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Apex Linen Service, Inc. and International Union of Operating Engineers, Local 501, AFL-CIO.

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

January 29, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

On May 28, 2020, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

¹ The Respondent excepts to the judge's failure to reference in his decision R. Exh. 57. That exhibit includes a text message that employee Joseph Servin—one of the alleged discriminatees in this case—sent to coworkers in February 2017, stating that he is glad that a recently discharged employee had found other employment and that he, Servin, could now “just make their lives hell for the pure pleasure of it,” referring to the Respondent. The Respondent contends that this text message is evidence that Joseph Servin was biased against the Respondent and, more broadly, that the judge's “decisions as to credibility were one-sided.” The Respondent does not identify, however, any factual finding that hinged on Servin's credibility or any legal conclusion that was based on any such factual finding. Given the myriad facts and numerous legal conclusions contained in the judge's 90-page decision, the Respondent's exception fails to substantially comply with Sec. 102.46(a)(1) and (2) of the Board's Rules and Regulations and may be disregarded. In any event, we have examined R. Exh. 57 and find that it does not undermine any of the judge's factual findings or legal conclusions.

Member Emanuel agrees that R. Exh. 57 does not undermine any of the judge's factual findings or legal conclusions and therefore finds it unnecessary to pass on whether the Respondent's exception regarding R. Exh. 57 complies with Sec. 102.46(a)(1) and (2) of the Board's Rules and Regulations.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) when Chief Engineer Eugene Sharron told Servin and employee Adam Arellano that he was getting pressure from his bosses to write them up; Sec. 8(a)(3), (4), and (1) by delaying

AMENDED REMEDY

Although the judge found that Walker, Arellano, and Servin potentially lost overtime income because the Respondent unlawfully delayed their reinstatement and instead placed them on paid administrative leave, the judge did not order a make-whole remedy for Walker. The judge also implied that make-whole relief for Arellano and Servin would be limited to making them whole for the unlawful suspension (Arellano) and discharges (both Arellano and Servin). We shall order the Respondent to make the discriminatees whole for any loss of earnings and other benefits resulting from the unlawful discrimination against them, which would include any lost overtime income stemming from the Respondent's unlawful delay in reinstating them to work.⁴ Backpay for any lost overtime resulting from the delayed reinstatement shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).⁵

Additionally, the judge recommended a narrow cease-and-desist order, enjoining the Respondent from interfering with, restraining, or coercing employees in the

reinstatement of Servin, Arellano, and employee Charles Walker, by thereafter requiring them to work on the roof of the Respondent's facility rather than inside and failing to provide them with radios or keys, by disciplining Arellano and Servin for inefficiency in repairing the Respondent's evaporative coolers, and by disciplining Servin for insubordination; and Sec. 8(a)(5) and (1) by failing and refusing to provide the Union with information related to discipline issued to Arellano and Servin that the Union requested on August 17, September 5, and September 19, 2018, and with bargaining-unit employees' Social Security numbers and work schedules. Also in the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing Walker's classification and its disciplinary practices and by failing and refusing to provide the Union with subcontracting invoices and information that it requested on September 11, 2018, related to discipline of Arellano and Servin.

In his decision, the judge inadvertently stated that Servin's September 1, 2018 discipline for inadequate workmanship was for an incident that occurred the day before. In fact, the incident occurred on August 30.

³ We shall modify the judge's recommended Order to conform to the amended remedy and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

⁴ Whether the discriminatees would have worked overtime absent the unlawful delay in reinstatement, and if so, how much, can be determined at the compliance stage.

⁵ Backpay for Arellano's September 18, 2018 suspension shall be computed in the same manner. Backpay for the unlawful discharges of Arellano and Servin shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

exercise of the rights guaranteed them by Section 7 of the Act in any manner “like or related” to the violations the Respondent has been found to have committed here. In *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), the Board explained that a broad cease and-desist order, enjoining a respondent from violating the Section 7 rights of employees “in any other manner,” is warranted “when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” In either situation, the Board reviews the totality of the circumstances to ascertain whether the respondent’s unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally. *Postal Service*, 345 NLRB 409, 410 (2005), *enfd.* as modified 477 F.3d 263 (5th Cir. 2007).

This is the third case in less than 3 years in which the Respondent has been found to have committed unfair labor practices, including numerous violations of Section 8(a)(3), (4), (5), and (1).⁶ In total, the Respondent has committed six discriminatory discharges, including repeated unlawful discharges of employees Arellano and Servin after having been ordered to reinstate them. The Respondent has refused to bargain in good faith with the Union in a variety of ways, including by failing to bargain about mandatory subjects, bypassing the Union and dealing directly with unit employees, and refusing the Union’s requests for relevant information. Additionally, the Respondent has chilled employees’ Section 7 rights in a variety of ways, including by maintaining an overly broad rule restricting use of social media, coercively interrogating employees about their union activities, creating an impression that it was surveilling employees’ union activities, and threatening adverse consequences if employees were to choose union representation. We find that the Respondent’s violations in these three recent cases indicate both a proclivity to violate the Act and a “general disregard for the employees’ fundamental statutory rights” sufficient to warrant a broad order. *Hickmott Foods*, *supra*.⁷

ORDER

The National Labor Relations Board orders that the Respondent, Apex Linen Service, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Union of Operating Engineers, Local 501, AFL–

CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(b) Threatening employees with discipline for engaging in union or other protected concerted activities.

(c) Disciplining, discharging, or otherwise discriminating against employees for supporting the Union or any other labor organization, or because they testified at a Board hearing, participated in Board investigations, or were named in an injunction proceeding in Federal district court in which the Board was a party.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the relevant information it requested, including unit-employee Social Security numbers, written policies and procedures that Adam Arellano and Joseph Servin were alleged to have violated resulting in their discipline, evidence relied upon to determine that discipline was warranted, comparator disciplines, and unit-employee work schedules.

(b) Within 14 days from the date of this Order, offer Adam Arellano and Joseph Servin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Adam Arellano, Joseph Servin, and Charles Walker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.

(d) Compensate Adam Arellano, Joseph Servin, and Charles Walker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, suspension, and warnings, and within 3 days thereafter, notify Adam Arellano, Joseph Servin, and Charles Walker in writing that this has been done and that the unlawful

⁶ See 366 NLRB No. 12 (2018), and Case No. 28–CA–192349 et al. (July 23, 2018) (unpublished).

⁷ Member Emanuel would not substitute a broad cease-and-desist order for the judge’s recommended narrow cease-and-desist order in the

absence of a request by a party for the Board to do so. He affirms the notice-reading remedy in the absence of exceptions.

adverse employment actions specific to each of them will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2018.

(h) Hold a meeting or meetings during working hours, scheduled to ensure the widest possible attendance of employees, at which the attached notice will be read to the employees by a high-ranking responsible management official of the Respondent in the presence of a Board agent and, if the Union so desires, a union representative or, at the Respondent's option, by a Board agent in the presence of a high-ranking responsible management official of the Respondent and a union representative.⁸

(i) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region

⁸ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted or read until a substantial complement of employees have returned to work. Any

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 29, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Union of Operating Engineers, Local 501, AFL-CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with discipline for engaging in union or other protected concerted activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against you for supporting the Union or any other labor organization, or because you testified at a Board hearing, participated in Board investigations, or were named in an injunction proceeding in Federal district court in which the Board was a party.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the relevant information requested by the Union.

WE WILL, within 14 days from the date of the Board's Order, offer Adam Arellano and Joseph Servin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Adam Arellano, Joseph Servin, and Charles Walker whole for any loss of earnings and other benefits suffered as a result of our unlawful delay in reinstating them and our unlawful suspension of Adam Arellano, plus interest.

WE WILL make Adam Arellano and Joseph Servin whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Adam Arellano, Joseph Servin, and Charles Walker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, suspension, and warnings, and WE WILL, within 3 days thereafter, notify Adam Arellano, Joseph Servin, and Charles Walker in writing that this has been done and that the unlawful adverse employment actions

specific to each of them will not be used against them in any way.

APEX LINEN SERVICE, INC.

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-216351> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Nathan A. Higley, Esq., for the General Counsel.
Justin Crane, Esq. (Myers Law Group), for the Charging Party.
John M. Naylor, Esq. and Andrew J. Sharples, Esq. (Naylor & Braster), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Las Vegas, Nevada, over a seven-day period in April and May of 2019. Pursuant to charges filed by the International Union of Operating Engineers, Local 501 (Union), a Third consolidated complaint and notice of hearing (Complaint) issued, which was subsequently amended, alleging that Apex Linen Service Inc., (Respondent or Apex) has violated Sections 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). Respondent denies the unfair labor practice allegations.¹ (Tr. 7–8; GC. 1(qq)–1(ww).)

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by all the parties, I make the following findings of fact and conclusions of law.²

I. JURISDICTION AND LABOR ORGANIZATION

Respondent operates a commercial laundry in Las Vegas, Nevada. Each year it purchases and receives goods valued in excess of \$50,000 directly from points outside of the State of Nevada and has annual gross revenues in excess of \$500,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor

based upon the entire record and may include parts of the record that are not specifically cited.

² Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.

¹ Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Judge's exhibits are denoted by "GC," "R.," and "ALJ" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are

organization within the meaning of Section 2(5) of the Act. (GC. 1 (qq), GC. 1(ss)) Accordingly, I find that this dispute affects commerce and the National Labor Relations Board (NLRB or the Board) has jurisdiction pursuant to Section 10(a) of the Act. See also, *Apex Linen Services, Inc.*, 366 NLRB No. 12, slip op. at 3 (2016).

II. FACTS

A. *Apex's Las Vegas Laundry Operations*

Apex was founded by Joe Dramise (“Dramise”) and Glen Edward “Marty” Martin (“Marty Martin”) and opened its doors in August 2011. Dramise serves as Apex’s CEO and is Respondent’s top management official. Marty Martin serves as the chief operating officer and reports to Dramise. The rest of Respondent’s management team reports to Marty Martin. (Tr. 351–352, 356, 436, 461)

Respondent’s Las Vegas facility is 100,000 square feet, almost the size of two football fields, taking up an entire city block.³ At the facility Apex launders bed sheets, towels, uniforms, and related linens for area businesses including restaurants and casinos. Depending upon the time of year, Apex cleans anywhere from 110,000 to 200,000 pounds of laundry on a daily basis. Its facility is segregated into nine sections, referred to as “bays.” Bays 1 through 7 contain the various washing, drying, cleaning, and finishing equipment; this area is generally referred to as the production department/area. Laundry production starts in Bay 1 and works its way down towards Bay 7. (Tr. 24, 231, 794, 1046)

Respondent uses three tunnel washers and 18 large conventional washing machines to clean the laundry. The tunnel washers are anywhere from 120–150 feet long. Each tunnel washer contains a long tube with an auger running through the middle; dirty laundry is deposited in one end, is moved through the tunnel by the auger, and in due course comes out clean at the other end. Once clean, the laundry is transported to dryers via a shuttle system and conveyors. Respondent has 12 large dryers dedicated to the tunnel washers and a dozen smaller dryers for the conventional washers. Six ironing lines are used to press the various laundered items, and multiple machines stack, fold, and package the finished laundry. Apex also has dry cleaning equipment which is kept in Bays 7 and 8. Bay 9 is an empty area, located at the end of the building near the administrative offices, which is used as a repair shop. Bay 10 is the smallest bay. It contains the administrative offices and a shop area used by the engineers to dress for work and stow their tools; sometimes the tool area is referred to as Bay 9½. (Tr. 79, 113, 125, 231–235, 797, 1045, 1267)

To operate its commercial laundry, Respondent’s employs about 350 employees, the vast majority of which work in the

production department operating the various equipment used to clean, dry, press, and package laundry. Apex also employs engineers whose job it is to maintain the physical plant, including all of the production equipment. (Tr. 60, 233)

In 2018, the engineers were categorized into two groups: utility engineers and maintenance engineers. The utility engineers were considered less skilled than the maintenance engineers. The total number of engineers varied between 10 and 14. In July 2018 maintenance engineers received about \$33 per hour, while utility engineers were paid \$21.45 per hour. During this time period, Respondent had three shifts, day shift, swing shift, and graveyard shift. And Apex generally tried to ensure there were one or two maintenance engineers assigned to each shift. (Tr. 57, 60–61, 237–238) (GC 3, 24)

The engineering department is overseen by the director of engineering Keith Marsh (Marsh). Marsh was hired by Respondent into this position sometime in 2016. Eugene “Gene” Sharron (“Sharron”) works as the chief engineer. Sharron has held this position for about 4 years and before his promotion worked for Respondent as an engineer. (Tr. 22, 251, 556–557)

On February 6, 2017, by a vote of 10 to 4, the engineers voted to unionize.⁴ And on February 15, 2017, the Union was certified as the exclusive collective-bargaining representative of Respondent’s engineers, including both the utility and maintenance engineers. The facts relevant to the Complaint allegations in this matter arise within the larger context of the Union’s organizing efforts and the resulting litigation which required the reinstatement of three engineers that Apex unlawfully fired in 2017. As it is within this framework that the alleged unfair labor practices unfold, a review of the history between the parties and the resulting litigation is necessary before addressing the substantive Complaint allegations. (GC 1(qq), 1(ss))

B. *The Union's Organizing Drive and Related Proceedings.*⁵

In January 2017, the Union filed a petition to represent Apex’s engineers. Before the company received a copy of the petition, Union Representative Charles “Ed” Martin (“Ed Martin”) met with Marty Martin and told him the Union was organizing the engineering department.⁶ After Ed Martin left, Marty Martin asked Sharron if he knew anything about the organizing effort; Sharron did not but said he would find out. Starting on January 24, 2017, Sharron interrogated employees by asking each engineer, one by one, if they knew anything about the organizing drive; they denied knowing anything and he reported this information back to Marty Martin. On about February 1, Dramise called engineers Adam Arellano (“Arellano”) and Joseph Servin (“Servin”) into a meeting and unlawfully threatened adverse consequences if the Union was voted in. Arellano was the one who had originally contacted the Union in July 2016. On that

³ See *Judson v. Bd. Of Supervisors of Mathews City, VA, Virginia*, No. 4:18CV121, 2019 WL 2558243, at *5 (E.D. Va. June 20, 2019) (noting that one football field is 57,600 square feet).

⁴ I take administrative notice of the tally of ballots in *Apex Linen Service, Inc.*, 28–RC–191728. *Rockwell Automation/Dodge*, 330 NLRB 547, fn. 4 (2000) (Board takes administrative notice of the case number and tally of ballots in a related representation proceeding). See also *Overstreet v. Apex Linen Services*, No. 17-CV-02923, 2018 WL 832851,

at * 1 (D. Nev. Feb. 12, 2018) (noting the engineers voted in favor of the union by a vote of 10 to 4).

⁵ Unless otherwise noted, the background facts in this section are taken from *Apex Linen Services Inc.*, JD(SF)-15-18, 2018 WL 2733700 (2018), which was adopted by the Board on July 23, 2018, in the absence of exceptions, and from the District Court’s decision in *Overstreet v. Apex Linen Services*, No. 17-CV-02923, 2018 WL 832851 (D. Nev. Feb. 12, 2018).

⁶ Ed Martin and Marty Martin are not related. (Tr. 352)

same day, Sharron told Servin that he had figured out who the union supporters were, naming three engineers including Arellano and Charles Walker (“Walker”).

The Union’s February 6, 2017 election victory was the first time that any of Apex’s employees were represented by a labor union. The day after the election, Respondent accelerated its closure of the engineers’ break room and failed to bargain with the Union over the effects of the closure. Then, on February 13, Respondent terminated Arellano. Two days later, on February 15, the day of the Union’s certification, Apex laid off Walker, who had served as the Union’s only election observer on February 6. And, on May 2 Respondent discharged Servin. Also, after the Union’s certification, Respondent made unilaterally changes to employee work schedules, changed their cell phone policy, dealt directly with the engineers regarding their schedules, failed to notify and bargain with the Union about the discharges of Arellano, Walker, and Servin, and refused to provide the Union with necessary and relevant information.

The Union filed numerous unfair labor practices charges over Apex’s conduct and on August 31, 2017, the Regional Director for NLRB Region 28 (Regional Director) issued a consolidated complaint alleging that Apex’s conduct violated Sections 8(a)(1), (3), and (5) of the Act. A hearing on the unfair labor practice allegations opened on October 10, 2017, was adjourned, and resumed two months later, closing on December 6. Meanwhile, in November 2017 the Regional Director filed a petition for a temporary injunction, pursuant to Section 10(j) of the Act, in the United States District Court for the District of Nevada.

After briefing and oral arguments, on February 12, 2018, the District Court granted the Regional Director’s 10(j) petition in pertinent part. See *Overstreet v. Apex Linen Services, Inc.*, No. 17-CV-02923, 2018 WL 832851 (D. Nev. Feb. 12, 2018). As part of its relief, the District Court enjoined Apex from, among other things: interrogating employees; creating the impression of surveillance; discriminating against employees because of their union support; making unilateral changes to employee working conditions; failing to provide the Union with necessary and relevant information; and failing to bargain in good faith. *Id.* at * 14–15. The District Court also ordered affirmative relief, and required Apex to offer Arellano, Servin, and Walker immediate reinstatement in writing, within 10 days of the Court’s order, “to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority and other rights and privileges previously enjoyed, displacing if necessary any workers hired or transferred to replace them.” *Overstreet*, 2018 WL 832851, at * 15.

On June 6, 2018, Administrative Law Judge Ariel Sotolongo issued his decision in the underlying unfair labor practice proceeding finding that Apex violated Section 8(a)(1) of the Act by: interrogating employees; threatening employees with adverse consequences if they unionized; and creating the impression that employee union activity was under surveillance. Judge Sotolongo also found that Respondent violated Section 8(a)(3) of the

Act by: discharging or laying off Arellano, Servin, and Walker because of their union support; and accelerating the closure of the engineers’ break room in retaliation for their decision to unionize. Finally, Judge Sotolongo concluded that Apex violated Section 8(a)(5) of the Act by: changing employee work schedules without bargaining with the Union; bypassing the Union and dealing directly with employees about their schedules; disciplining employees without first notifying and bargaining with the Union; and failing to furnish the Union with necessary and relevant information. *Apex Linen Services Inc.*, JD(SF)-15-18, 2018 WL 2733700 (2018) (“Sotolongo decision”). No exceptions were filed to the Sotolongo decision and pursuant to Section 102.48(a) of the Board’s Rules and Regulations it became the decision and order of the Board. On July 23, 2018, the Board entered its final order adopting the Sotolongo decision.

Regarding the injunction, the District Court retained jurisdiction until the Board issued its final order. See *Overstreet v. Albertson’s LLC*, 868 F.Supp.2d 1182, 1190 (D. N.M. 2012) (District Court retains jurisdiction over an action filed under Section 10(j) of the Act until a final order issues in the underlying action). Therefore, upon notification that the Board’s final order issued, the District Court vacated its order and dismissed the 10(j) petition on August 10, 2018.

C. Petition to Decertify the Union

On February 20, 2018, eight days after the 10(j) order issued, engineer Kevin McCann filed a petition to decertify the Union in Case 28–RD–215076.⁷ One week later, the Regional Director sent a letter to the parties stating that the petition would be held in abeyance pending the investigation and disposition of the unfair labor practice charges filed by the Union, regarding the matters that were being heard by Judge Sotolongo.

The evidence shows that Respondent was involved in the decertification effort. Both Sharron and Marsh signed the decertification petition; Marsh on February 9, 2018, and Sharron on February 12. Also, Sharron testified that he told the employees who wanted to decertify the Union that “if it doesn’t get cleared up and people come back to reality,” he would help them get a lawyer for the decertification effort. (Tr. 676) He then took steps to find a lawyer and directed the lawyer to McCann. Ultimately, the Regional Director dismissed the petition on April 13, 2018, based upon the investigation of the charges and the evidence adduced at the unfair labor practice hearing before Judge Sotolongo. (Tr. 32, 609, 675–680; GC 48)

D. Bargaining for an Initial Contract

Respondent’s bargaining obligation began as of the Union’s February 6, 2017, election victory. Notwithstanding, face to face bargaining for an initial contract did not begin until nearly three months later, on or about April 27, 2017.⁸ Marty Martin served as the Respondent’s chief negotiator from the start of bargaining until sometime in mid to late June 2018, when he was replaced by Dramise. Ed Martin served as the Union’s primary bargaining representative throughout bargaining, and at times he was

⁷ See <https://www.nlr.gov/case/28-RD-215076>, and related documents filed in the case. *Lord Jim’s*, 264 NLRB 1098, 1098 fn. 1 (1982) (The Board may take judicial notice of its own files.); *Baldwin*

Locomotive Works, 89 NLRB 403, 403 fn. 2 (1950) (“The Board takes judicial notice of its prior proceedings.”).

⁸ See *Apex Linen Services Inc.*, JD(SF)-15-18, slip op. at 46, 2018 WL 2733700 (2016).

accompanied by various employees. After they were discharged, and before they returned to work at the facility, Arellano, Servin, and Walker attended at least one such bargaining session. On June 6, 2018, before Dramise replaced Martin as chief negotiator, the Sotolongo decision issued. Soon after, when Dramise took over as Respondent's chief negotiator, the parties quickly reached agreement on the terms of a CBA, and by July 9, the Union was planning for a ratification vote. After nearly 15 months of bargaining, the parties signed a collective-bargaining agreement (CBA) on July 20, 2018. After the CBA was signed, in about August 2018, Arellano and Servin became the Union's shop stewards at the facility. (Tr. 38–39, 511–513, 516, 557, 732, 735–736, 1010–1011; GC. 3; GC 24(a))

III. THE 8(A)(3) AND 8(A)(4) ALLEGATIONS IN THE COMPLAINT

A. Legal Standard

1. *Wright Line* applies to the 8(a)(3) and 8(a)(4) allegations

The Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), where the employer's motivation is at issue involving alleged 8(a)(3) and 8(a)(4) violations of the Act.⁹ *Freightway Corp.*, 299 NLRB 531, 532 fn. 4 (1990) (noting that *Wright Line* applies to 8(a)(4) as well as 8(a)(3) violations). Under this framework, the General Counsel must prove by a preponderance of the evidence that employee protected activity was a motivating factor for the employer's actions. The elements required to support such a showing are union or other protected activity, knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019) (noting that the evidence of animus must be sufficient to establish a causal relationship between the employee's protected activity and the employer's action against the employee).

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *Consolidated Bus Transit*, 350 NLRB at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). (internal quotations and citations omitted). "In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so." *Id.* (italics in the original) Where an employer's explanation is

"pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). And, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

2. Employee protected activity and animus

Here, it is undisputed that Arellano, Servin, and Walker all engaged in activities in support of the Union and otherwise assisted the Union in its February 6, 2017 election victory. Indeed, they were unlawfully fired in 2017 because of these union activities, which are well documented in the Sotolongo decision and do not warrant repeating here. After the unlawful terminations, and before they actually started working again at the plant, the three continued to engage in activities on behalf of the Union by participating in negotiations for an initial CBA in February 2018. And, after the contract was signed, both Arellano and Servin became the shop stewards for the engineering unit. It is also undisputed that Respondent knew Arellano, Servin, and Walker participated in Board proceedings against Respondent, and were the subject of the District Court 10(j) injunction proceedings.

Respondent's animus against employee protected activity in general, and against the protected activities of Arellano, Servin, and Walker specifically, is clearly established by the findings in the Sotolongo decision. See *Success Village Apartments, Inc.*, 348 NLRB 579, 579 fn. 4 (2006) (Board affirms judge's reliance on background evidence, animus, and intent to retaliate against employees who were prominent union supporters, established by ALJ in previous proceeding); *1621 Route West Operating Company, LLC*, 364 NLRB No. 43, slip op. at 16 (2016) (Board's findings in previous cases show employer's "animus towards the union activities of its employees, and the union activities of the LPNs in particular.") (citing *St. George Warehouse*, 349 NLRB 870, 878 (2007) (relying on previous Board decisions finding violations of Sections 8(a)(3) and (1) as evidence of animus)). Respondent's antiunion animus, which I find was harbored by all of Apex's management and supervisory team, was also clearly articulated by Dramise who testified that before the union drive Servin and Arellano used to be good employees "[a]nd then this union thing happened, and they decided to go rogue." (Tr. 465) Other than the union, Dramise said he did not know why "two good employees all of a sudden became bad actors, bad players, and created a lot of problems in the Company." (Tr. 465) These statements are clear evidence of Respondent's animus. *Knoxville Distribution Co.*, 298 NLRB 688, 688 (1990), enfd. 919 F.2d 141 (6th Cir. 1990) (employer's speech, made the same day three employees were reinstated following their unlawful discharge, saying the company "did not need 'troublemakers,' evidenced the Respondent's continuing anti-union animus towards the employees); *Ramada Inn*, 172 NLRB 248, 251 (1968)

not allege that the adverse actions taken against Arellano, Servin, and Walker independently violated Section 8(a)(1) of the Act. They are only alleged as violations of Sections 8(a)(3) and 8(a)(4). (GC. 1(qq), GC. 1(tt), GC. 1(ww))

⁹ *Wright Line*, 251 NLRB 1083 (1980), also applies to Section 8(a)(1) allegations involving employee concerted activity where the employer's motivation is at issue. *Tortillas Don Chavas*, 361 NLRB 101 (2014) (applying *Wright Line* to 8(a)(1) allegations involving employee concerted activity). Here, the Complaint's conclusory paragraphs (paras. 9–13), do

(referring to employee as “troublemaker” evidence of unlawful motive); *United Parcel Service*, 340 NLRB 776, 777 (2003) (saying employee was “troublemaker” because of his involvement in filing grievances is evidence of animus). Moreover, at a time when the CBA was being finalized, Sharron told Walker that he was going to use the union contract against employees to get them fired and “was going to sue the Union and sue all those sons of bitches . . . the engineer or the union people for slandering his name.” *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996) (manager’s statement was evidence of antiunion animus when he told an employee that, referring to the union, “as long as he was there, those scum-sucking, lazy, sorry-ass son of a bitches wouldn’t get back in”). As set forth above, and as further outlined in the remainder of this decision, the evidence clearly shows that Respondent harbored animus against Arellano, Servin, and Walker specifically because of their union and other activities protected by the Act.

Accordingly, for the various 8(a)(3) and 8(a)(4) allegations set forth below, I find that the General Counsel has established a prima facie case that Respondent’s actions were unlawfully motivated. Therefore, the burden of persuasion shifts to Respondent to prove that it would have taken the same adverse actions against Arellano, Servin, and Walker even if they had not engaged in activities protected under the Act.

B. The Reinstatement of Arellano, Servin, and Walker Pursuant to the 10(j)

1. The three engineers are put on paid administrative leave

Under the District Court’s February 12, 2018 injunction order, Respondent was obligated to offer Arellano, Servin, and Walker reinstatement by February 22.¹⁰ Respondent mailed letters dated February 22, 2018 to the discharged engineers offering them “immediate reinstatement,” but the letters told them not to report to work.¹¹ (GC 35, 40) Instead, they were placed on paid administrative leave until further notice. Meanwhile, on February 22, Respondent filed an “Emergency Motion” asking the District Court to reconsider its reinstatement order. Among its arguments, Respondent claimed that the reinstatement of Arellano, Servin, and Walker would “create chaos and foster distrust in the workplace,” that it had received a petition to decertify the Union from “currently employed engineers” and that the “impending decertification vote” could render moot the discharged engineers’ employment status along with the remaining issues before the court.¹² The same day it was filed, the District Court denied the motion.¹³ (Tr. 734, 1010; GC 35, 40)

¹⁰ I have taken judicial notice of the District Court and Ninth Circuit dockets and pleadings from the related 10(j) injunction proceeding in *Overstreet v. Apex Linen Services, Inc.*, No. 17-CV-02923, 2018 WL 832851 (D. Nev. Feb. 12, 2018), appeal docketed, No. 18-15370 (9th Cir. March 6, 2018). See *Powell v. Rios*, 241 Fed.App’x 500, 501 fn. 1 (10th Cir. 2007) (court has discretion to take judicial notice of publicly filed court records that have a direct relation to the matters at issue); *McVey v. McVey*, 26 F. Supp. 3d 980, 984 (C.D. Cal. 2014) (consolidating cases and noting that a court can take judicial notice of court filings pursuant to Fed. R. Evid. 201).

¹¹ Only the letters sent to Arellano and Servin were introduced into evidence. (GC 35, 40) However, no party contends that Walker was treated any differently.

On March 5, 2018, Respondent filed a Notice of Appeal regarding the injunction, which was docketed by the Ninth Circuit Court of Appeals on March 6. On March 7, Respondent again filed with the District Court a motion to stay the reinstatement order pending appeal.¹⁴ On April 19, 2018, the District Court denied the motion finding it lacked jurisdiction.¹⁵ Pursuant to a stipulated motion by the parties, the Ninth Circuit entered an order voluntarily dismissing the appeal on July 16, 2018.¹⁶ One week later, the Board adopted the Sotolongo decision, in the absence of any exceptions having been filed.

2. Respondent requires the three engineers to complete new paperwork

During the same period in which Respondent was trying to get the reinstatement order overturned, on February 26, 2018, Arellano, Servin, and Walker were present at a collective-bargaining meeting when the issue of their reinstatement came up. During the meeting Marty Martin told the three engineers they needed to go to a company called AdvanStaff to complete certain paperwork so they could start receiving benefits. Although Respondent had its own internal human resources office, it also used AdvanStaff for hiring and human resources purposes. (Tr. 217, 735–736, 1010–1011)

After negotiations ended that day, Arellano, Servin and Walker went to AdvanStaff, and asked to speak with a representative responsible for Apex employee benefits. They eventually spoke with someone who told them that AdvanStaff had not received any notification from Apex about their reinstatement, or about what documents they were supposed to sign. Moreover, the three engineers were told that they would not be able to complete any applications or do whatever was needed for them to get back into the system until Apex contacted AdvanStaff. The representative further said that AdvanStaff needed to speak with Marty Martin about the matter and would then contact the employees accordingly. (Tr. 735–737, 1012, 1167)

The three engineers did not hear anything until March 6, when Arellano received a call from an Apex human resources employee to set up an appointment at AdvanStaff. The next day Arellano, Servin, and Walker went back to AdvanStaff. When they arrived all three were given a packet of documents to review, and were also asked to sign: (1) a Policy Agreement Receipt & Acknowledgment (Policy Acknowledgment); (2) an Employee Handbook Receipt & Acknowledgment (“Handbook Acknowledgment”); and (3) a Confidentiality & Non-Compete Agreement (Non-Compete Agreement). Arellano told the AdvanStaff representative that the Non-Compete Agreement would

¹² See Emergency Motion to Stay the Order Granting Petition for Temporary Injunction at 2–3, 18, *Overstreet v. Apex Linen Services, Inc.*, No. 17-CV-02923 (D. Nev. Feb. 22, 2018), ECF. No. 37.

¹³ See Order Denying Emergency Motion to Stay and for Reconsideration, *Overstreet v. Apex Linen Services, Inc.*, No. 17-CV-02923 (D. Nev. Feb. 22, 2018), ECF. No. 38.

