UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 251		
And	**Cases:**	**01-CB-219768**
		01-CC-219536
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25		**01-CC-219746**
	Administrative Law Judge	
And	**Elizabeth Tafe**	
DHL EXPRESS (USA), INC.		

LOCAL 251'S TRIAL BRIEF

Introduction

This matter is before the Administrative Law Judge on a complaint that International Brotherhood of Teamsters, Locals 251 ["Local 251"] violated sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) of the Act on May 1, 2018, by picketing DHL Express (USA), Inc., ["DHL Express"] and violated section 8(b)(1)(A) of the Act by impeding access to its South Boston facility.[1] Local 251 denies that it violated the Act because DHL Express is not neutral and Local 251 did not impede access to its facility.

Facts

The operative facts are undisputed. DHL Express is an international shipping company with service centers throughout the United States, including twenty-nine (29) in the Northeast. Service centers locally process inbound and outbound freight. There are DHL Express stations and 'service contractor' stations, where a third-party vendor manages pickup and delivery. This

[1] Other allegations against Local 25 will be addressed by Local 25.

latter situation prevails in Providence, Rhode Island,[2] where DHLNH, the service contractor, employs local management, warehouse employees and drivers, and DHL Express also employs one (1) administrative and three (3) clerical employees.

In June 2017, Local 251 was certified to represent DHLNH employees in Providence and shortly thereafter began servicing the unit. On April 30, 2018, when negotiations stalled, Local 251 struck DHLNH. On May 1, 2018, Local 251 extended the picket line to DHL Express in South Boston and Westborough, where Teamsters Local 25 ["Local 25"] is the bargaining agent. Local 25 employees in South Boston honored the picket line for about four (4) hours. In Westborough, some DHL Express drivers worked and some arrived about an hour later than usual.

The Amended Complaint alleges that Local 251 engaged in a secondary boycott by extending its picket line to DHL Express. Local 251 asserts that DHL Express is not neutral in the dispute, so its picketing was lawful, and denies that it impeded access to the South Boston facility.

Summary of Argument

DHL Express is not "neutral," so General Counsel failed to establish violations of 8(b)(4) of the Act.

The uncontradicted, credible evidence proves that DHL Express and DHLNH are a single integrated enterprise because they share common or centralized control of day-to-day operations, are engaged in a fully integrated business operation and are completely interdependent. Neither employer exists in the Rhode Island market without the other. DHL Express is DHLNH's only

[2] The facility is in Pawtucket, Rhode Island, but is designated in documents as "PVD," so it will be referenced here as the Providence facility.

customer, and DHLNH is DHL Express' only Providence service contractor. DHL Express tells DHLNH what packages it may or may not carry, how to carry them and to what locations. DHL Express' cartage agreement, Providence lease agreement, courier service guide and general operating regulations control DHLNH's day-to-day-operations. DHL Express and DHLNH share a common facility, production area, break area, signage, entrances and exits, parking, phone lines, bulletin boards, bathrooms, and equipment – all of which DHL Express provides for free. DHL Express performs identical functions to DHLNH in other markets. Union elections for DHL Express and DHLNH were conducted by the NLRB in the same room. The two companies literally share the same DHL name.

Second, DHL Express and DHLNH are joint employers. DHL Express has the capacity to control, and does control, terms and conditions of employment by virtue of the cartage agreement, Providence lease agreement, and operating rules and regulations. DHL Express regulations are specifically referenced in the cartage agreement and posted in DHLNH production areas. The Management Rights provision of the DHLNH collective bargaining agreement ["CBA"] stipulates that DHL Express rules trump all other provisions, and conversely, DHL Express' CBA with Local 25 controls the flow of work to DHLNH. DHL Express sets conditions for hiring or termination, sets work rules (including deliveries and pickups, employee conduct and appearance), trains drivers and sets other operating requirements that permeate the employment relationship. DHL Express manages employment disputes regarding union access, employee benefits, driver discipline and customer complaints. DHLNH drivers wear a DHL Express uniform. DHL Express cameras monitor every corner of the DHLNH warehouse area and the DHL Express scanner monitors road drivers. DHL Express employees, in Providence, Westborough and at Logan Airport, work side-by-side with DHLNH

employees and DHL Express employees at the DHL Express hub in Cincinnati and Providence routinely communicate (via the scanner) with DHLNH employees regarding production and local employment matters, like overtime. If DHLNH wants to communicate with drivers, it must use the DHL Express scanner. DHL Express tells DHLNH drivers which packages to deliver, which ones are priority, where and how to deliver them, where and how to pick them up, monitors drivers' performance by scanner and GPS to make sure they do it right, and tells their boss if they don't. All customer communications are routed exclusively through DHL Express phones or email, or to the DHL Express service desk in Providence. All customer complaints are routed to DHL Express via phone or email, then to DHL Express in Providence, then to DHLNH. DHLNH paychecks are delivered to DHL Express. DHL Express directly and indirectly bargained with Local 251 for the DHLNH CBA. DHLNH is compensated according to driver performance and efficiency, which DHL Express controls. DHL Express management told DHLNH not to tell its employees that work rules were in fact coming from him.

Third, DHL Express and DHLNH were allies prior to and during the strike. DHL Express provided administrative support, strike security, delivery vans, delivery staff and other support. A DHL manager directed strike security and was photographed loading a customer's truck.

Finally, General Counsel failed to establish that Local 251 impeded access to the South Boston facility. DHL Express management and other vehicles entered and exited the facility without interruption. A DHL Express supervisor was briefly delayed leaving the facility due to his own indifference and was so minor as to be *de minimis*.

Argument

I. GENERAL COUNSEL FAILED TO ESTABLISH THAT LOCAL 251 VIOLATED SECTION 8(b)(4) OF THE ACT

Section 8(b)(4)(ii)(B), the so-called secondary boycott provision of the Act, makes it an unfair labor practice for a labor organization that has a labor dispute with a "primary" employer to pressure other "neutral" employers who do business with the primary, where the union's objective is to force the neutral to cease doing business with the primary so as to increase its leverage in its dispute with the primary. *Subject: International Longshoremen's Association, AFL-CIO (Greenwich Terminals) District 15, International Association of Machinists and Aerospace Workers, AFL-CIO (Greenwich Terminals)*, 2014 WL 3887574, at *3. Section 8(b)(4) provides in relevant part that it shall be an unfair labor practice for a labor organization:

> to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to … perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: … (B) forcing or requiring any person … to cease doing business with 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 Act permits pressure on employers who, by their conduct or status, are enmeshed in the primary dispute. The Supreme Court has held that section 8(b)(4) was "the result of conflict and compromise" and should not be interpreted in a manner that would "find[] by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Carpenters Local 1976 v. NLRB,* 357 U.S. 93, 100 (1958). Section 8(b)(4) preserves "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes" while "shielding unoffending employers … from

pressures in controversies not their own." *National Labor Relations Board v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). Emphasis added.

Section 8(b)(4) does not insulate employers who are "substantially involved" in the primary dispute or "in cahoots" with the primary. A neutral employer must be "wholly unconcerned." In *Teamsters, Local 560 (Curtin Mathewson)*, 248 NLRB 1212, 1213 (1980) the Board held:

> We start with the fundamental proposition that Section 8(b)(4) was designed to preserve the traditional right of striking employees to bring pressure against employers who are substantially involved in their dispute, while protecting neutral employers from being enmeshed in it. Since these legitimate interests are often in conflict, lines must be drawn. Such line-drawing is as necessary when dealing with the problem of determining an employer's neutrality as it is when dealing with other aspects of the primary-secondary dichotomy. At times, the lines may seem arbitrary. See *United Marine Division of the National Maritime Union, AFL-CIO, Local No. 333 (D. M. Picton & Co., Inc.)*, 131 NLRB 693, 699 (1961). Arbitrariness can be minimized, however, if we do not lose sight of the fundamental policy considerations the Board and the courts have distilled from the known concerns of Congress.
>
> Two statements by Senator Taft have been taken to summarize the legislative history of Section 8(b)(4) with respect to what constitutes a neutral employer or, as the Act now reads, "person."
>
> This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees. [Emphasis supplied.] [93 Cong. Rec. 4198 (1947), reprinted in II Leg. Hist. 1106 (NLRA, 1947).]
>
> Later, in a post-legislative reflection on the purpose of the provision, Senator Taft stated:
>
> The secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike .... It is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer. [95 Cong. Rec. 8709 (1949).]

