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

McALLISTER TOWING AND
TRANSPORTATION CO., INC.,
PUERTO RICO BRANCH,

and Case No. 12-CA-146711

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND MOTION TO STRIKE RESPONDENT'S EXCEPTIONS AND BRIEF

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I. STATEMENT OF THE CASE AND MOTION TO STRIKE

On July 12, 2016, Respondent filed exceptions to the Decision of Administrative Law Judge Kenneth W. Chu (the ALJ) in the above-captioned matter of McAllister Towing and Transportation Co., Inc., Case 12-CA-146711, reported at JD(NY)-19-16, along with a supporting brief with the Board.[1] Preliminarily, Respondent's brief in support of exceptions is procedurally defective under Section 102.46(c)(1) and (2) of the Rules and Regulations of the National Labor Relations Board (the Board) because it does not contain a clear and concise statement of the questions presented or reference to the specific exceptions to which the arguments in its brief relate. Accordingly, General Counsel moves to strike Respondent's brief in support of exceptions and its exceptions.

Pursuant to Section 102.46 of the Rules and Regulations of the Board, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision for the Board's consideration in the event the motion to strike is denied.

On May 25, 2016, the ALJ issued his Decision in which he determined that McAllister Towing and Transportation Co., Inc. (Respondent) violated Section 8(a)(1), (3) and (5) of the Act. The ALJ properly found that Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to José M. Colón, a tugboat captain employed by Respondent and shop steward the International Organization of Masters, Mates and Pilots, ILA, AFL-CIO (the Union) on December 9, 2014, and by lowering Colón's performance evaluation because of

[1] Respondent did not file exceptions with respect to the ALJ's finding and conclusion that violated Section 8(a)(5) and (1) of the Act by unreasonably delaying in providing the Union with requested information regarding the discipline issued to Colón. Accordingly, the ALJ's findings, conclusions and recommended Order regarding that issue should be adopted by the Board.

his concerted and union activity. [JD 12:35 to 16:29].[2] The ALJ also properly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to timely provide with requested information related to Respondent's discipline of Colón. [JD 17:51 to 20:4].

Respondent excepted to the ALJ's findings that Colón engaged in concerted protected conduct, that Respondent discriminated against Colón in violation of Section 8(a)(3) of the Act, and to certain other claimed omissions or "exclusions" from the ALJ's Decision. Respondent's exceptions are largely based on contentions that the ALJ's appropriate credibility findings should be overturned.

For the reasons discussed below, the General Counsel urges the Board to deny Respondent's exceptions 2 to 21 in their entirety, and to affirm the ALJ's finding of fact, conclusions of law, and recommended remedy and Order.[3]

II. STATEMENT OF FACTS

Respondent is engaged in ship docking, general harbor towing, coastal towing and bulk transportation throughout the Caribbean Sea. At all material times in this case, Respondent and the Union were parties to a collective-bargaining agreement, which was effective by its terms from April 1, 2013 to March 31, 2016. [JD 4:36-37; J Ex. 1]. The collective-bargaining agreement covers several topics, including the days and hours of work of the crew members for the harbor vessels. Section 10(A) of the collective-bargaining agreement states:

A. Harbor Vessels:

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

[3] Respondent filed 21 exceptions. This answering brief addresses Respondent's Exceptions 2 through 20. General Counsel does not dispute Respondent's Exceptions 1 and 21, but the information added in those two exceptions is insignificant and is not a basis to change the ALJ's findings, conclusions or recommended Order.

> There shall be not less than two (2) fully crewed boats for the duration of this Agreement, provided such operations, in the opinion of the Company, are commercially viable. Tugs shall be available and ready for service as tug services are dispatched during each relevant 24-hour period in accordance with the guidelines provided herein. Boats shall be crewed in schedules of either four (4) days on / four (4) days off, or four (4) days on / two (2) days off rotations. All crews described above (each consisting of one (1) captain, one (1) engineer, one (1) deckhand), shall be assigned in accordance with seniority. The Company shall employ a minimum of twelve (12) crew members to man the crews described above, when in the opinion of the Company it is commercially viable to do so. The Company will notify the Organization in accordance with the notification provision of this Agreement of a decision to lay off employees and will negotiate with the Organization the effects of such action. Such lay off shall be subject to the grievance and arbitration provision of the Agreement, and such grievance may be submitted directly to an expedited arbitration without the need of exhausting the grievance steps. In addition there shall be relief personnel consisting of a total of three (3) crewmembers, (one captain, one engineer, one deckhand), who shall be assigned relief work in accordance with seniority.
>
> The Company shall make its commercially reasonable best effort to insure that equitable work assignments are distributed among full time crews. The Company at its sole discretion may release crewmembers from their vessels when job assignments are not pending and establish off duty periods which will not be considered working time. The parties agree that the above provisions shall be subject to modification and that scheduling may vary. The Company shall make an honest effort to procure that crewmembers enjoy at least eight (8) hours of uninterrupted rest at home every day.

[JD 4:38-51, 5:1-11; J Ex. 1, page 8-9].

Respondent's internal policies and past practice also establish that crew members are allowed to leave Respondent's premises to venture outside the premises to obtain meals or to endeavor in other personal affairs during their shifts when off duty, on their own responsibility. [JD 5:28-36; GC Ex. 4]. In such instances, unit employees are only required to notify the dispatcher that they are leaving the premises. [JD 5:39-40; Tr. 218:19-24, 219:3-4, 261:8-15, 282:9-10, 16-24, 301:24-25, 302:1-15, 303:1-6, 326:16-21, 349:18-25, 350:1].

A. Colón is the shop steward and a member of the Union's bargaining committee

Colón has been employed by Respondent since June 1994, and thus had been so employed for over 20 years at the time of the events in this case. [Tr. 23:12-17]. He is the shop steward for the unit of licensed crew members of Respondent including captains. [Tr. 25:9-15, 265:5-19, 360:11-16, 415:25, 416:1]. The ALJ correctly found that it was uncontroverted that Respondent was aware of Colón's union activities as shop steward for the unit. [JD 13:40-41; Tr. 265:5-19, 360:11-16, 415:25, 416:1]. Colón is also a member of the Union's national board. [Tr. 26:1-3].

