

**OS Transport LLC and HCA Management, Inc. and Teamsters Local No. 350, International Brotherhood of Teamsters, Change to Win.** Cases 32–CA–025100, 32–CA–025399, and 32–CA–025490

August 31, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES,  
AND GRIFFIN

On August 15, 2011, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Acting General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The 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. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent committed several violations of Sec. 8(a)(1) in response to its employees' protected concerted activity. The Respondent has excepted to only one of those findings: that it threatened employee Miguel Reynoso with retaliation, including loss of employment. It is unnecessary to pass on this exception: the judge's finding regarding Reynoso is cumulative of other threats of loss of employment found by the judge to which the Respondent has not excepted, and any additional finding regarding Reynoso would not affect the remedy.

In addition, the Respondent has not excepted to the judge's findings that OS Transport LLC and HCA Management, Inc. are a single employer and that the Respondent's drivers were statutory employees at all relevant times.

<sup>2</sup> We amend the judge's remedy to provide that make-whole relief for the employees unlawfully discharged by the Respondent shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), while the make-whole remedy for those employees who suffered unlawful reduction in their work assignments shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971). The *Ogle Protection* formula applies where, as in the latter instance, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Id.*, 183 NLRB at 683.

We have modified the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We have substituted a new notice to conform to the Order as modified. For the reasons stated in his dissenting opinion in *J. Picini Flooring*,

1. The judge found that the Respondent violated Section 8(a)(3) and (1) by reducing the driving assignments of 10 employees in retaliation for their Section 7 activity. All 10 employees signed a letter protesting the Respondent's requiring them to individually incorporate under threat of forced resignation from employment or shutdown of the Respondent's operations. The employees presented the protest letter to the Respondent's owner in early May 2009.

The Respondent does not dispute that it unlawfully reduced the driving assignments of four of its employees in retaliation for signing the letter, and has filed no exceptions as to them.<sup>3</sup> The Respondent has excepted, however, to the judge's findings as to the remaining six employees who signed the letter, arguing that the judge failed to identify any reductions as to them.

Initially, we reject the Respondent's exception with respect to employees Efrain Gutierrez Najera and Primitivo Guzman. The record supports the judge's particularized findings that the Respondent reduced their work assignments following their protected, concerted activity.<sup>4</sup> We also reject the Respondent's exception with respect to employees Jose Urias and Ceferino Urias Velasquez. Although the judge did not specifically detail the Respondent's reductions in their assignments following their protected, concerted activity, those reductions are established in the record.

Jose Urias received two Saturday assignments in each of the 4 months prior to the presentation of the protest letter (January through April 2010), but over the subsequent 8 months (May through December 2010) he received as many as two Saturday assignments in 1 month only. Looked at from another perspective, Urias received 12 Saturday work assignments in the 8-month period immediately preceding the protest letter but only seven Saturday assignments during the subsequent 8 months.

Ceferino Urias Velasquez suffered a similar reduction in Saturday work assignments. He received two Saturday assignments in each of the 4 months prior to the presentation of the protest letter, but received two or more Saturday assignments only once in the subsequent 8 months. Overall, Velasquez received 13 Saturday assignments over the 8 months preceding the letter, but

356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

<sup>3</sup> The four are Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, and Marcial Barron Salazar.

<sup>4</sup> The judge found that the Respondent took the lucrative Watsonville route away from Najera and that Guzman lost assignments when the Respondent denied him use of a spare truck while it purportedly made extensive repairs on his truck.

only 10 such assignments over the succeeding 8 months. On the basis of the foregoing comparisons, we are persuaded that the record supports the judge's findings that the Respondent discriminated against both Jose Urias and Ceferino Urias Velasquez.<sup>5</sup>

With respect to Enedino Millan and Jose Velasquez, however, we find that the record does not sufficiently establish a reduction in assignments. Enedino Millan began working for the Respondent in January 2010, and Jose Velasquez did not begin working for the Respondent until April 2010. Given Millan's limited tenure and Velasquez' essentially nonexistent tenure prior to the employees' presentation of the protest letter, we are unable to affirm the judge's finding that they suffered a loss of work afterwards.<sup>6</sup> Indeed, the Acting General Counsel does not cite any specific reduction in assignments suffered by these two employees, but asserts that such losses should be presumed because, before the protest letter, the drivers generally worked an average of two Saturdays per month. The record, however, does not establish that the Respondent consistently distributed Saturday work assignments equally among its employees prior to the protest letter, and therefore we cannot make the requested inferential leap. Because the Acting General Counsel has not carried his burden of establishing that the Respondent reduced the work assignments of Enedino Millan and Jose Velasquez, we shall dismiss the complaint allegation pertaining to them. See *Simmons Co.*, 314 NLRB 717, 725 (1994) ("There is no evidence of any adverse action taken by the employer . . . and thus no prima facie case.").

2. The judge recommended that the Board's notice be read aloud to employees in the presence of the Respondent's owner and that the Respondent, upon request of the Union, supply the Union with names and addresses of unit employees. The Respondent has not excepted to either of these remedies, and, in any event, we find that they are warranted here for the following reasons. First, the employees' protected, concerted activity was prompted by the Respondent's coercing its employees to sign sham independent-contractor agreements that purported to strip them of their employee status and their concomitant rights under the Act. Second, the Respondent responded swiftly to that protected activity with a series of escalating unfair labor practices: it made unlawful

threats, including closure of operations, job loss, and taking away lucrative work assignments; it reduced union supporters' work opportunities, resulting in a drop in their pay; and, ultimately, it discharged two prounion employees. Third, the Respondent's most senior officials—Owner Hilda C. Andrade and Principal Manager Oscar Sencion Sr.—were directly involved in the commission of the unfair labor practices.<sup>7</sup> Finally, the impact and awareness of the unfair labor practices was unit wide among the Respondent's relatively small complement of 14 drivers. These factors together warrant the imposition of the special remedies by the judge.<sup>8</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, OS Transport LLC and HCA Management, Inc., San Martin, California, and Las Vegas, Nevada, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to terminate employees because they engaged in activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win (the Union), or other protected concerted activities, such as signing a letter complaining about working conditions.

(b) Threatening to close its business because its employees engaged in union and other protected concerted activities.

(c) Promising or granting employees benefits, including more lucrative route assignments, if they abandon their support for the Union.

(d) Implying that employees' support of the Union is futile by telling them that they are not employees and therefore cannot be represented by a union.

<sup>7</sup> See *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) (notice-reading ensures that employees "fully perceive that the Respondent and its managers are bound by the requirements of the Act"), rev. denied 400 F.3d 920 (D.C. Cir. 2005).

<sup>8</sup> *Federated Logistics*, 340 NLRB at 256–258; *Excel Case Ready*, 334 NLRB 4, 5 (2001) ("Ordering the [r]espondent to provide the [u]nion the names and addresses of its current bargaining unit employees 'will enable the [u]nion to contact employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion.'") (citation omitted).

Member Hayes finds that the unfair labor practices were not sufficiently numerous and severe to warrant imposition of special remedies. In so finding, Member Hayes observes that the Respondent has, in any event, already taken the prescribed actions in response to the injunction granted by the district court in the related 10(j) proceeding. See *Baudler v. OS Transport*, 05:11-cv-01943 (N. D. Cal. May 17, 2011).

<sup>5</sup> Member Hayes would find that the Acting General Counsel failed to carry his burden of establishing Velasquez' loss of work assignments after presentation of the protest letter. He would dismiss the complaint allegation pertaining to him.

<sup>6</sup> We also note that despite the presentation of the protest letter in early May, Enedino Millan received four Saturday work assignments in that month.

(e) Threatening to reduce employees' work assignments and hours if they supported the Union or engaged in other protected concerted activities.

(f) Reducing employees' work assignments and hours because they supported the Union or engaged in other protected concerted activities.

(g) Discharging employees because they supported the Union or engaged in other protected concerted activities, such as signing a letter complaining about working conditions.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, offer Jesus Garcia Marquez and Alberto Pizano full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jesus Garcia Marquez and Alberto Pizano whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jesus Garcia Marquez and Alberto Pizano and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Make Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez whole for any loss of earnings and other benefits suffered as a result of the reduction in their work assignments and/or hours, in the manner set forth in the remedy section of the judge's decision, and restore the work assignments and hours of those employees.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its San Martin, California facility copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be posted in English and Spanish. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2010.

(g) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's owner, Hilda C. Andrade or, at the Respondent's option, by a Board agent in Andrade's presence, with translation available for Spanish-speaking employees.

(h) Supply the Union, on its request, with the names and addresses of unit employees, updated every 6 months, for a period of 1 year or until a certification after a fair election.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX  
 NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten to terminate our employees because they engaged in activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win (the Union), or other protected concerted activities, such as signing a letter complaining about working conditions.

WE WILL NOT threaten to close our business because our employees engaged in union or other protected concerted activities.

WE WILL NOT promise or grant our employees benefits, including more lucrative route assignments, if they abandon their support for the Union.

WE WILL NOT imply that our employees' support of the Union is futile by telling them that they are not employees and therefore cannot be represented by a union.

WE WILL NOT threaten to reduce our employees' work assignments and/or hours if they supported the Union or engaged in other protected concerted activities.

WE WILL NOT reduce our employees' work assignments and/or hours because they support the Union or engage in other protected concerted activities.

WE WILL NOT discharge employees because they support the Union or engage in protected concerted activities, such as signing a letter complaining about working conditions.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jesus Garcia Marquez and Alberto Pizano full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jesus Garcia Marquez and Alberto Pizano whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jesus Garcia Marquez and Alberto Pizano, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez whole for any loss of earnings and other benefits suffered as a result of the reduction in their work assignments and/or hours, plus interest, and WE WILL restore the work assignments and hours of those employees.

WE WILL supply the Union, on its request, with the names and addresses of unit employees, updated every 6 months, for a period of 1 year or until a certification after a fair election.

OS TRANSPORT LLC AND HCA MANAGEMENT,  
 INC.

*Amy L. Berbower, Esq.* and *Yaromil Velez-Ralph, Esq.*, for the  
 General Counsel.

*Eric Becker, Esq.* (*The American Consulting Group, Inc.*), for  
 the Respondent.

*Susan K. Garea, Esq.* (*Beeson, Tayer & Bodine*), for the Charging  
 Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Oakland, California, on February 22–24, and March 1–3, 2011. The initial charge was filed by the Teamsters Local No. 350, International Brotherhood of Teamsters, Change to Win (the Charging Party or the Union) on May 12, 2010,<sup>1</sup> and the order consolidating cases, amended consolidated complaint, and notice of hearing (the complaint) was issued January 14, 2011.

The complaint alleges that OS Transport LLC (OST) and HCA Management, Inc. (HCA) are a single employer (collectively the Respondent<sup>2</sup>) who violated Section 8(a)(1) by interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act by reducing employees' hours and wages and threatening to close Respond-

<sup>1</sup> All dates are in 2010, unless otherwise indicated.

<sup>2</sup> OS Transport is named after its founder, Oscar Sencion Sr., and HCA Management is similarly the initials of Hilda C. Andrade, the principal managers/supervisors of Respondent's two interrelated entities. Sencion Sr. also runs a sole proprietorship named after the couple's daughter known as Crystal Tires Mobile Repair. (Tr. 774.)

ent's business, threatening to terminate all of Respondent's employees and replacing them with nonunion owner-operators if they join the Union or because of their support for the Union. The complaint also alleges that by participating in the acts referenced above, Respondent also violated Section 8(a)(3) when it also terminated the employment of prounion employee Jesus Garcia Marquez (Marquez) in October.

As the trial commenced, counsel for the General Counsel sought leave to further amend the complaint after investigation of a new related charge filed on November 22. Applying the Board's standard set forth in *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003), I granted this request, as the proposed amendment did not materially prejudice the Respondent; the amendment involved new factual matters but included much of the same evidence as was required to litigate the matters arising from the original complaint and as Respondent had adequate time to properly defend the new charge.

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed on April 25, 2011, by the General Counsel and Respondent (GC Br. and R. Br., respectively),<sup>3</sup> for the reasons set forth below I find that OST and HCA are a single employer and that they violated the Act as alleged.

