UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

AMALGAMATED TRANSIT UNION LOCAL NO. 1498 (JEFFERSON PARTNERS L.P.) Respondent and RAYMOND JONES Charging Party	Case 18-CB-086687

BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF OF THE ACTING GENERAL COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT ON EXCEPTIONS

This case presents two principal issues: first, whether Respondent Amalgamated Transit Union Local 1498 ("Respondent") breached its duty of fair representation by its grossly negligent and therefore arbitrary conduct in processing Charging Party Raymond Jones' ("Jones") grievance. (ALJD p. 13, lines 33-40.)[1] And second, whether the General Counsel[2] proved, by a preponderance of the evidence, that Respondent would have prevailed in an arbitration proceeding had Respondent properly processed Jones' grievance. (ALJD p. 2, lines 1-21, p. 14, line 32.)

Administrative Law Judge Ira Sandron correctly found in the General Counsel's favor with respect to the first issue. (ALJD p. 13, lines 33-40). However, Judge Sandron incorrectly ruled against General Counsel with respect to the second issue. (ALJD p. 15, lines 17-21). General Counsel excepts only to this latter conclusion and to the erroneous factual findings on which this conclusion is based.

General Counsel does not challenge any of Judge Sandron's findings based on credibility. Those findings are relevant only with respect to the first issue, i.e., the duty of fair representation, and General Counsel prevailed on that issue. Instead, General Counsel excepts to *five critically important factual errors and their resulting conclusions*. The most important of these factual errors, and the *linchpin* of Judge Sandron's decision with respect to the second issue, i.e., the merits of the grievance, involves a mix-up of two employees whose last name is Moore, as well as a mistake regarding the position on which they bid. This mix-up resulted in the judge erroneously concluding that, on at least one occasion prior to 2010, the Employer

[1] References to the Administrative Law Judge's Decision will be designated as "ALJD p. __, lines __," references to the General Counsel's exhibits will be "GCX __," and references to the transcript will be cited as "Tr. __."

[2] This case was brought on behalf of Acting General Counsel Lafe Solomon, referred to herein as General Counsel.

awarded a B Mechanic position out of seniority order, thus undermining General Counsel's argument that Respondent would have prevailed on the grievance as established by the parties' consistent past practice. (ALJD p. 3, lines 5-6, 11-14, 20-23, p. 8, lines 7-9, p. 15, lines 2-3.)

The three remaining factual errors are related. Judge Sandron concluded that he could not find in the General Counsel's favor concerning the merits of the grievance because there was insufficient evidence concerning three topics: (1) evidence as to the Employer's reasons for denying Jones' bid; (2) evidence of prior arbitration awards involving the contractual provisions at issue; and (3) evidence of how often the Employer used ads and selected outside employees over current maintenance employees who bid. (ALJD p. 14, lines 38-46). However, as will be demonstrated below, the record contains sufficient evidence concerning each of those issues and supports General Counsel's theories of the violation. Moreover, as will also be demonstrated below, the record establishes, by a preponderance of the evidence, that Respondent would have prevailed on the merits at arbitration had it not breached its duty of fair representation in processing Jones' grievance.

Finally, General Counsel excepts to the judge's failure to consider or pass on the alternative theory that, disregarding past practice, Charging Party Jones' grievance still would have prevailed because the Employer's proferred reasons for denying the bid were demonstrably false, and, in any event, Jones had prior experience.[3]

This brief is organized as follows. First, it briefly explains the theories of the case and the relevant legal framework. The second section demonstrates that the record evidence establishes that if Respondent had not violated its duty to fairly represent Jones, it would have prevailed on its past practice theory at arbitration, and that even if Respondent lost on its past

[3] While the judge questions the focus of Jones' grievance, it is clear from all of the documents that Jones was grieving both the use of applications as part of the semiannual bid and also the denial of his C Mechanic bid. (ALJD p. 9, lines 2-12; GCX 7, 8, 9, 10, 12, 15, 16, 18.)

practice theory, it still would have prevailed at arbitration. Finally, after proving that Respondent would have prevailed at arbitration, the brief concludes with an explanation of the relief requested.

II. LEGAL THEORIES OF GENERAL COUNSEL'S CASE THAT RESPONDENT WOULD HAVE PREVAILED AT ARBITRATION

General Counsel's first theory that Respondent would have prevailed on the merits of Jones' grievance rests on the contention that the Employer failed to adhere to its well-established past practice in awarding bids. Under General Counsel's second theory, in the absence of a past practice finding, Respondent would have prevailed because the evidence establishes that the Employer's proffered reasons for denying Jones' bid are demonstrably false. Each theory will be addressed separately below.

With regard to the legal framework of this case, a case alleging that a union has breached its duty of fair representation by its failure to pursue a grievance is bifurcated into two separate proceedings. *California Iron Workers*, 326 NLRB 375 (1998). In the first proceeding, General Counsel must prove that a union breached its duty of fair representation by mishandling the grievance. Id. at 377. Then, in the second proceeding which is the compliance stage, General Counsel must prove *by a preponderance of the evidence* that Respondent would have won the grievance at arbitration. Id. at 377, 381 fn. 10. However, the parties may agree, with the consent of the judge, to try both issues in one proceeding. Id. at 377. Such was the case here. (ALJD p. 2, lines 16-21.)

As indicated above, the judge correctly concluded that Respondent breached its duty of fair representation. (ALJD p. 13, lines 38-40.) Turning then to the second issue, whether Respondent would have prevailed on the merits, the preponderance of the evidence standard "means evidence sufficient to permit the conclusion that the proposed finding is more probable

than not." *Diamond Walnut Growers Inc.*, 340 NLRB 1129, 1132 (2003); *Cobb Mechanical Contractors, Inc.*, 341 NLRB 1028, 1032 fn. 4 (2004). In determining whether the General Counsel has met its burden, the trier of fact takes into account the standard that an arbitrator would have applied had the grievance been submitted to arbitration under the contract. (ALJD p. 14, lines 32-36; *California Iron Workers*, 326 NLRB at 377.)

Under the contract in this case, there is no provision outlining who carries the burden at an arbitration hearing. (ALJD p. 7, line 1; GCX 2, pp. 36-37.) However, with respect to the past practice issue, Article 56 of the contract states what a party needs to prove in order to prove the existence of a past practice. (ALJD p. 7, lines 15-19, p. 15, lines 13-15; GCX 2, p. 42.) Those requirements are "1) that the practice be unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." (ALJD p. 7, lines 15-19; GCX 2, p. 42.) The standard of proof applied for a past practice under the contract is "beyond a reasonable doubt." (ALJD p. 7, lines 16-17, p. 15, lines 13-15; GCX 2.)

III. GENERAL COUNSEL DEMONSTRATED BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT WOULD HAVE PREVAILED AT ARBITRATION

All of the record evidence regarding the underlying merits of Charging Party Jones' grievance was presented by General Counsel. That evidence is *completely unrebutted* by Respondent. As a result, there are no facts in dispute with respect to the Employer's past practice regarding the semiannual bid, C Mechanic qualifications, or training.