Emphasis added.

From Senator Taft's "wholly unconcerned" statement, courts and the Board developed the "ally doctrine." The Supreme Court recognized the ally doctrine as a defense to section 8(b)(4)(B) "where the secondary employer against whom the union's pressure is directed has *entangled himself in the vortex of the primary dispute*." *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 627 (1967). Emphasis added. One branch of the doctrine involves cases in which an employer's neutrality is compromised by its performance of "struck work." The other branch, asserted here, challenges neutrality on the ground that "the boycotted employer and the primary employer were a single employer *or enterprise*." *Curtin Mathewson*, 248 NLRB at 1213. Emphasis added.

"To determine whether an employer is neutral involves a *commonsense evaluation* of the relationship between the two employers who are being picketed." Emphasis added. *N.L.R.B.* v. *Local 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 460 F.2d 1, 6 (2d Cir. 1972), *cert. denied* 409 U.S. 1041. Emphasis added.

> [T]he branches of the "ally" doctrine are not to be permitted to take on lives of their own and become encrusted with nice rules and exceptions. They are merely tools that must be used to reflect the full range of congressional policies underlying the primary-secondary dichotomy. In deciding this case, therefore, <u>we consider all the strands of mutual interest</u> between [the employers]. *Local No. 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [A.C.E. Transportation]* v. *N.L.R.B.*, 266 F.2d 675, 680 (D.C. Cir. 1959).

Curtin Mathewson, 248 NLRB at 1214.

The Board has articulated various versions of a four-factor test to assess the enterprise strand of the ally doctrine. In *Graphic Arts Local 262 (London Press)*, 208 NLRB 37, 39 (1973), the Board considered: (1) common ownership of employers involved, (2) common or centralized control of day-to-day operations including labor relations, (3) extent of integration of business operations, and (4) interdependence of employers for a substantial portion of business.

None of the individual factors is considered in isolation; "rather the Board weighs all of them to determine whether in fact one employer is involved in or is wholly unconcerned with the labor disputes of the other." *Retail Store Employee Union Local 1001, Retail Clerks International Association, AFL-CIO (Land Title Insurance Co. of Pierce County)*, 226 NLRB 754, 756 (1976), *enforcement denied on other grounds*, 600 F.2d 280 (D.C. Cir. 1979), *aff'd N.L.R.B. v. RWDSU, Local 1001,* 447 U.S. 607 (1980). "[A] determination of neutrality under Section 8(b)(4)(ii)(B) is not confined to the technical concepts of the "struck work" and "single employer" doctrines; rather, "all the strands of mutual interest" connecting the entities must be considered." SUBJECT: *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada and its Local 478 (The LookAlike, LLC),* 2013 WL 1497116, at *4.

These caveats – that "all strands" of the relationship must be considered and a "commonsense evaluation" undertaken - are particularly fitting in this case because General Counsel and Charging Party have attempted to hair-split the legalistic definitions of joint employer, enterprise and ally. The Board and courts have consistently rejected that approach. In all cases, "the test is not applied in a formulaic or rigid manner, but rather each situation must be evaluated on a case-by-case basis. *Curtin Matheson*, 248 NLRB 1212, 1214 (1980)." *International Longshore and Warehouse Union, Local 4*, 2014 WL 1669468. "Common ownership and potential control of the day-to-day activities of corporate divisions … certainly is not a factor to be accorded weight" and disparate "insurance, pension, and salary continuation programs" is "not considered a factor to be accorded significant weight." *Food & Commercial Workers Local 1439 (Price Enterprises),* 271 NLRB 754, 756 (1984). *See also Local 749*

(Transport, Inc.), 218 NLRB 1330 (1975); *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303 (1970).

The gravamen of the ally standard is often the vertical integration of the two employers. In *Longshoremen & Warehousemen Local 6 (Hershey Chocolate Corp.)*, 153 NLRB 1051, 1060–61, 1965 WL 16083, at *10–11, the Board explained:

> In the process of decisional interpretation of Section 8(b)(4)(A) the Board has developed two tests for ascertaining the existence of "ally" relationship between the employers involved in the dispute. Thus, the Board has held that when the primary and secondary employers, although separate legal entities, are commonly owned or controlled or are engaged in closely integrated operations, they would be regarded, under certain circumstances, as a single employer under the Act and hence "allies" in, and parties to a union's dispute with the primary employer.
>
> In other words, a "straight-line operation," also referred to in some decisions as a "single-line operation," is one in which the activities of two companies are so integrated and interdependent that they must be regarded as a single operation for the purpose of applying the ally concept.

Emphasis added. Similarly, vertical integration was the keystone in *Teamsters Local 519 (Cummins Crosspoint, LLC)*, 2013 WL 5740443. General Counsel noted:

> Although the Board has emphasized the importance of centralized labor relations to its single employer analysis, it has not always consistently explained how much integration is needed for separate but related entities to qualify as a single employer under Section 8(b)(4). For example, in *Teamsters Local 282 (Acme Concrete and Supply)*, the Board found it unnecessary to determine whether the relationship between two entities was that of a single employer or ally when their strong interrelationship and interdependence negated any claim of neutrality. And, in *Mine Workers (Boich Mining),* where there was no common management or labor relations, the Board specifically disavowed an ALJ's finding that interrelations of operations was the most important single employer factor while simultaneously relying on it to "tip [] the balance in favor of single employer status."
>
> The Board, therefore, has underscored functional integration's importance as a factor that often establishes that two entities, while appearing separate, function in reality as a single, integrated entity. The Board's seminal decision in *Curtin Matheson Scientific*, issued between Acme and Boich Mining, guides our analysis of the single employer factors in the Section 8(b)(4) context. The Board emphasized in *Curtin Matheson* that the fundamental issue in these cases is whether one employer entity is "wholly unconcerned" with the other's labor dispute, and the

> single employer factors are simply used to answer that question. Thus, when analyzing the primary-secondary dichotomy, the Board stressed that it would apply a flexible and common-sense approach by considering "all the strands of mutual interest" between the corporate entities. In *Curtin Matheson*, the Board found that the corporate parent itself was the "decisive link" between its branches— despite the daily autonomy enjoyed by branch managers— because of corporate policy of cross-shipping among branches and its ultimate control over branch labor relations. The Board thus recognized that, in those circumstances, the union had not attempted to enmesh a neutral because the corporation and its branches were a single employer, whose functional integration *and* control over labor relations allowed it an advantage in dealing with labor disputes at the local leve1.

Emphasis added. *Compare Office and Professional Employees Intl. Union, Local 2*, 253 NLRB 1208, 1211 (1981) ("two employers exist for separate purposes, and conduct separate and distinct operations, with no interchange of employees and a rather restricted interrelationship.").

A. Section 8(b)(4) Must be Narrowly Construed to Avoid Infringing Upon Constitutionally-Protected Activity.

There is also a constitutional component to the analysis. Construing section 8(b)(4) broadly presents "serious constitutional questions." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council,* 485 U.S 568, 588 (1988). "[A] broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760,* 377 U.S. 58, 63 (1964). To avoid such constitutional problems, the Supreme Court has instructed that section 8(b)(4) should be construed to apply to First Amendment-protected expression only where its text or legislative history provide the "clearest indication" that Congress intended to prohibit the conduct at issue. *DeBartolo,* 485 U.S. at 577; *see also Carpenters Local 1506,* 355 NLRB 797, 797 (2010) (construing section 8(b)(4)(B)(ii) in manner consistent with Board's obligation "to seek to avoid construing the Act in a manner that would create a serious constitutional question"); *UFCW Local 1996,* 336 NLRB 421,427 (2001).

