

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25

NOVA BASEMENT SYSTEMS, INC.

and

CASE NO.: 25-CA-250547

JOHN NAUGHTON,  
AN INDIVIDUAL

---

**NOVA BASEMENT SYSTEMS, INC.'S FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

---

Nova Basement Systems, Inc., (“Respondent” or “Nova”) by counsel, Nicholas T. Otis of **NEWBY, LEWIS, KAMINSKI & JONES, LLP**, and submits its Findings of Fact and Conclusions of Law:

**Findings of Fact**

**1. Nova Basements Systems, Inc. Owners**

Mike Flores is an owner and general manager of Nova Basement Systems, Inc. Trial Transcript, p. 19, lines 1-22. Mike Flores began working at Nova in September 2007. Tr., p. 48, lines 18-20. Mike Flores held the following positions at Nova: receptionist, sales, service coordinator, manager, then owner. Tr., p. 48, lines 23-25, p. 49, lines 1-2. Terresa Draves is an owner and Vice-President of Nova. Tr., p. 22, lines 20-24. Dave Naughton is an owner and President of Nova. Tr., p. 22, lines 24-25. Dave Naughton began working at Nova thirty years ago. Tr., p. 259, line 9. Dave Naughton has held the positions of laborer, foreman, service technician, and owner at Nova. Tr., p. 259, lines 14-15. Dave Naughton is

the brother of the charging party, John Naughton. Tr., 23, lines 1-3. Mike Flores, Teresa Draves, and Dave Naughton became owners of Nova in December 2014. Tr., p. 221, lines 17-19.

## **2. Nova Basement Systems, Inc. Business**

Nova Basement Systems, Inc. provides solutions to water intrusion in homes, including to put drainage systems around a basement or a crawlspace, jackhammering basement concrete floors, digging trenches in crawlspaces to help capture water and direct it to sump pumps where sump pumps eject it, foundation repair, and stabilizing house walls. Tr., p. 49, lines 14-23. The systems Nova installs in homes can range from \$6,000-\$20,000. Tr., p. 50, lines 3-4.

## **3. Nova Basements Systems, Inc.'s Organization**

Mr. Flores oversees the sales and service departments at Nova and Mr. Flores helps fellow owner, Dave Naughton, with the production department. Tr., p. 20, lines 4-9. Nova's sales and service departments report directly to Mr. Flores. Tr., p. 20, lines 13-15. Nova's production department reports to Mike Miller or Dan Hersom, then Dave Naughton, and then Mr. Flores if no one else is available in the production department. Tr., p. 20, lines 13-18. Mr. Flores has the authority to hire and fire employees. Tr., p. 20, lines 19-23.

When job candidates are interviewed at Nova they are first interviewed by office staff then Mr. Flores performs the second interview. Tr., p. 21, lines 3-5. When employees are terminated from Nova it is a collective decision between the Nova owners, Teresa Draves, Dave Naughton, and Mr. Flores. Tr., p. 21, lines 11-

16.

#### **4. Nova Basements Systems, Inc.'s Employee Policies**

Nova instituted a new attendance policy on September 1, 2019. Tr., p. 31, lines 9-4. Nova did not take into account attendance violations that occurred prior to September 1, 2019, when issuing discipline after September 1, 2019. Tr., p. 32, lines 4-9. Nova had a progressive disciplinary policy, a first offense may call for a verbal warning, a second offense may be followed by a written warning, another offense may lead to a suspension, and another offense may lead to termination. Tr., p. 33, lines 10-19, see also GC Exhibit 2, p. 13 of 14. However, Nova's progressive disciplinary policy provided that in certain circumstances disciplinary steps could be bypassed. Tr., p. 34, lines 17-24. Specifically, Nova's progressive disciplinary policy provided,

**Nova Basement Systems recognizes that there are certain types of employee problems that are serious enough to justify either a suspension, or in extreme situations, termination of employment without going through the usual progressive discipline steps.**

GC Exhibit 2, p. 13 of 14. Mr. Flores testified that certain employee behavior that could not be corrected would warrant skipping steps, such as suspension, and terminating employees. Tr., p. 34, lines 17-24.

