

ORAL ARGUMENT NOT YET SCHEDULED

Consolidated Cases Nos. 20-1030 & 20-1096

IN THE 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 from the National Labor Relations Board and
Cross-Application for Enforcement

**Reply Brief of Petitioner / Cross-Respondent
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INTRODUCTION AND SUMMARY OF THE ARGUMENT

For months after Freddy Lovato announced himself as a supporter of the Union's organizing campaign, Terranea chose to coach and counsel him on how to meet the stringent expectations Terranea has for junior sous chefs rather than issue discipline because of sustained underperformance. But when those efforts proved ineffective and Mr. Lovato's failure to oversee dishes going out of the kitchen left a child vomiting in a hotel room, Terranea gave Mr. Lovato a final written warning. And when Mr. Lovato then violated Terranea policy and basic kitchen-health protocols by attempting to rinse used chicken and serve it to guests, and then hid the chicken rather than discard it as instructed, Terranea discharged him. The existence and enforcement of these standards demonstrates that Mr. Lovato was a supervisor exempt from the protections of the National Labor Relations Act ("NLRA"). And Terranea's active assistance to Mr. Lovato demonstrates that the discipline was for failed performance, not anti-union motive. The General Counsel's and Union's arguments to the contrary do not add up.

ARGUMENT

I. Mr. Lovato Was an Exempt Supervisor

It is undisputed that Mr. Lovato had "the authority to 'direct' employees," *Woodman's Food Mkt., Inc. & United Food & Com. Workers Union, Local 1473*, 359 NLRB 1016, 1022-23 (2013), and thus qualified under the first element of the "responsibly direct" prong of NLRA § 2(11). The General Counsel's and

Union's arguments that Mr. Lovato was not also expected to exercise independent judgment, or held responsible for his failures, are unpersuasive.

A. Junior Sous Chefs Exercised Independent Judgment

1. *Focus on Creativity.* The Board erred on the independent-judgment element by directing the inquiry to the creative process of developing menus, whereas the statute looks to the "exercise of...authority" over subordinates. 29 U.S.C. § 152(11); Terranea Br. 24-25. The question is whether junior sous chefs exercised discretion in *supervising* lower-level cooks, and the Board's findings give an affirmative answer: junior sous chefs "make sure the cooks made the dishes correctly and direct them to remake a dish if they failed to do so." JA262 (Decision:4). This is independent judgment.

The General Counsel is wrong that junior sous chefs' lack of involvement in menu-creation "demonstrates that any discretion Lovato might have exercised in monitoring and correcting others' work was reduced below the statutory threshold." GC Br. 23 (quotation marks omitted). The existence of standards (here, menus) does not eliminate the judgment vital to implementing them. *See, e.g., STP Nuclear Operating Co. v. NLRB*, --F.3d--, 2020 WL 5543049, at *6 (5th Cir. Sept. 16, 2020) ("[T]he existence of procedures...does not eradicate the discretionary choices the record shows unit supervisors must make."). Just as it is an act of independent judgment for construction foremen to ensure that a home is built according to blueprints so the floor does not cave in, it is an act of judgment for a junior sous chef to determine whether food

prepared by line cooks comported with sophisticated food-quality standards so that children with food allergies are not harmed.

Judging dishes in a kitchen is not like the ministerial, judgment-less actions set by policies that “relieve [putative supervisors] of any discretion in decisionmaking.” *735 Putnam Pike Operations, LLC v. N.L.R.B.*, 474 F. App’x 782, 784 (D.C. Cir. 2012). Acts that are “routine and repetitive” may require no “more than minimal guidance,” *Shaw, Inc., Rapid River Enterprises, Inc., S & R Cable, Inc., & Kimron Res., Inc.*, 350 NLRB 354, 356 (2007), but it is in the eye the beholder whether a steak is sufficiently rare (or too rare), a plate is presented in an appealing manner, or a sauce could be sweeter or lobster meat softer. In this regard, far from being “generalized and conclusory” (GC Br. 23), the testimony indicated that junior sous chefs determined not only whether a dish was “correct” but also whether “it could be prepared better.” JA131 (Tr.453:6-11).

2. *The Board’s Precedent.* The Board’s precedent holds that kitchen management involves sufficient judgment to qualify for exempt status. *See, e.g., Piccadilly Cafeterias, Inc.*, 231 NLRB 1302, 1311 (1977); *Pioneer Hotel & Gambling Hall, Inc.*, 276 NLRB 694, 701 (1985); *Fortinbras Servs., Inc. d/b/a Darbar Indian Rest.*, 288 NLRB 545, 549, 551 (1988); *North Adams Inn Corp.*, 223 NLRB 807, 809 (1976), *aff’d*, 559 F.2d 187 (D.C. Cir. 1977). The General Counsel’s assertion that *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), renders this precedent obsolete is doubly erroneous.

