

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CON-WAY FREIGHT, INC.

and

Case 21-CA-135683

JAIME ROMERO, an Individual

CON-WAY FREIGHT, INC.

and

Case 21-CA-140545

JUAN PLACENCIA, an Individual

**General Counsel's Answering Brief
to Respondent's Exceptions to the
Decision of the Administrative Law Judge**

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I. Introduction

On November 5, 2015, Administrative Law Judge Eleanor Laws (ALJ Laws) issued her decision and report on objections (ALJD) in this matter, making her findings and conclusions of law.

On December 18, 2015, Respondent Employer Con-Way filed exceptions to the ALJD, accompanied by a supporting brief. In its 306 exceptions, Respondent argues that ALJ Laws erred in reaching each and every finding contained within the ALJD, including her credibility determinations.

Pursuant to Section 102.46 (d)(1)-(2) of the Rules and Regulation of the National Labor Relations Board, Counsels for the General Counsel file this Answering Brief. In this Answering Brief, Counsels for the General Counsel respectfully urge the Board to affirm ALJ Laws' well-founded and correct conclusions and the findings and to reject Respondent's exceptions as without merit.

II. FACTS

A. The Parties

Respondent, a freight transportation trucking company engages in transporting freight across North America and operates a facility in Los Angeles, California. (Tr. 47, ALJD 2:39-40).¹ The Los Angeles facility is commonly referred to as "ULX" (ALJD 3:7). Respondent

¹ All citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). Citations to Respondent's exhibits will be referred to as "R" followed by the appropriate numbers. General Counsel's exhibits will be referred to as "GC" followed by the appropriate number(s). Charging Party Juan Placencia's exhibits will be referred to as "CP" followed by the appropriate number(s). Joint Exhibits will be referred to "JX" followed by the appropriate number(s). Citations to the ALJ Laws' November 5, 2015 decision

employs approximately 44 Driver Sales Representatives (DSRs) at ULX, who pick up and deliver freight both locally and over long distances. (Tr. 45-46, 120, ALJD 3:7). Drivers who pick up and deliver freight locally are referred to as pickup and delivery drivers. Drivers who operate over long distances are referred to as line drivers. (Tr. 45-46 ALJD 3:8-10).

Charging Party Jaime Romero (Romero) was employed by Respondent as a DSR for almost 24 years from October 1990 until his employment was terminated in September 2014. (Tr. 44-45, 49). As of the date of his termination, he worked as a line driver. (Tr. 46, ALJD 3:22).

Charging Party Juan Placencia (Placencia) was employed by Respondent as a DSR from October 2011 until his termination in October 2014. (Tr. 151-152). He worked as a pickup and delivery driver. (Tr. 163, ALJD 3: 24-25).

B. Background of Union Activity at ULX

Union organizing at ULX began in 2009. (Tr. 51, 1571). The International Brotherhood of Teamsters Joint Council 42,² as well as Teamsters Locals 952 and 63, were involved in the organizing effort. (Tr. 51). A representation petition was filed by Teamsters Local 63 (Union) on September 11, 2014. (GC 1(d)). A representation election took place on October 23, 2014. (GC 1(x)).

The union organizing efforts at ULX were part of a national campaign by the International Brotherhood of Teamsters to organize Respondent's facilities across the United States. (Tr. 1594, ALJD 3 fn. 3).

will be referred to as ALJD, followed by the page and line number. Administrative Law Judge Exhibits will be referred to "ALJ" followed by the appropriate number(s).

² Joint Council 42 is the governing body of all the Teamsters local unions in Southern California. (Tr. 1570)

C. Charging Party Romero Was Engaged in Union Activity

Romero first became involved in the union organizing efforts at ULX in 2009. (Tr. 51, ALJD 3: 33-36). Romero played a lead role in the organizing effort. (Tr. 52, 142). Initially, he spoke to other DSRs about the Union during work breaks and after work hours. (Tr. 53, ALJD 3: 33-36). In addition, he called DSRs by phone and visited them at their homes to discuss the Union. (Tr. 53,). Over time, Romero recruited other DSRs into the organizing effort, including Placencia. (Tr. 170). Romero served on the Union's organizing committee; attended dozens of union meetings; and between about December 2013 and June 2014, he collected union authorization cards from other DSRs. (Tr. 53, 54, 1584, ALJD 3: 32-33).

Romero also had relationships with, and communicated with employees at other facilities operated by Respondent, including its facility in Laredo, Texas (ALJD 4: 29-30). Romero put Placencia in touch with these employees at other Respondent facilities so they both could assist those employees in their union organizing efforts. (Tr. 177). A representation petition was filed concerning drivers employed by Respondent at its Laredo, Texas facility at some point prior to September 12, 2014, and a representation election took place at that facility on September 12, 2014. (Tr. 353, ALJD fn 7).

D. Respondent Had Knowledge of Romero's Union Activity as Early as 2009

At the hearing, the parties stipulated that "Respondent, through its managers and supervisors, including but not limited to [Service Center Manager] Paul Styers,³ had knowledge

³ At the hearing, the parties stipulated that Styers was, at all material times, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 13-14).

that Jaime Romero assisted the Union and engaged in concerted activity between the period of 2009 and his termination date. (Tr. 63-64, ALJD 3: 34-36). Styers is the highest ranking manager at ULX. (Tr. 51, ALJD 3: 12-13).

Employees at ULX held their first union organizing meeting in 2009. The meeting took place at an employee's home, on a Saturday and coincided with the date of a boxing match. On the Monday following the meeting, Styers approached Romero and asked him how the boxing match was. When Romero asked Styers to explain what he was talking about, Styers asked if Romero attended the boxing match. Romero responded that he had and asked Styers what he wanted to know about it. As Romero answered Styers, another employee in the break room announced in a loud voice that all of the employees at the facility were going to be fired for trying to organize a union. After this incident, employees at the facility started talking about the fact that Styers was questioning DSRs about the union meeting. (Tr. 55-56).

In May 2014, Romero was summoned to a one-on-one meeting with Styers in Styers' office. (Tr. 65). During the meeting, Styers read a script to Romero, admitted into evidence as R13, concerning Respondent's stance on unions. Among other information with an anti-union slant, this script contained information regarding a company related to Respondent which closed in 1990 following a union strike. (R13). Styers admitted that this meeting with Romero was part of a series of meetings he held with employees during the first half of 2014. During each of these meetings, which were conducted with one or two employees at a time, Styers read the same script. The script, provided to Styers by Respondent, among other things, asserted, " . Teamster representation is only the beginning of a **NEGOTIATION FOR EVERYTHING. YOU DON'T START WITH WHAT YOU ALREADY HAVE. .**" (R13, emphasis in original, Tr. 1230-1232). In addition to reading this script during at the May 2014 meeting with Romero,

Styers again told Romero that he did not understand why employees were seeking third party representation. Styers also commented that Respondent treated Romero and other DSRs well by providing them with food and that the Union was not going to work given the way Respondent operates. (Tr. 60, 65-67, 119). In response, Romero stated that Respondent just wanted power and that was why it did not want employees to unionize. (Tr. 68).

E. Romero was Involved in a Minor Traffic Accident and Followed Respondent's Accident Reporting Procedures on August 15, 2014

On August 15, 2014, Romero was driving a tractor-trailer owned by Respondent on a freeway from ULX to Respondent's Blythe, California facility. (Tr. 69-70). Romero had a long record of safe driving and was awarded a 10-year safety award. Romero also received an award in 2010 for driving one million miles without any accidents. (Tr. 49).

Like every one of Respondent's tractor-trailers, Romero's tractor-trailer was equipped with a DriveCam camera system. (Tr. 73). The DriveCam camera installed in Romero's tractor-trailer had two lenses, one facing the interior of the tractor on the driver's side and the other facing the road. (ALJD 5: 41-42). These camera lenses record simultaneous video footage of the inside of the tractor and of the tractor's path on the road. (Tr. 73-74). The camera is set to always record, but its footage is not preserved unless it is either triggered by an event⁴ or manually activated. (Tr. 88, 1335-1336, (ALJD 5: 41-44). The footage captured has an internal timer, which begins at -8.00 seconds and ends at 4 seconds.⁵ Zero seconds indicates the moment the DriveCam camera is activated (JX1, Tr. 1365, ALJD 5: 42-44).

⁴ These events include a "braking application," a "side-by-side force by the steering wheel turning," or hitting a pothole or bump in the road. (Tr. 1336).

⁵ Once activated, the DriveCam system preserves the recorded footage of what occurred eight seconds before that activation of the camera and what occurred four seconds after the activation of the camera. (Tr. 1337).

On August 15, 2014, about 10 minutes after he departed for Blythe from ULX, a tractor-trailer in the lane to Romero's right made contact with a mirror on the passenger side of Romero's vehicle. (Tr. 71, 88). Romero had been driving eastbound in the center lane of five-lane Highway 60, when the accident occurred. (Tr. 71). After he heard a noise resulting from the contact, Romero noticed that he could no longer see his passenger side mirror⁶. Romero then manually activated the DriveCam camera and attempted to get the attention of the driver of the other tractor-trailer by flashing the headlights of his vehicle. The driver did not stop, and kept driving away. (Tr. 87, 89-90, ALJD 6: 12-13).

Romero proceeded to follow Respondent's protocol for dealing with traffic accidents. (ALJD 6: 4-5). Romero pulled over to the side of the freeway and inspected his vehicle for damage. He found that the passenger side mirror had some paint residue on it, and that it had been moved out of place. Romero moved the mirror back to the correct position. Romero then called Respondent's main dispatch number. (Tr. 90). His call was transferred to Respondent's Safety Department, and he spoke to a female Safety Department representative. (Tr. 131). Romero told the Safety Department representative, later identified by Respondent as Safety Response Coordinator Tricia Plonte (Plonte) that he was calling to report an accident (Tr. 1346). Plonte asked Romero for his company identification number and asked him several questions about the nature of the accident and road conditions. Romero gave Plonte correct and honest answers to her questions. (Tr. 144). Plonte did not ask Romero if he had been using an iPod or cellular phone, or whether he was distracted, while he was driving. (Tr. 145). Plonte asked Romero to call the California Highway Patrol to make a police report. Romero did so and then called Plonte back to give her the reference number for his police report. Consistent with

⁶ The side mirror on Romero's vehicle was attached to the passenger side door with a bracket and extended 18 inches from the door. (Tr. 114-115, ALJD 6: 11-12).

