UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

INTERNATIONAL SHIPPING AGENCY, INC. d/b/a INTERSHIP, MARINE TERMINAL SERVICES, INC. (MTS), and TRUCK TECH SERVICES, INC. (TTS), a Single Employer	Cases	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
and		
UNION DE EMPLEADOS DE MUELLES (UDEM), INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1901, AFL-CIO		

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Isis M. Ramos Meléndez
Manijée Ashrafi Negróni
Counsels for the General Counsel
National Labor Relations Board, Subregion 24
525 F.D. Roosevelt Avenue
La Torre de Plaza, Suite 1002
San Juan, PR 000918-1002
Tel. 787-766-5327
Fax. 787-766-5478
Email: Isis.Ramos-Melendez@nlrb.gov
Manijee.Ashrafi-Negróni@nlrb.gov

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I. STATEMENT OF THE CASE

This brief is submitted in support of Counsel for the General Counsel's (CGC) exceptions to the Decision of Administrative Law Judge Robert A. Ringler issued on March 30, 2016 in the matter of International Shipping Agency, Inc., Marine Terminal Services, Inc., and Truck Tech Services, Inc. (collectively Respondent), Cases 24-CA-097123 et al., reported at JD-24-16. This matter was heard by Judge Ringler on July 13 to 17 and from September 21 to 24, 2015.

Respondent consists of International Shipping Agency, Inc. d/b/a Intership (Respondent Intership or Intership), Marine Terminal Services, Inc. (Respondent MTS or MTS) and Truck Tech Services, Inc. (Respondent TTS or TTS). The ALJ properly found Intership, MTS and TTS (collectively Respondent) to be a single employer. (JD 12:23 to 13:33).[1] These cases involve Respondent's prolonged egregious unfair labor practices with respect to its employees' activities on behalf of Union de Empleados de Muelles, Local 1901, ILA, AFL-CIO (the Union).

With respect to the alleged unlawful conduct in 2012 and 2013 concerning the closure of MTS and TTS and discharge of the employees at those operations, the ALJ properly found that Respondent made numerous threats of discharge and plant closure, interrogations and other statements in violation of Section 8(a)(1) of the Act, and closed its MTS and TTS mechanical shops that served its Intership stevedoring operations, discharged the MTS and TTS employees because of their union activities, and subcontracted the MTS work in violation of Section 8(a)(3) and (1) of the Act, and that the MTS closure, discharges and subcontracting also violated Section 8(a)(5) and (1) of the Act. (JD 13:35 to 16:32; 17:32 to 24:23). However, in these exceptions, CGC submits that the ALJ erred by failing to find that the foregoing Section 8(a)(3) and (5) violations should also be found based on alternative theories of violations. In addition, CGC

[1] As used herein "JD" refers to the ALJ's Decision, followed by the page and line numbers; "Tr" refers to the transcript followed by the page and line numbers; "GC" refers to General Counsel's exhibits; "J" refers to joint exhibits; and "R" refers to Respondent's exhibits.

submits that the ALJ erred by recommending the dismissal of certain of Respondent's alleged unfair labor practices that occurred in 2014. Finally, CGC submits that the ALJ failed to provide proper remedies, and to recommend corresponding language in the Order and Notice to Employees with respect to certain violations of the Act he found, and, of course with respect to the allegations as to which the ALJ recommended dismissal.

II. STATEMENT OF ISSUES

The principal issues are:

1. With respect to the discharges/layoffs of the MTS employees on October 19, 2012 and the TTS employees on April 26, 2013, and the partial closings of those subsidiary operations of Respondent, a single employer, the ALJ properly relied on a *Wright Line*[2] analysis and found violations of Section 8(a)(1) and (3) of the Act. (JD 23:38-40; 24:1-23). Did the ALJ err by failing to find as an alternative theory of violation, if the Board finds that the Respondent's unlawful conduct regarding MTS and TTS constituted partial closings of Respondent's overall operations, that with respect to each of these partial closings, Respondent's conduct was designed to chill union activity among Respondent's remaining employees, and therefore violated Section 8(a)(3) of the Act under the principles of *Textile Workers Union v. Darlington Mfg. Co.*, 380 US 263 (1965)? (JD 22:2-45) (Exception 1).

2. With respect to the subcontracting and discharges/layoffs of the MTS employees, the ALJ found that Respondent violated Section 8(a)(5) of the Act based on an analysis under the principles of *Dubuque Packing Co.*, 303 NLRB 386 (1991) enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), pet. for cert dismissed 511 U.S. 1138 (1994). Did the ALJ err by failing to find that Respondent's conduct violated Section 8(a)(5) of the Act under the principles of *Fibreboard Paper Products v. NLRB,* 379 U.S. 203 (1964)? (JD 19:7-25). (Exceptions 2 and 3).

[2] 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

3. Did the ALJ err by failing to find that because of the Section 8(a)(3) violations, under *First National Maintenance Corp. v.* NLRB, 452 U.S. 666 (1981), there could be no legitimate refusal to bargain over the decision to partially close MTS, subcontract the MTS work, and layoff MTS employees*?* (JD 18:38-42; 19:1-5). (Exception 4).

4. Did the ALJ err by failing to find that Respondent suspended Intership shop steward Efrain Gonzalez on May 30, 2014, because of his union and protected concerted activities in violation of Section 8(a)(1) and (3) of the Act, and by analyzing the issue based on *Wright Line* rather than *Atlantic Steel*, 245 NLRB 814 (1979)? (JD 20:32 to 21:33). (Exceptions 5, 6 and 7).

5. Did the ALJ err by failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reducing the forty hour work week of Intership maintenance employees from July to November 2014? (JD 17:18-24). (Exceptions 8, 9 and 10).

6. Did the ALJ err by failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by eliminating guaranteed pay for auto checkers when called to work on a particular shift in December 2014? (JD 17:26-30). (Exceptions 11 and 12).

7. Did the ALJ err by failing to fully remedy Respondent's violations of the Act, including (a) restoration of the MTS and TTS operations (JD 26:20-33); (b) appropriate reinstatement, make whole remedies and expungement remedies for the discharged MTS and TTS employees (JD 29:28 to 30:1); (c) naming the MTS and TTS discriminatees in the recommended Order. (JD 26:34 to 27:4); (d) making employees whole for unilateral changes, including the distribution of vacation pay checks (JD 27, fn.66); (e) notice reading; (f) notices in Spanish as well as English; and (g) make whole remedies including reimbursement of employees for search for work and work related expenses caused by loss of their employment, without regard

to whether interim earnings are in excess of these expenses (JD 27, fn.65)? (Exceptions 13 through 19).

III. STATEMENT OF FACTS: THE CLOSING OF MTS AND TTS - ALTERNATIVE THEORIES OF THE SECTION 8(a)(3) AND (5) VIOLATIONS (Exceptions 1 TO 4)

A. Background

Intership provides stevedoring services and terminal operations at the Port of San Juan, Puerto Rico, and has its administrative offices in Bayamon, Puerto Rico. (JD 2:5-7; Tr. 622: 4-10; 79:10-14, 1409:15-21). Intership and the Union have had a longstanding collective-bargaining relationship; the Union represents Intership's checkers, paymasters, and maintenance employees (mechanics, welders, and tire repairmen.) (JD 2:29-38; J Ex. 1, par. 2, J Ex. 2, page 3; Tr. 832-833). Intership's maintenance employees are responsible for repairing the equipment used in Intership's operations. They perform these duties at Intership's Port facility. (Tr. 609-612). Until October 19, 2012 and April 26, 2013, Intership also used employees of its subsidiaries, MTS and TTS, respectively, to perform certain mechanical and maintenance repairs. (JD 3:1-15; Tr. 628-629, 631-632, 636-637).

MTS was also engaged in the business of repairing chassis, containers, and refrigerated containers (reefers), distributing heavy equipment and parts, and providing preventive maintenance to a few other clients. [JD 3:4-5; R. Ex. 54(c)]. TTS also repaired chassis, trailers, trucks and heavy equipment and sold parts and accessories. (R Ex. 26, Tr. 109). TTS had a division called KALOTTA, which mainly repaired Kalmars and Ottawa equipment for Intership. (Tr.112-113:12-15, 709:4-24). MTS also provided services to some of Intership's major clients, such as Sea Star, Trailer Bridge and Tropical. (JD 3, fn. 11; Tr. 73:2-11, 198:24-25). However, MTS' and TTS' major "client" was Intership. (JD 3:4-11; Tr. 73:2-11, 110:19-20).

The former MTS and TTS facilities are about two minutes walking distance apart, in Bayamon, Puerto Rico. (Tr. 795:10-14). MTS employees were responsible for picking up equipment from Intership's Port facility and delivering it to MTS or TTS for repairs. (Tr. 199-201:3-23, 296:6-11). TTS employees also went to Intership's Port facility regularly to repair Intership's equipment. TTS mechanic Yamil Colón performed repairs for Intership either at TTS or at Intership's Port facility and sometimes went to the port four days in the same week to repair Intership's equipment. (Tr. 387:17-398:5, 390:22-391:20). TTS employees were also assigned to help MTS with mechanical repairs. (Tr.796:4-7, 798:10-15). In fact, the employment contract of some of TTS employees was with MTS instead of TTS. (GC 21b, 22, 25b; Tr.80:2-6, 165:5-7) According to former TTS supervisor Ryan, while he worked at TTS, the MTS logo was on his work uniform, the purchase orders he prepared, the equipment repaired by TTS and the communications he made. TTS' manager's business e-mail address had an MTS domain. (Tr. 1164: 1-14; 718-720; R 28, 30, GC 18, 20, 53). Respondent admitted that some TTS mechanics came from MTS (apparently they were simply switched from the MTS to the TTS payroll) and continued wearing the MTS uniform while working at TTS. (Tr. 160:20-25; GC 26, 34).

As the ALJ properly found, Intership, MTS and TTS are a single employer (JD 3:17 to 4:37; 12:23 to 13:33).

