

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

ALL STATE POWER-VAC, INC.

Respondent

and

LABORER'S INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 78

Charging Party

Case Nos.: 29-CA-28264  
29-CA-28351  
29-CA-28394  
29-CA-28556  
29-CA-28594  
29-CA-28637  
29-CA-28683

**GENERAL COUNSEL'S EXCEPTIONS AND BRIEF SUPPORTING EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION**

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The General Counsel submits this combined Exceptions and Brief in Support seeking corrections to the supplemental decision of Administrative Law Judge Raymond P. Green. The ALJ issued his supplemental decision after the Board remanded multiple allegations with specific instruction that the ALJ reconsider allegations under a *Wright Line*<sup>1</sup> framework.<sup>2</sup> Despite the Board’s instruction, the ALJ again failed to apply the proper *Wright Line* analysis to the allegations. Contrary to the conclusions of the ALJ, it is respectfully requested that the Board find that Respondent committed the following violations:

- (1) **On October 1, 2007, Respondent unlawfully discharged Jose Adames.**
- (2) **On October 5, 2007, Respondent unlawfully discharged Rafael Bisono and suspended William Dominich and Hector Soler.**
- (3) **On December 12, 2007, Respondent unlawfully discharged Miguel Bisono.**

While the ALJ and Board have already found Respondent violated the Act on multiple occasions, the above violations are also well-established in the record. The ALJ has again neglected to properly apply *Wright Line* to these allegations, and, appropriately, should be reversed.

**EXCEPTIONS, FACTS, AND DISCUSSION**

- (1) **On October 1, 2007, Respondent unlawfully discharged Jose Adames.**

<u>Page</u>	<u>Lines</u>	<u>Decision</u>
3	1-2	The ALJ incorrectly finds Respondent expected Adames to return on September 24, 2007.
3	2-4	The ALJ incorrectly states that Adames failed to notify Respondent of his whereabouts.
3	3-5	The ALJ ignores the evidence demonstrating Jose Adames’ wife indeed contacted Respondent regarding Adames’ availability for work.
3	15-17	The ALJ incorrectly finds Respondent treated Adames consistent with its past practice, relying upon the distinguishable situation of Michael Young.
3	17-19	Without applying <i>Wright Line</i> , the ALJ reiterates his previous findings and disregards the purpose of the remand.

<sup>1</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>2</sup> *Allstate Power Vac, Inc.*, 354 NLRB No. 111, slip op. at 4 (2009).

## FACTS:

Jose Adames was a long-term employee, active supporter of the Union, and one of the five employees unlawfully laid off on June 4, 2007. (JD 16:29 – 31).<sup>3</sup> After his unlawful termination, Adames was recalled to work by Respondent on June 24, 2007. (JD 16:31 – 32). Respondent never gave Adames any explanation for his recall. (903:1 – 6).

Following his return to work, on September 7, 2007, Adames was given a company physical which revealed he had high blood pressure. (JD 16:43 – 44). Adames saw a doctor on September 14, who wrote him a prescription for a one-week leave of absence, which was approved by Respondent. (JD 16:44 – 47). At that point, Adames had permission to be off of work for the weekdays of September 17 to 21, with a scheduled return date of Monday, September 24. (JD 16:46 – 48).

On September 16, Adames learned that his grandmother in the Dominican Republic had passed away, and left to be with his family there the next day, September 17. (JD 16:50 – 17:3). After arriving, Adames learned his grandmother had not yet died, but was gravely ill. (JD 17:5 – 6). Adames' grandmother died shortly after his arrival, and he stayed with his family until returning to the United States on September 30. (GC 37, JD 17:7 – 8).

Contrary to the ALJ's finding, as admitted by Respondent and demonstrated in telephone records, while Adames was in the Dominican Republic, Adames' wife spoke with manager Burke on at least three occasions to make him aware of the situation – on September 23, 25, and 26 – with two of those phone calls initiated by Ms. Adames. (GC 7, GC 10). Burke told Ms. Adames that Adames could have until September 27 off of work to mourn his grandmother,

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<sup>3</sup> References to the Administrative Law Judge's Original Decision will be made as (JD --:--), and to the Supplemental Decision (JSD --:--); Transcript citations will be referred by page number and line number as (--:--). Exhibits will be designated as either GC or ER.

although Ms. Adames told him Adames would not be able to return by then. (GC 7, GC 10). With Ms. Adames as the intermediary (Burke and Adames do not share a common language), Adames believed Respondent had given him the time he needed away from work. (909:6 – 13, 911:18 – 20). Though Ms. Adames notified Burke that Adames could not return to work by September 27, Respondent terminated Adames when he returned to work on Monday, October 1, having missed September 27 and 28. (GC 7, GC 10, JD 17:19 – 24).

