

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 251**

**and**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 25**

**and**

**DHL EXPRESS (USA), INC.**

**Cases      01-CB-219768  
                 01-CC-219536  
                 01-CC-219746**

**COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

Colleen M. Fleming  
Counsel for the General Counsel  
National Labor Relations Board, Region 1  
10 Causeway Street, 6th Floor  
Boston, Massachusetts 02222  
(857) 317-7785  
Colleen.Fleming@nlrb.gov

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## **PROCEDURAL HISTORY**

On May 1 and 7, 2018,<sup>1</sup> DHL Express (USA), Inc. (“DHL Express”) filed charges against the International Brotherhood of Teamsters, Local 251 (“Local 251”) and International Brotherhood of Teamsters, Local 25 (“Local 25”), in Case Nos. 01-CB-219768, 01-CC-219536, and 01-CC-219746. GC Ex. 1 (a), (c), (e), and (g).

On May 21, the Acting Regional Director, Region 1, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 01-CB-219768 and 01-CC-219536 alleging that Local 251 violated the National Labor Relations Act (the “Act”). GC Ex. 1 (i). On June 26, the Acting Regional Director for Region 1 issued an Order Further Consolidating Cases, Amending Consolidated Complaint and Notice of Hearing (the “Complaint”) in Case Nos. 01-CB-219768, 01-CC-219536 and 01-CC-219746 alleging that Local 251 and Local 25, collectively “Respondent Unions” or “Unions”, violated the Act. GC Ex. 1 (n). On July 5, Respondent Unions filed answers to the Complaint. GC Ex. 1(q), (r). Local 251 raised several affirmative defenses in its answer, including that the picketing was primary because DHL Express is a joint employer with DHLNH, LLC (“DHLNH”); DHL Express is a franchisor to DHLNH; DHL Express is an ally with DHLNH; and any unlawful picketing was de minimis. GC Ex. 1(r).

An administrative hearing in this matter was held on the following dates before Administrative Law Judge Elizabeth Tafe: July 31, August 2, September 13 and 14, and October 9, 10, 17 and 24. At hearing, on July 31, the Counsel for the General Counsel (the “General Counsel”) moved to further amend the Complaint to allege that Local 25 violated Section 8(b)(1)(A) of the Act, on about July 19, by interfering with employees’ rights to testify and

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<sup>1</sup> All other dates refer to 2018, unless otherwise stated.

participate in the prosecution of unfair labor practice charges. Tr. 36. The Judge granted the amendment. Tr. 59.

### **SUMMARY OF THE CASE**

The record establishes that Local 251 and Local 25 violated Sections 8(b)(4)(B) and 8(b)(1)(A) of the Act. On the morning of May 1, 2018, Respondent Unions implemented a coordinated plan by establishing picket lines at two DHL Express facilities in Boston and Westborough, Massachusetts. The picketing and other activity by Respondent Unions on May 1 caused—and was intended to cause—DHL Express employees to refuse to work at the targeted facilities. During the picketing in Boston, the evidence shows that Local 251 and Local 25 both blocked the ingress and egress to the DHL Express facility. In seeking to “shut down” the DHL Express facilities, Local 251 and Local 25 had an object of enmeshing DHL Express in the labor dispute between DHLNH and Local 251. Therefore, Respondent Unions engaged in unlawful picketing of a neutral employer, DHL Express, in order to put pressure on the primary employer, DHLNH, during contract negotiations.

Despite their attempts, Respondent Unions have not proven any defense to excuse their unlawful conduct. The de minimis and franchisor defenses both plainly fail on the facts and as a matter of law. Local 251 did not meet its burden of proving that DHL Express lost its neutrality by performing struck work or being a single employer with DHLNH. With regard to Local 251’s joint-employer defense, it should be precluded from asserting the defense because it waived that argument when it deliberately pursued a bargaining relationship with only DHLNH. Moreover, the joint-employer argument is not a valid defense to secondary picketing by a union as part of a labor dispute with a primary employer when the targeted employer has no duty to bargain. Regardless, Local 251 has not proven that DHL Express is a joint employer with

DHLNH under any applicable standard. For its part, Local 25 presented no evidence to show it investigated or inquired about DHL Express' neutrality to meet the narrow legal exception for a good faith mistaken belief about the neutrality of DHL Express nor has it shown that it ever possessed such a belief. Finally, Local 25 violated Section 8(b)(1)(A) of the Act by making statements that reasonably tend to interfere with an employee's Section 7 right to testify and cooperate with the NLRB in the prosecution of Local 25.

### **STATEMENT OF FACTS**

#### **I. THE OPERATIONS AT DHL EXPRESS AND DHLNH**

##### **A. An Overview of the DHL Express Facilities**

DHL Express is a company that provides international pickup and delivery services. Tr. 312. In the Northeast United States, DHL Express has twenty-nine service stations that process inbound and outbound freight for residential and commercial customers. Tr. 313. DHL Express operates: (1) company service stations that use company employees to conduct the pickup and delivery operations; and (2) independent contractor stations where it contracts with a third-party vendor to manage and conduct the pickup and delivery operations. Tr. 313.

DHL Express has a company service station located at 420 E Street, Boston, Massachusetts ("BOS"). Tr. 129, 314. About 100 DHL Express employees are employed at this station as couriers (or drivers) and operations agents (or clerical agents). Tr. 134, 314. Local 25 and DHL Express have an established collective-bargaining relationship with respect to these employees and current collective-bargaining agreements. GC Ex. 19-26; Tr. 135, 314.

DHL Express has a company service station located at 9 Otis Street, Westborough, Massachusetts ("MXG"). Tr. 224, 315. About forty DHL Express employees are employed at this station as couriers and operations agents. Tr. 221-22, 315. Local 25 and DHL Express have

an established collective-bargaining relationship with respect to these employees and current collective-bargaining agreements. GC Ex. 19-26; Tr. 223, 315.

DHL Express has an independent contractor station located at 101 Concord Street, Pawtucket, Rhode Island (“PVD”). Tr. 315, 1058. DHL Express employs a Station Manager at PVD, Glen Marzelli (“Marzelli”), and three operations agents that are represented by Local 251. Tr. 315, 1144. DHLNH employs the couriers at PVD who are also represented by Local 251. Tr. 316-17. Phillip Palker (“P. Palker”) is the owner of DHLNH; Canaan Palker (“C. Palker”) is the President of Operations; and Anthony Santiago (“Santiago”), Tim McLynch (“McLynch”), and Sam Thet (“Thet”) are supervisors that are located at PVD. Tr. 316, 348, 919-20, 1060, 1127, 1219. P. Palker also owns Northeast Freightways, Inc. (“Northeast Freightways”), which is an affiliated company that is referenced at times in the record as the company employing the drivers at PVD. *E.g.*, Tr. 316, 343.<sup>2</sup>

## **B. An Overview of the PVD Facility**

DHL Express leases the facility at PVD. Local 251 Ex. 78; Tr. 1144-45. There is a front parking lot to the right of the building where DHL Express employees and customers park and a rear parking lot to the left of the building where DHLNH employees park. Local 251 Ex. 1; Tr. 819, 1058. The first floor has a warehouse that has a conveyor belt used to sort freight and a break room accessible to both DHL Express and DHLNH employees. Tr. 818, 830, 1059.<sup>3</sup> The second floor of the facility consists of office space. Tr. 1059. The first office at the top of the stairs is for the full-time operations agents, Bethany Stamp (“Stamp”) and Kathy O’Gara (“O’Gara”). Tr. 857, 934, 1060, 1062, 1086, 1093. Marzelli’s office is through a door in the

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<sup>2</sup> DHL Express also has the independent contractor service centers in Manchester, NH (“MHT”) and Albany, NY (“ALB”). Tr. 175, 283. DHL Express contracts with Northeast Freightways for the delivery work at those two facilities. Tr. 283, 349.

<sup>3</sup> There is a second conveyor belt behind a desk in the warehouse that is used for packages that get forwarded to the United States Postal Service (“USPS”). Local 251 Ex. 8; Tr. 830-31.

area where Stamp and O’Gara sit and only accessible by keys that Marzelli possesses. Tr. 1060, 1221.<sup>4</sup> Further down the hallway on the second floor, DHLNH has an office where Santiago has a desk. Tr. 856-57.<sup>5</sup>

PVD receives freight each morning from both Logan Airport and JFK Airport that originates from DHL Express’ central facility in Kentucky. Tr. 170, 176. Freight at Logan Airport is destined for BOS, MXG, PVD, and MHT and DHL Express employees are responsible for handling the freight at Logan Airport. Tr. 177-78, 180-81. The freight destined for PVD is transported from Logan to PVD in two vehicles driven by a DHLNH employee and a Northeast Freightways employee. Tr. 178-79, 357, 859-60, 863-64.<sup>6</sup> The freight from JFK Airport is transported to PVD by a third-party company named Cargo Transport. Tr. 170, 228, 267-69.<sup>7</sup>

The DHLNH couriers report to work at about 9:30 a.m. as the freight from the DHLNH vehicles arrives from Logan Airport onto the conveyor belt in the warehouse. Tr. 855, 872-873. Couriers receive a sheet each morning from Santiago that has the list of packages for their respective routes. Tr. 869. The sheet is part of a report produced from something referred to as the inbound planning tool, which is generated by DHL Express based on all packages for that day and then given to DHLNH management. Tr. 870, 1073, 1076. The sheets given to Santiago do not have drivers’ names or the order of the routes because those are controlled by DHLNH.

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<sup>4</sup> Marzelli has monitors in his office that depict surveillance footage of PVD. Tr. 1071-72.

<sup>5</sup> There is DHL Express signage on the customer door of the facility, at the customer service desk, and on the building. Local 251 Ex. 2-6; Tr. 820-22. The break room has a bulletin board with DHL Express signage. Local 251 Ex. 7; Tr. 828.

<sup>6</sup> The freight for BOS and MXG is transported from Logan in tractor-trailers driven by DHL Express employees. Tr. 179, 229, 269.

<sup>7</sup> The truck that transports freight to PVD also brings freight to MXG. Tr. 228, 267-69. A separate truck brings freight from JFK Airport to BOS and MHT. Tr. 173-74. On Tuesdays, the day of the week that the alleged secondary picketing took place, the freight for MHT is delivered to BOS and a DHL Express employee located at BOS transports the freight in a DHL Express truck to Logan for consolidation with other inbound freight destined for MHT. Tr. 172-74.

Tr. 899, 1097-98. The drivers take the freight assigned to their geographic route for delivery, scan the labels, and load it on their vans. Tr. 867-69.<sup>8</sup> Stamp testified that she communicates with the drivers during the morning regarding changes in an address or delivery time for a package, the location of a missing package, or directions for a delivery. Tr. 1062, 1066, 1069-70.

The couriers then make their deliveries and pickups in their vehicles. Local 251 Ex. 24-26; Tr. 873. Each vehicle contains a DHL Express courier service guide—a booklet describing what products are permitted or prohibited from being shipped to or from different countries. Tr. 1068, 1200. Outbound freight that is picked up by the couriers on their routes from PVD is processed at MXG. Tr. 543. DHLNH drivers at PVD consolidate their pickups into one or two shuttles and those DHLNH shuttles transport the freight to MXG in the evenings. Tr. 543.<sup>9</sup> DHLNH provides the drivers a courier log that they must complete with mileage reports and the total packages delivered and picked up for each day. Tr. 877.<sup>10</sup>

As part of the daily operations, the DHLNH drivers use scanners. Local 251 Ex. 30-36. DHL Express maintains scanners if they are broken and they have a DHL Express logo on the screen. Tr. 878-79, 1075. Lee testified that he did not know what many of the functions on the scanner were for, including the feeder or sweeper screen, the time window option, and the handover option. Tr. 881, 883. Lee also admitted that the DHLNH employees do not use many

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<sup>8</sup> DHL Express handles package pickups at the facility and pallets are given to customers at the overhead doors of the warehouse. Tr. 1067. During the first week of the strike, a photograph was taken of Marzelli standing in the doorway at PVD after having put a pallet in the back of a pick-up truck. Local 251 Ex. 44; Tr. 916, 925. Former DHLNH employee, Joseph Lee (“Lee”) admitted that he did not actually know whether the other person behind the pallet was a customer, but only that Marzelli put a pallet on a truck. Tr. 927-28. Even if one infers that Marzelli was giving a package to a customer, this is work that is performed by DHL Express.

<sup>9</sup> Occasionally, a DHLNH driver transports his own pickups to MXG in the evening if he is running late for the shuttle. Tr. 543-44. After the processing at MXG, the freight is brought to Logan Airport that same evening for transport. Tr. 560, 562-65.

<sup>10</sup> DHL Express also utilizes the USPS for deliveries. Tr. 1240. DHL Express did so prior to the strike and after the strike. Tr. 1240. According to testimony by Lee, about three or four weeks into the strike, he observed a DHLNH vehicle with packages drive to the USPS. Tr. 919-20. Lee conceded that DHLNH used the USPS prior to the strike as well, however, he “believed” that DHLNH used USPS more during the strike. Tr. 920.

of the functions, including the break option for lunch breaks and the invoices screen. Tr. 886-87, 893. Lee testified that the DHLNH employees stopped communicating with DHLNH management on their personal cell phones in February of 2018 so Santiago started sending messages through the DHL Express dispatch on the scanners. Tr. 887-89, 895, 898, 932. The scanner also transmits information for changes to delivery addresses and times. Tr. 890.

Customers can make complaints by calling a 1-800 number and speaking with a DHL Express customer service representative or by email. Tr. 1077, 1172-74. The customer service representative either resolves the issue or forwards it to the relevant facility for further action. Tr. 1172, 1078. When Marzelli receives a customer complaint relating to PVD, he reviews the complaint and forwards clerical issues to Stamp for resolution and delivery issues to DHLNH management. Local 251 Ex. 87, 88, 90, 93; Tr. 1064, 1077, 1101, 1175. At times, Marzelli forwarded DHL Express delivery policies to DHLNH management with the customer complaints. Local 251 Ex. 86. Marzelli explained that it is up to DHLNH management to decide what to do with the complaints and policies. Tr. 1179, 1180, 1184. When pressed repeatedly, Marzelli maintained that what DHLNH does with complaints and policies is completely within the control of DHLNH. Tr. 1180, 1185. Marzelli explained that he cared about the complaints and wanted DHLNH to resolve the complaints, but it is up to DHLNH to do so. Tr. 1184. Marzelli explained that he cannot give any directives to DHLNH management on how to handle the complaint because it is up to DHLNH to respond however it deems fit. Tr. 1232-33.

After Marzelli forwards complaints to DHLNH, he often confirms the action with DHL Express customer service. Local 251 Ex. 88. In one instance, Marzelli confirmed internally that the complaint was forwarded to DHLNH management and wrote “we will monitor courier

performance moving forward.” Local 251 Ex. 93. Marzelli explained that he meant that they would monitor if they receive similar complaints, and he denied monitoring the couriers themselves. Tr. 1191-92. In another instance, Marzelli confirmed that a complaint was taken care of and wrote that he would speak to “IC staff.” Local Ex. 251 Ex. 88. Marzelli explained that he meant he would speak to DHLNH management and that he never spoke to any couriers about the complaint. Tr. 1185-87, 1232. Marzelli explained that he usually does not even know the identity of the courier involved in the complaint so he is only passing the complaint on to DHLNH. Tr. 1190. It is up to DHLNH to address the complaint and decide how to address the issue with the involved courier. Tr. 1189.

Marzelli testified that he does not interact with DHLNH couriers, does not discuss particular tasks with them, does not discuss customer complaints with them, does not send them messages using the scanners, and does not go on ride-alongs with them. Tr. 1231.<sup>11</sup> Marzelli does not have the telephone numbers or email addresses of the couriers nor does he know the names of all the couriers at PVD. Tr. 1220.

Marzelli has communicated with DHLNH management concerning issues covered by the Cartage Agreement, discussed further below, such as having DHLNH workers out of uniform, and regarding facility related issues such as door usage. Tr. 1083. In February of 2018, Marzelli emailed DHLNH management concerning an issue with the rear entrance door being propped open. Local 251 Ex. 80-81; Tr. 1083. Marzelli explained that the issue is causing property damage, and it is a TSA security concern. Local 251 Ex. 80-81; Tr. 1166. Marzelli testified that

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<sup>11</sup> Lee vaguely testified about a customer complaint concerning a package pick-up that he did not handle in January of 2018. Tr. 900. Lee stated that Marzelli sent him an email stating that he had to pick up the package. Tr. 900. Lee admitted, however, that he did not have an email address at the time when he was working as a driver for DHLNH. Tr. 929. Marzelli also testified that he does not have the email addresses for the couriers. Thus, Lee’s testimony regarding this instruction should not be credited because both witnesses admit there was no email address for Marzelli to send an email to.

the facility is regulated by the government—including TSA and FAA regulations—because the freight is transported by airplanes. Tr. 1166-67, 1222-23. Marzelli explained that the FAA does facility visits and DHL Express is subject to fines if there is unescorted access to the facility. Tr. 1166. Marzelli also emailed C. Palker after learning that a DHLNH courier changed the screen on a scanner. Local 251 Ex. 72-73. Lee testified that Marzelli was the person who gave him a key FOB when he became employed by DHLNH and gave instructions on how to swipe the FOB. Tr. 854. Marzelli denied issuing key FOBs to the DHLNH couriers. Tr. 1237.

Stamp answers incoming calls on PVD's single landline, which are usually from customers calling to speak to a DHL Express representative. Tr. 857-58, 874, 1064-65. If the phone call is regarding a package delivery, Stamp or another DHL Express representative generally handles the issue or the call might go to DHLNH management. Tr. 1065-66. If the phone call is regarding a customer's property damage, Stamp gets DHLNH management to answer the call. Tr. 1065-66. DHLNH receives few calls on the landline and DHLNH managers primarily use their cell phones for business calls. Tr. 935, 1096.

There is a bulletin board in the warehouse at PVD with eight "checkpoints" that relate to parts of the delivery process, such as missed deliveries, attempted deliveries, or miscoded packages. Local 251 Ex. 11-18; Tr. 834-43.<sup>12</sup> Local 251 introduced a photograph of the bulletin board of such poor quality that nothing is legible. Local 251 Ex. 11. Local 251 then introduced subsequent photographs that purport to be photographs of the same bulletin board and are even less reliable. For example, Lee testified that Local 251 Ex. 14 is a photograph of the checkpoint on the top row that is second from the left. Tr. 840-41. A comparison of the photographs shows that this is not accurate because there are about five additional lines of text under the table in the

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<sup>12</sup> Although the bulletin board has DHL signage on the top, this does not indicate whether DHLNH or DHL Express maintains the bulletin board because DHLNH has the right to use DHL signage in the Cartage Agreement.

middle of the page on the checkpoint that is Local 251 Ex. 11. *Compare* Local 251 Ex. 11 with Local 251 Ex. 14. Furthermore, all of the checkpoints in the first photograph have a footer that is a darker shade and not legible. Local 251 Ex. 11. Yet, all of the subsequent photographs that are purportedly of the same bulletin board lack the footer. Local 251 Ex. 12-18. Throughout Lee's testimony, he never explained what entity drafted the checkpoints, what entity posted the checkpoints, whether anyone enforces the checkpoints, or who the checkpoints apply to.<sup>13</sup>

### **C. The Cartage Agreement between DHL Express and DHLNH**

DHL Express and DHLNH are parties to a cartage agreement ("Cartage Agreement") in which DHLNH agrees to provide pick-up and delivery services as an independent contractor for certain areas, including the area serviced from PVD. Local 251 Ex. 74.<sup>14</sup>

Section 3.3 provides that the manner and means by which DHLNH performs the services are at its "sole discretion and control" and DHLNH has "sole responsibility" over the hours and days worked by the workers; the selection and supervision of the workers; and the number of vehicles used. Local 251 Ex. 74. Likewise, Section 3.4 provides that DHLNH is "solely responsible" for determining, providing, and assigning workers. Local 251 Ex. 74. DHL Express does not set the hours of work nor the routes for DHLNH couriers. Tr. 1229.<sup>15</sup> DHL Express is not involved in, nor does Marzelli have any knowledge about, determining rest breaks or lunch breaks for the couriers. Tr. 1230. DHLNH has three supervisors that reside at PVD:

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<sup>13</sup> There are two other bulletin boards in the break room at PVD that have federal and state regulations posted on them. Local 251 Ex. 9, 10; Tr. 832-34. The record does not show which entity maintains the bulletin boards, who posted any of the regulations, and who the regulations apply to. Tr. 832-34.

<sup>14</sup> Although the agreement states New England Freightways, Inc. and Northeast Freightways, Inc.; the parties agree that DHLNH is the contractor. Tr. 1148-49.

<sup>15</sup> Maini testified that Local 251 and DHLNH had a dispute about adding routes so that drivers did not work as many hours in a day. Tr. 1114. Maini testified that Santiago called Marzelli and, after that phone call, Santiago added two more routes. Tr. 1114. There is no evidence of anything that was said between Marzelli and Santiago with respect to the phone call, and Maini admitted that he could not hear anything that Marzelli said with respect to any conversation. Tr. 1123. Any argument that this shows DHL Express somehow has input over adding routes should be rejected because such an inference is unsupported by the record.

Santiago, McLynch, and Thet. Tr. 1060, 1219. DHLNH has the authority to decide how many vehicles to use, and it utilizes more vehicles on some days and fewer vehicles on other days. Tr. 1247.

Section 3.4.2 requires DHLNH to hire workers who are qualified to work in the United States, are fluent in English, and are licensed. Local 251 Ex. 74. Section 3.4.3 requires DHLNH to provide pre-employment and post-employment drug and alcohol testing as required by the Federal Motor Carrier Safety Administration. Local 251 Ex. 74. Section 3.4.4 requires DHLNH to conduct background screenings. Local 251 Ex. 74.

