United States Government

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April 18, 2011
BY EMAIL

Lester A. Heltzer, Executive Secretary
Office of Executive Secretary
National Labor Relations Board
1099 14th Street N.W., Room 11602
Washington, D.C. 20570-0001

Re: South Jersey Sanitation
Case 4-CA-37537

Dear Secretary Heltzer:

Enclosed please find Answering Brief by Counsel for the Acting General Counsel in the above-captioned matter. Copies of the above Answering Brief have been served on this day on the persons listed below by e-mail.

Very truly yours,

Margaret M. McGovern
Counsel for the Acting General Counsel

cc:
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

SOUTH JERSEY SANITATION

and

Case 4-CA-37537

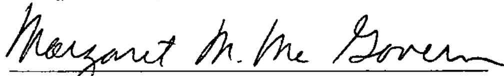
TEAMSTERS UNION LOCAL NO 115 a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO RESPONDENT'S EXCEPTIONS

TO: National Labor Relations Board

DATED: April 18, 2011

Respectfully submitted,



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I. STATEMENT OF THE CASE

Summary

Counsel for the Acting General Counsel files this brief in response to exceptions filed on April 4 by Respondent, and urges the Board to uphold Chief Administrative Law Judge Robert A. Giannasi's decision that South Jersey Sanitation, herein the Employer or Respondent, through its President and a supervisor, made various statements in violation of Section 8(a)(1) of the Act during a union organizing campaign and unlawfully discharged main union organizer Jerry Cotto in violation of section 8(a)(1)(3) and (4) of the Act. The Region has filed for interim injunctive relief under Section 10(j) of the Act with respect to all allegations found to have merit by the Administrative Law Judge, and a decision by the District Court of New Jersey concerning injunctive relief remains pending.

Procedural History

The charge in this case was originally filed on June 17 2010,[1] and amended on July 2. (GCX 1 (a), (c)) [2] The Complaint and Notice of Hearing issued on October 27 and alleged that on or about January 15, the Employer's President: interrogated an employee; indicated that choosing a union would be futile; told an employee that he would burn the place down before allowing anyone to extort him; told an employee that he had gotten rid of the employer who had circulated a petition seeking better terms and conditions of

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[1] All dates herein are in 2010, unless otherwise noted.

[2] Throughout this brief, references to the Transcript and Exhibits will be as follows:
Transcript.................................T (followed by page number)
General Counsel's Exhibit............. GCX (followed by exhibit number)
Respondent's Exhibit.................... RX (followed by exhibit number)
Employer's Exhibit...................... ERX (followed by exhibit number)
Administrative Law Judge's Decision.ALJD (followed by page and line numbers)
Respondent's Exceptions............... Exc. (followed by page number)

employment; told the employee that those employees who didn't like the way he ran things should quit, and said he would work on some health benefits in order to discourage employees from further protected, concerted activity.

The complaint further alleged that on or about May 28, the Employer's President again interrogated an employee; promised the employee a wage increase; asked the employee to report union activity; told the employee he would set up a meeting to address medical insurance and other problems; created the impression that employees' union activities were under surveillance and stated that Respondent knew there was a union meeting set for June 12. The Complaint also alleged that the wage increase that was promised to the employee on May 28 was put into effect on June 4. Additionally, the Complaint alleged that on or about June 9, the Employer's President told employees that he would sell or close the business if the employees chose the union to represent them, and promised that health benefits would be provided for all employees if employees gave him a chance. Next, the Complaint alleged that a supervisor of the Employer, Edwin Morales, surveilled attendance at a union meeting on or about June 12. The Complaint further alleged that supervisor Morales called an employee and interrogated the employee about union activity; created an impression of surveillance of the employee's union activity; and threatened job loss if the employees obtained union representation. Finally, the Complaint alleged that on June 16, the Employer discharged employee Jeraldo Cotto because Cotto engaged in union activity and because Cotto was to attend a representation hearing for the union on June 17. (GCX 1 (e))

Respondent's Answer admitted the Board's jurisdiction, filing and service of the charge and the amended charge, and the status of the Union as a labor organization, but

denied the status of the President of the corporation and Edwin Morales as supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act. (GCX 1 (g)) Respondent's Answer denied all alleged 8(a)(1) statements. The Answer admitted the raise on June 4 and the discharge of Cotto but denied that either event was an unfair labor practice.