> In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.

N. L. R. B. v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58, 62–63 (1964). *See Soft Drink Workers Local 812 v. NLRB,* 657 F.2d 1252, 1269 (D.C. Cir. 1980) ("[A] narrow construction of the statutory ban on secondary boycotts, relying only on the very clearest manifestations of congressional intent to ban a particular type of boycott, avoids collision with the Constitution").

B. General Counsel Failed to Establish that DHL Express was Neutral.

DHL Express and DHLNH are not commonly owned, but there can be no question that they share common or centralized control of day-to-day operations including labor relations, are engaged in a fully integrated business operation and are completely interdependent for all of DHLNH's business and all of DHL Express' business in the Providence market. *Graphic Arts Local 262 (London Press)*, 208 NLRB 37. DHL Express is not neutral.

1. DHL Express is Not Neutral Because it is a Vertically-Integrated Enterprise with DHLNH

Without DHL Express, DHLNH does not exist. Without DHLNH, DHL Express – a putative "international" company - cannot operate in Rhode Island. 251-74 at 1.

In the landmark case of *Local No. 24, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N. L. R. B.*, 266 F.2d 675, 678–81, 105 U.S.App.D.C. 271, 274–77 (C.A.D.C. 1959), the Court held that a vertically integrated operation of the sort presented here precludes a violation of section 8(b)(4). The Court stated:

The dissenting [Board] member said he thought his co-members misconceived the issue. He believed the issue to be whether ACE stood in such relationship to the drivers of the leased equipment that it was entitled to the protection intended by Congress to be afforded to neutrals or persons 'wholly unconcerned' with the primary dispute. Upon examination of the facts he concluded that, whether or not the owners of the equipment 'retained sufficient indicia of the relationship to constitute themselves employers of the drivers of such equipment, it is certainly true that these owner-lessors have given over to a more-than-merely-substantial degree the indicia and exercise of the functions of an employer of these drivers to ACE.' He then considered Section 8(a)(3) of the statute, which applies to representation cases, and thought that in a representation case ACE would undoubtedly be held to be an employer of the drivers. His final conclusion was that ACE could not be regarded as a neutral or 'wholly unconcerned' with a dispute concerning these drivers….

It is our view that the relationships of ACE, these drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the statute against the impact of a strike by the drivers against the lessor-owners. The many tiny strands of ACE control over these drivers cannot be extricated from the total fabric of mutual obligation. Those strands are clearly part of the pattern of the employer-employee relationship….

As we pointed out in *Seafarers International Union, etc. v. N.L.R.B.*, this section (8(b)(4)(A) and (B)) cannot be read or applied literally; it must be construed. Of course, in an area so wide as is the field of labor relations, there are many situations in which the answer to a dispute under this section is easily derived by the application of such legalistic formulae as 'independent contractors', 'co-employers', or 'allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts in the case. This is such a case. …

To state the matter otherwise, we agree with the contentions of our petitioners as the trial examiner described them. He said:

'Rather, the Respondents (our petitioners) say, the businesses of the Lessors and ACE are so integrated operationally that for purposes of this proceeding they must be deemed either a single employer, a joint or common venture, a 'straight line' operation within the Board's understanding of that term, or an alliance of interest. The Respondents maintain that whichever term may best be used to describe the relationship among ACE and the Lessors, their business arrangements are such that in the Union's dispute with the Lessors or any one of them neither ACE nor any of the Lessors is so unconcerned therewith that it is statutorily shielded as a neutral from an extension of the dispute by the Union to its operations, and, therefore, the Union's picketing and inducement herein occurred at premises which in this proceeding should be regarded as primary and not secondary.'

Emphasis added.[3]

At the threshold, the ALJ should examine the cartage agreement. 251-74. There, DHL Express maintains virtually complete control over DHLNH operations. Next, the ALJ should examine the lease agreement. 251-78. There, DHL Express maintains complete control over the facility. As described below, DHL Express and DHLNH are engaged in a fully integrated business operation and are completely interdependent.

a. *The physical facility*.

DHLNH operates exclusively out of the DHL Express facility, which is leased to DHL Express. Tr. 1145; 251-78. The lease covers the entire facility and there is no sublease to DHLNH or any of its affiliated companies. DHLNH does not pay rent. Tr. 1146. Indeed, DHL Express pays for 20 parking spaces, although it has just 3 employees. Tr. 1147. The lease requires the landlord's permission to assign the leased premises, but DHL Express has never obtained permission to assign some portion of the premises to DHLNH. Tr. 1147.

DHL Express badging and signage are ubiquitous throughout the facility, both outside and inside the warehouse, Local 251 Exhibits ["251- "] 2, 3, 4, 5, 6, 7, 8, 10, 11, and on DHLNH vehicles. 251-24, 26, 26. DHL Express and DHLNH share employee and customer entrances and exits, common areas, bathrooms, conference and break areas. Tr. 820-2, 828, 831. All the

[3] "As originally designed, the integrated enterprise test was used by the National Labor Relations Board to determine whether two firms were sufficiently related to meet its jurisdictional minimum amount of business volume. *See* Stephen F. Befort, *Labor Law and the Double–Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation,* 1987 Wis. L. Rev. 67, 75. Later, the Board came to use the same test to determine whether nominally separate firms constituted "neutral" entities in the context of secondary boycotts …." *Pearson v. Component Technology Corp*., 247 F.3d 471, 486 (C.A.3 2001).

furniture and appliances in the break room are shared. Tr. 856. They share a customer service desk and employee bulletin boards with common messaging. Tr. 830, 831; 251-11, 19. Labor standards and DHL Express rules and regulations are posted on the common bulletin boards. Tr. 1061 (Stamp). DHLNH supervisors' offices are a few feet from DHL Express managers. Tr. 857. Phone lines are shared. Incoming calls are answered by DHL Express Operations Agent Bethany Stamp and transferred to DHLNH staff. Tr. 858. Union elections for the two bargaining units were conducted in the same common break room. Tr. 1060-1.

DHL Express controls access to the facility. 251-24 (key fob). When the Union sought access to the facility to meet with drivers, DHLNH required Maini to "go through Marzelli. They were adamant about that." Tr. 1132. Marzelli told Maini that if he wanted a key fob to access the door, he would make the request to DHL Express. Tr. 1132. Lee also received his key fob from Marzelli. Tr. 855.

DHLNH is so invisibly integrated into DHL Express that the Westborough Service Manager Thomas McArdle had never heard of DHLNH. Tr. 282-4.

b. *The business operation*.

DHL Express is an international package carrier entirely reliant on DHLNH for delivery and pickup in the Providence market. Tr. 312-3 (Evans). DHLNH is the sole delivery contractor in the Providence region, and conversely, DHLNH is prohibited from working for any other carrier without DHL Express' written permission, which it has never obtained. 251-74 (cartage agreement); Tr. 1150, 1155, 1156.

The business operation is fully integrated. Packages arrive at Boston's Logan Airport from DHL Express hub in Cincinnati, where they travel to Providence via North East Freightways. Tr. 177-179. Packages are shipped in a DHL Express "egg container" or "can."

251-27, 28, 29. Cans are transferred to a tractor-trailer and transported to Providence. Tr. 862-3, 865; 251-27. Other packages are loaded into the belly of the plane ("the belly load") and transported to Providence by a DHLNH bargaining unit employee. Tr. 864. When the truck arrives, Stamp breaks the seal and DHLNH warehouse employees enter the can and unload packages onto a conveyor belt, label-side up. Tr. 867. Each package label, prepared by DHL Express, has a bar code which identifies the customer, address and station code. DHLNH drivers scan the labels to identify their packages, which they load onto DHLNH delivery vans backed up to the conveyor belt. Tr. 869. Drivers know which packages to expect because DHL Express emails an Inbound Planning Tool ["IPT"] to the DHLNH Station Manager, who prints it out and gives it to each driver.

