UNITED STATES OF AMERICA
NATIONAL LABOR REATIONS BOARD
REGION 12

In the Matter of CASE NOS.:

TRANSPORT WORKERS UNON OF AMERICA, 12-CA-072141. 12-CA-072148, 12-CA-074078

AFL-CIO

CHARGING PARTY

v.

ALLIED MEDICAL TRANSPORT, INC.

RESPONDENT

RESPONDENT ALLIED MEDICAL TRANSPORT, INC'S (AMT) ANSWER/RESPONSE TO THE NLRB GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ALJ'S RECOMMENDED ORDER WITH INCORPORATED MEMORANDUM OF LAW

COMES NOW, the RESPONDENT, ALLIED MEDICAL TRANSPORT, INC. (AMT), by and through their undersigned counsel and files their Answer/Response to the General Counsel's Cross Exceptions to the Administrative Law Judge's (ALJ) Recommended Order (RO) and state as good cause therefore the following:

RESPONDENT''S ANSWER/RESPONSE

The Respondent refutes the cross exceptions asserted by the General Counsel and states in support of the Respondent's Answer/response to the NLRB General Counsel's Cross Exceptions to the ALJ's Recommended Order and Incorporated Memorandum of Law in support the followng.

1. The ALJ did not err by finding and concluding Respondent had met its burden of proof establishing that it would have suspended and discharged employees Yvel Nicolas and Renan Fertil notwithstanding their alleged union activities and did not vioalte Section 8(a)(3) of the Act.
2. The ALJ did err finding Respondent's second audit of driver fare shortages was not completed until on or about December 7, 2011, (as the third audit was completed September/October 2011 and continued documenting shortages) after the unit employees chose to be represented by the Union in a Board election? (Cross-Exception 3).

3. The ALJ did not err by finding that Respondent historically had consistently disciplined drivers who denied liability for fare shortages; and by finding that Respondent demonstrated that Yvel Nicolas and Renan Fertil were guilty of not turning in the fares they collected based on audit summaries
4. The ALJ did not err by finding and concluding Respondent's placement of drivers Yvel Nicolas and Renan Fertil on indefinite suspension pending investigation and then discharging based on their job abandonment late December 2011 was not a "change in its disciplinary policies ad procedures concerning driver fare shortages or a violation of Section 8(a)(1) and (5) of the Act? (Cross-Exceptions 6 and 7).
5. The ALJ did not err by failing to find and conclude that Respondent violated Section 8(a)(1) of the Act by directing employee Andrys Etienne to vote and to vote against the Union (Cross-Exception 8).
6. The ALJ did not err by failing to recommend that the Notice to Employees be in Haitian Creole, in addition to English (Cross-Exception 9).

In response to the NLRB's cross exceptions Respondent requests the Respondent's Exceptions, Supplmental Exceptions and Reply to the NLRB's answers to Respondent's Exceptions be incorporated fully herein by reference in response to the NLRB's cross exceptions since the majority of these "cross exceptions" are duplicative particularly in reference to the NLRB's statement of alleged facts which are part of Respondent's exceptions to the AJL RO.

In further support the Respondent states as follows:

Union campaign and election: The assertion the Union began organizing Respondent's drivers, dispatchers and mechanics "in about June 2011" is blatantly false and unsupported by any documentary evidence and/or testimony and by sworn affidavit of the Union Organizer George Exceus dated 12/28/2011(EHT:82:10-13. and testimony during the evidentiary hearing organizing efforts began around or about August or September 2011 (Evidentiary Hearing Transcript (EHT 81:14-15) and the first employee union meeting was not even held until September 24, 2011 (EHT: 87:8-10)

Currently there is no evidentiary basis or factual support that Haitian Creole is the first language of many of Respondent's drivers or that they do not fully understand English both written and orally and the Union organizer testified "they would be able to understand English" [EHT 47:12-14] and it is required the drivers can effectively communicate in English as a requirement of the position in order to communicate with the clients.

