

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

**TOWNSEND CONTROLS &  
ELECTRIC LLC**

**and**

**Case 19-CA-315801**

**JOEL LEAHY  
an Individual**

*Cosimo Gaudio and  
Adam Morrison, Esqs., for the General Counsel.*

*Tami Culkar, Esq. (Fisher & Phillips LLP),  
for the Respondent.*

**DECISION**

**STATEMENT OF THE CASE**

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case in Richland, Washington between July 15 and August 20, 2025. This case was tried following the issuance of a complaint and notice of hearing (complaint) by the Regional Director for Region 19 of the National Labor Relations Board on November 29, 2024. The complaint was based on an unfair labor practice charge filed by Charging Party Joel Leahy (Charging Party or Leahy) on April 10, 2023 (later amended on May 25, 2023), against Respondent Townsend Controls & Electric LLC (Respondent). The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act), by discharging Leahy for engaging in union and protected concerted activities. Respondent, by its answer to the complaint, denies committing the alleged unfair labor practices as alleged.

5 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 to file post-hearing briefs.<sup>1</sup> The General Counsel and Respondent filed post-hearing briefs, which have been carefully considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

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<sup>1</sup> Abbreviations used in this decision are as follows: “Tr.” for transcript; “Jt. Exh. \_\_\_\_” for Joint Exhibit; and “R. Br. at \_\_\_\_” for Respondent’s post-hearing brief.

## FINDINGS OF FACT

## I. JURISDICTION

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Respondent, a Washington State limited liability company with a place of business in Pasco, Washington, has been engaged in electrical and automation/control systems contracting, primarily within the construction industry. Respondent is signatory to a collective bargaining agreement (“CBA”) with the International Brotherhood of Electrical Workers Local Union No. 191 (Local 191 or the Union).

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Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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## II. THE ALLEGED UNFAIR LABOR PRACTICES

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*A. Factual Background*<sup>2</sup>

Respondent employs a number of Local 191-dispatched electricians, which included—until his April 8, 2023 discharge—Charging Party Leahy. The facts of this case pertain to Respondent’s work as the electrical subcontractor on a project for JR Simplot Company (Simplot) in Moses Lake, Washington—referred to throughout the record as the “Simplot project.” (Tr. 104, Jt. Exh. 1.)

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Leahy, a licensed journeyman electrician with 22 years’ experience and longtime member of the International Brotherhood of Electrical Workers (IBEW) was dispatched to the job on March 27, 2023 by Local 191. Prior to his dispatch, Leahy had filed approximately 15–16 unfair labor practice charges; he testified that about half of these were filed against employers other than Respondent, while the other half were filed against IBEW locals, including Local 191. (Tr. 104, 255, Jt. Exh. 4.)

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The Simplot project was an expansion and upgrade of a food processing facility; Respondent’s electrical crew was tasked with electrical upgrades and installations, including the installation and wiring of an industrial spiral freezer (a specialized freezing system for food

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<sup>2</sup> Certain of my findings are based on witness 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness’ testimony. *Jerry Ryce Builders*, 352 NLRB 1262, 1262 n.2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), rev’d on other grounds 340 U.S. 474 (1951)). Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis.

products). This work included running and installing conduit and wiring, setting control panels and completing power terminations. (Tr. 101, 104, 108–110, 458.)

5 The general contractor at the project was Fisher Construction Group (Fisher); as such, Fisher was responsible for overall project coordination, scheduling, site logistics, and general site safety management, including general oversight for safety compliance, as well as conducting safety training and incident investigations. Respondent was not a subcontractor to Fisher, however, but rather had its own direct contractor relationship with Simplot. Other contractors onsite included Food Processing Solutions (FPS), whose employees performed specialty work such as cleaning and building the interior of the spiral freezer, as well as a union mechanical contractor whose employees handled pipefitting at the site. (Jt. Exh. 1, Tr. 105.)

### 1. The Simplot project jobsite

15 Work areas at the Simplot project were often congested, with multiple trades—including pipefitters (also called stainless steel welders) and specialty contractors—operating simultaneously within confined spaces around large equipment. The spiral freezer on which Leahy and the other electricians worked was one such area. The freezer is a large, stainless-steel cube (with approximate measurements of 25' x 40' x 30') suspended off the ground, containing a spiraling conveyor that freezes product as it travels upward and exits for bagging or palletizing. It was situated in a confined area of the facility; as the job progressed, equipment was brought into the space, further narrowing the walking areas surrounding the freezer to either two or six feet, depending on which side of the freezer was being worked on. (Tr. 45–46, 51–53, 109–114, 458, 463–464.)

25 The electricians' work on the freezer included running and installing conduit and wires, terminating devices, installing cable trays and completing tasks on top and below the freezer. They accessed the top of the freezer using a scissor lift;<sup>3</sup> their work underneath the freezer involved laying on the floor to install wires in cable trays, performing terminations and managing the work from a position only a few inches away. At the same time that the electricians performed this work, pipefitters installed valves, fittings and pipes on the sides of the freezer, which involved punching a hole in the freezer and welding the equipment to it. On any given day, approximately one to five pipefitters worked on the freezer. Also working in the freezer area were employees of various specialty contractors. (Tr. 44, 47, 52–59, 108–109, 126.)

### 2. Respondent's management team

40 At the jobsite, Leahy reported to Respondent's foreman, Kyle Casey (Casey). Although an admitted 2(11) supervisor, Casey spent approximately 90% of his time performing journeyman electrical work; his managerial functions were limited to ordering materials and supplies for the electricians, lining out their work, reading blueprints and keeping the crew on task. Casey reported to General Foreman Kipp Franklin. Overseeing Respondent's operation at the jobsite was Superintendent Colby Johnson (Johnson). (Tr. 460.)

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<sup>3</sup> A scissor lift is an elevating work platform used in construction that employs a crisscross mechanism to raise and lower a platform, providing vertical access for workers and equipment. <https://www.osha.gov/etools/scaffolding/scissor-lifts>.

Respondent is owned and managed by Sonny Townsend, who served as Respondent's table representative during the instant proceeding but did not testify. It is undisputed that there was no Local 191 steward on the jobsite. (Tr. 5, 107, 146–147, 408.)

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3. April 3: Leahy complains about tripping hazards.

Leahy testified that he observed multiple tripping hazards on the Simplot jobsite; as he explained:

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General housekeeping on that job was in pretty rough shape. There was a lot of trash, debris, cords, and welding leads just on the floor, going through doorways, cutting across walking surfaces, working areas.

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According to Leahy, he discussed these issues with other employees, as well as Foreman Casey. On April 3, 2023, approximately a week after being dispatched to the project, Leahy raised the crew's safety complaints to Fisher's management. On the day in question, he was assigned to run stainless steel conduit on the spiral freezer with crewmates Betty Smith (Smith), Rudy Garcia (Garcia) and Austin Hufford (Hufford), as well as Casey.

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At the beginning of the shift, the crew assembled by their toolboxes to conduct a "job hazard analysis," which is a routine, 5–10 minute meeting during which crew members are expected to identify any jobsite hazards presented by their next assigned task, in order to determine how to mitigate them. As the meeting wrapped up (and after Casey had left), Fisher Superintendent Daryl Quin (Quin) approached, demanding to know why one of the crew members (not Leahy) was not wearing safety glasses. Leahy intervened, explaining that his coworker's glasses had fogged up due to weather conditions, and that they were simply being cleaned and would "go right back on."