B. Intership's Subcontracting of Maintenance Unit Work to its MTS Facility

The most recent collective-bargaining agreement between Intership and the Union expired in 2012. [JD 2:41; GC Ex. 5(uu) and 5(aaa), paragraphs 5(a) to 5(c); J Ex. 2, Tr. 976:6-13]. While that agreement was still in effect, the parties arbitrated two grievances in which the Union claimed that Intership was violating the contract by using non-union personnel at MTS to perform bargaining unit maintenance work belonging to Intership's unit employees. On June 27,

2011, the arbitrator found that Intership was "subcontracting" bargaining unit maintenance work to its MTS subsidiary, had hired non-unit personnel to perform preventive maintenance and repairs, and paid that personnel less, thereby violating the parties' contract. The arbitrator ordered Intership to cease and desist from this practice and to pay unit employees for lost wages, plus attorneys' fees. (J Ex. 3b, pages 15-16).[3]

C. The Union's Petition to Represent MTS Employees and Respondent's Threats to its MTS Employees

The Union, under new leadership led by Rene Mercado,[4] then organized the MTS employees and on September 20, 2012, the Union filed a petition seeking to represent them. (JD 5:5-6; J Ex. 10) On September 21, 2012, the same day it received notice of the Union's petition, Respondent, by MTS General Manager Luis Ruiz, started making almost daily unlawful statements to the MTS employees. (Tr. 838:1-17; GC Ex. 36). Ruiz repeatedly interrogated MTS employees about their union activities and threatened them with loss of jobs and plant closure if they chose to be represented by the Union.[5] For example, he told employees that "the Company would close its gates" and that it "would close" if the Union came in, that employees would not have any work, that Respondent would not allow a union to come in, and that he "learned that ten persons had signed cards to belong to the union," and that "whoever he learned that had signed those, he was going to suspend them." Ruiz also solicited an MTS employee to ask his coworkers to side with the company (against the Union), and created the impression of surveillance of employees' union activities by telling them that Respondent would learn who

[3] On June 5, 2012, the United States District Court for the District of Puerto Rico dismissed a petition Intership had filed seeking to vacate the arbitrator's award. (J Ex.4). Respondent appealed to the U.S. Court of Appeals for the First Circuit. On October 24, 2012, Respondent filed for voluntary dismissal of the appeal, after closing MTS.

[4] All Union officers who were elected as part of the Union's new leadership in July 2012 were also Intership's employees and continued to work for Intership at the same time they held union office, except for Union President Mercado. (Tr. 625-627, 830-831).

[5] Ruiz' plant closure threats were consistent with Respondent's closure of MTS just two days after the MTS employees voted to be represented by the Union in a Board election. (see infra). (JD 6:1-2).

signed authorization cards. (JD 5:18 to 6:2, 13:37 to 16:5; Tr. 204:17-20, 206:1-11, 228- 229, 242:4-17, 256:18-23, 289:6-12, 297-298, 312-313, 324-325).

D. The Union's Election Victory and Respondent's Immediate Closure of MTS

On October 17, 2012, MTS employees voted for the Union as their exclusive collective-bargaining representative. (JD 6:5-6; J Ex. 10, 12).[6] Just two days after the Union won the representation election, on October 19, 2012, Respondent made good on its threats and closed MTS, falsely claiming the closure was based on economic reasons. (JD 6: 5-8; J Ex. 1, paragraph 36). [7] For years MTS had operated with losses; yet it was not until two days after the election that Respondent decided to close MTS. (Tr. 98: 2-99:15). The ALJ properly discredited Respondent's economic defense. (JD 6:10-35; 23:22-36).

E. Respondent's Failure and Refusal to Notify or Bargain with the Union about the Decision to Close its MTS Facility or the Effects of that Decision

Respondent admittedly closed its MTS operation without providing prior notice or bargaining with the Union. (JD 6: 5-8; J Ex. 20, paragraph 1). Respondent then failed to grant the Union's October 30, 2012 request for an opportunity to meet and bargain over the decision and effects of closing MTS. (JD 6: 7-8; J Ex. 15, 20, paragraph 2).

F. Respondent's Transfer of MTS Work to TTS and Subcontracting of MTS Work to Frank's Chassis

After Respondent closed MTS, it continued to operate its nearby TTS facility, which performed a similar maintenance function, also mainly for Intership - repairing chassis, trailers, trucks and heavy equipment. [R. Ex. 26, page 6, R. Ex.54 (c)]. After MTS closed, Respondent

[6] On October 25, 2012, the Union was certified as the representative of all full time mechanics, welders, utility, tire repair and maintenance employees employed by MTS at its facility in Bayamon, Puerto Rico, excluding all other employees, managers, supervisors and guards as defined in the Act. (J. Ex. 13).

[7] On October 19, 2012, MTS General Manager Ruiz gathered the employees at the end of their shift, and handed them a letter from Respondent's President, David Segarra, notifying them that MTS closed operations due to alleged economic reasons. (J Ex. 1, paragraph 37, J Ex. 14). Ruiz learned that MTS would close just an hour earlier, when President Segarra called him on the phone and instructed him to close the MTS operations. (Tr. 97:2 to 98:1). Segarra admitted he made the decision to close MTS after the election, on October 19, 2012. (Tr.1558:23-1559:4).

transferred some of the duties of MTS employees to its TTS employees. After MTS closed, TTS employees had to go to Intership to pick up Intership's equipment for repair at TTS, a duty previously handled by MTS employees. (Tr. 391:12-20, 709:1 to 711:19). In addition to transferring some of the former MTS work to TTS, Intership began subcontracting work that MTS used to perform to a third party entity, Frank Chassis. (JD 4:5-10; Tr.632:2-16).

Union President Mercado testified that, after MTS closed, the Union decided not to attempt to organize any other Intership's subsidiaries because it feared that Intership would respond as it did with MTS, by closing down the facility. (Tr. 1033:20 to 1034:4, 1064:18 to 1065:5). Thus, the closing of MTS had the intended chilling effect on the union activities of the Union's leaders, who, as noted above, were all employees of Intership.

G. Respondent's Threats to TTS Employees

After Respondent closed MTS, TTS supervisors Ernesto Dávila and Noel Lopez, and TTS manager Enrique Sosa repeatedly threatened TTS employees by telling them that MTS closed because its employees became part of the Union and that was against Respondent's interest, and that, if TTS employees unionized, TTS would close too and its gate would be locked.[8] (JD 7:3-37, 15:14:32 to 15:14; Tr. 392-394, 396:23 to 397:4, 409:14-22, 421-424, 716-717, 735-736, 806-809). Former TTS Supervisor Darren Ryan testified that, around March 2013, about a month before the closing of TTS on April 26, 2013, Supervisor Dávila told him that if TTS employees unionized TTS would close and they would be fired.

H. Respondent's Closure of TTS

As noted above, after MTS closed Respondent transferred some of the work performed by MTS to TTS. In addition, Intership used TTS employees to perform mechanical repairs at its

[8] At page 7, Line 9 of his Decision, the ALJ mistakenly stated that "Ruiz said…", instead of "Davila said…", as he correctly stated and found in the table in page 14. (Tr.392).

Port facility. As a result, on February 21, 2013, the Union, through Rene Mercado, renewed its objection to Intership's practice of having a non-union subsidiary perform unit work. At the same time, in a letter and discussion Mercado proposed to Intership Terminal Operations VP Joe García that the non-union TTS employees should be included in bargaining unit of Intership employees represented by the Union, to no avail. [Tr.843-844; GC 38(b), 39].[9] Mercado testified without contradiction that he told Intership's Terminal Operations VP Joe García that it was best to include the (TTS) employees who were coming to the Port in the bargaining unit. García argued that it was better to leave them outside the Union because they had a lower salary (than the unit employees). (Tr.843:12-23).

Then, on April 15, 2013, the Union filed a charge in Case 24-CA-102920,[10] alleging that Respondent was unilaterally subcontracting the Intership unit maintenance work to TTS. On April 26, 2013, just 11 days later, Respondent abruptly closed TTS and discharged all of its employees for alleged economic reasons. (JD 7: 41; J Ex. 1, paragraph 43). Respondent's defense was properly discredited by the ALJ.[11] (JD 7:39 to 8:6; 23:38 to 24:23).

[9] Mercado clarified that in the letter he inadvertently referred to MTS employees instead of TTS employees, but when he spoke with Garcia he talked about TTS. (By the time Mercado had these communications with Garcia, MTS had been closed and the only subsidiary performing maintenance repair at Intership's facility was TTS.)

[10] Although the ALJ rejected the General Counsel's exhibit concerning the filing of Case 24-CA-102920 against Respondent Intership (GC Rejected Ex. 40), General Counsel respectfully requests that the Board take administrative notice of the charge in Case 24-CA-102920.

[11] Noel López, the second in command at TTS, admitted that he learned about TTS' closure on the very day it closed. Before that, López had never heard about the possibility of TTS closing for economic reasons. (Tr.195:10-15, 1166-:23 to 1167:22). Also, it may not be coincidence that the closure of TTS occurred just a few days after the Regional Office asked Respondent to provide information about TTS' line of business and location in connection with the investigation of Respondent's alleged unlawful closure of MTS. (R Ex. 6, portion of the chain of e-mails dated April 23, 2013).

IV. RESPONDENT VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT BY ITS PARTIAL CLOSURES OF MTS AND TTS THAT WERE MOTIVATED BY THE PURPOSE OF CHILLING UNION ACTIVITIES AT ITS REMAINING FACILITIES. (Exception 1).

A. The ALJ's 8(a)(1) and (3) finding, but rejection of the *Darlington* theory of violation

As noted above, the ALJ correctly found that all three components of Respondent — Intership, MTS and TTS — constitute a single employer and a single integrated enterprise based on common ownership, common management, interrelation of operations and labor relations. (JD 22: 25 to 13:33). The ALJ further properly found that Respondent violated Section 8(a)(3) and (1) of the Act by closing MTS and TTS and discharging the MTS and TTS employees because they selected the Union as their bargaining agent. (JD 21:35-38; 23:40). Under the *Wright Line* framework, the ALJ concluded that the GC was able to make a *prima facie* case showing that Intership discriminatorily subcontracted out the MTS and TTS work, and that Respondent failed to show that it would have taken those actions absent the employees' union activities, and therefore that the discharges of the MTS and TTS employees violated Section 8(a)(1) and (3) of the Act. (JD 23:14 to 24:23).

General Counsel excepts, however, to the ALJ's rejection of the alternative theory under *Textile Workers Union v. Darlington Mfg. Co*., 380 US 263 (1965), that Respondent violated Section 8(a)(1) and (3) of the Act by closing MTS and TTS and discharging the MTS and TTS employees, in each case to chill union activities among employees at Respondent's remaining operations, because he found that Respondent did not partially close those operations. As a result, he failed to conclude that Respondent's closings of its MTS operations, and later TTS, and discharges of its respective employees, were intended to discourage Respondent's remaining employees from engaging in union activities. (JD 21:40 to 22: 45).

The ALJ reasoned:

> The *Darlington* line of cases holds that if an employer partially closes its operation with a motivation to affect union activities at its remaining plants, it violates Section 8(a)(3). *PurolatorArmored, Inc.,* 268 NLRB 1268 (1984). Furthermore, an employer in such a case also violates Section 8(a)(5) in the likely event that the employer also fails to notify, and bargain with, the employees' bargaining representative. *Parma Industries,* 292 NLRB 90 (1988). The Board has dismissed an 8(a)(5) allegation over the closing of an entire business, where the *Darlington* precedent ruled out an accompanying 8(a)(3) violation. *Milo Express, Inc.*, 212 NLRB 313, 314 (1974). Thus, in 8(a)(3) cases, *Darlington* is applied in 8(a)(5) partial closing cases, where there is no other basis upon which to argue that a bargaining obligation exists. To hold otherwise would contradict and undermine the *Darlington* principle that an employer has a right to get out of one part of its business, even if it does so because of union animus, so long as it does not attempt to gain "unfair advantage" over union supporters at its other operations. *First National Maintenance,* supra, 452 U.S. at 682. As the Court observed in *First National Maintenance,* Section 8(a)(3) represents the Union's "direct protection against a partial closing decision" motivated by union animus. Accord: *D & S Leasing*, 299 NLRB 658 (1990) (cancellation of subcontract violates Sec. 8(a)(3) and (5) because of union animus); *Parma Industries*, 292 NLRB 90 (Sec. 8(a)(3) and (5) partial closing); *Mashkin Freight Lines*, *Inc.*, 272 NLRB 427 (1984) (Sec. 8(a)(3) and (5) closing and relocation of operations). Section 8(a)(5), independent of Section 8(a)(3), does not provide protection, direct or indirect, to a union to insist upon bargaining over an employer's decision to partially close its business.
>
> 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 the MTS subcontract into a non-*Darlington* matter.