There is no factual evidence to support the finding that White saw Fertil actually distributing flyers and Union Agent George Exceus did not testify to White's knowledge of their alleged activity on one isolated afternoon. White did not testify in the evidentiary hearing. Furthermore, White never discussed with Fertil any of his activities. In fact, Fertil testified no one spoke to Fertil regarding his distribution of flyers (e.g. one isolated day after his shift.)[EHT 128:16]. No one ever saw him wear a union t-shirt, sign a union authorization card, and no one ever talked to him about his alleged union activity. [159: 8-20] No one threatened him regarding his alleged union activity; no one threatened him about job loss [EHT: 166:17-24]. Fertil collected only (3) union authorization cards during the entire union campaign date uncertain [EHT 125:18]. Nicolas handed out flyers at Union meetings not at the Lauderdale Lakes facility.[EHT 222:4-9] There is no testimony as to whether anyone witnessed Nicolas handing out flyers or distributing union authorization cards and they only people that may have seen him was some other driver (singular). [EHT 271: 11] Nicolas and Fertil did not testify anyone saw them wearing their union t-shirt.

The evidentiary record is absent any facts to support the NLRB's allegation that Respondent's anti- union campaign "intensified" or the substance of Respondent's anti-union campaign. In addition, the NLRB's assertions that Respondent's anti-union campaign was somehow "illegal" under the Act are unsupported by the evidentiary record. The NLRB has failed to recognize that there are certain unalienable rights created under the Taft-Hartley Act which established the "employer free speech clause which permits employers to openly campaign against worker self-organization as long as the employer does not discriminate against workers. None of the comments satisfy the threshold to questioning employees about their union sympathies in any manner that were or did intend to interfere with restrain, or coerce these employees in the exercise of their

rights under the NLRA. In the instant, case Respondent did not discriminate and any general comments as alleged were made by Respondent are clearly protected under the NLRA.

Any discussions with any of the employees clearly fall within the law under NLRB v. Gissel. It is well settled that an employer, and by extension, the employer's agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit". NLRB v. Gissel Packing Co., 395 US 575, 618 (1968). The day of the meeting Mr. Rowe saw Mr. Nicholas he stopped and talked to him and laughed and then he went on to his parking lot across the street. [EHT 406: 9-24] The drivers pulled into AMT's lot dropped off their vehicles greeted Mr. Rowe and proceeded across the street to their meeting. [EHT 406:9-15] The ALJ RO findings of fact are unsupported under Aladdin Gaming LLC, 345 NLRB 585, 586 (2005) as it does not meet the surveillance criteria, duration criteria and there is no evidence and at a minimum conflicting evidence of "other coercive behavior" as such the finding of surveillance should be struck. Mr. Rowe's presence on his company property is lawful under the Act. Albertsons v. NLRB, 161 F.3d 1231, 1238 (10th Cir. 1998). Further Beauvais, did not identify the driver of the alleged Toyota Sequoia or whether the vehicle he saw was in fact owned and operated by Wayne Rowe. In fact Wayne Rowe denies engaging in an anti-union campaign. [EHT 32:19-25] Respondent had 1 meeting prior to the vote. [EHT: 33:9-10] Some messages were sent out on pay stubs which are legal under the Act. [EHT: 34:4-6]

The anti-union campaign met the legal parameters of the Act and Respondent did not engage in illegal or unlawful conduct before, during or after the campaign.

Respondent's fare collection procedure

The NLRB's assertions that "at times drivers delivered their fares to Respondent's Hollywood, Florida facility where they were collected by a supervisor named Clyde Plummer or Dino is factually incorrect. Both facilities have ATM machines which were fully functional during the relevant time period and drivers know they are to deposit the fares in the ATM machines on a daily basis as the long established written policy and practice of the Respondent. Depending upon the driver's route assignment for the day

will determine where the driver will deposit client fares (e.g. Lauderdale Lakes or Hollywood). At no time is any driver permitted to submit his fares to any other employee but securely log into the ATM machine and deposit their monies in the ATM and return the ATM receipt with their completed manifest to the office. [EHT 261:17-20; 285:18-20; 289:22-24;] Failure to do so will result in disciplinary action up to and including termination [EHT:294;5-10] and includes suspension [EHT: 305:7]. The accurate process is for a driver to deposit the money into the ATM machine by entering their pin and dropping change in a sealed envelope into the deposit slot with the amount and name, attaching the receipt on the manifest and turning in the receipt and the manifest into the office. [EHT: 299-303:1]

Broward County's Requirement that Respondent Submit Collected Fares to the County

