UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTER CITY INTERNATIONAL TRUCKS, INC.	:	
Respondent	:	Cases Nos. 9-CA-45338
	:	9-CA-45402
And	:	9-CA-45437
	:	9-CA-45820
INTERNATIONAL ASSOCIATION OF MACHINISTS & AREOSPACE WORKERS AFL-CIO DISTRICT LODGE 54, LOCAL LODGE 1471	:	9-CA-45975
	:	9-CA-46081
	:	9-CA-46136
	:	9-CA-46183
Charging Party	:	

CENTER CITY INTERNATIONAL TRUCKS, INC.'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE SANDRON'S DECISION AND BRIEF IN SUPPORT

Ronald L. Mason (#0030110)
Aaron T. Tulencik (#0073049)
William H. Dulaney III (#0037969)
Mason Law Firm Co., L.P.A.
425 Metro Place North, Suite 620
Dublin, Ohio 43017
rmason@maslawfirm.com
atulencik@maslawfirm.com
Counsel for Respondent,
Center City International Trucks, Inc.

Eric Oliver
Jamie Ireland
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
eric.oliver@nlrb.gov
jamie.ireland@nlrb.gov
Counsel for the General Counsel

Sorrell Logothetis
Cook, Portune & Logothetis, LLC
22 West Ninth Street
Cincinnati, Ohio 45202
slogothetis@econjustice.com
SMoorhouse@econjustice.com
For the Charging Party

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RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE JUDGE SANDRON'S DECISION

Exception I – Respondent opposes Judge Sandron credibility resolutions throughout his Decision. Respondent will address the particular credibility resolutions in its supporting brief attached hereto.

Exception II – Judge Sandron erred in finding Respondent did not establish that it would have reprimanded Jeff Ward in the absence of his union activities and, therefore, violated sections 8(a)(3) and (1) of the Act.

Responded satisfied the *Wright Line* analysis in proving by a preponderance of the evidence that it would have reprimanded Jeff Ward notwithstanding his union activity.

Exception III – Judge Sandron erred in finding Respondent unilaterally changed its policy governing unit employees' use of vacation days and, therefore, violated sections 8(A)(5) and (1) of the Act.

Exception IV – Judge Sandron erred in finding Respondent did not establish that it would have terminated Russ Mason in the absence of his union activities and, therefore, violated sections 8(a)(3) and (1) of the Act.

Responded satisfied the *Wright Line* analysis in proving by a preponderance of the evidence that it would have terminated Russ Mason notwithstanding his union activity.

Exception V – Judge Sandron erred in finding Respondent unilaterally changed its policy governing the re-employment of mechanics who re-acquire their CDL's and, therefore, violated sections 8(a)(5) and (1) of the Act.

General Counsel did not make such an allegation in the Complaint.

Exception VI – Judge Sandron erred in finding Respondent unilaterally changed its health insurance policy and failed to timely furnish the union with information regarding the health insurance policy and, therefore, violated sections 8(a)(5) and (1) of the Act.

Exception VII – Judge Sandron erred in finding Respondent engaged in bad faith or surface bargaining and, therefore, violated sections 8(a)(5) and (1) of the Act.

General Counsel did not allege surface bargaining in the Complaint.

I. STATEMENT OF THE CASE

Center City International Trucks, Inc. ("Center City," "Company" or "Respondent") sells, services and repairs tractor trailers, buses and is an Isuzu truck dealership. Idealease is a leasing Company connected to Center City. Idealease technicians service trucks which are owned by Idealease and then rented and/or leased to customers. Idealease technicians generally service trucks off site while Center City technicians service customer owned trucks on site. All technicians are in the bargaining unit. Center City employs nearly 100 people, approximately 35-38 of which are members of the bargaining unit. The Company is comprised of two facilities in the Columbus, Ohio area, the West location[1] and the East location.[2] International Association of Machinists and Aerospace Workers, District 54, Local Lodge 1471 ("charging party" or "union") represents the Company's employees and has done so for approximately 40 years. The bargaining unit is comprised of the following:

> All full-time [and regular part-time] mechanics, leadmen, mechanic's helpers, mechanic's apprentices employed by Respondent at its facilities located at 4200 Currency Drive, Columbus, Ohio and 10271 Hazelton-Etna Road, Pataskala, Ohio but excluding the service station manager, service station assistant manager, all office and clerical employees, all retail parts and service representatives, and all guards, professional employees and supervisors as defined in the Act.

The parties' most recent collective bargaining agreement expired on October 31, 2009. (General Counsel's Exhibit ["G.C."] 2.) The first bargaining session was held on September 9 2009. (Trial Transcript ["Tr."] 1278.) At the outset of negotiations Mark Chema[3] ("Chema") was the lead negotiator for the union. (Tr. 664.) On November 9, 2009 Mark Ward ("M. Ward") replaced Chema as the union's lead negotiator. On January 7, 2010 Chema was once again the union's lead negotiator. (Respondent's Exhibit ["R"] 1 at pp. 60-65 & Tr. 664.) On

[1] The West facility is located at 4200 Currency Dr. in Columbus, Ohio.
[2] The East facility is located at 10271 Hazelton Etna Road in Pataskala, Ohio.
[3] Chema is the Business Representative for IAM District Lodge 54.

January 20, 2010 the Company was greeted with yet another union participant as Bill Rudis[4] ("Rudis') was assigned to assist Chema due to the fact that he was "fairly new Business Agent." (Tr. 665.) Rudis, is the current chief negotiator for the union and has been since September 2010. Ron Mason ("Mason"), the Company's attorney, was its lead negotiator from September 2009 thru October 2010. Mason was assisted by Aaron Tulencik, Pat Pesta[5] ("Pesta") and various other times, Nick Wahoff[6] ("Wahoff"). Tim Reilly ("Reilly"), owner of Center City, assumed the position of lead negotiator for the Company in January 2011. Reilly was assisted by Pesta and Wahoff.

This consolidated case was tried before Administrative Law Judge Ira Sandron in Columbus, Ohio, on April 4 thru 8, 2011 and May 17 thru 19, 2011. The Complaint alleged various violations of 8(a)(1), (3) and (5) of the Act. Specifically, the alleged 8(a)(3) and (1) violations at issue in this appeal are as follows: the January 27, 2010 attendance reprimand issued to Jeff Ward ("Ward") and the November 30, 2010 termination of Russ Mason ("Russ Mason"). (Decision p. 42.)

The alleged 8(a)(5) and (1) violations at issue in this appeal are as follows: the Company's November/December 2009 unilateral change to its policy governing unit employees' use of vacation days carried over into the following calendar year; the November 1, 2010 unilateral implementation of a health insurance plan for bargaining unit employees and the Company's failure to furnish the union with certain information regarding its health plan; the Company's November 30, 2010 unilateral change with respect to re-employing mechanics who

[4] Rudis is a Grand Lodge Representative with the IAM. (Tr. 767.)
[5] Pat Pesta is the Company's Director of Parts and has been for the past eight (8) to nine (9) years. Pesta has been on the Company's bargaining committee since bargaining commenced in September 2009. (Tr. 1188.)
[6] Nick Wahoff is the Company's the Government Sales Manager. Wahoff has been a member of the Company's bargaining committee since spring 2010.

reacquire their Commercial Driver's License ("CDL"); and that the Company engaged in bad faith and/or surface bargaining. (Id.)

The alleged 8(a)(1) violation at issue in this appeal is as follows: the Company threatened employees with discipline as retaliation for their membership on the union's bargaining committee. (Id.)

II. FACTS

A. Jeff Ward's January 27, 2010 Attendance Reprimand

The attendance/tardiness issue was first discussed during the January 25, 2010 bargaining session. R. 1 at pp. 89-99. The Union inquired as to whom at the Company determines excessive absenteeism. (Id. at pp. 92-93) The Union also inquired as to the specific guidelines in regard to absenteeism/tardiness. (Id.) The Company informed the Union that the Company's Service Managers use their own discretion in determining what is or is not reasonable in regards to absenteeism. (Id. at p. 96.) Furthermore, the Company advised the Union that six (6) minutes is the guideline for tardiness. (Id.) Thus, if an employee is six (6) or more minutes late, he may, at the discretion of the Service Manager, be issued discipline for being tardy. (Id.) The Company advised the Union that this was not a written policy. Lastly, the Company further informed the Union that it cannot recall ever having terminated ANYBODY for an attendance/tardiness problem. (Id.) The following interaction took place during the January 25, 2010 bargaining session:[7]

> MC – Alright. Moving onto request #3. Who at management determines tardiness or excessive absenteeism?
>
> RM – Where does it say that in number 3?
>
> JW – Explaining that some of the evaluations note excessive absenteeism and want to know what that means. Is there a set number, what is the guideline?

[7] MC – Mark Chema; RM – Ron Mason; JW – Jeff Ward; BR – Bill Rudis; PP – Pat Pesta; AT – Aaron Tulencik

RM – Oh, ok. So first of all it is a new question. It wasn't in the original request for information. Obviously the employee calls in and tells us if he is going to be absent or late.

MC & BR – Who do they call?

RM – Use to have an HR person.

PP – Service managers deals with this.

BR – Is that the same throughout the bargaining unit or is at the service manager's discretion? The reason I ask is that employees are telling us that managers treat others differently.

RM – We will have to get back to you on that.

MC – Next question is no specific written guidelines to what the attendance policy is? For instance Randy Mongol's 2009 Performance Review (document number 355) indicates he meets the job requirements for attendance. The review states that his attendance record meets the guideline.
What is the guideline?

RM – So again you want to know what those guidelines are. Didn't we give that to you?

BR – I believe so. I don't have it in front of me.

MC – I don't think you did.

AT – I'm pretty sure we did.

BR – On top of that counselor it says the attendance was exemplary, but the performance evaluation itself says meets guidelines.

****

RM – Also, you had inquired about the guidelines on attendance. Basically the service managers use their own discretion in determining what is reasonable or not reasonable.

MC – So basically someone could miss a lot of work and be treated differently if he is well liked by management.

RM – I'll give you an example. Someone may have the flu and miss 5 days of work. The Company would not terminate that person. However, if someone missed one day per month the Company may decide to let that person go.

MC – So 12 absences?

RM – Yes.

BR – Let me just ask the question. You're saying each member….

RM – We have been looking into to see if anyone who has ever been discharged. Not saying it hasn't happened. But we cannot find any as of this time.

BR – Here's the concern and I know that you know this.

RM – Oh and tardy. 6 minutes is the guideline. If man is five minutes late he is okay. It's the tick of a clock.

Committee – Yep. 6 minutes is a tenth of an hour.

MC – Written down anywhere or just rule of thumb?

RM – No written policy. Now if you all want to go down that road and sounds like you do then we can certainly talk about an attendance system then we certainly can set up a point system. Now you must be terminated when you reach a certain point total, no questions asked.

That is a double edged sword. All this discretion and no one has yet to be terminated for an attendance issue. Be darn sure this is the road you want to go down.

R. 1 pp. 92-93 & 96.

Ward proceeded to clock in to work six (6) minutes late the very next day, January 26, 2010. (Tr. 1202 & R. 268.) Ward again clocked in late January 27, 2010. This time, Ward clocked in seven (7) minutes late. (Id.) Consequently, then current Service Manager Dan Shepherd ("Shepherd") issued Ward a written reprimand on January 27, 2010. (Tr. 1198 & G.C. 12(b).) The meeting was held in Shepherd's office. (Tr. 1198.) Shepherd told Ward his attendance must improve and then Shepherd inquired as to whether Ward was "trying to make a point with the Union and trying to set me up as a bad manager in the light of the Union and the Negotiating Committee, that I don't discipline on employees." (Tr. 1199.) Ward responded no. (Id.) Shepherd did not tell Ward that he was more strictly enforcing the attendance policy

because of the union's actions and/or conduct during bargaining. Notably, this was not the first time Ward was disciplined for attendance. He received a reprimand on July 30, 2008 due to his attendance issues. (Tr. 610, 1196 & G.C. 19.)

1. Similarly situated employees

Shepherd has issued discipline to other employees for attendance. (Tr. 1205). Rod Schultz ("Schultz") received an attendance reprimand on October 14, 2008. (Id. & R. 229.) Schultz was a member if the union's bargaining committee and the parties were engaged in negotiations at the time of this discipline.[8] (Tr. 1205-1206.) Shepherd also issued an attendance reprimand to Darren Ohde ("Ohde") on October 14, 2008. (Tr. 1207 & R. 230.) Moreover, Russ Mason received attendance reprimands in October 16, 2009 and January 8, 2010 for an infraction that took place at the end of the year. (Tr. 137-139, 1358 & R. 220 & 221.) Russ Mason was on the union's bargaining committee at the time he received these reprimands. (Tr. 138-139.)

B. Alleged Unilateral Change of Vacation Policy

Generally speaking, the Company has allowed its employees to carryover three (3) days of vacation from one (1) year to the next. (Tr. 836-837.) The employees could use those three (3) days at any time throughout the next calendar year in addition to the vacation they earn during the current year. (Id.) This practice made it difficult for the payroll administrator to keep track of employee's vacation time. (Tr. 837.) Accordingly, Diane Taylor ("Taylor"), the payroll administrator at the time recommended that there be a cutoff as to when the carryover days could be used. (Tr. 837-838.) In turn, Tessa Pekarcik ("Pekarcik"), the HR Manager at the time, recommended the cutoff date be the end of March. (Tr. 838 & R. 265.)

Based upon this recommendation, Service Manager Jim Ray ("Ray") issued a memorandum to the managers indicating that March 31 would be the cutoff date for employee

[8] The parties were engaged wage reopener negotiations during this time period.

use of carryover vacation days. (Tr. 838-840). Notwithstanding, this policy was never implemented as it became the subject of an unfair labor practice charge. (Tr. 841.) After consulting with legal counsel for the Company, Ray instructed his managers not to implement this policy. (Id.) Nor was the policy put into effect for the Company's non-bargaining unit personnel. (Tr. 841-842 & R. 266.)

C. Commercial Driver's License (CDL)

1. CDL policy

The CDL policy in question is set forth in Article XXIX of the expired CBA. (G.C. 2 at p. 20.) Article XXIX states in its entirety:

> The Company and the Union agree that any new employee that is hired under this contract will have up to ninety (90) days to apply for a Commercial Driver's License (CDL). If said employee has not applied for a CDL License within this time frame, said employee will be sent home and not allowed to return to work at the Company until they comply. The Company and or the Union can request a thirty (30) day extension. **All Union members shall maintain a current CDL and physical card.** Exemptions will be made for medical reasons. (Emphasis added).

(Id.) Notwithstanding, the Company's practice is to attempt to work with an employee until they are eligible to retest for a new CDL if an employee loses their CDL to suspension to the State of Ohio. (Tr. 843.) The Company requires the employee to start working toward his CDL as soon as an employee is eligible to test for a new CDL and they are put on the same time frame as a new hire. (Tr. 845 & 874.) Once the employee obtains his CDL, he is expected to maintain it just as the CBA expressly indicates. (Tr. 1366.) With respect to Article XXIX, there is no distinction between probationary employees and non-probationary employees. (Tr. 896.) The CBA states an employee is considered full time after 60 days and an employee has 90 days to obtain a CDL. (Tr. 896.)

At the Idealease portion of the business, the Company has contracts with its customers that require the Company to provide them with vehicles and keep those vehicles running. (Tr. 868 & 1433-1444.) Consequently, the journeyman technicians in the leasing department perform more test driving and service calls than journeyman technicians in the service department. (Tr. 1443-1444.) The Idealease technicians travel to the customer's location in order to service the truck. (Tr. 868.) If the truck is fixed on site it must then be test driven in order to make certain the repairs were made properly. (Id.) In some instances, the mobile service trucks that are sent to the customer locations do not have all the diagnostic equipment to determine what is wrong. (Tr. 868 & 1358.) In that instance, the truck must be brought back to the shop. (Id.) Consequently, another responsibility is to take replacement trucks to the customer. (Tr. 1443-1444.) This is part of the lease contract. (Id.) In fact, eighty (80) percent of work performed by Idealease technicians requires travel to and from the customer's site. (Tr. 1377.) Of that eighty (80) percent, seventy (70) percent requires a CDL.[9] (Id.)

2. Russ Mason discharge

Russ Mason was discharged on November 30, 2010 for failing to obtain a CDL by said date. (Tr. 861 & G.C. 5.) Russ Mason was a journeyman technician in the Company's leasing department. (Tr. 1357.) He repaired trucks and he picked up and delivered trucks to customers, i.e., if a truck breaks down he might have to supply a customer with another truck. (Id.)

In July of 2009, Russ Mason informed Ray that his license had been revoked, including his CDL, due to a DUI. (Tr. 843 & 1362.) The Company did not discipline Russ Mason at any time during the time his license was revoked for not having a CDL. (Tr. 845 & 1370.) During the time Russ Mason was without a CDL, he could not perform any of the tasks referenced above. (Tr. 1372.) Moreover, during this same time period Mosholder had three (3) journeyman

[9] CDL's are required to drive any vehicles weighing over 25,995 pounds. (Tr. 1369.)

mechanics in the leasing department; Russ Mason; John "Jack" Danhauer ("Danhauer") and Joe Lombardi ("Lombardi"). (Tr. 1373-1375.) Danhauer and Lombardi had CDL's. However, Lombardi quit shortly after July 8, 2010. (Tr. 1375.) The Company hired Cory Reeves ("Reeves") to replace Lombardi. (Id.) He did not have a CDL. (Id.)

Russ Mason notified his supervisor, Mosholder, on July 8, 2010 that his driver's license had been reinstated, but not his CDL. (Tr. 847 & 1368-1369.) Other Center City employees have lost their driving privileges due to suspension by the State of Ohio but their CDL's were reinstated along with their driving privileges. Russ Mason's license was reinstated as a "Class D" license. (Tr. 847 & 1368.) During their July 8, 2010 conversation Russ Mason instructed Mosholder that he was now eligible to get his CDL and, as such, would start working towards his CDL. Mosholder passed this information along to Ray, the Company's General Manager. (Tr. 849 & 1372.)

Mosholder had several conversations with Russ Mason about his CDL subsequent to their July 8, 2010 conversation. (Tr. 1378.) On August 4, 2010, Mosholder spoke with Russ Mason out on the shop floor. (Id.) Mosholder spoke with him about the importance of getting his CDL and Russ Mason indicated that he was aware of the importance. (Tr. 1378-1379.) Due the fact that approximately one month had come and gone since their July 8 conversation Mosholder was inquiring whether Russ Mason had made any progress with respect to obtaining his CDL. (Tr. 1379-1380.) Mosholder next spoke with Russ Mason about his CDL on September 7, 2010, during a staff meeting with the Idealease technicians. (Tr. p. 1380.) During said meeting Mosholder told both Russ Mason and Reeves it was very important that they get their CDL's considering the fact that only one technician had a CDL and, as such, he was having to do all the

work. (Tr. 1382-1384.) Reeves and Russ Mason responded that they were working on it. (Tr. p. 1384-1385.)

On September 16, 2010, Mosholder again spoke with Reeves and Russ Mason about the need to get their CDL's. (Tr. 1385-1386.) The conversation took place during a service meeting. (Tr. 1385). Mosholder called the meeting because the Company had acquired a new customer, Dayton Freight, and Mosholder wanted to go over the contract with them. (Tr. 135-1386.) Mosholder explained that the Company had assigned thirty-five (35) tractors to Dayton Freight. (Tr. 1386.) Accordingly, Mosholder notified both Russ Mason and Reeves that they needed to work harder to obtain their CDL considering the fact the Company had just signed a contract adding an additional thirty-five (35) tractors the Company was responsible for servicing, yet, only one mechanic has a CDL. (Id.) Both Reeves and Russ Mason told Mosholder that they were working on it and both had obtained their study guide. (Tr. 1387.)

On September 29, 2010 Russ Mason asked Mosholder if he could have the next week off. (Tr. 1387-1388.) He told Mosholder that if he granted the one (1) week vacation he would come back with his CDL. (Tr. 1388.) Mosholder granted the vacation request. (Id.) Mosholder next spoke with Russ Mason upon his return from vacation, October 11, 2010. (Tr. 1388-1390.) Mosholder asked him if he was successful in obtaining his CDL. (Tr. 1390.) Russ Mason responded that he only took the written test because he didn't have time to take the road test. (Tr. 1390 & 1393.) In his decision, Judge Sandron created a version of events as follows: "Mason also recalled a conversation in late September, in which he told Mosholder that he would be taking the written test during his vacation the following week." Notably, Judge Sandron did not cite to the transcript, as was his practice for an overwhelming majority of his "facts." A

review of Russ Mason's testimony indicates that he stated he would work on getting his CDL. He never limited it to only the written test. His testimony was as follows:

> Q. After you had this conversation in July of 12 2010 with Mr. Mosholder what, if anything, did you do to regain your commercial driver's license?
>
> A. I took a week's vacation in October. I'm not sure what -- which week by date, but I was able to get out and acquire my temporary CDL license during that time.
>
> **********
>
> Q. Do you recall on or about September 29 of 2010 telling Mr. Mosholder that you were going to -- you were asking to be excused from work from October 4, 2010 through October 8 of 2010 in order for you to obtain your CDL?
>
> A. I requested a week's vacation, and told him during that time I would work on getting my CDL. The purpose of the vacation was not to acquire the CDL.

(Tr. 47 & 129.)[10]

The next conversation took place on September 29, 2010. (Tr. 1393.) Mosholder issued a reprimand to Reeves and Mason acted as Reeves's witness. (Tr. 1394.) After he issued the reprimand to Reeves, Mosholder inquired as to the progress, if any, each had made in obtaining his CDL. (Id.) Both said they were still working on it. (Tr. 1394-1395.) Consequently, Mosholder reminded both yet again of the importance of getting their CDL. (Tr. 1395.) He further advised them that ninety (90) days was fast approaching and if they did not get it taken care of they would be given written reprimands which could include suspension or termination. (Id.)

Mosholder again spoke with Russ Mason on October 29, 2010.[11] (Tr. 1395-1396.) The conversation took place in Mosholder's office just before shift change. (Id.) Mosholder issued

[10] This is but one example where Judge Sandron purposefully misconstrues and mischaracterizes the testimony and subsequently states it as fact. More examples are cited Section III., A., *infra*.

[11] G.C. 3 is dated October 30, 2010. Nonetheless the document was in fact issued to Russ Mason on Friday October 29, 2010 as Russ Mason did not work on Saturday, October 30, 2010. (Tr. 1397-1398.)

Russ Mason a thirty (30) day notice with respect to his CDL. (Tr. 1395-1396 & G.C. 3.) The thirty (30) day notice states in relevant part:

> Please be advised that as of October 30, 2010 you have 30 calendar days to obtain your Commercial Driver's License (CDL). Failing to do so will result in disciplinary action up to and including termination. As you well know, Article XXIX requires that "[a]ll union members shall maintain a current CDL[.]" You were reissued an Ohio's driver's license in July 2010. Nevertheless, to the Company's knowledge you have yet to obtain your CDL.

(G.C. 3.) Russ indicated that that he knew he had to get it and that he would take care of it. (Tr. 1396-1397.) Mosholder even inquired as to whether Russ Mason was having financial difficulties and whether that was a contributing factor to his failure to obtain a CDL up to that point and, if so, Mosholder offered assistance. (Tr. 1397.) Russ Mason responded that money was not the issue, and he just had yet to secure his CDL. (Id.) Reeves was not issued a thirty (30) day notice at this time due to the fact that he voluntarily left his employment from Center City. (Tr. 1401.)

Mosholder did not make the decision to issue the October 30, 2010 notice to Russ Mason, Ray did. (Tr. 856 & 1398-1399.) Ray felt the notice was needed because it had become evident that Russ Mason was not making progress towards obtaining his CDL. (Tr. 855.) As such, a specific time frame was needed. (Id.) Mosholder spoke with Ray the morning of the October 29, 2010. In fact, Ray and Mosholder spoke on a consistent basis about the goings on of Idealease in general, as well as the need for Reeves and Russ Mason to obtain as CDL. (Tr. 851 & 1400-1401.) Ray noted that the Company had already given Russ Mason over one hundred (100) days to obtain his CDL while the CBA requires that you secure a CDL within in ninety (90) days. (Tr. 1399.)

The next time Mosholder spoke with Russ Mason about his CDL was November 24, 2010. (Tr. 1401.) He informed Mosholder that he had a test scheduled for December 1, 2010

and subsequently asked for the keys to the truck he would be using. (Tr. 1402-1403.) Mosholder handed over the keys. (Id.) Mosholder advised him that he was pushing the deadline as the letter clearly stated he had to have the CDL by November 30, 2010. (Id.) Russ Mason said nothing in response. (Id.)

On the morning of November 30, 2010, Mosholder and Ray spoke in Ray's office. (Tr. 1409-1410.) During this meeting Mosholder recommended that they discharge Russ Mason because the CBA requires an employee to obtain a CDL within ninety (90) days and the Company had already given Russ Mason approximately 145 days to do so. (Tr. 893, 1411 & 1436.) Ultimately Ray indicated that he wanted some time to think about what he was going to do. (Tr. 1409-1410.) At that point in time, Mosholder did not know how Ray was going to handle the situation. (Tr. 1411.) Ray never did notify Mosholder beforehand of his decision to terminate Russ Mason. (Tr. 860 & 1420.)

