

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

EAST END BUS LINES, INC.

And

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 1205**

Case Nos.	29-CA-161247
	29-CA-162261
	29-CA-166857
	29-CA-169382
	29-CA-172090
	29-CA-178014

And

SHARON TARRY

**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

**Clifford P. Chalet
W. Matthew Groh
Naness, Chalet & Naness, LLC
*Attorneys for Respondent East End Bus
Lines, Inc.*
375 North Broadway, Suite 202
Jericho, New York**

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	iii
I. PRELIMINARY STATEMENT	1
II. STATEMENT OF THE ISSUES	1
III. STATEMENT OF POSITION	3
IV. STATEMENT OF FACTS	5
A. <u>Background Facts</u>	5
B. <u>Ms. Tarry's Insubordination Regarding The Prohibition Against Handing Out Candy</u>	8
C. <u>Driving With No Hands On The Steering Wheel</u>	11
D. <u>The December Decision To Lay Off Ms. Tarry</u>	12
E. <u>Theft Of Time And Driving While Talking On The Cell Phone</u>	13
F. <u>The Assignment Of The Mercy HS Route To Ms. Tarry And Subsequent Decision To Assign Ms. Tarry From A Big Bus To A Mini-Bus</u>	13
G. <u>The Events Of October 15, 2015</u>	18
H. <u>The October 16, 2015 Extremely Dangerous Driving Incident And Mr. Vopat's Independent Investigation And Recommendation To Discharge</u>	19
I. <u>Exemplars</u>	26
V. ARGUMENT	29
A. <u>Respondent Reduced The Number of Stops On Ms. Tarry's Bus Route For Legitimate Non-Discriminatory Reasons</u>	30
B. <u>Respondent Changed Ms. Tarry from A Big Bus To A Van And Reduced Ms. Tarry's Rate Of Pay For Legitimate Non-Discriminatory Reasons</u>	32

C.	<u>Respondent Established That It Would Have Reassigned Tarry To A Mini-Bus In The Absence Of Alleged Protected Activity</u>	35
D.	<u>General Counsel Has Not Established A <i>Prima Facie</i> Case Regarding The October 19, 2015 Decision To Discharge Tarry For Extremely Dangerous Driving</u>	36
E.	<u>Even If The General Counsel Established a <i>Prima Facie</i> Case, The Record Unequivocally Shows That Respondent Would Have Discharged Tarry For The Extremely Dangerous Driving Incident Regardless Of Any Protected Activity</u>	38
F.	<u>Ms. Tarry’s Account Of The Events Of October 16, 2016 Has No Credibility</u>	43
G.	<u>A Review of Exemplars Shows That Ms. Tarry Was Not Singled Out and That She Would Have Been Discharged Notwithstanding Any Alleged Union Activities</u>	44
H.	<u>The Remainder Of The Conclusions Are Erroneous And/Or Fail To Establish That Tarry Would Not Have Been Discharged But For Her Alleged Protected Activities</u>	46
VI.	CONCLUSION	49

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Brink's Inc.</u> , 360 NLRB No. 136, 199 L.R.R.M. (BNA) 2082, WL 2886447 (2014)	29
<u>Camaco Lorain Mfg. Plant</u> , 356 NLRB No. 143, slip op. at 4 (2011)	29
<u>Centre Property Management</u> , 277 NLRB 1376 (1985)	30
<u>Emerson Electric Company</u> , 177 NLRB 75 (1969)	30
<u>Golden State Foods Corp.</u> , 340 NLRB 382 (2003)	29
<u>Limestone Apparel Corp.</u> , 255 NLRB 722 (1981)	29
<u>Manno Electric</u> , 321 NLRB 278 (1996)	29
<u>N.L.R.B. v. Bangor Plastics, Inc.</u> , 392 F.2d 772 (6th Cir. 1967)	30
<u>NLRB v. Transportation Management Corp.</u> , 462 U.S. 393 (1983)	29
<u>North Hills Office Services</u> , 346 NLRB 1099, 1100 (2006)	29
<u>Praxair Distribution</u> , 357 NLRB No. 91, slip op. at 1 fn. 2 (2011)	29
<u>Roure Betrand Dupont, Inc.</u> , 271 NLRB 443 (1984)	30
<u>Wright Line</u> , 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1 st Cir. 1981), cert. denied 455 U.S. 989 (1982)	29, 30, 33, 34 36
<hr/>	
<u>Statutes and Other Authorities</u>	<u>Page(s)</u>
National Labor Relations Act	2

I. PRELIMINARY STATEMENT

The Amended Consolidated Complaints against East End Bus Lines, Inc. (hereinafter referred to as “Respondent,” “the Company”, or “EEBL”) included allegations that Respondent:

1. Changed Sharon’s Tarry’s route assignment and reduced the number of stops on her route on September 8, 2015;
2. Changed Sharon Tarry from a big bus to a mini-bus and reduced Tarry’s rate of pay on September 23, 2015;
3. Discharged Sharon Tarry on October 19, 2015.

A hearing in the above matters was held before Administrative Law Judge Ira Sandron (hereinafter “the ALJ”) on July 11, 12, 13, 14, 18, 19, and 20, 2016.

On November 21, 2016, the ALJ issued a decision concluding that the change in route assignment and reduction in the number of stops on Tarry’s route on September 8, 2015 did not carry any connotation of animus (ALJ Dec. page 51, lines 34 to 35) and did not violate the Act.

However, the ALJ concluded that the change in assignment from a big bus to a mini-bus (and the resulting change in Tarry’s rate of pay) on September 23, 2015 and the decision to discharge Tarry on October 19, 2015 violated the Act.¹

The deadline to file Exceptions to the ALJ decision is Monday, December 19, 2016.

II. STATEMENT OF THE ISSUES

Was the ALJ’s conclusion that the change in Sharon Tarry’s reassignment from a big bus to a mini-bus (and the resulting change in pay) was motivated by protected concerted activity or

¹ In his decision, the ALJ makes references to the November 19, 2015 discharge of Tarry. However, Tarry was discharged on October 19, 2015, so this brief refers solely to October 19, 2015 as the date of discharge.

express support for the Teamsters or perceived support for Local 252 supported by the evidence in the record?²

Was the ALJ's conclusion that the discharge of Sharon Tarry was motivated by union or other protected concerted activities supported by the evidence in the record and, if so, would Tarry have been discharged regardless of any protected or concerted activities due to the extremely dangerous nature of the incident that occurred on October 16, 2016 wherein Tarry rapidly accelerated on a two lane road, was speeding, crossed over a double yellow line into oncoming traffic, and came within seconds of a head-on collision that would have killed her and her student passenger?

III. STATEMENT OF POSITION

Respondent did not discriminate against Tarry because she engaged in activity in support of a union or engaged in protected concerted activities regarding any of the General Counsel's allegations.

Tarry was discharged because she engaged in extremely dangerous driving with a child on the bus, conduct that nearly resulted in a head-on collision and the death of Tarry and the student. The evidence unequivocally shows that Tarry was traveling at a speed of 59.8 mile per hour on a two-lane road, crossed over a double yellow line to pass a slower vehicle, and averted a head-on collision by mere seconds. The ALJ failed to consider the highly dangerous level of Tarry's conduct, which would have resulted in her discharge regardless of any concerted or protected activities. The ALJ failed to acknowledge that Tarry violated important motor vehicle traffic laws

² There are no allegations in the Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing dated May 13, 2016 that the changing of Tarry's assignment from a big bus to a mini-bus was motivated by perceived support for Local 252 (see paragraphs 24, 30, and 31) and there is no testimony that Tarry supported Local 252. Thus, this Brief solely addresses whether the actions taken were motivated by protected concerted activity or express support for the Teamsters, which will be shown is not the case.

that Tarry violated, the intent of which is to protect the public from dangerous drivers like Tarry. The ALJ failed to recognize and appreciate that, in July 2015, a former New York City Police Officer with over twenty years' experience, Joseph Vopat, was assigned the tasks of investigating accidents and complaints about the Respondent's drivers and that from that moment forward a much more proactive approach was taken to investigating such complaints and issuing discipline. Instead, the ALJ found reasons to discredit Mr. Vopat for engaging in a very thorough investigation and for taking steps to reaffirm the integrity of that investigation, as he was trained to do as a police officer. Further, the General Counsel was not able to show that Mr. Vopat had any knowledge that Tarry was engaged in protected activity or that any such activity was a motivating factor in Mr. Vopat's recommendation to discharge Tarry. Rather, as shown herein, Mr. Vopat is a credible witness, and all his actions were taken with one purpose, to protect the safety of the more than 7,000 students who Respondent transports on a daily basis.

As also will be shown herein, Vice President Jennifer Thomas approved of the recommendation by Mr. Vopat to discharge Tarry based on the level of severity of the dangerous driving incident. Thus, Ms. Thomas would have taken the same adverse action, approval of the recommendation to discharge Tarry, in the absence of any alleged concerted or protected activity.

With respect to the decision to reassign Tarry from a big bus to a mini-bus prior to her discharge in September 2015, Tarry's alleged protected or concerted activities consisted of stating to owner John B. Mensch that, if she were to support a union, it would be the Teamsters (October 2014), complaining about the timing of bonus pay (December 2014), and filing an unfair labor practice charge after she was laid off (December 2014). However, there is no evidence that the dispatcher who reassigned Tarry from a big bus to a mini-bus, Lorraine Giugliano, did so because of any of the alleged protected or concerted activities, and the General Counsel failed to establish any nexus between those purported activities and Ms. Giugliano's decision. Despite the lack of

any direct or circumstantial evidence that protected activity was a motivating factor in her decision, the ALJ concluded that Ms. Giugliano was not a credible witness for reasons that are not justified based on the record. While Ms. Giugliano understandably appeared nervous, as some witnesses are when asked to testify, Ms. Giugliano testified honestly about the reasons for each and every one of her decisions, none of which had anything to do with any alleged concerted or protected activities. When asked if she had knowledge of protected activities or opposition to same, Ms. Giugliano honestly testified, "I kept myself out of it." Tr. 1299. As will be shown herein, the decision to reassign Tarry from a big bus to a mini-bus was not motivated by protected activity.

IV. STATEMENT OF FACTS

A. Background Facts

Jennifer Thomas first began working with Montauk Bus Transportation LLC, then owned by John M. Mensch, in 2009. In 2011, the name of the company changed to Montauk Bus Transportation Group LLC, which was owned by John M. Mensch's son, John B. Mensch. In 2013, the name of the company changed to East End Bus Lines, Inc. (Tr. 1327-1328). At present, Jennifer Thomas is Vice President of EEBL (Tr. 1334).

For the 2014 to 2015 and 2015 to 2016 school years, EEBL was responsible for the safe transportation of 7,000 children on a daily basis (Tr. 1328-1329). EEBL has implemented policies and procedures to ensure the safety of students and their safe transportation to and from school, which is a major focus in the school bus transportation industry (Tr. 1330-1331).

In addition, drivers and matrons, also known as driver's assistants and monitors, are required to attend safety meetings monthly (Tr. 773, 786-787, 1331).

Respondent also places video recording devices on its buses. If there is an incident on a bus, the districts can call the Respondent and request that it post video of the incident for review by the district (Tr. 1332-1333). EEBL also pulls video internally when issues arise, including accidents

and complaints from school districts, parents, and the general public (Tr. 1333, 1335). To view videos, the maintenance department is requested to pull an SD card from a bus, and the SD card is delivered to the party requesting it, i.e. Ms. Thomas or the Safety Department (Tr. 1333). Ms. Thomas has requested that video be pulled with respect to drivers and matrons on average, twice per month, and during a busy month, as many as five times (Tr. 1333-1334).

