

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADF, INC. AND ITS ALTER EGO ADLA, LLC

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 251

CASE 1-CA-45068
JD-59-09

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS'
EXCEPTIONS TO THE ALJD

Respectfully submitted by:

Elizabeth A. Vorro
Counsel for the General Counsel
National Labor Relations Board
First Region
O'Neill Federal Bldg.
10 Causeway Street
Boston, MA 02222-1072

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I. STATEMENT OF THE CASE

This case was heard before Administrative Law Judge Arthur J. Amchan in Pawtucket, Rhode Island on July 13, 2009, and in Providence, Rhode Island on August 24 and 25, 2009.¹ Anthony DeFarno, the owner of ADF and part-owner of ADLA, appeared *pro se* for the Respondents.

On November 4, Judge Amchan issued his Decision in the above-captioned case, in which he made certain findings of fact and conclusions of law and recommended that Respondent be ordered to take certain affirmative actions to effectuate the purposes of the Act.

Judge Amchan correctly decided that Respondent ADLA is an alter ego of Respondent ADF, and that Respondents violated Section 8(a)(5) and (1) of the Act by repudiating and failing to comply with their collective-bargaining agreement with Teamsters Local Union No. 251 (“Union”). En route to these legal conclusions, Judge Amchan properly discredited the testimony of Anthony DeFarno and Lisa Lavigne, and drew appropriate adverse inferences from their failure to produce subpoenaed documents.

In their Exceptions, Respondents launch a broad attack on the ALJD, arguing that Judge Amchan showed bias and animus toward ADF and ADLA, and that the decision was generally flawed in its analysis of the facts and applicable law. In response, the General Counsel submits this Answering Brief.

¹ All dates are in 2009 unless otherwise noted.

II. FACTS

A. ADF's Operation

Anthony DelFarno has owned and operated ADF since about 1990 (T 344),² and began acquiring trucks in about 2004. Since then, ADF has been operating flat bed trucks with which it hauls concrete, steel, and other materials for the construction industry. (T 74-75) In 2008, ADF and DelFarno owned a total of four trucks. (T 74) All four were painted black with lettering indicating that they were operated by ADF. (T 69)

ADF's primary place of business was 99 Jefferson Boulevard in Warwick, RI, where it leased from Cardi Corporation about 7000 square feet in a large, multi-tenant commercial building. (T 78-79) At that location, ADF had garage space, where its non-union mechanics maintained its trucks and trailers, as well as office space on two levels of the building. (T 79-80) ADF used the downstairs offices, while ADLA used the office above.³ (T 77-79; T-92)

The Union has represented ADF's drivers for many years. (T 51-52) The parties' current collective-bargaining agreement is effective from April 15, 2008 through April 14, 2011. (GC 4) Article VIII of the contract governs seniority, and states that employees shall be selected for layoff and recall by seniority. The contract also obligates ADF to make payments to the Teamsters Health and Welfare Fund (Art. XVII), as well as its Pension Fund (Art. XVIII).⁴ Finally, Art. XIX sets forth the wage scale for the life of the contract, including a wage increase effective April 15, 2009.

² "T" will be used to designate the transcript; "GC" will designate General Counsel exhibits; "RE" will designate Respondents' Exceptions to the ALJD.

³ ADLA's use of this space will be discussed in greater detail below.

⁴ Union Business Agent Steve Labrie testified that ADF had not made any health and welfare payments since about July 2008, and had not made any pension fund payments in 2008. Labrie testified about a one-

John Renzi was ADF's dispatcher and worked out of the downstairs office at 99 Jefferson Boulevard. (T 81) Louis Volante is a Union member who performed supervisory duties for ADF. DelFarno testified that Volante "coordinated the truck loads," helped schedule the drivers, and supervised the drivers. (T 81, 83, 172) Although DelFarno testified that Volante was injured on the job and has not worked since about February 2008, his testimony was contradicted by witnesses and documentary evidence, and the ALJ correctly found that he supervised the drivers of both ADF and ADLA.⁵ In particular, driver Brian Priest testified that, at the time of the hearing, Volante was still his supervisor. (T 16, 20) Similarly, employees Javier Lopez (T 243) and Dennis Barr (T 25) testified that Volante was their direct supervisor when their employment terminated. Additionally, payroll records for the weeks ending August 18 (GC 14R) and August 25, 2008 (GC 14V); January 12 (GC 14LL), January 19 (GC 5), January 26 (GC 6), and February 2, 2009 (GC 7) show that Volante was paid \$1500 for each of those weeks. DelFarno testified that those checks were issued in error and were voided, but produced no documentary evidence to support this statement.

