

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

**Division of Judges**

CALIFORNIA CARTAGE COMPANY, LLC; ORIENT TALLY COMPANY, INC.; AND NEXEM-ALLIED, LLC D/B/A CORE EMPLOYEE MANAGEMENT	CASE NOS.	21-CA-190500 21-CA-207939 21-RC-188813
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and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

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CALIFORNIA CARTAGE COMPANY, LLC; ORIENT  
TALLY COMPANY, INC.; NFI CALIFORNIA  
CARTAGE HOLDING COMPANY, LLC;  
CALIFORNIA CARTAGE DISTRIBUTION, LLC;  
CALIFORNIA TRANSLOAD SERVICES, LLC; CORE  
EMPLOYEE MANAGEMENT, INC.

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

**RESPONDENTS' POST-HEARING BRIEF**

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## I. INTRODUCTION

The principal question here is whether the General Counsel and Teamsters have proven that the employees' overwhelming rejection of Teamsters representation in the December 22, 2016, election should be cast aside and a new election ordered. On that question, there is only one set of allegations, amidst the various charges and objections asserted, that would warrant a new election, if true. That is the claim that the then-owner and CEO of California Cartage Company ("Cal Cartage"), Robert Curry, threatened to close the plant if employees voted in favor of the Teamsters. *See* GC Ex. 1(bb), ¶ 19. If true, a rerun of the election would be appropriate. But the General Counsel's and Teamsters' allegations are not true.

The evidence showed that, on the morning of December 20, 2016, neither Curry (speaking in English) nor Operations Manager Freddy Rivera (speaking after Curry in Spanish) made any threats to the gathered employees.

With respect to Curry's speech, there is no dispute regarding what he said during most of his speech. The recordings and transcript Cal Cartage introduced—which the General Counsel tried unsuccessfully to keep out—prove what was said. *See* Resps. Exs. 2, 3. During the almost eight minutes recorded, Curry relayed his past experiences with the Teamsters, talked about a lengthy strike—over thirty years ago—that he said "broke" him, and referenced the more recent loss of Amazon business. *See* Resps. Exs. 2, 3. While Curry deviated from the script that had been prepared for him, what he said is lawful under Section 8(c) of the Act and the First Amendment to the United States Constitution.

Rivera, likewise, made no threats. Rivera did not translate Curry's speech as Curry gave it, but stuck to the Spanish-language script. Rivera did not mention Curry's past bad experiences with the Teamsters or the loss of Amazon business. Instead, Rivera read a speech that shared

Cal Cartage's position with respect to representation generally and urged employees to vote no. *See* Resps. Exs. 5, 6. Like Curry's remarks, Rivera's speech was entirely lawful.

The testimony proffered by the General Counsel and Teamsters contending that Curry and Rivera made threats to the employees is not credible and must be rejected. It is inherently improbable that Curry and Rivera made the threats claimed, for a number of reasons.

Particularly telling as a practical matter is this: Had the owner and CEO of the Company really made threats of plant closure to all of the employees, one would have expected the Teamsters immediately to file a blocking charge. They did not, because no such threats were made.

Instead, the Teamsters filed the charges and objections at issue here only after employees voted 283 no, 124 yes—rejecting the Teamsters by 159 votes.

Given the importance of resolving what was said during Curry's and Rivera's speeches, we first address those claims and evidence before turning to the other allegations at issue. None of the allegations has merit. The Complaint and each of the Teamsters' objections should be dismissed.

## **II. CURRY'S AND RIVERA'S SPEECHES DID NOT VIOLATE THE NLRA, AS ALLEGED IN PARAGRAPH 19 OF THE COMPLAINT AND OBJECTION NUMBER 1**

The General Counsel's Complaint alleges that on or about December 20, 2016, during a mandatory employee meeting held in Bay 1 of Warehouse 13 at the Wilmington facility, Cal Cartage's CEO, Robert Curry, with Operations Manager Freddy Rivera translating for him: (a) threatened employees with job loss if they voted in favor of the Teamsters; (b) threatened to close the facility if employees voted in favor of the Teamsters; (c) threatened employees with loss of work if employees voted in favor of the Teamsters; and (d) threatened that employees' continued involvement with and support for the Teamsters would lead Cal Cartage to lose certain accounts and/or close certain departments. *See* GC Ex. 1(bb), ¶ 19. The Teamsters' Objection

Number 1 asserts an overlapping claim to the same effect. *See* GC Ex. 1(dd), Obj. No. 1.

Neither the Complaint nor Objection Number 1 is factually or legally supported. Both must be dismissed.

**A. During His Speech, Curry Spoke About His Past Experiences With The Teamsters.**

On the morning of December 20, 2016, in Bay 1 of Warehouse 13, Cal Cartage gathered employees together more than 24 hours in advance of the December 22 election to hear Curry's remarks. Just prior to this meeting, Curry, Norm Weisman (a management consultant for Cal Cartage), Freddy Rivera, and other managers gathered to discuss what was going to be said during the meeting. Tr. 316:4-318:2. A speech had been prepared for Curry in advance of the meeting. *See* GC Ex. 11, Jt. Ex. 3. But Curry was not happy with the prepared text. He wanted to tell employees about his past bad experiences with the Teamsters. *See* GC Ex. 13, Jt. Ex. 3. As Curry explained to Weisman, Rivera, and the others, he wanted to tell the story of the Teamster strike that had forced him to close his business more than 30 years earlier. The management consultant, Weisman, urged Curry not to talk about those things. Tr. 317:7-25.

But, as Rivera acknowledged, Curry was the boss. On the morning of December 20 he gave the speech he wanted to give to the assembled employees. Tr. 318:1-5. Curry spoke for approximately 10 minutes. Tr. 301:13-14 (Rivera); 348:19-20 (West); 378:21-22 (Lyons). During this time, he talked about a number of topics. After Cal Cartage was made aware of labor charges related to Curry's speech, Cal Cartage tried to secure a recording of Curry's speech and located one, which was introduced into evidence at the hearing. Tr. 301:15-302:25; 303:19-306:7; 307:8-20; 309:18-312:7; Resps. Exs. 2, 3. From that recording (Respondents' Exhibit 2)

and subsequent transcription (Respondents' Exhibit 3), the vast majority of Curry's speech is indisputable.<sup>1</sup>

Curry started his speech by talking about the history of Cal Cartage. Resps. Exs. 2, 3. He then transitioned to talking about his experiences with the Teamsters; how the Teamsters and a strike had "broke" him previously. Specifically, he said:

We were a full-bore Teamster company. Everybody in the company from the office to the dock workers to the truck drivers, all Teamsters. I am fully qualified to talk to you because I lived with the Teamster (inaudible).

That operation existed until the Teamsters struck me in 1984. It was about a 50-day strike, and they broke me. And in 1985 I closed up the operation, and about 175 to 200 people lost their jobs.

Resps. Ex. 3 at 2:17-25.

Curry then spoke about Cal Cartage and the people that work there. He reminded employees that the vote "is going to set the future of this company." Resps. Ex. 3 at 3:22-4:10. He told employees they had a choice and he did not want the Teamsters at Cal Cartage. At this point, the individual who had been videoing stopped and restarted the recording. Resps. Ex. 3 at 3:24-4:9; Tr. 304:21-25 (Rivera) ("Q. . . . Do you have an understanding as to why there's a stop at this point? A. No. Chris mentioned that he just stopped briefly, but he didn't mention why he stopped.") However, a review of the recordings and transcript suggest little—if anything—is missing during this gap. The transcript reads straight through:

I don't want the union or [Teamsters]in this company. I don't think we need it. We --

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<sup>1</sup> At the hearing, the General Counsel inexplicably objected to the showing and introduction of the recording (which had been provided to General Counsel during the investigation phase, and is the only recording Cal Cartage was able to locate). See Tr. 303:9-12; 303:25-304:15.

(End of recording.)

(Begin second recording.)

MR. CURRY: -- started from the ground up, and what you have today here is the result of the work that a lot of people put in; myself, as well as you and the other people that go out and get the business that keeps food on our tables.

Resps. Ex. 3 at 4:7-15.

Curry went on to tell employees that he had “lived through three strikes.” Resps. Ex. 3 at 4:21-22. He relayed that during one of those strikes:

A lady came to the line who worked in our office. And I heard her say, I need to go to work, I need to feed my family.

They told her if she crossed the picket line and came in, that she would be subject to being ousted from the Teamsters and if she ever got back in she'd have to pay substantial fines, and they intimidated her to the point that she did not come in. That's an example of how the Teamsters work.

Resps. Ex. 3 at 4:23-5:6.

Curry next talked about competition, and the recording ends:

This operation here has barely broken even for the last few years. Competition dictates what we can charge a customer because we have four or five companies that do exactly the same thing we do. They call on customers just like we do. And if our rates are out of line, we will lose the business. Competition also dictates what we can pay. If we can't get more money from the customer, it's pretty much --

(End of recording.)

Resps. Ex. 3 at 6:10-18. The employee who recorded the speech did not explain why he stopped recording when he did, and Cal Cartage has no other audio or video recordings.

Tr. 305:17-306:7. Nor did the General Counsel or Teamsters introduce any other recordings.

Curry only spoke for approximately two more minutes after the tape ended. Tr. 312:12-13. Multiple Cal Cartage witnesses estimated Curry spoke for approximately 10 minutes, and

the video recordings are 7 minutes and 46 seconds long in total. *See* Tr. 301:13-14 (Rivera); 348:19-20 (West); 378:21-22 (Lyons); Resps. Ex. 2. Accordingly, the majority of Curry's speech is reflected through the recordings. At the end of the speech, Curry said that Cal Cartage had "lost Amazon business, and he [concluded] with urging employees to vote no on Thursday." Tr. 312:14-19 (Rivera); *see also* Tr. 350:10-16 (West).

As demonstrated by the recording of Curry's speech and the testimony of Rivera, managers Diana West and Lisa Lyons, and supervisor Jose Rodriguez ("Supervisor Rodriguez"), Curry never made any threats. Specifically, he never: (i) threatened he would probably have to close down the CFS if the Teamsters came in; (ii) threatened he would close the company down; (iii) said that he could not afford to pay employees, he would have to sell Cal Cartage; (iv) threatened to move Cal Cartage; (v) said if the Teamsters came back, Cal Cartage was going to go into bankruptcy and have to close; or (vi) threatened that everyone was going to be left without a job. *See* Tr. 325:5-326:17 (Rivera); 348:21-349:17 (West); 378:23-379:19 (Lyons); 399:9-400:14 (Supervisor Rodriguez); *see also* Resps. Ex. 3.

