UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

EVENFLOW TRANSPORTATION, INC.,
Respondent

Case No. 2-CA-40128

and

INTERNATIONAL BROTHERHOOD OF TRADE UNIONS, LOCAL 413,
Charging Party

ACTING GENERAL COUNSEL'S BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

Dated at New York, New York
This 8th day of November, 2011

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I. INTRODUCTION

Respondent's Exceptions to the Administrative Law Judge (ALJ) Decision cannot change the basic facts and inescapable conclusions of this case. Respondent terminated employees Julio Castro, Nelson Rodriguez, Luis Correa, Anthony Smidth, and Lindbergh Wallace on September 23, 2010.[1] The record evidence establishes that Respondent concocted an "economic layoff" within weeks of learning of their union organizing activities, within weeks of unlawfully interrogating and threatening the employees in connection with these activities, and on the eve of a scheduled union organizing meeting. The ALJ correctly found that all evidence supported finding that Respondent terminated the five employees solely based on their protected union conduct. Respondent's arguments here cannot alter its failure to present evidence at the hearing permitting any other conclusion. For the reasons stated herein, each of Respondent's arguments is without merit and should be rejected, and the ALJ's factual findings and conclusions of law should be affirmed.

II. ARGUMENT

A. The ALJ's Credibility Determinations Were Correct and Should Not Be Overturned

Respondent employs a repeated and failing formula in its effort to challenge the ALJ's credibility determinations. The ALJ credited the witnesses called by counsel for the Acting General Counsel ("General Counsel"), the five employees terminated on September 23, 2010, and discredited Respondent's principal witness, General Manager John Bizzarro. (ALJD, p. 3, n.4). In each instance, as set forth more fully below, Respondent cites the discredited testimony of its witness, asserts (often incorrectly) that this testimony contradicts testimony of a General

[1] All references herein to General Counsel's Exhibits will be identified as "GC Ex. _"; references to Respondent's Exhibits as "Resp. Ex. __", references to the hearing transcript as "Tr., __"; referenced to the ALJ's August 31, 2010 Decision as "ALJD", and references to Respondent's Brief in Support of Exceptions as "Resp. Br.".

Counsel witness, and concludes that the General Counsel witness is therefore lacking in credibility. This circular logic cannot withstand scrutiny, and provides no basis for the Board to disturb the ALJ's credibility determinations.

1. The Board's Legal Standard

The Board's established policy is to uphold a judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). In particular, the Board grants great weight to the trier of facts' credibility determinations insofar as they relate to witness demeanor, recognizing that the trier of fact has the advantage of observing the witness while he testifies. *Id.* at 544. Accordingly, the Board will not overrule an ALJ's credibility conclusions unless a clear preponderance of all of the evidence convinces the Board that the conclusions of the trier of fact are incorrect. Id. Here, the record thoroughly supports the ALJ's credibility determinations.

2. The ALJ Correctly Credited General Counsel's Witnesses (Exceptions 10-13)

The ALJ credited General Counsel's witnesses, explaining that he was "favorably impressed by [their] testimony and demeanor" and that they testified "in a forthright manner" giving "mutually corroborative testimony." (ALJD, p. 3, n.4). Testimony concerning events witnessed by multiple witnesses, such as the witnesses' conversations with each other and the terminations of Castro, Rodriguez, and Smidth on September 23, was consistent and mutually corroborative. *See, e.g., Joy Recovery Tech. Corp.*, 320 NLRB 356 (1995) (crediting testimony that was "in significant part mutually corroborative"). Incidents witnessed by only a single witness, such as the one-on-one conversations with Bizzarro, were corroborative to the extent that he had similar conversations with each witness. Moreover, the testimony of General

Counsel's witnesses "withstood the test of thorough cross-examination". Joy Recovery Tech. Corp., 320 NLRB 356. The witnesses' stories did not change on cross examination, and the witnesses maintained their composure and remained forthright and responsive.

Respondent asserts that the credibility of discriminatee Anthony Smidth was damaged by his failure to "recall simple facts." This assertion is misleading, at best, as the purported "facts" were not established by any credible, admissible record evidence. For example, the only evidence Respondent proffered regarding a supposed failed drug test was in testimony of third party witness, Cheryl Davenport, testifying that discriminatee Nelson Rodriguez told her that Smidth had failed a drug test. However, Davenport's testimony was inadmissible double-hearsay, and cannot be viewed as a "fact" which Smidth failed to "recall", as Respondent asserts. *See Performance Friction Corp*., 335 NLRB 1117, 1120 n. 20 (2001) (discriminatee, who is not a charging party, is not a "party opponent" under Fed. R. Evid. 801(d)(2)). Such testimony cannot serve to impeach Smidth's credibility because the testimony recounts a statement made by Rodriguez, not by Smidth. *See, e.g., Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd*., 262 F. Supp. 2d 251, 262 (S.D.N.Y. 2003) ("[impeaching] statement must be that of the witness to be impeached and not of some other person") (citing Wright & Miller, § 6203).

Next, Respondent asserts that discriminatee Nelson Rodriguez should not be credited based on "testimony presented which questioned Mr. Rodriguez's credibility." In support of this assertion, Respondent cites testimony given by discredited witness Bizzarro about Rodriguez's past conduct. As an initial matter, this testimony – even if credited, which it was not – cannot serve to impeach Rodriguez under Federal Rule of Evidence 608. F.R.E. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attaching . . . the witness's character for

truthfulness . . . may not be proved by extrinsic evidence" but may be "inquired into on cross-examination of the witness" in the discretion of the court).

Moreover, the testimony referenced by Respondent was vague, internally inconsistent, and in short, not credible. Bizzarro testified that he believed that Rodriguez had sold drugs (and another time came to work with "very glassy and bloodshot" eyes), but at the time only took the step of warning Rodriguez that he would be checking him from time to time. (Tr., 622:8; 624:1). He first testified that he had been informed that Rodriguez was selling marijuana "to other drivers", and then said that this was not his testimony; instead, Rodriguez was selling drugs in the parking lot, but he did not know to whom he was selling. (Tr., 472:11; 621:4). Furthermore, Bizzarro's testimony was uncorroborated even though "Carlos the Mechanic", the individual who had reported the information to Bizzarro, is still employed at Evenflow and thus was in Respondent's control.

As to Rodriguez's allegedly "false" accident report, Bizzarro did not identify what these supposedly false statements were; he did not identify what was false about the report, and Respondent did not offer the report for admission into evidence. *See, e.g., Addicts Rehab.*, 330 NLRB at 741 (testimony should not be credited where it is "unsupported by documents, when documentation clearly should have been produced"). Further, Respondent did not introduce any testimony on the date the report was made, the date on which Bizzarro learned that it was (allegedly) false, or the circumstances in which Bizzarro learned of the report. Much later on redirect, Bizzarro attempted to elaborate on the significance of these issues; "the suspicion of the drug use and the false accident report left us – left the Company susceptible to a large law suit that is pending from his accident." (Tr., 624:18). Again, there was no testimony or documentary evidence offered about the circumstances of this accident, details of the lawsuit, or even when

the accident occurred. This lack of specificity and supporting documentation correctly led the ALJ to discredit Bizzarro's testimony and as such, the purported "facts" offered in this testimony cannot be used to impeach Rodriguez.

