JD-67-25
Minneapolis, MN

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

TWIN CITY TANNING COMPANY, LLP

and **Case No.: 18-CA-349420**

DI'JON DOCTOR-HARRIS

Selma N. El-Badawi and Tyler Wiese, Esqs.
for the Acting General Counsel

Grant T. Collins and David A. Richie, Esqs.
for the Respondent

DECISION

Statement of the Case

MICHAEL P. SILVERSTEIN, Administrative Law Judge. In this case, the Acting General Counsel alleges that Twin City Tanning reassigned Di'Jon Doctor-Harris to a shift incompatible with his childcare needs because Doctor-Harris filed a grievance seeking additional pay for the extra work he was assigned to complete. After weighing the record evidence, I find that Twin City Tanning has proven that it would have reassigned Doctor-Harris even in the absence of his protected activity, and as outlined below, I recommend dismissal of this complaint.

Di'Jon Doctor-Harris (the "Charging Party") filed the original charge in this matter on August 27, 2024, and filed an amended charge on December 3, 2024. Region 18 of the Board issued a Complaint and Notice of Hearing on January 27, 2025, and issued an Amendment to the

Complaint on April 15, 2025. Twin City Tanning Company, LLP (the "Employer" or "Respondent") filed its Answer to the Complaint on February 10, 2025.[1]

The hearing in this case took place in Minneapolis, Minnesota on May 19 and 20, 2025. At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, and to argue their respective legal positions orally.[2] Counsel for the Acting General Counsel and Respondent filed post-hearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by all parties, I make the following:

FINDINGS OF FACT

JURISDICTION

Respondent admits, and I find that at all material times, it has been a limited liability partnership with an office and place of business in South Saint Paul, Minnesota and has been engaged in the processing and non-retail sale of cattle hides. (GC Ex. 1(e)). In conducting its business operations, Respondent has purchased and received at its South Saint Paul facility, goods and services valued in excess of $50,000 directly from points located outside the State of Minnesota. Respondent also admits, and I find, that it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (GC Ex. 1(e)).

Respondent also admits and I find that at all material times, the Chicago and Midwest Regional Joint Board, Workers United/SEIU Local 150 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act. (GC Ex. 1(e)).

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction over this case pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Respondent produces leather goods for its customers. (Tr. 138). To perform this work, Respondent receives animal hides at its South Saint Paul facility from its customers/owners, Twin City Hide and S.B. Foot Tanning (Red Wing Shoes). (Resp. Ex. 13). The first part of the

[1] In its Answer to the Complaint, during its opening statement, and in its post-hearing brief, the Employer asserted a myriad of affirmative defenses assailing the constitutionality of this proceeding. Among other things, the Employer argues that Board members and ALJs are unconstitutionally insulated from removal and that ALJs lack the statutory authority to issue decisions during periods when the Board lacks a quorum. The Board has rejected the removal protection defenses in *Commonwealth Flats Dev. Corp. d/b/a Seaport Hotel Boston,* 373 NLRB No. 142, slip op. at 1, fn. 1 (2024). Regarding the quorum issue, the Employer only cites to *New Process Steel v. NLRB,* 560 U.S. 674 (2010), but nowhere in the Supreme Court's decision did it address the role of Administrative Law Judges during a period in which the Board lacked a quorum. Thus, I reject these affirmative defenses. Appellate courts and/or the Supreme Court will likely address these constitutional questions in the near future.

[2] The Acting General Counsel called two witnesses – Di'Jon Doctor-Harris and Desmond Jones – while the Respondent called three witnesses – Carlos Valencia, Wilber Moran, and Dallas Bryant.

process involves using chemicals to burn the hair off the hides. (Resp. Ex. 13; Tr. 151). Some of the hides are used for shoes and leather products. Other hides are used for food-grade products such as hot dog and sausage casings. (Tr. 339).

In 2024, Marvin Miller served as the plant manager and Wilber Moran worked as the plant superintendent. Carlos Valencia is in charge of human resources for the plant[3] and Dallas Bryant and Jorge Montoya served as 3rd shift supervisors. (Tr. 22, 150-151, 338).

The Union represents Respondent's 70 production and maintenance workers at the South Saint Paul facility. (GC Ex. 2; Tr. 24). The Union has represented this bargaining unit for at least 16 years and the parties' most recent collective-bargaining agreement runs from September 15, 2022 through September 14, 2025. (GC Ex. 2; Tr. 286-287). Esau Chavez is the Union's servicing representative. He is based out of Chicago. Mark Aufderhar is a shop steward on the first shift.[4]

Written grievances are uncommon. Valencia testified that other than the Charging Party's grievances to be discussed below, the only other grievance filed in the last four years was a grievance protesting the Employer's decision to send employee Javier Banos home early without just cause. (Tr. 307). This grievance was filed by the Union in December 2023 and resolved after a 2nd step meeting. (Resp. Ex. 28; Tr. 288-289).[5]

The Charging Party's Work History

The Charging Party started working for the Respondent in January 2019.[6] In his first position with the company, the Charging Party worked as a lead running the Blue Line on the 1st shift. (Tr. 54). The Blue Line workers wring the water and chemicals out of the hides after the hides finish their cycle in the drums. The product is split, cut, stamped, and weighed and then put on a truck. (Tr. 64).[7]

In 2020, the Respondent laid off Doctor-Harris due to the fallout from the COVID-19 pandemic.[8] (Tr. 54). The Charging Party was recalled sometime in 2021, but when he returned to work, he switched to an operator position on the 3rd shift.[9] (Tr. 54-55). According to the

[3] Valencia is the only HR representative at the facility. For grievances that are moved to the 2nd or 3rd steps, Sherry Voth from Red Wing Shoe Company assists Valencia. (Tr. 316-317). Red Wing Shoe Company is one of the Respondent's owners. (Tr. 247).

[4] There is no Union shop steward on the 3rd shift. (Tr. 57).

[5] The grievance settlement reduced Banos' discipline from a 3-day suspension to a written warning. Valencia testified that as part of its investigation into Banos' infraction, the Employer reviewed video footage of the alleged incident because it impacted production. (Tr. 289, 312).

[6] Doctor-Harris' employment application is dated January 11, 2019, but the date of hire on his 401(k) enrollment and union membership forms is listed as September 24, 2018. Whether the Charging Party was hired in late 2018 or early 2019 has no impact on this Decision. (Resp. Ex. 13).

[7] The Employer calls it the "Blue Line" because the chemicals cause the hides to turn blue. (Tr. 174).

[8] The Charging Party could not recall the exact date of his layoff. In his personnel file, there is an unemployment benefit determination letter dated April 9, 2020. (Resp. Ex. 13).

[9] Time off requests in Doctor-Harris' personnel file confirm that he was working for the Respondent

parties' CBA, all workers on the 3rd shift receive a $1/hour shift premium. (GC Ex. 2). There were three other bargaining unit employees that worked with the Charging Party on the 3rd shift – all of them were operators – Andrew Ochoa (running mixers in the process department), Eh Thoo (working drums in the process department), and Hit Thaw (working on mixers and drums in the process department). (Resp. Ex. 22; Tr. 21, 105, 165-166).

On occasion, the Respondent asked the Charging Party to cover other shifts when his co-workers were on vacation or otherwise unavailable. In this regard, in February 2022, the Respondent paid Doctor-Harris an extra $26.21 for working as a lead on the Blue Line (2nd shift) for two days. (Resp. Exs. 13 and 33; Tr. 170). Carlos Valencia testified that the Charging Party was eligible for lead pay on these occasions because he was in charge of the 8-9 employees that work on the Blue Line. (Tr. 171). Additionally, the Respondent paid Doctor-Harris $25.99 extra for working as a lead on one Blue Line shift in early May 2022. (Resp. Exs. 13 and 32; Tr. 172).[10] Finally, when 2nd shift operator Steven Peña went on vacation for two-week stretches in 2022 and 2023, the Respondent asked the Charging Party to cover certain 12-hour shifts and in exchange, agreed to pay Doctor-Harris lead pay for these shifts. (Tr. 28-29, 66, 178-179).

Doctor-Harris testified that prior to May 2024, he never received criticism for his job performance and was never disciplined for his on-the-job performance. (Tr. 23). Valencia also testified that he was not aware of any complaints about the quality of the Charging Party's work on the 3rd shift prior to May 2024. (Tr. 318). Additionally, Doctor-Harris never received a written performance evaluation during his employment with the Respondent.[11] (Tr. 23).

DEVRO Acidification Process

Devro is one of Respondent's four main customers.[12] (Tr. 339). Devro supplies the Respondent with process sheets that contain specific instructions for operators to follow to document the acidification of the hides. These sheets identify the lot number for the product used, the drum number for mixing, and details every step to be followed while the hides are in Respondent's care. Once the hides arrive at Respondent's facility, they are split and aged for 28 days. Then the acidification process begins – which is the first step to getting the product to food-grade. (Tr. 344). The process is a series of washes and cooling cycles to be run at specific temperatures and durations. This process lasts for approximately 24-hours, and at the conclusion of this cycle, the operator is responsible for weighing the hides, placing the hides into boxes, then storing them in a walk-in cooler until the boxes are shipped to Devro's facility in Columbia, South Carolina. (Tr. 102, 345-347). Accompanying the product in the shipping containers are the documentation forms containing the lot numbers and verification of the steps performed at the Employer's facility. (Tr. 375-376).

in January 2021. (Resp. Ex. 13).