Section 3.5 provides that DHLNH shall, at its own cost, provide and maintain vehicles necessary for the services and it is “solely responsible” for the titling, registering, licensing, permitting, insuring, and fueling of vehicles. Local 51 Ex. 74. DHL Express does not own or lease the vehicles used by the couriers and Marzelli is unaware of who owns the vehicles. Tr. 1223. DHLNH is responsible for maintaining the vehicles, obtaining insurance, getting inspections, and putting fuel in the trucks. Tr. 1226. DHL Express does not audit or monitor licenses for DHLNH vehicles, and Marzelli is not aware if there are any special requirements for licenses. Tr. 1225. DHL Express has no involvement with accidents involving DHLNH vehicles—it does not conduct audits to determine who is at fault for accidents nor does it get involved in the discipline of any courier for an accident. Tr. 1227. There is a dispute in the record with regard to access to any GPS devices used on the DHLNH vehicles. Although Stamp testified that DHL Express and DHLNH both have access to the GPS devices in vehicles, Tr. 1076-77; Marzelli testified that DHL Express does not have any access to any data for any GPS devices that might be in the DHLNH vehicles. Tr. 1224. Stamp testified that she does not use the GPS device or data herself and she only “believed” that Marzelli had access to it. Tr. 1077.

Given her uncertainty about Marzelli's access, his testimony that he does not have access to the GPS devices in vehicles, for which DHLNH has complete responsibility in all aspects, should be credited over Stamp's testimony on this subject because it is more reliable.

Section 3.15 provides that DHLNH is "solely responsible for the interviewing, hiring, training, disciplining, and termination" of its workers. Local 251 Ex. 74. DHL Express has no role in hiring, interviewing, or pre-screening candidates for courier positions. Tr. 1087, 1233. Marzelli had no knowledge as to whether DHLNH actually conducts pre-employment or post-employment drug and alcohol testing. Tr. 1234. Marzelli testified that he had no knowledge of any incident in which a courier failed a test. Tr. 1234. DHL Express does not pay for background checks that DHLNH performs on couriers and does not see the results of any such test. Tr. 1234-35.

DHL Express has no role in disciplining or discharging couriers. Tr. 1087, 1238. Marzelli testified that he never directed DHLNH management, including Santiago, to take action against a courier. Tr. 1238. DHLNH has a company handbook that applies to the couriers; whereas DHL Express has a company intranet and handbook that does not apply to DHLNH couriers. GC Ex. 41; Tr. 1238. In January of 2018, DHLNH terminated employee Sebastian Ntansah because of a criminal charge on a background check. Tr. 1114-15. In response to an email in which C. Palker informed Maini that DHLNH had to terminate Ntansah, Maini requested any communications between DHLNH and DHL Express regarding Ntansah's disqualification. Local 251 Ex. 71; Tr. 1124. Maini admitted that there were no communications or emails between DHLNH and DHL Express regarding the disqualification or termination. Local 251 Ex. 71; Tr. 1124. Daphne Dodge, the human resources representative for Northeast

Freightways, requested the background check and determined that Ntansah was disqualified from carrying DHL freight. Tr. 1125.

The DHLNH drivers receive training on the road from other DHLNH drivers. Tr. 1088. There is no reliable testimony that DHL Express is involved in any training for couriers. Stamp testified that DHLNH couriers receive hazmat training that is “administered” by DHL Express, however, she explained that “administered” meant that O’Gara possessed a CD that the couriers watch and “maybe” take a test on. Tr. 1081-82, 1098. Stamp later testified that the hazmat training is actually not conducted anymore, and it was replaced by government-mandated dangerous goods training several years ago. Tr. 1098-99.

Section 3.15 further provides that DHLNH’s workers are not employees of DHL Express for any purposes and are not entitled to receive any benefits or rights as employees of DHL Express. Local 251 Ex. 74. DHLNH pays the couriers and—prior to the contract with Local 251—the couriers were eligible to participate in health insurance and retirement benefit programs from DHLNH. Tr. 1136.<sup>16</sup> The couriers use a time clock that DHLNH owns. Tr. 933-34, 1079, 1090-91. DHL Express has no involvement in setting wages or benefits for DHLNH couriers, and Marzelli had no knowledge of their wages or their benefits. Tr. 1228-29. DHL Express does not get involved in the rates for premium pay, holiday pay, or overtime pay, nor does it get involved in determining whether overtime work should be performed. Tr. 1228. DHL Express does not have access to the data in the time clock and Marzelli has no knowledge as to which entity DHLNH uses for payroll, nor has he ever reviewed DHLNH’s payroll. Tr. 1229-30.

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<sup>16</sup> In comparison, DHL Express pays the operations agents it employs at PVD through direct deposit, their hours are monitored on a computer system named Kronos that is administered by DHL Express, and their health insurance and retirement benefits are set through the collective-bargaining agreements between DHL Express and Local 25. Tr. 1091, 1095.

Schedule A of the Cartage Agreement is the Schedule of Rates. CP Ex. 24; Tr. 1245. Section 3.1 shows that DHL Express pays DHLNH \$2.77 per pickup or delivery stop. CP Ex. 24; Tr. 1246. Section 3.2 shows that DHL Express pays DHLNH \$.26 per piece picked up or delivered. CP Ex. 24; Tr. 1246. Section 3.3 shows that DHL Express pays DHLNH a set amount of money for four different types of vehicles regardless of how many vehicles DHLNH chooses to utilize. CP Ex. 24.

Schedule C of the Cartage Agreement is the “Trademark Usage and Display Standards and Specifications.” Local 251 Ex. 75; Tr 1252-53. Section 1 explains that the trademarks, tradenames, service marks and logos identify DHL Express products and services to the public and the products and services have a reputation of goodwill and patronage that DHL Express strives to maintain. Local 251 Ex. 75. Thus, DHLNH must comply with certain usage and display standards when using the “DHL marks” or signage. Local 251 Ex. 75. Any operations that DHLNH performs while using the DHL marks must be professional and businesslike. Local 251 Ex. 75. Section 4 requires that DHLNH’s vehicles have the appropriate DHL marks and requires that the vehicles’ appearance be maintained. Local 251 Ex. 75. Section 4.2 requires DHLNH to display on the drivers’ side doors and passengers’ side doors that they are owned and operated by Northeast Freightways. Local 251 Ex. 24-25, 75; Tr. 1226.<sup>17</sup> Section 5 requires the DHLNH workers to wear a DHL marked uniform. Local 251 Ex. 21, 75; Tr. 849, 1156, 1161.<sup>18</sup>

In anticipation of its renewal date for the Cartage Agreement, DHL Express internally discussed the performance of DHLNH in February of 2018. CP Ex. 22; Tr. 1157. On February

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<sup>17</sup> DHL Express has a “Vehicle Image and Appearance Policy” that sets out standards and requirements for maintaining vehicles in DHL service regardless of whether they are owned by DHL Express or an independent contractor in order to maintain DHL Express’ image and brand. Local 251 Ex. 77; Tr. 1158-59. A comparison of the Policy and Section 4 shows that the provisions are similar. Local 251 Ex. 75, 77.

<sup>18</sup> The DHLNH workers are also required to wear an identification badge that states they work for a contractor. Local 251 Ex. 75. DHL Express does not issue the badges to DHLNH couriers, the badges are a different color than DHL Express badges, and they state that the employee is employed by “N.E. Freightways.” Tr. 1091-92, 1236-37.

14, Marzelli emailed a list of issues at PVD, MHT, and ALB along with a list of the B2B letters that issued over the prior six months. CP Ex. 22; Tr. 1157. Marzelli cited poor service performance, increased customer complaints, and inadequate compliance with requirements for the fleet of vehicles. CP Ex. 22; Tr. 1157-59. Marzelli emailed Sidorski three options moving forward: (1) issue a breach of the contract to Northeast Freightways; (2) give part of the Northeast Freightways' work to another third-party vendor; or (3) terminate the contract with Northeast Freightways in MHT. CP Ex. 22. Marzelli stated that they could continue the trend of sending Business-to-Business ("B2B") letters. CP Ex. 22; Tr. 1216.

B2B letters are letters of concern issued by DHL Express to an independent contractor to communicate an issue that possibly violates the Cartage Agreement, such as the appearance or maintenance of DHLNH vehicles. CP Ex. 23; Tr. 1214, 1218. With regard to DHLNH, Marzelli issued B2B letters addressed to P. Palker and later to C. Palker as well. Tr. 1214. Marzelli was frustrated with the overall level of service provided by DHLNH and the B2B letters were his available option to deal with those issues. Tr. 1214-15.

## **II. THE COLLECTIVE-BARGAINING RELATIONSHIPS AT PVD**

As discussed above, Local 251 represents both the couriers employed by DHLNH and the operations agents employed by DHL Express at PVD.

### **A. The Collective-Bargaining Relationship between DHLNH and Local 251**

Local 251 represents the couriers and dockworkers employed by DHLNH at PVD and the parties reached a first contract to resolve an economic strike on June 22, 2018. GC Ex. 39-40.

On May 8, 2017, Local 251 filed a petition with the NLRB to represent couriers at PVD in Case No. 01-RC-198316.<sup>19</sup> GC Ex. 31. Local 251 identified "DHL Express USA Inc./dba

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<sup>19</sup> Local 251's organizing began in January of 2017 when the DHLNH employees first reached out to Local 251 about representation. Tr. 921-22.

Northeast Freightways Inc. (Joint Employer)” as the Employer Representative. GC Ex. 31. On May 16, 2017, the NLRB approved Local 251’s request to withdraw that petition. GC Ex. 32.

On May 12, 2017, Local 251 filed a new petition with the NLRB to represent couriers at PVD in Case No. 01-RC-198728. GC Ex. 33. This time Local 251 identified “DHL Express, USA Inc., and DHLNH LLC (Northeast Freightways, Inc.) (Joint Employers)” as the Employer Representative. GC Ex. 33.<sup>20</sup> On May 19, 2017, Local 251, DHLNH, and the NLRB reached a stipulated election agreement identifying DHLNH as the sole Employer. GC Ex. 34. On June 15, 2017, the NLRB certified Local 251 as the collective-bargaining representative of the couriers employed by DHLNH after a Board conducted election. GC Ex. 35.

Shortly after certification, on June 15, 2017, Local 251 requested to bargain with DHLNH for a first contract and requested information from DHLNH about the bargaining-unit for negotiations. CP Ex. 9. Throughout the following year, Local 251 and DHLNH engaged in substantive negotiations for a first contract, Local 251 submitted several information requests to DHLNH, Local 251 and DHLNH reached various interim agreements, and Local 251 and DHLNH bargained over proposed discipline for DHLNH employees at PVD. During this entire time, Local 251 never requested that DHL Express be present at the bargaining table, Tr. 1006; nor did it reach any tentative agreements, interim agreements, or settlement agreements with DHL Express. DHL Express had no role in the collective bargaining, did not discuss any

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<sup>20</sup> Local 251 failed to provide a consistent reason to explain why it filed the two petitions listing the employer as it did and then agreed to an election with DHLNH. Local 251’s Secretary-Treasurer and Principal Officer, Matthew Taibi (“Taibi”) claimed that Local 251 withdrew the first petition because it did not feel that it had enough information to prove DHL Express was a joint employer. Tr. 944, 983, 988. Local 251 did not explain why it then filed a new petition that still listed DHL Express as a joint employer. To further confuse things, Taibi submitted an affidavit as part of the trial in which he testified that Local 251 withdrew the petition because DHLNH would stipulate to an election and DHL Express would not. Tr. 989-90. His confused and surprising demeanor when reviewing the affidavit raises further doubts about the reasoning presented by Local 251 and the overall credibility of Taibi.

bargaining proposals with DHLNH, and did not propose any language for the contract between Local 251 and DHLNH. Tr. 1239.

From September 1, 2017 through January 10, 2018, Local 251 and DHLNH met for at least eight bargaining sessions in which they negotiated proposals and reached tentative agreements on different contractual provisions. CP Ex. 19-20. On September 1, 2017, Local 251 and DHLNH met for their first bargaining session and Local 251 presented a comprehensive proposal. CP Ex. 12. Present for Local 251 was Taibi; Business Agent, Matthew Maini (“Maini”); Organizer, Michael Simone (“Simone”); Committee Member, Lee; and Committee Member, Sarong Rath (“Rath”). Tr. 946. Present for DHLNH was Attorney, Frank Davis (“Davis”); C. Palker; and P. Palker. Tr. 946. On that same day, Local 251 demanded bargaining with DHLNH on any and all DHLNH policies relating to or affecting bargaining-unit members during negotiations for a first contract. CP Ex. 11. On October 12, 2017, the parties met again for bargaining and DHLNH presented a counter proposal. CP Ex. 13. In early November of 2017, there were additional bargaining sessions in which the parties presented counter proposals. CP Ex. 17; Tr. 1018.

Throughout the bargaining, Local 251 and DHLNH reached interim agreements and settlement agreements to resolve certain issues concerning the bargaining unit. Local 251 asked that DHLNH add the dockworkers to the unit because they were not initially organized or in the NLRB certification and DHLNH agreed to do so. Tr. 943, 991-92. Local 251 proposed that DHLNH grant a wage increase for couriers and—after back and forth negotiations—Local 251 and DHLNH reached an agreement on a wage increase with a lump sum payment. CP Ex. 14; Tr. 1012, 1131. The two parties also agreed to provide Local 251 access to the facility in October of 2017. CP Ex. 14; Tr. 1012, 1131. After obtaining access, Maini went to the facility

every day to observe and ask any questions he had about the operations. Tr. 1133. In October 2017, Local 251 and DHLNH reached a settlement agreement regarding time and a half for Sundays and holidays after the employees walked off the job for two hours. Tr. 1113, 1133-34. On November 3, 2017, Local 251 and DHLNH reached a substantive settlement agreement in which they resolved several unfair labor practice charges that Local 251 filed solely against DHLNH. GC Ex. 44; Tr. 1018.

During this time, DHLNH also contacted Local 251 regarding disciplinary issues and the parties routinely negotiated about proposed discipline of bargaining-unit employees. Tr. 992-93, 1129. By way of example, Local 251 and DHLNH negotiated over discipline that DHLNH issued to Sebastian Ntansah, Jesus Diaz, Andre Sierra, Jason Brunette, and Alberto Almada. CP Ex. 8, 10; Tr. 996-97. The negotiations often resulted in settlement agreements between the parties such as two agreements, dated November 6, 2017, for discipline that DHLNH issued to Diaz and Brunette. CP Ex. 15-16. On November 27, 2017, Taibi submitted another information request to C. Palker and Davis for further information on the bargaining-unit employees. CP Ex. 18.

During the bargaining, Local 251 also reached out to IBT representatives for assistance with negotiations. On June 8, 2017, Taibi emailed Local 25's Business Agent, John Murphy ("Murphy") to request assistance from him and the IBT Express Division on negotiations with DHLNH. CP Ex. 5; Tr. 675. On June 9, 2017, Murphy replied that he looked forward to helping them out and asked for dates for negotiations. CP Ex. 6. On October 13, 2017, November 9, 2017, and March 6, 2018, Taibi emailed the Director of the IBT Express Division, William Hamilton ("Hamilton") to update him on the status of negotiations and any interim or tentative agreements that the parties reached. Local 251 Ex. 54, 56-61; Tr. 947-49, 957. In Taibi's

October 13 email, he wrote that DHLNH could work with DHL Express to fund a contract between DHLNH and Local 251. Local 251 Ex. 54; Tr. 949. In Taibi's March 6 email, he requested assistance with DHL Express in getting it to fund the agreement with DHLNH. Local 251 Ex. 57. Taibi testified that he made the comments so that Hamilton could attempt to persuade DHL Express to fund the contract between DHLNH and Local 251. Tr. 976. Taibi clarified that he really meant that he was seeing if the IBT could persuade DHL Express to increase the price that it paid to DHLNH for services so that DHLH would in turn agree to bargaining demands from Local 251. Tr. 1006.

By April of 2018, Local 251 and DHLNH reached tentative agreement on several contractual provisions after back-and-forth negotiations. Local 251 Ex. 67. For example, the discipline and management rights clause was a result of negotiating between Local 251 and DHLNH. Tr. 1029-30. Certain provisions in the tentative agreement as of April 2018 mention DHL Express. Article 3 is the management rights clause and it provides that DHLNH must comply with the contractual directives of its customer—DHL Express. Local 251 Ex. 67. Article 5 is the discipline clause and it provides that a verbal assault while representing DHLNH under circumstances that could result in the employee's disqualification under DHL standards results in a suspension and a conviction of a disqualifying offense under DHL standards results in discharge. Local 251 Ex. 67. Article 7 is the union access provision and it grants employees the right to wear a union pin or apparel so long as DHL Express does not object. Local 251 Ex. 67. There is no evidence to show that DHL Express was involved in the negotiation of these provisions or ever required or requested such language. Marzelli never saw language in the contract or dealt with language involving discipline or union pins. Tr. 1240.

Still, the “sticking points” for Local 251 and DHLNH during the course of the negotiations were wages, health insurance, and pension benefits. Tr. 1033. DHLNH objected in principle to the Teamsters healthcare plan and the Teamsters pension fund. Tr. 1034. Instead, DHLNH proposed the same healthcare plan it offered prior to the unionization and a 401(a) retirement plan. Tr. 1002-03, 1034. On April 18, Davis emailed Taibi stating that DHLNH might increase healthcare premiums if Local 251 dropped the Teamsters healthcare proposal. Local 251 Ex. 64. In response, Taibi emailed that Local 251 viewed healthcare and pension as the key issues and he provided a ten-day notice of a strike. Local 251 Ex. 64; Tr. 963-64. On April 18, Taibi also emailed Hamilton the latest comprehensive proposals with DHLNH along with an IBT strike authorization form for strike benefits using the address for PVD. Local 251 Ex. 63; Tr. 969, 1042-43. On April 24, Taibi emailed Hamilton again confirming that DHLNH’s refusal to agree to Teamster health and welfare and pension terms were the big issues for the employees. Local 251 Ex. 68; Tr. 1037-38. Thus, as Taibi admitted, obtaining a contract was never about getting DHL Express to fund the contract because DHLNH refused in principle to being in any Teamsters benefit funds. Tr. 1034. Taibi admitted that DHLNH took this position leading up to the strike and while the strike continued. Tr. 1035.

During the hearing, Local 251 presented testimony about purported statements made by P. Palker, C. Palker, and Davis at negotiations that should not be relied on for the purported truth of the matters because they are all hearsay under Rule 801 of the Federal Rules of Evidence. The statements relate to DHLNH purportedly making comments about DHL Express either funding the service agreement or being the reason that DHLNH could not agree to certain proposals from Local 251. For example, Taibi claimed that the parties discussed trying to get DHL Express to fund the contract when they met for negotiations in April of 2018. Tr. 964. At

one time, Taibi testified that P. Palker said he would request additional funding in order to fund the contract. Tr. 951. Taibi stated that DHLNH, without even specifying an individual, said that they could not pay for the health and welfare and pension proposal and were working to get DHL Express to pay for it. Tr. 954. Taibi claimed that Davis said that DHL Express uses a subcontractor model so that they do not pay health and welfare and pension to those employees. Tr. 966.<sup>21</sup>

**B. The Collective-Bargaining Relationship between DHL Express and Local 251**

Local 251 represents the operations agents employed by DHL Express at PVD and the parties currently have a collective-bargaining agreement in effect. Tr. 943. On February 9, 2018, Local 251 filed a petition with the NLRB to represent the operations agents employed by DHL Express at PVD in Case No. 01-RC-214554. GC Ex. 36. On February 16, DHL Express, Local 251, and the NLRB reached a stipulated election agreement. GC Ex. 37. On March 29, the NLRB certified Local 251 as the collective-bargaining representative of the operations agents after a Board conducted election. GC Ex. 38.

In the midst of the labor dispute between DHLNH and Local 251 and impending strike, DHL Express and Local 251 spoke on the telephone on April 26 to discuss dates for Local 251 and DHL Express to meet for negotiations regarding the operations agents. Tr. 980. On that same day, DHL Express' legal counsel, John Telford ("Telford"), called Taibi and asked whether

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<sup>21</sup> Local 251 initially subpoenaed P. Palker. Tr. 809. The Region declined to enforce the subpoena because Local 251 did not file the application for the subpoena with the Judge even though the hearing had already opened pursuant to Section 102.31 of the Board's Rules and Regulations. Tr. 809-10. Local 251 then subpoenaed P. Palker and C. Palker; however, the General Counsel's understanding—based on petitions to revoke filed by DHLNH's Counsel—is that the subpoenas did not include witness fees and mileage. Tr. 809-10. *See Zurn/NEPCO*, 329 NLRB 484, 486-87 (1999) (holding that a subpoena to a witness must include the same fees and mileage upon service that are paid to witnesses in federal court). Instead of curing the defects in the subpoenas, Local 251 rested without further explanation and without issuing valid subpoenas and obtaining testimony from the Palkers. Drawing any adverse inference against the General Counsel or DHL Express is inappropriate because Local 251 did not issue valid subpoenas and the Palkers are not agents of the General Counsel or DHL Express. Moreover, Local 251 subpoenaed Santiago and he appeared at the hearing to testify, however, Local 251's Counsel sent him home and declined to call him as a witness.

Local 251 would hold off on a strike if Local 251 received a phone call from DHLNH with movement on the contract. Tr. 978. About an hour later, Davis called Taibi and offered more money but not the Teamsters health and welfare or pension benefits. Tr. 979. Taibi called Telford back and said he would not confirm whether there would be a strike, and Telford said that DHL Express would do what they had to do to protect the business. Tr. 980.

