

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

SWIFT TRANSPORTATION CO., INC.

Respondent,

-and-

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

Charging Party.

Case No. 21-CA-38735

**RESPONDENT SWIFT TRANSPORTATION CO., INC.'S
BRIEF IN SUPPORT OF ITS EXCEPTIONS TO DECISION AND ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This case is before the National Labor Relations Board on Exceptions filed by Swift Transportation Co., Inc. to the Decision and Order issued by Administrative Law Judge Lana Parke on December 9, 2009. Swift submits this brief in support of those Exceptions pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations.

The ALJ's Decision is erroneous in several respects. As discussed below, the ALJ ignored relevant evidence and drew improper inferences from the testimony of the witnesses to conclude, incorrectly, that: (1) Swift's termination of two employees for falsifying criminal conviction histories and applications – acts which are consistent with its long-standing and uniformly enforced Prohibited Conduct policy and the express terms of the Company's employment application – violated Section 8(a)(3) of the Act; and (2) the Wilmington terminal manager's attempt to disperse a crowd of 50-60 on-the-clock employees in the parking lot to ensure that his employees were performing Company work qualified as an unlawful interrogation in violation of Section 8(a)(1) of the Act.

II. INTRODUCTION

As stated above, these Exceptions arise, in part, out of the Company's contested discharge of Marco Diaz ("Diaz") and Salvador Gonzalez ("Gonzalez"). From the day they applied for employment at Swift, both were placed on notice of the importance of full disclosure on their applications. The applications Diaz and Gonzalez submitted contain an "Acknowledgement" section which states, in pertinent part,

I understand and agree that any misrepresented, inaccurate, misleading, incomplete or omitted information provided by me in this application will be sufficient cause for cancellation of this application and/or separation from the Company's service if employed.

(Joint Exhibits (“JX”)¹ 1 and 7). During their initial orientation, they both signed a second “Application Update Acknowledgement” which expressly states,

I acknowledge that omissions of ... criminal convictions will constitute falsification of the employment application and will result in immediate termination of employment.

(JX 2, 8).

Swift employees across the nation attend orientation and learn about the Company’s policy on application falsification and criminal conviction disclosure. Indeed, both Diaz and Gonzalez were given another opportunity to step forward to supplement their applications during their orientation. Gonzalez did nothing in response to the Company’s offer to any previously undisclosed past transgressions. Although Diaz supplemented his application, he still failed to share his entire criminal history with the Company.

Later, the Company requested expanded background checks covering the five counties in the Los Angeles basin for Diaz, Gonzalez, and three other employees while investigating vandalism and employee harassment at the Wilmington terminal. After three of those initial expanded reports (including those run on Diaz and Gonzalez) came back with hits that were not included on those individuals’ applications or supplemental disclosures, the Company opted to run expanded reports for *all employees* at the Wilmington terminal. Ultimately, Swift discharged Diaz, Gonzalez, and six other employees pursuant to its policy on application falsification. This decision was not undertaken for any unlawful reason, nor was it based on any alleged union activity.

¹ Citations to the Administrative Law Judge’s December 9, 2009 Decision are abbreviated as “ALJ page(s):line(s).” References to the hearing transcript are abbreviated as “Tr. page(s):line(s)”; references to the General Counsel’s exhibits and to Respondent’s exhibits are abbreviated as “GCX ___” and “RX ___”, respectively.

III. EXCEPTIONS

A. **The ALJ Committed An Error of Fact By Concluding That Swift Did Not Rebut General Counsel's *Prima Facie* Case Of Discrimination.**

As ALJ Parke held, “to the extent he had failed to detail the court-imposed suspensions, Mr. Diaz had, in fact, submitted a false application to the Respondent and such was, ostensibly, a terminable offense.” (ALJ 27:35-37). Nonetheless, the ALJ still held, “the Respondent must provide that it would have implemented the discharge even in the absence of Mr. Diaz’ protected activity. The Respondent has not met its burden. There is no evidence the Respondent had a zero tolerance policy for false applications.” (ALJ 27:40-43). As explained below, those conclusions ignore the record evidence. There was express testimony that Swift terminated other employees for like offenses. Notwithstanding, the ALJ somehow concluded that Swift failed to rebut General Counsel’s *prima facie* case.

B. **The ALJ Committed Reversible Error By Substituting Her Own Judgment For Swift’s With Regard To Diaz’s Termination.**

ALJ Parke improperly drew an adverse inference against Swift because it did not, in her opinion, undertake the interview for an investigatory or evaluative purpose. (ALJ 28:1-5). She also improperly substituted her own business judgments by holding that “[a]lthough there was no evidence as to what criteria the Respondent used in deciding whether or not to retain such an employee, there is no question that retention was a viable option.” (ALJ 27:47-49).

C. **The ALJ Committed Reversible Error By Substituting Her Own Judgment For Swift’s With Regard To Gonzalez’s Termination.**

ALJ Parke acknowledged that Gonzalez’s omitted convictions “fit within the categories of convictions that normally disqualify from employment,” but she still held that the decision to terminate his employment violated the Act because “there is no evidence the Respondent even considered the fact that 12 years had passed since Mr. Gonzalez’ convictions or that the crimes on which they were based were committed when Mr. Gonzalez was very young.” (ALJ 30:17-23). Swift is not under any obligation by law, contract, or otherwise to engage in that balancing

test, and ALJ Parke committed reversible error by basing her decision on her opinion that it should have.

D. The ALJ Committed An Error Of Fact By Holding That Swift Acted Inconsistently With Its Own Policies.

The ALJ's Decision is also based on an error of fact – specifically, Swift's "apparent failure ... to follow its policy of evaluating and considering the circumstances surrounding false applications." (ALJ 30:31-32). There was no testimony or record that Swift had a uniform policy of permitting employees to explain away their omissions when caught in a lie.

E. The ALJ Committed An Error of Law By Holding That Swift Violated The Act By Ensuring That Employees Were Working While On The Clock.

The final Exception to ALJ Parke's Decision relates to her disregard for Terminal Manager Obray's credible testimony that he asked a group of on-the-clock employees, "What are you guys doing?" Instead, she found that he committed an unlawful interrogation by asking employees whether they were talking about the Union. (ALJ 20:45-46; 21-2). While ALJ Parke grounded her conclusion in the Board's *Rossmore* decision, she failed to analyze the situation based on the factors set forth therein. She also failed to make specific findings on witness credibility. (ALJ 20:48-52). The latter is a particularly grave error because General Counsel's witnesses offered different versions of what occurred.

IV. STATEMENT OF FACTS

Swift Transportation, which is headquartered in Phoenix, Arizona, is the largest truckload motor carrier in the world. (Tr. 794:12-16). Swift's Chairman, Jerry Moyes, founded the Company 40 years ago and has grown it from two trucks to a fleet of more than 14,000. (Tr. 774:15-775:8). With approximately 22,000 drivers, Swift performs its business out of forty full-service facilities in both the continental United States and Mexico. (Tr. 775:9-11; 777:25-778:1).

