

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

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

Respondent

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

and

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

Charging Party.

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. BRIEF STATEMENT OF THE 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.) 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.) 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.)

The recognition provision of the collective-bargaining agreement describes the bargaining unit as "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.)

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."

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.); *see* 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, 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.)

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.)

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 is 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 (GC Exhs. 31-34, 40-43), 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 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. ARGUMENT

A. The Board Has Jurisdiction Over Respondent

Respondent, from its place of business in Ardsley, New York, provides school bus services to school districts primarily in and around Westchester County. (Gillison Tr. 110, 124-26; ALJD 4:20-22.)

In advance of trial, the Respondent filed a motion to dismiss the Complaint based on lack of jurisdiction, and the Board dismissed that motion. (GC Exh. 1(kk) (Board’s Order); *see* GC 1(y) (Resp. Mem. to Dismiss Complaint); Exh. R. 1 (Resp. Reply to GC’s Opposition to Motion).) As the Board stated in its Order denying the motion, “the Board routinely asserts jurisdiction over private employers that provide services to public entities, including bus companies that enter into a contract with a state to transport students.” (GC Exh. 1(kk) at 2) (citing *Connecticut State Conference Board, Amalgamated Transit Union*, 339 NLRB 760

(2003).) In addition, because Respondent has admitted that its annual gross revenues have exceeded \$10,000,000 (GC Exh. 1(y) at 2), “the Board will assert jurisdiction over transit companies (including local bus companies) with a gross volume of business of at least \$250,000 per year.” (*Id.* (citing *Charleston Transit Co.*, 123 NLRB 1296, 1297 (1959) (establishing transit-system jurisdictional standard).) Respondent has also admitted that it sells approximately \$4,000 in services across state lines (GC Exh. 1(y) at 2; Tr. 39), and thus exceeds the *de minimis* standard for statutory jurisdiction. *See Consolidated Bus*, 350 NLRB 1064 (2007) (jurisdiction based on gross revenue exceeding \$250,000 and purchases exceeding \$5000 from out-of-state entities). Thus, as correctly found by the Administrative Law Judge (ALJD 4:20-31), Respondent meets the Board’s jurisdictional standards and its jurisdictional defense is meritless. (R. Excep. at 24-27.)

B. Respondent Unlawfully Withdrew Recognition From the Union Because Respondent Was Not Entitled To Rely on the Decertification Petition as the Basis for Respondent’s Withdrawal of Recognition

The evidence conclusively shows, and Respondent in its Exceptions nowhere denies, that Respondent withdrew recognition from the Union. However, Respondent argues that, based on the standard in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the decertification petition, transmitted to Respondent with a cover letter from employees on June 16, 2009 (R. Exh. 6a, 6b), provided Respondent with objective evidence that the Union had in fact lost majority support. (R. Excep. 28-29.²) Respondent further argues that, based on the factors set forth in

² Respondent summarizes the “objective evidence” at page 29 of its Exceptions. Items (a), (b), (c) and (e) relate to the sufficiency of the decertification petition. Items (d) and (f) pertains to facts of which Respondent was not aware before it withdrew recognition on June 30, 2009, and therefore cannot properly assert as objective evidence supporting withdrawal under *Levitz*. Item (d) cites affidavit evidence reveal at trial the hearing, and item (f) cites a rival Union’s RC petition filed on July 17, 2009.

Master Slack, 271 NLRB 78 (1984), the Respondent's unremedied unfair labor practices did not cause the employee disaffection evidenced in the decertification petition. (R. Excep. 32-36.)

To the contrary, Respondent was not entitled to rely on the decertification petition as evidence of employee disaffection with the Union because, based on longstanding principles, Respondent's unremedied unfair labor practices caused that disaffection. (See ALJD 39:7-38; Errata at 1:28-52 through 2:1-15.)

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001), the Board ruled that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union has actually lost majority support. An employer that withdraws recognition bears the initial burden of proving that the incumbent union suffered a valid, untainted numerical loss of its majority status. The employer can establish this loss by a variety of objective means, including an antiunion petition signed by a majority of the unit employees.

However, "[a]n employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Garden Ridge Management, Inc.*, 347 NLRB 131, 138 (2006) (citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996)). "Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber*, 322 NLRB at 177.

The causal connection between unremedied unfair labor practices and employee disaffection is examined through the factors outlined in *Master Slack*, 271 NLRB 78 (1984):

(1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; (4) the effect of unlawful conduct on employee morale, organizational activities, and membership in the union.

Master Slack, 271 NLRB at 84. As found by the ALJ, the facts support a finding that a causal relationship existed between Ardsley's unfair labor practices and the decertification petition. (ALJD 39:7-38; Errata at 1:28-52 through 2:1-15.)

Those unremedied unfair labor practices found by the ALJ are sufficient to show a causal connection, pursuant to *Master Slack*, between those unfair labor practices and the employee disaffection of the decertification petition. However, in its Cross-Exceptions and Brief in Support thereof, the General Counsel argues that other unremedied unfair labor practices, that the ALJ in error failed to find, lend further support to a finding that, based on *Master Slack*, Respondent's unlawful conduct caused the employee disaffection evidenced by the decertification petition. (GC Cross-Excep. Brief at 39-40.) These additional unfair labor practices are: (a) that Respondent, on or about March 19, 2008, by Thomas Gillison, violated Section 8(a)(1) of the Act by threatening shop steward Cesar Uchofen with physical violence because of his Union activities; (b) that Respondent, on or about June 16, 2008, by Thomas Gillison, violated Section 8(a)(1) of the Act by threatening shop steward Cesar Uchofen with physical violence because of his Union activities; (c) that Respondent, on or about January 21, 2009, violated Section 8(a)(3) and (1) of the Act by terminating the employment of shop steward Cesar Uchofen because of his Union activities; (d) 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; (e) that Respondent, on or about September 8, 2008, by Thomas Gillison, violated Section 8(a)(1) of the Act by telling shop steward Cesar Uchofen that it was futile for the Union to bring employee grievances to Respondent; (f) that Respondent, on or about September 8, 2008, by Thomas Gillison, violated Section 8(a)(1) of the Act by threatening shop steward Cesar Uchofen with unspecified reprisals if he assisted the Union; (g) that Respondent, in or about late-May 2009 and early to mid-June 2009, by Elisa Arias and Rosa Vilella, violated Section 8(a)(1) of the Act by interrogating employees regarding whether or not they signed a petition to decertify the Union; (h) that Respondent, in or about December 2008, by Elisa Arias at its facility, threatened employees that Respondent would reduce hours and other benefits to employees known to associate with the Union; and (i) that Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act because of conduct consisting of, on or about June 18, 2009, refusing to consider the Union's bargaining proposals, to submit its own proposals and to schedule an additional bargaining session unless and until it received the Union's proposals in writing.

The record supports finding of causation pursuant to the *Master Slack* factors.

Timing of the Unfair Labor Practices. Ardsley employees delivered the decertification petition to management on June 16, 2009. Ardsley withdrew recognition upon the June 30, 2009 expiration of the collective-bargaining agreement. Between the spring 2008 and the withdrawal of recognition, Ardsley engaged in the following unfair labor practices: (1) in May 2008, it failed and refused to provide the Union with relevant information regarding summer routes; (2) in August 2008, it failed to post all available routes for the 2008-09 school-year pick; (3) between October 2008 and April 2009, it failed to provide information responsive to repeated requests related to routes and assignments; (4) in November 2008, its general manager physically

assaulted the Union shop steward in front of numerous coworkers; (5) in December 2008 and January 2009, it twice bypassed the Union by dealing directly with dozens of drivers and monitors, and the entire complement of mechanics; (6) in May 2009, it failed to respond to the Union's request for relevant information related to bargaining a successor agreement; and (7) in June 2009, the Respondent stated its refusal to bargain with the a bargaining committee that included shop steward Uchofen.

As stated above, the unremedied unfair labor practices found by the ALJ are sufficient to cause employee disaffection. As also stated above, the General Counsel argues in its Cross-Exceptions that other unremedied unfair labor practices, that the ALJ erred by not finding, lend further support to a finding that Respondent's unlawful conduct caused employee disaffection. (GC Cross-Excep. Brief 39-40.)

Respondent's unfair labor practices accumulated up to the time of the circulation of the petition, and any passage of time between the more widespread, pervasive unfair labor practices and the petition does not serve to dissipate their adverse effects. For example, Ardsley here engaged in widespread direct dealing in December 2008 and January 2009, when it bypassed the Union and dealt directly with at least 78 drivers and monitors regarding summer picks, and with all of Respondent's mechanics regarding tool allowances. *See AT Systems West, Inc.*, 341 NLRB 57, 60 (2004) (widespread direct dealing within nine months before decertification drive "would not dissipate the effects of the Respondent's conduct") (citing *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000)).

Furthermore, the passage of time is also unlikely to dissipate the effect of Ardsley's January 2009 discharge of the bargaining unit's strongest Union advocate, Uchofen, based on events witnessed by a large group of employees. *See Penn Tank Lines, Inc.*, 336 NLRB 1066,

1067-68 (2001) (five-month period between termination of union activist and withdrawal of recognition would not “reasonably dissipate the effects of Respondent’s conduct” because “[i]t is well settled that the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten”).

