JD-46-26
Grayson, GA

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

SYNTACT, LLC

And **Case 10-CA-371322**

BLAKE PIERCE, AN INDIVIDUAL

Demi Kim, Esq. and *Kellie C. Bond, Esq.*, for the General Counsel.
Mr. Blake Pierce, for the Charging Party.
Frederick C. Dawkins, Esq., for the Respondent.

BENCH DECISION AND CERTIFICATION

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on May 9, 2026, by videoconference. On that day, the parties completed the presentation of evidence. After the parties rested, I adjourned the hearing to afford counsel time to receive and review the hearing transcript, perform legal research and prepare for oral argument.

On June 23, 2026, the hearing resumed by videoconference and counsel presented oral argument. On June 25, 2026, the hearing again resumed by videoconference and, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, I delivered a bench decision. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as an Appendix, the portion of the transcript containing this decision.[1] Findings of fact, conclusions of law and an order are set forth below.

Additional Discussion

<u>Pierce Not A Supervisor</u>

The Respondent has raised as a defense that Charging Party Pierce was a supervisor within the meaning of Section 2(11) of the Act and, therefore, did not enjoy the protection of the Act. Although the General Counsel contends that Respondent waived this defense by failing to raise it

[1]The bench decision appears in uncorrected form at pgs. 278 through 286 of the transcript. The final version, after correction of oral and transcriptional errors and the addition of footnotes, is attached as an Appendix to this Certification.

earlier in the proceeding, I conclude the Respondent did not wait too long. Nonetheless, I further conclude that the Respondent has failed to carry its burden of proving such supervisory status.

The Respondent hired Pierce in 2010. Pierce testified that "first and foremost" he worked as a technician monitoring nerve functioning during surgical procedures. Performing this work entailed taking the Respondent's equipment to a hospital, setting it up in the operating room, talking with the patient, connecting the monitoring equipment to the patient, and then, during the operation, using the equipment to measure nerve functioning. (Tr. 24–25.) Additionally, Pierce provided on-the-job training to new employees. (Tr. 26.)

Initially, Pierce received compensation based on the number of operations he worked. However, the Respondent's owner, Justin McLoughlin, credibly testified that sometime around the COVID–19 epidemic, Pierce sought to be placed on a fixed salary. (Tr. 144–145.)

On January 30, 2021, Pierce and the Respondent entered into an employment agreement which provided an annual salary and changed his title to "Supervising Neurophysiologist, Lead Clinical Manager/Trainer." (R.Exh. 2.) However, credible evidence does not establish that Pierce's job duties changed.[2]

As discussed in the bench decision, the record fails to establish that Pierce possessed any of the powers listed in Section 2(11) as indicia of supervisory status. (Tr. 27–28.) Pierce did train new employees on using the neuromonitoring equipment. During the training period, which took months, the new employee would learn by watching Pierce and then by operating the equipment while Pierce observed.

Observing the employee's progress, Pierce would decide when the employee was ready to "work solo" but added that he "definitely would run it by Justin [McLoughlin] before I would ever put anybody solo on their own." Pierce further testified:

> Q. When you say, run it by him, what did you—
> A. I would say, Justin, are you okay with me putting, let's say Robert on case as solo?
>
> Q. Okay. Were you making recommendations about whether someone was available or ready to go solo?
> A. Yeah, I would definitely make recommendations if I felt somebody was prepared to—to go solo or if they weren't, we would have a discussion about that as well.

[2]The January 30, 2021 agreement also provided that Pierce would receive a bonus if he developed a program for training and assessing new hires. (R.Exh. 2) However, McLoughlin credibly testified that Pierce never created such a program and never received the bonus. (Tr. 160.) According to McLoughlin, when Pierce later became dissatisfied with his salary, the two of them negotiated a new compensation agreement which provided commissions based on the number of operations Pierce worked. (R.Exh. 5; Tr. 161.) This agreement, dated May 31, 2023, referred to Pierce as "Supervising Neurophysiologist, Lead Clinical Manager/Trainee" but the record does not establish that Pierce's job duties significantly changed.

