

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

SOUTH JERSEY SANITATION CORPORATION

And

TEAMSTERS UNION LOCAL NO. 115 a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Case 4-CA-37537

**EXCEPTIONS TO DECISION BY
ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the undersigned, attorney for Respondent, South Jersey Sanitation (“SJS”) files these exceptions to the decision by Robert A. Giannasi, Administrative Law Judge (the “ALJ”), dated March 7, 2011 (the “decision”), service of which was made with the order transferring the case to the National Labor Relations Board (the “Board”) on March 7, 2011, pursuant to The National Labor Relations Act, as amended (the “act”)¹.

I. INTRODUCTION

On January 24 and January 25, 2011, hearings were conducted before the ALJ with respect to the following charges:² (1) that on or about January 15, 2010 Colasurdo wrongfully interrogated employee Jeraldo Cotto (“Cotto”); (2) that on May 28, 2010 Colasurdo again wrongfully interrogated Cotto and impermissibly granted Cotto a wage increase; (3) that in early June of 2010, Colasurdo wrongfully met with Cotto and various SJS employees regarding their

¹ Pursuant to 29 C.F.R. §102.46(b), Respondent herein identifies the specific errors and sets forth the factual and legal basis justifying each contention in the discussion immediately following.

² General Counsel’s Exhibits 1 and subparts.

efforts to unionize and impermissibly threatened to sell the company while referencing prior efforts to obtain improved health benefits; (4) that SJS violated the act by virtue of a threatening phone call to Cotto by Supervisor Edwin Morales (“Morales”) that also suggested that union activities were under surveillance; (5) that SJS violated, the act by virtue of Morales’ alleged surveillance of a union meeting; and (6) that on June 16, 2010 Cotto wrongfully terminated Cotto for a pretextual reason. All such alleged acts were asserted to be violations of Sections 8 (a)(1) and 8(a)(3)(4) and (1) of the act.

In its Answer, SJS denied any such alleged wrongdoing (General Counsel’s Exhibit 1 (g)).

II. STATEMENT OF THE CASE

For many years, SJS operated a trash collection and recycling business in Hammonton, New Jersey. Anthony Colasurdo (“Colasurdo”) is SJS’s owner, having purchased the company from his father in 2005. SJS’s primary business is highly competitive, deriving from municipal contracts that are publicly bid. (T268-13 to 14).³ SJS’s primary competition is with other companies that employ non-union workers. (T283-8 to 12) At all relevant times, SJS employed about thirty drivers. Prior to the organizational activities of Teamsters Union Local No. 115 undertaken in 2010 that are at issue here, neither Colasurdo nor SJS had any prior experience with union-related issues. (T271:20-T272:3).

The ALJ has ruled that Colasurdo’s communications with Cotto in January, of 2010, on May 28, 2010 and in early June of 2010, violated the act. The ALJ has also ruled that the increased wage granted to Cotto by Colasurdo violated the act, and that Colasurdo’s meetings

³ All transcript references are to the transcribed record of the hearings conducted before the ALJ on January 24 and 25, 2011.

with Cotto and other employees in June of 2011 were also violations. The ALJ has also concluded, despite Colasurdo's denial, that Colasurdo impermissibly threatened to sell the company due to the detrimental economic effect of unionization, and that Colasurdo's references to his efforts, well documented, to obtain an improved health plan were also violations. Finally, the ALJ ruled that Cotto's termination was pretextual, and thus also a violation of the act.

Apart from the wholesale dismissal of Colasurdo's testimony (a recurrent theme in the ALJ's decision), the ALJ has failed in his analysis to apply the relevant statutory and decisional standards of proof in cases of alleged employer misconduct.. First, employer misconduct must be proven by a *clear* preponderance of *all* of the relevant evidence. Hence, in weighing the proofs, the ALJ must fairly and comprehensively take account of the *entire* record. See generally, *Universal Camera Corp. v. Labor Board*, 340 U.S. 474,496, 71 S.Ct. 456, 468, 95 L.Ed. 456 (1951); *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950) *aff'd* 188 F.2d 362 (3d Cir 1951).

Here, the ALJ ignored this mandate, focusing with great favor on the General Counsel's witnesses and readily dismissing any of the contrary or qualifying evidence--testimonial and documentary. Most striking upon review is the alacrity, on the record, with which the ALJ categorically assailed Colasurdo's credibility: virtually minutes after Colasurdo took the stand, the ALJ accused him of being "evasive" and untrustworthy. On page 226 of the transcript, Colasurdo begins his testimony. On page 231, the ALJ enjoins him "not to editorialize." (T231-2) On page 241, The ALJ chastises the witness in terms that clearly express a decisive, and dismissive, opinion—"Now Listen, I want the truth...And it's not going to help you to dance around this issue, and I think you're being evasive, and I'll say that on the record. So, I want truthful answers and let the facts fall where they may, do you understand." (T341-1 to 10). And

what prompted this lengthy reprimand? Colasurdo asserted that SJS's mechanics were knowledgeable with respect to the vehicles under their control. (T240-18 to 25)

The ALJ's decision is replete with repeated denigrations of Colasurdo's credibility. This credibility determination is the ALJ's linchpin for resolving every material credibility and factual issue against SJS. In short, having dismissed Colasurdo's credibility early on (see above), the ALJ is able to conclude that the testimony of SJS's employees is truthful, even when (see below) material parts of that adverse testimony are recanted. This narrow and circular reasoning might have passed muster--given the deferential standard of review--if there had not been significant testimony and documentation in the record supporting Colasurdo's and SJS's denial of wrongdoing.. As an example, and this is as illustrative as it is important, the relevant testimony and supporting documentation established conclusively that Cotto, a driver with an indisputably disqualifying driving history, was terminated because of that history and its impact on SJS's ability to obtain cost-effective insurance. Any other option would have been significantly more costly. There was no evidence to the contrary.