B. On November 22, 2014, Colón requested to leave Respondent's tugboat at a time when no job assignments were pending, but dispatcher Moisés Ramos ordered him to stay inside the ship

On November 22, 2014, after the last service of the day, Colón contacted dispatcher Moisés Ramos (Ramos) on the radio to ask Ramos if he was going to grant Colón and his crew the 8-hour rest period at home that day, pursuant to Section 10(A) of the collective-bargaining agreement. [Tr. 33:9-15].[4] Ramos told Colón that the crew was not going to be granted rest at home because Capt. Enrique Sánchez and his crew were resting at home. [JD 6:5-7; Tr. 33:15-17]. Colón called Ramos from the galley of his tugboat.[5] His crew was sitting near him in the galley area while he talked to Ramos. [Tr. 34:4-9, 35:5-15].

The ALJ found that several minutes later, Colón called Ramos again, but this time on his cell phone, to notify Ramos that he was leaving the vessel. [JD 6:10-11; Tr. 33:17-18, 35:20-23]. Ramos informed Colón that the instructions were that he had to stay on the tugboat. [JD 6:11-12; Tr. 35:24-25, 36:1]. Colón replied that pursuant to the collective-bargaining agreement he could not be restrained to the vessel and that accordingly he was leaving. [Tr. 36:3-6]. Ramos

[4] Colón's work shift consists of 4 days of work (24 hour shifts) and 2 days off. [JD 5:19-20; Tr. 24:11-20, 322:17-20]. November 22, 2014 was the last day of Colón's 4-day work shift. [JD 5:48; Tr. 82:25, 83:1-3].
[5] Colón testified that the galley (kitchen area) of the tugboat is an area of approximately 8x8 feet. [Tr. 35:2-4].

responded that he was going to write it down on the dispatcher's log.[6] [Tr. 36:8-9]. At that moment, Colón told Ramos that he could write it on the log and call any of the supervisors: Port Superintendent Félix Feliciano, Vice President and General Manager Jaime Santiago, Buckley McAllister and/or President Mike Ring, because that (the requirement that Colón and the other crew members remain on the vessel) was not in the collective-bargaining agreement. [Tr. 36:11-14]. Ramos then hung up the phone and recorded the following in the dispatcher's logbook at 4:00 p.m. (1600 in military time):

> 1600 At this time Capt. Colón asked what was the next service after the M/T Gotland Marienn which I reported none and also he asked if I was going to let them go cause today is their last day. I told him that they were resting at pier cause Capt. Sánchez crew was the one to take the break as dispatcher J. González informed me. Capt. Colón said that he will be leaving and I told him under his own risk and that it will be log. Due to that Capt. Martínez is not on the dock left under his own risk as always and Capt. Sánchez is on his resting period. As I informed this to Capt. Colón he said via channel 79 that I could write, call Mike Ring and the entire company (bad attitude)!!!! While this conversation was going on I was talking via cel with J. González that heard Capt. Colón was making such comments.

[JD 8:22-33; R Ex. 16]. Ramos testified that "resting at the pier" required that the crew remain on board their tugboat. [Tr. 217:23 to 218:9]. As noted above, the collective-bargaining agreement does not reference "resting at the pier". [JD 12:52-53, 13:1]. However, dispatcher Javier González Díaz (González) testified that "resting at the pier" means that the tugboat crew members may leave the pier as long as they so inform the dispatcher and "stand" by in case a service is required. [Tr. 282:1-24]. Thus, according to González, it appears that when "resting at the pier" the crew may actually leave the pier, but must remain in fairly close proximity to the pier so they are able to return quickly if contacted by the dispatcher in the event of a service call.

Ramos also testified that even before Colón told him that he was leaving the vessel, Ramos presumed that something was going to happen based on the way Colón responded with

[6] The dispatcher's logbook is a record of the daily operations. Dispatchers are required to log all incidents that occur during the shifts. [JD 7:7-8; Tr. 210:4-7, 242:20-25, 243:1-2, 278:24-25, 279:1-14].

an "ok." [Tr. 224:17-20, 248:18-25, 249:7-11]. According to Ramos, he simply had a problem with Colón's tone during their conversation and that upset him. [Tr. 232:1-10]. Ramos further testified that he got "really upset" to the point that Port Superintendent, Félix Feliciano (Feliciano) later told him to "take it easy." [JD 8:38-39, 9:13-15; Tr. 232:23-25, 233:1, 248:9-10, 256:12-16, 257:1-3].

After hanging up with dispatcher Ramos, rather than leaving the vessel Colón stayed on the vessel and called his immediate supervisor, Port Superintendent Feliciano, for the purpose of informing him about his conversation with Ramos, but he did not immediately get through to Feliciano. [Tr. 36:17-25]. Feliciano returned Colón's call a few minutes later and told Colón that he had spoken with Ramos about what had happened. Feliciano said that he was going to instruct Ramos to contact Captain Harry Martínez and have Martínez relieve Captain Colón from his duties. Feliciano also told Colón that as soon as Captain Martínez showed up on the dock he (Colón) could leave, but until then, he (Colón) could not leave. [Tr. 37:12-23]. Feliciano further told Colón that Ramos complained that he had tried to reach Colón on the radio before the last service of the day and Colón did not respond right away. [Tr. 215:24-25, 216:1-16; R Ex. 16]. Colón told Feliciano that he did not have a problem with waiting until Captain Martínez arrived at the dock, and that the issue with the radio communication before the last service had an explanation. [Tr. 37:24-25, 38:1-6].

Dispatcher Ramos' logbook entry at 5:00 p.m. (1700 in military time) on November 22, 2014, states:

> 1700 Port Superintendent F. Feliciano informed that he spoked to Capt. Colon to release him earlier, but Capt. Colon decided to stay on board.

