

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERMODAL BRIDGE TRANSPORT

and

Case Nos. 21-CA-157647  
21-CA-177303

INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

**RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S  
EXCEPTIONS AND THE CHARGING PARTY'S CROSS-EXCEPTIONS**

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## STATEMENT OF THE CASE

Respondent, Intermodal Bridge Transport (“IBT”) uses independent contractor drivers to accomplish the transport of freight to and from the Ports of Los Angeles and Long Beach. The International Brotherhood of Teamsters (“Union”) sought to organize the independent contractors, but finding little support among the drivers, the Union turned to a campaign of alleging unfair labor practices, including attempts to invent new causes of action not authorized by either Congress or the Board. The General Counsel filed a Complaint and a trial was conducted over 26 days in late 2016.

On November 28, 2017 the Administrative Law Judge (“ALJ”) issued his Decision (“ALJD”). The ALJ first created a new cause of action, finding that IBT violated the National Labor Relations Act (the “Act”) by misclassifying drivers as independent contractors. The ALJ did so without acknowledging or addressing IBT’s showing that the Charging Party filed the applicable Charge outside the six month limitations period prescribed by § 10(b) of the Act. Substantively, the ALJ also ignored IBT’s showing that drivers were fiercely independent and that IBT had little control over them. The ALJ next held that IBT violated the Act with interrogations by its Vice President and a dispatcher, while he dismissed allegations of interrogation by a safety department employee and retaliation. On March 2, 2018, IBT filed its Exceptions, showing how the ALJ erred in the above findings.

Also on March 2, 2018, Counsel for the General Counsel (the “General Counsel”) filed Limited Exceptions to the Administrative Law Judge’s Decision and Order and a Brief in Support (the “GC’s Exceptions Brief”), arguing that the ALJ erred in dismissing

the allegation that driver Eddie Osoy was terminated/suspended in violation of the Act. On March 16, 2018, Charging Party filed Cross-Exceptions and Charging Party's Brief in Support of Cross Exceptions (the "CP's Cross-Exceptions Brief"), repeating General Counsel's arguments and adding that the ALJ erred in dismissing their allegations that IBT engaged in surveillance of Osoy and threatened discharge.

As more fully explained below, General Counsel's Exceptions and Charging Party's Cross-Exceptions should be rejected and the ALJD should be affirmed on the points raised by General Counsel and Charging Party in their collective Exceptions.

## **STATEMENT OF FACTS**

### **I. IBT's Beginnings And Use Of Independent Contractor Drivers**

IBT was formed in 1998 to facilitate port drayage movements in and around the ports of Long Beach and Los Angeles. Ozzie Zea was hired as IBT's first Operations Manager, and he worked initially with General Manager, Don Dorr. Zea got his start in the transportation industry as a billing clerk with respect to repairing chassis, reefers and port terminal equipment. *Zea* 3896.<sup>1</sup> He then moved to managing port terminal F at night, before moving to the trucking side of the business with Container Freight as a dispatcher in 1991. *Zea* 3897-98.

During Zea's time with Container Freight, 98% of all drivers who did port work were owner-operators. *Zea* 3902. Owner-operators were drivers who came to work any time they wished, used their own trucks, and choose loads from what the company had

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<sup>1</sup> "Zea" 3896 refers to page 3896 of the Transcript in which Zea was being examined. Transcript cites through this brief will identify the individual testifying followed by the transcript page number.

to offer. *Zea* 3902-03. The owner-operators used Container Freight's DOT operating authority number. *Zea* 3904. Zea moved to IBT in 1998. *Zea* 3909.

During Zea's time with Container Freight, 98% of all drivers who did port work were owner-operators. *Zea* 3902. Owner-operators were drivers who came to work any time they wished, used their own trucks, and choose loads from what the company had to offer. *Zea* 3902-03. The owner-operators used Container Freight's DOT operating authority number. *Zea* 3904. Zea moved to IBT in 1998. *Zea* 3909.

Setting up the IBT operation, which involved, among other things, finding a location and recruiting drivers, took approximately one month. *Zea* 3909. IBT started slowly with some land-based work moving intermodal containers between the port and the rail, followed by obtaining customers and delivering containers to customer warehouses. *Zea* 3910. IBT thereafter expanded its operation to warehousing, transloading, and container storage. *Zea* 3916-17.

IBT used owner-operators to perform delivery operations, many of whom followed Zea from Container Freight. *Zea* 3910, 3912. By December 1998, IBT had hired additional office employees, including Rod Kirkbride, Denise Ackerman, and George Nunez. *Zea* 3913.

IBT from the beginning dispatched by explaining to drivers what loads were available and the drivers would choose which runs they wanted. *Zea* 3911. Drivers were able to refuse loads, and refusals were fairly common. *Kirkbride* 4114. IBT grew, and by 2007, it contracted with approximately 160 owner-operators. *Zea* 3929.

## II. The Clean Truck Program Wipes Out The Port Truck Fleet And Requires The Use Of Employee Drivers

In 2008, the Ports of Los Angeles and Long Beach implemented the Clean Truck Program, which was designed to exclude trucks whose engines pre-dated 2007. *Zea* 3930. The Clean Truck Program, for the Port of Los Angeles at least, also contained a requirement that motor carriers serving the ports must use employee drivers instead of owner-operators. *Zea* 3930-31; *Bradley* 3786. The Clean Truck Program's implementation was followed swiftly by a mass exodus of port drivers from approximately 16,000 drivers down to 10,000 drivers. *Zea* 3931-32. Very few drivers qualified for the grant program to purchase new trucks, so most grants were provided to motor carriers. *Zea* 3932.

In order to satisfy the port employee driver mandate, IBT leased 50 new, white, Volvo trucks. *Zea* 3932-33. IBT also began leasing drivers from Staffmark, a temporary employment agency. *Zea* 3933. IBT paid Staffmark an hourly rate for services of the drivers Staffmark provided. *Zea* 3934-35. Staffmark, in turn, paid the drivers by the hour. *Zea* 3935.

