

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

HARBOR RAIL SERVICES COMPANY

and

Case 25-CA-174952

ERIC SCHULTZ, an Individual

GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

Caridad Austin
Counsel for the General Counsel
National Labor Relations Board
Region Twenty-Five
Minton-Capehart Federal Building, Room 238
575 North Pennsylvania Street
Indianapolis, Indiana 46204
Phone: (317) 991-7636
Fax: (317) 226-5103
E-mail: caridad.austin@nlrb.gov

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Comes now Counsel for the General Counsel and respectfully submits this General Counsel's Brief to the Administrative Law Judge in support of the General Counsel's position in the cause herein, and states as follows:

I. INTRODUCTION

This case involves the General Counsel's allegation that Harbor Rail Services Company (herein called Respondent) violated Section 8(a)(1) of the National Labor Relations Act (herein called the Act). On January 8, 2016, Respondent violated Section 8(a)(1) of the Act by discharging Employee Eric Schultz (herein called Schultz) because he concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by demanding that Respondent provide employees a lunch break.

II. STATEMENT OF FACTS

A. Respondent's Operations

Respondent is a corporation with an office and place of business in Belvidere, Illinois. (TR 28). Respondent is in the business of pre-tripping, inspecting, and repairing auto rack rail

cars for the railroad industry. (TR 28). Respondent began its operations at its Belvidere facility in October 2015. (TR 28). Prior to October 2015 another company, Road & Rail, operated the Belvidere facility. (TR 28-29). Respondent employs approximately 10 employees in various job classifications, including pre-trip laborer, repairman, welder, and inventory clerk. (TR 38). The facility operates one shift that begins around 6:00 a.m. until the cars are finished for the day, which could result in a longer than an 8-hour work day. (TR 39). The pretrip laborers work outside and are responsible for cleaning the inside of rail cars, inspecting wheel chocks, removing debris, replacing door edges, protecting the inside of the rail car to prevent damage, blowing out the cars, and inspecting the cars. (TR 38). The rail yard is a little over a mile in length, and the lines are separated by number. (TR 83). The mainline is the furthest line north, and line eight is the farthest line at the south end of the yard. (TR 83).

Respondent's General Manager, Albert DeLeon, is located in Dallas, Texas, and he oversees five of Respondent's facilities, including the Belvidere facility. (TR 27, 28, 29). DeLeon has held this position since August 2015. (TR 27). Respondent's location supervisors report to DeLeon. (TR 29). Location supervisors oversee locations, ensure job performance such as filling and pre-tripping rail cars, and they perform administrative tasks in an office. (TR 29-30). Location supervisors are also involved in reviewing inventory, conducting daily safety meetings, hiring employees, disciplining employees, and firing employees. (TR 104, 121-122). When Respondent began operations in October 2015, Steve Ostenson served as the Belvidere location supervisor until December 17, 2015. (TR 102). After that date, Ryan Schanfish served as the Belvidere location supervisor from December 2015 until August 2016. (TR 118, 120).

In addition to the location supervisor, there is also a team lead at Respondent's facility. (TR 31). The team lead is responsible for following through with the instructions that the

location supervisor receives from the railroad and to perform on the tracks. (TR 105). Team leads also move employees around to different jobs without consulting the location supervisor. (TR 105, 126). When Respondent began operations in October 2015 at the Belvidere facility, the team lead was Adam Gamblin. (TR 32). Gamblin stopped working for Respondent around December 15, 2015. (TR 72-73, 104-105). Schanfish served as the team lead for a very short time (for about four hours) after Gamblin quit. (TR 104, 120). Effective January 1, 2016, Kenyada “Ken” Clark became the team lead for Respondent, and he served in that role for about six months, and then he became the location supervisor. (TR 32-33, 158, 159, G.C. Exh. 2).

Clark previously served as a laborer for Respondent. (TR 33). When Clark became a team lead, he received a pay raise from \$10.50 to \$13.00 per hour. (TR 33-34, G.C. Exh. 2). As a team lead, Clark assigned the pretrip employees their positions and what duties they were to perform each day. (TR 161). Clark also interviewed applicants for hire with Schanfish, the location supervisor, and Clark asked questions throughout the interview of the applicant. (TR 123). After applicant interviews were completed, Clark and Schanfish would normally call DeLeon about hiring the applicants. (TR 124). Clark was also involved in the firing process for employees. (TR 125). Clark and Schanfish discussed any employee issues, and then they called DeLeon and discussed the issues with him. (TR 125). Clark had the authority to send employees home if an issue needed to be dealt with prior to speaking with Schanfish. (TR 146, 161-162). For instance, Clark once immediately sent an employee home without discussion with anyone else after the employee failed to clear a live track. (TR 155-156).

The chain of command for employees if they have issues in the yard is to start with the team lead, and if the team lead cannot resolve the issue then the issue is taken to the location supervisor. (TR 105). If employees had an issue on the yard, employees would speak with Clark

or Schanfish. (TR 35). However, Schanfish was not always on the yard so employees would speak with Clark. (TR 36, 85). The chain of command for employees was to start with Clark, and then Clark would notify Schanfish of any issues. (TR 85, 126). Clark had the authority to resolve any employee issues on the spot and did not have to consult Schanfish. (TR 126). Clark did not have to consult with Schanfish when moving employees to different job assignments because Schanfish trusted Clark's judgment. (TR 126).