First, the Board’s decisions in *Oakwood* and here did not mention these precedents, much less overrule them. “[W]here, as here, a party makes a

significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.” *LeMoynne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004); *see also Point Park Univ. v. NLRB*, 457 F.3d 42, 49 (D.C. Cir. 2006). Nor can the General Counsel remedy this omission. *See Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 311 (D.C. Cir. 2006) (citing *SEC v. Chenery*, 318 U.S. 80, 89-90 (1943)).¹

Second, the General Counsel’s argument misreads relevant precedent. *Oakwood* was the response to the Supreme Court’s rejection of a supervisory-authority test that was too narrow, not too broad. In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the Supreme Court rejected Board authority holding that “a particular kind of judgment, namely, ordinary professional or technical judgment,” did not qualify under Section 2(11), a rule the Supreme Court called “a startling categorical exclusion.” *Id.* at 714. In *Oakwood*, the Board, “guided by these admonitions,” announced “an interpretation of the term ‘independent judgment’” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise.” 348 NLRB at 69.

¹ The Union’s attempts (at 28-30) to distinguish the cases fails. Its brief describes facts present here (such as authority to issue “orders” and “direct[] the preparation of food,” Union Br. 29) and does not confront the fundamental problem that supervisory status is not contingent on the creation of food standards, but on discretion in implementing them.

But there is no reason to read *Oakwood* as abrogating prior Board decisions that did not exhibit this error—an error that would sometimes produce an erroneous rejection of supervisory status but never an erroneous finding of supervisory status. Had the Board adopted this position (it did not), it would have committed the error this Court condemned in *Prill v. NLRB*, 755 F.2d 941, 950 (D.C. Cir. 1985). There, the Board found itself bound to adopt a legal standard that this Court determined was not its legal obligation—including because the Board misinterpreted its own precedent and Supreme Court precedent—and this Court vacated its ruling. *Id.* at 951-57. In this instance, *Kentucky River* found the Board’s test too narrow and does not require abrogation of Board precedent treating kitchen supervisors as exempt under Section 2(11). The General Counsel’s contrary view misreads the law.

B. Junior Sous Chefs Were Accountable

The relevant question on this element is whether “some adverse consequence *may* befall the one providing the oversight if the tasks performed by the employee are not performed properly,” *Oakwood*, 348 NLRB at 691-92 (emphasis added), not whether adverse consequences in fact occurred. It is therefore insignificant that witnesses, put on the spot on the stand, “could not identify a single occasion on which the Company had issued any level of discipline to any of its junior sous chefs based on the performance of other kitchen staff.” GC Br. 28. In fact, Anita Kwok, Terranea’s HR manager, testified that she could not recall *anyone* in Terranea’s entire food and beverage department being disciplined for the performance of another. JA238 (Tr.872-

74). So the General Counsel's position would mean that the entire department lacks a single member who responsibly directs subordinates. *See Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721 (7th Cir. 2000) ("Yet the Board's ruling has the curious implication that a ship with more than 1000 people aboard it...has no supervisor on board at any time, making the situation...a little like that of the *Patna* in Conrad's novel *Lord Jim* after the crew abandoned it.>").

The record confirms the relevant point, that "disciplinary action...may transpire" when a junior sous chef's "lack of leadership" results in poor customer service. JA397 (Ex.R-21:2-3). In addition, Mr. Lovato was on a performance improvement plan to return him to the "trio of the management," and was warned to "show [his] presence as a manager," "[t]hink of the line as a whole," and "[t]ake initiative on working in other areas of the line / training." JA398 (Ex.R-22:1); JA202 (Tr.730:7-20). Discipline for not doing so was a meaningful prospect, and it is therefore irrelevant, contrary to the General Counsel's (at 29) and Union's (at 25) arguments, that these documents lack the explicit label "discipline." These instances show that Mr. Lovato "would be held accountable" for further failures. *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1346 (11th Cir. 2012).

Besides, Mr. Lovato *was* disciplined for failed supervision in the macaroni-and-cheese incident. JA707 (J3:3). The General Counsel's contention (at 27-28) that Mr. Lovato was, in the view of an HR manager (Ms. Kwok), disciplined for preparing the offending dish, not for failed supervision, departs from the Board's finding that Mr. Lovato did not make the dish and that the two persons who

chose the level of discipline knew this. JA272 (Decision:14). It is, fundamentally, the *level* of discipline that the General Counsel criticizes. *See* GC Br. 38 (“Lovato...was issued more severe discipline than Flamenco,” who received a verbal warning (quotation marks omitted)). Further, Ms. Kwok testified that Mr. Lovato could be held responsible for an allergy incident caused by a subordinate’s cooking, JA238 (Tr.874:3-875:6), so her misapprehension of what actually happened is beside the point that discipline *could* happen.