On April 30, DHL Express Controller, Seth Evans (“Evans”), went to PVD to support the service center manager—Marzelli—and assist with any facility issues in the event of a work stoppage. Tr. 345-56, 349-50, 361. DHL Express also hired security services and videographer services that were then utilized throughout the eventual strike. Local 251 Ex. 99-100; Tr. 914, 918, 925, 1203-04.<sup>22</sup>

On May 1, 2, and 3, DHL Express and Local 251 met and negotiated the first contract for the DHL Express operations agents at PVD. Tr. 981. Present for Local 251 was Murphy; Maini; and Assistant Business Agent, Thomas Salvatore. Tr. 1007. Present for DHL Express was Telford; Labor Relations Manager, Bob Connelly (“Connelly”); and Operations Manager, Jeff Sidorski (“Sidorski”). Tr. 1007. On May 1, Local 251 took the position that the master agreement between DHL Express and the Teamsters should apply to the operations agents. Tr. 1008. Throughout the three days of negotiations, DHL Express took the position that they were not there to talk about DHLNH. Tr. 1008.

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<sup>22</sup> Local 251 presented evidence that a DHLNH employee, Walter Delassantos (“Delassantos”), was told by security representatives on April 30 that he could not take his truck to Logan Airport. Tr. 901-02, 1119. Maini testified that he spoke to the security representative on the phone and told him that they were not on strike and Delassantos was able to take his vehicle to complete his assignment. Tr. 1121.

### **III. LOCAL 251 AND LOCAL 25 ENGAGE IN A PICKETING CAMPAIGN AT BOS AND MXG**

#### **A. DHLNH Employees Commence a Strike**

On April 30, the DHLNH employees commenced an economic strike at PVD against DHLNH. Social media posts, dated April 30, show that the workers went on strike against DHLNH. A Facebook post on Local 251's page is a photograph of picketers outside PVD with picket signs. GC Ex. 28. The caption for the post states that DHLNH workers are on strike demanding respect in their fight for a first contract. GC Ex. 28. The caption continues "[t]he company, a subcontractor for DHL Express, refuses to provide quality healthcare and a secure retirement for its workers. The company is a subsidiary of North East Freightways. . . ." GC Ex. 28. Local 251 posted a flier on its Twitter page stating that DHLNH workers are on strike at PVD for fair wages, a secure retirement, and affordable healthcare. GC Ex. 30. The flier states that DHLNH is a wholly owned subsidiary of North East Freightways. GC Ex. 30. On that day, Maini also posted a Facebook live video while picketing at PVD stating "[w]e're striking DHLNH which is an IC, independent contractor, for DHL. The issues are pension, healthcare." CP Ex. 21.

#### **B. Respondent Unions Organize Picketing at DHL Express Facilities**

On April 30, Local 251 and Local 25 representatives coordinated a plan through a series of emails and subsequent conversations to picket at DHL Express facilities on May 1.

On April 30, at 1:10 p.m., Taibi emailed the following individuals to extend the picket lines to DHL Express facilities: Maini; Local 25 Principal Officer, Sean O'Brien ("O'Brien"); Murphy; Local 25 Secretary-Treasurer, Tom Mari; and Principal Officer of Local 671,<sup>23</sup> David

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<sup>23</sup> The International Brotherhood of Teamsters, Local 671 has jurisdiction in Connecticut. Tr. 681.

Lucas (“Lucas”). GC Ex. 45; Tr. 681.<sup>24</sup> The email claimed that DHL Express was acting as an ally to DHLNH providing management as couriers. GC Ex. 45. Taibi asked the other locals for the addresses and best times to arrive for the picketing. GC Ex. 45.

At 1:27 p.m., O’Brien responded that Murphy would be the point person for Local 25. GC Ex. 46. At 1:27 p.m., Murphy responded that 8:00 a.m. for BOS and 9:00 a.m. for MXG were the best times. GC Ex. 47. Murphy asked Local 251 to confirm that it was a definite plan so that Local 25 could have agents at both locations. GC Ex. 47. At 1:38 p.m., O’Brien emailed to make sure that Local 251 members would be present at both locations. GC Ex. 48. At 1:40 p.m., Taibi confirmed that Local 251 representatives would be going to BOS, MXG, and Hartford. GC Ex. 49. At 4:36 p.m., Murphy responded that he would see everyone the following day. GC Ex. 50.

At 4:29 p.m., Taibi confirmed that a “crew” would picket at BOS and another “crew” would picket MXG but cancelled Hartford because it was not confirmed. GC Ex. 51. At 5:04 p.m., O’Brien replied that “[w]e should shut down [Connecticut] as well . . . .” GC Ex. 52. At 5:12 p.m., Taibi replied that he had not heard from Local 671 and suggested they picket in Connecticut on Wednesday. CP Ex. 3. At 5:21 p.m., O’Brien replied “let’s take them all down at once I’ll call Lucas.” CP Ex. 3.

After the email exchange, Local 251 and Local 25 decided to change the time to meet at BOS from 8:00 a.m. to 5:00 a.m. Tr. 681. Murphy had originally suggested 8:00 a.m. because that is when most employees report for work but changed it to 5:00 a.m. because some employees report to work at that time. Tr. 681-82. Murphy admitted that he spoke to someone

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<sup>24</sup> O’Brien is also the principal officer for Joint Council 10 of New England, which is an organization comprised of all locals in New England. Murphy admitted that O’Brien is responsible for all locals and O’Brien directed Murphy to act as the lead person for the activities on May 1. Tr. 699-700.

from Local 25 or Local 251 about changing the time, but he could not remember who he spoke to and whether it was by telephone or e-mail. Tr. 635-37.

On April 30, at 2:00 p.m., O'Brien separately emailed Local 25 Organizer, Chris Smolinsky ("Smolinsky"), and Murphy instructed Smolinsky to be at MXG with Joseph Foti on May 1 and that Murphy was the point person for details. GC Ex. 27. Murphy admitted to speaking with Smolinsky in-person and instructing him to arrive at MXG at 9:00 a.m. Tr. 628-29.

Despite the fact that Murphy represented DHL Express employees for more than fifteen years and was familiar with DHL Express management, Murphy admitted that he never contacted any DHL Express manager after receiving the April 30th email from Taibi to discuss the claim in the email. Tr. 622, 638-40. Murphy admitted that he had contact information for many DHL Express managers including Anthony Baglio; Wilfred Perry; Tom McArdle; the Director of Labor, Joseph Yates; and Connelly. Tr. 623-24, 675. Yet, on April 30 and May 1, Murphy never asked any DHL Express manager whether DHL Express was performing any struck work. Tr. 640. Murphy further admitted that he never investigated or looked into whether DHL Express was performing struck work. Tr. 640. Likewise, Murphy admitted that he took no steps to investigate the assertion in the April 30th email or whether managers were acting as couriers on April 30. Tr. 698-99, 713. Instead, Murphy admitted that "my belief is Local 251 can extend the picket line anywhere they want. We have Article 8 protection. My belief was I want them to extend it. I didn't want them to be there." Tr. 642.

There is no evidence in the record to indicate that any DHL Express employee or manager ever drove a van on April 30 or any day during the strike. Taibi claimed that he sent his April 30th email because he saw vehicles with DHL signage and additional personnel with DHL

Express identification at PVD earlier that morning. Tr. 976-77. Taibi further claimed there were “people” at PVD that he did not know with DHL identification driving vans and handling freight. Tr. 977.<sup>25</sup> However, Taibi admitted that he did not see Marzelli, Evans, or any DHL Express manager driving a van. Tr. 1036. DHL Express did not transport freight to PVD from Logan on April 30 nor did a DHL Express vehicle transport the freight. Tr. 183, 358.

Local 251 presented evidence about various trucks parked at the PVD facility during the strike. There were Budget rental trucks with DHL Express signage parked in the DHL Express parking lot. Local 251 Ex. 37-39; Tr. 903-04, 907-08, 910-12. Lee testified that he looked up the DOT number on the Budget rental vans on April 30 and it matched DHL Express. Tr. 912. The strike was in effect 24/7 with constant picket lines that were heaviest when vehicles were leaving and entering the facility. Tr. 928, 1137. Despite the fact that Local 251 filmed and photographed the vehicles leaving and arriving at PVD, there are no photographs or testimony to show or even indicate that any of the Budget vans ever left PVD or that any DHL Express manager ever drove a Budget van. Tr. 929, 1138.<sup>26</sup>

Local 251 also offered photographs of other vehicles belonging to DHLNH or an affiliate company that were parked in the front parking lot at some point during the strike. One is a photograph of a Northeast Freightways van; two U-Hauls operated by DHLNH; and Santiago’s personal truck in the DHL Express parking lot. Local 251 Ex. 42; Tr. 913, 926. Another

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<sup>25</sup> Local 251 also admitted that it knew P. Palker owned other companies in the transportation industry, including a freight company named Land Air Express and a less-than-load carrier named Precision Delivery Systems. Tr. 1127-28.

<sup>26</sup> A photograph shows a parked white van with DHL signage in which the owner or operator of the van is unknown. Local 251 Ex. 40. Despite the fact that Lee admitted he had photographs of the side door of the truck, Local 251 chose not to offer those photographs that would show who operated the truck. Tr. 909-10.

photograph shows a tractor-trailer from a DHLNH-affiliated company—Land Air Express—in the front parking lot. Local 251 Ex. 45; Tr. 918.<sup>27</sup>

### **C. Respondent Unions Picket at BOS on May 1**

At about 4:30 a.m. in the morning on May 1, Murphy met Maini and four DHLNH employees at BOS. Tr. 634-35. The four DHLNH employees were wearing DHL Express branded uniforms and picket signs and stood in front of the facility near the customer entrance with Murphy. Tr. 135-37. The picket signs stated: ON STRIKE AGAINST DHLNH Good Healthcare Quality Retirement Teamsters Local 251. GC Ex. 6; Tr. 149. At 4:40 a.m., DHL Express' Field Operations Supervisor, Wilfred Perry ("Perry"), arrived at BOS and contacted his manager and the police after entering the facility. Tr. 137, 166.

Facebook posts from Maini on May 1 show the four DHLNH employees wearing picket signs in front of BOS with a caption of "[i]n South Boston picketing shutting down DHL. Give DHLNH Quality healthcare and Pension for all." GC Ex. 14; Tr. 302. Maini, on May 1, posted a photograph of four DHLNH employees with picket signs outside the parking lot entrance to BOS and Murphy standing immediately to their side with a caption "John Murphy standing strong and fighting for Local 251 members at DHLNH. Thank you brother Murphy for all that you do when it comes to the fight you don't back down." GC Ex. 15; Tr. 303-04. The same photograph was posted on Local 251's Facebook page on May 1. GC Ex. 16; Tr. 305.

At about 5:30 a.m., the four DHLNH employees with the picket signs circled in a picket line in front of the building at the customer entrance with Murphy standing six to ten feet away nearby. Tr. 149-51, 161. The customer entrance is next to one of the two employee entrances. Tr. 130-31, 161. The individuals continued picketing throughout the morning. A video

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<sup>27</sup> The picketers often congregated at the back parking lot where the DHLNH vans were exiting and entering the facility. Tr. 1242-43. If picketers were congregated at a particular entrance, it would make sense for certain vehicles to use a different entrance or to park in a place where a more accessible exit would be available.

recording taken later in the morning shows the DHLNH employees wearing the picket signs and walking in a circular motion in front of the entrance to BOS. GC Ex. 11-A; Tr. 386. Maini also carried a picket sign and walked back and forth during the morning. Tr. 507.

On the morning of May 1, the DHL Express employees scheduled to work at BOS remained outside the facility and stood to the side of the picketing. Tr. 148-49, 386. DHL Express drafted a memorandum addressed to the DHL Express employees to inform them that they were participating in an unlawful strike action against DHL Express. GC Ex. 13. The memorandum states that the strike is a violation of the parties' collective-bargaining agreement, and any employee who continued to strike or honor an unlawful picket line would face discipline. GC Ex. 13. The memorandum warned employees not to jeopardize their jobs over a labor dispute that did not impact them. GC Ex. 13.

At about 8:30 a.m., DHL Express Senior Vice President, Laurice Bancroft ("Bancroft"), and Evans presented the memorandum to Murphy outside the facility and he read it. Tr. 325, 362. Bancroft asked Murphy why he was doing this and Murphy said he was there because O'Brien told him to be there. Tr. 325, 380. Bancroft said they were going to talk with the DHL Express employees and Murphy said that no one was going to cross the picket line. Tr. 325, 381. Bancroft and Evans then distributed the memorandum to employees outside the facility and Bancroft read the memorandum aloud. Tr. 325. A photograph shows Bancroft reading the memorandum to DHL Express employees with Murphy standing to his side and Evans and Maini nearby. GC Ex. 17. After Bancroft read the memorandum, Murphy responded that Local 25 respects picket lines and asked the employees not to cross. Tr. 326. A DHL Express employee asked if they could be fired and Murphy said not if the employees stayed out less than twenty-

four hours. Tr. 326. The employee then said that he guessed they would be out there for twenty-three hours and fifty-nine minutes. Tr. 326.

After this exchange, Maini and Bancroft engaged in a back-and-forth conversation in the presence of the employees. Evans testified that Maini asked Bancroft to “help us get back to the table or else we’re going to be back every day.” Tr. 329. Evans further testified that Maini said to Bancroft that “they’re [DHLNH] paying slave wages and you of all people should understand that.” Tr. 329. A recording shows that Maini then yelled to Bancroft that they wanted health and welfare and pension and that’s when the picketing would stop. GC Ex. 11-B.<sup>28</sup> Bancroft repeatedly told Maini that he was engaged in illegal secondary picketing. GC Ex. 11-B. Maini stated that they were social misfits and they wanted health and welfare and pension. GC Ex. 11-B. Maini said if “[y]ou want this to stop? Then come back with the people who can make it happen, otherwise we’re gonna be here every day.” GC Ex. 11-B. Bancroft said the doors were open for employees to come in. GC Ex. 11-B. Maini yelled “nobody is coming in.” GC Ex. 11-B.<sup>29</sup>

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<sup>28</sup> The Judge properly accepted three transcripts of the audio portions of three videos. GC Ex. 10-B, 11-B, and 12-B. The Board and judges routinely rely on stipulations with regard to transcripts of recordings offered at hearing. *See Gen. Die Casters, Inc.*, 359 NLRB 89, 136 n.34 (2012) (Board affirmed decision in which a judge admitted an audio recording and a transcript prepared by a respondent after the parties stipulated to the accuracy of the transcript); *Algreco Sportswear Co.*, 271 NLRB 499, 505 (1984) (Board upheld a decision in which a judge admitted a recording of a meeting along with a transcript prepared by the General Counsel after a respondent listened to the tape, compared it to the transcript, and agreed the transcript was substantially accurate). Indeed, the Board has upheld decisions in which judges receive transcripts offered by only one party. *See, e.g., Orange County Publ’ns*, 334 NLRB 350, 354 (2001) (Board upheld a decision in which a judge admitted a recording of a meeting and a transcript prepared for the union by a court reporting service over a respondent’s objections); *E. Belden Corp.*, 239 NLRB 776, 782 (1978) (Board upheld a decision in which a judge admitted a recording made by an employee and a transcript prepared by that same employee over a respondent’s objections); *Wellstream Corp.*, 313 NLRB 698, 711 (1994) (Board upheld a decision in which a judge admitted a transcript over the objections of a respondent).

<sup>29</sup> The Judge properly accepted the transcript pursuant to a stipulation by the parties. Tr. 407. Although there were inaudible portions, the parties agreed that the transcript notates the inaudible portions and the portions that are audible are accurate. Tr. 407. The Board has held that it is proper to admit a tape recording with inaudible portions into evidence. *See Planned Bldg. Servs.*, 347 NLRB 670, 671 n.5 (2006), *overruled on other grounds by Pressroom Cleaners*, 361 NLRB 643 (2014). Furthermore, the Board routinely upholds decisions in which judges accept recordings that are of less than perfect quality or have portions that are inaudible. *See, e.g., K. W. Elec., Inc.*, 342 NLRB 1231, 1238 (2004) (accepting the recording and transcript while noting that the recording did not capture the entire conversation and was difficult to understand in parts because those factors go to weight, rather than

Murphy admitted that he told the DHL Express employees at BOS of their right not to cross the picket line. Tr. 665-66, 683. Murphy admitted that he never tried to persuade DHL Express employees to go to work. Tr. 683. Murphy explained that Local 25's position is that it does not cross picket lines, regardless of the type of picket line and whether it is primary. Tr. 665.

At about 10:00 a.m., the picketing stopped at BOS and then all DHL Express employees reported to work. Tr. 155, 341. Murphy admitted that he told the DHL Express employees to return to work after the picket line came down and he went into the facility with all the employees. Tr. 124, 341, 662. At the same time, Maini told Murphy that they were also taking down the picket line at MXG. Tr. 663.

At the conclusion of the picketing, Maini posted a video on his Facebook page in which he addressed the DHL Express employees outside BOS and thanked them for everything they had done for Local 251. GC Ex. 10-A. Maini stated that the DHLNH employees wanted their health and welfare and pension. GC Ex. 10-B. Maini explained that DHLNH proposed an unaffordable healthcare plan and that Local 251 wanted the employees in the Teamster health and welfare and pension funds. GC Ex. 10-B. Maini stated that DHLNH said they would never associate their name to a Teamster pension. GC Ex. 10-B. Maini explained “[s]o we made the decision that we were going to get into a car and come up here and strike ‘em and hit ‘em where it hurts the most because DHL, well they are somewhat liable for this too because they could step in and do the right thing and help fund the IC. Bring the ICs, uh, monetary level up to cover some of these benefits, make it more appropriate, make it a living wage for all.” GC Ex. 10-B.

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admissibility); *Clements Wire & Mfg. Co.*, 257 NLRB 206, 208 n.5 (1981) (receiving a tape into evidence with many distortions, incomplete sentences, and gaps); *see also United States v. Parks*, 100 F.3d 1300, 1305 n.2 (7th Cir. 1996) (holding that “partially unintelligible tape recordings are admissible unless the unintelligible portions are so substantial as to render the entire recording untrustworthy” and any inaudibility of a portion of a tape is relevant only to the weight of the evidence and not its admissibility).

Maini then thanked Murphy who he said he called the prior night to come out and meet him at BOS at 4:00 in the morning. GC Ex. 10-B. Maini said that Murphy would let the employees know if there is any more action. GC Ex. 10-B. Maini admitted that IC refers to the independent contractor—DHLNH. Tr. 307.

As a result of the activity on May 1, the couriers left BOS to deliver packages later than their normal time of 9:30 a.m. Tr. 155-56. Although DHL Express employees who work out of BOS typically handle the incoming freight at Logan Airport each morning, DHL Express management had to handle the incoming freight on May 1 after the DHL Express employees did not report to work. Tr. 182-83. Thus, the process was delayed and the freight that was to be delivered by the couriers that morning was still at Logan Airport at 10:30 a.m. when the DHL Express employees finally reported to work. Tr. 155-56. Furthermore, freight on the JFK truck that should have been delivered to MHT had to be held at BOS for an entire day. Tr. 157. The delay was a result of the fact that there were no DHL Express employees working at BOS to transport the freight from BOS to Logan Airport for consolidation with other inbound freight that is transported to MHT on Tuesdays. Tr. 157, 172.

On May 8, DHL Express suspended all sixty-three employees for not reporting to work as scheduled. Local 25 Ex. 2; Tr. 632.

#### **D. Respondent Unions Block Access at BOS on May 1**

Throughout the morning of May 1, Local 251 and Local 25 blocked several vehicles from entering and exiting BOS in the presence of employees, including the JFK truck and trucks driven by Perry. At about 5:00 a.m., Perry went outside the facility and asked Murphy what was going on. Tr. 137. Murphy said that he was there representing the PVD drivers and that he was not going to allow the JFK truck to pull onto the facility. Tr. 138, 207. The JFK truck is a white

truck driven by a third-party company and arrives at BOS each morning around 5:00 a.m. with freight from JFK Airport. Tr. 138-39, 143, 169. Upon arrival, the JFK truck normally pulls up to the front of the facility onto dock doors and the freight is unloaded from the trailer. Tr. 139.

Shortly after 5:00 a.m. on May 1, the JFK truck pulled up to the front of the facility and the picketers stopped the truck so it was not able to back onto the facility. Tr. 139, 196, 208. One of the four picketers approached the JFK truck and spoke to the driver, while Murphy stood about five to six feet away. Tr. 139, 197. Photographs show the JFK truck stopped outside the facility on the street and a picketer at the cab of the truck speaking to the driver with Murphy standing nearby facing the driver. GC Ex. 4, 5; Tr. 140-41. Four DHL Express employees and Maini also stood nearby as the JFK truck was stopped. GC Ex. 4; Tr. 140. Perry took the photographs shortly after the JFK truck arrived. Tr. 143. Afterward, Perry spoke to the JFK driver who looked angry. Tr. 209, 216. In response to the driver telling Perry that he could not wait because he was not getting paid, Perry told the driver to standby and wait for his dispatcher. Tr. 147, 209, 215-16.<sup>30</sup> A police officer arrived about ten to fifteen minutes after the JFK truck arrived. Tr. 168. The police officer spoke to Perry, the JFK truck driver, and the picketers about what was going on. Tr. 147, 168. The police officer then provided escort for the JFK truck to back onto the facility. Tr. 147, 168. The JFK truck reached the bay doors at about 5:25 a.m. Tr. 147.