By late 2008, ADF had four drivers. In order of descending seniority they were: Javier Lopez, Dan LaChappelle, Dennis Barr, and Brian Priest. (T 16-17)

ADF's primary customers were Capco Steel, Concrete Systems, and Cardi Corp., all major construction companies in Rhode Island. (T 76) In 2008, ADF had revenues of

day strike against ADF in November 2008. The Union called off the strike after DelFarno agreed to make payments to the funds, but the checks issued by DelFarno bounced. A civil action against ADF by the Pension Fund is pending in Federal Court. (T 52-56)

⁵ It is noteworthy that Respondent's exceptions appear to acknowledge that Volante continues to supervise the drivers. (RE p. 1, para. 5; RE p. 4, para. 3)

\$150,000-200,000 from Capco, and another \$250,000 to \$300,000 from Concrete Systems. (T 206, 207)

According to DelFarno, ADF closed its doors in late 2008 or early 2009. At that point, its workers' compensation insurance was allowed to lapse, and DelFarno filed forms with the RI Department of Business Regulation indicating that the company was ceasing operations. (T 67-68) However, ADF has taken no action to formally dissolve the corporation.⁶ Nor did ADF communicate with its customers that it was going out of business. (T 206)

One of ADF's trucks – a black Kenworth still marked “ADF” – is still on the road, being driven by ADLA driver Dan LaChappelle.⁷ (T 71, 74, 215) According to DelFarno, the Kenworth is now operating under ADLA's DOT authorization, and is “working for ADLA.” (T 72) Although DelFarno testified that there are lease documents between himself and ADLA for the use of the black Kenworth, he failed to produce any such documents.⁸ (T 72-73, 215) Nevertheless, DelFarno asserted that ADLA pays him a percentage of the gross revenue generated by the truck (T 73), explaining that the truck's revenues are “accruing as being owed” (T 73), but produced no ledger or other documents tracking the revenues for accounting purposes.

⁶ DelFarno failed to produce copies of ADF's current filings with the Secretary of State's office, despite having been directed to do so by the ALJ. (T 103-104)

⁷ In his Exceptions, DelFarno contradicts this fact, asserting that “the black Kenworth was never registered in 2009 and has not operated.” (RE p. 5, para. 1) Respondents' Exceptions cite a multitude of other facts not in evidence. For example, the Exceptions state that ADLA has customers that were never customers of ADF (p. 5, para. 2); that Dennis Barr admitted to threatening someone with a pipe (p. 3, para. 1); and that ADF lost customers because of Barr's actions (p. 6, para. 3). These “facts,” and others not in the record, should be disregarded.

⁸ Moreover, in his response to the subpoena served during the investigation of this case, DelFarno stated in response to request number 14 that there were “no lease or rental agreements” between ADF and/or DelFarno and ADLA and/or Lavigne.

In order to keep ADF operating, DelFarno often made loans to the company. (T 201) DelFarno testified that such loans were made to cover payroll, pay for fuel for the trucks, and meet other business obligations. (T 201) There are no documents showing the dates, purposes, or terms of such “loans”, or indicating that DelFarno was ever repaid for them.

B. ADLA’s Operation

Lisa Lavigne is DelFarno’s significant other and the mother of his 2-1/2-year-old son. She started ADLA in about 2006 as a construction company doing demolition, painting, buildouts, and odd jobs. (T 284) Lavigne employed her two brothers, who performed work in New Hampshire and Rhode Island for commercial and residential customers. Lavigne could not recall when ADLA performed its last demolition or construction job, (T 290) but DelFarno testified that ADLA performed its last construction job in about the fall of 2008. (T 95) It is undisputed that ADLA has not performed any construction work in 2009. (T 303)⁹

ADLA’s revenue is now generated by the transportation of construction materials for Capco and Concrete Systems. (T 96, 217) In the fall of 2008, DelFarno was offered the opportunity to purchase six trucks from Financial Federal Credit, which had foreclosed on the truck loans. (T 237) DelFarno could not afford to buy the trucks. (T 147) His workers’ compensation, cargo, and vehicle liability insurance rates had skyrocketed (T 144); he was behind on the rent at 99 Jefferson Blvd. (T 146); and he could not afford to fix the trucks he had (T 144). He knew ADLA could obtain insurance at lower rates, and discussed with Lavigne the possibility of ADLA purchasing the trucks

⁹ Lavigne did not even know the whereabouts of her construction equipment, testifying that they are still at 99 Jefferson Boulevard, which ADF/ADLA has not occupied since March 2009. (T 310)

and operating them under ADLA's name and insurance. (T 237, 298) Lavigne financed the trucks through Financial Federal, paying \$385,000 for six white Freightliners. (T 299, GC 10 and 11) DelFarno, a part owner of ADLA (T 95, 283), signed as buyer on the bills of sale for the trucks. (GC 10 and 11)¹⁰

In about October 2008,¹¹ at the direction of ADF dispatcher John Renzi, ADF drivers Javier Lopez and Dan LaChappelle picked up the six white trucks in New Jersey and drove them to ADF's facility at 99 Jefferson Boulevard. (T 244-45) There, they were repaired and made roadworthy by ADF's mechanics. (T 245) There is no evidence indicating that ADLA compensated ADF for the drivers' or mechanics' time, despite repeated requests for such records.¹²