A hearing was held on January 24 and 25, 2011, in Philadelphia, Pennsylvania before Administrative Law Judge Robert A. Giannasi. At the outset, the parties entered into a stipulation that the President of the corporation was a supervisor and an agent, and during the presentation of its defense, Respondent amended its Answer to concede that Morales also was a supervisor and an agent of Respondent. (T. 9, 318) On March 7, 2011, Judge Giannasi issued his Administrative Law Judge's Decision, finding that Respondent had committed all violations pled in the Complaint, with the exception of two: the Judge did not find that Respondent promised medical insurance to employees on May 28, 2010 (ALJD p. 8, l. 23-28); nor did the Judge find that supervisor Morales interrogated Cotto during a cell phone conversation in early June. (ALJD p. 9-10, l. 44-3) Counsel for the General Counsel waives exceptions to these findings. On April 4, Respondent filed timely exceptions to the Judge's findings. Respondent's Exceptions are answered individually below.

II. RESPONDENT'S EXCEPTIONS AND ANSWERING ARGUMENT

A. Exception 1: The Judge's Admission and Reliance Upon Testimony of Jeffrey Kissling Concerning His Lay-Off

Respondent contends that the Judge erred by allowing Jeff Kissling to testify and relying upon his testimony. Respondent asserts that the testimony at issue was "wholly

irrelevant and seriously prejudicial" and that Respondent objected to the testimony at the hearing. (Exc. p. 5) There is simply no factual evidence to support the statement in Respondent's exceptions that the testimony was received "over the objection of South Jersey Sanitation's counsel." (Exc. p. 5) To the contrary, Counsel for Respondent noted in his opening statement that "Your Honor is going to have to hear from Mr. Kissling to see what it is about him that you believe and don't believe." (T. p. 30) Thus, Respondent's counsel not only failed to object to Kissling's testimony, but invited the Judge to draw appropriate credibility conclusions based thereon. Mr. Kissling was the first witness called by the Acting General Counsel, and no objection was raised at any time to Mr. Kissling's testimony. (T. 32) In failing to raise this issue at the time of the hearing, Respondent waived any right it had to object to Kissling's testimony. *Livermore Joe's Inc.*, 285 NLRB 169, fn.3 (1987); *Modern Motor Express, Inc.* 129 NLRB 1433, 1445 (1961). In *Modern Motor Express* the post-hearing "objection" also went to whether the alleged discriminatee was fired or laid off, and the Board held that the terminology made no difference. This point is also argued in Respondent's exceptions herein, but it makes even less difference in this instance, since Kissling's termination was not at issue as an unfair labor practice but was introduced as the context for allegations arising in Colasurdo and Cotto's January conversations about Kissling's petition and discharge, and also as background evidence related to the Cotto discharge some months later.

The remaining points raised in exception 1 take issue with the Administrative Law Judge's crediting of Kissling's account of his protected, concerted activity, and turn on the Judge's asserted "error" in not finding that Kissling was laid off as opposed to fired. This terminology argument is irrelevant to the Judge's findings on the merits of the

subsequent unfair labor practices regarding Cotto. It is beyond contravention that a Judge's credibility findings are entitled to great deference by the Board "except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Drywall Products*, 91 NLRB 544 (1951) (emphasis in the original.) This case does not present an exception to the rule, and Respondent's Exception 1 lacks merit.