However, in concluding that he could not rely on the past practice theory, the judge made several critical factual errors in assessing the evidence that resulted in this erroneous conclusion. But for those critical factual errors, the judge would have reached the correct conclusion that the

overwhelming record evidence establishes that Respondent would have prevailed on its past practice theory. In addition to these critical factual errors, the judge failed to draw any adverse inference from the fact that Respondent presented absolutely *no evidence* rebutting the existence of a consistent past practice. Finally, the judge failed to address General Counsel's second theory, that Respondent would have prevailed because Respondent's reasons for denying the bid were false.

A. Respondent's Past Practice Theory Would Have Prevailed At Arbitration

1. Charging Party Jones' 2010 C Mechanic Bid

The Employer violated its well-established past practice during the July 2010 bid by failing to award the C Mechanic position to Jones-the most senior employee who bid for the position. John Moore and Jones, both long-term employees, testified regarding the past practice of the Employer with respect to the semiannual bid and, specifically, regarding six Coach Servicers who bid on and received the C Mechanic position over the past several years. (Tr. 34-41, 60, 73-74, 163-64.) Each testified consistently that the only thing required of those six employees to receive the C Mechanic position was that they be the most senior employee who bid on the position. (Tr. 40-41, 73-75.) Significantly, John Moore, who has no personal stake in the outcome of this case, testified that at the time he bid on the C Mechanic position in 2009, he had no tire or mechanical experience and did not hold any certifications. (Tr. 39, 71.) No application, certification or experience was required. (ALJD p. 8, lines 5-7; Tr. 39, 60, 68-69, 71, 117-119.) Instead, John Moore's only relevant qualification was that he was the most senior

employee who bid on the position and he had a high school diploma.[4]

The facts of Jones' bid are as follows. In July 2010, Jones placed his name on the bid sheet next to the C Mechanic position and placed a "1" next to it to indicate that the C Mechanic position was his first choice. (ALJD p. 6, line 26; GCX 4, 6; Tr. 109-10.) It is undisputed that Jones was the most senior employee to bid on the position. (ALJD p. 7, lines 37-38; GCX 4; Tr. 109-10, 114, 126, 162.) In connection with this July 2010 bid, Jones and the other Coach Servicers who bid were required for the first time to complete an application-another deviation from the Employer's past practice. (ALJD p. 8, lines 1-7; GCX 17, 16, p. 1; Tr. 115-17, 119, 171-74.)[5] Jones was not awarded the bid. (ALJD p. 8, lines 31-33; GCX 4, 5; Tr. 126, 162.) Instead, in an unprecedented move, the Employer hired off the street. (ALJD p. 8, line 35; p. 10, lines 37-39.)

The undisputed record evidence establishes, contrary to the judge, that Jones' 2010 bid is the *only time* that seniority was not used. (ALJD p. 3, lines 21-23; Tr. 40-41, 74-76.) Both Jones and Moore testified consistently on this point. Additionally, Moore, who has worked at the Employer since 2006, testified regarding the bidding process. (Tr. 17, 34-38, 94-95.) He said that the fleet manager uses seniority in awarding bids and creating the new schedule. (Tr. 34-38, 81.) After the employee receives the position, the employee would be trained in. (Tr. 43-45, 71-73.) Further, Jones testified that he told Fleet Manager Ted Fritsch ("Fritsch"), Jones' direct supervisor, and General Manager Rob Doherty ("Doherty") the same when he was

[4]The C Mechanic position description states, "Education and/or Experience: High School diploma or equivalent and one year of related experience or one year of related trade school." (GCX 3, p.1.) Jones had a high school diploma or GED and also had prior related experience. (GCX 17, p. 4; Tr. 279.) In any event, it is clear from the testimony and record evidence that other employees received the C Mechanic position even though they had no prior experience or had less than one year of experience (i.e., John Moore and Quinton Moore, respectively). (GCX 22; Tr. 39, 71.)

[5] The second page of GCX 16 is mislabeled "Page 1of 2" in the bottom righthand corner; it should state "Page 2 of 2." All citations to GCX 16 will reference the correct page number.

protesting the requirement that he fill out an application. (ALJD p. 8, lines 16-21; Tr. 115-22, 171-174.) Jones testified that Doherty and Fritsch were new managers and supervisors in July 2010 and were unfamiliar with the applicable past practice and contract provisions, which is a possible explanation for the deviation from the well-established past practice. (ALJD p. 8, lines 1, 18-19; Tr. 27, 30-32, 120-21.)

Despite Jones' efforts and the Employer's past practice, Jones was not awarded the C Mechanic position in July 2010. (ALJD p. 4, lines 7-8, p. 8, lines 31-33.) When the new schedule was posted at the conclusion of the bid on July 18, 2010, it showed that John Moore would be the C Mechanic. Yet John Moore had not even bid on the position. (ALJD p. 8, lines 31-33; GCX 4 and 5). Next to John Moore's name on the Mechanics' new schedule are three asterisks, and at the bottom of the page next to the three asterisks it states, "John would have to wait till we would get someone trained in the tire shop." (ALJD p. 8, lines 31-33; GCX 5.) Those same three asterisks are next to John Moore's name on the Coach Servicer schedule, and at the bottom it states "John won the bid but he will need to stay in the tire shop until we get a replacement." (ALJD p. 8, fn. 21; GCX 6, p. 2.) Thus, not even John Moore actually got the job. Rather, on August 9, 2010, Mike Masanz began working for the Employer as a C Mechanic; he had been hired off the street to replace John Moore. (ALJD p. 8, lines 35-37; GCX 16, p. 1; Tr. 71-76, 107, 162-63.)

2. Judge Sandron's Most Critical Factual Errors Regarding The Employer's Past Practice

The judge erroneously determined that there were two times that seniority was not the determining factor in awarding bids: (1) when John Moore received the B Mechanic position in December 2010; and (2) when the Employer hired an A Mechanic named Chris from outside of the company sometime in the recent past. (ALJD p. 3, lines 8-39.) These conclusions are not

supported by, and in fact are contrary to, the record evidence and resulted in the judge's erroneous conclusion that seniority was not the only factor used by the Employer in awarding bids in the past. (ALJD p. 8, lines 7-9.) Moreover, these conclusions rest on five critically important factual errors. The factual findings in error, with the correct facts, are: (1) that the December 23, 2010 email (GCX 22) discusses the B Mechanic position, when in fact it discusses the C Mechanic position; (2) that the less senior John Moore received the position discussed in GCX 22, when in fact the more senior employee, Quinton Moore, received it; (3) that when new hire Chris received the A Mechanic position, he did so over the bid of a unit employee, when in fact there is no evidence that any current employee bid on the position; (4) that the record evidence failed to establish that, prior to 2010, seniority was the only factor the Employer used to award bids, when in fact all of the record evidence establishes that it was the only factor used by the Employer; and (5) that there was insufficient evidence concerning how often the Employer used ads and selected outside employees over current maintenance employees who bid, when in fact no outside person has ever been hired over a current employee who bid, *except in this case*. (ALJD p. 3, lines 5-6, 11-14, 20-23, 34-39, p. 5, lines 20-22, p. 8, lines 7-9, 27-29, p. 14, lines 38-46, p. 15, lines 1-6.) Each of the judge's five critical factual errors are explained in detail, as is the record evidence that demonstrates these errors.

