UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 2

ARDSLEY BUS CORPORATION INC.
a/k/a GENE'S BUS COMPANY,

Respondent

and

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO,

Charging Party.

Case Nos. 2-CA-38713
2-CA-39049
2-CA-39376
2-CA-39467

BRIEF IN SUPPORT OF GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Allen M. Rose
Counsels for the General Counsel
National Labor Relations Board, Region 2

April 20, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Administrative Cases

I. BRIEF STATEMENT OF FACTS

Respondent Ardsley Bus Corporation a/k/a Gene's Bus Company ("Respondent" or "Ardsley") provides school bus services to school districts primarily in and around Westchester County, New York. (Gillison Tr. 110, 124-26.)[1] Respondent's owner and general manager are Gideon Titkin and Thomas Gillison, respectively. (Gillison Tr. 92, 111.) Gillison has admitted that he manages all of Respondent's employees, runs all Ardsley's day-to-day operations, and "works together" with Titkin in dealing with the Union. (Gillison Tr. 101-03, 110-12.) Gillison also has admitted that he was "primarily responsible for employee discipline." (GC Exh. 12 ¶ 2 (Affidavit of Gillison).) Ardsley also employs an assistant manager to Gillison, Rosa Vilella (Gillison Tr. 115; GC Exh. 10), and at material times it has employed dispatchers John Stewart and Elisa Arias (Gillison Tr. 113, 116–17, 126), as well as assistant safety director Joe Ramos. Ramos was promoted to the safety director position in September 2007, after having served as a part-time driver and Union chairperson since 2000. (Gillison Tr. 127-29.)

The parties entered into their first collective-bargaining agreement in September 2000. The agreement was effective by its terms from September 1, 2000, through June 30, 2002. The Union and Respondent subsequently negotiated memoranda of agreement ("MOAs"), which extended and modified the September 2000 "master" agreement. The MOAs were effective for the periods July 1, 2002 through June 30, 2006, and July 1, 2006 through June 30, 2009. (GC Exh. 53.)

---

[1] The Decision and Recommended Order of the Administrative Law Judge ("ALJ") shall be referred to as the "ALJD." References to the ALJD shall be "ALJD [page number:line number[s]." References to the Errata shall be "Errata [page number:line number[s]." References to the transcript shall be "[Witness name] Tr. [page number]" or "Tr. [page number]". References to Counsel for the General Counsel's exhibits shall be "GC Exh. [page number]. References to Respondent's exhibits shall be "R. Exh. [page number]." Respondent's Exceptions and Supporting Brief shall be "R. Excep." General Counsel's Brief in Support of Cross-Exceptions shall be "GC Cross-Excep. Brief."

The MOAs each incorporated the terms of the prior agreement except as modified by the most recent agreement. Thus, the 2000 master agreement, together with two MOAs, represent the entirety of the provisions to which the parties had agreed. (Simino Tr. 559, Jennik Tr. 1274-1329.)[2] The recognition provision of the collective-bargaining agreement states:

> 1. UNIT OF EMPLOYEES
>
> This Agreement shall apply to all full-time and regular part-time school bus and van drivers, monitors, mechanics, cleaners and fuelers employed by Respondent but excludes office clericals and guards, professional employees and supervisors as defined by the National Labor Relations Act.

(GC Exh. 53 (2000 master agreement at 1) (hereinafter the "Unit.") The Unit comprises more than two hundred bus drivers, monitors, mechanics, and yard personnel. (Gillison Tr. 430.)

Section 15(e) of the 2000 master agreement provides that "[a]ll runs, holidays, vacations and extra work shall be picked by seniority. Routes becoming vacant during the school year shall be subject to bid by seniority and qualification." (GC Exh. 53 (2000 agreement § 15(e) at 10-11).) Section 5 of the parties' successor 2002-06 MOA also provides that:

> [a]ll runs open for bid must be posted and picked by seniority. The Picks shall include Bus Operators, Van Operators and Monitors. Schedules shall include hours of assignment. All extra work including Charters, summer camp and extra Runs must be posted and picked by seniority and assigned by Union and Management representative.

[2] Respondent did not enter into the administrative record what it asserted to be the collective-bargaining agreement, but during arbitration proceedings in May 2009, Respondent identified certain documents as constituting its then-current collective-bargaining with the Union. (*See* R. Exh. 18 and GC Exhs. 101 and 102.) However, all the relevant provisions of the contract, including those related to bus route selection and seniority, are contained in both versions of the collective-bargaining agreement.

GC Exh. 53 (2002-06 MOA at 2.) On December 17, 2007, the parties reached an agreement whereby Respondent recommitted, per the collective-bargaining agreement, to "have a job pick for the Summer routes and the Fall routes . . . by seniority." (GC Exh. 64-66.)

Beginning in September 2007, the Union became more actively engaged in dealing with Respondent and policing Respondent's adherence to the terms of the parties' collective-bargaining agreement. The Union replaced its shop steward at the facility and filed several grievances concerning Respondent's alleged failure to pay wage increases and other compensation, refusal to abide by the seniority provisions contained in the parties' contract, and deficiencies in maintaining Respondent's buses. (GC Exhs. 54–58; Simino Tr. 709.) The Union also began a publicity campaign centered on the wage issue. (GC Exh. 12 ¶ 15 (Gillison Aff.); s*ee* ALJD 9:1-2; Gillison Tr. 130–134.)

General Manager Gillison admitted that he disliked the Union's actions during this period because they disrupted the relatively problem-free relationship with the Union that Respondent had previously enjoyed. (GC Exh. 12 ¶ 15; ALJD 8:48-50.) In particular, Gillison disliked the replacement of the shop steward (GC Exh. 12 ¶ 15), the safety inspections performed by Union representatives at the facility (Gillison Tr. 131-32), and the placement of an inflatable rat adjacent to Respondent's facility (Gillison Tr. 351–355; GC Exh. 12 ¶ 15.) Gillison also expressed his hostility towards the new set of Union representatives assigned to Ardsley, led by Union representative John Simino. (Gillison Tr. 130–134.)

About three months after the start of the Union's publicity campaign, and within days of receiving notice from the Union that Uchofen was a new steward, Respondent suspended Uchofen because, as Gillison admitted, the Union sought to represent Uchofen regarding possible discipline. According to Gillison:

> Cesar [Uchofen] was not suspended at th[e] time. . . . I had summoned Cesar to my office . . . At that point, I had just intended on reading him the riot act and let it go . . . ." [However,] [o]nce [Simino] had forced the issue of the meeting on the 20th, and decided he was going to run it his own way by demanding a meeting to discuss [Uchofen]'s discipline, I decided on that day that it would be a suspension. . . . . It was when they demanded this meeting that I decided to suspend him."

(GC Exh. 12 ¶¶ 13–14.) Within the next week, the Union grieved Uchofen's suspension. (Simino Tr. 581–582; GC. Exh. 62.) At about the same time, the Union filed its first unfair labor practice charge against Ardsley.

In the spring of 2008, Respondent began seeking to minimize the Union's role as the employees' bargaining representative. Thus, in May and June 2008, Respondent refused to provide the Union with information regarding the summer routes on which employees would have to bid, and twice canceled meetings with the Union to discuss the summer route "picks," thereby precluding the Union from any meaningful participation in the summer route assignment procedure. (ALJD 17:15-16, 18:7-12; Simino Tr. 593–612.)

Ardsley's attitude towards the Union's role in the pick process was further illuminated when, in mid-June 2008, dispatcher John Stewart had to restrain Gillison from assaulting shop steward Uchofen in response to Uchofen's insistence that the Union needed information regarding certain summer routes. (Uchofen Tr. 891–892 (unrebutted testimony).)

In July and August 2008, the Union filed grievances concerning (i) the wages paid to Unit employees for their summer route work (GC Exh. 16) and (ii) Respondent's alleged refusal to hold a pick for the summer routes (Simino Tr. 620; GC Exhs. 48, 70, and 71). Ardsley also continued to exclude the Union from the route picking process. In August 2008, despite the presence of Union representatives at the pick procedure, Respondent, as it revealed in a letter to the Union of August 28, excluded a number of routes from the bidding process, thereby

violating, without the Union's consent, the terms of the collective-bargaining agreement requiring that all routes be available for employee bidding. (ALJD 20:26-35 GC Exh. 53 (2000 agreement § 15(e) at 10-11), 2002-06 MOA at 2.)

The Union's submission of numerous grievances in September and October of 2008, mostly through steward Uchofen,[3] certainly did not result in an improvement of its relationship with Ardsley. In October and November 2008, Respondent refused to provide the Union with relevant information regarding the fall route picks (GC Exhs. 41–42; ALJD 27:1-11) and ignored the Union's request for second step meetings on various pending grievances (GC Exh. 74; Simino Tr. 636; ALJD 18:37-44). As a result, in November 2008 the Union submitted a number of the pending grievances to the contractually-designated arbitrator. (GC Exh. 110 at Exhibit D thereto.)

In December 2008 and January 2009, Ardsley responded by bypassing the Union to solicit employee statements regarding summer route picks (Sanchez Tr. 1054–1056; Gillison Tr. 328–332; GC Exh. 49), dealing directly with mechanics regarding the settlement of a tool-allowance dispute (Lopez Tr. 1129–1136; Gillison Tr. 1136–1145; GC Exhs. 51–52), and seeking to stay the Union's arbitration demands (GC Exh. 109, Exh. 1 thereto). (ALJD 30:33-43, 31:1-26.)

Eventually, in April 2009, Respondent agreed to proceed to arbitration on certain grievances (GC Exh. 103, Exh. 1 thereto), but its relationship with the Union did not improve. In May, Respondent counsel questioned a Unit employee without providing the required *Johnnie's*

[3] The Union filed grievances regarding, *inter alia*, Respondent's alleged (i) failure to pay employees the daily guaranteed minimum number of hours (GC Exhs. 33–34); (ii) unjust discharge of driver Bellamy; (iii) underpayment of a senior driver (GC Exhs. 31–32); (iv) reduction of the route hours of senior employees in favor of junior workers (GC Exh. 40); (v) failure to pay employees for the guaranteed minimum number of weeks per year (GC Exh. 39); and (vi) failure to post and bid post-pick routes by seniority (GC Exh. 43).

Poultry assurances (Gomez Tr. 811–815; R. Exh. 8 ¶¶ 2–3; ALJD 32:20-23), and did not respond to a Union request for information in anticipation of bargaining (GC Exh. 75; Simino Tr. 644–646; ALJD 37:41-43).

In June 2009, the parties commenced face-to-face negotiations for a successor contract (Connolly Tr. 522–29), but Respondent quickly halted the bargaining progress. Respondent: demanded that the Union's shop steward Uchofen be excluded from attending negotiations (GC Exh. 85); demanded a copy of the Union's bargaining notes (Connolly Tr. 523 and 541); refused to make any proposals until the Union presented its proposals in writing and provided copies of its collective-bargaining agreements with other employers (Connolly Tr. 524–25, 528–29, 538–539, 542, and 544–45; GC Exh. 88); refused at the meeting to schedule further negotiating sessions (Connolly Tr. 525); and walked out without responding substantively to anything the Union had said. *Id.* In correspondence immediately following the session, Respondent refused to set further bargaining dates despite Union counsel's requests to do so. (GC Exh. 87, 89.)

