

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRINK'S, INC.

and

FEDERATION OF ARMORED CAR WORKERS

Case 29-CA-097556

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

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I. PROCEDURAL HISTORY OF THE CASE

On January 18, 2013, Federation of Armored Car Workers, a labor organization (herein called the Union), filed an unfair labor practice charge against Brink's, Incorporated (herein called Respondent) in Case No. 29-CA-097556 alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (herein called the Act) by suspending and discharging employee Marvin Francis because of his support for and activities on behalf of the Union. (GC Exh. 1(A))¹

On April 11, 2013, following a merit determination on the allegations made in the charge, the Acting Regional Director for Region 29 of the National Labor Relations Board (herein called the Board) issued a Complaint and Notice of Hearing in Case No. 29-CA-097556 (herein called the Complaint). (GC Exh. 1(C)) The Complaint alleges, *inter alia*, that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging its employee Marvin Francis because of his support for and activities on behalf of the Union. (*Id.*) On April 23, 2013, the Regional Director for Region 29 of the Board issued an Amendment to Complaint and Notice of Hearing, adding an allegation that Respondent failed to reinstate or offer to reinstate Francis to his former position of employment. (GC Exh. 1(E))

The case was heard before Administrative Law Judge, Margaret Guill Brakebusch (herein called the ALJ) on July 16 and 17, August 26, and September 10 through 12, 2013. (Tr. 1, 207, 357, 442, 637, 756) The ALJ issued her Decision on November 25, 2013, dismissing the Complaint in its entirety.

¹ References to the official record of the hearing are abbreviated as follows: "GC Exh." denotes General Counsel's exhibits. "Resp. Exh." denotes to Respondent's exhibits. "Joint Exh." denotes joint exhibits. Citations to the Transcript will appear "Tr. ___," with numbers specifying the particular the page(s) cited in the transcript. References to the ALJ's decision are denoted as "ALJD ___:___" denotes references to the Administrative Law Judge's decision, with numbers specifying the page(s) and line(s) cited.

II. FACTS

A. Respondent's Business and Operations

Respondent operates an armored car transportation service from its facility in Brooklyn, New York (herein called the Brooklyn Branch), specializing in the pickup and delivery of cash and other valuables for its customers. (Tr. 453-54) The Brooklyn Branch is a highly secured facility that is monitored vigilantly by over 300 surveillance cameras placed throughout the premises. (Tr. 459)

Respondent's Cash-In-Transit department facilitates the pickup and delivery of cash and valuables, which Respondent calls liabilities. (Tr. 54; 453) Drivers and Messengers who work in the Cash-In-Transit department make pickups and deliveries to various customers, servicing automated teller machines (herein called ATMs) and other devices called CompuSafes.² (Tr. 455-56) Respondent employs approximately 150 Drivers and Messengers. (Tr. 454-55, 552)

Drivers and Messengers are supervised by a group of Route Logistics supervisors. (Tr. 299) The Route Logistics supervisors report to Senior Route Logistics Manager Garth Young. (Tr. 301, 569-570) At all relevant times, Young was supervised by Strategic Market Director Michael Foreman, who was in charge of overseeing all operations at the Brooklyn Branch. (Tr. 450-51) Bryan Rosenthal is Respondent's Senior Human Resources Director for the Northeast Region and oversees human resources and employee relations at the Brooklyn Branch. (Tr. 715) Foreman, Young and Rosenthal are all supervisors and agents of Respondent, as defined by the Act. (Joint Exh. 1)

Drivers and Messengers work together in crews making stops at various customer locations to pick up and/or drop off items or liabilities. (Tr. 462) Respondent's armed Drivers and Messengers run these pickup/delivery routes in armored trucks. (Tr. 49, 216, 455) On most routes, the crew consists of one Messenger and one Driver, but for routes that carry especially high-value liabilities, Respondent assigns two Messengers to work the route with the Driver. (Tr.

² CompuSafes are used by Respondent's retail customers to store and automatically track their cash receipts from sales and transmit information to financial institutions about anticipated deposits into the customers' bank accounts. (Tr. 455-56)

455) On routes performed by two Messengers, one is assigned as Lead Messenger, Main Messenger, or Messenger-in-Charge, while the other serves as Assistant Messenger. (*Id.*; Tr. 52)

Before setting out on an assigned route, the Messenger in charge collects labeled bags of liabilities for that route from inside a cage kept on the platform within the Brooklyn Branch. (Tr. 52, 88) The platform is the main work area for Messengers, where employees prepare the items for shipment and return items picked up during the routes. (Tr. 52, 88) The Messenger has no role in putting the cash in the bag or counting the cash to be delivered. (Tr. 67) Also on the platform, the Lead Messenger obtains certain forms that the Messengers and Drivers are required to fill out along the route, such as the Guide Sheet. (Tr. 52-54) The Driver is responsible for filling out the Guide Sheet, which contains information about the route and includes the names of each crew member working that route. (Tr. 61, 483-84) The SL-1 form, also included in each of the sealed bags containing liabilities, is used to record the servicing of each ATM replenished with cash by Respondent's Messengers. (Tr. 68-9, 80) SL-1 forms are typically filled out by the Messenger who services the ATM, although Respondent permits Drivers to fill out SL-1 forms in certain situations. (Tr. 68-9, 83, 587-88) The SL-1 forms contain the pre-printed name of the Messenger usually assigned to the route, but that assignment is subject to change, so if the Messenger who is actually servicing the ATM is not the one whose name is pre-printed, he/she must cross out the pre-printed name and write in his/her own name. (Tr. 83, 693-94)

After the route crew has finished servicing the ATMs and CompuSafes and has returned to the Brooklyn Branch, the Messengers unload the liabilities from the route and place them inside a container on the platform. (Tr. 88-98, 466) Messengers must wait for another employee – usually a Vault Clerk or Night Loader – to “check them off” by verifying the number of items being returned to the Branch. The Vault Clerk or Night Loader then assumes possession and control over the liabilities from the Messenger. (*Id.*) After checking off, the Messenger has no further involvement with or responsibility for the liabilities that have been returned to the Branch. (Tr. 90)

The liabilities returned to the Branch by the Messengers are then transferred to the Cash Room, where tellers inspect the contents of the bags, physically count the cash inside the bag and compare the amount of cash in the bag to the amount that should be there according to the receipts taken from the ATMs. (Tr. 469-70, 644-45) If the amounts listed on the receipts do not match the amount of cash, then Respondent considers this a “variance.” (*Id.*) If a variance is identified, a Cash Room teller notifies a clerk from Respondent’s Reconciliation department, and that clerk almost immediately reports the variance (i.e., within a few hours) to Strategic Market Director Foreman, Senior Route Logistics Manager Young and the Route Logistics supervisors. (*Id.*, 312-13, 695) Respondent then assigns a Reconciliation clerk to investigate the discrepancy.

The Reconciliation clerk performs a number of tasks to try to account for the missing funds. The Reconciliation clerk checks the Guide Sheets to ascertain who was on the route crew that returned the variance and who was on the crew on the last day Respondent serviced the ATM involved. (Tr. 645, 704) The Reconciliation clerk further examines the relevant SL-1 forms to try to determine which Messenger on the route actually serviced the particular ATM in question on the day of the variance and on the prior service day. (*Id.*)

The Reconciliation clerk also requests a Route Logistics supervisor to physically inspect the ATM involved and fine count the money inside the ATM safe and compare it to the receipts. This typically takes place within 48 hours after the variance is discovered. (Tr. 313-14, 645) In addition, Reconciliation clerks generate a lock audit for the ATM at issue, which is a report showing a history of who opened the ATM safe and when. (Tr. 646) Like the fine count, Respondent usually performs the lock audit within 24 hours of the discovery of the variance. (Tr. 708) If none of the foregoing steps produced an answer as to why there was a variance, a Reconciliation clerk or a supervisor reviews video from the numerous surveillance cameras throughout the Brooklyn Branch to try to detect any unusual activity that may suggest a possible cause of the variance. (Tr. 314-15, 646-47) Once again, Respondent performs this video review within a matter of days of detecting a variance. (Tr. 315)

If, after performing the investigatory tasks described above, the Reconciliation clerk cannot account for the variance, then Respondent considers it a true variance, a loss or a shortage. (Tr. 314, 649) In the event of a true variance, Respondent is obligated to compensate the customer whose funds were lost. (Tr. 494, 649) In cases where Respondent sustains a particularly large loss, it assigns Regional Security Manager Michael Buckley, who is based in Massachusetts, to come to Brooklyn and conduct further investigation into the causes of the loss. (Tr. 494, 763-64)

One particular route regularly run by Respondent's Messengers, Route 14 or the Casino Route, is of special significance in the present case. Respondent serviced the ATMs of its customer, Global Cash Access, Inc. (herein called Global), which operates a number of ATMs located within the Resorts World Casino in Queens, New York (herein called the Casino). (Tr. 60-61, 476)

Respondent assigned two Messengers and one Driver to run the Casino Route. (Tr. 584-85) Respondent assigned a particular group of employees to the Casino Route on a regular basis, including Marvin Francis, Jerry Lewis, Anthony Maysonet, and Ruben Corchado as Messengers, and Crispolo Olivera as Driver. (Tr. 59) The evidence establishes that the Messengers who Respondent regularly assigned to the Casino Route were more highly skilled than other Messengers and that Respondent specifically chose them because of their elevated skill levels. (Tr. 616)

Work on the Casino Route called for servicing between 24 and 30 different ATMs within the Casino. (Tr. 85) The Messengers on the route split the work amongst themselves, with one Messenger servicing some ATMs and the other Messenger simultaneously servicing other machines, in no particular order. (*Id.*) Because the truck is left at a secured location within the Casino, the Driver was permitted to leave the truck unattended and accompany the Messengers into the Casino to help service the ATMs. (Tr. 586-87)

B. Francis' Employment History with Respondent

Marvin Francis began his employment with Respondent at the Brooklyn Branch in January 2008. (Tr. 44, 46-47) He was initially hired as an ATM Technician specializing in the technical

maintenance of ATMs. (Tr. 45-6) Francis worked as an ATM Technician for Respondent until about April 2008, when Respondent ceased providing ATM technical maintenance from the Brooklyn Branch. (Tr. 47) Francis continued his employment with Respondent, briefly serving as a Driver before becoming a Messenger. (Tr. 48-9) He held the position of Messenger until his termination in January 2013. (GC Ex. 19(b).)

