UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

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

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INTRODUCTION

Pursuant to §102.46 (d) (1) and (2) of the Rules and Regulations of the Board, the following is Respondents' Answering Brief to the GC's exceptions ("GC's Exceptions") filed on May 27, 2016.

The GC filed a number of exceptions to the ALJ's Decision issued on March 20, 2016. Although divided into nine-teen (19) separate exceptions, these can be grouped into six (6) main arguments as follows:

Argument A

The GC argues that the closing of MTS and TTS should be reviewed and found illegal under *Darlington*. Respondents agree that the closing of MTS should be reviewed under *Darlington*, but submits that under the facts of ***this particular case***, there is no evidence capable of supporting the required legal findings that the MTS closing was motivated by a purpose of chilling imminent unionization in the remaining plants of the single employer or that the employer could have reasonably foresaw that said closing would likely have that effect. *Argument A, **infra***. As to the closing of TTS, Respondents contend that it is outside the purview of *Darlington,* and ultimately that case's analytical framework provides no basis to conclude that the closing violated Section 8(a)(3). *Id.*

Argument B

Next, the GC excepts to the ALJ's finding that *Fibreboard* is not applicable to the case at hand and contends that Respondents had an obligation under the same to bargain the decision to close MTS. Respondents, however, submits that there is no decisional bargain obligation in this case because by closing MTS Respondents completely abandoned a line of business and completely closed the operation, which is a going-out-of-business decision akin to whether to be

in business at all and the decision was furthermore not amenable to resolution through bargaining with the Union. *Argument B,* ***infra***.

Argument C

The GC also excepts from the ALJ's finding that the Employer did not violate Section 8(a)(1) and (3) by suspending Mr. Efrain Gonzalez. Respondents contend that the record as a whole clearly supports the ALJ's finding that the disciplinary action was not taken on account of any protected conduct but for a violation of a well-known and well-established work rule. *Argument C,* ***infra***.

Argument D

The GC then excepts from the ALJ's finding that Intership did not unilaterally changed in a material way its assignment of maintenance work. Respondents contend that the ALJ's finding is well-supported by the record as a whole which demonstrates that Intership simply acted in accordance with a long lasting past practice, accepted by the Union, even during hiatus in the Collective Bargaining Agreement, and that in any case it fulfilled its obligations under Section 8(a)(5). *Argument D,* ***infra***.

Argument E

The GC excepts to the ALJ's finding that it failed to show that Intership unilaterally modified its auto checker procedures. Respondents contend that the ALJ's finding is well-supported by the record for it shows that there was no established term and condition of employment regarding the appointment of an auto checker and a pay guarantee of eight hours when these employees were assigned to the terminal, and accordingly there could not have been a unilateral change. *Argument E,* ***infra***.

Argument F

Finally, the GC excepts to the ALJ's rejection of some of the remedies requested, and to his alleged failure to provide for certain other remedies. Respondents contend that the ALJ's rejection of the restoration remedy is well-supported by the evidence and the subject was clearly litigated. Furthermore, Respondents submit that there is no basis for changing the long standing rule regarding search-for-work and work-related expenses, that the proposed change in those rule is inappropriate in any case, and that the case at hand does not warrant the extraordinary remedy of notice reading. *Argument F, **infra***.

ARGUMENT

A. ANSWER TO GC'S EXCEPTIONS 1 TO 4 (CGC'S BRIEF IN SUPPORT OF EXCEPTIONS, SECTIONS III-IV, P. 4-16)

The GC's first exceptions urge the Board to find a violation of 8(a)(1) and (3) in the closings of MTS and TTS under *Darlington*[1]*;* a different theory than the one relied upon by the ALJ. The GC invites the Board to delve into this analysis in case it determines that these closings "constituted partial closings of Respondent's overall operations." *CGC's Brief in Support of Exceptions, p. 2. ¶1.* Since an alternate theory – if the violation is sustained - contributes nothing to the ultimate remedies, proposing an alternate theory for the same violation is an implicit recognition of the weakness of the ALJ's findings that the closing of MTS and TTS were not "partial closings."

In advancing a different conclusion than that proposed by Respondents[2] to the argument that the closing of MTS should be reviewed under *Darlington*,[3] the GC emphasizes the proximity of

1 *Textile Workers Union v. Darlington Mfg. Co., 380 US 263 (1965).*

2 In their own exceptions, Respondents also contended that the closing of MTS should be reviewed under Darlington. It explained at length, however, why and how said analysis should lead to a conclusion that there was no 8(a)(3) violation.

3 As part of his theory that the closing of both, MTS and TTS, should be reviewed under *Darlington*, the GC makes

the MTS and TTS facilities and the testimony that MTS employees went to TTS' facilities. *CGC's Brief in Support of Exceptions, p. 5.* This is a transparent attempt to argue that the Employer should have "suspected" something that motivated it to act with ill intent. Besides the well settled legal dogma that "*mere suspicion cannot substitute for proof of an unfair labor practice*" *Lasell Junior College, 230 NLRB 1076, 1076, fn. 1 (1977),* the argument ignores the record as a whole of ***this particular case***.

The record as a whole in this case shows: ***i:*** that the MTS and TTS facilities were exactly at the same distance when the Union filed a petition to represent the MTS employees and did not file a similar petition for or even informally requested to represent the TTS' employees[4]; ***ii:*** that while MTS' employees went to Intership and/or TTS facilities, they admittedly did not interact with these employees, T. 216:22-217:20; ***iii:*** that there was no evidence adduced during the hearing to sustain that the MTS' employees conversed or otherwise discussed with the TTS' employees about unionizing; ***iv:*** that the President of the Union admitted that "*[t]he Union was not making efforts to unionize any employees of these companies [speaking about TTS among others subsidiaries],"* T.1036:23-24, and "*[t]he reality is that I do not know the employees of these companies"*, T.1037:6-7; and ***v:*** that the TTS employees never conducted any type of demonstration demanding union representation, T.1033:10-19.

It is submitted that under the facts of ***this particular case***, there is no evidence capable of

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a number of generalized statements that are not supported by the evidence. An example of this is when the GC asserts at page 10 of his brief that "[t]he ALJ further properly found that Respondents 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)" Emphasis added. Neither in the pages of the ALJ's Decision cited by the GC nor in any other part of the Decision, the ALJ found that TTS was closed and its employees discharged "because they [the TTS' employees] selected the Union as their bargaining agent." It is a ***fact*** in this case, that TTS' employees ***never*** selected the Union as their bargaining agent.