While the ALJ notes these facts as allegations, he readily, and without evidential justification, dismisses their importance, concluding "circumstantially" that Cotto's termination was pretextual because several years before SJS had purchased a more expensive policy covering Cotto. The cliché regarding the consequence of "good deeds" is worth invoking here; because SJS had incurred the extra insurance costs (approximately one hundred thousand of dollars) in the past, SJS's only legal option was to incur the additional cost in 2010. This is an astonishing proposition, but as a ruling it is representative of the larger failure by the ALJ to afford SJS a fair opportunity to defend against the allegations of misconduct set forth in the pleadings.

III. EXCEPTIONS

For the reasons and authorities which follow, it is respectfully submitted that the ALJ erred in concluding that Respondent SJS violated Section 8(a)(1); 8(a)(4)(3) and (1) as alleged. SJS's exceptions follow:

- 1. The ALJ Erred In Admitting And Relying Upon The Testimony Of Jeffrey Kissling Regarding His Being Laid Off In January Of 2010. (Decision, Page 2, line 30-50; Page 3, line 28-34; Page 7, line 30-42; Page 8, line 2-3).**

The General Counsel did not file any pleadings against SJS alleging wrongdoing with respect to Jeffrey Kissling ("Kissling"). Over the objection of SJS's counsel, however, the ALJ permitted testimony regarding Kissling, an employee who was, as Kissling conceded, laid off by Colasurdo in early January of 2010. Kissling's testimony was wholly irrelevant and unduly prejudicial. The core claim by the General Counsel in this case was that all of Colasurdo's relevant words and acts during the May 28-mid June time frame were motivated by anti-union animus. Kissling's difficulties with Colasurdo arose from his circulation of a petition which did not relate to any union activity. Indeed, the complaint and amendments were wholly silent regarding Kissling.

Colasurdo took issue with Kissling's account of what occurred in January, indicating specifically, and contrary to the claim of the General Counsel, that SJS had not fired Kissling, but laid him off:

A: It was a Friday. It was pay day. And I think the date was January 8. But he comes into the yard because I wanted to speak with him and he is on his cell phone. And I am waiting for him to get off the cell phone. About 20 minutes expired then he comes over to me and he says I was just on the phone with the Labor Board and you can fire me. And I go "What are you talking about" And he says, I tried to organize a strike for better, he goes I can't, you have the right to fire me. And I go, "Jeff, lets just talk. You

haven't been happy here for a long time. You've complained . . . about different things. We have given you good equipment, good helpers, good towns and you were never satisfied or happy. Maybe its better if you go work somewhere else", and he agreed. And I said, look its January, I can lay you off. And then he goes that's a good idea and with that I did proceed to lay Mr. Kissling off and he collected unemployment benefits. (316:1-17)

Kissling confirmed Colasurdo's testimony, admitting that he subsequently collected unemployment benefits based upon his representation of having being laid off, not terminated. Nevertheless, the ALJ relied upon Kissling's testimony as probative of Colasurdo's later anti-union state of mind and intentions. The admission of evidence of other instances of behavior as a basis for inferring behavior with respect to a specific later instance is generally barred for two reasons: a) the probative relationship between past conduct and present behavior is highly speculative, and (2) such sensitive evidence, inviting speculation by definition, is inherently and grossly prejudicial See, . Fed. R. Evid. 401, 404 (c); *U.S. v Morley* , 199 F 3d 129, 133 (3 Cir 1999). The ALJ never addressed the issues of probative value and prejudice, the central issue regarding the Kissling testimony. Such constitutes error. (T41-7 to 11).

As was characteristic of his treatment of other issues in this matter, the ALJ failed to take account of the entire record in evaluating Kissling's credibility. In *Universal Camera Corp. v National Labor Relations Board*, supra, the Court held that a reviewing court must take into account all of the evidence, even contradictory evidence, to determine the validity of the decision under review. If this standard governs judicial review of the administrative record, than the Board and the ALJ, *a fortiori*, must also take into account the entire record, including contradictory evidence, in reaching its decisions. Stated differently, if a *preponderance of the record* is the standard of proof at this stage of the proceedings, by definition all of the evidence constituting that record must be considered. In this instance, the ALJ took no account of the

agreement between Colasurdo and Kissling that Kissling was laid off and ultimately received benefits (without objection) in accordance with this representation (by Kissling). The significance of this testimony was not remarked upon by the ALJ.

2. The ALJ Erred In Finding That Colasurdo Had Violated The Act By Coercively Interrogating Cotto On May 28, 2010. (Page 8; line 1 to Page 9, line 7)

Cotto testified that on May 28, 2010, Colasurdo called him into the office and indicated that there had been “talk around here” that Cotto was trying to form a union. (T52-14 to 16). Cotto also testified that Colasurdo emphasized that: “I’m not firing you and I’m not laying you off.” And, of course, Cotto was not then fired or laid off. Cotto initially claimed that Colasurdo said “that if a union came, the company would crumble” and that he (Colasurdo) “would burn the place down before he allowed that to happen.” (T55-4 to 6). Colasurdo also said he wanted to schedule an insurance meeting with the employees and that he was working on obtaining better coverage. (T56-23 to T57-1). Colasurdo denied making such statements. The ALJ ruled that he had and that such communications were wrongful.

