JD(SF)–15–25
Austin, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BERG DRYWALL, LLC D/B/A THE BERG GROUP

and Case 16-CA-319280

FERNANDO A. MENDOZA GUEROLA

Alberto Aguirre, Esq., and *Martha Angelica Vertti Canto, Esq.,* for the General Counsel.
Manuel Quinto-Pozos, Esq., for the Charging Party.
Grant Collins, Esq., with David A. Richie, Esq., on the brief, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRIAN D. GEE, Administrative Law Judge. This case was tried before me either in-person in Austin, Texas, or remotely by Zoom, on January 7, 29, 30, and February 4, 2025. Based on a charge filed by individual charging party Fernando A. Mendoza Guerola (Mendoza) on June 2, 2023, the General Counsel[1] issued a complaint and notice of hearing on July 16, 2024 (the complaint). The complaint alleges that Berg Drywall, LLC dba The Berg Group (Respondent or Berg) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Mendoza on January 4, 2023, in retaliation for his protected concerted activities, which included raising complaints about safety and mistreatment by management. Respondent filed a timely answer denying the commission of any unfair labor practices and seeking dismissal of the complaint based on the assertedly unconstitutional removal protections applicable to Board Members and Board Administrative Law Judges (ALJs).

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and

[1] For brevity, I have referred to former General Counsel Jennifer Abruzzo, current Acting General Counsel William Cohen, and Counsel for the General Counsel Aguire and Vertti Canto as the "General Counsel."

to file posthearing briefs. Based on a careful review of the entire record, including the posthearing briefs[2] and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a construction contractor that provides pre-construction services, including interior and exterior framing and finishes, in the commercial and industrial construction industry. It is a Minnesota corporation with a principal office and place of business in Chaska, Minnesota, as well as offices and places of business located throughout the United States, including at the Tesla facility located at 13101 Tesla Road in Austin Texas. During the 12-month period preceding the issuance of the complaint, Respondent performed services valued in excess of $50,000 in States other than the State of Texas. Respondent admits, and I find, that during the times material to the complaint it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. FACTS

These events took place at Tesla's global headquarters in Austin, Texas, a facility known as "Gigafactory Texas."[3] Respondent was hired by general contractor Yates Construction to build out one part of the facility, called "Bob Project Cell Phase I." Respondent's work included erecting metal-framed walls and installing acoustic ceiling tiles, insulation, and firestop. Respondent's work on Phase I started in or around July 2021 and lasted through mid-2023. They operated approximately six days per week from 5:30 a.m. to 4:30 p.m. (Jt. Exh. 5[4], R Exh. 25, Tr. 44-46, 154, 283-284, 298-299, 310.) [5]

Respondent employed a staff of building trades workers in the positions of carpenter, laborer, and helper. During its busiest times, Berg had 65 to 75 employees at the facility. Central South Carpenters Regional Council Local Union 1266 (the Union)[6] represented a bargaining unit of "employees who perform work formally associated with the carpentry craft," which included Journeymen, Foremen, and the higher position of General Foreman. The Union's Business Representative for the facility was Enrique Garza. (Jt. Exhs. 4 and 5, R Exh. 8, Tr. 120-121.)

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[2] Respondent's brief makes various assertions of fact which are unsupported by the record. For example, on page 20 of their brief, Respondent counsel refer to certain Union hiring hall referral rules, absent any such fact in the record. In writing this decision, I have not considered such asserted facts unsupported by the record.

[3] See Giga Texas | Tesla, last checked on July 8, 2025.

[4] Abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibits; "R Exh." for Respondent's exhibits; "Jt Exh." for joint exhibits; "Tr." for citations to the hearing transcript; "GC Br." for General Counsel's brief; "R Br." for Respondent's brief; and "R Ans." for Respondent's answer.

[5] To aid review, I have included certain citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive, as my findings and conclusions are based on my review and consideration of the entire record.

[6] The Union did not file the charge and played no role in this litigation.

Safety was important to Tesla, Yates, and Respondent. One safety measure was to require workers to fill out "Pre-Task Plans" or "PTPs" before beginning tasks. In the PTP, employees were to identify safety hazards and explain how those hazards were going to be controlled. (R Exh. 21, Tr. 176-177, 306-307.)

