

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

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

**Case 10-CA-221731**

**and**

**UNITED STEELWORKERS**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND  
MOTION TO STRIKE RESPONDENT'S BRIEF IN SUPPORT**

Nathan K. Gilbert  
Joseph W. Webb  
Counsel for the General Counsel  
National Labor Relations Board, Region 10  
Birmingham Resident Office  
1130 22<sup>nd</sup> Street South  
Ridge Park Place, Suite 3400  
Birmingham, Alabama 35205  
(205) 518-7518  
(205) 933-3017 (fax)

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## **I. Statement of the Case**

On May 20, 2020, Administrative Law Judge (ALJ) Sharon Steckler issued her decision (ALJD) in this case finding, as alleged in General Counsel's complaint, that Respondent Lhoist North America of Alabama (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by 1) suspending and terminating employee Floyd Avery for engaging in protected concerted activity and union activity, and 2) suspending and terminating Avery pursuant to an unlawful rule which facially discriminates against union activity.

Respondent filed exceptions to the ALJ's credibility resolutions, legal reasoning, and conclusions of law, recommended order, and remedy. Respondent's Brief in Support of Exceptions is procedurally deficient to a degree that unduly prejudices the General Counsel and Charging Party United Steelworkers Local 563 (Charging Party). Specifically, it violates Section 102.46 of the Board's Rules and Regulations by failing to specifically identify which exceptions it was arguing by number, failing to argue certain exceptions listed in the Bill of Exceptions, and raising arguments for the first time which were not raised before the ALJ. Respondent's exceptions should be overruled, and Respondent's Brief in Support of Exceptions should be stricken from the record.

The ALJ presented a well-reasoned and in-depth analysis for each of her findings, based on the specific facts of this case. A preponderance of relevant record evidence supports the ALJ's credibility determinations, findings of fact, and conclusions of law.

This Answering Brief is filed pursuant to Rule 102.46 of the Board's Rules and Regulations. For the reasons explained herein, the Board should affirm the ALJ's decision and adopt her recommended Order.

## **II. Issues Presented**

Respondent's exceptions present the following issues:

1. Whether Respondent's Brief in Support of Exceptions should be stricken from the record due to its blatant violation of Board Rules and Regulations?
2. Whether the ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act when it terminated Avery for participating in the unemployment hearing of Respondent's former employee?
3. Whether the ALJ correctly determined that Respondent violated Section 8(a)(3) of the Act when it terminated Avery for participating in the unemployment hearing of Respondent's former employee?
4. Whether the ALJ correctly determined that Respondent terminated Avery pursuant to an unlawful rule, in violation of Section 8(a)(1) of the Act?

Respondent's Brief in Support of Exceptions should be stricken, each of the ALJ's determinations should be affirmed, Respondent's exceptions should be overruled, and the decision and recommended Order should be adopted.

## **III. Statement of Facts**

The facts of this case are correctly stated and discussed in the ALJD, and the ALJ's findings of fact are fully supported by the record. Below is a discussion of the relevant facts.

### **A. Background**

Floyd Avery worked for Respondent for over 25 years, serving as Vice President of Charging Party for the final eight years of his employment. Charging Party represents Respondent's employees at its lime mining and processing facilities in Alabama. (ALJD 3; Joint Exh. 3). Avery worked as a slurry operator at Respondent's Montevallo, Alabama facility, and

he was responsible for operating the machine which mixes lime slurry, and for loading that slurry onto outgoing trucks. This process did not take up a significant portion of time during the work week, and Avery had a lot of down-time between his slurry operator tasks (ALJD 5; Tr. 24:5-25:21, 26:6-10). During this down-time, Avery volunteered for other duties at the plant, such as driving a water truck around the facility to spray water and limit the amount of dust, and working in the bagging operation (ALJD 5). These extra tasks were not a part of Avery's assigned job duties (ALJD 5; Tr. 25-26, 388; GC Exh. 3; R Exh. 11). Respondent's Human Resources Director, Stacey Barry, and its Production Manager, Grant McCallum, testified that Avery was a hard worker (Tr. 284). Respondent acknowledges that Avery was a strong advocate for employees in his position with Charging Party (ALJD 6; Tr. 391-392).

#### **B. Avery's Disciplinary Record**

Avery did not have any history of disciplinary or performance issues with Respondent until the parties began negotiating a contract to replace the one that expired on December 1, 2016.<sup>1</sup> However, on January 5, 2017, Respondent began disciplining Avery, who was a strident voice for Charging Party in the contract negotiations, by issuing him a final written warning for an alleged no call/no show (ALJD 6; Tr. 27, Joint Exh. 4). Respondent issued this final written warning to Avery despite its Plant Manager, Craig Gordinier, recommending far less severe discipline (R. Exh. 12).

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<sup>1</sup> The negotiations for a successor collective bargaining agreement were heated and ultimately proved unfruitful. On October 30, 2017, Respondent unilaterally implemented terms and conditions of employment after the parties had reached an impasse. (ALJD 3-4; Tr. 244; J Exh. 2, 3; R. Exh. 10) Respondent's Unilaterally Implemented Terms and Conditions of Employment were in effect in June 2018, when Respondent suspended and discharged Avery. (J Exh. 2)

Respondent's policy for non-safety-related offenses provides for a four-step progressive discipline procedure, culminating in discharge.<sup>2</sup> Per Respondent's disciplinary policy, all disciplinary actions are counted against an employee for one year, after which the employee's record is reduced so that the next offense will be a written warning (ALJD 6-7; R. Exh. 7). However, more than a year after the above discipline, on January 26, 2018, Respondent disregarded its own policy and suspended Avery for attending a grievance arbitration. Respondent alleged that Avery attended the arbitration without giving his supervisor advance notice, but Respondent admitted that the parties' practice at the time was that Charging Party's President and Vice President attended every grievance arbitration, and did not have to notify their supervisors or get permission to attend. Contrary to its own policies, Respondent suspended Avery and placed him on a last chance agreement ("LCA"). Avery signed the LCA after Respondent told him that they would consider him to be resigning if he did not sign it (ALJD 7; Tr. 32-35, 39-41, 275; Joint Exh. 5). The LCA required that Avery notify his supervisor of any planned absence more than one hour prior to the start of his shift, unless he was going to be absent for union business, when Avery was required to provide a full week's notice. It also stated that if Avery violated any other company policy or rule over next twelve months, his employment would be immediately terminated. (ALJD 7-8; Joint Exh. 5.)

### **C. Avery Participates in June 1, 2018 Unemployment Hearing Call**

On June 1, 2018, Avery worked his normal shift at Respondent's facility. Avery was scheduled for a fifteen-minute morning break, which he took at 9:12 a.m. At 9:21 a.m., while Avery was in the breakroom, he answered a phone call on his personal cell phone from a hearing

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<sup>2</sup> The policy does state that certain egregious offenses may result in immediate discharge, but none of those offenses are at issue in this case.

officer with the Alabama Department of Labor's Unemployment Office. (ALJD 8; Tr. 41-44; GC Exh. 5.)

The hearing officer told Avery that he was calling regarding an unemployment compensation hearing for Respondent's former employee, Willie May, and that he understood Avery may be able to serve as May's representative in the hearing. Understanding that this call was from a hearing officer with a state government office, Avery believed that he had to cooperate and take the call, so he agreed to participate. Avery did not have any knowledge of the unemployment hearing prior to receiving the call from the hearing officer, and Avery had never participated in an unemployment compensation hearing prior to this June 1, 2018, call. (ALJD 9-10; Tr. 41-44, 160-161, 219; R. Exh. 8.)

Present on the telephonic hearing for Respondent were Human Resources Director Stacey Barry, and Kellen Anderson, who served as counsel for Respondent. The hearing officer identified Avery as May's representative, and as the "vice president of the union or the union steward there at Lhoist." Avery's participation in the hearing was limited to asking questions of Stacey Barry regarding the legitimacy of Respondent's discharge of May and attempting to make a statement in opposition to Respondent's discharge of May, before being cut off by the hearing officer. During the hearing, neither Barry nor Anderson made any comments about or asked any questions about Avery's participation in the hearing, nor did either state that Avery should not be participating in the hearing. (ALJD 8; Tr. 41-50; R. Exh. 8.) Additionally, none of Respondent's witnesses testified that they ever told Avery, or any other employees, that they were not allowed to participate in former employees' unemployment compensation hearings.

Avery's participation in the telephonic hearing lasted from 9:21 a.m. to 9:52 a.m. (ALJD 9; GC Exh. 5). His fifteen-minute break began at 9:12 a.m. and ended at 9:27 a.m.; thus, Avery's

participation in the call lasted 25 minutes longer than his allotted break. When Avery's break ended, he proceeded back to the water truck, and remained standing beside it for the remainder of the call. (ALJD 8; Tr. 44-45.)