B. If the Board finds that Respondent's closings of MTS and TTS were partial closings of its overall operations, a *Darlington* analysis is applicable.

As the GC argued and the ALJ properly found, Respondent violated Section 8(a)(1) and (3) of the Act because it subcontracted out the work performed by MTS and TTS employees. (JD 21:35-38; 23:1-36) However, if the Board finds that Respondent's actions with regard to MTS

and TTS were partial closings of segments of its overall business, then, it is submitted that Respondent still violated Section 8(a)(1) and (3) under the principles set forth in *Darlington*, since both closings were intended to discourage Respondent's remaining employees from engaging in union activities. In that regard, although Respondent subcontracted some of the MTS work and some of the TTS work upon closing those subsidiaries, in discussing the propriety of a restoration remedy, the ALJ referred to Respondent's actions toward its MTS and TTS as unlawful closures.

In *Darlington*, the Supreme Court held that an employer violates Section 8(a)(3) of the Act by closing part of its business if the employer was motivated by a purpose to chill unionism in its remaining facilities and the employer may have reasonably foreseen that the partial closing would likely have that effect.[12] Under *Darlington* it is sufficient to have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, to give promise of the company reaping a benefit from the discouragement of unionization in that other business. 380 U.S. at 275-276. In determining whether a partial closing was motivated by a purpose to chill, as well as whether that chill was reasonably foreseeable, the Board considers, among other factors, (1) whether contemporaneous union activity occurred at the employer's remaining facilities; (2) the geographic proximity of the employer's remaining facilities to the closed operation; (3) the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact; and (4) representations made by the employer's officials and supervisors to other

[12] There is no suggestion in *Darlington* or its progeny that the General Counsel must demonstrate that such a purpose was the employer's sole motivation. *See, e.g., Chariot Marine Fabricators*, 335 NLRB 339, 352-53 (2001). (finding *Darlington* violation where evidence established single employer closed one company in order to stop the unionizing effort there and to chill any threat of unionism at its other company's nearby facility).

employees. Not all elements need to be present for the Board to find a violation. *Darlington Mfg. Co.*, 165 NLRB 1074 (1967).

In the case at hand, the ALJ's finding that Intership, MTS and TTS constitute a single employer satisfies the "interest in another business" that is required under *Darlington*. (JD 12: 25). Moreover, in considering whether "contemporaneous union activity" existed at the remaining facilities, the Board does not require that such activity be organizational activity. For example, in *Purolator Armored, Inc.*, 268 NLRB 1268, 1290 (1984), *enforced*, 764 F.2d 1423 (11th Cir. 1985), an employer's partial closure violated Section 8(a)(3) where the remaining employees were already represented and the contemporaneous union activity was the negotiation of a new collective-bargaining agreement. The ALJ in *Purolator*, as affirmed by the Board, noted that the partial closure would have the "clearly predictable result" of impairing the remaining employees' "freedom to continue their representation by the Union…." [13]

1. Application of *Darlington to MTS*

The closing of MTS was in the context of the ongoing dispute between Intership and the Union over Intership's attempt to transfer unit work to its non-union subsidiary. After the Union obtained a favorable arbitration award ordering the payment of lost wages for the work the then-unrepresented MTS employees performed for Intership, the Union successfully organized those same MTS employees. Intership immediately responded by shutting down MTS, both to avoid dealing with the Union at MTS and to convey a clear anti-union message to its employees at TTS and Intership.

[13] *Id.* at 1289. *See also George Lithograph Co.*, 204 NLRB 431, 431 (1973) (employer violated Section 8(a)(3) and (1) by closing down the mailing division of its business while the Mailers Union was attempting to organize the employees, even though the employer's remaining employees were represented by other unions; the Board reasoned that those employees would not feel free to replace their bargaining representative with another, given the employer's hostility against the Mailers Union).

Additionally, there was close geographic proximity between the various parts of Respondent's operations. The MTS and TTS facilities were located very close to one another in Bayamon. MTS employees went to Intership's facility at the port in San Juan regularly to pick-up and deliver equipment. In an eight-hour shift, MTS drivers could go to Intership approximately seven to eight times. MTS employees also regularly picked up and delivered equipment for TTS. On occasion, TTS mechanics would be asked to perform work at MTS, and both entities interchanged personnel, since the employment contract of some of TTS employees was with MTS instead of TTS. There is no doubt that employees of the three entities had a certain level of interchange and/or interaction.

Under these circumstances, it was likely that TTS and Intership employees would learn of the circumstances surrounding the closure of MTS, as they in fact did. Furthermore, when Intership closed its MTS facility because of the Union, it was in fact chilling the union activities of its own employees, including the Union officers. Intership conveyed the message that union organization would not be tolerated at any of its subsidiaries, and that union organizing and vigorous contract enforcement activities by the Intership bargaining unit employees, including the Union officers, would not be tolerated.

Respondent's motivation of chilling unionism at its remaining facilities by closing MTS was clearly demonstrated shortly after the closing of MTS by the repeated unlawful threats of its supervisors to TTS employees that Respondent closed MTS because the MTS employees voted for the Union and that Respondent would also close TTS if TTS employees joined the Union.

For all of these reasons, it is submitted that Respondent knew, and could have reasonably foreseen, that the closing of MTS would likely chill its remaining employees' union activities.[14]

Based on the above, it is submitted that if the Board determines that Respondent's closure of its MTS facility is a partial closing of its overall operation, then the partial closing and the discharge of all 22 MTS employees violated Section 8(a)(3) and (1) of the Act under *Darlington,* in addition to the *Wright Line* theory of violation properly found by the ALJ.

2. Application of *Darlington* to TTS

The closing of TTS was also in the context of the ongoing dispute between Intership and the Union over Intership's attempt to transfer unit work to its non-union subsidiaries, MTS and TTS. TTS' closing also took place at a time when Respondent's violations of the Act with regard to the closing of MTS had not been remedied and after Respondent told the TTS employees that MTS was closed because it unionized.

Like MTS employees, TTS employees also went to Intership's facility regularly to pick-up or deliver equipment, and/or perform maintenance and repairs to Intership's equipment, especially after the closing of MTS. The evidence shows that Respondent feared that TTS employees would seek union representation. Consistently, supervisor López told TTS employee Rosa not only that MTS had closed because the Union came in, but also that if TTS noted a change in its employees, they would close the company. The "change" to which López referred obviously meant a change from being unrepresented to seeking union representation.

Moreover, it is undisputed that, a couple of months before TTS' closure, the Union, through Rene Mercado, protested the fact that unrepresented TTS employees were performing unit mechanical and maintenance repairs for Intership, and that on February 21, 2013, the Union

[14] Furthermore, there is evidence that Respondent's closing of MTS actually chilled the Union's organizational efforts at TTS because the Union specifically refrained from organizing at TTS and other subsidiaries of Intership because it was afraid that Respondent would also close those operations if they were organized.

proposed to Respondent's Vice President Joe García that the TTS employees who came to Intership's port facility should be included in the parties' existing bargaining unit. Through Mercado's letter dated February 21, 2013, the Union also let Respondent know that the fact that TTS' employees were performing mechanical and maintenance repairs for Intership was relevant to the charges filed by the Union concerning the discharges of MTS employees that were pending before the Regional office.

As in *Purolator Armored, Inc.*, 268 NLRB at 1290, even though the employees remaining after Respondent's partial closure of the TTS facility, i.e. the Intership employees, were already represented by the Union, it is apparent that Respondent foresaw the closure of TTS, shortly after the Union demanded recognition as the representative of the TTS employees when they were working at the Port on Intership equipment, as a means to send the message to the Intership employees that they should refrain from any further organizing activity, and that if they were too assertive in their bargaining demands Respondent would also retaliate against them. Accordingly, it is submitted that if the Board determines that Respondent's closure of its TTS facility is a partial closing of its overall operation, then the partial closing and the discharge of all TTS employees violated Section 8(a)(3) and (1) of the Act under *Darlington,* in addition to the *Wright Line* theory violation properly found by the ALJ.

V. RESPONDENT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT UNDER *FIBREBOARD* BY CLOSING MTS, SUBCONTRACTING THE MTS EMPLOYEES' WORK, AND DISCHARGING THE MTS EMPLOYEES, WITHOUT NOTIFYING AND/OR BARGAINING WITH THE UNION. (Exceptions 2 to 4).

A. The ALJ's finding that *Fibreboard* is inapplicable

The ALJ properly found that Respondent violated Section 8(a)(5) of the Act by unilaterally closing MTS without offering the Union a chance to bargain over that matter. He concluded that Respondent's subcontract of MTS' work was a mandatory subject of bargaining

under *Dubuque Packing Co.*, 303 NLRB 386 (1991) enfd. in rel. part 1 F.3d 24, 31–33, (D.C. Cir. 1993), pet. for cert dismissed 511 U.S. 1138 (1994). (JD 17:34-37). Although the GC is not excepting to the ALJ's finding that Respondent had a duty to bargain over its decision to close MTS under *Dubuque*, it is submitted that Respondent's duty to bargain over the decision to close MTS, to lay off its employees and to subcontract their work may also be based on the principles set forth in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964).

The ALJ found:

> MTS' cessation was, however, also not a clear case of *Fibreboard* subcontracting. *Fibreboard* subcontracting requires, inter alia, replacing existing employees with a contractors' workers performing the same work under similar employment conditions, without a capital investment or alteration in the employer's basic operation. Thus, although 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 employment conditions, other factors preclude *Fibreboard* handling. These non-*Fibreboard* factors, which elevate the MTS subcontract to a *Dubuque* issue, are as follows: (1) Intership did not just solely change the identity of the workers repairing chassis, it also disassembled MTS' chassis operation, dumped equipment and machinery, and leased away the building (i.e., this represented a liquidation of several assets that was not present in *Fibreboard*); (2) although Intership continued to perform its main stevedoring function, MTS' closure still represented the end of its minor business venture into repairing chassis for outside clients (i.e., this cessation of a business venture was also not present in *Fibreboard*); and (3) Intership's decision to close MTS was, in part, driven by economic profitability, given that MTS was deeply unprofitable and could not continue without Intership's fiscal aid. Although *Dubuque* specifically concerned work relocation decisions, its principles are still applicable to a "Category III" decision of this nature, which was a decision that had a direct impact on MTS' 25 workers, but, also focused upon economic profitability. *Westinghouse*, supra.