Mosholder spoke with Russ Mason on November 30, 2010 around 3:00 p.m., near the end of the shift. (Tr. 1403-1404.) Mosholder met with Russ Mason in order to issue him a reprimand for poor work performance. (Tr. 1403-1404 & G.C. 4.) At the conclusion of the meeting Mosholder suspended him effective December 1, 2010 until such time as he could produce a CDL. (Tr. 1404.) At that time, Russ Mason asked Mosholder if he could still use a Company truck and Mosholder indicated that he could. (Tr. 1405-1406.) Mosholder did so because the Company has historically allowed its employees use of a Company truck when taking their CDL test and considering the fact that Mosholder had only suspended him at that time, he still considered him to be an employee. (Tr. 1406-1407.)

Mosholder suspended Russ Mason because he does not have the authority to terminate employees without Ray's approval; the extent of Mosholder's authority with respect to discipline

is suspension. (Tr. 857, 860, 875, 881, 893, 1405 & 1436.) Ray makes all final decisions with respect to the hiring and firing of employees. (Tr. 856.) Secondly, Ray was not in the building at the time Mosholder suspended Russ Mason. (Tr. 857-858 & 1412-1413.) He was off site meeting with a customer and did not return to the building until approximately 3:15 p.m. (Id.) Again, at that point in time, Mosholder did not know how Ray was going to handle the situation so Mosholder suspended Russ Mason. (Tr. 860 & 1436.)

The next time Mosholder spoke with Ray was soon after Mosholder's meeting with Russ Mason had concluded. (Tr. 1413.) Ray notified Mosholder that he wanted to speak with Russ Mason. (Tr. 1413-1414.) Subsequently, Mosholder brought Russ Mason to the conference room. (Tr. 1414.) Mosholder then went to get Ray. (Tr. 1414-1415.) As Mosholder and Ray were walking into the conference room Mosholder informed Ray that he had suspended Russ Mason without pay until he could produce a CDL. (Tr. 859& 1415.) Mosholder also informed Ray that he had given Russ Mason permission to use a Company truck on December 1, 2010 in order to take his CDL test. (Tr. 858 & 1415.) Up until that point in time, Ray was unaware that Russ Mason was prepping a truck that day for his CDL test.[12] (Tr. p. 858).

Those present in the conference room were Russ Mason, Rob Romine ("Romine"),[13] Mosholder and Ray. (Tr. 861 & 1415.) Ray asked Russ Mason if he could produce a CDL and he responded that he could not. (Tr. 861 & 1415-1416.) Ray then told Russ Mason that "unfortunately this is your last day at Center City, you are terminated." (Id.) Ray asked him whether he remembered the thirty day notice that Mosholder had given him. (Tr. 1416-1417.) Russ Mason indicated that he did, but he just did not have time to get it and he was having financial difficulties. (Tr. 1416-1417 & 1419.) During the meeting Romine told Russ Mason he

[12] Prepping a new truck for a road test only takes fifteen (15) to thirty (30) minutes. (Tr. 858.)
[13] Romine is a journey mechanic at the west facility. (Tr. 184.)

knows full well you have to have a CDL to work for a leasing Company. (Tr. 206-207, 861-862 & 1418.) Judge Sandron ignored this testimony. Russ Mason signed his termination notice and the meeting concluded. (Tr. 1419-1420 & G.C. 5.) Simply put, Ray made the determination to terminate Russ Mason at 3:30 p.m. on November 30, 2010 when he was unable to produce a CDL. (Tr. 859 & 884-885.) Notably, at the time if his discharge, Russ Mason was the only Idealease technician without a CDL as Reeve's replacement, Ken Burchfield came from another leasing Company and, as such, already had his CDL. (Tr. 1435.)

3. Grievance meetings

On December 3, 2010 Russ Mason, Jonathan Steckman ("Steckman") and Ray participated in a first step grievance meeting. (Tr. p. 865.) Russ Mason presented the grievance as being treated unfairly because of the union. Ray then drafted his denial. (Tr. 865-866 & G.C. 6.) The second step grievance meeting took place on December 7, 2010. (Tr. 866 & 1420.) Those present included Russ Mason, Joe Gerchy ("Gerchy")[14], Taylor, Mosholder and Ray. (Tr. 866 & 1420-1421.) Gerchy asserted that Russ Mason was being unfairly targeted for union activities and Ray responded that his termination was based upon his inability to obtain a CDL. (Tr. 866 & 1422.) Ray then submitted reprimands of similarly situated employees. (Tr. 867, 1422 & G.C. 7, 8 & 9.) Ray then discussed a time line of all the conversations Mosholder had with Russ Mason inquiring about his CDL. (Tr. 867 & 1422-1423.) Russ Mason indicated that he remembered all but one (1) or two (2) of the dates discussed. (Id.) Ray then signed the grievance and the meeting concluded. (Tr. 867.)

[14] Joe Gerchy is a journeyman technician with the Company. (Tr. 213.) He is also the union's acting chief steward and committee Chairperson of the union's bargaining committee. (Id at 217 & 220.)

4. Similarly situated employees

Prior to the issuance of the thirty (30) day notice to Russ Mason (G.C. 3), Ray had research done on past practice in order to be sure that a past member of the bargaining unit committee was treated fairly, if not more fairly than anybody else in the same situation. (Tr. 851.) The research indicated that whenever a thirty (30) day notice was issued, that particular employee was sent home without pay and subsequently had thirty (30) days to produce a CDL or they would be terminated. (Id.) Russ Mason was treated differently only in the sense that he was treated BETTER than other employees; rather being sent home without pay upon the issuance of his October 30, 2010 Notice, the Company allowed him to work during those thirty (30) days. (Id.) Again, with respect to Article XXIX, there is no distinction between probationary employees and non-probationary employees. (Tr. 896.) The CBA states an employee is considered full time after 60 days and an employee has 90 days to obtain a CDL. (Tr. 896.) The similarly situated employees were non-probationary employees just like Russ Mason. (Id.)

a. David Fyffe

David Fyffe ("Fyffe") was suspended on March 12, 2008 for failure to obtain a CDL within the time parameters set forth in the CBA. At the time of his suspension, he was not a probationary employee as his hire date was November 12, 2007. (Tr. 1103, 1210 – 1211 & R. 267.) Fyffe was suspended on March 12, 2008 during a meeting with Shepherd because he had not obtained his CDL within ninety (90) days of his hire date. (Tr. pp. 1211-1212 & 1215-1216.) Shepherd submitted a Vacation absent slip to payroll. (Tr. 1212 & R. 271.) The slip is dated March 12, 2008 and it indicates that Fyffe's absence is not excused. (Tr. 1213 & R. 271.) Glen Jones, the 2nd shift supervisor at the time noted on the slip "No CDL - No Work." (Id.)

Shepherd wrote at the top of the slip "off until further notice." The slips are attached to the daily timesheets and are generated by the Department managers. (Tr. 1106.) Using the information on this slip, Taylor started recording absent, not excused, on Fyffe's absentee calendar. (R. 267.)

The reprimand, which was issued on March 27, 2008 was obviously not filled out during the March 12, 2008 meeting. (Tr. 1215-1216.) Moreover, because Fyffe was already on suspension he was not present when Shepherd issued the formalized paper Reprimand. (Id.) He was given thirty (30) days to obtain his CDL. (Tr. 1210-1211, G.C. 7 & R. 267 at page 6.) The Reprimand specifically stated that "[f]ailure to have a CDL within 30 days will result in termination of employment from Center City International Trucks, Inc." (G.C. 7 & R. 267 at p. 6.) Fyffe was subsequently terminated on April 14, 2008 for failing to obtain his CDL within 30 days as stated in his reprimand. (G.C 8 & R. 267 at pp. 4.) The reprimand specifically states: "David has failed to obtain a Commercial Driver's license as outlined in the reprimand dated March 12, 2008[.] David's employment at Center City International Trucks is [t]erminated as of April 14, 2008. G.C. 8 and R. 267 at p. 4.) Contrary to allegations otherwise, Fyffe did not quit. (Tr. 1218, 1414 & 1416.)

b. Joseph Oman

Joseph Oman ("Oman") was given a written reprimand on March 26, 2008 because he had not yet obtained his CDL. (G.C. 9.) Oman was subsequently sent home and given thirty (30) days to present a CDL. (Id.) The written reprimand stated that Oman had not yet obtained his CDL within the time frame set forth in the contract. (Id.) More importantly, the Reprimand specifically stated that "[f]ailure to have a CDL within thirty (30) days will result in termination of employment from Center City International Trucks, Inc." (Id.) Oman successfully obtained his CDL within the 30 day time period and, as such, returned to work. (Id.)

c. Josh Rose

Josh Rose ("Rose") was issued a reprimand for failure to obtain a CDL within the 90 day time period set forth in the CBA. (Tr. 1430.) The reprimand plainly stated that Rose had a date certain by which to obtain a CDL in order to "continue to work at Center City." (R. 249.) The reprimand further stated that failure to comply "may result in further disciplinary action including suspension or termination of employment from Center City International Trucks, Inc." Obviously, said testimony was supported by (R. 249.) Russ Mason signed this reprimand as the union representative. (R. 249 & Tr. 150, 163.) Rose successfully obtained his CDL within the time certain deadline noted in the reprimand. (Tr. 1430.)

D. Health Insurance

The parties reached an agreement with respect to insurance on October 12, 2009. The agreement was as follows:

> Section 1
> The Company shall once a year negotiate with insurance companies for the very best rates and coverage it can obtain at a reasonable price. The Company will then meet with the Union and discuss the coverage and the benefits before presenting it to the employees. Whatever the coverage is that the Company has negotiated with the insurance company chosen by the Company, the costs will be split.
>
> Section 2
> The employees will pay 25 % of the premium on the Standard Plan and the Company will pay 75 %. For all employees who choose an "Upgraded" plan, those employees will pay any additional costs for that plan.

(R.1 at pp. 17-18 & J. 22, 23 & 24.) Chema inquired about insurance during the August 27, 2010 bargaining session. (R. 1 at p. 314 & R. 264 at pp. 103-104.) Chema indicated that the T/A the parties reached on October 12, 2009 was for one year only and he wanted to remind Ron Mason, the Company representative, that the parties were only 2 months away from the expiration of that agreement. (Id.) Rudis was present at this meeting. (R. 1 at p 308 & R. 264 at

p. 99.) Chema further noted that the only reason he agreed to it in the first place was because insurance was set to expire on October 31. (R. 1 at p. 314 & R. 264 at pp. 103-104.) Mason responded that the Company is unable to get quotes until sixty (60) to ninety (90) days prior to expiration at the earliest, but that the Company would provide that information as soon as it was available. Id.

On September 24, 2010 Rudis submitted an information request to the Company regarding medical coverage. (J. 161.) The Company responded to Rudis's letter on September 29, 2010. (J. 163.) The letter states in full:

> Dear Mr. Rudis:
>
> > This letter is in response to your letter dated September 24, 2010. In said letter you request certain information with respect to the Company's Health Insurance coverage.
> >
> > The requested census information is attached hereto as CenterCity04686-04687. Center City currently has no employees on COBRA. All employees are covered under company paid Life, AD&D and STD policies, regardless of their choice in medical coverage.
> >
> > Center City's medical coverage includes medical and prescription, but does not include dental or vision. Notwithstanding, Center City does offer separate voluntary dental and vision policies that are 100% employee paid.
> >
> > Center City is not large enough to get claims experience. Accordingly, Center City does not have information on claims over $75,000. Additionally, Center City is not large enough to get claims experience on medical and pharmacy experience. Accordingly, Center City does not have information on medical and pharmacy experience. Lastly, monthly enrollment for the preceding twelve (12) months is provided for in the attached census.
> >
> > If you have any further questions, please do not hesitate to contact me.

On October 5, 2010 the Company submitted its Health Care Proposal to the union. (J. 165.) Specifically, the Company was proposing a fourteen (14) month health care plan beginning November 1, 2010 and concluding on December 31, 2011. (Id.) The proposed plan is

a 10.7% increase from the current plan of November 1, 2009 to October 31, 2010. (Id.) The increased cost would be shared by the employees (25%) and the Employer (75%). (Id.) The proposal also included a safety glasses plan from Wal-Mart. (Id.) The bargaining notes from October 5, 2010 indicate that the Company informed the union of the total number of plan participants. (R. 2 & R. 264 at p. 112). Taylor also confirmed for Rudis information which he had previously received per the Company's September 29, 2010 letter, namely, that no employees were currently on COBRA and no employees were currently on medical leave. (R. 2 and R. 264 at p. 113.)

During the October 5, 2010 bargaining session Rudis submitted another information request to the Company. (J. 167.) Some of the questions posed in the request had already been answered during the course of the meeting, i.e., cost of plan and specific coverage dates. (R. 2. & R. 264 at p. 112.) The Company responded to Rudis's letter on October 7, 2010. (J. 168.) The letter states in full:

> Dear Mr. Rudis:
>
> This letter is in response to your letter dated October 5, 2010.
>
> The Company has already provided to the Union the current costs and the proposed costs with respect to health insurance.
>
> As to the current benefit plan, we will provide you a copy of the summary plan description tomorrow during negotiations. The Company will also provide the form which you requested that it fill out. Nonetheless, as relayed to you during a previous bargaining session, the Company will not be providing any medical information with respect to individual employees. The Company is not required to obtain this information for you, not to mention the multitude of HIPPA issues concerning privacy. Consequently, the Company will not fill out the "Medical Profile" attached to your correspondence, nor will it request that the employees fill out said form. You have reminded the Company's bargaining committee countless times that the union represents the men. Accordingly, I suggest you have Mr. Joe Gerchy and or Mr. Russell Mason approach the men themselves and request that they fill out the "Medical Profile."

> **We have requested information form [sic] the insurance company that will enable you to get quotes for insurance for the bargaining unit.** Notwithstanding, your requests for information have come so late in this process that I sincerely doubt you will be able to get any quotes from insurance carriers that could secure coverage for the employees by the end of the month.
>
> In regards to the "grandfathered" question, the answer is the Company is not nor will it be grandfathered because that would not allow the Company to change the plan one iota, nor could the Company increase the cost to the employees. The advantages of grandfathering are not worth it.
>
> The Company selected the best coverage for the lowest overall increase in the premium and is charging the employee the 25% of the new rate that we are incurring from the insurance company. The percentage and the methods remain the same but the cost has increased by 10.7% for the 14 month plan and we are passing that cost on at 25% to the employee and paying 75% on that increase by the employer.
>
> The information on the number of employees and dependents covered in the bargaining unit will be given to you tomorrow as well.
>
> **Be advised that you do not represent non-bargaining unit employees. Therefore, we intend to secure health insurance coverage for those employees and we will bind the insurance coverage for them.**
>
> We are declaring an emergency regarding the insurance for the bargaining unit. As previously indicated, there must be an agreement to have insurance before November 1, 2010, as the employees must be registered with the insurance company before the date the insurance goes into effect. We have told you on more than one occasion that the normal enrollment period is 30 days. As such, we have advised you that to ensure coverage for the bargaining unit, we must have an agreement by Friday October 15, 2010. Accordingly, although we will provide the information referenced above, I doubt that you can get an insurance quote and submit the same to us by October 15, 2010. (Emphasis added.)

Rudis then submitted yet another request for information on October 7, 2010. (J. 170.) It is clear from the text of the request that the Company's October 7, 2010 letter referenced above is also in response to J. 170, as J. 170 asked for information with respect to whether the Company's plan is "grandfathered." The Company's response addresses that question. More importantly, the Company's bargaining notes indicate that the Company did in fact submit the requested information to the union during the October 8, 2010 bargaining session as promised.

(R. 3 & R. 264 at p. 118.) During this meeting the union offered a counter proposal to the Company's October 5, 2010 proposal. The union proposed to keep the current plan in place without any change to the plan or without any increased cost to the bargaining unit employees. (R. 3 and J. 171.) The union also proposed the establishment of a Joint Labor-Management Health and Hospitals Benefits Provider Search Committee. (Id.) The Company rejected this offer on October 11, 2010 and resubmitted its October 5, 2010 proposal. Also on October 11, 2010, Wahoff sent an e-mail to Rudis addressing a question Rudis posed during the October 8, 2010 bargaining session. (J. 174 and R. 3.)

During the October 14, 2010 bargaining session, the Company resubmitted its October 5, 2010 proposal. (R. 4.) The union submitted another counter proposal indicating they would accept the Company's Health Care proposal subject to twelve (12) conditions. (R. 4 & J. 175.) The Company rejected this proposal and resubmitted its October 5, 2010 proposal. (J. 177.) Then, on October 15, 2010 the Company unilaterally implemented its October 5, 2010 offer so as to not to allow health insurance coverage to expire for bargaining unit members. (J. 178.)

E. The Company Did Not Engage In Bad Faith Bargaining

The parties have been engaged in negotiations for a successor contract since September 9, 2009. (Tr. 1278.) At the outset of negotiations Chema was the lead negotiator for the union. (Tr. 664.) On September 9, 2009 the union made its first proposal to the Company. (J. 9.) When the union submitted this proposal to the Company Gerchy indicated that the proposal is very simple and that the men are extremely happy with the current contract. As such, the only thing the union is proposing is a wage increase. (Tr. 1278-1279 & R. 1 at page 2.) The Company made its first proposal on October 1, 2010. (J. 12.)

The Company did propose some changes to the current language of the contract, among them were an open shop clause and the deletion of dues check off provision. (Id. & R. 1 at pp. 4-11). The Company looked at the union's proposal and determined which items it considered not to be in dispute, that is the Company had no change and the union had no change. (Tr. 1279-1280 & R. 1 at pp. 4-11.) The Company subsequently T/A'd those articles. (Id. & J. 10.) The Company also proposed changes to the Recognition article, the Seniority article, the Promotions and Transfer article, the Vacations article, the Strikes and Lockouts article, the Health and Welfare article, the Jobs Classifications and Wages article and the Duration article. (Id.)

During the October 1, 2010 meeting, the union agreed to the Company's proposed changes with respect to the following Articles: Recognition, Seniority, Vacations, Strikes and Lockouts and the Jobs Classifications and Wages. (R. 1 at pp. 4-11 & J. 13.) The Company submitted another proposal on October 1, 2010. (R. 1 at pp. 4-11 & J. 14.) The Company agreed to the union's counter proposal on the Promotions and Transfers article. In addition, the Company's proposal contained two (2) new provisions: the elimination of the Pension plan, citing its concerns over the potential of withdrawal liability that attaches to these plans and transferring the $2.55 per hour that the Company was contributing to the pension into the men's wages for the first year, a wage freeze the second year, and a wage reopener in the third year. (Id.)

The parties exchanged proposals during the October 5, 2010 bargaining session. (J. 18-21.) No agreements were reached during this meeting, although both parties made movement with respect to the Health and Welfare proposal. The Union also proposed a wage increase of 4% in the first year, 3% in the second year and 3% in the third year. (J. 20.) The parties ultimately reached an agreement on the Health and Welfare article during the October 12, 2010

meeting. (J. 23 & R. 17-21.) The Company also changed its proposal with respect to Dues Checkoff and Wages. (Id.) Instead of deleting this provision, the Company's proposal left the decision up to the individual employee. (Id.) Moreover, the Company was now proposing a 1% increase in the second year as opposed to a wage freeze. (Id.)

As of October 15, 2009, the parties were bargaining over the following five issues: Union Security Clause, Union Dues Checkoff, the Pension, Wages and Duration. Then, during the October 15, 2009 bargaining session, the Union agreed to get out of the pension fund. (J. 25 & R. 1 at pp. 22-26.) Based upon this proposal and the concerns levied by the union concerning the unvested employees losing their contributions, the Company adjusted its proposal with respect the pension and wages. (J. 26 & R. 1 at pp. 22-26.) The parties exchanged another set of proposals during this meeting, each making adjustments to their respective proposals on the elimination of the pension and wages. (J. 27, 28 & R. 1 at pp. 22-26.)

Nevertheless, on November 5, 2009 a new lead negotiator for the union, M. Ward, replaced Chema. (Tr. 664 and R. 1 at pp. 27-36.) M. Ward proceeded to withdraw the union's proposal to terminate the union pension plan and put the pension back on the table with a $.05 per hour contribution increase each year. (J. 32 & R. 1 at pp. 27-36.) In regard to wages, the union was now proposing a fixed increase of 2% in the third year instead of a wage reopener.[15] (Id.) M. Ward also included language in the Duration clause indicating that "all benefits agreed to will be retro back to the November 1st execution date." (Id.) He even attempted to re-negotiate insurance despite the fact that it had already been tentatively agreed to during the October 5 and October 12, 2009 meetings. (Id.) Consequently, the Company responded with proposals in an effort to get back to where the parties were prior to M. Ward's regressive bargaining. (Id & J. 34 & 36.) M. Ward also asked the Company to explain it's the reasoning

[15] M. Ward's 2nd proposal of the day reverted back to a wage opener in the third year. (J. 35.)

behind its open shop, dues check off and pension proposal: The following interaction took place:[16]

> MW – Yep, yep.
>
> Couple questions in regards to Article II. What are the employer's advantages to an open shop?
>
> I guess the right to work people would be proud. Too bad Ohio is not a right to work state. Paint me a picture as to why the Company feels the need for it?
>
> RM – The reasons why we want it? Skilled mechanics are hard to come by. We have approximately 25% of our applicants that do not want to work for the company when they find out that we are a union shop.
>
> MW – Have you explained the benefits of working in a union shop with wages and guaranteed pension.
>
> RM – We tell them we are a union shop and that they will be required to join the union and pay union dues.
>
> MW – So you can show me how this data? If I make a request for information are you going to show me this 25%?
>
> RM – You can make any request for production you want. Put it in writing and we will address it.
>
> MW – Because you know I'm going to ask for it. Is the Company hiring now.
>
> RM – The Company is accepting applications.
>
> MW – Are they hiring?
>
> RM – We are currently accepting applications. We have placed an ad in the paper and it will start running this weekend.
>
> MW – Is it there now?
>
> RM – Well considering the fact that I said it will start running Saturday, no.
>
> MW – Ok Dues check off. Paint me a picture as to why that is a problem for the employer.

[16] MW – Mark Ward; RM – Ron Mason.

RM – Well if we are an open shop then the employee ought not to have to pay the dues if he doesn't want to.

MW – Well it's also up to the employee as well. If he wants to pay he can.

MW – As for the pension we are happy to say we have one of the best. What's the Company's problem with the pension?

RM – If you had been here from the beginning and heard all the discussions that we have had across the table in regards to the pension you would know this answer. As we have said multiple times we do not want to face the prospect of withdrawal liability. The fact of the matter is the Pension is underfunded right now.

MW – It is? How do you know?

RM – Because people from the Pension Fund told us. We are still waiting to see what the Company's withdrawal liability is. The Company has a 401K plan that is dependent upon the same stock market as the Pension Fund. We passed out distribution information as to what these men would receive if they put the same amount of money in the 401K as they do the pension….We….

MW – Come on. Wrap it up. Wrap it up.

RM – You asked me to tell you so I'm telling you…

MW – Wrap it up. Give me the condensed version.

RM – Can I finish? Are you going to let me talk?

MW – Is your 401K guaranteed and run by the PBGC?

RM – Can I finish?

MW – Is the 401K guaranteed.

RM – No.

MW – Thank you. Yeah I wonder why the men didn't jump at the idea of getting rid of a guaranteed pension for that. What's the benefit to the employer?

RM – Benefit of the employer is that we do not want the liability.

MW – When does that kick in?

RM – When we terminate the plan.

> MW and RM arguing that about whether there is economic loss right now. Whether or not there is withdrawal liability right now as we speak. Ron noting that there is withdrawal liability right now this instant. MW arguing that Company not obligated to pay unless it withdraws from the plan.

(R. 1 at pp. 30-32.) As a result of this conversation the union submitted an information request to the Company on November 9, 2009. (J. 39.) The Company responded to said request on November 24, 2009, including names of applicants (Danhauer and Dorr) who informed the Company they did not want to join the union or pay union dues. (J. 44.) Before submitting this information to the union, Mason spoke with both Danhauer and Dorr via telephone in order to let them know their names were being submitted to the Union. (Tr. 1286-1287.) Dorr told Mason that he did not want to pay union dues or join the union. (Tr. 1288.) Danhauer told Mason that he had not joined the union nor had he paid any dues. (Tr. 1289.)

The parties met again on November 12, 2009. (R. 1 at pp. 37 – 40.) Each side submitted proposals on the remaining issues without much movement by either party. (Id. & J. 40 – 42.)

The next scheduled meeting was December 7, 2009. During this meeting, the union proposed a wage reopener in years two (2) and (3) and the Company accepted that proposal. (R. 1 at pp. 41-45 & J. 45-48.)

The parties had another discussion during the December 11, 2009 meeting with respect to the Company's Open Shop proposal. The following interaction took place:[17]

> MW – Ok. Sorry guys.
>
> PP – Mark, I have a question before we start. I was with Tim all day yesterday in Cleveland. From our standpoint we think that is a good solution. If someone wants to join the union they can, and if they do not want to join they do not have too.
>
> RM – They want to hear your reason as to why open shop is an issue.

[17] MW – Mark Ward; PP – Pat Pesta; RM – Ron Mason;

> MW –Well first off that has been in the contract for the years and years and the Company has already agreed to it. It also keeps it a union shop and keeps the security together. We do not force people to join.
>
> RM – What it boils down is money. They still have to pay full amount of union dues, even if they do not join.
>
> MW – We don't force him to join. Because he can choose to work elsewhere….
>
> PP – You guys are looking at a different way than we are. All were saying is we want to give new people the option. If they want to join the union they can and if they don't they don't. I guess we just feel we can offer both.

