

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

PESSOA CONSTRUCTION COMPANY

and

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA

Cases 5-CA-34547
5-CA-34761
5-CA-35083

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This Case¹ involves hallmark violations of the National Labor Relations Act, Sections 8(a)(3), 8(a)(1), and 8(a)(5)—the discharge of an employee who spoke out against the company at a union meeting, creating the impression that employees' activities at a union meeting were under surveillance, and a unilateral change. The Laborers' International Union of North America² began organizing the employees of Pessoa Construction Company³ in the summer of 2008.⁴ The efforts culminated in an election on July 14 and the Union's certification on July 28.

During the union organizing campaign, one of Respondent's employees, William Membrino, began to ask why Respondent did not pay employees for commute time in travelling between Respondent's office and the jobsite. He further asked to be returned to a salary, which would have increased his wage rate. At first, Membrino presented his requests to Respondent's owner. Not satisfied with the responses he received, Membrino then decided to voice his complaints at a union meeting on September 30th. He attended the meeting and spoke out about how Respondent did not pay for the commute time and told him he could not receive a wage raise because of the Union.

Respondent's owner gradually became aware that Membrino had voiced his concerns at the union meeting. First, the day after the union meeting, another employee

¹ Three unfair labor practice charges were consolidated in this Case: 5-CA-34547, 5-CA-34761, and 5-CA-35083. The issues presented to the Board by Respondent's exceptions address only the unfair labor practice charge in Case 5-CA-34761, which concern the Section 8(a)(3) allegations involving William Membrino, the Section 8(a)(1) allegation of surveillance, and the Section 8(a)(5) allegation of unilateral change. (GC-1-D). The Judge dismissed the single Section 8(a)(1) allegation from Case 5-CA-34547 and the Section 8(a)(5) bad-faith bargaining allegations from Case 5-CA-35083. No exceptions were filed concerning those dismissals.

² Herein referred to as the Union.

³ Herein referred to as Respondent and/or the company.

⁴ Unless otherwise noted, all dates herein are in 2008.

told Respondent's owner that Membrino had been present at the meeting. Next, two days after the meeting, a Union agent sent an email to Respondent's attorney identifying the nature of the complaints made against the company at the union meeting. The Union agent urged the attorney to share the information with his client. Finally, on October 13, the owner confronted Membrino during a conversation and told him he had heard that someone had requested travel time and a pay raise at the union meeting. Membrino admitted that he had done so.

Immediately, Respondent's owner retaliated against Membrino. He unilaterally changed company policy so that at least some employees, including Membrino, could no longer drive company vehicles from the company's office to the jobsite. Ten days later, on October 23rd, he discharged Membrino, telling him his head was not with the company.

Administrative Law Judge Arthur J. Amchan held that Respondent violated: (1) Section 8(a)(3) of the Act by changing the company policy concerning the use of company vehicles in retaliation for Membrino's complaints and by discharging William Membrino because of his union activities; (2) Section 8(a)(1) by creating an impression that employees' union activities were under surveillance; and (3) Section 8(a)(5) of the Act by making unilateral changes in the terms and conditions of employment of bargaining unit employees. (ALJD-4, 6-7, and 12).⁵ Respondent takes exception to each of these findings of a violation.

As a preliminary matter, Respondent argues that the Judge should have dismissed the allegations in the Complaint because the unfair labor practice charges were not timely

⁵ Citations to the record are as follows: "Tr" followed by a number denotes specific pages in the transcript; "GC" followed by a number for General Counsel's Exhibits; "R" followed by a number for Respondent's Exhibits; "R Exceptions Brief" followed by a page number for Brief in Support of Exceptions of Respondent Pessoa Construction Company; and "ALJD" followed by a page number and, in some cases, a line number ("ln.") for the Judge's Decision.

served. (R Exceptions Brief at 49-50). However, the record shows that the first two charges, for Case 5-CA-34547 and 5-CA-34761, were properly served on Respondent by regular mail. The third charge, 5-CA-35083, which contained allegations dismissed on the merits by the Judge and to which no exceptions have been filed, was served on Respondent's counsel by email. All of the charges were served within the Section 10(b) period.

With regard to the Section 8(a)(3) violation, Respondent argues that it discharged Membrino for a legitimate non-discriminatory reason. It points to an accident that took place on October 23rd involving Membrino's dump truck and a gradall. Respondent argues that Membrino "recklessly" caused the accident by parking his dump truck in a place where it would be hit by the gradall. (R Exceptions Brief at 23). The accident, however, was caused entirely by the operator of the gradall, who backed into Membrino's dump truck. The Judge concluded that Respondent's asserted reasons for the discharge were pretextual and that Respondent had, in fact, discharged Membrino because of his union activities. (ALJD-12, In. 27-36). In support of this conclusion, the Judge noted, and the evidence shows, that Respondent did not treat Membrino in the same manner as it had treated other employees who were involved in accidents with company property. *Id.* The most glaring examples include the operator of the gradall involved in the accident with Membrino, who received no discipline and continues to work for the company, and another dump truck driver, who, despite being at fault in several accidents, was not terminated but only required to reimburse Respondent for the cost of the damage. Both the operator of the gradall and the other dump truck driver exhibited no union activity, whereas Respondent's owner was keenly aware, on October 23rd, that Membrino had voiced his complaints about the company at a union meeting. In addition, the Judge found that Respondent relied on a policy to terminate Memberino when it had never communicated that policy to him and that

Respondent terminated Membrino without providing him with an opportunity to explain his conduct. (ALJD-12, ln. 33-36).

With respect to the Section 8(a)(5) violation, Respondent asserts that it was privileged to make a unilateral change concerning employee's use of company vehicles because the change was consistent with Respondent's past practice. (R Exceptions Brief at 46-49).

Finally, Respondent refutes the Judge's finding that Julio Pessoa created an impression that employees' union activities were under surveillance. (R Exceptions Brief at 34-35). It contends Pessoa did not specifically indicate his knowledge concerning the extent of Membrino's union activities, but merely told Membrino that he heard someone at the union meeting had requested additional pay.

After setting forth the issues presented and the facts of the Case, the legal analysis that follows will show that the Judge correctly concluded that Respondent violated Sections 8(a)(3), 8(a)(1) and 8(a)(5) of the Act.

II. ISSUES PRESENTED BY RESPONDENT'S EXCEPTIONS

1. Was the Judge correct in dismissing Respondent's arguments and finding that the unfair labor practice charges had been properly served on Respondent?
2. Was the Judge correct in holding that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by implementing a new policy regarding the use of company vehicles in response to William Membrino's complaints and by discharging William Membrino on October 23, 2008 because of his union activities?
3. Was the Judge correct in holding that Respondent violated Section 8(a)(5) of the Act by unilaterally implementing a new policy regarding the use of company vehicles?
4. Was the Judge correct in holding that Respondent violated Section 8(a)(1) of the

Act by creating an impression among its employees that their union activities were under surveillance on October 13, 2008, when Julio Pessoa told William Membrino he heard someone at the union meeting was requesting to be paid for travel time and a pay raise.

III. STATEMENT OF FACTS

Pessoa Construction Company, incorporated in Maryland and owned by Julio Pessoa, is a highway construction contractor with a main office in Fairmount Heights, Maryland.⁶ (ALJD-2). It performs highway construction on state, county, and federal public works projects in Maryland, Virginia, and Washington, D.C.⁷ (Tr. 22, 24, 49-50). In performing this work, the company uses gradalls, a type of hydraulic excavator, and dump trucks. The 8(a)(3) discriminatee, William Membrino, was employed by Respondent as a truck driver. Respondent contends Membrino was terminated because of an accident involving a dump truck and a gradall.

In the autumn of 2008, Respondent performed road widening at the intersection of Route 4/2, also known as Solomons Island Road, and Route 231, in Prince Frederick, Calvert County, Maryland.⁸ The State of Maryland contracted Respondent to perform the work, which began sometime in August of 2007 and ended in July of 2009. (Tr. 67, 1476, GC-96(a)). Scott Taylor was the project manager and Abilio Machado was the superintendent at the Route 231 jobsite. (Tr. 68). Keith Reeder also worked as a superintendent at the Route 231 jobsite.

⁶ The Judge found that Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (ALJD-2).

⁷ The company also performs private sector projects, but much less frequently. (Tr. 1763-1764).

⁸ The jobsite is herein referred to as the "Route 231 jobsite."