Francis' experience made him a valuable asset for Respondent. As a Messenger, he used his knowledge about and skill working with various types of ATMs, which he gained through his years of work as a technician. (Tr. 51, 463) Because of his abilities, Respondent gave Francis special assignments, including regular shifts on the Casino Route and another special route called the 901 Route. (Tr. 62, 302) The 901 Route was unique in that, unlike other routes, it had few predetermined stops; instead, most of that crew's time was devoted to performing emergency stops at various customer locations and assisting other crews with problems they had in the field. (Tr. 62, 302, 571) Only the best Messengers were assigned to work the 901 Route, and Francis was one out of just three Messengers to whom Respondent regularly entrusted with this assignment. (Tr. 61-3, 302, 556)

Before his suspension and termination in January 2103, Francis was disciplined by Respondent only once for tardiness in March or April 2012. (Tr. 317-18) It is undisputed that Francis quickly corrected the problem. (*Id.*) The only other issue concerning Francis' job performance occurred on July 16, 2011 and involved a missing CompuSafe that contained a customer's cash. (Tr. 158, 481-82, 484) On July 16, 2011, after returning to the Brooklyn Branch after picking up a CompuSafe, supervisor Jaime Cespedes sent Francis on an emergency assignment. (*Id.*) Francis explained to Cespedes that Francis had not finished documenting the items picked up from his own route, but Cespedes insisted that Francis leave the Branch right away and told him not to worry about completing the paperwork. (*Id.*) Francis left the Branch as directed and had no further involvement with the CompuSafe or the other liabilities collected during the route. (Tr. 161-62) Cespedes and the Assistant Messenger on Francis' route that day,

Rantana Oum, failed to document the CompuSafe, and Respondent lost track of the CompuSafe, resulting in a loss of over \$30,000. (Tr. 158-60, 773-76)

Francis learned of the loss approximately two weeks later when Respondent brought Regional Security Manager Michael Buckley to the Brooklyn Branch on August 4, 2011 to conduct an investigation. (Tr. 162, 773) Buckley reviewed extensive surveillance video and interviewed multiple employees who may have had access to the CompuSafe, including not only Francis and his Assistant Messenger during the route in question, but also the Driver from that route, the Messengers who were on the next crew to use the truck from the route and managers Michael Foreman and Garth Young. (Tr. 773, 824-25; GC Ex. 29 pp. 40-54) Buckley's investigation did not reveal what happened to the missing CompuSafe. (Tr. 773) Buckley concluded that both Francis and Assistant Messenger Oum had erred in handling the CompuSafe, contributing to the loss. (Tr. 537-38; GC Ex. 30) Respondent did not at any time suspect Francis of theft. (*Id.*)

Respondent did not discipline Francis for his role in the loss incurred because of the misplaced CompuSafe. Furthermore, Respondent acknowledges that it did not rely on the 2011 CompuSafe incident as part of the basis for Francis' termination.³ (Tr. 200; 562) In discussing the incident with Francis, Manager Young told Francis that he knew that Francis did not steal the money from the CompuSafe and that Francis' actions during the incident did not warrant his termination. (Tr. 164, 577-78) Young told Francis that he had vouched for Francis during Respondent's investigation of the incident and that his efforts had saved Francis' job. (Tr. 164, 578) Respondent did not consider Young's discussion with Francis about the incident as a disciplinary warning, and there is no documentation of the conversation in Francis' personnel file. (Tr. 535-36, 604; GC Ex. 28 (showing no disciplines issued to Francis))

³ There is evidence in the record that Michael Foreman contemplated terminating Francis for his role in the July 2011 misplaced CompuSafe incident. (Tr. 496-97; Resp. Exh. 4) However, Respondent ultimately decided not to terminate Francis for his role in this incident. (Tr. 497-98, 577)

After the 2011 misplaced CompuSafe incident, Francis continued his work unchanged. Respondent continued to entrust Francis with handling its customers' cash and liabilities, and Respondent continued to entrust Francis with its important special assignments, as described above. (Tr. 302; GC Exh. 4, 14) Indeed, prior to the circumstances leading up to his termination in January 2013, Respondent considered Francis to be an excellent employee. (Tr. 302)

C. Francis Leads the Union Organizing Campaign among Respondent's Employees at the Brooklyn Branch

The record establishes that starting in about September 2012, Marvin Francis led a campaign to organize a union at the Brooklyn Branch with a co-worker named Franklin (Frank) Esammason, who worked as a Messenger at the Brink's Global Services branch located near John F. Kennedy International Airport in Queens, New York (herein called the JFK Branch). (Tr. 102-03, 248) Esammason, with JFK Branch colleague Al White, co-founded a labor organization called the Federation of Armored Car Workers. (Tr. 252-53) During the summer of 2012, Esammason told Francis about his plan to form the Union, and Francis was immediately receptive to the idea. (Tr. 261) Francis agreed to lead the effort to form the Union at the Brooklyn Branch, while Esammason and Al White worked on organizing for the Union at the JFK Branch. (Tr. 262)

Starting in about September 2012, Francis began speaking with his co-workers at the Brooklyn Branch to encourage their support for the Union organizing campaign. (Tr. 129) Francis spoke to his co-workers in a variety of locations within the Brooklyn Branch facility, including both work and non-work areas. (*Id.*) In total, Francis spoke with over 80 employees at the Brooklyn Branch about supporting the Union. (Tr. 131)

Throughout his organizing efforts, Francis maintained communication with Esammason. (Tr. 104-05, 262) Esammason's route brought him to the Brooklyn Branch every work day, consistently at around 5:00 or 5:30 p.m., to pick up liabilities to be delivered on his route. (Tr. 250-51) During these stops, Esammason stayed at the Brooklyn Branch, on the platform, for approximately 10-15 minutes. (*Id.*) Each time that Francis and Esammason saw each other there – which occurred between one to three times per week – they spoke about the progress of the

Union organizing. (Tr. 106, 262-63, 534) In addition, from about October through December 2012, Francis met several times with Esammanson, Al White and Union attorney, David Cann at a restaurant in Queens, New York to discuss the progress of the organizing. (Tr. 105, 267)

Esammanson and Francis began distributing Union authorization cards to employees at the Brooklyn Branch. (*Id.*) In about November 2012, Esammason gave Francis authorization cards to distribute to his co-workers in Brooklyn. (*Id.*) Francis began distributing them immediately and continued to do so over the two-month period from about November through December 2012. (Tr. 105, 141, 267) Francis handed out authorization cards to employees in various locations throughout the Brooklyn Branch facility. (Tr. 137-38) In total, Francis collected approximately 40-50 signed authorization cards. (Tr. 140, 273) These cards helped formed the basis of the representation election petition filed by the Union on January 15, 2013. (Tr. 273; Joint Exh. 2)

Francis distributed other Union campaign materials to employees as well. In about October or November 2012, Francis and Esammason began distributing Union flyers to employees outside the parking lot at the Brooklyn Branch. (Tr. 116-17) Standing on the street outside the employee parking lot, Francis distributed Union literature approximately three to five times between October or November 2012 and January 2013. (Tr. 116-18) This activity occurred both in the morning as employees were coming into work and in the evening as employees were leaving work. (Tr. 119)

The last time that Francis distributed Union materials outside the Brooklyn Branch employee parking lot was on the morning of January 17, 2013 – two days after the Union filed its representation petition and the same day that Respondent fired Francis. (Tr. 193-94) On this occasion, Francis came to the parking lot in order to inform co-workers about the upcoming representation election on February 21, 2013, and to encourage them to maintain their support for the Union. (*Id.*; Joint Exh. 2) Manager Young observed Francis engaging in this activity and made a comment to Francis to the effect that it was too cold outside for him to remain standing there. (Tr. 193-94) Francis responded, “Yeah, it’s worth it.” (Tr. 194) Later that day,

Respondent sent Francis a letter notifying him that he had been terminated. (GC Exh. 19(a)-(b) (showing Francis' termination letter postmarked January 17, 2013 at approximately 4 p.m.))

D. Respondent's Knew That Francis Was Involved in Union Organizing

1. Esammason Told Respondent that He Was Organizing a Union

In about September 2012, shortly after Esammason decided to organize Respondent's employees, JFK Branch Manager Tony Turrado and two other management representatives held a meeting at the JFK Branch with employees to discuss rumors about union organizing. (Tr. 256-59) When the management representatives said they had heard rumors that employees were trying to organize a union at the facility, Esammason volunteered that the rumors were true and that he was seeking to organize the Union. (Tr. 259-60)

Word of Esammason's admission that he was trying to organize employees quickly spread from the JFK Branch to the Brooklyn Branch. The evidence establishes that Brooklyn Branch Manager Foreman is a long-time friend of JFK Branch Manager Turrado. The evidence also establishes that Foreman frequently speaks with management personnel from the JFK Branch. (Tr. 531-32) Foreman admitted that he knew that there was an organizing campaign going on at the JFK Branch and that Esammason was involved in it. (Tr. 532-34) News of Union organizing at the JFK Branch created a "buzz" amongst Respondent's employees, and everyone at the Brooklyn Branch began talking about it. (Tr. 532) In fact, Foreman testified that he grew concerned that the Union campaign was "really bleeding into our [Brooklyn] employees." (Tr. 517)

The Union organizing campaign became a frequent topic of discussion among Brooklyn Branch management during their daily managers' meetings. (Tr. 320) The Union was first brought up at the managers' meeting by Foreman in around October or November 2012. (*Id.*) During these discussions, Brooklyn Branch management, including Foreman, Young, Tracy Williams and David Cruz, tried to identify who was involved in the Union organizing campaign. (Tr. 321) The managers at first discussed that Esammason and Al White were primarily behind the campaign at the JFK Branch. (*Id.*) Later, in about December – according to the testimony of

Route Logistics Supervisor Tracy Williams – Respondent’s managers identified Francis as one of the employees helping to form the Union at the Brooklyn Branch.⁴ (*Id.*)

2. Respondent Surveilled Francis Engaging in Union Activity with Esammason

Knowing that Esammason was organizing employees at the JFK Branch and fearing that the organizing campaign was spreading to the Brooklyn Branch, Respondent began to closely monitor Esammason’s activities during his regular visits to the Brooklyn Branch. Prior to the Union organizing campaign, Esammason rarely saw Foreman on the platform during his stops, only once per week or less. (Tr. 263-64) That is because Foreman’s typical practice was to be on the platform in the mornings, overseeing and assisting as the route crews prepare to embark on the day’s routes, and then work inside his office, which is on an entirely different floor of the facility, later in the day when Esammason would typically arrive. (Tr. 100, 566) However, beginning in about September 2012, after Esammason admitted his involvement in the Union campaign to JFK Branch managers, Foreman started to appear on the platform every time that Esammason came to the Brooklyn Branch. (Tr. 263-64) Foreman knew precisely when Esammason was entering the building because every vehicle entering and leaving the facility is closely monitored and controlled by Branch security. (Tr. 264-65) Once the Union campaign was underway, Esammason saw Foreman on the platform monitoring his whereabouts and the employees with whom Esammason was speaking practically every day that Esammason came to the Brooklyn Branch. (Tr. 265)

The evidence shows that Foreman paid particular attention when Esammason spoke with Francis. His increased presence was evident whenever Francis and Esammason got together on the platform to discuss the union campaign. (Tr. 126-27) During these instances, Foreman made eye contact with Francis and sometimes interrupted their conversations, asking if Francis needed someone to check him off and relieve him of the liabilities from his route. (*Id.*)

⁴ In her testimony, Williams differentiated the time when she started to hear about Francis’ union activities and when it was “officially” confirmed that he was a part of the organizing effort. (Tr. 335-36)

Manager Young similarly went out of his way to monitor the interactions between Francis and Esammason after Respondent knew of the Union campaign. Before Respondent became aware of union organizing among its employees, Francis rarely saw Young on the platform. (Tr. 100-01) Rather, Young was usually in his office. (*Id.*) However, after the organizing activity began, Francis noticed Young on the platform whenever Francis and Esammason got together there. (Tr. 120) Like Foreman in these situations, Young would stand at a distance, staring at Francis and Esammason talking on the platform and would occasionally pressure them to end their conversations and continue on with their work. (Tr. 121, 124)

3. Respondent Knew that Francis Was Distributing Union Authorization Cards

The evidence strongly demonstrates that Respondent knew that Francis was distributing Union authorization cards at the Brooklyn Branch shortly after he began doing so in about November 2012. In addition to handing out Union materials outside the employee parking lot, uncontroverted evidence in the record establishes that on December 15, 2012, Francis was approached by a co-worker who asked Francis for a Union card to sign. (Tr. 142-44) Francis reached into his bag to retrieve a card when Garth Young's assistant and Dispatcher, Tameka Grant walked by on her way into the dispatch area near Young's office. (Tr. 141-42) The evidence establishes that Grant and Young were very close friends who frequently discussed work-related matters together. (Tr. 141-42, 301) As Grant walked by Francis, several authorization cards fell out of Francis' bag. (Tr. 143-44) Grant stopped, picked up one of the cards and began to read what it said. Grant looked at the card and then said, "Ooh, I'm telling! You're going to get in trouble." (*Id.*) Grant then immediately proceeded directly into Young's office. (*Id.*) This unrefuted evidence shows that at least as of December 15, Respondent knew that Francis was organizing employees at the Brooklyn Branch.

