

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

APEX LINEN SERVICE INC.

and

**Cases 28-CA-216351
28-CA-218085
28-CA-222251
28-CA-225805
28-CA-226407
28-CA-226917
28-CA-226924
28-CA-226939
28-CA-227970
28-CA-227973
28-CA-233003**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 501, AFL-CIO**

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ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION

By its Brief in Support of Exceptions (Brief), Apex Linen Service Inc. (Respondent) urges the Board to overturn the well-reasoned rulings of Administrative Law Judge John T. Giannopoulos (the ALJ). All of the factual determinations in the ALJ's Decision (the Decision) are firmly rooted in the record. Each legal finding is accompanied by thorough analysis based on extant Board law. The Board should reject Respondent's exceptions *in toto* and affirm the Decision.

II. RESPONDENT'S EXCEPTIONS

A. The ALJ Properly Omitted Discussion of Respondent's Exhibit 57¹ from the Decision

1. Respondent's Exception to the ALJ's Treatment of RX 57²

Exception 1: To the ALJ's failure to consider probative, uncontroverted evidence of Servin's bias against Apex.

2. Facts

As Respondent correctly asserts, discharged employee Joseph Servin (Servin) admitted to sending certain text messages. Those texts are contained in RX 57. Servin sent them in February and March of 2017. Respondent discharged Servin a few months later on May 2, 2017. Decision at 4. That 2017 discharge was found to be unlawful in prior litigation.³ Pursuant to that prior litigation, Respondent was ordered to reinstate Servin. Decision at 5. Eventually,

¹ References to the Transcript are Tr. __:, showing pages, and lines where applicable. GCX __ refers to General Counsel's Exhibits. RX __ refers to Respondent's Exhibits.

² Although RX 57 is a motion from prior litigation (see footnote 3 immediately below), the portion Respondent references in its Brief are exhibits to the motion, which contain screen shots of text messages. References to RX 57 herein will refer only to those exhibits.

³ Namely, *Apex Linen Services Inc.*, JD(SF)-15-18, 2018 WL 2733700 (2018), which was adopted by the Board on July 23, 2018, in the absence of exceptions; and *Overstreet v. Apex Linen Services*, No. 17-CV-02923, 2018 WL 832851 (D. Nev. Feb. 12, 2018). The ALJ took judicial notice of these matters. Decision at 4, fn. 5; Decision at 8, fn. 10.

Respondent did so, returning Servin to work on March 29, 2018. Decision at 11. Respondent discharged Servin again on December 18, 2018. Decision at 68. That 2018 discharge is the one at issue in the current matter. The 2018 discharge occurred over 19 months after the text messages in RX 57 were sent. At the hearing in the present matter, Respondent asserted that Servin was never suspected of sabotaging Respondent. Tr. 1242:4-14.

When placed in sequential order,⁴ the text messages present the following exchange:⁵

February 17, 2017

Unknown sender: ...was hard at work they get to work and we get laid off and overtime for Production.

Walker: It's all good

Servin: I know Charlie but we will win this fight and get your job back and none of us are working any overtime till we get you back brother so gene office Kevin and kieth are gonna have to cover shifts they are already hating life I promise you we are sticking up for you brother hang tough you haven't been forgotten

Walker: Gene said they are all going to 8hr shift

Walker: Thanks brother i to hear that

Servin: They are gonna try but they have to fight the union plus we were short handed before they got rid of you guys and I call them all day long out to the floor to work on stuff plus take all my breaks so they have to cover floor and if no one can cover letter the machine sit broken we all have started doing this showing them how bad they need us

Walker: I start Monday at Brady working as an assistant to engineering

⁴ The text messages are not presented sequentially in RX 57, and RX 57 contains duplicate screen shots. It is also apparent that several messages in RX 57 are incomplete. The transcription here presents all of the content presented in RX 57.

⁵ The wording presented here is an unmodified transcription of the wording as presented in the texts. While RX 57 indicates that there were eight phone numbers included on the text exchange, the content of the messages makes it clear that the speech of Charles Walker (Walker) (referred to as "Charlie" in the exchange) is represented by phone number 17024676884. The transcription herein designates it as such. Also, the designation of "Joseph" in the text exchange refers to Servin. For the sake of uniformity, the transcription substitutes "Servin" for "Joseph."

Servin: Good to hear it Charlie glad you found work now I can just make their lives hell for the pure pleasure of it lol

Walker: The pay is better than collecting unemployment

Walker: Yes thank you lol ha ha ha [three smiling face emojis]

Servin: That's good brother and we will still fighting to get you...

...