Respondent also asserts that discriminatee Julio Castro should not be credited because of purported prior conduct which "refuted Mr. Castro's credibility." In particular, Respondent refers to testimony given by third-party witness Cheryl Davenport that Castro had sold piña coladas out of his work van. To the extent that Respondent asserts that the conduct itself casts doubt on Castro's truthfulness as a witness, such a conclusion is again prohibited by the Rules of Evidence. Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attaching . . . the witness's character for truthfulness . . . may not be proved by extrinsic evidence").

To the extent that Respondent suggests that Davenport's testimony directly contradicts Castro's testimony and thus may be used to impeach Castro, this is also an improper conclusion. First, Castro was not directly asked about this incident, and thus there is no direct statement to impeach. He was asked only whether he had ever used the van for "unauthorized" use. There was no evidence presented that this activity constituted an unauthorized use or that Castro had a basis to understand it as such. Had Respondent directly questioned Castro about this activity, he may or may not have admitted to it. However, Respondent chose to ask only vague questions and not question him directly, and thus the testimonies are not in sufficiently direct conflict to use Davenport's testimony to impeach Castro's. Moreover, Respondent cites various facts not in evidence. For example, Davenport never testified that the drinks were "alcoholic," an assertion Respondent nonetheless cites as fact four times in its brief.

Further, the testimony of General Counsel's witnesses "was substantiated in part by acknowledgments and admissions of Respondent Employer's witnesses." *Joy Recovery Tech. Corp*., 320 NLRB 356. For example, although Respondent asserts that the discriminatees' testimony on conversations with Bizzarro was not credible, Bizzarro himself admitted to having a conversation with Rodriguez about the Union and about the union representative Carlos Rodriguez. (Tr., 465:7-466:18).

Thus, the ALJ's credibility determinations were supported by significant record evidence together with the ALJ's observances of witness demeanor. Respondent's arguments fail to cite any evidence which would require the Board to disturb the ALJ's crediting of General Counsel's witnesses.

3. The ALJ Corrected Discredited Respondent's Principal Witness

While Respondent does not specifically except to the ALJ's discrediting of its principal witness, John Bizzarro, Respondent refers throughout its Exceptions to various pieces of evidence offered through Bizzarro's testimony, implying that this testimony should be credited. However, the ALJ concluded that he was "not favorably impressed by the testimony of Bizzarro, who, in my opinion, showed a cavalier attitude to this legal proceeding." (ALJD p. 3, n.4). To the extent that Respondent's Exceptions rely on evidence offered through Bizzarro's testimony, it may be helpful for the Board to understand why the ALJ's credibility determination concerning Bizzarro was based on substantial evidence and should be affirmed.

To demonstrate why the ALJ was correct in concluding that Bizzarro was not a credible witness due to his "cavalier attitude" toward to the proceeding, a line of testimony in which Bizzarro attempted to defend his failure to appear at the hearing pursuant to subpoena is particularly illustrative. Bizzarro's testimony about his absence that day is replete with inconsistencies, implausibilities, and evasion, sufficient to cast doubt on his overall credibility as

a witness. Bizzarro testified that he could not attend the hearing because he was attending a purported meeting in Washington, D.C., on June 27, as part of his activities with an organization called Vets for Vets.

First, there is inconsistent testimony as to Bizzarro's role in the organization: "another business venture that I'm working on" (Tr., 444:7) and "we formed Vets for Vets" (Tr., 448:22). Bizzarro testified that it was his idea (along with "the generals") to form the organization. (Tr., 540:17). When asked if anyone was in charge of the organization, he responded, "No, it's just about four or five of us that are – have a passion to help the wounded warriors coming back." (Tr., 449:1); when asked what his position in the organization is: "I'm a developer of it" (Tr., 538:19). When pressed for more information about the organization, he then attempted to minimize his role in the organization: "I'm a participant" (Tr., 448:25); "an activist" (Tr., 529:10); "I just would have a minimum role." (Tr., 558:2). This testimony demonstrated that he has, at best, a minimal role in the organization – insufficient to warrant his failure to appear pursuant to subpoena.

When asked on cross examination who founded the organization, Bizzarro responded, "I believe Joe Mirra," after not having mentioned Mirra a single time during his direct testimony on this topic. (Tr., 529:25). Bizzarro testified that Mirra was not himself a veteran, and when asked how Mirra became involved in this "issue", he responded indirectly, "To do the financial planning of everything, and the form of not-for-profit." (Tr., 540:8). But despite testifying that Mirra founded the organization, when then asked "whose idea was it to form this organization," Bizzarro responded, "The generals and myself." (Tr., 540:17). When Bizzarro was asked how he had become connected with the generals, his attorney objected to this question for no apparent reason. (See Tr., 541:4).

Bizzarro's testimony also contained inconsistencies about the meeting itself: "we had a meeting with some senators" (Tr., 444:7); when asked "which senators did you meet with?", he responded, "Senator Towns" (Tr., 445:1); when asked who was at the meeting, he did not identify the senator. The Judge asked, "And did you meet with senators?" and he then responded, "We met with his aide, Senator Towns' aide." (Tr., 448:13). He did not know the name of the aide. (Tr., 548:6). He also did not know what state Towns was from. In fact, there is no "Senator Towns" (although there is a Congressman Towns). (GC Ex. 31)

There were other implausible elements to this testimony. Bizzarro testified that he did not go through any security or a metal detector to enter Walter Reade Hospital, a federal (military) facility. (Tr., 549:7). Bizzarro testified that he had met with General Fold twenty times and General Ehrlich fifty times, but he could not identify their addresses or phone numbers (and testified that the numbers were "probably not" saved in his cell phone). (Tr., 542:18-25; 552:21-554:16).

At best, Bizzarro's testimony demonstrated that he was completely inconsequential to this meeting, about which he was unaware of what the purpose was, who he was meeting with, what the agenda was, and what the topics were that were discussed. At worst, and the theory best supported by the evidence, is that the meeting may or may not have taken place, but it was used by Bizzarro solely as an excuse to disregard the valid subpoena issued by General Counsel. In all, his testimony on this matter is illustrative of the "cavalier attitude" observed by the Judge.