B. The closure of MTS and associated discharges of MTS employees violated Section 8(a)(1) and (5) of the Act under *Fibreboard*. (Exceptions 2 and 3).

Although the ALJ found that Respondent replaced MTS workers with the workers of Frank Chassis, who performed the same type of work under presumably similar employment conditions, he incorrectly concluded that MTS' closing and subcontract should not be analyzed

under *Fibreboard*, because said analysis requires the subcontract to be, *inter alia*, without a capital investment or an alteration in the employer's basic operations. (JD 19:29-33; 20:19-24). Based on Respondent's generalized testimony that was unsupported by documentary evidence, that it disassembled MTS' chassis operation, the ALJ found that Respondent got rid of most of its equipment and machinery, and that it leased the MTS building, and concluded that there was a liquidation of assets or capital investment that made the subcontracting of work by MTS distinguishable from *Fibreboard*. In this regard, the ALJ erred by finding that Respondent's liquidation of assets and closure of its minor MTS business venture rule out a *Fibreboard* analysis.

In *Fibreboard*, the Supreme Court was faced with the question of whether an employer's decision, motivated by economic considerations, to subcontract certain maintenance work performed by its employees, was covered by the phrase "terms and conditions of employment" within the meaning of Section 8(d) and was, accordingly, a matter about which the employer was obligated to bargain by virtue of Section 8(a)(5). The Court, in affirming the Board's finding that subcontracting was a matter about which the employer must bargain, stated:

> The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railway Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330.* A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit. *379 U.S. at 210.*

In *Torrington Industries*, 307 NLRB 809 (1992), the Board applied the Supreme Court's holding in *Fibreboard* that an employer has a duty to bargain over decisions to subcontract work when the employer replaces employees in the existing bargaining unit with those of a contractor to perform the same work. The Court explained that requiring bargaining under these

circumstances would not abridge an employer's freedom to conduct its business, particularly when the subcontracting involved no capital investments or change in the company's basic operations. *Id.*, at 213-214. Applying that rationale, in *Torrington* the Board found that employers are required to bargain over subcontracting decisions where "virtually all that is changed through the subcontracting is the identity of the employees doing the work," 307 NLRB at 811, because such decisions are not "at the core of entrepreneurial control." *Id.*, quoting *Fibreboard*, *supra*, at 223.

The Board applied this approach in *O.G.S. Technologies, Inc.*, 356 NLRB 642 (2011), which involved an employer's decision to outsource die-cutting work to a subcontractor that utilized more advanced equipment. In finding that the decision was "*Fibreboard* subcontracting" and thus a mandatory subject of bargaining, the Board explained that, both before and after the decision to subcontract, the employer's enterprise was devoted to producing and supplying brass buttons to the same range of customers. Even though the subcontracting entailed some operational changes, no line of business was abandoned or contracted. Rejecting the employer's argument that the decision turned on technological considerations rather than employee wages, the Board noted the broad conception of labor costs under *Torrington* and concluded that the decision to subcontract "turned on how fast the employees could perform their work." *Id.*

Applying the above principles to this case, it is submitted that Respondent was required to bargain with the Union prior to closing MTS. Respondent's decision to close its MTS operation, transfer some of its work to TTS and subcontract other MTS bargaining unit work to an outside company, Frank's Chassis, was essentially a mere substitution of one group of employees for another to continue performing the same kind of work, and did not result in the alteration of

Respondents' basic operation—stevedoring. Respondent's cessation of its limited business venture involving MTS repairing chassis for outside clients does not preclude the application of *Fibreboard* because Respondent's basic operation was essentially untouched by elimination of that part of the MTS operation. Respondent failed to establish that MTS ever performed significant repairs for outside companies, as there is no documentary evidence showing that MTS performed such outside work.

In addition, as the ALJ correctly stated, "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" (of MTS work to Frank's Chassis). (JD 18:40-42). Thus, it cannot be logically concluded that the cessation of a minor portion of MTS' operation constitutes an alteration in Respondent's main business operations sufficient to render the issue outside the range of *Fibreboard*. The MTS capital investment alluded to by the ALJ is not significant enough to preclude categorizing this as a *Fibreboard* subcontract. Respondent merely sold some equipment and leased the MTS property after closing MTS. This transaction cannot be considered as a significant capital investment that altered in any way the scope and direction of Respondent's business and certainly does not make the subcontract a managerial decision. See *Whitehead Bros. Co.*, 263 NLRB 895, 898-99 (1982), where the Board affirmed the ALJ's finding:

> …. in *First National* the Supreme Court explicitly stated that "we do not believe that the absence [in that case] of 'significant investment or withdrawal of capital' is crucial." Rather as indicated, the Court regarded the nature of the employer's decision, rather than the amount of investment involved, to be the determinative factor.

The ALJ's finding that that a *Fibreboard* analysis is not applicable because "Intership's decision to close MTS was, in part, driven by economic profitability, given that MTS was deeply

unprofitable and could not continue without Intership's fiscal aid" (JD 19:21-22) is flawed and unsupported by the record evidence for the reasons the ALJ himself found in concluding that Respondent's economic defense regarding MTS is unpersuasive, invalid and implausible, and that the discharges of the MTS employees violated Section 8(a)(3) of the Act. (JD 23:24-36). Respondent admits that since its inception as a subsidiary of Intership in 2001, for over a decade, MTS lost money, and this was tolerated until two days after the MTS employees voted for the Union. (Tr.1346: 3-4, 1559: 5-9). Before MTS employees unionized, MTS' losses did not prevent or discourage Intership from continuing to invest in its subsidiary (nor did it prevent Intership from investing $2.1 million in TTS, which performed work that was very similar to the work performed by MTS). [Tr.1450:24-25; R Ex. 7(a), 7(b), 38]. CGC submits that MTS' losses on the books were long tolerated because Intership is the profit maker of Respondent's operations, MTS existed mainly to serve Intership and contribute to the success of Respondent as a whole. Respondent's Board of Directors' meeting minutes dated November 15, 2011, several weeks after the closure of MTS, simply state, "Several meetings have been conducted regarding the future of this subsidiary [MTS]." (R Ex. 53, Page 2). A corporation of the size of Respondent would undoubtedly have documents more carefully analyzing such a step if it was truly based on economics. As the ALJ correctly found in analyzing the Section 8(a)(3) violation, Respondent's failure to provide any such documents demonstrates that its economic defense is pretext. Therefore, the ALJ improperly concluded otherwise in evaluating the Section 8(a)(5) violation regarding MTS.

Given the "essential continuity in Respondent's operations" it is submitted that Respondent's decision to close MTS falls within the *Fibreboard* and *Torrington* framework. Therefore, Respondent violated Section 8(a)(1) and (5) of the Act by failing to give the Union

notice and an adequate opportunity to bargain about its decision to close the MTS portion of its operations, subcontract the MTS bargaining unit work, and discharge the MTS bargaining unit employees, and the effects of that decision.

C. Respondent's closure of MTS and the associated discriminatory discharges of MTS employees are also unlawful under Section 8(a)(5) of the Act because those actions violated Section 8(a)(3) of the Act. (Exception 4).

In *First National Maintenance Corp. v.* NLRB, 452 U.S. 666 (1981), the Supreme Court, citing *Darlington*, stated that "an employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic." The Court further noted that a "union's legitimate interest in fair dealing is protected by Section 8(a)(3), which prohibits partial closings motivated by antiunion animus when done to gain an unfair advantage. Under Section 8(a)(3) the Board may inquire into the motivations behind a partial closing." 452 U.S. at 682. The Court summed up its survey of the law by stating that, under Section 8(a)(3), the union "has direct protection against a partial closing decision that is motivated by an intent to harm a union." Id.

Thus, under *First National Maintenance* if a partial closure and/or sale is motivated by anti-union animus, an employer's failure to bargain about the decision to close with the union cannot be called entrepreneurial, or exempted from bargaining. See *Equitable Resources Energy Co.*, 307 NLRB 730, 732 fn. 11 (1992); *Continental Winding Co.*, 305 NLRB 122, 125 (1991) ("Discrimination on the basis of union animus cannot serve as a lawful entrepreneurial decision," citing *Strawsine Mfg. Co.*, 280 NLRB 553 (1986); accord: e.g., *Parma Industries*, 292 NLRB 90 (1988); *Challenge-Cook Bros.*, 288 NLRB 387, fn. 2 (1988).

In *Parma Industries*, supra, the Board found that the employer violated Section 8(a)(1), (3) and (5) by closing its plant, selling its assets, and terminating all unit employees in retaliation

for their voting in the Union, and to avoid bargaining with the Union. The Board noted that insofar these actions were taken for discriminatory reasons, i.e., to retaliate against the employees for voting for the Union, the actions could not constitute a legitimate entrepreneurial decision. See *Strawsine Mfg. Co*., 280 NLRB 553 (1986).

In this case, for the reasons stated in the ALJ's Decision with respect to a *Wright Line* analysis, and as stated with respect to the reasons above based on a *Darlington* analysis, there is no dispute that Respondent discharged the MTS employees in violation of Section 8(a)(3) of the Act. Given that Respondent's reasons for closing its MTS operations cannot be labeled as "purely economic," but instead were to retaliate against employees because they voted in the Union and/or were to chill unionism at Respondent's remaining operations, it is submitted that Respondent cannot claim that its decision to close MTS was an entrepreneurial decision over which it had no obligation to bargain with the Union. Accordingly, this is an additional rationale, not found by the ALJ, for concluding that Respondent's closing of MTS and termination of employment of the MTS unit employees, without giving the Union notice or bargaining over those decisions and their effects, violated Section 8(a)(1) and (5) of the Act.

VI. STATEMENT OF FACTS: THE SUSPENSION OF EFRAIN GONZALEZ (Exceptions 5 to 7)

On Friday, May 30, 2014, after regular work hours, Intership checker Efraín González, a shop steward and the Union's secretary-treasurer, saw Trailer Bridge[15] supervisor Reynaldo Ortega dispatching Intership cargo at the Army Terminal. The dispatch of cargo is bargaining unit work. (JD 12: 8-9; Tr. 761-762). As shop steward, González asked Ortega several times why he was dispatching cargo if he knew that work belonged to the Union, but Ortega ignored him at first. (JD 12: 9-10; Tr. 761:20 to 763). Then Ortega told González, "you are shit, and shit

[15] Trailer Bridge is a major Intership client. The checkers perform work at the Army Terminal. (Tr. 623:3-24, 678:18 to 679:11, 751:5-14, 762:10-13).

is ignored." González asked if Ortega was talking to him, and Ortega repeated, "you are shit, and shit is ignored." In response, González replied, "shit is what I can pull out of your mother." Ortega claimed that the Union had consented to this work arrangement. (JD 12:10-12; Tr. 763-764).