#### **5. John Naughton's Employment History**

John Naughton signed the Nova Employee Handbook on April 30, 2015. Tr., p. 26, lines 1-4. John Naughton held various positions at Nova including installer, foreman, and service technician. Tr., p. 51, lines 3-16. John Naughton was demoted from his position as foreman to service technician because he was not well

equipped to work with others. Tr. P. 51, lines 4-13. John Naughton received an hourly wage and commissions of 10% of projects he sold to customers. Tr., p. 51., lines 21-22, and p. 52, lines 1-3. Dave Naughton testified when John Naughton had confrontations with laborers below him when John was a foreman. Tr., p. 262, lines 5-9. John Naughton cussed out laborers below him so John Naughton was moved to a service tech position where he worked by himself. Tr., p. 262, lines 10-15. John Naughton even cussed out his brother, Dave Naughton, several times at work. Tr., p. 265, lines 5-6.

Nova received numerous complaints in the community about John Naughton's poor driving. Tr., p. 52, lines 14-21, see also p. 53, lines 23-25. Terresa Draves received phone calls over and over in the office complaining about John Naughton's driving. Tr., p. 223, lines 1-8. In the five years Mr. Flores owned the business he recalled two calls about other employees' driving, but recalled countless numbers of complaints regarding Mr. Naughton's driving. Tr., p. 39, lines 1-5.

On October 4, 2019, John Naughton was written up for various absences in September that reduced his bonus due by half. Respondent's Exhibit 9, p. 58, see also Tr., p. 99, lines 20-25, p. 100, lines 1-3. On October 4, 2019, Kent Rutland was also written up for various absences in September that reduced his bonus by half. Respondent's Exhibit 10, see also Tr., p. 184., lines 10-17. John Naughton admitted that Mr. Rutland was treated the same as John regarding Nova's quarterly bonus. Tr., p. 184, lines 18-19.

Dave Naughton, Terresa Draves, and Mike Flores collectively made the

decision to terminate John Naughton on Friday, October 11, 2019. Tr., p. 36, lines 4-23, see also (Terresa Drave's testimony) Tr., p. 226, line 3, see also (Dave Naughton's testimony), Tr., p. 264, lines 5-9. Terresa Draves testified that the owners had many conversations over the years about terminating John Naughton, but it was difficult for the owners because John Naughton was Dave Naughton's brother. Tr., p. 223, lines 22-25, p. 224, lines 1-5. Terresa Draves further testified that there were multiple conversations discussing terminating John over the course of his employment "because things would get off the rails and get very bad." Tr., p. 224, lines 18-22.

The decision to terminate John Naughton was based on a variety of factors, but the final straw for the Nova owners, Dave, Terresa, and Mike Flores, was when John Naughton significantly overbid a project for customer that was not needed. Tr., p. 37, lines 1-14, see also (Terresa Draves' testimony) Tr., p. 226, lines 4-6, see also (Dave Naughton testimony), Tr., p. 264, lines 24-25, p. 265, lines 1-7.

Mike Flores spoke with the customer, Pat Collins, regarding her issues with John Naughton. Tr., p. 72, lines 1-5. Mike Flores agreed to visit Pat Collins' house to investigate the issue for himself. Tr., p. 72, lines 10-11. When Mr. Flores arrived at Pat Collins house he was pretty upset because the issues with Pat Collins' house did not warrant the proposal to replace everything as quoted by John Naughton. Tr., p. 72, lines 17-19. Mr. Flores found evidence that John Naughton had not actually crawled through the entire crawl space. Tr., p. 72, lines 19-21.

It is the practice of Nova employees to take photos of crawl spaces to show

customers, but John Naughton had only taken photos of one particular area of Pat Collins' crawl space. Tr., p. 73, lines 3-11. Mr. Flores also went into the entire crawl space and noticed cobwebs and spiderwebs which informed Mr. Flores that John Naughton did not inspect the entire crawl space because the cobwebs would have been in the crawl space. Tr., p. 73, lines 12-25. Mr. Flores concluded that John Naughton did not inspect a large portion of the crawl space and attempted to sell Pat Collins a very expensive job that the customer did not need. Tr., p. 75, lines 1-6.

Mr. Flores noted the issue in Nova's BizWiz customer profile for Ed Bancroft and Pat Collins after speaking with Ms. Collins on Thursday, October 10, 2019, at 4:36 p.m., Mr. Flores would have talked to Pat Collins just before entering the below note. Tr., p. 76, lines 8-10.