4 The parties stipulated that there was no formal petition to represent employees in of Intership's subsidiaries during 2012 or 2013. J.Ex. 1, ¶44-45.

supporting the required legal findings that the closing of MTS was motivated by a purpose of chilling imminent unionization in the remaining plants of the single employer or that the employer could have reasonably foresaw that said closing would likely have that effect. As admitted by the Union's President, established by the testimony of witnesses and further illustrated by the lack of evidence to the contrary, there was in fact no unionization activity. In light of these particular circumstances, the proximity of the plants amount to nothing more than *"mere suspicion [that] cannot substitute for proof"* because here the evidence undoubtedly establishes that there was no imminent unionization to chill or that could have been chilled with the closing of MTS.

The GC contends that in February 2013 the Union's President supposedly requested that the TTS' employees be included in the bargaining unit. *CGC's Brief in Support of Exceptions, p. 8-9.* Besides being completely ***controverted by the record***[5], this allegation does nothing to support the argument. If indeed this exchange took place as indicated by the GC, ***it happened months after MTS closed***. In the context of this case where there is absolutely no evidence to show unionization activity and as admitted by the Union's President that by the time of the closing –

5 During the Hearing, the GC attempted to establish this alleged exchanged with a contemporaneous letter written by the Union's President. GC Ex. 38(b); T. 843: 12- 844:1. ***A cursory review of the letter shows that it neither say anything about including employees in any bargaining unit nor makes reference to TTS at all***. GC Ex. 38(b). During his testimony on September 21, 2015, Mr. Mercado alleged that the reference to MTS in the letter was a mistake that he wanted to refer to TTS which allegedly was the company he mentioned during his conversation with Mr. Garcia. Besides the fact that Mr. Mercado gives absolutely no explanation as to why he waited more than two years (from the date of the letter – February 21, 2013 – to the date of his testimony – September 21, 2015) to clarify the alleged error, Mr. Garcia contemporaneously responded to Mr. Mercado's letter. GC Ex. 39. In his response, Mr. Garcia addressed the allegations regarding MTS made in Mr. Mercado's letter. Mr. Mercado never sought a clarification to Mr. Garcia's response on the basis that he had allegedly not referred to MTS but to TTS. As if the above were not enough, the alleged testimony that Mr. Mercado sought in ***February 2013*** to have the employees of TTS included in the bargaining unit of Intership directly and irreconcilably ***contradicts*** the categorical statement given by him in ***March 2013*** (after he had allegedly had the exchange with Mr. Garcia in February 2013) in a Board Affidavit that *"[t]he Union was not making efforts to unionize any employees of these companies"* (T. 1036:23-24) and that*"[t]he reality is that I do not know the employees of these companies"* (T. 1037:6-7). And if the above above were not enough, this testimony squarely contradicts his previous self-serving testimony that he did not seek to represent these employees for fear that the same thing that allegedly happened to the MTS' employee happen to them. T.1033:20-1034:4.

October 2012 – there was no unionization taking place, what the Union purportedly requested in February 2013 is incapable of establishing knowledge or belief of imminent unionization by October 2012.

The GC also argues – as purported proof of a chilling effect – that the Union President testified that he did not attempt to organize the employees of the other subsidiaries because he feared that Intership "would respond as it did with MTS, by closing down the facility." *CGC's Brief in Support of Exceptions, p. 8.* ***That is not an accurate statement of the record as a whole***. The record as a whole contains the Union President's Statement given in ***March 2013*** (months after MTS closing) to the effect that "*[t]he Union was not making efforts to unionize any employees of these companies [the subsidiaries],"* T.1036:23-24, and that *"[t]he reality is that I do not know the employees of these companies"*, T.1037:6-7. Implying that the closing of MTS was the cause of the Union's alleged decision not to unionize certain employees completely ignores the facts that the Union had not begun any unionization efforts whatsoever towards these employees and were not even known at the time. The GC's argument, therefore, is no supported by the evidence because there was no unionization activity taking place that was suddenly discouraged, slowed down or dissuaded.

The GC's argument that the closing of TTS should be viewed under *Darlington*[6] is confusing. The GC's urging of a finding of a violation under *Darlington* presupposes that the Employer acted with the motive to chill unionization ***elsewhere***. This contention seems to hedge against the weakness of the theory that TTS closed because of the protected activity of its own employees.

6 Respondents are unaware of any Board's decision that reviews the closing of an operation and the termination of its employees under *Darlington* in a context where there was no unionization campaign in the affected facility. It is hard not to see this argument as an attempt to obtain an 8(a)(3) violation without having to comply with the first element of the GC's initial burden under *Wright Line* of establishing that the affected employees engaged in protected conduct.

In any case, in support of its *Darlington*'s theory, the GC argues that the motive in closing TTS was to chill the Union's complains on behalf of the Intership's bargaining unit regarding the alleged transfer of bargaining unit work to its non-union subsidiaries. C*GC's Brief in Support of Exceptions, p. 15.* The GC continues arguing that the closing "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 Respondents would also retaliate against them," *Id, p. 16, (Emphasis added).* The first problem with this argument is that the Intership employees were not engaging in any organizing activity ***and there is absolutely no evidence on the record to support such assertion***. The second problem with the argument is that the GC fails to explain how is that stopping the practice that the Intership's employees were complaining about – i.e. sending the work to its non-union subsidiaries – could have any chilling effect in the unionization activities of the complaining unit or send a message not to be too assertive in their demands. The closing of TTS had absolutely no adverse consequence to any Intership's employee. The only reasonable foreseeable consequence that the closing of TTS could have had, if true that the Intership employees' complaint played any role in the decision, was to ***encourage*** their assertive demands.[7] *Darlington* provides no basis to find a violation of Section 8(a)(3) regarding the closing of TTS.

7 There are a number of other intrinsic problems with the argument that Respondents were motivated by the Union's grievance and arbitration procedure to close MTS and TTS. The arbitration grievance was filed in 2005. T.834:24-835:2. MTS was closed in October 2012 and TTS in April 2013. The evidentiary hearings on the grievance were held in March, May and August 2010, and the Award was issued on June 27, 2011. J.Ex. 3(b), p. 1 and 16. Thus, the proposition that an Employer would wait ***seven years*** in the case of MTS and ***eight*** **years** in the case of TTS after the grievance was filed, more than ***two*** years (MTS) or almost ***three years*** (TTS) after the hearings of the grievance and ***well over a year*** after the award was issue to take action to ***chill*** vigorous contract enforcement actions stretches the legal concept of causality beyond acceptable boundaries. In any case, the gist of the Arbitration Award centered on the determination that MTS and Intership were alter egos or single employers. J.Ex. 3(b), p. 13-14. That was the determination at the center of the appeal process, and the reasons why the Appeal was withdrawn. After the closing of MTS, it made no sense to continue litigating the nature of the business relationship between MTS and Intership. The Arbitration Award had absolutely nothing to do with TTS.