(R. 1 at p. 46.) On December 11, 2009, the Company adjusted its pension and wages proposals. The Company proposed to eliminate its participation in the union pension plan. In turn, the Company was proposing a $2.55 increase in the first year and wage reopeners in the second and third years. (R. 1 at pp. 46-52. & J 52.) The Company re-submitted its December 11, 2010 proposal to various union proposals submitted during the December 14 and 15, 2010 bargaining sessions. (R. 1 at pp. 53–59 & J. 58-68.)

As of the January 7, 2010 bargaining session, Chema was once again the lead negotiator for the union. (R. 1 at pp. 60-65 & Tr. 664.) During this meeting, the Mediator had both sides air out their differences with respect to the pension, union security and dues check off. (R 1 at pp. 60-65.) Chema acknowledged that the union simply offered a wage proposal in its initial proposal because they liked how everything was and had no problems with the other language of the contract. (Id.) He also acknowledged that both sides had reached tentative agreements on nearly every article. (Id.) Mason stated that the Company was still trying to get back to where it was in October. He also discussed the Company's position on the open shop clause again. (Id.)

Towards the end of the bargaining session, the parties were engaged in "off the record" discussions. During said discussions, the union once again agreed to all the changes the Company wanted including to allow the Company to cease its termination in the pension plan in

exchange for a union shop and dues deduction. (Tr. 1290-1294.) Nonetheless, the Company ultimately turned down the offer. (Tr. 1294 & R. 1 p. 63.)

On January 11, 2010, the union submitted a new proposal on wages, despite the fact that parties had already agreed to wage reopeners in years two (2) and three (3). (J. 70.) The union indicated that the wage increase would be strictly tied to the economy. Any raise would be based upon the Consumer Price Index for Urban Wage Earners and Clerical Workers issued by the Department of Labor. Essentially, if the index went up, the men got raises. If the index remained the same there would be no increase. Considering the union wanted to tie wages to this Index, the Company asked what would happen if there was a decrease. The union responded that wages would not decrease. Put simply, the union only wanted to tie wages to this Index when it benefitted it. In response, the Company resubmitted its December 11, 2009 proposal, while noting the union's continued regressive bargaining. (R. 1 at pp. 64-65 and J. 71.)

On January 20, 2010 the Company was greeted with yet another new union participant as Rudis was assigned to assist Chema due to the fact that he was "fairly new Business Agent." (Tr. 665.) Below is a summary of the negotiation meetings once Rudis had arrived.

January 20, 2010: No proposals exchanged. The parties spent the entire meeting in dialogue concerning union information requests. (R. 1 at pp. 66-79 & R. 264 at pp. 1-5.)

January 22, 2010: No proposals exchanged. The parties spent the entire meeting in dialogue concerning union's information requests. (R. 1 at pp. 80-88 & R. 264 at pp. 6-14.)

January 25, 2010: No proposals exchanged. The parties spent the entire meeting in dialogue concerning union information requests. (R. 1 at pp. 89-99 & R. 264 at pp. 6-14.)

February 4, 2010: Parties engaged in dialogue concerning union information requests. Union submitted proposal on Joint Health and Safety Committee. Company resubmitted December 11,

2009 proposal because the parties had already reached a tentative agreement on October 1, 2009 regarding Safety and Health. (R. 1 at pp. 100-115, R. 264 at pp. 18-20 & J. 79-80.)

February 24, 2010: Union presented a power point presentation comparing its pension plan to 401(k) plans. Union submitted proposal on Attendance at Work. Company resubmitted December 11, 2009 proposal because Company already had a policy in place. (R. 1 at pp. 116-122, R. 264 at pp. 21-23 & J. 82-83.)

February 26, 2010: Union presented slide show on alleged safety issues within the Company's west side and east side shops. Rudis states T/A's are meaningless. Union submitted proposal on Injured Employee. Company resubmitted December 11, 2009 proposal indicating that Article VIII addresses this issue and the parties had already reached a tentative agreement on said article. (R. 1 at pp. 123-136, R. 264 at pp. 24-27 & J. 85-86.)

March 5, 2010: Meeting started 2 hours late due to union "caucus." Parties engaged in dialogue concerning union information requests. Union submitted proposal on Discharge and Discipline. Company resubmitted December 11, 2009 proposal noting that the parties had already reached a tentative agreement on October 1, 2009 concerning Disciplinary Procedures (Article VII). Union submitted proposal on Follow All Work. Company resubmitted December 11, 2009 proposal noting that the union's proposal was in direct conflict with four provisions that have already been tentatively agreed to by the parties. Said provisions are: the Agreement language; Promotions (Article XI); Temporary Assignments (Article XII); and the Subcontracting Clause (Article XXI). Union submitted proposal on Information to be Furnished to the Union. Company responded at the next meeting. (R. 1 at pp. 137-148, R. 264 at pp. 27-32 & J. 88-92.)

March 10, 2010: Parties engaged in dialogue concerning union information requests. Company proposed a .75% wage increase in year one (1) of the contract, on top of the $2.55 pension contribution that would now be a part of base wages. Union responded with a proposal regarding Attendance Incentive Vacation Time and Pay. The union alleged that it was to remedy attendance issues and resulting discipline. They later acknowledged that it had nothing to do with discipline and was strictly an incentive program. The Company responded with its Last and Final Offer. It contained a 1.75% wage increase in year one (1) of the contract, on top of the $2.55 pension contribution that would now be a part of base wages. The Company also noted that the union's latest proposal had nothing to do with anything that had been discussed since the onset of negotiations and could have been proposed long ago if it were truly significant. (R. 1 at pp. 149-157, R. 264 at pp. 33-37 & J. 93-95.)

March 18, 2010: Per the union's request, the Company presented its 401(k) representative. Union submitted proposal on Hourly Job Evaluation Plan. Company resubmitted its Last and Final offer dated March 10, 2010. Union submitted proposal on Job Classifications. Company responded at the next meeting. (R. 1 at pp. 158-167, R. 264 at pp. 37-41 & J. 98-100.)

March 26, 2010: Parties engaged in dialogue concerning union information requests. Company resubmitted its Last and Final offer dated March 10, 2010, noting that Job Classifications were bargained over back in October and subsequently tentatively agreed to. Union presented slideshow concerning alleged safety issues. Union submitted proposal on Apprenticeship. Company responded at next meeting. (R. 1 at pp. 168-180, R. 264 at pp. 41-44 & J. 101-102.)

April 1, 2010: Company resubmitted its Last and Final offer dated March 10, 2010 noting that the parties had already tentatively agreed to articles that address the union's Apprenticeship proposal. Company also noted if Apprenticeship were truly an issue it would have been brought

up well before now. Parties engaged in dialogue concerning union information requests. Union submitted proposal on Wellness Benefits. Company resubmitted its Last and Final offer dated March 10, 2010, noting that if this were truly an issue it would have been brought up well before now. The Company also pointed out that this was simply more evidence of the union's regressive bargaining. Union submitted proposal on Shift Hours. Company resubmitted its Last and Final offer dated March 10, 2010, noting yet again that if this were truly an issue it would have been brought up well before now. (R. 1 at pp. 181-191, R. 264 at pp. 44-49 & J. 103-107.)

April 9, 2010: Union power point presentation pertaining to its Joint Health and Safety Committee proposal. Union resubmitted its proposal on Joint Health and Safety Committee. Company resubmitted its Last and Final offer dated March 10, 2010, noting that safety was not an issue until Rudis showed up in January 2010. The union did not mention **ANY** safety concerns prior to Rudis's arrival on January 20, 2010. (R. 1 at pp. 192-199, R. 264 at pp. 50-54 & J. 110-111.)

April 15, 2010: No proposals exchanged. Parties spent the majority of the meeting discussing the issues raised by the union's March 26, 2010 slide show. The union presented a power point presentation concerning the union's High Performance Work Organization during the remainder of the meeting. (R. 1 at pp. 200-220, R. 264 at pp. 54-56.)

April 22, 2010: No proposals exchanged. Rudis not present. Parties engaged in dialogue regarding union information requests. Meeting concluded 1 hour and 8 minutes early. (R. 1 at pp. 221-223, R. 264 at pp. 57-58.)

May 4, 2010: No proposals exchanged. Rudis not present. Mr. Tim Reilly, owner of Center City, spoke at the beginning of the meeting with the union's bargaining committee. Union's bargaining committee failed to ask Mr. Reilly a single question. Parties engaged in dialogue

regarding union information requests the remainder of the meeting. (R. 1 at pp. 224-234, R. 264 at pp. 58-61.)

May 6, 2010: Meeting started 1 hour and 14 minutes late due to union "caucus." Rudis not present. Parties engaged in dialogue concerning union information requests. When the union finally called Company's committee into the room at 11:14 a.m., the parties only met for four (4) minutes. The union did not call Company's committee back into the room until 4:25 p.m. Union resubmitted proposal on Hourly Job Evaluations. Company responded at the next meeting. (R. 1 at pp. 235-237, R. 264 at pp. 61-62, J. 118.)

May 10, 2010 Rudis not present. Parties engaged in dialogue regarding union information requests. Company resubmitted its Last and Final offer dated March 10, 2010. Union submitted proposal on Sale, Transfer and/or Closure of Business. Company asked why now and the union responded that maybe it should have been brought up earlier. (R. 1 at pp. 238-240, J. 121 & J. 122.)

May 25, 2010: Parties engaged in dialogue concerning union information requests. Company resubmitted its Last and Final offer dated March 10, 2010. The Company withdrew its March 10, 2010 Last and Final offer in order to make a new proposal only on Safety and Health. The union submitted a proposal on Successorship. (R. 1 at pp. 241-249, R. 264 at pp. 63-66, J. 122-126.)

June 4, 2010: Rudis not present. Parties engaged in dialogue concerning union information requests. Union withdrew **ALL** tentative agreements previously reached and submitted an "entirely new package of proposals." (R. 1 at pp. 250-252, R. 264 at pp. 69-70, J. 127.)

June 11, 2010: Rudis not present. No proposals exchanged. Parties engaged in dialogue regarding Union's June 4, 2010 proposal. Company asked the union to point out all the changes

in its new proposal and the union refused. The union requested that the Company submit any questions in writing. The Company did so. (J. 129.) The Company also pointed out that the proposal appeared to be a simple cut and paste job as it was in different fonts. Additionally, there was duplicate language that was on the bottom of page 26 and carried over to page 27. (R. 1 at pp. 253-260.)

June 28, 2010: Rudis not present. No proposals exchanged. Parties engaged in dialogue regarding union information requests and union's June 4, 2010 proposal. Company again requested the union to point out the changes in its June 4, 2010 proposal. Additionally, the Company requested that the union explain why the changes were made now, as opposed to nine (9) months ago when the parties first started negotiating. The union responded that this new proposal brings the contract up to date. The union agreed, yet again, to highlight all the changes. Accordingly, the Company presumed it would be presented with said document at the next scheduled meeting. (R. 1 at pp. 261-270, R. 264 at pp. 71-75.)

July 8, 2010: (Meeting started late due to meeting with OSHA representative. Chema was present at said meeting). Rudis not present. No proposals exchanged. Parties engaged in dialogue regarding union information requests and union's June 4, 2010 proposal. Chema informed the Company that he decided against highlighting the changes in the June 4, 2010 proposal. He indicated that this was a brand new counter proposal that did not even follow the old contract. He also stated this proposal was gathered from several databases in order to bring this contract up to date. Chema further stated he did not make changes to the old contract he made a whole new contract. Committee members referred to it as an entirely new proposal. Chema further stated it was 100% new. (R. 1 at pp. 271-276, R. 264 at pp. 75-78.)

July 16, 2010: Union presented power point presentations on IAM 401(k) and Custom Choices Worksite Benefits. Rudis not present. Due to said presentations, actual meeting did not start until approximately 3:30 p.m. Union submitted proposal on Worksite Benefits. Company resubmitted its Last and Final offer. (R. 1 at pp. 277-278, R. 264 at pp. 78-82, J. 132-133.)

July 22, 2010: Meeting started 4 hours and 35 minutes late due to union "caucus." Rudis not present. No proposals exchanged. Parties engaged in dialogue concerning union information requests and Company's July 16, 2010 Last and Final offer. Union accused Company of surface bargaining. (R. 1 at pp. 279-286.)

July 23, 2010: Rudis not present. No proposals exchanged. The union did not ask to meet with the Company a single time throughout the day. At 3:45 p.m., the Company asked the union if they had any intention of meeting and, if they did not give the Company a specific time when we were meeting, that the Company's committee was leaving at 4:00 p.m. The Company also asked the union to provide dates to meet in September and the union refused. At approximately 4:20 p.m., the Company's committee informed the union that they were not going to wait around any longer. Chema had the audacity to instruct his committee to note that the Company's committee was leaving early, as we were scheduled to meet until 5:00 p.m. The Company had been there all day and the union did **NOTHING**. (R. 1 at p. 287, R. 264 at pp. 83-84.)

August 11, 2010: Meeting started 26 minutes late due to union "caucus." No proposals exchanged. Parties engaged in dialogue regarding union information requests. (R. 1 at pp. 288-298, R. 264 at pp. 85-92.)

August 19, 2010: Meeting started 1 hour and 29 minutes late due to union "caucus." Parties engaged in dialogue regarding union information requests. Union resubmitted its June 4, 2010

proposal. Union once again said its June 4, 2010 proposal simply brings the old contract up to date. (R. 1 at pp. 299-307, R. 264 at pp. 92-97, J. 142-143.)

August 27, 2010: Union submitted Safety and Health Proposal. (J. 146.) Company informed union that the OSHA VPP program had been in existence since the 1980's and that the union had to know this since the very beginning of negotiations and as such, if the union felt it was so important it would have raised it sooner than ten (10) months into negotiations. (Tr. 1037, R.1 at p. 308-315 & R. 264 at p. 103 & J. 146.)

September 23, 2010: Parties discussed information requests and Company's responses to those requests. Company discusses the health insurance proposal in its July 16, 2010 last and final offer. (R. 1 at pp. 316-326, R. 264 at pp. 104-111.)

III. LAW AND ARGUMENT

A. EXCEPTION I – JUDGE SANDRON ERRED IN HIS CREDIBILITY FINDINGS

As evidenced from testimony elicited at trial, there is little to no dispute as to whether certain events transpired. Nonetheless, the facts surrounding said events are very much in dispute. Essentially, Counsel for the General Counsel ("General Counsel") has attempted to manufacture a version of facts in an effort to prove Center City unlawfully violated the Act. Necessarily, Judge Sandron was tasked with considering the credibility of the witnesses that appeared before him, contemplating the likelihood that the events occurred in the manner each witness avowed. Judge Sandron must not only evaluate the witnesses based on their demeanor, but also the content of the testimony and the inherent plausibility of the testimony based on the record as a whole. Specifically, the trier of fact must consider the plausibility of a witness's testimony and appropriately weight it with the evidence as a whole. *See, Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970).

The Company has excepted to some of Judge Sandron's credibility findings. The Board's long established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the evidence establishes that those findings are incorrect. *See, Standard Dry Wall Products,* 91 NLRB 544 (1950), *enfd.* 188 F.2d (3d Cir. 1951). The Company believes that the totality of the record unmistakably establishes that Judge Sandron's credibility findings are erroneous. In addition to the specific examples cited below, the Company will address further credibility issues in particular detail under the appropriate Exceptions, *infra*.

1. Company Witnesses

The Company's witnesses offered testimony which was not only mutually corroborative and consistent, but said testimony was also supported by the plain meaning of exhibits admitted into evidence during the hearing. The Company's witnesses were candid, they answered questions without any obvious attempt to slant their answers and nothing in their testimony rang as implausible. Lastly, their testimony on direct remained consistent on cross examination.

Additionally, Judge Sandron notes that the Company failed to elicit any testimony from Reilly, the Company's owner. (Decision pp. 4-5). Specifically, Judge Sandron noted that Ray testified Reilly played a role in Russ Mason's discharge and Ward testified that Reilly made post-discharge comments about Russ Mason. (Id.) As a result, Judge Sandron drew an "adverse inference that Reilly's testimony would not have supported and, indeed, might have contradicted the Respondent's proffered version of what occurred. (Id.) Necessarily, what form the contradiction or admission would have taken is, of course, wholly speculative.

As discussed in more detail, *infra*, Ray testified that it was his decision, but that he did consult with Reilly, his boss. Such testimony is completely logical. Reilly need not appear to testify in order to corroborate Ray's testimony. Ray had the authority to terminate Mason and subsequently did so.

Ward's testimony contradicts the plain meaning of written documents that were admitted into evidence. The Company readily admits and past practice demonstrates that mechanics who have failed to obtain a CDL are sent home without pay and given 30 days to produce a CDL. If they are able to do so, they are brought back to work. If they are unable to do so, they are terminated. General Counsel failed to prove by a preponderance of the evidence that the Company rehires mechanics at any time after the 30 day period has expired. Accordingly, Reilly need not be called to rebut testimony that is not supported by and, in fact contradictory, to the plain meaning of written documents.

The facts of this case do not warrant an adverse inference. If Reilly would have done so much harm to Respondent's defense, then why did General Counsel and/or the charging party refrain from calling him as witness? They certainly have the power to compel his testimony, yet chose not to.

a. Jim Ray

Judge Sandron concluded that Ray was not a reliable witness because his testimony contained internal inconsistencies, conflicted with Mosholder's testimony, did not "gibe with the Respondent's actions and was incredible." (Decision p. 5.) Furthermore, Judge Sandron determined that Ray was "uncomfortable" and not "candid." (Id.) For instance, Judge Sandron found it odd that Ray, a manager of over 100 employees who should be accustomed to speaking in public situations such as a trial, appeared uneasy. (Id.) Yet, the record is devoid of any evidence related to the amount of "public speaking" Ray performs as part of his job duties. Additionally, to compare testifying at trial with public speaking is unreasonable. It is equally unreasonable to make credibility decisions based upon said comparison. Judge Sandron's

conclusion that Ray appeared to be uneasy is unfounded and yet more evidence that Judge Sandron intended to rule in favor of the General Counsel no matter the evidence.

Judge Sandron cited several "flaws" in Ray's testimony. For instance, Judge Sandron concluded that Ray's testimony with respect to why he issued Russ Mason the letter requiring him to get his CDL or face termination was "ambiguous." (Decision p. 5.) Ray's testimony was as follows:

> It was becoming apparent to me that progress was not being made on -- on achieving this commercial driver's license and that we had to set a time frame in which he would achieve that commercial driver's license.
>
> During the time frame leading up to that, he had even as much as taken a week off to -- to go with the full intent of gaining a commercial driver's license. That didn't happen.
>
> That was October 22nd, if I'm remembering right. And that was kind of a determining factor that he's not making progress, we need to put a time frame on this.

(Tr. 855-856.) There is nothing ambiguous about this answer. Russ Mason acknowledged that the contract required a CDL and that in order to perform all of his duties as a mechanic he needs a CDL. (Tr. 30-31 & 33-34.) Russ Mason acknowledged that he was eligible to obtain his CDL in July 2010. (Tr. 39-41 & 127.) Mosholder had numerous conversations with Russ Mason (most of which were corroborated by Russ Mason) regarding the importance of obtaining his CDL and Russ Mason indicated that he understood. Moreover, Russ Mason took a week off in October with the intention of obtaining his CDL but failed to do so (Tr. 1387-1388). Hence, progress was not being made.

Judge Sandron found fault with Ray's testimony regarding his decision to allow Russ Mason to work after the issuance of the thirty (30) day notice as opposed to suspending him without pay. (Decision p. 6.) Specifically, Judge Sandron contends that Ray testified that the

Company allowed Russ Mason to work as opposed being sent home without pay because he was a member of the bargaining committee and the Company wanted to treat him fairly. (Id.) Yet, on cross examination Judge Sandron contends Ray answers the same question differently, testifying he was allowed to work to avoid financial hardship and based on his value of an employee. (Id.) Judge Sandron mischaracterizes Ray's testimony on this point. The complete line of questioning is as follows:

> Q. Can you tell me whether or not the Company treated Mr. Mason differently than other employees who worked at City Center and did not also have a CDL license?
>
> A. Yes, we did.
>
> Q. In what way did the Company treat Mr. Mason differently than those other employees at City Center who did not have CDL's?
>
> A. Typically, or actually with – with everyone that we got to the point where we were issuing a 30-day termination notice, we sent them home without pay. And in Russ' case, we allowed him to work during those 30 days.
>
> Q. Can you tell me whether or not when Mr. Mason was given his 30-day letter, did you have any research done on past practice before that happened?
>
> A. Yes, we did.
>
> Q. Why did you have that done?
>
> A. Well, as a member of the Bargaining Committee, we wanted to be absolutely sure that we treated him as fairly, if not more fairly than anybody else that works at Center City and has -- was in the same situation.
>
> Q. And what did that research disclose with respect to this 30-day letter?
>
> A. Well, in past practice, we had – whenever we issued a letter, we sent them home without pay. And they either produced a commercial driver's when that -- within 30 days, or they were terminated.

(Tr. 851-852.) As noted above Ray was asked if Russ Mason was treated differently, whether he had conducted research before issuing the thirty day letter, and the reasoning behind conducting

the research. Judge Sandron uses this mischaracterization to conclude that Ray presented conflicting testimony on cross examination. (Decision p. 6.) However, Ray is answering different questions. The complete line of questioning is as follows:

> Q. I believe -- you recall testifying on direct examination that Russ Mason was -- had been treated differently than other employees with regard to his CDL situation?
>
> A. That's correct.
>
> Q. And do you recall saying that he'd been treated differently because he had been permitted to work longer than 30 days, or during the interim period?
>
> A. The -- we allowed, in lieu of sending him home without pay, we allowed him to work during that 30 days and earn a -- earn a living.
>
> Q. And what were the circumstances and reasons that gave rise to allowing him to work during that interim period?
>
> A. I believe my testimony was that we felt that it was a financial hardship on him, and I – you know, I just wanted to be fair with him.
>
> Q. Was it based at all upon his value as an employee to the Company?
>
> A. We value all of our employees. And it --
>
> **********
>
> Q. Specifically, with regard to Russ Mason, was the decision to permit him to work in the – and to continue to work based upon his value to the Company as an employee?
>
> A. Yes.

(Tr. 879-880.) Judge Sandron further misconstrues the testimony noted above in his attempt to show inconsistencies within Ray's testimony. Immediately above, Ray is unequivocally referencing "financial hardship" with respect to suspending Russ Mason without pay. Nonetheless, Judge Sandron cites to Ray's testimony regarding the termination meeting with Russ Mason and whether Russ Mason mentioned any "family financial hardships." (Tr. 862.)

Ray noted he may have but he could not recall. (Id.) The complete line of questioning is as follows:

> Q. Can you tell me whether or not you recall Mr. Mason talking about family financial hardships?
>
> A. You know, he may have, but I don't make it a practice to stick around for conversation after a termination, so I -- I was out of the room pretty quickly.
>
> Q. When was the first time that you recall the issue regarding Russ' financial conditions coming up?
>
> A. I was made aware of a Facebook page -- posting, but it --
>
> Q. Did you see the Facebook posting page?
>
> A. I did.
>
> Q. And whose Facebook page was it?
>
> A. Russ Mason's.
>
> MR. MASON: Approach the witness, Your Honor?
>
> JUDGE SANDRON: Yes.
>
> (Whereupon, Respondent's Exhibit Number 255 was marked for identification.)
>
> Q. Let me hand you what has been marked as Respondent's Exhibit Number 255. I'll ask if you can identify this for me, please?
>
> A. I do. It's a Facebook page from Russ.
>
> Q. Can you tell me whether or not this was the Facebook page that you saw?
>
> A. It is.
>
> MR. MASON: Move to admit Number 255.
>
> JUDGE SANDRON: For what purpose?
>
> MR. MASON: Deals with the issues in this case, Your Honor, of Mr. Mason asserting that the reasons why he did not get the CDL were financial.
>
> JUDGE SANDRON: Let me --

MR. MASON: Does not show anywhere in that document that he believed that he was being discharged for union activity.

JUDGE SANDRON: Well --

MR. OLIVER: That's a legal conclusion.

JUDGE SANDRON: Right.

MR. MASON: It's -- it's also -- it's something that the witness observed, he saw it, he printed it, it's a copy, he's identified it.

JUDGE SANDRON: But where – it appears there's only one comment that was by him. The rest appear to be by other --

THE WITNESS: Well, there's a number of them.

JUDGE SANDRON: Well, I'm -- I'm not sure what -- what weight it will be accorded, but do you -- does -- are there any questions on voir dire, or any --

MR. OLIVER: I --

MR. LOGOTHETIS: Well, is -- is this --

MR. OLIVER: I have one question.

MR. LOGOTHETIS: -- this document --

MR. OLIVER: What's the date of this document?

THE WITNESS: The day -- well, apparently it's not dated. It was printed the day after.

MR. OLIVER: I object.

JUDGE SANDRON: Well, without -- without -- well, without a date, it's hard to find that it's fully authenticated. All right. We'll reject it and put it in a rejected exhibits file, although, frankly, I don't see any harm in making it an exhibit. But since it doesn't have -- have the date, it's not fully authenticated.

(Tr. 862-864.) Furthermore, Judge Sandron is referencing testimony with respect to an exhibit he ***rejected***. Judge Sandron's endeavor to mischaracterize Ray's testimony in order to discredit his him must fail.

Next, Judge Sandron found that Ray's testimony as to why he made the decision to terminate Russ Mason was "vague to the point of meaningless." (Decision p. 6.) Judge Sandron referenced the following testimony:

> You know, I've—I'm a manger that has 99 other people that—that report to work to that building every day. **And at some point when I give a specific employee specific instructions with a specific time frame and a specific outcome if they don't do it, they really leave me no choice.** Because if I don't take action in that case, I really lose control in all cases. And if don't have a standard, I have no standards.

