

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

-----X
In the Matter of:

Case No. 2-CA-40128

EVENFLOW TRANSPORTATION
MANAGEMENT,

Respondent,

And

LOCAL 713 INTERNATIONAL BROTHERHOOD
TRADE UNIONS,

Charging Party.

-----X

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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PRELIMINARY STATEMENT

The instant brief is submitted in support of Respondent Evenflow Transportation, Inc.'s Exceptions to the Decision of Administrative Law Judge Raymond's Green dated August 30, 2011.

The Complaint in case number 2-CA-40128 alleges that the Respondent Evenflow Transportation, Inc. (hereinafter referred to as "Respondent" or "Evenflow") violated Sections 2(6), 2(7), 8(a)(1) and 8(a)(3) of the National Labor Relations Act. A hearing was held before Administrative Law Judge Raymond Green (hereinafter referred to as "ALJ") on June 6, June 27, July 5 and July 6, 2011. A decision was issued by the ALJ on August 30, 2011 finding that the Respondent engaged in the violations alleged in the Complaint.

ISSUES

1. Did the ALJ err in finding that Julie Bizzaro, wife to John Bizzaro, was "to a larger extent" responsible for Evenflow's bookkeeping. (ALJD at 2, lines 18-19).
2. Did the ALJ err in finding that two dispatchers "assisted" with Evenflow's day to day operations? (ALJD at 2, lines 21-22).
3. Did the ALJ err in finding that Evenflow dispatchers, Leandro DeSilva and Antonio Cabrera acted as a liaison between management and the drivers and were "directly" involved in the hiring of new employees? (ALJD at 2, lines 25-27).
4. Did the ALJ err in ruling that Leandro DeSilva and Antonio Cabrera were supervisors and/or agents of the Respondent, as defined in Section 2(11) and 2(13) of the Act? (ALJD at 2, lines 27-28).
5. Did the ALJ err in finding that the Respondent "merged" with a company called "Osiris"? (ALJD at 2, line 33).
6. Did the ALJ err in finding that the two dispatchers employed by Evenflow "directed" the work of the drivers? (ALJD at 2, lines 46-48).

7. Did the ALJ err in finding that dispatcher Antonio Cabrera was “aware” and “overheard” that a Union representative was talking to the Respondent’s employees? (ALJD at 3, lines 22-25).

8. Did the ALJ err in ruling that Mr. Cabrera was a supervisor or agent whose “knowledge” of the Union campaigning should be imputed upon the Respondent? (ALJD at 3, lines 25-27).

9. Did the ALJ err in finding that Mr. Bizzaro “interrogated” various employees about the Union campaigning during the summer of 2010? (ALJD at 3, lines 29-31).

10. Did the ALJ err in finding that Anthony Smidth “credibly” testified that Mr. Cabrera “asked” him about Union campaigning and then “told” him that Mr. Bizzaro wanted to speak with him? (ALJD at 3, lines 33-38).

11. Did the ALJ err in finding that Mr. Smidth “credibly” testified about a conversation with Mr. Bizzaro where there was questioning relating to Union campaigning? (ALJD at 3, lines 36-39).

12. Did the ALJ err in finding that Nelson Rodriguez “credibly” testified about Mr. Bizzaro questioning him about, and advising against, the Union campaigning? (ALJD at 3, lines 40-45; at 4, lines 1-5).

13. Did the ALJ err in finding that Julio Castro “credibly” testified about Mr. Bizzaro questioning him about Union campaigning and threatening to “bring his dogs out”? (ALJD at 4, lines 6-20).

14. Did the ALJ err in finding that a late wage payment in early September 2010 was the cause of the employees arranging to meet with a Union organizer? (ALJD at 4, lines 21-25).

15. Did the ALJ err in finding that the Respondent “conceded” that none of the employees would have been laid off or discharged? (ALJD at 5, lines 2-3).

16. Did the ALJ err in finding that Mr. Bizzaro gave a “different” reason for selecting the employees for lay-offs? (ALJD at 5, lines 5-10).

17. Did the ALJ err in finding that the Respondent had a “sudden realization” that it “might” owe a substantial amount of money to the Internal Revenue Service? (ALJD at 5, lines 14-15).

18. Did the ALJ err in ruling that the tax levy imposed by the Internal Revenue Service is “analogous to a garnishment on money” owed to the Respondent? (ALJD at 5, lines 16-17).

19. Did the ALJ err in finding that the reasons for CCM’s late payments was “largely” a result of the Respondent’s computer “failing” to generate proper invoices? (ALJD at 5, lines 24-27).

20. Did the ALJ err in finding that a letter dated June 3, 2010 was sent to Cheryl Davenport of CCM which “stated in substance that Evenflow couldn’t carry such a large balance and continue to provide the best service”? (ALJD at 5, lines 29-31).

21. Did the ALJ err in finding that the monies owed by CCM were “not a situation where long overdue payments are typically a prelude to non-payment”? (ALJD at 5, lines 36-37).

22. Did the ALJ err in finding that payments to the Respondent for CCM services would be paid directly from Medicaid? (ALJD at 5, lines 39-40).

23. Did the ALJ err in finding that the Respondent hired two new employees in June 2010? (ALJD at 5, lines 44-45).

24. Did the ALJ err in ruling that the Respondent failed to fully comply with the Counsel for the General Counsel’s demand for payroll records? (ALJD at 5, lines 46-51).

25. Did the ALJ err in finding that the IRS Notice of Levy served upon Neighborhood Health Providers LLC was “apparently similar to a garnishment”? (ALJD at 6, lines 4-7).

26. Did the ALJ err in finding that there was “no” evidence that any of the Respondent’s other customers were required to pay money to the IRS? (ALJD at 6, lines 10-11).

27. Did the ALJ err in finding that there was “no” evidence presented to show that the tax levy had “any substantial affect” on the Respondent’s business? (ALJD at 6, lines 11-14).

28. Did the ALJ err in finding that no evidence was produced to show that the amounts owed to and diverted from the Respondent comprised a significant portion of its business? (ALJD at 6, lines 15-16).

29. Did the ALJ err in finding that the outstanding monies owed by CCM were withheld “mostly through the fault of the Respondent”? (ALJD at 6, lines 21-22).

30. Did the ALJ err in finding that the evidence supported that Evenflow hired two drivers after learning of its financial problems? (ALJD at 6, lines 24-27).

31. Did the ALJ err in ruling that the decision to lay off the employees was not made until September 2010? (ALJD at 6, lines 27-28).

32. Did the ALJ err in ruling that the Respondent laid off the employees “after” it became “aware that the Union had restarted its organizing campaign in or about August 2010”? (ALJD at 6, lines 28-31).

33. Did the ALJ err in finding that the Respondent had knowledge of the Union’s restarting of an organizing campaign? (ALJD at 6, lines 34-35).

34. Did the ALJ err in finding that Mr. Bizzaro expressed anti-Union animus? (ALJD at 6, lines 35-36).

35. Did the ALJ err in finding that the timing of the “terminations” was consistent with an anti-union motivation? (ALJD at 6, lines 36-37).

36. Did the ALJ err in ruling that the Counsel for the General Counsel established a prima facie case? (ALJD at 6, lines 37-38).

37. Did the ALJ err in finding that the Respondent failed to comply with the Counsel for the General Counsel’s subpoena for documents relating to the IRS claims? (ALJD at 6, lines 45-48).

38. Did the ALJ err in finding that Mr. Cabrera had no knowledge of monies being owed to the Respondent? (ALJD at 6, lines 50-51).

39. Did the ALJ err in ruling that the Respondent failed to meet its burden? (ALJD at 7, lines 2-3).
40. Did the ALJ err in ruling that the lay-offs of the employees violated Section 8(a)(1) and 8(a)(3) of the Act? (ALJD at 7, lines 2-4).
41. Did the ALJ err in ruling that the Respondent illegally interrogated the employees regarding Union activity and in violation of Section 8(a)(1) of the Act? (ALJD at 7, lines 5-9).
42. Did the ALJ err in ruling that the Respondent “threatened” the employees with “physical harm” in retaliation of Union activity and in violation of Section 8(a)(1) of the Act? (ALJD at 7, lines 10-12).
43. Did the ALJ err in ruling that the Respondent’s discharge of the employees was due to their Union activity and in violation of Section 8(a)(1) and 8(a)(3) of the Act? (ALJD at 7, lines 14-15).
44. Did the ALJ err in ruling that the Respondent committed an unfair labor practice and violated Section 2(6) and 2(7) of the Act? (ALJD at 7, lines 17-18).
45. Did the ALJ err in finding that the Respondent’s actions warrant a cease and desist order? (ALJD at 7, lines 21-24).
46. Did the ALJ err in finding that the Respondent “must” offer the employees reinstatement and back pay for “discriminatorily” discharging them? (ALJD at 7, lines 25-27).
47. Did the ALJ err in finding that the Respondent must cease and desist from interrogating its employees about Union activity and sympathies? (ALJD at 7, lines 40-43).
48. Did the ALJ err in finding that the Respondent must cease and desist from “asking” its employees to report Union activities and supporters? (ALJD at 7, lines 44-45).
49. Did the ALJ err in finding that the statement “calling out the dogs” can be construed as a threat of physical harm to the employees? (ALJD at 7, lines 46-48).