Joseph Vopat first began working with EEBL in September 2013 as a driver (Tr. 783). Drivers must take written tests to get his passenger and school bus endorsements, and take a road test to get a commercial driver license ("CDL") (Tr. 783).

In July 2015, Mr. Vopat was promoted to Safety Supervisor in the Safety Department (Tr. 783). The duties of a Safety Supervisor include training drivers, ensuring that drivers are operating their buses in a safe manner, and investigating accidents and complaints received from school districts, parents, drivers, or the public (Tr. 783). As a road supervisor, Mr. Vopat also observes drivers on public roads and at schools to ensure safety (Tr. 785).

Prior to driving and becoming a Safety Supervisor for EEBL, Mr. Vopat was a New York City Police Officer for 20 years (Tr. 784). Mr. Vopat received extensive training, and his duties included investigating accidents, determining who was at fault, investigating complaints, gathering evidence, and writing reports (Tr. 784).

Since Mr. Vopat became a Safety Supervisor, he has become the lead investigator for the Respondent regarding the investigation of incidents and accidents, and he has taken a much more proactive approach to investigating complaints and accidents by school districts, parents, and the public, more so than anybody else who has held that position (Tr. 1356-1357).

In October 2015, the other members of the Safety Department who, in addition to Mr. Vopat, are considered a team, included Helen Lachacz, Donna White, and Donald Shukri (Tr. 785). The Safety Team works out of a trailer located in the rear of the EEBL yard; the trailer is

divided into two sections, one being the safety office and the other being a safety classroom for training drivers and matrons (Tr. 786). The majority of complaints investigated by the Safety Team are reported to Ms. Thomas, but not all of them (Tr. 1459-1460).

The Respondent also maintains a safe driving hotline (Tr. 787). A 1-800 number is posted on the rear of every bus. If a call is made to the 1-800 number involving a safety issue, it is forwarded to the Safety Department. However, if no members of the Safety Team are in the Safety Trailer at the time of the call, then a dispatcher takes the call and notifies a member of the Safety Team by telephone, email, or a handwritten note (Tr. 787, 850).

Lorraine Giugliano has been working with the Mensch Companies for 26 years (Tr. 1162). For the last four years, Ms. Giugliano has been the Head Dispatcher for EEBL with respect to the South Country School District (Tr. 1162-1163). Ms. Giugliano does all the routing for the South Country School District. Ms. Giugliano receives a list of about 5,000 students from the school district, puts the information into a computer software program called "Versitrans," and creates the routes (Tr. 1165, 1314). Ms. Giugliano enters the maximum number of students that can be on a particular vehicle and the school they attend, the system develops maps, and Ms. Giugliano creates routes from the maps (Tr. 1165-1166). Drivers are provided with a list of stops and a roster of the students (Tr. 1169). GC. Ex. 34 and R. Ex. 15 were created with Versitrans.

After routes are created, package hours are assigned to the routes based on the amount of time it is expected for a driver to do his or her routes (Tr. 1171). Packages can consist of three runs in the a.m. picking up children to take them to a high school, middle school, and elementary, and then taking them home from those schools in the afternoon; a package can also consist of one run per day, like a private or parochial school (Tr. 1171, 1265). Adjustments can be made to package hours during the school year based on a number of factors including ridership levels and efforts to combine routes to reduce expenses (Tr. 588, 1266-1267). Ms. Giugliano monitors routes

throughout the year to improve efficiency and economics. If Ms. Giugliano can save a school district money, she tries to do so, which keeps the school district happy (Tr. 1223, 1315).

Ms. Giugliano is independently responsible for the assigning of routes in the South Country School District (Tr. 1462-1463).

Ms. Giugliano has authority to issue discipline without consulting with Jennifer Thomas with respect to matters with which she has firsthand knowledge, like not following company procedures and other issues that arise during her workday (Tr. 1455-1456).

Mr. Mensch is occasionally involved with discipline, including incidents where he is informed about the matter by a school district, major safety violations, and other issues that might be brought directly to his attention by employees (Tr. 1456). However, the majority of disciplines are not reported to Mr. Mensch (Tr. 1457).

B. Ms. Tarry's Insubordination Regarding The Prohibition Against Handing Out Candy

There is no allegation in the Amended Consolidated Complaint that an October 30, 2014 warning issued to Ms. Tarry or a November 4, 2014 warning for driving with no hands was given to her because she allegedly engaged in union activities. Nor is there any mention in the Amended Consolidated Complaint of Tarry's alleged statement to Mensch in October 2014 that she supported the Teamsters, or any alleged meeting with Teamster officials in November 2014. Further, while there is mention of the first charge filed by Tarry, it solely involved a decision to layoff Ms. Tarry in December 2014 (Case No. 29-CA-143256, filed by Ms. Tarry on December 18, 2014). The charge merely asserted, "On December 4th the Employer discriminated against employee Sharon Tarry by discharging her in retaliation for her protected concerted activity." The underlying allegation was that Ms. Tarry complained about the timing of payment of the December

2014 bonus. Please note that Case No. 29-CA-143256 was settled without admission of fault or wrongdoing (GC. Ex. 33).

With respect to the charges filed in connection with instant Case Nos. 29-CA-162261 and 29-CA-161247, the Employer submitted a December 4, 2015 position statement and included evidence of Ms. Tarry's prior disciplinary history solely for the purposes of showing Ms. Tarry's lack of appreciation for the importance of safety and safety procedures, to wit the October 30, 2014 insubordination warning and the November 4, 2014 warning where Tarry was driving a bus with students on it with no hands on the steering wheel (Tr. 541). The first time the Employer ever learned about any purported allegation of Ms. Tarry being a union supporter in October 2014 was during the trial (Tr. 169, 525-534). Mr. Mensch has no knowledge of whether Ms. Tarry supported Local 1181, and Mr. Mensch never made any comments to Ms. Tarry about Local 1181 (Tr. 169). Similarly, no allegations that Ms. Tarry had a meeting with Teamster officials in November 2014 were ever known by Respondent or e alleged prior to the trial (Tr. 551-553). In any event, since the ALJ also claims that antiunion animus can be inferred because the October 30 and November 4, 2014 disciplines Tarry received were "suspicious" (ALJ Dec. page 52, lines 5 to 6), this Statement of Facts addresses the fact that October 30 and November 4, 2014 disciplines were issued for legitimate, non-discriminatory reasons.

Ms. Tarry began her employment with Montauk Bus Transportation Group, LLC as a big bus driver in December 2010 (Tr. 523).

In 2010, Ms. Tarry received her first employee handbook (Tr. 664), and then received handbooks for the school years 2011 to 2012, and 2012 to 2013 from Montauk Bus Transportation Group, LLC. (Tr. 670, R. Ex. 12). East End Bus Lines, Inc. began operations for the 2013 to 2014 school year (Tr. 1327-1328). On June 6, 2014, Ms. Tarry was provided with a 2013 East End Bus Lines, Inc. 2013 Employee Handbook (Tr. 670, 703-704, R. Ex. 9, Jt. Ex. 1(a)). The

acknowledgment of receipt of the 2013 Employee Handbook states, "This is to acknowledge that I have received a copy of the East End Bus Lines, Inc. Employee Handbook and I understand that it contains information about the employment policies and practices of the company. I agree to read and comply with this Employee Handbook." (R. Ex. 9). Since at least 2011, both the Montauk Bus Transportation Group, LLC. and East End Bus Lines, Inc. Employee Handbooks, in the GENERAL DRIVER RESPONSIBILITIES section 5, item 26., have the following candy policy: "Do not give passengers food, candy, cake, ice cream, etc. as passengers might be allergic. Bribery will not help you control passengers and it may harm them". (Tr. 667 (stipulation by the parties), Tr. 1256, Jt. Ex. 1(a) Section 5, page 19).

In addition, starting in 2014, Ms. Giugliano has been putting up signs in the drivers' room around Halloween and Christmas stating that no candy is to be given out (Tr. 1257). The signs are conspicuously displayed by the door to the drivers' room, and that was done in October 2014 (Tr. 1258). Ms. Tarry admits seeing a sign on October 30, 2014 (Tr. 538). Ms. Giugliano also reminded drivers on the radio to not give out candy for the holidays in October 2014 (Tr. 1258). The no candy issue was more strictly enforced in 2014 because the school district was emphasizing many points, including the fact that kids have peanut allergies, they could have allergic reactions, they could choke on candy, and the school district did not want candy on the buses (Tr. 1292). Nonetheless, Ms. Tarry claims she was not aware of the candy policy in October 2014 (Tr. 536-537).

On October 30, 2014, Ms. Giugliano told Ms. Tarry that she was not to give out candy to any student, which Ms. Tarry admits (Tr. 535, 536, 1260, GC. Ex. 29). Ms. Tarry replied, "I don't care, I will give out candy. What will they do, fire me?" (Tr. 1260, GC. Ex. 29). Ms. Tarry admitted she said, "I don't care if I get fired if I hand them out" (Tr. 539). Ms. Giugliano considered Ms. Tarry's conduct to be insubordinate and a violation of safety rules (Tr. 1261-1262). Ms.

Giugliano gave Ms. Tarry an Employee Warning/Disciplinary Notice on October 30, 2014 (Tr. 1261, GC. Ex. 29). Ms. Thomas was not involved in the decision to issue that warning (Tr. 1332, 1460).

After the October 30, 2014 warning was issued, Ms. Thomas asked dispatch if anyone had followed up to make sure that Ms. Tarry did not actually give candy to the students (Tr. 1332). The response was "no" (Tr. 1333). Ms. Thomas then pulled the video from Ms. Tarry's bus to see if she had given out candy on her route on October 30, 31, or after Halloween (Tr. 1263).

Upon viewing and listening to the video, Ms. Thomas learned that Ms. Tarry announced to her students she would be in the neighborhood in her blue minivan handing out candy after her route, which Ms. Tarry admits (Tr. 543, 1336). The policy is to not give candy out and, in Ms. Thomas' view, her doing so despite being instructed not to hand out candy was against the policy as well as a poor reflection on the Respondent (Tr. 1337). Ms. Tarry's refusal not to give out of Halloween candy was never discussed with Mr. Mensch (Tr. 1461).

C. Driving With No Hands On The Steering Wheel

Further, Ms. Thomas observed that Ms. Tarry was driving her bus with no hands on the steering wheel, while she put her hand up in a ponytail, with students on the bus (Tr. 1264, 1336). Ms. Thomas brought the matter to the attention of Ms. Giugliano because Ms. Tarry was one of Ms. Giugliano's drivers and she wanted Ms. Giugliano to see it (Tr. 1263, 1336). Ms. Thomas provided the safety team with the SD card and instructed them to view it, bring Ms. Tarry in, and write her up for it (Tr. 1337-1338, R. Ex. 61). Then Safety Director Anthony Reid discussed the matter, with Ms. Tarry, gave her a verbal warning about for announcing she would be giving out candy out of her personal vehicle, and warned her that if she was observed driving in such a manner again she would be suspended (Tr. 543, 1339, GC. Ex. 30). With respect to the statement in GC. Ex. 30 that Tarry is prone to "driving with her knee often," Ms. Tarry admitted at trial she often

drives with her knee (Tr. 547). The claim that Ms. Tarry drives with two hands on the steering wheel as well as her knee is nonsensical. The only reason someone would need to steer with their knee is if they took their hands off the steering wheel, as both Ms. Thomas and Ms. Giugliano testified seeing in the video (Tr. 12163-1264, 1336). Their testimony should be credited over that of Ms. Tarry.

