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May 15, 2013  
VIA E-MAIL

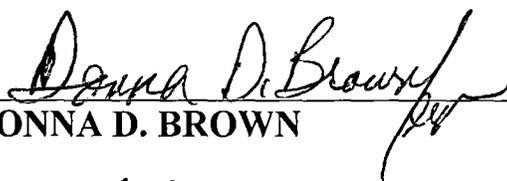
Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570-0001

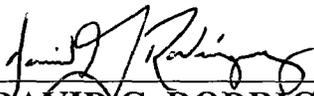
Re: Pratt Corrugated Logistics LLC  
Cases 04-CA-079603, 04-CA-079858,  
04-CA-079976 and 04-RC-080108

Dear Mr. Shinnars:

Enclosed please find Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions in the above-captioned matter. Copies of the Brief have this day been served on the persons below by e-mail.

Very truly yours,

  
\_\_\_\_\_  
**DONNA D. BROWN**

  
\_\_\_\_\_  
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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

PRATT (CORRUGATED LOGISTICS), LLC

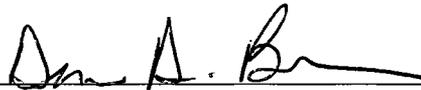
and

Cases 04-CA-079603,  
04-CA-079858,  
04-CA-079976 and  
04-RC-080108

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS LOCAL 773

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Respectfully submitted



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**DONNA D. BROWN**



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**DAVID G. RODRIGUEZ**

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Dated: May 15, 2013

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

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and

Cases 04-CA-079603,  
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INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS LOCAL 773

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, hereby files an Answering Brief to Respondent's Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi (herein called the "ALJ") in the above-captioned matter, and states as follows:<sup>1</sup>

1. Respondent excepts to the ALJ's reference to Pratt (Allentown Corrugating), LLC as Respondent's "affiliate, Pratt Corrugated of Allentown," and asserts that there is no evidence establish that Pratt (Allentown Corrugating), LLC or Pratt Industries (USA), Inc. are legally

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<sup>1</sup> Rather than include a Table of Contents, Counsel for the Acting General Counsel will address each of Respondent's Exceptions in sequential order.

..

affiliated with Respondent. (ALJD at 2, 11.48-49).<sup>2</sup> First the ALJ's reference to Pratt Corrugated of Allentown was merely wording used to distinguish between the three affiliated Pratt entities which, as Respondent points out, were alleged to be a Single Employer in the Amended Complaint. Respondent notes that the Single Employer allegation was withdrawn at trial, but neglects to reveal that the allegation was withdrawn as a quid pro quo for Respondent's stipulation that Shipping and Receiving Supervisor Francisco Ortiz was an agent of Respondent within the meaning of Section 2(13) of the Act. (T.225-226). Second, contrary to Respondent's assertion that there is no evidence whatsoever of such legal affiliation, the record is replete with evidence of the relatedness of the three Pratt entities. The record contains evidence that: (i) Respondent's website [www.prattindustries.com](http://www.prattindustries.com) shows that Pratt Industries is one company with at least seven divisions, including a corrugating division, and that there is one corporate office in Conyers, Georgia that services all Pratt locations in the United States (GCX-3, p. 1 and 7-8); (ii) Respondent's drivers were issued Corporate credit cards in the name of "Pratt Industries" (GCX-17); (iii) Respondent's drivers were given "Pratt Industries (USA), Inc. – Employee Handbook," and are covered under Pratt Industries' medical and insurance benefit plans (T. 189-190, GCX-18); (iv) Pratt Industries was responsible for having Respondent's drivers drug tested (T.139-140, GCX-15); and (v) Driver Christian Salazar testified that his work email address was [csalazar@Prattindustries.com](mailto:csalazar@Prattindustries.com) (T.65). Finally, the ALJ's reference to Pratt (Allentown Corrugating), LLC as Respondent's "affiliate, Pratt Corrugated of Allentown" is not relevant to any of his Conclusions of Law.

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<sup>2</sup> ALJD- (followed by page and line numbers) refers to citations to the ALJ's Decision. GCX- (followed by a number) refers to General Counsel's exhibits, and RX- (followed by a number) refers to Respondent's exhibits. "T" (followed by numbers in parenthesis) refers to pages in the official transcript. All dates are in 2012, unless otherwise indicated.

2. Respondent asserts that no record evidence supports the ALJ's finding that Corrugated Logistics' employees worked "in close proximity to and [had] contact with employees of related Pratt entities..." (ALJD at 3, fn.3). On the contrary, the record shows that Respondent Logistics Manager Phaedra Powell's office is right next to Pratt Allentown's Shipping and Receiving Manager's office (T.64). Also, Pratt (Allentown Corrugating), LLC's Warehouse Manager Paul Zallas was present with Powell and Pratt Industries Regional Human Resources Manager Erin Cutler at the beginning of the meeting at which they discharged Salazar (T. 69, 72, GCX-21). Additionally, Christian Salazar testified that, when he worked as Respondent's dispatcher, he had daily interaction with Pratt (Allentown Corrugating), LLC's Shipping and Receiving Managers, including Francisco Ortiz, because they worked together in prioritizing the scheduling of the loads (T. 64-65). In further support of the ALJ's finding, Yard Jockey Guillermo Mejia testified that Ortiz was his supervisor and that Ortiz gave him daily "orders to move trailers" and "inspect trailers" (T. 100). Mejia testified that Powell told him [Mejia] to do everything that Ortiz requested (T. 100).

3. Respondent excepts to the ALJ's finding that Francisco Ortiz "directed and assigned work to the yard jockeys and drivers." (ALJD at 3, ll. 15). As noted above in response to Respondent's Exception 2, Yard Jockey Guillermo Mejia testified that Ortiz was his supervisor, that Ortiz gave him daily "orders to move trailers" and "inspect trailers," and that Powell told him [Mejia] to do everything that Ortiz requested (T. 100). Salazar also testified that drivers contact Ortiz when they pull into the yard, and that Ortiz tells the drivers where to put their trucks (T.69-70).

4. Curiously, Respondent excepts to the ALJ's finding that Union Business Agent Darrin Fry went to Respondent's Macungie facility and passed out leaflets to some of Respondent's drivers as they were leaving the premises on their runs (ALJD at 3, ll.39-40). However, Respondent goes on to point out that Fry handed out flyers to two drivers on April 19, 2012. Indeed Fry testified that he gave flyers to drivers Christian Salazar and Denis Cortes (T. 37). Salazar testified that he was leaving the facility for a load when he saw Fry (T.66). Also, on cross-examination, Denis Cortes confirmed seeing Fry standing on the access road in April (252-253).