When IBT began using Staffmark, dispatch changed. Dispatchers began assigning particular runs, and drivers could not refuse them. *Kirkbride* 4118. Drivers were forced to appear for work each day, and they had a regular start time in which the drivers' hourly pay would begin. *Kirkbride* 4118-19. Thus, IBT knew how many drivers would be working each day. *Kirkbride* 4118. Drivers would work approximately eight hours each day, and dispatch would control when a driver was able to leave for the day. *Kirkbride* 4119.

Shortly after IBT began using Staffmark, the ports' employee mandate was found to be unlawful, so the requirement was canceled (while leaving the clean truck requirements intact). *Zea* 3936.

### **III. IBT Returns To Independent Contractor Drivers**

IBT's use of Staffmark to supply drivers in order to comply with the ports' employee mandate placed significant financial strain on IBT. *Zea* 3936. IBT therefore examined the industry to determine how other carriers were managing to stay afloat. *Zea* 3936-37. IBT found out that several motor carriers were leasing trucks to drivers. *Zea* 3937. *Zea* studied the potential for leasing trucks to drivers and determined it to be the best fit for IBT. *Zea* 3937.

Once *Zea* made the decision, IBT resumed its former practice of entering into written independent contractor agreements with drivers. *Bradley* 3786. The Agreements were titled "Lease and Transportation Agreement" ("LTA") and they spelled out the relationship between IBT and the drivers. Prospective drivers seeking to contract with IBT were sent first to accounting to discuss compensation rates, and then received a copy of the LTA to take home and consider for five days before making an appointment with IBT to fill out the remainder of the paperwork and complete the onboarding process. *Rosas* 3439-40.<sup>2</sup>

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<sup>2</sup> Vicky Rosas, a safety department employee, is bilingual and although drivers generally understand the documents, some may have trouble with a few things and Rosas will explain. *Rosas* 3441. Rosas provides drivers with a copy of the LTA, along with copies of anything they request. *Rosas* 3442.

Drivers had the chance of owning their own truck, leasing the truck from an outside third party, or leasing a truck from IBT. *Bradley* 3810. Eighteen current drivers have chosen to own their own trucks. *Bradley* 3860.

The drivers who leased trucks directly from IBT were offered choices as far as dispatching, they were not forced to accept runs, and they could come and go as they pleased. *Kirkbride* 4120-22; *Moreno* 3287-88.<sup>3</sup> For example, dispatchers run down the list of runs they have available and ask the driver which runs the driver wants. *Quevedo* 3526-28; *Moreno* 3318; *Nunez* 2703-04, 2707-08, 2714. No start time existed, drivers could show up any time they wished, drivers were not required to show up at all, drivers did not request permission for time off, drivers decided their routes, drivers rejected loads and were offered alternative loads, and drivers commonly failed to complete loads they initially accepted. *Kirkbride* 4115-17, 4125-26. This dispatch practice was the same practice IBT used before Staffmark. *Kirkbride* 4117. The only principle difference between drivers operating as owner-operators and drivers leasing equipment from IBT was the ownership of the vehicle itself. *Quintero* 1155. Drivers still paid for the vehicle, but the driver simply leased it rather than owning it outright.

IBT spent much of 2014 updating documents. In May, 2014, IBT provided “Independent Contractor’s Rights While Under Contract with IBT,” detailing freedoms enjoyed by drivers. *R19*. In August, 2014, IBT updated its application, which included re-

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<sup>3</sup> The dispatch department finds it more difficult working with independent contractors because dispatch does not know how many drivers will show up on any given day, and it does not know if the loads are being completed. *Kirkbride* 4120-21.

titling the document “Independent Contractor Application.” GC38 (showing Rosales signed the document August 25, 2014). Finally, in October, 2014, IBT rolled out the updated LTA. GC9.

#### **IV. The Union Calls, But Finds Little Support**

In the Fall of 2014, the Union began a campaign in an attempt to organize IBT’s drivers. *Silverman* 49; *Portillo* 760-61.

##### **A. The Union Engages In Strikes, Handbilling, And Publicity**

Following the late 2014 beginnings of the organizing campaign, the Union held a strike at the IBT yard. The initial strike occurred in April, 2015. *Portillo* 699. In preparation for the strike, drivers who supported the Union began wearing safety vests embossed with the Union’s logo. *Osoy* 188. Approximately 10 drivers wore safety vests embossed with the Union’s logo. *Osoy* 188. In all, the Union has implemented four strikes against IBT. *Osoy* 199.

Osoy has been involved in the organizing campaign by wearing the Union vest and leading demonstrations. *Osoy* 199. Osoy also has given out flyers, including flyers distributed to customers, and he has spoken with coworkers. *Osoy* 199, 212-13. Osoy continues to provide services to IBT. *Osoy* 238.

Driver Jose Portillo has also been an open supporter of the Union campaign, telling his coworkers to “unite.” *Portillo* 699. Portillo engaged in the strikes of IBT, including picketing. *Portillo* 699-700. He also began wearing a Union logo vest. *Portillo* 704. Portillo has also visited the port commissioners to protest. *Portillo* 706. Driver Pedro Miranda has likewise engaged in strikes and has distributed flyers. *Miranda* 966.

Driver Joel Ortiz is another open Union supporter who has engaged in strikes against IBT and handed out flyers at IBT customer locations. *Ortiz* 514. The flyers Ortiz handed out at the Target retail store contained his photo. *Ortiz* 516. In the flyer, Ortiz is quoted as indicating he is fighting “for the right to form a Union.” *GC4*. The flyer also features a photo of driver Daniel Uaina, and it quotes him as saying “Intermodal Bridge Transport – is hurting me and my family, along with hundreds of other truck drivers” and that Target is allowing IBT “to steal our wages, mistreat us, and put our families and communities at risk.” *GC4*. Ortiz and Uaina continue to provide services to IBT. *Ortiz* 443; *Uaina* 1360.

