

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

D & J AMBULETTE SERVICE, INC.,

Respondent,

and

Case No. 2-CA-040254

ANGEL MORENO, An Individual,

Charging Party.

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**RESPONDENT'S BRIEF IN RESPONSE TO ACTING GENERAL  
COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE  
DECISION**

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## **I. INTRODUCTION**

Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge ("ALJ") Decision cannot change the basic facts and inescapable conclusions of this case. The record evidence establishes that Counsel for the General Counsel failed to establish a *prima facie* case, consisting of employer knowledge of any protected activity and failed to establish that anti-union animus was a motivating factor in Respondent's decision to discontinue the employment of Angel Moreno, Carlos Valentin, Christopher Rodriguez and Yhou (Jose) Tejada (collectively referred herein as "Discriminatees"). Moreover, the record before the ALJ demonstrated that the Respondent would have severed the employment relationship of these individuals in the absence of any Union organizing activity, in that the uncontroverted testimony at trial was that these individuals were separated from employment with the Respondent for legitimate business reasons, including cost savings, insubordination and/or their unsatisfactory and poor job performance. Further, the record is clear that Mr. Tejada resigned of his own volition and not under any pressure or at the impetus of D&J. Counsel for the General Counsel's arguments here cannot alter its failure to present evidence permitting any other conclusion.

Likewise, the ALJ correctly concluded that Counsel for General Counsel failed to establish that D&J interrogated and/or threatened any employee for engaging in any union activity or for assisting in the Board investigation in this matter and correctly concluded that Luis Montas and Ely Talvy were not supervisors and/or agents of D&J as those terms are defined in the National Labor Relations Act (the "Act"). Counsel for the General Counsel's arguments to the contrary should be disregarded in their entirety.

## **II. STATEMENT OF FACTS**

### **A. Background**

D&J is a subsidiary of D&J Group, a full service ambulance provider which serves the five boroughs of New York City. D&J provides medical transportation for the disabled to medical appointments and day care centers<sup>1</sup>. D&J employs approximately two hundred and forty-eight employees, which includes one hundred and seventy-five drivers and sixty-five matrons<sup>2</sup>. The drivers have been represented by Local 124 for the past five to seven years<sup>3</sup>. The matrons recently elected Teamsters Local 854 as their bargaining representative and the parties are currently negotiating a collective bargaining agreement<sup>4</sup>.

### **B. Angel Moreno**

Angel Moreno was hired by D&J on or about February 23, 2009, as a tow truck driver<sup>5</sup>. He initially worked Monday through Saturday from 8 a.m. until 6 p.m.<sup>6</sup>. His working hours were subsequently changed, at his request, to 7 a.m. to 5 p.m.<sup>7</sup>. As a tow truck driver he was responsible for picking up disabled D&J vehicles and returning them to the D&J facility for repairs<sup>8</sup>. He would also pick up parts from suppliers<sup>9</sup>. On numerous occasions throughout his employment Mr. Moreno would refuse to operate the tow truck claiming that he was either "on lunch" or that the pickup was too close to the end of his scheduled shift<sup>10</sup>. Indeed, Mr. Moreno

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<sup>1</sup> Transcript, p. 576, ll. 8-12. References to "Transcript" in this Memorandum of Law refer to the Trial Transcript before NLRB Administrative Law Judge Green held on January 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, March 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup>, 2012.

<sup>2</sup> Transcript p. 576, ll. 16-25, p. 577, l. 1, p. 579, ll. 6-21.

<sup>3</sup> Transcript p. 576, ll. 23-25, 577, 1.

<sup>4</sup> Transcript p. 579, ll. 8-22.

<sup>5</sup> Transcript p. 26, ll. 16-19.

<sup>6</sup> Transcript, p. 28, ll. 21-23.

<sup>7</sup> Transcript, p. 29, ll. 1-4.

<sup>8</sup> Transcript, p. 29, ll. 19-23.

<sup>9</sup> Transcript, p. 29, ll. 24-25, p. 30, ll. 1-3.

<sup>10</sup> Transcript, p. 299, ll. 22-4, p. 300, ll. 6-25, p. 385, ll. 11-25, p. 386, l. 1, p. 437, ll. 20-25, p. 438, p. 438, ll. 1-14.

concedes that on at least one occasion he was sent home early for refusing to pick up a vehicle at 4 p.m. because it was too close to the end of his shift<sup>11</sup>.

In or about 2009 D&J began examining the overall costs of its operation with an eye towards reducing costs<sup>12</sup>. To that end D&J examined the costs of parts and supplies as well as the cost of operating the tow truck<sup>13</sup>. In or about August 2010 a meeting was held between Carlo Sacco, General Manager, Steven Squitieri and Joe Galito, D&J owners to discuss overall expenses. During this meeting they reviewed the invoices from the outside towing company which were, according to Mr. Sacco, "astronomical."<sup>14</sup> The owners could not understand why they were spending so much money to pay outside towing companies when D&J owned a tow truck<sup>15</sup>. Ultimately they determined that it was not financially sound to continue operating a tow truck and chose to rely solely on outside towing companies<sup>16</sup>. In making this decision Respondent took into consideration the fact that Mr. Moreno often refused to operate the truck during his scheduled working hours, which caused the Respondent to incur duplicate costs in the form of Mr. Moreno's salary and the cost of a private party towing company<sup>17</sup>. Further, the Respondent had recently purchased forty-one new vehicles with the intention of reducing repair/towing costs<sup>18</sup>. As such, on or about August 11, 2010, Joseph Davoli, Fleet Manager, advised Mr. Moreno that D&J was discontinuing the use of the tow truck and that his position

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<sup>11</sup> Transcript p. 73, ll. 10-25, p. 74.

<sup>12</sup> Transcript, p. 593, ll. 1-12.

<sup>13</sup> Transcript, p. 384, ll. 21-25, p. 385, ll. 1-15, p. 398, ll. 21-25, p. 44, ll. 1-10, p. 445, ll. 1-6, p. 446, ll. 20-25, p. 447, ll. 7-16, p. 448, ll. 22-25, p. 449, ll. 1-8; 598, ll. 23-25; p. 590, ll. 1-2 22-25.

<sup>14</sup> Transcript, p. p. 593, ll. 14-18; p. 594, ll. 23-25, p. 595, ll. 1-6.

<sup>15</sup> Transcript, p. 595, ll. 2-6.

<sup>16</sup> *Id.*

<sup>17</sup> Transcript, p. 387, ll. 19-25, p. 447, ll. 7-16.

<sup>18</sup> Transcript, p. 590, ll. 5-10; Respondent Exhibit 3.

was being eliminated<sup>19</sup>. Mr. Moreno was offered another position with D&J as a driver, but Mr. Moreno declined the offer<sup>20</sup>.