In sum, Respondents agree that the closing of MTS should be reviewed under *Darlington*. As more fully developed in their Brief in Support of Exceptions (p. 32-35), however, the analysis under this precedent does not support a finding of a Section 8(a)(3) violation. The TTS closing is outside the purview of *Darlington,* and ultimately that analytical framework provides no basis to conclude that said closing violated Section 8(a)(3). In any case, as more fully developed in Respondents' Brief in Support of Exceptions (p. 35-40 for MTS and 47-48 for TTS), the record as a whole establishes that MTS and TTS could not have continued operating and would have closed absent any protected conduct. Accordingly, the allegations of violation of Section 8(a)(3) regarding the closings of MTS and TTS should be dismissed.[8]

B. ANSWER TO GC'S EXCEPTIONS 2 TO 4 (CGC'S BRIEF IN SUPPORT OF EXCEPTIONS, SECTION V, P. 16-23)

The ALJ decided the question regarding the pleaded Section 8(a)(5) violation for the closing of MTS under *Dubuque*[9]. The GC, however, contends that it should be reviewed under *Fibreboard.*[10] *CGC's Brief in Support of Exceptions, p. 17*. Both legal precedents cannot co-exist. *Dubuque* was decided to review cases where *Fibreboard* is inapplicable. Thus, and despite the GC's claims to the contrary, the contention that this issue should be reviewed under *Fibreboard* is a direct challenge to the ALJ's determination that *Dubuque* applies.

Furthermore, the GC's assertion that what transpired with MTS "was essentially a mere substitution of one group of employees for another performing the same kind of work" - *CGC's Brief in Support of Exception, p. 19* – is unattainable. Respondents in their Brief in Support of

8 It is very significant that in its exceptions, the GC does not rely at all in Mr. Ryan's testimony that TTS' employees told him that they were talking with the Union about organizing and that he (Mr. Ryan) informed Mr. Sosa about it. This approach is consistent to the GC not having presented Mr. Ryan during the hearing to testify about this. The fact that the GC is not relying on this testimony at all is yet another indication of the unsupported nature of this finding. See Respondents' Brief in Support of Exceptions, p. 40-44.

9 *Dubuque Packing Co., 303 NLRB 386 (1991).*

10 *Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964).*

Exceptions already discussed at length how the review cannot be centered in the core business of the Parent Company but rather in the diminished or discontinued operation (p. 20-21), how the closing of MTS entailed the discontinuation of a distinct and separate identifiable operation that cost over a MILLION DOLLARS a year to operate to the extent that there is one less provider of these type of services in Puerto Rico (p. 12-16), and how it is impossible to conclude in this case that Respondents continue in the business of refurbishing chassis and containers for profit, *Id.*. Respondents also explained at length how the fact that Frank's Chassis is repairing a miniscule amount of Intership's ***own*** mission essential bomb-carts does nothing to change the inevitable conclusion that Respondents completely stepped out of the business of refurbishing chassis and containers for profit (p. 17-19). This case, thus, entails a change in the scope and direction of the enterprise.[11]

In taking exception with the ALJ's finding that the economic profitability of the operation played a role in the decision to close MTS, the GC points out that MTS sustained losses for several years before closing. *CGC's Brief in Support of Exceptions, p. 20-21*. This argument, ***again***, tries to ignore Respondents' allegation in this case. Respondents do not contend that MTS closed simply because it was not profitable. ***Respondents contend that MTS closed because it needed the financial aid of Intership to operate and Intership could not provide that assistance anymore***. The evidence shows, the ALJ found and no one questions[12] that MTS needed

11 CGC asserts at p. 20 of their Brief that "Respondents failed to establish that MTS ever performed significant repair to outside companies as there is no documentary evidence showing that MTS performed such outside work." The assertion is striking not only because there is unchallenged testimony regarding this – T. 73:9-13 – but also because CGC in the very same brief had argued at p. 4 that "MTS also provided services to some of Intership's major clients such as Sea Star, Trailer Bridge and Tropical." Moreover, CGC had subpoenaed all MTS' Invoices for services rendered. Thus, if they wanted to challenge the fact, there was no reason for not having tried. Similarly, CGC spent a great amount of effort trying to give the impression that MTS and TTS provided similar services. This theory was completely discredited during the hearing. T.1452:6-1454:5; 1526:4-1528:24. This citations to the record also clearly discredit any attempt to suggest that TTS repaired chassis.

12 The GC does not really challenge this fact. What the GC is arguing is that Intership accepted this – i.e. that MTS needed its financial aid to operate – for years.

Intership's financial aid to operate, and that Intership was under significant financial duress. The timing and causes for the financial duress are similarly unchallenged as this time.[13] There is no evidence to suggest that Respondents allowed MTS to operate during times Intership was expected to and in fact lost money[14]. Similarly, the GC makes no suggestion as to how Intership could have continued to provide financial aid to MTS while sustaining the losses it was facing which was not the case during the previous years.[15] The finding that economic profitability played a role in the decision to close MTS is, therefore, clearly supported by the record.

Similarly, the gist of the GC's argument is that the Respondents were required to bargain with the Union prior to closing MTS. *CGC's Brief in Support of Exceptions, p. 19.* Still missing in this argument is any suggestion as to how this decision was amenable to resolution through bargaining with the union. As shown by the audited financial statements, MTS had an income problem – it was not generating enough business to cover its then ***current*** expenses. MTS was at the time operating at very low non-union cost. This case, therefore, is not one where the Union could have rolled back union wages and benefits obtained through bargaining in order to avoid closing,[16] and obtaining more refurbishing business is well outside a union's control. There was

13 As it was the case during the hearing and in the Post Hearing Memorandum, the GC not only does not challenge the departure of clients including that of Mediterranean Shipping Company, or the timing of these departures, but does not even mention these undeniable facts in any part of its theory of the case.

14 In fact, the GC asserts in its brief – p. 21 - that "MTS' losses on the books were long tolerated because Intership is the profit maker of Respondents' operations" but then fails to recognize the logical consequence of his own assertion: when Intership is no longer a profit maker it cannot tolerate MTS' losses.

15 The GC asserts in his brief – p. 21 - that "[a] corporation of the size of Respondent would undoubtedly have documents more carefully analyzing such a step [the closing of MTS] if it were truly based on economics." He, however, does not clarify to what "documents" he is referring to. The record of this case has several Appraisals reviewing the value of the MTS' property, which the CFO testified she ordered to verify the current value of what she considered the guarantee for the loans made by Intership to MTS, it has an Opinion by a CPA regarding the consequences of different scenarios to dispose of MTS, and yearly annual audited financial statements of the MTS' operations. Respondents are not clear at all as to what other "documents more carefully analyzing such a step" the GC is making reference to.