After hanging up with Feliciano, at 5:22 p.m., Colón sent Feliciano a text message thanking him for his intervention with Ramos. [JD 6:22-23]. In his text message, Colón stated:

> Thank you for your work and thank you because you may be the only person in this office who has a clear perception of this business. Thank you for your advice, but believe me that the desire to leave when this happens is huge. Thanks bcs I know that many times you help all of us but the truth is that I'm tired of the same shit with the dispatcher. Its not easy when I, many times in good faith and bcs we all make our living off of this, try to help them squaring things off with the pilots so we don't lose the service, the same with Maffioli and Guzman and they keep on with the same attitude towards us. They take away my rest hours and they don't do what they did today and anyone would be overpowered by a sense of dismay when you see the attitude of the other captains, that they don't give a shit if they break the lines, if they damage boats, if they lose services etc etc but, nevertheless they are the ones who get rest benefits. What happened here today, if it happened with another crew, they would let them go, but since its Joito's crew, then they screw us over. Don't worry about holding any meeting I appreciate it and if you want to talk officially about what happened with the radio no problem I already told you what happened and I accept the consequence that it may bring I accept responsibility for my actions. I am sorry I interrupted your weekend it won't happen again believe me unless its because of damage to a boat. Have a good weekend.

[Tr. 38:9-8, 41:9-25, 42:1-4, 45:2-21, 374:2-12; R Ex. 20].

Colón was not relieved by Captain Martínez on November 22. [JD 6:31; Tr. 46:4-8]. Rather, at approximately 9:00 p.m. or 10:00 p.m. that night, dispatcher Ramos communicated again with Colón and his crew by radio and authorized them to leave for the day. [JD 6:31-32; Tr. 47:5-20; R Ex. 18]. Colón did not leave his vessel on November 22, 2014, until Ramos released him at 9:00 or 10:00 p.m. [Tr. 47:18-20, 308:19-25, 309, 311:8-14, 369:1-7]. There was no need for service to be performed by Respondent on November 22, 2014, after Colón and his crew completed service on the M/T Marianne Gotland. [Tr. 381:1-15].

Approximately two days later, i.e. on or about November 24, 2014, at the request of Respondent's President Mike Ring (Ring), dispatcher Ramos prepared a summary of his dealings with Colón on November 22, 2014. [Tr. 234-235; R Ex. 17]. Ramos testified that Ring instructed him to "prepare everything that happened correctly…. to make a complete summary of what really happened and to give it to Mr. Santiago and to send it to him." [JD 8:45-46; Tr.

258:11, 259:9]. The summary essentially mirrors the aforementioned logbook entry at 4:00 p.m. (1600) on November 22, 2014, but characterizes Colón's tone and attitude in responding to Ramos as "challenging." [JD 9:11; R Ex. 17]. Specifically, in the summary Ramos wrote that the service of the M/T Gotland Marieann had been performed earlier than originally scheduled; Colón requested that he and his crew be released; Ramos responded that Colón and his crew should be "Resting on Board (Pier Rest);" Colón said he was leaving the dock; Ramos responded that if he left it would be under his own risk and would be entered in the dispatcher's logbook; and that Colón answered with a "challenging" tone and attitude, saying that Ramos could log the entire Bible, call Mike Ring, call Buckley and the entire company and that he was leaving. Ramos' November 24, 2014, summary prepared at the request of Respondent President Ring makes no mention of Colón's failure to immediately respond to Ramos' radio call while performing service on November 22, 2014. [R Ex. 17].

C. Respondent reduced Colón's performance evaluation score and issued him a warning notice

On December 3, 2014, at around 3:30 p.m., Port Superintendent Feliciano summoned Colón to his office. [Tr. 51:7-11]. Feliciano informed Colón that because of the incident that occurred with dispatcher Ramos on November 22, 2014, he was going to amend the ethics section of Colón's performance evaluation for 2014, which he still had not sent to Respondent's headquarters in the United States. Specifically, Feliciano lowered Colón's score for ethics from four to two, out of a maximum positive score of five.[7] [Tr. 51:19-23, 53:3-5, 54:6-9; GC Ex. 5]. Colón told Feliciano that he disagreed with the decision to amend his performance evaluation. [Tr. 52:2-7].

[7] In his 2013 performance evaluation, Colón was given an overall score of "Very Good." Also, as in his 2014 performance evaluation as it was initially prepared, in his 2013 performance evaluation Colón received a score of four out of five in the ethics section. [Tr. 55:2-18; GC Ex. 6].

Then, on December 9, 2014, at around 3:00 p.m., Colón was summoned to the office of General Manager Jaime Santiago (Santiago) to meet with Santiago and Feliciano. [Tr. 56:1-12]. During the meeting, Santiago told Colón that he was not going to tolerate lack of respect from any of the captains towards the dispatchers or any other personnel at the office. Santiago also said that there was a general complaint from the dispatchers that it was difficult for them to reach Colón by radio or to wake him up. [Tr. 56:15-25]. Colón explained to Santiago and Feliciano that he was not disrespectful to Ramos on November 22, 2014, and that the radio communication problem that day occurred because when Ramos called on the radio, Colón was at the stern of the vessel with his crew. Colón then heard the ship next to him turn on its engines, and he immediately went to the tugboat radio and called Ramos to ask him if he needed to turn on the engines as well.[8] [JD 6:51-53; Tr. 57:2-8]. At that moment, Santiago gave Colón a written warning and asked him to sign it as proof of receipt.

The warning notice, signed by General Manager Santiago, stated:

> On November 24, 2014[9] when the Dispatcher ordered you to rest at the pier with your crew, you challenged him and refused to follow his instructions threatening to leave your work post. It has come to our attention that it is not the first time that you show a total lack of respect towards the Dispatchers. We must remind you that the Dispatchers are the representatives of management after 5:00p.m. and during the weekends.
>
> Moreover, you must also answer the telephone and/or the radio when the Dispatchers call you on a timely manner. As the Master of the tugboat, you are responsible for the safety of the crew and are required to provide a service of excellence to McAllister's clients. When you do not respond to a Dispatcher's call, a service could be lost, thus affecting the operations of the Company.

[8] According to dispatcher Ramos' logbook entry at 1:10 p.m. (1310 in military time) on November 22, 2014, the time lapse between his call to Colón and Colón's call to him was only a couple of minutes.[8] [R Ex. 16]. At the hearing Ramos exaggerated by testifying that it took seven to ten minutes for Colón to call him back. [R Ex. 16; Tr. 216:6-16].

[9] It is evident from the testimony and other exhibits that the date in question was actually November 22, 2014, rather than November 24, 2014, as erroneously stated in the warning letter. [JD 11:48-49].