Respondent's protocol, Plonte completed a report, based upon the information Romero provided to her by phone, which concluded that the incident Romero had reported to her was "non-preventable. (ALJD 6: 36). Romero then continued with his work assignment for the day. (Tr. 94, ALJD 6: 26-29).

When Romero returned to ULX from Respondent's Blythe facility at about 8:00 a.m. on August 16, 2014, he completed the remaining step of Respondent's accident reporting policy by completing an accident report form.⁷ The report asked for, inter alia, a narrative description of the accident and an illustration of what occurred. (GC 2). Romero included an accurate and honest description of the accident in the report. (Tr. 98). The information he provided in the report was based solely on his memory, as he did not have access to the DriveCam video footage, in order to review it before completing the report. (Tr. 99). Romero slipped the completed report under the office door of Personnel Supervisor Rick Licon (Licon),⁸ who was not present at that time. (Tr. 98-99). Romero cleaned the paint residue that had been left on the passenger-side mirror by the other vehicle. As a result, no damage remained on his tractor-trailer. (Tr. 99).

On August 16, 2014 Regional Safety Manager Dan Anderson (Anderson) and the other members of the "ULX Safety Event Notification" email group (Styers, Director of Operations Mike Wattier (Wattier), and Human Resources Generalist Dan Degener (Degener) received an email from Plonte containing a written account of Romero's August 15, 2014 accident, based upon what Romero told Plonte over the telephone after the accident. (Tr. 1346-47, R20, ALJD

⁷ Romero's completed accident report was admitted into evidence as GC2.

⁸ At the hearing, the parties stipulated that Licon was, at all material times, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 13-14).

7: 1-3): The email message contained Plonte's ruling on the nature of the accident, which she deemed "non-preventable" based on her determination that the tractor-trailer to Romero's right hit Romero's vehicle. (R20, Tr. 1348, 1353).

Later in the day that day, Anderson received an email from Styers, asking him to review the DriveCam footage from Romero's accident. Part of that email chain included a previous email sent by Wattier⁹, in which he asked if there was any way to verify that the other vehicle had left its lane, as stated in Plonte's report. (R20, ALJD 7: 4-6). Anderson was not told why Wattier sought this verification. (Tr. 1430, ALJD 7:6-7).

JX1, a twelve-second video recorded on August 15, 2014 by the DriveCam system installed in Romero's vehicle, was admitted by stipulation of the parties.¹⁰ (Tr. 32-33). Throughout the period recorded in the video, Romero can be seen holding an iPod in his left hand. (JX1, Tr. 78-79, ALJD 28, fn 28). Romero typically listened to music on his iPod while he drove, and he was unaware of any rule that prohibited him from doing so.¹¹ (Tr. 149).

The video footage of the inside of Romero's truck shows Romero looking out of his driver side window between -7.50 seconds and -6.75 seconds (Tr. 80, 1390-1391). Romero was looking out his driver side window to observe traffic, as he was trained to do.¹² (Tr. 80). The video footage also shows Romero looking down at his iPod at -6.25 seconds. Within one half of

⁹ Wattier was not presented as a witness at the hearing, having retired before the hearing date, according to Respondent. (Tr. 1172)

¹⁰ Counsel for the General Counsel stipulated solely to the authenticity, relevance, and admissibility of the video footage contained in JX1. Counsel for the General Counsel explicitly did not stipulate to the authenticity, relevance, and/or admissibility of any graphs, scientific analysis or other parts of the DriveCam software contained in the exhibit.

¹¹ Another DSR, Salvador Navarro testified that he and other DSRs very commonly wear Bluetooth as well as wired listening devices while driving and that he and other DSRs sometimes hold their cellular telephones in their hands while driving to access maps. (Tr. 668-669, 720, ALJD at fn. 8)

¹² Anderson testified that he teaches a driving system, known as the Smith System, which Respondent adheres to. The Smith System states that drivers should not maintain a fixed gaze while driving, should scan their mirrors every five to eight seconds, and should look outside their windows to maintain awareness of road and weather conditions. (Tr. 1435).

a second [at -5.75 seconds in the video], Romero lifts his head up towards the front windshield and looks forward. (Tr. 1394). By his account, Romero was not distracted by the iPod or anything else while he was driving. (Tr. 145).

The DriveCam video footage does not, at any point, show the exact location of Romero's vehicle in relation to the freeway's lane markers. (Tr. 1436). According to Anderson's hearing testimony, at the -7.25 second mark, a lane departure warning system installed in Romero's tractor-trailer was activated, resulting in a beeping sound being played on the video. (Tr. 1369, 1371). Anderson stated that, based on his personal experience, such a lane departure warning system beeps when the vehicle drifts approximately three to four inches over a lane line into a neighboring lane. (Tr. 1374). However, on cross-examination, Anderson admitted that he did not have access to the sound portion of the DriveCam footage until approximately a week before the date of the hearing, which was long after Romero's termination. (Tr. 1428, ALJD fn. 9).

With the benefit of the sound portion of the DriveCam footage, the sound of the tractor-trailer to Romero's right making contact with the mirror on Romero's vehicle is audible between -5.00 seconds and -4.50 seconds. (JX 1). The actual contact between the tractor-trailers is not visible in the video footage, however. (JX1, Tr. 1375). The front wheels of the tractor-trailer to Romero's right are visibly on the boundary line between its driving lane and Romero's driving lane for the same period of time. (JX1).

After receiving Styers' email, Anderson watched the DriveCam footage about a dozen times and emailed his opinion to Styers, Degener, and Director of Human Resources (Western Area) Kevin Huner (Huner).¹³ (Tr. 1427, 1350, R20, ALJD 7: 9-31). In his email, Anderson

¹³ At the hearing, the parties stipulated that Huner was, at all material times, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 13-14).

asserted that Romero falsified his report to Plonte because the tractor-trailer to Romero's right did not leave its lane. Additionally, Anderson alleged that Romero further falsified his report by failing to tell Plonte that he had been distracted while driving because of the electronic device he was holding and operating while he was driving (Tr. 1352, R20, ALJD 7: 34-36). Anderson cited as examples of Romero's distraction that he looked out his driver's side window and at his electronic device (Tr. 1350, R20). Anderson did not review Romero's written accident report, GC2, at any point during his investigation. (Tr. 1432). After reaching these conclusions, Anderson emailed Plonte and asked her change the ruling of the accident from "non-preventable" to "preventable." (Tr. 1354-1355, R21). Plonte did so. (Tr. 1356, R22). Then later that day, after apparently continuing to watch the DriveCam footage, Anderson emailed Styers asserting that the electronic device in Romero's hand was a cell phone, and that the footage showed him using it for text messaging while driving. (R20).

On August 19, 2014, Anderson and Huner discussed Romero's accident. Huner instructed Anderson to meet with Romero, show Romero the DriveCam footage and see what Romero said about it. (Tr. 1400). Huner also emailed Anderson and asked him to make sure Romero did not receive a coaching in lieu of discipline. (Tr. 1401, 1465, R23). According to Huner, he made this request because he wanted a full investigation to be conducted. (Tr. 1465).

Respondent is not notified when a DriveCam system is manually activated by a DSR. (Tr. 1337). As a result, Respondent admits that it would not have learned of the accident or the DriveCam footage if Romero had not also called line haul and reported the incident to Plonte. (Tr. 1442).

F. Respondent Suspended Romero on August 20, 2014

On August 20, 2014, at about 5:00 a.m. Romero returned to ULX from his run to Respondent's Blythe facility. Styers told Romero that he needed to meet with Anderson, and Romero went to the basement and met Anderson, Styers, and Licon there. (Tr. 100-101). Anderson testified that he read Plonte's accident report to Romero and that Romero confirmed what Anderson read was what he had reported to Plonte and that it was correct. (Tr. 1403-1404, R24). Anderson then played the DriveCam footage for Romero and explained to Romero that, in his view, the accident was a result of Romero's distracted driving and that Romero was responsible for making contact with the other tractor-trailer. (Tr. 102, 1405). Romero denied that the accident was his fault and reiterated the fact that the other tractor-trailer hit his vehicle and that he was not responsible for the contact. (Tr. 102, 1407, ALJD 8: 13). Anderson then accused Romero of lying in his report to Plonte because he had been distracted for three seconds while driving and that he had a cell phone in his hands during the accident. (Tr. 103).

Romero responded that he was not texting or holding a cell phone. He acknowledged that he did have an iPod in his hand, and was just selecting a song on the iPod. He denied being distracted while driving. (Tr. 103, 1406, ALJD 8: 15-16). Anderson also accused Romero of trying to hide his electronic device from the camera's view.¹⁴ (Tr. 1407). After Romero denied Anderson's version of events, Anderson told Romero he was suspended.¹⁵ (Tr. 103). Licon then asked Romero to provide a written statement about the accident. (Tr. 103). Romero wrote a brief statement which said "I'm being suspended for [an]other reason. This is being created to terminate[] me. and gave it to Styers. (Tr. 103-104, 1240, 1408-1409, GC 3, ALJD 8: 20-22).

¹⁴ As Romero explained at the hearing, the iPod was not within the camera's view because it was obscured by the tractor's steering wheel. (Tr. 84).

¹⁵ According to Anderson, it was Styers who told Romero he was suspended for "failure to properly report an accident." (Tr. 1240, 1409).

Romero's testimony was that he believed Respondent's real motivation for suspending him was because of his union activity. (Tr. 106). Romero handed Styers his company identification, at Styers' request. (Tr. 106).

After his meeting with Romero, Anderson emailed Huner with a summary of the meeting, stating that Romero's version of events remained consistent with what he had previously told Plonte. (Tr. 1410, R23). Anderson testified that by refusing to 'accept responsibility' for the accident after he reviewed the DriveCam video footage with him, Romero had engaged in an act of "falsification" (Tr. 1452).