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Leahy then confronted Quin, querying why, if he were really concerned about safety, he had not addressed the numerous cords lying on the floor in a congested work area. He then said that the walking surfaces should be cleared of trip hazards, pointing out that there were extension cords, welding leads and trash on the floor. Quin responded by questioned Leahy's motive in bringing up these concerns, asking, "[a]re you only bringing this up because I was telling somebody to put on their safety glasses?" At this point, Leahy dropped the conversation and went to work. (Tr. 114–118, 124–125.)

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Quin created an "Incident Report Summary" regarding the conversation, in which he noted that Leahy had employed an "argumentative tone" and "vented" for twenty minutes "about what he thought was wrong with the jobsite." This report was relayed to Fisher's Safety Manager Hildebrando "Junior" Puente (Puente), who testified that he later oversaw and documented the removal of the trip hazards from the site. (Tr. 348–349; Jt. Exh. 6.)

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4. April 4: Leahy complains about unsafe equipment and threatens to involve Local 191.

The following day, the electrical crew was again assigned to work on the spiral freezer. That morning, however, Casey requested that they move a scissor lift that was wedged in a corner, blocking access to a walkway around the freezer. The lift was owned by Fisher but expected to be used by the electrical crew to access the top of the spiral freezer. The crew performed standard safety inspections and checks on the lift and found it inoperable. Leahy then discovered that the only maintenance record contained in the lift dated back to January 2021, and that it was also missing required daily inspection sheets. He and the other crew members discussed the possibility that the lift had not been properly maintained. This was not the first time the crew had observed a safety-related issue with one of Fisher's scissor lifts; according to electrician Hufford, he and Leahy had previously discussed that another scissor lift was dented, potentially jeopardizing its structural integrity. (Tr. 39, 47, 51, 126–128, 133–135, 141.)

Casey appeared, requesting a progress report on the crew's efforts to get the lift working. Leahy reported that the lift appeared to not have been serviced for over two years, and that the crew had tried everything they knew to get it running. Casey acknowledged that the missing and outdated safety documentation was a problem and reassigned the crew to another task. According to Leahy's un rebutted testimony,<sup>4</sup> he then informed Casey that there were other scissor lifts with "visible issues" and that, considering there was no Local 191 steward on the jobsite, he would be documenting safety issues throughout the jobsite to ensure that—in case of an accident—management could not "perform a cover-up." Leahy then said that he was going to contact Local 191 to find out why there was no union steward for the electricians on the site, considering the number of safety problems he had observed. According to Leahy, Casey responded positively and was "supportive of my decision to start documenting things in a way that management would have a difficult time refuting." (Tr. 145–147, 287.)

Later during the shift, Safety Manager Puente approached Leahy, asking for a status report on the lift. Leahy reported that it was lacking maintenance logs and daily inspection sheets, and asked Puente if Fisher maintained those documents on the jobsite. Puente asked Leahy why he needed them, to which Leahy replied that the documents were required by Occupational Safety and Health Administration (OSHA) regulations to be stored on the lift. Puente responded that he did not know if they were on the site and that he would have to check. (Tr. 134–143.)

5. April 8: Leahy raises concerns about "trade stacking" around the spiral freezer and argues with another contractor's employees over safety concerns.

Four days after the scissor lift incident, Leahy raised more safety complaints. On the day in question, the electricians spent the first part of their shift installing conduit on the roof of the freezer. After they finished that task, Casey ordered them to install wires in the cable tray<sup>5</sup> underneath the freezer. This would require the crew to lay on the floor under the freezer and work approximately six inches above their heads; this would leave the lower half of their bodies exposed to a narrow, six-foot-wide pathway with limited sight for incoming hazards. Less than ten feet above where they would be working, pipefitters were performing welding work on the

<sup>4</sup> Although called by Respondent as a witness, Casey was not asked about this conversation.

<sup>5</sup> The cable tray is a wire basket roughly ten feet long underneath the freezer. (Tr. 148.)

freezer using a boom lift with an articulating basket.<sup>6</sup> As required before commencing this new assignment, the crew—including Casey—began to conduct their standard job hazard analysis. At this point, Leahy asked if the pipefitters were going to be welding above them the entire time they were working below, to which Casey responded that he was not sure. (Tr. 148–153.)

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What Leahy was inquiring about is commonly known as “trade stacking”—a construction industry term that refers to a situation in which several trade contractors end up working simultaneously in the same area of a project. See generally *In re Electric Machinery Enterprises, Inc.*, 416 B.R. 801, 822 (2009). Trade stacking was an ongoing problem on the work site; according to electrician Hufford, there were often a number of other trades present in the same area where the electricians were working, making the workspace “pretty tight”—an issue that he raised with Casey. As Leahy explained, the trade stacking on April 8 increased the risk of dropping hazards from falling tools, crushing hazards from the pipefitters’ lift, tripping hazards from workers not seeing the electricians’ legs and the danger of welding slag hitting them. According to Leahy, the electrical crew discussed these concerns multiple times with Casey throughout the shift. (Tr. 52–59, 149–152.)

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As the electricians worked under the freezer, laborers from specialty contractor FPS appeared and began cleaning the freezer’s exterior walls, leading them to step on the conductors that the electricians were trying to install. Leahy complained to Casey that the laborers were walking on their wires and asked if the electricians’ work area could be “danger taped.” Also known as “owning the zone,” this is a practice in construction in which one trade sets up barricades and caution tape to exclude other trades from working in their area for safety purposes. Casey said no.

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The laborers continued their work, which involved spraying a cleaning solution onto the freezer and wiping it down with squeegees on 15-foot poles; this resulted in mist from the cleaning solution falling on the electricians’ legs as they worked under the freezer. Leahy emerged from the freezer and confronted the laborers. While witnesses offered conflicting testimony about what happened next, I generally credit electrician Hufford, who recalled Leahy arguing with FPS employees Zack Gross and Antonio Gross (who are brothers), as another FPS employee, Jose Alberto Lopez Escamilla (Escamilla) was present.

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According to Hufford, Casey was present as Leahy told the Gross brothers, “I don’t know what you’re spraying, and I’m not comfortable with you guys ... being in our workspace right now.” Leahy, for his part, admitted to cursing during this exchange, demanding “what the hell is in those bottles?” He then warned them that it was not safe for them to be stepping on the electricians’ cables. The Gross brothers countered that they were just trying to finish up their cleaning assignment and were almost done. (Tr. 61–62, 65–66, 90–91, 164–165, 171, 463–465.)

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At this point, Leahy drew Casey into the conversation, repeating his request that the electricians “own the zone.” Again, Casey said no. Superintendent Johnson appeared and Casey

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<sup>6</sup> Like a scissor lift, a boom lift is a vehicle-mounted device used to elevate workers and equipment on a platform to jobsites above ground; the chief difference is that a boom lift, unlike a scissor lift, may feature an extendable or articulating boom platform allowing for horizontal movement. See <https://www.osha.gov/etools/scaffolding/aerial-lifts>.

5 alerted him that there was an “issue” with Leahy related to “crafts stacked on top of each other.” Johnson and Leahy immediately got into a heated discussion, with Leahy demanding that Johnson provide an OSHA-mandated material safety data sheet (MSDS),<sup>7</sup> for the cleaning liquid that the FPS laborers were spraying. Johnson responded that he would provide the MSDS but  
 10 could not do so at the moment. Leahy then stated that the FPS employees were stepping on the electricians’ cables, causing a trip hazard and potentially compromising the cables themselves.