a. <u>The December 23, 2010 Email Is For The C Mechanic Position, Not The B Mechanic Position</u>

The first critical factual error made by the judge was finding that Doherty's email dated December 23, 2010, summarizing his discussion with Union President Richard Davis ("Davis") regarded the B Mechanic position. (ALJD p. 3, lines 5-6, 11-14, 20-23, p. 8, lines 7-9, p. 15, lines 2-3; GCX 22.) This error is critical because what occurred with regard to John Moore in

December 2010 is part of the evidence of past practice. Contrary to the judge's findings, the testimony and documents establish that the email was regarding the C Mechanic position.

In the email, GCX 22, Doherty states, "I just want to review my conversation with Mr. Davis regarding the bid for the *shop tire position*. I called Mr. Davis and told him that we had a little dilemma and wanted to talk it over with him. I told him that the *tire position* has come open again . . .." (GCX 22, emphasis added.) The term "tire position" refers to the C Mechanic position. (ALJD pp. 5-6, lines 43- 1, p. 7, lines 30-34; Tr. 19, 42, 105.) The C Mechanic position is also referred to in the record as the Tire Maintenance position, as this position involves the maintenance and repair of tires. Doherty's November 17, 2010 response to Davis' information request for Jones' grievance states, "on the same bid we did have 3 Coach servicers that bid on the C Mechanic/Tire position." (GCX 16.) John Moore testified that at the Employer's facility the A and B Mechanics work in "the pit" or "the floor," while the C Mechanics, who work exclusively with tires, work in "the tire shop." (Tr. 42, 44, 50, 55, 68-70.) This is consistent with the bid sheet documents, which state "floor" or "pit" under the A and B Mechanic positions, but state "tire" under the C Mechanic position. (GCX 4, 5.) As discussed above, the July 2010 final schedules for the Mechanics and Coach Servicers state at the bottom that John Moore would have to stay in the "tire position" until the Employer found a replacement, which the document lists as a C Mechanic. (ALJD p. 8, lines 31-33, fn. 21; GCX 5 and 6, p. 1.)

Therefore, Doherty's email is summarizing a conversation with Davis *over the C Mechanic position, not the B Mechanic position* as the judge erroneously concluded. (ALJD p. 3, lines 5-6, 11-14, 20-23, p. 8, lines 7-9, p. 15, lines 2-3; GCX 22.) This mistake ultimately

leads him to conclude that the Employer did not always award bids based on seniority and therefore that there was no unequivocal past practice.

Additionally, the judge erroneously concluded that based on John Moore's testimony that he became a B Mechanic in late 2011 or early 2012 "this [GCX 22] had to be the B mechanic position for which he successfully bid and currently encumbers, even though he gave a later date." (ALJD p. 3, lines 11-13; GCX 22.) However, John Moore's testimony with regard to his work history was correct, and the judge's supposition is incorrect. John Moore testified that he was a C Mechanic for at least one-and-a-half years, from 2008 to August 2010, and that he then returned to the Coach Servicer position in August 2010. (Tr. 21-24.) He then became a B Mechanic (a higher skilled mechanic position) in late 2011 or early 2012. (Tr. 21-24.) At that time he was the most senior employee who bid on the B Mechanic position. (Tr. 68.) John Moore testified that he never returned to the C Mechanic position after the July 2010 bid. (Tr. 21-24, 42, 68.) Therefore, John Moore could not have been bidding to return to the *B Mechanic position* in December 2010, since he had never occupied that position prior to December 2010. Instead, John Moore was bidding to return to the C Mechanic position. This confirms that GCX 22 is referencing a bid for the *C Mechanic position, not the B Mechanic position* as the judge erroneously concluded. (ALJD p. 3, lines 5-6, 11-14, 20-23, p. 8, lines 7-9, p. 15, lines 2-3; GCX 22.)

b. <u>The December 2010 C Mechanic Position Was Awarded To Quinton Moore, Not John Moore</u>

The second critical factual error made by the judge was finding that *John Moore, rather than Quinton Moore*, received the December 2010 C Mechanic position referenced in the December 23, 2010 email (GCX 22) even though Quinton Moore was the most senior employee

who bid.[6] (ALJD p. 3, lines 13-14, 20-23, p. 8, lines 7-9, p. 15, lines 2-3; GCX 22.) Instead, and contrary to the judge, this email provides strong support for two critical facts: (1) that the C Mechanic position was awarded to senior employee Quinton Moore, rather than John Moore, even though John Moore had more experience, thus supporting General Counsel's past practice argument; and (2) that seniority is the only consideration in awarding the bid.

Specifically, in the email summarizing Doherty's conversation with Davis, he states, "I told him the tire position has come open again and we had 2 people that bid on it, Quinton Moore and John Moore. John Moore has previously held the position for a couple years and bid out of the position to go back to a cleaner position."[7] (GCX 22.) The email goes on to talk about the experience of the two employees but notes that John Moore, who held the tire shop position for a couple years, "has far more experience" than Quinton Moore. He also then states that John Moore does not have "near the seniority that Quinton Moore has." He then asked Respondent Davis whether they go off experience or seniority first. Davis responded that "seniority always takes precedence." Doherty then said that either way an employee would be upset. Davis then told him "to have John Moore call him and he will talk to him about his seniority." If this exchange was not clear enough, John Moore testified consistently that he never went back to the C Mechanic position after the July 2010 bid, corroborating the fact that the more senior Quinton Moore was awarded the C Mechanic position in December 2010, over the less senior, more experienced John Moore. (Tr. 21-24, 42.) This is also consistent with John Moore's and Jones'

[6] This case involves three people with the last name of Moore, and it appears that the judge inadvertently confused two of them.

[7] The "bid out of this position" refers to the July 2010 bid when Moore bid back to the Coach Server position. This was also the bid at issue in this case, i.e., when Raymond Jones bid on the C Mechanic position and was not awarded the bid.

testimony that Quinton Moore was a Coach Servicer who became a C Mechanic. (Tr. 21-24, 42, 68, 74, 163-64.)

The judge's error in this regard is absolutely critical because this evidence establishes that seniority was the only factor in awarding the position, even when another employee bidding had superior qualifications, and was the parties' consistent practice. (ALJD p. 3, lines 16-23; GCX 22; Tr. 35, 94-95, 126.)

c. The Subsequent Hiring Of A Mechanic Chris Is Irrelevant

The record discloses only one time (other than the bid at issue here) that the Employer hired off the street. Sometime in the recent past the Employer hired Chris (last name unknown) into the highest skilled A Mechanic position. However, the judge made two critical errors in assessing this evidence. First, he assumed that Chris was hired over a unit employee who bid on the position. Second, he failed to acknowledge that Chris is a recent hire and thus his hiring is irrelevant to the parties' past practice at the time of the grievance, i.e., in 2010.