The candy incident and the driving with no hands with children on the bus violated the safety policies and warranted discipline (Tr. 1337). Ms. Thomas formed an opinion that Ms. Tarry practiced unsafe driving well before Ms. Tarry engaged in any union or concerted activities (Tr. 1337).

D. The December Decision To Lay Off Ms. Tarry

As mentioned above, the allegations in Case No. 29-CA-143256 were settled with a non-admission clause (GC. Ex. 33). Thus, any testimony about the December 4, 2014 separation from employment is not evidence of anti-union animus and is not a basis for any violation (Tr. 554).

Nonetheless, since the ALJ stated he can refer to the subject matter of the settlement agreement as background evidence (ALJ Dec. page 5, lines 1 to 21). Thus, it is important to note the following. In December 2014, Ms. Tarry was laid off due to a need to consolidate routes (Tr. 171). There was no mention by Mr. Mensch of Local 1181, Local 1205, or any union activities when Tarry was laid off (Tr. 563). Ms. Tarry admits she was told the reason for separation was a "consolidation," and that Mr. Mensch told her she could collect unemployment and do charters and field trips. Ms. Tarry also admits she pushed Mr. Mensch to the point that he got very angry, he told her to get the "fuck off his property," she replied, "you're a fucking asshole," and she walked out (Tr. 563).

Without admitting fault or wrongdoing, the parties agreed to settle the matter and Ms. Tarry was permitted to return to work on March 30, 2015, with back pay and benefits (GC. Ex. 33).

E. Theft Of Time And Driving While Talking On The Cell Phone

In June 2015, Ms. Thomas had another occasion to view video with respect to Ms. Tarry after she filed a second unfair labor charge (29-CA-155432) on June 29, 2015 (Tr. 1340). That charge alleged that Ms. Tarry was not assigned to a comparable route, which was found to have no merit, and Ms. Tarry was discriminated against by reducing her hours of work, which was also found to have no merit (Tr. 685-688). In fact, the route Ms. Tarry had in December 2014, Route 28, and the route she had when she returned in March 2015, Route 49, were both big bus routes with 5.5 package hours per day (Tr. 717-718, 722). Ms. Tarry appealed the Regional Director's dismissal of the complaint to the NLRB in Washington, D.C., and the Office of the General Counsel dismissed the appeal on October 14, 2015 (Tr. 688-689). Nonetheless, the record also needs to be clear in this regard. Ms. Thomas was the only one tasked with investigating and responding to the second charge; Ms. Giugliano was not involved in the investigation despite General Counsel's unfounded protestations to the contrary (Tr. 1343-1345). Ms. Thomas's investigation revealed that Ms. Tarry filled out her time sheets incorrectly and that is considered "theft of time" (Tr. 1341). Ms. Thomas also observed Ms. Tarry talking on the phone while driving, which is a violation of company policy and the law (Tr. 1340-1341). No disciplinary action was meted out, however, regarding these incidents, which shows a lack of animus toward Tarry (Tr. 1345, 1347-1348).

F. The Assignment Of The Mercy HS Route To Ms. Tarry And Subsequent Decision To Change Ms. Tarry From A Big Bus To A Mini-Bus

At the beginning of the 2015 to 2016 school year, as mentioned above, Dispatcher Lorraine Giugliano was independently responsible for setting up routes and assigning them to drivers (Tr. 1220, 1462-1463). The South Country School District decided to discontinue the route that Ms. Tarry had been assigned to at the end of the 2014 to 2015 school year, Route 49. Thus, Ms.

Giugliano decided to assign Ms. Tarry to the Bishop McGann-Mercy Diocesan High School (hereinafter "Mercy HS") route, or Route 52 (Tr. 723). There is a need for such routes because school districts on Long Island are generally required to provide transportation to students residing in their districts when those students decide to attend parochial schools. The South Country Central School District, the district within which Ms. Tarry worked, is required to provide transportation to students attending the Mercy HS.

Mercy HS is located on Ostrander Avenue in Riverhead, NY 11901 (Tr. 719-720). During the 2014 to 2015 school year, there had been two vans assigned to pick up and drop off Mercy HS students (Tr. 1222). However, for the 2015 to 2016 school year, there had been a drop off in ridership and, to save the school district money and make the district happy, a decision was made to try to use one big bus to service Mercy HS (Tr. 1223). The route package hours assigned to the Mercy HS big bus run was to be the same as Ms. Tarry's package hours during the 2014 to 2015 school year, 5.5 hours per day or 27.5 hours per week (Tr. 1221-1222).

On August 25, 2015, Ms. Giugliano met with Ms. Tarry in the drivers' room after the refresher course at the Bellport Country Club (Tr. 1223). Ms. Giugliano explained to Ms. Tarry that there are not that many students on the Mercy HS run this year "so let's try to do it with a big bus". (Tr. 1224). Ms. Giugliano provided a list of stops for a.m. and p.m. runs and roster of students, which shows that there were 27 students on Ms. Tarry's Mercy HS route prior to the dry runs, plus one student was added (Tr. 578-579, 727, GC. Ex. 34). Ms. Tarry accepted the route, and signed the Route Assignment Sheet and Route Acceptance form on August 25, 2015 (Tr. 725, 1221, R Ex. 14).

Ms. Giugliano asked Ms. Tarry to do three dry runs and let Ms. Giugliano know if she can to the route in a reasonable amount of time so that the students would not be on the bus too long (Tr. 1224). After the first dry run, Ms. Tarry told Ms. Giugliano that it wasn't going to work, the

route was too long, and the amount of time the kids would be on the bus was too long (Tr. 1225). Even though there weren't many children on the bus, the area was too broad (Tr. 1225). Ms. Giugliano and Ms. Tarry discussed turning the run around a bit, starting in a different location, and trying again, which Ms. Tarry did (Tr. 1226). After the second dry run, Ms. Giugliano asked Ms. Tarry, "Well, how we doing? Does it work this time?" Ms. Tarry responded, "No, it's still not going to work". (Tr. 1227). Ms. Giugliano asked Ms. Tarry to try it one last time, a third time, and Ms. Tarry came back and said "it's still not going to work". (Tr. 1227). Ms. Giugliano decided that she would have to split the run because it was taking too long. (Tr. 1228). It was taking Ms. Tarry 4 hours to do dry runs, and students had to be at Marcy HS by 7:45 a.m. (Tr. 726). Ms. Giugliano told Ms. Tarry she would split up the route and re-route it, keeping Ms. Tarry on a big bus with no reduction in the 5.5 package hours. The parties stipulated that, before the split, there were 28 students on Ms. Tarry's route and, after the split, there were 21 students on Ms. Tarry's route. (Tr. 1245). Ms. Giugliano took 6 stops, which equated to 7 students, off Ms. Tarry's bus and put them on a mini-bus (Tr. 729, 1228, 1233, 1243).

After the route was split, Ms. Giugliano printed a new list of stops for a.m. and p.m. runs and roster of students, which also shows that there were 21 students on Ms. Tarry's Mercy HS route after it was split (Tr. 1230, 1239, 1243, R. Ex. 15). From September 9 to September 23, Ms. Tarry continued to drive a big bus and her package hours stated the same, 5.5 hours per day (Tr. 732).

Drivers who drive on private school, parochial school, and special education runs are required to maintain and hand in attendance sheets, which are needed if a school district ever needs to prove ridership for state aid purposes (Tr. 1233). Attendance sheets are also reviewed by Ms. Giugliano and other dispatchers after the start of the school year and periodically during the school year to check ridership levels on buses (Tr. 1233, 1246). After a school year starts, routes change

because children drop off, they move, they change schools, parents drive their kids to school, and they drive themselves to school (Tr. 1246-1247).

In connection with the Mercy HS route, Ms. Tarry was required to prepare and maintain attendance sheets (Tr. 1237; R. Ex. 60). The attendance sheets prepared by Ms. Tarry also show that there were 21 students when the school year started on September 9, 2015 (R. Ex. 60).

After the beginning of the 2015 to 2016 school year, Ms. Giugliano reviewed attendance sheets submitted by Ms. Tarry (Tr. 1233). Her review revealed that students started dropping off the route (Tr. 1233). For instance, on Friday, September 11, 2015, there were 10 students on the a.m. run and 5 students on the p.m. run (R. Ex. 60, page 1). On Tuesday, September 15, 2015, there were 10 students on the a.m. run and 4 students on the p.m. run (R. Ex. 60, page 2). On Tuesday, September 22, 2015, there were 12 students on the a.m. run and 2 students on the p.m. run (R. Ex. 60, page 3). Because there were not many kids riding the bus, Ms. Giugliano independently decided that ridership did not warrant a big bus and she decided to change Ms. Tarry's route from a big bus to a mini-bus (also known as a van) (Tr. 1245-1247). Ms. Giugliano's decision to reassign Ms. Tarry from a big bus to a van saved the school district money (Tr. 1223, 1315).

On September 23, 2015, Ms. Giugliano met with Ms. Tarry to tell her about her decision to change Tarry from a big bus to a van (Tr. 1250). Ms. Giugliano told Ms. Tarry, "I have to put [you] on a van because there weren't enough kids riding the bus". (Tr. 1250). Ms. Giugliano also provided Ms. Tarry with a new Route Assignment Sheet and Route Acceptance/Refusal Acknowledgement Form (Tr. 1247, GC. Ex. 35, pages 1 and 2). Initially, Ms. Tarry refused to

sign the Route Acceptance/Refusal Acknowledgement Form, and she requested to see Jennifer Thomas (Tr. 1250-1251, 1351).³

Ms. Thomas met with Ms. Tarry on September 23 in the afternoon (Tr. 1351). Ms. Tarry asked why she was being changed from a big bus to a van and Ms. Thomas told her that Lorraine made the decision (Tr. 1352). Ms. Thomas also told Ms. Tarry that they would continue to monitor the route to see if the ridership does change, for instance, if more students are added, or if the Company can combine the other van route that was also servicing Mercy HS and put her back into a big bus (Tr. 1352). At first, Ms. Tarry still refused the route and signed the Route Refusal form (Tr. 1352, GC. Ex. 35, page 2 of 3). Ms. Thomas told Ms. Tarry to see Lorraine if she changed her mind (Tr. 1352).

About fifteen minutes later, Ms. Tarry approached Ms. Thomas in the bus yard and told Ms. Thomas that she was going to accept the route. After Ms. Tarry met with Ms. Thomas the second time, she came back to Ms. Giugliano and signed page 3 of GC. Ex. 35 and accepted the route (Tr. 1252, 1353). Her package hours stayed the same, and her hourly rate was reduced to the van rate (Tr. 732-733, 745-746).

³ Please note that when Ms. Tarry filled out page 2 of GC. Ex. 35, she wrote that "the original route was a 6-hour route they wouldn't pay me only 5 1/2 hour," which is not true and further shows Ms. Tarry lacks credibility (Tr. 1251). In fact, on cross-examination, General Counsel asked Ms. Giugliano whether a driver, Susan Collins, had had 6 package hours when she worked on a Mercy HS route prior to Ms. Tarry (Tr. 1288-1289). On redirect, it was established that there was nothing discriminatory about the number of package hours assigned to Ms. Tarry on the Mercy HS route, 5.5, because Ms. Collins had started working with the company quite a few years ago, she was one of the persons referred to as a "senior driver," and senior drivers typically have 6-hour per day packages. (Tr. 1316). Moreover, in addition to the Mercy HS run, Susan had another school as a part of her package hours, H.B. Ward, which Ms. Tarry did not have. (Tr. 1316). Thus, any inference General Counsel tried to make that Ms. Tarry was paid less hours than Ms. Collins has no merit.