E. Evidence Establishing Respondent's Animus toward the Union Campaign

Respondent clearly harbored and expressed resentment toward the Union campaign and Francis' involvement in it. For example, when Esammason came to the Brooklyn Branch and distributed Union materials outside of the employee parking lot in November 2012, Senior Human Resources Director Rosenthal and Foreman came out of the building and confronted Esammason. (Tr. 270-72.) Rosenthal told Esammason that he needed to leave the area because he was blocking the gate into the facility. (*Id.*) Esammason, who was not actually blocking the gate, simply told Rosenthal as much and continued distributing Union materials. (*Id.*) Although Respondent permitted Esammason to continue this activity, Rosenthal's confrontation of Esammason and the false accusation that he was blocking the gate show that Respondent disapproved of Esammason's organizing activity and wanted to put a stop to it.

Respondent further demonstrated its animus when it observed Francis outside the employee parking lot advocating for the Union weeks later. On the morning of January 17, 2013 – the day of his discharge – Francis came to the parking lot to inform co-workers about the upcoming representation election and to encourage them to maintain their support for the Union. (Tr. 193-94) Manager Young and Route Logistics supervisor Tracy Williams observed Francis talking to employees that morning. (*Id.*, 325) Later the same day inside the dispatch office, Williams and Young were discussing having seen Francis advocating for the Union outside the parking lot that morning. Williams commented to Young, "Wow, that's a bold move." (Tr. 325) Young responded saying, "Yeah, I know. Francis has a lot of nerve doing something like that after everything I've done for him." (*Id.*) Young did not deny making this statement.

After the Union filed its representation petition on January 15, 2013, Respondent's animus toward the Union became even more apparent. Respondent began holding mandatory "speak out" meetings for Drivers and Messengers at the Brooklyn Branch to discuss the organizing campaign. (Tr. 321-24) Respondent's Human Resources managers and attorneys, who were rarely present at the Branch previously, attended these meetings. (*Id.*) Although Esammason did not attend any speak out meetings at the Brooklyn Branch, he was present for a number of these meetings that

took place at the JFK Branch multiple times per week between late December 2012 or January 2013 and the representation election on February 21, 2013. (Tr. 275-77; Joint Exh. 2) Bryan Rosenthal from the Brooklyn Branch represented Respondent at many of these JFK Branch meetings. (Tr. 276-77) During the mandatory meetings, Respondent derided the Union for being a start-up labor organization that was unqualified to function as the employees' collective-bargaining representative. (*Id.*) Respondent also showed employees videos that portrayed unions in general as ineffective and unresponsive to employees. (Tr. 277-78) Furthermore, Respondent distributed written materials to employees that expressed Respondent's opposition to unions and the Union that Francis and Esammason had formed in particular. (Tr. 274-75)

F. Evidence Relating to Francis' Termination

1. Respondent Initiated a Review of Outstanding Variances

On December 6, 2012, Respondent's variance-tracking computer system (BAMS) generated an automated report showing the Brooklyn Branch's outstanding unresolved variances, which was sent via e-mail to Foreman, Young, Jessica Rosario and two other managers in Respondent's Cash-In-Transit department. (Tr. 501-03; Resp. Exh. 5) Foreman asked the other individuals who received the report to try to determine which variances listed were true shortages. (*Id.*) On December 9, Rosario responded to Foreman's inquiry by sending an e-mail identifying the true variances, which included several shortages from the Global ATMs at the Resorts World Casino, several from a customer called NCR-TD Bank, one from First Republic Bank and one from Citibank. (Tr. 503-05; Resp. Exh. 6)

Foreman took no further action until he received an e-mail on December 18 from Respondent's Northeast Regional Controller indicating that unresolved variances should to be settled by December 31. (Tr. 505-07; Resp. Exh. 7)

2. Respondent Focused its Review on Losses from the Casino Route

Foreman directed Rosario to compile a spreadsheet providing additional information on the outstanding shortages. However, rather than ask for a spreadsheet for all of the unresolved variances, as was Respondent's usual practice, the evidence establishes that Foreman directed

Rosario to create a spreadsheet regarding losses from the Casino only. (Tr. 510, 512-13, 690-91) Rosario testified that she had never previously been asked to prepare such a spreadsheet specific to just one customer. (Tr. 650)

Rosario prepared the spreadsheet containing certain information regarding six shortages originating from ATMs at the Casino, including the name of the Messenger on the date of the loss, the Messenger on the service date before the loss and the amount of the loss. (Resp. Exh. 9) The dates listed on the spreadsheet for the six incidents ranged from March 2 to November 16, 2012. (*Id.*) The amounts of the losses listed in the chart ranged from \$2,200 to \$15,520. (*Id.*)

To identify the Messengers involved in servicing the given ATM on the day in question and the service day prior, Rosario testified that she reviewed the SL-1 forms and Guide Sheets for the routes at issue. (Tr. 650-51) The spreadsheet showed that Francis was the Messenger on the day before and the day of the loss in two of the shortage incidents; Ruben Corchado was the Messenger the day before and day of the loss in one incident; Antonio Maysonet was Messenger the day before and day of the loss in one other incident; and in two others, Francis and either Corchado or Maysonet were the Messengers involved. (*Id.*)

3. Respondent Decided to Terminate Francis on December 26, 2012

On December 26, after receiving the above information from Rosario, Foreman e-mailed Human Resources Director Rosenthal and Vice President of Operations Bill Vechiarella asking Rosenthal to “provide a termination letter for me to present to [Francis] when he returns from vacation.” (Tr. 510-11; Resp. Exh. 8) Even though Antonio Maysonet and Ruben Corchado were identified in Rosario’s spreadsheet as being involved in several of the Casino losses, Foreman did not mention or seek to discipline any other Messenger. (*Id.*) Vechiarella suggested suspending Francis pending an investigation. (*Id.*)

Regional Security Manager Michael Buckley was copied on Foreman’s December 26 e-mail conveying his decision to discharge Francis. (*Id.*) It was the first time that Buckley had heard anything about the losses from the Global ATMs at the Casino. (Tr. 828) Buckley replied on December 28 stating that he would be available to investigate the matter the following week, as

he was already scheduled to be at the Brooklyn Branch in connection with a different investigation. (Resp. Exh. 8; Tr. 782) Rosenthal then decided to suspend Francis until Wednesday, January 3, 2013, when Buckley would interview him. (Resp. Exh. 8)

4. Respondent Suspends Francis on January 3, 2013

While Respondent was orchestrating Francis' suspension, investigation and eventual termination, Francis had been away from work on a scheduled vacation beginning December 17, 2012. (Tr. 144) Even during his vacation, Francis continued to campaign for the Union, appearing on the street outside the Brooklyn Branch to distribute Union materials several times during that period. (Tr. 145-46)

Francis expected to return to work on December 31, so on December 30 he called into the dispatch office to find out which route he was scheduled to work. (Tr. 146-47) No one answered. (*Id.*) Francis tried calling again the next day, and still received no answer. (*Id.*) He tried calling the security guard at the facility, who Francis knew had a copy of the schedule, and the guard told Francis his name was not on the schedule. (*Id.*) Finally, on January 2, 2013, Francis reached his supervisor, Tracy Williams, and Williams told Francis that she did not know why he was off the schedule but that Francis should just come into the Brooklyn Branch for his regular work hours the following day. (*Id.*)

Francis came into work at 6:30 a.m. on January 3. He saw that he was listed on the day's schedule for a route labeled "10:00 Special." (Tr. 148) He did not know what that meant. (*Id.*) Francis approached Foreman in the dispatch office. Foreman was surprised to see him and asked Francis why he was there so early. Francis explained that no one had told him what his schedule was. Foreman told Francis to sit down and wait. (*Id.*) Francis waited in the employee break room until about 9:00 a.m. when Michael Buckley came to him and told Francis to report to the second floor. (Tr. 149-50) Francis went to the second floor of the facility and met Buckley in a conference room. No one else was present. (*Id.*)

5. Buckley Investigated Francis in Connection with the Casino Route Losses and Not Any Other Employees Involved

Upon arriving at the Brooklyn Branch on January 3, Buckley first met with Foreman. Foreman gave Buckley the spreadsheet Jessica Rosario had prepared concerning the Casino losses. (Tr. 834-36) Buckley was immediately surprised at how long ago some of these incidents occurred and questioned why it had taken the Brooklyn Branch so long to investigate them. (*Id.*) Buckley admitted that he used only the spreadsheet as the basis for his interview of Francis and did not review any other documents before the meeting. (*Id.*) He further admitted that he did not know what the information in the spreadsheet was based on (and therefore did not know the quality of that information), nor did he speak with anyone with knowledge about the incidents other than Foreman before meeting with Francis. (Tr. 839)

During their meeting, Buckley asked Francis what he recalled about each of the four Casino loss incidents in question. (Tr. 840-44) Francis said that he needed more information about the incidents, stating that he particularly wanted to see SL-1 forms and Guide Sheets associated with the routes in question in order to better recollect the events and explain what happened. (*Id.*, 166) This was the first time that Francis had heard that these losses were a recurring problem. (Tr. 840-44) Buckley agreed that reviewing the SL-1 forms and Guide Sheets would be helpful in determining what happened, but he did not have them or make them available. (*Id.*)

Buckley nevertheless continued to question Francis about each loss incident. For the June 1, 2012 loss, all that Francis could tell Buckley about that incident, which occurred over six months prior, was that Antonio Maysonet was the Messenger on the Casino Route who usually serviced the ATM from which the loss originated. (Tr. 841-42) For the incident dated November 16, 2012, Francis told Buckley he usually did not handle that ATM either because it tends to give him problems. (Tr. 843-44) For the September 7 and October 8, 2012 incidents, Francis said he could not recall specifics without reference to the SL-1 forms and Guide Sheets, except that Francis said he knew about the September incident because of discussions he previously had about it with Maysonet. (*Id.*)

Francis asserted that he had never before heard about these specific losses from Brooklyn Branch management. (Tr. 846) Francis explained that he had inquired with Reconciliation Clerk Trisha Cuomo about losses at the Casino in about early December 2012, after Garth Young made a vague, general comment to the Casino Route crew that all of the Casino ATMs were showing shortages. (Tr. 151-53, 847) Francis said that Cuomo told him she knew of only one Casino ATM that had a shortage.⁵ (*Id.*) The meeting ended with Buckley advising Francis that he was off the work schedule during the investigation and that Francis should check in with Respondent about what would happen next. (Tr. 189)

After the meeting with Buckley, Francis contacted Union attorney David Cann and told him about what had happened. (Tr. 189-90) In response, Cann faxed a letter to Respondent on January 3 advising that Francis and three other employees, including Esammason and Al White, were part of the Union's organizing committee and requesting that Respondent not retaliate against these employees, and Francis in particular. (GC Exh. 18; Resp. Exh. 10)

Buckley testified that he continued his investigation on January 3, interviewing Reconciliation clerks Cuomo and Jessica Rosario, in addition to Manager Young. (Tr. 790-91, GC Exh. 29 pp. 6, 10-11) Buckley testified that Cuomo told him she recalled Francis asking her about the Casino losses and recalled telling Francis that she had limited knowledge of those cases, but from what she had seen, Cuomo knew of only two losses, and those were then still under investigation. (Tr. 850) When Buckley spoke with Rosario, she told him that she had spoken with Francis and another Messenger about the September 7 loss incident. (Tr. 795) Nothing that Cuomo or Rosario said during their interviews with Buckley was materially different from what Francis told Buckley.