50. Did the ALJ err in finding that the Respondent threatened the employees with physical harm due to their union support? (ALJD at 8, lines 2-3).

51. Did the ALJ err in finding that the Respondent discharged the employees due to their Union support and sympathies? (ALJD at 8, lines 5-6).

52. Did the ALJ err in finding that the Respondent interfered, restrained or coerced against the employees' rights under Section 7 of the Act? (ALJD at 8, lines 8-9).

53. Did the ALJ err in ruling that Anthony Smidth, Nelson Rodriguez, Julio Castro, Luis Correa and Lindbergh Wallace should be reinstated within 14 days of the Order to their previous positions without any affect on their seniority? (ALJD at 8, lines 13-16).

STATEMENT OF THE CASE

In March 2009, Evenflow purchased Oasis Transportation (hereinafter referred to as "Oasis") and acquired Oasis' service contract with Comprehensive Care Management (hereinafter referred to as "CCM"). (Tr. at 460, lines 15-25). On or about April 30, 2009, the International Brotherhood of Trade Unions, Local 713 (hereinafter referred to as the "Union") filed a Charge¹ against Evenflow alleging unfair labor practices. In addition to the Charge, the Union filed a certification petition² against Evenflow on or about May 14, 2009. An election agreement was executed between Evenflow and the Union on or about June 3, 2009. A settlement agreement for the Charge was executed on or about July 14, 2010. Evenflow complied with the agreement and offered proof of compliance to the NLRB. (Tr. at 463; p. 518, lines 15-25).

In the interim, Evenflow was audited by the Internal Revenue Service ("IRS") sometime in May 2010. (Tr. at 584). In June 2010, the IRS imposed a tax levy for approximately \$447,297.57. (Tr. at 451-52; p. 582; p. 584, lines 15-25). In an effort to recoup its money, the IRS sent a Notice of Levy

¹ Under Case No. 2-CA-39280.

² Under Case No. 2-RC-23385.

to some of Evenflow's clients requesting that any accounts receivables due to Evenflow be re-directed to the IRS. (Tr. at 582-85).

Simultaneous to the period of the IRS audit³, Evenflow engaged in collection efforts against CCM for unpaid invoices totaling \$100,000.⁴ (Tr. at 374-75; p. 395, lines 20-25; p. 396; p. 433, lines 21-25; p. 434, lines 1-5; p. 460, lines 16-20). Prior to approving the outstanding invoices for payment, CCM's Director of Bronx Transportation Cheryl Davenport had to undergo efforts to confirm that the services were provided. (Tr. at 408-09). Upon confirmation of the services, Ms. Davenport would forward the invoices to Medicaid for remittance of payment. (Tr. at 383-84). During the Respondent's collection efforts with CCM, there were conversations between Ms. Davenport and Evenflow's General Manager John Bizzaro involving possible employee lay-offs of the staff dedicated to CCM transports. (Tr. at 380, lines 12-18).

In or about August 2010, the five alleged discriminatees were approached off site by Union representative Carlos Rodriguez to discuss an organization drive at Evenflow. (Tr. at 80, lines 11-21; p. 119; p. 149-150; p. 169, lines 20-25; p. 189, lines 1-10; p. 196, lines 21-25). Any and all conversations amongst the Discriminatees, with respect to joining the Union, were held off the Respondent's premises. (Tr. at 93-94; p. 170, lines 3-6; p. 171, lines 13-25; p. 195, lines 8-15).

Since CCM was consistently late with the remittance of payment, and in light of the IRS tax levy, the Respondent decided to go forward with its earlier decision to reduce the Evenflow staff dedicated to CCM transports. (Tr. at 107, lines -14; p. 114, lines 21-25; p. 155, lines 21-25; p. 167; p. 214, lines 6-8; p. 606, lines 15-25). More specifically, Evenflow intended to reduce the additional benefit of the two-man assist teams.⁵ (Tr. at 372; p. 606). The five alleged discriminatees were part of

³ May/June 2010.

⁴ Some of these invoices date back to 2009 for services provided by Evenflow's predecessor, Oasis.

⁵ "Two man" assist teams consist of a driver and a helper. (Tr. at 372). The "two-man" assist teams were provided to wheelchair bound clients whose homes lacked elevator services. (Tr. at 372, lines 14-22). This service was not a part of CCM's previous contract with Oasis. (Tr. at 372, lines 21-25).

the two-man assist teams for CCM. (Tr. at 107, lines -14; p. 114, lines 21-25; p. 155, lines 21-25; p. 167; p. 214, lines 6-8; p. 606, lines 15-25).

In the middle of September, 2010, the alleged discriminatees made a decision to meet with Mr. Rodriguez for purposes of discussing the organizing campaign. (Tr. at 70, lines 17-24; p. 124, lines 1-8; p. 152; p. 170, lines 7-18; p. 197, lines 1-11). This meeting was scheduled to take place on September 24, 2010 at an off-site location. (Tr. at 70, lines 17-24; p. 124, lines 1-8; p. 152; p. 170, lines 7-18; p. 197, lines 1-11). The Respondent had no knowledge of this meeting. (Tr. at 483, lines 16-25). On the morning of September 23, 2010, the alleged discriminatees arrived at Evenflow and met with Mr. Bizzaro and Evenflow owner Jack Mahanian. (Tr. at 490). Mr. Mahanian told the alleged discriminatees that the Respondent was experiencing financial difficulties and they were being laid-off. (Tr. at 490, lines 20-25).

EXCEPTIONS AND RESPONSE

As illustrated below, the Respondent takes exception to the specified portions of the ALJ's decision for the following reasons:

A) Alleged Unfair Labor Practices

1. *The ALJ erred in finding that Julie Bizzaro, wife to John Bizzaro, was "to a larger extent" responsible for Evenflow's bookkeeping. (ALJD at 2, lines 18-19).*

During the questioning of Evenflow General Manager John Bizzaro, the Counsel for the General Counsel asked a series of questions involving the corporate structure of EF Management LLC; the corporate entity who owns Evenflow. (Tr. at 261-262). In addition, Counsel for the General Counsel asked for the identity of those individuals who were responsible for handling administrative tasks at, or on behalf of, Evenflow. Amongst other things, Mr. Bizzaro testified that Joe Mirra handled the "bookkeeping responsibilities", such as payroll, on behalf of Evenflow. (Tr. at 279, lines 22-25; p. 280, lines 1-4).

2. The ALJ erred in finding that two dispatchers “assisted” with Evenflow’s day to day operations. (ALJD at 2, lines 21-22).

During his testimony, Mr. Bizzaro identified the persons responsible for various administrative functions at Evenflow; none of whom were dispatchers. (Tr. at 267-269). He testified that he, and he alone, was responsible for Evenflow’s day to day operations. (Tr. at 267, lines 20-25). He also testified that there were no other managers at Evenflow. (Tr. at 267, lines 20-25).

Both Evenflow dispatchers Leonardo DeSilva and Antonio Cabrera testified at the hearing. Their testimony revealed that they were only responsible for providing the appropriate coverage for the customer transportation routes. (Tr. at 509, lines 14-25; p. 511, lines 1-17). At times, they would switch drivers to other customer routes in order to fill any gaps in service. (Tr. at 509, line 14-18). Aside from their daily communication to the drivers of their scheduled assignments, there is no testimony or evidence to support that either dispatcher was involved in any of Evenflow’s day to day operations.

3. The ALJ erred in finding that Evenflow dispatchers, Leandro DeSilva and Antonio Cabrera acted as a liaison between management and the drivers and were “directly” involved in the hiring of new employees. (ALJD at 2, lines 25-27).