Unknown sender: ...schedules, laying off, and terminating engineers. For every action there's a reaction. All they had to do was stay in status quo follow the rules, and they wouldn't whe...

Servin: Exactly

Servin: Tunnel #1 down tunnel #2 down iron #5 down and I just sat down for break [smiling face emoji]

March 16, 2017

Servin: (1 of 2)Good morning had a good meeting last night at the hall things are progressing nicely for us Apex continues to think that they are smarter...

3. *Argument*

In its Brief, Respondent correctly points out that the ALJ presented no treatment of RX 57 in the Decision. Administrative law judges typically do not discuss each piece of record evidence. To do so would create an excessively long, cumbersome decision. Instead, administrative law judges routinely take up for discussion those pieces of evidence that have the most bearing on the matter at issue.

Here, the ALJ's choice not to discuss RX 57 in his Decision is not necessarily an indication that the ALJ ignored it. Of the Decision's 88 substantive pages, approximately 33 are devoted entirely to discussion of Servin's discipline and discharge. See Decision at 22-26, 39-61, 68-72. Those pages, like the rest of the Decision, constitute a thorough, careful analysis in

which the ALJ reached record-based conclusions about Respondent's motive for disciplining and discharging Servin. Given the length of discussion present in the Decision, it is likely that the ALJ did not discuss RX 57 because he found these text messages, which preceded even the discharge of Servin disposed of in prior litigation, to be of little weight in the current matter. For the reasons discussed below, the ALJ would be justified in this judgment.

In its Brief, Respondent argues that RX 57 demonstrates "Servin's bias towards" Respondent and that the ALJ's failure to include discussion of this exhibit in the Decision is grounds to overturn it. Brief at 18. Servin's texts certainly reveal that he had negative feelings toward Respondent. The cause of Servin's negative feelings is clearly illustrated in the first text. There, Servin addressed Walker, stating that they "will win this fight and get your job back and none of us are working any overtime till we get you back brother... I promise you we are sticking up for you brother hang tough you haven't been forgotten". RX 57. It is clear that Servin disagreed with Respondent's decision to discharge Walker. It also appears that Servin disliked the fact that Walker's discharge left the engineering department "short handed." RX 57.

It is in that context that Servin states that employees are refusing to work overtime and that supervisors Gene Sharron (Sharron) and Keith Marsh (Marsh) are "hating life" because they have to cover shifts for engineering staff. RX 57. It is in that context that Servin states that he takes "all [his] breaks," leaving supervisors to provide coverage for engineering needs in the facility. RX 57. It is in that context that Servin, after mentioning the Union, later states that he can make supervisors' "lives hell for the pure pleasure of it". RX 57. It is clear from these and later comments in RX 57 that Servin's plan to make supervisors' "lives hell" was a reference to

his plan to refuse to take breaks, to refuse to work overtime,⁶ and to allow supervisors to make up for any labor shortage resulting from Walker's discharge.

Therefore, while any factfinder would certainly take note of an employee's stated intent to make his supervisors' lives "hell," Servin's texts make it clear that he intended to do so by legitimate means, specifically, by taking authorized breaks and, together with his coworkers, declining to work overtime, which would lay the problem of understaffing caused by Walker's discharge at the feet of those who Servin felt were responsible. With no malicious intent evinced in RX 57, there was no reason for the ALJ to analyze it in his Decision.

Evidently, Respondent wished for the ALJ to draw a series of conclusions based on RX 57, namely: (1) In early 2017, Servin harbored malicious intent toward Respondent; (2) that Servin harbored that same malicious intent in March 2018, even after Walker was reinstated pursuant to the prior litigation; (3) that Servin acted in accordance with his malicious intent by committing certain infractions; and (4) Respondent disciplined and discharged Servin due to those infractions. Indeed, the only way RX 57 would be relevant to the present case is if the ALJ were to draw each of those conclusions.

The ALJ did not err in declining to draw those conclusions. There are multiple reasons it would have been improper for the ALJ to have done so. First, it is apparent that the cause for Servin's demonstrably negative views was Respondent's decision to discharge Walker and the resulting labor shortage in the engineering department. Second, between the time Servin sent these texts and the time of his alleged misconduct at issue in the present case, Walker was

⁶ There is no evidence that overtime was mandatory and that employees would be committing some infraction by refusing it, or that the breaks Servin referenced were unauthorized. In context, Servin's statements indicate that, up until then, he had a practice of forgoing his breaks in order to perform work.

reinstated;⁷ therefore, the cause of Servin's negativity was resolved. Third, at the hearing, Respondent asserted that Servin was never suspected of sabotaging Respondent. Therefore, Servin's alleged malicious intent notwithstanding, Respondent's own theory is that Servin did not intentionally interfere with⁸ Respondent's operations. In other words, even if Servin did have the malicious intent, he did not act on it.

