

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

QUICKWAY TRANSPORTATION, INC.

and

5-CA-33111
5-CA-33257
5-CA-33446
5-CA-33497

DRIVERS, CHAUFFEURS & WAREHOUSEMEN TEAMSTERS
LOCAL UNION NO. 639 a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

*James C. Panousos, esq., and
Daniel Heltzer, esq.,* counsel for the
General Counsel
Philip Giles, of Washington D.C.
for the charging party,
*James H. Hanson, esq., and
A. Jack Finklea, esq.,*
of Indianapolis, Indiana for the
Respondent

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Washington, D.C., on October 3 to 5, November 26 to 30, and December 3 to 5, 2007. The initial charge was filed on March 13, 2006, and the last charge was filed on March 8, 2007.¹ All charges were filed by the Drivers, Chauffeurs & Warehousemen Teamsters Local Union 639 a/w International Brotherhood of Teamsters (the Union or Local 639) against Quickway Transportation, Inc. (Respondent). The issues in this case include Section 8(a)(1) allegations of surveillance, the creation of the impression of surveillance, interrogation; Section 8(a)(3) allegations of unlawful discharge, refusal to accept the unconditional offer to return to work of unfair labor practice strikers, the lockout of unfair labor practice strikers; and Section 8(a)(5) allegations of direct dealing and diversion of bargaining unit work without bargaining in good faith.²

¹ All dates are 2006 unless otherwise specified.

² At the close of his case in chief, counsel for the General Counsel made a motion to withdraw complaint allegations set forth in then paragraph 9 that Respondent informed employees that it would be futile for them to select the Union as their collective bargaining representative; in then paragraph 10 that Respondent required employees to resign from the Union and related remarks; in paragraph 11 that Respondent discharged employee Angelo Jackson in violation of Section 8(a)(1) and (3) of the Act. That motion is granted except for the withdrawal of the discharge allegation pertaining to Jackson which is discussed in detail herein. At the outset of the hearing, Respondent admitted that Chris Cannon's title was regional vice

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs³ filed by the General Counsel and the Respondent, I make the following⁴

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Findings of Fact

I. Jurisdiction

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Respondent, a corporation, with its main office in Nashville, Tennessee, has been engaged in transporting dairy products from warehouses and dairies to grocery stores in various portions of the country, including from the Marva Maid Dairy (MMD) in Landover, Maryland to Giant Food stores in the greater Washington, D.C. metropolitan area. Since around April 2006, when it commenced its operations for MMD, Respondent has derived gross revenues in excess of \$50,000 on an annual basis from the transportation of freight from Maryland directly to points located outside of Maryland. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

Respondent is a transportation company primarily transporting dairy products and groceries for food chains. Respondent's corporate office is in Nashville, Tennessee. Respondent uses about 675 to 700 drivers throughout its 17 terminals nationwide. About 500 of those drivers are company drivers. Out of the 17 locations, five are organized by various Teamsters affiliates, they are: Landover, Detroit, Indianapolis, Shelbyville and Lynchburg. Respondent has contracts with the Teamsters at all but the Landover facility.

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William Prevost has been the president of Respondent since February 2004, when he began working at the company. Prevost testified Respondent completed a handshake agreement as of the week prior to his testimony on a five-year contract extension for the bargaining unit at the Shelbyville terminal. Cannon has been employed by Respondent

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president and that prior to that he had been a terminal manager. Respondent admitted that: Cannon has been a supervisor and agent of Respondent since July 19, 2005; William Cantrell has been a supervisor and agent since December 18; Harry O'Neal Crabtree has been a supervisor and agent since September 18; John Hoover was a supervisor and agent from August 25, 1997, until September 30; Michael Ort was a supervisor and agent from September 31, 2005 to January 12, 2007; David Taylor was a supervisor and agent from December 31, 1998, to July 25; and David Wilburn has been a supervisor and agent since July 29.

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³ At the close of the hearing, the parties were given the option of filing reply briefs. The Respondent filed such a brief and it has been considered. The record was also left open for Respondent to complete a summary which it filed in the form of R. Amended Exh. 34 (R.A. Exh 34) on February 14, 2008. The General Counsel objected to an earlier version of R. Exh. 34, but lodged no objection against the amended version, which has been received into evidence. The record has been closed upon the receipt of R. A. Exh. 34.

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⁴ In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth later herein.

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since July 19, 2004. Cannon was a terminal manager from July 2004 until July 2006. In July 2006, he became the Atlantic regional vice-president until August 2007, when he became the northern regional vice-president.

5 Cannon became involved with Respondent's start up of the Landover terminal in January 2006 when he began visiting the terminal to gather information concerning area wages and deliveries. At that time, Giant owned the dairy, and deliveries to the Giant stores were being made by drivers employed by Giant Transportation. In January 2006, negotiations were ongoing between MMD and Giant for MMD's purchase of the dairy, and
10 MMD had already selected Respondent to be its primary carrier from Landover. Cannon testified that Mike Miller, Respondent's director of pricing and business analysis, had created a pre-opening model as to how it would operate the Landover terminal. The model was based on 21 drivers, 21 trucks, 46 trailers, one yard jockey truck, with two yard drivers. Under the model, drivers were supposed to run two loads a day. Respondent
15 signed a contract on March 3 with MMD for the delivery of the dairy products out of Landover, with a March 27 startup for the deliveries. Respondent selected Michael Ortt as the terminal manager for the Landover operation. In March, Cannon was terminal manager for Newark, Ohio, but he continued to assist with the Landover start up. David Taylor, the then Atlantic regional vice president also assisted in the startup.

20 Cannon testified Respondent began advertising for company drivers in mid January and they began to hire drivers before the operation started. The hiring process including running a motor vehicle report on the driver's application for no more than two moving violations in the past three years, the driver having two years of current tractor trailer
25 experience, an interview, no past convictions or DUI's, a drug screen and a physical. Cannon testified it took 6 to 7 business days from the time a driver first called until he was hired. At time of the sale of the dairy to MMD, Giant laid off about 75 drivers and Respondent had former Giant drivers apply for employment. Cannon knew that Giant drivers were union members. Cannon testified that prior to operations starting on March
30 27, Respondent committed to hiring about three former Giant drivers, including Angelo Jackson and Kenneth Tucker. Cannon testified that over a two to three month period they hired about seven or eight former Giant drivers. Cannon testified that more applied than were hired. Cannon testified the company drivers based in Landover were guaranteed \$1000 a week at the start up of the operations for a six week period, while Respondent's
35 dispatchers became acclimated to the routes out of the Landover terminal. When the guarantee ended the company drivers were paid \$.45 a mile and \$15 a stop. For detention at a stop after an hour, the driver also received \$20 an hour paid in 15 minute increments.⁵

40 Cannon testified Respondent also received a list from MMD, which MMD had received from Giant, of area agencies for the supply of temporary drivers. Cannon testified Respondent started using temp agencies from day one of the Landover operation, and was using them six days a week. Cannon testified that from the end of March 2006
45 until the strike in January 2007, Respondent probably used temporary drivers almost every day. He testified that on the slowest days, Tuesday, Wednesday and Thursday, there may have been a few days that they did not require temporary drivers. Cannon testified if Respondent hired enough permanent drivers to handle the peak days which are Saturday

50 ⁵ Cannon testified for about a month and one half to two months, Respondent flew in about 20 to 25 drivers from other terminals on two week rotations to help with the Landover start up.

and Monday, there would not have been enough work Tuesday through Friday to keep all of the drivers active. Cannon testified all Respondent's company drivers were full time.

A. The Union campaign

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Kenneth Tucker applied to Respondent through a friend Angelo Jackson in early March for a job as a truck driver. Tucker's job application is dated March 8. Tucker and Jackson had previously worked for Giant as drivers. Tucker began driving loads for Respondent at the Landover facility on March 27. Tucker's initial assignment with
10 Respondent was helping to train other drivers, including drivers Respondent hired and drivers Respondent had brought in from other terminals to help start the Landover terminal. Tucker performed the training before the operation started. Tucker showed the drivers how the procedures were handled at the stores, with the loading and unloading of the milk and dollies. Jackson also conducted training for these individuals.⁶

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Tucker testified that on March 20, Tucker and Jackson met with Cannon and Ortt at the Landover facility. Tucker provided trip tickets from his prior work week at Giant Food to show Cannon and Ortt the wages he would have earned with the miles and stops pay Respondent was offering. In response, Cannon said he would drop the mileage and stops
20 pay rate for four weeks, and would pay \$1,000 per week, until they figured something out with the pay. Tucker testified he presented the paper work because of a concern, "That you wouldn't be able to make half the money that they say you would be able to make running on those terms." Jackson had a concern over the same issue. Tucker testified that Cannon later said the \$1000 guarantee was extended to six weeks. The drivers at
25 Giant had been paid by the hour, not by miles and stops.⁷

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Tucker testified to the following: Jackson called Tucker in May 2006, and Jackson said that he wanted to seek union representation for Respondent's employees. Jackson said he was going to contact Phil Giles of the Union. Later on that evening or the next
30 day, Jackson called Tucker and stated Jackson had spoken with Giles. Jackson said he wanted to meet with Giles on May 7 and that all who wanted to attend were welcome. Tucker attended the May 7, meeting at the Teamsters hall in Washington, D.C. Present were Giles and Respondent employees Tucker, Jackson, Mark Duncan, and Mike Wilkins. During the meeting, Giles discussed the need to distribute authorization cards to the
35 employees, and having those cards signed and returned to Giles.⁸ Giles gave cards out to

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⁶ Jackson did not testify at this proceeding. Accounts of Jackson's union activities were gleaned from the testimony of Tucker and Union official Phil Giles. I have found Tucker and Giles to have been credible witnesses during this proceeding. They testified in a straight
40 forward fashion to the extent their memories would permit.

⁷ Cannon confirmed that Jackson and Tucker met with Ortt and Cannon and they expressed a concern over Respondent's stop and mileage pay formula. Cannon confirmed that, during the meeting Cannon and Ortt gave the guarantee of \$1,000 a week gross to Tucker and Jackson.

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⁸ Giles testified that: Giles was contacted by Jackson in mid April 2006 to initiate the union campaign. Giles and Jackson initially met alone, and then Jackson arranged a meeting between Giles and other drivers who would be on the organizing committee. Giles confirmed Tucker's description of those who attended the meeting and the events that transpired there including Tucker's designation as a liaison between Giles and the employees for the collection of signed authorization cards. Giles placed this meeting on a
50 Sunday at the end of April. However, I have credited Tucker that it occurred on Sunday, May 7, as his recollection was more specific as to the date.

each of the men in attendance. Tucker was designated as the go between to collect signed cards from the men who attended the meeting and return them to Giles. All of the employee attendees at the meeting subsequently obtained signed cards and returned them to Tucker to return to Giles. Jackson had four to five cards signed. Former Respondent driver Roger Branch identified a card Branch signed on May 9. The Union filed a petition for election with Region 5 for Respondent's employees on May 17.

Tucker testified that during the union campaign Respondent campaigned against the Union by showing videos, paycheck distributions, and bulletin board postings. Respondent distributed a memo dated June 1, under the signature of Ortt to company drivers and hostlers informing them that there had been recent organizing activity at Respondent, and that a secret ballot election was scheduled for June 22. The employees were reminded of their right to vote no. It was stated, "If you give me a chance to show you what you and Quickway can accomplish without the interference of the union, I am confident you will come to the same conclusion that several other Quickway terminals (and 92% of America's workers) have reached- the union is not in anyone's best interest." Tucker identified other anti union distributions he received from Respondent. Respondent also stipulated at the hearing that it ran a campaign opposing the Union.

*B. The surveillance, Jackson's discharge,
and the creation of impression of surveillance*

1. Creation of impression of surveillance

Tucker credibly testified at follows: Tucker attended a meeting with Jackson, Taylor and Cannon on May 25, at around 3 or 4 p.m. Tucker had just turned in his paper work upon the completion of his shift when Taylor asked Tucker to attend the meeting. After the door was closed, Taylor told Jackson he was being terminated. Taylor read from a letter providing Jackson the reasons for his discharge. Tucker testified that, "They had read the letter and told him that was it, you know, and didn't give him a chance to respond." Tucker testified that Jackson attempted to respond. Tucker testified that, "he wanted to try to explain the issue that they were talking about, but they didn't let him." Tucker testified the issue was "Something about him being followed and videotaped at a store and taking too much time and falsifying a document."⁹ Tucker testified that, during the meeting, Taylor read from another memo explaining to Jackson the reasons he was discharged. Taylor provided Jackson with a copy of this memo upon Jackson's request.

Tucker credibly testified Jackson left and Tucker was about to leave, when Cannon asked Tucker to have a seat. Cannon pulled his chair within inches of Tucker's chair. Tucker testified Cannon said, "he knew that I was a leader and a professional and that he heard that I was involved in starting the union up." Tucker responded that he was not part of it. Tucker testified that Cannon then stated, "that the guys who-- that were opposing the union had told him that I was one of the guys helping to start the union up." Tucker again denied it. Tucker testified that during the exchange, Cannon said, "that they did not need a union. They thought that their open door policy was good enough. They did not need a third party and that, you know, all unions do is milk companies and employees out of money." Cannon stated the drivers were saying that Tucker was in the middle between

⁹ In Tucker's affidavit of July 7, 2006, It states Jackson took his discharge paper and left, that he did not ask any questions, and Taylor and Cannon did not give Jackson a chance to respond. They did not give him a chance to give his side of the story.

the drivers and the company, and that Cannon stated Tucker should not be in the middle. Tucker denied being in the middle.¹⁰

5 Tucker credibly testified that, during the May 25 meeting, after Jackson left, Taylor stated Respondent would be issuing a letter the next morning to the drivers. Taylor showed Tucker a typewritten document under Taylor's signature addressed to all drivers. The letter stated that, "As many of you may already know a Quickway Driver was terminated today for being dishonest when filling out his route sheet." The document went on to caution drivers about the importance of filling out their route sheets. Tucker testified that Taylor said that about 10 drivers were followed that week and that on that particular day, Jackson and Tucker were followed and Tucker conducted himself like a professional.

a. Respondent's witnesses

15 Cannon testified he received training on what a supervisor could and could not do during the union campaign. Cannon identified a campaign instruction sheet that Prevost gave Cannon, Taylor and Ortt entitled, "Remember These Tips." (Tips sheet). Cannon testified he participated in a conference call with Taylor and Prevost in which Prevost reviewed the Tips sheet.

20 Cannon testified he arrived at the Landover terminal on May 25, having flown in from Columbus, Ohio. Cannon was changing positions with Taylor at the terminal on a weekly basis, and it was Cannon's turn to be there and Taylor's to go home. When Cannon arrived, Taylor invited Cannon into the office to meet with Jackson and Tucker. Cannon testified Jackson's termination took place and then Jackson left, and Tucker remained in the office with Cannon and Taylor. Cannon testified Taylor and Tucker then had a conversation, but Cannon could not recall what they discussed. Cannon testified that, at one point in time, Cannon took over the conversation.

30 Cannon testified, in explanation, that around a week before the May 25 meeting, Tucker had pulled Cannon aside seeking help in that Tucker told Cannon that the other drivers were coming to Tucker with complaints. Cannon could not recall what type of complaints they were. Cannon testified Tucker did not want to play the middleman between the drivers and management. Cannon testified he told Tucker that he needed to take himself out of that position of being the go-to or fix-it person. Cannon testified that on 35 May 25, Cannon wanted to revisit that conversation and that Cannon initiated the discussion. Cannon testified, "That's when I took over the conversation with David Taylor and Kenny Tucker. So I just wanted to revisit with that and somewhat reiterate that, Kenny, you don't have to be in this position to be the sounding board for the drivers. 40 We've got office personnel that-- that has that responsibility and has that duty to take care of any type of problems that the driver may have. I conveyed to him that his response to the drivers, if they did have any complaints, would be, you need to go see management

45 ¹⁰ In response to Cannon's assertions during Cannon's testimony, Tucker credibly denied having a conversation with Cannon about being in the middle with the drivers prior to the May 25 meeting. Tucker testified he never complained to Respondent's managers or supervisors that other drivers were coming up to him with complaints. Tucker testified it was Cannon who first raised the issue on May 25 stating that Tucker was part of forming a union. Tucker denied making that assertion during the conversation. Tucker testified 50 Respondent never offered to move him into an office or a dispatch position, and that they never offered him any thing besides being a truck driver.

about that.” Cannon testified that Tucker, “did bring up that another complaint, that everybody was pointing their finger at him, as far as starting the union. And me and David Taylor both stopped him right there and said, Kenny, let's make it very well known that no one is pointing the finger at you, as far as starting the union.”

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Cannon testified that during the May 25, meeting, Cannon brought up the possibility of Tucker becoming as dispatcher as they had noticed leadership qualities in Tucker, particularly during his training of office personnel. Cannon testified Tucker liked the compliments they were giving him stating he was interested. Cannon testified that during the May 25, meeting, Taylor told Tucker that Tucker had also been followed but that Tucker did “a fantastic job.”¹¹

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Cannon denied telling Tucker that Cannon had received reports from other drivers that Tucker was involved in union organizing. Cannon testified he did not know Tucker was involved in union organizing at that point in time, although he learned later on that Tucker was involved. When asked when he learned, Cannon testified, “I can't recall. Just with, you know, the-- they talked back and forth from driver to office personnel. It eventually did come out, but putting to a calendar and what date, I can't recall.” However, Cannon testified he was sure he did not know at the time of the May 25 meeting. Cannon testified that as of the time of the May 25 meeting, he knew it was illegal to engage in surveillance of union activities. He denied stating anything that would give drivers the impression that he was engaging in surveillance of their union activities. He denied asking Tucker whether he was involved in union activities because Cannon knew it was illegal to do so based on the training he had received from Prevost.

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Cannon could not recall if the Union's petition for election had been filed at the time of the May 25, conversation. However, Cannon testified he knew about the union activity at the facility as of May 25, stating that, “I picked up a few rumors, that's about it.” Cannon testified the first indication was from Walt Aumen, the general manager of the dairy plant. Cannon testified he could not recall the date, but Aumen came into the dairy one morning and a group of drivers were standing in front of the dairy. Cannon testified when Aumen passed by “he caught a few key words pertaining to union.” Cannon testified the other rumors were from other drivers to Ortt or Cannon stating “Just union talk.” Cannon explained, “Nothing in particular or any detailed subject matter. It was just, they're talking about union, from what we hear.”

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Prevost testified that he ordered the driver surveillance because of performance issues at the Landover facility. Prevost claimed he only became aware there was union organizing drive at Landover, after Respondent received notice that the men had submitted cards to have an election. Prevost testified this was probably the last week of May 2006. Prevost testified as soon as he learned there was a pending election, he requested his labor counsel to prepare the Tips sheet instructions in terms of what management could and could not say in communicating with employees during an organizing campaign. Prevost testified he issued the sheet to Taylor, Cannon, John Hoover and the other people in the organization that had contact with the Landover terminal. Prevost testified as soon as he received the sheet he emailed it to Cannon and Taylor, and he had a training session with them over the phone. Prevost testified that

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¹¹ Cannon testified Taylor was no longer employed by Respondent and had left about a year and a half prior to the hearing. Cannon testified that at the time of the hearing Taylor was residing in Georgia. Taylor was not called as a witness during this proceeding.

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during the training session they discussed the TIPS memo that they would not threaten, interrogate, make false promises to employees to try to get them to vote against the union, and Respondent would not spy on employees during the organizing campaign. Prevo
 5 testified that during the union campaign, Respondent presented information to the employees as to why they did not need a union at Landover. He testified that, “our preference would've been to have run without it, but we were fine with it.” Prevo testified that Respondent started distributing materials about the Union around early June.

Prevo initially testified that he did not have any knowledge of reports of the
 10 number of employees for or against the union during the campaign. He testified that “most of the employees we hired had been laid off from a union company, so I was not surprised when the petition came across and I was not surprised when the vote was in favor of the election.” He then testified that he received reports from the facility that, “They thought the majority was for the union. There was six or seven guys that did not want it, but the
 15 bulk of them had worked in union organizations before and wanted it.” Prevo denied receiving reports as to who the union leaders or contacts were.

I do not credit Prevo’s claim that he was unaware of union activity at Landover until after the Union filed its petition for election. Similarly, I do not credit Cannon’s claim
 20 that he was unaware that Tucker was one of the union leaders at the time of the May 25 meeting. Respondent’s counsel stated the following as part of his opening statement, “After about a month of operating, we began to hear that there were rumors of union organizing going on. We were aware of it. We opposed it. We engaged in a campaign, once the petition was filed, to try and defeat that organizing attempt and it was
 25 unsuccessful.” Since Respondent started operating on March 27, counsel’s remarks place Respondent’s knowledge of the union campaign at the end of April or early May.¹²

Along these lines, Cannon testified that he knew about the union activity at the time
 30 of the May 25, meeting stating that, “I picked up a few rumors, that's about it.” Cannon testified the first indication was from the general manager of the dairy plant who heard employees were talking about the Union and who passed that knowledge on to Respondent’s officials. Cannon testified that other rumors of the union activity came directly from the drivers to Ortt and Cannon. Cannon testified that on May 25, he had just returned to the terminal after a week’s absence, yet he admitted knowing about the Union
 35 campaign prior to the May 25, meeting. Clearly, as Respondent’s counsel admitted, Respondent’s officials gained knowledge of the campaign early on, and I have concluded this information was quickly passed to Prevo, despite his claims to the contrary.

While Cannon admitted knowing about union activity prior to the May 25, meeting,
 40 he disingenuously claimed that he did know Tucker was involved in union organizing as of May 25. He admitted to obtaining knowledge of Tucker’s pro-union stance from the drivers later on, but could not recall a date. He could only state it was after May 25. Cannon testified that as of the time of the May 25 conversation, he knew it was illegal to engage in any type of surveillance of union activities, to give drivers the impression he
 45 was engaging in surveillance of their union activities, or to question Tucker about his union activities, because he received training from Prevo on the Tips sheet prior to the May 25.

Prevo incredibly claimed he only became aware there was union organizing drive
 50 at Landover, when he received notice of the Union’s filing of its May 17, petition for

¹² The drivers first obtained authorization cards for distribution on May 7.

election. Prevost estimated this was probably the last week of May 2006. Prevost testified that when he became aware of the campaign, he had his counsel prepare the Tips sheet, which he emailed and discussed by phone with Cannon and Taylor. Cannon's testimony as to the timing of the Tips trainings reveals that Prevost was aware of the union activity some time prior to Jackson's May 25, discharge. Like his denial of knowledge of the union campaign prior to ordering the surveillance, Prevost initially testified that he did not have any knowledge of reports of the number of employees for or against the union during the campaign. He then testified that he received reports from the facility that, "They thought the majority was for the union. There was six or seven guys that did not want it, but the bulk of them had worked in union organizations before and wanted it." Despite receiving these reports, Prevost denied receiving reports as to who the union leaders or contacts were, although Cannon admitted to receiving those types of reports at least pertaining to Tucker.

In view of the admission by Respondent's counsel that Respondent was aware of the Union campaign around a month after the operation started, as well as Cannon's testimony that he received reports about union activity from both dairy personnel and from drivers, I do not credit Prevost's claim that he did not learn of the union campaign until after the petition was filed. Cannon's claim that he did not recall whether the petition was filed at the time of the May 25 meeting is also clearly disingenuous. He claimed that he received training as to what he could say to employees prior to the May 25, meeting as part of his defense to allegations made by Tucker. Yet, Prevost testified the training was only initiated due to the filing of the petition. Therefore, if either are to be credited then Prevost learned of the petition prior to the May 25 meeting, consulted with counsel, had Respondent's Tips memo distributed to Cannon and Taylor and had a conference call with them prior to the May 25, termination meeting. If all of this occurred as their testimony indicates, I find it highly unlikely that Cannon would not have been told by Prevost that a petition for election had been filed which Prevost claimed was the basis for the training. I also find it highly unlikely, that Cannon, who impressed me as an intelligent individual would not have recalled he was aware of such information at the time he participated in the meeting where Jackson was terminated.

I have concluded based on the credible testimony, admissions, and the record as a whole that four of Respondent's employees met with Giles on Sunday, May 7, due to a meeting initiated by Jackson. They thereafter began distributing cards to the remainder of the unit of about 27 employees for signature beginning the week of May 8. I have concluded, as admitted by counsel and based on Cannon's testimony, that Respondent's officials received reports of this activity shortly after it began from the dairy officials and from drivers themselves. I also have concluded that this information was quickly relayed to Prevost who was a hands on manager and who was opposed to the facility being organized. Thus, I discredit his claim that he only first became aware of the union activity after petition was filed on May 17. I also discredit Cannon's claim that he did not know Tucker was one of the Union leaders at the time of the May 25 meeting. Rather, I find they both became aware of the union activity shortly after it began at Landover, and they quickly learned from reports from the drivers that Jackson and Tucker were leaders of that activity. Any doubt as to this conclusion is confirmed by Tucker's credible testimony that Cannon accused him of helping to start the union campaign on May 25, and that Cannon had been informed of it by drivers opposing the union.

Clearly, Respondent was receiving information from the drivers and dairy officials and monitoring the status of the Union's support at the facility. Both Jackson and Tucker had worked for Giant, which had been organized by the Union, and they concertedly met

with Cannon and Ortt on March 20, to protest Respondent's system of pay, and their protest resulted in a short term change of the system in that their meeting resulted in their receiving wage guarantees during the start up of the operation. Both Ortt and dispatcher Horner testified Respondent's method of pay was a source of complaints among
 5 employees. I have concluded that Respondent's officials knew early on from reports they received from drivers, and from their own surmise were aware that Jackson and Tucker were leaders in the union campaign, and that it was no accident that Tucker was asked to attend Jackson's discharge meeting or that Cannon had a heart to heart talk with Tucker immediately following Jackson's discharge.

10 Concerning the conversation that took place during the May 25, meeting, I have credited Tucker's version of events over that of Cannon's. Tucker, considering his demeanor, testified in a calm and straight forward fashion about the conversation with good recall. On the other hand, Cannon's story was somewhat convoluted and did not
 15 make sense considering the record as a whole. Tucker's and Giles testimony revealed that Jackson contacted the union, and during the union meeting on May 7, it was agreed that Tucker would serve as the intermediary between the other drivers and Giles in terms of the solicitation of union cards. Tucker, along with Jackson, had prior to the union campaign met with Cannon and Ortt to protest Respondent's pay policy. Following the
 20 selection of the Union, Tucker continued his course of conduct by serving on the Union's negotiating committee and attended all the meetings with Respondent's officials. The notes of the meetings reveal that Tucker was not afraid to speak and let his feelings be known during the negotiation sessions. Thus, I do not credit Cannon's claim that about a week before the May 25, meeting, that Tucker approached Cannon for help, that Tucker
 25 told Cannon that the other drivers were coming to Tucker with complaints and that Tucker did not want to play middleman between Respondent and the drivers. I do not find this claim, which was denied by Tucker to be credible. Tucker concertedly complained to Respondent about wages with Jackson, voluntarily placed himself as intermediary between the drivers and Giles in terms of card solicitation, and he served on the Union's
 30 negotiating committee. He voluntarily placed himself in the middle, and I do not find it believable, considering the demeanor of the two witnesses that he elected to complain about his role to Cannon during the middle of the union drive.¹³

35 *b. Analysis*

Cannon testified he initiated a conversation with Tucker on May 25, in that Cannon wanted to "reiterate that, Kenny, you don't have to be in this position to be the sounding
 40 board for the drivers. We've got office personnel that-- that has that responsibility and has that duty to take care of any type of problems that the driver may have. I conveyed to him that his response to the drivers, if they did have any complaints, would be, you need to go see management about that." Thus, Cannon instructed Tucker not to engage in concerted activity by telling him to tell drivers if they had any complaints rather than speak to Tucker they should go see management. This is akin to instructing Tucker not to discuss work
 45 related problems with other drivers, and I find the remark to be violative of Section 8(a)(1) of the Act. See, *Jeanette Corp.*, 217 NLRB 650, 656-657 (1975), enfd. 532 F.2d 916 (3d Cir.

¹³ I do not credit Cannon's claim, which Tucker denied, that Cannon brought up the possibility of Tucker becoming a member of the office staff or a dispatcher on May 25. Of
 50 interest, although Tucker continued work as a driver for Respondent until the January 12, strike, there was no claim by Respondent that he was ever offered another position or that the matter was ever raised again.

1976); and *K Mart Corp.*, 297 NLRB 80, fn. 2 (1989).

In *Bridgestone Firestone South Carolina*, 350 NLRB No. 52, slip op. at 2 (2007), the Board stated:

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In determining whether an employer's statement has created an unlawful impression of surveillance, the test is "whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance." *Flexsteel Industries*, 311 NLRB 257, 257 (1993); *United Charter Service*, 306 NLRB 150 (1992). The standard is an objective one, based on the perspective of a reasonable employee. *Flexsteel*, supra. The General Counsel has the burden of establishing, by a preponderance of the evidence, that the employer unlawfully created the impression of surveillance. *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001).

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Not all employer statements about employees' union activities are unlawful. An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided. See, e.g. *Rock-Tenn Co.*, 315 NLRB 670, 682 fn. 19 (1994), enfd. 69 F.3d 803 (7th Cir, 1995), and overruled on another point by *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F. 3d 1073 (D.C. Cir. 2002). As we recently reaffirmed in *North Hills Office Services*, "The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer.*" 346 NLRB No. 96, slip op. at 6 (2006) (emphasis in original). Thus, merely informing employees that their coworkers have volunteered information about ongoing union activities does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information. *Id.*

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In *Bridgestone Firestone*, supra, the plant manager issued a letter to employees in which he thanked employees for informing him that a union was attempting to organize the facility. In concluding the respondent did not create the impression of surveillance by the letter the Board explained the respondent relayed to employees only that certain coworkers had had voluntarily provided information about the existence of the union campaign. It was stated reasonable employees would not discern from the letter the respondent learned of their activities through a program of unlawful surveillance. *Bridgestone Firestone South Carolina*, supra., slip op. at 3,

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In *North Hills Office Services*, 346 NLRB 1099, 1101 (2006), the complaint alleged two instances of the creation of the impression of surveillance. On one occasion, a supervisor told an employee that two of her coworkers reported that the employee drove them to a union meeting. The supervisor did not deny making the statement but testified he never asked any employee to provide him with information. In the other instance, an employee testified that during a meeting in which she was given a discriminatory warning for distributing union literature on company time the operations manager told her two of her coworkers informed him that she was distributing union literature during working hours. The operations manager did not deny making the statement. In dismissing the Section 8(a)(1) allegations, the Board majority held that volunteering information concerning an employee's union activities by other employees, in the absence of evidence that management solicited that information does not create an impression of surveillance.

However, in *Flexsteel Industries*, 311 NLRB 257 (1993), the Board majority stated:

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The judge found that the Respondent created the impression of surveillance when its personnel manager, Don McFarland, on two occasions, informed employee Leroy Clark that he had heard rumors about Clark's union activity. Specifically, in early December

1991, McFarland told Clark he had heard a rumor that Clark had instigated the union campaign. Thereafter, in late December 1991 or early January 1992, McFarland told Clark that he heard a rumor Clark was passing out authorization cards. The judge found that McFarland's disclosures would tend to coerce and restrain Clark from continuing this kind of protected activity. We agree.

* *

It was stated in *Flexsteel* that “an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. See *Emerson Electric Co.*, 287 NLRB 1065 (1988).” Id at 257. In *Flexsteel* it was noted that in two separate occasions in statements coupled with interrogations and implicit threats, McFarland related his knowledge of ‘rumors’ to Clark, thereby informing him clearly that management was aware not only that Clark may have been a union supporter, but was also taking note of the reported manifestations of that support by asserting that Clark may have instigated the union campaign and that Clark had been passing out authorization cards. It was stated that McFarland's statements, on their face, reasonably suggested to Clark that the Respondent was closely monitoring the degree and extent of his organizing activities, and that these types of statements would reasonably lead Clark to believe that his protected activity was under surveillance, and this would tend to discourage this protected activity. *Flexsteel Industries*, supra. at 258.

Similarly, in his partial dissent in *Flexsteel Industries*, member Oviatt stated in agreement with the majority that the respondent there did unlawfully create the impression of surveillance pertaining to another employee when a supervisor told that employee that he knew the employee was getting people to sign authorization cards because people had told the supervisor that he was doing so. *Flexsteel Industries*, supra. at 260. In *Emerson Electric Co.*, supra at 1085, the Board, in finding that a plant manager unlawful created the impression of surveillance during a one on one meeting with an employee, stated:

Gilbert stated not only that he knew that Alsup had attended union meetings, but also indicated that he knew the extent of this involvement. As set forth above, Gilbert said that he knew that Alsup had “expressed an interest in the union,” but that Gilbert did not consider Alsup to be a “pusher” for or against the union effort. These statements would reasonably suggest to Alsup that the Respondent was closely monitoring the degree of his union involvement. For these reasons we find that the Respondent created the impression of surveillance in violation of Section 8(a)(1) of the Act.

The Board reached a similar result in finding a violation in *United Charter Service*, 306 NLRB 150, 151 (1992), wherein it was stated, “even if it were common knowledge that the employees were attempting to organize, Vieira's comments went beyond permissible limits. Not only did he tell the employees that he knew of their organizing efforts, he also went into detail about the extent of the activities and the specific topics they discussed at the meetings.” It was found, Vieira's statements reasonably suggested to the employees that the respondent “was closely monitoring the degree and extent of their organizing efforts and activities.”

I find Respondent unlawfully created the creation of the impression of surveillance by Cannon's remarks to Tucker during the May 25 meeting. Tucker and Jackson, the two leading union adherents were instructed to attend the meeting. At the outset of the meeting, Jackson was told he was being terminated and had the allegations for his termination read to him by Taylor, which related to Jackson being followed, videotaped at a store, taking too much time, and falsifying a document. Jackson was not permitted to defend himself against the allegations. Jackson then left, and Tucker was alone with Cannon and Taylor. Cannon pulled his chair within inches of Tucker's chair. Cannon told Tucker he knew Tucker was a leader and a professional and that he heard Tucker was

involved in starting the union start up. Tucker responded he was not part of it.¹⁴ Cannon stated that the guys who were opposing the Union had told him that Tucker was one of the guys helping to start the union up. Tucker again denied it. Cannon said, “they did not need a union. They thought that their open door policy was good enough.” Cannon stated they did not need a third party and that all unions do is milk companies and employees out of money. Cannon stated the drivers were saying Tucker was in the middle between the drivers and Quickway. Cannon stated Tucker should not be in the middle. Tucker responded he was not in the middle. Cannon, in fact, admitted his remarks went further testifying he told Tucker, “you don't have to be in this position to be the sounding board for the drivers. We've got office personnel that-- that has that responsibility and has that duty to take care of any type of problems that the driver may have. I conveyed to him that his response to the drivers, if they did have any complaints, would be, you need to go see management about that.” During the meeting, Taylor told Tucker that 10 drivers were followed including Tucker. Cannon's comments to Tucker, in the context of this meeting, conveyed to him that Respondent was closing monitoring the extent and nature of his union activities thereby creating the impression of surveillance in violation of Section 8(a)(1) of the Act. See, *Flexsteel Industries*, 311 NLRB 257 (1993); *Emerson Electric Co.*, 287 NLRB 1065 (1988), and *United Charter Service*, 306 NLRB 150, 151 (1992).

2. The surveillance and discharge of Angelo Jackson

In *Benjamin Franklin Plumbing*, 352 NLRB No. 71 (2008), in finding that the discharge of two employees violated Section 8(a)(1) of the Act, the Board approved the use of a *Wright Line* analysis for Section 8(a)(1) allegations that turn on motive. See also, *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (“*Wright Line* applies to all 8(a)(3) and 8(a)(1) allegations that turn... on employer motivation”). In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983), the Board established a framework for deciding cases turning on employer motivation. To prove that an employer action is discriminatorily motivated and violative of the Act, the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). If the General Counsel is able to make such a showing, the burden of persuasion shifts “to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra, at 1089.

In the instant case, on March 20, Tucker and Jackson met with Cannon and Ortt to protest Respondent's wage policy, resulting Cannon contacting Prevost and Respondent temporarily instituting a guaranteed wage rate for the drivers at the Landover facility. Jackson contacted the Union towards the end of April, and he arranged a meeting attended with Tucker, Giles and two other drivers on May 7, at the Union hall. During the May 7, meeting, Jackson, Tucker and the two other drivers were given union authorization cards for distribution amongst the bargaining unit members. At the May 7, meeting,

¹⁴ Tucker's denial of his involvement with the Union to Cannon could only be seen as matter of self preservation, given the fact that Jackson, the person who initiated the campaign had just been followed by Respondent's officials and then fired in the same meeting. It is likely, that being told of Cannon's knowledge of Tucker's union activities, that Tucker could presume that Cannon and Respondent had a similar knowledge of Jackson's pro-union status.

Tucker agreed to serve as the intermediary between the drivers and Giles in terms of the collection of union cards. Thereafter, union cards were distributed amongst Respondent's drivers by Jackson, Tucker and the two other drivers. On May 17, the Union filed a petition for election. On May 22, Respondent had Jackson followed. On May 25, Respondent discharged Jackson in Tucker's presence without allowing Jackson to defend himself against the allegations against him. Tucker was also told he had been followed. After Jackson left, Cannon told Tucker he knew Tucker was a leader and that he had been informed by other drivers that Tucker had help start the Union. Tucker denied the allegation, but Cannon persisted and stated the guys who were opposing the Union had told Cannon that Tucker was one of the guys helping to start the Union. Tucker again denied it. Cannon told him they did not need a union, their open door policy was good enough, they did not need a third party, and that all unions do is milk companies and employees out of money. Cannon told Tucker that the drivers said that Tucker was in the middle between the drivers and management, and he stated that Tucker should not be in the middle. Tucker he responded that he was not in the middle. Cannon testified that, he initiated the conversation with Tucker and that, "I conveyed to him that his response to the drivers, if they did have any complaints, would be, you need to go see management about that." I have concluded that Respondent received reports and concluded from its own surmise that Jackson and Tucker were the leading union adherents. I have concluded that Cannon unlawfully created the impression of surveillance, and that he unlawfully instructed Tucker not to engage as a middleman between Respondent and the employees thereby instructing him not to engage in protected concerted activities. There is evidence of knowledge, timing and anti-union animus with respect to Respondent's surveillance of its drivers. Under the Board's *Wright Line* analysis the burden shifts to Respondent to establish that they would have engaged in the driver surveillance absent the union activity. This they have failed to do.

Prevoist testified Respondent's operational model for Landover was initially was set with 21 trucks and 21 drivers with a six day a week operation using a first and second shift deliveries. Prevoist testified during the first couple of months the start up at Landover was not making money, and the actual business application was not matching the model. Prevoist testified they were not getting the projected utility out of the men or the equipment they had anticipated going into the business. Prevoist testified that to service the customer, Respondent had to rent extra equipment and extra drivers, and they were not able to hire enough local drivers. Prevoist testified that after a month or six weeks, they made a decision to do driver observations to determine where they had a modeling problem. Prevoist testified he directed Taylor, Cannon, Lyman Helms, then Safety Director John Hoover, and Hoover's assistant Anna Thomas to be involved in the Landover driver observation. Prevoist testified Respondent would have received the financial reports around the second week of May, so the conversation would have been around May 10 to May 15. Prevoist testified the primary conversation was with Taylor, but he also spoke with Hoover, and they spoke to the others who were involved. However, the referenced financial reports were not submitted into evidence, thus the decision and timing to commit the surveillance were based solely on Prevoist's testimony, part of which I have already discredited in terms of his claim of lack of knowledge of the employees' union activities.

Concerning the actual observations, Prevoist testified that he thought six drivers followed. Prevoist testified the observers were given the most efficient route from the dispatch in terms of selecting which drivers were to be observed. Prevoist testified he received several verbal reports about the study. Prevoist testified it was concluded based on the observations that the drivers, due to traffic congestion, could not do double loads as Respondent originally anticipated in its model. Prevoist testified Respondent adjusted

the model to go from 21 to 26 drivers, due to traffic. Prevost testified he only received a negative report about one of the six drivers and the rest were performing as they were instructed. Prevost testified there were no other changes made to the model.

5 I find Prevost's explanation as to the timing and the cause of the observation not be supported by record evidence. Respondent's payroll records as summarized in R.A. Exh. 34 reveal that by week ending April 22, Respondent already had hired 24 company drivers, and by week ending May 13, it was up to 25 drivers. Thus, the model of 21 drivers was adjusted upward before Respondent conducted the surveillance. Moreover, Cannon testified the company drivers started with a four week guarantee of \$1000 a week, which was extended to six weeks. However, Respondent's records reveal that the drivers were being paid uniform rates per day, as opposed to Respondent's mileage and stops formula until May 20. (R. A. Exh. 34, p. 6). Since the drivers were given a uniform rate per day, then it is unlikely that a driver spending extra time at a store, impacted on his pay, or that he had a reason to do so.