> If you continue to incur in this type of conduct, you will give us no other alternative than to take more severe disciplinary action, that could include termination of employment.

[GC Ex. 7]. Colón read the letter and told Santiago that he did not agree with the content of the letter and that he was going to request another meeting with the union representative to discuss the matter in detail. [Tr. 57:1-23].

That same day (December 9), Santiago sent Union representative Iglesias an email with a draft of the warning letter issued to Colón as a notice to the Union. [Tr. 154:1-19, 400:21-24; J Ex. 2]. Iglesias contacted Colón right away to discuss the allegations and afterwards he scheduled a meeting with Santiago to discuss the matter. [Tr. 155:5-24, 156:6-15, 401:9-17].

D. On December 22, 2015, Respondent met with Iglesias and Colón to discuss the disciplinary warning. General Manager Santiago abruptly adjourned the meeting without affording Colón a chance to fully discuss the allegations made against him

Iglesias and Santiago arranged to meet on December 22, 2015. [Tr. 155:19-20]. Santiago, Feliciano, Colón and Iglesias participated in the meeting. Iglesias stated that the purpose of the meeting was to discuss the warning letter issued to Colón, of which he (Iglesias) had received only a draft, and asked why Ramos was not present. [Tr. 157:3-8]. Santiago said that he was not going to tolerate disrespectful conduct from any of the crew members towards the dispatchers. Iglesias responded that the incident did not occur that way. Santiago said that he had witnesses. When Iglesias asked where the witnesses were, Santiago responded that he did not have to bring them to the meeting. [Tr. 59:5-17]. Then, referring to the allegation in the warning letter that Ramos had instructed Colón to stay in the vessel, restraining him to the ship, Iglesias stated that this was contrary to the collective-bargaining agreement, Respondent's policy and the past practice that the crew can leave the vessel if there is no service pending. [Tr. 59:13-25].

Feliciano then said that he had granted permission to Colón to leave the vessel as soon as Capt. Martínez arrived, and that he did not restrain Colón or the crew from leaving the ship. [Tr. 60:19-23, 61:1-2, 158:14-20]. Colón replied that he did not recall that he was granted permission to leave. [Tr. 158:21-22]. Iglesias told Feliciano that Santiago had just argued that Colón did not follow Ramos' instructions and refused to stay on the ship. [Tr. 61:3-6]. Iglesias confronted Santiago with the inconsistency between the assertion that Colón did not follow Ramos' instructions to stay on the ship and Feliciano's contention that he had granted Colón permission to leave the ship (on November 22, 2014). [Tr. 158:23-25, 159:1-3]. After further discussion of this inconsistency, Santiago stood up and adjourned the meeting, and stated that Iglesias was attempting to "entrap" him. [Tr. 159:4-8]. As a result, Colón was not able to fully discuss the allegations made against him in the written warning. [Tr. 61:7-14, 159:9-19].

Subsequently, on December 30, 2015, pursuant to the parties' collective-bargaining agreement, the Union filed a grievance on behalf of Colón with respect to the written warning. [Tr. 159:20-24, 403, 404:1-10; J Ex. 3]. In sum, in the grievance the Union, through Iglesias, recounted what was discussed and the outcome of the meeting held on December 22. Iglesias further clarified that the concept "resting at the pier" was not contemplated in the collective-bargaining agreement and crew members were permitted to leave Respondent's premises at their own risk or responsibility. Iglesias requested that Respondent remove Colón's warning letter from his personnel file, that his original performance evaluation score be restored, and that Respondent stop requiring crew members to remain with their vessels during their resting periods. [Tr. 161:3-10; J Ex. 3].

On January 8, 2015, Respondent, through Santiago denied the grievance. He simply stated that Colón received the warning because of his hostile attitude towards the dispatchers and his failure to answer telephone or radio calls. [Tr. 162:3-9; J Ex. 4].

E. Respondent's pretextual, shifting and unsubstantiated reasons for disciplining Colón

Although Colón's disciplinary warning does not state that Colón abandoned his post or that he used foul language, in an attempt to legitimize its actions, at the hearing before the ALJ Respondent asserted for the first time that these the warning was based on abandonment of post and use of foul language. In this regard, dispatcher González testified that he spoke with Feliciano about the conversation he heard between Colón and Ramos and implied that Colón was going to abandon his post. Specifically, González testified that he told Feliciano that Colón did not follow Ramos' instructions to stay in the vessel and that "we cannot have the crew abandon the area." [Tr. 290:6-11]. Feliciano further testified that when he spoke with Colón on the phone on November 22 regarding the incident with Ramos, Colón referred to the dispatchers as "cabrones"[10] and a "bunch of shit." [Tr. 336:13-25, 337:1-16]. Feliciano also claimed that Colón was going to leave work. [Tr. 337:17-18]. However, Ramos and González both admitted that Colón did not use foul language when speaking to Ramos on November 22, 2014, and there is no mention of this in the warning letter issued to Colón on December 9, 2014, or in his 2014 performance evaluation, as revised. [Tr. 231:6-15, 307:21-24]. The ALJ credited Colón's denial that he called the dispatchers foul names during cross-examination, while admitting that he stated to Port Superintendent Feliciano that he was "tired of the same shit with the dispatcher," as shown in his text to Feliciano on November 22, 2014. [JD 10:8-22, 10:40-48, 15:28-44; Tr. 102:1, 103:25; R Ex. 20].

[10] During the hearing the parties agreed that the English translation for the word "cabrones" is "motherfuckers."

