

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C. BRANCH OFFICE**

TYR ENERGY LOGISTICS

Respondent

and

Case 16-CA-262046

LUIS MIGUEL GARCIA, an Individual

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This case was heard by Zoom videoconference by the Honorable Administrative Law Judge Robert Giannasi on January 5 and 15, 2021.

Charging Party Luis Garza worked as a transloader at Respondent's Corpus Christi, Texas facility from January 13, 2020 until he was discharged on June 1, 2020. Garza worked outdoors in a largely vacant rail yard where he was involved in transferring fuel from trucks into train cars, at times climbing on top of the rail cars.

On the morning of June 1, 2020¹, Garza and other employees reported to work amid a heavy lightning storm. Garza and his co-workers discussed safety concerns related to working outdoors in these conditions, and were unsure of Respondent's policies related to lighting safety. Garza believed, based on OSHA guidance, that employees should stop working and seek shelter and remain inside for thirty minutes after any visible lightning or audible thunder, and urged his co-workers to do so.

¹ Unless otherwise noted, all dates herein are in 2020.

Garza eventually visited Respondent's Human Resources office to attempt to obtain information about Respondent's safety policies. After not receiving the information he requested, Garza expressed disappointment to a co-worker, Javier Guerra, who then also visited the office to express similar concerns. Guerra, who was also disappointed by the response from management, spoke to Garza. Garza then returned to the office for a second time and continued to ask to see Respondent's safety policies. A manager told Garza he could leave work with no repercussions if he did not feel safe. When Garza agreed to do so, he was promptly fired.

This brief will begin by presenting a statement of the relevant facts. The brief will then discuss the credibility of witnesses who testified at the hearing. Finally, the brief will establish that Respondent violated Section 8(a)(1) as alleged in the Complaint by discharging Garza because he engaged in protected concerted activities.

II. STATEMENT OF FACTS

A. Respondent's Operations

Respondent operates a rail yard in Corpus Christi, Texas, at which refined fuel products are transferred from trucks to railcars for transportation. (Tr. 136, LL. 16-20). The yard consists primarily of open space with rail track and a few small buildings, including the scale house and a small HR office building. (Tr. 18, LL. 9-24). Employees referred to as loaders or transloaders inspect rail cars on several rail lines in the yard, and then use equipment to load the cars with gasoline or diesel fuel from incoming trucks. (Tr.19-20, LL. 12-16). Loaders hold a safety meeting at the start of each shift, during which they review general hazards such as slips, trips, and falls; moving vehicles or train cars; and a general instruction to "watch the weather." (Tr. 124, LL. 7-11; 169, LL. 17-24; 210, LL. 3-10).

Michael Walter is Respondent's Chief Operating Officer. (Tr. 92, LL. 20-23). Mark Henry is Respondent's General Manager and Vice President of Operations. (Tr. 198, LL. 21-24). Selina Zapata is Respondent's Vice President of HR and Finance. (Tr. 198, LL. 13-18).

B. Respondent's Weather Policies

The Employer maintains an employee handbook. (GC Exh. 6; Tr. 45, LL. 23-25). The handbook includes the following language at page 32, under the heading "Severe Weather":

Severe weather is to be expected during certain months of the year. Although driving may at times be difficult, when caution is exercised the roads are normally passable. Except in cases of severe storms, we are all expected to work our regular hours. Time taken off due to poor weather conditions while the business remains open is to be used as PTO.

If extreme weather conditions require closing of the building, you will be notified by your supervisor.

At page 47, under the heading "Each Employee's Responsibility," the handbook lists a number of precautions employees are expected to take, including to "[c]omply with OSHA standards and/or applicable state job safety and health standards as written in our safety procedures manual."

Michael Walter testified to the existence of a separate "Human, Environmental and Safety Policy," although this document was not produced or introduced at the hearing. (Tr. 145, LL. 20-25). Garza and Guerra testified that they were not aware of any more specific policy addressing procedures for lightning storms. (Tr.173, LL. 19-25; 210-11, LL. 19-1).