Q. How frequently did Mr. McLoughlin not accept your recommendation about whether someone was ready to go solo or not go solo?
A. There were a couple times where he thought that they—that they were ready, and I did not. And we may have slightly disagreed on that, but at—in the end, it was his call as the owner of the—of the company.

Q. Okay. How—what percentage of the recommendations that you made to Mr. McLoughlin—Mr. McLoughlin, do you recall him accepting?
A. Oh, is it more often than not, he would accept it.

(Tr. 67–68.)

Pierce's testimony that McLoughlin would accept his recommendation "more often than not" does not persuade me that his recommendations were "effective" within the meaning of Section 2(11) of the Act. However, there is a more basic reason for concluding that Pierce was not a supervisor.

As the Board stated in *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889 (2014), the authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Nevertheless, the Board analyzes the evaluation of employees to determine whether it is an "effective recommendation" of promotion, wage increase, or discipline. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). If the evaluation does not, by itself, directly affect the wages and/or job status of the individual being evaluated, the Board will not find the individual performing the evaluation to be a statutory supervisor on that basis. See *Williamette Industries, Inc.*, 336 NLRB 743, 743 (2001). There must be a direct correlation between the employees' evaluation and their wage increases and/or job status. See, e.g., *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

In *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764, 764–765 (1995), the Board found that certain field training officers were not statutory supervisors even though they evaluated new paramedics and made effective recommendations as to whether the paramedics should be retained for further training or advanced to solo status. In finding the evaluations and recommendations insufficient to establish supervisory status, the Board noted that there was no evidence the recommendations would necessarily lead to permanent employment or to a change in pay status. Accord: *Mount Sinai Hospital*, 325 NLRB 1136 (1998); Webco *Industries*, 334 NLRB 608, 610 (2001).
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The cases cited above refer to "evaluations" but the present record does not establish that Pierce did any systematic review of a new employee's performance or prepared any document which would warrant that title. He simply told McLoughlin when he believed an employee was ready to "work solo." The evidence falls short of proving that such recommendations resulted in any change in an employee's pay or job status. Accordingly, for the reasons discussed above and in the bench decision, I conclude that the Respondent has failed to prove that Pierce was a supervisor within the meaning of Section 2(11) of the Act.

Wright Line Analysis

As stated in the bench decision, in determining whether the Respondent violated the Act, I have followed the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board typically uses this procedure to analyze allegations that an employer discriminated against an employee because of *union* activities, in violation of Section 8(a)(3) of the Act.[3] The present complaint does not allege that any employee engaged in *union* activities and likewise does not allege that the Respondent discriminated against any employee because of union activities. It makes no mention of Section 8(a)(3).

However, the Act protects more than employees' right to engage in union activities. In addition to the employees' rights to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing, Section 7 of the Act also protects employees' right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ." 29 U.S.C. § 157.

In general, and with certain exceptions, when an employee discusses terms and conditions of employment with another employee, that discussion falls within the protection of Section 7 of the Act. See *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014); *Floss N Gloss PA*, 374 NLRB No. 122, slip op. at 1, fn. 1 (2026). Similarly, the Act protects an employee's right to voice other employees' concerns and complaints about terms and conditions of employment.*Winston-Salem Journal*, 341 NLRB 124, 125 (2004). Doing so constitutes *concerted* activity, under the law, even though just one employee is doing the speaking.

However, discharging an employee for engaging in such activity is not discrimination to encourage or discourage membership in a *union*, the conduct made unlawful by Section 8(a)(3) of the Act. Instead, such a discharge, when proven, violates Section 8(a)(1). That provision makes it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, . 29 U.S.C. § 158(a)(1).