Avery did not have any slurry operator tasks pending at the time of the call, he had no scheduled slurry trucks, and he had not been assigned any specific tasks at the time of the call. Respondent admits that it received no complaints regarding Avery's work on June 1, 2018, and Respondent does not allege that Avery failed to timely complete any of his tasks at work that day, or that Avery's participation in the hearing in any way hindered Respondent's operations. (ALJD 8, 30; Tr. 382-383.) After the call, Avery resumed driving the water truck. He did not report to anyone that he had been on the call, because Respondent, through Barry's presence on the call, was already aware of his participation.

#### **D. Respondent's Cell Phone Practices**

As Avery and current employee Jon Wilson both testified, and the ALJ found, Respondent routinely allows employees to use their personal cell phones to make and participate in personal calls on work time without any penalty or recourse from Respondent. (ALJD 15; Tr. 66-67, 176-177.)

Respondent also routinely allows employees to engage in union business during work time without any penalty. Both Barry and Human Resources Manager Emily Berkes admitted that Respondent has often called employees regarding union business during those employees' working time. (ALJD 15.) Respondent admitted that it allows employees to participate in these calls on working time and without notifying their supervisor, either before or after the calls. Berkes even went so far as to state that Respondent considers such calls to be "company business." (Tr. 63-64;

481.) Prior to disciplining Avery, Respondent had never disciplined any employees for taking phone calls at work.

The only employee who was disciplined for any actions relating to cell phone use prior to Avery was Alvin Cameron. On January 12, 2017, Cameron had an accident while driving a loader at Respondent's facility when he unbuckled his seat belt to get his phone out of his pocket. This accident resulted in both injury to Cameron and damage to company property. Cameron was suspended for two days for violation of safety rules related to unbuckling his seat belt, but he was not disciplined or chastised for general use of his cell phone. (ALJD 16, 27-28.) Respondent instructed Cameron that he was "not to use mobile devices *while operating any Company equipment* which can definitely be a distraction." (Emphasis added) (GC Exh. 11; see also ALJD 27.)

#### **E. Respondent's Suspension of Avery and its Investigation into Avery's Participation in the Unemployment Hearing**

Respondent first confronted Avery regarding his participation in the unemployment hearing on June 5, 2018, four days after the hearing. On that date, Production Manager McCallum asked Avery whether he had informed anyone about his participation in the unemployment hearing. Avery told McCallum that he had not, and that he was on his break when he got the call. McCallum replied that he would let the company know that, and their conversation ended. (ALJD 7; Tr. 50-52) On June 6, 2018, McCallum followed up with Avery and asked Avery to write a statement regarding his participation in the June 1, 2018 call. Avery provided the requested written statement to McCallum on June 7, 2018. (ALJD 7; Tr. 52-54.)

Approximately an hour and a half after Avery submitted his statement to McCallum, Avery was called into the office of his supervisor, Terry Beam. Beam told Avery that he needed to go to McCallum's office, and that he should take a union steward with him. Avery and union steward

Robert Lacey then proceeded to McCallum's office. (ALJD 10; Tr. 54-55.) When they arrived at McCallum's office, McCallum informed Avery that he was being suspended pending investigation. When Avery asked McCallum why Respondent was doing this, McCallum told Avery that it was because Avery "was doing Union business on company time." (ALJD 10; Tr. 55.)

After Avery left work on June 7 to begin serving his suspension, he received a phone call from Berkes who requested that Avery meet with her at Respondent's regional office at 3:00pm that afternoon, to which Avery agreed (ALJD 10; Tr. 56-57). In attendance at this meeting were Berkes, Avery, Charging Party's then-President Jon Wilson, and an individual named Anastasia. Berkes asked Avery whether he knew about the unemployment hearing prior to being called. Avery told her that he did not. Berkes then asked Avery about his prior conversations with May, and Avery said that he had provided May with information concerning his discharge grievance, but that he had no idea about the unemployment hearing and had not spoken with May about it. (ALJD 10-11; Tr. 57-58.) Berkes also asked Avery whether he was serving as a representative or a witness in the hearing. Avery testified that he told her that he did not know. Berkes asked Avery how the hearing officer knew to call him, and Avery explained that May gave the Alabama Department of Labor his phone number. Avery knew this because the hearing officer told him that May provided his number. Avery asked what the purpose of the meeting was and Berkes replied she was investigating Avery's participation in the unemployment hearing and "doing Union business on company time." (ALJD 11; Tr. 62.) Avery told Berkes that he believed that he was supposed to be on the hearing call and stated that, if the time was an issue, Respondent should simply dock his time. Berkes told Avery that it was too late for that and stated that Avery's

attendance at the January 2018 grievance arbitration was evidence of a prior, similar company rule violation. (ALJD 11; Tr. 58-62; 440-441.)

#### **F. Avery's Termination**

The next communication between Avery and Respondent occurred on June 11, 2018. On that date, Berkes called Avery and asked to meet with him again at Respondent's regional office that afternoon. Berkes, Avery, Anastasia, and Wilson met that afternoon, at which point Berkes informed Avery that Respondent was firing him. (ALJD 12-13; Tr. 64-65.) Berkes provided Avery with a termination letter. The letter states, in relevant part:

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 claimed 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.

(Joint Exh. 6.) Berkes admits that she wrote this because Avery "could have requested time off [for the hearing] under union business," and that she considered it important to note that Avery was a representative because "he should have requested the time off as union business" (ALJD 13; Tr. 476).

#### **IV. Argument**

##### **A. Procedural Deficiencies in Respondent's Brief**

##### **1. Respondent's Brief Should be Stricken in Its Entirety for Failing to Specifically Identify Which Exceptions It Was Arguing in its Brief**

Section 102.46(a)(2)(ii) of the Board's Rules and Regulations states that a brief in support of exceptions must contain "[a] specification of the questions involved and to be argued, *together with a reference to the specific exceptions to which they relate.*" (emphasis added). In its Brief in

Support of Exceptions, Respondent violates this rule throughout. Instead of matching each of its exceptions to a specific argument and question presented, Respondent merely states “(Exceptions 1 through 91)” next to each of its questions presented, without any reference to specific exceptions. Nowhere in its Brief in Support of Exceptions does Respondent reference a specific exception by number. These deficiencies in Respondent’s brief make it exceedingly difficult for Counsel for the General Counsel or Charging Party to identify which exceptions are being explicitly argued by Respondent, and Counsel for the General Counsel and Charging Party are unduly hampered in responding to Respondent’s Exceptions and Brief as a result. Because this procedural defect is engrained in the entirety of Respondent’s Brief in Support of Exceptions, Respondent’s brief should be disregarded and stricken from the record as it is replete with violations of the requirements set forth in the Board’s Rules and Regulations.

**2. The Exceptions Listed in Respondent’s Bill of Exceptions Which Are Not Argued in Respondent’s Brief in Support Are Waived**

In the Appendix attached to its Brief in Support of Exceptions, Respondent lists some 91 exceptions that it takes to the ALJ’s decision. There is a fatal flaw, however, with this laundry list. Respondent fails to actually argue or support several of these exceptions in its Brief.<sup>3</sup> This is in violation of Section 102.46(a)(2) of the Board’s Rules and Regulations, which requires that a brief in support of exceptions must clearly lay out the facts and law which support Respondent’s position on each exception. The Board has found that where a party fails to support its exceptions with argument in the brief, such exceptions are waived. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) (unsupported exceptions may be disregarded), *enfd.* 456 F.3d 265 (1st Cir. 2006);

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<sup>3</sup> This is true of several of Respondent’s exceptions, including but not limited to numbers 1, 32, and 63. It is impossible for Counsel for the General Counsel to determine whether this list is exhaustive, as Respondent’s procedurally defective brief fails to identify which specific exceptions it is arguing.

*Oak Tree Mazda*, 334 NLRB 110 fn. 1 (2001). As such, Respondent’s unsupported exceptions, listed below, should be disregarded as waived.<sup>4</sup>

**3. Contentions Raised by Respondent for the First Time in its Exceptions to the Board are Untimely and Therefore Waived**

The Board has consistently held that a party waives exceptions whenever it has failed to first raise the argument before the ALJ, *Little John Electrical Solutions, LLC*, 368 NLRB No. 76, fn. 1 (September 17, 2019), citing *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) (“A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus deemed waived”), enfd. 922 F.2d 832 (3d Cir. 1990). In its Brief in Support of Exceptions, Respondent makes three arguments which it failed to raise before the ALJ. Pursuant to Board precedent, the three arguments, cited below have been waived by Respondent.

**a) Respondent Argues for the First Time in Its Brief that the ALJ Should Make Adverse Inferences Against the General Counsel’s Case**

Respondent argues at pages 27 and 32 of its Brief in Support of Exceptions that the ALJ failed to grant Respondent adverse inferences to which it believes it was entitled. In this argument Respondent omits that it failed to request that the ALJ make any adverse inferences against General Counsel’s case. As Respondent did not raise these arguments for adverse inferences before the judge, these respective exceptions to the ALJ’s decision and Respondent’s Brief in Support of Exceptions should be disregarded as waived. *Yorkaire* at 401.

