

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES**

XCEL PROTECTIVE SERVICES, INC.

and

**INTERNATIONAL UNION, SECURITY,
POLICE, AND FIRE PROFESSIONALS
OF AMERICA, LOCAL 5**

Cases	
	19-CA-232786
	19-CA-233141
	19-CA-234438
	19-CA-237861
	19-CA-241689

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Carolyn McConnell
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174
Telephone: (206) 220-6285
Facsimile: (206) 220-6305
E-mail: Carolyn.McConnell@nrlb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. OVERVIEW	1
II. THE ALJ’S FACTS AND FINDINGS DISPUTED BY RESPONDENT SHOULD BE AFFIRMED	1
<i>A. The ALJ appropriately found that there is no evidence that Salopek, Mullen, and Lein’s complaints to the Navy were maliciously false; that, in fact, they were at core true, and therefore did not lose the protection of the Act. (Exceptions 1, 2, 3, and 4)</i>	1
<i>B. The ALJ appropriately found that Filibeck fired Salopek for alleged misconduct that was part of the res gestae of his protected concerted activities. (Exceptions 5, 6, 7, 8, and 15)</i>	3
<i>C. The ALJ appropriately found that the same conclusion that Respondent violated Section 8(a)(1) of the Act when it terminated Salopek is warranted under a Wright Line analysis. (Exceptions 9, 10, 11, 12, 13, and 14)</i>	5
<i>D. The ALJ appropriately found that Respondent cannot rely upon Rake’s recommendation to remove Salopek from the contract to escape liability. (Exceptions 16, 17, 18, 19, 20, and 21)</i>	7
III. CONCLUSION	10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Black Magic Res., Inc.</i> , 312 NLRB 667 (1993)	9
<i>Consolidated Bus Transit</i> , 350 NLRB 1064 (2007)	5
<i>Dews Constr. Corp.</i> , 231 NLRB 182 (1977)	9
<i>Fluor Daniel</i> , 304 NLRB 970 (1991)	7
<i>Georgia Pacific Corp.</i> , 221 NLRB 982 (1975)	9
<i>L.B. & B. Assoc., Inc.</i> , 346 NLRB 1025 (2006)	7
<i>Marshall Engineered Products Co., LLC</i> , 351 NLRB 767 (2007)	4
<i>NLRB v. Burnup & Sims</i> , 379 U.S. 21 (1964).....	4
<i>Paragon Sys., Inc.</i> , 362 NLRB 1561 (2015)	8
<i>Taylor Motors, Inc.</i> , 365 NLRB No. 21 (Mar. 13, 2017)	4
<i>Three D, LLC</i> , 361 NLRB 308 (2014)	2
<i>Tschiggfrie Properties, Ltd.</i> , 368 NLRB No. 120 (Nov. 22, 2019)	5
<i>Valley Hosp. Med. Ctr.</i> , 351 NLRB 1250 (2007)	2

I. OVERVIEW

Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the Acting General Counsel (“General Counsel”) submits this Answering Brief to the Exceptions filed by Xcel Protective Services, Inc. (“Respondent”) to the December 7, 2020, decision of Administrative Law Judge John Giannopoulos in the above-captioned case¹ [JD(SF)-21-20] (“ALJD” or “Decision”).

Respondent concedes, by its lack of Exceptions on the majority of the ALJ’s findings, that it committed violations of §§ 8(a)(1) and (5) of the National Labor Relations Act (the “Act”). The Exceptions that Respondent did file, regarding the discharge of Mark Salopek, lack merit, as they are unsupported by the record evidence or the caselaw. As discussed in detail below, Counsel for the Acting General Counsel respectfully submits that the ALJ’s factual findings and legal conclusions regarding the discharge of Mark Salopek are appropriate, proper, and fully supported by the record evidence and established precedent. Accordingly, the Board should sustain the ALJ’s decision and recommended order as regards Salopek’s termination.