¹⁴ Motion to Stay Pending Appeal at 3, *Overstreet v. Apex Linen Services, Inc.*, No. 17-CV-02923 (D. Nev. March 7, 2018), ECF. No. 41.

¹⁵ Order Denying Motion to Stay Pending Appeal and Indicative Ruling, *Overstreet v. Apex Linen Services, Inc.*, No. 17-CV-02923 (D. Nev. April 19, 2018), ECF. No. 50. (2018 WL 2245145)

¹⁶ *Overstreet v. Apex Linen Services, Inc.*, No. 18-15370, 2018 WL 4201309 (9th Cir. July 16, 2018).

not apply to them, and the representative removed the document from the packet. The three engineers then signed the Handbook Acknowledgment without incident. (Tr. 737–739, 1013, 1167; GC 36, 41, 45)

As for the Policy Acknowledgment, it contained a signature line confirming receipt and acknowledging that the following additional policies were binding upon them: Conditions of Employment; Safety & Security in the Workplace; Nevada Pregnant Workers Fairness Act; Employee Rights and Responsibilities under the FMLA; Accident/Illness in the Workplace; Drug Free Workplace; and Notice of Privacy Practices for the Use and Disclosure of Private Health Information. There was also a space for the employees to place their initials next to each specific policy. (GC 36, 41, 45)

Arellano, Servin, and Walker all signed the Policy Acknowledgment, and placed their initials next to all of the policies except for the Conditions of Employment.¹⁷ The three discussed the matter and decided together that they would not initial the Conditions of Employment, as they had concerns about the document. Therefore, the three left AdvanStaff that day without acknowledging the Conditions of Employment and without signing the Non-Compete Agreement. (Tr. 1014, 1168–1169; GC 36, 41, 45)

In the early afternoon of March 8, Marty Martin emailed Union Representative Ed Martin saying that Respondent had complied with the District Court order by offering reinstatement to Arellano, Servin, and Walker, and that the conditions of employment existing at the time of their terminations continued. Therefore, in his email Marty Martin asked the Union to instruct Arellano, Servin, and Walker to: (1) either sign the forms presented to them by AdvanStaff, including the Non-Compete Agreement and Conditions of Employment; or (2) have each employee specifically agree that the paperwork the employees had originally signed prior to being terminated remained in full force pending the outcome of contract negotiations. If they did not do so, Marty Martin said that Respondent would consider their actions to be a rejection of Apex's reinstatement offer. Ed Martin replied saying that Respondent was unilaterally changing working conditions by requiring the employees to sign new documents. Therefore, Ed Martin asked for copies of the original Non-Compete Agreements and Conditions of Employment signed by the Arellano, Servin, and Walker, along with those signed by all other bargaining unit members. (GC 42; Tr. 372, 508–509; GC 42)

Later that day, Marty Martin emailed Ed Martin again requesting that the Union either: (a) direct Arellano, Servin, and Walker to sign the forms presented to them by AdvanStaff, or (b) specifically agree that their pre-termination forms remained in full force and effect pending the outcome of contract negotiations. (GC. 43) He further said that, if they did not do so by the end of the day, Respondent would treat their conduct as a rejection of the reinstatement offers. Finally, Marty Martin's wrote that, while some of the forms provided to Arellano, Servin, and

Walker to sign may have been different from those they had previously signed when they were originally hired, the company updated their forms periodically, and if the three engineers did not want to sign the new forms, all Respondent asked was that they acknowledge the forms they had originally signed remained in full force.¹⁸ Ed Martin replied by email about a half-hour later telling Marty Martin to pay attention to the Union's request and asked that Respondent provide the documents the Union had previously requested. (GC 43, Tr. 372)

While the two Martins were exchanging emails, Arellano, Servin, and Walker went back to AdvanStaff on March 8. Sometime that day Ed Martin had called Arellano saying that Marty Martin was going to fire him if he did not sign the AdvanStaff paperwork. Therefore, they needed to get back to AdvanStaff as quickly as possible to sign the documents; Ed Martin had a similar conversation with Servin. Arellano called Servin and Walker and the three went back to AdvanStaff. Once there, they signed the Non-Compete Agreement, initialed the space acknowledging the Conditions of Employment policy, and re-signed the Policy Acknowledgment.¹⁹ After completing the documents, an AdvanStaff representative put the paperwork in a file. Arellano asked if anything else was needed, and the representative said the documents should now be complete. (Tr. 741–744, 1015–1016; GC 36, 41, 45)

The morning of March 9, seemingly unaware that the three engineers had returned to AdvanStaff to complete their paperwork, Marty Martin emailed Ed Martin saying "you have not responded with a position and the three reinstated employees are still refusing to complete and sign the forms. Are you rejecting the offer of reinstatement?" (GC 43) Ed Martin replied about 10 minutes later writing that Marty Martin "obviously [did] not understand how the system works," and noting that Arellano, Walker, and Servin had signed their AdvanStaff paperwork during the afternoon of March 8. (GC 43)

Even though they had now finalized all the paperwork that they were originally asked to complete, Arellano, Servin, and Walker were not finished with AdvanStaff. Respondent required them to go back to AdvanStaff again to complete even more paperwork. According to Servin, he spoke with someone at AdvanStaff who told him that Marty Martin wanted brand new paperwork filled out. Therefore, on March 9 the three engineers once again went back to AdvanStaff. This time, Arellano, Servin, and Walker were given different paperwork to complete, documents that applied to newly hired employees. The packet contained paperwork for a background check, pre-employment screening, work history, criminal activity, references, etc. They completed all the documents and then asked the AdvanStaff representative to make sure they had finalized everything that was needed and that Marty Martin was happy. The AdvanStaff representative went away, and eventually came back saying that everything was fine. Notwithstanding the fact they had now visited AdvanStaff four times, and had completed all the paperwork

¹⁷ Arellano also did not initial the Nevada Pregnant Workers Fairness Act policy, as he did not believe it applied to him. (Tr. 740)

¹⁸ There is no evidence that other employees were required to update their forms or reconfirm that the paperwork they originally signed was still in effect.

¹⁹ Servin did not re-sign the Policy Acknowledgment, as he testified that the AdvanStaff representative told him he only needed to initial the Conditions of Employment section. (Tr. 1015)

that Apex wanted, without explanation Respondent did not allow Arellano, Servin, and Walker to physically return to work at the laundry until March 29. (Tr. 39, 744–745, 752, 933, 1017–1018)

During his testimony, Marty Martin confirmed that Arellano, Servin, and Walker had previously completed all the necessary paperwork needed to work for Respondent when they originally hired; Arellano and Servin were hired in 2011 and Walker in 2015. He also confirmed that he was the one that required them to complete a new hire packet after the District Court injunction. Marty Martin claimed that Apex did not control the process, and that AdvanStaff “had to have them re-enroll and everything.” (Tr. 374) Notwithstanding, he also testified that he was the one actually giving instructions to AdvanStaff, and those instructions included having Arellano, Servin and Walker complete new-hire paperwork. Marty Martin testified that he had them complete the new hire paperwork because he was concerned Arellano, Servin, and Walker would claim they were being reinstated under different terms than those that were in place when they were originally hired. (Tr. 373–734; GC 34, 39, 46)

3. Analysis

Complaint paragraph 6(a) alleges that Respondent violated Section 8(a)(3) and (4) of the Act by requiring Arellano, Servin, and Walker to sign various paperwork, or otherwise agree that their previous signed agreements remained in effect, as a condition of their interim reinstatement pursuant to the District Court injunction order. At its core, this allegation relates to Respondent giving Arellano, Servin, and Walker the runaround instead of reinstating them to work at the facility as required by the District Court’s 10(j) order. Pursuant to the 10(j) order, Respondent was required to reinstate Arellano, Servin, and Walker to their former jobs by February 22, 2018. When they were fired in 2016, Arellano, Servin and Walker were all working inside the plant as engineers and had already completed all the paperwork needed to work for Apex. Instead of putting the three engineers back to work inside the facility as ordered, Respondent placed them on paid administrative leave, made them go back and forth to AdvanStaff to complete various documents, eventually making them sign paperwork as newly hired employees, and then did not allow them to actually start working again until March 29, 2018.

Applying the *Wright Line* burden shifting framework, I find the General Counsel has shown that Arellano, Servin, and Walker all engaged in activities that are protected under the Act, and Respondent knew about their conduct. The evidence also establishes that Respondent harbored animus against their protected conduct. Along with the animus already outlined above, anti-union animus is also shown by the fact that Respondent’s supervisors were assisting with and promoting the decertification petition. “The law is clear, Section 8(a)(1) of the Act makes it unlawful for an employer to instigate or promote a decertification petition.” *Lomasney Combustion, Inc.*, 273 NLRB 1241,

1243 (1984). Here, both Marsh and Sharron signed the decertification petition. Also, Sharron told employees to “get this over with,” in reference to the Union, and said that he would help employees get a lawyer for the decertification effort if people did not come back to reality; Sharron then actually found a lawyer and directed the attorney to contact the decertification petitioner. I find these efforts are evidence of Respondent’s antiunion animus particularly when, at the same time, Apex was trying to get the District Court to overturn the reinstatement order, arguing that an “impeding decertification vote” would render reinstatement moot. In sum, there is ample evidence of animus in the record to establish a causal relationship existed between the protected activities of Arellano, Servin, and Walker and the actions that Respondent’s took against them.

Regarding this allegation, in deciding whether the General Counsel has presented a prima facie case of discrimination, the key issue is whether Respondent’s placing Arellano, Servin, and Walker on paid administrative leave, instead of reinstating them to work inside the facility, constitutes an adverse employment action. In the circumstances presented here, I find that it does.

“Although being on administrative leave, and therefore getting paid, is better than being on nonpay status,” it still denied the three engineers the potential opportunity to work overtime.²⁰ *Postal Service*, 352 NLRB 923 (2008) (putting employee on paid administrative leave was an adverse employment action as it denied the employee the opportunity to work overtime). Placing Arellano, Servin, and Walker on administrative leave also prevented them from gaining additional work experience, which would have been particularly important for Walker, as he was classified as a B-Level engineer at the time.²¹ *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013), cert. denied 134 S.Ct. 1283 (placing police officer on paid administrative leave would constitute an adverse employment action if it prevented him from furthering his investigative experience). Also, the stigma of keeping Arellano, Servin, and Walker off the shop floor, at a time when the District Court had ordered their reinstatement, is also sufficient to constitute an unlawful employment action as it would likely deter other employees from engaging in protected activities. *Id.* (“general stigma resulting from placement on administrative leave appears reasonably likely to deter employees from engaging in protected activity,” and would therefore constitute an unlawful employment action) (internal quotation omitted). This is especially true here, where Respondent kept Arellano, Servin, and Walker away from the facility for over 30 days while it was hoping for an impending decertification vote.²² The Union’s biggest advocates were therefore unable to discuss the merits of unionization with their colleagues at the plant, while at the same time Sharron was telling employees to “get this over with” and saying he would help them get a lawyer for the decertification effort. The absence of Arellano, Servin, and Walker from the workplace at this key time sent a clear message to

²⁰ It appears that Respondent’s engineers worked overtime fairly regularly, as Respondent had accused Servin of directing Apex engineers in 2017 to refuse to work overtime as a form of protest regarding Walker’s termination. (GC 57)

²¹ Before the CBA was signed, Respondent’s maintenance engineers were classified into “A level” and “B level” designations based upon their skills. (Tr. 235–236)

²² Along with being posted at Respondent’s facility, the District Court required its order be read aloud to employees during a mandatory meeting by no later than March 4, 2018. *Apex Linen Services, Inc.*, 2018 WL 832851 *16. Thus, all unit employees would have known that the District Court had ordered Arellano, Servin, and Walker to be reinstated, and could see for themselves that, despite the court order, they were not actually working at the plant.

employees that their destiny is controlled by Respondent, as not even a Federal District Court injunction could bring the three engineers back to work inside the facility. Cf. *Knutson v. AG Processing, Inc.*, 302 F. Supp. 2d 1023, 1039 (N.D. Iowa 2004) (“Staying the court’s order of reinstatement would send the message that discriminatory employers can continually run over victims of discrimination and make a mockery of civil rights legislation.”) (internal quotation omitted). As such, the general stigma resulting from Arellano, Servin, and Walker being placed on administrative leave at this key time supports a finding that an unlawful employment action occurred as it would likely deter other employees from engaging in protected activity. *Rodriguez*, 735 F.3d at 1079.

Accordingly, having presented a prima facie case of discrimination, the burden of persuasion shifts to Respondent to show that it would have taken the same actions even in the absence of employee protected activity. Apex has not met its burden. Respondent has not presented a valid justification as to why Arellano, Servin, and Walker were required to fill out additional paperwork before returning to work in the plant. As noted earlier, all three had already completed the necessary paperwork required to work at Apex when they were originally hired. And, there is no evidence that anything was wrong with their original paperwork, nor was any evidence presented that other employees were required to update their original paperwork. Similarly, Respondent has presented no justification for refusing to allow the three engineers to return to work until the end of Marsh.

Additionally, I find that Marty Martin’s contradictory testimony as to why the three engineers were required to complete new paperwork, before being reinstated to work on the shop floor, is also evidence of an unlawful motive. *Master Security Services*, 270 NLRB 543, 551 (1984) (assertion of contradictory and unconvincing motives infers that the actual motive was unlawful); *Paul M. O’Neill International Detective Agency, Inc.*, 124 NLRB 167, 172–173 (1959) (contradictory and unconvincing testimony creates a suspicion of unlawful motive). When asked why the three engineers were required to complete new paperwork, notwithstanding the fact they had already completed the required paperwork when they were originally hired, Marty Martin testified that AdvanStaff controlled the process and needed the employees to “re-enroll.” However, Marty Martin then testified that he was the one actually giving instructions to AdvanStaff, telling them to have Arellano, Servin, and Walker fill out new hire paperwork because he thought the three engineers would claim they were being reinstated under different terms of employment.

I find that Marty Martin was controlling the entire process and was instructing AdvanStaff the whole time. And, it is clear from the timing of the events that Respondent was using this entire process as a pretext to keep Arellano, Servin, and Walker away from the facility, while Apex was endeavoring to get the District Court reinstatement order overturned, or otherwise waiting for an election to decertify the Union, while the three activists were

away from the workplace. Accordingly, I find that, by not timely reinstating Arellano, Servin, and Walker to work at Respondent’s facility as required by the District Court 10(j) order, but instead demanding that they first complete additional employment paperwork, including paperwork designated for newly hired employees, and then waiting an additional three weeks after the paperwork was completed before allowing them to start work at the facility, Respondent violated Sections 8(a)(3) and (4) of the Act.

C. Imposing More Onerous Working Conditions on the Three Engineers After Reinstatement

On March 28, 2018, Arellano, Servin, and Walker returned to Respondent’s laundry to attend lockout/tagout training. And on March 29, 44 days after the District Court’s February 12, 2018 injunction order, they returned to work at the facility. However, when they returned to work on March 29, things were not as they were before. (Tr. 39, 375–376, 734, 736, 768, 1018; GC 4, 37)

1. Withholding Radios and Keys

a. Facts

Before they were discharged in 2017, Arellano, Servin, and Walker had keys to all of the various doors and rooms inside the laundry; they needed these keys to perform their every-day work as engineers. Each was also assigned a radio. Engineers use their radios throughout the workday to communicate with their coworkers and supervisors about broken machines, work calls, to request a part, or to otherwise just ask for help. Radios are specifically assigned to individual employees by serial number, and Respondent keeps tracks this information. (Tr. 52, 59, 63, 87, 764, 766, 1024–1026, 1175)

When they returned to work on March 29, 2018 Arellano, Servin, and Walker were not given a radio, even though all of the other engineers were assigned a radio. And, except for a lockout/tag out key, Arellano, Servin, and Walker were not given any keys to the facility. Thus, they did not have keys to open any of the individual doors and closets inside the laundry that the engineers use every day, including the parts room or the electrical room.²³ All of Respondent’s other engineers had these keys, as did the supervisors. It was only Arellano, Servin, and Walker who were denied the privilege of having keys. (Tr. 58–60, 63, 758, 762–765, 1023–1025, 1175–1176)

Because they did not have keys, if the three engineers needed to get a part for a repair from the parts room, or needed to enter the electrical room, they could not do so but instead needed to find somebody with keys to open the doors to these rooms. And, because they did not have a radio to communicate with coworkers, they had to walk around the plant to find another engineer with keys. This was both difficult and time consuming. The plant is almost the size of two football fields and is filled with large pieces of equipment, hampers, and other machinery. Walking around the facility trying to find someone with keys was, at times, like being in a maze. (Tr. 758, 765, 768, 1023–1024, 1176; R. 59)

²³ While Marsh testified that they received a master padlock key (Tr. 58), I specifically credit the testimony of the three engineers that they did not receive any keys to open the doors and rooms inside the facility. Even Marsh admitted that they were not given the general engineer’s

sub-master key that would give them access to the various doors and closets in the laundry, which included the parts room and the electrical room. (Tr. 58–59)

According to Marsh, it would have been easy for Respondent to have made duplicates of the necessary keys to give to Arellano, Servin, and Walker. And, Marsh admitted that not providing them with all of the necessary keys differed from the company's normal practice. However, Marty Martin had decided that Arellano, Servin, and Walker were not to receive keys, and he specifically directed Marsh to withhold keys from them. Therefore, Marsh did not give them a general engineer's sub-master key, which all the other engineers had. (Tr. 58–63, 386)

To try and justify Respondent's decision to withhold keys from Arellano, Servin, and Walker, Marsh testified that they did not need keys for the rooftop project they were assigned to complete when they returned to work on March 29. However, the evidence shows that the roof could only be accessed through a ladder in the electrical room, and they were not given keys to the electrical room. When asked how he expected the three engineers to enter the electrical room without keys, Marsh said he expected them to find another engineer and ask them to open up the electrical room door so they could access the roof; the same would be true if they needed a part from the parts room. For Arellano and Servin, who had the most seniority amongst the engineers, this would mean trying to find someone with less seniority to open doors for them each day. On about August 1, four months after they returned to work at the laundry, Arellano, Servin, and Walker finally received the keys they needed for the facility. (Tr. 61–62, 88–89; GC 24)

As for the radios, when asked why Respondent did not assign radios to Arellano, Servin, and Walker, Marsh testified that he had sent seven radios to the repair shop in March 2018, and he expected a fast turnaround from the repair company; however, the radios were not returned until much later. Thus, according to Marsh, at the time Arellano, Servin, and Walker returned to the facility on March 29 the company did not have any extra radios to give them. (Tr. 63, 90, 319)

The receipts from the repair company, introduced into evidence by Respondent, show that Apex sent six radios, not seven, to be repaired on March 29, 2018, the very same day the three engineers returned to the facility. The six radios were fixed and returned to Apex intermittently over the next few months. One radio was returned on April 12, three were returned on June 28, one was returned on July 25, and one on August 23. However, Servin was not assigned a radio until August 10, Walker was not given a radio until August 17, and Arellano did not get one until September 5. The records show that the three radios issued to Arellano, Servin, and Walker had been repaired and returned to Respondent on June 28, 2018.²⁴ When asked to explain the delay between the time the repaired radios were returned to Apex, in relation to when they were issued to the three engineers, Marsh said that it was not something that he had on the top of his mind. (Tr. 315–317, 329; R. 29)

According to Marsh, when there is a shortage of radios, Apex's practice would have been for people to share radios, and he testified that Arellano, Servin, and Walker could have

borrowed a radio from an engineer who was not working. However, Respondent does not have a central area where radios are stored when employee leave work. Instead, some employees take their assigned radios home, some leave them sitting on desks, and others put them in the parts room. Thus, Marsh expected Arellano, Servin, and Walker to walk around the plant to find a spare radio lying around somewhere that they could use for their shift, and then put the radio back where they found it when they were done for the day. That being said, Servin credibly testified that he was not free to use radios assigned to other engineers. And, the evidence shows that Respondent requires employees to sign a property receipt when they are issued a radio. The receipt states that the employee is responsible for any damage done to the device and is required to replace the radio at their own expense if damaged or lost. (Tr. 64, 87–88, 319, 1028; R. 29)

b. Analysis

The evidence shows that, before Arellano, Servin, and Walker were unlawfully fired in 2017, they had been given their own radio and set of keys. The evidence further shows that Respondent's engineers rely upon their keys and radios to perform work at the laundry, and therefore these were part of their terms and conditions of employment. Arellano, Servin, and Walker all engaged in union activities, they were being reinstated pursuant to the District Court's 10(j) order, and Respondent's animus is well documented. Therefore, the burden of persuasion shifts to Respondent to prove that it would have withheld keys and radios from the three engineers even absent their protected conduct. It has not done so.

Marsh admitted that it would have been easy for Respondent to make copies of the needed keys for the three engineers, and that withholding keys from them was against the company's usual practice. As for the claim they did not need keys while working on the roof, the evidence shows the opposite is true. The three engineers needed keys to open the electrical room to access the roof each day, and to get parts from the parts room. And without radios, Arellano, Servin and Walker could not communicate with their coworkers. Instead, they had to walk around Respondent's maze-like facility to look for someone whenever they needed anything, including to open the electrical room and the parts room. Regarding the radios, there is no cogent explanation as to why Respondent withheld radios from Arellano, Servin, and Walker after they had been repaired and returned to Apex; Marsh's claim that it was not on his mind is simply not believable. Instead, I find the opposite is true. *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. at 7 (2018) (“[A] trier of fact may not only reject a witness's testimony about his or her reason for an adverse action, but also find that the truth is the opposite of that testimony.”). The radios were on his mind, and they were purposely withheld, as were the keys, to harass and punish Arellano, Servin, and Walker because they engaged in union activities, and because they were being reinstated pursuant to a District Court 10(j) injunction. *Miners' Welfare, Pension & Vacation*

²⁴ R. 29 #10310 and R. 29 #10314 show that Servin was assigned radio #275J270222, which Marsh signed for as being returned on June 28, 2018. R. 29 #10308 and R. 29 #10315 show that Walker was assigned radio #275J270194, which Marsh signed for as being returned on

June 28, 2018. And, comparing R. 29 #10313 with R. 29 #10312 shows that Arellano was assigned radio #275K080435, which Marsh signed for as being returned on June 28, 2018.

Funds, 256 NLRB 1145, 1159 (1981) (finding 8(a)(4) violation where employer harassed and discriminated against employee who participated in a Board proceeding by failing to give her new keys to the front door after the lock was changed). Under these circumstances, where Respondent does not have a credible explanation for its conduct, it has failed to show that it would have taken the same actions against the three engineers absent their protected activity. Accordingly, the evidence supports a finding that Respondent violated Sections 8(a)(3) and (4) of the Act by withholding radios and keys from Arellano, Servin, and Walker to punish and harass them because of their union activities and because they were being reinstated pursuant to the District Court's 10(j) order, or otherwise participated in Board proceedings. *Success Village Apartments, Inc.*, 348 NLRB 579, 587, 617 (2006) (employer violated Section 8(a)(3) and (4) by requiring employee to perform work without the use of customary or adequate equipment as a form of punishment and harassment).

2. Working on the roof

a. Facts

Upon returning to the laundry on March 29, 2018, Arellano, Servin, and Walker were not assigned to work back inside the facility, performing maintenance on the various machines as they had done before they were unlawfully fired in 2017. Instead, they were assigned to work full-time on the roof remanufacturing the laundry's 25 evaporative coolers, commonly referred to as swamp coolers, used to cool the building. Working on the roof was not common for these three. Arellano had only worked on the roof twice in his approximately 7 years of employment at Apex, Servin had never before worked on the roof, and had never previously been assigned to service an evaporative cooler. As for Walker, he had worked on the rooftop coolers a couple of times a year, but only for small projects like reattaching a belt, which would only last about an hour. (Tr. 43, 52, 253–254, 379, 752–753, 760, 1018–1019, 1037–1038, 1172–1173)

This was the first time that Respondent had undertaken a project to completely rebuild the swamp coolers. For general maintenance of the units, along with their seasonal start-up and shutdown, Respondent had previously contracted with mechanical repair companies specializing in this type of work. Sometime in 2017 Respondent decided to start performing the maintenance work inhouse, and assigned a utility engineer named "DJ," who was not skilled working on the shop floor, to maintain the swamp coolers full time. When DJ quit during the third-quarter of 2017, Respondent finished the year using various engineers rotating on the roof to work on cooler maintenance. In 2018 Apex decided to rebuild the coolers completely, to ensure their longevity and continued operation. (Tr. 54–57, 73, 246, 251, 379, 385)

Apex started the refurbishing project about three weeks before Arellano, Servin, and Walker were reinstated. The company established a set work schedule for all the engineers, including Sharron, who rotated working on the roof to refurbish the coolers, and would come off the roof if something needed repair on the shop floor. According to Sharron, in the three weeks before the arrival of Arellano, Servin, and Walker, the engineering department had completed rebuilding three swamp coolers. (Tr. 39, 559–560, 563, 619)

The swamp coolers themselves were four feet tall, three feet wide, and sat on a jack that elevated the cooler above the roof. Each cooler had eight vented vertical panels, two panels on each side. Each panel held an evaporative pod made of wood shavings; water running through the pod would evaporate thereby generating cool air which was blown downwards into the building. (R. 28; Tr. 48, 242–243, 254; R. 28)

The rebuilding project was quite a task. As Marty Martin testified, the engineers were required to take the coolers "down to their frames basically," cleaning and repairing the units and replacing worn parts. (Tr. 390) Half of the swamp coolers had been on the roof since 1996, and the other half since 2007. This level of detailed work on the coolers had never previously been done before at Apex by anyone. (Tr. 49–50, 246, 390, 379)

Specifically, the engineers were tasked with removing the lids, panels, pans, and structural beams of each unit and scraping clean all the hard water, calcium, and mineral deposits that had accumulated over the years; in some places this buildup was over an inch thick. According to Marty Martin, the side panels of the swamp coolers were "caked with minerals." (Tr. 397–398) They were also required to clean, check, remove, repair, and/or replace all drive belts, sheathes, shafts, motors, and outlets. The web of pipes inside the coolers, referred to as the spider, needed to be checked and snaked clean if clogged. The water pan at the bottom of every cooler was to be scrapped to the bare metal and a new epoxy seal applied. The epoxy sealant was a thick black paste, consisting of an asphalt emulsion. After hardening, the epoxy worked as a seal and prevented any water from leaking through the pan and into the building. Finally, the swamp coolers were to be washed and repainted. (Tr. 43–44, 247, 378–379, 560, 668–689, 752–753, 951, 1019–1021, 1175)

Marty Martin testified that it was his decision to assign Arellano, Servin, and Walker to work exclusively on the roof rebuilding the swamp coolers when they returned to work on March 29, and that he spoke with Marsh, Dramise, and Sharron about the decision. Marsh, on the other hand, testified that he made the decision, and passed the instruction onto Sharron. According to Marsh, the swamp cooler project needed completing, and "any available engineer was to go up to the rooftop to work on it." (Tr. 68) However, when Arellano, Servin, and Walker were assigned to work on the swamp coolers, Sharron took all of the other engineers off the roof, returning them to work inside the facility. When asked why Arellano, Servin, and Walker were assigned to work full-time on the roof, while other engineers were removed from the swamp cooler project, Sharron said that Respondent thought the project would be completed faster if they left the same people on the project, Apex already had the shop floor covered at the time, and those other engineers covering the floor were simply too busy to continue having them work on the roof. (Tr. 41, 67–68, 378, 562–563, 618–619)

As for why skilled maintenance engineers were used to chip away lime and calcium, as opposed to having less skilled utility engineers do the job, Marty Martin noted that the project also included rebuilding the units. He further testified that, when Arellano, Servin, and Walker were reinstated, the company already had a full complement of maintenance and utility engineers which they did not want to displace to make room for the reinstated workers. This meant that Apex now had more

engineers than they had budgeted for; but Martin admitted there was more than enough work to be completed inside the plant for all of the engineers. Therefore, according to Marty Martin, since the company assigned the rooftop work to Arellano, Servin, and Walker full time, there was no need to have anyone else work on this assignment. (Tr. 429–431)

To access the roof the engineers had to enter one of two electrical rooms. Each electrical room had a ladder, which led up 30 feet to a metal hatch that opened onto the roof. However, because Arellano, Servin, and Walker did not have keys, they could not open the door to reach the ladder to get onto the roof. Instead they had to walk around the plant searching for someone with keys to open the electrical room so they could climb up the ladder to start working. (Tr. 50, 58–62, 146, 286–290, 758, 791, 1036, 1176; GC 49(c), GC 51; R. 51)

The lack of keys and radios also affected the productivity of the swamp cooler project. Along with wasting time trying to find someone to open the electrical room door just to start work, because they did not have a radio, whenever the three engineers needed to get a part for a swamp cooler they needed to physically go down the ladder, and then walk around the plant to find someone to open the door to the parts room. Respondent's lack of spare parts also affected their ability to refurbish the swamp coolers. Multiple parts that were needed to refurbish the swamp coolers were simply not in stock. Because they could not order parts themselves, the three engineers would have to ask Sharron or Marsh to order specific parts and then wait for them to arrive before completing their work. (Tr. 62, 65–66, 74–75, 572, 775–78, 953–954, 1023, 1030, 1048; GC 38)

Upon their return to work at the facility, the three engineers all worked different schedules. Servin worked from 8:00 a.m. to 4:30 p.m., and Walker worked the graveyard shift from 10 p.m. to 8:30 a.m. Arellano worked four 10-hour shifts, starting the day at 4:00 a.m. and ending at 2:30 p.m. Sometime in April 2018, Arellano asked Marsh if the three engineers could change their schedules to work at the same time, in the morning, in order to be more productive; Arellano did not think it made sense for Walker to be working alone, at night, on the project. However, Marsh said that he could not change their schedules because the District Court injunction required them to work their original pre-discharge schedules. Arellano replied that the District Court injunction also ordered him to be reinstated to his former job, which was not cleaning swamp coolers, but Marsh did not reply to this comment. (Tr. 51, 67, 558, 756, 770–771, 1019, 1173)

When Arellano, Servin, and Walker first started rebuilding the swamp coolers they were given putty knives to scrape the coolers clean. Eventually, they were also provided with wire brushes, and about three weeks into the project they were given an angle grinder. Because there is no lighting on the roof, and his entire shift was at night, Walker had to use a flashlight while working on the roof in order to see what he was doing. About a month into the project the three engineers decided that it was safer for Walker to work on the ground, instead of the roof, since he worked alone at night. Therefore, during their shifts Arellano

and Servin would bring swamp cooler panels down from the roof, and Walker would recondition them during his graveyard shift while working on the ground. Walker would perform this work outside, near the loading dock, as there was an overhead light in the area. Eventually Respondent provided three drop lights for the engineers to use when needed. (Tr. 51–53, 755, 771–772, 833, 946–947, 1020, 1049, 1174–1175; GC 14)

To get materials, tools, and parts onto the roof, the three engineers used a rope tied to a crate. They would fill the crate with whatever they needed and hoist it onto the roof. They similarly used the rope to lift a water jug to the roof so they could have drinking water for the day. (Tr. 50, 759, 1034, 1037; GC 49(c))

When Arellano, Servin, and Walker returned to work they were provided a canopy for shade, but it was damaged by the wind. By mid-April 2018 the daily temperature in the Las Vegas area reached the low-to-mid 90's and temperatures were consistently in this range throughout the month of May. Because the engineers wore black uniforms, and the roof's surface reflected the sun, the actual temperature on the roof felt even hotter. After the canopy was damaged, Arellano asked Marsh for a replacement, but Marsh said he did not think Marty Martin would replace the canopy because the three engineers did not take care of it. Therefore, Arellano brought his own personal canopy to use for shade, but that too was damaged by the wind. Arellano and Servin then purchased a third canopy, which they tied to a water jug for stability. The engineers would move the canopy from one swamp cooler to another to provide shade while they were working and would disassemble it if it became windy. (Tr. 50, 757–759, 1033–1036; ALJ 2–3)

As discussed in more detail later, on June 6, 2018, work on the roof was shut down by the State of Nevada, Division of Industrial Relations Occupational Safety and Health Administration (OSHA) due to safety violations. With OSHA shutting down work on the roof, on June 6, Marsh posted notices that access to the roof was closed. On the notices Marsh asked the three engineers to patrol the outside of the property for trash and to clean two adjacent fields. The notices were posted specifically for Arellano, Servin, and Walker since they could no longer work on the roof on what Marsh referred to as their "priority project." (Tr. 81) Therefore, Marsh wanted to give them options on what they could work on until Respondent "could reorganize and get them squared away with . . . an actual task."²⁵ (Tr. 80–83, 275–276, 444, 762, 792–793; GC 8, 9)

The day OSHA shutdown the roof, Servin still had a couple hours left on his shift and Sharron told him to pick up garbage around the building. Servin went outside the plant and picked up trash by himself. Servin then worked on cleaning portable swamp coolers for about a week, and on some electrical work outside the plant. Apex has a number of portable swamp coolers, which are smaller units on wheels that can be rolled into different areas for cooling. Like the rooftop swamp coolers, the portable coolers also needed refurbishing. Servin returned to work inside the plant sometime towards the end of June 2018. Walker also worked on the portable coolers after the roof was shut down, and

²⁵ Testimony from Respondent's managers as to how many swamp coolers had been completed at the time OSHA ordered the roof closed varied widely. Marsh testified that between 20 to 25 coolers had been

completed while Sharron testified that only between 8 to 10 of the coolers had been finished. (Tr. 256, 577–578)

similarly returned to work on the shop floor around the same time as Servin. As for Arellano, he did the majority of the work on the portable coolers and estimated that it took him a month to complete this work. According to Arellano, he had to finish the portable coolers before moving on to anything else and he did not return to work inside the laundry until around August 1. (Tr. 348, 577, 795–798, 1044–1047, 1175, 1212)

In order to once again work on the roof, Respondent had to complete various abatement measures, which were completed in August 2018. Thereafter, work was restarted on the swamp coolers. However, when work restarted on the rooftop in August, instead of assigning only Arellano, Servin, and Walker to work on the coolers, Apex put all of the engineers into a rotation to work on the roof with everyone being assigned a set of coolers to complete. (Tr. 94, 616–619)

b. Analysis

As with the keys and the radios, I find Respondent has not shown that it would have assigned Arellano, Servin, and Walker to work exclusively on the roof from March 29 through June 6 absent their union and other protected conduct. Before the three engineers were reinstated, Apex had already established a schedule with all of the engineers rotating on the roof to work on the coolers, but when Arellano, Servin, and Walker returned, everyone else was pulled off the roof, and the three engineers were assigned to work on the roof alone. Respondent has not credibly shown that altering the established rooftop work schedule, to place only Arellano, Servin, and Walker on the roof full-time, was unrelated to their protected conduct. According to Marsh, this was a priority project, and he expected “any available engineer was to go up on the rooftop to work on it.” (Tr. 68) If that were the case, then Arellano, Servin, and Walker should have been added to the existing rotating schedule; they were not. Instead, while the other engineers were able to go back to work full-time inside the climatized laundry, Arellano and Servin worked on the roof, in the heat, spending much of their time doing unskilled work. And, Walker was required to work on the roof in the dark with a flashlight, while his coworkers worked inside a fully lit facility.