By mid-December 2008, the first of the white trucks was ready for the road, and was assigned to driver Brian Priest. (T 246-47)¹³ Union Business Agent Labrie testified that, on December 12, 2008, he saw Priest driving a white ADLA truck on Route 295 in Cranston, RI. He contacted Dennis Barr, a more senior driver, to verify that Barr had been out of work since December 9. (T 58) Shortly thereafter, a second white truck was ready. It was assigned to John Donovan, a newly hired driver,¹⁴ while Barr was still on

¹⁰ When shown the bills of sale at the hearing, Lavigne testified that she had never seen them before. (T 297)

¹¹ Lopez testified that this occurred in the late summer. (T 245) However, the trucks appear to have been purchased and delivered in about October 2008. (GC 10 and 11)

¹² In spite of the uncontradicted evidence that Lopez and LaChappelle picked up the trucks for ADLA and drove them to RI, that ADF's mechanics worked on the trucks, and that Renzi dispatched them, DelFarno stated in his affidavit that "ADF employees do not perform any office work or business work for ADLA." (T 219)

¹³ The white trucks were registered on December 10, 2008. (T 333)

¹⁴ Despite DelFarno's affidavit testimony that he was not involved in the hiring of ADLA's drivers (T 175 and 176, quoting affidavit), he admitted at the hearing that he had hired Priest, LaChappelle, and Donovan to work for ADLA. (T 126, 174)

layoff. (T 248) Although it is not clear who paid Donovan and Priest for the week ending December 6 (GC 15c), they were both on ADLA's payroll beginning the week ending December 13. (GC 15d) Regardless of which trucks they were driving, drivers all punched the same time clock, reported to Louis Volante, and were dispatched by John Renzi. (T 20, 248) Additionally, they all performed the same work for the same customers: Capco, Concrete Systems, and Cardi Corp. (T 21, 217) The transition to ADLA was so seamless that employees did not even know that they were working for a different company. (T 264) Except for the color of the trucks and the lettering on them, which now said ADLA, there was nothing to alert drivers that they were now working for a different company.

Until about March 2009, ADLA had an office above ADF's at 99 Jefferson Boulevard, in the space ADF leased from Mountindale Realty. (T 91-92)¹⁵ Lavigne testified that she also worked out of her home in New Hampshire, and out of an office at 75 Independence Way, Cranston, RI, where she shares an apartment with DelFarno. DelFarno testified that the office at 99 Jefferson was used only for storing ADLA's construction equipment, and went so far as to state that no business was conducted out of that space. (T 232, 339) Nevertheless, Lavigne testified that the office out of which ADLA operated contained a desk and a phone, provided by DelFarno and ADF. (T 302)¹⁶ After ADF closed its doors, ADLA operated out of the Jefferson Boulevard

¹⁵ This contradicts DelFarno's affidavit testimony, in which he stated that "ADLA does not conduct any business out of our offices or out of our garage." (T 219, quoting affidavit)

¹⁶ ADF and ADLA shared a single telephone number at the Jefferson Boulevard facility. (T 136) Moreover, when answering questions about how the phone was answered at 99 Jefferson Boulevard, DelFarno stated that it depended on who was answering. If Lavigne answered the phone, according to DelFarno, she would answer it "ADLA." (T 136-37) Clearly, some ADLA business was conducted out of that office.

facility. DeFarno admitted that ADLA did not compensate ADF for the use of the space, adding that Dennis Barr and other employees stored vehicles at that facility without being charged for it. (T 135, 231, 302)

In about February 2009, after ADF had purportedly ceased to operate, the entire operation was moved to Pine Street in Pawtucket, Rhode Island, where ADLA currently operates out of a construction trailer on property owned by Capco. (T 347) ADF had been evicted from the Jefferson Boulevard facility for non-payment of rent, but did not actually vacate the premises until about March 30, 2009, the date agreed upon by stipulation of the parties on March 23, 2009. (R 1, T 270) Although he knew by March 23 that he had to vacate by March 30, DeFarno claimed he did not have the time or space to move his business records out, and asserted that they were subsequently destroyed or discarded by the landlord. (T 271-272)

As noted above, DeFarno describes himself as a part owner, with Lavigne, of ADLA.¹⁷ On ADLA's 2009 filing with the RI Secretary of State's office, DeFarno is listed as a member of the limited liability company, and its primary contact person. Lavigne's name does not even appear on the annual report, which was filed and signed by DeFarno. (GC 13) DeFarno signs checks on ADLA's behalf, maintains the company accounts (T 101), and signed for the six white trucks (GC 10 and 11). Nevertheless, in the affidavit he gave during the investigation of this charge, DeFarno testified: "I am not

¹⁷ In his Exceptions, DeFarno asserted that his ownership interest in ADLA increased in December 2008. (RE p. 1, para. 4) However, there is nothing in the record to support this statement.

an owner of ADLA.... I do not have any ownership interest in ADLA. ADF has no ownership interest in ADLA.”(T 218, quoting affidavit)¹⁸

DelFarno is the face of ADLA to its employees and customers. As noted above, some employees have never even met Lavigne, who is ostensibly their boss. (T. 19 and 253) Lavigne could not name any of her employees or customers, or identify how many customers ADLA has. (T 302-303, 305) She does not know that John Renzi is ADLA's dispatcher (T 305-06), does not get involved in day-to-day operations (T 306), does not know what kinds of trucking-related equipment ADLA owns (T 309), and does not deal with customers (T 307). In short, other than her initial investment in the trucks, and the occasional signature required, she has had no role in the operation of ADLA.