[10] The Respondent also retroactively paid the Charging Party $47.45 for work as a lead in November 2019, but it is unclear from the record which shift the Charging Party covered. (Resp. Ex. 13).

[11] Doctor-Harris confirmed that he received verbal warnings for poor attendance on March 10, 2020 and January 19, 2022. (Resp. Ex. 13; Tr. 23).

[12] Devro has been a customer of Respondent for over 25 years. (Tr. 378).

General Counsel Exhibit 5 is an example of a Devro acidification process sheet. (Tr. 41). The process typically begins on the 1st shift, with the operator noting the start and end time of each step and placing their initials on the process sheet. (Tr. 41). The first shift operator's steps are as follows:

Step 3: Float 100% with tempered water
Step 4: Wash for 60 minutes with tempered water at 2 RPM[13]
Step 5: Drain for 45 minutes at 3 RPM and check temperature of drain
Step 6: Float 100% with tempered water and run for 30 minutes at 2 RPM
Step 7: Drain for 45 minutes and check temperature of drain
Step 8: Float 100% with City water and run for 30 minutes at 2 RPM
Step 9: Drain for 105 minutes at 3 RPM and check temperature of drain
Step 10: Float 7.5% with cold water

The 2nd shift operator normally takes over at the 11th step, which requires the addition of a 15% solution of hydrochloric (HCL) acid and running the drum for 9 hours at a speed of .5 RPM. 30 minutes into the 9-hour runtime, and after the HCL acid solution has been added, the operator is supposed to do a temperature check and note the temperature on the designated line on the process sheet. (Tr. 350).

The 3rd shift operator completes a number of steps in the overnight hours:

Step 12 Take an acid cut of the hide adding liquid to determine if the acid has penetrated through the hide and measure the temperature and pH level of the hides. Then drain for 45 minutes at a speed of 3 RPM. The form indicates that the operator must contact the supervisor if the pH level is over 1.2 or if the temperature reading is above 77 degrees. (Tr. 349).

Step 13 Float 85% with temper water
Step 14 Wash thoroughly for 35 minutes at a speed of 1.3 RPMs
Step 15 Drain for 30 minutes at a speed of 3 RPM and check the conductivity of the drain
Step 16 Float 85% with temper water and run for 20 minutes at .5 RPM
Step 17 Drain for 30 minutes at 3 RPM and check conductivity, temperature, and pH. The operator must note these readings on the designated lines on the process sheet.
Step 18 Float 85% with temper water and run for 20 minutes at .5 RPM
Step 19 Drain for 30 minutes at 3 RPM and check conductivity of drain, temperature, and pH, and note these readings on the designated lines on the process sheet.
Step 20 Run for 20 minutes at .5 RPM.

The first shift operator takes over at Step 21 and concludes the process as follows:

Step 21 Drain for 30 minutes at 3 RPM and check conductivity of drain, temperature, and pH, and note these readings on the designated lines on the process sheet.

[13] RPM stands for Revolutions Per Minute. This is the speed of the drum during the cycle. (Tr. 348).

Step 22	Float 85% with temper water and run for 20 minutes at .5 RPM.
Step 23	Drain for 30 minutes at 3 RPM and check conductivity of drain, check temperature, and pH and note these readings on the designated lines on the process sheet.
Step 24	Float 85% with chilled water and run for 30 minutes at .5 RPM.
Step 25	Record splits temp. of 3 splits
Step 26	Check final conductivity, temperature, and pH, and save 125ml liquid sample for shipment to Devro.
Step 27	Drain 60 minutes at 3 RPM
Step 28	Clean conveyors before dump in tubs
Step 29	Dump into tubs

Respondent Asks the Charging Party to Take on Additional Work Responsibilities in April/May 2024

Jose Rascon Sanchez worked the 2nd shift as an operator in the collagen department.[14] This work involved monitoring hides placed in mixers and completing acidification forms a little less detailed than the Devro forms. (Tr. 72-73, 354). Wilber Moran testified that Rascon-Sanchez was working a lot of overtime in Spring 2024 because there were too many hides to process. (Tr. 357). Moran opined that Rascon-Sanchez's process was shorter than the Devro acidification process, it didn't require Rascon-Sanchez to stay all night, Respondent believed that it was paying Rascon-Sanchez overtime for no reason, and Moran believed that the Charging Party could help Rascon-Sanchez finish up the process on the mixers and lower Respondent's overtime costs. (Tr. 167, 355-357). According to Moran, he asked the Charging Party to assist with collagen and the Charging Party said that he would do so. (Tr. 359).

Later that day, supervisor Jorge Montoya called Moran and said that Doctor-Harris did not want to assist with the collagen tasks. Moran called the Charging Party, but he did not answer the phone. When Moran spoke to the Charging Party, he relayed the supervisor's message that the Charging Party was not willing to assist. Moran asked the Charging Party to help them out for this one night and they would figure out what happens next. Doctor-Harris agreed to do the collagen work on that evening's shift. (Tr. 359-362).[15]

Doctor-Harris testified that the additional work he was asked to do involved running 1-3 mixers, dumping the hides, weighing and storing them in the cooler by himself while tending to his regular work duties. (Tr. 132). He would travel from one department to the other based on the timing of the processes on the collagen and Devro process sheets. (Tr. 30). Doctor-Harris testified that he was capable of performing both jobs and so he did it. (Tr. 30-31).

Moran testified that after Doctor-Harris performed the dual roles for the first time, Moran followed up with plant manager Marvin Miller. Miller and Moran decided that it was fair to ask

[14] Rascon-Sanchez worked from 2:00pm to 10:30pm. (Resp. Ex. 22; Tr. 355).

[15] The Charging Party's testimony aligns with Moran's in that Doctor-Harris says that the Respondent initially asked him to help out with the mixers on one occasion because Rascon Sanchez needed help finishing his process. (Tr. 72).

Doctor-Harris to help them finish Rascon Sanchez's processes because there was no need to incur additional overtime expenses. Moran testified that when he informed the Charging Party of this more permanent change, the Charging Party said that he didn't want to do both jobs because he was too busy. (Tr. 364-365).

The Charging Party testified that he performed both jobs as instructed, but he asked 3rd shift supervisor Dallas Bryant to talk to Marvin Miller and Carlos Valencia about receiving lead pay for performing both roles, as he had in the past. (Tr. 71). Doctor-Harris later checked his paystub app and noticed that he wasn't paid lead pay as he requested.[16] Doctor-Harris then spoke with Valencia and asked him why he wasn't receiving lead pay for performing both roles and said that he would only continue performing both jobs if he received lead pay. Union shop steward Mark Aufderhar accompanied the Charging Party to Valencia's office for this conversation. (Tr. 112, 167-168). Valencia told the Charging Party that the job he is performing doesn't involve lead pay. Doctor-Harris said that he would speak with the plant manager regarding this matter. (Tr. 168-169). On his way out, Doctor-Harris asked Aufderhar how to file a grievance. (Tr. 115).

Doctor-Harris eventually spoke with Marvin Miller about this issue. Doctor-Harris asked him why the Employer was refusing to pay him lead pay for doing two jobs now when he has been given lead pay before. Miller denied paying Doctor-Harris lead pay in the past. Doctor-Harris testified that after being rebuffed by the plant manager, he had no interest in waiting for Valencia to respond to his earlier inquiry. Instead, Doctor-Harris reached out to Aufderhar and asked him to file the lead pay grievance on his behalf.[17] (Tr. 116).

May 10, 2024 Grievance Meeting

The parties' grievance and arbitration contract language states as follows:

> "The Employer and Union agree that prior to pursuing a formal grievance, the employee shall first attempt to resolve the issue through discussions with their immediate supervisor, either with or without the assistance of the Union Steward. If the issue is not resolved to the employee's satisfaction, the following grievance procedure shall apply:
>
> STEP ONE: The employee, with the steward if desired, shall discuss the grievance with the Plant Manager or the Plant Manager's designated representative no later than seven (7) working days following the date of the occurrence. After completing discussions, Management will notify the employee, and the steward, if involved, of Management's final decision in the matter no later than seven (7) working days following completion of discussions.

[16] Employees are paid every week. (Tr. 111).

[17] None of the witnesses who testified in this matter – Doctor-Harris, Valencia, and Moran – could pinpoint the exact dates of these conversations. Since the lead pay grievance meeting took place at 7:00am on May 10, 2024, it appears that the collagen assignment and requests for lead pay took place one to two weeks before May 10, 2024.