On May 22, when the pay guarantee ended, Respondent followed Jackson, and shortly thereafter Tucker, the two leading union adherents. While Jackson apparently did not fill out his log sheet as accurately as Respondent would have liked, Cannon testified that at as of May 22, recording the reason for the delay probably was not required because it was still a new operation. Thus, Cannon acknowledged as Respondent's records confirm that Respondent was in a transition period with respect to its operation and pay system, so the drivers, except for the two leading union adherents were not being monitored very closely as to how they filled in the pay forms. Yet, Jackson was followed on May 22, and fired on May 25, without being allowed to explain the accusations against him.¹⁵ Respondent's claims become all the more untenable in that while there were two discrepancies on Jackson's May 22 trip sheet, only one of two of those misfilings cost Respondent or its customer money. Cannon testified it amounted to a 20 minute overage, which rounded down cost to Respondent and or its customer \$5 in extra pay for Jackson. Thus, although Prevost testified Respondent was having a hard time retaining drivers, it discharged Jackson who had helped train its other drivers with no warning, or chance for an explanation, for what was in essence a \$5 overage. Respondent's extreme reaction of discharge by failing to at least give Jackson a warning against future conduct, in the circumstances here, signals that Respondent was motivated by something other than the inaccurate filling out the form and a \$5 overage. That Respondent's discharge of Jackson was premeditated and in furtherance of Respondent's anti union cause is further substantiated by Tucker's testimony that during the same meeting in which Jackson was discharged Taylor showed Tucker a pre-drafted memo to all drivers announcing Jackson's termination. Thus, as Tucker credibly testified whatever ever Jackson had to say did not matter as Respondent was intent on firing him. More than that Respondent was intent on making sure that the employee who had initiated the union campaign had been summarily discharged and that the discharge served as a warning to other employees.

The circumstances, behind the actual surveillance also smack of pretext. Despite Respondent's contention that it was just a random list of drivers to be followed, Hoover, who along with Thomas did the actual surveillance, testified that the day when he and

¹⁵ The only other record of a driver for which Respondent produced as the results of its surveillance was Garner, who appeared to have to at least two discrepancies between his trip sheet and the surveillance report, yet there is no claim that Gardner was disciplined or even talked to.

Thomas arrived at the hotel in Landover from the airport, Ortt came to their hotel, and said, "here's the guy I want you to follow," in reference to Jackson. Hoover testified Thomas was present for the conversation. Hoover testified Ortt only gave them one driver to follow the first day of their observation and that was Jackson. Hoover testified that Ortt gave him other drivers the next day. Hoover testified that they only followed three or four different drivers, and he could only recall the names of two of them, Jackson and Tucker.¹⁶ Hoover testified he could recall these two drivers because Jackson's performance did not make sense, in that Jackson would sit in the parking lot both before and after making deliveries. Hoover testified Jackson would sit for no reason and read the paper although Jackson had an empty dock. Hoover testified when they followed Tucker, he was "Mr. Perfect," in that he did everything by the book. As a result of Tucker's good work, Hoover testified they followed him twice, just in case the first time was not accurate.¹⁷

Thomas' testimony varied from Hoover's. She said nothing about Ortt meeting them at the hotel the first day they were there, or Ortt's only naming Jackson as the driver they were to follow the first day. Contrary to Hoover, Thomas testified she was not involved in any meetings the day of her arrival at Landover "other than we all decided that we would meet at a certain time the next morning, and then all went to our separate rooms." Thomas testified the people who were going to carry out the observation met early the next morning and that someone had a list of the drivers. She testified they divvied the list up among two teams of surveillors. She testified they each took a couple of driver's names, and left. Thomas then changed her testimony stating it was not really a list, but a packet, and when she opened the packet she saw there were three drivers in her packet. Thomas testified the other team was also handed a packet, but she did not see the driver names in that packet. Thomas testified both packets were about the same size. When asked how many drivers were on the list, Thomas testified, "I couldn't tell you that. I believe we got a list of three or four, and I'm sure that's probably what the other team got. I don't know for sure." Thus, Thomas testimony changed from the amount of drivers she observed from a couple, to three, then to three or four. Thomas testified the first day Arthur and Hoover were on her team and they went out together. She testified Lyman and Fred Long were on the other team. Thus, Thomas did not mention anything about their just following Jackson the first day as Hoover testified; and Hoover did not testify about there being two teams of observers as Thomas claimed.

Moreover, Respondent did not provide a consistent story to either Tucker or in the testimony its witnesses as to the number of drivers that were actually followed. Tucker credibly testified that on May 25, Taylor told him ten drivers were followed. However, Prevost testified it was only about six drivers who were followed. Ortt gave a differing opinion stating that he provided the list of drivers to be followed and there were only four

¹⁶ Hoover, upon having his recollection refreshed, testified Respondent's officials also followed Gardner, as he recalled Thomas filled out a report concerning Gardner.

¹⁷ I do not credit Hoover and Thomas' testimony that they were not aware there was a union campaign at the facility at the time of the surveillance. Prevost testified he circulated a copy of the Tips sheet to Hoover. I have concluded, contrary to Prevost's testimony, as admitted by Respondent's counsel, that its officials became aware of the union campaign shortly after it started and that the Tips sheet was created and distributed shortly thereafter. Thus, I have concluded since Prevost testified he gave Hoover a copy of the Tips sheet that he gave it to him before Hoover went to Landover, for Hoover would have had no need for the sheet after he returned to Nashville following the surveillance, for there is no contention that he ever revisited the facility during the course of the union campaign.

or five drivers that were followed. Hoover testified they only followed three or four drivers, and did not mention a second team of observers. Thomas testified there were two teams of observers, and then varied her testimony stating that from two to four drivers as being the number that her team observed.

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Respondent could also provide only limited documentary evidence as to the driver observations. Aside from evidence pertaining to Jackson, only one other written report was provided relating to driver Andrew Garner.¹⁸ Cannon stated he received Garner's report from Taylor, there is no explanation as to why if other reports existed that Taylor did not provide Cannon with all of the reports. Cannon testified that Jackson was fired for, "Falsification of legal document," referring to Jackson's, Monday May 22, trip sheet.¹⁹ Cannon testified that on the May 22, trip sheet Jackson reported he arrived at store 342 at 12 noon and left at 1:20 p.m. Cannon testified Jackson would have received \$5 detention pay for the 20 minutes over the hour, since the pay is rounded down. Cannon testified upon reviewing a written report from Taylor, the times Jackson arrived and departed from store 342 were false on Jackson's trip sheet.²⁰ Cannon testified this was a legal document, the falsification of which was cause for termination. Cannon testified this was the only reason Jackson was terminated. Cannon testified he is not aware of Respondent terminating any other driver for falsification of legal documents. Thus, despite its operation of 17 terminals, Respondent put forth no evidence of any other driver being discharged or even disciplined for misstating information on their route sheet.

A report written by Taylor to Jackson, dated May 25, states he was observed arriving at his first stop on May 22 at 6:30 a.m. and that he backed into the dock to unload at 7:40 a.m. He was then observed pulling out of the dock and parking in the store lot at 7:50 a.m. and sitting in his tractor and reading the paper until 8:15 a.m. It is stated that on his dispatch route sheet Jackson he wrote down that he arrived at the store at 7 a.m. and departed at 8 a.m. It is stated therein that on his last stop of his four stop route, he was observed arriving at the store at 11:50 a.m. and backing directly into the dock to make his delivery, and that he pulled away from the dock and parked his vehicle in the parking lot at 11:59 a.m., with his delivery completed. He was then observed of sitting in his tractor until 12:50 p.m. and leaving the area. On his dispatch route sheet he wrote that he arrived at 12 noon and departed at 1:20 p.m. It stated on the report that his actions were two acts of dishonesty and constituted falsification of company records as reflected on page 38 of Respondent's handbook which subjected Jackson to immediate termination. Taylor stated Jackson's actions at the last stop required Respondent to pay him 20 minutes for delay time at the last store. Taylor also wrote that Jackson's actions were constituted

¹⁸ Garner's name appears alternatively as Gardner on the record but there is no dispute between the parties that Gardner and Garner is the same individual.

¹⁹ Cannon testified that when a driver arrives at a store he is paid \$15 for the stop for the first hour. Anything beyond the first hour, he is paid \$20 an hour in 15-minute increments for delay time, and the clock starts running for delay time at the time the driver arrives at the store. Respondent is reimbursed for those payments by its customer MMD. If the driver is at the store for an hour and 15 minutes, he would receive an extra \$5. In order to get the detention time a driver must record the reason for the delay on his trip sheet. Cannon testified this is required by MMD. However, Cannon testified that at as of May 22, recording the reason for the delay probably was not required because it was still a new operation.

²⁰ Cannon testified there was another time pointed out in the statement that was false, but he could not recall it at the time of testimony.

5 unauthorized absence from duty during regularly scheduled work hours citing page 39 of the handbook which is the subject of immediate termination. It is stated because of his actions Jackson was terminated immediately. However, despite the two reasons, listed in Taylor's letter, Jackson's typed termination report reflects that he was terminated on May 25, as approved by Ortt on June 2, with only the only stated reason on the report being for "Falsifying Company Documents."

10 Respondent produced in response to the General Counsel's subpoena request a handwritten memo dated May 25, with Gardner written at the top, which Cannon testified looked to be a report on an observation of driver Andrew Garner. Cannon became aware of the report through Taylor. Cannon testified after Taylor resigned from the company, Cannon took over his position; and Taylor gave Cannon all of his files. Garner recorded on his May 25 trip sheet that he arrived at the third store 108 at 7:45 and departed at 8:50. He placed at the bottom of the sheet that for store 108, "Docks blocked for 1 hour."
 15 However, the observation report for Garner states "arrived at 7:36 and immediately docked then talked to another guy (Giant driver) for 15 minutes, then went inside, pulled out 8:45. The last paragraph on the Garner observation report states, "we left at 11.18 to last store arrived at 11:33 --we proceeded to conduct a grid search to no avail. At 11:54 a.m. a telephone contact attempt was made. We were informed driver had not made his delivery yet. We call Elcott store and they said he was there between 11:00 & 11:30--- At 12:03 he still had not made his delivery. Waited until 1:15 no show called terminal and they said he called in empties at quarter till 1:00. The arrival and departure time Garner reported on his trip sheet for the last store was 12:01 to 12:40. Cannon testified he never confronted Garner for falsification of documents. He testified he was not aware if Ortt did.

25 In sum, the credited testimony reveals that on May 22, just five days after the petition for election was filed, Respondent began conducting a surveillance of its drivers. Included in the surveillance were leading union adherents Jackson and Tucker. Hoover's testimony, reveals Respondent's officials were so anxious to have Jackson watched that Ortt came to their hotel room on the day of their Landover arrival, a Sunday when the terminal was closed, and gave them Jackson's name stating "here's the guy I want you to follow." On May 25, Jackson and Tucker were called into a meeting, and Jackson was summarily discharged without being given a chance to defend himself. During the same meeting, Tucker was told Respondent had received reports that he had helped start up the Union, and that he was serving as a middle man between drivers and management.
 30 Tucker was told Respondent was opposed to the Union, and that he was to stop serving as a middle man, and to instruct the drivers to take their complaints directly to management. In response to the evidence of timing, animus, and knowledge, the testimony of Respondent's officials differed as to the number and names of drivers watched other than Tucker, Jackson, and Garner, and records were only produced for Garner and Jackson with a claim that records for other drivers could not be located since Taylor was no longer employed there. Yet, Garner, who appeared to have as many deviations in his report as Jackson was not disciplined over the incident. Respondent officials Hoover and Thomas also gave inconsistent descriptions as to how the surveillance was conducted. I have also discredited Prevost's testimony as to his knowledge of union activity at the facility at the time he ordered the surveillance and his reasons for ordering the surveillance were not supported by the documentary evidence as Respondent submitted no records in support of Prevost's testimony concerning the financial status of Landover, and Respondent had already hired more drivers than the original model called for prior to initiating the surveillance.
 45 The discharge of Jackson was further undercut by the fact that Respondent had only recently changed its system of payment for the drivers, and Cannon's admission that the drivers were not being

scrutinized for their accuracy in filling out the trip sheets at the time because Respondent was in a transition period. Accordingly, Respondent has not established that it would have engaged in the surveillance of its drivers absent their union activity and I find that surveillance to be violative of Section 8(a)(1) of the Act.

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Jackson's May 25, discharge was a direct result of the surveillance which I have found to be unlawful. Jackson was terminated shortly after Respondent ended its guaranteed pay system, at a time when Cannon testified the driver's accuracy in filling out their trip sheet was not being strictly enforced. Jackson was discharged by Taylor, the regional vice president, although Cannon testified it would normally be the terminal manager's job to make such a decision to discharge the employee. Jackson's overage was only \$5 and he was given no warning or chance to defend himself at time when Prevost testified Respondent was having difficulty in securing drivers. Hoover testified the first day he was there he was giving specific instructions by Ortt that Jackson was the one Ortt wanted Hoover to watch. The Board has long held that when an employer adopts discriminatory rules as a result of a union campaign, the discipline or discharge of employees pursuant to those rules is unlawful. See, *Tuscaloosa Quality Foods, Inc.*, 318 NLRB 405, 411 (1995); *Hyatt Regency Memphis*, 296 NLRB 259 (1989); and *Baptist Memorial Hospital*, 229 NLRB 45 (1977), *affd.* 568 F.2d 1 (6th Cir. 1977). I find counsel for the General Counsel's motion to withdraw the complaint allegation over Jackson's discharge at the end of his case in chief does not preclude an unfair labor practice finding here since the surveillance allegation remained part of the complaint and was found to be unlawful. I find that in these circumstances, Jackson's May 25, 2006, discharge was fully litigated, in that it came about as a result of the unlawful surveillance, and the discharge was violative of Section 8(a)(1) and (3) of the Act. See, *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923, fn. 2 (1994), holding the General Counsel does not have unlimited discretion to withdraw complaint allegations after presenting evidence. This concept is especially applicable here because the circumstances concerning Jackson's discharge were fully litigated as part of the lawfulness of the surveillance involving Jackson and Tucker.

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C. The interrogations

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General Counsel witness Kevin Cook worked for Respondent as a company driver out of Landover from March to January 2007.²¹ Cook testified he had one conversation with Cannon and one with Taylor on how he was going to vote in the union election. He testified the conversation with Taylor occurred first. It was about two or three weeks prior to the June 22, election. Cook testified, after he completed his run that day, Ortt asked Cook if he needed a ride home. Cook stated he was waiting for Tucker to come back because they were riding together. Ortt said Tucker was gone, and Taylor offered Cook a ride. Taylor took Cook home in Taylor's car. Cook testified that during the drive, "We both was talking and then he started on about the-- about the union election is coming up and he said that he knew he had lost all the Giant drivers and he was hoping that he had my support and vote a no with the union-- and I told him that he had my support." Cook later stated when he told Taylor that Taylor had Cook's support that Taylor said, "good guy or something." Cook testified Taylor patted Cook on the knee and then started talking about Taylor's father. Cook testified he did not tell Taylor the truth when he told him he had his support with a no vote. Cook testified he did not tell Taylor the truth, "Because then he'd want them to terminate me or something." He testified he was afraid Taylor would terminate him, "Because he was the vice president of the company." Cook was aware the company was against the Union.

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²¹ At the time of the hearing, Cook was working for MMD as a yard jockey.

5 Cook testified he had a conversation with Cannon around a week before the election outside the office in the Landover plant. The conversation took place when Cook returned from one of his runs. Just Cannon and Cook were present. Cook testified he came in from his run, turned in his paperwork and made his copies. Cannon asked if he could speak to Cook and Cook agreed. Cook testified, "He walked out of the office and asked how I was doing, and I said I'm doing okay. He said that he hoped that he had my support with the election, and I said yeah, you got my support, because I was against the union. And he said, good guy, and he patted me on my shoulder and that was it."

10 In determining whether a supervisor's questions to an employee constitutes an unlawful interrogation, the Board examines whether under all the circumstances, the questioning tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). In making this assessment, the Board reviews various factors, including whether the employee is an open union supporter, the employer's background (whether there is a history of employer hostility and discrimination), the nature of the information sought (whether the interrogator appeared to be seeking information on which to base action against individual employees), the identity of the questioner in terms of how high they are in the company hierarchy, the place and method of the interrogation, and the truthfulness of the reply. The Board will determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Carroll & Carroll*, 340 NLRB 1328, 1332 (2003). The Board will also find statements that are not phrased as questions to constitute unlawful interrogations when they are designed to elicit responses from employees about their union sentiments. *Medcare Associates, Inc.*, 330 NLRB 935, 941 fn. 21, citing *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 929 (5th Cir. 1993).

30 Respondent argues that I should not credit Cook because he stated that Taylor patted him on the knee showing approval for his anti-union stance during the first conversation, and he stated that Cannon patted him on the shoulder during the second conversation. Respondent contends Cook's testimony that both Taylor and Cannon had similar reactions to Cook's anti union response undermines Cook's credibility. Respondent also argues that Cook's testimony as to his remarks about the use of owner operators during the October 15 meeting when the strike vote was taken undermines Cook's overall credibility.

40 Having considered Respondent's arguments, I am nevertheless persuaded that Cook should be credited concerning his encounters with Taylor and Cannon.²² Respondent called both Ortt and Cannon as witnesses. Ortt did not deny Cook's assertion that around three weeks before the election, Ortt helped arrange a ride home for Cook with Taylor. Moreover, Cannon did not deny having the conversation with Cook in the manner Cook testified. Finally, Prevost admitted that he received reports from the facility that the majority of the employees were for the union in that most of the employees had worked in union organizations before and wanted it. In a clear reference to Giant, Prevost testified that most of the employees Respondent hired were laid off from a union company. Thus, Prevost's testimony serves to corroborate Cook's testimony that Respondent's officials, including Taylor, were keenly aware that the ex-Giant drivers supported the

50 ²² Respondent did not call Taylor, who no longer worked at the company at the time of the hearing, as a witness.

Union. Cook also testified in a credible and consistent fashion about his conversations with Taylor and Cannon, and his testimony is undenied on the record by Respondent's witnesses who did appear at the hearing.

5 I find that both Taylor and Cannon violated Section 8(a)(1) of the Act by
interrogating Cook. The union filed a petition for election on May 17. On May 22,
Respondent for the first time at this facility began to follow drivers, including leading union
adherents Jackson and Tucker. On May 25, Respondent discharged Jackson, and during
10 the same meeting told Jackson and Tucker that they had been followed. Tucker was
informed by Cannon in Taylor's presence that Respondent was aware Tucker helped
start the union, Tucker was serving as a middle man between the drivers and the
Respondent, and Tucker should cease acting in that capacity. On May 26, Taylor issued a
memo dated May 25, in all capital letters notifying the drivers of Jackson's discharge.
15 While Jackson's name was not specifically mentioned in the memo, Taylor acknowledged
news traveled fast amongst the drivers by starting the memo out, "AS MANY OF YOU
ALREADY KNOW A QUICKWAY DRIVER WAS TERMINATED TODAY...". In early June
Respondent began to distribute campaign literature against the union.

20 Viewed against this backdrop, I do not find Taylor's conversation with Cook to
constitute a mere permissible campaign statement by one of Respondent's officials.
There is no contention that prior to the conversation, Cook had broadcast his sentiments
about the union to Respondent's officials. Taylor, a regional vice president, was a high
level official with Respondent. Terminal manager Ortt had helped arrange for Taylor to
25 give Cook a ride home in Taylor's car. Thus, Cook was a captive audience for a one on
one meeting with Taylor. During the ride home, a conversation about the upcoming union
election ensued, and Taylor told Cook that he had lost all the Giant drivers and he was
hoping he had Cook's support with a no vote for the union. Cook responded that Taylor
had his support. I find Taylor's remarks were coercive. First they served to create the
impression of surveillance in that Taylor related that Respondent was keeping track of
30 employees' union sentiments when he stated he knew he had lost the Giant drivers.
Second, his remark that he hoped he had Cook's support, placed Cook in the Hobson's
choice of not responding thereby creating the inference that he supported the Union, or
responding as he did by assuring Taylor that Taylor had Cook's support. Given the
circumstances of the conversation, and its content, I find Taylor interrogated Cook in
35 violation of Section 8(a)(1) of the Act. Given Jackson's recent discharge, which
Respondent broadcast to the drivers by memo, it was reasonable for Cook to fear reprisal
as he testified if he announced his pro union position to Taylor during the car ride.

40 Similarly, I find Cannon's encounter with Cook to constitute a coercive interrogation
violative of Section 8(a)(1) of the Act. While Cannon was not a regional vice president at
the time of the conversation, his testimony revealed that he had been alternating with
Regional Vice President Taylor in supervising the Landover start up. Cannon was also
present, along with Taylor, for Jackson's termination meeting. Thus, just a week before
the election, Cannon requested a one on one meeting with Cook, outside of Respondent's
45 office. Respondent had conducted a campaign against the Union, and Cannon told Cook
that he hoped he had Cook's support with the election. Cook responded that Cannon had
his support and that he was against the Union. Cook was again placed in a position where
he had to respond to a high level official, in a one on one situation, about Cook's union
sentiments. That Cook felt compelled to misinform Cannon that Cannon had Cook's
50 support because Cook was against the Union reveals that Cook felt coerced by Cannon's

inquiry. I have concluded, given the circumstances, Cook's feelings were reasonable.²³

D. The diversion of bargaining unit work

5 1. The use of temporary drivers

Respondent began making deliveries out of Landover on March 27, to about 200 Giant stores and 10 Stop and Shop stores. The Stop and Shop stores were in southern New Jersey. These deliveries did not require the drivers to layover. Respondent had 17
10 company drivers during the week of March 27.²⁴ The parties stipulated Respondent also used temporary drivers on an on going basis from the outset of the Landover operation. The number of temporary drivers Respondent used varied on a daily basis. For example, during the week of June 1, Respondent used four temporary drivers on Monday, one each on Tuesday, Wednesday, and Thursday, three on Friday, and five on Saturday.
15 Respondent paid the temporary agencies by the hour, including overtime, for the use of the temporary drivers. The temporary drivers were compensated by the temporary agencies for their pay and benefits. The temporary drivers could change from day to day as referral of the drivers was based on the discretion of the temporary agency, subject to Respondent's right to reject a particular driver. Respondent generally used a greater
20 number of temporary drivers on Mondays and Saturdays, with Saturdays being the highest usage. The temporary drivers drove the 21 cabs Respondent originally rented from Ryder to begin its operation. Respondent would also rent additional cabs as needed from Ryder on a daily basis for the heavier work days, Mondays and Saturdays, for the temporary drivers. The temporary drivers pulled the same trailers as the company drivers.

25 The NLRB election was held on June 22, and a certification of representative was issued for the Union on July 10, in the following unit:

30 All full-time and regular part-time company driver employees and hostlers employed by the Employer making deliveries from its domicile at 5 S. Club Drive, Landover, Maryland; but excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

35 Following the election, Respondent continued to use the temporary drivers on a weekly basis. For example, during the week of July 10, Respondent used four temporary drivers

40 ²³ I do not view Respondent's reliance on *BI-LO*, 303 NLRB 749, 764 (1991), enfd. 985 F.2d 123 (4th Cir. 1992) to warrant a different result. There the judge after refusing to rely on an employee's testimony about an alleged interrogation, merely speculated that the manager said that he hoped he could count on an employee for support. Such, speculation would not be the foundation for a Section 8(a)(1) finding, nor would it provide the context in which such a remark may have occurred. Similarly, *Diamond Hosiery Corporation*, 105 NLRB 532, 533, (1953), enfd. 21 F2d 262 (4th Cir. 1954), where a supervisor accused two employees of being ringleaders from the union does not require a different result. There the Board held the statement was not
45 in the form of a question, and it was not the type of remark which was intended to elicit a reply concerning union activity. For the reasons set forth above, I have concluded Taylor and Cannon's remarks were intended to elicit a reply from Cook, and that they succeeded in doing so. See, *Medcare Associates, Inc.*, supra, at 941 fn. 21; and *NLRB v. McCullough Environmental Services., Inc.*, supra., at 929.

50 ²⁴ By the week of April 3, the number of company drivers had increased to 19, and by the week of April 10, there were 23 company drivers. (See R. A. Exh. 34)

to ask Ortt and Cannon about becoming an owner operator. Branch testified he and Cannon had a conversation in June 2006, about rates if Branch were to convert to an owner operator. The conversation took place in Respondent's office and that he thought Ortt was also present. Branch testified in response to a leading question that he was
 5 approached by management about the conversation. Branch testified that, during the meeting, Cannon showed Branch three of Branch's trip sheets dated June 5, 12, and 19, which contained Cannon's handwriting. Cannon had used Branch's mileage and stops for each of those weeks to show Branch what he would have earned as an owner operator for Respondent rather than being a company driver. Branch testified the numbers Cannon
 10 told him he would be paid as an owner operator were \$1.13 a mile, \$18 dollars a stop, and \$.33 a mileage surcharge, which is a fluctuating number to offset the cost of fuel to the driver. Branch testified Cannon's calculations were already on the sheets prior to time the meeting started. Branch testified the mileage for the week of June 19 presented by Cannon was based on Branch's mileage totals ending on June 24. Branch testified that
 15 since Cannon had Branch's mileage figures as current as of June 24 at the meeting that the meeting with Cannon took place after the June 22 union election.²⁸

Cannon initially testified that an announcement had been made at Landover that Respondent was to be receiving new northern New Jersey (NNJ) runs, and that
 20 Respondent was going to lease owner operators.²⁹ Cannon testified that once the word got out that Respondent was going to be picking up the new freight and going to lease owner operators, Branch phoned Cannon at the Newark terminal and inquired whether it was time for them to talk about Branch being an owner operator. Cannon testified Branch stated he heard Respondent was getting some business and that he was still interested in
 25 being an owner operator. Cannon stated he would probably be out there in the near future and they could talk about it then.

Cannon testified that he went to Landover, met with Branch, and they went over the contract for owner operators. Cannon testified they discussed rates Branch could make
 30 upon becoming an owner operator. Cannon did not know the date he met with Branch, but estimated that it was a few weeks before the Union was certified. Cannon testified they talked about pay regarding dollar per mile, stop pay, what insurance was available through the company, and what insurance was required by an owner operator. He testified they discussed the other requirements in that the owner operator would have to maintain at
 35 least a \$1,000 escrow account, and the possibilities of purchasing a license plate for the truck through Respondent. Cannon testified he took what Branch had made in the past days or even weeks on his mileage and stops when he was running around Washington and Baltimore and applied it to the owner operators pay scale. Cannon identified his handwriting on the trip tickets he presented to Branch during the meeting testifying he
 40 wrote the calculations on the sheet regarding Branch's pay. Cannon testified he told Branch they were going to start the NNJ runs at the end of August or beginning of

²⁸ The parties stipulated Branch was a member of the bargaining unit for a period of time.

²⁹ However, Cannon later testified he did not make an announcement at the facility
 45 about the acquisition of the NNJ stores and the use of owner operators, but that he just had casual discussions with drivers when they were told about it on a one on one basis. Cannon testified there was no special visit by Cannon to make an announcement. Cannon was not sure when he informed the drivers about the new runs, stating the runs were initially supposed to start at the end of August, but they were postponed several times.
 50 Cannon testified he visited the facility when they had negotiations and he may have had a conversation with the drivers then. However, negotiations did not begin until August 8.

September. However, the start date of the NNJ runs was pushed back several times until the actual date of October 16. Cannon testified Branch signed the owner operator agreement on October 13, because he told Cannon he did not want to become an owner operator until Respondent started the NNJ runs.³⁰

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Giles identified a document entitled, "Independent Contractor Agreement," with Respondent listed as the carrier. Giles testified Branch gave Giles the document at the union hall on July 16, following a union meeting on that date.³¹ Giles testified Branch told Giles that Respondent had talked to Branch about being an owner operator. Branch asked Giles what he thought of it, and Giles said not much. Giles asked Branch what the rates were and Giles told him that he did not think much of the rates. Giles testified that, "He told me he had talked to Mr. Cannon about this in the prior week I believe."

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On July 17, Giles sent by fax and first class mail a letter to Taylor. Giles sent the letter because of the information Branch had provided Giles. In the letter, Giles stated:

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As you also may know, the National Labor Relations act (NLRA) prohibits an employer from diverting bargaining unit work from employees in the certified bargaining unit to other employees, or from otherwise converting bargaining unit work to non-bargaining unit work. Furthermore, the NLRA prevents an employer from unilaterally changing wages, hours and other terms and conditions of employment without bargaining over such proposed changes with the Union.

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It has come to our attention that Quickway intends to offer or already has offered bargaining unit work to drivers and hostlers on an independent contractor, or owner-operator basis. Such improper diversion of bargaining unit work would

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³⁰ Ortt testified he was not present for a meeting with Branch and Cannon when Branch was shown some of his trip sheets and it was calculated what he would make as an owner operator. Rather, Ortt claimed once Branch found out the New Jersey freight was coming, Branch approached Ortt about it. Ortt testified it was approximately in August, or September when Branch came to the office. Ortt testified Branch wanted to know if they were going to hire owner operators for the NNJ runs, and if Branch would have a shot of leasing his truck on. Ortt testified the only other conversation he recalled was that Ortt approached Cannon and asked him if they were bringing owner operators on if Branch was eligible to bring his tractor on. Ortt testified Respondent had been looking for owner operators prior to the NNJ runs and ran ads in Baltimore Washington area newspapers which Branch saw. Ortt testified there were ads in July 2006 for owner operators for Landover. I do not find Ortt's testimony credible here as Cannon and Branch's testimony reveals that Cannon met with Branch at the end of June or early July, and told Branch about the NNJ runs, gave him the rates, and offered him a position as an owner operator at those rates, which Branch declined until the NNJ runs actually started. Thus, Ortt's claim that Branch asked Ortt in early August if Respondent was going to hire owner operators to run the NNJ runs makes no sense in terms of the sequence of established and admitted events. I also find that Ortt was present for the meeting between Branch and Cannon as Branch testified. I do not credit, Ortt's claim that Cannon bypassed the terminal manager when he met with Branch to offer to convert Branch to an owner operator position.

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³¹ Giles recalled the date by reviewing the meeting sign in sheet. Branch testified that right after the union meeting, Branch shared the information Cannon had given him about being an owner operator with Giles. Branch testified Giles looked at the information and told Branch that it was not worth doing. Giles said the rates were garbage.

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violate federal labor law and demonstrate bad faith on the part of Quickway in refusing to bargain with its certified collective bargaining representative.

..*

5 The Union also demands that Quickway immediately engage in good faith collective bargaining over any proposed change in Quickway's operations, as well as to commence the forming of a collective bargaining agreement between Quickway and the Union.

10 Cannon responded to Giles by letter dated July 28, in which Cannon stated:

15 In your letter dated July 17, 2006, you requested information from Quickway Transportation, Inc., with respect to contracting with independent contractors at its Landover terminal because of concerns that Quickway (h)as diverted bargaining unit work to those independent contractors in violation of federal law. The underlying premise of your letter and your request for information is incorrect.

20 Quickway currently has equipment for and needs 26-27 company route drivers to do the work presently being performed at the Landover terminal. Unfortunately, we only have 22 route drivers and have been supplementing the workforce with the use of temporary employees from a local temp agency. Because of the cost involved in using temporary employees, Quickway would like to reduce the use of temporary employees and is actively trying to hire additional route drivers to fill the company trucks.

25 Quickway has also begun advertising to attract independent contractors to work out of the Landover facility. We anticipate beginning some additional runs that will require layovers. Notwithstanding the fact that Quickway does not have enough route drivers to perform its current work, Quickway does not have any sleeper cab equipment at its Landover terminal to perform those runs. Using company route drivers is therefore not an option, and Quickway will have to supplement its workforce with independent contractors who have sleeper cab equipment. Those independent contactors may also supplement any work that cannot be performed by route drivers with company equipment. Suffice it to say, however, despite Quickway Transportation's plans to use independent contractors, no work is being diverted or taken from bargaining unit employees.³²

35 ³² I have credited Branch's testimony that it was Cannon not Branch who initiated the meeting where Cannon discussed the NNJ runs and Branch becoming an owner operator. The meeting taking place at the end of June or early July, since Cannon presented Branch's route sheets ending on June 24, during the meeting. While Cannon's June 28 letter and Ortt's testimony reveal that Respondent began to advertise for owner operators
40 sometime in July, Respondent presented no documentary evidence showing the date those advertisements actually began. On the other hand, Cannon was aware of Branch's prior desire to convert to an owner operator position based upon Branch's entreaties to Cannon to do so. Given the fact that Respondent did not contract with its first owner operator until August 8, the record evidence supports a finding that Respondent did not
45 begin to advertise for owner operators until sometime after Cannon met with Branch. Along these lines, Ortt testified that Branch did not approach Ortt about the ads until sometime in August, and Cannon could only state that he discussed the matter with drivers when he was in town for negotiations which began on August 8. Given, Respondent's knowledge of Branch's desire to be an owner operator, and Respondent's
50 inability to establish how Branch would have learned of the NNJ runs at such an early date other than by Cannon informing him of it during their meeting, as well as considerations of

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3. The contracting with owner operators

Respondent contracted with Thomas Purnell as its first owner operator out of Landover on August 8. Purnell began running routes for Respondent on August 10, which was a Thursday, and he worked three days that week. Purnell's records show beginning August 14, he worked five days a week for Respondent through and including the week of September 18. Purnell worked four days during the week of September 25, and thereafter resumed his five day a week schedule through the week of October 9. Purnell was running all local runs during this period, which theretofore had been performed by the company drivers or temporary employees.³³ Dion Lane was the second owner operator hired by Respondent with a contract date of September 5. Lane ran five days the week of September 18, three the week of September 25, five the week of October 2, and four the week of October 9. Terringus Walker entered a contract with Respondent on September 19. Walker ran three days the week of September 25, four the week of October 2, and six the week of October 9. Respondent contracted with additional owner operators on October 5, October 10, and on October 13. Respondent's records reveal that it had contracted with six owner operators by October 16 the day the NNJ runs began. Respondent subsequently contracted with additional owner operators on November 14; November 29; December 11, and on December 21. Cannon testified Respondent had as many as 13 owner operators during the strike beginning on January 12, 2007.

Branch credibly testified to the following: On October 13, Branch signed Respondent's agreement entitled "Independent Contractor Agreement." Ortt approached Branch and gave him the agreement on October 13. Branch had previously received a call from Ortt stating that on October 16, Respondent was going to start the new NNJ runs. On October 16, he began running routes as an owner operator for Respondent.

As an owner operator Branch used Respondent's DOT number.³⁴ Branch testified that upon signing the contract his runs also changed from local to NNJ runs. When Branch became an owner operator his compensation was \$1.13 for mileage, \$18 a stop, and whatever the fuel surcharge was for the week. Respondent paid for tolls when Branch was a company driver. As an owner operator, Branch was also reimbursed by Respondent for tolls for about \$100 to \$150 on a weekly basis. When Branch was a

the demeanor of the witnesses, I have concluded it was Cannon who initiated the meeting with Branch, and that Branch did not call Cannon on the phone to initiate the conference as Cannon testified. It appears from the record, that the General Counsel has established that the meeting between Cannon and Branch took place after the June 22, election. However, the General Counsel has failed to establish, with sufficient specificity from the testimony, that the meeting took place after the July 10, certification date as the record evidence shows that the meeting between Cannon and Branch took place sometime after June 24, but before July 16.

³³ Cannon testified when owner operator Purnell he came on he did the same type of work as the company drivers and as the temporary (temps) were.

³⁴ Branch testified that contrary to being an owner operator at Respondent, that when he is an independent contractor he retained his own operating rights, and that as an independent contractor he could contract for his own loads without Respondent's or anyone's help. As an independent contractor Branch uses his own DOT number. As a lease contractor or owner operator, he used the DOT number of the company he was leasing to. Branch testified he was not an independent contractor when working for Respondent as an owner operator.

company driver, Respondent was responsible for his taxes, and when he became an owner operator he was responsible for his taxes. When Branch became an owner operator he purchased insurance for his truck through Respondent. He did not insure Respondent's truck when he drove it as a company driver. He testified that under the terms of the independent contractor agreement with Respondent, he could only work for Respondent. He testified this was because he could not use Respondent's DOT authority without their permission, and he was purchasing his insurance through Respondent.³⁵ As an owner operator, Branch had to put a sign on his truck that said Quickway and he had to display Respondent's DOT number. The sign was a peel and stick sign. Branch testified the owner operators were not represented by the Union. Branch testified, "The operators didn't say that they were. I assumed myself, once I went on this contract, all my union stuff that I was being represented by, was no longer." He testified no one told him this was the case.

4. Contract Negotiations August 8 to October 4

During contract negotiations, the parties worked from a typed template combining proposals from both the Union and Respondent. The parties stipulated there were bargaining sessions on August 8, 9, 30, 31, September 1, October 2, 3, 4, November 7, 8, 9, December 6, 7, and 8, 2006, and on January 15 and 17, 2007. Giles testified in preparing for negotiations with Respondent he contacted the International Union's research department and was sent four contracts that Respondent had with other Teamsters local unions. Giles testified that all four contracts included owner operators as being covered by the collective bargaining agreement.³⁶

In attendance for the Union during negotiations sessions were Giles and unit members Tucker and Mark Duncan, and for Respondent were Cannon and Respondent's attorney James Hanson, with Ortt attending one or two sessions. During the August 8, session, the parties exchanged proposals. Giles testified that during the session he informed Respondent that while they may reach tentative agreements on specific proposals nothing was agreed to until they reached an agreement on everything. Giles testified the Union's initial proposal on subcontracting was "that bargaining unit work could be subcontracted only if equipment and manpower were exhausted." Giles testified Respondent's initial proposal on subcontracting was included in a proposed management rights article, and it provided for unlimited subcontracting of bargaining unit work.

Cannon testified, relying on Hanson's notes, that during the August 8, session,

³⁵ Counsel for the General Counsel stated at the hearing that he was not contending that Branch was still an employee when he became an owner operator.

³⁶ Giles and Cannon each testified in detail about negotiations with Giles relying on his own bargaining notes, and Cannon relying on the notes taken by Hanson. Giles' notes were legible and his recollection was good as to the specifics of each meeting, particularly when aided by the use of his notes. On the other hand, Cannon on occasion had difficulty deciphering Hanson's notes. Cannon's recall about the specifics of a particular meeting was not good, and he on occasion testified in generalities with his claims not supported by either set of notes. Considering their respective demeanors, I have found Giles to be a credible witness and his notes to be a reliable aid in detailing what occurred. I have credited his testimony as to what occurred during negotiations. I credited Cannon in some instances concerning his testimony about negotiations, but not others. Cannon's credibility concerning specific aspects of his testimony will be further discussed herein.

there was a notation in the notes at page 4, stating, “extra work--offered to available employees already working.” Cannon testified that there was a discussion on August 8, that extra work would be offered to company drivers that are currently working or scheduled to work. He testified any company drivers not scheduled to work would be offered to possibly come in on their off day. Cannon testified that any work beyond that would be offered to subcontractors. Cannon testified that on August 8, if Respondent needed an extra driver it was offering the work to company drivers first.

In addition to the regular attendees, Ortt attended the August 9, session. During that session, the Union agreed to Respondent’s proposed Article 3 management rights article, with the exception of the last sentence which would have allowed for unlimited subcontracting. Giles testified that it was reflected in his notes for this session that Hanson stated that when and if Respondent obtained some additional work that involved layovers, they would come to the Union and compare having company drivers do the work versus using owner operators. Giles responded he wanted it be perfectly clear that Hanson said they would come to the Union when the Company wants to use owner operators on layover runs and Hanson replied, yes, and that they were looking at owner operators to supplement the workforce now in place instead of using temps on some local runs. Giles testified it is reflected in his notes that he told Respondent again, during the August 9, session that nothing was agreed to until everything was agreed to.

Cannon testified concerning the August 9 session referring to page 15 of Hanson’s notes testified Giles stated on August 9, that the key issues in negotiations were wages, health and welfare, vacation, sick leave, personal days and holidays.³⁷ However, as reflected at page 16 of Hanson’s notes, following Giles remarks about the big picture or key issues, a discussion ensued about the use of owner operators. Hanson’s notes read:

JHH: Using o/o’s-replace rent-a-driver-may use in place of—our workforce exhausted.
 MO: To cover the temp
 CC: O/o’s cant get into some stores- a handful
 KT: Will take away from us –my runs³⁸
 JHH: Not trying to take away from our drivers
 PG: Only cannot be run by co. drivers?
 CC: Calculation by miles, stops –is issue 75-80% of loads require layover.
 PG: How about using cartage agreement?
 CC: Not going to do it that way-too expensive.