That afternoon, González received the following week's schedule and noticed he had not been scheduled to work. (Tr. 765:15-23). As a result, he called supervisor Rivas, who informed him that he was suspended because of the incident with Ortega. (Tr. 765:24 to 766:10).

Respondent VP Joe García corroborated González' version by testifying that on May 30, 2014 at around 5:00 p.m., Ortega called and told him that when González asked why Ortega was dispatching cargo, he replied using foul language against González and González then replied with a gross comment. (Tr. 968-969). García later testified that on the Monday or Tuesday after the incident, Ortega brought a memo about the incident to his office. (Tr. 987; R Ex. 11).[16] However, García made no mention of the memo in his Board affidavit provided shortly after the incident, or during prior testimony at the hearing.[17] (Tr. 966:1-8). García claimed that he relied on Ortega's written statement when deciding to suspend González. (Tr. 969:16-18). However, García was forced to admit that the decision to suspend González was made before he purportedly received Ortega's statement. (Tr. 969: 19-22). Respondent called Ortega as a witness, but did not question him about the incident with González.[18] (Tr. 1147-1152).

On June 4, 2014, the parties met at García's office to discuss González' suspension. (Tr. 766:-767: 23-5). García agreed to reinstate González the next day, but did not agree to make

[16] Ortega's memo, besides describing a convenient different version of the events, showed that Intership's clients sometimes directed unit employees. For example, Ortega wrote that he "asked [Intership employee] Jose M Rivera … if he could stay one additional hour, because there were a few Crowley and Sea Star movements left." (R Ex. 11).
[17] The only document Respondent (García) had mentioned or provided before was an e-mail he claims he received from Ortega on the day of the incident. (GC Ex. 47).
[18] An adverse inference should be drawn against Respondent for failing to elicit such testimony from Ortega.

González whole, stating he was still investigating the matter. (Tr. 768, 901). On July 9, 2014, García notified the Union and González that the suspension was upheld based on a company directive that states that employees cannot take any claims or grievances directly to Intership clients, and that any grievance should be addressed to Intership's supervisors. (Tr. 769: 17-22; 770: 4-9; 895: 1-5; GC. Ex. 30). García concluded that González violated said instruction and was disrespectful to a supervisor of Intership's client. (Tr. 901: 17-20).

VII. RESPONDENT VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY SUSPENDING SHOP STEWARD EFRAIN GONZALEZ FOR UNION ACTIVITY. (Exceptions 5 to 7).

A. The ALJ's findings

The ALJ erred by applying the analysis in *Wright Line* instead of *Atlantic Steel*, 245 NLRB 814 (1979), to determine whether shop steward González lost the protection of the Act when he took a grievance directly to Intership's client and responded with profanity after being provoked. Relying on *Wright Line* the ALJ found that the General Counsel made a *prima facie* showing that González's protected activity was a motivating factor in his suspension, but Respondent proved that it would have suspended González even in the absence of his protected activity. (JD 21:15-35). In *Felix Industries, Inc.*, 331 NLRB 144, 144-146 (2000), enf. denied on other grounds 251 F.3d 1051 (D.C. Cir. 2001), the Board rejected the application of *Wright Line* "where the conduct for which the Respondent claims to have discharged [the employee] was protected activity. *See also Atlantic Scaffolding Co.*, 356 NLRB 835, 839 (2011) ("[W]hen the conduct for which the employees are discharged constitutes protected activity, 'the only issue is whether [that] conduct lost the protection of the Act…"). Even under *Wright Line*, the ALJ erred. Respondent could not lawfully rely on the rule it applied to suspend González because it effectively prohibited him from exercising his Section 7 rights.

B. Legal Standard under *Atlantic Steel*

Under *Atlantic Steel*, 245 NLRB 814, 816 (1979), the Board has held that obscenities uttered by an employee as part of the *res gestae* of protected activity were not so flagrant or egregious as to remove the protection of the Act and result in a disciplinary action.[19] The Board set forth a four factor balancing test to determine whether the protection of the Act is safeguarded: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.*, at 816. If after these factors are weighted, the conduct is found to cross the line from "protected activity ... [to] opprobrious conduct," the worker loses the protection of the Act. *Id.*

The *Atlantic Steel* test presupposes that "not every impropriety committed during [otherwise protected] activity places the employee beyond the protective shield of the [A]ct." *Plaza Auto Ctr., Inc.*, 360 NLRB No. 117, at 10 (2014) (citation omitted). "This is so because '[t]he protections [that] Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses,' and that the language of the workplace 'is not the language of 'polite society'." Even though an employee's right to engage in protected activity is not absolute, this right allows "some leeway for impulsive behavior." *Id.* (citation omitted). The employee's conduct arising from his

[19] Employees who have insolently questioned a supervisor's intelligence or called a supervisor a "liar," a "cheat," or an "asshole" while engaged in protected activity have retained their protected status in spite of their remarks. *Firch Baking Co., 232 NLRB 772 (1977); Hawaiian Hauling Service, 219 NLRB 765, 766 (1975); Hamlet Steak House, 197 NLRB 632, 635 (1972); Postal Service, 241 NLRB 389, 390 (1979).* In *Coors Container Co., 238 NLRB 1312, 1320 (1978),* an employee engaged in protected activity called a superior a "beaner" and a "Mexican mother fucker" and remained protected under the Act.

protected activity must be weighed against the employer's need to maintain order, using the balancing test set forth in *Atlantic Steel* and not *Wright Line*.

C. González was suspended because he exercised his rights as a Union steward.

Respondent admitted that it imposed discipline on González because he took a grievance directly to its client, in violation of a company directive, and because, during the process, he was disrespectful to Ortega. By suspending González for taking a grievance directly to Ortega (Intership's client), Respondent imposed discipline on González because he exercised his rights under Section 7 of the Act. When employees have been elected or designated to represent a union in the administration of a contract and the resolution of grievances, and are engaged in Section 7 activity, as was undisputedly the case with González, the Board has held that the employee has protection for conduct, attitudes, and statements which might not otherwise be protected. *Trumbull Asphalt Co.*, 220 NLRB 797 (1975)*; Huttig Sash & Door Co.*, 154 NLRB 1567 (1965)*; Thor Power Tool Co.*, 148 NLRB 1379 (1964). Here, González's interaction with Ortega was clearly a protected activity under the Act, because his actions were made solely in the interest of the bargaining unit and as part of his shop steward duties.

Even though González did not direct his complaint to his employer, but to his employer's client, he was engaged in protected activity. It has long been held that the protection afforded to employees by Section 7 of the Act extends to employee efforts to improve their terms and conditions of employment, or their "lot as employees," through channels outside the immediate employee-employer relationship. *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007). The Supreme Court has stated that labor's cause is often advanced on fronts other than bargaining and grieving within the immediate employment context. *Eastex v. NLRB*, 437 U.S. 556, 565 (1978). In other words, the Act does not limit employees' rights to conduct or communication directed

towards an employer. It extends employees' rights to conduct or communications with third-parties, including the employer's clients. *Handicabs, Inc.,* 318 NLRB 890 (1995*),* enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997). Such communications are protected even when negatively impacting the employer's business. *Tradesman International, Inc.,* 332 NLRB 1158, 1160 (2000), enf. denied on other grounds 275 F.3d 1137 (DC Cir. 2002); *Sacramento Union,* 291 NLRB 540, 546 (1988), enfd. sub nom. *Sierra Pub. Co*., 889 F.2d 210 (9th Cir. 1989).

González approached Intership's client in an effort to protect unit employees' rights. González was raising his concern immediately to Ortega, who was performing bargaining unit work, and González, especially as the Union shop steward, was not bound by his employer's choice of forum when raising these concerns. Intership's alleged directives cannot constrain González's rights nor frustrate the policies of the Act since it is immaterial that an employee's protest may have or may have not violated its employer's rules. The Board has long held that employees engaged in protected activity "generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies." *See Louisiana Council No. 17*, 250 NLRB 880, 882 (1980). Thus, González should not lose the protection of the Act for carrying out his shop steward duties and safeguarding unit work that was being performed by a third party, just because Respondent created a rule prohibiting employee interactions with its clients, a rule that abridged employees' Section 7 rights and interfered with shop steward duties. The ALJ's decision in this regard, if upheld, would seriously constrain employees' Section 7 rights.

D. Gonzalez did not lose the protection of the Act.

With regard to Intership's argument and the ALJ's erroneous finding that González was lawfully suspended because he was disrespectful to Ortega, it is submitted that González did not lose the protection of the Act when he replied in kind to Ortega's profane comment. When applying the four *Atlantic Steel* factors to the exchange between González and Ortega, the balance weighs in favor of the Act's protection.

The conversation took place in the Army Terminal, an area at the Intership facility where cargo is dispatched. The conversation occurred after regular work hours. It did not disrupt the work process or Respondent's operations and did not occur in front of fellow employees. The Board has "regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high." *Plaza Auto Ctr., Inc.*, 360 NLRB No. 117, slip op. at 11 (citations omitted). Thus, the first factor —place of the discussion— weighs in favor of protection.

The second factor, the subject matter of the discussion, also strongly favors protection. González addressed a concern that Respondent's client was performing bargaining unit work, thereby protecting unit work of the Intership employees.

Furthermore, the nature of the outburst was equivalent, parallel, and in response to Ortega's prior *ad hominem* attack. Although González' statement was inappropriate, Ortega provoked him by initiating the exchange of insults and using obscene language first.[20] González' reaction to Ortega's foul remark was limited to a similar vulgar statement. There is no evidence that he yelled or got agitated. He simply replied in kind, with a single statement, and walked away. His statement was not opprobrious as to make him lose the protection of the Act. See *Kiewit Power Constructors Co. v. NLRB,* 652 F.3d 22, 28 (DC Cir. 2011) ("In

[20] This also suggests that such profane language is common at the Intership docks.

determining which actions are 'opprobrious' and thus count against protecting the employee, we defer to the NLRB's distinction between merely intemperate remarks, which the Act protects, and actual threats, which it does not.") (Citations omitted).[21]

Finally, the fourth factor, whether the outburst was in any way provoked by an employer's unfair labor practice, also weighs in favor of protection. The ALJ properly found that González was not the instigator. (JD 12:19). Respondent admitted that Ortega was performing bargaining unit work when González approached him and that Ortega was the first who used foul language. Thus, González's outburst was not only admittedly provoked by Ortega's inappropriate remark after ignoring him multiple times, but was also provoked by the fact that Ortega continued to perform unit work without explanation even after González, as the Union shop steward, questioned him about it.

The foregoing analysis of the *Atlantic Steel* factors strongly militates in favor of finding that González remained protected under the Act. As a result, it is submitted that Respondent violated Section 8(a)(3) and (1) of the Act by suspending González, because he was engaged in protected union activity.