As he was exiting the shop on his last day of employment Mr. Moreno threatened to cut Mr. Montas' throat<sup>21</sup>. Mr. Moreno admits telling Mr. Montas that, "if we were in a jail situation, you would have got yours"<sup>22</sup>. Mr. Montas called the police and subsequently obtained an order of protection against Mr. Moreno<sup>23</sup>. Several months later Mr. Moreno again threatened Mr. Montas. Specifically, Mr. Montas was riding with Eduardo Jurjo, another D&J employee, in a company van<sup>24</sup>. While they were stopped at a traffic light on Williamsbridge Road, Mr. Moreno approached the van as he was friends with Mr. Jurjo<sup>25</sup>. When Mr. Moreno saw Mr. Montas he ran his fingers across his throat, which Mr. Montas interpreted as a threat<sup>26</sup>.

### **C. Christopher Rodriguez**

Mr. Rodriguez was hired by D&J on or about January 11, 2010, to park company vehicles in D&J's parking lot<sup>27</sup>. Mr. Rodriguez was also responsible for making sure that all the vehicles were properly secured, that the keys were returned and that the facility was secure<sup>28</sup>.

During the last two weeks of his employment Mr. Rodriguez engaged in egregious acts of misconduct. Specifically, on Saturday night in early August 2010, John Oliveri, a D&J manager who was ultimately responsible for, among other things, making sure that the D&J facility was

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<sup>19</sup> Transcript, p. 387, ll. 19-25.

<sup>20</sup> Transcript, p. 75, ll. 7-9, p. 616, ll. 15-21.

<sup>21</sup> Transcript p. 509, ll. 2-8

<sup>22</sup> Transcript, p. 48, l. 25, p. 49, ll. 1-6, p. 78, ll. 12-14.

<sup>23</sup> Transcript, p. 509, ll. 6-14.

<sup>24</sup> Transcript, p. 572, ll. 5-15.

<sup>25</sup> Transcript, p. 509, ll. 25; p. 510, ll. 1-13; p. 512, ll. 20-25; p. 513; p. 514, ll. 3-11; p. 572, 16-25.

<sup>26</sup> Transcript, p. 509; 510, ll. 1-13; p. 512, ll. 20-25; p. 513; p. 514, ll. 3-11; p. 572, 16-25.; p. 573, ll. 1-22.

<sup>27</sup> Transcript p. 337

<sup>28</sup> Transcript, p. 337, ll. 22-25; p. 338, ll. 1-9.

properly secured<sup>29</sup>, drove past the D&J facility and noticed that the lot was open, that the garage doors were open and that all the lights were on at the facility<sup>30</sup>. Upon entering the lot Mr. Oliveri found that several D&J vehicles had their doors open and the keys were still in the ignition<sup>31</sup>. Further, many vehicles were not in their designated spots<sup>32</sup>. Mr. Oliveri attempted to locate Mr. Rodriguez, who was on duty that night and responsible for the security of the facility, but he was nowhere to be found<sup>33</sup>. Indeed, Mr. Oliveri unsuccessfully tried to contact him on his D&J two-way radio<sup>34</sup>. Thereafter, Mr. Oliveri proceeded to park and secure the vehicles and the D&J lot<sup>35</sup>.

The following Monday, Mr. Oliveri spoke to Mr. Rodriguez and asked him what happened on Saturday night<sup>36</sup>. Mr. Rodriguez replied that he had a problem with "his girl" and that he "had to run out"<sup>37</sup>. Mr. Oliveri told Mr. Rodriguez that he could not leave during his shift and that he had to make sure that the vehicles and the lot were not left unattended or unsecured<sup>38</sup>.

Notwithstanding this warning, Mr. Rodriguez continued to engage in further egregious behavior. The following Saturday Mr. Oliveri arrived at the D&J lot and found that Mr. Rodriguez, who was scheduled to work that day, was not at the site and that a company vehicle was missing<sup>39</sup>. Mr. Oliveri was informed by another D&J employee that Mr. Rodriguez was at

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<sup>29</sup> Transcript, p. 338, ll. 10-19.

<sup>30</sup> Transcript, p. 345, ll. 2-19; p. 346, ll. 9-19; p. 347, ll. 4-11.

<sup>31</sup> Transcript, p. 345, ll. 2-19.

<sup>32</sup> Transcript, p. 345, ll. 12-14.

<sup>33</sup> Transcript, p. 345, ll. 16-19; p. 348, ll. 14-18.

<sup>34</sup> Transcript, p. 348, ll.

<sup>35</sup> Transcript, p. 348, ll. 14-18.

<sup>36</sup> Transcript, p. 348, l. 25; p. 349, ll. 1-15.

<sup>37</sup> Transcript, p. 349, ll. 6-21.

<sup>38</sup> Transcript, p. 350, ll. 11-15.

<sup>39</sup> Transcript, p. 339, ll. 2-14

another D&J lot, purportedly cleaning out the lot<sup>40</sup>. Mr. Oliveri drove over to the other lot to check on Mr. Rodriguez and confirm that he was using the missing vehicle<sup>41</sup>. When Mr. Oliveri arrived at the other lot he was unable to locate Mr. Rodriguez or the D&J vehicle<sup>42</sup>. He also found the lot dirty<sup>43</sup>. Approximately one hour later Mr. Oliveri returned to the D&J facility and located Mr. Rodriguez<sup>44</sup>. In response to Mr. Oliveri's questions about his whereabouts Mr. Rodriguez told Mr. Oliveri that he was "doing my thing", "don't worry about where I was" and "don't worry, I'm, you know, cool"<sup>45</sup>. Mr. Oliveri found Mr. Rodriguez to be smug and in light of this behavior told Mr. Rodriguez to go home<sup>46</sup>. Mr. Rodriguez then proceeded to call Mr. Talvy on the phone and was overheard stating "this nigger is sending me home, what should I do"<sup>47</sup>. Mr. Oliveri responded that he was not sending him home, rather he was firing him<sup>48</sup>. Mr. Rodriguez then hung up the phone and aggressively brushed past Mr. Oliveri as he left the facility<sup>49</sup>.

Thereafter, Mr. Oliveri called Mr. Squitieri and informed him that he fired Mr. Rodriguez because last week he left the facility open and unattended and this Saturday he disappeared<sup>50</sup>. Mr. Oliveri was unaware that Mr. Rodriguez signed a union card or that any union organizing

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<sup>40</sup> Transcript, p. 339, ll. 2-14; p. 340, ll. 3-4.

<sup>41</sup> Transcript, p. 340, ll. 6-7; p. 369, ll. 6-12; p. 372, ll. 16-17.

<sup>42</sup> Transcript, p. 340, ll. 3-7.

<sup>43</sup> Transcript, p. 340, ll. 3-7; p. 376, ll. 14-25; p. 377, ll. 1-2

<sup>44</sup> Transcript, p. 370, ll. 2-25

<sup>45</sup> Transcript, p. 340, ll. 17-25; p. 341, ll. 20-25.

<sup>46</sup> Transcript, p. 341, ll. 16-25

<sup>47</sup> Transcript, p. 342, ll. 11-22.

<sup>48</sup> Transcript, p. 342, ll. 23-25.

<sup>49</sup> Transcript, p. 343, ll. 22-24.

