

ORAL ARGUMENT NOT YET SCHEDULED**Consolidated Cases Nos. 20-1030 & 20-1096****UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DH Long Point Management LLC,
Petitioner/Cross-Respondent,
v.
National Labor Relations Board,
Respondent/Cross-Petitioner,
&
UNITE HERE Local 11,
Intervenor.

**On Petition for Review and Cross-Application for
Enforcement of an Order of the National Labor Relations Board**

**Brief of Intervenor
UNITE HERE Local 11**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, Amici

DH Long Point Management LLC (“Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The National Labor Relations Board (“Board”) is the respondent/cross-petitioner before the Court. UNITE HERE Local 11 (“Union”) was the charging party before the Board and is the Intervenor before the Court. The Company, the Board’s General Counsel, and the Union appeared before the Board in case number 31-CA-226377.

B. Rulings Under Review

The Company seeks review and the Board seeks enforcement of a Decision and Order the Board issued in case number 31-CA-226377, on February 3, 2020, reported at 369 NLRB No. 18.

C. Related Cases

Intervenor is unaware of any related cases pending in this court or any other court.

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GLOSSARY

ALJ	Administrative Law Judge
JA[Page#]	Joint Appendix and page reference
Flamenco	Jose Flamenco, cook
Guerrero	Mona Guerrero, in-room-dining chef de cuisine
Haack	Terri Haack, Terranea's president
HR	Human resources
Ibarra	Bernard Ibarra, executive chef and vice president of culinary experience
Kwok	Anita Kwok, human resource manager
Lovato	Freddy Lovato, former junior sous chef
NLRA	National Labor Relations Act
NLRB, or Board	National Labor Relations Board
Pet'r's Br.	Petitioner DH Long Point's Opening Brief
Resp't's Br.	Respondent NLRB's Reply Brief
Ruano	Efren Ruano, in-room-dining sous chef
Santos	Francisco Santos, junior sous chef
Terranea	Terranea Resort, operated by petitioner DH Long Point Management, LLC

STATEMENT OF THE ISSUES

Intervenor concurs with the Statement of the Issues put forth in the brief filed by the Board. (Resp't's Br. 2-3.)

PERTINENT STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Statutory Addendum to the brief filed by the Board.

STATEMENT OF THE CASE

Intervenor concurs with the Statement of the Case in the brief filed by the Board. (Resp't's Br. 3-14.)

SUMMARY OF THE ARGUMENT

When companies target workers because of their participation in protected union activity, such retaliation not only harms the targeted worker but also sends a cautionary message to other workers about what may befall them if they follow suit. In this case, Freddy Lovato, a veteran line cook at the Terranea Resort, did not simply participate in protected union activities. He helped launch a union organizing drive at his workplace and quickly became the campaign's most outspoken and visible proponent. Among other actions, he led multiple delegations to complain to management about labor issues and was one of the few employees to be quoted in multiple press stories about the resort's employment practices,

including in such major publications as *Bloomberg* and the *Los Angeles Times*. As unions like Intervenor know all too well, the targeted removal of such a high-profile leader can quickly put an end to workers' efforts to better their lot.

Based on a meticulous review of a rich record, the Board found that the Company discriminated against Lovato because of his organizing activities when it issued him the final written warning that set the stage for his termination. As set out herein, the Company's objections to the Board's conclusion are meritless because an abundance of evidence shows that the Company's discipline of Lovato was discriminatory. There is direct evidence of general union animus, including a statement by the Company's president that the resort would be unionized "over her dead body." The record is also replete with circumstantial evidence demonstrating discrimination against Lovato for his protected activities. First, the Company's discipline of Lovato was marked by disparate treatment. The Company issued its harshest discipline short of termination to Lovato for not catching a coworker's mistake, while issuing lesser discipline to the employee who actually made the mistake but whom the company did not consider a union supporter. Second, the Company based its discipline on a sham thirty- to forty-five-second investigation. The Company accuses the Board of substituting its judgment for the Company's on this point, but this ignores the fact that the Company's HR manager herself admitted that this investigation was unreasonable. Third, the Company departed

from its standard progressive-discipline system. Its only defense is to say that it reserved the “sole and absolute discretion” to do so, even though court after court has confirmed that such use of discretion can, indeed, be evidence of union animus. Fourth, the Board determined that the Company’s witnesses gave false or misleading testimony.

Each of these pieces of evidence supports a finding of union animus. Together, they form a cohesive picture that the Company acted with an unlawful discriminatory motive in disciplining and discharging Lovato. In turn, each of the Company’s attempts to undermine the Board’s factual finding is either factually inaccurate or legally misleading. As a whole, they come nowhere near the showing that this Court would require to second-guess the Board’s expertise in inferring discriminatory intent from such a robust and varied set of evidence.

The Company’s argument that Lovato was a statutory supervisor and thus not entitled to the NLRA’s protection likewise falls short. The Board properly found that the Company did not meet its burden to establish Lovato was a supervisor on the sole ground for its claim: that Lovato “responsibly directed” his coworkers. None of the evidence that the Company points to suggests that it held persons in Lovato’s position—junior sous chef—responsible for the performance of other employees, as would be required for a showing of “responsible direction.” Indeed, apart from the discipline against Lovato that the Board found was

unlawfully discriminatory, the Company could not identify a single instance in which any junior sous chef was similarly disciplined for another employee's performance. Nor did any of its other evidence rise beyond vague, unsupported, or conclusory statements. Moreover, the Company failed to show that Lovato exercised independent judgment in carrying out any direction of others because his conduct was tightly circumscribed by the Company's predefined menus and kitchen rules. Further, the Company's legal arguments on independent judgment are based entirely on older, often out-of-circuit cases that do not apply the current Board standard and differ markedly from the facts presented here.