#### FINDINGS OF FACT

##### I. JURISDICTION

OST is a Nevada limited liability company and HCA is a Nevada corporation, with offices and activities in San Martin, California. Both are engaged in the business of hauling waste and recycling materials between various landfills and recycling plants in and around San Jose, California. In a representative 1-year period, HCA admits, and I find, that it provides services valued in excess of \$50,000 directly to Greenwaste Recovery, Inc. (Greenwaste) which, during the same time, purchased and received goods valued in excess of \$50,000 directly from sellers located outside the State of California. Similarly, I also find that in a representative 1-year period, OST provides services valued in excess of \$50,000 directly to HCA which, during the same time, purchased and received goods valued in excess of \$50,000 directly from sellers located outside the State of California. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>3</sup> Although counsel to the Charging Party attended the majority of the trial, she did not file a posthearing brief by the extended deadline of April 25, 2011.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

As stated above, Respondent is engaged in the business of hauling waste and recycling material<sup>4</sup> between various landfills and recycling plants in and around San Jose, California. Beginning in 2010, OST is owned by Andrade and her two children, Oscar Sencion Jr. and Crystal Sencion, by Oscar Sencion Sr. (Sencion Sr.). Andrade is its managing partner, tax matters partner,<sup>5</sup> and oversees all operations. Andrade also solely owns, runs, and is the lone officer/manager of HCA which has no employees. In addition to any profits Andrade received from HCA in 2009 and 2010, she also distributed to herself from OST—\$5617 and \$35,000 in 2009 and 2010, respectively.<sup>6</sup> (R. Exhs. 13 and 14.)

Sencion Sr. has operated his own trucking company for many years under the name of Sencion Trucking. Sencion Trucks has done business hauling various materials to and from various recycling and landfill facilities near San Jose, California, including GreenWaste Recovery, Inc. (Greenwaste), Zanker Road Resource Management (Zanker), and Z-Best Products (Z-Best). Sencion Sr. employed approximately 10–15 drivers over the years to haul materials using his trucks. Sencion, Trucking evolved to become OST in 2006.

For at least 9 years through 2009, Sencion Trucking and later OST worked with and invoiced Greenwaste directly for the truckdriving services it provided. Andrade worked in tandem with Sencion Sr. with Andrade maintaining financial management, labor and contract administration for both HCA and OST while he performed field supervisor work with the OST drivers and his client contacts at Greenwaste, Zanker, and Z-Best. (See GC Exh. 10.) HCA was first incorporated on January 29, 2009, in Nevada and, as a shell or liability shelter, inserted itself in OST's place with Greenwaste and used OST's drivers for the same hauling work OST performed for years. Beginning sometime in 2010, HCA also contracted with OST's approximately 15 drivers and 4 mechanics. Respondent's only customers are Greenwaste, and its affiliate, Zanker, and Z-Best. For a 2-week period from July 16 through 31, HCA invoiced in excess of \$204,000 to Greenwaste for approximately 21 different routes for hauling loads.<sup>7</sup> (ALJ Exh. 4(g) at HCA 1473–1493.) For that same time period, HCA issued a check to OST as a sub-hauler in the amount of \$72,135. (ALJ Exh. 4(g) at HCA 1504.)

Incredibly, Respondent claims to have no written contract with Greenwaste or Zanker but apparently both parties have operated under an oral agreement for 10 years. Up through 2009 or early 2010, Greenwaste paid OST before changing payment to HCA without any other changes in the business

<sup>4</sup> The hauled materials are comprised primarily of food waste, yard waste, trash, metal, organic soil, wood chips, and concrete.

<sup>5</sup> On May 11, Andrade received an employer identification number for OST from the IRS. (GC Exh. 44.)

<sup>6</sup> Andrade's and Sencion Sr.'s son and daughter also received cash distributions from OST in 2010 of \$25,000 and \$24,000, respectively. (See R. Exh. 14.)

<sup>7</sup> This bimonthly amount extrapolates to in excess of \$4,896,000 on an annual basis.

relationship between the entities. (Tr. 442–444, 472.) For example, OST continues to directly provide Greenwaste with a hauling rate sheet/price diesel fuel surcharge per route list<sup>8</sup> and the trailer lease agreement<sup>9</sup> for 2010–2011 remains between Greenwaste/Zanker as lessor and OST as lessee. (GC Exhs. 22 and 23.) OST paid rent of \$42,600 and \$67,000 in 2009 and 2010, respectively, but Andrade testified that she also has no written lease with OST’s yard landlord.<sup>10</sup> (R. Ex. 14.) At the OST yard in San Martin, California, Andrade would prepare paychecks and utilize a mobile trailer office at the yard for both OST and HCA until the trailer was ordered off the property some time after May.

Hauling operations of HCA and OST are based out of a yard in San Martin, California. Through 2010, Andrade handled all financial, labor, and contractual matters for both companies from a mobile trailer at the truck yard until approximately May and at her home in San Martin thereafter. HCA and OST are held out to its customers as a single integrated business operation. Andrade invoices Greenwaste twice monthly from HCA based on weight tickets brought back to her by OST’s drivers for transported loads over 6 days a week.

Drivers use OST-owned trucks, receive daily route instructions from Sencion Sr., and have OST pay for their diesel fuel, Nextel radios, tolls, truck repairs, tire expenses, and truck insurance. Hours worked by OST drivers prior to May, averaged 10–12 hours per workday. In addition, OST drivers must submit written requests to Sencion Sr. or Andrade for time off from work. Greenwaste opens at 5 a.m. so some OST drivers need to be there early and workdays end at 6 p.m. or occasionally 8 p.m. when busy.

OST assigned routes to its drivers on a daily basis. Some drivers would start out with a route assigned the night before by Sencion Sr. while most drivers received daily route assignments from Sencion Sr. based on his communications with Greenwaste, Zanker, and Z-Best. Saturday work was also assigned by Sencion Sr. on Friday evenings and did not go to all the drivers. One route in particular, was consistently provided to Reynoso, Pizano, and Efrain Gutierrez until they supported the Union, complained of work conditions and testified at the NLRB representation hearing in early May. What made the Watsonville route so attractive is that a driver received pay for each leg of a trip and could start the workday by going to the Watsonville landfill at Z-Best with a loaded truck and get greenwaste to drive to Greenwaste and get paid \$45 for a 1–1.25 hours route before receiving a new route from Sencion Sr. though most often the Watsonville route driver would be allowed to drive to Greenwaste with a second full load, cut in line with the full load, empty, and get filled without having to go to the end of the line and wait. At Greenwaste, they usually were able to get

another load to take to Z-Best. If there was more greenwaste to pick up in Watsonville then get another load and repeat at Greenwaste. Drivers are paid by the load so it is easier to get more loads each way on the Watsonville route than, for example, driving 4–5 hours round trip and fight traffic just to drop off one load at Z-Best Potrero Hills in Fairfield, California.

Sencion Sr. is the father of Oscar Jr. and Crystal Sencion. He lived with Andrade for 10–12 years while their children were young. He is Respondent’s yard manager and oversees the day-to-day operations, including assigning drivers to particular routes. Greenwaste Supervisor Ricardo Lopez very credibly testified that either he directly contacts Sencion Sr. or his assistance does to communicate loads that need hauling from Greenwaste and Sencion Sr. would determine which driver at OST would pick up the load for additional compensated work. (Tr. 459, 462–464; ALJ Ex. 3(a) at 56.) Sencion Sr. is in direct contact with Respondent’s customers and coordinates the fluctuating workload, including assigning drivers particular loads and Saturday schedules. OST drivers were informed in writing by Andrade and Sencion Sr. that Andrade, as OST manager and Sencion Sr., as OST supervisor, can fire or terminate any OST driver who is giving the company problems. Greenwaste regularly contacts Andrade and Sencion Sr. if there are any problems with OST drivers. (GC Exh. 9; ALJ Ex. 4(g) at HCA 1132.) OST drivers look to Sencion Sr. as their supervisor and OST rules also provide that Sencion Sr. is the OST supervisor or operations manager using Nextel Radio Channel No. 15 known as Oscar with the nickname Anaconda. (GC Exhs. 10, 11, 31, and 43; ALJ Ex. 5(a) at p. 19.) Andrade confirmed initially that Sencion Sr. was OST’s field or outside supervisor.<sup>11</sup> (ALJ-3(a) at 245.)

Sencion Sr. is reimbursed by OST for buying various truck parts for the Company. He also assists Andrade in purchasing trucks for OST and he and his own truck are insured by OST’s business truck insurance. (GC Exh. 42.) He claims that he is doing business as Sencion Trucking, was paid \$160,000 by HCA in 2009. OST also paid Sencion Sr.’s other business, Chrystal Tire Co., \$10,000 in 2009. A check dated July 15 from HCA to Sencion Sr. in the amount of \$7575<sup>12</sup> shows that compensation flowed to Sencion Sr. from HCA and OST in 2010. (ALJ Ex. 4(g) at HCA 1505.)

#### *B. The Beginning of the Union Campaign and Respondent’s Reaction*

On or about January 15, Andrade and Sencion Sr. called a meeting of OST’s drivers and mechanics in the yard and announced in Spanish that the Company had been sold to new

<sup>8</sup> OST’s diesel fuel surcharge price list to Greenwaste is a pass-through expense and is based on an identical surcharge imposed by Zanker Road Resources San Jose to all subhaulers. (See ALJ Ex. 4(g) at HCA 1514; GC Exh. 22.)

<sup>9</sup> Greenwaste owns the trailers and leases them to OST for use by OST drivers to haul materials.

<sup>10</sup> Notwithstanding the significant lease amounts involved, Andrade and Don Dean, from Greenwaste, claim that OST and Greenwaste have no written contract between them.

<sup>11</sup> Sencion Sr. and Andrade, as Respondent’s principal representatives, did not provide reliable testimony at the ULP hearing as much of the time their testimonies completely contradicted their earlier testimonies from the representation hearing and related depositions. It appeared more likely that they viewed the R-case hearing and depositions as a dry run practice so they could fabricate new facts for the ULP hearing. Also, not believable as per Andrade that Sencion Jr. was a supervisor of the OST drivers on May 14, 2008, when he was only 15 or any other material time. (See GC Exh. 15.)

<sup>12</sup> If this is a bimonthly payment to Sencion Sr., this extrapolates out to almost \$182,000 for the year 2010.

investors and that Andrade and Sencion Sr. would no longer be the owners.<sup>13</sup> They did not announce who the new owners were but informed the employees that business would continue as usual, including the functions performed in operation of the business by Andrade and Sencion Sr. However, there were no new investors; instead, Andrade reorganized OST in early 2010 into a Nevada LLC owned by herself (36 percent) and her two minor children (32 percent each). She told the drivers that OST was going to shut down if they did not individually incorporate themselves. Andrade decided to force the drivers and mechanics to incorporate themselves to shield her from tax liability and a few days later Andrade and Sencion Sr. called a meeting for that purpose.<sup>14</sup>

Soon thereafter during a meeting at a nearby pizza parlor attended by all the drivers in order to receive their paychecks, Andrade introduced Charles Naegele, Respondent's legal representative, as a new partner and the attorney for the "new investors." Naegele spoke English and Andrade interpreted for him in Spanish. Andrade told the employees that in order to continue working, they would have to sign various forms<sup>15</sup> or turn in their resignation effective immediately. Andrade gave the employees incorporation applications, which had previously been filled out by the attorney, and were entirely in English, although many of the employees were monolingual Spanish speakers and could not understand the forms. All of the employees decided to sign the forms even though Andrade did not fully explain the incorporation process or ramifications and did not give them copies of what they signed. Andrade told the employees that their work would not change at all and only that they would have tax benefits due to the incorporation. Andrade filed the paperwork with the California Secretary of State on February 1, and HCA paid all costs associated with the incorporation.

Among themselves, the drivers expressed skepticism. Pizano added that at this January meeting about incorporation the lawyer told the drivers that incorporation was better for the drivers because they could deduct everything—clothes, food, utilities, etc. and pay less taxes. Sencion Sr. repeated this later to the drivers telling them that at the end of the year the deductions would help out a lot by saving on income taxes. Pizano credibly opined that the drivers indicated to him that incorporation would not really help them.

In April, drivers Marcial Barron Salazar and Marquez contacted the Union about the changes in their company, including the incorporation. The Union began organizing Respondent's

drivers and collected signed authorization cards.<sup>16</sup> On April 11, Marquez signed an authorization card. On April 14, the Union filed a petition to represent a unit comprised of 11 Respondent's drivers in Case 32-RC-5761.

Also on April 14, the NLRB mailed OST notice of an April 22 representation hearing at the NLRB's Region 32 hearing room in Oakland, California (the NLRB Petition). (ALJ-3(b), Exh. 15 to Andrade's July 7 deposition.) In addition on April 19 and 20, the hearing officer in the representation hearing left voice messages on OST's telephone answering machine giving additional notice of the April 22 hearing. (ALJ-2(a) at 6.) Andrade admitted that she first became aware that OST's drivers considered unionizing when she reviewed the NLRB Petition on April 25 or 27 after returning from a trip out of the country. (ALJ-3(a) at 263-264.)