I also find it relevant that, at the time the initial assignment was made on March 29, the decertification petition had not been dismissed, and Respondent was hoping there would be an impending decertification vote. By assigning Arellano, Servin, and Walker to work on the roof, by themselves and without a radio, Respondent was, for all intents and purposes, isolating them from their coworkers. As for claims by Sharron that Respondent believed the work could be completed faster with only the three engineers working on the roof full time, this is undercut by the fact that they were denied keys and radios. Thus Arellano, Servin, and Walker would have to waste time walking around the plant just to find someone with keys in order to get into the electrical room and access the roof. And without a radio, they would have to climb up and down the ladder, and then walk around the plant to find someone to open the parts room to get a part. Also, when Arellano asked that their schedules be changed so they could work at the same time to be more productive, Marsh dismissed the request outright. Clearly Respondent was more concerned with keeping the three engineers up on the roof,

in the heat and dark, working by themselves and away from their coworkers, than they were with the timeliness of the project. Finally, the inconsistent testimony of Marty Martin and Marsh, as to who made the decision to assign the three engineers to work on the roof full-time, further supports a finding of pretext. See *Maywood, Inc.*, 251 NLRB 979, 993–994 (1980); Cf. *Planned Building Services, Inc.*, 347 NLRB 670, 713–715 (2006).

It is unlawful to assign more onerous duties to employees and isolate them in retaliation for their engaging in activities protected by the Act. *Wellstream Corp.*, 313 NLRB 698, 706 (1994). The evidence supports a finding that this is exactly what happened here. Accordingly, by assigning Arellano, Servin, and Walker to work exclusively on the roof refurbishing swamp coolers, Respondent violated Section 8(a)(3) and (4) of the Act.

D. Respondent Disciplines Arellano and Servin for their Work on the Swamp Coolers

1. April 12, 2018 disciplines to Arellano and Servin

On April 12, 2018 Arellano and Servin were called into a meeting and given a disciplinary document for lack of productivity. Present at the meeting were Arellano, Servin, Marsh, Marty Martin, and Union representative Ed Martin. Marty Martin drafted the discipline and presented it to Arellano and Servin. Respondent had never previously disciplined an engineer for lack of production. (Tr. 70, 72, 391, 397–400, 773, 1041, 1049; GC 7)

According to Martin, he discussed the production issue with Marsh, and also walked around the roof, before deciding that the production rate on the swamp coolers was insufficient. The written warning, which was a single document but applied to both Arellano and Servin, is titled “Employee Counseling Statement.” The document reads, in part, as follows:

Since starting work 3-28-18, only two swamp coolers have [sic] been brought online. We have 3 full time engineers assigned to this task, and the performance level is unacceptable. We are receiving excuses, and a lack of effort and performance completing tasks.

The discipline goes on to say that the air conditioning system is critical to Respondent’s operations, and that the engineers were expected to: (1) bring all the units on-line; (2) rebuild two complete units per week, per engineer; and (3) work complete shifts. Finally, the document states that the consequences for not doing so was “progressive discipline.” Marty Martin testified that during the meeting the Union did not agree on Respondent’s productivity standard regarding work on the swamp cooler. Also, both the Union and the employees themselves strongly disagreed with the disciplines. (Tr. 391–392; GC 7)

According to both Servin and Arellano, during the April 12 meeting Marsh said that Apex had contacted four different engineering companies and received estimates from them as to how long it would take to complete the coolers. In reply, the Union argued that the condition of each cooler was different, and nobody could tell how long it would take to complete each cooler. Ed Martin then asked Marsh for the names of the companies Apex contacted, but Marsh said that it was Gene Sharron who did the research and actually had that information. According to Marty Martin, Respondent did not reach out to mechanical subcontractors for estimates until after the April 12 meeting and did

so based on the Union's suggestion. Moreover, Marty Martin testified that it was Marsh—and not Sharron—who had these discussions with the subcontractors. For his part, Sharron testified that when Arellano, Servin, and Walker were assigned to refurbish the swamp coolers, he expected them to complete the entire project in three or four days.²⁶ He also said that Respondent had started the project three weeks earlier, and had completed work rebuilding three swamp coolers. Thus, when the three engineers were reinstated and started working on the coolers, there were 22 swamp coolers that still needed to be rebuilt. (Tr. 390–391, 559–560, 563, 619, 774, 1042–1043)

According to Marsh, the standard of two coolers per week, per employee, was established based upon “past experience for the same type of work.” (Tr. 72) Marsh testified that Apex reviewed the work that its staff and the mechanical subcontractors had done in the past, came up with an estimate, tallied the total, and averaged it out over the 25 coolers. Marsh admitted that Respondent's time estimate corresponded to the amount of time Apex's mechanical subcontractors had taken in the past to complete their seasonal work, despite the fact that the rebuilding project was much more labor intensive. But, Marsh testified Respondent had contacted the contractors, let them know the scope of work that needed to be completed, and the contractors responded that it could be completed in less time than was allotted to Arellano, Servin, and Walker.²⁷ (Tr. Tr. 72–74, 339–340)

Also, within the first few weeks of the project Respondent sent a maintenance engineer named Chuy to the roof to refurbish a cooler by himself. Marty Martin testified that Chuy was sent to the roof for a specific purpose, to see how long it would take for someone working diligently to complete one swamp cooler. According to Marty Martin, Chuy was able to refurbish a cooler by himself in a day and one-half, the equivalent of 12 work hours. Sharron, on the other hand, testified that Chuy completed refurbishing his cooler in only four hours. The only witnesses who testified that they actually inspected the cooler completed by Chuy was Servin. According to Servin, one day in April 2018 he was on the roof and talking with Chuy. The two looked at the unit Chuy had completed and discussed all the extra work Arellano and Servin were doing on the coolers compared to what Chuy had done. Chuy had only epoxied the water pan. He did not replace any of the parts or pieces on the swamp cooler and did not even scrape the water pan completely clean before applying the epoxy. As for how long it actually took to complete a cooler, Arellano testified that it would take about 2 days just to completely scrape an entire unit down to the bare metal, including the water pan. Arellano estimated that it took all three of the engineers one week to complete two swamp coolers. (Tr. 421, 426–427, 620–621, 775, 951–952, 955, 1000, 1129, 1140)

As to whether the Employee Counseling Statement issued to

²⁶ Sharron's target of four days to complete 22 swamp coolers would require the engineers to finish 5.5 coolers per day.

²⁷ Marsh also testified that during a meeting with the Union and the three engineers, that occurred within the first week of the project, he communicated Apex's expectations regarding the swamp coolers and everyone agreed the project could be completed within the time allotted. (Tr. 340) However, other than this testimony there is no other evidence of this purported meeting, and during the April 12 meeting the Union strongly objected to the disciplines based upon Respondent's imposed

Arellano and Servin was disciplinary in nature, Marty Martin testified that it was, in fact, a “disciplinary document.” (Tr. 391) Marsh, on the other hand, testified that, while they determined there was a lack of productivity, “[d]iscipline was never brought up.” (Tr. 72)

Martin testified that he had also requested Walker be disciplined, but Walker worked the graveyard shift and was not available for the April 12 meeting. After the meeting, Marty Martin decided not to further pursue disciplining Walker. He believed Walker was not as culpable since he was working on the ground in more of a supporting role. (Tr. 391–392)

2. June 15, 2018 discipline to Servin

Servin received another discipline for lack of productivity regarding the coolers on June 15, 2018. He was called into a meeting that day at the facility, given a written warning, and told that he was being disciplined for lack of productivity. The discipline reads as follows:

Joseph has been working on a project for 2 months longer than it should have taken to complete. In 14 weeks, only 21 Swamp coolers have been rebuilt and brought back on line. The required standard is 2 units per week per individual as initially discussed. (GC 10)

Marty Martin was the final decisionmaker regarding the discipline and was the person who both drafted and signed the document. During the meeting, Servin explained that the delays with fixing the swamp coolers were primarily caused by Apex, because they did not have the parts and pieces needed to complete the units. At trial, Marsh testified that he did not doubt Servin's statement that there were a lack of parts at the time. However, during the meeting, Marty Martin did not respond to Servin's explanation.²⁸ (Tr. 97, 99, 111, 394–395, 1047–1049, 1060, 1136)

After the CBA was signed, Marty Martin testified that he purged the April 12 and the June 15 disciplines from the employee files, in an effort to start over. That being said, neither Arellano nor Servin were ever notified that the disciplines were removed from their files. And there is no documentary evidence that this so-called purge ever occurred; I do not credit Marty Martin's testimony that the disciplines were purged. (Tr. 415–416, 1135)

3. Analysis

The evidence supports a finding that Respondent violated Section 8(a) (3) and (4) of the Act by issuing written disciplines to Arellano and Servin on April 12, 2018, for their purported lack of production regarding their work remanufacturing the swamp coolers, and for issuing Servin a written discipline in June for the same reason. Respondent's assertions, particularly about the

standard. (Tr. 1043) Also, Marty Martin testified that Marsh did not get estimates from mechanical contractors until after the April 12 meeting. I do not credit Marsh's testimony, and find that no such meeting, or agreement on a productivity standard, ever occurred. (Tr. 390–391)

²⁸ A discussion also arose during the meeting about Servin's work on a project changing various light fixtures. (Tr. 1047–1060) However, it is clear from the face of the discipline that it was being issued because of Servin's work on the swamp coolers only. (GC. 10)

supposed production standards, are not credible. Instead, I find that Respondent's use of a production standard requiring the completion of two coolers per week, per engineer, was fabricated as an excuse to discipline Arellano and Servin.

When asked how Respondent determined the production standard, Marty Martin, who drafted the disciplines, testified that it was based upon Marsh's experience on what he had expected in the past. Marsh similarly testified that it was based upon past experience for the same type of work. However, it is undisputed that this type of work, the complete rebuilding of all the swamp coolers, had never been performed in the past. Thus, the assertion by both Martin and Marsh that the production standard was based on Marsh's past experience is not believable.

Regarding the standard, Marsh also testified that Respondent contacted mechanical contractors, let them know the scope of the work that needed to be completed, and the standard was based upon their responses. However, Marty Martin testified that Marsh did not contact the contractors until after April 12. When asked by the Union during the April 12 meeting for the names of the companies Respondent had purportedly contacted, Marsh was unable to give any names—saying it was Sharron who did the research. However, Sharron testified the standard was not two coolers, per engineer, per week. Instead, Sharron said that he expected them to complete the entire project in three to four days. Respondent's basis for its production standard is not believable, as Respondent's witnesses gave conflicting answers; this supports a finding of pretext.

Also, pretextual is any claim Respondent's production standard was established by the work performed by Chuy. Marty Martin testified that Respondent sent Chuy to the roof to see how fast someone working diligently could finish a cooler, alluding that Apex based its standard using Chuy as a comparator, and that he was able to finish one swamp cooler by himself in 12 work hours. However, Sharron testified that it took Chuy only four hours to completely refurbish a swamp cooler. Neither testimony is worthy of belief; instead I find that both Sharron and Marty Martin were making up numbers to correspond with whatever they believed would help Respondent's explanation of events at the time they testified. Moreover, I credit Servin's testimony that the only work Chuy had actually completed was epoxying the cooler's water pan, and even then he did not scrape the pan clean before applying the epoxy.

Instead of a lack of production, the evidence supports a finding that the production numbers of Arellano, Servin, and Walker were on par with Respondent's efforts to refurbish the coolers that occurred before their reinstatement. The April 12 discipline states that two swamp coolers had been completed in 2 weeks; one cooler per week. Sharron testified that, in the three weeks prior to the reinstatement, the entire engineering staff had completed work on three coolers; one cooler per week. While Sharron said he could not keep the engineers on the roof full-time, Respondent had its entire engineering department, well over ten people, working on the coolers, including Sharron. Thus, the fact that Arellano, Servin, and Walker were able to complete the

same numbers of coolers per week as the entire engineering staff undercuts Respondent's claim that there was a lack of production. This is especially true considering that Arellano, Servin, and Walker worked without keys or radios, and Walker worked at night using a flashlight to see.

Accordingly, I believe the evidence supports a finding that Respondent set up Arellano, Servin, and Walker to fail, and when they actually kept pace with the production output compared to the original team working on the roof, Respondent simply fabricated a production requirement, and then disciplined Arellano and Servin for not meeting the contrived standard. *Metalite Corp.*, 308 NLRB 266, 268, 273 (1992) (By detailing union activist to work in a section of the plant with "dismal conditions" the employer "set him up to fail" and then discharged the employee for pretextual reasons). Indeed, Sharron practically admitted that Apex was setting up the three engineers to fail. After testifying that it only took Chuy 4 hours to complete one cooler, the General Counsel asked Sharron why he did not have Chuy work on the project instead of Arellano, Servin, and Walker, since Chuy seemed to be more efficient. In reply, Sharron said that he "wanted to prove a point that these guys were not doing their job on the roof." (Tr. 620) Sharron's testimony completely undermines Respondent's original claims that this was a priority project requiring any available engineer to work on the roof. Therefore, by fabricating a production standard, and disciplining Arellano and Sharron for failing to meet that standard on April 12, I find that Respondent violated Section 8(a)(3) and (4) of the Act.²⁹

I find the same is true for Servin's June 15 discipline. Respondent used its fabricated production standard to subsequently discipline Servin, who tried to explain that Apex did not have the parts and pieces needed to rebuild the swamp coolers. The trial evidence showed that Respondent's lack of parts substantially affected the ability of the reinstated engineers to work on the swamp coolers, and even Marsh tacitly admitted that Respondent lacked adequate spare parts for the coolers. Accordingly, by disciplining Servin on June 15 for failing to meet Apex's contrived production standards, at a time when Respondent did not have spare parts available and was withholding keys and radios from the reinstated engineers, thereby making their jobs more difficult to complete, Respondent again violated Section 8(a)(3) and (4) of the Act.

E. Respondent Issues Three Disciplines to Arellano on August 16, 2018

On August 16, 2018, Arellano was called into a meeting and given three separate disciplines for events that occurred on July 31, August 10, and August 15. Two of the disciplines were drafted by Sharron, and one was drafted by Marsh; both Marsh and Sharron have authority to issue discipline to employees. Present during the August 16 meeting was Marsh, Arellano, and Servin; Servin was there as Arellano's union steward. Sharron was not at the meeting, even though he was responsible for drafting two of the disciplines and was the primary witness for the

²⁹ That Walker was not ultimately disciplined does not affect the finding that the disciplines issued to Arellano and Servin were unlawful. "An employer's failure to discriminate against every union supporter does not

disprove a conclusion that it discriminated against one of them." *Handicabs, Inc.*, 318 NLRB 890, 897-898 (1995), *enfd.* 95 F.3d 681 (8th Cir. 1996).

third. (Tr. 113–1114, 130–133, 800, 1065; GC. 11, 12, 13)

1. Arellano’s disciplines for his repairs on a Mosca machine and bagger motor

a. Arellano’s July 31, 2018 work on a Mosca

The first discipline presented to Arellano involved an incident that occurred on July 31, 2018, while he was working on a Mosca machine.³⁰ Respondent has five Mosca machines which are used to package linen. A pile of linen is placed on the machine which shoots a plastic strap around the linen. The two ends of the strap are then melted together by a heating element in the Mosca keeping the bundle secure. At some point while the roof was closed, Arellano was assigned to retrofit Respondent’s Mosca machines, ensuring that they worked properly. (Tr. 93, 113, 969; RX. 46, 50)

Arellano’s written warning for the July 31 incident was drafted by Sharron, who testified that he completed the discipline on August 7. The document states that Arellano violated a company policy by “ordering unnecessary parts.” Sharron wrote a summary of what occurred on the discipline, saying that Arellano asked him to order a wiring harness for a Mosca claiming he had checked the machine and that it had a broken wire on the harness. Sharron further wrote that he checked the Mosca, found no problem with the harness, and when he asked Arellano why he wanted to order a harness, Arellano replied saying something was probably wrong with the circuit board. The document states “no problem with board. Mosca still has a problem not found yet;” after Sharron completed the document, someone inserted the word “bigger” so the phrase read “Mosca still has a bigger problem not found yet.” (GC 11) Somebody, at some point, also inserted the phrase “combining w/ 8/10/18.”³¹ Sharron signed the document but did not date his signature. (Tr. 111–112, 583–584, 691–692; GC 11)

According to Marsh, he reviewed the facts of what occurred to ensure the discipline was warranted, and he was the one who presented it to Arellano during the August 16 meeting. Regarding the incident, Marsh testified that on July 31 Arellano approached him asking if Marsh wanted to look at his work on the Mosca, but Marsh had other obligations and told Sharron to look at the machine. Marsh said that Sharron subsequently told him Arellano was concerned because there was a jumper on the heating harness. A jumper is a device used to bypass a switch or sensor used to regulate the machine. The Moscas use a timer on the heating element to melt the plastic straps which bundle the linen. Sometimes production employees insert a jumper to bypass the timer so they can work faster than what is allowed by the machine’s factory settings. (Tr. 112–114, 119–122, 970, 1302–1303)

Marsh testified that Sharron told him there was, in fact, a jumper on the machine in question, and that Arellano wanted to order a new wiring harness because of a short in the wiring. However, when Sharron tested the harness for continuity the wiring was fine. For this reason, Sharron thought that disciplining

Arellano was appropriate, and Marsh agreed. According to Marsh, the presence of a jumper on a harness may or may not be a cause of concern, depending upon what the jumper was bypassing. In this instance, Marsh testified he was not concerned about the jumper even though he did not know why the jumper was on the machine. (Tr. 120–122)

Marsh admitted that Respondent did not order a new harness for the machine, that Arellano never submitted a written parts request for a new harness, and that Arellano’s concerns about the jumper did not cost Apex any money. According to Marsh, what Arellano did wrong was that he said a new wiring harness needed to be ordered, but he was incorrect. During his testimony, Marsh acknowledged past instances where engineers had submitted requests for parts or equipment which Respondent ultimately decided were not necessary and therefore not ordered; these employees were not disciplined for submitting their request. (Tr. 124–125, 129)

Regarding the July 31 incident, Arellano testified that his shift was ending, and he went to Marsh’s office and spoke with both Sharron and Marsh. Arellano told them what was happening with the Mosca and asked whether they wanted him to work overtime to finish the machine or pass it on to Servin. Marsh then asked Sharron to look at the machine. Sharron and Arellano walked to the Mosca and Sharron inspected the machine. That day, Arellano had removed the sealing assembly and all the gears on the Mosca, cleaned, lubed, reassembled, and tested the machine, which was running properly. However, there was a jumper between two terminals on the heating element. According to Arellano, it is not normal to have a jumper on a machine, so he thought there was a problem. He showed the jumper to Sharron, told him that there might be a problem with the machine because of the jumper, and asked whether he should stay overtime to identify the problem. At some point Sharron performed a continuity test on the wires, and told Arellano there was nothing wrong with the wiring harness. Arellano then told him that maybe something was wrong with the circuit board, as the presence of a jumper indicated there must be something wrong with the machine. Arellano testified that, other than the presence of a jumper, there was nothing else wrong with the Mosca. Arellano denied ever asking Sharron to order a new harness. (Tr. 798–813, 969)

Regarding the incident, Sharron testified that Arellano came up to him about 15 minutes before the end of his shift on July 31 saying they needed a new wiring harness. Sharron said he inspected the Mosca in the presence of both Marsh and Arellano, tested the wires, and found nothing wrong with the wiring. According to Sharron, he then told Arellano “you need to stop ordering parts when we don’t need them.” (Tr. 587) Sharron said that, at some point Arellano told him that maybe it was the circuit board and asked if he should stay overtime and put the machine back together. Sharron told Arellano to go home. According to Sharron, the machine continued to work, but had intermittent

³⁰ The transcript of Marsh’s testimony reads “August 31, 2018,” however as stated on the discipline the incident occurred on July 31, 2018. (Tr. 119; GC. 11) The date of the incident is not disputed by Respondent, as Sharron testified it occurred on July 31. (Tr. 680, 691)

³¹ There was no explanation as to why the word “bigger” was written on the document or the phrase “combining with 8/10/19.” Sharron speculated that it was written by Marsh. (Tr. 595, 691–692)

problems; they eventually needed to change the strapping motor a month later. (Tr. 586–589, 592–595)

Sharron admitted that no parts were ordered for the Mosca that day, and the incident did not cost Apex any money. Instead, he testified that he drafted the discipline because Arellano had come to him in the past asking to order harnesses for different machines, and he had a problem with Arellano requesting parts that were not necessary. However, these other purported incidents were never documented, and are not included in the July 31 discipline. Regarding the July 31 incident, Sharron denied that it involved a Mosca with a jumper. Instead, Sharron said that the machine with a jumper was another incident on a different day. (Tr. 587–589, 591–593, 597, 687, 691)

b. Arellano’s August 10, 2018 work on a bagger motor

The second discipline Arellano received involved his August 10 work on a bagging machine motor. The machine in question is used by Apex to package small towels for distribution to customers. Clean towels are dumped into a bag, and a motor on the machine shakes the bag so that the towels settle; the bag is then sealed and ejected. (Tr. 615, 814, 978–979; GC 12)

On August 10, Arellano was tasked with troubleshooting a shaker motor which was not working. Arellano testified that he removed the motor, took out the brushes, blew clean the inside of the motor, reinserted the brushes, and checked the motor to ensure it was receiving power. However, the motor would not run. He then tested the motor using another harness, but again the motor would not run. Arellano therefore concluded that the motor was defective. (Tr. 815, 978–979)

According to Arellano, he took the motor to Sharron’s office. Sharron was not there so he left the motor in the office. He then spoke with Marsh, telling him the work he performed on the motor. Arellano requested that Marsh order a new motor and said he left the original one in Sharron’s office in the event Marsh wanted someone else to check the motor. Arellano testified that Marsh said he would just order another motor. Marsh testified that he was present that day but denied Arellano asked him to double-check the motor. (Tr. 134, 815–816, 980–981)

Sharron testified that Arellano told him to order a new motor and wiring harness for the machine. For his part, Arellano denied ever speaking with Sharron that day.³² Sometime that evening, another engineer was able to get the motor working and put it back on the bagger. There is no evidence that Arellano’s actions resulted in Respondent purchasing a new motor, or other parts, for the bagger as the existing motor was put back on the machine that same evening. (Tr. 137–138, 602–605, 980; GC 12)

Arellano testified that, after receiving his discipline, he spoke with the other engineer and asked him how he fixed the motor. The other engineer told Arellano that he started tapping the motor with a hammer and suddenly the motor started working. About two weeks after the motor was fixed, it stopped working again. This time Arellano tapped the motor with a hammer, and it once again started working. (Tr. 135, 606, 817–818)

Regarding the discipline itself, it was drafted by Sharron on

August 13, three days after the incident, and the document states that it is both a verbal counseling and written warning. In the section asking for details of the incident Sharron wrote “ordering parts that are not needed not checking to see what’s wrong with machine bad diagnosis combined w/ 7/31/18 Mosca.” (GC 12) At some point after Sharron drafted the discipline, Marsh wrote in this section “Motor found with brush stuck–loaded w/carbon–motor still running.” (GC 12) It appears that Marsh also wrote that Arellano needed to work on his corrective diagnosis. Sharron signed, but did not date, the document. (Tr. 137–138; 600–603; GC 12)

When he drafted the discipline, Sharron did not know what work Arellano had performed to try and fix the motor, or what the other engineer did to get the motor running again. He concluded that Arellano made a bad diagnosis by the fact Arellano said the motor was not working and another engineer was able to get the motor to work. That being said, Sharron also testified that there have been instances in the past where an engineer has been assigned a task, tries to fix a machine but is unable to do so, and someone else goes out and fixes the machine. In these instances, Sharron said that he would not discipline an engineer for trying to fix a machine but not succeeding. He would only issue a discipline if the engineer “tried to cover it up.” (Tr. 604, 606)

c. August 16 meeting regarding the Mosca and the bagger motor

Although Marsh and Arellano both testified that Sharron was not present at the August 16 disciplinary meeting, Sharron said that he sat in the room when Marsh presented Arellano with the Mosca discipline. Regarding the Mosca, Arellano testified that during the meeting he explained to everyone what occurred, but Marsh said that Arellano had ordered unnecessary parts. Arellano denied ordering any parts and asked to see the paperwork showing he had submitted an order. Instead, Marsh read from the discipline and said there was still a problem with the machine that had not been discovered. Arellano testified that, other than the jumper, there was no other problem with the Mosca, which was still working. Arellano asked Marsh to identify which specific Mosca the discipline was related to, but Marsh said that he did not know because Sharron had drafted the document. Arellano asked where Sharron was, and Marsh said that he was on vacation. According to Arellano, the Mosca continued to operate, with the jumper, until the day he was terminated. (Tr. 114, 131, 583–584, 798–801, 811–814, 1215)

Regarding the bagger motor, during the meeting Arellano asked Marsh to explain what he could have done differently to determine what was wrong with the motor. As per Arellano, Marsh replied saying he did not know. Marsh testified that he replied to Arellano’s inquiry by questioning why the other engineer was successful when Arellano was not and saying that Arellano needed to improve his troubleshooting skills along with being a little more concise. According to Arellano, Marsh told him that he was being disciplined because the other engineer was able to get the motor running, he ordered parts that were unnecessary, and he made a bad diagnosis. Marsh testified that both the July

³² I do not credit Sharron’s testimony that Arellano wanted to order a new harness. Neither Marsh nor Arellano testified that Arellano requested a new harness for the bagger, or that Arellano spoke to Sharron

about it. Instead, it appears that Sharron either confused his testimony about a new harness with the incident involving the Mosca or he was trying to bolster Respondent’s reason for the discipline.

31 Mosca discipline and the August 10 bagger motor discipline were “wrapped together as a verbal counseling,” and that he issued the disciplines instead of Sharron because he was available and Sharron was not. (Tr. 130, 133, 816, 1216)

d. Analysis of the Mosca and bagger motor disciplines

The evidence supports a finding that Apex violated Section 8(a)(3) and (4) of the Act by disciplining Arellano for his work on the Mosca machine and the bagger motor as Respondent has not met its burden of proof to show that it would have disciplined Arellano absent his union and other protected activities. Regarding Arellano’s work on the Mosca, the fact the testimonies of Sharron and Marsh differed on key details regarding the incident supports a finding that the discipline was unlawfully motivated. For example, Marsh testified that Sharron inspected the machine by himself as Marsh had other obligations. Sharron on the other hand testified that he examined the machine in the presence of Marsh and Arellano. In fact, Marsh and Sharron could not even agree on what machine Arellano was working on that resulted in his discipline. Marsh was explicit that the incident involved a machine that had a jumper on it, which comported with Arellano’s testimony. However, according to Sharron, the discipline involved Arellano’s work on a different machine, and the incident involving a Mosca with a jumper was another incident that occurred on a different day. Cf. *Southern Pride Catfish*, 331 NLRB 618, 621 (2000) (where “Respondent’s witnesses could not even agree as to the alleged reason for the discharge, it is clear those reasons were pretextual.”).