This prohibition on interference with the exercise of Section 7 rights is broad enough to cover many different types of violations, including threats, questioning employees about their protected activities and creating the impression that those activities are under surveillance, among others. It may be noted, though, that in the large genus of independent[4] 8(a)(1) violations, the particular species of violation alleged here—the discharge of an employee for engaging in protected activity—is an outlier because it requires proof of intent.

For most violations of Section 8(a)(1), the employer's intent is irrelevant. Regardless of why a supervisor made a particular statement, if the words reasonably would be understood to

[3]In general, Sec. 8(a)(3) provides that it shall be 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)(3).

[4]Violations of other sections, such as Sec. 8(a)(3), obviously interfere with the exercise of Sec. 7 rights and thus also violate Sec. 8(a)(1). Unfair labor practices which violate *only* Sec. 8(a)(1) are called "independent" violations of that provision.

convey a threat of reprisal for engaging in protected activity, it violates Section 8(a)(1).[5]

However, the 8(a)(1) violation alleged in the present complaint—discrimination because of an employee's protected activity—resembles an 8(a)(3) violation except for the type of protected activity. Accordingly, the Respondent's intent is as relevant here as it would be in analyzing an 8(a)(3) allegation.

To examine motivation and causality, the *Wright Line* framework proves as useful here, considering an allegation that an employer discharged an employee for protected activity, as in a case alleging 8(a)(3) discrimination because of union activity. Clearly, the Board intended its use in such cases. In *Wright Line* itself, the Board explained that in "resolving cases involving alleged violations of Section 8(a)(3) and, *in certain instances, Section 8(a)(1)*, it must be determined" whether an employer's action was motivated by an employee's protected activity. *Wright Line*, 251 NLRB 1083 (italics added). So, it is not unusual for a *Wright Line* analysis to be performed in a case alleging that a discharge violated Section 8(a)(1). See, e.g., *Apple, Inc.*, 374 NLRB No. 109, slip op. at 14–15 (2026).

In the bench decision, citing *Willamette Industries*, 341 NLRB 560, 562 (2004), I stated that the General Counsel has the initial burden of establishing that "employees' union activity was a motivating factor in the Respondent's taking action against them." In the present case, however, it is more accurate to state that the General Counsel has the initial burden of establishing that the discharged employee's *protected concerted activities* were a motivating factor in the Respondent's decision to terminate his employment.

Here, the protected concerted activities consisted of employee Pierce discussing working conditions with other employees and speaking on their behalf, expressing their concerns to the Respondent's owner, Justin McLoughlin. Pierce said that he discussed working conditions with other employees "a handful of times" during the fall of 2024. According to Pierce, other employees expressed concerns about the increasing number of instances when they received assignments ("add-ons") in addition to the surgeries already on the calendar. They also wanted to receive performance reviews on a regular basis. (Tr. 48.)

Pierce testified about a particular instance, on February 5, 2025, when employee Robert Lanham sent him a text message complaining about the workload. In the message, Lanham commented "I can tell you now I'm probably not going to be here the end of the year." (GC Exh. 2; Tr. 33–35; see also Lanham's testimony at Tr. 110–113.)

On February 14, 2025, Pierce told McLoughlin that Lanham was ready to quit and that "other people weren't happy, as well. . ." (Tr. 47.) It is well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received. *Winston Salem Journal*, 341 NLRB 124, 125 (2004), citing *Churchill's*

[5]See, e.g., *AT&T Mobility, LLC*, 372 NLRB No. 121, slip op. at 4 (2021), quoting American *Freightways Co.*, 124 NLRB 146, 147 (1959) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.").

Restaurant, 276 NLRB 775, 777 fn. 11 (1985). Therefore, I find that Pierce was engaged in activity protected by Section 7 of the Act.

According to Pierce, McLoughlin asked him to identify the people who were not happy. Pierce replied he was not comfortable naming the individuals but, when pressed, said "I'm not that happy either." (Tr. 47.)