By its actions, Respondent withdrew recognition from the Union as of the expiration of the parties' collective-bargaining on June 30, 2009. (ALJD 36:39-45.)

Respondent also refused the Union access to the August 2009 pick procedure for the 2009-10 school year (Simino Tr. 1190–1200; ALJD 37:1-4), and made unilateral changes in employees' terms and conditions of employment with regard to pay rates, assignment of charter work, holidays and leave, discipline, attendance/absenteeism and hours of work (*compare* GC Exh. 19 *with* GC. Exh. 53; ALJD 37:5-19).

II. ARGUMENTS IN SUPPORT OF CROSS-EXCEPTIONS

A. Violations of Section 8(a)(1) of the Act

1. Cross-Exception 1: Respondent, on or about March 19, 2008, by Thomas Gillison Threatened Shop Steward Cesar Uchofen With Physical Violence Because of His Union Activities

On the morning of Wednesday, March 19, driver and Union vice-chair (shop steward) Cesar Uchofen discovered that his keys were not in his company van. Uchofen reported to the dispatch office, where dispatcher John Stewart told him that Gillison wanted to see him upon his morning return. (Uchofen Tr. 868-69.) Thus, at around 10:30 a.m., Uchofen went to Gillison's office. During their ensuing conversation, Gillison told Uchofen that he could no longer take his van home during lunch and asked Uchofen how many times he had taken the van to Yonkers, New York. Uchofen replied that he had done so three times, and Gillison knew of these visits. (Uchofen Tr. 870-71.)

Uchofen further testified:

> He told me also because I am the -- you know, a Union person, you think you are smarter than me. You don't know who are you dealing. I am going to take all the shit from you. I say you're not supposed to talk like that to me. I come nice to talk to you. But, he try to say I am -- I have the power here. I do whatever I want here.

(Uchofen Tr. 872-73.) In an affidavit taken of Uchofen, which the ALJ admitted into the record evidence, Uchofen attests to the conversation, in pertinent part, as follows:

> I asked Tom what was going on, because the key hadn't been in the bus yesterday and today. I asked him if he was treating me like that because I am the Union's Vice Chair. He got upset and asked why I would come into his office to say something like that to him. I told him I was sorry, that I didn't mean to upset him, that maybe it was because my English is not so good. Tom said "No, I understand your English just fine" but he was very upset.
>
> * * *

> He said again, "don't insult my intelligence," then something like, "You don't know who I am, you think because you are in the Union you are smarter than me, but I'm going to squeeze the shit out of you." I said, "You're not supposed to talk to me like that." He said, "This is my shop and my business and I do what I want."

(Resp. Exh. 24 ¶ 14.)

The ALJ quoted Uchofen's trial testimony. (ALJD 10:30-33.) He also discounted the affidavit testimony, stating:

> The General Counsel points to an assertion in Uchofen's affidavit to the affect that during this conversation, Gillison stated; "I'm going to squeeze the shit out of you." I am not going to rely on this to find that the [sic] Gillison threatened Uchofen with violence. For one thing, this out of court statement is hearsay if offered by the General Counsel for the truth of the matter asserted. Secondly, it is contrary to the record testimony of Uchofen at the hearing.

(ALJD 10:47-51.)

With regard to hearsay, Uchofen's affidavit was entered into evidence by Respondent without objection from any party. (Tr. 969.) As such, the affidavit is considered substantive evidence of the truth of the matter asserted. *Alvin J. Bart and Co., Inc.*, 236 NLRB 242, 243 (1978) enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979).[4]

The ALJ's reasoning appears to be that: (1) Gillison's statement that he was "going to take all the shit from [Uchofen]" does not stand alone as a threat of physical violence against Uchofen as a "Union person" who "think[s he is] smarter than [Gillison];" and (2) the affidavit testimony that Gillison said to Uchofen, "I'm going to squeeze the shit out of you" sufficiently contradicts Uchofen's trial testimony that Gillison said (that he was "going to take all the shit from" Uchofen) such that it renders Uchofen's testimony not credible.

[4] In fact, the ALJ admitted as substantive evidence the unobjected-to affidavit of another witness, Reynaldo Gomez. (Tr. 482-83, 814, 817.)

A cursory reading of Uchofen's trial testimony shows that English was not his first language, and the only dissimilarity between the trial and affidavit testimonies amounts to the tiny difference between two synonymous phrasal verbs: "take all from" and "squeeze out of." Uchofen's use of a synonym should not have been a basis for the ALJ to dismiss what was clearly a threat towards Uchofen because of his status as a Union steward. The Act prohibits an employer from saying to an employee, because of the employee's union activities, both sentences: "I am going to take all the shit from you" and "I'm going to squeeze the shit out of you."

2. Cross-Exception 2: Respondent, on or about June 16, 2008, by Thomas Gillison Threatened Shop Steward Cesar Uchofen With Physical Violence Because of His Union Activities

Uchofen provided unrebutted testimony concerning an incident in Gillison's office on June 16, 2008. According to that testimony, Uchofen and other drivers had just attended a meeting in an Ardsley trailer convened by a representative Mohawk summer camp. (Uchofen Tr. 889.) After the meeting ended, at about 11:00 a.m., Uchofen went to Gillison's office to ask for information about the work at the camp. Gillison was seated at his desk, and John Stewart was standing nearby. Uchofen asked how many hours, and at what rate, the Mohawk runs would pay. Gillison replied that it was "not Union business. It's none of your business." (Uchofen Tr. 944.) Uchofen posed again his questions to Gillison. Gillison stood up and bellowed, "It's not your business. It's not Union business. Get out of here." Uchofen replied he was going to stay until Gillison gave him an answer. Gillison then bolted towards Uchofen, raising his hands in a manner to throw him out. John Stewart moved to put himself in the middle of the two men, and asked Uchofen to leave quickly. (Uchofen Tr. 891-92.)

The ALJ dismissed the allegation because Respondent's actions, as described by Uchofen show "[a]t most . . . an irritated and angry Gillison responding to a request for information by the Union's shop chairman." (ALJD 13:10-11.)

To the contrary, the facts show that Gillison threatened to physically throw Uchofen out of his office because Uchofen asked for information from Gillison about the Mohawk summer routes. Gillison's aggressive respoonse was a direct reaction to Uchofen's protected activity. *See Jones Motor Co., a Div. of Allegheny Corp.*, 202 NLRB 123, 133 (1973). Because Uchofen was seeking information about the hours of work and pay for certain runs for unit employees, *i.e.*, terms and conditions of employment for unit workers, and such information was patently related to employee bidding for routes in the upcoming summer pick, that information was plainly relevant. *See, e.g., Kathleen's Bakeshop, LLC*, 337 NLRB 1081 1094 (2002) (union requesting delivery routes); *Postal Service*, 341 NLRB 655, 663 n.17 (2004) (union requesting list of applicants for positions under contract's bidding and posting procedures); *Summa Health Systems, Inc.*, 330 NLRB 1397, 1399 (2000) (union requesting job postings). As the ALJ found, the evidence demonstrates that Gillison understood that Uchofen was seeking this information as a Union representative: Gillison repeatedly told Uchofen that the information was not "Union business." Consequently, Gillison's threat was in response to Uchofen's protected activity and that threat was therefore unlawful.

3. <u>Cross-Exceptions 3 and 4</u>: Respondent, on or about September 8, 2008, by Thomas Gillison: (i) Told Shop Steward Cesar Uchofen that It Was Futile for the Union To Bring Employee Grievances to Respondent; and (ii) Threatened Shop Steward Cesar Uchofen With Unspecified Reprisals If He Assisted the Union

At the start of the 2008-09 school year, Uchofen learned that he had not been assigned a monitor for his van of sixteen children. In early September 2008, he approached Gillison to

request a monitor. Gillison replied that "[i]t's the Union fault that" Uchofen was separated from his monitor, and therefore, Uchofen, as "a Union person . . . need[s] to fix it." Gillison added that he (Gillison) was Uchofen's boss, who paid his salary, and that Gillison could do "whatever [he] wanted." (Uchofen Tr. 896-98.) Respondent did not rebut this testimony.

Regarding Gillison's statement, the ALJ opined that "nothing in this conversation supports the allegations that Gillison made statements of futility or that he threatened Uchofen with unspecified reprisals. At most, this testimony shows that Gillison was annoyed by the Union and that he was merely asserting his status as Uchofen's boss." (ALJD 29:48-51.)

To the contrary, Gillison threatened Uchofen with unspecified reprisals when Gillison reminded Uchofen that he could seek the Union's help, but that Ardsley, not the Union, paid his salary. *See, e.g.*, *United Merchant*, 284 NLRB 135, 136 (1987) (employer violated § 8(a)(1) by reminding employee that it had been good to him and his family but had power to eliminate jobs), revd. on other grounds sub nom. *Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC v. NLRB*, 850 F.2d 688 (4th Cir. 1988). Gillison also implied to Uchofen that it was useless to bring this grievance to him. *See Prudential Ins. Co.*, 317 NLRB 357, 357 (1995) (finding violation of § 8(a)(1) where employer implied that it would not cooperate in resolving grievance).

4. <u>Cross-Exceptions 5, 6 and 7</u>: Elisa Arias and Rosa Vilella Are Agents Within the Meaning of the Act, and, as such, Respondent, By These Agents, Violated Section 8(a)(1) of the Act as Alleged in the Complaint

a. Agency Status of Vilella and Arias

The Board has stated that:

> The position and duties of the employee alleged to be an agent are relevant in determining agency status. Thus, an employee's statement may be attributed to the employer if the employee is "held out as a conduit for transmitting information [from the

> employer] to the other employees." The Board also considers whether the alleged agent's statements or conduct were consistent with those of the employer.

D&F Industries, Inc., 339 NLRB 618, 619 (2003) (footnotes and citations omitted).

Gillison identified Rosa Vilella as his "assistant," and in a company disciplinary document she is identified as the "Assistant Manager." (Gillison Tr. 115; GC Exh. 10.) Gillison admitted to using Vilella as a conduit to employees regarding "whatever I need" and "what I want done." (Gillison Tr. 116.) Gillison admitted that during an absence from the facility, he "instructed Rosa Vilella and John Stewart – the Dispatcher – to inform Cesar that he had to go to my office and see Rosa explaining why he didn't show up" to discuss his alleged misuse of the company van. (Gillison Tr. 151-52.) Gillison also delegated to Vilella the task of informing Uchofen that his take-home van privileges had been revoked and in fact, told Uchofen that when Gillison is away from the facility, Vilella fills in for Gillison. (Uchofen Tr. 862-863, 870.) Vilella exercised this authority on several occasions, including when she told Uchofen that he was not permitted to discuss a work accident with a monitor who had come to Vilella's office to report an accident. (Uchofen Tr. 864-65.)