<sup>50</sup> Transcript, p. 351, ll. 23-25; p. 352, ll. 5-9; p. 353, ll. 19-23.

activity was taking place at D&J<sup>51</sup>. The following Monday, Mr. Rodriguez arrived at the D&J facility and spoke with Mr. Squitieri, who confirmed that his employment was terminated<sup>52</sup>.

### **Yhou (“Jose”) Tejada**

Mr. Tejada was hired as mechanic for D&J in or about July 6, 2010. He was assigned to work 2 p.m. to 10 p.m. Tuesday through Saturday<sup>53</sup>. On or about September 21, 2010, at the request of Mr. Davoli, Mr. Montas asked Mr. Tejada to put air in the tires of a D&J vehicle<sup>54</sup>. Mr. Tejada refused to perform the task instead telling Mr. Montas that he should do it himself<sup>55</sup>. Mr. Montas told Mr. Tejada that if he didn’t want to do the work he should go home<sup>56</sup>. He then went into the office and told Mr. Davoli that Mr. Tejada had refused to put air in the tires<sup>57</sup>. Mr. Davoli came out of his office and found Mr. Tejada packing up his tools to leave<sup>58</sup>. Mr. Davoli asked him what he was doing and Mr. Tejada informed him that he was leaving and that he was “done here”<sup>59</sup>.

### **Carlos Valentin**

Mr. Valentin was hired in April 2010 by D&J as a maintenance worker<sup>60</sup>. At his request, and with the representation that he had the requisite experience, Mr. Valentin was promoted to the position of mechanic<sup>61</sup>. Mr. Valentin was, however, unable to perform the job of a

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<sup>51</sup> Transcript, p. 354, ll. 19-25, p. 355, ll. 1-8.

<sup>52</sup> Transcript, p. 612, ll. 19-22.

<sup>53</sup> Transcript, p. 203, ll. 13-25.

<sup>54</sup> Transcript, p. 221, ll. 1-5; p. 395, ll. 19-25; p. 396, ll. 1-7; p. 518, ll. 22-25; p. 519, ll. 1-2.

<sup>55</sup> Id.

<sup>56</sup> Transcript, p. 396, ll. 3-7; p. 518, ll. 14-25; p. 519, ll. 1-2, 8-12; p. 519, ll. 8-11.

<sup>57</sup> Transcript, p. 395, ll. 19-25; p. 396, ll. 1-7.

<sup>58</sup> Transcript, p. 396, ll. 8-11; p. 519, ll. 13-25.

<sup>59</sup> Transcript, p. 396, ll. 12-20; p. 519, ll. 21-24.

<sup>60</sup> Transcript, p. 391, ll. 10-13.

<sup>61</sup> Transcript, p. 391, ll. 13-17.

mechanic<sup>62</sup>. On numerous occasions vehicles that Mr. Valentin supposedly repaired were returned to the shop and needed to be repaired again<sup>63</sup>. For example, on one occasion, he was asked to replace the alternator in a vehicle<sup>64</sup>. When he completed the job he forgot to put the charging plug back in the vehicle<sup>65</sup>. As a result the battery did not charge and eventually died<sup>66</sup>.

In August 2010, Mr. Valentin committed a serious error that ultimately led to his termination. Specifically, Mr. Valentin was asked to put new brakes on a D&J van<sup>67</sup>. After he completed the job Mr. Valentin told Mr. Davoli that he couldn't get the brakes to work<sup>68</sup>. Mr. Davoli asked Mr. Montas to examine the van<sup>69</sup>. After putting the van on the lift, Mr. Montas quickly discovered that Mr. Valentin had put the calipers for the brakes on upside down<sup>70</sup>. Had this error not been caught any driver or passenger in this vehicle could have been seriously injured or killed<sup>71</sup>. This incident coupled with the prior mistakes led Mr. Davoli to conclude that he could not trust Mr. Valentin as a mechanic<sup>72</sup>. As such, Mr. Davoli terminated Mr. Valentin's employment<sup>73</sup>. As D&J had already back filled his position, they could not return him to his old maintenance job<sup>74</sup>.

The Complaint also alleges Respondent interrogated employees about their union activities and interrogated and interfered with the Board investigation into this Complaint.

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<sup>62</sup> Transcript, p. 392, ll. 3-5; p. 393, ll. 9-17; p. 515, ll. 14-19.

<sup>63</sup> Transcript, p. 392, ll. 8-13; p. 478, ll. 2-17.

<sup>64</sup> Transcript, p. 392, ll. 6-13.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Transcript, p. 515, ll. 22-25.

<sup>68</sup> Transcript, p. 515, ll. 22-25; p. 516, ll. 1-5..

<sup>69</sup> Transcript, p. 515, ll. 25; p. 516, l.

<sup>70</sup> Transcript, p. 392, ll. 14-21; p. 515, ll. 22-25; p. 516, ll. 1-2, 23-25.

<sup>71</sup> Transcript, p. 392, ll. 14-25; p. 393, ll. 1-2; p. 480, ll. 8-17.

<sup>72</sup> Transcript, p. 394, ll. 1-8; p. 480, ll. 6-17.

<sup>73</sup> Transcript, p. 480, ll. 10-17.

<sup>74</sup> Transcript, p. 394, ll. 23-25, p. 395, ll. 1-10.

Respondent denies those allegations. The transcript is bereft of any facts that the Union was in any way prevented from organizing the Discriminatees, that those employees were illegally interrogated about whether they had signed Union cards, or that the Respondent threatened reprisals against any employee for Union activity or for participating in the underlying Board investigation. There is nothing in the Record to indicate any employee interrogation is occurring now or has occurred.

### **III. ARGUMENT**

#### **A. The ALJ Correctly Concluded that Luis Montas and Eli Talvy are Not Supervisors and Agents of the Respondent**

Section 2(11) of the Act defines “supervisor” as follows:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. §152(11). Possession of any one of the above indicia contained in the Act is enough to confer supervisory status on the employee. Sunnyside Farms, 308 NLRB 346, 347 (1992). Critically, the Board looks to whether the “supervisor” exercised independent judgment in assigning work, adjusting grievances and in the hiring and firing process. Id.

For purposes of hiring authority under Section 2(11) an individual’s mere presence in the interview process even where opinions and recommendations are given, is not necessarily sufficient to establish effective recommendations to hire particularly where the ultimate decision

maker also participated in the interview process. Ryder Truck Rental, 325 NLRB 1386, 1387 n. 9 (1998). Moreover, where the “supervisor” is merely a participant in the process as part of a group recommendation that the individual seeking employment would be a good fit this is considered to be merely an assessment of compatibility and does not support a finding of hiring authority within the meaning of Section 2(11). Talmadge Park, Inc., 351 NLRB 1241, 1244 (2007).

In order to establish that an individual directs employees under Section 2(11), it must be demonstrated that the employer delegated to the purported supervisor the authority to direct the work of employees using independent judgment, plus the authority to take corrective action if necessary and that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. Oakwood Health Care Inc., 348 NLRB 686, 690-94 (2006).