5. Respondent excepts to the ALJ's finding that alleged discriminatee Christian Salazar's conversations with other employees about the Union took place mostly in person and in the yard at the facility (ALJD at 4, ll.6-7). According to Respondent, Salazar testified only that he called other drivers. Here, Respondent has obviously ignored the testimony of the other drivers. Driver Michael Dolan testified that Salazar talked to him about joining the Union on April 19, 2012, outside of the dispatch office (T.166-167) Driver Brian Fritzinger testified that he talked to Salazar in person at Penske, the place from which Respondent's trucks were released (T. 277). More significantly, the ALJ does not find that anyone in management witnessed Salazar's conversations with the other drivers.

6. Respondent excepts to the ALJ's finding that Respondent apparently stopped using NFI (National Freight Industries) drivers because it hired those drivers as Respondent's employees, and asserts that it is undisputed that at all times Respondent continued to use outside carrier NFI. Brain Fritzinger, a former NFI driver, testified that Powell agreed to hire him and NFI drivers

Tyler Donnelly and Mark Neely (T.275). Respondent hired Fritzinger on March 26, and hired Donnelly on April 16, 2012 (T. 276, GCX26, Exhibit 3). Fritzinger also testified that NFI drivers were sent to drive for Respondent less and less as Respondent started hiring its own drivers (T.275). The ALJ's finding is consistent with Powell's testimony that, on April 19, she called NFI for drivers because "that was the carrier that actually started us up so I was familiar with them." (T. 416). Powell's testimony makes it clear that Respondent did not use NFI as an outside carrier at all times as Respondent asserts.

7. Respondent excepts to the following statement by the ALJ: "When Salazar's tractor-trailer was making a turn coming off an exit ramp, it became embedded on a railing." (ALJD at 4, ll.44-45). According to Respondent, this phrasing makes that the accident happened without any involvement of Salazar. In fact, in Salazar's traffic citation for the incident, the State Police Officer described the offense as "Operated or permitted to operate a vehicle not equipped as required." (GCX-5). Salazar testified that he had picked up a load of paper from Lansdale, Pennsylvania, and he argued to Respondent that the accident occurred because the load shifted (T.353). The ALJ's characterization of Salazar's accident is also consistent with Respondent's handling of the accident, giving Salazar a warning and allowing him to write it himself, and paying for Salazar's citation when it had the discretion not to. (T. 355, GC-8, GC-18,p.33).

8. The ALJ correctly noted that Olshefski never gave a reason for the delay in implementing the decision to discharge Salazar (ALJD at 17, ll.42-45). Olshefski's testimony that Salazar was working in the office and had become a "softened focus" is not credible because, as the ALJ

points out, Olshefski admitted knowing that, after about 30 days, Salazar went back to driving his truck (356).

9. The ALJ correctly found that it is uncontradicted that, as Mejia testified, at no time before the April 24 meeting, did Powell or any other representative of Respondent tell Mejia that he was in danger of losing his job (ALJD at 7, ll.21-23), (T. 110). It is true that Mejia received warnings indicating that the timetable for improvement was immediate, and that consequences for failure to improve was discipline up to and including discharge. This is not the same as “telling” Mejia that he was in danger of losing his job. In fact, Mejia testified that, when Powell gave him a warning on March 30, she told him not to worry about it, that it was just a consultation (T. 108). Also, on Mejia’s April 4 warning, Powell indicated on the document that the discipline was a “verbal” counseling (GC-11, T.422). Powell never testified that she told Mejia that his job was in jeopardy. Instead, she explained that Mejia’s April 4 discipline was not a final warning because it was the first time she was writing Mejia up for the issue (T. 391).

10. Respondent again excepts to the ALJ’s characterizing Pratt (Allentown Corrugating), LLC, as “a Respondent-affiliated company at the Macungie facility.” As set forth in Counsel for the Acting General Counsel’s response to Respondent’s Exception 1, the record evidence amply shows the interrelationship between the three Pratt entities. Respondent also incorrectly states that the General Counsel failed to present any evidence regarding the scope of Ortiz’s 2(13) agency status. Evidence of Ortiz’s agency status is set forth above in Response to Respondent’s Exceptions 2 and 3. Moreover, as noted above, Respondent stipulated to Ortiz’s agency status.

11. Respondent correctly notes that Counsel for the Acting General Counsel did not allege Ortiz to be a Section 2(11) supervisor in the Amended Complaint in this matter. Nevertheless, evidence of Ortiz's agency and supervisory status was presented during the hearing. Most significantly, the ALJ does not conclude that Ortiz is a statutory supervisor, and such a finding has no bearing on Ortiz's agency status.

12. Respondent excepts to the ALJ's finding that, on the day of the layoff, a sign advertising for drivers remained posted at the Macungie facility (ALJD at 12, 13, ll.34). Respondent argues that the ALJ "totally ignored the uncontradicted record evidence," apparently Powell's testimony that, when she "took the sign down", it was just leaning against some steps at the facility (T. 418). In addition to the ALJ having discredited much of Powell's testimony, Salazar identified the sign in GCX-19, and testified that it was "posting hanging off the gazebo. The gazebo is actually right outside the logistics door." (T.73-74). Indeed, Driver Michael Messina confirmed that when he went to the facility to apply for work with another gentlemen, the hiring sign was out front (T. 138).

13. Respondent excepts to the ALJ's failure to credit the unrebutted testimony of Craig Anderson, Vice President of Regional Sales for U.S. Express, that Olshefski contacted him in November 2011 to discuss the availability of U.S. Express to provide third party logistics services to the Macungie facility. Even had the ALJ credited Anderson's testimony, the evidence established that Respondent went on to hire its own fleet of drivers and did not even secure a bid from U.S. Express until September 2012 (T. 361). Moreover, as asserted by Counsel for the Acting General Counsel in its Brief to the ALJ, Anderson's testimony was not

credible because he repeatedly testified that U.S. Express provided Respondent with trucks and drivers in late March to early April 2012. Indeed, Olshefski later admitted on cross-examination that U.S. Express did not begin operating at Macungie until around mid to late May 2012 (T.360, 366).

14. Respondent also excepts to the ALJ's alleged failure to consider the email that Anderson sent to Olshefski which allegedly shows that they had been discussing a restructuring of the Macungie operations well prior to the drivers' April 2012 Union activity (RX-4). As noted above, Anderson's testimony about when U.S. Express provided drivers to Respondent was not credible. The ALJ properly considered the email to be of no significance because any alleged talks between Anderson and Olshefski did not alter Olshefski's plan to hire 15 drivers or his continued authorization of Powell's hiring drivers as recently as April 16, less than 2 weeks before the April 27 mass discharge of 11 drivers. Also, the evidentiary value of the document is seriously undermined when one recalls that it was emailed on May, 11, 2012, after the mass discharge.

15. The ALJ properly failed to find that Powell's inexperience was a factor in Olshefski's decision to restructure the Macungie operations. The foregoing is consistent with the ALJ's specific rejection of Olshefski's testimony about his reasons for the layoff (ALJD at 21, ll.1-2). The ALJ pointed to specific conflicts and problems in Olshefski's testimony as did Counsel for the Acting General Counsel in its Brief to the ALJ at p. 50-52.