I also find the fact that Arellano never ordered any parts further shows that Respondent’s reason for the discharge was contrived. The written warning for the Mosca repair states that the policy Arellano violated was “ordering unnecessary parts.” (GC. 11) However, it is undisputed that neither Arellano, nor Respondent, ever ordered any parts for the machine. Even if I were to credit the testimonies of Marsh and Sharron as to what occurred, at most Arellano was just giving his opinion as to what the machine needed—a new wiring harness.³³ Also, the fact that Sharron, at trial, tried to add additional reasons for the discipline, involving other undocumented requests from Arellano to order parts, further supports a finding of unlawful motive. These other purported incidents are not mentioned in Arellano’s written warning, nor were they documented elsewhere.³⁴ *Lucky Cab. Co.*, 360 NLRB 271, 274 (2014) (citing *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (raising additional allegations of misconduct for the first time at hearing supports a finding of pretext).

Finally, the disparate treatment accorded to Arellano also shows unlawful motive. Marsh admitted that there have been instances in the past where an engineer has requested a part or piece of equipment be ordered but Respondent decided the request was unwarranted. These employees were not disciplined. Arellano, on the other hand was given a written warning. *Shamrock Foods Co.*, 366 NLRB No. 107 slip op. at 1, fn. 1 (2018),

enfd. 779 Fed.Appx. 752 (D.C. Cir. 2019) (per curium) (disparate treatment where employer’s witnesses testified other employees made similar mistakes but were not disciplined).

The same analysis holds true for the bagger motor discipline. Arellano was disciplined for being unable to fix the motor/making a bad diagnosis and for ordering parts that were not needed. However, Sharron testified that other engineers have been unable to fix machines but were not disciplined, because he would not discipline someone for trying, but failing. Instead he would only issue a discipline if someone tried to cover something up. Here, there is no claim that Arellano tried to cover anything up. Therefore, the disparate treatment between the other engineers who unsuccessfully tried to complete a repair but were not disciplined, and Arellano is evidence of unlawful motive. *Shamrock Foods Co.*, 366 NLRB No. 107 slip op. at 1, fn. 1. As for claims that Arellano requested Respondent order parts, no parts were ever ordered. And, other employees who made similar requests, which went unfulfilled, were not disciplined. Accordingly, I find that Respondent violated Section 8(a)(3) and (4) of the Act by issuing Arellano a written warning dated August 7, 2018, for his work on a Mosca machine and for issuing him a written warning dated August 13, 2018, for his work on a bagger motor.

2. August 15, 2018 discipline regarding the Weightanka

a. OSHA stops work on the roof

On June 6, 2018 OSHA conducted a surprise inspection at Respondent’s facility. OSHA closed down access to the roof and all work was halted. Servin was working on June 6, and he met with the OSHA investigator that day. Ed Martin from the Union had contacted OSHA as the Union and some of the engineers were concerned about the lack of fall protection for employees working on the roof. At the time, Respondent did not know who contacted OSHA, but assumed Arellano, Servin, or Walker had done so. (Tr. 76–77, 444, 547–548, 762, 792, 1043, 1047; GC 8)

OSHA issued Respondent a citation and fine for several violations. Before OSHA would reopen the roof, Respondent had to undertake various abatement measures. These included installing a guardrail on the roof wall adjacent to the hatch opening to ensure the wall was at least 42 inches high. At the time, the height of the roof wall ranged from between 10 to 24 inches. Apex also needed to ensure that employees working on the roof were protected from falling through the skylights. The roof contained multiple skylights, most of which were located only a few feet away from the swamp coolers. The skylights had plastic covers and there was nothing to protect workers from falling through them in the event of an accident. The lack of fall protection was specifically noted in the OSHA citation. Therefore, as part of their abatement measures, Respondent purchased a portable anchoring system called “Weightanka” for use on the roof. (Tr. 77–79, 146–147, 332, 826, 848; GC 8, 14, 15, 49; R. 13, R. 51, R. 51 p. 4, R. 51 p.10)

³³ Along with assessing their demeanor, because of their inconsistent and contradictory testimony as to what happened, I credit Arellano’s testimony over that of Marsh and Sharron where their testimonies contradicted.

³⁴ The only other documented incident involving claims that Arellano tried to order unnecessary parts involved the bagger motor. However, Sharron testified he drafted the Mosca discipline on August 7. (Tr. 691–692) Thus the bagger motor incident, which happened on August 10, had not even occurred when Sharron drafted the Mosca discipline. (GC. 12)

The abatement measures were completed by August 2018, and the company was ready to restart work on the swamp cooler project. Marsh self-designated the area where the new guardrails were installed as a “safe zone,” as he believed the guardrails would keep someone from falling off the roof’s edge. That being said, there is no evidence that Marsh informed any of the employees about a “safe zone,” and Arellano testified that, before returning to the roof in mid-August, nobody from the company had ever informed him that there was such an area on the roof. (Tr. 94, 125, 283, 826, 1218; R. 13, R. 51 p. 10)

b. Training on the Weightanka

On August 1, 2018, Marsh led a training for Respondent’s engineers on fall protection as part of the OSHA required remediation in order to reopen the roof for work. As part of the training he distributed a booklet containing the operating instructions for the four Weightanka units Respondent had purchased. (GC 15) (Tr. 143–145, 148, 284–285, 825, 828–829; GC 15, GC 49 p. 5; R. 7 p. 3)

Each Weightanka consists of four rubber-coated base weights attached by cross arms in an “X” pattern, with a stabilizing arm connecting the cross arms at the bottom of the “X” and an anchoring point in the middle. Once assembled, the unit takes up between 16-20 square feet and weights around 200 pounds. Additional 50-pound weight plates are stacked on top of the rubber-coated bases to provide users with a sufficient anchoring base. Each unit comes with a total of 12 weight plates, including the four rubberized base plates. Users are supposed to wear a harness and fasten themselves onto the Weightanka’s anchor point using a lanyard and rope. (Tr. 286–287, 324–325, 820–821, 836, 960–961; GC. 14, 15, R. 51 p. 4)

Arellano attended one of the training sessions on August 1. During the training, Marsh discussed the Weightanka, its components, and went through the instructional booklet. He also showed the workers how to wear the harness, discussed the use of the harness with the attendant lanyards and ropes, and told employees they needed to be anchored to the Weightanka when they worked on the roof. During the training employees were given an opportunity to ask questions; Arellano did not ask any questions. Sharron also attended Weightanka training that day but attended the second training session and not the one attended by Arellano. (Tr. 144–145, 284–85, 614–615, 828–829, 853, 958–959, 961; R. 7 p. 3)

Even though Marsh led the training, he had never assembled a Weightanka or even used one. And, during the training attended by Arellano, nobody actually assembled a Weightanka unit or physically showed the employees how to do so. Instead, Marsh showed the engineers a picture of an assembled unit from the manual.³⁵ During the meeting Marsh did not provide any instructions to the engineers as to who was assigned to assemble the Weightankas on the roof, the order in which they were to be assembled, or the locations on the roof the units were to be placed. (Tr. 145, 825, 829–830, 961)

At some point after the meeting, and it is unclear from the record exactly when, Marsh took the components of the four

Weightanka units and placed them on the roof; Marsh went up to the roof without wearing any safety equipment. He did not assemble any of the units, testifying that it was not his job to do that type of work. Instead, he put the components for three Weightanka units against the west wall containing the newly erected guardrail. The parts for the fourth unit he placed near the middle of the roof. When asked why he was on the roof without safety equipment, Marsh testified that he was standing in the area that he had self-designated as safe zone, where the guardrail would prevent him from falling off the edge. However, pictures introduced into evidence show that the components of one of the Weightanka units by the west wall were placed in an unprotected area, where the roof parapet wall was only 24 inches high. And, Marsh did not explain why he placed a Weightanka in the middle of the roof without being anchored or otherwise wearing safety gear given the fact that there were skylights all over the roof that he would have to walk past. (Tr. 145–46, Tr. 154, 159, 826; GC 14, 49)

c. Arellano works on the roof

On August 15, Arellano was assigned to work on the roof re-building swamp coolers; this was the first time he had returned to the roof since it was closed by OSHA. His shift started at 4:00 a.m. When Arellano got to the roof, he found the Weightanka units laid out, unassembled, where they had been placed by Marsh. According to Marsh, between the time the roof was shut down by OSHA and August 15, he was the only person that had accessed roof in order to install the guardrails and bring up the Weightankas. Therefore, Arellano’s 4:00 a.m. shift was the first time an engineer would be on the roof using the fall protection system. (Tr. 41, 145–146, 611–612, 825–26, 841, 961; GC. 14)

Arellano testified that once he was on the roof, he started moving components of the Weightanka unit that Marsh had placed in the middle of the roof to an area near the cooler he was going to work on. It did not occur to Arellano to first build a Weightanka unit near the roof hatch; instead he built a unit near his work area. At some point, while he was arranging the pieces of the Weightanka, Arellano disconnected the power from the swamp cooler he was going to work on and removed the panels and pads, placing them on the roof next to the cooler. Arellano thought it would be more efficient to remove the pads and allow them to drain, as they contained large amounts of water, while he was building the Weightanka. It is undisputed that during this time Arellano was walking around on the roof unsecured. (Tr. 154, 159, 831, 835–839, 852, 854, 963)

At about 5:40 a.m. Sharron took two pictures of Arellano on the roof. According to Sharron, he watched Arellano for less than five minutes before he took the pictures. The photographs show Arellano standing next to a swamp cooler, between four to seven feet away from a skylight. The panels and pads of the swamp cooler had been removed, were lying on the roof, and water had accumulated around the pads and was draining in the direction of the roof’s slope. In the pictures Arellano is wearing a harness around his shoulders, but there is no lanyard or rope attached to the harness and he is not secured to a Weightanka or anything

³⁵ The manual itself does not include specific instructions on how to assemble the unit but does have pictures of an assembled Weightanka

with the names and functions of its various components along with some diagrams for establishing fall clearance distances. (GC 15; Tr. 825)

else. There is a hose lying on the roof, which seems to encircle the area where Arellano is working, but neither end of the hose is visible. Finally, the pictures show a work light set up on a tripod illuminating the swamp cooler. Sharron also took a photograph of the components for the three Weightanka units that Marsh had spread out against the western wall of the roof. (Tr. 338, 608, 611, 830–831, 833, 855; GC 14)

Sharron testified that he arrived to work early on August 15 and went to the roof specifically to see if Arellano was going to use the safety equipment. He knew that Arellano would be the first person on the roof that day and would be tasked with assembling a Weightanka. Sharron claimed that the previous day two employees told him Arellano said he was not going to wear his safety equipment; Arellano denied making any such statement. (Tr. 608–609, 611–612, 615, 858–859)

Sharron was not wearing any safety gear when he was on the roof and was not anchored to a Weightanka or anything else when he took the pictures. According to both Sharron and Marsh, Sharron did not need to wear safety gear, or be anchored while on the roof, because he was standing in the “safe zone” when he took the pictures. That being said, the photographs clearly show otherwise. Sharron was not near the parapet wall with the extended guardrail or near the hatch when he took the photographs of Arellano. Instead, he was standing next to a swamp cooler, near a skylight.³⁶ Indeed, from the photographs it appears that, when he took the pictures, Sharron was standing about as close to a skylight as was Arellano.³⁷ The evidence shows that Sharron was standing next to swamp cooler “A-8” when he took the pictures and Arellano was standing next to swamp cooler “A-7.” (Tr. 125, 155, 158, 336–338, 681–683, 695, 831–832; GC 14; R. 13, R. 51 p. 10)

After Sharron took the pictures, he left the roof to tell Marsh. However, Marsh did not start work until 8:00 a.m. At no time that day did Sharron speak to Arellano about the fact he was not anchored to a Weightanka or was otherwise working unsafely. When asked why he did not do so, Sharron testified that it was because Arellano had taken the fall protection training course the previous day, should have known what to do, and had “defied what he was told to do.” (Tr. 621–22) Moreover, according to Sharron, in his opinion the roof was safe, and Arellano was not working in an unsafe manner, notwithstanding the OSHA citation. Sharron was adamant that the roof was safe, saying that before the OSHA citation they had worked on the roof for seven years without any problems or complaints, and that if he thought Arellano was in any real danger, he would have never sent him onto the roof to begin with. (Tr. 152, 613, 621–622, 690, 694)

Neither a completed Weightanka unit, nor any of its components, are visible in Sharron’s photographs of Arellano. According to Arellano, he was assembling the Weightanka in an area just outside of the frame of the photograph, and Sharron’s pictures must have occurred while he was moving components to assemble the Weightanka. Arellano testified that he completed building a Weightanka unit on August 15, and he took a picture

of the unit he built; the picture was introduced into evidence. Arellano estimated that it took him about an hour and a half to build the Weightanka, because he had never assembled one before, and testified that it was only after building the unit that he continued working on the swamp cooler. (Tr. 836–839, 839–484, 852, 857; GC 14; GC 47)

According to Sharron, Arellano did not assemble a Weightanka unit on August 15. Sharron said he knew this because he went to the roof about midday, after Arellano had stopped working, and saw the Weightanka components “sitting in the same spots.” (Tr. 612) However, Sharron testified that Respondent had only purchased two Weightanka units, while four units were actually purchased, and there was no testimony as to which Weightanka units Sharron claimed to have seen that day. Moreover, there is no evidence that Sharron knew Marsh had put the components for one of the Weightanka units in the middle of the roof. Instead, Sharron believed that all the units needed to be disassembled every day and placed against the wall in the area designated as a “safe zone.” As for Marsh, he confirmed that Arellano had built, and used, a Weightanka unit on August 16, but could not recall if he went to the roof to see if a Weightanka was assembled on August 15. Instead, Marsh testified that he was not 100 percent sure how the facts played out on August 15, or whether Arellano eventually did, or did not, assemble a Weightanka unit that day. According to Arellano, Marsh saw him anchored to the Weightanka on August 15, and Marsh admitted this to him during their disciplinary meeting. (Tr. 161–162, 612–616, 858)

After Sharron came down from the roof on August 15, he waited for Marsh to arrive and then gave him the photographs. Marsh reviewed the pictures, listened to Sharron’s report of the incident, and decided to discipline Arellano. According to Marsh, the discipline was warranted because the pictures showed that, even though Arellano was wearing his harness, he was not anchored to a Weightanka. And, by not properly securing himself to the Weightanka, Arellano could have been injured or killed. Specifically, the concern was that Arellano was standing in an unsafe area near a skylight. (Tr. 140, 142, 148, 152, 338, 690)

Marsh testified that the area around the skylights is dangerous, and this was an issue highlighted by OSHA. The part of the roof where Arellano was working has five rows of skylights running from east to west across the roof. Marsh testified that any area within tripping distance of a skylight was unsafe. Marsh estimated that the danger zone around the skylights was an area of about 6 feet in any direction. He further testified that OSHA would require workers avoid a distance of even greater than 6 feet. In his review of Sharron’s photographs, Marsh estimated that Arellano was standing, unanchored, within 6 or 7 feet of a skylight which put him in the danger zone. (Tr. 333–335, 338; R. 13, R. 51 p. 10)

According to Marsh, what the engineers were supposed to do while working on the roof was build a Weightanka unit in the

³⁶ Using the height of the swamp cooler as a guide, it appears that Sharron was standing about 6 feet away from the skylight when he took the picture. (Tr. 242)

³⁷ Arellano testified that, in the picture, he was standing about 4–5 feet away from the skylight. (Tr. 833) Looking at the photo, Marsh estimated that Arellano was standing within 6 or 7 feet of the skylight. (Tr. 338)

“safe zone,” anchor themselves to that unit, and then build another unit near the cooler they were working on. Engineers could then leapfrog from one Weightanka to another, by transferring their anchor lanyard as they go. According to Marsh, as of the date of the hearing, there was a Weightanka built and available for use near the safe zone. But as of August 15, nobody had built a unit in the safe zone yet, even though the components were available. (Tr. 287–288, 336)

d. August 16, 2018 disciplinary meeting

At the August 16 disciplinary meeting, Marsh presented Arellano with the discipline for not being properly anchored to the Weightanka while he was working on the roof, he also showed him the photographs taken by Sharron. The disciplinary document was drafted by Marsh and states that Arellano was seen on the roof in safety gear, working on swap cooler A-7, but was not anchored as required. Thus, Arellano was in violation of Respondent’s safety program and OSHA requirements. The discipline also notes that Arellano attended the safety training on August 1 and did not ask any questions. The discipline was marked as a written warning and cautioned that any further similar incidents could result in further discipline, up to and including termination. Arellano signed the document but wrote that he was signing it under protest. In the area on the document for employee comments, Arellano wrote that he was the first person to build the Weightanka, and that Marsh said that he and “Marty” were on the roof without fall protection while placing the components of the Weightanka on the roof. (Tr. 139–140, 142, Tr. 613, 819–820; GC 13; R. 7)

During the disciplinary meeting, Arellano asked Marsh if anyone had been on the roof after it had been closed by OSHA, noting that the guard railing had been installed, the Weightanka pieces were on the roof, and the roof looked differently than it did when it was closed in June. Both Servin and Arellano testified that Marsh told them he was the one who put the Weightanka components on the roof, and that he had a special permit to do so without fall protection. Servin asked who took the pictures of Arellano, and Marsh said that Sharron did so but that he was standing on the roof-hatch ladder in the “safe zone” when he took the photographs. (Tr. 847–848, 851, 1065)

According to Arellano, during the meeting he and Servin asked when Apex had started disciplining people for working on the roof, and Marsh looked up an email on his computer and told them as of July 30. Marsh testified that prior to the CBA no written disciplines had ever been issued for a safety violation. According to Marsh, the only incident before the CBA that came close to a discipline regarding a safety violation involved two employees who were hoisting each other up into the air with a forklift. Those employees were stopped immediately and spoken to about the proper use of a forklift. However, no written discipline was administered. (Tr. 163, 859–860)

Arellano testified that, during the disciplinary meeting, he tried explaining to Marsh that he was in the process of building a Weightanka unit when the pictures were taken, and that he finished assembling the unit shortly thereafter. However, Marsh responded by saying that Arellano had been on the roof without fall protection. Marsh believed that Arellano was actually working on the evaporative cooler, as opposed to building a

Weightanka. However, even if Arellano was in the process of building the unit, Marsh testified that it did not matter because Arellano was not anchored while working on the roof as per the training directives. (Tr. 148–151) (Tr. 159–160) (Tr. 966–967)

As for Sharron’s failure to stop Arellano or say anything to him about working on the roof unanchored, Marsh testified that he spoke with Sharron after the incident. Marsh said he told Sharron that, whenever he sees a safety violation, he is supposed to stop the conduct or add corrective measures. According to Marsh, Sharron seemed more interested in documenting what occurred so Arellano could be disciplined as opposed to Arellano’s safety. (Tr. 152–153)

e. Analysis

It is undisputed that Arellano was working on the roof early in his shift on August 15 without being anchored to a Weightanka. Because of this, Respondent could have validly disciplined Arellano. However, “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009) (internal quotations omitted). “In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so.” *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (italics in original). Respondent has not done so here.

According to Marsh, Arellano was disciplined for being on the roof without being secured, which was against the training directives. However, so was Sharron. When he took the pictures of Arellano, Sharron was similarly on the roof without being secured, which would have also been against training directives. Sharron and Marsh’s claim that Sharron was standing in some self-declared safety zone, or on the roof-hatch ladder, is belied by Sharron’s very own pictures. The pictures clearly show that Sharron was standing right next to swamp cooler A-8 and about six feet from a skylight, near to, or within, the danger zone identified by Marsh, and certainly within the danger zone that Marsh testified OSHA would require workers to avoid. Respondent’s claims that Sharron was standing in some sort of safe area is not only unbelievable, but clearly contrived to somehow excuse the fact that Arellano was disciplined for being on the roof unsecured while Sharron was not.

It is also undisputed that Marsh was on the roof unsecured when he transported the Weightanka units to the roof. I do not credit Marsh’s testimony that he had some sort of special permit to be on the roof without fall protection, as it was self-serving, and no such permit was introduced into evidence. Moreover, it is clear that Marsh was outside his own self-declared safe zone while he was on the roof. Sharron’s pictures show that the components of at least one Weightanka unit was placed by Marsh in an area next to the parapet wall where there is no guardrail. (GC. 14, p.2) And, Marsh placed one of the units near the middle of the roof, which would have required him to walk past multiple skylights. By the requirements that Marsh applied to Arellano, if he or Sharron were to be on the roof safely, they should have built a Weightanka near the hatch, tied off, and then proceeded

to carry on with their duties. While that would clearly have been the best practice to ensure safe access to the roof, neither Sharron nor Marsh did so. But the moment that Arellano was on the roof unsecured he was disciplined. The fact that Marsh and Sharron took such a brazen approach to being on the roof unsecured, but disciplined Arellano while he was in the process of building a Weightanka, albeit in his work area instead of near the hatch, supports a finding of unlawful motive.³⁸

I further find the fact that no training was provided to the engineers as to where to build a Weightanka when they accessed the roof, and how they were supposed to move across the roof, is evidence that Respondent was hoping to catch Arellano in some type of situation where he could be disciplined. Marsh testified that a Weightanka should have been built near the hatch opening and the engineers were supposed to tie-off and leapfrog across the roof, building more Weightankas as needed. However, at the training no such directives were given to the engineers. Marsh did not provide any instructions as to where the Weightankas were to be assembled, the order in which they were to be built, or the locations on the roof where they were to be placed. Moreover, nobody even built a Weightanka unit during the training. It appears from the evidence that August 15 was the first time the engineers were allowed to be back on the roof, and Sharron knew Arellano would be the first person working on the roof that day and tasked with building a Weightanka.³⁹ Without ever having built a Weightanka before, and only rudimentary training, it is reasonable that it would take Arellano time to piece together a unit. And when he started building a unit near his work area, instead of near the hatch, Respondent used this to discipline him claiming a safety violation. Cf. *Hollywood Brands, Inc.*, 169 NLRB 691, 691, 696 (1968) (employer's failure to provide adequate instructions or the normal training period because of employee's union adherence evidence of pretext).

Finally, the disparate treatment afforded to Arellano, compared to other employees who engaged in safety violations, also supports a finding of unlawful motive. *Shamrock Foods Co.*, 366 NLRB No. 107 slip op. at 1, fn. 1 (2018). Marsh testified that, before the CBA went into effect two employees were caught hoisting themselves up into the air with a forklift. The practice was stopped immediately, the employees were spoken to about the proper use of the forklift, but no written discipline was administered. Here, neither Sharron nor Marsh stopped Arellano from working on the roof without being secured, or spoke to him about it, on August 15. Instead he was given a written discipline. Marsh even admitted that Sharron seemed more interested in documenting what occurred so Arellano could be disciplined than with Arellano's safety.

³⁸ I credit Arellano's testimony that he eventually built a Weightanka near the cooler he was working on and that he took a picture of the unit on August 15. (Tr. 839–844, 857; GC 47) I also believe that Marsh saw Arellano attached to a Weightanka on August 15 and admitted this during the disciplinary meeting. (Tr. 858) Marsh's testimony that he was "not 100 percent sure how the facts played out" on August 15, and that he did not know if he went to the roof that day, were equivocating statements in order to avoid admitting that Arellano eventually built, and was secured to, a Weightanka that day. (Tr. 161–162)

³⁹ I do not credit Sharron's hearsay testimony that two engineers came up to him the previous day saying that Arellano was not going to wear

Based on the foregoing, I find that Respondent has not met its *Wright Line* burden of showing by a preponderance of the evidence that it would have disciplined Arellano for being on the roof unsecured while he was building a Weightanka unit on August 15 if he had not engaged in protected activity. Accordingly, his August 15 discipline was unlawful under Section 8(a)(3) and (4) of the Act.

F. Servin's September 1, 2018 Discipline for Inadequate Workmanship

On September 1, 2018, Sharron drafted a written warning and gave it to Servin during a meeting in Sharron's office. The discipline was related to Servin's work the day before on a machine called an "iron folder," which was also sometimes also referred to as the "stacker" or "folder/stacker." The written warning states that Servin showed inadequate workmanship by not tighten the bolts on the machine's slide transfer table (referred to as the "transfer table.")⁴⁰ Servin signed the document under protest. (Tr. 295, 1072–1073) (GC 16; R. 16)

1. The folder/stacker

The folder/stacker is a machine that folds freshly ironed sheets into a packageable size, stacks them, and then discharges the stack onto the main conveyor line. Respondent has six machines in this configuration each having the capacity of folding between 700 to 800 sheets an hour. The machines are made by a company called Kannegiesser, which sends a technician to the plant quarterly to check on the equipment. (Tr. 166–167, 295–296, 635, 1266–1267)

To move the folded sheets out of the machine, the folder/stacker has a series of belts that rest on the transfer table. The transfer table is basically a long metal plate, about 3 feet long and 8 inches wide, which supports the sheets as they are discharged from the machine. Each side of the transfer table is attached to machine's railings/guides via bolts. There are three holes on each side of the transfer table which are fitted onto bolts and then secured using nuts. (Tr. 297–299, 1242–1243, 1246, 1271; R. 15, R. 16, R. 42, R. 51, R. 52)

The top of the transfer table, which supports the belts as they move, is flat. The underside contains a perpendicular metal support frame which runs down the middle of the transfer table. The support frame is used to attach the transfer table to a pneumatic rod or piston which moves the transfer table back and forth ejecting the folded sheets.⁴¹ The pneumatic rod is attached to the metal support frame by a bearing known as a "heim joint." The bottom of the heim joint contains a nut which attaches to the pneumatic rod which also has a nut; it appears that using these two nuts the heim joint is fastened to the pneumatic rod. The top

his safety equipment. During the hearing Sharron was prone to framing his testimony to support whatever narrative he was trying to advance, like his claim that he was standing in the "safe zone" when he was on the roof, even though his photographs clearly show he was standing right next to a swamp cooler and few feet away from a skylight. (Tr. 695)

⁴⁰ At various times during the hearing, the transfer table was also referred to as the belt guide, belt support table, or belt support. (Tr. 167, 168, 174, 298–303, 305, 698, 1242–1244, 1267; R. 62)

⁴¹ The pneumatic rod/piston was also referred to at times as the "ram." (Tr. 631–632, 996, 1243, 1304, 1309; R. 41)

of the heim joint is rounded and attaches to the support frame via a bolt that runs through the support frame and the heim joint. A nyloc locknut is used to secure the heim joint and prevents it from backing off the bolt due to the machine's vibrations. (Tr. 30, 167–168, 299–300, 326, 707, 862, 1251–1252). (R. 15, R. 41(c), R. 42–45, R. 51, R. 56)

The part of the heim joint that attaches to the transfer table support frame contains a smooth bored bushing, which looks like a chrome ball bearing with a hole drilled through the middle and can rotate within the heim. The bolt attaching the heim joint goes through one side of the support frame, through the heim joint bushing, and is attached by the nyloc locknut on the other side. The heim joint wears out over time and periodically needs to be replaced. (Tr. 169, 985, 1070–1071, 1075, 1081; R. 15, 43–45, 51, 56)

Respondent's folder/stacker machines operate 24 hours per day and require daily adjustments to work properly. Belts break, components wear out, and the accumulation of lint, all cause issues which require attention by the engineers. Respondent will generally run the machines until they fail completely, with engineers clearing jams or making small corrections to keep production running until the machine finally stops working. At that point Respondent tries to determine the actual issue causing the malfunction. (Tr. 166–167, 1269, 1283–1284)

2. Repairs on folder/stacker #2

On August 30, 2018, folder/stacker #2 stopped working. The transfer table had come off its railing and was jammed inside the machine. Arellano was called to work on the machine; he was assisted by Servin and utility engineer Kevin McCann. The engineers took the machine apart and replaced multiple components including the transfer table. However, before they had completed their repairs and reassembled the machine, Arellano's shift ended, and he left. Therefore, Servin completed the work on folder/stacker #2 and then returned the machine into service. (Tr. 166, 174, 622–624, 862, 982–983, 1067–1068, 1072; R. 16, R. 34 p. 2)

According to both Servin and Arellano, along with the various problems on the machine, the heim joint's bushing was worn. The bolt hole that goes through the bushing had worn away, becoming larger than the bolt and resulting in the bolt moving/shaking within the bushing whenever the transfer table moved, which caused a rattling noise. (Tr. 863–864, 1068, 1070–1072, Tr. 1137–1138)

The bushing alone cannot be replaced, instead a new heim joint needed to be installed. According to Arellano, because work on the folder/stacker was still ongoing when he left for the day, he did not do anything to address the issue of the worn heim joint. Servin testified that he spoke with Marsh on August 30, telling him that they needed to order a new heim joint. According to Servin, Marsh said that he was going to either try to find a new heim joint in town or order it from the manufacturer so they could receive it as soon as possible. Without a new heim joint to replace the worn one, Servin testified that he put the old heim joint back on the machine and tightened it in order to put the machine back into service to get the production line running again. According to Servin, after he finished, the machine was working, in that it was being used for production, but because of

the worn heim joint, it was not functioning properly. (Tr. 864–865, 982–983, 986–987, 1072, 1138–1139, 1142)

Sharron testified that at about 4:00 p.m. on August 30, Servin told him that the machine was done and going back online. At about 5:30 p.m. Sharron said that the machine started “clanging and banging” so he turned it off and climbed underneath to fix the problem. According to Sharron he fixed the issue by tightening the nuts and bolts that connected: (1) the heim joint to the pneumatic rod; (2) the heim joint to the support frame; and (3) the transfer table to the guides/railings. According to Sharron he also adjusted a sensor which was in the wrong position. Sharron testified that, at the time, the bolt hole in the support frame was beginning to wear out, but he did not see any damage to the bolt holes connecting the transfer table to the guide/railings. Sharron said that, after he tightened the loose nuts and bolts, the machine worked fine and it was returned to production. (Tr. 624–625, 630–362, 700, 707–708, 725–726, 1313)

Before fixing the machine, using his phone Sharron took photographs and a video to document the matter for disciplinary purposes. The photographs include pictures of the sensor, the heim joint, the support frame, and part of the pneumatic rod. The video shows the heim joint rattling against the support frame and against the bolt used to secure the heim joint. It also shows Sharron moving the nut used to attach the pneumatic rod to the heim joint with his finger. After taking the video, Sharron testified that he shut down the machine and repaired it. (Tr. 626, 701–709; R. 41, 43)

3. Work orders for folder/stacker #2 and the heim joint

Respondent's engineers carry an iPad/tablet that they use to document work orders and access their emails. Arellano opened a work order for folder/stacker #2 on August 30. The work order shows the job was assigned to Arellano, and that both Arellano and Servin worked on the machine that day. In the notes section, Arellano wrote that they replaced the slide bars, belt guard, belt guide [transfer table], and belts along with hardware that was missing and damaged. Nowhere in the work order does it state that the heim joint was replaced, or that there were any issues with the heim joint. The work order was closed on September 6. (Tr. 775, 897, 1090, 1246, 1307; R. 34 p. 2; R. 62(a))