Respondent claims Adames was terminated for missing two days of work (two days Burke had been notified that Adames could not make); yet the evidence shows Respondent's actual attendance policies are substantially more lenient. Respondent regularly allows employees to take unpaid personal days off of work without discipline (51:22 – 24), and Respondent's records show Respondent has granted employees extended leaves of absence to leave the country for family occasions like weddings. (GC 59(a) – (c)). Burke admitted that one employee, currently in jail, is not considered terminated despite his unavailability for work. (1108:12 – 22). Furthermore, Respondent has tolerated egregious attendance issues like missing large numbers of work days and having repeated incidences of no-call/no-shows without resorting to termination. (GC 44, GC 55, GC 57). The ALJ continues to ignore this evidence.

#### DISCUSSION:

Under *Wright Line*, Respondent terminated Jose Adames a second time in violation of the Act. There is no dispute Adames' engaged in union activity, and that Respondent knew of his activity. The violation therefore turns on Respondent's motivation in discharging him. While the Board found Respondent unlawfully discharged Adames the first time on June 4, 2007, to the degree Respondent's motive is in doubt for the second discharge, Respondent's unlawful motive

can be inferred from its treatment of Adames relative to other employees. The ALJ ignores this evidence, but a fair assessment of the record shows Respondent treated Adames differently.

Contrary to the ALJ's finding, the termination of Adames was not consistent with Respondent's practices. In the only example the ALJ relies upon, he argues the treatment of employee Michael Young shows Adames was treated consistent with the usual practice. (GC 39, JSD 3:15-17). But Adames' situation is completely different than Young's situation. In Young's case, Respondent sent him a letter confirming his termination after he disappeared for over a month without any contact with Respondent, and had kept a company truck, tools, and cell phone. (GC 39). This is nothing like Adames' situation. Adames repeatedly communicated with Respondent through his wife (Adames does not speak English), and ultimately missed only two unexcused days of work. Further, Respondent's letter to Young is nothing like the unprecedented letter Respondent sent deadlining Adames to return to work, and it is inaccurate for the ALJ to claim the two situations are comparable. (GC 39, ER 14, JD 17:38 – 41). Respondent's letter to Adames was unique, and sent when Respondent knew Adames could not return to work in time. Respondent had never before sent such a letter to an employee, and nothing like it was in Respondent's records or ever put into evidence.

The ALJ's reference to Michael Young gives little insight into Respondent's actual practice regarding attendance issues. If anything, it shows Respondent's leniency to another employee. The record has sufficient documentation of Respondent's practice which the ALJ ignores. One example is the treatment of employee Melvin Brown. As shown in GC 44, Brown had repeated attendance problems, and, as of October 2007, had missed eighteen days of work for the year, only seven of which were excused or sick days. While Adames was terminated for missing just two days of work, Brown had eleven unexcused absences for the year yet received

only a written warning and was never terminated. (1080:10 – 12). Notably, while these documents were put in the record, Respondent made no attempt at hearing to explain or distinguish Brown’s treatment from Adames, and the ALJ fails to mention them.

Another comparable is shown by a suspension issued to employee Lee Hardy after he was a no call, no show for three days. (GC 55). Not only did Hardy miss one day more than Adames, but Adames, by his wife, notified Respondent prior to missing the two days (September 27 and 28). (GC 7, GC 10, GC 55). In addition to Lee Hardy, the evidence shows other employees have been no call, no shows, and received little more than a written warning. (GC 49 pg. 3, GC 57). Another employee received a written discipline after agreeing the night before to work on Saturday, only to back out the next day, in what was “not an isolated event.” (GC 59(o)). These infractions of other employees appear more severe than Adames’ situation, yet Respondent made no attempt to explain or justify treating Adames differently.

Though it is conceivable that Adames bore some responsibility for any miscommunication surrounding his grandmother’s funeral, the evidence is nonetheless clear that Respondent deviated from its regular practice to take advantage of the situation and terminate him. Throughout the record there are numerous examples of Respondent’s incredible lenience towards employees with disciplinary problems. (For example, GC 48 shows an employee with eleven disciplines.) This leniency is in part because of the difficulty Respondent has keeping employees, a difficulty that has lead Respondent to rehire employees even after they have been terminated for cause. (69:15 – 25, 1039:13 – 16). Though Respondent admits that employees who remain for more than a year are “going to last,” in the case of Adames, Respondent was eager to discharge one of its most senior field technicians who had no past history of discipline.