16. Respondent asserts that the ALJ speculated by concluding that some of the damages to Respondent's equipment could have been attributed to the equipment itself, and that there was no way to determine whether NFI drivers were responsible for some of the damages (ALJD at 21, 11.39-42). Indeed, Olshefski testified that the damages at Macungie were much higher than at Respondent's other operations, and was not financially sustainable as Respondent was losing money (335, 339). In response to questioning by the ALJ, Olshefski testified that the invoices in R-7 were from the rentals that were being driven by Respondent's drivers and by third party carriers (339-340). On cross-examination, Olshefski admitted that, when reviewing the costs of repairs for damages to the rental trucks and trailers in R-7 and R-8, he didn't know if the damages were caused by Respondent's drivers or by the drivers of the outside carriers (364). He also conceded that some of the damages to Respondent's vehicles could have been attributed to the trucks themselves and not have anything to do with the drivers (365-366). Accordingly, not only was the ALJ correct that there was no way to determine whether NFI drivers caused some of the damages, but there was no way to determine if they were also caused by drivers of other outside carriers as well.

17. Respondent excepts to the ALJ's reliance on Michael Messina's alleged "contradictory and confused" testimony to support the Section 8(a)(1) allegations concerning Ortiz's statement to Messina (ALJD at 9, 1114)(T.143-144). A review of Messina's testimony regarding his conversation with Ortiz may be somewhat confusing, but it's not contradictory. Messina testified that Ortiz told him that he was not allowed to talk about the Union, and Messina testified three times that Ortiz told him to stay away from certain individuals and the [Union] situation (T. 143-144). Significantly, Respondent did not call Ortiz as a witness to deny any of

the unlawful statements attributed to him by Messina or Driver Denis Cortes. In fact, Counsel for the Acting General Counsel requested, in its Brief to the ALJ at p.12 f.14, that the ALJ draw an adverse inference from Respondent's failure to call Ortiz as a witness, and find that Ortiz would have admitted making the statements attributed to him. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006)(ALJ may draw an adverse inference from a party's failure to call a witness who may be reasonably be assumed to be favorably disposed to a party...particularly when the witness is the party's agent).

18. through 21. In its Exceptions 18 through 21, Respondent excepts to the ALJ's "mixed findings of fact and law" regarding all of the remaining 8(a)(1) statements attributed to Ortiz. A review of the ALJ's Discussion and Analysis of Ortiz's 8(a)(1) statements, shows that each of the ALJ's findings is supported by relevant facts and Board law. As noted above in paragraph 17, by Respondent's failure to call Ortiz, the ALJ could have concluded that Ortiz would have admitted making the statements attributed to him.

22. Respondent excepts to the ALJ's consideration of GCX-19, a one-page document taken from Respondent Consultant Jason Greer's website, asserting that the GC failed to provide the requisite foundation for the exhibit. Indeed, Driver Jay Lohrman testified that, during his meeting with Greer, Greer mentioned that he played football for Valparaiso College (T.193). Lohrman testified that after the meeting, he did an internet search for Greer and Valparaiso football, which led him to another Greer website where Greer's picture popped up with the words "union buster right across the top" (T. 194-196). Lohrman also identified a picture from

Greer's website as one of the pictured advertisements that he saw on the internet on his laptop (T.194-195, 196).

23. Respondent excepts to the ALJ's finding that "Greer's appearance and statements [to employees] were a response to the nascent, but ongoing union campaign." (ALJD at 14, ll.41-42). The ALJ clearly explained that his finding above was, inter alia, based on the timing of Greer's appearance, his background, and his reluctance to reveal his last name (ALJD at 14, ll. 44-45). The ALJ also properly discredited Respondent's suggestion that Greer was simply trying to increase efficiency and productivity, especially since Greer met with the drivers on April 24 and 25, just two days before Olshefski allegedly planned to permanently lay them off.

24 through 26. Respondent's Exceptions 24 through 26 concern the ALJ's findings concerning Section 8(a)(1) statements made by Respondent Consultant Jason Greer. In its Exception 24, Respondent asserts that the ALJ improperly relied on the timing of Greer's appearance, his background, and his reluctance to reveal his name to support the inference that Greer's promise to resolve the grievances was conditioned on employees rejecting the Union (ALJD at 14, ll.41-42). In its Exception 25, Respondent further excepts to the ALJ's finding that Greer's solicitation of grievances with the promise to resolve them amounted to still another violation of Section 8(a)(1) of the Act (ALJD at 15, ll.8-9). Finally, in its Exception 26, Respondent excepts to the ALJ finding that "Respondent brought in a consultant who unlawfully solicited grievances with the promise to resolve them." Board law clearly supports the ALJ's findings. The ALJ cites *Bally's Atlantic City*, 355 NLRB 1319, 1326 (2010) as support for finding that Greer's statements to employees make a very strong case for a violation. As the ALJ

points out, and as *Bally's* makes clear, even without a specific statement that grievances will be resolved, the bare solicitation of grievances during a Union campaign permits a "compelling inference" that they would be resolved without a Union. Here, Zsolt Harskuti testified that, in response to employees' suggestions, Greer said that the employees would see changes soon, and Jay Lohrman also testified that Greer said "there would be changes." (T.183, 193). Greer did not testify at the hearing, and Harskuti and Lohrman's testimony was not rebutted. Accordingly, the ALJ's findings with respect to Greer's statements should be upheld.

27. Respondent excepts to the ALJ's finding that it is "uncontradicted that Greer identified himself as a union buster on one screen of his webpage." (ALJD at 11, ll.8-9). As set forth above in response to Respondent's Exception 22, Jay Lohrman's testified that he did an internet search on "union busters" that took him to a website with Greer's picture and the words "union buster right across the top" (T. 194-196). Also, as noted above, Respondent did not call Greer as a witness, and the ALJ correctly noted that Lohrman's testimony is uncontradicted.

28. Respondent excepts to the ALJ's alleged mixed findings of fact and law regarding the discharges of Salazar and Mejia and asserts that the ALJ incorrectly found, "...in the context of the Respondent's 8(a)(1) violations, the evidence makes a compelling case that the terminations of Salazar and Mejia were motivated by their contemporary union activities." (ALJD at 16, ll.14-16). Respondent ignores record evidence that "the evidence" for the ALJ's finding includes the timing of the discharges and other factors leading to a "strong inference of antiunion animus and knowledge." As to Respondent's Section 8(a)(1) violations, the ALJ specifically points to Ortiz's statement that Salazar was fired because of his Union activity, but states that he would

find Salazar's discharge to be unlawful even without that piece of evidence (ALJD at 18, ll.13-14).