	<b>Mike Flores</b> <a href="#">Edit</a>
	Customer
Thu Oct 10, 2019 4:36 PM	Talked to Pat about CleanSpace. I visited her home on 10/7/19, and discovered that the CleanSpace was not as bad as John had made it out to be. Only found four holes in the CleanSpace and one hole in the wall. Some tape had been chewed as well. Told her that we could patch these areas or lay new CleanSpace over them depending on what the service tech fee is necessary. Told her charge was \$750, but we would split the cost for the miscommunication in regards to the CleanSpace being a rodent deterrent. She was happy. Scheduled with Josh for 10/25/19.

Respondent's Exhibit 8, p. 1.

Mr. Flores also created a Coaching and Counseling Memo regarding the Pat Collins issue,

**Nova Basement Systems Coaching and Counseling Memo**

Name: John Naughton	
Title: Service Tech	Shift:
Department: Service	Date of Memo: 10/7/19

Following is a summary of the employee's undesirable behaviors and/or activities requiring a coach and counsel interaction (*attach appropriate additional documentation as necessary*).

Reason(s) for memo (*see Infraction Codes - i.e. A2*): \_\_\_\_\_

Examples and Dates of Behavior/Activity: Visited home of Pat Collins in Lakeside John wrote bid for \$6500 to replace floor and informed me the crawlspace was "fished". Upon my inspection, I found 4 holes in floor and one in wall. Only patches needed for \$350. Had to explain to upset customer difference in observations. Also, Aprilax was leaking. Was suppose to check as part of annual. Don't think it was done.

GC Exhibit 12, p. 7 of 12.

John Naughton's termination was based on a combination of multiple violations including the significant overbidding of the Pat Collins job, consistent attendance policy violations, and constant complaints about John Naughton's driving. Tr., p. 38, lines 3-9, see also Tr., p. 76, lines 11-21. Mike Flores testified how he felt about Mr. Naughton's overbidding of Ms. Collins' project

It -- it was extremely upsetting, because John is a representation of Nova Basement Systems, and the -- I guess I felt complete disheartened because that is not the company that we strive to be. I felt like -- because he is a representation of our company, that the perception is that we were taking advantage of somebody, and it -- it -- that is not who I am as a person, and I was honestly disturbed and distraught and bothered, all of those things.

It is not who I want to be and it is not the company that we want to be perceived as.

Tr., p. 76, lines 24-25, p. 77, lines 1-9.

Terresa Draves testified about her concerns regarding John Naughton's bidding of the Pat Collins' project,

The customer then called in upset and wanted to speak with someone, you know, in management about it. She was clearly upset.

On the heels of everything else that had been happening with John, I just didn't feel like it was sitting right. Something was not right. So Mike Flores decided to go himself to the customer's house and take a look at things, and determined that that was not, in fact, the case at all. She -- her system was not completely ruined, and in fact, I think we were able to repair it for like \$350 or something minimal like that.

So, to us, that -- that was -- right there, he was taking advantage of a customer and trying simply to make commission for himself.

Tr., p. 227, lines 12-25.

Terresa Draves testified John Naughton could have made \$700.00 in commissions if Pat Collins hired Nova for the unnecessary project. Tr., p. 228, lines 8-11.

Dave Naughton, Terresa Draves, and Mike Flores met for about an hour on Friday, October 11, 2019, to discuss John Naughton's termination. Tr., p. 40, lines 7-18. Nova production manager, Mike Miller, did not have any role in terminating John Naughton. Tr., p. 82, lines 13-16. Dave Naughton, Terresa Draves, and Mike Flores terminated John Naughton on October 12, 2019. Tr., p. 44, lines 6-8.

The final Coaching and Counseling memo for John Naughton issued on October 12, 2019, provided,

Based on ***all prior convictions***, and being late today being the final basis, we decided to let John go.

GC Exhibit 12, p. 11 of 12.

Mr. Naughton's prior convictions (disciplinary issues) included:

- November 5, 2015 – Cursing at crew at customer's houses, share duties with crew, clean truck out and be organized. GC Exhibit

3.