William Membrino began working for Respondent in 2003 as a CDL⁹ truck driver. He quit working for the company, to accept other employment, in 2006, and later returned to work for Respondent in June of 2007. (Tr. 324). Throughout his employment at Respondent, Membrino's job duties as a CDL driver included operating dump trucks, fuel trucks, water trucks, roll-off trucks, and boom trucks. (Tr. 325, 327). Respondent rehired Membrino in June of 2007 at a salary of one thousand dollars a week.¹⁰ (ALJD-3; Tr. 326).

In January of 2008, Respondent changed its pay structure from salaried to hourly. (ALJD-3, GC-115, Tr. 90-91, 1209-1211). Thus, Membrino went from receiving a salary of \$1,000 per week to receiving an hourly wage rate of \$22 per hour. (GC-101, Tr. 91-93, Tr. 328). His compensation decreased, particularly as Respondent's business declined. (ALJD-3).

A. The Union's Organizing Efforts Begin: Summer of 2008

The Union¹¹ began to organize Respondent's employees in about February of 2008. (ALJD-2). Raymin Diaz and Miguel Carballo, organizers for the Mid-Atlantic Regional Organizing Coalition of the Laborers' International Union of North America, led the efforts by talking to employees at Respondent's facility in Fairmount Heights, Maryland and at the jobsites. (Tr. 135-138). They wore shirts and hats that identified them with the Union. (Tr. 142). They also collected authorization cards. (Tr. 139). William Membrino signed an authorization card on June 3, 2008. (GC-78, Tr. 139-140, 338-340).

⁹ "CDL" stands for commercial driver's license. (Tr. 59-60). Membrino testified that he has driven tractor trailers and operated CDL vehicles for approximately eighteen years. (Tr. 327).

¹⁰ Membrino testified that he never received a copy of the employee handbook. (Tr. 326).

¹¹ The Judge found that the Union is a labor organization within the meaning of Section 2(5) of the Act. (ALJD-2).

Respondent, in turn, created anti-union flyers and distributed them to employees along with their paychecks. (Tr. 69-71, 246, GC-81, 82).

On June 2, 2008, the Union filed a Petition for a Certification of Representative, Case number 5-RC-16230. (GC-3). Respondent and the Union signed a stipulated election agreement and a secret-ballot election took place on July 14, 2008. (GC-4). Jose Ramirez served as Respondent's observer and William Avelar served as the Union's observer during the election. (Tr. 153, 196 307). The Union won the election, with 48 votes being cast for the Union and 30 votes against the Union. (GC-5). Thus, on July 28, 2008, the National Labor Relations Board certified the Union as the collective-bargaining representative of the following unit of employees:

All full-time and regular part-time laborers, pipe-layers, carpenters, finishers, truck drivers, heavy equipment operators and small equipment operators employed by the Employer at its Fairmount Heights, Maryland facility, but excluding all clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act. (GC-6a).

B. William Membrino Complains to Julio Pessoa about His Wage Rate and Not Being Paid for the Commute Time

Membrino was unhappy about his decrease in pay and, on several occasions, he talked to Pessoa about it.¹² Pessoa told Membrino he would switch him back to salaried as soon as he could. Membrino often followed up by asking Pessoa when he would be put back on a salary. On or about June 14, 2008, prior to the election, Membrino went to Pessoa's office to ask about a pay raise. (Tr. 340-342). Pessoa said he could not do anything because he was having "these union problems." (Tr. 341). He told Membrino his

¹² Pessoa acknowledged, at the hearing, that Membrino talked to him about his salary. He also admitted that he knew, before the discharge, that Membrino complained about not being paid for the travel time. (Tr. 111-113). Pessoa said he has an "open door policy." (Tr. 1765-1766).

lawyer had advised him not to do anything until he resolved the union issues. Id. Pessoa also said the Union was handing out cards and trying to get everyone to sign up.¹³ Id.

Membrino did not vote in the representation election. (Tr. 342-343). He was on vacation from approximately July 4 to July 21, 2008. Id. He had another conversation with Julio Pessoa when he returned from vacation. Membrino asked about the election. Pessoa said: "Well, these mother fuckers are lying to me. They smile in my face, saying they're not going to vote for the union and turned around behind my back and voted for the union." (Tr. 343-344). Membrino quickly pointed out that he had been on vacation and said: "Well, at least you know there's one person that didn't vote for the union." Id. Once again, Membrino asked for a pay raise. (Tr. 344). Pessoa said he could not do it because he was still having the union issues. Id.

Another conversation took place between Membrino and Pessoa on September 23, 2008. (Tr. 345). Membrino again asked to be returned to salary, which would give him a higher wage rate. Id. Pessoa acknowledged that he had promised to return Membrino and other employees¹⁴ to a salary, but said he could not return them to salary right now. Id. Pessoa continued by saying the Union was giving him problems and he didn't want the Union in the company. Id.

Membrino also complained to Abilio Machado. On at least two occasions, Membrino told Machado he was not happy and he believed his pay should commence when he started driving the dump truck, including the commute time from Respondent's office to the jobsite. (Tr. 1506-1507).

¹³ Membrino did not bring up the topic of a Union; rather, Pessoa did. (Tr. 510).

¹⁴ Monty Ralney and Juan Carlos Martinez. (Tr. 346).

C. William Membrino Attends a Union Meeting on September 30, 2008 and Voices His Complaints about the Wage Rate and Not Being Paid for the Commute Time

The Union held a meeting on Tuesday, September 30, 2008, at the Seat Pleasant Activity Center in Capitol Heights, Maryland, at 5 p.m. (ALJD-3, Tr. 145, 166, GC-79). The purpose of the meeting was to explain the collective-bargaining process to Respondent's employees and to identify what issues they hoped to address in the negotiations. (Tr. 591, GC-79).

Jose Ramirez (a truck driver),¹⁵ Michael Moltz (a parts/yard runner),¹⁶ Romulo Ventura (a finisher), Agustin (a crew leader), and William Membrino (a CDL driver) were the only employees present at the September 30th union meeting.¹⁷ (ALJD-4, Tr. 151, 303-304, 314, 351). Ramirez, Moltz, Romulo, and Agustin drove to the meeting together. (Tr. 301, 315). Membrino arrived separately, at a later time. (ALJD-4). Steve Lanning, the Union's director of organizing at the time, led the meeting. Raymin Diaz, another Union agent, was also present. (Tr. 152). At one point, Michael Moltz asked questions about health insurance. (Tr. 154, 316, 352). He had with him a list of questions. (Tr. 316, 352; GC-83). William Membrino also spoke out during the meeting and raised concerns about not being paid for the commute time to and from Respondent's office to the jobsite and that Pessoa said he could not give the employees a pay raise because he had a problem with the Union.

¹⁵ Jose Ramirez was Respondent's observer at the representation election. (Tr. 153, 307). Steve Lanning described Ramirez as being "hostile toward the whole union organizing drive." (Tr. 591). He also said Ramirez made non-constructive comments at the start of the meeting, such as "where is everybody" and "how much is this going to cost?" *Id.*

¹⁶ Pessoa testified that he authorizes Moltz to sign checks on behalf of the company when he is absent. (Tr. 1212-1213). No other employee, except for Respondent's CPA and Pessoa, is authorized to sign checks. *Id.* At the November 6th bargaining session, Respondent asked to exclude Michael Moltz, and a few other employees, from the bargaining unit. (Tr. 162, GC-20).

¹⁷ Jose Ramirez, Michael Moltz, William Membrino, Raymin Diaz, and Steve Lanning testified about the meeting.

(ALJD-4, Tr. 155-156, 355-356). Steve Lanning answered his questions and said he would ask the Union's attorney to contact Pessoa about his obligation to pay for the commute time and about the pay raises.¹⁸ (Tr. 356). Membrino further explained that he was not present for the vote and wanted to know if the Union was in the company and whether there was anything that Pessoa could do to get rid of the Union. (Tr. 354). Finally, he asked if drivers were represented by the Union. *Id.* Lanning answered his questions. (Tr. 593-594). The meeting lasted approximately forty-five minutes. (Tr. 594).

The next day, in the cafeteria at lunch, Michael Moltz saw Julio Pessoa and told him he had attended the union meeting. (ALJD-5, Tr. 319-322). Pessoa asked if Membrino was present at the meeting. *Id.* Moltz said yes. *Id.*

Two days after the meeting, on October 2nd, Lanning sent an email to Orlando Bonilla, another Union representative. (GC-12, Tr. 594-597). The email said: "one of the drivers at Tuesday's meeting stated that the drivers do not get paid until they get to the jobsite." *Id.* It also said: "[s]ome workers have been told that they cannot receive raises because of the union." *Id.* Bonilla forwarded Lanning's email message to Brian M. Hudson, who, at the time, was Respondent's counsel. (Tr. 125). Bonilla urged Hudson to share Lanning's email with his client as part of a good-faith effort to resolve the issue and avoid filing more unfair labor practice charges.¹⁹ (GC-12, Tr. 594-597).