Notwithstanding this practice, DHL Express reserves the authority to change the work flow. In 2014, a dispute arose between Local 25 and DHL Express regarding "the decision to move certain processing work to Providence." An arbitration award issued by the DHL-IBT National Grievance Panel and a neutral arbitrator redirected the work to Local 25. 251-47, 48. During the labor dispute between Local 251 and DHLNH, DHL Express increased its usage of the USPS for package deliveries. Tr. 1201.

All of this is contractually regulated. DHL Express "provide(s) guidance and the contract and stipulations as to the requirements [service contractors] must adhere to." Tr. 345 (Evans). DHL Express work rules are posted on the common bulletin boards. Tr. 834. The rules include "checkpoints" and the "step by step process of DHL [Express] regulations," including how drivers respond to unusual deliveries. Tr. 835, 836. On the bulletin board, 251-11, DHL Express posts rules on miscodes (incorrect deliveries), Tr. 836; 251-12, miscode checkpoints, Tr. 839; 251-13, damaged packages, Tr. 840, 841; 251-14, 251-15, facility checkpoints, Tr. 842; 251-16,

customer tracking information, Tr. 843; 241-17, and mis-sort checkpoints, Tr. 843-4; 251-18. The rules are incorporated in the cartage agreement at Schedule B. On a second bulletin board near the conveyor belt, 251-19, DHL Express posts TSA information about known criminals, driver productivity delivery attempts. DHL Express maintains a courier service guide, which designates what types of items can or cannot be transported, or which are prohibited in certain locations. The guide is kept in drivers' vans. Tr. 1069; 1199-1200 (Marzelli). All of these rules and regulations are binding on the DHLNH drivers.

The package delivery operation is managed and controlled by DHL Express by means of its package scanner, which records virtually every aspect of deliveries and pickups by drivers. 251-30. Drivers collect their scanner, which is stored next to the DHLNH time clock, when they punch in for work. Tr. 873-4. The scanner is a phone-sized device used to make deliveries. 251-30, 31. Scanners are maintained by DHL Express. Tr. 1076. Various screens identify customers, packages, delivery routes, pickups, number of pickups, number of packages, delivery times, added pickups, arrival times, mileage. Tr. 880;251-31, 32, 34, 35, 36. DHL Express can direct-message drivers through the scanner, but DHLNH cannot. Tr. 880-1. DHLNH has no access to this messaging system. "The only way they have control of drivers on the road is through the scanner. They have to call dispatch in Cincinnati, and they relay the message through DHL Express in Ohio and message it through the scanner." Tr. 888 (Lee). Even the DHLNH manager has to go through DHL Express. Tr. 888. This includes messages requesting volunteers for Sunday work. 251-33. Drivers respond to those requests through the scanner to DHL Express, which relays the message to DHLNH. Tr. 888-9. Delivery time, pickup time, pickup window or route changes are directed to DHL Express and messaged through the scanner. Tr. 890; 251-34, 35. These updates occur throughout the day, every day. Tr. 891; 895. The

customer signs the scanner to acknowledge pickup or delivery, which uses GPS to confirm and coordinate the customer's address and is communicated to DHL Express to confirm as a "completed delivery." Tr. 897. Drivers can use the scanner to message co-workers or notify co-workers about traffic or construction delays by entering a "checkpoint." Tr. 897-8. If a driver misses a pickup, DHL Express can message the driver through the scanner to return to the customer. Tr. 899.

Just as the scanner integrates DHL Express and DHLNH operationally, DHL Express employees' job duties are integrated with those of DHLNH employees. Bethany Stamp's duties are to see what packages need to go out for delivery and assist the drivers and customers with delivery issues. Tr. 1062. Each morning Stamp runs the inbound planning tool for each driver showing the shipments that are arriving that morning and assigned to each route, which she sends to DHLNH. Tr. 1073, 1076. She receives and signs for their paychecks. Tr. 1079. She has drivers' personal phone numbers if she needs to reach them for work. Tr. 1074. Drivers vehicles have Geotab, which is a GPS system used by DHLNH and DHL Express. Tr. 1076-7.

Stamp or Marzelli notifies Santiago when particular packages are designated as priority. Tr. 1080. DHL Express designates when priority packages must be delivered. Tr. 1105; 251-74 (cartage agreement at Schedule B 3). Stamp has an office and a desk in the warehouse and has access to the same programs on both computers. Tr. 1080. She receives emails from DHL Express customer service and Marzilli regarding workloads pickups or other shipments, and from DHLNH regarding missing deliveries and other issues. Tr. 1063-4. She screens and directs phone calls on a single line and phone system to both DHL Express and DHLNH staff. Tr. 1064-5. For property damage issues, Stamp will typically contact a DHLNH supervisor or take a message if they are not available. For delivery issues, she will try to handle the matter herself or

call the DHLNH driver personally. Tr. 1066. Mornings in the warehouse Stamp assists drivers with package updates and 'holds.' Tr. 1066. She deals with walk-in customers who ship, receive or redirect packages at the facility. Pallet deliveries are received at the loading dock. Tr. 1067. She has key fob access to all areas of the facility, including the warehouse. Tr. 1067. Stamp typically interacts with drivers regarding missing items, delivery issues, incorrect addresses or damaged packages. Tr. 1069-70. In January, 2018, Marzilli sent Stamp an email telling her not to speak to with drivers, but nothing changed. Tr. 1070-1.[4]

DHL Express' involvement in DHLNH operations is exemplified by how they deal with customers; especially customer complaints. DHLNH has no customer service number. Tr. 874. Instead, customer service – pickups, deliveries, complaints - is exclusively through DHL Express. Complaints are received by DHL Express through an 800 number or the "straight-to-the-top" line. Complaints frequently involve driver conduct, including missed or wrong deliveries, wrong locations, bad driving or other violations of DHL Express delivery policies. Tr. 1175. DHL Express records the complaint, then routes it to Marzelli. Tr. 1171-74. Marzelli would forward the complaint to DHLNH management, which is not copied on the original complaint. Tr. 1175, 1176.[5]

For his part, Marzelli monitors "pretty much every area of the warehouse" on a large screen television in his office. Tr. 1072. Does DHL Express seriously contend Marzelli spends the day watching SportsCenter? Tr. 1094

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[4] Around the same time Marzelli told DHLNH management not to disclose that his memos and instructions to drivers were coming from him. 251-80. The obvious purpose of Marzelli's instructions was to attempt to dissociate DHL Express from control over working conditions.

[5] DHL Express' use of customer complaints as a means to effect driver discipline is discussed infra at 23-28, in regard to joint employer status.

C. DHL Express is Not Neutral Because it is a Joint Employer with DHLNH.[6]

1. A joint employer is not neutral.

A joint employer is *not* neutral. In *Teamsters, Local 559 (Atlantic Pipe Corp.)*, 172 NLRB 268, 273–74 (1968), the Board conclusively held that joint employer status is a defense to secondary boycott. The Board held:

> Thus, the concept of a joint employer appears to apply in unfair labor practice cases. Although research has revealed no case in which this concept has been applied to a secondary boycott situation, I cannot find any precedent holding that such a concept would not be so applicable.
>
> Thus, I find that, as noted above, the interrelationship of supervision first by White Oak and then by Atlantic must be considered a major factor in evaluating the relationship between the two companies.
>
> I find and conclude that these corporations are in fact as well as in law joint employers within the meaning of the Board precedent above cited.
>
> Accordingly, I find and conclude that the picketing at Atlantic's yard by the Respondent Union was part of the Union's lawful primary activities directed against Atlantic as well as White Oak. Such picketing being primary in nature is not a violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

Cited with approval, *Milk Drivers Local No. 471*, 209 NLRB 24, n.25 (1974). *See also Teamsters Local 557*, 338 NLRB 896, 897 n.3 (2003) (Liebman concurring) *and cases cited therein*; Service *Employees Intern. Union Local 525, AFL-CIO*, 329 NLRB 638, 640 (1999) ("where it is demonstrated that the targeted entity exercises substantial, actual, and active control over the working conditions of the primary's employees, that entity may be found to have relinquished its 8(b)(4)(B) protections."); *Chauffeurs, Teamsters and Helpers Local Union No. 776*, 313 NLRB 1148, 1153 (1994) ("Unless the evidence establishes that Drivers, Inc. and Pennsy Supply were … joint employers, alter egos, or allies in the strike, as claimed by the

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[6] Although discussed separately, these same joint employer factors mitigate in favor of finding the employers are part of an integrated operation because they show common or centralized control of labor relations.