II. Terranea Did Not Violate the NLRA

The record is clear that Terranea did not act with anti-union motive in disciplining and ultimately discharging Mr. Lovato. As Terranea’s opening brief explains (at 51-52), months after Mr. Lovato joined the organizing campaign, Ms. Guerrero placed Mr. Lovato on a performance-improvement plan with the stated goal of returning him to the “trio of the management,” JA398 (Ex.R-22:1); JA202 (Tr.730:7-20). Terranea turned this opportunity to discipline Mr. Lovato into an opportunity to *help* him. Even after this, Terranea’s managers responded to Mr. Lovato’s repeated failings with leniency and assistance, fostering “hopes that Mr. Lovato [would] be able to provide leadership, guidance and supervision to” the kitchen team. JA397 (Ex.R-21:3).

These facts and others refute the General Counsel’s and Union’s unsupportable narrative that Terranea’s managers were out to get Mr. Lovato because of his Union affiliation and render *their* burden impossible to meet. Yet the General Counsel and Union have no response to this set of arguments, even though they appear prominently in Terranea’s brief (51-52) and even though the

Board is legally obligated to “consider the body of evidence opposed to [its] view,” *Epilepsy Found. of Ne. Ohio v. N.L.R.B.*, 268 F.3d 1095, 1103 (D.C. Cir. 2001) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951)). The Board’s failure even to mention most of this evidence constitutes an independent and sufficient basis for reversal. *See id.* at 1105.

The General Counsel’s and Union’s arguments for enforcement fail.

A. The Board and Union Improperly Introduced New Grounds To Enforce the Decision

1. The Board Did Not Find Circumstantial Evidence Sufficient

The Board and the Union defend the decision below on the ground “that ‘circumstantial evidence alone may establish unlawful motivation.’” Board Br. 42 (quoting *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987)); Union Br. 9-10. But that was not the basis of the decision. “[T]he agency runs this regulatory program, not its lawyers; parties are entitled to the agency’s analysis of its proposal, not post hoc salvage operations of counsel.” *Fla. Power & Light Co. v. F.E.R.C.*, 85 F.3d 684, 689 (D.C. Cir. 1996); *see also NLRB v. Special Mine Servs., Inc.*, 11 F.3d 88, 89-90 (7th Cir. 1993) (criticizing the “depressing pattern” of NLRB attorneys’ post hoc justifications for NLRB decisions on grounds not there stated).

The Board did not hold that circumstantial evidence alone is sufficient in this case. The ALJ predicated his decision predominantly on supposed direct evidence of anti-union animus, JA270-71 (Decision:12-13), and treated various

forms of circumstantial evidence as “support” for the finding, not as sufficient. JA271-73 (Decision:13-15) (repeatedly stating that circumstantial evidence “may support” the finding of motive). But, after Terranea argued in its exceptions, Attachment to NLRB Mot. To Lodge Brief (“Exceptions Brief”) 29-31, that most of the direct evidence consisted of First Amendment protected speech that cannot lawfully be considered as evidence of an unfair labor practice, 29 U.S.C. § 158(c), the Board stated that it was not relying on that direct evidence, JA259 (Decision:1 n.1.). But it failed to explain how the decision could stand without that evidence; it did not find the circumstantial evidence sufficient or explain how it could be when the ALJ’s decision relied substantially on direct evidence. The General Counsel has no prerogative to fill in the gaps.

And no explanation could make sense. The cases the General Counsel and Union cite where circumstantial evidence is sufficient involve the paradigmatic scenario where an employee is deemed excellent, then joins or supports a union, and is promptly punished. *See, e.g., Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987); *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941).² By contrast, Mr. Lovato was repeatedly documented as a poorly performing junior sous chef and was known to be a vocal union sympathizer for months with no consequence. As explained below (§ II.B), the circumstantial evidence amounts to virtually nothing.

² Many cases they cite involve powerful direct evidence of unlawful motive. *See, e.g., Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988); *Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015).

2. Terranea Did Not Waive Its Right To Contest Post Hoc Justifications

The General Counsel is incorrect (at 40-41) that Terranea waived its contention that the Board's decision lacks a reasonable explanation by failing to move for reconsideration. The Board ruling in question was in response to a position Terranea *did* raise: that the ALJ improperly relied on direct evidence that could not lawfully form the basis of an unfair-labor-practice ruling. Exceptions Brief 29-31. Terranea preserved the right to challenge the Board's resolution of that very question, including on the ground that the Board's "explanation" for the resolution "is nonsense." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998).