On cross-examination, Cotto specifically recanted any claim that Colasurdo had made comments about “burning down the business or selling the business **or anything like that.**” (T95-2 to 16) (Emphasis provided). Cotto acknowledged that the conversation of May 28 largely related to Cotto’s claim that he had been treated unfairly regarding his most recent raise, and that Colasurdo agreed to look into and remedy this claim. (T93-4 to T95-1).

The significant recantation by Cotto regarding Colasurdo’s threats is not referenced by the ALJ despite its key relevance to the substantive claim of wrongful threats by Colasurdo. The recantation also bears on Cotto’s credibility in general. The ALJ’s consistently uncritical

acceptance of Cotto's testimony in light of the recantation and its implications, are inexplicable and constitute error. The ALJ's disregard for such evidence typifies the ALJ's indiscriminate attribution of credibility to those witnesses who testified against SJS and his contrasting attitude to the witnesses who testified in favor of SJS.

An ALJ'S credibility findings may be rejected if the Board's review of the "clear preponderance of all the relevant evidence" shows that the ALJ was incorrect. *Standard Drywall Products, Inc.*, 91 N.L.R.B. 544 (1950), aff'd 188 F. 2d 362 (3d Cir. 1951). This process clearly requires consideration of the entire record, but such consideration must begin with particular testimonial assertions and contradictions. The recantation of testimony regarding the "burning down the business or selling the business or anything like that" is not only material, it is essential to the finding of wrongful conduct. It is also relevant to Cotto's credibility with respect to the other charges of SJS's wrongdoing. Yet, Cotto's repudiation of sworn testimony regarding a core claim of employer misconduct is unremarked upon in the decision. Accordingly, the ALJ failed to take account of *all the relevant evidence with respect to Cotto's credibility*. *Universal Camera Corp. v. National Labor Relations Board, supra*.

3. The ALJ Erred In Finding That Colasurdo's Granting Of A Raise To Cotto Constituted A Violation Of The Act (Page 9, lines 3-5)

Cotto testified that he had last received a raise on May 6, 2010. (T50-21 to T51-1). On May 28, Cotto indicated to Colasurdo that he (Cotto) was not satisfied with the raise. (T54-4 to 14). Colasurdo testified that "Cotto was correct. He rose, he raised a very valid point to me that he should make the money those guys were, and I was wrong and I told him I was wrong." (T275-5 to 7).

The ALJ cites to *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964)(page 9; line 21) as authority for the proposition that the conferral of employee benefits while a union election is pending “for the purposes of inducing employees to vote against him” is wrongful under 8(a)(1). This begs the question of the justification for the raise. The Supreme Court in *Exchange Parts* cites affirmatively to *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686, 64 S. Ct. 830, 834, 88 L. Ed. 1007 (1944) in which the Court notes that “well-timed increases in benefits” is “the suggestion of a fist inside the glove.” It is this formulation that the ALJ cites. In *Medo*, however, the issue was extremely fact-sensitive, turning on the “almost explicit” inference in an employer’s statement in a letter to it’s employees that “the union can’t put any of those . . . (benefits) in your envelope – only the company can do that.” 370 U.S. at 409 n. 3. See also, *N.L.R.B. v. Curwood Inc.* 397 F. 3d 548, 553 (3d Cir. 2005)(noting that “[n]ot all agree with the *Exchange Parts* premise that employees receiving benefits from an employer in response to a union campaign are “intimidated by the figurative ‘fist inside the velvet glove.’”). If *Exchange Parts* stands for any proposition relevant to Colasurdo’s actions, it is that such conduct requires a fact-sensitive analysis that takes into account the fact that Cotto raised the issue and Cotto was right.

Needless to say, there was no explicit or implied representation in Colasurdo’s response to Cotto’s grievance—raised by Cotto in the first instance. Both Colasurdo and Cotto agreed that the standard of experience among other employees justified the increase. There was no evidence, certainly none that would satisfy the preponderance standard, that Cotto’s increase was not consistent with these established practices or was not otherwise warranted. In fact, the opposite is suggested by the record. See *Huttig Sash & Door Co.* and *U.A.W. Local 376*, 300

N.L.R.B. 93, 96-97 (1990) (election eve announcement of existing pension benefits was not akin to announcing new or future benefits and therefore was not violative of Section 8(a)(1).

In *N.L.R.B. v. M.H. Brown, Co.*, 441 F. 2d 839 (2d Cir. 1971), the Court held that the employer's president did not impermissibly interrogate certain employees or wrongfully cite to intended raises in response to union activity. During an organizing campaign, the president had requested employees to come to his office and had inquired as to the nature of their complaints. The president informed the employees that he was surprised to hear of the union campaign and of the complaints respecting money. The president indicated that he was going to give them raises and suggested that a wage benefit package was in the offing. The Court cited to *N.L.R.B. v. Dorn's Transportation Co.*, 405 F. 2d 706 (2d Cir. 1969) for the proposition that an employer can interrogate employees with respect to union organization purely for informational purposes. *Id.* at 841. Significantly, the Court also observed that the promise of increased wages, previously planned, was entirely permissible under the circumstances:

The dilemma Brown found himself in, however, is that if he went ahead and gave the increases, the union would accuse him of committing an unfair labor practice as it in fact did. But if he withheld the increases, and they were already planned, that would also be an unfair labor practice if the requisite anti-union motivation was found.