(70:24 – 71:2, GC 20). Respondent has the burden under *Wright Line* of showing it would have terminated Adames regardless of his union activity, yet no such showing was made.

Despite the Board's remand, the ALJ again neglects to analyze Adames' second termination under *Wright Line*. Under *Wright Line*, the General Counsel has established a prima facie violation: Adames engaged in union activity, Respondent knew of the activity, and Respondent then terminated Adames because of that activity. As previously found by both the ALJ and the Board, Adames was one of the Union's primary supporters, and Respondent knew of his union activity when it unlawfully terminated him the first time on July 4, 2007. Similarly, Respondent again acted with unlawful motivation when it terminated Adames on October 1, 2007. Respondent's motive is evident by the timing of the second termination – just four days before the election – and, as described above, the disparate nature of the termination. As is clear in the record, Respondent routinely tolerated attendance problems, and had never terminated an employee for missing two days of work with notice. Respondent provided no other basis for terminating Adames, and, consequently, an unlawful motive is reasonably inferred. Under *Wright Line*, a prima facie violation has been established.

As the General Counsel has made a prima facie showing that Respondent terminated Adames unlawfully, under *Wright Line*, Respondent has the burden to demonstrate it would have terminated Adames even in the absence of union activity. Respondent fails to meet its burden. Respondent failed to provide any evidence it would ever terminate an employee for the attendance issue of Adames. Again, Respondent's disciplinary records show the opposite – that Respondent regularly tolerated attendance problems that were significantly worse than Adames' situation. As Respondent cannot show it would have terminated Adames in the absence of his union activity, under *Wright Line*, Respondent again violated the Act.

**(2) On October 5, 2007, Respondent unlawfully discharged Rafael Bisono and suspended William Dominich and Hector Soler.**

EXCEPTIONS:

<u>Page</u>	<u>Lines</u>	<u>Decision</u>
3	30-34	The ALJ again fails to do a proper <i>Wright Line</i> analysis and inappropriately fails to find violations for the suspensions of William Dominich and Hector Soler, and the termination of Rafael Bisono.
3:35-4:2		The ALJ discounts and ignores the unprecedented nature of the disciplines, while failing to properly apply <i>Wright Line</i> .
4	30-34	Contrary to the record evidence, the ALJ baselessly faults Rafael Bisono's behavior in his disciplinary interview.
4	fn. 4	The ALJ disregards evidence of Respondent's unlawful motive by discounting admissions by Respondent's safety manager Guerrero as "personal opinions" despite Guerrero's acting in the capacity of Respondent's agent.

FACTS:

Respondent's employees clean transformers for Con Ed, its principal client. (JD 18:5 – 6). Transformers convert energy for residential and commercial use, and thousands are maintained throughout New York City in underground vaults. (JD 18:6 – 9). The transformers are cleaned periodically by crews of employees consisting of a foreperson,<sup>4</sup> vacuum truck operator, and field technician. (JD 16:9 – 13).

On October 4, 2007, the day before the election, a crew of three employees was assigned to clean a transformer vault near Respondent's facility. (JD 18:25 – 27). This crew included Rafael Bisono, a supporter of the Union who, as he often did, wore a union cap and shirt to work that day. (741:15 – 25, 751:22 – 24, GC 18). Rafael Bisono is also the brother of union supporter and fellow discriminatee Miguel Bisono, and, as noted by manager Burke, wore a Union shirt "all the time." (143:12 – 17, 758:19 – 759:9). William Dominich, another member of the crew, was also a known supporter and the Union's observer at the election the next day.

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<sup>4</sup> The forepersons are also known as "field supervisors," though they are employees under the Act and were members of the bargaining unit and eligible to vote in the election.

(143:20 – 144:4, 442:24 – 443:7). Hector Soler, the field supervisor, was the third member of the crew. (JD 18:25 – 27, GC 8).

After the crew arrived at the jobsite on October 4, the men first properly secured the area around the transformer. (427:24 – 25). Before beginning work, the men put on their safety gear. (JD 18:27 – 28). The transformer had a large amount of water which needed to be pumped out before the vault could be entered. (430:5 – 24). About half an hour into the water being pumped, safety manager Al Guerrero visited the site, inspected for safety issues, and found everything was being done properly. (430:25 – 431:25). Then, while waiting for the water to be pumped, the men removed their safety gear and waited in their trucks for an hour and a half to two hours. (435:5 – 17).