C. Luis Garza's Employment History

Luis Garza was employed by Respondent as a transloader from January 13, 2020, until he was terminated on June 1, 2020. (Tr. 17, LL. 18-19). Prior to his discharge, he had not received any disciplinary action. (Tr. 63, LL. 3-6). At the time of his discharge, Garza normally began work

at 7:30 a.m. and worked until loading for the day was complete, generally between 8:00 p.m. and 11:00 p.m. but sometimes as late as 1:00 a.m. (Tr.19, LL. 2-8).

D. Events of June 1, 2020

Six loaders reported to work on the morning of June 1: Garza, Ruben (last name unknown), Herman Gutierrez, Javier Guerra, Fabian Torres, and David Torres. (Tr. 34, LL. 6-8). Lonnie Jackson, whose position is unclear, and Julian Delacruz, the loader foreman, were also working. Delacruz drives a truck around the yard to check on the loaders as they work, and sometimes gives them rides between the work lines and buildings on the job site. (Tr. 35, LL. 20-24; 179, LL. 20-24). Delacruz also served as a point of contact for communication between employees and managers. (Tr. 172, LL. 7-10). Although employees testified that they viewed Delacruz as their immediate supervisor, he is not alleged to be a statutory supervisor. Delacruz, Jackson, Garza, and the other loaders working on June 1 were included in a group text message string. (GC Exh. 2; Tr. 26-27, LL. 1-12).

As Garza drove to work on the morning of June 1, 2020, he encountered a heavy lightning storm near Robstown, about 20 minutes from the job site. (Tr. 23-24, LL. 15-5). At about 6:52 a.m., Garza sent a message to the group text notifying Delacruz and his co-workers that he was going to be late because of road conditions. (GC Exh. 2; Tr. 30, LL. 19-23). Delacruz responded, "Be careful boss." (GC Exh. 2; Tr. 26, LL. 10-16).

When Garza arrived at work, he noticed that the area around the Scale House was flooding because of the storm. (Tr. 33, LL. 3-4). Garza initially waited in his vehicle before running inside the Scale House with his co-workers. (Tr. 33, LL. 4-6). At the Scale House, Garza and other employees discussed concerns about the ongoing lightning storm. (Tr. 33, LL. 3-8; 113, LL. 9-15; 167, LL. 12-16). The loaders and Delacruz were present, as well as employees from the rail

crew. (Tr. 33, LL. 11-15; 188-89, LL. 20-3). It is not clear whether Mark Henry was present at the job site at this time, but he was not at the Scale House with the employees. (Tr. 75, LL. 9-15; 170, LL. 21-22). Michael Walter was not present at the yard at any time during the day. (Tr. 147, LL. 6-9). During the morning safety meeting, the employees reviewed the normal safety precautions but were not given any specific instructions as to working during the ongoing lightning storm. (Tr. 169-70, LL. 11-6; 210, LL. 8-10). Garza questioned Delacruz about what employees should do about the bad weather. (Tr. 34, LL. 11-15). At some point after the safety meeting, as employees were preparing to report to their work locations, Delacruz and some of the loaders began monitoring lightning strikes using a phone app called Lightning Tracker. (Tr. 36, LL. 12-19; 114-15, LL. 21; 167-69, LL. 23-2). Delacruz told Garza that if lightning struck within five miles of the work site, he would try to suggest something to management to keep employees safe. (Tr. 36, LL. 13-19).

At some point prior to June 1, Garza had accessed an OSHA fact sheet titled “Lightning Safety When Working Outdoors.” (GC Exh. 3; Tr. 42, LL. 8-18). The document advises employees to seek shelter in a building or vehicle, and to remain inside for at least thirty minutes after hearing the last sound of thunder. (GC Exh. 3, p. 2). It states, “If you hear thunder, even a distant rumble, get to a safe place immediately, Thunderstorms always include lightning. Any thunder you hear is caused by lightning! NOAA advises that nowhere outside is safe when thunderstorms are in your area.” Id.