Due to General Manager DeLeon's physical distance from the Belvidere facility, he relied on Clark and Schanfish to be his eyes and ears at the plant. DeLeon is not physically present every day, nor even every month, at the Belvidere facility, and was there as little as once every three months. (TR 29, 127). As a result, DeLeon relied on Clark and Schanfish to know what was going on in the Belvidere facility. (TR 37). DeLeon received phone calls at least once a day from Clark and Schanfish. (TR 29, 37). Clark and Schanfish called DeLeon about issues with employees. (TR 37). DeLeon also communicated daily with the location supervisor via e-mail about what was happening in the facility, issues with customers, and issues with employees. (TR 31, 127-128). These e-mail communications also alerted DeLeon of employee performance issues. (TR 128). For instance, on January 5, 2016, Schanfish e-mailed DeLeon about the work performance of employee Louis Milka. (TR 129, G.C. Exh. 6).

When Respondent began operations at the Belvidere facility, almost all of its employees were hired through a temporary staffing agency named Network Staffing Solutions. (TR 40). Temporary employees have around a 90-day probationary period. (TR 131). After the probationary period is completed, the employee gets uniforms, a benefits package, and an evaluation and pay increase. (TR 131). Respondent maintains an employee handbook that applies to the temporary employees. (TR 133, G.C. Exh. 4). Temporary employees are required to be

familiar with the policies and procedures in the employee handbook. (TR 134-135, G.C. Exh. 7). If an employee is disciplined, Respondent informs the temporary staffing agency and then Respondent assesses whether it is grounds for termination of the temporary employee. (TR 40). DeLeon ultimately makes disciplinary decisions. (TR 40). Respondent maintains a “Rest Periods and Meal Periods” policy in the employee handbook that applies to all employees, including temporary employees (TR 44), and it provides the following:

REST PERIODS

All hourly employees will receive two 15-minute paid rest breaks during any day in which the employee works five hours or more. If an hourly employee works less than five hours, only one paid 15-minute rest break will be provided. In any case, the employees’ supervisor will establish the rest period time schedule for each employees.

MEAL PERIODS

All hourly employees working five or more hours in a day will receive one 30 minute unpaid meal period. Company management will establish the meal time schedule for each employee.

(G.C. Exh. 4, pg. 11). Supervisors approve when employees take breaks, regardless if the break occurs before, on, or after the five-hour mark of the shift. (TR 63, 64, 65).

B. Employee Eric Schultz’s Discharge

Employee Eric Schultz began working for Respondent in October 2015. (TR 67). Schultz was hired through a temporary staffing agency. (TR 67). Schultz worked as a pretrip laborer, also known as a prepper, where he was responsible for cleaning and maintaining rail cars. (TR 48, 67). Like the other laborers, Schultz performed his job duties outside. (TR 69). When Schultz first began working for Respondent, he reported to Steve Ostenson and Adam Gamblin. (TR 69). Prior to Schultz’s termination, he reported to Ryan Schanfish and Ken Clark. (TR 69). In Schultz’s day-to-day work, he never reported to the temporary staffing agency. (TR 72). Schultz testified that Schanfish spent the majority of the time in the office and that he did not see him out

in the yard every day. (TR 70). Schultz saw Albert DeLeon approximately two times at Respondent's Belvidere facility. (TR 72).

Schultz was terminated on January 8, 2016. (TR 48, 67). On January 8, Schultz began his work day at 7:00 a.m. (TR 73). The weather conditions that day were cold and rainy, and Schultz performed his regular job duties of cleaning and maintaining the auto racks and rail cars. (TR 73). At approximately 12:30 p.m., which was five and a half hours after the shift started, Schultz engaged in a general conversation with around six employees about getting hungry and what lunch plans were for the day. (TR 74, 86-87). Schultz and the employees then called on the two-way radio to the office to let either Clark or Schanfish know that they would like to take a break. (TR 74). The employees had around 80 to 100 cars on the line that day, and they were about halfway done with the line when they made the call to ask to take a break. (TR 85). At that moment, Clark drove towards the employees in the pickup truck. (TR 74). The employees were working halfway down the line on the mainline of the rail yard. (TR 83). Clark got out of his vehicle and approached the employees. (TR 98). Schultz asked Clark if the employees could go ahead and take a break. (TR 75). Schultz told Clark that they had not had a break at that point in time during the day, and that the employees were cold, fatigued from working in the weather, and they wanted just at least 15 minutes to grab a cup of coffee to warm up. (TR 75). Clark responded that the employees needed to finish the current line of cars and that they had approximately another hour to go. (TR 75). Schultz then again asked if they could stop where they were, take a lunch break, and then come back and finish. (TR 75-76). Clark responded that the employees needed to finish the job and possibly go on to another set before any breaks would be given. (TR 76). The employees became irritated at Clark's response and began cursing. (TR 87, 90). As was common practice on the yard, employees regularly used obscenities when

speaking at the yard. (TR 80, 110). Schultz also used curse words as he persisted that employees receive a lunch break, but he did not specifically direct any use of the “F-word” towards Clark. (TR 88). Clark also used profanity during the exchange about breaks with Schultz. (TR 100). Clark then got in his truck, made a phone call for approximately two minutes, exited the vehicle, and then told the crew that they could go ahead and take a regular lunch break and return to regular duties after that. (TR 76).