Similarly, a purported supervisor’s recommendation of approval of vacations for certain employees does not involve the exercise of independent judgment but rather is based simply on availability of those dates or enforcement of the employer’s rules on frequency of vacations and therefore are merely routine and clerical in nature. Dico Tire, Inc., 330 NLRB 1252, 1253 (2000).

Evidence must also be presented that the employer holds the purported supervisor responsible for the performance of certain employees under his or her alleged supervision. Counsel for the General Counsel must present evidence that the supervisor will face adverse consequences as a result of any employee failing to perform a task that the purported supervisor is allegedly responsible for directing them to perform. Lynwood Manor, 350 NLRB 489, 490-91 (2007).

In the absence of primary indicia of supervisory status so called secondary indicia of that status, such as participation in management meetings, receipt of management memoranda and the “fact” that certain employees consider the individual to be a manager cannot be relied upon to establish supervisor status and are therefore not dispositive. Central Plumbing Specialties, 337 NLRB 973, 975 (2002).

Even if the evidence is insufficient to establish that an employee was a supervisor, the Board may find that an employee was acting as an “agent” as that term is defined by Section 2(13) of the Act<sup>75</sup> for the employee if under all the circumstances, other employees would reasonably believe that the “agent” was reflecting company policy and acting for management. Zimmerman Painting & Heating, 325 NLRB 106 (1997). Critically, the Board will look to whether management placed the “agent” in a position whereby he transmitted management directives and therefore it would be reasonable for the employees to believe this person speaks for management. *Id.* Also relevant would be the fact that the “agent” was engaged in the pro-union activity on company property and during work hours. Dentech Corp., 294 NLRB 924, 926 (1989).

Against this backdrop the ALJ correctly concluded that Messers. Montas and Talvy were not supervisors and/or agents of Respondent.

**1. The ALJ Correctly Concluded that Luis Montas is Not a Supervisor or Agent of Respondent. (Exceptions 1 through 9)**

Counsel for the General Counsel first asserts that the ALJ incorrectly concluded that Mr. Montas was not an agent of Respondent. In support, Counsel for the General Counsel asserts that Mr. Montas served as a translator for his supervisor Mr. Davoli and cites to cases where the

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<sup>75</sup>That provision provides that: “ In determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

Board found that a translator of significant matters was an agent. However, none of the cases cited establish that an employee called upon to translate routine matters standing alone is an agent of the Respondent. To the contrary, those cases make clear that other factors must be present to establish agency. See e.g. Cream of the Crop, 300 NLRB 914, 917 (1990), (the bi-lingual employee not only was called upon to translate for certain employees, but, unlike the situation here, was also designated as the person to receive employee complaint); Great Am. Products, 312 NLRB 962, 963 (1993) (the bi-lingual employee deemed an agent translated for employees **and** management informed employees that they should direct their questions and problems to the putative agent). As the record clearly established that Mr. Montas was called upon to translate routine matters for his supervisor and was not put in position whereby employees “would reasonably believe that [he] was reflecting company policy and speaking and acting for management” the ALJ correctly held that Mr. Montas was not an agent under the Act. Cream of the Crop, 300 NLRB at 917.

It should be noted that Counsel for the General Counsel’s position that an employee who translates routine matters for his supervisor is an agent of the employer is not only contrary to law, it is simply unworkable. Counsel for the General Counsel is essentially asserting that any employee called upon to translate for his or her employer is an agent of an employer. If Counsel for the General Counsel is correct, however, then employers would have a disincentive to hire non-English speaking employees lest they run the risk that a bi-lingual employee called upon to serve as a translator will be considered a supervisor and expose the employer to liability. This cannot be and is not the law.

Counsel for the General Counsel’s alternative argument that the ALJ incorrectly concluded that Mr. Montas is not a supervisor is meritless. The record clearly established that

Mr. Montas did not have the authority to hire, fire, layoff, recall or adjust the grievances of any employee, nor did he have the authority to approve vacations<sup>76</sup>. Indeed, Counsel for the General Counsel concedes as much, but asserts that on one occasion Mr. Montas approved Mr. Tejada's request for time off to attend his grandmother's funeral; assigned and checked the work of other employees and terminated Mr. Tejada. As explained herein, these so called facts do not undercut the ALJ's well reasoned and factually supported conclusions.

First, the claim that Mr. Montas approved Mr. Tejada's request to attend his grandmother's funeral does not establish that Mr. Montas is a supervisor<sup>77</sup>. The record is devoid of any evidence that Mr. Montas exercised any independent judgment in connection with Mr. Tejada's request for time off, which is fatal to any claim that Mr. Montas is a supervisor. See Dico Tire, Inc., 330 NLRB 1252, 1253 (2000) (holding fact that employee may have approved single vacation request without any evidence that employee exercised independent judgment did not establish supervisory status). Indeed, Joseph Davoli, Fleet Manager, credibility testified that while Mr. Montas might have relayed requests for time off by employees to him, the authority to approve time-off rested solely with Carlo Sacco and himself<sup>78</sup>.

Likewise, the ALJ correctly concluded that Mr. Montas did not assign work to employees and check their work. While it is true that Mr. Montas did, at times, tell other mechanics which tasks to complete, the record is clear that Mr. Montas did not exercise any independent judgment when giving these directives<sup>79</sup>. To the contrary, the record demonstrates that Mr. Montas simply

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<sup>76</sup> Transcript, p. 380, ll. 16-25; p. 381, Transcript 502-03.

<sup>77</sup> It should be noted that the affidavit Mr. Tejada submitted to the Region identified Mr. Davoli as the "shop supervisor" and is devoid of any allegation that Mr. Montas was a supervisor. See Affidavit of Yhou Tejada, sworn to on Aug. 25, 2011, at p. 1, ll. 25-26. Further, Mr. Moreno asked Mr. Montas to sign a union card, which further undercuts any claim that Mr. Montas was a supervisor. Transcript, p. 41, ll. 2-4; p. 42, ll. 2-4.

<sup>78</sup> Transcript, p. 383, ll. 15-25; p. 384, ll. 1-9;

<sup>79</sup> Transcript, p. 504, ll. 2-5, 10-23; p. 506, ll. 2-11.

relayed directives from Mr. Davoli to the other mechanics<sup>80</sup>. Mr. Montas explained that Mr. Davoli would often ask him to tell the other mechanics what to do, but that he did not take it upon himself to independently assign any tasks to mechanics<sup>81</sup>. Mr. Davoli corroborated this testimony and further explained that some of the mechanics only spoke Spanish and that he relied upon Mr. Montas to translate his directives to the non-English speaking mechanics<sup>82</sup>. That Mr. Montas relayed information from his supervisor and served as a translator is hardly indicia of supervisory authority. Oakwood Health Care Inc., 348 NLRB at 689 (“[t]he authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’”).

