

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington D.C.**

INTERMODAL BRIDGE TRANSPORT

and

Cases 21-CA-157647
21-CA-177303

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

Submitted by:

Ami Silverman
Sanam Yasseri
Counsels for the General Counsel
National Labor Relations Board, Region 21

888 S. Figueroa Street, Ninth Floor
Los Angeles, CA 90017

Tel: (213) 634-6521 (Silverman)
(213) 634-6527 (Yasseri)
Fax: (213) 894-2778
E-Mail: ami.silverman@nlrb.gov
sanam.yasseri@nlrb.gov

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I. INTRODUCTION

This is a case about Respondent Intermodal Bridge Transport (“IBT”) misclassifying its lease driver employees¹ as independent contractors and actively using this misclassification to chill their Union and protected concerted activities. IBT not only insisted that the lease drivers were independent contractors not entitled to the protections afforded by Section 7 of the National Labor Relations Act (“NLRA” or “Act”), but also used its misclassification to threaten the futility of the drivers’ organizing efforts by continuing to disguise the lease drivers’ employee status by changing documents, nomenclature, and practices without appreciably changing the drivers’ actual working conditions. IBT further declared that federal law prevented drivers from collectively negotiating wage rates with IBT or even discussing wage rates among themselves, and threatened them with ramifications for continuing their protected challenge to the misclassification itself. Moreover, these sham efforts by IBT took place in the context of other coercive conduct, including interrogations, promises of benefits, and threats, found by Administrative Law Judge Dickie Montemayor (“ALJ”) to be unlawful under Section 8(a)(1) of the Act.

On November 28, 2017, the ALJ issued his decision, wherein he correctly concluded that IBT violated Section 8(a)(1) of the Act by: misclassifying its lease drivers as independent contractors and that the misclassification of its lease drivers was an independent violation of Section 8(a)(1) of the Act; interrogating lease driver employees regarding their support of the International Brotherhood of Teamsters (“Union”); promising a lease driver employee better work in exchange for abandoning his Union support; telling lease driver employees that the Union organizing campaign would be futile; threatening lease driver employees with company closure and unspecified reprisals for supporting the Union; and suggesting that driver employees who did not

¹ The General Counsel alleged that only those drivers who lease trucks from IBT and whom IBT refers to as “independent contractors” were the subject of the Consolidated Complaint. The employee status of the 10 to 11 owner-operators working for IBT as referenced in GC Exh. 54 was not considered by the ALJ. (ALJD 4:12-13).

like their current working conditions should leave the company. (ALJD 19:19-22; 20:19-20; 22:11-12; 24:1-4; 25:19-20; 25:24-25; 25:28-29).²

On March 2, 2018, IBT filed 106 exceptions to the ALJ's decision challenging most of the ALJ's findings of fact and legal conclusions. However, the record and relevant Board precedent establish that the ALJ's decision is well-founded and that IBT's exceptions are without merit and should be rejected.

II. BACKGROUND FACTS

A. IBT's Business Operations

IBT provides drayage services and is in the business of moving goods held in containers that can be readily carried by ship, train, or truck to facilitate the movement of freight to and from various customer locations around the Los Angeles/Ontario, California area and in and out of the Ports of Los Angeles and Long Beach ("Ports") and the Intermodal Container Transfer Facility (ICTF) and BNSF rail hubs. (ALJD 4:6-9; Tr. 63).

In providing drayage services out of its Wilmington, California facility, IBT uses trucks that transport shipping containers that are fixed atop of a chassis and driven by drivers who own their own trucks or lease trucks from IBT. (ALJD 4:9-12).

B. History and Development of IBT's Wilmington Facility

In 1998, approximately 98 percent of the 16,000 drayage drivers in the Los Angeles and Long Beach Ports were owner-operators who owned their own trucks and worked hours of their own choosing moving containers for various companies. (Tr. 3902). In 2008, the Ports of Los Angeles and Long Beach instituted the Clean Truck Program, designed to improve the pollution issues caused by older trucks in and around the Ports and on the highways. (ALJD 4:19-20; Tr. 63;

² ALJD__:_ refers to page followed by line or lines of the ALJ's decision in JD(SF)-48-17 (November 28, 2017); Tr. __refers to pages of the Transcript of the hearing from August 22, 2016 to December 7, 2016; GC Exh.__ refers to GC exhibit followed by exhibit number; U. Exh. refers to Union exhibit followed by exhibit number, and R. Exh. __ refers to Respondent exhibit followed by exhibit number.

2074; 3929). This program, in conjunction with the overall economic recession in 2008, had a negative effect on the owner-operator truck drivers, who had to replace their old trucks with expensive new equipment. (ALJD 4:20-24).

These new requirements had an immediate impact on IBT's business model, which up to then had consisted entirely of owner-operator drivers. (Tr. 2075; 3931). IBT quickly discovered that many owner-operators could neither retrofit their old trucks nor afford the expensive clean trucks. (ALJD 4:22-24; Tr. 2077). Consequently, IBT lost many drivers, and the overall pool of available drivers in the Ports shrank almost 30 percent in a few months, as former drivers sought out other kinds of work that did not require such a large capital investment. (Tr. 2077; 3933-3934). As a result, IBT, on its own accord, leased fleets of newer trucks from third-party leasing companies, and then subleased those trucks to drivers in order to continue its operations. (ALJD 4:24-25; Tr. 63; 98).

Subsequently, IBT contracted with a commercial staffing agency – Staffmark – that specialized in providing drivers and other logistical workers.³ (ALJD 4:25-26; Tr. 2077; 3931). While these drivers worked at IBT, Staffmark employed them, paid them hourly, and handled all the requisite paperwork. (ALJD 4:26-27). These drivers had set start and end times, and were expected to work a fixed shift, either day or night. (Tr. 2723). IBT, through a special grant program, leased 50 trucks to be used by the drivers provided through Staffmark. (ALJD 4:24-26; Tr. 2077-2078; 3932-3933). IBT itself was leasing trucks the Staffmark employees drove, but the drivers did not have to pay any leasing fees. IBT supplied the work and the customers and Staffmark supplied the drivers. (ALJD 4:27-29).

After a few years, however, this staffing model became economically unfeasible for IBT, and the decision was made in 2010 by IBT's Assistant Vice President, Oswaldo "Ozzie" Zea

³ IBT still utilizes Staffmark for certain office workers, including dispatchers, but no longer obtains drivers from them (Tr. 2077).

(“Zea”)⁴, in consultation with his boss Gary Shubert, to stop hiring drivers through Staffmark and instead have drivers lease trucks directly from IBT on a daily or weekly basis. (ALJD 4:31-32; Tr. 2078-2079; 3936-3937).

Notably, the work drivers performed for IBT through Staffmark did not change under IBT’s leasing business model as the driving that was done by the drivers as Staffmark employees was identical to the work performed by drivers under IBT’s new model. (ALJD 4:34-35). Under this new leasing model, IBT charged drivers a daily lease rate for the trucks and other expenses, including fuel. (ALJD 4:37-39). This remains essentially the business model that IBT utilizes presently, with about 70 percent of its workforce leasing trucks from IBT and the remainder being owner-operators who own their own trucks or work under some other unspecified arrangement with IBT. (ALJD 5:8-9; Tr. 2080-2081).

III. ARGUMENT

A. IBT’s Statute of Limitations Defense is Without Merit (Exceptions 1, 103-106)

IBT takes exception to the ALJ’s decision for failing to conclude that the complaint allegations are time barred pursuant to Section 10(b) of the Act. In that regard, IBT argues that the General Counsel’s driver witnesses first began a working relationship with IBT as independent contractors several years before the filing of the original charge in August 2015. IBT also points to “Independent Contractor Applications” and “Lease and Transportation Agreements” (“LTAs”) signed by driver witnesses in 2014, to argue that lease drivers first became aware that IBT had classified them as independent contractors in 2014, outside of the 10(b) period.

Such arguments should be rejected as the Board has long held the maintenance and enforcement of an unlawful agreement or rule constitutes a continuing violation for purposes of

⁴ Zea is an admitted 2(11) supervisor of IBT. (ALJD 2:22).

tolling the Section 10(b) statute of limitations.⁵ More recently, the Board in *Kmart Corporation*⁶ held that “maintenance of an unlawful restriction on Section 7 activity is an unfair labor practice each day that it is maintained. Whether viewed as an employer rule or as an agreement, the unlawful restriction on Section 7 activity may be prosecuted as long as the unlawful restriction is in effect. It is a classic continuing violation.”

It is undisputed that IBT continued to maintain the LTAs during the six-month period preceding the filing of the initial charge in August 2015. These agreements remained in effect during the 10(b) period, even if they were executed outside of the 10(b) period. IBT even continued to have lease drivers sign weekly truck lease agreements (“weekly truck lease”) during the statutory period. Indeed, there are a number of weekly truck leases in the record, executed by lease drivers in April 2015, referring to them as independent contractors, which serve as further evidence of IBT’s maintenance of these agreements well-within the 10(b) period. (GC Exhs. 10, 16, 22, 27, 32, 40, 43, 53, 140, 144). Under these circumstances, maintenance of the LTAs and the weekly truck lease agreements referring to lease drivers as independent contractors constitutes a continuing violation that is not time-barred under Section 10(b) of the Act.⁷

Furthermore, the cases relied on by IBT in support of its position that the continuing violation doctrine should be rejected are inapposite. IBT cites to the Supreme Court’s decision in

⁵ See, e.g., *Carney Hospital*, 350 NLRB 627, 640 (2007); *Central Pennsylvania Regional Council of Carpenters*, 337 NLRB 1030 (2002), enf. 352 F.3d 831 (3d Cir. 2003); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985) (maintenance of unlawful rules within six months of filing charges renders the action timely).

⁶ 363 NLRB No. 66 (2015) (relying on *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), as affirmed by the Board in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). The Board relied on *D.R. Horton* and *Murphy Oil* in concluding that Kmart violated Section 8(a)(1) by maintaining an arbitration policy that included a class-action waiver. While that issue is currently pending review before the Supreme Court, the Board’s explanation in *Kmart* regarding the continuing violation doctrine and the restriction on Section 7 activity still serves as authority binding on the Board.

⁷ See *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 2-3 (2016), citing *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn.7 (2015).

Local Lodge No. 1424 v. NLRB,⁸ where the Court rejected the notion that the on-going enforcement of a collective-bargaining agreement including a union-security clause was a continuing violation. In making that conclusion, the Supreme Court held, the entire foundation of the unfair labor practice charge was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. If the Union had represented a majority of the relevant employees at the time it executed the agreement, the Court pointed out, the security clause would have been entirely unobjectionable; because the unfair labor practice charges were therefore founded upon an occurrence that lay outside the six-month period, the charges were barred by the statute of limitations.⁹

By contrast, IBT's misclassification of its lease drivers as independent contractors here is not grounded merely on events predating the 10(b) period as IBT continued to implement its leasing model and policies and procedures for lease drivers during the 10(b) period. In fact, IBT still continues to misclassify and exert control over these lease drivers that is representative of an employee-employer relationship, including having lease drivers operate under IBT's operating authority, using trucks provided by IBT, filling out paperwork provided by and required by IBT, and following IBT's rules and policies under threat of discipline.

IBT's reliance on District Court cases is equally misplaced. District Court decisions do not constitute binding authority as they are not issued by either the Board or the Supreme Court and the Board is not obligated to acquiesce to decisions of the Federal courts as it has a duty to apply uniform policies under the Act.¹⁰ Accordingly, the Board should reject this argument entirely and affirm the ALJ's decision.

⁸ 362 U.S. 411, 415-416 (1960).

⁹ *Id.* at 417-419.

¹⁰ See *Tim Foley Plumbing Service*, 337 NLRB 328, 329 fn. 5 (2001); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964) (quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957)); *Enloe Medical Center v.*

B. The ALJ Correctly Found that IBT Failed to Carry its Burden in Establishing that its Lease Drivers are Independent Contractors (Exceptions 3-88, 103-106)

1. The ALJ Properly Concluded that IBT Has the Burden of Proof in Establishing Independent Contractor Status

IBT erroneously argues in its Exceptions Brief that the burden of establishing employment status should rest with the General Counsel. The Board has consistently held that the party seeking to exclude individuals performing services for another from the protections of the Act on the grounds that they are independent contractors has the burden of proving that status.¹¹

IBT cites to the Board's decision in *Central Transport, Inc.*,¹² to argue that the Board should reject historical precedent and place the burden of disproving independent contractor status on the General Counsel. However, a careful review of the judge's reasoning affirmed by the Board in that case and Supreme Court precedent further undercuts IBT's argument.

In finding that it was not the burden of the General Counsel to disprove independent contractor status, the Board in *Central Transport, Inc.*, relied on the Supreme Court's general rule of statutory construction that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."¹³ This general rule of statutory construction originally set forth by the Supreme Court in *Morton Salt Co.*¹⁴ has been consistently applied by the Supreme Court in other cases and adopted by the Board in later decisions assessing the burden of proof in excluding individuals from the coverage of the Act.¹⁵

NLRB, 433 F.3d 834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1988).

¹¹ *Cent. Transp., Inc.*, 247 NLRB 1482 (1980); *BKN, Inc.*, 333 NLRB 143, 144 (2001); *Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (July 11, 2017); *FedEx Home Delivery*, 361 NLRB 610 (2014) enf. denied 849 F. 3d 113 (D.C. Cir. 2017); *Sisters' Camelot*, 363 NLRB No. 13 (2015); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004).

¹² *Cent. Transp., Inc.*, supra at 1482.

¹³ *Id.* at 1483 (citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)).

¹⁴ 334 U.S. 37, 44-45 (1948).

¹⁵ See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001) (upholding Board rule that party seeking to exclude persons as supervisors bears the burden of proof); *BKN, Inc.*, supra at 144 (party asserting independent contractor status bears burden of proof); *Allstate Insurance Co.*, 332 NLRB 759 (2000) (party asserting

Moreover, the Board in *Central Transport, Inc.* found that determining independent contractor status requires carefully assessing a series of factors, including “matters that employers would be thoroughly conversant with, such as contracts and agreements documenting the working relationship, statutes bearing thereon, and the particular employer's practice with respect thereto. Therefore, there is no unreasonable burden imposed on employers by placing the onus on them to affirmatively plead and substantiate such a defense on the basis of record proof.”¹⁶

The Board should reject any attempt by IBT to shift the burden of proof as IBT is the party trying to deny its lease drivers their rights under the Act. Accordingly, the burden to prove that lease drivers are excluded from statutory employee status rests with IBT because they are the party asserting that exclusion.

Notably, the ALJ correctly held that even assuming *arguendo* that the burden of proving employment status lies with the General Counsel, the sheer weight of the record evidence supports a finding that IBT’s lease drivers are statutory employees entitled to the protections of the Act. (ALJD 11: fn. 5).

2. The ALJ Correctly Relied on the Board’s 2014 FedEx Decision in Finding that IBT Failed to Meet its Burden of Establishing Independent Contractor Status

The ALJ properly applied the analytical framework adopted by the Board in *FedEx Home Delivery*¹⁷ in finding IBT’s lease drivers to be statutory employees.

In determining whether an individual is properly classified as an employee or an independent contractor, the Board traditionally applies general agency principles.¹⁸ In identifying the relevant common-law agency principles, “the Board must also conform to the Supreme Court

supervisory or managerial status bears burden of proof); *AgriGeneral L.P.*, 325 NLRB 972 (1998) (party claiming exemption of agricultural employees bears burden of proof).

¹⁶ *Cent. Transp., Inc.*, supra at 1483.

¹⁷ 361 NLRB 610 (2014) (concluding that package delivery drivers were statutory employees rather than independent contractors).

¹⁸ *Id.* at 611; *NLRB. v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

decisions that have applied the same common-law test under other Federal statutes. In those cases, the Court has cited with approval the non-exhaustive, multifactor test outlined in the Restatement (Second) of Agency § 220 (1958).”¹⁹

The Board considers the following non-exhaustive factors: (1) The extent of control over the details, means and manner of the work; (2) Whether or not the person employed is engaged in a distinct occupation or business; (3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) The skill required in the particular occupation; (5) Whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) The length of time for which the person is employed; (7) The method of payment, whether by the time or by the job; (8) Whether or not the work is part of the regular business of the employer; (9) Whether or not the parties believe they are creating the relation of master and servant; and (10) Whether the principal is or is not in the business.²⁰

The Board further notes that when applying these common-law agency factors and determining employee status under Section 2(3) of the Act, it will “construe the independent contractor exclusion narrowly” so as to not deny protection to workers the Act was designed to reach.²¹

In addition to the common-law factors, the Board has also considered whether a worker has “significant entrepreneurial opportunity for gain or loss.”²² The Board restated and refined its application of the multi-factor test in its 2014 decision in *FedEx Home Delivery* and further clarified the role entrepreneurial opportunity for gain or loss plays in the analysis of employee status.²³

¹⁹ *FedEx Home Delivery*, supra at 611.

²⁰ *Id.*

²¹ *Id.* at 618.

²² *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998).

²³ *FedEx Home Delivery*, supra at 620-621.

And the application of the analytical framework set forth in the Board's 2014 *FedEx* decision to this case cannot be in doubt. IBT mistakenly cites to the D.C. Circuit's 2009 decision in *FedEx Home Delivery v. NLRB* ("*FedEx I*"),²⁴ as controlling authority for its assertion that entrepreneurial opportunity is a decisive factor in the independent contractor analysis. However, this argument was expressly rejected by the Board in 2014 and the Board has repeatedly declined to adopt the D.C. Circuit's view of entrepreneurial opportunity as the key factor in determining independent contractor status.²⁵

Instead, in accordance with the Supreme Court's decision in *United Insurance*,²⁶ the Board has repeatedly affirmed that no specific factor is "more or less indicative of employee status," and that the common-law test requires a "careful examination of all factors" including "all the incidents of the individual's relationship to the employing entity."²⁷ Thus, while the Board examines entrepreneurial opportunity as one relevant consideration, entrepreneurial opportunity is not itself sufficient to establish independent-contractor status.

Entrepreneurial opportunity is merely considered as part of a new factor, with: whether the evidence tends to show that the putative contractor is, in fact, rendering service as an independent contractor, that is: whether the individual has a significant actual (as opposed to merely theoretical) entrepreneurial opportunity for gain or loss; a realistic ability to work for other companies; a proprietary or ownership interest in the work; and an ability to control important business decisions such as scheduling, hiring, selection, and assignment of employees, purchase and use of equipment,

²⁴ 563 F.3d 492 (D.C. Cir. 2009).

²⁵ *FedEx Home Delivery*, supra at 610, 618; *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015); *Sisters' Camelot*, 363 NLRB No. 13 (2015).

²⁶ 390 U.S. 254 (1968).