As for Curry's reference to the loss of Amazon business, it is undisputed on the record that Cal Cartage had, in fact, lost Amazon business due to the Teamsters' organizing efforts at the Wilmington facility. In August 2015, Amazon first approached Cal Cartage about operating a pop-up business at the facility for three months during the holidays. Tr. 350:13-353:20. Amazon was intending to have its own employees work within one of the warehouses operating a direct fulfillment center for certain high-volume goods. *Id.* Cal Cartage cleared out the intended space in one of the warehouses, cleared out and fenced a parking lot, and performed IT and certain electrical work necessary for Amazon. *Id.* Amazon and Cal Cartage entered into a contract for the pop-up business. Tr. 353:1-353:20; 356:5-15; Resps. Ex. 7.

Amazon never operated the pop-up business under the terms of the contract. On September 21, 2015, Amazon personnel visited the Wilmington facility. Tr. 357:5-25. Cal Cartage had been informed that the Teamsters would be having a strike the next day; thus, they shared this information with the Amazon personnel visiting. *Id.* Chris Novosad, Cal Cartage’s day-to-day Amazon contact, later told Cal Cartage’s Manager Diana West that Amazon corporate did not like what they heard regarding the strike and Teamsters activity at the facility. *Id.* Amazon decided not to proceed with the pop-up business, because of the organizing activities. Tr. 357:1-360:12, Resps. Ex. 8. In an email chain dated September 30, 2018, Luke Lynch, then-Vice President of Cal Cartage, emailed Hermann Rosenthal, then-General Manager at the Wilmington facility: “[b]ecause of [Cal Cartage’s] labor issues Amazon is pulling the plug on the pop up.” Resps. Ex. 8. Rosenthal subsequently forwarded that email chain to West. Resps. Ex. 8.

**B. Rivera Did Not Translate What Curry Said; Instead, He Read A Prepared Script.**

After Curry spoke, Rivera then spoke in Spanish to the gathered employees. The General Counsel and Teamsters contend Rivera translated Curry’s speech, including Curry’s alleged threats. Originally, Cal Cartage had intended for Rivera to give the same speech as Curry, so that Spanish-speaking employees would understand. However, with Curry’s changes to the prepared speech, Rivera did not deliver the same speech as Curry.

Prior to the morning meeting, Rivera had been provided a translated written speech. *See* Resps. Ex. 5. The Translation generally tracked the first version of the speech provided to Curry. *Compare* Resps. Ex. 5 and GC Ex. 11. Rivera had made small hand-written notations in the translated speech, to assist him in presenting it. *See* Resps. Ex. 5; Tr. 318:3-320:2. Rivera testified that during the pre-speech meeting with Curry, he made notes with the asterisks that

appear on Respondents Exhibit 4. *See* Ex. 4; Tr. 314:4-10. Then, as Curry went off script during his morning speech, Rivera made an additional note appearing on Respondents Exhibit 4 without an asterisk. *See* Ex. 4; Tr. 314:11-14. Rivera took the notes before and during the speech, with translation in mind. Tr. 318:6-19. Rivera decided, however, not to add what Curry was saying about his past experiences with the Teamsters to his speech. Rivera testified that he “just wasn’t sure if it was okay to say it . . .” Tr. 321:4-325:1.

Accordingly, when it came time for Rivera to speak, he added the background information that Curry’s father had started Cal Cartage 60-plus years ago, but then read the translated version of the speech previously prepared (Respondents’ Exhibit 5). Tr. 319:7-325:1; 401:6-12. In reading the prepared speech, Rivera: (i) reminded employees that they had seen information about collective bargaining; (ii) talked about strikes and the potential impact of strikes; (iii) reminded employees that the Teamsters could not guarantee any result; (iv) told employees the only thing they had seen up until then was “the offer of free donuts and hot dogs”—but only to “people who wanted to sign a Teamsters card in exchange for eating the food[;]” and (v) concluded by urging employees to vote, and to vote “no.” *See* Resps. Exs. 5, 6; Tr. 321:4-325:1. Rivera’s prepared remarks were only eight pages, double-spaced. *See* Resps. Ex. 5. Accordingly, Rivera’s speech was shorter than Curry’s; Supervisor Rodriguez estimates Rivera spoke for between 7 and 10 minutes. Tr. 401:14-20.

Like Curry, Rivera never made any threats during his speech—including the potential closure of the facility or specific departments, or loss of jobs or work if employees voted for the Teamsters. Tr. 326:5-17; 401:25-402:15; *see also* Exs. 5, 6.

**C. The General Counsel’s Witnesses’ Claims That Curry And Rivera Made Various Threats Are Not Credible And Should Be Rejected.**

Notwithstanding the evidence of what Curry and Rivera said (or did not say) during their speeches—including video recordings of most of Curry’s speech and the script for Rivera’s—six witnesses for the General Counsel and Teamsters claim Curry and Rivera made various future threats should employees vote for Teamsters representation. In assessing credibility, the Board has directed that a variety of factors should be considered: “witness testimony in context, including among other things, [the witness’] demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences.” *See In re Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003); *In re Daikuchi Corp d/b/a Daikichi Sushi*, 335 NLRB 622, 623 (2001) (same). Here, the overwhelming circumstances demonstrate that the General Counsel’s witnesses’ testimony is not credible and should be rejected.

**1. The General Counsel’s Witnesses’ Testimony Regarding Curry’s Alleged Threats Is Inconsistent In Critical Ways.**

The General Counsel’s witnesses testified in substantively inconsistent ways as to the purported threats Curry made, which the General Counsel and Teamsters claim Rivera then translated. The following chart summarizes the testimony of the General Counsel’s witnesses regarding the alleged threats and their inconsistencies.

<b>The General Counsels’ Witnesses Gave Inconsistent Testimony Regarding The Alleged Threats In Curry’s/Rivera’s Speeches</b>		
<b>Witness</b>	<b>Testimony</b>	<b>Differences In Alleged Threats</b>
Michael Johnson	<p>“[T]hey told us that they was going to <b>either <u>move the company</u></b> or they’ll have to <b><u>sell the company</u></b> if the Teamsters come back in.”</p> <p>Tr. 74:1-10 (emphasis added).</p>	<b>Did not say “close.”</b>

**The General Counsels' Witnesses Gave Inconsistent Testimony  
Regarding The Alleged Threats In Curry's/Rivera's Speeches**

Witness	Testimony	Differences In Alleged Threats
Dwayne Wilson	<p>“Q. Do you recall if Mr. Curry said anything about what would happen if the <b>Teamsters come in</b>?”</p> <p>“A. He said that he’ll probably have to <b>close</b> down <b>the warehouse.</b>”</p> <p>Tr. 150:14-17 (emphasis added).</p>	<p><b>Did not say “move” or “sell.”</b></p>
Victor Gonzalez	<p>“He said that if the Teamsters came in, he would have to <b>close the company</b> down. He would like us to vote no. And then he just kept saying, we -- we need our jobs so we can afford to pay our rent and buy food. So he said a lot of things towards that --” Tr. 175:11-18 (emphasis added).</p> <p>V. Gonzalez then added on cross examination that Curry might have to sell the company “because he couldn’t afford to pay us if the Union came in.” Tr. 178:25-180:3.</p>	<p><b>Did not say “move.”</b></p> <p>Specifically <b>denied</b> hearing the Company may have to move. (Tr. 178:22-24).</p>
Alberto Arenas Carbajal	<p>“[I]f the Teamsters came back, <b>the company</b> was going <b>go to bankruptcy</b>, and that it was going to have to <b>close</b>; that everyone was going to be left without a job.”</p> <p>Tr. 195:5-21 (emphasis added).</p>	<p><b>Did not say “move” or “sell.”</b></p>
Miguel Rodriguez	<p>“That if the <b>Teamsters came back</b>, the <b>company</b> would have to <b>close or change location.</b> Yes.”</p> <p>Tr. 217:2-25 (emphasis added).</p>	<p><b>Did not say “sell.”</b></p>
Jose Rodriguez	<p>“And if the <b>Teamsters came in</b>, the <b>company</b> would have to <b>close</b> or <b>move to a different location</b> and all the employees would be <b>left with no work.</b> That’s all I remember from</p>	<p><b>Did not say “sell.”</b></p>

The General Counsels' Witnesses Gave Inconsistent Testimony Regarding The Alleged Threats In Curry's/Rivera's Speeches		
Witness	Testimony	Differences In Alleged Threats
	that meeting.” Tr. 236:15-24 (emphasis added).	

In sum, the General Counsel’s witnesses’ testimony regarding what Curry or Rivera said is inconsistent, contradictory, and cannot coexist. As discussed below, one would expect that a threat that directly impacted one’s livelihood by the then-owner and CEO would leave an indelible and lasting impression, such that it would be remembered vividly. Indeed, as Cal Cartage witness Diana West explained, she would have remembered such threats because it “would have affected me and my family. I would have remembered that.” Tr. 349:25-350:2. And yet, the General Counsel’s witnesses were all over the map in recounting Curry’s alleged threats.

With respect to Rivera’s speech—which, remember, the General Counsel and Teamsters allege is merely a translation of Curry’s speech—it is notable that the General Counsel’s witnesses could only testify to a few statements allegedly made by Rivera during his speech. Carbajal, J. Rodriguez, and M. Rodriguez denied that Rivera talked about certain topics that Respondents Exhibit 6 shows he did discuss. Specifically, J. Rodriguez and M. Rodriguez denied Rivera talked about union dues; denied Rivera told employees that, even if they had signed a Teamsters authorization card, they could still vote against the Teamsters; and denied that Rivera talked about the Teamsters’ giving free donuts and hot dogs to supporters. Tr. 227:25-229:7 (M. Rodriguez); Tr. 243:6-245:11 (J. Rodriguez). And yet, Rivera did talk about those things. Resps. Exs. 5, 6. Similarly, Carbajal denied that Rivera talked about dues and that if employees signed a Teamsters card they could still vote against the Teamsters. But Carbajal

admitted Rivera did talk about the Teamsters giving donuts and hot dogs to supporters.