Similarly, while Mr. Montas and Mr. Davoli denied that Mr. Montas “checked the work” of other mechanics<sup>83</sup>, the record is devoid of any evidence that Mr. Montas was held responsible for the actions of the other mechanics, which is fatal to any claim that Mr. Montas was a supervisor. See Lynwood Manor, 350 NLRB 489, 490-91 (2007) (noting that “the Board held that to establish accountability, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”)

Lastly, the claim that Mr. Montas is a supervisor because he terminated Mr. Tejada is based upon a flawed premise *i.e.* that Mr. Montas terminated Mr. Tejada. As set forth in Section E, herein, the record before the ALJ clearly established that Mr. Tejada resigned and did not quit.

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<sup>80</sup> Transcript, p. 504, ll. 10-23; p. 506, ll. 2-11. Indeed, Mr. Tejada confirmed in his affidavit that Mr. Montas “sometimes would tell us what to do at work. [Mr. Davoli] would tell [Mr. Montas] what needed to be done and [Mr. Montas] would tell the mechanics.” See Affidavit of Yhou Tejada, sworn to on Aug. 25, 2011.

<sup>81</sup> Transcript, p. 504, ll. 10-23; p. 506, ll. 2-11.

<sup>82</sup> Transcript, p. 382, ll. 7-25; p. 383, ll. 1-4.

<sup>83</sup> Transcript p. 543, ll. 2-12.

As Mr. Montas did not terminate Mr. Tejada he cannot be transformed into a statutory supervisor.

**2. The ALJ Correctly Found that Eli Talvy is Not a Supervisor and/or an Agent of Respondent (Exceptions 10-14)**

Contrary to Counsel for the General Counsel's assertions the ALJ correctly found that Mr. Talvy was not a supervisor. At the outset, Counsel for the General Counsel's claim that the ALJ incorrectly concluded that Mr. Talvy was one several individuals involved in dispatching employees as opposed to the "Operations Manager" is a credibility determination that should not be disturbed. Comau, Inc. & Automated Sys. Workers Local 1123, 357 NLRB No. 185, fn 1. (Jan. 3, 2012) (noting [t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect"). Moreover, it is the employee's duties and not his title that controls. See Erica Inc., Gen. Partner d/b/a Foodbasket Partners, Ltd. P'ship & United Food & Commercial Workers Int'l Union Local No. 1564, Afl-Cio, 344 NLRB 799, 805 (2005) ("Supervisory status is not determined by title or job classification, but by the nature of the individual's functions and authority in the workplace."). Strikingly absent from any of the testimony cited by the Counsel for the General Counsel is anything that would remotely indicate that Mr. Talvy exercised any independent judgment when engaging in these tasks or any detail regarding these tasks. Thus, the conclusory testimony cited by Counsel for the General Counsel does not support these exceptions. See In Re Beverly Enterprises-Minnesota, Inc., 348 NLRB 727, 731 (2006) ("The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue.") Indeed, while the Counsel for the General Counsel notes that Respondent failed to question its witnesses regarding Mr. Talvy's

“2(11) duties” Counsel for the General Counsel forgets that his office, who has the burden of proof, did not elicit any detailed testimony concerning these factors. As the record is devoid of any evidence that Mr. Talvy exercised any independent judgment when he performed any of the so called tasks outlined in the exceptions, the ALJ correctly held that Mr. Talvy was not a supervisor under the Act. Oakwood Health Care Inc., 348 NLRB at 689.

**3. The ALJ Correctly Dismissed the Allegations that Respondent, by Mr. Montas, violated Section 8(a)(1) (Exceptions 15 and 16)**

Counsel for the General Counsel’s claim that the ALJ incorrectly dismissed the allegations that Respondent, by Mr. Montas, violated Section 8(a)(1) of the Act is without support. This claim is based upon statements purportedly made by Mr. Montas. The problem, however, is that the ALJ, as noted above, correctly concluded that Mr. Montas was not a supervisor or agent of Respondent. Thus even assuming that Mr. Montas made the statements recounted in pages 12 through 16 of the Counsel for General Counsel’s brief, which Respondent denies, these statements cannot support a claim against Respondent.

**4. The ALJ Correctly Found that Respondent through Ely Talvy Did Not Violate Section 8(1)(a) of the Act . (Exceptions 17 through 21)**

Counsel for the General Counsel’s claim that the ALJ incorrectly dismissed the allegations that Respondent, by Mr. Talvy, violated Section 8(a)(1) of the Act by interrogating Mr. Jurjo is without support. This claim is based upon statements purportedly made by Mr. Talvy. The problem, however, is that the ALJ, as noted above, correctly concluded that Mr. Talvy was not a supervisor or agent of Respondent. Moreover, while Mr. Talvy denied ever having a conversation with Mr. Jurjo about the Union<sup>84</sup>, Mr. Jurjo simply testified that he had a conversation with Mr. Talvy wherein Mr. Talvy allegedly asked him if he signed a union card

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<sup>84</sup> Transcript, p. 550, 1-9

and told him it was nobody's business but his if he signed a union card<sup>85</sup>. Even assuming that Mr. Talvy and Mr. Jurjo had a conversation regarding the Union, which Respondent denies, strikingly absent from these allegations is any claim that Mr. Talvy told Mr. Jurjo that he would be terminated for signing a Union card. Indeed, Mr. Jurjo remains employed by Respondent to date.

Perhaps recognizing as much, Counsel for the General Counsel then asserts that the ALJ erred in failing to admit the affidavit given by Mr. Jurjo to the Board Agent as a past recollection recorded. Given that Mr. Talvy is not a supervisor the statements recounted in Mr. Jurjo's affidavit are irrelevant and cannot support a claim of improper interrogation. Moreover, the ALJ correctly concluded that Mr. Jurjo's affidavit was inadmissible hearsay. In order to establish that Mr. Jurjo's affidavit is admissible as a past recollection recorded Counsel for the General Counsel had the burden of establishing that "(1) [Mr. Jurjo's] memory of the events detailed in the [affidavit] was sufficiently impaired; (2) he prepared or adopted the [affidavit] at or near the time of the events; and (3) at the time he prepared or adopted it, it correctly reflected his knowledge of the events." Parker v. Reda, 327 F.3d 211, 213 (2d Cir. 2003). Counsel for the General Counsel made no effort to establish the second and third prongs of this test. Indeed, all Counsel for the General Counsel asked Mr. Jurjo was "when you gave this affidavit, your recollection of the events was better than it is now ....<sup>86</sup>" Counsel for the General Counsel failed to establish that "at the time [Mr. Jurjo] prepared or adopted the [affidavit] it correctly reflected his knowledge of the events." To the contrary, Mr. Jurjo denied drafting the affidavit and

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<sup>85</sup> Transcript, p. 285, ll. 15-23.

<sup>86</sup> Transcript p. 286, ll. 7-14.

expressly noted that affidavit “is not [him] talking<sup>87</sup>.” Absent any evidence that the affidavit was accurate at the time it was executed it cannot be admitted into evidence<sup>88</sup>.