The NLRB's assertion that Respondent has not been vigilant in regards to client fares is factually incorrect and unsupported by the record. Respondent has conducted audits in the past (e.g. prior to Union presence or campaigning) and employees have always been on notice they could be subjected to an audit. [EHT 290:2-3; 23:6] On the last audit 120 drivers were audited and 77 drivers were identified as being short. [EHT 23:9-10] The audit concluded in September/October 2011 and revealed the 77 drivers who were short. [EHT: 23:9-10]

Respondent's President Rashelle Rowe posted memos on September 29, 2010 (**one year prior to the presence of the union**) which employees testified to seeing and knowing about the long standing policies and procedures of audit and client fares which was neither threatening or coercive but again notified employees of the long standing policy regarding the depositing of client fares. [EHT 360:1-20]. Respondent did implement the policy in 2010 and Terrance Wilson who testified he was disciplined and subjected to an audit May of 2011, months prior to the presence of the union. R. Rowe also sent a memorandum to all employees in November of 2010 (approximately 1 year prior to the presence of the union) regarding fare collection and penalties for failure to comply with policy and the company's right to audit drivers. [EHT 365:1-25-367:1-11].

Respondent's pre-election treatment of drivers who had fare shortages

Respondent found drivers had fare shortages beginning in 2010 and continuing through 2011 before the Union became the bargaining agent. [EHT 290:2-3; 23:6]. Other employees agreed to repay the shortages and signed acknowledgments in this regard. Fertil and Nicolas denied responsibility, abandoned their positions, and never re-paid the fare shortages or did not make **any effort** to review the completed manifests and supporting documentation from the audit.[EHT 300-303 and 312-3115] The reason Fertil and Nicolas were suspended was because they refused to re-pay, refused to acknowledge their fare shortages and failed to repay or make any arrangements to review the complete records in support of the audit and never returned to Respondent or sought re-employment or resolve their fare shortages. It was not an issue as to the amount it was the fact the drivers in the 3 separate audits had shortages and with the exception of Fertil and Nicolas agreed to repay and acknowledge their violations or otherwise abandoned their position.

Respondent's fare shortage audits

Prior audits have been conducted as set fully forth in the preceding paragraphs titled Broward County's Requirement that Respondent Submit Collected Fares to the County and incorporated fully herein by reference. The audit conducted from March 2011-September/October 2011 was completed at that time and continued beyond that date as fare shortages continued to arise. (e.g. Fertil/Nicolas) [EHT 290:2-3; 23:6] On the last audit 120 drivers were audited and 77 drivers were identified as being short. [EHT 23:9-10] The audit concluded and in September/October 2011 revealed the 77 drivers who were short. [EHT: 23:9-10]

The audit is a summary based on manifests and receipts and deposits accurately reflecting each driver's shortage or overage. The NLRB failed to review the manifests and receipts or introduce any evidence of any discrepancy between the manifests, receipts and the summary audit of the 120 drivers. The burden is on the NLRB to show the audit was fabricated. The audit report is a business record kept in the normal course of business in order to reconcile the County's billing of client fares. The audit is an exception to the hearsay rule as a business record kept in the normal course of business. Besides the audit was reconciled with the receipt and the manifest. [EHT 422:7-18] The NLRB was given more than one occasion to view the manifests, receipts and tapes and failed to do so.

Furthermore, W. Rowe went specifically and thoroughly through the receipts and logs for Yvel Nicolas from December 5, 2011-December 12, 2011 and Mr. Nicolas had **not** made any deposits of client fares through this period as reflected on the audit and verified through all supporting documentation and discussed with Nicolas. [EHT 433]

Respondent's post-election treatment of drivers who had fare shortages according to the audit.

Respondent's conduct was consistent with all prior identification of fare shortages. Prior audits have been conducted as set fully forth in the preceding paragraphs titled Broward County's Requirement that Respondent Submit Collected Fares to the County and incorporated fully herein by reference.