In 2021, the year preceding the events in the complaint, Respondent operated both day and night shifts at the facility. The manager who oversaw the day shift was Joe Spain, the Superintendent. Spain and his Foreman "Richard" were viewed by some as racist and abusive to the workers. When asked how management treated employees, admitted supervisor David Cepeck answered, "the treatment that Joe and Richard had given the guys was pretty bad….¶ And I would hear it just about every morning, 'All right. Let's go see who we can fire today.' …it was almost like a game to these two to – you know, just finding – you know, 'Oh, you don't have your gloves on? Oh, you're fired. ¶ 'They don't have their safety glasses on? You['re] fired.'" (Tr. 287-290.)

In late November 2021, just one week before Thanksgiving, the employees orchestrated a work stoppage to protest the mistreatment by management. Respondent's vice president and Union officials traveled to the facility to investigate. They were presented with a "stack of papers from the guys on the treatment they were receiving from Joe and Richard," Cepeck stated, as well as an audio recording of Richard "just screaming at these guys and just saying some real nasty things." This resulted in Spain and Richard being fired. Mendoza, who held the position of carpenter at that time, was the employee who led the complaint and work stoppage. "He's the one that got the Union involved," Cepeck recalled. Upon Spain's discharge, Cepeck was promoted from head of the night shift to Superintendent of the project.[7] (Tr. 223, 229-232, 287-294.)

In terms of management structure at the facility, Respondent's two managers were Project Manager Mason Sierra and Superintendent Cepeck. Sierra managed administrative matters in the office, while Cepeck oversaw the construction operations. Respondent admitted, and I find, that Cepeck was both a supervisor and agent of Respondent under Section 2(11) and (13), respectively. Cepeck was the person responsible for all final decisions regarding discharges and layoffs at the facility. (R Ans., Tr. 285-287. 301.)

Upon becoming the Superintendent, Cepeck promoted Mendoza to foreman because he was a good carpenter and because he spoke Spanish, the language used by most of the workers. The three individuals reporting directly to Cepeck were Site Safety Director Berenice Villalobos, General Foreman Luis Villalobos[8], and Mendoza. (Tr. 108, 238-239, 284-289, 318-319.)

As Foreman, Mendoza oversaw employees to ensure they were building out the walls and other building features according to plan. He did not have the authority to hire or recall employees; when Respondent needed additional unit personnel, Cepeck contacted the hiring hall and the Union referred those employees. Mendoza did not have the authority to fire, layoff,

[7] Around this time, Respondent consolidated operations into just a day shift. (Tr. 289.)
[8] The two are sister and brother. To avoid confusion, I refer to Berenice Villalobos as "Berenice" and Luis Villalobos as "Luis." (Jt. Exh. 8, Tr. 108.)

suspend, transfer employees between different Berg projects, or transfer employees to different areas within the facility, grant bonuses, or issue discipline. Only Cepeck had the authority to do those things. When Berg needed to reduce staff, Cepeck told Luis and Mendoza how many employees needed to be laid off and asked them to make recommendations. They did so based on the employees' skills, safety record, and attendance. Cepeck would then make the final decision ("We'd have a conversation if I recognize them or not, and I would put my blessing on it," he explained). Cepeck determined what work was to be done and gave instructions to Luis and Mendoza two or three times per week. Mendoza did not have authority to change work plans. The performance of the employees he oversaw did not affect his pay or his title. When employees raised workplace concerns, Mendoza would try to solve the problems but if that did not work, he would refer the matter to either Cepeck or Site Safety Manager Andy Ross. Detailed instructions in the blueprints indicated where the walls were to be built. Based on those instructions, Mendoza directed his team members as they erected the metal frames, columns, and doorways. After other crafts performed their tasks (e.g., electricians installing wiring), Mendoza's crew would return to install the drywall, doors, and ceilings. Upon completing one section, they would move onto the next. (Tr. 42-54, 56-60, 231, 301-302, 319-320.)

Employees went to Mendoza when they had concerns about being able to proceed with work assignments safely. For example, in January or February 2022[9], employees Juan Vasquez and Cristian Hernandez approached Mendoza to tell him that they could not safely install drywall to the ceiling in a particular area because their scaffold was too short. Mendoza consulted with Cepeck, who told him to place the scaffold on top of a platform to elevate it. When the employees pushed back on that idea as dangerous, Cepeck told Mendoza to find other employees who weren't afraid to complete the job that way. Mendoza decided to leave that task to Luis' crew to complete. (GC Exh. 2, Tr. 60-68.) Also in February, a group of employees approached Mendoza to complain that their self-retracting safety harnesses (called "yo-yos") were too short, thereby preventing them from reaching the area on their work platform where they would install drywall or ceiling boards. Their fear was that the yo-yos would prematurely retract on them, causing them to drop the drywall off the platform and potentially onto workers below. Mendoza asked Cepeck to ask Berg for new yo-yos with longer cables, but Cepeck said the company was not going to buy new yo-yos and that the work had to be done. Mendoza told this to his crew and advised them to go slower and get the job done safely. (Tr. 69-77.)