²⁷ *Roadway Package Sys., Inc.*, 326 NLRB 842, 850 (1998).

and commitment of capital.²⁸ The Board does not, however, treat this or any of the other factors as decisive in determining status.²⁹

Moreover, as properly noted by the ALJ, these factors regarding the existence of actual entrepreneurial opportunity set forth in the Board's 2014 *FedEx* decision are also considered under the Restatement of Employment Law, Section 1.01. Indeed, the Board has deferred to the Restatement of Employment Law in analyzing the issue of employment status in other cases.³⁰

IBT's reliance on the D.C. Circuit's March 2017 decision in *FedEx Home Delivery v. NLRB* ("*FedEx II*"),³¹ to argue the inapplicability of the legal framework adopted by the Board in its underlying 2014 *FedEx* decision is equally unavailing. Like it did with the D.C. Circuit's 2009 decision, the Board continues to decline to adopt the D.C. Circuit's view of entrepreneurial opportunity as the key factor in determining independent contractor status and instead has reaffirmed its application of the employee status analytical framework outlined in its 2014 *FedEx* decision in more recent cases.³² Furthermore, the Board has a long-standing policy of refusing to acquiesce in decisions of the Court of Appeals that are contrary to Board law, until the Supreme Court has ruled otherwise.³³

Here, in applying the analytical framework outlined in the Board's 2014 *FedEx* decision, the ALJ correctly concluded that IBT failed to establish that its lease drivers are independent contractors. In reaching that conclusion, the ALJ properly found the extent of IBT's control over

²⁸ *FedEx Home Delivery*, supra at 621.

²⁹ *Id.* at 625; see also *Porter Drywall, Inc.*, 362 NLRB No. 6, slip. op. at 1 (2015).

³⁰ See *Trustees of Columbia University in the City of New York*, 364 NLRB No. 90, slip op. at 11 fn 52 (2016).

³¹ 849 F. 3d 1123 (D.C. Cir. 2017).

³² See *Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (July 11, 2017) (adhering to the independent-contractor analysis adopted in the Board's 2014 *FedEx* decision, notwithstanding the D.C. Circuit's 2017 decision in that case); *Minn. Timberwolves*, 365 NLRB No. 124, slip op. at 6 (August 18, 2017) (same); *Porter Drywall*, 362 NLRB No. 6 (Jan. 29, 2015) (adhering to the independent-contractor analysis adopted in the Board's 2014 *FedEx* decision); *Sisters' Camelot*, 363 NLRB No. 13 (Sept. 25, 2015) (same).

³³ *Pathmark Stores, Inc.*, 342 NLRB 378, fn. 1 (2004); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enf. in part 331 F.2d 176 (8th Cir. 1964) (quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957)); *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1988).

lease drivers and their work through the dispatch process, the integral nature of the lease drivers' work to IBT's regular business, supervision and use of progressive discipline, the method of payment, and the fact that lease drivers do not render their services as part of an independent business as ample evidence of the lease drivers' employee status. (ALJD 11:36-40). Accordingly, the ALJ properly relied on the analytical framework set forth in the Board's 2014 *FedEx* decision in concluding that every single analytical factor establishes the employee status of IBT's lease drivers.

a. **The ALJ Rightly Found that IBT Has "Far-Reaching Control Over the Means and Manner of Lease Drivers' Work"**

While IBT contends in its Exceptions Brief that the ALJ acknowledged that lease drivers have control over some aspects of the job, IBT failed to recognize that despite such evidence, the ALJ properly concluded that IBT exercises "pervasive" control over their work. (ALJD 13:11-12). In making this conclusion, the ALJ properly relied on substantial record evidence of IBT engaging in strict oversight in the manner and means in which its lease drivers perform their work, including controlling their work schedules and assignments and demanding that lease drivers comply with stringent company practices and procedures. The control exerted by IBT over lease drivers is representative of an employee-employer relationship as the ALJ correctly found that the work that lease drivers perform for IBT is identical to the work performed by drivers when they were statutory driver employees of Staffmark. (ALJD 4: 32-35).

i. **IBT Controls Drivers By Administering Stringent Tests at the Time of On-Boarding**

The ALJ correctly concluded that IBT's pervasive control over its lease drivers begins at the on-boarding process and that tests administered by IBT at the time of on-boarding serve as further evidence of IBT's pervasive control. (ALJD 12:3-10). IBT requires that drivers complete a proficiency test and mandates driver awareness training for all entry-level drivers and a written test

for entry-level drivers with less than one year experience. (ALJD 12:5-8; Tr. 1707-1708; 1968; 1971; U. Exhs. 19-21). IBT also administers a 14-mile driving road test, evaluating drivers on over 120 different criteria. (ALJD 12:8-9; Tr. 1974-1975; U. Exh. 22). For drivers with hazardous material (HAZMAT) endorsements, IBT requires that drivers complete training and take written tests. (ALJD 12:9-10; U. Exh. 24). Although federal law only requires that IBT administer these tests to drivers every three years, both testimonial and documentary evidence in the record confirm that IBT administers these tests more frequently. (Tr. 1982-1985; 3838-3840; U. Exh. 24).

IBT misleadingly claims in its Exceptions Brief that tests it administers to entry-level drivers are attributed solely to government regulations, even though the tests and requirements imposed by IBT are more stringent and exceed statutory requirements. As one example, IBT avers that the 14-mile driving road test it administers to drivers does not amount to evidence of control because it is mandated by Department of Transportation (“DOT”) regulations and cites to federal regulation 49 C.F.R. § 391.31 (Road Test) in support of that contention. However, the federal regulation cited by IBT in its Exceptions Brief does not support this position as the regulation does not include any language mandating that motor carriers administer a 14-mile driving road test, evaluating drivers on over 120 different criteria.³⁴ In fact, the road test regulation sets forth only eight areas of evaluation, as opposed to the 120 areas of inquiry tested by IBT.³⁵ (U. Exh. 22).

Moreover, with regard to HAZMAT endorsements, IBT failed to cite to any direct authority in its Exceptions Brief establishing that federal regulations mandate that IBT directly administer such training to its lease drivers. The record establishes that IBT administers HAZMAT training every two years, even though federal regulation 49 C.F.R. § 172.704(c)(2) states that drivers must receive recurrent training only every three years. (Tr. 1982-1985; 3838-3840; U. Exh. 24). The

³⁴ 49 C.F.R. § 391.31.

³⁵ *Id.*

frequency of HAZMAT training issued by IBT exceeds federal requirements and further supports a finding of employee status.³⁶

The ALJ properly rejected IBT's misleading claims that these stringent on-boarding requirements imposed by IBT were mandated by federal regulations and not evidence of employer control. Accordingly, the record evidence supports the ALJ's finding that IBT exerted pervasive control over its lease drivers even during the on-boarding process.

ii. IBT Controls Drivers' Work Shifts and Schedules

IBT also exercises considerable control over the lease drivers' work schedules. As noted by the ALJ, IBT's lease drivers are not given a choice in their shift and not allowed to choose their work hours. (ALJD 7:16-18; Tr. 119-120; 445; 1304; 1361; 1489). Rather, IBT assigns lease drivers to either the day or night shift and lease drivers are not able to unilaterally switch shifts without first requesting and receiving permission from IBT. (ALJD 7:16-18; Tr. 2931-2932; 1611; 1251-1252).

The hours of the respective shifts are clearly defined in the weekly truck leases that drivers are required to execute if they desire to continue to lease a truck and drive for IBT. Daytime lease drivers are required to return the truck to IBT's Wilmington facility by 4:00 p.m. and nighttime lease drivers have to return the truck by 4:00 a.m. (GC Exhs. 10, 16, 22, 27, 32, 40, 43, 53, 68, 69, 140, 144). By assigning drivers to certain shifts and requiring the drivers to indicate which shift they are leasing the truck for, the hours they can drive the truck are clearly defined: in fact, penalties are incurred for failure to return the truck at the end of the defined shift. (U. Exh. 5). Therefore, lease drivers cannot drive whatever hours they like, as IBT avers, but are constrained by the hour limitations set forth by IBT in its weekly truck lease.

³⁶ See *Metro Cab Co.*, 341 NLRB 722, 724 (2004), enforced 512 F.3d 1090 (9th Cir. 2008) (finding training in excess of government requirements indicative of employee status).

In exclusively relying on testimonial evidence from its own officials, IBT argues in its Exceptions Brief that its lease drivers have the freedom to switch from day to evening work, even within the same week, provided drivers comply with DOT hours of service regulations. Yet IBT fails to cite to any testimonial evidence in the record from lease driver witnesses in support of this assertion. This is because the record evidence does not support this assertion, rather it establishes that drivers cannot freely choose and that IBT places lease drivers wanting to change shifts on a waiting list, often for years. (Tr. 156). Importantly, the ALJ correctly noted that IBT’s safety department kept a list of the drivers whose request for shift changes were pending, further confirming IBT’s control over lease drivers’ work schedules. (ALJD 7:18-19; Tr. 1735–1736). The Board has found that an “employer's control over drivers’ hours and shifts is an indication that its drivers are employees, rather than independent contractors.”³⁷

Furthermore, documentary evidence in the record shows that drivers can be disciplined and removed from service for refusing to drive the night shift or for showing up for a shift that they had not been assigned to. (Tr. 2003-2004; U. Exh. 28). By assigning a lease driver to a particular shift, IBT effectively imposes constraints on that driver’s ability to render services as an independent business.

Equally problematic is IBT’s reliance on the uncorroborated testimony of Ted Moulder (“Moulder”), its mechanic, to argue that lease drivers have the freedom to regularly switch shifts. Moulder testified about one lease driver, Alfredo Zavala, out of a workforce of over 77 lease drivers, switching from the night to day shift only months before the hearing in this case. Upon further questioning, Moulder admitted that he was not aware of any other drivers at IBT switching shifts and that Zavala had not worked the day shift prior to the summer of 2016, even though he had been working for IBT since September 15, 2012. (Tr. 2857-2858; GC Exh. 54).

³⁷ *Yellow Cab Co.*, 312 NLRB 142, 145 (1993); *O'hare-Midway Limousine Serv.*, 295 NLRB 463 (1989) (finding inability to change shift without employer permission as indication of employee status).

The ALJ properly credited and relied on the corroborated testimony of over six of the General Counsel's lease driver witnesses in finding that IBT controls lease drivers by assigning them to either the day or night shift and does not give drivers the option to go back and forth between shifts or freely switch shifts. (ALJD 12: 4-5; Tr. 476; 661-662; 1089; 1304-1305; 1390; 1504).

Moreover, IBT does not dispute that it has a limited number of trucks that it can lease to drivers on a daily basis, a limitation that serves as further evidence of why IBT must control the number of drivers that work in either the day or night shift. (Tr. 1844; 2084-2087). While IBT claims that drivers can lease their truck from outside locations for short term use at IBT, the record evidence establishes that none of IBT's drivers do so. (Tr. 3810-3811; 3859-60). Giving lease drivers the freedom to switch shifts without obtaining permission from IBT, would not allow IBT to run its business and manage its workforce as IBT cannot ensure it has enough trucks to lease to drivers to make deliveries in the day and night, without controlling which drivers work during each shift. Accordingly, the ALJ properly concluded that the inability of lease drivers to choose their shift and unilaterally switch shifts without first requesting and receiving permission from IBT, served as evidence of control in finding IBT's lease drivers to be statutory employees. (ALJD 7:16-18; 12:4-5).

iii. IBT Controls the Leased Trucks

The record evidence supports the ALJ's finding that IBT also controls the trucks it leases to its drivers. (ALJD 12:23-26). IBT leases the trucks from a third-party leasing company and therefore the lease drivers cannot modify the trucks in any way, nor can they perform repairs or maintenance or have anyone except IBT's mechanic perform repairs or maintenance on the trucks. (ALJD 12:23-24; Tr. 1678; 151-152; 470-472; 655-656; 926; 1083; 1385). As further evidence of control, drivers are prohibited from smoking inside the trucks, required to clean the trucks, and

assessed monetary penalties for not doing so. (ALJD 12:24-25; U. Exh. 2). As the ALJ properly noted, IBT exerts further control over lease drivers by requiring that drivers drain their air tanks at the end of every shift. (ALJD 12:25-26; U. Exh. 33).

Although the lease drivers are responsible for fueling the trucks, they can only use certain fueling stations near IBT's Wilmington facility that will accept the company credit card issued to them. (Tr. 150-151; 473; 656-658; 927; 1084-1085; 1202; 1385-1386). While IBT generally claims that drivers are free to use their own personal credit cards, drivers who do so still have to provide IBT with original fuel receipts and an accurate accounting of miles traveled under the terms of their Lease and Transportation Agreement with IBT. (GC Exh. 21 at 00671).

The record evidence strongly supports the ALJ's finding that IBT has far-reaching control over the means and manner of the lease drivers' work. IBT management officials admitted that all of IBT's lease drivers are also insured under IBT's general liability and cargo policy and drivers have been told that they have to obtain and pay for coverage through IBT's insurance provider. (ALJD 9:24-26; Tr. 1160; 1248; 1328; 1358; 1751; 1754; 1842; 1845; 2682). IBT deducts these insurance premiums from the lease driver's weekly pay and lease drivers cannot negotiate the amount they pay for such coverage as it is exclusively determined by IBT through its negotiations with its insurance vendor. (ALJD 9:24-26; Tr. 145; 147; 467; 652; 918; 1076; 1382; 1840; 1843; 2636; 3266).

The control exerted by IBT with regard to insurance is highly analogous to the control exerted by the employer in *Corporate Express Delivery Systems*,³⁸ where the Board found owner-operator truck drivers required to use insurance recommended by the employer and pay for insurance premiums through deductions from weekly pay to be statutory employees.

³⁸ 332 NLRB 1522, 1527 (2000).

iv. IBT Controls the Lease Drivers' Work Assignments

The ALJ properly found that IBT controls the work assignments of lease drivers through the dispatch process. (ALJD 12:42-43). Lease drivers receive their work exclusively through dispatch by appearing in person at the dispatch window. (Tr. 479; 2701; 3280; 4153). The drivers are initially assigned a truck and issued the key at the first dispatch window, as well as a radio to communicate with the dispatcher during their shift. (ALJD 7:10-11; Tr. 2701).

IBT's dispatchers typically assign drivers one empty and one loaded container initially and then drivers must regularly communicate with dispatch throughout the day to receive new assignments and specific instructions regarding deliveries. (ALJD 7:38-39; 7:41-43; Tr. 165; 169; 667; 934-935; 1091-1092; 2951-2954; 3332).

Prior to the Union campaign in April 2015 and the filing of the class action lawsuits, IBT dispatchers did not give lease drivers any options with respect to the assignment of the first load. (Tr. 480; 1052; 1092; 1139; 1395-1396). After April 2015, IBT began to give drivers limited options, allowing drivers to only choose from between two and four possible delivery assignments for their first load. (ALJD 7:45-46; Tr. 170-172; 480-483; 666-667; 1091-1093; 1394-1396; 2785; 3099-3100.)

However, this choice is illusory as the ALJ correctly found that IBT's dispatchers have sole discretion on what if any work to offer lease drivers, confirming that the assignment choices are limited by the dispatchers to meet the company's business needs. (ALJD 8:15-16; Tr. 2149; 2755; 3295). As further evidence of discretion and illusory choice, one lease driver testified that even as recently as August 2016, IBT did not present him with options when assigning him his first load. (Tr. 935).

The record establishes that dispatchers will not offer every movement available at the time to each driver who comes to the window (Tr. 2748; 3290-3291). Drivers have even confirmed this

practice because they will talk to other drivers who approached the dispatch window either before or after them, and dispatchers will have offered them different assignments. (Tr. 480-483; 538-539; 410-411). And lease drivers are not given any choice with respect to the assigned empty. (Tr. 166; 481; 936; 1092-1093). Often, in order to meet business demands, the dispatchers heavily rely on the drivers in completing specific assignments and moving certain freight that have priority, particularly containers in the Ports accruing demurrage fees, which are deemed “emergency loads.” (Tr. 2149; 2755; 3295).

Moreover, there is no evidence to suggest that a driver can request certain work or ask to perform only certain runs for certain customers.³⁹ Although a driver may prefer a particular run or specific customer, the dispatcher can only give him the work that is available at that time and not the work the driver may want. (Tr. 3288). In fact, the dispatchers testified that they attempt to distribute desirable runs among the drivers in order to create the appearance of fairness. (Tr. 1652-1654).

Dispatchers also assign lease drivers jobs with specific appointment times, either at a customer location or the Ports and have exclusive access to the Ports’ electronic appointment system to change appointments. (ALJD 8:2-3; Tr. 3729; 3325-26; 2054-58). Drivers cannot contact the customers directly to set up or reschedule appointments, as this is exclusively done by IBT’s dispatchers. (ALJD 8:3-4; Tr. 172–174; 256–257; 939–941; 674; 1100;4129-4130).

As further evidence of the lease drivers’ employee status, IBT also controls the order in which assignments are completed by giving drivers subsequent assignments one at a time, so that they must complete one to receive the next. (ALJD 7:13-14; Tr. 1097; 1396-1397; 4157; 3374-3375; 4147-4148; 3527-3530). As a result, lease drivers are unable to plan out their day as the

³⁹ Only one driver, David Cabral, who the ALJ properly defined as an “outlier,” asserted that he could request specific customers, but this was not corroborated by any of the 11 other lease drivers who testified at the hearing. (ALJD 19: fn. 14; Tr. 3118).

dispatchers determine the order in which assignments are given to each driver, to maximize efficiency. (Tr. 2951–2954; 3283-3284).

The control exerted by IBT over the order of assignments is highly analogous to that exerted over the statutory driver employees in *Time Auto Transportation, Inc.*,⁴⁰ where the Board determined that requiring drivers to call dispatch to obtain additional assignments and report status of deliveries supported a finding of employee status.

Indeed, subsequent assignments are based primarily on IBT’s need to coordinate movements to accomplish the most work during the day to satisfy its customers, and not on the drivers’ preferences. (Tr. 3283-3284; 172; 487; 608; 803; 1098; 1179; 1264). Some drivers testified that they are not even given options when they call in and are just assigned what the dispatcher wants. (Tr. 1097-1098; 1396-1397). The evidence established that assignment of subsequent work by dispatch is largely based upon the driver’s location when he calls in for additional work, and whether he has an empty container bound for a specific destination. (Tr. 1097; 1396-1397; 2152; 3333; 3646-3647).

Based on the foregoing, the ALJ properly concluded that IBT controls the work assignments of the lease drivers through its dispatch procedure, a procedure designed to accommodate the requirements of the ports and the demands of IBT’s customers, rather than the preferences of the lease drivers. (ALJD 12:42-43).

v. **IBT Controls Its Lease Drivers’ Interactions With Its Customers**

The ALJ properly concluded that the lack of interactions that lease drivers have with IBT customers serve as further evidence of IBT’s far reaching control over the work lease drivers perform for IBT. (ALJD 12:37-41). The record evidence established that IBT lease drivers do not interact with IBT customers directly, and IBT has never told drivers that they could do so. (Tr. 162;

⁴⁰ 338 NLRB 626 (2002).