- February 18, 2016 – Discussed with John softening his edges with his crew, he was warned about his fast and aggressive driving, John Naughton acknowledged he would slow it down, and John Naughton was advised if there was not a change he would be demoted. GC Exhibit 4.
- March 26, 2019 – A lady called to report John Naughton’s dangerous driving behavior. GC Exhibit 6.
- May 2, 2019 – John Naughton skipped team meetings. GC Exhibit 7.
- May 7, 2019 – John Naughton was pulled over for speeding, it took the officer three (3) miles to catch Mr. Naughton’s vehicle. Multiple individuals called in to report incident. GC Exhibit 8.
- June 6, 2019 – John Naughton shouted profanities at driver driving by customer’s home while co-worker and homeowner were present. John Naughton also insulted a co-worker in front of the customer. The customer also alleged John Naughton did not crawl into crawlspace, but was uncomfortable reporting the incident because John stated he was the owner’s brother. John Naughton also did not clean customer’s pit thoroughly, which could be the cause of the problem. GC Exhibit 9.
- June 7, 2019 – A driver called to report that a truck tire was on fire on John Naughton’s truck. The driver said she tried to catch John’s truck, but he was “flying like a bat out of hell.” GC Exhibit 10.
- October 1, 2019 – John did an annual service at a customer’s house, but it appeared he did not perform the entire annual service as an additional employee visited the home and found shingle debris clogging the system. GC Exhibit 12, p. 1 of 12.
- October 2, 2019 – John Naughton was late on October 2, 2019 after already given a warning. GC Exhibit 12, p. 5 of 12.
- October 2, 2019 – John Naughton left work early without cleaning his truck. GC Exhibit 12, p. 3 of 12.
- October 4, 2019 – John Naughton was late on four (4) separate dates in September and had two (2) unexcused absences in September. GC Exhibit 11.

- October 7, 2019 – John Naughton overbid Pat Collins’ house, wrote bid for \$6,500, when the project was \$350. GC Exhibit 12, p. 7 of 12.
- October 12, 2019 – John Naughton was late for work. GC Exhibit 12., p. 9 of 12. John Naughton admitted coming into work thirty (30) minutes late on his last day. Tr., p. 177, lines 17-21.
- From January 1, 2019, through October 12, 2019, John Naughton had nine (9) tardies and eight (8) unexcused absences. GC Exhibit 13.
- From September 1, 2019, through October 12, 2019, John Naughton had six (6) tardies and two (2) unexcused absences. GC Exhibit 13.

Terresa Draves testified the various reasons for terminating John Naughton were overbidding Pat Collins’ house, driving erratically in Nova’s box vans (“driving billboards” for Nova), poor attendance, and John Naughton’s inability to work with other crew members. Tr., p. 226, lines 4-6, p. 226, lines 18-25, p. 227, line 1.

Mike Flores testified that not much was discussed at John Naughton’s termination meeting because John made a few choice words and then stormed out of the meeting and did not want to have a discussion. Tr., p. 128, lines 5-11. Terresa Draves testified about the termination meeting, “we didn’t get very far into the conversation and John blew up. It got very volatile very quickly. There was a lot of cursing going on.” Tr., p. 230, lines 14-17. Dave Naughton testified that John Naughton went on a rampage and started cussing during the termination meeting. Tr., p. 266, lines 10-17.

John Naughton testified about the termination meeting stating that Mike Flores addressed John’s absences and tardies, John’s truck cleanliness, overbidding

a job, then John said a few choice words and stormed off. Tr., p. 143, lines 23-25, p. 144, lines 1-8. John Naughton admitted he cut Mike Flores off at the termination meeting before Mike Flores could advise John of all the reasons for his termination. Tr., p. 178, lines 12-20. John Naughton admitted there was a list of about seven (7) things he was being terminated for by Nova, but he only let Mike Flores address three (3) of them before he cut Mike off. Tr., p. 178, lines 18-20. John Naughton admitted the termination meeting only lasted a few minutes because he cut off Mike Flores from speaking. Tr., p. 187, lines 4-10. John Naughton admitted the owners could not review documents with him at his termination meeting because John “did not give them the opportunity.” Tr., p. 190, lines 21-25.