15 Leahy then stated that he felt it was a safety hazard to have other trades in the area while electricians were working and repeated his request that the electricians be allowed to “own the zone.” Johnson said no and ordered Leahy to work on part of the freezer that was not near the laborers. Leahy stated that he did not feel comfortable going back to work until his safety concerns were addressed, to which Casey and Johnson in turn responded that they could not halt the project or keep other people from working in the electricians’ area. In Johnson’s words, Leahy then “kind of pushed back on me,” insisting that he was concerned about safety issues;  
 20 Johnson then ordered him to work on another part of the freezer, stating, “I need you to go back to work, or I’m going to have to write you up for insubordination.” At this point, Leahy complied—relocating as ordered—and continued working. (Tr. 65–72, 90–91, 421–423, 471.)

25 As noted, I have largely credited Hufford’s account of these events, which generally jibes with Leahy’s account.<sup>8</sup> According to both Hufford and Leahy, although the exchange involved raised voices, there was no screaming or yelling, nor did Leahy make any physical contact with another person. Casey and Johnson likewise each admitted that they did not witness any physical contact between Leahy and the laborers on April 8. Neither the Gross brothers nor Escamilla testified. (Tr. 67, 173, 479.)

30 6. Respondent accuses Leahy of assaulting Everett Gross and discharges him.

35 One or two hours following Leahy’s confrontation with Casey and Johnson, Puente appeared at the freezer where the electricians were working. Addressing crew members Garcia and Smith, he asked whether either of them had been present when “the fight” happened. Leahy jumped in, asking, “why do you want to know?” Puente responded that he was investigating an accusation that Leahy had been involved in a physical altercation with laborers on the site. Leahy responded that, since Puente was conducting an investigation, the electricians had a *Weingarten* right to have a union representative present when he questioned them. Puente responded that he had been instructed that, if Leahy were to mention “Weingarten,” he must report to a certain trailer on the jobsite.

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<sup>7</sup> A MSDS (now referred to as a “safety data sheet”) contains safety information and handling instructions for each hazardous chemical used at a jobsite. Pursuant to OSHA regulations, employers must maintain in the workplace copies of the MSDS for each hazardous chemical used in the workplace and “ensure that they are readily accessible during each work shift to employees when they are in their work area(s).” 29 C.F.R. § 1910.1200(g)(8).

<sup>8</sup> That said, I do not credit certain aspects of Leahy’s account. He testified, for example, that Johnson directly accused him of “making bullshit safety problems,” and also claimed that the events of April 8 involved him exercising “stop work authority” and leading the crew on a safety walkout of sorts. See Tr. 165–175. This testimony appeared embellished and went uncorroborated by Hufford, whose matter-of-fact demeanor convinced me he would have disclosed such events had they occurred.

Leahy complied, waiting in the trailer for twenty minutes, at which point Puente, Johnson and Casey entered. Leahy again demanded a *Weingarten* representative but was told by Johnson that he was not entitled to one. He then stated that he wanted to interview the witnesses against him and demanded copies of any statements they had given. Puente responded that those

5 documents were not “finalized.” Minutes later, the meeting ended with Leahy being presented with—and refusing to sign—a discharge notice that stated he was terminated for “physical and verbal abuse of other [sic] craft worker.” Leahy was also provided with the MSDS he had requested earlier in the day. (Tr. 190–198, 416, 431; Jt. Exh. 9.)

10 7. Respondent’s witnesses’ conflicting accounts

Respondent’s witnesses offered divergent accounts of the trailer meeting that ended in Leahy’s discharge. Puente described Leahy as confrontational and threatening, claiming that Leahy responded to questioning by becoming threatening and argumentative and even took a

15 “combative stance” including “clenching his fists.” I do not credit Puente in this regard; he appeared to embellish this portion of his testimony, which was contradicted by Johnson, who recalled Leahy being “straight-faced” and, other than refusing to sign his discharge paperwork, not particularly confrontational. Leahy, for his part, testified that, “I pretty much dummied up and got out of there.” Based on Leahy’s rather spirited manner, I do not consider him a person

20 who would readily admit to ‘dumming up’ during a confrontation with management unless he actually had. (Tr. 190–194, 199, 416, 431.)

Nor could Respondent’s witnesses agree on what substantively took place during the meeting. According to Johnson, Leahy was summarily discharged pursuant to a decision that

25 had been made earlier that day. Specifically, he testified that he and Sonny Townsend had conferred prior to the trailer meeting and determined to fire Leahy. This decision, he explained, was based on the results of an investigation conducted by Puente into Leahy’s altercation with the FPS laborers earlier that day. In particular, he testified, he relied on an “Incident Report Summary” drafted by Puente that had concluded that Leahy had twice “shoulder checked”<sup>9</sup>

30 Everett Gross.<sup>10</sup>

Notably, Johnson appeared to hedge as to who—between he and Townsend—actually made the final decision to discharge. He initially testified that Townsend “signed off” on his recommendation, and that he lacked independent authority to fire Leahy. Later in his testimony,

35 however, he backtracked, stating, “I determined after [Townsend] and I had a discussion that *he was going to—I was going to* terminate him for being physical.” (Tr. 430) (italics mine). Despite attending the entire hearing as Respondent’s representative, Townsend did not testify.

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<sup>9</sup> “Shoulder checking” is an intentional act where one person leans or bumps into another with their shoulder, typically as they pass by or stand near each other. (Tr. 370, 389–390.)

<sup>10</sup> At hearing, Respondent presented signed witness statements by the three FPS workers involved in the altercation but Johnson denied having seen these prior to recommending Leahy be discharged. These hearsay reports went unreferenced in Puente’s Incident Report Summary and unauthenticated by their purported authors, who did not testify. Based on this, I do not afford them any weight. (Tr. 429.)

In any event, Johnson’s timeline, however, was contradicted by Puente, who denied presenting Johnson with the results of his investigation prior to the trailer meeting. According to him, he had *not* completed his investigation when he arrived at the meeting, the purpose of which was to solicit Leahy’s side of the story. This, he testified, backfired when Leahy responded to questioning by becoming threatening and argumentative. In his words:

[n]o determination was made up until the moment where we attempted to gain information regarding the incident with Mr. Leahy, and Mr. Leahy lost control of himself and his emotions, and we decided to just move forward with just remove him from the project.

(Tr. 185–186, 190–194, 380, 384, 431; Jt. Exh. 8.)

By Puente’s telling, then, Leahy was discharged not merely for a physical assault but rather for becoming confrontational when accused of it. While, at first blush, it appears possible that Johnson and Puente simply had different impressions about when the discharge decision was made (Johnson entering the trailer already decided and Puente not). However, Respondent’s business records—specifically, the Incident Report Summary on which Johnson supposedly relied—undermines any such harmonization of the contradictory accounts.

The Incident Report Summary recounts three instances of Leahy’s conduct. First, it summarized his altercation with the FPS laborers, concluding that Leahy was guilty of assault. Second, it referenced Leahy’s prior April 3 confrontation with Superintendent Quin, stating that Leahy “had become aggressive and argumentative with Fisher Superintendent Daryl Quin on April 3, 2023, when Mr. Quin asked a Townsend employee to put on safety glasses.” Third, it stated:

During my initial conversation with Mr. Leahy, he raised his voice and became argumentative with me, demanding to know who the witnesses were that I had spoken to. I refused to provide that information to him. Mr. Leahy also refused to prepare a statement on this incident or to sign any documentation of the occurrence. Based upon his repeated confrontational behavior and failure to cooperate with my investigation, he was asked to leave the site.