#### **B. Drivers Hold A Meeting In The Yard**

In February, 2016, drivers gathered on their own in the IBT yard to discuss flyers that had been posted in a retail location of Target, a customer served by IBT’s drivers. Portillo, a self-proclaimed open Union supporter, contacted all of the night drivers, encouraging them to remain at the IBT yard after they were finished for the night because the drivers were going to meet. *Rosales* 1349. Portillo told the night drivers they were going to hold up dispatch until they met. *Rosales* 1349. The discussion was organized by two drivers who wanted to let the Union-supporters know that the majority of drivers wished to be left alone in peace and for the Union to stop bothering and harassing them. *Eduardo Molina* (“EMolina”) 2967.<sup>4</sup>

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<sup>4</sup> Eduardo Molina is referenced as “EMolina” to differentiate him from another driver, Jose Molina, who will be referenced as “JMolina.”

Zea did not call a meeting, nor did any other IBT employee, and Zea was not present at the beginning of the meeting. *EMolina* 2969-70. Nevertheless, when Zea arrived at the facility, drivers called him over because they wanted to speak with him. *Osoy* 216. According to driver Eddie Osoy, another driver told Zea that only four drivers support the Union and that Zea should just “kick them out.” *Osoy* 218. Also according to Osoy, Zea said “No. We can’t do anything because we are in the middle of a legal process.” *Osoy* 218. According to Portillo, Zea said “we’re going to let the law decide” the issues. *Portillo* 712.<sup>5</sup> According to driver Joe Ortiz, Zea “said that if we wanted to work with a company, another company, we could use his trucks. We could do it or we could ask another person to use the trucks for us.” *Ortiz* 520.

The discussion involved many drivers, all of whom were trying to give their opinion, and they could not be heard very well. *Osoy* 218. IBT’s facility is stationed underneath a highway. *Rosales* 1349-50; *EMolina* 2968. It is also positioned right next to a railroad spur and an intersection in which trains frequently pass and sound their horns, making the yard a difficult place to communicate. *Rosales* 1349-50; *EMolina* 2968. Zea, when he spoke, was therefore forced to speak loudly. *Zea* 3979.

Zea never told drivers there would be no union at IBT, did not threaten any Union supporters, did not tell Union supporters to go work for a union company, and did not direct any person to leave IBT. *Zea* 3979-80. Zea said only what he has always told drivers and even IBT employees - if they think there is a better company than IBT, they can go

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<sup>5</sup> See also *EMolina* 2970 (noting Zea said “everything was in the attorney’s hands.”)

try it out and if they do not like it, they would be welcomed back at IBT. *Zea* 3980.

### C. Eddie Osoy Attempts To Provoke A Fight

In the early morning hours of May 25, 2016, driver Jose Molina (“JMolina”) was in the IBT yard near a picnic table used by drivers. A fellow driver asked JMolina if he had a safety vest the driver could have, and JMolina provided the driver with one. *JMolina* 2813. Osoy, seated at the picnic table, made a comment to the driver next to him while looking at JMolina. *JMolina* 2814. JMolina therefore told Osoy that if he had a problem with vests being handed out, he could take a picture like Osoy was in the habit of doing. *JMolina* 2814. Osoy got up, approached JMolina, and told JMolina he wanted to take him outside so they could fight. *JMolina* 2814-15.

JMolina did not respond, but Osoy nevertheless called for the guard to open the gate. *JMolina* 2815. Osoy then called for JMolina to step outside the gate with him to fight, and after JMolina refused to respond to multiple invitations by Osoy, Osoy stepped back inside the gate and challenged the other drivers who were present by saying if someone had a problem with Osoy that they should step outside with him and “kick the mother out of each other.” *JMolina* 2815-16. Osoy also stated “let’s go outside you sons of whores.” *JMolina* 2816, 2834.<sup>6</sup> JMolina just turned his back and went to the lunch truck. *JMolina* 2816.<sup>7</sup>

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<sup>6</sup> The interpreter had difficulty translating the colloquial Spanish term, noting in any event that the phrase involved a “very vulgar” reference to a female. *Interpreter* 2834.

<sup>7</sup> Portillo was not present during the confrontation. *Portillo* 600. He arrived 5-10 minutes after the fact. *JMolina* 2816.

JMolina reported the matter to Christine Rivera, who passed it on to Zea and to Brent Bradley. *Bradley* 1913. Zea and Bradley, in turn, discussed the matter that same day. *Bradley* 1913. When the two completed their discussion, they had decided to place Osoy out of service pending an investigation. *Bradley* 1914. Bradley sought out Osoy at 2:00 p.m., but Osoy had already left for the day, so Bradley decided to speak with Osoy first thing the next morning. *Bradley* 1914-15. Bradley drafted a letter explaining he would be investigating the matter and that Osoy was being placed out of service during the investigation. *JX1(e)*.

Bradley provided Osoy with the letter early on May 26, 2016. *Bradley* 1916. Bradley also had two security guards present to ensure Osoy left the facility peacefully, and he did so in order to remove what seemed to be a credible threat to multiple individuals on the property. *Bradley* 1917-18. Bradley had never needed to have a driver escorted off of the property before because Bradley had never encountered anything like the threat in this case. *Bradley* 1918.<sup>8</sup>

Osoy left Bradley's office, followed by the two security guards. The security guards were dressed in casual clothes, they did not appear to be armed, and they did not wear a badge of any kind. *Santamaria* 82. The security guards, Dana Munde and Larry Cervantes, had previously been on the premises multiple times, primarily during strikes to keep the peace. *Munde* 4064.

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<sup>8</sup> Although nothing like the incident had previously occurred, a similar confrontation occurred after Osoy had been returned to service. Bradley placed the driver out of service to investigate the matter, and he concluded that the actual physical nature of the confrontation called for terminating the contract. *Bradley* 1928, 1930-32; GC89

As Osoy left the office area, the guards followed approximately 10 feet behind Osoy. *Munde* 4069. Osoy noted he had personal items in his truck that he wanted to retrieve and the guards had no problem with him doing so. *Munde* 4070. Another driver approached Osoy from the passenger door and they engaged in a conversation. *Munde* 4071. After a while, Munde, a 31-year old veteran of full-time law enforcement, “very politely” indicated he needed to move forward, and Osoy climbed out of the truck and exited the facility. *Munde* 4071. The guards did not imply or engage in force, did not display nightsticks or anything of the sort, did not display handcuffs or suggest handcuffs would be used, did not use imposing language, and did not touch Osoy at any time. *Munde* 4072-73. According to Munde, who observed Osoy the entire time, Osoy did not appear to be upset or crying at any point. *Munde* 4087-88.<sup>9</sup>

After Osoy had left the property, a group of drivers including Portillo, Miranda, Ortiz, and Hector Flores visited Bradley’s office to discuss the matter. *Ortiz* 528. Bradley told them he was going to investigate – “find out what happened and that he was going to fix the problem.” *Ortiz* 530-31.<sup>10</sup>

The following evening, Osoy emailed Bradley and Zea his version of the altercation, but Bradley had already left the facility and did not read the email until Saturday morning, May 28, 2016. *Bradley* 1921. Bradley contacted Zea, who had also read the email that morning, and they decided to wait until Monday morning (a holiday in

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<sup>9</sup> Munde testified that neither he nor Cervantes laughed at Osoy, nor did he witness any other person at the facility laugh or taunt Osoy. *Munde* 4088-89.

