UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL SHIPPING AGENCY, INC. AND MARINE TERMINAL SERVICES, INC., AND TRUCK TECH SERVICES, INC. SINGLE EMPLOYER and INTERNATIONAL SHIPPING AGENCY, INC. AND TRUCK TECH SERVICES, INC. SINGLE EMPLOYER and UNION DE EMPLEADOS DE MUELLES (UDEM), ILA 1901, AFL-CIO	Case : 24-CA-091723 24-CA-104185 12-CA-129846 12-CA-133042 12-CA-135453 12-CA-135704 12-CA-136480 12-CA-142493 12-CA-143597 12-CA-144073

BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL SHIPPING AGENCY, INC. *et als.* and UNION DE EMPLEADOS DE MUELLES (UDEM), ILA 1901, AFL-CIO	Case: 24-CA-091723; 24-CA-104185; 12-CA-129846; 12-CA-133402; 12-CA-135453; 12-CA 135704; 12-CA-136480; 12-CA-142493; 12-CA-143597; 12-CA-144073.

BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

TO THE NATIONAL LABOR RELATIONS BOARD:

COME NOW Respondents through their undersigned counsel and respectfully state and request as follows:

I. STATEMENT OF THE CASE[1]

1. Procedural Events

The present case commenced on October 19, 2012, with the filing of Charge No. 24-CA-091723, by the Union de Empleados de Muelles (UDEM), ILA 1901, AFL-CIO, against Marine Terminal Services, (MTS). In the Charge the Union alleged violations of Sections 8(a)(1) and (3) claiming that MTS discharged its employees to discourage union activities in support of said labor organization. The Charge was amended on three (3) subsequent dates to include International Shipping Agency, Inc. (Intership), as an Employer or Joint Employer; to include a claim under Section 8(a)(5), alleging unilateral cessation of operations without notifying or bargaining with the Union; and allegations that the Employer interrogated the employees about their union activities and support, and threatened them. In neither the Original Charge nor in any of the subsequent amendments did the Charging Party claim that the Employer had engaged in

1 As per Rule 102.46(c)(1), the Statement of the Case would be limited to facts and review of evidence relevant to the questions presented in Respondents' Exceptions.

"illegal subcontracting" or "transfer of work."

On May 2, 2013, Charge No. 24-CA-104188 was filed against Truck Tech Services, (TTS). It alleged violations to Sections 8(a)(1) and (3), claiming that TTS discriminatorily discharged ten (10) employees for their activities, support and cooperation in favor of the Union. This Charge was amended on June 28, 2013 to plead all three respondents as joint employers and to include allegations regarding threats to TTS employees.

On July 31, 2013, Regional Director for then Region 24 issued a Consolidated Complaint and Notice of Hearing regarding Charges No. 24-CA-091723 and 24-CA-104188. A hearing was originally scheduled for October 22, 2013 but postponed and continued for several reasons. On September 10, 2014, Charge No. 12-CA-136480 was filed alleging violations to Sections 8(a)(1) in that purportedly employees were intimidated and threatened using physical violence during a concerted activity and/or protest. On February 26, 2015, a Complaint was issued in that case, among others, and on June 2, 2015, Counsel for the General Counsel requested that the same be consolidated with the Complaint in Cases No. 24-CA-091723 and 24-CA-104188. Over, Respondents' objection the General Counsel's petition was granted, and hearings were held on July 13th through 17th 2015, and September 21st through the 24th, 2015, on the entire Consolidated Complaint of referenced. The ALJ issued his decision on March 30, 2016.

2. The Different Companies

International Shipping Agency, Inc., ('Intership'), is a stevedoring company created in 1961 to provide services to several shipowners and other marine companies. *T. 1317:23-25; 1318;1-7.* This means that Intership loads and unloads its clients' vessels engaged in the maritime domestic and international cargo trade. *T. 622:5-10.*

For decades Intership had entered into and maintained labor contracts with three (3) different

labor organizations representing its employees: Hatchtenders ILA-Local 1902, ILA-Local 1740, representing stevedoring workers, and ILA-Local 1901, representing checkers, paymasters and certain maintenance workers, amongst others. *See Stipulation No. 2, Joint Exhibit 1.*

Intership's main source of income comes from the loading and unloading of cargo from clients' vessels or steamship lines. *T. 1318:19-25; 1319:1-3.* Interships' audited financial statements reveal that more than fifty percent (50%) of its income is generated from two major clients, Trailer Bridge and Sea Star. *T. 1321:16-21.* Also, another client, Mediterranean Shipping Company represented around twenty percent (20%) of Intership's business. *T. 1327:1-18.*

Marine Terminal Services Inc. (MTS), was formed in 1999. The property where it was located was originally bought as an investment. *T. 1533:8-15***.** Later, the opportunity to generate income from body work services to third party businesses equipment was pursued. *T. 1533:16-25; 1534:1-15*.

By the year 2012, MTS was engaged in body work, which is heavy damage refurbishing of chassis, containers, trucks and other heavy equipment for third parties. *T. 1533:16-25; 1535:1-15*. It served clients like Trailer Bridge, Sea Star, JC Penney, and Puerto Rico Supplies among others. *T. 73:9-13.* Because of EPA and U.S. Coast Guard regulations, the heavy repairs or sandblasting to the chassis for example, could not be done inside a water front terminal. *T. 1533: 24-25; 1534;1-4.*

MTS daily operations were managed by Mr. Luis Ruiz, the General Manager. *T. 78;3-9.* MTS closed operations on October 19, 2012. *T. 1535;22-23.*

Truck Tech Services Inc.(TTS): Before becoming TTS, Commonwealth Spring & Equipment Co. of Puerto Rico ("CS&EPR") engaged primarily in the business of truck suspensions. *T. 1173:23; 1174:1-3*. Intership bought all of CS&EPR's assets in 2009. *See*

Joint Exhibit 1, Stipulation of Facts, Item. 40. In 2010 CS&EPR's name was formally changed to Truck Tech Services Inc. ("TTS"). *See Joint Exhibit 1, Stipulation of Facts, Item. 41.* TTS was engaged in the business of providing maintenance and repairs to trucks and heavy equipment with attention to truck and company's fleets. *T. 108: 10-18.* The purpose of Intership investing in TTS was to establish a distinct and separate line of business dedicated to the repair of trucks' and company fleets and other heavy equipment. *T. 1173:23-25; 1174:1-3.* TTS closed its operations on April 26, 2013. *T. 1274:22-25: 1275:1-2.*

3. The Closing of MTS

In 2011, Intership conducted more business than in 2010. See *R. Ex. 54(a), p. 3 of Audited Financial Statements.* At the end of 2011, however, Trailer Bridge –one of the two main Intership clients– filed for bankruptcy. See *R. Ex. 42.* At the time, Trailer Bridge owed Intership $700,000.00, and as a result of the bankruptcy filing, payments to Intership were delayed because approval was required by the Bankruptcy Court. *T. 1321:1–1322:8.* Moreover, Intership's Chief Financial Officer feared that this bankruptcy could very well be converted into liquidation. *T. 1322:9-11.* By mid 2012, Sea Star –the other main Intership client– decided to eliminate one of three vessels coming to Puerto Rico every week. *T. 1322:14-18.* This resulted in the loss of 33% of Sea Star's business. *T. 1534:25–1535:12.*

As a result of the above events, by September 2012 Intership had 212,588 cargo "moves" when by the same time in 2011 it had 226,757. See *R. Ex. 47.* This information is important to CFO Maria Caraballo since most of Intership's income is generated by each cargo move. There was also a reduction in hours worked during the same period. In September 2012, that is,

Intership worked 166,942.50 hours while by the same period in 2011 it had worked 178,377.00 hours. *Id.*

The above was reflected in Intership's Statement of Income in the following manner: by September 2012, Intership had $1,051,113.00 less in Revenues than in the previous year. See *R. Ex. 46*, Column 14, Row 9, "Variance." Similarly by September 2012, Intership had $606,024.00 in Net Income after Taxes – See *R. Ex. 46*, Column 10, last row - while by the same period in 2011 it had had $1,374,629.00 – See *R. Ex. 46*, Column 12, last row. This represented a ***reduction*** as of September 2012 of 56% over the Net Income of the previous year. (*R. Ex. 46*, Column 15, last row). The number of "movements" *T. 1343:15-16*, hours worked, T. 1343:1- 11, revenues, *T. 1339:8-10*, and Net Income up to September 2012, *T. 1339:14-23*, as of September 2012 ***included*** the movements, hours of work and revenues related to Mediterranean Shipping Company (after this "MSC"), which Intership continued working at that time. *T. 1327:15-18.*

By June 2012, Intership became aware that MSC entered into a joint venture with Maersk Line *T. 1322:19-23*; 1323:21 (for date). This meant that MSC's cargo was coming to Puerto Rico on Maersk's vessels that were worked by Horizon Lines: an Intership's competitor. *T. 1323:1-20.* Intership, nevertheless, reviewed an email where MSC stated that it was not going to cancel Intership's contract in case it needed to come back to Intership. *See R. Ex. 43*, p. 2. Similarly, by June 2010 Intership still had many MSC's containers in its facilities and continued performing some work. *T. 1327: 2-8*. Since there had not been any formal cancellation of the contract, Mrs. Caraballo hoped that Intership would be able to continue providing services to MSC. *T. 1327:10-14*. On October 10, 2012, however, MSC sent its last vessel to Intership' facilities to pick-up all of its remaining cargo. See *R. Ex. 44 and 45.*

MSC's last voyage represented "the perfect storm" for CFO Caraballo. Confronted with the

financial difficulties Intership was facing as of September 2012, she predicted that on account of MSC's departure, Intership would have losses the following years and concluded that "we needed to take drastic measures." *T. 1344:10-20*. Mrs. Caraballo –as to whom the record is devoid of any evidence regarding any role in the MTS' election process but has unchallenged evidence that she was not involved in that election process at all *(T. 1375:4–9)*– had been of the opinion that MTS should close operations since at least 2010 because it was bleeding the company. *T.1364:25–1365:9*. Up to that date MTS had survived through "Intership Bank" meaning that Intership lend it the money that it needed to carry on operations. *T.1354:15-24*.

Several measures had been taken to try to improve MTS' numbers. In 2011, to be effective as of December 2010, the $1,895,000 debt MTS had with Intership was financially converted into $895,000 of additional capital investment and the remaining $1,000,000.00 into a long term debt. See *R. Ex. 49(b)*. Converting $895,000.00 to capital investment meant that MTS did not have to pay that amount back to Intership. *T. 1360:11-15*. This conversion in fact erased MTS' account payable to the Intership as of December 2010. See *R. Ex. 50* (Independent Audit Report, p. 2); *T. 1360:16–1361:20*. Mrs. Caraballo, in addition, commissioned an opinion from the auditors regarding the tax effects that a sale or the closing of MTS would have. See *R. Ex. 52(b)*. Mrs. Caraballo also commissioned an appraisal of MTS' real state. See *R. Ex. 51*. The appraisal showed that the value of what she considered the collateral backing Intership's loans was decreasing. *T. 1365:13-24*.

Mrs. Caraballo took this information in 2011 to Mr. David Segarra – Intership's President – and urged him to close MTS. *T. 1365:10-12*. Mr. Segarra asked for time to see if a business opportunity he was working on involving MTS would materialize. *T. 1365:25-1366:6*. As he put it: "I mean I had to. Remember, you know, I run the company, but I don't own it, so, you know, I

had to look and make an effort to see if we could keep it going, okay." *T. 1538:7-9*. The efforts to seek the business opportunity for MTS continued through 2012. *T. 1546:7-15*.