**B. The ALJ Correctly Concluded that Respondent Did Not Violate Section 8(a)(1) of the Act by Terminating Angel Moreno**

Section 8(a) (3) of the Act prohibits an employer from discriminating against employees “in regard to hire or tenure of employment to discourage membership in any labor organization.” 29 U.S.C. § 158(a) (3). An employer is found to have violated Section 8(a)(3) of the NLRA when it “retaliate[es] against [its] employees for engaging in union activity.” NLRB v. Joy Recovery Technology Corp., 134 F.3d 1307, 1312 (7th Cir. 1998). The burden is placed upon Counsel for the General Counsel to show, by a preponderance of the evidence, that an employer’s anti-union animus was a substantial or motivating factor in its decision to make an adverse employment decision. Id. at 1314; see Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980); NLRB v. GATX Logistics, Inc., 160 F.3d 353, 356 and n.1 (7th Cir. 1998).

Counsel for the General Counsel’s burden is composed of two inter-connected components: (1) the employer had anti-union animus that is, or was, motivated to discriminate against employees engaged in union activities; and (2) the animus was, in fact, a substantial or motivating factor in the decision to terminate the employee. Salem Leasing Corp. v. NLRB, 774 F.2d 961, 967 (4th Cir. 1985). Factors such as an employer’s knowledge of the employee’s alleged union activities are taken into consideration when evaluating whether the employer possessed an anti-union animus. Teamsters Local Union No. 171 v. NLRB, 863 F.2d 946, 955 (D.C. Cir. 1988).

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<sup>87</sup> Transcript p.

<sup>88</sup> Although not addressed in his brief, Counsel for the General Counsel’s exceptions assert that the ALJ also incorrectly concluded that Mr. Davoli did not interrogate Mr. Jurjo regarding his meeting with the Board Agent. The ALJ correctly ruled that Mr. Davoli’s testimony that no such conversation occurred was credible. The Counsel for the General Counsel has failed to introduce anything to establish by a clear preponderance of the evidence that the ALJ was wrong.

Once Counsel for the General Counsel meets its burden, the burden of proof is then shifted to the employer to show that it had a legitimate, non-discriminatory reason, to have taken the contested employment action in spite of any union activity. Joy Recovery Technology, 134 F.3d at 1314. See generally, Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980); NLRB v. Transportation Management Corp., 462 U.S. 393, 394 (1983). Against this backdrop the ALJ correctly concluded that Respondent had legitimate non-discriminatory reasons to have discontinued the employment of all of the Discriminatees.

The question of whether Respondent had legitimate business reasons turns largely on issues of credibility. As a general rule the Board will uphold a judge's credibility determinations unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enforced 188 F.2d 362 (3d Cir. 1951). To that end, the Board gives significant weight to the ALJ's credibility determinations insofar as they relate to witness demeanor, recognizing that the trier of fact has the advantage of observing the witness while he testifies. Id. at 544. Here, the record thoroughly supports the ALJ's decision.

**1. The ALJ Correctly Concluded that Counsel for the General Counsel Failed to Meet Its Burden under *Wright Line* of Establishing that Respondent Was Motivated By Anti-Union Animus. (Exceptions 22-23)**

As correctly held by the ALJ the record is devoid of any evidence that the decision makers *i.e.* Mr. Davoli, Mr. Sacco, Steve Squitieri and Joseph Gallitto had any knowledge of Mr. Moreno's purported union activity or harbored any anti-union animus<sup>89</sup>. Indeed, the Counsel for the General Counsel relies upon the alleged actions of Messers. Montas and Talvy to support his claim that the ALJ incorrectly held that Respondent was not motivated by anti-union animus. This argument is again based upon a faulty premise—that Messers. Montas and Talvy were supervisors and/or agents of Respondent. As the ALJ correctly concluded that Messers. Montas

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<sup>89</sup> Transcript, p. 608, ll 23-25; p. 609, ll. 1-12.

and Talvy were not supervisors or agents of Respondent, Counsel for the General Counsel's argument that employee conversations with them regarding the Union demonstrate Respondent's knowledge of Union activity and/or anti-union animus misses the mark. Moreover, Messers. Montas and Talvy were not involved in the decision to eliminate Mr. Moreno's position<sup>90</sup>.

**2. The ALJ Correctly Held that Respondent Satisfied the Second Prong of the Wright Line Test by Demonstrating a Legitimate Nondiscriminatory Reason for Discontinuing the Employment of Angel Moreno (Exceptions 24-34)**

The record before the ALJ amply established that Mr. Moreno's employment ended when Respondent eliminated his position after making the economic decision to stop using its tow-truck and instead chose to use a private towing company full time. The majority of the Counsel for the General Counsel exceptions are focused on attempting to either rewrite the record or poke holes in Respondent's legitimate business reasons for eliminating Mr. Moreno's position. These arguments *i.e.* that Mr. Moreno refused to go out on assignments on one occasion as opposed to numerous occasions or that Mr. Moreno received a raise close in time to the elimination of his position were raised by Counsel for General Counsel and properly rejected by the ALJ. Indeed, these arguments simply go to the credibility of Respondent's witnesses. Try as he might Counsel for the General Counsel cannot escape the fact that the ALJ concluded that Respondents' witnesses credibility testified that beginning in 2009 the Respondent made a concerted effort to reduce its costs, including those associated with repairing its aging fleet<sup>91</sup>. To that end, by August 2010 the company purchased forty-one new vehicles<sup>92</sup>. Further, in or about August 2010, the Respondent reviewed the invoices from the outside towing company that it used when Mr. Moreno was not working, or refused to perform his job. While the Respondent expected its

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<sup>90</sup> Transcript, p. 384, ll. 21-25; p. 387, ll. 19-25; 398, ll. 21-25, 399, ll. 12-17; p. 589, ll. 19-25; p. 591, ll. 18-25; p. 591, ll. 18-25; p. 592, ll. 13-16.

<sup>91</sup> Transcript, p. 589, ll. 19-25; p. 591, ll. 18-25; p. 591, ll. 18-25; p. 592, ll. 13-16.

<sup>92</sup> Transcript p. 582, ll. 1-6; p. 590, ll. 5-10.

towing costs to have decreased by using its own tow truck, the Company determined that it was still incurring significant costs<sup>93</sup>. The company determined that it did not make financial sense to continue using its tow truck and, as such, eliminated Mr. Moreno's position<sup>94</sup>.

Unable to challenge this record, Counsel for the General Counsel attempts to call into question the purported financial wisdom of this decision. These exceptions miss the mark. In determining whether an employment decision violates Section 8(a)(3), the "crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change." NLRB v. Savoy Laundry, 327 F.2d 370, 371 (2d Cir.1964). Thus, as a matter of law, the fact that Counsel for General Counsel does not think that Respondent made a wise business decision is of no moment and cannot overturn the ALJ's well reasoned decision.

Counsel for the General Counsel also attempts to attack the ALJ's decision by asserting that the ALJ ignored the "fact" that Respondent "simply adduced the hearsay testimony of those who were told of the decision to terminate [Mr.] Moreno rather than the testimony of the management officials who made the decision to terminate [Mr.] Moreno." This is simply untrue. There was extensive testimony by Messers. Davoli and Sacco, concerning the decision that was made to eliminate Mr. Moreno's position. Messers Davoli and Sacco were directly involved in the decision making process that resulted in Mr. Moreno being laid off<sup>95</sup>. Indeed, Mr. Davoli testified that he was the one who informed Mr. Moreno that his employment was ending and specifically told Mr. Moreno that "we had decided that the cost of running the truck and his salary and the insurances and being that quite often we had to go to outside vendors to do work

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<sup>93</sup> Transcript, p. 595, ll. 4-6.