¹⁸ Other employees shared Membrino's concern about not being paid for the commute time. William Avelar testified that he and other employees complained their paychecks were missing hours because they were not paid for the commute time. (Tr. 195-196). According to Avelar, the issue of not being paid for the commute time led the employees to seek out the union. *Id.*

¹⁹ Julio Pessoa did not deny having seen the email that Bonilla forwarded to Brian Hudson nor did he deny that Hudson told him the contents of the email. Indeed, his later comments to Membrino, that he heard someone at the Union meeting requested travel time and a raise, suggest that Hudson either sent the email to Pessoa or shared the contents of the email with Pessoa.

D. Respondent Changes its Policy Regarding the Use of Company Vehicles

Two weeks after the Union meeting, on or about October 13, Membrino again went to ask Pessoa to be returned to a salary. (Tr. 359). Membrino gave a detailed account of the conversation in his trial testimony:

[Pessoa] said, I heard someone was in the meeting requesting travel time and requesting to their raises, and I stopped him right there. I said, Mr. Pessoa, I said, I don't want to bullshit you, sir, I said, and I don't want you bullshitting me. I said, I know you know that it was me in the meeting requesting that. But I said, sir, I said, the same thing I've been asking you is the same thing I've been asking them. I said, I told them, I said, I asked the Union three questions: Is the Union in the company? Can you get the Union out of the company? Do they represent us? I said, because I don't know what's going on, and you keep telling me that you can't do nothing—your attorney. And I said, Sir—you know, I was asking him—I just wanted to know what was going on. And he said, Will, I can't afford to pay you travel time right now. He said, So what we want to do is—what I was thinking about doing is taking the company vehicles and pinning them on the job site, and then you all have to drive down to the job site from now on. (Tr. 360-361).²⁰

Pessoa followed through on the plans he announced to Membrino. At the end of the week, on Friday, October 17, Membrino received a notice enclosed with his paycheck. (Tr. 361-363, GC-84). The notice instructed Membrino to leave his dump truck at the Route 231 jobsite, report directly to the jobsite and not to Respondent's offices, and to obtain the keys to his dump truck and his work assignments from Keith Reeder, the superintendent. (Tr. 1458-1459, GC-84). Only one other driver received a similar notice: Nicholas Cappetta.²¹ (Tr. 1467, 1505). Reeder testified that the dump trucks were left at the Route 231 jobsite,

²⁰ The Judge fully credited Membrino's account of the conversation because it was un rebutted. ALJD-5, fn. 6.

²¹ The Judge found that Respondent employed several other truck drivers at the Route 231 jobsite when these notices were issued: Jose Ramirez, Brian Loving, Percell Smith, and two female drivers, whose first names are Bonnie and Laura. ALJD-5. The Judge noted that none of these drivers received a notice instructing them to report to the jobsite and to leave their vehicles there at the end of the day. *Id.*

and he retained custody of the keys, for only one to two months, from approximately October to sometime in November of 2008. (Tr. 1324-1325). However, Respondent continued to work at the jobsite until July of 2009.²² (Tr. 1327).

Since the end of September, Membrino had been regularly assigned to work at the Route 231 jobsite. (Tr. 363-364). Respondent's practice, prior to October 17, was to store most of its vehicles at the Fairmount Heights office.²³ The drivers would report to the office in the morning, receive their work assignments from the dispatch office, and drive the vehicle to the jobsite. William Avelar testified that, during the time of his employment at Pessoa, from the summer of 2007 to the summer of 2008, he drove the company dump trucks from Respondent's office, also referred to as the "yard," to the jobsite and was never required to drive his personal vehicle from the yard to the jobsite. (Tr. 190-191, 194). Jose Ramirez, currently employed by Respondent as a CDL driver, also testified that he drives a company vehicle from Respondent's office to the jobsite, that he has never driven his personal vehicle to the jobsite, and that he never received a written document stating he could not drive the company vehicle from Respondent's office to the jobsite. (Tr. 308). The commute between Respondent's offices, where Membrino's dump truck was stored, and the Route 231 jobsite was about 35 to 40 miles and took approximately an hour and a half. (ALJD-5, Tr. 365).

²² Machado and Pessoa testified that they decided to keep the trucks at the Route 231 jobsite because it would reduce the consumption of fuel. (Tr. 1505, 1799-1801). Respondent failed to explain why it continued the practice only for the time period from October to November of 2008 even though the Route 231 project was not completed until July of 2009 and the price of gasoline remained high through the summer of 2009. (Tr. 1854). The evidence shows that Membrino's complaints, at the September 30th meeting, and his discharge, on October 23, 2008, coincide with the time period in which the practice of keeping the dump trucks at the Route 231 jobsite was in effect.

²³ Pessoa testified that the dump trucks are normally kept at 1500 Marblewood Avenue. (Tr. 115).

E. Respondent Discharges William Membrino: October 23, 2008

In the days following his receipt of the October 17th notice, Membrino continued to work at the Route 231 jobsite. Reeder assigned him to work with Sherman McCane, an equipment operator.²⁴ (Tr. 425-430, 435). McCane has been employed by Respondent for approximately thirty years. (Tr. 1356). He worked with Membrino on a daily basis at the Route 231 jobsite. (Tr. 1363).

Membrino commuted from Respondent's office to the jobsite with McCane, in one of Respondent's pick-up trucks. (Tr. 436). Once at the jobsite, McCane and Membrino worked behind a 7-Eleven building. See roman numeral I in GC-96(b). They installed sewer lines, storm drain lines, and tore out old curbs and installed new curbs and gutters. (Tr. 444). Membrino's primary duties were to haul the dirt and asphalt out of the jobsite and bring in other material. *Id.*

On October 23rd, Membrino and McCane were assigned to tear up existing asphalt curbs so that a new curb and gutter could be installed. (ALJD-7, Tr. 437). McCane operated a gradall, which is a type of hydraulic excavator. (GC-85). The gradall has two cabins, a counterweight, an arm, and a bucket at the end of the arm. (Tr. 53-56, 438-440). The cabin in the middle of the gradall pivots 360 degrees and is used to operate the arm and bucket, while the front cabin is used to drive the gradall.²⁵ *Id.* The front cabin has a driver's seat that is located on the left side of the gradall. *Id.* By contrast, the operator's seat in the middle cabin is located on the right side of the gradall. *Id.* Different buckets, such as a straight-edge bucket, used for grading, or a claw bucket, used for tearing up

²⁴ Machado testified that he knew Membrino and McCane had been assigned to work together at the Route 231 jobsite. (Tr. 1544).

²⁵ It is possible for the operator to drive the gradall while he is in the middle cabin, but the gradall will only move at a speed of three to four miles per hour. (Tr. 438).

asphalt, can be placed on the arm, depending on the type of excavation to be performed. Id.

On the morning of Thursday, October 23rd, McCane used a claw bucket on the gradall to break up the asphalt. (Tr. 441). He loaded the asphalt onto Membrino's truck and, once the truck's cabin was full, Membrino took the load to a dump site and then returned to the Route 231 jobsite to once again work with McCane. Id. While Membrino was dumping the asphalt, McCane accumulated another small pile of asphalt. (Tr. 442). McCane set the pile to the side and asked Membrino to help him change the bucket on the gradall, from the claw bucket to the dirt bucket. Id. McCane had finished tearing up the old asphalt curb and was going to begin preparing the topsoil. Id. This was not the first time Membrino had assisted McCane in changing the gradall bucket. Indeed, they had changed the bucket together twice on Monday and once on Tuesday of that week. (Tr. 442-443, 553).

