

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

CHEMICAL SOLVENTS, INC. AND
TURN-TO TRANSPORT, LLC,
SINGLE EMPLOYERS/ALTER EGOS

and

CASES 8-CA-39218
8-CA-39277
8-CA-39300
8-CA-39335
8-CA-39362
8-CA-39412
8-CA-61979

TEAMSTERS LOCAL UNION 507 A/W
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

EXCEPTIONS OF COUNSEL FOR THE ACTING
GENERAL COUNSEL AND BRIEF IN SUPPORT



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Administrative Law Judge Ira Sandron issued his decision in the above-captioned cases, JD-23-12, on May 15, 2012.

I. EXCEPTIONS

Counsel for the Acting General Counsel excepts to the following findings of fact and conclusions of law made by Judge Sandron in this matter:¹

1. JD page 5, lines 34-36

Judge Sandron's findings and conclusions that employee witness James Griffith's testimony was confusing because he jumped back and forth in terms of sequence

¹ All further page and line references in the Exceptions are to Judge Sandron's decision, JD-23-12. Where "JD" is used herein, it will refer to the written decision issued by Judge Sandron; Where "Tr." is used herein, it will refer to the transcript. Where "G.C. Exh." is used herein, it will refer to General Counsel's

and events and was, therefore, unclear whether Respondent's supervisor Jerry Schill stated drivers should not talk to each other while driving an employer vehicle or at any time while they were on the road.

2. JD, page 5, lines 38-39

Judge Sandron's finding that Griffith's description of the cell phone policy prior to September 2, 2010 was somewhat contradictory.

3. JD, page 6, lines 40-41, and page 7, line 1

Judge Sandron's findings and conclusion that Griffith only testified that supervisor John Pavlish, Respondent's owner's son, and supervisor Jerry Schill made statements evidencing anger at the drivers because of the 2007 work stoppage, omitting his testimony regarding threats made by owner Ed Pavlish.

4. JD, page 7, lines 30-31

Judge Sandron's findings that Respondent implemented a new cell phone system in 2010 (rather than 2009).

5. JD, page 12, lines 24-25

Judge Sandron's findings that Charging Party union representative Al Mixon, somewhat conveniently, did not recall certain facts until he was asked about them on cross examination.

6. JD, page 17, lines 28-29

Judge Sandron's findings of fact and conclusion that Mixon should not be

Exhibit. Where R. Exh. is used herein, it will refer to Respondent's Exhibit. Where Jt. Exhibit is used herein, it will refer to a Joint Exhibit.

credited as far as making a statement regarding Respondent's past practice of using subcontractors in limited situations and that Mixon's statement actually reflected Respondent's practice at the time of contract negotiations.

7. JD, page 18, lines 41-42

Judge Sandron's findings that All Pro Freight drivers were used a couple of weeks after Respondent's drivers met with Respondent's owner Ed Pavlish and supervisor Schill to complain about the use of outside contract drivers.

8. JD, page 20, line 15

Judge Sandron's findings that John Pavlish advised Chris Haas, the principal of All Pro Freight, that Respondent might have some trucking opportunities.

9. JD, page 21, lines 2-4

Judge Sandron's findings and conclusions that Schill's testimony was credible regarding his claims that, prior to the breakdown of negotiations with All Pro, Schill explored subcontracting its trucking operation with other entities; CETCO and Thomas Freight.

10. JD, page 22, lines 37-38

Judge Sandron's findings and conclusions that owner Ed Pavlish determined that Respondent would save about \$300,000 a year by terminating the trucking division.

11. JD, page 23, 26-27

Judge Sandron's finding and conclusion that Turn-To Transport owner Patricia (Pat) Pavlish's testimony was consistent with that of the Acting General Counsel's witnesses and other evidence of record.

12. JD, page 24, 11-12

Judge Sandron's finding and conclusion that Jonathon Brown, the sole Turn To-Transport employee, takes his tanker home after he hauls chemicals.

13. JD, page 24, lines 15-18

Judge Sandron's findings and conclusions that Pat Pavlish arranged for the selling/leasing vehicles to CETCO without assistance from Schill and his finding that her negotiations with CETCO began in October or November 2011.

14. JD, page 38, lines 16-17

Judge Sandron's findings and conclusion that Respondent's motive behind closing the trucking operations was financial, rather than based on anti-union animus.

15. JD, page 39, lines 14-18

Judge Sandron's findings and conclusions that the applicable contract language in the instant case is akin to language that the Board found to be a waiver in Allison Corp., and that the management rights clause in the contract grants the Respondent the right to subcontract without restriction.

16. JD, page 39 line 26

Judge Sandron's findings and conclusions that the language in the applicable contract permits Respondent's unilateral subcontracting and, therefore,

that the instant case is distinguishable from Owens-Broadway Plastic Products and Reece Corp.

17. JD, page 39, lines 28-30

Judge Sandron's findings and conclusions that the Union waived its right to engage in bargaining over Respondent's decision to terminate its trucking division.

18. JD, page 40, lines 3-6

Judge Sandron's findings and conclusions that Respondent did not fail and refuse to bargain over the effects of its decision to terminate the trucking division.

19. JD, page 40, lines 42-46

Judge Sandron's findings and conclusions that the credited history of anti-union animus, demonstrated by the previous ULP decision in 2000 and statements made by Respondent to employee Griffith in 2007, and statements found in be Section 8(a)(1) violations in these matters, were insufficient to show a *prima facie* case of unlawful discrimination behind Respondent's subcontracting decision.

20. JD, page 41, lines 19-21

Judge Sandron's finding that Respondent engaged in ongoing discussions with several carriers concerning contracting out drivers' work and closing the trucking division.

21. JD, page 42, lines 2-4

Judge Sandron's finding and conclusion that it is incredulous that

Respondent would terminate its trucking division because of strike talks and the filing of grievances.

22. JD, page 42, lines 10-13

Judge Sandron's conclusions that Respondent has rebutted the Acting General Counsel's case and established a Wright Line defense by showing that it would have terminated the trucking division and laid off drivers for legitimate business reasons, even absent its employees' protected activities.

23. JD, page 42, lines 46-47 and page 43, lines 2-4

Judge Sandron's findings and conclusions that the decision to close Respondent's trucking division was a non-mandatory subject of bargaining and, therefore, Respondent was not obligated to bargain over the closure decision.

24. JD, page 43, lines 10-12

Judge Sandron's findings and conclusions that Respondent was not obligated under the Act to furnish information related to a grievance filed over the decision to subcontract.

25. JD page 44, lines 37-38

Judge Sandron's findings and conclusions that Respondent Chemical Solvents and Respondent Turn-To Transport have only limited, if any, interaction on a regular basis.

26. JD page 45, lines 35-37

Judge Sandron's findings and conclusions that Respondent's decision to terminate the trucking operation was based on economic considerations rather than being motivated by anti-union animus.

27. JD page 45, lines 38-41

Judge Sandron's failure to conclude that Respondent Turn-To Transport was created as part of a scheme to avoid the Unions' efforts to compel a restoration of the trucking operation and his findings and conclusions that, instead, it was formed to maximize profitability.

28. JD page 45, line 43

Judge Sandron's conclusion that Respondent Chemical Solvents and Respondent Turn-To Transport are not a single employer and/or alter egos.

29. JD page 47, lines 46-48

Judge Sandron's findings and conclusions that Respondent did not unilaterally change its cell phone policy, in relation to its disciplinary policy, in September 2010.

30. JD page 48, lines 20-23

Judge Sandron's findings and conclusions that changes to the pre-trip inspection policy, in relation to its disciplinary policy, was not a material and substantial change.

II. BRIEF OF THE COUNSEL FOR THE ACTING GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Counsel for the Acting General Counsel files these exceptions because the Decision issued by ALJ Sandron is, with all due respect, seriously flawed with regards to the following issues: (1) subcontracting, (2) alter ego/single employer, (3) the failure to provide information regarding the decision to subcontract, and (4) the unilateral change

to Respondent's disciplinary policy regarding cell phone usage and pre-trip and post trip inspections. Overall the Judge's decision reflects a failure to closely review the record and properly consider the undisputed documentary evidence and testimony from the witnesses credited by the ALJ. Moreover, as discussed later in this brief, the Judge ignored well established Board precedent. In so doing, he wrongly concluded that the Respondent had not violated the Act when it subcontracted the bargaining unit drivers' work and permitted non-bargaining unit employees to do their work, that the two Respondents did not constitute a single employer/alter ego, that Respondent had not unlawfully failed to provide the Union with information relating to the decision to subcontract and that no material changes occurred with Respondent's change of cell phone and inspection policies in 2010.