<sup>94</sup> Transcript, p. 593, ll. 1-18; p. 595, ll. 2-6; p. 599, ll. 22-25.

<sup>95</sup> Transcript, p. 384, ll. 21-25; p. 387, ll. 19-25; 398, ll. 21-25, 399, ll. 12-17; p. 589, ll. 19-25; p. 591, ll. 18-25; p. 591, ll. 18-25; p. 592, ll. 13-16.

that he should have been able to do, that was the reasons we were going to park the truck<sup>96</sup>”. Mr. Sacco testified that he “oversees the overall operations from day to day, the hiring and termination of employees<sup>97</sup>.” As such, the claim that Messers. Davoli and Sacco simply heard of the decision from others and were not competent to testify as to this decision is at best disingenuous and is at worst dishonest.

Along those lines, Counsel for the General Counsel’s claim that the ALJ erred by not finding an adverse inference based upon the fact that Respondent did not introduce the towing invoices is equally without support. Counsel for the General Counsel appears to be asserting that an ALJ cannot credit the testimony of a witness without documentary support. The cases cited by Counsel for the General Counsel do not stand for this blanket proposition. Rather, in those cases under the specific facts and circumstances the ALJ as the trier of fact concluded that the specific testimony at issue was not credible in the absence of documentary evidence. Here the ALJ listened to the testimony of Messers. Davoli and Sacco and concluded that their testimony standing alone was credible and the Counsel for the General Counsel cannot establish by a clear preponderance of the evidence that such a decision was incorrect.

Likewise, the claim that Messers. Davoli and Sacco’s testimony regarding the decision to discontinue to the use of the tow truck was “unconvincing” is equally without support. As noted, both Messers Davoli and Sacco testified extensively about this decision<sup>98</sup>.

Lastly, contrary to the Counsel for the General Counsel’s claim the ALJ correctly noted that the claim of anti-union bias is belied by the fact that the vast majority of the Respondent’s

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<sup>96</sup> Transcript p. 387, ll. 21-25 (emphasis added).

<sup>97</sup> Transcript p. 575, ll. 17-22.

<sup>98</sup> Transcript, p. 384, ll. 21-25; p. 387, ll. 19-25; 398, ll. 21-25, 399, ll. 12-17; p. 589, ll. 19-25; p. 591, ll. 18-25; p. 591, ll. 18-25; p. 592, ll. 13-16.

employees are members of a union<sup>99</sup>. The record evidence established that for the past five to seven years approximately one hundred and seventy-five bus drivers employed by D&J have been represented by Local 124 and that Local 854 recently successfully organized approximately sixty-five matrons<sup>100</sup>. Counsel for the General Counsel failed to introduce any evidence that Respondent has ever been found to have engaged in any unfair labor practices or engaged in any improper anti-union activity during the recent campaign conducted by Local 854. Indeed, as correctly noted by the ALJ Respondent stipulated to an election for the matrons<sup>101</sup>. It is simply incredulous to assert that the Respondent would not interfere with the organizing efforts of sixty-five matrons, but would take retaliatory actions against a handful of employees who wanted to join the ranks of Local 854. Indeed, this directly refutes Counsel for the General Counsel's unsupported claim that D&J might have been favoring Local 124 over Local 854.

**C. The ALJ Correctly Concluded that Respondent Did Not Violate Section 8(a)(1) of the Act by Terminating Carlos Valentin**

**1. The ALJ Correctly Concluded that Counsel for the General Counsel Failed to Meet Its Burden under *Wright Line* of Establishing that Respondent Was Motivated By Anti-Union Animus.**

Counsel for the General Counsel's claim that the ALJ erred by determining that Respondent was not motivated by anti-union animus when it discontinued Mr. Valentin's employment is again based solely on statements purportedly made by Mr. Montas. While Mr. Montas denied making such statements, given that the ALJ correctly concluded that Mr. Montas was not a supervisor or agent of Respondent any statements allegedly made by Mr. Montas are wholly irrelevant to this issue.

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<sup>99</sup> Transcript, p. 576, ll. 16-25, p. 579, ll. 8-22.

<sup>100</sup> Transcript, p. 576, ll. 16-25, p. 579, ll. 8-22.

<sup>101</sup> Government Exhibit 2.

**2. The ALJ Correctly Held that Respondent Satisfies the Second Prong of the Wright Line Test by Demonstrating a Legitimate Nondiscriminatory Reason for Discontinuing the Employment of Carlos Valentin (Exceptions 35 and 36)**

The ALJ correctly held that Mr. Valentin's employment was terminated solely due to poor work performance. To that end, Messers. Davoli and Montas credibly testified that Mr. Valentin was a poor mechanic and that his repairs often had to be redone<sup>102</sup>. Further, it is undisputed that during the incident that led to Mr. Valentin's termination he put the calipers for the brakes on a van upside down and if the error had not been caught it could have caused serious injury to D&J employees and its clients<sup>103</sup>. This is clearly a legitimate business reason to terminate a mechanic's employment, and the Respondent is not required to continue the employment of a mechanic who endangers the safety of its clients simply because he, unbeknownst to them, filled out a union card.

While Counsel for the General Counsel takes issue with the ALJ's decision, it is clear that he is essentially arguing that Mr. Valentin's testimony should have been credited over the testimony of Messers Montas and Davoli. The ALJ as the trier of fact was presented with all of the evidence, including the purported inconsistencies set forth by Counsel for the General Counsel, and concluded that Respondent's witnesses were credible. Nothing in Counsel for the General Counsel exceptions establishes by a clear preponderance of the evidence that the ALJ was wrong. As such, these exceptions should be denied.

**D. The ALJ Correctly Concluded that Respondent Did Not Violate Section 8(a)(1) of the Act by Terminating Christopher Rodriguez**

**1. The ALJ Correctly Held that Respondent Satisfies the Second Prong of the Wright Line Test by Demonstrating a Legitimate Nondiscriminatory Reason for Discontinuing the Employment of Christopher Rodriguez (Exception 37).**

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<sup>102</sup> Transcript, p. 392, ll. 3-25.

<sup>103</sup> Transcript, p. 392, ll. 14-25; p. 393, ll. 1-8, p. 394, ll. 1-8.

The record before the ALJ amply established that Mr. Rodriguez's employment was terminated due to his being derelict in performing his job duties, insubordination, leaving the Respondent's garage unattended and Respondent's vehicles unlocked and unattended, disappearing with Respondent's vehicle without prior authorization and engaging in a verbal altercation with John Oliveri wherein he called him a "nigger"<sup>104</sup>. The record is devoid of any evidence that Mr. Oliveri, who terminated Mr. Rodriguez's employment, harbored any anti-union animus or was even aware of the fact that Mr. Rodriguez signed a union card<sup>105</sup>.