There is no evidence or testimony presented to support that Mr. DeSilva and Mr. Cabrera acted as a “liaison” for Evenflow and were “directly” involved in the hiring of new employees. The subject of Mr. DeSilva’s testimony involved a conversation with alleged discriminatee Luis “Benji” Correa where Mr. Correa made threats to physically harm Mr. Bizzaro as a result of his paycheck being untimely. (Tr. at 683-694). He testified that Mr. Correa brought a bicycle chain to work and slammed it on the desk while making his threat. *Id.* Mr. DeSilva testified as to how he, as well as other employees, was upset over not receiving their paychecks on a timely basis. (Tr. at 696-696). At no point during Mr. DeSilva’s testimony did he indicate, imply or infer that he acted as a liaison or was involved in the hiring of new employees. *Id.*

As for Mr. Cabrera, he testified as to his dispatching duties at Evenflow. (Tr. at 507-510). He testified that he was mainly responsible for the handling of the CCM drivers' transportation schedule. (Tr. at 509, lines 1-9). He testified how he would put together the schedule and communicate the same to the drivers on a daily basis. (Tr. at 507-510). When asked by Counsel for the General Counsel whether he was involved in hiring, Mr. Cabrera responded that he was not. (Tr. at 513, lines 6-19).

Mr. Bizzaro testified that he, along with his wife, were involved in the hiring process. (Tr. at 269, lines 20-23; p. 594, lines 10-12). He testified that, "to some extent", Mr. Cabrera assisted in the hiring process. (Tr. at 269, lines 7-9). The "extent" of Mr. Cabrera's involvement involved his giving an opinion on a driver's employment application; an opinion that was not usually followed. (Tr. at 513, lines 17-23). Mr. Cabrera's opinion does not, in and of itself, rise to the level of being involved in "direct" hiring of an employee under Section 2(11) of the NLRA.

4. *The ALJ erred in ruling that Leandro DeSilva and Antonio Cabrera were supervisors and/or agents of the Respondent, as defined in Section 2(11) and 2(13) of the Act. (ALJD at 2, lines 27-28).*

For purposes of brevity, we aver to the legal argument set forth below.

5. *The ALJ erred in finding that the Respondent "merged" with a company called "Osiris." (ALJD at 2, line 33).*

The testimony presented shows that corporate entity EF Management LLC, on behalf of Evenflow, acquired Oasis, not Osiris, Transportation. (Tr. at 282, lines 24-25; p. 283, line 1). There is no evidence or testimony to support that a merger took place between Evenflow and Oasis. (Tr. at 283, lines 2-7).

6. *The ALJ erred in finding that the two dispatchers employed by Evenflow "directed" the work of the drivers. (ALJD at 2, lines 46-48).*

As indicated in paragraphs 2 and 3 above, Mr. DeSilva and Mr. Cabrera's only job function was to schedule drivers for the customer transportation routes. (Tr. at 507-510). They did not

supervise, manage or “direct” any of the drivers employed by the Respondent. They did not exercise independent judgment, on behalf of the Respondent, relating to any of the employees.

7. *The ALJ erred in finding that dispatcher Antonio Cabrera was “aware” and “overheard” that a Union representative was talking to the Respondent’s employees. (ALJD at 3, lines 22-25).*

This is a mischaracterization of Mr. Cabrera’s testimony. Mr. Cabrera testified that he did not have personal knowledge of any Union activity occurring at Evenflow. (Tr. at 506, lines 1-11). He testified that he did not have knowledge of the Union speaking with any of the Respondent’s drivers at the times complained of in the complaint. (Tr. at 506, lines 2-5).

Mr. Cabrera testified that he overheard from the drivers that someone was “soliciting” at the CCM Bronx location. The drivers did not convey, and he did not ask, what the solicitation was for. (Tr. at 506, lines 7-8; p. 516, lines 22-25; p. 517, lines 1-18). He also overheard from the drivers that there were unidentified pamphlets being distributed at CCM. (Tr. at 517, lines 15-21). However, he did not “connect” the talks of solicitation at CCM to any Union campaigning. (Tr. at 522, lines 11-13). Lastly, he testified that he did not have any discussions with Mr. Bizzaro about what he had overheard. (Tr. at 507, lines 14-17).

8. *The ALJ erred in ruling that Mr. Cabrera was a supervisor or agent whose “knowledge” of the Union campaigning should be imputed upon the Respondent. (ALJD at 3, lines 25-27).*

For purposes of brevity, we aver to the legal argument set forth below.

9. *The ALJ erred in finding that Mr. Bizzaro “interrogated” various employees about the Union campaigning during the summer of 2010. (ALJD at 3, lines 29-31).*

No evidence was presented to support that Mr. Bizzaro “interrogated various employees” during the summer of 2010. Mr. Bizzaro testified that he did not ask any of the five alleged discriminatees about purported Union activity. (Tr. at 466, lines 4-15; p. 469, lines 21-25; p. 470, lines

1-7). He indicated that he did not engage the employees in any conversations regarding the purported Union activity as he knew he could not legally do so. (Tr. at 466, lines 17-23).

Mr. Bizzaro did testify that he was approached by several drivers advising that they were “tricked” by Union representative Carlos Rodriguez into signing the Union authorization cards. (Tr. at 468, lines 1-9). These drivers indicated that they were told that Mr. Bizzaro wanted them to sign the Union cards. (Tr. at 468, lines 1-9). At that time, these drivers expressed to Mr. Bizzaro their desire to revoke their signature cards. In response to this, Mr. Bizarro had his counsel prepare the appropriate letter to rescind their consent. (Tr. at 468, lines 10-16). This letter was not distributed to the employees and was left for whoever wished to voluntarily revoke their consent. (Tr. at 468, lines 15-22). This does not, in any way, equate to an interrogation of the employees on part of Mr. Bizzaro.

10. *The ALJ erred in finding that Anthony Smidth “credibly” testified that Mr. Cabrera “asked” him about Union campaigning and then “told” him that Mr. Bizzaro wanted to speak with him. (ALJD at 3, lines 33-38).*

Mr. Smidth testified that Mr. Cabrera allegedly asked him in May/June 2009 about the execution of Union authorization cards and was told that Mr. Bizzaro wanted to talk to him about it. (Tr. at 191, lines 1-11). Mr. Cabrera testified that he had no knowledge, and was not advised by any of the employees, of Union campaigning. (Tr. at 506, lines 1-8; p. 517, lines 1-25). Mr. Cabrera denies warning the employees against Union campaigning at Evenflow. (Tr. at 506, lines 24-25; p. 507, lines 1-16).

It is of interest that the ALJ found Mr. Smidth’s “credible” as there was evidence presented to the contrary. Mr. Smidth could not recall simple facts, such as submitting an employment application, and failing a urine test, for a potential subsequent employer. (Tr. at 209-210). He first testified that he, as well as the other alleged discriminatees, spoke about unionization “every other day” during the months of July, August and September. (Tr. at 195-196). However, on cross-examination, Mr. Smidth

recanted this statement and indicated that it was not as frequent; only once or twice during the months of August and September. (Tr. at 217-218).

As Mr. Smidth could not remember submitting an employment application, failing a urine test or the amount of times he spoke to his co-workers about unionization, it can be inferred that his recollection of the events in question are, at best, questionable.

11. *The ALJ erred in finding that Mr. Smidth “credibly” testified about a conversation with Mr. Bizzaro where there was questioning relating to Union campaigning. (ALJD at 3, lines 36-39).*

Mr. Smidth testified that Mr. Bizzaro asked him about the Union campaigning. (Tr. at 191, lines 12-20). He claims Mr. Bizzaro told him to “give him some time” and asked him to sign the letter revoking his authorization to the Union. (Tr. at 191, lines 20-24). This conversation allegedly took place in May/June 2009; approximately one year prior to Mr. Smidth’s lay-off. (Tr. at 223, lines 1-10). There are no witnesses to this conversation.

Mr. Smidth then testified to an alleged subsequent conversation with Mr. Bizzaro in August 2010. He claims Mr. Bizzaro asked him to “speak” with the drivers and advise them to not sign the Union authorization cards. (Tr. at 198, lines 5-20). He claims he was asked to identify the employees who sign the Union authorization card. (Tr. at 198, lines 9-16). Of interest, there are no witnesses to this conversation. (Tr. at 199, lines 12-22).

Mr. Bizzaro denies having any conversations with the alleged discriminatees regarding their Union activity. (Tr. at 466; p. 470). He denies having closed door meetings with the employees in an effort to avoid any misunderstandings. (Tr. at 467). He denies asking Mr. Smidth to keep him advised as to whether any of the employees sign an authorization card. (Tr. at 481, lines 5-13). As indicated in paragraph 10, *supra*, Mr. Smidth’s credibility is questionable as his recollection of events are murky and tend to change each time he re-tells the story.