Respondent also employed Elisa Arias as one of his dispatchers. (Gillison Tr. 113, 116-17, 126.) Gillison admitted to using his dispatchers to "transmit messages to employees" at the facility and in the field regarding all work-related matters. (Gillison Tr. 1333-34.) Uchofen testified that Arias passed on management instructions to him regularly, including how to handle problems on the bus. (Uchofen Tr. 861-62.) Uchofen further testified that, on occasion, Elisa Arias represented Respondent during step one grievance hearings. (Uchofen Tr. 853.)

Furthermore, Vilella was a relatively high-level manager as the sole Assistant to General Manager Gillison, and both Vilella and Arias had served as translators and accomplices during

Gillison's unlawful direct dealing with employees in Decembers 2008. As the ALJ found, Gillison unlawfully soliciting "waivers" from employees of their rights regarding the Union's grievance over the equitable distribution of summer camp work. (ALJD 31:23-26; GC Exh. 49.) Gillison admitted at hearing that, while he was soliciting employees' signatures in the classroom trailer, he was accompanied by safety director Ramos and either assistant manager Vilella or dispatcher Arias, who apparently performed Spanish translations. (Gillison Tr. 328-30, 331, 332.) *See Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007) (supervisor, who had served as translator during a captive audience meeting, unlawfully interrogated an employee about whether employee had signed a decertification petition by asking employee if she had "agreed to keep the union" and was "happy with the union").

b. Aria's 8(a)(1) Threat In December 2008

The ALJ dismissed General Counsel's allegation that Respondent violated § 8(a)(1) of the Act when, in or about December 2008, Arias, at Respondent's facility, threatened employees that Respondent would reduce hours and other benefits to employees known to associate with the Union. (Compl. ¶ 17.)[5]

Uchofen testified, in December 2008, Arias announced, in the presence of fifteen-to-twenty employees congregating in and around the dispatch office, that "the people who was complaining to the Union don't got any summer work . . . ." (Uchofen Tr. 963-65.) Uchofen identified in particular two monitors and a driver who were close enough to Arias to have heard

[5] The "Complaint" shall refer to the Order Revoking Informal Settlement Agreement, Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing, issued by the Regional Director on September 11, 2009, and which consolidated Case Nos. 2-CA-38713, 2-CA-39049 and 2-CA-39376. During the course of the unfair labor practice hearing, Counsel for the General Counsel moved to consolidate the forgoing with the Complaint and Notice of Hearing in Case No. 2-CA-39467, and the ALJ granted that motion. (Tr. 29.)

the threat, and Ardsley did not rebut Uchofen's testimony about the incident. (Uchofen Tr. at 965.)

The ALJ, noting that Uchofen's testimony was uncorroborated, but never indicating that his unrebutted testimony was not credible, held that:

> the evidence does not suggest that Arias was a supervisor within the meaning of the Act. Although the dispatchers do communicate between Gillison and the employees on the road, the evidence does not suggest that Arias or any other dispatcher is authorized, on their own account, to speak about company policy.

(ALJD 30:48-51.)

As stated above, Arias was a dispatcher whom Gillison employed as conduit regarding all work-related matters. (Gillison Tr. 1333-34.) Uchofen also testified that Arias relayed management instructions to him regularly. (Uchofen Tr. 861-62.) Uchofen further testified to Arias representing management during step one grievance hearings. (Uchofen Tr. 853.) Arias was also a translator for Gillison when he directly dealt with employees. (Gillison Tr. 328-30, 331, 332.)

Arias's threat regarded the number of hours employees would work, depending on their support of the Union. The ALJ himself described a dispatcher's job as inclusive of having the authority over employee hours:

> The dispatchers are people who are responsible for making sure that the routes are covered and they are in constant touch with drivers via two way radios. For example, although regular school year routes are established before the beginning of each school year, with the drivers and monitors assigned to specific routes, there are occasions when substitutions and changes have to be made at the last minute. A driver or monitor may be sick and a substitute will have to be assigned to a route by a dispatcher. Or a school might cancel a route and this might engender another change. Or a charter run may come into the office and *a dispatcher, on short notice, will have to find and assign a driver and/or monitor to do this work.*

> Other than dealing with the day to day shifting of people around when needed to fulfill the needs of the routes, there is no evidence that dispatchers [have certain supervisory indicia] set forth in Section 2(11) of the Act. The dispatchers are however, responsible for transmitting instructions to the drivers from Mr. Gillison, who is the General Manager. To a limited extent, they may, in certain limited circumstances, be construed as agents within the meaning of Section 2(13) of the Act.

ALJD 6:20-35 (emphasis added). Thus, Arias, as a dispatcher, had, at the very least, the power "to find and assign a driver and/or monitor" to obtain additional work hours by covering for an absent employee. As a consequence, an employee can reasonably expect that Arias had the power, conferred by management, to make good on a threat to reduce hours if an employee is deemed a Union supporter. *See Electronic Data Systems Corp.*, 305 NLRB 219, 219 n.4 (1991) (Board agreeing with ALJ that dispatcher was agent, cloaked with apparent authority, when she unlawfully interrogated and made coercive statements to employees).

c. Vilella's and Arias's Interrogations in May 2009

General Counsel alleged that, in about late-May 2009 and early to mid-June 2009, Elisa Arias and Rosa Vilella interrogated employees regarding whether or not they signed a petition to decertify the Union. (Compl. ¶ 23.)

Respondent entered into evidence an undated employee petition to decertify the Union, along with a cover letter which was addressed to the employer and dated June 16, 2009. (R. Exhs. 6a, 6b.) Throughout June 2009, Driver Guillermo Sanchez witnessed three employees, including Maciera, each equipped with clipboards, collecting signatures. Sanchez usually saw them in the bus parking lot. One of the employees, whose name he could not recall, asked Sanchez, at the entrance to one of the trailers, to sign a petition to remove the Union. (Sanchez Tr. 1059-60, 1061.) On two or three occasions in June, as he was punching his time card in the

dispatch trailer, Sanchez observed Assistant Manager Vilella and dispatcher Arias ask employees whether or not they signed the petition. Sanchez identified these employees as female monitors. (Sanchez Tr. 1066-67, 1072-73, 1077.) Respondent did not rebut this testimony.

The ALJ, noting that Sanchez's testimony was "uncorroborated," did not discredit Sanchez's testimony. However, he dismissed this interrogation allegation because:

> the evidence does not establish that either is a supervisor within the meaning of Section 2(11) of the Act or that such a question as within their authority as employees of the Respondent, I do not conclude that this single transaction violated the Act. Nor would I view this one time question as being coercive under *Rossmore House*, 269 NLRB 1176 (1984).

(ALJD 34:48-51.)

However, as stated above, the evidence shows that both Vilella and Arias were agents within the meaning of the Act. Furthermore, the interrogation does not run afoul of the holding in *Rossmore House*. There, the Board rejected the principle that "an employer's questioning open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act." *Rossmore House*, 269 NLRB at 1177-78 (footnotes omitted). In the instant case, there is no evidence that the interrogated employees were open Union supporters (or anti-Union activists). In fact, the very question posed of the employees was to gauge the employees' level of support for the Union, *i.e.*, whether or not they wanted the Union's removal by signing the petition. Furthermore, as stated above, Vilella was a the only Assistant to General Manager Gillison, and both Vilella and Arias were translators and accomplices when Gillison directly dealt with employees in Decembers 2008.

Therefore, contrary to the ALJ findings, the facts show that, under all the circumstances, the interrogations of employees regarding their signing the decertification petitions were coercive and violated Section 8(a)(1) of the Act.

B. Cross-Exception 8: Respondent, on or about January 21, 2009, Violated Section 8(a)(3) of the Act By Terminating the Employment of Shop Steward Cesar Uchofen Because of His Union Activities

The ALJ incorrectly dismissed the allegation that Uchofen, the Union's sole and most vocal voice among the bargaining unit, was terminated because of his Union activities, in violation of Section 8(a)(3) of the Act. (ALJD 16:13-16.) As described below, the ALJ ignored important evidence, applied incorrectly the test in *Atlantic Steel*, 245 NLRB 814 (1979), and even if he had properly applied *Atlantic Steel*, Uchofen's discharge was unlawful based on an analysis under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

1. Facts Surrounding the Discharge

Ardsley fired Uchofen on January 22, 2009, based on an event occurring on the preceding day. In the morning of January 21, employees were waiting in a 75-by-12-foot trailer to take eye and physical exams. (Simino Tr. 639-40; Stevens Tr. 1180.) As administered, those exams involved employees entering the trailer, sitting at several tables, filling out the top section of a self-evaluation form for the physical exam, and waiting until called. (Clayton Tr. 1120-22, 1125-26.) Employees were first called for the eye exam, which Gillison performed at one end of the trailer, giving instructions to employees one at a time. (Clayton Tr. 1124-25; Gillison Tr. 387.) Employees then waited to be summoned for the physical exam, which was performed by a doctor behind the door of the trailer's inner office. (Simino Tr. 639-40; Stevens Tr. 1180.) The wait time between the eye exam and physical exam was about twenty minutes. (Clayton Tr.

1115.) The examining doctor testified that "[t]here are people in line to see me. They're filling out paperwork and they're talking and chatting away." (Stevens Tr. 1181.)[6]

At mid-morning, Uchofen entered the trailer and began distributing a survey to the waiting employees. That survey was designed to collect information from Unit employees about what they wished to bargain for in the next collective-bargaining agreement. (Uchofen Tr. 930-40; Gillison Tr. 386-87; ALJD 13:40-43.) Uchofen had been distributing the survey over the prior two months in other places at the facility, regularly in view of Gillison, Titkin, and dispatch office employees. (Uchofen Tr. 940-41, 948-49, 952.) As Uchofen spoke with employees about the survey in the trailer, Gillison told Uchofen to stop what he was doing, that he could not perform "Union business," and should leave. (Clayton Tr. 1113-15. Uchofen Tr. 943, 945. Gillison Tr. 386-87.)

Uchofen responded that he would not leave and would continue with what he was doing because he had a right to be present on behalf of the Union. (Uchofen Tr. 945; Gillison Tr. 386-87.) Uchofen telephoned Union representative Simino. For about the next ten minutes, Uchofen continued talking to employees about the survey while intermittently responding to Gillison's further demands to cease his activity and leave.[7]

Simino arrived at the trailer and asked Gillison to allow Uchofen to continue with the distribution, to which Gillison responded, "[Y]ou can't have a Union meeting in the trailer." (Simino Tr. 638-39, 640, 641.) Owner Titkin then entered the trailer and asked Uchofen to come

[6] The examining doctor testified to the small amount of personal information required on the form: "their name[s], their address[es], their phone number[s], their social security number[s]. . . . Their cell phone [numbers], where they live. And there is a series of boxes of what they check off; do they have a heart problem, diabetic, hypertension, stomach problems, asthma." (Stevens Tr. 1182.)