STANDARD OF REVIEW

The Court's review of Board decisions is "narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (quoting *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419 (D.C. Cir. 1996)). The Court must uphold the Board's decision "unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so." *E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). The Court may reverse the Board's factual findings "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Bally's Park Place v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). Finally, the Court must accept the

Board’s credibility determinations unless they are “patently unsupportable.” *Inova*, 795 F.3d at 80 (citing *Traction Wholesale Ctr. Co. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000)).

ARGUMENT

I. The Board Properly Found that the Company Violated the NLRA in its Discipline and Discharge of Lovato.

i. Legal Framework

An employer violates Section 8(a)(3) of the NLRA by taking adverse employment action against an employee because of that employee’s union support or participation in protected, concerted activity. 29 U.S.C. § 158(a)(3). To determine whether an employer’s disciplinary action violates the NLRA, the Board applies the burden-shifting test set forth in *Wright Line*, 251 NLRB 1083 (1980). In this case, substantial evidence supported the Board’s findings that the General Counsel met its burden under *Wright Line* and that the Employer failed to show it would have taken the same action against Lovato in the absence of his protected activities.

ii. Substantial Evidence Supports the Board’s Findings that Lovato Engaged in Extensive Protected Activities, and the Company Knew of Lovato’s Activities.

The Board properly found that the General Counsel established the first two elements of the *Wright Line* test—protected activity and employer knowledge of

such activity—by a preponderance of the evidence. The Company does not dispute that Lovato was an active leader in the Union’s organizing campaign at Terranea. But it is worth emphasizing just how visible and outspoken a leader Lovato was ever since he helped to launch the unionization campaign in October 2017. On October 19, 2017, for example, Lovato led and spoke at the opening Union delegation, participated in a march around the resort, and stood next to the podium during a press conference, during which Executive Chef Bernard Ibarra and Chef de Cuisine Mona Guerrero were present. (JA31-32; JA51; JA53; JA 510.) Lovato subsequently led several delegations of workers to speak in support of unionization with Terranea management. (JA32-33; JA117.) Going forward, Lovato would attend the most organizing meetings of any of his coworkers, actively invite his coworkers to join these meetings, and encourage his coworkers to sign union-authorization cards. (JA144; JA148.) Summing up Lovato’s role in the unionization drive, organizer Alicia Quiros stated that Lovato was one of the Union’s two most consistently involved and outspoken leaders at Terranea. (JA149.)

Lovato also became the public face of the Terranea organizing drive after he was one of the few employees to be quoted, sometimes at length, in multiple press stories about the resort’s employment practices, including in such major

publications as *Bloomberg* and the *Los Angeles Times*.¹ (JA149; JA561-79.)

Lovato's willingness to speak openly to the media about poor working conditions at the resort distinguished him as the most prominent worker leaders at Terranea. In short, the record below supplies ample evidence of Lovato's unusually vocal and vigorous activism on behalf of the unionization campaign and the Company's knowledge of his actions, presenting a clear "reason for [Terranea] to single out [Lovato] for negative treatment." *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006). (*Contra* Pet'r's Br. 52.) Thus the Board properly found that the first two parts of the *Wright Line* inquiry are met.

iii. Substantial Evidence Supports the Board's Finding That Union Animus Was a Motivating Factor in the Company's Discipline and Discharge of Lovato.

The Board also properly found that the third element of *Wright Line* was satisfied because a preponderance of the evidence supported the inference that union animus was a motivating factor in the Company's discharge of Lovato. A finding of union animus is typically established through circumstantial

¹ While one of these articles specifically reported on the unionization drive, several others covered allegations of labor abuses by the Company. These included one on allegations of the exploitation of migrant workers at the Terranea, *see Complaint accuses luxury Terranea Resort of human trafficking violations, exploiting foreign interns*, L.A. TIMES (Dec. 27, 2017) (JA573-81), and two on wage-theft lawsuits against the Terranea, *see Workers at Luxury Rancho Palos Verdes Resort Sue Over Alleged Wage Theft Violations*, LAIST (Oct. 19, 2017) (JA569-72), and *Terranea Workers Allege Wage Theft Violations in Class Action Lawsuit*, EATER (Oct. 19, 2018) (JA566-68).

evidence that can include, among other things, departure from past practice, disparate treatment of the discriminatee, statements and actions showing the employer's animus, the timing of the employer's adverse action in relationship to the employee's protected activity, the presence of other unfair labor practices, and shifting explanations for a personnel action. *Kitsap Tenant Support Servs.*, 366 NLRB No. 98 (May 31, 2018). Substantial evidence from each of these categories supports the Board's finding of animus.