Although Pierce's testimony indicates that McLoughlin was very interested in knowing which employees were unhappy, Pierce did not state that McLoughlin became upset or angry. Moreover, he specifically testified, on cross-examination, that McLoughlin did not say he was going to punish any employees who had concerns. (Tr. 74.)

This was not the first time Pierce had conveyed to McLoughlin the concerns of other employees. If McLoughlin disliked Pierce speaking to him about other employees' workplace concerns, presumably he would have manifested such antipathy on previous occasions when Pierce did so. However, the record does not indicate that McLoughlin ever did so.

Sometime earlier, Pierce, on his own initiative, had conducted a study concerning how other employers providing similar services compensated their employees for "add-on" assignments. He gave this information to McLoughlin.

Pierce clearly acted in the interest of other employees as well as himself. However, nothing in the record indicates that McLoughlin reacted negatively to Pierce taking this initiative. Similarly, nothing in the record suggests that the Respondent punished Pierce in any manner for doing the study or advocating for the employees. The Respondent eventually did provide employees with extra compensation for add-on work assignments. (Tr. 75–77.)

Pierce expended considerable effort to ascertain the rates paid by other employers and providing them to McLoughlin, yet this action produced no adverse reaction. So, it is somewhat difficult to believe that Pierce's simply telling McLoughlin, on February 14, 2025, about other employees' discontent would arouse animus. The record certainly does not establish that McLoughlin reacted with any hostility to Pierce's statements.

Moreover, their close friendship, dating back to fraternity days in college, allowed Pierce to speak with candor without worrying that McLoughlin would react badly. Thus, Pierce felt free to tell McLoughlin about fellow employee Lanham's work-related concerns even though Lanham was reluctant to do so. This same close friendship made it difficult for McLoughlin to discharge Pierce even after employees complained about the way Pierce had treated them.

General Counsel's Animus Arguments

The record provides no direct evidence of animus. However, the General Counsel contends that animus should be inferred from the timing of the discharge and from the explanation McLoughlin reportedly gave to Pierce at the time of the discharge. With respect to the timing, the General Counsel notes that Pierce was fired just 1week after he described to McLoughlin the employees' complaints about the workload.

In appropriate cases, the Board will infer discriminatory motive from circumstantial evidence, including proximity in time between the protected activity and the adverse employment action. *Absolute Healthcare d/b/a Curaleaf Arizona*, 372 NLRB No. 16, slip op. at 2 fn. 9 (2022). However, the trier of fact should proceed cautiously, recognizing that neither the sequence of two events nor their closeness in time provides absolute proof that the first caused the second. The sun doesn't rise because the rooster crowed.

Instead, the totality of circumstances must be taken into account and alternative explanations for the timing considered. To do so here, I look to McLoughlin's testimony which, based on my observations of the witnesses, I believe is reliable and credit.

McLoughlin's dissatisfaction with Pierce's work performance had been building over a substantial period of time. However, McLoughlin was reluctant to confront Pierce or take disciplinary action because they had been fraternity brothers while attending Georgia Tech and remained friends.[6]

Additionally, the discharge of Pierce would make it necessary to find someone to replace him. However, performing Pierce's job—monitoring an anesthetized patient's neurophysiology during a surgical operation—required months of n-the-job training.

As discussed in the bench decision, employees had complained to McLoughlin about the way Pierce treated them. McLoughlin also was disappointed because Pierce had failed to create a clinical training program for new techs, as McLoughlin had requested. These concerns alone had not been enough to overcome McLoughlin's reluctance to discharge Pierce.