At about 7:30 a.m., Perry attempted to leave BOS to drive to Logan Airport and receive inbound freight for delivery. Tr. 152. Perry initially drove a DHL branded pickup truck from the parking lot toward the exit at BOS. Tr. 152. When Perry attempted to leave the parking lot, about twenty to thirty DHL Express employees stood in front of the exit to the parking lot. Tr.

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<sup>30</sup> Although the statement by the driver was not offered for the truth of whether he could not wait or was not getting paid, it shows the context of the situation. Tr. 213-14.

152-53, 201-02. The employees stood in front of his truck about six to ten feet away. Tr. 152-53, 201-02. Perry waited in his truck for them to move for about ten to fifteen minutes before pulling back into the lot and parking the truck. Tr. 153, 202-03. Perry went inside the facility through the side employee entrance and contacted the police to return to the facility. Tr. 204. Perry then took a different DHL branded vehicle and attempted to leave through an overhead ramp door. Tr. 153. At that point, two picketers—Sarong Rath and Mike Fogarty—moved in front of his vehicle and blocked his exit from the station. Tr. 153, 204, 1108. Rath admitted that they moved in front of the space when Perry was driving his truck out of the loading dock because they saw he was trying to exit. Tr. 1111. Perry took a photograph while stuck in his vehicle that shows the two picketers blocking his exit. GC Ex. 7. Rath admitted that he observed Perry's truck at the loading dock for about fifteen minutes while he stood in front of it. Tr. 1108. The photograph shows there are curbs on each side of the exit path and Rath further testified that there is a dumpster on the right side next to the curb. GC Ex. 7; 1109. As Rath admitted, Perry could not have driven to either side to get around the picketers. Tr. 1109. Perry waited for the police to arrive and then explained to the police what was happening and asked that the police officer remove the picketers from his path. Tr. 154, 205. Perry was then able to exit to drive to the airport. Tr. 155. It took Perry thirty to forty minutes to get out of the facility because of the Respondent Unions blocking the exits. Tr. 155.

At about 8:00 a.m., Evans and Bancroft arrived at BOS. Tr. 321. Upon arrival, there were four picketers with Maini blocking access to the parking lot and about thirty DHL Express employees standing off to the side. Tr. 321-23, 365, 376. Murphy was also standing nearby. Tr. 322, 377-78. Evans stopped the car and Bancroft approached the police officers to ask that they allow them access to the parking lot. Tr. 322-23. The police officers instructed the picketers to

move and the picketers eventually moved after a couple of minutes to allow access to the parking lot. Tr. 323, 365-66.

**E. Respondent Unions Picket at MXG on May 1**

Simultaneously, Respondent Unions engaged in picketing at MXG. At about 8:00 a.m. on May 1, Smolinsky arrived at MXG and parked his car in the community lot. Tr. 234, 430-32, 533. Smolinsky walked to the top of the driveway at the entrance of Otis Street and observed three DHLNH employees wearing DHL uniforms and picket signs and a gentleman in street clothes. Tr. 426, 430, 433, 443, 479-80.<sup>31</sup> After introducing himself, Smolinsky walked back to the building and toward the side employee entrance. Tr. 234, 253. At this time, two DHL Express employees—David Grasso (“Grasso”) and Burt Yocum (“Yocum”) were working in the building. Tr. 227-28, 238, 515-16. Smolinsky rang the doorbell and was let into the warehouse by an individual wearing a DHL Express uniform (likely Grasso). Tr. 440-42, 480-82. After entering the warehouse, Smolinsky introduced himself and spoke with the individual who let him inside. Tr. 440-41. Then, DHL Express Supervisor, Tom McArdle (“McArdle”), went to the warehouse and Smolinsky introduced himself to McArdle and let him know he was there to set up a picket line. Tr. 234-35, 290, 440-42, 482. McArdle told Smolinsky to leave the building. Tr. 237, 442. Smolinsky left the warehouse, and McArdle contacted the Westborough Police Department. Tr. 237, 442. Then, McArdle realized Grasso had left the building. Tr. 240, 290-91. At about 8:30 a.m., Yocum told a DHL Express Supervisor, Joel Fiutak (“Fiutak”), that he was told by his union brothers that he had to leave the building as he left the building. Tr. 520-22, 554.

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<sup>31</sup> Although Smolinsky did not testify that the gentleman in street clothes was Michel Simone, it is a reasonable inference based on the fact that Local 251 admits Simone was present at MXG during the picketing and he would be the individual with the picketers.

Around the same time that Smolinsky came back down the driveway toward the warehouse door, Simone and the three DHLNH picketers drove down to the community lot in a car with Rhode Island license plates. Tr. 234, 517-18. The individuals wearing DHL uniforms and picket signs began walking back and forth in front of the gate on the side of the building. Tr. 518. At about 8:30 a.m., one officer from the Westborough Police Department arrived in the parking lot. Tr. 238-39.<sup>32</sup> After conversing with the police, Smolinsky, Foti, Simone, and the DHLNH employees wearing picket signs moved to the top of the driveway. Tr. 239-40, 444, 519. The individuals with the DHL uniforms proceeded to walk back and forth in front of the entrance at the top of the driveway wearing the picket signs. Tr. 240, 254, 432-33, 523.

An additional eighteen DHL Express employees, scheduled to work at MXG at 9:00 a.m. remained outside the facility throughout the morning and waited in the parking lots of a Target and an abandoned warehouse down the street from MXG. Tr. 241-42, 464-66, 523. Smolinsky learned of the employees' location at Target through a text message that he received from a DHL Express employee. Tr. 464-65, 487. Earlier that morning, Smolinsky gave the employee his telephone number while at the picket line. Tr. 477, 484. Smolinsky later learned that the DHL Express employees moved to a parking lot of an abandoned warehouse when one of the employees drove by the picket line and told him. Tr. 472-73, 487, 489.

At about 9:00 a.m., McArdle and Fiutak walked up to the group of men at top of the driveway, and McArdle read the same memorandum that Bancroft read in BOS while Fiutak recorded him with his personal cellphone. GC Ex. 12-A, 12-B, 13; Tr. 242-43, 452, 524. When they went to the top of the driveway, there were no DHL Express employees present. Tr. 296. One of the individuals asked "why are you reading this to us and we are not employees of the

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<sup>32</sup> Shortly after the officer arrived, a Local 25 representative, Joseph Foti ("Foti") arrived in the parking lot at MXG as well. Tr. 439.

company.” Tr. 296. McArdle responded that he was just doing what he was told to do. GC Ex. 12-A, 12-B; Tr. 296. After finishing the statement, McArdle and Fiutak returned to the building while the picketers continued walking in front of the entrance to the driveway as they had before McArdle read the memorandum. Tr. 254.

At around 10:00 a.m., the picketing stopped at MXG and the picketers and Union representatives left the driveway entrance. Tr. 255, 470-71, 490. Smolinsky drove to the abandoned warehouse parking lot and told the employees that the picket line was down. Tr. 473-74, 490. Smolinsky then drove to Target to confirm there were not any employees waiting there before leaving for the day. Tr. 490. Then, all of the DHL Express employees reported to work. Tr. 255.

As a result of the activity on May 1, the couriers left MXG to deliver packages at around 11:45 a.m., which is later than their normal time of 9:45 a.m. Tr. 255-57. On May 8, DHL Express suspended all MXG employees for not reporting to work as scheduled. Local 25 Ex. 2; Tr. 633, 709-10.

#### **IV. LOCAL 25 INSTRUCTS EMPLOYEES NOT TO COOPERATE WITH THE GENERAL COUNSEL**

On July 19, 2018, less than two weeks before the hearing commenced, Local 25’s Counsel left a recorded voicemail on an NLRB Board Agent’s telephone. GC Ex. 9-A and 9-B. Local 25’s Counsel informed her that Local 25 learned the NLRB was contacting employees at DHL Express. Local 25’s Counsel further stated that they instructed employees who receive a telephone call from the NLRB to ignore it. GC Ex. 9-A and B. Likewise, Local 25’s Counsel admitted on the administrative record that Local 25 instructed employees “if you’re contacted by the NLRB, ask the NLRB agent to contact our legal counsel.” Tr. 127.

Murphy admitted to contacting Grasso and instructing him to tell Local 25's attorney if he wanted to meet with the Board Agent to arrange the meeting. Murphy testified that, in July, he received a telephone call from the Shop Steward at MXG, Peter Sweeney ("Sweeney"). Tr. 655. Sweeney informed Murphy that an NLRB Board Agent was calling Grasso. Tr. 655. Murphy then admitted to calling Grasso. Tr. 656. Murphy asked Grasso who was trying to meet with him and Grasso said a Board Agent. Tr. 656-57. In response, Murphy admitted that he told Grasso if the Board wanted to speak with Grasso to call the attorney and "we" would set up that meeting. Tr. 659. Murphy admitted to having a second telephone conversation with Grasso about him meeting with the NLRB. Tr. 659-60. Murphy admitted that he told Grasso if the NLRB wanted to meet with him he should call Local 25's attorney and Local 25 would set up the meeting. Tr. 661.

### ANALYSIS

#### **I. RESPONDENT UNIONS VIOLATED SECTION 8(b)(4)(B) OF THE ACT BY ENGAGING IN SECONDARY PICKETING AT BOS AND MXG.**

Section 8(b)(4)(i)(B) of the Act forbids that a union "induce or encourage" any individual employed by any person to refuse to perform services with an object of forcing or requiring any person to cease doing business with any other person. Conduct that falls within this subsection includes "every form of influence or persuasion." *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 701-02 (1951). Section 8(b)(4)(ii)(B) of the Act forbids that a union "threaten, coerce, or restrain any person in commerce" with an object of forcing or requiring any person to cease doing business with any other person.

Although both (i) and (ii) require the same object, subsection (i) prohibits a subset of conduct that is directed toward individuals employed by a neutral employer, whereas subsection (ii) prohibits conduct that is directed toward a neutral employer. The Act prohibits a union that

has a direct dispute with one employer (the “primary”) from pressuring other employers (a “secondary” or “neutral”) who deal or do business with the primary, where an object of the union’s conduct is calculated to force or require the secondary, or neutral, person to cease dealing with the primary and thus increase the union’s leverage in its dispute with the primary. *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 632-34 (1967). These provisions implement the “dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and other forms of pressures in controversies not their own.” *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

**A. Respondent Unions Engaged In Unlawful Conduct by Picketing and Making Other Appeals to Employees.**

Respondent Unions’ orchestrated campaign of picketing at BOS and MXG constitutes unlawful conduct that is highly confrontational. Although there is no statutory definition of picketing, the “element of confrontation has long been central to [the Board’s] conception of picketing for purposes of the Act’s prohibitions.” *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 802 (2010). The central conduct that renders picketing coercive is the combination of carrying picket signs and patrolling back and forth in front of an entrance to a work site, “creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite.” *Id.* Further, the Board had held that non-picketing conduct can still be unlawful when the “conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary’s operations.” *Id.* at 806 (noting that the blocking of egress or ingress is an “obvious” example of coercive activity).

Here, it is undisputed that Respondent Unions implemented a coordinated plan to establish picket lines at both BOS and MXG on May 1.<sup>33</sup> Local 251 admitted in its amended answer and on the record that it established the picket lines. GC Ex. 1(r); Tr. 813. Local 25 representatives met Local 251 representatives and DHLNH employees wearing picket signs outside both facilities on the morning of May 1. The evidence shows the picketers carried signs and patrolled back and forth in front of the entrances to the two facilities while Local 25 and Local 251 representatives stood nearby. GC Ex. 11-A; Tr. 240, 254, 386, 432-33, 507, 518, 523. Local 25 admitted that it instructed its representatives to be present at both BOS and MXG and monitor the activities. Tr. 123. Respondent Unions' blocking of ingress and egress to BOS, discussed in further detail in Section III, is also evidence of unlawful conduct under Section 8(b)(4)(B) of the Act. The picketing violates subsections (i) and (ii) because it was directed at both DHL Express and the employees of DHL Express. Murphy admitted that they scheduled the picketing to commence at 5:00 a.m. because that was when employees first began arriving at BOS for work. Tr. 681-82. The picketing continued throughout the morning at BOS in front of an employee entrance and in the presence of the DHL Express employees standing outside the facility. Tr. 148-49, 386. The DHL Express employees at MXG became aware of the picketing at their facility by several means, including when two workers who had already reported left the building after the picketing commenced, when two employees who had not yet reported came to the picket line to speak with the Local 25 representative, and when employees waited nearby while staying in contact with the Local 25 representative. Tr. 240, 464-65, 472-73, 477, 484, 487-89, 516-17, 520.

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<sup>33</sup> As discussed below in Section II, the evidence shows that Local 25 and Local 251 engaged in a joint venture with regard to the secondary picketing and their agents acted on behalf of both Local 25 and Local 251, so they are each liable for the picketing at BOS and MXG on those bases as well.

In addition to the actual picketing, Respondent Unions made several statements to employees and in the presence of employees in further violation of Section 8(b)(4)(B) of the Act.<sup>34</sup> Statements made directly to employees of a secondary employer are unlawful under Section 8(b)(4)(i)(B) of the Act if “such statements would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer.” *E.g., Int’l Bhd. of Teamsters, Local 122*, 334 NLRB 1190, 1214 (2001) (holding that a union engaged in unlawful (i) conduct by booing and saying “scab” to the employees). Union remarks to neutral employees that “[you’re not] supposed to cross the picket” and “any time you cross a picket line, it’s not right” constitute unlawful inducements. *Constr. & Gen. Laborers, Local 304*, 282 NLRB 100, 103 (1986); *see also San Francisco Typographical Union, No. 21*, 187 NLRB 542, 542, 549 (1970) (holding that a union violated Section 8(b)(4)(B) of the Act by inducing drivers of a neutral employer when it told employees not to cross a picket line). Statements that picketing was authorized and sanctioned in reply to employees’ questions about whether any action would be taken against them if they proceeded to work constitute unlawful inducements because it suggests the employees should not cross a picket line. *See Los Angeles Bldg. & Constr. Trades Council*, 215 NLRB 288, 290 (1974).

Here, Murphy admitted on direct examination that he told the DHL Express employees at BOS of their right not to cross the picket line. Tr. 665-66, 683. According to Evans’ unrebutted testimony, after Bancroft read the memorandum to DHL Express employees outside BOS, Murphy responded in the presence of employees that Local 25 respects picket lines and asked the

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<sup>34</sup> The Board does not require that the inducement or statement be directed toward the neutral employees to constitute a violation of the Act. *See Serv. Employees Int’l Union, Local 525*, 329 NLRB 638, 639 n.10 (1999) (finding “an express inducement of [neutral] employees to strike is not a necessary predicate to a finding” of a violation of the Act if conduct directed at neutrals and customers is open and notorious because the foreseeable consequence is to appeal to employees to cease services for the employer).

employees not to cross. Tr. 326.<sup>35</sup> Evans also credibly testified that, in response to a DHL Express employee's question whether they could be fired, Murphy said not if the employees stayed out of work for less than twenty-four hours. Tr. 326. Likewise, an audio recording shows that after Bancroft said the doors were open for employees to come to work, Maini yelled that "nobody is coming in." GC Ex. 11-B. At MXG, Smolinsky's arrangement with the DHL Express employees in which they understood that Smolinsky was at the picket line outside MXG and they should wait until Smolinsky notifies them to report to work is another independent violation. That understanding is exhibited by the fact that an employee came to the picket line to get Smolinsky's contact information and update him on their initial location, a second employee updated Smolinsky when they changed locations, and Smolinsky went to notify the employees when the picketing ceased so they could report to work. Tr. 464-65, 472-74, 477, 484, 487-90. Smolinsky even went as far as to enter the warehouse and speak with a DHL Express employee just before the two employees who had already reported left the building. All of this conduct constitutes unlawful activity under Section 8(b)(4)(i)(B) of the Act because it is reasonably understood as a signal or request for DHL Express employees to refrain from crossing the picket line and working.<sup>36</sup> Because the inducements of the DHL Express employees were successful

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<sup>35</sup> Evans' testimony along with Murphy's repeated admissions should be credited over Murphy's testimony on cross-examination in which he denied telling anybody not to cross the picket line and claimed that he only told them their rights under Article 8 of the parties' contract. Tr. 709. Evans' thorough and detailed account of the event is inherently more credible than Murphy's testimony consisting of a flat denial of the unlawful statement. *See Automated Waste Disposal, Inc.*, 288 NLRB 914, 922 (1988); *see also Weiss Mkt., Inc.*, 325 NLRB 871, 888 (1998) (finding General Counsel witnesses' account of a meeting "more spontaneous and detailed" than accounts provided by employer witnesses, and therefore more credible). During his testimony, Murphy admitted that his memory is not great and his poor recollection of events when questioned by the General Counsel as compared to Counsel for the Unions is a sign of evasiveness. *E.g.*, Tr. 627-28, 635-37, 641, 648, 650. And, regardless of any ultimate credibility determination with regard to Murphy's testimony, his admissions on direct testimony on this subject should further be relied on because they are admissions against interest. *See Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 131 n.2 (1993). Nevertheless, even Murphy's claim on cross-examination that he told the employees of their rights under Article 8 is an unlawful statement. As Murphy himself testified and Local 25's Counsel admitted, that means he told the employees of their rights not to cross the picket line. Tr. 123, 683.

<sup>36</sup> Regardless of any conclusion with regard to joint venture status or individuals acting as agents of both Unions; the statements by the union representatives are attributable to their respective Unions. Thus, Local 25 and Local 251

and none of the DHL Express employees reported to work during the picketing, the conduct restrained and coerced DHL Express and is also a violation of Section 8(b)(4)(ii)(B) of the Act. *See Los Angeles Bldg. & Constr. Trades Council*, 215 NLRB at 290.

**B. Respondent Unions Acted With An Unlawful Object.**

Respondent Unions' conduct has an unlawful secondary object of disrupting DHL Express' operations to pressure DHL Express to influence the contract negotiations between DHLNH and Local 251. In determining whether a union has an unlawful object, the inquiry is "often an inferential and fact-based one, at times requiring the drawing of lines 'more nice than obvious.'" *NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 81 (1985). It is well settled that the forbidden object need not be the union's sole object; the union's conduct is proscribed so long as the forbidden object is *an* object of the conduct. *Denver Bldg. & Constr. Trades Council*, 341 U.S. at 688-89.

Strikes and picketing might have a number of unlawful and lawful objects that might be ultimate, alternative, conditional, or immediate. *See Retail Clerks Union, Local 770*, 145 NLRB 307, 308 (1963). "[T]he ultimate objective of a strike may be, not to bring about a cessation of business between the primary and secondary employers, but in fact to increase it, so as to increase the employment opportunities of the union-represented employees." *Id.* "The immediate objective, however, may be to cause a cessation of business between the two employers, as a means of exerting pressure to achieve the ultimate object. If the strike has such an immediate objective, it is unlawful." *Id.* at 308-09.

The law interprets the statutory language concerning "cease doing business" as only requiring an object of interfering with or disrupting the neutral's business, rather than a complete

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both independently violated Section 8(b)(4)(B) of the Act through the statements made by Murphy, Maini, and Smolinsky.

termination of operations. While rejecting a narrow reading of “cease doing business” as “requiring that the union demand nothing short of a complete termination of the business relationship,” the Supreme Court held that it was sufficient that “the union’s objective was to force [the general contractor] to use its influence with the subcontractor to change the subcontractor’s conduct.” *NLRB v. Local 825, Int’l Union of Operating Eng’rs*, 400 U.S. 297, 304 (1971). The Board has since held that the “cease doing business” object does not require a complete cessation of business because it also includes conduct that is intended or likely to disrupt or alter the business dealings. *See, e.g., Road Sprinkler Fitters Local Union 669*, 365 NLRB No. 83, slip op. at 7 (May 23, 2017); *Serv. Employees Int’l Union, Local 525*, 329 NLRB at 675; *Gen. Longshore Workers, Local 1418*, 235 NLRB 161, 168 (1978).

Here, there is direct evidence of a secondary objective because the record establishes that Respondent Unions’ picketing campaign had an object of disrupting DHL Express’ business operations to enmesh DHL Express in the labor dispute between Local 251 and DHLNH. A Facebook post by Local 251 on May 1 directly reveals this object of the picketing. GC Ex. 14. The post states that Local 251 was in BOS shutting down DHL Express. The following sentence in the post provides “[g]ive DHLNH Quality Healthcare and Pension for all.” Thus, the post shows that the Unions had an object of shutting down DHL Express in order to put pressure on DHLNH in contract negotiations.

The evidence shows that Local 251 had a labor dispute only with DHLNH. The picket signs and social media posts from April 30 and May 1 show that Local 251 was engaged in a labor dispute only with DHLNH. GC Ex. 6, 14, 28, 30. The picket signs themselves state “ON STRIKE AGAINST DHLNH Good Healthcare Quality Retirement Teamsters Local 251.” GC Ex. 1(r). Recordings from the mornings of April 30 and May 1 show that Maini admitted the

primary labor dispute is over the wages and benefits DHLNH would provide to the employees. GC Ex. 10-B; CP Ex. 21.