Membrino explained that he assisted McCane in changing the bucket because the hydraulic arm would often self-adjust and move slightly while the bucket was being changed.²⁶ (Tr. 443, 541-543). Thus, McCane sat in the middle cabin and held the controls steady, to prevent the arm from moving, while Membrino stood on the ground, next to the arm, and loosened the bolts. Id. After the old bucket had been removed, McCane, still in the middle cabin, would use the controls to slightly adjust the position of the arm so that its gripper lined up with the new bucket. Id. Once they lined up, Membrino, who remained on the ground near the arm, would tighten the bolts and complete the installation. Id. This

²⁶ The Judge credited Membrino's explanation regarding the events of October 23rd, including why he helped change the gradall bucket. (ALJD-8). By contrast, the Judge discredited McCane and Resondent's other witnesses because they "testified with very general denials." Id.

process also allowed McCane, who is approximately 67 years old,²⁷ to avoid having to climb up and down from the middle cabin several times to re-position the arm and bucket and to tighten the bolts on the bucket. (Tr. 544). Rather, he remained in the middle cabin and Membrino remained on the ground.²⁸

To change the gradall bucket on October 23rd, Membrino and McCane moved from their work area, behind the 7-Eleven, at Roman numeral I in GC-96(b), to a storage area, at Roman numeral II in GC-96(b).²⁹ (Tr. 451, GC-96(b)). The spare buckets were kept at the storage area. (Tr. 543). It was approximately 11:15 a.m. (Tr. 472). Membrino drove his dump truck to the storage area while McCane drove the gradall. Id. McCane went first, pulled into an alley next to the storage area, and parked the gradall. (Tr. 452-454).

Membrino positioned his dump truck perpendicular to the gradall, so that the front right side of his dump truck was behind the back right end of the gradall. (Tr. 454, 460-461). See GC-89. A distance of four to five feet separated the back right end of the gradall from the front right side of the dump truck. (Tr. 460-462). About two to three feet of the front right side of the dump truck overlapped with the back right end of the gradall.³⁰ (Tr. 462).

Membrino explained that he parked the dump truck in this particular way in order to occupy as little space as possible and to avoid blocking the nearby parking lot. (Tr. 464). It was the

²⁷ Membrino testified that McCane was about 67 years old. (Tr. 544). Machado testified he thought McCane was in his sixties. (Tr. 1533). The Judge noted McCane was in his sixties. (ALJD-8, In. 27-28).

²⁸ The deck of the gradall is about five feet above the ground. (Tr. 1372, 1419). The operator has to climb about three steps to get to the gradall deck. Id. McCane testified that, in the process of changing the gradall bucket, he had to climb up and down the steps to the middle cabin of the gradall about three times. (Tr. 1413-1418).

²⁹ They followed this same procedure, including the location and manner in which they parked their vehicles, when they changed the bucket on Monday and Tuesday of that week. (Tr. 452, 464).

³⁰ The entire length of the dump truck is about twenty-four feet whereas the entire length of the gradall is about thirty feet. The remaining twenty-one to twenty-two feet of the length of the dump truck did not overlap with the gradall. (Tr. 4601-463).

same position where he had parked the truck on Monday and Tuesday of that week, when he and McCane had previously changed the gradall bucket together. (Tr. 553).

Membrino then put the truck in neutral, pulled the emergency brake, opened the door, and got out of the dump truck. (Tr. 465). McCane remained in the front cabin of the gradall. (Tr. 467, 1426). As Membrino walked behind the dump truck, he noticed it rock back and forth and he heard a crack. Id. He ran around to the front of the dump truck and saw that the back right end of the gradall had backed into the front right side of the dump truck. Id. Membrino then yelled out McCane's name several times and ran to the front of the gradall. (Tr. 466). After McCane got out of the gradall, they both looked at the damage. Id. McCane said it wasn't major. Id. A small portion of the white fiberglass hood on the dump truck's right front side had torn off and a portion of the metal grill on the front of the dump truck was bent outward. (Tr. 474, GC-90-92). There was also minor damage to a light at the back right end of the gradall.³¹ (Tr. 476, GC-93, 94).³²

Immediately after the accident, Membrino called Abilio Machado and Keith Reeder, superintendents.³³ (Tr. 466-467). He reported that McCane had backed into his dump truck.³⁴ Id. Machado arrived first. (Tr. 469, 1510). He asked Membrino if the truck could still be driven. Id. Membrino responded that there had been no engine damage, no radiator

³¹ McCane testified that, as of the time of the hearing, the light on the Gradall had not been replaced. (Tr. 1432).

³² The scratch marks that appear on the gradall in photograph GC-93, labeled with an "A," were not caused by the accident. Membrino testified that they were on the gradall prior to the accident. (Tr. 476-477).

³³ Neither Machado nor Reeder witnessed the accident. (Tr. 1329, 1542) They also did not know why the dump truck was parked perpendicular to the gradall, near the storage area, at the time of the accident or how long it had been parked there. (Tr. 1330, 1542-1543). They did not ask Membrino to explain why the dump truck was parked there at the time of the accident.

³⁴ Membrino did not tell McCane or Reeder that the accident had been his fault. (Tr. 562). The Judge found "Abilio Machado's testimony to be a complete fabrication in so far as he claims that Membrino admitted to him that he was at fault and that Machado related this to Julio Pessoa." (ALJD-10, In. 37-39).

damage, and no fluid leakage. *Id.* He said he believed there were no safety problems and that the truck could be driven. *Id.* Reeder arrived shortly after Machado.³⁵ (Tr. 469-470). Machado took pictures of the damage.³⁶ (Tr. 1508, GC-90-94). Meanwhile, McCane and Membrino changed the bucket on the gradall. (Tr. 470). Machado then instructed them to return to work and finish what they had been doing. (Tr. 471, 1544). He did not give them other instructions or tell them they had to meet with Pessoa to tell him about the accident. (ALJD-9, In 47-48).³⁷ He did not ask why Membrino's dump truck was parked perpendicular to the gradall, near the storage area, at the time of the accident. (Tr. 1515, 1542).

Membrino drove the dump truck and McCane drove the gradall back to their work area, at around 11:30 a.m., and continued to work together until the end of the work day. (Tr. 471-472; GC-95). See Roman numeral I of GC-96(b). After he returned to the work area, Membrino called Juan Infante, dispatcher, and informed him of the accident. (Tr. 393, 472).

At the end of the work-day, at around 4 p.m., Reeder instructed Membrino and McCane to write accident reports. (Tr. 483. See *also* Tr. 1280, 1284). McCane refused. *Id.* Reeder told them they could not leave until they submitted the accident reports. *Id.* Membrino prepared an accident report, which states:

³⁵ Reeder testified that he did not see Machado when he arrived at the scene of the accident. (Tr. 1285).

³⁶ Machado did not take any pictures that show the placement of the gradall and dump truck at the time of the accident. (Tr. 1554). He testified he was only concerned with assessing the damage. *Id.*

³⁷ During his direct examination, Machado was asked to explain Respondent's practice or policy concerning accidents. Machado said: "The understanding is that after an accident, a[n] accident report will have to be filed and sent to the office." (Tr. 1475). On cross examination, he confirmed there were no other procedures. (Tr. 1539). The Judge specifically found Machado's testimony on redirect examination, at Tr. 1563-1564, that Respondent has a policy that employees who are involved in an accident "should go to the office and get with Michelle so she can do a formal report," to be false. (ALJD-10, fn. 11). A one-on-one conversation with Julio Pessoa was not part of the procedure. As explained further below, Membrino completed an accident report and followed all procedures.

Pull into lot to help Sherman
change the bucket on gradall
Pulling behind him then got out
of truck to help then I heard
the gradall hit the hood of the dump
truck. (GC-86).

Membrino also drew a picture, showing the position of the two vehicles, and used stars to indicate the point where the two vehicles had collided.³⁸ (GC-86). McCane continued to refuse to write an accident report. He kept saying “I don’t know what happened.”³⁹ (Tr. 486, 1436). Therefore, with McCane’s consent, Membrino wrote the accident report for McCane: “Truck in blind spot. Don’t know what happen.” (GC-87). McCane signed the accident report and they submitted both reports to Reeder. Membrino also completed a daily log and indicated that there was damage to the hood of the dump truck. (GC-88). Reeder did not give them any other instructions or tell them that they had to see Pessoa. (Tr. 490, 1332). Reeder faxed the accident reports to the attention of Michelle Rocha, at Respondent’s office, at approximately 5:22 p.m. (Tr. 1333, 1341, GC-86, 87). He wrote the following message on the fax cover page: “As much as I tried to get a statement from Sherman, he insisted that he does not know what happened. Abilio was there and took pictures. It may be helpful to get a statement from him as well.” (GC-116, Tr. 1343-1344). Reeder said he wanted to alert Michelle Rocha to get a more detailed account from McCane when he returned to Respondent’s office. (Tr. 1345). He did not note any concerns regarding Membrino’s accident report. Id.

After they left the jobsite, Membrino and McCane returned to Respondent’s office. Upon arriving, at around 5:30 p.m., Membrino went to the dispatch office and asked Juan Infante if he needed to take a drug test because of the accident. (ALJD-11, Tr. 492, 559).