B. Exceptions 2 and 4: The Judge's Finding that Colasurdo Unlawfully Interrogated Jerry Cotto on May 28, 2010.

At the outset, it should be noted that the Complaint allegations with respect to Respondent's unlawful statements during the May 28 conversation with Colasurdo do not include references to burning down the business, though the January 2010 allegations do recite such a threat. (GCX 1 (e), compare subparagraphs 5(a) and (b)). Respondent's exceptions 2 and 4 rely heavily upon Cotto's "recanting" of the "burn down the business" threat as a basis for finding that no threats of any kind occurred on May 28. A review of the transcript establishes that Cotto clearly testified that Colasurdo made the threat at issue in the January 28th conversation. Thereafter, at T. 55, Cotto was asked about statements made in the context of the May 28th conversation. but Cotto answered broadly and included the January threat and even threats to sell or close (not made until June), thus creating momentary confusion. Cotto erred in referring to the threat to burn down the business as having been repeated on May 28th. Respondent probed this matter on cross examination, in the following exchange:

> Q. Now you testified that when you had this meeting with Mr. Colasurdo on the 28th that he told you he would not be able to compete and bid on the jobs that he bid on if he was a union shop, correct?
>
> A. Yes.

> Q. He didn't say anything at that time about burning down the business or selling the business or anything like that, did he?
>
> A. I'm not, I mean he told me that I think it was with Jeff, the Jeff incident.
>
> Q. (by Ms McGovern) What?
>
> A. The Jeff incident in January.
>
> Q. (by Mr. Lichenstein) Now what I want you to focus on, because what you testified on direct I believe was that he made similar statements at the end of May. You agreed with me that he didn't make any statements at the end of May about burning down the business or selling the business, or anything like that, correct? What he said was he would not be able to compete with other non-union shops, correct?
>
> A. yes.
> (T. 94-95)

The significance of this testimony is that Cotto clarified his misstatement about the chronology of events(T. 55), thereby confirming his original testimony that Colasurdo made the threat to burn the business down in January, but did not repeat that threat in May. Consistent with Cotto's testimony, there was no Complaint allegation that such a threat occurred in May. Furthermore, the only allegations of threat to sell or close are pled in the Complaint as having occurred at the group meeting on June 9. (GCX 1(e) para. 6) Both the January May 28 and the January 15 meetings were between Colasurdo and Cotto, with Morales as a silent witness. Two other witnesses, Cartagena and Capeles, also testified about the threats to sell or close at the group meeting on June 9. Thus, once Cotto clarified that the burn threat occurred only in January and was not repeated in May, there were no inconsistencies in the transcript concerning any threats in May. This clarification does not constitute a "recanting" of all testimony about the May 28

conversation, as Respondent's exceptions characterize it. Cotto's detailed testimony of the May 28 conversation was found highly credible by the Judge. Moreover, despite Respondent's claim to the contrary, Colasurdo never denied these May statements. (ALJD p. 3, fn 4 and 5). Respondent asserts that Colasurdo denied the statements, but included no transcript reference to corroborate the denial. Respondent's exceptions cite Cotto's date confusion as evidence that no threats at all, and no interrogations, occurred on May 28. This is an unwarranted expansion on this small error – particularly since Colasurdo admitted generally interrogating employees during the first few days after he learned of the union activity. (T. 28-29, 271)

The Judge's credibility findings on unlawful statements made by Colasurdo on May 28 are based on a number of points set forth in detail by the Administrative Law Judge. The Judge's conclusions are well supported in the record and should not be overturned based on this minor correction in Cotto's testimony. There was little discrepancy between Cotto and Colasurdo's versions of their conversations generally, except that Cotto recounted them in considerable detail while Colasurdo was invariably inclined to give only summary, self-exculpatory reviews of things said. This was another contributing factor in the Judge's credibility resolutions. (ALJD p. 3, fn. 4 and 5) Given how well supported the Judge's credibility findings are, there are no compelling grounds for reversing them. Certainly the date confusion on Cotto's part cannot reasonably be construed as a recanting of all unlawful statements made on May 28.

C. Exception 3: Cotto's Raise was not Unlawful

There are no significant credibility conflicts on the subject of Cotto's raise. Both Colasurdo and Cotto described Cotto's frustration, expressed in the May 28 conversation,

that his most recent raise had been inadequate because employees with less time at South Jersey Sanitation were being paid more. Colasurdo states that he then gave Cotto a second raise because he thought Cotto was right.