Arellano's August 30 work order was accompanied by four photographs. According to Marsh, Respondent encourages its engineers to include photographs with their work orders to show the condition of the equipment before and after the repairs. The pictures show that the bolt holes, where the transfer table is attached to machine's railings/guides, were torn out, or elongated. Similarly, the bolt hole through which the support frame attaches to the heim joint was also torn out/elongated, and the metal support frame was bent. (Tr. 1243–1244, 1246–1247; R. 34 p. 2–3; R. 42)

There were also two other work orders for folder/stacker#2 introduced into evidence, one opened on September 11, 2018, and another opened on October 3, 2018. The September 11 work order was opened by Arellano and closed the next day. In the notes of the work order, Arellano wrote that the cylinder bolt had come loose and started to slam, so he removed the bolt and inspected the area including the heim joint; both the support bore, and the cylinder shaft bore were damaged. The notes also say

that Arellano replaced various components including the locking nut securing the heim joint. The work order shows that both Arellano and Servin worked on the repairs that day. (Tr. 1307–1308; GC 50; R. 62(b), R. 63)

During his testimony, Arellano discussed his work on folder/stacker #2 which seemed to correspond with the September 11 work order. Arellano said that about two weeks after the initial repair, there was a noise coming from the machine and he saw the bolt and locking nut connecting the heim joint to the support frame was loose. Arellano turned off the machine to see if a new heim joint was available. According to Arellano, while looking for a new heim joint, he saw Sharron and another coworker. He told Sharron that the nut/bolt on the heim joint had come loose, asked if a new heim joint was available, or whether Sharron wanted him to just tighten the bolt on the existing heim. Arellano said that Sharron told him to just tighten the bolt. Arellano tightened the nut/bolt securing the heim joint, which resolved the problem for the moment. However, he testified the same issue kept recurring. (Tr. 865–871)

The final work order for folder/stacker #2 was opened on October 3, 2018, by Servin. According to Servin, that day the Kannegiesser technician was at the plant working on the unit and noticed the heim joint was defective, and something was also wrong with a bearing, so they shut down the machine. While the Kannegiesser technician worked on the bearing, Servin tried to change the defective heim joint. Servin testified that he spoke to Marsh, who told him that a new heim joint was in stock and they could replace the old one. However, when Servin tried to change the heim joint, the new one was the wrong size. Servin took the old heim joint to the office so Marsh could take measurements and order an appropriate replacement. He then put the defective heim joint back on the machine. According to Servin, the defective heim joint was finally replaced a couple days later. (Tr. 1089–1091; GC 50)

Sharron testified there was nothing wrong with the heim joint on folder/stacker #2, and nobody ever told him that it was defective. In fact, Sharron said the heim joint was replaced on August 30 by Arellano and Servin. Thus, when he repaired the machine an hour and a half after Servin returned it to production, Sharron claimed that the heim joint was brand new, and to his knowledge never came loose again. That being said, none of the work orders show that the heim joint was replaced on August 30, and both the September 11 and October 3 work orders discuss problems with the heim. (Tr. 623–625, 630, 634–635, 724–725; GC 50, R. 62(b), R. 63)

Marsh testified that there was, in fact, an issue with a worn heim joint associated with the transfer table on folder/stacker #2. Marsh said that the engineers found the heim joint was loose and needed to be adjusted. When they got into the repair, they realized that there were various components that also needed to be replaced. According to Marsh all this happened sometime in around September 2018. Marsh also testified that sometime during this same time period Servin told him that the heim joint needed to be replaced. According to Marsh, he either gave Servin a new heim joint or ordered a new one; he could not say specifically. When asked whether the machine continued to operate with the old heim joint, because a new one was not available, Marsh answered “[i]t’s possible. Yes sir.” (Tr. 170) And,

although Marsh did not know exactly when, he testified that the original heim joint on the machine was ultimately replaced and thrown away. (Tr. 137, 167, 170, 1244–1245, 1265)

4. Servin’s discipline

According to Servin, during their September 1 meeting, Sharron gave him the written discipline and showed him the video he had taken. Servin testified that he tried to explain to Sharron the heim joint was defective, but Sharron told him he did not care. Sharron denied that Servin said anything to him about the heim joint during the meeting. (Tr. 630, 1073–1074)

According to both Sharron and Marsh, Servin was disciplined because the machine malfunctioned after Servin finished the repairs and returned the stacker back into service on August 30. That being said, no investigation was conducted as to why the machine needed subsequent repairs and nobody else was disciplined for the work they performed on the machine even though several people worked on it. (Tr. 174–175, 624, 699, 1278–1279, 1313)

Marsh testified that he reviewed the situation regarding Servin’s discipline and discussed the matter with Sharron. Marsh was in his office on August 30, and he did not witness firsthand what actually happened, nor did he inspect any of the equipment. Instead, Marsh said that he reviewed the surveillance video to get a timeline as to what occurred. According to Marsh, the surveillance video showed that, within a few hours of the machine being returned into production, it started showing signs of failure; it was not discharging properly and continued to go into default. This required various engineers to work on the machine in order to put it back into service and continue the production run. (Tr. 173, 1267–1268, 1270, 1273–1274, 1281, 1283)

Marsh further testified that, after Servin worked on the machine, the locknut securing the heim joint came loose and the heim was moving laterally “rattling on its fitment” causing extensive damage to the transfer table. (Tr. 300) To show the extent of the damage caused by Servin’s original repair, Respondent produced at the hearing what Marsh said was the actual transfer table from folder/stacker #2 that Servin installed on August 30, which according to Respondent had to be replaced a few days later; corresponding photographs were also introduced into evidence. (Tr. 300, 328–239, 1243–1244; R. 42)

Marsh testified that the nuts/bolts on the transfer table were not properly tightened after Servin finished his repair on August 30 causing damage and requiring the transfer table to be replaced again within a few days. According to Marsh, the transfer table was new when Servin installed it on August 30, and it only lasted about 4 days. (Tr. 300–301, 327–329)

The transfer table Respondent produced at hearing had extensive damage. Instead of being round, three of the bolt holes had become oval shaped. The hole where the heim joint attaches to the support frame was egged out, as were two of the bolt holes where the transfer tables attaches to the guides/rails. The support frame was also severely bent. Instead of being straight the frame was clearly bowed at the point where it attaches to the heim joint. And, the weld in one corner of the table was also cracked. (Tr. 1243–1244; R. 42)

While Marsh testified that the badly damaged transfer table produced at the hearing, and depicted in R. 42, was the one that

came apart after it was installed by Servin on August 30, there is counterevidence in the record showing otherwise. According to Marsh, transfer table in R. 42 is the same one that is shown in the photographs attached to Arellano's original work order that was created on August 30. (Tr. 1246–1247) The pictures taken attached to Arellano's work order show damage to the transfer table, including elongated bolt holes and a bent support frame, which look similar to the damage shown in R. 42. (R. 34, p. 3, R. 42) Servin testified that the bolt holes on the transfer table he originally replaced on August 30 were "egged out," which also corresponds to the condition of the transfer table in R. 42. (Tr. 1139–1140) Also, in both the video and the photographs taken by Sharron, when he subsequently fixed the machine after Servin returned it into service, the support frame is not bent; the support frame in R. 42 is bent. (R. 41(c), R. 43) Moreover, the transfer table in R. 42 contains a manufacturer's identification sticker near the support frame. (R. 42) This sticker is not visible on the transfer table depicted in Sharron's video or photographs; the sticker should be there if the damaged transfer table in R. 42 was the new one installed by Servin on August 30, and subsequently failed as a result of his faulty work. (R. 41, 43) Instead, this evidence supports a conclusion that the transfer table in R. 42 is actually the one that was taken off the machine during the original repair, and not the new one that was installed by Servin.

5. Analysis

Again, the question here is not whether a lawful basis existed for disciplining Servin. Instead, Respondent must show "that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so." *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (italics in the original) Respondent asserts that it properly disciplined Servin for failing to tighten the bolts on the transfer table claiming that, as a result of Servin's botched repair "within two hours the new" transfer table "came lose, was damaged, and had to be replaced." (Resp't Br., at 39) However, this does not comport with the evidence provided by Respondent's own witnesses.

First, as noted earlier, there is a serious question as to whether transfer table produced at the hearing, as shown in R. 42, was the actual new transfer table that Servin put on the machine on August 30, as opposed to the damaged transfer table that was removed that day. The fact that the manufacturer's sticker is missing from Sharron's video and photographs (which purportedly show the new transfer table) supports a finding that the transfer table in R. 42 is the damaged one that Sharron removed. Notwithstanding, even assuming it was the new transfer table Servin installed, the damage did not occur within two hours of Servin's repair as Respondent argues. Instead, Marsh testified that the transfer table lasted "about 4 days" before it had to be replaced. (Tr. 307)

Also, Respondent completely ignores the fact that Sharron turned the machine off, repaired it less than two hours after Servin had done so, and said that after his repair the machine was running fine. Sharron's pictures and video do not show any damage to the support frame, while the support frame depicted in R. 42 is clearly bent. Therefore, if the transfer table failed a few days later, it is unclear why Sharron was not disciplined for bad workmanship in failing to tighten the bolts, when Sharron was

the last person to tighten the bolts and repair the machine before it allegedly failed. Respondent's disciplining Servin, while not disciplining Sharron, who performed intervening repairs, is evidence of pretext. *Zurn Industries, Inc.*, 255 NLRB 632, 635 (1981), *enfd.* 680 F.2d 683, 694 (9th Cir. 1982) (evidence of pretext included the fact foreman who oversaw and worked with crew that performed allegedly faulty work was neither discharged nor reprimanded, while all the employees were fired).

Moreover, the overwhelming evidence clearly shows that, whatever damage occurred to the transfer table after the repairs by both Servin and Sharron, happened because of the faulty heim joint. Marsh admitted that there were problems with the heim joint, and also admitted that he likely told Servin to put the worn heim joint back on the machine, as Servin testified. The subsequent work orders show there were continual issues with the heim joint coming loose, and when Servin tried to replace it on October 3, Apex did not have a heim joint that was the correct size. Also, Marsh admitted that the heim joint on the machine was ultimately replaced, and the worn one was thrown away; there is no evidence that there were any other problems with the machine after the heim joint was replaced. Finally, Marsh admitted that there was no investigation into why folder/stacker #2 kept needing additional repairs after August 30. Under these circumstances, I believe that Respondent's disciplining Servin, when there was no investigation into the machine's continuous failures, and it was admitted that the heim joint was worn and ultimately replaced, is evidence of unlawful motive.

As for Respondent's claim that Servin and Arellano concealed the damage to the heim joint by not listing it in the August 30 work order (Resp't Br., at 40), a close look at the document shows that it simply lists the work performed on the machine and the parts that were replaced. (R. 62(a); R. 34 p. 2) The heim joint was not replaced that day, the workers simply took the old one off, and put it back on. Therefore, there is a valid reason it is not listed. And, I credit Servin's testimony that he told Marsh they needed to order a new heim joint on August 30, and that he raised the worn heim joint during his disciplinary meeting with Sharron on September 1, but that Sharron simply did not care. There is no evidence of concealment here.

Finally, the fact that a heim joint is not listed on the August 30 work order undercuts Sharron's testimony that Arellano and Servin put a new heim joint on the machine on August 30. I do not credit Sharron's testimony. Under these circumstances, I find that Respondent has failed to rebut the General Counsel's prima facie case, and the evidence shows that Servin's September 1, 2018 discipline was unlawfully motivated. As such, by giving Servin a written warning on September 1, 2018, Respondent violated Sections 8(a)(3) and (4) of the Act.

G. Servin's Discipline for Insubordination

Respondent had a disciplinary meeting on September 18, 2018, where Servin and Arellano were both presented with two disciplines each, and Arellano was suspended. Regarding Servin's disciplines, one involved alleged insubordination that occurred on September 6, and the other involved work he performed on September 13 on a shirt ironing machine.

Servin's discipline for insubordination stemmed from an argument on September 6, 2018 between Sharron and Servin that

occurred at one of the ironing/folding machines. On September 6, two of Respondent's ironing/folding machines, Iron #2 and Iron #3, had stopped working. These machines are large industrial irons which iron and fold linens, such as bed sheets, using multiple belts to move the laundry through the machine. Sharron confronted two engineers, Chuy and Servin, about the fact the irons were not working, and nobody was fixing them. Both denied knowing that any of the machines were down. As further discussed below, Sharron and Servin walked to the ironing/folding machines, and eventually an argument occurred. (Tr. 649–650, 1345)

Sharron, Servin, Arellano, and Marsh all testified about what occurred that day, or about the discipline in general, and Respondent introduced a video of the incident into evidence. Written statements from Sharron, Arellano, and two other employees were also introduced into evidence.

1. Video of the incident

The video introduced into evidence actually consists of 3 separate video files, none of which have sound. Marsh explained that Respondent has multiple cameras covering the work area, and he chose the camera angle which he believed provided the best view of the incident. When he tried to download the entire video Respondent's computer program separated the recording into three different files. As a result, there are short gaps between the videos, ranging from 10 to 12 seconds. That being said, Marsh viewed the original video, as one continuous file, and testified that nothing different or unusual occurred during those gaps. A review of the videos appears to show that Marsh's testimony is accurate. (Tr. 1233, Tr. 1259–1260, 1290–1291; R. 59, 60, 61)

The first video is 6 minutes and 48 seconds long. As it starts, the camera is pointed primarily towards Iron #2, however the top of the frame shows a portion of Iron #3. The video shows production workers idling about, with carts full of bed sheets staged in front of each machine waiting to be loaded into the irons. The sheets are a tangled mess, and workers can be seen trying to untangle the linens. As the video starts, the belts on Iron #3 are moving, but stop a few seconds later. The belts on Iron #2 are not moving at all. At 52 seconds into the video, the belts on Iron #3 start moving again, but they stop about ten seconds later. At 1:15 into the video, Iron #2 starts operating, and soon after laundered sheets can be seen feeding through the belts. Iron #2 continues operating throughout the rest of the video. At 1:36, Iron #3 has restarted. A worker is moving around in front of Iron #3, and sheets can be seen feeding through the belts. However, at 2:30 into the video, the belts on Iron #3 stop moving again. (R. 59)

At 2:53, the production line supervisor named Daniel walks into the frame. After speaking with someone he goes to the front of Iron #3, which is still not operating. Daniel stops and apparently speaks to the machine operators, and then walks towards the back of the machine; he is talking on his radio as he walks out of the frame. At 4:06 Daniel walks back through the camera frame and goes towards the front of Iron #3; he is again talking on his radio. At 4:12, as Daniel is walking out of the camera's view, Sharron walks into the frame and goes towards the back of Iron #3. It is unclear if Sharron and Daniel say anything as they

pass each other. The belts on Iron #3 are still not moving. Servin walks through the camera frame five seconds behind Sharron, also going towards the back of Iron #3. As Servin walks towards the back of the machine, Daniel walks into the frame and stops at the front of Iron #3. Although the view is obstructed by a laundry cart, at 4:24 Daniel appears to press a few buttons on the machine and the belts start moving; a few seconds later a sheet that was apparently stuck between the belts can be seen moving. At 4:33 Arellano walks into the camera frame and goes straight towards the back of Iron #3. As Arellano walks through the frame, at 4:35, the belts on Iron #3 stop again. At 4:45 Sharron walks to the front of Iron #3 with Daniel a few feet behind him. They stop at the front of the Iron #3, and Sharron appears to be doing something to the machine, or explaining something, as Daniel watches him. Sharron can be seen pointing to Daniel, and also pointing to the machine. At 5:15 the two separate, with Daniel walking one way and Sharron going towards the back of Iron #3. The belts on Iron #3 are still not moving. (Tr. 203; R. 59)

At 6:38 the camera jerks quickly to the left, and then moves steadily towards the right and stops at 6:42 after Sharron, Servin and Arellano are all in the frame. They are standing at the left, rear side of Iron #3, in front of the machine's service panel. One door to the service panel has been removed exposing various plugs, outlets, circuits, and wires. Servin has his back towards the service panel and is a few feet away from it, facing the camera. Sharron has his back to the camera and is facing Servin; the two are about an arm's-length apart. Arellano is facing both Sharron and Servin, with his left side towards the camera. Servin and Sharron are arguing with each other while Arellano is standing there listening. The arguing continues until the video ends six seconds later. (R. 59)

The second video lasts for only 18 seconds. Servin, Sharron, and Arellano are all standing in the same place with Arellano listening while Servin and Sharron are arguing. The video shows that Servin is wearing a pocket protector with the Union's logo over his right pocket. The third video picks up with all three men again standing in the same spots and is 3 minutes and 9 seconds long. Servin and Sharron are still arguing, while Arellano is listening. In all three videos, while Servin and Sharron are arguing with each other, they can be seen at various points shaking their heads back and forth as they speak, waving their hands and arms, and pointing their fingers up, down, back and forth. (R. 59, 60, 61)

About half-way through the third video, at 1:36, Sharron points his fingers around—as if giving instructions to both Servin and Arellano and then walks away. At 1:41, Sharron walks out of the frame. As Sharron finishes giving instructions and walks away, Arellano says something, gesturing with his arms out. At the same time, Servin turns around, grabs the door, and begins putting it back on the service panel. Arellano then walks along the back of the machine, towards the opposite corner. While Servin is putting the door back on the service panel his head tilts to the left, in Sharron's direction; he is either looking at, or saying something to, Sharron who is out of the frame. At 1:44 Sharron walks back into the video holding a cell phone in his left hand with his right hand out. Sharron starts speaking forcefully to Servin, standing about a foot or so away from him, and

pointing his right finger at Servin as he speaks. Servin shakes his head back and forth, as if saying “no,” and resumes securing the service panel door, locking the top lock. While Servin is locking the top of the panel, Sharron walks away again, speaking to Servin and fidgeting with his phone as if to call someone. While this is going on, Arellano is at the opposite corner of the machine, at the top-right of the video. At 1:46 Arellano appears to reach for something with his right arm, as if trying to push a button. Arellano does this twice, and the belts on Iron #3 start moving; a sheet can then be seen traveling along the machine’s belts. The machine started again at 1:53 into the video, just as Sharron was walking away for the second time, fidgeting with his phone. (R. 61)

After Iron #3 starts, Arellano walks along the back of the machine towards Servin. They look at each other and appear to smirk/chuckle; Servin then walks away. Arellano notices that the bottom of the service panel door is loose. He pulls out the bottom half of the door, spends about 30 seconds fiddling with it, and then secures the bottom lock on the door. About 25 seconds later, the video camera zooms out, showing a wide shot of the shop floor. The camera then repositions itself to focus generally on Irons #2 and #3. (R. 61)

2. The written statements

Respondent ultimately received four written statements regarding what occurred that day. Two statements, one from Sharron and one from Arellano, were received before Servin was given his discipline on September 18. The other two statements, one from Daniel and another from a production employee named Alicia (also known as Bertha) were received after Servin was given his written warning. (Tr. 1194–1195, 1198)

In his statement, dated September 19, Daniel writes that he was with Arellano and Servin checking on Iron #3, when Sharron came with “a really loud voice” telling him to check his employees regarding how they feed sheets into the iron. Sharron was telling Daniel that the corners of the sheets were sticking out too much. Daniel explained this to his employees, and when he was doing so he turned around and saw that Servin was arguing with Sharron. Daniel did not know what they were arguing about. (GC 44, p. 5; Tr. 1203)

Alicia wrote her statement in Spanish, and it was then translated into English. In her statement, which is also dated September 19, Alicia writes that she was “catching sheets” for Iron #2 on September 6 when she heard Sharron “screaming” at Servin. She did not understand what Sharron was yelling about, as she does not know much English. However, she noticed that Servin seemed very upset (Tr. 203–204; GC 44, p. 3–4)

Regarding his statement, Arellano testified that he emailed it to Marsh, right before Servin’s disciplinary meeting, as Marsh had asked him for it. In his account, Arellano wrote that Sharron arrived at the ironing line where he ran into Daniel and scolded him about his workers. Sharron then made his way to where Arellano was standing and started complaining about Servin, Chuy, and McCann. Servin then walked up and Sharron started scolding him, initiating an argument. Sharron mentioned that Marty Martin was “surveillancing members of the bargaining unit” and also said that Arellano was nowhere to be found. Arellano ends his statement by saying Sharron was extremely

unprofessional and angry during this encounter, and that at no time did Sharron give Servin a direct order. (Tr. 909; GC 19 (b))

Finally, Sharron testified he wrote his statement the day of the incident and that he was “hot on the temperature” and “still pretty disturbed” when he wrote it. In his statement, Sharron states that he was talking to Servin, telling him not to walk by machines when they are down. Arellano came to the area where they were talking, and Sharron asked Arellano where he was while the machine was down. Arellano said he was at the dry-cleaning station. Sharron then asked Servin to fix the machine, as the breaker needed to be reset. Servin started complaining that other workers come into work wearing flip flops and take too long to get onto the work floor. Sharron told Servin not to concern himself with others, but Servin persisted on the point. Sharron told Servin again not to concern himself with other workers, as he tends to clock out 7–10 minutes early every day. Servin said the claim was not true, and he does not clock out early. Sharron then told Arellano that he comes in at 4 a.m. and does not take his tools or make it out to the shop floor until 5 a.m. Sharron then asked Servin and Arellano not to complain about other workers. He asked Servin to fix the machine first and then they could review the clocking issue later. Sharron wrote that Servin said “no, he was going to prove it now.” Sharron then asked Servin to fix the machine now, but Servin said “no” a second time. Sharron wrote in his statement that he then walked away from the situation, as did Servin, and Arellano reset the machine. (Tr. 652, 659; GC. 19(c))

3. Gene Sharron’s testimony

According to Sharron, Marty Martin was the one who alerted him to the problems with Iron #2 and Iron #3 that day. Sharron testified that Marty Martin called him on the phone, asked why the irons were down, and said there were no engineers working on the machines. Sharron said he then walked out of his office and the first person he saw was Chuy, a maintenance engineer who was ending his shift. Sharron spoke to Chuy, “yelling” at him in a higher than usual voice. (Tr. 650) Sharron told Chuy that he could not walk by machines when they were down, but instead needed to fix them. Chuy replied saying he was off, and that none of the machines were down. Sharron said that the machines were, in fact, down and Chuy was there when it happened. Chuy again disagreed, saying he does not walk by machines when they are down; Sharron told Chuy he did this time. Servin then joined the conversation and, agreeing with Chuy, said all the machines were running and nothing was broken on the floor. Sharron said he was wrong, told Servin to follow him out to the irons, and the two walked out to Iron’s #2 and #3. (Tr. 649–650, 1327, 1344–1345)

Although Sharron testified initially that he was in his office when Marty Martin called on the phone saying the machines were down and no engineers were present, he later changed his testimony, saying Martin did not call him on the phone. Instead, when asked why he accused Servin of walking by a machine that was not working, Sharron claimed that he was in Marty Martin’s office speaking with him when Martin turned over his shoulder and told Sharron to come here. Sharron claimed that Martin then showed him “on film” Servin walking by the machine when it was down. (Tr. 1348) In fact, Sharron claimed that Martin

showed him “on film” Chuy, McCann, and Servin all walking past the machine while it was not working. According to Sharron, Marty Martin wanted to know why the engineers were not fixing the machines. Sharron said he then left Martin’s office, went to Bay 9, opened the door, and saw Chuy. (Tr. 1348–1351)

After walking to the ironing/folding machines with Servin, Sharron testified that Iron #2 had started working, as utility engineer Kevin McCann was able to get it running. McCann then started working on Iron #3 trying to clear a jam in the machine. According to Sharron, sheets can sometimes jam the machine when they are being ironed/folded, and clearing the jam causes the rollers to move backwards producing an overload which trips a circuit breaker. (Tr. 650, 1345)

Sharron testified that he walked to the back of Iron #3 and saw a circuit breaker had tripped, so he removed the door to the service panel.⁴² As he did so, he was telling Servin that he cannot walk by irons when they are down, but instead he needed to fix them. Servin denied seeing the machine was down. At this point, Arellano was watching the two of them as he had “come over the top of the stairs.” (Tr. 1328) Then, according to Sharron, “all of the sudden” Servin started saying that Sharron could not pick on just Servin and Arellano. (Tr. 650) Servin said that Sharron also needed to yell at McCann and another engineer named Joe who would come to work, but then take 10 minutes doing other things like taking off their flip-flops, putting on their work uniforms, or getting their tools ready, before they actually started working. (Tr. 650, 1328, 1331–1332, 1347, 1365)

When Servin brought up the other engineers, Sharron testified that he told him they were not there to talk about what other employees do, but that Servin cannot walk by a machine when it is down, as his job is to keep them running. According to Sharron, during their interaction, Servin kept trying to bring up what the other engineers were doing, while Sharron was explaining that what other people did had nothing to do with the machine being down. Sharron said that Servin “just kept going on” so Sharron finally told him “you guys do not want to go there with me.” (Tr. 1329) Sharron told Arellano that he had previously clocked in at 4 a.m., but did not put his tools together until 5 a.m. He then said that Servin clocks in and takes 15 minutes to get his tools together, leaves seven minutes early every day, and also goes to the lunchroom for a half-hour at the end of his shift to do bookwork, which was excessive. Sharron said that he was not complaining about those things and did not want to go there. Instead, he wanted to talk about the machine being down, and Servin fixing machines instead of walking by them. Even though Sharron set forth an initial timeline in his testimony where Servin “all of the sudden” started saying that Sharron could not yell at him and Arellano without calling-out the other engineers, he then testified that Servin brought up the other workers only *after* Sharron told him and Arellano that they were late starting work each day. (Tr. 650–653, 1329–1331)

Sharron further testified that, in reply to his accusations, Servin said that Sharron could not prove he leaves seven minutes early every day; Sharron replied saying Respondent had cameras at the facility that go to the time clock. Sharron believed Servin

was insinuating that he wanted to go look at the cameras, so Sharron told him to fix the machine and they would then go look at the cameras afterwards. Sharron claimed that Servin “told me no,” and Sharron said he was going to fix the machine himself and that he then “reached over and pushed the reset button [him]self to start the machine.” (Tr. 656–658) Sharron said he then told Servin “it was insubordination” and started to walk away. (Tr. 657) As he was walking away, Servin protested saying that it was not insubordination. Sharron then got mad, turned around, went back to Servin and told him that his conduct was, in fact, insubordination and Servin needed to look up the meaning of the word, because he refused to fix the machine. At this point, Sharron testified the conversation was “heated.” (Tr. 657–58; 1335–1336)

Sharron claimed that he told Servin three times to fix the machine. He also testified that he told Servin that he was not supposed to speak to him that way, and that Servin could be fired for his conduct. Then, according to Sharron, Servin turned around and started to put the service panel door back on the machine, but Arellano finished securing the door while the machine was working. Sharron testified that he then walked away and called Marty Martin. He told Martin what happened, and said he wanted to fire Servin on the spot. Marty Martin told him not to do so. Sharron claimed that he then drafted the written discipline. Sharron believed that Servin’s conduct constituted insubordination because he refused to fix the machine after Sharron told him to do so three times, and he also talked back to Sharron. In the course of their interaction, Sharron said that Servin kept changing the subject to what other employees were doing, and was getting irate, pointing, screaming, and yelling at Sharron. Meanwhile, Sharron testified that he was just “standing still letting him vent.” (Tr. 651) (Tr. 651–652, 657–658, 1336, 1365–1366; GC 19)

While Sharron testified that he was the one that “had the magic finger” (Tr. 657) and pushed the reset button on the machine, his written statement says that Arellano pushed it. When shown his written statement, Sharron then testified that Arellano did push the reset button but did so only after Sharron had pushed it. Sharron said that he was sure the machine started after he pushed the reset button but did not know for a fact that it did. That being said, the video does not show Sharron pushing any buttons or otherwise doing anything to start the machine when Iron #3 eventually started working after the argument concluded. (Tr. 657–659; GC 19)

Regarding Arellano, Sharron testified that, while he did not say much during the interaction, he was taking Servin’s side by just nodding his head and agreeing with everything Servin said. And, at one-point, Sharron turned to Arellano and told him that if he was a man, he would tell Servin that he was in the wrong. According to Sharron, Arellano just stood there and looked at him. (Tr. 656, 1330)

Ultimately, the problem with Iron #3 was that the sheets were getting jammed in the machine. Sharron testified that, to get the machine working again, the jam needed to be cleared, the service panel door needed to be removed, the overload switch reset, and

⁴² At various times, Sharron, Arellano, and Servin referred to the circuit breaker as “F-2,” the “F-2 breaker,” or the “F-2 relay.” (Tr. 649–

650, 875, 1093, GC 19(c)) F-2 appears to reference an error code on the machine when the breaker is tripped. (Tr. 1093, 1260)

then the start button needed to be pushed. As to who was manipulating the video camera that was filming the incident, Sharron testified it was Marty Martin. Finally, Sharron said that after he walked away from the incident the last time, he did not have any other conversations with either Arellano or Servin about the incident that day. (Tr. 659, 1363–1365)

4. Servin's testimony

Servin testified that he and Sharron walked out together to Iron #3 from Bay 9. According to Servin, the problem with Iron #3 was that the breaker had tripped, so he checked the machine to see if there were any jams, and by the time he reached the back of the machine to reset the breaker Arellano had already reset it. Servin testified that, at this point the machine was back online and the issue had been resolved. When he reached the back of the machine Servin said that Sharron started yelling at him for not being on the production floor at 8 a.m. Servin was offended by Sharron's comments. He protested saying there was one engineer who comes to work wearing flipflops, clocks-in, and spends 15–20 minutes in the tool room before working and another one that comes to work 15 minutes late consistently. In reply, Sharron told him not worry about the other engineers, since Servin clocks out 10 minutes early every day and goes home. Servin denied clocking out early and said that Sharron was going to have to prove the allegation. Sharron replied saying he was going to prove it by getting the timecard records, and Servin should not be concerned about what the other engineers are doing. According to Servin, Sharron then walked away and Servin went back to work. (Tr. 1093–1095)

5. Arellano's testimony

Arellano testified that he was on the side of Iron #3 resetting the breaker when the incident occurred. According to Arellano, Sharron told Servin that he was seen on camera having a little powwow with McCann and Chuy while the equipment was down. Servin replied saying that, if Sharron was going to chew his ass, he needed to chew everyone's ass because McCann comes to work in flipflops, clocks-in and then gets dressed, and another engineer named Joe always comes in late. According to Arellano, Servin was frustrated. Sharron replied saying "you don't want to go there." (Tr. 876) At some point during this interaction, Sharron told Arellano that the machines were down and he was nowhere to be found. He also told Arellano that Respondent had seen him clocking in at 4 a.m. but waiting an hour before making it out to the work floor. (Tr. 142, 875–877)

Arellano also said that, during the incident, Sharron told the engineers they were responsible if they saw an operator feeding sheets into the irons improperly. Arellano claims he said that it was not their responsibility, because the CBA outlines their work. In response, Sharron told them to stop arguing and fix the machines; he then walked off. (Tr. 878–879)

6. Marsh's testimony

Marsh testified that he approved the discipline issued to Servin for insubordination. According to Marsh, he reviewed the video of the incident and then discussed the matter with Sharron, who also provided him with a written statement. Marsh said that, during their discussion, Sharron told him that he asked Servin to restart the equipment, but instead of doing so Servin

started talking about other employees, their behavior, and how they dress in and out for work. Sharron told Marsh that Servin's conduct was insubordination because he asked Servin to restart the equipment several times, and Servin refused to do so. Marsh testified that Servin was written up for insubordination because he refused to make repairs on the machine. Marsh confirmed that the video shows Arellano pushing the button to restart Iron #3. (Tr. 200, 1240–1241, 1260–1261)

After reviewing the video of the incident, Marsh believed Sharron's body language showed that he was calm; Marsh thought Sharron was moving slowly and taking his time to point things out. Marsh testified that he did not see Sharron getting into anyone's personal space, and did not see him using emotional gestures, like "hands flying, anything like that." (Tr. 1201) Instead, according to Marsh, when he watched the video, he saw Sharron standing in front of other employees having a conversation. Also, Marsh testified that, before the September 14 disciplinary meeting, he did not speak with anyone about the incident except Arellano and Sharron. Marsh said that this was the first time an engineer had been disciplined for insubordination. (Tr. 202, 1201–1202)

7. Conversation with Sharron after the incident

Arellano and Servin both testified that after the incident, later in the day, they had another conversation with Sharron. According to Arellano, he asked Sharron what they could do to work better together saying that whatever Sharron wanted them to do they would do it. In reply, Sharron said, he was getting resistance from Arellano and Servin, and that he was getting pressure from his bosses to "write you guys up." (Tr. 880) Sharron then said that he was going to have to write-up Arellano for the water valve on press #1, an episode that occurred the previous day, and write-up Servin for insubordination regarding the incident earlier that day at Iron #3. Sharron said that he had asked Servin to fix the machine twice and that Servin said no twice. Servin disagreed with what Sharron said. Arellano testified that during this conversation Sharron told him to "be a man, tell the truth." (Tr. 882) In reply Arellano told Sharron that he was telling the truth, and that he never heard Sharron give those instructions to Servin. (Tr. 879–882, 1095)

Regarding this conversation, Servin testified that it occurred between tunnels 1 and 2 and Sharron approached them saying that he was going to write-up Servin for insubordination for refusing to work on the machine; Servin replied saying he never refused to work on any machine. Sharron then told Arellano to stand up, be a man, tell the truth, and confirm that he heard Sharron tell Servin to work on the machine. Arellano replied saying that he did not hear Sharron make any such statement. Then, Sharron told Arellano that he was not planning to write him up for the water valve incident but was going to do so now. (Tr. 1095–1096)

As for Sharron, he claimed that this conversation occurred about two weeks after the September 6 insubordination incident, and after he had already drafted Arellano's discipline regarding the water valve. According to Sharron, he was doing a walkthrough of the plant when he happened to come through tunnels 1 and 2. Arellano and Servin were walking towards him and asked if they could have a "friend to friend" conversation.