Counsel for the Acting General Counsel acknowledges that the Board's established policy is to not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). As will be discussed herein, there are many good arguments to be made that several of the Judge's credibility determinations should be overturned by the Board. However, Counsel for the Acting General Counsel submits that the real issue in this matter is not one of credibility. Instead, it is Judge Sandron's failure to properly weigh uncontroverted and credited evidence that clearly supports different findings on the issues addressed in these exceptions and his additional failure to properly apply Board precedent.

**A. JUDGE SANDRON ERRED IN NOT FINDING THE
SUBCONTRACTING TO VIOLATE SECTION 8(A) (3) OF THE ACT**

Judge Sandron erred in concluding that anti-union animus was not the motivating factor that caused Respondent to subcontract bargaining unit drivers' work. (JD page 42, lines 2-4) Counsel for the Acting General Counsel contends that there is overwhelming evidence in the record that demonstrates Respondent harbored animus toward the union for many years. It is equally clear that the more recent filing of grievances and threats to strike were the motivation for Respondent's actions. The timing of Respondent's actions and the pretext evidence presented on the record clearly demonstrates Respondent's unlawful motives. The critical facts set forth in the record related to the 8 (a) (3) subcontracting issue are as follows:

- On April 28, 1997, the Union was certified as the exclusive bargaining representative for the Respondent's truck drivers and production and maintenance employees. (G.C. Exh. 1 (y)). Over the next several years, the Respondent engaged in a multitude of unfair labor practices to thwart the Union's efforts to represent Respondent's employees. On July 12, 2000, the Board affirmed ALJ John H. West conclusions, as modified, that the Respondent violated Section 8(a) (3) and (1) of the Act by placing written warnings in the personnel file of one employee, discharging two employees, and threatening employees, interrogating them, and creating the impression that their union activities were under surveillance. Chemical Solvents Inc., 331 NLRB 706 (2000).
- On about August 23, 2007, the Respondent terminated the truck drivers' Union Steward James Griffith, holding him personally responsible for the

drivers “concertedly calling off” from work in protest of the Respondent’s contract negotiation tactics. (Tr. 43) Griffith filed an 8(a) (3) unfair labor practice charge on September 1, 2007 alleging that he was terminated for engaging in union activities. (Tr. 49-50) (G.C. Exh. Z) Prior to the completion of the unfair labor practice investigation, the Respondent reinstated him, and Griffith was warned by Respondent’s owner Ed Pavlish and his son, John Pavlish that similar action by its employees would be dealt with severely. (Tr. 60-67) Griffith, without contradiction, testified that with respect to future strike action, Ed Pavlish stated that he would “close this place down tomorrow, ...and it’s not going to make any difference to him personally because his lifestyle’s not going to change at all.” (Tr. 65) Pavlish stated that he (Pavlish) would still drive the same car, live in the same house, and go on the same vacations. (Tr. 66) Pavlish reminded him that if the Company closes it will drastically change Griffith’s life and everybody else that works at the facility. (Tr.66)

- Contrary to any intent to subcontract or terminate its trucking operations, between January 1, 2009 through August 1, 2010, Respondent Chemical Solvents made a major investment by purchasing three vehicles used by bargaining unit drivers which included two tractors and one trailer totaling about \$252,000. (R. Exh. 58)
- In late November 2009, Ed Pavlish met with bargaining unit drivers and explained that he had recently used non-bargaining unit employees of All Pro Freight Inc. to explore his options and reduce the drivers’ overtime

hours. (Tr. 148-153) The drivers provided Pavlish with a safety report concerning All Pro Freight Inc. that negatively reflected on All Pro's driving record. (Tr. 153) Contrary to Judge Sandron's finding, Pavlish did not use All Pro Freight or any other carrier to perform bargaining unit work until one year later, at a time after the Union had renewed its activism. (R. Exh. 153)²

- On or about July 28, 2010, showing disdain for the representative of its employees, Respondent unilaterally and substantially changed its health insurance benefits and eliminated bargaining unit employees' dental insurance without negotiating with the Union. Judge Sandron concluded that the Respondent's actions violated Section 8(a) (5) of the Act.
- On July 30, 2010, Union Secretary Treasurer Albert Mixon met with bargaining unit employees at the Respondent's premises and unequivocally stated that Respondent had seriously violated the contract and that it may be necessary to engage in a union strike. (Tr. 606-609)
- On August 1, 2010, the Respondent's attorney, Thomas Colaluca warned Mixon that his statements regarding a strike to bargaining unit employees were incendiary, non-productive, and rhetoric that should cease immediately. (Jt. Exh. 6; Tr. 612)
- On August 5, 2010, the Union and Respondent met regarding the health insurance changes, and Colaluca reiterated Respondent's fears over a potential Union strike which may cause its operations to shut down. Even

² The billing records for All Pro Freight demonstrates that it only performed work for Respondent Chemical Solvents on November 9th and 19, 2009. The entire record is void of any evidence that bargaining

so, Mixon explained that a strike was looming if the parties were unable to resolve the health insurance issue. (Tr. 614-615) (R. Exh. 152)

- On August 19, 2010, the Union sent a formal notice to reopen negotiations concerning the health insurance issue to the Respondent and the Federal Mediation and Conciliation Service. (Jt. Exh. 7). This step was to ensure that the Union met its contracting obligation under the contract prior to the implementation of a strike. (Jt. Exh. 1, page 5)
- Suddenly, in September 2010, long after their discussions had ended, Respondent resumed its talks with All Pro Freight regarding subcontracting bargaining unit drivers' work. Prior to this date, the parties had not had any discussions, nor had All Pro performed work for Respondent for over 10 months. (Tr. 909) Similarly, All Pro Freight had never provided Respondent with a cost comparison analysis, quotes for truck services, or an agreement to perform bargaining unit drivers' work. (Tr. 906-907)
- In September 2010, with Respondent's knowledge, the Union formulated a bargaining committee to meet with the Employer regarding the health insurance changes. (Tr. 418-419)
- On or about October 2010, the Respondent, for the first time and without notice to the Union of the change in policy, monitored the truck drivers' cell phone usage for one week, and warned drivers that they were not allowed to use their cell phones to contact other drivers or for personal

unit work was performed by any carrier November 2009 through May 2010.

use. (Tr. 940) The new cell phone policy eliminated the drivers' past practice of talking to each other on the cell phone. Respondent, by Schill, informed William Zemaitis and Jim Griffith that they would be disciplined for violating the policy. Prior to this date, no discipline policy regarding cell phone usage was in place. (Tr. 79, 93, 248-249, 803, 808) ³ Significantly, the Respondent upgraded its GPS system and provided its drivers with a Smartphone in February 2009. (Tr.938) The new system allowed the Employer to track the location of its drivers, and also determine who they were calling and the duration of the calls on the Company issued smart phones. (Tr. 937-938) As noted supra, the Employer did not monitor drivers' calls until 20 months later, immediately after there was talk of a strike.

- In the latter part of October 2010, the Respondent, by Schill, informed employees of new procedures that should be followed if a pre-trip or post-trip truck inspection took over 30 minutes. (Tr. 82-84, 249, 808) The Respondent informed employees that they would be disciplined for failing to follow the new procedures. (Tr. 803-808) This change in policy occurred without prior notice or an opportunity afforded to the Union to bargain.
- On October 27, 2010, Griffith requested to speak with Schill regarding the changes in the cell phone policy and pre-trip inspections. (Tr. 99) Griffith

³ General Counsel notes that Schill, initially and emphatically told drivers that they would be disciplined for violating the cell phone policy (talking to other drivers) and pre and post trip inspections. However, he changed his testimony when General Counsel provided him with a copy of his affidavit where he admitted that he told drivers that they would be disciplined for violating Respondent's new policies.

told Schill that he felt that he was harassing him along with other drivers. (Tr. 101-101) Schill responded “You are starting to piss me off”... “We’re starting to regret the fact that we hired you back.” (Tr. 102-103) Judge Sandron found that Schill’s statement was a reference to Griffith’s 2007 termination and, because it was in reference to the latter’s union activity, a violation of Section 8(a)(1) of the Act. (JD page 31, lines 26-28)

- On or about November 2, 2010 bargaining unit drivers Zemaitis and Griffith filed grievances in response to Respondent’s new rules and disciplinary policies. Grievants William Zemaitis and James Griffith both testified that they felt intimidated and threatened by Respondent for implementing its new policies. Griffith credibly testified that after he met with Respondent’s Vice President of Operations, Jerry Schill, concerning his grievance, Schill immediately informed him that Pavlish wanted him to resign and would give him money to do so. Similarly, Zemaitis testified that subsequent to his grievance meeting Schill told him that he should resign and that Respondent was willing to pay him money to do so. Judge Sandron credited both Griffith and Zemaitis testimony on this issue and found Respondent’s actions coercive of the employees’ Section 7 rights in violation of Section 8(a) (3) of the Act. (JD page 10, lines 35-40 and page 33, lines 30-32)
- Several days later, Schill disciplined Zemaitis for allegedly violating the Employer’s rules regarding the completion of a pre-inspection. The discipline was issued two days after the alleged misconduct occurred.

