

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

-----X
Local 660, United Workers of America,

Complainant,

**Case Nos.: 29-CA-147909 &
157108 & 146077**

and

**Deep Distributors of Greater NY d/b/a
The Imperial Sales Inc.,**

Respondent.

-----X

**BRIEF SUBMITTED IN SUPPORT OF
RESPONDENTS' EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

Deep Distributors of Greater N.Y. d/b/a Imperial Sales, (the alleged “Respondent”), for all of the reasons set forth below, seeks to have the Decision of Administrative Law Judge Davis and his Order Modifying that Decision determining that Respondent has violated the National Labor Relations Act (“Act”) dismissed.

Without belaboring the point, the allegations contained within CGC’s various and numerous charges, amended charges, and ultimately the ever-evolving complaint and amended complaints took a tortured route from their manufactured origin, to ALJ Davis’ intellectually dishonest, similarly manufactured and subsequently revised decision. ALJ Davis exhibited no restraint in disclosing his bias. He frequently referenced his 4 decades working for the National Labor Relations Board, and referenced his years as a Board Agent. He disregarded concerns for safety in his hearing room, attempted to prevent counsel from seeking police intervention when his client was being threatened, and feigned an inability to hear when relevant testimony was elicited. As if that was not enough to illustrate the manifestation of his bias, he continually asked questions of Respondents’ counsel only to deride him for the answers to those questions. The hearing was neither fair, nor honest and the complicit conduct of ALJ Davis, the witnesses and CGC should serve as a warning to the Board that its purpose is being prostituted to further an agenda not prescribed by the language of the Act.

Though numerous, the issues decided were simple and can be broken down as follows:

Pre-Election Issues

- 1. Challenges to ballots cast by Jose Wilfredo Argueta, Jose Martin Torres and Jose Michael Torres must be sustained;**
- 2. The objections to Amjad Malik and Manjit Singh must be denied.**

- 3. Allegations of verbal and physical confrontation occurring at the beginning of the election; and**
- 4. The March 6, 2015, discharge of Jose Wilfredo Argueta, Jose Martin Torres and Jose Michael Torres.**

Post-Election Issues

- 5. July 14, 2015, allegations of interrogation and threats of employees for their involvement in a Fair Labor Standards Act Lawsuit;**
- 6. July 21, 2015, implementation of written work rules that resulted in the discharge of Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabion; and**
- 7. The allegation of threats made by Counsel for Respondent to employees at the hearing regarding their unlawful immigration status.**

Challenges to Ballots cast by Jose Wilfredo Argueta, Jose Martin Torres and Jose Michael Torres must be sustained

The credible, uncontroverted testimony of Tony Bindra, a witness called by CGC Cabrera, revealed that these three (3) employees were laid off due to lack of work. The testimony elicited by CGC Cabrera indicated that consistently, for the past several years, warehouse staff members were laid off in the first quarter of every year. In addition, GCC Exhibits 15, 16, and 17 support both the financial basis and workplace history of first quarter layoffs. In fact, ALJ Davis acknowledged this fact at the hearing on Page 1252, Lines 8-12. "... [T]hey need evidence of alleged downturn and a connection between the downturn and the layoffs. There has been testimony concerning that."

To the extent the basis existed both in the admitted financials and corporate history for the discharge, CGC cannot logically argue there was no basis for the discharge. The direct testimony confirmed CGC's documents and cannot be disregarded because of ALJ error or bias. The uncontroverted testimony from CGC's own witness, Tony Bindra, indicates that for the last five years, Warehouse employees were laid off from Respondent in the first quarter of every year. This period of time was referred to as being after Christmas during direct testimony from Mr. Bindra. In his decision, no mention of first quarter layoffs were mentioned by the beleaguered ALJ Davis other than saying Christmas is not in March. It was precisely this myopic view that fostered a hearing environment wherein Respondent was prevented from posing relevant questions designed to illustrate both the intentional fraud perpetrated by CGC and their employee/Union witnesses. In the absence of any evidence to the contrary, ALJ Davis chose to disregard the obvious inconsistencies between charge allegations, complaints, affidavits and federally filed documents and the direct testimony of witnesses solely for the purpose of advancing his admitted anti-employer animus.