The employees then proceeded to take a thirty minute lunch break. (TR 77). After lunch, Schultz and the other employees returned to finish the line of cars. (TR 77). At approximately 1:30 p.m., an employee named Zach came in a vehicle and said that Schanfish needed to speak with Schultz in the office. (TR 77, 78). In the time between Schultz returning to work after lunch to when he was called into the office, Schultz did not speak with Schanfish, Clark, or DeLeon. (TR 78, 79). When Schultz arrived at the office, he asked Schanfish what was going on, and Schanfish said that he was ending Schultz’s employment and that his services were no longer needed. (TR 79). Schultz asked Schanfish why he was being terminated because they were short staffed, the work day was not done, and there was still work to be done. (TR 79). Schanfish responded that if Schultz wanted answers he needed to contact DeLeon on the phone and that Schanfish did not have the answers to the reason for his termination. (TR 79).

The decision to terminate Schultz was made by DeLeon. (TR 48, 137). DeLeon informed Schanfish over the phone of his decision to terminate Schultz. (TR 48, 137). DeLeon did not speak with Schultz, nor was he present at the facility, on the day of Schultz’s termination. (TR 48, 137). DeLeon testified that he decided to terminate Schultz after speaking with Schanfish and because of Schultz’s “conduct of using abusive language towards employees.” (TR 49). Specifically, DeLeon testified that Schutz’s abusive language was “the F word” and that Schultz

was “using fuck, stating towards employees in so many – fuck the employee who he was talking to, fuck this job, and so on.” (TR 49). DeLeon testified that Schanfish told him that Schultz said this to Clark. (TR 49-50). Schanfish testified that he did not recall Schultz directing any profanity at him on the day of Schultz’s termination. (TR 138). Prior to Schultz termination, Schultz had never received discipline. (TR 51, 108).

III. CREDIBILITY

Throughout the hearing, Kenyada Clark gave contradictory testimony, was purposely evasive, self-serving and gave outrageously false and implausible accounts of events. As example, Clark’s testimony regarding his interaction with Schultz on the day of Schultz’s termination is contradictory and inconsistent with the affidavit he previously provided to Respondent under penalty of perjury on November 16, 2016. (G.C. Exh. 8). Clark claimed in his testimony that he heard Schultz “trying to get everybody in an uproar” and was “complaining about the weather, because it was rainy and it was kind of cold. So he was just really just fussing about working out there and being on the train, versus being in a buggy.” (TR 171). Clark also testified that after he told Schultz to stop complaining, Schultz then began yelling and cussing, and proceeded to call Clark a “fat F’er, fucking F’n nigger.” (TR 166). Clark then testified, “At that point, when he said the ‘nigger’ word, that’s when I had him removed. Everything else, I was kind of letting it go past. When he said that, I radioed it in and took off the train.” (TR 166). Clark then testified that he called Schanfish over the radio, told Schanfish that Schultz used the “N” word, and asked Schanfish to remove Schultz. (TR 165, 166) However, it is clear that Clark’s testimony claiming that Schultz used the “N” word and other derogatory terms is a complete fabrication after the fact. When DeLeon, as the decision maker in Schultz’s termination, was asked what alleged “abusive language” Schultz used on the day of his

termination, DeLeon never testified that Schultz used the “N” word or said “fat F’er”. (TR 49). In addition, in Clark’s November 16 affidavit he states that after he directed Schultz to perform a task, Schultz yelled “Fuck this shit!” and “Fuck you and fuck this job!”, and that Clark then asked Schanfish to remove Schultz from the site. (G.C. Exh. 8). Nowhere in Clark’s affidavit does he mention that Schultz called him such appalling words such as the “N” word or “fat F’er”. (TR 174).

Despite Clark’s attempt to justify why he did not mention the “N” word in his affidavit, that explanation is nonsensical. Clark claimed in testimony that he did not mention the “N” word in his affidavit because he did not want to make it a “race issue” or make it “really personal with HR”, that he did not want “sympathy”, and that he did not want Schultz to be terminated based off of him using the “N” word. (TR 176-177). However, just a few moments before, Clark testified that he told Schanfish that Schultz used the “N” word and asked for his removal. (TR 166). Clearly, Clark’s testimony attempts to suggest that Schultz’s alleged use of the “N” word was what drove Clark to ask for Schultz’s removal. Yet, Clark unconvincingly explains that he did not want to mention the “N” word in his affidavit because he did not want Schultz to be terminated for that reason. (TR 177). Also adding to Clark’s illogical explanation for omitting the use of the “N” word in his affidavit was that he did not want Schultz to be terminated based on his alleged use of those words, yet Clark provided the affidavit over ten months after Schultz’s termination.