Significantly, Schill was present when Zemaitis allegedly failed to perform the inspection, but allowed him to leave the premises despite significant safety and financial risk. Crediting Zemaitis testimony that he performed the inspection and discrediting Schill's testimony, Judge Sandron concluded Zemaitis discipline was a violation of Section 8(a)(3) of the Act and in retaliation for the latter's union activities. (JD page 35, lines 34, 48 and page 36, lines 1-16)

- On November 1, 2010, the Union and Respondent Chemical Solvent held a brief meeting regarding the health insurance changes. (Tr. 421) The Respondent had no one present at the meeting with authority to bind it. (Tr. 423) Union Secretary Mixon reiterated that the Union might strike over the changes.
- On November 5, 2010, the Respondent began to use All Pro Freight drivers to perform bargaining unit work. Almost immediately the unit drivers began to have their hours reduced. (Tr. 496-498)
- On or about November 23, 2010 through January 31, 2012, the bargaining unit drivers filed numerous grievances regarding the Employer subcontracting bargaining unit work. (G.C. Exh. 17, page 2-17) Schill asserted that the contract permitted the Employer to subcontract bargaining unit work to avoid employees working overtime. (Tr. 505-506) (G.C. Exh. 17, page 2-17) Schill never asserted that the Employer had an unfettered right to subcontract bargaining unit work in all situations, either by contract or past practice.

- On or about November 11, 2010, Schill, for the first time began to discuss subcontracting bargaining unit drivers' work with DistTech Manager John Rakoczy. (Tr. 394) If there is a "smoking gun" on the subcontracting issue, it is found in the evidence of Schill's e-mail transmissions with Rakoczy. Respondent, through Schill, made it quite clear that it wanted to get rid of its Union represented drivers. In an e-mail, Rakoczy asked Schill whether the Respondent would insist that all of its drivers be hired should Distech take over the transportation department. Schill made it clear that the Respondent had no desire to retain its Union activist drivers by saying, "Does not have to include our drivers." Rakoczy sent Schill an e-mail the following day indicating that he would be sending a representative to meet with Schill and another representative would also be present from a partner carrier. Rakoczy stated that this person would be able to get around the union issue. Schill responded, "We do not want union drivers in here". Rakoczy responded, "I agree, we don't either. However, in speaking with our labor attorney, there is a concern that unless your company transportation arm goes out of business and lays off the drivers in the process, we may be inviting a union into DistTech. Perhaps your legal folks can contact me and illustrate what they feel would be a plan forward to get around the union. I would like to discuss." (G.C. Exh. 13)
- In late December 2010 and or early January 2011, Respondent Chemical Solvents had not yet found a qualified carrier to obtain hazardous waste permits and transport hazardous waste, which was necessary to perform

almost half of the bargaining unit drivers' work. (Tr. 999-1000) Nor did Respondent Chemical Solvents have quotes, cost analysis, or agreements from anyone to perform their work.

- On January 3, 2011, Respondent announced that it was closing its trucking operations, and subsequently laid off three drivers in February 2011. Respondent took this action, as noted above, without any knowledge of who would perform the hazardous waste work, a substantial portion of bargaining unit drivers' work.
- In April 2011, Respondent's Production Supervisor John Mitchell warned production and maintenance employees not to file grievances regarding overtime and other working conditions. Mitchell announced during a group meeting with six employees "don't file any grievances about it because you'll end up like your drivers." (Tr. 733) Mitchell was asked to explain his statement, and he responded that they did not have a strong union. Mitchell subsequently reiterated his statements on several occasions when employees were having problems with their work. (Tr. 739) Bargaining unit employee Travis Hreha testified that he took Mitchell's statements very seriously in light of the drivers that were disappearing. He further testified that he did not file a grievance because he did not want to end up on the outside like the drivers. Hreha stated "I still need my job." (Tr. 743) Judge Sandron fully credited Hreha's testimony regarding Mitchell's statements and concluded that each time

Mitchell made the threat it constituted a separate violation of 8(a)(1). (JD page 33, lines 34-46)

Based on the foregoing facts, it is astonishing that Judge Sandron failed to find, calling it implausible, that Respondent subcontracted its bargaining unit work to rid itself of union drivers. (JD page 42, lines 2-4) Counsel for the Acting General Counsel notes at the outset that the Respondent was fully aware of the drivers' willingness to walk off their jobs in protest of Respondent's actions, because they had done it in 2007. The Judge erroneously ignored this evidence and Pavlish's threats to close the business in response. He rationalized that the drivers' protest was never adjudicated as lawful, hence Ed Pavlish's threats of closure if the drivers walked off their jobs was not evidence of anti-union animus to be considered here. In this instance the Judge fails to understand that Pavlish's threats did not address the legality of the drivers' work stoppage, but rather the conduct itself. In short, Pavlish was threatening to retaliate in the event of any strike, lawful or otherwise.

Thus, Pavlish's threat was certainly critical evidence of anti-union animus and should have been given great weight. Judge Sandron credited Griffith's testimony on this issue, and Respondent did not refute Griffith's testimony. Similar statements made by Supervisor Mitchell, found unlawful by Judge Sandron, warning employees about the example made of the drivers clearly supports a finding that union activity was the primary motivation for the subcontracting. See Century Air Freight Inc., 284 NLRB 730, 732 (1987)

In Century Air Freight Inc., the employer violated Section 8(a) (3) by permanently subcontracting its bargaining unit drivers' work and discharging them in

order to forestall the exercise of their right to strike. Similar to the facts here, in Century Air Freight Inc. Union officials had notified the employer that its members may strike if the employer was unwilling to pay a wage increase. Because the employer feared the Union's threat to strike would significantly impact its operations it immediately made arrangements to subcontract the unit drivers' work and discharge them.

In the instant case, the Respondent had prior experience involving the unit drivers willingness to engage in a work stoppage, and similar to the facts in Century Air Inc., a potential strike had been announced and steps had been taken to comply with the contract to facilitate a strike. Even more compelling, Pavlish's warning that a work stoppage would result in a closure cannot simply be ignored. Likewise, Schill's statement that "We do not want union drivers here", clearly states the impetus for the real motive of its discriminatory actions. In both Century Air Inc. and the instant case, Respondents were eager to subcontract unit drivers' work rather than risk a work stoppage.

Acting Counsel for the General Counsel notes that the unilateral implementation of the discipline policy concerning cell phones and inspections was solely directed at the drivers, the segment of the bargaining unit who had historically engaged in a work stoppage and included the most frequent grievance filers. By eliminating the drivers past practice of talking to each other on company cell phones and limiting pre-trip inspections, the Respondent drastically reduced or eliminated the drivers' opportunity for all manner of interaction, including discussing a strike.

Further, Respondents' own evidence regarding its "path" to subcontracting shows the pretextual nature of its argument. In analyzing subcontracting cases involving claims of unlawful motive, the Board has distinguished cases in which an employer was simply

contemplating subcontracting prior to union activity, as the facts here demonstrate, as opposed to those instances, similar to Capitol Transit, 289 NLRB 777 (1988), where an Employer has definitive plans to take such action when union activity occurred. Masland Industries, Inc. 311 NLRB 184 (1993); Gold Coast Produce, 319 NLRB 202 (1995);

To illustrate, in Capital Transit, the employer made an arrangement to lease truck drivers to operate its vehicles with Transcontinental Leasing, which caused an entire bargaining unit to be terminated. 289 NLRB at 778 The effective date of the change was 1 month after the employer's drivers had commenced a union organizational campaign with a Teamsters Local. Id. at 779.

There the Board determined the Employer had made the decision to lease truck drivers, subject to "working out comparable insurance coverage and employment protection for Capitol's employees. This decision occurred several weeks prior to the commencement of union activity. Id. Several weeks after the union activity began, the parties met again and agreed that Transcontinental's insurance policy provided more coverage than Capitol's and did so at a less expensive rate. Transcontinental had also reached an agreement with the Union representing Transcontinental's employees to permit Capitol Transit employees to work for Transcontinental. Id. At 778 In this instance, the Board found that management had carried out actual advance steps of a closure and thereby had met its burden that it would have taken the same action even in the absence of the protected activity. Id.

In the instant case, there was no evidence of recent steps taken by Respondent to subcontract bargaining unit truck drivers' work at the time the Union began to protest the health insurance changes and more stringent enforcement of drivers' work rules and

discipline policy. To the contrary, Respondent had not met with, or exchanged any information with All Pro Freight for at least 10 months before the onset of this union activity. The record is devoid of any evidence that Respondent had discussions with any other contractor prior to the employees engaging in this protected activity.