Respondent's suspension pending investigation and discharge of Renan Fertil

Respondent found drivers had fare shortages beginning in 2010 and continuing through 2011 before the Union became the bargaining agent. [EHT 290:2-3; 23:6]. Other employees agreed to repay the shortages and signed acknowledgments in this regard. Fertil and Nicolas denied responsibility, abandoned their positions, and never re-paid the fare shortages or made **any effort** to review the completed manifests and supporting documentation from the audit. [EHT 300-303 and 312-315]. Furthermore, Fertil was well aware violation of the client fare policy would subject him to disciplinary action up to and including termination. Failure to do so will result in disciplinary action up to and including termination [EHT:294;5-10] and includes suspension [EHT: 305:7].

It is not Respondent's obligation to present proof Fertil took the money. It is the obligation of the NLRB to prove the audit was not an accurate reflection of the receipts, client fare audit deposits and manifests. The NLRB failed to review the supporting documentation (on two separate occasions) or in the alternative reviewed it and determined the audit was an accurate reflection of the manifests, tapes and receipts. The evidentiary record is completely absent any testimony that the audit is not an accurate reflection of the records. Witnesses testified the audit was reviewed with them. The other employees agreed to the findings of the audit and entered into repayment agreements. The audit is a business record and therefore is a self -authenticating document and was admitted into evidence.

Respondent's suspension pending investigation and discharge of Yvel Nicolas.

There is no evidence in the record Nicolas contacted Respondent 15 times in order to find out if he was back on the work schedule. In fact the evidentiary record indicates that Respondent and Respondent's employees did not hear from Nicolas again after his suspension and issuance of his final pay.

Respondent's suspension pending investigation and discharges of Fertil and Nicolas were unprecedented.

At no time is any driver permitted to submit his fares to any other employee but securely log into the ATM machine and deposit their monies in the ATM and return the ATM receipt with their completed manifest to the office. [EHT 261:17-20; 285:18-20; 289:22-24;] Failure to do so will result in disciplinary action up to and including termination [EHT:294;5-10] and includes suspension [EHT: 305:7]. Other employees agreed to repay the shortages and signed acknowledgments in this regard. Fertil and Nicolas denied responsibility, abandoned their positions, and never re-paid the fare shortages or made **any effort** to review the completed manifests and supporting documentation from the audit.[EHT 300-303 and 312-315].

Although Respondent had not previously suspended an employee for shortages it is undisputed that fare shortages are grounds for immediate dismissal/termination. There was not change in practice, procedure, discipline, client fares, audits, shortages, overages as reflected in numerous documents reflecting the long standing policy and practice. {EHT 152:11-14]Verbal discussions were had with both Fertil and Nicolas and even after first discussions subsequent shortages were identified.[EHT 161:15-23] Wilson was disciplined and written up for his fare violation. Distinguishing all of the other employees from Fertil and Nicolas is the simple fact both Fertil and Nicolas refused to repay their documented shortages and abandoned their positions.[EHT 18:3-22, 20:15-18] Written repayment agreements were not given to Fertil and Nicolas because they denied the shortages and refused to pay. Fertil was offered a repayment plan and Nicolas was not because he refused a repayment plan. [EHT 329:20] The remaining uncollected client fare shortages and information was turned over to the Police [EHT 19:8] The NLRB's argument that Respondent did not do any further investigation is simply untrue and unsupported in the record. The audit was provided the manifests were reviewed, the

ATM deposit summaries with employee PIN identification numbers were reviewed and it was determined Fertil and Nicolas had stolen client fare monies and had failed to deposit client fare monies which is an immediate terminable offense. Furthermore, although Nicolas may have agreed to pay at some later point in time he never did pay and never returned to pay so no repayment agreement could be initiated. [EHT 310:24-25, 20:15-18] Furthermore, he was going to pay cash and no repayment agreement was necessary but he never returned to pay. [EHT 311:10-20, 20:15-18] Both Fertil and Nicolas were informed that if they signed the letter, re-paid the client fare money they would be returned to work. [EHT: 318:1-4] Fare shortages had also traditionally been taken as a deduction from employees' payroll checks. [EHT: 347:2-5]

Respondent did not notify the Union about its changed disciplinary policies and procedures for driver fare shortages.