[7] According to Uchofen, after phoning Simino, he continued distributing the survey and told employees that Gillison "want to be Fidel Castro here, because he think it's Cuba. We are American. The people are free here. You can fill it out, this one, is your opinion. It's for you. Don't let other people do for you." (Uchofen Tr. 945.)

to his office. Uchofen refused. (Uchofen Tr. 945-46.) Uchofen asked Titkin to allow him to finish and to meet with him afterward. According to Gillison, Simino "belligerently" responded to Titkin that no one was leaving. (Gillison Tr. 386-87.) Within moments, police officers arrived. (Uchofen Tr. 946.) After some discussion with the police, Uchofen and Simino, along with another Union representative who had arrived with Simino, continued to distribute the survey outside the trailer. (Simino Tr. 641.)

The doctor performing the physicals did not hear any disruption during the morning and, according to employee Clayton, Gillison's encounter with Uchofen merely "took our attention a little bit from" Gillison's instructions regarding the eye exam. (Stevens Tr. 1184-85; Clayton Tr. 1009.). Furthermore, Clayton testified that she heard no cursing during the entire incident and there is no Respondent testimony otherwise. (Clayton Tr. 11120.)

Clayton also testified, and it was not rebutted by Ardsley, that the only employees taking the exam were at the other end of the trailer, where Gillison was instructing them one-by-one; other employees waited at tables for about twenty minutes to be called. (Clayton Tr. 1115,. 1124-25; Gillison Tr. 387.) Gillison wrote in Uchofen's discharge letter that, after telling Uchofen that he could not perform "union business," Uchofen "immediately began to yell and told me that he had a right to be there to do union business and I could not stop him." (R. Exh. 5 at 1.) However, the only witness testimony from any party regarding shouting concerned Gillison's behavior, not Uchofen's. (Simino Tr. 639-40.)

When he arrived to work the next morning, Uchofen was told that he was not driving and that Gillison wanted to see him. (Uchofen Tr. 954.) Later, Simino, Uchofen, and Union attorney Ursula Levelt met with Titkin, who handed Uchofen his last paycheck and a letter stating that he was fired. (Uchofen Tr. 955; R.. Exh. 5.) The letter, written by Gillison, summarizes: "for

Cesar to come into a New York State required function . . . and be disruptive and to flatly refuse a directive from the owner several times and to tell him that he will not comply with his order is nothing but plain insubordination and it will not be tolerated." (R. Exh. 5 at 2.)

2. The ALJ's Inadequate *Atlantic Steel* Analysis

Relying almost exclusively on the testimony of employee Rosie Clayton (ALJD 14:4-52 through 15:1-41), the ALJ concluded that Uchofen:

> interfered with the operations of the employer on that day and that he refused to leave the trailer after being politely asked to leave. There was no good reason for Uchofen to be in the trailer handing out his papers or talking to the employees while the Company was conducting the exams. He could have easily waited just outside the trailer which was still on the Respondent's property and handed out his questionnaires. Indeed, the evidence is that before this particular date, he did so without any interference on the part of the Company.

(ALJD 16:5-11.) Although acknowledging that Uchofen did not engage in any "verbal outbursts" and that "the Company demonstrably held Uchofen in enmity," the ALJ reasoned that Respondent's dislike of shop steward Uchofen "did not give [Uchofen], even though a union representative, the right to do whatever he liked." (ALJD 16:13-16.) Although listing the factors to consider in the *Atlantic Steel* test (ALJD 15:46-52), the ALJ did not discuss how each factor weighs or not in favor of Uchofen having lost the Act's protection, as the Board takes cares to do. (*See, e.g., Starbucks Corp.*, 354 NLRB No. 99 (2009).)

As set forth below, a thorough analysis, considering all the relevant evidence, would show that Uchofen had not lost the Act's protection and was therefore fired unlawfully because of his Union activities.

3. Testimony Which the ALJ Failed To Adequately Consider

Although Clayton testified that Uchofen's Union activities in the trailer took attention away from Gillison, Clayton and others also testified, and it was not rebutted by Respondent: that the only employees taking the exam were at the other end of the 75-foot trailer, where Gillison was instructing them one-by-one; and that other employees waited at tables for about twenty minutes to be called. (Clayton Tr. 1115, 1124-25; Gillison Tr. 387.)

Furthermore, the doctor giving the exams testified to what he saw when he would open the inner door of the trailer to call in the next patient: "[t]here are people in line to see me. They're filling out paperwork and they're talking and chatting away." (Stevens Tr. 1181.) John Simino corroborated the "waiting room" scene in the trailer that morning: "They were sitting in mass waiting for their annual physical. Just like a waiting room. . . . They had newspapers or whatever. Now they had a contract survey." (Simino Tr. 642.) Uchofen described the scene as employees standing in line snaking around tables. (Uchofen Tr. 941-43.)

Thus, apart from filling out paperwork and actually taking the exams, the employees' activities consisted of waiting, reading and chatting. In essence, the trailer became a waiting room.

4. Uchofen Was Unlawfully Discharged For Protected Activities Pursuant to *Atlantic Steel*

Where the conduct for which a respondent admits to having discharged an employee occurred during the course of the employee's protected activity, the proper analysis is to determine whether the employee's conduct was so opprobrious that the employee thereby lost the Act's protection. *Starbucks Corp.*, 354 NLRB No. 99, slip op. at a 2 (2009); *Felix Industries, Inc.*, 331 NLRB 144 (2000) remanded on other grounds *Felix Industries, Inc. v. N.L.R.B.*, 251 F.3d 1051 (D.C. Cir. 2001). The longstanding factors considered for determining whether such

an employee loses the Act's protection through opprobrious conduct are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814 (1979).

The balance of these factors falls in favor of the conclusion that Uchofen retained the protection of the Act. Uchofen was engaged in Union activities when distributing the surveys to employees in the trailer, and Uchofen's refusal of Gillison's directive to leave the trailer was based on Uchofen's belief that he had the right to engage in this Union-related activity. Uchofen was not engaged in obscene conduct and had not engaged in an outburst: the question thus turns on whether Uchofen lost the protection of the Act by his insubordination, *i.e.*, his refusal to follow Gillison's directive to leave the trailer.

Place of discussion. The place of the discussion here arguably weighs against protection because 20-30 employees were exposed to Uchofen's refusal to leave the trailer. *See Starbucks Corp.*, 354 NLRB No. 99 slip op. *3 ("[t]he location of an employee's conduct weighs against protection when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees regardless of whether those employees are on or off duty. The question is whether there is a likelihood that other employees were exposed to the misconduct") (citing *Postal Service*, 350 NLRB 441, 459 (2007).) *But see Datwyler Rubber and Plastics Inc.*, 350 NLRB 669, 670 (2007) (the place of the discussion weighs in favor of protection where the outburst occurred during an employee meeting held in the employees' breakroom, a location that would not disrupt Respondent's work process); *Noble Metal Processing*, 346 NLRB 795, 800 (2006) (place of discussion weighs in favor of protection where outburst occurred during employee meeting held away from employees work area).

Subject matter of discussion. The second factor—the subject matter of the discussion—mitigates against losing the Act's protection. Uchofen and Gillison were discussing the very right to engage in Union activity in the trailer while employees were waiting for their exams. The subject matter was directly related to Uchofen's role as Union steward and his right to communicate with Union members and distribute to them a survey that the Union would use to negotiate a collective-bargaining agreement. *See Bloomfield Health Care Center*, 352 NLRB 252, 254 (2008) (union supporter, whose "outburst involved no profanity and no threatening conduct," did not lose Act's protection where subject matter of discussion with supervisor was "whether [the employee] had a right to remain on the Respondent's property, and whether [the supervisor] was discriminating against her because she was a union supporter");

Nature of the employee's conduct. The third factor—the nature of Uchofen's conduct—also mitigates against losing the Act's protection. Even though Uchofen refused directives from Gillison to leave the trailer persisted in disobeying those orders, Uchofen did not use profane language or shout and there was no evidence that Uchofen's conduct amounted to a disruption of the eye exams and physicals. The evidence also shows that the employees with whom Uchofen was conversing were sitting inside the trailer waiting to be called for exams taking place at the other end of the 75-foot-long enclosure.

The Board's reasoning in *Postal Service*, 252 NLRB 624 (1980), is particularly instructive in analyzing the third factor here. In that case, a shop steward left her work station without permission in order to represent a group of employees who had just complained about a supervisor. When she approached the supervisor and the complaining employees, the supervisor told the steward that "[t]his is not union business," to which the steward "responded by asserting her right to represent the employees." *Postal Service*, 252 NLRB at 624 (footnotes omitted).

The supervisor "gave [the steward] several direct orders to return to her workplace," and the steward persistently "ignored the orders, protesting that she had a right to remain with, and represent, the men." *Id.* In finding that the steward did not lose protection of the Act, the Board reasoned that the supervisor's statement to the steward that "this is not union business" "made it abundantly clear to [the steward] that [the supervisor] was bent on preventing her from performing her official duties and also plainly demonstrated the futility of her requesting permission to engage in union business." The Board found the steward to not have been insubordinate, but rather her "conduct involved neither a refusal to work nor a disruption of work production, and her conduct did not exceed 'acceptable bounds' and lose the protection of the Act." *Postal Service*, 252 NLRB at 624-25 (footnotes omitted).

Here, as in *Postal Service*, Gillison made it clear to Uchofen that he could not conduct Union business in the trailer; in Gillison's words, Uchofen could not have "a Union meeting". Despite Uchofen's refusal to leave, the relatively calm nature of his refusal mitigates against losing the Act's protection of Uchofen's distribution of the Union survey. *See Bloomfield Health Care Center*, 352 NLRB at 254 (nature of employee's "outburst involved no profanity and no threatening conduct," while employee was asserting a right to remain on employer property while off-duty). *Compare Carolina Freight Carriers Corp.*, 295 NLRB 1080, 1080 n.1 (1989) (finding employee's "behavior in asserting a contract right constituted insubordination because he *persisted* in challenging his supervisor's direct order to clock out" and also because he had also been the subject of employer's counseling "in the past about his abrasive behavior and explosive temper") (emphasis in original).