Another example of Clark’s contradictory and unreliable testimony involves his description of Schultz’s complaints on the day of his termination. At first Clark testified that he did not recall what Clark was complaining about because he was “complaining about whatever” (TR 165), but when pressed during cross-examination Clark said that Schultz “was trying to get

everybody in an uproar” and was “complaining about the weather, because it was rainy and it was kind of cold. So he was just really just fussing about working out there and being on the train, versus being in a buggy.” (TR 171). Once again, Clark’s testimony contradicts his November 16, 2016 affidavit where he stated, “At no time did Schultz involve anyone else in the discussion, nor did he talk about anyone else’s job, the working conditions, or anything else other than refusing to work his assignment.” (G.C. Exh. 8). Furthermore, Clark claimed that Schanfish saw Schultz still “enraged” and “acting out” after Clark asked Schanfish to remove Schultz. (TR 178). In his affidavit, Clark also asserted that Schultz cursed and yelled at both Clark and Schanfish. (G.C. Exh. 8). However, Schanfish testified that he did not recall Schultz yelling any profanity at him on the day of Schultz’s termination. (TR 183).

Similar to Clark, Albert DeLeon provided inconsistent and unreliable testimony. Regarding Respondent’s employee handbook, DeLeon first stated that the handbook did not apply to temporary employees. (TR 43). Then when DeLeon was asked whether temporary employees also had 30-minute lunch breaks like the regular employees, DeLeon changed his testimony and said that the rest periods and meal periods policy in the handbook did apply to temporary employees. (TR 44). DeLeon then incredulously stated that the rest period and meal periods policy was the only policy in the handbook that applied to temporary employees. (TR 45). However, as an employee disciplinary record for another temporary employee demonstrates, temporary employees are responsible to be familiar with the policies and procedures of Respondent’s Handbook. (G.C. Exh. 7). As Schanfish testified, this language on the employee disciplinary form for a temporary employee was directly supplied by DeLeon (TR 134-135), which contradicts DeLeon’s testimony about the application of the handbook to temporary

employees. Furthermore, Schanfish, the onsite supervisor, testified that the employee handbook applied to temporary employees. (TR 132-133).

In contrast, General Counsel's witnesses testified in a straight forward and honest manner and should be credited over Respondent's witnesses wherever their testimonies conflicted. Schultz's and Schanfish's corroborating testimony regarding what Schultz said on the day of his termination should be credited over Clark's testimony. Schultz denied calling Clark an "F'ing N word" or a "fat F'er" on the day of his termination. (TR 180). Schanfish corroborated Schultz by testifying that he had heard another employee during a separate incident call Clark an "F'ing N word", and that it was not Schultz who made the comment. (TR 182). As Schanfish testified, in a completely separate incident from the day of Schultz's termination, another employee was originally sent home for the day, but then the employee "blew up and started cussing and punching things" and on his way out he made those comments to Clark. (TR 182). Regarding the testimony of Ostenson and Schanfish, both should be credited because neither one have anything to gain from this proceeding because both of them are no longer employed at Respondent's facility. Both Ostenson and Schanfish testified in a direct and forthright manner, and did not attempt to evade questions.

Although Respondent may argue that Schanfish was disgruntled with Clark for sending him home right before Schanfish resigned from employment with Respondent, that argument by Respondent is illogical because Clark was not Schanfish's supervisor when Schanfish stopped working for Respondent. (TR 184-185). In addition, any attempt by Respondent to discredit Schanfish's testimony about Schultz based on a previous written statement made by Schanfish could be attributed to the confusing nature of the questions asked by Respondent's representative about Schanfish's characterization of Schultz as an employee. (TR 139, 141, Resp. Exh. 2). If

anything, Schanfish's previous written statement about Schultz demonstrates that Schanfish does not hold some sort of allegiance to Schultz, and therefore makes Schanfish's testimony that corroborates Schultz's testimony even more credible. Thus, where material conflicts arise, General Counsel's witnesses should be credited over Respondent's witnesses.

IV. ARGUMENT

A. Lead Man Kenyada Clark was a Supervisor under Section 2(11) of the Act.

Section 2(11) of the Act defines a supervisor as follows:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Individuals are statutory supervisors if (1) they hold the authority to engage in any one of the supervisory functions enumerated above; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of "independent judgment;" and (3) their authority is exercised "in the interest of the employer." See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Board has explained that in order to exercise independent judgment, an individual must "'at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.' A judgment is not independent 'if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.'" *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 1 (2014) (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006)). The burden of proving

supervisory status rests on the party asserting that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001).

The record demonstrates that Clark, who was the team lead at the time of Schultz's discharge and played an integral role in that discharge, was a supervisor under Section 2(11) of the Act because he possessed several of the primary indicia of supervisory status. As a team lead, Clark assigned the pretrip employees their positions and what duties they were going to perform each day, and he could move employees around to different jobs without consulting the location supervisor. (TR 105, 126, 161). In so doing, Clark was not dictated or controlled by detailed instructions or by higher authority, as is evidenced by Schanfish's testimony that Clark did not have to consult him because Schanfish trusted Clark's judgment. (TR 126). Clark even admitted to specifically assigning Schultz to work "A" deck, rather than drive the supply buggy, on the day of Schultz's termination. (TR 170-171). Clark was also involved in hiring by interviewing job applicants with Schanfish and asking questions of applicants in the interviews. (TR 123). After the interviews, Clark and Schanfish would then report their findings to DeLeon about hiring new employees. (TR 124).