257; 477-478; 664; 932). IBT drivers are also not involved in choosing or finding customers for IBT. (Tr. 162; 477; 664; 932; 1090; 1389).

As the ALJ correctly noted, IBT chooses the customers that lease drivers service and drivers cannot choose which of these customers they can work for or get additional work from IBT's customers directly, without IBT's authorization. (ALJD 12:37-38; Tr. 162; 477-478; 664; 933; 1090; 1390; 3095; 3097). Nor can lease drivers contact customers directly regarding scheduling or perform work for non-IBT customers with the trucks they lease from IBT. (ALJD 12:40-42; Tr. 674; 3096).

Moreover, unlike drivers the Board has found to be independent contractors, IBT drivers cannot determine customer rates or solicit new customers.⁴¹ Indeed, drivers do not negotiate with IBT customers over pay or any terms or conditions of IBT's commercial relationships with its customers, as that is exclusively done by IBT's management officials. (ALJD 12: 39-40; Tr. 478; 933; 1090-1091; 1390; 2460; 3947; 3998; 2933; 2976; 3094; GC Exhs. 103, 104; U. Exhs. 46, 47).

Accordingly, the ALJ properly concluded that the interactions that lease drivers have with IBT customers serve as further evidence of IBT's far reaching control over the work lease drivers perform for IBT.

vi. **IBT Controls the Lease Drivers' Work Performance By Mandating Strict Compliance With Work Rules and Policies**

As the ALJ properly found, IBT requires that lease drivers comply with a series of work rules and policies to further control the lease drivers' work performance. (ALJD 12:10-11). Indeed, his conclusion is soundly based on extensive documentary and testimonial evidence establishing how IBT requires its lease drivers to comply with work rules and policies by threatening discipline and assessing monetary penalties against lease drivers.

⁴¹ See *Am. Publ'g Co. of Mich.*, 308 NLRB 563, 564 (1992) (drivers were expected to solicit new customers); *Glens Falls Newspapers*, 303 NLRB 614, 614 (1991) (drivers determined customer rates).

One rule, related to a safety measuring system, whereby drivers and motor carriers were assessed points for safety violations, referred to as Comprehensive Safety Analysis (“CSA”). (Tr. 1878-1879; GC Exh. 95). As the ALJ correctly pointed out, IBT threatened disciplinary action against drivers with unacceptable CSA inspections. (ALJD 12:11-14; GC Exh. 95). For example, IBT stated in the CSA program notice that drivers who were cited for speeding 10 miles over the speed limit would be subject to two days without work; and drivers who received points for violating their hours of service or failing to properly maintain and cure mechanical defects on their leased trucks could be subject to at least one day without work. (GC Exh. 95). The CSA notice also stated that “inspections receiving an out of service violation would be subject to time off and could result in discipline, up to and including termination of lease.” (GC Exh. 95).

IBT continued implementing this disciplinary CSA program to avoid a DOT audit and in June 2013 participated in a nationwide inspection event entitled “Roadcheck 2013” to advance the safety of its vehicles. (Tr. 1880; GC Exh. 96). As further evidence of driver control, IBT issued a notice to its drivers about Roadcheck 2013 and told drivers to conduct pre-trip inspections, maintain accurate logs, and driver credentials and to not incur violations during inspections. (Tr. 1880-1881; GC Exh. 96). While IBT maintained that the Roadcheck 2013 notice merely included helpful hints or reminders to drivers, the content in the Roadcheck notice served as directives to drivers as they related to the same CSA criteria that were the subject of discipline in IBT’s CSA program. (Tr. 1880-1882; GC Exhs. 95, 96).

As the ALJ correctly concluded, IBT’s reliance on discipline, standing alone, supported a finding of employee status as the Board has consistently held that the right to discipline establishes significant employer control.⁴² (ALJD 12:11-23).

⁴² See *Sisters’ Camelot*, 363 NLRB No. 13 (2015) (finding even occasional instances of discipline indicated significant employer control)(citing *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 889, 892–893 (1998)); *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011), *enfd.* 822 F.3d 563 (D.C. Cir. 2016) (finding discipline threatened

IBT takes exception to the ALJ's reliance on IBT's CSA program as set forth in General Counsel's Exhibit Number 95 on the grounds that the program referred to DOT requirements, that there was no evidence of IBT actually disciplining drivers under the CSA program, and that it was implemented in 2010, prior to the limitations period.

IBT's arguments should be summarily rejected. First, IBT cites to federal regulation, 49 C.F.R. § 390.11, to argue that it merely implemented disciplinary protocols under the CSA program to ensure driver compliance with motor carrier regulations. However, there is no language in 49 C.F.R. § 390.11 mandating that motor carriers, like IBT, threaten to subject drivers to days without work to ensure compliance. Rather, threatening drivers with discipline is purely a business decision made by IBT to further control lease drivers in maintaining good safety scores.

Second, the Board has held that even threatening to withhold future work without actually doing so evinces employer control and in reviewing General Counsel's Exhibit Number 95, there is no doubt that IBT advanced such threats against its lease drivers.⁴³

Lastly, although the disciplinary CSA program was first implemented in 2010, IBT's Safety Director could not confirm whether it was suspended prior to December 2015. (Tr. 3825). More importantly, there was no evidence in the record of IBT ever informing drivers that the disciplinary CSA program had been suspended or that the program was not in place up until December 2015. In fact, over 50 percent of lease drivers working for IBT during the limitations period worked for IBT in 2010, when IBT first implemented this disciplinary CSA program. (ALJD 5:9-10). During the limitations period, these drivers continued their work under threat of discipline based on the

by the employer as evidence of control); Cf. *Pa. Acad. of the Fine Arts*, 343 NLRB 846, 847 (2004) (finding workers' freedom from employer discipline supported independent contractor status).

⁴³ See *Lancaster Symphony Orchestra*, supra at 1763 (finding employer's threats to withhold future assignments from orchestra musicians indicative of employee status). IBT's mere ability to impose discipline serves as evidence of control. See *NLRB v. O'Hare-Midway Limousine Serv.*, 924 F.2d 692, 695 (7th Cir. 1991) (finding company's "right to fine or reprimand the drivers for failure to comply with company procedures" as support for concluding limousine drivers were employees); *Sisters' Camelot*, supra, slip op. at 2 (citing *Dial-a-Mattress*, 326 NLRB at 889, 892-93).

practices in the established CSA program because they were never informed by IBT that the program had been suspended as IBT claims.

Additionally, IBT exerts control over drivers by demanding strict compliance with safety policies and procedures set forth in safety handbooks distributed to lease drivers. (ALJD 8: 25-26; 12:28-30; GC Exhs. 71, 72, 77; U. Exh. 35.) Although Safety Director Brent Bradley (“Bradley”)⁴⁴ confirmed that more than half of IBT’s lease drivers are primarily Spanish speaking, IBT only distributed the safety handbooks to drivers in English. (ALJD 5:38-40; Tr. 1065; 1703). The content in the safety handbooks serve as company directives to lease drivers as many of the provisions relate to the same CSA criteria that were the subject of discipline in IBT’s CSA program. (GC Exhs. 71, 72, 73).

The Board in *Slay Transport Company, Inc.*⁴⁵ found the employer’s conduct in mandating owner-operator drivers’ compliance with policies and procedures outlined in the employee manual as indicative of employee status. Like the employer of the statutory drivers in *Slay Transport*, IBT demands that lease drivers comply with numerous policies and procedures.

For example, the handbooks distributed to drivers set forth rules regarding loading and accident procedures, customer service, safety, inspections, drug and alcohol testing, and hours of service. (ALJD 12:30-33; Tr. 1794–1796; GC Exh. 72). Although IBT’s managers insist these are only “helpful hints,” the drivers have to acknowledge, in writing, receipt of and compliance with the provisions of the safety handbooks. (Tr. 1788-1790; 1794-1796; GC Exh. 77). And the handbooks are riddled with company issued directives and prohibitions, including: (1) Prohibitions against contacting customers directly; (2) Prohibitions against drivers taking loads home; (3) Specific instructions on handling cargo including a prohibition of dropping off cargo without IBT permission. (ALJD 8:29-33; GC Exh. 72 at 02910-02912). Also included in the handbook is a “General Rule for

⁴⁴ Bradley is an admitted 2(11) supervisor of IBT. (ALJD 2:23).

⁴⁵ 331 NLRB 1292, 1294 (2000).

All Customers,” which specifically prohibits drivers from resolving disputes on location and mandates that IBT alone, through dispatch, resolve such conflicts. (GC Exh. 72 at 02913.)

As the ALJ properly noted, IBT exerts further control over lease drivers in demanding compliance with its Container, Cargo and Security Procedures, mandating that drivers inspect the leased trucks and chassis and complete paperwork based on IBT’s directives. (ALJD 12:33; U. Exh. 29). IBT instructs drivers how to do their work by demanding that drivers check: sealed containers, tire pressure, and brakes before transit; and their mirrors while in transit for load shifts, flat tires or tire peels. (ALJD 12:34-35; U. Exh. 29).

The ALJ properly found IBT’s zero tolerance policy regarding loaded or unloaded containers dropped and left unsecured without authorization as further evidence of its pervasive control over lease drivers. (ALJD 12:35-36; U. Exh. 29). The record evidence further established that strict compliance with this policy requires that drivers even go over their hours of service to ensure that no containers are left at IBT’s yard. (Tr. 1573-1575). In fact, one lease driver testified that he was reprimanded by a dispatcher for failing to deliver and leaving a container at IBT’s yard even though he had gone over his hours. (Tr. 1575). And IBT’s own dispatcher further confirmed IBT’s strict policy by testifying that it was “improper” for drivers to leave empty containers in IBT’s yard. (Tr. 2702).

IBT also mandates that lease drivers complete work-related paperwork, including daily truck inspection reports, delivery slips, hours of service logs and daily manifests. (Tr. 149; 419–420; 541; 676–678; 1103; 943–645; 1410-1413; 1103–1105; GC Exh. 46, U. Exh. 12, R. Exhs. 5, 13) Drivers are required to inspect the trucks and turn in their inspection reports daily, or risk being subjected to progressive discipline by IBT. (Tr. 1855–1856). IBT also mandates that drivers submit weekly hours of service logs, tracking the number of hours a driver works. Violations of hours of service

rules will also subject drivers to IBT's progressive discipline program, including being taken out of service. (Tr. 1807-1808; 1856-1857; 1901-1903, 3795; 3821; GC Exh. 78.)

IBT also regularly distributes written memos and notices to the lease drivers with their weekly settlement checks demanding compliance with IBT rules and procedures (including but not limited to timely submission of logs and manifests and truck maintenance) for which drivers can be subject to discipline. (ALJD 8:37-40). Indeed, to ensure lease drivers comply with its policies and procedures, IBT enforces progressive discipline against them, which the Board has held is a hallmark of an employee-employer relationship.⁴⁶ (ALJD 9:9-12; Tr. 138-139; 1806-1807; 3873-3874; GC Exhs. 70, 81; U. Exhs. 26, 36 at 029405).

IBT's exercise of discipline over lease drivers serves as further evidence of the lease drivers' employee status. Although IBT can inform a true independent contractor of its general business standards or of its customers' requirements, it cannot discipline an independent contractor for a failure to comply. In such a situation, if the independent contractor driver fails to comply with IBT's rules and policies, IBT can discontinue contracting with the independent contractor driver. However, IBT has instead set forth detailed rules regulating its lease drivers' conduct, and it has disciplined its lease drivers when they have failed to comply with these rules.

The record evidence establishes that IBT has warned and suspended drivers for failing to properly inspect IBT's leased trucks and complete inspection reports, getting into an accident with IBT's lease truck, damaging company property, and failing to sign IBT's weekly truck lease. (Tr. 1822-1823; 1855-1857; 1196-1197; 1786-1787; 2023-2025; GC Exhs. 70, 80, 84; U. Exhs. 27, 36).

For example, Safety Director Bradley admitted that IBT prevented a driver from being dispatched work and placed him out of service for one day for failing to take IBT's truck to the

⁴⁶ *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (employer's imposition of discipline on canvassers evinced employer control over canvassers' work, supporting employee status); *Pa. Acad. of the Fine Arts*, 343 NLRB 846, 847 (2004) (art models' freedom from discipline supported independent contractor status).

Radio Frequency Identification (“RFID”) tag center to have a faulty RFID tag replaced (Tr. 1823-1824; GC Exh. 81). Even though IBT provided these tags, mounted them on the leased trucks, and was responsible for making repairs on its leased vehicles, IBT forces drivers to replace faulty RFID tags and disciplines drivers for refusing to do so (Tr. 1825). On the suspension form, Bradley also explicitly wrote that this driver was given a “1 day suspension” for “following of direction.” (Tr. 1994-1996; U Exh. 26). Thus, IBT’s exercise of discipline over its lease drivers establishes its clear control.

vii. IBT’s Control Over Lease Drivers Exceeds Government Regulations

IBT’s assertion that its compliance with state and federal regulatory requirements does not serve as evidence of employer control should be rejected as the ALJ correctly concluded, and the record evidence overwhelmingly demonstrates, that IBT exercises control beyond what is required under government regulations. The Board has found that an employer’s control is extensive and exceeds government regulations when “the employer has essentially micromanaged the drivers on issues that do not involve government regulations and has imposed a detailed and severe system of sanctions to enforce the rules it wants the drivers to follow.”⁴⁷

Such is the case here as the record evidence shows that IBT exerts control over lease drivers by seeking compliance with matters related solely to company directives as opposed to government regulations. IBT’s Safety Department regularly gives notices to drivers about how they should maintain the lease trucks and other IBT issued equipment. (U. Exhs. 2, 5). To ensure compliance with these directives, IBT threatens drivers with monetary penalties. (U. Exhs. 2, 6). IBT’s admonitions to the drivers to keep the trucks clean and refrain from smoking in the trucks or risk discipline are not required by government regulations, but are policies unique to IBT.

⁴⁷ *Elite Limousine Plus*, 324 NLRB 992, 1003 (1997).

Moreover, IBT's rules appear to exceed those required by government regulations and are generally more stringent, particularly with regard to the maintenance and submission of logs, its "zero tolerance" drug and alcohol policy, certification testing, accidents, and the implementation of progressive discipline. IBT's directives and policies regarding customer service and the escrow account are also not mandated by government regulations, further supporting the ALJ's finding of employee status.⁴⁸

While government regulations mandate that drivers submit their logs every 13 days, IBT requires drivers to submit them more regularly. 49 C.F.R. § 395.8; (Tr. 1804; 3504-3505). Moreover, government regulations do not mandate that motor carriers implement a zero tolerance drug and alcohol policy. (Tr. 2007). With respect to certification testing, IBT's Safety Director admitted that IBT administers these tests more frequently than what is required under the law. (Tr. 1982-1985; 3838-3840; U. Exh. 24).

Lastly, there is nothing in the record to establish that IBT's use of progressive discipline is mandated by government regulations. Rather, the evidence establishes that IBT implements progressive discipline to establish more control over its lease drivers for strictly business purposes. In fact, the LTA and weekly truck lease are both terminable at-will, thereby allowing IBT to end its contractual relationship with lease drivers without having to institute progressive discipline. (GC Exhs. 9 at 00859; 10 at 06551). There is no evidence in the record to disprove that IBT's implementation of progressive discipline is purely a business decision and unrelated to compliance with government regulations.

Despite IBT's claim, the record evidence and Board precedent establish that the control exercised by IBT in using progressive discipline to enforce workplace policies and procedures that

⁴⁸ *Metro Cab Co.*, 341 NLRB 722, 724 (2004), enforced 512 F.3d 1090 (9th Cir. 2008) (policies contained in the employer's manual which went "beyond, and d[id] not involve, government regulations" supported finding of employee status).

exceed government regulations is representative of an employee-employer relationship.⁴⁹ Based upon the foregoing, the record evidence strongly supports the ALJ's finding that IBT clearly promulgates, maintains, and enforces policies that lease drivers are required to comply with under threat of discipline or termination of contract, thereby demonstrating that lease drivers are more like employees than independent contractors.

b. The ALJ Correctly Found that IBT Lease Drivers Are Not Engaged in a Distinct Occupation or Business

The record evidence supports the ALJ's finding that IBT lease drivers are not engaged in a distinct occupation or business. As correctly noted by the ALJ, IBT would not be able to operate its business without its lease drivers as drivers perform their work in furtherance of IBT's core operations. (ALJD 13:20-21). The Board in *Roadway Package System, Inc.*,⁵⁰ found that the drivers' connection to and integration in Roadway's operations was highly visible and well publicized as Roadway's vehicles were identical and clearly displayed Roadway's name, logo, and colors.

Like the statutory driver employees in *Roadway*, IBT lease drivers operate in the name of IBT and drive trucks that are all the same and leased by IBT from a third-party vendor. The IBT lease trucks have IBT's logo, and DOT and CA numbers prominently displayed on the doors.⁵¹ (Tr. 141; 175-176; 649; 941; 1765; 2454). IBT lease drivers do not have their own DOT or CA numbers, nor do they have any independent operating authority. (ALJD 4:14-16; Tr. 463-465; 915; 3841). IBT lease drivers do not advertise themselves as professional drivers in the drayage industry,

⁴⁹ *People Care, Inc.*, 311 NLRB 1075, 1077-1078 (1993); see also *Stamford Taxi*, 332 NLRB 1372, 1385 (2000) (stating that employer control exceeding government regulations favors employee status).

⁵⁰ 326 NLRB 842, 851 (1998) (citing *C.C. Eastern, Inc.*, 313 NLRB 632 (1994) (noting control exercised over driver's vehicle as indicia of employee status)).

⁵¹ See *Sisters' Camelot*, 363 NLRB at slip op. at 3 (canvassers' presentations and distribution of materials clearly identified them as working for the employer, supporting employee status); *FedEx Home Delivery*, 361 NLRB 610, 618 (2014) (delivery drivers' uniforms and logos and colors on delivery vehicles established that drivers did business in employer's name rather than their own, supporting employee status, notwithstanding that some drivers operated as incorporated businesses).

operate as a separate business, or carry business cards for themselves. (Tr. 512-513; 697-698; 964; 1134-1135; 1447-1448). Instead, lease drivers work only for IBT and clearly identify themselves as working for IBT. (ALJD 13:31-32; Tr. 512; 697; 964; 1134; 1446). IBT lease drivers cannot hire other drivers to operate IBT's trucks, nor is there any evidence that they are allowed to or have ever done so. (ALJD 13:31).

Moreover, IBT lease drivers are prohibited from getting work directly from IBT's customers and must go through IBT dispatch for any work. (ALJD 12:38-39; Tr. 162; 257; 477-478; 664; 932;1090; 1390; 3095-3097). They rely on IBT's dispatchers to give them assignments, to provide them information such as the location and container numbers for containers they are moving, and to address any problems the driver has at the Ports or at a customer's location. (ALJD 7:37-39, 7:41). Drivers communicate with IBT personnel on radios provided by IBT. (ALJD 7:10-12) The trucks are registered to IBT and IBT's lease drivers do not carry their own collision and liability insurance, but must use what IBT provides for the fleet trucks. (ALJD 9: 24-25; GC Exhs. 92, 93).