However, while in 2010 MTS' account payable to affiliates had been taken to $0, by December 2011 it reflected an increase of $449,265 meaning that it had continued to take loans. *See R.Ex.*54(c), p. (numbered) 2; *T. 1372:24–1373:1*. Also, in 2012 Mrs. Caraballo commissioned yet another appraisal of MTS' property that again showed that the Real Property (which Caraballo considered the collateral for the loan) continued to lose value. See *R. Ex. 55*. Accordingly, when MSC's last vessel arrived, Ms. Caraballo returned to Mr. Segarra's office and as testified at *T. 1373:5-19*:

> "Like I said earlier, on October 10th, when the last ship from Mediterranean Ships came to our dock, I took my file, the one that I had on the left-hand side of my desk; it had the name in really big letters, and MTS, and I went over to my boss' office, to the president's office, and I said that we needed to take immediate action because the projections that I had said that we were going to lose money; that this pattern of MTS losing money would continue, and MTS would continue to bleed Intership.
>
> And there were really no opportunities for MTS, no new business opportunities. The opportunity that we had had did not go through. And so I couldn't really say, look, MTS is going to make a change, we have this new line of business, or this new company that will come in. So there weren't any new prospects for it."

She continued explaining at *T. 1374:10-19*:

> "Well, I told him that my recommendation was that MTS should close. MTS was a file that was complete, and the decision should be to close it. We had three appraisals that reflected that the value of the property had been decreasing. We had an opinion for -- from our CPA, stating the tax effects of either closing, transferring it, or selling it. Also, we didn't have any new business, and the financial statements also showed that it was not in a good situation.
>
> So it was a complete filed, what we had. The only thing left to do was to make the decision, when are we going to close."

Mr. Segarra agreed, and in his words: "[s]o we had to make a decision. And I think I finally learned there that I had to go back to my core business." *T.1559:10-23*. Ms. Caraballo proceeded

to make the arrangements. *T.1374:10-19*. That was not the only measures undertaken to address Intership's financial difficulties. *T.1398:15-1399:19*. Intership could not have continued operating MTS during these times "[b]ecause it wouldn't have had money, not even to cover its own expenses, and its cash flow was in a difficult situation." *T.1386:13-18*.

In fact, ***just as Mrs. Caraballo had predicted back in October 2012***, Intership had an Operating Lost in 2013 of ***$1,820,196*** and even a bigger one in 2014 of ***$2,922,982***. See *R. Ex. 67* Audited Financial Statements, page (numbered) 3, "Consolidated Statements of Income (Loss) and Retained Earnings."

The above stated facts are supported by uncontested documentary evidence which led the ALJ to rule that the witnesses' "testimonies regarding MTS' and Intership's ongoing losses and poor fiscal performance were credited, and supported by voluminous records and statements." See ALJ's Decision, p. 6:33-35. Moreover, there is absolutely no evidence on record to contradict, and Counsel for the General Counsel did not even attempt to question or discredit the documentary and testimonial evidence regarding the facts that MSC was a client of Intership, the amount of business it represented to Intership, the fact that it gave notice that the last call of its vessels for Intership to service was October 10, 2012 and that this date was in fact the last day Intership worked an MSC vessel. Similarly, the audited financial statements clearly demonstrate that after MSC's last vessel, Intership indeed lost substantial amount of money just as its CFO Caraballo had predicted.

In light of the above, on October 19, 2012, MTS closed its facilities and discharged all its employees. After this, MTS' facility was leased long-term to a completely unrelated party, with an option to buy the property. See *R. Ex. 58.* Also, the MTS' equipment used to conduct its operations was sold. *T. 1529:14–23.* After this date, Intership has not engaged either directly or

indirectly in the business of repairing chassis and containers for profit. *T.1370:16 -19.*

4. The Closing of TTS

Engineer Enrique Sosa was appointed General Manager of TTS in May 2011. *T.143:5-6.* At the time he was appointed, Mr. David Segarra gave him the assignment of trying to get the Company to at least a break-even point. *T.1172:24-1173:5*. The evidence shows that Mr. Sosa took his assignment seriously. From 2011 to 2012, that is, he reduced TTS Operating Expenses by $339,058.00 for a company whose total revenues that year totaled $1,023,268.00. See *R. Ex. 26*, p. (numbered) 4. Despite these extraordinary measures, the Company continued losing money. *Id.* During these times, TTS survived with loans from Intership. *T. 1175:23–1176:6*. Mr. Segarra, however, was very persistent in asking for financial results. As Mr. Segarra testified "I was always on his back, and . . . I started to feel sorry because I was really putting him up against the wall all the time" *T. 1549:25–1550:3*; "I kept going on him: Are you getting new business? Do you think we're going to go somewhere with this business?" *T. 1566:15-16*. During their conversations, Segarra "would mention many times that I [Sosa] should . . . stop asking for money, because they needed that money over there." *T. 1203:8-13*.

In 2013, TTS was impacted by the loss of several clients including the US Postal Service. *T. 1204:10-1205:5*. On April 8, 2013, the US Postal Service informed TTS in writing that it would "stop using Truck Tech as a vehicle maintenance service provider" because purportedly a TTS' employee was seen driving a USPS vehicle "on a busy avenue at highway speed." See *R. Ex. 36*. Mr. Sosa expeditiously tried to reverse this decision, giving the Company's version of the events and requesting a meeting to discuss the situation. See *R. Ex. 37; T. 1209:18– 1210: 12*. His efforts, however, were unsuccessful. *Id.*

By this time, yet another major client of Intership – Tropical Shipping – had informed

Intership that it was terminating its stevedoring contract by April 14, 2013. See *R. Ex. 62*. Mr. Sosa was summoned to a meeting on April 15, 2013 to express his position as to what to do with TTS. *T. 1216:1-7*. He assessed the situation as difficult since "we would not be able to get out of the economic situation that we had in which we were losing money...we were not only losing money, we were losing clients, and we were not getting any new clients." *T. 1216:17-22*. Upon being called to state his position, he finally concluded "this cannot hold on any longer and I [thought] we should close." T. 1217:13-14. TTS closed on April 26, 2013.

5. The alleged acts of physical violence

As to the alleged acts of physical violence, there are two versions of the incident. According to the employee, Mr. Rene Concepcion testified, on July 24, 2014 that during a demonstration against Intership, he was talking in the street with a truck driver who was inside his truck. *T. 449:16-450:22*. While he was doing this, according to his version, Mrs. Caraballo came and tried to get in-between him and the truck driver to talk to the latter. He testified that in doing this, Mrs. Caraballo pushed him with her body and then with her arm. *Id*. According to Mr. Concepcion, after this, Mr. Enrique Sosa pulled him by the arm while they were talking, but did not move him. *T. 450:23- 451:5*. The very same employee admits that he did not file a complaint with the Police, that the demonstration continued and that he did not feel intimidated. *T. 451:12-24*.

II. QUESTIONS PRESENTED

The following are the questions presented by Respondents' exceptions:

A. Whether substantial evidence on the record of this case supports the ALJ's finding that Respondents' subcontracted MTS' work or that they redistributed Intership's chassis upkeep functions to Frank's Chassis? (See Exception A of Respondents' Exceptions to the ALJ's Decision);

B. Did the ALJ err in finding that MTS' closure is not a "closing of a business" or a "going out of a business" under *First National Maintenance* by centering his analysis in the Parent Company's core business rather than in the dismantled line of business? Does the analysis followed by the ALJ in this case in effect obliterate the right of any employer to terminate ***part*** of its business as recognized by applicable legal precedent? (See Exception B of Respondents' Exceptions to the ALJ's Decision);

C. In the alternative, did the ALJ err in finding on the evidence of this case that the Counsel for the General Counsel made a *prima facie* showing under *Dubuque Packing* by concluding that the closure of MTS was "unaccompanied by a basic change in the nature of the employer's operation" and in the "scope and direction of the enterprise" despite the weight of the evidence to the contrary? (See Exception C of Respondents' Exception to the ALJ's Decision);

D. In any case, did the ALJ err in assuming, without resolving, that any obligation to bargain with the Union in MTS had arisen? (See Exception D of Respondents' Exception to the ALJ's Decision);

E. Did the ALJ err in assuming, without resolving, that the Union did not waive any right to bargain regarding MTS? (See Exception E of Respondents' Exception to the ALJ's Decision);

F. Did the ALJ err in finding that the closing of MTS violated 8(a)(3) despite *Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965)*? (See Exception F of Respondents' Exception to the ALJ's Decision);

G. In the alternative, did the ALJ err in finding that Intership would not have closed MTS operation absent protected activities? Is that finding supported by substantial evidence in the record? (See Exception G of Respondents' Exception to the ALJ's Decision).

H. Whether substantial evidence on the record of this case supports the ALJ's finding that TTS's

employees engaged in protected activity or "began considering unionizing," and that the Employer had any knowledge of the same? Did the ALJ err in finding given the evidence in this case that the Counsel for the General Counsel met his ***prima facie*** showing under *Wright Line*? (See Exception H of Respondents' Exceptions to the ALJ's Decision);

I. Whether substantial evidence on the record of this case supports the ALJ's finding that the TTS' closing is not a partial closing because Respondents subcontracted TTS' work to Tribo Tech? (See Exception I of Respondents' Exceptions to the Administrative Law Judge's Decision);

J. In the alternative, did the ALJ err in finding that Respondents would not have closed TTS operation absent protected activities? Is that finding supported by substantial evidence in the record? (See Exception J of Respondents' Exception to the ALJ's Decision).

K. Whether the version of the events credited by the ALJ regarding the alleged acts of physical violence raises to the level of interference with protected rights under the Act in light of the totality of the circumstances and the admissions on record? (See Exception K of Respondents' Exceptions to the ALJ's Decision).

III. ARGUMENT

A. There is no evidence in the record of this case, substantial or otherwise, to support the ALJ's findings that Respondents subcontracted MTS' work or that they redistributed Intership's chassis upkeep functions to Frank's Chassis. (Exception A of Respondents' Exceptions to the ALJ's Decision).[2]

The ALJ in his decision after describing the services MTS performed for Intership stated that

[2] **SUMMARY OF THE ARGUMENT**: *The ALJ found that Respondents subcontracted MTS' work, that they did it in such a way that "it replaced MTS' workers with Frank's Chassis' workers, who performed the same type of mechanical work on the same chassis under presumably similar conditions" and that the main thing it achieved was "redistributed Intership's chassis upkeep functions from MTS to another entity," among others in the same nature. The ALJ made these findings without any reference to the evidence in the record to support them or a discussion of the reasoning he followed in coming to these conclusions. These findings are not only unsupported by the evidentiary record but also fail to take into consideration the evidence in the record that detracts from them as well as his own contradictory findings.*

"Frank's Chassis & Repair now perform these services." ALJ's Decision, p. 4:6. This rather innocuous statement then turned into a subcontracting finding. For example, the ALJ states at p. 19:10-12 that "some portions of Intership's ***subcontract*** support *Fibreboard* handling because ***it replaced MTS' workers with Frank's Chassis' workers, who performed the same type of mechanical work on the same chassis under presumably similar conditions*** . . .." (Emphasis ours). Similarly, at page 19:4-5, the ALJ writes that "the main thing that the ***subcontract*** achieved was that it redistributed ***Intership's chassis upkeep functions*** from MTS to another entity (i.e. Frank's Chassis)." (Emphasis ours). In fact, the ALJ entitled a whole section of his decision as "MTS Subcontract" - ALJ's Decision p. 21:35 – and ascribed to Respondents having raised an affirmative defense that "it ***subcontracted MTS' work*** for financial reasons." ALJ's Decision, p. 23:25-26.

It is difficult, if not impossible, to ascertain the evidence on which the ALJ rests these conclusions because in none of the above instances he makes any reference whatsoever to either the Transcript or any evidence on the record. While no reference is made to the evidence in support or to the reasoning followed, it is quite obvious that these conclusions are rife in the ALJ's entire decision: i.e. "[t]he MTS subcontract did not significantly change the scope and direction of Intership's operation" ALJ's Decision p. 19:29-30.