Employer provocation. Finally, the nature of Uchofen's conduct must be evaluated alongside the fourth factor of the *Atlantic Steel* test: provocation. *Special Touch Home Care*

Services, Inc., 351 NLRB 754, 756 (2007), citing *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849 (2001) (employee's conduct must be evaluated by comparing "the seriousness of the employer's unlawful conduct with the extent of the employee's reaction"). Here, like in *Postal Service*, *supra*, Gillison "may have considered [Uchofen]'s conduct as a challenge to his authority, but the fact remains that he provoked the confrontation by his unwarranted interference with [Uchofen]'s protected right to" perform Uchofen's steward functions. *See Postal Service*, 252 NLRB at 625. Furthermore, unlike in *Carolina Freight*, 295 NLRB at 1083, in which the employee was protesting a work order on working time to clock out because it violated the collective-bargaining agreement's minimum-hour requirements, Uchofen was protesting an order to cease his steward-related activities, which he had been conducting in a non-disruptive manner on his own time. What is more, Uchofen was discussing the survey with employees while they were not engaged in their work of driving a bus or monitoring students; the employees were passing the time waiting to called for the exams taking place at the far end of the trailer. Uchofen was in part provoked because Gillison's conduct was extreme for the context: he did not tell Uchofen to quiet down because he was not able to give instructions to employees, Gillison told Uchofen to cease his Union activity and leave.

Based on the foregoing balancing of the *Atlantic Steel* factors, Uchofen was discharged because of his Union activities in violation of Section 8(a)(3) of the Act.

5. Alternatively, Respondent Discharged Uchofen Because of His Union Activities Under *Wright-Line*

Although Uchofen's termination was unlawful in light of the *Atlantic Steel* test discussed above, General Counsel submits that the same result would obtain if the discharge were analyzed using the *Wright Line* burdens of proof.

Whether an employer's change in an employee's working conditions violates Section 8(a)(3) of the Act is analyzed under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating (1) protected activity, (2) employer knowledge of that activity, and (3) animus against that protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *Allstate Power Vac, Inc.*, 354 NLRB No. 111, slip op. at *4 (2009); *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1088-1089 (2002) citing *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *revd.* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand 281 NLRB 882 (1986), *affd.* 835 F.2d 1481 (D.C. Cir. 1987), *cert denied* 487 U.S. 1205 (1988).

Both employer knowledge of protected activity and anti-Section 7 motive in taking adverse action against a specific worker may be proven by circumstantial, as well as direct, evidence. *See, e.g., Dlubak*, 307 NLRB 1138, 1155 (1992), *enf'd*, 5 F.3d 1488 (3rd Cir. 1993); *Abbey's Transportation Services*, 284 NLRB 698, 700-701 (1987), *enf'd* 837 F.2d 575 (2d Cir. 1988). Factors typically considered include general employer knowledge of protected activity and the timing and surrounding circumstances of the adverse action. *See American Cyanamid Co.*, 301 NLRB 253 (1991); *Abbey's Transportation Services*, 284 NLRB at 700. Finally, if the evidence indicates that the employer's purported reasons for firing an employee are pretextual, the Employer *a fortiori* fails to rebut the *prima facie* case. "[I]f the evidence establishes that the reasons given for the Employer's action are pretextual—that is, either false or not in fact relied

upon—the Employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the Wright Line analysis." *Golden State Foods*, 340 NLRB 382, 385 (2003) citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Uchofen's activity of passing out the surveys and discussing them with employees was Union activity, and based on Gillison's words and actions during the encounter in the trailer, he treated Uchofen disparately because of that activity. It was not that Gillison told Uchofen to stop distributing materials and keep his discussion with employees to a whisper, Gillison admittedly objected to Uchofen conducting a "union meeting"[8] and "union business,"[9] and thus ordered Uchofen to leave precisely because of the Union-related nature of Uchofen's activities. Thus, the evidence shows that Gillison forbade discussion and "meeting" concerning Union matters, while permitting the chatting and reading of newspapers among the other employees, about which Dr. Stevens and Simino testified.[10] Gillison's actions patently show the disparate treatment of Uchofen because of his Union activities, and thus demonstrate a Section 8(a)(3) violation. *See, e.g., NLRB v. ADCO Electric, Inc.*, 6 F.3d 1110, 1119 (5th Cir. 1993) (employer discharged only union supporter for failing to report for overtime duties); *Regal Recycling, Inc.*,

[8] Simino Tr. 640.

[9] R. Exh. 5 at 1 (Gillison's discharge letter to Uchofen) ("I, Tom Gillison told Cesar politely that he could not do his *union business* while we had physicals being completed. . . . Again I told him that be could not do his *union business* until the physicals were finished.") (emphasis added); Gillison Tr. 386; Uchofen Tr. 944.

[10] Stevens Tr. 1181; Simino Tr. 642. Furthermore, "an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work. . . ." *Scripps Health*, 347 NLRB 51, 51 (2006) (quoting *Jensen Enterprises*, 339 NLRB 877, 878 (2003). Respondent has also made no claim that it maintained any rule against Union solicitation or distribution of Union materials. In fact, article 7 of the parties collective-bargaining agreement provides that "The Employer agrees to provide the union Chairperson with 7 (seven) hours of paid time to conduct union business (this is above regular pay)." (GC Exh. 53.)

329 NLRB 355, 356-357 (1999) (employer required only supporters of disfavored union to produce immigration documents); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (employer disciplined only open union supporter for same conduct engaged in by two other employees). *See also Scripps Health*, 347 NLRB 51, 51 (2006) (section 8(a)(1) violation where supervisor told nurse at nurse's station that discussing the union does "not belong here"); *Palms Hotel & Casino*, 344 NLRB 1363, 1363 n.2, 1382, 1385 (2005) (section 8(a)(1) violation where supervisor told kitchen staff to "stop it" when he overheard them discussing overtime and break complaints in the kitchen); *Sam's Club*, 349 NLRB 1007, 1009 (2007) (announcing prohibition on discussion of union matters on sales floor during working time).

Furthermore, the evidence shows that Respondent did not merely "hold Uchofen in enmity" as understated by the ALJ (ALJD 16:13), but Gillison openly hated Uchofen because of his role as a shop steward and Union activist. As the ALJ found, Gillison suspended Uchofen in March 2008 because he brought his Union representative to Gillison's office to discuss Uchofen's removal of service for the afternoon. (ALJD 12:20-27.) Furthermore, as discussed above, on March 19, 2008, Gillison threatened to "squeeze the shit" out of Uchofen because he was a "Union person" who thought he was "smarter than" Gillison. As also discussed above, on June 16, 2008, Gillison bolted towards Uchofen to throw him out of his office because Uchofen had asked Gillison for information on summer routes. By October 31, 2008, Gillison admitted his open dislike of Uchofen's shop steward duties; on that day, Gillison wrote to Uchofen of his grievance-handling and information requests: "You just send me letters of what you think the company should be doing. I will remind you that it is not your job to instruct this company on what we should do or not do." (GC. Exh. 44.) Finally, as the ALJ correctly found, on November 25 -- a month after this letter, and two months before Uchofen's discharge -- Gillison kicked

Uchofen in the back in front of coworkers after belittling Uchofen's shop steward activities in front of them. (ALJD 13:16-23.)

Assuming *arguendo* Respondent's evidence establishes that Uchofen did act in an insubordinate manner by refusing Gillison's directive to leave the trailer on the morning of January 21, Respondent has not presented any evidence to establish that Respondent would have terminated Uchofen for refusing the directive to leave the trailer absent his protected activity. In fact, it is clear that Gillison would not have directed Uchofen to leave the trailer because Gillison allowed other employees waiting in the trailer to chat and read newspapers. As described above, Employer's claim that Uchofen disrupted its operations is not supported by the evidence. Furthermore, corroborating Gillison's admission that "he's not crazy about suspending" drivers (GC Exh. 12 ¶ 17), Respondent submitted no evidence to show that it has a practice of disciplining insubordination.

For the reasons set forth above, Respondent's evidence falls short of its *Wright Line* burden and the record supports the conclusion that Uchofen's Union activities were the motivating factor in his termination, in violation of Section 8(a)(3) of the Act.

C. Violations of Section 8(a)(5) and (1) and 8(d) of the Act

1. Cross-Exception 9: Respondent Violated Section 8(a)(5) and 8(d) of the Act By Failing To Continue All the Terms and Conditions of the Parties' Collective-bargaining Agreement By Means of Respondent's Failure and Refusal To Assign Regular, Charter and Extra Routes as Required by the Parties' Collective-bargaining Agreement

The ALJ incorrectly dismissed General Counsel's allegation that Respondent since on or about August 25, 2008, and continuing to date, violated Section 8(a)(5) and 8(d) of the Act by failing to continue all the terms and conditions of the parties' collective-bargaining agreement by

means of Respondent's failure and refusal to assign regular, charter and extra routes as required by parties' collective-bargaining agreement. (ALJD 26:8-9.)

The ALJ found all the predicate facts for the violation. First, the parties collective-bargaining agreement indeed provided clearly that Respondent assign regular, charter and extra routes. (ALJD 25:51-52.) Section 15(e) of the 2000 master agreement provides that "[a]ll runs, holidays, vacations and extra work shall be picked by seniority. Routes becoming vacant during the school year shall be subject to bid by seniority." GC Exh. 53 (at 2000 agreement). Section 5 of the parties' successor 2002-06 MOA also provides that:

> [a]ll runs open for bid must be posted and picked by seniority. The Picks shall include Bus Operators, Van Operators and Monitors. Schedules shall include hours of assignment. All extra work including Charters, summer camp and extra Runs must be posted and picked by seniority and assigned by Union and Management representative.

GC Exh. 53 (at 2002-06 MOA). *See* GC Exh. 101 at Section 16(d) (Ardsley's collective-bargaining agreement asserted in arbitration).

Second, Respondent did not abide by the clear language of the agreement. (ALJD 25:46-49.) This is supported by the evidence. Gillison admitted that, following the August 2008 route pick, new routes came available, route compositions changed and no additional route pick was held for the school year 2008-2009. (Gillison Tr. 267, 273.) He further admitted, by his June 9, 2008 letter to Simino, that Respondent assigns new hires – clearly junior employees – to new, post-pick routes that become available at the request of school districts. (GC Exh. 68.) In another letter to Simino, Gillison admitted that driver Jocelyn Carter gets regular charter work only by virtue of the fact that her school route "allows her to drive a charter every afternoon." (GC Exh. 32.)

Nevertheless, the ALJ dismissed the violation, not based on the uncontroverted facts, but on his speculation about a string of "contingencies" "in the real world" making compliance with the clear language of the contract impossible. (ALJD 17:43-51.) In so speculating, the ALJ ignored the testimony of Union representative John Simino, who explained clearly and in detail how it is possible to distribute this type of work, based on his personal observation of another bus service named White Plains Bus Company.

