

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTER CITY INTERNATIONAL TRUCKS, INC.	:	
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	:	
Respondent	:	Cases Nos. 9-CA-45338
	:	9-CA-45402
And	:	9-CA-45437
	:	9-CA-45820
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS	:	9-CA-45975
AFL-CIO DISTRICT LODGE 54, LOCAL LODGE 1471	:	9-CA-46081
	:	9-CA-46136
	:	9-CA-46183
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Charging Party	:	
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**CENTER CITY INTERNATIONAL TRUCKS, INC.’S ANSWERING BRIEF  
TO GENERAL COUNSEL’S LIMITED CROSS EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE SANDRON’S DECISION**

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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](mailto:rmason@maslawfirm.com)  
[atulencik@maslawfirm.com](mailto: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@nrlb.gov](mailto:eric.oliver@nrlb.gov)  
[jamie.ireland@nrlb.gov](mailto:jamie.ireland@nrlb.gov)  
*Counsel for the General Counsel*

Sorrell Logothesis  
Cook, Portune & Logothesis, LLC  
22 West Ninth Street  
Cincinnati, Ohio 45202  
[slogothesis@econjustice.com](mailto:slogothesis@econjustice.com)  
[smoorhouse@econjustice.com](mailto:smoorhouse@econjustice.com)  
*Counsel for the Charging Party*

## **I. INTRODUCTION**

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. Judge Sandron rendered his Decision on September 2, 2011. The Company filed Exceptions and Brief in Support on November 4, 2011. General Counsel filed Limited Cross Exceptions on January 18, 2012. General Counsel has made exception to Judge Sandron's determination that the Negotiation Updates issued by the Company were not coercive in violation of § 8(a)(1) of the Act nor were they evidence of bad faith bargaining in violation of § 8(a)(1) and (5). (G.C. Brief pp. 1 and 2.)

## **II. FACTS**

General Counsel offered no testimony as to how or why the Negotiation Updates at issue violate the Act, other than peculiar, conclusory allegations set forth in the Complaint and stated to Judge Sandron during the hearing. General Counsel stated as follows:

JUDGE SANDRON: Well, all right. Now, again, remember, I -- as we had discussed in our -- our conference calls, you know, one counsel for a party at a -- at a time.

But, assuming the Respondent can show that it did not misrepresent the status of negotiations, then I assume General Counsel would agree, then that allegation is now sustained to that part.

MR. OLIVER: Well, one of the issues with the three negotiation updates that have been included in the Complaint, is that the Region felt it interfered with the Union's internal processes. That they tended to probe into areas that were of -- only of concern to the Union.

For example, in trying to get them to -- to vote on a -- on a contract, those are things that are within the exclusive realm of the Union, and then they decide, when they choose to do so, to discuss those issues with the membership.

So, not only was it thought that these updates were disparaging, but they crossed the line because they interfered with the right -- with the Union's right to conduct business in the manner it -- it -- it deemed appropriate.

SANDRON: All right. But -- but -- but -- but it --

MR. MASON: That didn't even make any sense.

JUDGE SANDRON: As I understand it, though, these are severable grounds; in other words, I could find, theoretically, that these memos interfered, but that they did not misrepresent the status of negotiations.

In other words, they -- they don't all necessarily come together, they could be found to be -- to disparage the Union, but not necessarily misrepresent the status of negotiations; correct?

MR. OLIVER: But -- that's correct. But it still opens a question. You haven't heard all the testimony.

And you, as a finder of fact, will have to decide, you know, if, in fact, there was some mischaracterization.

And I feel that based upon reading these negotiation updates, it's pretty clear that the -- the Company has crossed the line in trying to delve into areas that are within the exclusive providence of the Union with respect to its membership.

MR. MASON: Your Honor, what a vague statement to be making without any specifics. I mean, that we've crossed what line?

MR. OLIVER: Well, it clearly --

MR. MASON: We're talking about what happened in negotiations.

MR. OLIVER: It clearly tends to create a wedge when you're making comments that can upset --

JUDGE SANDRON: All right. Well --

MR. OLIVER: -- the employees.