As per his practice whenever an employee is suspended ("taken out of service" in Respondent's parlance), Styers prepared an out of service message concerning Romero, citing "facts reported inaccurate" as the reason for Romero's suspension. (Tr. 1240-1242, R14). Styers testified that this was the cited reason for the suspension because Romero "made a false statement" when he spoke to Plonte.¹⁶ (Tr. 1242). Indeed, Respondent, admittedly relied on this, and only this, as the reason for Romero's suspension and subsequent termination. (ALJ2 at 13).

G. Respondent Terminated Romero on about September 4, 2014.

After Styers completed the out of service message on about August 20, 2014, Huner and Degener discussed Romero's accident and agreed that termination was appropriate. (Tr. 1241, 1470). Huner testified that he was ultimately the person who decided Romero should be terminated, though he and Degener discussed Romero's accident before this decision was made.

¹⁶ Although Romero's out of service message lists Romero's disciplinary history, Respondent has admitted that Romero's suspension and termination were based solely on its claim that Romero falsified his accident report to Plonte. (Tr. 1540; ALJ2 at 13). When counsel for Respondent sought to have documentary evidence of Romero's disciplinary history admitted into evidence, he stated that any past discipline was not a basis for Romero's termination. (Tr. 139).

(Tr. 1459). Huner testified that this decision was based upon the conclusion Romero falsified his version of events, thereby violating Respondent's policy concerning falsification of company records. (Tr. 1459, 1470-1471, R25). Huner admitted, however, that in making the decision to terminate Romero, he did not consider the written accident report, which Romero himself had completed and submitted upon his return to ULX on the morning of August 15, 2014. (Tr. 1534).

On about September 3, 2014, Licon called Romero and told him that Styers wanted to meet with him. They scheduled a meeting for the next day. On about September 4, 2014, Romero met Styers and Licon in Styers' office. (Tr. 107, 1252). Degener was present telephonically (Tr. 1252). Styers informed Romero that he was terminating Romero's employment because Romero had falsified his report of the accident. (Tr. 108, 1252-1253).

Sometime following the termination meeting with Romero, Styers completed an employee separation checklist detailing Romero's termination. (Tr. 1317, GC13) In that document, Styers indicated that Romero did not 'work well with customers and other people' At the hearing, Styers testified that Romero did not get along with all of his fellow employees, yet he was unable to give any specific examples of employees Romero did not get along with. (Tr. 1318). In the same document, Styers also indicated that Romero had not had any major or repeated disciplinary problems during his employment. (GC13).

H. Charging Party Placencia Was Engaged in Union Activity

Sometime between October 2011 and the beginning of 2013, Romero approached Placencia and asked him if he was interested in going to a union meeting. (Tr. 151-152, 171). Placencia agreed to attend the union meeting and by about early 2013, Placencia had become actively involved in the union organizing efforts. (Tr. 171). Placencia spoke to DSRs employed

at ULX and at other Respondent facilities about working conditions and shared with his coworkers the information he received at union meetings. (Tr. 173-174). Placencia also invited his coworkers to union meetings. (Tr. 173). He talked to employees in break rooms and over the telephone. (Tr. 174-176). Placencia took part in an employee organizing committee at ULX and helped employees in other Respondent facilities set up their own organizing committees. (Tr. 174-175). Starting in early 2014, Placencia collected union authorization cards from his coworkers. (Tr. 179).

I. Respondent Had Knowledge of Placencia's Union Activity

Approximately one week after the representation petition in case 21-RC-136546 was filed (GC 1(d)¹⁷), Placencia approached Styers, Licon, Freight Operations Supervisor Steve Roman (Roman), and Freight Operations Supervisor Armando Rosado (Rosado)¹⁸ at ULX and told them about his union activity. (Tr. 181-182).

Placencia first approached Rosado inside ULX. DSR John Cabrera (Cabrera) was also present for this conversation. (Tr. 181-182). Placencia told Rosado that he was a Union supporter and that he would be talking to drivers about the Union in the break room leading up to the election. (Tr. 184). Rosado replied that Placencia should stick to his guns and that he should be careful because "they" had eyes on him. (Tr. 184). Rosado did not specify who "they" were, but Placencia believed Rosado was referring to Styers and Licon. (Tr. 184-185). Cabrera, who

¹⁷ The petition was filed on September 11, 2014.

¹⁸ At the hearing, the parties stipulated that Rosado was, at all material times, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 13-14).

remained employed at ULX at the time of the hearing, corroborated Placencia' testimony.¹⁹ (Tr. 517).

During the same week he spoke to Rosado, Placencia spoke to Styers near Licon's office. Licon was in his office at that time. (Tr. 186). Placencia told Styers that he wanted to talk him. Styers interrupted and said "I already know what you're going to tell me and I know what you're already doing. (Tr. 186-187). Styers was upset and used an aggressive tone when he said this. (Tr. 280).

Styers and Placencia first spoke about unionization at Respondent's facilities long before any representation petition was filed. When Placencia first began working for Respondent in October 2011, he participated in about two weeks of training. (Tr. 156). As part of the training, he was shown videos on various topics, including one about unions. (Tr. 152). The video discussed Respondent's acquisition and subsequent dissolution of a unionized company.²⁰ (Tr. 154). Styers showed Placencia this video and, after doing so, Styers told Placencia that ULX was a nonunion facility and if DSRs wished to work there, Respondent had to remain nonunion. (Tr. 155, ALJD 4: 8-11). During his training period, Placencia also watched a video concerning the importance of getting sufficient rest. (Tr. 157). After watching the video, Styers commented to Placencia that one of the drivers featured in the video, named "Chucky, no longer worked for Respondent because he talked about union activity. (Tr. 158, ALJD 4: 17-20)). Styers also told Placencia that line drivers were the biggest crybabies employed by Respondent and that he should stay away from them, especially Romero. (Tr. 158, ALJD 4: 13-15).

¹⁹ Rosado admitted that a conversation took place in mid-September 2014 during which Placencia told him that he supported the union movement and that he was a Teamster. Rosado also admitted that Cabrera was present during that conversation. (Tr. 1103-1104).

²⁰ DSR Cabrera also recalled watching this video during his orientation. (Tr. 515, ALJD 4: 2-6)

Styers also talked to other DSRs about his negative opinion of unions, Romero, and “Chucky. On several occasions, during conversations with DSR Cabrera, Styers told Cabrera that he should stay away from “the dark side, referring to people who were trying to organize a union. Styers specifically referred to Romero and “Chucky’ as being part of “the dark side. (Tr. 553-555).

J. Respondent Prohibited Placencia from Wearing Union Insignia on about September 15, 2014

Soon after he informed Styers and other managers and supervisors of his union activity, Placencia began to wear a lanyard to work, that read ‘Union Local 63’ in blue and yellow lettering. (Tr. 187, 189-190, ALJD 9: 12-14). As soon as Placencia started wearing the lanyard at work, Styers approached him near the dispatch window in the facility’s break room.²¹ (Tr. 190). Styers, gesturing towards the lanyard, said “Take it off” and told Placencia that it did not comply with “company policy.”²² (ALJD 9: 15-16). Styers had another lanyard in his hand, and tried to hand it to Placencia, but Placencia did not take it. (Tr. 191-192).

Later that same day, Placencia went to Licon’s office to speak to him about how Styers was treating him. Placencia told Licon that Styers wanted him to take off his lanyard and that Styers was mad at him. Placencia then told Licon that he thought the ‘drama’ that was going on between the DSRs and supervisors during the union campaign was unnecessary. In response, Licon told Placencia that he could wear a button, but could not wear his union lanyard, referencing something about company policy. Placencia asked Licon what policy he was referring to, but Licon did not tell him. (Tr. 193). Respondent offered no evidence to controvert

²¹ During cross examination, Placencia testified that this conversation may have taken place around one to one and a half weeks after the representation petition was filed. (Tr. 330-331).

²² Placencia was unaware of any policy regarding the wearing of lanyards. (Tr. 191). Respondent failed to produce any evidence of such a policy.

this testimony, as Licon did not testify, and during his Styers' testimony, he did not deny instructing Placencia to remove the lanyard.

K. Respondent Threatened Placencia With Unspecified Reprisals on about September 15, 2014 Because Placencia Supported the Union

During Placencia's conversation with Licon in Licon's office concerning Placencia's Union lanyard, Styers entered Licon's office. This occurred after Licon told Placencia he could wear a button, but not a union lanyard. Styers asked Placencia and Licon what they were talking about. Placencia repeated to Styers what he had said to Licon - that the 'drama' between the drivers and management was not necessary. Red-faced, and appearing angry, Styers responded, to Placencia, "you haven't seen nothing yet. (Tr. 280-281, ALJD 9: 22-25). In response, Placencia asked Styers "What else can you do? You already harassed me. Are you going to fire me?" The conversation then ended. (Tr. 195, ALJD 9: 26-28).

Styers admitted having a conversation with Placencia after the filing of the representation petition during which Placencia stated that he did not understand why there was so much drama between Respondent and the Union about the election, but denied saying to Placencia that he hadn't seen nothing yet. (Tr. 1259).

Placencia continued to wear the Union lanyard until his suspension several weeks later, without comment from any Respondent supervisor or agent. (ALJD 9:27-29).

L. Camarena and Echanique Provided Labor Consulting Services to Respondent and Acted as Respondent's Agents

Edward Echanique (Echanique) and Luis Camarena (Camarena) were labor consultants who provided services at ULX from about September 23, 2014 until about October 21, 2014. (Tr. 723, 782). In response to the growing union activity at ULX, they provided their services

through a company called Cruz & Associates. Echanique and Camarena explained their role as providing information to employees about union elections and collective bargaining from a management prospective. (Tr. 723 -724, 765, 782). While they worked at ULX, Echanique and Camarena communicated with DSRs in both group meetings and one-on-one meetings. (Tr. 724, ALJD 9: 31-33). Camarena also engaged in 'ride-alongs', during which he spoke to DSRs while riding with them in their work vehicles during their working time. (Tr. 724-725, 784, ALJD 9:34-35). Camarena and Echanique were provided with badges which allowed them to freely roam ULX unescorted. (Tr. 1320).