Respondent also presented evidence attempting to show that Colón was warned based on past instances during which he failed to promptly respond to dispatchers' calls because he was asleep. [Tr. 290:12-20, 291:1-13, 315:13-20, 332:10-16, 350:8-14, 352:19-23]. However, there is no evidence that Colón was sleeping on November 22, 2014, when he failed to immediately return Ramos' call and then called back a couple of minutes later. The problem of not immediately answering the phone when he is sleeping appears to concern alleged occasions for which no dates were provided by Respondent's witnesses prior to November 22, 2014. General Manager Santiago admitted that the only reason he included the radio communication issues with the dispatchers in Colón's written warning was because he knew that for some time, Colón have had a problem answering the phone or radio when called to perform a service. [JD 11:25-26; Tr. 398:10-18]. However, the only documents Respondent arguably produced concerning such an event were dated over seven years before the alleged unfair labor practices, in May and June, 2007. [R Ex. 6, 7 and 11]. Respondent's witnesses specified no other dates on which Colón allegedly failed to promptly respond to a radio or phone call before November 22, 2014, when he responded within a couple of minutes according to dispatcher Ramos' logbook entry. [R Ex. 16]. Although Port Superintendent Feliciano claims that Colón failed to respond to a call on a "recent" occasion, maybe "one month, two months" he did not specify a date and admitted that Colón was not disciplined for that purported incident. [Tr. 360:17, 361:3]. Thus, it appears from Feliciano's testimony that this alleged occasion was one or two months before he testified on December 15, 2015, about a year after the written warning issued to Colón. Moreover, Feliciano admitted that Respondent never lost any business as a result of Colón's failure to promptly respond to a dispatcher's call. [Tr. 350:15-20].

Dispatcher González admitted that to his knowledge Colón had never been disrespectful to the dispatchers during the eighteen (18) years he has been a dispatcher. [JD 9:27-29; Tr. 291:11]. Moreover, Respondent presented no evidence that prior to November 22, 2014, Colón had shown "a total lack of respect towards the Dispatchers" as asserted in the warning it issued to him.

F. Respondent's disparate treatment of Captain Colón

Dispatcher González testified that there are communication problems with the rest of the captains, not just Colón. [Tr. 312:22-25, 313:1-2]. Port Superintendent Feliciano also admitted that other captains have had problems answering the radio or the telephone calls of the dispatchers right away. [Tr. 375:19-21]. However, the record is devoid of relevant evidence showing disciplinary measures to other captains due to the same behavior imputed to Colón in the written warning letter of December 9, 2014. Respondent submitted evidence of disciplinary measures to other employees that are not relevant because they concern unrelated alleged misconduct, the alleged misconduct was more egregious, and/or the discipline was issued four or more years before the alleged unfair labor practices. [R Ex. 22-29]. Further, the record shows that the problems regarding communications between the dispatchers and captains are common and recurring, but other than the December 9, 2014, warning letter to Colón, Respondent's captains have not received disciplinary warnings because of their communication problems with the dispatchers.

III. ARGUMENT

A. Captain Colón was disciplined and his performance evaluation was lowered because he engaged in union protected concerted activities when he asserted the contractual rights of his crew to leave the vessel on November 22, 2014, in violation of Section 8(a)(1) and (3) of the Act. (Respondent's Exceptions 14 – 19)

1. The ALJ's finding with regards to Colón's discipline

Respondent argues that the ALJ erred by concluding that Colón engaged in concerted or protected conduct in violation of Section 7 of the Act. Respondent specifically contends that Colón did not engage in protected concerted activity. [R. Brief 3-5]. Respondent also argues that it did not discriminate against Colón, that Respondent did not have any animus, that Respondent established by a preponderance of evidence that it would have made the same decision even in the absence of protected activity, and that the General Counsel was unable to show the basis for the adverse employment action was Colón's alleged protected conduct. [R. Brief 12-18]. However, Respondent's contentions are not supported by the record.

In this regard, the ALJ correctly concluded based on the evidence he credited that Colón was engaged in protected concerted and union activity. [JD 12:38 to 14:14]. The ALJ further correctly issued the written warning to Colón and lowered his performance evaluation because he engaged in union activity and protected concerted activity, in violation of Section 8(a)(3) and (1) of the Act. (JD 14:16 to 16:29). The ALJ found that Respondent disparately treated Colón by disciplining him and reducing his evaluation; that the situations for which other captains were disciplined in the past were not similar to the conduct for which Colón was disciplined; and that the evidence regarding Colón's past alleged failure to promptly answer calls was not proximate in time and failed to establish any legitimacy for the written warning and the reduction of Colón's performance evaluation. [JD 16:8-20].

2. Legal Analysis

a. Colón engaged in protected concerted activity

In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984) the Supreme Court upheld the Board's doctrine enunciated in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd., 388 F2d 495 (2nd Cir. 1967), and held that an employee who reasonably and honestly invokes a right derived from a collective-bargaining agreement, is engaged in concerted activity under Section 7 of the Act and cannot be disciplined for engaging in such activity. The Court stated:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process -- beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement -- is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees.
>
> ...Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes lite, not only into the promises contained in the ...agreement, but also into the entire process envisioned by Congress and the means by which to achieve industrial peace.
>
> ...Indeed it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.

As noted above, Section 10(A) of the collective-bargaining agreement provides that Respondent may release tugboat crew members from their vessels when job assignments are not pending and establish off duty periods which will not be considered working time. On November

22, 2014, Captain Colón, asserted to dispatcher Ramos, that he and his crew were entitled to leave their tugboat after they had completed service to the M/T Gotland Marieann, because they had no more services scheduled that day. By so doing, Colón was invoking his contractual right and his right based on the parties' past practice both to be relieved by another crew and to leave the vessel during rest periods.

As the ALJ correctly found, it is undisputed that Colón was invoking the rights of himself and his crew to leave the vessel when he was instructed by Ramos to "rest at the pier" and not to leave the vessel. [JD 13:10-12]. Respondent contended that Colón was required to stay at the pier on November 22, 2014, because of Respondent's policy to have manned vessels for emergencies or other out of the ordinary jobs that on a regular basis come up without prior notice or arrangement. [GC Ex. 10, paragraph 6(a)]. However, González admitted that there are times at which Respondent does not have any of the regular crews resting on the vessels at the pier. [Tr. 317:9-15]. Moreover, as the ALJ properly concluded, Colón's honest and reasonable invocation of rights under the collective-bargaining agreement and Respondent's policies and practices constitutes protected concerted and union activity without regard to whether Colón was ultimately correct that his rights and those of his co-workers were violated. *NLRB v. City Disposal Systems*, *supra*; *Interboro Contractors, Inc.*, *supra*; *First Western Building Services*, 309 NLRB 591, 603 (1992).