Therefore, the discharge of Jose Wilfredo Argueta, Jose Martin Torres and Jose Michael Torres cannot be considered in violation of the Act. It is well established that to be eligible to vote in a Board election, an employee must be employed in the unit during the payroll period for eligibility and on the day of the election. *Plymouth Towing Company, Inc.*, 178 NLRB 651 (1969); *Choc-ola Bottlers, Inc.*, 192 NLRB 1247 (1971); and *Stockton Fittings, Inc.*, 222 NLRB 217, fn. 2 (1976). The Board will presume a discharge to be lawful and the voter ineligible to vote in the absence of a charge alleging that discharge as a violation of the Act. *See Times Square Stores Corp.*, 79 NLRB 361 (1948); *Texas Meat Packers*, 130 NLRB 279 (1961).

The Objections to the Ballots of Amjad Malik and Manjit Singh Must be Denied

Despite CGC's feeble attempts, there was no credible testimony to conclude that Amjad Malik was anything other than a warehouse worker. The unambiguous testimony of Tony Bindra and Herb Miller confirms that although Mr. Malik had access to a locked room in the warehouse, that the room was not an office, but rather, a secured area for higher value items. The clear testimony was that Amjad Malik did not hire or fire employees, nor did he direct the terms and conditions of any employees' duties. He had no supervisory responsibility, whether express or implied. His pay was in line with that of his warehouse colleagues. He spoke English and was therefore viewed differently by Spanish speaking Warehouse workers. The differences between he, and the remaining warehouse workers ended there. Nowhere does ALJ Davis make mention of those factors. His unwavering attempts to ignore facts that do not support the outcome he seeks to manufacture cannot be overlooked.

Similarly, Manjit Singh was employed as a warehouse worker. No testimony, credible or otherwise was introduced to refute this fact. As no testimony exists to refute the incontrovertible fact Malik and Singh were anything other than Warehouse workers, their ballots cannot properly be excluded.

Allegations of Verbal and Physical Confrontation

Occurring at the Beginning of the Election.

We have alleged that during the course of the election, the Union, in an overt attempt to bully their way to a desired election outcome, resorted to acts of violence against the Employer and the Employer's agents. The clear, undisputed testimony of Tony Bindra, Danny Bindra and Herb Miller supports the allegations that a person identified at the hearing as, "Union President Gilberto Mendoza," yelled profanities, threatened the Employer and their Agent at the election on March 24, 2016. In fact, Mr. Mendoza himself admits to screaming and using profanities. Page

1193, Lines 17 and 1197, Lines 14-17. Specifically, Mendoza was asked these questions and gave these answers:

Page 1197

12 Q Did you walk out of the building when you were asked to?

13 A No.

14 Q Did you use profanities while you were at the election?

15 A Yes.

16 Q After you used profanity at the election, did you then speak to the employees in Spanish?

18 A Don't remember.

Mr. Mendoza's testimony confirms he argued with a representative of the Employer before the voting occurred because he was not allowed full access to the Employer's premises. Pg. 1202 lines 16 through Pg. 1203 Line13. He further admitted he raised his voice and was in close physical proximity, "matter of inches" to a representative of the employer. Pg. 1205 Lns. 5- 25. & Pg. 1211 Lns. 24-25 – Pg. 1212 Ln 1. In fact, Mr. Mendoza denied making any threatening gestures with his hands while at the same time not remembering where his hands were during the confrontation. Pg. 1208 Lns. 1 through Pg. 1210 Ln 11. Additionally, various employees testified that they saw or heard the act of aggression and bullying. In fact, it was testified that the confrontation occurred in front of several employees and that Mendoza sought to head-butt Respondent's counsel. This coupled with the clear and unwavering testimony of Tony Bindra, Danny Bindra and Herb Miller makes it clear that the behavior of Gilberto Mendoza was exactly the type the Board has found to constitute a transgression of the Act because it clearly seeks to deprive both employees and employers the right to participate in an election free from undue influence.

The Board has evaluated threats of physical harm and other misconduct attributed to a party under the standard of whether such conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election. *See Baja's Place*, 268 NLRB 868 (1984) (where the Board found objectionable, among other things, the Union agent's threat "to get" an employee inasmuch as it could reasonably be viewed as a threat of physical harm and of other unspecified reprisals). The Board has long recognized that employees may be restrained or coerced in their protected activities by Union misconduct directed not against them, but against supervisors, managers, and security guards. Union misconduct of this character coerces employees who witness it or learn of it because they may reasonably conclude that if they do not support the Union's goals, like coercion, will be inflicted upon them. *See 1199, National Health and Human Service Employees Union, SEIU AFL - CIO Staten Island University Hospital*, 339 NLRB 1059 (2003) *Central Massachusetts Joint Board, Textile Workers Union of America, AFL-CIO* 123 NLRB 590 (1959).