Despite the fact that the dispute was with DHLNH, the picketing campaign targeted DHL Express. This is plainly shown by the fact that DHLNH was not present at either station during the picketing. Furthermore, the email exchanges between Local 251 and Local 25 show that the Unions targeted DHL Express facilities, rather than DHLNH, and sought to “shutdown” the DHL Express locations. Local 251’s Counsel admitted, on the record, that Local 251’s “object was to influence DHL Express to fund the collective bargaining agreement,” and the picketing was an “attempt to fulfill the collective bargaining agreement regarding their health plan and their pension plan.” Tr. 750, 778.<sup>37</sup> The record shows that Maini yelled to DHL Express representatives that if they wanted the picketing to stop then they should come to the table. GC Ex. 11-B; Tr. 329. Maini then admitted that they made the decision to come and strike DHL Express and “hit them where it hurts because they were somewhat liable and could step in and do the right thing with DHLNH.” GC Ex. 10-B. Thus, Local 251 had an intermediate objective to “shutdown” DHL Express in order to reach its ultimate objective of pressuring DHLNH to make certain economic concessions in the contract between Local 251 and DHLNH, a clearly unlawful object under the Act.

Furthermore, Local 25 acted with an unlawful objective of supporting Local 251’s labor dispute with DHLNH. A union is not insulated from the Act merely because it engages in picketing or other activity in support of a different union’s labor dispute, rather than its own labor dispute. The Board has held that two unions violated Section 8(b)(4)(B) of the Act even though they did not have an independent objective of their own because both were “cooperating

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<sup>37</sup> Taibi admitted that what the relevant individuals really mean when they refer to “funding the collective-bargaining agreement” is that DHL Express would increase the price it paid to DHLNH for services under their Cartage Agreement. Tr. 1006.

with” and “furthering the objectives” of a third union. *See Lathers Local Union No. 252*, 159 NLRB 550, 551, 551 n.1 (1966) (holding that the unions violated the Act when business agents ordered and induced employees of neutral employers to leave their jobs). The Board has also found a representative of one union that joined another union’s representative in picketing at a job site saying “birds of a feather stick together” acted just as unlawfully as the representative who had the dispute with the employer because they picketed with the same object. *See Gen. Teamsters Union Local No. 126*, 200 NLRB 253, 257 (1972). Here, Murphy explicitly admitted that he was there to support Local 251. Tr. 138, 207. Local 251 confirmed this support by thanking Murphy for “standing strong and fighting for Local 251 members” in Facebook posts. GC Ex. 15, 16. At the conclusion of the picketing, Maini posted a video on his Facebook page in which Maini thanked Murphy and the DHL Express employees for their support. GC Ex. 10-B. Therefore, both Local 251 and Local 25 engaged in unlawful secondary picketing in violation of Section 8(b)(4)(B) of the Act.

## **II. RESPONDENT UNIONS ENGAGED IN A JOINT VENTURE AT BOS AND MXG ON MAY 1.**

Respondent Unions’ picketing campaign constitutes a joint venture, so they are each responsible for the other’s acts and unfair labor practices in connection with the picketing at BOS and MXG on May 1. The Board finds a joint venture among unions when they engage in a joint course of action to accomplish a common purpose. *See Seattle Dist. Council of Carpenters*, 114 NLRB 27, 30 (1955) (finding a joint venture where only one union established a picket line seeking to organize an employer because the one union’s activity along with the action by the other unions, “whose manifest purpose was to implement and further the effectiveness of [the one union’s] activity, were all directed toward the same end, namely, to secure the unionization of” the employer’s employees). In a situation in which one union had a labor dispute and

established a picket line, the Board found another union without a labor dispute engaged in a joint venture with that picketing union because it had a policy of supporting other sister locals' labor disputes by requiring its members to respect others' picket lines; an agent of the union maintained surveillance of the picket line established by the picketing union; and that agent indicated approval of the picket line to employees. *Retail Fruit & Vegetable Clerks' Union, Local 1017*, 116 NLRB 856, 856, 856 n.14 (1956); *see also Sheet Metal Workers Local Union No. 19*, 316 NLRB 426, 434 (1995) (holding that five picketing unions engaged in a joint venture because they all had the same purpose and they were affiliated with the same international union and coordinated their activities in furtherance of their shared dispute).

Here, Local 251 and Local 25 planned and coordinated the picketing by email and subsequent conversations on April 30. GC Ex. 45-52; CP Ex. 3; Tr. 628-29, 635-37, 681. They coordinated specific locations and specific start times. GC Ex. 47; Tr. 635-37, 681. Emails from Local 25's Principal Officer, O'Brien, reveal the collective purpose by stating that "[w]e should shut down [Connecticut] as well . . . ." and "let's take them all down at once . . . ." GC Ex. 52; CP Ex. 3 (emphasis added). The Unions then implemented their common plan when their representatives met at BOS and MXG on May 1 with the same purpose of supporting Local 251 in its labor dispute with DHLNH. Facebook posts show Murphy standing with the picketers at BOS along with a caption stating that Murphy stands strong with Local 251. GC Ex. 15. Similar to the joint venture in *Retail Fruit*, Local 25 admits that it has a policy of "respecting" other union's picket lines, Tr. 665-66, 683; Murphy and Smolinsky monitored the picket lines, Tr. 123; and Murphy and Smolinsky signaled approval of the picket lines throughout the morning with their conduct and statements. The joint venture lasted through the conclusion of picketing when the Unions took down the picket lines at BOS and MXG at the same time and Local 25 directed

the DHL Express employees to return to work. Tr. 155, 341, 662-63. At the conclusion, Maini made a speech posted on Facebook that thanked Murphy and Local 25 and informed DHL Express employees that Murphy would let them know if there was any further action. GC Ex. 10-A and B.<sup>38</sup>

### **III. RESPONDENT UNIONS VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY BLOCKING INGRESS AND EGRESS TO BOS ON MAY 1.**

It is a violation of Section 8(b)(1)(A) of the Act for a union to block ingress or egress at a facility. The Board's standard is whether the union's conduct was "reasonably calculated to coerce anti-union or non-union [employees] in the exercise of their right[s]" to refrain from joining the union. *Int'l Bhd. of Elec. Workers, Local 98*, 350 NLRB 1104, 1107 (2007). The Board has held that blocking access to a workplace constitutes unlawful restraint and coercion, including by having picketers place themselves in the paths of vehicles attempting to enter the workplace to arrive for work or to perform assigned tasks. *See id.* Efforts to prevent employees from reporting to work by impeding access to an employer's facility is unlawful. *See N. Am. Meat Packers Union*, 287 NLRB 720, 721 (1987). Indeed, even where blocking is not altogether successful, the act of amassing a hostile crowd at a building's entrance in a confrontational manner is coercive and unlawful. *See id.*

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<sup>38</sup> Even if there is no finding of a joint venture, Local 251 and Local 25 are responsible for the acts of each other's representatives that were acting as agents of both Unions at BOS and MXG on May 1. The Board applies the traditional tests of agency to determine whether a union should be held responsible for the acts of individuals with regard to picketing. *Metro. Dist. Council of Philadelphia & Vicinity*, 281 NLRB 493, 498 (1986). Under those principles, an agent's authority may be actual or apparent, and the principal may create either type of authority expressly or by implication. *See Int'l Bhd. of Elec. Workers, Local 98*, 342 NLRB 740, 741-43 (2004) (holding a union granted a representative of another union implied actual authority to speak on its behalf at a meeting to further their interests and gave him apparent authority by presenting him in ways that would lead employees to conclude he was an authorized representative in connection with an organizing campaign). Here, the email exchanges from April 30th show that Local 251 granted Murphy and Smolinsky implied actual authority to act on their behalf with regard to the picketing and Local 25 granted Maini and Simone implied actual authority to act on its behalf at the picket line. Murphy also acted as an agent of Local 251 based on apparent authority because of the way that Maini and Local 251 held him out as an agent of Local 251 at BOS. For example, Maini's speech at the conclusion of the picketing shows that Murphy was there at the request of Local 251 and to support Local 251.

Here, the record shows that Respondent Unions unlawfully blocked several vehicles at BOS on May 1. First, Respondent Unions blocked the JFK truck when it arrived to deliver freight at 5:00 a.m. According to unrebutted testimony from Perry on both direct and cross-examination, as the JFK truck was approaching BOS, Murphy told him that he was at BOS to support Local 251 and he was not going to allow the JFK truck onto the facility. Tr. 138, 207.<sup>39</sup> The picketers stopped the JFK truck as it was going to back up to the dock doors and then it remained stopped after a picketer approached the truck and spoke to the driver. GC Ex. 4-5; Tr. 139, 198. After about twenty-five minutes, a police officer arrived and spoke to the parties before escorting the truck onto the facility. Tr. 147, 168.

Any argument by Respondent Unions that the JFK driver voluntarily stopped his truck or that Perry stopped the JFK truck is disputed by the evidence. First, Murphy admitted to Perry that the Unions were going to block the truck prior to doing so. Second, the JFK driver looked angry when Perry approached him. Tr. 209, 216. Only in response to the JFK driver saying he could not wait because he was not getting paid, did Perry tell him to wait for his dispatcher. Tr. 147, 209, 215-16. The record also shows that prior to Perry speaking to the driver, the JFK truck had already been stopped, the picketer had already spoken to the driver, and Perry had already taken the photographs. Thus, Perry was only attempting to get the driver to wait so that Perry could get him access to the facility. It could not have been Perry's statement that caused the truck to stop because his truck had already been stopped for a period of time prior to Perry even approaching the truck. Also, the fact the JFK driver backed onto the facility once the police provided assistance proves the cause of the JFK truck not entering the facility was not the driver's disinterest in doing so but rather his inability to do so without a police escort.

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<sup>39</sup> Perry testified about this statement consistently on both direct and cross-examination. Overall, Perry's testimony was poised, forthright, and consistent and should be credited. Even though Murphy testified as a witness, he did not dispute Perry's testimony or deny making any such statement so Perry's testimony is unrebutted.

Afterward, Respondent Unions blocked two trucks that Perry attempted to drive to Logan Airport. Initially, twenty to thirty DHL Express employees blocked the exit to the parking lot as Perry sat in his truck waiting to get out for ten to fifteen minutes. Tr. 152-53. After Perry got in a second truck and attempted to exit an overhead door, two DHLNH picketers—Rath and Fogarty—blocked his exit by standing in front of his truck until a police officer arrived to provide assistance for Perry to exit. GC Ex. 7; Tr. 154. Rath’s own testimony shows that the picketers deliberately and knowingly moved in front of Perry’s truck when they saw it exiting the facility to prevent it from leaving. Tr. 1108, 1111. In addition, later in the morning, the picketers blocked the vehicle driven by Evans and Bancroft and police officers had to instruct the picketers to move to provide access to the parking lot. Tr. 323, 365.

In addition to the blocking of vehicles, the congregation of a large group of individuals at a facility is unlawful under Section 8(b)(1)(A) of the Act because it “tends to place employees in fear of penetrating through the group to enter or leave their workplace.” *See Metro. Dist. Council of Philadelphia*, 281 NLRB at 498 (finding the congregation of twenty to twenty-five individuals at and near the entrance to a worksite where employees appear for work unlawful because it reasonably intimidates employees from exercising their Section 7 rights to work during the activity). The group of twenty to thirty DHL Express employees that stood near the entrance to BOS and at the side of the entrance to the parking lot throughout the morning along with the DHLNH picketers is further evidence of unlawful conduct.

The fact that Respondent Unions blocked vehicles driven by an employee of a third-party company and DHL Express managers is irrelevant because employees were present and witnessed each incident that occurred immediately outside BOS where the employees were standing. GC Ex. 4; Tr. 140-41, 153, 323. Section 8(b)(1)(A) of the Act applies to the blocking

of vehicles driven by nonemployees, such as supervisors, if employees are present or if the incident is likely to come to their attention and would reasonably tend to restrain them in the exercise of their Section 7 rights. *See N. Am. Meat Packers*, 287 NLRB at 721 n.5. “[C]onduct directed against nonemployee third parties can violate Section 8(b)(1)(A) where such conduct, as here, became or was sure to become known to employees and would reasonably tend to restrain or coerce them in the exercise of Sec. 7 rights.” *See id.* The Board has held that blocking of trucks driven by nonemployees is unlawful because it can be inferred that conduct during normal business hours was observed by employees. *See Shopmen’s Local Union No. 455*, 243 NLRB 340, 348 (1979) (holding that a union violated the Act by blocking a truck attempting to leave the loading dock because there were ten pickets in front and on both sides of the truck with policemen taking several minutes to break up the congregation).

The fact that the JFK truck was eventually able to unload freight or that Perry was eventually able to depart BOS does not forgive the Unions’ unlawful conduct. Indeed, intervention by police officers was necessary to provide access and resolve each instance of blocking. Tr. 147, 154-55, 168. It took the JFK truck about twenty-five minutes to gain access and it took Perry thirty to forty minutes to exit, which is more disruptive and lengthy than other instances in which the Board found unlawful blocking. Tr. 147, 155, 168, 1108. “[B]locking an entrance or an exit even for a short period of time constitutes restraint and coercion” within the meaning of Section 8(b)(1)(A) of the Act. *Id.* at 346. In reversing a judge’s finding that a union’s conduct was lawful because it was peaceful and only caused a delay of one to five minutes, the Board found that picketers stopping a car on four occasions in the presence of union agents violated the Act. *See Metal Polishers Int’l Union, Local 67*, 200 NLRB 335, 335 (1972). The Board explained that the union interfered with the rights of non-striking employees to refrain

from participation in union activities, including strikes, by blocking access to the plant of cars of employees and other people seeking access even if done peacefully and for a short period of time. *See id.* Moreover, the absence of physical violence does not make the conduct lawful because the union's conduct causes the drivers to be faced with the choice of "running down the pickets, at the risk of inflicting serious injury, or driving away." *Id.* at n.10. Instead, the "interposition of passive force to prevent employees from going to work" is unlawful restraint. *Id.* Thus, the law does not require violence or arrests as a predicate for unlawful blocking, nor does it require that the JFK driver or Perry honk or drive closer to the picketers to prove blocking.

Both Local 25 and Local 251 are responsible for the misconduct in BOS because both Unions established the picket line at that location and participated in the blocking.<sup>40</sup> *See Metro. Dist. Council of Philadelphia*, 281 NLRB at 497-98 (finding the union adopted the acts of the picketers because union agents were present and refused to ask the picketers to remove themselves from the front of the entrance). Maini and Murphy were both present at BOS during all of the blocking incidents and photographs show they were standing very close to the JFK truck after it was stopped. Neither Maini nor Murphy took any action to stop the misconduct by asking the picketers to move or otherwise separate themselves from the blocking. The record shows even more than mere presence and approval because Murphy actively participated and encouraged the blocking by announcing that he would block the JFK truck. Therefore, Respondent Unions unlawfully blocked vehicles at BOS in violation of Section 8(b)(1)(A) of the Act.

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<sup>40</sup> As discussed above in Section II, Local 25 and Local 251 acted as a joint venture when engaged in the picketing, so they are both liable for the blocking based on that theory as well.

Although a Section 8(b)(1)(A) violation was not specifically plead with respect to Local 25, the Complaint allegations set forth a basis to find such a violation here. First, the Complaint alleges that Local 251 violated Section 8(b)(1)(A) of the Act by blocking ingress and egress at BOS on May 1, 2018. Second, the Complaint alleges that Local 25 engaged in secondary activity in BOS on May 1, 2018, which includes the blocking of vehicles. *See United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 806 (2010) (explaining the blocking of egress or ingress is an obvious example of coercive activity that is still unlawful under Section 8(b)(4)(B) of the Act even though it is non-picketing conduct if it causes, or could be expected to cause, disruption to the secondary's operations). As a result, the question of whether Local 25 engaged in blocking at BOS was fully litigated because it overlaps with the same evidence as the other allegations. Indeed, Local 25's Counsel specifically cross-examined the General Counsel's witnesses that were present at BOS with regard to the alleged blocking. *Tr. 193-99, 376-78*. Thus, the General Counsel moves to amend the Complaint to add an allegation that Local 25 violated Section 8(b)(1)(A) of the Act by blocking ingress and egress at BOS on May 1, 2018. *See Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989) ("It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.").

#### **IV. RESPONDENT UNIONS DID NOT PROVE THAT DHL EXPRESS LOST ITS NEUTRAL STATUS AS AN ALLY.**

Board law is clear that the General Counsel meets the burden of proof in the 8(b)(4)(B) context by showing that the union directed conduct to "an ostensibly neutral company." *See Serv. Employees Int'l Union, Local 525*, 329 NLRB at 639 n.15. The union may then defend itself by showing that the "company is an ally of the primary or has otherwise enmeshed itself in

the primary dispute. The union bears the burden of proof as to this issue.” *Id.* While describing the union’s burden as a “heavy” one, the Board specifically warned that any attempt to lessen or shift a “union’s clear burden of demonstrating loss of neutrality” ignores Congress’ clear intent when enacting Section 8(b)(4)(B) to shield neutrals from outside disputes. *Id.* at 639 & n.15. A union can meet this burden by establishing that the targeted entity is an “ally” of the primary employer by showing that: (1) the entity performed “struck work” for the primary employer; *or* (2) the entity is a single employer with the primary employer. *Id.* at 639-40.

When setting out the burdens currently applicable to the parties in the secondary picketing context, the majority explained that there is no legal support for the dissent’s conclusion that a targeted entity lost its neutrality by becoming too entwined in the union campaign even though the entity did “not fit within any of the definitions in existing Board law which would render them primary as opposed to secondary employers.” *Id.* at 640. The Board explained that part of the flaw in this reasoning is that the dissent “erroneously assumes that ‘wholly unconcerned’ means that neutrals must be totally disengaged from a labor dispute to retain their neutrality;” however, that is not the law. *Id.* As an example, the Board discussed that a customer may want a supplier to resist union demands for a wage increase out of concern that it would result in a price increase. *See id.* Even though that customer is not “wholly unconcerned” with the supplier’s labor dispute, it does not lose its neutrality or status as a secondary party. *See id.* at 640-41. Thus, Respondent Unions must establish that the struck-work branch exists or that the two entities are a single employer to meet its burden under the ally doctrine because merely showing a business relationship based on some degree of operational integration or physical closeness is not sufficient.

In a decision issued almost twenty years prior to *Service Employees International Union,*

*Local 525*, 329 NLRB 638, the Board concluded that an employer lost its neutrality because it both performed struck work and was a single employer with the primary employer. *See Teamsters, Local Union No. 560*, 248 NLRB 1212, 1215 (1980). In that case, the Board had said that the two branches of the ally doctrine are not to “take on lives of their own,” and are tools that must be used to reflect the congressional policies behind the notion of neutrality. *See id.* at 1214. To the extent language in that decision implied a framework that did not require a finding of at least the struck-work branch *or* single-employer status, that prior framework is overturned by the standard set forth in *Service Employees International Union, Local 525*, 329 NLRB at 640.

**A. DHL Express Did Not Perform Any Struck Work.**

Under the ally doctrine, an employer may lose its neutral status if it “performs ‘struck work’ for the primary employer, that is, work that he would not have performed ‘but for’ the strike at the primary employer’s facility.” *Newspaper & Mail Deliverers’ Union of N.Y. & Vicinity*, 271 NLRB 60, 67, (1984). An employer does not forfeit its neutral status by continuing “business dealings with the struck employer, in the same manner and to the same extent as it had before the strike.” *United Steelworkers of Am.*, 127 NLRB 823, 826 (1960). Moreover, the primary and neutral employers must have “devised and originated” an arrangement in which the neutral employer agreed to perform the struck work and accepted the work with the knowledge that it was helping the primary employer. *See Laborers Int’l Union, Local 859*, 180 NLRB 502, 503, 506 (1969) (holding that customers were not allies because they made their own arrangements for delivery work that had been done by the striking employees). In the absence of any arrangement between the primary and neutral employer, the “work previously performed by the struck employer may not be interfered with even though the secondary employees are

performing a service which, but for the dispute, would customarily be performed by the employees of the struck employer.” *Teamsters, Local 379*, 175 NLRB 459, 460 (1969) (holding that an entity did not lose its neutrality by engaging a new employer to perform the delivery of products that the primary employer had delivered prior to the strike because it did not constitute struck work).

Local 251 failed to show that DHL Express lost its neutral status by performing struck work at some point between the commencement of the strike on April 30 and the picketing on the morning of May 1. With respect to the delivery of packages from PVD, there is no evidence that DHL Express performed any delivery work of the DHLNH couriers during the strike. Indeed, Taibi admitted that he did not see Marzelli, Evans, or any DHL Express manager driving a van. Tr. 1036.<sup>41</sup> DHL Express did not perform any of the transportation of freight from Logan to PVD that is done by DHLNH. Tr. 178-79, 357, 859-60, 963-84. Instead, DHL Express supervisors confirmed that DHL Express did not transport freight from Logan to PVD nor did anyone use a DHL Express vehicle to transport the freight on April 30. Tr. 183, 358. The record shows that the DHLNH employee who typically transported freight from Logan to PVD did perform his usual job assignment on April 30. Tr. 1121. The record shows that the handling of the freight at Logan Airport is work that was performed by DHL Express employees before and during the strike so that cannot be a basis for determining that DHL Express performed struck work. Tr. 177-78, 180-81. Likewise, to the extent that Marzelli gave a package to a customer at PVD during the strike, Local 251’s witness admitted that DHL Express handled package pickups

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<sup>41</sup> Despite the fact that picket lines were up at all times and Local 251 photographed and recorded the delivery trucks leaving PVD, there is no evidence of DHL Express representatives driving the DHLNH couriers’ trucks or otherwise leaving to make deliveries, because it did not happen. Tr. 928-29, 1137-38. Local 251 also admitted that it knew P. Palker owned several other companies in the transportation industry, and the record shows that P. Palker has contracts to perform delivery services at other DHL Express stations. Tr. 1127-28. As a result, P. Palker has employees in the industry at other facilities he can use to perform deliveries in the event of a strike, and Local 251 representatives were fully aware of that fact. Indeed, the record shows that vehicles belonging to companies owned by P. Palker were present at PVD during the strike. Local 251 Ex. 42, 45; Tr. 913, 918, 926.

at PVD before the strike so that is not struck work because it was never performed by DHLNH. Tr. 916, 925-28, 1067.