Sharron said “sure,” and Servin then said “Gene, what do you expect from us?” According to Sharron he said that he expected them to do their work like they did before and go home. He then said that was all he ever asked and was not asking anything more. (Tr. 1314–1315)

8. Servin’s meeting on September 14

Servin testified that Sharron tried to discipline him for insubordination the morning of September 14. That day Sharron called Servin into his office and tried to give him the written warning. However, Servin said that he wanted his union representative present for any disciplinary meeting. The two of them then went to Marsh’s office and Sharron told Marsh that Servin wanted a union representative. The meeting stopped. According to Servin, later that day, he was putting his toolbox away when Marsh came into the toolroom and said that, he knew Servin wanted his union representative, but they needed to take care of this right now. The two of them walked to Sharron’s office where Sharron was waiting. According to Servin, he told Marsh and Sharron that they should check the video of the incident before writing him up; Marsh then left the office, saying he was going to go look at the video. While Marsh was gone, Servin texted Ed Martin at the Union, who instructing Servin to invoke his *Weingarten* rights.⁴³ When Marsh returned, Servin told him that he had spoken with Ed Martin who instructed him to invoke his *Weingarten* rights. The meeting then ended with Marsh telling Servin that they would take care of the matter the next week. (Tr. 1100) (Tr. 1097–1099; 1100)

According to Marsh, he discussed the alleged insubordination incident with Servin on September 14 in his office. Marsh testified that, during the meeting Servin asked for Respondent to review the surveillance video, saying that whatever they thought had happened did not occur. He also invoked his *Weingarten* rights, so the meeting ended and Servin was returned to work. Notwithstanding Servin’s requests, Marsh testified that he had already decided to discipline Servin as of the September 14 meeting. (Tr. 198–199, 201–202)

9. September 18 disciplinary meeting

Servin reported to work on September 18, and Marsh notified him by radio to come to the office for a meeting with his “favorite union rep,” referring to Arellano, to deal with the insubordination write-up. (Tr. 1101) Servin went to Marsh’s office. Present was Marsh, Sharron, and Arellano; Servin was presented with his discipline. The discipline itself is dated September 6 and is signed by Sharron. Parts of the document were clearly drafted by Sharron, and he wrote that Servin was being disciplined for insubordination. The document also states, “investigation still ongoing.” It is obvious that someone else’s handwriting is also on the document and it appears to be Marsh’s.⁴⁴ Marsh’s handwriting was clearly added after Sharron drafted the original document as it states: “Review detail on issue – video reviewed, *Weingarten* rights, read both written statements (Gene, Adam’s) Joseph [Servin] requested to produce a written

statement. He stated no written statement would be given.” (GC19) Servin signed the document on September 18 and wrote “under protest” beneath his signature. (GC. 200, 1101–1102; GC. 19)

During the meeting either Arellano or Servin asked Marsh whether Respondent had spoken with all the of the witnesses to the incident. Marsh replied saying there were no other witnesses. Arellano then told Marsh there were two witnesses and gave Marsh their names. Marsh said that he would get the plant manager to take their statements. As discussed later, during this same meeting Servin also received a discipline regarding an incident involving a double-buck press, and Arellano was disciplined and suspended. (Tr. 911, 1103, 1105)

That day Marsh sent an email to Dramise, Marty Martin, and Sharron, with of summary of what Marsh said were his notes of the meeting regarding Servin’s insubordination discipline. Among other things, the email says that, during the disciplinary meeting Arellano asked that they be allowed to review the video. Marsh said they could not review the video until all the written statements were collected. Arellano also asked if there were any witness statements or other witnesses; Marsh replied saying that Respondent had requested a statement from Daniel, and that the video showed Alicia was present. It is clear from the email that, as of September 18, Respondent knew that there were two other witnesses to the incident but had not received statements from them. (Tr. 1186–1193, 1199–2000; GC 44)

10. Credibility of Sharron and Marsh

I generally did not find Sharron to be a credible witness. He was visible hostility towards both Servin and Arellano, their reinstatement, their role in the Union’s election victory, and the fact Respondent’s facility was unionized. While testifying, when confronted with an inconsistency or fact that did not support his version of events, Sharron would just change his testimony. For example, Sharron first testified that Marty Martin called him on the phone, told him the machines were down and no engineers were working on them, and that he walked out of his office and saw Chuy. However, when asked how he knew Servin had walked by Iron #3 when it was not working, Sharron changed his testimony saying Marty Martin did not call him on the phone, but instead said he was in Marty Martin’s office and saw this occurring in real time “on film.”

Moreover, parts of his characterization of what occurred did not comport with the video or the written statement made by Alicia. For example, Sharron claimed that he just stood there and let Servin vent, while Servin was getting irate, screaming, and yelling at Sharron. However, the video clearly shows otherwise. Similarly, Sharron testified that he was the one with the “magic finger” that pushed the reset button to restart Iron #3. However, his written statement, along with the video, shows that it was Arellano who did so. And, as noted by Alicia in her written statement, she heard Sharron “screaming” at Servin who seemed very upset. Sharron also seemed to conflate his testimony about what he witnessed first-hand while the incident was occurring, with

⁴³ See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975) (explaining that Section 7 of the Act gives union members the right to be accompanied by a union representative during certain investigative interviews conducted by their employer).

⁴⁴ The handwriting is similar to that in GC 18 and GC 20, which were drafted by Marsh.

things that happened after the fact or that he saw in the video. For example, Sharron testified that that Arellano was the one who secured the service panel door. While the video does, in fact, show this is what happened, Sharron had left the area well before Arellano started working on the service panel door.

Marsh's testimony about this incident also shows why his credibility is questionable. Marsh testified that after reviewing the video he believed that Sharron's body language showed that he was calm, that Sharron was moving slowly, taking his time to point things out, was not in anyone's personal space, and he did not see Sharron using emotional gestures, "hands flying, or anything like that." Instead, Sharron was standing in front of other employees having a conversation. (Tr. 1201) Not only does Marsh's testimony conflict with what was written by Alicia, it does not comport whatsoever with the video of the incident. Even when a video was introduced into evidence that clearly showed what was occurring, Marsh was still reticent to testify accurately for fear of hurting Respondent's case. I have generally discredited the testimony of both Sharron and Marsh in this proceeding and have only relied upon their testimony when it is corroborated by other credible evidence.

11. What occurred on September 6

I find the credited evidence, along with the inferences derived therefrom, show that Sharron was in his office when he received a phone call from Marty Martin who scolded him saying that the ironing/folding machines were down, there were no engineers present to fix them, but instead the engineers (including Chuy, McCann, and Servin) were standing around talking to each other. Sharron then walked out of his office and interacted with Chuy near Bay 9, yelling and accusing him of walking by a machine when it was down. He did the same to Servin when he joined the conversation. Sharron was still mad when he went to Iron #3 and yelled at Daniel because the production workers were mis-feeding the sheets into the machine. When Sharron, Servin, and Arellano gathered at the back of Iron #3, whatever work that was needed to have been accomplished in the service panel was completed, but the panel door was still off. And the only thing that needed to be done for the machine to start working again was for somebody to physically push the reset button. However, Sharron was upset and started screaming at the engineers, focusing his ire particularly on Servin. He said that Servin was seen on camera talking with McCann and Chuy and accused Servin of walking by the machine while it was down, saying that Servin needs to fix machines when they are down instead of walking by them. Sharron then expanded his complaints. He demanded to know where Arellano was when the machine was down and said that Arellano would clock in but wait around before actually starting work. He then accused Servin of clocking in and taking his time to get his tools together before he actually started working.

Servin was offended by Sharron's accusations. Servin told Sharron that, if he was going to chew out his ass, he needed to chew out everyone's ass and not just pick on him and Arellano. Servin told Sharron that McCann comes to work in flip-flops, clocks-in, and spends 15-20 minutes in the tool room getting dressed for work, and that another engineer named Joe always comes in late. Sharron and Servin then started arguing, with Sharron saying that Servin did not "want to go there." Sharron

told Servin that he took too long to complete his paperwork each day while sitting around the lunchroom and accused Servin of clocking out early every day. Servin denied the accusations and demanded to see proof of what Sharron was asserting. The two continued arguing, going back and forth about what other engineers were doing/not doing, in comparison to Servin, and whether Sharron could prove/not prove his claim that Servin clocks out early or loaf around. Towards the end of the argument, Sharron told Servin to stop arguing and start the machine, pointing towards the service panel and the reset button, Sharron also told Servin his conduct constituted insubordination, and he then walking away. As Sharron walked away, Servin turned towards the service panel and put the door back on the panel as Arellano walked towards the reset button. As he was securing the service panel door, Servin turned towards Sharron and said that he was not being insubordinate. Sharron heard the comment, turned around, and came back to Servin. Sharron was mad, and angrily told Servin that his conduct was, in fact, insubordination, because he refused to fix the machine and he needed to look up the meaning of the word. While Sharron was yelling at Servin, Arellano was pushing the reset button on Iron #3, restarting the machine. Sharron then called Marty Martin as he walked away while Servin locked the top lock on the service panel door.

In his testimony, Sharron insisted that he told Servin multiple times to fix the machine and Servin refused to do so. That being said it is clear from the video that, from the time the argument began until the argument ended and the machine restarted, there was nothing left to do to fix the machine except push a button, which Arellano did after Servin and Sharron stopped arguing.

Later that day Arellano and Servin had a discussion with Sharron near tunnels 1 and 2. Arellano asked Sharron what he expected from them, and how they could work better together. Sharron told them to do their work and go home. He further said that Arellano and Servin were giving him resistance, and that his bosses were pressuring him to "write you guys up." (Tr. 880) Sharron told Arellano that he was going to have to write him up for the water valve on press #1, an incident that occurred the previous day, and that he was going to write up Servin for insubordination, saying he asked Servin to fix the machine twice, and Servin said no twice. Servin replied saying that he never refused to work on the machine. Sharron then told Arellano to stand up, be a man, and tell the truth. Arellano said that he was telling the truth, and that he did not hear Sharron make that statement.

12. Analysis

As with the other disciplines, the issue here is not whether Respondent could have validly disciplined Servin for insubordination, but whether Apex has shown "that it *would* have taken the challenged adverse action in the absence of protected activity." *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (italics in original). Respondent has not met its burden to show by a preponderance of the evidence that it would have done so.

According to Marsh, Servin was disciplined for insubordination because he refused to make repairs on the machine. However, the credited evidence shows that Servin did not refuse to make any repairs. By the time the argument started, the repairs were complete and the only thing left to do was for someone to push the restart button and to replace the service panel door.

After Sharron left the area, Servin turned around and replaced the panel door while Arellano, who was closest to the reset button, walked over and pushed it. The machine then started working. This was clearly evident from the video which Marsh said he watched before the September 18 meeting. The only delay was caused by the argument, which both Sharron and Servin participated in equally. And, Servin could hardly be faulted for complaining that Sharron was generally picking on him and Arellano, as the facts set forth herein show this was true. As such, I find that Servin did not refuse to make any repairs on the machine, nor did Respondent have a good faith belief that he engaged in this conduct. *Olathe Healthcare Center, Inc.*, 314 NLRB 54, 54 (1994) (Employer failed to meet its *Wright Line* burden where no competent, credible evidence was presented that employee had engaged in wrongdoing, or that it had a good-faith belief the employee was engaged in misconduct).⁴⁵

Also, Marsh testified that as of September 14 he had already decided that Servin was to be disciplined, even though Respondent had not interviewed all the witnesses to the incident or received written statements from them. And, when Servin was given his discipline on September 18, Respondent had still not received any written statements from the neutral witnesses. This is evidence of unlawful motive. *Shamrock Foods Co.*, 366 NLRB No. 107, slip. op. at 13 (2018) (employer's investigation is evidence of discriminatory motive when it fails to interview key witnesses) citing *American Crane Corp.*, 326 NLRB 1401, 1414 (1998), enfd. mem. 203 F.3d 819 (4th Cir. 2000); *Aliante Gaming, LLC*, 364 NLRB No. 78, slip. op. at 13 (2016) (sham investigation where employer failed to obtain written statements from other employees present when the incident occurred).

During the conversation that occurred after the incident, Sharron told Arellano and Servin that they were giving him resistance, that he was getting pressure from his bosses to write them up, and that he was going to have to write-up Arellano for an incident that occurred the previous day involving a water valve, and write-up Servin for insubordination. Considering the background events that occurred between Respondent, Arellano, and Servin, and the fact that Arellano and Servin were the only two union stewards at the facility, I find that this statement is further evidence of Respondent's unlawful motive. *Production Plated Plastics*, 247 NLRB 595, 596 (1980), enfd. 663 F.2d 709 (6th Cir. 1981) (ALJ properly relied on supervisor's statement to employee that he had been under pressure to discipline and terminate employees because of the union campaign as evidence of unlawful motive). I also find that this conversation also constitutes an unlawful threat, in violation of Section 8(a)(1) of the Act. Given the context in which this statement was made, including the fact Arellano and Servin were union stewards, and the numerous unfair labor practices found herein, Sharron's statement constitutes an unlawful threat. *KTRH Broadcasting Co.*, 113 NLRB 125, 126 (1955) (supervisor's "friendly warning to [union activist] that 'they are out to get you at all costs' was a threat."). *Avondale Industries, Inc.*, 329 NLRB 1064, 1411 (1999) (telling employee who was wearing union insignias to

"watch [his] butt" because "you know they are out to get you," constitutes an illegal threat).

Based upon the foregoing, I find that the Respondent has not met its burden of proving by a preponderance of the evidence that it would have disciplined Servin absent his union and other protected activities. Accordingly, I find that the discipline issued to Servin for insubordination violated Section 8(a)(3) and (4) of the Act.

H. Servin's Work on the Double-buck

1. Background

In its dry-cleaning operations Respondent uses a machine to press shirts referred to as a "double-buck;" there are about four double-bucks at the facility. A double-buck is basically a double shirt press. The machine has two torso-forms which are fitted with shirts. Each form has extenders to clamp the sleeves/cuffs and a chrome clamp folding down from the top, putting pressure on the neck, to hold the shirt collar in place. The ironing/pressing mechanism is on one side of the double-buck, and basically squeezes down on the torso form pressing the shirt with hot steam which blows out through the sleeves. A device on the machine rotates the forms through the ironing mechanism. As a one shirt is being pressed, a worker fits a clean shirt over the other form. The machine then rotates; the ironed shirt is unloaded, and a new shirt put on, while the shirt on the other form is being pressed. The machine is rotated again, and this process continues throughout the shift. The double buck is operated using various buttons and foot pedals located at a control panel in the front of the machine; the control panel is opposite the ironing/pressing mechanism. (Tr. 206, 232–233, 307, 310, 664–665, Tr. 643, 659–660, 1100, 1105–1106, 1110; R. 19–21)

The various functions on the double buck are controlled by a pneumatic system consisting of around 60 air-hoses running to various parts of the machine. The air-lines themselves are small, about 1/8 inch in diameter, and at various points multiple air hoses run through a larger tube or harness. Vacuum suction also is used on the machine to pull the shirt tight to the torso form so it will be ironed smoothly. If the vacuum system is not working, the double-buck will still operate, but the shirts will not be ironed properly as the shirt will not be held in the proper position for pressing. (Tr. 207, 307, 311, 660, 666–668, 1106, 1108–1110; R. 20, 21)

Because of the working environment, the air hoses on the double buck machine become brittle over time and develop leaks. There are two general ways to locate an air leak when they develop, by sound/touch, or by using soapy water in a spray bottle. Respondent tries to repair air leaks by using a coupling, which is a quick connector with a rubber seal that pins the hose in the area of the leak. However, if a hose is too brittle a coupling will not hold. Because of the machine's configuration, when one or two hoses become too brittle, fail, or when multiple couplings are needed on a hose, Respondent changes out all of the hoses on the machine. This takes hours to complete and requires the machine to be shut down completely. Therefore, Apex first tries to repair

⁴⁵ While Sharron testified Servin was also insubordinate because he talked back, it was clear that Marsh conducted an intervening investigation of the incident for Respondent and Marsh was the one who approved

this discipline. Marsh was specific that Servin was disciplined for refusing to make repairs on the machine. (Tr. 200, 1260)

leaks with a coupling. (Tr. 209, 311, 662, 665–668, 913–915, 1108, 1111)

On September 13, Servin was called to work on a double-buck because the collar clamp would not open. According to Servin, he checked the machine and realized that a faulty air hose was causing the problem. To trace the exact location of the leak, he needed the air to continue flowing through the hoses so he could hear or feel the leak. However, to try and hear the leak Servin testified that he needed to turn the vacuum off, as the vacuum system is loud. (Tr. 206, 660, 1106–1108; R. 19)

According to Servin, each double-buck contains a switch for the vacuum to that particular machine located at the operator's control panel; the switch is easily accessible to anyone. Therefore, he turned off the vacuum switch on the machine and was able to hear the leak. He then used a coupling to stop the leak and get the machine working again. Servin said that all of the air hoses on the double buck he worked on were brittle and needed replacing. Therefore, he told the engineer who was coming on duty, named Ivan, to watch the machine because the hoses could snap. (Tr. 1106–1111)

According to Marsh, on September 13 he heard several calls coming over the radio that the double-buck was down, so he went to investigate. When he arrived at the location, Marsh testified that Servin and a utility engineer were troubleshooting the machine and had determined a broken airline was preventing the collar clamp from working. At the time, Marsh believed that Servin had a good game plan in place to fix the machine. Marsh testified that, at the end of Servin's shift, the two spoke briefly. Servin told him that he had returned the double-buck to service and turned the machine over to the next engineer regarding the repairs that were made; Servin then left for the day. Shortly thereafter, Marsh said that he continued getting calls that the double-buck was not functioning. He went back to the floor and saw that the unit was not working properly. According to Marsh, the coupling Servin fastened on the air hose had fallen off, and the machine was returned to service without any vacuum power. Marsh claimed that the vacuum had been turned off at the circuit breaker, which is located in the electrical panel about 20 feet away from the machine. (Tr. 205–209, 342; GC 20)

Regarding the coupling, Marsh said that he actually saw the coupling had fallen off. As for the vacuum being turned off at the circuit breaker, Marsh did not see this first-hand. Instead, somebody told him the machine did not have vacuum pressure. Marsh testified that the vacuum on the double-buck is turned on and off via a separate power system. When asked what Ivan did to fix the machine, Marsh testified that he "believed" Ivan replaced the coupling, and then tracked down the issue with the vacuum system. (Tr. 343) According to Marsh, Ivan was working on the machine from 4:15 p.m. to 5 p.m., and during this time the machine was inoperable. (Tr. 206–207, 342–343)

Although Sharron was not involved in this discipline, he testified generally about the double-buck press. According to Sharron, air pressure to the machine's hoses is on at all times, "24/7." (Tr. 661) Sharron said the double-buck does not have a separate switch at the operator's control panel to turn the vacuum on and off, nor is there a separate power system for the vacuum. Instead, Sharron testified that the vacuum system comes on automatically when the main power is turned on. Then, with the power on, the

machine independently activates vacuum suction when it is needed. Sharron also testified that, to deactivate just the vacuum, someone would need to physically disconnect the vacuum power from the switch, as it cannot be turned on and off, and turns on when the main power is activated. Finally, Sharron said that if power to the double-buck was turned off at the circuit breaker, the air valves on the machine would not allow air to travel through the pneumatic hoses, as the valves could not be turned on, even manually, in such a scenario. (Tr. 660–663)

Marsh determined that Servin's actions warranted discipline. He prepared a written warning, which is dated September 14, for "substandard work/work slowdown." According to Marsh, the term "work slowdown" only meant that the machine was inoperable, causing a loss of production. In the discipline Marsh wrote that Servin repaired an air-line on the double-buck, informed Ivan of the repair, but later, dry cleaning called saying the equipment was not working. According to Marsh's narrative, Ivan found the original air leak needed further repair and that the vacuum was left off at the breaker. The discipline also states that the equipment was inoperable from 4:15 p.m. to 5 p.m., and that Servin needed to be better aware that all functions and energy sources were restored when returning equipment to service. The discipline was not presented to Servin until September 18. (Tr. 210; GC. 20)

2. Analysis

Apex has not shown that it would have disciplined Servin for this incident absent his union or protected conduct. Sharron specifically testified that employees would not be disciplined for trying unsuccessfully to fix a machine, unless they tried to cover something up. Here there was no coverup, but Servin was disciplined nonetheless. *Shamrock Foods Co.*, 366 NLRB No. 107 slip op. at 1, fn. 1 (2018), enfd. 779 Fed.Appx. 752 (D.C. Cir. 2019) (per curiam) (disparate treatment where employer's witnesses testified other employees made similar mistakes but were not disciplined). If anything, the fact the coupling fell off was more a sign that the hoses on the double-buck were too brittle and needed replacing, something Respondent puts off until absolutely necessary, rather than indicating something was wrong with Servin's repair. Moreover, I do not credit Marsh's testimony that Servin turned off the vacuum pressure on the machine at the circuit breaker. This was not something that Marsh witnessed firsthand. And, while the testimony from the various witnesses differed, Sharron testified that air pressure is functioning on the double buck at all times, there is no separate power system for the vacuum on the machine, and the vacuum on the double buck is turned on and off when the main power is activated/deactivated. As Sharron was Respondent's chief engineer, he surely knew how the machine operated.

Also, as noted later in this decision, I have found that Respondent violated Section 8(a)(3) and (4) of the Act by holding engineers to a higher standard, and more strictly enforcing work rules, after the CBA was signed. This further supports a finding that Respondent would not have disciplined Servin for this incident absent his union and protected activities. Accordingly, Respondent's conduct violated Section 8(a)(3) and (4) of the Act.

I. Arellano's Suspension and Termination

On September 18, 2018, Arellano was presented with two

separate disciplines, one concerning work he performed on a water valve on September 5, and another involving a piece of equipment he turned off on September 12; he was also suspended. Arellano returned to work on September 26 but was fired the next day. (GC 17, 18, 21)

1. September 5, 2018 repair on a water valve

On September 5, Arellano was dispatched to inspect a water valve on press #1. The valve would not shut off at the appropriate time, causing water to flow freely through the line. Respondent was wasting water as a result. (Tr. 177, 882; R. 8 p. 2; GC 17)

The defective part was a solenoid valve located on the side of a vertical hydraulic tank that sat on top of a platform at the end of washing tunnel #1. A copper water pipe ran down one side of the hydraulic tank and connected to a quarter-turn valve with red handle, which in turn connected to a pvc hose. The pvc hose ran to the solenoid valve which was on the opposite side of the hydraulic tank. Water flowed down the copper pipe, through the red-handled valve, to the pvc hose, and then through the hose to the solenoid valve. Inside the solenoid valve was a disc/diaphragm which regulated the opening and closing of the valve and allowed water to flow to a heat exchange unit at the appropriate interval. In the heat exchange unit the water cooled hydraulic oil that circulated through the system; the hydraulic oil was necessary for the press to function properly. The solenoid valve was connected to an electronic coil. When the coil was energized the valve was supposed to open allowing water to flow through the valve. When it was de-energized a plunger closed on the diaphragm stopping the water from flowing. (Tr. 714, 885, 989–996; R. 47, R. 48, R. 54)

To investigate the problem, Arellano turned the red-handled valve to the off position; this stopped water from flowing through the copper pipe to the solenoid valve and on to the heat exchange unit.⁴⁶ He examined the solenoid valve and saw that the diaphragm was missing. Thus, the valve could not close; this was causing water to flow freely to the heat exchange unit instead of at specific intervals as designed. (Tr. 177, 883–884, 988–991, 993–994; R. 48)

Arellano testified that he reported the matter to Sharron, telling him that water was flowing freely, and they needed to replace the solenoid valve. According to Arellano, an exact replacement part was not available, but Respondent had other, more expensive, solenoid valves available that could have performed the same function. Arellano said that Sharron told him the other valves were more expensive and were for other equipment, thus Apex would just order a replacement part and change the solenoid valve when it arrived. According to Arellano, after discussing the matter with Sharron, he picked up his tools and left for the day as his shift had ended. When asked whether he turned the valve with the red handle back on before leaving, Arellano testified that he could not remember. At the time he was working on the solenoid valve, Respondent was between production shifts, so the machines were not working. (Tr. 178, 885–886, 996; R. 48)

⁴⁶ Arellano first identified the specific valve he closed during cross-examination by Respondent's counsel. (Tr. 988–989) In fact, it was Respondent's counsel who showed Arellano a picture of the valve and

Sharron denied that he spoke with Arellano that day. Instead, Sharron testified that he came to work as Arellano was getting ready to leave; the two did not interact. According to Sharron, the primary reason for Arellano's discipline was because he did not turn the valve back on which resulted in the press overheating. However, at the hearing, when asked by Respondent's counsel to identify the specific valve that was turned off, causing the press to overheat, Sharron testified that it was not the red-handled valve attached to the copper pipe. Instead, Sharron said that Arellano was disciplined for turning off the main water valve, which has a white handle, and is located on the other side of the tank. (Tr. 637–638, 712; R. 8, R. 17, R. 48)

Sharron drafted the discipline that was ultimately given to Arellano over the water valve. As for when he prepared the document, Sharron testified that he drafted it “[o]n 9/6/18, the day that it happened.” (Tr. 1325) However, the document itself, as well as the accompanying work order, states that Arellano inspected the solenoid valve on September 5. (Tr. 636, 1320, 1325; R. 8; GC 17)

Marsh testified that he approved Arellano's discipline, after speaking with Sharron and reviewing the situation; Marsh was not onsite that day and did not witness any of the events firsthand. According to Marsh, Arellano was asked to inspect the solenoid valve on press #1, as it would not shut off after the cooling temperature had been reached, resulting in Respondent wasting water. Arellano did this work between production shifts when the machines were not operating. According to Marsh, Arellano shut down the unit and documented the required parts that needed to be purchased but he did not turn the valve back on. Marsh identified the same valve as Sharron, the main water valve, as the one that was turned off causing the machine to overheat. Marsh testified that, about an hour after the next shift started production, the press overheated resulting in the unit being shut down for an hour to allow the machine to cool down. Although some production time was lost, the machine did not sustain any damage. Marsh stated that when he asked Arellano what happened, with respect to the press overheating, and Arellano told him “I guess I forgot a valve.” (Tr. 178) (Tr. 175–180, 187)

2. Rema Vac discipline

The second discipline given to Arellano on September 18 involved his turning off the power to a Rema Dry-Vac air vacuum (Rema Vac). Rema Vacs are used only in Respondent's dry-cleaning operation where steam is used to press out wrinkles. At the time, Respondent was using Bay 7 to operate its commercial dry-cleaning business. Apex was starting a home dry cleaning service and installed new dry-cleaning equipment in Bay 8 for this purpose, as well as to assist with the commercial dry-cleaning overflow. The equipment in Bay 8 was installed by AJ Industries, a company owned by Dramise, and Respondent's engineers were not involved with the installation. The equipment was brand new, and Apex had not yet started using it for dry-cleaning work. (Tr. 190–194, 313, 642–643, 892–893, 997–999, 1002; GC 18; R. 22)

asked him if he turned off the valve with the red handle to work on the solenoid valve; Arellano answered yes. (Tr. 988–989; R. 48)

The equipment installed in Bay 8 was similar to that which was already installed in Bay 7. Once operational both bays would have the same capabilities. Two new Rema Vacs were installed in Bay 8, to correspond with the two that were already in Bay 7. (Tr. 313)