While the Court must generally afford the Board's decisions a "high degree of deference," *Parsippany Hotel Mgmt.*, 99 F.3d at 419, the Court is "even more deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motivation is circumstantial." *Inova*, 795 F.3d at 80 (quoting *Traction Wholesale Ctr. Co.*, 216 F.3d at 99). This is because the Board's reliance on circumstantial evidence is grounded in credibility determinations that this Court "is ill-positioned to second-guess." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1200 (D.C. Cir. 2005) (quoting *W.C. McQuaide, Inc. v. NLRB*, 133 F.3d 47, 53 (D.C. Cir. 1998)). Such findings go to the core of the Board's "expertise in drawing reasonable inferences from the evidence to determine an employer's motive" *Id.*

Despite *Wright Line's* well-established emphasis on circumstantial evidence, the Company erroneously implies—in a claim conspicuously lacking a citation—

that direct evidence of unlawful behavior is required for a finding of union animus. (Pet'r's Br. 42. ("Supposed 'circumstantial evidence' cannot make up for the total absence of direct evidence.")) This is not the law, and for good reason: in a legal regime that prohibits certain forms of discrimination, employers and other parties are understandably careful to avoid inviting liability by making overtly discriminatory statements. Thus the Board adopted the Supreme Court's framework for inferring animus from a variety of circumstantial evidence, which is typically all that a discriminatee can muster in making an unfair labor practice case. *See Wright Line*, 251 NLRB at 1087-88 (discussing and adopting the Supreme Court's reasoning in establishing the shifting burden tests to evaluate discriminatory motive in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

This Court has embraced the logic of the *Wright Line* test and does not require direct evidence to establish union animus. *Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988). Accordingly, the uncontroverted direct evidence of President Haack's overt threat of futility, discussed below, is far from a "thin reed" on which to base the entire finding, as the Company misleadingly suggests. (Pet'r's Br. 39.) On the contrary, Haack's unlawful threat reinforces an otherwise substantial showing of animus based on the Board's findings of the

Company's disparate treatment, failure to conduct a reasonable investigation, departure from established disciplinary procedures, and shifting and implausible testimony, among other evidence.

1. The Company made an overt threat of futility and conducted unlawful surveillance of union organizers.

Shortly after the union campaign was announced, the Company's senior managers required workers to attend numerous meetings in which managers, including its most senior manager, made antiunion statements. (JA100.) At one of these meetings, Terranea President Terri Haack stated that the union would only come into the resort "over her dead body." (JA125-26.)² As the Board observed here, the Board has previously held that such a statement by a high-level manager constitutes an unlawful threat of futility in violation of Section 8(a)(1) of the Act and demonstrates an employer's union animus. (JA271 (citing *Montgomery Ward & Co.*, 316 NLRB 1248, 1249 (1995), *enfd. per curiam* 97 F.3d 1148 (4th Cir. 1996); *S. Nassau Cmty. Hosp.*, 262 NLRB 1166, 1175 (1982)).) As the Board also correctly observed, it makes no difference whether or not Haack herself was

² The Company also questions the credibility of the employee's testimony concerning President Haack's "over her dead body" statement. Yet the Board found this testimony "credible on its face." (JA271 n.36.) Moreover, the Company not only declined to call Haack as a witness to rebut the testimony but also credited other parts of the same witness's testimony. (JA271 n.36.) This Court is ill-positioned to second-guess the Board's credibility finding, especially given the complete absence of any rebuttal by the Company.

directly involved in issuing Lovato's final written warning. (JA271.) *See Parsippany*, 99 F.3d at 423-24.

The Company attempts to argue otherwise by relying on several cases that can be readily distinguished from the case at hand. First, the Company points to *Flagstaff v. NLRB*, 715 F.3d 928, 935 (D.C. Cir. 2013), for its finding that the antiunion statement of a higher-level supervisor should not be imputed to the lower-level supervisors responsible for the termination. (Pet'r's Br. 40.) But in *Flagstaff*, the Board credited testimony that the vice-president who made the termination decision was actually unaware of the employee's union activity, while the other involved supervisor had a long record of enforcing the employer's attendance policies consistently. *Flagstaff*, 715 F.3d at 935-36. Thus, the Court found that it was inappropriate to impute knowledge to supervisors where doing so would defy credited "direct proof to the contrary." *Id.* at 935.

Here, the clear difference is that the Board has not credited any relevant proof to the contrary that would suggest union animus was not a factor in Kwok, Ibarra, and Guerrero's decision-making. Instead, the Board found that those managers' inconsistent and evasive testimony around Lovato's discipline was yet another factor supporting an inference of union animus. (JA273; *see infra* Section I.iii.5.) Therefore, this imputation is far from an "absurd" legal fiction in this case;

rather, it forms part of the reasonable inferences the Board made based on its credibility findings of the witnesses.

Second, the Company attempts to rely on *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302 (D.C. Cir. 2006), for a similar argument. (Pet'r's Br. 41.) Yet this comparison similarly fails on the facts: in *Detroit Newspaper Agency*, the Court discredited the antiunion statement as proof of the firing supervisor's animus both because the ALJ found the only relevant witness to be "very lacking in credibility," and because the contested statement was only made in private to one person. *Detroit Newspaper Agency*, 435 F.3d at 310. Given those two facts, the Court noted that the impact of the statement was further circumscribed because the supervisor who made it was not directly involved in the termination. *Id.* Again, the meaningful factual differences between the cases the Company cites and the case at hand lead back to the proposition that the question of animus is a fact-intensive inquiry based on credibility determinations that the ALJ and the Board are uniquely well positioned to make.³

³ Finally, the Company also misleadingly relies for the same purpose on *Meco v. NLRB*, 986 F.2nd 1423, 1437 (D.C. Cir. 1993). (Pet'r's Br. 40-41). As this Court has clarified, *Meco* held only that "prior anti-union comments of two low-level factory supervisors were insufficient to establish" animus in a subsequent firing conducted by other managers. *Parsippany*, 99 F.3d at 423 (discussing *Meco*'s holding).