An argument before the Board preserves not only those positions explicitly raised but also those "necessarily include[d]," *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 830 (D.C. Cir. 2012), and those of which the Board is "sufficiently apprised," *BPH & Co. v. NLRB*, 333 F.3d 213, 219 (D.C. Cir. 2003). Terranea's exceptions to the ALJ's reliance on certain items of purported direct evidence necessarily encompassed an objection to the Board's actual resolution of that issue. The argument that the ALJ erred by considering direct evidence impliedly included the argument that the result must be different without that evidence. The Board was on notice that it needed to explain a decision rejecting that evidence but affirming the result. The General Counsel's contrary position "requires...a triumph of technical pleading over fundamental fairness." *NLRB v. Blake Const. Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981); *see also Local 900, Int'l*

Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 727 F.2d 1184, 1193 (D.C. Cir. 1984); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 438 (3d Cir. 2016); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB*, 844 F.3d 590, 599 (6th Cir. 2016).

Further, the *Chenery* doctrine invoked here operates, not primarily as an “objection” to the Board’s decision, 29 U.S.C. § 160(e), but as a limit on the arguments the General Counsel may raise in its defense on appeal. Hence, in *Council for Urological Interests v. Burwell*, 790 F.3d 212 (D.C. Cir. 2015), the Court held that, “[p]lainly,” a party challenging an agency decision “did not need to raise a *Chenery* argument preemptively in its opening brief” in the court of appeals, much less before the agency, “before it knew whether the Secretary’s litigation strategy would deviate from the reasoning she used” below. *Id.* at 223 n.8. In *Mitchell v. Christopher*, 996 F.2d 375 (D.C. Cir. 1993), the Court applied *Chenery* on its own volition, after criticizing the appealing party for failing to raise it (or, rather, for doing so only “implicitly”) on appeal. *Id.* at 378 & n.2; see also *Utah Env’tl. Cong. v. Troyer*, 479 F.3d 1269, 1287-88 (10th Cir. 2007) (cited favorably in *Council for Urological Interests*, 790 F.3d at 223 n.8) (treating *Chenery* position as superseding requirement to raise issues before a district court); *Utah Env’tl. Cong. v. Richmond*, 483 F.3d 1127, 1136-37 (10th Cir. 2007) (same).³

³ That Terranea’s opening brief anticipated that the General Counsel would be forced to supplement reasoning for the Board only confirms that no waiver occurred. It is implausible that an argument amenable to being raised (by implication) for the first time in reply, *Council for Urological Interests*, 790 F.3d at 223 n.8, would be waived by the best practice of anticipating it in an opening brief.

B. The Board Improperly Analyzed Causation

As Terranea's opening brief explains (at 37-52), the evidence did not establish that anti-union motive "was a substantial or motivating factor in the adverse action," *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983), and the decision is plagued by an erroneous belief that the mere existence of anti-union sentiment was sufficient, *see Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011).

The General Counsel (at 42-43) responds that Terranea waived its objection to a "statement" the ALJ made about the governing legal standard—which did not mention causation, *see* JA268 (Decision:10)—because Terranea did not specifically identify that statement to the Board. The General Counsel is mistaken. Terranea vigorously asserted below that a "causal link between the employee's protected activities and the adverse employment action is imperative for the GC to establish a prima facie case," Exceptions Br. 17, and its brief contained an entire section, with a bold heading, challenging the ALJ's causation ruling, *id.* at 33-36. The General Counsel acknowledged that Terranea "defends against a causal link between alleged animus and Lovato's discipline." Board Br. Answering Exceptions 8. Terranea made causation the centerpiece of its exceptions and may refer to any sentence in the Board-adopted ruling that displays this error. *See, e.g., Local 900, Int'l Union of Elec., Radio & Mach. Workers*, 727 F.2d at 1193 (objection to remedial order preserved challenge to its retroactive effect, which was not mentioned to the Board); *Blake Const.*, 663 F.2d

at 283 (objection to “misstatements of facts, mistaken premises, suppositions, hearsay, and misapplication of law” preserved a due-process legal challenge).

The General Counsel also misses the mark in contending (at 43) that the ALJ’s statement was not “improper.” Terranea’s point is not that it was *per se* improper to omit any reference to causation in a sentence, but that this omission is indicative of a pervasive failing plaguing the entire analysis. Terranea Br. 37-53. The General Counsel is also incorrect that Terranea demands a showing of causation as to “each item of employer conduct.” Board Br. 43 (quotation marks omitted). Terranea contends that the full record—including facts the General Counsel refuses to confront (such as Ms. Guerrero’s efforts to *help* Mr. Lovato and the lack of any proximity between the discipline at issue and when Lovato announced his union allegiances)—fails to establish causation. The record makes this clear.