Respondent did not change its practice and procedure for handling discipline for fare shortages and dealt with all of its employees in the same manner. Therefore there was no need to notify the Union and the audit predated the Union (e.g. July initiated concluded September/October 2011) Although Respondent had not previously suspended an employee for shortages it is undisputed that fare shortages are grounds for immediate dismissal/termination. There was no change in practice, procedure, discipline, client fares, audits, shortages, overages as reflected in numerous documents reflecting the long standing policy and practice. Wilson was disciplined and written up for his fare violation. Distinguishing all of the other employees from Fertil and Nicolas is the simple fact both Fertil and Nicolas refused to repay their documented shortages and abandoned their positions. Written repayment agreements were not given to Fertil and Nicolas because they denied the shortages and refused to pay. Fertil was offered a repayment plan and Nicolas was not because he refused a repayment plan. [EHT 329:20] The NLRB's argument that Respondent did not do any further investigation is simply untrue and unsupported in the record. The audit was provided the manifests were reviewed, the ATM deposit summaries with employee PIN identification numbers were reviewed and it was determined Fertil and Nicolas had stolen client fare monies and had failed to deposit client fare monies which is an immediate terminable offense. Furthermore, although Nicolas may have agreed to pay at some later point in time he never did pay and never

returned to pay so no repayment agreement could be initiated. [EHT 310:24-25] Furthermore, he was going to pay cash and no repayment agreement was necessary but he never returned to pay. [EHT 311:10-20] Both Fertil and Nicolas were informed that if they signed the letter, re-paid the client fare money they would be returned to work. [EHT: 318:1-4] Fare shortages had also traditionally been taken as a deduction from employees' payroll checks. [EHT: 347:2-5]

Of particular concern is the assertion that Respondent failed to take supplemental action against the remaining drivers. The Respondent ceased further audit discipline at the request of the Union which the Respondent agreed to do.[EHT 315:19-25] There are still 67 drivers' still pending potential discipline and substantial uncollected fare monies. Respondent accommodated the Union in spite of significant financial impact by agreeing to cease further deductions for fare shortages in agreement with the Union. [EHT:344:23-25;345:1-3] Respondent has suffered financially (e.g. approximately $5,000.00 per month shortage of client fare deposits by the drivers.[EHT 351:2-5] The policies and procedures, memorandums, audit and discipline have been in place since the implementation of the paratransit contract in December 2009 [EHT 353:22] Memos were posted on company bulletin boards regarding client fares and potential discipline for failure to deposit in September 2010 (e.g. more than a year prior to Union presence) and July 2011 (months prior to union notification). [EHT 360:4-6;20-22] In fact, Respondent had previously conducted a similar audit in November of 2010 notifying employees they were subject to audit and disciplinary action (e.g. one year prior to any Union presence or request for representation or election) [EHT 365:2-25]. The audit and subsequent discipline is not a unilateral change and therefore not a violation of Section 8(a)(5) of the Act. Golden Stevedoring Co., 335 NLRB 410, 415-16 (2001). The discipline and Respondent's reaction regarding the audit in 2010 and in 2011 clearly reflects that if an employee would have been fired for cause or in the instant case suspended irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory. Edgewood Nursing Center Inc. v. NLR, 581 F.2d 363, 368 (3d Cir. 1978). The NLRB has failed to prove or tender any evidence that Respondent's reasons for suspending Fertil and Nicolas was pretext and the real motive was anti-union animus. Gould Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979). The NLRB has disregarded

documentary evidence that similar warnings, discipline, audits etc. were given before, during and after Union presence to other employees who were not active in the organization drive as fully set forth above. Each instance of discipline was as a result of a violation of company rules. NLRB v. Garry Manufacturing Co., No. 79-2113 (3d DCA 06/10/1980), 630 F.2d 934.

As such, Respondent engaged in the same conduct it had always engaged in prior to the presence of the Union and agreed to cease any further disciplinary action after certification of the union. There was no violation of Section 8(a)(5) and (1) of the Act.

Argument

Respondent did not violate Section 8(a)(1) of the Act **by CEO** Wayne Rowe's direction to Etienne that he must vote, and that he must vote against the Union.

It is well settled that an employer, and by extension, the employer's agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit". NLRB v. Gissel Packing Co., 395 US 575, 618 (1968). As such, the NLRB's Cross-Exception 8 should be denied.

Respondent did not suspend and discharge Renan Fertil and Yvel Nicolas because of their union activities and therefore there was no violation of Section 8(a)(1) and **(3)** of the Act.