When introducing himself to Respondent's employees, Echanique explained that he was present at ULX on Respondent's behalf. (Tr. 632, 737, ALJD 9: 35-37). Camarena introduced himself as a representative of Respondent. (Tr. 793, ALJD 9: 35-37). Camarena and Echanique held group meetings with ULX DSRs in the facility's basement training room, and used the room as their office space during other times. (Tr. 726, ALJD 15: 10-11). Echanique testified that about sixty meetings with employees took place in the time he and Camarena worked at ULX. (Tr. 740). Either Echanique or Camarena led these group meetings. (Tr. 752, 876) Respondent's supervisors and managers instructed DSRs to attend meetings with Camarena and Echanique. (Tr. 196, 630). Respondent's supervisors and managers attended at least "a couple" of those meetings. (Tr. 741).

As part of their work for Respondent, Camarena and Echanique assigned a score, on a scale of one to five, to each employee, to indicate whether the employee was pro-union (5) or pro-Respondent (1). (Tr. 916-917, ALJD 10: 1-3).

Placencia first met Camarena and Echanique at one of the group meetings the consultants were holding at ULX, during the week of September 22, 2014. (Tr. 198, 726, 784). When the

meeting began, Camarena introduced himself and Echanique as labor consultants and representatives of Respondent. (Tr. 793). Admittedly, Placencia spoke openly and passionately about employees' right to join the Union and about his belief that unionization would benefit himself and his family. In his testimony, Echanique noted the powerful analogies made by Placencia, but stated that Placencia did not act in a threatening manner. (Tr. 752). Camarena, on the other hand, claimed to be 'shocked' by Placencia's statements and demeanor during the meeting, yet, he could not recall reporting his alleged concerns about Placencia's statements to anyone, and did not make any written report. (Tr. 792, 880). Placencia was not invited to any further meetings with Camarena and/or Echanique, though Placencia heard from his fellow DSRs that additional meetings were conducted. (Tr. 203).

M. Respondent, by Camarena, its Agent, Implicitly Threatened Placencia with Physical Harm on October 6, 2014

On October 6, 2014, Placencia and Camarena had a conversation on the ULX dock. Freight Operations Supervisor Rosado was also present. (Tr. 204-205, 359, 1105). The conversation began when Placencia approached Rosado and asked if there was more work to be done before the end of his work day (Tr. 205, 29, ALJD 11:6). A conversation between Placencia and Camarena began, lasting about 30 minutes in total, all but about 7-8 minutes of which was witnessed by Rosado.²³ (Tr. 1110, ALJD 12:17-20, 23: fn 44). During this lively conversation, Placencia stated that Respondent's employees had sought out the Union, explaining that the DSRs felt abused, like battered wives. (Tr. 370, ALJD 11. 12-14). Placencia further explained that it was because of the lack of respect and the harassment they

²³ Rosado testified that he was absent for seven or eight minutes of the conversation, while he had stepped away to attend to other work matters. (Tr. 1110).

experienced that he and his fellow workers had gone through with the union organizing effort, and noted that Respondent was not going to change their minds. (Tr. 206, ALJD 11. 12-16).

Placencia also stated that the campaign for union representation was not about money, but about respect, and in response, Camarena said he's the type of person that if you owe him money, that he will call you. If you ignore his calls, he will go down to your house and kick the door down, push you to the ground, put his foot on your chest and then he said "I'll stick a gun out, pull my .45, put it to your head and I'll get my money one way or the other." (Tr. 207, ALJD 11. 14-23). As he made these statements to Placencia, Camarena pantomimed the acts he was describing, including pretending to kick down a door, push a person down, grab them by the hair, pull out a gun, and point it down to the person's head. Placencia did not respond to Camarena, but just asked Rosado if that was all, and left when Rosado said "Yes." (Tr. 208, ALJD 11:23). Placencia later memorialized this conversation with Camarena in writing.²⁴ (GC7).

Camarena admitted that he had a conversation with Placencia sometime between 6:30p.m. and 8:30p.m. on October 6, 2014. Camarena characterized Placencia's statements during the conversation as a "rant" spoken in an "aggressive" tone (Tr. 798-799). Camarena admits making statements about his willingness to fight for his own family, and to kick down doors or do anything else needed to help his family, but he claimed that these statements were made for the purpose of illustrating for Placencia that he (Camarena) could act on his own behalf and didn't need anyone to represent him. (Tr. 799-800, ALJD 11:37-41). Rosado, to the contrary, described the conversation between Camarena and Placencia as "very professional" and "a spirited debate of sharing opinions" (Tr. 1113, ALJD 12: 8-10).

²⁴ Placencia testified that his written memorization contains a mistake and should read that "[t]he consultant Louie started mentioning article 8 and he said article 8 was that the company does not have to negotiate with the union. (Tr. 363).

N. Respondent, by Camarena, its Agent, Filed Criminal Charges Against Placencia, and Proximately Caused His Arrest on October 7, 2014

On October 7, 2014, Placencia arrived at ULX for work shortly before 10:30 a.m. (Tr. 209, 450). As usual, Placencia went to the break room to clock in and obtain his work assignment for the day from the dispatch window. (Tr. 167, 209). The time clock used by DSRs is located in the break room, as is the dispatch window. The dispatch area is separated from the break room by a wall, with a counter at about chest level, with two windows above the counter. DSRs can speak to the dispatcher from inside the break room, across the counter and through the two windows. (Tr. 168-169, R9(a), R9(d), ALJD 12: 26-29). That day, DSR Cabrera arrived at work around the same time as Placencia. (Tr. 209, ALJD 13: 6-7). Neither Placencia, nor Cabrera had been invited to the 'LEAN' meeting that their fellow workers were engaged in when they arrived for work that day. (ALJD 12: 40-41). They both clocked in for work and engaged in small talk as Placencia began emptying the contents of his small backpack onto a table in the break room near the dispatch office. (Tr. 210, 524, ALJD 13: 13-14). Cabrera started to make fun of Placencia concerning the large quantity of items Placencia had managed to fit in his small bag. (Tr. 210, 525, ALJD 13: 16-17). Among the items Placencia put on the table were a belt clip that DSRs use to carry the handheld computers they use while working, work gloves, a battery charger, food, water, a pen, a flashlight, a folding knife he used for work, and pros.²⁵ (Tr. 212, ALJD 13: 22-23).

While Placencia was going through the items in his bag, Freight Operations Supervisor Roman (Roman) and DSR Salvador Navarro (Navarro) were sitting in the dispatch area. Roman sat at one of the two windows and Navarro sat at the other (ALJD 13:14-15). Camarena was also

²⁵ Pros are labels used to identify and track freight. (Tr. 212).

in the dispatch area, between Roman and Navarro. (Tr. 214). Navarro remained in the dispatch area during the entirety of the ensuing interaction between Camarena and Placencia. (Tr. 225, 614). DSRs Elvis Martinez and Hector Sanchez were present in the break room and other DSRs came in and out of the break room around that time. (Tr. 213, 640, ALJD 13:31-32). The other DSRs were laughing at Placencia as Cabrera and Martinez made fun of Placencia's back pack. (Tr. 214-215). Camarena, through one of the dispatch area windows, asked what they were laughing about. (Tr. 214). Instead of answering Camarena's question, Cabrera asked if they [the labor consultants] were allowed to go on ride alongs with DSRs. (Tr. 214-215, ALJD 13:19-22, 30-31). Camarena did not answer Cabrera's question, and Placencia said to Cabrera that he thought it would be a good idea for Camarena to go on a ride along with him, because it would give Camarena an opportunity to further explain to him what [Article] 8 means.²⁶ Placencia was talking to Cabrera and was not directing his statement to Camarena. (Tr. 217). Placencia and Cabrera teased each other about the benefits of riding along on their routes: Placencia touted his route in Beverly Hills, which would give Camarena access to celebrities; Cabrera asserted that his route in Malibu would have girls. (Tr. 217-218, ALJD 13: 19-22). As Placencia and Cabrera joked with each other, Placencia was arranging his work items in his pockets and putting on his belt clip and computer pouch. (Tr. 219-220). He had his flashlight and knife in his hand. (Tr. 220, 222, 528, ALJD 13:22-23). Both the flashlight and the knife were black and about four to five inches long. The knife was closed.²⁷ (Tr. 220, 222, 529, 570).

Camarena, who was still in the dispatch area, then entered the conversation again. He pointed at Placencia's hand and said "That's not a knife. He then reached around behind his back and said "This is a knife" as he pantomimed pulling (an imaginary) knife from behind his

²⁶ Camarena had made mention of "Article 8" during his conversation with Placencia on October 6, 2014. (Tr. 205).

²⁷ Placencia's knife was a folding knife with a locking mechanism and a black blade. (Tr. 242, 537).

back and holding it high above his head. (Tr. 221-222, 527-528, 642, ALJD 13: 22-24). As he did this, Camarena was in the dispatch area leaning sideways to speak through an open dispatch window. (Tr. 223). Placencia responded by saying "That's not a knife, that's a machete," and added, "that looks like a scene from *Crocodile Dundee*." Everyone, including Camarena, then started to laugh. (Tr. 222, 529, 642, ALJD 13: 24-25). Cabrera was right in front of Placencia during Placencia's interaction with Camarena. (Tr. 225, 530). Cabrera and Navarro, who are still employed by Respondent, corroborated this version of events. (514, 523-530, 642, 649, 686-688, CP2, CP3, ALJD 13:33-35).

Placencia did not show his knife to Camarena, open his knife at any time during this interaction with Camarena, ask Camarena if he was scared, tell Camarena 'don't worry, nothing bad will happen, or threaten Camarena (Tr. 222-223, 530, 644, ALJD fn 26, 29).

After Camarena's *Crocodile Dundee* reference, Navarro saw Camarena approach Roman while all three of them were still in the dispatch area. Camarena asked Roman if he could speak to him, and then Camarena and Roman left the dispatch area. Camarena did not seem upset or emotional. (Tr. 654). After a few minutes, Navarro gave a safety meeting²⁸ to Placencia and Cabrera in the break room. The meeting lasted about five minutes. (Tr. 224-226, 530, ALJD 13: 25-26, 36). Shortly thereafter, Navarro saw Styers, Licon, and Camarena in Styers' office acting in a secretive manner. (Tr. 680-681, ALJD 14: 33-35).