³⁸ This diagram, prepared on the day of the accident, is essentially the same as the diagram that Membrino prepared in GC Exhibit 89.

³⁹ McCane testified that he did not see the dump truck behind his gradall. (Tr. 1376).

Infante asked if Membrino had prepared an accident report and, when Membrino said he had, Infante told Membrino everything was fine and that he did not need to take a drug test. Id. Infante talked to McCane about the incident and prepared an Incident Report Form based on what McCane told him. (GC-107).⁴⁰ The report, which is signed by Infante, states:

Sherman turned Gradall around to change bucket back into dump TK 5067.⁴¹
Damage to 5067 front Hood
Damage to Gradall busted light on counterweight
As reported by Sherman McLaine [sic] (GC-107).

After talking to Infante, Membrino left the office and went to pick up his children from the babysitter. (Tr. 493). While he was driving, at around 5:41 p.m., Membrino received a telephone call from Machado, who told him he did not need to come back to work the following day because he was fired. (Tr. 493, 1524). Caught off-guard and completely by surprise, Membrino laughed and said: I'm fired? Why? (Tr. 494). Machado said he did not know why.⁴² Id. Immediately, Membrino called Pessoa. Id. He asked Pessoa what was going on and if he was fired. Id. Pessoa asked what was going on with him and what he was doing. Id. Then, Pessoa said:

I think your head is not on the company no more. He said, Sherman was in here talking to me. You didn't come talk to me. So, I think, you know, your head is somewhere else. You need to, you know, just go ahead about—you know, go ahead part ways. (Tr. 494).

Membrino asked why he was being fired. Id. Again, Pessoa repeated: "your head is not in with the company no more." (Tr. 494-495). Membrino protested that he had not been in the

⁴⁰ General's Counsel's Exhibit 107 was admitted into evidence on November 24, 2009, by Order of the Administrative Law Judge, Granting the General Counsel's Unopposed Motion to Receive Into Evidence General Counsel's Exhibit 107.

⁴¹ 5067 is the number of the dump truck that was assigned to Membrino.

⁴² Machado admitted that he called Membrino. (Tr. 1524). However, he never testified as to what he told Membrino in that telephone call.

dump truck when the accident occurred. Rather than address the facts of the accident, Pessoa once again said, “your mind is just somewhere else, Will” and “your head is not in with the company no more.” (Tr. 495).

At the hearing, Pessoa testified that he made the decision to discharge Membrino not because of the accident but because Membrino didn’t talk to him after the accident. (Tr. 107-111, 116-117). “One of the reasons is if they come to see me for anything else, why he did not come to see me and explain what the problem is.” (Tr. 107). “Actually, it’s not really the accident, is the way he present himself. He don’t care.” (Tr. 117). Pessoa also confirmed that he told Membrino: “your head is not on the job.”⁴³ (Tr. 108).

After talking to Pessoa on the telephone, Membrino decided to go back to Respondent’s office. When he arrived, he turned in his keys and cell phone. (Tr. 495-496). Pessoa gave him two paychecks. He did not ask Membrino about the accident. (Tr. 496).

On October 30th, Respondent purchased a few replacement parts from Central Truck Center, Inc., at a total cost of \$509.44, and Respondent’s mechanic repaired the dump truck.⁴⁴ (Tr. 119-120, GC-102a). At the time of the hearing, the damaged light on the gradall had not been replaced. (Tr. 1432).

⁴³ During Counsel for the General Counsel’s 611(c) examination, Pessoa said, on several occasions, that he told Membrino his head was not on the job. Membrino’s testimony corroborates that Pessoa told him his head was not with the company.

⁴⁴ Months later, after Respondent’s mechanic had repaired the dump truck and during the investigation of unfair labor practice charge 5-CA-34761, Respondent obtained an estimate of the cost of repairs from Central Truck Center, Inc. The estimate is dated March 31, 2009. (GC-103). The total amount of the estimate is \$8,011.92. *Id.* Respondent did not pay \$8,011.92 to repair the truck. Rather, it paid only \$509.44 for the parts and its own mechanic made the necessary repairs. (Tr. 121-123, 1189-1193).

McCane received no discipline for the October 23rd accident and he continues to be employed by Respondent.⁴⁵ (Tr. 1444). He was not charged for any expenses related to the repair of the gradall or dump truck. (Tr. 1153).

At the time of his discharge, Membrino's personnel file contained no record of any disciplinary action. (Tr. 1149-1150). A copy of his daily log for October 23, 2008, the accident report prepared by Infante, and the accident reports signed by Membrino and McCane were placed in Membrino's personnel file. (Tr. 1150-1151). McCane's personnel file, by contrast, contained no reference to the October 23rd accident. (Tr. 1151-1152).

Prior to October 23rd, Membrino had only been involved in one other incident. Sometime in 2007, at a jobsite in Rockville, Maryland, he was driving a roll-off vehicle and Juan Carlos Martinez was operating a gradall. (Tr. 500-503). The two vehicles were positioned on a slight incline and Martinez's gradall was behind Membrino's roll-off. Id. Membrino lightly backed into the gradall and caused a little dent in the gradall's fender. Id. Martinez fixed the fender with his own hands. Id. Neither Membrino nor Martinez received any discipline for the incident. Id.

The Union filed an unfair labor practice charge, 5-CA-34691, concerning Membrino's discharge on January 6, 2009.⁴⁶ (GC-29).

IV. ARGUMENT

The record evidence in this Case solidly supports the Judge's findings that Respondent violated: Section 8(a)(3) by changing Membrino's work conditions and then discharging him because of his union activities; Section 8(a)(1) by creating an impression of surveillance; and Section 8(a)(5) by unilaterally changing the policy regarding the use of

⁴⁵ The record contains no evidence that McCane engaged in union activity. He was not present at the September 30th Union meeting.

⁴⁶ The charge was later withdrawn and replaced with unfair labor practice charge 5-CA-34761. (GC-30).

company vehicles. In his decision, the Judge cited the relevant Board case law, applied the case law to the facts of this Case, and clearly noted what evidence he relied upon, as well as his reasoning for finding a violation. With regard to oral testimony adduced at the hearing, the Judge repeatedly credited Membrino's account of the accident and his conversations with Julio Pessoa, while discrediting some, if not all, of the testimony of many of Respondent's witnesses, including Sherman McCane, Abilio Machado, and Julio Pessoa.⁴⁷ The documentary evidence likewise affirms the Judge's conclusions.

A. The Judge properly dismissed Respondent's arguments and found that the unfair labor practice charges had been served within the statutory time period.

As a preliminary matter, Respondent argues that the Judge should have dismissed the allegations in the Complaint because the unfair labor practice charges were not timely served. (R Exceptions Brief at 49-50). On this issue, the Judge made the following conclusion:

This argument has no merit. The Board's regulations at section 102.14 allow service of the charge by regular mail. The first two charges were served by the Region by regular mail. As to the third charge, it was mailed to the wrong address and then emailed to Respondent's counsel, who is an agent of the Respondent for such matters. I view the email to be the functional equivalent of regular mail; indeed, it is a better mechanism of service in that it assures receipt. (ALJD-1, fn. 1).

⁴⁷ See ALJD-8, "Membrino testified to a completely plausible rationale to explain what occurred on October 23, whereas McCane and Respondent's other witnesses testified with very general denials." See also ALJD-10, fn.11, "I thus decline to credit any of Machado's testimony in support of Respondent's defense" and ALJD-11, fn. 13, "I discredit the testimony of Abilio Machado and Julio Pessoa regarding the content of their conversation on October 23, particularly the testimony of Julio Pessoa suggesting that he was acting upon a recommendation of Machado in deciding to fire Membrino."

The record contains no basis for overruling the Judge's credibility findings. Therefore, the Board should apply its longstanding policy, announced in *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951), that it does not overrule and Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect.

General Counsel's Exhibits 1-B and 1-E show that the unfair labor practice charges in Cases 5-CA-34547 and 5-CA-34761 were served on Respondent by the Regional office via regular mail. Respondent argues that service of the third charge, 5-CA-35083, by email was improper. It should be noted that the Judge dismissed, on the merits, the allegations raised in Case 5-CA-35083 and no exceptions have been filed regarding the dismissal.

When the Union filed unfair labor practice charge 5-CA-35083 it incorrectly listed Respondent's address on the charge as being 1600 Marblewood Avenue rather than 1500 Marblewood Avenue. (GC-1-J). The Regional office mailed a copy of the charge to 1600 Marblewood Avenue. Nevertheless, on July 14, 2009, at the request of Michael Avakian, Respondent's counsel, Janet Schaefer, Senior Field Examiner at the NLRB Regional office, sent a copy of the unfair labor practice charge and docket letter to Mr. Avakian by email. (GC-1-BB, Tr. 181). Respondent does not contest receipt of the email.