On April 20, the 11 prounion OST drivers signed a joint letter of protest about the working conditions and the forced incorporation (the protest letter). (GC Exh. 4.) Employee Marquez kept the protest letter as he planned to use it to show support for Escobar who was supposed to testify at the representation hearing on the Union's petition on April 22. However, Respondent did not appear at the hearing and the hearing was continued.

On April 30, Andrade and Sencion Sr. held a second meeting with the employees at the nearby pizza parlor. Naegele was present again and Andrade once again interpreted for him. Andrade gave each of the employees a corporation kit and once again required them to either sign employment contracts between their "corporations" and OST or resign from OST employment. The contracts were in English, were not translated and employees were told that in order to continue working, they had to sign the contracts. Even if the Respondent's drivers could read English, these "incorporation" documents were drafted in language that a nonlawyer is not likely to understand. The evidence does not show that the drivers were given an adequate explanation of what the "incorporation" documents meant. One employee, Julio Escobar (Escobar), refused and was required to sign a resignation form. The employees continued to perform the same duties. The only change that occurred is that Andrade stopped withholding employment taxes from their paychecks and issued the checks to the employees' corporate names, which was the employees name followed by "Inc."<sup>17</sup> During the meeting, Naegele through Andrade told the employees that if they were thinking about getting help from a union that it would not be possible because they were going to be the owners of their own companies.

Following their execution of the corporation contracts in late April, the employees continued to perform the same duties in the same manner and under the same assignment and direction as before. The only change that occurred is that Andrade stopped withholding employment taxes from drivers'

<sup>13</sup> The majority of OST drivers do not speak, read, or understand English as Spanish is their primary language. All but one or two required an interpreter at trial.

<sup>14</sup> Andrade issued OST drivers W-2's reflecting their annual wages in 2009 and followed this by issuing IRS Form 1099's in 2010 in an attempt to reclassify OST drivers as independent contractors and not employees. The IRS did not go along with the sham and issued Andrade information letters dated November 29, disallowing the independent contractor label which continued the OST drivers' employee status. (See GC Exh. 19.)

<sup>15</sup> The forms turned out to be incorporation documents, articles of incorporation, bylaws, and contracts written in English and none of the drivers were instructed to seek their own legal counsel.

<sup>16</sup> The card authorized the Union to represent the signatory in negotiations for better wages, hours, and working conditions at OST.

<sup>17</sup> However, Andrade had been issuing checks in this way since the beginning of January before any discussion of incorporation.

paychecks, instead issuing checks to the employees' corporate names, which was the employee's name followed by "Inc."<sup>18</sup>

On May 5, at the resumed representation hearing, Marquez submitted the protest letter to Andrade. Later that day, Andrade showed the protest letter to Sencion Sr. in the yard at OST.

On May 6, driver Miguel Reynoso (Reynoso) called Sencion Sr. to let him know that he had been subpoenaed to testify for the Union at the hearing the following day. Reynoso told Sencion Sr. that he signed the protest letter in support of the Union and that all of the other drivers were in agreement. Sencion Sr. responded that not all the drivers had signed in, specifically: Jose Victor Vargas (Vargas) and Ceferino Urias (C. Urias). Reynoso told Sencion Sr. that C. Urias had signed it and Sencion Sr. told Reynoso to come meet him at the OST yard and take a look at the protest letter for himself.<sup>19</sup>

On May 6, when Reynoso arrived at the OST yard with his wife and young son accompanying him, Sencion Sr. and Andrade were there and spoke to him. Sencion Sr. told Reynoso that if he was not supporting the Union, he could load up and go to Watsonville for a load. (Tr. 255, 260.) Sencion Sr. admitted meeting with Reynoso on May 6 at the OST yard with Andrade and that Reynoso mentioned that the OST drivers were applying for a union. Sencion Sr. also admitted telling Reynoso that he did not believe that having the drivers unionized was good either for the drivers or OST and that the drivers "should think about it [unionizing] well, but it was their decision." (Tr. 797.)

Reynoso added further details about the May 6 meeting when he credibly explained that Sencion Sr. told him that those drivers that signed the protest letter would be fired by the end of May. Reynoso also repeated this discussion to other drivers who recalled hearing it from Reynoso including Pizano, Gutierrez, and Urias. Sencion Sr. also threatened Reynoso by saying that he would close the Company and not have any drivers.<sup>20</sup> (Tr. 255–256.)

Reynoso admitted to Sencion Sr. and Andrade that he did not read the protest letter before he signed it. Andrade told Reynoso that she was sorry that drivers who signed the protest letter would be fired but that she was safe because she had a job. She also told Reynoso that he was an idiot for signing the protest letter without reading it. The three kept going around and around at the meeting as per Reynoso with Andrade and Sencion Sr. further reminding Reynoso that he was going to lose his job for signing the protest letter. Sencion Sr. also mentioned to Reynoso how Julio Escobar had resigned rather than sign

incorporation documents but that he had returned asking for his job back. Sencion Sr. further recounted to Reynoso that he had told Escobar that he would give him his job back but Sencion Sr. told Reynoso that this was not going to happen as he would never give Escobar his job back. Escobar had also signed the protest letter.

Beginning on or about May 7, directly after Sencion Sr. testified at the NLRB representation hearing, he stopped directly communicating with OST drivers and Greenwaste Supervisor Lopez and continued to direct and assign work through OST mechanic Felipe Campos (Campos).<sup>21</sup> (ALJ Exh. 5(a) at pp. 6–7; ALJ Exh. 3(a) at 57–58.) Sencion Sr. and Andrade continued to discipline and control OST drivers' work hours and employment status at OST in 2010.

Later in May on a Saturday at the OST yard, Sencion Sr. also approached prounion driver Velasquez about the Union and told him that the Union was suing OST but Velasquez corrected Sencion Sr. by saying that there was no lawsuit. Instead, OST drivers just wanted to be in a union. This meeting took place with Sencion Sr. and Jr. 2 or 3 weeks after the May 7 NLRB hearing. Sencion Sr. further told Velasquez that OST can get new nonunion drivers "that own their own trucks." Sencion Sr. also told Velasquez that with respect to the OST drivers who unionize, Sencion Sr. intended to diminish their hours and give them just a few hours per day and pay them only \$20 a day. (Tr. 344–345.) He also said, "I can get owners, people who own their own truck, and do the work that way. And the drivers that are here, I can give them fewer work hours and I can work with the truck owners" and give them the hours that formerly went to the union drivers.<sup>22</sup> (Tr. 344.)

The representation hearing lasted 3 days and four employees, Marquez, Reynoso, Primitivo Gusman, and Julio Escobar, testified on behalf of the Union. Despite receiving a Board subpoena, Andrade never appeared. Sencion Sr. appeared and testified vaguely about the Company's operations. The Region subpoenaed Andrade and Sencion Sr. to submit to depositions which occurred over the course of 5 days in July and September. Subsequently, the Regional Director issued a Decision and Direction of Election on January 14, 2011. (CP Exh. 1.)

#### *C. Changed Terms and Conditions of Employment for Union Supporters*

Almost immediately on learning of its employees' signing of the protest letter and their support of the Union, Respondent

<sup>18</sup> However, Andrade had been issuing checks in this way since the beginning of January before any discussion of incorporation.

<sup>19</sup> There was a great deal of confusion over whether Ceferino signed the protest letter due to the fact that his signature had been added by another employee with his permission but misspelled as Serifino. (See GC Exh. 4.)

<sup>20</sup> I find Reynoso's testimony particularly credible given the fact that he testified against his own interests as at the time of trial he remained employed at OST and is a longtime friend to Sencion Sr. who must continue to face Respondent's principals after trial. See *S.E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by respondent.).

<sup>21</sup> Campos' testimony was evasive and his demeanor was unconvincing as he did not appear to take his oath or appearance at hearing seriously. He was unbelievable when he denied communicating route orders from Sencion Sr. to OST drivers after May 7, 2010, despite credible and consistent contrary testimony from drivers Reynoso, Valequez, Marquez, Pizano, and Sencion, Sr. himself who admitted that he stopped communicating to all union drivers after the May 7, 2010 NLRB hearing.

<sup>22</sup> Sencion Sr. admitted that he spoke to Cerefino Urias Velasquez around the time of the representation hearing about a car he sold Velasquez, but he did not specifically deny making the statements described by Velasquez. (Tr. 795.) Moreover, like Reynoso, Velasquez was a current employee of Respondent at the time he testified, which makes it unlikely that he would give false testimony against Respondent. *S.E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987).

changed the terms and conditions of employment and payment of wages of the prounion drivers to discourage employee support for the Union. Respondent did this by decreasing total wages and union supporters' work assignments, reassigning more lucrative routes to nonunion drivers, eliminating union supporters' opportunities to work on Saturdays, and by not recalling union supporters to work after their trucks broke down and/or delaying repairs of their trucks and not providing substitute trucks as in the past. In contrast, the nonunion OST drivers, both those employed at OST as of April and those hired after April were rewarded with plentiful work assignments and sizeable increases in their total wages which exceeded the pay or long-term union supporters. The decreased compensation for prounion OST drivers and the increased compensation to nonunion OST drivers is most apparent when reviewing the May–November wages compared to 2009 and also when compared to a nonunion driver such as Victor Vargus (Vargus) for the same 7 months. (See GC Exh. 46.)

Specifically, Reynoso usually worked 10–12 hours daily at OST before the May 7 NLRB hearing. Also, before the May 7 NLRB hearing, Marquez would make four–six trips per day at OST. Marquez averages two–four trips after his May 7 testimony. Reynoso averaged six–seven trips per day in 2009. Before the May 7 NLRB testimony, Reynoso would work every other Saturday. After the May 7 hearing, Reynoso did not get any Saturday work for the rest of 2010 except once on December 18. Reynoso credibly explained that he could not just show up at Greewaste on a Saturday because he did not own the truck. He was required to and routinely received orders from Sencion Sr. to work a Saturday.

Marquez noticed that after his May 5 NLRB testimony, he had a changed work/route schedule and his pay went down. Marquez was no longer assigned Saturday work except during holiday weekends. Velasquez knew that some drivers who signed the protest letter had their work hours reduced after May 5, but he only lost some Saturdays. Marquez would accompany Sencion Sr. on trips to Sacramento, Bakersfield, and Phoenix to buy trucks before May 5, but never again after the May 7 NLRB hearing. Marquez would work some Saturdays before the May 5 NLRB hearing but not after except maybe Saturdays during holiday weekends. Sencion Sr. no longer called Marquez to work Saturdays after the May 5 hearing. Instead, Vargus, Rafael Martines, and new drivers were assigned to work on Saturday by Sencion Sr.

Pizano worked five–seven loads per day before Sencion Sr. or Andrade became aware of the protest letter and the prounion activities in early May. Pizano would average working only two–four loads per day after early May. Before the protest letter, Pizano drove two–three of the less profitable Potrero Hills trips per month. After the protest letter, Sencion Sr. assigned him 10–12 Potrero Hills trips per month. Also, before the protest letter, Pizano worked one–three Saturdays per month. After signing the protest letter, Pizano's Saturday work went away completely.

For years, Reynoso drove the profitable Watsonville route for OST and would routinely drive the OST truck home at night and weekends. Reynoso says Watsonville was easier to drive to and from his home than from the OST yard. Reynoso says that

after the May 7 NLRB hearing, Sencion Sr. ordered that Reynoso no longer be allowed to bring a truck home after work or on weekends.

After approximately May 7, Vargus, an OST driver who had not signed the protest letter, took over Reynoso's Watsonville route despite Vargus being a relatively new driver at OST at that time. In addition, besides Reynoso, Pizano, and Efrain Gutierrez (the two others who had signed the protest letter) also lost their Watsonville route with Reynoso. Reynoso and Pizano only getting to drive the Watsonville route 1 day per month after May 7. In addition to Vargus, Reynaldo Del Rio and Margarito Ruiz, all nonunion drivers, took over the regular lucrative Watsonville route despite having very little seniority at OST as Ruiz was hired May 13, and Del Rio hired on May 18.

After signing the protest letter, Salazar's work went from five loads per day down to two–three loads though OST's workload did not change. One time after signing the protest letter, Salazar was sent home on Sencion Sr.'s orders through Rigaberto even though there was more work to do. Once Salazar approached Andrade in October and pledged not to support the Union, he resumed his former work assignments including occasional Saturday work from Sencion Sr.

Pizano used to leave the OST yard before 5 a.m. before early May. After May 10, Sencion Sr. told Pizano not to leave yard until after 6 a.m. To the contrary, Vargus was allowed by Sencion Sr. to leave the yard before 6 a.m. after May 10. Victor Vargus, Mar Ruiz, Rinaldo Del Rio, and Rafael Diaz Martines did not attend any union meetings and worked Saturdays after the May 7 NLRB hearing.