Unable to challenge this record Counsel for the General Counsel focuses on a conversation between Mr. Oliveri and Mr. Squitieri<sup>106</sup> wherein Mr. Oliveri explained the reasons why he terminated Mr. Rodriguez to Mr. Squitieri and claims that the conversation should not be credited. Counsel for the General Counsel failed to cite to anything other than his own fanciful assertions to challenge Mr. Oliveri's credibility and thus the ALJ's credibility determinations should not be overturned. Standard Dry Wall Products, 91 NLRB at 544. Moreover, even assuming that the testimony regarding this conversation was not admissible, it would not affect the ALJ's decision. Mr. Oliveri testified as to what he witnessed and the reasons why he terminated Mr. Rodriguez. This testimony separate from any conversations with Mr. Squitieri were more than enough to establish Respondent's legitimate non-discriminatory reasons for terminating Mr. Rodriguez's employment.

In a desperate attempt to challenge the ALJ's decision Counsel for the General Counsel next claims that Respondent did not conduct an adequate investigation. This exception is based

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<sup>104</sup> Transcript, p. 339; p. 340, ll. 8-25; p. 341, ll. 16-25; p. 342, ll. 11-25, p. 344, ll. 15-25; p. 345, ll. 8-19; p. 346, ll. 11-19; p. 347, ll. 4-11; p. 348, ll. 16-25; p. 349, ll. 1-14; p. 352, ll. 1-9; p. 354, ll. 3-14; 612 ll. 4-22.

<sup>105</sup> Transcript p. 354, ll. 19-25; p. 355, ll. 1-8; p. 613, ll. 14-21.

<sup>106</sup> Counsel for the General Counsel also asserts that he was denied the opportunity to examine Mr. Squitieri concerning this conversation. Nothing could be further from the truth. If Counsel for the General Counsel wished to question Mr. Squitieri they were free to subpoena him to testify. That they chose not to is not grounds to overturn the ALJ's decision.

upon Counsel for the General Counsel's claim that "it [was] quite suspicious that [Mr.] Oliveri and [Mr.] Squitieri did not contact [Mr.] Talvy, [Mr.] Rodriguez's supervisor, to determine what [Mr.] Talvy knew or to solicit his views concerning any discipline of [Mr.] Rodriguez." The problem with this allegation is that Mr. Talvy was not present during any of the events that led to Mr. Rodriguez termination and thus there was no need to speak with Mr. Talvy. Further, given that Mr. Oliveri had firsthand knowledge of both incidents there was no need to conduct a lengthy investigation.

Likewise, the record is devoid of any evidence that Mr. Rodriguez was not provided an opportunity to explain himself. To the contrary, Mr. Oliveri credibly testified that when he questioned Mr. Rodriguez concerning his whereabouts Mr. Rodriguez told Mr. Oliveri that he was "doing my thing", "don't worry about where I was" and "don't worry, I'm, you know, cool"<sup>107</sup> Moreover, there is nothing to indicate that if Mr. Rodriguez had been given more time to explain himself that the outcome would have been different. Indeed, Mr. Rodriguez did just that at the hearing and the ALJ still found in Respondent's favor. Thus, the claim of a "shoddy investigation" is a red herring that should be disregarded in its entirety.

**E. The ALJ Correctly Concluded that Respondent Did Not Violate Section 8(a)(1) of the Act by Terminating Yhou Tejada (Exception 38)**

In support of his claim that the ALJ incorrectly held that Mr. Tejada was not terminated, Counsel for the General Counsel asserts that Respondent's claim that Mr. Tejada resigned was not credible. The record, however, established that Mr. Tejada voluntarily resigned from employment<sup>108</sup>. It bears repeating that Mr. Tejada was asked to put air in the tires of van, that he refused to do the job and when he was told to either do his job or go home he picked up his tools

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<sup>107</sup> Transcript, p. 340, ll. 17-25; p. 341, ll. 20-25.

<sup>108</sup> Transcript, p. 395, ll. 19-25; p. 396, ll. 1-20.

and left never to return to D&J<sup>109</sup>. Moreover, as noted by the ALJ at best Counsel for the General Counsel can establish that there was some confusion between Mr. Tejada who thought he was terminated and the Respondent who thought Mr. Tejada had resigned. However, the ALJ correctly concluded that the record was devoid of any credible evidence that Respondent harbored any anti-union animus towards Mr. Tejada. Indeed, Mr. Tejada was terminated more than a month and a half after he signed a Union card.

**F. The Mass Discharge Theory Is Not Applicable**

Counsel for the General Counsel's argument that the Board should apply a mass discharge theory is equally without support. At the outset it should be noted that the mass discharge theory merely relieves the Counsel for the General Counsel of his burden to establish that the Respondent knew of each of the Discriminatees alleged Union activities or harbored specific anti-union animus towards each of the Discriminatees. Counsel for the General Counsel must still establish that the "Respondent ordered the mass layoff to discourage union activity altogether or in retaliation for the union activity of some of the [Respondent's] employees. Evenflow Transp., Inc., 358 NLRB 1, 4 (2012). Here the record is devoid of any evidence that Respondent knew of any of the Discriminatees' Union activities or harbored any anti-union animus. Indeed, Counsel for the General Counsel argument on this point is circular and based upon a faulty premise—that Respondent's reasons for terminating the Discriminatees was pretextual. However, as set forth above, the record more than established Respondent's legitimate non-discriminatory business reasons for the contested actions. Thus, this theory does not apply.

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<sup>109</sup> Id.

Moreover, even assuming that the mass discharge theory applies, and to be sure it does not, this would only relieve Counsel for the General Counsel of its initial burden under Wright-Line. However, given that Respondent more than established legitimate non-discriminatory reasons for discontinuing the employment of the Discriminatees, the Board, even if it applies this theory, should still affirm the decision of the ALJ.

**G. The ALJ's Conclusions of Law Were Correct (Exception 39)**

In his last exception Counsel for the General Counsel asserts that "the ALJ, erred as a matter of law, in failing to recommend an appropriate remedy ...." Counsel for the General Counsel does not separately address this argument in his brief and thus, a separate detailed response is not required. For the reasons set forth above the ALJ's decision should be affirmed in its entirety.

**CONCLUSION**

For the above-stated reasons, the Respondent respectfully requests that the Board affirm the decision of the ALJ in its entirety.

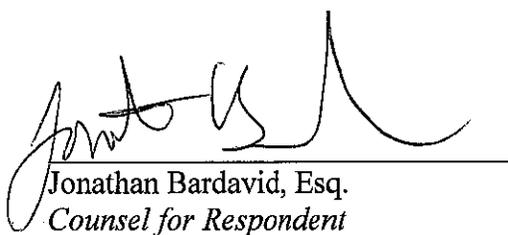
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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, I caused the foregoing RESPONDENT'S BRIEF IN RESPONSE TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION to be served by electronic mail as follows:

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