In late February, Mendoza assisted two brothers, Lucio and Cresenciano Hernandez, with attempting to file a grievance with the Union. On that day, Lucio and Cresenciano came to Mendoza to report that, due to a possible miscommunication about an assignment, Cepeck got so angry at them that they feared he was going to throw a punch at them. Even though they were being supervised by Luis that day, the Hernandezes spoke with Mendoza since they figured that Luis would side with Cepeck. After work, Mendoza drove them the 20 to 25 minutes to the Union's office to file a grievance. They spoke with business representatives Francisco Marquez and Enrique Garza. While Marquez and Garza said they would "take action," all they did was turn around and report the matter to Cepeck. (Tr. 78-84.)

[9] All dates hereafter for the year 2022, unless specified otherwise.

On or about February 29, Cepeck confronted Mendoza about his visit to the Union. Before the encounter, Mendoza put his cellphone in his pocket to record the conversation. Cepeck said that Garza telephoned him to disclose Mendoza's visit with the Hernandez brothers. Cepeck angrily accused Mendoza of going "behind my back" to the Union and to Project Manager Sierra, and threatened to discharge him:

> And then, I come to find out not once, not twice, but three times after everything I've done for you…you stabbed me in the back three times. ¶ You went to the Union on me. You went to Mason twice on me. You went to Mason on fucking Luis. ¶ I can't have that.
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> You went to the – you tried to rally the troops Friday. You tried to get people to go with you and fucking go strike on me again. ¶ You went to the fucking Union. I talked to [indiscernible]. I know. Okay? ¶ Okay? I'm not going to have that. ¶ Berg has the opportunity to do nine years' worth of fucking work here. ¶ I am not going to let one individual create issues on this job site and ruin it for Berg. I will not allow that. ¶ If that means terminating you, that's what I will do. But I'm not going to allow that to happen. ¶ But as far as you personally, you stabbed me in the back three times after everything I've done for you. ¶ That's – we were friends at one time. ¶ Okay? And then you stabbed me in the back, and I don't appreciate that at all.

(GC Exh. 3, pp. 3-4.) Cepeck continued, saying that project manager Sierra and an executive named "Chris" (surname not specified)[10] supported him in whatever action he chose to take against Mendoza. He then added, "now it's going to be up to you what happens." (GC Exh. 3, pp. 6-7, Tr. 120-122.)

Several months passed and on December 19, Mendoza suffered an accident at work. That morning, Mendoza was tasked with drawing out lines where walls were to be erected, but he was concerned about being able to do that safely because there was an open trench in the floor which presented a safety hazard. Mendoza raised his concerns with Cepeck and Luis, but Cepeck just told him to get the job done. Additionally, while he was supposed to fill out a PTP prior to beginning the work, there were none since Berenice had not refilled the supply of forms. While performing the work, Mendoza stepped backwards into the trench and twisted his knee. Cepeck and Berenice took him to the medical clinic, where he was treated, given some medications, and placed on temporary medical work restrictions. After he suffered the injury, Berenice told him to fill out a PTP. (GC Exhs. 4, 5, R Exh. 21, Tr. 102-110, 177-181, 210.)

The next morning, December 20, Mendoza reported to work despite the injury. At the morning meeting, Cepeck was upset and "scolded" Mendoza because the injury was going to cost the company a lot of money. Mendoza spoke up to say that the prior day's job was

[10] While Mendoza called Chris the "CEO," R Exh. 6 identified Berg's CEO as Ron Johnson. "Chris" might refer to "Chris Dickerson," whom the Berg website calls its Chief Operating Officer. See Chris Dickerson – The Berg Group, last checked on July 8, 2025.

dangerous due to the open trench. Even though Mendoza had been placed on medical restrictions, Cepeck instructed him to handle physically demanding tasks which involved walking stairs, carrying materials, and pushing carts. (GC Exh. 5, Tr. 109-113.)