1. The Sole Item of Supposed Direct Evidence

No evidence links anyone involved in Mr. Lovato’s discipline and termination with any statement of anti-union animus. But the General Counsel (at 34-35) and Union (at 10-11) seek to impute a single statement by Terranea’s president to everyone at Terranea. The Board and Union have no response to Terranea’s observation (at 40) that a “single, isolated comment” is insufficient to establish an unfair labor practice. *Tic-The Indus. Co. Se. v. NLRB*, 126 F.3d 334, 339 (D.C. Cir. 1997). But that aside, this is precisely the imputation theory this Court rejected in *Flagstaff Medical Center, Inc. v. NLRB*, 715 F.3d 928, 935-36 (D.C. Cir. 2013).

The General Counsel responds that imputation follows from the fact that “Haack was the Company’s president and highest-ranking onsite manager.” Board Br. 44 (quotation marks omitted). But that was also true in *Flagstaff*: the company’s “president” made the statement in question, which the Board erroneously tried to impute to others. 715 F.3d at 930. As *Flagstaff* indicated, imputation makes no sense, notwithstanding the speaker’s role, because the inquiry turns on the *actual* motive for the action, not the legal authority to bind the entity. *Id.* at 935-36.

The Union retorts (at 11) that the rule against imputation in *Flagstaff* only applies where there is “direct proof” against imputation. But imputation was rejected as to one supervisor in *Flagstaff* simply because “there is no such evidence in the record.” 715 F.3d at 936. The General Counsel bears the burden.

The General Counsel tries (at 45 n.7) to sweep *Flagstaff* away, arguing that the president’s statements were ultimately found to be “neither unlawful nor improper.” But *Flagstaff* extensively discussed whether the statements, all the same, could be imputed to managers involved in the termination and held they could not. 715 F.3d at 935-36. “[I]t is well-established that an alternative holding is not dicta but rather binding precedent.” *Karem v. Trump*, 404 F. Supp. 3d 203, 211 (D.D.C. 2019); *see also Ass’n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 673 (D.C. Cir. 2013). In any event, there is no Section 8(a)(1) claim challenging the statement in question here.

Next, both the Union (at 10-11) and General Counsel (at 44-45) rely on another decision, *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413 (D.C. Cir.

1996), for their view that a *single* statement of an executive against unionization forever bars a company from disciplining any union-affiliated employees. *Parsippany* cannot bear this weight. *Flagstaff* read *Parsippany* to apply where anti-union bias “pervades” a company, 715 F.3d at 936 (quotation marks omitted), and, in *Parsippany*, the persons involved in the adverse employment decision heard the executive’s statement and made no effort to disclaim it. See *Parsippany Hotel Mgmt. Co.*, 319 NLRB 114, 117 (1995). But here, the Board relied on a single, isolated statement, and no evidence links it to those involved with Mr. Lovato’s discipline. This case is like *Flagstaff*, not *Parsippany*.

Finally, the reliance of the Union (at 13) and General Counsel (at 45 n.6) on evidence the Board did not rely on runs afoul of *Chenery*. *Detroit Newspaper Agency*, 435 F.3d at 302.

2. The Circumstantial Evidence

The General Counsel’s circumstantial showing fares no better. Whatever it may or may not show about management best practices, it does not establish unlawful motive.

a. *Investigation*. As Terranea’s opening brief explains (at 43), the investigation into the macaroni-and-cheese incident cannot show anti-union motive, no matter how poorly it was conducted, because the same investigation concerned a non-union employee, Jose Flamenco. The General Counsel (at 35) and Union (at 17) principally respond with boilerplate statements of law that a cursory investigation of a union supporter may evidence unlawful motive. But this investigation concerned both a union supporter and a non-union supporter

and afforded each the same opportunity to explain why they were not at fault. As the General Counsel's brief elsewhere concedes (at 48), "[t]he question...is whether Terranea's choice...supported an inference of unlawful motive." *See Epilepsy Found.*, 268 F.3d at 1105. No such inference can follow when the same managerial inquiry affects a union and non-union employee equally. The General Counsel's citation (at 46) of a supposed "distinction between the two employees' roles in the incident" bypasses the salient point that it was the same investigation, and this cursory investigation allegation proffers the investigation itself as evidence of unlawful motive.

