

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**TRANS-ED, INC.**

**And**

**Case 22-CA-170891**

**LUIS DEL TORO, an individual**

*Tara Levy*, Counsel for the  
General Counsel  
*Edward Thomas*, pro se for the  
Respondent

**Decision**

**Statement of the Case**

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Newark, New Jersey on August 9, 2016. The charge and the amended charge were filed on February 29 and April 26, 2016. The complaint, which was issued on May 25, 2016, essentially alleges that on or about February 26, 2016, the Respondent discharged Luis Del Toro because he urged employees to vote against the ratification of an agreement made between the Respondent and Local 226, Transport Workers Union of America.

On the entire record in this case, including my observation of the demeanor of the witnesses and after reviewing the briefs filed, I hereby make the following

**Findings of Fact**

**I. Jurisdiction**

The parties agree and I find that Trans-Ed Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Union is a labor organization as defined in the Act and is subject to the jurisdiction of the Board.

**II. The Alleged Unfair Labor Practices**

The Respondent is a school bus company which operates out of two terminals in New Jersey. The owner is Edward Thomas. The General Manager of the Paterson, New Jersey terminal is Bismarck Calobaro. Luis Del Toro, the charging party, has been employed by the company for about 15 years as a driver. There are essentially three categories of employees, apart from office workers. These are drivers, monitors and mechanics. (Monitors are also called aides).

In early 2015, Del Toro, along with other employees, made contact with Local 226, Transport Workers Union of America, whose president is Jon Bradford. According to Del Toro, he was one of the people who solicited union authorization cards for the Union.

Local 226 filed a petition in 22–RC–150289 on April 17, 2015, and pursuant to a Stipulated Election Agreement, an election was held on April 27, 2015, for the full-time and regular part-time drivers, monitors and mechanics employed at the Respondent’s Jefferson Street, Passaic facility. (Since moved to Patterson, New Jersey). The Tally of Ballots showed that the votes were 61 to 33 in favor of the Union. The Union was certified by the Board as the bargaining representative on May 6, 2015.

Subsequent to the Certification, the Union appointed Oscar Colon, one of the mechanics, and Del Toro as shop stewards. At a later date, Del Toro ceased being a shop steward after he suffered an accident and was out on Workers’ Compensation until December 2015.

At some point, the Union and the company commenced negotiations for a contract. In September 2015, Del Toro was chosen, along with Oscar Colon, to attend a bargaining session. When Del Toro was introduced as a shop steward, Thomas stated that Del Toro should or could not be a shop steward because he was a bully. At that meeting, Del Toro, with the acquiescence of Bradford, did not attend the meeting. He didn’t attend any further bargaining sessions.

After presenting initial contract proposals to the employer, Del Toro started telling other employees that in his opinion, the union representatives were not asking for enough.

In January 2016, the company and the Union agreed to a tentative contract that was subject to employee ratification. When Del Toro learned of its terms, he spoke to other employees and urged them to vote against ratification. The evidence shows that Thomas was aware that Del Toro was urging employees to reject the agreement. It was also conceded by Thomas that he had heard that Del Toro, not only was telling employees to vote against the agreement, but that he was also urging them to get rid of the Union and find another one.

The agreement was, in fact, voted down and the parties resumed negotiations. During these negotiations, Thomas refused to make any but the most minor concessions. Another agreement was reached in February 2016, and a ratification vote was scheduled for early March. Prior to the ratification vote, Del Toro again spoke to numerous employees and expressed his opinion that the agreement was not adequate. Again, the evidence establishes that Thomas was aware of Del Toro’s activity. Thomas also testified that he was notified by his Manager Caraballo, that Del Toro was urging employees to engage in a strike.

On February 26, Del Toro was at the facility’s parking lot and engaged in an argument with Bradford about the terms of the proposed agreement. At one point, Thomas came out of the office and witnessing the argument between Del Toro and Bradford, told the former to leave. At this point, Del Toro went home and then returned for the afternoon run. When he arrived at the facility, Del Toro was told by Thomas that he was fired because he was telling employees that the company was going to sell the buses and would close down. Del Toro denied making such statements. He asserted that Oscar Colon had told him about the company selling buses but that he did not make any such statements to other employees.