The key question in the current case is the one at issue in the fourth conclusion listed above: whether Respondent discharged Servin for the reasons it claimed or due to a motive unlawful under the Act. With regard to RX 57, there is only one reasonable conclusion. The texts contained in RX 57 were drafted over a year before the events at issue in this case occurred, and there were multiple intervening events. The only relevant conclusions that could be drawn from RX 57 are unsupported by logic and by Respondent's own theory of the case. To connect RX 57 to the events at issue in the present case would be to stretch the doctrine of proximate cause beyond reasonable bounds. As such, the Board may reasonably conclude that the ALJ's omission of discussion a portion of this single exhibit was deliberate.

Even if the ALJ were to have negligently failed to consider RX 57, the rationale within the Decision withstands any shortcoming in the analysis caused by the omission. As argued above, RX 57's significance from the outset is minimal, at best. When set against the ALJ's exhaustive analysis of Servin's disciplines and discharge, RX 57 is a non-issue. Whether the ALJ considered RX 57 and rightly dismissed it as unworthy of discussion, or if the ALJ

⁷ Adam Arellano (Arellano), the other discriminatee in the prior litigation was discharged before Walker. Arellano was also reinstated prior to Servin's alleged misconduct in the present case. Arellano and Walker were the only two engineers discharged at the time that the texts in RX 57 were sent. Servin's concern about short-staffing was therefore completely resolved at the time of the events at issue in the present case.

⁸ Merriam-Webster online defines sabotage as "an act or process tending to hamper or hurt." https://www.merriam-webster.com/dictionary/sabotage?utm_campaign=sd&utm_medium=serp&utm_source=jsonld retrieved July 2, 2020.

neglected to consider it at all, the lack of discussion of this single exhibit should not be the basis for overturning the ALJ's record-based, well-reasoned findings.

Finally, in its Brief, Respondent asserts that the ALJ failed to "make any findings regarding Servin's credibility". Brief at 15. As Respondent pointed out, Servin admitted to authoring the texts in RX 57. Therefore, this is not an issue of credibility but of the relevance and weight of the evidence. Further, Respondent's assertion is incorrect. The ALJ did make credibility findings with respect to Servin. See Decision at 15 fn. 23, 16, 25, and 45; *see also* Decision at 2 fn. 2 ("Testimony contrary to my findings has been specifically considered and discredited.") Respondent also makes a general credibility argument. Longstanding Board policy is to not overturn an administrative law judge's credibility determinations unless the clear preponderance of all the relevant evidence demonstrates that the ALJ is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent makes no such argument in its Brief and presents only a conclusory assertion that the ALJ's credibility determinations were erroneous. There is no basis for disturbing the ALJ's credibility determinations.

Counsel for the General Counsel (CGC) respectfully requests that the Board dismiss Exception 1.

B. The ALJ Properly Found that Respondent Disciplined and Discharged Arellano and Servin in a Disparate Manner

1. Respondent's Exceptions to the ALJ's Wright Line Analysis

Exception 2: To the ALJ's erroneous finding that discipline issued to Arellano regarding unnecessarily ordering parts constituted disparate treatment because other employees had not been disciplined for the same thing.

Exception 3: To the ALJ's erroneous finding that discipline issued to Arellano for his failure to correctly diagnose and repair the "bagger motor" constituted

disparate treatment because other engineers who unsuccessfully tried to complete a repair were not disciplined.

Exception 4: To the ALJ's erroneous finding that other employees who ordered parts which went unfulfilled were not disciplined constituted disparate treatment.

Exception 6: To the ALJ's erroneous finding that Apex afforded Arellano disparate treatment for his safety violation because Apex did not issue written discipline to other employees for safety violations.

Exception 7: To the ALJ's erroneous finding that Apex failed to show it would have disciplined Arellano for his safety violation if he had not engaged in protected activity.

Exception 8: To the ALJ's erroneous finding that Apex failed to rebut the General Counsel's prima facie case and that Servin's September 1, 2018 discipline for inadequate workmanship on the "folder/stacker" was unlawfully motivated.

Exception 10: To the ALJ's erroneous finding that Apex would not have disciplined Servin for his faulty work on the "double-buck" but for his union and protected activities.

Exception 11: To the ALJ's erroneous finding that Apex failed to show that it would have disciplined, suspended, and discharged Arellano absent his union and other protected conduct.

Exception 13: To the ALJ's erroneous finding that Apex failed to show that Servin would have been fired absent his protected activity.