Swift requires its employees to exemplify the highest level of professional conduct while at Company facilities and on the job. (JX 3 at STC00415). Swift also places a heavy emphasis

on safety and the maintenance of a respectful working environment, and it does not tolerate any conduct which violates those policies. (Tr. 873:19-876:16; JX 3 at STC00406).

The Company has succeeded in making itself a carrier of choice based on its high level of security. (Tr. 793:18-794:16). The freight Swift transports, which ranges from electronics to pharmaceuticals, is highly valuable, and cargo theft is a major issue for the Company. (Tr. 794:2-16). To ensure maximum security, it employs various Corporate Security personnel, including Vice President Gary Fitzsimmons and Director Shawn Driscoll, both of whom are based in Phoenix and responsible for ensuring that all 40 Company terminals are secure. (Tr. 792:23-793:9). Swift also employs field Security Investigators like Mark Donahue, who served at the California Highway Patrol as a cargo theft investigator for 27 years prior to joining Swift. (Tr. 870:14-17). The Corporate Security department runs background checks on drivers as an added measure of defense. (Tr. 792:23-793:9) Because of the importance of tight security, Fitzsimmons and Driscoll are permitted to make termination decisions without having to seek prior approval from Human Resources or Operations. (Tr. 800:8-12).

A. Swift's Hiring Process.

Swift serves the Ports of Los Angeles and Long Beach out of its Wilmington, California terminal. In 2008, the Company altered an existing over-the-road drop facility in Wilmington, California to serve the Ports and local customers. (Tr. 776:17-777:4). The Company then hired drivers and management staff with Port-related experience. (Tr. 33:11-18; 139:11-14; 280:19-21; 335:14-17; 424:18-19). The majority of drivers at the Wilmington facility were hired between August and October 2008. (*Id.*) The drivers at the Wilmington terminal, like all Swift employees, are employed at-will. (Cal. Labor Code § 2922; Tr. 111:2-7; 764:12-18; JX 3 at STC00406).

1. Swift's Employment Application.

Driver applicants must complete a Swift employment application prior to being hired. That application includes a series of questions relating to driving and criminal conviction history.

Applicants are required to respond truthfully to those questions. (Tr. 917:23-25; JX 1). By submitting the application, applicants sign two acknowledgements which provide:

I understand and agree that any misrepresented, inaccurate, misleading, incomplete or omitted information provided by me in this application will be sufficient cause for cancellation of this application and/or separation from the Company's service if employed. (JX 1, 7).

and

I acknowledge that omissions of ... criminal convictions will constitute falsification of the employment application and will result in immediate termination of employment. (JX 2, 8).

Applicants also acknowledge that they are employed at-will, and as such may be terminated "at any time, for any reason, with or without notice." (*Id.*)

Question F, which is located on the first page of the application, asks clearly and unequivocally, "Have you ever been convicted of a criminal offense? (A conviction will not necessarily disqualify you from employment.)" (*Id.*) If an applicant marks "yes," he must provide additional information about the circumstances and date of the conviction. (*Id.*)

2. Swift's New Driver Orientation.

All newly hired drivers attend a two-day orientation. (Tr. 455:12-14). The majority of Wilmington new hires, including Diaz and Gonzalez, attended orientation at Swift's Fontana, California terminal in 2008. (Tr. 63:10-14; 421:16-20; 871:22-872:10).

The purpose of orientation is to educate drivers on Company policies, including its at-will employment and "Prohibited Conduct" policies. (Tr. 454:1-18; 872:7-10; 873:6-21). Drivers are also provided with a copy of Swift's Driver Manual, which contains those policies as well as others governing their employment with the Company. (Tr. 454:1-456-5; Tr. 873:4-21; JX 3, 4, 9). Pursuant to Swift's Prohibited Conduct policy, employees may be immediately dismissed for:

- Threats, coercion or use of insulting, offensive or abusive language or conduct towards others, including employees, Managers or customers; and
- Improper completion, misrepresentation, omission or falsification of employment application, expense reports, timecards or any other Company records or reports.

(JX 3 at STC00415-416). Because compliance with these policies is essential to the Company's continued success, they apply to all Swift employees and are uniformly enforced. (Tr. 874:2-878:3).

Orientation consists of several modules, including one on corporate security. Driver applicants are shown a videotape on corporate security procedures, including the background check process and requirements, during that session. (Tr. 795:16-796:19; 877:10-20). Additionally, Swift Corporate Security Investigator Mark Donahue has made live presentations at the Fontana orientation sessions over the past few years. (Tr. 871:22-872:10). Donahue directs drivers to highlight and read the Prohibited Conduct policy. (Tr. 874:5-24). He also spends time going through the list of examples to ensure that drivers understand the various provisions. (Tr. 874:25-875:2).

The standard video on corporate security emphasizes the noteworthy aspects of Company policy, including the importance of providing truthful information on job applications. (Tr. 795:25-796:19). At the conclusion of the video, applicants are provided with a second opportunity to truthfully disclose their prior criminal convictions. (Tr. 796:20-22; 878:4-6). Applicants are then provided with a "conviction form" at orientation if they wish to amend their application. (Tr. 878:17-20). Although the Company mandates amendment of employment applications if previously incorrect, it does not automatically disqualify applicants who so amend during orientation. (Tr. 796:20-797:5; 878:7-24). Applicants are reminded that any failure to truthfully disclose requested information will result in termination for application falsification. Donahue places a similar emphasis during his live presentation on the driver applicants' obligations to fully and truthfully disclose their prior criminal histories. (Tr. 877:7-878:3). In

particular, Donahue explains that drivers must disclose all convictions – whether felonies or misdemeanors – after age 18 through the present date, or if they were treated and prosecuted as an adult, even though they might have been a minor. (Tr. 877:21- 878:3; 918:1-10; 918:21-22).

Driver applicants also complete a “Driver Orientation Training Sign-Off Form” which tracks the various types of information presented at orientation, and specifically agree to abide by the Company’s policies and procedures. JX 14.

3. Swift’s Background Check Process.

As stated above, the Company performs background checks on its new employees. It conducted more than 25,000 such checks in 2008 alone. (Tr. 795:5-11; 797:6-11; 836:24-837:1; 876:6-11). Applicants for employment are notified of the background check requirements during the hiring process. (Tr. 765:16-24). Although not all convictions will disqualify an individual from employment, convictions for theft, drugs, and aggressive behavior usually do. (Tr. 799:11-19). Also, multiple convictions may disqualify an applicant from employment. (Tr. 816:14-25). Gary Fitzsimmons and Shawn Driscoll have the authority to determine which types of convictions disqualify applicants from employment. (Tr. 817:1-6). They make their decisions on a case-by-case basis.