IBT argues in its Exceptions Brief that the reference to lease drivers as self-employed truck drivers and the payment of taxes and deduction of business expenses establishes that lease drivers engage in a distinct occupation or business. The ALJ carefully considered such arguments and rejected them in finding that IBT's issuance of 1099 forms to lease drivers without driver consent or input is not dispositive of their actual employment status. (ALJD 9:39-40). Moreover, IBT's issuance of 1099 forms to the lease drivers leaves the lease drivers no choice in how to file their taxes since they have to rely on IBT's characterization. (ALJD 9:39-40). IBT's reliance on bankruptcy filings to establish independent contractor status is equally erroneous as those drivers who were forced to declare bankruptcy were forced to refer to themselves as independent contractors based on the paperwork given to them by IBT.

IBT also excepts to the ALJ rejecting the testimony of lease driver David Cabral in support of its incredulous position that IBT lease drivers operate their own businesses while also working for IBT. However, the ALJ properly rejected IBT's reliance on Cabral's testimony by finding that when Cabral formed his own business, Baywater Logistics, he provided brokerage services, but not drayage services. (ALJD 19: fn 14). Indeed, Cabral directly admitted that the type of work he completed through his business, IBT did not do. (ALJD 19: fn 14; Tr. 3153). Moreover, even assuming some relationship could be established to Cabral's work as a lease driver at IBT, the ALJ, consistent with Board precedent, carefully considered and rejected IBT's argument by finding the ability to work for multiple employers does not make an individual an independent contractor.⁵²

Equally damaging is IBT's repeated reliance on the discredited testimony of Cabral, who the ALJ properly identified as an "outlier" and not representative of the majority of other lease drivers who testified as there was no evidence in the record that any other driver operated a distinct business. (ALJD 19: fn 14). For example, Cabral's credibility was significantly impaired when he testified that he obtained his subsequent dispatches for the day by email, a fact which IBT's lead dispatcher specifically denied. (Tr. 3166-3168; 3382). The ALJ properly discredited Cabral's testimony regarding the working conditions of lease drivers at IBT in finding that the record was devoid of evidence that other drivers operated as a distinct business. (ALJD 19: fn 14).

c. The ALJ Correctly Found that IBT Lease Drivers Work at the Direction of IBT, Supporting a Finding of Employee Status

IBT takes exception to the ALJ's conclusion that IBT undeniably controls and directly or indirectly supervises the work of IBT's lease drivers on the grounds that lease drivers are not subject to in-person supervision while driving and delivering loads. However, consistent with

⁵² *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011) (citing *KCAL-TV*, 331 NLRB 323, 323 (2000)), enf. 822 F.3d 563 (D.C. Cir. 2016); see also *Sisters' Camelot*, supra, slip op. at 2.

precedent set forth by the Board in *Sisters' Camelot*⁵³ and *FedEx Home Delivery*,⁵⁴ the ALJ expressly rejected this argument in finding that the lack of direct in-person supervision over the lease drivers, reflected the nature of the job itself, and was not indicative of independent-contractor status.

As the ALJ properly found, the record is ripe with evidence of IBT supervising the most important aspects of the work of its lease drivers, including controlling the work that drivers perform through the dispatch process and the assignment of work. (ALJD 14:9-10; 14:22-23). Lease drivers have to obtain daily initial and subsequent dispatches from IBT's dispatchers and have to keep in constant communication with IBT representatives throughout the work day in order to perform their work. (ALJD 14:11-14). By requiring that lease drivers call them for subsequent assignments, IBT dispatchers monitor when drivers are finished with particular loads or assignments and how long it takes to complete them. (ALJD 7:13-14; Tr. 1097; 1396-1397). Indeed, the drivers stay in constant communication with the dispatchers during the day in order to continue to get work and update them on their movements. (Tr. 611; 1142; 3375; 3530). This constant communication enables IBT to closely monitor and supervise the lease drivers' activities.

IBT also monitors when lease drivers start and stop working as lease drivers are required to report to IBT's Wilmington facility at the beginning and end of each shift to pick up and drop off the IBT issued radio and keys to the leased truck. (ALJD 7:10-12; 12:25-28; U. Exh. 5). The dispatch procedures at IBT's facility are similar to the employer's in *Corporate Express Delivery Systems*,⁵⁵ where the Board found that drivers who received daily assignments and had to report to the dispatch office at the beginning and end of each workday as statutory employees.

⁵³ See *Sisters' Camelot*, supra, slip op. at 3, (citing *Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980) (finding drivers to be employees and analyzing extent of supervision in the context of "the nature of the occupation.")).

⁵⁴ *FedEx Home Delivery*, supra at 622.

⁵⁵ 332 NLRB 1522 (2000).

As further evidence of supervision, IBT regularly monitored the movements of its lease trucks through a GPS tracking system during the statutory period. (Tr. 141, 175-176; 649; 941; 1408-1409; 2454; 4151). IBT dispatchers relied on the GPS tracking system to monitor the activity of lease drivers and called lease drivers to check on their progress throughout their shift (Tr. 649; 941; 1408-1410).

While Respondent cites to non-binding state and federal court decisions to argue that IBT's use of GPS to electronically monitor lease drivers is not relevant to the inquiry of employment status, the Board has rejected such an argument. Indeed, the Board in *Elite Limousine Plus, Inc.*⁵⁶ found that the employer's use of a computer system designed to locate and track drivers while driving as one factor supporting a finding that the drivers were statutory employees.

The record evidence also fully supports the ALJ's finding that IBT supervises and directs the work of lease drivers through demanding that lease drivers comply with its workplace policies and procedures. (ALJD 14:22-29). In reaching this conclusion, the ALJ properly relied on the Board's decision in *FedEx Home Delivery*,⁵⁷ holding the employer's enforcement of similar rules and oversight tools over the statutory employee drivers supported a finding that the supervision factor favored employee status.

Contrary to IBT's assertion, the record demonstrates that IBT consistently sends notices to drivers demanding compliance with its company policies and procedures and threatens disciplinary action and the assessment of fines to ensure compliance. In fact, IBT issued notices regarding: mandatory safety meetings; the timely submission of inspection reports, logs and manifests; lease drivers' compliance with safety policies; drivers turning in company issued equipment and cleaning leased vehicles or paying monetary fines; and policies mandating that drivers follow certain

⁵⁶ 324 NLRB 992, 1002 (1997).

⁵⁷ *FedEx Home Delivery*, supra at 623.

procedures with respect to the movement of containers and cargo. (GC Exhs. 47-49, 74-76, 83; U. Exhs. 1-6, 29, 31-33).

IBT's contention that it does not discipline drivers for violating workplace rules is equally without merit and contradicted by the record evidence. Indeed, IBT routinely disciplined drivers for failing to comply with company rules and procedures including: disciplining drivers for failing to conduct a truck inspection and failing to follow directions, (Tr. 1823-1824; 1855-1857; GC Exhs. 80, 84), disciplining drivers who got into an accident while driving for IBT, (Tr. 2023-25; U. Exh. 36), and disciplining a driver for driving with a defective radio frequency tag (Tr. 1994-96; U. Exh. 26). The ALJ noted one instance where IBT initially decided to terminate a driver for "Breach of company rules" and "dishonesty." (ALJD 9: 17-18; Tr. 1989-1993; U. Exh. 25).

IBT also monitors the lease drivers' daily activities through requiring the completion and submission of a daily manifest wherein drivers document their start time, lunch break, and end time and time tables for every delivery made that day. (Tr. 1411; 1431; 4107; GC Exh. 46). IBT then audits these manifests daily and has drivers correct any errors. (Tr. 1687-1688; 2975; 3101; 1204-06; 492-96). Driver manifests are not an official record of the hours worked and there are no federal regulations requiring the use of manifests. (Tr. 4130). Like IBT's lease drivers, the employee canvassers in *Sisters' Camelot*⁵⁸ were also required to adhere to strict record keeping requirements, which established that the employer closely monitored canvassers' daily activities.

IBT's assertion that the ALJ incorrectly found that customer requirements served as further evidence of IBT supervising its lease drivers is equally unavailing. The testimonial and documentary record evidence directly support the ALJ's finding that one of IBT's customers,

⁵⁸ See *Sisters' Camelot*, supra, slip op. at 3 (employer's extensive recordkeeping requirements demonstrate that the employer closely monitored canvassers' activities on a daily basis); *FedEx Home Delivery*, supra at 623 (employer conducted periodic audits and appraisals and had the ability to track all major work activities in a real-time scanner).

Target, required that lease drivers track and document specific turn time data on their manifests.⁵⁹ (Tr. 1438-1439; 2632; U. Exh. 6). In fact, lease drivers understood that if they didn't comply with this policy of documenting turn time data, they would be penalized \$10 for failing to do so. (Tr. 1438-1439; 1537-1539).

Furthermore, IBT's contention that drivers directly engage customers is false. In advancing this baseless assertion, IBT once again cites in its Exceptions Brief the discredited testimony of Cabral; however, the majority of drivers testified that they do not have direct contact with customers or make suggestions on how IBT can better service its customers. (Tr. 162; 477; 664; 932-933; 1090; 1389). The record is clear that IBT secures its own customers and customers directly contract with IBT, not with the lease drivers. (ALJD 6:22; Tr. 478; 933; 1090-1091; 1390; 2460; 2933; 2976; 3094; 3947; 3998). IBT directly negotiates rates with its customers with no involvement by the lease drivers. (ALJD 6:22-23).

The ALJ correctly found that the supervision factor favors employee status as the evidence amply demonstrates that IBT directed and controlled the drivers' performance by enforcing its rules and imposing disciplinary measures against lease drivers if they failed to comply.

d. The ALJ Correctly Concluded that IBT Lease Drivers' Skill in Driving Commercial Trucks Did Not Preclude a Finding of Employee Status

IBT also takes exception to the ALJ's conclusion that lease drivers' skill favored a finding of employee status because lease drivers attend trucking school, must obtain a commercial driver's license, conduct pre and post-trip inspections, and take possession of freight from IBT's customers. IBT's arguments should be summarily rejected.

⁵⁹ Although the ALJ's decision inadvertently cites to pages 1537 to 1539 of the record, testimonial evidence from IBT's Comptroller on page 2632, fully supports the ALJs' finding. (ALJD 14: fn 6; Tr. 2632).

First, the Board has previously found drivers with commercial licenses to be statutory employees.⁶⁰ Therefore, Board precedent supports the ALJ's finding that the level of skill required in obtaining a commercial license is not indicative of independent contractor status. Second, to obtain a commercial license, IBT lease drivers have to only complete about 20 to 30 hours in truck driving school. (Tr. 418-419; 695-696). Lastly, completing pre and post-trip inspections and taking possession of freight from customers are duties of commercial truckers and the Board has consistently found drivers performing these same duties to be statutory employees.⁶¹ Tellingly, even the undisputed statutory employee drivers that IBT initially hired through Staffmark conducted pre and post-trip inspections and took possession of freight directly from IBT's customers. (Tr. 114-15; 631-34; 1304; 3114-3115).

Moreover, as the ALJ properly noted, any skills demonstrated by lease drivers in driving commercial trucks for IBT are essential to IBT's ability to accomplish its core business objective of providing drayage services. (ALJD 15:2-5). Inarguably, IBT does not enlist the skills of lease drivers to accomplish an ancillary task, but to take possession of and deliver freight to accomplish its core mission of providing drayage services. The alignment of the skills of lease drivers in driving commercial trucks with IBT's core business objective to move freight establishes that lease drivers are statutory employees. Lastly, IBT's administration of entry-level training to drivers with less than one year of driving experience is further indicative of employee status as the Board has routinely held that employer provided training supports a finding of employee status.⁶² (U. Exh. 21). In light of this evidence, the ALJ correctly concluded that this factor supported a finding of employee status.

⁶⁰ See *Time Auto*, 338 NLRB 626 (2002).

⁶¹ *Time Auto*, supra at 626 (finding lease drivers responsible for truck inspections to be statutory employees); *National Freight*, 146 NLRB 144, 145 (1964) (finding non-owner drivers and owner-drivers taking possession of freight from employer's customers to be statutory employees).

⁶² *Sisters' Camelot*, supra, slip op. at 3 (finding employer provided training necessary to perform work indicative of employee status); see also *NLRB v. United Insurance Co.*, 390 U.S. at 258-259 (finding employer's training of workers supported a finding of employee status).

e. **The ALJ Rightly Found That IBT Supplies the Instrumentalities, Tools, and Place of Work for Its Lease Drivers**

Based upon the wealth of evidence, the ALJ properly concluded that IBT provides the drivers with the instrumentalities, tools and place of work. Nevertheless, IBT argues in its Exceptions Brief that it does not provide drivers with work tools, clothes, and cell phones, and that the payment of the truck lease, fuel, liability insurance, occupational accident insurance, and citations for moving violations by lease drivers establishes an independent contractor relationship. The ALJ properly rejected this argument in finding that IBT undeniably provides lease drivers with the most critical tools to perform their job at IBT. (ALJD 15:17; 25-26). The undisputed evidence shows that IBT provides drivers with the trucks, the chassis, radios to contact dispatchers, delivery slips, inspection reports, manifests, logbooks, fuel card, commercial insurance, maintenance of the trucks, and even safety vests. (ALJD 15: 18-20; Tr. 3095-3096; 3263-3264; 1406-07; 1859-1862; 2045-2047; 2683; 2927-2928; 2933; 1097-1098; 670-71; 856-57; 939; 485-486).

Furthermore, the fact that the lease drivers do not own their own trucks and must pay \$60/day to lease trucks from IBT establishes that the lease drivers' use and possession of the truck is entirely dependent on IBT, further supporting the ALJ's finding of employee status. (ALJD 6:14-16). The Board has found the extent of an employer's control over the leasing process as one factor in determining employee status.⁶³

For example, in *Roadway Package System, Inc.*,⁶⁴ even though the employer did not directly participate in its owner drivers obtaining the requisite vehicles, it promoted a particular type of vehicle sold or leased through a specific leasing company. Roadway purchased specialty made vehicles, sold them to an independent leasing company, and then recommended that leasing company to prospective drivers. Negotiation for the Roadway vehicles took place between the

⁶³ See *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998).

⁶⁴ 326 NLRB 842, 851 (1998).

owner drivers and the third-party leasing company, without Roadway's participation. The Board found Roadway's involvement and indirect control over the leasing process as one factor in establishing that the Roadway owner drivers were statutory employees.⁶⁵

The control exerted by IBT over drivers during the leasing process is even more prevalent than the control exerted over the statutory employee drivers in *Roadway*. Unlike the *Roadway* drivers, IBT lease drivers do not even have an ownership interest in the trucks they lease from IBT. Moreover, as further evidence of control, IBT selects the trucks it wants its drivers to use and leases those trucks directly to its own lease drivers.

In support of its contention that drivers pay for cell phones, computers, and fax machines, IBT cites to the testimony of only one driver, David Cabral, who the ALJ appropriately discredited as an "outlier." (ALJD 19: fn 14). Indeed, the ALJ correctly found that there was no evidence in the record establishing that cell phones, computers, or fax machines were required by lease drivers to perform their job for IBT. (ALJD 15: fn 9). Any assertion that lease drivers used computers to receive assignments via email from dispatchers is entirely unsupported by the credible record evidence as IBT's lead dispatcher specifically denied this. (Tr. 3166-3168; 3382). Additionally, IBT, through its dispatch process, controls the place of work and through its requirement that drivers park in its yard,⁶⁶ controls the place in which the leased trucks are stored.⁶⁷

Based on the foregoing, the ALJ's determination that IBT undeniably provides the place, truck, and instrumentalities for its drivers, favoring a finding of employee status, is legally sound and should be affirmed.

⁶⁵ *Id.* at 852, 854.

⁶⁶ One lease driver in the night shift was threatened with discipline when he tried to leave the company truck on the street after he was unable to get back to the yard within his allowable driving hours. (Tr. 1608-1609).

⁶⁷ *Roadway*, 326 NLRB 842 (1998); *Sisters' Camelot*, supra, slip op. at 3.

f. The ALJ Correctly Found IBT Lease Drivers are Employed by IBT for an Indefinite Period of Time, Strongly Supporting a Finding of Employee Status

IBT lease drivers have long-term working relationships with IBT and do not work for IBT on a job-to-job basis. (GC Exh. 54). As noted by the ALJ, more than a third of lease drivers worked for IBT for more than six years, another third for approximately five years. (ALJD 15:31-32). Approximately 82% of the lease drivers have worked for IBT since 2013 and some drivers even started working for IBT prior to 2008. (ALJD 15:31-34; GC Exh. 54).

Moreover, none of the documents executed by the lease drivers – the LTA or the weekly truck lease, or any side agreement – provide for a fixed contractual term. (GC Exhs. 9, 69). The LTA allowing the drivers to work under IBT’s operating authority is for an indefinite duration, although it can be terminated at any time by either party with 24-hour notice, or immediately by mutual agreement. (ALJD 15:34-36; GC Exh. 9 at 00859). Thus, IBT’s lease drivers are retained for an indefinite period – like employees – and not on a job-by-job or task-related basis of limited duration like independent contractors.

g. The ALJ Correctly Found that IBT Establishes and Controls the Lease Drivers’ Compensation, Further Supporting a Finding of Employee Status

IBT lease drivers have little or no control over how and how much they are paid, which strongly supports the ALJ’s conclusion that the method of payment factor weighs in favor of employee status. While IBT pays its lease drivers by the “job” or movement, it also pays them an hourly rate for excessive wait time at the Ports, which is unilaterally set by IBT and granted or denied at its sole discretion. (ALJD 10:4-6; 16:9-10; Tr. 2655-2656; 2243; 2760; 507; 688; 960; 1129; 1132; 1437). IBT’s hourly payment of wait time to drivers incentivizes drivers to wait at the congested Ports to complete the loads given to them by IBT, further promoting IBT’s business interests. (Tr. 2800-2801). In order to ensure that its work gets completed, through compensating

drivers for wait time hourly, IBT gives drivers a guaranteed pay to limit their loss of income, which the Board has found as a further indication of employee status.⁶⁸

With regard to the rate of compensation, the ALJ correctly found that IBT regulates, controls, and unilaterally sets the rates of compensation for delivery assignments, wait time, fuel surcharges, rates charged to customers and discretionary reduction of the leasing fees. (ALJD 16: 7-9; Tr. 504-506; 685; 693-694; 955; 1433). The Board has repeatedly acknowledged the employee status of drivers when an employer “establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers.”⁶⁹

IBT has the sole discretion to reduce the \$60 daily lease rate and lease drivers cannot negotiate the reduced lease rate as the rate is exclusively set by IBT. (Tr. 504; 955; 1425-1428; 2927; GC Exh. 128). In fact, emails exchanged in December 2015 and January 2016 between IBT representatives about the reduced lease confirm that IBT sets the reduced lease rate without negotiating with lease drivers. (GC Exhs. 128, 129).⁷⁰

Lease driver Daniel Uaina requested that IBT waive his lease or let him pay half on May 24, 2016. (GC Exh. 46(d)). For the first time, IBT representatives wrote language on the May 24, 2016 manifest indicating that “IBT agrees to your request to negotiate the base rate for this manifest.” However, Uaina testified that he did not meet with or talk to anyone at IBT regarding his request to pay the partial lease on May 24, 2016, nor did he “negotiate” the amount. (Tr. 1430-1431).