Respondent as affirmative defenses, the picketing … violated Section 8(b)(i) and (ii)(4) of the Act."); *Teamsters Local No. 85*, 253 NLRB 632, 635 (1980); *Teamsters Local Union No. 688*, 211 NLRB 496 (1974); *Carpenters (AFL-CIO) (Levitt Corp.)*, 127 NLRB 900, 905 (1960) ("the first question to be resolved is whether Sullivan and Commonwealth are in fact subcontractors or are, as alleged by Respondents, joint employers.").[7] *See also Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Local No. 279*, 882 F.2d 1117, 1123 (C.A.7 (Ill.),1989) ("persons who might at first blush appear to be neutrals may violate the gate system if it is found that the putatively "neutral" employer was in fact a "joint employer" with, or "ally" of, the primary employer.").

Most recently, in *Preferred Building Services, Inc.,* 366 NLRB No. 159, *recon. den.* 2018 WL 5734450 (2018) the Board acknowledged the joint employer defense to 8(b)(4)(B). There, employees of Ortiz Janitorial Services ["OJS"] picketed Preferred Building Services ["Preferred"], which provided cleaning services via OJS to Harvest Properties, a building

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[7] In her summary judgment motion, General Counsel claimed that *Browning-Ferris of California*, 362 NLRB No. 186 (2015), "made it clear that its decision did not apply to issues under 8(b)(4)" because the dissent expressed concern that "neutral parties normally protected from picketing could be treated as employers" and the majority responded that its decision was not intended to modify existing law. Motion at 18. True as far as it goes, but not for the conclusion General Counsel claims. What the dissent actually said was this:

> More specifically, the majority *redefines and expands the test* that makes two separate and independent entities a "joint employer" of certain employees. *This change* will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

Emphasis added. *Browning-Ferris*, 2015 WL 5047768, at *25. So, it was not *application* of joint employer to secondary boycott (and other doctrines) that concerned the dissent, but its *redefinition and expansion*. Contrary to General Counsel, the colloquy indicates that the dissent accepts application of joint employer doctrine to 8(b)(4) – albeit more narrowly defined.

management company, with tenants KGO Radio and Cumulus Media. Shortly thereafter, OJS terminated several picketers. General Counsel alleged Preferred and OJS violated section 8(a)(3). Preferred and OJS asserted an affirmative defense that the picketing violated 8(b)(4)(ii)(B) and was therefore unprotected. The ALJ found that PBS was a joint employer with OJS and the picketing was therefore protected. Slip op. at 14-16. The Board reversed, *but without disturbing the joint employer analysis*. Rather, the Board found that the picketing enmeshed non-employer neutrals at the common situs, including KGO, and was for the purpose of disturbing the business relationship between the employer(s) and Harvest.[8] "[W]e find it unnecessary to pass on the judge's finding that Preferred is a joint employer of OJS's employees… Assuming arguendo they are joint employers … the picketing still had a prohibited object." 366 NLRB at n.18. So not only did the ALJ apply joint employer analysis to 8(b)(4)(B), the Board acknowledged that on different facts, the doctrine would apply.

2. DHL Express and DHLNH are Joint Employers.

The Board will find that two employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment." *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015) (citing *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)). *See* SUBJECT: *Securitas Security Services USA, Inc., and Bechtel National, Inc., joint employers*, 2017 WL 9439265, at *5. It is not necessary to show that DHL Express directly or actually controls essential terms and conditions of employment; simply that it has authority to do so. "Terms of employment such as hiring, firing, disciplining, supervising and directing employees as well as wages and hours are examined to determine whether such

[8] General Counsel did not allege that the picketing enmeshed any other employers.

authority exists. Other examples include dictating the number of workers, controlling scheduling, seniority and overtime, assigning work, and determining the manner and method of work. Id.; see also, *Retro Environmental, Inc.,* 364 NLRB No. 70, slip op. at 5 (2016)." *Preferred Building Services*, 2018 WL 4106356, at *8, *rev'd on other grounds*. Examining the cartage agreement, lease agreement, DHL rules and regulations, and the practices at DHLNH, the evidence is simply overwhelming that DHL Express and DHLNH satisfy this standard.[9] [10]

a. Hiring, firing and other discipline.

Although DHLNH is responsible for providing staff, the cartage agreement sets "significant limitations" on whom DHLNH can employ. Tr. 1155 (Marzelli). These include criminal and driving record background checks, written and oral English fluency, drug screening conducted by a DHL Express-approved lab, post-employment drug and alcohol testing and random testing. Tr. 1151-55; 251-74 (cartage agreement) at 3.4.2, 3.4.3, 3.4.4, 3.4.4.1. The

[9] At the outset, there can be no doubt that *Browning-Ferris* is the appropriate joint employer standard. It is specious to cling to *Hy-Brand* when the Board on February 18, 2018 – roughly ten weeks before the strike – held that "overruling of the *Browning-Ferris* decision is of no force or effect." *Hy-Brand Industrial Contractors*, 2018 WL 1082557, at *. Moreover, the Board has announced that it will address joint employer in rulemaking, which is unlikely to conclude prior to decision in this case. Finally, even if a new standard is ultimately approved, it would not be applied retroactively as this would work a "manifest injustice" and "unfairly prejudice" Local 251, *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993) (citing *NLRB v. Bufco Corp.*, 899 F.2d 608, 609 (7th Cir. 1990), as well as interfere with Local 251's First Amendment rights by retroactively rendering lawful speech unlawful. *See, e.g., Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, at *6 (S.D.Ohio, 2014) ("Where, however, the retroactive application of a law implicates First Amendment rights, "rigorous adherence" to due process is required lest exercise of those rights be chilled*."). Cf. Shaw's Supermarkets, Inc. v. N.L.R.B.,* 884 F.2d 34, 37 (1st Cir.1989) (departure from precedent regarding permissible speech not adequately explained and may not be applied retroactively).

[10] None of this will surprise DHL Express, since the cartage agreement anticipates the possibility of a joint employer claim and allows DHL Express to demand that DHLNH indemnify and hold it harmless. 251-74 at 12, 12.2, 12.7.

cartage agreement also sets appearance standards, including grooming and facial hair. DHLNH employees "must "deal [] with the public in a professional, neat, clean, presentable manner." 251-74 at 3.13. And DHL Express in fact has total control over who DHLNH hires because, under the lease agreement, it alone determines who may come on the property. 251-78 sections 1, 25, 33. If DHL Express doesn't want a candidate hired, or wants an employee fired, it can prevent him from coming onto the facility.

While DHLNH may have nominal authority to terminate an employee, ultimate control is with DHL Express. For example, DHL Express caused the discharge of Sebastian Ntanseh in January, 2018. At that time, DHL Express required DHLNH to run criminal background checks on its employees. When Ntanseh's record came back with a pending criminal charge, he was fired. Tr. 1115. The firing was pursuant to DHL Express' policy prohibiting employment of drivers with a criminal record. Tr. 1115-6; 251-71. When Maini asked for documents pertaining to the firing, DHLNH gave him the DHL Express policy regarding criminal background compliance. Tr. 1124. Under the cartage agreement, 251-74, employees must provide "courteous, efficient, reliable, safe and secure" services, maintain various licenses and training, pass random drug and background screens and other requirements. 251-74 at 3.4.1. A positive drug screen results in termination. 251-74 at 3.4.3. And even where driver qualifications do not specify termination, Marzelli admitted that any violation of the cartage agreement is grounds for DHL Express to terminate the agreement entirely. Tr. 1257-8; 251-74 at 9.2.2, 9.2.3. Local 251 presented numerous examples of Marzelli investigating customer complaints and investigating driver performance, often with directions to DHLNH to correct the issue. *See* 251-88, 89, 90, 91, 92, 93.