<sup>10</sup> See also *Portillo* 727 (noting that Bradley told him he was in the middle of investigating the matter).

which no one was operating) to make a decision on the matter. *Bradley* 1921, 1923. On Monday, May 30, Bradley and Zea determined that enough time had passed since the incident to sufficiently dissipate any lingering threat, so they decided to allow Osoy to resume performing services the next morning. *Bradley* 1924; *JX1(g)*.

## **ARGUMENT**

### **I. Osoy's Attempt To Start A Fight Warranted Temporary Removal From The Facility<sup>11</sup>**

Since at least April 2015, the Union has publicized its driver organizing campaign, including publicly picketing IBT. The Union's organizing campaign has remained ongoing, including further instances of picketing and distribution of written materials. During the entire period, open union supporters have freely displayed their position by among other things wearing Union logo safety vests and affixing Union logo flags to their trucks without incident. Those contractors, which represent a distinct minority of the independent contractors doing business with IBT, likewise have on many occasions confronted IBT's management. Open opponents of the Union have also expressed their position.

Against this backdrop, IBT, faced with a credible allegation that Osoy threatened multiple individuals with physical violence, placed him on hold while it investigated the

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<sup>11</sup> IBT maintains in its March 2, 2018 Exceptions and Brief in Support that Osoy and other drivers were independent contractors, thereby precluding the Board from applying the Act to Osoy and other drivers. This Answering Brief will not reiterate the argument, but the argument remains in full force and effect despite its absence from this brief. Moreover, to the extent the Board finds Osoy and other drivers were in fact independent contractors, the analysis of Osoy's decision to challenge JMolina to a fight as well as the allegations of threats and the impression of surveillance all become moot as the Board would not have jurisdiction over the matters.

matter. IBT confirmed the threat, but determined the volatile circumstances had subsided and Osoy continued performing services. Under these circumstances, the ALJ properly dismissed the allegation that Osoy was wrongfully suspended/ discharged.

**A. The ALJ Properly Credited JMolina’s Version of Events**

In May, 2016, Osoy unquestionably challenged JMolina to a fight. *JMolina* 2814-15. JMolina did not respond, so Osoy called for the guard to open the gate. *JMolina* 2815. Osoy then called for JMolina to step outside the gate with him to fight, and after JMolina refused to respond to multiple invitations by Osoy, Osoy stepped back inside the gate and challenged the other drivers who were present by saying if someone had a problem with Osoy that they should step outside with him and “kick the mother out of each other.” *JMolina* 2815-16. Osoy also stated “let’s go outside you sons of whores.” *JMolina* 2816, 2834.<sup>12</sup> Osoy admitted he told JMolina “if you have an issue with me we can go discuss it outside” and he further admitted asking the guard to open the gate and telling everyone else present “if any of you have any problems with me, just let me know and we can fix everything right now.” *GC6*, p. 3. JMolina nevertheless just turned his back and went to the lunch truck. *JMolina* 2816. Osoy was placed out of service pending an investigation, and he was permitted to resume his services within three business days. *JX1(e); JX1(g); Bradley* 1924.

Despite Osoy’s admissions, the General Counsel asserts that Osoy merely wanted to talk, not to fight. Osoy, however, was already talking and did not need to go off

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<sup>12</sup> The interpreter had difficulty translating the colloquial Spanish term, noting in any event that the phrase involved a “very vulgar” reference to a female. *Interpreter* 2834.

company property to “talk.” Rather, consistent with the common meaning across the country that goes along with an invitation to step outside, Osoy’s challenge involved an off-premises fight. *Glenn v. Raymour & Flanigan*, 832 F.Supp.2d 539, 544, 549-50 (E.D.Pa. 2011) (asking co-worker to “step outside” was a threat to fight even when aggressor claimed it was not a threat to fight). *See also Danielson v. Eaton Corp.*, 46 F.3d 1135 (8th Cir. 1995) (as a matter of law, the invitation to “step outside” in context was a threat to fight).

The General Counsel’s claim that neither Portillo nor Ortiz heard Osoy challenge JMolina to a fight conveniently skips over the fact that they were not present when the altercation occurred. Portillo showed up in his truck five or ten minutes after the altercation. *JMolina* at 2816. Portillo, himself, admits someone told him about the altercation and he then went to address the issue. *Portillo* 716, 851.<sup>13</sup> Likewise, Ortiz admitted he was not present for the argument, and he could not hear what was being said. *Ortiz* 600.<sup>14</sup>

The ALJ in this case correctly recognized and held that JMolina was a credible witness and that Osoy’s own statements corroborated IBT’s stated reason for taking the action it did. *ALJD* at 29. In short, the ALJ correctly found IBT “did not violate” the Act. *Id.* The General Counsel and the Union nevertheless re-argue that IBT sought to punish

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<sup>13</sup> Portillo described Osoy’s behavior but it is clear from the dialogue that Portillo was describing what Osoy had told him, not what he, himself, witnessed. *Portillo* 717-18, 851-52.

<sup>14</sup> Miranda testified that he heard the argument, but he testified that when it started, it was just Osoy and JMolina, then “several” came up, including Portillo, Ortiz and Miranda. *Miranda* 974. Because Portillo and Ortiz admitted they were not initially present, Miranda could not have been initially present. Moreover, despite Miranda’s shading of the incident, he confirmed that Osoy asked JMolina to step off of company property to fix the problem. *Miranda* 975.