Before the early May NLRB hearing, Sencion Sr. would immediately replace a driver's truck in need of repair either with another spare truck or Campos or another mechanic would quickly repair a truck so a driver would not miss work. This too changed after the May 7 hearing. After May 7 when Sencion Sr. refused to speak directly to prounion drivers, the usual practice of immediately driving a spare truck when a driver's regular truck needed repair ended. (Tr. 701–702.) Thereafter, union drivers who had signed the protest letter began missing work, sometimes for weeks at a time, even with spare trucks available, waiting for Andrade to order replacement parts or for repairs to be completed by Campos. This happened to Reynoso, Guzman, Marquez, and Pizano. All drivers having their trucks repaired were required to check in with Campos to find out the progress of the repair and Campos would contact them to advise when their trucks would be ready. Reynoso, Guzman, and Pizano in fact returned to work when Campos called them after each had waited without work for weeks. None of the drivers called Andrade or Sencion Sr. to explain their absences nor submitted written requests for time off while waiting for their trucks to be repaired, and none were accused of abandoning their jobs until Marquez as described below. (Tr. 204–205, 270–273, 402–405, 413–414, 436–437, 605–607, 612, 657–658, 742, 937–939, and 961; ALJ Exhs. 3(a) at 89–91, 4(d) at 296–297.)

Soon after Campos testified at the representation hearing, Campos required Reynoso, on orders from Sencion Sr., to remove all of his personal belongings including any installed

radio from his regular OST truck. No spare truck was offered for use by Campos as he usually did. This had never happened before and the repair turnaround was usually a day or two or you could drive a spare truck. After a few days and no work, Reynoso called Campos to check the status of his downed truck and Campos told him that “attorneys” had not bought the part yet. Reynoso was off work for 10–12 days. Reynoso believed that repair should have taken 4–6 hours not 10–12 days because all that was needed was a new part for water pump.

As discussed below, Pizano had the same issue with delayed truck repairs as did Marquez. Before the May 7 NLRB hearing, a truck in need of repair would be out no more than a day or so with ample supply of spare trucks. Not so for Reynoso, Pizano, and Marquez after the May 7 NLRB hearing due to the protest letter. Pizano was forced to work 1 week on and 1 week off for 6 weeks starting June 2010. Campos would call Pizano if a driver on another truck was a no show so Pizano could drive in their place.

#### *D. The Discharge of Marquez*

On or about August 29, Marquez submitted a written request for time off for the birth of his son for the period of September 6 to 20. (GC Exh. 5.) Andrade admits that she received and approved the request. One week into the approved leave, however, Andrade canceled service to Marquez’ Nextel radio.<sup>23</sup> (Tr. 1071.) Andrade also had Campos sign Marquez’ initial paternity leave request as a “witness.” (Tr. 1066–1069, 1071, 1099.)

When he returned to work on September 20, Campos told Marquez that his truck was unavailable and in need of repair. Campos presented Marquez the option of returning to work by using spare truck No. 12 or extending his leave so that Marquez’ regular truck (No. 7) could be repaired.

Marquez chose to extend his leave another week to wait for his usual truck to be repaired and he submitted another written request to extend his leave through September 27 when Campos estimated the truck would be repaired. (GC Exh. 6.) Andrade approved Marquez’ second paternity leave request. Campos agreed to contact Marquez as soon as his truck was repaired. Because Marquez’ radio contact had been discontinued, Campos and Marquez agreed to communicate through Marquez’ coworker Pizano as Pizano was driving Marquez’ post-May regular routes and using his trailer while Marquez was out on leave without his regular truck. (Tr. 93–98, 166–177, 625–626, 1066–1070.)

Pizano checked in with Campos daily as to the status of Marquez’ truck repair. Campos would continuously inform Pizano that Marquez’ truck was not ready and Pizano relayed this information to Marquez daily. Finally on September 30, Marquez went to the OST yard to check on his truck and pick up his paycheck from Andrade. At that time, Campos told Marquez that his truck was still not repaired and he reassured Marquez that he would contact him as soon as it was ready to use again. Marquez then asked to use a spare truck that was available in the yard and Campos told him that fellow mechanic

Jose Carillo would soon be repairing that truck. Marquez confirmed this with Carillo who added that yes he was going to repair the spare truck and that Carillo “had his orders.” Marquez went home and continued his daily check-in with Pizano as to the repair status of his truck and Campos continued to say that the truck was not yet repaired and they could see his truck broken down in the yard. (Tr. 99–110, 122–123, 204–205, 625–626, 640–641, 652, and 657–658.) Andrade did not approach Marquez to inquire when he would return to work before sending the October 15 termination letter despite her opinion that when trucks were not under repair and sat idle, Respondent lost money. (See Tr. 1072–1074, 1057.)

Nothing changed for Marquez’ unrepaired truck 7 according to Campos until October 15 when Marquez received a letter from Andrade dated October 14 stating that he was terminated for job abandonment. (GC Exh. 7.)

#### *E. The Discharge of Pizano*

Respondent’s drivers were enrolled by Respondent in a California Department of Motor Vehicles’ (DMV) “pull-notice” program which automatically generates notification to Respondent when a driver incurs violations. On or about November 1, Andrade received a DMV pull notice that alerted her to a speeding ticket issued to Pizano. (GC Exh. 37 at p. 2.) On November 4, Andrade contacted Respondent’s insurance broker, Christina Bettencourt of Commercial Carriers, and asked her to review Pizano’s driving record “and write a letter that he [Pizano] is no longer insurable” on OST’s truck insurance policy. (Tr. 1107–1110; GC Exhs. 37–38.)

On November 8, Commercial Carriers contacted Coastal Brokers, its underwriting firm and underwriter Cheryl Hartz, to review Pizano’s driving record and offer advice. Hartz determined that unless Respondent could provide proof that Pizano was not at fault for an April 25, 2009 accident which appeared on his DMV record, Pizano was ineligible for continued coverage under Respondent’s Scottsdale Indemnity policy. Hartz opined that all accidents are deemed to be “at fault” unless proof of nonfault is received. (Tr. 1005–1025; GC Exhs. 34, 38 & 39.)

Pizano credibly explained that with respect to this April 25, 2009 accident, he was actually found to be not at fault on May 18, 2009, and was never cited by the California Highway Patrol (CHP). (Tr. 620; GC Exh. 28.) Soon after the April 2009 accident, Pizano submitted a written explanation of the circumstances surrounding the accident to Andrade at Andrade’s insistence and OST policy.<sup>24</sup> (Tr. 616–623; GC Exhs. 27 and 28.)

Pizano further recounted that on May 18, 2009, the CHP Traffic Collision Report (CHP Report) concerning the April 25, 2009 accident was ready for pickup and he went to the CHP, picked up the CHP Report, stopped at Z-Best and gave Andrade one copy of the CHP Report that exonerated Pizano from any citations or liability tied to the April 25, 2009 accident. (Tr. 620–22; GC Exh. 28.) In addition, Pizano also credibly noted that not only did he provide Andrade with a copy of the CHP

<sup>23</sup> The timing of Respondent’s cancellation of Marquez’ Nextel radio occurred at the same time Andrade was required to testify at her deposition on September 13 and 14 in the representation case. (See ALJ Exhs. 4(c) and (d).)

<sup>24</sup> In fact, Campos confirmed this respondent policy requiring drivers to submit to the Company a written report if they are involved in an accident or damage a truck. (Tr. 699.)

Report but he also discussed his exoneration, confirmed in the report, to Sencion Sr. later that day who had earlier expressed to Pizano his opinion that there was an 80–85-percent chance the accident was Pizano’s fault. (Tr. 620–621.) Instead, Pizano convincingly testified that he told Sencion Sr. that the CHP Report “shows that I wasn’t at fault” and Sencion Sr. responded saying only, “Okay, looks like they didn’t blame it on you.” (Tr. 621.)

Based on Hartz’ determination, Commercial Carriers sent Andrade an email on November 8 advising her that Pizano was ineligible for continued coverage unless Andrade could provide proof of nonfault for Pizano’s involvement in the April 2009 accident. (GC Exhs. 36 and 39.) Before November 19, Bettencourt, OST’s insurance broker, called Andrade to remind her that she needed to submit the signed driver exclusion form if she was not going to submit proof of Pizano’s nonfault. During the call, Andrade demanded that Bettencourt remove any reference in the insurance broker’s written communications to Andrade which indicated that Pizano could still be eligible for coverage if proof of nonfault for the April 2009 accident were submitted. When Bettencourt advised Andrade that Commercial Carriers was obligated to notify her that she could provide proof of nonfault for continued coverage, Andrade stated that she did not want to employ Pizano anymore and did not want to give him any opportunity to provide proof of nonfault for the April 2009 accident. (Tr. 1113–1115.)

On November 19, Andrade presented Pizano with a letter written in English, stating that Respondent terminated Pizano because he was no longer insurable under Respondent’s insurance policy. (GC Exh. 29.) At that time, Andrade also asked Pizano to sign a driver exclusion form which he did. Andrade did not ask Pizano about the April 2009 accident and did not notify him that he might be able to remain eligible for insurance coverage if he could establish proof of nonfault for the April 2009 accident. Instead, when Pizano told Andrade that there must be some mistake because his driver’s license remained valid, Andrade told him that it was not her problem and she could not help him. (Tr. 612–616.) Andrade said nothing to Pizano about having too many points and termination until actual date of termination.

### III. DISCUSSION AND ANALYSIS

#### A. *Credibility*

The key aspects of my factual findings above with respect to Respondent’s entity forms, Sencion Sr.’s true supervisory role with Respondent, the threats and follow through from the protest letter and Respondent’s drivers’ unionization, and the discharge of employees Marquez and Pizano incorporate the credibility determinations I have made after carefully considering the record in its entirety. The testimony concerning the material events in 2010 contain sharp conflicts. Evidence contradicting the findings, particularly testimony from nonunion drivers Vargas and Martines,<sup>25</sup> has been considered but has not been credited.

<sup>25</sup> Respondent describes nonunion current employees Vargas and Martines as “uninterested” witnesses. (See R. Br. at 15.) This could not be farther from the truth as both drivers benefited greatly by Respond-

My credibility resolutions have been informed by my consideration of a witness’ opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness’ testimony; the quality of the witness’ recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear herein in those situations that I perceived to be of particular significance.

The facts concerning Respondent’s business prior to 2010, and Sencion Sr. obvious role as supervisor and hauling route assignor as well as the specific statements generated from the January 15, April 30, and May 6 meetings attended by Reynoso and described by him were most convincing. His demeanor at trial was impressive. Reynoso has worked with Respondent’s principals, Sencion Sr. and Andrade for over 7 years and was still employed with them at the time of the hearing. Also, prior to signing the protest letter, he had the seniority and trust to drive the lucrative Watsonville route and he was clearly in Sencion Sr.’s inner circle as evidenced by his accompanying Sencion Sr. to buy trucks—a nice break from hauling. Reynoso’s chronology of events and detailed recollection were quite credible especially when verified numerous times by Marquez, Pizano, Velasquez, and Salazar. He was especially believable when he explained that he had no clue why he incorporated except for the insistence of Andrade, Sencion Sr. and their attorney or face losing his job.

I found key elements of the testimony given by Respondent’s principal witnesses, Andrade and Sencion Sr., that conflict with the testimony of employee witnesses unworthy of belief especially when it contradicts their earlier testimony from the representation hearing or subsequent depositions. In virtually all of the significant instances, reliable documentary evidence failed to support accounts provided by Respondent’s key witnesses.

I also find Ricardo Lopez from Greenwaste and Cheryl Hartz, Respondent’s truck insurance underwriter, to be very credible witnesses, because they do not work for Respondent and have no apparent bias. Lopez was very convincing that Sencion Sr. controlled the drivers’ route schedules. Hartz was most credible with her explanation that Pizano did not need to be fired for his driving record in November as Andrade for Respondent was aware that Pizano’s extra points or percentage against his driving record was a mistake that could easily be corrected.

Marquez and Pizano were also credible witnesses as they were earnest, genuine, and their testimonies were reasonable and consistent with the record. In addition, they appeared serious and respectful of the hearing process. In contrast, Velasquez, Marciel Salazar Espinosa, Sencion Jr., and Campos either seemed unable to appreciate the seriousness of the hear-

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ent’s questioned behavior with higher compensation taken from the prounion drivers. (See GC Exh. 46.) I found them both to be heavily biased toward Respondent and noncredible in their testimony. As a result, except to the extent their testimony is consistent with reliable witness testimony, I reject Vargas’ and Martines’ testimony as wholly false.

ing process (Sencion Jr. and Velasquez) or, in the case of Salazar and Campos, did not care to directly answer questions posed to them and were very evasive and unbelievable except when consistent with other drivers' testimony and when Salazar described events involving his role as a union organizer and Velasquez recounted his conversation with Sencion Sr. and Sencion Jr. in late May at the OST yard. I discount the veracity of their testimony when many times each of these four witnesses would look directly at Respondent's trial representative, Andrade, apparently for guidance or approval before remembering some fact in response to a question. In addition, Salazar recounted how he begged for his job back with Respondent in October after he was forced out due to his union support. His demeanor at trial left me the impression that in return for his job he must disavow all his prior union support and help Respondent any way he could thereby sacrificing his own credibility, if necessary.