(Tr. 424–428, 430; Jt. Exh. 8.) By all accounts, this appears to be an account of the trailer meeting itself. In other words, Johnson testified that, he and/or Townsend decided to discharge Leahy based on his confrontational conduct at a meeting that—at the time he claimed the decision was taken—had not yet occurred.

## ANALYSIS

5 Section 8(a)(1) of the Act prohibits interference with the promise of Section 7 that employees shall have the right “to engage in other concerted activities for the purpose of . . . other mutual aid or protection.” Section 8(a)(3) of the Act provides, in relevant part, that it is “an unfair labor practice for an employer by 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(a)(1), (3).

10 The General Counsel alleges that Leahy’s discharge violated Section 8(a)(1) because it was based on his engaging in conduct protected by the Act, namely, raising multiple safety-related complaints about the Simplot jobsite. It is further alleged that the discharge violated Section 8(a)(3) insofar as it was based on his threat to document and report his safety concerns to Local 15 191, and seek to have a steward assigned to the jobsite.

20 Respondent raises various defenses, the most prominent of which are that Leahy’s safety complaints were not protected under the Act, that Respondent harbored no anti-union animus and that, even assuming Leahy did engage in conduct covered by the Act, Respondent would have discharged him even in the absence of such conduct because it held a good-faith belief that he engaged in serious misconduct by arguing with the FPS laborers and physically assaulting one of them.

25 As discussed more fully below, I find that the General Counsel has proven by a preponderance of the evidence that Respondent discharged Leahy in violation of Section 8(a)(1) but not Section 8(a)(3) of the Act.

1. The legal standards: *Wright Line vs. Burnup and Sims*

30 In cases involving alleged discriminatory discipline where the employer’s motive is at issue (i.e., where the employer claims to have based its decision on conduct separate and apart from the employee’s alleged protected conduct), the Board employs the burden shifting analysis set forth in *Wright Line*.<sup>11</sup> Under this standard, once the General Counsel establishes, among other things, that the employer was motivated in whole or part by animus against protected conduct, 35 the employer may successfully defend its conduct by proving that the same action would have taken place even in the absence of the protected conduct. Typically, an employer may meet this burden by demonstrating that its decision was based on a good-faith belief that the employee engaged in misconduct and is not required to demonstrate the correctness of this belief. In such a case, whether the employee actually engaged in the alleged misconduct is irrelevant to the merits 40 of the case. See, e.g., *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989) (finding respondent met its *Wright Line* burden by establishing that it would have suspended employees, even in the absence of their protected activity, because based on its investigation, it reasonably believed they had engaged in serious misconduct), *enfd.* 924 F.2d 1055 (5th Cir. 1991) (unpublished).

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<sup>11</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

*Wright Line*, however, does not apply to situations in which the employer asserts that discipline was justified by misconduct occurring within the course of otherwise protected conduct. In such circumstances, the Supreme Court’s *Burnup & Sims* test provides enhanced protection for employees. As Court explained, it would “weaken or destroy” Section 7 rights and “protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.” *Id.* See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Therefore, in such cases, the Board declines to extend the “good faith belief” defense and will find the employer’s action lawful only where the employer’s belief is ultimately proven to be correct. Because an employer’s good-faith belief in misconduct alone will not carry the day, it follows that, where *Burnup & Sims* applies, the General Counsel need not make an independent showing of animus typically required under *Wright Line*. See *Aqua-Aston Hospitality, Inc.*, 365 NLRB 592, 596–597 (2017) (“the existence or lack of unlawful animus is not relevant” under *Burnup & Sims*).

Before addressing the application of these standards to the instant complaint allegations, I will address Respondent’s arguments that Leahy’s safety complaints were not protected by the Act, which, if successful, would be dispositive of the discharge allegations under either *Wright Line* or *Burnup & Sims*.

## 2. Leahy engaged in Section 7-protected conduct

There is no dispute that Leahy brought numerous safety complaints directly to the attention of Respondent’s managers; others of his complaints were relayed to management by Puente, Fisher’s safety manager. Johnson, who recommended Leahy be discharged, was on the receiving end of Leahy’s running critique of the jobsite. On the day of Leahy’s discharge, the two men got into a heated debate with him over whether the electricians should be permitted to “own the zone” for safety purposes. Johnson also admittedly relied on Puente’s Incident Report Summary, which described Leahy’s prior run-in with Fisher Superintendent Quin. Finally, Leahy twice invoked his (and his coworkers’) *Weingarten* rights on the day of his discharge.

Respondent does not dispute knowledge of this conduct but rather argues Leahy’s safety complaints did not qualify for the Act’s protection.<sup>12</sup> Specifically, Respondent contends that Leahy’s barrage of safety complaints during his brief assignment to the Simplot project were neither concerted nor protected but instead amounted to de minimis personal gripes. Even assuming that his complaints were concerted, Respondent contends that they were not protected by Section 7 because he made them in bad faith and additionally because he engaged in misconduct sufficient to strip him of the Act’s protections. As set forth below, I disagree and find that Leahy’s safety complaints were protected by Section 7.

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<sup>12</sup> Respondent fails to address Leahy’s invocation of *Weingarten* rights, and Board law is clear that such an act is protected, regardless of whether the employer is obligated to grant the request in question. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 6 n. 21 (2018)

(a) Leahy’s safety complaints were protected and not “de minimis.”

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” With respect to the latter requirement,  
 5 it is well settled that an employee who attempts to address workplace health and safety concerns faced by his work crew clearly raises matters of “mutual aid or protection.” *North West Rural Elec. Coop.*, 366 NLRB No. 132, slip op. at 8 (2018) (linemen’s Facebook comments regarding crew size and number of workers at work site protected, as they related to safety of linemen and fellow crew members). I find that Leahy’s raising safety issues at the Simplot jobsite met this  
 10 standard.

That Leahy and his crew members were expected to begin each new work assignment with an all-hands safety meeting for the purpose of identifying potential jobsite hazards speaks to their common interest in safety when performing their electrical work. On both April 4 and April 8,  
 15 Leahy elevated the crew’s concerns to management and insisted that Respondent address them. See *Brown & Root, Inc.*, 246 NLRB 33, 37 (1979) (“an individual employee is engaged in protected concerted activity when he acts in the interest of his fellow employees on a matter of concern to them”) (citation omitted), enfd. 634 F.2d 816 (1981). Moreover, in addition to taking  
 20 the lead in bringing the crew’s safety complaints to management, on April 3, Leahy functioned as a de facto steward for the electrical crew: when Puente attempted to admonish an electrician for failing to don safety glasses, Leahy intervened with a tirade about the shoddy state of the jobsite, safety-wise.<sup>13</sup>

Respondent’s characterization of Leahy’s safety complaints as “de minimis” is not well  
 25 taken. As at least one Court of Appeals has explicitly recognized, construction sites present uniquely dangerous electrical hazards. See *National Constructors Ass’n v. Marshal*, 581 F.2d 960, 962 (D.C. Cir. 1978) (construction projects typically rely on temporary electrical systems “involving many feet of extension cords and large numbers of moveable outlets,” and “[b]ecause the construction environment exposes this electrical transmission equipment, as well as the tools  
 30 themselves, to severe wear and tear, accidental leakages of electricity and resulting electrical shocks, i.e., ground faults, present a significant threat to the safety of construction workers.”). An experienced journeyman operating in the inherently hazardous field of electrical work, Leahy alerted management to tripping hazards, defective equipment, missing safety documentation, flagging numerous instances of what he deemed non-compliance with OSHA safety  
 35 requirements designed to prevent accidental workplace deaths—hardly de minimis matters.<sup>14</sup>

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<sup>13</sup> Respondent asserts that, because Leahy raised certain of his safety complaints with Puente, a member of Fisher’s management team, they should not be considered protected by Section 7. This flies in the face of clear Supreme Court guidance that employees are protected by the Act when they seek to improve their terms and conditions of employment or improve their lot as employees “through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); see also *Oncor Elec. Deliver Co., LLC*, 373 NLRB No. 80, slip op. at 7 (2024) (finding protected electrical worker’s testimony to state legislative committee about workplace safety hazards of smart electric meters).