Lavigne described her company as a non-union company (T 308), and it is undisputed that ADLA has not applied the collective-bargaining agreement to its employees. In this regard, ADLA has not made payments into the Union's funds,¹⁹ has not followed the contract's seniority provision, and has not paid drivers a contractually-required wage increase in 2009. (T. 14) DelFarno testified that there was no intention on either his part or Lavigne's to get out from under his union contract. (T 345) Nevertheless, the ALJ correctly concluded that DelFarno, in transferring the trucking operation from ADF to ADLA, was motivated in part by a desire to avoid his obligations under the collective-bargaining agreement with the Union. (ALJD 4: 20-25) In

¹⁸ DelFarno tried to explain this discrepancy by distinguishing between a corporation and an LLC, which technically has no “owners.” On direct examination at the hearing, however, he readily characterized himself as a part-owner of ADLA.

¹⁹ No pension contributions have been made for ADF's employees since at least December 2007. No Health and Welfare payments have been made since about July 2008. (T 52-54) When the Union organized a one-day strike against ADF for non-payment of fringe benefits, DelFarno made a payment with checks that eventually bounced. (T 56)

particular, the Judge noted DelFarno's admission that he could not afford a union contract. (T 230)

C. Javier Lopez

Lopez drove for ADF for about 17 years, and for DelFarno's father before that. (T 241-42) The most senior driver at ADF, he was also the shop steward. Lopez' last day of work for ADF/ADA was March 2, 2009. (T 242) He left because he was not being paid for work he had performed.

Until about February 11, 2009, when he was assigned a white ADLA truck, Lopez drove one of ADF's black trucks. (T 248-49, 253, 254) Lopez testified that his ADF pay checks bounced almost every week, and that he was worried about the company and his job. His last pay check, drawn on an ADF account on February 2, 2009, was returned by the bank for insufficient funds. (T 250; GC 17) On February 22, DelFarno replaced it with an ADLA check, which also bounced.²⁰ Lopez has never received that money.²¹ (T 252)

In March 2009, frustrated that he was not being paid for his work, Lopez left his job. Lopez informed DelFarno that he would not work until he was paid, and DelFarno seemed to understand.²² (T 255) When Lopez indicated that he was going to report the

²⁰ The second check is for a higher amount because it included vacation pay. (T 251; GC 17 and 18) DelFarno made a notation on the check that it was a loan to ADF.

²¹ DelFarno insists that he eventually paid Lopez in cash for the bounced pay checks. (T 258) Lopez, however, testified credibly that he never received cash from DelFarno to replace the February 22 ADLA check. In support of this testimony, Lopez described the normal procedure DelFarno used to replace bounced checks with cash: when a check bounced, DelFarno took it back from the employee and replaced it with cash. In the case of the ADLA check, Lopez still has the original returned check in his possession. (T 252) Lopez did receive an ADLA check for about \$510 in about early March.

²² By his questioning of Lopez on cross-examination (T 261-62), DelFarno intimated that Lopez quit because he was told to do so by the Union. Lopez vigorously and consistently denied that the Union played a role in his decision to stop working in March 2009 until he was paid. DelFarno testified that employees

matter to the Labor Board, however, DeFarno became angry. (T 255) Lopez currently has a claim pending for unpaid wages before the RI Labor Standards Division.²³

D. Dennis Barr²⁴

Dennis Barr drove for ADF for about eight years and was third on the ADF seniority list. In about late November 2008, when his truck was down for repairs, he drove Javier Lopez' truck for a period of about 3-4 weeks. On December 9, his last day of work, dispatcher John Renzi told him that the truck Lopez was driving had broken down, and that there would be no work for Barr the next day. (T 28-29) Renzi did not say how long Barr would be out of work. (T 30)

Barr testified that this was not an unusual occurrence, as trucks frequently break down, and there is less work in the winter months. (T 30) However, after about two weeks, Barr wondered why he was not being recalled, and went to see DeFarno in his office at 99 Jefferson Boulevard. DeFarno reported that there was not much work, that business conditions were poor, and that he was considering selling some trucks. After some discussion, they mutually agreed that Barr would be laid off. (T 31, 39) There was no discussion of Barr's driving record or performance issues. Nor did DeFarno indicate that the layoff would be permanent. (T 31-32) Barr filed for and began receiving unemployment benefits.²⁵

have been threatened by the Union (T 235), but produced no witnesses to corroborate this hearsay statement.

²³ Although the General Counsel initially sought Lopez' reinstatement as part of the remedy in this case, no exception is being taken to the ALJ's decision not to order Lopez' reinstatement.