JUDGE SANDRON: -- I understand. But now we're getting into argument about the memos, themselves. What I'm talking about is the legal -- the conclusions that follow from the memos.

So as I understand it, the General Counsel's contending, basically, three alternative grounds for why the memos are bad.

But my question to General Counsel is, if it's determined that they do not constitute misrepresentation of the status of negotiations, then that out -- that portion would not be sustained. The other two grounds could be.

MR. OLIVER: The other two grounds could be, that's correct.

Tr. pp. 321-324.

The parties stipulated that the following excerpt from the July 16, 2010 Negotiation Update was not being alleged as a violation of the Act:

In addition, we have learned that Union stewards have been threatening our people that if any bargaining unit employee signs the decertification petition, then the Union will look into taking away their pensions.

**Not only is what the Union trying to do unlawful, in plain simple language this is impossible. It is illegal for the Union or its stewards to be threatening other employees with a loss of pension benefits for signing a petition. NO EMPLOYEE WHO IS VESTED IN THE UNION CAN LOSE THEIR PENSION. THE UNION HAS NO POWER TO TAKE IT FROM YOU. Whether or not you sign the decertification petition is up to you but the threats and intimidation to you the worker is plain wrong. THE UNION CANNOT TAKE AWAY ANYONE'S PENSION.**

**WE HAVE FILED A COMPLAINT WITH THE NLRB ABOUT THE UNION MISLEADING EMPLOYEES ON THIS MATTER.**

(Tr. pp 1183-1185, G.C. 16.) (Bold font and ALL CAPS in original.)

**II. JUDGE SANDRON CORRECTLY DETERMINED THAT THE COMPANY'S NEGOTIATION UPDATES DID NOT VIOLATE THE ACT**

General Counsel alleges that some, not all of the Company's Negotiation Updates are unlawful. General Counsel did not produce any evidence illustrating how or why. Rather, General Counsel simply set forth conclusory allegations that the Updates in question misrepresent the status of negotiations, and/or had the effect of disparaging the union so as to undermine support for the union and/or interfered with the union's internal processes for ratification and execution of collective bargaining agreements. Again, General Counsel elicited no evidence during trial to support its allegations. As such, General Counsel failed to prove by a preponderance of the evidence that the Negotiation Updates in question violated the Act. Accordingly, Judge Sandron correctly dismissed this portion of the Complaint.

Board precedent plainly indicates that the Company's March 12, April 2 and July 16, 2010 Negotiation Updates (G.C. 14-16) are lawful. Moreover, these Updates are no different than the other Updates the Company submitted to its employees. (R. 206-208 and 211-213.) The Company is entitled to communicate with its employees concerning its position in collective-bargaining negotiations and the direction of those negotiations. The Board believes this to be a fundamental right protected by 8(c) of the Act. See, *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985). Section 8(c) states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

*Id.*, citing the Act. The Board further stated:

An employer is not required to watch passively as a union conducts "public" negotiations through one-sided distributions which denigrate the employer, raise expectations, and engender fear that the employer's position is sinister or unfair. Furthermore, we believe that free and open discussion by all parties to the collective-bargaining process affords the best chance for successful conclusion of negotiations and creates the most favorable climate for successful bargaining. Indeed, employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues. We believe employees are full capable of evaluating the relative merits of those positions for themselves. As in *United Technologies*, [274 NLRB No. 87 (Feb. 28, 1985)], there is nothing in the Respondent's communications here which indicates an effort by the Respondent to bargain directly with the employees or an invitation to them to abandon their representative to achieve better terms directly from the Respondent. Indeed, all the Respondent's substantive proposals were submitted to the Union prior to their disclosure to the employees. Moreover, the Respondent acknowledged to Union's rightful role as the statutory representative by urging the employees to discuss the course of negotiations with their union representatives and to attend and participate in the ratification vote.