Even if Respondent’s requests for adverse inferences were not procedurally deficient, neither request is supported by the facts. Respondent requests an adverse inference over the fact

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<sup>4</sup> Similarly, the Board’s Rules and Regulations state that “Any exception to a ruling, finding, conclusion, or recommendation not specifically urged [in Respondent’s brief] will be deemed to have been waived...” NLRB Rules and Regulations, Sec. 102.46(a)(1)(ii).

that the General Counsel did not call Charging Party's business agent Michael Smith to testify regarding the statement that Barry made to the union to "go file a charge." No adverse inference is proper here, because Wilson was present at this meeting and testified that he heard Barry make the statement. The judge made a credibility determination in her decision that Wilson testified more credibly than Barry (ALJD 17-18). Thus, there was no need for Smith to testify on this point. No adverse inference is appropriate where a missing witness's testimony was unnecessary. See generally, e.g., *Roosevelt Medical Center*, 348 NLRB 1016, 1022 (2006); *One Stop Kosher Supermarket*, 355 NLRB 1237, 1238 n. 3 (2010); *Riley Stoker Corp.*, 233 NLRB 1146, 1146-1147 (1976).

Secondly, Respondent claims that it should have been granted an adverse inference because General Counsel did not call Willie May to testify that he did not give Avery advance notice of the hearing. On this point, Avery credibly testified that he did not receive any advance notice of the hearing, and Respondent failed to present any admissible evidence that Avery received such advance notice.<sup>5</sup> Respondent admits that it did not even see the unemployment hearing transcript before making the decision to terminate Avery. (ALJD 25; Tr. 446-447.) Furthermore, no adverse inference can be drawn regarding Counsel for the General Counsel's decision to not call May as a witness, as May cannot be presumed to be favorably disposed to any party. See generally, e.g., *Pacific Green Trucking, Inc.*, 368 NLRB No. 14, slip op. at 4 (June 27, 2019); *Daikichi Corp.*, 335 NLRB 622 n. 4 (2001), *enfd. per curiam* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 n. 6 (1996), *affd. on point*, 123 F.3d 899, 907 (6th Cir. 1997)

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<sup>5</sup> Respondent attempts to rely on the portions of the unemployment hearing transcript from before either Avery or any of Respondent's witnesses were on the call. However, the ALJ correctly found that such portions of the transcript are inadmissible hearsay. (ALJD 25, fn. 24) See *Local 101, IUOE, AFL-CIO*, 133 NLRB 1728 (1961); *Accurate Die Casting Co.*, 292 NLRB 982 (1989).

(cases standing for the proposition that bystanders cannot be presumed as favorably disposed towards any party). No adverse inference was due to Respondent on either issue.

**b) Respondent Argues for the First Time in Its Brief in Support of Exceptions that the ALJ Should Not Make the Adverse Inferences Requested by the General Counsel**

In its post-hearing brief to the ALJ, Counsel for the General Counsel argued that the ALJ should make certain adverse inferences against Respondent. The ALJ adopted many of these adverse inferences in her decision. In its Brief in Support of Exceptions, Respondent argues that the ALJ should not make the adverse inferences requested by Counsel for the General Counsel. Respondent waited until after the ALJ had issued her decision to take issue with the adverse inferences and raised such objections for the first time in its Brief in Support of Exceptions. As the Board has held, “[t]he decision to draw an adverse inference lies within the sound discretion of the trier of fact.” *Tom Rice Buick, Pontiac & GMC Truck, Inc.*, 334 NLRB 785, 786 (2001) citing *Underwriters Labs. Inc. v. N.L.R.B.*, 147 F.3d 1048, 1054 (9th Cir. 1998). Respondent had the option of filing a motion with the ALJ for leave to file a reply brief challenging the General Counsel’s requests that adverse inferences be drawn, but Respondent failed to make any such request of the ALJ. Because Respondent never requested that the trier of fact in this case, the ALJ, deny the adverse inferences requested by the General Counsel, such requests are untimely at this juncture in the case, and are, therefore, waived. See *Little John Electrical Solutions, LLC*, 368 NLRB No. 76, fn. 1; *Yorkaire* 297 NLRB at 401.

**c) Respondent Argues for the First Time in Its Brief that Section 16.3 of the Unilaterally Implemented Terms and Conditions of Employment Is Not a “Rule”**

Respondent also argues, for the first time, in its Brief in Support of Exceptions that Section 16.3 of the Unilaterally Implemented Terms and Conditions of Employment, which it relied upon

in part to support its decision to terminate Avery, is not a “rule,” and therefore cannot be applied discriminatorily against union activity. In addition to the fact that Section 16.3 is a rule and is facially discriminatory as explained in depth below, this argument cannot now be raised by Respondent, as it failed to raise the argument before the ALJ. This argument has been waived and should not be considered. See *Yorkaire* at 401.

Even if not waived, the argument that Section 16.3 is not a “rule” is disingenuous. Section 16.3 of Respondent’s Unilaterally Implemented Terms and Conditions of Employment requires that one week’s notice be given prior to an employee taking certain union leave, while other requests for leave require far less notice. Additionally, as demonstrated by Avery’s discipline and prior LCA, failure to give the notice required by Section 16.3 can subject an employee to discipline at the hands of the company. Section 16.3 required action on the part of Avery (to give one week’s notice), and Avery’s failure to abide by Section 16.3 subjected him to discipline.<sup>6</sup> Thus, it cannot be viewed as anything other than a “rule.”

**B. The ALJ Correctly Applied the Federal Rules of Evidence (Response to Respondent Exceptions #2, 14, 21, 26, 27, 48)**

**1. The ALJ Correctly Found That Respondent Relied on Leading Questions to Solicit Desired Responses from Its Witnesses (Response to Respondent Exceptions #14, 21, 26, 27)**

Federal Rule of Evidence 611(c)(2) states that leading questions should not be used on direct examination except when the witness is called as a “hostile witness, an adverse party or a witness identified with an adverse party. . .” The testimony of Respondent’s witnesses was frequently elicited by Respondent’s counsel through leading questions on direct examination. See

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<sup>6</sup> Respondent admits in its brief that “whether Avery had advance notice [of the unemployment hearing] and [Avery’s] compliance with Section 16.3 of the CBA” was relevant to its termination decision. (R.Br. at 13; ALJD 32)

*United States v. Cephus*, 684 F.3d 703, 707 (7th Cir. 2012) (“A leading question is defined as one phrased in such a way as to hint at the answer the witness should give.”) The ALJ correctly noted in her decision that all three of Respondent’s witnesses, Berkes, Barry, and McCallum (none of whom were hostile witnesses or identified with an adverse party), responded to questions asked by Respondent’s counsel which clearly suggested the desired answers. (ALJD 17; Tr. 300, 305, 427-428.) There are multiple additional examples of Respondent’s use of leading questions in the transcript (ALJD 15-19; Tr., e.g., 302, 304, 405, 439). The judge sustained objections to such leading questions on three separate occasions during the hearing (Tr. 300, 305, 434). Moreover, Respondent’s witnesses answered leading questions before the ALJ ruled on pending objections (ALJD 18-19, Tr. 296-298). In such cases, the ALJ correctly held that such answers are entitled to “minimal weight” (ALJD 18). *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1, fn. 1 (Feb. 8, 2019). Respondent’s pervasive practice of leading its own witnesses significantly diminished the credibility of Respondent’s witnesses. See, e.g., *Richfield Hospital, Inc.*, 368 NLRB No. 44, fn. 16 (August 23, 2019) (where leading questions asked by counsel on direct examination coach witnesses to give specific answers, the witnesses’ responses are not credible).

**2. The ALJ Correctly Found That Respondent Relied on Inadmissible Hearsay Evidence (Response to Respondent Exceptions #2, 48)**

At the hearing, Production Manager McCallum testified that he had heard Supervisor Beam tell employees in Avery’s area multiple times that they were not allowed to use their cell phones during working time, and heard him and give employees instructions about specific times they were allowed to take their breaks and use their cell phones. This statement is a classic example of inadmissible hearsay.

Any statement not made “while testifying at the current trial or hearing,” that is offered for the truth of the matter asserted, and is not a prior statement by the witness, is inadmissible as hearsay, unless an exception applies. FRE 801(c)-(d), FRE 802. No exception applies to McCallum’s testimony regarding what he heard Beam say.

Beam did not testify, and Respondent offered no evidence that Beam was unavailable. Instead, Respondent attempted to rely on McCallum’s second-hand testimony about what he heard Beam say. The Board has specifically held that testimony about what others heard supervisors say, when those supervisors themselves do not testify, is properly excluded as hearsay. See *Yellow Ambulance Serv.*, 342 NLRB 804 (2004); *Federation of Telephone Workers*, 226 NLRB 427 (1976).

Although the ALJ allowed McCallum’s testimony at the hearing over General Counsel’s objection, in her decision, she agreed that McCallum’s statements about what he heard Beam say should properly be excluded as hearsay (ALJD 15, fn. 17). This determination was correct and should not be disturbed.