Company recruiters initiate the background checks during the hiring process by making a request with Swift Corporate Security. (Tr. 837:22-838:1; 852:16-25). The Company engages Hire Right, a third party vendor, to perform the general criminal conviction reports. (Tr. 837:5-11). Phoenix-based Security Investigators, like Angelica Flores who testified during the hearing, place orders for applicant background checks via the Internet using personal identifiers provided by the applicant, like his name, social security number, date of birth, and county of residence. (Tr. 837:12-21; 838:2-5).

Hire Right produces various criminal background check reports for the Company’s use. During the application process, the Company typically requests four reports on all driver applicants. The Company usually first requests a “CDLIS” report, which contains history for an

individual's commercial driver's license, commonly referred to as a CDL. (Tr. 852:11-15). Next, the Company requests an "SS ID" report, which provides a "hit" if the applicant's social security number has been reported deceased. (Tr. 853:3-7). The Company then requests a "transportation employment history" report, which provides information on the applicant's employment history at prior transportation jobs. (Tr. 853:8-10).

The final report requested by the Company depends on the criminal history information provided by the driver on his employment application. (Tr. 841:22-842:1). If the driver applicant has not disclosed criminal convictions on his employment application, the Company will only run a "widescreen report." (Tr. 841:22-842:5). A widescreen report criminal background check is run for all California drivers. (Tr. 838:18-839:14). If a criminal record matches the applicant's personal identifiers, the widescreen report returns a hit. (Tr. 851:13-16). If no match is found, the widescreen report is returned as "clear." (Tr. 853:15-854:1). Widescreen reports are usually completed within 72 hours. (Tr. 838:2-10). If the driver applicant has disclosed prior criminal convictions on his employment application, Hire Right would run a "Trac to Crim" search, which is a more detailed process, instead of a widescreen search. Hire Right uses the applicant's Social Security number to trace prior residences and create a list of the jurisdictions where the applicant has resided. (Tr. 840:12-841:7). Once the Social Security trace is complete, Hire Right automatically orders criminal history reports for every county in which the individual has resided. (Tr. 841:1-15). A Hire Right researcher must physically visit courthouses in each jurisdiction to obtain records to complete the report. (Tr. 842:11-16; 842:23-843:8). The timeframe for producing a Trac to Crim report varies by jurisdiction. The Company may have to wait up to two weeks – the common turnaround time for Los Angeles County – for the results. (Tr. 842:6-22).

Swift Corporate Security personnel based at its Phoenix headquarters review the background checks and compare the results with the information previously submitted by the applicant. (Tr. 797:12-798:5; 838:11-15). Corporate Security Investigators refer applications with discrepancies to Shawn Driscoll, Director of Security, for further review. (Tr. 838:13-17).

Corporate Security employees evaluate whether it would be best to approve or reject an applicant on the basis of the offense(s). (Tr. 797:22-798:11; 798:21-799:10). Corporate Security personnel sometimes, but certainly not always, interview applicants to gather additional information about their conviction history. (Tr. 799:2-10). Interviews are reserved for instances when the decision whether to terminate is not clear cut. (*Id.*)

As stated above, Donahue directs employees to come forward during orientation and amend their applications if they omitted potentially disqualifying information like criminal convictions. If they file an amendment, Donahue reviews the original employment application and the amendment form, and then compares the two. (Tr. 878:7-16). After reviewing the two documents, Donahue sometimes interviews the applicant to elicit further details of the newly-disclosed criminal convictions. (Tr. 878:21-879:2). Once the interview is complete, Donahue determines whether the applicant is approved to continue work at the Company. (Tr. 879:15-24).

B. Vandalism And Misconduct At Swift's Wilmington Terminal.

On or around February 5, 2009, Terminal Manager Brennan Obray noticed that one of the tires on his personal vehicle had been slashed. (Tr. 886:19-22). He then notified Mark Donahue, who is based out of Swift's Fontana facility, about the incident. (Tr. 886:11-18). Prior to working for Swift, Donahue was a law enforcement officer for the California Highway Patrol for twenty seven years. (Tr. 870:13-17). In his role as a Security Investigator, Donahue is responsible for investigating theft, workplace violence, and other issues at Swift terminals throughout the United States, including the one in Wilmington. (Tr. 870:24-871:18).

1. Donahue's Initial Investigation Into The Harassment And Intimidation Of Driver Hugo Molina.

Donahue traveled to the Wilmington facility on February 6, 2009 to conduct an investigation. (Tr. 887:17-19). While there, Swift driver manager Mery Rodales² informed him that Hugo Molina, one of the Company's drivers, had been threatened by other Swift employees. (Tr. 891:25-892:9). Donahue spoke with Molina about this issue later that same day.

² Ms. Rodales is referred to as "Mary Raudales" throughout the ALJ's Decision.

(Tr. 892:10-20). Molina stated during that conversation, which was partially transmitted by Rodales, that he was previously threatened by Diaz and Diego Lopez in the parking lot. (Tr. 892:22-893:3; 893:8-11). He also expressed to Donahue his personal concern that the situation might get worse. (Tr. 893:1-3).

Donahue then interviewed Diaz that same day. (Tr. 893:14-17). At that time, Diaz admitted that he confronted Molina in the yard about a rumor that Molina was reporting drivers to management who were on the clock but not working. (Tr. 895:6:20). Because it was totally irrelevant to the purpose of his investigation, Donahue did not ask Diaz about his union activities. (Tr. 897:3-7). Diaz acknowledged that at no time during the interview did he and Donahue discuss the Union or union supporters, nor did Donahue ask him about either of those topics. (Tr. 68:12-78:22; 897:3-7; G.C. Exh. 9, ¶11). Donahue concluded afterwards, presumably based on his years of law enforcement experience, that Diaz was not credible. (Tr. 897:17-19).

Donahue also interviewed Lopez that day about his involvement in the Molina confrontation. (Tr. 897:22-898:5). The interview was short because Lopez had child care issues that day and needed to leave. (Tr. 898:6-10). Lopez denied threatening Molina, but did state that Molina was mad because Lopez and Diaz accused him of being a snitch. (Tr. 168:3-15). At no time during that very short meeting did Donahue ask for information on union supporters or otherwise ask about the Union. (Tr. 898:11-16). At trial, Lopez claimed for the first time that Donahue asked him about Diaz's union activities. Specifically, Lopez claimed that Donahue wanted to know whether Diaz was a Union leader. Lopez though, never made any such allegation in the written statement he provided to the Union shortly after the interview in February. If Donahue had, in fact, asked Lopez about the union activities of other employees, such a question would undoubtedly be the entire focus of any statement provided to the Union. (Tr. 185:12-191:15; RX 1). Moreover, if Donahue asked Lopez about Diaz's union affiliation, presumably he would have asked the same about Lopez himself, but Lopez admitted that Donahue never asked him whether he supported the Union. (Tr. 184:9-15). Because February 6,

2009, was a Friday and it was getting late in the day, Donahue adjourned his investigation for the weekend. (Tr. 899:4-7).