II. THE ALJ’S FACTS AND FINDINGS DISPUTED BY RESPONDENT SHOULD BE AFFIRMED

A. The ALJ appropriately found that there is no evidence that Salopek, Mullen, and Lein’s complaints to the Navy were maliciously false; that, in fact, they were at core true, and therefore did not lose the protection of the Act. (Exceptions 1, 2, 3, and 4)

The ALJ found, and Respondent does not dispute, that security guards Mark Salopek (“Salopek”), Stephen Mullen (“Mullen”), and Daniel Lein (“Lein”) concertedly

¹ References to the ALJD will be designated as (ALJD __:__), including appropriate page and line citations. References to the official transcript will be designated as (Tr. __:__), including appropriate page and line citations. References to the General Counsel’s Respondent’s, and Joint exhibits will be referred to as (GC Exh), (R Exh), and (JX), respectively.

complained about safety issues to the U.S. Navy. (ALJD 45:7-13). They did not disparage or seek to harm Respondent, but simply went to the Navy base commanding officer to discuss their concerns about whether Respondent was ensuring that their coworkers knew how to competently use the weapons they were required to carry at work. (ALJD 45:7–12, 45:37–40; Tr. 161–62, 463–64, 684–88). They did so after having raised their concerns with Respondent’s supervisors, to no avail. (ALJD 10:10–14; Tr.115–16, 120, 137–39, 290, 460–61; GC Exhs.3–5). Whistleblower complaints are protected even if they are inaccurate; they lose their protection only if they are maliciously untrue, and Respondent bears the burden of proving this. *Three D, LLC*, 361 NLRB 308, 312 (2014), *enfd.* 629 Fed.Appx. 33 (2d. Cir. 2015); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1253 (2007).

Here, their complaints were, in fact, true. Respondent’s own witnesses admitted that it had been qualifying guards at non-Navy sites using non-Navy weapons and had filed documents with the Navy falsely claiming that the weapons tests had occurred at Navy ranges, just as Salopek and the others had reported. (Tr. 893–99, 962, 967–69; R. Exh.42). The Navy’s own report concluded that guards had been issued weapons they were not qualified to carry (Jt. Exh.10) and, in statements to Navy investigators, Respondent’s employees admitted they had taken weapons qualifying tests at non-Navy ranges and altered test targets to make it easier to see them. (R. Exh.2 pp.20, 22).

Respondent, without addressing these core issues, harps on supposed inaccuracies in the trio’s complaints, including an error in a date. However, the ALJ rightly credited Salopek’s testimony that he quickly corrected that error verbally to the Navy investigator and found that he also corrected it in a written statement to the Navy. (ALJD 46:43–47:2; R. Exh.2,

14). In any case, none of these quibbles suffices to meet Respondent's burden of proving that Salopek's complaints were maliciously untrue, or even inaccurate at their core.

Respondent also attempts to make hay out of a supposition that a coworker disputed Salopek's and the others' claims. But that coworker, Jake Schryver ("Schryver"), wrote a careful statement to Navy investigators that did not contradict the whistleblowers' claims. (R 2 p.24). Respondent relies on hearsay testimony that Schryver allegedly said something different to Navy investigators, yet it never called Schryver to testify, warranting an inference that his testimony would not have supported their case. In any event, even if Schryver had testified to his belief in the inaccuracy of Salopek's claims, this would not demonstrate malice by Salopek or undercut the other voluminous record evidence of the truth of the complaints, as correctly found by the ALJ.

As the ALJ properly found, Salopek, Mullen, and Lein's complaints went directly to their terms and conditions of employment, including being safe from being shot at work. The ALJ correctly found that nothing in the manner of their complaints was disloyal and nothing in their content was maliciously false. Indeed, as the ALJ found, their core complaints were true and they sought to ensure that Respondent's employees were properly protecting a major U.S. military weapons depot.