While the Board chose not to rely on it, the Union also presented “uncontroverted evidence” of other unlawful antiunion conduct by other resort managers and security guards. (JA271 n.37.) This conduct included “surveilling employees engaged in pro-union activity, telling employees not to talk about the union at work, and prohibiting off-duty employees from handbilling around the resort.” (JA271 n.37.) The Board found it unnecessary to address that direct evidence of animus in light of the other extensive evidence of animus and discriminatory motive. Though we do not address it here further, we simply note that such additional examples of unlawful union animus inform the Board’s credibility determinations.

2. The Company’s discipline of Lovato was marked by disparate treatment.

This Court has long embraced Board precedent holding that the disparate issuance of discipline against union supporters relative to other employees provides strong evidence of discriminatory intent. *See, e.g., Fort Dearborn v. NLRB*, 827 F.3d 1067, 1075-76 (D.C. Cir. 2016) (company’s disparate enforcement of its no-visitor policy supported Board’s finding of animus); *Ozburn-Hessey Logistics v. NLRB*, 833 F.3d 210, 223 (D.C. Cir. 2016) (company’s punishing a union worker’s infraction “far more severely than prior, similar infractions by other employees” supported Board’s finding of animus); *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (severity of discipline

considering the prior nonenforcement of work rule supported Board's finding of animus).

Here, the Company engaged in a paradigmatic act of discrimination when it issued its most severe form of discipline short of termination to union activist Lovato for failing to catch the error of another employee, while at the same time issuing lesser discipline to Jose Flamenco, the employee who it knew actually made the alleged error but was not a union supporter. The Company argues that this can be explained by Lovato and Flamenco's different rankings and that Lovato's position of junior sous chef "carried higher responsibility." (Pet'r's Br. 46-47.) However, the Board found that the Company failed to show that Lovato was actually responsible for directing the work of others. *See infra* Section II.i.

Moreover, even assuming that it would be proper to issue its harshest discipline to a junior sous chef but not a cook II for the mistake of the cook II, the Company fails to explain away the extraordinary and unprecedented nature of its discipline of Lovato. As the Board noted, the Company cannot identify a single other instance in which it has issued discipline to any junior sous chef—or to any other employee at the resort—because of another employee's mistake. (JA272; JA238.) The two other allergen incidents on the record resulted in minimal or no discipline, even though one was actually life-threatening. In the "pizza incident" of May 19, 2018, a contaminated gluten-free pizza gave a child guest such a severe

allergic reaction that he “could have died” and was transported to the hospital; the incident left his family “traumatized.” (JA265, 272; JA174, JA612, JA711.) And yet no one was disciplined, including the cook who made the pizza and Chef Guerrero, the top manager of the in-room-dining kitchen who oversaw the making of the pizza. (JA265-66 n.21.) Instead, Ibarra simply directed Guerrero and Sous Chef Efren Ruano to “remind the kitchen staff” about standard operating procedures for allergen-free orders. (JA265-66). Similarly, in the “pineapple incident” of June 29, the intern cook who served pineapple to a guest with known pineapple allergies was merely given a verbal warning. (JA268.)

The Company claims that these are “legally deficient” comparisons because “the Board failed to identify any other instance where a junior sous chef failed to responsibly supervise subordinate cooks... .” (Pet’r’s Br. 47.) The Company also claims that Lovato was present at the pizza and pineapple incidents, suggesting that his not being disciplined as a result of either shows an absence of discrimination toward Lovato—even though the Board found no support in the record that Lovato was actually present at these incidents. (JA265 7 n.21, JA268 n.26.) In any case, the Company cannot seriously be implying that Lovato had the unique misfortune of being the only junior sous chef allegedly on duty during all three allergy scares in the history of Terranea, a 600-room resort serving guests from seven different restaurants, a separate banquet kitchen for large events, and an in-room-dining

kitchen for room service. (JA261.) Indeed, Chef Guerrero admitted that nut and shellfish allergies were common problems for their kitchen line. (JA209.) Nor can it seriously be arguing that no junior sous chef has ever failed to notice the error of another cook in the kitchen. Apart from allergy-related issues, the record reveals numerous food-handling problems in Terranea kitchens resulting in discipline for lower-level cooks, such as undercooking food and maintaining moldy ingredients. Yet, although there are junior sous chefs working in its various kitchens, (JA169), none of these incidents resulted in the discipline of any junior sous chef for failing to catch the errors. *See infra*, Section II.i.

Given the powerful evidence Lovato was subjected to disparate treatment, it is the Company's burden under *Wright Line* to show it would have treated Lovato the same even absent his union activism. The lack of record evidence that the Company has ever issued a comparable discipline to any other similarly situated employee undermines the Company's ability to make such a showing and supports the Board's reasonable inference that Lovato's final written warning was motivated by union animus.