> STEP TWO: If the grievance is not resolved in Step One, it shall be submitted in writing to the Employer, and shall be received by management no later than seven (7) working days following the date of Management's final decision. If the grievance involves a matter of earnings, the grievance shall be received by management no later than fifteen (15) calendar days from the date on which the paycheck for the period covering the disputed matter was received. Following receipt of the written grievance by the Employer, Management shall meet with the Union in an attempt to resolve the grievance within ten (10) working days. Subsequent to the meeting between Management and the Union, the Employer shall present a written answer to the grievance no later than seven (7) working days following the meeting…" (GC Ex. 2).

Page 14 of the parties' CBA addresses lead persons. The contract language says that "Lead positions are appointed by Management. These positions will be filled through a posting with the most qualified candidate selected by the Employer, regardless of seniority." (GC Ex. 2). Valencia testified that the plant manager assigns the leads to each department, with the lead pay scale laid out in the parties' CBA. Valencia also testified that each department has an assigned lead – process, Blue Line (wringer), fleshing, and splitting. (Tr. 172-174).

The handwritten grievance submitted by Mark Aufderhar alleged that the Employer violated past practice because the Charging Party was paid lead pay on multiple occasions when he worked in Devro and collagen positions in the past. (GC Ex. 3; Tr. 26-27). Before the grievance meeting, Doctor-Harris reviewed his paystubs with Esau Chavez and Mark Aufderhar[18] to explain why he believed, based on past practice, he should be paid lead pay for doing both Devro and collagen work. (Tr. 118). Chavez shared these paystubs with Valencia before the grievance meeting, arguing that these paystubs confirmed the Employer previously paid the Charging Party as a lead in similar circumstances. Valencia testified that he reviewed the paystubs and the Employer's records, which confirmed that the Charging Party was paid as a lead only when he was working on the Blue Line or when he worked 12-hour shifts covering for Steven Peña. (Tr. 179-180).

The Union and Employer met to discuss the Charging Party's grievance on May 10, 2024[19]. In attendance for the Union were Esau Chavez, Mark Aufderhar, and the Charging Party. In attendance for the Employer were Marvin Miller, Wilber Moran, and Carlos Valencia. (Tr. 32, 367). Doctor-Harris' recall of the meeting's details was limited. To this end, he remembered that Chavez did most of the talking at the meeting, but he couldn't recall what was said. He recalled a discussion at the meeting regarding whether he had enough time to complete all of his work on both the mixers and the drums. The Charging Party said that it was more work because he had to complete both sides of the forms for both the Devro acidification and collagen process sheets. (Tr. 77-78). The Charging Party also recalled the Employer representatives' body language and his interpretation that the Employer was upset "that we were in this position again." (Tr. 32-33). When pressed for more details, the Charging Party stated: "To be honest, this has been a year ago. So for me to remember exactly what they said, I couldn't tell you, but I

[18] Doctor-Harris testified that he had no reason to believe that Chavez and Aufderhar would not represent him properly. (Tr. 119-120).

[19] All dates hereinafter are in 2024 unless otherwise noted.

do know when we walked in the room and we were back in this situation, me sitting there, they were upset." (Tr. 34). Doctor-Harris did recall that the Employer's position at the May 10th meeting was that he was not entitled to lead pay. (Tr. 78).

Carlos Valencia also testified about the May 10th grievance meeting. He said that Chavez began the meeting by requesting that Doctor-Harris receive lead pay for doing both the Devro and collagen work. Chavez then explained that the Charging Party had been paid as a lead on previous occasions. Miller and Valencia replied that they did not believe that Doctor-Harris should be paid as a lead, stating that the only time that Doctor-Harris received lead pay in the past was when he worked 12-hour shifts covering for Steven Peña when he was on vacation. During this meeting, the Charging Party said that he couldn't cover both of the processes because he was really busy. In response, Miller said that he believed that the Charging Party had the time to finish the mixers and then work on the drums. (Tr. 182). In his testimony, Valencia observed that the Charging Party was not happy at the grievance meeting because he believed that he should be paid as a lead. (Tr. 176-177). At the conclusion of the meeting, Chavez requested that the Employer answer the grievance in writing.[20] (Tr. 180).

According to Moran and Valencia, after the meeting ended, Miller said that maybe Doctor-Harris has a point, and he is busy, and they can't force him to take on additional responsibilities if he is busy. (Tr. 368). Miller then said that he was going to give the Charging Party the benefit of the doubt and would check the Employer's surveillance camera footage to see how busy the Charging Party was in the overnight hours.[21] (Tr. 182, 368).

Miller and Moran then went to Miller's office to review the video footage. (Tr. 368). Moran testified that they reviewed about 4 hours of video footage from the overnight shift, fast forwarding the video when there was nobody in camera range. (Tr. 380). Moran observed that the Charging Party was not busy at all and that he was not in the video footage of Devro Drum 1 for the first three hours of his shift. (Tr. 380).

The Employer's video review focused on the 11th and 12th steps of the Devro acidification process. Second shift operator Steven Peña initialed the form to indicate that he added hydrochloric acid to Drum 1 at 3:35pm and ran the drum for 9 hours at a speed of .5RPM. According to the form, the cycle was scheduled to end at 12:35am[22] (GC Ex. 5).

The next step in the Devro acidification process is to drain the drum for 45 minutes at a speed of 3 RPM. But before the drum is sped up, the operator is supposed to take an "acid cut"

[20] Wilber Moran's testimony regarding the May 10th meeting was not illuminating. He testified simply that Doctor-Harris said at the meeting that he had been paid as a lead before and Miller said that he was not going to pay the Charging Party as a lead. (Tr. 366, 368).

[21] There are cameras in the production area that run 24/7 and there are monitors in the front office and Miller's office broadcasting these camera images. Additionally, Miller had access to 2-weeks of archival footage that he could pull up only with the assistance of the Employer's IT contractor. (Tr. 183, 194-195).

[22] Line 11(a) of the process form indicates that the operator should check the temperature of the drain 30 minutes into the 9-hour cycle. There is a line next to that notation for the operator to record their temperature reading, but Peña did not record the temperature. (GC Ex. 5).

of the hides in the drum.[23] To perform the acid or pickle cut, the operator takes the hide out of the drum, cuts a rectangular piece out of the raw hide, puts acid in the hide, and observes the hide change colors to indicate it is ready for the next step in the process. (Tr. 135). The process sheet says that the operator must contact their supervisor if the acid cut is not through or if the pH is above 1.2. (GC Ex. 5). Moran testified that the operator must stop the drum after Step 11 and do the acid cut. The purpose of this cut is to make sure that the acid has gone through the hide during the 9-hour cycle. Since this is a product designed for human consumption, if the acid does not go through, the product will be raw and there is an increased likelihood that bacteria can seep into the hide. (Tr. 374-376). The pH level and the acid cut both verify that the acid has gone through the product. It is the operator's judgment as to whether the cut is all the way through. (Tr. 391). But if either the pH level or the acid cut readings are not within prescribed limits, the Employer can contact the customer and make adjustments to the formula.[24] (Tr. 375).

The operator can perform the acid cut and pH test on the upper level of the Devro production space. There the operator will find a pH meter, conductivity meter, temperature gun, knife, and indicator to perform the required tests. (Tr. 373).

Respondent Exhibits 39 and 40 consist of a 5-minute video clip of the Devro production area from 12:30am to 12:35am. One clip shows the upper level of the Devro production area and the other clip shows the lower level. (Resp. Exs. 39 and 40). In the clip focused on the lower level, Drum 1 is spinning at a very slow rate at the beginning. About a minute into the clip, the Charging Party comes through a door[25] and heads towards hanging clipboards that appear to be under an electrical box.[26] A few seconds later, Drum 1 speeds up dramatically. The Charging Party puts down the clipboard about a minute later and proceeds to spray wash the floors. About a minute after that, he is no longer in view of the cameras. (Resp. Ex. 39).

Although the Charging Party initialed the form at Step 12 and put down a temperature and pH reading in the appropriate box, Moran testified that after reviewing the footage, there was no doubt in his mind that Doctor-Harris did not do the acid cut. (Tr. 402). Moran specifically testified that the video shows that Doctor-Harris never performed the tests/readings he indicated were done on the process sheet. Moran noted that the video showed the Charging Party walking into the building from the street, going over to the control panels, and speeding up the drums, meaning that the Charging Party proceeded to Step 12 without taking the pH, temperature, and cut. (Tr. 369, 374).

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[23] There is no place on the process sheet to mark that the acid cut was done. (Tr. 391).

[24] Steps 22 and 23 of the Devro Acidification form require the operator to float, run, and then drain the drum for a total of 50 minutes. During the drain cycle, the operator is supposed to check the conductivity of the drain using a sample from the lab box, check the temperature and pH level, and record this information on the designated lines. Raphael Calderon took over for the Charging Party at Step 21, but there were no readings recorded for Steps 22 and 23 on the acidification form. Steps 24 through 26, which began 10 minutes after Step 21 finished, also required a float, run, and recording of readings. It is unclear from the record whether Steps 24 through 26 are a substitution for Steps 22 and 23 or whether all steps must be performed consecutively. Neither party probed the witnesses regarding the omissions in Steps 22 and 23. (GC Ex. 5).

[25] Respondent's schedule for the week of May 6 indicates that the Charging Party's scheduled break was from 12:00am to 12:30am. (Resp. Ex. 22).