While waiting, Soler spoke with a woman at Con Ed, who told him to check the serial number on a second nearby transformer. (433:1 – 19). Soler and Dominich went to do the job, and despite having problems opening the lid of the second transformer, were able to open it before Rafael Bisono arrived to help. (744:25 – 745:2). Though Bisono walked over to help the other men, he never touched the grate of the transformer himself. (438:18 – 22, 770:8 – 10, GC 18).<sup>5</sup> The men only took the serial number from the second transformer, and otherwise did not perform any work on it. (441:19 – 25).

As the employees were checking the serial number on the second transformer, manager Chris Baran arrived at the site and photographed the men. (JD 18:32 – 33). Though Respondent claims the men were committing an egregious safety violation, Baran said nothing to the men about safety. (748:5 – 16, 1332:1 – 4). Baran took photographs despite never having photographed safety violations before, and despite photographs being unnecessary to issue safety

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<sup>5</sup> In GC 18, Rafael Bisono is the man in the middle, in the background relative to Dominich, on the left, and Soler, on the right.

violations. (1344:13 – 19, 1347:5 – 7, 1348:4 – 14). Baran then returned to the shop, and though safety violations are usually first reported to safety manager Al Guerrero, went straight to manager Burke with what he had photographed. (1341:20 – 25, 1347:22 – 1348:1). Though Burke usually decides the discipline for the facility, he nonetheless contacted the president of the company because he “wasn’t quite sure what needed to be done.” (1432:24 – 1433:10).

Following the election the next morning,<sup>6</sup> Rafael Bisono and Dominich were allowed to leave work early. (443:8 – 10, 750:16 – 751:7). Soler then called them and informed them the group had been suspended. (443:16 – 23). Confused by the suspensions, Dominich and Bisono returned to the facility, but were not given any explanation and only told they would be contacted later. (444:5 – 13). The three employees were then kept in limbo until the regional corporate safety manager Curtis Ross and Glenn Burke met with them a week later. (444:17 – 445:11). Typically, Ross only visits the Brooklyn facility about once a month. (39:2 – 4, 1158:23 – 1159:6).

At the investigatory meeting, Respondent made transcripts of each employees’ testimony, something it had never previously done. (159:9 – 21). Being questioned by Ross, Burke and Guerrero, Rafael Bisono said he understood the danger of the situation, but had “gotten off the truck, just to help” Soler and Dominich. (754:6 – 12). Confused, Bisono asked Guerrero why, on prior occasions when they had worked together, nothing had happened, but Guerrero did not say anything. (754:16 – 24). Rafael Bisono never said he would not follow directions, and never said he would not wear safety equipment. (755:7 – 9, 797:2 – 5). Nonetheless, Burke terminated Bisono the next day, without explanation or written documentation. (755:13 – 24).

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<sup>6</sup> The ALJ incorrectly finds the men were notified of the suspension on October 4, 2007. (JD 18:35 – 36). An exception is not taken to this inaccuracy, as it does not substantively change the merit of the allegation, though it is further indicative of the ALJ’s cursory handling of the facts in this case.

In explaining his recommendation to terminate Rafael Bisono, Ross claimed at the hearing that Bisono demonstrated “during the interview time and time again, that he did not care about safety and safety was taking a back seat for him.” (1267:9 – 20). The ALJ accepted this explanation. (JD 19:19 – 21). Yet Ross then admitted Bisono never said he would not follow safety protocol in the future, and when asked to find support for his claim in the investigatory transcript Ross himself had created, Ross failed to find anything demonstrating that Bisono had any less regard for safety than the other two men. (1268:8 – 1269:5, ER 22). Rather, the investigatory transcript demonstrates Bisono never said anything like what Ross initially claimed. (ER 22).

Prior to meeting with Ross and Burke, Dominich and Bisono spoke with safety manager Guerrero, who admitted to them Respondent had not disciplined another employee for a similar safety violation because that employee was “pro-company,” even though it “hadn’t been equitable,” and “[t]hat was a problem with the company.” (445:16 – 447:13). Similarly, after his termination, Bisono again talked with Guerrero, who told him Respondent was not going to give him a reference for future jobs because of the Union. (756:21 – 25).<sup>7</sup> Respondent chose not to call Guerrero as a witness, and these admissions were never refuted.

At the hearing, Respondent called Matthew McFarland, the 10-year safety manager of Con Ed. (1177:18 – 1178:12). However, McFarland testified that safety violations on job sites are not uncommon, and in ten inspections, one would find at least one violation, and probably more. (1202:25 – 1203:3). McFarland testified further that injuries from opening a transformer were uncommon, and, in his tens years, he knew of only two injuries resulting from work similar to that in GC 18. (1212:5 – 1213:8). The only one he remembered in detail, the employee had been wearing safety equipment. (1213:6 – 8). McFarland estimated those two injuries would

have been out of 800,000 transformer openings a year, and approximately 8 million openings during his tenure. (1214:17 – 1215:11, 1214:14 – 16). McFarland further testified that safety glasses were a relatively new requirement, and that a hard hat would have served no purpose for the work in GC 18. (1192:2 – 22, 1213:9 – 12). The three discriminatees’ disciplines nevertheless listed not wearing hard hats as part of their violations. (GC 9).