IBT charged lease drivers who lease a truck from IBT for five consecutive days \$20 for the lease of the truck on the fifth day: this is also exclusively set by IBT and not negotiated by lease drivers. (Tr. 647; 868; 1113; 1428-1429; GC Exhs. 34, 46 (c), 129, 130). Emails exchanged

⁶⁸ *Roadway Package System, Inc.*, supra at 853 (delivery drivers found to be employees based on evidence showing that employer guaranteed new drivers a minimum income level).

⁶⁹ *Id.* at 852; *FedEx Home Delivery*, supra at 627.

⁷⁰ Customer Service Manager Rivera’s placement of quotation marks around the term “negotiating” in her January 21, 2016 email implies that IBT did not negotiate with drivers and there were no guidelines in place for doing so at that time. (GC Exh. 129).

between Zea and other IBT representatives about the 5th day lease rate in late January 2016 confirm that IBT unilaterally sets the 5th day lease rate without negotiating with lease drivers. (GC Exh. 130).

IBT also unilaterally changed rates to movements without meeting with or even communicating with lease drivers. (Tr. 2274-2275). IBT's Comptroller confirmed this practice in a May 6, 2016 email to IBT representatives wherein he stated, "You can work on all not mentioned as if they negotiated, their new rates will take effect (affect) later." (GC Exh. 125). However, IBT representatives did not negotiate rates even with drivers they actually met with.

After the lease drivers concertedly complained in spring 2015 about the rates and the perceived discriminatory dispatch procedures and began to engage in concerted activities, IBT offered to meet with them individually to discuss rate increases. (Tr. 2264; Jt. Exh. 1(a)) However, as recognized by the ALJ, these rate "negotiations" were easily shown to be fraudulent, as all the drivers were given the SAME rates – even those recently hired or who did not request to meet with IBT representatives – and that many of the "rate negotiation" sheets were filled out by IBT in advance of these illusory negotiation meetings. (ALJD 16: fn. 10; Tr. 2273-2275; 2279; 2281; 2286; 2289; 2291; GC Exhs. 36; 113 at 2; 114 at 2; 115 at 2; 116 at 2; 127). Notably, Vice President Zea conceded that prior to May 2015, IBT had not increased driver rates in over five years. (Tr. 2421; U. Exh. 42).

For the first time, in 2016, IBT created a formal worksheet regarding the rates entitled "Rate Negotiation Worksheet Between Intermodal Bridge Transport and Independent Contractor" ("Rate Negotiation Worksheet") (Tr. 2278; GC Exhs. 13; 37; 113 at 3; 114 at 3; 115 at 3; 116 at 3; 117 at 2; 118-119; 120-124(a)-(cc)). Lease drivers testified that when they met with IBT's Sales, Pricing,

and Administrative Manager, Denise Ackerman (“Ackerman”)⁷¹ in 2016, she had already filled out the Rate Negotiation Worksheet with the new rates when she presented it to the drivers and made no further changes to the worksheet during these meetings. (Tr. 191-192; 1124-1126; 1275).

In fact, Ackerman admitted that in 2016 she gave all lease drivers who met with her about the rates the same increase, and made all these rates effective May 1st, even if drivers had not met with her by that time. Ackerman admitted that she wanted all the drivers to receive the “top” rate and be at the same level. She even gave drivers who had not met with Zea in 2015 the same increases as if they had met with Zea in 2015. (Tr. 2478-2479; 2577-2579; 2491-2495).

The 2016 Rate Negotiation Sheets in the record further establish that lease drivers did not negotiate rates. From June 27, 2016 to July 22, 2016, Ackerman met with five lease drivers and conceded that all five lease drivers got the same exact rate increases for the same four movements. (Tr. 2481; 2482; 2484-2486; GC Exhs. 37; 113 at 3; 114 at 3; 115 at 3; 116 at 3).

Similarly, from May 3, 2016 to June 6, 2016, Ackerman met with five other lease drivers and conceded that all five of these drivers got the same exact rate increases for the same five movements. (Tr. 2491; 2493-2495; 2497-2498; GC Exhs. 13; 120-123). Indeed, Ackerman testified that one driver got increases on five routes because he had not previously obtained increases in 2015 for two routes and Ackerman included those two routes into the 2016 increases “so he would be the same as everyone else.” (Tr. 2493). From April 28, 2016 to June 16, 2016, Ackerman met with a total of 29 lease drivers to discuss new rates and admitted that all 29 lease drivers received the exact same rate increases on the same three movements. (Tr. 2499-2510; GC Exh. 124 (a)-(cc)).

IBT feebly attempts to explain the rate similarities by claiming in its Exceptions Brief that drivers received the same rates because they spoke with one another about the rates received. There is no evidence to simply support this assertion and contending that nearly 29 lease drivers spoke

⁷¹ The parties stipulated that Ackerman is an agent of IBT within the meaning of Section 2(13) of the Act. (Tr. 2458-2459).

with one another regarding rates, without a single witness testifying that they did so, is highly implausible. Instead, the credible record evidence, including emails exchanged between IBT officials, established that lease drivers did not negotiate rates, which the Board has found as further evidence of an employment relationship.⁷² (GC Exhs. 125, 127, 139).

While IBT claims in its Exceptions Brief that Ackerman always completed the Rate Negotiation Worksheet in front of drivers, the testimonial and documentary evidence does not substantiate this claim. (Tr. 1126; 2476-2477; 2491; 2497-2498; GC Exhs. 124 (o) and (v)). For example, Ackerman signed and dated lease driver Tiberiu Chilintan's 2016 worksheet on May 5, 2016, a day before Chilintan signed it on May 6, 2016 (GC Exh. 124 (o)). Similarly, Ackerman dated and signed lease driver Tommy Phan's 2016 worksheet on May 6, 2016, two days before Phan actually signed it on May 8, 2016 (GC Exh. 124 (v)). Ackerman's testimony that these two lease drivers mistakenly dated their respective worksheets without her correcting the dates contradicts her concession that drivers always signed the worksheets in front of her (Tr. 2508; 2511).

Moreover, the ALJ properly rejected IBT's suggestion that its nonpayment of fringe benefits, paid holidays, sick days, vacation days or health insurance is indicative of independent contractor status in finding that many statutory employees do not receive benefits as a consequence of their employee status. (ALJD 16:16-19). In fact, the Board has found these facts as insignificant where an employer exerts significant control over compensation.⁷³

Furthermore, IBT does not give lease drivers any choice regarding how their pay is characterized, either through receiving a Form 1099 or having taxes deducted from their settlement

⁷² See *FedEx Home Delivery*, supra at 623 (finding employee status where drivers' rates of compensation were "generally nonnegotiable"); *Porter Drywall*, 362 NLRB No. 6, slip op. at 4 (where drywall crew leaders were paid pursuant to an established square footage formula and employer would not generally negotiate for increased payments, this factor weighed in favor of employee status); *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1764 (2011) (finding employee status where musicians' "fees are unilaterally set by the employer and there are no negotiations over such fees").

⁷³ *Igramo Enterprise, Inc.*, 351 NLRB 1337, 1345 (2007).

checks. Relying on *Time Auto Transportation, Inc.*,⁷⁴ the ALJ properly found that IBT had full control over the tax documents it provided drivers and because it unilaterally intended to categorize the drivers as independent contractors does not in and of itself establish lease drivers as independent contractors. (ALJD 16: 19-25).

h. The ALJ Properly Found that Lease Drivers Perform Work Integral to the Regular Business Services of IBT

IBT is in the drayage business and the movement of freight by its lease drivers is the core of IBT's operation. The Board has consistently held that performing work that is the core of the company's business supports a finding of employee status.⁷⁵

Nevertheless, IBT asserts in its Exceptions Brief that services provided by its lease drivers do not amount to essential services to IBT's completion of work for customers. In expressly rejecting this argument, the ALJ correctly found that the overwhelming record evidence established that the work of lease drivers in moving containers from one location to another is undeniably integral to the regular business services that IBT admitted it provides.⁷⁶ (ALJD 16:34-17:4).

IBT is a container trucking company, whose primary business is moving containers. (ALJD 4:35-37). IBT's lease drivers' central function is to move containers between the Ports and IBT's customers. Thus, the lease drivers do not provide merely some limited functions at the periphery of IBT's business: their work is central to that business and the work they perform is in fact the entirety of IBT's regular business. As noted by the ALJ, IBT would simply not be able to operate its business without drivers. (ALJD 17:6-7).

⁷⁴ 338 NLRB 626, 639 (2002).

⁷⁵ See *Slay Transp. Co., Inc.*, 331 NLRB 1292, 1294 (2000); *Roadway Package System, Inc.*, supra at 851.

⁷⁶ See *Roadway Package System, Inc.*, supra at 851 (the drivers performed functions that were not merely a "regular" or even an "essential" part of the employer's normal operations, but were the very core of its business).

i. The ALJ Correctly Found that IBT Lease Drivers Believe They are Employees and Not Independent Contractors, Further Supporting a Finding of Employee Status

IBT lease drivers believe they are statutory employees as drivers have engaged in collective action and invoked employee rights recognized under the Act, including participating in strikes, signing and presenting a petition for recognition to IBT, and engaging in other concerted activity aimed at improving terms and conditions of their work at IBT. (ALJD 18:2-4; 22:45-46; 24:12-13; Tr. 66; 69; 70-71; 73-77; 187-188; 514; 704; 966; 1321; GC Exhs. 2-4). As further indication of their belief, many lease drivers filed meritorious wage claims with the DLSE and class-action lawsuits against IBT in state court alleging misclassification. (Tr. 1448-1449; 1562; GC Exh. 85 (a)-(i)); U. Exhs. 10, 11, 17, 18, 51-53).

IBT contends in its Exceptions Brief that agreements executed by lease drivers referring to them as “Independent Contractors,” including the LTA and weekly truck lease, serve as conclusive evidence of an independent contractor relationship. However, the Board has generally found the existence of agreements referring to an independent contractor relationship as inconclusive evidence of the parties’ intent as to the nature of their relationship.⁷⁷

Notably, the ALJ expressly rejected IBT’s reliance on these agreements on the grounds that the agreements were unilaterally drafted and presented to drivers with no opportunity to negotiate any of the terms. (ALJD 17:13-19). In fact, not a single witness testified that they had made changes to either the weekly truck lease or LTA before signing it. Equally troubling was the fact that many of the agreements were replete with “legalese,” were lengthy, complex, and entirely in English for which no translation or explanation was provided to the majority of Spanish speaking

⁷⁷ See *FedEx Home Delivery*, supra at 623 (intent factor inconclusive where contract between employer and delivery drivers designated drivers as independent contractors, but employer imposed term unilaterally and majority of drivers voted for union representation); *Lancaster Symphony Orchestra*, 357 NLRB at 1766 (intent factor inconclusive where contract characterized musicians as independent contractors, musician playing with employer for thirty-two years considered himself an employee, and at least 30% of musicians signed cards reflecting interest in union representation).

drivers. (ALJD 5:15-19). IBT was aware of these language proficiency issues as it had distributed notices to drivers in Spanish in the past (GC Exh. 47; U. Exh. 32).

In taking exception to this finding, IBT cites to self-serving testimony from its own officials. However, contrary to IBT's baseless contentions, a majority of drivers testified that they did not really understand the 28-page LTA as IBT officials did not explain the agreement to them, drivers were not allowed to take the LTA home before signing, and could not make changes to the LTA before signing it. (Tr. 118-119; 454-455; 906; 1311-1313; 1339; 1369-1370). Instead, IBT representatives referred to a "dummy" lease agreement or cheat sheet and merely told lease drivers to initial, date, and sign the agreement. (ALJD 5:19-22; Tr. 1495; 3473). Under these circumstances, the ALJ correctly concluded that the actions of IBT in presenting these agreements to its lease drivers "erodes the veracity" of all documents relied on by IBT to argue the existence of an independent contractor relationship. (ALJD 17:32-35).

In further rejecting IBT's reliance on these agreements and finding an employee-employer relationship between IBT and its lease drivers, the ALJ properly noted that many of the agreements in the record were not even signed by any IBT officials. (ALJD 17:22-26; GC Exhs. 21, 22, 31, 32). The ALJ correctly concluded what was most damaging to IBT's reliance on these agreements was its conduct in redrafting, back dating, and destroying documents in an attempt to "cover up and manipulate IBT's employment records." (ALJD 17:26-28; 17:32-35; Tr. 1724-1726).

It is undisputed that beginning in August 2014, IBT "updated" its driver application form formerly entitled "Driver's Application for Employment" to "Independent Contractor Application" without making any other changes besides to the title. IBT could offer no coherent explanation or business justification for this "update," nor could it explain why the original applications were destroyed, apparently in violation of DOT regulations regarding retention of Driver Qualification files. (ALJD 17:28-32). The timing of this change demonstrates that it was in direct response to one

of the initial DLSE claims filed in August 2014 and the initial rumors of the class-action lawsuits that were later filed in December 2014.⁷⁸ (ALJD 17:28-30).

While IBT takes exception to the ALJ's consideration of its conduct in 2014 of backdating the updated application and LTA because it falls outside the 10(b) period, IBT's argument here should be rejected. The Supreme Court and the Board in deference to, have routinely held evidence outside the limitations period may be used to shed light on other timely events proving an unfair labor practice.⁷⁹ And based on such precedent and IBT's deliberate efforts to cover its tracks, the ALJ's decision to attribute little weight to the agreements should be affirmed.

Moreover, there is no dispute that IBT entered into weekly truck lease agreements with lease drivers, well-within the statutory period and the ALJ correctly found that the manner and means in which IBT entered into agreements with lease drivers referring to them as Independent Contractors damaged their veracity. (ALJD 17:32-35). The ALJ's consideration of IBT's backdating and document destruction merely six months before the statutory period "shed light" on and reveal the flagrancy of IBT's conduct during the statutory period. Under these circumstances, the ALJ properly determined that IBT's conduct in 2014 was relevant and attributed to its subsequent conduct during the statutory period.

IBT also contends that drivers believed an independent contractor relationship existed with IBT because they could set their own schedule. However, the Board has routinely held even if a worker has a truly unrestricted right to set his own schedule, having the right to work for an

⁷⁸ IBT revised the application even more recently in 2016, calling it "Independent Contractor/Subcontractor Application" without any further substantive changes except to the title, which was obviously meant to suggest that the lease drivers could hire subcontractors. However, as the record illustrates, the lease drivers could not allow others to drive the trucks they leased from IBT. (GC Exhs. 63, 64).

⁷⁹ *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 416 (1960) (although the memo was distributed to employees outside the 10(b) period, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period . . ."); *Ariel Offset Co., Inc.*, 149 NLRB 1145 (1964) (relying on the Supreme Court's holding in *Local Lodge*); *Ferguson Lander Box Co.*, 151 NLRB 1615 (1965).

employer when one wants does not necessarily make one an independent contractor.⁸⁰ Accordingly, based on the weight of the evidence, the ALJ correctly concluded that this factor supported a finding of employee status.

j. IBT and Its Lease Drivers Are Both Engaged in the Drayage Business

IBT's core business is to provide drayage services for its customers. Lease drivers are engaged to perform these drayage services and are in the same business as IBT.

k. The ALJ Properly Found That IBT Lease Drivers Do Not Render Services as an Independent Business and Do Not Have Entrepreneurial Opportunities

In addition to the traditional common-law factors, the Board also considers, as a separate factor, whether the worker at issue renders services as an independent business, usually interpreted as having the actual entrepreneurial opportunity for gain or loss.⁸¹ The ALJ's finding that IBT's lease drivers do not render services to IBT as independent businesses is supported by the record evidence. (ALJD 19:14-16). And evidence establishing that lease drivers lack actual entrepreneurial opportunities, have no real ability to work for others, no proprietary or ownership interest in their work, and cannot make business decisions further supports the ALJ's decision. (ALJD 18:20-27).

i. IBT Lease Drivers Lack Actual Entrepreneurial Opportunities

IBT's lease drivers lack any meaningful entrepreneurial opportunity because they do not own their own trucks. Due to the inability to take the trucks home or even use the lease trucks to work for other drayage companies during their shift at IBT, they are effectively precluded from performing independent work.

⁸⁰ See, e.g., *Minn. Timberwolves*, 365 NLRB No. 124; *Sisters' Camelot*, 363 NLRB No. 13; *Lancaster Symphony Orchestra*, 357 NLRB 1761.

⁸¹ *FedEx Home Delivery*, supra at 625.

Even within the confines of their work for IBT, the lease drivers have little opportunity to increase their income, which they testified can only be accomplished by trying to work more hours. Realistically, this is generally not an option since they are confined by the hours of the lease and limited by DOT regulations about how much they can drive in a day. Moreover, “the choice to work more hours or faster does not turn an employee into an independent contractor.”⁸²

The inability to negotiate rates further supports the ALJ’s conclusion that lease drivers lack entrepreneurial opportunity. It is undisputed that IBT sets these amounts based, in part, on the rates it negotiates with its customers and that IBT lease drivers are not involved in these customer negotiations. (ALJD 6:22-23; Tr. 741; 1142; 2465-2474). Lease drivers consistently testified that after they concertedly complained about the rates in 2015, IBT offered to meet with them individually to discuss rate increases. However, these rate “negotiations” were easily shown to be fraudulent, as the record evidence demonstrates that all the drivers were given the SAME rates, and that many of the “rate negotiation” sheets were filled out by IBT in advance of these illusory negotiation meetings.

IBT renews the same argument in its Exceptions Brief that it unpersuasively made to the ALJ that its lease drivers exercise entrepreneurial freedom by rejecting assignments, finding their own work without being dispatched, and staging containers at the IBT yard in order to complete more work. The ALJ rejected all of these arguments in his decision and correctly found that the record is ripe with evidence demonstrating how lease drivers lack any meaningful entrepreneurial opportunity and are instead fully controlled by IBT. (ALJD 18:29-19:6-16).

With respect to the rejection of assignments, drivers consistently testified that they could not refuse assignments before the Union campaign, because if they did so, they would receive undesirable assignments that were based out of congested ports and paid less. (Tr. 167; 481-482;

⁸² *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011).