Then, on New Year's day, 2025, a hospital notified the Respondent that there was going to be emergency surgery and the surgical team needed a neurophysiological monitor technician. McLoughlin believed that. under standard procedure, it would be Pierce's turn to take the call. However, Pierce refused, sending McLoughlin a rather bluntly worded text message, (R. Exh. 6; Tr. 175.)[7]

Nonetheless, McLoughlin remained reluctant to fire his friend. Indeed, his reluctance to terminate Pierce became an issue in his marriage. McLoughlin's wife, Brooke McLoughlin, who is a coowner of the Respondent, testified that when the two of them went to therapy sessions with the psychologist, they discussed Pierce:

> I had feelings that Mr. Pierce's performance wasn't going to improve, and I was confronting Justin about that. He felt, like, hopeful. I think he wanted things to be

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[6]As discussed in the bench decision, the difficulties with Pierce bothered McLoughlin so much that he discussed them with his psychologist, Dr. Rosa Ashe-Turner, who was puzzled. She testified: "I didn't really understand why he hadn't terminated this relationship. Months earlier, it was certainly my thought that it would make sense for him to terminate this person, because it was an ongoing source of stress for him." (Tr. 135–136.)

[7]Pierce did not admit refusing the assignment. Based on my observations of the witnesses, I credit the testimony of McLoughlin, rather than that of Pierce, in instances where the two witnesses disagree.

> good. He wanted to salvage the friendship, and so he continued on in the process.
>
> (Tr. 194.)

Pierce's refusal to accept the New Year's Day assignment proved to be a turning point. Brooke McLoughlin testified:

> [A]fter New Year's, when Blake didn't show up for work to cover his call, Justin got clear that his performance wasn't going to improve. And at that point in time, we started talking about hiring somebody to try to cover the transition, and then, like, how to actually go through the hiring process.
>
> Justin had an idea that maybe he could tell Blake and then give him, like, six months to try to find a job and get things in order and stuff. I was really against that. *I was adamant that that was not a good idea*, that we needed to have a clean break, and that was that.
>
> (Tr. 194, italics added.)

McLoughlin did not discharge Pierce immediately but ultimately his wife's adamancy prevailed. In mid–January 2025, the Respondent hired another person, Gabe Palmer, and began his training. (GC Exh. 4.) About 1month later, McLoughlin discharged Pierce.

Because of the Respondent's need to train an employee to replace Pierce, and particularly because of McLoughlin's reluctance to fire a good friend, I do not believe it would be appropriate to infer animus from the timing of events.

The General Counsel also argues that animus should be inferred from the reason McLoughlin gave Pierce at the time of discharge:

> Pierce testified that McLoughlin told him that he was firing Pierce because Pierce was not happy. Lanham corroborated this by testifying that, after McLoughlin had fired Pierce, McLoughlin told Lanham over the phone that he fired Pierce because Pierce was, quote, "unhappy with the job." Contradictory to what he told Lanham and Pierce, McLoughlin testified in the hearing that he fired Pierce for calling out on January 1st, 2025.
>
> (Tr. 217–218.)

The General Counsel is not arguing that McLoughlin told a Board investigator that he fired Pierce because Pierce was "unhappy." Rather, the General Counsel refers to the explanations which McLoughlin reportedly gave to Pierce himself and to another employee.

Considering McLoughlin's close friendship with Pierce, it is not surprising that he would not "unload" on Pierce by quoting to Pierce other employees' complaints about him. Also, in view of Pierce's blunt text message about the New Year's Day assignment (R. Exh. 4.), McLoughlin hardly would want to reignite that conflict by mentioning it at the time he fired Pierce.

Moreover, from my observations of the witness, as well as from the way he treated Pierce over the years, I conclude that McLoughlin was not fond of confrontation and avoided it when possible. McLoughlin typically found ways to accommodate Pierce's demands, such as by changing how Pierce’s compensation was calculated to increase his pay.

McLoughlin's friendship with Pierce also explains why he would not tell Pierce's fellow employee, Lanham, the reasons for Pierce's discharge. It would hardly be consistent with his friendship to do so.

The General Counsel further argues that the statement attributed to McLoughlin—that Pierce was not happy—manifests an unlawful intent. However, considering the totality of circumstances, I do not find that the words "not happy" were a veiled reference to Pierce's protected concerted activities.