The facts here are more closely akin to those in Masland Industries Inc. In that case the employer embarked on a two-path solution to the problem of increased losses in its transportation department.⁴ Initially, the employer received a written proposal from a driver leasing company to replace its drivers. Simultaneously, the Employer met with the drivers to discuss a way to fix the problem internally. During a subsequent meeting, the drivers mentioned that perhaps the facility should become unionized. Several days later, management requested the leasing company to revise its proposal and include additional information, and the requested information was provided within a week. Even so, management continued to meet with the drivers to try to reach an alternative wage structure that would allow it to maintain its in-house trucking operations. Id. at 189-191. It was not until the employer became aware that the drivers were meeting with the Union to sign authorization cards and the Union demanded recognition that management made its decision to pursue the path of leasing out its trucking operations.

Based on the timing of its decision, the statements made to drivers during their meetings, and the employer's inaction, until the demand for recognition, regarding the leasing company's prior proposal, the Board determined that union activity was the real reason for the employer's motives when it discharged the drivers and immediately subcontracted their work to a leasing company. Id. at 184, 201.

⁴ Counsel for the Acting General Counsel Notes that R. Exh. 157 clearly notes that Chemical Solvents' costs in the trucking department had steadily been reduced from 2008 – 2010.

The record evidence here makes out a stronger case for a violation than that contained in Masland Industries. Respondent Chemical Solvents Inc. never received a written agreement, study, cost comparison analysis, or had a subcontractor lined up to transport hazardous load work performed by bargaining unit drivers when it announced its decision to eliminate the bargaining unit drivers' work. It is hard to imagine a better example of an employer making a bad, hurried decision in response to union activities that had angered it.

It was not until after Complaint issued in this matter that Respondent recognized the need to provide a cost analysis or study to justify its reason for its subcontracting decision. Judge Sandron properly rejected this after-the-fact evidence. (Tr. 844-846)

Overlooking the obvious evidence of pretext, however, the Judge erroneously relied on All Pro Freights owner's testimony and that of Respondent's accountant Bob Debevec to support his finding that there were definitive plans and a decision to subcontract prior to any union activity. The Judge clearly misread the facts and confused the sequence of events on this issue.

First, Accountant Bob Debevec's testimony, credited by Judge Sandron, clearly contradicts Ed Pavlish testimony regarding the date that he made the decision to subcontract. Pavlish testified under direct examination that the 2008, 2009, and 2010 truck summaries annually compiled by his accountant Debevec caused him to decide in the Spring of 2009 to close the in-house trucking operations. (Tr. 1212-1214; R. Exh. 157) Yet, Debevec testified that he did not prepare the summaries until the spring of the following year. Thus, the 2008, 2009, and 2010 summaries were not prepared until the spring of 2009, 2010, and 2011, respectively. Pavlish's testimony regarding the date the

decision was made was clearly false, and one strong indication that the subcontracting decision was dictated by unlawful motives.

Counsel for the Acting General Counsel further notes that Respondent's witness Schill testified that the Respondent's subcontracting decision was made in late December 2010 or early January 2011, not 2009 as Ed Pavlish claims. (Tr. 371) This is strong evidence that the decision was made in response to the drivers' refusal to accept Schill's offers to resign for monetary gain, grievances filed over threats of discipline, and strike talk in response to Respondent's unilateral changes.

Equally significant, summary records prepared by Debevec demonstrate that the overall trucking costs, including labor and gas mileage costs, had progressively declined between 2008 and 2010. (R. Exh. 157) Thus, Respondent had no immediate urgency to subcontract the work and no apparent economic reason to do so. This is particularly true, where, as here, the record evidence demonstrates that Respondent purchased three vehicles (tractors and trailers) totaling over \$252,000.00, during the same time period that owner Pavlish asserts that he made the decision to subcontract drivers' work. It is implausible to believe that Respondent would make such a large capital investment in its trucking operation at the same time it had purportedly made a decision to subcontract.

Counsel for the Acting General Counsel acknowledges that Chris Haas' testimony demonstrates that Respondent was contemplating subcontracting a limited portion of bargaining unit work in 2009. However, the record evidence and Haas' testimony, clearly illustrates that Respondent and Haas reached no agreement and had no discussions or exchanged information regarding subcontracting from November 2009 through August 2010. Moreover, Schill testified, and the documentary evidence clearly demonstrates that

Respondent did not begin to discuss the subcontracting of bargaining unit work with CET until late December 2010. (Tr. 1078-180. Equally important, Respondent did not receive a written proposal from CET until February 2011. (G.C. Exh. 31) This proposal did not even include the transporting of hazardous waste that represented over 40% of the bargaining unit's work. (Tr. 1079-1081)

Simply put, Respondent may have contemplated some sort of limited subcontracting in November 2009, but did nothing to pursue the matter for ten months. The retaliatory action, total elimination of the trucking operation, occurred in response to Union members' complaints about the unilateral changes to the health insurance benefits, strike talk, and filing of drivers' grievances in protest of the Respondent's unlawful actions, which included instituting disciplinary action for talking to other drivers on the cell phones and failing to call in for pre-trip and post-trip inspections that took more than 30 minutes.

If permitted to stand, the Judge's decision not only ignores an overwhelming amount of credited evidence to the contrary, but permits the Respondent to prevail in its defense that it had made advanced steps to close its facility beginning in 2009 without one iota of tangible evidence in support. Judge Sandron's decision never answers the following obvious questions, "Why did discussions only resume between Respondent and All Pro Freight in September 2010, after a 10 month hiatus?" Why did Respondent wait until December 2010 to inform All Pro Freight that it would have to acquire permits to transport hazardous waste that constitutes over 40% of the bargaining unit drivers' work if a decision to subcontract had been made in November 2009? Respondent must be

deemed to answer these, among other, questions if the Judge's decision is to stand. Respondent has failed to do so.

Accordingly, Counsel for the Acting General Counsel submits that the Board should reverse the ALJ's decision and find that the Respondent violated Section 8(a)(3) of the Act when it subcontracted the drivers' work and laid off employees.

B. JUDGE SANDRON ERRED IN FINDING THAT THE UNION WAIVED ITS RIGHT TO BARGAIN WITH RESPONDENT OVER THE DECISION TO SUBCONTRACT

The facts regarding this issue are rather straight forward. The parties' collective bargaining agreement provides in pertinent part:

Article 2—Conditions of Employment, Section 1 The Employer retains the right to...

.... "12) establish, expand, transfer, and/or consolidate work processes and facilities; 13) consolidate, merge or otherwise transfer any or all of its facilities property, processes or work with or to any other entity of effect or change in any respect the legal status, management or responsibility of such property, facilities or process of work; 14) terminate or eliminate all or any part of its work or facilities. Emphasis added."

The Respondent claims that Article 2 of the collective bargaining agreement permits it to unilaterally and permanently subcontract bargaining unit work. This defense is without merit.

As noted by Judge Sandron, the facts in the instant matter clearly denote that the replacement of bargaining unit drivers with non-bargaining unit drivers, to perform the same work, from the same location, and to the same clients is subcontracting, and is therefore a mandatory subject of bargaining, both as to the decision and its effects. The Respondent had an obligation to give the Union reasonable notice and an adequate opportunity to bargain until agreement had been reached or a valid impasse had occurred. Fiberboard Paper Products Corp., 379 U.S. 203 (1964); NLRB v. Plymouth Stamping

Div., Elec. Corp., 870 F.2d 1112 (6th cir. 1989). Respondent's refusal to bargain over its decision to subcontract its drivers' unit work can only be excused if it demonstrates that the decision to subcontract is explicitly reserved to the employer by contractual agreement and that there is a "clear and unmistakable waiver of the union's right to bargain. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

The Board has held that a waiver can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practice, bargaining history and action or inaction) or by a combination of the two. United Technologies Corp., 274 NLRB 504, 507 (1985). When an employer asserts that contract language demonstrates that a union has waived its right to bargain over an issue, the contract waiver language relied on must be specific. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) Equally important, the employer must establish that the parties fully discussed the issue and that the union clearly and unmistakably waived its interest in the matter. Trojan Yacht, 319 NLRB 741, 742 (1995)

In reviewing the express provision in the contract at issue here, no such waiver exists. This is crystal clear when compared with contract provisions the Board has found constituted waivers of a union's rights to bargain over the decision to subcontract as set forth below:

In Allison Corp., 330 NLRB 1363 (2000), the Board found that the following contract language provided a "clear and unmistakable waiver" of the union's right to bargain and plainly gave the Employer the right to "subcontract": "The Company shall have the exclusive right to manage the business and operation of its facilities... to

subcontract;...and generally to control and direct the Company in all of its operations and affairs.”