After the meeting in the Scale House, employees were transported by Delacruz in his truck to their work locations. (Tr. 34, LL. 14-16). Garza and Fabian Torres were assigned to work together. (Tr. 34, LL. 23-24). Gutierrez and Ruben worked together on another line, while David Torres, Jackson, and Guerra worked alone elsewhere. (Tr. 34-35, LL. 25-2; 174, LL. 3-5). At

some point shortly after beginning work, employees began shutting down for thirty minutes when lightning or thunder was observed nearby. (Tr. 44-47, LL. 25-8; 114, LL. 3-8; 176, LL. 12-17). Employees were unclear about the exact details of the policy or who it came from. Garza testified that he had discussed the OSHA guidelines calling for a thirty-minute pause indoors with Gutierrez; that he told Fabian Torres not to work during the thirty minutes and told David Torres by phone that this is what he was doing; and that he was not sure what other employees were doing. (Tr. 42, LL. 13-18; 45-47, LL. 12-8). Fabian Torres testified that Garza first brought up the thirty-minute period and that other employees agreed to follow the OSHA rule. (Tr. 114, LL. 19-23). Guerra testified that Delacruz told him to stand-by if lightning struck nearby. (Tr. 176-77, LL. 12-14). Employees were also unclear about exactly what time they began working. However, the group text message exchange shows that Guerra sent a screenshot of a lightning strike recorded at 8:07 a.m. (GC Exh. 2). Prior to this, Garza had sent two text messages about shutting down due to nearby lightning. *Id.* After Garza sent these messages, Delacruz sent a message stating, “I am using a 3 mile radius per Mark & I am using the app for confirmation on time. We will stay shut down till we have 30 minutes of no lightning from last strike.” *Id.* It is not clear whether this instruction was passed to Delacruz by a manager. Garza then texted that employees should also shut down if they heard thunder. *Id.* Employees continued to exchange text messages about the weather and nearby thunder and lightning through the morning. (GC Exh. 2).

At some point later in the morning, about 10:00 a.m., Garza asked Delacruz to give him a ride to the HR building because he wanted to discuss a time-off request related to his girlfriend giving birth and to request a copy of the “EPA,” or Emergency Plan of Action.² (Tr. 47-48, LL.

² The OSHA document relied upon by Garza contains a section headed “Emergency Action Plan,” which states “Employers should have a written Emergency Action Plan (EAP), as outlined in 29 CFR 1910.38 or 29 CFR 1926.35. (GC Exh. 3 at p. 2). It then goes on to list elements that should be included in the plan. *Id.*

18-7; 83, LL. 8-11). When Garza arrived at the office, Zapata; her daughter, who is also employed by Respondent in some capacity; and another female employee were present. (Tr. 49, LL. 1-6). Garza discussed his time-off request with Zapata, and asked her for a copy of the Emergency Plan of Action so that he could understand the protocols for lightning storms and better inform his co-workers. (Tr. 49, LL. 10-17). Zapata told Garza that they were busy, but that they would attempt to locate the Plan and send it to him at his workstation. (Tr. 59, LL. 20-23). Zapata then asked Garza to return to work. (Tr. 49, LL. 24-25). He notified Zapata that he was waiting to leave the building until the thirty-minute period from the last lightning or thunder incident expired. (Tr. 49-50, LL. 24-3). After waiting for a few minutes, Garza returned to his worksite with Delacruz. (Tr. 50, LL. 3-5).

