burdens on Lhoist which lack any basis in law and is substituting her judgment for the Company's. *Watco Transloading, LLC*, 369 NLRB No. 93 at 4 (May 29, 2020) ("The possibility that Respondent's officials could have done things differently at different times does not vitiate the legitimacy of the actions taken.").

The ALJ also cites Berkes' failure to question supervisors about break and cell phone practices and whether the extended break affected his work. As explained below, McCallum's

alleged hearsay testimony regarding Beam's instructions to his employees regarding the cell phone policy was not hearsay at all. Moreover, the cell phone policy has **never** been cited by Lhoist as a basis for Avery's termination. Whether Avery had pending duties during his extended break does not mean that the violation is not worthy of discharge. Following the ALJ's logic, Avery's violation only warranted discipline if it interfered with his duties. This is yet another clear illustration of the ALJ impermissibly substituting her judgment for that of the Company.

IGNORING the fact that Avery ADMITTED to his misconduct, the ALJ accuses Lhoist of presuming misconduct. There was nothing to be presumed. Apparently, the ALJ's believes that unless Avery had advance notice of the hearing, then he did not engage in misconduct.²⁷ Although Avery denied having advance notice during the his testimony despite May's statements to the Hearing Officer about Avery agreeing to represent him, the fact is that Avery admitted to Berks that he had talked to Mays a few days before the hearing and Berkes testified that in her experience, the unemployment office notifies you if you need to participate in a hearing. R. 8 at 3-5; T. 58, 125, 477. However, whether Avery had advance notice or not does not eliminate or diminish the fact that he admitted that he engaged in non-work related business while on the clock and that he did not correct his time records after doing so. Likewise the fact that Avery suggested that Berkes dock his time after he had been caught is irrelevant. *See Circus*, 2020 WL 3108276 at *8 (“[a]n employee's offer to correct misconduct does not disturb [employer's] reasonable belief that a terminable offense had been committed”).

Despite the ALJ's mischaracterization of Lhoist's argument regarding the unemployment hearing transcript, Lhoist has never relied upon the hearing transcript in articulating its reasons for

²⁷ The ALJ focuses on Section 16.3 as opposed to the numerous other applicable policies that applied even if Avery did not have advance notice of the hearing.

Avery's termination or to prove advance notice. It obviously could not have, because Lhoist did not receive the transcript until after his termination. Instead, the transcript reflects that Lhoist was correct in its determination. May told the Hearing Officer that he had spoken to Avery about representing him in the hearing and that Avery said he would be available. The Union could have called May to corroborate Avery's testimony that he did not have advance notice, but it did not. It is curious why the Union did not as this fact has been at issue and the transcript contradicts Avery's testimony. Accordingly, Lhoist is entitled to (but was again not given) an adverse inference as to this point. *Warsawsky & Co. v. N.L.R.B.*, 182 F.3d 948, 955 (D.C. Cir. 1999) (recognizing Board precedent permits the drawing of an adverse inference from Union's failure to call witnesses under its control); *Underwriters Laboratories v. N.L.R.B.*, 147 F.3d 1048 (9th Cir. 1998).

The cases cited by the ALJ for her determination that Lhoist's investigation was "truncated" are easily distinguished here. In *Mondelez Global*, the employer varied from its normal practice which deprived the employees of an opportunity to respond to the allegations. The accused employees also denied having engaged in the misconduct. In *Cordua*, a case also heard by ALJ Steckler, a more complete investigation allegedly would have exonerated the employee. That is not the case here. As set forth above, Lhoist had all of the information it needed, including direct admissions by Avery that he failed to get permission to take an extended break and falsified his time records. Accordingly, there was no need for any further investigation and nothing would have exonerated him.

C) The ALJ Improperly Found That Lhoist Shifted Explanations

The ALJ posits that Lhoist shifted its position on its reason for terminating Avery. Specifically, the ALJ concludes that Lhoist shifted on how long Avery was involved in the subject call, application of the cell phone policy, and on why Avery's first no call/no show discipline did

not fall off of Avery's disciplinary record after one year. Evidence in the record that the ALJ did not fully and fairly consider establishes that Lhoist's basis for terminating Avery was consistent.

1) Lhoist's Position On Avery's Termination Would Have Remained The Same Regardless Of The Length Of The Call

The only possible confusion about the length of time the subject call exceeded Avery's morning break time, is whether his break began at 9:00 as scheduled or 9:12 as Avery claimed. Either way, Avery exceeded his break time – either by 37 minutes or 25 minutes. Lhoist's position was made clear through Barry and Berkes' testimony which indicated that supervisor approval would be necessary for a personal break even between 10-20 minutes. T. 305, 428. And, when asked about why Lhoist cares about employees reporting extended breaks, Berkes stated “[b]ecause if they don't, it's considered falsification of timekeeping. We don't pay employees for non-working time.” T. 429. This testimony does not evidence a shift in position.

2) Lhoist Never Took The Position That Avery Was Terminated For Violating A Cell Phone Policy

The issue of whether Lhoist had a cell phone policy and whether it historically disciplined employees for violating that policy was discussed during the hearing at some length. However, McCallum, Berkes, Barry, and even Avery understood that Avery was being suspended and terminated because he conducted personal or union business on company time without notifying any of his supervisors and without correcting his time records. T. 42, 55, 310, 440. Even if the ALJ was not persuaded by this testimony, the ALJ should have also considered that Avery's termination letter is completely devoid of any mention of a cell phone policy. J. 6. Between the abovementioned testimony and the actual termination letter, Lhoist left no confusion about the basis for which Avery was suspended and terminated, and it was not due to violating a cell phone policy. The cell phone policy is discussed in more detail below.