Cannon testified there was a discussion that Respondent was going to replace the temporary agency drivers that Respondent was using to supplement their company driver fleet, and Respondent was going to start using owner operators instead of the temps.³⁹

³⁷ Giles notes reflect that Hanson asked, “What are the big picture issues?” Giles responded, “The wage structure & benefit structures being maintained including overtime provisions (including Vac, sick, pers. Leave, holiday,---The economic Package.”

³⁸ Cannon later testified that Hanson’s notes reflect that Tucker stated, “will take away work from us, my runs...” Cannon agreed Tucker expressed a concern that using owner operators would take away work from us, meaning the bargaining unit and his runs.

³⁹ Cannon also testified the whole discussion was that the majority of the New Jersey runs were going to require a layover, that Respondent was not going to spend the money for extra equipment, that Respondent was going to use owner operators, that Respondent

Continued

As set forth above, the first owner operator agreement was signed with Respondent for Landover on August 8, for Purnell, who began running routes on a full time basis on August 10. Giles, referencing his notes, testified he had a phone call with Hanson on August 15.⁴⁰ Giles testified that during the call Hanson told Giles that on August 10, Respondent sent out one owner operator on a regular route. Hanson stated the driver was off sick and the company offered the work to company drivers including Tucker and it was turned down. Hanson also stated Respondent had no interest in returning Jackson to work or paying him any money. Giles asked Hanson to send Giles the video tape they had of Jackson. Giles testified Hanson did not send him the tape.

The next session was August 30. Giles testified that during the August 30, session, the parties tentatively agreed to a recognition clause that mirrored the NLRB certification. Giles testified that Respondent's proposal on Article 3 management's rights was again discussed at this meeting. Giles again insisted that Respondent delete the last sentence providing for unrestricted subcontracting from the article. Hanson replied they would have to put the article on hold. Giles testified he did believe subcontracting was discussed at the next two sessions held on August 31 and September 1.

On September 27, the Union filed an unfair labor practice charge in Case 5-CA-33257, alleging Respondent had diverted and/or subcontracted bargaining unit work by using independent owner operators without bargaining in good faith with the Union. The charge also alleged Respondent had engaged in direct dealing with employees.

The parties met on October 2. Giles testified that during the meeting he told Hanson the Union considered anything delivered from the dairy to be unit work, and Hanson had said on August 9, regarding the use of owner operators that when and if they got any work that required a layover, they would talk to the Union and negotiate the use of owner operators versus having Company drivers do it. Giles testified he considered the work being performed by owner operators to be union work, "Because we were certified as all full and part-time drivers at that location. There were no owner operators at the time that the operation was started. It would be new work. Anything that, you know, was new to the unit, you know, was still covered by the unit. It was still unit work." Giles testified that at the beginning of the meeting, Hanson responded to Giles concern about Respondent's using owner operators, by stating that Respondent had been subcontracting since they started the Landover operation by using temporary drivers. Hanson stated if

stated that 75 to 80 percent of the New Jersey freight was going to require layovers, and that Respondent was going to use owner operators. I do not credit this aspect of Cannon's testimony. The statements he made here about not spending money on company equipment and that Respondent was going to use owner operators for the New Jersey runs were not supported by Hanson's notes, and contradicted by Giles credible testimony that Hanson told Giles during the session that and if Respondent obtained some additional work that involved layovers, they would come to the Union and compare having company drivers do the work versus using owner operators.

⁴⁰ Giles testified that on August 10, he went over to MMD for a meeting with management there. When he came out of the building at around 5 p.m., he recognized an owner operator tractor in that it was not leased by Ryder, as were the tractors Respondent was using. Respondent's tractors were all the same color, make, model and year. The tractor Giles saw was older, it had different markings on it, and new set of Quickway decals on the side of it, and this tractor had a sleeper cab.

someone feels cheated about this tell us.⁴¹ It is reflected in Giles notes of October 2, that Giles stated stops were being removed from existing runs and put on new trailers to create additional runs. Hanson stated the customer tells how and when to deliver the milk. Tucker asked what about a driver that has a regular run and now he gets something else and an owner operator gets his run. Cannon stated we never had set loads, and Tucker
 5 replied we have had them for the last three months. Hanson stated we have to check the facts and the parties had a caucus.

Giles testified that during the caucus, Giles called MMD and talked to then Dairy
 10 Manager Aumen, who has since retired. After the caucus, Giles made the assertion that he thought the owner operators were being used to do bargaining unit work. Giles testified he asserted that loads were being manufactured by taking stops off existing runs and combining them to make an additional trailer load of milk. He testified Hanson's response is reflected at the top of page two of Giles October 2, notes. Giles testified
 15 Hanson responded that the dairy determines the number of stops and how many dollies are on a trailer. Giles testified, "We went back and forth" and that Ortt said he was not pulling stops off of the trucks to make additional loads.⁴² Giles testified Tucker said that was not true. Tucker said, he had seven stops on a specific run, and there was one stop off, so there was only had six stops. Giles testified the impact of the loss of a stop was
 20 Tucker would have lost mileage and stop pay.

Owner operators were discussed later on during the October 2, session as reflected at page 5 of Giles notes. At that time, Giles stated owner operators were being used to do bargaining unit work. Giles testified Respondent was not performing any layover runs out
 25 of Landover at that time. Hanson responded Respondent was going to use owner operators on runs that require a layover. Giles responded that any delivery made from that dairy was bargaining unit work, and that giving it to an owner operator without bargaining with the Union is a diversion of bargaining unit work. Hanson responded owner operators were not company employees, and were not part of the bargaining unit. Giles testified, "I responded by saying, look, when this bargaining unit was stipulated to, there
 30 were no owner operators but this was new work that should be bargained over. I asked him specifically have you changed your position on what you told me in August, that the Company would bargain with the Union on the use of owner operators. He responded, no, not on the new work. I asked him to explain." Giles testified that Hanson said "that to the extent that they use owner operators, as they have used the temps, we will continue our
 35 past practice. He then stated on the new work, we will come to the Union, and if able or not to run without a layover, we'll bargain over the new work and the cost, et cetera." Giles testified he responded that when the Union stipulated the bargaining unit, they were unaware of any temps or owner operators. Hanson responded that it was not the
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⁴¹ Giles testified it was his view that the use of owner operators was different than the use of temporary employees. Giles explained temporary drivers were not uncommon to this type of an operation which was delivering perishable products to a major customer, as they have certain service requirements that have to be met. Giles testified using temps or
 45 rent a drivers is not alien to Local 639 because the Union has recognized when there is something that causes these operations not to be able to cover their work they have to be able to fill that need. Giles testified the use of temporary drivers is not a subcontracting situation in the sense that they are sending work away to be done by somebody else on a long term or permanent basis. It's just to fill an immediate need.

⁴² Giles notes do not reflect that Ortt was in attendance at the meeting, but he was
 50 apparently consulted with by Respondent's officials during the caucus.

company's fault that the Union did not know about temps. Giles stated there were owner operators that were included in the bargaining unit at other Quickway locations and they were covered by the contract. Giles asked Hanson if he intended to bargain with the Union over the use of owner operators. Giles testified, Hanson "responded by saying, no." Hanson went on to state that he had never seen anything like the other Quickway locations where the owner operators pay Union dues but do not receive any benefits under the contract. Giles testified he ended the session at that time.

Cannon testified that, according to Hanson's notes, Giles opened up the October 2 session talking about owner operators stating he was going to go to the NLRB for a Section 10(j) injunction. Cannon testified as he interpreted the notes that during the discussion Hanson responded Respondent had been subcontracting since the start up by using temp drivers, and now Respondent was going to use owner operators doing the same type of work. Cannon testified the Union made a claim that Respondent was taking stops off current loads to make up additional loads just to give owner operators, and the Union mentioned company driver William Walker was losing loads. Cannon testified, in reviewing page 43 of Hanson's notes, that during a caucus Hanson and Cannon placed a call to Ortt, Respondent took the last three weeks of pay of Walker and averaged it out. Cannon testified the notes show that the average came to in gross wages to \$1,215, and the current week was \$1,181. Cannon testified the notes reference a claim from Giles one load went from nine to six stops, which he testified is not a possibility. Cannon testified Ortt told Hanson and Cannon there were no nine stop loads, that the majority were five to six stops. Ortt indicated he had only seen one eight stop load. Cannon testified a driver's pay fluctuates weekly based on the stores orders. Cannon testified that following the caucus at 2:03 p.m., they returned to negotiations and Respondent discussed with the Union the information they received from Ortt about Walker's pay. Cannon testified Hanson's notes at page 47, reveals that later on there was a general discussion about subcontracting. Hanson's notes read as follows:

(general discussion re subk. & NJ runs)
 -Co has subc BU work since start of operation
 -Co uses o/os everywhere else
 -Co will discuss new work with union to see if drivers want that work
 -Co will decide when to add driver and equipment
 -Co will cost new work by o/os vs. co. driver⁴³

For the October 3 session, it is reflected at the third page of Giles notes that Hanson referenced Article 15.09 and stated, "15.09 We're OK." Article 15.09 reads:

Section 15.09. Bargaining Unit Work/Subcontracting. Supervisory employees or non-bargaining unit personnel may perform the work covered by this agreement or the Employer may subcontract the work covered by this Agreement when all of its

⁴³ Cannon testified that he and Hanson explained to the Union that owner operators were used at all other locations throughout the Company and that we intended on using them in Landover for the NNJ runs. Cannon testified Hanson indicated Respondent costed out the new work concerning the use of owner operators versus drivers, and the company did not want to spend the money for sleeper trucks. This testimony by Cannon is not credited as it is not supported by Hanson's notes where there is no reference to the cost of sleeper cabs, and which state the "Co will discuss new work with Union to see if drivers want that work" and that the "Co will cost new work with o/os vs. co. drivers"

employees are working, scheduled to work or are unavailable to work.

Giles's notes reflect that he told Hanson concerning Article 15.09 that the Union maintains the Employer should have enough employees to do the work of the bargaining unit.

5 Hanson responded that he did not know what Giles meant as it was cheaper to use company drivers than temporaries. Hanson stated Respondent was not going to have its manpower needs dictated by the Union, and Respondent will decide when it hires and who it hires. Giles asked Hanson how much temps cost the company and Hanson stated he did not know. Giles stated bargaining unit work should be covered by union members, and
10 Respondent should maintain enough drivers to do the work of the unit. Hanson said, as reflected in Giles notes, that if we do not have enough drivers to get the work done, then we will subcontract it. Giles stated, as reflected in his notes, if the normal work of the union requires 25 people, the company should have 25 drivers, not 10 and then say they can subcontract the rest. Giles stated as to overtime, drivers who are off work should be
15 offered over time before the company calls in a temporary or anyone else. If the overtime is refused by the bargaining unit then a temporary would be allowed. Hanson stated the Union was not going to tell them whether they have 18, 20, or 24 drivers that they were going to staff as they saw fit. Giles stated if you are subcontracting every day you should be trying to hire someone.

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During the conversation, Hanson stated he anticipated they were going to start getting some Jersey work in about two weeks, which is referenced by the parties as northern New Jersey work.⁴⁴ Giles testified Hanson stated that some of the routes were up to 500 plus miles, might have 6 stops on them, that on average they would be around
25 475 miles a trip with 5 stops. He estimated that it would take 12 to 16 hours to run these trips. Hanson stated that 65 percent of the routes would take over 14 hours to run. Giles notes reflect Hanson stated they had done some costing for the routes using owner operators versus company drivers with per diem and hotel, and that it would be 3.5 to 9.5 cents a mile less to use owner operators. Giles asked what would the costs be without per diem and a hotel, and Hanson said he would have to figure that out. In response to Giles' inquiry, Hanson told Giles that Respondent calculated \$25 per day per diem and \$75 a day hotel costs if they had to layover someone without a sleeper cab. Giles responded \$75 a night for a hotel could buy a lot of sleeper cabs. Giles asked what Respondent was proposing to the owner operators and Cannon responded the stop pay was \$1.33 a mile,
35 and he said that was based on \$1.13 a mile and \$18 per stop. Hanson said the tolls were the owner operator's expense. Giles notes reflect Hanson stated they were proposing to use owner operators for the New Jersey stores for all of the obvious reasons. Giles asked if that included the New Jersey stores that were currently being serviced, and Hanson said no the new stores. Giles asked if they were talking about the 54 new Stop & Shop Stores throughout New Jersey that are presently not being handled by Marva Maid, and Cannon replied yes. Giles stated some of the runs could be handled by the bargaining unit. Tucker stated they were currently servicing two New Jersey runs that were 400 plus miles and five stops. Giles stated the Atlantic City run is 433 miles and five stops, and the Rio Grande run is 479 miles and five stops. Giles testified both were existing runs being
45 serviced by the bargaining unit.

Giles testified that they again discussed Article 15.09 later on during the October 3

50 ⁴⁴ Giles testified there were already 10 stores in New Jersey referred to as southern New Jersey (SNJ) that had been serviced by the bargaining unit since the first day of operation.

session. Giles raised it, and his notes reflect that during the discussion Hanson stated the Union was not going to tell them when to spend money on equipment. Hanson stated if they get more business they might give it to another carrier. A discussion ensued about making money, and Hanson said they could make money with owner operators. Giles
 5 stated they must be making more money with company drivers, or they would only have all owner operators. Giles stated that Article 15.09 and the last sentence of Article 3, the management rights article was a major problem. Giles stated the company was going to have to do something about it or this was all just a big waste of time. Giles stated, if you think I'm going to negotiate a contract that allows unlimited subcontracting, then "I'm
 10 pissing in the wind." Hanson stated it is not that bad, that Respondent had owner operators in other parts of the country, and that some operations are better served by using owner operators. Hanson stated we now have 24 company drivers, the work we started with, Respondent figured they would need 27 drivers and that was what they want to have. Giles stated as new work is added, the Union wanted their membership to grow
 15 also, and if the work was doable with company drivers, the Union wanted to do it. Giles stated he was going to have a problem with the subcontracting language as written. Hanson stated they were trying to do the Landover work with company drivers but the New Jersey runs make more sense with owner operators. Giles stated they needed to agree on some language because the Union could not agree to open subcontracting language.
 20 Hanson stated they would work on it tonight, and the Union should suggest some language also.⁴⁵

Cannon testified that on October 3, the parties discussed proposal 15.09 relating to subcontracting. Cannon referred to page 53 of Hanson's notes. Cannon testified Giles
 25 stated they were going to hold on Section 15.09, Cannon testified "I guess there was a little bit of disagreement from the union and company, and Phil Giles was still making the plea that the company should hire enough drivers to do all the work." Cannon testified there was a discussion if Respondent did not have enough drivers they were going to subcontract out to temporary drivers or even owner operators. Cannon testified the New
 30 Jersey runs were probably referenced during this discussion. Cannon testified the pay amounts to the owner operators of \$1.13 per mile and \$18 a stop, were referenced in Hanson's notes referring to pay 54 of Hanson's notes. Cannon testified the fuel surcharge being paid to the owner operators was not included in the calculations presented to the Union. Hanson's notes reveal that Giles stated during the meeting, "Average, 45 miles an
 35 hour, with stops of 30 minutes each. If it can be done without a layover, the bargaining unit does it or do it." Cannon testified Hanson's notes again reflect a discussion of subcontracting at pages 58 and 59. Cannon testified they were still discussing Article 15.09, and Giles had made a statement if Respondent was using subcontractors every day, he insisted that Respondent hire more drivers, or even casual temps or part timers.⁴⁶

40 The October 4 session was also attended by Ortt. Giles testified, and his notes reflect, that when they opened the session, Giles made a verbal proposal pertaining to subcontracting of unit work. Giles testified he proposed the Employer agree the work of

45 ⁴⁵ Giles explained it was the Union's position that some of the 54 new stores did not require a layover, and could be handled by the bargaining unit. He testified it was the Union's position that anything that did not require a layover was bargaining unit work, and that anything that did require a layover should be bargained over.

50 ⁴⁶ Cannon testified Giles was insisting he wanted the Respondent to hire more drivers, "but we weren't going to do it to run the northern New Jersey freight. We were still going to run the northern New Jersey freight with owner operators."

the bargaining unit shall include but not be limited to the delivery of dairy products from the Marva Maid Dairy in Landover, Maryland, to retail or wholesale facilities owned or operated by (the name of the operation was left blank in the proposal), that are 500 miles or less in total mileage and can be run without a layover. The Employer agrees that the deliveries now being made in New Jersey shall remain bargaining unit work. Giles testified he arrived at the 500 mile limit as a compromise based on his experience that a run of that distance or less could be done without a layover. Hanson responded he would look at the proposal during a break.

Giles testified that, after the break, Hanson stated as to subcontracting Respondent should have a full complement of drivers by next week. Giles testified Hanson had previously said that would be 27 drivers. Hanson stated if they had the full complement of drivers, it was their intent to run the work they originally bid on with company drivers and he hoped everyone would feel better. Giles responded the Union's proposal was made to protect the work the unit was handling when the Union filed the petition. Giles stated his proposal gave definition to the work and there was work that will be new that could also be run with the company drivers. At the end of the meeting, Giles notes reflect he stated this will not continue much longer, that the Union would be prepared to settle in the next round, and that they would present a total solution to the company.

5. The October 15 strike vote

Giles testified that on October 15, he held a meeting with members of the bargaining unit. Giles called the meeting because he was receiving phone calls from members of the union that people were very angry, "that they-- they were anxious to get a contract completed." Giles testified Tucker and Duncan served as conduits between bargaining unit members and Giles. Giles testified Tucker, Duncan, and other drivers called him. Giles testified, "they were very upset about the pay structure. They were very upset about their benefits, the fact that there was no contract in place. So they were just, you know, upset about the whole situation really."⁴⁷ Giles identified a sign in sheet for bargaining unit employees containing 21 signatures for the October 15 meeting beginning at 9 a.m., and lasting until 10:55 a.m. Giles identified a two page handwritten agenda that he testified he prepared prior to the start of the meeting. Giles testified the agenda was not all inclusive of what was discussed at the meeting.

Giles testified Tucker opened the October 15, meeting with a prayer, then Giles updated the membership on negotiations stating he felt they were very close on agreement on a lot of the language in the contract. Giles stated they must be willing to

⁴⁷ The Union had previously filed a request for strike benefits assistance for Respondent with the International Union dated August 16. Giles testified the information on the application form came from him. The date of the proposed strike action was August 25, and it states under outstanding issues, "Wages, Health, Pension and other language." By fax dated October 20, the Union's request for strike benefits was approved by the International Union. Giles testified he filed a strike authorization request over the summer because Respondent ran an anti-union campaign. He testified the Union demonstrated an overwhelming majority of support and offered third party verification, but Respondent wanted to go to an election. He testified it was his opinion that Respondent had delayed the start of negotiations, had not bargained in good faith, and was untruthful to him, so he filed the strike authorization paper work. Giles testified it was also his standard operating procedure to file the paper work early so things did not have to be done at the last minute.

maintain area standards regarding pay and benefits. Giles stated they would either get an agreement or they would have to do something else. He stated if they had to do something else they would have to act at a time which would have maximum impact. Giles stated he had filed strike paperwork weeks ago but the constitution required them to
 5 take a vote on whether to strike. Giles explained this gave the committee the big stick that sometimes got things moving at the bargaining table.

Giles testified he told the members there was an issue that was probably being overlooked that they needed to understand, that Respondent was subcontracting the
 10 bargaining unit work, that the Union had filed unfair labor practice charges over this problem, and the outcome of the negotiations did not mean a thing if Respondent continued to outsource their work. Giles explained the situation in more detail, and then he threw the meeting open to questions. Giles testified there was a lot of discussion and people were asking for more details on what he told them. Giles could not specifically
 15 recall who spoke at that time. He testified the discussion, lasting about 30 minutes, was a general discussion with a question and answer period. Giles testified he explained to the membership about the unfair labor practice charges, that they were important because it was always important to follow the law but even more than that if the Company continued to divert the work we might have to take action to stop the diversion. Giles testified he
 20 discussed the complaint that issued over the termination of Angelo Jackson, and that charges had been filed on the surveillance and the impression of surveillance.

Giles testified that following the discussion they took a strike vote which was unanimous to strike. Giles stated if it became necessary to strike they would see a picket
 25 line when they showed up for work and that they should join the picket line. Giles testified he told the employees they were waiting to strike because they were still in negotiations, that it was possible they could resolve the charges, and it was Giles' hope Respondent would stop diverting work. Giles testified the diversion of work was the main issue to him.

Giles' written agenda for the meeting reflects a motion was made by Tucker and
 30 Duncan to have the negotiating committee continue negotiations until a tentative agreement is reached or in the judgment of the negotiating committee with the approval of the Union's executive board a strike should be called. Giles testified the motion was made at the meeting. Giles testified he knew they were going to make the motion before the
 35 meeting started because he had discussed it with them and he filled in their names on the agenda before the meeting started. Giles testified he did not make any notes on the agenda outline during the meeting, except to add the time the meeting ended.⁴⁸

Tucker testified that, during the meeting, Giles spoke about Respondent's engaging
 40 in unfair labor practices, specifically the firing of Jackson, the videotape and following of Tucker and Jackson, and the diverting of bargaining unit work to owner operators.⁴⁹

⁴⁸ Giles admitted there was nothing in his written agenda for the meeting stating
 45 anything about unfair labor practices. Giles identified an affidavit he gave on February 6, 2007, in which he stated, "I prepared an agenda before the meeting and I kept notes on my agenda." Giles admitted he stated in the affidavit that he did not specifically recall what was discussed at the meeting. He explained he did not have his notes with him at the time the statement was taken.

⁴⁹ Tucker testified Giles did not say anything about the use of temporary drivers.
 50 Tucker did not recall Giles saying anything specific about what the company was offering. Tucker did not recall Giles discussing anything about being paid by the hour as opposed to
 Continued

Tucker testified they then had a strike vote by secret ballot. Tucker testified before the strike vote, Giles stated contract negotiations were still going on. Tucker testified the vote was unanimous to strike. Tucker testified there was no strike date given at the meeting. Tucker testified that as far as he could remember there was no discussion about the negotiations, it was all about the unfair labor practices and going on strike for the unfair labor practices. Tucker testified he gave the opening the prayer and that was all he recalled he talked about at the meeting. Tucker did not recall making a motion at the meeting to authorize the strike, but he would not deny that he did so.⁵⁰

Kevin Cook testified that, during the meeting, Giles distributed a contract that Respondent had given out, and Giles wanted to go over the whole contract. Cook testified they took a vote to see if anyone wanted to accept the contract, and everyone turned the contract down. Giles then explained what an unfair labor practice was, and he stated all the work that came out of MMD was their work as company drivers and no one could come in and take it from them. Giles then passed out the ballots to take a strike vote and asked if anyone had any questions or any concerns. Cook testified he did not recall what everyone said, but he stood up and said he was hurting "from losing out on going to northern New Jersey because of the owner operators." Cook later testified he said at the meeting "that I was hurting because of the owner operators, that I wasn't making enough money because they were taking most of the work going to North Jersey." When confronted that the NNJ runs did not start until October 16, which was after the October 15 meeting, Cook testified, "Well, they was taking the long distance runs, not just the North Jersey. They were taking the local runs that was long distance." Cook testified the owner operators were hurting him. He testified, "They was also taking the long distance runs going further, Virginia, Delaware. Cook testified they took a strike vote by secret ballot and it was unanimous. Cook testified that Giles explained the difference between an unfair labor practice and economic strike. Cook testified Giles said all the work that comes out of MMD is the company drivers' work, and it's an unfair labor practice to give it to temp drivers or owner operators."⁵¹

Phillip Langhorn testified the meeting started with Tucker leading a prayer and then Tucker spoke for a minute stating they were not getting anywhere at the bargaining table.

being paid by the mile.

⁵⁰ Tucker testified Respondent's use of owner operators sometimes impacted on the availability of a second run for Tucker in that it might not be available if an owner operator needed work. He also testified that sometimes to make a load for an owner operator, Tucker was deprived of loads and stops. He raised this at negotiations on one occasion, and Ortt came to the next session and responded to it. He testified he thought one of his stops was given to an owner operator, but he was not positive this was the case.

⁵¹ Cook testified he thought the use of owner operators decreased his income because they were giving them the longer runs to NNJ. Cook told the dispatcher he was willing to take a run, but he would just give it to the owner operators. Cook testified he was not getting those runs unless an owner operator was not available. Cook testified before the NNJ runs started, he felt the use of owner operators was decreasing his income because he came in a couple of times and it seemed owner operators had a longer run than he had. He might have a run that was not even 100 miles, and would get paid minimum pay for that day, when an owner operator may have a run going to Delaware or further out in Virginia. Cook testified he remembered calling Ortt in the morning and asking if he needed Cook to take a run, and Ortt said an owner operator had taken it. Cook estimated he called Ortt about this four or five times before the NNJ runs started.

Then Giles spoke and said the meetings with Respondent were not going very well, “they weren't getting anywhere, and so we had a strike, a vote to strike.” Langhorn testified, Giles told them what Respondent had offered and it was not acceptable. When asked if he recalled Giles saying anything about unfair labor practices, Langhorn testified, “The
 5 unfair labor practice was with the owner operators running during our work.”⁵² He testified the unfair labor practice was what they were going on strike about. When asked what else was discussed with regard to unfair labor practices, Langhorn replied, “we considered unfair was getting paid by the mileage.” Langhorn testified the drivers said they wanted to be paid by the hour.

10 Langhorn testified he thought they discussed Jackson's being fired for stealing time and that it came up that drivers were being followed. He testified Tucker raised it, “that they was being I guess targeted, I guess they figured they was and they was being followed by Quickway.” Langhorn testified that it was not just Tucker who said it. He
 15 testified, “They said they was being watched, and Angelo was being followed.” Langhorn testified that Giles said, “The unfair labor practice was them taking our work. The owner operators. The vote was conducted on a secret ballot. Strike, a strike vote.” Langhorn testified it was his understanding that they were going out on strike for the unfair labor practices of the owner operators doing the company drivers' work. Langhorn testified
 20 Giles gave that reason, and the drivers were complaining about the owner operators taking their work. He testified a few of the drivers complained about it including Tucker. Langhorn testified Tucker was speaking for all of the drivers. Langhorn testified there may have been a discussion about upholding area standards, which is hourly pay. He testified most of the drivers, including Langhorn, wanted to be paid by the hour. He testified that
 25 was one of the complaints. He testified, the strike was about the unfair practice with the outside drivers doing our work, as well as the drivers' desire to be paid by the hour. Langhorn testified the drivers felt it was unfair to get paid my miles and stops.

30 Jameel Keys testified during the meeting Giles explained they would be going on strike because the work was being given away to temporary drivers and owner operators. Keys testified the drivers took a vote and agreed if it came to it, they would be prepared to strike. Keys did not know whether the NNJ runs had started at the time the Union took the strike vote. Keys testified a lot of times, the company drivers would be back for second runs but there was no run because the owner operators or temp drivers had them.

35 *a. Credibility*

40 Giles credibly testified he did not take notes during the October 15 meeting, but created the agenda outline prior to the time of the meeting, except noting the ending time on the outline. In this regard, the agenda outline was only two pages for close to a two hour meeting and was nowhere near the detail of the contemporaneous notes Giles maintained during the collective bargaining negotiations.⁵³ The second page of the agenda outline was mostly left blank except for a description of the pre-planned motion by Tucker at the end of the meeting. I have also credited Giles and the testimony of the
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50 ⁵² Langhorn testified that some time in August 2006, Ortt told Langhorn that pretty soon Respondent would be acquiring stores in New Jersey that required layover runs, and that they were hiring guys to make those runs with sleeper cabs. Ortt told Langhorn the runs were going to start in early August. However, Langhorn testified they kept changing the dates when those runs were to start.

⁵³ The outline shows a 9 a.m. start time at the heading and the meeting ended at 10:55 a.m.

bargaining unit employees that Giles discussed the unfair labor practices at the meeting including the diversion of bargaining unit work. The negotiations leading up to the strike vote did not focus on economics, rather the parties were dealing with language issues including subcontracting. In fact, subcontracting was discussed during the August 8, 9, and 30 sessions, and the use of owner operators was specifically discussed on August 9.

On August 8, Purnell, the first owner operator, signed a contract with Respondent and Purnell began to run routes for Respondent on a full time basis on August 10. On September 11 and 23, respectively owner operators Lane and Walker began to run routes for Respondent. On September 27, the Union filed an unfair labor practice charge over the diversion or subcontracting work to the owner operators without bargaining with the union. On September 29, the Region issued complaint over Jackson's termination and allegations pertaining to surveillance. During the October 2, session, there was a discussion regarding the use of owner operators, where Giles and Tucker accused Respondent of pulling stops off company drivers' routes and giving them to owner operators, and there was a dispute about owner operators doing bargaining unit work in general. Giles opened up the October 2, meeting by stating the Union was seeking injunctive relief with the NLRB due to the use of owner operators. During the October 3, meeting, the discussion about the use of owner operators continued, and Hanson informed Giles that Respondent intended to begin the NNJ runs in about two weeks. On October 4, the last session before the strike vote the discussion about subcontracting continued.

Thus, during negotiations leading up to the strike vote the Union notified Respondent that subcontracting and the use of owner operators was of major concern to the Union to the extent that the Union had filed an unfair labor practice charge over the diversion of work, and the Union was seeking injunctive relief. Both Tucker and Giles also accused Respondent of manipulating loads to the benefit of owner operators to the detriment of company drivers.

I find, in these circumstances, that it likely, as Giles credibly testified, that during the October 15, meeting Giles told the members there was an issue that was probably being overlooked that they needed to understand, that Respondent was subcontracting bargaining unit work, that the Union had filed unfair labor practice charges over this problem, and that the outcome of the negotiations did not mean a thing if Respondent continued to outsource their work and to subcontract it. Giles credibly testified he explained to the membership about the unfair labor practice charges, and if the Company continued to divert the work that they might have to take action to stop the diversion. Giles credibly testified he discussed the complaint that issued over Jackson's discharge, and that charges had been filed on the surveillance and the impression of surveillance. Giles testified he explained in more detail along those lines, and then he threw the meeting open to questions. Giles testified there was a lot of discussion and people were asking for more details on what he told them.

While their memories varied as to the specifics of the meeting, the drivers who testified supported Giles description of the meeting. Tucker testified Giles spoke about Respondent's engaging in unfair labor practices including the firing of Jackson, the videotaping and following of Tucker and Jackson, and the diversion of bargaining unit work to owner operators. Cook testified that during the meeting Giles explained what an unfair labor practice was, and he stated that all the work that came out of MMD was their work as company drivers and that no one could come in and take it from them. Cook testified he

did not recall what everyone said, but that he stood up and said that he was hurting “from losing out on going to northern New Jersey because of the owner/operators.”⁵⁴ Cook testified they took a strike vote by secret ballot and that he thought it was unanimous. Similarly, Langhorn testified, “The unfair labor practice was with the owner operators running during our work.” He testified the unfair labor practice was what they were going on strike about. When asked what else was discussed with regard to unfair labor practices, Langhorn replied, “we considered unfair was getting paid by the mileage.” Langhorn testified the drivers said they wanted to be paid by the hour. Langhorn testified he thought they discussed Jackson’s being fired for stealing time and it came up that drivers were being followed. Keys testified that during the meeting Giles explained what they would be going on strike for because the work was being given away to temporary drivers and owner operators. Keys testified a lot of times, the company drivers would be back for second runs but there was no run because the owner operators or temp drivers had them.⁵⁵ In sum, I have credited Giles and the drivers’ testimony that the unfair labor practices, including the diversion of work to owner operators was raised by Giles during the meeting, that the drivers whose pay was based on the number of miles and stops they ran were concerned about the diversion of bargaining unit work, and that the Union’s unfair labor practice claims played a significant role in the drivers vote to strike.

6. Contract negotiations November 7 to December 8

Giles testified that, during the November 7 session, subcontracting was discussed and they again discussed Article 3, Management Rights. Giles told Hanson the Union was not agreeing to the last sentence in Article 3 pertaining to subcontracting. Giles testified Hanson made a proposal stating hopefully this would resolve the subcontracting and management rights issues. Hanson said Respondent would agree to delete the last sentence of Article 3 if the Union withdraws its proposal on subcontracting made on October 4, and accepts the Respondent’s proposal on Article 15.09. Giles credibly testified, “I asked Mr. Hanson a question and I wrote this question verbatim in my notes.” “Because I considered the question and its answer key.” Giles testified he wrote in his notes, “Does the Company agree that the work presently being performed is bargaining unit work?” Giles testified Hanson replied, “Yes.” Giles testified Respondent acquired the

⁵⁴ I do not find Cook’s testimony about his reference to the NNJ runs during the meeting to warrant discrediting his testimony that Giles raised the topic of unfair labor practices and diversion of unit work during the meeting. First, Respondent had previously announced to the Union that the NNJ work was coming on board soon, and it had advertised for and hired owner operators. Branch had been contacted the prior week and told the NNJ work was starting on October 16, and that he was to convert to owner operator status at that time. Thus, at the time of the October 15, meeting the Union and its membership were aware of Respondent’s use of owner operators and its plan to give them the NNJ runs. Since Respondent had created a system where drivers’ income was increased by the length of their runs, I credit Cook, who felt he had lost income to the owner operators, to have raised a complaint in their meeting about their usage. I have concluded that Cook was mistaken in his testimony that Giles stated that work was also being improperly diverted to temporary employees. The Union did not file a charge of the use of temporary employees, and I find that Cook mistakenly recalled that as being part of the discussion.

⁵⁵ As with Cook, I have concluded that Keys was mistaken as to his recall that Giles mentioned temporary drivers as part of the improper diversion of work. However, Keys credibly testified that the unfair labor practices including the diversion of work was discussed at the meeting, and that this was a concern of his and played a role in his vote for a strike.

NNJ stores on October 16, and that Giles had been informed by bargaining unit members that some of them had been doing some of the layover runs to NNJ.

5 Giles testified his notes reflect a caucus at 2:10 p.m. following Hanson's proposal and Giles' response. Giles testified he took Tucker and Duncan to Giles' office and explained to them that he had written verbatim the question and answer in his notes and that he felt that he had nailed down the work that Respondent had agreed to was the New Jersey work and that was the Union's work. Giles testified they were only out six minutes and returned following the caucus. Giles testified when they returned they told Hanson 10 the Union agreed with what he had just proposed and Respondent should withdraw Article 4.02, which was Respondent's proposal on casual employees. Respondent caucused and when they returned, there was a discussion about Article 4.02, which Respondent did not agree to withdraw during that session. Giles testified, however, that during the November 7, session the parties tentatively agreed on the language of Section 15.09. He testified 15 this was reflected in his notes made on the printed working document, as opposed to his handwritten notes taken at the meeting. It is stated in Giles handwriting next to 15.09 of the printed working document, "TA 11-7-/06 2:17 p.m." It was also stated in Giles actual notes of the meeting that the parties reconvened from a caucus at 2:16 p.m., at which point Giles stated "We agree." The latter comment was in obvious reference to Hanson's 20 proposal on subcontracting. Giles testified Respondent later withdrew its proposal on Article 4.02 during the November 9, session.⁵⁶

25 Cannon testified referencing page 97 of Hanson's notes that during the November 9, session there was a discussion of the open issues and they were all related to economics, wages, health and welfare, pension, overtime, holiday pay, vacation pay, sick leave pay, a legal service plan, funeral pay, jury duty time and pay for drug tests. Cannon testified there was an understanding between the parties that nothing was finally agreed to until the whole contract was agreed to.

30 Giles cited his bargaining notes from December 6, in testifying that at the outset of that session he stated that two complaints issued by the NLRB, and the Company should follow the law.⁵⁷ Giles testified that following his introductory remarks about the NLRB

35 ⁵⁶ Concerning the November 7 session, Hanson's notes reflect at page 70, there was a discussion about Respondent's proposal on management's rights with the deletion of the last sentence pertaining to subcontracting, to accept article 15.09 relating to subcontracting, and that the Union withdrew its October 4, proposal. Cannon testified the parties came to agreement on these terms at the meeting. The parties stipulated at the hearing that the agreement was reached on November 7. Giles interjected at the hearing 40 that, "What my notes reflect is that to resolve it, Mr. Hanson proposed deleting the last sentence of Article 3 if we withdrew our proposal on subcontracting made on 10/4/06 and accepts the company's 15.09 and I-- to nail it down, I asked does the company agree that work presently being performed is bargaining unit work? Mr. Hanson replied yes." When 45 asked at the hearing if that was Respondent's understanding of what transpired, Hanson stated, "Yes. And if you look, Your Honor, at the bottom of Page 70, the-- it's a PG, does company agree that work being performed in bargaining unit-- the BU work, bargaining unit work? Yes. And then there's a parenthetical, meaning the work performed by bargaining unit employees at the Landover operation." Hanson stated at the hearing that he was in agreement with Giles' representation.

50 ⁵⁷ Cannon testified referencing page 103 of Hanson's notes concerning the December 6, meeting that the notes contain a statement by Giles that two complaints issued, one on

Continued

complaints, the remainder of the session was a discussion on economics. Giles testified that the four sessions following December 6, were also focused on economics, such as wages, benefits, and vacation. He testified subcontracting issues were not discussed at those sessions. Giles' notes for the December 6 session reveal Respondent made its
 5 initial overall economic proposal, which included a proposal on wages which called for effective January 1, 2007, \$45.5 per mile and \$15 a stop. It was a five year proposal calling for a \$.5 per mile increase per year, and beginning the second year of the agreement a \$.15 increase per stop a year. Following Respondent's presentation of the proposal, the Union caucused. Tucker and Duncan did not return following the caucus.
 10 Giles informed Respondent's negotiators that Tucker and Duncan walked out and that they consider Respondent's proposal insulting. Giles notes reflect he told Respondent that, "If you wanted to be serious, I would have expected you to propose mileage in "steps." Hanson referred to it as a mileage matrix.⁵⁸ The notes reveal Hanson said they would consider it but did not think it was feasible in this area. Cannon stated, as reflected in the notes, "When I look at the lay of the land, i.e.: Balto and D.C. It's such a mess of traffic, it
 15 wouldn't work." Giles responded, "My point exactly. Mileages & stops don't work. You gotta pay by the hour in some way, even as a guarantee to back up miles & stops."

Cannon referencing page 116 of Hanson's notes testified that on December 6,
 20 there was a discussion from Giles wanting Respondent to make a final offer. Cannon testified it was not referenced in Hanson's notes, "but as far as that I can recall, Mr. Giles made a comment of putting the company's best foot forward or indicating what you've got here, putting it all on the table." Cannon testified Respondent indicated they could put some more money on the table, and then Giles "actually used, as far as what I remember,
 25 requesting a best and last and final offer and also using a comment of putting the company's best foot forward, putting it on the table, which—" I do not credit, Cannon's testimony here. Hanson's notes at page 116, reveal that the following exchange occurred:

JHH: We've got some room in the mileage & stops
 30 PG: Put it on the table-don't hold back – cut (illegible) the fat to the bone.

There is no reference in Hanson's notes to Giles using the term best, last final offer. I am convinced if Giles had used such language Hanson, an experienced labor attorney, would have referenced it.
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Giles testified Tucker and Duncan returned to negotiations for the December 7, session. Giles testified that over night he had looked at what Respondent had given him concerning pay records for drivers Tucker and Hughes. He testified he tried to extrapolate hourly pay from those records and it was very low on an hourly basis. He testified that on
 40 December 7, he told Respondent the records they had provided the Union were obviously not the norm.⁵⁹ Giles notes reveal he stated, "I have some trip cards, hourly rate are very low. Let's not play with this. What you showed me yesterday on Tucker and Hughes obviously is not the norm. We need to agree on some other means of compensation, that means wages should be hourly."
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surveillance and the other the discharge of Angelo Jackson.

⁵⁸ Cannon testified Giles was referencing a mileage matrix, where the shorter the distance a driver went the higher the rate he would be paid per mile.

50 ⁵⁹ Giles testified the Union's team felt the records Respondent had shown them were exceptional productivity weeks.

Giles testified that, later on in that session, Respondent made a new economic proposal, the terms of which are reflected in Giles notes of the meeting. Giles testified Respondent offered an increase in mileage rates and in hourly rates for the jockeys. Giles testified that in response to the proposal that he stated that what Cannon had said the
5 previous day is exactly what the problem is, and that the mileage pay would not work in the area. Giles stated they did not feel the driver could make a fair wage on mileage pay and he asked if they would be willing to work on a pay system that, within a certain radius of Landover, would be hourly and beyond that would be a mileage-based pay system. Giles notes reflect that he suggested that within a 75 mile radius of Landover the pay
10 should be hourly pay. He suggested in the alternative rather than a radius they could identify counties where there would be hourly pay. Hanson stated they would have to talk about it before responding. He testified Hanson responded, I do not know if we can get there. Giles stated where there is a will there is a way. Hanson stated we were not going to settle this contract based on the Giant contract. Giles responded, "forget Giant. We'll
15 settle it with what we consider to be a fair settlement."