Guerra testified that at about 11:00 a.m., Garza contacted him by text message about his visit to HR and said that he was unhappy with the way employees' concerns were being addressed. (Tr. 178-89, LL. 1-16). Guerra told Garza that he also did not feel Respondent was addressing the concerns, and that he felt it was his turn to go to HR to express his concerns on the record. (Tr. 179, LL. 11-14). Guerra asked Delacruz to give him a ride to the HR building, which Delacruz did. (Tr. 179-80, LL. 15-5). Guerra arrived at the office and spoke to Zapata, who called Walter on the phone. (Tr. 180, LL. 11-13). Guerra spoke to Walter over the phone, and told him that he was concerned about the lightning strikes in the area, including one at a nearby property. (Tr. 180, LL. 16-21). Guerra said he was also concerned about flooding in certain areas of the yard in relation to the lightning, and that he was working in ankle-deep water. (Tr. 180, LL. 21-24; 193, LL. 8-13). Walter said that this was not possible and that the yard did not flood, and suggested that he use rocks to fill in the flooded area. (Tr. 195, LL. 23-25). Guerra said he was also concerned about what might happen if a fuel truck were struck by lightning. (Tr. 180, LL. 21-24).

Walter told Guerra that the cars were grounded and that nothing would happen to the fuel containers. (Tr. 180-81, LL. 25-1). He said that everything done at the yard was completely safe, and that if the nearby refineries were open, they should also be open. (Tr. 181, LL. 14-19). Walter then told Guerra that if he felt unsafe, he should go home. (Tr. 181, LL. 19-20). At this point, the phone call with Walter ended. (Tr. 181, L. 22).

Guerra asked Zapata if “going home” would be permanent, or whether Walter meant he could leave for the day. (Tr. 181-82, LL. 22-3). Zapata said that he could go home, but not to expect to call in for the next three or four days because of the rain. (Tr. 182, LL. 14-16). Guerra told Zapata that the issue was not the rain, it was the lightning, and that the concerns had still not been addressed and no clarification had been provided on procedures or regulations. (Tr. 182, LL. 16-19). Guerra did not leave work at this time, but instead returned to work with Delacruz. (Tr. 183, LL. 10-13).

Garza and Guerra spoke while Guerra was on his way to his work location.³ (Tr. 183, LL. 15-17). Guerra told Garza about his visit to HR and the response he had received from Walter. (Tr. 183-84, LL.19-1). Because of the conversation, Garza decided to return to the HR office. (Tr. 51, LL. 7-10). Garza again asked Delacruz for a ride to the office, and arrived at the office about 11:30 a.m. (Tr. 51, LL. 16-23).

When Garza arrived at the office, Mark Henry was present outside the building. (Tr. 51-52, LL. 25-1). Garza testified that he asked Henry for a copy of the Emergency Action Plan, and Henry began scrolling through his phone. (Tr. 52, LL. 1-2). Henry and Garza walked inside the building, where Henry sat down and continued using his phone. (Tr. 52, LL. 4-6). Garza waited with Henry until Henry got up and walked back outside. (Tr. 5, LL. 6-7). Garza followed him out

³ Garza testified that this conversation took place in-person when Delacruz drove by Garza’s work location, while Guerra testified the conversation occurred via text message. (Tr. 50-51, LL. 8-8; 183, LL. 15-17).

and again asked for the Plan. (Tr. 52, LL. 7-8). Henry told Garza that if he felt it was unsafe, he was able to leave. (Tr. 52, LL. 8-12). At this point, Garza began recording the conversation with Henry using his phone. (GC Exh. 4; Tr. 54-55, LL. 21-12). Garza asked Henry to confirm that he could go home if he did not feel safe, and that there would not be any retaliation, which Henry did. (Tr. 55, LL. 13-25).

Portions of the audio of GC Exhibit 4 are somewhat difficult to hear because of background wind noise. However, the following portions are audible, with time stamps in brackets. At the beginning of the recording, Henry states, “[Inaudible] said, if he feels unsafe he can go home.” [0:03]. Garza responded, “If I feel unsafe I can go home?” [0:05]. Henry responded, “Yeah.” [0:06]. Garza asked, “And does that count towards, what, me leaving, is that bad? Does that count toward me?” [0:07]. Henry said, “No, just if it’s unsafe, just go home.” [0:13]. Garza said, “No, but what I’m trying to say is, like, there . . .” [0:15]. Henry said, “No, it’s not a write-up, it’s nothing like that.” [0:17]. Garza said, “Nothing, I’m not going to be looked at different, no retaliation, nothing like that, just because I feel unsafe?” [0:19]. Henry responded, “No.” [0:24]. Garza responded, “OK. Just making sure, boss.” [0:25].