Nature of the unfair labor practices. As stated above, Ardsley’s unremedied unfair labor practices included Gillison’s act of violence upon Uchofen, as well as widespread direct dealing. These are precisely the types of unfair labor practices that have a lasting adverse impact on employees. *See N.L.R.B. v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980) (“the resort to physical force or discharge . . . are complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period”); *Miller Waste Mills, Inc.*, 334 NLRB 466, 468-69 (2001) (nature of direct dealing caused employee disaffection because “go[ing] over the head of the [Union] to deal individually with the employees . . . tend[s] inevitably to weaken the authority of the [Union] and its ability to represent the employees in dealing with the Company”) (quoting *Utica-Observer Dispatch v. NLRB*, 229 F.2d 575, 577 (2d Cir. 1956)).

As argued in General Counsel’s Cross-Exceptions, Ardsley’s unremedied unfair labor practices included Gillison’s act of violence upon and discharge of Uchofen. These are also the kinds of unfair labor practices that have a lasting adverse impact on employees. *See Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067-68 (2001) (“[i]t is well settled that the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten”); *D&D Enterprises, Inc.*, 336 NLRB 850, 859 (2001) (withdrawal of recognition unlawful in light of lasting effect of termination of union supporters); *N.L.R.B. v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir., 1980) (“the resort to physical force or discharge . . . are complete acts which may reasonably be

calculated to have a coercive effect on employees and to remain in their memories for a long period”).

Tendency to cause disaffection and effect of unlawful conduct. The Board has held that “unremedied unfair labor practices, which . . . ‘strike at the very heart of the Act,’ would reasonably tend to cause employee disaffection from the Union.” *D & D Enterprises, Inc.*, 336 NLRB 850, 859 (2001) (citing *Williams Enterprises*, 312 NLRB 937, 940 (1993), *enfd.* 50 F.3d 1280 (4th Cir. 1995)).

In this case, Respondent’s unlawful conduct struck at one of the most important benefits guaranteed to employees under the terms of the collective-bargaining agreement: the equitable and non-arbitrary assignment of bus routes. *See Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006) (“[r]espondent’s unilateral changes -- particularly those regarding route and store assignments and the increased use of temporary employees -- involved the important “bread and butter” issues that lead employees to seek union representation”). Respondent not only unilaterally assigned routes outside the contractually-guaranteed bidding process, Respondent also sought, through its recalcitrance in providing essential bidding and route information to the Union, to render the Union, in the eyes of its employees, powerless to police Respondent’s contractual commitment to fair bidding practices. *See Saginaw Control and Engineering, Inc.*, 339 NLRB 541, 545-46 (2003) (unfair labor practices tending to cause disaffection included, *inter alia*, failing timely to furnish requested information to the Union). By its widespread direct dealing, Respondent attempted to enlist dozens of employees to undermine the Union’s attempts through the grievance process to correct Respondent’s unfair distribution of summer work and its failure to reimburse mechanics for the tools of their trade. *See Miller Waste Mills, Inc.*, 334 NLRB at 468-69.

Furthermore, Uchofen's discharge, as well as Respondent's threats to reduce hours and its interrogation of employees, strike at the heart of the Act, and tend to weaken Union support and cause employee disaffection. *See Penn Tank Lines, Inc.*, 336 NLRB at 1067-68 (2001); *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000), *enfd.* in relevant part unpublished 47 Fed. Appx. 449 (9th Cir. 2002); *Saginaw Control and Engineering, Inc.*, 339 NLRB 541, 545-46 (2003) (unfair labor practices tending to cause disaffection included threats of retaliation against union supporters; interrogating employees about Union activity, and failing timely to furnish requested information to the Union). In this atmosphere, "it is not surprising that an employee petition rejecting the Union would surface." *Penn Tank Lines*, 336 at 1068.

The wide-spread and pervasive nature of Ardsley's unfair labor practices render Respondent's reliance on *Airport Aviation Services*, 292 NLRB 823 (1989) inapt. (R. Excep. at 33.) In that case, the Board held: that respondent's failure to furnish payroll records were "too remote in nature;" that its refusal to respond to grievances were "too vague to infer" employee disaffection; and there was also no evidence that employees knew of respondent's failure to comply with another information request made nine months before the withdrawal of recognition. *Airport Aviation*, 292 NLRB at 824. By contrast, in the instant case, as set forth above, Respondent's failure to furnish information and to meet for at step 2 were coupled with wide-spread direct dealing, threats and interrogation of employees, and the very public violence against, and dismissal of, the employees' vocal shop steward.

Respondent's argument that the evidence shows that the Union caused employee disaffection is also meritless. As evidence, the Respondent cites Thomas Gillison's idiosyncratic and patently absurd characterization of the Union's inflatable rat activity in December 2007 as anti-Semitic. (R. Excep. at 3, 11, 35, 37.) Respondent also cites hearsay evidence from the

petition itself that some employees were upset by a rise in Union dues. (R. Excep. at 36; R. Exh. 6b.) Even if the record contained reliable evidence of a rise in Union dues, Respondent's argument that it was the cause of employee disaffection does not stand up to the weight of the countervailing evidence of the pervasive and substantial unremedied unfair labor practices preceding the circulation of the petition. Logic also dictates that, absent Respondent's unfair labor practices which eroded Union support, employees may not have minded a rise in dues in exchange for effective representation unencumbered by the Respondent's unlawful conduct.

Thus, based on the analysis of each of the relevant *Master Slack* factors, Respondent's substantial, widespread and unremedied unfair labor practices did not permit it to rely on the decertification petition as evidence of loss of employee majority support for the Union. As such, Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. Indeed, the Administrative Law Judge concluded that the numerous unfair labor practices that he found "undermin[ed] the Union in the eyes of the bargaining unit employees," rendering the Respondent's withdrawal of recognition unlawful. (ALJD 39:21-23.)³

C. Respondent's Post-Withdrawal Unilateral Changes Violated Section 8(a)(5) of the Act

Respondent does specifically object to the ALJ's correct finding that Respondent violated Section 8(a)(5) the Act when it made unilateral changes in employees' terms and conditions of the employment after the withdrawal of recognition. (ALJD 36:39-47 through 37:1-19; 42:18-20.) The facts support the ALJ's conclusions. Gillison identified General Counsel Exh. 19 as

³ The ALJ alternatively held that Respondent cannot rely on the decertification petition as a basis to withdraw recognition because Respondent did not meet its burden in establishing the authenticity of the decertification petition. (ALJD 39:45-52 through 40:1-28.) Respondent argues in its Exceptions that, based on *N.L.R.B. v. B.A. Mullican Lumber and Mfg. Co.*, 535 F.3d 271, 279 (4th Cir. 2008), the ALJ incorrectly placed that burden on Respondent. (R. Excep. at 30-31.) It is unnecessary to address the ALJ's alternative holding because of the conclusive evidence showing that, based on the *Master Slack* factors discussed above, the Respondent could not withdraw recognition based on the petition.

Respondent's policies in effect beginning September 1, 2009, and admitted that Ardsley had each employee sign a copy of that document. (Gillison Tr. 232, 1332-33.) The document is similar to company policies issued in prior years during the life of the parties' collective-bargaining agreement (GC Exhs. 17, 18), but several provisions of the September 2009 policies differ from the terms and conditions established in the collective-bargaining agreement and carried over after its June 30 expiration date. The most significant differences are as follows.

(i) Freezing anniversary-date wage increases. Section 3, "Starting Rate of Pay," of the 2002-06 MOA sets forth how the pay rates are determined for new employees.⁴ It states that "Bus Operators, Van Operators and Monitors shall receive \$1.00 (one dollar) per hour less than the top rate of pay. The rate shall increase by \$.25 (twenty-five) per hour each six months, until reaching the top rate after 24 (twenty-four) months." The September 2009 policies state, on page 2, that "The Company Will Not Increase Wages for: 9/01/09 thru 08/31/10." Respondent thereby implemented a one-year wage freeze for those employees.

(ii) Excluding casual employees from wage increases. The collective-bargaining agreement defines "Casual Drivers" in the 2000 master agreement in Section 3 at page 2, and it does not state that casual employees are exempt from the wage and paid time-off provisions for other covered employees. However, the September 2009 policies seek to treat them differently. For example, it excludes the statement on page 1, under the title "Casual Workers," that "casual workers . . . are not entitled to rate increases, holiday pay or school closing day pay days."

(iii) Imposing new seniority rules for charter routes. The collective-bargaining agreement shows that the parties bargained over charter work, including assignment

⁴ Section 3 is distinct from Section 2 of the 2002-06 MOA, which sets forth wage scale increases for current employees, which was later modified by the wage scale increases set forth in the 2006-09 MOA.

of that work by seniority. (GC Exh. 53 (2000 agreement section 4.f., 15(e); 2002-06 MOA Section 5.) However, in the September 2009 policies, beginning at page 1 under the title “Charter Work,” Ardsley established new rules for charter work in contradiction of the seniority provisions of the collective-bargaining agreement. For example: “Drivers without a regular school route s[sic] can be assigned to charter work according to seniority, or they can be switched to a school route if the company deems it necessary and it is in the best interest of the company;” “All charter work will be assigned according to seniority whenever possible” (emphasis added); “The company has the right to pull a driver from his/her school routes and assigned [sic] him or/her to charter work provided, it is, agreed by the driver;” The Company will honor requested charter drivers for over seniority.”

(iv) Replacing minimum guaranteed annual work weeks with paid holidays. The collective-bargaining agreement does not provide drivers and monitors with enumerated paid holidays and vacations leave. Instead, it provides for minimum annual guarantees of work weeks. (See 2006-09 MOA, Section 2; 2002-06 MOA Section 3.c.; master agreement, Section 7.b. at 6.) However, Respondent, in its new policies at 2-3, enumerated “Paid Holidays,” “Paid School Closing Days” and “Paid School Closing Weeks.” Furthermore, at page 3, it imposes a calculation for “Eligibility for the paid week recess” instead of the contractual annual weekly guarantee formula.