b. Respondent lowered Captain Colón's 2014 performance evaluation score and issued him a written warning because he invoked his collectively bargained rights to leave the vessel on November 22, 2014 and engaged in protected concerted activity

It is plain from the December 3, 2014, comments by Port Superintendent Feliciano to Colón about the reason for reducing the score on his performance evaluation, and from the

language of the December 9, 2014 warning letter, and surrounding events that Respondent took these actions against Colón precisely because he invoked his collectively bargained rights to leave the vessel on November 22, 2014. Respondent cited only two reasons in the written warning as the basis for Colón's disciplinary action: the fact that he challenged Ramos' instruction to remain at the vessel and threatened to leave, and moreover, that he did not answer the telephone and/or radio in a timely manner. A mere "challenging tone" of voice is consistent with any grievance about working conditions and does not lose the protection of the Act.[11]

The ALJ properly concluded that there were no comments in the performance evaluation showing why Respondent reduced Colón's ethics score, and Port Superintendent Feliciano told Colón that was done because of the "incident" with dispatcher Ramos. [JD 15:16-18; GC Ex. 5]. As a result, the ALJ found that Respondent was clearly referring to the incident of the exchange between Ramos and Colón regarding Colón's request to leave the vessel. [JD 15:23-25].

The ALJ properly found the alleged failure to respond to dispatchers' calls in a timely manner was not the real reason for the warning or reduced performance evaluation. As noted above, Respondent admittedly had long tolerated Colón's alleged repeated and more egregious failures to promptly respond to dispatchers' communications without disciplining him in any fashion, and those alleged failures never resulted in a loss of business to Respondent. In addition, as the ALJ found, when Respondent President Ring asked dispatcher Ramos to carefully describe the problem with Colón a couple of days later, apparently in anticipation of issuing discipline to Colón, Ramos made no mention of any problems with communications. Ramos' entire summary, R Ex. 17, consists of a description about his conversations with Colón with respect to Colón's

[11] As the ALJ found, there is no credible evidence that Colón used foul language or even shouted at Ramos. [JD 15:36-39; Tr. 231:6-15]. Respondent did not rely on such conduct in issuing the warning letter to Colón, and cannot rely on it now. Ramos' own notes in the dispatcher's logbook for November 22, 2014, and his summary reflect the uncontroverted fact that he did not call Ramos names and merely protested the denial of the employees' right to leave the vessel. [R Ex. 16 and 17].

requests to be relieved and to leave the vessel. [JD 8:45-52, 9:1-15; R. Ex 17]. Furthermore, the fact that the alleged communications "issue" on November 22, 2014, was a non-issue is demonstrated by the fact that Colón called Ramos back in just a couple of minutes that day, and there was no loss of service or evidence of any resulting problem or complaint from the customer. In addition, Santiago admitted that although he was informed about the incident on November 22, 2014 regarding the radio call, as reflected on the dispatcher's log, but he did not have the details and Colón's failure to immediately answer Ramos' call on November 22, 2014, and Santiago was not referring the communications issue on November 22, 2014, in the written warning. [Tr. 398:19-23; 411:12-17].

In summary, as the ALJ found, the reference to communications problems in the warning letter is only a make-weight designed to bolster the validity of the warning for challenging dispatcher Ramos' direction that Colón could not leave the vessel. The language of the warning letter makes it clear that Respondent would not have issued it because of the alleged communications problem alone. Respondent acted against Colón precisely because he invoked his collectively bargained rights to leave the vessel on November 22, 2014. Accordingly, Respondent violated Section 8(a)(3) and (1) of the Act by reducing Colón's performance evaluation and issuing him the written warning.

As the ALJ further properly found, citing *Atlantic Steel*, 245 NLRB 814, 816-817 (1979), Respondent did not allege, and he did not find that Colón was disciplined because he engaged in opprobrious conduct costing him the Act's protection. (JD 15:50-52). In this regard, dispatcher González, who testified that he heard Colón's conversation with Ramos, admitted that Colón did not use foul language or curse words. [Tr. 307:24]. There is no credible evidence that Colón called Ramos or the dispatchers as a group any names. Although Feliciano testified that Colón

referred to the dispatchers with foul language when they spoke privately on the phone on November 22, 2014, the uncontroverted testimony is that Colón did not use foul language when he spoke with Ramos. [Tr. 231:6-15; 307:24]. Besides, as noted above, the alleged foul language is not mentioned in the warning letter and was not discussed with Colón or the Union on December 22, 2014.

Although Colón essentially told Ramos he was leaving the vessel and that Ramos could tell anybody and write it down in his logbook, in fact he did not leave the vessel, and was not insubordinate. In fact, Colón did not leave the vessel and he finished his shift. [Tr. 372:21-25; 373:1]. It is undisputed that there were no other services pending on November 22, 2014, and Colón finished his work shift at 9:00 p.m., and was authorized to leave by dispatcher Ramos at that time. There is no evidence that Colón incited other crew members to leave the vessel, and there is no evidence that they did so. The issue was quickly resolved following Colón's call to Port Superintendent Feliciano.

During the hearing, General Manager Santiago testified that based on what Feliciano, Ramos and González told him about the conversation between Colón and Ramos on November 22, 2014, he believed that Colón had spoken in an "insolent manner" to Ramos. However, the warning notice says nothing about that, and Ramos' log only refers to Colón's "challenging tone" and "bad attitude." Moreover, Santiago did not witness the conversation and did not meet with Colón to afford him a chance to provide his version of the incident before the warning notice was issued. [Tr. 409:20; 410:1].

In other words, Santiago "beefed up" the written warning with unspecified prior actions not related to the events of November 22, 2014.

As demonstrated above, the evidence shows that Respondent was motivated to discipline Colón because he invoked his right and the rights of his crew members to leave the vessel at a time where there were no pending services or assignments.

The shifting and false reasons cited by Respondent for its actions against Colón are pretext. *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (finding pretext based on shifting explanations where the employer provided new reasons supporting the discharge); *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993) (finding the employer's attempt to bolster claim by distorting facts was evidence of pretext).

Based on the above, Respondent's Exceptions 14-19 have no merit, and should be denied.