When Donahue met with Molina a second time the following week, he learned that one of the tires on Molina's vehicle had been slashed and that his personal vehicle had been broken into at his house. (Tr. 923:1-10). Donahue also received a phone call from Molina's sons, who were concerned because two men came to Molina's house looking for him. When the men were told that Molina was not there, they responded "We'll talk to him at work." (Tr. 905:1-3; 924:24-4).

Diaz previously represented himself to Donahue as "the kind of guy people could come up and talk to." (Tr. 897:10-11). For that reason, Donahue held a second meeting with Diaz to see if he could provide any information about who visited Molina's house or slashed his tires. (Tr. 906:16-907:4; 905:15-906:6). Diaz denied having any knowledge about those topics. (Tr. 906:7-9). Towards the end of the meeting, Diaz volunteered to Donahue that he heard that drivers were talking about the union. (Tr. 907:10-12). Donahue responded that he was not interested in union issues; his goal was to fix problems with vandalism, drivers getting threatened, and other threats and acts of violence. (Tr. 907:19-24). Donahue did not discuss any other union related issues with Diaz. (Tr. 908:2-6).

2. The Company's Second Round of Background Checks In Furtherance Of Its Investigations Into Threatening Conduct And Vandalism.

Because the Company had not experienced these types of incidents with any frequency, Donahue's superiors, Gary Fitzsimmons and Shawn Driscoll, stayed peripherally involved. (Tr. 802:2-803:4; 821:24-822:14). Fitzsimmons discovered during a conversation with Driscoll that the Company was not running background checks for its Los Angeles area drivers against the databases for all five counties in the Los Angeles basin. (Tr. 803:9-24; 818:18-820:21). Fitzsimmons then ordered that five county background checks be run on the five drivers who were suspects in Donahue's investigation, which included Diaz and Gonzalez. (Tr. 803:25-

804:4; 820:22-23). Phoenix-based Security Investigator Angelica Flores then placed the order. (Tr. 846:20-847:3). At first, Fitzsimmons did not order five county background checks for all employees at the Wilmington facility because of the cost associated with such an undertaking. Tr. 804:9-14.

Flores reviewed the results of the checks and noted that Hire Right's reports for Diaz and Gonzalez, along with one other individual, included criminal convictions that had not appeared on the reports run at their time of hire. (Tr. 848:4-16). Flores reported the discrepancy issue to Driscoll, who then notified Fitzsimmons. (Tr. 849:4-6).

3. Termination Of Diaz And Gonzalez's Employment At Swift.

When Driscoll notified Fitzsimmons, Fitzsimmons happened to be at the Wilmington facility with Donahue to discuss the heightened security measures needed to implement a cross-dock operation which was being contemplated by Swift. (Tr. 805:14-806:7). Because he was on site, Fitzsimmons decided to personally conduct the meetings with Diaz and Gonzalez. (Tr. 822:23-823:5). Prior to those meetings, Fitzsimmons reviewed Diaz and Gonzalez's background check results and applications. (Tr. 806:17-807:3; 823:9-15).

Fitzsimmons and Donahue met with Diaz on February 24, 2009 in the Wilmington conference room. (Tr. 806:5-16). Fitzsimmons walked through Diaz's employment application, the amendment to it for criminal conviction issues Diaz submitted during orientation, and Donahue's notes of the orientation interview. (Tr. 806:17-25; RX 16, 17; JX 5). During the interview, Diaz readily admitted that he failed to list two convictions for contempt of court for which he received three years of probation and a conviction for violation of a protection order for which he received two years of probation. (Tr. 808:19-809:7; RX 14). Diaz also admitted that he had originally submitted a false application during orientation, but that he had amended his application during orientation to include a conviction for soliciting a prostitute. (RX 14). Diaz further admitted that he listed the wrong year for that solicitation conviction. (*Id.*) In light of Diaz's admission that he failed to list contempt of court and violation of an order of protection

on his application, Fitzsimmons immediately terminated Diaz's employment. (Tr. 808:19-809:7). Neither Diaz nor Fitzsimmons mentioned the Union at any point during the termination meeting. (Tr. 809:8-12). Copies of Fitzsimmons' notes were entered into the evidentiary record as RX 14. Fitzsimmons alone made the decision to terminate Diaz's employment. (Tr. 815:8-10).

Fitzsimmons went through the same process for Gonzalez – *i.e.*, he reviewed Gonzalez's original employment application, in which Gonzalez claimed that he had no criminal convictions (Tr. 811:9-11; JX 7), and the original and expanded background check reports. The additional report revealed that, in fact, Gonzalez had been convicted of: (1) receiving/concealing stolen property, for which he received three years of probation and 30 days of community service; (2) carrying a loaded firearm in a public place, for which he received three years of probation and had the weapon confiscated and destroyed; and (3) challenging to a fight in a public place, for which he received one year of probation and 20 days community service.

After Diaz's termination meeting, Fitzsimmons and Donahue met with Gonzalez in the Wilmington conference room. (Tr. 810:10-18). Gonzalez admitted that he received three convictions in Los Angeles County, and that he did not list any of them on his employment application. (Tr. 814:2-11). When Fitzsimmons informed him of his termination, Gonzalez responded, "I know why you guys are doing this." (Tr. 814:12-18). Fitzsimmons was presumably not interested in Gonzalez's theory of why he was fired and did not respond. Fitzsimmons did not know whether Gonzalez supported the Union. (Tr. 814:19-23). The decision to terminate Gonzalez rested solely with Fitzsimmons; he did not consult human resources, Terminal Manager Brennan O Bray, or CEO Jerry Moyes prior to effectuating the discharge. (Tr. 814:25-815:7).

Fitzsimmons was so concerned about these false applications that he decided to run all current and prospective Wilmington employees through the five county background check process. (Tr. 804:9-25; 821:8-20; 849:11-850:12). Five additional drivers were discovered

through the expanded report process to have submitted false applications. Like Diaz and Gonzalez, their employment was also terminated. (Tr. 815:11-16).

C. Obray's Parking Lot Conversation.

Terminal Manager Obray received a number of employee complaints about low load volumes and other operations-related issues in mid-January 2009. Obray asked the drivers to select one representative from each shift so he could address their concerns in an orderly fashion. (Tr. 42:23-43:6; 724:2-4; 724:23-24).

The following day, Obray noticed a group of 50-60 drivers standing in the employee parking lot when he returned to the facility from picking up his lunch. (Tr. 652:16-653:16). He was immediately concerned, especially because the drivers were hourly employees and presumably on-the-clock but not performing any work. (Tr. 627:16-27). Obray then parked his car and jogged out to the group. (Tr. 377:12-378:3; 653:17-22, 654:9-21). The drivers watched Obray approach the group. (Tr. 654:22-655:8). Obray's initial question was clear and succinct: "What are you guys doing?" (Tr. 378:4-5; 655:7-10). Only Anthony Herron responded and he stated that the drivers were "putting together driver representatives" like Obray requested. (Tr. 655:11-19). Obray was not pleased with that response because most of the drivers probably should have been dispatched out on loads. Notwithstanding, he offered the drivers the use of the driver conference room behind the office. (Tr. 655:24-656:7). Herron declined, citing the drivers' propensity to use foul language. (Tr. 656:8-12). Obray then returned to his office. (Tr. 656:13-16). Obray's testimony was unequivocal: the Union was never mentioned at any time during his brief encounter with Herron in the parking lot. (Tr. 656:17-24). The ALJ found Obray's testimony, in general, to be "forthright and clear." (ALJ 7:35-43).