> They had a rotational charter of drivers who were interested in doing charters. Okay? So, not every driver in any company wants to do them, so you get a list of volunteers at the beginning of the year, who wants to do charters. And, say a hundred drivers want to do charters. You have that list, and it's rotated. As they come in, you go to the next gentleman, the next woman, whoever, and it's rotated. Sometimes, they make mistakes, but you can correct it the next day. And, by the end of the month, you could -- or the end of the week, you could check it. Does everyone have approximately twenty hours of charters? One guy has fifteen. One guy has twenty-five. As well as it's reasonable everyone is -- everyone is rotating and sharing in the charters. It works.
>
> * * *
>
> I observed there's a chart on the wall -- Monday, Tuesday, Wednesday, Thursday, Friday. And, the manager in the morning, they come out and put -- here's the charters for the next five days, on the wall. . . . And then, the drivers look at it in the morning, and by, say -- say, by Tuesday, at three o'clock, they all have to have their names on which one -- which of those charters they like. So, if your and my name are on the Monday charter, whoever has seniority will get the Monday charter. . . . So, it's very simple where members, over the next five days, see what they want. They put their name on it. And then, it goes into the office with the manager and [the Union chairman][11] Joe Iovino. They look who is senior, and whoever is senior gets it, and they choose the next guy. And, it rotates down the -- down the list of drivers. So, it's distributed fairly during the week.
> So, people could see it. It's all transparent. It's on the wall. All the charters, over the next week.

[11] Simino Tr. 840-41.

(Simino Tr. 835, 837, 843-44.) Therefore, the ALJ improperly substituted his own musings about how the system of charter and extra work may be distributed for testimony from an experienced Union representative who related his observations of how equitable, seniority-based assignments can be accomplished in "in the real world."

2. Cross-Exception 10: Respondent Bargained in Bad Faith in Violation of Section 8(a)(5) and (1) of the Act Based on Conduct in Addition to that Found by the ALJ

The ALJ found that Respondent bargained in bad faith, in violation of Section 8(a)(5) of the Act, because of Respondent's refusal to bargain a successor agreement if Cesar Uchofen remained on the bargaining committee. (ALJD 38-4-11.) However, that is not the only conduct constituting bad-faith bargaining committed by Respondent, as General Counsel alleged in the Complaint. (Comp. ¶ 24.)

The parties' collective-bargaining agreement was to expire on June 30, 2009. In a letter to Gideon Titkin dated May 21, 2009, Simino requested to begin bargaining for a successor agreement, and described that "the Union's bargaining team will consist of Gil Hodge, Miguel Gonzalez, Joyce Green, Victor Santos, Donna Turner, Yolanda Vergara, Cesar Uchofen and [me]. (GC Exh. 76.) On the same date, Simino sent an information request to Respondent, seeking certain information in aid of bargaining. At the end of the letter Simino wrote, "We look forward to a response to this request within 15 days. (GC Exh. 75.)

By letter to Respondent counsel Pirrotti dated June 1, 2009, Union attorney Levelt proposed that the parties schedule weekly Monday bargaining sessions beginning June 8, 2009. (GC Exh. 83.) Levelt also renewed the Union's May 21 information request by attaching a copy of that request. The Union received no response to the information requested in the May 21 letter. (Simino Tr. 644-46.) Respondent did not rebut this testimony.

Levelt wrote Pirrotti another letter, dated June 5, 2009, proposing an alternative bargaining date of June 15. (GC Exh. 84.) However, in a letter dated June 5, Pirrotti responded to the Union's May 21 request for bargaining, informing Levelt that his client was out of the country until June 14, and that Ardsley would contact her about scheduling negotiations thereafter. With respect to this letter, ALJD found that "this is beginning to look like the Company is trying to run out the clock until the contract's expiration date." (ALJD 34:28-29.)

In this June 5 letter, Pirrotti also wrote, "[W]e cannot permit Mr. Uchofen to be part of any negotiating team because of his bias and because of the fact that my client has had to call the police on no less than two (2) occasions to remove him from the business grounds. (GC Exh. 85.) In a further letter to Pirrotti dated June 11, Levelt proposed that the parties commence bargaining on June 18, a date that had been previously scheduled for a cancelled arbitration hearing. (GC Exh. 522.)

The Respondent accepted Levelt's proposal and the parties met for a bargaining session in a conference room at Pirrotti's office on June 18. (Connolly Tr. 522.)[12] Levelt began the session by stating that, because it was the first bargaining session, she wanted to have an informal conversation about the parties' demands, and that the Union at that time had no written demands. Levelt introduced employee Gil Hodge as the individual who would be verbally presenting the Union's proposals. (Connolly Tr. 522-24.) After Hodge began reading from notes he had in front of him (copies of which were also in front other Union representatives), Pirrotti and Gillison demanded a copy of the notes. (Connolly Tr. 523, 541.) Levelt told Ardsley that the Union was not ready to give them written demands but would have them ready by the end of the week. (Connolly Tr. 524.)

[12] Union representative Sean Connelly provided the only testimony regarding this bargaining session. Ardsley did not rebut the testimony.

As Hodge spoke for about 30 minutes, covering around 30 proposals, Pirrotti and Gillison "constantly interrupted, constantly going over that they wanted a copy of the demands," to which Levelt repeatedly replied that Union did not currently have written demands, and would provide written demands at the end of the week. (Connolly Tr. 524, 544-45.) The only substantive remark made by an Ardsley representative at the meeting regarded a Union proposal that "if work was [to] come open, that it was to be reported to the Union immediately." Pirrotti inquired what the Union meant by "immediately." (Connolly Tr. 538-39.) When Hodge was finished, the Union asked for Ardsley's demands. Pirrotti and Gillison announced that they would not provide the Union with any demands until the Union turned over Hodge's notes. (Connolly Tr. 524, 528-29.) Pirrotti also said, "[I]t's going nowhere unless the demands are in writing." (Connolly Tr. 542.) Gillison stated, "[I]t's a waste of time" and rose from his seat along with Titkin and Pirrotti. (Connolly Tr. 525.)

As they were leaving, Levelt attempted to schedule a further bargaining session, but Pirrotti refused to do so until he had a copy of the Union's proposals. Levelt repeated her earlier statement that she would provide written proposals by week's end and reiterated that she wished to schedule a meeting for the following week. At that moment, Gillison, standing with Titkin at the doorway, announced to Pirrotti, "Your clients are walking out. This is over." Pirrotti, Gillison, and Titkin then left. (Connolly Tr. 525.)

The parties exchanged letters later that same day. In his letter to Levelt, Pirrotti wrote, "Before addressing the demands, please furnish me with copies of contracts which you have entered into with other bus companies so that we can determine whether the demands that you are making are reasonable." (GC Exh. 88.) By reply letter, Levelt sent Pirrotti the Union's written bargaining demands and repeated the Union's May 21, 2009 request for information.

Levelt also wrote, "We look forward to a next negotiation session next week. We are available on Tuesday, June 23 after 11:00 a.m. and Thursday, June 25 at any time of day." (GC Exh. 89.)

By letter to Employer counsel Pirrotti dated June 23, 2008, Levelt memorialized a conversation with Pirrotti the two had held the day before. Levelt wrote that, on June 22, she had asked Pirrotti for a date for further contract negotiations, but that Pirrotti refused, purportedly because he had seen a petition to decertify the Union signed by a majority of employees and felt that negotiating with the Union would be illegal under those circumstances. (GC Exh. 87.) Levelt also wrote:

> We are hereby renewing our offer to conduct a negotiation session on Thursday, June 25, any time of the day. We are also enclosing an agreement to extend the collective bargaining agreement for your signature.
>
> Please advise us by 3:00 pm tomorrow (Wednesday) whether your client is available to meet with us on Thursday, June 25, 2009. We also request that you return the extension agreement by close of business on Friday, June 26, 2009.

(GC Exh. 87.) Respondent has not denied the authenticity of the letter, nor its receipt of it. The record contains no evidence that the Respondent replied to this letter, or that bargaining occurred after the session on June 18. The collective-bargaining agreement expired by its terms on June 30, 2009.

Thus, Respondent's statements and conduct surrounding the negotiation for a successor agreement revealed that it had no intention to meaningfully bargain in good faith with the Union before, during, or after the parties' June 18 bargaining session.

As stated above, on June 5, Respondent demanded that Cesar Uchofen be removed from the Union's negotiating committee. Ardsley also failed to provide requested information to the Union relevant to bargaining prior to the first meeting. At the June 18 bargaining session,

Ardsley flatly refused to consider the Union's verbal bargaining proposals until it received and reviewed them in writing. Respondent also refused to schedule another meeting until it reviewed the written proposals. Respondent further refused to articulate its own bargaining proposals until it reviewed the Union's proposals in writing. In his letter to Union counsel Levelt on June 18 following the meeting, Respondent counsel Pirrotti repeated that his client would not present any proposals or schedule further sessions until the Union put their proposals in writing. In addition, Respondent counsel conditioned further meetings on the Union's providing Respondent with contracts from other employers. On the same day (June 18), Levelt sent Pirrotti a letter attaching the Union's written bargaining demands and requesting to meet for further bargaining during the following week. In a letter to Pirrotti dated June 23, Levelt repeated her request to meet that week. Respondent rebuffed or ignored each of the Union's requests to schedule bargaining.

Respondent's failure to provide information necessary for bargaining, demanding written proposals before further bargaining, refusal to offer counterproposals, and refusal to schedule further bargaining evidences its bad faith. *See J & C Towing Co.*, 307 NLRB 198, 205 (1992) (finding of bad-faith where, in the context of a single bargaining session: (1) the employer persisted to demand a wage proposal despite having not provided necessary information to the Union on wages; (2) the employer's only counteroffer was the "status quo" regarding all terms and conditions of employment; and (3) the employer refused to meet further); *Excel Fire Co., Inc.*, 308 NLRB 241, 246 (1992) (in the context of one bargaining session for a successor agreement, finding of bad-faith bargaining where the employer: (1) "flatly rejected the entire [successor] contract . . ., thereby refusing to agree to continuation of even a single one of its provisions," (2) insisted on hearing the Union's proposal and then "rejected every one;" (3) "presented no proposals or suggestions of its own that might facilitate the progress of

negotiations toward possible agreement;" and (4) refused to schedule a further bargaining session); *Twin City Concrete, Inc.*, 317 NLRB 1313, 1314 n.5 (1995) (employer violated § 8(a)(5) by insisting on union's position in writing before meeting face-to-face).

Furthermore, this bad faith is evident within the relatively short time span between the Union's first request for bargaining on May 21, 2009, and the contract's June 30 expiration. *See Port Plastics, Inc.*, 279 NLRB 362, 383 (1986) ("what is crucial to a determination of good- or bad-faith bargaining is the quality of bargaining and not the duration of same"); *J & C Towing Co.*, 307 NLRB at 205 (bad faith in the context of one bargaining session); *Excel Fire Co., Inc.*, 308 NLRB at 246 (same).

In sum, the totality of Respondent's conduct in May-June 2009 is evidence of its bad-faith bargaining, in violation of Section 8(a)(5) of the Act.

3. Cross-Exception 11: The ALJ Inadvertently Misidentified Certain Dates of the Union's Information Requests

The ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with requested information. (ALJD 37:43; 46:6.)