Hanson later stated they could try to develop a matrix, but it is not possible to do by tomorrow. Hanson stated they had drivers that go into Chicago and Detroit, but do not face traffic jams like you do here. He asked Giles if the Union had a proposal for a
20 mileage rate, and Giles stated he did not as he did not think they could intelligently do a mileage rate. Giles notes reflect that as discussion on pay continued, Giles repeated his proposal to have hourly pay within a certain area and mileage and stops beyond that area. Hanson stated that is why they would come back with a mileage matrix. He stated as reflected in Giles notes, we are hearing there is a lot of traffic in this area, we agree. We
25 are trying to address the concern. Giles, according to the notes stated, we strongly feel that hourly pay is what is necessary to settle this contract. Giles testified he also told them that we needed health and welfare, retirement, sick leave, and the other things that we proposed. Giles notes reflect that at the end of the session, he stated more ULP complaints were coming.
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At the beginning of the December 8, meeting, Giles came forward with a proposal to Respondent. Giles' proposal as reflected in his notes was the drivers were to be paid \$18 an hour, \$.15 per mile, and \$10 per stop. Giles notes reflect he stated at the outset of the session, "You want incentive pay, we want hourly pay. Let's do both." Giles proposal
35 included, as reflected in his notes, a daily and weekly guarantee as proposed, overtime as proposed, days off as proposed, sick leave as proposed, H & W as proposed, pension - 2.25 all hours worked to Teamster National 401 (K) plan, holidays as proposed, vacation as proposed, funeral pay as proposed, jury duty as proposed. It is stated in the notes that all leave should be based on hourly rates. According to Giles notes, Hanson responded after a caucus, "We considered your proposal. The numbers would annihilate us. An
40 increase of \$800,000. We're not interested in that kind of cost." Towards the end of the meeting, Hanson told Giles that costs to the company were greater in the Union's second proposal than in the Union's first proposal. Giles responded Hanson should then go with the Union's first proposal. Giles also told Hanson that he could not work with
45 Respondent's incentive pay as he did not have Respondent's information. Giles went on to state as reflected in his notes, "This needs to be concluded. One way or another. I'm available, you tell me." Hanson responded they were going back to Nashville and see about a matrix, and that it might not be possible. Giles later stated, "We're not going to drag this out for months. We need to wrap this up now." Giles asked for Respondent's
50 availability. Giles stated, the "men and the union are really pissed over these ULP's. The Company needs to stop breaking the law." A meeting was scheduled for January 15, 2007, based on the Respondent's earliest availability. Giles notes reflect that he stated,

“No negotiations for 5 weeks. Maybe you can get back sooner.”⁶⁰ Cannon testified all the proposals were economic at the December 8 meeting, except for item 14 listed on the notes at page 165, which was the expiration date.

5 On December 27, Region 5 issued a consolidated complaint against Respondent. Included in the complaint for the first time was an allegation that Respondent since July 10, 2006, and at all times since then, has assigned work performed by the Union to other employees or independent contractors without prior notice to the Union and without giving the Union an opportunity to bargain in violation of Section 8(a)(1) and (5) of the Act.

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7. Testimony of Respondent’s witnesses concerning the need for and use of owner operators

15 Cannon testified there came a point when Respondent considered using owner operators and this related to the addition of 54 northern New Jersey stores (NNJ stores) to its Landover routes. He testified MMD approached Respondent around June or July, regarding the addition of the NNJ stores. MMD initially informed Respondent that MMD had about 35 stores in NNJ, however, by the October 16 start date for the NNJ runs the number increased to 54 stores. Cannon testified Respondent was informed the NNJ stores were going to be 500 and 600 mile roundtrips, with five to possibly six stops on each run, and the routes would require a layover for the driver.

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25 Prevoist testified that as part of the purchase of the dairy from Giant, MMD negotiated a minimum volume requirement, and if Giant did not meet that requirement, they were required to make a payment every month to MMD. After a few months, Giant indicated to MMD that rather than make a cash payment, they would put the additional volume of 50 plus Stop & Shop locations located in New Jersey to be serviced by the Landover dairy. Prevoist testified based on the length of the NNJ runs and the overnights, “we determined it would be most efficiently operated with owner operators.” Prevoist testified the day cabs Respondent runs are purchased at a lower cost than sleeper cabs, and Respondent has a higher utility with the day cabs in that they can be used for up to three shifts. Prevoist testified MMD informed Respondent that since the NNJ work was supplementing the minimum volume requirement it was not permanent, and MMD insisted on a 90-day cancellation clause for the new work in its contract with Respondent. Prevoist testified Respondent was not going to buy expensive sleeper tractors that could be cancelled in 90 days. Prevoist testified Respondent purchased additional trailers for the NNJ runs under the condition that if the business went away, MMD would either buy the trailers from Respondent or reassign them and continue to make a monthly payment for them. Prevoist testified Respondent made the decision to use owner operators for the tractors because the MMD did not have use for the additional tractors.⁶¹

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45 ⁶⁰ Giles testified there was nothing in his notes for the December 8 meeting, that he asked Respondent to bring its last, best and final offer to the table for the next meeting. He testified he was pretty sure he would have written something like that down. He credibly testified, “My belief that there was no demand from the Union for a last, best and final offer on December 8th, as a matter of fact, I was upset about the fact that it was going to take five weeks to have the next session and said I was available.”

50 ⁶¹ Prevoist testified that in Detroit, which is a union terminal, Respondent has 30 company drivers and eight owner operators. He testified the owner operators run all the overnight in Indianapolis. Prevoist testified he did not think owner operators were covered by the collective bargaining agreement in Detroit, but that in Indianapolis and Shelbyville

Continued

Prevo testified Miller, Respondent's director of pricing and business analysis, modeled the new routes using company tractors and using owner operators and by far the most economically decision to MMD and to Respondent was to use owner operators.

5 Prevo testified Landover did not have enough tractors with the original 21 cabs to run the additional 54 northern NNJ stores. He testified using owner operators was the most economical model for Respondent as it required no capital investment and it required a lower cost to the customer. Prevo testified Respondent would have had a \$900,000 to a million dollar in capital investment if it leased or rented the additional tractors for the new work. He testified Respondent had done a leveraged buyout in June 2005, so they had certain bank covenants. Prevo testified purchasing the tractors would have affected Respondent's debt to equity ratio and it would affect Respondent's fixed asset leverage ratio. Prevo testified if the work went away, which it eventually did, Respondent was not stuck with the equipment with owner operators.⁶² Prevo testified the longer the lease for the tractors the lower the fixed asset cost because you are stretching the life of the asset over a longer period of time. Prevo testified a month to month lease would have been very expensive because lessors do not want to lease month to month.

20 Prevo testified Respondent was able to lease additional trucks on a daily basis for Mondays and Saturdays as part of its original deal with Ryder to lease the 21 trucks. Prevo testified when Respondent leased a daily vehicle from Ryder it paid a fixed amount for the daily rental and a variable amount for the miles. He testified Ryder has a pool of vehicles for daily rentals. However, he testified they do not have a pool of vehicles for high-mileage short-term rentals. He testified that would have depreciated Ryder's asset so rapidly that it would have been cost prohibitive.

30 Prevo testified there was nothing the Union could have done to convince Respondent to run the NNJ runs with additional company drivers and equipment. He testified the return on capital analysis indicated it was much more advantageous to the company to use owner operators, especially when the business could have been cancelled on a 90-day notice. Prevo testified owner operators were not hired or trained until Respondent knew the New Jersey business was coming on line. He testified Respondent had some owner operators before the NNJ runs started, stating, "We brought them on to train them and we trained them on the existing business." Prevo testified there is a clause in Respondent's contract with MMD that if there was a cancellation MMD had to pay for the trailers. He testified there is such a provision for the tractors in the initial contract, but MMD would not agree to that for the tractors to be used for the NNJ stores. Prevo testified it was about 4 cents a mile cheaper to use owner operators than company drivers from Landover for the layover runs.

40 Cannon attended negotiations between Respondent and MMD regarding rates for the NNJ runs. He testified Respondent decided it would need an additional nine tractors to service the 54 NNJ stores. It was decided Respondent would also need an additional 12 refrigerated trailers which Respondent purchased for this operation. He testified Respondent did not receive any compensation from MMD for the purchase of the trailers. Rather, Respondent was paid for the trailers by the rate MMD paid for the operation. Cannon testified there was a contractual penalty to MMD if it cancelled the contract for the

50 they were. He testified in Lynchburg they are not.

⁶² Prevo explained that Respondent lost the work because after the Union struck Landover, Shop and Stop went to a dairy in New Jersey and decided to remain there.

54 stores prior to the end of the term in that MMD was obligated to purchase the extra trailers from Respondent.⁶³

5 Cannon testified Respondent's decision to use owner operators rather than company drivers for the NNJ runs was a collective decision by Respondent's officials. Cannon testified the reasons were if Respondent used company drivers, they would have had to purchase additional equipment in the form of nine sleeper cabs. He testified the decision to use owner operators because Respondent did not want to spend the capital for the nine sleeper cabs at a cost of \$100,000's each. He testified the cost was the same whether Respondent purchased or leased the cabs. Cannon testified there was nothing the Union could have offered to change Respondent's decision not to make the additional capital expenditure. Cannon testified the decision had nothing to do with actual drivers' wages. Cannon testified that in order to get the best utilization of the original 21 day cabs Respondent had acquired when it began the operation, it did not make sense to have those trucks used on runs that required layovers because then they would not be around the next morning. Cannon testified Respondent was able to take on the 54 new stores without an extra equipment charge to MMD, "because we told them at the very beginning that we can do this with owner operators and we prefer to, because we did not want to invest the capital into a hundred thousand piece of equipment times nine." Cannon testified Respondent does not pay per diem or hotel costs when it uses owner operators, which it pays to company drivers who layover with company equipment.⁶⁴ Cannon testified the start of the NNJ runs was expected by Respondent to be in the latter part of August, but it was pushed back several times by MMD until the start date of October 16. Cannon testified Respondent did a comparison and he recalled it being upwards of 17 to 25 19 cents more per mile to use company drivers for layover runs than owner operators.

Miller testified he analyzed the use of owner operators for the 54 new stores. He testified the cost of operating with owner operators versus the cost of operating company equipment was a little less expensive to run with owner operators so Respondent could use owner operators and not have to spend the capital to purchase tractors. He testified the cost of the purchase of 10 sleeper cabs would have been about \$900,000. Miller testified Respondent would have been in the same position if they leased the tractors or purchased them. Miller testified the leasing of cabs would be a capital investment because Respondent would have to make a five-year commitment for those tractors to a leasing company because a one year lease would be more costly. Miller testified if they purchased or leased sleeper cabs on a five year lease, if Respondent lost the business, they would have to park the additional cabs or find some new business.

Miller testified Respondent started pricing the new business around July and finalized most of the details around the end of September 2006. Miller testified, "We looked at it under both methods, under company and under owner operators, and we placed the bid based on the basis that we would try to use owner operators because we felt that was the best way to do that from a business sense." He testified once Respondent placed the bid the cost was fixed whether Respondent used owner operators

⁶³ Cannon testified MMD cancelled Respondent's contract for the delivery to all 64 New Jersey stores a few days after the January 12, 2007, strike began.

⁶⁴ Cannon testified that two owner operators that Respondent eventually used only had day cabs. Cannon testified if the owner operators did not have sleeper cabs, they had to pay the expense for overnight accommodations when they ran layover runs as all the owner operators were paid the same rate.

or company drivers. Miller testified the projected cost was about 4 1/2 cents per mile less to do the work with owner operators as opposed to company drivers. Miller testified the 4 and 1/2 cent per mile cost differential included the cost of leasing or purchasing additional tractors. Miller testified some of the company drivers actually made the NNJ layover runs on company equipment. However, Miller claimed he did not compare the actual cost of those runs by the company drivers to what the owner operators were costing. Miller testified that when he did the pricing for the 54 stores in July 2006, he did not have any knowledge that the Landover stores were unionized and the union status of Landover was not part of the pricing model. Miller testified they came up with the cost of the owner operators by using what they thought the market would require to hire owner operators which was around \$1.13 per miles plus \$15 a stop. He testified he did the analysis using those figures.⁶⁵ Miller testified he concluded concerning it would be best to hire owner operators to run the NNJ runs without having to spend additional money on company equipment. Miller testified he provided that conclusion to Prevost, who agreed.

Respondent's records reveal that it had 24 company drivers working the week of October 16. Respondent's records reveal that it had contracted with six owner operators by October 16. Cannon testified, "the purpose of the owner operators, once the northern New Jerseys came on, that they were going to run all of the northern New Jersey runs." Cannon testified, however, that after the NNJ runs started, some members of the bargaining unit did do NNJ runs. Cannon testified that as far as he could recall none of the owner operators did local runs after the NNJ runs started on October 16. However, Respondent's payroll records as summarized by counsel for the General Counsel in appendices to his brief reveal that between October 16 and December 30, there were 16 days in which owner operators ran non New Jersey routes referred to as local runs which did not require a layover;⁶⁶ there were seven days in which owner operators ran SNJ routes which also did not require a layover and was pre-existing work;⁶⁷ and there were nine days in which owner operators ran mixed NNJ and SNJ.⁶⁸ Respondent's records also reveal that following October 16, company drivers also regularly ran NNJ runs.⁶⁹

Cannon testified the maximum owner operators Respondent had was 13, which was during the course of the strike, and at the time of the hearing, Respondent was still using some owner operators, although Respondent lost both the NNJ and SNJ runs shortly after the start of the January 12, strike. He testified they used owner operators through the strike from January 12 to March 2, 2007. Cannon testified the owner operators used their own tractors but pulled the same trailers as company drivers and their product was loaded by MMD as it was for the company drivers. The owner operators were listed on the assignment board as were the company drivers. Cannon testified referring to the owner

⁶⁵ While Miller testified the analysis was done a projected \$15 a stop fee for owner operators, Branch's testimony reveals the owner operators were actually paid \$18 a stop.

⁶⁶ These dates were October 21, November 4, 8, 22, December 8, 9, 15, 16, 19, 21, 22, 23, 27, 28, 29, and 30.

⁶⁷ These dates were October 21, 25, November 18, 21, 25, December 2 and 9.

⁶⁸ These dates were October 30, November 6, 15, 20, 29, December 1, 6, 8, and 13.

⁶⁹ During October 15 to December 30, company drivers ran NNJ routes on: October 17 to 20; 23 to 27; October 30 to November 3; November 6 to 8; November 10, 13, 14, 17, 20, 22, 25, and 30; and December 2, 4, 6, 7, 9, 14, 16, 19, 23, and 24. On some of these dates more than one company driver ran these routes. Following October 16, Respondent's records reveal that company drivers continued to run southern New Jersey routes almost on a daily basis. They also on occasion ran mixed northern and southern New Jersey routes.

operators, temporary drivers and company drivers that “They all did the same work.”

5 Cannon testified that: During the time period of June 1, through October 16, the company drivers could not have handled all of Respondent’s loads because under Respondent’s model they expected the company drivers to run more loads than they were actually running. Respondent was expecting a large percentage of drivers to run at least two loads a day, but they were not doing that. As a result, Respondent had to use temp drivers and owner operators. Company drivers would also call off from work. Cannon testified it was less expensive for Respondent to use owner operators than temporary drivers, when Respondent was required to rent an extra tractor for the temporary driver.⁷⁰ Cannon testified from the start of the operation to the time of the strike Respondent was trying to hire company drivers.

15 Prevoost testified the initial projected model for Landover operations included 21 company drivers, and a six day a week operation with first and second shift deliveries. Prevoost testified they were able to hire up to 21 company drivers at some point, but still were not able to complete all of the loads. He testified they realized they needed change the model to increase it to 26 company drivers to remedy the problem. Prevoost testified they used company drivers, temps, and “we brought in owner operators to train, once the New Jersey business was coming on line.” Prevoost testified, “The model for 26 was to be 26 company drivers, not owner operators.” Prevoost testified while the model called for 26 company drivers, Respondent actually made the increase in numbers by using temps and owner operators. He testified Respondent had some owner operators before the New Jersey business started, stating, “We brought them on to train them and we trained them on the existing business.” He testified when Respondent approached 26 drivers it included temporary drivers and owner operators.⁷¹

30 ⁷⁰ However, Miller testified he was sent to Landover to do an analysis after the operation ran for six weeks. Given a March 27 start date, the sixth week ended on Saturday, May 6. Miller testified that Respondent was using more tractors than was anticipated in its model for the facility, but they were able to manage that down to where they were operating with the original number of tractors anticipated in the original model. Miller testified the need for extra tractors was reduced by better routing and better dispatching. Miller did not know if there was still a need to rent tractors on the heavier days, but he testified it was no longer done on a regular basis. He testified Respondent just needed extra drivers. Miller testified part of the need for extra drivers was the mileage being run was about seven and one half to eight percent more than anticipated in the original model. Miller provided this information to Prevoost.

40 ⁷¹ Respondent had the following number of company drivers during the listed weeks: March 27, 18 drivers; April 3, 19 drivers; April 10, 23 drivers; April 17, 24 drivers; May 8, 25 drivers; May 22, 23 drivers; May 29, 22 drivers; June 5, 23 drivers; July 10, 22 drivers; July 17, 21 drivers; July 24, 22 drivers; August 7, 23 drivers; August 13, 22 drivers; August 21, 22 drivers; September 9, 23 drivers; September 18, 24 drivers; October 9, 25 drivers; October 16, 24 drivers; October 23, 22 drivers; November 12, 21 drivers; November 19, 20 drivers listed but Garner ran no routes that week; November 26, 22 drivers listed but Garner ran no routes; December 3, 21 drivers; December 10, 23 drivers; December 24, 22 drivers; January 6, 23 drivers. Weeks for which there was no change in the number of drivers from the prior week listed were omitted from this summary. During the week of January 13, 27 drivers were listed but of those, four Grannison, Lacy, McCord, and Sims were apparently hired in preparation for the strike, as they were not listed the prior week, and all but McCord worked on January 13. These figures were obtained from R. A. Exh. 34.

When asked why Respondent could not hire a full complement of company drivers, Prevoost testified there was a high turnover at Landover during the March through December period. He testified there was no longer high turnover among drivers at the time of the hearing. He testified Respondent did not lower its hiring standards. Prevoost testified Respondent's last offer to the Union has been implemented at the facility around a week after it was offered to the Union, which was in mid-January 2007. He testified that this resulted in a wage increase. Prevoost testified Respondent no longer has a staffing problem at the facility since implementing the wage increase. Prevoost testified Respondent continues to use an owner operator or two at Landover, and continues to use temps there. He testified when Respondent brought the owner operators on, Respondent never stopped using temporary drivers.

Ortt testified as follows: Respondent receives a daily fax from MMD in the afternoon showing the number of dollies each store was receiving the next day. Ortt then broke the stores down into geographic areas, took the amount of dollies each store was receiving and planned the route for each trailer. Upon Ortt's completing the routes they were returned to MMD to load the trailers for the next day's deliveries. The dispatcher and terminal manager decided which routes a driver would be given. The dispatcher, at the time of the hearing, was Arvester Horner. Respondent tried to use company drivers by having them haul as many loads as possible to maximize their pay and fleet usage. When Respondent ran out of company drivers they resorted to temporary drivers and at some point it was temps and owner operators.

Ortt testified that: Under DOT regulations a driver cannot drive more than 11 hours or work more than 14 hours in a day. Respondent implemented a sign up sheet, at the Union's suggestion, where the drivers could sign up for extra loads. Respondent started using the sign up sheet in September or October 2006, and certain company drivers would regularly sign up. When a company driver was out on a route they would be given first shot at an extra load. If they did not want to do it then Respondent would contact any company driver who was off to see if they were interested. Once Respondent exhausted its company drivers then they would call the temps and owner operators. When a company driver delivered in the D.C. area they could not expect him to make two runs a day because it was too congested. Ortt testified a driver could do two runs in the Baltimore area, and make the same amount of money as someone driving one run to Delaware. Respondent was short company drivers from day one and it was a constant hiring battle. Ortt testified they hired drivers who saw the work was too hard and left. Respondent was short three or four company drivers at any given time.

Ortt testified Respondent hired some of the owner operators prior to the start of the NNJ runs. He initially claimed those owner operators were only used if Respondent was short of company drivers stating they would use the owner operators rather than calling temporary agencies to fill the gap. He also initially testified that prior to October the owner operators were not scheduled every day, but were basically scheduled on an as needed basis if they did not have their full compliment of company drivers come in. Ortt testified to offset the delay in the start of the NNJ runs Respondent put the owner operators on hold, and "only used them when we absolutely needed to, until the New Jersey did start up full time." Yet, Ortt then admitted that, despite his claim that owner operators were only being used as substitute drivers, the owner operators were being kept fully employed by Respondent. Ortt testified under Respondent's agreement with the owner operators they were not free to work for anyone else besides Respondent. The owner operator was leased to Respondent because the tractor would be in possession of Respondent because Respondent's DOT numbers were on the side of the tractor. Ortt testified working with

another carrier would have also caused problems with the insurance carrier. In essence, in order to retain their services, pending the start of the NNJ runs on October 16, Respondent had to keep the owner operators hired prior to that date fully employed.

5 Ortt testified it cost Respondent at least \$180 to \$250 a day or more to use a temp driver than company drivers. He testified if there was no vacant tractor for the temporary employee then Respondent had to rent an extra tractor. Respondent paid the temporary agency by the hour for the temporary drivers, plus overtime rates. He testified Respondent was paying the temporary agency \$10 to \$15 an hour per driver.

10 Horner had been employed by Respondent as a dispatcher since July 15 at the time of his testimony. Horner testified as follows: Saturdays were the heaviest days and Horner could not meet deliveries with Respondents company trucks and drivers alone. It was also fairly busy on Friday and Monday, with Monday being the second busiest day. 15 The set up was that no driver could be off on Saturday or Monday, although sometimes they called in sick. On Mondays, Horner also had more loads than drivers and trucks. Horner testified Respondent was renting three to five extra tractors from Ryder almost every Saturday since Horner started, and almost every Monday, they had to rent at least one tractor.⁷² When they had more loads on a day than they had scheduled drivers, he 20 would first call company drivers who were already working and if they were not available he would call company drivers who were off that day. Once he exhausted company driver availability, Horner would then resort to the temporary drivers. Horner could call a temporary agency and get a driver with as little as two hours notice on many occasions.

25 Horner testified that at some point Respondent started using owner operators. Horner testified the owner operators were assigned loads "just like the regular drivers were assigned the loads. If they called in sick or to take a day off, like I said, I'm going to call the Company drivers first, which I thought owner/operators, Company drivers, I went to them first. If they was off, if they want to run that extra load. If they don't want to run 30 that extra load, then I go to the temp." When asked if he treated the owner operators the same as he treated the regular drivers, Horner responded, "They had a regular schedule? Yeah, they was assigned the New Jersey runs, yes, sir. Some of the Jersey runs. So they were assigned on a regular basis? Yes, sir." He testified he asked the owner operators just as he did the company drivers if they were available to fill in for extra loads, and then 35 Horner would go to the temporary agencies. Horner testified he asked the company drivers to do extra loads before he asked the owner operators. He testified that practice has not changed for the entire time he was there.⁷³ Horner testified it was his decision to call drivers who were working first on a given day first to see if they wanted an extra load, and then to call the driver who was off from work. Horner testified he learned to use this 40 practice at the company he worked for before coming to Respondent. Horner testified there was never a week where did not have to resort to using temporary drivers.

45 ⁷² This assertion by Horner is contradicted by Miller's testimony that Respondent early on was able to cut down on the need for short term rented tractors by more efficient routing.

⁷³ Tucker testified Respondent had a bin where it kept all the drivers assignment sheets. Tucker could also recognize the owner operators by their trucks and he knew their names. Tucker, like Horner, testified Respondent's use of owner operators differed from temporary 50 drivers in the owner operators were scheduled in automatically, while the temporary drivers were scheduled when there was too much work. Tucker testified the owner operators were part of the schedule the same as the company drivers, and that they were always on the schedule.

Horner testified Respondent receives a cube report from MMD detailing the milk to be delivered the next day to the stores. The terminal manager then routes the stores with no more than 50 dollies per trailer. Once everything is routed they send it back to MMD to load the trailers according to Respondent's routing directions. He testified it was possible for Respondent to have altered the number dollies in a trailer to give more work to one as opposed to another when they asked MMD to load the trailer. Horner testified he did not set the routes. Rather he received the routes and assigned the driver to the route.

8. The January 12, 2007 strike.

Giles testified a decision was made to go on strike in the last week of December. The decision was made by the Union's officers and Giles in consultation with the Union's legal representatives. Giles testified it was decided the strike would begin on January 12, 2007, to allow the bargaining unit a couple of weeks of work to help pay for their Christmas holiday. Giles testified that, "What triggered the decision in the last week of December was the National Labor Relations Board issued a complaint against the Company over the diversion of bargaining unit work."

Giles testified the parties reached tentative agreement on the subcontracting issue on November 7, and they bargained over economics and some other language issues after that date. Giles testified he called the strike in January because Respondent's actions were contrary to what they had agreed to concerning subcontracting. Giles testified, "If you look at all my bargaining notes and you see the progression of events, that led up to that tentative agreement, you will see that the Company understood the Union's concern over the subcontracting and the Union's willingness to, to allow limited subcontracting to allow the Company to operate in the event that there was a sudden vacancy or absence for some reason. During this time, the Company continued to hire additional owner operators, and also during this time, it was in mid December, it was after we had had our December session, the Company suddenly brought in, I don't know, 12, 15 drivers from other parts of the country and were using them to ride with the existing bargaining unit members and do all of that.⁷⁴ So I mean I didn't know where any of this was going. Like I said though, the actions of the company were contrary to what we had agreed to, in the spirit to which we agreed to it. I'd say it again. I wasn't trying to stop this Company from offering service to its customer, to have service failures, but we were certainly nailing down the scope of the work and the fact that bargaining unit work should be done by bargaining unit members. And they continued to hire more owner operators and divert additional work."

Giles testified as follows: The strike began at 9:30 p.m. on January 12, 2007. Giles called Tucker at about 5 p.m. on January 12, and told him the strike was going to start at 9:30 p.m. and asked Tucker to meet Giles at the dairy at 9 p.m. When Tucker arrived, Giles had picket signs and picket instructions available. A few minutes before 9:30 p.m. they put the picket signs on and established a picket line in front of the main entrance to

⁷⁴ Following the November 7, tentative agreement date on subcontracting, Respondent contracted with additional owner operators on November 14; November 29; December 11, and on December 21. The owner operator who signed a contract on November 29 did not start working for Respondent until December 19. Cannon testified that, at Prevost's direction, Cannon began strike preparations in early December. He testified that in about mid-December he had about seven drivers from other companies come in and take a look at the operation and familiarize themselves with Respondent delivery procedures.

the dairy facility. Giles had drafted letters dated January 12 addressed to MMD to the attention of Jan Tenpas and Walt Aumen, officials of the Dairy. The letters state this was to notify them on that date the Union commenced an unfair labor practice strike against Respondent and that a picket line has been established at their shared facility. Giles delivered the letters by hand to Bob Doe the ranking supervisor at the Dairy at 9:30 p.m. on January 12. Giles told Doe the letters were addressed to the named individuals and he asked him to deliver the letters, and Doe said he would take care of it.

Giles identified the picket sign the Union used during the strike. The printed portion of the sign was a stock sign. The sign read "Unfair" and then there's a blank space, and then it says Teamsters Union Local 639. Giles inserted Respondent's name in the blank space on the sign.⁷⁵ Giles testified they used the sign that said "Unfair" for the strike at Respondent to signify that they were on an unfair labor practice strike. Giles also identified picketing instructions which begin with, "You are helping to publicize the strike by Teamsters Local Union No. 639 against Quickway Transportation for their unfair labor practices." Giles testified he handed copies of the instructions to the members of the bargaining unit when they arrived at the picket line on January 12, 2007. Giles testified the picketing that night was in front of the dairy, and that they were wearing the signs. Giles testified there was no chanting going on. Giles testified that around 11 p.m. the picket line was moved to the sidewalk in front of Gate 3 of the distribution center. Giles testified they picketed the entrance and exit gates by walking back and forth within the crosswalk of the driveway entrances when there were trucks entered or exited the facility. Giles participated in the picketing throughout the strike, and he was there every day at various points in time. Giles testified while he was on the line he never heard any chanting.⁷⁶ He testified the picket signs remained the same during the strike.

⁷⁵ Giles identified another sign that states, "On Strike, Teamsters Union Local 639." This sign was distinguished from the sign the Union used for the strike at Respondent in that it did not have the word unfair on it. He testified he had two choices of signs in that the described signs were the only ones in the union hall.

⁷⁶ While Giles denied he was present for any chanting on the line, Respondent played a DVD at the hearing of events which Cannon testified took place on January 15 on the line where there was chanting by the picketers to the effect that they wanted a contract now. Cannon identified an individual who he testified was Giles. Cannon testified he was not present at the picket line when the chanting occurred on this date, but he was merely identifying Giles by his familiarity of Giles' appearance on the video. The face of the individual on the video who Cannon claimed was Giles could not be seen with any clarity and Cannon was just going by the individual's hair color, walk, and other characteristics when he claimed the individual was Giles.

Giles was present in the hearing room when the film was shown. When asked whether Giles knew if the individual Cannon identified was Giles, Giles replied, "No, I don't." He testified, "It could've been, but you know, I can't clearly see the face of the person in that video." Giles testified he did not remember the incident. He testified he did not remember being there when the picketers were chanting. When asked if he was denying it was him, Giles responded, "It could've been me. I don't think it was me. I have no recollection of any chanting going on while I was on the picket line." Giles admitted he was on the picketing line on the evening of January 15, and that he came there from the Union hall after negotiations ended at about 7:45 p.m., and that it was a about a 10 to 15 minute drive from the hall. Yet, Giles maintained that he could not recall what time he arrived at the picket line that night.

Regardless of whether the individual Cannon identified was Giles, there is testimony by the picketers that the chanting occurred on more than one occasion for a two to three

Continued

Cook testified he showed up for work at 4.m. the day of the strike and was intending to go to work that day, but when he saw the picket line he went on strike. Cook confirmed his receipt of and Giles description of the unfair labor practice strike instructions as well as Giles description of the picket sign. Cook participated in the picketing almost every day. Cook testified, "I was on strike to try to get the work back, try to make more money, because I was upset for the owner/operators taking all of the work." Cook testified he thought if they had gotten a contract the strike would have ended and they would have gone back to work. Cook testified he did not understand the dispute in negotiations between the Union and the Company at that time to be between hourly pay versus miles and stops pay. Cook testified the dispute was they were trying to stop the owner operators and temp drivers from stealing work from us. Cook testified, "My understanding

week period. Giles impressed me as a meticulous individual, and I have concluded even if he was not present for the actual chanting that he would have received reports that employees were chanting for a contract on the line, and that this occurred on more than one occasion. In this regard, General Counsel witness Cook testified that during the second week of the strike the picketers were divided into three shifts. Cook testified he heard chanting on the line while picketing on the day shift. The testimony of the strikers reveals that the chant was, "Who are we? The Teamsters. What do we want? A contract. When do we want it? We want it now." Cook estimated the chanting went on for about a week or two. Striker Langhorn estimated the chanting went on two to three weeks when a truck came through the gate. Striker Keys estimated the chanting lasted a few days. Tucker testified he was assigned the 4 p.m. to midnight shift, but that he also came in on the other shifts. Tucker testified he picketed at least three to four days a week during the course of the strike. He testified he was present one time when there was chanting on the picket line and then the guys were asked to stop it by union official Michael David. Tucker testified the chant was lead by someone with a bullhorn.

Harry Crabtree was employed by Respondent as vice president of safety and recruiting. Crabtree testified Prevost asked Crabtree to go Landover during the strike and that Crabtree stayed there for about two weeks. While in Landover, Crabtree worked with Cannon, and Willie Cantrell, the Atlantic region director of safety, monitoring drivers entering and exiting the facility, and he watched strikers walking in front of the trucks before the drivers entered the gate. He testified he heard chants and saw signs and posters. Crabtree testified he heard the above described chant over and over again when the drivers approached the gates to enter and exit the property. Crabtree testified a man named Kenny Tucker was identified to him as the guy who was initiating the chant. Crabtree testified this was his first visit to Landover, and that Cantrell identified Tucker to Crabtree. Crabtree testified Tucker "was a large, middle-aged black fellow, maybe 300 pounds, very vocal, but, yes, sir, I did see him." Crabtree testified he had no direct knowledge as to whether Cantrell was correct when he identified Tucker. Cantrell, although still working for Respondent at the time of the hearing, was not called to testify. Given the hearsay nature of Crabtree's testimony in that he could not personally identify Tucker, I do not find that Tucker led the strikers in the chant as Respondent contends, given Tucker's credible testimony that he only heard the chant on one occasion.

Cannon testified he arrived at the facility on January 15 around 6 or 7 a.m., and he left there around 1 p.m. to go to negotiations. Cannon testified he heard some chanting as he was going through the picket line at about 1 p.m. Cannon was driving his vehicle accompanied by Hanson. Cannon named four drivers who were at the line, and he thought Langhorn was also there. Cannon testified he heard the drivers say, "we want a contract, Chris. Chris, give us a contract. We need more money."

was the work that came off the dairy, was supposed to be all company drivers and this was-- the purpose of getting a contract was to stop them from taking the work that we would be running."⁷⁷

5 Cook testified the owner operators were running varied runs before the NNJ runs began in that they were given the same runs as the company drivers. Cook testified he earned the most money by running the longer distance runs due to the increased mileage. Cook testified he thought the use of owner operators decreased his income because they were giving them the longer runs to NNJ. Cook told the dispatcher he was willing to take
10 the run, but he would just give it to the owner operators. Cook testified he was not getting those runs unless an owner operator was not available. Cook testified he remembered calling Ortt in the morning and asking if he needed Cook to take a run, and Ortt said an owner operator had taken it.⁷⁸

15 Tucker testified he went on strike because of the unfair labor practices, the firing of Angelo Jackson and the diverting of bargaining unit work. He testified there was no other reason he went on strike.⁷⁹ He testified if Respondent and the Union reached a contract it would have helped resolve the strike because it would help stop the unfair labor practices by the company. Tucker testified he did not run layover runs to New Jersey while
20 employed by Respondent, but he did run non-layover runs to New Jersey. He testified Respondent's use of owner operators affected him, because sometimes if there was a second run that he could run, then it might not be available if it had been given to an owner operator. Tucker also testified that in some cases, just to make a load for an owner operator, Tucker may have been deprived of stops on his loads. Tucker testified he did
25 not recall when this occurred, but he recalled it happening and he brought it up during negotiations with Ortt attending a negotiation session to answer his question. Tucker testified Ortt did not agree with him because Tucker was asking to be paid for the stop because it would have fit in his load.

30 9. Contract negotiations January 2007

Giles testified the January 15, 2007, session opened with Hanson stating they were working on a mileage grid. Giles notes read Hanson stated, "we've been working on a
35 final offer. A mileage grid - bands. Also some other economic proposals and language, but let's focus on the economics. We have some language on the shoe allowance that we talked about B-4. We had also talked about the 72 hours notice of picketing." During the meeting, Respondent presented a two page document, entitled "Company's Economic

40 ⁷⁷ Cook testified the company drivers that he was aware of who wanted to run to NNJ runs were Cook, Keyes, Samuels, and Smith. Respondent's records reveal that in addition to the company drivers named above by Cook, that company drivers Coldwell, Hughes, and Graham ran the NNJ runs on one or more occasions.

45 ⁷⁸ Langhorn testified he voted to strike in October because owner operators were taking bargaining unit work. He testified he knew there were negotiations between the Union and Respondent during the strike in that Tucker and Duncan had left the line to go to negotiations. He testified if a contract had been reached that day the strike would have been over. He testified they wanted to be paid by the hour not by the miles, and they did not want contract drivers doing their work.

50 ⁷⁹ Owner operator Branch testified he spoke to Tucker on one occasion during the strike and Branch asked Tucker why the men were on strike. He testified Tucker "said it was an unfair labor strike, something of that nature."

Proposal, January 15, 2007.” The proposal included a mileage matrix. Giles testified based on the work sheets Respondent had provided the mileage matrix proposal came to a rate of \$18.99 an hour. Giles testified that Hanson asserted the January 15 proposal was a 12.3 percent increase. Giles responded why not add the 12.3 percent increase to the hourly rate Giles had calculated for a floor of \$21.25 an hour under Respondent’s mileage matrix. Hanson responded they could not do that, they do not have it any where in the company. Giles told Hanson that he was going to have to do something to resolve the hourly pay versus mileage and stops.

As reflected by Giles’ notes, Hanson stated they had a huge philosophical difference. Hanson stated he thought the drivers would love the pay package. Giles stated you do not know them. Giles stated, as reflected in his notes, “You’re in an area where hourly pay, H and W, health and welfare, a pension paid by the employer, and they also expect sick leave. None of that’s here.” The notes reflect Cannon stated we put together this proposal and it was Respondent’s final offer. Giles stated we do not accept. Hanson asked Giles to let the drivers decide, and Giles stated it would be rejected 100 percent. Giles’ notes reflect that towards the end of the meeting, Giles stated they were not getting anywhere, and asked if Respondent wanted to meet the next day. Hanson responded, “I don’t think it would do any good. I don’t know where the compromise lies then.” Cannon asked Giles if he was going to take Respondent’s proposal to the members for a vote, and Giles stated no they had two members there to ask them what they think of it. Cannon said they are only seven percent of the group, that it was not fair to the other 93 percent. Giles asked what happens after it is rejected? Cannon replied as reflected in the notes, “we’re one step closer to getting through to the end.” At the end of the meeting, Giles asked if this was Respondent’s last, best, and final offer, and both Cannon and Hanson responded that was correct. Respondent’s written January 15, 2007, economic proposal includes a proposed a matrix pay system for the drivers based on a 5 year agreement. In the first year for the first two grids, drivers whose routes were 0 to 75 miles were to receive \$.55 a mile, and 76 to 150 miles, \$.52 a mile. There were four grids in all with routes of over 300 miles receiving \$.46 per mile. All of the drivers were to be paid \$17 a stop for the first year, with \$.25 increases per year.

Cannon testified he was informed by Giles the contract offer was voted down unanimously by the members on January 16, 2007. Prevost’s testified Respondent implemented its January 15 offer shortly after the start of the January 12, strike. However, the Union was never notified the offer was implemented.

Giles testified Respondent’s January 15 offer was incomplete. He testified there were still several language issues open. He testified Respondent had advanced numerous work rules in November, and the Union had been waiting for language for the work rules since the beginning of negotiations. He testified language issues involved the bidding and the carry forward of vacation, the work rules, the assignment of overtime and additional routes.⁸⁰ He testified Respondent’s proposal in reduction of hours was still out

⁸⁰ Giles testified he thought work rules were given to him on November 9. Giles testified he became really agitated about the work rules. He testified Respondent put it on the table and said they were going to implement it. Giles testified that was going to be a major problem with the work rules lying out there. Article 12.03 of the parties’ combined typed working document is entitled work rules. Giles has noted with respect to Article 12.03 in his November 7 bargaining notes, “Ok w/noted changes.” Hanson’s notes read at page 94 referring to Giles remarks, “Work Rules- 42 items in there. Consider it bad faith

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there. Giles testified these things had not been agreed to, and that he did not have Respondent's position on these items. Giles testified that, at the January 15 meeting, Hanson started the meeting by stating they had been working on a final offer, a mileage grid slash or dash bands, and some other economic proposals and language. Giles testified that Hanson, "just blew right by it and went straight to the economics and we never came back to the language. So Mr. Hanson knew that there were language issues still open in this, in this contract." Giles then conceded that he had Respondent's prior proposals on these issues, and they had not been agreed to or had not been withdrawn. He testified he had no basis to conclude Respondent had changed its position on those issues prior to that meeting. Giles testified, "But the proposal that he gave me was everything that they were proposing to conclude the negotiations. There were other items that were still open and were not addressed in that last offer." Giles testified, "They appeared to have been omitted, to me, and I think that there was a probably three or four times during the course of these negotiations that I said to Mr. Hanson, that nothing's agreed to until everything's agreed to. Now, I think that he clearly started that meeting by saying to me, look, we got some things here, mostly economic, but there's some language too, and then we went right past the language. The language was never addressed."