Similarly, in Ingham Regional Medical Center, 342 NLRB 1259 (2004), the Board upheld the ALJ’s decision that the union waived its right to bargain about a subcontracting decision. First, the management rights clause includes “subcontracting” as one of the rights reserved to the Employer. Second, the section dealing specifically with subcontracting reserves the right to subcontract bargaining unit work to the Employer. Specifically, the contract language stated “The Employer reserves the right to enter into affiliation and merger agreements and to subcontract work normally performed by bargaining unit employees.”

In each of these examples where the Board found a waiver, the term “subcontract” was expressly used. Where a contract is either silent and does not use the word “subcontract”, as is the case here, or vague concerning the right to bargain over subcontracting, the Board has found no waiver. Here, there is no contract language that demonstrates that the Union waived its right to bargain over the decision to subcontract unit work. Even if the language here infers a right to subcontract, an inference is insufficient to satisfy the Board’s strict standard regarding a “clear and unmistakable” expression of the Union’s intent to waive its right to bargain over a mandatory subject. Metropolitan Edison Co. v. NLRB, noted supra. See also Public Service Co., 312 NLRB 459, 460 (1993).

The contract language relied on by the Respondent is more closely akin to that in Reece Corp., 294 NLRB 448, 452 (1989). In Reece Corp., a management rights clause in the collective bargaining agreement gave the employer “the right to abandon or

discontinue any production methods or facilities...When in the sole judgment of the Company it decides to close permanently the plant or discontinue permanently a department of the plant or portion thereof and terminate the employment of individuals....” The management-rights clause also reserved the right to “subcontract” work. In neither clause, however, did the Respondent reserve the right unilaterally to transfer or relocate work from one of its own plants to another. The Board found that the union did not waive its right to bargain over the transfer of work because the language in the contract did not meet the “clear and unmistakable” standard that governs the waiver of statutory rights.⁵ Similar to Reece Corp., the Respondent here may have included “transfer of work” language in its contract, but there is no language in the contract that establishes that the Union waived its right to “subcontract” bargaining unit work.

Acting General Counsel notes that the Judge apparently assumes that the terms “subcontracting” and “transfer of work” are synonymous. They are not. Subcontracting is typically defined as replacing bargaining unit employees with another group of employees, performing the same type of work and at the same location. Conversely, “transfer of work”, as noted in Reece Corp. is generally defined as moving work from one location to another, whether it is to another worksite owned by the Employer or the site of another entity. This is not the case here. The work was not transferred. Indeed, it is being done exactly as it was before with the only change being the use of non-union, non-unit drivers instead of the unit drivers.

⁵ See also Public Service Co., 312 NLRB 459, 460 (1993) where the Board found that a subcontracting provision in a collective bargaining agreement that dealt only with subcontracting for the sole purpose of laying off employees, did not constitute a waiver of the employer’s decision to subcontract work in all other situations.

The record evidence demonstrates that Supervisor/Dispatcher John Jones continues to prepare the Daily Driver Manifests a day prior to the product delivery and provides the manifest to the subcontractors' drivers, similar to the bargaining unit drivers. (Tr. 333; G.C Exh. 7) Similarly, Respondent's production and maintenance employees are still loading Respondent's product on trucks that are driven by subcontractors. Subcontract drivers, similar to bargaining unit drivers are returning empty totes, empty drums, and/or hazardous waste to Respondent's facility on the return trip. (Tr. 337-342)⁶ These actions clearly demonstrate that there was no transfer or elimination of work. This is clearly subcontracting. Therefore, a waiver of the Union's right to bargain cannot reasonably be inferred by the language of the parties' contract cited by Judge Sandron.

Equally important, there is no bargaining history or past practice that demonstrates that the parties previously permitted unilateral subcontracting that would result in the lay off of unit drivers.

Union Secretary Albert Mixon, James Griffith and Kenneth Glodden testified that in the past, Respondent used non-bargaining unit employees to perform bargaining unit truck driver work in very limited circumstances. (Tr. 143-144, 642, 647) This occurred primarily when unit drivers were unavailable either because they were on assignment, leave, or had already reached the maximum 60 hours per week as under the Department of Transportation regulations. They also used outside drivers when they needed to transport small orders, commonly referred to as "less than a truck load" (LTL), and/or out

⁶ Bargaining unit drivers were rarely if ever used to transport freight waste. Instead, Schill testified that Respondent has dedicated carriers that handle freight waste for economic reasons. (Tr. 357-358; G.C. Exh. 9) Similarly, Respondent has dedicated carriers that transport certain product on a regular basis from the shipping department by employee Bill Burnside, who works in a separate and distinct work area and job than that performed by bargaining unit drivers and the current subcontractors. (Tr. 1073-1075; R. Exh. 2, 148) These carriers do not use Respondent Chemical's equipment to transport product, nor does the work appear on the daily driver manifests. (Tr. 1073-1074; R. Exh. 2, 148)

of client necessity. (JD Sandron page 18, lines 10-15) Respondent's witness, Jerry Schill's testimony, under 611(c) corroborated General Counsel witnesses testimony regarding the use of common carriers for these limited purposes. (Tr. 346-349) This testimony clearly fails to show a past practice that would support Respondents argument that the contract permitted subcontracting bargaining unit work. Essentially subcontracting occurred in the past primarily when unit drivers were unavailable and additional help was needed.

Respondent has argued that a proposal made by the Union during the last contract negotiations tacitly recognized that the current contract language permitted unilateral permanent subcontracting. It is true that the Union did propose explicit language prohibiting subcontracting. (Tr. 640, R. Exh. 12 pg. 5 (000126) However, the Respondent told the Union that there was no need for this language. (Tr. 641-643) This exchange at past negotiations does not establish a waiver by the Union, but rather shows that the Respondent reassured the Union that it needed no protection from subcontracting. This was an admission by the Respondent that the management rights clause did not act as a waiver on this issue.

Further, General Counsel notes that Article 1, Paragraph 3 provides in pertinent part:

The Employer and the Union acknowledge that during negotiations which preceded this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining/negotiations and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, for the life of this Agreement, the Employer and the Union each voluntarily and unqualifiedly waives the right and each

agrees that the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to, or covered in this Agreement....

Contrary to Respondent's contentions, it never proposed specific language that provides it with an unfettered right to subcontract, nor did it ever claim that such right existed prior to November 2010.

This is illustrated by Respondent's statements about an earlier subcontracting grievance filed by Scott Haught. (Tr. 810) In the grievance, Haught alleges that on March 23, 2009, several drivers were available to work and the Employer utilized Thomas Transport to perform bargaining unit work. (G.C. Exh. 23) Schill initially testified that he denied Haught's grievance because the contract permitted subcontracting. (Tr. 810) Yet, Schill's testimony was contradicted by the language he used in the grievance answer in which he made no claim to a contractual right to subcontract bargaining unit work. Schill wrote "it was cost effective to ship the product, by Thomas Transport because the customer did not need Respondent to backhaul waste." (G.C. Exh. 23) There was no contractual right to subcontract asserted because Respondent did not believe it possessed such a right.

Even when employees filed grievances over the subcontracting contained herein, between November 2010 through January 31, 2011, Schill never asserted that the contract allowed permanent subcontracting. (Tr. 496-498; G.C. Exh. 17 pg. 2-17) Rather, Schill told Union Steward Hughes and grievants that Respondent was required to provide its drivers with 40 hours each week, and that subcontractors were being used to avoid overtime. (Tr. 505-506) Schill's statement to Hughes was consistent with General Counsel's witnesses Mixon and Griffith and Respondent's witness Pavlish regarding the

use of carriers to perform bargaining unit work. Significantly, Judge Sandron credited Hughes testimony on this issue, (JD page 17, lines 33-35) but failed to give this critical piece of evidence the proper weight.

Equally significant, bargaining unit drivers observed All Pro Freight performing some limited trucking work in November 2009. (R. Exh. 153; Tr. 152) Bargaining unit drivers immediately requested to meet with Respondent/Owner Ed Pavlish. (Tr. 147-149) Griffith testified that during the meeting, Pavlish stated that Respondent had been spending too much money on bargaining unit drivers' overtime. Pavlish did not assert a contractual right to subcontract work. (Tr. 156) As noted above, the Respondent did not use All Pro Freight or any other carrier to permanently perform bargaining unit work, until sometime after November 1, 2010. (R. Exh. 153; Tr. 156-159)⁷

In light of the Respondent's failure to show specific contract language that the Union waived its right to bargain over subcontracting as well as its failure to establish a bargaining history or past practice that demonstrates a "clear and unmistakable waiver", General Counsel requests that the Board reverse Judge Sandron's ruling on this issue and find that the Respondent violated Section 8 (a) (1) and (5) of the Act by failing to provide the Union with an opportunity to bargain over its subcontracting decision.