Cepeck's punitive response to the situation prompted Mendoza and several co-workers to send an email to Human Resources Director Sarah Burdick on December 27 to complain about Cepeck and to raise concerns about safety and favoritism. The employees created a new email account and sent their message under the pseudonym "Oswald Marz" for fear of retaliation. They demanded Cepeck's removal based on asserted anger issues, ethics violations, abuses of power, nepotism, favoritism, and safety deficiencies. Absent action by management, they threatened to strike and to share their complaints with Tesla. The email was sent directly to Burdick at Respondent's corporate headquarters. They were able to find her email address using Mendoza's tablet.[11] Despite these emails being anonymous, Cepeck concluded that they were "most likely" written by Mendoza. Cepeck formed this belief because he had observed Mendoza walking around the facility "trying to get employees all riled up over complaints about safety or the work" and because other employees told him that Mendoza had spoken to them about safety. (GC Exh. 6, Tr. 113-119, 269-270.)

On December 29, Cepeck issued Mendoza a verbal warning for operating a forklift without a spotter. Prior to that, Mendoza had never been disciplined. (R Exh. 5, Tr. 123-127, 274-275.)

On December 30, Berg president/CEO Ron Johnson and national safety director Dave Derzab flew to Texas to visit the facility and look into the issues raised in the anonymous emails. Derzab told Burdick that they spoke with Union representatives and "voiced our concerns over the allegations stated in the anonymous emails. We felt that a few employees may be [SIC] instigated the crew to voice unsubstantiated claims concerning Safety, Jobsite management and un-professional behavior." (Jt. Exh. 3, R Exhs. 6 and 7.)

On January 3, 2023, co-worker Dany Herrera also sent an anonymous email to Burdick to complain about Cepeck and workplace conditions. (GC Exh. 8, Tr. 128-132.)

On the morning of January 4, 2023, Respondent discharged Mendoza from his foreman position and let go five carpenters.[12] Cepeck made that decision. While Cepeck viewed him as a good carpenter, he selected Mendoza for removal—instead of keeping him on as a carpenter—because "other carpenters weren't being disruptive on the job." Cepeck viewed Mendoza as disruptive because he sought to build group opposition to management: "Just trying to get them to go against me or whatever the case may be because they've already done that once to two other superintendents. And I received an email – a text message…that somebody admitted to me that what [Mendoza] was doing, and I forward[ed] that…I sent it off to HR, and they have it on

[11] The only Berg personnel at the jobsite with tablets, and thus access to the Berg email directory, were Cepeck, Luis, and Mendoza. (Tr. 113-119, 160, 269-270.)

[12] The language in Mendoza's personnel action form ("involuntary termination," "terminated," and "NOT ELIGIBLE FOR RE-HIRE") clearly indicate he was discharged. However, for the five carpenters separated that day, it is uncertain whether they were laid-off subject to recall or discharged since their personnel action forms were not offered into evidence.

file." Mendoza was "trying to instigate another mutiny to walk off the job" or "riling up" the employees about workplace matters, such as safety. (R Exh. 16, Tr. 227, 232-236, 262, 269-281.)

After he separated the six employees, Cepeck met Mendoza and Jose Quijvix outside of the fence surrounding the facility to oversee the loading of Mendoza's and Quijvix' large toolboxes (called a "gang boxes") into their trucks. To get past the fence, the employees had to swipe their ID badges to exit the turnstiles. When Cepeck asked them for their badges, Mendoza replied that he had already given his to Berenice inside. Cepeck thought that was a lie since Mendoza would not have been able to pass through the perimeter fence unless he still had his badge and could swipe it at the turnstile. Nonetheless, Cepeck asked no follow-up questions to test his assumption. Quijvix also refused to turn in his badge to Cepeck.[13] (ALJ Exh. 1, R Exh. 16, Tr. 141-145, 147-153, 322-327.)

Cepeck then drafted the personnel action form for Mendoza. He called the separation an "Involuntary Termination," wrote that Mendoza was "TERMINATED," and marked him as "NOT ELIGIBLE FOR RE-HIRE." Cepeck listed two bases for the discharge: "He has a fork lift safety violation & lied about turning in his badge at the time of termination." (R Exh. 16, Tr. 227.) Respondent never recalled Mendoza to work at that or other jobsites. (Tr. 144, 156.)

Later on January 4, 2023, Mendoza and the others went to the Union to file a grievance. While the Union representatives said they would file it, Mendoza believes that the Union never filed or pursued a grievance on their behalf. (Tr. 144-147.) No party presented any evidence to show that the Union grieved the discharge of Mendoza or any of the others.

III. CREDIBILITY

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, 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). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue on which the witness would likely have knowledge.

[13] While Cepeck testified at the hearing that Quijvix did not respond to his question whether he turned in his ID badge, that is not what he wrote at the time. In an email to Mason, Burdick, CFO Chris Dickerson, and a person named Bobbie Cortese on the morning of January 4, Cepeck reported that "Jose Quijvix refused to turn in badge." (R Exh. 16.) I find Cepeck's email, sent almost immediately after the incident, to be a more reliable account of what happened.