At the time of the hearing, the parties last met on January 17, 2007, with a federal mediator. Giles testified that during that session, the Company made a slight modification by proposing a conditional weekly guarantee on wages. He testified there was still movement being made. Giles characterized movement by the Union as significant and Respondent's on January 17th as fairly small but he testified it was still movement. As reflected in Giles' notes near the outset of the January 17 session, Hanson stated that in economics there were five major areas of disagreement. Giles notes read as follows:

JH-We have, in the economics, 5 major areas of disagreement:

1-Productivity pay-same all around the country. 40% union

2. O/T + Guarantees- We don't pay o/t. It's factored into the pay structure.

3. P/H/sick leave- Co. gives 2 pers. Days, the Union want 6 p/h after 3 yrs + 12 sick days p/y.

4. H & W—We have offered a company plan, we would do L639 H & W but all have to contribute to the plan.

5. Pension- U has proposed 639 pension, has moved off of that & proposed Teamsters Nat'l 401 (k) w/defined contribution, we have an ESOP + have shown the value of that. We also have a Co. 401 (k) plan w/a 50% match on 6% of emp. Contribution.

PG-Responds to the 5 above + rules + regs +bargaining unit work.

JH- A lot of the language issues will fall into place as we get it done.⁸¹

bargaining." Article 4.05 entitled bidding appears to have a tentative agreement initialed on August 30. There is no T/A noted in the working document for Article 5.03 for the assignment of overtime and additional routes. There was no T/A listed for any of the vacation provisions listed in Article 7 of the parties' working document.

⁸¹ Giles testified he told Hanson during the January 17 meeting that they had a just cause or a good cause provision in the contract and they were going to grieve and arbitrate anything they considered unreasonable. He testified he told Hanson that if he wanted to settle some of the language he needed to take the work rules off the table. Giles testified vacation bidding was an item, the work rules, and the accrual of vacation were open. Giles testified the parties did not reach an impasse in negotiations and Respondent never said they were at impasse. Giles testified in December and in the January sessions the Union made significant movement in what

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Giles testified on January 17, after meeting with the Respondent, Mediator Lynn Sylvester returned to talk with the Union, and Giles wrote in his notes the following:

- 5 LS- I told the Company that the answer to the question is somewhere in the middle.
The concept they are willing to discuss is:
Guaranteed weekly amount w/ the following
1 5 days of availability, including Sat.
2. Doesn't apply to unexcused absences.
10 3 Could not refuse load if hours available.

Giles testified after Sylvester gave the Union this information, the parties again got together and talked. Giles notes of that point of the meeting read as follows:

- 15 PG- Flesh out what your concept is.
JH- Must be available to work 5 days including Saturday, doesn't apply on unexcused absences. Cannot refuse a load w/hrs available.
PG- How would you determine the guarantee?
JH- It would be a weekly minimum.
20 PG- We're not any closer than we were five hours ago. What about hours, miles and stops?
JH- We're not interested in hourly wages.
LS- It seems to me that what it comes down to is what the numbers are.
JH- 5 mos of thinking about it, I still don't know what the solution is.⁸²

- 25 Giles testified then they took a break and Sylvester met with Respondent. Giles' notes reveal that when she returned she ended the session by stating:

- 30 LS -We're at the end of the rope for today. I've asked them to go back & look at some other things and I'll stay in touch w/ the Co.

Giles testified he did not agree that there was no movement at the January 17 session. However, Giles testified all Respondent ever proposed was miles and stops. When asked if that ever changed from the beginning, Giles responded, "I don't think so, no."

- 35 Cannon testified he recalled talking to Hanson about some type of daily or weekly guarantee. When asked if Respondent made a formal proposal to the Union on that Cannon testified, "We did." However, Cannon then qualified his response stating it was a concept the Union did not accept contending Sylvester made the suggestion to
40 Respondent. Cannon testified they discussed it, but Respondent did not propose it. He testified they discussed it at Sylvester's suggestion, but "No, we did not discuss it with the union." Despite Cannon's claim that Respondent did not discuss the guarantee with the Union, Hanson's notes stated the following at page 202:

- 45 _____
they had proposed.

- ⁸² Giles testified during questioning by Hanson that during the exchange he asked, "What about hours, miles and stops?' I'm trying to reach a compromise of something we can all agree to, and you flat out said, 'We're not interested in any hourly wages.' So the idea of negotiations is somewhat of a question to me when you got your, when you got
50 your heels dug in and won't make any movement. We didn't want miles and stops either, Mr. Hanson."

4:22 p.m.

PG, Mr. Giles: Flesh out concept.

JHH: Explained weekly guarantee. They can't refuse loads, unexcused absences.

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It is reflected at page 203 of the notes:

PG: Weekly guarantee ties to hours. Will, and then 40 or 70 hours, won't agree to something that's not fair.

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JHH: Eyes of the beholder.

PG: (Talked about)

PG: Boils down to we're not interested in mileage and you're not interested in hourly.

JHH: Can't figure out how to bridge that gap.

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E. Analysis

1. The unlawful transfer of work to owner operators

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a. Legal principles

In *Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203, 209, (1964), the Court stated, on the facts therein, that contracting out of work previously performed by bargaining unit employees is a subject about which the Act requires bargaining. There the Court approved the Boards "directing the Company to resume its maintenance operations, reinstate the employees with back pay, and bargain with the Union." The Court stated at 214:

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The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

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The Court also emphasized that a desire to reduce labor costs was a matter "peculiarly suitable for resolution within the collective bargaining framework..."*Id* at 214.

In *First National Maintenance Corp. v NLRB*, 452 U.S. 666, 686 (1981), the Court stated:

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We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s "terms and conditions,..."

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The Court cited the facts of the case to show the limits of its holding. In that case, the Employer decided to terminate its cleaning contract with a nursing home, and it had no intention of replacing the discharged employees or moving the operation elsewhere. The employer's sole purpose was to reduce its economic loss and there was no claim of antiunion animus. The employer's dispute was with the nursing home over the size of its management fee to be paid to the employer. The Court noted the union was not selected as the bargaining representative or

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certified until well after petitioner's economic difficulties with the nursing home had begun. Thus, the Court was not faced not faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement. The Court noted the decision to halt the work at the location in question represented a significant change in the employer's operation, not unlike opening a new line of business or going out of business entirely. Id at 687-688.

In *Torrington Industries, Inc.*, 307 NLRB 809 (1992), the Board majority found the employer violated Section 8(a)(5) of the Act by laying off two bargaining unit employees and replacing them with a nonunit employee and independent contractors, without giving the union notice to bargain about the decision and the effects on unit employees. The Board cited Justice Stewart's concurring opinion in *Fibreboard* for the proposition that when all that is involved is the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer that such decision does not involve a change in the scope and direction of the enterprise and is therefore not a core entrepreneurial decision which is beyond the scope of the bargaining obligation. The Board majority concluded that, given the circumstances, it did not have to address the issue as to whether labor costs were a factor of the employer's decision to subcontract since the employer's reasons had nothing to do with a change in the scope and direction of its business. Rather, the employer simply replaced two employees hauling sand and stone with a nonunit employee and independent contractors. The Board majority noted that no substantial commitment of capital or change in the scope of the business would be involved in negotiating with the Union over retaining the two bargaining unit employees to perform the work. Therefore whether the decision to replace them was motivated by labor costs, it involved unit employees' terms of employment and was not at the core of entrepreneurial control.

In *Naperville Ready Mix, Inc.*, 329 NLRB 174 (1999), enfd. 242 F.3d 744 (7th Cir. 2001), cert. denied 534 U.S. 1040 (2001), the Board found the employer violated Section 8(a)(5) of the Act when in the midst of contract negotiations and within three days of a strike it instructed its attorney to draft documents setting up ten corporate shells, in which the titles of certain of the employer's trucks were placed. After examining the nature of the transactions, the Board concluded they were not arms length business arrangements, but rather stratagem designed to give the appearance rather than the effect of removing the employer from the ready mix business. It was concluded the employer engaged in a type of subcontracting to subcontractors of its own creation. It was found there was no major shift in the direction of the employer's business, rather it continued to engage in the delivery of ready mix product to construction sites with the only difference the work that was being performed by bargaining unit drivers changed to being done by "owner drivers" through an elaborate subcontracting arrangement. It was also noted that the employer did not engage in a significant redirection of capital in that before and after the purported sale of the corporations into which title of the trucks had been placed, the employer continued to bear financial risk because the new owners had not yet paid for the trucks. Thus, the employer continued to use the same equipment in which it continued to have an ownership interest. The Board stated, the employer's basic operation remained unchanged, and it merely replaced the employees driving the trucks with other employees under the owner operator rubric, and in some cases it used the same employees under the new title, maintaining essentially the same control over them that it always enjoyed. The Board concluded its motivation for engaging in this maneuver was its concern over the labor costs of a union contract. The Board found for labor cost reasons the employer subcontracted the work to employees named as owners of the various corporations its attorney had set up.

In *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), affd. in part, reversed in part 248 F.3d 1131 (3rd Cir. 2000) (nonpublished), the Board majority cited the rationale pertaining to subcontracting in *Torrington Industries*, supra. with approval. In *Overnite*, the

Board majority stated:

5 At issue here is a decision to deal with an increase in what was indisputably bargaining
unit work by contracting the work to outside subcontractors rather than assigning it to
unit employees. We think it plain that the bargaining unit is adversely affected whenever
bargaining unit work is given away to nonunit employees, regardless of whether the work
would otherwise have been performed by employees already in the unit or by new
employees who would have been hired into the unit. In any event, it is not clear in this
10 case that the Respondent's current employees did not, themselves, lose work
opportunities. *Overnight*, supra at 1276.⁸³

Thus, the Board has held that a bargaining unit is adversely impacted when new work is
subcontracted out rather than letting the unit expand.

15 In *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994), the Board majority noted that
Torrington is not limited to circumstances where employees are laid off or replaced. There, the
employer was found to have violated the Act when subcontracting to avoid paying employees
overtime. Along these lines, in *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), enf. 420
20 F.3d 294 (3rd Cir. 2005), an unlawful transfer of bargaining unit work to temporary employees
was found when the employer stopped hiring bargaining unit employees, and replaced those
who left with temporary employees. There the employer had a practice of using temporary
employees to supplement its work force, but after a union won an election, the employer
stopped hiring bargaining unit employees and increased its usage of temporary employees
thereby causing attrition in unit positions. In *Clear Channel Outdoor*, 346 NLRB 696 (2006), a
25 violation of the Act was found based on subcontracting of unit work, although no employee lost
their job as a result of the subcontracting, and no current employee suffered a loss of wages.
However, it was noted that the parties could have negotiated an increase in the number of bills
to be posted by unit employees, and they could have negotiated offering employment to unit
employees who had been terminated rather than using subcontractors.

30 In *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158,
166-167 (1st Cir. 2005), the court citing the Board's decision in *Acme Die Casting*, supra
enforced the Board's finding of unlawful subcontracting holding that the subcontracting was a
mandatory subject of bargaining even if it did not result in loss of union jobs. The court stated:

35 There is good reason for the *Acme Die* rule. Union members have an interest in an
employer's subcontracting decision in addition to the potential for layoffs. This work
provides bargaining unit members with the opportunity to obtain extra shifts (possibly at
overtime rates) or to expand the size of the unit through the hiring of new employees.
40 Considering these interests (and possibly others), the Board has reasonably concluded
that the duty to bargain over subcontracting extends beyond the circumstance where the
employer's subcontracting decision will result in the direct loss of union employment.

45 In *Regal Cinemas, Inc., v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003), the court affirmed the
Board's finding that a movie theater operator violated Section 8(a)(5) of the Act by refusing to
bargain over its converting to manager operated theaters and terminating its union represented

50 ⁸³ In *Overnight*, the Board majority stated the General Counsel has introduced enough
evidence that the subcontracting "might" have had a material impact on the earnings of unit
employees to warrant considerations of whether the unit employees should be granted a
monetary remedy at the compliance stage of the proceeding.

projectionists. The court in *Regal Cinemas* stated:

5 Here, the Board affirmed the ALJ's conclusion that the *Fibreboard/Torrington* approach governed Regal's decision to convert to manager-operated theaters and thereby eliminate the projectionist position. This conclusion stemmed directly from the ALJ's determination that Regal "has continued to operate the same business at the same locations and the only change is in the identity of the employees doing the work." JDA 16. On review, Regal maintains that the Board's decision cannot be sustained due to its reliance upon *Torrington*, a decision that, in its view, "creates a virtual 'per se' rule that is incompatible with the test established in *First National Maintenance*." Br. for Pet'r 10 at 17. Because the Board's decision is both "reasonably defensible," *Ford Motor Co.*, 441 U.S. at 497, 99 S.Ct. at 1849, and consistent with this court's precedent, see, e.g., *Rock-Tenn*, 101 F.3d at 1446, we reject Regal's challenge. Id. at 310.

* * *

15 Although the instant case involves a transfer of unit work to managers and assistant managers, and not a transfer of unit work to an outside subcontractor, we find this distinction to be irrelevant. What matters, in our view, is that Regal, like the employer in *Rock-Tenn*, transferred " 'the same work' " performed by the union-represented projectionists to its managers and assistant managers " 'under similar conditions of employment,' " and did so, not because of technological change but, instead, to reduce its labor costs. *Id.* Given our conclusion that substantial evidence supports the finding that Regal's conversion to manager-operated theaters resulted in a transfer of bargaining unit work, we find the ALJ's legal approach, adopted by the Board to be 'reasonably defensible.' *Ford Motor Co.*, 441 U.S. at 497, 99 S. Ct. at 1849.

25 In *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 258 (2006), the Board citing *Fibreboard Paper Products v. NLRB*, supra., and *Torrington Industries*, supra., found the transfer of work for bargaining unit truck drivers to owner operators to be violative of Section 8(a)(5) of the Act. The Board stated

30 We reject the Respondent's argument that the decision to replace employee drivers with owner-operators was a change in the scope, nature, and direction of its enterprise pursuant to *First National Maintenance Corp. v. NLRB*, supra. The Respondent's transfer of the Belvidere-Toledo run to the owner-operators involved "nothing more than the substitution of one group of workers for another to perform the same work." *Gaetano & Associates*, 344 NLRB 531, 533 (2005) (citing *Fibreboard* and *Torrington*, supra). See also *Naperville Ready Mix, Inc.*, 329 NLRB 174, 181 (1999), enfd. 242 F.3d 744 (7th Cir. 2001), ...

40 In *San Luis Trucking, Inc.*, 352 NLRB No. 34 (2008), the Board approved the judge's findings that an employer violated Section 8(a)(1) and (5) of the Act by transferring a majority of its trucking work from its wholly owned subsidiary to another company. In finding a violation of Section 8(a)(5) the judge concluded that the subcontracting of the work did not alter the employer's basic operations as goods were still transported from the subcontractor to the employer's stores and warehouse. Rather, the essential difference was a change in the identity of the drivers who transported the grocery goods, and no capital investment was made by or contemplated by the respondent in connection with its decision, in that the respondent had all times maintained its subsidiary's trucks in a state ready for activation. The judge stated in *San Luis Trucking*, id., JD slip op. at 20-21 that:

50 The Respondents' decision to substitute Unified for SLT to transport grocery goods for Factor Sales was motivated, at least in part, by labor costs, which are amenable to

collective bargaining. This is demonstrated by the Respondents' reliance on SLT's alleged losses as a reason for the transfer of SLT's business to Unified. *Dorsey Trailers, Inc.*, 321 NLRB 616, 616-617 (1996), enf. denied 134 F.3d 125 (3d Cir. 1998); *Rock-Tenn Co.*, 319 NLRB 1139, 1139 fn.2 (1995);⁸⁴ *Furniture Renters of America, Inc.*, 311 NLRB 749, 750 (1993) enf. denied 36 F.3d 1240 (3d Cir. 1994) ("labor costs were a factor in the subcontracting decision").

* * *

Alternatively, 'it is well established that an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise.' *Joy Recovery Technology Corp.*, 320 NLRB 357 fn. 3 (1995), enf. 134 F.3d 1307 (7th Cir. 1998). Thus, even if the Respondents' decision to subcontract SLT's transportation business to Unified were deemed to constitute a change in the scope and direction of the business, the decision would nevertheless be a subject of mandatory bargaining if it was motivated by antiunion considerations. The evidence demonstrates that the Respondents' decision to subcontract SLT's transportation business to Unified was motivated by and was in response to the union activities of SLT's drivers. [FN11] Accordingly, the Respondents' failure to notify the Union or bargain with it concerning the decision to subcontract SLT's work to Unified violates Section 8(a)(5) and (1) of the Act.

*b. Respondent unlawfully diverted bargaining unit work*⁸⁵

In the instant case, on March 27, Respondent began operations at Landover servicing about 200 Giant stores in Virginia, Maryland, Washington, D.C., and Delaware. Respondent's initial operations also included 10 Stop and Shop stores in Southern New Jersey. (SSJ). On its initial assumptions, Respondent expected to operate with 21 drivers and 21 tractors, based on the idea drivers running short distance runs could perform two loads per day. From the outset of the operation, in addition to its company drivers, Respondent used drivers hired through and employed by temporary agencies. Respondent used temp drivers on a daily basis and their numbers fluctuated based on the rise and fall of the store orders for dairy products, with the heaviest usage of temp drivers on Saturdays and Mondays. The temp drivers for the most part were scheduled the day before they were used, and could be procured with as little as two hours notice. The temporary agencies controlled which drivers were sent to Respondent, subject to Respondent's being able to reject a particular driver.

The NLRB election was held on June 22, and a certification of representative was issued for the Union on July 10, in a unit that included, "All full-time and regular part-time company driver employees and hostlers employed by the Employer making deliveries from its domicile at 5 S. Club Drive, Landover, Maryland...". Following the election, Respondent continued to use the temp drivers on a weekly basis.

The testimony of Respondent's officials reveals that, sometime in June or July, MMD approached Respondent about the addition of NNJ runs, which was initially estimated at 35 stores, and then increased to 54 stores. Cannon testified Respondent was informed the NNJ stores were going to be 500 and 600 mile roundtrips, and many of

⁸⁴ The Board's decision in *Rock-Tenn Co.*, 319 NLRB 1139, 1139 fn.2 (1995) was enforced. See, *Rock-Tenn Co. v NLRB*, 101 F.3d 1441 (D.C. Cir. 1996)

⁸⁵ The following summation of facts, unless otherwise stated, is derived from credited testimony, credited portions of bargaining notes, and payroll records or summaries thereof.

the new routes would require a layover for the driver. Cannon testified the start of the NNJ runs was expected by Respondent to be in the latter part of August, but it was pushed back several times by MMD to the actual start date of October 16.

5 As a result of the upcoming contract for the new runs, Cannon contacted and met
with company driver Branch, after the June 22, election sometime in late June or early
July, and he offered Branch a chance to convert to owner operator. Cannon told Branch
the pay as an owner operator was \$1.13 a mile, \$18 dollars a stop, and \$.33 a mileage
10 operator would have to maintain at least \$1,000 escrow account, and the possibilities of
purchasing a license plate for the truck through Respondent. Branch felt the money
Respondent was offering was not sufficient for local runs, but agreed to convert to owner
operator status when the longer NNJ runs began.⁸⁶

15 On July 16, Branch met with Giles and showed him a copy of the "Independent
Contractor Agreement" Cannon had given Branch. Branch also discussed with Giles rates
Respondent was offering Branch if he agreed to convert to owner operator status. On July
17, Giles sent by fax to Taylor, a letter stating, "It has come to our attention that Quickway
intends to offer or already has offered bargaining unit work to drivers and hostlers on an
20 independent contractor, or owner-operator basis. Such improper diversion of bargaining
unit work would violate federal labor law and demonstrate bad faith on the part of
Quickway in refusing to bargain with its certified collective bargaining representative."
Giles went on to state that the Union demands Respondent immediately engage in good
faith collective bargaining over any proposed change in Quickway's operations, as well as
25 to begin negotiations for a collective bargaining agreement.

Cannon responded to Giles by letter dated July 28, in which Cannon stated the
Respondent has equipment and needs for 26 to 27 company drivers, but only had 22 and
had been supplementing the workforce with temporary employees. Cannon stated the
30 Respondent was actively seeking to hire additional company drivers to fill company trucks
in an effort to cut costs by decreasing the use of temporary employees. Cannon also told
Giles that Respondent had been advertising for independent contractors in that they
anticipated some additional runs that would require layovers. Cannon stated Respondent
did not have enough company drivers to perform its current work, and it did not have any
35 sleeper cabs at Landover. Cannon stated, "Using company route drivers is therefore not
an option, and Quickway will have to supplement its workforce with independent
contractors who have sleeper cab equipment. Those independent contactors may also
supplement any work that cannot be performed by route drivers with company equipment.
Suffice it to say, however, despite Quickway Transportation's plans to use independent
40 contractors, no work is being diverted or taken from bargaining unit employees."

Respondent contracted with Thomas Purnell as its first owner operator out of
Landover on August 8 and Purnell began running routes on August 10. Purnell's records
show beginning August 14 through October 16, Purnell was working a full time schedule
45 for Respondent equivalent to the full time schedule of the company drivers. Purnell was
running all local runs during this period, which theretofore had been performed by the
company drivers or temporary employees.

50 ⁸⁶ Branch was again contacted by Ortt in October, and he signed an owner operator
agreement on October 13, and began making the NNJs runs on October 16.

Contract negotiations began on August 8. Giles testified in preparing for negotiations, he obtained copies of four contracts which Respondent had at other terminals with other Teamster locals. Giles testified that in all four contracts owner operators were covered by the collective bargaining agreement.⁸⁷ During the August 8, session, Giles informed Respondent that while they may reach tentative agreements on specific proposals nothing was agreed to until they reached an agreement on everything. The Union's initial proposal on subcontracting was "that bargaining unit work could be subcontracted only if equipment and manpower were exhausted." Respondent's initial proposal on subcontracting was included in a proposed management rights article, and it provided for unlimited subcontracting of bargaining unit work.⁸⁸

Giles credibly testified, as reflected in his bargaining notes, that during the August 9, session, Hanson stated when and if Respondent obtained some additional work that involved layovers, they would come to the Union and compare having company drivers do the work versus using owner operators. Giles responded he wanted it be perfectly clear that Hanson said they would come to the Union when the Company wants to use owner operators on layover runs and Hanson replied, yes, and that they were looking at owner operators to supplement the workforce now in place instead of using temps on some local runs. The following is reflected at page 16, of Hanson's notes:

JHH: Using o/o's-replace rent-a-driver-may use in place of—our workforce exhausted.

MO: To cover the temp

CC: O/o's can't get into some stores- a handful

KT: Will take away from us —my runs

JHH: Not trying to take away from our drivers

PG: Only cannot be run by co. drivers?

Cannon testified there was a discussion that Respondent was going to replace the temporary agency drivers that Respondent was using to supplement their company driver fleet with owner operators. Thus, Hanson's notes reveal the Union was told that owner operators were just going to be used as temporary drivers were, that is to fill in for work when Respondent's company driver work force was exhausted. There is no claim that the Union was told that the owner operators were going to be scheduled on a full time basis to perform local runs. Along these lines, Giles credibly testified he had a phone call with Hanson on August 15, during which Hanson told Giles that on August 10, Respondent sent out an owner operator on a regular route. Hanson stated the company driver was off sick and the company offered the work to company drivers and it was turned down.

Respondent signed its second contract for an owner operator with Lane on September 5,⁸⁹ and entered a contract with the owner operator Walker on September 19.⁹⁰ On September 27, the Union filed an unfair labor practice charge alleging

⁸⁷ There is a dispute between Giles and Prevost as to whether all four agreements covered owner operators. Prevost admitted two of the four agreements covered owner operators, and was not sure about the third. He testified the fourth agreement did not cover owner operators.

⁸⁸ While Respondent entered into a contract with Purnell on August 8, there is no contention that the Union was informed of Purnell's status on that date.

⁸⁹ Lane ran five days the week of September 18, three the week of September 25, five the week of October 2, and four the week of October 9.

⁹⁰ Walker ran three days the week of September 25, four the week of October 2, and

Continued

Respondent had diverted and/or subcontracted bargaining unit work by using independent owner operator delivery drivers without bargaining in good faith with the Union. The charge also alleged Respondent had engaged in direct dealing with employees.⁹¹

5 The parties met on October 2. Giles opened up the meeting talking about owner operators stating he was going to go to the NLRB for a Section 10(j) injunction. Cannon testified Hanson stated Respondent had been subcontracting since the start by using temp drivers, and now Respondent was going to use owner operators doing the same type of work. Cannon testified the Union made a claim that Respondent was taking stops off
10 current loads to make up additional loads just to give owner operators work. Giles credited testimony reveals that at the beginning of the October 2 meeting, Hanson responded to Giles' concern about Respondent's using owner operators, by stating Respondent had been subcontracting since they started the Landover operation by using
15 temp drivers. Hanson stated if someone feels cheated about this tell us. During this session both Giles and Tucker accused Respondent of taking stops off company drivers' loads, and Tucker's in particular, and giving those stops to owner operators.

 The discussion about owner operators continued later on during the October 2, session. Giles again asserted that owner operators were being used to do bargaining unit work. Hanson responded the Respondent was going to use owner operators on runs that
20 require a layover. Giles responded that any delivery made from that dairy was bargaining unit work, and that giving it to an owner operator without bargaining with the Union is a diversion of bargaining unit work. Hanson responded owner operators were not company employees, and were not part of the bargaining unit. Giles testified, "I responded by
25 saying, look, when this bargaining unit was stipulated to, there were no owner operators but this was new work that should be bargained over. I asked him specifically have you changed your position on what you told me in August, that the Company would bargain with the Union on the use of owner operators. He responded, no, not on the new work. I asked him to explain." Giles testified Hanson said "to the extent that they use owner
30 operators, as they have used the temps, we will continue our past practice. He then stated on the new work, we will come to the Union, and if able or not to run without a layover, we'll bargain over the new work and the cost, et cetera." During the discussion, Giles stated there were owner operators included in the bargaining unit at other Quickway locations and they were covered by the contract. Giles asked Hanson if he intended
35 intend to bargain with the Union over the use of owner operators. Hanson "responded by saying, no." Hanson went on to state that he had never seen anything like the other Quickway locations where the owner operators pay Union dues but do not receive any benefits under the contract. Giles ended the session at that time. Hanson's notes at page
40 47 read as follows concerning the discussion about owner operators:

40 (general discussion re subk. & NJ runs)
 -Co has subc BU work since start of operation
 -Co uses o/os everywhere else
45 -Co will discuss new work with union to see if drivers want that work
 -Co will decide when to add driver and equipment
 -Co will cost new work by o/os vs. co. driver

six the week of October 9.

50 ⁹¹ Owner operator Carrington contracted with Respondent on October 5, George Dorsey on October 10, and on October 13, then company driver Branch contracted with Respondent as an owner operator.

During October 3 session, the parties discussed proposed Article 15.09 concerning subcontracting. Giles told Hanson concerning Article 15.09 that the Union maintains the Employer should have enough employees to do the work of the bargaining unit. Hanson stated Respondent was not going to have its manpower needs dictated by the Union, and Respondent will decide when and who it hires. Giles stated bargaining unit work should be covered by union members, and that Respondent should maintain enough drivers to do the work of the unit. Hanson said if we do not have enough drivers to get the work done, then we will subcontract it. Giles stated if the normal work of the union requires 25 people, the company should have 25 drivers, not 10 and say they can subcontract the rest. Giles stated as to overtime, drivers who are off work should be offered over time before the company calls in a temporary or anyone else. If the overtime is refused by the bargaining unit then a temporary would be allowed. Hanson stated the Union was not going to tell them whether they have 18, 20, or 24 drivers that they were going to staff as they saw fit. Giles stated if you are subcontracting every day you should be trying to hire someone.

During the conversation, Hanson stated he anticipated that they were going to start getting some NNJ work in about two weeks. Hanson stated some of the routes were up to 500 plus miles, might have 6 stops on them, that on average they would be around 475 miles a trip with 5 stops. He said they estimated that it would take 12 to 16 hours to run these trips. Hanson stated 65 percent of the routes would take over 14 hours to run. Hanson stated they had done some costing for the routes using owner operators versus company drivers with per diem and hotel, and that it would be 3.5 to 9.5 cents a mile less to use owner operators. Giles asked what would the costs be without per diem and a hotel, and Hanson said he would have to figure that out. Hanson told Giles Respondent calculated \$25 per day per diem and \$75 a day hotel costs if they had to layover someone without a sleeper cab. Giles responded that \$75 a night for a hotel could buy a lot of sleeper cabs. Giles asked what Respondent was proposing to the owner operators and Cannon responded the stop pay was \$1.33 a mile, and he said that was based on \$1.13 a mile and \$18 per stop. Hanson said the tolls were the owner operator's expense. Giles notes reflect that Hanson stated they were proposing to use owner operators for the New Jersey stores for all of the obvious reasons. Giles asked if that included the New Jersey stores that were currently being serviced, and Hanson said no the new stores. Giles asked if they were talking about the 54 new Stop & Shop Stores throughout New Jersey that are presently not being handled by Marva Maid, and Cannon replied yes. Giles stated that some of the runs could be handled by the bargaining unit. Giles mentioned two southern New Jersey runs with five stops each, one with 433 miles and the other with 479 miles that were being handled by the bargaining unit.

The parties again discussed Article 15.09 later on during the October 3 session. Giles stated that Article 15.09 and the last sentence of Article 3, which provided for unlimited subcontracting was a major problem. Giles stated the company was going to have to do something about it or this was all just a big waste of time. Giles stated, if you think I'm going to negotiate a contract that allows unlimited subcontracting, then "I'm pissing in the wind." Hanson stated we now have 24 drivers, the work we started with, Respondent figured they would need 27 drivers and that was what they want to have. Giles stated as new work is added, the Union wanted their membership to grow, and if work was doable with company drivers, the Union wanted to do it. Hanson stated they were trying to do the Landover work with company drivers but the New Jersey runs make more sense with owner operators. Giles stated they needed to agree on some language because the Union could not agree to open subcontracting language.

When the October 4 session opened, Giles made a verbal proposal pertaining to the subcontracting of unit work. Giles proposed the Employer agree the work of the bargaining unit shall include but not be limited to the delivery of dairy products from the Marva Maid Dairy in Landover, Maryland, to retail or wholesale facilities that are 500 miles or less in total mileage and can be run without a layover. The Employer agrees that the deliveries now being made in New Jersey shall remain bargaining unit work. After a break, Hanson stated as to the subcontracting that Respondent should have a full complement of drivers by next week. Giles testified Hanson had previously said that would be 27 drivers. Hanson stated if they had the full complement of drivers, it was their intent to run the work they originally bid on with company drivers and he hoped everybody would feel better. Giles responded the Union's proposal was made to protect the work the unit was handling when the Union filed the petition. Giles stated his proposal gave definition to the work and there was new work that could also be run with the company drivers. At the end of the meeting, Giles notes reflect he stated this will not continue much longer, the Union would be prepared to settle in the next round, and they would present a total solution to the Company.

Giles called a union meeting on October 15, where a strike vote was taken. During the meeting, Giles told the members there was an issue that was probably being overlooked that they needed to understand, that Respondent was subcontracting bargaining unit work, that the Union had filed unfair labor practice charges over this problem, and that the outcome of the negotiations did not mean a thing if Respondent continued to outsource their work and to subcontract it. Giles told the membership if the Company continued to divert the work that they might have to take action to stop the diversion. Giles discussed the complaint that issued over Jackson's discharge, and that charges had been filed on the surveillance and the impression of surveillance. Giles then opened the meeting to questions. Strikers Tucker, Cook, Langhorn, and Keys corroborated Giles' testimony that there was a discussion of the unfair labor practice charges during the meeting, including the diversion of work to owner operators, prior to the employees unanimously voting to authorize a strike.

Respondent's had 24 company drivers working the week of October 16, and Respondent had contracted with six owner operators by October 16. Respondent's records reveal following October 16, company drivers and owner operators regularly ran NNJ runs. Respondent's records reveal that between October 16 and December 30, there were 16 days in which owner operators ran non New Jersey routes referred to as local runs which prior to October 16 had been run by the bargaining unit; there were seven days in which owner operators ran SNJ routes which prior to October 16, had been performed by the bargaining unit; and there were nine days in which owner operators ran mixed SNJ and NNJ routes.

During the November 7, session, the parties came to a tentative agreement on subcontracting by agreeing to Article 15.09, based on Hanson's verbal representation during the meeting that the work presently being performed was bargaining unit work. At that time, as referenced above, company drivers were running some of the NNJ runs. However, despite Hanson's representation during bargaining that Respondent intended to run the runs other than the NNJ runs with bargaining unit members, the owner operators continued to run both the SNJ runs and local runs after October 16. Toward the end of the December 8, session, the last meeting before the strike, Giles stated this was not going to last much longer, that they needed to wrap this up now, that they were not going to let this drag on for months. Respondent refused Giles' request for a quick resumption of

negotiations stating earliest the they could meet was January 15, 2007. At the end of the meeting, Giles stated, the “men and the union are really pissed over these ULP’s. The Company needs to stop breaking the law.”

5 Cannon testified that in early December, Prevost had instructed him to begin preparations for a strike. In this regard, during this time, Respondent continued to increase the number of owner operators contracting with additional owner operators on November 14, November 29, December 11, and December 21, and Cannon brought in drivers from outside company to train on Respondent’s Landover procedures. On
10 December 27, Region 5 issued a consolidated complaint against Respondent. Included in the complaint for the first time was an allegation that Respondent since July 10, 2006, and at all times since then, has assigned work performed by the Union to other employees or independent contractors without prior notice to the Union and without giving the Union an opportunity to bargain in violation of Section 8(a)(1) and (5) of the Act.

15 Giles testified a decision was made to go on strike in the last week of December. Giles testified it was decided the strike would begin on January 12, 2007. Giles credibly testified that, “What triggered the decision in the last week of December was the National Labor Relations Board issued a complaint against the Company over the diversion of bargaining unit work.” Giles testified the parties reached tentative agreement on the subcontracting issue on November 7, and they bargained over economics and some other language issues after that date. Giles testified he called the strike on January 12, 2007, because Respondent’s actions were contrary to what they had agreed to concerning subcontracting. Giles testified, “If you look at all my bargaining notes and you see the progression of events, that led up to that tentative agreement, you will see that the Company understood the Union’s concern over the subcontracting and the Union’s willingness to, to allow limited subcontracting to allow the Company to operate in the event that there was a sudden vacancy or absence for some reason.” He testified during this time Respondent continued hire additional owner operators and in mid December
20 Respondent brought in 12 to 15 drivers from around the country to ride with bargaining unit members. Giles testified, “I wasn’t trying to stop this Company from offering service to its customer, to have service failures, but we were certainly nailing down the scope of the work and the fact that bargaining unit work should be done by bargaining unit members. And they continued to hire more owner operators and divert additional work.”

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35 The strike began at 9:30 p.m. on January 12, 2007. Giles was present for the start of the strike, at which time he handed out picket signs using the term “Unfair” and he gave out printed instructions to the bargaining unit members stating “You are helping to publicize the strike by Teamsters Local Union No. 639 against Quickway Transportation for their unfair labor practices.” On that same evening, Giles hand delivered two letters to officials of MMD notifying them that the Union had commenced an unfair labor practice strike against Respondent. The testimony revealed that for the first two to three weeks of the strike that there was chanting among the picketers for a contract.

40
45 1. Respondent’s use of owner operators was presented to the Union as a fait accompli

Sometime after the Union won its election on June 22, Cannon contacted Branch, informed him Respondent was in the process of acquiring some layover runs, and
50 discussed with him the terms of Branch’s converting to owner operator. The agreement Cannon presented to Branch during the meeting is entitled, “Independent Contractor Agreement.” At page 9, of the agreement it specifically states, in bolded print,

“CONTRACTOR NOT AN EMPLOYEE OF THE CARRIER.” The agreement goes on to state, “It is expressly understood and agreed that CONTRACTOR is an independent contractor for the Equipment and driver services provided pursuant to this Agreement.” Giles was presented a copy of this contract by Branch on July 16. By letter dated July 17,
5 to Taylor, Giles protested the diversion of any bargaining unit work to owner operators or independent contractors, and demanded immediate bargaining over any change in Respondent’s operations. Cannon responded by letter date July 28, stating that Respondent had been advertising for independent contractors in that they anticipated
10 some additional runs that would require layovers. Cannon stated Respondent did not have enough company drivers to perform its current work, and it had no sleeper cabs at Landover. Cannon stated, “Using company route drivers is therefore not an option, and Quickway will have to supplement its workforce with independent contractors who have sleeper cab equipment. Cannon further stated the independent contactors may also supplement any work that cannot be performed by route drivers with company equipment.
15

The parties met on August 8, for their initial negotiation session, at which time Respondent proposed for unlimited subcontracting as part of its management rights clause. While Respondent had contracted with owner operator Purnell on August 8, it did not inform the Union of said contract during the meeting. During the August 9, session,
20 Hanson told Giles when and if Respondent obtained some additional work that involved layovers, they would come to the Union and compare having company drivers do the work versus using owner operators. Hanson also told Giles Respondent was looking at owner operators to supplement the workforce now in place instead of using temps on some local runs. Hanson’s notes reflect that he told Giles that Respondent was using owner
25 operators to replace temporary drivers when Respondent’s work force was exhausted. There is no claim that the Union was told that the owner operators were going to be scheduled on a full time basis to perform local runs. Along these lines, Giles credibly testified he had a phone call with Hanson on August 15, during which Hanson told Giles that on August 10, Respondent sent out an owner operator on a regular route. Hanson
30 stated the driver was off sick and the company offered the work to company drivers and it was turned down.

Thus, despite Giles July 17, demand to bargain, Respondent’s officials gave the Union no prior notice as to the actual contracting with an owner operator, and then
35 misinformed Giles as to how owner operators were going to be used. In this regard, Respondent contracted with Purnell on August 8, and despite representations to the Union that he was just going to be used to supplement the work that could not be performed by the bargaining unit, Respondent immediately placed Purnell on a full time schedule as part of the company driver rotation, performing work that had been theretofore been performed
40 by the bargaining unit and temporary employees.⁹²

⁹² Horner testified the owner operators were assigned loads “just like the regular drivers were assigned the loads. If they called in sick or to take a day off, like I said, I’m
45 going to call the Company drivers first, which I thought owner/operators, Company drivers, I went to them first. If they was off, if they want to run that extra load. If they don’t want to run that extra load, then I go to the temp.” When asked if he treated the owner operators the same as he treated the regular drivers, Horner responded, “They had a regular schedule? Yeah, they was assigned the New Jersey runs, yes, sir. Some of the Jersey runs. So they were assigned on a regular basis? Yes, sir.” He testified he asked the
50 owner operators just as he did the company drivers if they were available to fill in for extra loads, and then Horner would go to the temporary agencies.

Following the August sessions, Respondent signed on two more owner operators in September, and on September 27, the Union filed an unfair labor practice charge of the diversion of unit work to owner operators. At the start of the October 2, Giles informed Respondent that the Union was seeking 10(j) relief with the Board over the diversion of unit work. Cannon testified Hanson responded that Respondent had been subcontracting since the start up by using temp drivers, and now Respondent was going to use owner operators doing the same type of work. It is reflected in Giles notes of October 2, that Giles stated stops were being removed from existing runs and put on new trailers to create additional runs for owner operators. During the discussion that followed, Giles again asserted that owner operators were being used to do bargaining unit work. Hanson responded the Respondent was going to use owner operators on runs that require a layover. Giles responded that any delivery made from that dairy was bargaining unit work, and that giving it to an owner operator without bargaining with the Union is a diversion of bargaining unit work. Hanson responded owner operators were not company employees, and were not part of the bargaining unit. Giles testified Hanson said "that to the extent that they use owner operators, as they have used the temps, we will continue our past practice. He then stated on the new work, we will come to the Union, and if able or not to run without a layover, we'll bargain over the new work and the cost, et cetera. Giles told Hanson there were owner operators that were included in the bargaining unit at other Quickway locations and they were covered by the contract. Giles asked Hanson if he intended intend to bargain with the Union over the use of owner operators. Giles testified, Hanson "responded by saying, no." Hanson went on to state that he had never seen anything like the other Quickway locations where owner operators pay union dues but do not received any benefits under the contract.

Thus, on October 2, Hanson told Giles that owner operators were not company employees, and were not part of the bargaining unit. He told Giles to the extent Respondent used owner operators as they had temporary employees Respondent would not bargain over their usage, and he rejected Giles suggestion of possibly including owner operators in the collective bargaining unit as they were at Respondent's other locations. He made the statement that Respondent would bargain with the Union over the new work whether or not it involved a layover.