In the same vein, the ALJ also concluded that MTS's functions were somehow intertwined with the chassis upkeep work performed at Intership: i.e. "MTS' main role was to support Intership's stevedoring services business ***by servicing its chassis***" - ALJ's Decision, p. 18:40-41 emphasis ours – and "the main thing that the subcontract achieved was that it redistributed ***Intership's chassis upkeep functions*** from MTS to another entity (i.e. Frank's Chassis). ALJ's Decision, p. 19:4-5. It is again impossible to ascertain the evidence on which the ALJ rests this

conclusion because in none of the above instances he makes any reference whatsoever to either the Transcript or any evidence on the record. While no reference is made to the evidence in support or to the reasoning followed, it is quite obvious that these conclusions permeated the ALJ's entire decision.

Respondents submit that not only none of these conclusions are supported by the record, but also that they in fact fail to take into consideration the record as a whole including the evidence that detracts from those findings and some of the ALJ's other determinations.

The uncontroverted and unchallenged evidence establishes the following regarding MTS' operation:[3]: ***1)*** MTS was engaged in the refurbishing of containers and chassis. ALJ's Decision, p. 3:4-5; ***2)*** MTS operated in a separate facility, different from Intership's, which consisted of a building with 14 bays; *T. 1091:6-1093:3*; see also, *R. Ex. 7(a) and (b)* (image of MTS' facilities); ***3)*** MTS employed mechanics, welders and painters; ALJ's Decision, p. 3:5; ***4)*** MTS operated with its own equipment and machinery, which included sand-blasting booths, spray-paint machines and welding equipment and provided its employees with the tools needed for their functions; *T.1091:7-13; 281:15-20.* ***5)*** MTS had its own Employer's Social Security Number; See *R. Ex. 48(b)* (MTS' Tax Returns identifying the Employer Identification Number as "66-0593601", compare same with *R. Ex. 60* (Intership's Tax Returns identifying "Employer Identification Number as "66-0234014"); ***6)*** MTS had its own (and separate) accounting books and prepared its own (and separate) Financial Statements; See Audited Financial Statements enclosed with each MTS' Income Tax Returns, *R. Ex. 48, 50, 54*; ***7)*** MTS filed its own (and separate) Income Tax Returns and Corporate Statutory Reports; See *R. Ex. 48* (MTS' Tax

3 Respondents submit that the above-referenced list with respect to MTS, does not in any way challenge the determination that MTS and Intership are a single or joint employer, an allegation that at the outset of the proceedings Respondents stated for the record that they were not going to challenge. Instead, these facts are listed herein because they establish that MTS was a distinct and severable operation; or put in other words, a separate identifiable operation.

Returns); compare with *R. Ex. 60* (Intership's Tax Returns); ***8)*** MTS had its own bank account; See *GC Ex. 8* and compare with *GC Ex. 16*; ***9)*** Besides Intership, MTS provided services to other clients; *T. 73:9-13*; see also, ALJ's Decision p. 3, n. 11; ***10)*** MTS had a full-time salesperson – Mr. Hugo Adames - whose full time regular job was to look for outside business for MTS; *T. 1124:23-1126:9*; ***11)*** For the services it rendered, MTS invoiced its clients; that was also the case when Intership sent chassis for refurbishing to MTS, MTS sent Intership an invoice for the services and Intership paid those invoices to MTS; *T. 1517:4-12*; ***12)*** The monies MTS received in payment of its services were registered in MTS accounting books and Financial Statements as MTS' Income and used to defray MTS' operating expenses; See *R. Ex. 48(a)* Statement of Loss and Deficit of Financial Statement, p. 3; ***13)*** When MTS needed money to cover its expenses, Intership would lend it money, and these transactions were recorded in MTS's accounting books and financial statements as an account payable to affiliates and in Intership's accounting books and financial statements as an account receivable from MTS. *T. 1354:15-1355:12*; see also for example: *R. Ex. 48(a)*, Financial Statements, Balance Sheet p. 2 (Accounts payable affiliates) and notes at p. 7; ***14)*** MTS closed on October 19, 2012, at which time it terminated all its employees. See *Joint Ex. 1*, ¶*36*. It leased long-term its facilities, and disassembled and sold the equipment and machinery used in its operations. ALJ's Decision, p. 19:15-17; ***15)*** The closure of MTS represented the end of the business venture into repairing chassis for outside clients. See ALJ's Decision p. 19:19-20; p. 19:43-44; ***16)*** Intership does not repair chassis for outside clients; *T. 1516:5-18*; ***17)*** Intership cannot do in its facility the type of refurbishing work performed by MTS because of E.P.A.'s regulations. See ALJ's Decision, p. 3, n.10.

The above list includes ***only*** facts either found proven by the ALJ, or established by the unchallenged testimony of witnesses or by the admitted documentary evidence. These facts

establish conclusively that, whether or not MTS and Intership were single or joint employers, MTS was a distinct or separate identifiable operation. This is illustrated by the undeniable truth that – pursuant to the above - ***prior*** to October 19, 2012 an owner of chassis or containers in need of refurbishing in Puerto Rico could go to MTS for these type of services without in the least relating with Intership in whatever manner. Conversely, it is also an undeniable truth that ***after*** October 19, 2012, the market of Puerto Rico has one less provider of the services of refurbishing of chassis and containers where an owner of these type of equipment could go to get these type of services.

Accordingly, in the context of this case, the ALJ's findings – which permeated his entire decision – that "Intership's ***subcontract*** . . . ***replaced MTS' workers with Frank's Chassis' workers, who performed the same type of mechanical work on the same chassis under presumably similar conditions***" or that Intership needed to show how much money it saved "***by subcontracting out its chassis repair operation to Frank's Chassis***" or even characterizing Respondents' defense as alleging that "it ***subcontracted MTS' work*** for financial reasons" are devoid of any support on the record. For these finding to be within the realm of possibilities in this case, there needed to be evidence to support the conclusions that Intership still performs the same type of repairs on the same chassis and containers it used to (for owners of these type of equipment) but that now instead of using MTS, it has contracted Frank's Chassis to do so.

Not only the record in this case is devoid of any evidence capable of supporting the ALJ's referenced findings, but they are contrary to other findings he made which are supported by the evidence: i.e. the closure of MTS represented the end of the business venture into repairing chassis for outside clients. The ALJ's findings also distract from the unchallenged evidence in the record that Intership does not repair chassis for outside clients.

To be sure the record in this case contains references to Frank's Chassis. This testimony was given by Mr. Jose Garcia – a witness who the ALJ found credible – when explaining what Intership does as part of its stevedoring business and how it deals with the chassis. As to this latter subject, Mr. Garcia testified at *T. 891:19-893:1* that he groups repairs into three categories: rodability[4], medium-to-heavy damages, and refurbishing or rebuild[5], that since he had been working at Intership (twelve and a half year "and before") rodability had been the only repairs done at the terminal and the other two had always been done outside, and that no one does sand blasting and spray painting (refurbishing work) at the docks. As to Frank's Chassis he testified at *T. 893:22-894:23* that he has sent it from 15-20 "mission essential" bomb carts during the last six months because Intership only has 30 of them.

Pursuant to Mr. Garcia testimony, what Intership has historically done at its facilities and with its own employees as part of its stevedoring services is to provide "rodability" repairs for its chassis. Intership did this while MTS was in operation and continues to do so after MTS closed. The refurbishing of damaged (unusable) chassis is the quintessential capital investment decision. In other words, while continue providing stevedoring services the Company can decide whether to refurbish its damaged equipment or not and when to do it. It can decide not to refurbish, sell the damaged equipment, buy new equipment or delay that type of work. In fact, Mr. Garcia also testified that given Intership's decreasing volume of business[6] he was stacking chassis to use them or repair them "as need be fit". *T. 893:6-21*. Since it is unquestionable that during the time chassis were being stacked, Intership continued to provide stevedoring services it is quite evident

[4] Although the word transcribed in the Transcript is "rollability," the word he used during his testimony was "rodability".

[5] This is the type of work for which MTS was used. *T.954:17-21.*

6 The transcript is again inaccurate in this section by transcribing "lots of" instead of "lost of" as he testified and the context of the declaration suggest. See for example *T. 956:16-17* where it is confirmed that Mr. Garcia had testified as to lost of clients.

that refurbishing chassis is not an essential part of these services. Similarly, the fact that Intership had been in the stevedoring business since 1961, decades before MTS even came into existence, further proves that refurbishing chassis is not part and parcel of that business.

As Mr. Garcia's testimony establishes, the chassis that Intership is sending now for repairs does not relate to the chassis upkeep functions that Intership performs in its terminal because Intership has never done refurbishing work in the terminal. In any case, is beyond any dispute that the Complaints in this case do not make any allegations regarding Intership sending its own unit work to a subcontractor so ultimately anything regarding that issue is completely beyond the scope of these proceedings. Accordingly, the ALJ's finding that "the main thing that the subcontract achieved was that it redistributed ***Intership's chassis upkeep function*** from MTS to another entity (i.e. Frank's Chassis)" - ALJ's Decision, p. 19:4-5, emphasis ours - is completely unsupported by the record and in fact contrary to the evidence presented.

Moreover, Mr. Garcia's testimony further establishes that the work it is sending to Frank's Chassis does not even correspond to the amount it sent to MTS. As found by the ALJ, pursuant to the evidence, Intership sent from 8 to 10 chassis every week to MTS. ALJ's Decision, p. 4, n. 13. As testified by Mr. Garcia he has sent from 15-20 "mission essential" bomb-carts to Frank's Chassis over six-months. As important as the above is the fact that it is quite evident from Mr. Garcia's testimony that the equipment he is sending to Frank's Chassis is Intership's, and not those of other companies.

Therefore, there is absolutely no evidence in this case to support a finding that Respondent's subcontracted the MTS' operation after it closed. In other words, there is no evidence in this case – substantial or otherwise – to establish that after the closing of MTS Respondents continued running MTS' operation through any other entity or contractor. That is what subcontracting

means.

In light of the above Respondents submit that the ALJ's erred in finding that Respondents subcontracted MTS' work or that it redistributed Intership's chassis upkeep functions.

B. [7] The Honorable ALJ erred in finding that MTS' closure is not a "closing of a business" or a "going out of a business" under *First National Maintenance.* Viewed pursuant to the correct analysis, the closure of MTS is a privileged decision under *First National Maintenance* so there is no 8(a)(5) violation regarding decisional bargaining. (Exception B of Respondents' Exceptions to the Administrative Law Judge's Decision)[8].

In distinguishing the present case from *First National Maintenance v. NLRB, 452 U.S. 666 (1981)* the ALJ stated the following:

> "As a threshold matter, Intership's decision to close MTS was not a *First National Maintenance* decision. MTS was not a separate and distinct entity (i.e. it was just a cog within Respondent's single employer enterprise). Moreover, MTS' main role was to support Intership's stevedoring business by servicing its chassis. ***Intership's primary business, stevedoring, was effectively unchanged by the subcontract***. The elimination of MTS' supporting function precludes First Maintenance treatment, inasmuch as it is not the kind of "partial closing," or going out of business, at stake in *First National Maintenance*. ***Or put another way, Intership never stopped stevedoring, or performing chassis upkeep; the main thing that the subcontract achieved was that it redistributed Intership's chassis upkeep function from MTS to another entity (i.e. Frank Chassis)***." Emphasis ours, ALJ's Decision P. 18:38-19:5.

Of course, whether MTS was a "cog" (subsidiary or subordinate) of Intership is ultimately of little consequence to the question of whether there was a partial closing or a going out of part of a business. That is so because it is well settled that an employer can decide to close or get out of one of many work locations of the same Employer – *First National Maintenance, supra* – or

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7 Exception B and C relates only to the decisional bargaining aspect of the 8(a)(5) alleged violation. Similarly, for purposes of discussing those exceptions, Respondents assume that the general obligation to bargain with the Union had arisen or that it has not been waived. Those premises are questioned in Exceptions D and E.