Tr. 201:2-202:1. Note: Carbajal's admissions that Rivera did talk about donuts and hot dogs belies the argument that Rivera was merely translating Curry's speech. Curry did not talk about giving donuts and hot dogs to supporters. *See, e.g.*, Resps. Exs. 2, 3.

Thus, the inconsistent testimony of the General Counsel's witnesses regarding the alleged threats should not be credited.

**2. *It Is Inherently Improbable That Curry (Translated By Rivera) Made The Alleged Threats.***

**a. The Documentary Evidence Shows That It Is Not Inherently Probable The Claimed Threats Were Made.**

None of the documentary evidence supports the General Counsel's witnesses' testimony regarding alleged threats in Curry's and Rivera's speeches.

With respect to Curry's speech: (i) none of the drafts of Curry's speech contains the threats alleged to have been made (*see* GC Exs. 11, 12, 13; Jt. Ex. 3); (ii) the video of Curry's speech does not reflect any threats alleged to have been made (*see* Resps. Exs. 2, 3); (iii) Rivera's notes taken before the speech when meeting with Curry do not reflect any threats (Resps. Ex. 4); and (iv) Rivera's notes taken during the speech do not reflect any threats (Resps. Ex. 4). Thus, to conclude that Curry made the threats alleged requires one to believe that those threats just happened to have been made when the employee recording the speech had stopped. It is implausible that such threats just happened to occur then.

Indeed, if Curry were to have said that Cal Cartage could go bankrupt or need to close, sell, or move, he logically would have said it when he was discussing past bankruptcy and the closure of the business in 1985. But, there are no such future threats surrounding Curry's discussion of the 50-day Teamsters strike that "broke" him. *See* Resps. Ex. 3 at 2:17-25. Again,

it is not inherently probable Curry would have just happened to make the threats alleged in the final couple minutes when his speech was not being recorded.

With respect to Rivera's speech: neither Rivera's script (Resps. Exs. 5, 6) nor his notes before or during Curry's speech (Resps. Ex. 4) reflects any threats. Rivera's script and notes also reflect that Rivera intended to use a translated document. Rivera was taking the notes reflected in Exhibit 4, because he wanted to be able to translate it. Tr. 318:6-13; *see also* Resps. Ex. 4 (showing Rivera's translation of his opening remarks and welcome at the top of the page). Thus, to conclude that Rivera made the threats alleged requires ignoring that Rivera was reading his speech and assuming that Rivera was able to remember all that Curry said and then translate it contemporaneously. There is no documentary evidence in support of that conclusion, and it is not inherently probable Rivera did so.

**b. General Counsel Witness Carbajal's Testimony Shows It Is Improbable That The Claimed Threats Were Made.**

General Counsel witness Carbajal testified in his affidavit, which was read into the record, that what he “recall[s] the most” (emphasis added) from Rivera's speech is that Rivera told employees they “were the future of the company, that he appreciates all of us and that we shouldn't vote for the Teamsters.” Tr. 226:20-227:4. Carbajal testified in his affidavit that when Rivera said they were the future of the company, he “turned around and told the employees behind me not to believe what [Rivera] was saying.”<sup>2</sup> *Id.*

If Rivera, translating for Curry, had said “the company was going to go to bankruptcy, and it was going to have to close, that everyone was going to be left without a job” (Tr. 195:5-21) – as Carbajal testified – how plausible is it that what Carbajal would remember *most* is that

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<sup>2</sup> Carbajal tried to change his testimony at the hearing and said, contrary to his affidavit, that he made those statements while walking out from the meeting. *See* Tr. 224:10-18; 226:20-227:21.

Rivera told employees they “were the future of the company and that he appreciates all of us and that we shouldn’t vote for the Teamsters”? And how plausible is it that **this** remark, and not the alleged threats, would prompt Carbajal to turn around and dispute the remark with other employees? If what Carbajal remembers, and chose to dispute, is a benign remark about the Company’s appreciation of its employees, it is highly improbable that the alleged threats were made.

c. **It Is Inherently Improbable That Curry’s And Rivera’s Speeches Were As Long As The General Counsel’s Witnesses Estimate.**

Most of the General Counsel’s witnesses testified that Curry and Rivera gave speeches of a length that is inherently improbable and further demonstrates the lack of credibility in their testimony. Specifically, Johnson estimated Curry and Rivera both spoke for about a half-hour each. Tr. 111:25-112:7. Wilson estimated Curry spoke for 30 to 45 minutes. Tr. 151:11-15. Carbajal estimated that Curry spoke for between 20 and 30 minutes and Rivera for between 20 and 25 minutes. Tr. 194:22-25. M. Rodriguez estimated a half hour for Curry’s speech and “15, 20 minutes” for Rivera’s speech. There is no support for these estimates.<sup>3</sup>

*First*, it is not inherently probable that Curry’s speech was any longer than the 10-minute estimate of Cal Cartage’s witnesses. The initial remarks prepared for Curry’s speech were only 11 pages long, double-spaced, all-caps, with significant blank-space. GC Ex. 11. The video of Curry’s speech is less than 8-minutes long (and, per Cal Cartage’s witnesses, covers all but the last couple of minutes of the speech). Resps. Exs. 2, 3; *see* Tr. 301:13-14 (Rivera); 348:19-20

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<sup>3</sup> Indeed, two of the General Counsel’s witnesses’ contradict their fellow witnesses’ testimony. With still overly long estimates, Gonzalez testified Curry’s speech was “15, 16, 18 minutes” and both speeches were 25 to 30 minutes total (Tr. 175:24-176:4), and J. Rodriguez testified that each of Curry’s and Rivera’s speeches was 15 to 20 minutes (Tr. 236:7-8; 237:6-7).

(West); 378:21-22 (Lyons). It is not probable that Curry spoke for 22 minutes more than what is recorded—especially where the General Counsel’s witnesses could only testify to a couple specific statements allegedly made by Curry.

*Second*, it is inherently improbable that Rivera’s speech was the length of the General Counsel’s witnesses’ estimates. The script Rivera used was only eight pages long, double-spaced, all-caps, with large amounts of blank-space. *See* Resps. Ex. 5. As General Counsel witness M. Rodriguez admitted, Rivera read his speech. Tr. 218:11-16.

*Third*, as to the time estimates for both speeches combined, it is inherently improbable that hundreds of employees stood in a warehouse for up to a full hour while Curry and Rivera each gave half-hour speeches.

Thus, the General Counsel’s witnesses’ testimony regarding the length of time Curry and Rivera spoke demonstrates, again, the lack of credibility their testimony warrants.

**d. The Teamsters’ Response To The Purported Threats Shows That It Is Not Inherently Probable Curry And Rivera Made The Threats Claimed.**

If Curry, the then-owner and CEO of Cal Cartage, and Rivera, the Operations Manager of the facility, made the threats alleged less than two days before the election was scheduled to begin, that would present a classic and compelling case for a blocking charge. However, that is not what occurred. Instead, the election proceeded. It was only after the employees voted 283 no, 124 yes—rejecting the Teamsters by 159 votes—that the Teamsters filed the charge being heard here. It is not inherently probable that Curry and Rivera made the threats alleged and the Teamsters would not immediately rush to the Board with a blocking charge.<sup>4</sup>

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<sup>4</sup> It is also notable that, contrary to the Teamsters’ request, the General Counsel never sought Section 10(j) relief for this alleged charge.

**3. *The General Counsel's Witnesses' Testimony Regarding Sequencing Of The Alleged Threats In Curry's And Rivera's Speeches Further Demonstrates That Their Testimony Is Not Credible.***

Because the video recording accounts for all but the last couple minutes of Curry's speech, Cal Cartage sought through cross-examination to obtain General Counsel's witnesses' testimony about the sequencing of the alleged threats by Curry and Rivera.

None of the General Counsel's witnesses could specify the sequence of statements in Curry's speech. Johnson became argumentative in claiming he does not recall the sequence: "How I supposed to know? All I know is what was said in the speech. I'm not remembering no orders or none of that." Tr. 114:10-18; *see also* Tr. 116:3-20. Wilson first admitted that his affidavit set forth the sequence of statements by Curry, as reflected in Respondents' Ex. 1 (rejected). Tr. 162:1-12 ("Q. And to the best to your recollection, in the order that it was stated in your affidavit? A. Yes."). However, he quickly recanted that position and claimed the threats were made within the last 10 to 15 minutes. *See* Tr. 163:4-22; 167:24-168:8. Finally, V. Gonzalez denied being able to recall the order in which Curry's spoke. *See* 185:19-186:14.

When the General Counsel's witnesses testified as to Rivera's speech, counsel for the General Counsel decided to preemptively ask Carbajal and J. Rodriguez when Rivera's purported threats occurred. This time, the witnesses testified that Rivera's alleged threats came at the end of his speech. Tr. 194:17-21 (Carbajal); 236:25-237:5 (J. Rodriguez). However, Carbajal then testified inconsistently with this claim that, in translating Curry's speech, Rivera's threats occurred at the end of the speech. Specifically, Carbajal testified:

Q. Now, in Spanish, what you heard him say -- excuse me, strike that. In Spanish, I believe you testified that you heard Freddy say, ***if the Union came back in, the company would go to bankruptcy?***

A. ***Yes.***

Q. Did he say that in the same part of the speech where Freddy was talking about Mr. Curry's previous experience with the Teamsters?

A. Yes.

Tr. 202:17-25 (emphasis added). If Rivera was translating Curry's speech, as claimed, the video recording of Curry's speech indisputably demonstrates that Curry did not make such statements when he was talking about his past experience with the Teamsters. *See* Resps. Ex. 3 at 2:12-25. Thus, Rivera could not have been translating Curry's speech and have made the statements in the order Carbajal claims.

**4. *Given Their Status As Teamsters Advocates, The General Counsel's Witnesses Should Not Be Given Additional Credibility Weight.***

In *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995), *enf'd, per curiam*, 1996 U.S. App. LEXIS 45284 (5th Cir. 1996), the Board held that no "presumption" of credibility attaches to the testimony of current employees who testify adversely to their supervisors. "A witness' status as a current employee," said the Board, "may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues."

Where employee witnesses are self-declared advocates of the union's cause, their bias in favor of the union undercuts any extra credibility that their status as current employees might otherwise warrant. The Fourth Circuit has stated this common-sense proposition nicely:

It is just as likely that an employee testifying against his employer is also testifying in his own self-interest as a union supporter. . . . [A]n employee "may be strongly motivated to establish an employer unfair labor practice." Employees could be so motivated because of their involvement with the union.