During the October 3, session, Giles stated bargaining unit work should be covered by union members and Respondent should maintain enough drivers to do the work of the unit. Hanson said if we do not have enough drivers to get the work done, then we will subcontract it. Giles stated if the normal work of the union requires 25 people, the company should have 25 drivers, not 10 and say they can subcontract the rest. During the conversation, Hanson stated he anticipated that they were going to start getting some NNJ work in about two weeks. Hanson stated some of the routes were up to 500 plus miles, might have 6 stops on them, that on average they would be around 475 miles a trip with 5 stops. Hanson stated they had done some costing for the routes using owner operators versus company drivers with per diem and hotel, and that it would be 3.5 to 9.5 cents a mile less to use owner operators. Giles asked what would the costs be without per diem and a hotel, and Hanson said he would have to figure that out. Hanson told Giles Respondent calculated \$25 per day per diem and \$75 a day hotel costs if they had to layover someone without a sleeper cab. Giles asked what Respondent was proposing to the owner operators and Cannon responded the stop pay was \$1.33 a mile, and he said that was based on \$1.13 a mile and \$18 per stop. Hanson said the tolls were the owner operator's expense. Hanson stated they were proposing to use owner operators for the New Jersey stores for all of the obvious reasons.

When providing the Union with the costs of the owner operators, Respondent's officials failed to mention the owner operators were also being paid a fluctuating fuel allowance, and he incorrectly told the Union the owner operators were responsible for their own tolls. Branch testified as an owner operator he was reimbursed for tolls at the rate of \$100 to \$150 per week. Moreover, while Hanson represented the cost gains by using owner operators over company drivers was 3.5 to 9.5 cents mile, Miller, who had made the calculation for Respondent, stated the actual saving was 4.5 cents a mile, and that this calculation included the cost of renting or purchasing sleeper cabs for company drivers.⁹³

It is a violation of Section 8(a)(5) of the Act for an employer to change a mandatory term or condition of employment without bargaining with a union. *Litton financial Printing Div. v NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994), the Board stated when parties are engaged in contract negotiations an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain. Rather, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for an agreement as a whole, absent two limited exceptions, that is if a union has in response to an employer's diligent and honest efforts is seeking to delay bargaining, or when economic exigencies compel prompt action.⁹⁴ In *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), the Board held as follows:

Of course, there are certain compelling economic considerations that the Board has long recognized as excusing bargaining entirely about certain matters. The Board has limited its definition of these considerations to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987). Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action.

* * *

We believe, however, that there are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exception.When these circumstances occur, we believe that the general *Bottom Line* rule foreclosing changes absent overall impasse in bargaining for an agreement as a whole should not apply. Instead, we will apply the traditional principles governing bargaining over changes in terms and conditions of employment referred to in *Bottom Line*. Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception, as further explicated here, that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event,

⁹³ Miller testified that he made the calculation for cost of owner operators based on an assumption that they were being paid \$15 a stop, when in actuality Respondent paid them \$18 a stop.

⁹⁴ This duty applies as well when parties are engaged in negotiations for their initial contract. See, *Citizens Publishing and Printing Co., v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001); and *Northwest Graphics, Inc.*, 342 NLRB 1288, enfd. 156 Fed. Appx. 331 (D.C. Cir. 2005).

consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change. (Footnotes omitted.)

5 The Board went on to state,

10 In defining the type of economic exigency susceptible to bargaining, however, we start from the premise, derived from the cases discussed above, that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were “compelled,” the employer must additionally demonstrate that the exigency was caused by external events, was beyond
15 the employer’s control, or was not reasonably foreseeable.

20 As discussed above, an employer which has demonstrated that a situation meets these requirements would satisfy its statutory obligations by providing adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted. *Dixon*, supra. Thus, the Board has recognized in a number of analogous cases that the amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation. (Citations omitted.) Id. at 81-82.

25 See also, *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962-63 (2001), enfd. in relevant part 351 F.3d 747 (6th Cir. 2003), where the Board further explicated an employer’s requirements for the limited exception referenced in *Bottom Line Enterprises*. In *Pleasantview* the Board stated:

30 While the Respondent has shown that it needed to raise its starting wage rates in order to attract and retain qualified employees, it has failed to show that ‘time was of the essence’ with respect to its employment situation, and that ‘prompt action’ was ‘compelled’ independent of the overall ongoing bargaining process. Id. at 82. The evidence here simply does not demonstrate the sort of emergency that *RBE Electronics* contemplates.
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40 Even if it did, however, we would not find that the Respondent met its residual duty to bargain in good faith under the circumstances here. The Respondent did not notify the Union that it needed to immediately implement the wage rate proposal on a piecemeal basis. Nor did it seek to bargain over the wage-rate increase as a separate, emergency matter. Good-faith bargaining would have entailed informing the union, in advance, that the Respondent believed that an emergency existed and that it intended to unilaterally implement a proposal to address the situation, if impasse were reached. Last, there is no basis for concluding—indeed, the Respondent does not argue—that impasse had been reached on July 1 over the wage rate changes proposed to respond to the claimed
45 exigency.

50 There are certain circumstances, where the Board has recognized where a union’s request to bargain is futile, either because the notice by an employer is too short before the actual implementation, or because the employer has no intention of changing its mind. In these circumstances, the notice is nothing more than a *fait accompli*. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enf. 722 Fed 2d. 1120 (3rd Cir. 1983). A union is not required to request bargaining over a decision or effects in circumstances when there is a *fait*

accompli. *Holiday Inn of Benton*, 237 NLRB 1042 (1978), enfd in relevant part 617 F.2d 1264 (7th Cir. 1980).

5 I do not find either of the bargaining exceptions, or the more limited exceptions
pertaining to bargaining set forth in *Bottom Line Enterprises*, supra applicable here.
Cannon, without notifying the Union, contacted Branch about converting from a company
driver to an owner operator in late June or early July. Branch reported the contact to Giles
on July 16. Giles promptly demanded immediate bargaining by fax on July 17, over any
change in Respondent's operations, as well as to start negotiations for a general contract.
10 Respondent did not respond until July 28, wherein Cannon stated Respondent has begun
advertising to attract independent contractors to work out of the Landover facility, that
Respondent anticipated beginning some additional runs that will require layovers, that
Respondent did not have any sleeper cab equipment at its Landover to perform those
15 runs, that using company drivers was therefore not an option, and Respondent will have
to supplement its workforce with independent contractors who have sleeper cab
equipment. Giles was told those independent contactors may also supplement any work
that cannot be performed by route drivers with company equipment. Cannon did not state
these changes were imminent or offer to set up special negotiations outside general
bargaining about these stated changes in Respondent's operation.

20 The parties met on August 8, to begin general contract negotiations and
Respondent neglected to inform the Union that it had contracted with an owner operator
on that date. During the August 9, session, Hanson told Giles that when and if
Respondent obtained some additional work that involved layovers, they would come to the
25 Union and compare having company drivers do the work versus owner operators. Despite
the Union's immediate demand to bargain on July 17, Respondent postponed providing
the Union with the details of the cost of owner operators until October 3, when it had
already placed its bid with MMD premised on the use of owner operators, and when it had
already hired three owner operators. The information Respondent provided the Union on
30 October 3, was also inaccurate and incomplete. At that time, Hanson told Giles the owner
operators paid their own tolls although Respondent paid them, and Giles was not informed
the owner operators also received a gasoline allowance. Moreover, Hanson represented
to the Union the cost gains by using owner operators over company drivers was 3.5 to 9.5
cents mile. However, Miller, who made the calculation for Respondent, testified the actual
35 saving was only 4.5 cents a mile, and this calculation included the cost of renting or
purchasing sleeper cabs for company drivers.

40 I have concluded Respondent had no intention of bargaining with the Union over
the use of owner operators. Rather, it exhibited a fixed intent to use them on both local
and the NNJ runs as exhibited in Cannon's initial response of July 28. In this regard, while
Hanson's represented to the Union on August 3, that it would come to the union and
compare the costs of having company drivers versus owner operators performing the
work, Miller testified that Respondent started pricing the new business around July 2006,
and they finalized most of the details around the end of September 2006. Miller testified,
45 "We looked at it under both methods, under Company and under owner operators, and we
placed the bid based on the basis that we would try to use owner operators because we
felt that was the best way to do that from a business sense." He testified once
Respondent placed the bid the cost was fixed whether Respondent used owner operators
or company drivers. It is clear from all of the forgoing that Respondent had a fixed plan to
50 use owner operators for both local and long distance runs, and that plan did not involve
good faith negotiations with the Union over its actions as Miller was not even informed
there was a union at Landover when he formulated Respondent's pricing model.

Accordingly, I find the Union was presented with a *fait accompli* concerning the use of owner operators, with Respondent disingenuously going through certain motions in a half hearted effort to appear that it had bargained about the subject. In fact, Cannon dealt directly with Branch with no notification to the Union, and Respondent hired Purnell in the face of Giles request for immediate bargaining without even meeting with the Union.

2. The owner operators were statutory employees

Respondent's propensity to play both sides of the coin is demonstrated by passages in its post-hearing brief and later filed reply brief. Respondent authored the independent contractor agreements signed by the owner operators which contained the statement in reference to the owner operators that "CONTRACTOR NOT AN EMPLOYEE OF THE CARRIER." The agreement goes on to state, "It is expressly understood and agreed that CONTRACTOR is an independent contractor for the Equipment and driver services provided pursuant to this Agreement." During the October 2, session, Hanson stated owner operators were not company employees, and were not part of the bargaining unit. Giles told Hanson there were owner operators that were included in the bargaining unit at Respondent's other locations and they were covered by the contract. Giles asked Hanson if he intended intend to bargain with the Union over the use of owner operators. Hanson responded "No." Hanson further stated he had never seen anything like the other Quickway locations where the owner operators pay Union dues but do not receive any benefits under the contract, thereby rejecting any possibility that the owner operators be included in the existing Landover bargaining unit. Respondent continued this position in post-hearing brief stating at page 34:

Just like *BLT Enterprises*, Quickway has contracted out the hauling of loads either to temporary agency workers or owner-operators since it took over operations at the Landover facility. At most, Quickway simply substituted one set of non-bargaining unit workers for another.

It similarly stated at page 37 of the post-hearing brief:

In sum, Quickway simply continued to use non-bargaining workers to supplement work performed by the bargaining unit members. The bargaining unit members were always given their assignments first, they were always offered additional work, and Quickway only used temporary agency workers and owner-operators to cover the runs that bargaining unit members could not cover. (Transcript citations omitted.)

However, Respondent's position changed in its later filed reply brief stating at page 13:

Finally, General Counsel's claim is based on the complaint allegation that Quickway 'entered into agreements with employees in the unit that *purported* to change their status to independent contractors.' *Complaint*, (P) 16. (emphasis supplied). The complaint allegation necessarily implies that the change in status was ineffective and that the drivers remained employees. General Counsel furthers this position by eliciting multiple sources of testimony showing owner-operators pull the same trailers company drivers pull, Quickway's name is on the owner-operators' tractors, Quickway paid tolls for owner-operators, and the owner-operators were controlled by Quickway to the point they could not drive for anyone else (GC Exh. 5, 26) General Counsel eventually decided not to pursue the evidence that owner-operators were actually statutory employees, but the evidence

is nevertheless present - evidence establishing a statutory employment relationship, which thereby eviscerates the claim that any loads whatsoever were subcontracted, as well as the claim that company drivers went out on strike to protest diversion of work to non-bargaining unit drivers since they were all bargaining unit drivers. See *Roadway Package System, Inc.*, 326 NLRB 842 (1998).

In addition to the factors cited by Respondent above, there are other factors that militate in favor of employee rather than independent contractor status for the owner operators. Respondent's independent contractor agreement provides that: it can be terminated on one days notice for any reason; the carrier has the right to disqualify drivers provided by the contractor if they do not meet the carriers minimum standards; the contractor and its drivers are required to submit to the Carrier's random drug and alcohol testing program; the contractor agrees that it will comply with the carriers policies and procedures and any revisions thereto; the contractor is required make its equipment available for reasonable inspection of the carrier, and is required to have its equipment inspected on an annual basis at a facility authorized by the carrier. The independent contractor agreement provides that the equipment shall be for the Carrier's exclusive possession and use during the agreement, and that the contractor shall not operate the equipment for any other motor carrier without prior written consent from the carrier. The owner operators were paid a fuel surcharge for gas usage. The terms of their compensation were uniform and they were set by Respondent. In this regard, Cannon testified Respondent paid the owner operators the same compensation whether or not they had sleeper cabs. Respondent also has a history of including owner operators in its collective bargaining agreements at other facilities.

I concur with Respondent for the reasons it enunciated in its reply brief, as well as for the reasons I have cited that the owner operators were statutory employees. In this regard, their operations were in the control of Respondent, as they could not work for other carriers, they had to abide by Respondent's rules and regulations as did any drivers they might employ who also had to be approved by Respondent, and their incomes were directly dependent on the routes they were assigned by Respondent's dispatchers. I also agree with Respondent's assertion in its reply brief that the owner operators should have been part of the collective bargaining unit. In this regard, they drove the same routes as the company drivers, their routes were assigned by the same dispatchers and they followed the same dispatch procedures, they hauled the same trailers and performed the same work. The routes of the owner operators were also readily observable to the company drivers through Respondent's dispatch postings, and its placement of all the drivers' routes in a dispatch bin available for review by all of the drivers. Respondent also converted one of the company drivers to an owner operator position.

Despite Respondent's belated concession that the owner operators are employees and should have been in the collective bargaining unit, it took a contrary position during negotiations with the Union and the owner operators themselves. As reflected in Giles' October 2 notes and his credited testimony, Hanson specifically told Giles that owner operators are not company employees and they were not part of the bargaining unit. Thus, Hanson specifically refused to consider the owner operators being included in the bargaining unit during negotiations, although he conceded they had been included in bargaining units at other locations. This is consistent with Respondent's actions where it bypassed the Union and met and set the terms of the owner operator agreements with the owner operators on an individual basis, and the owner operator agreements crafted by Respondent specifically state the owner operators are not employees.⁹⁵

⁹⁵ In fact, Cannon met with the owner operators as a separate group, and questioned them

Thus, whether the owner operators are statutory employees or should have been members of the bargaining unit is not determinative, for Respondent by its own actions excluded them from the bargaining unit, and refused to bargain with the Union over their usage or terms of their employment. The diversion of work from a collective bargaining unit has the same impact
 5 whether it is subcontracted to independent contractors, given to non bargaining unit employees, supervisors, or other members of an employer's staff. See, *Naperville Ready Mix, Inc.*, 329 NLRB 174 (1999), enfd. 242 F.3d 744 (7th Cir. 2001); *Torrington Industries, Inc.*, 307 NLRB 809 (1992), where the employer violated Section 8(a)(5) of the Act by laying off two bargaining unit employees and by replacing them with a nonunit employee and independent contractors; *Office and Professional Employees International Union, Local 425 v. NLRB*, 419 F.2d 314 (D.C. Cir. 1969), and *Regal Cinemas, Inc., v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003). Respondent's actions here had a particularly severe impact on bargaining unit employees. Their income was directly tied to the length of their runs and the number of stops they received. Just as contract negotiations began with the Union, Respondent bypassed the Union and brought in owner
 10 operators, a new category of drivers. Respondent converted a bargaining unit driver to owner operator, excluded the owner operators from the bargaining unit, and favored them with longer routes all in plain view of the bargaining unit members thereby serving to undermine the Union.

3. Respondent violated Section 8(a)(1) and (5) of the Act
 20 by diverting bargaining unit work to owner operators
 for layover and non-layover runs

Respondent argues it had no obligation to bargain over the existing work assigned to owner operators asserting that it was merely continuing the practice of contracting out
 25 extra work to temporary employees by shifting that work to owner operators. I do not find this argument to be persuasive. In *Citizens Publishing and Printing Co. v NLRB*, 263 F.3d 224, 233-34 (3rd Cir. 2001), the court approved a section 8(a)(5) finding when an employer unilaterally subcontracted night and weekend work to stringers during the negotiation of an initial collective bargaining agreement. While the employer had used stringers in the past
 30 to perform some of the work, the court noted that the status quo is determined as of the time of the union's certification and at that time the work in question had become an integral part of the duties of the photographer, and therefore it was bargaining unit work. Thus, by removing those duties from the photographer's position and shifting it exclusively to stringers the employer had unlawfully subcontracted unit work. Similarly, in *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), enfd. 420 F.3d 294 (3rd Cir. 2005), an employer's
 35 increased usage of temporary employees to replace bargaining unit employees as they left after a union won an election was found to violated the Act.

At the time of the union's certification the work out of Landover was being
 40 performed by company drivers and temporary employees. The company drivers were full time, and scheduled on a daily basis by Respondent's dispatcher based on routes created by the terminal manager formulated by store orders provided by MMD. The company drivers were assigned to work five days a week with Sunday's off, and required to work Saturdays. They could work a sixth day on a voluntary basis if the work was available,
 45 and if they had DOT hours remaining. On certain days the company drivers were either assigned two loads, or on occasion if off from work offered an extra load on a voluntary basis. Company drivers were paid on a formula based on miles and stops, and there was testimony that their income increased based on the length of their assigned load. This was acknowledged by Respondent in that on January 15, 2007, it proposed a plan that
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as to whether he had their support to continue working should the Union call a strike.

company drivers be paid based on a mileage matrix formula with those driving 75 miles or less receiving \$.09 more per mile than those driving routes over 300 miles. There was also a monetary incentive for Respondent to provide the company drivers as much work as possible rather than use temporary drivers. Ortt confirmed this by his testimony that Respondent tried to use company drivers to haul as many loads as possible to maximize their pay and fleet usage. He testified only when Respondent ran out of company drivers did they resort to temporary drivers, for whom the temporary agencies received an hourly fee and overtime. In this regard, Ortt testified it was \$180 to \$250 a day or more to use a temporary driver than a company driver.

By letter dated July 28, Cannon told Giles Respondent had equipment for and needs for 26 to 27 company drivers, but only had 22 on its payroll.⁹⁶ It was stated in the letter that Respondent was looking to hire more company drivers due to the cost of using temporary drivers. Prevost testified Respondent realized it needed to operate with 26 company drivers, rather than the original estimated 21 and he attributed the need for additional drivers due to congested area traffic patterns. He testified while Respondent's revised model called for 26 company drivers, Respondent did not hire the 26 drivers rather it made up for the extra drivers by using temporary drivers and owner operators.

Despite Prevost's testimony, I find Respondent did not make up for the admittedly low level of company drivers by using temporary drivers during the period in question. In this regard, Respondent's post-hearing brief reveals that for the week ending September 2, Respondent had 36 runs by temporary drivers. This number dwindled to seven runs by temporary drivers by the week ending October 14, when it had four owner operators making runs. Thus, rather than expanding the bargaining unit to 26 or 27 company drivers as its model called for, Respondent shifted the work to full time owner operators. In fact, for a period of time, Respondent decreased the number of company drivers as it brought on more owner operators. Respondent had 24 company drivers on its payroll the week ending October 7; 25 drivers the week ending October 14; and 24 drivers the week ending October 21. By the week ending October 28, it had only 22 company drivers; and by the week ending November 25, it was down to 20 company drivers. During this period of time, it had increased to seven owner operators. Thus, prior to the NNJ runs, Respondent shifted work of temporary drivers and company drivers to full time owner operators, rather than fully staffing the bargaining unit. If it had sufficient business to keep the owner operators fully employed with local and SNJ runs, it could have used that same business to increase the company drivers since it admittedly had the equipment to support 26 to 27 company drivers, and there would have been no additional capital expenditure for it to have increased the bargaining unit to a full staffing level.

While Ortt at first claimed that prior to October 16, owner operators were only used on an as needed basis, he eventually admitted that Respondent kept the owner operators fully employed because under their agreement with Respondent they were not free to work for another carrier. Thus, Horner testified the owner operators were assigned loads just like the company drivers were assigned loads. If an owner operator called in sick, Horner was "going to call the Company drivers first, which I thought owner/operators, Company drivers, I went to them first." Horner would then go to the temporary drivers. When asked if he treated the owner operators the same as the company drivers, Horner testified that he did and that the owner operators had a regular schedule, and were assigned on a regular basis. He testified he asked the owner operators just as he did the company drivers to fill in for regular loads, then he would

⁹⁶ Giles testified he was told during negotiations that 27 company drivers would constitute full staffing for Respondent.

go to the temporary drivers.⁹⁷

Thus, at the time of the Union's certification there were no owner operators. Respondent used a mileage based pay system for the company drivers and it was less expensive for Respondent to use them to full capacity than it was to rely on temporary drivers. Respondent, by its own admission, had a financial incentive to keep the company drivers as fully utilized as possible before using temporary drivers. On the other hand, contrary to temporary drivers, owner operators were regularly scheduled the same as the company drivers and were competing with the company drivers for higher paying and spare runs. Respondent had an obligation to keep both owner operators and company drivers fully employed in order to retain their services, and used them interchangeably on local runs prior to October 16, and on local and long distance runs thereafter. The use of regularly scheduled owner operators served as a basis to refrain from fully staffing the bargaining unit with company drivers. Respondent never hired enough company drivers to fully staff its available equipment.⁹⁸ At the same time it steadily increased the number of owner operators contracting with its first on August 8, second on September 5, and third on September 19. Thus, it was using three owner operators on a full time basis almost a month before it obtained the new NNJ work.⁹⁹ By October 16, the date the NNJ runs had started, it had contracted with six owner operators. Respondent was then content to run the NNJ runs using a mix of company drivers and owner operators through the end of the year.¹⁰⁰ It waited a month from October 16, to contract with the next owner operator on November 14. Respondent began its strike preparations in early December. It did not contract with the next owner operator until November 29, and he did not start runs until

⁹⁷ I do not credit Horner's claim that he went to the company drivers first to fill an extra load before he went to the owner operators. Rather, I have concluded that he intentionally back tracked on his initial testimony that he used company and owner operators interchangeably in an effort to advance Respondent's cause.

⁹⁸ Respondent had the following number of company of drivers in the referenced weeks: July 24, 22 drivers, August 7, 23 drivers; the weeks of August 13 and 21, 22 drivers; September 9, 23 drivers; September 18, 24 drivers; October 9, 25 drivers; October 16; 24 drivers; October 23, 22 drivers; November 12, 21 drivers; November 19, 20 drivers; November 26, 22 drivers; December 3, 21 drivers; December 10, 23 drivers, December 24 22 drivers; and January 6, 23 drivers.

⁹⁹ I do not find that Respondent needed to train the owner operators for a month to run the NNJ runs. Company driver Keys testified his training consisted of two road trips before he ran routes on his own. These owner operators were obviously experienced drivers as all but two owned their own trucks. Respondent contracted with an owner operator on November 14, and he was able to run a route the next day. There was also nothing to prevent Respondent from allowing the owner operators from riding along with the company drivers in order to train, if necessary, rather than diverting the bargaining unit work without bargaining with the Union.

¹⁰⁰ Respondent asserts that its use of owner operators did not impact on the earning of company drivers because the week ending June 3, their average daily pay was \$191.99; week ending August 5, it was \$193.23; week ending October 28, it was 201.88; and week ending December 23, it was \$195.76. Overlooked in this analysis was that during the week ending October 28, the company drivers had run seven NNJ runs, and one mixed NNJ and SNJ run thereby increasing their income by the longer runs. However, as Respondent continued to increase the owner operators, it used the company drivers less for the NNJ runs, using them for only two such runs during the week ending December 23, and having them run no mixed runs. Thus, the company drivers had a temporary increase in income when they were allowed to run the NNJ runs on a more regular basis.

December 19. Respondent contracted with two other owner operators in December. Despite its claims that it needed nine or ten owner operators and their trucks to service the NNJ routes, it was content to run those routes mixture of six or seven owner operators and company drivers, until Respondent began preparations for a strike at which time it started
5 to increase its owner operators until it had 13 during the course of the strike.

There was testimony by Respondent's officials that Respondent had difficulty hiring and retaining a sufficient number of company drivers. I do not credit this testimony. Prevoost attributed the problem to high turnover of company drivers. He testified the
10 problem was eliminated when Respondent issued a pay raise after the start of the strike. By Prevoost's admission Respondent's difficulty in hiring and retaining drivers was directly linked to the wages it was offering. Moreover, during the week of January 6, Respondent had 23 company drivers running routes. However, the week of the strike for the first time
15 its number rose to 27 company drivers. Three of the four new drivers worked on January 13, the day after the strike. Respondent was able to hire company drivers based on pre-strike wage rates in a hurry as part of its strike preparation. I have concluded that absent the use of owner operators there would have been increased pressure to hire more company drivers and to increase their wages to retain them, as opposed to using the more
20 expensive temporary employees.

Since the company drivers were paid by stops and miles there was an inherent tension created by Respondent's regular scheduling of owner operators. Tucker protested during the October 2 bargaining session that a stop had been taking off one of his routes and diverted to an owner operator costing him stop pay and a loss of miles. Cook testified
25 he thought the owner operators decreased his income because they were taking the longer runs to NNJ. He testified before the NNJ runs started he felt he lost money to the owner operators because he came in on a couple of occasions and it seemed like an owner operator had a longer route than he had. He testified he called Ortt on four or five occasions asking him if he needed Cook to take a run, only to be told an owner operator
30 had taken it. Keys testified the company drivers lost runs to the owner operators and temporary employees.

Finally, the record reveals some of the company drivers had previously been employed by Giant where they received hourly wages. Respondent was aware based on
35 complaints to its officials by the company drivers that they wanted to receive hourly pay. Respondent's system of pay nationwide was based on stops and miles. Respondent officials admitted that traffic was worse in the D.C. metro area than in the remainder of its terminals, even those in big cities, leading it to eventually propose a mileage matrix pay scale shortly after the strike started. Respondent, however, never acceded to the Union's
40 request for some form of hourly guarantee, even for the local routes. Respondent opposed the Union, and committed other unfair labor practices during the course of the union campaign. Respondent had experienced labor counsel, and was aware from the outset of negotiations of the strong possibility of a strike. I have concluded that Respondent began the use of owner operators as part of its strike contingency plan.
45 Cannon met with the owner operators around a week before the strike, and asked if they would cross the picket line. It added three additional owner operators running routes in December when it began its strike preparations bringing the total to 10 shortly before the strike, and raised the amount to 13 during the strike.

50 In sum, Respondent did not use owner operators at the time the Union was

certified.¹⁰¹ I find that the use of owner operators constituted a material change to the certification status quo in that it created a new full time group of drivers competing with the company drivers for runs. The company drivers were keenly aware of the use of

5 Moreover, a driver's pay was based on stops and miles which prior to the strike were paid at a uniform rate, therefore the longer run and the more stops a driver received the likelihood that their pay would increase for that day. The record testimony reveals the company drivers felt aggrieved by Respondent's use of owner operators both before and after the start of the NNJ runs, and their use was protested in general and pertaining to
10 specific drivers during negotiations. The company drivers differed from temporary drivers in that they were employed on a full time basis, whereas temporary drivers were mainly used after all available runs were offered to company drivers. The use of owner operators suppressed company driver pay in several ways. It did so on a daily basis when owner operators received a more favored run than a company driver including local runs, when
15 the company drivers received the bulk of the NNJ runs at the expense of the company drivers, and by serving as a disincentive to raise the pay of company drivers in general to minimize their turnover, since the use of owner operators provided Respondent an alternative to the use of temporary employees.¹⁰² The use of owner operators, in particular for local and southern New Jersey, runs served as an alternative to increasing the size of the bargaining unit to 26 or 27, for which Respondent admittedly had available
20 equipment.¹⁰³ Finally, Respondent subcontracted the work to owner operators as a safeguard against a possible strike. Respondent took this action because of its concern of increased labor costs due to a union contract.¹⁰⁴

25 Beginning August 9, owner operator Purnell began performing local runs, which had theretofore been bargaining unit work, on a full time basis. Thereafter, new owner operators began running local runs on September 11, September 23, October 7, and October 14 on a full time basis as the NNJ runs did not begin until October 16. Owner

30 ¹⁰¹ See, *Citizens Publishing and Printing Co. v NLRB*, 263 F.3d 224, 233-34 (CA 3, 2001), holding the status quo of the unit is determined as of the time of the union's certification.

35 ¹⁰² See, *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994), where subcontracting was unlawful when purpose was to avoid paying unit employees overtime; *Clear Channel Outdoor*, 346 NLRB 696 (2006), a violation of the Act where rather than subcontracting the parties could have negotiated an increase in the number of bills to be posted by unit employees, and they could have negotiated offering employment to unit employees who had been terminated rather than using subcontractors. See also, *Office and Professional Employees International Union, Local 425 v. NLRB*, 419 F.2d 314 (D.C. Cir. 1969), where plans of an employer to
40 unilaterally have auditing work done outside of the bargaining unit could not be said to have an insignificant impact on the unit where the union lost an element of work carrying higher pay and an opportunity for experience and advancement.

45 ¹⁰³ *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), *affd. in part, reversed in part* 248 F.3d 1131 (3rd Cir. 2000) (nonpublished), bargaining unit adversely affected when an employer contracts out work rather than hiring new employees; *Clear Channel Outdoor, supra*, bargaining unit adversely affected by subcontracting rather than recalling terminated employees; and *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158 (1st Cir. 2005).

50 ¹⁰⁴ See, *Naperville Ready Mix, Inc.*, 329 NLRB 174, 181 (1999), *enfd.* 242 F.3d 744 (7th Cir. 2001), where subcontracting work with "owner operators" due to the concern of the cost of a union contract found to be violative of the Act.

operators also continued to run local runs and bargaining unit southern New Jersey (SSN) runs unit after the NNJ runs started on October 16. During the weeks ending August 9 to December 30, Respondent's records reveal Respondent had between 20 and 24 company drivers, with only one week during that period where there were 25 company drivers on Respondent's payroll. Respondent admittedly never staffed to the 26 or 27 company drivers its available equipment would support. Thus, it could have increased the bargaining unit with no capital investment required for non layover runs that it contracted with owner operators to perform. It merely substituted the owner operators for work out of the same terminal, with the same procedures, for work that could have been performed by bargaining unit employees with no additional capital investment. For the reasons set for the above, I find Respondent failed to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act over the decision and effects of diverting the non layover work from the bargaining unit to owner operators, as it constituted nothing more than a transfer of the work from one group of employees to another. See, *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 258 (2006), and *Naperville Ready Mix, Inc.*, supra.¹⁰⁵

Respondent argues that is was not required to bargain with the Union over the use of owner operators for the NNJ runs because its contract with MMD for the NNJ runs was cancelable on short notice and Respondent did not have enough vehicles on hand to cover the NNJ stores with company drivers. By Respondent's model it would have had to acquire 9 or 10 sleeper cabs to staff the addition 54 NNJ stores at a cost of \$900,000 to \$1 million whether or not Respondent acquired the sleeper cabs through purchase or long term lease. Prevost testified the purchase of the sleeper cabs would also have had an adverse impact on Respondent's debt equity ratio and a negative impact on Respondent's financial standing. Respondent claims the costs were prohibitive to use company drivers because of the hotel and per diem requirements for running the NNJ runs without sleeper cabs and it would be required to take its day cabs out of use for periods of time when the drivers had to layover.

There are several problems with Respondent's position. While it claims labor costs were not a factor in its decision to use owner operators because of a required capital investment to use company drivers, it in fact did have Miller, its financial analyst, do a cost comparison between the costs of owner operators and company drivers. Miller taking into account the cost of additional capital outlays for 10 new vehicles concluded it was only four and one-half cents a mile more to use company drivers than to hire owner operators for the NNJ runs.¹⁰⁶ Miller's assessment, by his testimony, was based on a stop pay to owner operators of \$15 per stop, while their actual pay was \$18 per stop. Moreover, Respondent managed the addition of the 54 stops from October 16 to November 14, using a mixture of six owner operators and company drivers performing the NNJ runs and local routes. Respondent added a seventh owner operator on November 15, but did not bring other owner operators aboard until mid to late December when it was in the midst of its strike preparations. Thus, I have concluded that representations of the costs of capital investment requiring 9 or 10 sleeper cabs to service the NNJ runs were inflated, because Respondent was content to use six or seven owner operators to service the

¹⁰⁵ There were also claims by existing company drivers that they lost stops and runs to the owner operators for bargaining unit work. I shall leave to the compliance stage of this proceeding as to whether the General Counsel can establish there was an actual loss to the earnings for the existing company drivers to determine if a backpay reward is warranted for particular drivers for the subcontracting. See, *Overnite Transportation Co.*, supra.

¹⁰⁶ There was a variance in testimony of Respondent's officials with Cannon stating 9 sleeper cabs and Miller stating 10 were needed to service the NNJ runs.

runs until December when it began its strike preparations in earnest.¹⁰⁷

Respondent also toyed with the idea of negotiating with the Union over the use of owner operators. During the August 9, bargaining session, Cannon told Giles that when and if Respondent obtained the work involving layovers, it would come to the Union and compare the cost of using company drivers versus using owner operators. Hanson gave a similar assurance to Giles during the October 2, session. Despite its contention that it did not have enough tractors to run the NNJ runs with company drivers, and that it was too expensive to use them, when the October 16 NNJ runs began, Respondent's records reveal that company drivers regularly ran some of the NNJ runs and received compensation for laying over on some of the runs.¹⁰⁸ In fact, after October 16, Respondent used owner operators on bargaining unit local and SSJ runs, as well as on the new NNJ runs. It also used company drivers on all three sets of runs.

In sum, while Respondent informed the Union that it would be using owner operators on the NNJ runs because they involved layovers and it needed to use sleeper cabs, it also used company drivers for the NNJ runs on a regular basis. While Respondent informed the Union that the owner operators were not employees, dealt with the owner operators directly, and refused to include them in the bargaining unit, it has taken a position in its post hearing reply brief that the owner operators are employees and members of the bargaining unit. Respondent has owner operators as part of bargaining units at some of its other facilities. I have concluded that labor costs were the motivating factor in Respondent's decision to employ the owner operators for the local and the NNJ runs and to exclude them from the bargaining unit. First, Respondent's analysis in determining to use owner operators for the NNJ runs was based on a cost comparison of using them versus company drivers, and Respondent made that comparison taking into account the cost of acquiring sufficient additional cabs to staff the new runs with company drivers. It came up with only a four and one half cent differential per mile.¹⁰⁹ That was clearly something that could be bargained with the Union for service for some or all of the NNJ runs with company drivers. In this regard, if acquiring extra vehicles rendered the use of company drivers for NNJ runs a non starter, Respondent had no reason to have Miller do the cost comparison in the first instance.

Moreover, I have concluded Respondent, as part of its defense, exaggerated the number of owner operators and therefore capital expenditure it needed to complete the NNJ runs. For it ran the runs with a combination of owner operators and company drivers

¹⁰⁷ Moreover, two of the cabs owned by the owner operators were in fact day cabs, not sleeper cabs. While these owner operators were paid the same rates as those using sleeper cabs, they nevertheless found it worthwhile to run those routes with day cabs.

¹⁰⁸ During October 15 to December 30, company drivers ran NNJ routes on: October 17 to 20; 23 to 27; October 30 to November 3; November 6 to 8; November 10, 13, 14, 17, 20, 22, 25, and 30; and December 2, 4, 6, 7, 9, 14, 16, 19, 23, and 24. On some of these dates more than one company driver ran these routes. Following October 16, Respondent's records reveal that company drivers continued to run southern New Jersey routes almost on a daily basis. They also on occasion ran mixed northern and southern New Jersey routes. Obviously, company drivers could have performed a greater percentage of the NNJ runs on available equipment had Respondent fully staffed the unit as Hanson assured Giles they would during negotiations.

¹⁰⁹ Even this differential was based on an estimate of paying the owner operators \$15 a stop when they were actually paid \$18.

for a period of time and only increased the number of owner operators to its original estimate when it specifically began to prepare for a strike. Respondent also had excess capacity with existing tractors to allow it to accommodate more company drivers without any capital expenditure. Finally, I have concluded Respondent orchestrated the use of owner operators and intentionally excluded them from the bargaining unit as part of its strike contingency plan because it did not want to assume the labor costs of a union contract which from the Union's standpoint included some form of hourly pay. As set forth above, Respondent's actions served to maintain the bargaining unit at a smaller size than there was available work at a time of a possible strike, and it created a pool of trained employees in the form of owner operators to perform that work in the event there was a strike. See, *Naperville Ready Mix, Inc.*, 329 NLRB 174, 181 (1999), *enfd.* 242 F.3d 744 (7th Cir. 2001). Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act, when it refused to bargain in good faith with the Union over the decision to use owner operators for the NNJ runs and its failure to bargain over the effects of that decision on bargaining unit employees. In this regard, it substituted one group of drivers for another to perform new work that was of the kind and nature that had theretofore been performed by the bargaining unit. See, *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), *affd.* in part, *reversed* in part 248 F.3d 1131 (3rd Cir. 2000) (nonpublished); *Clear Channel Outdoor, supra*; and *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158 (1st Cir. 2005).¹¹⁰

4. Direct Dealing

This allegation centers on Respondent's conversion of company driver Branch to a position of owner operator on October 13. Branch was hired as a company driver around April 16. At that time, Branch informed Respondent that he owned a truck and had a desire to become an owner operator for Respondent. Cannon responded they could not do it at that time, but if Branch took the job as a company driver, he could become an owner operator at a later but unspecified date. Branch was hired as a company driver, and any proposed compensation for him for a conversion to owner operator was not discussed at that time. After Branch was hired, he continued to ask Cannon and Ortt

¹¹⁰ I do not find Respondent's negotiating a subcontracting provision with the Union during the November 7 bargaining session in any way shields Respondent from a finding of a violation here. By November 7, Respondent had already unilaterally employed six owner operators who were performing local, SNJ and NNJ runs. Respondent's actions undercut the Union and forced it to bargain from a weekend position. The Union had the Hobson's choice of not bargaining at all with Respondent or trying to reach an over all contract for the employees it represented. Moreover, during the November 7, session, Hanson represented to Giles that Respondent agreed that the work currently being performed was bargaining unit work. At that time, the bargaining unit employees were performing some of the NNJ runs. However, after that date, and prior to the strike Respondent continued to hire owner operators, which Giles felt was a breach of their understanding. Finally, the parties had an understanding during negotiations no tentative agreement on any item was final until the parties reached an overall contract. Therefore, there was never any agreement on a subcontracting provision that could somehow shield Respondent from its actions. I also do not provide much credence here to Respondent's contention that Giles was inflexible about the use of owner operators. In fact, Giles made proposals which may have allowed for the use of some combination of owner operators, and it is likely that he would have been even more flexible if Respondent took the position during negotiations that it took in its reply brief that owner operators were part of the bargaining unit. Finally, Respondent gave Giles incomplete and inaccurate information about the pay and cost of the owner operators, and only did so after several of them had been added to its work force.

about becoming an owner operator.

5 Sometime after the June 22, union election, in either late June or early July, Cannon approached Branch and met with him with Ortt present, and discussed with Branch specific rates Respondent was offering if Branch agreed to convert to owner operator. Cannon told Branch they were going to start the NNJ runs with an expected starting date of the end of August or beginning of September. Cannon had Branch's prior trip sheets with him to show Branch what Branch's earning would have been at the proposed owner operator rates. The rates included new mileage and stop rates for an owner operator, as well as a mileage surcharge rate to help pay for the cost of gas. 10 Branch was also informed what insurance was available through Respondent and the insurance that would be required if he became an owner operator. Branch was told an owner operator had to maintain a \$1000 escrow account with Respondent, and of the possibilities of purchasing a license plate through Respondent. Branch took the information home, and discussed it with his wife and concluded he could not perform local routes at the rates Respondent was offering, but that he could do longer distance runs. Branch then called Cannon and told him the rates Respondent was offering was fine for the NNJ runs, but that he could not do the local runs for that pay. Cannon told Branch he did not think he could raise the price for the local routes. Branch told Cannon that he did not want to start as an owner operator at that time, but he agreed to do so when the NNJ runs became operational. 20

Branch met with Giles on July 16, and discussed the rates Cannon offered him as an owner operator, and presented Giles with a copy of Respondent's independent contractor agreement that Cannon had provided to Branch. On July 17, Giles wrote Taylor that it had come to the Union's attention that Respondent intends to offer or already has offered bargaining unit work to drivers and hostellers on an independent contractor, or owner operator basis. Giles informed Respondent that such a diversion of work would constitute a diversion of bargaining unit work, and a refusal to bargain in good faith. Giles requested information pertaining to Respondent's actions, and requested immediate bargaining as to any proposed change in Respondent's operation, as well as to commence bargaining over a collective bargaining agreement. By letter dated July 28, Cannon replied to Giles and denied any improper diversion of work. Cannon neglected to inform Giles of Cannon's meeting with Branch. 30

35 Sometime in October, Branch received a call from Ortt telling him the NNJ runs were going to start on October 16. Branch signed Respondent's independent contractor agreement on October 13, under the terms Cannon had presented him in their June or July meeting. Branch's rates of pay changed from \$.45 per mile and \$15 a stop as a company driver, to \$1.13 per mile, and \$18 a stop as an owner operator. As an owner operator he used Respondent DOT number, and he purchased his truck insurance through Respondent. As an owner operator, Branch became responsible for his own taxes. Branch also had to affix Respondent's DOT numbers to his vehicle. 40

45 The Board and courts have long held that by dealing directly with bargaining unit employees an employer unlawfully bypasses a union and in doing so undermines its representation status in the bargaining unit. See, *Medo Photo Supply Co. v NLRB*, 321 U.S. 678, 683 (1944); *Georgia Power Co.*, 342 NLRB 199 (2004), enfd. 427 F.3d 1354 (11th Cir. 2005); and *Ken's Building Supplies*, 142 NLRB 235 (1963), enfd. 333 F.2d 84 (6th Cir. 1964). In *Medo Photo Supply Co. v NLRB*, supra, 18 of the employers 26 employees had designated the union as their collective bargaining representative and the employer recognized the union as such on June 4 and 5, 1941. On June 7, 12 employees told the employer's 50

manager that they and six other members had no desire to belong to the union if they could obtain a list of wage increases they submitted to the manager. On June 9, the manager met with four of the employees from the group of 12, and he told them the employer would grant the wage increases requested. The committee of four employees informed other employees of the employer's position, and then the committee returned and informed the manager of the employees' position to accept the wage increases and that they did not need the union and would rather stay out. At a meeting thereafter with the union that same day, the employer's attorney informed the union that he understood the union no longer represented a majority of the employees and he declined to negotiate with it unless it established that it was the bargaining representative through an election. The Court held that the employer's "determination to increase wages was 'occasioned solely by the employees' offer to withdraw from the union if the raises were granted'; and that the employees' defection from the union was induced by (the employer's) conduct in dealing directly with the employees." *Id.* at 682. The court stated:

Nor in the circumstances disclosed by the evidence and the Board's findings can we say that it was of any significance whether, as the Court of Appeals thought, the employees' offer to abandon the union originated with them or was inspired by the employer. For in either case, as will presently appear, we think that the negotiations by petitioner for wage increases with any one other than the union, the designated representative of the employees, was an unfair labor practice. We think that the Board's order should have been enforced for the reasons stated by it. *Id.* at 683.