(v) Imposing new terminations rules on absent employees. Section 15(e) of the 2000 agreement portion of the collective-bargaining agreement states that “An employee’s seniority shall be broken so that no prior period of employment shall be counted and his seniority shall cease upon: . . . (iii) Absence for five (5) consecutive working days without notifying the employer (a registered letter will be sent to the employee after the second day and a

copy shall be give to the Union chairman).” It does not, however, mandate termination as a penalty. Under the section titled “Employee Absenteeism” on page 3 of the September 2009 policies:

Employees who are absent from work for more than five (5) consecutive days without notice to the company other than the following reasons listed below will be considered terminated by the company and will forfeit all seniority rights to holiday pay, school closing pay, school closing recess weeks, and route pick seniority. . . . Returning to the company after five consecutive unexcused absences the employee will be treated as a new hire.

(Emphasis added.) Therefore, Respondent imposed the mandatory penalty of termination on an employee.

(vi) Changing the method by which route hours and daily work guarantees are calculated. Section 4 of the 2002-06 MOA states that “Regular Bus and Van runs shall pay a minimum guarantee of two (2) hours pay in the A.M., two (2) hours pay in the P.M. and one (1) hour guaranteed for mid-day runs paid at employees regular rate of pay.” However, in the September 2009 policies at 4-5, Respondent set forth rules that state “Mid-day routes are paid at a guaranteed 1 ½ hours. Time worked over the 1 ½ will be paid as time punched. . . . **Some routes may consist of one and one half (1 ½ hours) on the morning route and 2 ½ hours on the afternoon shift which total guaranteed 4 hours for the day.**” (Emphasis in original).

Thus, under the collective-bargaining agreement, an employee who has no mid-day runs and who works 1.5 hours in the morning and 2.5 in the afternoon is guaranteed the 2 minimum hours in the morning and the full 2.5 hours in the afternoon, thereby totally 4.5 hours, instead of the 4 hours specified in the new policies.⁵

⁵ The ALJ granted the General Counsel’s amendments to the Complaint in 2-CA-39467 (GC Exh. 3) to conform to the evidence of the implementation of the new policies, by adding additional allegations of § 8(a)(5) unilateral changes. GC Exh. 114 (at 3) sets forth the amendment.

Because the withdrawal of recognition was unlawful, it was unlawful for Respondent to thereafter make unilateral changes to terms and conditions of its Unit employees. *See Goya Foods of Florida*, 351 NLRB 94 (2007); *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994). Ardsley's post-withdrawal changes concern mandatory subjects: job bidding (refusing to allow a Union representative to attend the August 2009 pick) (*see American Standard Cos., Inc.*, 352 NLRB 644, 652 (2008)); wages (freeze on anniversary-date wage increases and excluding casual employees from wage increases); seniority (imposing work rules on charter work in violation of seniority principles) (*see Harowe Servo Controls, Inc.*, 250 NLRB 958, 1051 (1980)); holidays (replacing guaranteed annual work week minimum with paid holidays) *see Waxie Sanitary Supply*, 337 NLRB 303 (2001)); termination policy (imposing termination on employees who are absent from work for more than five consecutive days without sufficient notice) (*see King Soopers, Inc.*, 340 NLRB 628 (2003)) and work hours (changing the method of calculating employee route hours and daily work hour guarantees).

Therefore, as the ALJ found, Respondent violated Section 8(a)(5) of the Act by its post-withdrawal unilateral changes.

D. The ALJ Properly Rejected as Hearsay the Affidavits of Michael Wade and Luis Maciera

Respondent further excepts to the ALJ's proper rejection, on hearsay grounds, of two employee affidavits that Respondent attempted to enter into the record. (R. Excep. at 12, 16, 44-46.) It is hornbook law that an affidavit is hearsay, and as such is generally inadmissible as substantive evidence when offered to prove the truth of the matter asserted in the affidavit. Respondent made no claim in the record or in its Exceptions that the employee affiants were unavailable to testify pursuant to Federal Rule of Evidence 804(a). *See, e.g., Burlingame Saab*, 296 NLRB 227, 233 n. 7 (1989) (rejecting General Counsel's proffer of affidavit and contention

that witness was unavailable within meaning of Fed. Rule of Evid. 804(a) because he was out of the country on vacation); *Limpco Mfg.*, 225 NLRB 987 n.1 (1976) (“[e]xcept in rare cases, the Board’s established policy is not to accept affidavits of allegedly unavailable witnesses because affidavits afford no opportunity to cross-examine or evaluate demeanor”).

In any event, even if these statements were accepted as substantive evidence, they prove nothing material. The rejected affidavit of Maciera (Rejected R. Exh. 7, attached to R. Excep. at Exh. B thereto) concerns a failed circulation of a decertification in around *October 2007*, a year and half before the circulation of the June 2009 petition. The affidavit of Michael Wade (Rejected R. Exh. 20, attached to R. Excep at Exh. A thereto) states that, because “[i]n or around mid-June 2009,” Wade and “some coworkers were unhappy with local 100,” he and others attended a meeting with a rival union, who helped them prepare the decertification petition. (Rejected R. Exh. 20 ¶¶ 3, 5.) Wade then describes how he and others asked coworkers to sign the petition in Respondent’s yard, then took it to the Board, where the petitioners were told that petition was premature in light of the June 30, 2009 expiration of the parties’ collective-bargaining agreement. (Rejected R. Exh. 20 ¶¶ 6-7.) Thus, the Wade affidavit only confirms the undisputed, established fact that there was disaffection with the Union at the time of the circulation of the petition.

E. Shop Steward Uchofen’s Suspension in March 2008 Was the Product of Anti-Union Animus

Respondent excepts (R. Excep. at 37-38) to the ALJ’s correct finding that Respondent’s General Manager Thomas Gillison gave shop steward Uchofen a suspension because Uchofen had sought representation from his Union representative John Simino. (ALJD 12:20-27.)

1. Facts Relevant to Uchofen's March 2008 Suspension

The relevant facts are clear and largely undisputed. In a March 13, 2008 letter to Respondent's President Gideon Titkin, Union Secretary-Treasurer Ed Watt identified the new Union stewards and their positions. (GC Exh. 11; Gillison Tr. 145-46.) In that letter, Cesar Uchofen was identified as the Union's Vice-Chair. On the morning of March 20, a dispatcher instructed Uchofen to return to Gillison's office after his morning run. Uchofen was unable to find parking space at Gillison's offices, and left a message on Assistant Manager Rosa Vilella's answering machine explaining that he could meet with Gillison later because he needed to run an errand regarding his son. (Uchofen Tr. 873-74, 958-59.) After Uchofen did not show at his office, Gillison assigned another driver to cover Uchofen's afternoon shift. (Gillison Tr. 151, 153-54; GC Exh. 12 ¶ 12.) Upon later receiving a phone call from his monitor that the Respondent was taking him off his afternoon run, Uchofen went to the Union's offices, and then returned to the yard with John Simino. (Uchofen Tr. 874, 877-78.)

At about 1:15 p.m. on March 20, Simino and Uchofen arrived at Gillison's office. When Gillison demanded to speak with Uchofen alone, Simino responded that he was there to represent Uchofen, at Uchofen's request. Gillison stated that he would not meet with Simino and Uchofen unless he spoke to Uchofen alone. (Simino Tr. 578; Uchofen Tr. 878.)⁶ Gillison also told them that he was too busy to talk and confirmed that Uchofen was not driving his van that afternoon. Simino requested a grievance hearing, and Gillison repeated that he did not have the time. Gillison then announced that he was calling the police, picked up the telephone, and told Simino and Uchofen to get out of his office. (Simino Tr. 578, 580; Uchofen Tr. 878.) Gillison ended the

⁶ Although Gillison, in his affidavit, denies that he demanded to speak with Uchofen alone (GC Exh. 12 ¶ 13), Respondent admits in its Exceptions that "[w]hen Uchofen demanded to have Simino present during the meeting between himself and Gillison regarding the parking ticket, Gillison instead asked to speak to Uchofen alone in order to avoid further conflict." (R. Excep. at 37.)

encounter by asking Simino and Uchofen to return on Monday, March 24 at 10:00 a.m. (Simino Tr. 578, 580; GC Exh. 12 ¶ 13. (Monday was a holiday. Uchofen Tr. 880.)

Simino and Uchofen returned to Gillison's office on Monday morning, March 24. When they arrived at the door, Gillison asked what they were doing there and Simino reminded him that they had agreed to meet at that time. (Simino Tr. 580-81.) Gillison said that he would meet with Uchofen but not Simino. (Uchofen Tr. 880-81; Simino Tr. 580-81.) Simino demanded a few minutes to have a hearing on Uchofen's March 20 suspension from service. Gillison replied that there would be no hearing and he had no time for it, and then called the police. (Simino Tr. 580-81; Uchofen Tr. 880-81.) At that point, Simino and Uchofen stepped outside Gillison's office to wait for the police. In his affidavit, Gillison admitted, "I told [Simino] I needed to call the police on him, and he still refused to leave. So I needed to call the police and John stayed there until I did." (GC Exh. 12 ¶ 13.)