3) Avery's January 2018 Discipline Was Not The Result Of Animus

Because Avery's January 2018 discipline was not the basis of the hearing or Avery's termination, it is suspicious that the ALJ concludes that Lhoist shifted its position on that discipline and is somehow proof of animus for Avery's unrelated termination. First, this conclusion unfairly interjects an issue not properly before the ALJ, as Avery's prior disciplines were not referenced in the charges or the Complaint. At every turn, Lhoist objected to this "hearing by ambush" tactic that the General Counsel repeatedly advanced in violation of Lhoist's right to due process. Next, this conclusion also fails to consider the most important aspect of the January 2018 discipline that undermines its relevance here—Avery, the Union Vice-President, did not even dispute or grieve it. As discussed above, there is no basis for Avery's unsupported belief that discipline for No Call/No Shows fall off after one year. There is nothing in the policies that provide for such nor anything in the Final Written Warning to indicate such. It appears that the ALJ is conflating the attendance point system with whether an individual violates the No Call/No Show policy, for which termination for a second offense is specified and without regard to timing. For these reasons, it was improper for the ALJ to consider the January 2018 discipline and worse that the ALJ used it as a vehicle to establish animus in terminating Avery for an unrelated violation that occurred six months later.

D) The Timing Here Is Not Relevant

Close timing between the alleged protected activity and the adverse action can support finding of animus in certain circumstances, but temporal proximity alone is not sufficient to establish a causal nexus. *Simmons Co.*, 314 NLRB 725 (1994). And where, as here, there is close proximity between the protected activity, blatant misconduct, and resulting termination, timing is not particular relevant. *See Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 674 (2004) (timing did not support pretext where employees were fired for falsifying time records).

The ALJ took exception to the fact that Barry did not ask Avery whether he was at work while the hearing was occurring and that Lhoist used the unemployment hearing as a springboard for investigating whether Avery was participating in the hearing during working hours. O. 27:11-12. As an initial matter, it was not Barry's responsibility to ask Avery anything at that point. Avery was appearing as Claimant May's representative and Barry was the Company witness. The issue being heard was May's termination – not whether Avery had requested time off to participate was not relevant to the proceedings. Even if Lhoist wanted to terminate Avery because of his Union activity, it was not required to turn a blind eye to terminable conduct. See *Huntsman Packaging Corp.*, 1999 WL 33454775, 12 (1999) (“If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstances that the employer welcomed the opportunity to discharge the employee does not make it discriminatory and therefore unlawful.”) (quoting *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966)).

E) There Is No Evidence of Disparate Treatment

According to the ALJ's decision, Lhoist treated Avery disparately with regard to enforcement of the cell phone policy and the employees who were disciplined for falsifying the weight records. However, there is no evidence of disparate treatment. The General Counsel has not met his burden to establish that any of the alleged comparators engaged in similar misconduct with a similar disciplinary history. The General Counsel also failed to establish that these individuals were not union supporters.

The General Counsel and ALJ also invented a reason for Avery's termination in an effort to establish disparate treatment where none exists. The cell phone policy was never a basis for Avery's termination. The fact that Avery used his cell phone to engage in personal business during

working hours is an irrelevant fact and nothing but a red herring.²⁸ Indeed, the fact that Avery was using a cell phone was never an issue until the Union, grasping at straws, made it one.

Although the ALJ seems to find that a cell phone policy existed for certain purposes of her discussion, she ultimately found that Lhoist did not have a cell phone policy at the time of Avery's termination and used that as a basis to find disparate treatment. O. 28:4-5. Contrary to the General Counsel's argument and ALJ's finding that Lhoist's July 10, 2018 position statement stated no cell phone policy existed, Lhoist did have an unwritten cell phone policy. The policy was simply that employees should not use cell phones while working or operating equipment and should only use them during breaks. At the same time, Lhoist tolerated some cell phone usage during work as long as it was very short (usually less than a minute) and for an important matter such as dealing with childcare. T. 299-302, 369.

This policy was regularly communicated to employees. McCallum testified that Avery's supervisor, Beam, regularly told employees that they could not use their cell phones except during breaks. T. 370-71. After overruling an objection that this was hearsay during the hearing, the ALJ did a complete 180 in her Order and determined that McCallum's testimony on this point was hearsay and then inferred that since Beam was not there to testify to that fact himself, it never happened. O. 15:n.17. McCallum simply testified that he had heard Beam speaking to his employees about it. His testimony was not for the purpose of asserting the truth of what Beam was saying (that employees should only use cell phones during breaks) but to establish that Beam had repeatedly relayed the policy to the employees under his supervision. The ALJ herself asked McCallum if he had actually heard Beam say this and McCallum confirmed that he had on many occasions. T. 371. The ALJ improperly inferred that Beam would not have corroborated this

²⁸ The Complaint does not even contain a reference to the cell phone policy.

statement. As shown above, there was no need for Beam to testify because the matter was uncontroverted and had nothing to do with Avery's termination

In another disingenuous effort to discredit Lhoist, the General Counsel and the ALJ made much of the manner in which Lhoist responded to the Region's following Request for Documents:

9.The Employer's cell phone policy.