The General Counsel's retort (at 46) that "Lovato was not a 'supervisor' and was not 'responsible' for Flamenco's error under Section 2(11)" conflates two different inquiries and burdens of proof. Even if an employer fails in after-the-fact litigation to establish an employee's supervisory status under Section 2(11), the Board is not entitled to rewrite an employee's actual job responsibilities—especially on an inquiry where the General Counsel bears the burden. With or without Section 2(11), employees can be required to take responsibility for those beneath them in the hierarchy, as Mr. Lovato was. JA365 (Ex.R-14:1) (job description includes supervising). Indeed, it is undisputed that Mr. Lovato qualified under the first element of the "responsibly direct" inquiry and "directly oversaw...work being done" by others. *In Re Oakwood Healthcare, Inc.*, 348 NLRB at 690; *see* GC Br. 21 (conceding Mr. Lovato's "direction of other kitchen employees"). And the Board's decision found that Mr. Lovato "became 'the person in charge'" when he was the highest-

ranking cook, which “meant that...he was expected to ‘monitor’ the line, make sure the cooks made the dishes correctly, and direct them to remake a dish if they failed to do so.” JA262 (Decision:4). Terranea had every reason to discipline Mr. Lovato for failing to fulfill these duties.

Both the General Counsel and the Union retreat to testimony by Ms. Kwok about investigatory best practices, but the Board’s decision did not rely on this testimony, and it was not the basis of the pertinent decision. Besides, however “wildly” Terranea may have “deviated” from the “judgment” of Ms. Kwok, Union Br. 17, the fact remains that Messrs. Flamenco and Lovato were subject to the identical investigation. Further, the Union and General Counsel completely mischaracterize Ms. Kwok’s testimony: she testified that an investigation of just a few seconds made perfect management sense in this case because Mr. Flamenco “admitted” that the cheese sauce caused the allergic reaction. JA238 (Tr.872:6-10).

b. *Progressive Discipline.* The Union’s (at 18-20) and General Counsel’s (at 48-49) reliance on Terranea’s “bypassing” a purported progressive-discipline policy is superficial. Terranea had frequently chastised Mr. Lovato for poor supervision and warned of future discipline for future failures. JA393-97 (Ex.R-21:2-3); JA707 (Ex.J-3:3). This provided the same written notice as was issued under the progressive scheme, and the formal label is irrelevant.

In addition, the Union and General Counsel both agree that Terranea’s progressive-discipline policy contemplated that steps could and would be bypassed in Terranea’s “sole and absolute discretion.” JA457 (Ex.R-31:31).

Their contention that the use of discretion may evidence bad motive, Union Br. 19; GC Br. 49-49, is circular in this case: the mere use of discretion expressly contemplated in the policy does not on its own establish bad motive. *Detroit Newspaper Agency*, 435 F.3d at 310-11.

The General Counsel and Union admit that the record shows that Terranea often bypassed disciplinary steps. The General Counsel's response (at 48-49) that these incidents did not involve kitchen workers is not true, JA614, JA619, JA624, JA640, JA659 (GC-21:5, 10, 26, 45), and rings hollow, as Terranea's treatment of non-kitchen employees is equally probative. Also unpersuasive is the General Counsel's response (at 49 & n.8) that it was *unclear* whether some of these incidents involved employees with prior discipline. Unclearness cuts against the General Counsel at this stage. The argument is quibbling with Terranea's management, while Mr. Lovato's case file reveals extensive disappointment with his performance.

c. *Disparate Treatment*. The General Counsel and Union do not appreciate that disparate treatment is only circumstantial evidence of unlawful motive if it involves similarly situated employees. *See Flagstaff*, 715 F.3d at 936 n.6. Differential treatment of different employees with different responsibilities is meaningless.

The record shows that a junior sous chef received a final written warning, a cook-II received a written warning, and an intern received a verbal warning for food-allergy incidents. *See* GC Br. 50-51 (recounting these instances); Union Br. 14-15 (same). That is consistent treatment based on employee rank that the

Board simply disagrees with. The General Counsel complains (at 50) that Terranea failed to identify instances of similar treatment of junior sous chefs, but the General Counsel bears the burden to identify disparate treatment—not the other way around—and he is wrong to dismiss that burden as “dubious.” GC Br. 50; *Flagstaff*, 715 F.3d at 932 (“General Counsel for the NLRB has the initial burden....”). Besides, all of that *is* evidence of similar, proportionate treatment.

Further, the inquiry is case sensitive, not a check-the-box process. Those instances on record where discipline may have been warranted for a junior sous chef identically situated with Mr. Lovato as to the macaroni-and-cheese incident all involved Mr. Lovato—the junior sous chef then on duty. Terranea Br. 46-47. Although this may suggest Terranea’s inconsistency in enforcing policies, it is in *Mr. Lovato’s favor*.