After this exchange, Garza continued to ask to see “the paper,” referring to the Emergency Action Plan. (GC Exh. 4; Tr. 56, LL. 16-21). Garza told Henry that if he didn’t have it at the moment, that was OK, because Garza was going home, but that he would still like to see it to be better prepared in the future. (Tr. 56-57, LL. 22-2). Garza went back into the building with Henry, and Henry printed a copy of the Emergency Action Plan. (GC Exh. 7⁴; Tr. 57, LL. 9-11). The Plan includes a list of emergency contacts and a list of events to be reported by site personnel, but

⁴ A copy of the Emergency Action Plan is also included in GC Exhibit 10, Garza’s personnel file. The copy in Garza’s file includes a hand-written note stating: “6/1/21 @ 12:13.p.m. Luis requested a copy & one was provided.”

does not include detailed plans for responding to severe weather or other emergencies. (GC Exh. 7).

Garza returned to Delacruz's vehicle to review the document. (Tr. 57, LL. 11-14). While he was in the truck, Henry, who had his phone to his ear, approached and asked Garza again whether he was sure he was going home. (Tr. 57, LL. 15-19). Garza responded yes, and that he did not feel safe. (Tr. 57, L. 20). Henry told Garza that his services were no longer needed, and to go inside to sign a termination paper that Selina Zapata had written up. (Tr. 57, LL. 21-23). Garza said "okay" and went back into the HR office. (Tr. 57, L. 24). Zapata gave Garza a copy of the termination notice, and Garza took a picture of the document. (GC Exh. 5⁵; Tr. 61, LL. 7-12). The document states that Garza was terminated because he "was asked to get back to work and refused." (GC Exh. 5). Garza asked Zapata and Henry who had asked him to return to work, and Henry responded that it was Delacruz. (Tr. 61, LL. 12-17). Guerra notified Delacruz he was quitting after he learned that Garza had been terminated. (Tr. 184-85, LL. 9-10).

E. Testimony of Michael Walter

Walter testified that on-site supervisors call him on speakerphone any time there is a situation with an employee, whether or not the employee is aware that he is listening. (Tr. 104, LL. 11-14). Walter testified that Garza did not visit the HR office for the first time until about 11:50 a.m., shortly before he was fired and after Guerra had visited. (Tr. 97, LL. 2-8).

Walter testified that he monitored weather conditions throughout the morning, and gave the "all-clear" for employees to return to work shortly after 10:30 a.m. based on weather app data and the reopening of a local refinery. (Tr. 137-38, LL. 23-18). He did not specify who communicated this to employees or how this message was communicated. No employees testified

⁵ A copy of the termination notice is also included in GC Exhibit 10, Garza's personnel file. The copy in Garza's file includes a manager and witness signature.

to having received such a communication from a supervisor. Fabian Torres testified that, at some point, Delacruz told him that “the thirty minutes wasn’t going to be allowed anymore and to not shut it down anymore.” (Tr. 123, LL. 2-6). It is not clear exactly when this occurred, but Torres testified that it was about the time that Garza visited HR for the second time, sometime between about 11:00 a.m. to noon. (Tr. 119, LL. 4-11).

Walter testified that Guerra visited the HR office at about 11:00 a.m. (Tr. 97, LL. 2-8). Walter spoke directly to Guerra, who complained only that his feet were getting wet because of a hole in his work area. (Tr. 139, LL. 12-16). Walter told him that this was not a safety concern, and that he could either fill the hole with rocks, or that he would be allowed to go home if he did not feel safe. (Tr. 139, LL. 16-19). At another point in his testimony, Walter testified that Guerra told him that he just didn’t feel good and wanted to go home. (Tr. 100, LL. 15-16).