C. JUDGE SANDRON ERRED IN FINDING THAT RESPONDENT DID NOT VIOLATE SECTION 8(A)(1) AND (5) OF THE ACT BY FAILING TO PROVIDE THE UNION WITH INFORMATION RELEVANT TO THE SUBCONTRACTING OF THE DRIVER'S WORK

⁷ It is clear from the record that ALJ Sandron misconstrued the facts on this issue because there was no testimony or documentary evidence that suggest that Respondent continued to use All Pro Freight after this meeting was held, until a year later when bargaining unit employees were engaged in union activity. ALJ Sandron's confused the facts on this relevant point, which demonstrates that no subcontracting decision was made until after union activity.

Judge Sandron erroneously held that because the “decision to close the trucking division was made a non-mandatory subject of bargaining by virtue of the management-rights clause in the collective-bargaining agreement, and the Respondent was not obliged to bargain over the closure decision, it logically follows that the Respondent was not legally required to comply with the Union’s information request to the extent that it dealt with the decision to close. (JD Sandron page 42, lines 46-47 and page 43, lines 2-5) Judge Sandron concluded that the class-action grievance solely concerned the permanent outsourcing of work and no other matter, thus the Union was not entitled to the information.

First, as Counsel for the Acting General Counsel has shown that Respondent was obligated to bargain about the decision to subcontract, it follows that it also had to provide the requested information regarding its decision.

Even assuming, arguendo, that this particular subcontracting decision is not a mandatory subject of bargaining, the Respondent’s obligation to provide the union with subcontracting information does not depend on whether the employer is also found to have had an obligation to bargain about the subcontracting of work.

Instead, the standard has always been that an employer has the statutory obligation to provide on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967). This includes the decision to file or process grievances. Beth Abraham Health Services, 332 NLRB 1234 (2000)

Where the union is obligated to establish relevance, it need only demonstrate a reasonable belief based on objective facts that the requested information is relevant.

Disneyland Park, 350 NLRB 1256, 1258 (2007). Further, the Board does not pass on the merits of the Union's grievance, or assertion that the employer may have violated its contract in assessing whether information relating to the processing of a grievance is relevant. National Broadcasting Company, 352 NLRB 90, 97 (2008)

Contrary to Board law, ALJ Sandron clearly based his findings on the merits of the Union's grievance. Yet, it is clear that the Union reasonably believed that Respondent was obligated to provide the information based on the contract, past practice, and no clear and unequivocal waiver by the Union. The Union Attorney James Petroff credibly testified, and Judge Sandron found, that the purpose of its request for information was to gather information as part of the investigation of its class action grievance and other potential grievances regarding outsourcing, and to determine whether Respondent had retaliatory motives for closing its in-house truck driving operations. (Tr. 539; JD Sandron page 25, lines 11-18; Jt. Exh. 11, 13) As noted by Judge Sandron, Petroff provided a brief statement summarizing the reason for each requested item in Joint Exhibit 11 and 13. (JD page 27, lines 36-47, page 28, lines 2-46, and page 29, lines 2-4; Tr. 544-565, 573-575)

Based on these facts, Counsel for the Acting General Counsel requests the Board to reverse Judge Sandron's findings and conclusion that the Union was not entitled to information requested regarding the decision to subcontract and find that the Respondent violated Section 8(a)(5) of the Act.⁸

D. JUDGE SANDRON ERRED IN NOT FINDING THE EXISTENCE OF A SINGLE EMPLOYER AND/OR ALTER EGO

⁸ Counsel for the Acting General Counsel further notes that the ALJ did find that Respondent failed to provide information related to effects bargaining, and thereby concluded that this was a failure to bargain over the effects in violation of Section 8(a)(5) of the Act. (JD Sandron page 43, lines 14-48 and page 44, lines 3-4).

Judge ALJ Sandron misapplied the law to the facts concerning the single employer and/or alter ego issue in this case. The Board considers four factors in determining whether two or more entities should be treated as a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. Of Mobile, 380 U.S., 355 (1965). While the Board considers common control of labor relations a significant indication of single-employer status, no single aspect is controlling. All four factors need not be present to find single-employer status. Instead, the ultimate determination turns on the totality of the evidence in a given case. Bolivar-Tees, Inc. 349 NLRB720 (2007), *enfd.* 551 F.3d 722 (8th Cir. 2008).

Here, there is ample evidence of the requisite interrelation of operations between Respondents to support a finding of a single employer status. Respondent Chemical Solvents, solely owned by Ed Pavlish, has for over forty years been engaged in the business of customizing materials for paint formulation, paint purging, metal degreasing and the cleaning of many plastic and fiberglass materials, and providing industrial chemicals in the recycling, treatment and disposal of generated waste materials. (G.C. Exh. 1y) From its inception until Respondent engaged in the instant unfair labor practices, the Employer has operated its own in-house trucking operation to ensure quality service to its customers. (Tr. 1200)

Respondent Turn-To Transport (herein Turn) began its operations on May 16, 2011. It is solely owned by Patricia Pavlish, the wife of Ed Pavlish, the sole owner of Chemical Solvents Inc. Patricia Pavlish testified that Respondent Turn is engaged in the

leasing of equipment and over the road long haul trucking. (Tr. 1233) There was no evidence presented that Pavlish had experience operating a truck leasing company, rather the record evidence demonstrates that she had worked at Respondent Chemical Solvents, as a product buyer many years ago, and is currently an office holder and manager at Respondent Chemical Solvents Inc. (Tr. 1130)

Significantly, Respondent Turn officially acquired equipment from Respondent Chemical Solvents in August 2011. Respondent Chemical Solvents Vice President of Operations Jerry Schill began to negotiate the lease and sale of Respondent's Chemical Solvents' vehicles to Cleveland Express Trucking (CET) when it began to layoff its bargaining unit drivers. (G.C. Exh. 32) Schill's negotiations began at least three months prior to Respondent Turn's creation and five months prior to Respondent Turn acquiring legal ownership of Chemical Solvents fleet. (G.C. Exh. 25 – 29, 34-35). Despite Patricia Pavlish's and Schill's denial of these facts, the email correspondence between CET representative Andy Ilcin and Schill indicates that in February 2011, Schill began to arrange for the lease/sale of Chemical Solvent's equipment to CET. Patricia Pavlish was not involved in these early discussions. (Tr. 823, 1242; G.C. Exhs. 25-29, 34-35)

Significantly, Patricia Pavlish obtained her entire fleet from Respondent Chemical Solvents, and has limited the leasing of her fleet to Cleveland Express Trucking Company (CET). (Tr. 1233) CET is the primary manpower subcontractor used by Respondent Chemical Solvents Inc. to perform bargaining unit truck drivers' work. Respondent Turn's equipment that has not been leased by CET continues to be stored and maintained at Respondent Chemical Solvents' facility, without any charge to Respondent Turn. (1244-46, 1257)

Moreover, evidence of a less than arms length transaction is demonstrated by the overall purchase price of Respondent Chemical Solvent's fleet. The purchase price of \$399,000 seems unreasonable in light of the amount of money Respondent Chemical Solvent's paid to purchase the equipment. ⁹ A review of R. Exh. 136 demonstrates that Ed Pavlish sold over 90% of Respondent Chemical Solvent's fleet to Patricia Pavlish for less than 40% of the vehicle costs.

To illustrate, in August 2010, Respondent Chemical purchased Unit # 48 (Peterbilt Tractor) for \$122,786 and sold it to Respondent Turn-To one year later for \$54,000. Likewise, Respondent Chemical purchased a similar vehicle Unit #47 in 2007 for \$169,578.00, and sold it to Respondent Turn-To in August 2011 for \$29,600. (R. Exh. 136.) Respondents offered no explanation or documentation as to how they arrived at the figures that were used for the selling price.

Equally significant, at no time did Respondent Turn present evidence regarding the source of the funds Patricia Pavlish used to purchase her husband's fleet. Based on Respondents' failure to provide that information, it is reasonable to conclude that (1) no actual transfer of funds was involved or (2) the money came from the Pavlishs' personal assets. So, in effect, Ed Pavlish may well have purchased his own trucks and gifted them to his wife.

Respondent Turn's sole employee Jonathan Brown hauls chemicals for Respondent Chemical Solvents. It is undisputed that Brown hauls chemicals in trailers and tankers that have Respondent Chemical Solvents name on them. (Tr. 773) Brown's

⁹ Pavlish purchased ten (10) tractors, ten (10) trailers, and eight tankers. The contract price for the equipment was \$399,800.00. Pavlish made a payment of \$252,000.00, and the remaining balance of \$147,8000 is due one year from the date of sale. Respondent did not present evidence that an appraiser had determined the fair market value of the equipment. This indicates a less than arm lengths transaction.

trailer and tanker are also housed at Respondent Chemical Solvent's facility. (Tr. 773-774) Respondent Turn-To uses the same broker, David Sindel, as Respondent Chemical Solvents to obtain clients. (Tr. 1237-1240) Respondent Turn also uses Respondent Chemical Solvents address to register its license for its International Fuel Tax Agreement. (G.C. Exh. 19).