Section 7 of the Act gives employees the right to be represented by a union and the right to reject unionization. In this case, Del Toro obviously was engaged in union and concerted activity when he engaged in activity in 2015 to obtain representation by Local 226, Transport Workers Union of America. By the same token, he was engaged in concerted activity when he later engaged in activity to convince employees to reject a ratification of the proposed collective-

bargaining agreement. *London Chop House, Inc.*, 264 NLRB 638 (1982). Moreover, to the extent that Thomas believed that Del Toro was urging other employees to engage in a strike or to seek alternative union representation, those activities would also be protected by Section 7.

5 In my opinion, the evidence, particularly considering the timing of Del Toro's discharge in relation to his activity of urging employees to vote against contract ratification, is sufficient to establish a *prima facie* case within the meaning of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). I also note that although Thomas asserted that he discharged Del Toro because he was telling employees that the company was going to sell its buses, go out of business and that they should look for other jobs, Thomas also testified as follows:

JUDGE GREEN: Alright. Fine... So what else do you want to tell me?  
 THE WITNESS: I'm -- like I said the issue was so simple to me coming  
 15 forward. Now -- you know, now we're into this question and answer period.  
 But there's my proof and there's more proof, as to the fact that what I had  
 heard was just -- was not only a rumor, it was true. Luis was opening his  
 mouth to people when he shouldn't have as he did, when he was trying sell off  
 20 the idea of getting \$2 an hour from the Union. And when they didn't reach that  
 number that's why he wanted them out. He had his agenda. Now, unions and  
 non-unions, you know, we don't need unions in our business, but we have it  
 now thanks to Luis. Yes, it is discomfoting to have to share with one another -  
 - with another person what I want to do... But when it came to that situation of  
 25 him even going further than that, trying to harm the business more so, that's  
 when I said no. No, we can't deal with this.

Having concluded that the General Counsel has established a *prima facie* case, the burden shifts to the Respondent to show that it would have discharged Del Toro in the absence of his union or concerted activity.

30 As noted above, the Respondent asserts that the reason Del Toro was discharged was because he was falsely telling other employees that the company was going to sell its buses and go out of business and that they should look for other jobs. In this regard, he testified that such activity on the part of Del Toro would substantially damage his business because if his employees quit their jobs, he would not be able to service his contracts.

Thomas stated that he heard that Del Toro was telling employees about selling buses and closing the business from Oscar Colon who passed along statements that he heard from other employees. Colon, however, testified that he did not talk to Thomas about these alleged statements.

Thomas also testified that at some time in February 2016, after hearing of the rumors from Colon, he asked a number of employees who was telling them that the company was going to sell buses and going to close down. He testified that many of the employees were reluctant to say anything but that two, Andrea Garcia, and Doralinda Ramirez told him that it was Del Toro. In this regard, Thomas offered what purported to be written statements from these two employees, both of which were in Spanish and one of which was dated February 26. (The other was undated). The statement by Garcia was that Del Toro told her that the Employer was going to sell its small buses and that she should look for a job with a company called Rudco. The statement by Ramirez was that Del Toro told her on at least two occasions, that if she wanted another job, he had a friend who could get her a job for more money.

The obvious problem with these “statements” is that they are hearsay as to the truth of the matters asserted and the employer did not call either employee to verify the statements that are attributed to Del Toro and denied by him. The next problem is that only one of the two statements supports the version asserted by Thomas. The final problem is that Thomas could not say when he spoke to these employees or even if the statements were obtained before or after he discharged Del Toro.