After Ms. Tarry was assigned to the van, the seating capacity was 19 (Tr. 737). Ms. Tarry made claims that there was not enough room on the bus because students had their backpacks (Tr. 1250, GC. Ex. 36). In response, Ms. Thomas said she would have to view the video to see what Ms. Tarry was talking about (Tr. 749-750). Subsequent reviews of video and attendance sheets showed Ms. Tarry's claims were untrue (Tr. 1253).

G. The Events Of October 15, 2015

On October 15, 2015, Ms. Thomas approached Ms. Tarry at the gate and had a conversation with her about Ms. Tarry's lawful activities handing out union cards (Tr. 1354). Ms. Thomas contacted legal counsel, was advised it was within Ms. Tarry's lawful rights to do so (Tr. 1465). After that, Ms. Thomas did nothing about the handing out of cards (Tr. 1354, 1465). When Ms. Thomas spoke to Mr. Mensch about it, including the advice given by counsel, Mr. Mensch, who was not at the facility that day, responded, "okay, that's fine." (Tr. 1464-1465).

The ALJ also concluded that a payloader was put in front of Tarry's van on October 15, 2015 (Tr. 620) and that same shows animus (ALJ Dec. page 52, lines 38 to 41). However, that conclusion is not supported by the evidence. The bus yard is dirt, potholes and large puddles develop, and an area was being cleared to expand the size of the parking lot (Tr. 751). Ms. Tarry does not know who was driving the payloader or how long it was parked in front of her van (Tr. 752). Mr. Mensch did not put the payloader in front of the car (Tr. 1465-1466). In addition, Ms. Tarry's allegations regarding the payloader lack credibility in that Ms. Tarry testified that the payloader only blocked in her vehicle (Tr. 752), but the photo (GC. Ex. 16) and the dimensions of the Compact Wheel Loader (R Ex. 74) clearly show that Ms. Tarry's vehicle was not the only one blocked by the payloader. Furthermore, Ms. Tarry and her fellow drivers starting laughing hysterically about the payloader, which shows it was not evidence of animus (Tr. 623). In any

event, the General Counsel has not produced any evidence as to who left the payload in that location and the intentions of such person.

H. The October 16, 2015 Extremely Dangerous Driving Incident And Mr. Vopat's Independent Investigation and Recommendation To Discharge

On October 16, 2015, EEBL received a complaint from a motorist who called the 1-800 number and reported that the operator of bus number 1033 was following her very closely, beeping a horn at her, and speeding and went into oncoming traffic over a double yellow line, passed her, and swerved back in front of the motorist (Tr. 788).⁴

Upon being advised of the incident by one of the dispatchers at about 3:30 p.m., Ms. Thomas requested that the SD card be pulled from bus number 1033 and when she received it she walked it over to the safety trailer (Tr. 1355-1357). Mr. Vopat was not there; Ms. Thomas left the SD card on his desk (Tr. 357). There was no conversation with Mr. Vopat at that time (Tr. 1357).

At about 4:00 p.m. on October 16, 2015, Mr. Vopat received a message about the complaint by the motorist (Tr. 789). Mr. Vopat went to the dispatch officer to interview the dispatcher who took the call, Barbara Nunziata (Tr. 789). During the interview, Mr. Vopat learned that the incident took place near a traffic circle, and he received a copy of a note that Ms. Nunziata had written when she took the call (Tr. 789, R. Ex. 18).

After Mr. Vopat received the note, he returned to the safety trailer, where Ms. Lachacz told him there is a GPS report (GC. Ex. 41) and a video from bus number 1033 (an SD card) on his desk (Tr. 791, 866). Mr. Vopat inserted the SD card into his computer, went to the index, and began reviewing video, and narrowed the date and time down to the date and time date in question (Tr. 791-792). Mr. Vopat then viewed the video and saw the operator of bus number 1033 traveling

⁴ It is undisputed that Ms. Tarry was driving bus number 1033 on October 16, 2015 (R Ex. 17; stipulation on the record (Tr. 755).

on a roadway with one lane in each direction, north and south, divided by a yellow line, go over the double yellow line, pass a vehicle on the right, and then cross back over the double yellow line to continue in the direction of travel (Tr. 793). After the pass was made, Mr. Vopat observed, approximately three seconds later, two motorists traveling in the northbound direction (Tr. 793). Mr. Vopat saw that bus number 1033 narrowly avoided a head-on collision (Tr. 793).

Mr. Vopat asked Safety Team members, Donna White and Helen Lachacz to view the video, and they agreed with what Mr. Vopat had seen (Tr. 792, 794).

After Mr. Vopat viewed the video with Ms. White and Ms. Lachacz, he called Ms. Thomas to tell her about the incident and to ask her come to the safety trailer to view the video (Tr. 853, 1358). Ms. Thomas went to the trailer somewhere between 5:00 and 6:00 p.m. that day and the video was played for her by Mr. Vopat in the presence of Ms. White and Ms. Lachacz (Tr. 792, 852, 853, 1358). After Ms. Thomas viewed the video footage, she told Mr. Vopat to investigate the complaint over the weekend and then get back to her with his findings (Tr. 795, 1358).⁵ Those were the only instructions she gave him (Tr. 1357).

After viewing the video with Ms. Thomas on Friday afternoon, Mr. Vopat reviewed the GPS records for bus number 1033 (Tr. 795). The GPS records showed that bus number 1033 was on Lake Avenue at the time of the incident, that the bus did accelerate on Lake Avenue, that the highest speed recorded on Lake Avenue was 59.8 miles per hour, and that the bus continued south on County Road 51 where the vehicle reached speeds of 64.1 miles per hour and 66.1 miles per hour (Tr. 795, GC. Ex. 41, R. Ex. 21).

⁵ Mr. Vopat also cut the video down to three 10 minute segments and archived them on the Company's hard drive (Tr. 795). Ms. Thomas then burned the three clips onto DVDs (Tr. 795, Jt. Ex. 2). Please note that one has to use a specific computer program to be able to see the video and listen to the audit, which program is Windows Media Player.

Before he left the safety office to go home on Friday, Mr. Vopat also downloaded the Vehicle and Traffic Law speed limits for Lake Avenue and County Road 51 (R. Ex. 19) and a map of the area (R Ex. 20) (Tr. 796-797). Mr. Vopat drew a compass and a dotted line showing the route traveled by Ms. Tarry from north to south on the map (Tr. 799). R Ex. 54 is a map showing, on pages 1 and 2 of 6, an overview of Lake Avenue from the Riverside traffic circle to the point where it intersects with County Road 51. Pages 3 and 4 of 6 show Lake Avenue from the Riverside traffic circle to Pegs Lane. Pages 5 and 6 of 6 show the southern portion of Lake Avenue.

The speed limit from the Riverside traffic to a quarter mile south of Pegs Lane is 40 miles per hour and then it increases to 55 miles per hour (Tr. 800).

Over the weekend, Mr. Vopat went over all the information that he had gathered and concluded that the allegations against Ms. Tarry were substantiated (Tr. 802). He worked on the matter about two and a half hours on Saturday and about two hours on Sunday (Tr. 854-855). He wrote out a report of his findings, which was later typed up by Ms. Lachacz (Tr. 802, R. Ex. 21). Mr. Vopat wrote,

Ms. Tarry had operated the above vehicle in an extremely dangerous manner at times exceeding the state speed limit dramatically and operating 1033 with extreme disregard to the possible consequences of her actions. What makes matters even more serious, the infractions and dangerous maneuvers were all committed with a student on board. Therefore, it is the recommendation of this department that Ms. Tarry be removed from this route and terminated without delay for the good of this company and the students we serve whose safety is paramount. (R Ex. 21).

During the hearing, a review of the video, Mr. Vopat's testimony, and the stipulations established that the following occurred at the times and locations indicated:⁶

⁶ Please note that the GPS is real time, and the time on the video camera is set manually. In this case, there is about a 4-minute difference between the times on the GPS record and the times on the video (Tr. 810-811).

15:04:00, Southbound on Roanoke Avenue

15:04:30, right turn on Main Street, which is also Route 25.

15:04:35, left turn on Peconic Avenue.

15:05:45, horn blown first time by Ms. Tarry (Tr. 764).

15:06:15, Riverdale traffic circle, and then the Shell station, and then the beverage distributor.

15:06:26, "you've got to be kidding me" quote and horn blown again (Tr. 764).

15:07:00, Woodhull Lane and then after that Pegs Lane can be seen out passenger side windows of the bus.

15:07:07, accelerates engine, crosses over double yellow line, passing motorist, coming back over double yellow line.

15:07:18, first car goes by.

15:08:30, car belonging to motorist who called the 1-800 number to report the incident is seen in rear window.

15:08:40, left turn on County Road 51.

(Tr. 764-766, 808-813).

On Sunday, October 18, 2015, Mr. Vopat called Ms. Thomas to report his findings to her (Tr. 1358). Mr. Vopat told Ms. Thomas that he found Ms. Tarry to be driving aggressively, that she crossed over a double yellow line to pass a motorist, and that she was also speeding (Tr. 1359). He also reported that within mere seconds Ms. Tarry narrowly avoided a head-on collision with two cars that were traveling in the opposite direction (Tr. 793, 1359). Mr. Vopat recommended that Ms. Tarry be terminated, which recommendation Ms. Thomas approved (Tr. 1359-1361). In addition to the events that occurred on October 16, 2015, Ms. Thomas took into consideration the previous safety violations (the candy incident, driving with no hands with children on the bus, and talking on the cell phone while driving), and those incidents also played a part in her decision to approve the termination (Tr. 1361).

On Monday, October 19, 2015, Mr. Vopat instructed dispatch to remove the key form Ms. Tarry's bus and to inform her as soon as she arrived for work to report to the safety trailer (Tr. 814,

1360). Upon her arrival, Mr. Vopat asked Ms. Tarry to wait in the classroom portion of the trailer so Mr. Vopat could review the video and the results of his investigation with Mr. Shukri, who was not present on Friday, prior to carrying out the discharge (Tr. 814, R Ex. 23). After Mr. Shukri agreed with the decision, Mr. Vopat and the safety team went forward with the termination. Mr. Vopat told Ms. Tarry that the Company had received a complaint from a motorist who stated that she went around, passed her in oncoming traffic, and then swerved back in front of her again (Tr. 815, R Ex. 23). The motorist said it was on County Road 51. In response to that statement, Ms. Tarry told Mr. Vopat that County Road 51 is a four-lane highway (Tr. 815, R Ex. 23). Mr. Vopat agreed, but said that "the incident happened on Lake Avenue. We have the video footage. We have the GPS data." (Tr. 815, R Ex. 23). At that point, Ms. Tarry had an opportunity to deny that her route took her down Lake Avenue, as she alleged at the hearing, but she did not state such a position (Tr. 815-816). Mr. Vopat told Ms. Tarry that the allegations have been substantiated and that her services with the company are being terminated (Tr. 816, R Ex. 23). Ms. Tarry responded, "that's crazy, I want to see the video" (Tr. 778, 816, R Ex. 23). The safety team then allowed Ms. Tarry to watch the video. After she watched the video, Ms. Tarry had an opportunity to offer a further explanation; however, she did not do so. Rather, Ms. Tarry said, "that's all you got, that's nothing, I will own this company" (Tr. 778, 816-817, R Ex. 23). Ms. Tarry was then asked to leave the property and, after she initially refused, she complied (Tr. 817, R Ex. 23).