At one point in his testimony, reading from the affidavit he provided during the investigation⁶, Walter testified that when Henry called about Garza’s visit to HR, Henry told Walter that Garza was refusing to go back to work after supervisors had given the all-clear, and that he was requesting printed information on the company’s policies and procedures. (Tr. 138, LL. 8-12). Walter testified that he provided Garza the documents he was asking for and instructed Garza to return to work, and that Garza refused, saying it was unsafe.⁷ (Tr. 139, LL. 2-7). Walter testified that he did not at any point give Garza the option to go home if he felt unsafe. (Tr. 140, LL. 6-8). Walter asserted that any threat related to lightning had passed and that Garza was

⁶ Walter read his entire affidavit into the record. (Tr. 134-140, LL. 11-25).

⁷ Garza testified that he was aware that Henry was on the phone with someone during their conversation, but that he did not know who at the time and there was no direct discussion between him and Walter. (Tr. 220, LL. 10-21).

refusing to return to work because he did not have his company-issued raincoat, which he had torn up.⁸ (Tr. 139-40, LL. 8-12).

At another point in his testimony, Walter testified that he did not speak directly to Garza when Garza visited the HR building at 11:50 a.m., but that he was on the phone with Zapata and could hear the conversation. (Tr. 100-01, LL. 24-5). Garza walked into the office very upset, said he should not be working in the rain, and asked for a copy of the Emergency Action Plan. (Tr. 101, LL. 8-11). Garza was told to return to work at this time, presumably by Zapata, although this is not clear from the testimony. (Tr. 102, LL. 1-5). Walter learned that instead of returning to work after leaving the office, Garza had gone to the Scale House to have a conversation with Guerra, and that Garza was again requesting a copy of the EAP from the Scale House. (Tr. 102, LL. 15-20). Walter then called Henry and told him to drive to the Scale House, provide a copy of the EAP to Garza, and again instruct Garza to return to work. (Tr. 102,-03, LL. 23-1). Walter was on the phone with Henry when Henry spoke to Garza at about 12:13 p.m. (Tr. 103, LL. 4-11). Garza refused to return to work and wanted to review the documents in the Scale House. (Tr. 103, LL. 1-3). Walter instructed Henry to terminate Garza at this point. (Tr. 103, LL. 12-18). At 12:30 p.m., Garza returned to the administrative office and asked why he was being fired. (Tr. 103, LL. 20-24). He continued to talk about the weather, and did not leave the premises until 1:20 p.m. (Tr. 103-04, 24-2).⁹

⁸ Garza testified that he tore his company-issued raincoat during the first week of his employment in January. He notified Delacruz at the time. After this, he used his own Carhartt jacket, and he had worked in the rain prior to June 1. (Tr.211-12, LL. 5-5). Torres testified that Garza was wearing a Carhartt rain jacket on June 1. (Tr. 125, LL. 19-25).

⁹ Walter testified that Respondent keeps documentation of employee conversations with HR, and that these documents were something Counsel for the Acting General Counsel could expect to receive in response to the subpoena. (Tr. 98, LL. 8-18). No such documents were produced or offered at the hearing. The outside folder covers for the personnel files for Guerra and Torres also include notes about the circumstances under which the employees left their employment with Respondent. (GC Exhs. 8-9; Tr. 199-202, LL. 8-3). Walter testified that it is the Employer's regular practice to include such notes on the outside of the personnel folders. (Tr. 199, LL. 17-20). The version of Garza's personnel file provided by Respondent did not include the outside folder cover. (GC Exh. 10).

Walter testified that “Guerra and Garza obviously talked to one another but they couldn’t get their story straight about what the hazard was.” (Tr. 139-40, LL. 24-1). He also testified that “Javier [Guerra] told me on the phone that he had been approached by Luis [Garza] looking for collaboration before his complaint.” (Tr. 140, LL. 3-6).