Young, however, testified that he spoke with "all" of the Messengers from the Casino Route about each of the losses from the route whenever he first heard about the variance. (Tr. 603-05) While claiming that he spoke with Francis many times about these issues, Young could provide no specifics about when he spoke with Francis, where these supposed conversations took

⁵ Respondent did not call Cuomo as a witness during the hearing, and Francis' testimony in this regard is unrebutted.

place, how the issue was brought up or what in particular was said. (Tr. 582-83) Moreover, despite his claim of having counseled Francis repeatedly regarding similar recurring incidents, Young took no action, disciplinary or otherwise, as a result. (Tr. 196-97, 604, 621-24) Thus, Young's testimony that he counseled Francis is unsubstantiated by any probative evidence.

The record establishes that Respondent's investigation focused solely on Francis. In that regard, the undisputed evidence establishes that Buckley never interviewed any of the other Messengers or Drivers who worked with Francis on the Casino Route. (GC Exh. 29 pp. 14-16, 20; Tr. 825-27.) Buckley admitted that his failure to interview other Messengers and Drivers was at odds with his usual method of conducting investigations, in which he normally speaks with all individuals who may have had access to missing liabilities. (Tr. 823, 826-27)

Buckley also reviewed the SL-1 forms and Guide Sheets associated with loss incidents in question and discovered that there were several errors in the spreadsheet that Foreman had gave him to use during his interview with Francis regarding which Messengers were involved in the incidents. Buckley made a revised version of the spreadsheet for himself, which showed that Francis had been listed on the original spreadsheet as the Messenger for some of the losses whereas the underlying documents did not bear that out. (Tr. 797-803; Resp. Exh. 34) Despite these deficiencies in the investigation, Buckley concluded that it was Francis who was not being truthful. (Tr. 815)

6. Respondent Terminated Francis on January 17, 2013 without Any Prior Warning or Discipline

On January 17, 2013, Respondent issued a termination letter to Francis signed by Michael Foreman.⁶ (GC Exh. 19(a)-(b)) The termination letter plainly states that Respondent was terminating Francis because of his involvement in four incidents of cash losses, all of which took place in the year 2012. (GC Exh. 19(b); Tr. 561-62) No other alleged misconduct by Francis is cited as grounds for the termination, including the July 2011 missing CompuSafe incident. (*Id.*)

⁶ The letter was sent to Francis via mail, and although it was dated January 16, 2013, the postmark on the envelope in which Francis received the letter indicates that Respondent did not send it until the afternoon of January 17. (Tr. 192-93, 561; GC Exh. 19(a).)

Francis had no prior warning that he may be subject to termination. Before he was suspended and placed under investigation, Respondent never warned, disciplined or even counseled Francis about his handling of cash from the Casino ATMs.⁷ (Tr. 196-97)

G. Respondent's Historical Treatment of Employees Associated with Cash Losses

Under subpoena, Respondent produced a chart summarizing information from every incidence of loss at the Brooklyn Branch for which Respondent had to reimburse its customers during the period from January 1, 2011 to the start of the hearing on July 16, 2013. (Tr. 373; GC Exh. 23) The information on this chart includes the customer's name, the date of the loss, whether the loss originated from an ATM or a CompuSafe, the amount that Respondent had to pay out to reimburse the customer for the loss and the name or names of the employee(s) associated with the loss. (GC Exh. 23(a); Tr. 724) Respondent compiled this information specifically in response to the General Counsel's trial subpoena, and it did not previously keep track of which employees were associated with particular losses. (Tr. 382-83)

Employees whose names are listed on the chart alongside information concerning a loss are those whom Respondent considers to be "associated" with the loss event, meaning that Respondent concluded that the employee had some connection with the liability that was lost. (Tr. 379) Respondent determined the identity of employee(s) associated with a loss by consulting documents indicating the route assignment for the date at issue, such as the Guide Sheet, as well as investigation notes indicating which particular Messenger may have had access to the missing liability. (Tr. 386-87) Respondent listed multiple names of employees alongside a single loss incident entry on the chart when documents in its investigation files showed that several different Messengers handled the lost liability, such as when two different individuals were Lead

⁷ The only notification Francis received from Respondent regarding issues related to the Casino ATMs was in about early December 2012, when Garth Young said over the radio to the entire Casino Route crew that all of the Casino ATMs were returning shortages. (Tr. 151-53) Young's comment, however, was not directed specifically at Francis, nor did it indicate that Francis particularly may be subject to discipline because of the shortages. (*Id.*)

Messenger on the route in question on the day of the loss and the day before the loss.⁸ (Tr. 388-89)

Respondent's chart shows that it incurred a large number of losses in the period between January 1, 2011 and the start of the hearing in this matter on July 16, 2013. (Tr. 384-85) In total, there were 367 loss incidents during this period, or an average of over two and half losses per week. (*Id.*) Yet despite the high volume of losses, Respondent terminated only two employees at the Brooklyn Branch – Ariel Serrano on January 6, 2011 and Jeffrey Diaz on April 9, 2012 – in connection with their involvement in losses during that time span, aside from Marvin Francis.⁹

In addition, the evidence shows that Respondent associated numerous Brooklyn Branch employees with as many or more losses than it associated with Francis at the time of his termination. (Tr. 406) However, Respondent terminated none of these other employees for their involvement in such recurring losses. (Tr. 406-426) Only two employees associated with repeated losses even received so much as a disciplinary warning from Respondent. (Tr. 407-09, 413; GC Exh. 27 (reflecting written warning Respondent issued to Messenger Renee Espinal); Tr. 425-26; GC Exh. 28, p. 1 (reflecting verbal warning Respondent issued to Messenger Ibo Morrison)) Many others received no discipline whatsoever. (Tr. 406-426) Significantly, Respondent associated Antonio Maysonet – the Messenger whose involvement in the same losses that supposedly led to Francis' termination is described above – with as many or more losses than

⁸ It is noteworthy that Respondent's preparation and review of the chart entered into the record as GC Exhibit 23(a) caused it to reconsider whom it deemed associated with two of four the losses for which Francis was terminated. (Tr. 723, 750; Resp. Exh. 26) Respondent introduced into the record a revised version of the chart, which shows that Respondent now associates the Casino losses dated June 1 and October 8, 2012 with both Francis and Messenger Antonio Maysonet, whereas previously Respondent identified only Francis with the loss. (*Id.*) Respondent's conduct in this regard confirms the incomplete and slipshod nature of its original investigation of the Casino losses.

⁹ The record also reflects that Respondent terminated employee Ruddy Mendoza on October 19, 2010 in connection with a loss sustained at the Brooklyn Branch. (Resp. Exh. 30) Respondent further introduced evidence regarding several additional employees from Respondent's branch locations in other parts of the country who were allegedly terminated for their involvement in cash losses. (*Id.*) However, there is no evidence that Respondent's treatment of employees in locations as far removed from the Brooklyn Branch as Petaluma, California is in any way indicative of Respondent's historical treatment of employees at the Brooklyn Branch itself. Therefore, the ALJ correctly disregarded evidence regarding terminations in branches other than the Brooklyn Branch. (Tr. 739-40)

Francis, yet Maysonet received no discipline for his involvement in any cash losses. (Tr. 416; GC Exh. 23(b))

The dollar amounts of the Casino losses for which Francis was terminated were also similar in value to the losses associated with other employees whom Respondent did not discipline. The evidence shows that the Casino loss dated June 1 was in the amount of \$2,900; the loss dated September 7 was \$13,000; the incident on October 8 was \$3,980; and the November 16 variance – for which Respondent never had to reimburse the customer because no claim was ever filed – was determined by Respondent to be in the amount \$5,000. (GC 2(a)-(c); Tr. 672-73, 700) Similarly, the evidence shows that Respondent jointly associated employees “D. Tavares” and “L. Paulino” with a loss of \$9,900, associated Antonio Maysonet with a loss of \$8,875, and associated employee “J. Lewis” with a loss of \$4,120, just to name a few of the comparable losses that went unpunished by Respondent. (Resp. Exh. 27)

III. ARGUMENT

The ALJ Erred By Failing To Find That Respondent Violated Section 8(a)(1) and (3) of The Act By Suspending and Terminating Marvin Francis Because of His Union Activity

A review of the record makes apparent that the ALJ made erroneous, unsupported findings of fact and law that led her to conclude that Respondent did not violate the Act by suspending and then terminating Francis’ employment. After considering all relevant evidence, it is apparent that the ALJ did not make her findings based on an objective review of the entire record, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record. Instead, the Judge ignored relevant probative evidence and circumstances regarding the strength of General Counsel’s prima facie case and regarding critical matters that called into question the likelihood of Respondent’s defense, offered no valid reasons for ignoring such testimony, substituted her own conjecture or speculation for record evidence and simply turned a blind eye to the logical conclusions that must be drawn from the record.

After an objective and thorough review of the record, however, it is clear that a preponderance of all relevant evidence establishes that Respondent suspended and terminated

Francis because of his Union activity. For these reasons, which are fully supported below, General Counsel urges that the ALJ's findings and conclusions must be reversed. See *Fresenius USA Manufacturing, Inc.*, 358 NLRB No. 138 (2012); *Jewel Bakery, Inc.*, 268 NLRB 1326 (1984).

A. The ALJ Erred by Failing to Find that Francis Was a Lead Employee Organizer And Openly Engaged in Union Activity

(Exception Nos. 1-4)

1. The ALJ Disregarded Overwhelming and Unrebutted Evidence that Established Francis Was a Key Union Proponent and Failed to Give Proper Weight to the Evidence of Francis' Active Role in Organizing

The record is replete with evidence that Francis played a key role in union organizing at Respondent's Brooklyn facility. Nevertheless, the ALJ disregarded crucial evidence establishing Francis' union activity and the key role he played in organizing. Disregarding the record evidence, the ALJ erroneously minimized Francis' union activity and found, contrary to the evidence, that Francis' "only" union activity was the signing of his own Union authorization card and "that he talked with other employees about signing cards." (ALJD 22:15-17; 21-23). This conclusion is contrary to the record evidence. A full and fair evaluation of the evidence shows that Francis did much more than that in connection with the Union organizing campaign. The ALJ erred in disregarding the evidence of Francis' union activity.