[26] Doctor-Harris testified that there is a temperature reader on the electrical box/control panel located on the first floor. (Tr. 94).

Moran testified that he and Miller determined right away that Doctor-Harris was not following the required process as he did not go in the drum to make the acid cut or check the pH reading.[27] Moran also testified that the consequences for the Employer could be catastrophic – if the acid cut and pH readings are not done and there is a problem with the product, they could lose the customer. (Tr. 375).[28] Miller decided that the Charging Party had lied to the Employer by noting on the form that he had done something that he never did, the Employer could not tolerate this, and the Employer was going to disqualify the Charging Party from his operator position going forward. (Tr. 381, 383). Moran also testified that the Employer no longer trusted the Charging Party to work as an operator because he didn't follow the required process. (Tr. 383). To be clear, the Employer did not terminate the Charging Party's employment at this time – it gave him the option to select a non-operator position on either the 1st or 2nd shifts because there were no non-operator positions on the 3rd shift. (Tr. 382-383). Valencia confirmed that the Employer made this decision before it spoke with either the Charging Party or the Union. (Tr. 212).

Valencia viewed the videos with Miller before reaching out to the Charging Party. Valencia testified that Miller watched the videos to see if Doctor-Harris had enough time to work on the mixers. But when Miller watched the video, he saw that Doctor-Harris did not take the acid cut or do the pH test as required.[29] (Tr. 184, 192). Valencia clarified that the videos show the Charging Party walking in from the outside of the building, going over to the control panels for the drums, writing something down on the process sheet, and then washing the floors. (Tr. 184). Valencia confirmed that the Charging Party was spraying the floors with the hose because this work area needs to be kept very clean since they are working with food-grade products. Valencia also testified that cleaning the floors is part of the Charging Party's normal job responsibilities. (Tr. 190).

Valencia also confirmed Moran's testimony that if the formulas are not accurately followed, the customer is not going to get the correct product quality and could potentially return the product or cancel the contract. (Tr. 209). According to Valencia, Moran and Miller discussed the seriousness of the Charging Party's conduct and the need for operators to follow every step of the process as directed by the customer.

Valencia testified that he reviewed the video footage with Moran and Miller on Monday, May 13.[30] After deciding to disqualify the Charging Party from his 3rd shift operator position, Valencia reached out to Esau Chavez to see if he could come to the Employer's facility that day

[27] Moran testified that the acid cut could be taken either a few minutes before or after the time listed on the process sheet. (Tr. 394). Although Doctor-Harris wrote down 12:40am on the process form as the time Step 12 began, Moran testified that he reviewed the footage after 12:35am and it showed that the Charging Party did not stop the drum and do the required readings. (Tr. 393).

[28] Miller stopped the video and asked the IT worker how to download this portion of the video. (Tr. 368-369, 372).

[29] To take the sample, you need to stop the drum, open one of the doors, take a sample, and bring that sample to the table, and use the chemicals to test the sample. (Tr. 201).

[30] Valencia only viewed the 12:30am to 12:35am footage. He did not view any footage from before 12:30am or after 12:35am. (Tr. 297).

to view the footage. Chavez indicated that he was only available by phone that day and the Employer did not show him the video footage until later that week.[31] (Tr. 210-211).

Valencia also testified about his phone call with the Charging Party from May 13 where he informed the Charging Party of the Employer's decision to disqualify him from the 3rd shift operator position. Valencia told the Charging Party that after their grievance meeting, Miller decided to check to see if the Charging Party was busy in the overnight hours and was not going to ask him to do both the mixers and the drums if he was really busy. Valencia explained to the Charging Party that the video footage showed that the Charging Party was not really busy and did not follow the formula as required. Valencia said that this was really serious and that the Employer decided to disqualify the Charging Party from his 3rd shift operator position. Valencia told the Charging Party that he had the right to work in a different area on a different shift. The Charging Party said he was not happy with the decision and hung up the phone. The Charging Party did not say that he did the test and Valencia did not ask the Charging Party if he performed the required acid cut. (Tr. 213-214).

Doctor-Harris testified that Valencia and Moran called him on May 13. Valencia told him that Miller reviewed tapes to see if the Charging Party had enough time to perform additional work on the overnight shift. Valencia said that the videos showed that the Charging Party did not do the acid cut and going forward, he would be disqualified from his operator position. (Tr. 35-36, 38). Valencia told Doctor-Harris that he could choose a different shift to work and told the Charging Party that he was eligible to work as a wringer, stacker, feeder, or forklift driver. (Tr. 36). Doctor-Harris testified that he was confused and upset because he did not understand why he was demoted on a Monday after he filed a grievance on a Friday, and did not receive any due process. (Tr. 46-47). On cross-examination, the Charging Party testified that he didn't deny that he failed to follow the process, opining that he didn't think it mattered at that point because the Employer had already decided to punish him. (Tr. 95).

At the trial, no party directly asked the Charging Party if he had or had not performed the acid cut and pH reading. On direct examination, the inquiry went as follows:

> Q. Did either person on the phone call provide you with any evidence that you hadn't performed that test?
> A. No, not other than their words saying that they had a video of it, but I didn't see any evidence. (Tr. 36)

Subsequent questions on direct examination explored GC Ex. 5 as follows:

> Q. What part of the document did you fill out?
> A. Starting at line 12.

[31] Valencia confirmed that the Employer did not speak to Esau Chavez on May 13 even though Chavez indicated that he was available by phone that day. (Tr. 301).

Q. Okay. And what is at line 12?
A. Line 12 is when you drain and check the temperature and the pH on the hides…

Q. So is line 12 referring to the acid cut process?
A. Yes.

Q. Okay. And do you recall – does it say what time that process was undertaken?
A. At 12:40. (Tr. 42).

The inquiry regarding GC Ex. 5 continued as follows:

Q. Okay. And were you provided any other documentary evidence to establish that you didn't do the cuts?
A. No, ma'am.

Q. Okay. Were you given a chance to provide a further response to the employer when you were provided this document?
A. Did I respond to what they were asking me in this document? Is that what you're asking?
Q. Yes.
A. Yes.

Q. And do you recall what you said?
A. I don't recall. I might have told them I – I don't recall, to be honest. (Tr. 45-46).

On cross-examination, the following colloquy addressed the May 13th phone call and the acid cut:

Q. …Wilber and Carlos were on the phone. They told you that Marvin reviewed the tape and that you had not done the correct processes, right?
A. Yes, that's what they say.

Q. And you didn't deny it, did you? You didn't deny that you failed to do the process, did you?
A. No, I didn't deny it. At – at the grievance, I don't think it mattered. They already punished me. So rather I said I did it or I didn't do it, they already decided if – what they were going to do. So I can't recall if I said I didn't do it. (Tr. 94-95)

Respondent Prepared Two Different Employee Warning Notices Addressing the Video Footage

General Counsel Exhibit 4 is an employee warning notice that lists the Charging Party's name and identifies May 13 as the "date of incident." The attachment to the document states the following:

> "During our investigation, we were checking if Dijon had time to help in both areas. When we were checking we realized that Dijon was not following the process. Following every step of the process is very important for us to determine if our production is to the standards that our customers require.
>
> If we do not comply with these standards, the customer can return the whole load, or we can even lose the customer, impacting the business significantly.
>
> Due to this, we are disqualifying you from all operation positions. You have the right to move to a different position in fleshing, splitting or wringing…Refer to the union contract…"

This warning notice is not signed by either a management representative or the Charging Party. There is also no marking in the section labeled "Disciplinary Action Being Assessed." The Charging Party provided this document to the Region during the investigation of the underlying charge. (Tr. 237).

Respondent Exhibit 3 is a similar, but not identical warning notice. The date of the incident listed on Resp. Ex. 3 is May 10, and reassignment is circled under the "Disciplinary Action Being Assessed." Valencia signed the document on May 13 as the management representative, and hand wrote "via phone" on the line next to "Employee Signature." The narrative on the attachment, however, is the same in both exhibits. Only Resp. Ex. 3 was provided to the General Counsel pursuant to its trial subpoena. (Tr. 237).

Valencia testified that he prepared both GC Ex. 4 and Resp. Ex. 3, but he did not know why the dates on the two documents did not match. Valencia also did not know why the discipline to be meted out was outlined on one document, but not the other, and he did not know why he only signed Resp. Ex. 3. (Tr. 229-235).

Respondent Formally Denies the Charging Party's Lead Pay Grievance

Later on May 13, the Employer submitted its written grievance answer to the Union regarding the Charging Party's lead pay grievance. The grievance answer says:

> "It hasn't been past practice to pay Dijon lead pay when he works Devro & Collagen. He only got paid as a lead two specific times when we were short on people and another employee (Steven) was on vacation so, he worked 12-hour shifts to cover all positions. Also, while he works in his regular working hours, he will not get lead pay when he is working in Devro & Collagen.
>
> He will only receive lead pay when he is working as a Lead at the blue line.
>
> If you check the paystubs that you sent me, he only got paid lead pay those two times in October 2022 & January 2023. The other times he was paid as a lead it was because he was covering a lead position (Desmond or Ruben)." (Resp. Ex. 5).