12. *The ALJ erred in finding that Nelson Rodriguez “credibly” testified about Mr. Bizzaro questioning him about, and advising against, the Union campaigning. (ALJD at 3, lines 40-45; at 4, lines 1-5).*

Mr. Rodriguez testified that he had three conversations with Mr. Bizzaro regarding Union campaigning during the period of August 2010 to September 2010. (Tr. at 85, lines 7-10; p. 86-88). He claims he was told by Mr. Bizzaro to stay away from the Union representative and to “watch” out to see if any of the drivers were talking to him. (Tr. at 85, lines 15-25). He claims Mr. Bizzaro told him that he had “beaten another lawsuit” involving the Union. (Tr. at 91, lines 15-25). He claimed that all of these conversations took place in Mr. Bizzaro’s office. (Tr. at 88, lines 12-15). As with the other discriminatees, there were no witnesses to Mr. Rodriguez’s conversations with Mr. Bizzaro. (Tr. at 85, lines 10-12; p. 87, lines 14-15; p. 88, lines 12-15).

As indicated in paragraph 11, *supra*, Mr. Bizzaro denies having any conversations with the alleged discriminatees, whether alone or in the presence of someone else, about alleged Union activity. However, Mr. Bizzaro does admit to having a discussion with Mr. Rodriguez regarding a claim that he had to pay the Union \$100,000. (Tr. at 464, lines 22-25; p. 465, lines 1-5). In response, Mr. Bizzaro stated that the rumor was false. (Tr. at 465, lines 5-8). He stated that the Union representative was a sales person and advised Mr. Rodriguez to “do all his homework” before making any type of decision. (Tr. at 465, lines 14-18). Contrary to the findings made in the ALJ’s decision, Mr. Bizzaro did not initiate or “interrogate” Mr. Rodriguez about his alleged Union activity.

Mr. Rodriguez’s credibility is also at issue. Throughout his testimony, Mr. Rodriguez could not recall key facts relating to the alleged interrogation he was subjected to by Mr. Bizzaro. More than once, Counsel for the General Counsel asked Mr. Rodriguez leading questions and referred him to his sworn affidavit dated October 15, 2010 as a way to “refresh his recollection” to the events in question. (Tr. at 88, lines 22-25; p. 89-90; p. 91, lines 1-7). The repeated attempts to “refresh” Mr. Rodriguez’s

recollection were questioned by the ALJ as he found it “diminished” Mr. Rodriguez’s credibility. (Tr. at 86, lines 18-24).

In addition to his inability to independently recall pertinent facts, there was testimony presented which questioned Mr. Rodriguez’s credibility. Mr. Bizzaro testified that an employee observed Mr. Rodriguez selling marijuana to other drivers. (Tr. at 472, lines 10-12; p. 621, lines 1-8). Mr. Bizzaro investigated the allegation and upon a search of Mr. Rodriguez’s vehicle, he discovered “poppy seeds.” (Tr. at 623, lines 1-16). He also observed, on one occasion, that Mr. Rodriguez’s eyes were bloodshot and “glassy.” (Tr. at 624, 1-10).

If being suspected of distributing contraband was not enough, Mr. Rodriguez falsified an accident report in the summer of 2010, which resulted in litigation brought against the Respondent. (Tr. at 624, lines 18-20). Mr. Rodriguez was involved in a car accident where the police report indicated that his illegal u-turn was the cause of the accident. (Tr. at 104, lines 18-25; p. 105, lines 1-10). He claims he told the reporting police officer that there was no truth to his making an illegal u-turn yet he does not contest the accuracy of the police report. (Tr. at 105, lines 1-12).

When Mr. Rodriguez returned to the office, he filled out an accident report to be submitted to the Respondent’s insurance company. The accident report filled out by Mr. Rodriguez conveniently excluded the police report’s findings that it was his illegal u-turn that caused the accident. (Tr. at 106, lines 1-19; p. 473, lines 15-22). It is clear that the ALJ failed to take into account the suspicions of illegal drug activity as well as the intentional falsification of the insurance accident report when he made his determination that Mr. Rodriguez was credible.

13. *The ALJ erred in finding that Julio Castro “credibly” testified about Mr. Bizzaro questioning him about Union campaigning and threatening to “bring his dogs out.” (ALJD at 4, lines 6-20).*

Mr. Castro testified that Mr. Bizzaro, on more than one occasion, asked him about his Union activity. (Tr. at 127-129). Mr. Castro alleges that Mr. Bizzaro wanted the “heads up” about anyone

who was believed to be talking with the Union representative. (Tr. at 127, lines 14-25). He claims Mr. Bizzaro told him that he did “not want his company unionized” and would “bring his dogs out if he had to.” (Tr. at 127, lines 21-22). He claims these “meetings” with Mr. Bizzaro occurred either in the Evenflow parking lot or in his office. (Tr. at 127, lines 1-9; p. 128, lines 1-15). There were no witnesses for each of these alleged conversations. (Tr. at 128, lines 1-10; p. 139, lines 9-12).

As indicated in paragraph 11 above, Mr. Bizzaro denies having conversations with the alleged discriminatees regarding their Union activity. (Tr. at 466; p. 470). He denies ever saying he would “bring his dogs out.” (Tr. at 470, lines 6-8). As with the testimony from the other discriminatees, there are no witnesses to Mr. Bizzaro’s alleged interrogation. If Mr. Castro was interrogated to the extent that he claims, there should have been a witness to one, if not all, of these “meetings” and “interrogations.”

At the time of the hearing, the ALJ failed to take into account evidence which refuted Mr. Castro’s credibility. The Respondent has a strict policy, which is communicated to its employees, that none of its vehicles are to be used for an unauthorized use. (Tr. at 618, lines 11-19; p. 619, lines 1-17). Mr. Castro denies using an Evenflow vehicle for an unauthorized use. (Tr. at 141, lines 20-21). However, there was credible testimony provided by non-party Cheryl Davenport to refute his statement. (Tr. at 402-405).

Ms. Davenport testified that she, as well as two other people, consumed alcoholic piña colodas sold by Mr. Castro out of an Evenflow vehicle which was parked in City Island, New York. (Tr. at 402, lines 5-17). She testified that Mr. Castro had a portable blender inside the vehicle which was “hooked up” to an outside source for electricity. (Tr. at 402, lines 18-22; p. 403, lines 22-25). The ALJ did not allow for any evidence to be presented which would demonstrate that Mr. Castro’s sale of the alcohol was done illegally. (Tr. at 404, lines 15-25; p. 405, lines 1-13). Despite the fact that independent evidence was presented to show that Mr. Castro was not only unlawfully selling alcohol

outside of a company vehicle but was “stealing” electricity from the electrical company in order to sell such alcohol, Mr. Castro was found to be “credible” by the ALJ.

14. *The ALJ erred in finding that a late wage payment in early September 2010 was the cause of the employees arranging to meet with a Union organizer. (ALJD at 4, lines 21-25).*

The consensus amongst the discriminatees is that they had several meetings and discussions with the Union organizer, as early as June 2010, in order to discuss their respective gripes and complaints. (Tr. at 80-81; p. 150; p. 119-120; p. 195, lines 1-25). While it is not disputed that there is testimony indicating that the alleged discriminatees, on more than one occasion, were paid late, it is disputed that a late payment occurred in early September 2010 which was the initial cause of their scheduling a meeting with the Union organizer. (Tr. at 694-696). There is no testimony or evidence considered by the ALJ to support this finding.

15. *The ALJ erred in finding that the Respondent “conceded” that none of the employees would have been laid off or discharged. (ALJD at 5, lines 2-3).*

This is a mischaracterization of Mr. Bizzaro’s testimony. The decision to lay off employees stemmed from two factors: 1) a levy imposed by the IRS in the amount of \$447,297.57 and 2) monies owed by CCM in the amount of \$100,000. (Tr. at 385, lines 7-8; p. 451, lines 10-25; p. 452, lines 1-5; p. 454, lines 5-8; p. 459, lines 15-20). Evidence was presented to support that the IRS sent a Notice to Levy to a couple of Evenflow’s customers in an effort to satisfy the debt. (Tr. at 452, lines 1-5; p. 456, lines 15-25). In the Notice of Levy, the IRS mandated that any monies owed to Evenflow be directly paid to the IRS. *Id.*

In addition to the IRS tax levy, Mr. Bizzaro made an attempt, in May and June 2010, to obtain the monies owed by CCM. (Tr. at 374, lines 5-25; p. 375, lines 1-7; p. 378, lines 1-11). This proved to be unsuccessful. The two man assist teams offered to CCM was an additional service. (Tr. at 606, lines 15-19). As it was not financially feasible to continue to fully staff an account which continued to be in a substantial amount of arrears, a decision was made to reduce, by half, the staff dedicated to CCM in

an effort to save money. (Tr. at 459, lines 15-25; p. 483, lines 21-25; p. 484, lines 1-10; p. 606, lines 21-25). This does not, in any way, equate to a “concession” by Mr. Bizzaro that the alleged discriminatees would not have been lawfully discharged, at any point, for any other reason.