Response: Lhoist does not have a cell phone policy applicable to this charge.

G.C. 7. (emphasis added). That response is 100% accurate because it is a response to a request for production of DOCUMENTS, not an interrogatory. Lhoist did not have a written cell phone policy on June 1, 2018. A review of the August 17, 2018 position statement also shows that Lhoist explained its cell phone policy clearly to the Region and that Avery's use of a cell phone played no part in the decision to terminate him (other than it was the device he used when he took a 25 minute break without approval). G.C. 12. Lhoist further responded to this baseless claim in its August 17, 2018 position statement. G.C. 12 at 2-3.

Allegations

...

II. Employees at Lhoist are routinely allowed to use their phones and take calls on working time.

Response: Avery's allegation that other employees are routinely allowed to use their cell phones to take calls during working time is **taken out of context and is misleading at best**. Though employees and supervisors use their cell phones to communicate with each other about work from time to time – for example, if a supervisor or other employee needs to contact a maintenance mechanic regarding an issue in a particular area of the plant – employees are not permitted to use their cell phones for personal use during working time and are disciplined for doing so. In fact, employees are not allowed to use their cell phones at all when operating equipment or trucks.

But that again misses the point. It is one thing for an employee to take a call from their spouse about an emergency or picking up the kids from school. It is an entirely different issue for an employee to schedule a 30 plus minute call during

working time without asking their supervisor and then falsifying a time card so that they get paid for not working.

G.C. 12. When read in context, it is clear that the ALJ selectively omitted words that would not warrant a finding that Lhoist has taken inconsistent positions or engaged in disparate treatment.

After the Union claimed that Avery was terminated pursuant to a policy that did not exist and/or was not uniformly applied, Lhoist issued a reminder memorandum to employees, reemphasizing the policy against using cell phone during working time or while operating vehicles. T. 248-250, 288-90, 299; G. 6. The evidence shows that it was indeed a reminder. All witnesses, whether testifying for the Union or Lhoist, testified that the use of cell phones was permitted for work related calls or for quick personal calls such as discussing childcare arrangements. T. 299-302, 369. This practice was permitted before and after the memorandum was issued. Id.

Indeed, Lhoist dismissed a temporary employee who used his cell phone for non-work related purposes excessively. T. 390-91. Lhoist also disciplined an employee who used his cell phone while operating equipment. T. 251-53; G.C. 11. The ALJ's determination of disparate treatment is misplaced as there is no evidence that Avery was targeted because he was a union supporter. There is no record evidence at all as to whether either of these employees supported the union. It is General Counsel's burden to establish disparate treatment and he has not done so.

Likewise, there is no evidence of disparate treatment with regard to other employees who were on a Last Chance Agreement. It is undisputed that Lhoist has disciplined other employees for the falsification of records. T. 292-96. These particular employees had falsified records regarding truck weight. One of the disciplined employees was on a Last Chance Agreement, but the Company chose not to terminate him because the supervisors were also at fault to some degree and because he had filed multiple EEOC charges against the Company. T. 292-96. The remaining employees were placed on a Last Chance Agreement. The circumstances surrounding Avery's

third violation (the last of which involved falsification of time records as well) for attendance in less than three years is not comparable to the employees who falsified documentation at their supervisor's instruction.

Finally, the ALJ erred in finding that Lhoist applied Section 16.3 in an overly broad fashion. O. 32. Lhoist attendance policies require employees to provide a certain amount of notice for unscheduled absences, regardless of the reason. This is so that the Company can make necessary adjustments and find a replacement. R. 1. Some positions, such as Avery's Slurry Operator position, are only held by one employee. T. 26.

A violation of the notice requirements, including a shift interruption, results in an occurrence. R. 1. The policy is very clear that prescheduled leave, including Union leave, is not a violation of the policy at all, but rather is an excused absence which does not result in an occurrence. R. 1. The policy applies to all unscheduled leaves, and does not treat unscheduled Union leave differently. Thus, it does not facially discriminate against Union activities.

Separately and in addition to Lhoist's general attendance policies, Section 16.3²⁹ of the CBA is a separate notice provision that requires a week's notice for Union leave. It does not penalize an employee for taking such leave and is not a basis for discipline. Thus, it is not a "rule" that could be applied disparately or over broadly to Union activity.

The provision provides some specific examples reasons for Union leave: union conventions or meetings, third step grievance meeting(s), arbitration hearing(s), and labor negotiation(s).

²⁹The implemented provision remains in the current CBA, which the parties negotiated and agreed to in 2019. T. 76-78. As recognized in *N.L.R.B. v. U.S. Postal Service*, "neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement. Quite the contrary, the courts are bound to enforce lawful labor agreements as written...." 8 F.3d 832, 836 (D.C. Cir. 1993).

According to the ALJ, the omission of “unemployment hearings or other governmental activity” means that Lhoist applied it in a discriminatory manner. O. 32:20-32. However, “the collective bargaining agreement is not just a contract, but a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate...and are negotiated and refined over time by the parties themselves so as to best reflect their priorities, expectations, and experience.” *Nat’l Football League Mgmt. v. Nat’l Football Players Ass’n*, 820 F.3d 527, 536 (2d Cir. 2016) (internal quotations omitted). It is clear that the intention of the parties is that leave to take care of Union business requires advance notice and is paid by the Union. *See M&G Polymers U.S.A., L.L.C. v. Tackett*, 574 U.S. 427 (2015) (parties’ intentions control interpretation of CBA).