Clark also had the authority to adjust employee grievances. Specifically, Clark had the authority to resolve any employee issues on the spot without consulting with Schanfish. (TR 126). Employees in following the chain of command would typically go first to Clark with their issues. (TR 85, 126). The most glaring example in the record of Clark adjusting grievances was on the day of Schultz's termination. After Schultz asked Clark if the employees could get a break, Clark initially denied employees their break. (TR 75). After Schultz continued to insist that employees get a break, Clark got in his truck, made a short phone call, then returned to the employees and granted them their break. (TR 76).

Although DeLeon testified that he ultimately made disciplinary decisions, Clark was also involved in the discipline and discharge of employees, and as evidenced by Schultz's discharge and by Clark's own admission, he effectively recommended the removal of employees. For instance, Clark had the authority to send employees home without first consulting with Schanfish, and Clark even did so on at least one occasion when an employee committed a safety violation by failing to clear a live track. (TR 146, 155-156, 161-162). Clark was involved in the firing process for employees, and he and Schanfish would call General Manager DeLeon with employee issues. (TR 125). Due to DeLeon's physical distance from the Belvidere facility, he relied on Clark and Schanfish to be his eyes and ears at the plant.¹ DeLeon received phone calls at least once a day from Clark, like he did from Schanfish, and Clark reported to DeLeon about employee issues. (TR 29, 37). With regard to Schultz's discharge, Clark admits that he asked for the removal of Schultz. (TR 165, 166, G.C. Exh. 8). Specifically, Clark testified, "I called and had him removed from my presence and the track." (TR 178). The removal of Schultz at the insistence of Clark came with no independent investigation other than Clark's claims of how the incident with Schultz occurred. *See Progressive Transportation Services*, 340 NLRB 1044 (2003) (supervisory status found when deck lead supervisor made recommendation to discipline employee and such recommendation was accepted by upper management without further investigation). This is evidenced by the fact that DeLeon, the decision maker, did not speak with Schultz, nor was he in person at the facility, on the day of Schultz's termination. (TR 48, 137). In fact, in the time between when Schultz returned to work after lunch to when he was called into the office for his discharge, Schultz did not have a conversation with Schanfish, Clark, or DeLeon about the incident with Clark. (TR 78, 79). Although Counsel for the General Counsel

¹ DeLeon relied so much on Clark that Clark was even granted authority to send Supervisor Schanfish home based on Schanfish's work performance, although Schanfish was Clark's superior. (TR 185).

contends that the record supports that Clark made the recommendation to DeLeon to discharge Schultz, regardless of who Clark made the recommendation to, there was no independent investigation done prior to Schultz's termination. Thus, Clark clearly had the authority to recommend the discharge of employees, and he effectively did so regarding Schultz.

Having satisfied several of the primary indicia of supervisor status, Clark also possesses secondary indicia of supervisory status. For example, Clark's rate of pay increased from \$10.50 to \$13.00 per hour when he changed positions from laborer to lead man on January 1, 2016. (G.C. Exh. 2) *See Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004) (finding individuals who had authority to effectively recommend discipline also possessed secondary indicia based on higher hourly rate than employees). Clark also chaired the morning meetings (similar to Schanfish), which is when job duties were assigned to employees for the day, such as who would drive the supply buggy. (TR 97). In addition, in Clark's affidavit he admits to being a supervisor "at all relevant times" and that he worked in that capacity with Schultz. (G.C. Exh. 8). Also in his affidavit, Clark admits that he "directed" Schultz to perform certain job duties on the day of Schultz's termination. (G.C. Exh. 8). Furthermore, in accordance with Respondent's employee handbook and its "Rest Periods and Meal Periods" policy, which provides that supervisors or management will establish break times for employees, Clark acted as a supervisor in determining whether to deny and then grant Schultz's request for a break for employees. (TR 75-76). Based on Clark's possession of supervisory authority, his use of independent judgment, and that his authority was exercised in favor of Respondent, the evidence demonstrates that as a team lead Clark acted as a 2(11) supervisor under the Act.

B. Respondent Violated Section 8(a)(1) When It Discharged Employee Eric Schultz Because He Concertedly Complained to Respondent Regarding the Wages, Hours, and Working Conditions of Respondent's Employees by Demanding that Respondent Provide Employees a Lunch Break

On January 8, 2016, Respondent discharged Employee Eric Schultz because of his concerted complaints demanding that employees receive a lunch break, in violation of Section 8(a)(1). The Board holds that the discharge of an employee violates Section 8(a)(1) of the Act if the following four elements are established: (1) the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the Act; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity. *Myers Industries*, 268 NLRB 493, 497 (1984) (*Myers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 US 948 (1985). See also *Correctional Medical Services*, 356 NLRB 277, 278 (2010).

The record establishes that Schultz engaged in protected concerted activity just an hour before his discharge on January 8, 2016. In order for an employee's activity to be "concerted," the Board requires that the individual be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. *Myers Industries*, 268 NLRB 493, 497 (1984) (*Myers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 US.S 948 (1985). The Board clarified that the standard "encompasses those circumstances where individual employees seek to initiate or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Myers Industries*, 280 NLRB 882, 887 (1986) (*Myers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). On January 8, 2016, after having worked five and a half hours without a break, the employees working out on the yard were cold, wet, and hungry.