*Id.* at 1074. The union posted cartoons disparaging the Company's owner due to his desire to eliminate the Company's participation in the union's pension plan and instead have the employees invest their money in the Company sponsored 401(k) plan. (R. 216 & 244.) The Company responded through Updates and/or other postings. Moreover, Center City often used

its Negotiation Updates to address rumors and scare tactics being circulated by the union. For instance, the Company's March 12, 2010 Update was written just four days after the union disseminated its March 8, 2010 Update (R. 244) discussing strike preparation and other goings on at the bargaining table. It addressed the fact that the union could not force the Company to fire any members who would cross a picket line. Another union rumor was addressed in the Company's July 16, 2010 Negotiation Update. The Company instructed the men that the union cannot take away one's pension for signing a decertification petition. In fact, the Company noted that the union cannot take away anyone's pension, under any circumstances, if that individual is vested in the plan.

As Judge Sandron acknowledged, even misstatements of law and/or the union's proposal do not violate the Act. (Decision p. 37.) For instance, an Employer's statement to employees that they must join a union, although clearly a violation of the law, is not a violation of the Act. *Manor Healthcare Corp.*, 1995 NLRB LEXIS 1060, \*28, (1995), citing *Daniel Construction Co.*, NLRB 1276 (1981). The Board reasoned that such a statement is not coercive within the meaning of the Act when it ". . . contained no express threat that the employer by its own action would impose dire consequences, such as discharge, on the employees and no implicit threat to the employees' rights." *Id.*, at 28-29, citing *Daniel Construction Co.*

The Negotiation Updates and the language therein speak for themselves. The Updates clearly do not violate the Act. The Company's Updates are free of threats and/or reprisals, express or implied. The Company's Updates are free of any promised benefits, express or implied. In no instance did the Company's material contain proposals or ideas which were not first submitted to the union's bargaining committee at the bargaining table. The Company simply issued memoranda condemning the union's demands and tactics, while setting forth its own version of the process of negotiations. An unprejudiced review of the case law reveals that

that Company did not engage in direct dealing or bypass the union through its communication to the employees. A neutral, unbiased review of the case law demonstrates that the Company's Updates were not coercive, nor did they disparage the union.

General Counsel alleges that Respondent's "inaccurate statements" were "intentional and undoubtedly designed to undermine the union and present the Respondent, not the union, as the true protector of employees; concerns." (G.C. Brief p. 3.) General Counsel also claims that Judge Sandron did not analyze the memos properly. (Id. pp. 2-3) General Counsel claims that "even if the language is found not to be unlawfully derogatory, degrading comments and interjection in the ratification process, taken together, undermine employee support for the union." (Id. p. 3) A close review of Judge Sandron's decision establishes that he took all of these factors into account.

With respect to the misrepresentations Judge Sandron stated as follows:

Misrepresentations of contract proposals do not necessarily violate Section 8(a)(5) and (1) as evidencing an intent to bypass, undermine, or subvert the union, or constitute independent violations of Section 8(a)(1). *Adolph Coors Co.*, 235 NLRB 271, 276–277 (1978). See also *McClatchy Newspapers*, 307 NLRB 773, 773 (1992). In terms of Section 8(a)(5), the test is whether the nature of the misrepresentations was calculated to create the impression that the Respondent was the true protector of the employees' interests, or was part of an unlawful bargaining table strategy. *Adolph Coors*, above at 277. As far as an independent 8(a)(1) violation, the misstatement must contain a threat, express or implied, to interfere with employees' rights, or promise benefits. *Laverdiere's Enterprises*, 297 NLRB 826, 826 (1990), enfd. in part 933 F.2d 1045 (1st Cir. 1991); see also *Daniel Construction Co.*, 257 NLRB 1276, 1276 (1981), enfd. 732 F.2d 139 (1st Cir. 1984), and *Adolph Coors*, *ibid.*

I conclude that the two cited misrepresentations did not expressly or implicitly threaten employees or promise them benefits and that they were not in any other way coercive of employees' rights. Nor, in the context of the length of negotiations can they be deemed to have been part of a bargaining strategy to undermine the Union. I note that although they were not entirely accurate, neither misstatement was based on total fabrication.