*Fieldcrest Cannon v. NLRB*, 97 F.3d 65, 70 (4th Cir. 1996) ("ALJ erred in giving more than a 'little' weight to a witness' status as an employee") (citation omitted). *See also Dresser-Rand Co.*, 358 NLRB 854, 876 (2012), *adopted and incorporated by reference*, 362 NLRB No. 136

(2015)(ALJ declined counsel for General Counsel's request to credit current employee who testified against his employer's interests, observing that the witness shared in the "obvious passions" of a "bitter, lengthy, labor dispute").

Here, several of the General Counsel's witnesses testified to their role as strongly committed, self-identified Teamsters advocates:

- V. Gonzalez testified that he has been involved with the Teamsters and the organizing campaign for over three years; he participated actively in delegations, strikes, and pickets. Tr. 172:15-25. V. Gonzalez's passionate commitment to the Teamsters' cause was demonstrated by his testimony that, during Curry's speech, he turned to six or seven employees around him to say that Curry was lying. Tr. 177:24-178:19; 183:15-25.
- Carbajal was supportive and involved with the campaign by speaking with other employees and a self-identified t-shirt supporter. Tr. 191:9-24. Like V. Gonzalez, he told fellow employees not to believe what was being said by management while the December 20 speeches were still being delivered. Tr. 226:20-227:1.
- M. Rodriguez admitted he is "very, very dedicated to supporting the Teamsters cause" and has been involved in strikes and delegations in support of the campaign. Tr. 214:8-22; 227:22-24.
- J. Rodriguez also showed himself to be a self-declared Teamsters' advocate. He wore a Teamsters jacket with his name on it when he took the stand, and testified to his

support for the campaign and role talking with fellow employees about the Teamsters and that they need representation by the Teamsters. Tr. 232:24-233:11; 245:12-17.<sup>5</sup>

Thus, as self-identified Teamsters advocates, the General Counsel's witnesses' testimony is not subject to any special credibility enhancement.

**D. Cal Cartage's Witnesses Should Be Credited Over The General Counsel's Witnesses.<sup>6</sup>**

At the end of the day, the testimony of the General Counsel's witnesses regarding what they claim Curry and Rivera allegedly said is inconsistent, contradictory, incomplete, self-serving, not inherently probable, and should not be credited. In contrast, the testimony of Cal Cartage's witnesses demonstrates sincerity, candor, and all indicia of credibility.

For example, Rivera candidly described the disagreements between Curry and Cal Cartage's management consultant, Norm Weissman, about the content of Curry's forthcoming speech. *See* Tr. 317:16-25.<sup>7</sup> Rivera went on to explain that when he spoke to the

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<sup>5</sup> General Counsel witness Johnson is a former employee who would not qualify for any credibility enhancement as a current employee anyway (Tr. 57:20-21). In any event, as discussed in Section III.A. below, Johnson's testimony should be rejected in its entirety and none of it credited.

<sup>6</sup> As a matter of law, Cal Cartage's not calling Curry, the former owner and CEO of Cal Cartage who is now almost 90 years old, is not subject to any adverse inference. *See, e.g., Reno Hilton Resorts*, 326 NLRB 1421 fn.1 (1998) (judge erred in drawing adverse inference from failure of employer to call *former officials* involved in decision to subcontract); *Irwin Industries, Inc.*, 325 NLRB 796, 811 fn.12 (1998) (no adverse inference from failure to call *former supervisors*); *Goldsmith Motors Corp.*, 310 NLRB 1279 fn.1 (1993) (no adverse inference drawn from failure to call *former co-owners*); *Lancaster-Fairfield Community Hosp.*, 303 NLRB 238 fn.1 (1991) (judge erred in drawing adverse inference against Employer for failing to call former supervisor); *see* Tr. 347:14-22 (West) (Curry has not been associated with Cal Cartage since October 2017).

<sup>7</sup> Specifically, Rivera testified:

Q. Go ahead. What do you remember being said in that discussion?

A. That maybe [Curry] shouldn't have said a few -- or shouldn't say a few things. But he said -- he just felt like he wanted to say it. It was things he had lived in the past, and he wanted to mention a few things.

(continued...)

employees, he did not translate into Spanish certain notes he had written down during the meeting with Curry and Weissman because he did not know if he should.<sup>8</sup> Tr. 318:6-19; 324:5-325:1.

Also, even though Curry's comments regarding the loss of Amazon business were accurate and lawful, (*see* Section II.E., *infra*), Lyons candidly acknowledged she was a little bit concerned regarding the reference to losing Amazon business. Tr. 380:12-20. Thus, Lyons explained how, after the speech, she, and supervisors M. Gonzalez and E. Gonzalez, talked to employees working in the Amazon Department to explain that the reference was with respect to the pop-up business. Tr. 380:7-382:11.

Unlike the General Counsel's witnesses, Cal Cartage's witnesses testified that they knew for certain that the threats were never made, because statements by the then-owner and CEO of Cal Cartage that the Company was going to move, close, or be sold is something they would absolutely remember. As Supervisor Rodriguez testified:

“Q. Now, a year and a half have passed, more than a year and a half, since Mr. Curry's speech. How are you able to testify that he did not say those things?”

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(...continued)

Q. Who, if anyone, said that he should not say it?

A. The Teamsters consultant.

Q. The management consultant, Mr. Weissman?

A. Correct.

Tr. 317:16-25.

<sup>8</sup> The General Counsel's efforts to discredit Rivera's testimony by questions related to differences between the orientation (vertical v. horizontal) and number of files (two versus one) between Respondents' Exhibit 2 and the disc produced to the NLRB previously is a red herring. As Rivera noted, “[i]t is the same video showing what was said during the speech. If it's sideways or vertical --[.]” Tr. 334:9-12.

A. **Because it would impact my employment directly, and that he never said.”)**

Q. How can you be sure Freddy [Rivera] did not say those things?

A. That would be easy to remember for me because I’m -- **my employment would be in danger. So he never said that.”**

Tr. 400:12-16; 402:13-15 (emphasis added).

West said substantially the same thing: “Q. How can you be sure Mr. Curry did not say any of those things? A. Well, because I work there. **If I thought he was going to close the company, that would have affected me and my family. I would have remembered that.”**

Tr. 349:23-350:2 (emphasis added). The General Counsel did not even cross-examine West, Lyons, and Supervisor Rodriguez. *See* Tr. 369:2-3; 387:9-10; 403:14-15.

In view of their manifest candor, Cal Cartage’s witnesses should be credited in full. They should be credited in their firm denial that Curry (i) threatened he would probably have to close down the facility if the Teamsters came in; (ii) threatened he would close the company down; (iii) said that he could not afford to pay employees, and would have to sell Cal Cartage; (iv) threatened to move Cal Cartage; (v) said if the Teamsters came back, Cal Cartage was going to go into bankruptcy and have to close; or (vi) threatened that everyone was going to be left without a job. *See* Tr. 325:5-326:17 (Rivera); 348:21-349:17 (West); 378:23-379:19 (Lyons); 399:9-400:11 (Supervisor Rodriguez); *see also* Resps. Ex. 3.

**E. Curry’s Speech Was A Lawful Communication Under Section 8(c) and the First Amendment.**

The Board has recognized a critical distinction between threats of potential future actions that will be taken in response to organizing efforts (*e.g.*, plant closure or loss of jobs) and an employer’s discussing its past bad experiences with a union. The Board has held it is entirely

lawful and within an employer's free speech rights to tell employees about its past bad experiences.

The Board's decision in *Atlantic Forest Products, Inc.*, 282 NLRB 855 (1987), is directly on point. In *Atlantic Forest Products*, the Board reversed the ALJ's finding that the employer had unlawfully threatened employees with plant closure. An employer representative gave a speech discussing eight unionized operations of the company that had closed, or were expected to close, because they were unprofitable. The speech linked the unprofitability and resulting plant closures of the unionized operations to "work stoppages," a strike for "totally unreasonable demands," "extremely high labor rates," and "productivity [that] is very low . . . the people don't want to work." *Atlantic Forest Products*, 282 NLRB at 859, 869. In another speech, a company spokesman "told employees he was 'personally involved' in one closing, and that it was a 'very sad feeling walking through a plant where the machinery is rusting away,' and to see the 'look of despair' in employees' faces, and that he 'didn't want to see it again.' [He] then turned to the issue of job security and strikes, and discussed a strike's impact on job security." *Id.* at 862. Explaining a sample ballot that the employer had distributed, another company representative told employees, "if you do not want to take a chance on strikes and lost paychecks and lost jobs; you will make an 'X' in the NO box." *Id.*

Noting that the employer "never explicitly stated that the plant would close if the Union won the election," *Id.* at 860-61, the Board found all of the foregoing remarks to be protected speech under Section 8(c). "That [an employer representative] then reported on some Unionized plants which were closed, or expected to close (the 'bad experiences') because of 'unprofitable' operations, is precisely the type of speech Section 8(c) protects. . . . [A]n employer is not limited by Section 8(c) to reporting only on favorable, as opposed to

unfavorable, facts.” *Id.* at 861. The references to “tak[ing] a chance on strikes and lost paychecks and lost jobs” while explaining the sample ballot were likewise “mere argumentation protected by Section 8(c).” *Id.* at 862.

Similarly, in *Stanadyne Automotive Corp.*, 345 NLRB 85 (2005), the Board reversed an ALJ’s finding that the employer had threatened plant closure. At a campaign meeting with employees, the employer unveiled a large sign displaying photographs of seven closed plants. “A heading at the top of the sign read, ‘These are just a *few* examples of plants where the UAW *used to* represent employees.’ (Emphasis in original.) Across each photograph was the word ‘CLOSED’ in large red block letters, with the date of closing below each photograph. Below the photographs, the sign read, ‘Is this what the UAW calls job security?’ and ‘VOTE NO!’ at the bottom. Copies of the sign were also displayed throughout the plant during the week before the election.” *Stanadyne*, 345 NLRB at 88 (emphasis and alterations in original). At the same meeting, managers told of their past bad experiences during UAW strikes, including loss of customers and loss of work, and accused the UAW Local of being “‘strike happy.’” *Id.* at 87.