Specifically, in response to General Counsel's question whether anyone had been hired off the street before, John Moore testified, "Since I've been there they haven't hired anybody off the street except Mike Masanz (who was hired to fill the C Mechanic position at issue in this case) and a new guy, Chris. I don't know his last name," and "He was hired to be a A Mechanic." (Tr. 40-41, 76.) The judge then asked John Moore, "only one new employee has been made a C Mechanic, and the other four or several, including you, were previously Coach Servicers," to which John Moore responded "yes." (Tr. 76.) This is the only mention of A Mechanic Chris in the record.

Based solely on this evidence, the judge erroneously concluded that this established that the Employer did not always choose the most senior employee who bid. The judge reached this

conclusion because he *assumed* that A Mechanic Chris was hired by the Employer *over the bid of a current employee*. (ALJD p. 3, lines 37-39, p. 8, lines 27-29, p. 15, lines 1-2.) There is no record evidence to support this conclusion because there is no record evidence that any unit employees even bid on the A Mechanic position. Therefore, the subsequent hiring of A Mechanic Chris is irrelevant to the past practice issue.

In addition, it is clear from John Moore's testimony that the hiring of A Mechanic Chris was *after* the denial of Jones' bid in July 2010. (ALJD p. 3, lines 37-39.) At the time of John Moore's testimony, February 2013, he referred to A Mechanic Chris as "a new guy" and did not even know his last name. (Tr. 76.) If he was new in 2013, then he certainly was not hired prior to Jones' C Mechanic bid in July 2010. The hiring of Chris after July 2010 is therefore irrelevant to the issue of the Employer's past practice at the time of Jones' C Mechanic bid in 2010.

d. <u>The Only Criteria Used By The Employer Was Seniority</u>

The judge's fourth critical error was in concluding that seniority was not the only factor the Employer used in awarding positions. (ALJD p. 3, lines 21-23, p. 8, lines 7-9, p. 15, lines 2-3.) This erroneous conclusion is based on the judge's reliance on his other erroneous findings, discussed above, with regard to GCX 22 (that John Moore, rather than Quinton Moore, received the B Mechanic position in December 2010 even though he was less senior, and that the outside hiring of A Mechanic Chris was over a current employee). (ALJD p. 3, lines 5-6, 11-14, 20-23, 37-39, p. 8, lines 7-9, 27-29, p. 15, lines 1-3.) After correcting the judge's erroneous findings with regard to GCX 22 and A Mechanic Chris, all of the record evidence establishes that seniority was the only factor used by the Employer in awarding bids.

As the judge correctly states John Moore, Charging Party Jones, and even Respondent's agent Davis, testified that seniority is the only factor used by the Employer in determining which

employees receive the positions they bid on. (ALJD p. 3, lines 21-23; Tr. 35, 94-95, 126.) The judge asked John Moore, "Are you aware of any time in which seniority has not been used for a selection?" to which John Moore replied, "Only time I can think of is the time that we're talking about right now . . . Not other than this." (Tr. 40-41.) The judge then clarified, "Just involving Mr. Jones," and John Moore answered, "Just involving him." (Tr. 40-41.) This evidence is consistent with Davis' August 8, 2010 letter to Doherty regarding the denial of Jones' grievance, in which Davis states that the Employer did not honor Jones seniority rights. (GCX 8.) It is also consistent with GCX 22, in which Doherty agreed that Quinton Moore would receive the C Mechanic position even though John Moore had significantly more experience. Finally, John Moore testified that Masanz was the only Maintenance Department employee hired off the street over a current employee (*this is the hiring at issue in this case).* At all times prior to July 2010 the most senior employee who bid always received the position. (ALJD p. 3, lines 21-23, 32-34; Tr. 35, 40-41, 73, 75-76, 94-95.) All of the above record evidence establishes that seniority was the only factor used by the Employer in awarding bids.

e. <u>The Employer Had Not Used Ads To Fill The C Mechanic Position Before</u>

In addition to the critical factual errors regarding the evidence of past practice, the judge also concluded that he could not find in General Counsel's favor concerning the merits of the grievance because there was insufficient evidence concerning how often the Employer used ads and selected outside employees over current maintenance employees who bid. (ALJD p. 3, lines 34-37, p. 5, lines 20-22, p. 14, lines 38-46, p. 15, lines 4-6.) This conclusion is in error because all of the record evidence discussed above establishes that seniority is the only factor used by the Employer and the only time someone was hired off the street over a current employee is *the incident at issue in this case*. (ALJD p. 3, lines 32-34; Tr. 35, 40-41, 73, 75-76, 94-95, 126.)

Therefore, there is no precedent for the Employer's hiring off the street to fill a Maintenance Department position when a current employee bid. Moreover, none of the above evidence is rebutted by Respondent. (ALJD p. 14, lines 15-17.) As stated above, the hiring of outside employee A Mechanic Chris occurred years after Jones' grievance, and there is no evidence that a current employee had bid on the position, therefore it is irrelevant.

Contrary evidence in the record does not rebut the conclusion that at all times in the past the Employer has awarded Maintenance Department positions to the most senior employees who bid on the jobs. For example, although Field Operations Supervisor Sam Howell ("Howell") testified that it was the Employer's practice to post ads online and in the lunchroom, this testimony does not contradict the testimony of Jones and John Moore with regard to a lack of precedent for hiring outside people *for maintenance positions when current employees had bid*. (ALJD p. 3, lines 34-37, p. 5, lines 20-22, p. 14, lines 38-46, p. 15, lines 4-6; Tr. 213-14.)

The record establishes that the Employer has a bargaining relationship with three separate unions which represent many of its employees. (Tr. 203.) These three unions represent employees in different cities and states. (Tr. 203.) The United Transportation Union Local 1042 represents employees in Oklahoma City, Oklahoma. (Tr. 203-04.) The International Brotherhood of Teamsters Local 120 represents employees in Sioux Falls, South Dakota and Billings, Montana. (Tr. 203-04.) In addition to employees represented by Respondent, there are other employees such as managers, supervisors, dispatchers and other front office workers who work out of the Employer's headquarters in Minneapolis and are unrepresented. (Tr. 26-32, 57, 203-04, 282-83.)

The Employer may use the online ads and lunchroom postings for other employee classifications, but the record establishes that such ads were not used for maintenance employees

who are exclusively represented by Respondent, as current employees who bid on positions were always awarded those positions based solely on seniority. (Tr. 35, 73, 75-76, 94-95, 126, 203-04.) As a result, the judge's conclusion that he lacked information of "how often JP advertised for, and selected, outside employee[s] over current maintenance" employees who bid is in error. (ALJD p. 3, lines 34-37, p. 5, lines 20-22, p. 14, lines 38-46, p. 15, lines 4-6.) Therefore, all of the record evidence establishes that the Employer always chose the most senior employee in determining which employee received each bid and that ads were not used to hire outside people for Maintenance Department positions over current employees other than *in this case*.