The ALJ completely misses the point about Section 16.3. Avery has not claimed that he participated in a meeting covered by Section 16.3 (the ALJ agrees that it is not covered). O. 32:14-33:13. Not only does Avery’s statement not mention Section 16.3, but Avery claimed that he had no idea about the unemployment hearing until he received the phone call. G.C. 4. The only reason Lhoist mentioned the notice requirement in Section 16.3 was that to the extent Avery was or might claim the unemployment hearing was covered, he had failed to give the requisite one week notice. But that was not the reason for his termination, as clearly explained in the termination letter. See J. 6. Instead, to the extent Avery was engaged in union representation at the unemployment hearing, he was not entitled to be paid for that time. Avery, himself, admitted that he had never participated in an unemployment hearing before. T. 59. And, the undisputed record is that, pursuant to Article 4 of the CBA, Lhoist does not pay for union representatives to attend meetings such as third step grievance meetings, arbitration hearings, union meetings and conferences, or labor negotiations. J. 3. It only pays union representatives when Lhoist requests the meeting during work time, which was not the case here. The ALJ’s finding that Lhoist terminated Avery for violating

Section 16.3, is contrary to the evidence in the record, both parties' testimony, and common sense, and is nothing more than a biased effort to misconstrue the record.

Despite the General Counsel's Herculean efforts to establish animus, he did not do so. There is no evidence, direct or circumstantial, that Lhoist harbored any animus toward Avery's participation in the hearing.

c. Lhoist Proved By A Preponderance Of The Evidence That It Would Have Taken The Same Action Even If Avery Had Not Engaged In Union Activity

The General Counsel failed to satisfy his burden of establishing his prima facie case by a preponderance of the evidence. However, even assuming he did, Lhoist established by a preponderance of the evidence that Avery would have been discharged even in the absence of any alleged protected conduct. Avery admitted to the misconduct so Lhoist clearly had a reasonable belief that he did so. Lhoist further showed that its actions were consistent with its policies and practices.

Prior to termination, Avery had accepted a Last Chance Agreement, which the Company placed him on instead of terminating him for misconduct following a Final Written Warning.³⁰ T. 39-40; J. 5. It is undisputed that misrepresenting hours worked is a serious, terminable offense. T. 100-04, 421-22; R. 5, 7. That Last Chance Agreement made it clear that Avery would be terminated for any further violations of Company policies, including failing to give proper notice to management of his need for time off from work. It is undisputed that Lhoist has disciplined other employees for the falsification of records.³¹ T. 292-96. Likewise, Lhoist has terminated

³⁰ This fact alone shows that Lhoist actually favored Avery rather than discriminating against him for Union activities. It also undermines the ALJ's conclusion that Lhoist was not flexible at times. O. 26:21-22.

³¹ One of the disciplined employees was on a Last Chance Agreement, but the Company chose not to terminate him because the supervisors were also at fault to some degree and because he had filed multiple EEOC charges against the Company. T. 292-96.

employees who were on a Last Chance Agreement, including some who were not represented by a union. T. 312.

Whether Avery was engaged in Union activities is ultimately of no consequence. He was clearly not terminated because of his participation in Union activities. T. 322, 375, 377. The fact that someone violated a company policy while engaged in union activities does not equate being fired for Union activities. If his phone call had related to non-union activities—for example, a discussion with a friend about football or politics, or even a discussion about an issue at home—he still would have been terminated. The reason is because he did not notify his supervisor he needed time off, he spent approximately 30 minutes on a matter unrelated to work, he failed to notify his supervisor afterwards, and he stole time by not correcting his time records.

As Barry testified, if Avery had simply requested the time off in advance or if he had reported the need to correct his time record, his supervisor likely would have allowed him to participate in the call, but only after clocking out. T. 311-12. If that had happened in this case, Avery would not have been discharged. T. 311-12.

d. The General Counsel Did Not Satisfy His Burden To Show Pretext Or That Animus Was The Reason For Avery's Termination

The ALJ recited much of the same evidence that purportedly shows animus to establish pretext: the alleged faulty investigation, disparate treatment, and shifting explanations. O. 29. Each of these points is discussed in depth above. There is simply no pretext to be found here.

In this case, the ALJ prematurely ended her analysis by finding Lhoist's explanation for its actions was pretext. O. 29:40-44. She failed to continue with the required analysis of whether the General Counsel met his burden to establish that Avery's union activity was a motivating factor in his suspension and discharge. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, n. 10 (collecting cases holding even if pretext is found, the General Counsel must “adduce additional supporting

circumstances to establish that the actual reason for the discharge or discipline was animus for union activities”.

Once an employer establishes that it would have taken the same action even in the absence of protected activity, the General Counsel must show its reasons are pretextual. However, even if the General Counsel shows pretext, his burden of proof is not necessarily satisfied.

When confronted with evidence of a legitimate motive, the General Counsel must prove by a preponderance of the evidence that union antipathy did actually play a part in the decision to discharge the employees. In deciding what motivated the employer the Board may not simply declare that the stated reasons for discharge are pretextual, rather the General Counsel must put forth substantial evidence that anti-union animus motivated the decision to terminate.