**C. The ALJ’s Credibility Determinations Should Not Be Disturbed  
(Response to Respondent Exceptions #4, 5, 12, 13, 15, 16, 17, 18, 19,  
22, 23, 25, 26, 28, 29)**

In its brief, Respondent expends significant effort towards disputing the ALJ’s credibility resolutions. It is well settled that the Board will not overrule an ALJ’s credibility resolutions “unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect.” *Hotel Burnham & Atwood Café*, 366 NLRB No. 22, fn. 1 (Feb. 28, 2018), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). As the Board explained in *Standard Dry Wall Products*:

[I]n all cases which come before us for decision we base our findings as to the facts upon a de novo review of the entire record, and do not deem ourselves bound by the Trial

Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence, we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

*Standard Dry Wall Products*, 91 NLRB at 545. Respondent has not met its burden to establish that the ALJ's credibility resolutions are unsound; therefore, the Board should not disturb her well-founded conclusions regarding the credibility of the witnesses. See *Id.* Rather than present evidence to support its claim that the credibility determinations were incorrect, in its brief, Respondent presents its discredited witnesses' testimony as established fact. It provides no legitimate basis to invalidate the ALJ's credibility resolutions. Respondent essentially argues that because the ALJ made credibility determinations contrary to its theory of the case, these findings should be reexamined by the Board. This circular argument is not a valid basis for the Board to reconsider the ALJ's credibility determinations under the standard enunciated in *Standard Drywall*, as nearly all the arguments presented in support of its exceptions are mere disagreements with the ALJ's credibility determinations and the weight she afforded Respondent's evidence. See *Id.*

Respondent's exceptions and supporting brief fail to establish that the ALJ erred in resolving credibility in favor of the General Counsel's witnesses. Specifically, Respondent takes issue with the ALJ's statement that she generally discredited the testimony of Respondent's witnesses unless such testimony was an admission against interest or was corroborated by other evidence. Respondent argues that, by this finding, the ALJ is attempting to violate the Administrative Procedures Act, and that the ALJ is advocating that the Board overrule long standing precedent. Respondent's arguments on this point are disingenuous. The ALJ did not state

that she discredited all the testimony of all Respondent witnesses, as Respondent alleges. Rather, the ALJ stated her finding that, based on the evidence specific to this case, this particular Respondent's witness testimony was discredited. In her decision, the ALJ goes on to explain that she discredited Respondent's witnesses for a number of reasons, including Respondent's use of leading questions, Respondent's reliance on hearsay testimony, Respondent's witnesses' contradictory statements, Respondent's witnesses' shifting explanations, and the fact that Respondent's witnesses were impeached by Respondent's own documents on more than one occasion. (ALJD 18, 20.) These factors combined led the ALJ to correctly conclude that the testimony of Respondent's witnesses should be discredited. Respondent repeatedly states in its brief that it disagrees with the ALJ's credibility determinations, but Respondent fails to present evidence to support its argument that such determinations are incorrect. Respondent has failed to carry its burden of demonstrating that the ALJ's credibility determinations should be overturned.

**D. The ALJ Correctly Credited the General Counsel's Witnesses  
(Response to Respondent Exceptions #4, 5, 16, 18, 19)**

**1. Avery (Response to Respondent Exceptions #4, 5, 16, 18)**

The ALJ found that Avery was a credible witness and correctly credited his testimony. Avery credibly and consistently testified that he believed that he was supposed to be on the unemployment call and that he had no notice of the call prior to being called by the hearing officer (ALJD 11, 13, 17; Tr. 55, 56, 62, 112, 113, 113, 160). The ALJ correctly found that, despite its repeated insinuations, Respondent failed to demonstrate that Avery had any advance notice of the call (ALJD 17). The ALJ points out that Respondent could have checked with the unemployment office to determine whether it sent Avery any written notice of the hearing and could have called May to the stand to testify that he gave Avery prior notice. However, Respondent failed to do either of these things. Avery also testified consistently in all other aspects of his testimony and

maintained the same position regarding his motives for taking and staying on the call, both at the time immediately following the call and to date, on direct as well as cross examination. See generally, e.g., *Daikichi Corp.*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997) (in determining a witness's credibility, factors include whether the witness's testimony is consistent with the documentary evidence and/or the established/admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole). Avery's testimony was properly credited by the ALJ.

## **2. Wilson (Response to Respondent Exception #19)**

The ALJ found that Wilson's testimony should be credited, and this determination should not be disturbed. As a current employee, Wilson's testimony is particularly credible, especially because he testified against Respondent. The Board has long recognized that the testimony of a witness that is adverse to their employer is apt to be particularly reliable, in as much as the witness is testifying adversely to their pecuniary interest, a risk not lightly undertaken. See *Watco Transloading, LLC*, 369 NLRB No. 93, n. 13 (May 29, 2020) ("The testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.") citing *Flexsteel Industries*, 316 NLRB 745, 758 (1995); *PPG Aerospace Indus., Inc.*, 355 NLRB 103 (2010). The ALJ correctly credited Wilson's testimony and Respondent has presented no evidence to support its argument that the ALJ's credibility determination should be overturned (ALJD 17).

**E. The ALJ Correctly Discredited Respondent's Witnesses (Response to Respondent Exceptions #12, 13, 15, 22, 23, 24, 26, 28, 29)**

As explained above, the ALJ correctly noted several reasons why the testimony of Respondent's witnesses was not credible, including Respondent's use of leading questions, the witnesses' intentionally evasive answers, and the fact that the witnesses' testimony was often contradicted on cross examination as well as by Respondent's own documents. As such, the ALJ's credibility determinations related to Respondent's witnesses should not be disturbed.

**1. McCallum (Response to Respondent Exceptions #12, 13, 15, 24, 25)**

Judge Steckler correctly found that the testimony of Production Manager McCallum should not be credited because McCallum's testimony, like that of Respondent's other witnesses, was often out of alignment with the corroborated facts of the case. First, McCallum testified that driving the water truck was part of the job description for the slurry operator. The ALJ correctly pointed out that this answer is inconsistent with the plain language of the job description itself (ALJD 18; R Exh. 11; Tr. 401-402.) Similarly, McCallum testified that the temporary employee who was allegedly terminated for cell phone use,<sup>7</sup> had "multiple instances" of cell phone misuse, but McCallum later changed his story and stated that the temporary employee only had two incidents of misuse (ALJD 18; Tr. 390). As McCallum's testimony was contradictory, the ALJ discredited his backtracking (ALJD 18). On direct examination, McCallum testified that if employees were caught on their phones during work time, such employees were told to get off of their phones. When pressed on this point, however, McCallum could not provide a single example of a time when he had told an employee to get off their phone. Furthermore, Respondent did not call any supervisor or manager who could corroborate McCallum's testimony. The ALJ was correct in

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<sup>7</sup> Respondent provided no evidence of this incident, other than McCallum's contradictory testimony.

discrediting this portion of McCallum's testimony. (ALJD 18.) See, i.e., NLRB Division of Judges Bench Book, *supra*; see also *Metro-West Ambulance Service, Inc.*, 360 NLRB at 1030, n. 13 (2015).

## **2. Barry (Response to Respondent Exceptions #22, 29)**

In her decision, the ALJ correctly noted that Human Resources Director Barry's testimony was replete with contradictions. For example, Barry testified on direct examination that nothing in the attendance policy supported Avery's testimony that attendance-related discipline fell off an employee's record after one year. (ALJD 18; Tr. 306-307.) This is directly contradictory to the plain language of Respondent's own policy (ALJD 26; R. Exh. 7). Barry's testimony that the cell phone policy issued in response to the unfair labor practice charge filed surrounding Avery's discharge was merely a reminder about an existing policy was also directly contradicted by Respondent's own position statement which flatly states that Respondent had no cell phone policy at the time of Avery's discharge. (ALJD 18; GC Exh. 7 at 10). These contradictions make Barry's testimony far less credible. See generally, *Unite Here! Local 5*, 365 NLRB No. 169 (Dec. 16, 2017) (witness's lack of credibility established through inconsistent statements).

Additionally, the ALJ correctly found that Barry's testimony, like much of the testimony from Respondent's other witnesses, was often in response to inappropriate leading questions by Respondent's counsel (ALJD 11, 16, 17; Tr. 300-301, 305). This pervasive practice of leading its own witnesses significantly weakens the credibility of Respondent's witnesses. See, e.g., *Richfield Hospital, Inc.*, 368 NLRB No. 44, fn. 16 (August 23, 2019) (where leading questions asked by counsel on direct examination coach witnesses to give specific answers, the witnesses responses are not credible). The ALJ correctly discredited Barry's testimony.

### 3. Berkes (Response to Respondent Exceptions #26, 28)

As explained above, the ALJ correctly found that Human Resources Manager Berkes' testimony was significantly bolstered by Respondent counsel's leading questions (ALJD 18- 19; Tr. 427-428). This reliance on leading questions in which Berkes often merely agreed to the premise of Respondent's counsel's questions discredits her testimony. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 15, fn. 16 (Aug. 23, 2019) (testimony in response to direct questions that have broad hints and suggestions about answers or answers is not credible); *Ajax Tool Works, Inc.*, 257 NLRB 825, 826 fn. 2 (1981) enfd. 713 F.2d 1307 (7th Cir. 1983); *Sheet Metal Workers Local 20*, 253 NLRB 166, 168 (1980); *Woodline Motor Freight, Inc.*, 305 NLRB 6 (1991), affd. 972 F.2d 222 (8th Cir. 1992).