²⁴ Mr. Barr died unexpectedly in about early October.

²⁵ Barr testified that he had not filed for benefits during his initial two-week layoff, assuming he would be returning to work shortly. (T 34)

On January 5, 2009, Barr filed a grievance over his layoff, complaining that he was out of work while the less senior Brian Priest was working. (GC 2) Two days later, DelFarno terminated Barr's employment. (GC 3) In the termination letter, DelFarno asserted that Barr's employment had been terminated when the two met in DelFarno's office. The letter went on to describe an incident involving Barr that occurred in June 2008, and stated that Barr's "separation with ADF [was being changed] from a layoff to a termination for gross insubordination." (GC 3) Although DelFarno had spoken with Barr at the time of the incident, he had not disciplined him. The January 5 letter was the first time Barr was hearing that he was being terminated for cause. (T 37-38)

Despite being the third senior driver, Barr has not worked since December 9, 2008. Coincidentally, this was the day before ADLA's trucks were registered, and the same week Brian Priest started working for ADLA. Thus, although DelFarno explained that he did not have work for Barr, he put Priest and John Donovan in ADLA trucks, where they worked full-time making deliveries for ADLA.

III. CREDIBILITY

Judge Amchan correctly concluded that neither DelFarno nor Lavigne was a credible witness. In particular, he found DelFarno's shifting testimony to be self-serving and unreliable, and Lavigne's to be evasive and non-responsive. Additionally, the ALJ properly drew adverse inferences from Respondents' failure to comply with the subpoenas duces tecum served on them.²⁶

The record is replete with examples of DelFarno's lack of trustworthiness. For example, DelFarno admitted during the hearing that he had conducted the hiring for

²⁶ Judge Amchan also noted that Lavigne failed to comply with the General Counsel's subpoena to appear and give testimony, finally appearing under his direct order on the third day of trial.

ADLA, despite the flat denials in his affidavit. In his earlier sworn testimony, DelFarno stated, “I was not involved in hiring [Brian] Priest to work for ADLA,” but acknowledged at trial that he had, in fact, hired Priest. (T 173-174) Similarly, DelFarno stated in his affidavit, “I had nothing to do with [John] Donovan’s hiring,” while admitting at trial that he had hired Donovan. (T 175-176) These are not nuanced issues or answers; they are flat contradictions, calculated to obscure the truth and paint DelFarno and his companies in the best possible light.

In a similarly calculated statement, DelFarno testified in his affidavit, “I am not an owner of ADLA.... I do not have any ownership interest in ADLA.” (T 218) Likewise, in his response to the investigative subpoena, DelFarno wrote that Lavigne was the sole owner of ADLA. (GC 23) In his Answer to the Complaint, however, DelFarno admitted that he owned 45 percent of ADLA (GC 11), a fact both he and Lavigne confirmed during the trial. (T 95, 283) The Judge correctly perceived DelFarno as someone who will swear to whatever he believes is in his best interest at the time, with no regard for the truth.

DelFarno’s attempts to evade questions with unresponsive testimony further evidence his lack of trustworthiness. The following exchange is illustrative:

- Q: Now, I believe you testified last month that you also were the person who hired John Donovan to work for ADLA?
- A: Well, again, you’re talking drivers like Brian Priest I’ve known for 25 years.
- Q: That was actually a question about John Donovan. That was a yes or no question.
- A: John Donovan, I’ve known him for over 20 years.
- Q: And you hired him ADLA; is that correct?
- A: Again when we were talking, they talked to myself, they talked to the other drivers, they probably talked to Louis who they know so yes, at the end of the day it’s my decision as a principle [sic] in the company who I want to work or not.

(T 175-176) This was not a difficult question. It called for a yes or no answer.

Nevertheless, as he often did, DelFarno attempted to obfuscate the truth with a muddled response intended to distract. Such intentionally evasive answers to straightforward questions underscore the unreliability of DelFarno's testimony.

Finally, the record as a whole demonstrates that DelFarno cannot be trusted because he constantly makes excuses that are simply not credible. For example, when faced with evidence that Louis Volante has, in fact, worked since February 2008, DelFarno insisted that the payroll records were wrong, and that the checks had been voided. (T 99) Similarly, when faced with documentary evidence that Brian Priest worked full-time, as he had testified, DelFarno stated that the payroll records were not an accurate reflection of drivers' time, and that Priest must be mistaken.

DelFarno's explanations for his failure to produce subpoenaed documents provide perhaps the clearest example of his unreliability. As described above, DelFarno testified that he could not produce certain documents because his computer crashed, because they were left behind at Jefferson Boulevard and destroyed by the landlord, because his attorney had the documents, and because he had sent the originals to the investigator in the Regional Office. Individually, these excuses are incredible. Taken together, they paint a picture of a witness who fabricates stories, excuses, and misstatements in order to get himself off the hook. The ALJ properly discredited his self-serving testimony.