Pirelli Cable Corp. v. N.L.R.B., 141 F.3d 503, 523 (4th Cir. 1998) (internal quotations and citations omitted).

As explained above, the record evidence, when taken as a whole, does not support a finding of pretext. Even if pretext was established, the ALJ’s inquiry cannot end there. The ALJ’s completely skipped the last step in the analysis. This case does not present the appropriate circumstances in which pretext establishes a violation.

The record also contains countervailing evidence that Lhoist did not foster animus against Avery or any other union member. There are no other allegations of unfair labor practices. There is no reason why Lhoist would have singled Avery out for discipline when other employees such as Wilson were equally vocal union supporters. Like Avery’s timesheet on June 1, it simply does not add up.

2. The ALJ’S Opinion Is Riddled With Other Errors And Misapplication Of The Law That Undermine All Of Her Findings

The problems with the ALJ’s opinion are too numerous to address in full. Many of her findings consist of a combination of misstatements of the record, improper inferences, improper credibility determinations, and misunderstanding (or intentional misapplication) of the law. As set

forth above, the General Counsel cannot meet his burden under *Wright Line*. But there are numerous other errors in the opinion that also support this conclusion.

a. The ALJ's Credibility Determinations Show Clear Bias And Are Not Supported By The Record

Due to the lack of direct evidence, many unfair labor practice decisions hinge on credibility determinations. However, the determinations must have some basis. Here, the ALJ's first sentence regarding the credibility of Respondent's witnesses demonstrates that she crafted her own standard that has no basis in NLRB law. O. 17:34-35.

I generally discredit the testimony of Respondent's witnesses unless it is an admission against interest or corroborated by other reliable evidence.

Id. The application of this blanket standard produces absurd results. For example, application of this standard would mean that the ALJ discredited Barry's testimony that he started working at Lhoist on December 9, 2013 as untrue, even though no one disputed it. T. 229.

This blanket standard also violates the Administrative Procedure Act ("APA"). As a result, if the Board adopts or affirms the ALJ's opinion, the decision will contravene of the APA's "reasoned decision making" requirement. *Circus Circus*, 2020 WL 3108276 at *3. The standards adopted by the Board through adjudication must be "rational and consistent with the Act," and its application in specific cases must be "reasonable and reasonably explained." *Id.* (citing *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 74 (1998); *Carlson v. PRC*, 938 F.3d 337, 343-44 (D.C. Cir. 2019)). If the Board wishes to adopt a standard, the Board must "'display awareness that it is changing position,' demonstrate the rule is 'permissible under the statute,' and show 'there are good reasons for the new policy.'" *Id.* (quoting *FCC v. Fox Television States, Inc.*, 556 U.S. 502, 515 (2009)). Additionally, when departing from precedent, the Board must explain, or at least acknowledge, its deviation from established precedent, and if it does not, the decision is arbitrary and capricious. *Id.* (citing *ABM Onsite Servs.-West, Inc. v. N.L.R.B.*, 849 F.3d 1137, 1146 (D.C.

Cir. 2017)). If the Board adopts the ALJ's decision in this case, its actions will be arbitrary and capricious and subject to being overturned by a reviewing court. *See Id.*

Moreover, the ALJ's wholesale rejection of Lhoist's uncontradicted and unimpeached testimony is plain error. *Benton v. Blair*, 228 F.2d 55, 58 (5th Cir. 1955). In the absence of any direct conflicting testimony, the court should, as a general rule, honor and allow positive testimony to control the decision of the court unless it is inherently improbable. *Id.* (citation omitted).

More so, the court should not discredit the testimony of a witness simply because he or she is an employee of the defendant absent "conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his [or her] statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable." *Id.* (citing *Chesapeake & O. Ry. Co. v. Martin, et al.*, 283 U.S. 209, 214 (1931); *See also Foran v. Comm'r of Internal Rev.*, 165 F. 2d 705 (5th Cir. 1948)).

In taking this biased approach, the ALJ's conclusions and inferences demonstrate that she acted as an advocate for the Union rather than an adjudicator in this case. Attached as Ex. A is a table reflecting the ALJ's conclusions and inferences, all of which are in favor of the Union. As in *Sutter*, "the ALJ treated conflicting [and even non-conflicting] evidence here with an almost breathtaking lack of evenhandedness. The employer's witnesses saw their testimony completely disregarded for the slightest immaterial inconsistencies, while the union's witnesses survived even material contradictions." 687 F.3d at 437. For example, the ALJ applied her credibility criteria in an uneven manner when she faulted McCallum for failing to provide detailed testimony regarding the management call discussing the results of the investigation but she credited Avery and Wilson's vague testimony about the instances which Barry allegedly made anti-union statements.

Barry's testimony was much more detailed but was discredited. O. 11:33-36, 24:43-45; T. 198, 200-01, 208, 317-20.