Respondent’s records show multiple examples of similar safety violations, none of which resulted in a five-day suspension or termination. In fact, the most severe prior discipline for such a violation in all Respondent’s records was one issuance of a two-day suspension, where a customer had complained to Respondent. (GC 59(g)). However, Respondent’s regular response to similar safety violations is the issuance of a verbal or written warning. (GC 42 pg. 4, 56, 59(i), 59(k), 59(x), and 59(z)). When confronted at the hearing with these usual examples, Respondent’s head of safety Ross admitted the safety violations of October 4 were no different than these violations that usually result in verbal or written warnings. (1306:1 – 10).

#### DISCUSSION:

Respondent’s disciplines following the October 4 incident are quintessential, mixed-motive *Wright Line* disciplines. However, the ALJ again fails to properly assess the disciplines under *Wright Line*. As in his previous decision, the ALJ uncritically accepts Respondent’s purported defense and decides the disciplines are “reasonable.” While the ALJ fails to acknowledge the undisputed union activity of Rafael Bisono and Dominich, more significantly, the ALJ disregards the significant record evidence showing Respondent deviated from its usual practices and disparately disciplined these union supporters. Under the necessary *Wright Line* analysis, the suspensions of Dominich and Soler, and the termination of Rafael Bisono, were unlawful.

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<sup>7</sup> Though not alleged in the complaint, Guerrero’s statements were likely additional violations.

While the ALJ now makes a cursory reference to Respondent’s past disciplines in his supplemental decision, he still ignores or greatly discounts the numerous ways in which the disputed disciplines were unprecedented. Though unacknowledged by the ALJ, these disciplines were unusual in numerous ways: (1) virtually every previous similar safety violation resulted in either a verbal or written warning, not suspensions or termination;<sup>8</sup> (2) when the safety incident occurred, manager Baran said and did nothing to correct the violations which were Respondent’s purported primary concern; (3) Baran photographed the men, which was unprecedented; (4) Baran then reported the violations to head manager Burke, rather than safety manager Guerrero, contrary to the regular practice; (5) Burke then took the unusual step of contacting the company president; (6) the men were suspended indefinitely without explanation, and were kept in limbo for a week; (7) the initial suspensions were announced the day of the election, and prior to any final election result; (8) regional corporate safety manager Ross became involved in what typically would be handled locally; (9) Respondent did an unusually exhaustive investigation into the incident, including making unprecedented transcripts of interviews; (10) the safety violations written for the three men include citations for not wearing safety helmets, though helmets are not required for above-ground work; and (11) Respondent’s safety manager Guerrero admitted to Dominich and Rafael Bisoño that the discipline is unfair, and that “pro-company” employees were treated differently. The ALJ, however, disregards the unprecedented nature of the disciplines – disproportionately severe and issued on the day of the election – and blithely asserts the disciplines were “within the range of past practice.” (JSD 3:47-48).

While all the October 4 disciplines were unlawful, the termination of Rafael Bisoño was especially egregious. However, the ALJ again neglects to apply *Wright Line* to Bisoño’s

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<sup>8</sup> Again, the only suspension issued for a safety violation involved a customer complaint, unlike the disciplines currently at issue and the other comparables in evidence. See GC 42 pg. 4, GC 56, 59(i), 59(k), 59(x), and 59(z).

termination. Rather, the ALJ rewords his own rationale for why Bisono's termination was appropriate in his opinion, completely neglecting Respondent's established disparate treatment of Bisono. In the ALJ's initial decision, he claimed Bisono's termination was justified because "he indicated to the Company that he was not going to change his ways." (JD 19:19 – 21). While that finding was unsupported by fact, on remand, the ALJ now finds the termination appropriate because "Bisono essentially said that he could do as he wished and did not need to be told how to do his job." (JSD 4:8-9). But the ALJ's conclusions are unsupported by the record and inconsistent with a proper analysis under *Wright Line*.