Berkes' testimony was also contradictory on multiple counts. Berkes originally testified that Respondent's clock in/out policy was not limited to times when employees physically entered and exited the plant. When questioned further and presented with Respondent's actual policy, Berkes admitted that her earlier testimony was incorrect. (ALJD 20; Tr. 448-450; R. Exh. 5 at 29.) In relation to the conference call in which she participated where the decision was made by Respondent to terminate Avery, Berkes' testimony was wildly varied. Berkes initially testified that she could not remember if Avery's status as a union representative was discussed in the meeting, then she later changed her mind and stated that such status was not a factor in the decision. (ALJD 20; Tr. 452-453.) This testimony is directly contradicted by the termination letter that Berkes herself drafted which clearly states that Respondent considered Avery's actions as a union representative in its decision to terminate him (ALJD 24; Joint Exh. 6, Tr. 453, 475-478). The Board has held that inconsistencies in a witness's testimony can be used to establish that the

witness's testimony is not credible, and the ALJ correctly discredited Berkes on these bases. See, e.g., *Wonder State Mfg. Co.*, 141 NLRB at 1228.

**F. The ALJ Drew the Correct Adverse Inferences (Response to Respondent Exception #45)**

Judge Steckler drew the correct adverse inferences against Respondent based on the testimony, or lack thereof, from its witnesses. Specifically, Respondent failed to call either of Avery's direct supervisors: Beam, Avery's normal supervisor, or Hemphill, Avery's supervisor on the day of the unemployment call (ALJD 25). The ALJ correctly pointed out that Respondent, during its investigation, never questioned Supervisor Hemphill about Avery's break that morning and whether his break affected his work (ALJD 45). *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 23 (Aug. 14, 2019) (failure to question supervisor who could exonerate employee shows lack of concern about investigation). These failures to call potentially favorable witnesses create an adverse inference that such witnesses would not have testified favorably to Respondent. *Michael Cetta, Inc. d/b/a Sparks Rest.*, 366 NLRB No. 97, slip op. at 9-10 (May 24, 2018).

Such adverse inferences have often been applied by the Board against employers, such as Respondent, who fail to call certain witnesses "reasonably assumed to be favorably disposed toward it" to testify about matters in dispute. NLRB Division of Judges Bench Book, §16-611.5 (January 2020); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, n. 1 (1977) (same, where the employer failed without explanation to call its supervisors to testify); and *Dayton Newspapers, Inc.*, 393 NLRB 650, 664 (2003) (same, where employer failed to call a dispatcher who attended meetings between operations director and employees), enfd. in part 402 F. 3d 651, 661-662 (6<sup>th</sup> Cir. 2005). Respondent's failure in this case to examine favorable witnesses regarding factual issues that they "would likely have knowledge [of], gives rise to the 'strongest possible adverse inference' regarding such fact(s)." *Valley Hospital Medical Center*, 369 NLRB No. 16, slip op. at

24 (Jan 30, 2020), citing *Flexsteel Industries*, 316 NLRB 745, 758 (1995). Therefore, the ALJ's adverse inferences should be affirmed.

**G. The ALJ Correctly Found that Respondent Suspended and Discharged Avery for Engaging in Protected Concerted Activity and Union Activity (Response to Respondent Exceptions #30, 34, 87)**

To determine whether a respondent's adverse employment actions are attributable to unlawful discrimination against protected Section 7 activity, the Board applies the analysis set forth in the seminal case of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 900 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982). This framework requires proof that an employee's union or other protected concerted activity was a motivating factor in Respondent's action against that employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of the activity, and animus on the part of Respondent. *Fremont-Rideout Health Group*, 357 NLRB 1899, 1902 (2011). The Board has also found that the General Counsel must establish "a connection or nexus between the Respondent's animus and its decision to discharge [the employee]." *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4 (Nov. 21, 2019); see also *General Motors*, 369 NLRB No. 127, slip op. at 15 (July 21, 2020) ("the General Counsel must initially show... the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.") "(E)vidence is probative of unlawful motivation ... if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline." *General Motors*, *supra*.

When the *prima facie* elements are satisfied, the burden shifts to Respondent to demonstrate that Avery would have been suspended and discharged regardless of his protected activity. *Miera v. NLRB*, 982 F.2d 441, 446 (10<sup>th</sup> Cir. 1992). Respondent does not satisfy its

burden merely by stating a legitimate reason for the action taken. Instead, it must establish by a preponderance of the credible evidence that it would have taken the same actions in the absence of Avery's protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *T&J Trucking Co.*, 316 NLRB 771 (1995).

The evidence clearly demonstrates that Avery engaged in both protected concerted activity and union activity when he participated in the unemployment hearing phone call. Furthermore, his participation in the phone call was not in violation of any of Respondent's lawful rules or directives; thus such participation did not lose the protection of the Act. Respondent failed to establish that it would have taken the same actions in the absence of Avery's protected conduct. Therefore, the ALJ correctly found that Avery was suspended and discharged by Respondent for engaging in protected concerted activity and union activity.

- 1. The ALJ Correctly Found That Avery Engaged in Protected Concerted Activity (Response to Respondent Exceptions #30, 87)**
  - a) The ALJ Correctly Found Avery's Action of Participating in the Unemployment Hearing Was Protected and Concerted (Response to Respondent Exception #30)**

Among other things, Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. In order to enjoy the protections of the Act, such action must be both protected and concerted. In her decision, the ALJ carefully analyzed Avery's conduct of participating in the unemployment hearing and correctly determined that his conduct was both protected and concerted.

This right to engage in protected concerted activity does not just apply to dealing directly with an employer, but may also occur "outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978). The Board has repeatedly held that an

employee's participation in an unemployment hearing is protected concerted activity. *Andronaco Industries*, 364 NLRB No. 142, slip op. at 12 (Nov. 4, 2016); *M K Laboratories, Inc.*, 261 NLRB 152, 158 (1982). This position has also been affirmed in the circuit courts. Specifically, in *NLRB v. Faulkner Hospital*, 691 F.2d 51, 54-55 (1st Cir. 1982), enfg. 259 NLRB 364 (1981), the First Circuit affirmed the Board's holding that a security guard's statement given in support of a terminated co-worker at an unemployment compensation hearing was protected concerted activity, even though the guard who gave the statement was on duty at the time he gave the statement. The situation in *Faulkner Hospital* is analogous to Avery's situation, and the ALJ correctly found that Avery's conduct of participating in his former co-worker's unemployment hearing was also protected concerted activity. (ALJD 30) See *Security U.S.A.*, 328 NLRB 374, 383 (1999) ("The law is clear that an employee's testimony, and by implication representation, in aid of another's claim for unemployment compensation is protected by Section 7 of the Act."); *Global Recruiters of Winfield*, 363 NLRB No. 68, fn. 31 (Dec. 15, 2015).

**b) The ALJ Correctly Found that Avery's Participation in the Hearing Did Not Lose the Protection of the Act**

In its brief, Respondent argues that even if Avery's activities were protected and concerted, Avery lost the protection of the Act because he did not have Respondent's express permission to participate in the telephonic hearing. For this proposition, Respondent relies on *Supreme Optical Co., Inc. v. NLRB*, 628 F.2d 1262 (6<sup>th</sup> Cir. 1980) and *Vokas Provision Co. v. NLRB*, 796 F.2d 864 (6<sup>th</sup> Cir 1986). (See GC Exh. 7). However, both Sixth Circuit cases are distinguishable from the instant case and are inapplicable to this matter.

In *Supreme Optical*, the Sixth Circuit held that the employees who attended a former employee's unemployment compensation hearing engaged in protected concerted activity did not lose the protection of the Act because they had the employer's permission to attend. The court

enforced the Board's order finding that the employer unlawfully discharged the employees for attending the unemployment compensation hearing, in violation of Section 8(a)(1) of the Act. *Id.* at 1263. *Supreme Optical* is distinguishable from this case because it involved multiple employees who had to leave their employer's facility to participate in the hearing, *Id.* at 1435. In the instant case, Avery participated from the unemployment hearing by phone, and he never left the work site.

In *Vokas*, the court held that an employee is not protected by the Act when he "absents himself from work without permission or and contrary to the employer's instructions..." *Vokas Provision Co. v. NLRB*, 796 F.2d at 871. The ALJ correctly found that the *Vokas* decision is also highly distinguishable from the instant case. In *Vokas*, a full one-half of the employer's employees left the facility to participate in a representation hearing pre-conference in direct contravention to the instructions of the employer. The employer warned the employees multiple times that they could be terminated if they attended the hearing without presenting the employer with subpoenas requiring their attendance. The employees ignored the employer's instructions and left the facility to attend the hearing for almost the entire workday. The employer then terminated the employees.