16 As a matter of law, MTS could not have paid below minimum-wage salaries and a Union could not have bargained or agreed to it. Therefore, the argument here goes beyond simply asserting that in the Employer's opinion the Union would not agree to the needed concessions. The argument here is that because there was an income problem – operating at non-union level – there was absolutely nothing the Union could have offered to avoid the

no concession that the Union could have given in negotiations that could have solved the problem that the income MTS was receiving was not enough to cover its current expenses. The decision to close MTS, therefore, did not turn in the least on labor costs, and involved issues that were not suitable for resolution through collective bargaining. The fact that the GC even at this stage does not suggest otherwise is the best confirmation of this fact. It is submitted that under these circumstances, there cannot be a Section 8(a)(5) violation.

For all of the above explained reasons, the GC's argument – *p. 22-23* - that the closing of MTS is not privileged under *First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)* is misplaced and the cases cited in support of that contention clearly distinguishable. Put in other words, the cases cited by the GC neither involves a situation where the employer abandoned a line of business nor a situation where bargaining with the Union would not bring resolution to the situation. So in *Equitable Resources Energy Co.*, *307 NLRB 730 (1992),* in finding a violation of 8(a)(5), which this Board upheld, the ALJ distinguished the situation before him from that in *First National* noting the following: "There [in *First National*] the employer actually terminated a part of its business services and the employment of the employees rendering services to that particular customer all at the same time. . . [i]n the instant case, the Respondent did not terminate a particular aspect of its operation at once, in which all of the laid-off employees were working exclusively, because it would have been unprofitable for Respondent to render any additional services." *Equitable Resources Energy Co.*, 3*07 NLRB at 750*. The ALJ further noted that "the Union and the employees might have offered concessions or other suggestions to Respondent which might have averted their imminent layoff." *Id.* Similarly,

closing. As established by the Financial Statement, even staying at the same cost, would not have avoided the closing.

Continental Winding Co., 305 NLRB 122 (1991) involved a situation where the Employer simply began recruiting from Kelly Services to replace departing employees from the bargaining unit and the ALJ concluded in part by referring to admissions of the Respondent's counsel that this did not amount to a significant change in the scope or direction of the business. *Continental Winding Co., 305 NLRB at p. 130, n. 5. Strawsine Mfg. Co., 280 NLRB 553 (1986)* is a case where the employer simply relocated the operation to another facility owned by it, a matter clearly not privileged by *First National* as noted by the ALJ. *Id at p. 560. Challenge-Cook Bros. 288 NLRB 387 (1988)* involved the Employer's decision to eliminate one classification of the bargaining unit (journeyman mechanic). In fact, the ALJ in that case distinguished the authority cited by the Employer on the grounds that "[t]here the employer completely closed its service department and took itself out of the business of servicing equipment. . .[t]he credible evidence in the present case would indicate that the action of the Respondent [in the case] was only temporary." *Id at p. 401.*

CGC's reliance on *Parma Industries Inc., 292 NLRB 90 (1988)* also has nothing to do with the case at hand. *Parma* involved what can otherwise be described as a "sham" closing. In other words, the joint employers there closed the plant (Parma) and sold the equipment to another entity[17] which continued to manufacture the same product for the benefit of the selling joint employers. In differentiating that scenario from *Darlington*, this Board noted that "[i]n other words, the closing of Parma which with Wolverine constituted a single employer was calculated in part to suppress union activity on the successor operation that would continue to make auto parts to fulfill Wolverine's production orders." *Parma Industries Inc., 292 NLRB at 90, n. 5.*

17 The acquiring entity did not exist before and was formed simply to buy the business from Parma. In fact, the acquiring company was found to be a successor.

Moreover, the Board also found that the closing and sale of assets was predicated on labor cost, which is clearly amenable to resolution through bargaining.

In sum, there is no decisional bargain obligation in this case because by closing MTS Respondents completely abandoned a line of business- i.e. refurbishing chassis and containers for profit – and completely closed the operation, which is a going-out-of-business decision akin to whether to be in business at all. This decision was furthermore not amenable to resolution through bargaining with the Union.

C. ANSWER TO GC'S EXCEPTIONS 5 TO 7 (CGC'S BRIEF IN SUPPORT OF EXCEPTIONS, SECTIONS VI AND VII, P. 23-30)

The GC excepts to the ALJ's finding that Intership suspended Mr. Efrain Gonzalez lawfully, and that he would have been suspended even in the absence of his protected conduct. The gist of the GC's argument is that it must be found that Mr. Gonzalez was terminated because he presented a grievance. The GC further argues that Respondent could not lawfully rely on the rule it applied to suspend Gonzalez "because it effectively prohibited him from exercising his Section 7 rights." *CGC's Brief in Support of Exceptions, p. 25.*

To begin with the obvious, the Complaint does not plead nor did the GC raised before the ALJ during the hearing the issue that the rule in question was illegal either on its face or in its application. By not raising the argument in the charging pleadings or before the ALJ during the hearing, the GC waived it and cannot urge it now. *Auto Workers Local 594 v. NLRB, 776 F.2d 1310, 1314 (6th Cir. 1985)* ("Since the Union failed to raise this issue in a timely fashion before the ALJ, we hold that it waived this defense."), *enfg*. 272 NLRB 705 (1984).

Moreover, it is a well settled and longstanding rule acknowledged by the Employer and the Union that work-related grievances arising when Intership's employees are working in Intership

client's facilities need to be directly brought to the attention of Intership's supervisors. T.1050:7-12. ***The Union has sanctioned this policy*** and there is no written document exempting the shop stewards from this rule. T.1050:13-18. This rule was created because Intership's clients do not have a basic knowledge of the provisions of Intership's Collective Bargaining Agreement ("CBA") with the Unions.[18] T.895:14-896:5. For the effective implementation of this rule, all the employees and union-delegates have the mobile phone number of the VP in charge of the operation, which is available 24 hours a day – seven days a week. T.896:9-12. As it is quite evident, this rule does not prevent the presentation of grievances, it simply provides, with the Union's approval, a meaningful process on how to do so.