Confused and unresponsive, Lavigne is no more reliable than DelFarno. The following exchange, regarding repayment of a purported loan made to ADF, is a good example of her testimony:

Q: Okay. Are there any documents that you have provided showing repayment of that loan?
A: I don't recall. It could – I could –
MR. DELFARNO: She already answered about the document, Your Honor. That she doesn't recall. So it's kind of all part in the same.
JUDGE AMCHAN: Well she's asked specifically whether they're –
THE WITNESS: Your honor –
MR. DELFARNO: Whether she specifically knows of the accounting –
JUDGE AMCHAN: Right. Are there any documents show that the loan was repaid by ADF to her?
THE WITNESS: I just don't think that all this is fair, because I had a nervous breakdown the other week and ended up in the hospital. I had a nervous breakdown for five days. That's why I'm trying to do the best that I can.

(T 328) Lavigne's testimony was laced with emotion, gratuitous remarks, and irrelevant comments like the one quoted above. The Judge was right to discredit it.

IV. ADVERSE INFERENCES

On June 25, 2009, ADF and ADLA were served with subpoenas duces tecum, directing them to produce certain documents related to the allegations in the Complaint.²⁷

On the first day of hearing, DelFarno appeared without a single document. (T 6)

Subsequently, on July 14, 2009, Judge Amchan issued a Notice of Resumption of Hearing and Order Regarding Compliance with Subpoena, in which he directed Respondents to produce "all documents requested by the General Counsel's subpoena no later than July 31, 2009."

On July 21, 2009, DelFarno produced a small number of documents, along with a cover letter.²⁸ In his letter, DelFarno stated that "almost all" of the requested documents had been produced during the investigation of the underlying charge. The documents

²⁷ The subpoena served on ADLA was received into evidence as GC 19. The subpoena served on ADF is not in the record, but was attached to the General Counsel's Notice of Intent to Amend Complaint and Motion for Adverse Inferences. The two subpoena attachments are substantially identical and will be referred to collectively as "the subpoenas."

²⁸ The documents produced, in their entirety, are attached to the General Counsel's Motion for Adverse Inferences. The cover letter is in the record as GC 21.

purportedly produced during the investigation were not included. During DeFarno's testimony over two days, he repeatedly acknowledged that he had not produced certain documents, but, as noted above, offered the following shifting excuses for the failure to produce them: that all his business records were left at 99 Jefferson Boulevard when ADF was locked out in March 2009 (T 166); that his computer had crashed (T 134, GC 22); that he did not have copies of canceled checks; that he had sent the originals to the investigator (T 186); that he had given the records to his divorce lawyer (T 351); and that the payroll company has not provided documents as he requested (T 167). He also testified that he had sent most of the requested documents to the Boston Regional Office during the investigation of this charge, claiming that he had sent up "a box of documents." (T 352)

In the July 21 submission of documents, DeFarno produced copies of his March 14 and March 25 replies to investigative subpoenas, copies of affidavits given during the investigation, and a small number of responsive documents that had already been produced during the investigation.²⁹

Among the critical documents requested but not produced were loan documents between or among, ADF, ADLA, and DeFarno; checks and check registers showing payments made between and among the parties; documents showing the lease or sale of vehicles and equipment between and among the parties; documents identifying subcontractors and customers of ADF and ADLA; payroll records; and assorted other documents.³⁰

²⁹ The entire submission is contained in GC 22 and 23.

³⁰ A complete list is contained in GC 19.

DelFarno testified that the payroll records produced by Paychex are not a reliable indicator of employee hours or wages. (T 181-83) Instead, he said, the most reliable source of that information would be driver log books and time sheets. (T 183, 185) Although DelFarno insisted that he had produced driver time sheets, he was forced to acknowledge that there were no time sheets in the pile of documents he did produce. (T 189) Nor did he produce any evidence of cash payments made to employees in lieu of pay checks. (T 190)

Although DelFarno produced a few invoices from ADF to ADLA and vice versa, he failed to produce any evidence that those invoices were ever paid. Instead, he testified that he keeps a ledger of payments accrued and owing between the two companies. However, he failed to produce that as well.

In view of the nearly total disregard for the government's subpoena, the General Counsel filed a Motion for Adverse Inferences, requesting that certain adverse inferences be drawn against ADF and ADLA. The ALJ properly drew adverse inferences as requested.

The Board has repeatedly held that, where a party fails to produce documents pursuant to a valid subpoena, an inference should be drawn that, if produced, the subpoenaed documents would be unfavorable to the party that failed to comply. *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994). As will be described in detail below, ADF and ADLA produced almost none of the documents requested in the subpoenas. Many of those documents were critical to the General Counsel's burden of proving that ADLA is an alter ego of ADF, with the same customers and supervision; and that ADF and ADLA failed to maintain an arm's-length

relationship. In addition, the Board has held that a party failing to produce subpoenaed documents should be precluded from offering testimony or other evidence regarding matters related to those documents, and that the General Counsel should be permitted to offer secondary evidence on those matters. *Perdue Farms*, 323 NLRB 345, 348, affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998); *Bannon Mills, Inc.*, 146 NLRB 611, 633-634 (1964). In view of Respondents' near-total failure to comply with the subpoenas, Judge Amchan correctly disregarded the testimony offered on matters best demonstrated with documentary evidence.