<sup>14</sup> OSHA’s legislative history of that statute indicates that deaths caused by electrical construction accidents were among the explicit concerns of its drafters. See *National Constructors Ass’n v. Marshal*, 581 F.2d at 967 n. 12 (citing OSHA’s legislative history indicating that accidental death rate for electrical construction workers as that statute’s drafting was twice that of coal miners).

(b) Leahy's complaints were concerted.

As discussed, it is undisputed that, during his brief tenure at the Simplot jobsite, Leahy and his crew discussed the above-referenced jobsite hazards, as well as safety issues caused by management's insistence on trade stacking. While, as noted, Leahy generally operated as the 'tip of the spear,' by going solo when elevating these concerns up the chain of command, this is not an unfamiliar pattern in industrial relations. For this reason, the Board recognizes that lone act of a single employee will be deemed concerted where it "stems from" or "logically grew" out of prior concerted activity. *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995); see also *Meyers Industries, Inc.*, 281 NLRB 882, 885 (1986) (under proper circumstances, single employee may engage in concerted activity).

Notably, the Board does not require proof that employee's solo actions were expressly authorized or endorsed by his coworkers. See, e.g., *Gold Coast Restaurant Corp.*, 304 NLRB 750, 752–753 (1991) (finding concerted complaint where single employee, acting without authority from other employees, reported to management the group's dissatisfaction with their pay). Instead, once there has been established the existence of a common complaint or concern which transcends the interests of that employee alone, an employee's individual conduct will be deemed concerted as a continuation of the employees' protected activity. See, e.g., *Every Woman's Place, Inc.*, 282 NLRB 413, 413 (1986).

The Board has applied this principle to find protected a single employee's refusal to work in dangerous conditions, where that refusal was the "logical outgrowth" of prior concerted activity. See, e.g., *Western Refining*, 366 NLRB No. 83, slip op. at n. 3 (2018) (single employee's declaration of a "safety stop" found protected where it was "logical outgrowth" of earlier safety discussions with coworker earlier that day), enfd. sub nom. *St. Paul Park Refining Co. v. NLRB*, 929 F.3d 610 (2019); *Dynatron/Bondo Corp.*, 324 NLRB 572, 585 (1997) (individual's refusal to wear dirty respirator she considered to be unsafe was concerted activity, because it was a logical outgrowth of earlier complaints by employees), enfd. 176 F.3d 1310 (11th Cir. 1999); see also *Brown & Root, Inc.*, 246 NLRB at 36–37 (pipefitters' refusal to return to work in the rain constituted protected concerted activity because it was a continuation of the earlier group work stoppage over electrical safety hazards and represented a matter of common concern to all employees).

To the extent Leahy complained to management about "trade stacking," he was not alone—electrician Hufford testified that he had done exactly the same thing. Indeed, on the day of his discharge, Leahy and his fellow crew members concertedly expressed concerns—in Casey's presence—about the safety implications of welders working above them and laborers stepping on their lines. Later, when their concerns proved prescient, Leahy engaged in a one-man standoff with management, refusing to return to work until the electricians were permitted to "own the zone." After his request was refused and the electrical crew was exposed to an unidentified liquid sprayed by the FPS workers, he again demanded that the other crafts be excluded and that management provide an MSDS regarding the liquid.

Thus, the evidence clearly establishes that, while Leahy was undeniably more assertive and persistent than his fellow journeymen in holding management to account for safety standards on the jobsite, his conduct—which culminated in a threatened safety stop—logically grew out of the

crew's prior concerted discussions. As such, Leahy's conduct is easily distinguished from those cases in which an employee raises a safety issue solely on his own behalf. Accordingly, I find his relaying group safety concerns to management qualified as "concerted" conduct under the Act.

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(c) Leahy's complaints were not made in bad faith and he did not lose the Act's protection.

Respondent contends that Leahy's safety complaints were unprotected because they were made in bad faith and further that his conduct was so opprobrious that it cost him the Act's protection. I find neither of these arguments meritorious.

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As support for its bad-faith argument, Respondent points to Leahy's admitted proclivity for filing unfair labor practice charges against both employers and unions. Without more, however, his past charge filing practices have no relevance to whether his safety complaints on the Simplot jobsite were made in bad faith, and I therefore reject this argument. Nor do I find relevance in Respondent's assessment that certain of Leahy's complaints were not well grounded. See *ILWU Unit 223 (Matson Navigation)*, 373 NLRB No. 133, slip op. at 3, n. 18 (2024) ("the protection of the Act is not dependent on the merits of the underlying complaint," and absent a showing that the employee "did not genuinely believe it or that he filed his safety grievance with the intent to deceive" the complaint retained protection) (citing *Interior Alterations, Inc. v. NLRB*, 738 F.2d 373, 376 (10th Cir. 1984)); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344–345 (1938) (neither employees' "wisdom or unwisdom" nor "their justification or lack of it" impacts the protected nature of their conduct).

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Respondent also claims that Leahy's conduct cost him the protection of the Act, in that he engaged in a "profane and violent outburst" on April 8. In this regard, Respondent relies solely on the FPS laborers' hearsay reports of him cursing at them and "shoulder checking" Everett Gross. These claims went wholly unsupported at hearing and—as discussed below—I am not convinced that this conduct (most particularly the alleged assault) in fact occurred. Leahy admittedly deployed "adult language" in accusing the laborers of endangering the electrical crew, but Section 7 communications are not limited to those that are civil and polite, and cursing on a construction site did not cost him the Act's protection. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 156 (2014) (employee's § 7 activity does not lose protection merely because it makes fellow employees uncomfortable).

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Next, Respondent claims that Leahy's brusque manner in raising safety complaints to management caused him to lose the Act's protection. I disagree. While Leahy's arguably confrontational style in presenting his complaints may have been viewed by management as offensive and even uncivil, this is also irrelevant to the analysis of their protected status. See *Tamara Foods*, 258 NLRB 1307, 1308 (1981) (whether employees could have protested working conditions in a "more efficacious or reasonable manner," irrelevant to analysis of protected conduct), *enfd.* 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983).