In this context, VP Garcia received a report from Mr. Reynaldo Ortega, the supervisor of one of its clients (Trailer Bridge), relating that Gonzalez had approached him with a work related grievance and in the process addressed him with "gross words". R.Ex. 11(b). VP Garcia met with Gonzalez and the Union delegates, at which time Mr. Gonzalez had the opportunity to explain what happened. T.901:2-8. Gonzalez admitted that he approached the client's supervisor – T.773:12-14 - and the use of "gross words," T.764:2-4. VP Garcia then sustained a three-day suspension for not "follow[ing] the procedures"[19] and for the disrespect toward the client's supervisor (related to the "gross words"). T.901:5-20. That is exactly what the suspension letter states. G.C. Ex.30(b).

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18 The need for this rule is evident in the context of Intership's operation. Intership has hundreds of workers that work in the facilities of its clients. Not providing for a work-related process where grievances are to be presented directly to Intership's supervisors would result in chaos and in grievances not being reported to management. Interhsip, as the workers' employer, is the entity that must and needs to address the grievances and, if the situation warrant, give the necessary instructions to correct any alleged contract violation(s). Moreover, grievances need to be addressed within a prescribed time period. The presentation of work-related grievances directly to the client, who has no employer-authority to correct any violation, has no knowledge of the terms of the CBA, and suffers no consequence for untimely grievance resolution directly affects Intership's ability to effectively manage the CBA.

19 Mr. Garcia is 23-year veteran of the US Army.

The record is also perfectly clear, in that no one in the grievance process understood or could have understood that the suspension was given because Gonzalez presented a grievance. Indeed, Mr. Gonzalez admitted the fact that during the investigation meeting VP Garcia asked him "why you did not bring that issue to me?" T.774:21-24. Also, Gonzalez admitted that just a few minutes after he approached the client's supervisor, he called one of Intership's supervisors – Mr. Ramon Rivas – with the same grievance. T.774:15-20. The Intership's supervisor answered the call and responded to his inquiry. Id. Yet no disciplinary action was taken because of Gonzalez's call to the Intership's supervisor, and as admitted the grievance was addressed.

For the foregoing reasons, the cases cited by the GC are inapposite to the issue at hand. In the cases, the disciplinary action was taken ***because*** of the protected conduct. Here, the record as a whole show that the disciplinary action was taken because Mr. Gonzalez ignored a longstanding work-rule sanctioned by the Union. *Baltz Bros. Packing Co., 153 NLRB 1114, 1122, fn. 15 (1965)* ("It is well settled that an employee's known union adherence and prominence in union activity does not grant him any right to special treatment in case of clear misconduct, or immunity from discipline or discharge for such misconduct. . . It would seem that this principle should apply all the more strongly to an employee who stands in a position of leadership…, and whose conduct can set an example and have more effect on other employees than that of an ordinary rank-and-file worker."). *See also: Gates Rubber Co., 186 NLRB 837 (1970)* for the proposition that concerted activities lose their protection if carried out in violation to valid work rules.

It is respectfully submitted that the GC's exception should be denied for the ALJ's finding is correct and well supported by the evidence.[20]

20 In arguing this exception CGC makes assertions that do not reflect accurately the record as a whole. CGC

D. ANSWER TO GC'S EXCEPTIONS 8 TO 10 (CGC'S BRIEF IN SUPPORT OF EXCEPTIONS, SECTIONS VIII & IX, P. 30-39)

The GC excepts from the ALJ's finding that Intership did not unilaterally change in a material way its assignment of maintenance work. The ALJ's finding on this subject is substantially supported by the record.

The record as a whole in this case shows the following: ***i:*** Intership calls employees to work through a seniority list when the Company needs them, T.902:12-5; ***ii:*** there has never been a substitute seniority list, T. 905:13-14; ***iii:*** the Company determines the amount of employees to employ, T. 905:20-21; ***iv:*** the Company have determined the amount of employees to employ ***even at times when the contract is not in effect***, T.1052:18 – 25; ***v.*** there is no guarantee of forty (40) hours of work per week, T.905:24 – 906:1; T.1053:5- 25; ***vi:*** there are workers that work forty (40) hours of work because of their seniority, T. 906: 2 – 10; ***vii:*** there are welders that do not work forty (40) hours per week, T. 906: 22-23; ***viii.*** the Company has never sent to the Union a list of the Maintenance Department employees that are going to work the next day, the

argues at p. 24 of their brief that "Garcia made no mention of the memo [R.Ex.11b] in his Board affidavit provided shortly after the incident, or during prior testimony at the hearing" as to imply that VP Garcia had not acted based on the report of the client's supervisor. That is not what the record reflects. In his Board Statement, Mr. Garcia clearly stated that he had received an email by the client's supervisor summarizing the incident. T.966:1-8. As shown by GC Ex. 47(b) he had received this email on May 30, 2014. Mr. Garcia had previously testified, that the client's supervisor sent an email ***and*** also put his statement in writing. T.965:16-19. Precisely because CGC was making an issue regarding the authenticity of the Memo, Respondents called the client's supervisor, Mr. Ortega – a witness with no particular interest in the proceedings - to confirm it, which he did. T.1151:6-1152:4. CGC also alleges at p. 24 that Mr. Garcia claimed that he relied on Ortega's "written statement" [without clarifying whether they are referring to the email or to the Memo R. Ex. 11b] when deciding to suspend Gonzalez but "was forced to admit that the decision to suspend Gonzalez was made before he purportedly received Ortega's statement." CGC cited T.969:16-18 and 969:19-22 in support of these assertions. A cursory review of the cited section of the Transcript clearly reveals that the CGC's statement is not supported by the record. Note in this respect that Mr. Garcia had received an email from the client's supervisor letting him know of the incident on May 30 [2014] (a Friday). GC Ex. 47(b), T.964:8-23. The CGC also requests that an adverse inference be taken because Respondent failed to elicit testimony from Ortega regarding what did happen. Respondents did not need to elicit the testimony of Mr. Ortega regarding his version of the events – to which Mr. Garcia had in any case already testified- for the pertinent question was what motivated the disciplinary action. *Cast-Matic Corp., 350 NLRB 1349, 1358-1359 (2007)*("The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts.") No adverse inference is justified in this case.

supervisor call the employees directly[21], T. 521: 7-10; 908:11-22; and ***ix:*** the employees with the most seniority come to work unless they are told not to come because there is no work to be done at the shop, T. 579:17-580:11.

In July 2014, the Company decided that it was not going to repair chassis on a certain day of the week[22], and that in another there was work for only one welder; accordingly, the most senior welder was called to work four days per week, and the second most senior was called to work three days per week. T. 907:18 – 908:10. This in fact had happened before. T.576:24 – 577:16. These two particular workers had been working 40 hours per week because at those times there was work available at the shop and they were the most senior. T. 579:22-25.