Respondent Chemical Solvents' human resource employee Kathy Cahill processed paperwork to establish Respondent Turn's business and to lease its vehicles to CET. (Tr. 1254-55) Significantly, Respondent Turn leases office space in a building that is owned by Patricia Pavlish's husband, Ed Pavlish and his partner George Davet. Respondent Turn's office is located upstairs from George Davet's business, George's Pawn Shop. (Tr. 1264; G.C. Exh. 33) Patricia Pavlish admitted that her main residence is in Florida, and she is usually in Ohio only during the summer and fall. (Tr. 1258) Therefore, most of the time, Respondent Turn's office is vacant. (Tr. 1258-1262)

Further, Respondent Chemical Solvents' accountant, Bob Debevic of Clearpoint Partners, set up the original books and chart of accounts for Respondent Turn. (Tr. 1117-1118) Debevic testified that Chemical Solvents is managed by Ed Pavlish, Patricia Pavlish and Jerry Schill. (Tr. 1130) Similarly, General Counsel's witness Gloden testified that Patricia is part owner of Chemical Solvents, and the bargaining unit drivers met with her to complain about All Pro Freight performing their work in December 2010. (Tr. 761-766) Likewise, Respondents Turn and Chemical Solvents are represented by the same Attorney Thomas Colaluca. Attorney Colaluca has represented Chemical Solvents in all labor negotiations and disputes for many years, and assisted in preparing the legal documents of incorporation for Respondent Turn. (Tr. 1241; G.C. Exh. (1y, 10); R. Exh.

52). These factors clearly support a finding that Respondent Chemical Solvents and Turn are single employers.¹⁰

Additional evidence of single employer status is the common ownership present here. As previously noted, Respondent Turn is owned and operated by Patricia Pavlish, the wife of Ed Pavlish, the sole owner of Respondent Chemical Solvents Inc. (Tr. 1232-1234); See Kenmore Contracting Co., 289 NLRB 336, 337 (1988), enfd. 888 F.2d 125 (2nd Cir. 1989) Patricia and Ed Pavlish are the sole members of Respondent Chemical Solvents' Board of Directors. (Tr. 1235) Equally important, Patricia Pavlish has held the position of Secretary/Treasurer at Respondent Chemical Solvents for twelve years and remains a salaried officer. (Tr. 1235, 1260)

Judge Sandron erroneously asserts that there was no evidence presented that Respondent Chemical Solvents has anything to do with the operation of Turn-To, but it is clear from the record evidence, as noted supra, that Chemical Solvents' Vice-President Jerry Schill significantly assisted in making arrangements for the lease of vehicles to CET for the benefit of Turn prior to Turn's inception. Further, the remaining vehicles that were not leased to CET, are housed, stored and maintained at Ed Pavlish's facility at no cost. This is strong evidence that a single employer relationship exists. Significantly, Respondent Turn employs one employee, so the fact that Respondent Chemical Solvent's owner, Ed Pavlish is not involved with labor relations at Respondent Turn-To is not dispositive evidence.

In addition, the Board looks to see if an entity is created in an attempt to allow another related entity to further its unlawful conduct and avoid a full unfair labor practice

¹⁰ The single employer status is not undercut here by the lack of evidence to support centralized control of labor simply because Turn-To Transport LLC has only one employee, other than the owner. See Three

restoration remedy. If so, the Board will find the new entity to be an alter ego and disguised continuance of the former. Woodline Motor Freight, 278 NLRB 1141 (1986).

Here, there could be no other reason to create Respondent Turn, but to respond to the Union's filing of unfair labor practices relating to subcontracting and the resulting lay offs. As noted in the Original Second Order Consolidating Cases, the Union began to file charges against Respondent concerning the 8(a) (1) and (3) allegations in November 2010, and subsequently filed numerous charges in December 2010, January 2011, and February 2011 regarding the unlawful subcontracting and lay off of bargaining unit drivers. (G.C. Exhs. 1(c), 1(e), 1(g), 1(i), 1(k), 1(m), and 1(y)). Soon thereafter, Respondents began to lay the ground work to dispose of its trucking assets by means of the creation of Turn. Based on the timing and the lack of evidence of any economic advantage to Respondent Chemical Solvent in "selling" its trucks at what appear to be bargain prices, the only basis for creating Turn has to be Respondent's desire to avoid the restoration remedy that Respondents knew might well result from the Union's ULP filings.

Based on these facts, Judge Sandron should have found that Respondents Chemical Solvent and Turn were both a single employer and an alter ego, an arrangement the sole purpose of which was to allow Respondent to continue its unlawful actions and avoid a restorative remedy.

Counsel for the Acting General Counsel requests that Judge Sandron's ruling on this issue be reversed, and that Respondents be adjudicated as single employer/alter ego and both jointly and severally liable for the violations contained in the instant cases.

Sisters Sportswear Co. 312 NLRB 853at 863 (1993); Bolivar-Tees, Inc. 349 NLRB at 722.

E. JUDGE SANDRON ERRED IN NOT FINDING THAT RESPONDENT VIOLATED SECTION 8(A) (1) AND (5) OF THE ACT BY UNILATERALLY CHANGING ITS DISCIPLINARY POLICY AS IT RELATES TO CELL PHONE USE AND VEHICLE INSPECTIONS

Counsel for the General Counsel submits that Judge Sandron's misapplication of Board law to the evidence on these issues requires a reversal of his decision to dismiss the allegations concerning the unilateral change in disciplinary policy regarding cell phone usage amongst drivers and pre-trip and post-trip inspections. Contrary to Judge Sandron's ruling, the evidence shows that employees were subject to new rules that implement discipline for violations of cell phone and pre and post trip inspection policies without notice to the union or an opportunity to bargain.

As a matter of law, the institution or alteration of a disciplinary policy is a mandatory subject of bargaining. Quality Food Management, Inc. 327 NLRB 885, 889 (1999) Where, as here, an employer institutes a new offense for which an employee is subject to discipline, the change is considered material and significant. Toledo Blade Company, Inc. 343 NLRB 385, 387 (2004).

Here, it is undisputed that drivers for many years had a past practice of talking to each other on the phones. (Tr. 229, 245-250) Witness Zemaitis and Griffith were in agreement on this, despite Judge Sandron's assertion that they were unclear on this point. So, despite the Judge's findings to the contrary, Counsel for the Acting General Counsel has established what the past practice was regarding cell phone usage. The change in that policy came when Schill told drivers, in October 2010, that they were now subject to discipline for such conduct. (Tr. 808) The September 2 memorandum, noted by Judge Sandron, has no bearing on this issue. Likewise, in these same conversations, Schill announced for the first time that driver's were subject to discipline for failing to call in if

they took more than 30 minutes on a pre trip and post trip inspection. (Tr. 245-250; JD Sandron page 31, lines 35-36)

Respondent, for the first time in October 2010, imposed potential discipline for this previously tolerated conduct. Schill admitted that he informed both Griffith and Zemaitis that they would be disciplined for violating Respondent's new rules. (Tr. 808) Similar to the facts in Toledo Blade, the Employer here has instituted new rules that lead to discipline, without notifying the Union. Contrary to Judge Sandron's ruling, these changes are significant and material and must be negotiated. 343 NLRB at 387.

Based on these facts, Counsel for the Acting General Counsel requests that the Board reverse Judge Sandron and find the Employer violated Section 8(a)(5) of the Act by instituting a new disciplinary policy in connection with cell phone use and pre trip and post trip inspections.

F. EVIDENTIARY ISSUES RELATED TO THE EXCEPTIONS

1. Subcontracting

Judge Sandron credited the uncontroverted testimony of an Acting General Counsel witness, James Griffith, who testified that Respondent threatened to close the facility if employees were to engage in a work stoppage. (Tr. 60-67; JD, p. 6, lines 41-42). Yet, Judge Sandron inexplicably gave no weight to this threat when considering the Employer's alleged reasons for subcontracting the unit drivers' jobs shortly after its employees threatened to go out on strike. Similarly, there was classic "smoking gun" evidence in the form of e-mails and verbal threats that evidenced the Respondent's unlawful motivations when it rushed to secure subcontractors to replace the bargaining unit drivers. These communications showed that its actions were driven by concerns that

bargaining unit employees would continue to threaten it with strikes and engage in other protected concerted activities. (GC 13) Yet Judge Sandron inexplicably overlooked all of this credited evidence of animus and motivation while dismissing the Section 8(a)(3) allegation relating to subcontracting.