As detailed above, the evidence clearly established that Francis was the lead organizer for the Union among employees working at the Brooklyn Branch. After learning about the Union organizing campaign from Frank Esammason in about September 2012, Francis actively generated support for the Union amongst his co-workers. (Tr. 129-31) To that end, Francis spoke with over 80 Brooklyn Branch employees about the Union. He discussed the Union with co-workers in a variety of places throughout Respondent's facility, including work areas monitored by Respondent's video surveillance cameras and non-work areas alike. (*Id.*) Francis also solicited

co-workers to sign Union authorization cards, gathering a total of approximately 40-50 signed cards during November and December 2012. (Tr. 140-41; 273)¹⁰ Moreover, on three to five occasions between October and December 2012, Francis, accompanied by Esammason, distributed Union campaign literature to employees on the street outside the Brooklyn Branch facility. (Tr. 116-18; 145)

Francis' testimony regarding his involvement in these activities was corroborated by the testimony of Esammason. Esammason testified that that he gave Francis Union authorization cards to distribute to employees at the Brooklyn Branch in October or early November 2012, and that within two weeks, Francis returned signed cards back to Esammason. (Tr. 266-67; 289) Additionally, Esammason corroborated that, on several occasions from late November 2012 until the representation election in February 2013, Francis joined him in distributing Union literature on the street outside the Brooklyn Branch. (Tr. 269-70, 272-73) Esammason testified that he himself distributed Union literature twice per during this period but did not testify that Francis joined him in this activity every time. (*Id.*)

Thus, although Francis and Esammason could not recall the particular dates on which they engaged in these specific organizing activities, their testimony firmly establishes that Francis openly engaged in union activity during the period from October through December 2012 by distributing Union authorization cards to employees within Respondent's facility and distributing Union literature to employees on the street just outside the facility. Nevertheless, the ALJ completely disregarded the evidence of Francis' union activity and instead focused on minor discrepancies between the two witnesses' estimates concerning the timeframes in which these

¹⁰ While Francis initially estimated that he started soliciting authorization cards "in around November" he later affirmed the statement he made in a Board affidavit given in connection with the investigation of this case that he did not first receive the authorization cards that he would distribute to co-workers until November 30, 2012. (Tr. 131; 224) In any event, undisputed record evidence establishes that over the course of the union organizing campaign, Francis distributed and obtained 40-50 union authorization cards.

events occurred, somehow using these minor discrepancies to as grounds to ignore the overwhelming evidence of Francis' union organizing activity and the integral role that he played.

2. The ALJ Improperly Gave Weight to Minor Discrepancies Between the Testimony of Francis and Esammason Concerning the Timing of Francis' Union Activity

In regard to Francis' solicitation of authorization cards, the ALJ relied on Esammason's testimony that Francis returned signed cards to him in October 2012 and Francis' testimony that he did not first receive the cards until November 2012, to improperly conclude that there was no clear evidence showing when Francis solicited employees to sign the cards. (ALJD 24:24-33) However, despite the minor discrepancy between their estimates of the timing of Francis' solicitation of cards, both witnesses mutually corroborated that Francis engaged in this activity before January 2013, when Respondent suspended and then discharged him. Yet, inexplicably, the ALJ found that the record lacked evidence that Francis engaged in solicitation of cards prior to January 3, 2013, when Union attorney David Cann explicitly notified Respondent that Francis was a member of the Union organizing committee. The ALJ's conclusion is simply not supported by the evidence, as the record is clear that whether Francis solicited cards in October, November or December 2012, the activity certainly predated January 3, 2013.

Similarly, the ALJ disregarded the evidence that Francis distributed Union campaign materials to employees on the street outside Respondent's facility, citing Francis' inability to recall specific dates on which he engaged this activity. (ALJD 23:20-28) The Judge erred by ignoring evidence of Francis' union activity on the grounds that he could not recall the specific dates.

To the extent that the ALJ's failure to credit the evidence establishing Francis' extensive union activity prior to January 3 reflects her assessment of the witnesses' credibility, the Board should not defer to such credibility determinations. While the Board's policy generally is to defer

to the credibility determinations of an administrative law judge, especially those based on demeanor, the policy should not be applied so as to make inviolable the administrative law judge's credibility findings. *Jewel Bakery, supra*, 268 NLRB at 1327 (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950)). Here, the ALJ's failure to credit the testimony establishing Francis' union activity was not based on her assessment of the witnesses' demeanor, but rather was grounded in her misinterpretation of the evidence and giving undue weight to minor, immaterial discrepancies between the testimony of Francis and Esammason regarding the exact timing of Francis' organizing activity.

Further, the ALJ erroneously misstated Esammason's testimony by concluding that Francis assisted Esammason in this activity twice per week until the election in February 2013. (ALJD 23:24-30) As noted above, the record reflects that Esammason's actual testimony on this matter was that Esammason distributed Union materials approximately twice per week from November 2012 until the date of the election and that Francis assisted him in doing so only occasionally. (Tr. 269-70; 272-73) The ALJ relied on her misinterpretation of Esammason's testimony in concluding that "it is more likely that Esammason exaggerated the extent to which Francis attempted to assist him in organizing efforts." (ALJD 23:28-30) Esammason did not exaggerate the extent to which Francis helped him in organizing the Union, and the testimony of these witnesses did not conflict in any material way.

The ALJ also erred by giving undue weight to the slightly varying recollections of Esammason and Francis regarding the estimated dates of Francis' organizing activity. The Board has repeatedly affirmed that such immaterial differences between witness recollections of dates do not impugn the witnesses' credibility. *Marko Contractors*, 275 NLRB 425 (1985) (affirming administrative law judge finding that "an inability to remember precise dates [is] a common failing among witnesses which experience has proven to be, in most instances, insignificant. . .");

Carpenters Local 558 (B & W Contractors), 271 NLRB 1048, 1050 (1984) (affirming finding that witness' testimony was credible, despite "insignificant discrepancy in dates"); *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1107 (1983) (affirming finding that collateral issue did not impact assessment of witness' credibility). The Judge manufactured a credibility dispute where there was none, and used these minor, immaterial discrepancies in Francis and Esammason's recollections to completely negate all record evidence that demonstrates Francis' extensive union activity. Furthermore, the ALJ erred by failing to address at all the fact that both Francis and Esammason's testimony establishes that Francis' open union activity occurred before Respondent was explicitly notified of Francis' position on the Union organizing committee on January 3 and before Respondent terminated him on January 17.

Based on the above, a clear preponderance of the evidence establishes that the ALJ's failure to credit the testimony establishing Francis' substantial union activity was error. Contrary to the ALJ's finding, the probative record evidence establishes that Francis engaged in extensive and open advocacy on behalf of the Union, thereby firmly establishing the first element of a prima facie case of unlawful discrimination in violation of the Act. See *Wright Line, Inc.*, 251 NLRB 1083 (1980).

B. The ALJ Erred in Not Finding that Respondent Had Knowledge of Francis' Union Activity

(Exception Nos. 5-12)

The ALJ's failure to credit the evidence establishing the full extent of Francis' union activity prior to January 3, 2013 led to her further erroneous conclusion that Respondent did not have knowledge of Francis' involvement in the Union organizing campaign before Respondent was explicitly notified of such by the Union's attorney on January 3. The ALJ's analysis of Respondent's knowledge focused widely on her unsupported finding that the record did not establish Francis' open advocacy for the Union before January 3. (ALJD 23-24:10-37) However,

as illustrated above, the evidence shows that Francis did indeed engage in extensive open union activity prior to January 3, providing significant support for the inference of Respondent's knowledge. Furthermore, the ALJ erred by ignoring, without explanation, substantial additional evidence that Respondent knew of Francis' union activity.

The second element of the *Wright Line* analysis requiring the General Counsel to prove Respondent's knowledge of Francis' protected activity may be established by circumstantial evidence, such as "(1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995) (citing *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979)).

The ALJ disregarded significant testimony and other record evidence that, if considered, inescapably leads to the necessary conclusion that Respondent had knowledge of Francis' Union activity well before January 3. First, as explained above, the ALJ erroneously found that prior to January 3, Francis was not an open supporter of the Union and, therefore, there was insufficient evidence of knowledge on the part of Respondent. (ALJD 22:36-37; 26:20-22) In addition, the ALJ minimized or ignored entirely other critical evidence establishing Respondent's knowledge of Francis' union activity well before that date as well.

1. The ALJ Disregarded Evidence and Downplayed Esammason's Connection to Francis and the Union Organizing Campaign

The ALJ erred in disregarding evidence of Respondent's general knowledge of the Union campaign and diminished the evidence of Esammason's collaboration with Francis regarding the Union organizing efforts. Respondent's admitted knowledge of the Union campaign in general, Esammason's lead role in organizing, and his connection to Francis add to General Counsel's establishing knowledge. See *Montgomery Ward & Co.*, 316 NLRB at 1253; *Sears, Roebuck and*

Co., 337 NLRB 443, 450 (2002) (“association of the employee with well-known union activists” provides circumstantial evidence of knowledge).

The ALJ found that there was “no doubt” that Respondent was “probably aware” of Esammason’s activities in support of the Union prior to January 3, 2013, and goes on to state that Respondent only “may have known” that Esammason was organizing a union. (ALJD 22:39-40) This equivocal conclusion improperly ignores the undisputed evidence that Esammason began the Union organizing campaign, and that he explicitly told Respondent so.

Esammason’s unrefuted testimony established that during a September 2012 meeting at the JFK Branch, he told Respondent’s management, including JFK Branch Manager Tony Turrado, that he was seeking to organize a Union. (Tr. 259-60) The ALJ ignored manager Foreman’s testimony that not only is he friends with Turrado and talks with management at the JFK Branch at least once a week, but also that he knew about the organizing campaign at the JFK Branch and that Esammason was involved in it. (Tr. 531-34) In addition to admitting he knew about Esammason and the organizing efforts at the JFK branch, Foreman also testified that he was concerned about the union campaign “bleeding into” employees at the Brooklyn Branch. (Tr. 517) As a result, Foreman and Respondent’s other managers began trying to identify which employees at the Brooklyn Branch may be involved in the organizing campaign. (Tr. 320) The ALJ ignored and simply did not mention or deal with any of this evidence.

Additionally, Francis and Esammason both testified about conversations they had with each other about the organizing campaign in the afternoons inside the Brooklyn facility. (Tr. 119, 263) The ALJ focused on the fact that Francis and Esammason had previously been friendly and concluded that their practice of talking on the platform in the afternoons did not change after the Union campaign began. (ALJD 23:1) However, the ALJ, without explanation, disregarded the

more relevant and critical evidence establishing that *Respondent's* conduct toward Esammason and Francis' conversations changed after the Union organizing began.

In that regard, Francis testified that before the organizing campaign, manager Young rarely, if ever, came to the platform at the Brooklyn Branch during the afternoon hours when Francis and Esammason were present there. (Tr. 100-01) After Respondent became aware of Esammason's efforts to organize Respondent's employees, however, Young began to regularly appear on the platform whenever Esammason came to the Brooklyn Branch. Francis further testified that Young would stare from a distance at him and Esammason while they were talking and occasionally would interrupt their conversations by telling them to stop talking and continue with their work. (Tr. 120-21, 124-25) Prior to the Union organizing campaign, Young never said anything to Francis and Esammason while they were talking on the platform. (Tr. 120-21) The ALJ improperly disregarded this evidence.