The record, therefore, clearly demonstrates that the Company did what it has always done: call workers to work when it has work for them- "as needed" - and determine the amount of employees to employ even – as recognized by the Union's President - ***at the times when the contract has not been in effect***. T. 1052:18–25. Because the Employer here acted in accordance to this long lasting practice there is no Section 8(a)(5) violation.[23] *Courier-Journal, 342 NLRB 1093 (2004).* Here, as in *Courier*, "the past practice, accepted by the Union, privileged the Respondent's actions." *Id at p. 1094*.[24] Since this is what the ALJ decided, he was not in error as to this claim of the Complaint.

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21 The GC in its Brief in Support of the Exceptions, p. 31, asserts these employees "report to work regularly without the need to verify if there is any work for them" and cites p. 503 of the transcript in support of said statement. Not surprisingly, neither p. 503 nor any other part of the Transcript support the statement that any employee reports to work without the need to verify if there is work available for them.

22 As testified by Mr. Garcia, this was due to the fact that there was a "slow-down" of cargo and the Company was putting away or stacking the chassis and stopped fixing them. T. 907:21-25. GC asserts at p. 38 of his Brief that the argument related to loss of clients "is obviously related to labor cost." Respondents are at a lost regarding the "obvious relation" that losing a client has with labor cost since there many different reasons for a client leaving a service provider.

23 What the Government pretends to do in this case is to in effect impose on the Employer a guarantee of forty-hours per week or a list of permanent employees when those concepts have never existed in Intership.

24 As noted in Courier, the privileged nature of the action does not rest on the survival of the Management's Right clause.

Here, the evidence shows that the Employer in fact met with the Union officials and they acquiesced to calling these welders as the Company did. As part of an agreement to put an end to a strike, the Company agreed with the Union "without waiving any right" to discuss this issue with the Union. R. Ex. 4(b), ¶4; T.908:23 – 909:25. In addition, Mr. Garcia agreed to stay his decision[25] in order for the meeting to take place. T.910:1–14. On July 24, 2014, Mr. Garcia met with the Vice President and Secretary Treasurer to discuss among other things, the situation with the welders. T.910:22 – 911:3. This meeting was held with these particular individuals because the Union's President went on vacation and left these individuals in charge. T.911:4 – 9; R. Ex. 14(b). The letter leaving these individuals in charge did not limit their authority in any way. R. Exh. 14(b).

In their meeting, Mr. Garcia explained to these Union's officers everything regarding the Company's decision not to call these particular welders on certain days[26], and the officers informed Mr. Garcia that they understood and just wanted the opportunity to explain the situation to the employees themselves. T.912:11- 913:7. None of them informed Mr. Garcia that they needed to wait until Mr. Mercado returned. Id. The week after the meeting, Mr. Garcia went back to not calling these employees on the particular days previously discussed. T.912:8-12. When this happened, none of the two individuals that met with Mr. Garcia complained with him that they had asked him to wait until Mr. Mercado returned from his vacations. T.913:13-22.

The GC argument that the testimony of Mr. Garcia is "absurd" - p. 33 – is misplaced. It fails to understand that the parties – meaning the Employer and the Union – are the best to understand

25 CGC argue in the brief that on July 21 the employees were on strike and that July 25 was a Holiday to give the impression that Mr. Garcia did not rely stay the decision. The CGC are playing with semantics. Mr. Garcia testified, and the CGC presented no evidence to refute him, that the affected employees worked during that week the days the Company had previously decided not to do any work on chassis or to call only one welder. T.1004:7-16.

26 As testified by Mr. Garcia, he explained to the Union's officers why the Company did not need to continue to repair chassis five days a week. T. 912:14-913:16.

the particular situation facing the Company, and what the long lasting practice at the work place has been. This is illustrated by the Union President's candid admission that the Company has always determined the amount of workers to employ even during hiatus of the collective bargaining agreement. The GC's argument further fails to take into consideration that – as shown by the R. Ex. 4(b) – what the Union was interested in doing was to understand why the Company did what it did. Once the reasoning behind the decision was explained to the Union, there is no reason to believe that it would have demanded a concession from the Employer to acquiescence to what always has been the manner in which employees are called to work. The record is certainly devoid of any evidence to the effect that the Union were at the time requesting any concession from the Employer in exchange for this long lasting practice.

Respondents respectfully submit that even if it is found that the Company indeed needed to bargain with the Union regarding this matter, which is denied, Intership fulfilled its obligation, and therefore, there is no supportable Section 8(a)(5) violation.

E. ANSWER TO GC'S EXCEPTIONS 11 AND 12 (CGC'S BRIEF IN SUPPORT OF EXCEPTIONS, SECTIONS X & XI, P. 39-44)

The GC excepts to the finding that it failed to show that Intership unilaterally modified its auto checker procedures. The problem with this argument is that – as the ALJ recognized – the evidence fails to show that there was a ***substantial*** and ***significant*** ***departure*** from an ***existing*** term and condition of employment. What the record shows was that there was a controversy between the parties regarding the amount of cars to be dispatched from the Pier (Terminal) that would trigger the appointment of an "auto checker" and the guarantee pay that such assignment entails.

The record as a whole in this regard shows that: ***i:*** on August 3, 2013 the parties agreed that

Intership would assign an auto-check to its facilities in Pier M (the terminal) and ***that they would continue to bargain this matter***; GC Ex.31(b); T.922:8–25; ***ii:*** what remained to be negotiated was the pay guarantee for this assignment and when that particular checker was going to be called upon; T.924:7-10; ***iii.*** the Company followed up on the negotiations, R. Ex.15(b); T.925:5-7; ***iv.*** before August 3, Intership were not assigning these checkers for there would be absolutely no reason to agree that it would do so if it was already doing it; ***v:*** after the August 3, 2013, the parties met on numerous occasions to discuss about the terms and conditions of employment of the auto-checker in Intership's terminal, T.1054:9-11; 925:23-25; ***vi:*** the negotiations centered around the subjects of the amount of cars necessary to appoint the checker and the pay guarantees for the assignment, T.924:11 – 925:1; 1054:12 – 1055:15; ***vii:*** the parties seem to have reached an agreement on the pending issues: the amount of cars to be dispatched needed to trigger the assignment of an auto checker and the pay guarantees for the assignment, R. Ex.8(b); T.926:7-15; ***viii.*** the Union backed down from that agreement and proposed a different one - R. Ex.9(b); T.932:6 – 11 – to which the Company did not agree, T. 933: 21–935:1; ***ix.*** the Company has not agreed to pay a checker assigned to dispatch autos in the terminal (Pier) eight hours of guarantee, T.935: 15-21; ***x:*** G.C. Ex.33 shows that during the period between July and December 2014, the Company was not paying checkers assigned to dispatch autos in Pier M (Terminal) any work guarantees, T. 937:5–942: 20.