Respondent's own evidence does not support the ALJ's factual conclusions. Respondent made unprecedented transcripts of each employee interview about the incident, and nowhere in the transcript does Bisono say, as the ALJ claimed, that "he was not going to change his ways" in regard to safety. (ER 22). Rather, Rafael Bisono repeatedly testified that he never said he would not follow directions, and never said he would not wear safety equipment. (755:7 – 9, 756:2 – 4, 797:2 – 5). The claim that he said otherwise is not only counterintuitive (as Bisono pointed out, he always wore safety equipment in a transformer for his own safety) (750:8 – 13), but it has no basis in evidence. Significantly, Respondent never called safety manager Guerrero, though, as translator during the interrogations, he was Respondent's only witness in the position to testify about what Rafael Bisono said during Respondent's interrogation.

Even if the ALJ's claim that Bisono had somehow indicated "he could do as he wished" – again, a claim contradicted by the evidence – a *Wright Line* analysis requires the ALJ look at how Respondent acted in comparable situations. Though Respondent's records show multiple examples of employees disrespecting their supervisors and engaging in insubordination, the ALJ fails to consider any of this evidence. For example, GC 59(d) and (e) show an employee

receiving a verbal warning for insubordination and being “disrespectfull [sic] to [his supervisor] and [his supervisor’s] position.” Another employee was also insubordinate, yet given only a written warning despite yelling and cursing about a job assignment in front of people. (GC 53, pg. 2). Another example is employee Joel Pena, who, among the numerous disciplines he received, was given only a written warning after arriving late to work, being “disrespectful,” and having a “a poor work attitude.” (GC 43, pg. 4). Other employees have had poor attitudes and been disrespectful, yet only issued verbal or written warnings. (GC 48, pg. 2, GC 59(j)). While the idea that Rafael Bisono would refuse to follow safety protocol is counterintuitive and contrary to the record, even if the ALJ were correct, the evidence clearly demonstrates Respondent does not terminate employees in such circumstances. The ALJ fails to provide an example to the contrary, and again neglects to properly apply *Wright Line*.

In regard to the safety incident of October 4, Respondent took numerous strange and unexplained steps in responding to what the record shows was a technical, but not necessarily unusual safety violation.<sup>9</sup> The record has multiple examples demonstrating that Respondent does not issue suspensions and terminations under the circumstances at issue. As it has been found to have done on multiple occasions, Respondent again unlawfully retaliated against employees for union activity.

**(3) On December 12, 2007, Respondent unlawfully discharged Miguel Bisono.**

EXCEPTIONS:

<u>Page</u>	<u>Lines</u>	<u>Decision</u>
4	18-23	The ALJ inappropriately subjectively assesses Miguel Bisono’s conduct as “disgusting” and “beyond the pale,” while ignoring overwhelming evidence that the conduct (i.e., urinating in bottles) was standard for Respondent’s employees.
4	21-24	The ALJ incorrectly claims the General Counsel did not present examples

<sup>9</sup> Again, see examples GC 42 pg. 4, 56, 59(i), 59(k), 59(x), and 59(z).

		of comparable conduct by Respondent's employees.
4	24-27	While the ALJ correctly finds a prima facie violation, he fails to properly apply <i>Wright Line</i> in concluding Respondent has met the burden of its defense.

FACTS:

Miguel Bisoño was unlawfully laid off on June 4, 2007, and Respondent was aware of his continued union activity when it then recalled him to work on July 24, 2007. (JD 16:21 – 22, 19:34 – 37). Like the twice-terminated Adames, Miguel Bisoño was a relatively long-term employee of Respondent, employed since January 2005, and was also a lead supporter in the Union's campaign. (GC 20, 192:15 - 193:5). Respondent also terminated Miguel Bisoño again after his recall, citing an event that occurred on December 6, 2007 as the sole basis for his second termination. (19:39 – 40).

On December 6, 2007, Miguel Bisoño's team of employees at a Con Ed generating station was given a 15 minute break during which he needed to urinate. (JD 19:42 – 44, 830:6 - 9). To use the bathroom in the Con Ed office, Bisoño would have had to remove all of his safety gear. (884:15 – 24, 1319:18 – 1320:5). Rather than remove everything, Bisoño returned to the truck and used a plastic bottle taken from the trash on the floor of the truck. (830:10 – 19). Employees regularly urinate in bottles, and manager Burke had never instructed otherwise. (836:5 – 9, 836:24 – 837:4). The bottle Bisoño used was one among multiple bottles on the floor, and Bisoño was not aware it was employee Melvin Brown's. (883:6 – 9). The bottle had a "little bit" of drink in it, about half an inch, and Bisoño urinated in it and placed it back under the seat in the truck to discard later. (831:6 – 12, 832:19 – 833:4, 860:16 - 20).