According to Ms. Tarry, she was never on Lake Avenue on the day in question, October 16, 2015 (Tr. 643). Rather, she asserts that she traveled south on Roanoke Avenue, made a left onto Main Street, made right onto Peconic Avenue, came to the traffic circle, made a right onto County Road 24, and made a left turn on County Road 51 (Tr. 757 to 758). However, the falsity of Ms. Tarry's testimony is clearly shown by the GPS records, which unequivocally show after she entered the Riverdale traffic circle she did not make a right turn on County Road 24 but proceeded

south on Lake Avenue from the Riverdale traffic circle to get to County Road 51 (GC. Ex. 41). Ms. Tarry's entire defense to the claim she was speeding, crossed over a double yellow line, and narrowly avoided a head-on collision is that she did not travel on Lake Avenue.

Nonetheless, let's further review her testimony. Ms. Tarry claims she was driving on County Road 51, a woman in front of her jammed on her brakes at 55 miles per hour, and she was required to slam on her brakes (Tr. 634). After vehicles passed her, she then admits to passing the slower car and speeding at 61 miles per hour (Tr. 634). On the video viewed during the hearing, there is absolutely no indication that bus number 1099 jammed on its brakes prior to making the pass.

Ms. Tarry also generally denies going over any double yellow line (Tr. 634) and specifically testified that she never crossed over a double yellow line on Lake Avenue (Tr. 657). The General Counsel submitted into evidence a photo of County Road 51 (GC. Ex. 39). Ms. Tarry testified that County Road 51 is two lanes northbound, two lanes southbound, with a grassy median between the lanes (Tr. 636). The video clearly shows Ms. Tarry driving on a two-lane road at the time of the pass, not a four-lane highway with a grass median.

When the Safety Team played the video for Ms. Tarry, she told them the following:

I first told them I recognized the kid on the school bus. And then a little bit down the ways you hear my voice on the video and I told them that's the only way I recognize it's my bus, because you cannot see the driver.

Tr. 637.

And then they let it continue a little bit longer and then you heard me say on the bus to the lady in front of me, "you've got to be kidding me, you're jamming on your brakes doing 55 miles an hour, on County Road 51."

Tr. 637. See also Tr. 647-648.

This testimony is not credible. As established by the testimony of Mr. Vopat during review of the video and by listening to the audio, at 15:06:26, the exact quote is, "you've got to be kidding me" and then the horn is blown. This happens after Ms. Tarry passed through the through the Riverdale traffic circle at 15:06:15, passed the Shell station and the beverage distributor, proceeded south on Lake Avenue, and before Ms. Tarry reached Woodhull Lane at 15:07:00, not on County Road 51.

With respect to the Ms. Tarry hearing the dispatcher call her while she was on County Road 51 (Tr. 637), this clearly took place after the motorist who called the 1-800 number caught up to Ms. Tarry at the intersection of Lake Avenue and County Road 51, called the 1-800 number, and the dispatcher subsequently called Ms. Tarry on the radio after she proceeded south for a period of time on County Road 51.

Ms. Tarry's testimony that, when shown the double yellow line through the rear window of the bus on the video, it was a "whited dot line" also shows Ms. Tarry's testimony lacks credibility (Tr. 638). It is clear that the bus is on a two-lane road with a double yellow line with side streets (Woodhull Lane and Pegs Lane) seen outside the passenger side windows of the bus.

Based on the forgoing, Ms. Tarry lacks any credibility with respect to the dangerous driving events that occurred the afternoon of October 16, 2016, with a child on the bus, and her discharge must be upheld.

With respect to Ms. Tarry's conduct, it is important to note that, as a driver, she was required to be familiar with the Vehicle and Traffic Law, regulations of the Commissioner of Motor Vehicles, regulations of the Commissioner of Education, and knowledge of the NYS Department of Transportation safety rules and regulations governing motor carriers of passengers, and the parties stipulated that drivers employed by EEBL have that obligation (Tr. 661, 662, R. Ex. 29, 8 NYCRR 153 e1 and 17 NYCRR 721.3C on page 4 of 7). Nonetheless, by her conduct

Ms. Tarry violated the following laws, which was also taken into consideration by Mr. Vopat (Tr. 793, 840-844):

<u>Law</u>	<u>Citation</u>	<u>Exhibit</u>
Speed	8 NYCRR 156.3e6	R Ex. 29, page 6 of 7
Reasonable and Prudent Speed	VTL 1180a	R Ex. 29, page 7 of 7
Reckless Driving	VTL 1212	R Ex. 29, page 7 of 7
No-passing Zones	VTL 1126	Administrative Notice

The first conversation Ms. Thomas had with Mr. Mensch regarding the October 16, 2015 dangerous driving incident was on Sunday night, October 18, 2015, after Ms. Thomas had approved the recommendation by Mr. Vopat (Tr. 1362-1366). Ms. Thomas informed Mr. Mensch about the incident that occurred, the investigation, Mr. Vopat's recommendation to terminate her position, that Ms. Thomas was in agreement, that it was moving forward on Monday. Mr. Mensch replied, "okay" and that was the end of the conversation (Tr. 1363).

After Mr. Vopat discharged Ms. Tarry on October 19, he called Ms. Thomas to inform her that the discharge was carried out (Tr. 1352), and she informed Mr. Mensch (Tr. 1363).

I. Exemplars

In Respondent's post-hearing brief, the Company pointed out that, prior to the discharge of Ms. Tarry and Mr. Vopat becoming a Safety Supervisor, a number of workers were discharged for safety related issues. For instance, a driver, Janice Marinaccio, failed to check that her bus was empty before returning to the yard, discovered the child upon her return to yard, and rather than reporting the matter as required or answering the dispatcher calls over the radio, she turned around and drove the child home (Tr. 1368-1369, R Ex. 63). Ms. Marinaccio was discharged on February 25, 2014 (R Ex. 63).

On April 4, 2014, driver Deborah Friscia was discharged because video showed her swerving on a highway (R Ex. 64).

On November 12, 2015, Antonio Ramos was discharged for using his cell phone to call dispatch while driving (R Ex. 65).

In addition, since becoming a Safety Supervisor, in addition to recommending the discharge of Ms. Tarry, Mr. Vopat has recommended the discharge of approximately seven drivers and matrons during the 2015 to 2016 school year, and in each of those cases Ms. Thomas accepted his recommendations (Tr. 1359-1361).

By way of example, before Ms. Tarry was discharged, Mr. Vopat along with Ms. Lachacz recommended the discharge of a driver, Kathy Tallerine, who let a student who had to go to the bathroom get off the bus at a bus stop in route to the school and then abandoned the student on the side of the road (Tr. 820-821).

On November 3, 2015, after receiving a complaint from a parent, Mr. Vopat conducted an investigation and recommended the termination of a driver, Joan Perry, who was found to be speeding and engaged in dangerous driving (Tr. 828-829, R Ex. 24). Mr. Vopat did not solicit a written statement from the parent who made the complaint because, similar to Ms. Tarry, he had GPS and video evidence (Tr. 859, 869). In fact, Ms. Thomas testified that the Respondent does not necessarily seek a written statement prior to issuing discipline (Tr. 1467-1468). "Typically, if you have evidence of what the infraction may be or if you're going by video, if you're going by GPS, if you're going by certain testimony from other people that may have been involved in it, there are outlying circumstances." (Tr. 1468).

Also on November 3, 2015, Mr. Vopat recommended the termination of Cynthia Piercy, a matron who forcibly handled a student and verbally chastised the student, which incident was also complaint driven (Tr. 829-831, R. Ex. 25).

Another matron, Rhona Gorman, was also discharged in November 2015 after she failed to adequately supervise the students on her bus in accordance with company policy and a child stabbed another child in the head with a pencil, causing injury (Tr. 832-833, R Ex. 26).

In February 2016, a driver, Anthony Houston, was discharged, amongst other things, for driving while talking on a cell phone, in violation of New York State's Vehicle and Traffic Law § 1225 (Tr. 833-834, R Ex. 27).

Driver Karen Mellon was discharged for failing to follow company procedures before backing up her bus, hitting a pole, and damaging a taillight in March 2016 (Tr. 836-837, R Ex. 28).

On cross-examination, General Counsel asked Mr. Vopat if he gets the employee's side of the accusation prior to issuing a discipline (Tr. 858). Mr. Vopat gives employees the opportunity to write down their side of the story on an employee warning, but he usually gets a refusal (Tr. 858). In addition to allowing her to review the video and provide an explanation, Ms. Tarry was given an opportunity to write down a rebuttal on the warning notice but she declined to take advantage of that opportunity (Tr. 815-817, 868, R Ex. 23).⁷

With respect to about 40 or 50 safety violations during the 2015 to 2016 school year, Mr. Vopat discussed about a quarter of them with Ms. Thomas (Tr. 867). While Mr. Vopat has the authority to issue lesser disciplines, like verbal and written warnings, on his own, he makes

⁷ On cross-examination, Mr. Vopat was asked, "Did you interview Ms. Tarry?" (Tr. 868). He replied, "Did I interview Ms. Tarry? No." (Tr. 868). He said, "I didn't need to due to all the other evidence I had." (Tr. 868). In any event, this is just a matter of semantics. Vopat discussed the matter with Tarry, and she had the opportunity to claim the pass was on County Road 51, view the video, offer a comment afterward, and make a written statement, which she declined to do. Moreover, Mr. Vopat did not have any knowledge of any union activity until November or December of 2015, after Ms. Tarry's discharge, and the General Counsel has failed to make any connection between Mr. Vopat's investigation and recommendation to any concerted or union activities allegedly engaged in by Ms. Tarry (Tr. 848).

recommendations regarding suspensions and discharges that must be approved by Ms. Thomas (Tr. 862).

As will be shown below, Ms. Tarry was discharged due to her own extremely dangerous driving with a student on the bus, and the change from a big bus to a van was not based on any protected activity.

V. ARGUMENT

With regards to the discharge of Tarry and all other instances where discipline was meted out, the record establishes legitimate non-discriminatory reasons for taking the actions taken under the Wright Line test.⁸

As stated in Brink's Inc., 360 NLRB No. 136, 199 L.R.R.M. (BNA) 2082, 2014 WL 2886447 (2014):

“Under *Wright Line*, the General Counsel must establish certain elements by a preponderance of the evidence. The General Counsel must show the existence of activity protected by the Act and that the respondent was aware that the employee had engaged in such protected activity. In addition to showing that the employee in question suffered an adverse employment action, there must be some showing that the employer bore animus toward the employee's protected activity. *Praxair Distribution*, 357 NLRB No. 91, slip op. at 1 fn. 2 (2011); *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Furthermore, an employer cannot carry its *Wright Line* burden by showing that it had a legitimate reason for the action, but must “persuade” that the

⁸ Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).”

In the instant matter, the evidence clearly establishes that: 1. Respondent had legitimate non-discriminatory reasons for taking the action it took; 2. its reasons were not a pretext to hide an unlawful motivation for its actions, and 3. it would have taken the same action absent Tarry’s alleged protected activity.

In applying the Wright Line analysis, it should be clear that the engagement of an employee in union activity is not a cloak that protects the employee from the obligation to perform his/her job and to comply with the employer’s policies, rules and regulations. Emerson Electric Company, 177 NLRB 75 (1969) (“Union membership and activities is not a shield behind which a discharged employee can take refuge and claim discrimination... The burden remains upon the General Counsel to prove that the reason for the discharge was the employer's anti-union hostility. An employer is not obliged to treat a union member differently or with greater deference than any of his other employees. Poor performance, misconduct and insubordination, for example, do not have to be tolerated merely because the offenders are among the plant's most active union supporters. An employer's stated opposition to unionization is not in itself sufficient evidence to sustain a finding that an employee was discharged because of discrimination against a union.”) (citing N.L.R.B. v. Bangor Plastics, Inc., 392 F.2d 772, 777 (6th Cir. 1967)).