See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977)(adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995)(failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact). Adverse inferences may also be drawn based on a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030 fn. 13 (2014).

In the instant case, most of the testimony about events was not in dispute. Just two witnesses were called—Mendoza and Cepeck—and both gave testimonies that were largely consistent on key points. Mendoza and Cepeck both listened carefully to the questions and answered without hesitation. Based on my observations, I found that Cepeck made an effort to be forthcoming and accurate. However, there were times when he could not remember particular events, either in their totality or with accuracy. For that reason, I have only credited Cepeck's testimony where consistent with the facts above. As to Mendoza, I generally found him to be a credible witness. One exception pertained to his testimony about why he did not return his ID badge. Mendoza testified that he held onto the badge so that he could exit the perimeter fence to retrieve his gang box. When I asked Mendoza if he could have picked up his tools and then handed the badge to the guard at the security entrance as he drove out, he answered, "Yes. That could be possible." But then he changed his answer to claim, "Well what happened, my ID card was already deactivated when I went out." Whether or not his badge was activated does not explain why he did not turn it into the guard. Moreover, I found that Mendoza's shifting and evasive answers on this topic revealed an intent to conceal the truth. Other than this incident, though, I found Mendoza's testimony to be generally credible. (ALJ Exh. 1, Tr. 147-153.)

IV. DECISION AND ANALYSIS

A. Respondent Discharged Mendoza in Violation of Section 8(a)(1)

The complaint alleges that Mendoza engaged in various forms of protected concerted activity between December 20 and 27—such as raising safety complaints during meetings and sending emails to Burdick detailing employee complaints about safety and about Cepeck—and that Respondent discharged him in retaliation for that activity.

When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the analytical framework 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 by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). The General Counsel must initially establish that Section 7 activity was a motivating factor in in the employer's adverse action against the employee. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). This can be satisfied by showing that: (1) the employee engaged in union or other protected activity, (2) the employer had knowledge of the activity, (3) the employer had animus against union or other protected activity, and (4) an adverse employment action occurred. Animus can be established through direct evidence or inferred from circumstantial evidence on the record. *Intertape Polymer Corp*, 372 NLRB No. 133, slip op. at 6 -7 (2023). Circumstantial evidence of

discriminatory motive may include, among other factors, the timing of the action in relation to the union or protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; or disparate treatment of the employee. Id.

If the General Counsel makes an initial showing, the burden of proof shifts to the employer to demonstrate it would have acted the same had the statutorily protected activity not occurred. *Wright Line*, 251 NLRB at 1089. The employer cannot carry this burden merely by showing that it had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the adverse action would have taken place absent the protected concerted or union activity. *Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1-2 fn. 5 (2022), and cases cited therein. If the employer fails to meet this burden, a violation will be found because a causal relationship exists between the employee's protected activity and the employer's adverse action. *Intertape Polymer*, supra. The employer's burden also cannot be satisfied by proffered reasons that are pretextual, i.e., false reasons or reasons not in fact relied upon. In fact, where the reason advanced by an employer for the adverse action either did not exist or was not actually relied on, the inference of unlawful motivation remains intact, and is in fact reinforced by the pretextual reason proffered by the employer. Id.

In the instant case, the General Counsel established a strong prima facie case. Mendoza's protected concerted activity consisted of collaborating with several other employees to draft and send emails to HR Director Burdick starting on December 27 to complain about safety, favoritism, and Cepeck's anger issues. They also demanded that Cepeck be removed from his position as Superintendent or else the employees would complain directly to Tesla or would go out on strike. While these emails were written anonymously, Cepeck knew or believed they were written by Mendoza. Various factors support finding that Mendoza was discharged based on animus. There is direct evidence of animus in that Cepeck admitted that he discharged Mendoza at least partially due to his efforts to "rile up" others about workplace conditions, such as safety. Cepeck testified that, while Mendoza was a good carpenter, he chose Mendoza for discharge because "other carpenters weren't being disruptive on the job." Cepeck explained that by "disruptive," he meant that Mendoza was, "[j]ust trying to get them to go against me or whatever the case may be because they've already done that once to two other superintendents. And I received an email – a text message…that somebody admitted to me that what [Mendoza] was doing, and I forward[ed] that…I sent it off to HR, and they have it on file."[14] There is also circumstantial evidence from which I infer animus. The timing of discharge, which came just eight days after the first complaint email, gives rise to an inference of animus. *Trader Joe's*, 373 NLRB No. 73, slip op. at 2 (2024). Cepeck's disparate treatment of Mendoza and Quijvix shows animus. One reason why Cepeck deemed Mendoza ineligible for rehire was because he supposedly "lied about turning in his badge at the time of termination." Yet carpenter Jose