3. The Company based its discipline on a sham thirty- to forty-five-second investigation that the Company itself acknowledged was not reasonable.

The Board has long held that an employer's failure to conduct a full and fair investigation of an employee's alleged misconduct can be evidence of

discriminatory motive, especially when viewed in the light of an employer's union hostility. *See, e.g., Shamrock Foods*, 366 NLRB No. 117 (June 22, 2018); *Nat'l Dance Inst.—N.M., Inc. & Diana M. Orozco-Garrett*, 364 NLRB No. 35 (June 23, 2016); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Johnson Distributorship, Inc.*, 323 NLRB 1213, 1222 (1997); *cf. Windsor Redding Care Ctr., LLC v. NLRB*, 944 F.3d 294, 301 (D.C. Cir. 2019) (employer's thorough and continued investigation suggested that employer disciplined employee for legitimate reasons and not union animus).

Here, the Board reasonably concluded that the Company conducted a cursory investigation and failed to seek an explanation from Lovato before issuing the discipline. (JA271-72.) Chef Guerrero's "investigation" of the macaroni-and-cheese incident consisted solely of a conversation with Flamenco and Lovato that, according to her own testimony, lasted "probably 30-45 seconds." (JA207.) During this exchange, she asked no follow-up questions to clarify what had happened, causing her to miss basic facts known to others in the kitchen. (JA272 n.39.)

The Company attempts to challenge this conclusion by appealing to the notion that an employer "is free to lawfully run its business as it pleases" and according to its own judgment. (Pet'r's Br. 43 (citing *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001)).) This argument ignores the fact that Respondent deviated wildly from the judgment of its own human resources

manager in conducting this “investigation.” HR Manager Kwok testified that a reasonable investigation would involve interviewing the person who is alleged to have committed misconduct, speaking with witnesses to the alleged events, and reviewing video recordings, among other sources. (JA236-37.) Kwok further testified that a reasonable interview with an employee accused of misconduct could take thirty minutes to an hour, but at minimum fifteen minutes, depending on the circumstances, and it would typically involve follow-up questions to ensure clarity on the issues. (JA236-37.) She acknowledged that it would not be possible to conduct a reasonable interview to gather facts in less than a minute. (JA237.) Thus, the Board is not substituting its judgment for the Company’s. Rather, the Company’s thirty- to forty-five-second investigation fell short by the Company’s own stated managerial standards. The Board properly found that such a deviation supports an inference of animus.

4. The Company departed from its standard practice by failing to apply progressive discipline.

An employer’s failure to adhere to its progressive-discipline system also supports an inference of unlawful motive. *Citizens Inv. Servs. Corp.*, 430 F.3d at 1201; *see, e.g., Fort Dearborn Co.*, 827 F.3d at 1076 (finding substantial evidence of union animus where a company “inexplicably” failed to apply its normal progressive-discipline policy to an employee with a “very good” previous record spanning nine years with only one minor previous infraction, like Lovato’s).

Here, the Board properly determined that the Company's inexplicable departure from its progressive-discipline policy was evidence of union animus. The Company admits that it has a standard escalating disciplinary process, which includes a verbal warning, written warning, final written warning, and termination. (JA699; JA457; JA229.) In issuing Lovato's final written warning, the Company skipped over the first two steps of the process. As the Board observed, the HR manager could not point to a single comparable instance in which the company had bypassed steps in its disciplinary system. (JA272.)

The Company attempts to justify this departure from practice by pointing to a clause in its policy allowing managers to bypass steps of progressive discipline at the Company's "sole and absolute discretion." (Pet'r's Br. 45.) But the Company's discretion to bypass steps of its progressive discipline is not immunized from scrutiny under federal labor law simply because its own policy declares it "absolute." Rather, as the Board found here and as is firmly settled law, when union animus is a motivating factor in the Company's use of its "discretion" to bypass a progressive-discipline policy, then the Company has violated the NLRA. *See Ozburn-Hessey*, 833 F.3d at 224 (deviation from progressive-disciplinary policy was evidence of unlawful motive even though the company retained "discretion"). "Discretion" can certainly be a red flag for discrimination, but it is no defense.

The Company next attempts to make a wholly misleading comparison to *Detroit Newspaper Agency*, 435 F.3d at 310-11. (Pet'r's Br. 45.) In doing so, it neglects to mention that in *Detroit Newspaper Agency*, there was in fact “no evidence that [the employer] promulgated a ‘progressive discipline’ policy” and therefore that the facts do not offer a meaningful analogy to the case at hand. 435 F.3d at 310-11. Considering that the Company *has* admitted to having such a policy here, the comparison is inapposite. The Court should therefore uphold the Board’s reasonable inference that the Company’s abrupt and unprecedented departure from its discipline system is evidence of animus.