After the safety meeting, Cabrera and Placencia walked to their trucks in the ULX dock area. (Tr. 226-227, 530, ALJD 13: 27). As they neared their trucks, Placencia noticed there were items that still needed to be loaded onto his truck, including several buckets and at least one pallet that would not fit in the truck. (Tr. 226-227). Once at their trucks, they saw Freight

²⁸ Safety meetings consist of a summary of any accidents that occurred during the previous work day. (Tr. 530)

Operations Supervisor Robert Salas.²⁹ (Tr. 228, 531-532). Placencia told Salas that the extra items would not fit inside his truck. (Tr. 228, 533-534). Salas instructed Placencia to break the items down. (Tr. 534). Placencia then used his knife to cut away the shrink wrap which held the pallet together. After doing so, he was able to load the items on the open pallet into his truck. (Tr. 228, 533-534). Placencia then departed the facility to begin his deliveries and pick-ups scheduled for that day. (Tr. 229).

Almost all the DSRs at ULX carry knives. (Tr. 228, 645, 647). Romero carried a knife to cut rope and plastic, the shrink-wrap that goes around the pallets or crates. It is common for drivers to carry knives for this purpose. (Tr. 116, ALJD 13:3-4). Cabrera and Navarro also testified that they use a knife at work for this purpose. (Tr. 534, 645). Respondent also distributes knives to its employees as raffle prizes and rewards for being recognized as employee of the month. (Tr. 647-648).

According to Camarena's version of his October 7, 2014 interaction with Placencia, he (Camarena) entered the dispatch office at about 10:15 a.m. There, Camarena spoke to Roman about which delivery routes would be best suited for ride alongs. Roman assisted him in deciding which routes were best (Tr. 808). According to Camarena, Placencia entered the break room and approached the dispatch counter at about 10:30a.m.³⁰ (Tr. 809, ALJD 13: 38-40). Placencia and Camarena were about six feet away from each other, on opposite sides of the counter and wall that separates the break room from the dispatch office. (Tr. 811). Placencia asked Camarena what he was doing in the dispatch office and Camarena replied that he was

²⁹ At the hearing, the parties stipulated that Salas was, at all material times, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 13-14).

³⁰ According to Roman, Placencia arrived in the area first and that Roman and Placencia had been talking through the dispatch window for several minutes before Camarena arrived. (Tr. 1146, ALJD 14:16-18).

going to do some ride alongs that day. Placencia asked Camarena to ride with him, but Camarena said he had not planned to ride with Placencia that day. Placencia again asked Camarena to ride with him. Camarena said he would let Placencia know in the future when he would ride with him. (Tr. 810-811, ALJD 14: 1-5). Placencia then reached into his pocket and pulled out a black knife. Placencia opened the knife, exposing a four inch blade. (Tr. 811). Placencia looked at the knife, then looked at Camarena, and asked Camarena if he was scared. Placencia then again looked at the knife and again asked Camarena if he was scared.³¹ This occurred over the span of 30 seconds. (Tr. 812, 891, ALJD 14: 5-7). According to Roman, Placencia closed and then reopened the knife before repeating his statement to Camarena. (Tr. 1219, ALJD 14: 20-23). In response, Camarena had a "nervous reaction," which consisted of acting out a scene from the film *Crocodile Dundee*. He said "that's not a knife. .this is a knife" and pulled an imaginary knife from his back. (Tr. 812-813). Placencia then turned around and left. (Tr. 815, ALJD 14: 9-12).

After Placencia left, Camarena discussed the incident with Roman, whom he described as his supervisor, and who was with Camarena in the dispatch office while the incident occurred. (Tr. 817, 820, ALJD 14:12-14, fn 28). Camarena stated that he was going to prepare a written statement of what occurred and asked that Roman do the same. (Tr. 821, ALJD 14: 13-14). Camarena informed Styers and Licon of the incident (Tr. 821-822), and then went to the basement training room. (Tr. 823, ALJD 14:33-35, 15:10-11). After learning of the incident, Styers called Human Resources Generalist Kimball Hinds (Hinds). Hinds, in turn, informed Huner of the alleged incident. (Tr. 1482). Huner asked Hinds to initiate an investigation. (Tr.

³¹ According to Roman, Placencia said "Why don't you go with me. You don't have to be afraid. Nothing's going to happen." and then closed the knife, reopened it, and made the same statements again. (Tr. 1149). Roman did not hear Placencia say 'are you scared' to Camarena. (Tr. 1205).

1483). Over the span of two telephone conversations, Hinds instructed Styers to get written statements from Roman, Camarena, and Placencia. (Tr. 1264-1265, ALJD 15:6-7). Camarena stayed in the training room and wrote his written statement of the incident. (Tr. 835, ALJD 15:10-31). That statement did not contain any mention of Camarena's reference to Crocodile Dundee. (R5, Tr. 864). Camarena was unable to offer any explanation for this omission. (Tr. 864). Camarena's statement did mention that an employee's windshield had been recently smashed, but he admitted that he knew of no connection between that incident and Placencia's alleged threat. (R5, Tr. 865). After completing his written statement at about 12:00p.m., Camarena ate lunch in the basement training room. (Tr. 831-832, 863). Camarena did not know where Placencia was at that time. (Tr. 863, ALJD 15: 33-34). After Camarena finished eating lunch at about 2:30p.m., Licon drove Camarena to the nearby Los Angeles Police Department's Newton Division to file an investigative report. After waiting approximately 10 to 15 minutes with Licon, Camarena met with Police Officer Bell to complete a report. (Tr. 835). Licon assisted Camarena in completing the report by providing information to Officer Bell. (Tr. 836, ALJD 16: 15-17). The report lists the ULX address as Camarena's business address. (R6). Camarena admitted that he could have gone to the police immediately after the incident with Placencia or called 911, but did not. He could not explain why he failed to take immediate action. (Tr. 884).

After completing the report, Licon drove Camarena back to ULX. (Tr. 846). At approximately 4:00p.m., Camarena gathered his personal belongings, gave copy of the investigative report to Styers, and then left the facility for the day, going back to his hotel room (Tr. 847, 1272, ALJD 16: 17-18).

Approximately two months after Camarena filed the police report, a detective called him and left him a voicemail. In that voicemail, the detective asked Camarena to call him back to discuss the report. Camarena did call back and left a message with another detective. (Tr. 847-848). Since then Camarena has had no other contact with the police concerning his report. (Tr. 849). Although Camarena testified that he filed the report because he feared for his and his family's well-being, he admitted that he made no other efforts to contact the police to follow up on the report. (Tr. 849, 856). Camarena also failed to notify authorities near his home in San Diego about the incident. (Tr. 912-913). Camarena informed Respondent that he would file a restraining order against Placencia, but Camarena failed to do so. (Tr. 869).

Roman prepared a statement on October 7, 2014 concerning the knife incident. (Tr. 1166-1167, R10, ALJD 15: 36). However, his statement also failed to include any mention of Camarena's reference to *Crocodile Dundee* and failed to report that Placencia allegedly closed and then reopened his knife before repeating his statements to Camarena. (Tr. R10, ALJD 15: fn 32). Further, at Styers request, Roman wrote another statement, in which he claimed for the first time that there were no other witnesses to the incident. (Tr. 1179-1180, R11, ALJD 15: 36-38).

Styers testified that he planned to get a written statement from Placencia and place him out of service when he returned to ULX later in the day. (Tr. 1274). Because Styers was "unsure of what would happen" when Placencia returned, Styers called the Los Angeles Police Department, Newton division. Styers intended to have police officers present at the facility while he spoke to Placencia. (Tr. 1274-1275). According to Styers, he called the police at about 4:30p.m. and told a watch commander that he wanted get a statement from an employee and put the employee out of service, but the employee had a knife and was involved in a violence in the workplace incident earlier in the day. (Tr. 1274-1275, ALJD 16: 25-26). The watch commander

asked when the employee would return to the facility. Styers told the watch commander that he would call right back. (Tr. 1276). Styers spoke to Roman and instructed him to get Placencia off the street right away.

Shortly before 5:00p.m., Placencia received a telephone call from Roman. At that time, Placencia was on the Westside of Los Angeles, near the University of California at Los Angeles. (Tr. 486). Roman stated that Placencia needed to report back to ULX. Placencia responded that he could finish his remaining scheduled stops on his way back to the facility, but Roman told him not to do so. (Tr. 230, ALJD 16: 21-22). While there are times during which a DSR misses a scheduled delivery, they are usually instructed that they should make sure to make as many deliveries as possible before the end of their day. In light of this, Placencia found Roman's instruction odd. Nonetheless, Placencia headed back to ULX. (Tr. 231). Roman informed Styers that Placencia would be back at the facility around 5:30p.m. Styers called the police watch commander and stated that Placencia would be back around 5:30p.m. (Tr. 1277-1278).

Los Angeles Police Officer Mario Lagac³² and his partner, Officer Flores reported to ULX after receiving a radio call at 5:30p.m. concerning a business dispute at ULX. (Tr. 376-378, ALJD 16: 28-30). The officers then went to the facility. (Tr. 378). When they arrived, they met Styers. Styers told the officers that two of his employees had engaged in a verbal argument. Styers showed them a copy of the police report Camarena had filed earlier that day. (Tr. 378-379, ALJD 16: 33-35). Styers explained that he wanted them to serve as witnesses while he suspended Placencia. (Tr. 386). The officers asked if the victim was still at the facility. Styers answered no and stated that Camarena was unavailable. (Tr. 405, 1279-1280, ALJD 17: 10). The officers waited for Placencia to return. While they waited, they asked Styers to update them

³² Officer Lagac's testimony is corroborated by the arrest reported prepared by Officer Flores, GC 8.

about Placencia's location several times. Each time the police officers asked, Styers asked Roman to locate Placencia using GPS. (Tr. 1280-1281). At one point, Styers checked on Placencia's location, and he discovered Placencia had stopped in a shopping center near the facility. He informed the police officers of this. (Tr. 1282). The officers told Styers that they would go arrest Placencia. (Tr. 1283, ALJD 16: 39-44). The officers left Respondent's facility at about 6:15p.m. or 6:30p.m. Styers and Licon followed the officers to the shopping center to retrieve Placencia's work truck. (Tr. 1284).