[14] While I do not rely on this for this Section 8(a)(1) analysis, I note that Cepeck's angry outburst at Mendoza in late February for taking the Hernandez brothers to the Union revealed his hostility towards union activity. In the secret recording, Cepeck is heard angrily and repeatedly saying that he was "stabbed in the back" by Mendoza. Cepeck added that he would not tolerate such in the future: "I will not allow that. ¶ If that means terminating you, that's what I will do. But I'm not going to allow that to happen." (GC Exh. 3, pp. 3-4.)

Quijvix also refused to turn in his ID badge, but Cepeck rehired him when he needed more staffing. See *Absolute Healthcare d/b/a Curaleaf Arizona*, 372 NLRB No. 16, slip op. at 2-3 (2022)(the Board will infer animus from circumstantial evidence, including disparate treatment in implementation of discipline). The pretextual nature of Cepeck's reliance on the badge issue gives rise to a finding of animus. On one hand, the unreturned ID badge was supposedly such an important matter to Cepeck that he said that Mendoza could not be rehired; yet, at the time of the incident, Cepeck did not bother to ask Mendoza a single follow up question to test his hunch, such as how Mendoza was able to exit the turnstile if he supposedly already turned in his badge. This lack of any follow up suggests that Cepeck merely seized upon the badge as a reason to get rid of an employee too active in raising workplace issues. *St. Paul Refining Co*., 366 NLRB No. 83, slip op. at 15 (2018)(pretext may be demonstrated by asserting a reason that is false and by an indifferent or inadequate investigation). The adverse employment action was Mendoza's discharge.

Respondent Failed to Carry Its Burden Under Wright Line. Respondent argues that it laid off Mendoza and five other employees because of reduced staffing needs and that it selected Mendoza because of his two safety violations (failing to complete a PTP on December 19 and failing to use a spotter when operating the scissor lift on December 27). This fails to establish a *Wright Line* defense. First, as was admitted, Respondent selected individuals for layoff based on multiple factors such as work performance, attendance, and safety habits. Respondent presented no evidence to show that Mendoza had any performance or attendance problems; to the contrary, Cepeck admitted that Mendoza was a good carpenter. As to Mendoza's supposed failure to complete a PTP, that was not mentioned as a reason for the discharge prior to trial and his separation notice contained no mention of that. Moreover, I credit Mendoza's testimony there were no PTP forms available that morning. Second, Respondent's reliance on failure to complete the PTP is also a shifting defense in that it was only raised at trial and in Respondent's brief, and was not mentioned at the time of discharge or anywhere in Mendoza's separation notice. It is well established that "such shifting of defenses weakens the employer's case, because it raises the inference that the employer is 'grasping for reasons' to justify an unlawful discharge." *U.S. Service Industries, Inc*., 324 NLRB 835, 837 (1997)(citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983)). Third, as found above, discharging Mendoza for supposedly failing to return his ID badge was pretextual, which means that it was false or not actually relied on and that "the employer necessarily cannot meet its *Wright Line* rebuttal burden." *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019). Finally, and most significantly, Respondent's proffered explanation relating to a layoff due to a reduction in staffing needs is inapplicable to what occurred here, which was a discharge for cause. The language in Mendoza's separation notice established unambiguously that he was discharged for cause. Cepeck cited only two reasons for the discharge: the December 27 scissor lift violation and lying about the ID badge after the discharge occurred. Respondent failed to demonstrate that it would have, not just could have, discharged Mendoza based on the verbal warning related to the scissor lift and for his post-discharge conduct of supposedly lying about returning his badge. Respondent presented

no comparators showing that other employees were discharged for those reasons. Nor did it present any other evidence supporting a discharge on these bases.[15]

B. Respondent's Other Defenses Lack Merit

Respondent's Constitutional Arguments Are Unsupported by Law. Respondent argues that the complaint should be dismissed because the structure of the Board is constitutionally infirm. First, because the Act provides that Board Members may be removable by the President only for neglect of duty or malfeasance, the structure of the Board violates the separation of powers. More specifically, these limitations on the President's unfettered power of removal unconstitutionally interfere with his duty to faithfully execute the law. Second, the "three-layer removal restrictions" enjoyed by Board ALJs is unconstitutional because it improperly interferes with the President's ability to control Inferior Officers charged with performing important functions. (R Brf. pp. 21-22.) In *Commonwealth Flats Development Corporation*, 373 NLRB No. 142 (2024), the Board already considered and rejected these arguments as having "no merit." Slip op. at 1 fn. 1. Consistent with that, I find no merit to these arguments.