Colasurdo faced the same “damned if you do . . .” choice discussed in *Brown*. The ALJ, however, did not recognize, much less address the issues of Cotto's entitlement or Colasurdo's dilemma. This, again, constitutes error under the controlling law.

4. The ALJ Erred In Finding That Colasurdo Coercively Interrogated Cotto On May 28, 2010 (Page 3; lines 12-52 to page 4; line 33; page 7; lines 15 to 50 to Page 8; line 28)

The ALJ erred in its review of the testimony relating the conversation between Cotto and Colasurdo on May 28, 2010. The ALJ accepted the testimony offered by Cotto, and adopted the implications that most favored the proposition that Colasurdo had engaged in a coercive interrogation of Cotto on May 28, 2010. In doing so, the ALJ disregarded, without comment, evidence that was not compatible with this conclusion.. For example, Cotto testified that he (Cotto) referenced the Kissling incident, not Colasurdo.(T53-15). Absent the reference to Kissling, the inquiry by Colasurdo regarding union activity is an entirely permissible exercise of Colasurdo's First Amendment rights (see below). It is true that in Cotto's direct examination he claims that Colasurdo said "[t]hat if a union came, the company would crumble. That he would burn the place down..." (T55-4 to 7). But this assertion was recanted on cross-examination: (T94-22-T95-6). The bulk of the conversation, apart from the inquiries regarding the union activity and Colasurdo's indication (entirely permissible) that unionization would prejudice SJS's ability to compete (T94-22 to T95-1), related to Cotto's complaints regarding the insufficiency of the raise he had received.(T93-1 to T 94-2). Colasurdo agreed that Cotto's complaints were justified and increased Cotto's wage, but this has also been alleged to be a violation of the act.

In *Hotel employees and Restaurant Employees Union , Local 11 v. NLRB*, 760 F. 2d 1006 (9 Cir 1985) the Court held that any determination of whether a communication is coercive is an intensely fact-specific inquiry, and inquiries regarding unionization and assertions of the prejudice a company may sustain as a result of unionization are not *per se* prohibited under the act. See also, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L.Ed. 2d 547 (1969), *supra*. *Graham Architectural Products v. NLRB*, *supra*; *Crest Industries Corp, supra*..

Colasurdo's testimony regarding the May 28 meeting is largely consistent with Cotto's testimony, with the marked exception of Cotto's recanted testimony. Colasurdo recalled that at the end of May of 2010, Cotto had expressed dissatisfaction with the raise he had been given. (T274-7 to T 275-4) Colasurdo confirmed that his subsequent investigation revealed that Cotto should have been given a larger raise, so Colasurdo adjusted Cotto's salary. (T275-5 to 11)

The ALJ does not take account of Cotto's recantation, claiming rather that Colasurdo "did not specifically deny the substance of Cotto's testimony." (Page 3; line 42) Why Colasurdo should deny recanted testimony is inexplicable. Absent the recantation, the May 28 communication is entirely permissible and the Board should so find.

With respect to the ALJ's failure to take into account of Cotto's recantation and the implications thereof, this represents another failure by the ALJ to fairly consider the entire record. In *Hotel employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F2d 1006 (9 Cir 1985) the court held that any determination of whether a communication is coercive is an intensely fact-specific inquiry. The court also held that an employer's inquiries regarding efforts to unionize and assertions of the prejudice a company may sustain as a result of unionization are not *per se* prohibited under the act. See also, *Gissel, supra* (noting that that the First Amendment protects inquiries that are non-threatening); *Graham Architectural Products v. NLRB*, 697 F2d 534, 541 (3Cir. 1983) (noting that the employer's right to make such inquiries is expressly protected by section 8(c) of the act.); *Crest Industries Corp*, 276 N.L.R.B. 490 (1985). Given Cotto's recantation, there is no evidence that Colasurdo engaged in a coercive communication on May 28, 2010.

5. The ALJ Erred In Finding That Colasurdo Made Coercive Remarks To Cotto And Other SJS Employees In Early June of 2010 Including Threats To Sell The Company. (Page 5; lines 15-30)(Page 10; line 5).

In early June of 2010, Colasurdo met with groups of employees (including Cotto) to discuss the union campaign. The ALJ found that certain statements allegedly made by Colasurdo regarding the impact of unionization on SJS were coercive. Colasurdo testified that he met with the employees at several meetings in early June (T281-1 to T290-5). Colasurdo, without any prior experience with labor matters, attempted, within bounds advised by consultants, described SJS's history, the problems he foresaw with respect to unionization, and his efforts, undertaken months before the union issues arose, to procure and provide better benefits for the employees. (*Id.*) None of this, even the references to the economic consequences—however picturesquely conveyed—was wrongful.