VIII. STATEMENT OF FACTS: THE REDUCTION OF HOURS AND DAYS OF WORK OF INTERSHIP MAINTENANCE EMPLOYEES (Exceptions 8 to 10)

At the beginning of July 2014, Respondent admittedly reduced the work hours of employees in the Intership maintenance department, composed of welders, mechanics, tire repairmen, refrigeration specialists, and utility employees, among others. (Tr. 904: 1-3). Union Secretary-treasurer José Rivera testified that employees in these classifications have a fixed

[21] Even it were found that González' outburst weighs against him, it is not sufficient to make him lose the protection of the Act. See *Plaza Auto Ctr., Inc.*, supra, slip op. at 10. ("The fact that the nature-of-the-outburst factor weighs against protection does not require us to find that Aguirre lost the protection of the Act. Thus, 'It is possible for an employee to have an outburst weigh against him yet still retain [the Act's] protection because the other three [*Atlantic Steel*] factors weigh heavily in his favor.'").

schedule of forty hours per week, Monday through Friday, from 7:00 a.m. to 4:00 p.m. These employees are not subject to a shape-up or call to work; they report to work regularly, without the need to verify if there is any work for them. (Tr. 503). Welders Juan Delgado and Ramón Duran, who had 20 and 24 years of seniority, respectively, testified that they worked forty hours per week, from 7:00 a.m. through 4:00 p.m., on Monday through Friday until July 2014. (Tr. 596-597, 603-604). Mechanic Enrique Figueroa also testified that, since about 2010, he had worked forty (40) hours per week, from 7:00 a.m. to 4:00 p.m., Monday through Friday. (Tr. 609:13-20).

Delgado testified that, in June or July 2014, his work schedule was reduced to thirty-two (32) hours per week. As a result, he did not work on Wednesdays. This went on for three to four months, until approximately the end of November 2014. (Tr. 597). Likewise, in July 2014, Maintenance Manager Gerardo Rosa reduced Duran's schedule to thirty-two (32) hours per week, from that time until Delgado, who was on vacation at the time, returned to work. When Delgado returned, Duran's work schedule was further reduced to three days (twenty-four (24) hours) per week. (Tr. 604: 12-16, 605: 8-12). Respondent admitted that no welder was assigned to work on Wednesdays. (Tr. 974: 20-23).

Gerardo Rosa, Intership's Maintenance Manager, admitted that employees under his supervision worked fixed schedules, Monday through Friday, from 7:00 a.m. to 4:00 p.m., including Esteban Cabrera (tire repairman), Eduardo Pena, Juan Delgado (welder), Ramón Duran (welder), Enrique Figueroa (mechanic), José Viana (mechanic), Bartolo Garó (utility), and Manuel Álvarez (utility). (Tr. 572-576). Rosa confirmed that he does not have to notify these employees to report to work based on this fixed schedule, as Rivera testified. (Tr. 579: 24-25).

Respondent VP García also admitted that maintenance department employees are not subject to a shape-up or a daily call. (Tr. 970-19-21).

Manager Rosa further admitted that, in the summer of 2014, the hours of some of the maintenance employees were reduced, and that in addition to reducing the hours of welders Duran and Delgado at that time, Respondent also reduced the work hours of maintenance employee Bartolo Garó. (Tr. 577-578). Rosa admitted that, for **at least** two years prior to the summer of 2014, those workers worked a schedule of forty hours per week. (Tr.579:13-25). He later testified that a previous reduction of hours occurred five or six years earlier, in 2008 or 2009. (Tr. 581:11-18). The ALJ found, and Rosa acknowledged, that Intership's most senior employees regularly worked forty hours. (JD 10:21-22; Tr. 579:13-25; 599: 15-17; 606: 14-16).

Union President Mercado testified that Respondent never notified the Union that it was going to reduce the maintenance employees' work days in July 2014. (Tr. 850). Mercado learned about the reduction of hours directly from the employees. (Tr. 948:19-21). After receiving this information, on July 17, 2014, Mercado sent a letter to Respondent regarding the reduction of hours and requested to bargain over that matter, offering August 4 and 6, 2014, as potential dates. (GC Ex. 41; Tr. 850: 18-23). Respondent admitted that it did not notify the Union of its decision to reduce the hours of work and asserts that the decision was within management's prerogative and that it had no obligation to notify the Union. (Tr. 975-976).

On July 21, 2014, Respondent and the Union signed a stipulation that provided for an end to the Union's July 2014 strike and picketing,[22] and further provided, "[w]ithout waiving their managerial rights [..] the Company shall discuss with the Union, the amount of personnel to be

[22] See JD 8:8 to 9:34, 16:7-32, regarding the Union's strike and picketing at Intership in mid-July 2014, and Respondent's unfair labor practices in response.

called into the shop area."[23] (R Ex. 4(a) and (b); Tr. 852). This stipulation did not resolve the issue of Respondent's reduction of the maintenance employees' hours because Intership did not return employees to their regular work schedule at that time. (Tr. 856).

On July 22, 2014, Mercado notified Respondent that he was going on vacation and that Union VP Ramón Rodríguez and Secretary-treasurer José Rivera would be in charge of Union matters beginning on July 24. (R Ex.14). Respondent VP García testified that, before Mercado left for vacation, they agreed that Respondent would restore the maintenance employees to their full schedule on the week Mercado was to leave. (Tr. 910:4-9). However, García claims that, on July 24, when Mercado started his vacation, Union officers Rivera and Rodríguez came to his office to discuss an unrelated issue about a supervisor performing unit work and, at some point, the reduction of hours was brought up. García absurdly claims that, there and then, Rivera and Rodríguez simply agreed to the reduction of hours and asked García to allow them to explain the situation to the employees. (Tr. 982:20 to 983:9; 912-913). García further claims that, accordingly, Respondent re-implemented the reduced work schedule for the maintenance employees the following week. (Tr.912-913).[24]

García's testimony about this purported agreement is not credible and was contradicted by Rivera and Rodríguez, who testified that on July 24, 2014, they both headed to the mechanic's shop in response to a complaint they received from mechanic Figueroa about a supervisor performing unit work.[25] (Tr. 506, 532). Rodríguez testified that he called García to make him aware of the issue, and García told him to come over to his office to discuss the matter. (Tr. 507:14-18, 533: 14-25). Rivera and Rodríguez testified that, during the meeting with

[23] There could be no waiver of management rights because the collective-bargaining agreement had expired in 2012. (J Ex. 2). Moreover, nothing in the agreement permitted management to unilaterally reduce employee hours.
[24] García admitted that neither Rivera nor Rodríguez got back to him confirming that they had talked to employees, as he claims it was agreed. (Tr.985:14 to 986:9).
[25] Figueroa confirmed making this complaint to Rodríguez. (Tr. 611:21 to 613:17).

García, they addressed the issue regarding the supervisor performing unit work, and García then brought up the issue of the reduction of hours. They told García that he had to wait until Mercado returned from vacation to discuss that issue. According to Rivera and Rodriguez, the only agreement was that they would wait for Mercado's return.[26] (Tr. 507-508: 20-10, 534-535).

Furthermore, Respondent's contention that for the week that Mercado was on vacation, July 21-25, 2014, it restored the maintenance employees' regular schedule and called them to work the full week is not supported by the evidence and should be rejected. (Tr. 980:20-24). García admitted that employees did not work on July 21, because they were picketing, furthermore, July 25 was a local holiday. (Tr. 980-982). Welder Delgado consistently testified that his hours remained reduced continually from July to November 2014. In addition, Respondent failed to produce any business records showing that employees in fact worked the entire week from July 21 to 25, 2014, as García claimed.[27]

Logic dictates that no agreement was reached. The parties' July 21 stipulation containing a promise to bargain later was not fulfilled by the impromptu discussion on July 24. It is highly improbable that the Union would simply accept Respondent's explanation and concede to the reduction without gathering the employees' view first and without obtaining any concession from Respondent in exchange for an agreement, especially in view of the Union's recent picket and vigorous representation of the unit employees.

[26] The parties were not scheduled to discuss the reduction of work on July 24, 2014. Thus, if the subject was unexpectedly brought up, it is reasonable to expect that the Union was not prepared to bargain about it.

[27] A party's failure to offer documentation in support of witness testimony warrants an inference that the documentation would not support the party's position. *Bay Metal Cabinets*, 302 NLB 152, 178-179 (1991).

IX. ARGUMENT: RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY UNILATERALLY REDUCING THE INTERSHIP MAINTENANCE EMPLOYEES' WORK HOURS FROM JULY TO NOVEMBER 2014. (Exceptions 8 to 10).

A. The ALJ's finding

The ALJ found that Respondent did not violate the Act because it did not make any material or significant change in maintenance employees' schedules. He credited Respondent Manager Rosa and VP García over the welders and the mechanic, even though Rosa's testimony about the maintenance employees' work schedules is basically consistent with the employees' version. Although he credited Rosa, the ALJ failed to mention his admission that maintenance employees, including the two welders, maintained a fixed schedule consisting of forty weekly hours, for a number of years before July 2014,[28] and merely found that employees were assigned to work "as needed" and "subject to the availability of work." (JD 10:15-19). The ALJ found, however, that the two senior mechanics mostly work forty hours per week. (JD 10:21-22)

Despite Respondent's admission, the ALJ also erroneously concluded that the GC solely offered generalized and conclusory evidence regarding Respondent's maintenance employees' hours of work and failed to produce sufficient work and pay records that would have adduced a consistent practice with regard to the maintenance employees' schedule. (JD 10: 28-31) In view of that, it failed to find whether Respondent bargained with the Union about these changes.

B. The Legal Standard

An employer violates Section 8(a)(5) of the Act when it evades its duty to bargain by making a material and substantial change in wages, hours, or other terms and conditions of employment that are mandatory subjects of bargaining, at a time when a union is representing its employees. *Fresno Bee*, 339 NLRB 1214, 1214 (2003). Such unilateral changes made after the

[28] Maintenance Manager Rosa admitted that, since about 2008 or 2009 until the July 2014 reduction, certain maintenance employees worked forty hours per week. (Tr.581:11-18).

collective-bargaining agreement expires are unlawful because these conditions generally survive expiration of the agreement. *Hen House Market No.* 3, 175 NLRB 596 (1969), *enfd.* 428 F.2d 133 (8th Cir.1970).

The implementation of unilateral changes violates an employer's duty to bargain established by Section 8(a)(5) of the Act, absent the agreement of the bargaining representative, an impasse in negotiations, or a waiver by the bargaining representative. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994). The waiver must be clear and unmistakable and is not to be lightly inferred. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Georgia Power Co*., 325 NLRB 420 (1998) "To meet the 'clear and unmistakable' standard, … it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

An employer may not avail itself of a waiver defense where it presents the union with a *fait accompli*. In other words, an employer must give notice "sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain . . . . [I]f the notice is too short . . . [or] the employer has no intention of changing its mind, then the notice is nothing more than a *fait accompli." Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). A finding that a union was presented with *fait accompli* will prevent a finding that a failure to request bargaining is a waiver. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001); *Gannett Co.*, 333 NLRB 355, 359 (2001). A waiver of bargaining rights under a collective-bargaining agreement does not survive the expiration of the agreement. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 655 (2001); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d. Cir. 1992).