3. The Record Evidence Meets The Standard Applied By An Arbitrator

As required under the contract, the past practice record evidence presented by General Counsel must establish that Respondent would have been able to prove beyond a reasonable doubt that the Employer's past practice is unequivocal; clearly enunciated in the contract and acted upon by the Employer; and readily ascertainable through the testimony of the witnesses regarding the Employer and Respondent's practices since 2003, a fixed and reasonable period of time. General Counsel has presented sufficient evidence to demonstrate that Respondent would have met the high "beyond a reasonable doubt" standard because there exists no record evidence to contradict any of the past practice record evidence. (ALJD p. 7, lines 15-19.) All of the evidence consistently demonstrates the existence of a well-established past practice.

The first subsection will show that the Employer's past practice was unequivocal. Second, General Counsel will demonstrate that the Employer's past practice was clearly enunciated in the contract and was acted upon by the Employer. Third, General Counsel will show that the Employer's past practice was readily ascertainable for a fixed and reasonable period of time.

a. The Employer's Past Practice Was Unequivocal

As fully discussed above, all past practice evidence was presented by General Counsel and unrebutted by Respondent, and therefore there is no factual dispute with respect to the Employer's past practice. The judge determined that it was clear from GCX 22 that there was a difference between the positions of Respondent's President Davis and the Employer Vice President Doherty; that Davis insisted seniority was the only factor that mattered, while Doherty believed some experience should be considered. (ALJD p. 3, lines 16-20, p. 15, lines 2-4.) However, Davis was clear that seniority took precedence. (ALJD p. 3, lines 21-23; GCX 22.) Both Doherty and Fritsch were new managers who were unaware of the Employer's past practice. (ALJD p. 8, lines 1, 18-19; Tr. 27, 30-32, 120-21.) The fact that Doherty believed that experience should be considered does not make him correct nor does it establish that this position would prevail at arbitration. Indeed, as the Employer awarded that bid to Quinton Moore, it appears the Employer knew it could not prevail on that position.

As fully discussed above, all of the record evidence establishes that at the time of Jones' July 2010 C Mechanic bid, the Employer had always selected employees for positions based on seniority only and that the only other time an outside employee was hired was A Mechanic Chris, which is irrelevant because there is no evidence to suggest that a current employee bid on the position and because it occurred after Jones' bid. (Tr. 35, 73, 75-76, 94-95, 126.) As a result, there was no evidence that any outside person was hired for a position that a current employee had bid on. (Tr. 35, 76, 94-95.) Therefore, the record evidence establishes that Respondent would have proven at arbitration that the Employer's past practice was unequivocal.

b. The Employer's Past Practice Was Clearly Enunciated In The Contract And Acted Upon By The Employer

As found by the judge, Article 48 of the contract provides for a semiannual bid where Maintenance Department employees have five days to bid on as many positions or shifts as they wish. (ALJD p. 6, lines 18-21, 24-28; GCX 4, 2, p. 40, and 6, p. 1; Tr. 34-37, 43, 109-10, 210.)[8] Employees do not need to complete a separate application or interview for positions. (ALJD p. 8, lines 5-7; Tr. 39, 60, 68-69, 117, 173.) After the bid sheet has been posted for five days, the bid sheet is taken down and the fleet manager posts the new schedule. (ALJD p. 20-21; GCX 4, 5, 6, p. 2; Tr. 35, 38.) For each position or shift on the bid sheet, whichever employee has the most seniority wins the position or shift. (Tr. 35, 94-95, 126.) Under Article 9[9] of the contract, seniority is based on the amount of time the employee has been a full-time employee. (GCX 2, p. 5; Tr. 36.)

Under Article 45,[10] Section 45.7, and Article 48 of the contract, after an employee bids and receives a new position, he/she receives training in that new position for up to 20 days. (ALJD p. 6, lines 14-16, p. 7, lines 8-11; GCX 2, p. 38 and 40.) The contract provides that if during that 20 day probationary period, "the employee is found incapable by the shop foreman of holding the position," he/she reverts to their old position. (ALJD p. 6, lines 14-16, p. 7, lines 8-11; GCX 2, p. 40.) The shop foreman is the Lead Mechanic.[11] (Tr. 210.)

[8] Article 48 of the contract also provides for a vacancy bid, which occurs when a position is open due to a promotion, termination, or resignation. (ALJD p. 6, lines 6-12, 21-22; GCX 2, p. 40; Tr. 25, 67.) The only difference between the vacancy bid and semiannual bid is that the vacancy bid can arise at any time as a position becomes vacant. The semiannual bid has a set time and includes all positions and shifts. (Tr. 67.) The procedural process for the vacancy bid is identical to the semiannual bid. (Tr. 67-68.)

[9] Article 9 of the contract is "Maintenance of Membership." (GCX 2, p. 5.)

[10] Article 45 of the contract is titled "Maintenance Department Performance Pay." (GCX 2, p. 38.)

[11] The Lead Mechanic is a bargaining unit employee under Article 45 titled "Maintenance Department," Section 45.2 of the contract. (GCX 2, p. 38.)

Employer Field Operations Supervisor Howell, Charging Party Jones, and John Moore testified consistently that it is the Employer's practice to provide up to 20 days for training. (ALJD p. 6, lines 14-16, p. 7, lines 8-11; Tr. 80, 165-66, 244.) In addition, Howell testified that the employee had to meet the qualifications of the position within the 20-day time period provided for under the contract. (ALJD p. 6, lines 14-16, p. 7, lines 8-11; Tr. 244-45.) There is no evidence of any Coach Servicer who bid into the C Mechanic position and was deemed not qualified by the Employer, who could not be trained, or who lost the new position. (ALJD p. 8, lines 9-14; Tr. 82, 244-45.)

Although the contract language could be interpreted to mean that qualifications are a consideration *before* the position is awarded, this is not the way the bid process has worked. Instead, a determination of qualifications is made *during* and *after* the 20-day training period. Training for the C Mechanic position lasted one week.[12] (ALJD p. 8, lines 9-14; Tr. 81, 165-66.) John Moore testified that after the one week of training the fleet manager would make a decision on qualifications based on the employee's performance. (Tr. 34-38, 81.)

In Respondent's own position to the Employer set forth in Davis' August 8, 2010 response to the denial of Jones' grievance, Davis cites three articles of the contract that the Employer violated by denying Jones' bid and requiring Jones to submit an employment application. (GCX 8.) The articles cited by Davis are Article 48; Article 45, Section 45.7; and Article 56.[13] (ALJD p. 7, lines 8-11; GCX 8.) Article 56 describes how a party establishes a past practice under the contract. (ALJD p. 7, lines 15-19; GCX 2, p. 42.) More importantly,

[12] There was testimony regarding training one to two years *after* Moore began the C Mechanic position when he was required to take a course taught by an instructor in order to receive a certification. (Tr. 44-45.) This training was required as a result of the Employer's changing its contract to a new tire company, Michelin. (Tr. 46.) The certification required that employees take a course followed by a test they had to pass. (Tr. 45.) However, Quinton Moore and Hamilton (both Coach Servicers who became C Mechanics) failed the test but were allowed to keep their C Mechanic positions without demotion. (GCX 23; Tr. 49-51, 73-74, 245-46.)