16. *The ALJ erred in finding that Mr. Bizzaro gave a “different” reason for selecting the employees for lay-offs. (ALJD at 5, lines 5-10).*

This is a mischaracterization of the testimony. The alleged discriminatees were part of the two man assist teams dedicated to CCM transportation services. (Tr. at 107, lines -14; p. 114, lines 21-25; p. 155, lines 21-25; p. 167; p. 214, lines 6-8; p. 606, lines 15-25). Mr. Bizzaro testified that his only reason for instituting an economic employee lay-off was due to the IRS Levy and the CCM arrears. (Tr. at 459, lines 14-25; p. 460, lines 1-3). He was asked what factors were taken into consideration when deciding which CCM dedicated staff member to lay off and he provided his reasons. (Tr. at 177, lines 14-25; p. 178, lines 1-6; p. 402-03; p. 470, lines 23-25; p. 471, lines 1-13; p. 473, lines 1-21; p. 474; p. 480, lines 1-7; p. 620-21; p. 624; p. 685-87; p. 690, lines 1-7). These reasons were in addition, not different or supplement, to reasons surround the decision to institute employee layoffs.

17. *The ALJ erred in finding that the Respondent had a “sudden realization” that it “might” owe a substantial amount of money to the Internal Revenue Service. (ALJD at 5, lines 14-15).*

This is a mischaracterization of the testimony. Mr. Bizzaro, who is neither a corporate officer nor responsible for any of the Respondent’s bookkeeping, personally learned of the monies owed to the IRS when an agent appeared at Evenflow in April 2010. (Tr. at 584, lines 11-18; p. 589, lines 1-11). The monies owed by Evenflow were for the tax periods ending in March 31, 1999 and June 2005. (Tr. at 586, lines 7-13; p. 587, lines 6-9). Until the visit from the IRS agent, Mr. Bizzaro believed that any debt owed by Evenflow’s predecessor, Oasis, was discharged in its bankruptcy proceeding. (Tr. at 586, lines 14-25; p. 587, lines 1-3).

There is no evidence or testimony presented at the hearing to support that the IRS “may” want the Respondent to pay back the monies owed. A tax levy in the amount of \$447,297.57 has been imposed upon the Respondent and there is no reason to believe that the IRS does not fully expect to be repaid in full. This is evident by the IRS’ attempts to intercept monies from the Respondent’s clients as a way to pay off the debt. (Tr. at 452; p. 456; p. 561). Of interest, the IRS is still actively collecting on the tax levy imposed upon the Respondent. (Tr. at 573, lines 8-16).

18. *The ALJ erred in ruling that the tax levy imposed by the Internal Revenue Service is “analogous to a garnishment on money” owed to the Respondent. (ALJD at 5, lines 16-17).*

It was apparent at the hearing that the ALJ was not familiar with the concept of an IRS tax levy and was unable to distinguish between a tax levy and a lien. (Tr. at 451, lines 19-25; p. 561, lines 21-25; p. 576-580). It was explained to the ALJ, by counsel, that a tax levy is self-executing and it is for the entire amount due and owed to the IRS. (Tr. at 579, lines 14-25; p. 581, lines 11-15). The ALJ incorrectly equated the levy to a garnishment, which is statutorily maximized at 10%. (Tr. at 581, lines 15-22). It was explained to the ALJ that the IRS was not subject to the statutory maximum. (Tr. at 581, lines 24-25). The ALJ’s decision does not offer any statutory precedent or law to support that a tax levy imposed by the IRS is equivalent or “analogous” to a garnishment of wages. As such, his analogy is baseless.

19. *The ALJ erred in finding that the reasons for CCM’s late payments was “largely” a result of the Respondent’s computer “failing” to generate proper invoices. (ALJD at 5, lines 24-27).*

There is no testimony from Ms. Davenport to support that the reason for the delay is “largely” due to the Respondent. In May, 2010, Mr. Bizzaro contacted Ms. Davenport to discuss the outstanding monies owed by CCM. (Tr. at 378, lines 5-11; p. 433, lines 21-25; p. 434, lines 1-5; p. 460, lines 16-20). Due to the Respondent’s computer problems, it was unable to send the invoices to Ms. Davenport until June 3, 2010. (Tr. at 374, lines 17-25; p. 375, lines 1-7; p. 395, lines 20-25; p. 396).

Ms. Davenport testified that she handles bill discrepancies. (Tr. at 408-09). In order to resolve the billing issue, she engages in a process known as “reconciliation.” (Tr. at 408-09). When reconciling the bill, Ms. Davenport refers to the pertinent documents maintained by both the customer and CCM in order to confirm whether or not the services were rendered and accounted for. (Tr. at 412-17).⁶ She testified that this process takes time as it is done by her and two other assistants. (Tr. at 429, lines 11-15). At the time of the hearing, CCM had only reconciled the 2009 bills. (Tr. at 381, lines 7-14). Based upon this, it is unclear as to how the ALJ found that the Respondent is responsible for CCM’s timely process of reconciliation.

20. *The ALJ erred in finding that a letter dated June 3, 2010 was sent to Cheryl Davenport of CCM which “stated in substance that Evenflow couldn’t carry such a large balance and continue to provide the best service.” (ALJD at 5, lines 29-31).*

The testimony and evidence in this matter does not support this finding. The evidence presented shows that the Respondent sent to Ms. Davenport a fax cover sheet dated June 3, 2010 annexing copies of the outstanding invoices. (Tr. at 374, lines 19-25; p. 377, lines 1-10). The fax cover sheet merely stated “Please see attached invoices that were denied for payment for the following patients.” (Tr. at 377, lines 6-7).

There was a telephone conversation between Mr. Bizzaro and Ms. Davenport discussing the outstanding invoices. (Tr. at 378). It was during this conversation where Mr. Bizzaro conveyed that, due to the large balance, the Respondent could not continue to provide full services to CCM. It was also during this conversation that Mr. Bizzaro indicated that some of its drivers were going to be laid off. (Tr. at 380, lines 12-18). Neither of these statements was made in any letters to CCM.

⁶ Ms. Davenport testified that she reviews documents maintained in the CCM computer system as well as the paper documents relating to client sign-in and transportation logs when trying to reconcile disputed invoices. (Tr. at 412, lines 9-20)

21. The ALJ erred in finding that the monies owed by CCM was “not a situation where long overdue payments are typically a prelude to non-payment.” (ALJD at 5, lines 36-37).

The significant debt owed by CCM, which currently remains unpaid, contradicts the ALJ’s findings that the bills will eventually be paid. The evidence presented shows that CCM’s process to reconcile contested bills is time consuming. (Tr. at 412; p. 428-29). The purpose for the reconciliation is due to CCM’s position that services were not rendered. (Tr. at 410, lines 11-17). At the time of the hearing, CCM had recently finished reconciling and remitting payment for the services rendered in 2009. (Tr. at 381, lines 7-14). CCM did not provide a time frame as to when it anticipated having the 2010 invoices reconciled and they remain unpaid to date. (Tr. at 381, lines 10-15).

22. The ALJ erred in finding that payments to the Respondent for CCM services would be paid directly from Medicaid. (ALJD at 5, lines 39-40).

Ms. Davenport testified that once she verifies that a CCM client was provided with a transport, she submits the bill to Medicaid for payment. (Tr. at 383-84). Medicaid pays CCM directly and they, in turn, pay the Respondent. (Tr. at 383, lines 21-25). There are no monies directly exchanged between Medicaid and the Respondent.

23. The ALJ erred in finding that the Respondent hired two new employees in June 2010. (ALJD at 5, lines 44-45).

This is a mischaracterization of the evidence. During the hearing, the Counsel for the General Counsel offered into evidence two driver employment applications submitted to Evenflow around June 2010. (Tr. at 597-98). On the documents, there was a handwritten notation indicating “hired June 14, 2010.” *Id.* However, the IRS 2010 W-4 forms executed by both these employees are dated October 29, 2010. (Tr. at 602, lines 21-25). Mr. Bizzaro testified that the W4 forms are not executed until after an employee is hired. (Tr. at 600-01). Other than a notation on the employment application, there is no evidence or testimony to support that both of these employees were hired in June 2010.

24. The ALJ erred in ruling that the Respondent failed to fully comply with the Counsel for the General Counsel's demand for payroll records. (ALJD at 5, lines 46-51).

At the hearing, testimony was offered relating to the disclosure of payroll records. It was conveyed that Evenflow experienced intermittent computer “crashes” which impacted its ability to produce the information requested. (Tr. at 300-03; p. 613). Mr. Bizarro testified that the computer “crashes” deleted the data inputted and thus, made it irretrievable. *Id.* Evidence of Evenflow’s computer problems were confirmed by Ms. Davenport when she testified that there was a point in time where Evenflow could not provide her with the outstanding invoices due to the computer “crashes.” (Tr. at 395). Ms. Davenport testified that she was told by Mr. Bizarro that the data had been deleted as a result. (Tr. at 395-96). The inability to provide the information is different than an unwillingness to provide the information.