29. Respondent excepts to the ALJ's finding that the reasons for its discharge of Salazar and Mejia were pretextual. (ALJD at 16, 17, ll. 33-34; 5-7). The ALJ properly found that Salazar's involvement in an accident almost four months earlier, was a pretext. In reaching this conclusion, the ALJ noted the unusual night-time assemblage necessitated for his discharge. The ALJ further noted that Respondent permitted Salazar to go back on the road driving trailers, and discredited Olshefski's testimony that Union reasons did not play a role in Salazar's discharge.<sup>3</sup>

First, as to Salazar's December 29, 2011 accident, the Pennsylvania State Police, in issuing Salazar a traffic citation, described his offense as "Operated or Permitted to Operate a Vehicle Not Equipped as Required." (GC-5). While Respondent conducted its own investigation and concluded that Salazar was traveling too fast for conditions (T.86-87), Respondent did not consider Salazar's conduct as a terminable offense. Salazar testified that he met with Powell on January 9, and that she said all he was getting was a warning (T.90). Indeed, after repeated conversations with Olshefski about Salazar's accident with Olshefski, during the January 9 meeting, Powell gave Salazar a blank "Employee Corrective Action Report" and allowed him to write out his own written warning (T.355), (GC-8). Also significant is that Respondent paid Salazar's fine even though it can require drivers to pay their own fines "as a result of the infraction." (GC-18, p. 33)

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<sup>3</sup> In addition to the facts cited by the ALJ, as set forth in Counsel for the Acting General Counsel's Brief to the ALJ (pages 11-17), there is a wealth of evidence from which the ALJ could have found Respondent's asserted reason for discharging Salazar to be pretextual.

After receiving the January 9 warning, Salazar worked as Respondent's dispatcher and Powell even offered him the dispatcher's job (T.59). Salazar declined the promotion, but continued to work as Respondent's dispatcher until Christian Westgate was hired in mid-March (T.403, 432). After Westgate was hired, Respondent returned Salazar to his driving position and he worked without incident until April 20, the day after he started organizing the drivers.

During the hearing, Respondent offered different explanations for discharging Salazar. Olshefski testified that he decided to discharge Salazar in mid-January, after the investigation of Salazar's December 29 accident was complete (T.353-355). Then, the "situation" didn't "come back" to Olshefski until he was allegedly "going through the employee roster for the employee selection when [they] were going to do the restructuring, and [he] was looking at the performance levels of each team member." (T. 356-357) That would have been about four months later, in late April. Counsel for the Acting General Counsel asserts that the ALJ properly discredited Olshefski's testimony because it defied logic and bordered on the ridiculous. Respondent expected the ALJ to believe that Olshefski decided that Salazar's driving was so negligent that it warranted discharge, yet he forgot about his own decision even though he had "repeated conversations" with Powell about Salazar's accident within the first two to three weeks after it happened, talked to Powell three to four times a day every day thereafter, knew that Salazar was working as dispatcher, and allowed him to return to his driving duties (T.355-356). In fact, Salazar drove without incident for about a month before Olshefski allegedly came across his name on the employee roster. If Olshefski was truly looking at the drivers' performance in order to make layoff selections, absent any animus against Salazar, he would have simply included Salazar in the layoff. Instead, Respondent discharged Salazar within 24 hours.

Powell had a different explanation for Respondent's discharging Salazar. She pinned the decision on Respondent's Safety Director Tina Overstreet (405, 409). Powell obviously was unaware of Olshefski's alleged mid-January decision to discharge Salazar. Thus, Powell testified that, "after a thorough and long investigation," she received a call from Safety Director Tina Overstreet saying that the bills kept coming in and added up to be about \$80,000 in damages, and that Overstreet and Olshefski decided to terminate Salazar (405). Powell identified an e-mail from Hale Trailer's Tim Markert, dated February 22, 2012, wherein Markert states that the trailer appears to be a total loss, and that labor hours alone would cost about \$7,000 (R-10). Powell estimated the damages to the trailer at around \$30,000. However, Respondent had already received an estimate, dated January 13, 2012, from PENSKE of \$ 22,913.18, including \$10,151.10 for labor.<sup>4</sup>

One problem with Powell's story is that Respondent presented no evidence of any bill or invoice for any damages related to Salazar's accident other than the above estimates to repair the trailer. Additionally, Powell claimed that she didn't know if any of the damages resulting from Salazar's accident were covered by insurance. Indeed, Respondent failed to offer any evidence showing what, if any, portion of the damages were covered by insurance. Accordingly, there is no evidence of how much actual cost, if any, was incurred by Respondent. Nor is there any evidence that explains why Powell testified that Respondent's investigation of Salazar's accident continued into April 2012, when Olshefski testified that it ended in mid-January, that he decided to discharge Salazar at that time, and he so instructed Powell (354-355, 356-357). Moreover,

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<sup>4</sup> See, GCX-24, page 5 of the Repair Order in Exhibit C of Respondent's position statement dated May 14, 2012.

Powell testified that it was Tina Overstreet, not Olshefski, who instructed her to terminate Salazar.

To summarize, the evidence shows that Respondent never planned to discharge Salazar for the December 29 accident. Rather, Respondent paid Salazar's fine, gave him a warning, and that was the end of it. After his accident, Salazar worked as Respondent's dispatcher, was offered the dispatcher's job, and returned to his driving duties in mid-March. Respondent's assertion that Olshefski decided to discharge Salazar in January is not supported by any evidence. Moreover, Olshefski's contention that he did not recall his mid-January decision to terminate Salazar until he saw Salazar's name on the driver list in late April is not credible. Coincidence cannot explain why Olshefski just happened to be looking over the Macungie drivers' list the same day that Salazar starting talking to his coworkers about the Union. See, *Abbey's Transportation Services*, 284 NLRB 698, 699 (1987), *enfd.* 837 F.2d 575 (2<sup>d</sup> Cir. 1988)(delay between the conduct cited by Respondent as a basis for the discipline and the actual discharge supports a finding that the discharges are unlawful). Similarly, Powell's testimony that Respondent discharged Salazar because the bills kept coming in and added up to about \$80,000 is not supported by any documentary evidence. Respondent presented no evidence that it received any bills or invoices related to Salazar's accident after February 22. On that basis alone the ALJ could have drawn an adverse inference from Respondent's failure to produce the "bills that kept coming in" and found that they would have shown that Respondent knew the total costs of the damages resulting from Salazar's accident long before April and that the damages were far less than Powell claimed. *Mammoth Coal*, 354 NLRB 687, 724 *fn.* 63 (2009)(ALJ may draw a negative inference from Respondent's failure to produce documents that are central to its

defense). *Weldun Intern*, 321 NLRB 733, 750 (1996); *Galesburg Construction*, 267 NLRB 551, 552 (1983). Accordingly, the ALJ's finding of pretext should be upheld.