In concluding that there was no violation, the *Stanadyne* Board stated, “By conveying events that had already occurred, as well as supplying the perspective of employees who had experienced some of those events, the speeches and the ‘closed’ sign merely attempted to inform employees of the potential negative effects of their upcoming vote.” *Id.* at 89. Significantly, the Board held that the employer’s failure to establish that the UAW had *caused* the seven plants to close was immaterial. The employer did not claim the Union had caused the closings. But “even if employees drew the inference of Union causation, that would not suggest to those employees that the closures were volitional retaliatory acts by the Respondent.” *Id.*

In *UFCW Local 204 v. NLRB*, 506 F.3d 1078 (D.C. Cir. 2007), the D.C. Circuit upheld the Board’s rejection of an ALJ’s finding that the employer had violated Section 8(a)(1) by, among other conduct, threatening to close the plant if workers unionized. The employer had engaged in a series of speeches and letters during which executives repeatedly told employees that three other companies had previously operated the plant at issue, that the plant had become unionized under each of those other companies, and that each company ultimately shut down the plant. *UFCW*, 506 F.3d at 1081. The employer noted that in none of those three instances had the union contract provided long-term job security for employees. *Id.* at 1082. Then, in a final speech, the employer stated that they were making no predictions: “I cannot stand here and tell you what will happen[,]” but then concluded by urging employees not to “hang the [union] around this plant’s neck for a fourth time.” *Id.* at 1082.

As the appellate court noted in affirming the Board, the Board had distinguished between discussion of past plant closings (lawful) and threat of a future plant closing (unlawful):

“Reviewing all the evidence ‘in context,’ the Board, over one member’s dissent, found no threat or coercion in [the employer’s agents’] statements and concluded that they merely contained ‘relevant, factual information about the union’s history at the facility.’” *Id.* As the court noted, the Board had found the employer did not predict “that the company would take any particular course of action,” nor “suggest closing the plant.” *Id.* at 1083-84.

Here, the evidence of Curry’s speech, as reflected in the video recording (Resps. Ex. 2) and corresponding transcript (Resps. Ex. 3) demonstrates that Curry made no threats of closure, the sale, department closure, or job loss if employees voted for the Teamsters. Instead, Curry told stories of past events. He talked of (i) a 50-day Teamsters strike in 1984 that “broke” him, resulting in plant closure and job loss in 1985 for “about 175 to 200 people;” and (ii) he talked

about his experiences living through three strikes with the Teamsters over 30 years ago. Curry also briefly referenced the (undisputedly accurate) more recent loss of Amazon business Tr. 312:24-313:1; 350:10-16. It is also undisputed that Curry's statement regarding Amazon focused on what occurred *historically*; no one testified that Curry made any prediction *for the future* about Amazon. See Tr. 74:6-10 (Johnson) ("Then they was like since the Teamsters been back, they *had lost* all the contracts. One of the contracts *was* with *Amazon*.") (emphasis added); 150:18-24 (Wilson) ("Q What did he say about *Amazon*? A He said that he -- *before*, when he was dealing with the Teamsters, that he *had to close down* one of the accounts. He --.") (emphasis added); see also 312:24-313:1 (Rivera); 350:10-16 (West); 380:4-6 (Lyons); 399:16-24 (Supervisor Rodriguez). Curry's speech, as in *Atlantic Forest Products*, *Stanadyne*, and *UFCW Local 204*, focused on past events and experiences with the Union. None of Curry's statements was forward-looking. None predicted (or even purported to predict) what would or could occur if employees chose to be represented by the Teamsters. Thus, Curry's statements were lawful free speech under Section 8(c) and the First Amendment. Paragraph 19 of the Complaint and Objection Number 1 should be dismissed.

**F. Rivera's Speech Was A Lawful Communication Under Section 8(c) And The First Amendment.**

Turning to Rivera's speech, Rivera, like Curry, did not make any threats when speaking. As discussed above, there is no logical support for the claim that he did. Moreover, while it would have been lawful to do so, Rivera did not even translate any of the statements Curry made about past bad experiences with the Teamsters. There is nothing unlawful or problematic in Exhibits 5 and 6, which Rivera merely read to employees. See Resps. Exs. 5, 6; Tr. 218:11-16 (J. Rodriguez); 321:4-325:1 (Rivera). Thus, Rivera's speech did not violate the NLRA and, again, Paragraph 19 of the Complaint and Objection Number 1 should be dismissed.

### III. THE REMAINING ALLEGATIONS IN THE GENERAL COUNSEL'S COMPLAINT SHOULD ALL BE DISMISSED

The General Counsel's Complaint asserts three other substantive claims. Specifically, the Complaint alleges:

1. About December 2016, Cal Cartage, by On-Site Supervisor Marco Gonzalez and Supervisor Enrique Gonzalez, orally promulgated a rule prohibiting discussions among employees about the Teamsters. *See* GC Ex. 1(bb), ¶ 17(a).
2. From about December 2016 to about October 1, 2017, Cal Cartage, by On-Site Supervisor Marco Gonzalez and Supervisor Enrique Gonzalez, enforced the rule prohibiting discussions among employees about the Teamsters but allowed employees to discuss other non-work topics unrelated to the Teamsters. *See* GC Ex. 1(bb), ¶ 17(b).
3. On about January 18, 2017, near the front gate of the facility, Cal Cartage, by On-Site Supervisor Marco Gonzalez, threatened to call the police on an employee in response to observing that employee engaging in protected concerted conduct. *See* GC Ex. 1(bb), ¶ 20.<sup>9</sup>

None of these allegations has legal or factual support. Accordingly, each should be dismissed in its entirety, as addressed in turn below.

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<sup>9</sup> During the hearing, the General Counsel withdrew Paragraphs 18, 21, and 23 of the Complaint. *See* Tr. 298:2-15 (withdrawing Paragraph 18) and Tr. 11:11-24; 16:5-13; GC Ex. 2 (introducing Settlement Agreement, executed by the General Counsel and Cal Cartage's Counsel on July 22, 2018, and withdrawing Paragraphs 21 and 23).

**A. Cal Cartage Did Not Violate The Act By Promulgating And Enforcing A Rule Prohibiting Discussions Among Employees About The Teamsters, As Alleged In Paragraph 17 Of The Complaint.**

In Paragraph 17 of the Complaint, the General Counsel alleges that Supervisors Marco Gonzalez and Enriquez Gonzalez violated Section 8(a)(1) by: (i) about December 2016, orally promulgating a rule prohibiting discussion among employees about the Teamsters (*see* GC Ex. 1(bb), ¶ 17(a)); and (ii) from about December 2016 to October 1, 2017, enforcing that rule (*see* GC Ex. 1(bb), ¶ 17(b)).

The General Counsel offered two witnesses in support of these allegations: Johnson and Wilson, who offered contradictory testimony of what occurred. Johnson testified that he was talking on the dock to two co-workers and a lead when the supervisor of Amazon approached him and asked him to go with him in the golf cart. Tr. 69:2-17; 104:1-19. Johnson claims that when the supervisor approached, he told Johnson and the co-workers to “*stop talking about the Union and get back to work.*” Tr. 70:9-12 (emphasis added). Johnson testified that he went with the supervisor, they observed where forklift training was occurring, and then they ended up meeting with Marco Gonzalez. Tr. 70:4-71:1. Johnson then claims M. Gonzalez told him: ”to stop talking to people about the Union. . . . during work hours.” Tr. 71:2-15.

In contrast, Wilson testified that a week or two before the election, he was talking with an employee by the name of Pacifico regarding Union dues and how they work. Tr. 145:3-9; 145:22-146:22. Johnson and Michael Morris overheard and “jumped in the conversation.” Tr. 146:6-22. Wilson testified that E. Gonzalez then interrupted the conversation: “[S]top talking. He said there’s a time and place for everything, but you shouldn’t be talking right now. Or you should – you’re not allowed to talk right now. Something along those lines.” Tr. 146:25-147:9. Wilson confirmed E. Gonzalez did not mention anything about the Union: “Q. Do you recall if he mentioned anything about the Union? A. *He didn’t mention anything about the*

*Union specifically.*” Tr. 147:10-11 (emphasis added). Wilson testified that Johnson later told him E. Gonzalez took him to talk to M. Gonzalez and told Johnson “to explain what he was saying about the Union to him.” Tr. 147:14-22.

The Board has held that where there is a finding of an unfair labor practice relating to conduct during the critical period, a rerun of the election is appropriate unless it is “virtually impossible” that the unfair labor practice impacted the results of the election. *Longs Drug Stores Cal., Inc.*, 347 NLRB 500, 502 (2006) (certifying the results of an election, even where underlying confidentiality provisions were unlawful, because “it is virtually impossible to conclude that the employee handbook confidentiality provisions could have had an effect on the results of the election.”). Here, (i) the General Counsel has failed to prove an unfair labor practice and, (ii) even if there was a violation of the NLRA, it is virtually impossible it impacted the results of the election.

**1. *The General Counsel Did Not Prove An Unfair Labor Practice As Alleged In Paragraph 17.***

The General Counsel failed to prove an unfair labor practice as alleged in Paragraph 17 for at least four reasons.

**a. The General Counsel Did Not Prove Factually That Any New Rule Was Promulgated Prohibiting Employees From Talking About The Union As Alleged In Paragraph 17(a).**

As to Johnson’s testimony, his testimony, as a whole, should not be credited. Johnson acknowledged he was a self-identifying “blue-shirt” WWRC/Teamsters advocate and demonstrated his hostility towards Cal Cartage through his demeanor while testifying. *See, e.g.*, Tr. 112:17-25; 114:1-9; 120:9-121:14. He also demonstrated an inability to recall events. For example, in relation to the Teamsters’ Objection Number 10 regarding the Christmas party (*see* Section IV.B., *supra*), Johnson could not even recall if it was a Thanksgiving or Christmas party

about which he was supposed to be testifying. Tr. 91:10-92:15. Given Johnson’s inability to testify to such facts and his demonstrated bias, none of his testimony should be credited.

Furthermore, as a former employee (Tr. 57:20-21), Johnson’s testimony is not subject to any special credibility enhancement.