Osoy for the union activities he had undertaken for the previous year. The General Counsel and the Charging Party, however, failed to prove their allegations, and the ALJ's credibility determination on this issue bars them from succeeding at this level as well.

Without question, the General Counsel cannot meet its burden of proof without establishing a causal connection between IBT's action and Osoy's Union activities.<sup>15</sup> No such causal connection can be established where, as here, multiple open union supporters have provided uninterrupted service to IBT. *Gold Coast Restaurant Corp.*, 304 NLRB 750, 751 (1991) (holding the discharge of a union supporter could not be based on union support where other union supporters engaged in similar union activities without being discharged). Here, Portillo, Miranda, Ortiz, Quintero, Uaina and others have engaged in picketing, distributing flyers and wearing union logo vests without being temporarily placed out of service. Ortiz and Uaina have in fact suffered no adverse action despite their photographs on a flyer which not only contains their photos but also their words of support for unionization and complaints about wage theft by IBT. *GC4*.

Osoy has been open with his Union support since April 2015, a full year before he challenged JMolina to a fight, yet his relationship with IBT remained intact and largely uneventful. The passage of such an amount of time removes any suggestion that the two

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<sup>15</sup> Specifically, the General Counsel and the Charging Party must prove (1) Osoy engaged in union activity, (2) IBT knew of Osoy's activity, (3) IBT harbored animus toward the activity, and (4) a causal connection between the activity and the discharge occurred. *Carry Cos. Of Ill., Inc. v. NLRB*, 30 F.3d. 922 (7th Cir. 1994). See also *Wright Line*, 251 NLRB 1083, 1089 (1980). And if the General Counsel could establish such a *prima facie* case, the Complaint must nevertheless be dismissed if IBT can show it would have taken the same action in the absence of protected activity. *Wright Line*, 251 NLRB at 1089.

events are related. Specifically, in *Camaco Lorain Mfg. Plant*, the Board rejected a proposed inference of timing-based causation, holding that a suspension occurring a full month after learning of union activity did not permit an inference of causation. 356 NLRB 1182 (2011).<sup>16</sup>

### **B. IBT's Actions Are Consistent With the Only Other Similar Incident**

IBT has in fact treated similar incidents in a similar fashion. Although nothing similar had occurred previously, an event occurred just after Osoy's threatening conduct that involved a physical altercation in which IBT took the same steps. Specifically, a driver was entering IBT's facility and did not appreciate being slowed by a Union picketer, and the driver engaged the picketer in a physical altercation. GC89. IBT barred the driver from the property pending an investigation, and once the investigation was concluded, the driver's contract was terminated. *Bradley* 1928, 1930-32; GC89. Thus, Osoy

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<sup>16</sup> The ALJ, before recognizing that IBT established that it would have taken the same action regardless of union activity, incorrectly found the General Counsel met its initial *prima facie* burden. *ALJD* at 28. The ALJ rested his finding that the timing supported the General Counsel's *prima facie* case in the notion that Osoy was engaging in protected activity just before challenging JMolina to a fight. *Id.* Osoy was doing no such thing. Osoy, himself, claimed he was talking with a fellow driver about that driver's personal car not passing the smog test before telling the driver he should get a vest from JMolina before they run out. *Osoy* 223; GC6, p. 3. Osoy then jumped from his seat and challenged JMolina to a fight. *JMolina* 2814-16. Osoy even admitted he wanted to stand up to JMolina and anyone else who had a problem with him to let them know he was not scared of them. GC6, p.3. Osoy, however, incredibly claimed he invited JMolina and the others off of IBT property merely to talk rather than to fight.

Challenging someone to fight is unquestionably unprotected. What is more, timing, alone, cannot establish a *prima facie* case. *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 690 (7th Cir. 2008); *Camaco Lorain Mfg.*, 356 NLRB 1182 (2011); *Interbake Foods*, 2013 WL 4175677 (Div. of Judges Aug. 30, 2013). Thus, no *prima facie* case was established and the ALJ erred in holding otherwise. IBT therefore requests that the Board sustain its Exceptions to the Administrative Law Judge's November 28, 2017, Exception No. 102.

was not subject to disparate treatment.

The General Counsel and the Charging Party paint the picket line altercation in a different light, highlighting the fact that the investigation took much longer than Osoy's investigation. The picket line altercation, however, found the driver *immediately* barred from the property and out of service with the likely result of contract termination. *Bradley* 1930-32. There was therefore no pressing need to formalize the contract termination before the full investigation was complete. Likewise, there was no need to remove the driver from the facility because the incident occurred in the middle of the night, and by the time IBT received its first word of the incident, the driver was off duty and off premises.<sup>17</sup>

The General Counsel and the Charging Party additionally point to an instance in which a driver damaged a facility door and was placed out of service until he explained the incident. The General Counsel, however, blatantly misstates that the driver "attempted to reach through the dispatch window to 'get' the dispatcher." *GC Exceptions Brief* at 27. Indeed, the General Counsel twice mischaracterized the incident, incorrectly asserting the driver was "reaching through the window to 'get' the dispatcher." *Id.* at 16. Contrary to the mischaracterizations, this incident did not involve a driver challenging another driver to a fight. Rather, it was a problem involving damage to company property and whether he was out of service. *Tr.* at 1995-96.

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<sup>17</sup> Osoy, on the other hand, had already accepted an early morning run for the following morning and appeared at the facility. *Osoy* 227-28. Had the driver involved in the picket line altercation appeared at IBT's facility, the driver would presumably have been escorted off the property.

### C. IBT Properly Placed Osoy on Hold In Order To Investigate

The General Counsel's reference to Osoy being escorted off company property fares no better. Importantly, IBT took temporary protective action solely in order to secure the facility in the face of an immediate safety risk. JMolina made a credible report of a threat of physical violence, prompting the need to separate the source of that threat from the facility. Specifically, JMolina reported the matter to Christine Rivera, who passed it on to Zea and to Brent Bradley. *Bradley* 1913. Zea and Bradley, in turn, discussed the matter that same day. *Bradley* 1913. When the two completed their discussion, they had decided to place Osoy out of service pending an investigation. *Bradley* 1914. Bradley sought out Osoy at 2:00 p.m., but Osoy had already left for the day, so Bradley decided to speak with Osoy first thing the next morning. *Bradley* 1914-15. Bradley drafted a letter explaining he would be investigating the matter and that Osoy was being placed out of service during the investigation. *JX1(e)*.