Respondent's exceptions suggest that these facts should be examined as though they occurred in isolation – i.e., in an atmosphere free of numerous other unfair labor practices. This sanitizes the context in which the raise was discussed and granted. The actual facts establish that Colasurdo had just given a raise to Cotto on May 6; surely Colasurdo knew on that date what he was paying other drivers. The inception and the entire purpose of that meeting on May 28 was to confirm the rumors that Cotto was behind the nascent union drive and to see what Colasurdo could do to head it off. Colasurdo made numerous statements in violation of Section 7 at that meeting. For example, when Cotto complained about the raise, Colasurdo said he'd have to look into it, "but what are you trying to do to my company?" (T. 54) Not only did Colasurdo summon Cotto to his office to question him about the union drive, he also summoned driver Capeles on the same afternoon for the same kind of inquiry, accusing Capeles of passing out cards for the union, and later apologizing to Capeles for this accusation. (T. 117-120) This is yet another factual account which Colasurdo did not deny.

Against this backdrop of trying to stop the union effort, the raise to Cotto is clearly intended to influence Cotto to drop the organizing effort. In virtually the same breath that Colasurdo informed Cotto that he would get an additional 25 cent per hour raise, he asked Cotto to let him know if any union organizers approached him. (T. 56) The intent of the raise could not have been clearer. Respondent's case cites to campaigns where such promises were lawfully made are unavailing. Eg., *Hutting Sash and Door*

Company, 300 NLRB 93, 96-96 (1990) where the Employer was permitted to announce a pre-existing benefit to employees on the eve of the election. That case does not fit the current facts. Respondent's exception on this point rests on a flawed assertion that, so long as the raise is justified by the economic facts, it must be lawful. A raise that is offered to quell the employee's union support is unlawful, no matter how overdue or economically justified.

D. <u>Exception 5: Colasurdo Did Not Threaten Employees by His Remarks at a Group Meeting on June 9</u>

Respondent herein contends that Colasurdo's threat to sell or close the business, recounted by three employees present at that meeting, were lawful predictions under *NLRB v. Gissel Packing Co.*, 395 U.S. 575; 89 S. Ct. 1918, 1942 (1969), 23 L. Ed. 2d 547 (1969). Respondent urges that the threat to sell or close the business in the event the employees vote for the union is a non-coercive factual prediction permitted by law. In so arguing, Respondent misapprehends the law under *Gissel.* The sincerity of Respondent's belief that he will be at an economic disadvantage in bidding jobs does not shield the threat of harsh consequences for choosing union from being an unlawful threat of retaliation:

> "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that '(c)onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.' [NLRB v. Sinclair Co.] 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside

> his control,' and not 'threats of economic reprisal to be taken solely on his own volition.' *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (C.A.2d Cir. 1967)."

Gissel Packing Co., id. at 618-19. Colasurdo's general assertion and belief that he won't be able to underbid non-union companies and will therefore "have to" sell or close the business is not the "proof" contemplated in *Gissel. Honeywell, Inc.*, 225 NLRB 617 (1976); *Iplli, Inc.*, 321 NLRB 463, 467-68 (1996). According to witness Cotto, Colasurdo declared that if the company were unionized, he could not afford it; he could not bid non-union and he would have to sell the Company. (T. 58-59) Capeles testified that if the union came in, the Company would "crumble" (T. 128) Finally, Cartagena testified that Colasurdo told them: "If the union win[s], I will have to sell the company. I can't pay the union wage. Anthony say if the union win[s], it will cripple the company. Everybody will [lose] their job."