(TR 73, 74). Schultz and the employees discussed “what everybody was going to do for lunch and what our plans were for the day.” (TR 74). As a result, Schultz and the employees called on the two-way radio back to the office for either Clark or Schanfish to let them know that “we would like to take a break.” (TR 74). When Clark approached and Schultz asked Clark for employees to take a lunch break, Schultz did so on behalf of all of the employees and in a concerted manner. (TR 75).

The record also establishes that Respondent knew that Schultz’s activity was concerted. Although Clark testified that he did not recall Schultz’s complaints dealing with breaks, Clark did testify that Schultz, on the day of his discharge, was trying to “rowdy up the team, complaining about whatever.” (TR 165). Clark clarified in his testimony that Schultz “was trying to get everybody in an uproar” and was “complaining about the weather, because it was rainy and it was kind of cold. So he was just really just fussing about working out there and being on the train, versus being in a buggy.” (TR 171). Clark even described that Schultz was the “leader” of the employees when it came to “rant[ing] and rav[ing] all day long about the job, the responsibilities, the performance, what they needed to do, this and that.” (TR 164). Even if Respondent claims that it was unaware of Schultz’s concerted complaints because of its argument that Lead Man Clark was not a 2(11) supervisor, the timing of Schultz’s discharge suggests otherwise. Around 12:30 p.m., Schultz asked Clark for a break for employees, and Clark vehemently denied the break despite employees having worked more than five and a half hours that day. (TR 75). When Schultz persisted that employees receive a break, Clark got in the pickup truck, made a phone call, then returned to the crew and granted them their lunch break. (TR 76). After the employees took a 30-minute lunch, they returned to work. (TR 77). By approximately 1:30 p.m., which was just about an hour after Schultz asked for a lunch break for

employees, Schultz was taken to the office and terminated while there was still work left to be completed that day. (TR 78, 79). Again, even if Clark is not a 2(11) supervisor, it is clear from the record that he was the eyes and ears for General Manager DeLeon, and that he called him every day about any issues with employees. (TR 37). The evidence clearly supports the inference that Clark got in his truck after Schultz insisted on a lunch break for employees, Clark called DeLeon to tell him about Schultz “rowdy[ing] up the team”, and then DeLeon decided to terminate Schultz and had Schanfish inform Schultz of his termination.

The record also establishes that Schultz’s activity was protected by the Act. Schultz testified that he did not tell Lead Man Clark to “fuck off”, “fuck you”, or “fuck this job.” (TR 88). Even if we would attribute Respondent’s decision maker for its reason for terminating Schultz, specifically DeLeon’s testimony that Schultz used abusive language when he said the “F word” to employees and “fuck this job” (TR 48, 49), such language would not take Schultz out of the protections of the Act. In assessing such conduct, the Board looks at four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Datwyler Rubber & Plastics Co.*, 350 NLRB 660 (2007). In that regard, the standard for determining whether specified conduct is removed from the protections of the Act is whether the conduct is “so violent or of such serious character as to render the employee unfit for further service.” *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007). It is well-settled that the use of the word “fuck” and its variants is insufficient to remove otherwise protected activity from the purview of Section 7. *See Plaza Auto Center*, 355 NLRB 493, 494-497 (2010) (employee’s activity remained protected,

despite reference to owner as a “fucking motherfucker,” “fucking crook,” and ““asshole,” as “a single verbal outburst of insulting profanity does not exceed the bounds of the Act’s protection”).

Any alleged profanity used by Schultz occurred out on the rail yard during a discussion of employee concerns about lunch breaks, there was no physically threatening or intimidating conduct during the exchange, and any such statements would have been provoked by Respondent’s initial refusal to grant a break to employees after they had worked over five and a half hours outside in cold and rainy weather. (TR 87, 90). *See Plaza Auto Center*, 355 NLRB 493, at 495-496 (nature of outburst “not so opprobrious” as to deprive employee of statutory protection where no evidence of physical harm or threatening conduct); *Tampa Tribune*, 351 NLRB 1324, 1326 (2007) (employee’s outburst remained protected where not directed at manager and unaccompanied by physical conduct, threats, or confrontational behavior). As the record clearly demonstrates, Respondent’s workplace is rife with the use of profanity by employees, including by Clark. (TR 80, 180-181, 183). In fact, Respondent has previously tolerated the use of profanity in the work place, and it did not discharge a temporary employee because he used profanity against Clark. (TR 182). Therefore, to the extent that Schultz might have used profanity when asking for a break, Schultz’s language did not remove his concerted conduct from the protections of the Act.

Finally, the record undoubtedly shows that Schultz’s discharge was motivated by his protected, concerted activity. Again, it is the timing of Schultz’s discharge that is the clearest indication of Respondent’s motivation. About one hour after Schultz insisted on a lunch break for the crew, Schultz was taken to the office and terminated. (TR 78, 79). Schultz was terminated in the middle of the shift when there was still work to be performed that day and when Respondent was short staffed. (TR 79). In the time between Schultz returning to work after lunch

to when he was called into the office and terminated, there was no intervening event or discussion with Schanfish, Clark, or DeLeon. (TR 78, 79). Prior to Schultz's termination, he had never received discipline. (TR 51, 108). In fact, Schultz's previous supervisor Steve Ostenson testified that Schultz's job performance was good and that he did not refuse to do job assignments. (TR 107). Furthermore, Respondent stipulated that there were no disciplinary or discharge records for insubordination within the subpoenaed records that show any comparable treatment of other employees for the same reasons as Schultz's termination. (TR 55-56).