First, Colasurdo denied threatening to sell the company. Here, again, the ALJ's persistent bias against Colasurdo finds expression. As with respect to his statement to Cotto that he was attempting to procure a better health plan, Colasurdo's remarks thereto were well within the scope of permissible and constitutionally protected expression. Here too, the parameters of permissible expression as established by the court in *Gissel* applicable. *Id. at 617-18 N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617-18, 89 S. Ct. 1918(1969):

Thus, an employee is free to relay to his employees his general views about unionism, or even about a particular union, so long as the communications do not contain retaliatory threats. An employer may even make a prediction as to the precise effects he believes unionization will have on his company. Colasurdo's testimony clearly established the great care he exercised in June of 2010 not to cross this line. The ALJ, apparently relying again on Cotto's claims

regarding Colasurdo's predictions of the company's economic difficulties upon unionization, concluded that such remarks were wrongful. This finding is inconsistent with the law as noted in *Gissel*. In ruling that Colasurdo wrongfully threatened to sell the business, the ALJ relied upon *Gissel*. But, *Gissel*, as noted above, requires greater factual sensitivity than that accorded by the ALJ.

It should be noted that the Court in *Gissel* cited to *Textile Worker's Union of America v. Darlington Mfg. Co.* 380 U.S. 263, 85 S. Ct. 994, 13 L. Ed. 2d 827 (1965) in which the Court acknowledged as a first principle that a single employer as a company "has the absolute right to close out a part or all of its business regardless of anti-union motives." *Id.* at 268. In *Textile Workers*, an employer had terminated part of its business following the election of a union as the employees' bargaining agent. The Board claimed that such action violated Section 8(a)(1) and (3) of the Act by interfering and penalizing the employees' rights to self-organization. Justice Harlan underscored the employer's right to cease operation of his business even if such decision is motivated by the desire to avoid unionization:

We consider first the argument, advanced by the petitioner union but not by the Board, and rejected by the Court of Appeals, that an employer may not go completely out of business without running afoul of the Labor Relations Act if such action is prompted by a desire to avoid unionization. Given the Board's findings on the issue of motive, acceptance of this contention would carry the day for the Board's conclusion that the closing of this plan was an unfair labor practice, even on the assumption that *Darlington* is to be regarded as an independent related employer. **A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.** (*Id.* at 269-70)(emphasis provided).

And further:

“[A termination of the business] may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act.” *Id.* at 272.

This is not to say that an employer is wholly free to threaten such termination, only that there must be proof by a preponderance, when reviewing the entire record, that representations by an employer regarding the need to sell a business are inspired by an anti-union bias and are intended to be coercive rather than a statement of fact based upon the apprehension of economic realities. As noted in *Gissel*, an employer is free to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control so long as such are not threats of economic reprisal. *Id.* at 618. Hence, in *Darlington*, the Court affirmed the employer’s right to liquidate his company. In *Gissel*, the Court affirmed the right of the employer to threaten to liquidate his companies so long as such threat was not retaliatory or coercive. The *Darlington/Gissel* principles require a close yet balanced review of the factual record. Colasurdo denied threatening to sell the business. (T290–13 to 15). These meetings were conducted after Colasurdo had spoken to his consultants regarding what he could say to the employees and what he could not say. (T288-10 to T289-1). Although the ALJ permitted such testimony, he did so while questioning, at the outset, their relevance:

JUDGE GIANNASI: Well, wait a minute. Are you talking about conversations that you had with employees or with your consultants?

THE WITNESS: With my employees.

MS. MCGOVERN: Your Honor.

JUDGE GIANNASI: Is that in the complaint?

MS. MCGOVERN: Hearsay. It’s hearsay.

MR. BRAINARD: It’s not in the complaint.

JUDGE GIANNASI: What's the relevance of this?

MR. LICHTENSTEIN: It goes to a lot of the testimony that was introduced during the, during General Counsel's case.

JUDGE GIANNASI: There's no allegation in the complaint about this.

MR. LICHTENSTEIN: There is an allegation in the complaint about conversations that are alleged to –

JUDGE GIANNASI: They're rather specific though. The complaint allegations say nothing about a job action or anything like that.

MR. LICHTENSTEIN: All right. Go ahead.

THE WITNESS: Me, sir?

JUDGE GIANNASI: No, I'm asking your lawyer. I'm not interested in other conversations. I have to make findings based on the testimony that was given to me in the complaint allegations as to whether those conversations happened. Whether other conversations happened or not I'm not particularly interested in unless they relate to these conversations. I mean we could be here forever if he's going to tell a whole story about what happened in those six months. (T289-3 to T290-5).

The failure to accord any consideration to the credibility of Colasurdo's testimony or to weigh, even if such credibility were denied, any such representations regarding termination in light of the *Darlington/Gissel* line of cases constitutes error.

Too fastidious a bar on the employer's remarks would necessarily transform a discussion between employer and an employee regarding the real world consequences of unionization into a college lecture, but this is not the requirement of the law. Given the highly competitive nature of SJS's business, it is not surprising, and should not be deemed wrongful, that Colasurdo believed, and so expressed, that unionization in a non-union market would be fatal to SJS. If this is the employer's belief and it is not irrational or "threatening" in the sense of a vindictive and

unjustified action, why can it not be expressed under the authority of the First Amendment? Colasurdo did not threaten individual employees or indicate he would extinguish the company as a retaliatory act. Cotto's testimony is consistent with Colasurdo's recitation of what occurred at the meetings. (T56-23 to T59-22). What Colasurdo did say, according to Cotto, was that SJS could not compete with non-union companies, a wholly permissible, and factually defensible, remark. (T 94-22 to T95-1). An inability to compete would result in obvious consequences. Verbalizing those consequences is not necessarily unlawful under the act. None of this was of moment to the ALJ. None of this was even noted or weighed by the ALJ.