Further, the ALJ was bound to "follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals unless and until Board precedent is overruled by the Supreme Court or the Board itself." Division of Judges Bench Book §13-100 (2020). This she did not do. Instead, she cherry picked language from exhibits and testimony to make the "facts" fit her narrative. As shown below, the ALJ used these improper inferences and one-sided determinations to find animus and causation where none exists. The rulings are one-sided and results oriented and the resulting decision cannot stand.

b. The ALJ's Evidentiary Determinations Are Erroneous

The ALJ purported to base multiple inferences and conclusions on her evidentiary determinations, citing the Federal Rules of Evidence ("FRE"). The ALJ Bench Book notes that the Board is to apply the FRE to the extent practicable. Bench Book § 16-100 (2020) (citing NLRB Rules and Regulations, Sec. 102.39 and Statements of Procedure, Sec. 101.10(a)). However, when the Board purports to base its rulings on the FRE, it must do so correctly. *Id.*

i. The ALJ Misunderstands What Constitutes A Leading Question

Several of the ALJ's credibility findings are based on testimony in response to what she found to be a leading question. As an initial matter, the ALJ misunderstands the standard for what makes a question a leading one.³² Further, she failed to take into account the multiple circumstances in which leading is acceptable.

³² The ALJ specifically cites page 300 of the transcript as an example of improper leading questions. O. 17:41-42. Her ruling is solely based on the fact that the question called for a yes or no answer. T. 300. She also cites Berkes' testimony on pages 427-28 of the transcript which did

Leading questions suggest or indicate the particular answer desired. *U.S. v. Mejia-Ramos*, 798 Fed. Appx. 749, 753 (4th Cir. 2019) (quoting *De Witt v. Skinner*, 232 F. 443, 445 (8th Cir. 1916)). A question is not leading simply because it can be answered with a “yes or no” response, but rather a question which “suggests only the answer is yes is leading; a questions which suggest only the answer no is leading; but a question which may be answered either yes or no, and suggest neither answer as the correct one, is not leading.” See *U.S. v. Wright*, 540 F.3d 833, 844 (8th Cir. 2008) (holding “[D]id [Wright] ever say anything to you about . . . reporting it or words to that effect” is not a leading question even though it can be answered with a “yes or no”); *U.S. v. Weeks*, 2016 WL 8715933, *1 (S.D. Fla. 2016).

FRE 611(c) states “leading questions should not be used on direct examination except as necessary to *develop the witness’s testimony*.” (emphasis added). The recognized circumstances for which leading questions are appropriate include “to establish ‘undisputed preliminary matters’”; “to elicit information that does not substantially expand or alter earlier testimony elicited through non-leading questions”; to establish undisputed facts; to expedite entry of foundational information into evidence; and to avoid length delays and fragmentary responses. Bench Book § 16-611.4; *U.S. v. Torres*, 894 F.2d 305, 317 (D.C. 2018); *U.S. v. Garcia-Gastelum*, 650 Fed. Appx. 470, 470 (9th Cir. 2016); *Shultz v. Rice*, 809 F.2d 643, 654-55 (10th Cir. 1986).

Here, the specific questions identified by the ALJ are either not leading or should otherwise be considered a circumstance where such a question was appropriate. See O. 17, 19. The Respondent asked questions soliciting a “yes or no” response; however, the questions cited by the ALJ as leading are in fact neutral and called for the witness to respond either “yes or no.” Yet even

not suggest the correct answer to the question and also covered facts that were not in dispute. O. 19:1-25.

if the Board considers the questions leading, the information sought is undisputed (i.e. Avery's participation in the call) and indisputable (i.e. contents of a screenshot). If the ALJ believed the questions to be improper, she should have advised counsel to allow counsel the opportunity to draw out the necessary information through non-leading questions. Bench Book §16-611.5 (2020) (citing *Liberty Coach Co.*, 128 NLRB 160, 162 N. 7 (1960); *Roy v. The Austin Company*, 194 F.3d 840, 844 (7th Cir. 1999)). Instead, the ALJ stripped Respondent of the opportunity to correct its "leading" questions directly prejudicing its position.

ii. The ALJ Misunderstands Hearsay

The ALJ also inappropriately disregarded evidence which she characterized as inadmissible hearsay evidence. The United States Supreme Court has held it is undisputed that an ALJ can consider and admit relevant and material hearsay unless it is "hearsay without a basis in evidence having rational probative value." *Leitman v. McAusland*, 934 F.2d 46, 51 (4th Cir. 1991) (citing *Evosevich v. Consolidated Coal Co.*, 789 F.2d 1021 (3d Cir. 1986); *Williams v. U.S. Dept. of Trans*, 781 F.2d 1573 (11th Cir. 1986); *Richardson v. Perales*, 402 U.S. 389 (1971)); *Johnson v. U.S.*, 628 F.2d 187, 190 (D.C. Cir. 1980). Not only is it admissible, it may constitute substantial evidence in appropriate circumstances. *Johnson*, 628 F.2d at 190. In considering the weight of hearsay evidence, a judge shall evaluate its truthfulness, reasonableness and credibility. *Id.* Rather than conducting a proper weighing of the evidence, here the ALJ wholly ignored evidence which she deemed hearsay, whether it met these standards or not.

As previously discussed, the ALJ correctly recognized that the certified unemployment hearing transcript was admissible, stating that the transcript speaks for itself and that the questioning could go forward because it was a certified government document. T. 125. The ALJ further stated, "[a]nd it's a government document as I would with this transcript that we're making today. I'm going to allow it...." T. 134. See also Bench Book § 16-402.8. However, the ALJ found

the transcript admissible only to the extent it demonstrates Lhoist's belated reliance on it to discipline Avery.³³ O. 26 n.24. It is clear that the transcript falls under several exceptions to the hearsay rule and the ALJ misapplied the applicable FRE. *Sneed v. Ken Edwards Enterprises, Inc.*, 2009 WL 10668429, at *2 (N.D. Ga. Aug. 18, 2009) (citations omitted) (properly authenticated transcript is admissible); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) (same); *Richmond v. Mission Band*, 2015 WL 1291365 (E.D. Cal. 2015).