On June 6, Chavez emailed Valencia, Miller, and Moran to let them know that the Union was moving the lead pay grievance to the 3rd step of the parties' grievance procedure. In this same email, Chavez asked whether the Employer agreed to refer the matter to the Federal Mediation and Conciliation Service (FMCS). (Resp. Ex. 11). In a June 11 email, Valencia asked Chavez if they could talk about the FMCS request at the parties' next meeting. Chavez consented to this request. (Resp. Ex. 11).

The parties met later in June to again discuss the lead pay grievance, but the Employer held firm to its denial. In its June 27th letter to the Union, the Employer wrote:

> "After meeting with you about the lead pay grievance and reviewing the case, we have decided that we are not changing our decision. The grievance is still denied.
>
> First, the CBA specifically states that 'Lead positions are appointed by Management.' There is no dispute that the Company did not agree to appoint the grievance (sic) to lead in the disputed instance.
>
> Second, it has not been past practice that Mr. Doctor-Harris has been paid lead pay every time that he works in collagen and Devro. He asked for and was granted lead pay twice by the Company due to a shortage and vacation time of employees. Again, the Company agreed to pay lead time in these two instances given the unique circumstances. These two isolated instances do not, by any means, create an enforceable past practice. The other times that the grievant got paid as a lead it was because he worked as a Lead at the Wringing area covering for another lead.
>
> At this point, we do not agree to go to Federal Mediation because we do not believe it would be productive.[32]" (Resp. Ex. 11).

Valencia testified that the Union never responded to the Employer's June 27th letter, the Union did not move the lead pay grievance to arbitration, and the Employer considers the lead pay grievance closed. (Tr. 246, 249-250).

The Charging Party Moves to the Second Shift and the Union Files a Grievance Over His Demotion

The Charging Party testified that he selected the 3rd shift upon his return from layoff because of his childcare responsibilities. To this end, working the 3rd shift allowed the Charging Party to take his children to school in the morning, pick them up in the afternoon, and stay with them after school without interfering with his work schedule. (Tr. 37, 49-50).

After his May 13th phone call with Valencia and Moran, the Charging Party took a few days to digest the news and select a new job assignment. Ultimately, the Charging Party selected a forklift operator position on the 2nd shift, where he was no longer responsible for completing

[32] Valencia testified that the parties can skip Step 3 of the grievance procedure if they both don't agree to pursue mediation. (Tr. 249).

any processing sheets. (Tr. 47, 95, 214-215). But by moving from the 3rd shift to the 2nd shift, the Charging Party forfeited his hourly shift premium. (Tr. 120).

When he accepted the position on the 2nd shift, the Charging Party raised his childcare concerns with Valencia, Moran, and Esau Chavez. In this conversation, the Charging Party explained that he wouldn't be able to come to work at 2:30pm, when the 2nd shift began because he had to get his children situated after school. In response, the Employer representatives agreed to give the Charging Party a 30-to-45-minute grace period before he was expected to report to work each afternoon.[33] (Tr. 124-125).

Later in May, the Union filed a grievance protesting Doctor-Harris' disqualification from his 3rd shift operator position.[34] (Resp. Ex. 6). On May 24, the parties met to discuss Doctor-Harris' disqualification grievance. Although the Charging Party attended this meeting, his testimony regarding this subject was limited. To this end, the Charging Party testified that he was given a copy of GC Exhibit 5 at the meeting and Employer representatives told him that customers could complain about the process not being followed and the Employer could lose business as a result. (Tr. 38, 40). The Charging Party, however, could not recall what he said in response to receiving the acidification process sheet. (Tr. 46).

Carlos Valencia testified in more detail regarding the May 24th grievance meeting. Esau Chavez, Mark Aufderhar, and the Charging Party attended on behalf of the Union and Miller, Moran, and Valencia attended on behalf of the Employer. At the outset, the Employer confirmed that it would not reverse its decision regarding the lead pay grievance. When the conversation turned to the disqualification grievance, the Employer representatives explained why they believed the Charging Party's behavior was so serious and why they decided to disqualify him from the 3rd shift operator position. In this regard, the Employer reps explained that the Charging Party made up numbers on the process sheet and never did the acid cut.[35] And consequently, the Employer could potentially lose the customer. Valencia asked the Charging Party why he didn't take the acid cut and the Charging Party said: "What's the point, I've already been disqualified so it doesn't matter at this point." (Tr. 241-243).

Respondent's Comparator Evidence of Other Operators Disqualified from Their Positions

As part of its defense, the Respondent spotlighted two previous operator demotions that it asserts are comparable to the Charging Party's misconduct. In July 2011, Jamie Cuevas, who

[33] Valencia testified that the Charging Party selected the 3rd shift after his recall from layoff because it worked better for him, but Valencia says that he did not know why the 3rd shift schedule was better for the Charging Party. Valencia testified that he first learned about the Charging Party's childcare needs after he started missing work in July 2024. (Tr. 320-321).

[34] The "Discharge and Discipline" section in the parties' collective bargaining agreement states that "any employee may request an investigation as to his/her discharge or discipline, which shall be handled in accordance with the grievance procedure." (GC Ex. 2). It does not appear from the record that the Charging Party availed himself of this option.

[35] Valencia testified that by this point, the Employer had already shown Esau Chavez the video footage. (Tr. 241-242).

worked as a chemical make-up operator was disqualified from his position. The Employee Warning Notice indicated that "after fact checking some chemical pallets we found some chemical weight problems. Soda ash weights were the biggest problem." Cuevas received a written warning and was reassigned from his position. The Employer wrote on the discipline form: "The next time there is a discrepancy like this it may result in termination. Employee is being disqualified from chemical make-up position as this was second instance in two days." (Resp. Ex. 26; Tr. 218).

The next incident occurred in July 2013 and involved tan drum operator Jose Vazquez. The memo accompanying the Employee Warning Notice indicated that "you are in violation of work rule #5 – unsatisfactory work performance. On 5/17/2013 the formula called for a minimum of 79.1 pounds chemtan N-34. And you weighed up 73.1 pounds of chemtan N-34. This is 5.9 pounds short. As a result of this violation you are disqualified as a tan drum operator." (Resp. Ex. 27).[36]

3rd Shift Supervisor Dallas Bryant Tells the Charging Party that the Employer Demoted Him Because Wilber Moran was Upset that the Charging Party Enlisted the Support of the Union

Doctor-Harris testified that about two weeks after his demotion, he encountered supervisor Dallas Bryant at the Employer's facility. The Charging Party said that this was the first time he saw Bryant since he was moved to the 2nd shift. Doctor-Harris told Bryant that he was demoted and wasn't going to be on the 3rd shift anymore. Bryant told the Charging Party that Wilber (Moran) was upset that this was the second time that the Charging Party went to the Union. (Tr. 47-49). Bryant testified at the hearing and denied making such a statement. Moran similarly testified that he never told Dallas Bryant that he was mad that the Charging Party filed a grievance. (Tr. 402, 413).

The Employer Denies the Charging Party's Disqualification Grievance and the Union Ultimately Declines to Arbitrate the Grievance

On June 6, Esau Chavez emailed Carlos Valencia to remind him that the Union had not received the Employer's answer to its Step 1 grievance regarding the Charging Party's demotion. Chavez asked that the Employer respond as soon as possible, or the Union would file an unfair labor practice charge. (Resp. Ex. 11). The next day, Valencia emailed Chavez the Employer's answer to the disqualification grievance. The answer reads as follows:

> "This is in response to the above referenced grievance that the grievant and the union brought forward during our meeting on 5/24/24.
>
> The Company has considered the information presented by the grievant and the union during the meeting. The union asked for an exception to the contract language be

[36] Valencia testified that he was working for the Employer when Cuevas was disciplined in 2011 and when Vazquez was disciplined in 2013, but Valencia testified about these incidents as a human resources gatekeeper as opposed to an individual with personal knowledge of the respective incidents. (Tr. 219).

> extended to Dijon. The Company considered the situation as well as similar situations and concluded an exception would not be granted. The Company believes that it has complied with the requirements of the collective bargaining agreement. As a result, this grievance is denied." (Resp. Ex. 7; Tr. 243).

On July 10, Chavez emailed Valencia an information request regarding the Charging Party's disqualification grievance. (Resp. Ex. 12). Valencia emailed Chavez the requested information on July 16, and later that same day, Chavez emailed Valencia to confirm that the Union was moving this grievance to arbitration. (Resp. Exs. 13 and 14; Tr. 250-255). But on August 2, Chavez emailed Valencia to let the Employer know that the Union was withdrawing the Charging Party's demotion grievance. (Resp. Ex. 14; Tr. 255-256). The Union did not provide an explanation to the Employer as to why it was withdrawing the grievance.[37] (Tr. 256).