Bizzarro's testimony on many aspects of Evenflow's business was "incoherent, unresponsive, and evasive." *Addicts Rehab.*, 330 NLRB at 740. For example, Bizzarro's testimony on payroll practices was evasive and inconsistent. When initially asked if he was responsible for payroll, Bizzarro responded that he was responsible "to some extent," and

responsibility was shared by bookkeeper Joe Mirra. (Tr., 268:14). However, when asked later if he had "testified earlier that you're responsible for payroll," Bizzarro replied that this was not his testimony and he had said only that Mirra was responsible for payroll. (Tr., 279:19). In other places, Bizzarro testified that his wife, Julie Bizzarro, was responsible for processing payroll, including cutting checks, making cash withdrawals, and keeping records of the wages paid to each employee.[2] (Tr., 288:16-289:5). In another place, he described an incident when "I was out of town and I couldn't make it back to make payroll on a Friday." (Tr., 475:14).

Even on simple, uncontroversial points, Bizzarro "steadfastly refused answering a direct question with a direct answer." *Addicts Rehab*, 330 NLRB at 740. This is evident in Bizzarro's testimony concerning company bookkeeper Joe Mirra. When initially asked who shared responsibility for payroll, Bizzarro replied with a one-word answer: "Bookkeeper," and did not identify Mirra until directly asked for the bookkeeper's name. (Tr., 268:16). When asked "what are Joe Mirra's responsibilities for the company", Bizzarro gave another terse answer: "Bookkeeping responsibilities." (Tr., 280:4). Bizzarro was then asked what those bookkeeping responsibilities entail, and rather than answer this direct question, he stated, "I'm not sure." (Tr., 280:6). Bizzarro testified that, along with owner Jack Mahanian and Julie Bizzarro, he has communications with Mirra. When asked about his communications with Mirra, Bizzarro responded with a series of vague, non-responsive answers:

> Q: And when you communicate with Joe Mirra what do you communicate about?
> A: Questions he'll have.
> Q: What sorts of questions does he have?
> A: Financial questions.
> Q: Such as?
> A: Invoice[s], you know.
> Q: Can you elaborate, please?
> A: That's really it.

[2] The ALJ's conclusion that Julie Bizzarro was responsible for Evenflow's bookkeeping is supported by this evidence, refuting Respondent's Exception 1.

(Tr: 280:18-281:1).

Bizzarro was particular evasive, vague, and inconsistent when questioned about matters central to the case. Bizzarro's testimony concerning the reasons for discharging the five employees was vague, inconsistent, and utterly lacking in specificity. Bizzarro's testimony on his knowledge of union activities was inconsistent. Bizzarro was asked if he knew of any union organizing drive going on in September 2010, and he responded, "No, I thought it was over when the first case was settled or dismissed." (Tr., 483:23). However, this is inconsistent with his testimony that he had conversations with Rodriguez about union organizer Carlos Rodriguez. Bizzarro's testimony on the financial problems facing the company was also vague and inconsistent.

Furthermore, Bizzarro's testimony should not be credited, because it was "unsupported by documents, when documentation clearly should have been produced." Addicts Rehab., 330 NLRB at 741. There were numerous areas in which Bizzarro testified that documents existed, but those documents were not produced even though they were subject to General Counsel's subpoena. *See also Nat'l Football League*, 309 NLRB 78, 96-99 (1992) (drawing an adverse inference where respondent failed to produce subpeoaned document); *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994) (same).

B. <u>The ALJ Correctly Found that Respondent Violated Section 8(a)(1) of the Act</u>

1. The ALJ Correctly Found that Respondent Unlawfully Interrogated Employees (Exceptions 9, 10-13, 41)

The question of whether Respondent unlawfully interrogated employees turns, in large part, on the ALJ's credibility findings. Most of the alleged unlawful interrogations occurred in one-on-one conversations between one of the discriminatees and Bizzarro. The ALJ credited the

discriminatee's version of events, not Bizzarro's. Thus, the credible evidence supports the ALJ's conclusion.

An employer's interrogation of an employee violates Section 8(a)(1) of the Act when, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees' exercise of the rights guaranteed to them under the Act. *United Svcs. Auto. Ass'n*, 340 NLRB 784, 786 (2003). In undertaking this analysis, the Board considers what are known as the "the Bourne factors":

> (1) The background, i.e., is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Westwood Health Care Center, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). *See also Scheid Electric*, 355 NLRB No. 27 (2010) (citing *Bourne* factors). The Board has explained that "these and other relevant factors are not to be mechanically applied in each case." *Westwood*, 330 NLRB at 939.

Bizzarro asked Rodriguez on three separate occasions whether he had spoken with union organizer Carlos Rodriguez and asked that Rodriguez report to Bizzarro the union activities of other employees. In particular, Bizzarro questioned Rodriguez about his union activities, including asking whether Rodriguez had spoken with the Union representative, who Bizzarro told him, was a "creepy guy" that Rodriguez should "stay away from." (Tr., 84:21-24; 85:15-22). Bizzarro then told Rodriguez that if he saw his coworkers speaking to the Union representative, "to let him know [] who was talking to [the Union representative]." (Tr., 85:22). About two weeks later, in the last week of August, Bizzarro again questioned Rodriguez asking Rodriguez if he had had any other conversations with the Union representative and if Rodriguez

had "been watching any other workers talk to him." (Tr., 87:17-20). Rodriguez testified that there was a third, similar conversation in the first week of September. (Tr., 88:17).

Similarly, Bizzarro had three conversations with Castro about the Union, and in two of these, he asked Castro about his union activities and those of other employees. He also stated in no uncertain terms that he was opposed to the Union. Specifically, Bizzarro asked Castro "to please let him know that the Union was coming around or if anybody was going to be talking to the Union to please let him [know] and give him the heads up." (Tr., 127:15). Bizzarro also told Castro that he "didn't want his company to be unionized" and that "if he had to he'd bring his dogs out to get the Union out." (Tr., 127:20). About two weeks later, Bizzarro spoke to Castro in his office and asked Castro if "anybody is talking to the Union" and if "the Union was coming around to start their shit again." (Tr., 128:17).

Here, the questioner was the highest ranking manager (as far as the employees were aware) at the company; Bizzarro was the person they called the "big boss", and the employees rarely dealt with him. (Tr., 84:9; 126:9). The conversations took place in Bizzarro's office, a place where the employees do not typically spend time. (Tr., 84:14). In these conversations (as well as those described by Smidth occurring in 2009), it is clear that Bizzarro is "hostile" toward the Union. Further, Bizzarro was clearly soliciting specific information, repeatedly requesting that these employees inform him of any union activities by their coworkers. The employees agreed that they would let Bizzarro know if they learned of any such union activities – not a truthful reply as contemplated by the Bourne factors. (*See*, *e.g.*, Tr., 128:3). Based on these factors, and on the overall circumstances, Bizzarro's conversations with these employees sent a clear message that employees were not free to engage in union activities as they saw fit. This restraint of the employees' statutorily guaranteed rights is a clear violation of Section 8(a)(1).