Finally, I found Don Dean from Greenwaste and Christina Bettencourt from Respondent's insurance brokerage to be less credible and evasive in response to the General Counsel's questioning. Dean was not believable that his company does not have written agreements with its haulers especially given the volume and large amount of money that changes hands. At the time of hearing, Bettencourt was Respondent's sales agent so she did not want to hurt her business relationship with Andrade so I give her testimony less weight than Hartz.

#### B. The "Single-Employer" Status Issue

Initially, it is necessary to address the issue of whether HCA and OST constitute a single employer, as contended by Respondent. HCA and OST both were represented by the same lawyer with Andrade at the hearing. Respondent refused to stipulate to the single-employer status of HCA and OST and argues that the instant complaint would require outright dismissal if the two entities are not found to be a single employer. However, the uncontroverted record establishes that HCA and OST are in essence a single employer for the reasons that follow.<sup>26</sup>

Multiple entities may constitute a "single employer" for purposes of the Act. *Parklane Hoisery Co.*, 203 NLRB 597, 612 (1973), amended on other grounds 207 NLRB 991 (1973). Where an "arm's-length relationship" does not exist among the entities under scrutiny, the Board may find that together they constitute one employer. See *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744 (7th Cir. 2001); *Blumenfeld Theaters Circuit*, 240 NLRB 206 (1979), enf. mem. sub nom. *Roxie Oakland Theater v. NLRB*, 626 F.2d 865 (9th Cir. 1980) (where relationship resembled close family rather than independent companies found to be a single employer). The Board considers four factors to determine whether two or more companies

<sup>26</sup> The Acting Regional Director found that HCA and OST were a single employer in his decision in the R-case. (CP Exh 1.) Respondent did not file any exceptions to the Acting Regional Director's factual findings in his decision. While I do not rely on the Acting Regional Director's decision, I note that Respondent did not offer any new reliable evidence proving that the Acting Regional Director's factual findings were incorrect. No convincing arguments or supplemental reliable evidence have been proffered by Respondent.

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 Service of Mobile*, 380 U.S. 255 (1965) (per curiam) (quoted with approval in *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 fn. 3 (1976)).<sup>27</sup>

#### 1. Interrelation of operations

As stated above, Greenwaste and OST have worked together for at least the past 10 years—Greenwaste paying OST for its drivers to pick up and haul materials mostly from Greenwaste/Zanker to landfills. HCA was created in 2009, and inserted in between Greenwaste and OST as a shell entity with no employees. The same business relationship between Greenwaste and OST continued without any meaningful changes as Greenwaste views HCA and OST as one and the same. HCA and OST are completely interrelated in that they are both engaged in the same business of waste transportation for their only two clients: Greenwaste Recovery and Zanker Road Landfill. In fact, HCA operates as a shell company, supplying Greenwaste with drivers by contracting exclusively with OST.<sup>28</sup> Through 2011, OST supplies Greenwaste with its own rate sheet/price list for hauling loads yet since 2009, Greenwaste pays HCA for hauled loads obtained from OST's drivers and their submitted weight tickets. HCA does not own any trucks nor does it have any employees. Andrade signed the contract between HCA and OST for both companies, and controls how much HCA pays OST for labor.<sup>29</sup> Andrade admits that if Greenwaste is having a problem with an OST driver under Greenwaste's contract with HCA that Greenwaste has been asked by Andrade to describe in writing the underlying circumstances of the OST driver problem to Andrade who with Sencion Sr. will determine whether the OST driver has violated OST rules and should be terminated for the conduct. (ALJ Exh. 3(a) at 46.) The OST drivers were required to sign prefilled out incorporation paperwork which Andrade then used and HCA paid for to incorporate each of the OST drivers. OST and HCA also used the same mobile trailer office at OST's yard facility during relevant times, and Andrade works for both companies and distributes paychecks to OST drivers and controls all aspects of both entities presently from her home. Similar to the facts in *Naperville Ready Mix, Inc.*, 329 NLRB 174, 179–180 (1999), without OST, HCA would not be able to fulfill its con-

<sup>27</sup> *Contra Dow Chemical Co.*, 326 NLRB 288 (1998) (common ownership alone insufficient to establish joint employer status).

<sup>28</sup> In fact, HCA and Greenwaste do not even have a written contract and instead operate under an oral contract. Additionally, although Andrade testified that HCA contracts with companies other than OST for "construction" her testimony was vague and there was no evidence to support that assertion. One would expect that Respondent has records as to HCA contracts in 2010. Thus, it was incumbent for Respondent to proffer such records to show that HCA is more than a shell corporation who has no employees.

<sup>29</sup> Greenwaste pays HCA and then Andrade determines what share of that money to give to OST who uses some of the money to pay drivers but also distributes profits back to Andrade as majority general manager.

tractual obligations with Greenwaste and Zanker Road Landfill, and OST would not have any work without HCA.<sup>30</sup>

Significantly, many of the drivers called to testify never heard of HCA and could only testify that they were employed by “Hilda [Andrade].” Of those who could name a company that employed them, the drivers named OST. While this is not definitive in determining whether operations were interrelated, it weighs in favor of showing that HCA was created merely as a corporate shell acting as a middleman between OST and the greenwaste/trash companies in order to avoid liability. In fact, Andrade admits that her role with HCA is that of a broker or middleperson.<sup>31</sup> (Tr. 866.) As in *Naperville Ready Mix*, “[t]he functional integration of these two companies is clear.” *Naperville*, 329 NLRB at 179.

## 2. Common management

Respondent admits that HCA and OST share a common management with Andrade yet cites *Cimato Bros.* to support its contrary position that there is no common management between HCA and OST. The Board stated “common management exists where one of the nominally-separate enterprises exercises actual or active control, as distinguished from potential control, over the other’s day-to-day operations.” 352 NLRB 797, 799 (2008). In *Cimato*, the Board found that there was no common management because although one individual was on the board of the company, another individual actually oversaw the day-to-day operations. *Id.*

In this case, Andrade oversees and manages operations of both entities and exercises exclusive authority over the business operations, contractual relationships, and financial records of the businesses. She admits that she has the same management duties with OST and HCA. (ALJ Exh. 3(a) at 7–54.) In addition, Andrade is solely responsible for recordkeeping, payroll, and distributing paychecks.

While Respondent’s witnesses made much ado about the fact that they were their own corporations and did not have to report to anyone, eventually they conceded that they did speak with Andrade regarding taking days off and other day-to-day operations. Moreover, testimony from Respondent’s driver witnesses regarding the fact that they never spoke with Sencion Sr., is not credible. The drivers testifying for Respondent were obviously attempting to bolster Respondent’s case and were hyper-

<sup>30</sup> This is a key distinguishing fact from the *Cimato Bros., Inc.* case, 352 NLRB 797 (2008), relied on by Respondent. The two questioned companies in *Cimato Bros.* were engaged in entirely different businesses—one was involved in buying, selling, and developing real estate while the other was involved in the unrelated operations of residential construction. *Id.* at 800.

<sup>31</sup> For example, OST drivers simply hand in their weight tickets to Andrade which reflect the amounts and weights of materials they haul and she simply turns around and submits to Greenwaste HCA invoices reflecting the same weight ticket amounts times a profit rate for Greenwaste to pay to HCA who takes a share of profit off the top, distributes some Greenwaste funds to OST drivers, pays other OST expenses, and, ultimately, Andrade distributes to herself and her two children leftover net cash profits as OST’s owners. (Tr. 443–449, 848–849, 855; R. Exh. 13 at 6–8; ALJ Exh. 3(a) at 37, 62–63.)

bolic as to the amount of control they asserted they had over their work schedules.<sup>32</sup>

In contrast, several other drivers credibly testified that Sencion Sr. had control over driver schedules as well as which drivers were given Saturday shifts. Sencion Sr. and Andrade have a complicated relationship although Andrade described it only as they “helped each other.” To the contrary, Sencion Sr. did Andrade’s bidding and through Sencion Sr., Andrade exercised exclusive authority over the day-to-day operations of both OST and HCA. Also, as stated above, Andrade admits, and Greenwaste employee Lopez confirms, that if Greenwaste is having a problem with an OST driver, Greenwaste has been asked by Andrade to describe in writing the underlying circumstances of the OST driver problem to Andrade who with Sencion Sr. will determine whether the OST driver has violated OST rules and should be terminated for the conduct. (ALJ Exh. 3(a) at 46; see also R. Exh. 15.)

Moreover, as discussed below, incorporating each of the OST drivers was entirely a sham. Andrade testified several times that she manipulated her corporate entities in order to avoid liability.<sup>33</sup> Many of the employees did not understand what incorporation entailed and only agreed so that they would not lose their jobs. Andrade, through HCA, paid for each of the employees to become incorporated and attempted to absolve herself from liability in doing so. Even after incorporation, business continued as usual and Andrade was in control of day-to-day operations. Therefore, the common management and/or financial control prong is satisfied by Andrade’s roles in the two entities.

## 3. Common control of labor relations

Common control of labor relations has been described as a critical factor.<sup>34</sup> In this case, these criteria clearly weigh in favor of a finding that the entities constitute a single employer, despite the fact that HCA did not have any employees.<sup>35</sup> The record makes clear that Andrade exercised complete control over labor relations at OST. Andrade communicated with employees regarding layoffs and was responsible for which employees were terminated. Moreover, she single-handedly sought

<sup>32</sup> After being questioned as to the number on his radio, which he had possessed for a number of years, one of Respondent’s witnesses even went so far as to say, “I don’t even know my own phone number.” (Tr. at 904.)

<sup>33</sup> For example, Andrade admitted incorporating her businesses in Nevada to avoid liability when her trucks caused window shield damage to other cars. (Tr. 864.)

<sup>34</sup> *Naperville Ready Mix*, 242 F.3d at 744. In *Naperville*, three companies operated within a single family, had cross-financing, operated out of the same address, and had similar day-to-day management which was sufficient to satisfy the single-employer analysis.

<sup>35</sup> See *Cimato Bros.*, 352 NLRB at 799. This factor is given less weight where one of the companies has no employees. *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007), *enfd.* 551 F.3d 722 (8th Cir. 2008); *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993), *enfd. mem.* 55 F.3d 684 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1093 (1996) (where one company has no employees, factor of centralized control of labor relations becomes less important). Despite the fact that HCA does not have any employees, it still somehow operates as a corporation and this does not preclude a finding of single-employer status.

the advice of an attorney and unilaterally decided that the employees would have to form corporations in order to remain employed.<sup>36</sup> Although it seems work rules were somewhat lax, all drivers signed contracts with Andrade and any paperwork in regard to the terms of their employment came directly from Andrade. Additionally, Andrade sets the drivers' wages, insurance, repair of trucks, and makes decisions regarding discharge. Andrade's presence in handing out paychecks, oversight of operations, and authority over all financial and operational matters suggests that she controlled labor relations at OST. Moreover, the drivers, even those who testified that they did not report to Sencion Sr., admittedly reported to Andrade regarding labor issues, including time off.

#### 4. Common ownership or financial control

Andrade is the sole owner of HCA, and the controlling general partner/manager with her two children with Sencion Sr. listed as the other owners of OST. Under Board case law, this satisfies common ownership. See *Naperville Ready Mix, Inc.*, 329 NLRB 174 (1999) (common ownership satisfied where the same individual had a "significant ownership interest in the companies in question). Respondent admits so. Andrade clearly has significant ownership interests in both companies and as such, this prong of the single employer analysis is satisfied.

Consequently, I conclude that for the reasons stated above, HCA and OST operate as a single-integrated enterprise to establish them as a single employer. As a result, HCA is admittedly subject to the Board's jurisdiction and because I further find that the two entities are a single employer under Board law, OST, collectively Respondent, is also subject to the Board's jurisdiction. See *Precision Industries*, 320 NLRB 661, 667 (1996) (finding that when there is a finding of single-employer status, and one entity is subject to the Board's jurisdiction, all entities part of that single employer are subject to the Board's jurisdiction).

#### C. Supervisory Status of Sencion Sr. and Agent Status for Campos

##### 1. Sencion Sr. is a supervisor of Respondent

While Respondent readily admits and I find that Andrade has been a supervisor and agent of Respondent at all material times within the meaning of Section 2(11) and (13) of the Act, respectively, Respondent challenges the supervisor status for Sencion Sr. and the agent status for Campos.