In light of the above stated facts, the ALJ correctly determined that the GC failed in establishing that there was an established term and condition of employment regarding the appointment of an auto checker and a pay guarantee of eight hours when these employees were assigned to the terminal. What the GC seems to be arguing is that the Company should be

paying the guarantee pay of eight hours because the expired CBA – in his opinion – so provides. *CGC's Brief in Support of Exceptions, p. 42 ("The parties' expired contract generally makes reference to the dispatch area but does not distinguish between the canopy and the terminal.")* Although Respondents vehemently disagree with the GC's reading of the CBA (T. 935:22-937:4), it submits that ultimately it is immaterial to the question of the allegation of unilateral change.

That is so because it is well settled that this Board is not a contractual grievance forum.[27] For purposes of a unilateral change allegation what is relevant is the existence of a norm and the substantial and significant departure from the same. The GC's theory fails in this case because the evidence here shows that: ***i.*** prior to August 2013, the Company was not assigning any checker to perform auto-checking duties in Pier M (the terminal); ***ii.*** in August 2013, it agreed to make this appointment ***subject*** to the continue negotiations about the terms and conditions for this; ***iii.*** that the parties continued negotiating on the issues of the amount of cars to be dispatched needed to trigger the assignment of the checker and the applicable pay guarantee for the assignment, but there was no meeting of the minds regarding these subjects; and ***iv.*** that there had not been any established practice of paying checker assigned to the auto-checker functions in the terminal an eight-hours guarantee. The ALJ did not err in this allegation.

F. ANSWER TO GC'S EXCEPTIONS 13 THROUGH 19[28] (CGC'S BRIEF IN SUPPORT OF EXCEPTIONS, SECTION XII, P. 44-49)

1. The exception regarding the restoration remedy

Without excepting to the ALJ's findings that MTS could not operate without Intership's

27 *See: Mine Workers v. NLRB, 257 F2d 211 (CA DC, 1958); Independent Petroleum Workers v. Esso Standard Oil Co., 235 F2d 401, 405 (CA 3, 1956) for the proposition that contract violations are not an unfair labor practice.*

28 Respondents do not object to the posting of any Notice be done also in the Spanish language, for that is the customary practice in Puerto Rico.

financial aid or that Intership is currently under significant financial duress, the GC protests the conclusion that a restoration remedy would cause undue hardship to Respondents. CGC's main contention is that the issue was not litigated. *CGC's Brief in Support of Exceptions, p. 41.* If anything was litigated in this case was Intership's financial distress and its inability to continue providing financial aid to MTS and TTS. Respondents showing of Intership's financial hardship began with its Opening Statement[29] (given before the GC started his case in chief), and constituted Respondents' main line of defense throughout this proceedings. It involved the majority of Respondents' documentary evidence and the majority of the testimonial evidence. In addition to the contention that the restoration remedy is not applicable to this case because there is no correlating violation of the Act to justify it, the ALJ's finding is in any case proper and supported by the record.

In support of this exception, the GC asserts that there is no evidence that the machinery and equipment that had been used by MTS and TTS was sold or discarded. *CGC's Brief in Support of Exceptions, p. 44.* Respondents presented into evidence the contract with the professional hired to liquidate the business, R. Ex. 56(b), and testified that the machinery and equipment used to perform the services at MTS were sold. T.1529:14-23. Similarly, it presented photographs of the MTS facilities being operated by the lessee. R. Ex. 7a and b. The same holds true for TTS. As shown by pictures and as testified by witnesses, TTS is closed and emptied and is being offered for rental. R. Ex. 38(a)-(e); T.1231:3-5. ***In fact, in response to specific question of the ALJ, CGC stated that they were not debating that these facilities were closed and empty***. T.1231:25-1232:5.[30]

29 In fact, it started at the investigatory stage of these charges for it has been the consistent argument of Respondents throughout this whole process.

30 For this reason, it is incomprehensible to Respondents that the GC now asserts that "[t]here is no evidence that . . . the TTS facility is vacant." CGC's Brief in Support of Exceptions, p. 44.

The GC also asserts in support of this exception that the lease regarding MTS facilities expires in February 2018 and that "[t]here 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." The Lease Agreement between the lessee and MTS was presented into evidence – R. Ex. 58 – and in fact, the CGC has had a copy of it since the early investigatory stage of these charges. This lease agreement has been in effect continuously since March 2013 – in other words, for more than three (3) years – and there are almost two-years remaining in the same. The question, therefore, is not whether there is any proof that it will not be terminated or renewed but rather what proof there is that it would be terminated before expiration or not renewed. As to the questions regarding the relationship between Respondent and lessee, a simple search in the Internet – www.suncolors.com – would demonstrate that Sun Colors Digital Graphics Inc. (the lessee) is a well-established business in Puerto Rico that has absolutely nothing whatsoever to do with the shipping or stevedoring business.

The question regarding the appropriateness of the restoration remedy was clearly litigated during the hearing. The best way to exemplify this is by the undeniable reality that if any further proceeding is ordered on this subject, Respondents would have to present exactly the same evidence and make exactly the same arguments they made during the hearings of this case. If there were any areas to explore regarding this subject, the GC should have explored them during the hearing particularly because restoration was a remedy requested in the Complaint and because these matters were in any case relevant to GC's case in chief.[31]

31 In fact, the GC subpoenaed as part of the investigation of these charges the evidence regarding the sale or disposition of the property, the machinery and the equipment. They were in fact in a position to challenge the sufficiency and credibility of the evidence relating to sale and disposition of the machinery and equipment.

In light of the current state of the economy of Puerto Rico, the unchallenged and established fact that MTS and TTS cannot operate without the financial aid of Intership, as well as the unchallenged and established fact that Intership is under significant financial duress, a restoration remedy would represent an insurmountable hardship for Respondents. Accordingly, the GC's exception should be denied.

2. The exception regarding reinstatement

In addition to the contention that reinstatement is not applicable to this case because there is no correlating violation of the Act to justify it, the GC's exception regarding the alleged failure of the ALJ to provide for this remedy is contingent to his restoration argument. To the extent that, as discussed previously, the ALJ's rejection of the restoration remedy is well founded and supported, the reinstatement remedy necessarily also fails.

In terms of the argument that Respondents should be ordered to reinstate the claimants in Intership, the GC fails to take into consideration that there is a distinct and separate bargaining unit with its own rule for calling employees to work and its own seniority rule. An order requiring Intership to offer employment to the claimants in this bargaining unit would affect the seniority rights of a substantial amount of workers that have an acquired right to be called to work when work is available at this work place. Far from solving any alleged violation, this would create further and more complicated problems. Accordingly, the GC's exception should be denied.