Contrary to Respondent's arguments, the Board liberally construes proof of service for unfair labor practice charges. *United States Service Industries*, 324 NLRB 834 (1997). The Board has held that service of an unfair labor practice charge on counsel constitutes as service on the principal and that any potential defects in service are cured by a timely served complaint. *Buckeye Plastics*, 299 NLRB 1053 (1990). See also *Control Services, Inc.* 303 NLRB 481, fn. 3 (1991) (finding adequate the service of an unfair labor practice charge on an attorney who at the time was representing the company in its dealings with the union). Here, Respondent's counsel, at his request, received a copy of the charge by email. At the time he requested the charge, Respondent's counsel represented the company in the investigation of the prior charges, 5-CA-34547 and 5-CA-34761. For this reason, the fact that counsel had not yet submitted a notice of appearance is inconsequential. It was clear—by the fact that he represented the company in the

investigation of 5-CA-34547 and 5-CA-34761 and that he requested a copy of the charge in 5-CA-35083—that he was acting on behalf of the company.

B. The Judge correctly held that Respondent violated Section 8(a)(3) of the Act by changing Membrino’s work conditions and then discharging him because of his union activities.

The Judge found two violations of Section 8(a)(3), both involving William Membrino. First, he concluded that Respondent implemented a new policy regarding the use of company vehicles in retaliation for Membrino’s complaints about travel time at the union meeting on September 30th. (ALJD-5-7). The new policy adversely impacted Membrino because it forced him to drive his personal vehicle from Respondent’s office to the jobsite if he could not find another employee to give him a ride, thereby causing him to bear the burden of paying for the fuel necessary to reach the Route 231 jobsite.⁴⁸ Id. Second, the Judge concluded that Respondent discharged Membrino on October 23rd because of his union activities. (ALJD-7-13).

Respondent argues that the Judge misapplied the burdens of proof and relied on inferences rather than proof by a preponderance of the evidence. It further argues that the evidence does not support a finding of anti-union animus. Finally, Respondent takes issue with the Judge’s conclusions regarding disparate treatment.

A complete reading of the Judge’s decision shows that the Judge clearly set forth the *Wright Line* analysis, identified the facts that supported each element of the analysis, unambiguously identified the source of Respondent’s motive for changing Membrino’s work conditions and discharging him, and explained his basis for concluding that Respondent’s asserted reasons for the discharge were either false or not in fact relied upon.

⁴⁸ The Judge noted that Membrino lives within approximately a five minute drive from Respondent’s Fairmount Heights office, whereas the Route 231 jobsite was located in Prince Frederick, Maryland, about 35-40 miles from Fairmount Heights. (ALJD-5, In. 25-27).

Contrary to Respondent's assertions, the Judge did cite and discuss the applicable burdens of proof for a Section 8(a)(3) allegation. On page 6 of his decision, in connection with discussing the change in Membrino's work conditions, the Judge stated as follows:

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence. JD-06-10 at page 6.

To establish that union activity was a motivating factor in the employer's decision, the General Counsel must prove that the employee engaged in protected activity, such as speaking out against the company at a union meeting, that the employer knew or suspected that the employee engaged in protected activity, and that the employer bore animus towards the employee as a result. Unlawful motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge or refusal to hire and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge. *W.F. Bolin Co. v. NLRB*, 70 F. 3d 863, 871 (6th Cir. 1995).

After setting forth the legal standard, the Judge then clearly identified the evidence in support of each element of the *Wright Line* analysis.

1. Membrino Engaged in Union Activity by Voicing His Complaints about Respondent at the September 30th Union Meeting

For the protected union activity, the Judge pointed to Membrino's attendance at a September 30, 2008, union meeting and the questions he posed to union representatives, at the meeting and in the presence of other employees, about whether he was entitled to be paid more for travel time from Respondent's yard to the jobsites than he was receiving and whether Pessoa's statements to him that he could not grant Membrino a wage increase because of the Union were correct. (ALJD-4 to 5, 12).

2. Pessoa Had Knowledge of Membrino's Union Activity

Next, the Judge identified knowledge as being evident through Pessoa's inquiry to employee Moltz, the day after the union meeting, about whether Membrino had attended the union meeting. (ALJD-12). The Judge also cited Pessoa's statements to Membrino, on October 13, that he heard somebody was at the union meeting requesting pay for travel time as evidence of Employer knowledge. *Id.* at pages 5 and 12. Finally, the Judge cited Membrino's admission to Pessoa, also during the October 13th conversation, that he indeed had asked about travel pay at the union meeting. *Id.* Another fact in support of employer knowledge is that on October 2, 2008, two days after the union meeting, Steve Lanning sent an email to Orlando Bonilla, which Bonilla then forwarded to Brian Hudson, Respondent's attorney at the time, stating that a driver complained at the union meeting that employees were not paid until they arrived at the jobsite and that some employees had been told they could not receive raises because of the union.

The chronology of these facts indicates when and how Pessoa became aware of Membrino's union activities. Prior to the September 30th meeting, Pessoa most likely had no knowledge of Membrino's union activities. Membrino signed a union authorization card on June 3, 2008, but he was on vacation at the time of the representation election. (GC-

78). Shortly after his return from vacation, Membrino talked to Pessoa and jokingly told Pessoa that at least he knew one person who had not voted for the union. In subsequent conversations with Pessoa, between July 21st and September 23rd, Membrino asked to be returned to a salary. He also complained to Machado about not being paid for the travel time. There is no evidence that during this time period, Respondent was aware of Membrino's union activities.

However, on September 30th, Membrino attended his first union meeting. The first key fact gives Pessoa clear knowledge that Membrino attended the union meeting. Moltz, an employee in whom Pessoa places such great trust that he allows him—above all others, including his own daughter—to sign checks on behalf of the company, tells Pessoa that Membrino attended the union meeting. The second key fact, taking place only two days after the union meeting, gives Pessoa knowledge of what Membrino said at the union meeting. Lanning's email indicates that an employee complained about not being paid for travel time and not receiving a raise. Lanning sent the email to Bonilla, who then forwarded it to Brian Hudson and encouraged Hudson to share it with his client. Pessoa, who testified at the trial, did not deny having seen the email or being told about its contents from Hudson. Lanning did not identify the employee's name in the email. The complaints are, nevertheless, consistent with the same concerns that Membrino repeatedly raised with Pessoa. Finally, the third key fact conclusively links Membrino to the complaints raised at the union meeting. Pessoa begins the October 13th conversation by coyly telling Membrino he has heard that someone at the union meeting requested travel time and a pay raise. Membrino calls Pessoa's bluff and bluntly tells him that indeed he did request those things at the union meeting. Moreover, Membrino tells Pessoa he knows that Pessoa knows it was him and that they are the same requests he had repeatedly been making of Pessoa.

Thus, without any ambiguity, Pessoa knows Membrino attended the September 30th union meeting and complained about not being paid for travel time and not receiving a pay raise.

3. Discriminatory Motive: Respondent's Anti-Union Animus

Pessoa bore animus towards Membrino for voicing his complaints against the company at the September 30th meeting. He acted upon that animus by changing his policy concerning the use of company vehicles and by discharging Membrino on October 23rd, only ten days after he conclusively learned that Membrino had, in fact, complained at the union meeting. The Judge found several indicia of animus. For the allegation that Respondent violated Section 8(a)(3) by changing Membrino's work conditions, the Judge stated: "I infer animus and discriminatory motive from the timing of the change, Pessoa's comments to Membrino on October 13, and the unexplained failure to make the same change in the working conditions of other drivers." (ALJD-6, ln. 31-34). With respect to the 8(a)(3) discharge, the Judge again cited to Pessoa's inquiry to Moltz about whether Membrino had attended the union meeting on September 30th and Pessoa's conversation with Membrino on October 13th as evidence of animus. (ALJD-12). Moreover, the Judge cited to the other Section 8(a)(3) allegation, concerning a discriminatory change to Membrino's work conditions by requiring him to report for work at the jobsite rather than at Respondent's Fairmount Heights office and to leave his truck at the jobsite. *Id.* Thus, Pessoa's animus is evident through: (1) the relationship between the timing of when he becomes aware of Membrino's complaints at the union meeting and the change in company policy and the discharge of Membrino; (2) his statements and actions; and (3) treating Membrino differently from how he treated similarly-situated employees who were also involved in an accident with company vehicles.