Turning to Wilson’s testimony, Wilson testified that in telling employees to go back to work, E. Gonzalez did not say *anything* about the Union. Tr. 147:10-11. Moreover, Wilson admitted that he talked with coworkers about “[a]most anything, from the Union campaign to the weather to sports, anything.” Tr. 144:21-23. Even if Wilson’s testimony is credited, it does not support a conclusion that E. Gonzalez was promulgating or enforcing a rule to prevent employees from talking specifically *about the Union* or *organizing efforts*. Instead, per Wilson, E. Gonzalez merely told employees they should just not be talking about anything right then. Tr. 147:5-9. Indeed, they should not have been; they were in the middle of working time unloading containers on the dock. Thus, even if Wilson’s testimony is credited, it does not factually support a claim for violation of Section 8(a)(1).

**b. As A Matter Of Law, The General Counsel Did Not Prove That Any New Rule Was Promulgated Prohibiting Employees From Talking About The Union.**

Even assuming *arguendo* the General Counsel proved E. Gonzalez did stop a conversation about the Union because it was about the Union—and he did not—this does not support a finding that any new rule was promulgated.

The Board has held that one-on-one statements by management do not establish a rule or policy for all employees—where there is no evidence it was more broadly disseminated. For example, in *American Federation of Teachers New Mexico*, 360 NLRB 438, 439 n.3 (2014), the Board reversed the ALJ and dismissed allegations of a violation of Section 8(a)(1), because the alleged rule was only communicated to a single employee. Similarly, in *St. Mary’s Hospital of*

*Blue Springs*, 346 NLRB 776, 776-77 (2006), the Board held that a supervisor’s comments and reprimand directed to one employee that he could not talk with other employees about the Union “could not reasonably be interpreted as establishing that he intended to implement a new, more restrictive solicitation policy regarding employees in the hospital.” *St. Mary’s*, 346 NLRB at 776-77. *See also Flamingo Las Vegas Operating Co., LLC*, 359 NLRB 873, 874 (2013) (dismissing allegation that statement directed solely at one employee and communicated to no other employee was an unlawful promulgation of a new rule).

The Board’s rationale and reasoning applies here. Even assuming *arguendo* the General Counsel’s witnesses’ testimony, at most, E. Gonzalez’s comments were directed to four specific employees who were then talking with one another, and M. Gonzalez directed his comments only to Johnson. There is no evidence E. Gonzalez or M. Gonzalez directed any comments more broadly to other employees. The petitioned-for-unit encompassed hundreds of employees. *See* GC Ex. 1(dd) at 2-3 (reflecting 689 votes). Thus, under those circumstances, it could not reasonably be interpreted that Cal Cartage was implementing a new policy or rule.

c. **The General Counsel Did Not Prove Factually That A Rule That Prohibited Employees From Talking About The Union Was Enforced From December 2016 To October 2017, As Alleged In Paragraph 17(b).**

With respect to Paragraph 17(b), the General Counsel proffered no evidence that the purported rule prohibiting employees from talking about the Union in particular was enforced from December 2016 to October 1, 2017. Specifically, Johnson’s and Wilson’s testimony focused only on the alleged comments by E. Gonzalez and M. Gonzalez in December 2016. The General Counsel presented nothing as to subsequent events enforcing the purported rule. Thus, allegations contained in Paragraph 17(b) that Cal Cartage enforced the rule until October 1, 2017, are without support, and they should be dismissed.

**d. The General Counsel's Allegations That A Rule Was Promulgated And Enforced From December 2016 To October 2017 Are Not Inherently Probable.**

As discussed above, Teamsters supporters were engaged in organizing efforts at Cal Cartage for years prior to the election. During this time, supporters engaged in petitions, strikes, and delegations. *See, e.g.*, Tr. 172:20-22 (V. Gonzalez); 214:15-18 (M. Rodriguez). It is preposterous that amongst such organizing activity Cal Cartage would have promulgated (as alleged in Paragraph 17(a)) or enforce a rule from December 2016 to October 2017 (as alleged in Paragraph 17(b)) prohibiting employees from talking about the Union. From years of responding to organizing activities, Cal Cartage was more sophisticated than that. It is just not inherently probable that Cal Cartage would have promulgated and enforced such a rule.

**2. *Even If The General Counsel Did Prove An Unfair Labor Practice, It Is Virtually Impossible It Impacted The Results Of The Election And No Election Should Be Ordered.***

Assuming *arguendo* the General Counsel proved an unfair labor practice as alleged in Paragraphs 17(a) and/or (b), analysis of whether a new election is necessary does not end there.

As noted above, an unfair labor practice during the critical period does not trigger setting aside the result of an election and ordering a rerun where it is virtually impossible the unfair labor practice affected the election results. *See Longs Drug Stores*, 347 NLRB at 502. For example, in *Flamingo Las Vegas Operating Co., LLC*, 360 NLRB No. 41 (2014) (Pearce, Hirozawa, Johnson), the employer was found to have engaged in two sets of threats that violated the NLRA during the critical period, which, as the Board noted, would normally warrant setting aside the result of the election. However, the evidence showed that the threats affected “significantly fewer employees than the 18-vote margin in the election tally.” *Id.* Accordingly, the Board concluded “that the unlawful threats could not have affected the election.” Similarly, in *Werthan Packaging, Inc.*, 345 NLRB 343, 345 (2005), the Board declined to set aside an

election even though the employer was found to have unlawfully threatened to discharge one employee and unlawfully interrogated, at most, five other employees, because there was no evidence of dissemination and the union lost by 21 votes. Thus, it was virtually impossible the threats in *Werthan* could have affected the result of the election.

*Flamingo* and *Werthan* are on point. *First*, as to the allegations in Paragraph 17(a), the General Counsel's evidence focused on what was purportedly said by E. Gonzalez to *four employees* (Wilson, Johnson, Pacifico, and M. Morris) in advance of the election. There is no evidence of any dissemination more broadly. It is undisputed that employees rejected the Teamsters by 159 counted votes.<sup>10</sup> GC Ex. 1(dd) at 2-3; Tr. 39:11-18; 44:15-45:18. Thus, it is virtually impossible to conclude that what was purportedly said to four employees in December 2016 could have had an effect on the results of the election. *Second*, the allegations in Paragraph 17(b) focus on the enforcement of the purported rule between December 2016 and October 1, 2017. As discussed above, the General Counsel failed to present any proof of this alleged enforcement. But, in any event, the election occurred on December 22, 2016. GC Ex. 1(dd) at 2. Thus, the alleged enforcement of the purported rule after that date could not have any bearing on the election—as it had already occurred. Thus, even if the General Counsel proved an unfair labor practice under Paragraph 17(a) and/or 17(b), any such finding does not support overturning the will of the employees and ordering a new election. The election results must still be certified.

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<sup>10</sup> There were also 113 challenged ballots. GC Ex. 1(dd). Of these 113 challenged ballots, 45 were challenged by Union observers, and an additional group were lead persons that the Company contended were eligible to vote, and that the Regional Director allowed to vote by challenged ballot. Tr. 44:15-45:18

**B. The General Counsel Failed To Meets It Burden To Prove Paragraph 20 Of The Complaint.**

The Complaint concludes with an allegation that on or about January 18, 2017, Core Supervisor M. Gonzalez threatened to call the police on an employee near the front gate of the facility, in response to his engaging in protected concerted activity. *See* GC Ex. 1(bb), ¶ 20. The General Counsel failed to meet its burden of proof and, in any event, the allegation does not implicate the election result.

The only support for Paragraph 20 is Johnson's testimony. As to this allegation, Johnson claims that he was concerned about discrimination against African-Americans in work assignments. Tr. 76:25-77:7. He claims that Hispanics received assignments first to the detriment of African-Americans and other races. *Id.* Accordingly, Johnson testified that on January 18, 2017, he started filming what was occurring outside of the main gate at the CFS, as employees were waiting to be assigned work. Tr. 81:23-85:13; GC Ex. 7. He claims that after he finished recording, Supervisor M. Gonzalez told him: ". . . I was gonna get called the police on if I keep recording. And if I want to record I need to go to the front of the facility outside the gate and record." Tr. 85:14-21.

There are at least two deficiencies with the General Counsel's reliance on Johnson's testimony. *First*, Johnson's testimony regarding this alleged incident is inconsistent and contradictory. Johnson claims he filmed M. Gonzalez first asking him to stop filming, but he no longer has that recording. Tr. 125:6-15. As to why he no longer has that recording, Johnson testified: (i) he showed it to other people, and he does not know why they did not show it; (ii) M. Gonzalez told him it was illegal to film others and he has enough problems with the law; and (iii) he does not know where the phone is because his kids have it. Tr. 82:20-83:4; 125:9-18. *Second*, as discussed in Section III.A. above and further evidenced by the inconsistencies

identified here, the entirety of Johnson’s testimony should not be credited. *See* Section III.A., *supra*. Thus, with Johnson’s testimony cast aside, the General Counsel failed to meet its burden to prove Paragraph 20.

Even were Johnson to be credited and Cal Cartage deemed to have engaged in an unfair labor practice as alleged in Paragraph 20, that does not implicate the election. It is alleged the conduct set forth in Paragraph 20 occurred January 18, 2017—almost a month after the election and the critical period. Thus, Paragraph 20 does not provide a basis to overturn the will of the employees and alter the results of the election.

#### **IV. THE TEAMSTERS’ OBJECTIONS DO NOT PROVIDE ANY BASIS TO OVERTURN THE OVERWHELMING WILL OF THE EMPLOYEES; THE OBJECTIONS SHOULD BE OVERRULED AND THE RESULT CERTIFIED**

Eight Teamsters’ Objections were addressed at the hearing.<sup>11</sup> The conduct complained of in Objection Number 1 is duplicative of Paragraph 19 of the Complaint; accordingly, it is addressed in Section II above.<sup>12</sup> *See* GC Ex. 1(dd), Obj. No. 1, n.4. The remaining seven objections do not implicate unfair labor practice charges, but assert that:

1. Cal Cartage allegedly wrote an anti-Teamsters message inside of a polling booth. *See* GC Ex. 1(dd), Obj. No. 9.
2. Cal Cartage allegedly held an employer-sponsored holiday party wherein Cal Cartage provided lunch, extended paid break time, and held a raffle for the employees while distributing new anti-Teamsters literature within 24 hours of the election. *See* GC Ex. 1(dd), Obj. No. 10.

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<sup>11</sup> The Teamsters withdrew Objections 2 through 8 and 15 through 18. *See* GC Ex. 1(dd) n.3.