2. *Facts*

Although the Exceptions make reference to multiple errors in the ALJ's determinations with regard to Adam Arellano (Arellano) and Servin, only three specific examples are cited, all of which concern Arellano. CGC will present facts pertaining to each of the specific examples mentioned in the Brief in the order they were presented in the Brief.

a. Discriminatee Adam Arellano's Parts Order Discipline

Discriminatee Arellano was employed by Respondent as an engineer. One of his duties was to repair equipment. On July 31, 2018, Arellano was performing work on "Mosca"

machines, which place a plastic cord around laundered linen and bind the cord by applying heat. There are five Mosca machines. Tr. 800. In the course of making repairs, Arellano noted a “jumper” on one of the Moscas. A jumper is a wiring configuration in which an electrical wire is removed from its proper connection and placed in another connection. A jumper might be placed for a number of reasons, including because the proper connection is not functioning.

Noting the jumper, Arellano took the Mosca to Marsh’s office at the end of his shift and informed him that a jumper was present and that it should be investigated. Arellano offered to investigate but stated that he would need to stay after his shift in order to do so. Marsh declined to have Arellano perform further work on it. Later, Sharron examined the Mosca and informed Arellano that he had determined that there was no problem with the wiring harness. Sharron acknowledged, however, that the Mosca was experiencing some technical issue. See GCX 11. Arellano, who had clocked out for the day, recommended that Sharron inspect another area of the machine, the board, which might reveal why the jumper was put in place. No replacement parts were ever ordered, and this incident did not cost Respondent any money. Tr. 597.

A week after the incident, on August 7, Sharron drafted a written warning, GCX 11. Sharron claimed that Arellano orally requested that Sharron order a new wiring harness to repair the Mosca, an assertion that Arellano denied at the hearing. Marsh and Sharron decided that Arellano should receive discipline for recommending that a new part be ordered. Parts orders are normally submitted to Sharron in writing. Tr. 593. After some vacillation, Sharron testified that he has never denied an engineer’s part request. Tr. 596-597. Marsh stated that some part requests have been denied. He stated, however, that no employee has been disciplined for ordering a part that was deemed unnecessary. Tr. 128-129.

As of August 10, 2018, the Mosca's technical issue was not resolved. GCX 11. It was repaired a month later by replacing a motor. Tr. 592. The jumper was never addressed. Tr. 814, 1341.

b. Discriminatee Adam Arellano's Bagger Discipline

On August 10, 2018, Arellano was unable to bring a bagging machine into operation. After replacing a blown fuse, removing the brushes and cleaning out the machine, it still did not operate. Arellano disassembled the motor and offered it to Marsh for inspection. Tr. 815. The task of repairing the machine was thereafter assigned to another engineer, who was able to bring the machine into operation. Tr. 134. Neither Arellano nor Respondent ordered a new motor or other parts in connection with this issue. About two weeks after the repair, Arellano experienced the same issue with this motor. He was able to bring it back into operation by shutting it down and tapping it, which he learned by speaking with the other engineer were the actions that had brought the machine back into operation previously. Tr. 817. This did not reveal to him, however, what the technical issue was. Three days after the incident, on August 13, Sharron drafted a written warning for "ordering parts that are not needed" and failing to make the repair. GCX 12. Sharron did not know what Arellano had done to attempt to repair the motor or what the other engineer did to successfully repair it. Respondent had never disciplined another engineer for failing to successfully complete a repair. According to Sharron, he would only discipline an employee for engaging in a cover-up. Tr. 604, 606. Respondent did not allege that Arellano engaged in a cover-up.

c. Discriminatee Adam Arellano's Safety Discipline

In August 2018, Respondent was preparing to resume work on its facility's rooftop after a hiatus caused by an order halting work from the Occupational Safety and Health

Administration (OSHA). Respondent obtained fall protection devices, called Weightankas, in order to address the safety issues OSHA cited.

On August 1, 2018, Marsh conducted multiple training sessions to instruct engineers on how to use the Weightanka device. See RX 7, p. 3. Marsh had employees review the Weightanka booklet, GCX 15. Marsh discussed the Weightanka components, showed employees how to wear the harness with the attendant lanyards and ropes, and told employees they needed to be anchored to the Weightanka when they worked on the roof. Tr. 144–45, 284–85, 614–15, 828–29, 853, 958–59, 961; RX 7, p. 3. The training did not include instructions on how to assemble the Weightanka, as Marsh had never used or assembled one, and GCX 15 contains no instructions on that subject. Marsh did not provide any instructions to the engineers as to the order in which the Weightankas were to be assembled or where on the roof the Weightankas were to be placed. Tr. 145, 825, 829–30, 961.