It is true that, in a labor relations context, an employer's statement than an employee was not happy or had a "bad attitude" can be a euphemism for the employee's prounion sentiments. See, e.g., *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998). However, such a labor relations context is not present here.

Additionally, as noted in the bench decision, I reject the General Counsel's argument that the Respondent has failed to comply with the government's subpoena and that an adverse inference should be drawn from this failure. The Respondent is a small company, not a large corporation with an extensive human resources department. The record does not suggest that the Respondent intentionally withheld records or otherwise sought to avoid compliance with the subpoena.

In sum, I conclude that the General Counsel has failed to prove the existence of animus. Therefore, the government has not shown that animus was a motivating factor in the Respondent's decision to discharge Pierce. Accordingly, I recommend that the complaint be dismissed.

Conclusions of Law

1. The Respondent, Syntact, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate the Act in any manner alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

Order[8]

The complaint is dismissed.

Dated Washington, D.C. July 23, 2026

Keltner W. Locke
Administrative Law Judge

[8]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.

Appendix

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Rules and Regulations of the National Labor Relations Board, herein called the Board.

The owner of a business hired his college fraternity brother but, after 15 years, discharged him. Because the record does not establish the presence of animus, I recommend that the complaint be dismissed.

Procedural History

This case began on August 13, 2025, when the Charging Party, Blake Pierce, an individual, filed an unfair labor practice charge against the Respondent, Syntact LLC. Board staff docketed this charge as Case 10–CA–371322.

On March 26, 2026, after investigation of the charge, the Regional Director for Region 10 of the Board issued a complaint and notice of hearing, which I will call the "complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

The Respondent filed a timely answer to the complaint.

During a prehearing conference call, all parties agreed to a hearing by videoconference. On May 1, 2026, I issued an order that the hearing be conducted using the Zoom for Government videoconferencing protocol.

On May 6, 2026, the hearing opened. The parties finished presenting evidence on that day and I adjourned the hearing to give counsel time to receive and review the transcript and exhibits and to prepare oral argument. On June 23, 2026, the hearing resumed by videoconference and the parties presented oral argument. Then, I adjourned the hearing until today, June 25, 2026, when it resumed by videoconference for this bench decision.

Admitted Allegations

The Respondent filed a timely answer to the complaint. In this answer, the Respondent admitted the allegations raised in the following complaint paragraphs or subparagraphs: 1, 2(a), 2(b), 2(d), 3, and 5(a). Additionally, during the hearing, the Respondent entered into a stipulation which established the facts alleged in complaint subparagraph 2(c).

Based on these admissions, I find that the General Counsel has proven these allegations. More specifically, I find that the General Counsel has proven that the Charging Party filed the unfair labor practice charge on August 13, 2025, and that a copy was served on the Respondent the next day, as alleged in complaint paragraph 1.

Based upon the Respondent's admissions, I further find that at all material times, it has been a limited liability corporation with an office and place of business in Grayson, Georgia, and has been engaged in providing medical services, as alleged in complaint subparagraph 2(a). Additionally, the Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as alleged in complaint subparagraph 2(d). Further, I conclude that the Respondent meets the Board's discretionary standards for the assertion of its jurisdiction.

Further, the Respondent has admitted, and I find, that at all material times, Justin McLoughlin held the position of Respondent's Owner/Manager and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act, as alleged in complaint paragraph 3.

The Respondent also has admitted that about February 21, 2025, it discharged Blake Pierce, as alleged in complaint subparagraph 5(a), and I so find.

Facts

This case concerns two men who were fraternity brothers at Georgia Tech in the mid-1990s. A little more than a decade after graduation, one of the men was running his own company and the other was looking for a job.

Justin McLoughlin, who runs the Respondent and, along with his wife owns it, hired his fraternity brother Blake Pierce to be a neurophysiological monitor technologist. For brevity, I will refer to such a technologist as a "tech."