B. The ALJ appropriately found that Filibeck fired Salopek for alleged misconduct that was part of the res gestae of his protected concerted activities. (Exceptions 5, 6, 7, 8, and 15)

The ALJ appropriately found that Respondent fired Salopek for a chain of command violation and dishonesty, properly relying on Respondent's own proffered discharge form, as well as CEO Michael Filibeck's ("Filibeck") testimony. (ALJD 50:8-14; Tr. 203; Jt. Exh.5 p.1285). The ALJ further found that the alleged chain of command violation and dishonesty were part and parcel of Salopek's protected concerted activity,

in that Salopek supposedly violated the chain of command in complaining to the Navy and those complaints were purportedly dishonest. (ALJD 50:15-24). The ALJ therefore applied a *res gestae* analysis. (ALJD 50:26-30)

In taking exception to this, Respondent recycles the discredited claim that Salopek, Mullen, and Lein's complaints were false. They were not and this is a *non sequitur*. For, even if they were false, that would not indicate either that they lost the protection of the Act, or that they were not part and parcel of Salopek's protected activity. As such, the ALJ's findings must stand.

Although Respondent also argued post-discharge that there were other not-previously asserted reasons that it fired Salopek, the ALJ properly held Respondent to the reasons it gave in its own paperwork. In any case, the supposed additional reasons Respondent offered—his demeanor and conduct during the investigation, which the Navy investigator disliked—are themselves part and parcel of the protected activity. For all these reasons, the ALJ's reliance on a *res gestae* analysis should be sustained.

As the ALJ correctly found, Salopek did not actually violate any chain of command rule and his complaints were not dishonest, but rather correct. (ALJD 46:6–7, 50:n.38). Therefore, an analysis under *Burnup & Sims* would also apply; that is, where an employee is fired for supposed misconduct arising out of protected activity, but the General Counsel demonstrates that the employee was not, in fact, guilty of the misconduct, a violation will be found, without regard to the employer's motive or good faith. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). See also *Taylor Motors, Inc.*, 365 NLRB No. 21 (Mar. 13, 2017); *Marshall Engineered Products Co., LLC*, 351 NLRB 767 (2007). Under either analysis, the ALJ's order should be sustained and Respondent's exceptions rejected.

C. *The ALJ appropriately found that the same conclusion that Respondent violated Section 8(a)(1) of the Act when it terminated Salopek is warranted under a Wright Line analysis. (Exceptions 9, 10, 11, 12, 13, and 14)*

Under the *Wright Line* burden-shifting framework, the General Counsel must prove by a preponderance of the evidence: that the employee's protected activity was a motivating factor for the employer's actions; the protected activity itself; employer knowledge of that protected activity; and animus against it by the employer. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), *enf'd.* 577 F.3d 467 (2d Cir. 2009). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (Nov. 22, 2019). Once 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. As the ALJ found, two elements are easily established. (ALJD 51:38). In fact, Respondent does not, and cannot, dispute that Salopek engaged in protected activity, nor that Respondent was well aware of that activity, as the Navy immediately reported it to Respondent's supervisor Michael Terry and later reported it directly to Filibeck. (Tr. 535, 537, 988-90).

Respondent tries to take issue with the ALJ's findings of animus by both Respondent directly and by the Navy's representatives, but its attempts fail because the evidence of animus is replete. Respondent tries to explain away as a mere transcription error Filibeck's claim that it couldn't reinstate Salopek after the Navy's removal request because the nearest Respondent facility was 10,080 miles away. But this statement is only one of numerous instances of Respondent animus in the record: CEO Morgan stated that those who had complained to the Navy were "a cancer;" Supervisor Terry said that complaining to the Navy was "a big mistake;" Lt. Powless told Lein that Respondent was

going to fire him for jumping chain of command; CEO Morgan told Mullen that he could face disciplinary actions for his complaints; and CEO Morgan told Lein he was angry that he had jumped chain of command by complaining. (ALJD 52: 14-24; Tr. 467:16–19; 475, 706, 725, 727).