Two officers arrived and remained at the scene as Simino, Uchofen and Gillison discussed the labor-management issue. Simino asked Gillison what the charges against Uchofen were and requested a hearing. Gillison replied that there no hearing and that Uchofen was out of service. (Simino Tr. 581.) Simino ended the conversation by telling Gillison that the Union was grieving the matter. Before leaving the facility, Simino left a grievance on Titkin's desk. (Simino Tr. 581-82; GC. Exh. 62.)

Uchofen and Simino, along with other Union representatives, returned to the yard the following morning, Tuesday, March 25, at 7:00 a.m. After confirming that Respondent would not let Uchofen take his van, the group went upstairs and met with Titkin. (Simino Tr. 584-85.) After some discussion, Gillison entered Titkin's office and Titkin asked to speak with Uchofen alone for a few minutes. Simino agreed and, after a private discussion among Gillison, Titkin

and Uchofen, the parties reassembled to discuss the suspension for about an hour. (Simino Tr. 584-85.) Before the meeting ended, Gillison left the room and returned with a written disciplinary notice and report. (GC Exh. 10; GC Exh. 12 ¶ 16.) Simino later served the Respondent a formal grievance on the five-day suspension. (Simino Tr. 585; GC Exh. 63.)

After refusing to negotiate down the suspension with the Union, Gillison gave Uchofen a letter dated March 24, 2008 repeating his issuance of the five-day suspension. (GC Exh. 12 ¶ 17.) Ardsley called Uchofen back to work after 2.5 days of suspension. Following negotiations with the Union, Respondent, in a letter dated April 21, 2008, agreed to expunge mention of the suspension and make Uchofen whole. (GC Exh. 31.)⁷

2. Gillison's Admissions of His Unlawful Motivation

Gillison testified that his decision to issue a suspension to Uchofen occurred after Simino's demand to represent Uchofen in the early afternoon of March 20.⁸ Gillison also admitted that, as of his conversation with Uchofen on March 19, Uchofen "had not been suspended at that point." (GC Exh. 12 ¶ 11.) Gillison further admitted that Uchofen had not been suspended at the time of the March 20 meeting with Simino, and "[a]t that point, I had just

⁷ The informal settlement also contained a make-whole commitment to Uchofen. Although Uchofen achieved a remedy through the grievance process, the ALJ determined that the retaliatory suspension must be remedied by the Act as well. (ALJD 12:29-36, 43:5-9.) Therefore, a cease-and-desist and notice-posting, but not a monetary remedy, are herein sought. Furthermore, the circumstances of the retaliation, and Gillison's admissions, are evidence of anti-Union motivation and of the pattern of discrimination visited upon the bargaining Unit, as alleged elsewhere in the Complaint. In any event the issue is not before the Board because Respondent did not except.

⁸ Gillison testified that this visit by Uchofen and Simino occurred before the date of the March 21 disciplinary document. (Gillison Tr. 155.) Gillison's affidavit also confirms that the date of Uchofen's and Simino's visit to be Thursday, March 20. (GC 12 ¶¶ 12-13.) Thus, Gillison admits that disciplinary documents were written after Simino and Uchofen's March 20 visit. (Gillison Tr. 155-59; GC 12 ¶ 16-17.) The evidence thus proves that Gillison made his decision to suspend Uchofen – as distinct from merely removing him from service for an afternoon – after the March 20 visit by Uchofen and Simino in which Simino demanded to discuss the afternoon's removal from service.

intended on reading him the riot act and let it go but he never showed up.” (GC Exh. 12 ¶ 13.) Gillison in fact repeats in his affidavit that he “had asked Cesar to meet with me on the morning of the 20th to discuss the ticket and he didn’t show up – I wasn’t going to suspend him, just going to read him the riot act and send him out again.” (GC Exh. 12 ¶ 14.)

Gillison also admits that his decision to suspend Uchofen was triggered by Simino’s request to represent him:

Once John [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 Cesar’s discipline, I decided on that day that it would be a suspension. I didn’t tell Cesar it would be suspension on that day, I just told them to come back the next day to discuss it. . . . It was when they demanded this meeting that I decided to suspend him.

(GC Exh. 12 ¶ 14.)⁹

3. Uchofen’s Suspension Was Unlawful Under *Wright Line*

Whether Uchofen’s suspension 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). 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 (2nd 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

⁹ Gillison further admits that he “decided on the suspension after John made it clear he was going to do it his way” and that he is “not crazy about suspending people because I need the drivers.” (*Id.* ¶¶ 16, 17.)

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)).

Here, Respondent’s March 2008 suspension represents an adverse change in Uchofen’s working conditions, and Uchofen was engaged in protected activity when he sought his Union representative’s assistance for meeting with Gillison. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). That this protected activity was a “motivating factor” in Gillison’s decision to suspend Uchofen is established by Gillison’s admission—made in his affidavit—that he had no intention of issuing a five-day suspension to Uchofen before Simino intervened. That same testimony precludes Respondent from establishing that it would have similarly disciplined Uchofen in the absence of his protected activity.

The ALJ correctly relied on Gillison’s affidavit admissions. (ALJD 11:21-52 through 12:1-27.) Thus, the ALJ properly did not rely the self-serving disciplinary documents given to Uchofen, which listed the purported bases for suspending Uchofen as: returning late to the yard; using his company van for personal business between morning and afternoon shifts; and refusing to meet with Gillison when asked to come to his office. (GC Exh. 10.) The ALJ also correctly did not believe Gillison’s trial testimony that the only reason for the suspension was “Mis-use of a company van. Illegal.” (Gillison Tr. 146-47.) Furthermore, the various reasons for the suspension advanced in the disciplinary documents and the trial testimony show Respondent’s shifting defenses, which support a finding that the purported reasons for Uchofen’s suspension

were pretextual. *See, e.g., Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988); *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983); *Seminole Fire Protection, Inc.*, 306 NLRB 590, 592 (1992).

Thus, based on the clear admission of Gillison's anti-Union animus motivating his decision to suspend Uchofen, the ALJ correctly determined that the suspension was motivated by that animus. (ALJD 12:20-27.)

F. The ALJ Relied On Unrebutted, Corroborated Testimony That Gillison Physically Assaulted Shop Steward Cesar Uchofen

Respondent excepts (R. Excep. 38-39) to the ALJ's correct finding that Gillison kicked Uchofen out of a company trailer, in front of coworkers, because of Uchofen's role as shop steward. (ALJD 13:14-23.) Although given ample opportunity to do so on the witness stand, Gillison did not rebut the testimony of Cesar Uchofen or employee Rosie Clayton regarding Gillison's physical assault on Uchofen on November 25, 2008.

Uchofen testified that, on the morning of November 25, 2008, as Uchofen was signing in, Gillison entered the trailer, and announced, "Hey, everybody here, listen. Here's Cesar. He's the new boss here. He's going to run the company now." (Uchofen Tr. 937-98.) As Uchofen tried to leave, Gillison called for him to stop and talk to him. Uchofen asked Gillison to let him go on his route. Gillison repeated his remark about Uchofen being "the new boss," and Uchofen again implored Gillison to let him leave. As Uchofen opened the door, Gillison shouted, "Hey, come over here, son of a bitch." Provoked, Uchofen showed Gillison his middle finger. As Uchofen opened the trailer door, Gillison kicked Uchofen in the back down the trailer steps. Uchofen called Gillison a coward. Dispatcher Stewart intervened to separate the two. (Uchofen Tr. 937-98.)

Monitor Rosie Clayton, who had been on her way to the trailer, saw Uchofen coming out the door and turning towards Gillison to protest the kick. She heard Gillison say, “You want me to kick you? You want me to put my feet on you?” (Clayton Tr. 1106.) Respondent did not rebut either Uchofen’s or Clayton’s testimony regarding this incident.

Although offensive or disparaging remarks about union adherents are not by themselves violations of § 8(a)(1) of the Act (*M.K. Morse Co.*, 302 NLRB 924, 925 (1991); *see Ryder Transportation Services*, 341 NLRB 761, 776 (2004)), Gillison’s comments that Uchofen was “the new boss” made clear that Gillison was objecting to Uchofen’s attempts to interfere, as Gillison saw it, in the way his business was run. (*See also* GC Exh. 44, wherein Gillison wrote to Uchofen, “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.”) Thus, Gillison was objecting to Uchofen’s grievance filing, which constitutes activity protected by Section 7 of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984). Gillison’s assault on Uchofen was therefore in response to Uchofen’s concerted, protected activities, and hence violated § 8(a)(1) of the Act. *See Kenrich Petrochemicals*, 294 NLRB 519, 534 (1989) and case cited therein (“[i]f an employer assaults or otherwise physically abuses its employees because of said employees’ protected activities, such conduct is violative of Section 8(a)(1) of the Act”).

Respondent objects that the ALJ improperly relied on Clayton’s testimony because she had not directly witnessed what happened inside the trailer. (R. Excep. 38-39.) However, the ALJ here was entitled to believe Uchofen’s un rebutted testimony, and there is no evidentiary requirement that corroborative testimony precisely and completely overlap un rebutted testimony. When credibility findings are not based on demeanor, “an administrative law judge properly may

base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, ‘and reasonable inferences which may be drawn from the record as a whole.’” *Daikichi Corp.*, 335 NLRB 622, 623 (2001) (quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). Furthermore, although not made explicit by the ALJ, an adverse inference may be drawn from Respondent’s failure to ask its own general manager to explain his version of events while on the witness stand. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (“when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge”) (citing 2 Wigmore, *Evidence*, § 286 (2d ed. 1940); McCormick, *Evidence*, § 272 (3d ed. 1984); *Greg Construction Co.*, 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974).) Furthermore, the ALJ nowhere in his decision made a determination that Uchofen lacked credibility in any part of his testimony, which would impair the credibility of his version of the physical assault. Cf. *Matros Automatic Electrical Corp.*, 353 NLRB No. 61 slip op. at *5-6 (December 8, 2008) (finding it is proper for the trier of fact to specifically discredit the testimony of a witness on a particular subject because the witness was untruthful on another material matter, or because the testimony contradicts documentary evidence).