The March 6, 2015 Discharge of Jose Wilfredo Argueta,

Jose Martin Torres and Jose Michael Torres

For all the reasons stated in the above paragraph addressing the appropriateness of the ballots cast by these individuals, the appropriateness of their discharge must be upheld. To establish that a discharge violates Section 8(a)(3), the general counsel must prove (1) the employer knew of the employee's union activity (*Phillip Megdal, Inc.*, 267 NLRB 82 (1983)) and (2) the employee was discharged or disciplined as a result of the employer's unlawful motivation or "union animus." *NLRB v. Chaim Babad dba J.R.R. Realty Co.*, 785 F.2d 46, 121 LRRM 2940 (2d Cir.) *cert. denied*, 479 U.S. 830, 123 LRRM 2592 (1986). **"Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the [Act]."** *Clothing Workers v. NLRB*, *see* p. 286, fn.

215.

**July 14, 2015 Allegations of Interrogation and Threats to Employees in Retaliation for
Their Participation in a Fair Labor Standards Act Lawsuit**

The filing of a labor-related, civil action by a group of employees is ordinarily a concerted activity protected by the Act unless employees acted in bad faith. *Leviton Mfg. Co., Inc. v. NLRB*, C.A.1 1973, 486 F.2d 686, *Socony Mobil Oil Co. v. NLRB*, 357 F. 2d 662, 663-664 (2d Cir. 1996) In the instant matter, no facts have been introduced indicating that the FLSA matter was filed in good-faith. In fact, what little testimony Respondent was allowed to either introduce or elucidate, indicates that the filing was not in good faith. Initially, there is **the admission from Counsel for the employees wherein he affirmatively concedes that the original FLSA filing was not accurate**. See Exhibit R5 conveniently ignored by ALJ Davis. Ordinarily, this fact alone would be enough, but Respondent's counsel was not permitted to question any of the parties to the lawsuit regarding their basis for filing the FLSA suit. This is particularly germane because complainants provided sworn testimony admitting they were each paid properly long before any allegations of unfair labor practice charges arose or were filed. While Counsel for Respondent was not permitted to introduce the relevant evidence which included such sworn testimony, the testimony itself was acknowledged on the record.

Similarly, relevant to the analysis here is the specific testimony attributed to Tony Bindra. This testimony does not support any allegation of purported interrogation or threats that violate the Act. Upon receipt of the FLSA complaint, Mr. Bindra inquired if the employees filed suit because the facts contained therein were not supported by reality, or their previously sworn testimony. In response, he indicated that he would have to fight the lawsuit in court. No reasonable interpretation of that statement lends one to believe it was a threat of reprisal, to the contrary, it

was simply an assertion of ones rights. ALJ Davis attempts to characterize the meeting as a one-on-one session, but no testimony supports his position. In fact, at the hearing all the employees acknowledged that the meeting was as a group and recorded *via* iPhone as a group. ALJ Davis' attempts to ignore the obvious when coupled to his overt discriminatory acts screams bias. His bias was either manipulated or coordinated with that of the CGC to advance positions not supported by the credible testimony.

It is well established that interrogation is only unlawful when it is coercive in light of the surrounding circumstances. *Blue Flash Express*, 109 NLRB 591 (1954). *Bourne v. NLRB* established that interrogation that is not itself threatening will not be an unfair labor practice unless it meets certain criteria. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), *enforcing as modified*, 144 NLRB 805 (1963)) The criteria established under *Bourne* are (1) the background of employer hostility, (2) the identity of the interrogator, (3) the place of the interrogation, (4) the method used, and (5) the truthfulness of the employee's response. CGC nor ALJ Davis addressed these factors and in their failure to do so further evidences their bias.

The July 21, 2015 implementation of written work rules that resulted in the discharge of Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabion

On or about July 21, 2015, Respondent introduced written work rules regarding attendance and the use of cell phones in the workplace. *See* GC 2A and 2B. No testimony offered on this point was contradictory. The entire workforce was asked to sign the acknowledgement of receipt of the policy. Those employees who did not sign the policy were terminated and those that did sign the policy remained employed. Signed policy forms were turned over in prior to and during the hearing. Respondent enumerated a legitimate business reason for the policies that were not refuted in any manner by the employees. In fact, with regard to attendance, most employees clearly

testified that they were expected to be at work on time and expected that they were not permitted to come to work late. Despite answering in response to CGC's specific line of questioning that there were no work rules, complainants each testified that they were required to come to work at 8 a.m. despite it not being written anywhere.