5. *The Company’s witnesses gave false or misleading testimony.*

This Court has adopted the Board’s rationale that “when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.” *Citizens Inv. Servs. Corp.*, 430 F.3d at 1202 (quoting *Black Entm’t Television*, 324 NLRB 1161, 1161 (1997) (citations omitted)). That is, false or misleading testimony concerning the relevant facts or circumstances supports an inference of animus and discriminatory motive. *See, e.g., Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (“can infer from falsity of employer’s stated reason for discharge that motive is unlawful”) (citing *Shattuck Denn Mining Corp. v. NLRB*,

362 F.2d 466, 470 (9th Cir. 1966)); *CCI Ltd. P'ship v. NLRB*, 898 F.3d 26, 32-33 (D.C. Cir. 2018) (same).

Here, the Board determined based on credibility determinations explained at length in its Decision that the Company's witnesses did not testify truthfully as to relevant aspects of the matters at issue. (JA273.) Specifically, the Board found that Ibarra was evasive and inconsistent on the central question of whether he knew Lovato was a union supporter. (JA273.) And both Ibarra and Guerrero exaggerated the seriousness of the macaroni-and-cheese incident and Lovato's role in it in explaining their decision to issue him a final written warning. (JA265-66 n.21; JA266 n.23.) The Court should defer to the Board's expertise in drawing such inferences from evidence and the credibility findings on which those inferences rest.

In sum, the Company's attempted challenges to the Board's finding of animus are alternately incorrect on the facts and misleading in their application of law. Given the strength of the General Counsel's evidence, the Company has come nowhere near carrying its burden of showing that it would have discharged Lovato in the absence of his union activity. For all these reasons, the Court should affirm the Board's well-supported finding of animus.

II. Substantial evidence supports the Board's finding that the Company failed to prove Lovato was a statutory supervisor.

To establish supervisory status under the NLRA, it must be shown that the employee in question holds the authority to (1) engage in at least one of twelve enumerated supervisory authorities, and (2) exercises such authority in a manner that is “not of a merely routine or clerical nature, but requires the use of independent judgement.” 29 U.S.C. §152(11). “It falls clearly within the [NLRB’s] discretion to determine, within reason, what scope of discretion qualifies” as authority sufficient to establish supervisory status. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

Because it is the party asserting supervisory status, the Company bears the burden of demonstrating that Lovato was a statutory supervisor and thus not entitled to the NLRA’s protections. *Id.* at 710-712. It must do so with “specific examples drawn from the record.” *Matson Terminals, Inc., v. NLRB*, 728 F. App’x 8, 9-10 (D.C. Cir. 2018). Generalized or conclusory statements are not sufficient. *Beverly Enter.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999). Where evidence is conflicting or inconclusive, the court will find that supervisory status has not been established. *See Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015). As shown below, the Board reasonably concluded based on its review of the evidence that the Company did not carry its burden.

i. The Board reasonably found Lovato did not responsibly direct other employees.

The only one of the twelve enumerated supervisory authorities that the Company claims Lovato held is the authority “responsibly to direct” other employees. (Pet’r’s Br. 21.) In order to show responsible direction, the putative supervisor must be “fully accountable and responsible for the performance and work product of the employees he directs,” such that “‘some adverse consequence may befall’ the supervisor if the employee does not perform properly.” *Brusco Tug & Barge, Inc. v. NLRB*, 696 F. App’x 519, 521 (D.C. Cir. 2017) (quoting *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691-92 (2006)). The Board reasonably concluded that none of the evidence the Company presented, taken individually or as a whole, demonstrated the required level of accountability for others’ performance. (JA262.)

First, as its only purported example of accountability-based discipline for any junior sous chef, the Company cites the “final written warning” it issued Lovato in relation to the macaroni-and-cheese incident. (Pet’r’s Br. 28.) Since the Board correctly found the discipline was discriminatorily motivated, it cannot serve as legitimate evidence of responsible direction. (JA264; JA274.) Moreover, even if that discipline were lawful, it does not clearly show accountability for others’ mistakes because one of the managers who was consulted on and helped write Lovato’s disciplinary notice, HR Manager Anita Kwok, mistakenly believed

Lovato had made the dish at issue himself even as the other two managers were aware that he did not. (JA237; JA264; JA267.) Such “conflicting evidence” cannot support a finding of supervisory status. *Salem*, 808 F.3d at 69.

Other than Lovato’s final written warning, none of the managers who testified for the Company—its HR manager, its food and beverage manager, and the chef de cuisine for the in-room-dining kitchen—could recall a single instance in which the Company disciplined a junior sous chef based on the performance of another employee. (JA193; JA224; JA238.) Contrary to the Company’s claim, this was not for lack of opportunity. Indeed, the record is replete with disciplines issued to lower-level kitchen employees for food-handling errors such as maintaining expired or moldy ingredients, undercooking food, failing to put away meats in a timely manner, and failing to follow cooking instructions or sanitation protocols. (JA414; JA618; JA642-44; JA667; JA680-681; JA684; JA696.) Yet, unlike in the macaroni-and-cheese incident, the Company did not issue any corresponding discipline to any of the junior sous chefs working alongside the disciplined employees for failing to catch their mistakes. *See supra* Section I.iii.2.

Second, the Company points to comments in employee evaluations of both Lovato and fellow junior sous chef Francisco Santos criticizing them for leadership failings. (Pet’r’s Br. 27-28). However, the Company presented no evidence that this general criticism—which the Board notes in Lovato’s case appeared in only

three junior sous chef evaluations between July 2010 and August 2018—resulted in any adverse consequence for Lovato, Santos, or any other junior sous chef (JA264.) Indeed, Lovato was even promoted to junior sous chef despite similar general criticism made in his October 2009 and June 2010 evaluations, when he was a lower-ranking cook. (*Id.*; JA545-559.) Furthermore, as the Board noted, the direction of kitchen staff was not among the factors used in the Company’s standard performance evaluation form. (JA264; JA530-36.)