After the training, Marsh took the components of the four Weightankas and placed them on the roof. Marsh was not wearing any safety equipment. When asked why he was on the roof without safety equipment, Marsh testified that he was standing in the area that he had self-designated as a “safe zone” where a guardrail would prevent him from falling off the edge. However, pictures introduced into evidence show that the components of one of the Weightankas were placed in an unprotected area, where the roof parapet wall was only 24 inches high. GCX 14. Marsh placed the components for another one of the Weightankas near the middle of the roof. In doing so, he passed within the proximity of several skylights. He did not explain why he was not anchored or otherwise wearing safety gear. He did not assemble the Weightankas. Tr. 145–46, 154, 159, 826; GCX 14 and 47.

Arellano was the first employee assigned to work on the rooftop after work on the rooftop resumed. On August 15, 2018, when Arellano arrived on the roof, the four unassembled Weightanka devices were present. Arellano learned how to assemble the devices by reading the instructions included with the devices. Arellano opted to assemble the first Weightanka device near the location where he would be working that day.

That day, Sharron arrived at Respondent's facility at around 5:30 a.m., two and a half hours prior to his normally-scheduled work time. According to Sharron, his purpose was to catch Arellano not using fall protection equipment. At around 5:41 a.m., in a span of less than five minutes, Sharron took two pictures of Arellano. Tr. 608; see GCX 14. Pages 3 and 4 of GCX 14 show Arellano working while wearing "safety gear," but the Weightanka pieces that Arellano had transported are not visible from the vantage point in GCX 14. GCX 13; Tr. 837-838. Sharron also left the stairwell area to take pictures of the unassembled Weightankas. See GCX 14. At no point during the period that Sharron observed Arellano did he advise him to change the manner in which he was working.

Sharron reported this incident to Marsh, who drafted a written warning, GCX 13. Despite Marsh's concern that Arellano might have been at risk of death or injury, he did not advise Arellano on this matter at the time, although he did speak to Sharron about failing to do so. Tr. 152-153. Marsh admitted that he believed Sharron was more concerned with disciplining Arellano than ensuring his safety. Tr. 152-153. When Marsh issued GCX 13 to Arellano, Arellano explained that he was assembling the Weightanka at the time. Tr. 159. Marsh argued that Arellano should have been attached to the Weightanka but eventually admitted that it was impossible to attach himself to a device that he was in the process of assembling. Tr. 159-161. Marsh admitted that Arellano later completed and used the Weightanka. Tr. 160-161.

Respondent issued GCX 13 to Arellano on August 16, shortly after Arellano became a shop steward. Tr. 732

3. Authority

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the existence of a violation turns on an analysis of the employer's motivation. *Gravure Packaging, Inc.*, 321 NLRB 1296, 1304 (1996). The General Counsel must make an initial showing that animus toward the protected activity was a substantial or motivating factor for the employer's action. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). To do so, the General Counsel must by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089. Animus may be inferred from disparate treatment. *See Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *see also Electrolux Home Products*, 368 NLRB No. 34 slip op. at 4 (2019) (disparate treatment remains a key factor in determining whether an employer's adverse action toward an employee is unlawful).

If the General Counsel carries its initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *See Manno Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.*, 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence,

Merrilat Industries, 307 NLRB 1301, 1303 (1992), that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984); *Durham School Services, L.P.*, 360 NLRB 851 (2014).

4. *Argument*

In its Brief, Respondent does not dispute that evidence of disparate treatment exists. Rather, Respondent argues that the ALJ misapplied *Wright Line*⁹ by focusing exclusively on evidence of disparate treatment in reaching his conclusions. Contrary to Respondent’s assertion, the ALJ analyzed disparate treatment as one of multiple factors in determining that the disciplines at issue were unlawful.

There were multiple allegations at issue in this case. The Decision takes the logical approach of first discussing the discriminatees’ protected activity and Respondent’s animus toward those activities generally. Decision at 7-8. The Decision then treats each allegation of discriminatory conduct individually.

As stated above, although the Exceptions make reference to multiple errors in the ALJ’s determinations with regard to Arellano and Servin, only three specific examples are cited. CGC will present responsive argument in the order the incidents were presented in the Brief.

a. Arellano’s Parts Order Discipline

Regarding the discipline Respondent issued to Arellano in connection with his work on the Mosca, the ALJ examined several factors, taking up the issue of disparate treatment last. Before discussing disparate treatment, the ALJ presented extensive analysis of evidence that the

⁹ Respondent appears to argue that the Decision contains a legal inconsistency by finding that Respondent “could have validly disciplined Arellano” in one instance then ultimately finding that the discipline was unlawful. Brief at 16, fn. 7. This finding by the ALJ is consistent with the analysis required by *Wright Line* as a precursor to exploring the issue of disparate treatment as evidence of unlawful motive. Ultimately, the ALJ found that Respondent failed to rebut CGC’s prima facie case. Decision at 66. The ALJ’s analysis is in line with Board law.