V. ARGUMENT

A. The ALJ correctly concluded that ADF and ADLA are alter egos of each other, with substantially identical ownership, business purposes, operations, equipment, and supervision.

The Judge properly held that ADLA, as an alter ego of ADF, violated Section 8(a)(5) and (1) by repudiating and failing to comply with its collective-bargaining agreement with the Union. In reaching that decision, Judge Amchan concluded that the General Counsel had satisfied the burden, established in *Advance Electric*,³¹ of showing that the two companies have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.

Judge Amchan noted that, although the two companies do not have identical ownership, the Board readily finds alter ego status when the owners are in a close familial relationship. *Fallon-Williams, Inc.*³² Although the Board has never inferred alter ego

³¹ 268 NLRB 1001, 1002 (1984)

³² 336 NLRB 602, 602 (2001)

status in “the context of unmarried cohabitating couples,”³³ Judge Amchan distinguished *US Reinforcing*. In particular, he observed that DelFarno, unlike the owner in *US Reinforcing*, is a part owner of ADLA; and that Lavigne, unlike the owner of the alleged alter ego in *US Reinforcing*, has absolutely no management role in ADLA.³⁴

Judge Amchan further concluded that, “ADF, in the person of Anthony DelFarno, has maintained complete control over the trucking business of ADLA.” (ALJD 4:14-15) The Judge noted that this has sometimes been called “the crucial factor” in determining alter ego status, as set forth in *McAllister Bros.*³⁵ In this regard, DelFarno signs ADLA’s annual filings as its contact person, maintains ADLA’s bank accounts, signed for ADLA’s major asset, and represented both companies in these proceedings. In short, he makes all the significant decisions for ADLA, manages all its business dealings, and is the primary steward of ADLA and its assets. Lisa Lavigne, ADLA’s majority owner, is little more than an investor in the business. Lavigne admitted that she knew little or nothing about the trucking business when she purchased the white trucks in October 2008. After her initial financing of the trucks, Lavigne has left all decision-making to DelFarno, and has no contact with the company, its customers, or its employees.

Judge Amchan also concluded that, since late 2008 or early 2009, ADLA has had the same business purpose as ADF, as well as the same customers. Although ADLA

³³ *US Reinforcing, Inc.*, 350 NLRB 404, 406 (2007)

³⁴ It should also be noted that DelFarno and Lavigne, although unmarried, are raising their son together, and that they cannot legally marry because DelFarno was still married to his estranged wife at the time of the hearing. Thus, the case at hand is further distinguishable from *US Reinforcing*, in which the Board reasoned that the relationship did not warrant the application of the inference because the owners of the two alleged alter ego companies had “not taken the step of entering into the legal arrangement of a marriage, with the familial connection and attendant presumption of commonality of finances that such a legal arrangement may imply.” *Id.* at 406. The Board in *US Reinforcing* specifically declined to state that an unmarried, cohabiting couple could *never* support an inference of common ownership and control. *Id.* (emphasis added)

³⁵ 278 NLRB 601, 616 (1986)

began as a construction demolition company, it has not performed any construction work in 2009. ADF and ADLA operated out of the same facility on Jefferson Boulevard in Warwick, RI until their eviction in March 2009. Capco Steel, Concrete Systems, and Cardi Corp. accounted for the lion's share of ADF's business, and are ADLA's primary customers as well. In fact, there is no evidence suggesting that ADLA has performed work for any customers who were not customers of ADF.

The Judge correctly observed that, from the drivers' standpoint, little changed when ADLA became their employer. They continued to perform the same work out of the same facility for the same customers. The only difference was that they lost many of the contractual benefits they had enjoyed as ADF employees.

The final factor in the Board's analytical framework is the presence or absence of evidence showing a motive to evade contractual obligations or the requirements of the Act. The Board frequently notes that such evidence of motive is "a relevant consideration, but such an intent is not requisite to an alter ego finding." *D. L. Baker, Inc.*, 351 NLRB 515, 520 (2007). Nevertheless, Judge Amchan found such a motive here. ADLA was transformed into a trucking company specifically to take on ADF's customers and work. Although DeFarno testified that he and Lavigne were not motivated by a desire to avoid obligations under the collective-bargaining agreement, DeFarno also testified that he could not afford a union contract. (T. 230) The Judge correctly observed that, in addition to other motivating factors, the decision to transfer the trucking operation from ADF to ADLA was motivated by a desire to avoid the obligations of his collective bargaining agreement with the Union. (ALJD 4:20-25)

B. The absence of an arm’s-length relationship between ADF and ADLA, and between DelFarno and the two companies, supports a finding that the companies are alter egos of each other.