See also *Ken's Building Supplies*, 142 NLRB 235 (1963), *enfd.* 333 F.2d 84 (6th Cir. 1964), where a direct dealing violation was found even though employees initiated a meeting with the employer over health insurance.

In *Naperville Ready Mix*, 329 NLRB 174, 184 (1999), the Board found the employer engaged in unlawful direct dealing when the employer held meetings with the drivers and mechanics where it discussed with them arrangements by which drivers might buy the employer's trucks and mechanics might continue to service the trucks. The Board stated:

...we disagree with the judge's conclusion that the meetings were essentially between potential business associates and had nothing to do with the unit employees' terms and conditions of employment, which were then under negotiation with the union. In our view, the meetings were efforts to enlist the employees in the sham transactions by which the Respondents would carry on the ready mix delivery operations without the obligations or costs of a union contract. Such direct dealing over terms and conditions of employment is a clear violation of Section 8(a)(5) of the Act.

As in *Naperville Ready Mix*, *supra*, I find that Respondent engaged in unlawful direct dealing with Branch, when upon receiving notice that it would receive the NNJ runs it sought Branch out and offered him a contract as an owner operator in June after the Union election and thereafter had him sign a contract as owner operator in October. While Branch had requested to become an owner operator when hired in April, and had been given assurances by Respondent that this would eventually be the case if he accepted a job as a company driver no terms of his owner operator status were discussed at that time. It was only after the Union had received a majority vote, that Respondent through Cannon and Ortt approached Branch and offered him specific details of working for Respondent in an owner operator capacity. Branch thereafter unsuccessfully attempted to negotiate different terms directly with Respondent. As a result, Branch would not accept

employment in June or July as an owner operator, and only agreed to accept the position when Respondent began the longer NNJ runs, which he did in October after being contacted by Ortt to sign Respondent's contract.

5 Thus, while Branch had expressed a desire to become an owner operator when he was hired, it was only after the Union won the election that Respondent bypassed the Union and approached him about specific terms to operate in that capacity. Until Respondent gave Branch the specifics of its offer there was no guarantee that he would accept it. In fact, he turned it down at a time when it was offered for only local runs. An employer's obligation to bargain accrues at the time a union wins the representation election, absent valid objections to that election. See, *Bloomfield Health Care Center*, 352 NLRB No. 39, slip op. at 4 (2008); and *Ramada Plaza Hotel*, 341 NLRB 310, 315-316 (2004). As I have found, when Branch was converted to owner operator he still remained an employee of Respondent. However, Respondent had removed him from the bargaining by requiring him to sign its independent contractor agreement stating he was not an employee, and by informing the Union during negotiations that the owner operators were not employees and that they were not going to be included in the unit. Thereafter, Cannon met with the owner operators as a group prior to the strike and asked them if they would cross a picket line, which they agreed to do. I have concluded the conversion of Branch to an owner operator, along with the hiring of owner operators, and Respondent's refusal to include them in the bargaining unit was part of Respondent's plan to avoid expanding the bargaining unit, and to have the owner operator's at its disposal in the event of a strike. I have concluded that by Respondent's meeting with then company driver Branch in June or July and discussing with him the terms of being an owner operator, and by tendering him an owner operator agreement for signature and conversion in 25 October, Respondent engaged in direct dealing with its employee in violation of Section 8(a)(1) and (5) of the Act.¹¹¹

I do not find the cases cited by Respondent require a different result. In *U.S. Ecology Corp.*, 331 NLRB 223, 226 (2000), enfd. 169 LRRM 2320 (6th Cir. 2001), an employer sent letters to striking employees in response to employee questions to supervisors about their returning to work. The employer stated in the letters they could return to work for the time being and receive the same wages and benefits that prevailed before the strike. The Board stated in deciding the issue of direct dealing "the question is whether (the) employer's direct solicitation of employee sentiment over working conditions is likely to erode 'the Union's position as exclusive representative.'" Contrary to the judge, we do not find any such likelihood here." (Citations omitted from quote). The Board stated to begin with the employer did not initiate the communications but sent its letter in response to employee questions. The Board stated, "We do not believe that, merely by stating (in response to employee inquiries) the only employment conditions it could lawfully offer under the circumstances, the Respondent can reasonably be found to have 'eroded the Union's position as exclusive representative.'" Similarly, in *Boehring Ingleheim Vetmedica, Inc.*, 350 NLRB No. 60 (2007), an employer engaged in a lawful lockout and gave the union two options for returning bargaining unit employees to work. The Union declined both options. The Board majority found the employer did not bypass the Union. Rather it timely informed the union of its intentions giving it two options to end the lockout. In the face of the union's refusals to provide a no-strike assurance, the employer allowed employees to return to work by providing individual assurances, as referred to in the second option given to the Union. The Board found in doing so, the employer did nothing to derogate from the Union's representative status or to undermine its legitimate role. On the contrary, the

50 ¹¹¹ While the complaint only alleges Respondent's conduct in October of 2006, the June or July meeting with Branch was fully litigated by the parties.

Respondent told a number of employees to talk to their union representatives before deciding whether to sign the no-strike assurances. A factor considered by the Board majority was that although the employees did not verbally inquire about returning to work they did so nonverbally by presenting themselves for work despite having been informed of the lockout.

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Neither of the cases cited by Respondent stand for the proposition that an employer cannot engage in direct dealing when employees initiate a conversation about a subject matter. Such a conclusion would be contrary to the pronouncements in *Medo Photo Supply Co. v NLRB*, 321 U.S. 678, 683 (1944); and *Ken's Building Supplies*, 142 NLRB 235 (1963), *enfd.* 333 F.2d 84 (6th Cir. 1964). Rather, it is apparent from *U.S. Ecology Corp., supra*, and *Boehring Ingleheim Vetmedica, Inc., supra*, that the Board refused to find a violation because the employer offered the employees the only terms and conditions it was legally permitted to offer in *U.S. Ecology Corp.*, and in *Boehring* the employer only offered employees what it had previously offered to and been rejected by the union. In the latter case, it even informed the employees to consult with the union before deciding whether to accept the offer. Neither employer offered employees new terms or conditions of employment that the Board found rose to the level of bypassing the union or engaging in direct dealing. In the present case, Cannon offered Branch new terms and conditions of employment in an effort to convert his employment status from company driver to owner operator. Cannon did so without contacting the Union. When Giles was informed of Cannon's actions after the fact, he immediately faxed a letter in protest. I have concluded in another section of this decision that Respondent did not bargain in good faith with the Union over the use of owner operators, and it continued its course of conduct with its unlawful direct dealing with Branch by converting him to owner operator on October 13.

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*F. The strike beginning on January 12, 2007
was an unfair labor practice strike.*

In *East Buffet and Restaurant, Inc.*, 352 NLRB No. 116 JD. Slip op. at 25 (2008), it was held that:

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"It is well settled that if a strike is caused in part by an employer's unfair labor practice, the strike is an unfair labor practice strike. An unfair labor practice strike occurs even when the employer's unfair labor practice is not the sole or major cause or aggravating factor; it need only be a contributing factor." *RCG (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1633 (2001).¹¹²

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In *East Buffet and Restaurant, supra*, a strike was found to be an unfair labor practice strike in part based on flyers distributed by the union during the strike stating the employees were striking in protest of unfair labor practices which specified the unfair labor practices. In *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 (1995), *enfd.* 77 F.3d 461 (3rd Cir. 1996), the Board concluded that a strike was an unfair labor practice strike stating, "It is well established that a causal connection between the Respondent's unlawful conduct and the strike may be inferred from the record as a whole." (citations omitted.) Factors considered there were the timing of a threat to senior employees on the union's negotiating committee shortly before the start of the strike and that employees on the negotiating committee

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¹¹² See, also *Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989); *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991); and *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 419 U.S. 850 (1972) holding that as long as an unfair labor practice has "anything to do with" the cause of a strike, it will be considered an unfair labor practice strike.

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had knowledge of the threat. Moreover, the union representative discussed the threat with employees at a strike vote meeting held a few days before the strike. The Board stated, “we find it reasonable to infer that Koff’s June 27 threat, which was specifically discussed and became a matter of consternation at the employee membership meeting that evening,
 5 contributed to the employees’ June 27 decision to strike. Accordingly, we find, contrary to the judge, that the July 1, 1991 strike was an unfair labor practice strike.” It was specifically noted in *Child Development Council* that the absence of picket sign language stating the strike was in protest of an unfair labor practice does not establish that unlawful conduct was not a cause of the strike citing *Lifetime Door Co.*, 179 NLRB 518, 522-523 (1969); and *AMF-Inc.*, 228 NLRB
 10 1406 (1978), *enfd.* 593 F.2d 972, 979-981 (10th Cir. 1979).

In *Fairhaven Properties, Inc.*, 314 NLRB 763,768 (1994), on February 25, a union called a strike. The Union claimed the strike was an unfair labor practice strike because of the Respondent’s February 6 meetings with employees. The union business agent (BA) testified he
 15 met with groups of employees prior to the strike, informed them of what happened in negotiations, and explained that because the employer had gone around with the February 6 paper to oust the union, if the union called a strike it would be due to the employer’s attempt to break the union. The union business agent further explained that in an unfair labor practice strike employees could return to work but if it were an economic strike their jobs would not be as
 20 protected. It was noted employees corroborated the BA’s testimony. Another factor considered by the Board in finding it was an unfair labor practice strike was the BA’s testimony that during the strike the union used only its “unfair” picket signs not its “on strike” signs. Also leaflets handed out by the union stated the Employer “unlawfully intimidated our members in an attempt to have them disavow their Union.” In finding the strike was an unfair labor practice strike, the
 25 Board noted that “A strike may be an unfair labor practice strike even though it also has economic objectives. *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (2d Cir. 1963), *cert. denied* 375 U.S. 834 (1963).”

In *Capitol I Steel & Iron Co.*, 317 NLRB 809, 814 (1995), *enfd.* 89 F.3d 962 (1st Cir. 1996), a strike was found to be an unfair labor practice strike where a respondent violated
 30 Section 8(a)(5) by unilaterally granting wage increases in such a way as to undermine the union’s status in the bargaining unit. It was found that the wage increases angered and frightened the employees and were part of the debate leading up to the strike. In finding the strike was an unfair labor practice strike it was noted, “It is not required that they correctly
 35 perceive the unlawful nature of the Employer’s actions. *F.L. Thorpe*, 315 NLRB 147, 150 fn. 8 (1994).” The judge as approved by the Board went on to state:

The strike was no less an unfair labor practice strike because the employees discussed whether they would receive the added protection accorded unfair labor practice strikers rather than whether a strike would cure those unfair labor practices. Such discussions
 40 may in fact evidence that, but for such conduct, the strike would not have occurred. Similarly irrelevant is evidence that there were other motives for striking or that some employees may have indicated that the strike would cease if the employer agreed to one of its major proposals. A willingness to forgive or overlook the unlawful conduct in return
 45 for a significant gain in the negotiations does not establish that the unlawful conduct was not a motivating factor.

In *Teamsters Local Union No. 515 v. NLRB*, *supra*, the court reversed the Board to find that a strike was an unfair labor practice strike. The employer there was found to have
 50 unlawfully insisted to a no-access provision to the point of impasse during negotiations. The court stated in finding the strike was an unfair labor practice strike noted the union president indicated at the bargaining table that the no-access provision was a strike issue, and at the

strike vote meeting he told the employees that the employers proposals were unreasonable and outrageous and that there were items in the management rights and no strike clause that he had never seen before, and that if the union agreed to these proposals they would not have a significant agreement. The court stated:

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In this case, because the matter of the no-access provision was not specifically discussed at the strike meeting, it is crucial to inquire whether the Union's reasons for recommending a strike can be imputed to the employees who voted for the strike. That inquiry is relatively easy on this record, for it is unrefuted that the employees voted to strike solely pursuant to the Union President's recommendations. Id at 725.

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* * *

Employees may formally cede authority to a union agent to call a strike; they can also achieve the same result by simply endorsing a union agent's judgment that a strike is necessary. In either case, the union representative's reasons for calling or recommending a strike may provide the basis for determining causation. Here the employees followed their Union leader's recommendation to strike, in part because of his view that the provisions of the no-strike clause were outrageous. In so voting, the employees ratified the Union leader's judgment that they should strike because of the Company's demand for a no-access provision. Id. at 725-726.

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In the instant case, the Union filed a petition for election on May 17. During the week of May 22, Respondent brought in personnel from outside the facility and followed Jackson, the individual who contacted the Union, and Tucker the other leading union adherent. On May 25, they called both Jackson and Tucker into the office to meet with Regional Vice President Taylor, and Cannon who had been alternating with Taylor in supervising the start up of the Landover operation. Both Jackson and Tucker were told they had been followed during the meeting. Jackson was also told he was fired for falsely filling in a company document related to one of his routes, and was not given a chance to defend himself against the accusations. After Jackson left, Tucker was told Cannon had been told by anti-union drivers that he was involved in starting the Union. Tucker was also told he should not serve as a middle man between the drivers and management and that if the drivers had complaints Tucker should refer them directly to management personnel.

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The Union won its election on June 22. Shortly, thereafter Cannon and Ortt called company driver Branch into a meeting. Branch was told Respondent was expecting NNJ runs which would require a layover, and he was given the option of converting to owner operator under terms of employment including new stops and mileage pay rates that were presented to him during that meeting. Branch was also provided a copy of an independent contractor agreement provided by Respondent, which stated that the contractor was not an employee of the Respondent. Upon reflection Branch declined to convert to owner operator status until Respondent began the NNJ runs, which were more lucrative to the driver due to the length of the runs. Branch was informed by Ortt in mid-October that the NNJ runs were to start on October 16. Branch signed the independent contractor agreement on October 13, and by its terms and Respondent's actions at the negotiating table Branch was effectively removed from the bargaining unit on that date.

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Branch met with Giles on July 16, and informed Giles of Respondent's offer for him to become an independent contractor. Giles sent a fax to Respondent the next day protesting the diversion of bargaining unit work, and requesting bargaining over any such diversion as well as the start of negotiations for a new contract. The parties first negotiation session was August 8, but unbeknownst to the Union, Respondent had hired a full time owner operator to begin servicing routes that had theretofore only been serviced

by company drivers and temporary employees. Respondent continued to increase the number of the owner operators on its staff totaling six by October 16, with three starting work in December, thus shortly before the Union's January 12, strike.

5 The parties discussed subcontracting during the August 8 session, and specifically discussed the use of owner operators during the August 9 session. They again discussed subcontracting on August 30. On September 27, the union filed an unfair labor practice charge alleging the diversion of bargaining unit work by the use of owner operators, and that Respondent had engaged in direct dealing with employees. Giles opened up the
10 October 2, negotiation session by stating he was seeking an injunction at the NLRB concerning Respondent's use of owner operators. A discussion ensued throughout that session where Giles protested Respondent's use of owner operators. Tucker also protested that he had lost a stop on one of his routes to owner operators. The discussion concerning subcontracting continued on October 3, during which Giles told Respondent he
15 wanted the unit to be fully staffed. During the session, Giles told Hanson that Respondent's proposed management's right clause was a major problem, that the company had to do something about it or it was a big waste of time, and that if Hanson thought Giles was going to negotiate a contract with unlimited subcontracting then Giles was "pissing in the wind." Subcontracting was again discussed on October 4.

20 Giles called a union meeting on October 15, which the sign in sheet reveals was attended by 21 bargaining unit employees. During the meeting, Giles told the members there was an issue they needed to understand, that Respondent was subcontracting bargaining unit work, that the Union had filed unfair labor practice charges over this
25 problem, and that the outcome of the negotiations did not mean a thing if Respondent continued to outsource their work and to subcontract it. Giles explained to the membership about the unfair labor practice charges, and if the Company continued to divert the work that they might have to take action to stop the diversion. Giles also discussed the complaint that issued over Jackson's discharge, and that charges had been
30 filed on surveillance and the impression of surveillance. Giles explained in some detail about the charges, and then he threw the meeting open to questions. The drivers who testified supported Giles description of the meeting pertaining to his description of the unfair labor practices, and they specifically testified that drivers also brought up complaints relating to Respondent's use of owner operators. The testimony concerning
35 the meeting revealed that following a discussion of the unfair labor practices, the employees unanimously voted to strike. Thereafter, Giles told the employees if it became necessary to strike they would see a picket line when they showed up for work and they should join the picket line. Giles told the employees they were waiting to strike because they were still in negotiations, that it was possible they could resolve the charges, and it
40 was Giles' hope Respondent would stop diverting work. Giles testified the diversion of work was the main issue to him.

 The parties resumed negotiations on November 7, at which time they reached tentative agreement on a subcontracting provision. Giles testified the Union tentatively
45 agreed to the provision based on assurances from Hanson that the work presently being performed was bargaining unit work, and that he specifically recorded that assurance in his bargaining notes discussing it in a caucus with the employee bargaining committee members before agreeing to the provision. Giles agreed to the provision because at the time of the agreement some of the company drivers were running NNJ runs.

50 The December 6, session opened with Giles stating two complaints had issued by the NLRB and the company should follow the law. Thereafter, the parties began to

5 discuss economics. At that time, Respondent made its initial economic proposal for a five
year agreement with an increase in pay of \$.5 per mile with no increase in stop pay for the
first year. Following the first year, there was to be an increase in stop pay of \$.15 per
stop. Following a caucus, the employee members of the negotiating committee walked out
10 over Respondent's pay proposal. However, Giles returned and suggested increased
mileage pay for the local drivers due to area traffic. Cannon in response said Giles was
seeking a mileage matrix. Respondent's officials conceded traffic was a problem. During
the December 7, meeting, Respondent offered an increase in mileage rates, and an
increase in pay for the jockeys over its initial offer. Giles suggested as an alternative a
15 pay system by the hour within a 75 mile radius. During the session Hanson stated they
were going to return to Nashville, and work on some type of mileage matrix. Towards the
end of the December 7, session Giles told Hanson more unfair labor practice complaints
were coming. During the December 8 session, the Union came forward with a proposal
combining an hourly rate with Respondent's stops and miles formula. The proposal also
20 included a daily and weekly guarantee, overtime, days off, sick leave, pension, 401(k) and
some other economic items. The proposal was rejected by Respondent. Towards the end
of the meeting, Giles stated they were not going to drag this out for months, that it needed
to be wrapped up now, and he asked for Respondent's availability. Giles stated, "the men
and the Union are really pissed over these ULP's. The Company needs to stop breaking
the law." However, the earliest Respondent agreed to meet was January 15, 2007, five
weeks away.

25 On December 27, Region 5 issued a consolidated complaint against Respondent,
included in which for the first time was the allegation that since July 10, and at all times
since then Respondent assigned work performed by the Union to other employees or
independent contractors without prior notice to the Union and without giving the Union an
opportunity to bargain. Giles testified a decision was made to go on strike in the last week
of December. Giles testified it was decided the strike would begin on January 12, 2007.
30 Giles credibly testified that, "What triggered the decision in the last week of December was
the National Labor Relations Board issued a complaint against the Company over the
diversion of bargaining unit work." Giles testified that, while the parties had reached
tentative agreement on the subcontracting issue on November 7, the Union decided to
strike on January 12 because Respondent's actions were contrary to what they had
agreed to. He testified the progression of bargaining that led to the tentative agreement
35 on subcontracting was Respondent understood the Union's concern over subcontracting
and the Union's willingness to allow limited subcontracting to allow the Company to
operate in the event that there was a sudden vacancy or absence for some reason.
However, during this time, Respondent continued to hire additional owner operators and in
mid December Respondent brought in 12 to 15 drivers from around the country to ride with
40 existing bargaining unit members. Giles testified, "I didn't know where any of this was
going. Like I said though, the actions of the company were contrary to what we had
agreed to, in the spirit to which we agreed to it." Giles testified, "I wasn't trying to stop this
Company from offering service to its customer, to have service failures, but we were
certainly nailing down the scope of the work and the fact that bargaining unit work should
45 be done by bargaining unit members. And they continued to hire more owner operators
and divert additional work." Respondent in fact hired between three and four additional
owner operators during the period of November 14 and December 31.

50 The Union's strike began at 9:30 p.m. on January 12, 2007. Giles called Tucker at
about 5 p.m. on January 12, and told him the strike was going to start at 9:30 p.m. and
asked Tucker to meet Giles at the dairy at 9 p.m. When Tucker arrived, Giles had picket
signs and picket instructions. A few minutes before 9:30 p.m. Giles and Tucker put the

picket signs on and established a picket line in front of the main entrance to the dairy facility. Giles identified the picket sign used during the course of the strike which had the word "Unfair" and then there's a blank space, and then it says Teamsters Union Local 639. Giles inserted Respondent's name in the blank space on the sign. Giles testified they
 5 used the sign that said "Unfair" for the strike at Respondent to signify that they were on an unfair labor practice strike. Giles testified they used that sign as opposed to the Union's other sign which just said "On Strike." Giles also identified picketing instructions which he distributed to all the strikers and asked them to read it which begin with, "You are helping to publicize the strike by Teamsters Local Union No. 639 against Quickway Transportation
 10 for their unfair labor practices." Giles also hand delivered two letters to MMD addressed to Dairy Officials Aumen and Tenpas at about 9:30 p.m. on January 12, notifying them that on that date the Union had commenced an unfair labor practice strike against Respondent and that a picket line has been established at their shared facility.

15 Cook testified he thought the strike started on January 12, 2007, and that when he showed up at 4 a.m. on Friday, he was intending to go to work that day. Cook confirmed receipt of the picket sign and picketing instructions from Giles. Cook testified, "I was on strike to try to get the work back, try to make more money, because I was upset for the owner/operators taking all of the work." Tucker testified he went on strike because of the
 20 unfair labor practices, the firing of Angelo Jackson and the diverting of bargaining unit work. He testified there was no other reason he went on strike.¹¹³ He testified if Respondent and the Union would have reached a contract it would have helped resolve the strike because it would help stop the unfair labor practices the company was committing. The testimony of some of the strikers revealed that during the first two to
 25 three weeks of the strike there was chanting for a contract.

I have concluded that the facts establish that the strike was clearly motivated at least in part by Respondent's unfair labor practices. The discussion in particular of the diversion of bargaining unit work was an ongoing discussion during negotiations, and by
 30 the Union's repeated comments at the bargaining table to Respondent's officials including that the Union had filed an unfair labor practice charge and was seeking 10(j) relief over the matter Respondent's officials were aware this was a matter of grave concern to the Union as well as the employees. In fact at the end of the December 8 bargaining session, the last bargaining session prior to the strike, Giles informed Respondent's officials that
 35 the men and the Union were really "pissed" over Respondent's unfair labor practices. I also do not find Respondent's unfair labor practices were remote in time to the strike in that Respondent's use of owner operators was ongoing, and in fact increased by three or four in December, the month before the strike.¹¹⁴ Thus, as Giles credibly testified the

40 ¹¹³ Owner operator Branch testified that during the strike he spoke to Tucker on one occasion. Branch testified he asked Tucker why the men were on strike and Tucker "said it was an unfair labor strike, something of that nature." Branch testified the conversation was halfway through the strike.

45 ¹¹⁴ I do not find the November 7, tentative agreement on subcontracting to be significant here. First, it was just a tentative agreement, conditioned on an overall contractual agreement. Second, standing alone it did not remedy the unfair labor practice I have found with respect to the unilateral change concerning the use of subcontractors. Finally, Respondent continued to add owner operators after the agreement was reached which as Giles indicated upset the
 50 employees and in the Union's view was violative of the spirit of the November 7 tentative agreement. Even if Respondent were to argue that Giles was incorrect in his assessment as to the meaning of the November 7 tentative agreement that would not be determinative here. In

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5 timing of the unfair labor practice complaint in combination of with Respondent's increased use of owner operators was the main motivating factor in Union's decision to call the strike. The fact that the complaint issued was clearly a legitimate factor to be considered by the Union as to the advisability of the strike. See, *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995), enfd. 89 F.3d 692 (10th Cir. 1996). Giles picket line instructions to employees, as well as his use of the picket sign stating "Unfair", and his letter to the Dairy officials on the night of the strike notifying them that it was unfair labor practice strike all confirm Giles testimony as to the purpose of the strike. See, *Fairhaven Properties, Inc.*, 314 NLRB 763,768 (1994); and *East Buffet and Restaurant, Inc.*, 352 NLRB No. 116 (2000).

10 Giles had also held a meeting with the vast majority of strikers on October 15, wherein he reviewed Respondent's unfair labor practices with them and explained to them the importance of diversion of the bargaining unit work, after which they unanimously voted to strike. Thus, the unit employees were aware of the nature of the unfair labor practices when they received the strike instructions stating they were engaging in an unfair labor practice strike and thereafter joined the picket line. See, *Fairhaven Properties, Inc.*, supra. I do not find the fact that the employees chanted on the picket line for a contract or their desire to be paid by the hour to establish that the unfair labor practices did not at least serve as a partial motive for the strike. For "a willingness to forgive or overlook the unlawful conduct in return for a significant gain in the negotiations does not establish that the unlawful conduct was not a motivating factor." See, *Capitol Steel & Iron Co.*, supra. at 814. Moreover, as Tucker credibly testified he felt that if the parties reached an agreement they could resolve the unfair labor practices as part of the agreement. The fact that the employees ceded the decision of the timing of the strike to the union officials does not suggest that they changed their reasons for authorizing the strike made during their October strike vote. In fact, they were given written instructions by Giles on January 12 that they were striking for unfair labor practices and only thereafter joined the picket line. Thus, by their actions they adopted the Union's goals in calling the strike. See, *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990).

30 Finally, I reject Respondent's argument that in the circumstances here the Union did not provide notice to Respondent's officials that they were on an unfair labor practice strike. The Union repeatedly through Giles beginning on July 17, expressed a strong concern to Respondent's officials over the use of owner operators and diversion of unit work. This concern was repeated multiple times during the course of negotiations, including the filing of an unfair labor practice charge, and the statement during the October 2, session that the Union was seeking 10(j) relief with the Region. The Union ended the December 8 session, the last session before the strike by demanding earlier negotiations than January 15, 2007, the earliest date Respondent was willing to meet, and stating the Union and the men were "pissed" over the unfair labor practices. In the face of the Union's statements, Respondent began to prepare for a strike and hired more owner operators. On January 12, 2007, Giles delivered two letters to MMD officials stating the Union was going on an unfair labor practice strike at the Dairy. MMD and Respondent shared facilities at Landover, and Respondent and MMD officials were in contact on a daily basis for the loading of trailers and the scheduling of deliveries. I have concluded that the MMD officials would have informed Respondent's management of the content of Giles letters, as they had earlier told Cannon that there was union activity amongst his employees during the course of the union campaign. Moreover, both Cannon and Hanson

50 this regard, the agreement was not binding on the parties and it did not remedy the unfair labor practice with respect to the diversion of bargaining unit work. As set forth above, I have found the unfair labor relating to the diversion of bargaining unit work was in particular a motivating factor for the strike.

are intelligent individuals and I have concluded they were aware that the strike was at least partially motivated by the diversion of work based upon Giles repeated entreaties at the bargaining table over the issue. I have also concluded that all of this information would have been reported to Prevost. Moreover, the real issue here is whether the strike was at least partially motivated by Respondent's unfair labor practices, not Respondent's knowledge of that motive. I have concluded for the reasons set for the above that the strike was at least in part motivated by conduct that I have found to be unfair labor practices and therefore the strike beginning on January 12, 2007 was an unfair labor practice strike.

I do not find cases cited by Respondent such as *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998), require a different result. In *Pirelli*, the court reversed the Board and concluded that a strike was not an unfair labor practice strike. The court first found that the employer's letter to its employees concerning possible job loss if they went out on strike was not an unfair labor practice, therefore the contended basis of the strike was not over an unfair labor practice. The court went on to state even assuming that the letter violated Section 8(a)(1), there was no substantial evidence the workers were motivated by threats contained in the letter. The court refused to rely on the testimony of union officials that the employees were upset about the letter. The court stated union official Massey was not an employee of Pirelli, nor a member of the bargaining unit, his feelings about the Q & A letter are completely irrelevant to the causation question before us as he could not vote to strike. The court went on to caution against self serving statements by union officials as to the cause of a strike and stated evidence of union officials ire does is not sufficient to constitute evidence that the letter was a contributing cause of the strike. The court stated, here the Board without substantial evidence of the membership's reaction to the letter equates union leadership sentiment with membership sentiment, and concluded that the rank and file members had the same reaction to the letter as members of the negotiating committee was not substantiated by the record. The court concluded the union leadership made a strategic decision to file an unfair labor practice charge because it had potential of shielding union members from the consequences of an unfair labor practice strike.

In the first instance, the court's view of the role of a union official in determining the cause or setting the agenda for strike in *Pirelli* may differ from the role enunciated by the D.C. Circuit in *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). However, it is not necessary for me to decide which if either the Board may follow with respect to this case. In this regard, Giles protested the diversion of work beginning in July, and raised it at most negotiation sessions from August through November. Giles was joined in his protest at the bargaining table by Tucker who claimed to Respondent that the use of owner operators would take work from bargaining unit employees in general as well as to himself for which he specifically cited the loss of a stop. Cannon's testimony reveals the Union also specifically protested the loss of work for another company driver during negotiations. On September 27, Giles filed a charge over the diversion of work, on October 2, he stated the union was attempting to seek 10(j) relief over it, and on October 15, he discussed the matter with bargaining unit employees in detail, cautioned them about its effects on the bargaining unit, after which he opened the matter to discussion to bargaining unit members and several raised claims of loss of work to owner operators and thereafter they voted to authorize the Union to call a strike. It cannot be said here the Union's filing the charge over the diversion of work was merely a ruse to seek unfair labor strike protection. The Respondent's conduct here was not one isolated letter. The Respondent's pay system was based on stops and miles. The employees' income was directly related to the routes they received in terms of the number of stops, length, and location of those routes. By creating a new full time position of owner operator which competed for those routes with company drivers and which was specifically given on a more regular basis longer routes, Respondent created grievances both real and perceived amongst the company drivers which I have found had a direct causal effect on their

decision to strike.

G. Respondent unlawfully refused to reinstate unfair labor practice strikers on March 2, 2007, and continued in its unlawful conduct by locking them out on March 7, 2007

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I. The strike ends on March 2, 2007

10 Giles testified the strike ended on March 2, 2007, by a consensus of the members still picketing. Giles sent Cannon by fax and regular mail on March 2, 2007, a letter stating that on January 12, 2007, the bargaining unit employees of Respondent employed at the Landover, Maryland facility, commenced an unfair labor practice strike. The letter stated that effective immediately, these employees were ceasing their strike activities and were making an unconditional offer to return to work under the current terms and
15 conditions of employment. It stated the employees are ready to return to work for their regular duties effective immediately. Giles copied the letter to Hanson on the same date by fax. Giles testified Respondent did not respond to the letter until March 5, when Giles had a phone call with Hanson. Giles asked Hanson if he had received Giles' letter. Hanson acknowledged the receipt and Giles stated he was waiting for a response.
20 Hanson said he had to check with Respondent that he thought Respondent had hired replacements, and that he was not sure how many people would be recalled. Giles said that ULP strikers cannot be permanently replaced, and Hanson said Respondent considered the strike to be an economic strike. Giles disagreed with that assertion, and stated he expected a response from Hanson. Hanson said he would get back to Giles the next day after he talked to the Company. Giles testified they talked again on March 6, and
25 Hanson had a similar response that he did not know where Respondent was and how many people they needed. On March 7, 2007, Giles received a fax from Hanson dated March 7. In the fax, Hanson stated:

30 Quickway believes that the strike, which commenced on January 12, 2007, has always been an economic strike. As a result, while the bargaining unit employees were out on strike, Quickway began hiring new employees as permanent replacements and has hired, as of March 2, 2007, 24 permanent replacements of the striking employees.¹¹⁵ In addition four positions in the bargaining unit have
35 been lost as Marva Maid Dairy is currently performing the spotting functions at the dairy, which were previously performed by Quickway. It is my understanding that, with your agreement, several different striking employees have been performing that work for the several weeks.¹¹⁶

40 Despite your offer to return to work on the same terms and conditions of employment that have been offered to the permanent replacements, Quickway is still involved in a labor dispute with teamsters Local Union No. 639. Specifically, the contract negotiations, which began in August, 2006, have still not resulted in a contract. As a result, members of Local 639 who are part of the bargaining unit and have been on strike since January 12, 2007 will be "locked out" and are not going
45 to be allowed to work at Quickway effective immediately, until the contract negotiations are resolved.

¹¹⁵ Cannon testified Respondent hired permanent replacements during the strike, estimating that "got up to...about 22, 23.

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¹¹⁶ At the time of the hearing, the General Counsel was not claiming the spotting positions should be available to Respondent's employees upon their recall.

Quickway must protect its business and ensure continued service to its customers so that its employees will have work available when the parties reach an agreement. Local 639's decision to end the strike and offer to return to work does not resolve the labor dispute and, without a signed collective bargaining agreement, still leaves Quickway vulnerable to strikes in the future. Until Local 639 is prepared to sign an agreement with the last, best and final offer made by Quickway in our meeting on January 15, 2007, the employees will remain "locked out."

In order to end the "lock out," Local 639 must be prepared to execute the proposed collective bargaining agreement between Local 639 and Quickway encompassing the terms of Quickway's last, best and final offer. If you have any questions or want to discuss this matter further, please feel free to contact me.

A letter went out under Cannon's name, dated March 7, addressed to "Striking Quickway Employees." The parties stipulated it was mailed to all striking employees.¹¹⁷ The employees were told Respondent had received an unconditional offer to return to work. In informing the employees they were being locked out until an agreement is reached with the Union, Cannon stated:

Specifically, Quickway made its last, best and final offer to Local 639 on January 15, 2007, and Mr. Giles told me the following day that Quickway's last, best and final offer was unanimously voted down by the employees. When our attorney questioned Mr. Giles after receiving notice that the strike was ending whether the union would be signing a contract including Quickway's last, best and final offer, Mr. Giles stated that the employees would be ending the strike, but that Local 639 would not sign a contract. As a result, there is still an ongoing labor dispute with Local 639 over the contract negotiations. Because that labor dispute has not been resolved, bargaining unit members of Local 639 will be "locked out" and not allowed to return to work at Quickway effective immediately, until a contract is signed, even though the strike on the part of Local 639 has ended.

Respondent had not ended its lockout at the time of the unfair labor practice trial in this matter. Cannon testified Respondent was still using some owner operators out of Landover at the time of the unfair labor practice trial, although they had lost both the southern and northern New Jersey runs shortly after the start of the January 12, strike.

Bargaining unit employees Jeremy Smith and Lawrence Simms, Sr., were hired by Respondent on April 10, and April 17, respectively. Each drove routes for Respondent the week of January 8, 2007, with Simms driving a route on January 13. Smith's payroll records show that he worked for Respondent during the course of the strike, and that he last worked for Respondent for the pay period ending on March 10, 2007. Records from the Maryland state government reveal that Smith applied for unemployment insurance. The state records show the last day Smith worked for Respondent was March 8, and that he was discharged for fighting effective March 10, 2007.¹¹⁸ Smith represented to the

¹¹⁷ Hanson, at the time of the stipulation, represented that Cannon's letter was also mailed to some additional drivers other than the strikers, but no evidence was tendered to support that representation.

¹¹⁸ The parties stipulated at the hearing that Smith was hired on April 10, 2006, that his last of work was March 9, 2007, and that Respondent terminated his employment on March 19, 2007. Cannon testified Smith was fired because store operations at Giant did not want him back in the store.

Office of Unemployment Insurance that, "I did cross the picket line in defiance of the union strike, but I did not quit my job-I was fired for fighting." Respondent asserted in response that he crossed the picket line, came back to work, and that he quit on March 10, 2007. The finding made by the state was that he was discharged for fighting. Cannon also testified Smith was discharged for fighting.

Simms payroll records show he worked for Respondent during the strike and he continued to work for Respondent at least through the pay period ending September 29, 2007, when the payroll records submitted into evidence ended. Tucker testified on November 27, 2007, that Simms is a driver who did not strike, and that he was not locked out. Tucker testified, "We seen him come through the picket line and he's still working there today." Tucker was working for MMD as a yard jockey at the time of his testimony and he testified he saw Simms was still working for Respondent at Landover as a driver.¹¹⁹

Cannon testified that Simms is a company driver, hired prior to the strike, and he was a member of the bargaining unit. Cannon testified Simms continued to work during the strike in that Simms worked out of a Ryder facility in Landover, and he also worked out of a Ryder facility in Virginia. Simms picked up loads at these facilities that originated from Landover. Cannon testified loads were shuttled to Simms at those locations so he did not have to cross the picket line. Had there not been a strike Simms would have just gone to Landover to pick up the loads. Cannon testified that, for a period of time during the strike, the Landover Dairy was not operating, but Simms continued to work. Cannon testified he was not crossing the picket line, rather he was going to the Ryder facility and to other area plants to pick up his load. Cannon testified this was just the time the Landover Dairy was not operating. He testified the Dairy went down about two or three days after the strike started and remained down for about four weeks. The strike was seven weeks long. While the Dairy was down there were five other area locations that were servicing the stores MMD had serviced and Simms went to those locations to pick up his loads. Cannon testified when the Dairy started to operate Simms began getting loads delivered to him from the MMD plant at the mentioned Ryder locations.¹²⁰

Hanson did not testify at the hearing, however, in response to questions placed to him during his opening statement, he stated that the strikers remained locked out at the time of the hearing. He stated the strikers have been permanently replaced prior to Giles' March 2, offer to return to work, which Hanson admitted constituted an unconditional offer to return to work. Hanson stated Respondent still maintained at the time of the hearing about 18 of the permanent replacements hired prior to the unconditional offer. Hanson stated that the owner operators Respondent had before the strike continued to run work during the strike. He stated that Respondent lost the New Jersey work gained in October at the start of the strike. Hanson initially stated there were 26 drivers who went out on strike. Hanson conceded that Respondent could not replace strikers after the strike was over with permanent replacements contending that after the unconditional offer Respondent only hired temporary replacements to replace the permanent replacements who left. Hanson later stated as follows:

¹¹⁹ Tucker testified the owner operators also continued to work during the strike.

¹²⁰ No other company drivers worked throughout the strike as did Simms and Smith. A couple of drivers crossed the line to return their vehicles the first day of the strike, but did not work thereafter. A couple of other drivers crossed the line for a day or two after the strike started. None of these drivers worked after Respondent imposed the lockout.

JUDGE FINE: So the employer -- the employer says how many people went out on strike, 26?

MR. HANSON: There were 26, I believe.

5 JUDGE FINE: And prior to the strike --

MR. HANSON: There were 26 people that did not work.

JUDGE FINE: Right, during the strike.

MR. HANSON: Some were strikers and some were not.

10 JUDGE FINE: They were on the -- whether they -- they all went out together, correct? They all ceased working at the start of the strike?

MR. HANSON: No.

* * *

JUDGE FINE: Okay. Well, how many went out on strike, from the employer's point of view?