III. CREDIBILITY

To determine whether Respondent engaged in unfair labor practices as alleged in the Complaint, the Administrative Law Judge must make credibility determinations. The Board gives weight to the ALJ’s credibility determination as the ALJ “sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.” *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). The ALJ may assess all aspects of the witness’s demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication.” *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977). Besides these evaluations, “credibility resolutions are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.” *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (citing *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989); *Gold Standard Enterprises*, 234 NLRB 618, fn. 4 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979); *V & W Castings*, 231 NLRB 912, 913 (1977), enf. 587 F.2d 1005 (9th Cir. 1978)).

As discussed above, Michael Walter’s testimony is internally inconsistent, including two very different accounts of the events immediately preceding Garza’s discharge, and is inconsistent in key respects with the testimony of the other witnesses at the hearing.

Respondent also failed to call Mark Henry or Selina Zapata, both officer-level managers who were directly involved in conversations key to this case. Walter confirmed both Henry and Zapata were employed at the time of the hearing. (Tr. 198-99, LL. 13-1). The Board has held that when a witness may reasonably be assumed to be favorably disposed to the party and is not called to testify, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). "It is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party." *Ibid.* As discussed above in footnote 9, Walter also referenced documents related to employee conversations with managers and the reasons for Garza's discharge which were neither produced nor offered at hearing.

The Acting General Counsel's witnesses testified credibly and consistently. Any argument by Respondent that Garza should not be credited because of allegations included in the charge should be rejected. Garza filed the charge without legal representation using the form on the Board's public website, and erroneously included two allegations of Section 8(a)(3) violations. (GC Exh. 1(a)). These allegations were withdrawn and were not included in the Complaint. (GC Exh. 1(c)). Issues with the NLRB's e-filing forms should not be a basis for discrediting the pro se Charging Party in this matter.

IV. LEGAL ANALYSIS AND DISCUSSION

In cases involving employer motivation, the Board's analysis of a discharge is governed by the burden-shifting framework articulated in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Here, because Respondent claims

that Garza was discharged for insubordination because he refused to return work after being told to do so, *Wright Line* applies.

To establish a violation of Section 8(a)(1) under *Wright Line*, the General Counsel must show, by a preponderance of the evidence, that an employee's protected activity was a motivating factor in the employer's decision to take adverse action against the employee. *Id.* at 1089. If the General Counsel makes the required showing, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employee's protected activity. *Id.* The General Counsel must meet this initial burden by showing protected activity, employer knowledge of that activity, and animus toward the protected activity. See, e.g., *Approved Electric Corp.*, 356 NLRB No. 45, slip op. at 1 (2010).

As discussed below, Garza engaged in protected concerted activities by discussing safety concerns with co-workers, urging co-workers to stop work after lightning or thunder, and visiting the HR office to attempt to obtain information about Respondent's safety policies. Respondent had knowledge of Garza's protected activities, and Garza's discharge was motivated by animus toward these activities. Respondent cannot meet its burden to prove Garza would have been discharged absent his protected activities.

A. Garza engaged in protected concerted activities.

In this case, Garza engaged in protected concerted activities when he discussed concerns about lightning safety and the lack of a clear policy with co-workers, and when he encouraged co-workers to stop work for thirty minutes if they saw lightning or heard thunder.¹⁰ Although Respondent took the position at hearing that the employees were simply following established

¹⁰ The Board and courts have held that concerted work stoppages in response to concern about safety or other working conditions are protected, even where employees do not raise their complaints to management prior to stopping work. See *Washington Aluminum*, 370 U.S. 9 (1962); *Vemco, Inc.*, 314 NLRB 1235 (1994).

company protocol, no written policies were produced or offered at the hearing other than the general language discussed in Section II(B), supra. It is clear from the testimony of the three employee witnesses, as well as the text messages between employees, that no such detailed protocol had been communicated to employees. (GC Exh. 2). Rather, Julian Delacruz, either on his own or after speaking to a manager, sent a text message to employees after work had begun that they were going to stop work for thirty minutes after lightning struck within a small radius. Garza continued to encourage employees to stop work and seek shelter if they heard thunder, as well. Id.