(Decision p. 37.) With respect to disparagement and undermining support for the union Judge

Sandron stated as follows:

Turning to the alleged disparagement of the Union, as a general proposition, an employer's words of disparagement alone pertaining to union officials are insufficient to constitute violations of Section 8(a)(1), absent other coercive statements, since "It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations," *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004), citing *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991); see also *Atlas Logistics Group Retail Services (Phoenix) LLC*, 357 NLRB No. 37, slip op. at 1 (2011). I am not entirely convinced that the memoranda can be characterized as "derogatory" to the Union but, in any event, I conclude that they were not otherwise coercive.

Disparagement of the union is also a factor that is considered in determining whether the employer's communications seek to undermine the union's role as collective-bargaining representative. *Armored Transport*, above at 377–378, 379 fn. 9. **In view of the tone of the Union's memoranda and the three memoranda read in their totality**, I cannot conclude that the latter rose to the level of undermining employee support for the Union.

(Id. at p. 38). (Emphasis added.) Judge Sandron noted the tone of the union's own memoranda towards the Company also made clear that he viewed the Company's memos in their totality.

With respect to the Company's alleged interference with the ratification process Judge Sandron noted:

[U]rging employees to discuss the course of negotiations with their union representatives and to attend and participate in the ratification vote is permissible. Ibid. On the other hand, contract ratification votes and procedures are "internal union affairs upon which an employer is not free to intrude." *London Chop House, Inc.*, 264 NLRB 638, 639 (1982); see also *Sheridan Manor Nursing Home*, 329 NLRB 476, 477 (1999). However, the facts of both of those cases, in which violations were found, are distinguishable. *London Chop House* dealt with the termination of an employee who opposed ratification. The employer's memorandum in *Sheridan Manor* solicited employees to oppose the union's announced procedure for ratification and discouraged membership in the union, and the Board found it relevant that "the memorandum did in fact disrupt the ratification procedure." Ibid.

I conclude that the Respondent's statements urging employees to notify the Union that they wanted a ratification vote on the Respondent's proposed agreement did not amount to unlawful interference in the ratification process or violate Section 8(a)(5) or (1) independently.

(Id. p. 38).

General Counsel cites to *Adolph Coors Co.*, 235 NLRB 271 (1978) to support its position that the memos independently violated § 8(a)(1) of the Act. (G.C. Brief p. 3.) However, similar to the Judge in *Adolph Coors*, Judge Sandron found that the misstatements did not explicitly or implicitly threaten the employees or promise them benefits and that they cannot be deemed to have been part of a bargaining strategy to undermine the union. (Id. at 277 & Decision p. 37.) Judge Sandron found that the parties had met over 50 times between September 2009 and January 2011, engaging in lengthy discussions over their respective proposals and reaching tentative agreements. (Decision p. 40.) Judge Sandron also noted that the Company did modify its original proposals on several subjects. (Id.)

General Counsel cites to *Texas Electric Co.*, 197 NLRB 10 (1972) to support its proposition that the Company was undermining the union and presenting itself as the true protector of the employees' rights. (G.C. Brief pp. 4-5.) In doing so, General Counsel focuses on the following excerpt from the Company's March 12, 2010 Negotiation Update:

Therefore, our Last and Final proposal in regards to wages and benefits is **MORE** than what the union was willing to accept on January 7, 2010. Under this contract, we would maintain the open shop and dues as proposed. **YOU** would **NOT BE REQUIRED** to join the Union or pay dues money to the Union unless you wanted.

Every day that goes by, is a day for those who are not yet vested in the plan to ever get your money out of it. Every day that goes by is yet another day of the entire work force losing the wage increase we are proposing.

(G.C. 14.) (Bold font and ALL CAPS in original.) In stark contrast, the conduct at issue in *Texas Electric* concerned a speech in which one of the Employer's managers stated the following to the employees:

[T]hat the Union had asked for an 8 percent wage increase with check-off: that Respondent, for several reasons, was opposed to checkoff: that Respondent felt

like the employees were entitled to a more substantial increase than an 8 percent increase: that to this end Respondent had made a counterproposal to the Union offering a better increase than 8 percent: and that Respondent's counterproposal was thus more advantageous to the employees than the Union's proposal. Finally, [the Employer's manager] told the employees to urge and encourage [Business Representative] to accept [the Employer's] proposal.