The testimony regarding cell phone usage at work is similarly uncontroverted. In an effort to make their new work location more efficient, Respondent implemented a no cell phone usage policy at work. This was particularly appropriate in the warehouse where there was substantial testimony regarding heavy equipment and dangerous conditions. Of particular import, none of the employees could provide any basis, legitimate or otherwise, as to why they did not sign the work rule other than to say they did not like how it was presented to them.

It is clear from the testimony that the attendance policy was a written embodiment of the work rules that were essentially in place. The cell phone policy is not unlike any typical workplace rule where employees are not to use their cell phones at work. Although this was a new policy, it was companywide and reasonably related to the legitimate business interest of the employer and the safety of the employees.

**The Allegation of Threats Made by Counsel for Respondent to Employees at the
Hearing Regarding their Unlawful Immigration Status**

With one (1) exception, the sworn testimony from CGC's witnesses does not support these allegations. There is little to no consistency between witnesses who testified as to the purported existence of such threats. In sum and substance, the majority of the testimony surrounds non-English speaking individuals who allegedly overheard conversations in English and ascribed either their own interpretation of the conversation, or that of CGC. The reality is, upon meeting Respondent at the NLRB, they observed a conversation between Respondent and counsel while

they were in the elevator during which immigration status was discussed. The gravamen of the conversation was that the immigration status of the discharged employees did not affect the proceeding, unless it was ultimately determined that the employees were not authorized to work in the United States. In which case, said employees would not be entitled to any back pay. *See Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 142-152 (2002). Federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board from awarding back pay to an undocumented alien who has never been legally authorized to work in the United States. In response to specific questions regarding whether the NLRB has authority to deport these individuals, Respondents all of whom were not born in the United States and immigrated here as adults) were advised that although illegal aliens could be deported, it was unlikely that they would be in connection with the pending dispute. A subsequent conversation ensued between Counsel for Respondent and CGC Powell, wherein the practical effect of continuing this proceeding given the respective beliefs that the claimants were not authorized to work in the United States was prominently discussed. The conversation included a discussion of *Hoffman Plastics*, wherein it was said that if the claimants are in the country unlawfully, then the Board is not authorized to award them back pay. At no point did Respondent, through counsel or individually, indicate an intention to contact immigration. To the contrary, Counsel engaged in a discussion of controlling precedent and answered specific questions posed by Respondent wherein they drew upon personal experiences with immigration in an attempt to better understand the significance of claimants' immigration status on this dispute. Essentially, the witness testimony supports my assertions.

Furthermore, Gilbert Mendoza, Union President, testified that on December 9, 2015, outside of the hearing room, He heard, "Immigration is here" (*See Hearing Transcript*, at Page

1182, Line 17) and that “this is a waste of time, you’re never going to get a penny out of my client, you’re all a bunch of immigrants; if they get up on the stand and give a statement, they will be committing perjury, so I’m going to take it to the grand jury so they can get deported.” (*Id.* at 1184, Lines 1-5). Not surprisingly, Mr. Mendoza subsequently backtracked and testified that he did not hear counsel for Respondent issue those comments to anyone in particular, but the comments were made “out loud” (*Id.* at 1222, Line 14) and that Counsel for Respondent made the comments in English when the group of employees admittedly do not speak the language. (*Id.* at 1223, Lines 20-24). Mr. Mendoza then testified that he specifically prepared his testimony about the events of December 9, 2015 with Counsel for the General Counsel, Mr. Powell. (*Id.* at 1219, Lines 4-8). This fact is significant particularly since Mr. Mendoza’s narrative changed during the course of his testimony.

Additionally, claimant Henry Hernandez testified that while Counsel for Respondent was having a conversation with CGC Powell, he heard Counsel for Respondent say, “like I’m going to report to immigration or a penny and something. And I’m going to report you to immigration.” Mr. Hernandez went on to admit that he does not understand English and more specifically, that he does not understand the words that come out of my [counsel’s] mouth. (*Id.* at 61, Lines 18-21). Judge Davis cautioned Mr. Hernandez and stated “You know that you’re in a lot of trouble if you don’t tell the truth, is that correct?” (*Id.* at 63, Lines 23-25).

Claimants Augustine Sabillion, Jose Michel Torres, and Marvin Hernandez did not testify regarding any alleged threats or comments regarding immigration.