(Id., citing Tr. 857.) (Emphasis added.) Ray was unmistakably referencing the 30 day notice that was issued to Russ Mason. Russ Mason was given an inordinate amount of time to obtain his CDL. When he failed to do so, he was given a time certain and, if not, he would be terminated. Russ Mason's indifference left Ray with no choice.

Judge Sandron also found that Ray's testimony that he made the decision to terminate Russ Mason was "further undermined" when he testified on cross examination that he consulted with his boss and owner of the Company, Reilly. (Decision p. 6.) The testimony referenced by Judge Sandron certainly does not undermine Ray's testimony. When being cross-examined by General Counsel and Counsel for the charging party, Ray testified as follows:

> Q. I believe you testified that you were the person that made the decision to fire Russ Mason.
>
> A. That is correct.
>
> Q. And that no one else could have made that decision but you.
>
> A. I am the person that makes that decision at Center City.
>
> Q. And Mr. Mosholder can decide to suspend someone, but that's the extent of his authority.
>
> A. That is correct.

Q. Did you consult the contract when you made the decision to fire Russ Mason?

A. I consulted my boss, who consulted counsel.

Q. But you did not consult the contract.

A. Counsel consults the contract. I did not --

JUDGE SANDRON: All right. Well, directly. Directly?

THE WITNESS: I did not.

****

Q. Okay. Now, did you have the final authority to terminate Russ Mason?

A. Yes.

Q. I believe, did you not testify on cross-examination that you had to check with your boss?

A. I consulted my boss. I think it's reasonable to consult with the owner of the Company, yes.

Q. So you did consult with Mr. Reilly before you terminated Russ Mason?

A. That's correct.

(Tr. 875 & 881-882.) As Ray noted in his testimony, it is certainly reasonable to consult with the boss. Notwithstanding, that does not change the fact that it was his decision to terminate Russ Mason.

Yet another supposed "flaw" alluded to by Judge Sandron was Ray's testimony that he first became aware that Mosholder suspended Russ Mason and gave him use of a Company truck in order to take his CDL test just as Ray was walking into the termination meeting. (Decision p. 6.) Judge Sandron maintains that this testimony was inconsistent with his and Mosholder's testimony that they discussed Russ Mason and the status of his CDL on a regular basis. (Id.) In doing so, Judge Sandron conveniently disregards both Ray and Mosholder's testimony that on

November 30, 2011, Ray was not on the premises the majority of the afternoon. (Tr. 857-858 & 1412-1413.) Lastly, Judge Sandron found it rather incredible that learning Mosholder had suspended Russ Mason and given him permission to use a Company truck had no impact on Ray's decision to terminate Russ Mason. (Decision p. 6, citing Tr. 860.) Nonetheless, Judge Sandron wholly disregards that Ray's testimony on this point remained consistent on cross examination. Ray testified as follows:

> Q. Did Mr. Mosholder, in what he reported to you, have any effect at all on your decision to follow through with the discharge?
>
> A. It had no effect.
>
> Q. Can you explain why not?
>
> A. As the manager of the facility, when we ask an employee to meet a deadline and they don't meet a deadline --
>
> Q. Uh-huh.
>
> A. -- we have to take action.
>
> Q. Uh-huh.
>
> A. And he was -- and it's not that we gave him 24 hours to get something done, we gave him 30 days on notice. And since July, prior to that.

(Tr. 891-892.)

Additionally, Judge Sandron found it too convenient that Ray could not recall when the last time he spoke with Mosholder prior to November 30, 2010 but that he "may have" spoken to him within a week thereof. (Decision p. 6, citing Tr. 886.) Nevertheless, Ray did testify that he did in fact speak to Mosholder sometime during the 30 day period and Mosholder indicated that Russ Mason was not making any progress. (Decision pp. 6-7, citing Tr. 886.) Judge Sandron found that testimony odd considering the fact that Russ Mason instructed Mosholder that he had scheduled a CDL test for December 1, 2010. (Decision p. 7.) To the reasonable person, the

scheduling of a test after the requisite deadline does not equate to progress. Moreover, the record is clear that even after Russ Mason had received his thirty (30) day notice he made no discernable effort to obtain his CDL. Thus, no progress was made. Again, Judge Sandron's hollow attempt to discredit Ray is ineffective.

Lastly, Judge Sandron noted Ray did not testify on direct examination with respect to an early morning November 30, 2010 conversation with Mosholder concerning Russ Mason. (Decision p. 7.) However, on cross examination he noted that Mosholder recommended Russ Mason be terminated sometime prior to the time he (Ray) left the premises to meet with a customer. (Id., citing Tr. p. 893-894.) During cross-examination counsel for the charging party questioned Ray with respect to Mosholder's supervisory authority. (Tr. 892-893.) During said questioning Judge Sandron interjected and inquired as to whether Mosholder recommend discharge in this instance. (Tr. 893-894). The fact that Ray could not recall the exact time and location of the conversation does not discredit his testimony. The line of questioning is as follows:

> Q. Okay. And what was the extent of Mr. Mosholder's authority over Russ Mason at that time? What -- what parts of Russ Mason's job and his duties did Mr. Mosholder have authority over?
>
> A. He -- he directs his daily activities at -- at that time.
>
> Q. Okay. Did he have the authority to excuse days, and allow him to go home early, and things of that nature?
>
> A. Oh, yeah. He approves vacations.
>
> Q. Approve vacation. He had authority --
>
> A. Approve payroll.
>
> Q. He had authority to assign duties.
>
> A. That's correct.

Q. He had authority to discipline –

A. That's --

Q. -- up to and including suspension?

A. That's correct.

Q. So the only authority, supervisory authority that he did not have was with regard to discharge; correct?

A. Unilaterally, correct.

Q. Yes. But he could recommend discharge to you.

A. Yes.

Q. Okay.

JUDGE SANDRON: Did -- did he recommend discharge to you of Mr. Mason?

THE WITNESS: Yes.

JUDGE SANDRON: And do you recall when he recommended -- do you recall when he recommended --

THE WITNESS: That day.

JUDGE SANDRON: And do you remember what time that day that he --

THE WITNESS: No, I don't. Sorry, Your Honor.

JUDGE SANDRON: Was it before or after you went -- went -- left the facility and came back, if you --

THE WITNESS: Before.

JUDGE SANDRON: And do you remember the circumstances of when he made that recommendation?

THE WITNESS: In just talking about his progress.

JUDGE SANDRON: Do you recall where you were?

THE WITNESS: I don't.

JUDGE SANDRON: Well, do you remember the time, the exact -- the time more specifically?

THE WITNESS: I do not.

JUDGE SANDRON: And how -- do you recall how the subject came up of Mr. Mason?

THE WITNESS: Well, of the hundred and five people that were in the building, Russ was the only one that was on some sort a time line to get something done.

JUDGE SANDRON: Well, no, I mean, how -- how you -- you and Mr. -- you said Mr. Mosholder made the recommendation that Mr. Mason be terminated and that you had a conversation with him that day.

Do you recall how that conversation – how Mr. --

THE WITNESS: How we brought it up.

JUDGE SANDRON: -- how Mr. Mason was brought up? Who -- who brought him up?

THE WITNESS: It just came up in conversation.

JUDGE SANDRON: And you don't – do you recall any specifics of that conversation?

THE WITNESS: I do not.

(Tr. 893-895.) It is conceivable that Ray is unable to recall every minute detail. Even Judge Sandron acknowledged the "natural difficulties of precise detail." (Decision p. 4.) Apparently Judge Sandron found it odd that Ray only recalled that he and Mosholder talked and that Mosholder recommended discharge, while Mosholder was able to recall the conversation with more specificity. Mosholder's testimony was as follows:

Q. What was said during this meeting?

A. I explained to him where we were at with the situation, what had transpired. We went through some history of what had happened over the hundred and forty-five days so far that Russ was to obtain a CDL.

> Once we -- once we got all that ironed out, Jim wanted some time to think of what his response was going to be that day.
>
> Q. During that meeting did Jim tell you what his response was, or what his decision was?
>
> A. No, he did not.

(Tr. 1409-1410.) Judge Sandron also mischaracterizes the above testimony. He summarized Mosholder's testimony as follows: "They reviewed what had transpired and determined that they had given Mason 145 days to obtain his CDL (I question whether they would have had to do this if, as they both testified, they were in regular and frequent contact about Mason and his CDL)." (Decision p. 7.) (Emphasis added.) Nothing in Mosholder's testimony demonstrates that they had to count how many days they had given Russ Mason to obtain his CDL. Moreover, it would be inconceivable if Ray and Mosholder had not met to review the goings on of the past four (4) to five (5) months regardless of whether they were in regular contact with respect to Russ Mason.

Contrary to Judge Sandron's findings, Ray's answers on direct examination remained consistent on cross examination. His testimony was consistent with written documents and the testimony of other witnesses. His testimony was detailed and accurate. Viewing Ray's testimony in conjunction with the entire record and the totality of the evidence, his testimony was credible. Accordingly, Judge Sandron's credibility findings with respect to Ray are erroneous and Ray's testimony must be credited over any conflicting testimony given by General Counsel's witnesses.

For example, Ray, Service Manager for Center City (Tr. 835), testified with respect to the Company's vacation policy and the termination of Russ Mason. Ray testified that the announced change in the vacation policy was ultimately never implemented. (Tr. 841-842 & R. 266). Ray's

testimony on this point was corroborated by written documents, i.e., R. 266, as well as testimony elicited by General Counsel from Russ Mason. (Tr. 101.) Additionally, Ray credibly testified that Russ Mason was terminated not because of his union activities but because of his failure to obtain a CDL despite the fact he was given 145 days to do so. (Tr. 849, 861, 866 & 872-873.)

Furthermore, Ray testified that Russ Mason was treated no differently than past employees who had failed to obtain their CDL within time parameters set forth in the in the CBA in the sense that the Company issued him a thirty (30) day Notice. (Tr. 850-851). Nonetheless, rather than being suspended without pay in conjunction with the thirty (30) day notice as other employees had been, Russ Mason was permitted to work. (Id.) Again, Ray's testimony is consistent with written documents[18] and is corroborated by testimony from Mosholder and Shepherd. Ray also testified that Article VII, Disciplinary Procedures, does not apply to the CDL provision in the CBA because there is a separate Article relevant to CDL requirements. (Tr. 875-876 & 897.) This testimony was corroborated by Joe Gerchy, the union's acting Chief Steward and Chairperson of the bargaining committee. (Tr. 217, 220 & 241.) Lastly, Ray testified that service managers cannot terminate employees without first consulting with him. (Tr. 857 & 881.) Service managers only have the authority to issue discipline up to and including suspension. (Tr. 860, 875.) Again, this testimony is corroborated by Mosholder and Shepherd. (Tr. 1194, 1405-1406 & 1436.)

b. Dale Mosholder

Judge Sandron concluded that Mosholder was not a reliable witness because his testimony contained internal inconsistencies, conflicted with Ray's testimony, did not "gibe with the Respondent's actions and was incredible." (Decision p. 5.) Furthermore, Judge Sandron determined that Mosholder "clenched his hands" on the witness stand when questioned about the

[18] General Counsel's Exhibit ("G.C.") 7, 8 and 9 & R. 249.

events of November 30. (Id.) Again, this is yet another outlandish statement by Judge Sandron in a not so subtle attempt to shy away from tangible evidence that unquestionably establishes that Russ Mason was not treated disparately.

Judge Sandron asserts that Mosholder's testimony was "faulty for many reasons." (Decision p. 7.) Specifically, Judge Sandron found it "wholly unbelievable" that 70% of Russ Mason's duties required a CDL. (Id.) Judge Sandron argues that if that were truly the case it is "inconceivable" that Mosholder would have waited till October 30, 2010 to issue a thirty (30) day letter to an employee who had lost his CDL in July 2009 when his license was suspended by the State of Ohio for a DUI. (Id. & Tr. 34, 1362.) However, Judge Sandron discounts evidence that Center City has had other mechanics lose their driving privileges due to DUI's and have allowed them to continue to work with the understanding that they were not to drive any vehicles. (Tr. 37, 1364-1365, & G.C. 35, p. 3.) Once they are eligible to obtain a CDL they are required to do so as stated in the contract. (Tr. 1366.) Moreover, just as he did with Ray, Judge Sandron mischaracterizes Mosholder's testimony. Mosholder testified as follows with respect to the percentage of work performed which requires a CDL:

> Q. Okay. Now, what percentage of work performed by Idealease techs requires travel to and from a customer's site?
>
> A. Right now, it's -- it -- it is at 80 percent.
>
> Q. Okay. And of that 80 percent, is there a percentage that would require -- does that -- does that 80 percent require a CDL, or is that a different percentage that requires a CDL?
>
> A. Different, it's 70 percent. We have some trucks that are non-CDL.
>
> Q. Okay.
>
> JUDGE SANDRON: And -- and was that the -- was that -- were those figures the same back in July of 2010 --

THE WITNESS: Yes.

(Tr. 1377.) Judge Sandron seizes upon this gross mischaracterization that seventy (70) percent of the work necessitated the possession of CDL in an attempt to further undermine Mosholder's testimony. As of late July 2010 Mosholder had three journeyman mechanics under his supervision, only one of which had a CDL. (Decision p. 7.) Accordingly, Judge Sandron concluded that it simply is not possible for a single mechanic to perform all of the CDL work. (Id.) Judge Sandron went so far as to state "[i]f at least 70 percent of the mechanics' work required a CDL, then I must seriously question why the Respondent would have been willing to keep Mason and Reaves [sic] on the payroll." (Id.) It is inconceivable that he would make such statement. First, Center City did remove Russ Mason from the payroll for the very reason he alluded to, yet he concluded that the discharge was unlawful. Secondly, as Judge Sandron noted, Reeves was hired in late July after another mechanic quit. Reeves did not have his CDL and under the parameters of the Contract had a time certain with which to obtain one. Notwithstanding, Judge Sandron would have the Company remove Reeves from the payroll in direct violation of the contract.

Next, Judge Sandron attacks Mosholder's testimony with respect to a notation in his daily planner. (Decision p. 7.) Specifically, General Counsel and Judge Sandron maintain that the notation for July 8, 2010 is "money," while Mosholder maintained that it is supposed to say "Monday." (Id., citing Tr. 1439.) Mosholder testified that Russ Mason was going to find out Monday why his CDL was not returned back to him with his regular driver's license. (Id.) Judge Sandron concluded that this testimony was wholly contrived because "after a year of Mason's not having a CDL, such testimony makes no sense on its face; when Mosholder initially related the July 8 conversation, he testified that Mason said he was now eligible for his CDL and

would be working on getting it and Mason and Mosholder had no conversation on the following Monday." (Decision pp. 7-8.)

However, in viewing both Mosholder and Russ Mason's testimony together, Mosholder's testimony certainly does not ring as contrived. For instance, Mosholder testified that Russ Mason's driver's license was reinstated as a Class D driver's license, not a CDL. (Tr. 1368.) Mosholder further testified that on July 8, 2010 Russ Mason told him that he had his driver's license back, but he did not obtain his CDL with it. (Tr. 1369). During the July 8, 2010 conversation, Russ Mason indicated that "he was going to work to get his CDL license." (Tr. p. 1370.) Similarly, Russ Mason testified that his regular driver's license was only suspended for nine (9) months and in order to reacquire that, he had to drop the CDL endorsement from his license. (Tr. 41-42.) His CDL was suspended for one (1) year and was not automatically reinstated. (Tr. 42.) The fact that the record contains no evidence of a conversation on the following Monday between Mosholder and Mason does not in turn mean that the testimony "makes no sense on its face."

Lastly, Judge Sandron is unable to grasp why Mosholder recommended discharge during his November 30, 2010 meeting with Ray and the fact that Ray was apparently on the same page, yet proceeded to suspend Russ Mason later that afternoon. (Decision p. 8.) Judge Sandron disregarded the reasoning and circumstances behind Mosholder's actions. First, at no time did Ray notify Mosholder that he was going to terminate Russ Mason. (Tr. 859 & 1420.) Secondly, Mosholder suspended Russ Mason near the end of the shift and, at that time, Ray had not yet returned from off-site meetings with customers. (Tr. 1403-1404, 1412.) More importantly, Mosholder does not have the authority to terminate employees. (Tr. 1405-1406 & 1436.) Suspending him was the only action he could take. (Id.)

Contrary to Judge Sandron's findings, and as evidenced below, Mosholder was candid. He did not answer questions with any obvious attempts to slant his answers and his testimony was not self-serving. His answers on direct examination remained consistent on cross examination. His testimony was consistent with written documents and the testimony of other witnesses. His testimony was detailed and accurate. Viewing Mosholder's testimony in conjunction with the entire record and the totality of the evidence presented, his testimony was credible. Accordingly, Judge Sandron credibility findings with respect to Mosholder are erroneous. Mosholder's testimony must be credited over any conflicting testimony given by General Counsel's witnesses.

Mosholder, Service Manager for Idealease (Tr. 1355), testified exclusively with respect to Russ Mason's termination. Mosholder testified that he has the authority to issue discipline up to and including suspension, but cannot terminate any employee without first consulting with Ray. (Tr. 1405-1406 & 1436.) Furthermore, Mosholder testified that he had to issue a reprimand to employee Josh Rose ("Rose") for failure to obtain a CDL within the 90 day time period set forth in the CBA. (Tr. 1430.) The reprimand plainly stated that Rose had a date certain with which to obtain a CDL in order to "continue to work at Center City." (R. 249.) The reprimand further stated that failure to comply "may result in further disciplinary action including suspension or termination of employment from Center City International Trucks, Inc." Obviously, said testimony is supported by R. 249.

More importantly, Mosholder gave exceptionally detailed and accurate testimony regarding eleven (11)[19] conversations he had with Russ Mason about the need for him to obtain his CDL. (Tr. 1370-1420.) Mosholder was able to recall the specific dates because he kept track

[19] July 8, 2010, August 4, 2010, September 7, 16 and 29, 2010, October 11, 20 and 29, 2010, November 24, 2010, and two separate conversations on November 30, 2010.

of said conversations in his day planner. (Tr. 1423-1424 & R. 277.) Mosholder testified as to what was said during these conversations, where the conversations took place, when the conversations took place and who else, if anyone, was present. Conversely, Russ Mason offered unreferenced and general testimony. Furthermore, Russ Mason's testimony was vague and he revealed a poor recollection as to dates, conversations and details of those conversations. For instance, Russ Mason testified that from July 2010 until the date he received his thirty (30) day notice he can only recall three (3) conversations with Mosholder. (Tr. 158-159). Yet, Mosholder gave specific details with respect to eight (8)[20] meetings which took place during that time period.

c. Dan Shepherd

Shepherd, former service manager (Tr. 1193) for Center City, testified with respect to the Company's attendance policy, a former employee's termination for failing to obtain a CDL within the time parameters set forth in the CBA and applicants who refused jobs at Center City due to the fact that they did not want to join the union and/or pay union dues.

Shepherd testified that he issued a reprimand to Jeff Ward on January 27, 2010 due to the fact that Ward was tardy on January 25 and 26, 2010. During the meeting he told Ward his attendance must improve and then he asked Ward whether he was trying to paint a picture during negotiations that Shepherd was as bad manager and that he never disciplines employees. (Tr. 1199.) Notably, both Russ Mason and Ward's stories with respect to this meeting are inconsistent and flawed. Russ Mason testified that Shepherd told Ward that if the union is going to make an issue out of attendance during negotiations, then he was going to start enforcing it. (Tr. 112.) Yet, the Company introduced evidence of other employees who had received reprimands for attendance prior to this incident, including two (2) reprimands issued to Russ

[20] July 8, 2010, August 4, 2010, September 7, 16 and 29, 2010, October 11, 20 and 29, 2010.

Mason. (R. 220, 221, 229 & 230.) General Counsel even introduced a prior reprimand issued to Ward for poor attendance. (G.C. 19.) Russ Mason's story is flawed. It's not plausible that Shepherd indicated that he was going to "start" enforcing the attendance policy when the evidence plainly illustrates that he already was. Likewise, Ward's account is unsound. Ward indicated that Shepherd told him "you can't be starting shit at negotiations and not expect it to trickle down." (Tr. 624). The facts established that Ward was late to work each of the two consecutive days immediately prior to the discipline in question and he had been disciplined in the past due to his attendance. (R. 269 and G.C. 19.)

Additionally, Shepherd's testimony with respect to Fyffe's suspension and subsequent termination is supported by written documents, unlike Joe Gerchy's testimony. Fyffe was suspended on March 12, 2008, for failure to obtain a CDL within the time parameters set forth in the CBA. He was given thirty (30) days to obtain his CDL. (Tr. 1210-1211, G.C. 7, R. 267 at page 6 and R. 271.) Fyffe was subsequently terminated on April 14, 2008 for failing to obtain his CDL within 30 days, as stated in his reprimand. (G.C. 8 & R. 267 at p. 4.) Conversely, not only was Joe Gerchy's story implausible that Shepherd created a false document, his testimony was self serving and contradicted by the plain meaning of written documents. Bluntly put, it's unbelievable that he, acting as chief union steward, would sign off on the termination of a non-probationary bargaining unit employee if said employee voluntarily quit as is asserted by Gerchy. If so, Gerchy admitted to falsifying an official Company document. Moreover, Gerchy's testimony was self serving in that he was attempting to show the Company discriminated against Russ Mason by fabricating a story that Fyffe was not terminated, but rather that he voluntarily quit. Accordingly, his testimony cannot be credited on this issue.

Lastly, Shepherd testified that applicants who were offered jobs with the Company ultimately refused the job offer citing concerns of having to join the union and pay union dues. (Tr. 1228-1231 & 1250-1254.) This testimony was unrebutted and must be credited.

Shepherd was candid. He did not slant his answers and his testimony was not self serving. Shepherd is retired and has been since October 31, 2010. (Tr. 1192-1193.) As such, he has no reason to be untruthful in order to aid the Company in its defense of the unfair labor practice charges referenced above. Moreover, his testimony was consistent with written documents and the testimony of other witnesses. His testimony was detailed and accurate and his answers on direct examination remained consistent on cross examination. Viewing Shepherd's testimony in conjunction with the entire record and the totality of the evidence presented, his testimony was credible. Accordingly, his testimony must be credited over any conflicting testimony given by General Counsel's witnesses.

d. Pat Pesta & Nick Wahoff

Both Pesta and Wahoff testified with respect the bargaining over health insurance. Specifically, each testified that Pesta never represented to the union that the Company would only entertain proposals on insurance presented by the union that encompassed insurance for both bargaining and non-bargaining unit employees. (Tr. 1190-1191 & 1268-1269.) Their testimony is consistent with the Company's bargaining notes, as well as bargaining notes taken by the union's committee Chairperson. (R. 2, 3, 4, R. 264 at pp. 111-125.) It is nonsensical that the Company would look to the union to provide insurance for its non-bargaining unit employees. Indeed, the Company sent a letter to the union on October 7, 2010 reminding the union that they did not represent the Company's non-bargaining unit employees and, as such, with respect to the non-bargaining unit employees, the Company intended to "secure health

insurance coverage for those employees and we will bind the insurance coverage for them." (Joint Exhibit ("J") J. 168 at p. 2.)

Hence, their testimony corroborates one another and is entirely consistent with the plain meaning of written documents. Accordingly, their testimony must be credited over Rudis, the current chief negotiator for the union. Not only was Rudis's testimony on this issue illogical, it is inconsistent with the bargaining notes taken by the Company and the union's bargaining committee chairperson, in addition to the statements referenced above in J. 168. Further, Rudis stated falsely that on requests for information, he specifically asked for the health information on non-bargaining unit employees, when the Union's notes taken by Gerchy clearly state he was ONLY asking for bargaining unit employees. (R. 264 at p. 115.)

e. Diane Taylor

Taylor testified with respect Fyffe's suspension and subsequent termination. As a senior administrator with the Respondent, she testified that anytime an employee is not working an eight (8) hour shift a slip comes through payroll. This process enables her to know which notations to mark on the employee's absentee calendar. On March 12, 2008 she received a slip for Fyffe that indicated Fyffe was not to work until he obtained his CDL. (Tr. 1104-1105.) The slips are attached to the daily timesheets and are generated by the department managers. (Tr. 1106.) Thus, she started recording absent, not excused, on his absentee calendar. (R. 267.) Taylor's testimony on this issue is supported by written documents and is unrebutted. Therefore it must be credited. Additionally, Taylor testified that Fyffe did not quit, but was terminated for failing to produce a CDL within the requisite time period. (Tr. 1114 & 1116.) This testimony is supported by written documents and is consistent with Shepherd's testimony. Lastly, her testimony remained consistent on cross examination.

2. General Counsel's Witnesses

General Counsel's witnesses presented testimony that was not probable and often times conflicting. For instance, some witnesses contradicted their own testimony, some witnesses testified in direct conflict to the plain meaning of written documents proffered and subsequently admitted into evidence, some witnesses offered unreferenced and general testimony with respect to bargaining that was self-serving and contradictory to the contemporaneous bargaining notes, while other witness offered contradictory testimony with respect to the same topic. As a whole, their testimony was inexact, inaccurate and not plausible.