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Finally, Respondent contends that Leahy was "agitated and uncooperative," presumably referring to Puente's claim that he displayed aggressive body language during the trailer meeting. Even if I were to credit Puente's account, I would not find that Leahy clenching his fists and appearing upset—viewed in the context of him being accused of assault and being denied a

*Weingarten* representative—would cost him the Act’s protection. See *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 6, 59–65 (employee accused of sexual misconduct did not lose Act’s protection by engaging in “hostile and uncooperative” conduct, including speaking in a raised voice and twice storming out of meeting after being denied *Weingarten* representative) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)); see also *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (labor dispute contexts inherently generate heated emotions and strong responses, requiring accommodation for impulsive behavior during protected activity); see also *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1966) (“[l]abor disputes are ordinarily heated affairs” and “[b]oth labor and management often speak bluntly and recklessly”).

3. Was Leahy discharged for engaging in Section 7-protected activity?

Having found that Leahy engaged in protected, concerted activity of which Respondent was aware, I next consider the standard that will govern whether his discharge violated the Act. The General Counsel alleges that Respondent violated Section 8(a)(1) by discharging Leahy not based on his allegedly aggressive conduct but because of his deluge of safety complaints about the Simplot jobsite. At first glance, this appears to be a mixed-motive theory calling for a *Wright Line* analysis. However, the government alternately argues for a violation based on the Supreme Court’s *Burnup & Sims* standard. The appropriate analytical framework to apply under such circumstances depends on the rationale the respondent asserts for the alleged discriminatory action. See, e.g., *Nestlé, USA, Inc.*, 370 NLRB No. 53, slip op. at 14 (2020) (citing *MCPC, Inc. v. NLRB*, 813 F.3d 475, 487–490 (3d Cir. 2016); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135–1136 (D.C. Cir. 2003), enfg. 337 NLRB 915 (2002)).

As noted above, Respondent’s witnesses offered two competing rationales for discharging Leahy: (a) that he assaulted a coworker and (b) that he later became combative when accused of that assault. Each of these instances of alleged misconduct took place during the course of his ongoing safety complaints. This is evidenced by the fact that his run-in with the FPS laborers was precipitated by his trade stacking concerns and, hours after he threatened a work stoppage over Respondent’s failure to address his concerns (and minutes after he invoked *Weingarten* rights on behalf of himself and his coworkers) he was summoned to a meeting during which Respondent claims he became confrontational and argumentative. Finally, in the midst of discharging him, Respondent provided him with the safety information (the MSDS) he had demanded earlier that day.

Under the circumstances, Respondent cannot sever Leahy’s alleged misconduct from his protected activity; this renders *Burnup & Sims* the appropriate framework. As the Board held in a similar case, “*Wright Line* is inapplicable to cases—like this one—in which the employer has discharged the employee because of alleged misconduct “in the course of” protected activity. See *Shamrock Foods Co.*, 337 NLRB 915, 924 (2002) (applying *Burnup & Sims* to discharge based on discriminatee’s alleged physical threats to coworkers while soliciting them for union authorization cards) (citations omitted), enfd. 346 F.3d 1130 (D.C. Cir. 2003).

(a) *Burnup & Sims* dictates a finding of liability.

Under *Burnup & Sims*, “§ 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.” *Burnup & Sims*, 379 U.S. 21, 23; see *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 29 (D.C. Cir. 1998). In this case, as discussed, the first three parts of the *Burnup & Sims* inquiry are easily satisfied: it is clear that Leahy was engaged in protected activity when made ongoing safety complaints; there is no doubt that Respondent knew that such activity was protected; and, according to Respondent’s witnesses, the basis for discharging Leahy was his alleged misconduct in the course of that otherwise protected activity.<sup>15</sup>

As noted, *Burnup & Sims* dictates that finding Leahy’s discharge unlawful, irrespective of Respondent’s motive. Rather, the General Counsel has the burden of showing that Leahy did not, in fact, engage in the misconduct Respondent alleges. *Shamrock Foods Co.*, 337 NLRB at 924 (citations omitted). I find that the General Counsel easily satisfied that burden. Leahy testified candidly about his altercation with the FPS laborers, admitting to cursing at them (including asking, “what the hell is in those bottles”). He also explicitly and credibly denied engaging in physical conduct. Indeed, given his rumbustious personality (on full display during the hearing) I find it highly likely that that he launched verbal abuses—not physical strikes—on April 8. Reinforcing this conclusion is Respondent’s failure to call any of the FPS laborers to rebut Leahy’s account.<sup>16</sup>

Nor do I credit Respondent’s claims that, at his discharge meeting, Leahy became “intimidating, ... agitated and uncooperative.” This claim was based on Puente’s dramatized and uncorroborated testimony, which was not only explicitly denied by Leahy but ran counter to Johnson’s narrative whereby the discharge decision had been made prior to this supposed conduct.

As I have found that there is no basis on which to find that Leahy in fact engaged in the act(s) of misconduct which Respondent asserts as a basis for his discharge, pursuant to *Burnup & Sims*, I find that the General Counsel has proven that Respondent discharged him in response to his ongoing safety complaints in violation of Section 8(a)(1) of the Act.

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<sup>15</sup> As noted above, application of *Burnup & Sims* means that Respondent’s good faith belief that he engaged in an assault and/or later became confrontational with management is not determinative and no showing of animus is required.

<sup>16</sup> Although I do not find it necessary to make an adverse inference that the laborers’ testimony would not have corroborated Respondent’s claims, the circumstances would certainly justify one. See, e.g., *Starbucks Corp.*, 354 NLRB 876, 906 (2009) (finding adverse inference justified based on respondent’s failure to call witness who directly involved in heated face-to-face argument with discriminatee); *American Petrofina Company*, 247 NLRB 183, 191 (1980) (same, based on failure to call witnesses with first-hand knowledge of alleged wrongdoing by discriminatee).

(b) Alternately, a *Wright Line* analysis produces the same result.

The General Counsel and Respondent each argue for a *Wright Line* analysis of Leahy's 8(a)(1) discharge allegation. Application of this standard, while increasing the General  
5 Counsel's prima facie burden, would not impact my determination of Respondent's liability.

As discussed above, the traditional *Wright Line* standard imposes on the General Counsel the  
burden to show that Respondent harbored animus towards the discriminatee's concerted,  
protected conduct—in Leahy's case, his safety complaints. Proof of an employer's motive can  
10 be based upon direct evidence or can be inferred from circumstantial evidence, based on the  
record as a whole. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 7 (2023), enfd. Nos.  
23-1831/1854, 2024 WL 2764160 (6th Cir. May 9, 2024). As part of its initial showing, the  
General Counsel may also offer proof that the employer's reasons for the personnel decision  
were pretextual—that is, false or not in fact relied upon. *Con-Way Freight, Inc.*, 366 NLRB No.  
15 183, slip op. at 3 (2018); see also *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 218–  
219 (D.C. Cir. 2016).

Typically, a showing of animus would act to shift the burden to Respondent to substantiate  
with evidence its claim that Leahy “was terminated for his own verbal and physical conduct  
20 toward another worker”; in other words, Respondent would be required to prove that it held a  
good-faith belief that Leahy verbally attacked and “shoulder checked” Everett Gross as accused.  
(R. Br. at 1.) However, should the General Counsel demonstrate as part of its prima facie case  
that Respondent's asserted rationale is pretextual, this burden shifting becomes unnecessary.

25 As the D.C. Circuit Court of Appeals has explained:

[a] finding of pretext defeats any attempt by the [company] to  
show that it would have discharged the discriminate[e]s absent  
their union activities ... because where “the evidence establishes  
30 that the reasons given for the [company's] action are pretextual—  
that is, either false or not in fact relied upon—the [company] fails  
by definition to show that it would have taken the same action for  
those reasons, absent the protected conduct, and thus there is no  
need to perform the second part of the *Wright Line* analysis.