Furthermore, Board law prohibits employers from urging employees to inform on the union activities of their coworkers. In particular, "the Board finds overbroad requests to report to be unlawful even where they are not accompanied by any statement that the employer would take adverse action." *Winkle Bus Co., Inc*., 347 NLRB 1203 (2006). Requests are not "overbroad" where an employer makes clear that he is asking employees to report only "harassment, not [ ] union activity per se." *Publix Super Markets, Inc.*, 347 NLRB 1434 (2006). Here, Bizzarro's statements to Rodriguez and Castro was certainly unlawful: they requested that the employees report "union activity per se" rather than distinguishing harassment or other impermissible conduct, and they were not accompanied by any assurances against adverse action.

2. The ALJ Correctly Found that Respondent Unlawfully Threatened Employees With Physical Harm (Exceptions 13, 43)

Where an employer makes a threat of violence to an employee, "The test is not one of intent, as the judge's findings suggest, but whether the threatened conduct has the tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights." *Cox Fire Prot., Inc.*, 308 NLRB 793 (1992). The Board has found such a threat unlawful where, "[w]hether [the supervisor] meant his statement to be taken literally or merely as a colorful figure of speech used to express his feelings, the clear import of [his] statement was that he wanted to retaliate against [the employee]." *Id.* The same applies here.

Here, employee Julio Castro testified that Bizzarro told him that he "didn't want his company to be unionized" and that "if he had to he'd bring his dogs out to get the Union out." (Tr., 127:20). This "threatened conduct has the tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights." *Cox Fire Prot., Inc*., 308 NLRB 793 (1992).

As the ALJ correctly concluded, this statement constituted a violation of Section 8(a)(1) of the Act.

C. The ALJ Correctly Found that Respondent Terminated Five Employees in Violation of Section 8(a)(3) of the Act

In evaluating alleged unlawful discipline, including discharges, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd*., 662 F.2d 899 (1st Cir. 1981). The General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected activity, that the employer had knowledge of that activity and had animus against such activity, and that the activity was a motivating factor in the employer's decision to discipline the employee. *United Rentals, Inc.*, 350 NLRB 951 (2007); Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999). Both employer knowledge of protected activity and anti-union motivation may be proven by circumstantial, as well as direct, evidence. *See, e.g., Dlubak*, 307 NLRB 1138, 1155 (1992), enf'd, 5 F.3d 1488 (3rd Cir. 1993); *Abbey's Transportation Services*, 284 NLRB 698, 700-01 (1987), enf'd, 837 F.2d 575 (2nd Cir. 1988). The employer's adverse action is evaluated in the context of all of the surrounding circumstances, including the timing of the action, disparate treatment, and inconsistent or shifting reasons proffered for the discipline. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995). *See also American Cyanamid Co*., 301 NLRB 253 (1991); *Abbey's Transportation Services*, 284 NLRB at 700. Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *General Films*, 307 NLRB 465, 468 (1992).

Once protected conduct is established as the motivating factor for the employer's action, the burden shifts to the employer to produce evidence to establish that the employer would have

taken the same action even in the absence of union activity. *Septix Waste, Inc.*, 346 NLRB 496 (2006); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). However, if the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer "fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp*., 340 NLRB 382, 385 (2003). *See also Metropolitan Transportation Services*, 351 NLRB 657, 660 (2007); *Limestone Apparel Corp*., 255 NLRB 722 (1981), *enf'd* 705 F.2d 799 (6th Cir. 1982). Even assuming that Respondent's rebuttal case may be considered, Respondent cannot meet this burden simply by presenting legitimate reasons for discharging the five discriminatees, but rather, it must persuade the ALJ by a preponderance of the evidence that it *in fact* acted upon those reasons. *Wright Line*, 251 NLRB at 1089; *W. F. Bolin Co*., 311 NLRB 1118, 1119 (1993); *Manno Electric, Inc*. 321 NLRB 278, 280 n.12 (1996). Here, analysis of all the circumstances leads to the inescapable conclusion that Respondent violated Section 8(a)(3) of the Act by discharging the five discriminatees on September 23.

1. The ALJ Correctly Found that General Counsel Made a Prima Facie Case

a) Respondent Does Not Dispute that the Employees Engaged in Protected Activity

Respondent does not dispute that the five terminated employees engaged in protected activity. They each testified that they had conversations about the Union with union representative Carlos Rodriguez, conversations with each other about taking steps to vote in the Union, and conversations with other coworkers about the Union. They engaged in planning a meeting with the union organizer to inform their coworkers about the Union. These sorts of discussions are core Section 7 activities, protected by the Act.

b) The ALJ Correctly Found that Respondent Had Knowledge of the Employees' Protected Activity (Exceptions 2-4, 6-8, 10-12, 33)

The Board has explained, "an employer's knowledge of protected conduct can be inferred from its general knowledge of union activity, its demonstrated antiunion animus, the timing of its actions against prounion employees, and the pretextual nature of its defenses." *Glasforms, Inc.*, 339 NLRB 1108, n.6 (2003). *See also Kajima Engineering and Construction, Inc*., 331 NLRB 1604 (2000) (same). Under Board precedent, "it is not necessary for the General Counsel to prove that the employer had specific knowledge of an employee's union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information on the identity of union supporters. Such circumstances may include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the pre-textual reasons for the discharge asserted by the employer." *Martech Medical Products Inc*., 331 NLRB 487, 488 (2000).

Despite Respondent's protestations to the contrary, the record evidence makes it indisputable that Respondent had, at the very least, a "general knowledge of union activity." *Glasforms, Inc*., 339 NLRB 1108. Bizzarro himself admitted that he had a conversation about the Union with Nelson Rodriguez in August 2010. In that conversation, he told Rodriguez that union representatives "were sales people and that you have to do your homework before you listen to what they say." (Tr., 465:16). Despite Bizzarro's assertions at other times that he did not know union activity was ongoing, his admission to this discussion is proof that he had knowledge of general union activities afoot. Moreover, the fact that he admitted to having this conversation with Rodriguez supports an inference that he suspected Rodriguez of being a union supporter. It is also clear from the testimony of Castro, Smidth, and Rodriguez that Bizzarro

questioned them about union activities that Bizzarro was aware that the Union had resumed organizing at Evenflow. His questioning of these three employees also supports an inference that he suspected that they were each involved in the union activities. As discussed above, the ALJ credited the employee's testimony regarding these conversations, and did not credit Bizzarro's blanket denials.