When Brown saw the bottle was full of urine, he said whoever did it would have a "problem" with him, "whether he's big or small." (862:3 – 5, 16 – 20). Brown never opened the bottle nor put it to his lips. (846:10 – 20). Bisoño felt threatened by Brown, so when Brown

asked who had used his bottle, Bisoño denied having been the one to urinate in the bottle. (862:24 – 863:2). Bisoño considered Brown a coworker and friend, someone he would respect, but not somebody he would joke around with. (881:4 – 16). After confronting different employees who all denied having urinated in the bottle, Brown reported the incident to field supervisor Michael Rademaker, who then reported the matter to management. (JD 20:11 – 14).

When Bisoño arrived back at the shop, he was met by managers Baran and Guerrero. (841:5 – 6). Baran took the bottle of urine to his office and questioned the different employees about who had urinated in it. (841:8 – 12). Baran later asked Bisoño if he knew who had done it, and Bisoño, feeling pressure, initially said he did not know. (841:14 – 22). As Bisoño speaks Spanish, Guerrero was translating the conversation, and Bisoño told Guerrero to tell Baran it had been him who urinated in the bottle, but Guerrero told him no, and to wait until they completed the investigation. (841:22 – 25, 958:25 – 959:8, 968:10 – 16).

The next day, December 7, Ross came to the facility to conduct an investigation. (JD 20:22). Manager Burke had contacted Ross to handle the investigation because, as he admitted at hearing, “[Bisoño] was with the Union and [Burke] felt [he] would be impartial<sup>10</sup> [sic] towards him.” (153:6 – 13). As in the termination of Miguel’s brother Rafael Bisoño, Ross again took the unusual step of making investigatory transcripts of employee testimony. (159:9 – 21). Bisoño was questioned whether he knew who had urinated in the bottle, and feeling pressured, said he did not know. (842:20 – 22). Bisoño had admitted to Guerrero and the other employees – Bratini and Nelson Caesar – it was him, but when he then told Guerrero to tell Ross, Guerrero again said no, but to wait. (874:8 – 19).<sup>11</sup> Ross, however, admitted he was aware of Bisoño’s

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<sup>10</sup> It is clear from the context that Burke meant “partial,” not “impartial.”

<sup>11</sup> Some confusion exists surrounding these conversations, in large part because the conversations were translated between English and Spanish. Guerrero was the only bilingual participant in these conversations, and Respondent declined to call him as a witness despite his integral participation in many of the allegations at issue.

admission. (1228:13 – 18, 1279:12 – 14). In Bratini’s separate interview, he told Ross that Bisono had urinated in the bottle, and further told Ross that the bottle was never opened, and Brown did not drink from it. (959:22 – 960:3).

Regardless, the following week, Bisono called work repeatedly, until on Wednesday, Guerrero told him he was no longer needed. (843:15 – 21). According to Ross, Bisono was terminated for the “willful act of urinating in the bottle,” and “[the] possibility of creating the risk to another employee.” (1228:23 – 1229:1). Ross, however, admitted he found no personal animosity between Bisono and Brown. (1276:1 – 1277:4).<sup>12</sup>

In an arguably similar situation, Jose Mota, another employee and witness at hearing, had reached into fecal matter when reaching into a bag in one of Respondent’s trucks. (970:3 – 22). Unlike in the case with Miguel Bisono, when Mota reported the incident to Baran, and indicated his concern for his health, Baran laughed and found the incident funny. (971:15 – 972:10). Though Mota raised the issue multiple times, no investigation was ever done into the incident, and no discipline was ever issued. (972:11 – 21).

#### DISCUSSION:

In deciding Miguel Bisono’s second termination was lawful, the ALJ fails to apply a *Wright Line* analysis. Rather, while ignoring the multiple ways Respondent deviated from its regular practices, the ALJ concludes Bisono’s conduct was “disgusting,” and therefore his discharge was “for cause.” (JD 20:45 – 48, JSD 4:20). A review of the evidence, however,

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<sup>12</sup> Ross’s testimony in this regard was inconsistent, as he also said he did not believe Bisono was trying to harm Brown, but had been horsing around as “workers have a tendency to do.” (1277:5 – 9). Ross then said the incident was not a joke by Bisono, and was not “horseplay.” (1277:10 – 20). But Ross backtracked again, saying Bisono had engaged in “horse play” and a “willful intent to agitate a co-worker.” (1277:21 – 25). Ross then said he did not know why Bisono would agitate Brown, and that he had not asked Bisono why when he did the investigation. (1278:1 – 5). These repeated inconsistencies should reflect poorly on Ross’s credibility as a witness.

demonstrates Respondent treated Bisono disparately, and discharged him a second time unlawfully.