DHL Express also did not perform struck work regarding any deliveries performed by the USPS on behalf of either entity. First, the record shows that DHL Express utilized the USPS for package deliveries before and after the strike. Tr. 1240. Local 251's own witness testified that the facility had a conveyor belt used to store packages for forwarding to the USPS. Tr. 830-31. Second, the only evidence that DHLNH might have used the USPS during the strike relates to freight on a DHLNH truck that was driven to a post office about three or four weeks into the strike. Tr. 919-20. The timing of the observation makes it irrelevant because it was well after the picketing at BOS and MXG. Lee admitted that DHLNH used the USPS prior to the strike as well. Tr. 919. Even still, if DHLNH had the USPS performing deliveries that it would not perform but for the strike it certainly does not make DHL Express an ally. Thus, the record does not show any instance in which work previously performed by DHLNH striking employees was then performed by DHL Express on April 30 or May 1—let alone that DHLNH received any benefit for such an arrangement.

Any argument that DHL Express somehow lost its neutrality by continuing to do business with DHLNH during the strike should be rejected because a secondary employer does not become an ally simply because it continued a business relationship. Similarly, a neutral employer does not lose its neutrality by merely providing assistance to the primary employer during the strike. For example, a neutral does not become an ally merely by storing and handling cars of the primary employer to avoid the impact of the picketing at the primary's job site and assist in combating the strike where the striking employees were car salesman because such assistance is not the performance of struck work, which was selling, not storing, cars. *See*

*Teamsters, Local 868*, 156 NLRB 67, 70 (1965). And, a neutral does not become an ally by storing equipment of a primary employer or allowing the primary employer use of a facility during a strike because that is not struck work. See *W. States Reg'l Council No. 3*, 137 NLRB 352, 353-54 (1962).

During the strike, the record shows that a DHL Express manager visited PVD to assist Marzelli with any facility issues and it hired security personnel to protect its facility. Tr. 345-46, 349-50, 361, 914, 918, 925, 1203-04.<sup>42</sup> Neither of those things constitute the performance of struck work (here delivery and picking up of packages by the couriers) and they were done to protect DHL Express—not to assist DHLNH. Moreover, both were *in response* to a strike at the facility so they are certainly not things that would have been done *in the absence* of a strike. Furthermore, the testimony and photographs regarding vehicles parked at PVD do not support an ally conclusion. DHL Express is not an ally on the basis that DHLNH parked vehicles belonging to DHLNH or an affiliated company in the DHL Express parking lot or that DHL Express had Budget rental vans parked at PVD during the strike. This is because allowing an entity to park vehicles in a parking lot and storing rental vans at a facility are not the performance of struck work.

**B. DHL Express is Not a Single Employer With DHLNH.**

In determining whether two separate entities constitute a single employer, the Board examines four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *E.g., Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007); *HydroLines, Inc.*, 305 NLRB 416, 417 (1991). The single-employer test ultimately depends on all the circumstances and is characterized by the absence of

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<sup>42</sup> The record includes some evidence that a security guard initially told a DHLNH employee in the hours before the strike that he could not go to Logan Airport; however, security allowed him to complete his assignment that morning so he performed his work on April 30. Tr. 1119, 1121.

an arm's-length relationship among the companies. *See Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1284 (2001). The Board has generally held that the most significant factor is centralized control over labor relations. *See id.*<sup>43</sup>

Here, Local 251 has not argued and cannot argue that DHL Express and DHLNH are a single employer. First, there is no common management because the record shows that DHL Express and DHLNH have a completely separate management structure with different individuals involved in each managerial hierarchy. Second, there is no common ownership because the evidence shows that DHLNH is owned by P. Palker and it is affiliated with other entities he owns, including Northeast Freightways, rather than any common ownership with DHL Express, which is owned by a corporation based in Germany. Third, the parties have distinct labor relations, demonstrated by the representatives that handle labor issues for each entity; their negotiations with Local 251; their collective-bargaining agreements in the record; and the benefits offered to the DHL Express operations agents compared to the DHLNH couriers at PVD. There is no evidence of centralized control over labor relations of DHLNH employees and DHL Express had no involvement in the bargaining sessions to negotiate a contract between DHLNH and Local 251 for the couriers at PVD. Finally, the operations are not integrated to any

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<sup>43</sup> The current facts are distinguishable from *Teamsters Local 560*, 248 NLRB at 1214-15, in which the Board found a single-employer relationship existed. In that case, there was evidence of common ownership because it was one corporate entity that owned both the branch that was the primary employer and the branch that was the targeted employer. The branches also had a corporate policy of cross-shipping that allowed one branch to ship items from its warehouse to a customer even though the item was sold by another branch. *See id.* at 1214. The policy is particularly relevant for purposes of a strike because the computer systems were programmed to allow branches to ship the items in the event that another branch was unable to ship items, including if it was unable to ship because of a strike. *See id.* Here, there is no evidence of common ownership between DHL Express and DHLNH and none of the DHL Express company stations performed delivery or pickup of items for DHLNH during the strike pursuant to any corporate policy that provided for cross-shipments. In order for this case to be applicable, the situation would have to include a DHL Express corporate policy that resulted in one DHL Express company station performing deliveries for a second DHL Express company station because the second station's couriers went on strike. However, those are not the facts—PVD is an independent contractor station so there is no common ownership and no DHL Express company stations performed deliveries for PVD during the strike.

level sufficient to show a single employer relationship, particularly in the absence of the other factors.

**V. THERE IS NO DEFENSE BASED ON A JOINT-EMPLOYER RELATIONSHIP.**

Local 251's joint-employer defense is a transparent attempt to misuse the Board's law and procedures to excuse secondary picketing and should be dismissed. First, Local 251 should be precluded from arguing that DHL Express is a joint employer because Local 251 has stipulated that DHLNH is the employer of the bargaining-unit and deliberately pursued a bargaining relationship—that includes a comprehensive contract—only with DHLNH. Second, a claim of a joint-employer relationship is not a viable defense to secondary picketing by a certified union that is picketing an employer without a duty to bargain. Third, even under the most favorable joint-employer standard, the record shows that DHL Express and DHLNH are not joint employers. Fourth, the joint-employer defense itself undermines the Board's policies and procedures.

**A. Local 251 Waived Its Right to Argue that DHL Express is a Joint Employer.**

Local 251 has repeatedly admitted that DHLNH is “the Employer” of the bargaining-unit and should be precluded from asserting an after-the-fact claim of joint-employer status to excuse secondary picketing. The Board has established that “once an election agreement has been approved, a party may withdraw therefrom only upon an affirmative showing of unusual circumstances or by agreement of the parties.” *First FM Joint Ventures, LLC*, 331 NLRB 238, 238 (2000). After the representation proceeding, “in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent [] is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.” *M.H.T. Corp.*, 250 NLRB 1361, 1362 (1980).

With regard to alleged violations of Section 8(a)(5) of the Act, the Board has held that a union waives its right to claim that an employer committed such violations when it engages in a “conscious and deliberate pursuit of a bargaining relationship limited to [a different employer] alone.” *Aldworth Co.*, 338 NLRB 137, 140-41 (2002). Thus, the Board held that any violations of 8(a)(5) and bargaining obligations were restricted to the employer that the union named in the representation proceeding. *See id.* (explaining that the union was aware of the arrangement between the two employers but chose not to include the employer on the petition or otherwise identify that employer during the representation proceeding).

In a similar decision, the Board upheld a judge’s explanation that a union’s decision to name only one employer in a representation case should be given weight because it is an admission that the other entities are not joint employers. *See Goodyear Tire & Rubber Co.*, 312 NLRB 674, 688 (1993). The judge found that the union was aware of the probable relationship between the entities, but “made a deliberate decision, comparable to a waiver,” that the only employer with whom it intended to bargain was the one it named in the petition. *See id.* Moreover, the “belated contention” that these entities were joint employers was another factor that mitigated in favor of finding that no such relationship existed. *See id.* Asserting a joint-employer defense in the context of a labor dispute during bargaining is akin to asserting a joint-employer defense in the context of an unfair labor practice regarding bargaining obligations under Section 8(a)(5) of the Act. In order for a targeted entity to be lawfully picketed as part of a labor dispute, it would have to be under an obligation to bargain over that labor dispute. For that reason, the waiver analysis applied to Section 8(a)(5) allegations should also be applied in a labor dispute in the bargaining context.

The administrative record shows that Local 251 consciously and deliberately pursued a bargaining relationship with only DHLNH. Local 251 filed a petition naming DHL Express as an employer only to then withdraw that petition and later stipulate that DHLNH was “The Employer.” GC Ex. 31-35. In an attempt to explain why Local 251 filed two petitions with DHL Express as an employer only to later stipulate that DHLNH was “The Employer,” Taibi claimed that Local 251 withdrew the first petition because it did not feel that it had enough information to prove DHL Express was a joint employer. Tr. 944, 983, 988.

Throughout the following year, Local 251 bargained solely with DHLNH for a collective-bargaining agreement that they eventually reached in June of 2018. GC Ex. 39; CP Ex. 11-13, 17, 19-20. During this time, Local 251 submitted information requests to DHLNH, CP Ex. 9, 18; Local 251 and DHLNH reached interim agreements, CP Ex. 14; Tr. 943, 991-92, 1012, 1113, 1131, 1133-34; the two parties reached tentative agreements on bargaining proposals, Local 251 Ex. 67; the two parties negotiated several settlement agreements to resolve unfair labor practice charges that Local 251 filed against DHLNH, GC Ex. 44; Tr. 1018; and Local 251 and DHLNH bargained over proposed discipline for DHLNH employees. CP Ex. 8, 10, 15-16; Tr. 992-93, 996-97, 1129. Local 251 never demanded bargaining with DHL Express; DHL Express has had no role in bargaining or Local 251’s representation of the couriers at PVD; and DHL Express was not a party to any of the interim, tentative, or settlement agreements. Tr. 1006, 1239.

Thus, Local 251 not only stipulated to the identity of the employer in the representation proceeding but also reached a first contract with DHLNH. Local 251 was fully aware of DHL Express’ existence because it initially named the entity in the representation petition before intentionally deciding to remove DHL Express from the petition. Yet, prior to the picketing—

and even after the picketing—Local 251 deliberately pursued a bargaining relationship with *only* DHLNH. Local 251’s repeated refusal and failure to challenge the certification of DHLNH as *the employer* is an admission that DHL Express is not a joint employer and constitutes a waiver. Not only is it a waiver and an admission by Local 251 that DHL Express is not a joint employer, but every instance in which Local 251 bargained or negotiated a term or condition of employment with DLHNNH supports the argument that DHL Express had no involvement in that term or condition of employment. Whether it was negotiating a wage increase or union access or settling an issuance of discipline to a bargaining-unit employee, the fact that Local 251 only dealt with DHLNH on each issue is an admission that DHL Express was not involved in that issue.

**B. The Joint-Employer Defense is Not a Recognized Defense for Secondary Picketing During a Bargaining Dispute.**

In addition to the fact that Local 251 waived its right to assert a joint-employer argument, there is no Board precedent applying a joint employer-defense to excuse what would otherwise be secondary picketing in the context of a bargaining dispute with a certified employer. Although some Board decisions might appear applicable at first glance, the decisions are distinguishable because they either do not actually apply a joint-employer analysis or they relate to labor disputes outside of the bargaining context where the primary employer is the only party with a duty to bargain. For example, the Board decision that sets forth the burdens currently applicable to parties with regard to neutrality illustrates both of these distinctions. *See Service Employees International Union, Local 525*, 329 NLRB at 640. When explaining that a union could meet its burden of proving that an entity lost its neutrality by demonstrating the targeted entity is an “ally” of the primary, the Board explained that the burden might also be met by showing that the “targeted entity exercises substantial, actual, and active control over the working conditions of the primary’s employees.” *Id.* That dicta is perplexing because the Board

then cited to a portion of a judge’s decision in *Int’l Bhd. of Elec. Workers, Local 2208*, 285 NLRB 834, 838 (1987) that determined a parent company lost its neutrality in a dispute involving its subsidiary based on a single-employer analysis, rather than a joint-employer analysis. *See id.* Furthermore, that decision involved a labor dispute over organizing, rather than a labor dispute in the context of bargaining with a certified primary employer.

In an attempt to argue that the joint-employer defense is valid, Local 251 has relied on Board decisions—*Int’l Bhd. of Teamsters, Local 559*, 172 NLRB 268, 272-73 (1968) and *Milk Drivers & Dairy Employees, Local No. 471*, 209 NLRB 24, 28 (1974)—that actually applied a single-employer analysis to determine whether the targeted entity lost its neutrality. Even a Board decision that used the term “joint employer” in the context of secondary picketing actually applied the single-employer test and relied on single-employer precedent to determine neutrality. *See Teamsters, Local No. 85*, 253 NLRB 632, 635-36 (1980) (holding no ally relationship where there was some functional relationship between the entities because there was “no common ownership or financial control, no common management, and no centralized control of labor relations”); *see also P.R. Dist. Council*, 127 NLRB 900, 905 (1960) (holding two entities were subcontractors rather than joint employers as argued by a respondent in the context of secondary picketing without citing any joint-employer precedent or applying a joint-employer analysis). In a concurrence in *Teamsters Local 557*, 338 NLRB 896, 897 n.3 (2003), Member Liebman conflated the tests by asserting a union might meet its burden of showing an entity lost its neutrality because it is a joint employer while citing to *Teamsters Local 560*, 248 NLRB at 1213, which is actually a decision analyzing single employer. Despite the confusion, the joint-employer and single-employer tests are distinct tests that cannot be applied interchangeably. *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, slip op. at 13 (Aug. 27, 2015).

Moreover, reliance on a Board decision in which the primary labor dispute involves a strike in support of alleged unfair labor practices is misplaced because such a putative joint employer can commit an unfair labor practice against employees that are in a certified bargaining-unit with a different employer. *See Teamsters, Local Union No. 776*, 313 NLRB 1148, 1150 (1994) (judge applied a joint-employer analysis in a case and determined the targeted entity was not a joint employer where the primary labor dispute involved a strike in support of alleged unfair labor practices). Where a strike responds to an alleged unfair labor practice, a putative joint employer can be a party to the primary labor dispute as a joint employer involved in the commission of the unfair labor practice; however, that is very different from a bargaining dispute. It is a necessary predicate that the entity already has a bargaining obligation in order to be involved in the bargaining dispute. For that same reason, reliance on a Board decision in the bargaining context where the putative joint employer already had an established duty to bargain as a joint employer is misplaced. *See Teamsters Local Union No. 688*, 211 NLRB 496 (1974). Thus, there is not a single Board decision in the context of secondary picketing that actually applies joint-employer precedent or a joint-employer analysis to determine that an entity lost its neutrality because it was a joint employer in a bargaining dispute between a primary employer and union that is the certified representative of only the primary's employees.

It is particularly inappropriate to expand the law in the current case given the fact that DHL Express had absolutely no involvement or control over the limited issues remaining in the labor dispute at the time of the picketing. With regard to unfair labor practices, a conclusion that two entities are a joint employer does not mean that an entity is automatically liable for unfair labor practices committed by the other entity, because the Board must conclude the putative joint employer was actually involved in the unlawful conduct at issue. *See Capitol EMI Music, Inc.*,

311 NLRB 997, 1000-01 (1993) (holding that an employer was not liable for a violation of Section 8(a)(3) even though it was a joint employer because the evidence did not show that it knew of the unlawful discharge that was the basis for the violation); *see also Esmark, Inc.*, 315 NLRB 763, 763 (1994) (holding that a joint employer was liable for 8(a)(3) violations because it directly participated in the acts; however, it was not liable for violations of Section 8(a)(5) because it did not participate in those violations). Similar to the fact that the putative joint employer must have been involved in the alleged unfair labor practice, logic dictates that the putative joint employer in a bargaining context must be involved in the actual issues that are the basis for the labor dispute.<sup>44</sup>

Here, the bargaining dispute was over wages, health insurance, and pension, because DHLNH and Local 251 reached a tentative agreement on all other terms and conditions of employment for the bargaining-unit prior to the strike. Local 251 Ex. 67; Tr. 1033. Local 251's witness admitted that DHLNH objected in principle to the Teamsters healthcare plan and Teamsters pension fund. Tr. 1033-34. Therefore, it was not simply a labor dispute over bargaining a first contract, but rather a narrower labor dispute over the employees' wages, healthcare, and retirement benefits. GC Ex. 1(r), 10-B, 28, 30; CP Ex. 21. The record conclusively shows that DHL Express has never had any involvement or control over the bargaining-unit's wages, healthcare, or retirement benefits. Local 251 Ex. 74 (§3.15); Tr. 1136, 1228-30. Even if one wanted to expand the law and apply a joint-employer analysis to a labor dispute in the bargaining context, the analysis should be limited to whether the neutral was a

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<sup>44</sup> In the bargaining context outside of picketing cases, a joint employer is only required to bargain over the terms and conditions of employment that it has authority to control. *See Browning-Ferris*, 362 NLRB No. 186 at 20. For example, if a putative employer is a joint employer with regard to hiring, it is only required to bargain with respect to hiring and not over terms that it is not a joint employer with regard to. This is another reason why any extension of a joint-employer defense for picketing in the bargaining context should require a finding that DHL Express is a joint employer specifically with regard to the actual issues remaining in dispute.

joint-employer with respect to the issues that were actually in dispute at the bargaining table at the time of the picketing.

**C. DHL Express is Not a Joint Employer Even Under *Browning-Ferris*.**

As a result of the fact that the Board has never applied a joint-employer analysis to determine neutrality of a targeted employer when a union had a bargaining dispute with a primary employer, there is no Board precedent to dictate what analysis would apply to such a test. It is, however, clear that the joint-employer test set forth in *Browning-Ferris*, 362 NLRB No. 186 does not apply to secondary picketing. In response to a concern by the dissent that the majority's decision meant that neutral parties otherwise protected from secondary picketing would be treated as non-neutral parties, the majority stated that the "prohibition on secondary boycott activity" was "not at issue" and that "our decision today does not modify any other legal doctrine, create 'different tests' for 'other circumstances,' or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." *Id.* at 24 n.120.

Notwithstanding the fact that the framework in *Browning-Ferris*, 362 NLRB No. 186 is not applicable case law, DHL Express is not even a joint employer under the most favorable standard. In *Browning-Ferris*, the Board held that it may find two or more statutory employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment." *Id.* at 2. The inquiry turns on whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." *Id.* The Board held that it would no longer require that a joint employer exercise authority to control employees' terms and conditions of employment because reserved authority is relevant to the inquiry. *See id.* Similarly, the Board held that it would no longer require that such control be exercised

directly because indirect control may establish joint-employer status so long as it is sufficient. *See id.* The burden of proving a joint-employer relationship rests on the party asserting the relationship. *See id.* at 22. Unlike BFI in *Browning Ferris*, DHL Express does not have actual or reserved control, either directly or indirectly, over the wages, hours' worked, direction of work, supervision, discipline, or hiring of the DHLNH couriers.

With regard to wages, DHL Express has no control or involvement over the wages or other benefits of the DHLNH couriers. Local 251 Ex. 74 (§3.15); Tr. 1136, 1228-30. In *Browning-Ferris*, BFI played a role in determining employees' wages because it prevented Leadpoint from paying employees more than BFI employees performing comparable work, which created a wage ceiling for the workers. *See id.* at 23. Here, DHL Express has no wage ceiling for DHLNH couriers nor does it otherwise reserve control over the wages in the Cartage Agreement. Moreover, BFI and Leadpoint had a cost-plus contract where BFI was required to reimburse Leadpoint for labor costs and the parties renegotiated the rate for services after an increase in the minimum wage. *See id.* Here, DHL Express and DHLNH are not parties to a cost-plus contract, and there is no evidence of any similar renegotiation. Instead, Schedule A of the Cartage Agreement is the Schedule of Rates, and it shows that DHL Express pays DHLNH a set price for each pickup or delivery stop, a set price for each piece picked up or delivered, and a set amount for different types of vehicles that DHLNH may or may not utilize. CP Ex. 24; Tr. 1245-46. Thus, the Schedule of Rates shows that DHL Express does not directly or indirectly control wages because the rates are not based on labor costs as they were in the *Browning-Ferris* agreement.

The record shows that DHL Express has no control over the hours that DHLNH employees work. Section 3.3 of the Cartage Agreement provides that DHLNH has sole control

over the manner and means by which it performs services and DHLNH has “sole responsibility” over the hours and days worked by the workers. Local 251 Ex. 74. Testimony confirmed that DHL Express does not set the hours of work, control the rest or lunch breaks, determine whether overtime should be performed, or have access to the time clock that DHLNH owns and uses for the couriers. Tr. 933-34, 1079, 1090-91, 1228-30. This is distinguishable from *Browning-Ferris*, where BFI specified the number of workers required, set the number and timing of the shifts, determined whether overtime was necessary, and signed off on the hours of services rendered by Leadpoint employees each week. *See id.* at 22.

Likewise, DHL Express does not exercise control over the day-to-day work of the couriers. In *Browning-Ferris*, BFI controlled the pace of the work by dictating the speed of the streams and the specific productivity standards for sorting. *See id.* at 23. BFI directed the workers to work faster and smarter and counseled workers on productivity. *See id.* BFI had ultimate control over the speed of the work, overtime, and break times. *See id.* Here, DHL Express has no control over the productivity of the couriers or how long it takes them to conduct their deliveries, nor does it control their breaks or overtime. Tr. 1228-30.