The ALJ correctly found the facts of *Vokas* to be distinguishable from the instant case. (ALJD 30) *Vokas Provision Co. v. NLRB*, 796 F.2d 864. In this case, Respondent never told Avery that he was not to attend the hearing, Avery never left the job site, Avery's participation only lasted 25 minutes beyond his break time, as opposed to the hearing lasting almost a whole day as in *Vokas*, and Avery is only one of the hundreds of employees at his facility as opposed to the full 50% of the employer's workforce who left the facility to attend the hearing in *Vokas*. (ALJD 31). Additionally, Respondent provided no evidence that Avery's relatively brief participation in the hearing affected either Respondent's operations or Avery's productivity. Finally, Avery's participation was in response to a direct request from a government agency, as opposed to the

purely voluntary attendance of the employees in *Vokas*. (ALJD 31). Therefore, the ALJ correctly found that Avery's participation in the hearing did not lose the protection of the Act.

**2. The ALJ Correctly Found that Avery Engaged in Union Activity  
(Response to Respondent Exceptions # 8, 34, 35, 37, 68, 74)**

The ALJ correctly found that Avery's participation in the unemployment hearing also constituted union activity protected by Section 7 of the Act (ALJD 31). During the unemployment hearing, the hearing officer identified Avery as May's union representative, and at the time of the call Avery was also serving as May's union representative in a grievance regarding the same discharge. As Avery participated in the hearing in his capacity as a union representative representing a fellow union member, Avery was engaged in union activity protected by Section 7 of the Act (ALJD 31).

It is also clear that Respondent believed that Avery was engaged in union activity when he participated in the unemployment hearing. This is established by the fact that both Berkes and McCallum told Avery that he was being disciplined for performing "union business on company time." (ALJD 10-11; Tr. 55, 62.) These statements alone are "independently sufficient to demonstrate unlawful discrimination." See *Tito Contractors, Inc.*, 10 366 NLRB No. 47, slip op. at 4 (March 29, 2018), *enfd.* 774 Fed. Appx. 4 (D.C. Cir. 2019) (respondent employer's statements and actions reveal true reasons). Additionally, Respondent's reliance on Section 16.3 of the unilaterally implemented terms and conditions of employment, entitled "Union Leave," as one of its many shifting reasons for Avery's termination, further demonstrates that the ALJ correctly held that Respondent believed that Avery's participation in the unemployment hearing was union activity, and that Respondent terminated him for such union activity (ALJD 32). Furthermore, as discussed in detail below, Berkes admitted in Avery's termination letter that Respondent

considered Avery's participation to be that of a union representative, as opposed to merely a witness, in its decision to terminate him (ALJD 24; Joint Exh. 6; Tr. 453, 475-478.)

**3. The ALJ Correctly Found That Respondent Had Animus Against Avery's Protected Concerted Activity and Union Activity (Response to Respondent Exceptions #6, 7, 8, 9, 35, 36, 37, 38, 40, 41, 42, 43, 44, 54, 55, 74 84, 88)**

The Board's "task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment." *Tschiggfrie Properties, Ltd.*, supra, at 5, quoting *Wright Line*, 251 NLRB at 1089. However, the Board does not require direct evidence of this causal relationship. It can be "based on direct evidence or can be inferred from circumstantial evidence, based on the record as a whole." *Tschiggfrie Properties, Ltd.*, supra, at 8, quoting *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). The ALJ correctly found that the evidence in this case established that Respondent's suspension and discharge of Avery were motivated by its animus against Avery's participation in the June 1, 2018, unemployment hearing.

**a) The ALJ Correctly Found that Evidence of Animus Outside the 10(b) Period is Admissible to Show a Pattern of Animus**

In its brief, Respondent erroneously argues that it was prejudiced by the ALJ's reference to Respondent's past history of animus, some of which occurred outside the six-month limitation period of Section 10(b) of the Act. These past incidents of animus were not pled as independent violations of the Act by the General Counsel, nor did the ALJ find that these previous incidents were violations of the Act. Instead, the ALJ correctly followed a long line of precedent in considering Respondent's previous acts of animus to find a pattern of animus leading ultimately to Avery's termination. As the ALJ noted, the Board has held that it is entirely appropriate to

consider actions that may not violate the Act, although not independently alleged, to establish animus (ALJD 24). *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993). It is settled Board law that incidents that occurred outside the 10(b) period can still be used as evidence of animus. *SCA Tissue North Am., LLC*, 338 NLRB 1130, 1135-1136 (2003), *enfd.* 371 F.3d 983 (7th Cir. 2004); *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003). Thus, the ALJ's use of this evidence to cast additional light on Respondent's history of anti-union discrimination, particularly against Avery, was proper.

**b) Direct Evidence of Animus (Response to Respondent Exceptions #6, 9, 35, 37, 38, 41, 45, 46, 74)**

The ALJ correctly found that this is a unique case in that there is a plethora of direct evidence of animus both against the union and against Avery in particular. Specifically, the ALJ correctly found five concrete examples of direct animus by Respondent (ALJD 24-28). Such direct evidence can be sufficient proof of animus. See *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 5 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). Each of those findings should be adopted for the reasons explained below.

**(1) Berkes Admitted She Drafted Portions of the Termination Letter Because Respondent Believed Avery Engaged in Union Activity (Response to Respondent Exceptions #6, 35, 45, 46)**

At Avery's termination meeting, Respondent provided him with a letter explaining Respondent's alleged reasons for his termination. This letter was drafted by Berkes and stated, in part, "our investigation indicates that you were not sworn in [on the unemployment hearing call] as a witness, did not act as a witness, and instead acted as a representative for Willie May during the hearing" (ALJD 13; Joint Exh. 6). When questioned about this portion of the letter at the hearing, Berkes admitted that she wrote this because Avery "could have requested time off (for

the hearing) under union business,” and that she considered it important to note Avery’s status as a representative for fellow union member Mays because “[Avery] should have requested the time off as union business” (ALJD 26; Tr. 476). The Board has held that “[a]n employer violates...the Act when it disciplines or discharges an employee because he/she engaged in, *or is believed to have engaged in,*” protected activity. *Marburn Academy, Inc.*, 368 NLRB No. 38 (Aug. 1, 2019) (emphasis added), citing *Hyundai Motor Mfg. Alabama, LLC* 366 NLRB No. 166, slip op. at 2 (Aug. 20, 2018) (finding unlawful discharge based on belief employees engaged in protected concerted activity, regardless of whether they actually did so). Based on this evidence, the ALJ correctly found that Respondent, through Berkes, relied on its belief that Avery was engaged in union activity in its decision to terminate him (ALJD 24).

**(2) McCallum Told Avery That He Was Suspended Due to His Union Activity (Response to Respondent Exceptions #37, 74)**

The record establishes that McCallum called Avery into McCallum’s office to inform Avery that he was being suspended pending investigation for his participation in the unemployment call. When Avery asked McCallum why Respondent had made the decision to suspend him for participating in the unemployment hearing, McCallum responded that Avery was being suspended because he was conducting “Union business on company time.” (ALJD 10; Tr. 55.) Respondent argues that McCallum testified that he told Avery that he was being suspended for performing “personal business on company time,” but on cross examination McCallum corroborated Avery’s testimony, admitting that he considers “union business” to be synonymous with “personal business,” and “not work” (ALJD 10; Tr. 374-375; 393). The ALJ properly found that McCallum’s statement to Avery that he was being suspended for conducting union business on company time was direct evidence of animus.

**(3) Berkes Told Avery That He Engaged in the Same Conduct as When He Attended the January 2018 Arbitration Hearing, Which Implies That He Was Relying on Belief That Avery’s Participation in the Unemployment Hearing Was Union Activity (Response to Respondent Exception #38)**

In the June 7 investigatory meeting with Avery, Berkes told Avery that his participation in the unemployment hearing was similar to the conduct for which he had previously been disciplined in January 2018 when he attended the January 2018 grievance meeting (ALJD 24; Tr. 58-62; 440-441). The only instance cited in this meeting by Berkes as an example of Avery violating company rules involved Avery previously participating in what was undeniably union activity. The ALJ correctly noted that Respondent’s implication was that Respondent considered Avery’s participation in the unemployment hearing to be union activity, and that it took issue with such activity (ALJD 24).

**(4) Barry Told Avery That the “Higher Ups” Wanted Him Terminated for the January 2018 Incident (Exceptions #18, 39, 40)**

When Avery was disciplined for his participation, as Charging Party’s vice president, in the January 2018 grievance arbitration, Barry told Avery that Respondent’s “higher ups” wanted to terminate him for this offense (ALJD 24). Barry did not dispute this fact in his own testimony. This statement demonstrates that Respondent’s management desired to terminate Avery for engaging in protected concerted and union activity as early as January 2018. As the ALJ found, this is further evidence of animus (ALJD 24).

**(5) Barry Told the Union to “Go File A Charge” (Response to Respondent Exceptions #9, 41)**

During the heated contract negotiations from 2016 to 2018, Charging Party filed a number of unfair labor practice charges with the Board. In early 2018, during a third step grievance meeting

in which Wilson and Avery were in attendance, Barry told the union representatives that if they were not happy with Respondent's conduct, then they could just "go file a charge" (ALJD 4-5; Tr. 198-200). The ALJ correctly noted that Barry's cavalier statement, which essentially communicated that Respondent was going to do as it pleased, and the Union could file a charge if it had a problem with it, directly shows animus against the Union (ALJD 24.) The ALJ's determinations regarding direct evidence of animus should not be disturbed.