Respondent is correct that Colasurdo denied these threats. In fact, he categorically denied that such topics even arose. When asked by his attorney whether he "discuss[ed] in any way issues that relate to selling or transferring the business" he answered "Absolutely not". (T. 287 l. 10) Again at T. 290, he denied any threat to sell the business. Respondent does not cite any transcript references to establish instead that Colasurdo testified about offering a reasoned explanation of the impact of unionization. Such testimony might have satisfied the Gissel requirement that an Employer may make a lawful, fact-based prediction. In the absence of any testimony to bring Colasurdo's remarks into the realm of permissible campaign predictions as opposed to general anticipatory threats to close, there is no basis for finding that lawful predictions were in fact made. Respondent does not cite to any account by Colasurdo to support this exception but relies on Cotto's testimony to argue that only lawful predictions were

made. Since Cotto's testimony, along with Capeles and Cartagena's, establishes unlawful threats to sell and/or close, this Exception should be overruled.

E. Exception 6: Colasurdo Did Not Unlawfully Promise Health Insurance Benefit Improvements.

This case included three allegations of unlawful promises of improved health benefits: (1) on about January 15, in the conversation between Colasurdo and Cotto about Kissling's protected activity; (2) on May 28, in the conversation between Colasurdo and Cotto over union activity; and (3) by Colasurdo at the group meeting on June 9.[3] The Judge concluded that unlawful promises were made in January and June, but not in May. Respondent excepts to the findings of promises primarily on grounds that the Judge failed to fully credit the testimony of Employer witness Richard Malesich to the effect that the efforts toward benefit improvements predated any union activity. In so arguing, the Employer fails to challenge the Judge's finding (ALJD p. 8, l. 4-6) that the January promise was unlawful, as it is conceded that Malesich was not contacted until after January. (Exc. P. 7-8) Thus, only the June 9 promises are encompassed by the exceptions and the finding of an unlawful promise to look into improved health benefits in January is unchallenged.[4] To the extent that Respondent seeks to use Malesich's testimony to overturn the Judge's finding that an unlawful promise was made in January, the exception should be overruled as Malesich concededly was not involved in January.

[3] These allegations appear in the Complaint, GCX (1)(e), at: paragraph 5(a)(5); paragraph 5(b)(4); and paragraph 6(2).
[4] The Judge did not rely on *Parexel International, LLC.*, 356 NLRB No. 82 for his findings regarding the lawfulness of Colasurdo's comments on June 9 about health benefits. Rather, *Parexel* is cited in support of the Judge's finding that, during the January conversation with Cotto in response to the Kissling petition, Colasurdo said he would work on improving health benefits as a means of heading off further protected, concerted activity.

Regarding the June 9 promise, Respondent essentially argues that Malesich's testimony is unimpeachable. At p. 20 of its Exceptions and brief, Respondent argues:

> "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."

However, it is simply untrue that Malesich's testimony precludes a finding that Colasurdo unlawfully promised benefits on June 9. Malesich's testimony is not inconsistent with he Judge's finding that Colasurdo unlawfully told employees on June 9 that he was looking into improvements that could not be implemented because of the pendency of the union campaign. (ALJD p. 10 l. 10-29) Colasurdo tried to have it both ways, asserting that the benefits were lawfully underway *before* any union activity (in which case they could have gone forward), while also claiming he could not take further action because such action was preempted by union activity.

An examination of the testimony and particularly the documents – or, more specifically, the lack of documents – on this issue is illustrative. At no point in describing his comments made to employees on June 9 does Colasurdo tell employees that he has gotten a quote on insurance costs; rather, he testifies that he is "working on it" but it takes time: "you can't just go to WalMart" for this. (T. 287) Only at the unfair labor practice hearing did Colasurdo claim to have gotten an actual price quote for universal insurance coverage. Although Respondent offered testimony from insurance broker Malesich to establish how much effort he invested over several months to provide insurance information to Colasurdo, no insurance quote nor any supporting paperwork, not even a copy of the census that leads to a quote, was offered into evidence to confirm all this activity and fact-gathering to seek insurance. Indeed, the only documents introduced at

the hearing on the insurance issue were three one or two line emails from Malesich, which consisted entirely of the following messages:

- Malesich to another broker on March 31, with no subject line: "when you get a sec, give me a call. Got a health ins quest for ya" (RX 13)
- To Malesich from a broker on May 19, subject "South Jersey Sanitation Benefits Proposal": "Attached are the plan options for South Jersey Sanitation. I never got an email from you so I figured I'd send this now that we have them."
- Broker to broker (neither is Malesich) on May 19, subject "South Jersey Sanitation Benefits Proposal": "Enclosed please find information regarding your benefits."