While the ALJ finds urinating in a disposable bottle “disgusting,” his personal opinion on this practice is not relevant to deciding the allegation. Disgusting or not, as was the undisputed testimony of many witnesses at the hearing, urinating in bottles was and is the regular practice of Respondent’s employees while on the job site.<sup>13</sup> The appropriate question, which the ALJ ignores, is why Respondent terminated Miguel Bisono for doing something the majority of Respondent’s employees do regularly with Respondent’s acquiescence. While the ALJ bases his decision on his personal disgust for urine in a bottle, a more-serious analysis is needed.

The only difference between Bisono’s incident and the everyday practice of Respondent’s employees is that Bisono urinated in a bottle that another employee, Melvin Brown, claimed had not yet been discarded. While the uncontroverted testimony is that there was very little liquid left in the bottle, and the bottle was among other garbage on the truck floor, the focus of the analysis has to be on how Respondent responded to Brown’s complaint that another employee had urinated in a drink bottle he claimed was not yet finished. Was Respondent’s response consistent with its usual practice? In the absence of union activity, would Respondent have terminated another long-term employee over this type of dispute?

The evidence shows Respondent handled Miguel Bisono’s incident outside of its usual practice. As with the October 4 incident, the local managers took the unusual step of bringing in Ross from corporate to do the investigation that would typically have been handled locally. As with the October 4 incident, Ross again took the extra step of making transcripts of all employee

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<sup>13</sup> At one point in the hearing, the ALJ inappropriately sought to prevent the General Counsel from putting in evidence regarding Respondent’s practices with regard to employees urinating in bottles. (760:7 – 762:18). Nonetheless, the record contains repeated testimony from many witnesses that urinating in bottles was a common and permitted practice.

interviews, and creating a substantial written report of his findings. (GC 11). Ross's involvement itself in such a matter was peculiar, and facility manager Burke explained the special treatment in what amounts to an admission: "[Bisono] was with the Union and I felt I would be impartial [sic] towards him." (153:6 – 13). Nonetheless, Burke ultimately makes all decisions regarding discipline, and there is no evidence any exception was made for Bisono's second termination. (1448:14 – 18).

Respondent initially tried to frame the incident as a health issue. However, to the degree that is an accurate formulation of the situation, Respondent's handling of the matter contrasts greatly from how Respondent reacted to the situation of Jose Mota, treating Mota's exposure to fecal matter as an amusing joke. Respondent's reaction to Mota is especially confounding as, unlike Brown, Mota was actually exposed to waste material. Respondent's expressed concern for the health of Brown, who had no contact with urine in the bottle, is dubious, and it is telling that Respondent requested a subpoena for Brown, yet never called him to testify. Similarly, Respondent never called safety manager Guerrero, who is not only responsible for safety at the facility, but was Respondent's Spanish translator throughout the situation in dispute, and the only witness in a position to counter Bisono's testimony.

Respondent also tried to claim the incident was somehow a dispute between employees, Bisono's "willful intent to agitate a co-worker," as Ross claimed. (1277:21 – 25).<sup>14</sup> While the evidence contradicts this and shows Bisono had no desire to harm or agitate Brown, even considering the matter "an employee dispute," Respondent has never terminated employees for such things. For example, Respondent's records show two employees engaged in a "heated argument (which, if no action was taken would surely have turned into a physical

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<sup>14</sup> Again, Ross contradicts himself, admitting Bisono never intended to harm Brown, then claiming he was "horsing around," and then admitting it was neither a joke nor "horseplay." (1277:5 – 20).

confrontation),” yet each employee in that situation was issued only a written warning, and allowed to continue working after being separated. (GC 59(1), GC 50 pg. 2). This is in marked contrast to the handling of the situation with Bisono.

While Bisono’s second termination occurred following the union election, no conclusive result to the election had yet been reached, and the union campaign was still underway. (An overview of the representation case is at JD pgs. 1-2). Respondent presented no evidence showing it would have terminated Miguel Bisono even in the absence of his union activity, a burden Respondent carries under *Wright Line*. The ALJ fails to properly assess the merit of this allegation, emphasizing instead the dirtiness of the employees’ practice of urinating in bottles. That is irrelevant. The evidence shows Respondent again acted disparately and opportunistically to terminate a union supporter. A violation on the second Miguel Bisono discharge should be found.

### **CONCLUSION**

The General Counsel respectfully submits that the evidence shows Respondent committed multiple additional violations of the Act. While the ALJ fails to find these violations, as discussed above, the ALJ again fails to properly apply *Wright Line*, and again ignores relevant and substantive evidence. The General Counsel therefore requests that the ALJ be reversed, and these additional violations be found.

Respectfully submitted February 18, 2010.



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