Even more significant than their sharing of office space, equipment, and the like is the fact that the two companies shared funds, as did DelFarno and the two corporations. For example, when Javier Lopez’ pay check bounced in February 2009, DelFarno replaced it with an ADLA check. Although the notation on the check reads “loan to ADF,” as described in detail above, there are no ledgers or other documents showing this “loan” was ever repaid. Such a failure to operate at arm’s-length – by transferring or diverting funds without documentation of the terms of the loans, without the assessment of any interest, and without any effort to repay the “loans” – supports a finding that ADF and ADLA are alter egos. *SRC Painting, LLC*, 346 NLRB 707 (2006); *Vallery Electric, Inc.*, 336 NLRB 1272, 1275 (2001). Likewise, there is nothing to show that ADF was ever compensated for bringing the white trucks to Rhode Island, or making them roadworthy. Nor has DelFarno shown that ADF was compensated for the services of his dispatcher, who dispatched for both companies in late 2008. Instead, it appears that the two companies operated as one from October 2008 until ADF closed its doors, when ADLA became indistinguishable from its predecessor. These failures to observe corporate formalities further support the alter ego finding. *SRC Painting, LLC*, above at 721.

Moreover, the absence of any documentary evidence of the lease of vehicles by one company to the other, or between DelFarno and the companies, is indicative of a lack of arm’s-length relationship both between the corporations, and between DelFarno and the Respondent companies, further supporting a finding of alter ego status. In this regard,

there are no lease documents showing the terms of the arrangement between DeIFarno and ADLA for the use of his black Kenworth, and nothing to show that DeIFarno is being compensated for its use. Similarly, the absence of any lease documents setting forth the terms of the use of office space at 99 Jefferson Boulevard reinforces the lack of an arm's-length relationship. These factors bolster the General Counsel's contention that ADF and ADLA are alter egos of one another. See *SRC Painting, LLC*, above at 721.

C. **As an alter ego of ADF, ADLA is obligated to apply to its employees the terms of ADF's collective-bargaining agreement with the Union, including the contract's seniority provision, its wage scale, and its fringe benefits.**

Judge Amchan properly concluded that ADLA, as an alter ego of ADF, is bound by the terms of the collective-bargaining agreement with the Union. *Cadillac Asphalt Paving, Co.*, 349 NLRB 6, 7 (2007).

ADLA considers itself a non-union company, and has not applied the collective-bargaining agreement to its employees. First, ADLA has refused to follow the contractual wage scale by failing to give its drivers the negotiated wage increase beginning April 15, 2009. Second, ADLA has failed to make fringe benefits payments for its drivers as required by the contract. These changes in terms of employment, as well as any presently unknown to the General Counsel, must be rescinded, the contract applied, and employees and the Union made whole for their losses.

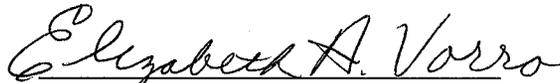
Finally, ADLA failed to follow the contract by laying off Dennis Barr in violation of the seniority clause. When he was laid off in about December 2008, Barr was third in seniority. He was not recalled for work even though ADF and ADLA had work for less senior drivers, including Priest and Donovan. As Judge Amchan found, Barr's estate

should be made whole for any losses incurred as a result of ADLA's failure to abide by the contract.

VI. CONCLUSION AND REMEDY

The General Counsel has established, by a preponderance of the evidence, that Respondents ADF and ADLA are alter egos, and that they have been violating Section 8(a)(5) and (1) of the Act by repudiating and failing to comply with their collective-bargaining agreement with the Union. Therefore, General Counsel urges the Board reject Respondents' exceptions and instead adopt the Judge's findings of fact and conclusions of law as described herein, and to adopt the recommended order.³⁶

Respectfully submitted,



Elizabeth A. Vorro
Counsel for the General Counsel
National Labor Relations Board
First Region
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

Dated at Boston, Massachusetts
this 18th day of December, 2009.

³⁶ In General Counsel's separate cross-exceptions and brief in support of cross-exceptions, General Counsel argues for further expansion of the order to include individual liability of Anthony DelFarno and compound quarterly interest for the monetary remedy.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of

ADF, INC. AND ITS ALTER EGO ADLA

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 251

CASE 1-CA-45068
JD-59-09

DATE OF MAILING December 18, 2009

AFFIDAVIT OF SERVICE OF copy of General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge, General Counsel's Brief in Support of the Limited Cross-Exceptions to the Decision of the Administrative Law Judge, AND General Counsel's Answer Brief to Respondents' Exceptions to the Administrative Law Judge's Decision

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

Anthony Delfarno, President ADF, Inc. and its alter ego ADLA, LLC 99 Jefferson Boulevard Warwick, RI 02888	Ryan C. Hurley, Esq. Gursky Law Associates 420 Scrabbletown Road, Suite C North Kingstown, RI 02852
Ms. Lisa Lavigne ADLA, LLC 99 Jefferson Boulevard Warwick, RI 02888 Ms. Lisa Lavigne 75 Independence Way Building 40, Apt. 114 Cranston, RI 02021	

/s/ Mary H. Harrington

Subscribed and sworn to before me this 18th day of December,
2009

DESIGNATED AGENT

Michelle Cassata
NATIONAL LABOR RELATIONS BOARD