These three emails, without any attachments for our review, represent all of the documentary evidence to prove that Colasurdo had been "working on" insurance coverage for all employees since January. Underscoring the ambiguity of these emails is the admitted fact that Malesich's wife handled the insurance coverage that Colasurdo provided for *some* employees, selected at his discretion. (T. 364, 275-76) As that policy was renewed annually, these emails prove absolutely nothing with regard to *new* coverage that would be available to all employees. The first email lacks a subject and is entirely useless, as it could have been about anything within the universe of insurance questions. The next two very generic emails could have addressed existing annual benefits, for all that can be derived from the cover sentences without any attachments.

It is not difficult to see why the Judge was not influenced by Malesich's testimony. There should have been a myriad of documents to confirm any work in progress to obtain coverage for all employees over the months between January and May,

but none were provided except these three all-purpose emails. Nevertheless, the Judge credited Colasurdo's assertion that he received an insurance quote on May 27, the day before his first round of interrogations with Cotto. This is highly suspicious timing for the receipt of a written document that was never produced at trial. The Judge assumed that a quote actually materialized on May 27; he based his finding that Colasurdo unlawfully promised health insurance on June 9 on the fact that *Colasurdo told* employees that he couldn't proceed with improved benefits while the union election was pending, implying that, once the union matter was concluded, he could put this benefit into place. (ALJD p. 10 l. 15-29) Although the Judge could have credited Malesich in full and still reached the same conclusions regarding Colasurdo's comments on June 9, he simply did not address Malesich's testimony. Thus, the apparent failure to give weight to Malesich's testimony is not error and this exception should be overruled.

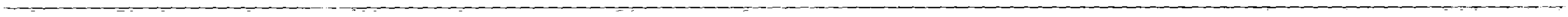
F. Exception 7: Colasurdo's Conversation with Cotto in January Did Not Violate the Act.

Respondent's argument on this point is that the January conversation was isolated and occurred months before any union activity and therefore none of the comments therein were unlawful. A vitriolic conversation such as the one at issue does not call for splitting hairs as to whether numerous statements therein were unlawful. The threats made are hardly borderline unfair labor practices. The claim that they were isolated should be rejected because the conversation included no less than five unlawful statements. An argument that threats are isolated may carry some weight when the threat is a close question of fact and law, and it occurs in a casual or unplanned moment, but such extenuating circumstances did not exist in January. Furthermore, the fact that four

months elapsed between the January statements and the union activity in May has no bearing on the lawfulness of the January comments. At no point throughout these proceedings has Colasurdo disavowed the January statements. Indeed, many of the threats and unlawful statements made in January were precursors of similar threats made in May and June: threats that people who engage in activities under Section 7 will be let go; threats to close the business in the face of protected, concerted activity or union activity, promises to improve benefits in order to discourage such activity, and multiple interrogations. Under these circumstances, the unlawful statements are hardly isolated nor too remote in time to be considered relevant to the similar unlawful statements again made by Colasurdo to Cotto in response to union activity in May and June. This exception should be overruled.

G. Exception 8: Cotto's Discharge Was Lawful.

Respondent excepts to the Judge's finding that Jerry Cotto was fired for his union activity and not for insurability problems stemming from his driving record. First, Respondent contends that the Judge failed to give adequate weight to the testimony of Respondent's long term insurance broker, Kirk Cavicchio. For its defense to the discharge, Respondent relied heavily on the assertion that Cavicchio discovered Cotto's poor driving record the day before his discharge and gave Respondent no choice in requiring that Cotto be discharged so that Respondent could afford a new insurance policy. At exceptions p. 22, Respondent argues "the [] issue [was] the inability of SJS to qualify for the most cost-effective insurance because Cotto was employed as a driver." However, Cavicchio's undated letter faxed to Colasurdo on the day before Cotto's discharge indicates that the Delos' insurance company's notice on non-renewal was "for



reasons not related to drivers." (GCX 6) Indeed, the letter from Delos/Five Star to Cavicchio dated June 2, 2010 makes no reference to any particular drivers as a reason for non-renewal[5]. (GCX4) The Judge correctly concluded that Respondent's defense based on Cavicchio's review of Cotto's driving records left "just too many questions on the insurance issue to provide a persuasive defense, especially in the face of the overwhelming evidence that Cotto's discharge was unlawfully motivated." (ALJD p. 13, l.14-16).