Judge Sandron fully generally credited the uncontroverted testimony of the Acting General Counsel's witnesses regarding the Respondent's 8(a)(1) threats of work stoppages, threats regarding future grievance filings, offers to resign for money, the timing of unilateral changes to quell union activity, and 8(a) (3) disciplinary action for engaging in these protected activities. (JD, pp.48-49, lines 46-3). Yet, the Judge apparently gave no weight to the compelling evidence of anti-union animus in concluding that the subcontracting decision was not motivated by union activities.

Compounding his error, the Judge then totally ignored the serious shortcomings in the testimony of Respondent's witnesses concerning the decision to subcontract and the timing of that decision. Respondent presented four witnesses who provided testimony regarding the subcontracting allegation. Owner Ed Pavlish testified that he made the decision to subcontract the trucking division in the spring of 2009 based on trucking summaries prepared by his accountant Bob Debevec. (Tr. 1213-1214) However, two-thirds of these summaries were not yet prepared in the spring of 2009. (Tr. 1104-1105) (R. Exh. 157) (JD page 22, lines 11-14) Yet the Judge overlooked this flaw in the evidence and gave weight to it. Further, Judge Sandron, without explanation, credited owner Ed Pavlish's statement that he believed the trucking department was losing \$300,000. Pavlish provided no documentary evidence of any kind to support his statement and offered no explanation for how he came to this belief. Thus, the Judge

credited a totally unsupported claim by Pavlish who in no way explained how he got that number or how he even knew that the respondent was losing money.

Indeed, contrary to Pavlish, Vice President of Operations Jerry Schill testified that the subcontracting decision was not made until late December 2010 and/or January 2011. The inconsistent testimony by Respondent's witness supports the Acting General Counsel's position that there was no decision made, or advance steps taken, to subcontract until after the strike threats and grievance filings that so angered Respondent. Judge Sandron readily admits that the witnesses gave conflicting testimony, but then seemingly ignored his own doubts in finding that Respondent made out its defense to the Section 8(a)(3) subcontracting allegation. (JD page 22, lines 26-30)

The Judge also erred in relying on the testimony of All Pro Freight owner Chris Haas concerning his 2009 discussions with Respondent about subcontracting. This testimony had little probative value on this issue since Respondent did not initiate the discussions and they quickly broke off without any agreement. Yet Judge Sandron apparently gave this evidence great weight in determining that Respondent made a decision to subcontract the trucking operation in 2009. (JD page 41, lines 19-21). The following review of that testimony will clearly demonstrate where the Judge went astray.

Haas, the only subcontractor who testified, stated that Respondent did not seek out his services in 2009. Rather Schill's son, a landscaper, mentioned to Haas that Respondent might have trucking work available.¹¹ (Tr.869-870) Haas contacted Schill and met with him on three occasions for one hour or less in March, July, and October

¹¹ Judge Sandron wrongfully concluded that the owner's son, John Pavlish, was responsible for contacting Haas, which may have erroneously swayed the Judge in believing that Respondent was actively seeking a subcontractor. (JD. page 20, line 15) Instead, Haas testified that Schill's son told him that Schill may need trucking assistance.

2009 (Tr.870, 873, 878). As a result of their meetings, he provided Schill with a gas and labor cost savings estimate (Tr. 906, R. Exh. 154). There was nothing provided regarding insurance costs (R. Exh. 154). Haas testified that he never provided a proposal that encompassed taking over the bargaining unit truck drivers' work (Tr. 906-907). Equally important, Haas reluctantly admitted under cross examination that he did not have any further meetings or exchange any documents with Respondent from November 2009 through August 2010. (Tr. 909)

Haas testimony was evasive at best when he searched for reasons to explain the lack of contact with Respondent for almost a year. (Tr. 900, 906-907, 909). Similarly, there was no discussion, until December 2010, of hauling hazardous waste, a significant portion of the unit drivers' work. December 2010 was right after the union activity at issue had occurred (Tr. 911-912). Even more compelling is that there is not a scintilla of evidence in the record that supports Judge Sandron's findings and conclusions that subcontracting discussions continued with other contractors during the relevant time period preceding the union activity. (JD page 21, lines 2-4) ¹²

Counsel for the Acting General Counsel further notes serious difficulties with Schill's claim that Thomas Transport was also being considered as a potential replacement for bargaining unit drivers in 2009. In support of this claim, the Respondent provided a quote dated March 16, 2009, for work performed by Thomas Transport shortly thereafter. (R. Exh. 45) On its face, the quote is only for one-time work to be

¹² R. Exh. 45 is a simple quote for work that was eventually done for Respondent Chemical Solvents by Thomas Freight in the Spring of 2009. (See R. Exh. 111). Additionally, Schill testified that Respondent did not begin discussing subcontracting with CET until All Pro Freight notified Respondent that he was having problems with insurance. Thus, discussions with CET did not occur until mid to late December 2010, well after the onset of union activity. (Tr. 988) Further, there was no written agreement until July, 2011. (R. Exh. 80)

performed in four cities, covering two states. (R. Exh. 45 and 111) There is no evidence that this quote was an estimate prepared in contemplation that Thomas Transport would permanently replace bargaining unit drivers. Schill reluctantly admitted that the Respondent did nothing after receiving this estimate. (Tr. 1077) Rather this estimate was for immediate service, which was in fact performed shortly thereafter. (R. Exh. 111) Therefore, this evidence can not be construed as supportive of Respondent's claims that it decided in 2009 to eliminate its trucking operations.

Based on these facts it is clear that Judge Sandron seriously misconstrued the testimony and misread the documentary evidence when he came to the conclusion that discussions regarding permanent subcontracting were ongoing and serious between Respondent and other subcontractors beginning in 2009. As noted, all the evidence shows these discussions were exploratory at best, sharply limited in their focus, led to no agreement, and were not aimed at replacing the unit drivers. As noted above, it was only after the employees' strike threats and grievance filings that Respondent pursued subcontracting to eliminate its trucking operations. Thus, the record evidence shows that there were no real discussions to subcontract the work of the unit drivers until after the Union began challenging the Respondent. The evidence of discussions with potential contractors prior to the union activism of the drivers is insubstantial and pretextual.

2. Single Employer/Alter Ego

Moreover, Counsel for the Acting General Counsel submits that Judge Sandron credited the testimony of Respondent's witness Patricia Pavlish regarding the relationship between Respondent Turn-To Transport and Respondent Chemical Solvents Inc., even though it was completely contradictory and inconsistent. Judge Sandron's appears to

credit Pavlish's testimony because she consistent with Acting General Counsel's case. (JD page 23, lines 22-24) Yet, Sandron ignored the fact that Pavlish gave false statements with respect to her current role at Respondent Chemical Solvent's Inc., by testifying that she was not involved with managing Respondent Chemical Solvents' business and by denying that Respondent Chemical Solvents' Vice President of Operations assisted Turn-To Transport in negotiating the sell/lease agreement with Respondent Chemical Solvent's manpower subcontractor, CET. (Tr. 1242)

The testimony of Respondent's accountant Debevic and Acting General Counsel's witness Kenneth Gloden, both credited by Judge Sandron, demonstrates that Pavlish was clearly part of the management team at Respondent Chemical Solvents even after Turn-To Transport was created. In that regard Gloden testified that Patricia Pavlish was a part owner of Chemical Solvents. (Tr. 761-762) Debevic also testified that Patricia Pavlish was a part of the management team at Respondent Chemical Solvents. (Tr. 1130)

Moreover, contrary to Patricia Pavlish's and Jerry Schill's testimony, Jerry Schill, not Patricia Pavlish, initiated and participated in substantial negotiations to lease Respondent Chemical Solvents equipment to subcontractor CET even before Turn-To Transport came into existence in May 2011. Turn-To then reaped the benefit of Schill's efforts when it acquired from Chemical Solvents the very equipment that CET had or was in the process of contracting to lease. (Tr. 823, 1252-1253) The documentary evidence provided by Respondent pursuant to General Counsel's subpoena clearly demonstrates this fact, despite the denials of Respondent's witnesses. (G.C. Exh. 25-29) The Judge

made the correct finding on this point of fact, yet apparently ignored his own conclusion when evaluating Patricia Pavlish's credibility. (JD page 21, lines 13-19)

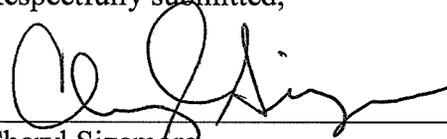
III. CONCLUSION

Counsel for the General Counsel respectfully submits that Judge Sandron's decision in these matters should be set aside to the extent that he failed to find the aforementioned alleged violations of Section 8(a)(1) (3) and (5) of the Act as set forth in the Complaint.

An appropriate, modified Order and Notice should also be issued.

Dated at Cleveland, Ohio this 6th day of July 2012.

Respectfully submitted,



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