Moreover, testimony of dispatcher Tony Cabrera makes clear that Cabrera was well-aware of ongoing union activities. As an initial matter, the ALJ's conclusion that Cabrera is a supervisor and agent of Respondent should be affirmed. (ALJD p. 3). For CCM and certain other clients, Cabrera is responsible for making assignments of drivers to runs each day and for communicating these assignments to drivers throughout the day. (Tr., 510:19). Drivers seek permission from him if they need to come in late or leave early. (Tr., 515:2). Cabrera hired Nelson Rodriguez and Luis Correa (Tr., 71:24; 148:1), and both interviewed and hired Julio Castro and Lindbergh Wallace.[3] (Tr., 114:14; 167:10). When asked about his knowledge of Union activities, Cabrera testified that he had "heard from other guys . . .about a certain person hanging around . . . CCM and just soliciting." He had heard Carlos Rodriguez's name in connection with this soliciting. (Tr., 506:5; 516:5). Because Cabrera is an agent of Respondent, his knowledge may be imputed to Respondent.

Even if there is no evidence of employer knowledge of each specific employee's activities, "the discharge of an employee who is not known to have engaged in union activity, but who has a close relationship with a known union supporter may give rise to an inference of discrimination." *Martech Medical Products Inc.*, 331 NLRB 487, 488 (2000) (overturning ALJ to find discharge unlawful where ALJ found insufficient evidence that Respondent's was aware

[3] Cabrera's testimony that he could not recall hiring anyone does not refute this testimony. (Tr., 514:10).

of employee's union support, but where ALJ "failed to consider McNamara's open friendships with known union supporters," including employee's sister).

The credible evidence shows that the Employer was aware of the Union activities of Rodriguez, with whom Bizzarro admitted to discussing the Union, and that the Employer was aware of Castro and Smidth's activities based on their testimony of conversations with Bizzarro about the Union. Thus, even if the Employer was not aware of Wallace's and Correa's activities and union support, an inference of discrimination is permissible based on their relationships with the other discriminatees. Wallace was Smidth's helper and Correa was Rodriguez's helper. Further, Rodriguez was Castro's step-son; Rodriguez's sister (Castro's step-daughter) dated Correa; Smidth was a neighbor and friend of Rodriguez and Castro; Wallace and Correa both got their jobs at Evenflow through their connections to Castro (and thus Cabrera, who hired them, was aware of their connections); Wallace had previously served as helper to Castro and Rodriguez.

Thus, the record contains ample evidence, both direct and circumstantial, that Respondent was aware of the union activities of the five discriminatees and Respondent's exceptions on this issue should be rejected.

c) The ALJ Correctly Found that Respondent Exhibited Animus (Exceptions 34-36)

First, Respondent's animus is clear from the numerous 8(a)(1) violations, as discussed above. Respondent threatened Smidth and Wallace, unlawfully urged Smidth to discourage his coworkers from supporting the Union, unlawfully interrogated Rodriguez and Castro, and unlawfully solicited Rodriguez and Castro to report the union activities of their coworkers. Regardless of whether they are found to be independent, the conversations described by General Counsel's witnesses are evidence of animus.

Moreover, the timing of the discharges is further evidence of animus. Even where "the circumstances surrounding the discharge of several union supporters seems otherwise innocent" (which this does not), "significant weight may be given to the timing of the decision and its implementation." *Delchamps, Inc., 330 NLRB 1310 (2000).* Thus, discharges of union supporters have been held unlawful where discharges occurred within a week of expiration of a the one-year election bar. Id. Here, the discharges occurred when union organizing resumed in anticipation of the termination of the notice-posting period and resumption of the Region's processing of the Union's representation petition – and most importantly, on the eve of a planned union meeting. Furthermore, there was testimony that cuts were made in Evenflow's services to CCM in June 2010 but there is no evidence that Respondent cut any employees when it made these service cuts. (Tr., 386:19). Instead, the evidence shows that Respondent did not cut employees until it learned of their protected Union activities.

Furthermore, Respondent's asserted defenses are simply a pretext for the real reason that Respondent discharged the employees: due to their protected union activities. In sum, the evidence is clear that, as the ALJ found, General Counsel made a prima facie case.

2. The ALJ Correctly Found that Respondent Failed to Meet its Burden Under Wright Line

It is not sufficient for an employer to simply assert that it has economic problems without any proof. Instead, when an employer asserts an economic defense for terminations, the Board will probe the employer's asserted business justification in determining whether the assertion was pretextual. Thus, an employer's defenses failed to satisfy its Wright Line burden where its financial evidence was "generalized and uncorroborated," and the employer had "not shown with any reasonable certainty the amount of any cost savings" resulting from its business restructuring and resulting discharges. *Delchamps, Inc.*, 330 NLRB 1310, 1320, 1322 (2000) (affirming ALJ

finding that economic justification was pretextual and discharges unlawful); *Schaeff Inc.*, 321 NLRB 202, 216 (1996) (affirming ALJ finding that economic justification was pretextual and discharges unlawful where, after considering employer's financial documents and testimony, ALJ discredited employer's witnesses and found that asserted financial losses were pretextual and not actual justification for discharges).

As the ALJ correctly concluded, Respondent failed to satisfy its burden of presenting a legitimate defense, and instead, Respondent's evidence and testimony illustrated that its asserted defense was pretextual. The record demonstrates a "conspicuous lack of evidence" in Respondent's economic defense of financial conditions purportedly requiring it to undertake lay-offs. *Glasforms, Inc*. 339 NLRB 1108, 1110 (2003).

a) The ALJ Correctly Found that Respondent Did Not Show a Non-Discriminatory Reason for its Decision to Conduct a Layoff

In the hearing, Respondent presented a defense that it terminated the five employees due to worsening economic conditions, citing in particular payments owed to Respondent by its client CCM, and monies owed to the IRS. The Judge concluded that these defenses failed to satisfy Respondent's burden of showing a non-discriminatory reason for the terminations. In particular, the Judge determined that while "there is really no dispute that as of May 2010, CCM owed about $100,000 to Evenflow for work that had been performed"[4] (ALJD p. 5) and appeared to accept that the IRS had levied monies from a client in order to collect back taxes owed by Respondent, the Judge concluded that Respondent had failed to establish that these issues were, in fact, the reasons for terminating the five employees. Instead, the Judge noted a number of problems with Respondent's evidence: (1) as to CCM, "this is not a situation where long overdue payments are typically a prelude to non-payment," but the evidence showed that

[4] General Counsel would dispute that the record supports a conclusion that there is "no dispute" as to this fact, but accepts the Judge's conclusion for the purposes of argument.

"there is no question but that the payments would be made as soon as CCM confirmed that the services were provided,"; (2) after Respondent became aware of and tried to rectify the CCM arrears, it continued to service the account with the same number of employees and even hired two more for more than five months before terminating the five employees; (3) instead, Respondent waited five months to terminate the employees only after learning of the union activity; (4) Respondent provided no evidence to show that "the amounts owed by CCM or the amounts diverted to the IRS comprised a significant portion of its business"; and (5) reducing service to CCM would reduce Respondent's revenues since CCM was not a "deadbeat customer". (ALJD p. 5-6).