8 **SUMMARY OF THE ARGUMENT:** *The ALJ erred when, in determining if the closure of MTS amounted to a "closing of a business" or a "going out of a business" under First National Maintenance, he centered his analysis on whether the Parent Company's core business continued as before. The proper analysis should rather be on the business or operation that is claimed to have been dismantled, discontinued or diminished because otherwise an employer's right to terminate* ***part*** *of its business as recognized by Supreme Court precedent would be obliterated. Viewed pursuant to the correct analysis, the evidence in this case shows that Respondents decided to completely step out of the business of repairing chassis and container for profit which is a quintessential management prerogative akin to whether to do business at all over which there is no decisional bargaining obligation.*

even a department in of two integrated plants – *Brooks-Scanlon Inc., 246 NLRB 476 (1979)*. Whether or not MTS was a subsidiary or subordinate, therefore, does nothing for the ultimate question here presented.

It is equally clear that the ALJ centered his analysis of the pertinent question on the core business of the Parent Company: "***Inteship's primary business, stevedoring, was effectively unchanged***" and ***"put another way, Intership never stopped stevedoring, or performing chassis upkeep.***" That this is not the appropriate analysis is easily demonstrated by applying the ALJ's approach in the present case to the factual situation in *First National Maintenance. In First National Maintenance* the employer decided to stop doing business in one location (Greenpark Care Center). The services the Employer decided to stop rendering in that location were much more than supporting in nature, in fact, there were the main services it offers to all its clients (i.e. housekeeping, cleaning, maintenance and related services). It is equally clear that after deciding to stop doing business in that location, the Employer's (First National Maintenance's) primary business (i.e. offering housekeeping, cleaning, maintenance and related services) "was effectively unchanged' or "put another way, [First National] never stopped . . . performing [these type of services]" and offering the same to the same type of clients. Applying the analysis the ALJ used in this case to that set of facts, First Maintenance could not have decided to stop doing business in that location without bargaining the decision with the Union. That of course is not what the Supreme Court decided. See also: *Brooks-Scanlon Inc., 246 NLRB 476 (1979) (A lumber and plywood manufacturer decided to close the sawmill department in one of its plant – Redmon, Oregon – while continuing a sawmill operation in Bend, Oregon).*

Since the ALJ's analysis used in this case disallows what is otherwise permitted by legal precedent, his approach in fact obliterates an Employer's right to stop doing business, diminished

or otherwise shot down **part** of a business, which is a well settled management prerogative for being akin to the decision of going out of business entirely. *First National Maintenance, 452 U.S. at p. 686-687*. To be consistent with legal precedent, therefore, ***the analysis as to this question needs to be centered on the line of business or operation that is claimed to be diminished, closed or discontinued in order to allow for the employer's right to do so in reference to only part of its complete operation***.

Viewed pursuant the correct analysis, the conclusion is necessarily different. This is illustrated by the unquestionable realities of the facts of this case: ***prior*** to the closing of MTS on October 19, 2012, Company A – owner of chassis or containers – could go to MTS to have its chassis or containers refurbished; in fact, as documented above, MTS had a full time sales person whose only duty was precisely to look for and get Company A's business; Company A would get an invoice from MTS for the services performed, and would pay MTS for the same; the monies paid by Company A for these services would go to MTS' account – be registered as income – and help defray MTS' operational expenses. ***After*** the closing of MTS on October 19, 2012, Company A could not go to MTS to refurbish its chassis or containers, and there is no one on behalf of Respondents looking for this type of business. Moreover, the evidence is clear that Intership has deprived itself of the ability to render this type of service by among other things, leasing long-term with an option to sell MTS' facilities and selling all the equipment and machinery needed to provide these services. See *R. Ex. 58; T. 1529:14-23*. Equally unquestionable are the facts that the record of this case is devoid of any evidence showing that Intership is still soliciting business of refurbishing chassis or containers for profit, AND has unchallenged testimony that Intership does not provide these services. *T. 1516:5-18*.

In light of the above, it is submitted that to conclude that there was no partial closing or shot

down of a separate and identifiable operation in this case would be tantamount to ignoring the reality that ***after*** October 19, 2012 there was one less provider of refurbishing services for chassis and containers in Puerto Rico. The decision to close MTS is in fact is a decision not to be in business at all.

Moreover, the decision to close MTS exemplifies the occasions where the underlying problem is not suitable to resolution through bargaining. According to the "testimonies regarding MTS' and Intership's ongoing losses and poor fiscal performance [that] were credited, and supported by voluminous records and statements" - ALJ's Decision, p. 6:33-35 - the problem was that MTS was not generating enough income to cover its expenses and relied continuously on Intership lending it money. There was absolutely nothing that any Union could have done to improve this situation for obtaining more refurbishing business is well outside a union's control. This is particularly true in the case at hand where MTS had been operating non-union.[9] There is absolutely no suggestion either in the ALJ's decision or in the General Counsel's case as to what, if anything, could have been achieved regarding the decision to close MTS through decisional bargaining regarding the underlying fiscal problem.

In light of the above, Respondents submit that the Hon. ALJ erred in finding an 8(a)(5) violation regarding decisional bargaining related to the closing of MTS and that therefore, an Order should be issued finding no violation.

C. The ALJ erred in finding on the evidence of this case that the Counsel for the General Counsel made a *prima facie* showing under *Dubuque Packing* by concluding that the closure of MTS was "unaccompanied by a basic change in the nature of the employer's operation" and in the "scope

9 MTS was operating non-union and still not generating enough money to cover its expenses. Therefore, even if one were to consider the unlikely proposition that after winning an election the Union would agree not improve by even once cent the economic compensation of the employees, that would not have change the reality that the income was not enough to cover the operating expenses. This situation is clearly distinguishable from the situation where the company has a collective bargaining agreement with Union's rates and benefits that the Union can adjust in order to alleviate the financial situation.

and direction of the enterprise" despite the weight of the evidence to the contrary. (See Exception C of Respondents' Exception to the Administrative Law Judge's Decision).[10]

If the present case[11] is adjudged to be outside the purview of *First National Maintenance* and in fact a subcontracting case, both premises that Respondents most vehemently deny, the ***only*** other analytical framework under which it could be reviewed is *Dubuque Packing Co., 303 NLRB 386 (1991).*[12] In ruling that the General Counsel established a *prima facie* case under *Dubuque*, the ALJ stated:

> "The MTS subcontract did not significantly change the scope and direction of Intership's business, inasmuch as it uniformly remained a stevedoring company. Intership continued to service constant clients, market the same stevedoring services and compete in identical markets. Such a decision, thus, remained mandatory bargaining subject. It is noteworthy that, although the MTS subcontract involved substantial capital transactions (i.e. the leasing of the MTS facility, disassembly and sale of MTS' equipment, and cessation of performing servicing for the outside clients), these substantial capital transactions make this a case appropriately analyzed under *Dubuque*, rather than *Fibreboard*, but does not, independent of other rationales, require a finding that Intership changed the nature or direction of its business." Citations omitted for purposes of clarity, ALJ's Decision P. 19.

The ALJ based the above finding not only on his continued focus on Intership's core business, but on the following previous decisions of this Board: *Bob's Big Boy Restaurants, 264 NLRB 1369 (1982); Michigan Ladder, 286 NLRB 21 (1987)* and *Pertec Computer, 284 NLRB 810 (1987).* Respondents submit that ALJ erred in relying on those cases for they are clearly

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[10] **SUMMARY OF THE ARGUMENT**: *Even if this case is to be reviewed under Dubuque, the ALJ erred when - while continuing to focus in the Principal's core business – he reviewed the substantial capital transactions found to be involved in this case (i.e. the leasing of the MTS facility, disassembly and sale of MTS' equipment, and cessation of performing servicing for the outside clients) against inapposite cases to conclude that there was no change in the scope or direction of the business. In light of the substantial capital transactions found here and the undisputed facts of this case, legal precedent requires a finding that there was a basic change in the scope and direction of the business, and that, therefore there was no decisional bargaining violation of Section 8(a)(5).*

[11] This case has the peculiarity that the ALJ specifically asked the Counsel for the General Counsel whether they were presenting a *Fibreboard* or a *Dubuque* case so that all parties be on notice. *T. 871:25-872:23.* ***After consulting, Counsel for the General Counsel responded that their theory of the case was Fibreboard.*** *T. 887: 20-21*. True to their word, their Post Hearing Memorandum does not have ***one*** reference to *Dubuque*. Needless to say Respondents litigated the case the General Counsel expressly affirmed he was presenting. Somehow, however, Respondents were chastised for not litigating a case that the General Counsel said was not putting forward and in fact did not. ALJ's Decision P. 20:12-15.

[12] It is obvious exactly for the same reason explained by the ALJ in his decision – P. 19 – that the present case is not a *Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964)* case.

inapposite analogues precisely for the same reasons he found that the present case is not covered by *Fibreboard*. When the "substantial capital transactions" that the ALJ found proven in this case are compared to a long standing line of cases, it becomes clear that this case involves a substantial change in the scope and direction of the business.

The ALJ first relied on *Bob's Big Boy Restaurants, 264 NLRB 1369 (1982)* for the proposition that "[the] Board held that, where shrimp processing operation was discontinued, processing equipment was sold, and another company was retained to provide processed shrimp to its restaurants, the subcontract was a mandatory bargaining subject because the employer had not changed the nature and direction of its business, and remain in its core business of providing foods, including processed shrimps to its restaurants." *Bob's Big Boy* – a pre-*Dubuque* plurality decision - is however substantially different in its facts to the case at hand. The activities under reviewed in that case involved a commissary operation which, as a division of Marriott Corporation, was in the business of providing prepared foodstuffs to ***its*** individual restaurants. The specific commissary operation had five departments: shrimp preparation, meat, salad dressing, produce, and bakery.

Around May and July 1979, the Respondent contracted with a third party ***only*** the shrimp processing work ***while it continued operating***. Because of this transaction, Respondent terminated all the shrimp processing employees. The plant area devoted to shrimp processing remained part of Respondent's facility and it also retained ownership of the freezers and hydraulic system previously used in shrimp processing. Although the Respondent sold some of the equipment (to the subcontractor) in what was described as not *de minimis* but "at a leisurely pace," it was considered that there was no immediate restructuring of capital or subsequent capital transactions for Respondent retained possession of the basic facility and certain of the

equipment used in shrimp processing.

The differences between *Bob's Big Boy* and the present case, therefore, abound. For it to deal with the same subject as the case at hand, the entire commissary operation needed to close to the extent that it was not providing its services to its client, the entire facility leased [long-term], and the equipment sold. Those are the substantial capital transaction that consistent with the undisputed evidence the ALJ found are involved in the present case. ALJ's Decision, P. 19: Because it rests on different material facts, *Bob's Big Boy* provides no guidance for the case at hand.

The ALJ cited *Michigan Ladder, 286 NLRB 21 (1987)* for the proposition that the "Board held that, where the employer stopped manufacturing ping pong tables and ladder parts, and contracted with a subcontractor to manufacture those items on its behalf, its subcontract remained a mandatory subject of bargaining." ***Michigan Ladder, however, has absolutely nothing to do with the facts of this case***. In *Michigan Ladder*, the employer – while continue in operation - leased to the subcontractor the areas and machines within its (the Employer's) own facility where ping pong tables and certain parts for ladders were manufactured for the subcontractor to produce these items for the Employer. The ALJ ruled that the Employer, "in effect", retained responsibility for the production of the subcontractor. For the present case to come near the purview of *Michigan Ladder*, MTS needed to still be in operation offering its services to its clients, it needed to have leased to a contractor its facilities ***including the machinery and equipment with which MTS previously performed the refurbishing of chassis and containers***, and the subcontractor needed to be performing those services for MTS, in MTS' facilities, with MTS' machinery and equipment, under the ultimate control and supervision of MTS. Indeed, the ALJ noted in *Michigan Ladder* that the facts there were basically the same as

in *Fibreboard, Michigan Ladder*, therefore, is of little import to the case at hand.