The evidence also establishes that if Young didn't come out to the platform when Francis and Esammason were talking about the Union, Foreman would. (Tr. 122) Foreman's presence on the platform at this time of day was also uncharacteristic as compared to his behavior prior to the start of the organizing efforts. (Tr. 125-27, 264-66)

Despite the testimony of both Francis and Esammason about Respondent's coordinated surveillance, the ALJ failed to address in her analysis of Respondent's knowledge the evidence that Foreman and Young's behavior changed in regard to their surveillance and monitoring of Francis and Esammason's conversations. (ALJD 23:2-9) Ignoring this evidence of knowledge, the ALJ instead noted that neither Foreman nor Young observed Francis and Esammason's conversations from a distance close enough to overhear what they were saying. The ALJ's focus however, has no bearing on the analysis of Respondent knowledge. The fact that Foreman and Young might not have heard Francis and Esammason's discussions does not diminish the import

of the evidence that Respondent increased its scrutiny of Francis and Esammason's conduct on the platform. It is well settled Board law that such evidence of Respondent's change in behavior provides strong circumstantial evidence of knowledge, and the ALJ erred by neglecting to consider this evidence and by failing to address relevant Board law. See *Greco & Haines, Inc.*, 306 NLRB 364, 364 (1992).

2. The ALJ Ignored Critical Unrefuted Evidence That Tameka Grant Reported Francis's Activity to Respondent

The un rebutted record evidence established that on December 15, 2012, employee Tameka Grant saw Francis drop Union authorization cards while he was talking with a coworker about the Union. (Tr. 142-43) Grant picked up one of the authorization cards and after looking at it said to Francis, "Ooh, I'm telling. You're going to get in trouble." (*Id.*) Grant then walked directly into supervisor Young's office. (*Id.*)

Francis testified that after this incident his heart was pounding. (Tr. 143) This is clearly understandable, as Grant just told Francis that she was going to report his union activity to Respondent and that he was going to get in trouble for it. Inexplicably, however, the ALJ concluded that Francis' nervousness about Grant seeing the authorization cards contradicted the evidence that he openly distributed Union materials to employees between October and December. (ALJD 25:3-9) The ALJ's use of this evidence to discredit Francis and Esammason's testimony regarding Francis' union activity is plainly flawed and flies in the face of reality. Even if one is openly organizing, one would still be nervous when confronted with the threat that specific union activity – distributing union authorization cards – would be reported to management and retaliation would ensue. This evidence compels the necessary conclusion that Respondent knew about Francis' union activity prior to January 3, 2013 or even December 26, 2012, when Foreman made the decision to discharge Francis. Furthermore, Francis' nervousness in response to his

interaction with Grant in no way lessens the reliability of his testimony about having distributed Union materials between October and December. The ALJ's conclusion that it did is illogical and not based on any record evidence.

Instead of analyzing this undisputed evidence to establish Respondent's knowledge of Francis' union activity, for some unexplained reason, the ALJ erroneously speculated that had Francis been actively and openly distributing Union materials, he would not have been concerned that Grant might tell Respondent that he was distributing authorization cards. In jumping to this unfounded conclusion, the ALJ substituted her own subjective conjecture about the validity of Francis' feelings and completely failed to consider Francis' unrebutted testimony that Grant said that she was going to tell Respondent about his union activity and that Francis would get in trouble for it.

In failing to infer Respondent's knowledge from this evidence, the ALJ also failed to consider the undisputed evidence that Grant went directly into Young's office after making her comment to Francis regarding his distribution of authorization cards. The fact that Grant immediately went to Young's office made her threat to get Francis in trouble all the more viable, especially in light of the testimony of both Francis and former supervisor Tracy Williams about the close personal friendship between Grant and Young. (Tr. 142, 301) The totality of this unrebutted evidence compels the conclusion that Grant told Young about Francis distributing authorization cards on December 15, 2012. Young did not so much as even mention the extent to which Grant discussed Francis' union activity with him in his own testimony and Respondent did not put Grant on the stand.¹¹

¹¹ In these circumstances, it is appropriate for the Board to draw the adverse inference – based on Respondent's failure to elicit testimony from Young concerning this incident and its failure to call Grant – that such testimony from these witnesses would not have supported Respondent's defense. See *Bay Metal Cabinets*, 302 NLRB 152, 173 (1991), *enfd* 940 F.2d 661 (6th Cir. 1991) (adverse inference drawn based on failure of witness to testify as to certain

3. The ALJ Minimized Williams' Testimony About Discussions Related to the Union From Managers Meetings

Former supervisor Tracy Williams, whose testimony the ALJ explicitly credited, testified that as early as October or November 2012, managers discussed the union campaign during their daily managers meetings. (ALJD 26:1-2; Tr. 320-21) During these managers meetings, at which both Foreman and Young were present, the subject of the Union organizing campaign was discussed regularly. (*Id.*) The managers discussed the fact that the Union was started by Esammason and Al White at the JFK Branch, and importantly, who was possibly involved in organizing at the Brooklyn Branch. (Tr. 320) Williams testified that during a managers meeting in about December 2012, the managers, including Foreman, Young, Jaime Cespedes and herself, discussed that Francis was likely one of the Brooklyn employees involved in the Union. (*Id.*) Williams' testimony was not refuted by any of Respondent's witnesses.

Ignoring Williams' undisputed testimony that Respondent knew of union organizing as early as October or November, the ALJ instead makes much of Williams' additional testimony that she did not receive "official" notification about Francis' involvement in organizing the Union until after his discharge in January 2013, thereby speculating that Respondent had no knowledge of Francis' union activities prior to his termination. (ALJD 25:40-45) A review of Williams' testimony, however, makes clear that by "official" notification of Francis' union activity, Williams was referring to the January 3, 2013 letter faxed to Respondent by the Union's attorney in which the Union advised Respondent not to retaliate against employee organizers Francis, Esammason, or White. (Tr. 331-32) This "official" notification does not contradict Williams' testimony that Respondent's managers began talking about the union campaign in October or November and believed that Francis was involved at least as of December. However, that is precisely what the

material matters); *Redwood Empire, Inc.*, 296 NLRB 369, fn. 1 (1989), citing *International Automated Machines, Inc.*, 285 NLRB 1122 (1987) (adverse inference drawn based on failure to call material witness).

ALJ did. Thus, the ALJ once more minimized evidence establishing Respondent's knowledge prior to January 3, 2013.

The ALJ asserts, with no foundation or basis in the record evidence whatsoever, that if Respondent knew of Francis' Union activities, Foreman and Young would have discussed it with Williams as soon as they discovered it. (ALJD 26:10-14) In drawing the conclusion that Foreman and Young did not know about Francis' Union involvement prior to January 3, 2013 because they did not discuss it with Williams, the ALJ again based her conclusion on her own subjective speculation and committed a logical fallacy, failing to consider any of the myriad reasons that Foreman and Young may not have discussed the issue with Williams.¹² The ALJ erred in using the absence of a discussion with Williams to prove or disprove what was in Young or Foreman's minds.

4. The ALJ Disregarded Evidence that Respondent Sent Francis' Termination Letter After Respondent Saw Francis on the Morning of January 17, 2013

Francis testified that he distributed Union materials in the parking lot several times between October and December. Although he could not remember the specific dates for these instances, the one date he knew for certain that he talked to employees in the parking lot about the Union was on the morning of January 17, 2013, the day of his discharge. (Tr. 193) That morning, Francis was standing by the coffee truck on the public street near the entrance to the employee parking lot encouraging his coworkers to support the Union when manager Young came over. Young ordered coffee and said to Francis, "You know it's cold outside," to which Francis responded, "Yeah, it's worth it." (Tr. 194) Francis was already suspended at that time, so Young would likely have known he was advocating for the Union as there is no other reasonable

¹² For example, Williams testified that she believed she was terminated because of a conflict with Tameka Grant, and that Grant was close friends with Young. (Tr. 300-01) If Young ended up choosing to keep Grant over Williams, he may not have trusted Williams enough to share all information with her.

explanation for why he would be standing outside in the cold.¹³ Francis' statement that it was "worth it" only further supported Respondent's knowledge that Francis was still a strong Union supporter and was continuing to campaign for the Union even while suspended from work.

Respondent issued its letter terminating Francis on the afternoon of January 17, 2013 according to the postmark on the envelope in which Francis received the letter. (Tr. 192-93; GC Exh. 19(a)) The letter was dated January 16, 2013, but Respondent presented no evidence that it was actually written on that day. (GC Exh. 19(b)) Foreman did not know whether it was on or merely "about" January 16th that he signed it, just that the envelope was time stamped by a machine on January 17th, just after 4:00 pm. (Tr. 561)

The ALJ disregarded all evidence about the date the letter was sent and Foreman's testimony about when the letter may have been written. By disregarding this evidence, she also disregarded the timing: Respondent sent the termination letter on January 17th, the same day that Young observed Francis advocating for the Union outside of the facility. It is well established that suspicious timing of an adverse employment action provides substantial evidence from which knowledge may be inferred. *Montgomery Ward & Co.*, 316 NLRB at 1253. Therefore, by failing to consider the extremely suspect timing between management observing Francis engaged in protected activity outside the parking lot on the morning of January 17, 2013 and then issuing him a termination letter later that afternoon, the ALJ again ignored critical evidence establishing knowledge.

¹³ Respondent was certainly aware of Francis' Union activities at this point because of the letter faxed by the Union's attorney to Respondent on January 3, 2013. (Resp. Exh. 10)

C. The ALJ Erred in Failing to Find that Respondent Harbored Animus Against Francis' Union Activity

(Exception Nos. 13-28)

In order to establish a *prima facie* case under *Wright Line*, the General Counsel must prove that Respondent harbored animus towards Francis' protected union activity. See, e.g. *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562-63 (2004). Contrary to the ALJ's decision, the record establishes that Respondent was demonstrably hostile to the Union organizing campaign and toward Francis sufficient to meet the General Counsel's burden in this regard. In reaching her decision that the record did not establish animus, the ALJ relied on an erroneous interpretation of Board law, failed to properly consider direct evidence of Respondent's animus and declined to draw appropriate inferences from indirect evidence demonstrating animus.

1. The ALJ Overlooked Direct Evidence Establishing Animus

a. *The ALJ Misapplied Board Law Concerning Animus*

From the very first sentence, the ALJ's analysis of whether Respondent demonstrated the requisite animus to establish a *prima facie* violation of Section 8(a)(3) of the Act under *Wright Line* reflects a deeply flawed interpretation of Board law as applied to the facts of this case. The ALJ stated, "There is no evidence establishing any independent violations of Section 8(a)(1) of the Act; thus there is no direct evidence of animus." (ALJD 26:31-32) This is a blatant misstatement of applicable Board law. The Board has long held that an employer's anti-union statements or comments, while themselves lawful, may nevertheless be considered as evidence of animus toward employees' union activities. See e.g., *Tim Foley Plumbing Serv., Inc.*, 337 NLRB 328, 329 (2001); *Lampi LLC*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001). The ALJ's misunderstanding of this aspect of the law colors her entire analysis of Respondent's animus and caused her to overlook or downplay the overwhelming direct evidence of animus.

First, a statement made by Foreman in his testimony describing his reaction to learning about the Union campaign reflects his hostile attitude toward the Union Francis helped organize. Foreman admitted that he knew about the organizing campaign that had started at the JFK Branch and that Esammason was involved in it. (Tr. 532-33) After learning this fact, Foreman testified that he became concerned that the Union campaign was “really bleeding into our [Brooklyn] employees.” (Tr. 517) Foreman’s admitted concern about the organizing activity spreading into the Brooklyn Branch demonstrates his animus toward the Union campaign. See *Lampi LLC*, *supra*, 327 NLRB 222 (even a statement by employer’s president that “We don’t particularly like unions,” which is far more innocuous than Foreman’s expressed here, helped establish animus).