The primary purpose of a Rema Vac is to draw out steam used by the dry-cleaning presses, discharging it through the exhaust system that vents via the roof. The Rema Vac looks like a home water-heater tank but sits about two feet above the floor on a metal base. A copper pipe attaches to the middle of the unit. This pipe runs to a manifold and ultimately attaches to the various presses, providing a constant vacuum pressure. Each press also has a foot pedal which opens a port allowing for additional vacuum pressure to remove the steam. The top of the unit contains a black steel pipe that is used to vent the steam/warm air through the rooftop exhaust. The lower half of the Rema Vac contains a 15-gallon tank that collects water from the condensed steam that cannot be vented. At the bottom of the collection tank is a spigot with a valve. On a daily basis engineers use the spigot to drain the tank into a utility bucket. (Tr. 191, 312–313, 896, 997–998; R. 22)

The Rema Vacs in Bay 8 were installed in such a way that they shared the same exhaust system with those in Bay 7. Another third-party contractor installed the exhaust system, and Respondent's engineers were never informed that Bay 7 and Bay 8 shared an exhaust. These were the only two bays at the plant that shared an exhaust system. (Tr. 194–195; 894–895)

At some point during the morning of September 12, Arellano walked by Bay 8 and saw the Rema Vacs were running, even though dry cleaning production was not occurring. Therefore, he turned the Bay 8 Rema Vacs off. For Arellano, turning off equipment that was not being used conformed to Respondent's longstanding practice. Apex expected employees to turn off equipment that was not being used in order to save money, conserve energy, and protect the machinery. (Tr. 192, 196, 644, 891–894, 897–898)

Later that morning, when dry cleaning employees started using the equipment in Bay 7, all of the steam extracted from the Bay 7 Rema Vacs did not vent through the ceiling. Instead, some of it traveled backwards through the joint exhaust system resulting in water/condensate accumulating in the Bay 8 Rema Vacs. This would not have occurred if the Bay 8 Rema Vacs were running, as pressure from the machines would have stopped the Bay 7 steam from backflowing into Bay 8 via the joint exhaust; instead the steam would have vented through the roof. For this reason, Marsh wanted the Rema Vacs in Bay 8 to remain running at all times. Using Respondent's iPads/tablets Marsh could have notified the engineers by email that he wanted the Rema Vacs to stay on. He did not do so. Instead, the day before the incident occurred, Marsh verbally told the day-shift engineers to leave the machines running. However, because of Arellano's schedule he had left for the day and was not present during this discussion. Marsh also gave the swing shift engineers the same instructions and told them to inform the graveyard shift accordingly. Marsh never told Arellano to keep the machines running but expected that he would learn about the instructions by word of mouth. However, nobody ever told Arellano. (Tr. 194–196, 330–331, 893–896, 999–1000)

The water backing up into the Bay 8 Rema Vacs did not cause any damage to the machines, and there is no evidence that it caused a loss of production. Instead, the water was drained from the machines and they were turned back on. (Tr. 330–331, 896, 1005)

3. September 18, 2018 disciplinary meeting

The disciplinary meeting on September 18 was held in Marsh's office; present was Marsh, Sharron, Arellano, and Servin. There were multiple disciplines presented to Arellano and Servin, and the parties reviewed each discipline individually. Regarding the water valve, during the meeting Marsh told Arellano that leaving the water valve off constituted substandard work. Servin asked Marsh when the company started disciplining employees for substandard work, and according to Arellano, Marsh had the CBA in front of him, looked at the date of the agreement, and said as of July 20. Arellano testified that during the meeting Sharron said that another engineer named Ivan was the one who said that the water valve was turned off, and that Ivan's work order would serve as his statement of what occurred. However, during his review of the incident, Marsh looked for a work order from Ivan but never found one. (177–178) (Tr. 888–891, 1118, 1317, 1322; R. 8 #010248)

Regarding the Rema Vac, the disciplinary document is dated September 14 and states that Arellano turned off both Bay 8 Rema Vacs at 4:38 a.m., which caused them to fill with water/condensate from the Bay 7 dry cleaning operations. The document also states that Arellano was suspended pending investigation, and that human resources would contact him as to the outcome of the investigation. The document was signed on September 18 by both Marsh and Arellano, with Arellano writing that he strongly disagreed, and further noting that he signed the document under protest. (GC 18)

During the September 18 meeting, Arellano said that he turned off the Rema Vacs because they were not being used. Marsh replied saying that he told the other shifts about leaving the machines on, and that Arellano should have known because somebody should have told him. Marsh testified that he watched the surveillance video and saw Arellano turn off the machines and thought Arellano turned them off because they were not in use. Notwithstanding, during the September 18 meeting, Marsh told Arellano that he was suspended until human resources could investigate and that Marsh would let him know of the outcome of the investigation. (Tr. 196–197, 214–215, 899, 1112)

There was conflicting testimony as to why the parties did not meet until September 18 regarding the various disciplines. Marsh originally testified the delay was caused by scheduling and trying to get everyone in the room at the same time. He then said he believed Sharron may have requested that Servin and Arellano attend a meeting a week earlier, but they failed to show up. However, he later admitted that, other than what Sharron may have told him, he did not know whether Arellano or Servin were ever asked to attend any earlier meeting. Both Servin and Arellano denied that they had ever failed to show up for a disciplinary meeting with Marsh. As for Sharron, he testified that there were a couple of times that Respondent delayed issuing discipline because they were waiting for both Arellano and Servin to be at work on the same day. (Tr. 188–189, 647, 1100–

1101)

4. Respondent suspends and then discharges Arellano

According to Marsh, Arellano's suspension was only supposed to last for 3 working days. However, time dragged on and Marsh did not hear anything regarding the investigation. Marsh testified that he then sent an email saying he planned to bring Arellano back to work, and when he did not get a response, contacted Arellano telling him to return to work on September 26. Arellano worked a full day on September 26. That day, while Arellano was working, Marsh met with Marty Martin and Joe Dramise to discuss Arellano. According to Marsh, during this conversation it was determined that Arellano would be fired. Marsh testified that while he and Marty Martin provided input during their discussions, it was Dramise who made the final decision to fire Arellano. They had previously received input from Sharron, Respondent's human resources personnel, and the AdvanStaff team. According to Marsh, each of Arellano's previous disciplines were considered and formed the basis for his discharge. The next day, Marsh said that Marty Martin and Dramise came to his office and told him that Arellano had to be let go. Other than Servin, Walker, and Arellano, Marsh could not recall any other engineer having ever been fired by the company. (Tr. 212–221, 338–339)

According to Marty Martin, the decision to both suspend and discharge Arellano was made by himself, Marsh, Sharron, and Dramise; it was a joint decision. And the decision was based upon the various behaviors outlined in Arellano's previous disciplines. According to Marty Martin, Arellano engaged in repeated incidents of misconduct, and they did not believe it was going to get any better. (Tr. 406–408)

Dramise denied that he participated in the decision to terminate Arellano. According to Dramise, he received a call from either Marsh or Sharron who alerted him to the situation, and his only instructions were to make sure they followed the guidelines laid out in the CBA. Regarding both Arellano and Servin, Dramise testified that they caused the company a great level of frustration. According to Dramise, Arellano and Servin used to be good employees "until this union thing happened, and they decided to go rogue." (Tr. 465) Dramise testified that he had no explanation for their conduct, other than the Union, saying "I had two good employees that all of the sudden became bad actors, bad players, and created a lot of problems in the Company." (Tr. 465) (Tr. 451–453)

On September 19, Dramise sent an email to the Union in which he specifically discussed both Arellano and Servin. The email was part of a string of emails relating to an information requests the Union had made, along with other issues. In the email, Dramise wrote, in reference to Arellano and Servin, that a significant amount of time was being spent "dealing with a few individuals that do not want to honor the contract." (GC. 5 p. 3) He further wrote that "[j]ust have them do their job, that's all we want. They seem to be embolden[ed] to not do their job and always looking for ways to give Apex trouble." *Id.* (emphasis in original) Dramise further complained that whenever Respondent disciplined Servin and/or Arellano the Union filed grievances, pursuant to the CBA. He further wrote that "[t]his is a never ending cycle and I don't know where this ends but I'm losing my

patients [sic] on this process." *Id.* (Tr. 462) For Arellano, the process ended with his termination on September 27.

On September 27, Marsh called Arellano into his office and told him that he was fired. Servin was also present along with another official from the company. During the meeting, Marsh told Arellano that he was being fired for poor workmanship. Marsh gave Arellano his termination notice which states that he was being fired for violating company policy, citing the following sections of the employee handbook: Section 5-1-5 (Violation of safety rules and policies), Section 5-1-14 (Willful or careless destruction or damage to company assets or to the equipment or possessions of another employee), and Section 5-1-20 (Unsatisfactory job performance). The document also cites Article 13.01 of the CBA, which is the section of the contract covering discipline and discharge. (Tr. 213, 916, 919; GC 3, GC 21; R. 3)

5. Analysis

Respondent has not rebutted the General Counsel's prima facie case to show that it would have disciplined, suspended, and discharged Arellano absent his union and other protected conduct. Regarding the water valve incident, Respondent claimed the unit overheated because the main water valve (with the white handle) was shut. However, there is no evidence Arellano did anything to the main water valve. Instead, when working on the solenoid he turned off another valve, one with a red handle, which was never implicated in the machine's overheating. *Olathe Healthcare Center, Inc.*, 314 NLRB 54, 54 (1994) (Employer failed to meet its *Wright Line* burden where no competent, credible evidence was presented that employee had engaged in wrongdoing, or that it had a good-faith belief the employee was engaged in misconduct). Also, Respondent never took a written statement from Ivan regarding what occurred, and Marsh said that Ivan's work order would serve as his written statement, however no such work order existed. *Aliante Gaming, LLC*, 364 NLRB No. 78, slip op. at 13 (2016) (sham investigation where employer failed to obtain written statements from other employees present when the incident occurred).

Regardless of whether Arellano was, or was not, ultimately responsible for turning off the main water valve, even assuming he was, Respondent has not established that it *would* have disciplined Arellano absent his protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (italics in original). Marsh told Arellano and Servin that Apex started disciplining engineers for substandard work as of July 20, the effective date of the CBA. And, Sharron told Arellano that he was not going to discipline him for the water valve but was getting pressure from his bosses to do so. I have found below that Respondent violated Section 8(a)(3) and (4) by holding employees to a higher standard and more strictly enforcing work rules because of their protected activities, and this is an example of Respondent doing so.

As for the discipline involving the Rema Vacs, the circumstances clearly support a finding of unlawful motive. When Arellano turned off the Bay 8 Rema Vacs he was following Respondent's established protocol of turning off equipment that was not being used in order to save money, conserve energy, and protect the machinery. Marsh admitted that this was Respondent's established practice. (Tr. 196) Neither Marsh, nor anyone

else, informed Arellano that the Rema Vacs in Bay 8 were to be left on, Respondent's engineers did not install machines, and were never told that the Rema Vacs in Bays 7 and 8 shared an exhaust system. Under these circumstances blaming Arellano for turning off the machines, when he was following Respondent's established procedures, is evidence that Apex's true motives were unlawful. Cf. *Master Security Services*, 270 NLRB 543, 551 (1984) (Pretext where employer disciplined guard, in part, for not knowing what certain keys were used for when employer never provided the guard with training or instructions regarding the keys.)

The same is true regarding the discharge. Marty Martin and Marsh stated that the decision to fire Arellano was based upon his previous disciplines, which I found were unlawfully issued. Board law is clear, when an employer disciplines an employee based on prior disciplines that were unlawful, "any further progressive discipline based in whole or in part thereon must itself be unlawful." *The Hays Corp.*, 334 NLRB 48, 50 (2001); see also *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013) ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action."). Accordingly, on this basis alone, Respondent's decision to fire Arellano based, at least in part, on his previous disciplines, is a violation.

Moreover, Respondent's inconsistent testimony as to who made the decision to fire Arellano is indicative of unlawful motive. See *Maywood, Inc.*, 251 NLRB 979, 993-994 (1980) (inconsistent testimony from company witnesses as to who made decision to discharge employee and the reason for the discharge is evidence of pretext to hide the real reason, advocacy for the union); Cf. *Planned Building Services, Inc.*, 347 NLRB 670, 713-715 (2006) (in a refusal-to-hire case, inconsistent testimony as to who made decision to not hire employees supports a finding of pretext). Marty Martin testified that the decision to fire Arellano was a joint decision involving himself, Sharron, Marsh, and Dramise. Marsh testified that, while others had input, the ultimate decision was made by Dramise. For his part, Dramise denied any involvement in the decision, saying that he was only alerted to the situation and he told his subordinates to make sure they followed the CBA guidelines. I find the entire testimony from Respondent's officials regarding the decision-making process, and the reasoning for the discharge, to be a charade.

Sharron had previously stated that the CBA would be used against employees to get them fired, by disciplining them and three strikes "one, two, three, you're done, down the road." (Tr. 1178) And Respondent's management team was clearly targeting both Servin and Arellano, with Dramise saying that, other than the Union, he could not explain why "two good employees all of a sudden became bad actors, bad players, and created a lot of problems in the Company." (Tr. 465) *Knoxville Distribution Co.*, 298 NLRB 688, 688 (1990), enf. 919 F.2d. 141 (6th Cir. 1990) (employer's speech, made the same day three employees were reinstated following their unlawful discharge, saying the company "did not need 'troublemakers,' evidenced the

Respondent's continuing anti-union animus towards the employees); *Ramada Inn*, 172 NLRB 248, 251 (1968) (referring to employee as "troublemaker" evidence of unlawful motive); *United Parcel Service*, 340 NLRB 776, 777 (2003) (saying employee was "troublemaker" because of his involvement in filing grievances is evidence of animus). Marsh stated that Respondent only started disciplining employees for poor workmanship after the CBA, and it is clear that Respondent was looking for any excuse to write up Arellano and Servin "one, two, three, you're done, down the road."⁴⁷ (Tr. 1178) Under the facts presented, Respondent has failed to show by the preponderance of the evidence that it would have disciplined, suspended, and discharged Arellano absent his union and other protected activities. Accordingly, Respondent's actions against him violated Section 8(a)(3) and (4) of the Act.

J. Servin's December 18, 2018 Discharge

1. Background

On December 18, 2018, Respondent discharged Servin. There was no written warning, or oral discipline given to Servin that precipitated his discharge. Instead, he was called into a conference room on December 18, and given an employee termination form, which was completed by Marsh, saying he was fired because his performance was below standard. The termination form contains a box asking whether written or verbal warnings were given, and if so, states that they should be attached to the form. Marsh checked "yes" in the box, but no such documents were attached to the termination form. And, other than the previous disciplines outlined herein, no new disciplines were introduced into evidence. The document further states that Servin would not be recommended for rehire. (Tr. 221-223, 1119; GC. 22)

As for his termination, Servin testified that on December 18 he was working when Marsh brought him into a conference room near the company offices. Present in the room was Servin, Marsh, and Marty Martin. Marty Martin presented him with the discharge paperwork saying that he was being terminated for a lack of productivity and not answering floor calls. According to Servin, Respondent did not have a specific standard regarding answering floor calls, so during the meeting he asked Marty Martin what the standard was; Martin replied saying there was no standard. Servin then asked how he could be below standard if Respondent did not have a standard. However, before Martin could answer, Marsh cut him off saying that was not what Martin said. (Tr. 1120) Servin replied saying that was exactly what Martin had said but was told by Marsh they were not going to discuss the matter any further. Servin then turned in his belongings. (Tr. 1118-1120)

Regarding Servin's discharge, Marsh testified he was the one who drafted the termination notice, and that Servin was fired for poor performance. When asked who made the decision to fire Servin, Marsh testified that it was a "conversation" between himself, Dramise, Marty Martin and Sharron. However, it was Dramise who had the final say. (Tr. 221-222; GC 22)

⁴⁷ I find this to be a more credible reason as to why Respondent waited almost 2 weeks to issue Arellano a discipline for the water valve incident. Respondent waited in order to pile on consecutive disciplines to fulfill

Sharron's prediction, three strikes "one, two, three, you're down the road." (Tr. 1178)

According to Marsh, there were several incidents which happened in preceding the 4–5 days that culminated in Servin’s discharge. Marsh said that Marty Martin brought these incidents to his attention, which included repairs taking longer than expected and equipment downtime which affected production. According to Marsh, a review then determined that Servin’s workmanship was in question and after reviewing Servin’s previous write-ups, his findings were brought to the group and it was determined that Servin would be fired. In deciding that termination was appropriate, Respondent took into consideration each of Servin’s previous disciplinary actions. (Tr. 222–223, 339)

To examine Servin’s work during the week before he was fired, Marsh said that he reviewed 15–20 work orders, and video if it was available. Marsh thought Servin’s repairs seemed to be taking longer than was necessary. He also testified that he made notes of his review and attached them to Servin’s termination form in his files. That being said, no such notes or other documentation are attached to the termination form, nor were they otherwise introduced into evidence. Finally, Marsh confirmed that Respondent does not have a formal standard regarding how long various repairs are supposed to take. (Tr. 223, 225; GC 22)

Marty Martin testified that he was present the day Servin was fired. According to Martin, Servin’s discharge was based upon a number of incidents, including the conduct outlined in Servin’s previous disciplines. Martin said that Servin was dragging out repairs, made some serious mistakes that caused excessive downtime, Marsh and Sharron were reporting Servin was not up to standards, and that he was not trying to improve. (Tr. 408–410)

Dramise testified that, while he was aware Servin was fired, his involvement in the decision was limited to general phone calls with Marsh and Sharron where they told him what was happening, as opposed to asking him for permission to fire Servin. According to Dramise, he does not get into much detail regarding disciplinary matters but leaves the decision up to his managers and tells them to follow the procedures set forth in the CBA. As with Arellano, Dramise was frustrated with Servin and believed that he was once a good employee “until this union thing happened” and he decided to “go rogue” along with Arellano. Other than the union drive, Dramise had no explanation for the conduct of Servin and Arellano saying that he “had two good employees that all of the sudden became bad actors, bad players, and created a lot of problems in the Company.” (Tr. 465) Dramise was also frustrated the Union filed grievances whenever Respondent disciplined Arellano and Servin, he thought it was a never-ending cycle and was losing his patience with the process. (Tr. 455, 457, 464–465; GC 5 p 3)

2. Engineer work statistics

In 2018 Apex had a practice of tracking the work completed by engineers during their shifts and posting those statistics. The General Counsel introduced into evidence two sets of documents from Apex’s records ranking the engineers for August and September of 2018. These documents ranked the engineers in terms of total work orders completed and total labor hours entered. In both sets of documents, the top three engineers in each category appear in red font and at the bottom of the page the word

“LEADERS” is also listed in red font. The remaining engineers are listed in black font. According to Marsh, these documents were created, compiled, and posted by John Robinson (“Robinson”), who manages Respondent’s maintenance program. Robinson stopped posting the documents in October 2018. (Tr. 227–28, 1220–1221; GC 23, 53)

The first set of documents are titled “Work Order Leaders” and list the total work orders completed (both scheduled and unscheduled). In August 2018 Servin was second, with 203 total work orders completed for the month. The engineer in first place completed 212 total work orders and the one in last place completed 63. In September 2018 Servin was in first place with 232 total work orders completed. The engineer in second place completed 210 work orders while the one in last place completed 81. (GC 53)

The second set of documents are titled “Labor Leaders.” These list the total labor hours entered for each engineer. In August 2018 Servin was in fourth place, with 134.62 total labor hours. The engineer in first place had 170.19 labor hours for the month, while the two engineers with the least amount of labor hours worked had 77.07 and 24.50 hours respectively. Two engineers have an asterisk next to their names and their work hours. (GC. 53) At the bottom of the document it states that the asterisk represents employees who had multiple dates listed with more labor hours entered than hours worked. In September 2018 Servin is listed sixth, with 101.22 total labor hours entered. The labor hours for the remaining engineers below Servin ranged from 78.48 to 24.50 labor hours. The engineer in first place had 138.89 total labor hours. One employee is listed with an asterisk next to his name for September, and the document similarly states that the asterisk represents someone who has multiple dates listed with more labor hours entered than hours worked. (GC 53)

Regarding these documents, Servin testified that they were posted on a bulletin board in the tool room. Servin said that each engineer has a set of preventative maintenance “PM” tasks, which they are assigned on a weekly basis, such as greasing and cleaning machines. They also receive unscheduled work calls during their shift. Thus, the document titled “Work Order Leaders” tallies the number of both scheduled and unscheduled projects each engineer completed for the month. Regarding the document titled “Labor Leaders,” Servin testified that each engineer enters into his iPad/tablet the time it takes to complete a task, including both scheduled and unscheduled work orders. The software then adds up the total number of hours worked per engineer, and these numbers are then posted. (Tr. 1120, 1123–1124, 1038)

According to Servin, after the September 2018 numbers were posted, which ranked him first in total work orders completed, Robinson shook his hand and told him that he was doing a really good job. Servin testified that, more than once, Robinson had told him that being at the top of both lists is viewed as a positive attribute by Apex. Regarding the asterisks on the documents, Servin testified that Robinson had explained to the engineers that the asterisks represent employees who had entered more labor hours for their projects than the actual number of hours they had worked. Finally, Servin said that, between the time the last statistics were posted, and his discharge in December, his work

performance had not changed in any way. (Tr. 1125–1131)

Regarding the rankings, Marsh testified that, notwithstanding what the documents said, the names listed in red font signify that those employees either worked more hours than was physically possible or there were discrepancies in the raw data used. Marsh claimed that he got this information from speaking with Robinson. However, when it was noted that the asterisks on the documents actually denote the engineers who had more labor hours entered than hours worked, Marsh said that these were not his reports, but were Robinson's and it would be up to Robinson to explain what they meant in detail. Finally, regarding Servin's productivity, Marsh testified that he did not review anything that showed Servin's productivity had fallen dramatically in December 2018. (Tr. 229, 1221, 1257–1258)

3. Analysis

The evidence shows that Servin's discharge was unlawful. His union and protected activity is well documented, as is Respondent's knowledge and animus. And, Apex has not shown by a preponderance of the evidence that Servin would have been fired absent his protected activity.

Respondent's claims that Servin was fired because his performance was below standard is refuted by the fact he was at or near the top of the engineer work statistics for the months of August and September, and Marsh's testimony that he did not review anything that showed Servin's productivity had fallen dramatically in December 2018. Any testimony by Marsh trying to diminish the importance of Respondent's statistical reports, by claiming there were discrepancies in the raw data because Servin's name is listed in red, is belied by the documents themselves. The plain reading of the documents show that the names listed in red delineated the workplace leaders in those categories. Indeed, when Servin ranked first in September he was even congratulated by the Apex official who was responsible for tracking the data. This is just another example of Marsh trying to tailor his testimony to support Respondent's case, notwithstanding what the actual evidence showed.

Similarly, not credible are claims by Marsh and Marty Martin that Servin was dragging out repairs, making serious mistakes, taking too much time, or that his work was not up to standard. Between his September disciplines, which I found to have been issued unlawfully, and his December termination, Servin did not receive any other discipline, nor is there evidence that his work was substandard. Instead, when his work was being tracked, he finished at or near the top of the rankings.

Marsh's testimony that there were several incidents that occurred in the days preceding Servin's discharge is also unworthy of belief. Marsh claimed to have reviewed 15–20 work orders, and video, which showed that Servin's repairs seemed to be taking longer than necessary, and said he made notes of his review and attached them to Servin's termination form. However, no such notes were attached to Servin's termination form, nor were they independently introduced into evidence. Neither were any such work orders or videos introduced into evidence. Therefore, I find that either no such notes or documents/videos showing deficiencies ever existed, or if they did exist, they were unfavorable to Respondent's case. See *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (“[W]hen a party has relevant

evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.”); *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 366 NLRB No. 97, slip op. at 10 (2018) (“An adverse inference may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue.”).

Respondent's inconsistent testimony as to who made the final decision to discharge Servin is also evidence of an unlawful motive. See *Maywood, Inc.*, 251 NLRB 979, 993–994 (1980); Cf. *Planned Building Services, Inc.*, 347 NLRB 670, 713–715 (2006). Marsh testified that Dramise had the final say in the discharge, while Dramise, who was frustrated with the Union's grievances and labelled Servin and Arellano as “bad actors” who went “rogue” after the engineers unionized, testified that he leaves those decisions up to his managers.

Finally, the fact that Respondent relied upon Servin's past disciplines, which I have found to be violations, is also evidence of the unlawful nature of Servin's discharge. *The Hays Corp.*, 334 NLRB 48, 50 (2001); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 787 (8th Cir. 2013). As such, I find that Respondent has not shown by a preponderance of the evidence that it would have discharged Servin absent his union and other protected activities, and by terminating his employment Respondent violated Section 8(a)(3) and (4) of the Act.

K. *Changes in Disciplinary Practices were Unlawfully Motivated*

Complaint paragraph 6(n) alleges that Respondent changed its disciplinary practices, in violation of Section 8(a)(3) and (4) of the Act. Specifically, the General Counsel asserts that Apex started disciplining engineers for safety violations and substandard work only after the collective-bargaining agreement was executed. *Id.* (GC Br. at 51)

It is well established that an employer violates the Act when it increases discipline among its employees in response to their engaging in union or other protected activities. *Jennie-O Foods*, 301 NLRB 305, 311 (1991). If the General Counsel shows that the pattern of discipline after the commencement of union activity deviated from the pattern of discipline prior to the start of union activity, a prima facie case of discriminatory motive is established, and the Respondent is then required to show that its increased discipline was motivated by considerations unrelated to employee union activities. *Id.* (citing *Keller Manufacturing Co.*, 237 NLRB 712 fn. 7 (1978)) “The issuance of warnings pursuant to stricter enforcement constitutes a further violation of . . . the Act.” *Id.* (citing *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987)).

Here, the credited evidence supports a finding that Respondent did, in fact, change its practice and more stringently enforced its work rules to target employees because of their union activities. For example, a few weeks before the CBA was signed, and during the general timeframe that the Union was arranging for a ratification vote, Sharron told Walker that he was going to use the engineers' own CBA against them to get them fired. He said to Walker that there was nothing in the contract saying he could not write-up employees, and “one, two, three, you're down the road.” (Tr. 1117)

When Respondent held a mandatory meeting for all engineers on August 15, 2018, Marsh testified the purpose of the meeting was to bring the staff together and give them a heads up that Respondent had signed a CBA with the Union, and that the previous rules of engagement were changing; they were operating under new rules. (Tr. 116, 118) He also told them, among other things, the department had been slacking. At the same time, Sharron told the engineers that the meeting constituted their first and final verbal warning and that if they did not meet expectations he was going to start writing-up the engineers. (Tr. 802–804) When questioned about his comments, Sharron doubled down, saying again that the engineers would be written-up if they did not meet expectations, because the engineers now had a contract, were well paid, and “so we have a higher standard for you guys.” (Tr. 803)

At the hearing, when asked whether Respondent issued disciplines for safety violations prior to the collective-bargaining agreement, Marsh said that he could not recall any such disciplines. (Tr. 162–163) The only incident, before the CBA, he could remember that came close to a discipline was one in which two individuals were hoisting each other up with a forklift. However, those two employees were “spoken to about the proper use of [a] forklift” and nothing was documented in their work record. (Tr. 163) Arellano, on the other hand, was given a written warning for a safety violation involving the Weightanka about 3 weeks after the CBA was signed. (GC 13) Moreover, during Arellano’s disciplinary meeting on August 16, 2018, Marsh was asked when Respondent started disciplining employees for working on the roof; he looked up an email on his computer and said as of July 30. (Tr. 859–860) During the September 18, 2018 disciplinary meeting involving both Servin and Arellano, when asked when the company started disciplining employees for substandard work, Marsh looked at the date of the CBA, and told them as of July 20. (Tr. 888–889, 1118; R. 8 #010248)

In sum, I believe that the credited evidence establishes a prima-facie case showing show that, after the CBA was negotiated with the Union, Respondent started holding engineers to a higher standard than before, and more strictly enforced its work rules; this increase was based, at least in part, on employee union activities generally, and the new CBA specifically. As further discussed above in the sections involving the individual disciplines issued to Arellano and Servin, Respondent did not show that it was motivated by considerations unrelated to employee protected activities. Id. Accordingly, I find that Respondent violated Section 8(a)(3) and (4) of the Act by holding employees to a higher standard and more strictly enforcing its work rules because of their union and other protected activities.

IV. THE ALLEGED 8(A)(5) UNILATERAL CHANGES

A. *The Changes in Disciplinary Practices*

After the hearing in this matter closed, the Board issued its decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) adopting a “contract coverage” standard when deciding whether a collective-bargaining agreement grants an employer the right to take certain actions unilaterally, without bargaining with the union. The Board applied this standard retroactively in all pending cases. Id., slip op. at 2. Accordingly, it applies here.

Under the contract coverage approach, the Board examines the “plain language of the collective-bargaining agreement to determine whether the action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.” Id. The contract language does not need to specifically address the decision at issue, as “a collective bargaining agreement establishes principles to govern a myriad of fact patterns.” Id., slip op. at 11 (internal quotation omitted). Instead, “[w]here contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).” Id. For example, in *MV Transportation* the Board stated “if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate Section 8(a)(5) and (1) by . . . revising existing disciplinary . . . policies.” Id., slip op. at 2. That is precisely the situation presented here.

Section 12.01 of the CBA generally gives Respondent the right to implement, establish, and enforce rules of conduct, discipline employees, and determine the level of discipline. (GC 3, p. 26) Therefore, notwithstanding the fact Respondent may not have disciplined employees for safety violations or substandard work before the CBA was signed in July 2018, pursuant to the language of the agreement Respondent retained the right to revise its existing disciplinary policies. For this allegation, the General Counsel relies exclusively upon conduct that occurred after the CBA was signed. And, pursuant to the plain reading of the CBA, the contract language covers Respondent’s right to revise existing disciplinary policies without negotiating with the Union. Therefore, under these circumstances, I recommend this allegation be dismissed.