V. ARGUMENT

A. The Two-Member Board Lacks Jurisdiction To Issue A Final Decision And Order In This Case.

Section 3 of the Act creates the Board, which consists of five members, "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). "The Board is

authorized to delegate *to any group of three or more members* any or all of the powers which it may itself exercise.” 29 U.S.C. § 153(b) (emphasis added). The Act provides that:

[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

Id. The statutory intent is clear from a straightforward reading of its language. The Board consists of five members. A quorum, which is necessary for the Board to act, requires at least three members. The Board can delegate its powers to “groups” of “three or more members.” Two members of such “groups” of three or more members constitute a quorum of such groups for the transaction of business. The Board’s regulations reflect this legislative intent. *See* 29 C.F.R. §§ 102.2 and 102.138.

According to the Board’s December 28, 2007 press release, Chairman Battista’s term expired December 16, 2007. The terms of Members Kirsanow and Walsh, who were serving under recess appointments, expired when the 110th Congress adjourned on December 31, 2008. Pursuant to the March 4, 2003 Office of Legal Counsel (“OLC”) Memorandum, on December 20, 2008, the then four-Member Board delegated all of its powers to three of its then-sitting members, indefinitely, despite knowing that two of those four Members’ recess appointments would expire in a matter of days upon the adjournment of the 110th Congress. Ignoring the fact that this “group” would shortly consist of only two Members, the Board attempted to avoid the requirements of the statute by making this delegation before the recess appointments of Members Kirsanow and Walsh expired. While sanctioned by the OLC Memorandum Opinion, this action is not supported by the Act or the Board’s rules and regulations, basic principles of organizational governance, or the scant authorities referenced in the OLC Memorandum.

The statutory and regulatory intent are largely self-evident from their language. A quorum of the Board may delegate its powers to “groups” of three or more members. While “[a]

vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board,” the Act says nothing about vacancies in the “groups” to which Board functions may be delegated. And while one or more vacancies may not impair the authority of the Board as a whole to perform its functions, even this proviso is subject to the limitation that the Board itself must have a quorum of three or more members to act. Where, as here, vacancies reduce the Board to less than a quorum, it is in fact “impaired” from further action by the statutory quorum requirement.

Clearly, there is no similar proviso allowing a reduced group of three members to act where the Board itself has only two active members. All of the statutory and regulatory provisions clearly contemplate that the “groups” shall be composed of three members, as an irreducible minimum. While the Board may act with four members, or even three, a three member quorum of the Board cannot delegate its authority to a two member “group” composed of two active members and one former member. The Board’s December 20, 2007 attempt to keep itself “alive” defies basic principles of organizational governance. For these reasons, the two-Member Board is without jurisdiction to issue a final decision resolving Swift’s exceptions to the ALJ’s Decision. Accordingly, Swift requests that the Board defer ruling on its exceptions until a three-Member quorum is re-established.

B. The General Counsel Failed To Establish A *Prima Facie* Case Of Unlawful Discrimination Against Marco Diaz Or Salvador Gonzalez.

Violations of sections 8(a)(1) and 8(a)(3) of the Act are analyzed under the causation test laid out in *Wright Line Inc.*, 251 NLRB 1083, 1089 (1980), *enf’d*, 662 F.2d 899 (1st Cir. 1981). Under that test, an employee must initially “make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” *Id.*

To demonstrate a *prima facie* case, the Charging Party must show that: (1) the employee engaged in protected activity known to the employer, and (2) the protected conduct is a substantial or motivating factor for the employer’s action. *See, e.g., Peter Vitalie Co., Inc.*, 310 NLRB 865, 871 (1993) (explaining that “[t]he classic elements commonly required to make out a

prima facie case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus”).

If the General Counsel articulates a *prima facie* case, the burden shifts to the employer to rebut this showing by demonstrating a legitimate, nondiscriminatory motive for its actions. *See Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993); *Wright Line, supra*, 251 NLRB at 1089.

Throughout this burden shifting analysis, the General Counsel retains the ultimate burden of proving the elements of an unfair labor practice by a preponderance of the evidence. *Wright Line, supra*, 251 NLRB at 1088 n.11.

1. Counsel For The General Counsel Failed Establish That Swift Knew About Alleged Union Activity.

One of the essential elements of a *prima facie* case of discrimination on the basis of protected activity is a showing that the employer knew of the concerted nature of the employee’s activity. *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom., *Prill v NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*) aff’d sub nom., *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

Assuming, *arguendo*, that the ALJ’s findings that Diaz and Gonzalez participated in concerted, protected activities are true, her conclusion that General Counsel established a *prima facie* case of discrimination is in error because there is no evidence in the record to support a conclusion that Gary Fitzsimmons, Swift’s decision maker, knew about those activities. Because General Counsel has not established knowledge, which is an essential prong of its *prima facie* case the ALJ’s decision with respect to the Diaz and Gonzalez discharges must be reversed.

a. Fitzsimmons Made The Termination Decision, And He Did Not Know About Diaz’s Alleged Concerted, Protected Activities.

The ALJ improperly found that that it was “reasonable to infer” that Swift knew about Diaz’s union proclivities based on the second meeting between Donahue and Diaz during the

Molina investigation. (ALJ 27:9-11). Contrary to the ALJ's findings, that meeting was not for union fact-finding – it was to figure out who was harassing and terrorizing another Company employee.

During that meeting Diaz denied knowing what was going on with Molina. Out of concern about the potential scope of the issue and because Diaz represented that he was somebody the drivers talked to about their problems at work (Tr. 906:15-23), Donahue pressed him about “what do they talk with you about?” (Tr. 906:15-907:4). Diaz then provided a laundry list of issues that drivers brought to his attention, like payroll and truck parking. (Tr. 77:1-7). He also told Donahue that he had heard that drivers were talking about the Union. (Tr. 907:10-16). At the hearing, Donahue testified that he responded,

I didn't care one way or the other what they talked about as far as the Union. What I care about is drivers getting threatened, drivers becoming victims of vandalism, of physical violence or threats of physical violence. Those are what I care about.

(Tr. 907:17-24). At no time did Donahue ask Diaz for names of union supporters. (Tr. 907:25-908:6). Nor did Diaz state that he was a Union supporter. In fact Diaz testified that he never told anyone in management that he supported the Union at any time. (Tr. 41:22-25). There is no record evidence that Donahue knew Diaz supported the Union, and, likewise, no record evidence that Donahue's interview with Diaz was for any unlawful purpose.