The evidence shows, as the General Counsel alleged (Compl. ¶ 14(a)), that in order to investigate potential post-pick grievances, shop steward Uchofen sent a letter to Ardsley dated October 23, 2008, requesting certain information. (GC Exh. 41.) Although the ALJ correctly identified the date of that letter in his facts sections (ALJD 21:4-18), the ALJ misidentified the date as October 21 in his recommended order and notice to employees. (ALJD 46:6; Notice to Employees at 2.)

The evidence also shows, as the General Counsel alleged (Compl. ¶ 22(a)), that, in aid of bargaining for a successor agreement, the Union's John Simino requested in a letter dated May 21, 2009, certain information. The ALJ correctly identified the date of this letter in his decision.

(ALJD 32:39-51 through 33:1-24; 46:6.) Furthermore, as the General Counsel alleged in Complaint ¶ 22(b), this information request was repeated in a letter from the Union dated June 1, 2009, which attached the May 21 letter. That June 1 letter is in evidence. (GC. Exh. 83.)

In the record is a letter from the Union to Respondent dated June 18, 2009, which essentially repeats seven out of the nine items of information requested in the May 21 letter. (Compare items 3-9 in GC Exh. 75 with items 1-7 in GC Exh. 89.)[13] The General Counsel never alleged specifically that Respondent did not comply with the June 18 letter; rather General Counsel alleged a failure to comply with the June 1 letter because it repeated the May 21 letter requests. Thus, the ALJ misidentified, in his recommended order and notice to employees, the June 18 letter in addition to the May 21 letter. General Counsel submits that, instead of June 18, 2009, the date should read June 1 at ALJD 46:6 and in the notice to employees at 2.

4. Cross-Exception 12: The ALJ Failed to Find that Respondent Violated Section 8(d) in Addition to Section 8(a)(5) When It Refused to Meet With Respondent at Step 2 on Certain Pending Grievances

Although the ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet with Union representatives regarding pending grievances (ALJD 42:1-2), the ALJ erred by not also finding such conduct to be a violation of Section 8(d) of the Act, as alleged in General Counsel's Complaint. (Compl. ¶ 15(a)(b)(d) and (e); ¶ 29.)

The parties' collective-bargaining provision contains the following:

> 14. GRIEVANCES, DISPUTES AND ARBITRATION
>
> a. A grievance shall be defined as including only those disputes which relate to the meaning, application or interpretation of this Agreement.

[13] The ALJ mischaracterized the June 18 letter as a supplement to the May 21 request, when in fact it repeated a subset of the May 21. (ALJD 36:20-21.) Furthermore, the ALJ refers to a letter dated "June 21," which appears to be the June 18 letter discussed by the ALJ. (ALJD 37:43.)

> b. Any grievance of either party which cannot be adjusted with the head of the department in which the grievance arose, may be submitted in writing to the President of the Company who shall thereupon hear same himself, or designate a. representative to hear the same, together with the appropriate Union Officer. Within ten (10) days after the receipt of said submission, a second level hearing should be held, notice of which shall be given to the employee involved and the appropriate Union Officer, Vice President or his/her designee, together with the grievant
>
> c In the event that the grievance is not mutually adjusted within thirty (30) days after such hearing, the matter may at the request of either party, be submitted to the designated Impartial Arbitrator as hereinafter provided. After both the Union and Ardsley have been given an opportunity to be heard and to submit such proof as may be desired, the decision in writing of such Impartial Arbitrator shall be final and binding . . . .

(GC Exh. 53.) Thus, Respondent, without the Union's consent, violated the clear, unambiguous provisions for Step 2 grievances when Respondent refused, as the ALJ found, to meet with the Union at Step 2 regarding pending grievances. (ALJD 22:35-38; 29:34-35; GC Exh. 73; Exh. 74; Simino Tr. 636.)

5. <u>Cross-Exception 13</u>: The Foregoing Unfair Labor Practices, which the ALJ Erred by Failing to Find, Represented Additional Proximate Causes of Employee Disaffection Under *Master Slack*

The ALJ correctly found that Respondent violated Section 8(a)(5) and (1) when it unlawfully withdrew recognition from the Union because employee disaffection with the Union was proximately caused, pursuant to the analysis in *Master Slack*, 271 NLRB 78, 84 (1984), by certain of Respondent's unremedied unfair labor practices. (ALJD 39:21-39; Errata at 1:28-52 through 2:1-15.) However, the ALJ erred by failing also to find the additional unremedied unfair labor practices, regarding which General Counsel cross-excepts herein above, to have also caused employee disaffection. Those unfair labor practices therefore should also be enumerated

in the ALJD and Errata as causing the employee disaffection. (ALJD 39:21-38; Errata at 1:28-52 through 2:1-15.)[14]

D. Cross-Exception 14: Interest on the Monetary Award Should Be Compounded on a Quarterly Basis

The ALJ incorrectly dismissed General Counsel's request for compounding the interest on any monetary award on a quarterly basis. (ALJD 43:50-52.) Counsel for the General Counsel urges that the current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest. Only the compounding of interest can make discriminatees fully whole for their losses, and IRS practice and precedent from other areas of labor and employment law provide ample legal authority for assessing compound interest to remedy unfair labor practices. Indeed, the trend in recent years has been increasingly toward remedies that include compound interest, and the NLRA will soon be an anomaly if the Board continues with its current practice.

1. Computing Compound Interest, Rather than Simple Interest, Is the Only Manner by Which to Make Adjudged Discriminatees Whole and Carry Out the Purposes of the Act

The Act has been interpreted as "essentially remedial," *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940), meaning that Board orders are to restore the situation to that existing before any unfair labor practices occurred so as to assure employees that they are free to exercise their Section 7 rights, *see Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 197-198 (1941); *Freeman Decorating Co.*, 288 NLRB 1235, 1235 n..2 (1988) (Board does not award tort remedies but only makes discriminatees whole for losses incurred because of unlawful conduct). Thus, an employee that was unlawfully discharged is entitled to backpay representing his or her lost wages. Absent an award of interest on that backpay, the discriminatee will not have been

[14] Respondent's failure to meet at step 2 regarding certain greivances is listed by the ALJ, but only as a Section 8(a)(5), and not also 8(d), violation.

returned to the pre-unfair labor practice status quo because there is no consideration for either the discriminatee's lost investment opportunities or need to borrow interest-bearing funds during the period of the unlawful discharge. *See Florida Steel Corp.*, 231 NLRB 651, 651 (1977) ("The purpose of interest is to compensate the discriminatee for the loss of use of his or her money."), enf. denied on other grounds, 586 F.2d 436 (5th Cir. 1978).

The issue then becomes what method of computing interest best returns the employee to the pre-unfair labor practice status quo. Because the established practice among banks and other financial institutions is to charge compound interest on loans, the Board's current policy of assessing only simple interest fails to return discriminatees to the pre-unfair labor practice status quo. Thus, if an employer violates Section 8(a)(5), for example, by failing to pay unit employees their contractual benefits, a unit employee may need to borrow money from a bank in order to pay bills or maintain private health insurance while awaiting the Board order or the enforcement of that order. The employee will have to repay that loan with compounded interest, and a Board order awarding only simple interest will fail to fully compensate that employee for out-of-pocket expenses caused by the unfair labor practice.

2. IRS Practice and Precedent from Other Areas of Labor and Employment Law Provide Ample Legal Authority for Assessing Compound Interest to Remedy Unfair Labor Practices

A significant amount of legal authority supports a change in remedial policy from simple to compound interest. First, the Internal Revenue Service (IRS) requires the compounding of interest on the overpayment or underpayment of taxes and the Board has a history of linking its interest policy with that followed by the IRS. Second, federal courts routinely exercise their discretion to award compound interest for employment discrimination, a policy also adopted by the Administrative Review Board of the U.S. Department of Labor, and the U.S. Office of

Personnel Management (OPM) charges compound interest on monetary remedies owed to federal employees. The Board should update its policy so as to be in line with these practices.

a. The Board Should Follow IRS Policy and Compound Interest on Monetary Remedies

Since the Board first adopted a policy of assessing interest on monetary remedies in *Isis Plumbing & Heating Co.*, it has linked that policy to the practices followed by the IRS. 138 NLRB at 720-721. Thus, in *Isis Plumbing*, the Board adopted a flat interest rate of six percent on monetary remedies, which at the time was the rate used by the IRS with regard to a taxpayer's overpayment or underpayment of federal taxes. *See Florida Steel Co.*, 231 NLRB at 651 (six percent interest rate was used by "the [IRS], in suits by the Government, and was the legal rate of interest in most States"). The IRS later changed to a sliding interest scale and, in *Florida Steel Corp*., the Board concluded that its flat interest rate "no longer effectuate[d] the policies of the Act" and it adopted that sliding interest scale. *Id*., at 651. Finally, in *New Horizons for the Retarded, Inc.*, the Board, in accord with another change in IRS policy that was mandated by the Tax Reform Act of 1986, again changed the method of determining its official interest rate. 283 NLRB 1173, 1173 (1987). The Tax Reform Act required the IRS to use the short-term Federal rate to calculate interest on tax overpayments and underpayments. *See* 26 U.S.C. § 6621(a) (2000). The Board adopted the rate applicable to the underpayment of federal taxes, i.e., the short-term Federal rate plus three percent, and reasoned that its official interest rate should reflect, at least indirectly, the forces of the private economic market. *See New Horizons for the Retarded, Inc.*, 283 NLRB at 1173.

In both *Florida Steel* and *New Horizons*, the Board followed the lead of the IRS with regard to the appropriate interest rate, but failed to adopt the IRS's practice of compounding interest on amounts owed. As part of the Tax Equity and Fiscal Responsibility Act of 1982,

Congress mandated that the IRS compound interest on the overpayment and underpayment of taxes. *See* 26 U.S.C. § 6622(a). The rationale was that calculating simple interest on amounts owed did not conform to commercial practice and that, without compounding interest, "neither the United States nor taxpayers are *adequately compensated* for the value of money owing to them under the tax laws." S. Rep. No. 97-494(I), at 305 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1047 (emphasis supplied). This same rationale mandates that the Board adopt a policy of compounding interest on its monetary remedies because adjudged discriminatees in NLRA cases are not "adequately compensated," i.e., made whole for their economic losses, with simple interest alone. Thus, the Board should continue to adhere to IRS practices and should assess compound interest on all monetary remedies.

b. The Board Should Follow the Practice Of Federal Courts Applying Employment Discrimination Law, Of The U.S. Department Of Labor, And Of OPM And Award Compound Interest On Monetary Remedies

Federal courts routinely award compound interest on backpay awards in Title VII cases, 42 U.S.C. §§ 2000e to 2000e-17 (2000), with one court insisting that "[g]iven that the purpose of back pay is to make the plaintiff whole, *it can only be achieved if interest is compounded*." *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (emphasis supplied), cert. denied 510 U.S. 1164 (1994). *See also Cooper v. Paychex, Inc.*, 960 F. Supp. 966, 975 (E.D. Va. 1997) (Title VII and 42 U.S.C. § 1981 race discrimination case stating "common sense and the equities dictate an award of compound interest"), affd., 163 F.3d 598 (4th Cir. 1998) (unpublished table decision); *Rush v. Scott Specialty Gases, Inc.*, 940 F. Supp. 814, 818 (E.D. Pa. 1996); *O'Quinn v. New York University Medical Center*, 933 F. Supp. at 345-346; *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 676 (E.D.N.Y. 1996), affd. 110 F.3d 210 (2d Cir. 1997); *Davis v. Kansas City Housing Authority*, 822 F. Supp. 609, 616-617 (W.D. Mo. 1993). When

discussing the presumption of a backpay remedy for a Title VII violation, the Supreme Court has made clear that Title VII remedies were modeled after those provided under the NLRA, the purpose of which is to put discriminatees in the position they would have been in absent the respondent's unlawful conduct:

> The "make whole" purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) (citations omitted); *see also EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987) (Congress modeled Title VII remedies on those afforded by NLRA). Because Title VII remedies were modeled after those provided by the NLRA and it has been determined that compound interest is needed to make a Title VII discriminatee whole, it follows logically that compound interest is needed to make whole a NLRA discriminatee who was discriminated against because of his or her exercise of Section 7 rights.