The most significant weakness in Respondent's defense was Colasurdo's own glaring failure to deny that he had knowledge of Cotto's poor driving record for more than two and a half years before the discharge but chose to reject the insurance company's recommendation in 2007 that Cotto be let go over his record. Cotto testified convincingly about a conversation he had with Colasurdo in 2007 about his record in which Colasurdo said that he declined to discharge Cotto notwithstanding the insurance Company's request that he do so. In fact, Cotto's driving abstract establishes that following his hire on June 20, 2007, he had three accidents and two accident-related tickets by November 5, 2007, just five months after his hire. (GCX 10(b)) This record represents eight points on the insurability scale, with six points being sufficient to make the driver uninsurable. (T 155; 159; 163) Nevertheless, Colasurdo refused to discharge Cotto at that time. Instead, he told him to be more careful driving – advice which Cotto took, as he did not have another accident or ticket by the time of his discharge in June 2010. Furthermore, when the union activity began in May of 2010, Colasurdo immediately complained to Cotto, while interrogating and threatening him on May 28,

[5] This document summarily cites "lack of cooperation on loss control", the meaning of which is unclear. (GCX 4)

that he had "gone to bat" for Cotto when the insurance company wanted him fired in the past. Again, Colasurdo failed to deny this May 28 remark about 'going to bat' for Cotto. The Judge reasonably concluded that both conversations occurred as reported by Cotto, and he concluded that:

> "Implicit in this reproach was a warning that, if Cotto did not support Colasurdo on the union issue, he could not count on Colasurdo's support on future insurability issues. Thus, Respondent itself injected the issue of Cotto's insurance coverage into its antiunion campaign..."

ALJD p. 11, l. 34-43.

Respondent notes that three other employees were fired for uninsurability, but one of these, "AM" in the Judge's decision (ALJD 11-12, l. 50-3), was the subject of a letter from Delos' Florida office in September, 2009 asking that Respondent cease using him as a driver because he was uninsurable. A second driver, CV, was fired at Colasurdo's initiative because of multiple *unreported* accidents. (T 312) The third driver was let go in 2008 and there is little information on the record about the circumstances of his dismissal. (RX 7) Of these three dismissals, AM's raised more questions than it answered, as AM was discharged within the same policy year that Cotto was discharged, after the insurance Company, Delos, discovered in a "routine company investigation" (GXC 19) that AM was uninsurable. The most intriguing part of this discharge is that, pursuant to subpoena, Respondent provided copies of four sets of insurance documents, for the years 2007, 2008, 2009 and 20010, and three of these incorporated lists of drivers by name. The exception was the 2009 policy, in effect when both AM and Cotto were discharged. Respondent and Cavicchio minimized the significance of the absence of a driver list for the 2009 policy. However, the absence of the list is consistent with the apparent conclusion that Respondent deliberately declined to disclose that it retained

Cotto as a driver. Cotto is not named on the 2008 policy either, although that year the Employer was in an assigned risk pool and the drivers' list not only includes names but also shows how many insurance points each driver had accumulated. It is inexplicable that, in 2009, new insurer Delos could have "routinely investigated" AM's status without a list identifying Respondent's drivers. If Delos had such a list, it should have included Cotto, who remained uninsurable until the fall of 2010 under the Delos insurance point system. It is also noteworthy that Cotto's driving abstract was obtained on June 15[6], the day of his discharge, but all remaining employees'[7] abstracts (save one: Colon's at GCX 10(c) dated in July) were dated June 17, the day after Cotto's unlawful discharge. These abstract report dates establish that the review of Cotto's record occurred in isolation, and certainly suggesting that the subsequent review of all other drivers' records was a belated attempt to mask the Cotto review as routine.