**c) Indirect Evidence of Animus (Response to Respondent Exceptions #42, 43, 44, 50, 51, 53, 54)**

As explained below, the ALJ also correctly found several instances indirectly evidencing Respondent's animus.

**(1) Respondent Undertook an Incomplete and Truncated Investigation (Response to Respondent Exceptions #42, 43, 44)**

In her decision, the ALJ correctly determined that Respondent's investigation into Avery's alleged misconduct was arbitrary. (ALJD 25-26) Respondent's incomplete and prejudiced investigation provides evidence of unlawful animus. *Mondelez Global, LLC*, 368 NLRB No. 46, slip op. at 2 (March 31, 2020).

Respondent's truncated investigation was lacking in many respects. First, there is almost no documentation of any of the meetings which took place between the management employees of Respondent related to the discharge investigation or decision (ALJD 25; Tr. 355, 468-469). Indeed, only the termination letter explains in writing the allegations against Avery and the findings of the investigation, and even this letter is inconsistent with Respondent's witnesses' testimony, as demonstrated elsewhere in this brief (ALJD 29). Second, Respondent presented no evidence that it even spoke with either of Avery's first line supervisors, Beam or Hemphill, about his participation in the hearing and how it may have affected his productivity or the efficient

operation of the plant, or about the break and cell phone policies allegedly in place as they related to Avery (ALJD 20, 25). The ALJ correctly acknowledged that the Board has held that failure to question a direct supervisor who could potentially exonerate an employee shows lack of concern about investigation (ALJD 25). See, e.g., *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 23 (2019).

Rather than conduct an impartial investigation to find the truth about Avery's participation in the unemployment hearing, Respondent based its decision to terminate Avery on presumptions of his wrongdoing and contended that it did not have an obligation to fully investigate the allegations against Avery (ALJD 25, 27-33). As the ALJ correctly noted in her decision, presuming evidence of misconduct does not render Respondent's actions lawful (ALJD 25). *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989); *Champion Parts Rebuilders, Inc., Northeast Div.*, 260 NLRB 731 fn. 1 (1982), *enfd. in rel. part*, 717 F.2d 845 (3d Cir. 1983). Because Respondent's termination decision was based on a truncated, speculative, and prejudiced investigation, the ALJ correctly found that the investigation was further evidence of Respondent's animus.

**(2) Shifting Explanations (Response to Respondent Exceptions #50, 51, 53)**

Another example of indirect evidence of animus cited by the ALJ was Respondent's constantly evolving defenses for suspending and terminating Avery. The ALJ correctly points out several examples of Respondent's shifting explanations. First, as explained elsewhere, Respondent's position on how long Avery was on the call was not consistent. Respondent contends that Avery went to break at 9:00 a.m. and therefore spent 37 minutes on the call (ALJD 26; R. Br. at 7). This, however, is not in alignment with the undisputed fact that Avery began his break at 9:12 a.m., not 9:00 a.m. The ALJ also pointed out that Respondent shifted its explanations about whether discipline fell off of employees' records after one year and about whether it maintained a

cell phone policy at the time of Avery's discharge (and then later issuing such a policy a full five months after Avery was terminated) (ALJD 26; Tr. 26, 37-41).

Respondent repeatedly changed its proffered reasons for Avery's termination. Respondent's justifications for suspending and discharging Avery shifted from "doing union business on company time" (ALJD 10-11; Tr. 55, 62), to Avery acting as a representative for May in the unemployment hearing as opposed to a witness (ALJD 12; Joint. Exh. 6), to Avery's participation in May's unemployment hearing violating its core values by constituting falsification of documents and misrepresenting working hours, to failing to notify his supervisor of an "unscheduled break," until finally shifting to its assertion that it suspended and fired Avery because his participation in the unemployment hearing constituted "stealing time" and failing to clock out for the phone call (ALJD 12; Joint. Exh. 6; GC Exh. 7; Tr. 292, 306, 421, 441). These shifting reasons are strong evidence that Respondent's given justifications are pretextual.

The Board may infer animus from the pretextual nature of an employer's proffered justifications for the adverse action, "at least where...the surrounding facts tend to reinforce that inference." *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 4 (2019), quoting *Shattuck Denn Mining Corp v. NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966); see also *Active Transportation*, 296 NLRB 431, 432 fn. 8 (1989), *enfd.* 924 F.2d 1057 (6<sup>th</sup> Cir. 1991). The ALJ correctly pointed out that Respondent's shifting explanations, reinforced by the surrounding facts of the case, are evidence that Respondent's asserted reasons for the disciplinary action against Avery were pretexts for the true reason for Avery's termination, Respondent's animus (ALJD 14). See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Kingman Regional Medical Center*, 363 NLRB No. 145 (March 17, 2015) (respondent's shifting defenses implies grasping for reasons to

justify unlawful conduct); *Scientific Ecology Group, Inc.*, 317 NLRB 1259, 1259 (1995); see also *Electrolux*, supra.

**(3) Timing (Response to Respondent Exception #54)**

The ALJ also correctly found animus in the close timing between Avery's protected concerted and union activity and his suspension and termination. In this case, Avery undertook the protected concerted activity and union activity on June 1, was suspended on June 5, and was terminated on June 11. Just ten days after his protected concerted activity, Respondent terminated a 25-year employee for minor alleged infractions. The ALJ correctly cited two cases in which the timing of discipline imposed after periods of several weeks and even four months following protected concerted activity was sufficiently indicative of retaliatory motive on the part of the employer. See, respectively, *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). In this case, the timing is much closer than in those cases, and the ALJ correctly found that the timing in this case is indirect evidence of animus on the part of Respondent (ALJD 27).

**(4) Disparate Treatment (Response to Respondent Exceptions #57, 58, 59, 60, 62, 86)**

**(a) Respondent Allowed Employees to Regularly Use Their Cell Phones for Personal Reasons on Working Time**

The evidence shows, and the ALJ correctly found, that employees are routinely allowed to use their phones to make and participate in personal calls on work time without any penalty or recourse from Respondent (ALJD 15; Tr. 66:-67, 176-177). McCallum testified that when he sees employees on their phones, he tells them to get off of them (ALJD 15). However, McCallum was unable to recall even a single example of a time when he had told an employee to get off their

phone, and Respondent failed to call any supervisors who could testify that they had told employees to get off of their phones during working time (ALJD 18).

**(b) Disparate Discipline (Response to Respondent Exceptions #57, 58, 59, 60, 62, 86)**

At the hearing, Respondent produced testimony, through McCallum, that it had, for the first time, disciplined an employee for cell phone use. The employee in question, however, was not a Lhoist employee, but was an employee of a temporary employment service which placed employees at Lhoist's facility. This situation is distinguishable from Avery's as McCallum testified that the temporary employee was sent back to his employment service only after "multiple offenses" of cell phone use during working time, including being found surfing the web on his phone when he was supposed to be working. Avery, on the other hand, was terminated for just a single incident of cell phone use, which lasted only 25 minutes past his break time, during a time when he did not have pending job duties, and for a call with a government agency. The ALJ correctly found that Respondent treated Avery, a 25-year veteran of the company with a sterling work record, more harshly than a temporary employee. This is a clear example of disparate discipline, and evidences Respondent's animus (ALJD 27). See *Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532, 1549 (2015), enfd. 689 Fed. Appx. 639 (D.C. Cir. 2016) (violation found where others violated rules but not disciplined similarly to union adherent).

Respondent also evidenced disparate discipline when it decided to merely suspend a group of employees who had been found guilty of falsification of company records, a charge levelled against Avery as well. As explained by the ALJ, these employees lied about truck weights leaving the facility, an act which was in violation of federal law and potentially opened Respondent up to legal liability. However, none of these employees were terminated for their actions. Indeed, one of these employees, Albert Thomas, was also on a last chance agreement, like Avery, at the time he

falsified company records related to truck weights, but Thomas was merely suspended even though his conduct directly violated his last chance agreement. As for the reason why Respondent admittedly treated Thomas differently than Avery, Respondent states that it did not terminate Thomas because he had previously filed EEOC charges against Respondent.<sup>8</sup> The ALJ correctly noted that this example further shows Respondent's disparate treatment of Avery.

**4. The ALJ Correctly Found That Respondent Failed to Demonstrate that It Would Have Taken the Same Action If Avery Had Not Engaged in Protected Concerted and Union Activity (Response to Respondent Exception #67)**

In its brief, Respondent takes exception to the ALJ's finding that Respondent failed to show that it would have taken the same action against Avery had he not engaged in protected concerted and union activity. The ALJ, however, correctly found that Respondent failed to carry its burden on this point. At the hearing, testimony was elicited about three other employees who engaged in similar misconduct to that Avery is alleged to have engaged in; Alvin Cameron, Albert Thomas, and an unnamed temporary employee. These employees, however, were not also engaged in protected concerted or union activity, and Respondent admits that all of these employees were disciplined less severely than Avery.