Respondent's exceptions here fail to provide any basis for overturning the ALJ's conclusions in this regard. The exceptions, as described more fully below, are not supported by the record, or challenge the ALJ decision on only inconsequential aspects which do not change these ultimate conclusions.[5]

(1) The ALJ Correctly Found the Respondent Failed to Present Sufficient Evidence (Exceptions 24, 26-28, 37)

Respondent challenges the ALJ's conclusions that Respondent failed to fully comply with General Counsel's subpoena duces tecum and, in general, failed to provide sufficient evidence in support of its economic defenses. However, the ALJ's conclusions are amply supported by the record and Respondent's exceptions do not suggest that the ALJ disregarded any record evidence or offer any other basis for concluding that the ALJ was incorrect.

Respondent excepts to the Judge's determinations that it failed to provide payroll records, evidence that the IRS levied other Evenflow customers, evidence that the levy had a "substantial

[5] Certain of Respondent's exceptions are so utterly irrelevant to the legal analysis and ultimate conclusions that they do not warrant lengthy responses by General Counsel. (Exceptions 5, 14, 22, 38). Exception 22, in addition, mischaracterizes the ALJ Decision, which nowhere refers to Medicare payments being made "directly" to Respondent.

affect" on Respondent's business, or evidence that the monies owed by CCM comprised a significant portion of Respondent's business. (Exceptions 24, 26-28). Respondent makes but a single argument in support of all four of these exceptions: Respondent asserts that it was unable to produce documents because its computer server crashed. However, this assertion is not supported by any admissible evidence, and in any event, would not excuse compliance with General Counsel's valid subpoena and the Judge's Order pursuant to Respondent's Petition to Revoke. Respondent offered Exhibit 1 into evidence to support this defense, but this document was hearsay not properly admitted for the truth of the matter asserted, vis, that Respondent did not have access to its documents due to technical problems. Moreover, the letter was dated June 30, 2010 and refers to server problems the prior week, but subpoena was served on April 19, 2011 and was initially returnable on May 2, 2011, later extended to June 6, 2011. (GC Ex. 8). Furthermore, Respondent's Exhibit 1 was entered into evidence on July 5, nearly a week after the purported server crash. Moreover, the letter states only that "*some* of their programs and files have been inaccessible," and thus was entirely insufficient to prove that the documents responsive to the subpoena were inaccessible. (Resp. Ex. 1) (emphasis added). Respondent's suggestion here that references in the transcripts to Respondent's computer having "crashed" at other times cannot be used to support this defense. This testimony – which is hearsay – in no way changes the lack of admissible evidence and of a valid excuse for failure to comply with a subpoena and failure to satisfy its burden. Thus, the Judge's conclusion should be affirmed and Respondent's non-compliance should not be excused.

Respondent also contends that the ALJ erred in finding that Respondent failed to comply with the Subpoena request for documents related to its IRS claims. (Exception 37). Here, Respondent raises another argument: namely, General Counsel failed to "do its due diligence" to

seek IRS-related information during its investigation. This argument fails on multiple grounds. First, the Region's conduct of the investigation is not at issue in a ULP hearing and in no way excuses a party from complying with a valid subpoena. Moreover, this assertion ignores the fact that the IRS levies were part of Respondent's defense, and thus it was Respondent's burden to present evidence on this issue in support of its defense.

(2) Lack of Evidence Regarding Client CCM (Exceptions 19-21, 29)

Respondent also excepts to the certain aspects of the ALJ's discussion of the monies owed by client CCM. First, Respondent contends that the ALJ erred in finding that CCM's late payments were largely Respondent's own fault. (Exceptions 19, 29). It is unclear precisely what Respondent objects to and on what basis, because Respondent admits that there was, in fact, testimony that Respondent's computer problems delayed it in sending invoices to CCM. (See Resp. Br., p. 19; Tr., 374:17-25; 375:1-7). Moreover, allocating blame for the delayed payments to CCM does not in any way alter the Judge's ultimate conclusion that Respondent failed to establish that the CCM arrears were, in fact, the cause of Respondent's decision to terminate the five employees.

Next, Respondent takes the issue with the ALJ's characterization of a June 3, 2010 letter from Bizzarro to CCM as stating "in substance that Evenflow couldn't carry such a large balance and continue to provide the best service possible". (Exception 20). Respondent asserts that the referenced statement was, according to testimony, made in conversation, and was not made in the document. However, Respondent's Exhibit 2 contains a statement which the Judge was not incorrect in interpreting in this manner. Nonetheless, these arguments fall short of the mark because both the statements offered through documents and testimony are all hearsay which should not be admitted for the truth of the matter asserted. When the testimony to which

Respondent refers was offered, the ALJ correctly ruled that it was hearsay not admitted for the truth of the matter asserted. (Tr., 378:24; 379:19). The statement in Respondent's Exhibit 2 is also hearsay which should not be admitted for the truth of the matter asserted.

Next, Respondent excepts to the Judge's conclusion that the monies owed by CCM were "not a situation where long overdue payments are typically a prelude to non-payment." (Exception 21). Respondent does not cite any evidence calling this conclusion into question. Indeed, all of the evidence presented at the hearing (and in Respondent's arguments in its brief) concern delays in CCM's payments due to its verification process. As the ALJ observed, there was simply no evidence presented that Respondent expected these delays to ultimately lead to non-payment.

(3) Lack of Evidence Regarding IRS (Exceptions 17, 18, 25-27)

With regard to the Judge's rejection of its IRS levy defense, Respondent excepts to a number of the Judge's conclusions. First, Respondent challenges the judge's characterization that Respondent had a "'sudden' realization" that it "might owe a substantial amount of money to the IRS in back taxes." (Exception 17). Respondent's argument is that this mischaracterizes the testimony because while Bizzarro "personally learned" of the monies owed to the IRS at this time, Bizzarro "is neither a corporate officer nor responsible for any of Respondent's bookkeeping." Indeed, Bizzarro testified that Respondent's tax counsel, Edward Guttenmacker, communicated chiefly with accountant Mike Ducca and with Julie Bizzarro, not with Mr. Bizzarro, and it was Julie Bizzarro's decision to retain Guttenmacker. (Tr., 567:8; 568:8). Nonetheless, Respondent selected Bizzarro as its primary witness on this and other issues central to the lawfulness of the discharges in this case. Respondent did not call the more knowledgeable people to testify, including its owners Julie Bizzarro and Jack Mahanian, or its agents bookkeeper Joe Mirra, accountant Mike Ducca, or tax attorney Edward Guttenmacker.

Respondent cannot now assert, in its defense, that the Judge should have inferred conclusions not in evidence because an individual other than its chief witness bore primary responsibility for certain duties. (See Exception 17).