On his way back to ULX, Placencia stopped to take his lunch break in the parking lot of an El Pollo Loco restaurant located about two miles from ULX.³³ (Tr. 231-232, ALJD 16: 23). He arrived there at about 6:00p.m. (Tr. 498). After being in the parking lot for about 20 to 30 minutes, Placencia heard the noise of an intercom and saw a police car to the side of his work truck. (Tr. 244, 433, 487). A Los Angeles Police Department officer told Placencia to get out of the truck. (Tr. 235, 244). After Placencia got out of his truck, the police officer asked him if he had any weapons. He answered no.³⁴ The officer asked if he had a knife, and he answered yes. Placencia told him the knife was in his right side [pocket] and the officer took it. The officer asked if Placencia had threatened anyone with the knife and he answered no. The officer spoke to his partner and then both officers handcuffed Placencia. Placencia, who did not understand what was happening, asked one of the officers to explain what was going on. (Tr. 235, 237). The officer replied that "the company had filed charges against" him. (Tr. 237). The officer stated that he did not want to arrest Placencia, but that "they" were pressing charges [against Placencia].

³³ Placencia testified that DSRs were supposed to take their lunch break between their fourth and sixth hours of work. He took his lunch break on the way back to the facility to avoid missing his lunch break and avoid discipline for doing so. (Tr. 231-232.)

³⁴ Placencia did not consider the knife a weapon because it was an item he used for work every day. (Tr. 240-241).

When Styers arrived at the shopping center, the officers asked if the person who had witnessed the knife incident was available. Styers understood that referred to Roman. According to Styers, he answered said yes and called Roman on his cell phone to ask him to come to the shopping center. (Tr. 1285-1286). Roman, however, testified that Director of Operations Mike Wattier received a phone call and then told Roman that the police needed him to identify Placencia. Wattier and Roman then, together, went to the shopping center at about 6:00p.m. (Tr. 1171-1172, ALJD 16:45-17:2)

Placencia saw four of Respondent's managers/supervisors in the parking lot: Vice President of Operations Neal Smith, Mike Wattier, Styers, and Licon. (Tr. 236, 1250). Placencia also saw Roman approach one of the police officers (Tr. 239). One of the police officers asked Roman to identify Placencia. Roman saw Placencia and identified him. An officer then showed Roman a knife and asked if that was the knife Placencia had earlier in the day. Roman said yes. (Tr. 1173-1174). The officers then took Placencia into their car and took him to jail. (Tr. 239-240). Styers drove Placencia's work truck back to ULX. Roman and Licon also returned to the facility. (Tr. 1175-1176).

Camarena was not present in the parking lot during Placencia's arrest. (Tr. 240, 390). When Officer Legac asked Styers about the location of the 'victim', Styers responded that he had already gone home for the day and could not be contacted, because he lived out of town, in Chula Vista. (ALJD 17:9-11)

Placencia was booked, fingerprinted, and spent the night in jail. He was released on bail the next day. (Tr. 243-244, ALJD 17: 6-7). Officer Lagac testified that absent someone having summoning the police to Respondent's facility, Placencia would not have been arrested that day.

(Tr. 437). The charge against Placencia was first reduced from a felony to a misdemeanor and then dismissed entirely. (Tr. 263-264, ALJD 17: 38).

O. Respondent Suspended Placencia on October 7, 2014

As the police officers drove Placencia to jail, one of them told Placencia, "Don't return back to work tomorrow if you bail out. Your supervisor said you're suspended." The officer explained that Styers told him to inform Placencia of that fact. (Tr. 246, ALJD 17: 5-6).

Since he was told he had been suspended, Placencia did not report for work once he was released from jail. After his release, he spoke to Huner. Huner asked Placencia to write his own statement about what occurred in the break room between him and Camarena. Huner also asked Placencia to collect witness statements. (Tr. 246-247, ALJD 17: 14-16). Placencia contacted Cabrera, Navarro, and Martinez to ask them to prepare statements concerning what occurred on October 7, 2014 in the break room. (Tr. 250, ALJD 17: 16-17). Placencia did not tell them what to write. (Tr. 251). Cabrera, Navarro, and Martinez each prepared statements in response to Placencia's request. Each of these statements corroborate Placencia's version of the incident with Camarena. (Tr. 250-251, 545-546, 663-664, CP1, CP2, CP3).

Styers prepared an out of service message concerning Placencia on October 8, 2014. (Tr. 1291). That out of service message states that the reason for taking Placencia out of service is that he made "criminal threats in the work place." (R19).

Hinds also reported his findings to Huner on October 8, 2014. (Tr. 1487, R27). However, Hinds prepared, and sent to Huner, several versions of his report because of errors and inaccuracies it contained. (Tr. 1487). Even after Hinds corrected his first report, Huner called Hinds and asked him to further clarify the report because Huner believed it contained mistakes. (Tr. 1488). Huner also asked Roman to clarify his written statement (Tr. 1496, R12), spoke to

and received written statements Martinez, Navarro and Cabrera (Tr. 1498, CP1, CP2, CP3).

Huner also received Placencia's statements concerning his interactions with Camarena on October 6 and October 7, 2014: (Tr. 1494, GC6, GC7)

P. Respondent Terminated Placencia on October 15, 2014

Huner made the decision to terminate Placencia. He terminated Placencia because he allegedly violated Respondent's no threats or violence in the workplace policy.³⁵ While Huner noticed and considered the fact that Navarro, Cabrera, and Martinez's statements differed from Roman's statement, Huner decided that Placencia had threatened Camarena and should be terminated. (Tr. 1505, 1543). Huner decided to discredit the accounts of Navarro, Cabrera, and Martinez because they were nearly identical in detail. He concluded that they had been dishonest in their statements. While dishonesty or falsification is a "cardinal sin," Huner admitted that Navarro, Cabrera, and Martinez were not disciplined for dishonesty. (Tr. 1472, 1548, 1550-1551, ALJD 17: 33-36). Huner testified that he, instead, credited Roman's version of events because he had known Roman for several years, and Huner had never known him to be dishonest. (Tr. 1553-1554).

On October 15, 2014, Huner spoke with Placencia by telephone. Styers was also present during the call. Huner informed Placencia that he was terminated. (Tr. 1508).

After Placencia's termination, Styers completed an employee separation checklist as part of the termination-related documentation. (Tr. 1302, 1304, GC 11) In Placencia's separation

³⁵ R31 purports to be a compilation of 13 employees who were terminated for the same reason as Placencia. Of the 13, none concern a single incident between an employee and a non-employee labor consultant. Of the 13, all but 5 involve *actual physical contact*. As for the remainder: One threat was towards a fellow employee and a second similar incident within the first 6 months of employment (Demeatsha Smith); another was extreme cruelty towards another employee, with a physical dimension (Ray Castillo); repeated and specific threats of violence to several fellow workers within the first year of employment (Mario Martinez); pattern of aggressive and threatening conduct towards fellow employees within first year of employment (Joseph Mellon); and reports of an inappropriate comment of a sexual nature and a bizarre threat to murder a fellow worker sent via text message (Abidah "Hector" Flores.).

checklist, Styers indicated that Placencia did not work well with customers and other people. During his testimony, Styers claimed that Placencia did not get along with others, but he was unable to give any specific examples of anyone Placencia did not get along with. (Tr. 1305). In the same document Styers indicated that Placencia had not had any major or repeated disciplinary problems during his employment. (GC 11).

III. Argument

A. Standard of Review

The Board has long granted substantial deference to the credibility determinations made by Administrative Law Judges, as reflected in the Board's established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the judge was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). A careful review of the record evidence illustrates that there is no such basis for reversing ALJ Laws' findings. *Kag-West*, 362 NLRB No. 121, fn. 1 (June 16, 2015). The Board should, therefore, rely upon the credibility resolutions reached by ALJ Laws after her careful consideration of the appropriate factors, including the witnesses' demeanor.

Additionally, ALJ Laws appropriately drew relevant inferences as part of her consideration of all of the record evidence, such as whether a witness was a current employee of Respondent testifying in favor of Respondent, or against Respondent's interests. It is well established that testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978);

Georgia Rug Mill, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

ALJ Laws correctly weighted the reliability of current employees of Respondent who testified for the General Counsel and found them particularly reliable.

B. ALJ Laws Correctly Found That Respondent Committed Several Independent Violations of Section 8(a)(1) of the Act

“It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed. *American Tissue Corp.*, 336 NLRB 435, 441 (2001). The relevant inquiry is whether, under all the circumstances, the employer’s conduct reasonably tended to restrain, coerce, or interfere with employees’ rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). The Board has held that an implied threat of physical harm constitutes a violation of § 8(a)(1). *North Hills Office Services, Inc.* 344 NLRB 1083 (2005), *Green Fleet Sys., LLC*, JD(SF)-16-15, 2015 WL 1619964 (Apr. 9, 2015), adopted by the Board on Aug. 18, 2015, 2015 WL 49323. Conduct which only occurred on one occasion is not necessarily *de minimis*. See *Regency at the Rodeway Inn*, 255 NLRB 961, 961-962 (1981); *Golub Corp.* 338 NLRB 515, 516, fn. 13 (2002).

i. Respondent’s September 15, 2014 Prohibition of Union Insignia was a Violation of Section 8(a)(1) and was not de minimis

It is well established that Section 7 of the Act protects employees’ right to wear union insignia, including buttons, while at work. This right is balanced against employers’ right to maintain order, productivity, and discipline. The Board has struck a balance by permitting employers to prohibit employees from wearing union insignia where the employer proves that “special circumstances” exist. *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801-803 797-798;

(1945) [citations omitted]. The burden of establishing the existence of any such special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378, 379 (2004).

It is uncontested that on about September 15, 2014, Styers told Placencia to remove his lanyard, which bore the name of Teamsters Local 63. Immediately thereafter, when Placencia went to Human Resources representative Licon to protest the unlawful restriction communicated by Styers, Licon told Placencia that he could not wear the union lanyard, but he could wear a union pin. Respondent offered no evidence showing any special circumstances which would justify a complete ban, or even a limited ban, on employee use of union insignia, including union-logo lanyards, in the workplace.