John Naughton never discussed unionizing the company with any owners prior to his termination. Tr., p. 192, lines 11-14. John Naughton was never told by ownership that his attempt to unionize Nova was the reason for his termination. Tr., p. 193, lines 13-19.

**6. Nova terminated many employees for attendance violations in 2019 and 2020**

In 2019 Nova terminated Phil Jackson, Austin Wilhelm, Austin Dowd, Levi Miller, Otto Proud, and Ashton Lyman in 2020, for attendance violations. Tr., p. 56, lines 23-26, p. 57, line 1. Austin Wilhelm was terminated on April 26, 2019, for two (2) tardies and two (2) unexcused absences in April 2019. Respondent’s Exhibit 1. Levi Miller was terminated on January 27, 2019, for seven (7) unexcused absences from November 28, 2018, through January 23, 2019. Respondent’s Exhibit 2. Phil Jackson was released from his employment at Nova on July 20, 2019, for fifteen (15)

unexcused absences in 2019. Respondent's Exhibit 3. Austin Dow was terminated on August 21, 2019, for ten (10) tardies and two (2) unexcused absences.

Respondent's Exhibit 4. Otto Proud was terminated on September 23, 2019, after having nine (9) unexcused absences between August 29, 2019, and September 23, 2019. Respondent's Exhibit 6.

Mike Flores testified the attendance policy was not retroactive before September 1, 2019. Tr., p. 67, lines 9-12. However, two of Otto Proud's attendance violations pre-dated September 1, 2019. Tr., p. 67, lines 21-24. Mike Flores admitted Nova terminated Otto Proud for attendance violations despite only having seven attendance violations after September 1, 2019. Tr., p. 85, lines 12-21. Ashton Lyman was terminated on January 15, 2020, for excessive absences. Tr., p. 69, lines 8-11, see also Respondent's Exhibit 7, p. 4.

#### **7. John Naughton's phone calls with Union**

Corey Campbell is the vice-president of Laborers' Local 81 in Valparaiso, Indiana. Tr., p. 197, lines 10-13. John Naughton reached out to Corey Campbell in 2018, but John Naughton did not call Corey Campbell back again until October 2019.. Tr., p. 207, lines 20-25, p. 208, line 1. John Naughton never discussed his disciplinary history at Nova with Corey Campbell. Tr., p. 209, lines 23-25, p. 210, line 1. Mr. Campbell spoke with John Naughton regarding unionizing Nova on October 9 and October 10, 2019. Tr., p. 198, lines 1-4, p. 199, lines 2-5.

#### **8. Nova Employee Mike Miller**

John Naughton admitted he was only ever disciplined by the owners of the

company and never by his friend, Mike Miller. Tr., p. 5-9. John Naughton and production manager, Mike Miller, were friends. Tr., p. 135, lines 18-21. Prior to John Naughton's termination, John only had two conversations with Mike Miller regarding John's union activities. Tr., p. 171, lines 14-17. John Naughton testified his first conversation with Mike Miller regarding John's union activities was not serious and Mike thought John was joking with him. *Id.*, p. 171, lines 17-21. Mike Miller's second conversation with John Naughton was short and it was Mike Miller simply telling John Naughton that Mike Flores had inquired to Mike Miller whether John Naughton was attempting to unionize Nova. Tr., p. 176, lines 8-13. John Naughton asked Mike Miller if Mike would want to join a union and Mike Miller informed John Naughton he would not join a union. Tr., p. 253, lines 21-25.

#### **9. Nova Employee Kent Rutland**

John Naughton was upset with Nova for taking a cash bonus from John and fellow employee, Kenny Rutland. Tr., p. 137, lines 8-13. John Naughton admitted that he and Kenny Rutland both did not receive their entire bonus because of their absences and tardies. Tr., p. 184, lines 10-17. John Naughton admitted Kenny Rutland was treated the same as John regarding the reduction of their quarterly bonus. Tr., p. 184, lines 18-19.

#### **10. Nova's limited knowledge of John Naughton's union activities**

Terresa Draves said her only knowledge of John Naughton's unionizing efforts she was aware of came from Mike Flores, "The only thing I knew was that Mike Flores had told Dave and I that over the weekend, which was the weekend

prior to John being let go, that two employees had reached out to him on his cell phone, saying that John had approached them about joining a union, and that they were very uncomfortable with it. They didn't agree with it. They didn't want any part of it, and they were just concerned, and they wanted to let Mike know what was going on, and that was the most that I had heard of it." Tr., p. 232, lines 13-21.