[13] This article is untitled. (GCX 2, p. 42.)

Articles 48 and 45, Section 45.7, provide for the requirements under the contract for the changing of positions and qualifications. (ALJD p. 7, lines 8-11; GCX 2, pp. 38, 40.) Article 48 states, "Employees bidding for such positions, upon being deemed qualified by the shop foreman, will be selected on the basis of seniority. If during a reasonable probationary period, not to exceed twenty (20) days, the Employee is found incapable by the shop foreman of holding the position; such Employee shall revert to his former position without loss of seniority." (ALJD p. 6, lines 13-14; GCX 2, p. 40.) Although the language of this article states that employees must first be deemed qualified and then be most senior, the undisputed evidence establishes that this had not been the practice of the Employer. (Tr. 35, 40-41, 74-75, 94-95, 126.)

The record evidence shows that the contract clearly provides the bidding steps which the Employer has always followed, that there is no provision for the additional submission of applications, and that, until July 2010, the Employer had followed that practice. Specifically, the record evidence establishes that the Employer had always awarded the positions based on seniority and then determined qualifications during the probationary period as stated under the contract. Based on the above, Respondent would have proved at arbitration that the past practice was clearly enunciated in the contract and acted upon by the Employer.

c. <u>The Employer's Past Practice Was Readily Ascertainable For A Fixed And Reasonable Period Of Time</u>

The Employer's past practice as established by the record evidence and thoroughly discussed above has existed since at least 2003, when Charging Party Jones began working for the Employer, but in any event no later than 2006, when employee witness John Moore began working for the Employer. (ALJD p. 2, line 28, p. 3, lines 21-23; Tr. 17, 21-24, 35-42, 59-60, 67-69, 73-75, 94-95, 104-05, 126.) That evidence demonstrates that the Employer's past practice for the seven years prior to Jones' 2010 bid was that positions were awarded to bidders based on

seniority only. The only time the Employer failed to follow the past practice was *in this case*. Therefore, the Employer's past practice is readily ascertainable for a fixed and reasonable period of time, throughout the seven years prior to Jones' July 2010 C Mechanic bid.

The record evidence establishes all three factors Respondent would have needed to prove at arbitration. There is no record evidence to the contrary, and therefore Respondent would have met the high beyond a reasonable doubt standard as required under the contract. Having established the three factors required to prove the existence of a past practice beyond a reasonable doubt, Respondent would have prevailed on its past practice theory at arbitration.

4. This Issue Had Not Arisen Or Been Grieved Before

Finally, the judge stated that determining the probability of success of Jones' grievance was made more difficult because he did not have evidence of prior arbitration awards involving the contractual provisions at issue in this case. (ALJD p. 14, lines 38-42.) However, there is no record evidence regarding arbitration decisions or awards, because, as John Moore testified, the Employer has never failed to honor seniority, before Charging Party Jones' situation. (Tr. 40-41.) If any such evidence existed and was favorable to Respondent in this case, Respondent would have surely offered it into evidence.

Instead, evidence which would instruct the judge as to the meaning and application of Articles 7.1 and 48 was presented by General Counsel in the form of testimony and documentary evidence of the Employer's past practice with regard to how the Employer determined which bidder was awarded the position, all of which was unrebutted by Respondent. That evidence consistently showed that employees were selected for positions based on seniority only, and that at no time before July 2010 was a current employee denied his bid or an outside employee hired to fill a position for which a current employee had bid. Had such an example existed, surely

Respondent would have known about it and testified to it, as such testimony would help its case. Respondent failed to do so. *Flexsteel Industries*, 316 NLRB 745, 758 (1995), enforced *NLRB v. Flexsteel Industry*, 83 F.3d 419 (5th Cir. 1996) (failure to examine a favorable witness regarding any factual issue upon which that witness would likely have knowledge gives rise to the "*strongest possible adverse inference against Respondent*" regarding any such fact, emphasis added).

B. If The Arbitrator Determined That No Past Practice Existed, Respondent Still Would Have Prevailed

Even if an arbitrator did not find a past practice, Respondent still would have prevailed because the Employer's stated reasons for denying Charging Party Jones' July 2010 C Mechanic bid were false, as discussed below. To succeed on this theory, Respondent does not have to prove past practice and therefore does not have to meet the beyond a reasonable doubt standard. General Counsel must simply prove by a preponderance of the evidence that Respondent would have succeeded on this second theory at arbitration.

1. The Employer Denied Jones' Bid For Two False Reasons

The judge stated that he had difficulty determining the probability of the success of Jones' grievance in part because he did not have "a full and complete account of why management decided that neither Jones nor the other two coach servicers who bid for the C Mechanic position were qualified (sic)." (ALJD p. 5, lines 14-16, 18-20, p. 14, lines 42-44.) However, this section will demonstrate that in fact the record evidence sufficiently establishes that the Employer had only two reasons for not selecting Jones for the C Mechanic position, neither of which would have prevailed had the grievance been arbitrated. Therefore, the judge's conclusion is in error.

Two Employer documents set forth the reasons that the Employer relied on in denying Jones' July 2010 C Mechanic bid. Those documents are fully corroborated by and consistent with the testimony regarding the reasons why the bid was denied. The reasons are: (1) lack of notice and time to train; and (2) Jones' lack of prior experience.

In Employer Vice President Doherty's August 17, 2010 response to Davis' appeal of the denial of Jones' grievance and Doherty's November 17, 2010 response to Davis' information request, the Employer states its reasons for denying Jones' bid. Both documents explicitly state that the Employer had two reasons for not awarding Jones the C Mechanic position. (GCX 9; 16, p. 1.) Doherty's August 17, 2010 letter states, "This decision was based on Mr. Jones previous work history and experience. It was also based on the amount of time needed to train a new person in the position vacated by another union employee." (GCX 9.)

These two reasons were reiterated in Doherty's November 17, 2010 information request response, which states that the Employer did not know they would have an opening for the "C-mechanic/tire position" until the bid came down, "We had no forewarning of this occurring and could not plan for it." (GCX 16, p. 1.) Doherty goes on to say that the three employees who bid on the position were asked to fill out applications and the Employer conducted interviews. (GCX 16, p. 1.) Then, after receiving the applications, "It was at this time that we found that none of the employees had any experience with tire services, the minimum requirements for the job. We were also told by Mr. Moore, who bid out of this position, that his school was going to start within several weeks and he would not be able to work in that position when it did." (GCX 16, p. 1.)