The Charging Party's Attendance Issues Worsen on the 2nd Shift and Ultimately Lead to His Termination

The Charging Party testified that his attendance record suffered on the 2nd shift because he could not be there for his kids and get to work in the middle of the afternoon. (Tr. 50). To this end, the Charging Party racked up a number of absences and tardies throughout the Summer of 2024. As a result, the Charging Party received a verbal warning for poor attendance on September 11 and a written warning on September 12. (GC Exs. 10 and 11; Resp. Exs. 16 and 17; Tr. 51). The absences continued and on September 26, the Employer issued the Charging Party a 3-day suspension for poor attendance. (GC Ex. 12; Resp. Ex. 18; Tr. 51).

When the Charging Party's absences continued in early October, the Employer sent him the functional equivalent of a last chance agreement.[38] In its October 3 correspondence, the Employer wrote:

> "As you know, our attendance program requires employees to: (a) show up to work on time, (b) work their entire scheduled shift, and (c) not miss any scheduled days. For purposes of attendance, 3 incidents of being late or leaving early without permission are considered equal to missing one day of work. A copy of the Attendance Policy is attached.
>
> If you have a combination of attendance incidents that result in being absent for an equivalent of 3 days in the past 6 months, your absenteeism is considered to be 'excessive' and you are subject to discipline in accordance with the CBA. The Company reviews your attendance record weekly and adjust your record to reflect the last 6-month period.

[37] The Charging Party testified that the Union told him that it was withdrawing the grievance because they did not have a case. (Tr. 99).

[38] The Charging Party testified that he received a copy of GC Exhibit 6 at his home address. (Tr. 50). The letter also indicates on its face that it was emailed to the Charging Party.

> In your case, in just the past 3 months, you have the following 6 tardies and 12 absences…
>
> We consider that your absenteeism is excessive, and we are only counting the last 3 months. As you know, as a result of your attendance issues, you received a verbal warning on 9/11/24 and a written warning on 9/12/24. Nevertheless, your attendance did not improve. You were absent again on 9/16/24, 9/18/24, 9/19/24, and 9/20/24. After being absent again on 9/23/24, you received a disciplinary suspension from 9/26/24 to 9/28/24.
>
> You were scheduled to return on 10/1/24. Nevertheless, you again called in absent on 10/1/24 and 10/2/24.[39]
>
> From our perspective, you do not appear interested in keeping your job. Your lack of attendance is already grounds for termination. Nevertheless, we are giving you one last chance to come back to work and improve your attendance record. If you do not return or if you do not demonstrate a better attendance record, we will have no choice but to terminate your employment…" (GC Ex. 6).

Valencia testified that he called Esau Chavez to let him know that the Employer was sending out GC Exhibit 6 to the Charging Party and the Employer was giving the Charging Party another chance to come back to work. (Tr. 284). The Charging Party, however, did not return to work after receiving a copy of GC Exhibit 6.[40] (Tr. 284). Consequently, on October 4, the Employer terminated the Charging Party's employment. (GC Ex. 13; Resp. Ex. 20; Tr. 285). The Charging Party testified that the Union did not file a grievance over his attendance disciplines or his termination. (Tr. 99). Chavez told the Charging Party that the Union could not represent him if he did not return to work. (Tr. 99).

Analysis

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act," and Section 8(a)(3) of the Act sanctions employers for "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. §158.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), the General Counsel bears the burden of making an initial showing sufficient to support the inference that employees' union or other protected concerted activity was a motivating factor for the employer's adverse employment action. This is commonly done by showing that the employees engaged in union or protected activity, the employer knew of that activity, and the employer harbored animus against that union

[39] The Charging Party asserts that for some of his absences listed in GC Exhibit 6, he was sick and under a doctor's care. (Tr. 122). He disputes the no-call/no-show designation for some of the absences but does not dispute that he did not show up for work on the days listed in GC Exhibit 6. (Tr. 123).

[40] Valencia testified that September 11th was the last day that the Charging Party had shown up for work. (Tr. 276-277).

or protected activity. See, e.g., *Amentum Services, Inc.,* 374 NLRB No. 16, slip op. at 3-4 (2024); *Consolidated Bus Transit*, 350 NLRB 1064, 1065-1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). An employer's motivation is a question of fact that may be inferred from direct and circumstantial evidence on the record as a whole. *Intertape Polymer Corp.,* 372 NLRB No. 133, slip op. at 6 (2023); *Amentum Services, Inc.,* 374 NLRB at slip op. 4. Circumstantial evidence of a discriminatory motive may include, but is not limited to, the timing of the adverse action in relation to the union or other 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; and disparate treatment of the employee. *Intertape Polymer Corp.,* 372 NLRB at slip op. 6-7; *Amentum Services, Inc.,* 374 NLRB at slip op. 4.

Once the General Counsel has satisfied their initial showing, the respondent can still prevail under *Wright Line* if it establishes that the same action would have taken place even in the absence of the union or protected activity. *Spike Enterprise, Inc.,* 373 NLRB No. 41 (2024). The employer's burden cannot be satisfied by proffered reasons that are found to be pretextual. *Amentum Services, Inc.,* 374 NLRB at slip op. 4; *CSC Holdings, LLC,* 368 NLRB No. 106, slip op. at 3 (2019). The defense burden is one of persuasion, not production. See *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 400 (1983). To meet its defense burden, the employer must show that "it had a reasonable belief that the employee committed the offense, and that it acted on that belief…" when it disciplined the employee. *McKesson Drug Co.,* 337 NLRB 935, 937 fn. 7 (2002). Where the employer demonstrates that it had such a reasonable belief, it must still show it would have, not merely that it could have, taken the same action absent the employee's protected conduct. *SBM Site Services, LLC,* 367 NLRB No. 147 (2019); *St. Paul Park Refining Co., LLC,* 366 NLRB No. 83, slip op. at 16 (2018).

The Charging Party Engaged in Union Activities and the Employer Had Knowledge of These Activities Before Its Decision to Demote Him

The record evidence unmistakably establishes that the Charging Party was engaged in protected union activities and the Employer had knowledge of these activities when the Employer demoted the Charging Party. To this end, prior to the filing of his lead pay grievance, Doctor-Harris asked shop steward Mark Aufderhar to accompany him to Carlos Valencia's office to advocate for extra pay for the extra work he was asked to perform. When Doctor-Harris was rebuffed by both Valencia and plant manager Marvin Miller, Aufderhar filed a grievance over this issue. The grievance alleged that the Employer violated past practice because the Employer previously paid the Charging Party lead pay on numerous occasions when he either performed extra work or covered his co-workers' shifts. It is well established that the filing of a grievance alleging a violation of the parties' collective bargaining agreement is a protected concerted activity regardless of whether the grievance relates solely to one employee's personal claim and regardless of the merits of the grievance. See *Interboro Contractors, Inc.,* 157 NLRB 1295, 1298 (1966); *Danny's Foods, Inc.,* 260 NLRB 1445, 1446-1449 (1982). Additionally, the parties met to discuss this grievance on May 10, and the plant's essential decision makers – Miller, Moran, and Valencia – were all in attendance. Therefore, the record evidence unquestionably establishes that the Charging Party was engaged in protected union activities and the Employer had knowledge of these activities.

Counsel for the Acting General Counsel Has Established Employer Animus Towards the Charging Party's Protected Activities

Animus may be established by direct or circumstantial evidence based on the record as a whole. *Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16, slip op. at 4 (2021). The Board has routinely inferred animus and a causal connection from, among other factors, the timing of the action in relation to the union or other 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; disparate treatment of the employee; and reliance on pretextual reasons for the action. *Intertape Polymer Corp.,* 372 NLRB at slip op. 14.

In this case, I credit the Charging Party's testimony that a few weeks after his demotion, and the first time that he saw his former supervisor Dallas Bryant at work since his demotion, Bryant told the Charging Party that Wilber Moran was upset that this was the second time that the Charging Party went to the Union. Bryant testified briefly and denied that he made such comments. Having observed the Charging Party's demeanor and testimony for half a day, I find the Charging Party's accusation to be more credible than Bryant's blanket denial. To this end, the Charging Party's testimony was genuine and free from embellishment. I can't say that his level of detail and recall was impressive, but he never tried to fill in any blanks with conjecture or guessing. In this respect, the Charging Party was quite blunt when he couldn't recall dates or details of conversations. He attributed these memory gaps to the passage of time, and I was impressed at his unwillingness to testify to things that he couldn't quite remember. The Charging Party's testimony was strongest when he described the work that he performed for the Employer. He knew how to do his job, and he knew how to explain how he did his job. In sum, I observed the Charging Party as a proud, insightful witness who told me what he knew while also readily volunteering that he did not know the answers to some of counsel's questions. On the other hand, Bryant testified only for about two minutes. In his brief testimony, Bryant denied telling the Charging Party that Moran was upset with him because he went to the Union again. That was it. In a vacuum, that might be enough for me to credit him. But I am tasked to compare my limited exposure to Bryant with observing the Charging Party's responses and demeanor over several hours of testimony. For these reasons, I credit the Charging Party's assertion that Dallas Bryant told him that Wilber Moran was upset with the Charging Party for enlisting the support of the Union a second time.