A. Respondent Reduced The Number of Stops On Ms. Tarry's Bus Route For Legitimate Non-Discriminatory Reasons

The ALJ has concluded that the September 8, 2015 reduction in the number of stops on Ms. Tarry's bus route did not carry any connotation of animus (ALJ Dec. page 51, lines 34 to 35). Nonetheless, an explanation of facts regarding the reason for the subsequent reassignment of Tarry from a big bus to a mini-bus is necessary for the Board to fully understand the reasons for that

decision.

At the beginning of the 2015 to 2016 school year, after the school district discontinued Route 49, Giugliano decided to assign Ms. Tarry to the Mercy HS route, or Route 52 (Tr. 723).

During the 2014 to 2015 school year, there had been two vans assigned to pick up and drop off Mercy HS students (Tr. 1222). However, for the 2015 to 2016 school year, there had been a drop off in ridership and, in an effort to save the school district money and make the district happy, a decision was made to try to use one big bus to service Mercy HS (Tr. 1223). The route package hours assigned to the Mercy HS big bus run was to be the same as Ms. Tarry's package hours during the 2014 to 2015 school year, 5.5 hours per day or 27.5 hours per week (Tr. 1221-1222).

On August 25, 2015, Ms. Giugliano met with Ms. Tarry in the drivers' room after the refresher course at the Bellport Country Club (Tr. 1223). Ms. Giugliano explained to Ms. Tarry that there are not that many students on the Mercy HS run this year "so let's try to do it with a big bus". (Tr. 1224). Ms. Giugliano provided a list of stops for a.m. and p.m. runs and roster of students, which shows that there were 27 students on Ms. Tarry's Mercy HS route prior to the dry runs, plus one student was added (Tr. 578-579, 727, GC. Ex. 34). Ms. Tarry accepted the route, and signed the Route Assignment Sheet and Route Acceptance form on August 25, 2015 (Tr. 725, 1221, R Ex. 14).

As more fully set forth in the Statement of Facts, Ms. Giugliano asked Ms. Tarry to do three dry runs, the area was too broad, and the route was not going to work because the children would have to be on the bus too long since it was taking Tarry to 4 hours to do a dry run and the children had to be at Mercy HS by 7:45 a.m. (Tr. 726, 1224 to 1227). Ms. Giugliano told Ms. Tarry she would split up the route and re-route it, and she kept Ms. Tarry on a big bus with no reduction in the 5.5 package hours. From September 9 to September 23, Ms. Tarry continued to drive a big bus and her package hours stayed the same, 5.5 hours per day (Tr. 732).

Based on the foregoing, the ALJ correctly decided that animus did not play any role in Respondent's decision to reduce the number of stops on Ms. Tarry's route (ALJ Dec. page 51, lines 25 to 35).

B. Respondent Changed Ms. Tarry from A Big Bus To A Van And Reduced Ms. Tarry's Rate Of Pay For Legitimate Non-Discriminatory Reasons

When creating routes and monitoring them throughout the school year, efficiency and economics are important. If Ms. Giugliano can save the school district money, she tries to do so, which keeps the school district happy (Tr. 1223, 1315). Thus, Ms. Guigliano continuously monitors routes with the hopes of saving the school district money. After a school year starts, routes change because children drop off, the move, they change schools, parents drive their kids to school, and they drive themselves to school (Tr. 1246-1247). Attendance sheets are reviewed by Ms. Giugliano and other dispatchers after the start of the school year and periodically during the school year to check ridership levels on buses (Tr. 1233, 1246).

As more fully explained in the Statement of Facts, the attendance submitted by Ms. Tarry revealed that students started dropping off of the route (R. Ex. 60; Tr. 1233). For instance, on Friday, September 11, 2015, there were 10 students on the a.m. run and 5 students on the p.m. run (R. Ex. 60, page 1). On Tuesday, September 15, 2015, there were 10 students on the a.m. run and 4 students on the p.m. run (R. Ex. 60, page 2). On Tuesday, September 22, 2015, there were 12 students on the a.m. run and 2 students on the p.m. run (R. Ex. 60, page 3). Because there were not many kids riding the bus, Ms. Giugliano independently made a decision that ridership did not warrant a big bus and she decided to change Ms. Tarry's route from a big bus to a van (Tr. 1245-1247).

On September 23, 2015, Ms. Giugliano met with Ms. Tarry to tell her about Ms. Giugliano's decision to change her from a big bus to a van (Tr. 1250). Ms. Giugliano told Ms.

Tarry, "I have to put [you] on a van because there wasn't enough kids riding the bus". (Tr. 1250). Ms. Giugliano also provided Ms. Tarry with a new Route Assignment Sheet and Route Acceptance/Refusal Acknowledgement Form (Tr. 1247, GC. Ex. 35, pages 1 and 2). Initially, Ms. Tarry refused to sign the Route Acceptance/Refusal Acknowledgement Form, and she requested to see Jennifer Thomas (Tr. 1250-1251, 1351).

Ms. Thomas met with Ms. Tarry on September 23 in the afternoon (Tr. 1351). Ms. Tarry asked why she was being changed from a big bus to a van and Ms. Thomas told her that Lorraine made the decision (Tr. 1352). Ms. Thomas also told Ms. Tarry that they would continue to monitor the route to see if the ridership does change, for instance, if more students are added, or if the Company can combine the other van route that was also servicing Mercy HS and put her back into a big bus (Tr. 1352). At first, Ms. Tarry still refused the route and signed the Route Refusal form (Tr. 1352, GC. Ex. 35, page 2 of 3).

However, about fifteen minutes later, Ms. Tarry approached Ms. Thomas in the bus yard and told Ms. Thomas that she was going to accept the route. After Ms. Tarry met with Ms. Thomas the second time, she came back to Ms. Giugliano and signed page 3 of GC. Ex. 35 and accepted the route (Tr. 1252, 1353). Her package hours stayed the same, and her hourly rate was reduced to the van rate (Tr. 732-733, 745-746).

In sum, Ms. Giugliano's decision to reassign Ms. Tarry from a big bus to a van saved the school district money (Tr. 1223, 1315). Based on the foregoing, Respondent has clearly established that it has legitimate non-discriminatory reasons for its decision to reassign Ms. Tarry to a van and reduce her rate of pay.

Despite the foregoing evidence, the ALJ concluded that the General Counsel established a *prima facie* case under Wright Line as to both union and protected concerted activity. That conclusion is erroneous. First, as established above, it is clear that the reason for the decision to

reassign Tarry from a big bus to a mini-bus was economical. According to the ALJ, Tarry claims that Ms. Thomas told Tarry the reason for the decision was that the district wanted a van instead of a bus. Incredibly, the ALJ then asserts that Respondent did not produce evidence in support of Tarry's claim (ALJ Dec. page 51, lines 41 to 43). That reasoning is misplaced. EEBL produced evidence in support of its claims, not Tarry's claims, and even if Thomas made such a comment to Tarry, then the reason for changing the bus would be the same economical reasons to which Giugliano testified, including keeping costs down. Second, the ALJ points to Tarry's alleged expression of "pro-Teamsters sentiment" to Mensch in October 2014 (ALJ Dec. page 52, lines 2 to 3). However, there is no evidence that Mensch had any input in the decision to change buses. Rather, the record is clear that solely Giugliano had authority to make, and did make, that decision. As also stated above, the ALJ also claims that antiunion animus can be inferred because the October 30 and November 4, 2014 disciplines Tarry received were "suspicious" (ALJ Dec. page 52, lines 5 to 6). For the reasons stated in Sections B and C of the Statement of Facts, the October 30 and November 4, 2014 disciplines were issued for legitimate, non-discriminatory reasons. Thus, any decision finding that General Counsel established a *prima facie* case under Wright Line is erroneous.

Based on the foregoing, under the Wright Line analysis, Respondent has clearly demonstrated legitimate, non-discriminatory reasons for Ms. Giugliano's decision to change Tarry from a big bus to a van, and reduce her rate of pay to the van rate of pay. The General Counsel has not satisfied its burden of showing alleged, purported union activities were a substantial or motivating factor with respect to those decisions; or that there was antiunion animus when Ms. Giugliano made the aforementioned decisions. Accordingly, the ALJ decision that a *prima facie* case was established should be reversed.

C. Respondent Established That It Would Have Reassigned Tarry To A Mini-Bus In The Absence Of Alleged Protected Activity

This Brief now addresses the ALJ's conclusion that Respondent has not rebutted the General Counsel's *prima facie* case (ALJ Dec. page 52, lines 10 to 20).

For the last four years, Ms. Giugliano has been the Head Dispatcher for EEBL with respect to the South Country School District (Tr. 1162-1163). Ms. Giugliano does all of the routing for the District, and she is independently responsible for the assigning of routes in the District (Tr. 1462-1463). As she credibly testified to at trial, one of her important concerns is economics and efficiency - keeping transportation costs for the District down. In addition, she keeps herself out of issues with respect to the union, never had any discussions with John Mensch or Jennifer Thomas about the union, and had no knowledge about Ms. Tarry being involved with the union until sometime in 2016, well after the start of the 2015 to 2016 school year started (Tr. 1200, 1287, 1295).⁹

Nonetheless, the ALJ found it "suspect" that Giugliano made the decision to "demote" Tarry after only 2 weeks following the split (ALJ Dec. page 52, lines 11 to 12). Also, the ALJ points to evidence allegedly not produced by EEBL (ALJ Dec. page 52, lines 12 to 20). However, that reasoning is flawed based on the significant drop in ridership between September 9 and 23, 2015. Second, the evidence shows that the splitting of the route was necessary due to the large geographic area that needed to be covered and, thus, the ALJ's musings that the routes could have been combined into one route again without ever asking such a question of the witness is misplaced. Further, with regards to the general policy that "senior drivers" are permitted to retain

⁹ As stated herein, any conclusion that Ms. Giugliano was less credible than Ms. Tarry regarding alleged comments that took place in October 2014 is erroneous. Ms. Giugliano's testimony was more credible than that of Ms. Tarry with respect to all issues, including alleged knowledge of Tarry's union activities, to which Ms. Giugliano unequivocally testified having no knowledge.

their routes, Tarry was not one of the persons who worked for the John M. Mensch companies and, thus, such a policy did not apply to her. Moreover, the route that Tarry had been on at the end of the 2014 to 2015 school year, Route 49, was discontinued at the end of that school year. Hence the need to assign Tarry to a new route. Similarly, had the ALJ asked if any other big bus drivers were ever assigned to vans due to a drop in ridership, Respondent could have addressed the issue. Having not asked that question, it is now disingenuous for the ALJ to find fault with evidence that he claims the Respondent did not submit, as he did numerous times in his decision. In short, the extensive testimony and exhibits discussed in Sections V. A. and B above show that Respondent rebutted the General Counsel's case. Based on the foregoing, under the Wright Line analysis, Respondent has clearly demonstrated legitimate, non-discriminatory reasons for Ms. Giugliano's decision to change Tarry from a big bus to a van, and reduce her rate of pay to the van rate of pay, and the General Counsel has not satisfied its burden of showing alleged, purported union activities were a substantial or motivating factor with respect to those decisions, or that there was antiunion animus when Ms. Giugliano made the aforementioned decisions.

D. General Counsel Has Not Established A *Prima Facie* Case Regarding The October 19, 2015 Decision To Discharge Tarry For Extremely Dangerous Driving

The ALJ found that the General Counsel established a *prima facie* case because of Mensch's Tarry's alleged statement in October 2014 that she supports the Teamsters, her alleged protected concerted activities in December 2014, and Thomas' interaction with Tarry on Thursday morning, October 15, 2015 (ALJ Dec. page 52, lines 24 to 29). However, as shown herein, that finding is erroneous.