Respondent's reason for disciplining Arellano was pretextual, including: Sharron's and Marsh's differing testimony on key details regarding the incident, including the machine at issue; the undisputed fact that neither Arellano nor Respondent ever ordered parts in connection with the incident, which contradicts an assertion Sharron made on the disciplinary form, GCX 11; and the fact that Sharron, for the first time at trial, listed additional reasons for the discipline, which reasons were undocumented in the discipline form or anywhere else. This analysis occupies the bulk of the Decision's discussion on the subject. Analysis of disparate treatment occupies only the final paragraph. There, the ALJ points out that Respondent admitted that it had never disciplined any other employee who had made a parts request that Respondent deemed unwarranted. It would have been inappropriate for the ALJ to omit discussion of Respondent's disparate treatment of Arellano. The ALJ committed no error in his application of *Wright Line*.

b. Arellano's Bagger Discipline

As with the Mosca discipline, the ALJ's analysis of the discipline connected to Arellano's work on the bagger included more than discussion of disparate treatment. The Decision highlights Sharron's testimony that he would not discipline an employee for failing to successfully repair a machine, but only engaging in a cover-up, which Respondent did not allege to have occurred here. The Decision points out that Respondent disciplined Arellano for ordering unnecessary parts but admits that no parts were ever ordered. With that, disparate treatment is an undoubtably salient factor. It would have been inappropriate for the ALJ to ignore Respondent's admission that other engineers have been unable to fix machines but were not disciplined for it. The ALJ committed no error in his application of *Wright Line*.

c. Arellano's Safety Discipline

With regard to the discipline Respondent issued to Arellano in connection with the Weightanka, the Decision analyzes evidence of disparate treatment as a final factor, after first analyzing evidence of pretext, namely: Respondent's unsupported claim that Arellano acted contrary to training, Respondent's unsupported claim that Arellano was outside of a purported safe zone, and Respondent's unsupported claim that Marsh had a special permit to exit the safe zone. Decision at 37-38. The ALJ further found that Respondent provided no training on the key issue of where the Weightanka devices were to be assembled or how the engineers were to move across the roof. Decision at 38-39.

After analyzing all of these issues, the ALJ turned to the evidence of disparate treatment, specifically, that employees who had committed safety infractions – as Arellano was alleged to have done – were halted and spoken to, but no discipline was issued. The ALJ pointed out that Arellano, by contrast, was neither stopped nor verbally advised. Decision at 39. As with the other disciplines, it would have been improper for the ALJ to overlook this evidence of disparate treatment as one of many factors showing that the discipline was unlawful. The ALJ committed no error in his application of *Wright Line*.

d. Respondent's General Assertions of Error

In its Brief, Respondent pointed to the fact that it has disciplined two other engineering employees and argues that this is evidence that it did not treat the discriminatees in a disparate manner. The two other employees were disciplined for different reasons – negligently overfilling a salt tank and intentionally destroying a cash box – and under circumstances entirely dissimilar to those at issue in this case. Thus, their disciplines do not constitute valid comparators. Rather, evidence of disparate treatment exists, as the ALJ found and as outlined

above, in those instances in which employees committed similar infractions to those allegedly committed by Arellano but received no discipline. Beyond stating that two other engineers were disciplined, the Brief does not elaborate why this fact should be the basis for overturning the Decision, including the other aspects of the Decision's analysis and findings with regard to the disciplines.

As mentioned, although the Exceptions make reference to multiple errors in the ALJ's determinations with regard to Arellano and Servin, only three specific examples are cited.¹⁰ With no argument to which CGC may respond regarding the instances referenced in the Exceptions, CGC defers to the reasoning contained in the Decision.

CGC respectfully requests that the Board uphold the Decision in its finding that Respondent disciplined and discharged Arellano and Servin unlawfully and dismiss the Exceptions above.

C. The ALJ Properly Found that Respondent More Strictly Enforced its Work Rules After Executing the Collective-Bargaining Agreement

1. Respondent's Exceptions Regarding Stricter Enforcement

Exception 9: To the ALJ's erroneous finding that Apex held engineers to a higher standard and more strictly enforced its work rules after the CBA was signed.

Exception 12: To the ALJ's erroneous finding that Apex held employees to a higher standard and more strictly enforced work rules because of their protected activities.