1094; 1398; 2890). Tellingly, IBT officials reprimanded drivers and expressly told them they could not reject work. (Tr. 878-879; 483). Although IBT asserts it cannot “force” a driver to take a particular load, as it was able to do when the drivers worked through Staffmark, drivers have been consistently told that they have to do certain work or work certain hours. (Tr. 878). In September 2014, Vice President Zea instructed dispatch to force the drivers to return their own empty containers to the terminals and not leave them in the yard to potentially be returned by other drivers. (Tr. 3972; U. Exh. 40). Previously, if a driver left a container in the Wilmington yard for several days, IBT would deduct money from the amount due that driver for completion of the entire movement. (Tr. 4007).

While IBT argues such conduct fell outside the statutory period, this conduct was pervasive, instilled the fear of retaliation in drivers, and persuaded drivers to continue not rejecting loads even during the statutory period. (Tr. 1398). In fact, one dispatcher confirmed that as recently as August 2016, drivers took what was offered to them for their initial dispatch. (Tr. 3346-3347). The record evidence establishes that lease drivers have no entrepreneurial discretion in their working relationship with IBT and any illusory right to accept or reject assignments unilaterally offered to them does not change that conclusion.

IBT’s assertion that drivers had the freedom to find their own work is equally without merit as testimonial evidence from IBT’s own officials confirms that this was a highly discouraged and ultimately discontinued practice at IBT. (Tr. 2143-2145; 3367-3368). Lease drivers consistently testified they have to first obtain authorization from dispatch before moving empties at IBT’s customer, Sony, and IBT’s own dispatchers confirmed that drivers had to be dispatched for all empties, including those at Sony. (Tr. 420-421; 582; 739-740; 984-985; 1025-1026; 1029; 1140-1142; 1181-1185; 1187-1190; 2248-2249; 3380; 1607; 803-04). In fact, drivers cannot move containers without dispatch authorization and the record confirmed that dispatchers prevented one

lease driver from picking up a Sony empty in the past by refusing to give him the DR or confirmation number. (Tr. 740; 1141).

Furthermore, even assuming some lease drivers occasionally picked up empties on their own as IBT claims, testimony from IBT's Vice President and dispatcher confirm IBT did not approve of this practice and took affirmative steps to discontinue it. (Tr. 2209-2211; 3367-3368). Vice President Zea testified that some drivers were cheating by going to Sony before even receiving their first assignment, so IBT decided to stop this practice by not giving drivers their keys until they also receive their first dispatch. (Tr. 2143-2145). Dispatcher Moreno also testified that drivers should not be going to Sony on their own as "there's no logic to it." (Tr. 3367-3368).

IBT's assertion that lease drivers had the freedom to complete dock moves at Elkay Plastics is equally unsupported by the credible record evidence. Lease drivers do not go to Elkay without a load just to perform dock moves; rather, drivers perform these dock moves once they are already at Elkay and have delivered an assigned load. (Tr. 889; 983). And dock moves are only assigned to day shift drivers. (Tr. 1457; 1530). The Elkay loads are assigned by IBT dispatchers and the dock moves are preauthorized by IBT through correspondence between IBT and Elkay representatives. (Tr. 889). Moreover, the majority of lease drivers testified that they needed to first get authorization from an IBT dispatcher before performing that work, which drivers do not perform very often. (Tr. 343-344; 420; 581; 861-862; 738; 983; 1140). And lease drivers universally testified they are paid \$15 per dock move by IBT, and no driver negotiated this rate. (Tr. 341-345; 615-616; 738-739; 860-862; 882-884; 888-889; 982; 1139-1140).

The ability to leave containers in IBT's yard is another illusory freedom and example of the level of control exerted by IBT over its lease drivers. Contrary to IBT's contention in its Exceptions Brief, the record evidence establishes that IBT officials instructed drivers not to leave loads in the IBT yard overnight, even if drivers were running out of hours, and told that they must complete the

loads they receive during their shift. (Tr. 1517-1519; 1573-1575). Vice President Zea also emailed dispatchers instructing them to force drivers to complete their empties instead of leaving them in the yard. (Tr. 2415-2417; U. Exh. 40). IBT also began penalizing lease drivers for leaving containers in the yard for too long by deducting \$15 for each container left in IBT's yard that had to be returned to the Port by another driver. (Tr. 1641-1645; 2244-2247).

Undoubtedly, IBT's lease drivers have significantly less entrepreneurial opportunities than the statutory driver employees in the Board's governing *FedEx Home Delivery*⁸³ decision.

- FedEx drivers could use the vehicles they leased from FedEx for other commercial or personal purposes (like moving family members or engaging in their own delivery business) so long as they masked the company logo on the side of the truck.⁸⁴ This option created the opportunity for these FedEx drivers to earn additional income with the truck if they so choose. This is clearly not an option for IBT's lease drivers, who cannot even take the trucks home and have to return them to the company's yard not later than the end of the daily lease period, or face fines. Thus, unlike the FedEx drivers, IBT's lease drivers have no entrepreneurial opportunity that can be derived from leasing the company trucks.
- FedEx drivers could sell, give, or bequeath their delivery routes to others without any authorization or involvement from FedEx: the D.C. Circuit recognized that this was "not a standard feature for an employee-employer relationship."⁸⁵ By contrast, IBT lease drivers do not have fixed delivery routes, since their dispatches are controlled entirely by IBT and the lease drivers have little or no control over where they go from day-to-day or even at any given time during the day. In fact, IBT lease drivers

⁸³ *FedEx Home Delivery*, supra at 610.

⁸⁴ *Id.* at 616.

⁸⁵ *FedEx Home Delivery v. NLRB* ("*FedEx I*"), 563 F.3d 492, 501 (D.C. Cir. 2009).

are told they cannot even switch assigned dispatches with other drivers without prior authorization. (Tr. 2183; 4160-4162; GC Exh. 107).

- FedEx drivers could take extended time off, during which they could hire other drivers to show up as replacements or substitutes to perform their routes: the D.C. Circuit recognized that the “ability to hire others to do company work” without any notice to the company was a crucial indicia of entrepreneurial opportunity.⁸⁶ In the instant case, IBT lease drivers can neither take significant time off without risking having their contracts cancelled, nor can they hire others to drive the truck they lease from IBT. Although IBT has suggested lease drivers might be able to have others drive the truck, the drivers consistently testified and the ALJ properly found that they are instructed to indicate “no” on their weekly truck lease form in response to whether they plan to have someone else drive the IBT truck leased to them. (ALJD 6:10-12; Tr. 138; 459-460; 462-463; 646; 910; 1071; 1317-1318; 1374; 1599; 3470). In fact, a lease driver testified that on one occasion he had accidentally marked “yes” in response to the question about other drivers driving the leased IBT truck and a dispatcher explicitly told him he had to mark “no” in response to that question (Tr. 1318). Moreover, no lease driver at IBT has ever had someone else drive the company truck in his place since IBT implemented its leasing business model in 2010, and this option remains completely theoretical – if not impossible – given the other restrictions placed on the lease drivers by IBT. (Tr. 1783). Thus, the IBT lease drivers lack this crucial element of entrepreneurial opportunity.
- The FedEx drivers could contract for multiple routes and hire their own drivers to service those routes, and in fact at least 25% of the FedEx drivers at a particular

⁸⁶ *Id.*

location did so.⁸⁷ As noted above, IBT’s lease drivers do not have “routes” *per se*, but are subject to the whims of daily dispatch. There is no evidence that any IBT lease driver has ever leased more than one truck at one time: however, as they are prohibited from taking the trucks home or having others drive the company trucks, there is no point in leasing more than one truck since there is no way the driver can generate additional income from doing so.

ii. Lease Drivers Do Not Have the Ability to Work For Others

Although IBT argues that the lease drivers can theoretically use the trucks they lease from IBT to work for other drayage companies, this is merely a theoretical possibility and there is no evidence that any lease driver at IBT has ever done so in the history of IBT. As previously noted, the Board, in determining employee status, ignores the theoretical right to work for others where the evidence demonstrates that the relationship between the parties creates obstacles to pursuing additional work.⁸⁸

Moreover, even if such an opportunity was more than theoretical, the Board has further noted opportunities that are “circumscribed or effectively blocked by the employer” are not actual opportunities.⁸⁹ The IBT lease drivers pursuit of work at other drayage companies is not possible since they lease the trucks from IBT, the trucks have IBT’s name and logo, as well as IBT’s DOT and CA numbers on the truck doors, the insurance and registration are under IBT’s name, and the lease drivers are not permitted to take the trucks home. The restrictions placed on the lease drivers by IBT, in conjunction with the afore-mentioned limitations on their hours of work and the length of

⁸⁷ *Id.* at 499.

⁸⁸ *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998).

⁸⁹ *FedEx Home Delivery*, *supra* at 619.

time they can lease the truck, effectively prohibit the lease drivers from working for anyone besides IBT.⁹⁰

Moreover, there is no evidence in the record that IBT lease drivers advertise their services as truck drivers to work at other companies or have their own business cards promoting their services in the drayage industry. Rather, lease drivers consistently testified that they do not work for anyone other than IBT and solely do business with IBT's customers in the name of IBT. (Tr. 512-513; 697-698; 964; 1134-1135; 1447-1448).

iii. **Lease Drivers Have No Proprietary or Ownership Interest in the Work**

As IBT controls the lease drivers' use of the company truck, as well as most other aspects of their work, including dispatch, insurance, customer contracts, and the method and amount of compensation, IBT lease drivers have no significant proprietary interest in the work they perform for IBT. Unlike the FedEx drivers, IBT lease drivers did not have fixed routes or customer accounts that they could sell or give to another driver. Moreover, lease drivers consistently testified they could not hire other drivers to drive the truck they leased from IBT and there was no evidence in the record that they did so. (ALJD 13:31).

iv. **Lease Drivers Do Not Control Important Business Decisions**

The ALJ correctly found that IBT lease drivers also have no control over important business decisions. (ALJD 18:20-21). Nevertheless, IBT argues in its Exceptions Brief that lease drivers have entrepreneurial freedom by deciding when to work, how much work to perform, and accepting or rejecting assignments. Relying on *Lancaster Symphony Orchestra*,⁹¹ the ALJ properly rejected these arguments.

⁹⁰ See *OS Transport, LLC*, 358 NLRB 1048 (2012) (finding that long hours worked for OS prevented drivers from working for other carriers).

⁹¹ 357 NLRB 1761, 1763 (2011), *enfd.* 822 F.3d 563 (D.C. Cir. 2016).

Here, IBT completely controls its business strategy, customers, and customer rates. IBT lease drivers consistently testified that they cannot negotiate movement rates with IBT's customers or even obtain work from IBT's customers without going through IBT dispatch. Nor are lease drivers permitted to contact IBT customers to change appointments. (ALJD 8:2-3; Tr. 3729; 3325-26; 2054-58). IBT unilaterally sets the rates like the Orchestra did for the musicians in *Lancaster Symphony Orchestra*. Although lease drivers can decide not to work on a particular day, like the statutory employee musicians in *Lancaster Symphony Orchestra*, the Board has consistently held that "the choice to work more hours or faster does not turn an employee into an independent contractor."⁹² Similarly, as the ALJ correctly noted, IBT fully controls the assignments given to lease drivers, like the performances offered to the musicians in *Lancaster Symphony Orchestra*. Therefore, any choice exercised by the lease drivers in working is significantly outweighed by their lack of control over important business decisions, including strategy, customer base and recruitment, and customer rates.

Moreover, the terms and conditions of the lease drivers' work are exclusively determined by IBT. When examining entrepreneurial control, the Board will consider whether a worker's terms and conditions of work are promulgated and changed unilaterally by the company.⁹³

IBT first had lease drivers execute a truck lease in 2010, when IBT began leasing trucks to drivers. (GC Exh. 7). In 2014, IBT unilaterally decided to modify the terms of its truck lease and demanded that all drivers execute a new truck lease agreement. (Tr. 117-118; 453-454; GC Exh. 9). The 2014 Truck Lease was pre-drafted by IBT and lease drivers were told that if they wanted to continue working for IBT, they had to sign it and agree to all of the provisions in the 28-page agreement. In fact, one lease driver testified that receiving his pay check was conditional upon

⁹² *Id.* at 1765; see also *Minn. Timberwolves*, 365 NLRB No. 124, slip op. at 13 (2017); *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7 (2015).

⁹³ See *Stamford Taxi*, 332 NLRB 1372, 1373 (2000) (finding that company's unilateral drafting, promulgating, and changing drivers' lease agreements weighed in favor of employee status).

signing the 2014 LTA and the weekly truck lease. (Tr. 1662). IBT did not provide lease drivers with a Spanish version of the 2014 LTA, even though it had distributed notices to drivers in Spanish in the past. (Tr. 906; 1067; 1312; 3472; GC Exh. 47; U. Exh. 32). Nevertheless, IBT representatives instructed lease drivers to sign the 2014 LTA before translating the agreement for them. (Tr. 118; 454; 1067; 1312).

Furthermore, IBT representatives did not explain to lease drivers, either in Spanish or English, any of the provisions of the lengthy 2014 LTA. (Tr. 118; 454; 906; 1068; 1313; 1369-1370). Instead, IBT representatives referred to a “dummy” lease agreement or cheat sheet and merely told lease drivers to initial, date and sign the agreement. (Tr. 2859-2860; 3441-3473).

As to the weekly truck lease, IBT unilaterally changed its weekly truck lease agreement two times within a single year; April 2014 weekly truck lease; September 2014 weekly truck lease; and April 2015 weekly truck lease. (GC Exhs. 68, 69, 140). Like the 2014 LTA, lease drivers cannot negotiate any of the terms of the weekly truck lease and are required to sign the weekly truck lease in order to work for IBT. (ALJD 6:5-7; Tr. 459; 912; 1072-1073; 1319; 1375-1376; 1600). IBT has not explained the weekly truck lease provisions to the lease drivers; rather, IBT has set a sample weekly truck lease in the safety office and instructs lease drivers to copy the information from the sample onto their weekly truck lease. (ALJD 6:8-9; Tr. 136; 462; 908-909; 1070-1071; 1315-1316; 1372; 1374-1375; 1598). Drivers are not aware of all of the weekly truck lease provisions as Bradley confirmed that IBT provides drivers with only the first and last pages of the four page weekly truck lease. (ALJD 6:7-8; Tr. 1781; 3427-3430; 2853; 136; 645; 1072; 1318; 1376; 1600).

The weekly truck lease purports to give lease drivers the right to hire others to assist them in performing services for IBT, however lease drivers consistently testified they believe they cannot sublease the company truck to other drivers, and are consistently told while completing their weekly

truck lease that they cannot do so. (ALJD 6:10-12; Tr. 138; 459-460; 462-463; 646; 910; 1071; 1317-1318; 1374; 1599).

IBT cites to the LTA and weekly truck lease in its Exceptions Brief as conclusive evidence of the existence of an independent contractor relationship; however, the record consistently establishes that provisions in these agreements are entirely illusory and do not accurately reflect the actual terms and conditions of work of lease drivers at IBT. IBT presents lease drivers with pre-drafted lease agreements with terms that establish the working conditions at IBT. IBT lease drivers cannot negotiate any of the terms of either the LTA or the weekly truck lease and must sign both agreements in order to work at IBT. IBT determines the amount drivers pay for liability insurance, the insurance provider, and other fees and deductions related to occupational accident insurance, the escrow account contribution, and the lease rate. Thus, the evidence strongly supports the ALJ's conclusion that IBT lease drivers are not rendering services as independent services and do not have actual entrepreneurial opportunities.

Based upon the foregoing and the record as a whole, IBT has failed to meet its burden that its lease drivers are independent contractors. The ALJ's decision, concluding that every single factor establishes the employee status of IBT's lease drivers, is supported by substantial record evidence and should be affirmed by the Board.

3. The ALJ Properly Concluded that IBT's Misclassification of Its Lease Drivers Independently Violated Section 8(a)(1) of the Act (Exceptions 1, 89-91, 103-106)

While the General Counsel does not agree with the "*per se*" legal theory relied on by the ALJ in addressing this issue of first impression,⁹⁴ the Board should nevertheless affirm the ALJ's finding and conclude that misclassification is unlawful under Section 8(a)(1) where, as here, there is

⁹⁴ The Board recently issued a Notice and Invitation to File Briefs on this issue in *Velox Express, Inc.*, Case 15-CA-184006, Feb.15, 2018.

evidence that an employer actively used the misclassification of its employees to interfere with activity that is protected by the NLRA.⁹⁵

The General Counsel maintains that misclassification in conjunction with some affirmative action by an employer to chill protected conduct qualifies as an independent violation of Section 8(a)(1). Although IBT has the burden to prove independent contractor status,⁹⁶ the burden in establishing that IBT independently violated Section 8(a)(1) by actively using the misclassification of its lease driver employees to interfere with Section 7 activity rests with the General Counsel. Once misclassification has been established by virtue of IBT's failure to meet its burden of proving independent contractor status, the burden shifts to the General Counsel to prove that IBT committed an unfair labor practice by using the misclassification to interfere with Section 7 activity.⁹⁷ And the record evidence amply demonstrates that the General Counsel has sustained that burden.

Indeed, this theory of violation is predicated on the future chilling effect on employees that the misclassification engenders, and more broadly, the misclassification's interference with Section 7 activity. Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" employees' Section 7 rights. Moreover, the Board has held that an employer violates Section 8(a)(1) when its conduct has a tendency to "chill" or curtail future activities of statutory employees protected under Section 7 of the Act. For example, an employer's

⁹⁵ There are numerous state and federal laws, governing various aspects of the employment relationship, under which workers are determined to be employees or independent contractors for purposes of that particular law, e.g., the IRS code, state unemployment statutes, federal anti-discrimination laws, the NLRA, ERISA, and OSHA. Employers must look to the interpretations of the courts and various enforcement agencies to decide if, in a particular situation and for a particular purpose, a worker is considered an employee or independent contractor. Given the different standards and legal tests that apply, a worker may be deemed to be an employee under one test and an independent contractor under another. It is the General Counsel's view that, given the complexities of these various analyses, employers should not be penalized for simply getting that classification wrong under the NLRA.

⁹⁶ *FedEx Home Delivery*, 361 NLRB at 611 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001) and *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof)).

⁹⁷ *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 7 (2016) (noting the burden of proof lays with the General Counsel to prove 8(a)(1) allegations by a preponderance of the evidence).