As for Yard Jockey Guillermo Mejia, the ALJ noted that he was discharged the day after he attended a Union meeting and the same day that he gave a blank Union authorization card to driver Michael Messina in the yard at the facility. In finding the reasons for Mejia's discharge to be pretextual, the ALJ found that Mejia was discharged for two allegedly questionable incidents which, in a "remarkable coincidence," involved the same subject matter that was involved in Mejia's two prior lawful disciplinary reports and he properly discredited Powell's testimony about both incidents. In view of the foregoing, the ALJ's finding that Respondent's reasons for Mejia's discharge are pretextual should be upheld.

30. Respondent incorrectly claims that the ALJ substituted his judgment for Respondent's by concluding that, "If the Respondent had only legitimate reasons for the discharge and if it was honestly concerned about damage and safety issues, it would have discharged [Salazar] sooner or notified him that his job was in jeopardy and would not have permitted Salazar to go back on the road driving trailers." (ALJD at 17, ll.28-31). On the contrary, the ALJ's reasoning is the only logical conclusion to be drawn when Respondent waited four months before discharging Salazar and then did so with such urgency (T. 356-357).

31. Respondent improperly asserts that the ALJ's conclusion was made out of whole cloth: "I find that Powell likely knew the real reason for Salazar's discharge and likely shared it with Ortiz." (ALJD at 18, ll.15-17). There is ample evidence in the record from which the ALJ

properly found that Powell likely knew the real reason for Salazar's discharge, including Powell's admission that she talked to Olshefski several times a day about matters including damage reports and the discipline of drivers (T.381-383, 387, 410). As to the ALJ's finding that Powell likely shared the real reason for Salazar's discharge with Ortiz, this is a situation where Powell "protested too much." As the ALJ pointed out, when asked if Ortiz had a role in the discipline of Respondent's drivers, Powell didn't just say, "no," but added that Ortiz had "nothing to do with [her] operation." (T. 419-420). Additionally, throughout her testimony, Powell maintained that "[her] operation" was completely separate from her "customer" Pratt Allentown's operations (T.391, 395, 395 419-420, 422). Obviously prepared to testify on the "single employer" issue, Powell went so far as to testify, "I don't discuss anything with my customer regarding Corrugated Logistics. I don't discuss anything with them." (T.419-420). However, Salazar testified that Powell's office is right next to Ortiz's office and the evidence shows that Ortiz deals directly with Respondent's drivers, particularly in Powell's absence (T. 64). Given the foregoing, coupled with the ALJ's finding much of Powell's testimony to be exaggerated, embellished and implausible, the ALJ properly rejected Powell's testimony and found the opposite to be true. See *Mar-Kay Cartage*, 277 NLRB 1335, 1340 (1985), citing *NLRB v. Walton Mfg.*, 369 U.S. 404 (1962).

32. Respondent excepts to the ALJ's finding that "[N]ot only did Mejia not know there was any impropriety on his part, but he could not know even that there was an 'incident,' because presumably Powell gave a lot of instructions to Mejia. It would thus have been difficult for Mejia to know what Powell was talking about in the April 24 meeting." (ALJD at 19, ll.37-40). Here, Respondent obviously ignores evidence the ALJ found significant, that the incident he

referred to occurred on April 16, but that no one mentioned any alleged impropriety to Mejia until the April 24 meeting. Moreover, Mejia's knowledge of his alleged April 16 impropriety is not critical to the ALJ's finding that Respondent used the alleged incident as a pretext to discharge Mejia. Rather, the ALJ found it significant that Powell had ample time to discuss the alleged incident with Mejia before April 24, and failed to do so. Indeed, the ALJ properly failed to credit Powell's testimony about the alleged April 16 incident where Mejia allegedly approved a damaged trailer going on the road contrary to her specific instructions, and alleged witness Dispatcher Christian Westgate did not testify in the case. The ALJ's findings are clearly supported by the credible record evidence.

33. Respondent excepts to the ALJ's finding that the April 16 and April 23 incidents involved the same subject matter was such a remarkable coincidence that is was no coincidence at all. As noted above in Response to Respondent's Exception 29, the ALJ properly considered the timing of Mejia's discharge, that Mejia was discharged less than a week after Salazar, one day after he attended a Union meeting, and the same day that he gave a blank authorization to another driver in the yard at the facility. Not only did the ALJ properly discredit Powell's testimony, but Respondent failed to call Dispatcher Westgate who allegedly made Powell aware of Mejia's alleged impropriety. Indeed, the ALJ could properly draw a negative inference from Respondent's failure to call Westgate as a witness, and conclude that Westgate would not have supported Powell's version of the alleged April 16 incident involving Mejia. Under these circumstances, the ALJ was correct. The similarity between the April 16 and April 24 incidents and Mejia's prior disciplinary actions was no coincidence.

34. Respondent excepts to the ALJ's alleged mixed findings of fact and law regarding the Section 8(a)(3) layoffs, and excepts to the ALJ's finding that "The April layoff of 15 drivers was unlawful (ALJD at 16, ll.18-20). First, the ALJ did not make that finding. Rather, the ALJ found that the sudden April 27 layoff of 11 of the remaining 15 drivers without prior notice, shortly after the discharge of Salazar and Mejia, ... shows that all the terminations were motivated by the same discriminatory reasons." The ALJ considered the evidence, including evidence that the layoffs made "no objective sense" given Respondent's hiring drivers just 11 days earlier, and planning to hire others. As with Salazar and Mejia's discharges, the record is replete with evidence showing the pretextual nature of Respondent's mass discharge of 11 drivers on April 27, 2012.

First, the pretextual nature of Respondent's defense can be seen in Powell's testimony on the layoff issue where she was untruthful about a critical fact at issue in this case – when she learned about the layoff. On direct-examination, Powell testified that she did not remember the date that she learned about the mass layoff (T.411). Then, in response to questions from the ALJ, Powell testified that she called NFI for drivers "on Friday after I found out about everything." (T. 416) Finally, on cross-examination, Powell testified that Olshefski first called her about the layoff on Thursday, April 26, that she sent Olshefski her drivers' list, and he called her back about which drivers would be retained (T. 437). However, in connection with Salazar's discharge, Olshefski testified that he implemented his decision to discharge Salazar when he was "going through the employee roster for the employee selection when [Respondent was] going to do the restructuring and [he] was looking at the performance levels of each team member of driver." (T. 356). Based on the above, it would have been impossible for Powell to have sent

Olshefski her drivers' list on or after April 26 because Salazar's name wouldn't have been on that list because Respondent had already discharged him. Olshefski's testimony on this point is more credible than Powell's only because it makes sense that he would have asked Powell for the drivers' list in response to learning that Salazar started contacting drivers on April 19 and was arranging for them to attend a Union meeting.