In sum, it is unrefuted that Respondent retained Cotto despite his long standing uninsurability. The Judge was more than justified in finding that the broker's analysis of the insurability factor was "unreliable and unpersuasive" (ALJD 12, l. 14-15) in the context of "overwhelming" (ALJD 11, l.24) evidence of discharge for union activity.

Finally, the record concerning Cotto's November-December license suspension is just as belated and unpersuasive a reason for discharge as the insurability claim — even moreso, since the suspension was an afterthought to the actual discharge: see second discharge letter, GCX 3. Colasurdo also admitted that he never checked with Morales to see if Cotto had discussed the suspension with him at the time it occurred. (T 353) The Judge credited Cotto's account of that suspension, including his testimony that he

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[6] See upper left hand "date of report" on each abstract at GCX 10.

[7] Villamonte's was obtained on June 10; he was discharged a few days before Cotto for unreported multiple accidents. (T 312)

immediately informed Morales of the situation when it developed. (ALJD 13, l. 30-45) Respondent has not presented any persuasive evidence that this credibility determination should be reversed.[8] As Respondent has failed to overcome the strong evidence that Cotto was discharged for union activity and the exceptions on this point should be overruled.

H. Exception 9: Supervisor Morales Did Not Violate the Act.

In support of this exception, Respondent argues that Morales' phone conversation with Cotto in early June was not coercive. In order to make this point, Respondent further argues that Morales statement to Cotto that "a lot of people would be out of work" is simply a valid prediction of the economic consequences of unionization and therefore not threatening. The distinction between a threat and a prediction is discussed in Section D (p. 9-10) above. As noted in that section, only those 'predictions' couched in objective facts will be found lawful. Morales made no such showing of objective factors to demonstrate that Respondent's business could be impacted adversely by the effects of unionization. Instead, he blamed Cotto for "messing things up" and stated that people would lose their jobs. He then urged Morales to head off these unhappy consequences by making some private arrangement with Colasurdo in lieu of continuing the union campaign. This is not the objectivity required in *Gissel*[9] for a statement about job loss to be non-threatening.

Respondent also contends that the Judge inadequately supported his credibility findings regarding Morales, since Morales denied the violations. (T. 9-10, l. 32-3) This

[8] Respondent also objects to the Judge's "unfair" remarks concerning the possibility of Respondent obtaining insurance through the aforementioned "risk pool" if Cotto had been kept on. Cotto was not kept on and Respondent did not have to resort to risk pool coverage, nor is it clear that Cavicchio was accurate that retaining Cotto meant accepting a risk pool assignment. All of Cotto's insurance points have dropped off after three years, so that he has had a point-free record since last fall. (T 156-57)

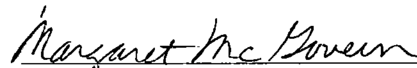
[9] *NLRB v.Gissel Packing Co.*, 395 U.S. 575; 89 S. Ct. 1918, 1942 (1969), 23 L. Ed. 2d 547 (1969).

includes the issue of whether Morales parked outside of a union meeting and watched who came and went. The Judge's credibility resolutions as between Morales and Cotto follow the Judge's general assessment of Cotto's highly credible testimony throughout the hearing, addressed primarily at ALJD p. 3-4, fn. 4, 5, 6, and 7. While the Judge's opinion did not include much discussion about Morales' credibility, he did discredit Morales' denial that Cotto told him about his driver's license suspension in November-December of 2008. (ALJD p. 13, l.35-45) Thus, the Judge credited Cotto over Morales both generally and specifically in reaching his conclusions. His credibility findings are reasonable and well-founded and should not be overturned.

III. CONCLUSION

Respondent's exceptions are not well supported and the evidence of multiple unlawful statements and an unlawful discharge is so substantial, Respondent's exceptions should be overruled and the appropriate Order and Remedy should ensue.

Respectfully submitted,



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