The evidence presented does not even remotely support a finding that the audit or the findings from the audit were motivated or a substantially contributing factor for AMT's audit, suspension or disciplined of the employee/drivers as a result of their alleged "union activity". Wright Line, 251 NLRB 1083. Although the NLRB has asserted an anti-union animus, the allegations of Nicholas and Fertil do not meet the test and the mere allegations of the existence of alleged anti-union amicus is not enough. N.L.R.B. v.

Billen Shoe Co., Inc. 297 F.2d 801, 803 (1st Cir. 1968). Regardless of any asserted alleged "union activity" AMT was under an obligation as per the Paratransit Contract to take disciplinary action for the extensive and repeated driver fare shortages and the audit was and is a continuing duty of AMT's as well as the implementation of policies and procedures for addressing employee misconduct in place years before the presence of a union as such said audit, employee discipline and the events leading up to and after would have occurred regardless of the presence of the Union. NLRB v. Fibers Internat'l Corp. 439 F.2d 1311, 1312 fn. 1 (1st Cir. 1971). In fact the Union has continued to stall the established business operations of the Respondent by continuing to delay Respondent's ability to conduct audits or discipline drivers for violations. There is no evidence tendered in either Nicholas or Fertil's case or any of the other drivers that the suspensions and audit were even partially or substantially motived by their alleged "union activity". In fact, AMT unequivocally denies these allegations and alleged findings of fact. Respondent's handling of these employees' misconduct would have been the same even if the protected activity had not occurred. White Line The constitutional principle at stake is sufficiently vindicated if an employee is placed in no worse a position than if he had not engaged in the conduct. White Line It would be blatantly unfair to limit the Respondent from taking appropriate and justified business necessity disciplinary action against these drivers and employees just because they have either engaged in alleged protected conduct or alleged they have engaged in protected conduct. Mt. Healthy City School Distr. Board of Education v. Doyle, 429 U.S. 274, 285-286.Dual Motivation: Nicholas and Fertils' claims fail for a number of reasons. (1) They have not tendered any evidence that would establish that their alleged protected conduct was an "in part",

"substantial" or "motivating" factor nor have they tendered any evidence that the policies and procedures initiated and enforced years before or an audit initiated multiple times prior to Union presence is even casually connected to "union activity". Although both may have engaged in "union support" activities the decision to initiate an audit and implement disciplinary action similar to disciplinary action initiated in the past is and was unrelated to their alleged union activity. This is not a case of a violation that is of "inoffensive significance" and in fact has a great financial significance and impact on the operations of the Respondent. The ALJ did not find that a prima facie case was established under Wright Line and that Fertil's and Nicolas' suspensions and discharges subsequently did not violate Section 8(a)(3) of the Act. There is limited evidence of Union activity by Fertil and Nicolas and no evidentiary evidence Respondent knew Fertil and Nicolas alleged union activity. The ALJ rightly found the audit was an accurate reflection of the fare shortages as 11 other employees agreed to repay the fare shortages and admitted to the fare shortages. The audit is a business document and is kept in the normal course of business to reconcile the county billing records of client fares.

There was no contradictory testimony of the Respondent's witnesses as different meetings and different conversations leads to different recollections of those conversations with Fertil and Nicolas. The additional manifests were readily available and many were reviewed with both Fertil and Nicolas and both Fertil and Nicolas failed to ever come back and review the substantial documentation in support of the audit and abandoned their positions. Respondent produced the manifests and the NLRB refused on two separate occasions to identify any documents which contradicted the audit. The Respondent has fully met its burden under Wright Line.

Based upon the foregoing incorporating the Respondent's Supplemental Exceptions to the ALJ RO, Reply to the NLRB's General Counsel's Answer as though fully set forth herein by reference, the NLRB's General Counsel's Cross-Exceptions 1 and 2 should be denied and the ALJ's recommended Order and Notice to employees should therefore not be modified with the exception of Respondent's previously established exceptions, supplemental exceptions, reply and answer to the cross exceptions.

The Respondent should not be found to have violated Section 8(a)(1) and **(5)** of the Act and did not unilaterally change its disciplinary policies and procedures concerning driver fare shortages and therefore did not violate Section 8(a)(5) and (1) of the Act when they lawfully suspending drivers and subsequently terminating pending investigation and then discharging them without conducting further investigation when it suspended and discharged drivers Yvel Nicolas and Renan Fertil, in violation of Section 8(a)(5) and **(1)** of the Act.