Even assuming, for the purposes of these Exceptions only, that Donahue knew Diaz was a union supporter, there is no evidence that he shared it with Fitzsimmons, who was the undisputed decision maker. (Tr. 815:8-10). There is no evidence that Fitzsimmons convened the termination meeting for some nefarious reason. He happened to be in town from Phoenix to address security measures for a contemplated cross-dock operation at the Wilmington terminal. (Tr. 805:14-806:7). He is Swift's top security official and the vandalism and extensive reports of employee threats were a matter of great concern to Swift. Because he was on site, Fitzsimmons decided to personally conduct the meeting with Diaz. (Tr. 822:23-823:5). Further, there is no record evidence that Fitzsimmons knew about Diaz's alleged union activities, that Diaz said

anything about his alleged union activities, or that Fitzsimmons asked him about his alleged union activities. Rather, Fitzsimmons' testimony, reproduced below, is unrefuted.

Q. Did Mr. Diaz say anything about the union during that conversation?

A. He said nothing.

Q. Did you say anything about the union?

A. No.

(Tr. 809:8-12).

Q. Did you know whether Mr. Diaz supported or didn't support the union?

A. No.

(Tr. 814:21-23). The General Counsel failed to introduce any evidence that Fitzsimmons knew about Diaz's union activities or improperly based his decision any such facts, and as a result, the ALJ's finding that the General Counsel established this prong of the *prima facie* test of discrimination toward Diaz was clearly in error.

b. Fitzsimmons Made The Termination Decision, And He Did Not Know About Gonzalez's Alleged Concerted, Protected Activities.

Similarly, General Counsel failed to establish that Swift had knowledge of Gonzalez's union activities. The ALJ found such knowledge on the basis of Gonzalez's question to Jerry Moyes, Swift's CEO, about Swift's wage rates and, by comparison, union packages, and his snide comment to Moyes. (ALJ 29:10-15).

Although others might have known more, Fitzsimmons' knowledge of what Gonzalez may have said was substantially limited. Fitzsimmons did not attend the meeting in person. At the hearing, Fitzsimmons testified that he was told "there was a person at the meeting that was rude to Jerry in the background and was making comments or whatever." (Tr. 834:13-15). Fitzsimmons' testimony was clear: he did not know that Gonzalez was the "rude" individual in question (contrary to the ALJ's assertion in footnote 22). (Tr. 825:25-826:16; ALJ 12:fn22).

That level of awareness (or lack thereof) is insufficient to support knowledge of alleged concerted, protected activity. Further, Gonzalez never told any manager at Swift that he supported the Union, and specifically never said anything to Fitzsimmons about the union during his termination meeting. (Tr. 336:17-19; 357:18-359:16).

Again, Fitzsimmons was the undisputed decision maker. He did not consult with Terminal Manager Obray, CEO Moyes, or anyone else before making the decision to terminate Gonzalez's employment, and the only reason Fitzsimmons delivered the message personally was because, as discussed above, he was on location for other Company business when the background checks came back. (Tr. 805:14-806:7; 814:24-7). Because he lacked knowledge of concerted activity by Gonzalez, the ALJ's finding that the General Counsel established this prong of the *prima facie* test of discrimination was also clearly in error.

2. Swift's Decisions To Terminate Were Based On Application Falsification, Which Is A Legitimate, Non-Discriminatory Business Justification.

Like many employers, Swift upholds a strict policy prohibiting application falsification. The Company's background check policy applies to all employees, and information on that policy was widely disseminated. As stated above, prospective employees repeatedly acknowledge throughout the application and orientation processes that they may be terminating for, among other transgressions, misrepresenting or omitting criminal conviction information on their applications. (JX 1, 2, 7, 8). The importance of total disclosure was also stressed during the orientation session on the Corporate Security videotape and during Donahue's live presentation. As indicated above, Donahue also reviews Swift's Prohibited Conduct policy, which is contained in the Employee Manual, with driver applications. (Tr. 873:13-876:5). That policy specifically identifies "improper completion, misrepresentation, omission or falsification of employment application" as a terminable offense. (JX 3 at STC00416).

Terminations based on dishonesty and false application are routinely upheld by the Board. *See, e.g., Piner's Napa Ambulance Service*, 352 NLRB No. 74 (2008); *Overnite*

Transportation, Inc., 343 NLRB 1431 (2004). The Board’s holding in *Overnite* is directly on point and controlling on the outcome of this matter.

There, one of the employer’s trucking terminals was the target of a troubling rash of high value theft. 343 NLRB at 1433. After “traditional methods” of investigation failed, the employer performed background checks on employees. *Id.* As a result of those checks, the employer discovered that seven employees and one supervisor failed to disclose criminal records on their job applications. *Id.* at 1432. Like Swift, *Overnite*’s application asked applicants to identify convictions, and the employee handbook identified falsification as an issue that could lead to dismissal. *Id.* at 1432, 1433. Applicants also signed an acknowledgment that each answer is “true and correct” and that “incomplete or deceptive” responses will result in termination. *Id.* at 1432. Because those eight individuals failed to abide by company policy, they were terminated for application falsification.

With respect to the termination of those individuals, the *Overnite* Board held that the employer did not violate the Act because it treated its employees consistently when it discovered application falsification. *Id.* at 1434. As stated below, that is exactly how Swift behaved when making the decision to terminate Diaz, Gonzalez, and the six other individuals whose false applications it discovered as a result of the expanded background checks run as part of its investigation into the threats, vandalism, and other misconduct at the Wilmington terminal. (Tr. 815:11-16).

a. Diaz Failed To Disclose Convictions For Contempt Of Court And Violation Of A Protective Order Despite Being Given Three Opportunities To Do So.

Upon hire, Diaz did not list any criminal convictions on his application. During orientation, Diaz, at Donahue’s urging to the group of driver applicants, amended his application to disclose “driving to [sic] fast 1989 & soliciting 6/89.” (JX 2, RX 14). Those disclosures were not treated as a false application because they were specifically solicited by the Company. Donahue then interviewed Diaz and assessed his disclosures as if they were indicated in the first

place. Most convictions themselves are not an automatic disqualifier, and Donahue determined that Diaz was still fit to drive for Swift.

Swift learned later through the expanded background check that Diaz had additional criminal issues he failed to disclose, namely two convictions for violating a restraining order and contempt of court. (Tr. 83:1-23; 85:4-86:1; 104:25-106:24; 107:4-22; 108:16-109:3). Diaz admitted during his termination meeting with Gary Fitzsimmons that he failed to list the two convictions on the application amendment he submitted during orientation, and that he also failed to honestly disclose the convictions during his orientation interview with Donahue. (RX 14).

Although Diaz claimed that he initially marked “no” on his employment application at orientation because “the lady” told him the Company only needed “to go back five years on your criminal record,” he subsequently admitted that he actually filled out his employment application online before he ever arrived at orientation. (Tr. 65:21-66:1; 130:9-18). Such a fundamental lie makes his testimony inherently suspect. Diaz also claimed that he told Donahue about his restraining order during their first orientation interview. Donahue credibly testified that Diaz never disclosed the prior restraining order.³ (Tr. 884:18-885:4). The more likely story is that Diaz did not think he would get caught, so he intentionally misrepresented his criminal background. His lie about what “the lady” at orientation told him to do supports Swift’s position on this issue.