6. The ALJ Erred In Finding That Colasurdo's References To His Efforts To Obtain Improved Health Benefits Violated The Act.(Page 10; Line 5 to 29)

The ALJ found that Colasurdo's references in his address to the employees to his efforts to obtain better health insurance violated the act. The ALJ did acknowledge Colasurdo's efforts to obtain better health benefits, but attributed those efforts to a cynical response by Colasurdo to the Kissling petition. The ALJ based his dismissal of these efforts on the fact that quotes obtained by Colasurdo were not implemented immediately. There is no evidence in the record to support the ALJ's attribution of cynical motives with respect to this issue.

In advancing his analysis, the ALJ disregarded the testimony offered by Miguel Capeles who confirmed Miguel Capeles and Cotto confirmed that Colasurdo referenced his past and ongoing efforts to obtain such benefits.(T132-11 to 21)(T 59-10). Most important, the ALJ disregarded the weight and significance of the testimony offered by Richard Malesich ("Malesich"), an accountant and financial supervisor for SJS. (T363-15 to 17). Malesich testified that in February or March, Colasurdo asked Malesich to put together a better benefit package for

the SJS employees (T 364-7). Malesich's wife is an insurance broker who had provided SJS's existing benefit plan and was enlisted in the effort to obtain an enhanced plan. (T364-20) The plan that Malesich was asked to prepare by Colasurdo would cover the entire company. (T 365-2 to 4). To find a plan that would meet these specifications required extensive time because Malesich needed to get an accurate picture of the company's needs. (T365-6)

Towards the end of March, Malesich communicated by e-mail with a broker regarding the specific terms of such coverage. (T365-17) There was much verbal communication before that contact. (T365-1). Such efforts could take weeks, if not months, because of the size and needs of the company. (T365-17) On May 27, 2010 a quote was provided to SJS. (T366-27). The history of these discussions and Malesich's efforts were well documented. Respondent Exhibit Six identifies the people with whom Malesich was working in response to Colasurdo's request. Respondent Exhibit 13 confirms such communications from Malesich dated March 13, 2010. This exhibit began a chain of e-mails respecting the provision of the kind of health plan Colasurdo had requested. (T 373-1 to 12).

The resulting quote that Colasurdo received on May 27 justifies the references made thereafter to Cotto, Capeles and the other SJS employees. What is clear is that Colasurdo's efforts were undertaken well before late May when the evidence of union activity first became evident. Equally important is that Colasurdo's references to such antecedent efforts in his communications with the employees were not disputable, indeed, they were not disputed as contrived or an *ex tempore* attempt to pacify the union effort. Such a contrivance would have violated the act, but this clearly was not the case.

The testimony of Richard C. Malesich ("Malesich") established that Colasurdo contacted Malesich after the turn of the new year (2010), well before unionization became an issue, to

discuss the adoption by SJS of an improved health plan. (T365-11 to 14). The effort was time-intensive. Malesich undertook such efforts in February and March of 2010 by, *inter alia*, obtaining the company “census” and soliciting quotes from brokers. (T365-7 to 17). There was much verbal communication Colasurdo and others with respect to the terms and needs of the new health plan. (T366-1). Quote were furnished to Colasurdo on and before May 27, 2010. (T366-9 to 11). With a large employer like SJS, the effort to develop a new health plan could take weeks if not months because of the need to assemble and analyze the necessary data--embodied in “census certifications.” (T366-14 to 20). This documented effort, months prior to discussions with Cotto and other employees regarding the issue of the union, was entirely disregarded by the ALJ. Simply put, the ALJ posited that Colasurdo’s reference to the prospective health plans was an explicit anti-union tactic “used” in the June meetings.

The ALJ cites to *Parexel International*, 356 N.L.R.B. N. 82 (2011) as authority for the proposition that Colasurdo’s representations regarding the improved health plan was wrongful. (T8-6) In *Parexel*, an employer who preemptively terminated an employee to discourage future protected behavior was held to have violated the Act. Colasurdo’s efforts in the first half of 2010, prior to Cotto’s union-related activity, can hardly be deemed a preemptive act comparable to that discussed in *Parexel*. The mere reference by Colasurdo to his on-going activities, as confirmed by Malesich, is also not wrongful under the Act. The ALJ also cites to *E.L.C. Electric, Inc.*, 344 N.L.R.B. 1200, 1201 (2005) as support for the proposition that promises of benefits that might not be available until later are actionable. (Page 8, line 43). In *E.L.C.*, the board disagreed with the ALJ’s determination that the employer had not interfered with the election by impliedly promising to improve health insurance benefits. In the context of the facts there elicited, promises made during a “critical period” prior to an election will be construed as

interference with the employees' free choice. "The employer may rebut this inference by providing a persuasive explanation, other than the pending election, for the timing of the grant or promise of benefits." *Id.* at 1201. Citing to *Dyncorp*, 343 N.L.R.B. NI. 124 (2004). Based on this testimony, it was clear that efforts by Colasurdo to obtain better health benefits significantly antedated Cotto's activities in support of the union. Colasurdo merely stated a fact regarding his past actions. In *B & D Plastics, Inc. Employer in Retail*, 302 N.L.R.B. NI. 33 (1991), two days before a union election, the employer conferred on all union employees, with no strings attached, a day off with pay solely in connection with its admitted purpose to deliver the final message in its anti-union campaign. *Id.* at 2. This fact pattern stands in stark contrast to the antecedent and well-documented efforts by Colasurdo to develop a better plan prior to any manifestation of the union. The hearing officer failed to afford the timing issue any consideration, much less wait.