Remarkably, Judge Sandron turned a blind eye to this dubious testimony failing to examine the credibility of any of General Counsel's witnesses, notwithstanding the fact that he dedicated nearly four (4) pages of his Decision to Ray and Mosholder's testimony. Instead, he simply cited the infamous *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2nd Cir. 1950), revd. on other grounds 340 U.S. 474 (1951) for the proposition that "[N]othing is more common than in all kinds of judicial decision than to believe some and not all of a witness' testimony." (Decision p. 4). Judge Sandron, as evidenced by his Decision, appears to have focused only on the testimony offered by Respondent's witnesses in a transparent endeavor to rule in favor of the General Counsel no matter the evidence.

a. Russ Mason

Judge Sandron noted that on one hand, Russ Mason was not a "stellar witness" nor was he "fully forthright on cross examination." (Decision p. 3.) Notwithstanding, Judge Sandron subsequently contradicts himself and deems Russ Mason to be "candid" and his testimony "consistent." (Id.) As evidenced below, his testimony was anything but candid and consistent.

Accordingly, viewing his testimony in conjunction with the entire record and the totality of the evidence, his testimony was implausible and self-serving. Especially fatal to his credibility was the fact that his testimony was contradicted by the plain meaning of written documents, i.e., G.C. 7, 8, 9 & R. 249.

As noted section III. A., 1, b. *supra,* Russ Mason offered unreferenced and general testimony with respect to his conversations with Mosholder. Moreover, his testimony was vague and he revealed a poor recollection as to dates, conversations and details of said conversations. For instance, Russ Mason testified that from July 2010 until the date he received his thirty (30) day notice he can only recall three (3) conversations with Mosholder. (Tr. 158-159). Yet Mosholder gave specific details with respect to eight (8) conversations/meetings with Russ Mason during this time period.

Another example of his faulty recollection is his testimony regarding his December 3, 2010 first (1st) step grievance meeting. Specifically, he testified that the following individuals were present during said meeting: himself, Gerchy, Mosholder, Ray, and Taylor. (Tr. 80-81.) However, Gerchy and Mosholder testified that they participated only in the December 7, 2010 second (2nd) step grievance meeting. (Tr. 223 & 1420-1421.) Also, Ray testified that the following individuals participated in the December 3, 2010 first (1st) step grievance meeting: himself, Russ Mason and Steckman. (Tr. 865.)

Furthermore, Russ Mason's testimony is littered with inconsistencies with respect to the circumstances surrounding other employees who have been suspended and/or terminated for failing to obtain a CDL. For instance, he testified that prior to being issued his thirty (30) day notice (G.C. 3) he was not aware of a rule in which employees had thirty (30) days to

obtain/renew a CDL and, he could not recollect any past practice. (Tr. p. 54). Yet on redirect he testified to the following:

> Q. In response to Mr. Mason's questions, you said that you understood that you might be disciplined if you didn't get the CDL license within 30 days?
>
> A Correct.
>
> Q. Why did you feel that way?
>
> A. Well, it -- if you don't have it within 30 days, of course, you're going to get disciplined.
>
> But, from my knowledge, the only way anybody's ever been disciplined for it in the past was suspended until they acquired it, then they were able to return to work.
>
> Q. And how many instances can you say where someone was suspended and then they got their CDL license and they returned to work after they got it?
>
> A. Well, I can say one for sure. I'm not sure if Josh ever actually got suspended.
>
> Q. And who is the person that you know for sure?
>
> A. The person that I'm for sure got suspended was Joseph Oman.

(Tr. 160-161.) Analogous to Rose and Fyffe, Oman was suspended and given a thirty (30) day deadline to obtain a CDL and, failure to do so would result in termination. (G.C. 9.) Oman returned to work after he had successfully obtained his CDL within the thirty (30) day time period. (G.C. 35.) Russ Mason further testified that no one had ever been discharged for failing to obtain a CDL within a thirty (30) day time period. (Tr. 96.)

However, he testified on cross examination that he understood he had thirty (30) days to get the CDL and, if not, he could be disciplined up to and including termination. (Tr. 134.) He further testified on cross examination that he signed a CDL reprimand on the signature line marked “Union Representative” for another technician, Rose. (Tr. 150, 163 & R 249.) The

reprimand plainly stated that Rose had a date certain with which to obtain a CDL in order to "continue to work at Center City." (R. 249.) The reprimand further stated that failure to comply "may result in further disciplinary action including suspension or termination of employment from Center City International Trucks, Inc." (Id.)

Likewise, G.C. 8 plainly states that Fyffe had "failed to obtain a Commercial Driver's license as outline[d] in the Reprimand dated March 12, 2008[.] [Fyffe's] employment at Center City International Trucks is [t]erminated as of April 14, 2008. Notwithstanding, Russ Mason stuck to his self-serving version that no one had ever been terminated for not obtaining a CDL and, if for some reason they did fail to obtain it, they were allowed to return to work once they had. (Tr. 162-163.) Russ Mason's version allows for employees to return to work at any time after having obtained a CDL and simply ignores the thirty (30) day, time certain deadlines noted in the reprimands and the fact that the employees who were given these letters were either terminated or they obtained their CDL within the thirty (30) day time period.

Lastly, as noted in full detail in section III. A., 1, c. *supra*, Russ Mason's testimony with respect to Ward's January 27, 2010 reprimand meeting rang as implausible.

b. Rob Romine

Romine's testimony was inconsistent and contrary to the plain meaning of written documents. Moreover, his testimony on direct examination was inconsistent with his testimony on cross examination. Specifically, Romine testified that no Center City employee has ever been discharged for not having a CDL and, he is not aware of a thirty (30) day deadline in which current employees must obtain a CDL if it has been revoked. (Tr. 190.) Yet, G.C. 8 expressly indicates that Fyffe was terminated for failing to obtain a CDL within the thirty (30) day deadline he was given. Additionally, on cross examination and questioning by Judge Sandron, Romine

testified that during Russ Mason's termination meeting he told Mosholder that Russ Mason should have a CDL and the Company requires that you have a CDL. (Tr. 205-206.)

c. William Graves

Graves, a leadman mechanic at the east facility,[21] offered testimony regarding the February 4, 2010 negotiation session. Graves asserted that Mason threatened members of the union's bargaining committee with termination if they continued to challenge the Company with respect to attendance. (Tr. 504-505.) He further alleges that Mason then asked Pesta whether anyone had ever been fired for attendance and Pesta responded not for a long time. (Tr. 506.)

Nevertheless, neither the Company's bargaining notes, nor the union's committee Chairperson's bargaining notes make any reference to these alleged threats. Moreover, Graves's recollection is faulty in that the party's also discussed attendance during the January 25, 2010 meeting. The following excerpts specific to attendance are from the Company's bargaining notes on January 25, 2010 and February 4, 2010:

January 25, 2010[22]

> RM – Also, you had inquired about the guidelines on attendance. Basically the service managers use their own discretion in determining what is reasonable or not reasonable.
>
> MC – So basically someone could miss a lot of work and be treated differently if he is well liked by management.
>
> RM – I'll give you an example. Someone may have the flu and miss 5 days of work. The Company would not terminate that person. However, if someone missed one day per month the Company may decide to let that person go.
>
> MC – So 12 absences?
>
> RM – Yes.
>
> BR – Let me just ask the question. You're saying each member….

[21] Tr. 499-500.
[22] RM – Ron Mason; MC – Mark Chema; BR – Bill Rudis

RM – We have been looking into to see if anyone has ever been discharged. Not saying it hasn't happened. But we cannot find any as of this time.

BR – Here's the concern and I know that you know this.

RM – Oh and tardy. 6 minutes is the guideline. If man is five minutes late he is okay. It's the tick of a clock.

Committee – Yep. 6 minutes is a tenth of an hour.

MC – Written down anywhere or just rule of thumb?

RM – No written policy. Now if you all want to go down that road and sounds like you do then we can certainly talk about an attendance system then we certainly can set up a point system. Now you must be terminated when you reach a certain point total, no questions asked.
That is a double edged sword. All this discretion and no one has yet to be terminated for an attendance issue. Be darn sure this is the road you want to go down.

R. 1 at 96.

February 4, 2010[23]

JW – So there are more than one on the west side? Can Dale take over for Dan when Dan is unavailable?

PP – I don't know that. Would have to look into that for you.
#3 - Who within management decides tardiness? What is the guideline?

RM – There is no guideline. It is at the service manager's discretion. And now would be good time to go over this yet again.

We will follow the same procedures we have. The supervisors have and will follow the same procedures. It seems to us that in January there were a number of attendance issues. RM talking about testing management and making martyrs out of themselves.

JW - What we find counselor are that the guidelines are arbitrary. What are those guidelines?

We are trying to figure out what those are.

RM – You are free to propose an attendance issue or a guideline.

[23] JW – Jeff Ward; PP – Pat Pesta; RM – Ron Mason; MC – Mark Chema; BR – Bill Rudis.

MC – It's arbitrary right.

RM – No. It's up to the discretion of the service manager. The fact of the matter is we still have a problem on attendance. And if people want to push that then we will see what happens.

BR – You have a complete misconception about what this is about. We are not interested in testing the employer. What we are interested is what you have said repeatedly. We are trying to determine with what you have said and the documents you have given to us.

Are you saying it is the employer's discretion to hand out discipline in discretionary manner and at their whim and some will be treated differently and disparately. And you focus on point systems.

Get off of that. Get back in the real world. We want harmony and uniformity in the policy.

Part of what you said is to make you a proposal. But it may not be where you want to steer this committee. The union will discuss this matter. Is it your position in continuing, that it is the service manager raping the men of the bargaining committee.

RM – Stop putting words in mouth. Never said whim never said disparate treatment.

Historically, service managers have addressed any attendance issues and there would be no further problems.

Trying to prevent someone from going down a road they ought not to go down and when we see people getting discipline issued for attendance over and over to become a martyr or whatever…….

BR – You're an angry man and you're resentful. You need to stop whiplashing these men and stop…..You have a disparate practice. And you have admitted that in your answers. You gave us responses and we are trying to get answers. And we have seen a change since the onset of these negotiations.

RM – Request for information. Show me the names of the people, show me the discipline they have received and show me how it is different.

BR – You will get that information through the company.

RM – You make the claim that we have treated people disparately. So show me.

BR – You know.

RM - So you don't have any.

Id. at 105-106. The notes taken by the union's committee Chairperson are also silent with respect to the threats alleged by Graves. R. 264 at 5-10 & 18-20. Moreover, committee Chairperson Gerchy noted in his March 8, 2010 affidavit that Mason did not make any specific threats towards the union's bargaining committee with respect to attendance. (Tr. 463.)

Graves's testimony was inaccurate and self-serving. His recollection of events was inconsistent with both sets of bargaining notes and Gerchy's March 8, 2010 affidavit. Moreover, considering the fact that Gerchy's sworn statement took place only a little over a month after the February 4, 2010 meeting, it must be credited over Graves's testimony which took place some thirteen (13) months after the February 4, 2010 bargaining session occurred.

d. Jeff Ward

As noted in section III. A., 1, c. *supra*, Ward offered shaky testimony with respect to his January 27, 2010 reprimand meeting with Shepherd. Bluntly put, Ward was late on two consecutive days and was subsequently issued disciplined just as had been in the past. His testimony on this matter is undeniably self-serving. Furthermore, his testimony on other matters is inconsistent with the testimony presented by other witnesses, and conflicts with written documents.

For instance, Ward testified that no other employee has ever been discharged for failing to obtain a CDL. (Tr. 600-601). Yet, G.C. 8 and R 267 at p. 4 expressly states otherwise. Additionally, Ward testified that during the January 22, 2010 negotiation meeting, the union indicated that they wanted a point system with respect to attendance because they wanted to do away with favoritism. (Tr. 616-617.) However, attendance was not discussed during the January 22, 2010 meeting. More importantly, on January 25, 2010 it was the Company who suggested

that perhaps the union should propose a point system if they were not satisfied with the Company's attendance policy. *See,* III., A., 2., c, *supra* & R. 1 at p. 96. The notes taken by the union's committee Chairperson do not indicate otherwise. (R. 264 at pp. 5-10.) Ward also testified that during the January 25, 2010 or the January 26, 2010[24] bargaining session meeting, Rudis inquired of Pesta whether anyone has ever been terminated for attendance. (Tr. 620-621.) Yet, Graves testified that it was Mason who asked this question to Pesta, not Rudis and, that it occurred during the February 4, 2010 meeting (Tr. 506), not the January 25 or 26, 2010 meeting as is alleged by Ward.

Viewing Ward's testimony in conjunction with the entire record and the totality of the evidence, his testimony is inaccurate and his recollection of events is obscure in that it is inconsistent with both sets of bargaining notes, as well as testimony presented by other witnesses.

e. Joe Gerchy

Gerchy's testimony is rife with inconsistencies and contradictions. Additionally, his testimony contains a myriad of flaws. For instance, Gerchy testified that an employee's probationary period runs for a period of sixty (60) days. (Tr. 418.) He also testified that Fyffe and Oman were probationary employees at the time they received their reprimands for not having a CDL. (Tr. 226 & 231 and G.C. 7 & G.C. 9.) He further testified that he was not aware of any non-probationary employees that had been disciplined and/or suspended for not having a CDL. (Tr. 231-232 & 242.) However, evidence in the record suggests otherwise. Neither Fyffe, Rose, nor Oman was a probationary employee at the time of their reprimand. For instance,

[24] Another example of Ward's hazy recollection as the parties did not even meet on January 26, 2010. That was one of the day's Ward was tardy for work.

Fyffe's hire date was November 12, 2007 (R. 267 at p. 2.) and he was subsequently suspended on March 12, 2008. (Id. at p. 3 & R. 271.)

Moreover, Gerchy testified that the Company has never terminated an employee, probationary or non probationary, for not having a CDL. (Tr. 232 & 245.) Again, the documents and testimony from other witnesses establish this to be untrue. In fact, Gerchy signed Fyffe's termination document as the chief union steward on the signature line marked union representative. (Tr. 229-230, 413 & G.C. 8.) Even so, Gerchy testified that Fyffe was not terminated, but rather, he voluntarily quit. His explanation as to why he signed off on an allegedly falsified document is irrational and self serving. His testimony is as follows:

> Q. Why did you sign this document indicating he was terminated, even though you had the conversation that -- with Mr. Shepherd –
>
> A. I just signed it as a witness. I don't sign it for any other reason. I don't -- I don't agree with it. And the employee acknowledgment, I always felt, gave me the opportunity to sign as a witness without agreeing.

(Tr. 229-230.) Even more astounding is the fact that on cross examination he testified that he did not consider it to be a false document. (Tr. 414.)

Another example of the implausibility of Gerchy's testimony relates to why the union put various matters on the table after January 7, 2010. He testified as follows:

> Q. Now, is that true, that those matters were addressed after January 7, 2010?
>
> A. Yes.
>
> Q. And why were those matters addressed after that date?
>
> A. We had meetings with our membership. We had become quite aware of what -- what a sham of a contract we'd been working under, and we got input from our membership to address some of these things, most of them.

(Tr. 261.) However, when viewing Gerchy's testimony as a whole, it is clear that the new proposals were not made because the membership had suddenly become aware that the contract they had been working under for years and years was a "sham."

For instance, Gerchy testified that the union generally polls the membership in the beginning in order to ask questions about issues, problems, or requested changes to the contract. (Tr. 283-284.) Moreover, the union's first proposal that it submitted to the Company on September 9, 2009 contained only a single change to the expired contract. (Tr. 298 & J. 9.) When the union submitted this proposal to the Company Gerchy indicated that the proposal is very simple and that the men are extremely happy with the current contract. As such, the only thing the union is proposing is a wage increase. (R. 1 at p. 2.)

On cross examination, Gerchy testified that the union's Job Classification Proposal was in fact submitted to the Company after January 7, 2010. (Tr. 445-446.) Gerchy explained that the union withdrew the T/A and submitted this proposal because the employees were being disciplined for work outside their classification and it was the union's opinion that said employees were not being paid for this higher classification work. (Id.) Nevertheless, Gerchy admitted that the union was aware of these changes prior to October of 2009. (Tr. 446.) The Company's bargaining notes confirm this. (R. 1 at pp. 161-162.) Yet, on re-direct, he altered his testimony and said he did not know when this problem first presented itself. (Tr. 486.) On re-cross, Gerchy confirmed that this was not a "new" problem. (Tr. 496.)

Gerchy also testified with respect to attendance, specifically the February 4, 2010 bargaining session. Gerchy testified that at the beginning of the meeting Mason announced that that a member of the bargaining committee had recently been reprimanded for attendance and if that person was somehow "trying" the Company he would advise against it. (Tr. 251.) He

viewed this statement as a threat. (Tr. 463.) Nonetheless, his March 8, 2010 affidavit suggests otherwise. In it he states: "I don't recall Mason making a specific threat." (Tr. 464.) Notably, this affidavit, was given just thirty-two (32) days after the bargaining session in question. Clearly, he would have remembered a threat had one actually occurred. Lastly, Gerchy's recollection of the meeting is inaccurate as the topic of discussion he is referencing did not take place at the beginning of the meeting, but rather, in mid-afternoon after the parties had returned from a long lunch break. (R. 1 at pp. 104 – 106 and R. 264 at pp. 18-20.)

Viewing Gerchy's testimony in light of the entire record and the totality of the evidence, it proves to be self-serving, inaccurate, and implausible. More importantly, it was inconsistent with that of other witnesses and with other evidence in the record in that it contradicted the plain meaning of written documents.

f. Mark Chema

Chema's testimony is replete with inaccurate and inconsistent statements. Chema was the union's lead negotiator at various times throughout the contract negotiations at issue in this case. (Tr. 664.) On cross examination, Chema acknowledged that he did not review Gerchy's bargaining notes and, as such, was only testifying from memory. Accordingly, he offered inexact and inaccurate testimony, instead of accurate detailed testimony that would support the union's allegations. His testimony was contrary to the plain meaning of written documents as well as the Company's bargaining notes and the notes taken contemporaneously by the union's committee Chairperson.[25] Moreover, Chema's testimony on direct examination was not at all consistent with his testimony on cross examination.

During direct examination Chema repeatedly asserted that after January 7, 2010, the union would make proposals to the Company and the Company would simply respond that it was

[25] R. 1 & 264.

not interested and summarily reject the proposal without giving it any consideration and/or explaining its reasoning. Subsequently, the Company would simply resubmit whatever proposal it currently had on the table. For instance, Chema testified as follows:

February 4, 2010: Union submitted proposal on Health and Safety Committee. (J. 79.) Chema did not offer any testimony on direct with respect to this proposal. However, on cross examination he acknowledged that the Company did explain its reasoning for rejecting the union's proposal. (Tr. 989-990, R. 1 at pp. 113-115 & R. 264 at p. 20.)

February 24 2010: Union submitted proposal entitled Attendance at Work. (J. 82.) Chema testified that the Company simply said nothing in response. (Tr. 706.) However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 990-991, R. 1 at p. 121 & R. 264 at p. 23.)

February 26, 2010: Union submitted proposal entitled Injured Employee. (J. 85.) Chema testified that the Company said was not interested and resubmitted its December 11, 2009 proposal. (Tr. 709-710.) However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 995, R. 1 at pp. 129-130 & R. 264 at p. 26.)

March 5, 2010: Union submitted proposal entitled Discipline and Discharge. (J. 88.) Chema testified that the Company had no response other than resubmitting its December 11, 2009 proposal. (Tr. 956). However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 998, R. 1 at p. 143 & R. 264 at p. 30.)

March 18, 2010: Union submitted a proposal entitled Hourly Job Evaluation Plan. (J. 98.) Chema testified that the Company said it was not interested and resubmitted its last offer that

was on the table. However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 1004-1005, R. 1 at p. 163 & R. 264 at p. 39.)

March 26, 2010: Union submitted proposal entitled Apprenticeship. (J. 102.) Chema testified that the Company informed the union that it was not interested and subsequently resubmitted its March 10, 2010 last and final offer. (Tr. 717-719.) However, on cross examination Chema acknowledged that the Company responded to the union's proposal at the April 1, 2010 meeting and did in fact explain why it was rejecting the union's proposal. (Tr. 1007, R. 1 at p. 181 & R. 264 at p. 44.)

April 1, 2010: Union submitted proposal entitled Wellness Benefit. (J. 104.) Chema testified that the Company said it was not interested. (Tr. 719.) However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 1010, R. 1 at p. 187 & R. 264 at p. 47.)

April 1, 2010: Union submitted proposal entitled Shift Hours. (J. 106.) Chema testified that the Company informed the union that it was not interested and subsequently resubmitted its March 10, 2010 last and final. (Tr. 719-720.) However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 1011-1112, R. 1 at p. 189 & R. 264 at p. 48.)

April 9, 2010: Union resubmitted its Health and Safety Committee proposal. (J. 110.) Chema testified that the Company simply responded with its last and final dated March 10, 2010. (Tr. 720-722.) However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 1012-1013, R. 1 at p. 198 & R. 264 at p. 53.)

May 6, 2010: Union resubmitted its Hourly Job Evaluation Plan proposal. (J. 118.) Chema testified that the Company responded that it was not interested. (Tr. 723-724.) The union previously submitted this proposal on March 18, 2010. (Tr. 1004.) On cross examination Chema acknowledged that the Company did offer an explanation as to why it was not accepting the union's proposal. (Tr. 1005, R. 1 at pp. 162-163 & R. 264 at p. 39.)

May 10, 2010: Union submitted Sale & Transfer of Business proposal. (J. 121.) Chema testified that the Company informed the union that it was not interested and simply resubmitted its March 10, 2009 last and final offer. (Tr. 724-726.) However, on cross examination Chema acknowledged that the Company responded to this proposal at the May 25, 2010 bargaining sessions and in fact explain why it was rejecting the union's proposal. (Tr. 1014-1015, R.1 at p. 241 & R. 264 at p. 63.)

August 27, 2010: Union submitted Safety and Health Proposal. (J. 146.) Chema testified that the Company informed the union that it was not interested. (Tr. 737.) However, on cross examination Chema acknowledged that the Company did in fact explain why it was rejecting the union's proposal. (Tr. 1037, R. 1 at p. 313 & R. 264 at p. 103.)

Chema's testimony on direct is wholly contradictory to his testimony on cross examination, as well as the contemporaneous bargaining notes taken by both parties. Simply put, Chema's testimony is anything but credible.

Additionally, Chema's recollection of various events that transpired during bargaining is erroneous. Chema testified that during the January 20, 2010 bargaining session Rudis asked Mason why the Company wanted an open shop provision in the contract. (Tr. 998-999.) There is nothing in the bargaining notes to support Chema's testimony. (R. 1 at pp. 66-79 & R. 264 at pp. 1-5.) Nevertheless, the parties did discuss this issue across the table. It was actually Mark

Ward, the union's lead negotiator during the months of November and December 2009 (Tr. 949) who actually made this inquiry. This took place during the November 5, 2009 bargaining session. (R. 1 at pp. 30-31.) When presented with this line of questioning on cross, Chema still did not recollect that it was Ward, not Rudis, who made this inquiry. (Tr. 949-950.)

Lastly, with respect to the union's June 4, 2010 proposal, Chema testified that he told Mason that since the Company withdrew its last and final, the union was withdrawing all of its tentative agreements. (Tr. 1019.) However, his affidavit states as follows: "I said the Union is withdrawing all the TA's and submitting a comprehensive counterproposal based on information from the records and our membership." (Tr. 1021-1022 & R. 279 at p. 7.) Chema's memory is hazy with respect to the various events that occurred over the course of bargaining as his testimony was inexact and inaccurate.

Viewing Chema's testimony in conjunction with the entire record and totality of the evidence, it is quite clear his testimony is dubious, vague, inconsistent and not credible. Given the extensive bargaining notes in evidence, Chema's baseless and wide-ranging testimony that the Company did not consider the union's proposals cannot be credited. Like Russ Mason, especially fatal to Chema's credibility is the fact that his testimony is contradicted by the plain meaning of written documents, not to mention his own testimony elicited on cross examination.

g. Bill Rudis

Rudis's demeanor during his testimony was poor. He was evasive and argumentative on cross examination. He often gave unresponsive speeches and was repeatedly told by Judge Sandron to answer the questions, preferably with a yes or no. See for example, Tr. 1131-1132. At one point he asked Judge Sandron how he wanted him to answer a specific question; he then answered the questions with a "yes" and a "no." (Tr. 1134.) At yet another point his counsel

blurted out an answer for him. After having been coached by his counsel, Rudis testified that he was not familiar with the document.[26] (Tr. 1141.) He even refused to answer a question on cross examination despite the fact that Judge Sandron overruled an objection made by his counsel. After further instruction by Judge Sandron to answer the question he finally did so. (Tr. 1153-1154.)

Rudis is the current chief negotiator for the union and has been since September 2010. (Tr. 768.) Nevertheless, he has been involved in these negotiations since January 20, 2010. (Id.) From January 20, 2010 thru December 2010 he attended approximately twenty-five (25) bargaining sessions. (Tr. 769.) Rudis testified that he was only interested in covering the unit employees even though the Company's current health insurance plan covered both bargaining unit and non-bargaining unit employees. (Tr. 780.) Moreover, he told Pesta that the union could only bargain for unit employees. (Tr. 1161.) Yet, he also testified that he never told the Company he was bargaining on behalf of the union workforce. (Tr. 1152.) This testimony is nonsensical.

He also claims Pesta informed him during the October 5, 2010 meeting that the Company would only accept proposals from the union that included both bargaining unit and non bargaining unit employees. (Tr. 1150.) However, the fact is the record contains not a single document to support this testimony, i.e. correspondence admitted as joint exhibits or both sets of bargaining notes. Importantly, Rudis testified that he reviewed Gerchy's notes from the October 5, 2010 bargaining session and they are accurate. (Tr. 819 & 1150.) Again, Gerchy's notes do not support Rudis's testimony. The record does contain correspondence that wholly opposes his testimony. The Company sent a letter to Mr. Rudis on October 7, 2010 reminding him that the

[26] The document Rudis asserted he was unfamiliar with was actually attached to a January 20, 2011 e-mail from Tim Reilly, the owner of the Company, to Rudis. (R. 246 & 280.)

union did not represent the Company's non-bargaining unit employees and, as such, the Company intended to "secure health insurance coverage for those employees and we will bind the insurance coverage for them." (J. 168 at p. 2.) The fact is that Rudis simply made up this statement by Pesta in a very bad attempt to support an allegation that has no merit.