Respondent Failed to Prove Mendoza's Supervisory Status. Respondent contends that Mendoza was a supervisor not subject to the Act's protections. But Respondent failed to carry its burden to prove that Mendoza possessed any supervisory authority.

Individuals are statutory supervisors if (1) they have the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act: to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *Modesto Radiology Imaging*, 361 NLRB 888-889 (2014)(citing *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006)). To exercise independent judgment, an individual must "at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. A judgment is not independent "if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. The party asserting supervisory status has the burden of establishing such status by a preponderance of the evidence. See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Conclusory evidence does not satisfy that burden. See, e.g., *Lynwood Manor*, 350 NLRB 489, 490 (2007).

Mendoza testified without contradiction that he lacked the authority to hire or recall individuals; when Respondent needed additional unit employees, it was Cepeck who contacted the Union hiring hall. Mendoza lacked the ability to fire, layoff, suspend, transfer employees (to different areas within the workplace and to different company projects). Mendoza lacked the authority to change work plans; Cepeck was the only person who decided what work was to be done, and he communicated those directions to Luis and Mendoza. While Mendoza had the ability to respond to some employee grievances, it was never shown that he exercised

[15] Nor did Respondent present any evidence showing that other employees were selected for layoff on these bases.

independent judgment in doing so. Moreover, if Mendoza could not resolve those matters, he passed them onto Cepeck or Site Safety Manager Ross.

Respondent asserts that Mendoza was a supervisor because he responsibly directed a crew of nearly 100 carpenters, apprentices, and laborers and because he had the authority to effectively recommend the discharge of his crew. Neither legal argument is supported by the record.[16] To "responsibly direct" others requires, among other things, that the putative supervisor to be accountable for the performance of tasks by their supervisees such that some adverse consequence may befall them if the supervisees do not perform tasks properly.[17] *Oakwood Healthcare, Inc*., 348 NLRB 686, 692 (2006). There was no such evidence in the record; to the contrary, Mendoza's pay and job title were unaffected by the employees' work performance. Nor was it shown that Mendoza had the authority to effectively recommend the discharge of others. Cepeck testified only that Mendoza, along with Luis, made recommendations on whom to pick for layoff. He did not specify Mendoza's level of involvement in that process (for example, whether Luis selected those employees and Mendoza simply agreed) and did not say whether he then conducted his own analysis. See *DirecTV*, 357 NLRB 1747, 1748-1749 (2011)(authority to effectively recommend generally means that the recommended action is taken without independent investigation by supervisors).

Based on the foregoing, Respondent failed to carry its burden to show that Mendoza was a supervisor unprotected by the Act.

The CBA's Provisions Do Preclude the Board from Reviewing this Statutory Allegation. Respondent argues that two provisions in the CBA preclude the Board from considering the merits of Mendoza's discharge under Section 8(a)(1). Article XIV of the CBA provides that it is the "sole responsibility" of Berg to determine the number of foremen employed on a project, while the management rights clause in Article XIX authorizes the company to discharge employees for just cause or to lay off employees for "lack of work or for other legitimate reasons." Based on these two CBA provisions, Respondent asserts that it has "the unqualified right to layoff employees and supervisors…[and] there is no basis for the ALJ to second-guess or qualify Berg's unqualified, bargained-for right, even under Section 8(a)(1) of the Act." (R Brf. p. 30.) This argument is contrary to well-established Board precedent. Setting aside the question whether the Section 8(a)(1) discrimination allegation is even covered by these CBA provisions, the Board has long held that simply because there is a CBA provision touching upon the same issue as an allegation in the complaint "does not operate logically to preclude the Board from determining the existence of an unfair labor practice." *Hoyt Motor Co., Inc*., 136 NLRB 1042, 1049 (1962). This decision adds that it "would seem inconceivable that the Board would regard

[16] The factual claim that Mendoza supervised a crew of nearly 100 workers is also unsupported. The record failed to establish how many workers Mendoza individually supervised. In terms of total staffing levels, Berg's peak employment on the job was typically between 65 and 75 employees. (Tr. 284.) But there was no indication that this peak was reached before or after Mendoza became a foreman. During the period from June through December, Respondent employed a maximum of 41 employees. (R Exh. 40.)