Exception 14: To the ALJ's erroneous finding that Apex changed its practice and more stringently enforced its work rules to target employees because of their union activities.

¹⁰ Respondent also argues in this section that the collective-bargaining agreement (CBA) justified its disciplinary practices. Immediately following this section of the Brief dealing with the unlawful discipline allegations, Respondent argues with regard to a separate set of Exceptions that the execution of the CBA weighs against the ALJ's finding that Respondent more strictly enforced its policies. CGC will present its entire discussion on that subject in connection with that section.

Exception 15: To the ALJ's erroneous finding that after the CBA was negotiated with the Union, Apex started holding engineers to a higher standard than before and more strictly enforced its work rules; and the increase was based at least in part on employee union activities and the new CBA specifically.

2. *Facts*

The facts discussed in the section immediately above regarding unlawful discipline are applicable here as well. The additional question here is whether Respondent violated the Act by more strictly enforcing its policies against Arellano and Servin because of their protected activity. In that regard, the record demonstrates overwhelmingly that Respondent did.

In anticipation of the execution of the collective-bargaining agreement (CBA), Sharron told Walker that he was going to use the CBA against engineers to get them fired. He said to Walker that there was nothing in the contract saying he could not discipline employees, and "one, two, three, you're down the road." Tr. 1117. Respondent held a mandatory meeting for all engineers on August 15, 2018, for the purpose of warning engineers that, according to Marsh, the "previous rules of engagement were changing." Tr. 116. During that same meeting, Sharron told the engineers that the meeting constituted their first and final verbal warning and that if they did not meet expectations he was going to start writing-up the engineers. Tr. 802-04. Sharron stated that engineers would be written-up if they did not meet expectations, because the engineers now had a contract, were well paid, and "so we have a higher standard for you guys." Tr. 803.

At the hearing, Marsh could not recall any instance in which Respondent issued disciplines for safety violations prior to the collective-bargaining agreement. Tr. 162-63. The only incident, before the CBA, he could remember that came close to a discipline was one in which two individuals were hoisting each other up with a forklift. Those two engineers were not disciplined, however. They were "spoken to about the proper use of [a] forklift" and nothing

was documented in their work record. Tr. 163. In contrast, as elaborated above, Arellano was given a written warning for a safety violation involving the Weightanka about three weeks after the CBA was signed. GCX 13.

Moreover, during Arellano's disciplinary meeting on August 16, 2018, Marsh was asked when Respondent started disciplining employees for working on the roof; he looked up an email on his computer and said as of July 30. Tr. 859–60. During the September 18, 2018 disciplinary meeting involving both Servin and Arellano, when asked when the company started disciplining employees for substandard work, Marsh looked at the date of the CBA, and told them as of July 20, which is the day the CBA went into effect. Tr. 888–89, 1118; GCX 3; RX 8 #010248.

3. *Authority*

It is well established that an employer violates the Act when it increases discipline among its employees in response to their engaging in union or other protected activities. *Jennie-O Foods*, 301 NLRB 305, 311 (1991). If the General Counsel shows that the pattern of discipline after the commencement of union activity deviated from the pattern of discipline prior to the start of union activity, a prima facie case of discriminatory motive is established, and the Respondent is then required to show that its increased discipline was motivated by considerations unrelated to employee union activities. *Id.* (citing *Keller Mfg. Co.*, 237 NLRB 712, 712 fn. 7 (1978)). “The issuance of warnings pursuant to stricter enforcement constitutes a further violation of...the Act.” *Id.* (citing *Dynamics Corp. of America*, 286 NLRB 921, 921 (1987)).

4. *Argument*

In its Brief, Respondent appears to acknowledge that it increased discipline as a result of the execution of the CBA. Respondent argues that it was necessary to do so in order to comply

with the CBA, which required that discipline be put in writing.¹¹ See Brief at 20, 21. This argument ignores the record evidence establishing that prior to the disciplines of Arellano and Servin, Respondent would not have issued any discipline – oral or written – for the matters on which it disciplined Arellano and Servin. Contrary to Respondent’s assertion, the ALJ did not conclude that the disciplines and discharges at issue were unlawful merely because they occurred after the CBA. The ALJ concluded, based on ample record evidence, that Respondent planned to rely on the CBA in disciplining and discharging Arellano and Servin because of their protected activities and that it later did so.

Respondent also argued that CGC did not allege in the current litigation that Respondent’s policies were unlawful. This is true, but it misses the point. The question is not whether the policy was unlawful – even a valid policy may not be enforced in a discriminatory manner – the question is whether the policy was more strictly enforced against Arellano and Servin due to their protected activity. As discussed above, the ALJ found that Respondent’s discipline and discharge of Arellano and Servin was due to their protected activities. Stricter enforcement of its policies was one of the means of doing so.