The timing of the new policy regarding the use of company vehicles and the discharge of Membrino illustrate Respondent's discriminatory motive. As the Judge noted:

“there is a temporal relationship between Membrino’s attendance at the union meeting, his October 13 conversation with Julio Pessoa and the directive issued to him regarding his dump truck.” (ALJD-6, In. 1-3). Pessoa gained definite knowledge on October 13th that Membrino complained about the travel time and wage rate at the union meeting. On Friday of that week, he implemented the change in company policy and issued a written memo to Membrino and Cappetta⁴⁹ stating that company trucks had to be left at the jobsite and the employees had to make alternate arrangements for the commute from Respondent’s office to the jobsite. Ten days later, on October 23rd, Pessoa discharged Membrino. Both events took place only a short time after Pessoa became aware of Membrino’s complaints at the union meeting.

Pessoa’s statements further demonstrate his animus toward Membrino’s union activities. As cited by the Judge, Pessoa asked Moltz if Membrino had attended the union meeting. He did not inquire about whether any other employee had attended. Then, on October 13th, Pessoa tells Membrino he has heard that someone at the union meeting requested travel time and a pay raise. Immediately after Membrino admits that he attended the union meeting and voiced his complaints, Pessoa tells Membrino he cannot afford to pay travel time and he announces a new company policy. In order to avoid any obligation to pay travel time, Pessoa decides that Membrino will no longer drive the truck from Respondent’s office to the jobsite. Rather, Membrino must report directly to the jobsite and the dump truck must remain at the jobsite.

Pessoa’s statements to Membrino at the time of his discharge further demonstrate his animus. He repeatedly tells Membrino that his head is not with the company and that his mind is somewhere else. The clear implication of these statements is that Membrino’s

⁴⁹ The Judge found that Cappetta was “merely an innocent bystander of this discriminatorily motivated change,” citing *RCN*, 333 NLRB 295, 303 (2001).

loyalties are aligned with the Union rather than with the company. See *Baltimore Transit Co.*, 47 NLRB 109, 160-162 (1943) (Board affirms judge's finding that Respondent violated Section 8(a)(3) by discharging Arthur W. Rawlings, where management frequently used the phrase "other things on your mind" to warn Rawlings and other employees to cease their union activities).

Respondent's discriminatory motive is further demonstrated by the fact that both the change in policy regarding the use of company vehicles and the decision to discharge Membrino are departures from its past practice. Membrino testified that until October 17, 2008, he always drove the company dump truck from Respondent's office to the jobsite. Other truck drivers, including William Avelar and Jose Ramirez, also testified that they drove the company dump trucks from Respondent's office to the jobsite.⁵⁰ Although the company employed other truck drivers at the Route 231 jobsite, only Membrino and one other driver, Nicholas Cappetta, received notice of the new policy. The Judge found that Jose Ramirez's testimony, in particular, "strongly indicates that Respondent discriminated against Membrino in instructing him to leave his truck at the 231 jobsite" because "If Respondent's instruction to leave the trucks at the jobsite was nondiscriminatory, Ramirez would have received the same instructions as Membrino." (ALJD-6, fn. 7, ln. 44-49). Moreover, according to Reeder, the new policy was only in effect for one to two months and ended shortly after Respondent discharged Membrino and Cappetta.

Membrino's discharge was another departure from past practice. Respondent has a practice of charging employees who damage company property for the cost of the damage by taking deductions from their paycheck. The documentary evidence establishes that the policy has been in effect since as early as August of 2003. In that time period, Percell

⁵⁰ Like Membrino, Ramirez also worked at the Route 231 jobsite.

Smith, a truck driver employed by Respondent, was operating a company lowboy when he hit another employee's personal vehicle. (Tr. 1164-1167). The total cost of the repair to the vehicle was \$1,057. (Tr. 1167). Respondent charged Smith half of this amount, \$528.50, in two installments deducted from his paychecks dated August 8, 2003, and August 29, 2003. (GC-110, 110a, 110b). Smith continues to be employed by Respondent. (Tr. 1160). In February of 2007, the company again charged Smith for intentionally cutting the wires of the GPS system installed in his assigned company truck. (Tr. 1174-1178). The cost of the repairs was \$150. (GC-112). Fifty dollar increments were deducted from his paycheck on March 17, 2007, March 24, 2007, and March 31, 2007. (GC-112a, 112b, 112c). Later that same year, in July of 2007, Smith backed a company lowboy into Sherman McCane's personal vehicle. (GC-113, Tr. 1178-1182). The cost of the repairs to McCane's personal vehicle was \$983.50. *Id.* The invoice contains Pessoa's instructions to his secretary to deduct half of the total amount from Smith and McCane's paychecks. *Id.* They each paid \$491.75. *Id.*

The practice continued. In March of 2009, Juan Carlos Martinez swung a company gradall he was operating and hit one of the mirrors on a company F-150 pickup truck assigned to Mario Diaz. (Tr. 247-248). Respondent deducted \$30 from Martinez's paycheck in order to pay for the damage to the mirror. (Tr. 251; GC-104). Martinez had another accident, in August of 2009, when he swung a company gradall he was operating and hit a company mini-excavator operated by Sherman McCane. (Tr. 252-253). Here again, Respondent deducted \$25 from Martinez's paycheck because of the damage. (Tr. 253-254; GC-105). Martinez complained to Pessoa about the deductions in his paycheck and Pessoa said he either would get charged for the cost of the repairs or he could quit. (Tr. 255-256). Martinez chose to quit. *Id.*

Respondent had previously applied its policy to Membrino. In 2007, Membrino's company cell phone was stolen. Respondent charged him for the cost of replacing the telephone, \$79.99, by deducting money from his paycheck. (Tr. 503-504, GC-106(a)). However, in October of 2008, when the incident between Membrino's dump truck and McCane's gradall occurred, Respondent never gave Membrino the option of paying for a portion of the cost of the repairs. (Tr. 1188). Rather, he was discharged.

The Judge made the following findings regarding disparate treatment:

The starkest disparity in Respondent's treatment of Membrino is that compared to its treatment of Purcell Smith. Smith has had several accidents which had economic consequences for Respondent. However, in several in which he was clearly at fault, he was not terminated but merely had to reimburse Respondent. Most glaring are two incidents which occurred in 2007 in which Smith *intentionally* cut the wires to his vehicle's GPS system, G.C. Exh. 112. Smith was still working for Respondent at the time of the trial in this matter. (ALJD-13, In. 26-31).

No employees were discharged in any of the incidents described above—Smith's August 2003 accident with the lowboy, Smith's February 2007 intentional cutting of the GPS wires, Smith's July 2007 accident with the lowboy, Martinez's March 2009 accident with the gradall and the mirror of a pick-up truck, and Martinez's August 2009 accident between the gradall and the lowboy.⁵¹

The Judge further noted that: "Respondent did not terminate every employee who was involved in an accident and failed to see Julio Pessoa the same day." (ALJD-12, In. 40-41). In the August 2009 accident between Juan Carlos Martinez and Sherman McCane, described above, Martinez neither prepared an accident report nor went to see Julio Pessoa on the day of the accident. He was not fired because of his failure to complete an accident report or to meet with Pessoa. Rather, he quit because he refused to pay for the damage.

⁵¹ Martinez quit in August of 2009 because he refused to pay for the cost of the damage to the lowboy. He was not discharged.

Thus, the Judge held that “Membrino was treated disparately from Martinez and several other employees who were charged or were required to reimburse Respondent for damage to property rather than being terminated.” (ALJD-13, In. 6-8).

The Judge concluded that, in those circumstances where Respondent did discharge an employee because of an accident involving a company vehicle, “the economic consequences to Respondent, in either lost production time, cost of repairs or compensation to the utilities, were far greater than they were with respect to the October 23 accident.” (ALJD-13, In. 22-24). The evidence shows that Respondent has discharged four employees as a result of accidents involving a company vehicle: Paul Marshall, Steven Colaw, John Branham, and Nicholas Cappetta. In April of 2007, Paul Marshall, a truck driver, overturned a company truck at a jobsite. (Tr. 1204-1206). The company deemed him to be at fault. *Id.* In the Spring of 2008, Steven Colaw, a foreman, instructed an employee who was operating an excavator to go further down a slope in order to reach the bottom of a pit. (Tr. 1198-1199, 1483-1487, R.-13). The employee refused because he felt it was unsafe. *Id.* Colaw jumped in the excavator, lowered it further and, consequently, the excavator tumbled down the slope and became stuck in the mud at the bottom of the pit. *Id.* The company lost numerous work hours attempting to remove the excavator from the pit. (Tr. 1847-1849). The accident also slowed production at the jobsite. *Id.* In September of 2008, John Branham, a truck driver, dumped a load and did not lower the bed of his truck. (Tr. 1807-1809 , R-18). As he pulled away from the jobsite, the raised bed of his truck got caught in utility wires and brought down the wires. *Id.* Similarly, on October 27, 2008, Cappetta, a truck driver, also forgot to lower the bed of his truck and brought down Verizon telephone wires. (Tr. 1158, 1200-1201, 1479-1482, R-12, R-17). The expense of Branham’s and Cappetta’s accidents each exceeded the cost of the company’s insurance deductible, which is approximately \$5,000. (Tr. 1805, 1855).