The ALJ next cited *Pertec Computer, 284 NLRB 810 (1987)* for the proposition that where the "employer closed a facility that manufactured typewriter ribbons and cartridges, relocated some of the work and subcontracted the rest to a Mexican manufacturer, that was not a fundamental change in the nature of the business because the employer did not change the products, manufacturing process, or technology of production, but merely was having essentially the same work done by other employees in other locations." In *Pertec*, however, the Employer continued to be in the business of manufacturing the products in question for it simply relocated to another plant two-third of the work withdrew from the bargaining unit. *284 NLRB at 818.* In fact, in sustaining the ALJ, this Board noted that "the Respondent [the Employer] continued its previous business of manufacturing . . ." in that "[p]art of the manufacturing function continued to be performed by employees of the Respondent, newly hired at new locations, and part was subcontracted to a Mexican manufacturer" but that "there was neither a liquidation of the enterprise, in whole or part, nor a fundamental change in its nature." *284 NLRB at 811*.

For the present case to come near the purview of *Pertect*, therefore, MTS needed to continue in operations providing the same services to its clients, and the question under review needed to be whether it could close the MTS Bayamon, Puerto Rico facility, terminate all the employees in that facility, open a new facility in say San Juan, Puerto Rico, hire new employees to perform two third of the work previously performed in Bayamon, and subcontract one-third of the work previously done in Bayamon without bargaining the decision with the Union. That those are neither the facts nor the question presented in this case require little further explanation. Obviously, *Pertec* provides no guidance to solve the question presented in this case.

In fact, Respondents have been unable to find any Board decision where it was determined

that there was no change in the scope and direction of the business when the Respondent decided to close an operation, dispose of the facility where that operation was pursued (in this case by long-term leasing it with an option to buy), disassembled and sold the equipment used in that operation, and ceased to service the clients of the operations. In cases where such elements are established, the Board has consistently found a change in scope and direction. *See for example: General Motors Corp., 191 NLRB 951 (1971)* (a significant withdrawal of capital will affect the scope and ultimate direction of an enterprise reversing the ALJ's determination that the transaction under review was more akin to a subcontracting than to a sale where the Employer sold the operation, property and equipment and ceased operating it itself); *Kingwood Mining Company, 210 NLRB 844 (1974)* (reversing the ALJ's determination to the contrary, no obligation to bargain decision because by shutting down its mining operation accompanied by the sale of the related equipment Respondent in effect went out of the business of mining coal which was "manifestly a major [decision] and entitled substantial withdrawal of capital investment" despite the fact that it continued its other operations); *Garwood-Detroit Truck Equipment Inc., 274 NLRB 113 (1985)* (reversing the ALJ's determination to the contrary, the decision to eliminate the service and mounting departments – an integral part of the business – found to be a significant change in the nature and direction of the business where the facilities and equipment where leased out and employer was no longer providing those services); *Hawthorn Mellody, Inc., 275 NLRB 339 (1985)*(reversing the ALJ and determining that the decision to close permanently a delivery operation in Cleveland which included the proposed sale of the entire property amounted to a change in the nature or direction of the business).

In light of the above, the ALJ's determination that despite what he called "substantial capital transaction" the closing of MTS does not entail a change in the scope and direction of the

business is clearly erroneous.

Accordingly, the ALJ's determination that the General Counsel met his prima facie burden of establishing that the transaction involved did not involve a change in the scope and direction of the business is in error, unsupported by the totality of the record and unsupported by applicable analysis of legal precedent. Because the closing in this case amounts to a basic change in the nature, scope and direction of the business there is no decisional bargaining obligation under *Dubuque.*

D. In any case, the Hon. ALJ erred in assuming, without resolving, that any obligation to bargain with the Union in MTS had arisen despite the fact that Respondents raised the lack of such obligation in their answers to the Complaint, litigated the matter during the hearing, and thoroughly briefed it in their Post Hearing Memorandum (See Exception D of Respondents' Exception to the Administrative Law Judge's Decision);[13]

In its Answer to the Complaint (the original Complaint in Cases No. 24-CA-091723 and 24-CA-104185) Respondents raised the following affirmative defense to the allegations of an 8(a)(5) violation regarding the closure of MTS: "As it relates to the events pleaded in the Complaint, there was no bargaining duty regarding either the decision or its effects because the general obligation to bargain had not arise yet." See Answer to Complaint in Cases No. 24-CA-091723 and 24-CA-104185, Aff. Defense No. 4, P. 5. As it would be discussed below, Respondents developed this defense during the hearing of the case, and in addition briefed the matter in their Post Hearing Memorandum. See Respondents' Post Hearing Memorandum, P. 41.

In its decision, the Hon. ALJ ruled that Respondents violated 8(a)(5) in respect to the closing of MTS by acting unilaterally without bargaining with the Union. See ALJ's Decision, P. 17:34-37. He, therefore, assumed without resolving that the general obligation to bargain had arisen.

[13] **SUMMARY OF THE ARGUMENT:** *Even though Respondents raised, briefed and argued that the general obligation to bargain with the Union had not arisen at the time MTS closed, the ALJ ruled that Respondents violated the duty to bargain without addressing this defense. It is undisputed in the record of this case, that one of the elements for the general obligation to bargain with the Union – that the Union had demanded bargaining – had not taken place at the time. It follows therefore that Respondents could not breach a duty they did not have at the time.*

This Board's decisions have unequivocally indicated when the obligation to bargain with a labor organization arises.

In addressing this question, it has been decided that an employer's duty to bargain with a labor organization representing its employees begins when ***two*** things happen: (1) first, a Union must obtain the support of a majority of employees in a unit appropriate for collective bargaining, ***and*** (2) second, after obtaining such majority status, the Union makes a demand to bargain. It is at that point that the employer has a duty to recognize the union and bargain with it. *Wal-Mart Stores, Inc. and United Food and Commercial Workers Union, Local 455; 348 NLRB No. 16 (2007).* This principle of law is explained by ALJ Keltner W. Locke in his decision in *Wal-Mart Stores* (adopted with modifications not relevant to this part) when he explained at page 290 of the reported decision:

> "***Respondent could not have breached a duty to bargain with the Union unless it had such a duty***. In general, an employer's duty to bargain with a union begins when two things happen: First, a union must obtain the support of a majority of employees in a unit appropriate for collective bargaining. Second, after obtaining such majority status, the union must make a demand to bargain; ***at that point, the employer has a duty to recognize the union and bargain with it***." Emphasis added.

It is also settled law that the Union does not fulfill its duty to request bargaining by simply protesting the decision or filing grievances over it. *W-1 Forest Products Co., 304 NLRB 957, 961 (1991); Haddon Craftsmen, 297 NLRB 462 (1989) (Filing a grievance does not constitute bargaining request). See also, Clarkwood Corp., 233 NLRB 1172 (1977); enfd. Mem. 586 F. 2d. 835 (3rd Cir. 1978); Medicenter, Midsouth Hospital, 221 NLRB 670 (1975) (mere protest is not sufficient to satisfy the bargaining request requirement).*

There is absolutely no controversy in this case that by the time MTS closed the Union had not requested bargaining. Mr. Rene Mercado, the Union's then President, candidly admits this. *T. 1026:15-25*. Therefore, one of the two elements ***required*** for the obligation to bargain to begin

had not been met. The filing of the original charge in case No. 24-CA-019723 – particularly when it only claims that the Employer discriminated against the employees – does not amount to a demand to bargain. Accordingly, the Employer was under no obligation at this time to either notify the union (which is part of its bargaining duties) or bargain the effect of the closing.[14]

Irrespective of whether or not the decision to close MTS was a mandatory subject of bargaining, the legal reality is that the general obligation to bargain had not arisen yet so that Respondents could not have violated a duty it did not have.

E. In any case, the Hon. ALJ erred in assuming, without resolving, that the Union did not waive any right to bargain regarding the closing of MTS? (See Exception E of Respondents' Exception to the ALJ's Decision).[15]

In any case, Respondents also raised as an affirmative defense that the Union had waived any bargaining right regarding effect it might have had concerning the closure of MTS. See Answer to Complaint in Cases No. 24-CA-091723 and 24-CA-104185, Aff. Defense No. 6, P. 5. Also, as it would be discussed below, Respondents developed this defense during the hearing and briefed it in their Post Hearing Memorandum. See Respondents' Post Hearing Memorandum, P. 42. The ALJ however found a violation of 8(a)(5) and assumed without resolving that the Union had not waived said right. See ALJ's Decision, P. 17:34-37. The record in this case, however, shows that the Union waived by inaction any right it might have had.

It is a fact in this case that eventually the Union wrote a letter to Intership's President Mr. David Segarra. See *Joint Ex. 15(b)*. Although the same is extremely vague in what it says or

[14] It must be noted that the element missing here – i.e. the demand to bargain - is completely under the control of the Union. There was absolutely no impairment for the Union to do it as soon as it learned that it had obtained the majority of the votes in the election process. There is, therefore, no possible argument to blame the Company for this failure on the part of the Union.

[15] **SUMMARY OF THE ARGUMENT:** *Even though the Respondents raised, briefed and argued a waiver by inaction defense, the ALJ ruled that Respondents violated the duty to bargain without once again addressing Respondents' defense. The record of the case establishes conclusively that the Union waited eleven (11) days after undoubtedly learning about the closing to make a very simple request. The excuse given by the Union's President for this conduct not only admits that at the time of the closing the obligation to bargain had arisen, but also fails to explain his delay. By this conduct, the Union waived any right it might have had to bargain.*

asks, [16] for purposes of this argument Respondents would assume that this Board would conclude that through the letter the Union requested to bargain.

Be it as it may, the reality is that the letter is dated ***October 30, 2012***, *Joint Ex. 15(b)*, ***amounting to a request to bargain eleven (11) days after the fact***. It is well settled that the failure to diligently request bargaining requires a finding that the Union has waived the bargaining right. *Medicenter, Midsouth Hospital; Bell Atlantic Corp., 336 NLRB 1076 (2001); McGraw-Hill Broadcasting, 355 NLRB No. 213 (2010).*

It is beyond any dispute in this case that the Union learned about the closing of MTS the very same day: October 19th. That is so because on that day the Union was diligent enough to file a charge by 4:44pm (see *GC Ex. 1(a)*) asserting that the Employer had discriminated against the employees by discharging them. Id. Even though the Union literally took just hours to fill out and filed a Charge, it took ***eleven (11) days*** to request bargaining.

There was absolutely no reason for the Union to have waited this long to make what only needed to be a one-sentence request: "we want to bargain about the effect and decision of closing MTS." The Union's President - Mr. Rene Mercado – testified during the hearing that he was waiting for the Certification of Representative. *T. 1026:15-25*. This testimony does nothing to avoid a finding of waiver by inaction; much more to the contrary. To begin, Mr. Mercado's testimony seems to recognize that at the time of the closing the obligation to bargain had not arisen. More importantly, it ignore the fact that the Certification of Representative was issued on **October 25th**. *Joint Ex. 13*. Accordingly, its issuance does not explain why he waited until October 30th - five (5) additional days - to make a simple request.

16 The letter simply states that on October 17 an election took place, that afterward Intership closed operations in the workshop without notifying the Union and then in the next paragraph states: "We request that you give us the opportunity to sit down and talk and/or negotiate, since this situation is affecting all the workers, members of our Union." Then it simply suggest dates for a meeting. See Joint Exhibit 15(b). That is it. The letter does not say anywhere that the Union wanted to bargain the decision or the effects of the closing.

It is most respectfully submitted that the Union waived its right to request bargaining in this case. Accordingly, the ALJ erred in simply assuming, without resolving, that there was no waiver. Because there was, the finding of an 8(a)(5) violation in regards to the closing of MTS cannot stand.