Second, Olshefski identified the documents in R-7 as those that were "reflective of the incredible damage issue we were having" as the volume of Respondent's business increased (T.331, 333). Olshefski testified that he actually reviewed the documents in R-7 in connection with deciding to downsize Respondent's driving fleet (T.333-334). A review of R-7 shows that the exhibit includes invoices with various dates between January and May 1.<sup>5</sup> Olshefski identified R-8 as a printout of the cost for repairs and maintenance for the trailers and tractors in R-7 (T.334). Olshefski testified that the amount of damages at the Macungie facility was extremely high, and much higher than the average costs for repairs at Respondent's other locations (T.335-336). In response to questioning by the ALJ, Olshefski testified that the invoices in R-7 are sent to Respondent "a week after the services are provided" (T.337). They are sent to Powell for approval and payment, then they are sent to Respondent's processing center in Conyers, Georgia where the data is entered into Respondent's computer system (T.337-338). After the information is entered into the computer system, Olshefski can access it at any time (T.337).

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<sup>5</sup> See invoice from Hale Trailer Brake and Wheel dated May 1, 2012 for repairs to a vehicle in the amount of \$1,673.48. Also included in R-7 are invoices dated April 25 and April 27.

Based on the foregoing, Olshefski's testimony regarding R-7 and R-8 was not credible. It was impossible for him to have reviewed these documents before the mass discharge of drivers on April 27. R-7 contains invoices from Hale Trailer dated April 27 and May 1, 2012, while the correspondence cost report shows no invoices for April 27 or May 1, but does show one for April 25 in the amount of \$132.50 (R-8, p.3). In any event, Olshefski testified that the invoices typically are sent to Respondent approximately one week after the services are provided. The invoices go to Powell for approval and then to corporate in Georgia, where they are entered into the computer system before he can access them. Obviously, there is no way Olshefski could have accessed invoices dated April 25, April 27 or May 1 before April 27, let alone review them. It should not be surprising that, on cross-examination, Olshefski admitted that he did not know if the damages reflected in R-7 and R-8 were caused by Respondent's drivers or by the drivers of the outside carriers who drove their own trucks while pulling Respondent's trailers (T.363-364). Olshefski also conceded that some of the damages in R-7 and R-8 could have been attributed to the trucks themselves and not have anything to do with the drivers (T.355-356). Certainly, if Respondent were so inclined, it could have produced the documents and records showing the total cost of the damages that were actually attributable to its drivers.

Based on the above, the record evidence shows that the documents in R-7 and R-8 were compiled after the April 27 layoff, and that Respondent used the "incredible damage issue" as a pretext to discharge the drivers because of their Union activities. See, e.g., *Active Transportation*, 296 NLRB 431, 432 (1989)(pretextual reasons advanced for discharge are indicative of illegal motivation in the discharges).

Third, Olshefski testified that, with respect to the damages to Respondent's rentals, he began to hit the "panic button" in around February to early March, and that the increase in damages corresponded to the increase in drivers (T.343). Olshefski further testified that, by the end of March to early April, he decided to downsize the fleet (T.344-345). If true, why did he instruct or authorize Powell to hire drivers in late March through mid-April? On cross-examination, Olshefski testified that Powell did not have to go through him every time she hired a driver because he gave her approval to hire a pool of 15 or 16 drivers (T.362-363). Powell confirmed that Olshefski authorized her to hire "up to 15 drivers" right away (T.377). Based on the foregoing, it stands to reason that Powell had to get additional hiring authority from Olshefski in order to hire more than 15 drivers. Indeed, Powell testified that she lets Olshefski know everything she was doing at the facility. Olshefski had to authorize Powell's hiring Luis Hernandez-Sanchez-Sanchez, Michael Messina, and Tyler Donnelly, as drivers 16, 17 and 18, in mid-April. The ALJ properly found that Respondent's hiring in April, and Powell's plan to hire other drivers supports a finding that Olshefski did not make a decision to downsize Respondent's fleet in late March to early April based on the alleged "incredible" amount of damages caused by the drivers, Powell's inexperience, or otherwise. See, *Evenflow Transportation, Inc.*, 358 NLRB No. 82, 5 (2012) (where Respondent laid off employees in September, the Board concluded that Respondent's hiring two new employees in June cast serious doubt on Respondent's claim that it contemplated the September layoff as early as May of the same year).

Fourth, Respondent called U.S. Express Vice-President of Regional Sales Craig Anderson who repeatedly testified that his company provided Respondent with four trucks and four drivers in around late March to early April, but he could not produce the contract between

the two companies (T.300; 301; 311). Anderson further testified that as time went on, Respondent called on his company for additional equipment and services (T.302). Anderson had no evidence of that either. Consistent with Anderson's testimony, Powell testified that the Monday after the April 27 mass discharge of drivers, Respondent operated with "no hiccups," using three to four drivers from NFI and stating that "the rest came from U.S. Express." (T.414, 416) While Anderson and Powell's testimony could arguably support a finding that Olshefski had taken steps toward restructuring the Macungie operations in late March and early April, Olshefski testified that U.S. Express didn't begin operating at Macungie with its four trucks and four drivers until mid to late May (T. 360, 366).

In summary, the evidence is more than sufficient to support the ALJ's finding that Respondent's layoff of 11 drivers on April 27 was unlawful.

35 through 38. In its' Exceptions 35 through 38, Respondent repeats its attack on the ALJ's findings that Respondent's asserted reason for the April 27 layoff was pretextual, including its alleged need to use third party drivers instead of its own and the chaotic nature of the alleged planned transition. Again, the record clearly supports the ALJ's finding. As to Respondent's alleged need to use third party external drivers, Respondent never established that its drivers were not able to handle the workload or that they were responsible for Respondent's alleged increased damages in its equipment.

39. The ALJ properly found that "[N]othing in Powell's testimony suggests that Olshefski said anything about considering the work records of the drivers in determining who was to be laid off." Indeed, at one point in her testimony, Powell made it clear that it was her

“understanding” that Olshefski kept the five senior drivers and drivers who had better performance records (T. 412). However, because it wasn’t clear if Powell was talking about what Olshefski told her at the time of the discharge or what she knew at the time of the hearing, the ALJ questioned Powell directly about what Olshefski told her before the layoff (T.412-413). In response to the ALJ, Powell made it clear that Olshefski only told her to keep the five most senior drivers. Then, she even changed that testimony and testified that Olshefski told her to keep the four most senior drivers and the night yard jockey (T. 413). In fact, Powell had every opportunity, but did not testify that Olshefski said anything to her about driver’s work records or job performance before the layoff. That the ALJ found the foregoing to be a serious impediment to accepting Olshefski’s testimony is more than reasonable given evidence that Olshefski and Powell talked three or four times a day, that Powell was responsible for the day-to-day operations at the facility and would have been the manager with the most knowledge about the drivers’ individual performance records, and that Powell testified that she didn’t send Olshefski her “drivers list” until April 26 (T.437). How could Olshefski have considered the performance of the drivers when he didn’t even have a list of their names? Indeed, the evidence shows that Olshefski decided to keep the night yard jockey as opposed to the day jockey, Guillermo Mejia. However, if Olshefski honestly considered the employees’ job performance before discharging Salazar as claimed, there is no explanation for his decision to retain the night jockey, who was still in his probationary period, as opposed to Mejia who was one of the most senior employees and whose alleged incidents resulting in his April 24 discharge had not occurred or had allegedly not yet been discovered. In view of the foregoing, the ALJ properly found a “conflict” in Powell and Olshefski’s testimony.