Based on circuit court precedent in employment discrimination cases, the Administrative Review Board (ARB) of the U.S. Department of Labor has also adopted a policy of compounding interest on backpay awards. The ARB issues final agency decisions for the Secretary of Labor in cases arising under a wide range of labor laws, including whistleblower protection, employment discrimination, and immigration. It has stated that a "back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest." *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub

nom. *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002), cert. denied 537 U.S. 1066 (2002). Thus, in *Doyle* the ARB agreed with the rationale of *Saulpaugh* and similar circuit court decisions and concluded that in light of the remedial nature of the whistleblower provisions involved and the make whole goal of back pay, "prejudgment interest on back pay ordinarily shall be compound interest." *Id.*, 2000 WL 694384, at *15. It then stated that, absent unusual circumstances, it would award compound interest in all cases involving analogous employee protection provisions. *Id. See also Amtel Group of Florida, Inc. v. Yongmahapakorn*, 2006 WL 2821406, at *9 (DOL Admin. Rev. Bd. September 29, 2006) (involving Immigration and Nationality Act).

Further support for adopting a policy of compounding interest comes from the public sector. Since the end of 1987, pursuant to Congressional directive, OPM has required all federal agencies to award compound interest on any backpay due to federal employees for "unjustified or unwarranted personnel action[s]." 5 U.S.C. § 5596(b)(1), (b)(2)(B)(iii) (2000); *see also* 5 C.F.R. § 550.806(a)(1), (e) (2006); 53 Fed. Reg. 45,885 (1988). By that legislation, Congress sought to "mak[e] an employee financially whole (to the extent possible). . . ." 5 C.F.R. § 550.801(a). Thus, in cases where a federal employee is subjected to unlawful discrimination, he or she will receive compound interest on the backpay award. *See, e.g., Bergmann v. Department of Justice*, 2003 WL 1955193, at *3 (EEOC Federal Section Decision dated April 21, 2003) (where federal agency had discriminated based on sex, EEOC stated that interest on backpay owed to discriminatee had to be compounded daily as required by 5 C.F.R. § 550.806(e)).

The policy underlying the practice followed by federal courts, the ARB, and OPM is the same: compound interest on backpay awards is necessary to make employees whole for economic losses they have suffered because of unlawful personnel actions taken against them.

Backpay awards issued under the NLRA serve the same purpose. *See, e.g.*, *Isis Plumbing & Heating Co.*, 138 NLRB at 719 ("'Backpay' granted to an employee under the Act is considered as wages lost by the employee as the result of the respondent's wrong."). Accordingly, the Board should update its interest policy so as to be consistent with the common practice used to remedy unlawful employment actions in other contexts.

3. The Arguments Made By Opponents of Compound Interest are Without Merit

First, compound interest is neither punitive nor inconsistent with the Act's remedial purpose of making discriminatees whole. Cf. *Republic Steel Corp. v. NLRB*, 311 U.S. at 11 (Board not vested with "discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act"). The purpose of compound interest is to make individuals whole for losses wrongfully inflicted upon them, and its assessment does not constitute a penalty merely because its calculation results in a larger remedial award. Rather, compound interest accounts for the true value of monies lost to a wronged employee during the time the backpay amount was unlawfully withheld, and therefore more accurately measures that value. Indeed, federal courts dealing with claims of employment discrimination have routinely awarded compound interest for this make-whole purpose. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d at 145 (Title VII case; court stated "[g]iven that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded"); *EEOC v. Kentucky State Police Department*, 80 F.3d 1086, 1098 (6th Cir. 1996) (Age Discrimination in Employment (ADEA) case; approving of *Saulpaugh* rationale), cert. denied 519 U.S. 963 (1996); *Sands v. Runyon*, 28 F.3d 1323, 1328 (2d Cir. 1994) (where Postal Service violated Rehabilitation Act of 1973 by refusing to hire applicant because of physical

disability, court stated backpay "should ordinarily include compound interest"); *Rogers v. Fansteel, Inc.*, 533 F. Supp. 100, 102 (E.D. Mich. 1981) (ADEA case).

Second, there is no merit to the argument that charging compound interest based on the interest rate adopted in *New Horizons*, *i.e.*, the short-term Federal rate plus three percent, would amount to a penalty on a penalty because the three percent surcharge already acts as a penalty. One federal district court that was presented with a similar argument in an ERISA case noted that Congress wanted the interest rate applicable to the overpayment and underpayment of taxes to reflect market rates and that the addition of three percent to the short-term Federal rate, which is a low-risk rate that may be below market rates, more appropriately measured the value of money than the short-term rate alone and was not a penalty. *See Russo v. Unger*, 845 F. Supp. 124, 127 (S.D.N.Y. 1994). Thus, compounding interest using the interest rate set forth in *New Horizons* cannot be considered a penalty on a penalty.

Third, there is no merit to the argument that compounding interest is inappropriate in cases where the Board's own processes, rather than anything within a respondent's control, arguably cause the delay in an adjudged discriminatee receiving backpay. Delay is inherent in any administrative process. Since the purpose of compounding interest is to make adjudged discriminatees whole for losses incurred as a result of unfair labor practices directed at them, it would be inappropriate not to make discriminatees whole for the entire period in which they incurred losses.

Fourth, compound interest will not dissuade respondents from fully litigating their positions before the Board and the reviewing federal courts, as is appropriate under the legal process established by the Act. As stated above, compound interest serves the same make-whole purpose, just on a more appropriate basis, as simple interest. Simple interest has not had the

effect of inhibiting respondents from fully litigating their positions, and neither will compound interest. Respondents can also address this concern by creating a litigation reserve account in which to deposit funds to be used in satisfying a monetary remedy. Pursuant to commercial practice, that account will accrue compound interest.

Finally, opponents have argued that the Board should proceed on a case-by-case basis rather than adopt a blanket rule of compounding interest. This argument is sometimes based on *Cherokee Marine Terminal*, 287 NLRB 1080, 1081 (1988), where the Board refused to adopt a blanket rule requiring visitatorial clauses in all cases because "hardship could result from the routine inclusion of a standard provision." Any reliance on *Cherokee Marine Terminal* is misplaced. The Board there concluded that the routine grant of the proposed visitatorial clause could create "hardship" because of "practical concerns regarding the administration of the model clause . . . and by the potential for abuse inherent in its lack of limits, specificity, and procedural safeguards." 287 NLRB at 1081. For example, the proposed clause did not specify time limits on Board access to respondents' statements and records, failed to specify the third parties who would be included in the order, and failed to specify that respondents could have counsel present or had reciprocal discovery rights. *Id*., at 1081-82 & n..12. No similar concerns are present here because there is no potential for Counsel for the General Counsel to manipulate a method for computing interest, which is a standard mathematical formula.

The Board has recently issued several decisions denying a request for compound interest. *See e.g.*, *National Fabco Mfg.*, 352 NLRB No. 37, slip op. at n.. 4 (March 17, 2008) ("Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.") Counsel for the General Counsel does not consider these decisions to be an authoritative resolution of this issue. Rather, these decisions are simply a

rejection of the relief sought in these specific cases and an acknowledgement that the issue will be considered in other cases once a full Board is constituted.

4. The Board Should Compound Interest on a Quarterly Basis

Interest on monetary remedies can be compounded annually, quarterly, or daily and each different method has some legal support. The IRS's practice is to assess daily compounded interest with regard to the overpayment or underpayment of federal income taxes. *See* 26 U.S.C. § 6622(a) ("In computing the amount of any interest required to be paid under this title . . . such interest . . . shall be compounded daily."); accord *Russo v. Unger*, 845 F. Supp. at 128-129 (awarding daily compound interest in ERISA breach of fiduciary duty case because defendants had engaged in self-dealing and, as trustees, had duty to reinvest interest earned on funds). Indeed, Congress explicitly recognized that daily compounding would bring the IRS's practices in line with commercial practice. *See* S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (compounding interest on a daily basis "will conform computation of interest under the internal revenue laws to commercial practice").

However, in the Title VII context, which is more closely analogous to that of the NLRA, interest on monetary remedies is compounded annually or quarterly. *See, e.g.*, *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 817, 819-820 (7th Cir. 1990) (annually); *Rush v. Scott Specialty Gases, Inc.*, 940 F. Supp. at 818 (quarterly); *O'Quinn v. New York University Medical Center*, 933 F. Supp. at 345-346 (annually); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 613 (S.D.N.Y. 1981) (quarterly). In 2000, the DOL's Administrative Review Board also adopted a policy of compounding interest quarterly on monetary awards owed to discriminatees in employee protection cases. See, e.g., *Amtel Group of Florida, Inc. v. Yongmahapakorn*, 2006 WL 2821406, at *9; *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *15.

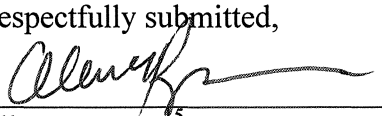
Counsel for the General Counsel requests that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See *New Horizons for the Retarded, Inc.*, 283 NLRB at 1173. Because the short-term Federal rate is updated on a quarterly basis, *id.*, at 1173, 1174, it would make administrative sense to also compound interest on the same basis. In addition, compounding interest on a quarterly basis is more moderate than daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than annual compounding, which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

III. CONCLUSION

General Counsel urges the Board to adopt the findings of facts and conclusions of law of the Administrative Law Judge, except as specifically excepted herein and in General Counsel's Cross-Exceptions.

Dated at New York, New York
April 20, 2010

Respectfully submitted,



Allen M. Rose[15]
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
Tel: 212-264-0300
Fax: 212-264-2450

[15] The ALJ incorrectly spelled Counsel for the General Counsel's name in the ALJD at 1, and in the Errata at 1. The correct spelling is Allen M. Rose.