Third, Company relies on a “memo to file” from July 2018 summarizing a conversation in which Chef Guerrero expressed “concern” to Lovato regarding his purported lack of “leadership” and “initiative” during a “much disorganized evening of service.” (JA395.) The Board reasonably accorded little weight to the conversation because the memo stated explicitly that it was “not [] a disciplinary notice,” and because neither the memo summarizing the conversation nor Guerrero in her testimony provided any detail concerning what specific conduct Lovato was being criticized for, including whether it was for his own performance or that of others. (JA213-14; JA263; JA332.)

Finally, the Company points to general references to supervision in the junior sous chef job descriptions. Yet the job descriptions bore little relationship to the shop-floor reality, listing numerous responsibilities such as creating menus, contribution to research, and managing costs which the Company acknowledged

junior sous chefs do not in fact perform. (JA190-92.) Precisely because of this problem, the Board holds that a “paper showing” of supervisory responsibility is insufficient on its own and is only relevant “when corroborated by live testimony or other evidence.” *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012). Given the lack of such corroborating evidence, the vague references to “supervision” in the job descriptions were appropriately accorded minimal weight.

As the Board clarified in *Oakwood*, responsible direction requires affirmative proof of accountability for others’ performance. 348 NLRB at 695. Finding a lack of such evidence, the Board properly found that the Company did not meet its burden to show Lovato responsibly directed other employees.

This dearth of evidence is not surprising given Lovato’s role: he was an hourly line cook who during busy periods was responsible for cooking as many as twenty dishes at a time. (JA197.) With this workload, it was simply not plausible that he or any other junior sous chef would have been made responsible for catching the mistakes of every other line cook preparing meals in the kitchen. The Company’s actual quality-control system during busy periods was to have managers Guerrero, Ruano, or another in-room-dining manager check dishes before they were served. (JA267; JA25-26; JA74.) This system broke down on the busy night of the macaroni-and-cheese incident. Yet despite having no precedent

of imposing discipline on junior sous chefs for not catching coworkers' mistakes, the Company issued Lovato a final written warning.

ii. The Board reasonably found that Lovato did not use independent judgement.

An employee's authority involves independent judgement if he or she acts "free from the control of others and form[s] an opinion or evaluation by discerning or comparing data." *Oakwood*, 348 NLRB at 693. The discretion exercised must be more than "merely routine or clerical." 29 U.S.C. § 152(11). "[J]udgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, [or] the verbal instructions of a higher authority." *Oakwood*, 348 NLRB at 693; accord *Beverly Enter.-Pa., Inc. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997). Heavy or constant managerial oversight restricts independent judgement. See, e.g., *Micro Pac. Dev. Inc v. NLRB*, 178 F.3d 1325, 1333 (D.C. Cir. 1999).

The Company claims Lovato exercised independent judgment because, during the minimal periods of time when Chef de Cuisine Guerrero and Sous Chef Ruano were not present, Lovato and other junior sous chefs were left to "monitor" the kitchen. (Pet'r's Br. 23; JA171-72; JA219-25.) The Board reasonably rejected this argument because Lovato and other junior sous chefs' discretion to direct other employees was tightly constrained by the Company's strict rules. (JA263.) The food and beverage director, in-room dining chef de cuisine, and sous chef created a

detailed and precise “standard” and “template” for the preparation and presentation of dishes, and any direction junior sous chefs provided to coworkers had to be in strict conformity with these rules, leaving them no meaningful discretion. (JA263; JA184-85.) The Company also points to the ability of junior sous chefs to move employees among stations if the kitchen was “going down” during a rush. (Pet’r’s Br. 23.) However, Chef Guerrero acknowledged that employees could be moved only if they already were known by management to have sufficient prior experience to work in the position. (JA263; JA219.) Such “common sense” functions have repeatedly been found not to implicate independent judgement. *See, e.g., Croft Metals, Inc.*, 348 NLRB 717, 722 (2006); *Cranesville Block Co. v. NLRB*, 741 F. App’x 815, 816 (D.C. Cir. 2018).

The Company’s appeals to precedent badly miss the mark. As the Board cogently explained in its reply brief, the Company relies heavily on out-of-circuit authority that predates the seminal cases of *Kentucky River* and *Oakwood* which clarified and refined the standard for finding independent judgment (as well as responsible direction) in assessing supervisory status. (Resp’t’s Br. 25-27.) For the reasons the Board lays out, the Company’s reliance on such outdated cases is erroneous and unavailing. *Id.*

Moreover, apart from applying an outdated standard, the Company’s historical cases do not remotely resemble the facts here. In *American Diversified*

Foods, Inc. v. NLRB, 640 F.2d 893, 896 (8th Cir. 1981), for example, the Arby's shift managers at issue were typically "the highest ranking employee[s] in the restaurant," responsible for "maintaining the inventory and cash receipt records, controlling the cash resources, and the opening or closing of the restaurant at the beginning or end of the business day." They had the authority to "replace absent employees, decide which employees are to leave early, and allocate work breaks," as well as "effectively recommend that certain employees should be fired or other persons hired." *Id.* at 895, 897. Likewise, in *Piccadilly Cafeterias, Inc.*, 231 NLRB 1302, 1311 (1977), the assistant chefs found to be statutory supervisors were, "for a substantial part of the day and the week, in full immediate charge of up to 10 employees." They issued the employees orders, directed the preparation of food, gave employees permission to go on break (in some cases not even allowing them to use the restroom), asked them to stay late, let them leave early, and were consulted for employee evaluations. *Id.*