Bradley provided Osoy with the letter early on May 26, 2016. *Bradley* 1916. Bradley also had two security guards present to ensure Osoy left the facility peacefully, and he did so in order to remove what seemed to be a credible threat to multiple individuals on the property. *Bradley* 1917-18. Bradley had never needed to have a driver escorted off of the property before because Bradley had never encountered anything like the threat in this case. *Bradley* 1918.

Osoy left Bradley's office, followed by the two security guards. The security guards were dressed in casual clothes, they did not appear to be armed, and they did not wear a badge of any kind. *Santamaria* 82. The security guards had previously been on the

premises multiple times, primarily during strikes to keep the peace. *Munde* 4064.

As Osoy left the office area, the guards followed approximately 10 feet behind Osoy. *Munde* 4069. Osoy noted he had personal items in his truck that he wanted to retrieve and the guards had no problem with him doing so. *Munde* 4070. Another driver approached Osoy from the passenger door and they engaged in a conversation. *Munde* 4071. After a while, Munde, a 31-year old veteran of full-time law enforcement, “very politely” indicated he needed to move forward, and Osoy climbed out of the truck and exited the facility. *Munde* 4071. The guards did not imply or engage in force, did not display nightsticks or anything of the sort, did not display handcuffs or suggest handcuffs would be used, did not use imposing language, and did not touch Osoy at any time. *Munde* 4072-73.<sup>18</sup> According to Munde, who observed Osoy the entire time, Osoy did not appear to be upset. *Munde* 4087-88.

Once the immediate threat was diminished, a measured review of the circumstances could be conducted, which included interviewing JMolina and reviewing the written statement of Osoy. *Bradley* 1924-25. This led to the determination by IBT on the third business day thereafter that a residual threat was likely not present and that

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<sup>18</sup> Osoy confirmed that the guards wore civilian clothes and he could not see whether they were armed. *Osoy* 230. And although Osoy claimed he saw that one guard had handcuffs in his pocket, Osoy did not explain how he could see handcuffs inside a pocket. *Osoy* 231.

Osoy could resume his contract with IBT.<sup>19</sup>

The General Counsel, impliedly recognizing that a rational first step in the process would be to remove the safety threat and then investigate, alleged that IBT's initial action was not temporary but was instead intended to be a permanent dismissal. *GC's Exceptions Brief* at 20. Bradley, however, provided a letter to Osoy informing him of the allegation and that he was prohibited from the property "until further notice." *JX1(e)*. The letter did *not* say his contract was terminated. Bradley clearly stated he "wanted to remove the threat from the property *until we investigated*." *Bradley* 1917 (emphasis supplied). Bradley confirmed the temporary nature of the issue when he told the drivers who met with Bradley about Osoy that he was investigating the matter. Indeed, those drivers admit Bradley told them he was investigating, not that he had made any determinations or final decisions. *Ortiz* 530-31; *Portillo* 727.

The General Counsel nevertheless argues that IBT's willingness to provide Osoy his escrow account balance signaled a permanent separation because escrow balances are refunded only when the relationship has been permanently severed. Osoy, however, requested his escrow refund, IBT let him know that it was only willing to provide the escrow refund if Osoy wished to terminate the relationship, and because Osoy did not

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<sup>19</sup> The General Counsel and Charging Party protest that IBT never interviewed Osoy, but Osoy provided IBT with his own account in writing. *GC6*. IBT evaluated that account, finding that it largely corroborated JMolina's complaint. Indeed, Osoy admitted urging JMolina to go with him and settle the matter outside the gate, that he challenged *everyone* who had a problem with him to settle it outside the gate, and that he even had the guard open the gate. *GC6*, p. 3. The account also helped IBT recognize the dispute would likely not lead to further conflict, so it decided not to take any action against Osoy. *Bradley* 1924; *JX1(g)*. Thus, there was no need to interview Osoy.

wish to end the relationship, he did not receive an escrow refund. *Osoy* 270-271. Finally, once IBT gathered sufficient information confirming the threatening conduct occurred but that the safety risk had dissipated, IBT let Osoy know he was free to continue providing services. *JX1(g)*.

IBT did not remove JMolina from the facility because, as noted above, no one – not even Osoy – has in any way suggested that JMolina at any point threatened or encouraged physical violence.<sup>20</sup> Osoy instead recounts essentially a philosophical disagreement between the two contractors. Unfortunately, Osoy escalated the disagreement to a threat of physical violence, which mandated that IBT take action to protect those persons on IBT’s property. The Board has unquestionably approved of even more severe action (on the part of an employer) in response to such a threat. If anything, the Union’s pronouncement of Osoy as the “lead Union activist” exposes a potential violation of the Act by the Union, as threats of physical violence by Union agents are coercive within the meaning of Section 8(b)(1)(A). *Commercial Workers Local TR* (Longmont Foods), 347 NLRB 1016 (2006).

In sum, IBT took action solely to dissipate an immediate security threat, and once it obtained a more complete record of what occurred and that the threat had indeed subsided, Osoy resumed providing services. As the ALJ recognized, IBT’s action had nothing to do with protected concerted activity, and the Union’s claim was correctly

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<sup>20</sup> The General Counsel alleges JMolina admitted to initiating the incident. *GC’s Exceptions Brief* at 26. To the contrary, it was Osoy who first made comments to another driver about JMolina, and JMolina’s sole response was to ask whether Osoy would like to take a picture or video of JMolina handing a vest to a driver. *JMolina* 2816.

rejected by the ALJ.

**D. No 8(a)(4) Violation Occurred**

The General Counsel gave up on the 8(a)(4) allegation by omitting it from the Limited Exceptions entirely. The Charging Party, however, attempted to revive the allegation. *CP's Exceptions Brief* at 52. As the Charging Party relies largely on its same 8(a)(3) arguments, IBT's response to the 8(a)(3) arguments above as well as the ALJD itself apply and the same result, dismissal, should follow.