3. The request for search-for-work and work-related expenses

On August 17, 2015, the GC filed a motion seeking to modify its desired remedies to include the compensation of search-for-work and work-related expenses without regard to whether

interim earnings are in excess of these expenses. Noting that granting this particular remedy would require a change in Board Law, the ALJ refuse to grant it. The GC excepts from this denial and wants this Board to award search-for-work expenses and work-related expenses as a separate, affirmative damage award, unconnected to interim earnings.

This Board requested amicus briefs on the subject in February 2015 as part of its consideration of *King Soopers Inc., 27-CA-129598,* and currently has this issue before it with extensive briefing in numerous other cases (*e.g., Tinley Part Hotel, 13-CA-141609*; *Component Bar Products, Inc., 14-CA-145064*; *Con-way Freight, Inc., 21-CA-135683, et al.*

In addition to the contention that the requested remedies are not applicable to this case because there is no correlating violation of the Act to justify them, Respondents join with and urge the legal arguments expressed in the employers' briefs currently before the Board, and as outlined herein. The Board should not change its long-standing rule on search-for-work and work-related expenses because:

- Such separate expenses constitute compensatory damages, and the Act (specifically 29 U.S.C. § 160(c)) does not allow for such damages; only Congress can amend the Act to provide for such damages;
- The CGC does not point to any changed circumstances in the American workplace generally (or in this case in particular) that warrant a departure from the Board's long-standing rule that the Act does not allow for such separate compensatory damages;
- The Board cannot grant compensatory damages under the Act simply because the EEOC and DOL have that authority. Congress specifically amended Title VII to allow for such damages and the FLSA and EPA (DOL) statutes and regulations (authorized by

Congress) specifically provide for such damages. The NLRB cannot unilaterally grant such damages;

- The Board's power is remedial, not punitive or penal and awarding such separate expenses would grant claimants an unwarranted windfall, which, by law, is penal in nature. Claimants could easily obtain a windfall by "seeking" unrealistic employment opportunities in the vacation destination of their choice, taking interim employment in unaffordable residential areas and charging the excess rent to the former employer, submitting receipts for personal travel, internet, or phone use under the guise of a "work search"; to name just a few; and
- Granting such damages would be inherently speculative and impossible to police given the myriad incentives claimants would have to invent or exaggerate such expenses if wholly disconnected from the interim work earning inquiry.

4. The request for notice-reading

The GC request a notice-reading remedy in this case. This remedy was not requested at the time the Complaint was issued, and unlike the case with the search-for-work remedy, the GC did not move prior to the hearing to supplement his desired remedies to include this particular one. For this reason alone, the request should be denied. *Camay Drilling Co., 254 NLRB 239, 240 fn. 9 (1981)* ("[T]o determine an issue of this magnitude when it is raised for the first time [by the General Counsel] as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense."), *enfd. sub nom. Operating Engineers Pension Trust v. NLRB, 676 F.2d 712 (9th Cir. 1982).*

This Board has routinely recognized the extraordinary nature of the notice-reading remedy

and reserves that remedy for cases involving flagrant, pervasive, and outrageous unfair labor practices. *Edro Corp., 362 NLRB No. 53* (Mar. 31, 2015) (declining to order notice reading because that remedy applies to "unfair labor practices [that] are 'so numerous, pervasive, and outrageous' that such remedies are necessary 'to dissipate fully the coercive effects of the unfair labor practices found'"); *McGuire Steel Erection, Inc., 324 NLRB 221, 221 (1997)* (finding that employer's unfair labor practices were not "so flagrant, aggravated, persistent or pervasive, as to warrant the imposition of [an] extraordinary remedy"). Additionally, the Board does not order extraordinary remedies in cases that involve difficult questions of fact, law, and policy. *See, e.g., New Process Co., 290 NLRB 704, 750 (1988)* (declining to order extraordinary remedy because the case involved "difficult questions of fact, law, and policy"); *Hanover House Indus., 233 NLRB 164, 178 (1977)* (declining to order extraordinary remedy because the case raised "close questions of law, giving rise to fairly debatable issues").

As the evidence establishes, Intership has been doing business since 1961. Throughout this time, and even when it has had bargaining relationships with three different unions for decades, it has never been found to have committed an unfair labor practice. Respondents are not recidivists and have no history of labor malpractices. The actions and conduct that are here under review took place during a time when – as found by the ALJ and unchallenged by the GC – Intership was under significant financial duress and needed to act swiftly, a predicament that it had not faced before. The legal positions Respondents have advanced in these proceedings are well-founded in existing law, well-explained and supported by evidence in the record. Although Respondents are convinced that the law and the facts support their position that no violation of the Act were committed, it is beyond dispute that these allegations involve difficult questions of

facts and law giving raise to fairly debatable issues. The number of exceptions taken in this case, including those of the GC, is the best evidence of this. Moreover, no argument has been presented as to why the traditional notice – including a version in Spanish – would not be sufficient to advise the employees that the Board has protected their rights, and to prevent and deter future violations.

Accordingly, Respondents submit that a notice-reading remedy is inappropriate in this case.

CONCLUSION

There are still important elements missing in this case for the GC to be able to establish the pleaded violations. Given the unchallenged findings that MTS and TTS could not operate without the financial aid of Intership and that Intership is presently under significant financial duress, the unanswered question of how Intership could have continued to provide financial aid to these subsidiaries while sustaining the losses it was facing remains an insurmountable hurdle to finding a Section 8(a)(3) violation. Misstating Respondents' defense as simply arguing that MTS and TTS were closed because they were unprofitable does nothing to answer this question.

Similarly, arguing that Respondents should have bargained the decision to close without explaining how the particular situation faced by MTS was amenable to resolution through bargaining with the Union or while ignoring that Puerto Rico has one less provider of refurbishing services for chassis and containers are clear impediments to finding a Section 8(a)(5) violation.

The same holds true for the GC's remaining exceptions. As a matter of law, there is no unilateral change violation in the absence of evidence demonstrating substantial and significant departure from an existing term and condition of employment.

For all the foregoing reasons, Respondents respectfully request that the Board deny the GC's Exceptions.

AFFIDAVIT OF SERVICE OF ANSWERING BRIEF TO CGC'S BRIEF IN SUPPORT EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

The undersigned hereby certifies that a true and correct copy of this Respondents' Answering Brief to GC's Brief in Support of Exceptions to the Administrative Law Judge Decision was served on this 17th day of June 2016 upon the following persons through email:

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