3. The ALJ did not omit or fail to consider Respondent's allegations that Colón used foul language and was disrespectful. (Respondent's Exception 2-5, 8, 10, 12 and 20)

Respondent takes exception to the ALJ's alleged omission or "exclusion" from his Decision, of Respondent's allegations that Colón used curse words in speaking to Port Superintendent Feliciano on November 22, 2014, and that that the dispatchers act as the captain's supervisors. Respondent further excepts to the ALJ's credibility finding regarding its claim Colón's alleged admission in writing to Feliciano that he allegedly violated Company policy and professional conduct towards the dispatchers by allegedly using foul language and being disrespectful, conduct that Respondent mistakenly contends that it was corroborated, and to the ALJ's credibility finding regarding Colón's denial of calling the dispatchers "motherfuckers". Respondent also takes exception to the ALJ's finding that Colón's adverse employment action was unrelated to his use of the term "motherfucker" and "a bunch of shits." Respondent's exceptions are without merit and should be rejected.

Contrary to Respondent's exceptions 2 to 5, 8, 10 and 20, a careful review of the Decision shows that the ALJ fully considered the claim by Feliciano that Colón called Ramos and the other dispatchers as "motherfuckers" and "a bunch of shits" during their conversation on November 22, 2014, and credited Colón's denial that he made those remarks.[12] (JD 10:5-6, 10:47-48, 15:35-36; Tr. 103). The ALJ properly referenced the record and concluded that Ramos' testimony did not substantiate misconduct on the part of Colón. Although Ramos characterized Colón's statements to him by testifying that Colón "exploded," as the ALJ found Ramos did not detail what was said, and González, who had overheard the third conversation between Ramos and Colón, testified that he did not hear any cursing or use of swear words used by Colón. [JD 15:32-35]. Moreover, the ALJ correctly pointed out that the evidence shows that the warning that was issued to Colón only references the "challenging behavior" that Colón had in his conversation with Ramos on November 22 and did not reference the alleged curse words he told Feliciano. In other words, he was admonished only for his interaction with Ramos, not for any statements to Feliciano. [JD 15:28-44]. Respondent has failed to show that any of the ALJ's credibility determinations are contrary to the clear preponderance of all the relevant evidence warranting the Board to overrule the ALJ's Decision. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). Moreover, Respondent cited no basis or extraordinary circumstance to justify overturning the credibility findings. *Advance Transportation Co. v. NLRB*, 979 F.2d 569 (7th Cir. 1992).

The ALJ fully considered Respondent's claim that Colón was disrespectful to Ramos, since he noted that Ramos alleged that Colón used "strong words." The ALJ properly concluded that although Colón did not use curse words, but that Ramos perceived Colón's challenge to his

[12] In addition, as stated above, neither the warning notice nor the revised performance evaluation cited alleged cursing by Colón. [JD 15:35-38].

instructions as disrespectful and rude. In this regard, the ALJ noted that Ramos testified that Colón said "he told me log the Bible, call Mike Ring, call Buckley, call Jaime Santiago, Felix. I am leaving." The ALJ further referenced the report that Ramos prepared for Respondent President Ring, where he wrote that the service of the M/T Gotland Marieann had been performed earlier than originally scheduled; Colón requested that he and his crew be released; Ramos responded that Colón and his crew should be "Resting on Board (Pier Rest);" Colón said he was leaving the dock; Ramos responded that if he left it would be under his own risk and would be entered in the dispatcher's logbook; and that Colón answered with a "challenging" tone and attitude saying that Ramos could log the entire Bible, call Mike Ring, call Buckley and the entire company and that he was leaving. [JD 8:15-34; Tr. 231].

In addition, the ALJ properly weighed this evidence in making its credibility findings, and concluded that Ramos' November 24, 2014, summary, prepared at the request of Respondent President Ring, makes no mention of Colón's failure to immediately respond to Ramos' radio call while performing service on November 22, 2014. [JD 8:45-52, 9:1-16; R Ex. 17].

Contrary to Respondent's exception 4, the ALJ properly found that Colón's text message to Feliciano was not an admission that he engaged in misconduct on November 22, 2014. The ALJ properly referenced the record which clearly shows that after hanging up with Feliciano, at 5:22 p.m., Colón sent Feliciano a text message thanking him for his intervention with Ramos. In his text message, Colón stated:

> Thank you for your work and thank you because you may be the only person in this office who has a clear perception of this business. Thank you for your advice, but believe me that the desire to leave when this happens is huge. Thanks bcs I know that many times you help all of us but the truth is that I'm tired of the same shit with the dispatcher. Its not easy when I, many times in good faith and bcs we all make our living off of this, try to help them squaring things off with the pilots so we don't lose the service, the same with Maffioli and Guzman and they keep on with the same attitude towards us. They take away my rest hours and they don't

> do what they did today and anyone would be overpowered by a sense of dismay when you see the attitude of the other captains, that they don't give a shit if they break the lines, if they damage boats, if they lose services etc etc but, nevertheless they are the ones who get rest benefits. What happened here today, if it happened with another crew, they would let them go, but since its Joito's crew, then they screw us over. Don't worry about holding any meeting I appreciate it and if you want to talk officially about what happened with the radio no problem I already told you what happened and I accept the consequence that it may bring I accept responsibility for my actions. I am sorry I interrupted your weekend it won't happen again believe me unless its because of damage to a boat. Have a good weekend.
>
> [Tr. 38:9-8; 41:9-25; 42:1-4; 45:2-21; 374:2-12; R Ex. 20].

The ALJ properly credited that Colón's acceptance of fault in the text message was only in reference to Ramos' attempt to reach him by ship radio at 1:10 p.m. on November 22 to turn on his tugboat engines and not for his interaction with Ramos at 4:00 p.m. [JD 15:42-44; Tr. 45; R. Ex. 18].

Contrary to Respondent's claim in its exception 12, the ALJ referenced the testimony of González that he overheard Colón talking on the radio "very clearly because it was loud" and that he heard that Colón tell Ramos that "he was leaving, to write it on the Bible, call Mike Ring, Brian McAllister, to write whatever he wanted, he was leaving." [JD 9:21-24]. Also, the ALJ found that González testified that he subsequently contacted Feliciano and told him that Colón was disrespectful to Ramos and sounded very angry and upset. [JD 9:25-26]. Therefore, it is clear that the ALJ fully considered this evidence in reaching his credibility resolutions and analyzing the case.