15 MR. HANSON: It was probably 21. I believe it was 21.

JUDGE FINE: All right. So from the employer's perspective, 21 went out on strike and during the course of the strike, you replaced all 21 with permanent replacements or you gave some of the work to independent contractors?

MR. HANSON: We did both.

20 JUDGE FINE: So how many actual permanent replacements were there?

MR. HANSON: There was -- at one time, we had had --

JUDGE FINE: Before the strike ended. At the day that the strike was over -- the day before the strike was over, how many permanent replacements did you have?

25 MR. HANSON: There probably were 22 people working, 22 permanent replacements. Twenty-four it may have been. But some of those have since left.

JUDGE FINE: Right. So at the time that they made an unconditional offer to return to work, it's the employer's position that there -- for every bargaining unit person that was out, whether they were on strike or not, the employer had hired a permanent replacement?

30 MR. HANSON: That's just -- I can't say that the numbers are exactly one for one, but yes, we were using owner/operators too. So for me to say that it was exactly --

JUDGE FINE: So -- but you're not contending an owner/operator as a permanent replacement?

MR. HANSON: No, I'm not.

35 JUDGE FINE: So you might've had -- at the time the strike ended by the union's letter, you might've had owner/operators taking -- doing -- performing bargaining unit work on a full-time basis, as well as permanently hired employees doing the work?

MR. HANSON: Yes, we would've had both working.

40 JUDGE FINE: Right.

MR. HANSON: Yes.

JUDGE FINE: So is it the employer's position, had there not been a lawful lockout, that once the strike ended, that those owner/operators doing bargaining unit work, they should've been gone --

45 MR. HANSON: Correct.¹²¹

50 ¹²¹ Hanson stated that after the start of the strike Respondent lost all the New Jersey work as well as the four spotters positions to MMD. He stated there were 26 bargaining unit drivers at the start of the strike and they were in addition to the four spotter positions that went to MMD.

2. Analysis

Under established law an employer is required to reinstate unfair labor practice strikers on their unconditional offer to return to work even if they have been permanently replaced. See, *East Buffet & Restaurant, Inc.*, (2008), 352 NLRB No. 116 (2008); *Boydston Electric*, 331 NLRB 1450, 1453 (2000); *Walnut Creek Honda*, 316 NLRB 139, 142 (1995), enfd. 89 F.3d 645 (9th Cir. 1996); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 fn. 5 (1967); and *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). It is also well established that an employer cannot warn unfair labor practice strikers that they have been permanently replaced. See, *Decker Coal Co.*, 301 NLRB 729, 748 (1991); *Escada USA*, 304 NLRB 845, 850 (1991), enfd. 970 F.2d 898 (3rd Cir. 1992); and *Walnut Creek Honda*, supra.

In certain circumstances, an employer retains the right to lockout employees. In *American Ship Bldg. Co. v. NLRB.*, 380 U.S. 300, 308-309 (1965), the Court held that an employer does not commit an unfair labor practice when, after a bargaining impasse has been reached, it temporarily shuts down its plant and lays off employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position. There, the Court noted there was no allegation the lockout was in the service of designs inimical to collective bargaining, and there was no evidence that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so. In *NLRB v. Brown*, 380 US 278 (1965), the Court held that nonstruck members of a multiemployer bargaining group did not engage in unfair labor practices when, in response to whipsaw strike against one member of the group which continued business operations, they locked out their regular employees and used temporary replacements to carry on business. In reaching this result, the Court again noted there is no assertion or evidence that the respondent's were motivated by antiunion animus. The Court stated the lockout was a defensive measure to preserve to preserve the multiemployer group, and the action was not inherently destructive employee rights. The Court held that the tendency to discourage union was comparatively remote. The Court stated, "First, the replacements were expressly used for the duration of the labor dispute only; thus, the displaced employees could not have looked upon the replacements as threatening their jobs." *Id.* at 288. The Court noted that the history of labor relations between the parties had always been amicable noting that even the struck member of the association did not resort to using permanent replacements for the striking workers. Rather, it sought to ride out the dispute with temporary replacements to avoid depriving the regular employees of their jobs.¹²²

In *Harter Equipment*, 280 NLRB 597, 597 (1986), review denied 829 F.2d 458, (CA 3,1987) (*Harter I*), The Board majority stated, "we hold that, absent specific proof of antiunion motivation, an employer does not violate Section 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during an otherwise lawful lockout." In *Harter I*, the Board majority stated there is no difference in an employer's using temporary replacements for an offensive or defensive lockout. The Board stated:

Finally, any adverse effect of the use of temporary employees on the right to belong to a union membership represents, as in *Brown Food Store*, at most only a slight addition to the impact of the lockout itself. In every instance, the use of 'temporary' employees means no threat to the permanent employee status of locked out employees. The Union

¹²² Justice Goldberg stated in his concurring opinion that, "There would be grave doubts as to whether the act of locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers, ...". *Id.* at 294"

or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work. *Id.* at 600.

5 In *Harter Equipment*, 293 NLRB 647 (1989), (*Harter II*) the Board held that the locked out employees were not strikers and could not be permanently replaced. The Board stated, “the Employer locked out the bargaining unit in support of its bargaining demands and they were not, and could not lawfully be permanently replaced. Indeed, the finding that the replacements were temporary was essential to the dismissal of the complaint in (*Harter I*).”

10 In *Ancor Concepts, Inc.*, 323 NLRB 742, 742 (1997), *enf. denied* 166 F.3d 55, (2nd Cir. 1999), the Board stated, “we find that following its initial declaration of a lockout, the Respondent engaged in conduct inconsistent with a lawful lockout by telling the Union that the replacements were permanent employees and that the strikers would be placed on a preferential recall list if the Union so desired. The Respondent’s assertion rendered the lockout
15 unlawful, so that the Respondent was no longer privileged to invoke *Harter* to justify its continued failure to reinstate strikers who had made unconditional offers to return to work.” The Board stated in that instance employees went on strike on September 24. In October the union representative asked the company owner if he would take the employees back under the terms of the expired contract. The owner responded that he would not take the employees back until
20 they reached a settlement on a new contract. By letter dated November 9, the union restated its unconditional offer to return to work on behalf of the striking employees. The employer responded by letter from its attorney dated November 29. Included in the response was that at the present time all of the striking employees’ positions had been filled by permanent replacements, and if the union wanted the strikers names to be placed on a preferential recall
25 list in the event of any openings the union was to advise the attorney. The Board stated:

Regarding the lawfulness of a claimed^[FN9] lockout, the Board in *Eads Transfer*^[FN9] found that absent timely notification, an employer's failure based on a claimed lockout to reinstate economic strikers on their unconditional offer to return to work is inherently destructive of
30 employee *Laidlaw* rights^[FN10] and violates Section 8(a)(3) and (1) of the Act. The Board, acknowledging and balancing the competing rights of economic strikers to reinstatement on their unconditional offer to return to work, and of employers to lock out and temporarily replace employees for legitimate economic or business reasons under *Harter I*, concluded that if the employer wanted to rely on *Harter* to suspend the strikers’ reinstatement rights, “it was obligated to declare the lockout before or in immediate
35 response to the strikers' unconditional offers to return to work.”^[FN11] Such timely notification is necessary, the Board reasoned, so that the strikers could fairly evaluate their bargaining position.^[FN12] *Id.* at 744

40 The Board stated the respondent informed the union in the November 29 letter that the replacements were permanent employees, and that an employer’s use of permanent replacements is inconsistent with a declared lawful lockout in support of its bargaining position, and in the letter the attorney stated the strikers wishing to recall could be placed on a recall list which was inconsistent with the respondent’s claim that it was refusing to allow the employees
45 to return to work at all. Thus, the Board found as of the November 29, letter the lawful lockout was over. The Board concluded that the respondent was obligated to offer reinstatement to all the strikers who had offered to return. The Board found that the failure, based on a claimed lockout to offer the strikers reinstatement on their unconditional offer to return to work after it had announced the replacements were permanent employees, is inherently destructive of
50 employees rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), and violates Sections 8(a)(3) and (1) of the Act. The Board found in reaching this conclusion that the Respondent was not motivated by union

animus. The Board stated,

5 In the instant case, the employees could not intelligently evaluate their position because the Respondent indicated to them (incorrectly in law) that they would remain replaced even if they yielded to the Respondent's bargaining demands. The Respondent's November 29 announcement, like the employer's untimely declaration of a lockout in *Eads*, could have reasonably caused the strikers confusion in evaluating their bargaining strength.^[FN20] Thus, for at least 21 months (i.e., from the Respondent's November 29 letter to the date of the hearing) the employees were in the dark about their status. Accordingly, for the reasons set forth above, we find that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers on and after November 29. *Id.* at 745.¹²³

15 In *Royal Motor Sales*, 329 NLRB 760, 761-762 (1999), *enfd.* 2 Fed. Appx. 1 (D.C. Cir. 2001), the Board majority stated:

20 In *Taft Broadcasting*, 163 NLRB 475, 478 (1967), *enfd.* sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board defined an impasse as a situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement.' This principle was restated by the Board in *Hi-Way Bill-Boards*, 206 NLRB 23, 23 (1973), as follows:

25 A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

See also *NLRB v. Powell Elect. Mfg.*, 906 F.2d 1007, 1011-1012 (5th Cir. 1990). The Board has further held that, even if impasse is reached over an issue, it may be broken if one of the parties moves off its previously adamant position. (Citation omitted.)

* * *

30 The Board has also long held that even if the parties have reached deadlock in their negotiations, a finding of impasse is foreclosed if that outcome is reached 'in the context of serious unremedied unfair labor practices that affect the negotiations.' (Citations omitted.)

35 In *Royal Motor Sales*, it was concluded the deadlock was broken when the Machinists submitted a written proposal that represented their agreement to bargain on the basis of a flat-rate model wage system, rather than their prior demand for hourly pay. Rather, than explore the possibilities of the proposal, Royal rushed to declare impasse and implement its July 5 offer. It was stated that it could not be fairly said that under the terms of *Taft Broadcasting*, the parties had exhausted all possibilities of reaching agreement. The Board majority then stated:

b. Our finding that negotiations between Machinists and Royal had not reached a valid

45 ¹²³ In refusing to enforce the Board's order in *Ancor*, the court noted the final sentence in the employer's November 29 letter reading, "However, if you believe there is sufficient flexibility in the Union's position so that meaningful negotiations can occur at this time, please contact the undersigned to arrange a meeting." The court stated this conclusion, put at the letter's end, demonstrates that nothing was final in *Ancor's* position. The court also cited prior communications by the employer indicating a willingness to negotiate if the union was. See, 50 *NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 58 (2nd Cir. 1999).

impasse finds further support in Royal's unfair labor practices away from the bargaining table. As discussed supra, we have found that Royal violated Section 8(a)(5) and (1) of the Act by virtue of Service Manager Chavez' direct dealing with employee Wong regarding flat-rate compensation, the very issue over which Royal has claimed, and the judge has found, the existence of impasse. When considered in the context of Chavez' role at the bargaining table, we conclude that Chavez' statements to Wong disparaged the collective-bargaining process and undermined the status of the Union at the bargaining table. (Citations omitted.)

c. In sum, based on the totality of the circumstances we find that there was no impasse in fact, and that even if deadlock had been reached, no impasse could properly be declared because of the context of serious unremedied unfair labor practices.

Accordingly, we find that Respondent Royal violated Section 8(a)(5) and (1) when it implemented portions of its final offer to the Machinists on July 5 in the absence of a bona fide impasse in bargaining. *Id.* 763-4

The Board in *Royal Motor Sales*, also found the respondent's lockout of the employees was unlawful because it was just used to facilitate the respondent's implementation of its offer without either the union's agreement or a genuine impasse therefore it was used in service of designs inimical to the bargaining process. Moreover, the respondent's hostility towards the Union expressed in the unlawful statements by the respondent's vice president permitted an inference that the lockout was caused by a desire to discourage membership in the union. See also *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991), where the court found an employers association's lockout and replacement of their employees in an attempt to coerce the Union to accept the Association's unilaterally implemented final offer was violative of Section 8(a)(5), (3), and (1) of the Act in that it did not constitute "legitimate bargaining position" that the employers may pursue through the use of a lockout."

In *Allen Storage & Moving Co.*, 342 NLRB 501 (2004), an employer locked out employees on condition that they could return to work when they accepted the employer's existing bargaining proposals, which included an unlawfully implemented change in the employees group life insurance plan. In approving the judge's finding that the respondent locked out the employees in violation of Section 8(a)(3) and (1) of the Act, the Board stated:

1. The judge found that the Respondent locked out its employees in violation of Section 8(a)(3) and (1) for periods in September 2001 and March 2002. In adopting this finding, we particularly agree with the judge that the Respondent's discriminatory motivation for the lockouts is demonstrated by the manner in which it implemented them.^[FN3] Thus, the Respondent, without explanation or justification, allowed Steven Jennings, the only unit employee who had not participated in the strike, to continue working during both periods of the lockouts, while it barred each former striker from work. Such disparate treatment of former strikers is, as the judge found, evidence of discriminatory motive in the circumstances of this case.^[FN4] See *McGwier Co.*, 204 NLRB 492, 496 (1973); *O'Daniel Oldsmobile*, 179 NLRB 398, 401 (1969).¹²⁴

2. We further agree with the judge that for a lockout to be permissible under *American Ship Building Co. v NLRB*, 380 U.S. 300, 318 (1965), it must be for the 'sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate

¹²⁴ See also, *Local 15, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB*, 429 F.3d 651 (7th Cir. 2005), cert. denied 127 S.Ct. 42 (2006); and *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO v. NLRB*, 179 Fed Appx. 61 (D.C. Cir. 2006).

bargaining position.’ Here, the Respondent’s lockouts were in support, at least in part, of a bargaining proposal to ‘provide each employee with a \$30,000.00 group term life insurance plan’ ‘in lieu of the current death benefit.’ While this proposal on its face might have been legitimate, it was advanced in the face of the Respondent’s unlawful termination of the employees’ current death benefit—an unfair labor practice, which was unremedied at the time of the lockouts. The Respondent’s proposal would, therefore, have required the employees to accept the Respondent’s unlawful conduct in order to end the lockouts. In this context, the Respondent’s lockouts cannot be found lawful under *American Ship Building Co.*^[FN5]

In the current case, On March 2, 2007, Giles faxed a letter to Cannon and Hanson stating that the strike was an unfair labor practice strike and that the employees were immediately ceasing their strike activities and making an unconditional offer to return to work under the current term and conditions of employment. Having received no response, on March 5, Giles had a phone call with Hanson during which Giles asked Hanson if he had received Giles’ letter. Hanson acknowledged the receipt and Giles stated he was waiting for a response. Hanson said he had to check with Respondent that he thought Respondent had hired replacements, and that he was not sure how many people would be recalled. Giles said that ULP strikers cannot be permanently replaced, and Hanson said Respondent considered the strike to be an economic strike. Giles disagreed with that assertion, and stated he expected a response from Hanson. Hanson said he would get back to Giles the next day after he talked to the Company. Giles testified they talked again on March 6, and Hanson had a similar response that he did not know where Respondent was and how many people they needed.¹²⁵

On March 7, 2007, Giles received a faxed letter from Hanson. In the letter, Hanson labeled the strike as an economic strike. The letter stated that while the bargaining unit was on strike Respondent began hiring new employees as permanent replacements and has hired as of March 2, 24 permanent replacements of the striking employees. Later in his response, Hanson also stated that, “members of Local 639 who are part of the bargaining unit and have been on strike since January 12, 2007 will be ‘locked out’ and are not going to be allowed to work at Quickway effective immediately, until the contract negotiations are resolved.” The letter later states that, “Until Local 639 is prepared to sign an agreement with the last, best and final offer made by Quickway in our meeting on January 15, 2007, the employees will remain ‘locked out.’”

A letter went out under Cannon’s name, dated March 7, addressed to “Striking Quickway Employees.” The parties stipulated it was mailed to all striking employees. Hanson, at the time of the stipulation, represented that Cannon’s letter was also mailed to some additional drivers who were not strikers. Hanson during questions posed to him during his opening statement took the position that 26 drivers ceased work around the start of the strike, but from Respondent’s perspective only 21 of those individuals were strikers. Apparently, from Hanson’s remarks, it can be presumed Respondent had mailed Cannon’s letter addressed to strikers to all 26 of the drivers. The recipients of Cannon’s letter were told Respondent had received an unconditional offer to return to work, that Giles had informed Hanson that the Union would not sign a contract including Respondent’s “last, best and final offer” and that

¹²⁵ There is a question as to whether Respondent’s institution of the lockout was done in a timely manner since Respondent did not immediately inform the strikers they were locked out upon their unconditional offer to return to work. *Ancor Concepts, Inc.*, supra. at 744. However, since I have found the lockout unlawful for other reasons I need not address this question here.

the “bargaining unit members of Local 639, would be locked out and not allowed to return to work until a contract is signed. Thus, the employees were informed in Cannon’s letter that they were being locked out because the Union had refused to sign Respondent’s “last, best, and final” offer. Moreover, any ambiguity in Cannon’s letter as to Respondent’s intent is cured by Hanson’s letter to Giles stating, “Until Local 639 is prepared to sign an agreement with the last, best and final offer made by Quickway in our meeting on January 15, 2007, the employees will remain ‘locked out.’”

While Hanson represented that Respondent had hired 24 permanent replacements in his March 7 letter, no testimony or documentary evidence was placed in the record in support of this contention. Cannon at one point estimated that Respondent hired up to 22 or 23 permanent replacements. In the circumstances of this case, I am not willing to take these blanket representations as correct absent documentary evidence showing the names of these individuals, their dates of hire, and proof of what they were told at the time of their hire. Moreover, despite the representations in his letter of 24 permanent replacements, Hanson admitted during his opening remarks that Respondent continued to use owner operators at the time of the Union’s March 2 offer, and he conceded that these owner operators did not constitute permanent replacements for the strikers, and that absent the lockout they should have been terminated and at least some of the strikers should have been reinstated regardless of whether they were unfair labor practice strikers or economic strikers.

For reasons set forth in detail in this decision, I have concluded that the strikers were unfair labor practice strikers, and that the strike was in large part caused by Respondent’s unlawful unilateral diversion of bargaining unit work to owner operators. Thus, I find that Respondent violated Section 8(a)(1) and (3) of the Act by permanently replacing unfair labor practice strikers, and by on March 7, 2007, informing their Union representative that it had done so.¹²⁶ *East Buffet & Restaurant, Inc.*, 352 NLRB No. 116 (2008); *Boydston Electric*, 331 NLRB 1450, 1453 (2000); *Walnut Creek Honda*, 316 NLRB 139, 142 (1995), enfd. 89 F.3d 645 (9th Cir. 1996); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379, fn. 5 (1967); and *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Decker Coal Co.*, 301 NLRB 729, 748 (1991); and *Escada USA*, 304 NLRB 845, 850 (1991), enfd. 970 F.2d 898 (3rd Cir. 1992). There is an inherent tension between the Supreme Court’s pronouncements in *American Ship Bldg. Co. v. NLRB.*, 380 U.S. 300, 308-309 (1965), and *NLRB v. Brown*, 380 US 278 (1965), that lockouts are permissible only when: there is no evidence that the employer was hostile to its employees’ banding together for collective bargaining; and there is no assertion or evidence that the lockout was motivated by antiunion animus and a lockout being lawfully applied to unfair labor practice strikers.

I find that the March 7, 2007, lockout was unlawfully motivated, in view of the unfair labor practices I have found showing that there is a background of strong anti-union animus on the part of Respondent. On May 22, five days after the Union filed its petition for election Respondent followed the employee who originated the union drive. On May 25, it fired that employee in a meeting without giving him the opportunity to defend himself as to the allegations against him. That meeting, at the Respondent’s request, was also attended by the other leading union adherent. He was also told at that time that he had also been followed, and that the Employer was aware that he was one of the individuals who started the union drive. He was instructed not to serve as a middle man between the Respondent and the employees, and that if

¹²⁶ Respondent continued to maintain through counsel that there were still 18 permanent replacements of the strikers employed at the time of the hearing.

employees had complaints he was instructed to refer them directly to management. Within weeks before the June 22 election, high level officials Taylor and Cannon separately isolated and then interrogated an employee as to whether they had his support for the upcoming election. Shortly, after the election, Cannon and Ortt met with and dealt directly with another employee over his removal from the unit and becoming an owner operator. On July 17, Giles by letter to Taylor protested Respondent's actions and demanded immediate bargaining over the diversion of bargaining unit work as well as beginning negotiations for a new contract. On August 8, the same day contract negotiations began Respondent, without informing the Union, hired an owner operator on a full time basis, and he began performing bargaining unit work. Thereafter, Respondent began to increase the number of owner operators who were directly competing with bargaining unit employees for work. During negotiations, Respondent's chief negotiator insisted that the owner operators were not part of the bargaining unit, although they had been included in bargaining units at other facilities operated by Respondent. In October Respondent again directly dealt with an employee by converting him to owner operator and removing him from the unit. The numbers of owner operators continued to increase and they were regularly performing local and long distance runs as were the bargaining unit employees. Thus, the Respondent had undermined the Union's bargaining strength by its direct dealing with an employee and its diversion of bargaining unit work.

In December, as part of its strike preparations Respondent increased its number of owner operators by three, and brought in outside drivers to accompany unit employees on their routes. Respondent's actions, concerning the continuing increase of the use of owner operators precipitated the employees' unfair labor practice strike. Shortly, after the strike started, Respondent implemented its January 15, 2007, offer. Respondent implemented the offer without informing the Union it was doing so. I find that Respondent implemented the offer at a time the parties' were not at impasse because the Respondent's unremedied unfair labor practices particularly those relating to direct dealing and the diversion of bargaining unit work had undermined the Union and precluded an impasse in bargaining. See, *Royal Motor Sales*, 329 NLRB 760, 761-2 (1999).¹²⁷

¹²⁷ While negotiations began on August 8, the parties did not begin bargaining with respect to economics until December 6. At that time Respondent made its first wage proposal with the first contract year beginning at \$45.5 per mile and \$15 a stop. During meeting, Giles suggested Respondent consider a mileage matrix as part of its proposal, and the parties agreed during that meeting that traffic in the D.C. area was a problem in terms of Respondent's pay system. Giles asserted the employees need some form of hourly pay, even if it was incorporated in Respondent's stops per miles system. On December 7, Respondent offered a new proposal which contained an increase in the mileage rates to \$46.5 per mile upon ratification with a \$.05 increase every year for four years. Giles suggested an alternative with hourly rates within a 75 mile radius of Landover or hourly pay within certain congested counties, and stops and miles pay outside the described areas. On December 8, Giles proposed a pay rate of \$18 an hour, \$.15 a mile and \$10 a stop. On January 15, 2007, the next bargaining session, Respondent proposed a mileage matrix where drivers within a 75 mile radius would receive \$.55 a mile the first year, and stop pay was increased to \$17 a stop. Giles responded that no area contracts were based on mileage and stops, and that the employees expect hourly pay. Giles was told this was Respondent's final offer. Giles testified Respondent's final offer was incomplete as the Union was still waiting on language for work rules since November, although he testified work rules had been given to him on November 9. Giles testified that language was missing in other areas, and that Hanson began the January 15, meeting by stating that Respondent had been working on economic proposals and language, but that Hanson failed to discuss the outstanding language issues during the meeting. On January 16, 2007, Giles told Cannon the employees

Continued

I reject any contention that the parties November 9, tentative agreement on subcontracting somehow remedies Respondent's unfair labor practices or somehow withdrew the issue of Respondent's use of owner operators as an issue between the parties. First, the Union never withdrew its unfair labor practice charge over the matter revealing that it was still a
5 bone of contention between the parties. Second, Giles felt that Respondent violated the terms of the understanding by its increased usage of owner operators precipitating the January 15 strike. Giles raised the issue of Respondent's unfair labor practice towards the end of the parties' December 8 session, the last session before the strike, and his notes reveal that Giles specifically raised bargaining unit work as an issue during the parties last session on January
10 17. That it is a continuing issuing is further established by the fact that Respondent continued to use owner operators throughout the strike, and was using them as of March 2, 2007, when the Union made its unconditional offer to return to work. Hanson's March 7, 2007, letter to the

unanimously voted down Respondent's final offer. However, Giles testified the parties did not
15 reach an impasse in negotiations and no one ever declared impasse. The parties met on January 17, 2007, with a federal mediator, and at that time Hanson laid out five economic areas in dispute. Giles responded in addition to the five items mentioned there were still issues as to rules and regulations and bargaining unit work. Hanson stated a lot of the language issues will fall into place as they get the other areas of the contract done. During the meeting, the mediator
20 told Giles that Respondent was willing to discuss a weekly guarantee, on condition that the drivers were available five days a week including Saturdays and they could not refuse loads if hours were available. The parties then met face to face, and Hanson repeated the terms relayed by the mediator. Giles asked how Respondent would determine the weekly guarantee, and Hanson stated it would be a weekly minimum. Giles stated they were not any closer to
25 where they were five hours ago, and asked about miles, hours, and stops. Hanson stated Respondent was not interested in hourly wages.

In sum, wages were discussed at five bargaining sessions beginning on December 6, and Respondent made movement on December 6, 7, and January 15, 2007. Respondent also
30 floated an additional proposal on January 17, 2007, for some type of weekly minimum pay, which was rejected by Giles. Respondent remained steadfast in its refusal to pay by the hour, while Giles insisted on some formula of hourly pay. I do not find at General Counsel contends that Respondent made its January 15, 2007 offer with a desire to provoke an impasse. There was substantial movement in that offer from its prior offer of December 7, and in fact some form of mileage matrix had been suggested by Giles during negotiations. One consideration against
35 an impasse finding was that there had been movement by the parties with respect to wages at all the negotiation sessions in which wages were discussed, and no declaration of impasse had been made. In fact, despite representations that the January 15 offer was its final offer, Respondent floated the framework for another proposal on January 17. However, I do not need to decide whether the parties were at impasse on wages as of the January 15, offer, as I have
40 already concluded that an impasse was precluded by Respondent's unfair labor practices. Of more significance was Respondent's unilateral implementation of at least the economic components of its January 15, 2007, offer near the start of the strike when the parties were not at a valid impasse, and Respondent's conditioning the end of the lockout on the Union's agreeing to the January 15 offer. Moreover, Hanson's statements during the January 15 and
45 17, bargaining sessions revealed an acknowledgement by him that in addition to economics there were some language issues Respondent had been working on that needed to be resolved between the parties, yet Respondent did not present proposals on the language issues at that time, and they were not discussed at either of those sessions. Respondent's written proposal on January 15, only dealt with economics, so Respondent's final offer was not presented in the
50 form of a complete agreement leaving terms of what Respondent's final offer actually was to be murky.

Union was somewhat misleading when he stated Respondent had hired 24 permanent replacements of the striking employees, but failed to mention Respondent's continued use of owner operators, who Hanson conceded at the hearing, did not constitute permanent replacements. Cannon testified Respondent was still using some owner operators out of Landover at the time of the unfair labor practice trial, although they had lost both the southern and northern New Jersey runs shortly after the start of the January 12, 2007, strike. Thus, owner operators continued to perform bargaining unit work which did not require a layover as it had been doing before the strike.

Another indicia that that Respondent's lockout was discriminatorily motivated was its allowing pre-strike bargaining unit employees Smith and Simms who had worked throughout the strike to continue to work after the lockout. Respondent's can point to no legitimate business justification for its partial lockout of only strikers and others, who perhaps were not strikers, but who did not work during the strike. In this regard, Prevost testified that upon the implementation of its final offer it no longer had staffing problems. The drivers were also in fungible positions in that Respondent can point to no special skills of Smith and Simms that separated them from the rest of the drivers justifying their recall. Moreover, Respondent had lost both its northern and southern New Jersey runs early on during the strike, but Hanson informed the Union on March 7, that Respondent had 24 permanent replacement drivers, and Respondent admittedly was still using owner operators so it is clear that Respondent's retention of Smith and Simms during the lockout was not a result of legitimate operational needs. I do not find as persuasive Respondent's arguments in its brief that its allowing Simms and Smith to work during the lockout was just an oversight. First, Hanson informed Giles in Hanson's March 7, letter that the lockout was limited to those that "have been on strike." Smith and Simms did not participate in the strike, and clearly by the terms of Hanson's letter the lockout was specifically designed not to include them. Moreover, the evidence revealed that Respondent went through elaborate procedures in order to keep Simms working during the strike including having him work out of other locations and having his loads shipped from the Landover dairy to him at a Ryder facility to allow him to avoid crossing the picket line. I have concluded that Respondent was fully aware and intentionally did not lock out Smith and Simms as it did the other employees as a reward for their crossing the picket line and working during the strike.

While Hanson suggested that 26 drivers ceased working at the time of the strike, he contended that only 21 were actual strikers implying there is an issue as to whether five individuals actually joined or supported the strike. However, Hanson represented that Cannon sent his March 7, 2007, letter to strikers as well as to other employees. Implicit in that contention is that the letter had been sent to all bargaining unit employees who were not working at the time. Thus, even assuming Hanson was correct that not all employees who did not work were active supporters of the strike, Cannon's March 7, letter addressed to strikers signaled that all employees who did not work during the strike were being locked out as "strikers" as a result of the strike. By not locking out the two employees who crossed the line and worked during the strike, Respondent discriminated against all of the locked out employees based on the strike in general and their refusal to cross the picket line and work. Any non strikers who refused to cross the picket line were swept into Respondent's unlawful lockout as a result of the employees' unfair labor practice strike. See, *McGaw Of Puerto Rico, Inc.*, 322 NLRB 438 (1996). Thus, given Respondent's overall background of animus towards the employees' union activities I find Respondent's actions of only locking out strikers and possibly non-strikers who did not cross the picket line as additional evidence that the lockout was unlawfully motivated.

I also find that Respondent unlawfully conditioned an end to the lockout on the

Union's acceptance of its final offer, because implicit in that offer was the acceptance of Respondent's unilateral diversion of bargaining unit work to owner operators, a new classification of employee, which Respondent had improperly removed from the bargaining unit as part of its strike preparation plans. See, *Allen Storage & Moving Co.*, 342 NLRB 501 (2004). I find that Respondent's March 7, 2007, lockout of strikers as well as any possible non strikers who did not cross the picket line constituted an unlawful lockout in violation of Section 8(a)(1) and (3) of the Act.¹²⁸ In making this finding, I note that I have also previously found that Respondent violated Section 8(a)(1) and (3) of the Act by failing to accept the Union's unconditional offer to return to work on behalf of unfair labor practice strikers on March 2, 2007.¹²⁹

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union represents Respondent's employees in the following unit appropriate for collective bargaining:
 All full-time and regular part-time company driver employees and hostlers employed by the Employer making deliveries from its domicile at 5 S. Club Drive, Landover, Maryland; but excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.
4. The Respondent violated Section 8(a)(1) of the Act by:
 - a. Engaging in the surveillance of employees because they engaged in union activities.
 - b. Creating the impression of surveillance of employees' union activities.
 - c. Informing employees that they should not serve as a middleman between employees and management and that if employees had complaints they should be told to go directly to management.
 - d. Coercively interrogating employees concerning their union activities.
5. Respondent violated Section 8(a)(1) and (3) of the Act by:

¹²⁸ Since I find that the lockout was discriminatorily motivated, I need not reach the General Counsel's contention that Respondent's conduct was inherently destructive of employee rights.

¹²⁹ Respondent conceded on the record by counsel's admission that there were at least 21 strikers. To the extent the any other individuals status as a striker becomes relevant to the remedial requirements of this decision, it can be litigated by the parties during the compliance stage of these proceedings. There is a possible dispute that I am aware as to four named company drivers as to whether they were strikers. Drivers Bright and Hughes were out on the road on Friday, January 12, 2007, and crossed the picket line on January 13, to return their trailers and did not work thereafter; Frost crossed the picket line and worked once on January 12, but not thereafter; and Hudson crossed the picket line once on January 15, but did not pull a load. Cannon testified that he had conversations with all or most of these individuals early on in the strike, and they related that they were afraid to cross the picket line. Whether or not these individuals actively participated in the strike at some point in time or can otherwise be argued to be strikers remains an issue for compliance proceedings, if necessary. In this regard, the strike ended on March 2, and I have concluded that Respondent unlawfully locked out all of its other pre-strike employees, including the aforementioned individuals, who did not work during the course of the strike on March 7.

- 5
- a. Discharging its employee Angelo Jackson on May 25, 2006, because he engaged in union activities.
 - b. Informing unfair labor practice strikers that they had been permanently replaced and refusing to recall them upon their March 2, 2007, unconditional offer to return to work.
 - c. Locking out unit employees starting March 7, 2007, because employees had engaged in protected activity and in order to discourage such activities.
- 10
- 6. Respondent violated Section 8(a)(1) and (5) of the Act by:
 - a. Engaging in direct dealing with employees and converting them to an owner operator position thereby bypassing the Union the employees' collective bargaining representative.
 - b. Transferring bargaining unit work to owner operators, who were employees that it had improperly removed from the bargaining unit, without bargaining in good faith with the Union.
- 15

Remedy

20 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

25 The Respondent unlawfully discharged employee Angelo Jackson, unlawfully failed to recall unfair labor practice strikers upon their unconditional offer to return to work, unlawfully locked out bargaining unit employees because employees in the bargaining unit engaged in an unfair labor practice strike, and therefore must offer them reinstatement and/or recall to their former positions and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from as applicable the date of their discharge, the date of their unconditional offer of reinstatement, and/or the entire lockout period continuing until the date of a proper offer of reinstatement and or recall, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹³⁰

30

35 Having found Respondent unilaterally transferred bargaining unit work to owner operators, it must rescind its agreements with owner operators and restore the transferred work to bargaining unit employees and make them whole for any losses they may have suffered as a result of the transfer under the formula prescribed in as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent the transfer caused losses to existing unit employees those losses can, if necessary, be determined in a compliance proceeding.

40

45 Having found that Respondent committed violations of Section 8(a)(1)(3) and (5) of the Act which impacted upon the parties negotiations for an initial contract the General Counsel's request that the Union's certification year be extended for six months from the date Respondent begins to bargain upon request with the Union is granted. Respondent's directing dealing with an employee began shortly after the Union won its representation election, and unilateral its transfer of bargaining unit work to owner operators began within one month of the Union's certification. That transfer led to a dispute between the parties early on in negotiations, and as I have found in large part led to an unfair labor practice strike, which when it ended resulted in the

50 ¹³⁰ The General Counsel argues that interest should be compounded on a quarterly basis. This is a matter of a change in Board longstanding policy, which is better left to the Board.

unlawful lockout of bargaining unit employees. See, *Mar-Jac Poultry*, 136 NLRB 785 (1962).

5 The General Counsel cites *Five Star Mfg., Inc.*, 348 NLRB No. 94, (2006), slip op. at 1, arguing the egregious nature of Respondent's conduct warrants a broad order as part of the remedy. In *Five Star*, the Board issued a broad order although the employer there did not have a prior history of unfair labor practices. The Board considered the totality of circumstances in assessing whether a respondent's behavior exhibits an opposition to the purposes of the Act which would provide "an objective basis for enjoining a reasonably anticipated future threat." In *Five Star Mfg., Inc.*, as here, the employer engaged in a sustained and ongoing course of 10 unlawful conduct in response to a union drive. However, unlike the instant case, Five Star was a family owned operation with no prior history of union activity. In the instant case, Respondent is a large operation with 17 terminals located around the country, four of which have contracts with other Teamsters Locals and seem to operate in relative labor tranquility. While Respondent reacted in a sustained an unlawful manner in response to the union campaign at its 15 Landover facility, given Respondent's history, I do not find that a broad order is warranted, at this time, unless Respondent continues in its course of conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³¹

ORDER

20 The National Labor Relations Board orders that Respondent, Quickway Transportation, Inc., with its main offices located in Nashville, Tennessee, and with a facility located in 25 Landover, Maryland, its officers, agents, successors, and assigns shall

1. Cease and desist from
 - (a) Engaging in the surveillance of employees because they engaged in union activities.
 - 30 (b) Creating the impression of surveillance of employees' union activities.
 - (c) Informing employees that they should not serve as a middleman between employees and management and that if employees had complaints they should be told to go directly to management.
 - 35 (d) Coercively interrogating employees concerning their union activities.
 - (e) Discharging employees because they engaged in union activities.
 - (f) Informing unfair labor practice strikers they had been permanently replaced and refusing to recall them upon their unconditional offer to return to work.
 - (g) Locking out unit employees because employees had engaged in protected activity and in order to discourage such activities.
 - 40 (h) Engaging in direct dealing with employees and converting them to an owner operator position thereby bypassing the Union as the employees' collective bargaining representative.
 - (i) Transferring bargaining unit work to owner operators without bargaining in good faith with the Union.
 - 45

50 ¹³¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

5 (a) On request, bargain with the Union for a collective bargaining agreement in the certified bargaining unit, with the certification year extended to six months from the date good faith bargaining begins, and if an understanding is reached, embody the understanding in a signed agreement.

10 (b) Within 14 days of the date of this order restore work that has been transferred to owner operators and terminate the contracts of those owner operators, and make whole bargaining unit employees where it can be established they lost work to the owner operators.

15 (c) Within 14 days of the date of this order offer Angelo Jackson reinstatement to his former position, discharging the occupant of that position if necessary, or if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and remove any reference from the Respondent's files of Jackson's unlawful discharge, and within 3 days thereafter notify Jackson in writing that this has been done and that the discharge will not be used against him in any way.

20 (d) Within 14 days of this Order offer the employees who were unfair labor practice strikers who were denied reinstatement on March 2, 2007, recall to their former positions terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

25 (e) Within 14 days of this Order offer the employees who were locked out by Respondent on March 7, 2007, recall to their former positions terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

30 (f) Make Angelo Jackson, the unfair labor practice strikers, and the locked out employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

35 (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

40 (h) Within 14 days after service by the Region, post at its Landover Maryland facility, copies of the attached notice marked "Appendix." ¹³² Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the
45 Respondent to ensure that the notices are not altered, defaced, or covered by any other

50 ¹³² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

5 material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 22, 2006.

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

10 Dated, Washington, D.C. September 12, 2008

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Eric M. Fine
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

20 WE WILL NOT engage in the surveillance of employees because they engaged in
activities on behalf of Drivers, Chauffeurs & Warehousemen Teamsters Local Union No. 639
a/w International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT create the impression of surveillance of employees' union activities
amongst our employees.

25 WE WILL NOT inform employees that they should not serve as a middleman between
employees and management and that if employees have complaints they should tell the
employees to go directly to management.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT discharge employees because they engaged in union activities.

30 WE WILL NOT inform unfair labor practice strikers they have been permanently replaced
and refuse to recall those strikers upon their unconditional offer to return to work.

WE WILL NOT lock out employees because employees have engaged in protected
activity and in order to discourage such activities.

35 WE WILL NOT engage in direct dealing with employees and convert them to owner
operator positions thereby bypassing the Union as the employees' collective bargaining
representative.

WE WILL NOT transfer bargaining unit work to owner operators without bargaining in
good faith with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees
in the exercise of the rights guaranteed them by Section 7 of the Act.

40 WE WILL, on request, bargain with the Union for a collective bargaining agreement in
the certified bargaining unit, with the certification year extended to six months from the date
good faith bargaining begins, and if an understanding is reached, embody the understanding in
a signed agreement.

45 WE WILL within 14 days of the date of the Board's order, restore work to bargaining unit
to company drivers that has been transferred to owner operators and terminate the contracts of
those owner operators, and make whole bargaining unit company drivers where it can be
established they lost work to the owner operators.

50 WE WILL within 14 days of the date of the Board's order offer Angelo Jackson
reinstatement to his former position, discharging the occupant of that position if necessary, or if
that position no longer exists, to a substantially equivalent position without prejudice to his
seniority or any other rights or privileges previously enjoyed, and remove any reference from our

files of Jackson's unlawful discharge, and within 3 days thereafter notify Jackson in writing that this has been done and that the discharge will not be used against him in any way.

5 WE WILL within 14 days of the date of the Board's Order offer the employees who were unfair labor practice strikers who were denied reinstatement on March 2, 2007, and/or who were locked out on March 7, 2007, recall to their former positions terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to a substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

10 WE WILL make whole: Angelo Jackson for his May 25, 2006, discharge; the unfair labor practice strikers who were denied reinstatement on March 2, 2007; and the employees locked out on March 7, 2007, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of Board's decision.

15 QUICKWAY TRANSPORTATION, INC.
(Employer)

20 Dated _____ By _____
(Representative) (Title)

25 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

30 103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

35 **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.

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

QUICKWAY TRANSPORTATION, INC.

and

5-CA-33111
 5-CA-33257
 5-CA-33446
 5-CA-33497

DRIVERS, CHAUFFEURS & WAREHOUSEMEN TEAMSTERS
 LOCAL UNION NO. 639 a/w INTERNATIONAL BROTHERHOOD
 OF TEAMSTERS

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