Rudis also presented testimony that conflicted with a November 12, 2010 affidavit he provided to Region 9. Rudis testified that he reviewed Gerchy's notes from the September 23, 2010 bargaining session and that while they were "representative," they were not "accurate." (Tr. 819-820.) Conversely, his affidavit states that the notes accurately reflect what transpired. (Tr. 823.) Rudis and the union continuously attempted to distance themselves from its Committee Chairman and acting Steward's bargaining notes.

Rudis also offered testimony which is contradictory to correspondence between the parties introduced as joint exhibits. Specifically, on cross examination Rudis was asked whether his September 24, 2010 letter (J. 161) was in fact the first written correspondence that he had sent to the Company requesting specific information in order to get a quote for insurance and he answered no. (Tr. 1127-1128.) He indicated that he had previous correspondence with Tulencik relative to insurance. (Tr. 1128.) Bluntly put, said testimony is not accurate and is contrary to the record. While Tulencik did correspond with Rudis on September 17, 2010 (J. 155) and again on September 21, 2010 (J. 159), neither letter dealt with insurance. Said letters were responses to Chema's August 27, 2010 Information Request (J. 145) related to OSHA Publication #310 – "Access to Medical Exposure Records."

When viewing Rudis testimony in light of the record as a whole, it becomes quite clear that he is not a credible witness. His testimony was inaccurate and it was inconsistent with the plan meaning of written documents. His demeanor on cross examination was unimpressive. He

became evasive and argumentative and often presented testimony that simply wasn't responsive to the questions he was being asked. He quite clearly made up facts that did not exist and are easily disproven.

h. Barak Dorr

General Counsel subpoenaed Barak Dorr ("Dorr"), an individual who applied for a mechanic job with Center City sometime in 2009. Dorr's testimony on direct was inconsistent with his testimony on cross and his recollection was muddled. Dorr applied for an entry level diesel mechanic's position in 2009. (Tr. 170-171.) He could not recall the month his interview took place nor could he remember who he interviewed with. (Tr. 170-171.)

On direct examination Dorr testified that he would prefer not to join the union and pay dues and if there was a position that did not involve the union he would take that. (Tr. 175-176.) Nonetheless, he testified that if he had to join the union he would. (Tr. 176.) On Cross examination Dorr admitted that he told the Company's HR manager, Pekarcik[27] that he would prefer not to pay union dues and that he was concerned about the amount dues. (Tr. 180-181.)

i. John Danhauer

General Counsel subpoenaed John "Jack" Danhauer ("Danhauer"), a current employee who had applied for a mechanic job with Center City October/November 2009. Generally speaking, Danhauer appeared to be a reliable witness. His answers remained consistent on direct and cross examination. Danhauer interviewed with the Company in 2009 and was subsequently hired around November 20, 2009. Danhauer testified that during his interview, Pekarcik asked him whether he would be willing to work for the Company if it was non-union and he said yes. (Tr. 538 & 540.) Moreover, Danhauer testified that Pekarcik informed him that Company was currently in negotiations with the union but was working without a contract. (Tr. 536.) She said

[27] The parties stipulated that Dorr interviewed with Tessa Pekarcik, the Company's HR manager at the time.

they were operating as an open shop but it could go either way. (Id.) She also mentioned union dues and said it was his choice whether to join the union or not. (Tr. 537.) Danhauer also testified that he spoke with Mosholder shortly after speaking with Pekarcik. Mosholder informed him that men were currently working without a contract, but they were still honoring the old one. (Tr. 540-541). Mosholder also told him that depending upon the outcome of negations it may end up being an open shop. (Tr. 541.) Danhauer also testified that he spoke with Ron Mason via telephone sometime after he had been hired. Danhauer told Mason if given the choice, he would prefer not to join the union and/or pay union dues. (Tr. 546) On cross examination Danhauer's answers remained consistent. He confirmed the fact that he told Mason that his preference was not to join the union or pay union dues. (Tr. 570.) Mason also told him that his name and number was being given to the union. (Id.) Even so, he was not contacted by the NLRB till almost a year later. (Tr. 571.)

B. EXCEPTION II – JUDGE SANDRON ERRED IN FINDING RESPONDENT DID NOT ESTABLISH THAT IT WOULD HAVE REPRIMANDED JEFF WARD IN THE ABSENCE OF HIS UNION ACTIVITIES AND, THEREFORE, VIOLATED SECTIONS 8(A)(3) AND (1) OF THE ACT

The Section 7 rights of the employees are inviolable pursuant to the Act. It is equally established that an employer has the right to discipline employees in a non-discriminating manner within the workplace while bargaining with the employees' representative for a collective bargaining agreement. Merely engaging in concerted protected activities does not confer immunity upon an employee from the consequences of violating established company policies, rules and practices. *Confort & Co., Inc.,* 275 NLRB 560, 583 (1985). The facts presented demonstrate that the Company did not discipline Jeff Ward because of his union

activities in violation the Act. Rather, it sought to equally enforce its work rules with respect to attendance.

Moreover, because the charging party has alleged Ward was discriminated against due to his union activities, General Counsel must establish a causal nexus between Center City's decision to discipline him and his protected activities. *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1991), cert denied 455 U.S. 989 (1982). Accordingly, General Counsel must establish a prima facie case of discrimination by putting forth evidence sufficient to support the inference that the employee's protected activity/conduct was a motivating factor in the employer's decision to discipline and/or discharge said employee. *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002.

In particular, General Counsel must demonstrate that the employee was engaged in protected activity; that the employer knew of the employee's protected activity; and that the employer acted as it did on the basis of anti union animus. Id. If General Counsel is successful, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct, in the nature of an affirmative defense. Id.; *see also, Arrow Elec. Co. Inc., v. NLRB,* 155 F.3d. 762, 766 (6th Cir. 1998). Notwithstanding, at all times, the ultimate burden of persuasion remains with the General Counsel. *Arrow Elec. Co. Inc., v. NLRB,* 155 F.3d. 762 at 766, fn 5, citing *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276-278, 129 L. Ed. 2d 221, 114 S. Ct. 2251 (1994). The Employer only bears the burden of persuasion as to its affirmative defense, i.e., that the action would have been taken in the absence of the protected conduct. Id. Put another way, the Company is afforded the opportunity to produce evidence of a legitimate and sufficient business

reason for the discipline and/or discharge, i.e., Ward would have been disciplined regardless of his participation in protected § 7 activities. *NLRB v. Wright Line*, 662 F.2d at 905-906.[28]

Furthermore, the Company need only produce evidence that the same action would have taken place even in the absence of the protected conduct. *NLRB v. Wright Line*, at 905. An employer in a § 8(a)(3) and (1) case only has a duty to produce evidence to balance, not outweigh, the evidence produced by General Counsel. Id. Accordingly, in order to meet *Wright Line*, an employer must simply establish that it had consistently and evenly applied its disciplinary rules. *Septix Waste, Inc*. 346 NLRB 494, 495-496 (2006). The overwhelming evidence presented by Respondent in this case unquestionably demonstrates that it has consistently and evenly applied its disciplinary rules.

The Company rebutted the presumption that Ward's union activity was the motivating factor for his January 27, 2010 reprimand when it introduced evidence that two other members of the union's bargaining committee, Russ Mason and Schultz had also been disciplined for attendance during negotiations. (R. 220, 221, & 229.) Moreover the Company introduced evidence of yet a third employee, Ohde, who had also received a reprimand for attendance. (R. 230.) More importantly, General Counsel introduced a previous reprimand Ward received for attendance on July 30, 2008. (G.C. 19.) The evidence overwhelmingly suggests that Ward was disciplined not because of his union activities but because he was in fact tardy on two consecutive days. (R. 268.)

The evidence shows that Ward had been previously reprimanded for tardy attendance. The record showed that Shepherd did not single Ward out for attendance discipline. He had

[28] The Board has held that *Wright Line* analysis is appropriate in cases concerning discipline where violations of 8(a)(3) and (1) are alleged. See, *Bridgestone Firestone S.C.*, 350 N.L.R.B. 526, 529 (2007).

issued reprimands to Ward prior to January 27, 2010. Likewise, Shepherd issued attendance reprimands as outlined above to at least two (2) other employees during the negotiations.

The cases relied upon by Judge Sandron in support of his finding of anti-union animus via pretext for giving the reprimand are remotely applicable at best. *See, State Plaza, Inc.* 347 NLRB 755, 756 (2006) involved a discharge that was delayed over a month in a "delayed reaction" anti union animus case. Id at p. 756. Likewise, in *Rood Trucking Company, Inc.,* 342 NLRB 895 (2004), the Employer waited six (6) months to discharge employees it perceived as having filed Department of Labor complaints regarding employer pension fund contribution violations. Id at p. 895. In *La Gloria Oil and Gas Company,* 337 NLRB 1120 (2002), a manager at a trucking operation caught wind of a union organization drive. He directly interrogated interested drivers, had the drivers followed by a safety consultant and terminated them based upon the consultant's recommendations where no driver had previously been discharged based upon the consultant's report. Id at pp. 1120-1121. In *Detroit Paneling System, Inc.,* 330 NLRB 1170 (2000), the Board found anti union animus based upon termination of an employee for a minor offense. Here, there is ample testimony that the employer has never terminated an employee based upon the employee's tardiness as was Ward's case. Additionally, there was no "lag" time as in the above cases where the employer held the discipline back prior to issuance. Accordingly, it was error for the ALJ to rely upon this line of case law when applying it to the instant situation.

With respect to Ward's reprimand, Shepherd testified as follows:

> JUDGE SANDRON: I -- I think it's best if you -- if you put it as far as who said what.
>
> THE WITNESS: Okay. I -- I stated to Jeff that his attendance must improve. And then I asked Jeff personally, or off the record, I says, "Are you trying to make a point with the Union and trying to set me up as a bad manager in the light of the

> Union and the Negotiating Committee, that I don't discipline on employees?" And he said "No".
>
> JUDGE SANDRON: Anything in the conversation that you recall that anybody said?
>
> THE WITNESS: No.

(Tr. p. 1199.)

Shepherd is retired from the Company. He has no reason to fabricate testimony or to be evasive upon direct questioning by Judge Sandron. The totality of the record reveals three undisputed facts: (1) an employee was considered to be tardy after 6 minutes; (2) Ward subjected himself to discipline for being over 6 minutes late two (2) consecutive days in a row, and (3) discipline for violation of the reporting requirement was discretionary. Instead of finding anti union animus on the employer's part – it is as logical to conclude that Ward was indeed setting him Shepherd up.

1. Shepherd's January 27, 2010 Statement Did Not Reflect Upper Management's Anger At the Union's Bargaining Stance On Attendance/Tardiness

Judge Sandron found that higher management's anger at the Union bargaining stance on attendance/tardiness was behind Ward's reprimand. He further went on to hold such reprimand, as a statement, was "patently coercive, sending the clear and chilling message that employees serving on the Union's negotiating committee would be punished. . . ." (Decision p. 36.) As stated above, Ward's reprimand was on account of Ward's failure to appear at work in a timely manner on two (2) consecutive days. Ward received a reprimand just as other bargaining unit employees had in the past. Judge Sandron imputed knowledge of "upper management anger" to Shepherd when the record is devoid of any facts to support the supposition. There is no evidence of management anger trickling down – there is only evidence of an employee being late for

work, not once, but two consecutive days in a row. Accordingly, said employee was disciplined, just as others had been disciplined.

C. EXCEPTION III – JUDGE SANDRON ERRED IN FINDING RESPONDENT UNILATERALLY CHANGED ITS POLICY GOVERNING UNIT EMPLOYEES' USE OF VACATION DAYS AND, THEREFORE, VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT

Judge Sandron concluded that the announced unilateral change in carryover of vacation days violated Section 8(a)(5) and (1) of the Act notwithstanding the fact that said change was never implemented. (Decision pp. 36-37.)

The vacation language in the expired CBA reads as follows:

> It is the intent of the parties of this Agreement that employees shall take their vacation and not draw pay in lieu thereof. Company will allow its employees as an exception to accumulate up to three days of vacation to the next calendar year or allow them to be paid hours at the regular hourly rate, provided it is agreed upon by the employee and the Company. This provision does not apply to the first six (6) months vacation time. Pyramiding of vacation time from year to year will not be permitted.

(G.C. 2 at p. 12.) The Company did not change its position in regards to this language. Rather, it simply announced that said carryover days must be used by March 31 of the following year. (Tr. 838-840)

With respect to scheduling vacation, the contract plainly states the following: "The Company reserves the right to rearrange vacation schedules or to determine the precise period of each of each employee's vacation, but an effort will be made to select a period that is satisfactory to the employee involved." (G.C. 2 at p. 12.) Accordingly the Company has not changed working conditions. Even Gerchy, the union's current chief steward and bargaining committee Chairperson admitted that under the contract the Company has a right to rearrange vacation schedules or determine when an employee takes his vacation. (Tr. 462-463.) He even admitted that the Company has taken such action in the past. (Id.) General Counsel failed to present

testimony to the contrary. As such, Gerchy's admission must be credited. Nevertheless, the Company did not even implement the policy that is the subject of this Complaint. (Tr. 841.)

Actual rearrangement of vacation schedules by an employer based upon express contractual language is generally not held to be an Unfair Labor Practice. The cases relied upon by Judge Sandron are not applicable to this case. For instance, *ABC Automotive Products Corp.*, 307 NLRB 248 (1992) found the employer committed an unfair labor practice where the employer announced it was abandoning the Union sponsored health care for returning strikers with a plan offered by a private carrier. In *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998), the employer threatened to reduce or curtail lunch breaks and morning breaks. Id at p. 155. In both cases cited by the ALJ, the employers did not have the contractual right to unilaterally change the terms and conditions of the working conditions – which is allowed by this contract.

Here, the express language states the Company reserves the right to rearrange vacation schedules or determine the precise period of each employee's vacation. (G.C. at p. 12.) Even during a strike, if express contract language allows, an employer may rearrange and schedule – or cancel vacations. *See Generally, Texaco, Inc.*, 291 NLRB 508, 512 (1988); *Noel Foods Division of the Noel Corp.*, 315 NLRB 905, 912 (1994) (Board found Respondent's refusal to pay vacation pay to strikers unless they resigned was not "inherently destructive" of employee rights, nor was it motivated by antiunion animus). The ALJ has errantly found that the announcement of a valid employer rule, although not implemented was enough to violate the Act. In a recent ALJ decision, Judge Kocol found that announcing the procedure to change scheduled shifts which would require a manager's approval was not a change that constituted a violation of Section 8(a)(5). *See, Veritas Health Services, Inc. d/b/a Chino Valley Medical*

Center, 2011 NLRB LEXIS 584 (2011). Regarding the announcement of the change, the ALJ stated: "[T]he announcement was roughly consistent with the existing practice. I dismiss this allegation of the complaint." Id at pp. *858. Unlike the cases cited by Judge Sandron, no benefit was being taken away from the employees. The employees were still permitted to carry over 3 vacation days into the next calendar year. The practice of requiring the vacation days be used or paid out at the regular hourly rate is unchanged. Because the Employer is contractually entitle to make such vacation schedule changes, and because the ability of the Employer to do so was verified by General Counsel's witnesses, among others, at the hearing, Judge Sandron's finding that the Employer violated Section 8(a)(1) and (5) of the Act must be dismissed.

D. EXCEPTION IV – JUDGE SANDRON ERRED IN FINDING RESPONDENT DID NOT ESTABLISHED THAT IT WOULD HAVE TERMINATED RUSS MASON IN THE ABSENCE OF HIS UNION ACTIVITIES AND, THEREFORE, VIOLATED SECTIONS 8(A)(3) AND (1) OF THE ACT

General Counsel asserts that Russ Mason was unlawfully terminated because no other non-probationary or probationary employee has ever been terminated with respect to a CDL, no other employee has ever been given only thirty (30) days with which to obtain a CDL and no other employee has ever been precluded from returning to work once they have obtained their CDL. All of these assertions are unequivocally false.

Russ Mason was not given thirty (30) days to obtain a CDL, he was given approximately 145 days – and told what he needed to do. Additionally, the testimony and documents presented clearly demonstrate that Fyffe, a non-probationary employee, was in fact suspended and subsequently terminated due to his failure to obtain a CDL within the time parameters set forth in the contract. Like Russ Mason, Fyffe failed to obtain a CDL within the time parameters set forth in the CBA. Like Russ Mason, Fyffe was given a thirty (30) day notice with which to obtain a

CDL. (G.C. 7 & R. 271.) Like Russ Mason, he failed to do so. Like Russ Mason he was subsequently terminated for failing to obtain his CDL within the expressly stated thirty (30) day time period. (G.C. 8.)

Additionally, the Company presented evidence with respect to two other employees: Oman and Rose, who, like Russ Mason, failed to obtain a CDL within the time parameters set forth in the CBA. Like Russ Mason, Oman and Rose were given thirty (30) day notices with which to obtain a CDL. (G.C. 9 & R. 249.) Unlike Russ Mason, Oman and Rose met the terms of their reprimands. The *only* difference between the circumstances surrounding Fyffe, Oman, Rose and Russ Mason is that Russ Mason, unlike the others, was allowed to continue to work during his thirty (30) day notice period rather than being sent home without pay. (Tr. 850.) He received a benefit the others did not.

Notably, Gerchy and Russ Mason signed the reprimands referenced above as union representatives. So, they knew full well what the CDL policy requirements were and that other similarly situated employees had in fact been given thirty (30) day notices/deadlines with which to obtain a CDL. It would be hypocritical to argue otherwise. Indeed, Russ Mason made the following admissions during direct examination:

> Q. What licenses or certificates did you have to have, if any, to work for Center City?
>
> A. You have to have a Class B, commercial driver's license.
>
> Q. Is this requirement in writing?
>
> A. There is a CDL requirement in the expired contract, yes.
>
> Q. If you could look at GC2, the exhibit I just handed you, on Page 20. It's Article 29, CDL requirement.
>
> A. Yes.

Q Is this the provision you just referred to?

A. Yes.

Tr. (30-31.) Russ Mason clearly acknowledges you have to have a CDL in order to work at Center City. He further testified:

Q. What were your job duties as a mechanic at Center City?

A. My job duties were to perform preventative maintenance, which is oil changes, checking break [sic] linings, tire pressure. It was very basic repairs on that end of it.

We made engine repairs, transmission repair and replacement, differential, drive line, electrical. We did almost everything to the trucks, actually.

Q. Did you ever have to drive the tractors or trucks?

A. Oh, yeah. After you complete repairs, it's common practice to road test the truck to make sure the problem is corrected.

Q. Okay. Of all these that you just mentioned, which of these required you to have a commercial driver's license?

A. Driving tractors.

(Tr. 32-33.) (Emphasis added.) This testimony demonstrates that Russ Mason could not adequately perform his job without a CDL as he revealed that its "common practice" to road test vehicles after repairs. Without a CDL, Russ Mason could not road test the vehicle in order to determine whether his repair corrected the problem. Simply put, he was unable to perform one of his job duties which he acknowledged was "common practice." Furthermore, Russ Mason acknowledged that after the Company had acquired a new customer, Dayton Freight, work which required a CDL increased by as much as twenty (20) percent. (Decision p. 9 & Tr. 43-44.) In his decision, Judge Sandron attempted to downplay this significant increase by noting that Russ Mason simply serviced these trucks on the customer's lot. (Decision p. 9.) In doing so, Judge Sandron wholly disregards the testimony referenced above. Taken at face value, Russ Mason

acknowledged that at least twenty (20) percent of the time he was incapable performing a work duty which is "common practice."

The Company did not unlawfully terminate Russ Mason. Ray decided to terminate Russ Mason on November 30, 2010 at 3:30 p.m. when Russ Mason was unable to produce a CDL as he had been previously instructed to do. (Tr. 859 & 884.) The thirty (30) day notice issued to Russ Mason expressly stated the following: "Please be advised that as of October 30, 2010 you have 30 calendar days to obtain your Commercial Driver's License (CDL). Failing to do so will result in disciplinary action up to and including termination." (G.C. 3.) Russ Mason failed to do so and he was subsequently terminated. The fact that Mosholder gave Russ Mason permission to use the Company truck on December 1, 2010 to take his road test had no impact on Ray's decision to terminate Russ Mason as all employees have access to Company trucks and, at that instant, he was still an employee. (Tr. 859-860.) Likewise, the fact that Mosholder suspended Russ Mason effective December 1, 2010 until he secured his CDL had no impact on Ray's decision to terminate Russ Mason as Mosholder only has unilateral disciplinary authority up to suspension. (Id.) It is reasonable that Mosholder would suspend an employee who disregarded a request. (Id.) Especially considering the fact he had been given nearly 145 days to do so.

Employers have the right to discipline employees in a non-discriminating manner within the workplace. Simply engaging in concerted protected activities does not confer immunity upon an employee from the consequences of violating established company policies, rules and practices. *Confort & Co., Inc.*, 275 NLRB 560, 583 (1985). The facts presented Section II. C., *supra* confirm that Center City did not violate the Act. Rather, it equally enforced the CDL provision set forth in the CBA. (G.C. 2 at p. 20.)

Furthermore, because the charging party has alleged Russ Mason was discriminated against due to his union activities, General Counsel must establish a causal nexus between Center City's decision to discipline him and his protected activities. *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1991), cert denied 455 U.S. 989 (1982). Accordingly, General Counsel must establish a prima facie case of discrimination by putting forth evidence sufficient to support the inference that the employee's protected activity/conduct was a motivating factor in the employer's decision to discipline and/or discharge said employee. *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002.)

Specifically, General Counsel must demonstrate that the employee was engaged in protected activity; that the employer knew of the employee's protected activity; and that the employer acted as it did on the basis of anti union animus. Id. If General Counsel is successful, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct, in the nature of an affirmative defense. Id.; *see also, Arrow Elec. Co. Inc., v. NLRB,* 155 F.3d. 762, 766 (6th Cir. 1998). Notwithstanding, at all times, the ultimate burden of persuasion remains with the General Counsel. *Arrow Elec. Co. Inc., v. NLRB,* 155 F.3d. 762 at 766, fn 5, citing *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276-278, 129 L. Ed. 2d 221, 114 S. Ct. 2251 (1994). The Employer only bears the burden of persuasion as to its affirmative defense, i.e., that the action would have been taken in the absence of the protected conduct. Id. Put another way, the Company is afforded the opportunity to produce evidence of a legitimate and sufficient business reason for the discipline and/or discharge, i.e., Russ Mason would have been discharged regardless of his participation in protected § 7 activities. *NLRB v. Wright Line*, 662 F.2d at 905-906.

Therefore, in order to meet *Wright Line*, an Employer need only establish that it had consistently and evenly applied its disciplinary rules. *Septix Waste, Inc*. 346 NLRB 494, 495-496 (2006). The overwhelming evidence presented by Respondent in this case indisputably demonstrates that it has consistently and evenly applied its CDL policy. Judge Sandron acknowledged as much in his when he noted the following:

> Because I have concluded that Mason's discharge was discriminatory under Section 8(a)(3), and there is **no evidence that any other employees were treated differently than in the past,** the unilateral change in discipline allegation is essentially subsumed by the 8(a)(3) allegation. **In other words, Mason was targeted for union considerations and not treated differently because the Respondent was changing a policy in general.**

(Decision p. 35.) (Emphasis added.) Judge Sandron concedes that the Company did not change its policy.

Furthermore, Judge Sandron acknowledges that there is no direct evidence of union animus against Russ Mason due to his union activities. Nonetheless, union animus can be inferred from circumstantial evidence. *Robert Orr/Sysco Food Services, LLC,* 343 NLRB 1183, 1184 (2004). To support an inference of unlawful motivation the Board looks to such factors as inconsistencies between the proffered reasons for the discipline/termination and other actions of the employer, disparate treatments of certain employees compared to other employees with similar work record or offenses, deviations from past practice and proximity in time of the discipline to the union activity. Id.

To support an inference of union animus, Judge Sandron notes that Ray "more or less" told Ward that higher management and/or the Company's counsel, had directed him to terminate Russ Mason. (Decision pp. 10-11 & 32.) He later claims that this conversation "clearly indicated that Ray was directed to discharge Mason and did not do so on his own volition, strongly suggesting that the termination was based on reasons other than Mason's job

performance." (Decision p. 33.) However, in viewing the testimony of both Ward and Ray, it is absolutely clear that Ray made no such statement, nor does it clearly indicate that Ray was directed to discharge Mason. Ward testified as follows:

> Q. Was anybody else with you when you spoke with Mr. Ray?
>
> A. No.
>
> Q. And who began the conversation?
>
> A. He came through the shop and -- he normally comes through the shop if he comes out there in the mornings and greets the men, asks how they're doing. So he initiated the conversation.
>
> Q. And what did he say to you?
>
> A. Just the normal small talk, how are you doing, you know, how's the work going here, and – and whatnot. And I told him all that was good but, you know, the men were extremely upset, so to speak, about the recent termination of Russ Mason.
>
> Q. Did he respond to you?
>
> A. Yes, he did. He responded as -- he told me there was factors, things that he could not speak of, and I took it as that.
>
> **********
>
> Q. Okay. Do you recall anything else that was discussed in that conversation?
>
> A. Yes. I can tell you the whole conversation. I mean, it was hit-and-miss, or it was a drawed out conversation. After he told me that there was factors involved he couldn't talk about, you know, I – you know, we would jump in and out talking about the business there in the shop, what I was working on, so to speak. And I even mentioned -- I would bring it back up, actually, about Mr. Russ, Russ Mason, about how he had a test scheduled for the very next day before he was terminated. And he said he was aware of that. But, once again, it would always lead back to there was factors he couldn't discuss.
>
> **********
>
> Q. After this conversation, did you speak with Mr. Ray again that day?
>
> A. I did.