Whether Respondent "might" owe back taxes or more certainly owed the taxes is neither here nor there. (Exception 17). Respondent made a point of asserting that it is currently challenging the IRS through a legal proceeding in which it is retained by counsel, and accordingly objected to answering certain questions about its tax liabilities in an asserted attempt to avoid implicating itself in connection with the IRS proceeding. (*See, e.g.*, Tr., 588:25-590:16). Respondent cannot now be seen to take issue with the ALJ's careful wording of references to Respondent's IRS liabilities.

Next, Respondent objects to the ALJ's characterization of a tax levy as being "analogous to a garnishment on money." (Exceptions 18, 25). Respondent's chief objection in this regard is that a garnishment is subject to a "statutory maximum" and a tax levy is not, a point which was is nowhere to be found in the ALJ Decision and is of no moment here. Of even more concern is Respondent's brazen attempt to rely on statements of counsel to support its assertions. By way of context, the discussion cited by Respondent arose in the context of General Counsel's effort to probe the knowledge of Respondent's principal witness, Bizzarro, about the tax issues that he asserted was central to Respondent's defense. Rather than allow his client to answer (or fail to answer) the questions posed to him on cross-examination, counsel for Respondent interrupted and offered a colloquy of his knowledge of tax liens and levies. Appallingly, Respondent now cites to those statements in support of its exceptions, as though these statements were somehow admissible evidence. It goes without saying that Respondent's counsel was not offered as an expert witness under Rule 702 (or even as a fact witness, for that matter), and Respondent cannot

now attempt to rely on inadmissible statements of counsel in support of its arguments. In any event, this exception, whether accurate or not, does not in any way undercut the Judge's ultimate conclusions.

Next, Respondent asserts that the ALJ erred in finding that there was no evidence that IRS levies or liens were imposed on any of Respondent's other customers, aside from the single customer, Neighborhood Health Providers (NHP), for which Respondent produced IRS records. (Exception 26). Oddly, Respondent's argument in support of this exception does not actually cite or refer to any such evidence, so it is unclear on what basis Respondent seeks to challenge this finding. Indeed, the record evidences that Respondent did *not* offer evidence of any other liens or levies, and thus the ALJ's determination should be affirmed.

Next, Respondent asserts that the ALJ erred in finding that there was no evidence in the record "to show that this tax levy had any substantial affect on the Respondent's business." (Exception 27). Again, Respondent's arguments in support of this exception are utterly meritless and fail to cite any such evidence on which the ALJ may have relied to conclude differently. Instead, Respondent refers to facts not in evidence to ask the Board to draw assumptions not based on record evidence. Respondent asserts that it "is a small 'mom and pop' organization" and therefore, the Board should assume that the tax levy substantially affects Respondent's business. However, there is not a single piece of evidence in the record to support this characterization of Respondent's business. Respondent failed to offer into evidence (or produce to General Counsel pursuant to subpoena) any documents showing its revenues, income, profits, clients, or the percentage of revenues for which each client accounted. A document that appeared to show a list of Evenflow's clients was shown to Bizzarro by counsel for the General Counsel, but he testified that this document was not accurate. (Tr., 296:11). Moreover, this

document had redacted the monthly billing figures for each client, and no other document was produced with this information or any other total billing figures. In fact, NHP was not identified by any witness identifying Evenflow clients, making it reasonable to infer that NHP is not a particularly significant client. (*See* Tr., 292:23, 298:3, 293:5). Based on this failure to produce any financial documents showing Evenflow's revenues, income, profits, or revenues per client, it was entirely proper for the Judge to conclude that the taxes owed and amounts levied do not have substantial impact on Respondent's overall business. It was Respondent's burden to prove otherwise, and it utterly failed to do so.

Therefore, the Board should affirm the Judge's conclusions with respect to Respondent's economic defense concerning back taxes owed.

(4) Timing Evidence Supports a Finding of Unlawful Discharge (Exceptions 31, 32)

Respondent also excepts to the Judge's conclusions regarding the timing of the discharges and surrounding events. In particular, the ALJ found that Respondent made the decision to lay off the five employees in September 2010, and by this time, Respondent had become aware that the Union had restarted its organizing campaign in August 2010. (Exceptions 31, 32). Again, Respondent's arguments do not support its assertion that the Judge's determinations were in error. The testimony cited by Respondent for the first point regarding timing of the layoff decision merely shows that there may have been discussions of the possibility of layoffs in May 2010, but Respondent's discussion illustrates that the decision to conduct the actual September 23 layoff was not made until September 2010. Respondent does not cite any facts to the contrary.

As to the timing of Respondent's awareness that the Union campaign had restarted, these facts are established by the evidence discussed in Section II.C.1(b) above, and are not challenged by Respondent's arguments.

(5) New Hires (Exceptions 23, 30)

Respondent challenges the ALJ's findings that Respondent hired two new employees in June 2010. (Exceptions 23, 30). The Judge concluded that Respondent's economic defense was undermined by evidence of hiring in between the time that the purported economic problems began in Spring 2010 and the time the five employees were terminated in September 2010.

Record evidence indeed demonstrates that Respondent hired additional drivers after its asserted financial problems allegedly commenced: Evenflow hired driver Juan Torres on June 8, 2010, and hired driver Christopher Terry on June 14, 2010. (GC Exs. 32, 33). On Torres's job application, a handwritten notation states, "Hired 6/8/2010," and the W-4 was completed on an unspecified date in 2010 (GC Ex. 32); on Terry's job application, a handwritten notation states, "Hired 6/14/2010" and the W-4 was completed in October 2010. (GC Ex. 33). These hire dates were uncontradicted. Moreover, since Respondent failed to produce any other documents showing seniority or dates of hire, even though Bizzarro testified that such documents exist (Tr., 357:19), it was proper for the Judge to conclude that these uncontradicted dates were accurate. Respondent's arguments do not present any basis for reaching a difficult result.

b) The ALJ Correctly Found that Respondent Did Not Show a Non-Discriminatory Reason for its Selection of Employees for Layoff (Exceptions 15, 16)

Respondent also challenges the ALJ's conclusion that it failed to prove non-discriminatory reasons for its selection of the five discriminatees for lay-off. Respondent's arguments are not supported by record evidence, which amply supports the Judge's conclusions.

"It is well settled that even if discharges are economically justified, it is no defense if the employees are selected for dismissal because of their union activity." *Carambola Beach Hotel*, 307 NLRB 915 (1992). *See also Schaeff, Inc.*, 321 NLRB 202 (1996) (the Act "does not permit an employer to exploit worsening economic conditions to rid itself of union supporters") (internal citations and alterations omitted).