<sup>12</sup> To the extent the Teamsters’ Objection refers to “two mandatory meetings,” the Teamsters presented no evidence of the second meeting that occurred in the afternoon on December 22, 2018. The evidence at hearing was focused only on the morning meeting.

3. Cal Cartage allegedly offered anti-Teamsters literature within 24 hours of the election directly to employees as they clocked out, thereby permitting supervisors to assess the employees' support of management in the election. *See* GC Ex. 1(dd), Obj. No. 11.
4. Cal Cartage allegedly distributed gift cards to unit employees during the critical period. *See* GC Ex. 1(dd), Obj. No. 12.
5. Cal Cartage allegedly interrogated employees regarding how the employees anticipated voting in the election. *See* GC Ex. 1(dd), Obj. No. 13.
6. Cal Cartage allegedly retaliated against temporary workers by not permitting them to work because of their Teamsters support, perceived Teamsters support, or protected concerted activities. *See* GC Ex. 1(dd), Obj. No. 14.
7. Cal Cartage allegedly provided the Teamsters with an Excelsior list that contained numerous inaccuracies and omissions, which prevented the Teamsters from contacting unit employees. *See* GC Ex. 1(dd), Obj. No. 19.

As a threshold matter, in asserting objections that are not concurrently alleged as unfair labor practices, the Teamsters Union must meet a heavy burden to set aside the results of the election. As the Board explained in *Delta Brands, Inc.*, 344 NLRB 252-53 (2005):

[R]epresentation elections are not lightly set aside. . . . Thus, there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees. Accordingly, the burden of proof on parties seeking to have a Board-supervised election set aside is a ***heavy one***. . . . The ***objecting party must show***, inter alia, ***that the conduct in question affected employees in the voting unit, . . . and had a reasonable tendency to affect the outcome of the election.***

(Internal quotations and citations omitted) (emphasis added).

As discussed below, the Teamsters—whether analyzing their objections independently or cumulatively—have failed to meet their burden. Thus, each of the objections should be overruled and the election results certified.

**A. Objection Number 9 Should Be Overruled; It Concerns Third-Party Conduct That Did Not Affect The Outcome Of The Election.**

In Objection Number 9, the Teamsters contend that Cal Cartage interfered with the election by writing “No” in one of the polling booths during the election. See GC Ex. 1(dd), Obj. No. 9.

First, there is not a scintilla of evidence that Cal Cartage bears any responsibility here. It is stipulated that, at the conclusion of the first voting session, a “No” was found written in one of the four voting booths. It is further stipulated that the “No” had been present in the voting booth for less than 30 minutes; the Board agent then took down that booth and the remaining three booths were used for the second voting session. See GC Ex. 3.

As the Board acknowledged in *Liberal Market, Inc.*, 108 NLRB 1481 (1954), “Board elections do not occur in a laboratory where controlled or artificial conditions may be established.” *Liberal Market*, 108 NLRB at 1482. Thus, analysis of the conditions of an election “must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards.” *Id.* The Board went on to note:

A realistic appraisal of the effect of antecedent conduct upon a Board election must, of course, be concerned with particular acts and their effect upon those of the voters who are directly involved; it must also be concerned, however, with the overall picture of how the totality of the conduct affects not only the voters directly involved, but any others who may or may not be indirectly affected because they are within the voting unit.

*Id.* In *Phoenix Mechanical, Inc.*, 303 NLRB 888 (1991), the Board then analyzed the impact of third-party conduct on an election, finding that it should serve as a basis to overturn an election

“only when it is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible.” *Phoenix Mech.*, 303 NLRB at 888 (citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)). *See also Newport News Shipbuilding*, 239 NLRB 82 (1978), *enf. denied*, 594 F.2d 8 (4th Cir. 1979) (multiple errors in conduct of election, but given the big margin, the result was upheld).

Here, evaluating the circumstances of the “No” in the polling booth realistically, practically, and in the totality of the circumstances demonstrates that it does not serve as grounds to overturn the election. As noted, there is no evidence that Cal Cartage wrote or placed the “No” in the polling booth as asserted. The “No” certainly did not create a general atmosphere of fear and reprisal. In fact, there is no evidence the message had any impact on the outcome. The Teamsters lost the election by a margin of 159 votes. Given that margin and that “No” appeared in a single booth for less than 30 minutes, there is no way it affected the election results. Moreover, if elections were to be overturned on this basis, any anonymous voter could sabotage the election by writing a message in a polling booth. Thus, Objection Number 9 must be overruled.

**B. Objection Numbers 10 And 12 Should Be Overruled Because The Holiday Party And Providing Of \$25 Gift Cards Does Not Demonstrate A Coercive Pre-Election Benefit.**

The Teamsters allege in Objections 10 and 12 that Cal Cartage interfered with the election and affected the outcome by providing coercive pre-election benefits. Specifically, in Objection Number 10, the Teamsters contend that Cal Cartage interfered with a fair election by holding an employer-sponsored holiday party, complete with lunch, an extended break time, a raffle, and anti-Teamsters literature, the day before the election. *See GC Ex. 1(dd), Obj. No. 10.* In Objection Number 12, the Teamsters contend that Cal Cartage interfered with a fair election by distributing gift cards to unit employees during the critical period. *See GC Ex. 1(dd),*

Obj. No. 12. As to these Objections the Teamsters cannot meet their heavy burden to prove, as required, that the conduct in question affected employees in the voting unit, and had a reasonable tendency to actually affect the outcome of the election. *See Delta Brands*, 344 NLRB at 252-53.

**1. *Objection 10 Should Be Overruled Because The Holiday Party Was The Same As In Previous Years.***

The holiday party was the same as Cal Cartage had hosted for many years prior:

- Cal Cartage has been hosting a holiday party for as many years as the witnesses have been associated with Cal Cartage—since at least 2005.<sup>13</sup> Tr. 382:19-383:6 (Lyons); *see also* Tr. 362:4-11 (West).
- The party was approximately the same length (two hours) as in prior years. Tr. 374:25-375:1.
- The food was catered by the same caterer, at the same cost as in prior years. *See* Teamsters Ex. 7; Tr. 364:25-365:20.
- Gift cards raffled for those in attendance in 2016 were in the same total amount and denominations as in years prior. *See* Tr. 365:21-366:25 (West); 384:3-24 (Lyons). Notably, this was not an election raffle. The raffle of gift cards had no link to the election; it was a longstanding holiday party tradition.
- The same band played at the 2016 holiday party as had played for at least a decade. Tr. 367:1-9.

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<sup>13</sup> Wilson attempted to suggest the holiday party was a new benefit (*see, e.g.*, Tr. 153:15-16), but he was forced to admit on cross-examination that he had not worked at Cal Cartage in years prior. *See, e.g.*, Tr. 157:20-22.

- As in prior years, all employees were invited to the holiday party—unit and non-unit employees. *See, e.g.*, Union Ex. 7 at 1-15 (documenting number of employees in attendance).
- No anti-union literature was offered at the holiday party.<sup>14</sup>
- Finally, the timing of the holiday party does not reflect anything improper. The holiday party was announced and scheduled before the Teamsters even filed their petition for election. Specifically, Cal Cartage scheduled and announced the date of its holiday party on November 8, 2016. Resps. Ex. 9. The Teamsters did not even file their petition for election until November 28, 2016. GC Ex. 1(a).

Thus, there is no basis to conclude the holiday party was anything other than a continuation of Cal Cartage’s holiday tradition. There is also no evidence that the holiday party

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<sup>14</sup> The General Counsel’s own witness, Wilson, testified that no literature was on the tables and he only remembers receiving a pamphlet when walking out towards the end of the day:

BY MR. DE HARO: At the holiday party you attended in December of 2016, was there any literature on the tables?

A. On the tables, no.

Q. At the party, do you remember any literature being handed out by the company?

A. I remember them handing out pamphlets that day.

Q. When that day?

A. I don’t remember specifically; I just remember, towards the end of the day, walking out with the pamphlet.

Tr. 153:22-154:6; *see also* Tr. 94:1-4 (Johnson: testifying any literature was handed out “after the party”).

As Lyons testified, the pamphlet handed out on December 21, 2016, Teamsters Exhibit 1, was not even delivered to Cal Cartage’s management until after the holiday party. Tr. 385:20-386:6.

had a reasonable tendency to actually affect the outcome of the election.<sup>15</sup> Thus, the Teamsters cannot meet their heavy burden, and Objection Number 10 must be overruled. *See Sequel of New Mexico LLC*, 361 NLRB 1124, 1124-26 (2014) (overturning the ALJ's decision that an objection should be sustained where the employer announced the party the same day the petition was filed, held the holiday party on the first day of the election, and had no prior history of hosting parties).

**2. *Objection 12 Should Be Overruled Because Cal Cartage's Distribution Of Gift Cards Was The Same As In Years Prior; It Did Not Affect The Election.***

As to Objection Number 12, regarding distribution of gift cards, yet again, the objection must be overruled. Cal Cartage had a holiday tradition of providing \$25 grocery gift cards to all employees working that day for as long as Cal Cartage's witnesses have been associated with Cal Cartage. *See, e.g.*, Tr. 367:10-22. The gift cards were an annual gift from Curry—like a turkey or a ham that some companies give. *Id.* The size of the benefit, the number of employees receiving it, and how it would be viewed by employees was the same in 2016 as in all prior years. Tr. 367:10-368:10. Thus, the Teamsters did not, because there is no evidence in support, prove that the distribution of gift cards had a reasonable tendency to actually affect the outcome of the election. Objection Number 12 must be overruled.

**C. *Objection Number 11 Should Be Overruled Because Cal Cartage Did Not Engage In Misconduct In Offering Anti-Teamsters Literature Prior To The Election.***

In Objection Number 11, the Teamsters allege that Cal Cartage interfered with the election by handing out literature less than 24 hours prior to the election as employees clocked

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<sup>15</sup> Had Cal Cartage chosen to forego the holiday party in advance of the election, that too would undoubtedly have been seized upon as grounds for a Teamsters' objection.

out. The Teamsters do not challenge the content of the literature—just the fact of its being handed out prior to the election. *See* GC Ex. 1(dd), Obj. No. 11.