DHL Express has no role in disciplining or discharging couriers. Tr. 1087, 1238. Marzelli testified that he never directed DHLNH management, including Santiago, to take disciplinary action against a courier. Tr. 1238. DHLNH has a company handbook that applies to the couriers with a disciplinary section, whereas DHL Express has a company intranet and handbook that does not apply to DHLNH couriers. GC Ex. 41; Tr. 1238. Section 3.15 of the Cartage Agreement provides that DHLNH is “solely responsible” for the discipline of workers. Local 251 Ex. 74. In comparison, BFI retained the unqualified right to “discontinue the use of any personnel” that Leadpoint had employed in their service agreement. *See id.* at 22. The

Board also relied on two specific instances that demonstrated BFI's ultimate right to dictate discipline where a BFI manager reported misconduct to Leadpoint *and* requested their discharge. *See id.*

Here, Local 251 provided evidence about an employee who was terminated by DHLNH after a DHLNH human resources' representative requested a background check that determined the employee was disqualified from carrying DHL freight. Local 251 Ex. 71; Tr. 1114-15, 1124-25. The record shows that there were no communications between DHL Express and DHLNH with regard to his disqualification or termination—let alone a request from DHL Express that the employee be discharged. The record also shows that DHL Express does not pay for the background checks nor does it receive the identity of any individual that might fail a background check that DHLNH conducts. Tr. 1234. Thus, the only instance that Local 251 tried to introduce to demonstrate DHL Express' involvement in a discharge actually shows no involvement by DHL Express. The other examples in the record of discipline of couriers relate to instances in which DHLNH notified Local 251 of proposed discipline and the two parties alone negotiated settlement agreements regarding such discipline issued by DHLNH. GC Ex. 44; CP Ex. 8, 10, 15-16; Tr. 992-93, 996-97, 1018, 1129. Those examples are further evidence that DHL Express was not involved in the discipline of DHLNH couriers.<sup>45</sup>

DHL Express has no role in hiring, interviewing, or pre-screening candidates for DHLNH courier positions. Tr. 1087, 1233, 1238. Section 3.15 of the Cartage Agreement provides that DHLNH is “solely responsible for the interviewing, hiring, [and] training” of its workers. Local

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<sup>45</sup> Any argument by Local 251 that the General Counsel has a burden of proving that every manager at DHL Express had no involvement in every instance of discipline of a DHLNH courier is a misstatement of the burden of proof. Local 251 is asserting the joint-employer defense so it must prove the involvement, rather than claim that somehow the General Counsel did not prove a negative. Local 251 did not elicit any testimony from witnesses about DHL Express imposing or otherwise being involved in discipline, including from the two couriers that have worked for DHLNH and from the Local 251 representatives that represented the bargaining-unit for more than a year. Despite DHL Express complying with a massive subpoena *duces tecum* issued by Local 251, Local 251 offered no further documentary evidence showing that DHL Express was involved in or controlled discipline at DHLNH.

251 Ex. 74. By comparison, BFI required that Leadpoint meet or exceed BFI's own standard selection procedures and tests on its equipment and prohibited Leadpoint from hiring any worker that BFI deemed to be ineligible. *See id.* Furthermore, BFI retained the right to reject any worker that Leadpoint refers "for any or no reason." *Id.* DHL Express did not retain the right to do any of those things in the Cartage Agreement nor is there any evidence to show that DHL Express ever exercised such involvement in DHLNH's hiring.

Similar to BFI, DHL Express does require that all applicants undergo and pass drug and alcohol tests. The Cartage Agreement requires DHLNH to conduct drug and alcohol screening in accordance with the Federal Motor Carrier Safety Administration (49 C.F.R. § 382.305), Local 251 Ex. 74; however, DHL Express is not involved in the process. Marzelli had no knowledge as to whether DHLNH actually conducts pre-employment or post-employment drug and alcohol testing, and he had no knowledge of any incident in which a courier failed a test. Tr. 1234. The Board has held that government-imposed regulations in the trucking industry do not constitute evidence of company control over drivers. *See Precision Bulk Transport, Inc.*, 279 NLRB 437, 437 (1986). A putative employer does not become a joint employer merely by complying with federal transportation laws, because such regulations constitute supervision by the government rather than the putative employer. *See Osco Drug, Inc.*, 294 NLRB 779, 786-87 (1989) (holding that an employer did not control drivers simply by complying with a federal law requiring it to maintain a qualification file for each driver). Here, the drug and alcohol testing is not control by DHL Express, but rather federal law. The same logic applies to the requirements that the individuals hired are authorized to work in the United States and possess a valid driver's license because those qualifications are set by the government rather than DHL Express. Likewise, the background check requirement is designed to ensure that drivers have proper

licenses and do not pose security risks. The fact that the service agreement requires DHLNH to hire individuals that speak English even though that is not required by law is not sufficient involvement by DHL Express in the hiring of DHLNH couriers to find that DHL Express is even a joint employer with regard to hiring. The limited qualifications that are not required by law are merely to ensure that DHLNH is able to provide the services that it contracts with DHL Express to deliver.

DHL Express has no control over the assignment of work to DHLNH couriers. Section 3.4 of the Cartage Agreement provides that DHLNH is “solely responsible” for determining, providing, and assigning workers. Local 251 Ex. 74. Testimony confirms that DHL Express does not assign the routes of couriers because it merely produces a report with all the freight to be delivered from PVD on a given day—it is DHLNH that assigns the routes. Tr. 869-70, 1073, 1076, 1097-98, 1229. In *Browning-Ferris*, BFI assigned specific tasks to employees, specified where the workers were to be positioned, and exercised “near-constant oversight” of the employees’ work performance. *See* 362 NLRB No. 186 at 23. There were also numerous instances in which BFI managers communicated detailed work instructions to employees, held meetings, disseminated preferred work practices, and assigned employees to tasks that take precedence over any work assigned by Leadpoint. *See id.*

DHL Express never held meetings, assigned tasks, dictated where DHLNH couriers were to be positioned, or gave specific instructions to DHLNH couriers. DHL Express managers—and Marzelli in particular—do not interact with DHLNH couriers, do not discuss particular tasks with them, do not discuss customer complaints, and do not send them messages using the scanners. Tr. 1231. The one isolated incident in the record of a communication that Local 251 tried to offer to show otherwise (which Marzelli denies) is Lee testifying that Marzelli gave him

his key FOB with instructions of how to swipe the FOB. Tr. 854, 1237. Even if Lee’s testimony is credited over Marzelli’s denial, an act as limited as showing someone how to swipe a key FOB is not remotely close to “detailed work instructions.” More importantly, Lee was initially hired as a DHLNH manager, so at most Marzelli was giving a key FOB to a DHLNH manager and that is an example of a business-to-business level communication. Local 251 was unable to elicit any testimony regarding DHL Express issuing instructions to couriers or otherwise communicating with couriers, despite calling two DHLNH couriers to testify. Indeed, even though Local 251 called Rath to testify about his conduct in BOS on May 1, Local 251’s Counsel chose not to elicit *any* testimony from Rath—a DHLNH employee working at PVD—that would support its joint-employer claim. The testimony about DHLNH management communicating with DHLNH couriers through the scanners is not evidence of DHL Express communicating with couriers merely because the scanners are supplied by DHL Express. Tr. 887-89, 895, 898, 932. The fact that dispatch transmits changes to delivery addresses or times on the scanners does not constitute assignment of work because such messages are merely routine updates of information and there is no testimony that they occur with any significant frequency or regularity. Tr. 890.<sup>46</sup>

Communications between DHL Express management and DHLNH management regarding compliance with the Cartage Agreement are also not indicative of DHL Express oversight of DHLNH couriers. Similarly, the evidence regarding customer complaints shows that Marzelli forwards complaints—and sometimes DHL Express delivery policies—to DHLNH management; however, it is completely up to DHLNH how to handle the complaints and policies because Marzelli cannot direct them to respond in a certain manner. Local 251 Ex. 86-88, 90, 93; Tr. 1064, 1077, 1101, 1175, 1179-80, 1184-85. Notwithstanding repeated questioning on the

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<sup>46</sup> The scanners actually illustrate the difference between the DHL Express couriers and DHLNH couriers because Lee admitted that he either did not know many of the functions on the scanner or did not use many of the functions as a DHLNH courier. Tr. 881, 883, 886-87, 893.

matter, Marzelli maintained that he cannot give any directive to DHLNH management on how to handle the complaints because it is up to DHLNH to respond however it deems fit. Tr. 1232-33.

There is no evidence to show that DHL Express is involved in evaluating the performance of couriers or monitoring the couriers. In response to a specific customer complaint, Marzelli emailed customer service that “we will monitor courier performance moving forward,” however, Marzelli testified that meant DHL Express would monitor the receipt of similar complaints, and he denied monitoring the couriers. Local 251 Ex. 93; Tr. 1191-92. Although Marzelli could have worded the email more clearly, picking a single phrase out of one of multiple customer complaints does not show that DHL Express actually monitors the couriers and there was no testimony of any instance of DHL Express evaluating the couriers’ job performance. The DHLNH couriers who testified at the hearing provided no evidence of DHL Express, or Marzelli in particular, monitoring or evaluating their work. With regard to the complaints, Marzelli explained that he usually does not know the identity of the courier involved so he cannot be monitoring the courier in question. Tr. 1189-90. Likewise, communications between Marzelli and DHLNH management about facility concerns such as a door being propped open, couriers not wearing uniforms, or couriers changing the screen on the scanner does not constitute constant oversight or supervision by DHL Express. Local 251 Ex. 72-73; Tr. 1083. DHLNH management is solely responsible for supervising the couriers and deciding any appropriate action to take in response to Marzelli’s communications, which do not dictate any action that DHLNH must take with regard to the couriers.

Local 251 introduced other evidence in an apparent attempt to show that DHL Express has some involvement in work instructions for DHLNH couriers; however, the evidence does not amount to such a conclusion. There is a bulletin board in the warehouse at PVD with eight

“checkpoints” that seemingly relate to parts of the delivery process, such as missed deliveries, attempted deliveries, or miscoded packages. Local 251 Ex. 11-18; Tr. 834-43. In addition to the fact that the evidence about the checkpoints is questionable because the photographs are illegible and they exclude the footer that is on each checkpoint, there is no evidence to show whether it is DHLNH or DHL Express that drafted or posted the checkpoints and nothing to indicate whether any entity even implements or enforces the checkpoints. The record also shows that the courier service guide is a DHL Express booklet that explains what types of items are prohibited from being shipped to different countries across the globe. Tr. 1068, 1200.

At most, this evidence shows that DHL Express has policies that relate to the performance of the delivery services that it contracts with DHLNH to conduct; however, it is up to DHLNH to determine whether to adhere to the policies and how the policies might apply or affect its own employees. In *Browning-Ferris*, the majority explained that its decision did not mean that “a putative employer’s bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status.” *Id.* at 21. Instead, the majority relied on the “precise directives” that BFI communicated through an intermediary to employees to show indirect control. *Id.* Here, there is no evidence of such precise directives from DHL Express, and any instances in which DHL Express is ensuring that DHLNH provides the services set out in the Cartage Agreement are not indicia of joint-employer status even under the *Browning-Ferris* standard. Likewise, any attempts by DHL Express to control its property, such as ensuring a door is properly secure, is not indicative of joint-employer status.

Moreover, any evidence of control that is related to the legitimate interest of DHL Express protecting the quality of its product or brand should not be considered indicative of a

joint-employer relationship. In *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 93, 119 (1979), the franchisor was found not to have joint-employer liability for the actions of the franchisee, where the franchise agreement required franchisees “to best preserve, maintain and enhance the reputation, trade name and good will built up for the franchising system,” and where the franchisor’s control over the franchisee was “retained solely in an effort to maintain the uniformity of the integrated enterprise for the mutual benefit of [the franchisor] and the other franchisees.” The Board explained that the franchisor requirements calling for franchisees to abide by product specifications, recipes for food preparation, and the sizes and portions of the menu items offered, by themselves, did not establish joint-employer status, because they relate to the image of the franchisor’s chain rather than labor relations. *See id.* at 120. Schedule C of the Cartage Agreement sets out the trademark usage and display standards. Local 251 Ex. 75. The provisions explain that the trademarks, tradenames, and logos identify DHL products and services to the public and there is a reputation of goodwill and patronage that must be maintained. Local Ex. 75. For this reason, requirements such as the use of DHL Express uniforms, the use of DHL Express signage on customer-facing trucks, standards for the appearance of those vehicles, or other signage at the facility is simply brand protection and not relevant to the joint-employer question. *See S. G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (holding that a franchisor did not have joint liability for two franchisees where the control exercised was done to keep the quality of the franchisor name from being eroded and the uniform requirement was “nothing more than an implementation of [the franchisor’s] advertising policy”).

In *Browning-Ferris*, the Board explained that “all of the incidents of the relationship must be assessed” and only concluded that BFI was a joint employer based on “multiple examples of

reserved, direct, and indirect control over Leadpoint employees.” 362 NLRB No. 186 at 21. Unlike BFI, DHL Express does not exercise such control over the DHLNH workers at PVD. Thus, under the most favorable standard in *Browning-Ferris*, Local 251 has not met its burden of proving that DHL Express is a joint employer based on a review of all the facts.<sup>47</sup>

**D. Allowing a Union to Use a Joint-Employer Defense for Secondary Picketing in This Context Undermines the Policies and Purposes of the Act.**

No matter what the conclusion is with regard to whether a joint-employer relationship exists between DHLNH and DHL Express, there is still no obligation by DHL Express to recognize and bargain with Local 251 as the representative of the bargaining-unit employed at PVD. The joint-employer defense does not alter any Board certifications or bargaining obligations that already exist or do not exist because a determination on joint-employer status would only be used for the limited purpose of concluding whether the picketing was lawful. That alone shows why the use of the joint-employer claim in this defensive posture is a sham that should not be considered.

In addition, Local 251 should not be able to utilize this defense because a union cannot picket to obtain recognition from an employer at a time when it cannot otherwise obtain recognition from that employer through the representation process. Local 251 sought representation through a Board conducted election in which it stipulated that DHLNH was the

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<sup>47</sup> Furthermore, while the General Counsel maintains that DHL Express is not a joint employer with regard to any term or condition of employment of any job classification for the DHLNH employees; a finding that a joint-employer relationship exists is not necessarily binary. For example, a finding that DHL Express controls a hiring qualification such a requirement for English fluency does not mean that DHL Express is a joint employer with regard to other terms or conditions of employment. A joint employer that has a bargaining obligation is only required to bargain with respect to the terms and conditions that is has authority to control. *See Browning Ferris*, 362 NLRB No. 186 at 20. And, any argument that DHL Express has policies regarding vehicles that somehow indirectly control DHLNH couriers does not relate to the dockworkers that do not drive the vehicles. As a result, a joint-employer finding that relies on such evidence would only extend the joint-employer finding to the couriers in the bargaining-unit and not the dockworkers. *See Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016) (holding that one part of a bargaining-unit was employed by one employer and the other part was employed by joint employers).

only employer and in which the Board certified DHLNH as *the employer* on June 15, 2017. The employees voted for Local 251 as their representative based on an understanding that DHLNH was the only employer involved in the collective-bargaining relationship. As a result of the certification, Local 251 and other unions were prohibited from filing a petition for representation of this bargaining-unit with respect to any employer—including DHL Express—through June 15, 2018. Currently, Local 251 would face the contract-bar doctrine if it tried to file a petition for representation with regard to DHL Express because Local 251 now has a collective-bargaining agreement with DHLNH for this bargaining-unit.<sup>48</sup> Thus, at the time of the picketing and even now, Local 251 had and still has no means of obtaining recognition with regard to DHL Express for this bargaining-unit through a representation proceeding because of the way it chose to pursue the representation procedure.

Although the General Counsel disputes the viability of Local 251's joint-employer argument, at the very least the joint-employer defense inherently requires Local 251 to admit that an object of the picketing was to seek recognition from DHL Express.<sup>49</sup> Any argument that DHL Express should have been involved in the contract negotiations as a joint employer requires Local 251 to argue that it was seeking recognition from and bargaining with DHL Express. This is because the Board certification did not include DHL Express as an employer so it was not already a certified employer that had a bargaining obligation with regard to this unit. However, Section 8(b)(7) of the Act proscribes picketing that has a recognitional object under certain circumstances in which a union would be otherwise unable to obtain recognition through the

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<sup>48</sup> Both filing a petition to amend the certification or a petition for clarification of the unit under Section 102.60(b) of the Board's Rules and Regulations would have been—and currently still are—an inappropriate way for Local 251 to attempt to add DHL Express as a joint-employer of the bargaining-unit.

<sup>49</sup> As discussed in Section I.B, Local 251 picketed at BOS and MXG with an object of enmeshing DHL Express in the labor dispute between DHLNH and Local 251. It only made the joint-employer claim *after* being accused of secondary picketing. Local 251 does not claim it picketed *because* DHLNH and DHL Express were joint employers. Nevertheless, in order to fully make its joint-employer argument, Local 251 would have to concede that it picketed at BOS and MXG with an object of obtaining recognition from and bargaining with DHL Express.

representation process. For example, Section 8(b)(7)(B) of the Act proscribes picketing “any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees . . . where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted.”<sup>50</sup>

The Board has analogized this statutory language concerning what is essentially an election bar to a union being unable to obtain a Board certification for a guard unit because of its voluntary choice to admit non-guard employees to membership. *See Drivers, Chauffeurs & Helpers, Local Union 639*, 211 NLRB 687, 690 (1974). The analogy shows that it is not only an election bar that makes such picketing unlawful because the statutory language is intended to prohibit any picketing with a recognitional object when a union would be unable to obtain a Board certification because of its own choices. Here, the certification year prohibited Local 251 from filing a representation petition with regard to this bargaining-unit so it should not be permitted to

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<sup>50</sup> Given the reasoning behind the statutory language, it is clear that the “unless such [union] is currently certified as the representative of such employees” phrase refers to a situation in which the union is certified as the representative of the employees with regard to the picketed employer. Thus, there is no Board law extending the language to a situation in which a union used a certification of a bargaining-unit at one employer and tried to use that certification to remove itself from the proscriptions of Section 8(b)(7) of the Act when it picketed at a second employer for recognition from that second employer. Congress’ intent with regard to secondary picketing and recognition—along with the “unless . . . certified” reference—is further illustrated by the language in Section 8(b)(4)(B) of the Act, which, in relevant part, prohibits a union from picketing with an object of “forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees.” The Board explained that this language is intended to permit a union that has already been Board certified as a representative of employees of one employer to picket a second employer to compel the first employer to recognize the union as already certified. *See United Food & Commercial Workers, Local No. 1996*, 336 NLRB 421, 428 (2001). “As a general matter, Congress viewed secondary boycotts for recognition as unjustified because the Act provides unions with peaceful means to compel an employer to recognize and bargain with them—a Board-conducted election.” *Id.* If, however, an employer refuses to abide by the results of an election, then a union may lawfully engage in secondary picketing to compel recognition by the primary employer. *See id.* The Board explained that this is why Congress deliberately distinguished between a certified union and an uncertified union in the statutory provision because Section 8(b)(4)(B) only carves out a limited exception for secondary picketing to compel recognition by a primary employer that has been certified through the Board process. *See id.* Reading the “unless certified” exceptions in the two statutory provisions—Sections 8(b)(4)(B) and 8(b)(7)(B)—together make it clear that the language intends to carve out an exception that only permits a certified union to picket a secondary employer to enforce a certification that applies to the primary employer.

engage in picketing with a recognitional object at a time it cannot lawfully obtain recognition with regard to DHL Express. Moreover, Local 251 should not be able to excuse secondary picketing based on conduct (recognitional picketing) that it cannot lawfully engage in.

Instead, the Board has set out a procedure for a Board-held election to ensure a peaceful way for a union to obtain recognition from an employer. The process provides an opportunity for the unions or employers that are involved to address any questions concerning representation that might exist, it allows the involved unions and employers to conduct any lawful pre-election campaigns or outreach to the petitioned-for bargaining-unit, and it allows the employees to vote for or against a representative with full knowledge of who the relevant employer or the employers are and with the benefit of a fully-informed campaign based on that process.

Otherwise, enabling a union to engage in picketing in the same context as Local 251 would allow that union to deliberately seek a bargaining-relationship with one employer through the representation process so that it can then go and picket a second employer based on an argument that they are a joint employer. Unions could choose to pursue an election with one entity that it felt it had an easier or quicker chance of obtaining a certification with in the representation proceeding and then turn around and lawfully picket the second entity. All the while, the union would have no way of obtaining recognition from the second entity through the representation process. This undermines the employees' right to free choice that is built into the election procedure because it would be the union, not employees, making the decision to picket another entity without a Board-held election for that targeted entity. It also undermines industrial stability because the entire basis for doctrines such as the certification-bar and the contract-bar is to provide the parties an opportunity for a period of stability in their bargaining relationship. If a union could alter that relationship at any given time by lawfully picketing at

another employer without an obligation to bargain based on a joint-employer theory, there would be no predictability.

Thus, as a matter of policy, Local 251's argument fails because the joint-employer doctrine is not meant to provide a defense to picketing when the targeted entity has no obligation to bargain and the union cannot lawfully obtain an obligation of that targeted entity to bargain. Moreover, it is reasonable to prevent a union from asserting a defense such as this when the union cannot lawfully achieve the underlying result that is the foundation of the defense.