If Malesich had not testified or documented his testimony, the ALJ would arguably have been justified in finding that the promises of better health benefits were a charade that violated the act. Because the ALJ cannot so find in light of Malesich's testimony, the ALJ is reduced to claiming that the entire effort precipitated by Colasurdo and undertaken by Malesich was a sham. There is, however, no evidence to support such a characterization or the ALJ's specific claim that because the May 27 quote was not adopted, Colasurdo must have been insincere. Such a dismissal, founded on pure speculation, ignores the prospect, apparent by May 28, and certainly evident within days, of precisely the kind of NLRB litigation that ultimately ensued. This, of course, was not weighed or even referenced by the ALJ, whose attributions to Colasurdo of the basest motives is of a part with the ALJ's wholesale dismissal of Colasurdo's credibility.

See, *National Labor Relations Board v. M.H. Brown*, 441 F.2d 839, 842 (2d Cir 1971) (holding not wrongful for employer to reference wage increases and benefits if planned before

union activity); *NLRB v. Gissel*, supra; *Hotel employees and Restaurant Employees Union , Local 11*, supra; *Graham Architectural Products v. NLRB*, supra; *Crest Industries Corp*, supra..

7. The ALJ Erred in Finding That Colasurdo’s Communications With Cotto In January Violated The Act (Page 3, lines 3-9; Page 7, lines 26 to 40).

The ALJ accepted Cotto’s claim that in late January of 2010, Colasurdo made specific reference to Kissling no longer being with the company. Cotto also claimed that Colasurdo threatened to burn the company down before he would let anybody extort him (T45-4 to 16). Colasurdo denied such claims. There is a direct credibility dispute at issue with Cotto’s claim regarding the January conversation. Again, the ALJ accepted uncritically Cotto’s assertion. Moreover, as noted above, employers are afforded a certain measure of latitude with respect to their commentary regarding the prospect of unionization. Case law cited above is incorporated herein for the proposition that however excitable Colasurdo may have been regarding Kissling, his alleged comments purportedly made in January, months before any union activity became evident (T270-22), should be deemed isolated from the relevant time frame of late May to early June of 2010 and, as isolated, not actionable under the act.

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8. The ALJ Erred In Holding That The Termination Of Cotto Violated The Act.(Page 10; line 33 to Page 13; line 45)

The discussion of the termination of Cotto constitutes the largest part of the decision. The ALJ’s analysis here exemplifies his consistent for any proof that would favor SJS or Colasurdo. Most blatant is the ALJ’s diminution of the testimony and supporting documentation proffered by Victor Cavicchio (“Cavicchio), Vice-President of the Johnston Insurance Group (T137-16).

Cavicchio was charged in 2010 with the responsibility of providing the insurance policies for SJS's drivers. Cavicchio testified that the expiration of the then effective policy was August 1 (T139-25) On June 10, 2010, Cavicchio received a list of drivers for whom insurance would be need in the following coverage period. (T142-13) Pursuant to standard operating procedure, Cavicchio received driver's abstracts for the purpose of insurance renewal. (T144-21) Using eligibility standards, Cavicchio reported to SJS that Cotto and another employee were not deemed eligible. (T164-5 to T165-1). Based on this disqualification, the insurance coverage for SJS would not be renewed.(T165-13). This was confirmed in a letter faxed to SJS on June 15, 2010. (T167-20 to T168-2) (General Counsel Exhibit 6) There had been no special request of by Colasurdo to do investigate Cotto's eligibility.

Based upon the information that Mr. Colasurdo had received from the Johnston Insurance Group concerning Mr. Cotto's uninsurability, Mr. Colasurdo prepared a letter to Mr. Cotto dated June 16, 2010. There was some discussion during the trial about the error that was made in that letter concerning the nature of the points in question. The fact is that there was some confusion over the nature of the "points" which, as the Court is now well aware, were insurance rating points. The undisputed and undisputable fact remains, however, that Mr. Cotto was uninsurable, as indicated in the June 16, 2010, letter-- the accumulation of points violated the eligibility standards for insurability for both Delos and Berkley. Subsequent to receiving Mr. Cotto's abstract and recognizing the minor error in characterizing the "points" as a State calculation, Colasurdo wrote and delivered to Cotto the clarifying letter dated June 17, 2010. In that letter, (General Counsel's Exhibit 3) Mr. Colasurdo pointed out that the points in question were actually insurance points. But the underlying issue remained the same, the inability of SJS to qualify for the most cost-effective insurance because Cotto was employed as a driver.

It is also undisputed that on the four separate occasions on which SJS employees were determined to be uninsurable, their employment was terminated. Specifically, Alejandro Mestre was terminated on September 28, 2009 as he no longer met the minimal insurance requirements (Respondent Exhibit 7), Jose Cruz was terminated on October 20, 2009 for failing to meet minimal insurance requirements (Respondent Exhibit 7) and Carlos Vilamante was terminated in June 2010 for failing to meet minimum insurance requirements. (T311-9 to T312-3). The fourth employee terminated for failing to meet minimum insurance requirements was Cotto.