[17] Nor was there any evidence to show that Mendoza's direction of other employees was more than routine in nature. In fact, the record showed that it was Cepeck who gave direction to lead foreman Luis Villalobos and Mendoza two or three times per week on how the work was to be carried out. The record is silent as to any independent judgment exercised by Mendoza when directing his crew.

this [CBA] provision as a reason to avoid a determination as to whether an employee was discriminatorily discharged." Id.

Respondent also argues that Mendoza's discharge "is subject to the grievance and arbitration" procedure contained in the CBA. (R Brf. p. 31.) But Respondent did not show that this Section 8(a)(1) discrimination allegation is cognizable under the CBA, that the Union is willing to file a grievance, and that Respondent waived any and all timeliness defenses to the grievance. See *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp*., 268 NLRB 557 (1984). Given Respondent's failure to present any evidence or valid legal argument to support its bare assertion, I reject this argument.

Having found that Respondent has failed to prove any of its affirmative defenses, I find that Respondent discharged Mendoza in violation of Section 8(a)(1), as alleged in paragraph 5 of the complaint.

CONCLUSIONS OF LAW

1. Respondent Berg Drywall, LLC d/b/a The Berg Group is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On or about January 4, 2023, Respondent violated Section 8(a)(1) of the Act by discharging Charging Party Fernando A. Mendoza Guerola in retaliation for his protected concerted activities.

3. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged Fernando A. Mendoza Guerola, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay 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 prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), Respondent shall compensate Mendoza for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether such expenses exceed interim earnings. Compensation for these harms 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.

Respondent shall be ordered to compensate Mendoza for the adverse tax consequences, if any, of receiving a lump-sum award for backpay and loss of benefits and to file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the award for backpay and loss of benefits to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In addition, Respondent is ordered to file with the Regional Director for Region 16 a copy of the corresponding W-2 form(s) reflecting the backpay awards. *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

Respondent shall be required to remove from its files any reference to the unlawful discharge of Mendoza and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

I deny the General Counsel's request for a letter of apology and the posting/mailing of an Explanation of Rights. The remedies discussed above will effectively address the unfair labor practices found, making these enhanced remedies unnecessary.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[18]

ORDER

Respondent Berg Drywall, LLC d/b/a The Berg Group, Chaska, Minnesota, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging employees in retaliation for having engaged in protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Fernando A. Mendoza Guerola full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Mendoza whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discharge.

[18] 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.

(c) Compensate Mendoza for his search-for-work and interim employment expenses, regardless of whether those expenses exceed their interim earnings.

(d) Compensate Mendoza for the adverse tax consequences, if any, of receiving a lump-sum award for lost backpay and benefits, and file with the Regional Director for Region 16, within 21 days of the date such amounts are fixed, either by agreement or Board order, a report allocating the award to the appropriate calendar years.

(e) File with the Regional Director for Region 16, within 21 days of the date the amount of the award for backpay and benefits is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Mendoza's corresponding W-2 forms reflecting the award.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Mendoza in writing that this has been done and that the discharge will not be used against him in any way.

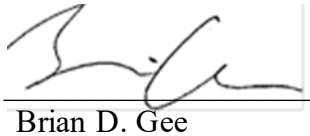
(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all 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 the Board's Order.

(h) Post at its headquarters located at 1225 Lakeview Drive, Chaska, MN 55318 (company headquarters) copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by 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 at company headquarters, notices shall be sent to all current and former employees who were employed at the Tesla Project at 13101 Tesla Road, Austin, TX 78725 at any time since January 4, 2023, at their last known address by U.S. Mail, text message, 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. If Respondent has gone out of business or closed its company headquarters, 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 company headquarters at any time since January 4, 2023.[19]

[19] If Respondent's company headquarters is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If company headquarters is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means

(i) Within 21 days after service by the Region, file with the Regional Director for Region 16 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.

Dated, Washington, D.C., this July 16, 2025.



Brian D. Gee
Administrative Law Judge

within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

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 discharge you in retaliation for having engaged in protected concerted activities.

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, within 14 days from the date of any Board order, offer Fernando A. Mendoza Guerola full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Mendoza whole for any and all loss of earnings and other benefits incurred as a result of our unlawful decision to discharge him and WE WILL make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Mendoza for the adverse tax consequences, if any, of receiving a lump-sum award for backpay and benefits, and WE WILL file with the Regional Director for Region 16, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Mendoza's W–2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of any Board order, remove from our files any reference to our unlawful decision to discharge Mendoza and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

BERG DRYWALL, LLC D/B/A THE BERG GROUP

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6107
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-319280 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (682) 703-7489.