The ALJ also, without explanation, disregarded evidence that Respondent displayed animus when Foreman and Senior Human Resources Director Bryan Rosenthal confronted Esammason as he was distributing Union materials outside the Brooklyn Branch employee parking lot, falsely accusing him of blocking the entrance to the lot. (ALJD 27-28:43-3; Tr. 270-72) This was a thinly disguised effort to intimidate Esammason and disrupt his organizing activity at the Brooklyn Branch, but the judge discounted this evidence simply because Rosenthal’s statement was “the only statement that is alleged to have been made to Esammason by Rosenthal or any other management official of Respondent.” (ALJD 27-28:46-2) Rosenthal’s comment clearly reflects Respondent’s desire to discourage its employees from engaging in union activity and demonstrates Respondent’s animus, and yet the Judge simply ignored this evidence.

The ALJ further erroneously found that statements Respondent made to employees during its anti-union campaign leading up to the representation election in February 2013 did not constitute direct evidence of animus. (ALJD. 28:5-18) While the ALJ acknowledged that the record left “no doubt that Respondent conducted a vigorous campaign to counteract the Union’s organizing efforts,” she ignored myriad Board precedent holding that such anti-union statements

display animus. See e.g., *In re Sunrise Health Care Corp.*, 334 NLRB 903, 903-04 (2001) (statements in campaign materials showed animus although not independently unlawful); *Kenco Plastics Co., Inc.*, 260 NLRB 1420, 1420 (1982) (statements in campaign letters); *Metal Cutting Tools, Inc.*, 191 NLRB 536, 542 (1971) (same). Unrefuted record evidence establishes that Respondent held frequent mandatory “speak out” meetings for its Drivers and Messengers in January and February 2013 at which Respondent’s representatives, including Bryan Rosenthal, disparaged the Union as incapable and showed employees videos deriding unions as being ineffective and unresponsive. (Tr. 275-78; 321-24) Additionally, written materials distributed to employees by Respondent during its anti-union campaign further expressed Respondent’s hostile attitude regarding unionization. (Tr. 274-75) Despite this evidence, the ALJ concluded, based on her misguided interpretation of Board law, that Respondent’s anti-union campaign could not establish animus because Respondent’s conduct was not unlawful. (ALJD 28:13-18) Such a clear misapplication of the law must be reversed.

b. *The ALJ Ignored Evidence of Direct Animus by Respondent*

In addition, the ALJ disregarded further direct evidence of animus by rejecting the significance of the comment made by Garth Young to Tracy Williams after Young observed Francis advocating for the Union outside the employee parking lot on January 17, 2013. (ALJD 28:21-37). Williams testified that while discussing their observations of Francis engaging in union activity earlier that day, Young said, “Francis has a lot of nerve doing something like that after everything I’ve done for him.” (Tr. 325) Young did not deny making the statement. The remark reflects not only Young’s hostility towards Francis, but also the sense of betrayal Young felt when he learned that Francis was organizing the Union after Young had advocated in support of Francis following the 2011 CompuSafe incident.

The ALJ recognized that Young’s statement “is certainly indicative of animus” towards Francis’ union activity. (ALJD 28:29) Nevertheless, the ALJ found that because Foreman made the decision to terminate Francis and because Young’s comment was made after Foreman made that decision, the statement did not establish that unlawful animus played a part in the decision. (ALJD 28:30-37) This reasoning is analogous to a judge ignoring an employer’s admission, after terminating an employee, that he fired the employee because he betrayed him by engaging in union activity. Once again, the ALJ’s conclusion runs contrary to Board law and to the facts establish in the record. The Board has held that it is not necessary for the General Counsel to show that the decision makers behind an adverse employment action had direct knowledge of statements demonstrating animus in order to show that the decision was motivated by animus. *Willamette Industries, supra*, 341 NLRB at 562 (citing *Turnbull Cone Baking Co. of Tennessee v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985)). In *Willamette Industries*, the Board found that a statement reflecting animus made by a management official other than the one who decided to take the adverse employment action in question established animus because the statement closely coincided in time with the implementation of the adverse employment action. *Id.* Similarly here, Young’s January 17 comment was made on the same day that Respondent implemented its decision to terminate Francis by sending his termination letter. (Tr. 192-93; GC Exh. 19(a)). Thus, the ALJ’s conclusion that the timing of Young’s statement diminished its significance in establishing animus was error.

2. The ALJ Erred in Failing to Draw Necessary Inferences Establishing Animus

In addition to disregarding direct evidence of animus based on her faulty application of Board law, the ALJ further failed to draw necessary inferences of Respondent’s animus toward Francis’ union activity from the unrefuted evidence in the record.

a. *The ALJ Ignored Evidence that Respondent Decided to Terminate Francis Before Investigating the Casino Losses*

Respondent's animus toward Francis is evident from the manner in which it conducted its investigation of the Casino losses that purportedly led to Francis' termination. The record clearly establishes that before Respondent even brought Regional Security Manager Michael Buckley to the Brooklyn Branch on January 3, 2013 to conduct an investigation into the Casino losses, Foreman – the ultimate decision-maker behind Francis' termination – had already decided to terminate Francis. (Tr. 563; Resp. Exh. 8) Foreman's December 26, 2012 e-mail said "Please provide a termination letter for me to present to him when he returns from vacation Monday," making explicit his intent remove Francis from the workplace immediately. (*Id.*) The ALJ found that the decision to discharge Francis was made on that date, over a week before Buckley's investigation began. (ALJD 28:33-26) The investigation of the Casino losses was thus merely a means to a pre-determined end, a pretext, a mere charade to lend an air of legitimacy to Foreman's unlawfully motivated decision to terminate Francis for his union activity.

Board law clearly establishes that an inference of animus is warranted based on evidence that an employer did not genuinely investigate an employee's purported misconduct. See *Diamond Elec. Mfg. Corp.*, 346 NLRB 857, 862 (2006) (finding inference of unlawful motive based on evidence that employer conducted "sham investigation"). Here, the fact that Foreman made the decision to terminate Francis before Buckley began his investigation compels the conclusion that the investigation of the Casino losses was a sham, further establishing Respondent's animus. *Id.* The ALJ's decision completely fails to address this critical fact and the applicable Board law and fails to draw the appropriate inference of animus. Therefore, her finding that there was insufficient evidence to establish Respondent's animus must be reversed.

b. *The ALJ Disregarded Evidence that Respondent Diverged from its Usual Investigatory Practices and Specifically Targeted Francis in Its Investigation*

As shown by the evidence proving that Respondent decided to discharge Francis before Buckley began his investigation of the Casino losses, the record establishes that, in investigating these variances, Respondent was not interested in actually determining what was the cause of the Casino losses or who was responsible, but was rather intent on establishing a pretense for terminating Francis. This is further demonstrated by the manner in which Respondent conducted its investigation of the Casino losses, which focused exclusively on Francis, despite the fact that other employees were involved.

The record establishes that Respondent's usual practice in investigating significant cash losses was to bring Buckley to the Brooklyn Branch within a matter of days following the incident to find out as much information as possible concerning the loss by reviewing relevant documents and video recordings and interviewing various witnesses who may have information about the loss. (Tr. 823) The evidence concerning Respondent's investigation of the July 2011 lost CompuSafe incident in which was involved provides a telling example of Respondent's usual investigatory methods. In response to the 2011 CompuSafe incident, Respondent sent Buckley to investigate less than three weeks after the date of the incident. (Tr. 773) In conducting this investigation, Buckley interviewed multiple individuals who may have had access to the CompuSafe, including not only Francis and his Assistant Messenger during the route in question, but also the Driver from that route, and the Messengers who were on the next crew to use the truck from the route. (773, 824-25; GC Ex. 29 pp. 40-54) In sharp contrast, Respondent sent Buckley to investigate the Casino losses in January 2013, several months after the losses occurred. (Tr. 825) Furthermore, unlike the investigation into the lost CompuSafe in 2011, where Buckley interviewed no less than five different Messengers and Drivers, the undisputed evidence

establishes that Buckley interviewed only Francis – and no other Messengers or Drivers – about the Casino losses, despite the fact that Respondent’s own records established that other employees were involved in the Casino loss incidents. (Tr. 825-27; Resp. Exh. 9, 34) Buckley admitted that his usual investigatory practice was to interview as many people as possible who may have had access to or knowledge about missing liabilities, yet he provided no explanation whatsoever as to why he did not interview other Messengers and Drivers during his investigation of the Casino losses. (Tr. 823, 825-27) The fact that Buckley failed to interview any Drivers or Messengers other than Francis and the significant delay in commencing his investigation establishes that Respondent deviated from its usual practices in this instance and structured the investigation to specifically target Francis.

Board law is clear that evidence that an employer departed from its usual standards for conducting investigations leads to an inference of animus. See *Joseph Chevrolet, Inc.*, 343 NLRB 7, 12 (2004) (affirming administrative law judge finding that inference of animus is warranted where the evidence reflects “either a demonstrable departure from prior standards for investigations of similar misconduct or a sham investigation”). Not only did the ALJ here fail to draw the necessary inference of animus, she ignored the uncontroverted evidence that Buckley did not interview any other Drivers or Messengers during his investigation of the Casino losses or address Respondent’s atypical conduct of the investigation. Thus, once again, the ALJ ignored crucial evidence establishing animus and disregarded relevant Board law.

c. The ALJ Ignored Evidence that Respondent Failed To Give Francis An Opportunity to Defend Himself During the Investigation of the Casino Losses

During Buckley’s interview of Francis on January 3, 2013 in connection with the investigation of the Casino losses, Francis told Buckley that he needed more information about the incidents in order to better recall the events of each day in question and explain what happened.

(Tr. 166, 840-44) Particularly, Francis asked to see SL-1 forms and Guide Sheets associated with his route on those dates. (*Id.*) Buckley agreed that reviewing the SL-1 forms and Guide Sheets would be important in determining what happened, but he did not have them available during the interview. (*Id.*; Tr. 846) Consequently, Francis was unable to explain to Buckley his recollection of the events and circumstances surrounding the Casino losses due to the lack of information. (*Id.*)

Although Buckley returned to the Brooklyn Branch after January 3 to continue his investigation and review the relevant SL-1 forms and Guide Sheets with Jessica Rosario, Buckley never attempted to provide Francis an opportunity to review those documents for himself and explain his recollection of the events. (Tr. 813-14; 167) In fact, Respondent never showed Francis these important documents. (Tr. 167) Francis was thus denied the opportunity to adequately defend himself, exposing Respondent's true motive – not to ascertain the truth regarding the losses – but to manufacture a sham excuse to justify its unlawful termination of Francis.