Ms. Thomas admittedly did not know what the laws and regulations were regarding the handing out of union cards when she approached Ms. Thomas on October 15, 2015 and had a conversation with her about Ms. Tarry's activities (Tr. 1354, 1464-1465). While Ms. Thomas

initially turned around and said, “we’ll see about that,” she contacted legal counsel, and was advised it was within Ms. Tarry's lawful rights to hand out union cards (Tr. 1465). Upon learning Ms. Tarry was engaged in lawfully protected activity, Ms. Thomas accepted the advice of counsel and took no further action (Tr. 1354, 1465). Thus, no anti-union animus is inferable from the events of October 15, 2016 with respect to Ms. Thomas’ approval of Vopat’s recommendation to discharge Tarry.

The ALJ also refers to the fact that a payloader was put in front of Tarry’s van on October 15, 2015 (ALJ Dec. page 52, lines 38 to 41). However, Respondent has established legitimate reasons for the presence of the payloader in the yard, to fill in potholes and large puddles and clear an area to expand the size of the parking lot (Tr. 751). Ms. Tarry does not know who was driving the payloader or how long it was parked in front of her van (Tr. 752), and the General Council has not produced any evidence as to who left the payloader in that location and the intentions of such person. In fact, Ms. Tarry and her fellow drivers laughed hysterically about the payloader (Tr. 623). Thus, no anti-union animus is shown by the location of the payloader. Based on the foregoing, the events of October 15, 2015 do not establish anti-union animus.

Furthermore, the person charged with investigating the October 16 dangerous driving incident and making a recommendation with respect to same, Joseph Vopat was not aware of any employees participating in union activities until November or December of 2015 (Tr. 847-848).¹⁰ Thus, he had no knowledge of any purported union activities by Ms. Tarry, and the General Counsel has failed to prove that he did.

¹⁰ With regards to union activity, Mr. Vopat was aware that a union campaign was taking place in the Fall of 2015, but he did not see any employees participating in union activities by the gate until November or December of 2015 (Tr. 847-848).

In addition, there is no evidence that Ms. Thomas gave any direction to Ms. Vopat about how he should conduct his investigation into the allegations by the motorist or the result that should be reached. In fact, when asked by the ALJ if she had given Mr. Vopat any direction when she dropped off the SD card on his desk, she stated “no, he wasn’t there.” (Tr. 1357). Further, after being called to the safety trailer to view the video, the only thing Ms. Thomas told Mr. Vopat was to “investigate the complaint over the weekend and then get back to me with [your] findings.” (Tr. 1358).¹¹ Nor did Mr. Mensch have any involvement in the investigation or decision to discharge Ms. Tarry. (Tr. 1362-1366). Ms. Thomas informed Mr. Mensch about the incident after she had approved Mr. Vopat’s recommendation (Tr. 1363). Thus, Mr. Vopat’s investigation was independent of any knowledge of or animus toward protected activity.

E. Even If The General Counsel Established a *Prima Facie* Case, The Record Unequivocally Shows That Respondent Would Have Discharged Tarry For The Extremely Dangerous Driving Incident Regardless Of Any Protected Activity

EEBL is responsible for the safe transportation of 7,000 lives on a daily basis (Tr. 1328-1329). EEBL has thus implemented policies and procedures to ensure the safety of students and their safe transportation to and from school, which is the greatest focus in the school bus transportation industry (Tr. 1330-1331).

Since Mr. Vopat became a Safety Supervisor, he has become the lead investigator for the Company regarding the investigation of incidents and accidents, and he has taken a much more proactive approach to investigating complaints and accidents by school districts, parents, and the public, more so than anybody else who has held that position (Tr. 1356-1357). This is evidenced by implementation of a more proactive approach to taking statements, statements, gathering facts,

¹¹ The fact that Ms. Thomas did not discipline Ms. Tarry for driving her bus while talking on her cell phone and did not discipline Ms. Tarry for “theft of time” in July 2015 also shows a lack of animus against Ms. Tarry (Tr. 1340-1348).

writing reports, and making recommendations regarding appropriate discipline action to be meted out, if any, which recommendations are given significant weight.

On October 16, 2015, the Company received a complaint from a motorist who called the 1-800 number and reported that the operator of bus number 1033 was following her very closely, beeping a horn at her, and speeding, went into oncoming traffic over a double yellow line, passed her, and swerved back in front of the motorist (Tr. 788).

Upon being advised of the incident, as she had done in numerous other cases, Ms. Thomas requested that the SD card be pulled from bus number 1033. After she received it, she walked it over to the safety trailer at about 3:30 p.m. and left it on Mr. Vopat's desk; Mr. Vopat was not in the safety trailer at the time (Tr. 1355-1357).

When Mr. Vopat returned to the yard about 4:00 p.m., he received a message about the complaint by the motorist so he went to the dispatch officer to interview the dispatcher who took the call, Barbara Nunziata (Tr. 789). Mr. Vopat learned that the incident took place near a traffic circle, and he received a copy of a note that Ms. Nunziata had written when she took the call (Tr. 789, R. Ex. 18). The fact that Mr. Vopat, as a result of his interview of Ms. Nunziata, learned more information than that which was written in her note shows he was diligent and, contrary to the ALJ decision (ALJ Dec. page 10, lines 24 to 32; page 11, lines 9 to 11), his learning more about the incident than that which was written in Nunziata's note is not evidence that he embellished the severity of Tarry's misconduct.

After Mr. Vopat received the note and interviewed Nunziata, he returned to the safety trailer, where Ms. Lachacz told him there is a GPS report (GC. Ex. 41) and a video from bus number 1033 (an SD card) on his desk (Tr. 791, 866). Mr. Vopat promptly commenced his investigation. He inserted the SD card into his computer, went to the index, began reviewing video, and narrowed the date and time down to the date and time date in question (Tr. 791-792). Mr. Vopat then viewed

the video and saw the operator of bus number 1033 traveling on a roadway with one lane in each direction, north and south, divided by a yellow line, go over the double yellow line, pass a vehicle on the right, and then cross back over the double yellow line to continue in the direction of travel (Tr. 793). After the pass was made, Mr. Vopat observed, approximately three seconds later, two motorists traveling in the northbound direction (Tr. 793). Mr. Vopat saw that bus number 1033 narrowly avoided a head-on collision (Tr. 793).

Mr. Vopat asked Safety Team members, Donna White and Helen Lachacz to view the video, and they agreed with what Mr. Vopat had seen (Tr. 792, 794).

After Mr. Vopat viewed the video with Ms. White and Ms. Lachacz, he called Ms. Thomas to tell her about the incident and to ask her to come to the safety trailer to view the video (Tr. 853, 1358). Ms. Thomas went to the trailer somewhere between 5:00 and 6:00 p.m. that day and the video was played for her by Mr. Vopat in the presence of Ms. White and Ms. Lachacz (Tr. 792, 852, 853, 1358). After Ms. Thomas viewed the video footage, she told Mr. Vopat to investigate the complaint over the weekend and then get back to her with his findings (Tr. 795, 1358).

Subsequent to viewing the video with Ms. Thomas on Friday afternoon, Mr. Vopat reviewed the GPS records for bus number 1033 (Tr. 795). The GPS records showed that bus number 1033 was on Lake Avenue at the time of the incident, that the bus did accelerate on Lake Avenue, that the highest speed recorded on Lake Avenue was 59.8 miles per hour, and that the bus continued south on County Road 51 where the vehicle reached speeds of 64.1 miles per hour and 66.1 miles per hour (Tr. 795, GC. Ex. 41, R. Ex. 21).

Before he left the safety office to go home on Friday, Mr. Vopat also downloaded the Vehicle and Traffic Law speed limits for Lake Avenue and County Road 51 (R. Ex. 19) and a map of the area (R Ex. 20) (Tr. 796-797). Mr. Vopat drew a compass and a dotted line showing the route traveled by Ms. Tarry from north to south on the map (Tr. 799). R Ex. 54 is a map showing,

on pages 1 and 2 of 6, an overview of Lake Avenue from the Riverside traffic circle to the point where it intersects with County Road 51. Pages 3 and 4 of 6 show Lake Avenue from the Riverside traffic circle to Pegs Lane. Pages 5 and 6 of 6 show the southern portion of Lake Avenue.

The speed limit from the Riverside traffic to a quarter mile south of Pegs Lane is 40 miles per hour and then it increases to 55 miles per hour (Tr. 800).

Over the weekend, Mr. Vopat went over all of the information that he had gathered and concluded that the allegations against Ms. Tarry were substantiated (Tr. 802). He worked on the matter about two and a half hours on Saturday and about two hours on Sunday (Tr. 854-855). He wrote out a report of his findings, which was later typed up by Ms. Lachacz (Tr. 802, R. Ex. 21). Mr. Vopat wrote,

Ms. Tarry had operated the above vehicle in an extremely dangerous manner at times exceeding the state speed limit dramatically and operating 1033 with extreme disregard to the possible consequences of her actions. What makes matters even worse, the infractions and dangerous maneuvers were all committed with a student on board. Therefore, it is the recommendation of this department that Ms. Tarry be removed from this route and terminated without delay for the good of this company and the students we serve whose safety is paramount. (R Ex. 21).

During the hearing, a review of the video, Mr. Vopat's testimony, and the stipulations established that the following events took place with regards to the location of bus number 1033 on the afternoon of October 16, 2015:

15:04:00, Southbound on Roanoke Avenue

15:04:30, right turn on Main Street, which is also Route 25.

15:04:35, left turn on Peconic Avenue.

15:05:45, horn blown first time by Ms. Tarry (Tr. 764).

15:06:15, Riverdale traffic circle, and then the Shell station, and then the beverage distributor.

15:06:26, "you've got to be kidding me" quote and horn blown again (Tr. 764).

15:07:00, Woodhull Lane and then after that Pegs lane can be seen out passenger side windows of the bus.

15:07:07, accelerates engine, crosses over double yellow line, passing motorist, coming back over double yellow line.

15:07:18, first car goes by.

15:08:30, car belonging to motorist who called the 1-800 number to report the incident is seen in rear window as bus number 1033 waits for the light at County Road 51.

15:08:40, left turn on County Road 51.

(Tr. 764-766, 808-813).

With respect to his recommendation to discharge Ms. Tarry, Mr. Vopat also took into consideration that Ms. Tarry violated the following laws (Tr. 793, 840-844):

<u>Law</u>	<u>Citation</u>	<u>Exhibit</u>
Speed	8 NYCRR 156.3e6	R Ex. 29, page 6 of 7
Reasonable and Prudent Speed	VTL 1180a	R Ex. 29, page 7 of 7
Reckless Driving	VTL 1212	R Ex. 29, page 7 of 7
No-passing Zones	VTL 1126	Administrative Notice

The ALJ decision completely ignores the fact that these very important vehicle and traffic laws were broken by Tarry on the day in question.

On Sunday, October 18, 2015, Mr. Vopat called Ms. Thomas to report his findings to her (Tr. 1358). Mr. Vopat told Ms. Thomas that he found Ms. Tarry to be driving aggressively, that she crossed over a double yellow line to pass and motorist, and that she was also speeding (Tr.

1359). He also reported that within mere seconds Ms. Tarry narrowly avoided a head-on collision with two cars that were traveling in the opposite direction (Tr. 793, 1359). When asked at trial what would have been the impact of cars hitting head-on, the ALJ did not let Mr. Vopat answer (Tr. 793). Obviously, keeping in mind Tarry reached a top speed of 59.8 miles per hour and the speed of oncoming traffic would have been at least the posted speed limit of 40 miles per hour, the answer was death of the student and Ms. Tarry. Please also watch the video, witness the speed of the vehicle through the passenger side windows, listen to the sound of the engine scream, and take note of the sound of the wheels quickly traveling over the cement highway. Mr. Vopat recommended that Ms. Tarry be terminated, which recommendation Ms. Thomas approved (Tr. 1359-1361).