G. The Evidence Supports the ALJ’s Conclusion that Respondent Violated the Act By Failing to Meet with the Union at Step 2 on Pending Grievances

The Respondents objects that the ALJ, in finding that Respondent violated the Act by failing to meet with the Union on certain grievances, erred by not identifying the specific grievances. (R. Excep. at 39; ALJD 18:37-44.)¹⁰

¹⁰ The ALJ find this to be a violation of Section 8(a)(5). However, as argued by the General Counsel in its Cross-Exceptions, the ALJ erred by not also finding this to be a violation of Section 8(d) of the Act. (GC Cross-Excep Brief 38-39.)

However, the record evidence clearly supports the finding. The parties' collective-bargaining agreement provides that a second-step meeting be "held" within ten days after receipt of a written request. (GC Exh. 53 (at 2000 agreement Art. 14(b).) In a letter dated September 30, 2008, the Union notified Respondent that it was appealing to grievance step 2 those grievances concerning the "integrity" of the fall pick and the failure to pay employees a minimum work guarantee. (GC Exh. 73.) In an October 31 letter to Respondent, Simino wrote that, although the parties had already reached step 2 on grievances concerning the denial of the summer pick and the integrity of the fall pick, the parties had still to meet on four grievances: (1) employees paid below the minimum weekly guarantee; (2) underpayment under the Fair Labor Standards Act; (3) failure to pay the minimum annual guarantee; and (4) underpayment of driver Jocelyn Carter. (GC Exh. 74.) Simino further wrote that "[i]f we do not hear from you in writing with a schedule for Step two hearings by business day ending Friday November 7th we will consider it untimely and have them scheduled for Arbitration." (GC Exh. 74.)

Ardley did not respond to the October 31 letter. (Simino Tr. 636.) In a letter dated November 19, 2008, Union counsel wrote to the contract-designated arbitrator, Andrew Sayegh, requesting the scheduling of arbitration dates for the grievances identified in Simino's October 31 letter to Ardsley. (GC Exh. 110 at Exhibit D thereto.)

Thus, Simino, in his October 31, 2008 letter, alerted Ardsley to the need for scheduling Step 2 meetings on four pending grievances concerning underpayment of wages, and Simino provided an explicit deadline for a response: (GC Exh. 74.) Simino further testified that the Union did not receive a response to his letter.. (Simino Tr. 636.) The record contains no evidence to the contrary, and Respondent did not rebut Simino's testimony.

Regardless of Simino's seven-day deadline for scheduling, the record shows that Respondent did not respond to the letter, by either the tenth day (November 10) or any time thereafter, or, pursuant to the contract, that Respondent made itself available for a hearing to be held by that day. Respondent thus violated § 8(a)(5) and (1), and 8(d), of the Act by not responding to Simino. *See Trailmobile Trailer, LLC*, 343 NLRB 95, 97 (2004) (employer violates § 8(a)(5) by failing to attend step 2 meetings by contractually specific deadline).

H. The ALJ Properly Relied on Respondent's Admission that It Did Not Post All Available Routes for Bidding During the August 2008 Route Pick

Respondent excepts (R. Excep. at 39-40) to the ALJ's correct finding that Respondent violated Section 8(a)(5) of the Act when it failed to post all available routes for employee bidding for the 2008-09 school year. (ALJD 20:26-35.)

The ALJ's finding was well supported by the evidence. 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.

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.)

A fall route pick took place at Ardsley beginning on August 25 and ending on or about August 29, 2008. (GC Exh. 22; Gillison Tr. 238, 243-44.) In an August 28, 2008 letter (before the pick process had ended), Simino notified Gillison that the Union was grieving the “integrity” of the August pick. Simino complained, in particular, that “an extensive amount of routes were closed off from picking as the schools allegedly picked drivers instead of the other way around” and, as such, certain routes were being distributed without following contractual seniority principles. (GC Exh. 24.)

Respondent confirmed the Union’s claims in a letter from Gillison to Simino dated August 28. In that letter, Gillison admitted to Union representative Simino that certain drivers and monitors for the Irvington and Dobbs Ferry school districts, as well as for the Westchester County routes and the Ursuline School, were assigned by Respondent without regard to seniority and the bidding procedure, but rather in accordance with contracts with, or requests from, those entities. (GC Exh. 25.)

Thus, as the ALJ found, Respondent violated Section 8(a)(5) and (1) and 8(d) of the Act by failing to post and bid by seniority the routes for the 2008-09 school years as required by the parties’ collective-bargaining agreement.

Sections 8(a)(5) and 8(d) of the Act establish the employer’s obligation to bargain in good faith with respect to “wages, hours, and other terms and conditions of employment.” 29 U.S.C. Sec. 158(d). Whereas Section 8(a)(5) generally prohibits an employer from implementing unilateral changes regarding mandatory bargaining subjects before reaching a good-faith impasse through negotiation, “Section 8(d) imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to ‘modify . . . the terms and conditions contained in’ the contract: The employer must obtain the union’s consent before

implementing the change. *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984) (footnotes omitted) (citing *NLRB v. Katz*, 369 U.S. 736 (1962); quoting *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), *enfd.* 505 F.2d 1302 (5th Cir. 1974), *cert. denied* 423 U.S. 826 (1975)).

Not only does Section 8(d) prohibit parties from changing a collective-bargaining agreement mid-term, it provides that the “duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.” 29 U.S.C. Sec. 158(d).

The Board distinguishes unlawful mid-term modifications from mere contract breaches where the “dispute is solely one of contract interpretation.” *NCR Corp.*, 271 NLRB 1212, 1213 (1984). There is no violation of Section 8(d) when an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it.” *Id.* (quotation marks omitted) (citing *Vickers, Inc.*, 153 NLRB 561, 570 (1965)).

In this case, there is no ambiguity, as the ALJ concluded (ALJD 25:33-44), in the relevant contract provisions sufficient to give Ardsley a sound arguable basis to modify its terms. As stated above: section 15(e) of the 2000 master agreement provides that “[a]ll runs, holidays, vacations and extra work shall be picked by seniority” (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” (GC Exh. 53 (2002-06 MOA at 2); and the parties’ December 17, 2007 agreement recommitted Respondent to “have a job pick for the Summer routes and the Fall routes . . . by seniority.” (GC Exh. 64-66). As further stated above, in contravention of this clear language, Respondent omitted substantial groups of routes from the

contractual bidding process, as Gillison admitted in his August 28, 2008 letter to the Union, thereby depriving employees of their contractual right to have all available routes open for bid. (GC Exh. 25.)

Thus, as the ALJ correctly concluded, Respondent violated Section 8(a)(5) and (1) and 8(d) of the Act by failing to post all available work for bidding at the start 2008-09 school year. In this regard, Respondent had no legal basis to deviate from the clear and unequivocal contractual language mandating that all routes be posted, bid and assigned by seniority, and therefore Respondent violated the Act. (ALJD 25:33-44.)

I. The ALJ Correctly Found that Respondent Committed Two Acts of Unlawful Direct Dealing with Unit Employees

Respondent objects to the ALJ's correct findings that Respondent, in December 2008, violated Section 8(a)(5) and (1) of the Act by dealing directly with unit employees surrounding its request to mechanics that they sign documents stating that they had received their contractual tool allowance, and when Respondent asked drivers to sign documents stating that they had not been coerced in making their summer 2008 route selections.

Section 3 of the 2002-06 MOA provides that mechanics annually receive either a \$500 or \$250 tool and shoe allowance, depending on their classification. (GC Exh. 53 at 2002-06 MOA § 3(a) at 1.) In around September 2007, the Union complained to Respondent about a failure to pay mechanics this allowance. On December 5, 2007, the parties entered into an agreement in which Ardsley agreed to pay all mechanics a tool allowance of \$250. (GC Exh. 45.)

In December 2008, Gillison entered the company garage and addressed six mechanics: Juventino Lopez, Jorge Ochoa, Jorge Escobedo, Granville Walker, Herbert Aparicio, and Raul Lopez. (Lopez Tr. 1129, 1132.) Gillison asked each mechanic if he wanted his money. After some answered yes and some no, Gillison asked rhetorically if the mechanics "worked for the

Union or for the shop” and “[w]ho does them a favor? Who helps them?” (Lopez Tr. 1133-34.) Gillison then asked them to make a decision, adding that the Union does not help them. Before leaving the garage, he promised a check, in particular, to Juventino Lopez. (Lopez Tr. 1133-34.)