Garza's and Guerra's visits to the office building to raise questions to management about the Employer's safety policies were a continuation of this protected activity. The Board has held that even the action of a lone individual can be concerted where it is the "logical outgrowth" of group activity. See, e.g., *Salisbury Hotel*, 283 NLRB 685 (1987). In this case, Garza and Guerra were not acting alone, as both visited HR to support one another and raise similar concerns.

B. Respondent had knowledge of Garza's protected concerted activities.

Although there is no direct evidence that Respondent's supervisors or agents had knowledge of the early conversations between employees related to lightning safety concerns, Respondent clearly had knowledge that Garza and Guerra discussed their concerns and spoke about visiting HR to voice them. Walter admitted that "Guerra and Garza obviously talked to one another. . ." , and that "Javier [Guerra] told me on the phone that he had been approached by Luis [Garza] looking for collaboration before his complaint." (Tr. 139-40, LL. 24-6). Walter testified that the decision to discharge Garza was made after Walter learned that Garza had gone to the Scale House to speak to Guerra after leaving the HR building. (Tr. 102, LL. 15-20). Thus, Respondent was aware that Garza and Guerra were coordinating their complaints.

C. Respondent harbored animus toward Garza's protected activity.

Evidence contributing to a finding of animus may include the timing of the employer's adverse action in relation to the employee's protected activity. See, e.g., *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action"). Animus can also be proved by evidence that the employer's asserted reason for an adverse action was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless. See, e.g., *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 8 (2014); *ManorCare Health Services - Easton*, 356 NLRB No. 39, slip op. at 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n. 12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), *enfd. sub nom. NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997). The Board has recently held that pretext alone is not sufficient to establish unlawful motivation without support from the surrounding circumstances to support such an inference. *Electrolux Home Products*, 368 NLRB No. 34 (2019).

In this case, Garza was discharged immediately after he engaged in protected concerted activity by continuing to raise questions about Respondent's safety policies. Respondent's purported reasons for Garza's discharge are also pretextual. Garza's account of his second visit to HR, during which Henry gave him the option to leave work if he did not feel safe, is consistent with the video evidence. (GC Exh. 4). The alleged offer to leave work is also consistent with

Guerra's account, which is undisputed by Respondent, that Walter gave him the option to leave work if he did not feel safe.

Garza's account should be credited over Walter's, which, as discussed above, is internally inconsistent and unsupported by other witnesses. Notably Henry and Zapata, who are agents of Respondent and were directly involved in the conversations at issue, were not called to testify. Respondent essentially baited Garza to agree to leave work, and then fired him without warning when he agreed to do so. It is not clear whether Guerra would also have been fired for leaving, as he quit when he decided to leave work after learning about Garza's discharge.

D. Respondent has not met its burden to establish that Garza would have been discharged absent protected activity.

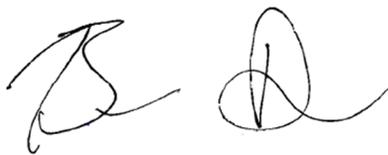
Respondent has not offered a reason for Garza's discharge other than that he refused to return to work after being instructed to do so, which, as discussed above, is pretextual. Thus, Respondent has not met its burden to establish a defense under the *Wright Line* framework.

V. CONCLUSION

For all of the reasons advanced above, the Acting General Counsel respectfully requests a finding that Respondent violated the Act as alleged in the Complaint. The Acting General Counsel also respectfully seeks the traditional reinstatement, a make whole remedy and order (including backpay, with interest), a cease and desist Order, and a Notice Posting. The Acting General Counsel further seeks all other relief as may be deemed appropriate to remedy the unfair labor practices alleged.

DATED at Fort Worth, Texas this 1st day of March, 2021.

Respectfully submitted,

Handwritten signature of Bryan Dooley, consisting of a stylized 'B' followed by a stylized 'D'.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the Acting General Counsel's Brief to the Administrative Law Judge has been served this 1st day March, 2021, via electronic mail upon each of the following:

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