Respondent tries to assail this long list by claiming that none can be attributed to Filibeck, who actually fired Salopek. Yet all of these other actors were Respondent supervisors whose statements can be attributed to Respondent, and Filibeck communicated at length with several of them before deciding to fire Salopek. (Tr. 1015) Furthermore, as the ALJ found, Filibeck acted on Navy contract representative Richard Rake's ("Rake") request for Salopek's removal and knew that Rake's request was motivated by animus against his protected concerted activity. (ALJD 54:45–55:16; Tr.945).

Furthermore, Respondent's asserted reasons for firing Salopek kept shifting, from chain of command, dishonesty, and lack of candor (asserted October 27, 2018), to supposed bad conduct years before and being a "malcontent in the workplace" (asserted January 3, 2019), to inciting discontent among guards, lying to government investigators, poor attitude, filing reports against female guards (asserted January 11, 2019), to the Navy's ordering his termination for falsifying documents (April 11, 2019), having his security clearance revoked (asserted April 25, 2019), and finally, an "active" investigation by the Navy into photographs posted online by Salopek (asserted at trial). (Tr. 202–03, 1005; Jt. 5 p.1285; Jt. 13 p.1679; Jt. 18 p.2; Answer to Consolidated Complaints dated April 11, 2019; Answer to Consolidated Complaints dated April 25, 2019). When the Union requested information about why Salopek was fired, Respondent failed and refused

to provide the information, as the ALJ found and Respondent does not dispute. (ALJD 59:12–28).

Under *Wright Line*, evidence that the proffered reason is pretextual supports an inference of unlawful motivation, both to support the General Counsel’s *prima facie* case and to rebut an employer’s defense. See, e.g., *L.B. & B. Assoc., Inc.*, 346 NLRB 1025, 1027 (2006), *enfd.* 232 Fed. App’x 270 (4th Cir. 2007); *Fluor Daniel*, 304 NLRB 970, 971 (1991), *enfd. mem.* 976 F.2d 744 (11th Cir. 1992). Thus, the ALJ’s finding of violation under *Wright Line* is amply supported and should be sustained.

D. The ALJ appropriately found that Respondent cannot rely upon Rake’s recommendation to remove Salopek from the contract to escape liability. (Exceptions 16, 17, 18, 19, 20, and 21)

The ALJ correctly found that the Navy’s request for Salopek’s removal was motivated by animus against Salopek’s protected concerted activity. As the ALJ noted, the evidence established that Navy contract representative Rake had known about the improper weapons qualifications for years, yet the naval base commander did not know about them until Salopek, Mullen, and Lein complained to him about them; as soon as the commander received the complaints, he demanded that all Respondent’s guards be removed from posts. (ALJD 53: 25–34; Tr. 561–63, 895, 899, 963, 978). Salopek, Mullen, and Lein’s going directly to the base commander put Rake in an embarrassing situation, and he showed his displeasure with that embarrassing position in numerous ways, from asking every person he interviewed whether they knew their chain of command, failing to acknowledge in his report that the bulk of the complaints were true, accusing Mullen of abandoning his post, focusing on Salopek’s long-past misdeeds and his demeanor, and accusing Salopek of a “hidden agenda.” (ALJD 53:35–40; R.Exh.2). Then, there was the odd duplicity in Rake’s inclusion of both Salopek’s rejected draft statement and final

statement in his report, after promising Salopek he would shred the draft. (Tr.1099–1100; R. Exh.2 p.13–15).

There were even discrepancies between Rake's report and the witness statements he took. For example, while Rake wrote in his report that Lein never said he was told to go to a gravel pit to qualify, in fact the statement Lein gave said exactly that. (R. Exh.2 pp.16–17). In addition, whereas Rake stated in his report that "loop holes" and poor "communication" allowed guard Emily Coler to carry weapons for which she had failed to qualify, she wrote in her statement that she was told after the gravel pit shoot that she could stand post. (ALJD 54:6-25; R. Exh.2).

Rake's report also accused the three whistleblowers of failing to cite any documents in support of their complaints, yet Salopek's statement cites a Bangor range sheet for the precise day in question. (ALJD 54:27–34; R.Exh.2). And, although Rake repeatedly noted the many hours he put into his investigation, he apparently failed to uncover, or at least to acknowledge, any falsified documents, even though Respondent itself put a weapons qualification document into the hearing record that its own witness testified was false yet filed with the Navy. (ALJD 7:14–21, 54:34–37; R. Exh.42).