Doherty's November 17, 2010 information request response letter to Davis is especially significant because at the time the letter was sent to Respondent, the Employer had already been

notified over one month before of Respondent's intent to take the grievance to arbitration. (GCX 11, 16.) As Employer Field Operations Supervisor Howell testified, during this time he would attend weekly meetings with Doherty and other managers to update them on grievance and arbitration processing. (Tr. 208-09.) Doherty would have known that his response to Respondent's information request could be used against the Employer at the arbitration.

In addition, Jones testified about his conversations with Employer Managers Fritsch and Doherty regarding the reasons he did not receive the bid. He testified that these same two reasons were provided by Fritsch and Doherty in July 2010 when he was asked to complete an application and explained to them that the Employer's past practice had always been seniority only. (ALJD p. 8, lines 16-21; Tr. 114-122.) Davis also testified, consistent with Jones, that around December 2010, in a phone conversation regarding Jones' grievance, Doherty provided these same reasons. (ALJD p. 11, lines 5-9; Tr. 297.) The testimony of Davis and Jones is consistent with the Employer's documents.

All of the record evidence establishes that the Employer denied Jones' bid for the reasons repeatedly advanced by Doherty, i.e., that the Employer was pressed for time in filling the C Mechanic position and did not have time to train an employee and that Jones lacked experience. (ALJD p. 8, lines 16-21, p. 11, line 5.) Both of the Employer's proffered reasons are demonstrably false, as demonstrated below.

a. Lack Of Notice And Time To Train

The evidence establishes that the proffered reasons were false. First, the evidence establishes that the Employer knew that John Moore would not be bidding on the C Mechanic position two weeks prior to the semiannual bid. (Tr. 61-66.) The evidence clearly establishes that the bid closed on July 14, 2010, and that the new schedule was posted on July 18, 2010.

(ALJD p. 7, lines 39-40, p. 8, line 31; GCX 4 and 5.) John Moore testified that two weeks prior to the July 2010 semiannual bid, he had a conversation with Doherty in Doherty's office. (Tr. 61-64.) John Moore described the work he had performed as a C Mechanic, how long he had held the position, and how well he performed the responsibilities of the job. (Tr. 65-66.) Doherty agreed with John Moore, and John Moore then stated that he felt he deserved a raise. (Tr. 66.) Doherty responded that while he agreed John Moore was doing well in the position, Doherty did not have the funds to provide John Moore with a raise, but "maybe in the future." (Tr. 66.) John Moore then told Doherty that if he would not be receiving the raise, he would go back to school and bid back to a lower position. (Tr. 59, 66.)[14] Thus, the Employer knew two weeks before the bid process began that employee John Moore would not be bidding on the C Mechanic position.

Moreover, the semiannual bid process itself provides uncertainty every six months, since employees get to have a say in their own schedule or position based on their seniority by bidding every six months. (ALJD p. 6, lines 18-21; GCX 2, p. 40; Tr. 34-38, 40-41, 94-95, 210.) Thus, inherent in the collective bargaining agreement is uncertainty as to which employees will bid on which jobs.

Perhaps most significantly, the employee actually hired off the street in lieu of Jones (Masanz) did not start until August 9, 2010—over 20 days after the new schedule began on July 18, 2010. (ALJD p. 8, lines 35-37; GCX 4, 5, 18, 16, p. 1; Tr. 107, 163.) Under the contract and the Employer's past practice, had Charging Party Jones been awarded the position and provided up to a 20 day probationary period to perform the duties of the C Mechanic position, the full 20-day training period would have elapsed even prior to Masanz's start date of August 9, 2010.

[14] Although Moore did not request a certain amount of money for a raise, Moore was making around $13.80 per hour, but in any event less than $15.00 per hour. (Tr. 66-67.)

(ALJD p. 6, lines 14-16, p. 7, lines 9-13, 35-37; GCX 40 , 2, p. 38; Tr. 43-45, 71-72, 80-82, 165-66, 244-45.) *None of this evidence is rebutted by Respondent.*

In addition, and importantly, Masanz received the same one-week training as all prior employees to receive the C Mechanic position. (ALJD p. 8, lines 35-37; Tr. 71-72, 43-45, 164-66.) The record is devoid of any additional skills or qualifications possessed by Masanz, compared to Charging Party Jones.

The documents and testimony provided by General Counsel establish two key facts. First, the Employer had prior forewarning that John Moore would not be staying in the C Mechanic position and they would likely have to train a new employee. (Tr. 61-66.) Second, from July 18, 2010 until August 9, 2010, the Employer had more than enough time to award Jones the position; provide him with the one week of training; and monitor his performance in the C Mechanic position for up to 20 days, in accordance with its well-established past practice and contractual provisions. Therefore, General Counsel has established that the Employer's first proffered reason for denying Jones the C Mechanic position, that it was pressed for time, is false. This fact would cut against the Employer in an arbitration.

b. Lack Of Prior Experience

Moreover, even if an arbitrator were to take the view that some experience was required prior to receiving the position (by finding no past practice), Jones still would have won his grievance, as he had prior relevant experience. Thus, as demonstrated below, Jones possessed all of the qualifications for the C Mechanic position as required by the contract and the Employer's past practice.

Jones lifted tires as part of his position as a Coach Servicer when the tires were delivered to the Employer every other week. (Tr. 78, 164-65.) He also assisted John Moore with rolling

tires into the shop and, in his role as a Coach Servicer, performed physical duties, including using a heavy washer machine. (ALJD p. 7, lines 30-31; Tr. 78, 105, 165.)

With respect to the experience issue, in the "Skills/Additional Training" section of Jones' employment application, it clearly shows that Jones had prior relevant work history at a truck stop, where he assisted with tire repair and routinely lifted heavy tires and rims. (GCX 17, p. 4.) Jones testified that Fleet Manager Fritsch, Jones' direct supervisor, wrote "Good" next to his skills and additional training section where this information is contained on his application. (GCX 17, p. 4; Tr. 115.) Despite Charging Party Jones' prior relevant experience his bid was denied whereas John Moore received the C Mechanic position even though he had no prior experience or certifications. (Tr. 39, 71.)

John Moore, who was a C Mechanic for over one-and-a-half years and trained Masanz, testified that he believes Jones is qualified and could do the heavy lifting required by the position. (Tr. 71, 77.) He testified that his assessment of Jones' qualifications was based on his experience with Jones assisting him and observing Jones perform other physical labor in Jones' Coach Servicer position. (Tr. 78-79.) Further, John Moore testified that the physical demands of the C Mechanic position are only moderately more taxing than those of the Coach Servicer position. (ALJD p. 7, lines 32-34; Tr. 80.) Moreover, John Moore testified that no supervisor or manager of the Employer ever expressed any concerns to him regarding Jones or his abilities. (Tr. 80, 98.)

Most critically, Employer Vice President Doherty's statements that Jones had no experience, contradicts the information provided by Jones on his application that he had prior relevant work history and could perform the physical demands of the position, as well as Fritsch's notes that his experience is "Good." (GCX 17, p. 4; Tr. 115.) Doherty's statements

also contradict the Employer's past practice and Howell's testimony that the employees had to meet the qualifications within the 20-day time period provided under the contract. (Tr. 35, 94, 95, 126, 245.)