This unfounded reversal directly harmed Lhoist's position because it completely impeaches Avery's testimony and statement that he did not know anything about the hearing until he received the phone call (thereby implying he did not know to ask a supervisor beforehand if he could take time off). The ALJ considered this to be a critical issue in the case—whether Avery had notice of the call—and the ALJ did not fully and fairly consider this evidence.

Likewise, in discussing McCallum's testimony regarding the unwritten cell phone policy, the ALJ now discredits that policy as hearsay because McCallum did not hear Beam's instructions himself. This is a glaring misrepresentation of the record because the ALJ herself asked McCallum whether he had heard Beam address the cell phone policy with his team.

JUDGE STECKLER: So was this something that you personally heard Mr. Beam say?

THE WITNESS: Yes, I've heard him say it many times.

JUDGE STECKLER: Okay. You may continue.

THE WITNESS: I've heard him say it over and over. It's – it's – it's clear it's 9 to 9:15, 12 to 12:30, in your time. Just the morning break, the lunch period, and time after work.

³³ This is only one of many misrepresentations of the record and misapplication of the law.

T. 371. Yet the Order inexplicably states that “McCallum was not present when Beam told employees about the cell phone policy. I now find the statement is hearsay.” O. 15:n.17. McCallum was not referring to Beam’s statements for the truth of the matter asserted but rather that he relayed the information to his employees. She also drew an improper adverse inference because Lhoist did not call Beam to testify to this fact. Beam’s testimony was not necessary because (1) the cell phone policy was not a reason for Avery’s termination and (2) Beam’s testimony would have been an unnecessary waste of time because all witnesses agreed that employees were permitted to use cell phones for short personal calls. *See Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). This may be the most egregious misapplication of law and misstatement of the record.

IV. CONCLUSION

The ALJ’s rulings, findings and conclusions that Lhoist terminated Avery because of his Union activity are inconsistent with applicable legal precedent and not supported by the record evidence. The fact that Avery was engaged in Union business, at the behest of Claimant May, does not negate the fact that he did so during working hours and failed to take any steps to make his participation comply with Lhoist’s policies. If this decision is upheld, it will stand for the proposition that union employees can walk away from their job at any time without steal time as long as they claim they are conducting “union business.” This simply cannot be the result.

Respectfully submitted on this the 2nd day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision has been served on the following by electronic transmission on July 2, 2020 to:

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EXHIBIT A

ALJ Inferences & Conclusions Favorability Table

ALJ Conclusions	Favors Avery	Favors Lhoist
McCallum’s testimony about his first two meetings with Avery were confusing as to the dates and sounded rehearsed, without much detail. (p. 9 n.10)	Yes	No
Gave little credence to McCallum’s version of the conversation between Avery and him because his testimony lacked detail. (p. 10)	Yes	No
Barry’s initial testimony about the unpublished guideline was to leading questions and “just put into writing at that point.” (p. 15 n.14)	Yes	No
Now finds McCallum’s statement about what Beam told employees about the phone policy is hearsay. (p. 15 n.17)	Yes	No
Crediting McCallum admission of “multiple incidents” instead of his later statement that the temporary employee was only caught on his phone twice. He appeared to be “covering his tracks.” (p. 15-16 n.18)	Yes	No
Finds credible Avery’s statements that he had no written notice of unemployment hearing. (p. 17)	Yes	No
Discredits Lhoist’s assumptions that Avery had advance notice of the unemployment. (p. 17)	Yes	No
Credits Avery’s testimony that the higher ups wanted him terminated in January 2018 for violating the no call/no show policy. (p. 17)	Yes	No
Wilson’s testimony as a current employee is credited. (p. 17)	Yes	No
“I generally discredit the testimony of Respondent’s witnesses unless it is an admission against interest or corroborated by other reliable evidence.” (p. 17)	Yes	No
Throughout the hearing, Lhoist used leading questions during direct examination. (p. 17)	Yes	No

Does not credit Barry’s testimony about the November 2018 cell phone policy publication. (p. 17-18)	Yes	No
Discredits Lhoist’s witnesses testifying that a cell phone policy existed before November 2018. (p. 18)	Yes	No
McCallum’s testimony about telling employees to get off their phones has little, if any, weight. (p. 18)	Yes	No
Credits Avery’s detailed discussion that McCallum told him he was suspended because he was on union business. (p. 18)	Yes	No
Because a number of questions to Berkes were leading and answered before an objection could be launched, the answers are entitled to “minimal weight.” (p. 18)	Yes	No
Berkes “merely capitulated to the proposition” on the duration of Avery’s call based on leading questions and is therefore not credited. (p. 19)	Yes	No
Berkes’ testimony about Avery’s termination letter undermines her testimony about whether Lhoist discussed Avery’s role during the unemployment hearing during the termination meeting. (p. 20)	Yes	No
Barry’s testimony about the significance of Avery’s role in the hearing is not credited. (p. 20)	Yes	No
Avery’s participation in the unemployment hearing was protected concerted activity. (p. 21)	Yes	No
Does not analyze the facts under <i>Burnup & Sims</i> because does not find that Lhoist’s reasons are based on good faith. (p. 21 n.20)	Yes	No
Participation in unemployment hearings on behalf of a terminated employee is a concerted activity. (p. 23)	Yes	No
Knowledge of the protected concerted activity and union activity are evident and undisputed. (p. 23)	Yes	No
Berkes’ basis for the termination letter and McCallum’s statement about union activity establish animus. (p. 24)	Yes	No