Q. And when did you speak with him?

A. Approximately 15 minutes later he came back out. I noticed him coming down the shop, and he came directly to me. Once again, we were alone. There – there wasn't nobody around us that could hear our immediate conversation. This was a briefer conversation than the first. He said do you remember our conversation we just had prior? And I said yes. And he said if you have any more questions about the reasoning for it, or any of the above, he asked me if I still had Tim Riley, which is the – our owner, if we -- if I still had his cell – cell number. And I told him I did. And he just nodded at me, and he started to walk away. I asked him is -- if -- if that implied that that was where the decision came from, or a higher up. And he, once again, repeated there's things that he couldn't say. He just nodded at me. **And I took his nod -- the nod as in --**

MR. MASON: Objection.

JUDGE SANDRON: All right. You -- you just -- it's best if you just tell us, you know, who said what.

THE WITNESS: Okay. That's fine.

DIRECT EXAMINATION (CONT'D)

BY MS. IRELAND:

Q. When -- oh, sorry.

A. He -- that's -- he replied there's – he could not talk about it.

Q. When you asked him if he said if – when you asked him if that meant the decision was made by higher up, did you say anybody specifically?

A. I did. I said Mr. Riley or his counsel, Ron Mason.

JUDGE SANDRON: Oh, oh, oh, so – so he's -- he's -- did he specifically say the decision had been made by some --

THE WITNESS: **He -- he did not.**

JUDGE SANDRON: He did not. But that -- but --

THE WITNESS: He just said – asked me if I had Tim Riley's phone number.

JUDGE SANDRON: And then you asked?

THE WITNESS: He asked me.

JUDGE SANDRON: Right. And did you ask him about any particular people? In other words, I -- I think you just said something about Mr. Riley and Mr. Mason -

THE WITNESS: Yes, I did.

JUDGE SANDRON: -- Attorney Mason. So did -- did you say anything about them?

THE WITNESS: Yeah. After I told him I did have Tim Riley's phone number, **I -- I implied as I take it**, you know, that the decision came from one of the above. And he said -- he just nodded at me and said there's things he couldn't talk about. That was his exact reply.

(Tr. 586 -592.) (Emphasis added.) Ray never specifically told Ward that the decision came from Reilly and/or counsel for the Company. Moreover, Ward simply assumed that it did. Ray never once nodded an affirmative response to a question by Ward. Ray testified as follows:

Q. I'd like now, if I could, turn your attention to Jeff Ward, if I could. Do you recall talking to Mr. Ward about Russ Mason, in particular, his termination?

A. I do.

Q. What do you recall was said at that meeting?

****

JUDGE SANDRON: You have to lay a foundation.

MR. MASON: All right. Foundation.

DIRECT EXAMINATION (CONT'D)

BY MR. MASON:

Q. Do you recall approximately when this conversation happened?

A. It was within a day or two of the termination.

Q. Do you recall the location of the conversation?

A. Again, when I -- periodically I do a walk-through in the shop, and it was just on one of those walk-throughs Jeff got me.

Q. Do you recall the approximate time of the conversation?

A. It would have been between seven and seven thirty in the morning.

Q. Do you recall who else was present during that conversation?

A. I don't know that anybody else was present at that conversation.

Q. All right. Do you recall what was said during that conversation?

A. Jeff just mentioned that the rank and file was upset that -- that Russ had been terminated.

Q. And what did you say in response?

A. Oh, like I say, respond to -- anytime I'm being asked about anything regarding the Union, I can't respond.

JUDGE SANDRON: Anything else in that brief conversation?

THE WITNESS: No. I -- I've learned it's best for me not to say anything when it comes -- when it comes to regards to the issues that we're dealing with.

DIRECT EXAMINATION (CONT'D)

BY MR. MASON:

Q. Now, can you tell me whether or not you had any other conversations with Mr. Ward regarding Mr. Reilly?

A. Well, Jeff, on occasion, will call Mr. Reilly. He has his cell phone number. And, you know, in this particular case, he -- you know, he -- he wanted to have more information as to why. And I suggested that if he wanted to have more information, he could call -- call Tim.

JUDGE SANDRON: Was this the same conversation you're talking about?

THE WITNESS: It would have been a little later in the day.

JUDGE SANDRON: Did -- did he approach you, or you approach him later in the day?

THE WITNESS: I just talked to him later in the day.

JUDGE SANDRON: Well, where, same place?

THE WITNESS: Out in the shop floor.

JUDGE SANDRON: And who initiated that second discussion, or exchange --

THE WITNESS: I did.

JUDGE SANDRON: And you told him he could call Reilly if he wanted more information?

THE WITNESS: That's correct.

DIRECT EXAMINATION (CONT'D)

BY MR. MASON:

Q. Why did you tell him to call Mr. Reilly?

A. Well, going back to my earlier statement that I'm just more comfortable if I stay out of all those conversations. If Mr. Reilly would like to further define our position, then I'm more than happy to let my boss do that, but I prefer not to -- to get involved with those.

(Tr. 868-872.) **The testimony bears out yet another example of Judge Sandron stating something as fact that is wholly unsupported by the testimony and certainly not proven by a preponderance of the evidence.**

Judge Sandron cites to *Rood Trucking Co., Inc.*, 342 NLRB 895, 900 (2004) for the proposition that a "dischargee's long duration of employment is a factor to consider, as is whether he was considered a good employee." (Decision p. 33). However, *Rood Trucking* **makes no such statement**. Rood Trucking does state that an employer's failure to permit an employee to defend himself before imposing discipline supports an inference of unlawful motivation. Id. at fn 18, citing, *Embassy Vacation Resorts*, 340 NLRB no 94, Slip op. at 4 (2003.) Judge Sandron further states that Russ Mason was employed for over ten (10) years and that Respondent's progressive discipline procedure set forth in the Handbook provides that the employee's length of service is a factor in determining the penalty imposed for misconduct.

(Decision p. 33.) Notwithstanding, Gerchy, the union's current chief steward and bargaining committee Chairperson stated otherwise. The line of questioning is as follows:

Q. What, if any, type of disciplinary policy does Center City have?

A. Relevant to?

Q. In -- well, in general, to your knowledge.

A. Well, it's progressive. Oral, written, suspension and/or termination.

Q. Is this policy in writing?

A. Yes, in the expired contract.

Q. I'm showing the witness GC2. If you could direct your attention to Page 4. Is that the policy that you're referring to?

A. Well, you've -- oh, okay, you're -- you're talking about discipline. Okay. I'm going back. Yes, that's it.

Q. Discipline. To your knowledge, does this policy apply to the commercial driver's license provision in the Handbook?

MR. TULENCIK: I'm sorry, what page are we on?

MR. MASON: What page are we looking on?

THE WITNESS: Page --

MS. IRELAND: It's Page 4.

JUDGE SANDRON: Page 4.

DIRECT EXAMINATION (CONT'D)

BY MS. IRELAND:

Q. Yes, Page 4, Article 7. Does this policy apply to the commercial driver's license provision in the handbook?

A. There's a separate article relevant to CDL requirements.

Q So it does not apply?

A. No.

(Tr. 240-141.) Moreover, Ray testified that the disciplinary steps set forth in Article VII do not apply to insubordination and/or failure to obey orders. (Tr. 896-897 & G.C. 2 at p. 4.)

Next, Judge Sandron determines that the timing of the discharge was "suspicious" even though Russ Mason was not engaged in union activities. (Decision p. 33.) Specifically, Judge Sandron notes that Russ Mason was discharged by Ray on the same day he was suspended by Mosholder, the Company had allowed him to work seventeen (17) months without a CDL, yet would not afford him one additional day beyond the 30 day time period he had been given. (Id.) As noted earlier, Mosholder does not have the authority to terminate employees without Ray's approval. Mosholder subsequently suspended Russ Mason near the end of the shift knowing that Ray had not yet returned from off-site meetings with customers. Unaware of his return, Mosholder took the only action he could. Moreover, Russ Mason was not terminated and subsequently allowed to continue working during the time that his operator's license and CDL were suspended by the state of Ohio because the Company had done so in the past with other employees. Lastly, Russ Mason had already been provided 145 days to acquire a CDL but failed to do so. As such, the Company did not afford him one (1) additional day that Judge Sandron concludes it should have. After having been repeatedly nudged by management for **months** to obtain a CDL, Russ Mason was given **a thirty (30) day deadline.** He ignored the deadline and was subsequently terminated.

In a further attempt to demonstrate an inference of unlawful motivation Judge Sandron contends that Russ Mason was disparately treated because the Company deviated from past practice. (Decision p. 33). Specifically, Judge Sandron maintains that "[p]ast practice was that such employees were suspended without pay pending their reacquisition of the CDL, but they

were not terminated. Moreover, they were allowed to return to work once they had obtained it, in contrast to the Respondent's refusal to reemploy Mason after he did so." (Id.) The Company readily admits and the evidence unequivocally establishes that employees are suspended and sent home without pay and, are allowed to return to work once they obtain the CDL. (G.C. 7, R. 267 at p. 6 & G.C 9.) However, the evidence also unequivocally establishes that the employees can only return to work if they acquire the CDL **within the thirty (30) day time period** specifically referenced in the reprimand and, if not, they are terminated. (G.C. 8, 9, 35 & R. 267 at p. 4.) Also, in lieu of suspension, Russ Mason was permitted to work during his thirty (30) day notice period.

Additionally, while Judge Sandron acknowledges that the Company provided evidence that employees who were hired without a CDL were required to obtain one pursuant to the term of the contract, the Company failed to provide evidence that it ever discharged an employee who had a CDL and subsequently lost it during the course of their employment. (Decision p. 33). Judge Sandron failed to note that the contract also states that "[a]ll union members shall maintain a current CDL[.]" (G.C. 2 at p. 20.) When Russ Mason became eligible to regain his CDL in July 2010 the Company applied the CDL policy set forth in the contract as it would to any other employee who did not have a CDL, i.e, Oman and Fyffe. To distinguish Russ Mason's circumstances from Oman and Fyffe is improper. The bottom line is none of them had CDL's and under the terms and conditions of the contract they were required to do so. Oman and Fyffe were suspended and given 30 days to produce a CDL. Oman did so and returned to work. Fyffe did not and was subsequently terminated. Russ Mason was given thirty (30) days to produce a CDL but was allowed to work during those thirty (30) days. Like Fyffe, he failed to produce a CDL within the given time period and was subsequently terminated.

In light of the above, Judge Sandron erroneously concluded that General Counsel had established a prima facie case of discrimination. (Decision p. 33.) However, even if the Board concludes that General Counsel put forth sufficient evidence to establish a prima facie case of discrimination, the Company has successfully demonstrated that Russ Mason would have been discharged regardless of his participation in protected activities. *NLRB v. Wright Line*, 662 F.2d at 905-906. In order to meet *Wright Line*, an Employer need only establish that it had consistently and evenly applied its disciplinary rules. *Septix Waste, Inc*. 346 NLRB 494, 495-496 (2006). The overwhelming evidence indisputably demonstrates that it has consistently and evenly applied its CDL policy.

Judge Sandron determined that the Company's asserted reason for the discharge, failure to timely reacquire a CDL, was pretextual. (Decision p. 34.) Judge Sandron relied upon the circumstantial inferences above. He also based his decision on the following: (1) Ray and Mosholder utterly failed to articulate a cogent, consistent, and convincing account of the reasons that Mason was terminated on November 30; and (2) I also take into account Shepherd's statement that Ward's reprimand was motivated by the Union's stance on attendance at bargaining, in the context of what can well be characterized as bitter negotiations. If the Respondent retaliated against one member of the Union's negotiating committee because of its displeasure at the Union's actions at the bargaining table, it could certainly do the same to another." (Id.) First, both Ray and Mosholder unambiguously testified that Russ Mason was terminated for failing to obtain a CDL. There testimony is corroborated by G.C. 3, the thirty (30) day notice issued to Russ Mason. More importantly Russ Mason acknowledged that you had to have a CDL in order to work for the Company as it is a requirement set forth in the

contract. Second, Russ Mason had not attended a bargaining session since July 23, 2010[29] and was not terminated until over four (4) months later until November 30, 2011. *See, Robert Orr/Sysco Food Services, LLC,* 343 NLRB 1183 at 1184 (proximity in time of discipline to the union activity is a factor the board looks to support an inference of unlawful motivation.) More importantly, this was not the first time Russ Mason had been disciplined. (R. 220, 221 & G.C. 4.)

Judge Sandron uses this finding of pretext as a means to avoid analyzing the Company's defenses. (Decision p. 34.) In *Rood Trucking Co.*, 342 NLRB 895 at 898 the Board stated as follows:

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminates [sic] absent their union activities. This is because where the evidence establishes that the reasons given for the Respondent's action are pretextual--that is, either false or not in fact relied upon--the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.

(Internal quotations and citations omitted.) Nevertheless, the Board in *Rood Trucking* still performed an analysis to determine whether the Employer had met its *Wright Line* burden of showing that the discriminatee would have been discharged for legitimate business reasons even if he had not engaged in union or protected activity.

In *Rood Trucking*, the Employer terminated an employee who was a member of the organizing committee and later became a steward and member of the union's bargaining committee. Id. at 895 & 898. Said employee also alerted the Department of Labor to the Employer's delinquent pension contributions. Id. This investigation caused heated discussions during bargaining. Id. The very next day, said employee was discharged for time theft. Id. at

[29] R. 1 pp.287-288 & Tr. 26.

896. The Board overturned the ALJ and found that the evidence established that the Respondent knew about the employee's involvement in union and protected concerted activities and that the Employer's asserted reason for discharging the employee was a "pretext designed to disguise its unlawful motivation." Id. at 898.

The Employer relied upon a surveillance report to establish that the employee was engaged in time theft. The Board determined that the surveillance report failed to accurately reflect either the beginning or the end of the employee's workday. Id. at 899. Said failure undermined the validity of the report and rendered it wholly unreliable as a basis for determining the total number of hours the employee worked. Id. Moreover, the evidence established that the Employer ignored aspects of what it knew and miscalculated what it did not bother to investigate. Id. This is yet further evidence that the Employer used the surveillance report as pretext. Id. For example:

> In finding that the theft of time allegation was a pretext to discharge Marangoni, we are mindful that there are discrepancies apparent between the Respondent's schedule for this route, Marangoni's timesheet, and the observations in the surveillance report. However, these discrepancies were not themselves the basis for the discharge, and they do not show that Marangoni had engaged in "theft of time," as claimed by the Respondent. On the contrary, the evidence supports Marangoni's claim for exception time. Although Marangoni's timesheet reported that he began and ended his assignment at the times provided by the Respondent's schedule, his claim for exception time is essentially consistent with the timesheet report stating that he took 25 minutes less of off-duty breaktime than the schedule allowed. Furthermore, the theft-of-time allegations are directly undermined by the Respondent's knowledge that Marangoni's timesheet reported that he began work at 2:45 p.m., whereas the surveillance report observed him leaving Rochester 15 minutes earlier. Assuming that his pretrip duties took at least 15 minutes, as provided by the Respondent's schedule, then his work report showed that he was not seeking pay for his first 30 minutes of work-time.

Id. at 900. Unlike the Employer in *Rood Trucking*, Center City did not have to manufacture evidence to support Russ Mason's discharge. He was terminated after having failed to obtain a CDL over a period of 145 days, the last thirty (30) of which he was on notice that failing to do so

would result in further discipline up to and including termination. More importantly, Russ Mason acknowledged that you must have a CDL in order to work for the Company and it is a requirement expressly set forth in the contract.

E. EXCEPTION V – JUDGE SANDRON ERRED IN FINDING RESPONDENT UNILATERALLY CHANGED ITS POLICY GOVERNING THE RE-EMPLOYMENT OF MECHANICS WHO RE-ACQUIRE THEIR CDL'S AND, THEREFORE, VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT

The Company did not unilaterally change its policy regarding the discipline of employees who do not have CDL's. (Decision p. 35.) Nor did the Company change its policy with respect to the re-employment of mechanics who successfully acquire their CDL's within the 30 day period expressly stated in their reprimands. (Id.) The Company presented a multitude of evidence already addressed *in passim* establishing that other employees have been suspended and/or terminated for not obtaining a CDL within the time parameters set forth in the CBA. (G.C. 2 at p. 20.) Moreover, the evidence establishes that employees are only permitted to return to work if the obtain the CDL within the 30 day notice. Judge Sandron disregards the plain meaning of written exhibits and instead credits the uncorroborated testimony of Ward with respect to a conversation he had with Reilly, the Company's owner. (Decision p. 11 and 35.) Ward testified as follows:

> I asked him if he would hire Russ – Russ back into the west side shop, same position, if he acquired his CDL, as he has done in the past, as Riley [sic] has done in the past, or the Company has. He told me no, that he could not do it like he -- the Company in the past, he explained to me the Company in the past has to put a stop to rehiring those that did not get their CDL on time.

(Tr. 596). Judge Sandron also claimed the Gerchy's testimony "confirmed Reilly's statement regarding the Company's past practice of reemploying mechanics suspended for not having a CDL once they obtained it." (Decision p. 11.) Gerchy testified as follows:

Q. How did your conversation with Mr. Riley come about?

A. Mr. Riley had had a chat with Jeff Ward and then came up through the shop. And we just -- I don't know that he sought me out, but we ran into one another and --

Q. Did you see him when he was speaking to Jeff Ward?

A. I saw him down -- yes. I saw him chatting with Jeff briefly. And then I went back to doing what I was doing.

****

Q. Okay. Can you give -- go through the conversation what he said and what you said?

A. He wanted to know about morale in the shop, and I asked him what he meant by that. And he said, well, you're a leader around here, how do -- how do the men feel? And I answered him by asking him that, how does he think the men feel? Well, I don't tell them what to think, I just represent them. And that he -- he responded by saying, well, we did what we thought we had to do. And then I told him that I'd already had a conversation relevant to Russ' termination with his general manager, that I preferred to leave it at that and let things work through the proper channels.

Q. Okay. But do you recall -- was anything else said during this conversation?

A. He agreed to that, then.

Q. And did the conversation end at that point?

A. Pretty much.

(Tr. 238-239). Said testimony fails to corroborate anything. More importantly, this allegation was not even alleged in the Complaint. General Counsel only alleged that the Company unilaterally change its policy regarding the discipline of employees who do not have CDL's.

F. EXCEPTION VI – JUDGE SANDRON ERRED IN FINDING RESPONDENT UNILATERALLY CHANGED ITS HEALTH INSURANCE POLICY AND FAILED TO TIMELY FURNISH THE UNION WITH INFORMATION REGARDING THE HEALTH INSURANCE POLICY AND, THEREFORE, VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT

The Company did not fail to furnish the union with the relevant information it needed to bargain for insurance. (Decision pp. 38-39). Specifically, on September 24, 2010 the union requested certain information with respect to both unit and non-bargaining unit employees. In turn, the Company submitted the relevant information with respect to the bargaining unit employees. The only information the Company did not provide with respect to bargaining unit employees was claims experience over $75,000, in addition to claims experience on medical and pharmacy experience. On September 29, 2010, the Company notified the union that it did not have this information as it was not large enough to be provided with said claims experience. (J. 188). Moreover, the union acknowledged that that the Employer alerted them that due to the fact they have fewer than one hundred (100) employees, the insurance company was not required to supply the Company with claims data. (Tr. 1138). Notwithstanding, the union claims that it did not know the Company was unable to provide the union with this information.[30] (Tr. 1140.)

Moreover, the union asserted that it needed the information with respect to the non-bargaining unit employees because, as Rudis testified, the Company verbally instructed the union on October 5, 2010 that the Employer would only accept health insurance proposals from the union that included both bargaining and non bargaining unit employees. (Tr. 1150.) There is not a shred of documentary evidence to support Rudis. Nonetheless, Pesta and Wahoff denied that such statement was made and their testimony is supported by the bargaining notes. (R. 2 & R.

[30] The Company later sent a letter from its insurance carrier to Rudis acknowledging the same. The letter was attached to a January 20, 2011 e-mail from Reilly to Rudis. (R. 246 & 280.) Even so, Rudis denied having ever seen the document after counsel for the charging party answered the question for him. (Tr. 1141.)

264. pp. 11-17.) Notably, Rudis testified that Gerchy's notes accurately reflect what happened at the October 5, 2010 bargaining session. (Tr. 1150.) These notes show no such demand by the Company. Rudis also admitted that the census data for the bargaining unit employees attached to the Company's September 29, 2010 letter was information that would allow the union to get quotes for the bargaining unit employees. (Tr. 1146-1148.) Moreover, the Company's October 7, 2010 letter to the union clearly states that the Company has requested information from the insurance Company that will enable the union to get quotes for insurance for the bargaining unit. (J. 168, p. 1.) The letter also states: "[b]e advised that you do not represent non-bargaining unit employees. Therefore, we intend to secure health insurance coverage for those employees and we will bind the insurance coverage for them." (Id. at p. 2.) These letters in no way indicate that the Company would only accept health insurance proposals from the union that included both bargaining and non-bargaining unit employees. In fact, they seem to be saying quite the opposite. Moreover, during the October 5, 2010 bargaining session, Rudis limited the medical profile forms to the members of the bargaining unit and notified the Company that this information is used to provide information to the carrier. (R. 2 and R. 264 at p. 115 & Tr. 1159.) Again, this is yet more evidence that the Company never stated that it would only accept insurance proposals that covering both unit and non-unit employees. Simply put, the requested non-unit information was not and is not relevant.

Accordingly, the Company provided the all relevant information to the union that it was required to by law. Notwithstanding, the Company did supply the union with information relevant to its requests, in addition to meeting and bargaining with the union and accepting and considering union proposals. However, the union was proposing something that was not possible. For instance, the union wanted the insurance to remain at the status quo, with no

increased cost to the employees. Again, this is not possible as the contract for insurance with the carrier was for one year and was set to expire. *See,* J. 178 & 180. Moreover, representatives for the Company told the union during the October 5, 2010 bargaining session that it would not entertain any proposals of no increase to the bargaining unit members. (R. 264 at pp. 113-114.) As an alternative, the union would accept the Company's October 5, 2010 insurance proposal subject to twelve conditions. However, the Company was unwilling to succumb to those conditions and subsequently rejected the union's counter proposals. The Company was left no choice but to unilaterally implement its insurance proposal. (J. 178.)

The company was obligated to unilaterally implement its insurance. The employees' coverage would have been disrupted had the Company not unilaterally implemented its insurance proposal. More importantly, in circumstances such as this, the Board has ruled that the Employer is not obligated to bargain to an overall impasse before implementation. In *St Mary's Hosp.*, 346 NLRB 776 (2006), the Board found the following:

> We agree with the judge, essentially for the reasons set out in his decision that the Respondent complied with its obligation to bargain with the Union over the changes in health coverage for unit employees that it implemented on January 1, 2003. The Respondent's implementation of those changes on that date was permissible even though the parties had not reached an overall impasse, under the authority of *Stone Container, 313 NLRB 336 (1993),* and its progeny. n2 See, e.g., *Saint-Gobain Abrasives, 343 NLRB No. 68 (2004).*
>
> n2 The Board has permitted implementation of a particular proposal, even in the absence of an overall impasse, in circumstances where the proposal concerns a discrete annually occurring event, such as an annually scheduled wage review, that simply happens to occur while contract negotiations are in progress. In *Stone Container*, *supra*, *313 NLRB 336,* the Board found that the employer did not unlawfully refuse to bargain where, during contract negotiations, it told the Union, in time to allow for bargaining over the matter, that it was unable to give the annual wage increase because of economic reasons, but the union made no counterproposal and did not raise the issue again during negotiations. In that setting, the Board found that the respondent satisfied its bargaining obligation regarding its failure to grant an annual wage increase.

> We do not rely on the judge's statement that "*Stone Container* established the principle that an employer is privileged to bargain to impasse over 'a discrete event. . . . that simply happens to occur while contract negotiations are in progress.'" More accurately stated, we reaffirm that, in circumstances like those presented here, involving a discrete event that coincidentally occurs while contract negotiations are in progress, an employer is "not required to refrain from implementing the change [involving a discrete annually recurring event] until an impasse has been reached in bargaining for a collective-bargaining agreement as a whole." *Saint-Gobain Abrasives, supra, 343 NLRB No. 68,* slip op. at 1. 346 NLRB 776, 776 (2006).

Just as in *St. Mary's Hosp.*, the employees at issue here would have suffered a disruption in coverage had the Company not unilaterally implemented its insurance proposal. Thus, just as in *St. Mary's Hosp.*, the implementation did not violate Section 8(a)(5) of the Act and Judge Sandron erred in ruling that said implementation was a violation. (Decision p. 39.)

G. EXCEPTION VII – JUDGE SANDRON ERRED IN FINDING RESPONDENT ENGAGED IN BAD FAITH OR SURFACE BARGAINING AND, THEREFORE, VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT

General Counsel alleged that Company bargained in bad faith because it repeatedly submitted its prior proposals in response to new union proposals, gave perfunctory consideration to and/or failed to consider union proposals and it proposed, in bad faith, the elimination of the union security provision and a voluntary check off clause. These allegations seem to originate from and/or mirror Chema's August 9, 2010 Affidavit. (R. 279.)