Respondent argues that even if this conduct is deemed to violate the Act, it should be disregarded as de minimis because the statements were not repeated, and because Placencia continued to wear his Union lanyard despite the prohibitions communicated to him by Styers and Licon. Contrary to Respondent's arguments, however, this conduct constituted a violation of the Act and should not be considered de minimis.

Respondent presented no evidence that it made any effort to disavow these unlawful statements, which were made by Respondent supervisors in high level positions at ULX. Furthermore, Placencia was terminated about three weeks later, so he wasn't able to wear his lanyard for long despite the prohibition.

Finally, ALJ Laws correctly concluded that, given the context within which this prohibition was communicated – amidst other violations of the Act, and during an organizing campaign, this conduct should not be viewed as de minimis, but as a violation of Section 8(a)(1).

ii. Styers Threatened Placencia with Unspecified Reprisals on or about September 15, 2014

In assessing whether an ambiguous remark by a supervisor to an employee constitutes a threat, the appropriate test is an objective one which asks whether, considering the totality of the circumstances, the remark can reasonably be interpreted by the employee as a threat. *Smithers Tire*, 308 NLRB 72 (1992). Regardless of the intent of the speaker or the effect on the listener, the inquiry under Sec. 8(a)(1) examines whether the threat can reasonably be construed as threatening, and whether the employer's actions would tend to coerce a reasonable employee. In *Leather Center, Inc.*, 308 NLRB 16 (1992), the Board upheld an ALJ's finding that a supervisor violated § 8(a)(1) when he told an employee that he knew she was talking to other employees about a union and she should be careful. The ALJ found that "[s]uch remarks constitute a veiled threat of possible repercussions against [the employee] because of her suspected involvement with the Union. *Id.* at 27. In *F.W. Woolworth Co.*, 310 NLRB 1197 (1993), the Board upheld an ALJ's finding that a supervisor violated § 8(a)(1) of the Act when she told an employee "If they think I've been a bitch in the past, they can just wait.

On about September 15, 2014, when Placencia went to Licon's office to discuss the fact that Styers had just instructed him to remove his union lanyard, Styers followed him there and demanded to know what Placencia and Licon were talking about. When Placencia told Styers that the drama surrounding the union campaign was unnecessary, Styers responded by telling Placencia, ominously, "you haven't seen nothing yet. Placencia, understanding this statement as a threat asked Styers if he was going to fire him, but Styers didn't bother to respond.

Even though Styers did not specify what action he or Respondent would take, it is clear from the context of their conversation that Styers' remark amounted to a veiled threat of repercussions against Placencia resulting from the employees' efforts to organize a union.

ALJ Laws correctly concluded, considering the totality of the circumstances, that Styers made this statement to Placencia, and that it constituted a threat. As noted by ALJ Laws, Styers was called as a witness by Respondent, but offered no testimony about anything that was said after what happened after Placencia's comment about the 'unnecessary drama.' Styers had clearly expressed to Placencia his hostility towards the idea of union representation at ULX, when Placencia was first hired by Respondent. At that point in time, as part of Placencia's new employee orientation, Styers, admittedly, in the context of showing Placencia a video depicting the closure of a unionized facility, advised Placencia that Respondent was union-free, and also acknowledged that it was serious about remaining that way. Styers also admitted sharing with Placencia the reasons he didn't like unions, by making reference to "all kinds of different things that go on in that type of environment," specifically mentioning "thuggery." ALJ Laws also concluded³⁶ that Styers also advised Placencia, during his new employee orientation, that a driver named "Chucky" no longer worked for the Respondent because of his support for the Union.

iii. Camarena, an Agent of Respondent, Implicitly Threatened Placencia with Physical Harm on the ULX Dock on the evening of October 6, 2014

Under Section 2(13) of the Act, not only actual authority, but apparent authority is sufficient to make a person responsible for the conduct of another, without regard to whether the

³⁶ ALJ Laws correctly resolved this credibility dispute by drawing an inference about the fact that another witness to the conversation, driver-trainer Ramsay Robles was presented by Respondent as a witness, but was not asked about this conversation. (ALJD 21: 2-5)

specific acts performed were actually authorized or subsequently ratified. In determining whether an individual has apparent authority, the Board applies common law principles, as set forth, for example in *Mastec North America, Inc.*, 356 NLRB No. 110, slip op. at pp. 1–2 (2011):

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. [Citations and internal punctuation omitted.]

The Board has held that labor consultants are agents of an employer. See, e.g. *Blankenship & Associates*, 306 NLRB 994, 1000 (1992), enf'd. 999 F.2d 248 (7th Cir. 1993). This is based on the fact that Respondent placed them in the position of a conduit where employees could reasonably believe that they spoke on behalf of management. *In Re Mike Campbell & Associates, Ltd., Inc.*, 31-CA-25763, 2003 WL 22248697 (Sept. 22, 2003) [citing *Three Sisters Sportswear Co.*, 312 NLRB 853, 864-865 (1993)].

It is undisputed that Camarena and Echanique were contracted to provide labor consulting services at ULX during the weeks leading up to the October 23, 2014 representation election, and that, in this role, they held many group and individual meetings with employees. Camarena admitted that when introduced himself, he identified himself as a representative of Respondent. Respondent's supervisors and managers instructed employees to attend these meetings and were present for some of them. When not conducting group meetings with employees, Echanique and Camarena were present at the facility on a daily basis, with unfettered access Respondent's premises, the use of Respondent's safety training room as their office, and, in the case of Camarena, conducting 'ride-alongs', wherein he rode alongside employees as they operated Respondent's vehicles, as they performed their job duties. Given the explicit representations of Echanique and Camarena when they introduced themselves, and in

light of the unlimited access they had to employees both at the facility and on employees' driving routes, Respondent clearly placed them in a position where employees would reasonably believe that they spoke on behalf of management and reflected company policy. Respondent's actions cloaked Camarena and Echanique with a veil of apparent authority to act on its behalf and, as such, they acted as Respondent's agents.

With respect to Camarena's conduct as alleged in paragraph 9(a) of the Complaint on the evening of October 6, 2014, ALJ Laws carefully considered the credibility and presumed biases of each of those three present, and explained fully why she found supervisor Rosado to be highly credible and apparently disinterested.³⁷ Using Rosado's testimony to resolve any differences in the witnesses' testimony, ALJ Laws concluded that Placencia's undisputed comparison of himself and his co-workers to battered wives was part of his explanation of why they felt they needed union representation. ALJ Laws properly rejected Respondent's attempts to suggest that these statements are evidence of Placencia's emotional instability, and instead concluded that they preceded Camarena's threatening comments.

As ALJ Laws explained, she reached her negative assessment of Camarena's credibility by considering the multiple instances in which he testified disingenuously and evasively³⁸ and contradicted himself when it served his interests to do so, yet he was forced to correct himself when closely questioned about the discrepancies of his testimony and pressed about the manner in which he carries out his union avoidance campaigns for employers including Respondent.³⁹ Furthermore, as ALJ Laws noted, Camarena's credibility was undermined by his clear "tendency to exaggerate and embellish when it served him. Respondent's attempts to assert, almost

³⁷ ALJD 23: 13-34

³⁸ ALJ Laws described Camarena's demeanor as "evasive, slippery, and [having] at times outright dishonest qualities" (ALJD 26: 14-15).

³⁹ ALJD at 24: 4-25: 45.

exclusively through Camarena's testimony that Placencia was "mentally unstable"⁴⁰ are bad enough, but even worse are Respondent's attempts to suggest that this claimed instability resulted in a reasonable fear that he is, or could be, violent or unpredictable.

ALJ Laws also explained why she found Placencia's testimony credible, despite his pro-union bias. She noted that his testimony was credible because, it was clear and forthright, as compared to Camarena's.⁴¹ Importantly, ALJ Laws also noted that the speech and conduct that Placencia described in his testimony about the evening of October 6 was consistent with the speech and conduct that Camarena admitted engaging in on October 7 (when he, inexplicably, pantomimed a scene from 1980's film *Crocodile Dundee*).⁴²

The credited evidence establishes that Camarena's statements about physical violence, which he went so far as to physically act out in front of Placencia, were meant to harass and elicit fear in him, a pro-union employee and leader in the union organizing campaign. As such, ALJ Laws, therefore, correctly concluded that Camarena, acting as an agent of Respondent, threatened Placencia, as alleged in paragraph 9(a) of the Complaint in violation of Section 8(a)(1) of the Act.

C. ALJ Laws Correctly Determined that Respondent's Fabricated "Justification" for Romero's Suspension and Termination Violated Section 8(a)(3)

An employer violates the Act when it discriminates against employees for engaging in Union or other protected concerted activities, and has no other basis for the adverse employment action, or the reasons proffered are pretextual. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662

⁴⁰ See ALJD 26:5-8. As ALJ Laws correctly notes, Camarena's self-serving testimony, which seeks only to, post-hoc justify Respondent's actions, are not based upon any objective evidence, and the record as a whole does not support a conclusion that Placencia had emotional problems.

⁴¹ ALJD 26: 14-15.

⁴² ALJD 26:17-24.

F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel has the initial burden of establishing that antiunion sentiment was a motivating factor in the employer's adverse employment decision. *Id.*

The elements commonly required to support such a showing are employee union activity, employer knowledge of that activity, and antiunion animus by the employer. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003) [internal citation omitted]. Once a prima facie case of discrimination has been established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the union or other protected activity. *Wright Line*, 251 NLRB at 1087. To establish this affirmative defense, the employer cannot simply present a legitimate reason for its action but must persuade "by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993) [internal citation omitted].

ALJ Laws' decision carefully sets forth how she reached the conclusion that Respondent seized upon the minor driving incident that Jaime Romero reported on August 15, 2014, and used it to fabricate a justification for his suspension and termination.⁴³ Respondent admittedly had knowledge Romero's union activity as of at least late 2009. ALJ Laws cited the examples in the record showing Respondent's anti-union animus, dating back to at least 2011, and as recently as the statements made to Placencia, described above.⁴⁴ Additionally, the timing of Romero's termination, which took place just as his organizing efforts were about to culminate in the filing of a representation petition, points inexorably to the conclusion that Romero's union activity was the true motivation for his termination. Thus, as ALJ Laws correctly concluded, the record

⁴³ ALJD 27:24-29:30.