DHL Express also imposed work-related discipline on Joe Lee. Around January 2018, Lee was written up for missing a customer pickup. The pickup window time was 1:00 to 3:00 p.m., but Lee left at 3:05 when the customer was not ready. Lee was sent back to the location, but refused because he had other deliveries to make and tries to reschedule. Later, DHL Express Station Manager Marzilli emailed Lee to say this was a big account, so Lee returned to the customer. He was "written up" for not making the pickup. Tr. 899-900.

c. Working conditions and other terms of employment.

According to Bethany Stamp, Marzelli monitors "pretty much every area of the warehouse "on a large screen television in his office. Tr. 1072. He observes whether drivers are out of uniform, mishandling packages or using the wrong entrance or exit, and brings that to Santiago's attention. Tr. 1082-3. He runs reports to show whether drivers had bad addresses. Tr. 1084. And Marzelli himself repeatedly acknowledged his direct involvement in driver discipline. Marzelli was directly involve in DHLNH operational and employment issues as a function of his role evaluating the DHL Express/DHLNH contract renewal. CP-22This included staffing, 251-79 and facility security, 251-80 ("address so this practice stops immediately"). Local 251 presented numerous examples of DHL Express involvement and control over DHLNH employee working conditions. These included:

- Drivers must agree in writing to the DHL Express uniform policy. 251-21. DHLNH drivers wear a DHL Express logoed uniform in DHL Express colors without any DHLNH badging. They must carry an ID with DHL Express badging. Tr. 848-849. Uniforms are ordered through DHL Express and shipped from DHL Express to DHLNH. 251-22; Tr. 851-2. Couriers must wear the DHL Express uniform, and a violation by the courier would be a contractual violation by DHLNH. Tr. 1161

- DHL Express was concerned with inadequate supervision and condition of vehicles. Marzelli reminded DHLNH of its contractual responsibility to comply with the Vehicle Image and Appearance policy. Tr. 1158; 251-77. DHL Express requires that couriers comply with the policy, Tr. 1159, 60, and a violation of the vehicle policy by the courier would be a violation by DHLNH. Tr. 1160.
- Although DHLNH provides driver training, DHL Express specifies what training is required, including DHL Express product lines, customer interaction, technology, safety and security, handling hazardous materials and basic job knowledge. 251-74 section 3.4.5; 251-74 at App. 1 (International Competence Profile for Contractor) ("it is critical that the contractor worker has the following minimal job knowledge and skills …"); 251-74 at Schedule B, 3.10 ("contractor workers will know of and will meet any special delivery requirements."
- Although DHLNH must provide delivery vans, DHL Express decides what vans they can use and how they appear. 251-74 at 3.5.2, 3.5.3
- DHL Express maintains specific appearance and behavior standards for drivers, including uniform appearance, grooming, facial hear, jewelry, earring and type of sunglasses. TR. 1252. Drivers may not do anything that brings "embarrassment or disrepute" to DHL Express. Tr. 1253-4; 251-75. DHLNH employees "must "deal [] with the public in a professional, neat, clean, presentable manner." 251-74 at 3.13.
- DHL Express can terminate the cartage agreement if DHLNH fails to comply with any provision of the agreement, or DHL Express rules and regulations, including delivery procedures. Tr. 1257-8.

- DHL Express provided a *DHL Express* Massport[11] access badge to a DHLNH driver so he could access Logan Airport. Tr. 1195, 1196; 251-94.
- Marzilli monitored and forwarded customer complaints to DHLNH. Complaints are received by DHL Express through an 800 number or the "straight-to-the-top" line. DHL Express customer service records the complaint, then routes them to Marzelli. Tr. 1171-74. Complaints frequently involve driver conduct, including missed or wrong deliveries, wrong locations, bad driving or other violations of DHL Express delivery policies. Tr. 1175. Marzelli would forward the complaint to DHLNH management. Tr. 1175, 1176.
- In January, 2018, Marzelli notified DHLNH by email that there had been a dramatic increase in customer complaints involving delivery issues, "something that the drivers were not doing right." Tr. 1177; 251-85. This included specific violations of DHL Express delivery policy and directives what to do differently. Marzelli expected DHLNH to train or retrain drivers on the policy. Tr. 1179; 251-85. He attached the DHL Express "Leave with Neighbor Delivery Process" which specifically directs drivers what to do when the customer is not available, including when it can occur, what shipments may be left, how many deliveries must be attempted, and what neighbors may accept the delivery. 251-86. In fact, all of the delivery and pickup procedures are memorialized in the cartage agreement. 251-74 at Schedule B 3, Description of Services,
- When a courier failed to make a proper delivery in February, 2018, Marzelli "confirmed courier failed to attempt per [DHL Express] policy, issue has been escalated to [DHLNH] management to follow up." 251-87.

[11] The Massachusetts Port Authority, which regulates access to Logan Airport and other facilities.

- One week in February 2018 Marzelli received ten (10) customer complaints. Tr. 1181. In one particular complaint he verified the issue with DHL Express Google Maps data from the scanner, then confirmed that the driver violated DHL Express policy regarding proper delivery procedures. TR. 1182-3. Marzelli referred the investigation results to DHLNH management "to follow up" or "do something," but stated "what they do is completely up to them." Tr. 1184. "I didn't say I didn't care." Tr. 1184.
- In February 2018, a customer complaint was received regarding delayed delivery. Tr. 1185; 251-88. Marzelli reported back to DHL Express that he would address the matter with DHLNH staff. Tr. 1186. Although Marzelli claimed that did not recall if that included drivers, Tr. 1186.
- In another instance, Marzilli reported a driver's violation of DHL Express delivery policy, and related that he had instructed the DHLNH "owner" "to address courier." Tr. 1189.
- On another occasion, in March 2018, a courier violated DHL Express policy by failing to leave a tag indicating he had been to a particular delivery location. Tr. 1191. A complaint was referred through DHL Express. Marzilli reported that the complaint had been turned over to DHLNH "to address with courier" and that he would "monitor courier performance moving forward." Tr. 1192; 251-93.[12] [13]

[12] In contrast, General Counsel offered the NEF handbook from April, 2016, GC-41, that had been eclipsed by the CBA.

[13] The cartage agreement purports to describe DHLNH is an "independent contractor" and that its employees are not DHL Express employees, but these are the types of legal definitions that the Board reserves to itself. *Stamford Taxi, Inc*., 332 NLRB 1372, 1400 (2000) ("The fact that the lease agreement defines the driver as an independent contractor … is undercut by the strong evidence of control exercised by Respondent over its drivers, and, consequently, may be accorded limited weight in determining the actual status of the drivers. *National Freight,*

Marzelli's testimony that DHLNH could ignore his complaints or that DHL Express policy was "completely up to them" is utterly incredible. First, he admitted he "cared" how DHLNH responded to complaints, Tr. 1190, and that "wouldn't be good" if DHLNH ignored DHL Express policies, Tr. 1180. Second, the documentary evidence proves he told DHL Express management that he was monitoring whether DHLNH would follow up. 251-88, 93. Third, his own job included reviewing DHLNH performance under the cartage agreement, including driver performance, 251-79 ("Everyone had all morning to talk to me today and nobody mentions anything about short staffing in PVD.").

While it is true that DHLNH set its own wage rates, it is also true that these rates are entirely dependent on and connected to the compensation arrangement with DHL Express. According to the rate schedule, CP-24, DHL Express pays DHLNH per piece and per count; both of which depend on driver performance. DHLNH receives no compensation from the shipper – it is entirely and completely dependent on DHL Express. Calculation of fees is based on data from the scanners. 251-74 at 5.1.