40. Respondent excepts to Paragraphs 1 through 4 of the ALJ's Conclusions of Law as erroneous and contrary to the law and facts of the case. On the contrary, the ALJ's Conclusions of Law should be upheld as they are supported by the facts and Board law. Indeed, the facts and law supporting the ALJ's finding are set forth in the Decision itself, as well as in Counsel for the Acting General Counsel's Brief to the ALJ. As to Paragraph 3 of the ALJ's Conclusions of Law, it should not be difficult for Respondent to understand why such serious violations are unfair labor practices within the meaning of the Act. Moreover, given the 12 determinative challenged ballots in Case 04-RC-08108 and the ALJ's finding that the Respondent discharged all of the alleged discriminates in violation of Section 8(a)(1) and (3) of the Act, it follows that they were eligible voters, and that their ballots should be opened and counted. The ALJ's Conclusions of Law should be upheld.

41. Respondent excepts to the ALJ's recommended remedy or any other remedy because it continues to assert that it did not violate the Act. Respondent's exception simply lacks merit. Counsel for the Acting General Counsel finds the ALJ's recommended remedy to be appropriate for the unfair labor practices herein even though the ALJ did not recommend that Respondent be ordered to read the notice before assembled employees as requested.

42. Respondent incorrectly asserts that the ALJ failed to correctly apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), or to consider the analysis set forth in *Baptisa's Bakery*, 352 NLRB 547 (2008), *Gem Urethane*, 284 NLRB 1349 (1987), and *Framan Mechanical*, 343 NLRB 408 (2004). First, a review of the ALJ's decision shows that he properly applied the *Wright Line* analysis in these cases. Second, the ALJ properly did not rely on *Baptisa's Bakery*

and *Gem Urethane*, supra, as they are not applicable or controlling. Those cases involved Respondents who made decisions to layoff employees because of financial difficulties. This case is just the opposite as Respondent does not assert that it laid off the drivers because of any financial hardship. Even though Respondent claims that its drivers were costing Respondent huge financial losses due to damaged equipment, Respondent failed to show what damages the drivers were responsible for. Respondent presented no credible evidence, not a single document to show that the cost of its damages exceeded those at any of Respondent's other facilities, or that it ever attempted to ascertain that amount of damages actually caused by its drivers verses the amount of damages caused by the drivers of its third-party carriers. As for the applicability of *Framan Mechanical*, supra, Respondent failed to demonstrate that it discharged Salazar, Mejia, or the other 11 drivers for legitimate business reasons. Accordingly, Respondent violated the Act, even under *Framan*.

43 and 44. Respondent asserts that the ALJ failed to analyze and make a legal finding regarding the nature and extent of Ortiz's Section 2(13) authority. Respondent also incorrectly asserts that the Acting General Counsel failed to establish that the actions of the agent were taken within the scope of his authority. It should be noted at the outset that Respondent impermissibly attacks the ALJ's conclusion that Ortiz was a Section 2(13) agent after stipulating to that authority during the hearing. Despite the foregoing, the record does contain, and the ALJ did analyze, evidence concerning the extent of Ortiz's authority. Indeed, the ALJ found that Ortiz was much more than an "agent" with respect to Respondent's employees. This is exactly what Respondent attacked in its Exceptions 2 and 3, that the ALJ found that Ortiz worked in close proximity to Powell and Respondent's dispatcher and drivers, and that he directed and assigned

work to the drivers and the yard jockeys on a daily basis. Also significant was Ortiz's telling Messina that he [Ortiz] was not supposed to say anything about Unions, the statement in itself showing that Ortiz was included in Respondent's management's "Union talks." Indeed, Ortiz was likely to know the real reason for Salazar's discharge. Clearly, Pratt (Allentown Corrugating), LLC's managers and supervisors were involved in Respondent's disciplinary and discharge decisions as Pratt (Allentown Corrugating), LLC's Warehouse Manager Paul Zallas was present with Powell and Cutler at the beginning of the meeting where they discharged Salazar (T.69, 72). In fact, according to Cutler's letter of recommendation for Brian Fritzing, Cutler is the Regional Human Resources Manager for "Pratt Industries Allentown Corrugating, LLC." (GCX-21). Based on the record evidence, Ortiz clearly knew about Salazar's unlawful discharge and warned other drivers about being next, although Respondent would obviously have preferred that he had not done so.

45. Respondent excepts to the ALJ's finding that Labor Consultant Jason Greer was an agent of Respondent and attacks the cases relied on by the ALJ as completely distinguishable or failing to support the proposition for which they are cited. Although Respondent asserts that the Acting General Counsel failed to call Greer or present evidence showing that he was an agent of Respondent, that is not the case. As found by the ALJ, witnesses for the Acting General Counsel testified that Cutler and Powell instructed them to attend the meeting with Greer, and Greer presented himself as an employee of Respondent there to resolve employee complaints. Accordingly, any effort by Respondent to deny Greer's agency status is without merit as labor relations consultants or "facilitators" hired by an employer to convey its message are typically

considered to be agents. *DHL Express*, 355 NLRB No. 144 at slip op. 19 (2010). The ALJ's finding of Greer's agency status and Section 8(a)(1) violations should be upheld.

46. Respondent excepts to the ALJ's alleged reliance on "purely circumstantial evidence or speculation" regarding Respondent's alleged anti-Union animus in making discharge decisions. On the contrary, there is direct evidence of Respondent's animus in Denis Cortes' undisputed testimony that Ortiz told him that Respondent discharged Salazar because he was involved in the Union. See, e.g. *ACTIV Industries*, 277 NLRB 356 fn.3 (1985) (Board found direct evidence of Respondent's unlawful motivation in the admission of a supervisor that the Union was the reason for Respondent's discharge of more than one-third of its workforce). Also, contrary to Respondent's assertion, the Board has held that both knowledge and unlawful motive can be inferred based on the particular set of facts presented by a case. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), and cases cited therein. In this case, the timing of Salazar's discharge, just one day after he started trying to organize the drivers, raises a strong inference of knowledge and animus. See e.g., *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). Equally troubling is Respondent's asserted reason for the discharge – an accident that he had four months prior, and for which he had already been disciplined.

47. Respondent asserts that the clear preponderance of the relevant evidence establishes that the ALJ made erroneous credibility findings. However, Respondent points to no facts or evidence to support its assertion. 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 the Board that they are incorrect. *Standard Dry Wall Products*, 91

NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). A careful examination of the record will show no basis for reversing the ALJ's finding as his credibility resolutions were well-reasoned and explained. As set forth more fully in the ALJ's Decision, in Counsel for the Acting General Counsel's Brief to the ALJ, and above in response to Respondents Exceptions to the Decision of the ALJ, much of Powell's testimony was exaggerated, embellished and/or untruthful. Similarly, Olshefski's testimony concerning Respondent's discharge of Salazar was strange and implausible, and his testimony regarding the reasons for Respondent's layoff of 11 drivers on April 27 are unsupported and unconvincing.