Mike Flores testified when Nova employees called him concerned about John Naughton's unionization attempts that Mike told the employees, "thanks for letting me know. As I am sure you know, John is just doing what he feels is best for him and for you guys, and you know, he is going to continue to do that." Tr., p. 277, lines 14-17.

Dave Naughton did not believe his brother, John Naughton, would follow through on bringing a union to Nova. Tr., p. 272, lines 4-6. Dave Naughton testified, "[John Naughton] throws a lot of things out there, you know. 'I am going to start a business doing this.' 'I am going to try doing this.' So, it was just basically in one ear and out the other for him, because I didn't think that it was something that he was actually going to follow through on." Tr., p. 272, lines 16-19.

### **Conclusions of Law**

29 U.S.C. § 158(a) provides in relevant part,

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Section 8(a)(3) prevents an employer from discriminating in the tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. 29 U.S.C. § 158(a)(3). An employer violates this section if anti-union animus was a substantial or motivating factor in the company's decision to discharge an employee. *Vulcan Basement Waterproofing of Ill. v. NLRB*, 219 F.3d 677, 684 (7th Cir. 2000).

To establish that a termination violates this section, the General Counsel of the NLRB must show by a preponderance of the evidence that: (1) the employee engaged in activities protected by the NLRA; (2) the employer knew of the employee's involvement in these activities; (3) the employer harbored animus toward those activities; and (4) a causal connection exists between the employer's animus and the decision to terminate. *Great Lakes Warehouse Corp. v. NLRB*, 239 F.3d 886, 890-91 (7<sup>th</sup> Cir. 2001). If the General Counsel succeeds, then the employer can still avoid the finding of a violation if it demonstrates by a preponderance of the evidence that its discharge decision was based on unprotected conduct and that it would have fired the employee regardless of his or her protected activities. *Id.*, at 891.

The Board must make an initial showing that “antiunion animus was a substantial or motivating factor in the employer’s decision.” *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 597 (7<sup>th</sup> Cir. 2011). Only after the Board makes its initial showing, does the burden shift to the employer to prove that it had a legitimate business reason for making its decision. *Id.* The General Counsel can

prove her case with direct or circumstantial evidence. *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 684 (7<sup>th</sup> Cir. 2000). The NLRB's legal conclusions must have a reasonable basis in the law, and its factual findings must be supported by substantial evidence, which "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*, at 684-85.

An employer does not violate the NLRA if antiunion animus did not contribute at all to an otherwise lawful discharge for good cause. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983). An employer can avoid being in violation of § 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event. *Id.*, at 400.

Mere coincidence is not sufficient evidence of antiunion animus. *Vulcan*, 219 F.3d 677, 688. Timing of a termination around union activity, alone, is not sufficient to show anti-union animus. *Id.* In *Vulcan*, the Seventh Circuit vacated the NLRB's order finding *Vulcan* violated the NLRA when two employees were fired the first business day after *Vulcan* received the NLRB petition. *Id.*

An employer is not required to give reasons when it fires its employees. *Id.* The fact that a union is trying to organize the work force...does not even throw on the company the burden of proving that it had a good reason for firing. *Id.* The company can fire for good, bad, or no reasons, so long as its purpose is not to interfere with union activity. *Id.*

When employees openly engage in gross misbehavior, their employer is not required to state or investigate the obvious. *Id.* Where there are multiple bona fide reasons for firing an employee, the fact that different supervisors with different experiences cite or emphasize different legitimate reasons does not give rise to a reasonable inference of an unlawful motive. *Id.*, at 689. An employer who has tolerated bad behavior in the past is not forced to continue to do so, let alone required to tolerate increasingly bad behavior. *Id.*

In *Vulcan*, 219 F.3d at 689-90, the Seventh Circuit stated,

An employer who has tolerated bad behavior in the past is not forced to continue to do so, let alone required to tolerate increasingly bad behavior. *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207, 1214 (7<sup>th</sup> Cir.) (“The Board’s case against the Company rests at bottom on the apparent notion that blatant misconduct once tolerated at all must be tolerated forever. However, as this Court has previously stated, there must be room in the law for a right of an employer somewhere, sometime, at some stage to free itself of continuing unproductive, internal, and improper harassment.”). Thus, even though Smith declined to fire Maney and McClinton for their *repeated complaints* or for suspicion of stealing gasoline before he went on vacation, he could change his mind once he returned and learned of their escalated misbehavior while he was away.