As the Board has explained, even where "there is no dispute that the Respondent's underlying decision to institute a layoff [ ] was motivated by business necessity, that defense does not shield the Respondent from a finding that its selection of these [ ] union supporters for layoff was discriminatorily motivated." *Merrill Iron and Steel, Inc*., 335 NLRB 171 (2001). Selection may be unlawful where evidence shows that the decision was made in a "haphazard manner". Id.

Where a respondent claimed that certain employees were retained because their "expertise" was needed for upcoming work, the ALJ "correctly rejected this claim" because the evidence showed that all of the employees were similarly skilled and frequently rotated to different jobs. Id. Here, the evidence shows not just that all of the employees were "similarly skilled", but that the terminated employees were far *more* highly skilled, trained, and knowledgeable than employees who were retained and employees subsequently hired.

The ALJ correctly concluded that Bizzarro's explanation of the reasons why each employee was selected for "lay-off" did not establish a non-discriminatory motive. As an initial matter, Respondent did not offer any justification for its decision to include Anthony Smidth among the lay-offs. There is no way to interpret this omission other than a simple failure to satisfy Respondent's burden, and thus, to find that Smidth's discharge violated the Act.

Next, Bizzarro's testimony concerning the reasons for Nelson Rodriguez's discharge were vague, contradictory, and ultimately demonstrates Rodriguez's discharge to be pretextual. He testified that Rodriguez was discharged for two reasons: suspicions or rumors of selling drugs, and filling out a false accident report. This entire tale is implausible, to say the least. If Respondent genuinely believed that one of its employees was engaged in the unlawful conduct of selling drugs on its property to its employees, it is not credible that Respondent would not have taken disciplinary action against Rodriguez at the time of the incident. Bizzarro admitted that he has the authority to fire an employee if he wants to do so. (Tr., 614:19). He has exercised this authority on occasion when an employee came to work intoxicated, admitting that "of course" an intoxicated driver needed to be let go because he was responsible for "driving people around." (Tr., 617:22). Thus, it is not credible that Bizzarro would learn of an employee engaged in similarly unsafe and unlawful conduct, and fail to take any action at the time. Instead, Bizzarro claims to have waited many months to take any action against Rodriguez based on this incident. Respondent's reference to this incident is an after-the-fact justification meant to cover up the real – and unlawful – reason for Rodriguez's discharge. *See, e.g., One Stop Immigration & Educ. Ctr., Inc*., 330 NLRB 413 (1999) (discharge unlawful where employee was "discharged shortly after the advent of his open union activity for a fight which he engaged in 7 months prior to that time"); *Domsey Trading Corp*., 310 NLRB 777, 788 (1993) (discharge unlawful where employee was discharged shortly after employer learned he was a union supporter, and respondent's claimed reason for discharge was conduct it knew of months earlier).

As to the purported "false" accident report, Respondent did not offer any evidence identifying the allegedly false statements, failed to identify why the statements were false, and failed to offer the report for admission into evidence. *See, e.g., Addicts Rehab*, 330 NLRB at 741

(testimony should not be credited where it is "unsupported by documents, when documentation clearly should have been produced").

As to Correa, Bizzarro simply asserted that he was terminated because he was "fairly new." Bizzarro did not testify that he was the newest employee or newest helper, and Respondent did not offer any seniority lists or documents showing hire dates in order to support assertions about seniority. Bizzarro identified a second reason for Correa's termination only after being asked a leading question by counsel. He was not asked whether there were any additional reasons for Correa's selection; he was not even asked a general question such as whether there were any disciplinary issues relating to Correa's selection. Instead, he was asked "were there any issues regarding Mr. Correa and threats that were made to you?" (Tr., 474:7). It was only at this point that Bizzarro described a purported threat made by Correa, and there are a host of problems with his testimony on this incident. However, Bizzarro never explicitly testified that this incident was a factor in Correa's discharge. He testified that this "issue" existed with respect to "threats", but when asked directly why Correa was laid off, he answered only because he was "fairly new." The Judge correctly gave no weight to this testimony as a reason for Correa's selection for layoff. (ALJD p. 4 (citing only Correa's seniority as the basis for his discharge).

As to Castro, Bizzarro testified that he was terminated because he used the van without authorization. However, Bizzarro's testimony failed to identify what this unauthorized use was.[6] The lack of specificity in Bizzarro's testimony should lead to a conclusion that this vague assertion is a pretext for the real, unlawful, reason for Castro's termination.

[6] Davenport's testimony on piña coladas at City Island cannot be given any weight on this issue. It does not corroborate Bizzarro's testimony because Bizzarro did not offer any explanation whatsoever as to what the unauthorized use was; thus, without testimony from the decision-maker (Bizzarro), it would be improper to infer that this incident constituted the improper use. In fact, there was no evidence that Bizzarro was even aware of this incident. The ALJ's description of Bizzarro's testimony in this regard is not accurate.

Finally, Bizzarro testified that Wallace was terminated because he had already informed Respondent that he planned to relocate to care for a sick family member. Even if Wallace said this, as the ALJ concludes, there is no basis for believing that this was the true reason for Wallace's discharge. First, if Wallace intended to resign anyway, cutting him a few weeks early would not result in substantial cost savings. But most importantly, the totality of the circumstances, including the Employer's animus and pretextual discharges of other employees support the ALJ's determination that Wallace's discharge was also motivated by animus.

Accordingly, the ALJ should be affirmed in his conclusion that Respondent failed to demonstrate a non-discriminatory reason for its selection of employees for "lay-off", and Respondent's exceptions on this issue should be rejected.

D. The ALJ's Conclusions of Law Were Correct and Should be Affirmed (Exceptions 39-44)

Respondent fails to identify a single legal issue that may have been incorrectly analyzed or determined. Instead, Respondent's exceptions to the ALJ's legal conclusions flow from and rely on its arguments on other issues. Accordingly, these exceptions do not require separate argument by the General Counsel.

E. The ALJ's Recommended Order and Remedy Were Correct and Should be Affirmed (Exceptions 45-53)

Respondent fails to offer any argument that the Board's traditional and customary remedies are inappropriate here, or that any employee is in any way disqualified from reinstatement or other remedies, even though Respondent bears the burden of proving such claims. *See Contemporary Guidance Services*, 300 NLRB 556, 558–560 (1990). As with its exceptions to the ALJ's conclusions of laws, Respondent's exceptions to the ALJ's

recommended order and remedy flow from and rely on its arguments on other issues. Accordingly, these exceptions do not require separate argument by the General Counsel.

III. CONCLUSION

For the reasons set forth above, the undersigned respectfully requests that the Board affirm the decision and recommended order and remedies of the ALJ.

Dated: November 8, 2011
New York, New York

Respectfully submitted,

/s/ Julie Rivchin Ulmet

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CERTIFICATE OF SERVICE

I hereby certify that on November, I caused the foregoing ACTING GENERAL COUNSEL'S BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION to be served by electronic mail as follows:

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