Perhaps the best evidence that Marzilli was directing the DHLNH work force is his effort to cover it up. Marzelli asked DHLNH to stop distributing his emails to DHLNH drivers, or attributing his instructions to him as "Glenn said." Tr. 1169-1170; 251-80 ("Can someone address so this practice stops immediately, and I would appreciate it if my emails were not shared with NEF [sic][14] employees/couriers, as well as when this communication happens that it isn't prefaced by 'Glenn said ….' Thank you." Even more incredibly, Marzelli claimed he was

Inc., 153 NLRB 1536 (1965)."); *See also Forsyth Elec. Co., Inc. & Local Union 342, Int'l Bhd. Of Elec. Workers, AFL-CIO*, 349 NLRB 635, 637 (2007) (employees did not engage in an "unfair labor practice strike" despite employees' claims that they did so).

[14] Marzelli understands DHLNH and NEF to be the same company. Tr. 1168.

unaware why he gave this instruction. But he "knew enough to tell them to stop." Tr. 1170. Palker relayed the instruction to DHLNH supervisors. Tr. 1171; 251-81 ("I want to reiterate Glenn's point that any directive we give employees comes from us not him. No e mails need to be shared either.")[15].

d. Resolution of grievances.

After Local 251 was certified, Business Agent Mathew Maini was assigned to address day-to-day issues at the facility. Tr. 1102. He testified to numerous examples, over just a few months, in which DHL Express shared responsibility for or co-determined terms of employment. These were:

- In December, 2017, a dispute arose concerning holiday work. Employees were not receiving premium pay required by Rhode Island law and a grievance strike ensued. As a settlement, DHLNH agreed to pay time and one half and "add routes going forward so they could alleviate hours so people were not working as many hours." Tr. 1114. DHLNH had to confer with DHL Express "to see if they could afford to do this." Tr. 1134.
- When DHLNH tried to cut a driver, Santiago called Marzelli, who authorized adding two (2) more routes. Tr. 1114, 1123.

[15] Charging Party expended a great deal of effort asking Marzelli he had been involved in *other* DHLNH employment decision and eliciting testimony in the negative. This of course has no bearing on the uncontradicted evidence of employment decisions that DHL Express *did* control, or could control. Of course, Charging Party never established that DHL Express had <u>not</u> been involved – only Marzelli. And Charging Party failed to offer any testimony in this regard from senior managers, like Evans (who testified) or Bancroft. In sum, Charging Party offered no evidence contradicting Maini's testimony that DHL Express was directly involved in these employment decisions.

- When the Union placed the IBT logo on the scanner, DHL Express objected. 251-71. Palker notified Maini that he was informed *by Marzelli* that the logo was on the scanner, and threatened disciplinary action if it was not removed. So, it was. Tr. 1117, 1122; 251-73.
- When Local 251 sought access to the facility to meet with drivers, DHLNH required Maini to "go through Marzelli. They were adamant about that." Tr. 1132. Marzelli asked Maini if he wanted a key fob to access the door, and that he would make the request to DHL Express. Tr. 1132.

The ALJ should note that these examples occurred over a relatively brief period of time and are precisely the sorts of interactions that any union would undertake with management. And they reflect a level of DHL Express involvement that goes to the core of the employment relationship.

e. Collective bargaining.

DHL Express was directly and indirectly involved in DHLNH negotiations. Mathew Taibi ("Taibi"), Local 251's principal officer, was chief negotiator. He knew that DHL Express was party to contracts with other Teamsters locals for the same bargaining unit work. Tr. 947; GC-20, 21, 22, 25 and 26. Taibi contact the IBT Express Division and Director Bill Hamilton ("Hamilton") to assist Local 251 with bargaining. Tr. 948; 251-54. Initially Local 251 and DHLNH agreed to 45-day interim agreement and ten (10) day strike notice provision. Tr. 950.

Negotiations centered on economic issues and particularly DHL Express' willingness to fund the agreement. DHLNH President Philip Palker was asked to seek additional funding from DHL Express. Tr. 951. Taibi regularly communicated with Hamilton as negotiations progressed. 251-55, 56. When Palker said DHLNH couldn't afford a proposal, both sides said

they were working to try to get DHL Express to pay for it. Tr. 954. "We believed that [DHL Express] could have and should have funded it." Tr. 955. Taibi appealed to Hamilton to use his relationship with DHL Express to fund the CBA. Tr. 955; 251-58. At Hamilton's request, Local 251 sent him its "bottom line" to pass on to DHL Express and Hamilton agreed to pass it on. Tr. 956; 251-59, 60, 61. Eventually, Hamilton asked Taibi to get DHLNH to make its best offer, and Hamilton said he'd see what he could do with DHL Express. Tr. 961; 251-63. Local 251 issued a strike notice on April 29. 251-64. DHLNH and Local 251 met on April 19, and the parties continued to discuss DHL Express funding the contract. DHLNH's lawyer, Frank Davis ("Davis"), told Taibi that DHL Express was concerned that couriers were telling customers about about the potential strike. TR. 965. Davis also told Taibi that "DHL Express employs their subcontractor model so that they don't have to pay health and welfare and pension to those employees." Tr. 966.

In addition to financing the package, many of the operational concerns raised in negotiations hinged on DHL Express. For example, a proposal regarding weekend work became a non-factor when DHL Express agreed, in a national agreement, not to require it. Tr. 966-7; 251-65. Scheduling language was also affected. Tr. 968. [16]

[16] Contrary to General Counsel's objection, the ALJ can rely on Taibi's 'hearsay' testimony. First, DHL Express and DHLNH are joint employers, so Palker's statements are an admission. *See generally Key Coal, Co*., 240 NLRB 1013, 1046 (1979) (testimony is an admission where employers are part of single employer group). In addition, the Board has held that hearsay testimony may be accepted for the truth of the matter where it is otherwise reliable:

> [T]he Board often receives hearsay evidence, independent of the FRE. Thus, the Board receives and relies on hearsay evidence, if it is, "rationally probative in force and corroborated by something more than the slightest amount of evidence." *Produce Warehouse of Coram*, 329 NLRB #80 ALJD Slip op. P. 2 (1999); *Dauman Pallet, Inc.,* 314 NLRB 185, 186 (1994); *Livermore Joe's Inc.,* 285 NLRB 169 fn. 3 (1987); *RJR Communications, Inc.,* 248 NLRB 920, 921

On April 23, Local 251 submitted a proposal reflecting tentative agreements reached to that point. 251-67. In Article 3, Management rights, the parties agreed that all provisions of the CBA were subject to all "lawful and contractual directives of DHL Express." Tr. 972. DHL Express could "disqualify" DHLNH employees for misconduct. Tr. 972. DHL Express could veto postings on the union bulletin board. Tr. 973. DHL Express could veto union pins or apparel. Tr. 974. Taibi sent the final proposal to Hamilton to attempt to have DHL Express fund the CBA. Tr. 976; 251-68.[17]

(1980); *Midland Hilton & Towers,* 324 NLRB 1141 fn. 1 (1997); *Sheet Metal Workers Local 28 (Astoria Mechanical),* 323 NLRB 204, 209 (1997).

Such language is extremely broad, and theoretically on its face could justify the admissibility of the evidence here. Indeed, a liberal reading of the language could permit practically any hearsay to be admitted, and then given "such weight as its inherent quality justifies." *Midland Hilton supra,* citing *Alvin T. Bart,* 236 NLRB 242 (1978).

Data Mail Inc., 2000 WL 33665527. Palker's representations are confirmed in Taibi's bargaining notes, 251-65, 66 and 68, communications with Hamilton, 251-54, 55, 56, 57, 58, 59, 60, 61, 63, 64, and the CBA. Moreover, DHL Express attorney Telford facilitated the financial offer from DHLNH. *Supra* at 27. Given the structure of the business – that DHLNH and DHL Express have an exclusive relationship in the Providence market - it actually defies credibility that DHL Express would *not* be directly involved in financing DHLNH's agreement.