48. Respondent asserts that the ALJ failed to make a finding regarding Messina's testimony that Respondent was aware of Messina's 23-year long membership in the Teamsters Union at the time it hired him. Respondent hired Messina on April 12, before Union Business Agent Darrin Fry ever leafleted at or near the Macungie facility. Accordingly, Messina's prior Union membership is not relevant except to support a claim that Respondent harbored animosity toward members. It says nothing about how Respondent would have felt about Messina bringing a Union into its facility. Indeed, Messina testified that it was his having identified his Union affiliation on his employment application that made him go to Powell, that he wanted to make it clear that he had no involvement in the Union campaign (T. 144).

49. In its Exception 49, Respondent again attacks the ALJ's finding that the Acting General Counsel established a *prima facie* case as to any of the Section 8(a)(1) violations concerning Ortiz. Here, Respondent's attack missed its mark. The Acting General Counsel obviously presented un rebutted evidence from Drivers Denis Cortes and Michael Messina sufficient to

show that Ortiz made the unlawful statements attributed to him. On the contrary, Respondent failed to present any defense to Ortiz's statements and its attempt to attack his agency status after stipulating to the same shows that Respondent is grasping at straws.

50. In its Exception 50, Respondent incorrectly asserts that the ALJ improperly concluded that the Acting General Counsel established a prima facie case as the Section 8(a)(1) violations concerning Respondent Labor Consultant Jason Greer. Counsel for the Acting General Counsel responded to this Exception above in response to Respondent's Exceptions 24 through 26 above. For the reasons set forth therein, the ALJ's findings regarding Greer's 8(a)(1) violations should be upheld.

51. In its Exception 51, Respondent asserts that the ALJ improperly concluded that the Acting General Counsel established a prima facie case that Respondent discharged Christian Salazar in violation of Section 8(a)(3) of the Act. As set forth more fully in response to Respondent's Exceptions 29 and 30. For the reasons set forth more fully therein, the Board should conclude that Respondent's Exception 51 lacks merit.

52. Here, in its Exception 52, Respondent again asserts that the ALJ improperly concluded that the Acting General Counsel established a prima facie case that Respondent discharged Guillermo Mejia in violation of Section 8(a)(3) of the Act. For the reasons set forth above in response to Respondent's Exceptions 29 and 33, the ALJ properly concluded that a prima facie case was established.

53. Respondent excepts to the ALJ's conclusion that the Acting General Counsel established a prima facie case that Respondent laid off 11 drivers on April 27 in violation of Section 8(a)(3) of the Act. Counsel for the Acting General Counsel fully addressed this issue in response to Respondent's Exception 34 where Respondent excepted to the ALJ's finding that the April 27 layoff was unlawful. For the reasons set forth therein, the ALJ's finding's concerning the April 27 layoff should be upheld.

54. Respondent again excepts to the ALJ's finding that "Nothing in Powell's testimony suggests that Olshefski said anything about considering the work records of the drivers in determining who was to be laid off," asserting that the foregoing was not in conflict with Olshefski's testimony. Counsel for the Acting General Counsel responded to this Exception in response to Respondent's Exception 39 above.

55. Respondent excepts to the ALJ's finding that Olshefski was aware of the Union activity of Macungie drivers. This exception simply lacks merit. It's undisputed that Driver Michael Messina told Powell about the April 23 Union meeting, and on April 24, he gave Powell the blank authorization card that had been given to him by Mejia. In response, Powell took Messina directly to the office of Regional Human Resources Manager Erin Cutler. (T. 146-147). Given Powell's testimony that she talked to Olshefski about everything she does as the facility, if the employees' Union activities were important enough for her to immediately report them to Cutler, she undoubtedly told Olshefski about it as well (T. 410). The ALJ's finding that Olshefski was aware of the drivers' Union activities should be upheld.

56. Respondent excepts to the ALJ's failure to find that Ortiz informed Messina that he was instructed not to make any comments (T. 157). Respondent is wrong. Indeed, the ALJ found that, "On another occasion, after Salazar had been fired, and on the day of the scheduled Union meeting, Ortiz told Messina that he was not allowed to say anything about Union (ALJD at 9, ll. 31-34).

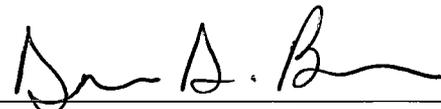
57. In its exception 57, Respondent asserts that the ALJ failed to make any finding or even to consider the testimony of Cortes that he learned Mejia was fired solely because he does what he wants in the yard. First, Respondent distorts Cortes' testimony. Cortes never used the word "solely." Rather, Cortes testified that Ortiz showed him his cell phone, that Mejia called and texted Ortiz many times because Respondent had discharged Mejia (T.342). Cortes testified that Ortiz said that Mejia wanted Ortiz to call him, but that Ortiz said he didn't want to call Mejia back because "he didn't have nothing to do with that." (T. 342-343). Although Cortes testified that Ortiz later said that Respondent fired Mejia because he did what he wanted in the yard, it is clear that Ortiz and Cortes were discussing the Union, and that Ortiz had already interrogated Cortes about the drivers' Union activities, and stated that Respondent fired Salazar because of the Union. So, why would Ortiz begin talking about Mejia and showing Cortes Mejia's calls/texts if Mejia's discharge had nothing to do with the Union? Given that Ortiz told Messina that he was not supposed to talk about the Union, perhaps Ortiz realized that he had already said too much. Or, perhaps Powell had already told Ortiz the pretextual reasons that Respondent was going to use to discharge Mejia. Perhaps it was when Balsavage walked in and Ortiz started talking to Mejia in Spanish (T. 242). Given that Ortiz and Cortes' entire conversation was about

the Union, coupled with Respondent's failure to call Ortiz as a witness, the ALJ properly did not rely on Ortiz's ambiguous remark to Cortes in finding that Mejia was unlawfully discharged.

58. Finally, Respondent again excepts to the ALJ's failure to find the Olshefski lacked knowledge of any Union activity at the time he made the layoff decision. As set forth in the Decision, the ALJ discredited Olshefski's testimony that he made the layoff decision before the Union campaign. The ALJ specifically rejected Olshefski's testimony "hit the panic button" in February or March because he approved the hiring of numerous drivers after allegedly "hitting the panic button," there was a frantic effort to get third party carriers after the April 27 layoff, and his testimony about the unusual damage caused by the Macungie drivers was not supported. (ALJD at 21, ll.18-44).

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board find no reason to reverse the ALJ's finding and conclusions in these cases.

Respectfully submitted



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**DONNA D. BROWN**



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