By contrast, the McCane and Membrino October 2008 accident resulted in virtually no loss of production time and the total cost of repairs was \$509.44. (GC-102a). Most significant, however, is the fact that Membrino was discharged while McCane—who was operating the gradall and backed into Membrino’s dump truck—was neither disciplined nor discharged.

Thus, having set forth the evidence in support of protected union activity, employer knowledge of that activity, and the employer’s animus toward that activity, the Judge concluded that the General Counsel had established the *Wright Line* prima facie case. (ALJD-6, In. 27-35 and ALJD-12, In. 27-36).

4. Respondent Failed to Prove it Would Have Changed Membrino’s Work Conditions or Discharged Him Even Absent his Union Activity

In the next part of his analysis, the Judge addressed Respondent’s defenses. For the change in Membrino’s work conditions, he noted that Respondent “relies on the high cost of diesel fuel and the fact it no longer had projects other than the Route 231 job on which to use Membrino and his truck.” (ALJD-6, In. 6-8). For the discharge:

Respondent contends that Membrino had no reason to position his truck in the location in which it was struck and that the accident was Membrino’s fault. Moreover, Respondent contends that Membrino demonstrated complete disregard of his obligations to it by failing to visit Julio Pessoa’s office at the end of the workday to discuss the accident. Thus, Respondent contends it fired Membrino for legitimate nondiscriminatory reasons. (ALJD-7).

The Judge found the defenses to be pretextual, noting evidence of disparate treatment, that Respondent took action against Membrino on the basis of policies without giving him prior notice of those policies, and that Respondent fired Membrino before giving him the opportunity to defend his conduct. *Id.* at pages 12 and 13. “There is no showing in this record when Membrino’s truck became exclusively dedicated to the 231 site and when diesel prices reached a level at which Respondent determined it was wasteful for Membrino to drive his truck from the yard to his jobsite every day.” (ALJD-6, In. 8-11). The Judge

similarly rejected Respondent's defenses to Membrino's discharge. With regard to the defense concerning the positioning of the truck, the Judge noted that "neither Machado nor Reeder [the two field supervisors] asked either Membrino or McCane why Membrino's truck was behind the Gradall or suggested that either one had done anything improper." (ALJD-9, In. 48-50). With regard to the defense that the accident was Membrino's fault, the Judge stated:

I make no finding as to who was at fault in the accident or whether either Membrino's conduct or McCane's conduct at the time of the accident was proper or safe. I believe these issues are totally irrelevant to whether or not Respondent would have discharged Membrino but for his attendance and conduct at the September 30 union meeting. (ALJD-10-11, In. 40 and 1-4).

Respondent complains that the Judge failed to address its response to the General Counsel's *Wright Line* prima facie case. It notes that Membrino was found to have acted recklessly in causing damage to his company truck and was discharged for that reason and also that the employer had a Section 8(c) right to discuss its views on unionization. The first argument is incorrect. The second is irrelevant. As already explained above, the Judge did, in fact, address Respondent's defenses. The Judge held that Respondent's asserted reason for the discharge—"reckless damage to the company truck"—was false and not in fact relied upon. Rather, the Judge concluded that Respondent discharged Membrino because he attended the September 30th union meeting and vocally raised concerns about Respondent's failure to pay for travel time or to grant a wage increase.

Respondent's Section 8(c) argument has no application to the Judge's analysis of the Section 8(a)(3) analysis. The Judge relied on Pessoa's statements to Membrino on October 13th that he heard somebody was at the union meeting requesting pay for travel time. The statement does not concern any expression of views on unionization but, as the Judge correctly concluded, it created an impression of surveillance and served as evidence of knowledge and animus.

For all of these reasons, the Judge correctly held that Respondent violated Section 8(a)(3) by changing Membrino's work conditions and by discharging him because of his union activities.

C. The Judge Correctly Held that Respondent Violated Section 8(a)(5) by Unilaterally Changing Its Policy Regarding the Use of Company Vehicles.

In addition to finding that the change in work conditions was a violation of Section 8(a)(3), the Judge also held that it was a unilateral change in violation of Section 8(a)(5). Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962). Wages, hours, and other terms and conditions of employment are mandatory subjects of bargaining. *Id.*

The effect on employees of losing the benefit of using a company vehicle to commute from Respondent's office to the jobsite relates to the wages and conditions of employment and is, consequently, a mandatory subject of bargaining. (ALJD-7, In. 25-27). See *Rochester Gas & Electric Corp.*, JD-31-08 at pages 14-16, citing *Union Child Day Care Center*, 304 NLRB 517 (1991) (finding that the employer violated Section 8(a)(5) of the Act by unilaterally discontinuing its practice of allowing employees to use a company vehicle to obtain their lunches) and *Yellow Cab Co.*, 229 NLRB 1329, 1333, 1354 (1977) (finding that the employer violated Section 8(a)(5) of the Act by unilaterally changing its policy allowing employees to use their cab for transportation to and from work). See also *Ekstrom Electric, Inc.*, 327 NLRB 339 (1998). Here, the change in policy clearly had a monetary effect on the employees. Membrino had advocated that employees should be paid for the commute time of driving the company vehicles from Respondent's office to the jobsite. Even absent the

payment of that commute time, the change in policy would cause employees to drive their personal vehicles and incur the expense of gasoline and wear and tear.

There is no evidence that Respondent informed the Union of the change in policy or gave it an opportunity to bargain before the change was implemented.

Respondent contends it was privileged to make the unilateral change because the change was consistent with its past practice. The record does not support this argument. There is no evidence that Respondent had ever required truck drivers to leave their vehicles at the jobsite and not allow employees to use the vehicles to commute from Respondent's offices—where employees receive their dispatch orders—to the jobsite. To the contrary, testimony from William Avelar and Jose Ramirez reveals that employees regularly drove company trucks from Respondent's offices to the jobsite.

The fact that there was no past practice is further reinforced by the limited time period in which the new policy was in effect. As the Judge noted:

[T]he policy of requiring drivers to leave their trucks at the Route 231 jobsite was in effect for a very short period of time, i.e., a month and a half, despite the fact that Respondent's work at the Route 231 site continued into the late summer or early fall of 2009. Respondent apparently used its dump trucks for snow removal in the winter of 2008-09, but there is no explanation as to why the policy was not reinstated in the spring. (ALJD-7, In. 3-7).

D. The Judge Correctly Held that Respondent Violated Section 8(a)(1) by Creating an Impression of Surveillance Among Its Employees.

The Judge concluded that Julio Pessoa violated the Act on October 13 when he discussed Membrino's attendance at the union meeting with Membrino and let Membrino know he was aware of what Membrino asked the union representatives. (ALJD-4, In. 26-32). He held that "an employer creates an impression of surveillance when it indicates, as did Julio Pessoa, that it is closely monitoring the extent of an employee's union involvement," citing *Emerson Electric Co.*, 287 NLRB 1065 (1988). *Id.* Respondent takes issue with the Judge's reliance on *Emerson*, arguing that Pessoa never indicated to

Membrino that he knew the extent of Membrino's union activities. Respondent's argument lacks any persuasive force. It is clear that by telling Membrino that he heard someone at the union meeting was requesting travel time and a pay raise, Pessoa intended to convey to Membrino his knowledge of the extent of Membrino's union activities. The statement was also intended to prompt an admission from Membrino. Indeed, Pessoa brought up the subject of the union meeting in a conversation in which Membrino was, once again, asking him for a pay raise.

V. CONCLUSION

Accordingly, for the reasons set forth in this Answering Brief and in the Judge's decision, the General Counsel urges the Board to affirm the Judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified by the General Counsel's cross-exceptions.

Dated March 23, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was electronically filed on March 23, 2010, and, on that same day, copies were electronically served on the following individuals by email:

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