Specifically, in referencing the time period from December 11, 2009 thru March 23, 2010 Chema stated as follows: "With each new proposal presented by the Union during this period, the Employer's Committee would caucus and then return after fifteen (15) minutes and state that the [C]ompany resubmits its proposal of December 11., [sic] without saying why." (R. 279 at pp. 5 and 6.) However, the testimony elicited form Chema on cross examination proves this allegation to be wholly untruthful. Furthermore, Chema makes the following statement:

> The Union made 8 different proposals from March 18 to May 25. In response to each of these union proposals the Employer responded by resubmitting it March 10 last and final offer. With each proposal we explained why we believed we needed the proposal. Mason did not have any commenst [sic] on the substance of any of these proposals other than to say he was resubmitting his March 10 last and final offer. I said we are putting a lot of effort into these proposal [sic] and you are not commenting or modifying you are just handing us back the same proposal. Mason did not comment.

Id. at p. 7. Again, the testimony elicited from Chema on cross examination proves this allegation to be utterly false. Moreover, Chema made the following statement:

> When the parties initially met the union said that we were going to just make proposals over the economics so the Employer reflected TAs on all non-economic issues; but over the course of time during negotiations, meeting with our members and considering information the company provided, the union decided to make proposals over noneconomics. Also, the prior contract [ ] needed fine tuning on non economic issues.

(Id. at pp. 6 and 7.) Again, this statement is an absolute misrepresentation of the facts. As noted above in Section II. E., *supra,* the parties most certainly did bargain over non-economic issues. The Company made a number of proposed changes to the contract. The parties bargained over those articles and then and only then were they T/A'd. Secondly, the testimony elicited form Gerchy on cross examination establishes that the "information" that the Company provided was available to them well before they started reneging on T/A's and subsequently submitting regressive proposals. For instance, Gerchy testified that the union's Job Classification Proposal was submitted to the Company after January 7, 2010. (Tr. 445-446.) Gerchy explained that the union withdrew the T/A and submitted this proposal because the employees were being disciplined for work outside their classification and it was the union's opinion that said employees were not being paid for this higher classification work. (Id.) Nevertheless, Gerchy admitted that the union was aware of these issues prior to October of 2009. (Tr. 446.) The

Company's bargaining notes confirm this. (R. 1 at pp. 161-162.) Another example is hours of work. Gerchy testified as follows:

> Q. Now, can you tell me why after a tentative agreement was reached with respect to hours of work that the Union didn't make a proposal and withdrew the tentative agreement on hours of work?
>
> A. After further thought, it occurred to us that they -- the Company never ever consulted us when we wanted to change shift hours, or add a shift or -- or what have you.
>
> And this affected our employees adversely in a lot of cases, because they have schedules. They have child care schedules, they have work schedules, they've got to pick up the -- pick up the spouse schedule.
>
> So we felt that it was -- it was necessary that the Company negotiate with the Union relevant to
> shift hours.
>
> Q. And you weren't aware that the Company could change these shifts before January 7 of 2010?
>
> A. I -- I was aware, yes.
>
> Q. And you were aware that the Company could do these changes before October of 2009; right?
>
> A. Correct.
>
> **********
>
> Q. With respect to the issue on shift hours, the Union withdrew the tentative agreement on hours of work, did it not?
>
> A. Yes.
>
> Q. Why did it withdraw the tentative agreement after January 7 of 2010?
>
> A We needed to -- the Company had always changed shift hours, and it adversely affected employees at times.
>
> And -- and I -- as I stated before, healthcare, or child independent care, and schools, and other family issues become a matter. And to ask someone to simply change their shift schedules upsets a lot of family issues.

So we needed to put something in writing and have the Company at least negotiate with the Union relevant to shift hours.

Q. And this information with respect to the changing of the shifts and the impacts it would have on people, that also happened before October of 2009, did it not?

A. Repeat the question?

Q. The changing of shifts of the employees that the Company would do that as you testified to had this effect upon the employees, the Company, in fact, did change employee shifts before October of 2009; right?

A Correct.

Q And you knew this before negotiations started in 2009; correct?

A. Correct.

(Tr. 435-436 & 459-460.) With respect to vacations, Gerchy testified that the union withdrew the T/A on vacations after January 7, 2010 and its reasoning was as follows:

Q. All right. Did you not know that other companies had different vacation schedules before October of 2009 than what City Center (sic) had?

****

A. -- different companies do have different vacation schedules. But for relevant to our occupation and contracts that the IAM has in places within our realm, then we found that we -- we were severely lagging in vacation benefits.

JUDGE SANDRON: Well, how -- how -- how -- how did you learn that, do you recall?

THE WITNESS: Based on research by the IAM.

CROSS-EXAMINATION (CONT'D)

BY MR. MASON:

Q Well, who represented you on October of 2009?

A Mr. Chema.

Q. Of what union?

A Pardon?

Q What was his union?

A. IAM.

(Tr. 449-450.) Yet another example is apprenticeship and training. Gerchy testified as follows:

Q. With respect to apprenticeship and training, the Union withdrew the tentative agreement on training after January 7 of 2010; correct?

A Correct.

Q. Why did the Union come up with this apprenticeship training program after January 7, 2010?

A. Because we needed to make changes relative to training. The new employees that come in often come in off the street.

The Union has no say-so in what they're -- how they're classified, what their qualifications should be when they come in. And we saw a need there.

Q. Okay. Did the Company have new employees without any training being hired before October of 2009?

A. Yes.

Q And you were aware of that in -- before October 2009?

A. Maybe subconsciously aware of it.

Q. You weren't ever involved in your entire history of working with the Company with a new employee that needed to be trained?

A. Oh, yeah.

Q. So you were aware that employees came to the Company before October of 2009 without training.

A. Yes.

(Tr. 455.)

Moreover, Chema indicated the expired contract needed fine tuning. If that was an earnest statement the union would have made these proposals at the outset of bargaining, not six

(6) months into bargaining. The Company readily admits that it resubmitted its December 11, 2009 and March 10, 2010 proposals. However, it did so because the union was reneging T/A's and submitting regressive proposals. More importantly, the union's bargaining tactics are indeed relevant in determining whether an Employer has bargained in bad faith. Notwithstanding, Judge Sandron found that the company bargained in bad faith because it committed ULP's[31] related directly or indirectly to bargaining; it demonstrated a general unwillingness after January 7, 2010 to accept or to offer counter proposals to the union's new proposals while simply resubmitting its last and final offer; it rejected the union's January 7, 2010 verbal proposal; it proposed an open shop and voluntary dues checkoff and it disciplined and terminated members of the union's bargaining committee. (Decision pp. 40-42.)

In assessing whether a certain party has engaged in bad faith bargaining, the Board must undertake the difficult task of determining a party's intent from the totality of its conduct. *See*, *Kuna Meat Co*., 304 NLRB 1005, 1013 (1991), citing *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988). More importantly, each party to collective bargaining has an enforceable right to good faith bargaining with the other. Id., citing *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988). Accordingly, the right to good faith bargaining is a two way street. Even before the enactment of § 8(d) and 8(b)(3) of the Act, the Board recognized, that "**a union's refusal to bargain in good faith may remove the possibility of negotiation and be considered in deciding whether an employer acted in good faith**." See, *Alba-Waldensian, Inc*. 167 NLRB 695, 720 (1967), citing *Times Publishing Company*, 72 NLRB 676, 683 (1947) (Emphasis added).

[31] For instance, Judge Sandron noted that discharging a member of the union's bargaining committee (Russ Mason) has a detrimental impact upon the unions ability to bargain. *Dynatron/Bondo Corp.*, 333 NLRB 750, 756 (2001). (Decision p. 41.) As noted earlier, Russ Mason was terminated on November 30, 2011, but had not attended a bargaining session since had not attended a bargaining session since July 23, 2010. Moreover, in Dynatron, the Employer discharged three (3) members of the union's bargaining committee, discharged another union supporter and converted the resignations of three (3) of the union's bargaining committee to discharges. Id. at 755. The union literally could get employee's to volunteer to be on the committee for fear of retribution. Id. at 756. There are no such allegations here.

The Board reiterated the rule after those Sections were added to the law. Id., citing *Phelps Dodger Copper Products Corp.,* 101 NLRB 360, 368 (1952). Each of these sections makes clear the **mutual obligation on both employer and union** to bargain in good faith. Id., citing *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487-488 (1960) (emphasis added) and *Radiator Specialty Co*., 143 NLRB 350, 373-374 (1963). The United States Supreme Court, in an attempt to define both the employer's and employee's obligation to bargain in good faith stated:

> The object of [the] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure the employers and their employees could work together to establish mutually satisfactory conditions… [I]t was recognized from the beginning that the agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

See, Warren County Community Health Services Head Start, LLC, 2007 NLRB LEXIS 97, citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-104 (1970).

Section 8(d) of the National Labor Relations Act ("NLRA") defines the duty to bargain as the mutual obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, in the negotiation of an agreement." *See, NLRB v. Insurance Agents Union (Prudential Insurance),* 361 U.S. 477, 486 (1960). Nevertheless, such obligation does not compel either party to agree to a proposal or require the making of a concession. *See,* NLRA, Section 8(d). As such, it is not illegal for a party to engage in hard bargaining, so long as the parties bargain in good faith, i.e., with a willingness to enter into a contract. *See, NLRB v. Insurance Agents Union (Prudential Insurance),* 361 U.S. 477 at 486. *See also, G. Zaffino and Sons, Inc.*, 275 NLRB No. 7 (1985).

Thus, while the Act does not compel either party to make a concession or agree to any specific proposal, the duty to bargain is "more than a willingness to enter upon a sterile discussion of union-management differences." *See, NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). A party must enter into negotiations with a good faith intent of reaching an agreement and may not close its mind to any arguments which may be presented by the other side. *See, Hudson Chemical Co.*, 258 NLRB 152, 155 (1981). A bargaining posture which is calculated to insure that bargaining will be futile is inconsistent with good faith bargaining. *See, NLRB v. Herman Sausage Co.*, 275 F.2d 229, rehearing den. 277 F.2d 793 (5th Cir. 1960).

Accordingly, it is necessary to scrutinize a party's overall conduct to determine whether it has bargained in good faith, or whether it is endeavoring to frustrate the possibility of arriving at any agreement. *See, Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984). Nonetheless, a party is entitled to stand firm on a position if it reasonably believes that the position is fair and proper or that it has sufficient bargaining strength to force the other party to agree. Id.

The Board has set forth the following factors that signal a refusal to bargain in good faith: (1) delaying tactics; (2) unreasonable bargaining demands; (3) unilateral changes in mandatory subjects of bargaining; (4) efforts to bypass the union; (5) failure to designate an agent with sufficient bargaining authority; (6) **withdrawal of already agreed upon provisions;** (emphasis added) and (7) arbitrary scheduling of meetings. Id. One need not engage in all these activities to be found to have bargained in bad faith. Again, the Board cannot force an employer to make concessions on any particular issues or adopt a particular position. Id.

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the

bargaining table. Id. The Board then must determine whether the party is engaged in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at an agreement. Id.

Surface bargaining occurs when a party's overall conduct, as defined by the factors above, reflects an intention to avoid reaching an agreement. *See, Altorfer Mach. Co.*, 332 NLRB 130, 148 (2002). When evaluating the totality of the conduct, the Board also considers the substance of proposals to determine good-faith bargaining. *See, Warren County Community Health Services Head Start, LLC*, 2007 NLRB LEXIS 97, *27 (2007). The Board will inquire to see if the proposal is reflective of an earnest effort to reach an agreement. Id., citing *Public Service of Oklahoma*, 334 NLRB 487 (2001). The substance of the proposals in addition to an employer's insistence on extreme proposals could be viewed as part of the whole party's conduct in negotiations in determining good faith. Id., citing *Reichhold Chemical*, 288 NLRB 69 (1988).

The ultimate issue in a surface bargaining case is whether it is to be inferred from the totality of a party's conduct that they merely went through the motions of the negotiation as an elaborate charade with no genuine desire to reach an agreement if possible, or that the party actually bargained in good faith but was unable to arrive at an acceptable agreement with the union. *See, Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953). Furthermore, the Board has held that bargaining conduct that does not rise to the level of a per se violation of the obligation to bargain in good faith may still support an assumption of bad faith or surface bargaining when considered in conjunction with all of the other evidence of a party's behavior. *See, Constitutional Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2nd Cir. 1974).

In *Reichhold Chemicals*, the Board stated that "in some cases, specific proposals might become relevant in determining whether a party has bargained in good faith." 288 NLRB at 69. The Board clarified its role in this area by stating:

> That we will read proposals does not mean, however, that we will decide that particular proposals are either 'acceptable' or 'unacceptable' to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract. . . . In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals.

Id. Essentially, ALJ Sandron must decide whether the totality of the conduct, including the substance of the proposals evidences an intent by Center City to frustrate the bargaining process or whether the Company was merely engaged in lawful, hard bargaining. More importantly, ALJ Sandron must also take into account the Union's regressive bargaining tactics that have been ongoing since the November 5, 2009 meeting.

Ironically, the facts here are analogous to those in a recent ALJ decision concerning this very union. The only difference being it is the union, who is engaged in bad faith/surface bargaining. In *Universal Fuel*, 2009 NLRB LEXIS 344 (2009), the ALJ determined that the Employer engaged in bad faith/surface bargaining where it reneged on tentative agreements previously reached with the union and subsequently began making regressive proposals. The ALJ relied heavily on *Reichhold Chemicals*, supra, in making his determination. The ALJ stated:

> In *Reichhold Chemicals, Inc.*, [ ] the Board reiterated some of the factors that it will consider in determining whether bad-faith bargaining had occurred. These include among others: unreasonable bargaining demands that are consistently and predictably unpalatable to the other party; unilateral changes in mandatory subjects of bargaining; and insistence to impasse on non mandatory subjects of bargaining, all of which are present in the instant case evidencing the Respondent's design to frustrate a bargaining agreement. **Moreover, the Board**

> **has held that the interjection of new proposals after months of bargaining can be evidence of bad-faith bargaining.** The Board has also held that the assertion of a proposal disingenuously is an indicia of bad-faith bargaining.
>
> From all of the above, and the timing of the Respondent's proposal, its regressive nature, without justification, the Respondent's seemingly pretextual explanation of the purpose therefore, and the Respondent's apparent disingenuous assertion of this proposal to the Union, I find and conclude that the Respondent's May 8, 1998 proposal was not made as part of any good-faith effort to reach an agreement, but instead, constituted bargaining in bad faith with the Union designed to frustrate a collective-bargaining agreement, in violation of *Section 8(a)(5)* of the Act. (Emphasis added.)

Id at 79-80. The ALJ further noted that it has long been recognized that when a party withdraws from tentative agreements it can constitute an indicia of bad faith bargaining. Id. at 80, citing *Golden Eagle Spotting Co. v. Brewery Drivers and Helpers, Local Union 133*, 93 F.3d 468, 471 (8th Cir. 1996). *See also, Hartford Fire Ins. Co. v. NLRB*, 456 F.2d 201 (retreat from previously agreed upon items evidences failure to bargain in good faith).

Likewise, in *Bob Showers Windows and Sunrooms, Inc.* 2005 NLRB LEXIS 589, *82 (2005) Judge Sandron held that the employer engaged in bad faith bargaining when it added an entirely new provision to the subcontractor clause to which there had already been a full agreement. Judge Sandron held as follows:

> I conclude that by throwing in this new provision, Respondent effectively reneged on its prior agreement on subcontracting language and, further, evidenced bad faith. The whole matter of subcontracting was integrally connected from the start with the mass layoff of employees in July 2003, and their replacement with subcontractors. The settlement agreement resolving the layoff specifically provided for the phasing out of subcontractors and the resumption of bargaining unit work by unit employees. This new provision did not offer a concession or clarify anything previously agreed to. What it did was to basically rescind the agreement Respondent had previously reached with the Union on subcontracting language and essentially undercut a key provision in the prior settlement agreement.
>
> I conclude, therefore, that by adding new proposed subcontracting language on November 18, 2004, Respondent reneged on terms previously negotiated with the

> Union and thereby violated Section 8(a)(5) and (1) of the Act by bad faith bargaining.

Id. at *82-83.

Similarly, in *Atlanta Hilton and Tower*, 217 NLRB 1600 at 1601, the ALJ concluded that the Employer bargained in bad faith where it bargained with no serious intent to adjust differences or to reach acceptable common ground with the union, did not seriously consider the union's proposals by categorically rejecting them and failed to make any counterproposals except for a one year extension of the last collective bargaining agreement. The Employer maintained its stance all the while illegally refusing to provide information to the union. The Board reversed the ALJ and stated as follows:

> The Company's firmness in insisting on a 1-year extension of the current contract does not of itself constitute bad faith. We find that the totality of the Company's conduct throughout the course of bargaining establishes that the Company engaged in hard bargaining, rather than surface bargaining. To hold otherwise in such circumstances would be tantamount to requiring an employer to offer improved benefits over an expired contract or be guilty of bad-faith bargaining.

Id. at 1603. The Board noted that the Company had participated in over 13 bargaining sessions, offered wage increase, the prior successful bargaining relationship between the parties, and the agreement in principal to a union proposal on sick-leave. Notably, the allegations in *Atlanta Hilton* are nearly identical to those presented here. Significantly, just as in *Atlanta Hilton*, Center City has met with the union over 50 times between September 2009 and January 2011 engaging in lengthy discussions over proposals reaching agreements. (Decision p. 40.) Likewise, the Company has proposed wage increases and the parties have had a successful relationship the past.

Based upon *Universal Fuel*, *Bob Showers* and *Atlanta Hilton* it is clear that the Company is not bargaining in bad faith. More importantly, just like the employer in *Universal Fuel* and

Bob Showers, the union has made significant new proposals, breached tentative agreements and engaged in regressive bargaining without good cause shown. The union has consistently engaged in this conduct for months. The only difference being the employers in *Universal Fuel* and *Bob Showers* reneged on only a miniscule amount of tentative agreements while here, the union has reneged on **ALL** the tentative agreements. The union's refusal to bargain in good faith as far back as November 2009 has polluted these negotiations. There conduct must necessarily be considered in deciding whether Center City has acted in good faith. See, *Alba-Waldensian, Inc*. *supra,* citing *Times Publishing Company*, 72 NLRB 676, 683 (1947). Judge Sandron failed to address the very case law he authored; he wholly disregarded the union's conduct; and failed to address both Gerchy and Chema's testimony. It is undisputable that the union has acted in bad faith through regressive bargaining and reneging on T/A's. As such, it is implausible that Judge Sandron would wholly ignore this evidence and rule that the Company negotiated in bad faith. The only conclusion drawn by a reasonable party is that the determining factor for Judge Sandron is that no matter the facts and/or the eveidence – the Company loses.

1. Seeking to remove the union security clause is not evidence of bad faith bargaining

An employer's refusal to grant a union security clause in negotiations does not constitute bad faith bargaining. *See, APT Medical Transportation, Inc*., 333 NLRB 760, 770 (2001). Simply because such a clause existed in a prior contract does not by itself obligate the parties to include it in successive contracts.[32] Id., citing *Challenge - Cook Brothers* 288 NLRB 387, 388 (1988) (Board reversed ALJ's finding of surface bargaining which was based in part on the Employer's proposal to eliminate union security as a condition of employment). **Whether the Union, General Counsel, the ALJ or the Board finds the Company's reasoning for such a**

[32] This statement is equally applicable to dues checkoff provisions. *Logemann Brothers Co.*, 298 NLRB 1018, 1020 (1990).

clause persuasive is immaterial. Id. at 770. (Emphasis added.) **The Employer need only show the reasons set forth for the elimination of the clause are not so illogical as to justify an inference that the Company has demonstrated an intent not to reach an agreement and to produce a "stalemate" so as to frustrate bargaining.** Id. (Emphasis added.)

Employers are entitled to advance a position genuinely held, notwithstanding the fact that it had taken a different position in the past. *See, Challenge - Cook Brothers* 288 NLRB at 389, citing *Atlas Metal Part Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981).[33] Union security is a mandatory subject of bargaining and an employer is entitled to stand firm on a position it reasonably believes is fair and/or that it has sufficient bargaining strength to force agreement by the other party. Id. Accordingly, an Employer is not required to concede its position and, may insist, as a condition of reaching an agreement that its position prevail. *See, Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455, 456 (2002).

Center City's reasoning for eliminating the clause not illogical or irrational. The Company was losing out on new applicants who choose to work elsewhere due to the fact that the facilities at issue herein are union shops. The Company had informed the union on more than one occasion that it was losing recruits do the union shop. The Company's reasoning was consistent throughout. Accordingly, the Company proposed that if employees want to join the union they are certainly free to do so, and if not, that's fine too. But, it must be the employee's choice. As noted above in Section II., E., *supra*, the parties discussed these issues across the table and in correspondence in response to information requests. Said conversations took place during the November 5 and December 11, 2009 bargaining sessions. (R. 1 at pp. 30-31, 46 & J.

[33] In *Atlas Metal*, the Company consistently asserted the same reason for wanting to eliminate union security and checkoff, i.e., so that employees would have free choice concerning union membership. The court ruled that the Company had not bargained in bad faith, while noting that the Board ignored evidence to the contrary and instead characterized Atlas' proposal as "unreasonable, redundant and in flammatory" and as "predictably unacceptable" to the union noted that the Board. 660 F.2d 304, 308, 309.

44) Moreover, within the three years immediately preceding the expired CBA, applicants did in fact turn down job offers from the Company citing concerns for union dues, benefits and initiation fees. (Tr. 1228-1231, 1233 & 1250-1252.) Additionally, both Dorr and Danhauer indicated during their interviews that they preferred not to join the union and/or pay union dues. (Tr. 175-176, 180-181 & 546.)

The circumstances are somewhat similar to those in *Phelps Dodge, supra.* In *Phelps Dodge* the ALJ found as follows:

> The evidence here indicates that the Respondent engaged in good faith bargaining in all other respects and made concessions during negotiations on wages and other matters. The Respondent's position with respect to union security and checkoff clauses cannot, in my opinion, be considered irrational and it took the time during negotiations to explain its positions. Given the fact that these issues are mandatory subjects of bargaining, neither side can be compelled to agree to the other's position or to even make concessions in its own position. **[**15]** Moreover, there was evidence that some bargaining unit employees, such as those accreted to the unit during the preceding contract term, raised some objections to joining this Union and made their feelings known to management.
>
> In my opinion, the conduct of the Respondent, in this case, and the positions taken by it in relation to union security and dues checkoff provisions do not, by themselves, amount to a violation of the Act. Accordingly I shall recommend that the Complaint be dismissed.

Phelps Dodge Specialty Copper Products Co., 337 NLRB 455 at 457. The Board subsequently affirmed the ALJ's decision.

The Company has put forth legitimate and logical reasons for the elimination of the union security clause and, under these circumstances, the Company believes the employees should have the right to choose to be members or non-members of the union. Also, employees who do not wish to be represented by the union should not be required to pay dues. Such reasoning cannot be considered illogical.

Simply put, General Counsel has not carried its burden of proving by a preponderance of the evidence that, in the circumstances of this case, Center City has made its proposals for ulterior motives, i.e., to frustrate negotiations. Just as in *Challenge - Cook Brothers, supra*, General Counsel has failed to adduce sufficient evidence to demonstrate that Center City asserted its proposal disingenuously or was unwilling to discuss it with the union. Furthermore, there is no evidence that in maintaining its position on an open shop and voluntary dues checkoff that the Respondent was motivated by bad faith or an intent to frustrate agreement.[34]

IV. CONCLUSION

For the reasons outlined above and in accordance with the evidence, Respondent did violate Section 8(a)(1), (3) and 5 of the Act. Accordingly, the Respondent respectfully requests that the Board reverse Administrative Law Judge Sandron's rulings, findings, conclusions and recommended Order with respect to the issues raised on exception and dismiss the Complaint in its entirety.

Dated at Dublin, Ohio on this 4th day of November, 2011

Respectfully submitted,

/s/ Ronald L. Mason

Ronald L. Mason (#0030110)
Aaron T. Tulencik (#0073049)
William H. Dulaney III (#0037969)
Mason Law Firm Co., L.P.A.
425 Metro Place North, Suite 620
Dublin, Ohio 43017
Telephone: (614) 734-9450
Facsimile: (614) 734-9451
E-Mail: rmason@maslawfirm.com
atulencik@maslawfirm.com
Counsel For The Respondent,
Center City International Trucks, Inc.

[34] The Company dropped these proposals in January 2011 and still does not have an agreement with the union. The Company is not the party that is frustrating agreement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 4, 2011, an electronic original of Respondent Center City International Trucks, Inc.'s Exceptions and Brief In Support was transmitted the National Labor Relations Board, office of the Executive Secretary, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Exceptions and Brief In Support were transmitted to the following individuals by electronic mail:

Mr. Eric Oliver
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Mrs. Jamie L. Ireland
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Sorrell Logothetis
Cook, Portune & Logothetis, LLC
22 West Ninth Street
Cincinnati, Ohio 45202

/s/ Aaron Tulencik

Aaron T. Tulencik (Ohio Bar #0073049)
Mason Law Firm Co., L.P.A.
425 Metro Place North, Suite 620
Dublin, Ohio 43017
Telephone: (614) 734-9450
Facsimile: (614) 734-9451
Counsel For The Respondent,
Center City International Trucks, Inc.