The Board has repeatedly held that an employer's failure to provide an employee with an opportunity to defend himself against allegations of misconduct manifests the employer's anti-union animus. *Igramo Enterprises, Inc.*, 351 NLRB 1337, 1340 (2007) (unlawful motive inferred where employer did not give discriminatee opportunity to defend himself during an investigation); *In Re La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (sudden discharge and failure to allow employees opportunity to respond to allegations support inference of pretext); *Hospital Espanol Auxillo Mutua de Puerto Rico, Inc.*, 342 NLRB 458, 460 (2004) (noting employer's failure to investigate as proof of discriminatory motive); see also *W.W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978) (failure to investigate incidents underlying grounds for discharge reflect employer's discriminatory motivation). Without explanation, the ALJ, however,

did not consider the evidence that Respondent failed to show Francis any of the relevant SL-1 forms or Guide Sheets that would have enabled him to explain his side of the story. The evidence therefore establishes that Respondent did not provide Francis an opportunity to defend himself against Respondent's allegations of misconduct, and the ALJ ignored this telling evidence of animus.

d. *The ALJ Erred By Speculating that the July 2011 CompuSafe Incident Distinguished Francis from Similarly Situated Employees and By Ignoring Evidence Establishing Respondent's Disparate Treatment of Francis*

Respondent's animus is further evident from its disparate treatment of Francis relative to other employees that Respondent associates with cash losses. The evidence shows that cash losses from Respondent's routes occurred regularly since January 2011, on a multiple-times-per-week basis. (Tr. 384-85; Resp. Exh. 26) Respondent associated at least 40 different employees with those losses. (GC Exh. 23(a); Resp. Exh. 28) Yet during this period, Respondent terminated just two employees, aside from Francis, for their involvement in cash losses. (Resp. Exh. 30) Other than the simple fact that two other Brooklyn Branch employees had been terminated for their alleged involvement in cash losses, Respondent offered no evidence showing that these terminations were otherwise similar in nature to the adverse actions it took against Francis.

Significantly, the record clearly establishes that while Respondent associated numerous employees with as many or more losses than it associated with Francis, with many of these losses being of similar dollar value to those attributed to Francis, Respondent terminated none of these other employees. (Tr. 406-426; 672-73, 700; Resp. Exh. 27) For most of these individuals, Respondent took no disciplinary action at all to address their involvement in recurring losses. (*Id.*) At most, Respondent issued disciplinary warnings to employees associated with frequent losses. (GC Exh. 27; GC Exh. 28 p. 1) Francis, however, received no prior warning but was summarily suspended and then terminated by Respondent. This type of disparate treatment supplies further

evidence of Respondent's animus. See, e.g., *Gravure Packaging*, 321 NLRB 1296 (1996) (discharge of a "marginally" performing employee whose work the employer had tolerated prior to the union campaign); *Pottsville Bleaching Co.*, 283 NLRB 359, 360-61 (1987) (relying in part on respondent's demonstrated leniency afforded to employees other than discriminatee to reveal employer's anti-union motivation).

The ALJ, however, mistakenly concluded that Francis was not treated disparately because his involvement in the July 2011 CompuSafe incident distinguished Francis from other employees with whom Respondent associated losses. (ALJD 30:15-27) In reaching this conclusion, the ALJ interjected her supposition and conjecture, unsupported by the record evidence, that the CompuSafe incident placed Francis under some kind of final warning whereby he would be terminated if Respondent associated him with further losses. Absolutely nothing in the record supports such an assumption, and Respondent never contended that Francis was on a final warning because of the CompuSafe incident. To the contrary, Respondent acknowledged that the CompuSafe incident played no role in Respondent's decision to terminate Francis. Francis never received any discipline for his involvement in the 2011 CompuSafe incident, let alone the type of final warning suggested by the ALJ. (Tr. 317-18; 535-36, 604; GC Exh. 28 (showing no disciplines issued to Francis)). In fact, Respondent's investigation of the incident revealed that both Francis and his Assistant Messenger, Rantana Oum, had made errors that contributed to the misplacement of the CompuSafe. (Tr. 537-38; GC Exh. 30) After the 2011 incident, Respondent continued to entrust Francis with its customers' money and continued to assign him to important and challenging route assignments. (Tr. 302; GC Exh. 4, 14) Thus, to the extent that Respondent placed any responsibility for the missing CompuSafe on Francis, it overlooked and tolerated the error until Francis began organizing the Union. See *Gravure Packaging, supra*, 321 NLRB 1296. The ALJ did not consider these facts in her disparate treatment analysis.

The ALJ's conjecture that Francis' involvement in the 2011 CompuSafe incident placed him under a final warning is further belied by the evidence establishing that Respondent knew about Francis' possible association with additional losses from the Casino as early as June 2012, yet took no disciplinary action against Francis until after the Union campaign was underway. (Tr. 582-83, 603-04, 694-95) Respondent moreover did not rely on the 2011 incident as a basis for discharging Francis, as reflected in Francis' termination letter, which makes no mention of the CompuSafe loss. (GC Exh. 19(b); Tr. 561-62) Therefore, no record evidence supports the ALJ's conclusion that the July 2011 CompuSafe incident distinguished Francis from other employees with whom Respondent associated multiple cash losses but who were not suspended or terminated. The ALJ's assumption that Francis was under some sort of final warning because of his association with the missing CompuSafe is nothing more than mere speculation, and the Board has previously rejected similarly unfounded speculation on the part of this ALJ. *Fresenius USA Mfg., supra*, 358 NLRB No. 138 (rejecting as "unfounded speculation" the ALJ's finding which was not based on the record evidence). In sum, the record establishes Respondent's disparate treatment of Francis, and the ALJ erred by speculating that the July 2011 CompuSafe incident distinguished Francis from other employees.

D. The ALJ Erred in Finding that Respondent Would Have Terminated Francis in Absence of Protected Activity

(Exception Nos. 29-31)

Because the General Counsel established a strong *prima facie* violation, the burden of persuasion shifts to Respondent to prove, by a preponderance of the evidence, that it would have taken the same action against Francis even absent his union activity. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995) (citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Respondent does not meet this burden merely by showing that it had a legitimate reason to terminate Francis or that it *could*

have terminated him. *Igramo Enterprise, Inc.*, 351 NLRB 1137, 1340 (2007), citing *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). Instead, Respondent must prove that its proffered reason was the actual reason that Respondent terminated Francis and that it would have terminated him even absent his protected activity and that its proffered reason is not merely pretext for the termination. The record does not rebut the General Counsel's *prima facie* case under applicable standard, and the ALJ erred in suggesting that it does.

The ALJ failed to engage in the required analysis of Respondent's defense under *Wright Line* and instead, carelessly concluded that Respondent met its burden. In so doing, the ALJ failed to engage in the proper legal analysis and completely ignored evidence that Respondent's asserted reasons for terminating Francis were merely pretext.

1. The ALJ Ignored Evidence That Respondent's Rationale For Terminating Francis Was Pretextual

The ALJ failed to consider all of the evidence surrounding Francis' termination when she erroneously concluded that Respondent would have terminated him absent his union activity. Completely ignoring all evidence of pretext and ignoring relevant Board law as set forth above, the ALJ haphazardly concluded that it was not plausible that Respondent's basis for terminating Francis' was false. (ALJD 30:35)

The same pretext evidence used to prove discriminatory motive may show that Respondent has not established that it would have taken the same adverse action absent Francis' protected activity. *Wright Line, supra*, 251 NLRB at 1091. As discussed above, the ALJ concluded that the decision to terminate Francis was made on December 26, 2012, prior to the start of Buckley's investigation of the Casino losses on January 3. (ALJD 26:23) Such evidence establishing Respondent's decision to terminate prior to investigating the misconduct underlying the

termination provides strong evidence of pretext. See *Diamond Elec. Mfg. Corp.*, *supra*, 346 NLRB at 862 (evidence of sham investigation supports finding of pretext).

In addition to failing to consider the timing of the investigation, the ALJ also erred in not considering the incomplete and atypical nature of investigation itself. As explained above, the ALJ ignored the evidence that Respondent deviated from its usual investigatory practices by commencing its investigation of the Casino losses months after the events occurred and failing to interview a single Messenger or Driver other than Francis in connection with the Casino losses. This evidence, once again, establishes that Respondent's rationale was pretextual, yet was not considered in the ALJ's analysis.

The ALJ also failed to properly consider evidence regarding the timing of the adverse employment actions Respondent took against Francis, another factor that supports a finding of pretext. The timing of Francis' suspension and termination are especially suspicious, given that the first of the Casino losses occurred *seven months* prior to the termination, and the last of the losses occurred two months prior, while Respondent's knowledge of Francis' union activity and the Union's representation petition were relatively much closer in time to the adverse employment actions. The ALJ carelessly excuses the suspicious timing by blaming the effects of Hurricane Sandy. (ALJD 27:39-41) By doing so, the ALJ overlooked the months that had passed since the losses associated with Francis started back in June, whereas the storm did not affect Respondent's operations until late October. (Tr. 500) The ALJ erred in ignoring all of the evidence of pretext that did not fit in her theory of the case.

2. The ALJ Erred In Finding That Respondent Met Its *Wright Line* Burden That It Would Have Terminated Francis Absent His Union Activity

The ALJ erred by concluding that Respondent would have terminated Francis despite his union activity, and justified this erroneous conclusion by posing a series of counterfactuals. She

stated that in order to find Respondent's rationale for terminating Francis to be insufficient, she would have had to find that Foreman's request to Rosario for a status report on losses was not prompted by the BAMS report and that Rosario deliberately prepared the spreadsheet in order to frame Francis. (ALJD 30:35-39) This conjecture is unsupported by the evidence. Even if Foreman's request to Rosario was in part prompted by the BAMS report, that does not diminish the fact that Foreman only asked Rosario to follow up on the report with regard to Global Cash Access, the customer that Francis typically serviced on the Casino Route. (Tr. 690) Foreman did not ask Rosario to look into any of the other customers with verified losses such as TD Bank, and Rosario testified that she had not previously been asked to prepare such a spreadsheet relating to only one customer. (Resp. Exh. 6; Tr. 650, 690-91) The ALJ unjustifiably ignored the evidence that Foreman only asked Rosario about the customer typically serviced by Francis.¹⁴ If Foreman was truly motivated solely by the BAMS report and not an unlawful motive towards Francis, he would have asked Rosario to look into all of the true variances and not just the ones on Francis' standard route.

The evidence thus establishes that Respondent's proffered reason for terminating Francis was a sham and that Respondent's actual and motivating goal was to remove Union leader Francis from its workplace in the midst of an organizing campaign. The record evidence clearly establishes that Respondent failed to establish by a preponderance of the evidence that Francis would have been terminated absent his union activities. Indeed, given the record, Francis' union activity serves as the only logical basis to explain his suspension and termination.

¹⁴ The General Counsel is not claiming that Foreman asked Rosario to look into Francis' losses by name nor is it claiming that the ALJ's credibility finding with regard to Rosario (ALJD 32:1) must be overturned in order to find that Foreman had an unlawful motive when asking Rosario to prepare a spreadsheet specifically about Global.

IV. CONCLUSION

Based on the entire record, a preponderance of the credible, probative evidence clearly supports the allegation that Respondent suspended and discharged Francis because of his union activity, in violation of Section 8(a)(1) and (3) as alleged in the Complaint. Therefore, the General Counsel urges that the Board sustain the General Counsel's Exceptions in their entirety, reverse the ALJ's findings of fact and conclusions of law, and modify the ALJ's Order with appropriate Order requiring that Respondent: cease and desist from its unlawful conduct; offer Francis reinstatement to his former position, without prejudice to seniority or other rights or privileges to which he would have been entitled; make Francis whole for any losses he suffered as a result of Respondent's unlawful conduct; and post appropriate notices in which employees are assured of their Section 7 rights, as well as any other remedy the Board deems appropriate.

Respectfully submitted,

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