Although Respondent may attempt to characterize Schultz as a "complainer", therefore making his complaints on January 8, 2016, seem like nothing unusual, such characterization fails. During the hearing Schultz, Ostenson, and Schanfish all testified that Schultz was not a "complainer." (TR 96, 109, 141). Based on all of these circumstances, it is undeniable that Respondent was motivated by Schultz's concerted complaints when they terminated him.

Since the conduct for which Schultz was discharged was protected conduct, it is irrelevant whether Respondent would have still discharged Schultz absent his protected concerted activity. *Atlantic Steel Co.*, 245 NLRB 814 (1979). Nevertheless, Respondent also failed to show that it would have discharged Schultz even in the absence of his protected concerted activity. Respondent may try to argue that it terminated Schultz because of various other reasons, but Respondent ultimately made a feeble attempt to shift its defenses. When asked for the reasons for Schultz's termination, General Manager DeLeon, the decision maker, testified that it was because of Schultz's "conduct of using abusive language towards employees", primarily for using "the F word" and for "using fuck, stating towards employees in so many – fuck the employee who he was talking to, fuck this job, and so on" in regards to Clark. (TR 49-50). DeLeon also vaguely testified that Schanfish told him that Schultz did not

want to do some of the pre-trip job requirements as well; however, DeLeon could not recall when this alleged concern was relayed to him, and he did not believe that it was relayed to him on the date of Schultz's termination. (TR 50-51). However, when DeLeon was asked if there was any other reason that Schultz was terminated, he responded, "No." (TR 51).

Notwithstanding Respondent's specified reasons in DeLeon's testimony for Schultz's discharge, Respondent may argue that Schultz had work performance issues when he drove the supply buggy. Driving the supply buggy required employees to drive down the rail lane and to provide the pre-trip team the supplies that they needed, and the job included completing paperwork. (TR 163). Employees would sometimes switch out of the supply buggy if someone got tired and did not want to do it the entire shift. (TR 96) The person who assigned buggy duties for the day would have been "the person that chaired the morning meetings," either Clark or Schanfish. (TR 97). However, even if Schultz frequently performed supply buggy duties, Clark described driving the supply buggy as not being a desirable job and that "[a] lot of people hated driving the buggy. They said it was too boring." (TR 163). In addition, Schanfish noted in a previous written statement that Schultz "was mostly assigned to the supply buggy due to his experience with paperwork." (Resp. Exh. 2). As far as Schultz's work performance was concerned, previous supervisor Steve Ostenson testified that Schultz's job performance was good and that he did not refuse to do job assignments. (TR 107). Schanfish also testified that he did not recall Schultz refusing to do any work assignments on the day of his termination. (TR 137). Furthermore, there was no evidence of Schanfish sending any e-mails to DeLeon with concerns about Schultz's work performance similar to what Schanfish did on January 5, 2016, regarding the work performance of employee Louis Milka, who like Schultz was also terminated in early January 2016. (TR 124-125, 128) , G.C. Exh. 6).

Respondent may also try to point to a “horseplay” incident that was described in Schanfish’s written statement in Respondent’s Exhibit 2. Schanfish testified that a few employees were involved in an accident where damage occurred to company property. (TR 142). Schultz was in the vehicle that was damaged. (TR 144). A majority of the employees who were questioned about the incident stated that a rock kicked up from a wheel and shattered the window. (TR 145). However, two employees claimed that the other employees were horseplaying and throwing rocks back and forth. (TR 145). Schanfish did not recall anyone being disciplined for that incident, and Schultz was not disciplined for it. (TR 154). Furthermore, Respondent failed to produce any subpoenaed records regarding any discipline following for any reason for any alleged involvement Schultz had with any horseplay incident, nor was it cited by DeLeon as a reason for Schultz’s discharge. (TR 49-51).

Respondent weakly alluded in its case that Schultz did not log in and out of lunch breaks, specifically on the day of his termination. (TR 86, 99-100). Schanfish explained in his testimony that employees signed in and out on a time sheet, and signed in and out during lunch. (TR 152). However, as Schultz testified, most of the time employees did not sign it. (TR 86). Again, DeLeon failed to cite this as a reason for Schultz’s discharge (TR 49-51), and Schanfish testified that he never disciplined anyone for not signing in and out on their time sheet. (TR 156).