In addition, at the time the June 17, 2010 letter was prepared, Colasurdo had an opportunity to review Cotto's driving abstract and it became clear that Cotto had his license suspended between November 30, 2008 and December 15, 2008, a fact which was unknown to SJS up until that point in time. Upon review of the payroll records of SJS, Colasurdo determined that Cotto had operated vehicles owned by SJS on nine separate occasions during the period of time of his suspension. In fact, Cotto's operation of these vehicles while suspended was stipulated by the General Counsel. While the evidence of Cotto's operation of these vehicles while suspended was not discovered until after the initial termination letter of June 16, 2010 was provided to Cotto, clearly this information falls within the category of recognized "after acquired" evidence which may be considered by the Court in connection with Cotto's termination. It is undisputed that South Jersey Sanitation never continued to employ any driver who was operating SJS's vehicles during a period of time when that driver's commercial driver's license had been suspended. (Respondent Exhibit 7).

Cotto's admitted operation of SJS multi-ton trash vehicles during a period of time that his license was suspended without having notified SJS was in direct violation of Parts 383 and 391 of the Federal Motor Carrier Safety Regulations. It was these same regulations that Cotto

acknowledged being placed on notice of when he executed the “Certification of Compliance with Driver License Requirements” on June 14, 2007 (Respondent Exhibit 1). It is undisputed that Cotto failed to complete the “Driver Mandatory Notification” as required by Section 383.33 of the Federal Motor Carrier Safety Act. (Respondent Exhibit 2).

Cotto’s operation of a motor vehicle during a period of suspension also violated Title 39 of the New Jersey Statutes and created a significant risk of liability for SJS in the event that Cotto was involved in an automobile accident while driving while his license was suspended. Cotto’s excuse concerning his suspension is not worthy of belief. Cotto testified that he had lived at the same location for many years including in and around the time of his license suspension and received mail at that address. (T95-17 to T96-2). In fact, Cotto was unable to deny the fact that he had received a document in advance of his suspension indicating that he was going to be suspended at his home where he received his mail. T96-3 to 8).

The standard for determining if a termination is pretextual requires the proponent of the claim to establish by a preponderance of the evidence that the employee was fired because of union activities. The burden then shifts to the employer to establish that it would have made the same reason irrespective of the union activity. *Donley v. NLRB*, 520 F.3d 629 (6Cir 2008). In light of the undisputable testimony and evidence provided by Cavicchio and the documentation he identified, it is clear that SJS had a legitimate reason to terminate Cotto, and that his termination was imperative if SJS were to avoid substantially costlier options for the insurance it required. This argument is given short shrift by the ALJ who defers to the claim that Colasurdo had opted in the past to pursue options that would have allowed Cotto’s continuing employ. The ALJ acknowledges that SJS had terminated other drivers for the same reason that Cotto was fired—but nevertheless claims that added costs incurred in the past should have been incurred in

the present (in the amount of \$100,000—T190-17) and Cotto kept on, despite the implications of the eligibility requirements. This ruling does violence to the preponderance standard as well as any fair accounting of SJS's business resource. The ALJ's disregard for the added financial costs of potentially keeping Cotto in SJS's employ confirms the unfairness of the decision.

**9. The ALJ Erred In Finding That SJS Had Violated The Act By
Virtue Of Various Actions By Edwin Morales (P. 9; line 23-45).**

In the cited page and lines of the decision, the ALJ found that SJS had violated the act by virtue of a phone call to Cotto by Morales in which Morales allegedly claimed that "Cotto was being pinpointed as the leader of the union effort and that he (Morales) knew about the union meeting scheduled for June 12." Cotto also claimed, and the ALJ so found, that Morales "showed up outside the union meeting." The ALJ ruled that the alleged phone call and surveillance violated the act. Morales denied the allegations. (T360-20 to T361-13).

In cross-examination Cotto's indicated, *inter alia*, that in the phone call Morales (a) inquired about the union; (b) indicated he knew that a union meeting was scheduled for June 12 and (c) requested Cotto to come and speak with Morales and Colasurdo. A fair reading of this testimony indicates an absence of any threatening or coercive statements. The ALJ contends that Morales' alleged statement that "a lot of people would be out of work" is indisputably coercive. Clearly, if as noted above, the employer can convey his view of the economic consequences of unionization, a supervisor can do so as well without violating the act. The ALJ, however, did not analyze the alleged Morales phone call in these terms, concluding that all of the alleged statements were animated by the motive to intimidate Cotto and other employees. Such an analysis was required under *NLRB v. Gissel*, *supra*; *Hotel employees and Restaurant Employees Union*, *Local 11*, *supra*; *Graham Architectural Products v. NLRB*, *supra*; *Crest Industries Corp*,

supra.. Not reviewing Morales' alleged remarks in accordance with these authorities constituted error.

Moreover, there was here, as above, a credibility issue that the ALJ, without detailed analysis, resolved in Cotto's favor. Given Morales' denials, almost summarily dismissed by the ALJ, the failure to fairly and explicitly resolve the competing credibility issues also constitutes error.

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/s/ Russell L. Lichtenstein

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Dated: April 4, 2011