35 *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d at 219 (quoting *Golden State Foods Corp.*,  
340 NLRB 382, 385 (2003)); see also *Lucky Cab Co.*, 360 NLRB 271, 275–276 (2014) (“finding  
of pretext defeats an employer's attempt to meet its rebuttal burden”). Application of these  
principles to the instant case merits a finding that the General Counsel has demonstrated both  
40 animus and pretext in the decision to discharge Leahy, thereby defeating any attempt by  
Respondent to meet its rebuttal burden.

The most basic evidence of Respondent's animus is found in the timing of Leahy's  
discharge. The Board has long recognized that “the timing of the [employer's conduct] is  
45 strongly indicative of animus.” *A.S.V., Inc.*, 366 NLRB No. 162, slip op. at 36 (2018) (quoting  
*Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th  
Cir. 1993)). Here, Leahy was discharged hours after demanding an MSDS for the liquid sprayed

on the electrical crew and that the electricians be permitted to exclude other crafts from their workspace. His complaints triggered a heated exchange with Casey and then Johnson, who threatened Leahy with insubordination if he did not drop his demands and return to work.

5        When Puente accused him of fighting, he invoked *Weingarten* rights and was immediately  
 was ordered to a jobsite trailer, where he was fired 20 minutes later. This timing presents clear  
 and robust evidence of Respondent’s discriminatory motivation. See *North Carolina Prisoner*  
*Legal Services*, 351 NLRB 464, 468 (2007) (timing of employer’s action in relation to protected  
 activity provides reliable evidence of unlawful motivation) (citing *Davey Roofing Inc.*, 341  
 10 NLRB 222, 223 (2004)); *McClendon Electrical Services*, 340 NLRB 613 n. 6 (2003) (where  
 adverse action occurs shortly after employee has engaged in protected activity, inference of  
 unlawful motive is raised) (citing *La Gloria Oil Co.*, 337 NLRB 1120 (2002), enfd. mem. 71  
 Fed. Appx. 441 (5th Cir. 2003)).

15        Even had Leahy’s discharge not occurred on the heels of his safety-related standoff with  
 management, Respondent’s shifting and inconsistent explanations for his discharge provide  
 ample evidence of its discriminatory motivation. An employer that provides different reasons for  
 the same adverse action at different times—or whose witnesses give contradictory accounts—  
 demonstrates that no single consistent legitimate reason underlay the decision, leaving unlawful  
 20 motive as the only explanation. See *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (where  
 employer “provides inconsistent or shifting reasons for its actions, a reasonable inference can be  
 drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive”).

Here, Respondent’s witnesses presented an incoherent timeline of the discharge decision.  
 25 Johnson claimed that he and Sonny Townsend determined to discharge Leahy prior to the trailer  
 meeting in reliance on a document that summarized that very meeting. This account traverses  
 the realm of the unlikely into that of the truly impossible. The only other explanation offered by  
 Respondent’s witnesses was Puente’s exaggerated account of Leahy becoming aggressive and  
 confrontational in the meeting, which was undercut by the remaining witnesses to that meeting.  
 30 Under the circumstances, I find that Respondent’s conflicting rationales for the discharge are so  
 baseless and contrived as to defy credibility, warranting an inference that Respondent is  
 concealing an unlawful motive. See *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27–28  
 (2018) (employer’s shifting, false, or exaggerated reasons for an adverse action are evidence of  
 unlawful motive) (citing cases); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509  
 35 (2007) (finding “employer’s shifting explanation for a discharge, or . . . its post hoc attempt to  
 rationalize such a decision, are suggestive of a pretext”) (citation omitted).

Further evidence of animus and pretext is found in Respondent’s failure to adequately  
 investigate Leahy’s incident with the FPS laborers; the Board has long held such conduct  
 40 indicative of a discriminatory motive. See, e.g., *Cintas Corp. No. 2*, 372 NLRB No. 34, slip op.  
 at 6–7 (2022); *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 13–14 (2021); *Green*  
*Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 17 (2018), enfd. 805 Fed.  
 Appx. 65 (2d Cir. 2020). On April 8, several electricians were working in tight quarters near the  
 site of the altercation, and one of them—Hufford—actually witnessed at least a portion of the  
 45 event. That Respondent undertook no effort to interview him, or anyone else potentially in a  
 position to confirm or deny the assault accusation lodged against Leahy, is a hallmark of an  
 inadequate investigation suggesting animus. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip.

op. at 13 (employer’s investigation is evidence of discriminatory motive when it fails to interview key witnesses) (citing *American Crane Corp.*, 326 NLRB 1401, 1414 (1998), enfd. mem. 203 F.3d 819 (4th Cir. 2000)); *Aliante Casino and Hotel*, 364 NLRB 1186, 1194 (2016) (finding sham investigation where employer failed to obtain written statements from other employees present when the incident occurred); *Stahl Specialty Co.*, 364 NLRB 635, 647 (2016) (failure to interview key witnesses supports inference of animus and discriminatory motivation); *The Sheraton Anchorage*, 363 NLRB No. 6 (2015) (same).

Finally, Johnson’s vacillation on precisely what role Sonny Townsend played in the discharge decision, combined with Respondent’s failure to call him as a witness, provides further evidence of unlawful motive. See *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999) (drawing adverse inference from employer’s failure to call the decision maker to explain the basis for challenged termination decision), enfd. 205 F.3d 1324 (2d Cir. 1999); *Dorn Transportation Co.*, 168 NLRB 457, 460 (1967) (failure of the decision maker to testify “is damaging beyond repair”), enfd. 405 F.2d 706 at 713 (2d Cir. 1969); see also *Apex Linen Service, Inc.*, 370 NLRB No. 75, slip op at 39 (2021) (employer’s inconsistent testimony as to who made the decision to fire employee indicates unlawful motive).

Accordingly, I find that, under a *Wright Line* analysis, the General Counsel has proven that Respondent discharged Leahy in response to his ongoing safety complaints, as well as repeated invocation of *Weingarten* rights, in violation of Section 8(a)(1) of the Act.

#### 4. Was Leahy discharged for engaging in union activity?

By its Section 8(a)(3) violation, the General Counsel contends that Respondent discharged Leahy not because of his alleged altercation with the FPS laborers (or his alleged confrontational conduct in the trailer meeting) but rather seized on this conduct to remove him from the jobsite because he had threatened to involve Local 191 in his safety complaints. This is a mixed-motive theory calling for a *Wright Line* analysis, for which a showing of anti-union animus is required.

I find that the General Counsel has failed to make out a prima facie case that Leahy’s discharge was motivated by his union conduct. As noted above, this requires a showing of: (1) Leahy’s union activity, (2) Respondent’s knowledge of that activity, and (3) antiunion animus, or animus against union activity, on Respondent’s part. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 2; see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000). I find that the General Counsel failed to establish the second of these elements: Respondent’s knowledge of Leahy’s union activity.