The General Counsel challenges this assertion (at 51-52) but has no response to the Board’s finding that Mr. Lovato was the junior sous chef on duty when the pineapple incident occurred. JA268 (Decision:10). As for the pizza incident, the General Counsel’s suggestion that Ms. Guerrero should have been punished, since she was also on duty, *might* be salient if the Board had overarching power to judge management practices and personal ethics. But the Board’s role is to assess anti-union motive, and the Board itself recognized that the purported failure of Ms. Guerrero to implicate or punish herself for an incident—in which fault was, besides, indeterminate (unlike the macaroni-and-cheese incident)—has a far more obvious explanation. *See* JA266 (Decision:8 n.21) (“Guerrero, as the manager overseeing the kitchen at the time, obviously

had a personal and professional interest in absolving the kitchen of culpability.”). The fact remains that Mr. Lovato could have been disciplined as the junior sous chef on duty during the pizza incident, and his clueless testimony that he did not know of a serious, health-threatening incident on his shift—and his watch (GC Br. 52)—only underscores why Terranea was frustrated with his performance.⁴

Finally, the General Counsel’s position that the Board discredited certain testimony about the pizza incident overlooks that the material facts are not disputed (e.g., that the junior sous chef on duty was not punished) and that this is proffered as *circumstantial* evidence of motive. If so, it should speak for itself. That the General Counsel relies on credibility determinations to make it mean anything at all only proves how weak this evidence is.

d. *Testimony*. The General Counsel and Union are confused as to what is at stake with their arguments about “[f]alse or exaggerated claims.” GC Br. 52. This argument does not simply concern the ALJ’s prerogative “to credit some but not all of a witness’s testimony,” GC Br. 52 (quotation marks omitted), but the atypical proposition that this prerogative becomes *substantive evidence* to meet the prosecuting party’s burden of proof.

The precedent on this point does not hold that, once the Board discredits a witness, it is free to rule against the party sponsoring the witness and treat the

⁴ It is truly remarkable that the Union complains of differential treatment (at 14-15) from the fact that the pizza incident was supposedly more severe than the macaroni-and-cheese incident. The macaroni-and-cheese incident left a child “vomiting” in a hotel room. JA266 (Decision:8).

credibility determinations as preclusive of judicial review. If the cases held that, it would be time to revisit them. Rather, the cases hold that, when a company's stated basis to discipline an employee proves in fact to be patently pretextual, the Board may treat the falsehood as circumstantial evidence that the true basis of the discipline was unlawful. *See, e.g., DHSC, LLC v. NLRB*, 944 F.3d 934, 938 (D.C. Cir. 2019). For instance, where a hospital claims to have disciplined a nurse for failing to conduct an examination that she did conduct, that might suggest the nurse's union affiliation was the true basis of discipline. *See id.*

That does not describe this case. The principle item of misleading testimony the General Counsel cites, "Guerrero's untruthful and inflated claims regarding the macaroni-and-cheese incident," GC Br. 15, does not involve this type of pretext. It is not as if Ms. Guerrero testified that Mr. Lovato made the offending dish and was shown to know he did not. Quite the opposite, Ms. Guerrero testified that Mr. Lovato did not make the dish (which is true) and that he was the junior sous chef on duty (which is also true). JA207-08 (Tr.750:3-751:5). Whatever determination the Board ultimately made on motive, Ms. Guerrero's attesting to *true facts* cannot be treated as evidence towards that ultimate conclusion. If it were so treated, that would mean the Board decided the ultimate question of motive and worked backwards to discredit Ms. Guerrero's testimony on motive—and then forwards again to decide the ultimate question of motive. That is not reasoned decision-making. *Cf. Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 482 (D.C. Cir. 2020).

The other instances of discredited testimony do not concern the “basis for discharge.” GC Br. 39. The Board faulted Ms. Guerrero’s testimony about the pizza incident, but Mr. Lovato was not disciplined for the pizza incident, and the Board identified a motive unrelated to anti-union animus for what the ALJ believed to be inaccurate testimony. JA266 (Decision:8 n.21) (identifying self-interest as the motive). Similarly, what the ALJ viewed as “evasive and inconsistent” testimony about whether Mr. Ibarra knew of Mr. Lovato’s union affiliation is not a pretextual assertion about the basis of Mr. Lovato’s discipline. JA270 (Decision:12). Although the ALJ might have been justified in finding the first element of the *Wright-Line* test met from this testimony (an element not at issue here), it did not show that anti-union animus was a but-for cause of discipline.

C. The Board Erred at Step Two

The Board’s analysis at step two of the *Wright-Line* test is shot through with error, and the General Counsel’s arguments do not cure it.