There simply was not any "unilateral" change or discriminatory motive and any rescission would result in a unilateral change as the status quo existed prior to the Union's presence regarding Respondent's policies, procedures, client fare audits, etc…Bohemian Club 351 NLRB 1065, 1068 (2007). Furthermore, all the drivers/employees referenced in the ALJ's order "voluntarily resigned" their positions by failing to return to work thereby waiving any rights to continued employment or benefits of that employment. Polson Industries, Inc., 242 NLRB 1210, 1211 (1979). Respondent continued and continues to bargain with the Union and there is no evidence that the Respondent made any unilateral changes to the terms and conditions of employment. In fact to the contrary Respondent has tendered significant evidence that the Respondent has acted in conformance with its long term practices, policies and procedures. In re: United Food and Commercial Workers, Local No. 1996 336 NLRB 421 (2001). As in Quality

House of Graphics, Inc., 336 NLRB 497, 498 (2001), there are circumstances where an employer may cat unilaterally if the employer can establish extraordinary events which are an unforeseen occurrence that require the company to take immediate action (e.g. approximately $5,000.00 per month loss of client fares in the instant case) Id. Respondent has clearly evidenced this was not a unilateral change but implementation of repeated past practice, policy and procedure which cost Respondent thousands of dollars as a result of the employee thefts of client fares. Respondent did not discipline these employees, impose "new" rules, impose "new" policies, impose "new" procedures, impose "new" audits for any "unlawful" purpose. Respondents have demonstrated a legitimate non-discriminatory reason for its action under the appropriate law and therefore cannot be held to have violated Section 8 (a)(5). Great Western Produce, Inc. 299 NLRB 1004, 1005 (1990). Shell Oil Co., 77 NLRB 1306 91948) and the Wright Line of cases. AMT should further not be required to read any Notice to Employees without a determination of violations under the act.

Although Respondent had not previously suspended an employee for shortages it is undisputed that fare shortages are grounds for immediate dismissal/termination. There was not change in practice, procedure, discipline, client fares, audits, shortages, overages as reflected in numerous documents reflecting the long standing policy and practice. Wilson was disciplined and written up for his fare violation. Distinguishing all of the other employees from Fertil and Nicolas is the simple fact both Fertil and Nicolas refused to repay their documented shortages and abandoned their positions. Written repayment agreements were not given to Fertil and Nicolas because they denied the shortages and refused to pay. Fertil was offered a repayment plan and Nicolas was not because he refused a repayment plan. [EHT 329:20] The NLRB's argument that Respondent did not do any further investigation is simply untrue and unsupported in the record. The audit was provided the manifests were reviewed, the ATM deposit summaries with employee

PIN identification numbers were reviewed and it was determined Fertil and Nicolas had stolen client fare monies and had failed to deposit client fare monies which is an immediate terminable offense. Furthermore, although Nicolas may have agreed to pay at some later point in time he never did pay and never returned to pay so no repayment agreement could be initiated. [EHT 310:24-25] Furthermore, he was going to pay cash and no repayment agreement was necessary but he never returned to pay. [EHT 311:10-20] Both Fertil and Nicolas were informed that if they signed the letter, re-paid the client fare money they would be returned to work. [EHT: 318:1-4] Fare shortages had also traditionally been taken as a deduction from employees' payroll checks. [EHT: 347:2-5]