Based on the foregoing, the Respondent has established a legitimate, non-discriminatory reason for its decision to discharge Ms. Tarry, her engaging in extremely dangerous driving with a child on her bus. No school bus transportation company would continue to employ a driver who speeds, crosses over a double yellow line to pass a slower vehicle, and narrowly misses a head-on collision by a mere three seconds, a collision that would have killed Tarry and the student she was transporting.

F. Ms. Tarry's Account Of The Events Of October 16, 2016 Has No Credibility

According to Ms. Tarry, she was never on Lake Avenue on the day in question, October 16, 2015 (Tr. 643). Rather, she asserts that she traveled south on Roanoke Avenue, made a left onto Main Street, made right onto Peconic Avenue, came to the traffic circle, made a right onto County Road 24, and made a left turn on County Road 51 (Tr. 757 to 758). However, the falsity of Ms. Tarry's testimony is clearly shown by the GPS records, which unequivocally show that after she entered the Riverdale traffic circle she did not make a right turn on County Road 24 but proceeded south on Lake Avenue, a two lane road with sidewalks and side streets, drove past

Woodhull Lane and Pegs Lane, increased her speed dramatically, and then proceeded onward to the intersection with County Road 51 (GC. Ex. 41). Please watch the video. Thus, Ms. Tarry's entire defense to the claim she was speeding, crossed over a double yellow line, and narrowly avoided a head on collision is based on the false representation that she did not travel on Lake Avenue.

Ms. Tarry also generally denies going over any double yellow line (Tr. 634) and specifically testified that she never crossed over a double yellow line on Lake Road (Tr. 657). The General Counsel submitted into evidence a photo of County Road 51 (GC. Ex. 39). Ms. Tarry testified that County Road 51 is two lanes northbound, two lanes southbound, with a grassy median between the lanes (Tr. 636). The video clearly shows Ms. Tarry driving on a two lane road at the time of the pass, not a four lane highway with a grass median.

Based on the forgoing, Ms. Tarry lacks any credibility with respect any aspect of the events of October 16, 2015, and her misrepresentations about her whereabouts on that day also shows her testimony in all other respects is not credible.

G. A Review of Exemplars Shows That Ms. Tarry Was Not Singled Out And That She Would Have Been Discharged Notwithstanding Any Alleged Union Activities

Janice Marrinaccio (failing to check her bus was empty), Deborah Friscia (swerving on the highway), and Antonio Ramos (talking on cell phone) were discharged for conduct less severe than that of Ms. Tarry. Moreover, since the elevation of Joseph Vopat to Safety Supervisor, the Safety Department has taken a much more proactive approach to investigating accidents and complaints by school districts, parents, and the public, more so than anybody else who has held that position (Tr. 1356-1357). Mr. Vopat goes to great lengths to investigate complaints and accidents and recommend appropriate action. In addition to recommending the discharge of Ms. Tarry, Mr. Vopat has recommended the discharge of six drivers and matrons during the 2015 to

2016 school year, and in each of those cases Ms. Thomas accepted his recommendations (Tr. 1359-1361). Please see the discussion in Section I, Exemplars, in the Statement of Facts above pertaining to the discharges of Kathy Tallerine, Joan Perry, Cynthia Piercy, Rhona Gorman, Anthony Houston, and Karen Mellon.

Further, the ALJ's discussion of exemplars and General Counsel Exhibit 53 and conclusion that the discipline meted out to Tarry was unduly and unexplainably harsh is erroneous and requires reversal. First, all persons referenced by the ALJ as having warnings regarding speeding were written up prior to Vopat becoming a Safety Supervisor in July 2015. See ALJ Dec. page 54, lines 10-13 and GC Exh. 53, pages 46, 70, 80, and 104 to 107). With regards to accidents, the ALJ did not provide the page numbers of GC Exh. 53 that support the claim that drivers involved in accidents received disciplines less severe than Tarry, but the warnings found by Respondent's counsel are all dated prior to Vopat becoming a Safety Supervisor (GC Exh. 53, pages 7, 61, and 73).¹² Further, the exemplars listed on page 54, lines 25 to 36, as is the case with all of the exemplars cited by the ALJ, did not cross over a double yellow line at more than 55 miles per hour and narrowly averted a head-on collision that would have resulted in the deaths of driver and the students they were transporting. The refusal to accept the magnitude of the severity of Tarry's conduct is evident throughout the ALJ decision, including not allowing Mr. Vopat to testify regarding the severity of the impact of a head-on crash (Tr. 793) and the limiting of the testimony regarding the importance of not violating vehicle and traffic laws Tarry violated (Tr. 840-844).

Based on the foregoing, Ms. Tarry was discharged due to her own extremely dangerous driving, and the evidence shows that Respondent would have taken the same action absent any alleged protected activity.

¹² The copy of GC Exh. 53 provided to Respondents was not page numbered so we apologize if our page numbers are off by a page or so).

H. The Remainder Of The Conclusions Are Erroneous And/Or Fail To Establish That Tarry Would Not Have Been Discharged But For Her Alleged Protected Activities

The ALJ concluded that the fact that Vopat continued his investigation over the weekend is “suspicious” (ALJ Dec. page 11, lines 4 to 7). First, Mr. Vopat was not asked if he ever spent time over the weekend investigating other complaints. Second, there was a legitimate reason for Vopat to continue his investigation over the weekend, protecting the safety of children, which is of the utmost importance to the Respondent. By verifying whether the manner in which Tarry drove was dangerous, Respondent was able to prevent a dangerous driver, Tarry, from getting behind the wheel early Monday morning. This is demonstrated by the fact that Vopat instructed dispatch to remove the key from Tarry's bus and to inform her as soon as she arrived for work to report to the safety trailer (Tr. 814, 1360). Similarly, the ALJ's statement that Vopat could have waited until Monday to finish his investigation and that Respondent could have suspended Tarry pending further investigation (ALJ Dec. page 53, lines 22 to 25) may be true, but it is not proper for the ALJ to substitute his judgment in place of that of a school bus company that is entrusted with the safe transportation of over 7,000 lives on a daily basis. Further, the ALJ's musing fails to take into consideration the fact that the student riding the bus could have reported the incident to his parents or the South Country School District Transportation Director and the fact that the Company must be in a position to respond to inquiries and show it had handled the matter appropriately if it ever wants to win the bid for the contract again.

The ALJ also concluded that the manner in which the discharge meeting was conducted on October 19 infers anti-union animus. However, that is not the case. Upon Ms. Tarry' arrival, Mr. Vopat asked Ms. Tarry to wait in the classroom portion of the trailer so Mr. Vopat could review the video and the results of his investigation with Mr. Shukri, who was not present on Friday, prior to carrying out the discharge (Tr. 814, R Ex. 23). After Mr. Shukri agreed with the decision, Mr.

Vopat and the safety team went forward with the termination. Thus, Vopat shared the results of his investigation with Shukri on Monday morning (Tr. 814). As stated by Vopat, he could have delayed the proceedings had Shukri not agreed with the findings. However, Shukri agreed (Tr. 814). Thus, there is nothing untoward, perplexing, or nonsensical in Vopat sharing the evidence with Shukri before proceeding with the discharge.

There was also nothing untoward about how the meeting with Tarry was handled. Mr. Vopat told Ms. Tarry that the Company had received a complaint from a motorist who stated that she went around, passed her in oncoming traffic, and then swerved back in front of her again (Tr. 815, R Ex. 23). Vopat told Tarry that the motorist said it was on County Road 51. In response to that statement, Ms. Tarry told Mr. Vopat that County Road 51 is a four lane highway (Tr. 815, R Ex. 23). Mr. Vopat agreed, but said that "the incident happened on Lake Avenue. We have the video footage. We have the GPS data." (Tr. 815, R Ex. 23). Mr. Vopat also told Ms. Tarry that the allegations have been substantiated and that her services with the company are being terminated (Tr. 816, R Ex. 23). Ms. Tarry responded, "that's crazy, I want to see the video" (Tr. 778, 816, R Ex. 23). The safety team then accommodated Ms. Tarry's request and allowed her to watch the video. After she watched the video, Ms. Tarry had an opportunity to offer a further explanation or write a statement on the warning notice; however, she did not do so. Rather, in her typically brash fashion, Ms. Tarry said, "that's all you got, that's nothing, I will own this company" (Tr. 778, 816-817, R Ex. 23). Ms. Tarry was then asked to leave the property and, after she initially refused, she complied (Tr. 817, R Ex. 23).

The ALJ also takes issue with the fact that the decision to discharge Ms. Tarry was made prior to "interviewing" Ms. Tarry. Mr. Vopat was asked, "Did you interview Ms. Tarry?" (Tr. 868). He replied, "Did I interview Ms. Tarry? No." (Tr. 868). He said, "I didn't need to due to all the other evidence I had." (Tr. 868). Nonetheless, as stated above, this is just a matter of

semantics. Ms. Tarry had the opportunity to claim the dangerous incident occurred on County Road 51, which is unequivocally untrue, view the video, and write down a rebuttal on the warning notice but she declined to take advantage of that opportunity (Tr. 815-817, 868, R Ex. 23). Ms. Thomas also testified that the Company does not necessarily seek a written statement prior to taking disciplinary action: "Typically, if you have evidence of what the infraction may be or if you're going by video, if you're going by GPS, if you're going by certain testimony from other people that may have been involved in it, there are outlying circumstances." (Tr. 1467-1468). Thus, there was nothing that shows anti-union animus with respect to the manner in which Ms. Tarry was informed of her discharge. In fact, the Company could have merely called her on the phone, told her not to report to work that Monday morning, and sent her a letter. The fact that Mr. Vopat attempted to meet with Ms. Tarry and explain the basis for the decision shows a lack of antiunion animus.

With regards to the ALJ's claim the Company did not follow progressive discipline, please see Exception number 18 to the ALJ's Decision.

Based on the foregoing, the General Counsel has not carried its burden of proving that Respondent bore animus toward Ms. Tarry with respect to the decision to discharge.

Assuming solely for the purposes of argument that some antiunion animus is perceived to be present in this case, which Respondent denies, then Respondent has proven by a preponderance of the evidence that, given the extremely dangerous conduct in which Ms. Tarry engaged, EEBL would have discharged Ms. Tarry absent the protected conduct. Ms. Tarry was undeniably speeding on a two lane road, Lake Avenue, crossed over a double yellow line, passed a vehicle on the right, and then crossed back over the double yellow line, narrowly avoiding a head-on collision by mere seconds, with a child on the bus (Tr. 793). Respondent would have undoubtedly discharged Ms. Tarry absent any alleged protected activity.

VI. CONCLUSION

Based on the foregoing, with respect to each and every allegation in the Amended Consolidated Complaints regarding Sharon Tarry, Respondent's evidence has clearly established that: 1. it had legitimate non-discriminatory reasons for taking the actions it took; 2. its reasons were not a pretext to hide an unlawful motivation for its actions, and 3. it would have taken the same action absent the Tarry's alleged concerted or protected activity.

Dated: December 19, 2016
Jericho, New York

Respectfully submitted,

By:



Clifford P. Chaiet
W. Matthew Groh
Naness, Chaiet & Naness, LLC
*Attorneys for Respondent East End Bus
Lines, Inc.*
375 North Broadway, Suite 202
Jericho, NY 11753
(516) 827-4300