Beyond this direct evidence, the record contains circumstantial evidence that further supports a finding of animus here. First, the Employer's decision to disqualify the Charging Party from his operator position took place just days after the grievance meeting (May 10 vs. May 13). Next, the record evidence is clear that the Employer failed to conduct a meaningful investigation of the Charging Party's alleged misconduct. To this end, the Employer decided to disqualify the Charging Party from the operator position he held for over three years without giving the Charging Party an opportunity to explain his side of the story. See *New Orleans Cold Storage & Warehouse Co., LTD.,* 326 NLRB 1471, 1477 (1998); *K&M Electronics,* 283 NLRB 279, 281 (1987) (the failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are clear indicia of discriminatory

intent). These two pieces of circumstantial evidence bolster the direct evidence of animus, thus allowing the Acting General Counsel to satisfy this element of its *Wright Line* burden.

I am mindful of Board cases that limit the application of animus to statements of supervisors who were not involved in the decision to take the alleged unlawful action. For example, in *Amcast Automotive of Indiana, Inc.,* 348 NLRB 836, 839 (2006), the employer discharged a pro-union employee shortly after the resumption of handbilling at the employer's workplace. The employee's immediate supervisor did not take part in the decision to discharge the employee, but this supervisor later told employees that the employee's union activity "probably didn't help his cause any" and "if it hadn't been for the 'U' word," (the employee) would probably still be employed. *Id.* at 836-837. The Board in *Amcast Auto* held that given the supervisor's noninvolvement in the decision to discharge the impacted employee, it was hard pressed to see how the supervisor's subsequent statements about the discharge constituted evidence of the employer's animus. *Id.* at 839. The Board also held that animus could not be inferred here from the insufficient thoroughness in investigating the employee's misconduct, including not consulting with the supervisor prior to the decision to discharge the employee. *Id.; Chartwells, Compass Group, USA, Inc.,* 342 NLRB 1155, 1158 (2004) (unlawful motivation cannot be established by showing that an employer "does not pursue an investigation in some preferred manner").

In *Amcast Auto,* the supervisor opined about the nexus between the discharged employee's union activity and the employer's adverse employment action. But Dallas Bryant was not speculating about the connection between the Charging Party's grievance filing and his demotion. Instead, Bryant relayed to the Charging Party that Wilber Moran was upset that the Charging Party complained to the Union again. This spoke directly to the issue of animus given that Bryant was relaying the 2nd highest ranking official in the plant's frustration with the Charging Party filing a grievance. While it's true that Bryant was divorced from the decision to demote the Charging Party, he was a direct participant in the conversation where Wilber Moran shared his disdain for the Charging Party's enlistment of the Union's support. Thus, our facts are distinguishable from *Amcast Auto*.

I am also mindful of the dearth of other record evidence reflecting Employer animus towards employee involvement in union activity. To this end, the Union has represented employees for over 16 years, over successive collective-bargaining agreements. There is no evidence that the Employer refused to meet on the Charging Party's grievances, or any other grievances.[41] Similarly, there is no evidence that the Employer failed to adhere to the parties' negotiated agreement. All witnesses concurred that very few grievances are filed at this workplace – but no witness attributed this lack of protected, union activity to Employer animus.[42] But even though the General Counsel's direct evidence of animus is limited to one statement,

[41] Although the comment attributed to Moran reflected his disdain for the Charging Party going to the Union for a second time, there was minimal testimony about the first occasion the Charging Party enlisted the Union's support. The Charging Party testified that he previously filed a grievance in 2023 regarding lead pay. There is no evidence that the Employer refused to discuss the first grievance with the Union or that the grievance wasn't resolved to the Charging Party's satisfaction.

[42] The Charging Party similarly noted that he had no reason to believe that Chavez or Aufderhar harbored any animus against him or that they would not faithfully execute their grievance processing responsibilities.

this one statement is the epitome of animus – the Charging Party exercised his legally protected right to file a grievance under the parties' collective bargaining agreement and in response, the Employer's second-in-command expressed his displeasure with the Charging Party enlisting the support of the Union to pursue his lead pay grievance. Based on this credited, impactful statement, I find that Counsel for the Acting General Counsel has established its prima facie case under the *Wright Line* framework.

The Employer Has Established That It Would Have Disciplined the Charging Party for His Failure to Take the Acid Cut Even in the Absence of His Protected Activities

The evidence shows that the Employer reasonably believed that the Charging Party failed to make the acid cut as prescribed on Devro's process sheet, and the Employer acted on this belief when it disqualified the Charging Party from his 3rd shift operator position. Having carried its burden of persuasion, I recommend dismissal of this charge.

The Charging Party knew how to do his job – he had done it for three years. And Steps 11 and 12 of the Devro acidification process require the operator to run the drum for 9 hours at a very low rate of speed, take a temperature reading and an acid cut of the hide, and test the pH level at the conclusion of that cycle. Once those readings are done, the drum is sped up to 3 RPM and the drain cycle runs for 45 minutes.

The beginning of the two video clips (at 12:30am) shows the drum running at a very low rate of speed. The Charging Party enters the frame, approaches the control panel, writes something down on the process sheet, and then the drum begins its drain cycle at a much higher rate of speed. The video clip is clear – and I credit Wilber Moran and Carlos Valencia's testimony – asserting that the Charging Party did not take the acid cut.

Questions lingered in my mind about why the Employer only submitted a 5-minute video clip running from 12:30am to 12:35am when the Charging Party wrote on the Devro acidification process sheet that he began Step 12 at 12:40am. These questions were magnified in listening to portions of Wilber Moran's testimony that I view as less than credible. Moran implied in his testimony that since the Charging Party entered the frame from outside the building, he was shirking his job responsibilities. Such an accusation is belied by the Employer's work schedules which show that the Charging Party's regularly scheduled break was from 12:00am to 12:30am. Thus, the Charging Party's return to the Devro area at 12:30am was nothing more than the resumption of his work tasks after the completion of his break.

Furthermore, Moran testified that the Employer had received several complaints about the Charging Party's performance on the 3rd shift prior to viewing the May 9th video footage. Specifically, Moran testified that at one point in 2024, the Charging Party was caught sleeping in the Employer's conference room during his shift and at another time, the Charging Party was caught sleeping in his car. (Tr. 396-397). But the Charging Party was not disciplined for these alleged incidents, there is no reference to these episodes in the Charging Party's personnel file, and Carlos Valencia testified that he was not aware of any complaints about the Charging Party's work on the 3rd shift prior to May 2024. Thus, I find that Wilber Moran's testimony about alleged Charging Party work deficiencies lacks credibility.

I also found unsettling contradictions in certain aspects of Valencia and Moran's testimony. In this regard, Valencia testified that Miller reviewed the video footage to determine if the Charging Party was too busy to perform the collagen mixer work in addition to his regular Devro work.[43] (Tr. 209). But Valencia also testified that while the lead pay grievance was being processed, the Employer did not make the Charging Party perform both jobs. (Tr. 181). This testimony undermines the entire rationale for the Employer reviewing the video footage immediately after the grievance meeting.[44]

In a similar vein, Moran testified that an operator is responsible for following the process sheet, and recording the required information, because these sheets tell the client the history of the processing steps taken in the plant. (Tr. 341, 346). Thus, on Step 11 of the Devro acidification process, the operator is supposed to add hydrochloric acid, run the drum for 9 hours, do a temperature check after 30 minutes and note this temperature on the process sheet. Moran testified that Steven Peña, the 2nd shift operator, was supposed to check the temperature of the wash at 4:05pm, 30 minutes after he started the wash, but Peña failed to record this temperature reading on GC Exhibit 5. (Tr. 347-351). There is no evidence that the Employer disciplined or even spoke to Peña about this glaring omission. Although Moran tried to chalk this omission up to confusion in the drafting of the form, Peña had been working as an operator for several years and thus, must have known that he was required to check the temperature 30 minutes into the 9-hour cycle and note the temperature on the acidification form.[45]

But despite the above weaknesses in the Employer's case, I still conclude that the Employer reasonably believed that the Charging Party failed to make the required acid cut. In

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[43] On pages 32-33 of its post-hearing brief, Counsel for the Acting General Counsel requests that I draw an adverse inference from Respondent's failure to call Marvin Miller to testify, stating that the Respondent's failure to call Miller strongly suggests that his testimony would not have been favorable to Respondent's case. I do not agree that an adverse inference is appropriate here. The missing witness rule allows a judge to draw an adverse inference against a party that fails to call a witness who is under the control of that party and is reasonably expected to be favorably disposed towards it. *Natural Life, Inc., d/b/a Heart and Weight Institute*, 366 NLRB No. 53, slip op. at fn. 1 (2018); *Electrical Workers IBEW Local 3 (Teknion, Inc.),* 329 NLRB 337, 337 fn. 1 (1999). At the time of the hearing, Marvin Miller had retired. A former employee, such as Marvin Miller, however, is not generally considered to be under a party's control. See, e.g., *Natural Life, Inc.,* 366 NLRB at fn. 1; *Food & Commercial Workers Local 1439 (Rosauer's Supermarket),* 275 NLRB 30, 35, fn. 10 (1985). Therefore, I decline to draw an adverse inference over Respondent's failure to call Miller to testify.