Of particular concern is the assertion that Respondent failed to take supplemental action against the remaining drivers. The Respondent ceased further audit discipline at the request of the Union which the Respondent agreed to do.[EHT 315:19-25] There are 67 drivers still pending potential discipline and substantial uncollected fare monies. Respondent accommodated the Union in spite of significant financial impact by agreeing to cease further deductions for fare shortages in agreement with the Union. [EHT:344:23-25;345:1-3] Respondent has suffered financially (e.g. approximately $5,000.00 per month shortage of client fare deposits by the drivers.[EHT 351:2-5] The policies and procedures, memorandums, audit and discipline have been in place since the implementation of the paratransit contract in December 2009 [EHT 353:22] Memos were posted on company bulletin boards regarding client fares and potential discipline for failure to deposit in September 2010 (e.g. more than a year prior to Union presence) and July 2011 (months prior to union notification). [EHT 360:4-6;20-22] In fact, Respondent had previously conducted a similar audit in November of 2010 notifying employees they were subject to audit and disciplinary action (e.g. one year prior to any Union presence or request for representation or election) [EHT 365:2-25]. The audit and subsequent discipline is not a unilateral change and therefore not a violation of Section 8(a)(5) of the Act. Golden Stevedoring Co., 335 NLRB 410, 415-16 (2001). The discipline and Respondent's reaction regarding the audit in 2010 and in 2011 clearly reflects that if an employee would have been fired for cause or in the instant case suspended irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory. Edgewood Nursing Center Inc. v. NLR, 581 F.2d 363, 368 (3d Cir.

1978). The NLRB has failed to prove or tender any evidence that Respondent's reasons for suspending Fertil and Nicolas was merely a pretext and the real motive was anti-union animus. Gould Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979). The NLRB has disregarded documentary evidence that similar warnings, discipline, audits etc. were given before, during and after Union presence to other employees who were not active in the organization drive. Each instance of discipline was as a result of a violation of company rules. NLRB v. Garry Manufacturing Co., No. 79-2113 (3d DCA 06/10/1980), 630 F.2d 934.

As such, Respondent engaged in the same conduct it had always engaged in prior to the presence of the Union and agreed to cease any further disciplinary action after certification of the union. There was no violation of Section 89a)(5) and (1) of the Act. For the foregoing reasons The AILJIs Findings and Conclusions that Respondent violated Section 8(a)(5) and **(1)** of the Act when it unilaterally changed its disciplinary policies and procedures concerning driver fare shortages and disciplined drivers under this modified policy without notifying the Union Should be Denied, and Respondent's Exceptions **1** and **17** Should be Accepted.

Conclusion

Respondent's respectfully request the Board to accept all of Respondent's Exceptions, Answers to Cross Exceptions and Reply to the General Counsel's Answers to Respondent's Exceptions.

1. Respondent did not suspend and discharge Fertil and Nicolas because of their alleged union activities and their suspensions and discharges did not violate Section 8(a)(1) and (3) of the Act.
2. Respondent did not change any of their long standing disciplinary policies and procedures concerning driver fare shortages specifically pertaining to Nicolas and Fertil and did not commit any violations as defined by significant case law and interpretation under Section 8(a)(5) and (1) of the Act.

3. Respondent did not violate any provisions of Section 8(a)(5) and (1) of the Act and gave significant notice and/or an opportunity to bargain and all actions were taken consistent with long standing policy and practice of Respondent predating even the insinuation or presence of any Union activity. All policies and procedures were uniformly applied to all employees.

4. Respondent's general conversations and discussions with its employees during the Union campaign did not violate Section 8 (a)(1) of the Act and were legal under any interpretation of the law and of the Act.

Respondent respectfully requests the Board to modify the ALJ's RO by requiring that the Respondent's exceptions, answers to cross exceptions, and reply by fully accepted and the General Counsel's cross exceptions and answers be struck on the basis of insufficient findings of fact and insufficient evidentiary findings which are clearly in contradiction to the law.

Dated: April 26, 2013

Respectfully Submitted By:

s/Lydia B. Cannizzo___
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CERTIFICATE OF SERVICE

I hereby certify that on April 26th, 2013 I electronically filed the foregoing document by using the E-Filing system on the Agency's website. I also certify that the foregoing document is being served this day via e- mail on all parties of record identified as follows: Marinelly Maldonado, Marinelly.Maldonado@nlrb.gov and Shelley Plass Shelley.Plass@nlrb.gov , Counsels for the Acting General Counsel, National Labor Relations Board, Region 12, 51 S.W. 1st Avenue, Miami, FL 33130, Osnat K. Rind, Esq.,

(orind@phillipsrichard.com), Phillips, Richard & Rind, 9360 SW 72nd St. Ste., 283, Miami, FL 33173-3283 on the same day as the E-Filing on the Agency's website and postmarked today via regular mail.

s/Lydia B. Cannizzo
Lydia B. Cannizzo, Esq.