25. The ALJ erred in finding that the IRS Notice of Levy served upon Neighborhood Health Providers LLC was “apparently similar to a garnishment.” (ALJD at 6, lines 4-7).

For purposes of brevity, we aver to the response set forth in paragraph 18 above.

26. The ALJ erred in finding that there was “no” evidence that any of the Respondent’s other customers were required to pay money to the IRS. (ALJD at 6, lines 10-11).

For purposes of brevity, we aver to the response set forth in paragraph 17 and 18 above.

27. The ALJ erred in finding that there was “no” evidence presented to show that the tax levy had “any substantial affect” on the Respondent’s business. (ALJD at 6, lines 11-14).

The evidence presented shows that the IRS is actively in the process of seizing the Respondent’s account receivables in an effort to satisfy its debt. (Tr. at 452; p. 456; p. 561; p. 573, lines 8-16). The Respondent is a small “mom and pop” organization which has an almost half a million dollar tax levy imposed against it. It is perplexing how the ALJ found the significant IRS tax levy, in addition to the outstanding monies owed by CCM, were not proof of a “substantial affect” on the Respondent’s business.

28. The ALJ erred in finding that no evidence was produced to show that the amounts owed to and diverted from the Respondent comprised a significant portion of its business. (ALJD at 6, lines 15-16).

For purposes of brevity, we aver to the response set forth in paragraph 27 above.

29. The ALJ erred in finding that the outstanding monies owed by CCM was withheld “mostly through the fault of the Respondent.” (ALJD at 6, lines 21-22).

For purposes of brevity, we aver to the response set forth in paragraph 19, 21 and 22 above.

30. The ALJ erred in finding that the evidence supported that Evenflow hired two drivers after learning of its financial problems. (ALJD at 6, lines 24-27).

For purposes of brevity, we aver to the response set forth in paragraph 23 above.

31. The ALJ erred in ruling that the decision to lay off the employees was not made until September 2010. (ALJD at 6, lines 27-28).

Contrary to the ALJ’s contention, the evidence presented at the hearing supports that the Respondent had been discussing employee lay-offs prior to September 2010. Mr. Bizzaro testified that he first had a discussion with Evenflow owners Julie Bizzaro and Jack Mahanian in May 2010 about possible employee lay-offs. (Tr. at 451, lines 1-5). Ms. Davenport testified that she first became aware of the potential lay-offs of the Evenflow staff dedicated to the CCM transports around May 2010. (Tr. at 380, lines 13-25). She testified that she asked Mr. Bizzaro to “hold off” on the lay-offs as she was “working” to get the invoices paid. (Tr. at 381, lines 1-6).

As the Respondent’s financial situation had not improved by September 2010, Mr. Bizzaro, Mrs. Bizzaro and Mr. Mahanian explored, once again, the option of employee lay-offs. (Tr. at 484, lines 9-10; p. 605, lines 10-11; p. 609, lines 12-25). As they found there was no other choice, the Respondent went forward with the employee lay-offs on September 23, 2010. (Tr. at 113, lines 23-25; p. 152, lines 15-25; p. 166, lines 22-25; p. 185, lines 24-25).

32. *The ALJ erred in ruling that the Respondent laid off the employees “after” it became “aware that the Union had restarted its organizing campaign in or about August 2010.” (ALJD at 6, lines 28-31).*

It appears the ALJ is basing this finding on a conversation held between Mr. Bizzaro and Mr. Rodriguez in August 2010. (Tr. at 464-467). Mr. Rodriguez told Mr. Bizzaro that he overheard that the Respondent paid \$100,000 to the Union. (Tr. at 464, lines 20-25). During this conversation, Mr. Bizzaro indicated to Mr. Rodriguez that he was wrong and should “do his homework.” (Tr. at 465, lines 14-18). This, in and of itself, cannot be considered “knowledge” on part of the Respondent that an organizing campaign was taking place.

As indicated at great length above, the Respondent’s financial problems came to a head around May 2010 with the notification of the IRS tax levy and the outstanding balance owed by CCM. (Tr. at 374-75; p. 451-52; p. 582-85). As the Respondent’s financial situation did not seem to improve, an earlier decision to institute employee lay-offs was put into effect in early September. (Tr. at 484, lines 9-10; p. 605, lines 10-11; p. 609, lines 12-25). At this time, Mr. Bizzaro was not aware of any Union organizing drive occurring at Evenflow as he thought the matter was resolved with the settlement agreement dated July 14, 2010. (Tr. at 462, lines 22-25; p. 463, lines 15-25; p. 464, lines 3-13, p. 483, lines 21-25).

33. *The ALJ erred in finding that the Respondent had knowledge of the Union’s restarting of an organizing campaign. (ALJD at 6, lines 34-35).*

For purposes of brevity, we aver to the response set forth in paragraph 32 above.

34. *The ALJ erred in finding that Mr. Bizzaro expressed anti-Union animus. (ALJD at 6, lines 35-36).*

For purposes of brevity, we aver to the responses set forth in paragraphs 9-13 above.

35. The ALJ erred in finding that the timing of the “terminations” was consistent with an anti-union motivation. (ALJD at 6, lines 36-37).

For purposes of brevity, we aver to the legal arguments set forth below.

36. The ALJ erred in ruling that the Counsel for the General Counsel established a prima facie case. (ALJD at 6, lines 37-38).

For purposes of brevity, we aver to the legal arguments set forth below.

37. The ALJ erred in finding that the Respondent failed to comply with the Counsel for the General Counsel’s subpoena for documents relating to the IRS claims. (ALJD at 6, lines 45-48).

There is nothing to support that the Respondent failed, whether intentionally or inadvertently, to comply with the April 2011 subpoena. During the Counsel for the General Counsel’s nine month investigation into the charge, the Respondent provided, via its attorney, a litany of documents inclusive of the ones relating to the IRS claim. On the documents provided, there was contact information for the IRS agent handling the tax levy. (Tr. at 594, lines 1-6). Counsel for the General Counsel chose not to contact the IRS agent in order to discuss or verify the status of the tax lien as she was simply “not interested.” (Tr. at 591-94). The Counsel for the General Counsel’s failure to do its due diligence with the information provided by the Respondent does not, in any way, equate to a failure to comply with the subpoena on part of the Respondent.

38. The ALJ erred in finding that Mr. Cabrera had no knowledge of monies being owed to the Respondent. (ALJD at 6, lines 50-51).

There is no support for this finding. During his testimony, Mr. Cabrera testified that he was aware that money was owed to Evenflow but could not recall when he first became aware. (Tr. at 507, lines 17-20).

39. The ALJ erred in ruling that the Respondent failed to meet its burden. (ALJD at 7, lines 2-3).

For purposes of brevity, we aver to the legal arguments set forth below.

40. *The ALJ erred in ruling that the lay-offs of the employees violated Section 8(a)(1) and 8(a)(3) of the Act. (ALJD at 7, lines 2-4).*

For purposes of brevity, we aver to the legal arguments set forth below.

III. Conclusions of Law

41. *The ALJ erred in ruling that the Respondent illegally interrogated the employees regarding Union activity and in violation of Section 8(a)(1) of the Act. (ALJD at 7, lines 5-9).*

For purposes of brevity, we aver to the legal arguments set forth below.

42. *The ALJ erred in ruling that the Respondent “threatened” the employees with “physical harm” in retaliation of Union activity and in violation of Section 8(a)(1) of the Act. (ALJD at 7, lines 10-12).*

For purposes of brevity, we aver to the legal arguments set forth below.

43. *The ALJ erred in ruling that the Respondent’s discharge of the employees was due to their Union activity and in violation of Section 8(a)(1) and 8(a)(3) of the Act. (ALJD at 7, lines 14-15).*

For purposes of brevity, we aver to the legal arguments set forth below.

44. *The ALJ erred in ruling that the Respondent committed an unfair labor practice and violated Section 2(6) and 2(7) of the Act. (ALJD at 7, lines 17-18).*

For purposes of brevity, we aver to the legal arguments set forth below.

IV. Remedy

45. *The ALJ erred in finding that the Respondent’s actions warrant a cease and desist order. (ALJD at 7, lines 21-24).*

For purposes of brevity, we aver to the legal arguments set forth below.

46. *The ALJ erred in finding that the Respondent “must” offer the employees reinstatement and back pay for “discriminatorily” discharging them. (ALJD at 7, lines 25-27).*

For purposes of brevity, we aver to the legal arguments set forth below.