The Board applied in effect a presumption that the discharge of a union adherent during an organizing campaign is motivated by hostility to the union, a presumption that can be rebutted only by showing that the discharge was for good cause--and maybe not even then. [The company] had plenty of cause to fire [its two employees], yet that did not help it with the Board. Evidently, if a worker is a good worker he cannot be fired if he is a union adherent because the company will not be able to show good cause for firing him, and if he is a bad worker, like [the two employees here], he cannot be fired either, for since he was not fired previously this shows that the company does not fire workers because they are bad workers but only because they are union adherents. *NLRB v. Loy Food Stores, Inc.*, 697 F.2d 798, 800-01 (7<sup>th</sup> Cir. 1983).

A union card does not insulate bad behavior. *Id.*, at 690. The NLRA does not give union adherents job tenure, even during union organizing campaigns. The fact that a union is trying to organize the work force does not suspend the company's right to hire and fire. *Id.*

Nova identified various legitimate reasons for John Naughton's termination including the overbidding of the Pat Collins' project, attendance issues, poor driving history, and poor interaction with other employees. John Naughton admitted he was told of some reasons for his termination, but he cut off Mike Flores before he could inform John of all the reasons for his termination. All three owners consistently testified regarding when they met to discuss John Naughton's termination and all three owners testified consistently regarding their reasons for terminating John Naughton. There was no evidence of anti-union animus by the owners. There was no evidence that anti-union animus played a role in the owners' decision to terminate John Naughton. John Naughton admitted he never discussed his union activities with the owners.

Mike Miller, the Nova Production Supervisor, had no role in the decision to terminate John Naughton. Mike Miller never disciplined John Naughton. Mike Miller did not interrogate John Naughton. In fact, John Naughton testified he was personal friends with Mike Miller. Mike Miller simply called John Naughton to advise him that Mike Flores had asked Mike Miller whether John Naughton was attempting to unionize Nova. Mike Miller did not interrogate or threaten John Naughton regarding his union activity.

Nova presented evidence of terminating Phil Jackson, Austin Wilhelm, Austin Dowd, Levi Miller in 2019 and Ashton Layman in 2020, for attendance violations. Nova presented evidence of Kent Rutland, another Nova employee, receiving a reduction in his quarterly bonus due to attendance violations. Nova presented evidence it terminated employee Otto Proud for the same amount of attendance violations after September 1, 2019, as John Naughton.

This case is directly on point with *Vulcan* where the Seventh Circuit reversed the NLRB's order finding a violation of the NLRA by Vulcan. John Naughton's communications with the union do not inoculate his bad behavior from receiving discipline, including his termination on October 12, 2019. John Naughton had a long disciplinary history at Nova including poor attendance, dangerous driving, poor interactions with co-workers, and significantly overbidding a customer's job. Even if the General Counsel has proven that Nova's dislike of John Naughton's union activities was a factor in Nova's decision to fire John Naughton, substantial evidence does not support a finding that Nova would not have fired John Naughton for legitimate reasons. See *Vulcan*, 219 F.3d at 689.

### **Conclusion**

For the above stated reasons, Nova Basement Systems, Inc., respectfully requests the Administrative Law Judge find that Nova did not violate the National Labor Relations Act, and for all other just and proper relief.

**NEWBY, LEWIS, KAMINSKI & JONES, LLP**

By /s/Nicholas T. Otis  
Nicholas T. Otis, #27992-64  
Attorney for Defendant  
916 Lincolnway, P.O. Box 1816  
La Porte, IN 46352-1816  
Telephone: (219) 362-1577

**Certificate of Service**

I certify that on January 20, 2021, I electronically filed the foregoing document using the NLRB website ([www.nlr.gov](http://www.nlr.gov)).

**NEWBY, LEWIS, KAMINSKI & JONES, LLP**

By /s/Nicholas T. Otis  
Nicholas T. Otis, #27992-64