Respondent's exception 3 is also without merit because, in fact, the ALJ found that the dispatchers were responsible for supervising, directing and coordinating operations between the services needs of customers for tugboat services and the tugboat crew, including the captains. [JD 4:20-22]. The ALJ also found that after 5 p.m., and during the weekends, the dispatchers are

the representatives of management and that on weekends and after hours, Ramos, as the dispatcher, supervised the captains. [JD 4:17-18, 7:1-2]. Thus, the ALJ properly considered this evidence in reaching his findings of fact and conclusions of law.

Respondent's contention in exception 20 that the ALJ acted a "super-personnel department" by re-examining its action is wholly without merit. This is not a case of the substitution of a tribunal's judgment for an employer's about the appropriate penalty for misconduct that is not protected by the Act. Rather, the ALJ properly concluded that Respondent reduced Colón's evaluation and warned him because he invoked his contractual rights, in violation of Section 8(a)(1) and (3) of the Act.

Respondent's Exceptions 2 through 5, 8, 10, 12 and 20, are meritless and should be denied.

4. Respondent's Exception 6 alleging that the ALJ incorrectly found that Colón could not leave the ship, when he could, but at his own risk, is without merit

Respondent argues that the ALJ failed to find that Colón could leave the ship at his own risk, and incorrectly concluded that Colón could not leave the ship. Contrary to Respondent's exception, the ALJ determined that based on the evidence, including Section 10 of the collective-bargaining agreement regarding employee work schedules and two company memoranda that help to clarify Section 10, that when a captain is resting at the pier, the captain is allowed to leave the boat under his own risk. [JD 5:28-43, 9:31-36; GC Ex. 3; GC Ex. 4; Tr. 31].

Moreover, the ALJ also properly concluded that Colón was instructed to stay on the ship by dispatcher Ramos. As dispatcher González testified, he spoke with Feliciano about the conversation he heard between Colón and Ramos and implied that Colón was going to abandon

his post. Specifically, he told Feliciano that Colón did not follow Ramos' instructions to stay in the vessel and that "we cannot have the crew abandon the area." [Tr. 290:6-11].

Furthermore, during the December 22, 2014 meeting, Union agent Iglesias told Port Superintendent Feliciano that Vice President and General Manager Santiago had just argued that Colón did not follow Ramos' instructions and refused to stay on the ship. [Tr. 61:3-6]. Iglesias confronted Santiago with the inconsistency between the assertion that Colón did not follow Ramos' instructions to stay on the ship and Feliciano's contention that he had granted Colón permission to leave the ship (on November 22, 2014). [Tr. 158:23-25; 159:1-3]. During that same meeting, Santiago told Colón that he was not going to tolerate any disrespect and that the dispatcher had to restrain him and his crew from leaving. [JD 12:1-2]. Thus, the ALJ properly concluded that Colón was instructed not to leave the ship. Accordingly, Respondent's Exception 6 has no merit and should be denied.

5. Respondent's Exception 7 regarding the ALJ's failure to find that the Company has an obligation to make an "honest" effort is without merit

Respondent argues that the ALJ excluded from the Decision that the Company had an obligation to make an "honest" effort to provide 8 hours of home rest on a daily basis to the captain and crew of the tugboats. However, after careful review of the Decision, it is evident that the ALJ properly determined that the collective-bargaining agreement between Respondent and the Union states that management will make an honest effort to provide home rest of 8 hours on a daily basis to the captain and crew and if there is no work pending, the company may send a crew member to rest and not be counted as working time. [JD 5:13-15; J. Ex. 1]. Therefore, Respondent's Exception 7 has no merit and should be denied.

6. Respondent's Exception 9 regarding the ALJ's failure to find that Colón did not timely respond to the dispatcher is without merit

Respondent argues that the ALJ failed to find that Colón did not timely respond to dispatcher Ramos' call on November 22, 2014. However, as discussed above, the ALJ considered the record evidence that Ramos attempted to reach Colón at 1310 hours (1:10 p.m.) on November 22, and Ramos wrote on the logbook that: "Capt. Colón never answer instruction on 79 (radio). Capt. answer on 79 after a couple of minute." Further, the ALJ referenced Ramos' testimony that Colón returned his call after 7-10 minutes. [JD 7:27-30; R Ex. 16].

Thus, the ALJ properly considered these facts in reaching his determinations. Respondent's Exception 9 has no merit and should be denied.

7. Respondent's Exception 11 regarding the ALJ's assessment of how the Company should have made the written warning and the evaluation form is without merit

Respondent argues that the ALJ incorrectly assessed Respondent's actions against Colón, acting as a "super-personnel department." For the reasons set forth above regarding Respondent's Exception 20, this Exception 11 is also without merit.

8. Respondent's Exception 13 to the ALJ's conclusion that Colón honestly thought that he was entitled to rest at home for another 8 hours is without merit

Respondent excepts the ALJ's conclusion that Colón believed that he was entitled to rest at home for another 8 hours on November 22, 2014. However, the ALJ properly determined that Colón credibly believed and testified that his 8-hour rest at home on November 22 was for the previous day because he did not receive his 8 hours of rest on November 21. [JD 13:25-27].

Once again, Respondent submitted an unfounded exception and failed to show that the ALJ's credibility resolutions are contrary to the clear preponderance of all the relevant evidence.

Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). Moreover, Respondent has cited no basis or extraordinary circumstance to justify overturning the credibility findings. *Advance Transportation Co. v. NLRB*, 979 F.2d 569 (7th Cir. 1992). Accordingly, Respondent's Exception 13 has no merit and should be denied.

IV. CONCLUSION

For the reasons set forth herein, Counsel for the General Counsel respectfully urges the Board to deny Respondent's exceptions to the ALJ's Decision in its entirety.

Dated this 3rd day of August, 2016.

Respectfully submitted,

s/ Enrique González Quiñones

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2016, I served General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Motion to Strike Respondent's Exceptions and Brief in the matter of McAllister Towing and Transportation Co., Inc., Puerto Rico Branch, Case 12-CA-146711**,** upon the following persons, addressed to them at the below electronic addresses, by the means set forth below:

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