C. Respondent's unilateral reduction of the hours and days of work of its maintenance employees is a material and substantial change subject to mandatory bargaining.

Respondent admits that, for at least two years prior to July 2014, certain of its bargaining unit maintenance employees worked a fixed schedule consisting of forty (40) hours per week, from 7:00 a.m. to 4:00 p.m., on Monday through Friday, even if Respondent claimed that the reason for this was that there was available work for them. Manager Rosa's testimony with regard to the days and hours maintenance employees were scheduled to work is consistent with the testimony of the employees, given Rosa's admission that maintenance employees, including the two most senior welders, had a fixed schedule of forty weekly hours, for **at least** two years before the July 2014 reduction. Despite Respondent's admission of this past practice, the ALJ focused on Rosa and García's statement that employees were assigned to work "as needed" and "subject to the availability of work." (JD 10:15-19). Even assuming that was the case, Respondent's admission clearly shows that its past practice for at least two years was having employees work a forty hour week fixed schedule, without having to call employees to tell them when to report to work. Accordingly, it was reasonable for Respondent's maintenance employees to expect to keep working forty hours, from Monday through Friday, as they had been doing for at least two consecutive years before Respondent's unilateral reduction of hours in July 2014.

In view of this undisputed evidence, the ALJ erred by finding that General Counsel failed to produce sufficient work and pay records that would have adduced a consistent practice with regard to the maintenance employees' work hours. (JD 10: 28-31).

D. Respondent failed to give the Union notice or an opportunity to bargain over its unilateral reduction of maintenance employees' work hours.

Regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective-bargaining agreement. As

such, these past practices cannot be changed without offering sufficient notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Phila. Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (2003); *Eugene Iovine Inc.*, 328 NLRB 294, 297 (1999).

Respondent admitted that it reduced the work hours of maintenance department employees Delgado, Duran, and Garó in July 2014, and the evidence shows that those reductions continued until at least November 2014. The reason given by Respondent for cutting employees' hours was that it lost clients, which is obviously related to labor costs, and such decisions are particularly amenable to the collective-bargaining process. *First National Maintenance*, 452 U.S. at 680, quoting *Fibreboard Paper Products v. NLRB,* 379 U.S. 203, 214 (1964).

Furthermore, even if Respondent was to be credited that it reduced employees' work schedule because there was insufficient work available, Respondent still was under an obligation to bargain with the Union before reducing employees' work hours. Respondent claimed that the most senior employees worked forty hours per week. If Respondent had insufficient work to be able to assign forty hours of work to its most senior employees, then the reduction of hours based on this circumstance was subject to bargaining.

Respondent's self-serving argument that after implementation of the reduction of hours it then restored the hours during the week of July 21, 2014, is obviously meritless because work was limited to four or probably even three days that week in view of the picketing on July 21, 2014, and the holiday on July 25, 2014. Respondent Vice President García's claim that the Union later agreed to the reduced hours is also incredible, and was not commented upon by the

ALJ. In any event, by then the hours of Duran, Delgado and Garo had already been unlawfully unilaterally reduced. By failing to give the Union notice and an opportunity to engage in meaningful bargaining about this matter, Respondent violated Section 8(a)(1) and (5) of the Act.

X. STATEMENT OF FACTS: ELIMINATION OF GUARANTEED PAY FOR AUTO CHECKERS (Exceptions 11 and 12)

As noted above, the Union represents Respondent's employees in the classification of checkers. (J Ex. 2; Tr. 832:17-20). Checkers are responsible for inspecting, receiving, dispatching and loading cargo. (ALJD 10:39). They verify the containers on the ships or delivered by truck drivers and dispatch general cargo, containers, and automobiles. They perform their duties either at the facility of Intership or the facilities of its clients —Trailer Bridge and Sea Star. (Tr. 678:18 to 679:11, 751:5-14).

Pursuant to the parties' expired contract and established past practice, checkers have an eight hour guarantee when working on any dispatch. (J Ex. 2, page 38, Section 2(c)-Guarantees; Tr. 753:12 to 754:5). As such, when unit employees are assigned to dispatch autos, Intership should guarantee them eight hours of work, as it admittedly does in any other dispatch (excluding vessel operations, which are governed by different guarantees.) (J. Ex. 2, page 38, Section 2(c); Tr.648-650). However, since the end of November or beginning of December 2014, Respondent has been failing and refusing to pay unit checkers the eight hour guarantee when assigned to dispatch autos at its terminal. (GC Ex. 33; Tr. 680:9-19, 754:6 to 755:14).

Checkers Efraín González and José Colón both testified that, from July 2014 to November or December 2014, Respondent paid unit employees the eight hour guarantee when dispatching autos at Intership's terminal. (Tr. 681:1-4, 755:9-14). Their testimonies are corroborated by documentary evidence showing Intership's payment of the eight hour guarantee. (GC Ex. 32; Tr.664-668). Employee Edwin Rodriguez was paid the guarantee on October 5,

2014, when he actually worked only 27 hours over a period of four days, but received payment for 32 hours that week (he received 5 hours' pay based on the guarantee, identified as unearned), and on November 16, 2014, when he actually worked only 12 hours over a period of two days, but was paid for a total of 16 hours that week (he received 4 hours' pay based on the guarantee). Employee Rafael Hernandez Alicea was also paid the guarantee on November 23, 2014; he actually worked 6.5 hours that day, but was paid for 8 hours (receiving 1.5 hours' pay). (GC 32). When confronted with GC 32, Respondent VP García admitted that these employees were paid the guarantee. (Tr. 664-668). He explained that an employee's unearned compensation, as displayed in GC Exhibit 32, corresponds to the hours paid to that employee under the guarantee. (Tr. 665:10-13)

Nevertheless, according to checker González, at the end of November or beginning of December 2014, Respondent stopped paying the eight hour guarantee to employees when dispatching autos at the Intership terminal. Respondent stopped this practice without notifying or bargaining with the Union over the matter.[29] (Tr. 861).

Respondent García claimed that employees assigned to dispatch autos at Intership's terminal should not be paid the eight hour guarantee they would otherwise receive if they were dispatching any other type of cargo at any other location or if they were dispatching autos at Intership's main gate, called the "Canopy." (Tr.660:12 to 661:6, 997:5-10). He further claimed that if these employees were paid the guarantee, it was by mistake, and that he was not aware of it because supervisors are the ones who sign employees' timecards. (Tr. 661: 7-14).

García based the above arguments on the contention that, on August 3, 2013, Respondent and the Union entered into a stipulation pursuant to which Respondent agreed to designate an

[29] Intership, however, continued to pay the eight hour guarantee when employees dispatched containers and general cargo or when they dispatched autos for Intership's clients, Sea Star and Trailer Bridge, at the clients' premises. (Tr. 754-755; GC Ex. 33).

additional checker to dispatch autos ("auto checker") at Pier M (Intership's terminal), subject to negotiating the terms and conditions of that additional checker within thirty (30) days of signing the agreement. (GC Ex. 31(b); Tr. 649-650, 920:15 to 924:25). García claimed that Respondent and the Union were not able to reach an agreement until February 2014, after the thirty days mentioned in the stipulation, at which time Respondent, through García and Intership Marine Department VP Renzo Román, met with the Union and allegedly reached a temporary agreement under which Respondent would pay a six (6) hour guarantee to a checker assigned to dispatch between 26 and 199 autos and an eight (8) hour guarantee to a checker assigned to dispatch 200 or more autos. If there were twenty-five (25) or less autos, Intership would be permitted, pursuant to this stipulation, to assign the checker assigned to dispatch containers to dispatch those autos and not pay a guarantee. (R Ex. 8; 926:4 to 932:5, 1055:16 to 1057:19).

Respondent admittedly implemented this arrangement and began paying auto checkers the guaranteed pay. (Tr. 662:3 to 663:3; 934:22 to 935:1). Subsequently, Union President Mercado learned that Intership began purposely fractioning the dispatch of autos in amounts of twenty-five (25) or less, as a tactic to avoid paying the agreed guarantee. As a result, President Mercado proposed a modified stipulation requesting a four (4) hour guarantee for the dispatch of twenty-five (25) autos or less. (R. Ex.10; Tr. 1058:7 to 1060:7).

García stated that, because of the Union's modified proposal, after March 24, 2014, Respondent rescinded the implementation and stopped paying the auto-checker guarantee. (Tr.934:22 to 935:1). García admitted that Respondent had started to pay the guarantee and, approximately a month later, stopped paying it because the Union made a proposal to change the stipulation. (Tr. 662:3 to 663:3). There is no evidence that Respondent informed the Union that it was going to withhold the guarantee that it had already admittedly implemented.

XI. RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY ELIMINATING GUARANTEED PAY TO ITS AUTO CHECKERS, WITHOUT NOTIFYING OR BARGAINING WITH THE UNION. (Exceptions 11 and 12).

The ALJ erroneously found that the GC failed to show that Respondent unilaterally modified its auto checker procedures. (JD 17:28-29). Although not supported by documentary evidence, the ALJ credited Respondent VP García's testimony that checkers assigned to the main gate ("canopy") are guaranteed payment eight hours of work, even if they work fewer hours, whereas checkers who are assigned to the terminal (or "in the yard") do not receive that guarantee. (JD 11:5-12). Although the ALJ credited García, he erred by failing to give weight to García's admission with regard to the one month implementation of the payment of the guarantee to checkers dispatching autos at Intership's terminal. In this regard, Respondent, by García, admitted that Intership started paying the six and eight hour guarantee, depending on the quantity of autos, around February 2014. Garcia further admitted that on an unspecified date after March 24, 2014, Respondent stopped paying the guarantees without prior notification to, or bargaining with, the Union. Respondent allegedly withdrew the guarantee because the Union proposed a modification requiring a four (4) hour guarantee for the dispatch of 25 or less autos. There is no evidence that the Union was made aware that Respondent rescinded the admitted previously implemented guarantee. García's testimony in this regard is crucial to a finding that Respondent violated the Act by unilaterally eliminating the implementation of the payment of the guarantee without notifying or bargaining with the Union.

The ALJ's finding, that the guarantee was only paid when checkers were assigned to the canopy (Intership's main gate), and not when they were assigned to the terminal, is not supported by the evidence. The parties' expired contract generally makes reference to the dispatch area but does not distinguish between the canopy and terminal. Moreover, GC Ex. 32 shows that Intership

paid checkers an eight hour guarantee regardless of the dispatch area to which they were assigned. In this regard, checkers Edwin Rodriguez and Rafael Hernandez Alicea received the guarantee when dispatching autos at the terminal.[30] (GC Ex. 32)

Furthermore, the ALJ erred when he found that García credibly testified that payment of the guarantee to "**a checker**" was the sole instance when this occurred and was an isolated error, based on Garcia's testimony about a General Counsel exhibit that actually showed three instances when Respondent paid the guarantee to employees Edwin Rodriguez and Rafael Hernandez Alicea. (JD 11, fn. 34; GC Ex. 32). This exhibit establishes that Intership resumed paying the eight hour guarantee to auto checkers working at its terminal from July 2014 to late November 2014, and stopped paying the guarantee again in December 2014, without notifying or bargaining with the Union.