[44] I also do not credit Valencia's testimony that he did not know about the Charging Party's childcare issues until the Charging Party stopped coming to work in the Summer of 2024. The Charging Party specifically chose the 3rd shift when he returned from layoff and it seems more likely than not that in his years working on the 3rd shift, the Charging Party informed the Employer, at least in passing, of his preference for these hours based on his ability to drop his children off at school and care for them after school without impacting his work hours. And the Charging Party credibly testified that the Employer granted him a 30 to 45-minute grace period for starting work on the 2nd shift to allow him to get his children settled each afternoon.

[45] Although I have discredited the above portions of Wilber Moran's testimony, I found other portions of his testimony to be credible. He has worked in every job at the Employer's facility all the way up to his current position as plant manager. Thus, his testimony about job processes, and specifically the Devro acidification process, was particularly impressive. Only when Moran veered from these areas to try to beef up the Employer's defense with uncorroborated allegations of Charging Party misconduct did I find his testimony to be unworthy of credit. In making credibility resolutions, the trier of fact may believe some, but not all, of a witness's testimony. *Daikichi Sushi,* 335 NLRB at 622; *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

reaching this finding, I note that at no point in the Employer's May 13th conversation with the Charging Party, the May 24th grievance meeting, or during his trial testimony did the Charging Party affirmatively state that he did the required acid cut. Similarly, during this same period, the Charging Party did not deny that he failed to make the acid cut.[46] For someone as proud and as knowledgeable as the Charging Party, if the Employer was accusing him of dereliction of duty and he knew, regardless of what the video showed, that he had done the required tasks, he would have said so. But the Charging Party did not say this. Instead, the Charging Party was asked on direct examination if he responded to the Employer's accusations and the Charging Party said that he couldn't recall. And on cross-examination, the Charging Party testified that denying the allegations against him wouldn't have mattered because the Employer had already punished him. I steadfastly disagree with the Charging Party's assessment. The essence of the General Counsel's case is that the Employer demoted him because he filed a grievance. Denying the Employer's accusation would have mattered. The video footage – only 5 minutes long – supports the Employer's argument that the Charging Party did not perform his job as required. There is no space on the process sheet to note that the acid cut was taken. Therefore, the Employer must trust that its operators are following all the required steps. If the operator does not take the acid cut, the Employer has only two ways of knowing – 1) review the security camera footage; or 2) receive word from the customer that the food-grade product was not made to specifications (hopefully before customers are sickened). The latter option severs the trust between the customer and the Respondent. The former option severs the trust between the operator and the Respondent. That is what happened here.

If the Charging Party said that he didn't do what he was accused of doing, the video footage from before and after 12:30am-12:35am would be relevant.[47] And if the Charging Party denied the allegations levied against him, I would have to make a credibility determination – are the Employer witnesses telling the truth or is the Charging Party? But I do not have to take those steps here. The Charging Party never stated that he performed the required acid cut and never denied the Employer's accusations. Thus, the video footage reinforces and substantiates the Employer's reasonable belief that the Charging Party failed to take the acid cut.

The Employer's Security Footage Review was Triggered by the Charging Party's Assertions That He was Too Busy to Do Both Jobs, Not Because He Filed the Grievance

[46] The Employer introduced the two videos in its own case meaning that the Charging Party never had an opportunity to comment on the videos either in his direct testimony or on cross-examination. Counsel for the Acting General Counsel could have called the Charging Party as a rebuttal witness to specifically refute what the 5-minute video clips showed, but they declined to do so.

[47] On page 33 of their post-hearing brief, Counsel for the Acting General Counsel requests that I take an adverse inference regarding the Employer's failure to produce video footage after 12:35am, surmising that the footage would not have supported the Employer's misconduct allegation. I decline to take an adverse inference here. Carlos Valencia testified that video footage is preserved for two weeks until it is either deleted or taped over. (Tr. 183). Marvin Miller requested the preservation of only the 5-minute clip in the record and there is no evidence that any other video footage from May 9/10 still exists. Additionally, it is unclear whether the Acting General Counsel subpoenaed this video footage as no subpoena was entered into the record and the Acting General Counsel did not specifically request that I order production of this material. Thus, I decline to grant an adverse inference. See *Champ Corp.,* 291 NLRB 803, 803-804 (1988).

In their post-hearing brief, Counsel for the Acting General Counsel question why the Employer initiated a review of the security footage when the grievance filed only concerned lead pay. The Charging Party, on cross-examination, testified that there was a discussion at the May 10th grievance meeting as to whether the Charging Party had enough time to do both jobs because of the increased paperwork requirements. (Tr. 77-78). By his own admission, the Charging Party did not recall much from the May 10th meeting. Carlos Valencia provided a more robust accounting of this meeting, asserting that the Charging Party claimed that he was too busy to take on both roles (unless he received lead pay). I credit the more detailed testimony Valencia supplied concerning this meeting, and therefore, it is understandable that plant manager Marvin Miller wanted to assess the Charging Party's workload before making the dual role permanent. Since it was Miller who initiated the review of the security footage, and there is no record evidence that Miller bore a grudge against the Charging Party or anybody else for exercising their Section 7 rights, I disagree with Counsel for the Acting General Counsel's contention that the nature of Respondent's investigation constitutes animus itself.

The Employer Has Established That Its Disqualification of the Charging Party from His Third Shift Operator Position is Consistent with Its Previous Treatment of Similarly Situated Employees

The record contains two other instances where the Respondent reassigned operators after failing to follow the required formulas. See *Genpak, LLC,* 372 NLRB No. 76, slip op. at 4 (2023). In 2013, Respondent disqualified Jose Vazquez from his tan drum operator position because he failed to properly weigh CHEMTAN N34R in accordance with the process sheet's specifications. And in 2011, Respondent disqualified Jamie Cuevas from his chemical make-up operator position because Respondent discovered that on two consecutive days, Cuevas improperly weighed certain chemical products. Although not identical to the Charging Party's alleged misconduct (failing to take an acid cut), Cuevas and Vazquez's disciplines were of a similar nature – failing to properly weigh and measure mixer and drum components. And even though these disciplines are not proximate in time to the Charging Party's disqualification, there is no evidence that operator error has been a recurring problem – e.g. there is no record evidence that other operators have been terminated for failing to follow protocol nor is there record evidence that Respondent has imposed more lenient discipline such as a verbal or written warning for similar offenses[48]. Thus, Respondent has established that it has disqualified other operators for similar infractions to the ones attributed to the Charging Party.

Respondent's chosen punishment, disqualification from all operator positions, resulted in the Charging Party being forced off the 3rd shift. The work schedules contained in Respondent Exhibit 22 confirm that there were only three employees regularly scheduled to work on the 3rd

[48] On pages 30-31 of their post-hearing brief, Counsel for the Acting General Counsel asserts that it is almost impossible to believe that there were no other operator process errors over the last decade. That may be true – but there is no record evidence supporting this hypothesis. To the extent that such errors existed and were memorialized by the Respondent, the General Counsel could have subpoenaed these records and entered them into evidence. The record here contains no such documents. Thus, I am left to decide whether the Employer has established that it would have taken the same action against the Charging Party absent his protected activity. Given the same disqualification punishment handed out to Cuevas and Vazquez, I conclude that the Employer has carried its burden here.

shift, and all worked in operator positions. Thus, to find a non-operator position, the Employer looked to the 1st and 2nd shifts for potential fits. This led to a rapid escalation of attendance troubles and ultimately, to the Charging Party's termination. But because I have found the Employer's disqualification of the Charging Party from his operator position to be lawful, the Employer's discharge of the Charging Party for attendance issues stemming from the Employer's refusal to allow the Charging Party to work on the 3rd shift is similarly lawful.

In sum, although the Employer's demotion of the Charging Party is highly suspicious given his clean work record, his filing of the grievance one week and unceremonious demotion the next without a full investigation into the alleged incident, I conclude that the Employer has carried its *Wright Line* burden by showing it had a reasonable belief that the Charging Party committed the alleged infraction, and the Employer has shown that its punishment is consistent with its handling of similar episodes of misconduct. Crediting the Charging Party that Dallas Bryant relayed the Employer's animus towards his protected activity also means that I credit the Charging Party in his refusal to affirmatively state that he performed the acid cut and his unwillingness to deny that he failed to follow the required steps on the Devro acidification sheet. Based on the above, I conclude that the Counsel for the Acting General Counsel has not established a violation of the Act and I recommend dismissal of the complaint.

CONCLUSIONS OF LAW

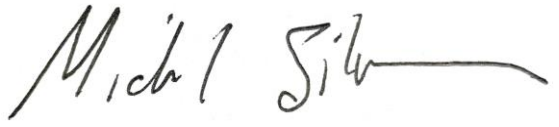
1. Respondent Twin City Tanning Company, LLP, is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. Chicago and Midwest Regional Joint Board, Workers United/SEIU Local 150 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(1) and (3) of the Act.

IT IS FURTHER ORDERED that the complaint herein is dismissed in its entirety.[49]

Dated, Washington, D.C. August 4, 2025



Michael P. Silverstein
Administrative Law Judge

[49] 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 waived for all purposes.