What is more, the Charging Party rests the crucial position of its argument on the credibility of Osoy over the credibility of Rosas.<sup>21</sup> The ALJ, however, recognizing that the credibility resolution was crucial, believed Rosas and not Osoy. *ALJD* at 26.

The only evidence from Osoy about his participation was his statement to Rosas that he did not know anything about any Board charges. *Osoy* 211-12. Rosas remembers Osoy at some point telling her the Union was "filing against IBT" to which she responded "well what do you want me to do or what do you want me to say?" *Rosas* 3462. Osoy said "I just wanted you to know." *Rosas* 3462. Thus, Osoy never told IBT he was providing testimony against IBT. Moreover, nothing was filed in May, 2016. *GC1*. This, alone, is fatal to the Union's claim. *Gold Coast Restaurant Corp.*, 304 NLRB 750, 751 (1991) (rejecting the charge even though the discharged employees were long time union members who freely discussed the union at work). *See also Camaco Lorain Mfg.*, 356 NLRB No. 1182 (2011).

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<sup>21</sup> For example, the Charging Party cites Osoy as saying Rosas told him she was aware Board charges would be filed, and that Osoy should "be careful." *CP's Exceptions Brief* at 5-6. Rosas denied saying any such thing, and when she testified as to her conversations with Osoy, the ALJ believed Rosas over Osoy. *ALJD* at 26.

## II. Osoy's Allegations About Vicky Rosas Lack Merit

### A. Rosas Created No Impression of Surveillance, Nor Did She Communicate Threats

“Rosas testified that she didn’t engage in the conduct attributed to her and I believe her” held the ALJ. *ALJD* at 26. Stated differently, Rosas’ testimony was credited because “she appeared to testify in an honest and truthful manner.” *Id.* Indeed, “the picture painted of Rosas in the Complaint as threatening union supporters with surveillance and termination simply didn’t correspond to the person who testified at trial.” *Id.*

Despite the ALJ offering such stark, unequivocal reasoning on the most basic and essential duties entrusted to him, the Charging Party asks the Board to overturn the ALJ’s credibility resolution. The Charging Party offers no substantive inconsistency in Rosas’ testimony or any other evidence relating to Rosas that would make her account of events anything less than the absolute truth. The Charging Party’s attempt should therefore be roundly rejected.

Osoy first claimed that Rosas created the impression of surveillance by asking Osoy to be careful because the company was watching them. *Osoy* 211. Rosas, however, credibly explained that no such incident occurred. *Rosas*, 3445, 3462. Even so, Osoy was an open Union supporter. Case law is clear that general comments made by the employer regarding an open Union supporter do not create an improper impression of surveillance. *Flamingo Las Vegas Operating Co.*, 361 NLRB No. 130 (2014). Thus, no impression of surveillance could come from Osoy’s allegations even if they had been true, which they are not.

Osoy next claimed that Rosas, in the IBT yard during the February 2016 meeting among drivers, told Osoy that she would be placed in charge of firing the drivers who wore Union vests. *Osoy* 211. As confirmed by the General Counsel's own witness, however, Rosas was not present at that meeting. *Miranda* 971. Moreover, Osoy, Portillo, and the remaining individuals who wore Union vests remained under contract with IBT and continued wearing Union vests. Most importantly, Rosas expressly denied making any such statement. *Rosas* 3445.<sup>22</sup> And Bradley has never vested Rosas with such authority or placed her in charge of terminating any contracts. *Bradley* 3852-53.

The Charging Party nevertheless asserts Rosas' credibility is subordinate to what the Charging Party characterizes as Osoy's "earnest, truthful, and without exaggeration" testimony. *CP's Exceptions Brief* at 25. Aside from the Charging Party's improper attempt to invade the province of the ALJ in believing one witness over another witness, Osoy's testimony was anything but earnest, truthful and without exaggeration. Among other things, Osoy testified that he did not understand the Agreement he signed was a contract until days later, yet he never canceled the Agreement once he did find out. *Osoy* 303-04, 306-07. In fact, he stated under oath to the bankruptcy court that he was a "Self-Employed" truck driver. *R8*, p.5. Osoy also downplayed his English proficiency, yet he met from time to time with Bradley about safety issues and with

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<sup>22</sup> The Charging Party attempted to manufacture gravity for Osoy's complaints by alleging he had been placed out of service for failing to turn in hours of service logs and for failing to sign a Truck Lease. The attempt is misplaced. DOT regulations render a driver out of compliance for being 13 days behind on their logs, and when Osoy passed that threshold, he was told he could not be dispatched until he got caught up, which took Osoy about 30 minutes to accomplish. *Rosas* 3419, 3422-24, 3455. Osoy was not placed out of service for failing to sign a Truck Lease, but he was required to sign a Truck Lease if he wished to lease a truck from IBT. *Rosas* 3437, 3456-57. Naturally, a driver cannot lease a truck from IBT or anyone else for that matter without signing a Truck Lease. *Bradley* 3787.

Ackerman about compensation issues and regularly conversed in English without anyone who spoke Spanish being in the room. *Ackerman* 2498.

The *only* direct attempt the Charging Party makes to question Rosas' credibility is an allegation that she denied that drivers discussed the union with her but admitted in the very next question that a few drivers commented to her about the strikes. *CP's Exceptions Brief* at 24. Rosas made no attempt to hide the fact that she heard comments about strikes, nor did she get defensive in any way. *Rosas*, 3460-61. And none of the questioning from the General Counsel or the Charging Party even remotely suggested they understood the answers to be contradictory or that there was any question Rosas considered the answers to be contradictory.<sup>23</sup>

Finally, the Charging Party's only citation to case law does not support its claim. In *W. T. Grant Co.*, 214 NLRB 698 (1974), the Board found the charging party's testimony was inconsistent, contrived and unworthy of belief. Specifically, the charging party's testimony that she overheard company managers threatening her fellow employees was directly contradicted by those fellow employees, themselves. *Id.* at 698. And in *Gold Standard Enterprises, Inc.*, credibility resolutions with respect to a charging party were revisited because the ALJ did not even mention the corroborating testimony of fellow employees. 234 NLRB 618 (1978).