As discussed above, Cameron was driving a loader vehicle at Respondent's facility when he unbuckled his seatbelt to answer his cell phone. While doing so, Cameron had an accident with the loader which results in both damage to company property injury to himself. Avery's brief participation on the unemployment call did not cause any injury or damage, and, in fact, did not affect Respondent's operation at all. Still, Avery was terminated for his conduct, while Cameron

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<sup>8</sup> It is probative that in making this admission, Respondent admits that it treats employees differently when it comes to discipline on the basis of their charge filing activities.

was not. Cameron did not engage in protected concerted or union activity and was not terminated, while Avery did engage in such activity and was terminated.

As discussed above, Thomas was one of six employees who were found to have falsified company documents related to truck weights, in violation of both company policy and federal law. While none of the six employees were terminated, Thomas' situation is most comparable to Avery's because Thomas was also on a last chance agreement at the time of this misconduct. However, despite Thomas' clear violation of this last chance agreement, Respondent made the decision not to terminate him. Respondent did not give Avery another chance like it gave Thomas, whose misconduct was clearly more severe than that which Avery was accused of committing. Thomas is not alleged to have engaged in protected concerted activity or union activity and was not terminated, while Avery did engage in such activity and was terminated.

For the first time at the hearing, Respondent provided evidence, through the testimony of Grant McCallum, that a temporary employee had been sent back to his temporary service only after "multiple incidents" of cell phone misconduct including being found surfing the internet on his phone while he was supposed to be working. Avery, on the other hand, a 25-year employee, was not afforded the same deference that this temporary employee was.

The ALJ correctly found that when an employer does not similarly discipline or discharge employees who commit similar alleged offenses, and/or shifts its reasons for disciplining or discharging the alleged discriminatee, this evidences that Respondent's stated reasons are pretextual (ALJD 28). See *Charter Communications, Inc. v. NLRB*, 939 F.3d 798 (6<sup>th</sup> Cir. 2019), enfg. 366 NLRB No. 46 (2018); see also, e.g., *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Kingman Regional Medical Center*, 363 NLRB No. 145 (2015) (respondent's shifting defenses implies grasping for reasons to justify unlawful conduct). "... (A) finding of pretext necessarily

means that the reasons advanced by the employer either did not exist or were not relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6<sup>th</sup> Cir. 1982). The evidence establishes that Respondent’s defenses for its suspension and discharge of Avery are pretextual, and Respondent therefore failed to meet its responsive burden. The ALJ’s finding that Respondent failed to carry its burden should be adopted.

**H. The ALJ Correctly Found that Respondent Suspended and Terminated Avery Pursuant to an Unlawful Rule (Response to Respondent Exception #49, 76, 77, 78)**

Respondent maintained two separate rules related to employees taking leave and providing notice of such leave: one for union related leave, and one for all other types of leave (ALJD 32-33; GC Exh. 1(g), compare 1(i)).

Respondent admits that it maintains the following rule regarding non-union activities:

It is your responsibility to contact your Supervisor as soon as you know or think that you cannot report to work, will be late for work, or must leave early. This is necessary so that adjustments can be made to the schedule and an appropriate replacement can be notified. Your Supervisor should be contacted as soon as possible or at least 1 hour before your starting time. In all cases, actual reasons for absences are expected to be given. Failure to report to work without notifying your Supervisor may result in termination of employment. Failure to report as assigned for two days without proper notification to [Respondent] will be considered a voluntary quit without notice.

(GC Exh. 1(g), compare 1(i)). Respondent also admits that it maintained the following rule, found at Section 16.3 of the Unilaterally Implemented Terms and Conditions of Employment,<sup>9</sup> at the time of Avery’s suspension and discharge, which specifically applied only to leave for union activities:

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<sup>9</sup> Respondent admits that Charging Party did not agree to the Unilaterally Implemented Terms and Conditions of employment, and Respondent unilaterally implemented them, over Charging Party’s objection, after an impasse in bargaining.

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) week's 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.

The rule contained in Section 16.3 facially discriminates against certain union activities, as it requires one week's notice before employees engage in those protected Section 7 activities, while Respondent's rules for all other types of activity require only that notice be given "as soon as possible or at least 1 hour before your starting time." Rules which facially discriminate against Section 7 activities are unlawful. *Boeing Co.*, 365 NLRB No. 154 (2017). Therefore, Section 16.3 of Respondent's Unilaterally Implemented Terms and Conditions of Employment is unlawful, as the ALJ correctly found.

Respondent relied upon facially discriminatory Section 16.3 in its decision to suspend and ultimately terminate Avery. Respondent admits as much in its brief where it states that relevant to the termination decision was "whether Avery had advance notice [of the unemployment hearing] and [Avery's] compliance with Section 16.3 of the CBA" (R.Br. at 13; ALJD 32).

In *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), the Board explained that discipline pursuant to any unlawful rule violates the Act per se, with the appropriate remedy being reinstatement and backpay. In *Continental Group*, 357 NLRB 409 (2011), the Board stated that for discharges pursuant to overly broad rules, as opposed to facially discriminatory rules, the employer would violate the Act if it applied the rule against Section 7 activity, or activity which implicates Section 7 activity, as Respondent did here. The ALJ correctly cited to both of these

decisions in holding that Respondent's suspension and discharge of Avery, pursuant to this facially unlawful rule, violated Section 8(a)(3) of the Act. Her holding should be adopted.<sup>10</sup>

**I. The ALJ Correctly Applied Board Precedent in Finding That Respondent's Suspension and Termination of Avery violated Section's 8(a)(1) and (3) of the Act as Alleged in the Complaint. (Response to Respondent Exceptions #90 and 91)**

Based on the evidence and legal precedent above, the ALJ correctly found that Respondent's suspension and termination of Avery violated the Act. (ALJD 34) The evidence establishes that Avery engaged in protected concerted activity and union activity by participating in May's telephonic unemployment hearing. The evidence establishes that Respondent knew of Avery's protected activity and believed the activity was union activity, and that Respondent suspended and discharged Avery due to its animus against his union and protected activity, and pursuant to a facially discriminatory rule. Respondent has failed to carry its burden of proving that it would have suspended and discharged Avery in the absence of his union and protected activity, as its shifting defenses and disparate treatment of Avery establish that its proffered justifications are pretextual. Therefore, the evidence establishes, and the ALJ correctly found, that Respondent's suspension and discharge of Avery violated Section 8(a)(1) and (3) of the Act, as alleged in General Counsel's complaint (ALJD 34).

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<sup>10</sup> Respondent also argues that Charging Party agreed to Section 16.3 and should not now be able to complain about its use in Avery's situation. This is factually incorrect. At the time of Avery's discharge, the parties were operating under the Unilaterally Implemented Terms and Conditions of Employment that were imposed on Charging Party by Respondent after an impasse in bargaining. Charging Party in no way agreed to these terms and strenuously objected to their implementation and enforcement. Respondent's additional argument, made for the first time in its Brief in Support of Exceptions, that Charging Party later agreed to Section 16.3 in a subsequently agreed upon collective bargaining agreement, was not supported by any record evidence, nor any argument made before the ALJ. This newly advanced argument by Respondent is therefore waived. See *Yorkaire, Inc.*, 297 NLRB at 401.

**V. Conclusion**

For the foregoing reasons, all of Respondent's exceptions, including those waived and not specifically argued, are without merit. Counsel for the General Counsel's Motion to Strike Respondent's Brief in Support of Exceptions should be GRANTED, the Board should overrule Respondent's exceptions, and the ALJ's decision and recommended order should be adopted.

Respectfully submitted this 30th day of July 2020,

*/s/ Nathan K. Gilbert*

Nathan K. Gilbert  
Joseph W. Webb  
Counsels for the General Counsel  
National Labor Relations Board, Region 10  
Birmingham Resident Office  
1130 22<sup>nd</sup> Street South  
Ridge Park Place Suite 3400  
Birmingham, Alabama 35205  
(205) 518-7518  
(205) 933-3017 (FAX)  
joseph.webb@nlrb.gov  
nathan.gilbert@nlrb.gov

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Answering Brief of Counsel for the General Counsel by electronic transmission on this date to:

M. Jefferson Starling, Esq.  
Balch & Bingham, LLP  
1901 Sixth Avenue North  
Suite 1500  
Birmingham, AL 35203  
E-mail: jstarling@balch.com

Irving Jones, Esq.  
Balch & Bingham, LLP  
1901 Sixth Avenue North  
Suite 1500  
Birmingham, AL 35203  
E-mail: ijones@balch.com

Richard P. Rouco, Esq.  
Quinn, Connor, Weaver, Davies & Rouco, LLP  
2-20th Street North  
Suite 930  
Birmingham, AL 35203  
E-mail: rrouco@qcwdr.com

/s/ Nathan K. Gilbert \_\_\_\_\_

Nathan K. Gilbert  
Counsel for the General Counsel  
July 30, 2020