V. Order

47. *The ALJ erred in finding that the Respondent must cease and desist from interrogating its employees about Union activity and sympathies. (ALJD at 7, lines 40-43).*

For purposes of brevity, we aver to the legal arguments set forth below.

48. *The ALJ erred in finding that the Respondent must cease and desist from “asking” its employees to report Union activities and supporters. (ALJD at 7, lines 44-45).*

For purposes of brevity, we aver to the legal arguments set forth below.

49. *The ALJ erred in finding that the statement “calling out the dogs” can be construed as a threat of physical harm to the employees. (ALJD at 7, lines 46-48).*

For purposes of brevity, we aver to the legal arguments set forth below.

50. *The ALJ erred in finding that the Respondent threatened the employees with physical harm due to their union support. (ALJD at 8, lines 2-3).*

For purposes of brevity, we aver to the legal arguments set forth below.

51. *The ALJ erred in finding that the Respondent discharged the employees due to their Union support and sympathies. (ALJD at 8, lines 5-6).*

For purposes of brevity, we aver to the legal arguments set forth below.

52. *The ALJ erred in finding that the Respondent interfered, restrained or coerced against the employees’ rights under Section 7 of the Act. (ALJD at 8, lines 8-9).*

For purposes of brevity, we aver to the legal arguments set forth below.

53. *The ALJ erred in ruling that Anthony Smidth, Nelson Rodriguez, Julio Castro, Luis Correa and Lindbergh Wallace should be reinstated within 14 days of the Order to their previous positions without any affect on their seniority. (ALJD at 8, lines 13-16).*

For purposes of brevity, we aver to the legal arguments set forth below.

54. *The ALJ erred in ruling that the employees should be issued any lost earnings and benefits “suffered as a result of the discrimination against them”. (ALJD at 8, lines 18-20).*

For purposes of brevity, we aver to the legal arguments set forth below.

55. *The ALJ erred in ruling that the Respondent produce all payroll records, social security records, time cards, personnel records and all other records necessary to analyze amount of back pay due to the employees. (ALJD at 8, lines 27-32).*

For purposes of brevity, we aver to the legal arguments set forth below.

56. *The ALJ erred in ruling that the Respondent is to post and distribute to all of its employees the notice annexed to its decision as Appendix “B” for a period of 60 days. (ALJD at 8, lines 34-50).*

For purposes of brevity, we aver to the legal arguments set forth below.

57. *The ALJ erred in ruling that the Respondent file a sworn certification attesting to the posting and distribution of the notice annexed to its decision as Appendix “B.” (ALJD at 9, lines 2-5).*

For purposes of brevity, we aver to the legal arguments set forth below.

STANDARD OF REVIEW

It is well established that the Board conducts a *de novo* review of the entire record when evaluating an Administrative Law Judge's findings of fact. *See, Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950). While great deference is given to an ALJ's credibility findings, such findings are subject to be overruled when a clear preponderance of all the relevant evidence convinces the Board otherwise. *Id.*

A failure of an ALJ to explicitly review and give due consideration to all the relevant evidence taints his or her credibility resolutions. *Jewel Bakery, Inc.*, 268 NLRB 197 (1984)(Board overruled an ALJ's credibility determination on the basis that ALJ omitted critical facts, such as the employee's questionable employment record, from its finding and determination); *see, Poinsett Lumber and Manufacturing Co.*, 147 NLRB 1197 (1964)(An ALJ's failure to consider uncontradicted testimony/evidence which discredited the claims made by the charging party resulted in the Board overruling the ALJ's decision); *see also, Valley Steel Products Co.*, 111 NLRB 1338 (1955)(Board agreed with Respondent's exceptions that the ALJ failed to consider the conflicts and inconsistencies amongst General Counsel's witnesses which raised doubts as to their credibility.)

ARGUMENT

I. THE EVIDENCE DOES NOT SUPPORT THAT THE RESPONDENT'S GENERAL MANAGER JOHN BIZZARO INTERROGATED THE ALLEGED DISCRIMINATEES ABOUT THEIR UNION ACTIVITIES

Under Section 8(a)(1) of the Act, an employer can commit an unfair labor practice when it interferes, restrains or coerces its employees in the exercise of its guaranteed rights under Section 7. The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

Thus, it is violative of the Act for the employer or its supervisors to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 117 (1984); *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

Similarly, with regard to employer interrogations of employees, it is well established that the interrogation of an employee is not illegal *per se*. The Board has held that the test of the illegality of interrogation is whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, nature of information sought, and the identity of the questioner. *Demco New York Co.*, 337 NLRB No. 135 (2002).

In the instant matter, there is no evidence to support that the Respondent's General Manager John Bizzaro interrogated the alleged discriminatees regarding their purported union activity. Each of the alleged discriminatees claim they had conversations with Mr. Bizzaro where he allegedly inquired as to whether they were having discussions with the Union representatives. They claim Mr. Bizzaro requested that they provide him with the names of any employee who executed an authorization card. They also claim that these alleged conversations were not witnessed by anyone and none of the alleged discriminatees could indicate when they allegedly occurred.

There is nothing to support that the alleged inquiries interfered, restrained or coerced any of the alleged discriminatees against the purported Union activity. As the purported Union activities occurred off site, there is no independent evidence to support that the Respondent knew the alleged discriminatees were engaging in such activity. These alleged questions by Mr. Bizzaro, under the totality of the circumstances, do not rise to the level of an interrogation, as defined by well established legal precedent.

It is also claimed by the alleged discriminatees, and vehemently denied by the Respondent, that Mr. Bizzaro threatened to “call his dogs out.” (Tr. at 127, lines 21-22; p. 470, lines 6-8). Other than the non-credible⁷ testimony of the alleged discriminatees, there was no independent evidence offered to support that this statement was made. Assuming, *arguendo*, that Mr. Bizzaro made this statement, it is not clear as to how the ALJ found it could be “reasonably construed” that he was threatening the employees with physical harm. The ALJ does not cite to any legal authority which would support that such statement rises to the level of a threat of physical harm. The alleged discriminatees admit that they did not feel threatened by Mr. Bizzaro at any point during these alleged inquiries. (Tr. at 107, lines 1-14; p. 139, lines 13-16; p. 163, lines 10-15). As such, the ALJ’s finding must fail.

In summary, the evidence in this case does not support that the Respondent unlawfully interrogated or threatened to physically harm the alleged discriminatees in violation of Section 8(a)(1) of the Act.

II. THE DISPATCHERS ARE NOT SUPERVISORS OR AGENTS AS DEFINED UNDER THE ACT

i. Definition of a “Supervisor” under the NLRA

Section 2(11) of the National Labor Relations Act (“Act”) defines the term “supervisor” as:

“[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their

⁷ The issues surrounding the credibility of the alleged discriminatees are discussed at length in paragraphs 10-12 *supra*.

grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

The burden of providing supervisory status rests on the party alleging that such status exists. *See, e.g., California Beverage Company*, 283 NLRB 328 (1987). The statutory indicia outlined in Section 2(11) are in the disjunctive and only one needs to exist in order to confer supervisory status on an individual. *See, e.g. Miller Electric Company*, 301 NLRB No. 41 at ALJ sl. op. p. 10 (January 24, 1991) and *Opelika Foundry*, 281 NLRB 897 at 899 (1986). As noted in *Hydro Conduit Corp.*, 254 NLRB 433 (1981), Section 2(11) insists that a supervisor (1) have authority, (2) to use independent judgment, (3) in performing such supervisory functions and (4) in the interest of management.

An employer’s holding out of an individual as a supervisor to his/her employees is not necessarily dispositive of supervisory status. *Polynesian Hospitality Tours*, 297 NLRB 228 (1989). An individual's status as a supervisor is not determined by the individual's title or job classification but rather is determined by the individual's functions and authority. *See, e.g., Mack's Supermarkets, Inc.*, 288 NLRB 1082 (1988). Isolated or sporadic exercise of Section 2(11) authority is insufficient to predicate a supervisory finding. Likewise, employees who are merely conduits for relaying management information to other employees are not true supervisors. *California Beverage Company, supra*. However, supervision of even one employee is sufficient if one or more of the supervisory indicia are met. *Opelika Foundry, supra*. Additionally, being able to keep things running smoothly is insufficient to confer supervisory status on an individual. *California Beverage Company, supra*.

ii. *Definition of “Agent” under the NLRA*

An agent, within the meaning of Section 2(2) and (13) of the Act, is an employee who the other employees could reasonably believe, under all the circumstances, reflects the company’s policy and speaks/acts for management. *See, American Door Co.*, 181 NLRB 37, 41 (1970); *Waterbed World*, 286 NLRB 425 (1987). When trying to determine whether a person is an agent of the employer, the Board has long applied common law agency principles. *Dr. Rico Perez Products*, 353 NLRB 453, 463

(2008); *see also*, *NLRB v. Longshoreman (ILWU) Local 10 (Pacific Maritime Assoc.)*, 283 F.2d 558, 563 (9th Cir. 1960).