“preemptive strike” to prevent employees from engaging in protected concerted activity violates Section 8(a)(1) because of its chilling effect on employees’ future exercise of their rights.⁹⁸

Although intent is not required in establishing a violation of Section 8(a)(1), what make this case even more compelling is that IBT was aware of its misclassification of its lease drivers and took affirmative steps to keep misclassifying them by reaffirming the drivers’ status as independent contractors and denying them of their Section 7 rights. Moreover, IBT’s assertions that it would use any means necessary to retain its independent contractor model through notices and letters distributed to drivers during the statutory period suggested that the lease drivers’ efforts to organize as statutory employees and join a union would be futile.⁹⁹

There is no dispute that IBT was aware of and closely monitored the Union organizing campaign. (Tr. 187; GC Exhs. 90, 127, 135-138; U. Exhs. 38, 39, 57). The campaign began with the drivers presenting a demand to IBT for recognition of the Teamsters. (Tr. 69; 702-704; GC Exh. 2). The drivers who supported the Union engaged in several strikes and other open and notorious conduct which IBT’s managers frequently discussed amongst themselves, often discussing ways to punish those drivers who engaged in this conduct. (Tr. 66; 71; 73-75; GC Exhs. 4, 5, 88, 126, 127, 137, 138; U. Exh. 45, 57).

As argued in the Region’s post-hearing brief to the ALJ, IBT took deliberate steps to use its misclassification of the lease drivers to chill their Union and protected concerted activities. Thus, IBT not only insisted that the drivers were independent contractors not entitled to the protections afforded by Section 7, it also used its misclassification to threaten the futility of the drivers’ organizing efforts by insisting that federal law prevented them from collectively negotiating wage

⁹⁸ See, for example, *Parexel International, LLC*, 356 NLRB 516, 520 (2011) (employer terminated employee to prevent her from engaging in future protected concerted activity).

⁹⁹ See *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 6. (2015).

rates with IBT or even discussing wage rates among themselves, and threatened them with ramifications for continuing their protected challenge to the misclassification itself.

For example, on May 21, 2015, about one month after the Union began publicizing its organizing campaign, IBT sent a “Notice” to all “Independent Contractor Drivers” notifying them that it had received written requests from them for rate increases but that, “[u]nder federal law all contractors must negotiate individually and not as a collective group.” (Jt. Exh. 1(a)). IBT then offered to meet with the drivers individually to discuss and negotiate confidential pay rates. Notably, Vice President Zea conceded that prior to May 2015, IBT had not increased driver rates in over five years. (Tr. 2421; U. Exh. 42).

And on July 15, 2015, shortly after the lease drivers’ presented their demand for Union recognition and went on their first strike in around April 2015, IBT distributed a memo to “All IBT Independent Contractors” reiterating that it was “defending a number of lawsuits that seek to end the way that IBT does business with its independent contractors.” (Jt. Exh. 1(d)). This memo said that “[o]ne result of those lawsuits is that IBT cannot continue to place itself at risk by making long-term lease commitments” for the trucks that the leased drivers used, and that “as a result” IBT would be returning the leased trucks and attempting to make shorter-term lease arrangements for the drivers. Thus, IBT explicitly tied this threat to make less-favorable lease arrangements for the drivers to their lawsuits challenging their misclassification as independent contractors. (Jt. Exh. 1(d)).

The memo in closing stated “IBT has had a long and successful relationship with its drivers, and, for the sake of IBT, our customers, and you and your families, we hope that it will continue.” This pronouncement, under the auspices of legal counsel, was consistent with earlier emails suggesting taking the drivers’ trucks away in retaliation for their protected activities. (GC Exh. 88; U. Exh. 45). IBT was unable to identify any particular incident that precipitated the distribution of

these memos to the drivers, further confirming that their only purpose was to “chill” protected activity.

IBT argues in its Exceptions Brief that its classification of lease drivers as independent contractors and its communications with drivers about that classification are merely expressions of opinion about legal status and a lawful exercise of free speech under Section 8(c) of the Act. However, the record reflects that IBT’s views on the employment status of its lease drivers were tainted by threats of reprisals and promises of benefits, which are expressly excluded from Section 8(c)’s protections.¹⁰⁰

As discussed more fully below, efforts to use the misclassification of lease driver employees as independent contractors to chill Section 7 activity took place in the context of other coercive conduct found by the ALJ to be unlawful under Section 8(a)(1). This includes: IBT’s Vice President threatening drivers with unspecified reprisals, interrogating drivers by polling them to ascertain who supported the Union, and expressing the futility of the Union organizing campaign; and a dispatcher threatening unspecified reprisals and plant closure, promising better work for abandoning their Union support, and interrogating employees. (ALJD 22:1-12; 23:43-24:8; 25:19-35). The ALJ properly found that threats of job loss and plant closure are among the most flagrant instruments of coercion. (ALJD 24:7-8). When IBT’s misclassification is considered against the backdrop of other unfair labor practices, including flagrant coercive statements made by IBT’s highest-ranking official, the conclusion that IBT actively used its misclassification of lease drivers to restrain Section 7 activity is even more clear and compelling.

More telling, after the lease drivers began to assert that they were employees through the filing of wage claims and class action lawsuits and initiating and participating in the Union organizing campaign, IBT began to modify its business forms and practices to make the lease

¹⁰⁰ 29 U.S.C. § 158(c).

drivers appear to be more independent, even though the drivers gained no entrepreneurial advantage and their working relationship with IBT remained essentially unchanged. While IBT contends that much of this conduct occurred outside of the statutory period, that is simply not true. Moreover, the Supreme Court and the Board have routinely held evidence outside the limitations period may be used to shed light on other timely events proving an unfair labor practice.¹⁰¹

Notably, as the ALJ correctly found, and as further reflected by the record, the record is ripe with evidence of IBT “manufacturing a record that would color the facts in its favor.” (ALJD 10:10-12).

- IBT Revised Its Driver Application Form
- IBT Ceased Requiring I-9 Forms From Its Lease Drivers After the Filing of the DLSE Wage Claims
- IBT Revised Its Lease and Transportation Agreement (LTA)
- IBT Repeatedly Revised Its Weekly Truck Lease Agreement During the Statutory Period
- IBT Engaged in Sham Negotiations With Lease Drivers Over Their Rates During the Statutory Period
- IBT Required That Drivers Sign-Up for Occupational Accident Insurance, Instead of Workers’ Compensation Insurance During the Statutory Period
- IBT Instituted The “Refusal” or Rejection Logs to Show Lease Driver Independence During the Statutory Period
- IBT Changed Dispatch Procedures During the Statutory Period to Make it Appear That Drivers Have More “Choices”
- IBT Issued Memos, During the Statutory Period, Advising Lease Drivers That They Were Independent Contractors Notwithstanding Their Union and Protected Concerted Activities
- IBT Threatened a “New Business Model” During the Statutory Period in Response to the Lease Drivers’ Protected Concerted Activities

¹⁰¹ *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 416 (1960) (although the memo was distributed to employees outside the 10(b) period, “earlier events may be utilized to shed light on the true character of matters occurring within the limitations period”); *Ariel Offset Co., Inc.*, 149 NLRB 1145 (1964); *Ferguson Lander Box Co.*, 151 NLRB 1615 (1965).

While the General Counsel has not alleged that each of these actions amount to an unfair labor practice, activity that may not be unlawful on its own may nevertheless still impart a coercive overtone in the context of other unfair labor practices. The record illustrates a pattern of deliberate efforts by IBT to use its misclassification of the lease drivers to interfere with their Section 7 rights.

IBT Revised Its Driver Application Form

It is undisputed that beginning in August 2014, IBT “updated” its driver application form formerly entitled “Driver’s Application for Employment” to “Independent Contractor Application” without making any other changes besides to the title. (GC Exhs. 41, 50, 51). Not only was this new application used prospectively, but all drivers at the time were forced to fill out and backdate the new application to the date of their original application, after which all the original applications were inexplicably destroyed. IBT could offer no coherent explanation or business justification for this “update,” nor could it explain why the original applications were destroyed, apparently in violation of DOT regulations regarding retention of Driver Qualification files. Nothing in the working conditions of the lease drivers changed after they executed this new application referring to them as independent contractors. The ALJ correctly found this as an intentional attempt by IBT to color the drivers’ employment record in its favor. (ALJD 10:12-22).

IBT revised the application even more recently in 2016, calling it “Independent Contractor/Subcontractor Application” without any further substantive changes except to the title, which was obviously meant to suggest that the lease drivers could hire subcontractors. (GC Exhs. 63, 64). However, as the ALJ correctly found, the lease drivers could not allow others to drive the trucks they leased from IBT. (ALJD 6:10-12; 13:31 Tr. 138; 459-460; 462-463; 646; 910; 1071; 1317-1318; 1374; 1599). Again, IBT management professed ignorance about why this change was promulgated or necessary.

IBT Revised Its Lease and Transportation Agreement (LTA)

Around the same time that IBT updated its driver application, IBT also had its lease drivers execute new LTAs. The LTAs included a new appendix entitled “Independent Contractor’s Rights While Under Contract,” which set forth for the first time for the lease drivers certain “rights.” (GC Exh. 9 at 26-28). By requiring lease drivers to acknowledge and agree to abide by these illusory rights, IBT intended to restrain and coerce the lease drivers from engaging in any future protected activities.

IBT Repeatedly Revised Its Weekly Truck Lease Agreement During the Statutory Period

Concurrent with the drivers’ DLSE claims and the inception of the revised Applications and LTAs described above, IBT also amended its Weekly Lease agreement in September 2014 and again in April 2015 after the Union organizing campaign went public. (GC Exhs. 22, 69). Both updated versions included for the first time an ostensible option for the lease drivers to indicate whether anyone other than the lessee would be driving the leased truck. However, drivers were consistently instructed to check “no” to this question, and none of them ever had anyone else drive the truck for them. (ALJD 6:10-12; 13:31 Tr. 138; 459-460; 462-463; 646; 910; 1071; 1317-1318; 1374; 1599).

IBT Required That Drivers Sign-Up for Occupational Accident Insurance, Instead of Workers’ Compensation Insurance During the Statutory Period

There is no evidence that IBT required the drivers to carry any insurance of this type before May 2015, and the timing suggests it was in direct response to the lease drivers’ protected concerted and Union activities. (Jt. Exh. 1(b)). Lease drivers testified that IBT representatives told them that obtaining occupational accident coverage was required by IBT. (Tr. 468; 1078; 3087).

Notably, IBT expressly recognized in an email amongst its managers that by forcing the lease drivers to purchase “Occ-Acc” insurance, this would be an indication that the lease drivers were not IBT’s employees. (U. Exh. 37). IBT deducted \$35.08 per week from the lease drivers’

settlement checks. (Tr. 468; 1226). Similar to the insurance on the trucks, IBT lease drivers did not negotiate the amount paid for occupational accident insurance. (Tr. 469; 1079; 3087).

IBT Instituted The “Refusal” or Rejection Logs to Show Lease Driver Independence During the Statutory Period

Around mid-March 2015, IBT instituted a “refusal” log in which dispatchers were instructed to document instances where lease drivers “refused” a movement or assignment. (GC Exh. 105). IBT readily admitted that the sole purpose of maintaining this log was to demonstrate that the lease drivers were “independent” and therefore were not employees.

By May 2016, IBT personnel routinely documented Union and protected concerted activities on the refusal logs, noting on one occasion that two lease drivers known to be Union supporters – Portillo and Flores – came to the window to be dispatched and then went to join the Union picket line (Tr. 2199; GC Exh. 110). Zea conceded that this was not a “refusal of work” *per se*, but was noted in the log to be “informational” (Tr. 2201). Although Zea denied that he told dispatchers to keep notes on any particular drivers, examination of the rejection logs kept in 2016 shows that drivers who openly supported the Union and/or were named in the misclassification lawsuits against IBT appeared almost daily in the logs, and their actions were closely monitored. (Tr. 2190; 2194; GC Exh. 112).

IBT Changed Dispatch Procedures During the Statutory Period to Make it Appear That Drivers Have More “Choices”

As previously discussed, after the Union campaign began in the spring of 2015, IBT lease drivers observed that the dispatchers began to offer them a choice between two and sometime three movements in the morning instead of just one for the assignment of the first load. Although IBT attempted to assert that they had been doing this all along, the lease drivers correctly recognized it as a response to their Union activities and an attempt to make it appear as though the lease drivers had actual control over the work they performed. This did not change the fact that the dispatchers

continued to offer runs based on appointments and expiring container “free” days, and did not offer drivers the full menu of available work at any given time. Moreover, the drivers still could not choose the customers or destinations they preferred.

IBT Issued Additional Memos, During the Statutory Period, Advising Lease Drivers That They Were Independent Contractors Notwithstanding Their Union and Protected Concerted Activities

IBT issued two memos to the drivers on June 12, 2015 shortly after the first strike. One entitled “Intimidation and Harassment,” referenced the Union organizing campaign and advised the drivers that IBT recognized them as running their “own independent business.” (GC Exh. 90). Notwithstanding, IBT then advised the drivers of their “rights” in order to prevent any “avoidable misunderstanding from disrupting IBT business.” The memo went on to list these “rights,” including the fact that the Teamsters held no power over the drivers or the company, could not prevent the drivers from providing services to IBT, and could not force the drivers out of their relationship with IBT – all direct references to their rights to engage in protected activity.

The second memo, entitled “Pending Disputes,” advised the drivers that IBT and other drayage companies were engaged in “an industry-wide challenge” to their historic use of independent contractors. After listing the ostensible rights that IBT believed the lease drivers had over their working conditions, the memo closed by stating IBT would defend its independent contractor model “with all available resources” and would not bow down to intimidation tactics. (Jt. Exh. 1(c)).

IBT Threatened a “New Business Model” During the Statutory Period in Response to the Lease Drivers’ Protected Concerted Activities

Discussion of a “new business model” began shortly after the lease drivers’ presented their demand for Union recognition and went on their first strike in around April 2015. In June 2015, IBT management traded emails referencing the strikes and suggesting taking IBT lease trucks out of service to punish the lease drivers who supported the Union. IBT’s upper management expressed

concern about the concurrent retention of the drivers “no matter what legal position they are taking” and not having them “feel threatened by our new business model.” (GC Exh. 126).

Through this continued and deliberate conduct in actively misclassifying its lease drivers, in the context of other coercive conduct found by the ALJ to be unlawful under Section 8(a)(1), IBT communicated to lease drivers that they had no rights under Section 7 of the Act. Because independent contractors may lawfully be terminated for engaging in Section 7 activity, IBT’s continued insistence to its lease driver employees during a union organizing campaign that they are independent contractors equates to IBT telling its lease driver employees that they engage in Section 7 activity at the risk of losing their jobs and having no workplace protections. The Supreme Court has held that “reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.”¹⁰² By making efforts to further misclassify its lease drivers, IBT denied lease drivers rights lawfully afforded to them under the Act.

IBT took numerous actions to chill employees from exercising their statutory rights during the Union’s organizing campaign and conveyed that their unionization efforts were futile.¹⁰³ In these circumstances, where there is evidence that the employer actively used the misclassification of employees to interfere with Section 7 activity and subvert the Act, the Board should affirm the ALJ’s conclusion that the misclassification of lease driver employees as independent contractors violated Section 8(a)(1).

As to the ALJ’s recommended remedy for this violation, the Board should not adopt the make-whole/consequential harm remedy ordered by the ALJ. Rather, the Board should order IBT to

¹⁰² *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996).

¹⁰³ See *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 6. (2015)(finding the employer violated Section 8(a)(1) by indicating that union organizing would be futile when it informed canvasser employees, who had been misclassified as independent contractors and were attempting to organize, that it would never accept an employee-employer relationship with its workers).

cease and desist from interfering with, restraining, or otherwise coercing its employees in the exercise of their Section 7 rights by communicating to the lease drivers that they are independent contractors and not employees under the Act. The order should also require IBT to rescind any portions of its agreements with its lease drivers that purport to classify them as independent contractors.

There is no reason to believe that consequential damages would be appropriate in this case, and no evidence supporting that remedy was introduced at trial. Where consequential damages are potentially appropriate, the General Counsel should plead it at the outset, or, if requested by the Charging Party, the Board should require that specific evidence supporting the appropriateness of the remedy be introduced at trial.

4. The ALJ Correctly Found that IBT Further Violated Section 8(a)(1) of the Act by Interrogating, Promising Better Work, and Threatening Its Lease Drivers With Job Loss, Plant Closure and Other Unspecified Reprisals (Exceptions 1, 2, 92-101, 103-106)

IBT's arguments regarding the Section 8(a)(1) unlawful statements in this case are tellingly sparse and contradictory to the ALJ's credibility assessments and well-settled applications of established law.

a. Vice President Zea Interrogated Drivers, Expressed the Futility of the Union Organizing Campaign, and Threatened Drivers With Unspecified Reprisals

In February 2016, IBT drivers distributed a flyer at a Target store asking Target to take responsibility for its supply chain and stop wage theft. (Tr. 514; 966; 1321; GC Exh. 4). Prominently featured on the flyer were photos of IBT's lease drivers and Union supporters Joe Ortiz and Daniel Uaina and quotes from them supporting the Union and accusing IBT of wage theft and mistreatment. (Tr. 212-14; 515-16; 967-68; 1320-21; GC Exh. 4).

On about February 16, 2016, shortly after certain lease drivers distributed the flyer, anti-union drivers at IBT angrily confronted lease drivers, like Jose Portillo (“Portillo”), about distributing the Target flyer and accusing the pro-Union drivers of losing Target as one of IBT’s customers. Contrary to IBT’s assertions in its Exceptions Brief, it was these anti-union drivers, and not Portillo, who asked Dispatcher Quevedo to not begin dispatching until Zea arrived at the yard. (Tr. 706-709; 216; 517-519; 1042). The drivers then waited for Zea to arrive. (Tr. 214-217). As soon as Zea arrived, he was quick to angrily express his displeasure with the flyer and its distribution, accusing the Union supporters of alienating IBT’s customers and potentially losing business for the company. (Tr. 217; 710). (ALJD 21:23-25).

The ALJ properly concluded that IBT violated Section 8(a)(1) of the Act when at this February 16, 2016 meeting, Vice President Zea angrily told drivers if they did not like it at IBT or if they wanted to work for a union company, there was a “big door,” or that “the door was open” and they could just leave. (ALJD 21:26-28). The ALJ’s finding is further supported by Zea’s own admission that he told the drivers that the “doors are always open,” and that if they thought there was a place better, they were “welcome to go there and check it out – there are other trucking companies out there, the doors are open.” (ALJD 21: fn. 16; Tr. 3980). The Board has long found statements like this to be unlawful because such statements imply a threat of job loss.¹⁰⁴ Relying on established precedent and the record evidence, including Zea’s own admission that largely corroborated the testimony of the General Counsel’s witnesses, the ALJ correctly found that Zea’s statements violated the Act.