Claimant Jose Wilfredo Argueta did not testify regarding any alleged threats or comments regarding immigration during his first round of testimony. However, he was subsequently recalled and after conspiring with CGC testified, for the first time, that he heard Counsel for Respondent

say by the elevator that I was going to report “us” to immigration and that he wasn’t going to pay us not even a penny.” (*Id.* at 964, Lines 16-18) Mr. Argueta testified that he overheard Counsel for Respondent talking to his clients as I walked out of the elevator and that Counsel for Respondent was not talking to him at the time. (*Id.* at 969, Lines 13-14 and Lines 23-24) He also admitted that he did not feel threatened by Counsel for Respondent comments, (*Id.* at 970, Line 2) and his overhearing what Counsel for Respondent allegedly said did not, in any way, interfere with his exercising his rights under the act. (*Id.* at 971, Lines 8-10) Mr. Argueta testified that the statements also took place in Hearing Room #2 when, in actuality, the hearing occurred in Hearing Room # 3. (*Id.* at 965, Lines 6-16) The witness also concedes he “does not fully understand English.” (*Id.* at 967, Lines 13-16) Mr. Argueta even went so far as to testify that ALJ Davis was present when the alleged threatening comments were made. (*Id.* at 974, Lines 8-12) In response, ALJ Davis stated, on the record, “. . . but I want to make a statement since my name was mentioned, and I let the questioning go on because the witness is giving his testimony. And the fact is that I was not in the room. I did not hear that alleged conversation or any alleged conversation concerning the testimony that Mr. Argueta has given at this when he was recalled. That’s my statement. He stated repeatedly that I was here. I’ve made my statement that I was not.” (*Id.* at 968, Lines 2-8) Despite ALJ Davis interrupting Argueta’s testimony to call attention to the fact that Argueta was lying, he ultimately credited his testimony. What basis could ALJ have to acknowledge a lie on the record and credit that witness’ testimony? Mr. Argueta ultimately came full circle and testified in response to the following question: **“Did I say any words to you other than good morning and good afternoon to you?” ANSWER: “No.”** (*Id.* at 993, Lines 10-12) In light of the incongruity found in Argueta’s testimony, the testimony of his cohorts, the testimony

of ALJ Davis, any attempt to rely on Argueta is inherently suspect. We posit it is in furtherance of ALJ Davis' discriminatory bias.

Claimant Roberto Reyes testified that, "The first day we came here, it was you [Counsel for Respondent] who pointed at us with your finger and you threatened us; threatened us as criminals." (*Id.* at 933, Lines 5-7) Despite such a damning statement, Mr. Reyes testified that he did not understand any of the words that came out of my mouth. "What was understood is that you were pointing at us as criminals." (*Id.* at 933, Lines 19-20) (emphasis added) Again, not unlike the testimony of his cohorts, on one hand, Mr. Reyes claims he heard Counsel for Respondent issue a series of statements, yet on the other, concedes that he does not possess the ability to understand what it is that Counsel for Respondent actually said. This practice is particularly troubling because Mr. Reyes added a claim that Counsel for Respondent referred to him and his comparators as "criminals". The record is devoid of any such reference and the allegation is materially false – singularly designed to curry favor with the tribunal in an attempt to secure a favorable outcome not on the merits, but rather, upon deception a deception either contrived with or by ALJ Davis and or CGC. In any event, to credit such inconsistent testimony further supports the failure of ALJ to conduct a fair and impartial hearing.

Claimant Wester Fabres, Union Organizer, testified that he overheard a conversation that Counsel for Respondent was having with CGC Cabrera, wherein Counsel for Respondent said, "they are all undocumented, illegal, undocument." (*Id.* at 997, Lines 16-17) He further testified that he heard Counsel for Respondent say "that he going to call immigration and have them deported." (*Id.* at 997, Lines 19-20) Mr. Fabres further stated that he told the employees "And I say Mr. Zabell make a comment about immigration." (*Id.* at 998, Lines 9-10) He then went on to testify that he overheard a conversation between Counsel for Respondent CGC Powell, wherein

he allegedly heard me say “If they going on the stand, they’re going to commit perjury, and he going to report to immigration” and “he also mentioned something about the Supreme Court and he pointed the Imperial’s employees, he pointing, and he say they won’t receive a penny.” (*Id.* at 999, Lines 11-14 and Lines 16-18) Admittedly, Mr. Fabres did not hear any other part of the conversation with Mr. Powell. (*Id.* at 1012, Lines 3-5) Importantly, despite his submitting a “sworn” Affidavit that he personally observed these statements on December 16, 2015, he testified that the statements were observed on December 9, 2015. Again, ALJ Davis chooses to ignore this seven (7) day disparity between his contrived Affidavit and his testimony to credit this witness. Not only does this strain credulity, it further evidences bias, the very same bias ALJ Davis and his 4 decades brings to his role as ALJ.