³ Even if this were true, Diaz’s testimony is not credible. Diaz’s acknowledgement of a restraining order was not an accurate disclosure of his criminal history. Diaz does not claim that he told Donahue the truth, which was that he had *two convictions for violating the restraining order*. Thus, Diaz’s claim that he “mentioned” the restraining order is simply further evidence of his dishonesty.

b. Gonzalez Failed To Disclose Convictions For Receiving/Concealing Stolen Property, Carrying A Loaded Firearm In A Public Place, And Challenging Someone To A Fight In A Public Place Despite Being Given Two Opportunities To Do So.

When he submitted his application Gonzalez never indicated that he had any criminal convictions. (JX 8). Although he was given the same opportunity as all other prospective employees to amend his application during driver orientation in Fall 2008, he failed to do so, instead opting to continue to claim that he had no convictions. When the Company confronted him with this evidence, Gonzalez admitted that he was the same Salvador Gonzalez, and that he did, in fact, have three post age 18 convictions: receiving/concealing stolen property, carrying a loaded firearm in a public place, and challenging to a fight in a public place – both serious convictions with violent underpinnings. (RX 15).

c. Swift Terminated Diaz And Gonzalez For Application Falsification, Not For Any Unlawful Reason.

The Wilmington terminal was experiencing an unprecedented period of threats and vandalism. (Tr. 822:6-10). After corporate security conducted interviews of all of the individuals identified during the Molina investigation as possible wrongdoers, Fitzsimmons ordered expanded background checks after Obray's tire was slashed. (Tr. 826:10-16).

Based on the nature of the offenses discovered, it is unrealistic to conclude that Diaz and Gonzalez simply forgot about them. This is especially true in light of Swift's repeated emphasis on full disclosure, which would lead to any reasonable individual to jog his memory. In fact, Diaz and Gonzalez lied or withheld information about their criminal convictions two or three times (*i.e.*, on the initial application, during orientation, and, if additional disclosed during orientation, during the confirming interview).

Even assuming, *arguendo*, that Diaz disclosed the fact that he had a restraining order entered against him, he still misrepresented the truth when he failed to disclose that he was convicted of contempt of court, for which he received three years of probation, and for violation an order of protection, for which he received two years of probation. (Tr. 66:8-24; 808:19-809:7;

RX 14). Gonzalez, on the other hand, did not admit to any of his many criminal convictions until Fitzsimmons questioned him about them directly at his termination meeting. (Tr. 813:23-814:11; RX 15).

The ALJ impliedly states that it was not a universal certainty that Diaz or Gonzalez would have been terminated for their convictions because of the nature of those convictions. (See, e.g., ALJ 28:5-8; 30:16-24). Such a conclusion is beyond the ALJ's jurisdiction. The simple facts are that both Diaz and Gonzalez admitted to lying on their applications. (Tr. 808:22-809:7; 814:5-8). The undisputed record evidence is that the Company maintains open and heavily emphasized policies on security, background checks, and total disclosure on employment applications (JX 1, 2, 3 at STC00415-00416, 7, 8; Tr. 871:22-872:10; 874:5-875:2) and that the five other individuals were caught having submitted false applications during the Company's investigation into the threats of vandalism and other misconduct, and that all of those individuals were discharged. (Tr. 815:11-16). Because there is no record evidence of disparate treatment and because Swift applied its policy for application falsification in an evenhanded manner, Swift, like the company in *Overnite*, has established a legitimate business reason which adequately rebuts General Counsel's theoretical *prima facie* case. 343 NLRB at 1434.

The ALJ took exception with the fact that Fitzsimmons did not conduct an investigation or engage in any type of substantive interview of Diaz or Gonzalez before terminating them. She also found that, with respect to Diaz, "there is no question retention was a viable option." (ALJ 27:47-49). In reaching those conclusions, ALJ Parke did exactly what she claimed to not do – substitute her own business judgment. Under the Board's established case law, an employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. *Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993) ("[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change."), citing *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enforcing in part 137 NLRB 306 (1962); see also *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the Board should not

substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that “Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent’s position”).

Contrary to the ALJ’s Decision, Swift does not have a set rule requiring that it interview individuals who were caught having lied multiple times. ALJ Parke is likely confusing testimony that applicants are sometimes interviewed if their background checks return borderline convictions not included on their applications and a Corporate Security supervisor determines that additional clarification is required, or she is seeking to expand that rule. (Tr. 799:2-10). Either way, the ALJ has committed a reversible error. Swift’s legitimate, non-discriminatory business justification for these terminations should not fail because the Company does not have a policy like the one the ALJ posits, which just would have provided Diaz and Gonzalez with yet another opportunity to lie or explain away their misconduct. They were terminated for application falsification, and there is no record evidence that employees caught in such lies were given a second chance to explain themselves. The only evidence is that this rule was uniformly enforced. (Tr. 815:11-16).

Moreover, the ALJ’s disapproval of Swift’s decisions ignores the justification for its rule. The belatedly discovered offenses are all serious. The crimes discovered indicate a basic disrespect for the rule of law (contempt of court and violation of a protective order) and expose tendencies which could create a problem for cargo and workplace safety (receiving/concealing stolen property, carrying a loaded firearm in a public place, and challenging to a fight in a public place). The reason Swift runs background checks and asks the application questions it does is to bring these issues to light, and Swift was well within its rights to terminate Diaz and Gonzalez’s employment because their falsifications undermined the Company’s policies and business interests in protecting cargo. Diaz and Gonzalez both admitted, without hesitation, that they were aware of the Company’s zero-tolerance policy for false applications and also later admitted

that the convictions were theirs. (JX 2, 3, 4; Tr. 110:5-14; JX 6, 7, 8; 370:3-373:14). Both men were fired as a result of their blatant dishonesty.

3. General Counsel Cannot Rebut Swift's Legitimate, Non-Discriminatory Business Justification.

Because Swift has presented sufficient evidence to establish it would have terminated the Diaz and Gonzalez regardless of their alleged protected activities, General Counsel must be able to demonstrate that said justification is pretextual.

In these types of cases, General Counsel can establish pretext through direct or circumstantial evidence. Here, as stated above, there is no direct evidence of discriminatory motivation by Fitzsimmons. He never made anti-union comments to Gonzalez or Diaz, and there is no record evidence that Fitzsimmons had any knowledge of their union activities or that someone who did have such knowledge had input into Fitzsimmons' decision to terminate Diaz and Gonzalez's employment. (Tr. 41:22-25; 336:17-19; 825:25-826:16).