Here, the Union bases the charge on a conversation Osoy allegedly had with Rosas

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<sup>23</sup> The Charging Party also inexplicably references Rosas' admittedly true testimony that she did not translate any agreements into Spanish as support for their claim that Osoy was more credible. Citing such truthful testimony by Rosas *bolsters* her credibility as opposed to calling it into question.

in which no one else was present. The ALJ was therefore left to decide which of the two participants in the conversations was telling the truth. The ALJ, based on witness demeanor, believed Rosas over Osoy, and under such circumstances, the credibility resolution is unassailable.

**B. Rosas Is Not A Supervisor Or Agent**

The Board has long held that an employer is only liable for the acts of its agents made within the scope of the agent's authority. *See* 29 U.S.C.A. § 152(2) (limiting the term employer to include only those persons "acting as an agent of an employer"); *See In re Robert Orr-Sysco Food Servs., LLC*, 338 NLRB 614, 621 (2002) (stating "employers and unions are generally not held responsible for acts of rank-and-file employees"). In other words, setting aside the ALJ's finding that Rosas did *not* make the statements Osoy alleged, IBT can only be held liable for the acts of Rosas if Rosas was acting within the scope of an agency relationship with IBT at the time of the alleged conduct which the Charging Party contends constitutes an unfair labor practice. *In Re Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (holding an agency relationship did not exist where alleged unfair labor practices were unrelated to employee's duties); *Waterbed World*, 286 NLRB 425, 427 (1987) (holding employer was not liable for acts of employee where General Counsel failed to present evidence that employee was an agent of company at time alleged unlawful statements were made by the employee).

The Board has stated that "whether someone acts as an agent under the National Labor Relations Act must be determined by common law principles of agency." *Food Mart Eureka, Inc.*, 323 NLRB 1288, 1295 (1997); *New England Confectionary Co. & Bakery*,

*Confectionary, Tobacco Workers & Grain Millers Int'l Union, Local 348 & Jose E. Pinto, Intervenor.*, 356 NLRB 432 (2010) (holding agency relationship did not exist where facts indicated that clerical employee did not have apparent authority to act on behalf of management). Generally, “the ultimate test [to establish agency] is whether, under all the circumstances, employees would reasonably believe that the purported agent spoke for and acted on behalf of company management.” *Id.* at 440. As the party asserting the existence of an agency relationship, the General Counsel bears the burden of proving that Quevedo was acting as an agent of IBT at the time of the alleged conduct. *Mastec N. Am., Inc., d/b/a Mastec Advanced Techs. & Int'l Bhd. of Elec. Workers, Local Union No. 728, Afl-Cio*, JD(NY)-24-12, 2012 WL 2992087 (July 20, 2012) (holding that rank-and-file employee was not an agent while merely training other employees on employer’s procedures and products); *St. Alphonsus Hosp.*, 261 NLRB 620, 624 (1982) (“the burden approving [sic.] supervisory status rests on the party alleging that such status exists”).

In order to establish the existence of an agency relationship it is not enough for the Charging Party to argue that it was possible other employees perceived Rosas to be an agent (or even that they *actually* perceived Rosas to be an agent). *Food Mart Eureka, Inc.*, 323 NLRB at 1295. Rather, a finding of agency status requires action *on the part of the employer* which would lead others to reasonably believe that the employee is acting as the employer’s agent. *In Re Tejas Elec. Servs., Inc.*, 338 NLRB 416, 423 (2002) (“[b]efore the acts of the self-proclaimed [agent] may be attributed to the [principal], the [principal] must have taken some action or made some statement which reasonably would lead others to believe the individual was acting with the [principal]’s permission”).

The General Counsel undoubtedly had the burden of proving that Rosas was acting as an agent of IBT at the time of the alleged conduct. *Id.* During the hearing, the General Counsel and the Charging Party failed to present any evidence that Rosas was acting as a supervisor at the time she engaged in the alleged conduct. Indeed, the Complaint does not even *allege* she was a supervisor. GC1 (cc), ¶5. Moreover, neither the General Counsel nor the Charging Party introduced any evidence or material which would establish that IBT ever made any manifestation to Rosas’s coworkers which would lead them to reasonably believe that she was acting as an agent of IBT.<sup>24</sup>

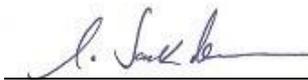
Osoy, himself, admitted that whenever he went to Rosas with complaints, she would reiterate that “I’m a small person and I can’t help you.” *Osoy* 237. As such, the Board should find that Rosas was not an agent of IBT even if the alleged conduct had been true, as the General Counsel failed to meet its burden of proof. *In Re Corner Furniture Disc. Ctr., Inc.*, 339 NLRB 1122 (2003) (holding no agency relationship existed where there was no evidence of a manifestation on the part of the principal which would lead a third party to believe an agency relationship existed); *see, El Paso Elec. Co. & Int’l Bhd. of Elec. Workers, Local Union 960, Afl-Cio*, 28-CA-20265, 2007 WL 674333 (Mar. 1, 2007) (holding no agency relationship existed where General Counsel failed to present evidence that employer and employee formed an agency relationship).

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<sup>24</sup> The ALJ, without analysis or explanation, found Rosas was a supervisor and agent. *ALJD* at 2. For the reasons set forth above, Rosas was neither, and the Board should sustain Intermodal Bridge Transport’s Exceptions to the Administrative Law Judge’s November 28, 2017, Exception No. 2.

## CONCLUSION

For all of the foregoing reasons, IBT respectfully requests the Board to affirm the ALJ's dismissal of the allegations relating to placing Osoy out of service to investigate the fight he attempted to provoke as well as the allegations that an impression of surveillance and threats of discharge occurred. IBT further requests the Exceptions of General Counsel and the Cross-Exceptions of the Charging Party be rejected.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Respondent's Answering Brief to the General Counsel's Exceptions and the Charging Party's' Cross-Exceptions was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on April 27, 2018. A copy of Respondent's Exceptions Brief was also served upon the following by electronic mail on April 27, 2018:

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