Pierce, who majored in industrial engineering, had no training in neurophysiological monitoring but that was no problem. The field is so new that there are few academic programs teaching these skills which, instead, techs learn on the job, under mentoring by an experienced tech.

The work involves monitoring and measuring the electrical properties of nerves during surgery and providing this information to the surgeon. The technique has made many kinds of surgery, including on the brain and spinal cord, safer.

Before an operation, a hospital will contact the Respondent and request a tech, who sets up the Respondent's equipment in the operating room before the surgery. When possible, hospitals make such requests far enough in advance that the Respondent can place the dates and times on a calendar, but often, emergencies require immediate surgery and techs may be sent to the hospital with little advance notice.

Pierce began working for the Respondent in 2010. Eleven years later, at his request, the Respondent promoted him to "Supervising Neurophysiologist, Lead Clinical Manager/Trainer." This promotion resulted in Pierce earning a yearly salary rather than being paid on a per–operation basis.

Pierce's job title includes the word "Supervising" and the Respondent asserts that he was a supervisor. The Act defines "supervisor" to mean

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.The burden of proving supervisory status rests with the party asserting such status. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998); *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998).

Pierce denied having any of the listed attributes of supervisory status. He stated that he sometimes did make recommendations concerning when a new tech was ready to "solo," and that McLoughlin followed the recommendations more often than not. However, I believe the evidence is insufficient to establish even that he effectively recommended such actions. Therefore, I conclude that he was not a supervisor within the meaning of the statute.

Respondent established, through McLoughlin's credited testimony and exhibits, that a number of employees complained to him about having to work with Pierce. Even Pierce acknowledged that two of these employees did not like working with him, although he added that they also didn't like working with some other techs.

Receiving these complaints, McLoughlin considered firing Pierce but the thought of firing a friend and fraternity brother caused him considerable anguish. McLoughlin struggled with this issue and discussed it with his therapist, Dr. Rosa Ashe–Turner, who testified:

> Mr. McLoughlin had been processing what I called a power struggle between himself and Mr. Pierce for over a year. In that, my concern was it was coming in as a power struggle between these two.

(Tr. 135.)

She also testified that McLoughlin was reluctant to discharge Pierce and she "was trying to figure out why." (Tr. 135–136)

McLoughlin's indecisiveness changed on New Year's Day 2025. On that date, emergency surgery required the presence of a tech. McLoughlin believed that it was Pierce's turn to go, but in a rather bluntly worded text message, Pierce refused. That tipped the balance. McLoughlin testified:

> I had decided, after that situation, that my relationship with Mr. Pierce had to come to an end. It was just—basically, he was defiant. He was, you know, didn't care about his job, or what—what my requests were. He didn't follow through with that, and so I needed to replace him.
>
> (Tr. 175.)

McLoughlin hired another person, a pastor of a church who had no tech experience, and had Pierce mentor him. Finally, on February 21, 2025, McLoughlin discharged Pierce.

Pierce filed an unfair labor practice charge which resulted in this hearing. The General Counsel argues that Pierce had engaged in protected activity a week before his discharge. This activity involved telling McLoughlin that other employees were unhappy with working conditions.

However, Pierce had made similar statements to McLoughlin in the past and McLoughlin did not retaliate.

Analysis of whether a discharge violates the Act is governed by *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employee's union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). However, to meet the General Counsel's initial burden, the evidence of animus also must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

In the present case, the General Counsel has established the first element, protected activity. However, there is no evidence at all of animus.

The General Counsel argues that the Respondent did not comply fully with a subpoena served on it, and therefore than an adverse inference should be drawn. However, the record does not establish any such noncompliance. And even if it did, I would be reluctant to draw such an inference in the absence of any other evidence indicating an unlawful intent.

Because the General Counsel has not established all the initial *Wright Line* elements, the government has not proven any violation of the Act. Therefore, I recommend that the complaint be dismissed.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run. I appreciate the professionalism and civility displayed by all in this proceeding. The hearing is closed.