F. The Hon. ALJ erred in finding that the closing of MTS violated 8(a)(3) despite *Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965)*. Particularly, the ALJ erred in not finding pursuant to the overwhelming weight of the evidence that Intership through the closing of MTS removed itself completely from the business of repairing chassis and containers for profit which amounts to a privileged decision under *Darlington.* (See Exception F of Respondents' Exception to the ALJ's Decision).[17]

The ALJ in its decision ruled that *Darlington* is inapplicable to the closing of MTS. He came to this conclusion relying on his prior finding[18] that Respondents have subcontracted MTS' operations. This reasoning is affirmatively stated at P. 22:39-45 of his decision when he writes:

> "The instant dispute, thus, should not be considered under the business closure principles set forth in *Darlington* because Intership had a bargaining obligation for the MTS subcontract under *Dubuque.* See, e.g. *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989) (*Darlington* not applicable where employer did not cease operations, but rather transferred some work to another location and subcontracted the remaining work; *Darlington* explicitly distinguished discriminatory relocation and subcontracting from partial closings). The bargaining obligation at issue herein, therefore, renders MTS subcontractor into a non-*Darlington* matter."

Respondents have already discussed at length how the ALJ's erred in finding that the dispute at hand is not a partial closing or a decision of going-out-of-business. Respondents incorporate by reference into this section the entire discussion on the subject. Suffice is to say here, that the record as a whole in this case, including the findings of the ALJ, establishes that in fact MTS

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[17] **SUMMARY OF THE ARGUMENT**: *The ALJ discarded Darlington based on his prior finding that MTS' clousure was not a partial closing. Since it is, the question becomes whether this decision is privileged under Darlington. Since there is no evidence capable of establishing purpose and effect of chilling imminent unionization activities in the other parts of the business, there is no 8(a)(3) violation.*

[18] The ALJ entertained first the 8(a)(5) allegations before addressing the 8(a)(3) allegations. Then he relied on his 8(a)(5) finding to discard *Darlington.* Respondents understand that as seen in the several cases where both issues 8(a)(3) and (5) are entertained the proper order should have been addressing the 8(a)(3) allegations first since it could dispose of the corresponding 8(a)(5). Because ultimately, each issue would be decided comprehensively, Respondents for purposes of clarity follows the ALJ's order.

operations were entirely closed to the extent that there is one less provider of those type of services in Puerto Rico. As previously explained, the fact that Intership had decided to refurbished 15-20 of its own "mission essential" bomb-carts over sixty-months do nothing to detract from this.

Because of the facts of this case, the ALJ citation to *Lear Siegler, Inc., 295 NLRB 857, 860 (1989)* do nothing to support the finding that *Darlington* is inapplicable here. *Darlington* was found inapplicable in *Lear* precisely because it did not involve the entire cessation of the operations conducted in the affected plan or the sale of that plant's machinery and equipment. In finding *Darlington* inapplicable, this Board wrote in *Lear* the following at P. 860:

> "In *Darlington,* the employer **ceased operations entirely at the affected plant and sold all the plant's machinery and equipment at auction**. The Respondent here, by significant contrast, did not cease operations; instead, it *transferred* its fabrication work to its West Chicago plant, and *subcontracted* the remaining work (the unloading of trucks) to Meyers Transportation. Both discriminatory relocation of work-the "runaway shop" gambit-and discriminatory subcontracting were explicitly distinguished from partial closings in *Darlington"* Bold and underline ours, italics in the original.

Since there is no legal reason for not applying *Darlington* to this case, the question then becomes whether the closing of MTS is a privileged decision under it. It is well settled that a partial closing violates Section 8(a)(3) only "if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect." *Darlington, 380 U.S. at 274-75*.

Therefore, there needs to be enough evidence to establish "the factors of '***purpose***' and '***effect***' which are vital requisites of the general principles that govern a case of this kind." *Darlington, 380 U.S. at 276.* As to this last burden, the Supreme Court was particularly clear in that it is not enough to simply argue that the closing necessarily had an adverse impact upon unionization in other plants since "[w]e have heretofore observed that employer action which has

a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of s 8(a)(3) in the absence of ***a showing of motivation which is aimed at achieving the prohibited effect***." *Darlington, 380 U.S.* at 276. Emphasis added. In this regard, the Supreme Court had noted that"[i]t is also clear that the ambiguous act of closing a plant following the election of a union is not, absent an inquiry into the employer's motive, inherently discriminatory. We are thus not confronted with a situation where the employer 'must be held to intend the very consequences which foreseeably and inescapably flow from his actions * * *." *Darlington, 380 U.S. at 269, n. 10*. Similarly, there needs to be strong evidence to establish the element of immanency of the employees' actions that are alleged to be the target of the chilling motive. *Darlington, 165 NLRB at 1084.*

The record of this case, however, has no evidence to support a finding that the closing of MTS had the purpose and effect to chill imminent protected action in the other parts of the Respondents' business and much less to support a finding that Respondent could have foreseen that that such closing would likely have that effect.

In this case, that is, it is a stipulated fact that there was no formal petition to represent employees in any of the other Intership's subsidiaries during 2012 or 2013. *Joint Exhibit 1,* ¶44-*45*. In addition, there was no informal request to voluntarily recognize a Union and no demonstration ever took place demanding Union representation. *T. 1033:10-19.*

Besides the fact that there was no overt act of unionization anywhere regarding Intership or its subsidiaries, the record of the case shows that in fact there was no such process going on ***at all*** and that the Union ***did not even know the employees*** of these other companies. *T.1033:20–1037:8,* which includes the following assertions in Mr. Rene Mercado's previous statement to the Board: "*[t]he Union was not making efforts to unionize any employees of these companies." T.*

1036:23-24 and *"[t]he reality is that I do not know the employees of these companies" T. 1037:6-7*. ***The record is therefore categorical in establishing that by the time MTS closed not only there was no covert act of unionization as to Intership or any of its subsidiaries but also that the Union had not begun the process or even knew these employees***.

Under these circumstances, there is no evidence from which to make the required legal conclusions that the closing of MTS was motivated by a purpose to chill ***imminent*** unionism in the remaining plants of the single employer or that the employer could have reasonably foresaw that such closing would likely have that effect.[19] As this Board has noted, "*mere suspicion cannot substitute for proof of an unfair labor practice*." *Lasell Junior College, 230 NLRB 1076, 1076, fn. 1 (1977).*

Accordingly, the closing of MTS is not an unfair labor practice and the ALJ, therefore, erred in finding an 8(a)(3) violation.

G. In the alternative, the ALJ erred in finding that Intership would not have closed MTS operation absent protected activities. (See Exception G of Respondents' Exception to the ALJ's Decision).[20]

If the closing of MTS is not reviewable or privileged under *Darlington*, then the only other analytical framework under which to review the subject is that of *Wright Line, 251 NLRB 1083*

19 Because of the many times that the Government asked the question during the hearings, it would not surprise Respondents in the least if Counsel for the General Counsel tries to argue that the alleged proximity between MTS and TTS should lead to a conclusion that the Respondent feared that TTS would unionized. Besides the legal fact that fear is not the element, but rather the belief of the decision makers supported by strong evidence that unionization was ***imminent***.These two plants were in the exact same proximity when the Union petitioned for representation in MTS and not TTS. Why would the Employer believe that something different was going to happen or that it would imminently happen? In the context of this case, where there is no evidence of any overt act of unionization, when in addition the record is clear that none was taking place, and that the Union did not even knew the other employees, the proximity between both plants would not be enough.

20 **SUMMARY OF THE ARGUMENT**: *If the closing of MTS is not reviewable or privileged under Darlington, then it needs to be reviewed under Wright Line. The ALJ erred in determining that Respondents would not have closed MTS absent the protected activities. This determination is not only unsupported by substantial evidence, but fails to take into consideration Respondents' complete defense and evidence that detracts from the ALJ's finding that is either unquestioned, corroborated, or both as well as a number of other contradictory findings. View in the light of the record as a whole, and consistent to ALJ's determinations that are supported by "voluminous records and statements," Respondents could not have continued financing MTS in any case.*

(1980). It is well settled under *Wright Line* that once the General Counsel meets his initial ***prima facie*** burden, the employer may defend by proving that it would have taken the adverse action even absent the employees' union activity. The employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries, 307 NLRB 1301, 1303 (1992)*. The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

The ALJ in his decision determines that "Respondent failed to show that it would have contracted out MTS' chassis repair work, absent the MTS unit's protected activities." ALJ's Decision P. 23:24-25. Not only is this finding not supported by the evidence in the record, but it is also contrary to the records as whole and the unchallenged evidence that detracts from it, including a number of other contradictory findings.

To begin, the ALJ found that Segarra's and Caraballo's testimonies "regarding MTS' and Intership ongoing losses and poor fiscal performance were credited, and supported by voluminous financial records and statements." ALJ's Decision P. 6:32-35. Based on these testimonies and voluminous financial records and statement, the ALJ then determined that "***MTS was deeply unprofitable and could not continue without Intership's fiscal aid***." Emphasis ours, ALJ's Decision P. 19:21-22. Further in his decision the ALJ concludes that "***Intership is presently under significant financial duress and has sustained mounting losses***; therefore, requiring it to restore 2 [referring to MTS and TTS] deeply unprofitable subsidiaries, in tandem with its own losses, would create an undue hardship." Emphasis ours, ALJ's Decision P. 26:23-24. The ALJ also determined that "it is probable that it [Intership] would have eventually cut its losses and closed these unprofitable entities on its own initiative." ALJ's Decision P. 26:26-28.

It is submitted that these findings of the ALJ, which are unquestionably supported by the

voluminous financial records and statement, contradicts entirely the finding that Intership would not have taken the same action in reference to MTS absent the protected conduct. The unanswered question that creates this contradiction, and as to which the General Counsel does not even tries to propose an answer for, is: if MTS could not continue without Intership's fiscal aid, and Intership has sustained mounting losses to the extent that restoring the MTS's operation would amount to hardship, how is it that Intership could have continued providing the same financial backing to MTS without the same hardship irrespective of any protected conduct? In fact, that was precisely Intership's defense in this case: MTS could not operate without Intership's financial aid, Intership confronted mounting losses and could not continue providing that financial aid. The ALJ credited all the elements of Intership's defense, recognize the logical consequence of them – i.e. "it is probable that it [Intership] would have eventually cut its losses and closed these unprofitable entities" - but failed to apply it to the facts of the case.

True, the ALJ noted that "Intership accepted MTS' mounting losses for several years without intervention." ALJ's Decision P. 23:26-27. Although it is correct to assert that Intership accepted MTS' mounting losses for several years"[21] this fact is ultimately insufficient to discard the Employer's defense ***because it ignores the second part of it***. In other words, Intership defense in this case ***is not simply*** that it closed MTS because it was unprofitable. Intership defense in this case is that it closed MTS because it was so unprofitable ***that it needed Intership's financial aid to operate and given its own mounting losses Intership could not provide that financial aid anymore***.[22]

21 Respondents understand that the record is clear in that MTS' mounting losses were ***not*** accepted "without intervention". The record is clear in that MTS undertook a financial conversion of its debts to Intership, a CPA's Opinion as to the tax effects of either closing or selling it was commissioned, and several Appraisal of the Property were requested.

22 Caraballo explained it as follows:

Equally important: each and every component of the triggering events that motivated the close is either not questioned, corroborated or both,: bankruptcy of Trailer Bridge (not question and corroborated), cancellation of one of three Sea Star's vessels coming to Puerto Rico (not questioned), MSC's moving to the competition without canceling contract (not questioned and corroborated), MSC's last vessel to Intership on ***October 10, 2012*** [two days prior to the Union's election] to take all remaining cargo (not questioned and corroborated); forecast effect on Intership's financial health of MSC's departure (corroborated as found by the ALJ). So, Intership's explanation that it needed to act when it acted is completely corroborated by the evidence.