CGC respectfully requests that the Board dismiss the Exceptions above.

¹¹ Note, this issue is separate and distinct from the question of whether Respondent could, under Board law, institute new disciplinary policies. The ALJ addressed that question. See Decision at 73-74. CGC filed no exceptions to that finding and does not assert here that the disciplines were unlawful because they were made pursuant to a unilateral change. See Complaint paragraph 12 and Tr. 8:1-12. The question here is not whether the Respondent was permitted to create new disciplinary policies – Respondent did not assert that the policies at issue were new – rather, the question is whether Respondent more strictly enforced its existing policies in a discriminatory manner.

D. The ALJ Properly Determined That Respondent Failed to Inform Employees of a Safe Zone on the Roof

1. Pertinent Exception

Exception 5: To the ALJ's erroneous finding that "there is no evidence that Marsh informed any of the employees about a 'safe zone'" regarding Weightanka training.

2. Facts

Marsh provided training to employees on the use of the Weightanka safety device. The record contains one instance of testimony where training and the safe zone are discussed.

Q. You didn't give him any instructions on assembly at all. Right?

A. No, sir. It was contained in the handout.

Q. Now, there is nothing in the handout, and I'm referring to General Counsel's 15, there is nothing in the handout about a safe zone. Correct?

A. No, sir. This is for -- specifically for the equipment.

Tr. 324:8-14. As Respondent acknowledges in its Brief, "Marsh did not specifically testify that he told Arellano about the safe zone." Brief at 19. Respondent also acknowledges in its Brief, "the training log does not specifically reference a "safe zone.'" Brief at 19.

3. Argument

The "safe zone" at issue here is a component of Respondent's affirmative defense that Arellano committed a safety infraction in connection with the Weightanka, specifically, that Arellano was outside of the safe zone and not attached to safety equipment while performing his work. That matter is treated on pages 32-39 of the Decision and discussed above.

In its Brief, Respondent urges the Board to conclude that because Marsh presented training on safety equipment, he must have also presented instruction regarding a safe zone. There is no evidence that Marsh did so. There is no mention of the safe zone in the sole

document Marsh presented during the training, GCX 15, or indeed in any record exhibit.

Respondent acknowledges that Marsh did not testify that he presented training on the safe zone. In other words, the entire record indicates that the first time a safe zone was mentioned was at the hearing. Even so, Respondent urges the Board to infer that it occurred.

In addition, Respondent argues that the fact that CGC did not prove that Marsh did not provide training regarding the safe zone – that is, that CGC failed to prove a negative – is evidence that it occurred. This is contrary to Board law. The issue of the safe zone was part of Respondent’s affirmative defenses. The burden is on Respondent to provide evidentiary support for the assertion. There is none. It would be improper for the Board to make the inference urged.¹²

Finally, even the Board overturns the ALJ’s finding that Arellano knowingly worked outside of the safe zone, it should leave untouched the ALJ’s determination that Arellano’s discipline was nevertheless unlawful. The multiple factors that entered into the ALJ’s determination in this regard have already been discussed above and will not be repeated here. Let it suffice to say that this determination contained in a single sentence of the Decision would not be the proper basis to overturn the ALJ’s determination.

CGC respectfully requests that the Board dismiss Exception 5.

¹² Respondent also appears to argue that any ignorance on Arellano’s part was his fault for not making inquiries during the Weightanka training. See Brief at 23. That is, according to Respondent, had Arellano made inquiries during the training, Marsh would have informed him of the safe zone. Because Arellano did not make such inquiries, he performed his duties in ignorance of the safe zone. He did so at peril of receiving discipline. CGC could not have guessed that Respondent would have pursued this theory, otherwise, CGC would have inquired whether Respondent holds employees accountable for policies of which they are not aware but would have been aware had they made sufficient inquiries. Amazingly, Respondent might have argued that it does; in this case, Respondent also disciplined Arellano for failing to follow a directive that Respondent acknowledged Arellano was unaware. See Decision at 63-65, particularly 63:16-23.

IV. CONCLUSION

The ALJ's Decision is comprised of proper credibility determinations, thorough reasoning based on the record as a whole, and correct interpretation and application of Board law. Respondent has not shown why any applicable Board precedent or any aspect of the Decision should be overturned. Respondent's Exceptions should be dismissed entirely.

Dated at Las Vegas, Nevada, this 9th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS in *Apex Linen Service Inc.*, Cases 28-CA-216351, et al. was served by E-Gov, E-Filing, and E-Mail on this 9th of July, 2020, on the following:

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