Claimant Javier Reyes testified that while speaking to the employees, “He [Counsel for Respondent] pointed at us. He [Counsel for Respondent] said that we were not able to get a penny”. (*Id.* at 1085, Lines 8-9) Mr. Reyes further testified that “Henry told me” and that he only remembers “a report of Immigration”. (*Id.* at 1149, Lines 2 and 12) Henry was CGC Powell.

Notwithstanding the obviously contentious nature of this proceeding to date, the essential allegations are otherwise routine and have been soundly rebuffed by the credible testimony of the witnesses for both Complainants and Respondent. Three (3) employees were discharged before the election. For years prior, Warehouse employees had been discharged or laid off at precisely the same time. More than four (4) months later, some additional employees were discharged for failing to sign receipt of two (2) workplace policies. Had they signed, like the majority of their fellow employees, they would have kept their jobs. They testified they had no basis for failing to sign, yet they chose not to so. All other allegations are hyperbole with now attendant economic value.

We apologize for the circuitous route this matter has taken and the vitriol with which this brief is written. The allegations, the decisions and the actions of both ALJ Davis and CGC has provided a reason for Respondent, immigrants themselves, to doubt the honesty and integrity of the National Labor Relations Board.

Section 7 of the National Labor Relations Act (“NLRA” or the “Act”) grants employees the right to form, join, or assist labor organizations. It is hereby declared to be the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization, and designation or representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. @ Section 1(b), Short Title and Declaration of Policy, Labor-Management Relations Act of 1947, Pub. L. No. 101, 80th Cong., 1st Sess.; 29 U.S.C. §141 et seq. (1976). Section 8(a)(1) of the Act forbids employers from interfering with, restraining or coercing employees in the exercise of Section 7 rights. Section 8(a)(3) of the Act forbids employers from discriminating against employees for exercising their Section 7 rights. **Section 8(a)(1) or (3) does not, however, proscribe an employer’s right to make legitimate business decisions.** (Emphasis added)

To establish conduct destructive of Section 7 rights, the General Counsel must prove that the employer’s conduct was inherently destructive of important employee rights despite evidence of business motivation. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). In *NLRB v. Great Dane*, the Court concluded that no proof of anti-Union motivation is required, however, where the discriminatory conduct has a “comparatively slight” effect on employee rights, an employer’s evidence of “legitimate and substantial business justifications for the conduct” will shift the burden of proof to the general counsel to show anti-Union animus. Although there has been no clear expression of the standard to define what conduct is “inherently destructive,” or what constitutes

“legitimate and substantial business justification,” what is clear is that a finding of unlawful discrimination cannot be sustained without independent evidence of improper motivation. *NLRB v. Brown Food Store*, 380 U.S. 278 (1965). *NLRB v. Brown Food Store*, characterized inherently destructive conduct as that which is demonstrably so destructive of employee rights and so devoid of significant service as a legitimate business end that it cannot be tolerated consistently with the Act.

In determining whether an employer’s conduct violates Section 8(a)(3) of the Act, the Board and the courts apply the analysis developed in *Write Line, Write Line Div.*, 251 N.L.R.B. 1083. The Board’s approach in *Wright Line* which was approved by the Supreme Court in *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983) focuses on the elements of the General Counsel’s *prima facie* case. That is (1) the existence of protected activity, (2) knowledge of the activity by the employer, and (3) Union animus. The General Counsel must provide proof of these elements to warrant an inference of a violation of the NLRA. The employer may then rebut the General Counsel’s *prima facie* case by showing that the same personnel action would have taken place for legitimate reasons regardless of the protected activity.

Notably, *Crown Zellerbach Corp.* established that “not every detriment which has a nexus to an employee’s union activities is thereby automatically rendered an unfair labor practice. . . .” 266 NLRB 1231 (1983).

CONCLUSION

Given all the overwhelming contradictions between the ALJD and the un-controverted testimony from all of the witnesses Respondent respectfully requests that ALJ Davis' decision be rejected.

Dated: Bohemia, New York
June 22, 2016

ZABELL & ASSOCIATES, P.C.
Attorneys for Respondent

By:

Saul D. Zabell
ZABELL & ASSOCIATES, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716
Tel.: '631) 589-7242
Fax: '631) 563-7475
szabell@laborlawsny.com