In sum, Jones was the most senior employee who bid, had prior relevant experience, and he had the ability to perform the physical demands of the position. (ALJD p. 7, lines 34-38; GCX 17, p. 4; Tr. 39, 41, 71, 77-78, 105, 114, 164-65, 279.) Even under Doherty's new requirement, that employees have related work experience, Jones is qualified for the C Mechanic position because he had worked at a truck stop where he assisted with tire repair and routinely lifted tires and rims, and he should have received the position. (GCX 17, p. 4.) All of these facts would cut against the Employer at arbitration. Therefore, the record evidence establishes that Respondent would have won on the merits of the grievance at arbitration under either the past practice theory or the experience theory pursued by the Employer. The General Counsel has proven by a preponderance of the evidence that Respondent would have won on the merits of the grievance at arbitration had it not arbitrarily mishandled Jones' grievance.

2. The Employer Had No Other Reason For Denying Jones' Bid

There is no evidence that suggests that the Employer had any other reasons for denying Jones' C Mechanic bid. The judge states that he did "not know the precise reasons why management determined that applications were necessary for the C Mechanic position in July, why they deemed Jones and the two other coach servicers who bid on the C Mechanic position unqualified to perform the work . . ." and needed the full and complete reasons that the Employer denied Jones' bid in order to make a decision on whether Respondent would have won at arbitration. (ALJD p. 5, lines 18-22, p. 11, lines 5-9.) However, the judge had the full and complete reasons provided directly by the Employer in its own written responses to

Respondent's appeal of the grievance and Respondent's subsequent information request. (GCX 9, 16, p. 1.)

In addition, the judge had the additional unrebutted testimony of Davis and Jones, which corroborated the statements of the Employer in the documents. (ALJD p. 8, lines 16-21, p. 11, lines 5-9; Tr. 114-122, 297.) The Employer consistently provided only these two reasons for denying Jones' bid–in the days before denying Jones bid, in the months after the filing of the grievance, and in response to Respondent's information requests after Respondent's appeal to arbitration. (ALJD p. 8, lines 16-21, p. 11, lines 5-9; GCX 9, 16; Tr. 114-122, 297.) Further, the Employer had never required employees to fill out an application when bidding on the C Mechanic position. (ALJD p. 8, lines 1-7; Tr. 39, 60, 68-69, 115-17, 119, 173-74.) Again, Doherty and Fritsch were new managers and were unfamiliar with the Employer's past practice. (ALJD p. 8, lines 1, 18-19; Tr. 27, 30-32, 120-21.) There is no reason to believe, nor does the record establish, that the Employer's proffered reasons for denying Jones' bid were incomplete or inaccurate or that any other reason existed.

IV. CONCLUSION AND REQUESTED RELIEF

When General Counsel has proven that a union has breached its duty of fair representation by improperly processing a meritorious grievance against the employer, the liability for the violation is apportioned between the employer and the union. *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967); see also *Del Costello v. Teamsters*, 462 U.S. 151, 168 (1983); *California Iron Workers*, 326 NLRB at 378 (applying *Vaca v. Sipes* to NLRB remedies). The apportionment of the damages to the employee is based on the fault of each party, where the employer is liable for damages attributed solely to its breach of the contract and the union is

liable for "increases in any of those damages" caused by the union's failure to properly process the grievance. *Vaca v. Sipes*, at 197-98.

In this case, Respondent is liable for the increase in damages caused by its failure to properly process Jones' grievance. Respondent's failure to request a Federal Mediation Conciliation Service ("FMCS") panel within the 30-day time limit and arbitrate Jones' grievance caused him to sustain damages in the form of lost wages. Respondent is liable for the damages from shortly after Howell notified Respondent by letter dated October 25, 2010, that the Employer had not received an FMCS panel for Jones' grievance until Jones' termination on May 19, 2012. These damages are the result of the difference between what Jones earned as a Coach Servicer during that time and what he would have earned as a C Mechanic, calculated using standard Board formulas. Any dispute as to the amount of damages can be handled in the compliance stage of this proceeding.

As found by the judge, Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, by arbitrarily failing to request an FMCS panel and arbitrarily misleading Jones. (ALJD p. 13, lines 38-40, p. 14, lines 1-5, p. 15, lines 28-32.) Based on all of the above, General Counsel respectfully requests that each of the allegations included in the complaint be sustained. Accordingly, General Counsel requests that an appropriate Notice to Members and Employees be issued to remedy Respondent's violations of the Act,[15] and that an order be issued requiring that the Notice to Members and Employees be mailed to all bargaining unit members and placed in Respondent's newsletter. These special remedies are particularly important in this case, where Respondent's bargaining unit employees are spread over several states. Finally, General Counsel requests that an order be issued making Charging Party Raymond Jones whole for the increased damages caused by Respondent's breach of its duty of fair representation.

[15] Attached as Appendix A is a proposed Notice to Employees and Members.

Dated: May 2, 2013

Respectfully submitted,

/s/ Chinyere C. Ohaeri

_____

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Appendix A

PROPOSED NOTICE TO MEMBERS AND EMPLOYEES

As you may know, Raymond Jones filed a charge with the National Labor Relations Board, alleging that we have violated the National Labor Relations Act. As a result of that charge, we have been ordered to post this notice by the National Labor Relations Board.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT arbitrarily fail to timely request arbitration panels from the Federal Mediation Conciliation Service (FMCS), pursuant to the terms of our collective-bargaining agreement with Jefferson Partners L.P., and thereby cause forfeiture of members' grievances, as we did with Raymond Jones' grievance of July 23, 2010.

WE WILL NOT mislead members into believing that their grievances are still pending in the arbitration process when they are not, as we did to Raymond Jones.

WE WILL timely request arbitration panels from the FMCS for members' grievances pursuant to the terms of our collective-bargaining agreement with Jefferson Partners L.P.

WE WILL ask Jefferson Partners, L.P. to hear the grievance of Raymond Jones and if they agree **WE WILL** promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence and **WE WILL** properly handle the grievance.

Raymond Jones may have a lawyer at any grievance meeting or arbitration and **WE WILL** pay the reasonable fees of the lawyer.

In the event Jefferson Lines L.P. or an arbitrator refuses to reinstate the grievance of Raymond Jones, **WE WILL** make Raymond Jones whole for the wages and other benefits he lost because we failed to properly handle his grievance.

AMALGAMATED TRANSIT UNION
LOCAL NO. 1498
(Labor Organization)

Dated: _____ **By:** _____
(Representative) (Title)

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Exception on Behalf of the Acting General Counsel and the Brief in Support of Exceptions on Behalf of the Acting General Counsel were filed via e-filing and served on May 2, 2013, by the methods indicated, on the parties whose names and addresses appear below.

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/s/ Chinyere C. Ohaeri

_____

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