Finally, Respondent may try to argue that Schultz violated its anti-harassment policy in its employee handbook. With this argument, Respondent wants to have its cake and eat it, too. DeLeon initially testified that the employee handbook did not apply to temporary employees, and then backtracked and said the break and meal time policy was the only policy applicable to temporary employees. (TR 43-45). Yet, Respondent’s representative tried to present through its questioning of Schanfish that Respondent’s anti-harassment policy in the employee handbook

applied to temporary employees. (TR 147-148). Then, in trying to analogize Schultz's termination to a hypothetical situation, Respondent's representative asked Schanfish, "If a temporary employee used an obscenity to a supervisor² – F you, F this – would you consider that to be violative of this policy?" (TR 149). This theory was also alluded to by Respondent's witness Clark when he testified that Schultz "violated our conduct policy, so he was terminated based off that." (TR 178). As has been previously argued, DeLeon failed to cite the violation of its anti-harassment policy, or any policy in its employee handbook, as a reason for Schultz's discharge. (TR 49-51). Also, as was previously discussed above, employees at Respondent's facility frequently use profanity in the work place, including even by Lead Man Clark. (TR 80, 180-181, 183). Furthermore, Respondent tolerated the use of profanity in the work place, and it previously did not discharge a temporary employee because he used profanity against Clark. (TR 182). Therefore, any argument by Respondent that Schultz violated its anti-harassment policy must fail.

Based on the evidence, it can be established that: (1) Schultz engaged in "concerted" activity within the meaning of Section 7 of the Act; (2) Respondent knew of the concerted nature of the Schultz's activity; (3) the concerted activity was protected by the Act; and (4) Schultz's discharge was motivated by the his protected, concerted activity. Therefore, Respondent unlawfully discharged Schultz in violation of Section 8(a)(1) of the Act.

V. CONSEQUENTIAL DAMAGES

Under the Board's present remedial approach, some economic harm that flows from a respondent's unfair labor practices is not adequately remedied. *See* Catherine H. Helm, *The*

² Again, in nonsensical fashion, Respondent analogizes this hypothetical to Schultz's situation and wants to argue that Schultz made obscene comments to a "supervisor", yet at the same time it contends that Clark is not a supervisor.

Practicality of Increasing the Use of Section 10(j) Injunctions, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board’s standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondents to compensate employees for all consequential economic harms sustained, prior to full compliance, as a result of the Respondent’s unfair labor practices.

Reimbursement for consequential economic harm is well within the Board’s remedial power. The Board has “‘broad discretionary’ authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.” *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board’s remedial structure is to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g.*, *Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up*

Bottling of Miami, Inc., 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require reimbursement for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (change from computing simple interest on backpay awards to computing daily compound interest); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the

economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.³ Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (employee entitled reimbursement for out-of-pocket medical expenses incurred during backpay period and it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).⁴

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66,

³ However, an employee would not be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

⁴ Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

66 n.3 (1993) (employee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (employee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union had just successfully negotiated a CBA with the employer). In these circumstances, the employee would not have incurred the consequential financial loss absent respondent's original unlawful conduct; therefore, compensation for these costs was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and

suffering.⁵ In *Nortech Waste*, supra, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving “pain and suffering” damages that were inherently “speculative” and “nonspecific.” *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for consequential medical expenses); *Lee Brass Co.*, 16 NLRB 1122, 122 n. 4 (1995)).⁶

VI. CONCLUSION AND REMEDY REQUESTED

For the reasons stated above, and based on the record as a whole, Counsel for the General Counsel respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint. The Administrative Law Judge is requested to find the aforementioned conduct to be in violation of the Act and to recommend an appropriate remedy for said violations

⁵ This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

⁶ The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

including an order that Respondent: (1) cease and desist from all of its unlawful conduct; (2) fully reinstate Eric Schultz to his former job; (3) remove from its files any reference to the discharge of Eric Schultz on January 8, 2016; (4) make whole Eric Schultz of any benefits lost, including consequential damages; and (5) post an appropriate notice to its employees. The Judge is further requested to grant all other appropriate relief.

VII. PROPOSED NOTICE

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss wages, hours, and other terms and conditions of employment including break times, with other employees and WE WILL NOT interfere with your exercise of that right.

WE WILL NOT discharge employees because they exercise their right to discuss wages, hours and working conditions, including break times, with other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Eric Schultz immediate and full reinstatement to his former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL pay Eric Schultz for wages and other benefits he lost because of his discharge, including consequential damages.

WE WILL remove from our files all references to the January 8, 2016 discharge of Eric Schultz and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

HARBOR RAIL SERVICES COMPANY

SIGNED at Indianapolis, Indiana, this 19th day of April 2017.

Respectfully submitted,

A handwritten signature in cursive script that reads "Caridad Austin".

Caridad Austin
Counsel for the General Counsel
National Labor Relations Board
Region Twenty-Five
Minton-Capehart Federal Building, Room 238
575 North Pennsylvania Street
Indianapolis, Indiana 46204
Phone: (317) 991-7636
Fax: (317) 226-5103
E-mail: caridad.austin@nlrb.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge has been filed electronically with the Division of Judges through the Board's E-Filing System this 19th day of April 2017. Copies of said filing are being served upon the following persons by electronic mail:

John Michels, Jr.
Lewis Brisbois Bisgaard & Smith LLP
550 W. Adams St., Ste. 300
Chicago, IL 60661
Fax: (312) 345-1778
E-mail: john.michels@lewisbrisbois.com

Eric Schultz
4002 Spruce Ct.
Belvidere, IL 61008
E-mail: eschultz9799@gmail.com

Caridad Austin

Caridad Austin