"It is well settled that an employer violates the Act when it follows the direction of another employer with whom it has business dealings to discharge its employees because of their protected activities." *Paragon Sys., Inc.*, 362 NLRB 1561, 1565 n.14 (2015). "The fact that the direction comes from a Government actor does not alter [the] analysis." *Id.* Respondent attempts to distinguish *Paragon* by noting that in that case, unlike here, the employer representative who discharged the discriminatee was present when the government representative conducted interviews, and thus directly witnessed that investigator's animus. But, as the caselaw cited in *Paragon* makes clear, no such

witnessing is required in order to attribute a third party's motive to the employer, only that the other party be motivated by animus and that the employer know it and then act upon it. See, e.g., *Black Magic Res., Inc.*, 312 NLRB 667, 668 (1993), *decision supplemented*, 317 NLRB 721 (1995)); *Dews Constr. Corp.*, 231 NLRB 182, 182 (1977); *Georgia Pacific Corp.*, 221 NLRB 982 (1975). The sheer volume of discrepancies between Rake's report and the truth supports the ALJ's conclusion that Rake was motivated by animus against the whistleblowers when he recommended that Salopek be removed from the Navy contract.

Further, Respondent did directly witness displays of Rake's animus. In his meeting with Filibeck, Rake read from his report (indeed, Filibeck testified that Rake read "85 percent" of it), reciting numerous ways he was displeased with Salopek over his complaints to the Navy and recommending that Salopek be removed from the contract because of them. (Tr. 555, 571, 999, 1003). Thus, Respondent's attempt to claim that Filibeck was unaware of Rake's animus when he fired Salopek because he hadn't yet read Rake's report is misplaced, even disingenuous.

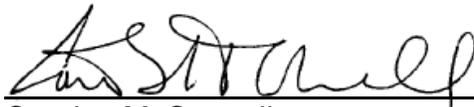
Finally, as the ALJ found, the Navy had no power to require Respondent to fire Salopek; all it could do was to recommend his removal from the contract. (ALJD 37:15-18; Tr. 558, 555-559, 625-627, 995, 981). Filibeck testified that no one from the Navy asked that Salopek be fired. (ALJD 38:9-10; Tr.1002). Yet Respondent responded to Rake's animus against Salopek's protected concerted activity by firing Salopek. For all these reasons, Respondent's attempted defense that the Navy made Respondent do it is utterly unavailing. The ALJ's finding on this point should be upheld.

III. CONCLUSION

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent's Exceptions and adopt the ALJ's findings of fact and conclusions of law that Respondent violated § 8(a)(1) of the Act by firing Mark Salopek.

Dated at Seattle, Washington, this 27th day of January, 2021.

Respectfully submitted,



Carolyn McConnell
Counsel for the Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174
Telephone: (206) 220-6285
Facsimile: (206) 220-6305
E-mail: Carolyn.McConnell@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision was served on the 27th day of January, 2021, on the following parties:

E-File:

Roxanne Rothschild, Executive Secretary
National Labor Relations Board
1015 Half St. SE
Washington, D.C. 20570

E-Mail:

Jason R. Stanevich, Attorney
Maura A Mastrony, Attorney
Littler Mendelson, P.C.
One Century Tower
265 Church Street, Suite 300
New Haven, CT 06510-7013
Email: jstanevich@littler.com
Email: mmastrony@littler.com

Richard M. Olszewski, Esq.
Gregory, Moore, Brooks & Clark, PC
65 Cadillac Square, Suite 3727
Detroit, MI 48226-2893
Email: rich@unionlaw.net

Matthew J. Clark, Attorney
Gregory, Moore, Brooks & Clark, PC
28 W. Adams Avenue, Suite 300
Detroit, MI 48226
Email: matt@unionlaw.net


Kristy Kennedy, Office Manager