1. *Cross-Reference to Finding of Pretext.* The Board was derelict in its duty to examine the record at this stage because it found the “employer’s cited reason for the adverse action [to be] pretextual.” JA273 (Decision:15).⁵ This Court

⁵ The Board’s contention (at 55-56) that Terranea’s opening brief is “perfunctory” on this point is perplexing. Terranea’s brief (at 54-55) spent a half page’s worth of text on it. The Board is also wrong that Terranea did not raise the argument below that the decision is insufficiently reasoned on this point. Terranea faulted the ALJ for “wrongly not entertaining the affirmative defense that Lovato would have received the same level of discipline even in the absence of his alleged protected activities.” Exceptions Brief 44.

recently reject this approach as “a fundamental misstatement of *Wright Line*.” *Circus Circus Casinos, Inc.* 961 F.3d at 482. The Court explained that “[d]etermining an employer’s explanation to be pretext is a legal conclusion that follows from the *Wright Line* analysis, not an upfront finding that short circuits consideration of the whole record.” *Id.*

This holding defeats the General Counsel’s position (at 56) that “the Board’s sound findings” at the first *Wright Line* step “regarding the abundant circumstantial evidence of unlawful motive” double as sufficient to reject Terranea’s position at the second step. As Terranea’s opening brief explained (at 54), the Board simply cross-referenced in a sloppy fashion an unspecified finding of “pretext” and treated it sufficient to reject Terranea’s showing at step two. But this Court’s *Circus Circus Casinos* decision holds that the *Wright Line* “framework governs regardless of whether an employer’s defense is meritorious or unmeritorious” and “the Board must examine” the issue, rather than summarily conclude that a finding of pretext compels the result at step two. 961 F.3d at 483.

2. *The Record as a Whole.* The confluence of facts on record—including that Terranea is not accused of taking improper action against even one other Union supporter and that it took no action against Mr. Lovato for months after he joined the organizing campaign—affirmatively show that Terranea would have taken action against Mr. Lovato anyway. Terranea Br. 53-54.

As to the first of those facts, the General Counsel responds (at 54) with a new argument, not adopted by the Board, that Mr. Lovato was an “especially

prominent” union supporter. That was *not* the basis of the Board’s decision. *See* JA273 (Decision:15). Meanwhile, the General Counsel improperly reads precedent holding that an employer need not “weed out all union adherents” to be found to have discriminated, *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 316 n.19 (D.C. Cir. 1989) (quotation marks omitted), as rendering it irrelevant that Terranea is not alleged to have taken any other adverse actions against any other Union supporters. This is a *non-sequitur*. *Detroit Newspaper Agency*, 435 F.3d at 310; *Meaden Screw Prod. Co.*, 325 NLRB 762, 770 (1998).

As to the second fact—Terranea’s lengthy forbearance from the time Mr. Lovato’s union sympathies became known until he was implicated in the poisoning of a child—the General Counsel (at 55) criticizes Terranea for citing “no precedent.” But this is a factual contention that speaks for itself. Besides, Board precedent supports Terranea’s position. *See, e.g. Old Tucson Corp.*, 269 NLRB 492, 498 (1984). Just as an employer’s swift action against an employee once the employee’s union sympathies are discovered is powerful evidence of unlawful motive, *see Southwire Co.*, 820 F.2d at 460, an employer’s months-long forbearance—and active assistance to the employee—is powerful evidence to the contrary.

D. The Discharge Was Lawful

Mr. Lovato’s discharge resulted from his inexplicable choice to wash used chicken wings, apply new sauce, re-fry them, and serve them to guests—which violated company policy—and his direct disobedience of an order of Ms. Guerrero to dispose of them. Terranea Br. 14-15. The General Counsel contends

(at 58) that Terranea “does not argue that Lovato’s discharge was lawful even if, as shown, his final written warning was unlawful,” but the converse is also true: the discharge cannot be unlawful if the final written warning was lawful. The Board found “that the chicken wings incident would not have warranted termination but for the prior final written warning for the mac and cheese incident” and thus that, “as the final written warning was unlawful, so necessarily was the termination.” JA274 (Decision:16).

The Board’s conclusion on the discharge falls with its erroneous conclusion on the final written warning. The General Counsel’s effort to disentangle these incidents (at 57-58) is yet another attempt to obtain enforcement on grounds absent from the decision. *See* JA274 (Decision:16) (relying on the “[s]ame evidence and circumstances” for both instances). Because the final written warning was not motivated by anti-union animus, the discharge also was not motivated by anti-union animus.

CONCLUSION

The Court should grant Terranea’s Petition and deny the General Counsel’s.

September 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 32(a)(7) because it is 6,489 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 Calisto MT font, a proportionally spaced face with serifs.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which will accomplish service on counsel of record for all parties in this case.

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