In conclusion, I find that the General Counsel, having made out a *prima facie* case that the Respondent discharged Del Toro for union and/or concerted activity, I also find that the Respondent has not presented sufficient evidence to rebut the General Counsel’s case. I shall therefore conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the Respondent unlawfully discharged Luis Del Toro on February 26, 2016, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.<sup>1</sup>

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Luis Del Toro for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Del Toro for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall be required to expunge from its files any and all references to the unlawful discharge and notify Luis Del Toro in writing that this has been done and that the unlawful action will not be used against him in any way.

As the employees work force consists of many Spanish speaking employees, the Notice to Employees should be in English and Spanish.

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<sup>1</sup> By email dated September 19, 2016, the Respondent asserted that the Charging Party engaged in certain improper conduct after his discharge and after the trial in this case had ended. To the extent that the Respondent raises an issue as to the appropriateness of a reinstatement or backpay remedy, the Respondent can raise this issue during the compliance stage of the proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>2</sup>

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### ORDER

The Respondent, Trans Ed, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

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(a) Discharging or otherwise taking adverse actions against employees because they urge other employees to vote against the ratification of a contract between the employer and Local 226, Transport Workers Union of America, or because they oppose that union or because of any other concerted activities for mutual aid or protection.

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(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Make Luis Del Toro whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision.

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(b) Within 14 days from the date of this Order, offer Luis Del Toro, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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(c) Remove from its files any reference to the unlawful action against Luis Del Toro and within 3 days thereafter, notify him in writing, that this has been done and that the layoff will not be used against him in any way.

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(d) Reimburse Luis Del Toro an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that he would have been owed had there been no discrimination against him.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Anthony Gallo it will be allocated to the appropriate periods.

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(f) Compensate Luis Del Toro for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

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(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

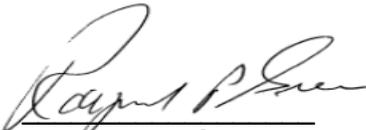
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<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5 (h) Within 14 days after service by the Region, post its Paterson New Jersey facility,  
copies of the attached notices marked "Appendix." Copies of the notices, on forms provided by  
the Regional Director for Region 22, in English and Spanish, after being signed by the  
Employer's authorized representative, shall be posted by the Employer and maintained for 60  
consecutive days in conspicuous places including all places where notices to employees are  
10 customarily posted. In addition to physical posting of paper notices, notices shall be distributed  
electronically, such as by email, posting on an intranet or an internet site, and/or other electronic  
means, if the Employer customarily communicates with its employees by such means.  
Reasonable steps shall be taken by the Employer to ensure that the notices are not altered,  
defaced, or covered by any other material. In the event that, during the pendency of these  
15 proceedings, the Employer has gone out of business or closed the facilities involved in these  
proceedings, the Employer shall duplicate and mail, at their own expense, a copy of the notice  
to all current employees and former employees employed by the Employer at any time since  
February 26, 2016.

20 Dated: Washington, D.C. September 22, 2016

  
Raymond P. Green  
Administrative Law Judge

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**Appendix**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

- Section 7 of the Act gives employees these rights.
- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise take adverse actions against any employee because he or she urges other employees to vote against the ratification of a contract between the employer and Local 226, Transport Workers Union of America or because they oppose that union or because of any other concerted activities for mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL make Luis Del Toro whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision.

WE WILL within 14 days from the date of this Order, offer Luis Del Toro, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL remove from our files any reference to the unlawful action against Luis Del Toro and within 3 days thereafter, notify him in writing, that this has been done and that the layoff will not be used against him in any way.

WE WILL reimburse Luis Del Toro an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that he would have been owed had there been no discrimination against him.

WE WILL compensate Luis Del Toro for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

**TRANS-ED, INC.**  
\_\_\_\_\_  
**(Employer)**

**Dated** \_\_\_\_\_

**By** \_\_\_\_\_  
**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

20 Washington Place  
5th Floor  
Newark, NJ 07102-3110  
Phone: (973) 645-2100

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/22-CA-170891](http://www.nlr.gov/case/22-CA-170891) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-2100