Gillison admitted that, in December 2008 and January 2009, the Union disputed that the tool-and-shoe allowances had been disbursed. In mid-January 2009, Gillison asked each mechanic to give a statement “backing [him] up that [Ardsley] had paid them.” (Gillison Tr. 1343-44, 1345.) At the hearing, Gillison identified a handwritten set of statements dated January 15, and a typewritten set dated January 14, from individual mechanics. In most of the documents, the mechanics wrote that they had received their allowances for 2007 and 2008. However, in two of the handwritten documents, the signatory mechanic wrote that he was not entitled to an allowance because he was a foreman and not a Union member. (GC Exhs. 50-51.)¹¹

On December 11, 2008, a dispatch office employee named Betty [LNU] directed driver Guillermo Sanchez to sign some papers. (Sanchez Tr. 1054.) In front of Betty and dispatcher Arias, Sanchez signed a typewritten document stating the following:

I [name] did choose the summer camp route that I drove for 2008. In no way was I ever coerced or forced to do my summer camp route. Nor was I ever coerced or forced to do any summer camp route or school route for Ardsley Bus Company. I have always chosen, picked or accepted the assigned routes of my own free will.

(Sanchez Tr. 1053, 1056-57; GC Exh. 49.) At the hearing, Gillison identified a total of 78 identical typewritten forms as the collection of statements that he had asked employees to sign on December 11 and 12, 2008. He admitted that he prepared the documents in response to the

¹¹ Respondent’s only argument regarding Respondent’s tool-allowance conduct is that Gillison did not physically produce the mechanics’ statements. (R. Excep. at 41.) It is immaterial to the finding of unlawful direct dealing that Gillison did not type-up the document; the relevant fact, as Gillison admitted, was that he solicited the statements from the mechanics.

Union's grievance concerning the alleged unfair distribution of summer work. Gillison also admitted that he had summoned the employees into Ardsley's classroom trailer, solicited their signatures, and witnessed them sign the form or, in a handful of cases, write on it that they were refusing to sign.¹² With him at the time were safety director Ramos and either assistant manager Vilella or dispatcher Arias. (The latter two apparently performed Spanish translations.) (Gillison Tr. 328-30, 331, 332.) Gillison's admitted purpose in soliciting these statements was to "back . . . up" Ardsley's position and to show that employees were not coerced in choosing summer routes. (Gillison Tr. 328, 330.)

An employer violates Section 8(a)(5) of the Act when it:

deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment Direct dealing need not take the form of actual bargaining. . . [T]he question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode "the Union's position as exclusive representative."

Allied Signal, Inc., 307 NLRB 752, 753-54 (1992) (citations omitted). The Board has developed criteria to determine whether an employer has engaged in unlawful direct dealing: "(1) the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication must be to the exclusion of the union." *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co.*, 316 NLRB 979, 982 (1995)). Here, Ardsley unlawfully bypassed the Union on two occasions.

¹² Respondent's sole argument regarding the summer-work statements is that Gillison's motivation was that he "did not want the Union to file another self-serving grievance." (R. Excep at 41.) Gillison's motive is irrelevant to the fact that his actions constituted direct dealing.

Between November 2008 and January 2009, the Union was trying in vain to get Respondent to arbitrate numerous grievances, including the grievance filed on August 6, 2009, regarding failure to post and bid summer work by seniority. (GC Exh. 110, exhibits D through AA thereto; GC Exh. 48.) As set forth above, on December 11 and 12, 2008, Gillison summoned at least 78 Unit employees to sign statements affirming that they did not object to Ardsley's distribution of summer 2008 routes, and that they were not coerced in choosing their routes. Respondent unlawfully bargained directly with these employees by asking them, without benefit of Union representation, effectively to waive their rights to protest Ardsley's unilateral departure from the provisions of the collective-bargaining agreement mandating that summer work be distributed through posting and bidding by seniority. *See Bozeman Deaconess Foundation*, 322 NLRB 1107, 1118 (1997) (employer unlawfully bypassed union and directly dealt with employees by asking them to sign off on a unilateral change in their job descriptions); *Circuit-Wise, Inc.*, 306 NLRB 766, 767 (1992) (finding violation of Section 8(a)(5) where employer met directly with employees without union representation within a employer-created grievance process). Respondent also bypassed the Union by polling employees regarding their sentiments towards the Union's position in the dispute over the distribution of summer work. *See Obie Pacific, Inc.*, 196 NLRB 458, 459 (1972) (employer "may not seek to determine for himself the degree of support, or lack thereof, which exists for the stated position of the employees' bargaining agent").

During this same December-January period, Gillison bargained with the mechanic staff over their contractual right to a tool allowance. "It is well established that an employer violates Section 8(a)(5) and (1) of the Act by meeting with employees to discuss wages without the presence of their designated collective-bargaining representative." *Anderson Enterprises*, 329

NLRB 760, 761 (1999). During his meetings with mechanics, Gillison asked them whether they would forego their right to tool compensation provided for in the December 17 settlement agreement, while implying that they would not receive their tool allowance if they supported the Union. (Lopez Tr. 1133-34.) Shortly thereafter, in mid-January 2009, Gillison asked each mechanic to provide a statement memorializing these waivers. (Gillison Tr. 1343-44, 1345; GC Exhs. 50-51.) *See Anderson Enterprises*, 329 NLRB at 761 (employer directly dealt with employee by telling him he would earn more money if the union did not represent him); *Fairhaven Properties, Inc.*, 314 NLRB 763, 767 (1994) (directly dealing with employees by conditioning continuation of their terms of employment upon abandoning the union).

Therefore, the Respondent violated Section 8(5) and (1) of the Act when it dealt directly with employees regarding mechanics tool allowances and the distribution of summer work, as the ALJ correctly found. (ALJD 30:33-43, 31:1-26.)

J. The ALJ Correctly Found the *Johnnie's Poultry* Violation

Respondent objects to the ALJ's finding that its counsel, Anthony J. Pirrotti, violated the mandate of *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), when counsel met with employee Reynaldo Gomez on May 8, 2009, at counsel's offices. (R. Excep. 41-42.)

In testimony at hearing, and in a sworn affidavit admitted into evidence, driver Reynaldo Gomez received by mail a subpoena from the Board's regional office to appear at the Region on May 13, 2009. (Gomez Tr. 810-11; R. Exh. 8 ¶ 2.) According to the affidavit, Gomez promptly informed General Manager Gillison about the subpoena and Gillison advised Gomez to meet with Pirrotti at Pirrotti's office. (R. Exh. ¶ 2.) Gillison arranged the meeting, and on or about May 8, 2009, Gomez was accompanied by Respondent employees Luis Maciera and Joe Ramos to Pirrotti's office. Ramos acted as a translator. (*Id.*) At the office, Pirrotti "asked me [Gomez]

how long I had been working with the company, if I paid the Union and if I received my route in August.” (*Id.*) Although Pirrotti did not offer to accompany Gomez to the address identified in the subpoena, or to report on the outcome of the subpoena, Pirrotti failed to tell Gomez “that the company was not going to take negative actions or reprisals against me because of the Subpoena or for my testimony.” (*Id.*) Gomez stated that he did not hire Pirrotti to represent him, or give him permission to represent him. (R. Exh. ¶ 3.)

Prior to Gomez’s hearing testimony, Respondent offered Gomez’s affidavit into evidence, and the affidavit was subsequently admitted for the truth of the matter asserted. (Tr. 480-483, 817.) Based on this fact, the ALJ urged Counsel for the General Counsel not to waste any more time questioning about the contents of the affidavit, a request to which Counsel for the General Counsel obliged. (Tr. 814.)

Gomez’s hearing testimony varied from the detailed, timely testimony he gave in his sworn affidavit. He did not recall whether he showed the subpoena to Vilella or Arias or who accompanied him to Pirrotti’s office to serve as a translator. (Gomez Tr. 811-12.) While he did recall going to Pirrotti’s office for an appointment, he could not remember any details of the appointment. (Gomez Tr. 814.) He testified that Pirrotti told him “that I had to come to the appointment” but that he did not “remember that we spoke much. Just - I don't remember the appointment.” (Gomez Tr. 811-14.)

It is well-settled that charged party agents, including charged party attorneys, may not interrogate employees on matters involving Section 7 rights unless the interrogation comports with the following standard:

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union

organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind or otherwise interfering with the statutory rights of employees.

Johnnie's Poultry Co., 146 NLRB 770, 775 (1964).

Gomez, by his sworn affidavit and hearing testimony, supports the allegation set forth in paragraph 21 that Respondent's attorney Pirrotti interrogated employees in violation of Section 8(a)(1) of the Act. His uncontroverted testimony establishes that after learning that the Regional Office issued Gomez a subpoena ad testificandum, Respondent agents arranged for him to speak to Respondent's attorney in Respondent's office and that Pirrotti failed to give him the assurances required by *Johnnie's Poultry*. (Gomez Tr. 811-813; R Exh. 8 ¶2.) Testifying in an affidavit just days after the meeting with Pirrotti, Gomez described that Pirrotti interrogated him about his employment, union membership and his participation in the August 2008 route pick and that Pirrotti *did not* tell him that Respondent would not take negative actions or reprisals against him. (R. Exh. 8 ¶ 2.)

That Gomez could recall almost nothing about this meeting when he testified at hearing does not undermine the statements he made under oath in his affidavit. As the ALJ stated in the record, Respondent offered Gomez's affidavit for the truth of the matter asserted prior to Gomez's testimony. General Counsel did not object to the Gomez affidavit, and thus the contents represents non-hearsay substantive evidence. (Tr. 482-83, 814, 817.) *See Alvin J. Bart and Co., Inc.*, 236 NLRB 242, 243 (1978) (enf denied on other grounds 598 F.2d 1267 (2d Cir. 1979).