García's claim to the extent that if the guarantee was paid, it was due to a mistake made by supervisors is irrelevant. It is submitted that an alleged "mistake" of this type does not excuse Respondent's failure to give the Union prior notification and bargain. In *JPH Mgt., Inc*., 337 NLRB 72, 73 (2001), the Board held that the rescission of a mistaken wage increase granted on July 1 and rescinded on August 10 was a violation of Section 8(a)(5) of the Act as a unilateral change absent bargaining to impasse. Likewise in *Atlantis Health Care Group, Inc*., 356 NLRB 140, 140, fn.2, 143 (2010), the Board affirmed the ALJ's finding that a revocation of an erroneously granted February wage increase was an unlawful unilateral change and, absent impasse or notice and bargaining with the Union, it violated Section 8(a)(5) of the Act. [31]

[30] See schedules in GC Ex. 32. Assignments to "M Auto" refer to dispatch work at the terminal (Pier M). Assignments to "B Auto" refer to dispatch work at a ship. García's testimony regarding GC Ex. 32 establishes that Edwin Rodriguez was assigned to dispatch autos at Pier M, and he received the guarantee. (Tr. 666:12-18).

[31] The instant case is distinguishable from cases where the Board has found there was no bargaining obligation because of computer mistake or clerical error. *Eagle Transport Corp.*, 338 NLRB 489 (2002); *Boeing Co.*, 212 NLRB 116 (1974). Here, the guarantee lasted at least four months and it was made not by a computer or a clerk, but by Respondent's supervisors and agents.

In view of Respondent's admitted unilateral elimination of the auto checker guarantee after implementation, the evidence showing that certain auto checkers received the guarantee for a period of time, and the evidence that Respondent did not give the Union notice or an opportunity to bargain about this matter, Respondent violated Section 8(a)(1) and (5) of the Act.

XII. THE ALJ FAILED TO FULLY REMEDY RESPONDENT'S VIOLATIONS OF THE ACT. (Exceptions 13 to 19).

A. The ALJ erred by failing to recommend a restoration remedy with respect to Respondent's closure of its MTS and TTS facilities. (Exceptions 13 and 14).

The ALJ found that the restoration of MTS and TTS would cause an undue hardship to Respondent. He erred by deciding that because Intership is undergoing significant financial losses, it is probable that it would have eventually closed MTS and TTS to cut its losses, and that the MTS and TTS facilities have been emptied and their equipment disassembled and disposed of. (JD 26:20-32). However, the ALJ's conclusion is premature, since the appropriateness of the remedy was not litigated during the unfair labor practice proceeding, and it is the Board's usual practice to require restoration and permit respondents to raise issues concerning the appropriateness of a restoration remedy in a compliance proceeding. *Lear Siegler, Inc.,* 295 NLRB 857, 861-862 (1989).

Respondent still owns the MTS and TTS facilities. There is no evidence that the machinery and equipment that had been used by MTS and TTS was sold or discarded. Although there is a lessee in the MTS building, the lease expires in February 2018. (JD 6:26-29). There has been no exploration that the nature of the relationship between Respondent and the lessee is at arm's length, and there is no proof or certainty that the lease will be renewed or that it will not be terminated before its expiration date. There is no evidence that the TTS property was leased, and the TTS facility is vacant. (JD 7: 40-43). The conclusion of whether reopening MTS and/or

TTS would cause undue hardship upon Respondent is a matter that requires to be fully litigated in a compliance proceeding.

B. The discharged MTS and TTS employees should be fully reinstated and made whole, and should be named in the Board Order and Notice to Employees. In the alternative, there should be other corrections to the recommended remedies for the unlawful termination of their employment. (Exception 15).

Based on the restoration remedy, Respondent should be required to provide full reinstatement and make whole remedies to **MTS** discriminatees Jesus Fernandez, Hugo Adames Soto, Angel M. Rivera, Jose M. Velazquez, Jose R. Marrero, Leonardo Morales, Raul Pineda, Ramon Lopez, Jose Nater, Socrates Escotto, Bryan Alvarado, Mario Galan, Dionisio Garcia, Carmen Morales, Jorge Mercado, Lydia E. Lopez, Jason Marrero, Manuel Figueroa, Rafael Rodriguez, Angel Garcia Pabon, Angel Garcia Garcia, and Luis Allende, and **TTS** discriminatees Yamil Colon, John Alexis Rosa, Miguel Ortiz, Elvin Jovany Moran, Elliot Santiago, Edgar Alejandro Diaz be offered reinstatement and made whole, in the conclusions of law, recommended Order and recommended Notice to Employees. (GC 1(o), 1(s), pars. 13(a) and 14(a); as to identity of the discriminatees).

In addition, the ALJ erred by failing to provide for expungement of the discharges of the MTS and TTS discriminatees. The ALJ ordered Respondent to make former MTS unit employees whole for any loss of pay suffered as a result of the discrimination against them. (JD 26: 34-46 to 27:1-4). However, he erred by failing to order Respondent to offer the MTS employees unconditional offers of reinstatement to their former jobs or to substantially equivalent jobs with Respondent if those jobs no longer exist, and, if there is no sufficient availability of positions, to place the discriminatees on a preferential hiring list.

The standard remedy in Section 8(a)(3) cases is to order laid-off employees' reinstatement with back pay. See *Lear Siegler*, 295 NLRB at 860. "Reinstatement is the

conventional correction for discriminatory discharges." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 187, (1941). "[T]o limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization." *Id.*, at 193. Therefore, it is submitted that the complete appropriate remedy for MTS unit employees, besides making them whole for their losses, is full reinstatement. If restoration is deemed inappropriate, since the discriminatees have skills that may be used to perform work for Intership, Respondent should still offer them reinstatement to any substantially equivalent jobs it has available or place them on a preferential hiring list, and make them whole until it does so.

C. The Board should award search-for-work and work-related expenses as part of the make whole remedy regardless of whether these amounts exceed interim earnings. (Exception 16).

The Board should award search-for-work and work-related expenses regardless of whether these amounts exceed interim earnings. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1995); *Crossett Lumber Co.,* 8 NLRB 440, 498 (1938).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatee's gross interim earnings. See W. *Texas Utilities Co.,* 109 NLRB 936, 939 fn. 3 (1954). Thus, under current Board law, a discriminatee who incurs expenses while searching for interim employment but is ultimately successful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an

employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. See *In Re Midwestern Pers, Servs., Inc.,* 346 NLRB 624, 625 (2006).

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Kentucky River Medical Center,* 356 NLRB 6, 8 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination," *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners, Inc*., 361 NLRB No. 57, slip op. at 2 (2014) (quoting *Phelps Dodge).* The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor, See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991,

Decision No. 915.002, at 5, available at 1992 WL 189089 (1992); *Hobby v. Georgia Power* Co., 2001 VVL 168898 at 29 (2001), *affd Georgia Power* Co. v. *US. Dept of Labor,* No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. *Don Chavas, LLC,* 361 NLRB No. 10, slip op. at 3 (2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period. These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See *Kentucky River Medical Center,* 356 NLRB 6 (2010) (interest is to be compounded daily in backpay cases).

D. The unlawful suspension of Efrain Gonzalez, and unilateral changes in the vacation pay distribution system, maintenance employees' hours of work and elimination of guaranteed pay for auto checkers working at the Intership terminal should be fully remedied. (Exceptions 5, 8, 11 and 17).

E. The Notice to Employees should be read to the employees by a high-ranking official of Respondent, such as CFO Maria Caraballo, and the Notice should be read and posted in Spanish. (Exceptions 18 and 19).

A Spanish notice reading, in addition to notice posting, remedy is appropriate in light of Respondent's egregious and numerous unfair labor practices, which were committed by high-ranking management officials over the course of a prolonged period of years. Reading the notice serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the

future. See, e.g., *Allied Medical Transport, Inc.*, 360 NLRB No. 142, slip op. at p.6, fn. 9 (2014). By this requirement, the dual purpose public interest of (1) advising employees that the Board has protected their rights, and (2) preventing or deterring future violations, will be clearly served. Because the unfair labor practices at hand occurred in Puerto Rico, where the first language is Spanish, the proceedings required an interpreter and most of the evidence required Spanish to English translation. Accordingly, Spanish language notices and a Spanish language notice reading are appropriate.

XIII. CONCLUSION

In summary, Counsel for the General Counsel respectfully urges the Board to grant all of General Counsel exceptions to ALJ Ringler's decision, and to find that Respondent violated the Act as found by Judge Ringler, and as further argued in these exceptions. Accordingly, General Counsel respectfully urges the Board to modify the ALJ's findings of fact and conclusions of law accordingly, and to issue a Board Order and Notice to Employees containing an appropriate and complete remedy for Respondent's violations of the Act, as urged in General Counsel's exceptions.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

DATED at San Juan, Puerto Rico, this 27th day of May, 2016.

Respectfully submitted,

s/*Isis M. Ramos Meléndez*
s/*Manijée Ashrafi Negroni*
Isis M. Ramos Meléndez
Manijée Ashrafi Negróni
Counsels for the General Counsel
National Labor Relations Board, Subregion 24

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision in the matter of International Shipping Agency, Inc., Marine Terminal Services, Inc. (MTS), and Truck Tech Services, Inc. (TTS), a single employer, Cases 24-CA-091723 et al., was electronically filed with the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 27th day of May 2016.

By electronic filing:

Hon. Gary W. Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

By electronic mail:

Henry P. Gonzalez, Esq.
Gonzalez del Valle Law
1250 Connecticut Ave., N.W., Suite 200
Washington, DC 20036
gonzalez@gdvlegal.com
www.gdvlegal.com

Antonio Cuevas Delgado, Esq.
Cuevas, Kuinlam, Marquez & O'Neill
416 Ave. Escorial
Urb. Caparra Hts
San Juan, PR 00920-3514
acuevas@ckblawpr.com

Elizabeth A. Alexander, Esq.
Marrinan and Mazzola Marnan, P.C.
26 Broadway, 17th Floor
New York, NY 10004
ealexander@mmmpc.com

s/ *Isis M.Ramos Meléndez*
s/*Manijée Ashrafi Negroni*

Isis M. Ramos Meléndez
Manijée Ashrafi Negróni
Counsels for the General Counsel
National Labor Relations Board, Subregion 24
525 FD Roosevelt Avenue
La Torre de Plaza, Suite 1002
San Juan, PR 000918-1002
Tel. 787-766-5327
Fax. 787-766-5478
Email: Isis.Ramos-Melendez@nlrb.gov
Manijee.Ashrafi-Negróni@nlrb.gov