The same holds true regarding the differences that existed between MTS and the other Intership's subsidiaries at the time the decision to close the first was taken. Besides the fact that the General Counsel went out of his way to establish that MTS was the subsidiary that owed the most in total to Intership[23], President Segarra called Oceanic "a very necessary thing." *T. 1561:9*. CFO Caraballo explained this noting that Oceanic is an agency[24] that does all the work for the maritime lines and that most of the time these lines ask the agency what stevedoring company it prefers. *T. 1467:14-17*. It was, obviously, a very related business that "if we have control of the agency, we also assure their stevedoring business." *Id:17-18*. As if this were not enough, Oceanic now "is making money and has totally paid its debt." *Id:19-20*. Oceanic, therefore, was

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"Well, as I said before, that's when Mediterranean Shipping came in for the last time, and Intership, which was the bank, was experiencing losses. So it's like when you go to the bank to ask for a loan, the bank looks at your finances, and if they are good, then they'll lend you money; and if not, they will not lend you money.

But then, when the bank itself starts to lose money, it cannot lend any more money. And this was a matter of letting go 20 employees, versus letting go 500 employees. *T. 1380:20 – 1381:3*.(It was clear from Mrs. Caraballo's testimony that when she referred to 500 employees she was referring to the jobs at Intership. *T. 1472:2 – 4*.

23 See *T. 1460:18 – 1461:20*, where through questions of Counsel for the General Counsel it was established that Sea Air owed in total $1,695,530.00, Oceanic $1,155,790.00 and TTS $1,221,050.00. This is obviously less than the $1,895,000.00 that MTS owed. *T. 1457:22-25*.

24 As Mrs. Caraballo later explained a shipping agency does husbandry for the shipping lines and the documentation to clear federal and local agencies like Customs and Coast Guard. An agency is the first person or business that a line contacts if he wants to go to that Port. *T. 1521:24 – 1522:23*.

consequently part and parcel of the stevedoring business and did not have the bleak business future that MTS had.

In the case of Sea Air, CFO Caraballo called it a "necessary evil". *T. 1466:6-7*. She explained that Sea Air's main business is to provide warehousing and services to Intership's stevedoring clients. *T. 1466:23–1467:11*. It complemented the stevedoring services that Intership provides. *Id:4-5*. Caraballo explained for example that Sea Air provided services to Intership's clients such as Tropical Shipping that besides being a stevedoring client also had a LCL business – loose cargo business – handled by Sea Air– *T. 1466:23-1467:11*- and to another customer Puerto Rico Supply which took advantage of Sea Air's free zone treatment to import most of cigarettes sold in Puerto Rico- *T. 1521:12-23*. Sea Air was, therefore, related and complementary to the stevedoring business and Intership believed that it could lose even more business if they closed that operation. *T. 1467:8-11*. "It was completely different and we saw it that way." *T. 1467:10-11*.

As to TTS, which in any case eventually closed shortly after MTS, Mrs. Caraballo testified that "TTS started in 2009 and you normally give five years to a business for that business to move on and progress." *T. 1467:25 – 1468:2*. There is absolutely nothing in the record capable of establishing that by October 2012, TTS had gone through the whole review process MTS went through (for example: three appraisals and one opinion regarding Tax consequences, etc.) so that its file was "complete" by then[25].

In sum, the finding that MTS would not have closed absent the MTS' unit protected activities is not only unsupported by record, but is in open contradiction to other findings made by the ALJ

25 As to MTS, Caraballo had testified at *T. 1374:10-19*:

"MTS was a file that was complete, and the decision should be to close it. We had three appraisals that reflected that the value of the property had been decreasing. We had an opinion for -- from our CPA, stating the tax effects of either closing, transferring it, or selling it. Also, we didn't have any new business, and the financial statements also showed that it was not in a good situation."

So it was a complete filed, what we had. The only thing left to do was to make the decision, when are we going to close."

and fail to consider the evidence that detracts from it. The record as a whole clearly establish that MTS would have close in any case and therefore there is no 8(a)(3) violation.

H. There is no substantial evidence on the record of this case to support the ALJ's finding that TTS's employees engaged in protected activity or "began considering unionizing," and that the Employer had knowledge of the same. The ALJ, therefore, erred in finding given the evidence in this case that the Counsel for the General Counsel met his ***prima facie*** showing under *Wright Line* (See Exception H of Respondents' Exceptions to the ALJ's Decision).[26]

The ALJ in his decision credited Mr. Daren Ryan's testimony about "employees telling him that they were talking to the Union about organizing" and that he "relayed these discussions to Sosa in September, in order to offer him a chance to remedy employees' concerns before they unionized." ALJ's Decision P. 7:18-21. Further in his Decision, the ALJ uses this testimony to find that the TTS' employees were discussing unionizing – the protected conduct element of the ***prima facie*** case – and that the Employer had knowledge" - *ALJ's Decision, P. 24:6-8* – and consequently that the General Counsel had established that the closing of TTS violated 8(a)(3).

Respondents must start the discussion of this exception with the clarification that it is not challenging a credibility determination. Respondents' contention is that there is no substantial evidence to support this finding when the record is reviewed as a whole, taking into consideration the evidence that detracts from this conclusion. To contextualize Respondents' assertions, the following must be underscore all of which is beyond any dispute:

1. Mr. Daren Ryan-Oppenheimer (Ryan) was presented during the Hearings as a witness for the General Counsel, *T. 673:7-8*;

[26] **SUMMARY OF THE ARGUMENT:** *The ALJ's determination that TTS' employees were taking concrete steps to unionize and that the Employer knew about it by September [2012] which were based on Mr. Daren Ryan's testimony (a former supervisor who believed he was terminated improperly) are not supported by the substantial evidence in the record because it fails to take into consideration the evidence that detracts from it such as the statements by the Union's President that the Union was not organizing these employees and did not even know their names or the fact that there was no testimony of any of the employees who were supposedly taking these concrete steps. Moreover, making these concrete steps toward unionization of which the employers purportedly learned by September the motivating factor for the closing of TTS, leaves the unanswered question of why the Employer waited from September (when it learned about it) to April to close the operation.*

2. Although Mr. Ryan was once a supervisor at TTS, by the time he gave his Statement to the Board and testified during the hearing, he was no longer in the employ of Respondents after having been improperly terminated in his opinion, *T. 728:1-5*;[27]

3. Mr. Ryan's testimony on which the ALJ relies for his finding, was not adduced during his direct examination by the General Counsel, *T. 738:9- 740:16*;

4. Mr. Ryan's testimony on which the ALJ relies for his finding was adduced by direct questions of the ALJ during his cross-examination[28], Id;

5. Immediately after he provided this testimony, Mr. Ryan was confronted with his statement to the Board – given at a much more contemporaneous date - where he had not mentioned that an employee told him that they were talking about unionizing around September or that he had told Mr. Sosa anything about this. *T. 741:2-7*. In response to having been confronted with his statement, he first replied that he was not asked about that during the interview – *T. 741:7-14* - only to be forced to retract later and admit that he was asked but failed to mention anything about it. *T. 744:9-14*.

6. The record of this case also contains the testimony of Mr. Rene Mercado, the then President of the only Union that have been mentioned in this case, when he was confronted with his statement

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27 This fact is of vital importance for two reasons. Although the ALJ noted that Ryan was an Assistant Operations Manager for TTS – ALJ's Decision P. 3:12 – and when relating his testimony asserted that he was "a TTS supervisor," nowhere in his decision there is a clarification that he was not in the employ of the Respondents by the time he gave the Statement to the Board or his testimony during the hearing. Thus, the reader of the Decision could get the impression that as a "TTS supervisor" his testimony is to be considered as an admission by party opponent when precisely because neither statements were "made during the existence of the relationship" it is ***not***. F.R.E., Rule 801(d)(2)(D). This important matter of law was raised to the ALJ before Mr. Ryan testified. *T. 703;7-704:(5)*. Secondly, if in any shape, form or matter, Mr. Ryan's testimony is considered to be the testimony of a Respondents' agent, then there is a corresponding ethical issue of skipping counsel for the General Counsel interviewed Mr. Ryan without notifying or permitting the appearance of Respondents' known counsel.

28 By stating this fact, Respondents do not question or in any shape, way or manner suggest that there is anything improper with an ALJ asking questions of the witnesses during the hearing. Respondents are well aware not only that this is proper but also that it is customary and needed to develop a full record. Respondents are stating the fact because it would challenge credulity to belief that if the General Counsel had reliable evidence that Mr. Ryan knew that TTS' employees were talking about organizing and that he told Sosa about it, he (the General Counsel) would not have presented that testimony during the direct examination of Mr. Ryan but rather wait or "hope" that it would come out during cross examination through ALJ's questions.

to the Board to the effect that "*[t]he Union was not making efforts to unionize any employees of these companies [referring to the Intership's subsidiaries other than MTS which include TTS]"* and that"*[t]he reality is that I do not know the employees of these companies". T. 1035:1-1037:8.*

7. In addition, the record also reflects that even though several TTS' employees were called to testify during the hearing, no TTS' employees testified that they were taking any concrete steps towards unionization.[29]

Long ago, the Supreme Court set the parameters of what "substantial evidence" means, and more importantly, what it does not mean. In *Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951),* that is, the Supreme Court endeavored to give meaning to the Taft-Hartley Amendments to Section 10(e) of the Act, amid criticism that Courts have been too lenient in reviewing the factual findings of the Board, and to thar end wrote at page 487-488: "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

In light of this guidance, Respondents contend that the findings that TTS' employees were discussing unionizing as well as the finding that the Employer had knowledge about this activity are not supported by the record as a whole. Respondents are ***not*** contending that protected

29 If in fact, TTS' employees were taking concrete steps to unionize, the customary, best and more direct way of establishing this fact is through the testimony of either the Union's officers or the employees themselves. Moreover, if in fact they were taking such steps, that testimony should have been readily available.

conduct or knowledge could not be established through a former supervisor of the Employer. What Respondents are contending is that ***in this case*** the off-hand remarks[30] made during cross examination by a former supervisor that felt he was terminated improperly cannot be evidence enough – much less amount to substantial evidence -to support a required element of a cause of action over which the General Counsel has the burden of proof ***where***: i. the President of the Union admits that it was not organizing these employees and that he did not even know them; ii. where there is no testimony from the employees that were in fact taking these concrete steps to the effect that they were doing so even though some testified during the hearing; iii. there was never a formal petition filed to represent these employees, *Joint Ex. 1* ¶44-45; iv. there was never an informal request to voluntarily recognize a union and no employee demonstration demanding representation, *T. 1033:10-19.*

For Mr. Ryan's off-hand remarks to be substantial evidence, Mr. Rene Mercado's statements need to be discarded and the fact that there was no evidence presented by employees actually involved in those "concrete steps" ignored. There is no reason, and none was adduced, to discard Mr. Mercado's statements in this respect, who as the Union's President had absolutely no reason not be frank regarding this subject if it in fact happened. Common sense and logic, moreover, indicate that there should have been ample evidence from the employees that purportedly took concrete steps to unionize if that were true.

30 There are many other intrinsic problems with Mr. Ryan testimony, and the connection the ALJ made from this testimony to the closing of TTS. Besides the fact that the testimony given by Mr. Ryan was not in his previous contemporaneous statement to the Board, he had testified that he did not acquiesce to a request for him to let know the employees that if the Union came TTS would close because "the employees have their rights." *T. 717:5-9.* On the other hand, he testified that he was motivated to go directly to Mr. Sosa to let him know that the employees were taking concrete steps to unionize because it was the Company's "golden opportunity" to avoid a union. *T. 739:12-15*. Seeing something as a golden opportunity to "avoid a union" does not seem to correlate to his previous testimony about not wanting to tell employees not to unionize because "they have rights". He also first testified that upon learning that the employees were taking concrete steps he "went ***directly*** to Ernesto Sosa's office and let him know" *T. 738:23-24*, emphasis added). A little bit later he however testified that Davila was in the conversation also, only to immediately say afterward that he went first to Davila's office and that Davila made him go to Sosa's office. *T. 740:12-15.*

Equally troublesome is the connection the ALJ made between this statement and the closing of TTS to rule that the General Counsel established his *prima facie* case. The ALJ ruled that because of these alleged concrete steps to unionize that the employees were taking, about which the Respondents learned ***in September***, TTS was closed ***in April 26, 2013***. Unexplained in the ALJ's decision, as in the General Counsel's theory of this case, is why – if in fact this was the motivating factor – ***Respondents waited seven months (from September to April) to close TTS***.