The ALJ’s conclusion regarding threats of futility made by Zea are equally supported by the credible record evidence. Zea told drivers at the February 16, 2016 meeting that “the Union was not

¹⁰⁴ *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (finding “suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity coercively imply that employees who engage in such activity risk being discharged”); *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171 (2011).

going to happen” at IBT. (ALJD 21:28-30). This is a classic statement of futility intended to chill Union support.¹⁰⁵ Notably, Zea did not specifically deny making this statement, and it is consistent with his admitted invitation to the drivers to just leave IBT if they did not like it there and go to a union trucking company.¹⁰⁶

The ALJ’s finding with regard to Zea’s coercive polling of drivers was also proper and legally sound. Several drivers who were present at this February 2016 meeting credibly testified that Zea, in response to a driver’s suggestion that Zea just fire the pro-Union drivers, asked those present who supported the Union and those who didn’t to raise their hands to identify their respective allegiances. (ALJD 21:29-30; Tr. 711; 1327). In relying on *Rossmore House*,¹⁰⁷ the ALJ properly found such “polling” of Union support as a form of interrogation, particularly when done by the highest-ranking official at the facility during a meeting where employees have already been threatened with possible termination. (ALJD 21:28-30; 22:5-12). Moreover, Zea did not specifically deny having done this, and again such conduct appears consistent with the overall tone of the meeting intended to restrain and coerce those who did and those who might in the future support the Union and/or engage in protected activities.

b. Dispatcher Quevedo is a Supervisor and/or Agent of IBT

The ALJ correctly found Quevedo to be both a 2(11) supervisor and 2(13) agent of IBT. (ALJD 22:16-17). Although the Consolidated Complaint did not allege Quevedo as a 2(11) supervisor, it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the

¹⁰⁵ See *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225 (2014) (employer told employees that their grievances and complaint would “go nowhere”).

¹⁰⁶ The Board has consistently held that a failure to deny a statement attributed to a witness justifies drawing an adverse inference that the statement was in fact made. Specifically, where a party questions a witness on other matters, as IBT did here with Zea, but fails to inquire into the witness’s knowledge or involvement in an unlawful statement, that raises the adverse inference that the statement was made. See *A-I*, 321 NLRB 800, 803 (1996); *Asarco Inc.*, 316 NLRB 636, 640 (1997).

¹⁰⁷ 269 NLRB 1176 (1984).

complaint and has been fully litigated.¹⁰⁸ This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.¹⁰⁹

Here, the allegation and finding by the ALJ that Quevedo was a 2(11) supervisor is closely related to the complaint allegation and finding that he was a 2(13) agent. Both of these allegations involved parallel facts. Quevedo's stipulated duties as well as his testimony during the trial about dispatch procedures and the assignment of loads to drivers confirm his supervisory status. The testimonial record evidence, including Quevedo's own admissions, established that Quevedo exercised independent judgment when providing dispatching services and directing the work of drivers through assigning loads and empties to them. (Tr. 2148-2151). The ability to assign work is one indicia of supervisory status set out in Section 2(11), supporting the ALJ's finding that Quevedo is a statutory supervisor.¹¹⁰

While IBT contends that Quevedo had no power to direct or assign work to the lease drivers, the ALJ properly found that the evidence contradicts such an assertion. Indeed, dispatchers, like Quevedo, examine the available loads each day and make judgment calls about the order in which to give those assignments to drivers. (Tr. 2699-2700; 2766; 3279; 3322; 3327; 3374; 3525; 3631). Dispatchers exercise judgment and meaningful discretion to try to move the maximum number of containers to advance IBT's business interests and group together customers and terminals, and different appointment times in doing that. (Tr. 2747; 3280; 3324; 3374; 3631).

As the ALJ correctly held, Quevedo not only assigned work, but he exercised discretion in deciding what work to give to each driver. (ALJD 22:21-24). As one example, Quevedo began assigning lease driver Eddie Osoy ("Osoy") favorable assignments and then gave him less favorable

¹⁰⁸ See *Timken Co.*, 236 NLRB 757, 757-758 (1978), enf. denied on other grounds 652 F.2d 610 (6th Cir. 1981); *Sports Coach Corp.*, 218 NLRB 992 fn. 1 (1975).

¹⁰⁹ See, e.g., *Timkin Co.*, supra at 758; *Crown Zellerbach Corp.*, 225 NLRB 911, 912 (1976).

¹¹⁰ 29 U.S.C. § 152(11).

assignments later. (Tr. 205-208). Furthermore, contrary to IBT's contentions that Quevedo could not assign work to drivers, the record established that Quevedo told lease driver Jose Portillo almost every day that he could not reject work. (Tr. 878). Quevedo exercised sufficient discretionary authority over the lease drivers to establish that he is a 2(11) supervisory.

Quevedo was also cloaked with the apparent authority to act on IBT's behalf as its agent. The Board applies common law principles when examining whether an employee is an agent of the employer. "An agent has apparent authority to speak for a principal when the principal does something or permits the agent to do something, which reasonably leads another to believe that the agent had the authority he purported to have."¹¹¹ It is well-settled that agency status can be established when the employee is held out as conduit for transmitting information to the employees.¹¹²

The ALJ correctly determined that Quevedo had apparent authority as the record established that Quevedo made decisions regarding dispatch and the movement of cargo on behalf of IBT. As a further reflection of his authority over drivers, IBT gave Quevedo the title of "Operations Coordinator," which Quevedo referenced in emails with IBT officials and customers. (U. Exh. 57). From this job title and the nature of Quevedo's duties alone, Quevedo was vested with apparent authority.¹¹³ (Jt. Exh. 2). Lease driver Osoy testified that Quevedo actually told him he was Osoy's boss and that Osoy needed to get authorization from him in order to work. (Tr. 291). In fact, Quevedo was Vice President Zea's brother, and as the ALJ correctly pointed out, this familial relationship cloaked Quevedo with an additional layer of apparent authority. (ALJD 22:39-40).

While IBT speciously claims that Quevedo was not responsible for speaking on behalf of IBT, the evidence established that IBT management representatives included Quevedo on strategic

¹¹¹ *Cablevision Industries*, 283 NLRB 22, 29 (1987); *Waterbed World*, 286 NLRB 425 (1987).

¹¹² *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998).

¹¹³ See *Newspaper & Mail Deliverers of New York, (Interborough News Co.)*, 90 NLRB 2135, 2144-2145 (1950) (noting agency authority based on job title and nature of duties).

business related emails about lease rates and that Quevedo regularly communicated management directives to IBT's drivers. (GC Exh. 129). Quevedo served as a conduit to relay information from IBT managers to employees, distributing memos from IBT management to drivers about company rules. (Tr. 728; Jt. Exh. 1(f); U. Exh. 57). On one occasion, Quevedo reported to Vice President Zia via email the names of drivers who attempted to work during the Union's first strike. Zia responded to Quevedo's email and instructed him to offer drivers \$100 if they worked during the strike. (U. Exh. 57). The Board has held such conduct amounts to apparent authority.¹¹⁴

Indeed, the evidence established that Quevedo also had the authority to enforce IBT's workplace rules and suspend drivers for not turning in their logs. (Tr. 412-413). These additional duties and his authority to reduce lease amounts further supported the ALJ's finding of Quevedo to be an agent of IBT. (ALJD 22:16-17; Tr. 2366; Jt. Exh. 2). Under these circumstances, the ALJ properly concluded that IBT placed Quevedo in a position, where drivers would reasonably believe that he was "speaking and acting for management." (ALJD 22:36-39).

c. Dispatcher Quevedo Interrogated Lease Driver Jose Portillo About His Support for the Union and Threatened Him with Unspecified Reprisals and Company Closure

In determining that Dispatcher Quevedo's questioning of lease drivers Portillo and Osoy violated the Act, the ALJ correctly relied on the analytical factors outlined in *Rossmore House*.¹¹⁵

As noted by the ALJ, Quevedo grilled Portillo at the dispatch window about the strike and the reasons for it, and whether Portillo thought what he was doing was "a good thing." Portillo responded by listing the drivers' grievances with dispatch, referenced favoritism and retaliation at IBT, and the lack of benefits provided by the company, and that he wanted a retirement plan. Quevedo asked Portillo if he thought he could accomplish these things through his Union activities,

¹¹⁴ *Victor's Cafe 52, Inc.*, 321 NLRB 504 fn. 1 (1996) (communication of management's views and directives indicates apparent authority); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998); *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997).

¹¹⁵ 269 NLRB 1176, 1177-1178 (1984).

and opined that the company had been operating this way for years and that nothing would change that. (ALJD 23:5-41).

As correctly found by the ALJ, such scrutiny by a dispatcher who holds considerable control over the type and amount of work offered to a driver is inherently coercive, particularly when the questioning occurred at the dispatch window where a driver must go to get his first assignment for the day. (ALJD 23:44-47). Moreover, the fact that Quevedo and Portillo were friends outside of the workplace does not lessen the coercive effect of this questioning, since the test is an objective, and not subjective, one.¹¹⁶

The ALJ properly found that Dispatcher Quevedo also threatened Portillo with job loss and other “consequences.” In finding these statements were coercive, the ALJ properly relied on several key facts not acknowledged on exception by IBT: Portillo’s testimony that Quevedo warned him, after Portillo indicated that he would continue to support the Union along with his coworkers, “let me tell you as a friend: this is not right. You don’t know the power the company has – they can very simply just close if they want. We’ll be screwed, because your family eats from here, my family eats, all your coworkers outside eat.” After Portillo persisted, Quevedo threatened Portillo to “just keep going and pay the consequences.” (ALJD 23:30-41). The Board has found similar statements to be unlawful.¹¹⁷

d. Dispatcher Quevedo Interrogated Lease Driver Eddie Osoy About His Support for the Union, Promised Him Better Work for Abandoning His Union Support, and Threatened Him With Job Loss for Engaging in Union Activities

Quevedo’s interrogation of Osoy at the dispatch window was equally unlawful. After the first strike, Dispatcher Quevedo spoke to lease driver Osoy about the petition that had been previously presented to Vice President Zea by several drivers, including Osoy. (Tr. 202-203).

¹¹⁶ See *In Re Multi-Ad Services*, 331 NLRB 1226 (2000); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

¹¹⁷ See *Tres Estrellas De Oro*, 329 NLRB 50, 51 (1999) (finding employer’s statement that employee would have to “face the consequences” of engaging in union activity as unlawful).

Quevedo then asked Osoy if he was one of those who recently went on strike, to which Osoy replied that it was all Quevedo's "fault" for always giving Osoy bad work. (Tr. 204-205). Quevedo then told Osoy that he would give him good work, but first Osoy would have to get out of the Union. (ALJD 24:16-24; Tr. 205).

After repeating again this offer conditioned on Osoy's abandonment of his Union support, Dispatcher Quevedo then asked Osoy if he "knew what he was getting into," that IBT was a "millionaire company" and that Osoy "would not win." (Tr. 266). Quevedo then reminded Osoy that Osoy had a family, and what was he going to support them with, implying that Osoy could lose his job or be terminated if he continued to support the Union and engage in protected activities. (Tr. 266). In acknowledging distinct similarities between the nature of Quevedo's interrogations of Portillo and Osoy, the ALJ correctly found that these questions asked by Quevedo amounted to an unlawful interrogation under *Rossmore House*. (ALJD 25:32-35).

The ALJ's finding that Quevedo's promise of benefit in exchange for Osoy abandoning the Union was legally sound as the offer of better work in exchange for abandonment of union support is inherently coercive.¹¹⁸ Moreover, as the ALJ correctly found, the promise of better work was accompanied by an expression of futility when Dispatcher Quevedo reminded Osoy of IBT's resources to fight the Union campaign and his prediction that Osoy and the other Union supporters "would not win."¹¹⁹

The ALJ noted that Quevedo also referenced family in his coercive conversation with Osoy, wherein he also threatened Osoy asking how he would support his family, implying that Osoy could be terminated for continuing to support the Union and engaging in protected activity. (ALJD 25:11-

¹¹⁸ See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

¹¹⁹ It is significant that this interrogation occurred just a few days after IBT distributed two memos to its drivers on June 12, 2015 referencing the drivers' attempts to be classified as employees, and advising the drivers that IBT intended to defend its independent contractor model with all available resources and by "all legal means possible." These statements by Dispatcher Quevedo both mirror and give teeth to the statements of futility contained in these memos. This also serves as further evidence of Dispatcher Quevedo's agency status and that he was echoing management policy.

17; Tr. 266). As properly noted by the ALJ, the “hallmark” threat of company closure and the resulting inability of the drivers to support their families is virtually a *per se* violation of Section 8(a)(1) of the Act.¹²⁰

The ALJ carefully analyzed these 8(a)(1) violations in light of well-established case law and found that these statements amounted to severe and hallmark violations of Section 8(a)(1) of the Act. Thus, the ALJ's conclusions should be affirmed.

e. The ALJ’s Credibility Findings With Regard to the Unlawful 8(a)(1) Statements Are Proper

Looking at the individual threats more broadly, it bears noting that the ALJ’s findings rest largely on credibility resolutions. It is the Board's established policy not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence is convincing enough to show that the resolutions are incorrect.¹²¹ Here, the ALJ’s credibility resolutions were exhaustive and even-handed, with witnesses for both sides being credited on certain points. (ALJD 21-27). In fact, the ALJ even dismissed some of the consolidated complaint allegations on the basis of his credibility resolutions. (ALJD 26-27 (dismissing allegation regarding Safety Assistant Rosas)).

On the other hand, IBT specifically cites in its Exceptions Brief the denials of its own witnesses without really providing concrete examples or evidence to support the argument that the ALJ erred. IBT has failed to show that the ALJ's decision to credit lease driver witnesses, including Osoy and Portillo, over the testimony of Vice President Zea and Dispatcher Quevedo was improper. Thus, the ALJ’s credibility resolutions should be affirmed.

IBT argues in its Exceptions Brief that Zea did not advance any threats during the February 16, 2016 meeting. However, the ALJ properly discredited Zea’s denials and instead properly

¹²⁰ See *National Steel Supply Inc.*, 344 NLRB 973, 976 (2005).

¹²¹ *Gold Standard Enterprises*, 234 NLRB 618 (1978).

concluded that Zea's own admissions and the credible testimony from other drivers left him with "the firm impression" that the statements and actions attributed to him were true. (ALJD 21: 32-35).

Moreover, the ALJ's credibility findings regarding Zea are legally sound as they are based on his first-hand observations of Zea's testimonial demeanor. The ALJ specifically referenced Zea's demeanor in properly discrediting him and finding that the statements attributed to him were true. (ALJD 21:32-41). Therefore, consistent with Board precedent, the ALJ's credibility findings with regard to Zea's testimony should be affirmed.¹²²

Furthermore, it is axiomatic that the testimony of current employees against the interests of their current employer should be given added credibility and weight. As the Board noted in *Flexsteel Industries*,¹²³ the testimony of current employees, which contradicts statements of their supervisors, is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.¹²⁴

The ALJ's credibility resolutions with regard to Dispatcher Quevedo were equally supported by a clear preponderance of all the relevant evidence. Dispatcher Quevedo proffered only a general denial that he talked to any drivers about the Union, but then admitted that he had many conversations at the dispatch window with various drivers about whether they supported the Union and why. (Tr. 3764; 3772). The ALJ properly found that this admission rendered Dispatcher Quevedo's denial not credible. (ALJD 22:46-23:1). Ultimately, Osoy and Portillo provided reliable and credible testimony because, as properly noted by the ALJ, there were distinct similarities between the nature of their interrogations and the types of threats made by Quevedo to Osoy and Portillo. (ALJD 25:31-35).

¹²² *Bralco Metals, Inc.*, 227 NLRB 973, 973 (1977) ("Board is reluctant to overturn the credibility findings of an Administrative Law Judge"); *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001) (noting that Board should reverse a judge's credibility resolutions only in rare cases); *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

¹²³ 316 NLRB 745 (1995), *enfd.* 83 F.3d 419 (5th Cir. 1996).

¹²⁴ *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972); and *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961).

Nevertheless, IBT takes issue with the ALJ's sound credibility findings and argues that that the ALJ should have discredited Osoy's testimony regarding the unlawful interrogation of Quevedo because of Osoy's alleged personal bias against Quevedo. IBT's contention is clearly erroneous as the ALJ provided sound reasoning in finding that Osoy's testimony was more credible than Quevedo's implausible version. (ALJD 25:31-35).

Notably, IBT chose not to attack the ALJ's credibility resolutions with respect to lease driver Portillo, even though it excepted to the ALJ crediting Portillo's version of events. (Resp. Exception 98). Instead, IBT speciously argues that these 8(a)(1) allegations should be dismissed because Osoy and Portillo were open Union supporters. The Board has expressly rejected this argument when the interrogation is coupled with threats, as was the case here.¹²⁵ Accordingly, the ALJ's findings regarding the 8(a)(1) violations should be fully upheld by the Board.

5. The ALJ Correctly Found that the General Counsel Established a Prima Facie Case Under Section 8(a)(3) of the Act With Regard to Osoy's Suspension and/or Discharge (Exception 102)

The ALJ correctly found that the General Counsel established a prima facie case under Section 8(a)(3) of the Act in determining that Osoy openly supported the Union and engaged in protected concerted and Union activities when he participated in strikes, wore and distributed safety vests with the Union logo, and spoke with his co-workers. (ALJD 28:25-28; 28:35-36; GC Exh. 5). The ALJ also properly found that Respondent disciplined Osoy during a time in which he was

¹²⁵ *Rossmore House*, supra at 1178 (finding the fact that the employee may be an open union supporter does not render interrogation about that employee's view lawful if the questioning is accompanied by threats or promises); *Philips Industries*, 295 NLRB 717 (1989) (noting an employee's status as an open and active union supporter does not grant employers a license to ask coercive questions); *Hoffman Fuel Co.*, 309 NLRB 327 (1992).

actively engaged in Union activity and that the timing of the discipline supported an inference of animus. (ALJD 28:39-43).

Moreover, IBT chose not to address this issue in its brief, choosing instead to merely mention it as an exception. Given IBT's failure to advance arguments in its brief regarding this exception, the Board should disregard it.¹²⁶

IV. CONCLUSION

In summary, the evidence fully supports the ALJ's factual findings and conclusions that IBT violated the Act. Counsels for the General Counsel submit that IBT's exceptions are without merit and respectfully request that they be denied.

Respectfully submitted,



Ami Silverman
Sanam Yasseri
Counsels for the General Counsel
National Labor Relations Board
Region 21

Dated at Los Angeles, California, this 27th day of April, 2018.

¹²⁶ See, e.g., *Ozburn-Hennessy Logistics*, 362 NLRB No. 180, slip op. at 1, n.4 (2015).

STATEMENT OF SERVICE

I hereby certify that a copy of **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on April 27, 2018.

The following parties were served with a copy of said document by electronic mail on April 27, 2018:

A. Jack Finklea, Esq.
Scopelitis, Garvin, Light, Hanson & Feary, PC
jfinklea@scopelitis.com

Donald J. Vogel, Esq.
Scopelitis, Garvin, Light, Hanson & Feary, PC
dvogel@scopelitis.com

Julie Gutman Dickinson, Esq.
Bush Gottlieb
jgutmandickinson@bushgottlieb.com

Hector De Haro, Esq.
Bush Gottlieb
hdeharo@bushgottlieb.com

Respectfully submitted,

/s/ Aide Carretero
Aide Carretero
Secretary to the Regional Director
National Labor Relations Board