Furthermore, Gomez did not deny any part of the affidavit during hearing, and the affidavit was sworn to just days after Gomez spoke to Pirrotti;. Therefore, to the extent that

Gomez could not remember the conversation with Pirrotti, the affidavit represents past recollection recorded pursuant to Fed. Rule Evid. 803(5). See *Douglas Food Corp.*, 330 NLRB 821, 828 n.4 (2000) (admitting a statement as past recollection recorded where the statement was prepared by the witness shortly after a conversation occurred and the witness no longer recalled some of the events described in the statement).

Based on the record evidence that Pirrotti interrogated Gomez about matters relevant to his Section 7 rights and did not give him assurances required by *Johnnie's Poultry*, the ALJ was correct in finding that the evidence shows Respondent violated Section 8(a)(1) of the Act. (ALJD 32:20-23.)

K. Respondent Failed to Provide Information Relevant and Necessary to the Union's Role as the Employees' Representative

Respondent takes exception to the ALJ's finding that Respondent violated Section 8(a)(5) of the Act by failing to provide requested information to the Union. However, Respondent makes virtually no argument supporting the exception. (R. Excep. at 42-43.) Nevertheless, the facts showing the violation are clear.

1. Union's Requests for Information Regarding Summer Route Postings and Ardsley's Refusal to Provide It

In the summer of 2008, Ardsley ran summer camp routes, routes for special education schools, and charter service. A single camp may have up to twenty routes (Gillison Tr. 191, 193), and most of the drivers perform the same camp routes every year (Gillison Tr. 191, 196). In 2008, summer camps began one week after the public schools closed. (Gillison Tr. 204.)

At the end of May 2008, Simino met with Gillison at Gillison's office. (Simino Tr. 593.) When Simino told Gillison that they had "to speak about the pick and develop it," Gillison replied that "the Union has no say in summer picks." Simino showed Gillison Respondent's

December 17, 2007 written commitment to hold a summer pick. Gillison repeated that the Union had “no say in the summer picks” and he refused to discuss it with Simino. (Simino Tr. 596-97.) Simino cautioned Gillison that the school year was ending and they had to arrange the pick. (Simino Tr. 596-97.) Simino asked for information relevant to the summer pick, telling Gillison that, in order to conduct “a fair pick,” the Union required descriptions of the summer routes and information about “the value” of the route, as well as route hours so that employees could chose, by seniority, the number of hours they wanted to work and how much they wanted to earn. (Simino Tr. 598.) By “value” of the routes, Simino meant that “[t]he driver would like to know how many hours they’re working in a particular day, a particular week and how much they’re going to make.” (Simino Tr. 599.) Gillison responded by insisting again that the Union had “no say in summer picks.” (Simino Tr. 598.)

After this end-of-May meeting, Simino arranged for two further meetings, to be held in the first week of June, to discuss the summer pick with Ardsley’s owner Titkin. Both meetings were cancelled by Titkin. (Simino Tr. 600-02.) On June 20, Simino sent a letter to Respondent that, in part, described how the Union thought a summer pick should be conducted. (GC Exh. 69.) After learning that Mohawk Summer Camp had visited the Respondent’s yard on June 16, and fearing that those and other routes may have already been assigned, Simino, along with two stewards from another bus company, met again with Gillison near the end of June. At this meeting, Gillison promised to provide the Union with certain information regarding route assignments. (Simino Tr. 602-03.)

On the last day of the school year — and just one week before summer camps were to start — Gillison provided Simino with a single document. That document constituted the only information about the summer routes Respondent gave the Union before the routes started.

(Simino Tr. 603-04; GC Exh. 67.) Entitled “Price Schedule for Summer Camps: 2008,” the document listed the names of the summer camps, along with the 2007 and 2008 “rates” Respondent had paid employees “per/day” and “per/wk.” Thus, the document contained but a portion of the information that Simino had requested in May. For example, it did not set forth the hours of work, which was important to the Union because it had received complaints from members that the summer runs lasted too long into the evening. (Simino Tr. 616.) The document itself showed that most employees were going to be paid a flat rate for summer work, thereby making the number of hours a key consideration in bidding. (Simino Tr. 610-11; GC Exh. 67.)

Gillison testified in support of Respondent’s defense that, in a 2008 meeting with Simino, Union lawyer Jennifer Hogan, and Titkin, the Union “agreed with the system that we had set up [for the assignment of summer work]. We laid it out right in front of them, and they both agreed to it. We gave them their documents and everything there.” (Gillison Tr. 198.) But Gillison refused in his testimony to specify the date of this meeting, referring only generally to documents produced at the hearing pursuant to subpoena. (Gillison Tr. 198, 201-03.) Notably, the only documentary evidence of a meeting attended by Simino, Hogan and Gillison regarding the 2008 summer routes is a July 28 letter from Hogan to Gillison, which attached the Union’s summer pay rate grievance and invited him to set up a step 1 grievance meeting. (GC Exh. 16.) Simino testified that he, along with Hogan, did meet with Gillison, but at the very end of July 2008, well after the summer routes had been assigned. (Simino Tr. 615; GC Exh. 16.) At that time, in the middle of summer, the Union needed summer route information in order to investigate a grievance that the routes had not been assigned by seniority. At the meeting, Gillison gave

summer route assignment information to Simino, and on August 6, the Union filed its grievance. (Simino Tr. 620; GC 48, 70, 71.)

2. Respondent's Failure to Provide Information Concerning Fall Routes

During this post-pick period, on September 8, 2008, Simino and Gillison held an unsuccessful step 2 meeting covering the summer and fall pick grievances. (GC Exh. 74.)¹³ In order to investigate potential post-pick grievances, Uchofen sent a letter to Ardsley dated October 23, 2008, requesting the following information:

- 1- All routes info.
- 2- A list of the drivers and monitors who have assigned to the routes.
- 3- List of drivers and monitors who are not assigned to any routes.
- 4- Any temporary or short term routes.
- 5- List of routes that have been canceled.
- 6- List of the new routes after September 2008.
- 7- The new routes that you posted to pick, after September 2008.
- 8- The charters routes that you posted to pick by seniority since September until now.

(GC Exh. 41.) Titkin responded in an October 24 letter, stating that Ardsley was “not obligated to reveal company documents” to Uchofen, unless Uchofen identified the adversely affected employees. Gillison also refused to respond to the Union’s request for new and cancelled routes because such information was “for company review only [and] [u]nless that information is needed to prove points via arbitration or the NLRB we see no reason why it should be given to you.” (GC Exh. 42.) On October 29, Uchofen served Respondent with a formal grievance concerning the post-pick issues. In the grievance, he complained that Ardsley was not posting and bidding by seniority all routes, including charter and newly-vacant routes. Uchofen requested that “[a]ny and all work should be posted by seniority.” (GC Exh. 43.) In an October

¹³ Although the parties had already held a second-step meeting on the integrity of the fall pick, Simino wrote to Titkin on September 30 requesting a step 2 hearing on that grievance. (GC Exh. 73.) This was an apparent error based on Simino October 31 letter indicating that the step 2 hearing on the grievance already occurred. (GC Exh. 74.)

31 letter to Uchofen, Gillison responded to this grievance by demanding that Uchofen specify problem routes. (GC Exh. 44.) Gillison also reiterated Respondent's position that "[t]he contract requires only one route pick at the start of schools" *Id.*

The summer and fall pick grievances, among others, proceeded to arbitration. On December 8, 2008, Union attorney Ursula Levelt wrote Respondent's counsel that "[i]n order to prepare the above referenced grievance for arbitration, we request the following information:"

1. Any evidence of work posted available for bid after the August 2008 pick;
2. Copies of route descriptions of all work performed by drivers and monitors (including charters, extra work/runs, vacations, holidays) from August 1, 2008 to the present with an indication of the time period the route or other work was being performed and who performed the work on which day;
3. Payroll records for all drivers and monitors from September 1, 2008 to the present;
4. Seniority list of drivers and monitors effective on or about July 1, 2008; and
5. Copies of all contracts with the Boards of Education of the different municipalities underlying the work described under no. 2 above.

(GC Exh. 77.) Respondent did not supply the requested information. In a letter to Respondent counsel Anthony J. Pirrotti dated April 27, 2009, Levelt repeated her December 2008 request and attached a copy of her previous letter. (GC Exh. 95.) The Union never received the documents requested in the December 8 letter, except item 4, the seniority list. (Simino Tr. 649.)

3. Respondent's Failure to Provide Information Regarding the Negotiation of a Successor Agreement

The parties' collective-bargaining agreement was to expire on June 30, 2009. (GC Exh. 53 (2006-09 MOA § 1 at 1.)) In a letter to Titkin, dated May 21, 2009, Simino wrote:

The collective bargaining agreement with TWU Local 100 will be expiring June 30, 2009. We are available to start bargaining and propose that we schedule weekly meetings on Mondays at noon, starting June 1,

2009. We propose to alternate between the Union's Yonkers office at 15 Palisades Avenue and your premises. Please contact me to confirm the first bargaining session.

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 a request to Respondent, seeking the following information:

1. Current enrollment in any health insurance program(s) offered to employees in the bargaining unit by type of coverage (individual, individual plus spouse, family, etc.) and the amount of the premium paid by the employee and the company for each type of insurance in dollar amounts;
2. The most recent plan documents for such insurance program(s) including the type of benefits covered, the cost of co-pays and other out-of-pocket expenses;
3. The most recent plan documents for any and all health insurance programs offered to management employees including the type of benefits covered, the cost of co-pays and other out-of-pocket expenses;
4. Number of current employees in each job title, with a breakdown within each title of the number of employees at top pay and successive six -month steps;
5. A list of all runs serving children with special needs and all monitors assigned to these runs;
6. Any and all information on training and instruction provided to monitors serving children with special needs in the last three years;
7. Invoices from Ardsley Bus Corporation to School Districts for all charters or other separately invoiced activities performed by members in the bargaining unit for the months of October 2008, November 2008, March 2009, April 2009, and May 2009;
8. All current contracts between Ardsley Bus Corporation and school districts with invoices showing the monetary value of the current contracts;
9. All documentary information in possession of Ardsley Bus Corporation from school districts regarding any extensions of contracts or the bidding process for new contracts.