Under Section 2(11) of the Act a supervisor is any person:

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

<sup>36</sup> In her brief, the GC correctly notes that while Andrade suggested that the drivers were originally "partners" and were never employees, the drivers were obviously not partners and did not assist in running the business or profit as partners would.

Each of these criteria need not be satisfied for an employee to be classified as supervisor under Section 2(11).<sup>37</sup> However, to be classified as a supervisor the employee must (1) have authority, (2) to use independent judgment, (3) in performing such supervisory functions, and (4) in the interest of management.<sup>38</sup> However, making routine assignments without the use of independent judgment has been found to be insufficient to meet the requirements of a statutory supervisor.<sup>39</sup>

Sencion Sr. fits several of the Act's enumerated criteria including hiring and training employees, assigning and directing work, promoting and rewarding employees, and choosing who works on Saturdays. Respondent's work rules clearly vest Sencion Sr. with supervisory powers and employees were directed to contact Sencion Sr. for any problems or complaints they had related to work.<sup>40</sup> Moreover, drivers were required to follow Sencion Sr.'s directions under threat of discipline.

Sencion Sr. conducted preemployment driving tests and was directly responsible for hiring several of the drivers. Sencion Sr. had the ability to directly impact the earning capacity of the drivers by assigning them more or less lucrative routes. Moreover, Sencion Sr. was able to control whether drivers were able to work by deciding whether or not to allow a driver to use a spare truck when his truck was undergoing repairs.

Although Respondent claims that Sencion Sr. does not have any supervisory authority over its employees, it is clear that Sencion Sr. is responsible for relaying orders to the drivers. It is telling that after the May NLRB hearing, Sencion Sr. suddenly began using Campos to pass on his orders to create the appearance that he had no authority over the drivers. On the contrary, Sencion Sr. is directly responsible for designating drivers to their routes. Sencion Sr. is in direct contact with both of OST's clients and contacts the drivers using their Nextel walkie-talkies and/or cell phones. He chooses who gets to work on Saturdays and is directly responsible for making sure the routes are sufficiently covered. Although Sencion Sr. has tried to use mechanics and Greenwaste employees to relay his messages, it is clear where the message originates and all efforts to downplay his authority are merely a ruse.

The drivers spend much of their day away from the yard and perform essentially the same job functions each day and therefore, supervision is somewhat minimal, however, Sencion Sr. does coordinate with Respondent's customers and makes work assignment decisions throughout each workday.

<sup>37</sup> *National Welders Supply Co.*, 129 NLRB 514 (1960). Moreover, the Supreme Court has suggested that an employee may be classified as a supervisor if he meets any 1 of the 12 criteria. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

<sup>38</sup> *NLRB v. Healthcare & Ret. Corp of America*, 511 U.S. 571 (1994).

<sup>39</sup> *Stanford Hotel*, 344 NLRB 558 (2005).

<sup>40</sup> Although Respondent claims that the rules vested Sencion Jr. with this supervisory power, the drivers who testified understood Sencion Sr. to be the "Oscar" listed in the work rules. Moreover, it is highly improbable that there was any intent to vest Sencion Jr. with any authority as he was 15 years old at the time the rules were issued and several witnesses, including Greenwaste employees testified that they commonly spoke with Sencion Sr. but had never spoken with Sencion Jr.

In addition to the primary supervisory status criteria, Sencion Sr. also meets many of the secondary criteria the Board has developed including employees' perception that Sencion Sr. is a supervisor as well as his attendance at meetings. *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Many of the drivers testified that they believed Sencion Sr. to be a supervisor and treated him as such. Sencion Sr. attended all meetings and it was clear from his relationship with Andrade that he was in charge and had authority over the drivers.

In addition, Sencion Sr. is inextricably linked with management and all of his actions are in the interest of management. Sencion Sr. is the father of Andrade's children, has been Andrade's business partner for over 10 years, and is a founder of the business. Both Andrade and Sencion Sr. admitted that Sencion Sr. helps out with the business because their interests are linked, particularly because of their children.

Sencion Sr. also makes a great deal more than the drivers. Sencion Sr. claims that he earned at least \$160,000 from HCA in 2009 even though in the May 7 hearing he incredibly claimed to never have heard of HCA. Moreover, it is implausible that Sencion Sr. earned this money merely for the waste he towed under the guise of Sencion Trucking seeing as the other drivers made approximately one third of that amount. Sencion Sr. also admitted earning approximately \$1000 per week from OST for ordering parts, although he denies this was also for his duties of managing the drivers. Moreover, several drivers and even Sencion Sr.'s son testified that they had never seen Sencion Sr. drive a truck for hauling.

Moreover, during his deposition on May 7, Sencion Sr. credibly classified himself as the yard manager, a supervisor to the drivers and stated that he told the drivers where they were supposed to pick up their loads and made sure that they were doing their jobs correctly. In addition, he testified that he was paid by OST for these duties. Andrade admitted during her deposition on July 7 that Sencion Sr. was a field supervisor and that he communicated directly with Greenwaste to determine how to allocate the drivers. (ALJ Exh. 3(a) at 56, 245.) However, later at trial Andrade was less than credible when she completely contradicted herself and claimed that her son, Sencion Jr. was in fact the supervisor.<sup>41</sup>

Despite Respondent's claims that Sencion Sr. did not have any authority over the drivers, it is clear that he did have actual control and authority over the drivers and that he directly supervised them. The record is rife with examples of how Sencion Sr. exerted that control and as such, I find that Sencion Sr. is a supervisor within the meaning of Section 2(11) because he is clearly vested with authority to hire and train OST drivers, assign and direct their work, and, along with Andrade, discipline OST employees.

## 2. Felipe Campos is an agent of Respondent

Section 2(13) of the Act creates the test for whether an employee is an agent of the employer:

<sup>41</sup> At the time the work rules were issued listing Oscar as the supervisor, Andrade's son, Sencion Jr. was 15 years old. Moreover, Sencion Jr. incredibly testified that he was issued the supervisor's walkie-talkie (#15) and that he even brought it with him to high school where he answered calls from Greenwaste.

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.

The Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving the agency relationship is on the party who asserts its existence. See *Pan-Oston Co.*, 336 NLRB 305, 305-306 (2001).<sup>42</sup> In *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106, 106 (1997),<sup>43</sup> the Board stated that "it is well established that the apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question."<sup>44</sup>

Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, *Agency*, § 33. Id.

Applying these principles here, it is manifestly clear that Campos was the Respondent's agent. At no time did Campos act on his own as the OST drivers' employer. After the representation hearing in May, Sencion Sr. abruptly stopped talking to his employees to create the appearance that he did not have any supervisory authority over them and that he was not an agent of OST. Instead, he began using lead mechanic, Campos, to relay his directions to the employees. Campos began calling drivers on their radios to assign the work routes. Campos also began relaying messages about who could take spare trucks while their trucks were being repaired, directing employees to take their belongings out of their trucks, requiring written requests for time off, and instructing employees to write up damage and incident reports. Campos also began communicating whether certain employees were allowed to work on certain days. Any documentation that Campos received from drivers was turned over to Andrade and/or Sencion Sr. who would

<sup>42</sup> Contra *Ready Mix, Inc.*, 337 NLRB 1189 (2002) (employee was not an agent where he was temporarily assigned the duties of a field representative and even though he made representations that he had authority over the other workers there was no evidence that the employer conferred such authority on him or "cloaked him with apparent authority to act as its agent").

<sup>43</sup> In *Zimmerman*, the Board found both apparent and actual authority where foremen "acted as the conduits for relaying and enforcing the Respondent's decisions, directions, policies and views . . . participated in monthly management meetings . . . were privy to the Respondent's policies and objectives . . . [and therefore] it was reasonable for the rank-and-file employees to believe that these foremen were reflecting company policy and acting for management when they engaged in the conduct found to be unlawful." 325 NLRB at 106.

<sup>44</sup> See also *Waterbed World*, 286 NLRB 425, 426-427 (1987) (the test for whether statements or actions taken by individuals are attributable to the employer is whether the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management"); *Southern Bag Corp.*, 315 NLRB 725 (1994).

instruct Campos as how to respond to the drivers. As such, Campos acted as a conduit between the drivers and management—Sencion Sr. and Andrade. Although Sencion Sr. tried to utilize Campos to obscure his own authority, in doing so he made Campos an agent of Respondent. Respondent inserted Campos in place of Sencion Sr. to be Respondent's agent to supervise Respondent's employees and was authorized by Respondent's management to act for its benefit. Campos was directed in what to tell the drivers and is an agent of Respondent within the meaning of Section 2(13) of the Act.

*D. Respondent's Drivers are Statutory Employees*

"Employees" are defined by Section 2(3) of the Act:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.<sup>45</sup>

Specifically disputed here are whether the drivers of OST are employees or independent contractors. The Board applies the common law "right of control" test in determining whether individuals are employees or independent contractors. *National Freight, Inc.*, 146 NLRB 144, 145–146 (1964).<sup>46</sup>

Decisions about the status of trucker owner-operators are subjective and each case must be decided on the basis of its own facts and the Board has specifically focused on: contracted agreements between the employer and owner-operators,<sup>47</sup> and the practice of the company and owner-operators.<sup>48</sup> Moreover, owner-operators have been found to be employees where the employer exercises "pervasive control over" the assignment of runs, including the distance, the nature of the load, and to whom delivery is made; the maintenance of the equipment; the selection of insurance; and the performance standards of the drivers.<sup>49</sup>

Here, Respondent certainly exercises pervasive control over the drivers. Respondent exercises considerable control over the

means and manner of its drivers' performance and does not provide drivers the ability to pursue entrepreneurial opportunities. The drivers are not owners-operators as they do not even own the trucks which belong, instead, to OST. Respondent assigns drivers their routes, directly impacting how much money each driver will make. Respondent communicates via OST-provided Nextel radios or cellphones directly with its employees and controls which drivers go to each site for pick ups and drop offs. Moreover, Respondent is solely responsible for the insurance, maintenance, fuel costs, tolls, and compliance with interstate carrier laws for the drivers. The drivers are not allowed to drive their trucks home without special permission and the drivers cannot use their equipment for purposes other than hauling for Respondent. This directly inhibits the drivers from exercising any entrepreneurial control of their own and instead, drivers can only make those wages that Respondent agrees to pay per load.<sup>50</sup> Moreover, the drivers may not negotiate directly with Greenwaste to determine how much they make per load, but instead Respondent sets the rate at which they are paid.<sup>51</sup> The long work hours at OST make it impossible for an OST driver to work any other job as workdays average from 10 to 12 hours. Given the extent to which Respondent controls the drivers' equipment and work hours, the drivers have no way to generate income outside of their relationship with Respondent.

While some drivers testified that they could make their own schedules and that there was no direct supervision, those facts are not credible in light of more credible conflicting testimony and are not controlling in this case. The drivers generally drive the same routes, unless instructed by Respondent, and therefore do not need much supervision. However, the drivers come to the yard before the start and after the completion of their workday and are in constant contact with Respondent via the walkie-talkies or cell phones as to work routes that arise during each workday. Saturday routes are determined each preceding Friday evening and assigned by Sencion Sr.

The sham incorporation is also telling, in that it was a ploy by Respondent to insulate itself from having employees and the many implications the employee-employer relationship carries. Andrade admitted that it was her idea to incorporate the drivers after speaking with her lawyer and she and Sencion Sr. told the employees that if they did not incorporate she would fire them. The drivers were required to sign prefilled out paperwork which Andrade then used and HCA paid to incorporate each of the drivers. Many of the drivers were confused by the paperwork and did not understand the terms written in English they could not read and had no idea of what the requirements of running a corporation are, and in fact, do not adhere to the requirements. Andrade began issuing paychecks to the drivers using their corporate names weeks before they ever agreed to be incorporated. Andrade even treated the drivers as employees until December 2009, and despite her sham incorporation plan, because there has been no substantial change in the work that the drivers do, the incorporation does not preclude a determination that the drivers are statutory employees.

<sup>45</sup> See *Roadway Package System, Inc.*, 326 NLRB 842, 848–850 (1998) (discussion of the case law regarding employee vs. independent contractor status).

<sup>46</sup> See *Kansas City Star Co.*, 76 NLRB 384 (1948) (finding newspaper employees who received income from profits rather than wages, had little supervision and set their own working conditions were independent contractors).

<sup>47</sup> See *Standard Oil Co.*, 230 NLRB 967 (1977) (contractual intent to make drivers independent contractors is relevant but not conclusive).

<sup>48</sup> *Ace Doran Hauling & Rigging Co.*, 214 NLRB 798 (1974).