*Texas Electric Co.*, 197 NLRB at \*11-13. (Internal quotations omitted.) The Board affirmed the ALJ's determination that the Employer's conduct undermined the union because it was placed in the context of offering the employees a benefit described as more advantageous to them than what the union was seeking at the bargaining table, emphasizing that the Company, not the union was the source of the benefit. (Id. at 21.) Here, the Company was simply informing the employees that it had made a Last and Final offer, the terms of the Last and Final offer -- noting that the Last and Final offer contained an increase in wages from what the Company had last proposed. The Company makes no claim that it is offering an increase in wages that is more than what the union was actually seeking. This language is not violative of the Act.

General Counsel also cites to *Armored Transport Inc.*, 339 NLRB 374 (2003), *Wired Products Mfg. Corp.*, 329 NLRB 155 (1999) and *Sheridan Manor Nursing Home, Inc.*, 329 NLRB 476 (1999) to support its proposition that the Company was unlawfully interfering with the union's ratification process. (G.C. Brief pp. 5-7.) However, as Judge Sandron correctly pointed out, these cases are inapposite to the facts herein. (Decision p. 38). In *Armored Transport Inc.*, the Employer sent a series of "Don't Blame Us" letters suggesting the following five courses of action the employees could take:

1. Demand that the union sign the enclosed proposal.
2. Demand that the union let you actually vote on the proposal and that they sign the proposal if a majority favor the proposal.
3. Go to the NLRB and request a new election because you no longer desire to be represented by people from Orange or Los Angeles or Blackfoot, Idaho(?).

4. Go to the NLRB and demand a new election because you are of the opinion you were misled (or deceived) by CASHA and you never agreed that UPGWA was a union you want to belong to.

5. Establish in some creditable fashion to Company management that CASHA (or is it UPGWA?) does not represent a majority of people in the Oakland [Sacramento, or Ventura] branch.

*Armored Transport Inc*, 339 NLRB at 378. The Board concluded in addition to direct dealing, a further effect of the letters was to undermine the union by urging that the employees insist that the union sign the contract and insist that they be permitted to vote on the contract. The Company has made no such demands here. In its March 12, 2010 Negotiation Update, the Company stated that it had made a Last and Final offer and asked that the union submit it to the employees for a vote. (G.C. 14.) The Company also urged the employees to vote for this proposal. (Id.) The Company stated that it cannot force the union to take the Last and Final Offer to the membership for a vote and to please let the union know you (the employees) would like to vote on this Agreement (Id.) In its April 2, 2010 Negotiation Update, the Company notified the employees that it continued to submit its Last and Final offer to the union while requesting a vote by the members. (G.C. 15.) The Company also urged those who want to accept the Company's offer to make their views known to the union. (Id.) Such conduct does not rise to the level of behavior deemed unlawful in *Armored Transport supra*.

In *Wired Products Mfg. Corp.*, 329 NLRB 155, 155 (1999) the Employer, on two separate occasions, urged employees to join the union, vote against contract ratification and then subsequently resign from the union. Furthermore, the Employer falsely told employees that resignation would mean that they could stop paying dues and fees despite the presence of union security clause. (Id.) The Board found that the Employer's behavior undermined both the union and the contract in the eyes of the employees. (Id.) The Board concluded that the Employer

interfered with the employees' statutory collective bargaining rights by attempting to control employee actions "vis a vis contract ratification." (Id.) Nothing of the sort happened here.

In *Sheridan Manor Nursing Home, Inc.*, 329 NLRB 476 (1999) the Employer's memorandum interfered with the employees' participation in the ratification process and discouraged membership in the union. The Board reasoned as follows:

[B]y means of the memorandum, the Respondent interjected itself into an internal union matter, about which no employee had complained. While characterizing the Union's ratification procedure as unfair and violative of the employees' freedom of choice, it pointedly told employees that they should object now and refuse to sign a membership card. It added that employees have a right to resign from the Union if you are already a member and you also have a right to refuse to sign a membership card if the Union attempts to require you to sign one in order to vote on the contract. By this memorandum, the Employer clearly interjected itself into the ratification vote. Although a violation of Section 8(a)(1) does not turn on whether the interference or coercion succeeded, it is relevant that the memorandum did in fact disrupt the ratification procedure.