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.

4. Legal Analysis

As the ALJ found, Respondent violated Section 8(a)(5) and (1) of the Act by not responding, or responding in an untimely manner, to the Union's information requests of May 2008, December 2008, and May 2009, which were related either to contractual grievances or successor contract negotiations. ((ALJD 17:8-13, 18:7-12, 27:1-11, 37:41-43.)

Based on longstanding principles, an employer has a duty to provide requested information to the collective-bargaining representative of its employees "if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities." *New Surfside Nursing Home*, 322 NLRB 531, 534 (1996) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967) and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). The standard of relevance applied "is a liberal one and it is necessary only to establish 'the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *Id.* Information is presumptively relevant if it relates to the bargaining unit's terms and conditions of employment; where the requested information is presumptively relevant, the respondent bears the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997) and cases cited therein.

Ardley failed and refused to furnish the Union with requested information responsive to: (1) the Union's May 23, 2008 request covering summer routes, including dates, hours and pay

rates; (2) the Union's October 23, 2008, December 8, 2008 and April 27, 2009 requests covering 2008-09 route descriptions, Unit employee assignments, dates of routes, payroll records, and route contracts with boards of education; and (3) the Union's May 21, 2008 request covering a variety of topics related to bargaining for a successor agreement.

The requested information related to the summer and fall picks, *i.e.*, route descriptions, route bidding, available route work, and payroll records, was presumptively relevant because it related directly to the terms and conditions of employment of bargaining unit drivers and monitors. *See, e.g., Kathleen's Bakeshop, LLC*, 337 NLRB 1081 1094 (2002) (delivery routes); *Postal Service*, 341 NLRB 655, 663 n.17 (2004) (list of applicants for positions under contract's bidding and posting procedures); *Summa Health Systems, Inc.*, 330 NLRB 1397, 1399 (2000) (job postings); *see also Wayneview Care Center*, 352 NLRB No. 129 (2008) (requested information on changes to work force, current schedule for each department, and information about current employees presumptively relevant); *Critten Hospital*, 343 NLRB 717, 745 (2004) (updated list of unit employees' names, addresses, and phone numbers presumptively relevant) (citing *Dynatron/Bondo Corp*, 305 NLRB 574 (1991)); *Contract Carriers Corporation*, 339 NLRB 851 (2003) (information relevant to processing grievances).

The information requested by the Union for successor-contract bargaining, including employee wage information, route and employee lists regarding special-needs children, health insurance information (*see Honda of Haywood*, 314 NLRB 443 (1994)), and training information (*see Southern California Gas Co.*, 346 NLRB 449 (2006)), was also presumptively relevant. School district invoices to Ardsley for bargaining-unit charter work were also presumptively relevant because they relate directly to employee wages. Pursuant to section 4(f) of the 2000 master agreement (GC Exh. 53), the pay of charter drivers is calculated as 33 1/3 percent of the

particular “charter price;” therefore, the Union’s request for the value of charter invoices was necessary to determine whether Respondent was paying the proper percentage amount.

Furthermore, to the extent that Respondent did provide information partially responsive to the Union’s requests, it was untimely. *See U.S. Information Services*, 341 NLRB 988, 992 (2004); *see Woodland Clinic*, 335 NLRB 735, 736 (2006) (“[t]he duty to bargain encompasses not only the duty to furnish relevant information, but also the duty to furnish such information in a timely manner” and “[t]here is no point in requiring a party to furnish information if it can delay its production so that its utility will be diminished or lost”) Gillison handed the one-page document titled “Price Schedule for Summer Camps: 2008” to Simino on the last day of the 2008-09 school year, a mere week before summer camps were to begin. (Simino Tr. 603-04; GC Exh. 67.) At that time, it was too late to hold a pick. Simino testified that a proper pick process required a seniority list, a complete description of hours and wages available, and the identification, through solicitation, of those employees wishing to bid for summer work. Only after these prerequisites are accomplished, can a one- or two-day selection process be properly conducted. (Simino Tr. 612.) As a further indication of the untimely production of the information in 2008, and the lead time required for a summer pick, the evidence reveals that Respondent held a summer pick on June 10-12, 2009, to which the Union was invited. (Gillison Tr. 198, GC Exh. 82 (invitation to 2009 summer pick).) The record also reflects that, in 2008, Ardsley was aware of summer routes by as early as June 16, 2008. (Uchofen Tr. 889.)

Thus, Respondent’s repeated failures to provide the Union with relevant information requested in writing on October 23, 2008, December 8, 2008, May 21, 2009 and June 1, 2009, violated Section 8(a)(5) and (1) of the Act. The ALJ found all this information to be relevant to

the Union's representational role, and that the Act obligated the Respondent to provide it. (ALJD 27:1-11, 37:41-45.)

L. Inquiries Into The Names of Employees Who Complained to the Union About Respondent Are Irrelevant

Respondent argues that it is somehow relevant to matters alleged in the instant case that there is no evidence in the record of which employees complained to Union about Respondent's violations of the collective-bargaining agreement. (R. Excep at 11-12; 40, 41, 46.)

During the hearing, Respondent counsel questioned Union representative Simino about who among the bargaining Unit had complained to the Union that Respondent's assignment of routes violated their contractual seniority rights. (Tr. 708-09.) Expressing his desire to protect the confidentiality of bargaining-unit members, Simino declined to name employees in the presence of Respondent agents. (Simino Tr. 709-10.) The ALJ, as matter of proof, concluded that no employees complained. (Tr. 710.)

The argument that Respondent appears to make in its Exceptions is that, because there is no evidence in the record of who complained to the Union, the Union had no basis to file grievances concerning contractual violations or request information to investigate the violations. This is contrary to the law, which imposes on employers the obligation to deal with their employees' exclusive collective-bargaining representatives – in this case, Union representative Simino and shop steward Uchofen – with regard to employee terms and conditions of employment. The information requested by the Union was presumptively relevant, as found by the ALJ (ALJD 17:39-42, 18:1-3, 27:1-7), and Respondent has failed to prove otherwise.

Respondent also argues that the lack of evidence of employee names shows that Simino and Uchofen were merely engaged in a baseless "anti-Semitic campaign" and "bullying tactics", which had no support from bargaining-unit members. To the contrary, the record shows that the

Union was in fact engaged in grievance-filing and requesting relevant information on behalf of its members, and not for any objective independent of its role as the exclusive bargaining representative.

M. Respondent's Arguments of Bias in the Investigation of the Unfair Labor Practices and of the ALJ Are Baseless

In its Exceptions, Respondent makes baseless claims of "bias" in the pre-complaint investigation, and on the part of the ALJ during the hearing. (R. Excep. 3, 16, 44.) With regard to the investigation, Respondent appears to argue that the Complaint should not have issued because the General Counsel ignored evidence that employee disaffection was caused by the Union and not Respondent's unfair labor practices. In particular, Respondent claims that the Regional office did not initially accept the decertification petition and ignored its plain language, and did not properly consider the two employee affidavits which, as stated above, were properly rejected on hearsay grounds.

Respondent here is essentially making a legal argument wrapped in frivolous accusations of impropriety. As the ALJ did find, and the record shows, the petition was initially brought to the Region's attention outside the window period; the petitioners were advised to await the expiration of the collective-bargaining agreement and were advised of the Board's blocking-charge policy. (ALJD 35:1-8, 48-51; R. Exh. 6a.)

Respondent also appears to argue that the Regional office and/or General Counsel, should have turned over the two rejected affidavits to Respondent, as well as other evidence in the Regional files. (R. Excep. at 4-5, 18.) However, Board Rule 102.118 precludes such production and, furthermore, Respondent's request for file materials under the Freedom of Information Act (R. Exh. 10) was properly rejected (GC. Exh. 81) pursuant to FOIA Exemption 7(A). *See* 5 U.S.C. 552 (b)(7)(A).

With regard to the ALJ's alleged bias, the trial transcript shows that Respondent counsel's behavior was destructive to the conduct of an efficient hearing, and tested the patience of the other counsel and the ALJ. Nearly every page of the transcript contains examples of Respondent counsel's constant interruptions of the ALJ and parties by repeating the same – mostly frivolous – objections and arguments after the ALJ had, repeatedly, made clear rulings on them. This and other conduct of Respondent counsel was so caustic and abusive that the ALJ considered reporting him to the State bar and removing him from the hearing room. (Tr. 651, 1116-17.) What Respondent claims to be "bias" is rather the diligent effort of the ALJ to maintain an orderly hearing.

N. Respondent's Request for Oral Argument Should Be Denied

Respondent requests oral argument. (R. Excep. at cover page.) There are no complicated facts or novel legal theories involved in this matter. Oral argument is therefore not necessary and would not be helpful to the Board in resolving the issues herein. Respondent's request for oral argument should be denied.

VI. CONCLUSION

Based on the foregoing reasons, Respondent's Exceptions should be denied in their entirety.

Dated at New York, New York
April 20, 2010

Respectfully submitted,



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