**VI. THERE IS NO DEFENSE BASED ON A FRANCHISOR-FRANCHISEE RELATIONSHIP.**

Local 251's franchisor-franchisee defense should be dismissed. The defense fails as a matter of law because the Board has rejected the notion that an employer loses its neutrality merely on the basis of a franchise relationship. *E.g., Teamsters, Local 456*, 273 NLRB 516, 519-20 (1984). Moreover, there is absolutely no evidence to show that DHL Express is a franchisor to DHLNH and Section 3.14 of the Cartage Agreement specifically states that neither party is or will be deemed a franchisor or franchisee for any purpose. Local 251 Ex. 74.

**VII. THERE IS NO DEFENSE FOR DE MINIMIS SECONDARY PICKETING.**

Local 251's affirmative defense that any unlawful picketing was de minimis should be dismissed because it is not a valid defense as a matter of law. Any amount of "unlawful picketing" is unlawful because "[t]here is no requirement that picketing continue for any specific period of time before it can be deemed unlawful within the meaning of [Section] 8(b)(4)(B) of the Act." *Shopmen's Local Union No. 455*, 243 NLRB at 349 n.24; *see also Local 2208, Int'l Bhd. of Elec. Workers*, 285 NLRB 834, 834 (1987) (holding that one hour of picketing violated 8(b)(4)(B) of the Act). The Board concludes that threats of unlawful picketing are a violation of

the Act so surely any actual unlawful picketing is sufficient to be a violation of the Act. *See Dist. Council of Painters, No. 48*, 144 NLRB 1523, 1523 (1963).

Furthermore, the record shows that the unlawful activity continued for more than five hours on May 1 and severely disrupted DHL Express' operations. The activity caused delays in deliveries and pickups from BOS and MXG on May 1. Tr. 155-56, 255-57. The activity forced DHL Express to hold freight destined for MHT overnight at BOS resulting in a one-day delay on all freight scheduled to be delivered from MHT on May 1. Tr. 157, 172. Respondent Unions' picketing and other unlawful inducements resulted in almost one hundred DHL Express employees not reporting to work at BOS and MXG and receiving one-day suspensions. Tr. 632-33.

#### **VIII. THERE IS NO DEFENSE FOR A GOOD FAITH MISTAKEN BELIEF OF THE NEUTRALITY OF DHL EXPRESS.**

Any argument by Respondent Unions that they acted with a good faith mistaken belief should be rejected. For years, the Board held that a union's mistaken belief that a picketed employer was not a neutral was not a defense to a violation of Section 8(b)(4)(B) of the Act. *See, e.g., Shopman's Local Union No. 455*, 243 NLRB at 347 (holding that picketing for four hours was unlawful even though the union had a possibly mistaken but sincere belief that the picketed employer was an ally to the primary employer); *Nat'l Ass'n of Broad. Employees & Technicians*, 237 NLRB 1370 (1978) (holding that a picketing union's good-faith mistaken belief that a primary employer was present at a picketed site was not a defense to secondary picketing); *Nat'l Ass'n of Broad. Employees & Technicians*, 226 NLRB 641, 644 (1976) (holding that the Act does not allow a union to picket whenever they wish against any employer and continue picketing while inquiring whether it is secondary picketing); *Linoleum Union*,

*Local 1236*, 180 NLRB 241, 243 (1969) (holding that the union’s mistaken belief as to the legality of picketing is no defense to a violation of the Act).

In *United Scenic Artists, Local 829*, 267 NLRB 858, 861 (1983), the Board continued to hold that the General Counsel does not have to establish the union’s knowledge of an employer’s neutrality to prove a violation of Section 8(b)(4) of the Act.<sup>51</sup> While doing so, the Board set out a limited exception that would apply in “extraordinary circumstances” in which a union is able to prove it had a good-faith but mistaken belief with regard to the lawfulness of the picketing based on a showing that it was denied access to information from the picketed employer or deliberately misled by that employer with regard to its neutrality.<sup>52</sup> *See id.* Since the Board’s decision in *United Scenic Artists*, the Board has held that a union was unable to insulate itself from liability for unlawful picketing by claiming it reasonably and in good faith believed that a picketed employer was an alter ego to the primary employer based on the fact that the picketed employer used the primary’s premises, services, and facilities during

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<sup>51</sup> The Board overruled the following decisions only to the extent they were inconsistent with its decision: *Nat’l Ass’n of Broadcast Employees & Technicians*, 237 NLRB 1370 (1978), *Nat’l Ass’n of Broadcast Employees & Technicians*, 226 NLRB 641 (1976), and *General Truck Drivers, Local 85*, 243 NLRB 665 (1983). *Id.* at 861 n.13.

<sup>52</sup> On remand from the D.C. Circuit, the Board issued a supplemental decision in *United Scenic Artists* and held that a union did not violate the Act because there was no evidence of an unlawful secondary object. *See* 278 NLRB 319 (1986). The Board explained that the D.C. Circuit stated that the Board “must either explicitly find” that the union had a secondary object or it must dismiss the complaint. *Id.* After no party offered evidence to support an inference that the union knew that another entity (besides the threatened entity) possessed absolute control over the disputed work, the Board applied the “court’s opinion as the law of the case” and dismissed the complaint. *Id.* This supplemental decision does not expand the narrow exception by the Board and is distinguishable for several reasons. First, the parts of the supplemental decision restating the D.C. Circuit’s remand are not actually binding on Board law. Second, *United Scenic Artists* involved a threat over a jurisdictional dispute, rather than secondary picketing. In the decision to remand, the D.C. Circuit explained that the unlawful conduct was restricted to a contact with a primary employer and there was no way of knowing that another employer had control over the disputed work based on a private agreement between the two employers that the primary employer never explained to the union. *See United Scenic Artists v. NLRB*, 762 F.2d 1027 (D.C. Cir. 1985) (explaining that the situation was different from common situs picketing cases because it was appropriate to require a union that has chosen to picket at a site occupied by a neutral to ascertain whether the primary is present). It is understandable that *United Scenic Artists* is different because the understanding of the union in that case would be that the primary employer is the only employer involved in the disputed work, and it had no basis or reason to know of a private agreement the employer had with another entity. The facts here, however, are more similar to the picketing case described by the D.C. Circuit because *Local 25* made the decision to engage in secondary activity and it would be equally appropriate to require *Local 25* to attempt to ascertain whether DHL Express was a neutral.

the transition period. The Board affirmed a judge's conclusion that the union had not met the "high burden of proof" in defending its conduct because it did not show the picketed employer either misled the union or flatly denied it any relevant information. *See Int'l Bhd. of Elec. Workers, Local 3*, 270 NLRB 1025, 1031 (1984).

The Board put a "high burden" on unions to prove this defense because without the requirement of proof of "deception or inaccessibility of information" regarding an employer's neutrality, the defense would be too easily taken advantage of by unions. *United Scenic Artists, Local 829*, 267 NLRB at 861. The Board only wanted a defense for unions that attempted to find out whether the targeted employer was a neutral and was unable to do so and emphasized that it did not envision many instances in which the defense would be meritorious. *See id.* at 861-62. Thus, the Board's intent in setting out the very limited defense was not to create a way for unions to insulate themselves from liability for secondary picketing simply because another union made an assertion as to the status of the targeted employer.

Here, Local 25 presented no evidence to meet the narrow exception under Board law for a good faith mistaken belief as to the neutrality of DHL Express. Instead, Local 25 admitted that it did nothing to investigate the claim made by Taibi in his April 30th email that DHL Express was an ally to DHLNH because managers were acting as couriers. Despite the fact that Murphy had contact information for several DHL Express managers, he never reached out to inquire about the claim, nor did he ask any of the managers about the claim when he saw them at BOS on May 1. Tr. 623-24, 640, 675. Murphy admitted that he did not investigate whether DHL Express was performing struck work or whether DHL Express management was acting as couriers. Tr. 698-99, 713. Thus, Local 25 certainly was not denied access to information or misled by DHL Express because it never even inquired or investigated the ally claim.

In addition to the fact that the exception does not apply, the record shows that Local 25 never even possessed a good faith mistaken belief. Within *fifteen minutes* of Taibi's April 30th email, Local 25 responded with information on the picket lines. Despite several emails about the picket lines, nobody at Local 25 ever mentioned the ally claim or asked for more details about the claim in any of the communications. It is not plausible that Local 25 believed DHL Express management was performing struck work for a third-party vendor and Local 25 simply chose not to address the issue with DHL Express. Murphy's inconsistent and confusing testimony on this issue reveals the lack of sincerity in the belief that DHL Express ever acted as an ally. For example, Murphy maintained that his opinion was not based solely on the email but could not explain any other basis he had for his opinion or any action he took independent of the email. Tr. 713-14. Local 25 never commented about the ally claim on May 1 or in any of its other communications with DHL Express regarding the picketing. Local 25 Ex. 3. Instead, Local 25's position was that Local 251 could picket anywhere they wanted and Murphy admitted that he wanted the picket lines extended to DHL Express. Tr. 642. Even after Bancroft told Murphy repeatedly that DHL Express viewed the picketing as unlawful, Murphy continued to instruct employees that Local 25 honors picket lines. Thus, Local 25's defense should also be rejected because the claim of a mistaken belief is disingenuous. This defense is not meant to be taken advantage of by unions searching for a way to justify their secondary picketing activity.

The situation here is also distinguishable from another supplemental Board decision finding that a union did not violate the Act by picketing a garage that ended up housing only commissioned cabs of the primary employer because the picketing lasted for thirty minutes and ceased as soon as the picketers were informed that there were no leased cabs in the garage from the primary employer. *See Prod. Workers Union, Local 707*, 283 NLRB 340, 341-42 (1987).

The Board explained that there was no evidence of a secondary object because the union only picketed there because it believed the garage was housing both leased and commissioned cabs of the primary employer. *See id.* As discussed above in Section I, the record shows that Local 251 and Local 25 had a secondary object when picketing, so the decision is distinguishable. Here, there is no claim that BOS or MXG were common sites or that the Unions picketed based on a belief that DHLNH was present at either site at the time of the picketing. Furthermore, the picketing continued even after DHL Express managers informed the Unions that they were engaged in secondary picketing.

**IX. LOCAL 25 VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY INTERFERING WITH EMPLOYEES' RIGHTS TO TESTIFY AND PARTICIPATE IN THE PROSECUTION OF UNFAIR LABOR PRACTICES.**

It is a violation of Section 8(b)(1)(A) of the Act for a union to interfere with an employee's Section 7 right to give testimony before the Board. *See United Paperworkers Int'l Union, Local 710*, 308 NLRB 95, 99 (1992). In considering whether such conduct is unlawful, the Board has held the "test is not whether the coercion was strong or subtle, nor whether it succeeded." *Id.* Instead, "[t]he test is whether the remark had a reasonable tendency to restrain or coerce an employee from vindicating a protected right—to give testimony to the Board about facts constituting an alleged unfair labor practice." *Id.* A union's "subtle threat" to an employee scheduled to testify at a Board proceeding that his testimony would make it an unpleasant place for him to work and that the union official would not want to be in his situation is unlawful because it would reasonably dissuade an employee from testifying.<sup>53</sup> *See id.*

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<sup>53</sup> Other conduct by union agents that would reasonably discourage employees from participating in the Board's processes by filing a charge or testifying is generally unlawful. For example, a union's statement to employees that there would be unpleasant consequences for individuals who create problems for the union by filing charges or seeking the Board's assistance constitutes unlawful restraint and coercion under the Act. *See Painters Local Union No. 558*, 279 NLRB 150, 150 (1986); *see also Local 235, Int'l Union, United Auto., Aerospace, and Agricultural Implement Workers of Am.*, 313 NLRB 36, 41 (1993) (holding that it is unlawful for a union to publicly state that a

Such conduct is no different than statements by employers and their attorneys that interfere with employees' rights to testify under Section 8(a)(1) of the Act. For example, the Board held an employer unlawfully interfered with an employee's right to testify at a hearing when its attorney told an employee witness prior to the hearing if he was the employee he would keep his nose out of the Board hearing. *See Firestone Steel Prods. Co.*, 228 NLRB 1040, 1041 (1977) (explaining that it was unlawful even though the attorney said it jokingly and a second attorney later notified the employee he must testify because of the subpoena). In another decision, the Board held that an employer interfered with the Board's processes and discouraged an employee from obeying a subpoena by stating that the Board never enforces subpoenas, the Board would not do anything if he failed to appear, and the employer would appreciate if he skipped the hearing. *See Tufo Wholesale Dairy, Inc.*, 320 NLRB 896, 901 (1996); *see also Bobs Motors, Inc.*, 241 NLRB 1236, 1236 (1979) (holding that an employer's statement in response to an employee's question whether he should honor a subpoena that it was not enforceable and up to the employee constitutes unlawful interference). The Board has also concluded that an employer unlawfully interfered with the processes of the Board by informing employees that it did not have to meet with Board agents based on a posting by an employer stating that employees were not legally required to appear for pretrial interviews with the General Counsel. *See Reeves Bros.*, 277 NLRB 1568, 1570, 1581-82 (1986). These decisions show that the Board does not find it necessary that the party affirmatively reach out to an employee and overtly instruct him not to testify for the conduct to be unlawful. Instead, jokingly telling an employee to keep his nose out of it, telling an employee it is up to him whether he honors a subpoena, or

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member cost the union a lot of money by testifying at a Board proceeding because it sends a message to employees that such testimony will result in humiliation and blame).

notifying employees that they are not legally required to meet with the Board are all sufficient to constitute unlawful interference.<sup>54</sup>

Here, the evidence shows that Local 25 made statements to an employee that reasonably tend to interfere with an employee's Section 7 right to testify and cooperate with the NLRB in the prosecution of a case.<sup>55</sup> Murphy learned that the NLRB was trying to meet with Grasso to discuss the Complaint allegations against Local 25. Upon receiving such information, Murphy chose to contact Grasso and ask who was contacting him. In response to Grasso stating that it was a Board Agent, Murphy admitted that he instructed Grasso if the NLRB wanted to meet with him then Grasso should call Local 25's attorney and Local 25 would set up the meeting. Murphy admitted to giving Grasso the same instruction in a second phone call about Grasso meeting with the NLRB. Regardless of any ultimate credibility determination with regard to Murphy's testimony, his direct testimony on this subject should be relied on because it is an admission against interest. *See Upper Great Lakes Pilots*, 311 NLRB at 131 n.2.<sup>56</sup>

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<sup>54</sup> The Board's treatment of employer and union rules that limit employees' access to the Board is further confirmation that it treats this as a fundamental right that neither employers nor unions can interfere with. The general right for unions to enforce internal rules that result in discipline does not extend to the enforcement of rules that impose discipline on employees for seeking access to the Board. *See Int'l Bhd. of Boilermakers*, 312 NLRB 218, 220 (1993). Similarly, employer rules prohibiting employees from providing information to federal agencies without company approval are unlawful. *See, e.g., Jack in the Box Distribution Ctr. Sys.*, 339 NLRB 40, 40 (2003). A statement to an employee that it should have the union's attorney—or the employer or employer's attorney—set up the meeting is unlawful for a similar reason that it is unlawful to maintain a rule requiring employees to obtain approval from an employer prior to speaking or meeting with a federal agency. Both the rules and the statement chill an employee's "unrestrained involvement in Board processes." *Id.*

<sup>55</sup> The General Counsel need not prove that an employee actually experienced coercion as a result of the conduct because the test is not whether "any employee was, in fact, coerced or intimidated by the remarks." *United Steelworkers of Am., Local 1397*, 240 NLRB 848, 849 (1979). Instead, "[t]he appropriate test is an objective one. A finding of a violation under this test turns not on evidence that a particular employee was actually restrained or coerced by union conduct but, rather, on whether such conduct would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights." *Metro. Reg'l Council of Philadelphia & Vicinity*, 335 NLRB 814, 815 (2001) (specifically holding that a judge incorrectly relied on an employee's subjective reactions in determining whether Section 8(b)(1)(A) of the Act had been violated). Likewise, Murphy's intent is also irrelevant because the test is not whether a union's agent acted with any unlawful intent. *See Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007).

<sup>56</sup> On cross-examination, Murphy claimed that Grasso called him; however, this testimony should not alter his admission on direct examination when he admitted to calling Grasso after speaking with Sweeney. Tr. 656, 711. Murphy's direct testimony that he called Grasso after receiving the phone call from Sweeney is consistent with his

Furthermore, Counsel for Local 25 admitted on the record that Local 25 instructed employees “if you’re contacted by the NLRB, ask the NLRB agent to contact our legal counsel.” Tr. 127. Counsel for Local 25 also left a Board Agent a voicemail stating that it learned the NLRB was contacting employees at DHL Express and Local 25 instructed employees who receive a phone call from the NLRB to ignore it. GC Ex. 9-A and B. The voicemail recording and the statement on the record are party admissions because statements made by attorneys in their representational capacity are excluded from the definition of hearsay. *See Hogan Masonry, Inc.*, 314 NLRB 332, 333 n.1 (1994). For example, the Board regularly holds that an attorney’s position statement can be received as an admission. *See, e.g., United Techs. Corp.*, 310 NLRB 1126, 1127 n.1 (1993); *see also Massillon Cmty. Hosp.*, 282 NLRB 675, 675 n.5 (1987) (holding that it is reversible error for a judge to refuse to admit into evidence such a position paper).

In considering either Murphy’s admission or Local 25 Counsel’s admission—or both admissions together—such conduct sends a message to employees that the union knows the NLRB is trying to speak with that employee and that the employee should not independently speak with the Board Agent. Even the statement to have the Board Agent contact the Local 25’s attorney signals to the employee that he cannot choose to cooperate or otherwise speak with the NLRB on his own. Indeed, any employee receiving such instructions would reasonably believe that he had just been told to “ignore” the Board Agent. Counsel for Local 25’s voicemail from July 19—at the very least—is an admission that he even interpreted Local 25’s messages to employees to mean that Local 25 instructed the employee to “ignore” the NLRB. Testimony from Grasso—the same witness that Local 25 interfered with—is not necessary to prove this violation because of the admissions by Murphy and Local 25’s Counsel. A party’s *admitted*

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overall testimony because it makes sense that he made the phone call to Grasso in response to the call he admits that he received from Sweeney.

interference with the General Counsel's prosecution of a case should not go unremedied because the General Counsel is then unable to secure testimony from the same witness with whom that party *admits* it interfered with.

The situation is comparable to an employer interfering with an employee's right to testify or participate in a proceeding in which the General Counsel was prosecuting the employer for unfair labor practices. An employer that learns the NLRB is contacting employees as part of that prosecution cannot contact the employees and instruct them to tell the NLRB to contact the employer or employer's attorney to find out what happened with respect to the alleged misconduct or to facilitate a meeting between the NLRB and employee. An employee receiving such instruction would reasonably believe that it should inform the Board Agent to contact the company rather than choose on his own whether to cooperate or testify.

Local 25's blatant disregard for the law does not make its conduct any less coercive or unlawful. Local 25's Counsel insisted on the record that the General Counsel should make a request to speak with DHL Express employees through counsel for Local 25. Tr. 126. Likewise, Local 25's Counsel instructed the Board Agent in the recorded voicemail to stop contacting DHL Express employees and to call him first before speaking to any of the employees. GC Ex. 9-A and 9-B. Although the intent of the union is irrelevant, the voicemail's instruction is further evidence that Local 25 sought to prevent the General Counsel from independently speaking with employees. The General Counsel is prosecuting Local 25 for unfair labor practices and it is entirely improper for her to contact Local 25's Counsel to seek the cooperation of third-party witnesses employed by DHL Express. Here, the interests of Local 25 are not aligned with the General Counsel because the General Counsel was seeking evidence that is detrimental to Local 25's defense. The voicemail and Murphy's telephone call occurred after the Complaint issued

against Local 25 and just days before the hearing commenced. Thus, it was obvious to all parties at this time that the General Counsel was seeking cooperation from employees to testify against Local 25 at the hearing. Local 25's Counsel even admitted that it learned the General Counsel was contacting employees in his voicemail. Certain Complaint allegations relate to alleged secondary conduct at MXG. The record shows that Grasso was in the building at MXG on the morning of May 1 before an employee—presumably Grasso—let Smolinsky into the warehouse. Tr. 240, 516-17, 520. As a result, any statements or instructions given by Local 25 to employees, including anything that Smolinsky said to Grasso in the warehouse, that relate to the picketing on May 1 are relevant as to whether Local 25 violated Section 8(b)(4)(B) of the Act. The General Counsel has the right to meet with neutral witnesses without Local 25's knowledge to protect the employees' right to unrestricted access to the Board and provide the General Counsel the opportunity to seek employee testimony without influence from the party the General Counsel is prosecuting. Thus, Local 25 violated Section 8(b)(1)(A) of the Act by interfering with employees' rights to participate in the prosecution of unfair labor practice charges.

### **CONCLUSION**

For the foregoing reasons, the General Counsel respectfully requests that the Judge find that Local 251 and Local 25 engaged in the unfair labor practices as alleged in the Complaint.

Respectfully submitted,

/s/ Colleen M. Fleming  
Colleen M. Fleming  
Miriam Hasbún  
Counsels for the General Counsel  
National Labor Relations Board, Region 1  
10 Causeway Street, 6th Floor  
Boston, Massachusetts 02222  
Colleen.Fleming@nlrb.gov

**CERTIFICATE OF SERVICE**

I hereby certify that I e-filed this document through the Agency's website and e-mailed a copy to Marc Gursky, Esq. at mgursky@rilaborlaw.com, Robert Fisher, Esq. at rfisher@seyfarth.com, and Michael Feinberg, Esq. at maf@fczlaw.com on the 18th day of December, 2018.

Respectfully submitted,

\_\_\_\_\_  
/s/ Colleen M. Fleming  
Colleen M. Fleming  
Counsel for the General Counsel  
National Labor Relations Board, Region 1  
10 Causeway Street, 6th Floor  
Boston, Massachusetts 02222