The ALJ's findings that the employees engaged in protected conduct – taking concrete steps to unionize – and that the Employer knew about this are unsupported by the evidence in the record as a whole. Consequently, these findings cannot sustain the ruling that the closing of TTS violated Section 8(a)(3) of the Act[31]. Said allegation, therefore, should be dismissed.

I. The ALJ's finding that the closing of TTS is not a partial closing because Respondents subcontrated the TTS' work to Tribo Tech is not supported by the evidence in the record as a whole (See Exception I of Respondents' Exceptions to the ALJ's Decision).[32]

Although of less legal significance because there is no corresponding 8(a)(5) allegation (because there was no Union), the ALJ in his decision and as it relates to TTS' work on Kalmars equipment found that "Tribo Tech now performs these services." ALJ's Decision, P. 4:6-8. This rather innocuous assertion then became a subcontracting finding. In fact, there is a section in the Decision entitled "TTS Subcontract" - ALJ's Decision, P. 23:38 – and at footnote No. 61 in page 23 of his decision, the ALJ found that: "TTS was not a partial closure; it was simply a work relocation or subcontract of a single employer's (i.e. Intership) in-house Kalmar servicing division (i.e. TTS) to Tribo-Tech (i.e. the new subcontractor), which left Intership's core business

31 Respondents have not been able to find any prior Board decision ruling that 8(a)(1) violations regarding threats and illegal interrogations by themselves establish the element of protected conduct for an 8(a)(3) allegation. The illegal threats and interrogations, of course, amount to violation of 8(a)(1).

32 **SUMMARY OF THE ARGUMENT:** *The ALJ's determination that the closing TTS is not a partial closing but a subcontract is not supported by substantial evidence because it fails to consider the record as a whole, particularly the fact that TTS was in business for more than repairing Kalmars and that after the closing there is one provider less in Puerto Rico of the type of services that TTS rendered to its client which decision entailed substantial withdrawal of capital.*

function (i.e. stevedoring) essentially unchanged."

First and foremost, there is absolutely no allegation in the Complaint asserting the illegal transfer of bargaining unit work in regards to TTS. See ¶14(a) and (b) of the Complaint issued on July 31, 2013, *GC Ex. 1(o)*. Consequently, since there is no allegation in the Complaint that the work TTS was performing on the Kalmars equipment refer or amount to bargaining-unit-work, whether or not the alleged "subcontracting" resulted in the contracting out of the employer "in-house Kalmar servicing division" is ultimately of no concern to the Act and well outside the scope of the Complaint.

Similarly, Respondents already discussed the ALJ's error in analyzing the closing of an operation by focusing on the Parent Company's core business rather than in the dismantled or diminished operation. Those arguments are incorporated here by reference as if restated in full in this section.

In any case and under any circumstance, Respondents submit that these ALJ's determinations are not only unsupported but also, that they fail to take into consideration what detracts from them. Particularly they fails to take into consider that the uncontroverted and unchallenged evidence in the record establishes the following regarding TTS: ***1)*** TTS was in the business of repairing trucks and heavy equipment with attention to Companies' fleets. *T. 1173:23-1174:3*; ***2)*** TTS operated from a separate facility dedicated to its operations. See *R. Ex. 38(a)-(e)*. Besides the Kalotta Division, TTS had a hangar with at least six bays to fix trucks. *T. 402:22-403:10*; see also *R. Ex. 38(a) and (b)*. In these bays trucks' repairs were conducted such as alignment, brakes, motor repairs and "things like that". *T. 1232:11-23*. Kalmars or reachstackers were not repaired in these bays. *T. 1232:24-25*; ***3)*** Besides this hangar, there was a shop to sell truck parts. *T. 403:11-13*; ***4)*** The majority of TTS' employees work in the hangar. *T. 403:14-16*; ***5)*** Kalotta, was

a division in TTS. *T. 112:9-13*. The Kalotta Division repaired Kalmars and Ottawa equipments. *T. 112:14-18*; ***6)*** Besides Intership, Kalotta also provided services to customers in the United States Virgin Island, other islands in the Caribbean and pharmaceuticals. *T. 709:9-19*.[33]; ***7)*** Besides its Supervisor, Daren Ryan-Oppenheimer, Kalotta employed two full time mechanics. *T. 709:1-3*; ***8)*** TTS had its own accounting books and prepared its own Financial Statements. *T. 1174:9-22*, see also *R. Ex. 26*; ***9)*** The Income generated by TTS's operations was registered as income and used to defray TTS' operations costs. *R. Ex. 26*, P. 4 (Statement of Loss and Deficit); ***10)*** When TTS needed money to cover its operation's cost, Intership would lend it money, and these transactions were registered in TTS' books as an account payable and in Intership's books as an account receivable. *T. 1175:19-1176:6*; see also *R Ex. 26*, P. 3 (Balance Sheet: Account payable:parent); ***11)*** When TTS closed, it emptied its facilities and dismantled the operation. *T.1230:9-1231:17*. Its equipment and machinery are being sold. *T. 1528:25-1529:4*. In fact, the General Counsel does not contest that TTS closed and that the facilities are empty. *T. 1231:25-1232:5*; ***12)*** The Kalmars Intership use are rented equipment. *T. 192:17-18*; ***13)*** After TTS closed, the owners of this equipment requested that it be repaired in Tribo Tech Intership pays for the repairs. *T. 179:810; 1455:6-11*.

The evidence in the case at hand, therefore, shows that TTS was a distinct and separate operation - costing $1.2MM (in 2012)[34] a year to run - doing more than repairing Kalmars. In fact, it repaired fleets[35] for the US Postal Service (*T.1205:2-5*) and for other companies such as Clean Harbors (*T. 1204:16-23*). There is absolutely no evidence on record that ***after*** TTS closed, Intership is still in the business or even seeking business related to repairing trucks' fleets for

33 It is correct to point out that Mr. Ryan testified that Intership was the major client it is equally true however that when he so testified we was referring solely to the Kalotta Division – not to TTS as an enterprise. *T. 709:17-24*.

34 See *R. Ex. 26*, p. 4 (Statements of Loss and Deficit).

35 Not Kalmars.

third parties, or that it is running a truck's parts shop. The fact that Intership is still paying for the repair of the Kalmars it uses, does nothing to negate this fact.

Accordingly, finding that TTS closing is not a partial closing because Intership is still paying for the repair of the Kalmars completely ignore the evidence in the record as whole that establishes that Puerto Rico has one less provider of the services rendered by TTS. Consequently, the ALJ erred in making a finding to the contrary and in finding an 8(a)(3) violation.

J. In the alternative, the ALJ erred in finding that Respondents would not have closed TTS operation absent protected activities. (See Exception J of Respondents' Exception to the Administrative Law Judge's Decision).[36]

The ALJ found that "[f]or many of the same reasons considered for MTS above, Intership claim that it would have transferred out TTS' work, irrespective of employees' protected activities is unpersuasive." ALJ's Decision, P. 24:12-13. Respondents already discussed at length the reasons why the ALJ erred in determining that Respondents would not have closed MTS even in the absence of protected activities. Respondents incorporate by reference those arguments in this section as if fully restated and assert that for those same reasons, the ALJ also erred in determining that Respondents would not have closed TTS absent any protected conduct.

In sum, Respondents' defense to the closing of TTS is not simply that it was closed because it was unprofitable. Respondents' defense is that TTS was so unprofitable that it needed Intership's financial aid to survive, and that Intership confronted with its own losses could not continue providing that financial aid. Accordingly, the very same unanswered question discussed for MTS remains exactly the same as to TTS: if TTS could not continue without Intership's fiscal aid, and

[36] **SUMMARY OF THE ARGUMENT:** *For basically the same reasons that the ALJ erred in finding that MTS would not have closed absent the protected activities, the ALJ also erred in making a similar finding as to TTS. Given the fact that all of the elements of the Respondents' defense as to the closing of TTS were established, the same question remains unanswered: if TTS could not continue without Intership's fiscal aid, and Intership has sustained mounting losses to the extent that restoring the TTS' operation would amount to hardship, how is it that Intership could have continued providing the same financial backing to TTS without the same hardship?*

Intership has sustained mounting losses to the extent that restoring the TTS's operation would amount to hardship, how is it that Intership could have continued providing the same financial backing to TTS without the same hardship? All other relevant matters regarding this exception are addressed in the discussion regarding Exception G so that Respondents rest on the same.

In conclusion, the finding that TTS would not have closed absent protected conduct is not only unsupported by the evidence in record, but is in open contradiction to other findings made by the ALJ and fail to consider the evidence that detracts from it. The record as a whole clearly establishes that TTS would have close in any case and therefore there is no 8(a)(3) violation.

K. The version of the events credited by the ALJ regarding the alleged acts of physical violence does not raise to the level of interference with protected rights under the Act in light of the totality of the circumstances and the admissions on record. (See Exception K of Respondents' Exceptions to the ALJ's Decision).[37]

Regarding the alleged acts of physical violence, the parties presented two versions of the same during the Hearing. ALJ's Decision P. 8:38; 9:3. The ALJ credited the General Counsel's version of the events which was presented through the testimony of Mr. Rene Concepcion. ALJ's Determination, P. 9:12-22. The extent of the credited acts of physical contacts violence are better understood through the specific testimony given in this respect by Mr. Rene Concepcion at T. 439:15-441:3.

Suffice is to say that as it is was made clear during his testimony the personal contacts between Mrs. Caraballo and Mr. Concepcion - even under the latter version - happened when Ms. Caraballo was trying to address the chaffeur by placing herself between him and the driver. *T. 449:8-19.* In other words, the physical contacts were not addressed to Mr. Concepcion, but

[37] **SUMMARY OF THE ARGUMENT:** *Respondents submit that the version of the events found credible by the ALJ does not amount to acts of violence in violation of the Act because it lacks the elements of pervasiveness, violence, harm or intimidation with the intended or naturally foreseeable consequence of causing a discernible effect in the employees' exercise of their Section 7 rights that previous decisions of this Board have shown need to be present for the conduct to become an independent 8(a)(3) violation.*

happened while Ms. Caraballo was trying to get in between him and the driver. While Mr. Concepcion testified that Mr. Sosa "pulled" him by the arm, he admitted that Sosa did not move him. *T. 450:23-451:3*. Mr. Concepcion did not file a Police Complaint because of the incident. *T.451:17-20*. Also, not only Mr. Concepcion did not stop his demonstrations because of what had transpired – *T. 451:17-20* – but also admitted that he did not feel intimidated because "we were at a protest and I know that emotions flare up when you were in a protest". *T. 541:21-24*.

Without questioning that verbal threats of termination when credited become a violation of 8(a)(1), Respondents submit that the physical contacts credited by the ALJ are not physical violence of the type that amount to an independent violation of the Act. A review of the decisions that have found a violation of the Act through acts of violence[38], however, demonstrate that there need to be pervasive violent acts in a context where harm or intimidation is the intended or the naturally foreseeable consequence of the conduct with a discernible effect in the employees' exercise of their Section 7 rights. These required elements are not present in the conduct credited regarding the acts of physical violence. Accordingly, Respondents submit that the ALJ erred in finding that there were acts of violence in violation of the Act.

IV. CONCLUSION

FOR THE FOREGOING REASONS, the ALJ's findings excepted to should be reversed and the Board should issue an order finding no violation on the corresponding allegations.

In San Juan, Puerto Rico this 27th day of May, 2016

[38] For a list of previous Board's decision regarding acts of violence and the type of conduct involved, refer to Respondents' Post Hearing Brief, p. 66-67.

AFFIDAVIT OF SERVICE OF BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE DECISION

The undersigned hereby certifies that a true and correct copy of this Brief in Support of Respondents' Exception to the Administrative Law Judge Decision was served on this 27th day of May 2016 upon the following persons through email:

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