B. *The Change in Charles Walker’s Job Classification*

1. Facts

Prior to the signing of the CBA, Apex had the following classifications for engineers: apprentice/utility; B-level engineer; and A-level engineer. Respondent’s highest skilled mechanic was an A-level engineer, who possessed the skills to complete all necessary repairs in the facility and could handle an entire shift on his own. The B-level engineer classification was used for someone who was capable of overseeing a specific project, and could complete some of the larger repairs individually, but was not quite at the skill level necessary to oversee an entire shift by themselves. Thus, a B-level engineer always worked with another engineer during a shift. Entry-level engineering employees were categorized as an apprentice/utility engineer. They assisted the other engineers and performed most of the “grunt work” around the laundry. (Tr. 235, 525)

Before he was unlawfully laid-off in February 2017, Walker worked as a B-level engineer; he was reinstated into this classification pursuant to the District Court’s 2018 injunction order. Walker has worked as an engineer, maintaining and repairing equipment, for his entire professional career, and started working at Apex in 2015. Respondent’s classification system for engineers did not fit the Union’s general system, which used only two classifications: apprentice and engineer. When the parties started bargaining for an initial CBA, Walker was Respondent’s

only B-level engineer. (438, 472, 521, 524–525, 530, 1180–1181; GC 24)

The CBA executed by the parties generally adopted the Union's two category approach. Under the CBA engineers were classified as either a "utility engineer" or a "maintenance engineer." The maintenance engineer classification appears to be the equivalent of Respondent's previous A-level engineer designation. The CBA describes the utility engineer position as "strictly a trainee classification;" it is reserved for someone who works under the immediate supervision of a maintenance engineer or the chief engineer. At the time the CBA was signed, the salary for a maintenance engineer was \$33 per hour and a utility engineer was paid \$21.45 per hour. (Tr. 237; GC 3 p. 35)

Once the CBA was finalized, Respondent's engineers had to be recategorized into the two classifications called for in the agreement. Generally, Respondent's existing apprentice/utility engineers were put into the utility category, and everyone else was designated as a maintenance engineer. However, a dispute arose regarding Walker. Prior to the signing of the CBA, as a B-level engineer Walker's pay rate was \$25 per hour. If Walker was classified as a utility engineer, he would receive a cut in pay of \$3.65 per hour and be required to work in a trainee classification. If he was classified as a maintenance engineer, Walker would receive a raise of \$8 per hour, but he would have greater responsibilities and be required to work unsupervised. Walker was ultimately classified as a maintenance engineer. (Tr. 23, 237–238, 351, 522, 530)

There was various testimony, some of which was contradictory and convoluted, as to what occurred during bargaining and the related conversations over Walker's reclassification. That being said, the following is firmly established by the documents introduced into evidence and the corresponding credited testimony. It is clear that the parties discussed Walker's status during bargaining for an initial CBA, but it does not appear that any definitive agreement was ever reached between the Union and Dramise, who everyone acknowledges had taken over Respondent's bargaining obligations, and with whom a final agreement was ultimately reached. During bargaining the Union wanted Walker to be reclassified into the less-skilled utility classification, while Dramise wanted Walker classified as a maintenance engineer. At one point in their discussions, Dramise proposed having the Union test all of Respondent's engineers, since the Union had a training program, in order to determine everyone's skill level and classify them accordingly. However, the Union did not agree to Dramise's proposal. (Tr. 439, 552; GC 5) When bargaining between Dramise and the Union ended, no agreement had been reached regarding Walker's final classification. (Tr. 438–439, 441–442, 524–525, 529, 552)

On July 9, 2018, 11 days before the CBA was signed, Ed Martin sent an email to Marty Martin asking for a list of unit members, their job classification, and seniority date. The Union was seeking this information in order to set up a ratification vote for the contract. Marty Martin replied the same day with a list of 12 engineers; five utility engineers and seven maintenance engineers. On the list supplied by Marty Martin, Walker was listed as a utility engineer. According to Ed Martin, sometime later that month, on either July 19, 20, or 29, he had a discussion with Marty Martin where he agreed that Walker would "come on" as

a utility engineer for purposes of bidding new shifts. Ed Martin testified that, as of the date he had this discussion with Marty Martin, the CBA had already been finalized. (Tr. 352–353, 475–777, 517; GC 24)

At some point after the Union's discussion with Marty Martin, but before new shift bidding commenced, Dramise intervened and promoted Walker from a utility engineer to a maintenance engineer. Sometime during the last week of July or early August, Walker told Ed Martin that Respondent had changed his position to that of a maintenance engineer, saying that his paycheck had increased, and Apex was assigning him maintenance engineer job duties. (Tr. 479–480) After learning this information, Ed Martin spoke with Marty Martin who told him that, according to Dramise, the ALJ decision (seemingly referring to the Sotolongo decision) made the company reinstate Walker as a maintenance engineer and that he was going to remain in that position. (Tr. 481, 483; GC 2)

A number of weeks passed until the issue again resurfaced. On September 17–18, 2018, Marsh and Ed Martin exchanged emails where the issue of bargaining unit seniority was discussed. During the exchange, Ed Martin wrote that, when the contract was signed he had reached an agreement with Marty Martin to classify Walker as a utility engineer but at some point Respondent changed Walker's classification to that of a maintenance engineer without giving the Union notice or an opportunity to bargain. Marsh replied saying that Respondent reinstated Walker pursuant to the District Court Order to the B-level engineer position and when the contract was signed Walker was promoted to maintenance engineer along with another employee. Ed Martin argued that Respondent was obligated to bargain any change over Walker's classification/pay with the Union, and again cited his agreement with Marty Martin that Walker would be classified as a utility engineer. Marsh ended the exchange with an email on September 18. In the email, Marsh wrote that he had spoken with Dramise who said he had final approval regarding the CBA, that the Union refused his request to test all the engineers to examine their skillsets, and while they had discussions about Walker's ability to handle the requirements of being a maintenance engineer, Dramise did not have anything saying that Walker was going to have his job classification lowered to that of a utility engineer. (GC 2)

The next day, on September 19, Ed Martin sent an email directly to Dramise. In the email, among other things, Ed Martin asked Dramise to "abide by the agreement reached with Marty [Martin] on Charlie Walker's classification after the contract was signed." Dramise replied saying that the Union disagreed with his request to test the skills of all the engineers and therefore Respondent classified Walker as a maintenance engineer. (GC 5)

A few more weeks passed and the issue of Walker's classification again emerged when the engineers were planning to bid on new shifts. Ed Martin admitted he told Marsh that Walker could bid on whatever shift he wanted—as either a utility engineer or maintenance engineer—and then it was Respondent's responsibility to award the shifts accordingly based upon the company's judgment of whether the Walker was qualified. Similarly, Marty Martin testified that during the shift bidding process Ed Martin told him that it was up to Walker as to whether he wanted to bid into a utility engineer position or a maintenance

engineer position. When the shift-bidding opened in October 2018, Walker bid for a shift as a maintenance engineer, working from 3:00 p.m. to 11:00 p.m. He was awarded the bid. (Tr. 354, 485–486; R. 2)

2. Analysis

The Government asserts that Respondent violated Section 8(a)(5) and (1) of the Act by classifying Walker as a maintenance engineer, as opposed to a utility engineer, without prior notice to the Union and without affording the Union an opportunity to bargain. At trial, the General Counsel stated it was the Government’s position that Walker’s change in classification to a maintenance engineer was something that was discussed during collective-bargaining but not agreed upon, and therefore constituted a violation. (Tr. 239–240)

However, the credited evidence shows that Walker was not promoted to a maintenance engineer until after the CBA was put into effect. And, the CBA contains a management-rights clause that allows Respondent to promote employees. Specifically, Section 12.01 of the CBA reads, in part, as follows:

Rights to Manage. Except as expressly modified or restricted by a specified provision of the Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Employer, including but not limited to, the rights, in accordance with its sole and exclusive judgment and discretion: to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to formulate, implement and enforce rules of conduct; to promote, demote, transfer, lay-off, recall to work, and retire employees.

As such, after the CBA was in effect, Respondent retained the right under the management-rights clause to determine the qualifications of the engineers and promote them, which is what Dramise did here. Cf. *Quality Health Service of Puerto Rico*, 356 NLRB 699, 702 (2011) (hospital’s unilateral requirement that nurses work twin shifts did not constitute a violation where management-rights clause gave employer the right to assign employees to different shifts). Moreover, the evidence shows that, before the first shift-bid under the CBA, Ed Martin specifically told Respondent that Walker could decide for himself whether he wanted to bid for work as a utility engineer or a maintenance engineer; Walker then chose to bid into a shift working as a maintenance engineer. After specifically delegating the choice to Walker, the Union cannot now complain about his choice to work as a maintenance engineer and demand that Respondent bargain over the decision. Under these circumstances, there is no violation and I recommend this allegation be dismissed.

V. THE INFORMATION REQUEST ALLEGATIONS

A. Legal Standard

Section 8(a)(5) of the Act imposes a “duty to bargain collectively” on an employer which includes the obligation to supply a union with requested information that will enable it to “negotiate effectively and perform its duties as bargaining representative.” *New York & Presbyterian Hospital v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011), *enfg.* 355 NLRB 627 (2010). This includes the duty to furnish the union with information requested in order to

properly administer a collective-bargaining agreement, and the processing and evaluating of grievances. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2007), *enfd.* 902 F.3d 296, 302 (D.C. Cir. 2018).

Information requests concerning bargaining-unit employees are presumptively relevant, as they go to the core of the employer-employee relationship. *Id.* If the information “request involves nonunit employees or operations, the union has the burden of establishing the relevance of the requested information.” *Id.* To satisfy this burden, the Union needs to show a reasonable belief, supported by objective evidence, that the requested information is relevant. *Id.* See also *Disneyland Park*, 350 NLRB 1256, 2157 (2007). In either instance, the Board applies a “liberal discovery-type standard” to determine the relevance of an information request. *Id.* See also *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (“Board is to apply a liberal discovery-type standard” to information requests).

B. The Union’s Request for Employee Social Security Numbers

1. Facts

Ed Martin testified that, as early as June 2018, he asked Respondent to provide him with employee Social Security numbers. According to Ed Martin, the Union needed this information because the pension fund primarily tracks employees by Social Security number. And, the Union wanted to ensure that unit employees received proper pension credits. Ed Martin testified that he explained the reason for the request directly to Marty Martin. (Tr. 495–497, 499; GC 6)

Employee Social Security numbers were also discussed in an August 29, 2018, email that Ed Martin sent to Marty Martin and Dramise, regarding documents the Union received pursuant to an earlier information request. In the August 29 email, Ed Martin wrote “[t]he information is incomplete. Missing is SSN and current addresses. This information is required for the pension fund notifications.” (GC. 32) Then, on September 26, 2018, Ed Martin met with Marsh in person and again asked for unit members’ Social Security numbers, telling Marsh that he needed the information so he could include the bargaining unit members in the union pension fund. Marsh gave the Union the contact information for bargaining-unit employees but did not provide the Social Security numbers. Marsh testified that Marty Martin told him to not provide Social Security numbers to the Union because this information was personal in nature. A few weeks later, on October 6, Marsh emailed Ed Martin saying that he had requested the employee Social Security numbers, but the request was denied; Marty Martin and Dramise were copied on the email. (Tr. 35–37; GC 6, GC 32)

Marty Martin confirmed he told Marsh to withhold unit employee Social Security numbers from the Union, claiming that several employees were concerned and did not want the information provided to the Union. Marty Martin testified that there were several engineers who did not “want to want to participate in the bargaining unit at that point,” did not want the Union to have this information and they had not “signed up for the pension or anything.” (Tr. 367–368) It is undisputed that the Union never received the Social Security numbers. It is also undisputed that the CBA requires pension contributions be made for all bargaining-unit employees, and not just those who want to sign up for

the pension plan. (Tr. 499; GC 3, GC 6)

2. Analysis

In their respective briefs, none of the parties cite any case-law regarding the relevance of the Union's request for employee Social Security numbers. Notwithstanding, the Board's position on this matter is well established. "The Board has held that employee social security numbers . . . are not presumptively relevant and that the Union must therefore demonstrate the relevance of such information." *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 fn. 2 (2003) (citing *Dexter Fastener Technologies*, 321 NLRB 612, 613 fn. 2 (1996) (summary judgment denied with respect to Social Security numbers). Thus, the Union needs to show a reasonable belief, supported by objective evidence, that the information request is relevant. *Disneyland Park*, 350 NLRB at 2157–2158.

Here, applying a "liberal discovery-type standard," I believe the Union has met its burden. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4. The Union explained to both Marty Martin and Marsh that it needed the information to ensure employees were properly enrolled/credited with their pension contributions. These contributions are mandated by the CBA for all bargaining-unit employees. And, bargaining-unit employee Social Security numbers are not considered confidential information within the meaning of *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). See *NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 152 fn. 11 (3d Cir. 1991). Under these circumstances, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with bargaining-unit employee Social Security numbers. *Radisson Plaza Minneapolis*, 307 NLRB 94, 110 (1992) (violation where employer failed to provide information, including the Social Security numbers of bargaining-unit employees), enf. 987 F.2d 1376 (8th Cir. 1993).

C. Union's August 17, 2018 Information Request about Arellano's Disciplines

On August 17, 2018, the day after Arellano received three separate disciplines, Ed Martin emailed Marty Martin and Dramise requesting the following information: (1) all the written policies and procedures that Arellano was alleged to have violated; and (2) copies of any previous written discipline given to any department employee regarding the same policies or procedures. Ed Martin attached to his email a grievance regarding Arellano's disciplines. Respondent did not respond or provide any of the information requested. (Tr. 486–487, 1204; GC. 11–13; GC. 25)

A union's information request seeking the policies that unit employees are accused to have violated, and any comparative disciplines relating thereto, are presumptively relevant. *St. Francis Regional Medical Center*, 363 NLRB 608, 629 (2015). Therefore, by failing to provide the information requested, Respondent violated Section 8(a)(1) and (5) of the Act.

D. Union's September 5, 2018 Information Request about Servin's Discipline

On September 5, 2018, the Union requested that Respondent provide the following information relating to the discipline that Servin was issued on September 1: (1) all written policies and procedures that Servin was alleged to have violated; and (2)

copies of any previous written discipline administered to department employees for violating the same policies. The Union had filed a grievance over the discipline. Respondent did not provide the requested information. (Tr. 487, 362, 1205; GC 16, GC 27)

The information the Union requested here is presumptively relevant. *St. Francis Regional Medical Center*, 363 NLRB 608 629 (2015). By failing to provide the information, Apex violated Section 8(a)(1) and (5) of the Act.

E. Union's September 11, 2018 Information Request

Complaint paragraph 8(i) alleges a separate violation that is based on a September 11, 2018 email from Ed Martin to Marsh. (GC. 1(qq); (GC. Br. at 57) As part of a longer email chain, on September 11, Ed Martin sent Marsh an email reading, in part, as follows:

I am requesting copies of all written policies and procedures the individuals are alleged to have violated. I am also requesting copies of any previous write up given to any department employee regarding the same policies or procedures.

It is unclear from the email which "individuals" the Union is referring to, whether they are unit employees or non-unit employees. There was no further explanation in the email, nor was there testimony at trial from Ed Martin explaining the significance of this specific email. (GC 6)

In its brief, and in the Complaint itself, the General Counsel asserts that "individuals" in question are Arellano and Servin. (GC Br. 57) If true, then this allegation is identical to Complaint paragraph 8(g), seeking information regarding Arellano's August 16 discipline, and Complaint paragraph 8(h), which asks for information regarding Servin's September 1 discipline. There is no evidence that Arellano was issued any discipline between August 16 and September 11, nor is there evidence that Servin was presented with a discipline between September 1 and September 11. And, the General Counsel does not otherwise explain what specific incidents, or violations, this information request relates to. The Union, in its brief, admits that Ed Martin's September 11 information request was duplicative of the Union's previous requests regarding Arellano and Servin, asserting that the email was a reminder to Respondent that they had not provided the information. (Union Br., at 29) Accordingly, because Complaint paragraph 8(i) deals with the exact same information requests covered by Complaint paragraphs 8(g) and 8(h), I recommend that this allegation be dismissed as being duplicative.

F. Union's September 17, 2018 Information Request for Invoices and Shift Schedules

1. Facts

On September 17, 2018, the Union filed two separate grievances with Respondent, and made information requests regarding the grievances. Both grievances, and their associated information requests, were made via emails sent by Ed Martin to Dramise and Marty Martin; Arellano and Servin were copied on the emails. (GC 28)

The Union's first grievance involved Respondent allegedly using employees of AJ Industries to perform bargaining unit work, claiming the practice violated Article 12 of the CBA. AJ Industries sells commercial laundry equipment and is owned by

Dramise. Along with installing laundry equipment, employees of AJ Industries have performed warranty work on Apex equipment and have also performed other maintenance work on Respondent's machines pursuant to a maintenance contract. (Tr. 193, 488, 1025, 1133; GC 28) The Union's grievance reads as follows:

On or about 8/27/18 Apex Linen used AJ Industries employees to do bargaining unit work. This is a violation of Article 12 and any others that may apply. Members to be made whole.

In its information request, the Union asked for copies of all AJ Industries invoices showing labor performed at Apex for of July, August, and September of 2018 in order to substantiate its grievance claims. Ed Martin testified that, after he sent the information request, he received correspondence from Marsh and Dramise asking why the Union wanted the information and inquiring as to what documents the Union was specifically seeking. According to Ed Martin, he told Respondent that he made the information request because he "felt that A.J Industries . . . was being used to supplant bargaining unit members doing work" on the shop floor which is a violation of the contract. (Tr. 488) He further testified that he told Dramise and Martin that he was seeking invoices showing the billing for the individuals working in the plant that would show "what the work was for." (Tr. 488) No other evidence was presented regarding the Union's need for the information. The Union never received the documents it asked for. (Tr. 487-489; GC 28)

The Union's second grievance alleges that Sharron was performing bargaining unit work, in violation of Article 24 of the CBA, in that he covered shifts for engineers in August and September 2018. In the accompanying information request, the Union asked for documents showing all shifts where engineers were on duty in August and September 2018, as well as documents showing shifts that engineers were scheduled to work but did not do so. Ed Martin testified he had received reports that Sharron was covering shifts for engineers who were on vacation, resulting in certain shifts where no bargaining-unit members were actually working. The Union believed the CBA required a bargaining-unit engineer to be present during all shifts when equipment was running in the plant. Again, the Union did not receive the information it had requested. (Tr. 489-490; GC 29)

2. Analysis

a. Request for subcontracting invoices

Here, AJ Industries serves as a subcontractor and third-party vendor for Respondent. Therefore, the Union's information request seeking invoices for AJ Industries is not presumptively relevant. See e.g., *Disneyland Park*, 350 NLRB 1256, 1258 (2007) ("Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant."). Accordingly, to be entitled to the information, it was incumbent upon the Union to establish the relevance of its request. *Ethicon, A Johnson & Johnson Co.*, 360 NLRB 827, 832 (2014). The Union needed to demonstrate "a reasonable belief supported by objective evidence for requesting the information." *Teachers College*, 365 NLRB No. 86, slip op. at 4. (internal quotations omitted) "The union is not required to show that the information in its

possession that triggered the request is accurate or ultimately reliable," and may even base an information request on hearsay or rumors, "providing that there is at least some demonstration that the request for information is more than pure fantasy." *Id.* (internal quotations and citations omitted). While a bare assertion from the union that it needs the information is insufficient, the threshold for relevance is low. *Teachers College, Columbia University v. NLRB*, 902 F.3d 296, 302 (D.C. Cir. 2018).

According to Ed Martin, he sought the subcontracting information to support his grievance because he "felt" Respondent was using AJ Industries to perform work on the shop floor, thereby displacing bargaining unit members. This explanation, along with the Union's grievance, was the only evidence presented at trial supporting the Union's information request.

Respondent asserts that, notwithstanding the grievance, it did not have to provide the information because the CBA allows for Apex to subcontract work. (Resp't Br. at 59) Section 12.03 of the CBA gives Respondent the right to subcontract work "to the extent and for the purposes it has done so in the past," but states that other bargaining unit work may be contracted out only if the Union cannot furnish qualified employees to perform the work. (GC 3, p 27) Here, had the Union presented some basis for suspecting that Respondent might be in breach of the subcontracting provision, it would be entitled to the information. *Disneyland Park*, 350 NLRB at 1259-1260 (Member Liebman dissenting) (citing *Detroit Edison Co.*, 314 NLRB 1273, 1275 (1994)). However, the only evidence presented at trial supporting the Union's information request was Ed Martin's testimony that he "felt" Respondent was in breach of the agreement. Notwithstanding the Union's outstanding grievance, and the low threshold for establishing relevance, the baseline must be greater than a subjective feeling, particularly when no evidence was presented as to why the Union "felt" this way. Compare, *Teachers College*, 365 NLRB No. 86, slip op. at 4 (2007) (union showed relevance of request seeking information about nonunit employees performing bargaining unit work by relying upon information gathered from union members) with *Disneyland Park*, 350 NLRB 1256, 1259 (2007) (union, which claimed a breach of the collective-bargaining agreement, was not entitled to subcontracting information where it did not present "at least some facts to support" its claim). Under the circumstances presented here, I find that the General Counsel has not met his burden of showing that the Union had a reasonable belief supported by objective evidence for requesting the invoices, and I therefore recommend this portion of the Complaint be dismissed.

b. Request for unit employee work schedules

In support of its grievance alleging Sharron was performing bargaining unit work, the Union asked for work-shift documents showing which engineers were on duty, and which engineers were scheduled to work but did not do so, in August and September of 2018. A union's request for unit employee work schedules is presumptively relevant and must be furnished upon request. *CVS Albany, LLC*, 364 NLRB No. 122, slip op. at 1 (2016). Accordingly, by failing to provide this presumptively relevant information, Respondent violated Section 8(a)(1) and (5) of the Act.

G. Union's September 19, 2018 Information Requests

About Disciplines

On September 18, 2018, Respondent issued two disciplines each to Arellano and Servin. Arellano was disciplined for his work on the water vale and the Rema Vac, while Servin was issued a discipline for his work on the double-buck and one for insubordination involving his interaction with Sharron #3. The next day, Ed Martin filed grievances over all the disciplines. He also made two separate information requests, one regarding the disciplines issued to Arellano and one regarding the disciplines issued to Servin. In each information request he asked that Respondent produce the following: (a) all written policies and procedures that were alleged to have been violated; (b) copies of all disciplines issued to bargaining unit employees in the past 5 years regarding those policies and procedures; and (c) copies of any evidence, including audio or video surveillance or statements, used to make the determination to issue the disciplines. The Union never received any of the information that it requested. (Tr. 491; GC 17–20, 30, 31)

All of the information requested by the Union related directly to the disciplines of Arellano and Servin, along with their related grievances, and was therefore presumptively relevant. *PAE Aviation & Technical Services, LLC*, 366 NLRB No. 95, slip op. at 2 (2018) (information pertaining to unit employees is presumptively relevant, and employer is obligated to provide information that is relevant to a union’s filing or processing of grievances, including information bearing on the union’s preparation of a defense for the grievant). And, the Union sought the type of information that the Board regularly requires a party to produce pursuant to an information request. *HTH Corp.*, 361 NLRB 709, 755 (2014) (prior disciplinary actions);⁴⁸ *Stephens Media, LLC*, 356 NLRB 661, 683–684 (2011) (copies of policies employee allegedly violated); *Teamsters Local 89*, 365 NLRB No. 115, slip op. at 11, fn. 11 (2017) (statements); *NTN Bower Corp.*, 356 NLRB 1072, 1139 (2011) (video/audio tapes).

Any claim by Respondent that the Union already had a copy of the employee handbook (Resp’t Br. at 59), even if true, is not a valid defense, as Apex neither provided the information again, nor did it advise the Union that it had previously provided the information. *Postal Service*, 332 NLRB 635, 636 (2000). This is particularly true here, as Marsh testified that his knowledge of the Union allegedly being in possession of the employee handbook came from a hearsay discussion with Marty Martin who said that it was produced during a previous NLRB hearing. (Tr. 220) The previous NLRB trial occurred in 2017, *Apex Linen Services Inc.*, JD(SF)-15-18, 2018 WL 2733700 (2018), and Marty Martin testified the handbook was revised in 2018. (Tr. 414) Apex has not presented a valid defense for refusing to provide the information requested. Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act by not responding to the Union’s September 19, 2018 information request.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce

⁴⁸ Respondent did not claim that producing disciplines going back 5 years was somehow burdensome or overbroad. *United Parcel Service of America*, 362 NLRB 160, 162 (2015) (if an “employer has a legitimate claim that a request for information is unduly burdensome or overbroad,

within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Operating Engineers, Local 501, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and extra board Engineers and Utility Engineers employed by Respondent at its facility located in Las Vegas, Nevada; excluding all other employees, office clericals, guards, and supervisors as defined in the Act.

4. By threatening employees with reprisals because they engaged in activities protected by the Act, Respondent has violated Section 8(a)(1) of the Act.

5. By discriminating against Adam Arellano and Joseph Servin (including by more strictly enforcing work rules) and by discriminating against Charlie Walker, because they engaged in union activities and engaged in protected concerted activities by testifying at a Board hearing, participating in Board investigations, and were named in an injunction proceeding in Federal District Court where the Board was a party, Respondent has violated Section 8(a)(3), 8(a)(4) and 8(a)(1) of the Act.

6. By failing and refusing to provide the Union with the information it requested that is relevant and necessary to the Union’s performance of its duties as collective-bargaining representative of its employees, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(5) and 8(a)(1) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Section 8(a)(3) and 8(a)(4) of the Act by suspending and discharging Adam Arellano, and discharging Joseph Servin, I shall order Respondent to reinstate them and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Respondent shall compensate Adam Arellano and Joseph Servin for any adverse tax consequences of receiving a lump-sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). Respondent shall also compensate them for their search–for–work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

Backpay, search–for–work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as

it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation”).

prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration.

The Respondent shall also be required to expunge from its files any references to the unlawful disciplines, suspension, and discharge issued to Adam Arellano, and the unlawful disciplines and discharge issued to Joseph Servin, and notify them and the Regional Director of Region 28, in writing, that this has been done and that these unlawful employment actions will not be used against them in any way. The Respondent shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010) and *Durham School Services*, 360 NLRB 694 (2014).

In addition to the notice posting, in the Complaint the General Counsel requests an order that the notice be read aloud to employees by a responsible management official. “The Board is vested with ‘broad discretion to devise remedies that effectuate the policies of the Act.’” *United Nurses Association of California v. NLRB*, 871 F.3d 767, 789 (9th Cir. 2017) (quoting *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883, 898–899 (1984)). “[A] reading order is . . . ‘an effective but moderate way to let in a warming wind of information, and more important, reassurance.’” *Id.* (emphasis omitted) (quoting *UNF West Inc., v. NLRB*, 844 F.3d 451, 463 (5th Cir. 2016)).

Here, I find that a notice-reading remedy is appropriate, as Respondent is a recidivist violator, and has engaged in multiple violations of the Act. As for Apex’s proclivity to violate the Act, the Board adopted the Sotolongo decision, where it found that Apex: violated Section 8(a)(1) of the Act by interrogating employees, threatening employees, and creating the impression surveillance; violated Section 8(a)(3) of the Act by discharging/laying off Arellano, Servin, and Walker, and accelerating the closure of the engineers’ break room; and violated Section 8(a)(5) of the Act by changing employee work schedules, dealing directly with employees, disciplining employees without bargaining, and failing to furnish the Union with information. *Apex Linen Services Inc.*, JD(SF)-15-18, 2018 WL 2733700 (2018). Upon the reinstatement of Arellano, Servin, and Walker, Respondent immediately began violating the Act again, as outlined herein. And, Respondent’s violations started at a time when it was under a District Court order restraining and enjoining the company committing from further violations. Moreover, before Respondent’s engineers unionized, another union tried organizing Apex production employees, and Respondent was found to have violated Section 8(a)(3) of the Act by discharging a production employee because of his union activities. *Apex Linen*

Services, Inc., 366 NLRB No. 12 (2018). In that case, Marty Martin was found to have been the person making the decision to unlawfully fire the employee. *Id.* slip op. at 10, fn. 18. Requiring that the notice be read “to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law . . . provides employees with some assurance that their rights under the Act will be respected in the future,” and “will enable employees to fully perceive that the Respondent and its managers are bound by the requirements of the Act.” *Latino Express*, 360 NLRB 911, 928 (2014) (internal quotations omitted).⁴⁹ Accordingly, the notice must be read to employees assembled for that purpose, on working time, by a responsible management official. At Respondent’s option, the notice can instead be read to employees by a Board agent, in the presence of a responsible management official. The Board and a Union representative will be provided the opportunity to be present to monitor the reading of the notice. *Id.* (citing *Texas Super Foods*, 303 NLRB 209, 220 (1991)).

In the Complaint, the General Counsel also requests that I order Respondent to reimburse Arellano and Servin for the consequential economic harm incurred as a result of Respondent’s unlawful conduct. However, the Board does not traditionally provide remedies for consequential economic harm in make-whole orders. See *Operating Engineers Local 513*, 145 NLRB 554 (1963). Accordingly, this request is denied.

Finally, Respondent is ordered to provide the Union with the relevant information it requested, as outlined herein, that is necessary to the Union’s performance of its duties and responsibilities as the exclusive collective-bargaining representative of Respondent’s employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁵⁰

ORDER

Respondent Apex Linen Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals because they engaged in activities protected by the Act.

(b) Discriminating against employees, including by more strictly enforcing work rules, for supporting the Union or because they engaged in protected concerted activities by testifying at a Board hearing, participating in Board investigations, or because they were named in an injunction proceeding in Federal District Court where the Board was a party.

(c) Refusing to provide the Union with information it requested that is relevant and necessary to the Union’s performance of its duties as the collective-bargaining representative of Respondent’s employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to

⁴⁹ Notwithstanding Respondent’s recidivism, and the nature of the violations found herein, neither the General Counsel nor the Union seek a broad cease and desist order.

⁵⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

effectuate the policies of the Act.

(a) Promptly provide the Union with all the relevant information it requested, including but not limited to, unit employee Social Security numbers, written policies and procedures that Adam Arellano and Joseph Servin were alleged to have violated resulting in their discipline(s), evidence relied upon to determine discipline was appropriate, comparator disciplines, and unit employee work schedules.

(b) Within 14 days from the date of the Board's Order, offer Adam Arellano and Joseph Servin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Adam Arellano and Joseph Servin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Compensate Adam Arellano and Joseph Servin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines, suspension, and discharge of Adam Arellano and the unlawful disciplines and discharge of Joseph Servin, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of the Board's Order.

(g) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted.⁵¹ In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the

⁵¹ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2018.

(h) Within 14 days after service by the Region, hold a meeting or meetings, during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees assembled for this purpose, by a responsible official of the Respondent, or by a Board agent in the presence of a responsible official of the Respondent, and provide an opportunity for representatives of the Board and the Union to be present for the reading of the notice.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

Dated, Washington, D.C. May 28, 2020

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with reprisals because you engaged in activities protected by the National Labor Relations Act.

WE WILL NOT discriminate against you, including by more strictly enforcing work rules, for supporting the International Union of Operating Engineers, Local 501, AFL-CIO, (Union), or any other labor organization, or because you have engaged in protected concerted activities by testifying at a National Labor Relations Board (Board) hearing, participating in Board investigations, or because you were named in an injunction proceeding in Federal District Court where the Board was a party.

WE WILL NOT refuse to provide the Union with information it requested that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative.

posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means, and to the reading of the notice to employees. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL promptly provide the Union with all the relevant information it requested, including but not limited to, unit employee Social Security numbers, written policies and procedures that Adam Arellano and Joseph Servin were alleged to have violated resulting in their discipline, evidence relied upon to determine discipline was appropriate, comparator disciplines, and unit employee work schedules.

WE WILL, within 14 days from the date of the Board's Order, offer Adam Arellano and Joseph Servin full reinstatement to their former jobs or, if those jobs no longer exists, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Adam Arellano and Joseph Servin whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Adam Arellano and Joseph Servin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful disciplines, suspension, and discharge issued to Adam Arellano, and the unlawful disciplines and discharge issued to Joseph Servin, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these unlawful employment actions will not be used against them in any way.

APEX LINEN SERVICE, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-216351 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