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Under these circumstances, we find that the Respondent went beyond merely providing information to its employees or expressing an opinion, but rather disrupted the Union's internal ratification procedures by soliciting and encouraging employees to refuse to comply with the lawful requirement that they be members of the Union in order to vote on the contract, and to resign or refuse to join the Union. By these actions, the Respondent unlawfully interfered in the relationship between the employees and their representative, in violation of Section 8(a)(1).

(Id at 477.) (Internal quotations and citations omitted.) The alleged interference at issue in this case is not even remotely similar to the circumstances described above.

### **III. JUDGE SANDRON CORRECTLY REJECTED GENERAL COUNSEL'S RECOMMENDED REMEDIES RELATED TO RUSS MASON**

The General Counsel is seeking remedies for Russ Mason regarding the manner in which he should receive backpay as well as an order prohibiting the Company from stating to any employer, prospective employer, or if responding to any credit reference or similar inquiry that Russ Mason was discharged for cause. (G.C. Brief pp. 8-9.) Judge Sandron declined to do so

citing General Counsel's failure to cite any Board Decisions adopting such remedies. (Decision p. 43.)

General Counsel now cites *Penn Industries, Inc.*, 233 NLRB 928 alleging that the Board issued an Order containing the same language as is requested in this matter. (G.C. Brief p. 9.) As such, General Counsel claims there is now precedent for granting the remedial measure requested. (Id.) A review of *Penn Industries* indicates that an order similar to that requested by the General Counsel is indeed included in the Order. Id. at 943. However, the requested remedy relating to the manner in which Russ Mason should receive backpay is not included in said decision. . Additionally, it would appear that the requested order is not necessary. If the Board overturns Judge Sandron's decision with respect to Russ Mason's termination, then his discharge will have been necessarily declared lawful and no such order is needed. Likewise, if the Board affirms, Judge Sandron's Decision the Company will be required to reinstate Russ Mason and no such order is needed. Accordingly, the Company respectfully requests that the Board deny General Counsel's request

#### **IV. CONCLUSION**

For the reasons outlined above and in accordance with the evidence, Center City respectfully requests that the Board affirm Judge Sandron's ruling, finding and conclusion that it did not violate § 8(a)(1) and (5) of the Act with respect to the Negotiation Update Memorandums dated March 12, April 2 and July 16, 2010, and further deny General Counsel's requested remedial relief.

Dated at Dublin, Ohio on this 1<sup>st</sup> day of February, 2012

Respectfully submitted,

/s/ Aaron Tulencik

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

t: 614.734.9450

f: 614.734.9451

e-mail: [rmason@maslawfirm.com](mailto:rmason@maslawfirm.com)

[atulencik@maslawfirm.com](mailto:atulencik@maslawfirm.com)

*Counsel For The Respondent,  
Center City International Trucks, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 1, 2012, an electronic original of Respondent Center City International Trucks, Inc.'s Answering Brief 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 Reply Brief were transmitted to the following individuals by electronic mail:

Mr. Eric Oliver  
Mrs. Jamie L. Ireland  
National Labor Relations Board, Region 9  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271  
[eric.oliver@nlrb.gov](mailto:eric.oliver@nlrb.gov)  
[jamie.ireland@nlrb.gov](mailto:jamie.ireland@nlrb.gov)

Sorrell Logothesis  
Cook, Portune & Logothesis, LLC  
22 West Ninth Street  
Cincinnati, Ohio 45202  
Counsel for Charging Party  
[slogothesis@econjustice.com](mailto:slogothesis@econjustice.com)  
[smoorhouse@econjustice.com](mailto:smoorhouse@econjustice.com)

/s/ Aaron Tulencik  
Aaron T. Tulencik (0073049)