⁴⁴ ALJD 27: 24:28

evidence gives rise to an inference that Romero's union activity was a motivating factor in Respondent's decision to suspend and terminate him.

The ALJ correctly concluded that Respondent's asserted justification was a mere pretext, and therefore, Respondent cannot rebut the inference that Romero's union activity resulted in his suspension and termination. The pretextual nature of Respondent's asserted justification for Romero's suspension and termination is exposed by the manner in which the DriveCam footage was reviewed and used, and the unwarranted scrutiny applied to Romero's conduct, as discussed below.

i. Management's Review of the DriveCam Accident Video was, Itself, Pretextual

Even though it was clear from Plonte's report that no injury had been suffered by any person, or even any damage to any of Respondent's equipment, Respondent's managers went to great lengths to transform a minor incident into an act of alleged misconduct, where no misconduct had actually occurred. This process was set in motion when Director of Operations Wattier received notice of the incident and asked if Romero's report that the other truck had left its lane could be verified. Wattier's inquiry resulted in Regional Safety Manager Don Anderson's (Anderson) painstaking review of the DriveCam footage.

Without speaking to Romero, or even reviewing the written incident report Romero had submitted after returning to ULX, Anderson carefully studied the DriveCam footage. Not surprisingly, Anderson determined that Romero had falsified the report he called in on August 15 by failing to inform Safety Response Coordinator Plonte that he had been distracted by the electronic device he was holding in his left hand, that the second vehicle had, in fact, not left its lane, but, rather, Romero, because he was distracted, had drifted toward the other truck. Based

upon Anderson's review, the conclusion of the report was changed from "non-preventable" to "preventable"

As noted by ALJ Laws, none of the contemporaneous documents suggest that it was Romero who left his lane and struck the other vehicle, yet Anderson so testified. Anderson supported this claim by demonstrating a beeping sound audible at the -7.25 second mark in the DriveCam footage produced for the hearing, which sound, he explained, was emitted by the activation of the lane departure warning system installed in Romero's tractor-trailer. This justification proffered at the hearing was exposed as pretext when Anderson admitted, on cross-examination that he did not have access to the sound portion of the DriveCam footage until approximately a week before the date of the hearing, which was long after Romero's termination.

On the one hand, Respondent offered multiple theories about what type of electronic device Romero was holding in the DriveCam footage, as well as what he was doing with the device, yet never wavered from the conclusion that Romero was distracted by it, whatever it was, and that his failure to report these facts to Plonte amounted to falsification. On the other hand, Romero credibly testified that Plonte did not ask him if he was holding or operating any electronic device, or if he was distracted, and that, in fact, he had not been distracted. ALJ Laws, therefore, appropriately, based upon the credible evidence, as opposed to Respondent's shifting assertions, found that Romero was not distracted and was truthful in his reporting of the incident to Respondent.

As reflected in ALJ Laws' analysis and conclusions, the DriveCam footage is not conclusive. The undisputed facts of Romero's conduct, however, establish that he acted honestly and in compliance with Respondent's policies. He voluntarily activated the system so that it would record the incident, because he didn't know, at that moment, whether the contact between

the trucks had actually resulted in damage to Respondent's vehicle. Then, he continued to follow Respondent's protocol by pulling off the road and inspecting his vehicle. Even after he realized that there was no damage to the vehicle, he continued to follow Respondent's protocol by calling in the incident to line haul and making the report. Respondent asserts that Romero engaged in misconduct by his failure to admit wrongdoing when confronted with 'evidence' of his alleged falsification, but as ALJ Laws correctly concluded, the facts clearly show that he engaged in no misconduct.

D. ALJ Laws Correctly Concluded that Respondent Caused Placencia's Arrest, and did so because of his Union Activities

As ALJ Laws concluded, the preponderance of the credited evidence establishes that Placencia did not threaten Camarena, but, rather, Camarena, as Respondent's agent, and in furtherance of Respondent's goal of union avoidance, concocted a theory that Placencia's passionate pro-union views amounted to mental instability, and falsely accused him of threatening Camarena with his work knife. It was Respondent who began the chain of events which resulted in Placencia's arrest, suspension, and termination. This chain of events began with written statements prepared by Respondent's supervisors and agent; and were followed by the police report Camarena filed with Licon's assistance; Styers' call to the police station asking them to be present when Styers suspended him; Styers' offering a copy of the police report Camarena filed to Officers Legac and Flores when they were dispatched to ULX; and Roman's positive identification before Placencia was taken into custody by the Los Angeles Police Department.

It cannot be denied that the timing of this chain of events is closely tied to Placencia's announcement of his support for the Union and his demonstration that he was not only a definite

pro-union vote, but an outspoken pro-union leader and campaigner, who did not shy away from questioning the anti-union messages communicated by Camarena and Echanique. Coupled with the anti-union animus which had been communicated to Placencia by Respondent's supervisors since he began his employment,⁴⁵ the preponderance of the credible evidence establishes that Placencia's support for the Union was a motivating factor in Respondent's conduct throughout this chain of events. Indeed, there was an escalating pattern in the Section 7 violations Placencia was subjected to in the weeks after the election petition was filed.

i. The Evidence Demonstrates that Labor Consultant Camarena was Acting as an Agent of Respondent

As noted above, the undisputed evidence clearly establishes that Camarena had, if not actual authority, he had apparent authority as an agent of Respondent, as he was permitted to freely roam about ULX, had use of the ULX training safety room as an office, and was empowered to summon DSRs to one-on-one and group meetings with and even to 'ride along' with DSRs as they performed their work. Significantly, he and his colleague introduced themselves as representatives on Con-way who were present to speak on behalf of Con-Way. A reasonable employee would easily understand Camarena to be an agent of Respondent. As reflected in ALJ Laws' analysis, it is clear that Camarena went to great lengths in an attempt to deliver an election loss, the result he was hired to produce.

ii. There is No Credible Evidence Suggesting that Camarena had any Reason to Fear Placencia

As found by ALJ Laws, Camarena's supposed fear of Placencia was not just disingenuous, but entirely fictional. Respondent, nonetheless, seized upon this fiction, as an

⁴⁵ Indeed, Placencia did not heed Styers' 2011 warning to stay away from Romero.

opportunity to accomplish the desired end of union avoidance and even facilitated Camarena's filing of a police report against Placencia. As ALJ Laws concluded, the testimony elicited from Camarena regarding Placencia's supposed mental instability was grossly exaggerated and, ultimately, not worthy of credence. The testimony offered strained credulity and was unsupported by documents or persuasive testimony. As far as the fear that Camarena claimed he experienced at the dispatch window, it defies all logic to suggest that Placencia would or could jump over a 4 foot-high counter, or would be any threat to Camarena's family, who were several counties away. Indeed, Camarena's own actions, which even he could not explain, after the supposed knife threat, undermine his credibility.⁴⁶ Additionally, none of Respondent's other witnesses offered testimony that gave more than a modicum of support to Camarena's illogical and incredible testimony. On the other hand, the weight of the inherently credible testimony from current employees of Respondent who testified on behalf of the General Counsel, as ALJ Laws correctly concluded, easily overcame the self-serving testimony of Camarena and other Respondent witnesses. ALJ Laws clearly explained the sound process she followed in arriving at her decision to discredit the accounts of Roman and Camarena regarding the events of October 7.

Based upon the above, Counsels for the General Counsels urge the Board to uphold ALJ Laws' conclusions, which are well supported by the preponderance of the credited evidence, that Placencia did not threaten Camarena, and that subsequent related actions of Camarena and other supervisor/agents of Respondent were calculated to fabricate a justification for Placencia's termination.

⁴⁶See, e.g. ALJD 31: 28-45.

iii. By Summoning Police to Be Present when Placencia Returned to ULX, Respondent Was the Proximate Cause of Placencia's Arrest

Styers claims that he contacted the Newton Station as a precautionary/safety measure to have an officer present when he put Placencia out of service. It strains credulity that Respondent would have allowed Placencia, a supposedly unstable and dangerous person, to work all day, making multiple pickups and deliveries around Southern California interacting with an unsuspecting public while driving a vehicle bearing the Con-Way logo, yet police presence was needed in order to issue him a suspension document at the workplace. Indeed, when Styers provided a copy of the police report to LAPD officers Legac and Flores, he exposed his true motive – removing an outspoken Union adherent from the workplace. Indeed, had Styers either not contacted Newton Station to request police assistance or not informed them about the threat against Camarena – who had already left ULX and could no longer be said to be ‘in harm’s way, Placencia would not have been arrested, according to the unbiased testimony of Officer Legac.

E. ALJ Laws Correctly Concluded that Placencia's Suspension and Termination for Allegedly Threatening Camarena with a Knife Violated Section 8(a)(3)

As stated above, an employer violates the Act when it discriminates against employees for engaging in union or other protected concerted activities, and has no other basis for the adverse employment action, or the reasons proffered are pretextual. *Wright Line*, supra.

As discussed above, ALJ Laws carefully considered the testimony and written statements provided by Respondent’s witnesses and the General Counsels’ witnesses. After considering many factors relevant to making credibility determinations, ALJ Laws decided that the evidence gleaned from current DSRs called by the General Counsel and disinterested witnesses rang true, while the opposite was true of the evidence cleaned from Respondent’s witnesses. ALJ Laws

clearly explained the process by which she made these determinations, necessary for deciding the allegations concerning Placencia's suspension and termination. Counsels for the General Counsel submit that the weight of the evidence strongly supports her conclusion – that Respondent could not overcome the strong inference that Placencia's arrest, suspension, and termination were motivated by his Union activity because Respondent's articulated non-discriminatory reason was demonstrably false.

IV. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board affirm the decision of ALJ Laws and find that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act as described above and alleged in the Consolidated Complaint, as amended at the hearing.

Dated at Los Angeles, California this 21st day of March, 2016

Respectfully submitted,



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STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** has been submitted by E-filing to the Executive Secretary of the National Labor Relations Board, on March 21, 2016, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of **General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** was served by e-mail, on March 21, 2016, on the following parties:

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