<sup>49</sup> *Time Auto Transportation, Inc.*, 338 NLRB 626 (2002); *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000).

<sup>50</sup> *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008).

<sup>51</sup> See *Standard Oil Co.*, above.

Similar to the facts in *Roadway Package System, Inc.*, 326 NLRB 842 (1998), the drivers here do not operate their own business, despite being incorporated, but instead “perform functions that are an essential part of one company’s normal operations.” *Id.* at 851. As in *Roadway Package System*, the facts here tend to show that the drivers were employees under the Act.<sup>52</sup>

Respondent cites *St. Joseph News-Press*, 345 NLRB 474 (2005), to support its contention that the drivers are in fact independent contractors. In *St. Joseph*, all drivers signed a contract describing them as independent contractors, some drivers were paid directly by the customers, carriers provided their own vehicles, managers had rare and little control over the means in which the carrier executed his job, carriers could, without notice to the employer, substitute drivers for their route and the carrier created the terms and conditions of the substitution, carriers could solicit their own business and could hold other jobs and deliver other products while working for the employer. Here, the drivers of OST had little freedom to arrive at a flexible hour. However, this was not coupled with the extensive control that carriers in *St. Joseph* had and the two cases are clearly distinguishable.

Moreover, since the sham incorporation the drivers’ duties have remained unchanged and under common law agency test, the drivers in this case are employees under the Act.<sup>53</sup>

#### E. Independent 8(a)(1) Violations

A statement is an unlawful threat under Section 8(a)(1), when it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a). The complaint alleges that Respondent violated Section 8(a)(1) of the Act at the April 30 pizza restaurant employee meeting by Respondent, through its attorney and interpreter, Andrade, telling employees that if they wanted a union, they could have one with their own self-named corporations in an attempt to dissuade employees from supporting the Union thereby implying to employees that their support for the Union would be futile. Respondent contends the April 30 conversation with drivers was too ambiguous to constitute a threat of futility.

Based on my factual findings set forth above, I find that Andrade did make the statement during the April 30 meeting to the drivers that if they were thinking about getting help from a union that it would not be possible because they were going to be the owners of their own companies through what I find to be Respondent’s sham incorporation attempt. By April 30, Andrade was aware that the drivers were attempting to unionize as she had seen notice of an April 22 NLRB representation hear-

<sup>52</sup> On November 19, the Internal Revenue Service issued a determination letter to OST finding that OST drivers were employees and not independent contractors for determining employment tax work status for 2010. (GC Exh. 24.) While I admitted GC Exh. 24 into evidence but did not take administrative notice of the protest letter, I found it consistent in its application of tax law and telling that the IRS came to the same conclusion I did under the Act and cases cited herein.

<sup>53</sup> The GC also alleges that Respondent’s mechanics are employees under the Act the same as its drivers. Because there is no evidence that the drivers and mechanics were interchangeable as to their job functions, duties, and employer control, I dismiss this allegation.

ing. There is no doubt that the drivers’ attempt to unionize is protected concerted activity. Andrade’s words amounted to a statement violative of the Act that it would be futile for Respondent’s employees to engage in future concerted protected activity, which includes union activities, because they were now incorporated independent contractors and no longer employees.<sup>54</sup>

The complaint also alleges that Respondent violated Section 8(a)(1) of the Act during a May 6 meeting at Respondent’s yard facility when Sencion Sr. and Andrade: (1) threatened employee Reynoso by stating that employees who supported the Union would be terminated by the end of May; (2) threatened that Respondent would not rehire a former employee, Escobar, because of his union support; (3) offered employee Reynoso improved working conditions of the lucrative Watsonville route if he abandoned his support of the Union (Tr. 255, 260); and (4) threatened to sell or close Respondent and hire new owner-drivers because employees signed the protest letter (Tr. 255–256).<sup>55</sup>

Cumulatively, these statements are alleged to unlawfully threaten Reynoso and other prounion employees with the loss of their employment should they choose the Union as their collective-bargaining agent. The lead case on this subject, and others, is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), where the Court stated:

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities, and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Based on my factual findings set forth above, I find merit in all of the complaint allegations concerning the May 6 OST yard meeting. The conversation between Sencion Sr., Andrade, and Reynoso contained Sencion Sr.’s threat that by joining the Union, Reynoso and other union drivers will lose their jobs at Respondent. In the context of Respondent’s other contempora-

<sup>54</sup> See, with regard to futility, employer statement that it would be futile for employees to select union because they were independent contractors, not employees, violative of Sec. 8(a)(1). *Careful Courier Services*, 344 NLRB 485, 486 (2005).

<sup>55</sup> I find Reynoso’s testimony about statements made to him by Sencion Sr. and Andrade on May 6 particularly credible given the fact that at the time of trial he remained employed at OST and is a longtime friend to Sencion Sr. who must continue to face Respondent’s principals after trial. See *S. E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987) (Current respondent employee unlikely to give false testimony).

neous unfair practices, it is clear that the job terminations would be caused by Respondent's reaction to the union campaign and the protest letter. Thus, Sencion Sr.'s statement amounted to an unlawful threat of reprisal not made on the basis of objective fact.<sup>56</sup> It was also unlawful for Sencion Sr. to tell Reynoso that he would not rehire Escobar because of his union support. Such a statement clearly amounts to a threat of retaliation for engaging in union activity and thus constitutes a violation of Section 8(a)(1) of the Act.<sup>57</sup> Furthermore, Sencion Sr.'s promise at the May 6 meeting to increase Reynoso's benefits by returning him to the lucrative Watsonville route he had lost through his union involvement and his signing of the protest letter constitutes interference with the employee's Section 7 rights. At that time, Sencion Sr. clearly knew of the union activity and the Board hearing the very next day, and he was intent on defeating the organizing campaign by improperly influencing Reynoso with increased benefits in return for him not testifying for the Union on May 7. This also violates Section 8(a)(1) of the Act. Finally, consistent with my factual findings set forth above, I further find that Sencion Sr. and Andrade also threatened to sell or close down Respondent's business because of the protest letter and unionizing efforts of Respondent's drivers. That threat of retaliation was not tied to demonstrably probable consequences outside of Respondent's control and therefore violated Section 8(a)(1) of the Act.<sup>58</sup>

The complaint also alleges that Sencion Sr. also violated Section 8(a)(1) of the Act by making the following statements at a late May yard meeting attended by Sencion Sr., Sencion Jr., and Urias Velasquez: (1) told employee Urias Velasquez that Respondent would reduce its employees' hours and pay if they joined the Union; (2) threatened to close Respondent's business; and (3) threatened to terminate all of Respondent's employees and replace them with owner-operators because of their support for the Union. (See Tr. 343.) I draw an adverse inference from Respondent's unexplained failure to call Sencion Jr. to rebut Velasquez's testimony. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge").

Consistent with my factual findings and legal analysis set forth above, I further find that Sencion Sr.'s late May statements to Velasquez are violative of Section 8(a)(1) for the same reasons as explained above and because Sencion Sr. also threatened that Respondent would reduce its union employees'

hours and pay in retaliation for their joining the Union in violation of Section 8(a)(1) of the Act.<sup>59</sup>

Finally, the complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act when on or about May 6, it began reducing the work hours and/or the number of assigned loads of its employees who supported the Union by signing the protest letter including Primitivo Guzman, Marquez, Enedino Millan, Efrain Gutierrez Najera, Pizano, Reynoso, Salazar, Urias Velasquez, Jose Urias, and Jose Velasquez.

Consistent with my factual findings set forth above, I further find that Respondent violated Section 8(a)(1) and (3) of the Act by intentionally reassigning and reducing the work hours and/or the number of assigned loads of its 10 remaining employees in retaliation for their support of the Union by signing the protest letter and/or participating in the NLRB representation hearing. (See GC Exh. 46.)

#### F. Discriminatory Treatment of Discharged Drivers

Motive-based allegations of discrimination are decided under the framework of the Board's *Wright Line* decision.<sup>60</sup> Discharge because of an employee's membership in or activities on behalf of a labor organization violates Section 8(a)(3). The General Counsel's initial burden under *Wright Line* is to show that the alleged discriminatee's protected conduct was a motivating factor in the discharge. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See, e.g., *Austal USA, LLC*, 356 NLRB 363 (2010); *Willamette Industries*, 341 NLRB 560, 562 (2004). The timing of the discharge in relation to the alleged protected conduct may also be relevant. See, e.g., *Best Plumbing Supply*, 310 NLRB 143 (1993).

Generally, the General Counsel relies on evidence<sup>61</sup> such as the timing of the employer's action,<sup>62</sup> pretextual motives,<sup>63</sup> inconsistent treatment of employees,<sup>64</sup> and shifting explanations provided by the employer.<sup>65</sup> *Flour Daniel, Inc.*, 311 NLRB 498 (1993). "Since motive is critical to a finding of an 8(a)(3) violation, but since direct evidence of motive is rare, one must look to all of the attendant circumstances to determine whether Respondent acted improperly or not." *Keller Mfg. Co.*, 237 NLRB 712, 734 (1978). See also *Atlantic Metal Products, Inc.*, 161 NLRB 919, 922 (1966). Moreover, where the employer's

<sup>56</sup> See *Patsy Bee, Inc.*, 249 NLRB 976, 977 (1980) (Finding violation where employer had no indication from union that it would make demands which would cause economic hardship, let alone plant closure; nor did he have evidence that his customers might even pull their contracts.).

<sup>57</sup> See *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1999).

<sup>58</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). No evidence was presented to show that Sencion Sr.'s or Andrade's statements constituted a prediction based on probable consequences beyond Respondent's control. Instead, the statements were unsupported predictions aimed at intimidating Reynoso and other drivers in the exercise of their Sec. 7 rights violative of Sec. 8(a)(1).

<sup>59</sup> See *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 fn. 5 (1999) (Mere fact that employer's remark that wages would go down if the union were voted in violated Sec. 8(a)(1) as a threat which interfered with the employees' free exercise of Sec. 7 rights).

<sup>60</sup> *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>61</sup> See also *Association Hospital del Maestro*, 291 NLRB 198 (1988) (finding that the employee's union activities were widespread and known to the employer and that there was companywide union animus); *White-Evans Service Co.*, 285 NLRB 81 (1987) (animus found where employer fired two of the most outspoken union supporters and refused to rehire them even though they continued seeking employees).

<sup>62</sup> *Bay State Ambulance Rental*, 280 NLRB 1079 (1986).

<sup>63</sup> *Abbey Island Park Manor*, 267 NLRB 163 (1983).

<sup>64</sup> *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998).

<sup>65</sup> *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263 (7th Cir. 1987).

“given reason for termination is implausible, then that fact tends to prove an attempt to disguise the true, and unlawful, motive.” *Keller Mfg. Co.*, citing *Capital Records, Inc.*, 232 NLRB 228 (1977). See also *J. S. Troup Electric*, 344 NLRB 1009 (2005) (Board will infer an unlawful motive if the employer’s action is “baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive”).

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,<sup>66</sup> departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of a prounion from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Services Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Banta Catalog Group*, 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medric One, Inc.*, 331 NLRB 464 (2000).

Once the General Counsel makes a showing of discriminatory motivation, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). In other words, under *Wright Line*,

an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even with the protected conduct.

*North Carolina License Plate Agency*, 346 NLRB 293, 294 (2006). If the evidence produced by the employer is found to be pretextual, the inference of wrongful motive established by the Acting General Counsel is left intact. *Frank Black Mechanical Services*, 271 NLRB 1302 (1984); *Limestone Apparel Corp.*, 225 NLRB 722 (1981), enfd. mem. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his or her (protected) union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

1. Marquez’ discharge violated Section 8(a)(3) and (1)

The Acting General Counsel asserts that Marquez was terminated for engaging in union and protected concerted activities and that Respondent’s action violated Section 8(a)(3) and

<sup>66</sup> The Board advises that the investigation should be full and fair. The Board has also noted, however, that while an employer’s failure to conduct a full and fair investigation into alleged misconduct of an employee may constitute evidence of discriminatory intent, such failure will not always constitute evidence of such intent. *Hewlett Packard Co.*, 341 NLRB 492 (2004).

(1). The *Wright Line* burden-shifting analysis set forth above is applicable to Marquez’ termination. Therefore, the Acting General Counsel must establish that Marquez was engaged in protected conduct, that Respondent knew about his protected conduct and that union animus was a motivating factor in Respondent’s decision to terminate Marquez.