On December 21, 2016, Cal Cartage gave employees a pamphlet, Teamsters Exhibit 1, as they were clocking out at the end of their shifts. *See* Tr. 94:1-4 (Johnson); 153:22-154:6 (Wilson); 326:22-347:13 (Rivera); 385:9-386:6 (Lyons); Union Ex. 1. Neither the *Peerless Plywood*<sup>16</sup> rule nor any other rule prevents Cal Cartage from doing so. Cal Cartage was entirely within its rights under Section 8(c) and the First Amendment to distribute literature one-on-one to employees as they were leaving. Accordingly, Objection Number 11 should be overruled.

**D. Objection Number 13 Should Be Overruled Because Cal Cartage Did Not Engage In Interrogation; And Even If It Did, The Teamsters Did Not Meet Their Heavy Burden To Prove It Had A Reasonable Tendency To Affect The Outcome Of The Election.**

In Objection Number 13, the Teamsters allege that Cal Cartage interfered and affected the election by interrogating workers regarding how they anticipated voting. *See* GC Ex. 1(dd), Obj. No. 13. To this Objection, Johnson testified that about two weeks before the election, about four-to-five employees (including Johnson, but who else he cannot name) were talking when Cal Cartage’s Kmart supervisor walked up and asked how they were going to vote. Tr. 86:5-87:7. Johnson testified he and a couple of other people responded. Tr. 87:16-88:4. Johnson said he told the supervisor “I’m going with the people that’s helping me get a pay raise and take care of my family.” Tr. 87:25-88:2. The supervisor asked why Johnson was voting for the Teamsters, and Johnson told him: “They helping me with my family and stuff.” Tr. 88:5-10. The conversation allegedly ended with the supervisor asking other employees, but Johnson testified he was the only one who answered. Tr. 88:11-19.

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<sup>16</sup> 107 NLRB 427 (1953).

Teamsters' Objection Number 13 should be overruled for two independent reasons.

*First*, as discussed above, Johnson's testimony should not be credited in anything.

*See* Section III.A., *supra*. Supervisor Rodriguez asking Johnson or any employees the questions alleged. Tr. 402:22-403:1. He knew he could not threaten, promise, or ask employees questions about how they would vote. Tr. 403:2-10.

*Second*, even if Johnson's testimony were credited, the questioning of Johnson and co-workers around him does not demonstrate misconduct that reasonably could have impacted the results of the election. *Liberal Market* is especially instructive. In *Liberal Market*—which involved unfair labor practice allegations and objections—the evidence showed that during the critical period a supervisor “asked a group of three or four employees what their feelings were about the union, and that some employees replied they were in favor of the [Employer] and that others said they were in favor of the [Union].” *Liberal Market*, 198 NLRB at 1485. The Board reasoned, however, that the conduct complained of was not “of such magnitude as to have had a serious impact upon the employees' freedom of choice.” *Id.* The Board went on to conclude:

[T]he total number of employees directly affected by the various acts forms but a very small percentage of the 70 employees concerned in the election. To dwell, moreover, on the possible indirect effects of these acts would be idle speculation. Accordingly, we believe that a realistic appraisal of the foregoing acts, whether they be considered singly or collectively, does not provide ample basis for setting aside this election.

*Id.*

Here, at most, Johnson testified to four people other than himself being a part of the alleged conversation with the supervisor. Tr. 122:3-10. Johnson testified he did not mind talking with the supervisor and discussing his evident support for the Union. *See* Tr. 120:9-121:24. Even assuming the other four employees felt intimidated by this alleged interaction, the Union was rejected by 159 votes. And the Teamsters provided no evidence that this alleged

interrogation was disseminated to anyone else. Thus, as in *Liberal Market*, there is no ground for setting aside the election.

**E. Objection Number 14 Should Be Overruled Because Cal Cartage Did Not Retaliate Against Any Employees Because Of Teamsters Support; And Even If It Did, The Teamsters Did Not Meet Their Heavy Burden To Prove It Had A Reasonable Tendency To Affect The Outcome Of The Election.**

In Objection Number 14, the Teamsters contend that temporary workers were retaliated against by not permitting them to work because of their Teamsters support. *See* GC Ex. 1(dd), Obj. No. 14. Johnson testified that the day after the Kmart supervisor asked who he was voting for, M. Gonzalez told him he was short of work and Johnson needed to wait to be assigned. Tr. 88:20-25. Johnson said he then waited, noticed M. Gonzalez was letting regular people in, and went up to M. Gonzalez and asked “[W]hat’s going on[?] Why -- why I’m not getting in[?]” Tr. 89:1-25. Johnson testified he was subsequently assigned work “right before they stopped letting people in[.]” Tr. 90:1-6.

Again, the Teamsters’ Objection Number 14 should be overruled for at least three reasons.

*First*, as discussed above, Johnson’s testimony should not be credited in its entirety. *See* Section III.A., *supra*.

*Second*, even if Johnson’s testimony is credible, his testimony provides no reason to draw an inference that he was “delayed” on account of his union activity. Remember: Johnson has also claimed African-Americans like himself were disfavored in being assigned work on account of the race. In fact, Johnson’s testimony does not tie the alleged “delay” on this particular occasion to any unlawful reason.

*Third*, even if Johnson’s testimony is credited, the conduct complained of and its purported impact does not provide a basis to overturn the election. Objection Number 14 only

concerns what allegedly happened to Johnson—a single employee. Thus, such isolated conduct could not have reasonably affected the outcome of the election.

**F. Objection Number 19 Should Be Overruled Because Cal Cartage Did Not Engage In Any Misconduct with Respect To The Excelsior List, And The Teamsters Have Not Proved Otherwise.**

In its final remaining Objection, the Teamsters allege that Cal Cartage interfered with the election by providing the Teamsters with an Excelsior list that contained numerous inaccuracies and omissions, which prevented the Teamsters from contacting unit employees. *See* GC Ex. 1(dd), Obj. No. 19.

In support of its Objection, the Teamsters proffered the testimony of their Western Regional Coordinator, Manuela Valenzuela, and presented Teamsters Exhibit 5, which Valenzuela testified contains a list of 138 “more or less” bad addresses provided by Cal Cartage. *See* Teamsters Ex. 5, Tr. 262:8-19; 275:17-276:9. However, Valenzuela’s contention is deficient in at least three critical ways:

- Teamsters Exhibit 5 is an incomplete document. Valenzuela admitted it is a compilation of various spreadsheets in which all of the underlying information and notes are not reflected. Tr. 267:6-269:15; 270:3-10.
- Valenzuela admitted that Teamsters Exhibit 5 includes many more entries than just incorrect addresses purportedly contained on the Excelsior list. For example, Teamsters Exhibit 5 includes addresses where they called on the address three or four times and did not reach anyone—regardless of whether they confirmed the address was correct. *See* Tr. 263:5-20. It contains addresses confirmed as correct, but where the employees had been contacted multiple times already or did not want to be approached at home. *See* Tr. 283:22-285:1; 286:15-287:6. It also contains addresses

where the organizer thought the address was good, but the contact did not want to admit who he was. *See* Tr. 285:2-20. Thus, Teamsters Exhibit 5 does not prove anything with respect to the addresses Cal Cartage furnished on the Excelsior list. It merely shows addresses the Teamsters decided not to go back to, for any number of reasons:

Q. Does that mean that your organizer or activist who called at that address thought he was actually talking to the employee but the employee did not want to admit it?

A. He may have done that. *The point of this list is to show that we're not going to go back to these particular houses.* And there are times where employees, when you knock on a door, don't want to have a conversation because they fear whatever may be at that point. And then we -- at that point, we don't go back to that house. So it's quite obvious that the person didn't want to talk to him.

Tr. 285:11-20 (emphasis added).

- The Teamsters cannot demonstrate that it even tried to communicate with Cal Cartage regarding the purported bad addresses. *See* Tr. 278:2-279:9.

Accordingly, there is no evidence at all that Cal Cartage provided the Teamsters a deficient Excelsior list, Objection Number 19 should be overruled.

**V. SHOULD CURRY'S/RIVERA'S SPEECHES BE DEEMED AN UNFAIR LABOR PRACTICE REQUIRING A RERUN ELECTION, NO NOTICE READING SHOULD BE ORDERED.**

For the many reasons stated herein, Curry's and Rivera's speeches on December 20 contained no unlawful threats. Should the ALJ conclude otherwise, however, no notice reading should be ordered. Notice reading is an "extraordinary remedy" that should be granted only in unusual circumstances. Such circumstances are cases in which unfair labor practices are "numerous, pervasive, and outrageous." *Federated Logistics & Operations*, 340 NLRB 255, 256-257 (2003). Here, such circumstances are not present. Curry's speech was a single

incident. Furthermore, it is well-known that Curry no longer has any role with Cal Cartage; his association with Cal Cartage ended in October 2017. *See* (West) Tr. 347:14-22; (Wilson) 148:7-10 (identifying Curry as the past owner). The new owner of Cal Cartage should not be saddled with a notice reading under these circumstances.

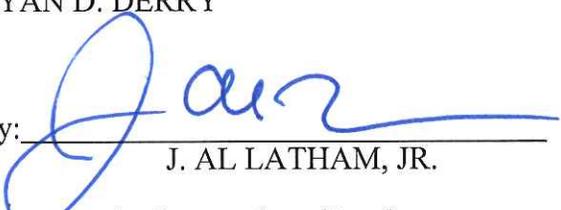
## VI. CONCLUSION

For the reasons set forth herein, Cal Cartage respectfully requests that the Complaint be dismissed and Objections overruled in their entirety. Alternatively, except for the allegations that Curry/Rivera threatened employees with future job loss—which did not happen—there is nothing alleged here that would justify overturning the clear will of the employees in rejecting representation by the Teamsters. It is long past time for the election results of December 22, 2016, to be certified.

Dated: September 28, 2018

Respectfully Submitted,

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By: 

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**CERTIFICATE OF SERVICE**

I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 South Flower Street, 25th Floor, Los Angeles, California 90071.

On September 28, 2018, I served the foregoing document(s) described as:

**RESPONDENTS' POST-HEARING BRIEF**

on the interested parties by electronic service as follows:

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**VIA EMAIL:**

The email was transmitted to the email addresses listed above on September 28, 2018. The email transmission was complete and without error.

**VIA U.S. MAIL:**

I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S. postal service on September 28, 2018 with postage thereon fully prepaid, at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on September 28, 2018, at Los Angeles, California.



Arlene Figueroa