An agent's authority can either be "apparent" or "ratified." Apparent authority is created through a "manifestation by the [employer] to a third party that supplies a reasonable basis for the [third party] to believe that the [employer] has authorized the alleged agent to do the acts in question." *See generally Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). "The Board has held that apparent authority may be inferred when an employee acts with the cooperation of or in the presence of supervisors." *Technodent Corp.*, 294 NLRB 924, 926 (1989). A failure of an employer to "disavow and/or discipline an employee for conduct engaged in with company knowledge may warrant an inference of apparent authority." *See, e.g. Haynes Industries*, 232 NLRB 1092, 1099-1100 (1977).

Ratification of authority is defined as "the affirmance by [an employer] of a prior act that did not bind him but which was done, or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Technodent Corp., Id.* An "affirmance" is defined as either "(a) a manifestation of an election by one on whose account an authorized act has been done to treat the act as authorized, or (b) conduct by him justifiable only if there were such an election." *Id.* An employer's failure to repudiate an unauthorized transaction can be considered an "affirmance." *Id.*

iii. The Dispatchers are neither a supervisor nor an agent

Simply, Mr. Cabrera and Mr. DeSilva are employed as dispatchers for the Respondent. Their only responsibility is to devise and communicate the daily transportation schedules to the drivers. (Tr. at 507-10). The only independent judgment they exercise during the course of their employment involved the rearranging of the drivers' transportation routes. (Tr. at 509, lines 14-18). Aside from being able to independently handle the transport schedule, Mr. Cabrera or Mr. DeSilva do not possess any authority to act on behalf of the Respondent.

Mr. DeSilva's testimony does not offer any information supportive that he was ever involved in the hiring, firing, disciplining or involved in the implementation of the Respondent's policies. The only testimony he offered involved his witness accounts with physical threats made by alleged discriminatee Mr. Correa. There was no other testimony solicited from Mr. DeSilva during the course of the hearing. We refer the Board to the information outlined in paragraph 3 *supra* accordingly and will only address the facts as they relate to Mr. Cabrera.

Mr. Cabrera never acted outside and above the scope of his dispatching position. He was not involved in the hiring of any the Respondent's employees, inclusive of the discriminatees. (Tr. at 513, lines 17-19). He has, on occasion, given an opinion on an employee application; an opinion which did not hold weight as Mr. Bizzaro and his wife made the hiring decisions. (Tr. at 513, lines 17-23). The rendering of an opinion does not, in and of itself, lend an inference that Mr. Cabrera had the authority, whether apparent or ratified, to hire new employees for the Respondent. (Tr. at 269, lines 20-23; p. 594, lines 10-12).

There is no evidence to support that Mr. Cabrera disciplined or was involved in disciplining any of the Respondent's employees, including the alleged discriminatees. He did not participate, or implement in any way, the Respondent's decision to lay-off the alleged discriminatees. (Tr. at 269, lines 20-23; p. 513, lines 6-19; p. 594, lines 1-10). The evidence supports that it was only Mr. Bizzaro, his wife and Mr. Mahanian who participated in the discussions surrounding the employee lay-offs. (Tr. at 451, lines 1-5). Also, Mr. Bizzaro testified that it was he and Mr. Mahanian who notified the alleged discriminatees that they were being laid off. (Tr. at 490).

To conclude, there is nothing to support that Mr. Cabrera or Mr. DeSilva can be considered a supervisor or an agent of the Respondent. Counsel for the General Counsel failed to offer a scintilla of evidence which would lend an inference that Mr. Cabrera or Mr. DeSilva acted in a capacity other than a dispatcher. The policies devised and implemented by the Respondent have not involved Mr. Cabrera or Mr. DeSilva in any way. The ALJ erred in finding that Mr. Cabrera and Mr. DeSilva were an agent

or supervisor of the Respondent. As such, any knowledge they may have had regarding the alleged discriminatees purported union activity cannot be imputed upon the Respondent.

III. THE RESPONDENT'S DECISION TO LAY-OFF SOME OF ITS EMPLOYEES WAS NOT DISCRIMINATORY

The Federal Labor Relations Law defines “discrimination” as employer conduct which results in differential treatment of employees as a result of their union activities, union membership or lack thereof. The basis of the preferential treatment stems from encouragement or discouragement of membership in a labor organization. Nevertheless, the foregoing statutory restrictions do not interfere with the employer’s right to discharge, discipline, lay-off, or otherwise treat differently their employees, so long as encouragement or discouragement of union membership or activity is not the motivating factor. Absent any anti-union motivation, employees may be discharged and/or laid off for good cause, bad cause or no cause at all.

The NLRB has held that the right of an employer to lay-off its employees is not affected by the Act as long as the employer’s decision to lay-off is not stemming from a discriminatory motive relating to an employee’s union activities or affiliations. *NLRB v. Piezo Manufacturing Corp.*, 290 F.2d 455 (2d Cir 1961). Moreover, if an employer does not have knowledge of an employee’s union membership or activity, a discriminatory motive for layoff cannot be established. *See, Beaver Valley Canning Co. v. NLRB*, 332 F.2d 429 (8th Cir. 1964); *see also, Eastman Kodak Co.*, 194 NLRB 220 (1971)(Board held that, absent any evidence, an inference of anti-union animus is not found when an employer laid off its employees after their attendance at a union meeting).

An employer is found to have violated Section 8(a)(3) of the National Labor Relations Act (“Act”) when it “retaliate[es] against [its] employees for engaging in union activity.” *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1312 (7th Cir. 1998). The burden is placed upon the General Counsel to show, by a preponderance of the evidence, that an employer’s anti-union animus

was a substantial or motivating factor in its decision to make an adverse employment decision. *Id.* at 1314; *See, Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 356 and n.1 (7th Cir. 1998).

Counsel for the General Counsel's burden is composed of two inter-connected components: (1) the employer had anti-union animus that is, or was, motivated to discriminate against employees engaged in union activities; and (2) the animus was, in fact, a substantial or motivating factor in the decision to terminate the employee. *Salem Leasing Corp. v. NLRB*, 774 F.2d 961, 967 (4th Cir. 1985). Factors such as an employer's knowledge of the employee's alleged union activities are taken into consideration when evaluating whether the employer possessed an anti-union animus. *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 955 (D.C. Cir. 1988).

Once Counsel for the General Counsel meets its burden, the burden of proof is then shifted to the employer to show that it had a legitimate, non-discriminatory reason, to have taken the contested employment action in spite of any union activity. *Joy Recovery Technology*, 134 F.3d at 1314. *See generally, Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394 (1983).

The facts in the instant matter do not support that the Respondent, or its principal, was aware that any of the alleged discriminatees were engaged in union activities prior to the time of the lay-offs. As explained at great length in Point II, *supra*, the dispatchers are not a supervisor or agent of the Respondent and any knowledge they may have had cannot be imputed to the Respondent. The alleged discriminatees testified that they discussed and/or conducted union activity at either an off-site location or via telephone. (Tr. at 93, lines 15-17; p. 119, lines 22-25; p. 125, lines 21-25; p. 170-71; p. 195, lines 8-17). They make claims that they discussed Union matters with Mr. Bizzaro but there are no witnesses or independent evidence to support their claim.

As discussed at great length in paragraphs 15-21 *supra*, the evidence is crystal clear in that the Respondent had financial problems which resulted in it having to lay off the alleged discriminatees.

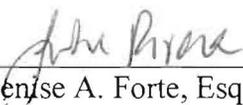
Discussions regarding the lay-offs occurred as early as May 2010. When deciding which employees to lay off, the Respondent took into consideration additional non-discriminatory reasons. (Tr. at 177-78; p. 402-03; p. 470-71; p. 473-74; p. 480, lines 1-7; p. 620-21; p. 624; p. 685-87; p. 690, lines 1-7). The Respondent's financial issues were known, in some form, by the Discriminatees. (Tr. at 136, lines 1-5; p. 180-183). At the time of the hearing, the Respondent was still in arrears with the IRS and was still owed monies by CCM.

Based upon the foregoing, there is no evidence presented by Counsel for the General Counsel which would support that the Respondent held animus toward the Union and acted as a result of the same. As such, the ALJ's recommendation and order should be denied.

CONCLUSION

It is respectfully urged that the Administrative Law Judge's Order dated August 30, 2011 be denied in its entirety.

Dated: White Plains, New York
October 21, 2011



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