Indeed, in virtually all of the cases the Company cited, the supervisors at issue were regularly placed in charge of the workplace and possessed a wide range of authorities, providing ample opportunity to exercise independent judgment. *See Fortinbras Servs., Inc.*, 288 NLRB 545, 551 (1988) (maitre'd could hire, fire, and issue write-ups); *Pioneer Hotel*, 276 NLRB 694, 701 (1985) (sous chefs could grant overtime and employee leave, shape schedules, and reprimand workers); *N.*

Adams Inn Corp., 223 NLRB 807, 809 (1976) (assistant chef could sign timecard corrections, make employees leave or stay late, and were consulted before scheduling and discharging employees); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (night manager could assign employees tasks, call employees to work, send employees home, suspend employees, and effectively recommend transfer or termination).

These cases are a far cry from the one at bar. Lovato's job was fundamentally that of a line cook. Rather than standing above and overseeing kitchen employees' work, he performed essentially the same work as his coworkers, hurriedly cooking dishes throughout his shifts. (JA261.) As Chef Guerrero testified, Lovato "was always cooking on the line. That's all he was doing." (JA223.) He was seldom the most senior person in the kitchen. (JA29.) Unlike supervisors in these other cases, Lovato could not hire, fire, suspend, discipline, or grant time off. (JA193; JA30.) And to the extent he occasionally had the opportunity to provide guidance to coworkers on their own dishes, he was required to follow the Company's detailed predefined standards precisely. (JA263.)

The Company appears to argue that all that is required to exercise independent judgment is for an employee to identify the standard of quality, compare it to the performed reality, and respond appropriately. (Pet'r's Br. 23.) But that formulation could describe almost any job. Under such a standard, nurses

who order “common sense” corrections to patient care based on doctors’ orders would be supervisory, *see VIP Health Servs. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999), as would tugboat shipmates who make “only obvious or self-evident work assignments” constrained by company staffing decisions. *Brusco Tug*, 696 F. App’x at 520. In effect, the Company reads the Act’s exclusion of tasks that are “merely routine or clerical in nature” as limited to only the most rote or unthinking possible exercises of authority. If that were the law, the Board would have no ability to exercise its expertise in separating “genuine management prerogatives” from the actions of “straw bosses, lead men, set-up men, and other minor supervisory employees” who are entitled to the NLRA’s protections. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974). But that is not the law, and the record clearly demonstrates Lovato was among the latter.

iii. Secondary-indicia evidence is irrelevant, but even if considered tends to refute the Company’s supervisory status argument.

Secondary indicia may be used to “corroborate[]” a determination of supervisory authorities as set out in Section 2(11). *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). However, such evidence may only come into play “when evidence of primary indicia is present.” *Jochims v. NLRB*, 480 F.3d 1161, 1173 (D.C. Cir. 2007) (quoting *Avante at Wilson*, 348 NLRB 1056, 1061 (2006)). Thus, “the employee must possess at least one of the twelve types of authority set

out in the statute.” *VIP Health Servs.*, 164 F.3d at 648. Here, given the lack of evidence that Lovato possessed any of the enumerated authorities, there is simply no proof for the secondary indicia to corroborate.

But even if the court were to consider evidence of secondary indicia relevant, this evidence tends to refute, rather than support, the Company’s argument. Most notably, managers like Guerrero, Ruano, and Ibarra were salaried, received manager-only bonuses, received manager-only benefits, had manager-only parking spots, attended management and supervisory meetings, and had access to certain parts of the resort designated for salaried managers. By contrast, Lovato and other junior sous chefs were hourly employees who clocked in and out each day, did not receive the same bonuses or benefits, could not park in the special parking spaces, did not attend management meetings, and were denied access to the salaried manager parts of the resort. (JA264-65; JA264-65; JA29; JA30; JA37; JA191; JA223; JA555.) The only evidence of secondary indicia the Board credited in support of the Company’s case included junior sous chefs’ company email addresses, their uniforms that differed from those of other cooks, and some general statements about their self-perception. (JA264-65; JA183-84; JA172.) The picture that emerges is that Lovato was treated in almost all material ways like the other line cooks. Thus, even if the evidence on statutory authorities

were present, which it is not, the secondary-indicia evidence offers no basis on which to overturn the Board's reasoned conclusions.

III. Conclusion

For the foregoing reasons, Intervenor UNITE HERE Local 11 respectfully requests that the Court deny the Company's petition for review and enforce the Board's order in full.

Respectfully submitted,

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⁴ Counsel for the Intervenor thanks Zoe Tucker and Maxwell Ulin for their significant contributions to the preparation of this brief.

CERTIFICATE OF COMPLIANCE

Intervenor certifies that the foregoing complies with the length limitations of Fed. R. App. P. 32(a)(2) because it is 7,455 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Times New Roman font, a proportionally spaced face with serifs.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2020, I filed the foregoing document with the Clerk of the Clerk for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will accomplish service on counsel of record for all parties in this case.

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