On this record, the Acting General Counsel has met his initial burden of proving that Respondent fired Marquez because he, along with Salazar, was a leader in the Union’s campaign and because he was subpoenaed to testify in a Board proceeding in support of the Union’s election petition. Marquez clearly engaged in protected concerted activities by signing the union authorization card and the protest letter in April as well as his testifying at the Board hearing on May 5. (See GC Exhs. 3, 4, and 8.) The protest letter, in particular, raised protected concerns about wages, work hours, and other terms and conditions of employment and questioned the propriety of the sham incorporation of drivers. Moreover, Andrade and Sencion Sr. were aware of that activity on or before May 6. Andrade admitted that she first became aware that OST’s drivers considered unionizing when she reviewed the NLRB Petition on April 25 or 27 after returning from a trip out of the country. (ALJ Exh. 3(a) at 263–264.) In addition, on May 5, at the resumed representation hearing, Marquez submitted the protest letter and his hearing subpoena to Respondent and later that day, Andrade showed the protest letter to Sencion Sr. in the yard at OST. (Tr. 68–83; ALJ Exh. 2(b).) In addition, Andrade testified at her September 13 deposition, prior to Marquez’ termination, that she knew that Marquez was one of the employees who decided to call the Union and that she considered him to be one of the leaders of the group that supported the Union and she repeatedly referred to Marquez as a complainer and whiner. (ALJ Exh. 4(c) at 245, 260–261, 278.)<sup>67</sup>

Respondent’s animus against the Union is shown as stated above, by Sencion Sr.’s own motivation by his May statements that all drivers supporting the Union would be terminated by the end of May for their union support and that resigned driver Escobar would not get his job back because of his union support. (Tr. 255–260.) Respondent’s animus against the Union is further shown by the independent 8(a)(1) violations I have found as described above. Moreover, from May through November, only the three union supporters who had signed the protest letter, Marquez, Pizano, and Escobar, were the only ones terminated or forced to resign by Respondent. Finally, as stated above, when Marquez first left Respondent on approved paternity leave at the same time Andrade was forced to testify at her deposition in the representation case, Andrade immediately cut off Marquez’ employer-paid Nextel radio service thereby disrupting Marquez’ ability to directly communicate with Respondent. I find that this unexplained cancellation by

<sup>67</sup> At trial before me, Andrade contradicted her earlier deposition testimony which I find to be noncredible. (Tr. 1103.) As stated above, I found Campos to be almost completely noncredible. In contrast, I found Marguez to be very genuine and credible. Andrade and Sencion Sr. were intimidating to many of the drivers, including Marquez and Pizano, who did not speak or read English very well and they were dependent on Respondent’s principals to treat them fairly being uneducated not only in the English language but also in legal matters.

Andrade of Marquez' work radio so close in time to her forced testimony in the earlier Board proceeding is further evidence of Respondent's antiunion animus. In these circumstances, the Acting General Counsel has met his burden of showing improper antiunion animus for the job terminations of Marquez and, as discussed below, Pizano.

Where, as here, the Acting General Counsel makes a strong showing of discriminatory motivation, the respondent's *Wright Line* defense burden is substantial. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010). I find that, on this record, Respondent has not overcome that substantial burden and persuasively shown that it would have fired Marquez absent his union and protected activity.

Respondent contends that Marquez simply refused to return to work after his paternity leave ended on September 27, his truck No. 7 was not under repair, and the evidence of animus on the part of Andrade or Sencion Sr. cannot be imputed to Campos because he is not Respondent's agent and therefore that the missing evidence of unlawful motivation on the part of Campos is fatal to the argument that Marquez was terminated for his union support. First of all, as I found above, Respondent inserted Campos in place of Sencion Sr. to be Respondent's agent to supervise Respondent's employees and was authorized by Respondent's management to act for its benefit. Campos was directed in what to tell the drivers and is an agent of Respondent within the meaning of Section 2(13) of the Act. As such, Respondent's principals' animus is imputed to Campos as Respondent's agent. Also, much of Respondent's defense is reliant on testimony at trial from Campos and Andrade which I have found to be contradictory and noncredible. Consequently, I reject Respondent's noncredible version of the facts portrayed through Campos and Andrade as they were unreliable witnesses. After his additional week of paternity leave, Marquez tried to return to work with Respondent but was told by Campos through Pizano or directly on September 30 that his regular truck No. 7 was not ready and Marquez was not permitted to use a spare truck.

Respondent also argues that the noted union activities by Marquez took place before June and too much time passed from the date he was expected back to work (September 27) and the date he was actually terminated (October 14) to provide adequate circumstantial evidence of Andrade's unlawful motivation to terminate Marquez for his union activity. This argument ignores the fact that Andrade was forced to testify in the earlier Board proceeding on September 13 and 14, the same time Marquez' Nextel radio was canceled by Andrade while he was out on leave. More importantly, there is evidence of disparate treatment to Marquez as Reynoso and Guzman also had lengthy periods of time without work waiting for Andrade to allow Campos to repair their trucks and they did not lose their jobs due to abandonment. Marquez went to Respondent on September 30 to retrieve his paycheck and check-in with Campos on the status of his truck or the use of a spare truck and Respondent put forth no evidence that Andrade inquired of Marquez whether he had abandoned his job. An employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee and its failure to give the employee an opportunity to explain are further indicia of discriminatory

intent. See *Hewlett Packard Co.*, 341 NLRB 492 (2004). Respondent has not shown that it would have terminated Marquez in the absence of his union support and protected concerted activities including his signing the union authorization card, the protest letter, and testifying for the Union at the May 5 Board proceeding.

## 2. Pizano's discharge violated Section 8(a)(1) and (3)

On this record, the same *Wright Line* analysis applies to the termination of Pizano, as the Acting General Counsel asserts that Pizano was also terminated for engaging in protected concerted activities and that Respondent's action violated Section 8(a)(3) and (1). Like Marquez, Andrade viewed Pizano as one of the union leaders and also referred to him as a whiner and complainer. (ALJ Ex. 4(c) at 245, 278.) Pizano also supported the Union and signed the protest letter raising protected concerns about wages, work hours, and other terms and conditions of employment and questioning the propriety of the sham incorporation of drivers. (GC Ex. 4.) Pizano's protected concerted activity is protected by the Act. As with Marquez, at the time of Pizano's termination on November 18, Respondent knew of Pizano's protected concerted activities in support of the Union. As stated above, Pizano already had his hours and wages decreased and had been removed from the lucrative Watsonville route with Reynoso and Gutierrez by Respondent in retaliation for his protected concerted activities. It does not take a leap of faith to tie Pizano's termination to the same discriminatory treatment from Respondent that began at the time Respondent's principals met with Reynoso on May 6 and described the threats, coercion, and discrimination that would follow the prounion drivers including Pizano.

As with Marquez, Respondent's numerous unfair labor practices demonstrate antiunion animus that was directed towards Pizano to retaliate against him. Significantly, Respondent, just a month before Pizano's firing, terminated Marquez for engaging in protected concerted activity. Where, as here, the Acting General Counsel makes a strong showing of discriminatory motivation, the respondent's *Wright Line* defense burden is substantial. *Bally's Atlantic City*, supra at 1321. I find that, on this record, Respondent has not overcome that substantial burden and persuasively shown that it would have fired Pizano absent his union and protected activity.

Respondent argues that Pizano was justifiably terminated due to his driving record point accumulation by November and that Pizano failed to provide Andrade with a copy of the exonerating CHP report either in May 2009 or November 2010.<sup>68</sup>

<sup>68</sup> Contrary to the evasive and noncredible testimony of Andrade and Sencion Sr. in this proceeding, I observed Pizano to be credible as he was believable and consistent with other credible witnesses recalling that Salazar was more of the union leader than Marquez or anyone else and that Pizano's hours were diminished after the protest letter went to Respondent. Also Pizano testified consistently with other drivers that Sencion Sr. stopped directly communicating route assignments to the drivers around early May and, instead, communicated route assignments through Campos. Pizano also credibly testified, consistent with Respondent's work records and other drivers' testimony that starting in early May, union supporting drivers lost their Saturday hours as well as the better weekday routes they had always driven. After April, Pizano and other union-tainted drivers got more routes to the least lucrative

(R. Br. at 42.) At trial, however, neither Andrade nor Sencion Sr. denied: (1) having a copy of the CHP report proving Pizano's exoneration for the April 2009 accident in his personnel file; or (2) Pizano's testimony that he discussed his nonfault with Sencion Sr. on May 18, 2009, after copying the CHP report. (Tr. 620–622.) Instead, Andrade fabricated facts that ignored more credible testimony. For example, Andrade claimed that she had submitted Pizano's written statement regarding the accident to Bettencourt, Respondent's insurance broker, when the accident occurred in April 2009, and that she expected the broker to obtain the police report and to make a determination regarding whether Pizano was at fault—an impossibility because Bettencourt did not begin to work with Respondent until December 2009. (Tr. 1107–1109.) Andrade also contradicted an earlier affidavit where she swore under oath that she did not remember the April 2009 accident, had never seen the written statement from Pizano, and that no one from her insurance company ever informed her or discussed with her the possibility that Pizano might be able to remain eligible for coverage if his driving record contained inaccurate information. (Tr. 1163–1186.)

Finally, Andrade's not wanting Pizano to remain employed because of his poor driving record is not believable because she employed numerous drivers with poor driving records and when insurance companies refused to insure some of them, Andrade asked that those drivers be covered as "probationary" drivers in order to obtain coverage for them notwithstanding their poor driving records. (Tr. 1115–1128; GC Exhs. 40, 42, and 43.) Andrade, however, did not want to allow Pizano the opportunity to provide proof of nonfault for the April 2009 accident and tried to conceal this option to Pizano as evidenced by her telephone conversation with Respondent's insurance broker Bettencourt some time before November 19. In that telephone call, Bettencourt called Andrade to remind her that she needed to submit the signed driver exclusion form if she was not going to submit proof of Pizano's nonfault. During the call, Andrade demanded that Bettencourt remove any reference in the insurance broker's written communications to Andrade which indicated that Pizano could still be eligible for coverage if proof of nonfault for the April 2009 accident were submitted. When Bettencourt advised Andrade that Commercial Carriers was obligated to notify her that she could provide proof of nonfault for continued coverage, Andrade stated that she did not want to employ Pizano anymore and did not want to give him any opportunity to provide proof of nonfault for the April 2009 accident. (Tr. 1113–1115.)

It is well settled that evidence of false reasons given in defense and tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of a prounion from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper*

*Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Services Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Banta Catalog Group*, 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medric One, Inc.*, 331 NLRB 464 (2000). Andrade claimed Pizano was terminated because he was no longer eligible for insurance under Respondent's policy. (GC Exh. 29.) Instead, Andrade was aware that Pizano could have remained eligible for coverage with the exonerating CHP report yet she purposely concealed this from Pizano and also failed to provide the same exonerating information to Respondent's insurance broker. Respondent has not shown that it would have terminated Pizano in the absence of his union leadership and protected concerted activity including his signing of the protest letter.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By impliedly threatening reprisals for engaging in protected concerted activity, threatening to terminate employees, threatening to close their business because their employees engaged in activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win (the Union), or other protected concerted activities, such as signing a letter complaining about working conditions, promising or granting employee benefits, including more lucrative route assignments, if they abandon their support for the Union, implying that employees' support of the Union is futile by telling them that they are not employees and therefore cannot be represented by a Union, threatening to reduce or reduce employees' work assignments and hours if they support the Union or engage in protected concerted activities, such as signing a letter complaining about working conditions, the Respondent violated Section 8(a)(1) of the Act.
4. By reducing employees' work assignments and hours for supporting the Union or engaging in protected concerted activities, such as signing a letter complaining about working conditions, the Respondent violated Section 8(a)(3) and (1) of the Act.
5. By permanently terminating employees because they support the Union or engage in protected concerted activities, such as signing a letter complaining about working conditions, the Respondent violated Section 8(a)(3) and (1) of the Act.
6. The above violations are unfair labor practices within the meaning of the Act.
7. The Respondent has not otherwise violated the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully terminated Marquez and Pizano, I shall order it to offer them full and im-

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Fairfield Potrero Hills dump (which took much longer to drive) and lost the lucrative Watsonville route that allowed a quicker turnaround and provided a driver with more loads/more money per day.

mediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).

I have found that Respondent unlawfully decreased wages and changed work routes and hours worked for employees

Reynoso, Gutierrez, Marquez, Pizano, Salazar, Guzman, Gusman, Velasquez, Urias, and Millan beginning on May 6, 2010. I shall order Respondent to rescind those changes and restore, and make available to these employees, the same routes, hours, Saturday work, and wages they averaged for the 12 months prior to May 6, 2010, that were available to such employees immediately prior to its unlawful conduct. In addition, Respondent must make these employees whole by reimbursing them for any losses resulting from the unlawful conduct, with interest as prescribed in *New Horizons*, id.

[Recommended Order omitted from publication.]