The sole union activity on which the General Counsel relies is the conversation between Leahy and foreman Casey four days before his discharge during which Casey disclosed that he planned to alert Local 191 about safety conditions at the jobsite and additionally arrange for a steward to be assigned to the site, to prevent management from performing a “cover up” in the event of an accident. As the Board has held, an employee who threatens to seek union assistance engages in protected conduct. *Charles H. McCauley Associates, Inc.*, 248 NLRB 346, 350 (1980) (“A threat to bring in a union must, itself, be deemed union activity.”). While Casey responded positively in support of Leahy’s plan, Leahy’s comments—which effectively upped the stakes of his safety complaints as a source of potential dispute between Respondent and

Local 191—were clearly protected. That said, there is no evidence that Casey—who was supportive of Leahy’s plan—played any role in the decision to discharge him, or that decision makers Johnson and Townsend ever learned that Leahy was planning to involve Local 191. The General Counsel, however, urges me to impute Casey’s knowledge of the conversation to Respondent. I decline to do so.

It is well established that the Board imputes the knowledge of other supervisors and managers to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation. See, e.g., *Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 7 (2018), enfd. 760 Fed. Appx. 413 (6th Cir. 2019); *G4S Secure Solutions (USA) Inc.*, 364 NLRB 1327, 1330 (2016), enfd. 707 Fed. Appx. 610 (11th Cir. 2017). In such cases, the Board typically relies on testimony that the supervisor with knowledge did not, in fact, relate it to the decision maker. See, e.g., *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1144 (1995), enfd. 81 F.3d 1546 (10th Cir. 1996).

However, the Board has also recognized that, even in the absence of such a denial, a pro-union stance taken by the supervisor with knowledge may “undercut[] any inference that [the supervisor] would have shared his knowledge” about the union activity in question. For example, in *Music Express East, Inc.*, the discriminatee, prior to his discharge, informed a “low-level, part-time” supervisor that he had signed a union card. The supervisor’s response was that the union was “a good idea.” Under the circumstances, the Board found that “common sense suggests” that the pro-union supervisor would not “tattle,” rendering the imputation of his knowledge inappropriate. 340 NLRB 1063, 1063–1064 (2003) (citing *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 685–687 (7th Cir. 2000)).

The same outcome results here. By Leahy’s own admission, Casey—a working foreman who spends the great majority of his time as a journeyman electrician—was supportive of his plan, clearly casting his lot with the rest of the crew that Leahy sought to protect from a potential safety related “cover up” by management. To the extent plan involved Leahy documenting safety practices and arranging for a Local 191 steward on the jobsite, this response indicated support for Leahy’s union conduct. Under the circumstances, I find that an inference cannot reasonably be drawn that Casey told either Johnson or Sonny Townsend of Leahy’s plans to involve Local 191. Accordingly, I find that the General Counsel did not meet his initial *Wright Line* burden and recommend dismissal of the complaint insofar as it alleges that Respondent discharged Leahy in violation of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent Townsend Controls & Electric, LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by dismissing Joel Leahy for engaging in protected concerted activity, including making safety complaints on behalf of himself and his coworkers.

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

## REMEDY

5 Having found that Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(1) of the Act, I shall order it to cease and desist from engaging in this conduct and, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, and to take certain affirmative action designed to effectuate the policies of the Act.

10 Respondent, having unlawfully discharged Joel Leahy on April 8, 2023, shall offer him 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. Respondent shall also make Leahy whole for any loss of earnings and other  
15 benefits he may have suffered as a result of his unlawful discharge. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall expunge any references to his discharge from its files and records, and to notify him, in writing, that it has  
20 done so and that the discharge will not be used against him in any way.

Respondent shall further compensate Leahy for any other direct or foreseeable pecuniary harms incurred as a result of his unlawful discharge, including reasonable search-for-work and interim employment expenses, regardless of whether those expenses exceed Leahy's interim  
25 earnings. *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022); *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enf'd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017). Compensation for such harms shall be calculated separately from taxable net back pay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall further compensate Leahy for the adverse tax consequences, if  
30 any, of receiving a lump sum back pay award, and file a report allocating backpay to appropriate years, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration as appropriate. In addition to the backpay-allocation report, Respondent shall file with the Regional Director copies of corresponding Internal Revenue Service W-2 forms  
35 reflecting the backpay award. *Cascades Containerboard Packing--Niagara*, 370 NLRB No. 76 (2021).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

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<sup>17</sup> 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.

## ORDER

Respondent Townsend Controls & Electric, LLC, its officers, agents, successors, and assigns,  
5 shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities,  
10 such as raising safety concerns to supervisors, including concerns stemming from the use of  
poorly maintained heavy machinery and multiple trades working in a crowded work area.

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

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

(a) Within 14 days from the date of this Order, offer Joel Leahy full reinstatement to  
20 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 he previously enjoyed.

(b) Make Joel Leahy whole for any loss of earnings and other benefits suffered as a  
25 result of the discrimination against him, and for any other direct or foreseeable pecuniary harm  
suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of  
this decision.

(c) Compensate Joel Leahy for the adverse tax consequences, if any, of receiving a  
30 lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of  
the date the amount of backpay is fixed, either by agreement or Board order, a report allocating  
the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 19, within 21 days of the date the  
35 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 Joel Leahy's corresponding W-2 form(s)  
reflecting the backpay award.

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

(f) Within 14 days from the date of this Order, notify the International Brotherhood  
of Electrical Workers Local 191 that Joel Leahy is eligible for rehire with Respondent.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional  
45 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, if any, under the terms of this Order.

5 (h) Within 14 days after service by the Region, post at its Pasco, Washington facility,  
copies of the attached notice marked Appendix.<sup>18</sup> Copies of the notice, on forms provided by the  
Regional Director for Region 19 after being signed by 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, the notices shall be distributed electronically, such as by email, posting  
10 on an intranet or an internet site, and/or other electronic means, if Respondent customarily  
communicates with its employees by such means. Reasonable steps shall be taken by  
Respondent to ensure that the notices are not altered, defaced, or covered by any other material.  
In the event that, during the pendency of these proceedings, the Respondent has gone out of  
business or closed the facility involved in these proceedings, Respondent shall duplicate and  
15 mail, at its own expense, a copy of the notice to all current employees and former employees  
employed by Respondent at any time since April 8, 2023.

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

Dated, Washington, D.C. April 23, 2026



Mara-Louise Anzalone  
Administrative Law Judge

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<sup>18</sup> 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."

**APPENDIX**

**NOTICE TO EMPLOYEES  
Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by 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** do anything that interferes with these rights. Specifically:

**WE WILL NOT** discharge you and ban you from working on a jobsite because you exercise your right to bring safety concerns to us—or another contractor on a jobsite where you are dispatched to work for us—on behalf of yourself and other employees.

**WE WILL** offer Joel Leahy immediate and 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 and privileges previously enjoyed.

**WE WILL** pay Joel Leahy for the wages and other benefits he lost because we discharged him, less any net interim earnings, plus interest and adverse tax consequences and **WE WILL** also make Joel Leahy whole for any other including direct or foreseeable financial harms suffered, plus interest computed in accordance with current Board policy, plus reasonable search-for-work and interim employment expenses.

**WE WILL** remove from our files all references to Joel Leahy's April 8, 2023 discriminatory removal and ban from working at the JR Simplot Company facility in Moses Lake, and **WE WILL** notify him in writing that this has been done and that the discharge and/or ban will not be used against him in any way.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**TOWNSEND CONTROLS  
& ELECTRIC, LLC**

\_\_\_\_\_  
(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.nlr.gov](http://www.nlr.gov).

915 2nd Avenue, Federal Building, Room 2948  
Seattle, Washington 98174-1078  
Hours: 8:15 a.m. to 4:45 p.m.  
206-220-6300

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/19-CA-315801> 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, (206) 220-6340.