Given the absence of any direct evidence that Respondent terminated Diaz or Gonzalez because of their protected activities, the General Counsel must establish pretext with circumstantial evidence. In discrimination cases, the primary method is showing that the policy relied upon has been disparately enforced. In *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 628 n.4 (1993), the Board stated, "[a]n essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated." This necessarily requires a showing that the comparators engaged in the same offenses as the discriminatee. See *Central Valley Meat Co.*, 318 NLRB 245, 249 (2006) (in determining whether the employer unlawfully terminated a pro-union employee for engaging in sanitation violations, the NLRB focused on similarly situated employees who also violated the employer's sanitation rules); *Engineered Comfort Sys., Inc.*, 346 NLRB 661, 662 (2006) (comparing employees who committed the "same infraction" as the discriminatee).

As described above, Swift has provided the only evidence on the enforcement of this policy, and that testimony reflects that its enforcement policy was consistent with its treatment of

Diaz and Gonzalez. (Tr. 815:11-16). General Counsel subpoenaed voluminous records from Swift about its treatment of other employees and it failed to introduce any evidence of disparate treatment.⁴ Because General Counsel has not made any showing of disparate enforcement, it cannot establish that Swift's justification for its decision is pretext for discrimination. *See, e.g., Eldeco, Inc. v. NLRB*, 132 F.3d 1007 (4th Cir. 2007) (no violation for discharge pursuant to drug testing policy that was not disparately enforced); *Asarco, Inc. v. NLRB*, 86 F.3d 1401 (5th Cir. 1996) (employer did not violate Section 8(a)(3) when it discharged the union president for violating three policies simultaneously).

In total, General Counsel has completely failed to present any evidence to set aside Swift's stated reasons for the discharges and show that it acted unlawfully when it terminated Diaz and Gonzalez for application falsification. Accordingly, the portion of the ALJ's Decision pertaining to those points must be overturned.

C. ALJ Parke Committed An Error Of Law In Finding Unlawful Interrogation.

The legal test for unlawful interrogation is "whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act." *See Millard Refrigerated Services*, 345 NLRB 1143, 1146 (2005) (citing *Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)). Some factors that should be considered when determining if an interrogation is unlawful are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. *See Rossmore House and Hotel Employees and Restaurant Employees Union, Local 11*, 269 NLRB 1176, 1178, fn 20 (1984)

⁴ General Counsel failed to introduce *any* evidence of disparate treatment on the record, despite having all of Respondent's background check records in its possession. Pursuant to the General Counsel's pre-trial subpoena, Respondent produced more than 3800 pages of responsive documents. Included in this production were the full background checks and security reports for every Wilmington employee, along with Corporate Security's notes and investigation reports for the Wilmington facility. Despite having these documents on hand, the General Counsel failed to introduce a single instance of disparate treatment, much less any evidence sufficient to shift the burden to Respondent.

enf'd sub nom. Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985). While probative, none of those factors is dispositive.

As described below, the ALJ misapplied the applicable law in finding that Swift committed an unlawful interrogation when Terminal Manager Obray dispersed a group of 50-60 on-the-clock employees in the parking lot of the Wilmington terminal.

1. The *Rossmore* Factors Dictate Against The Finding Of A Violation.

As the ALJ, citing *Rossmore*, correctly stated, “the test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference.” (ALJ 20:48-51). But, ALJ Parke erred in her application of that test.

Rather than conducting an analysis of the facts, the ALJ started with a conclusion and worked backwards. Under the facts as they actually occurred, Obray was entering the lot on the way back from picking up his lunch and got “upset because I saw the drivers over there meeting during while they were on the hourly clock during the day.” (Tr. 653:18-21). Like any competent manager would, and should have done, he “ran [his] lunch inside real fast and then ran over to meet them.” (Tr. 653:21-22). Obray then asked them “What are you guys doing?” (655:7-10). Consistent with that position, Gonzalez⁵ testified that Obray lead off by asking “What are you guys doing.” (Tr. 379:10-11). Under no circumstances can such a question – even from the top on-site manager – be deemed coercive.

⁵ Gonzalez alleged that Obray, at some later point in the conversation, made the affirmative statement, “I thought you were talking about the Union,” to which they all replied “No.” (Tr. 381:3-5).

Even if Obray's question was what ALJ Parke found – “in effect, whether they were talking about the Union” (ALJ p. 5, fn 8)⁶ – such a question does not arise to the level of an unlawful interrogation. In reaching her conclusion, the ALJ stated “At the highest level of coercive impact, the question could reasonably be viewed as an attempt to discover employees’ protected sympathies and activities; at the lowest level, it alerted employees that their supervisor had an undue if not hostile, interest in their union activities, which is also coercive.” (ALJ 21:5-9).

Further, the ALJ's holding ignores context, which is the spirit of *Rossmore*. As the principal management official on site, Obray was permitted to ensure that work time is being used for work business. Assuming for the purposes of this appeal only that Obray did ask the group if they were talking about the Union, such a single innocuous comment is insufficient to constitute unlawful interrogation. There is no record evidence that any of the 50-60 drivers felt like they were being spied upon. After all, they were meeting in an open, public area of the Wilmington facility. There is also no record evidence that the employees felt like their jobs were in danger as a result of the question. General Counsel's witnesses admitted that once they informed Obray that the meeting was to select employee representatives, he stated that he did not want them to meet at that time, offered them the use of the conference room to finish up (which they rejected), and he then left. There is no record evidence that he asked any follow-up questions about union activities, and the General Counsel failed to produce any evidence that the employees were coerced by the statement or otherwise afraid for their jobs.

⁶ General Counsel's witnesses all had different versions of what Obray allegedly said. Diaz alleged that Obray “told us if we were forming a union.” (Tr. 44:14-17). Sanchez recalled Obray commenting, “I hope this isn't a union meeting.” (Tr. 203:20). Herron testified that Obray said “Are we talking about the Union?” (Tr. 481:7-8). It is important to note that Herron's testimony was inconsistent with his prior sworn statement, in which he claimed Obray said “You are not over here forming a union, are you?” (Tr. 482:22-24). Although faced with three different stories, and two stories from opposite sides that lined up with each other, ALJ Parke found that there was “extensive corroborative testimony” as to what Obray said or did, and on that basis she found an 8(a)(1) violation. (ALJ 20:44-47).

VI. CONCLUSION

For the foregoing reasons, Swift respectfully requests that the Board reverse those portions of the ALJ's Decision and Order to which it has filed Exceptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

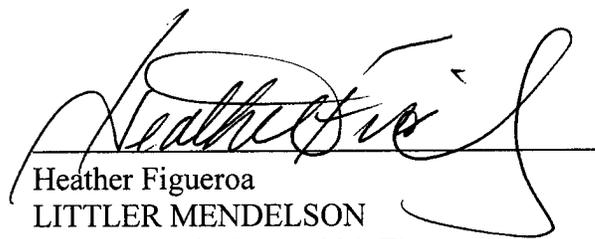
I hereby certify that a copy of Respondent's Brief in support of its Exceptions to Decision and Order of the Administrative Law Judge was submitted by e-filing to the Division of Judges of the National Labor Relations Board on March 1, 2010.

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