Berkes' statement that Avery engaged in the same conduct from January 2018 arbitration hearing shows hostility towards union activities. (p. 24)	Yes	No
Barry telling Avery that the higher ups wanted him terminated in January 2018 for arbitration hearing no show shows hostility toward union activities. (p. 24)	Yes	No
Barry's statements about filing a charge show animus. (p. 24)	Yes	No
Lhoist's investigation was "truncated" which shows animus, including failure to take notes, failure to interview supervisor. (p. 25)	Yes	No
Failure to call Avery's supervisors to testify about whether call affected his work or the cell policy creates an adverse inference that they would testify contrary to Lhoist's position. (p. 25)	Yes	No
No evidence in the record to support Avery having notice of the call. (p. 25)	Yes	No
Lhoist's actions are based on speculation about Avery having notice of the call and are therefore unreliable. (p. 25)	Yes	No
Finding that the transcript is hearsay and only admissible to demonstrate Lhoist's belated reliance upon it. (p. 25-26 n.24)	Yes	No
Lhoist mistakenly relied upon Section 16.3 to warrant Avery's suspension and termination. (p. 26)	Yes	No
Lhoist shifted regarding how long Avery was on the call and application of the cell phone policy. (p. 26)	Yes	No
Lhoist shifted explanations about why the first no call/no show discipline did not fall off Avery's record after 1 year. (p. 26)	Yes	No
Lhoist shifted the amount of time Avery was on the call. (p. 26)	Yes	No
McCallum could have changed Avery's time but declined to do so. (p. 26)	Yes	No

Lhoist shifted its position on the cell phone policy. (p. 26)	Yes	No
Timing of the discipline for the call shows animus because of its proximity. (p. 27)	Yes	No
Lhoist’s failure to not discipline Wilson does not translate into lack of animus. (p. 27)	Yes	No
Presumes that the temp employee was terminated for “multiple offenses” and, thus, we treated Avery unfairly in terminating him for one incident. (p. 27)	Yes	No
Distinguishes Cameron’s discipline from Avery’s discipline by concluding that Cameron was suspended for using a cell phone while operating equipment. (p. 27)	Yes	No
Finds that Lhoist disparately relies upon the cell phone policy that did not exist at the time of Avery’s discharge. (p. 28)	Yes	No
Lhoist did not demonstrate how long other employees were on the phone when McCallum caught them. (p. 28)	Yes	No
Thomas violated more rules than Avery, so Lhoist disparately treated Avery. (p. 28)	Yes	No
General Counsel made a strong showing of discriminatory motive with direct and circumstantial evidence. (p. 29)	Yes	No
Lhoist disparately treated Avery regarding falsification of records. (p. 29)	Yes	No
Lhoist’s treatment and failure to give “clear, consistent and credible explanation for discipline supports a finding of pretext.” (p. 29)	Yes	No
Lhoist’s explanations at the hearing for much of the termination letter are not about falsification of time records, but about performing perceived union activities after Avery’s break time. “Furnished the excuse rather than the reason for the discharge.” (p. 29)	Yes	No
Lhoist cannot rely upon the violation of the falsification of time records when it is a pretext to discipline Avery for his union and protected concerted activities. (p. 29)	Yes	No

Lack of a cell phone policy weakens Lhoist’s argument. (p. 29)	Yes	No
Lhoist fails to show it would have taken the same action absent the protected conduct. (p. 29)	Yes	No
Lhoist violated Section 8(a)(1) because it acted because of Avery’s participation. (p. 30-31)	Yes	No
Because Lhoist did not question the supervisors about Avery’s break or whether he was at his post, Avery’s testimony is “uncontradicted.” (p. 30)	Yes	No
Lhoist did not demonstrate that Avery’s participation affected production. (p. 30)	Yes	No
Found that Lhoist treated Avery differently for this particular break because he was engaged in protected concerted activity during an unemployment hearing. (p. 30)	Yes	No
Found that this case is not similar to <i>Vokas Provision Co.</i> (p. 30-31)	Yes	No
Lhoist violated Section 8(a)(3) because Berkes and McCallum relied on Avery’s union activity. (p. 31)	Yes	No
Lhoist supervisors were complicit in Avery’s falsification of records. (p. 31)	Yes	No
Lhoist “overbroadly” applied Section 16.3 of the CBA. (p. 32-33)	Yes	No
Section 16.3 does not include unemployment hearings. (p. 32)	Yes	No
Lhoist discriminately applied Section 16.3 to Avery. (p. 32)	Yes	No
Lhoist’s “time to find a replacement” argument is unavailing because it had no need for a replacement during the unemployment hearing. (p. 33)	Yes	No
Lhoist’s additional affirmative defenses are not supported by the record. (p. 33)	Yes	No