[17] Charging Party may rely on *Layton v. DHL Exp. (USA), Inc*., 686 F.3d 1172, 1178–81 (C.A.11 2012), an FLSA case that found no joint employer status for drivers, but a closer examination of the facts there compels a different result here. First, the FLSA incorporates a different standard –'suffer or permitted to work'- which focuses on wage issues rather than NLRB policy concerns. *See generally Blair v. Infineon Technologies AG*, 720 F.Supp.2d 462, 471 (D.Del.,2010) ("Because the present case involves application of corporate law and extends beyond NLRB's reach, the "integrated enterprise" test is inapplicable."). On its facts, *Layton* involved only drivers, so the Court emphasized that drivers spent most of their time away from DHL Express supervision. But this unit includes warehouse workers, not just drivers. And in *Layton*, DHL Express did not have an "overly active" role in supervision because the data transmitted by the scanner was much more limited, it had no role in processing customer complaints and there was no evidence of direct involvement in working conditions. Most importantly, "they were not contractually restricted from using those vehicles to serve other companies needing delivery services." Here, DHLNH has an exclusive relationship with DHL Express.

All of these terms made it into the final CBA.[18] The Management Rights provision requires DHLNH to "at all times comply with the lawful can contractual directives of its customer, DHL Express." DHL Express maintained veto power Union apparel (Article 5), disciplinary suspension (Article 6(d)(1)(D)), termination (Article 6(d)(2)(j)) and bulletin boards (Article 8(h)).

3. The Joint Employer Defense Cannot be Waived.

The Board has never held that a party can waive the argument joint employer status can be waived in the context of section 8(b)(4). "The Board has determined that, in certain situations, a union may *waive its right to bargain* …." Emphasis added. *SUBJECT: Securitas Security Services USA, Inc., and Bechtel National, Inc., joint employers,* 2017 WL 9439265, at *5. This is not a right to bargain case and this analysis has never been employed under section 8(b)(4). Nor could it be. Waiver doctrine is inconsistent with the requirement that courts and the Board examine the relationship between employers holistically.

Moreover, the Board has limited the waiver doctrine to cases in which the Union has statutory bargaining rights. In *A-1 Fire Protection, Inc.*, 250 NLRB 217, 219–20 (1980), the Board stated:

> [T]his standard had been applied by the Board and various courts to determine whether *parties to collective-bargaining relationships* have relinquished statutory rights. Under this standard, there is a presumption that employees and labor organizations, *in their collective-bargaining agreements*, have not abandoned rights guaranteed them in the Act. The presumption is rebutted only by evidence establishing that a statutory right has been clearly and unmistakably relinquished. Most commonly, the issue of waiver of a statutory right arises in cases involving the obligations of employers and collective-bargaining representatives under Sections 8(a)(5), 8(b)(3), 8(d), and 9(a) of the Act to "confer in good faith with

[18] General Counsel is expected to argue that the CBA post-dates the picketing, but it certainly does not post-date the tentative agreements that reflect the relationship between DHL Express and DHLNH. The TA were signed on April 23, before the strike. In fact, the CBA simply confirms that DHL Express maintains virtually total control over DHLNH.

> respect to wages, hours, and others terms and conditions of employment." Under these sections of the Act, the parties are required to bargain collectively about mandatory subjects of bargaining, i.e., those subjects which are covered by the phrase "wages, hours, and other terms and conditions of employment." When an employer defends itself against an allegation that it had violated its duty to bargain about a particular subject by claiming that the representative of its employees waived its right to bargain, and had thereby relieved the employer of its corresponding duty, the Board examiners the collective-bargaining agreement and the circumstances surrounding the making of the agreement to determine whether there has been a clear and unmistakable waiver. Thus, the Board has applied the clear and unmistakable waiver standard in determining whether unions have waived their statutory rights to bargain about such subjects as discontinuation of year-end bonuses; institution and modification of rentals charged for occupancy of employer-provided trailer space; discontinuation of payroll deductions for group health insurance; expiration of an employee retirement plan; and termination of an employees appliance purchase plan. In each of these cases, the Board examined the language of the collective-bargaining agreements and the facts and circumstances surrounding the making of the agreements to determine whether there was a clear and unmistakable waiver of the right to bargain about mandatory subjects of bargaining.
>
> This standard has also been applied in cases involving statutory rights other than the right to bargain about mandatory subjects of bargaining, e.g., to determine whether a union waived its rights to receive wage and employment information pertaining to bargaining unit employees, whether a collective-bargaining agreement precluded union-sponsored employee demonstrations, whether an employer waived its right to petition the Board for an election, and whether a union waived its right to represent employees in a bargaining unit covered by a Board certification.

Emphasis added.

Finally, in a related context, the Board has held that statutory rights under section 8(b)(4) cannot be waived. In *Teamsters Locals 554 and 608 (McAllister Transfer, Inc.)*, 110 NLRB 1769, 1779 (1954), the union alleged that employers had waived their right to object to secondary activity. The Board held:

> In the instant case, if any waiver occurred, it was a waiver by the secondary employers only. … Nor can it be said, in the light of the established law, that the secondary employers were able to effect a waiver on behalf of the public. The Board, in these circumstances, should not permit private parties to accomplish by agreement that which is clearly deemed inimical to the public interest by congressional enactment.

> We are therefore convinced from a careful reading of the legislative history and from an analysis of the established principles of law, that Section 8 (b) (4) (A) and (B) was specifically intended to protect the public interest, and that under those circumstances the secondary employers could not, as a matter of law, waive the provisions of the Act which effectuate that policy.

Cited with approval, Longshoremen, ILA (AFL-CIO) (Board of Harbor Commissioners), 137 NLRB 1178, 1205 (1962). A union's rights under section 8(b)(4) are no less important, as are its constitutional rights. If the Act prohibits a neutral employer from waiving its right to be free of a secondary boycott, so too should it prohibit a waiver of the defense that an employer is not neutral.

4. **Alternatively, Local 251 did Not Waive this Defense**.

Charging Party and General Counsel mistakenly argue that Local 251 is foreclosed from arguing "joint employer" because the Union withdrew an earlier representation petition. But a Union does not waive its right to bargain with a joint employer simply by failing to name it in representation proceedings. *See Securitas Security Services USA, Inc.,* 2017 WL 9439265. There, General Counsel found that the Union "was not fully aware of the relationship between the employers when it failed to name Bechtel in the representation proceedings and the Union's conduct did not evidence a "clear and unmistakable waiver.'" This is in part because "the Union did not have the whole picture until it began representing employees" after certification. And just as here, the employers failed to provide the Union with information pertinent to their relationship.

The evidence here shows that Local 251 became fully aware of Charging Party's joint employer status after the representation petition was filed and it began servicing the unit. 251-83 (Taibi Aff.). According to Taibi, initially the Union filed a representation petition for drivers against DHL Express d/b/a Northeast Freightways, but withdrew the petition "because the Union

did not feel there was enough information to prove a joint employer at that point in time. We wanted an election for the employees." Tr. 944; GC-33. The Union filed a new petition and stipulated to an election. GC-34.

D. DHL Express is Not Neutral Because it was an Ally to DHLNH.

DHL Express was an ally to DHLNH. In late April, 2018, Seth Evans was contacted by DHLNH President Phil Palker. On April 30, at Laurice Bancroft's direction, Evans reported to the Providence facility as "a function of concerns about (the strike)." Tr. 346. He and Bancroft reported to Providence to "provide assistance to the Local service manager and ensure there were no issues on the facility. TR. 350. Evan's job as controller is "financial accounting, managing the profit and loss, forecasting those kinds of things." Tr. 370. Evans was there for two reasons: "Number one, support the service manager and number two, assist in case there were any facility issues." Tr. 361. Also present was another DHL Express employee – Jeff Sidorsky, Area Operations Manager. Palker told Evans about the issues in dispute; "pay issues … health issues …pension issues." Tr. 359.

DHL Express retained security and videographer services for the facility four (4) days before the labor dispute began. Tr. 1202; 251-99, 100. Security commenced on April 30 at 6:00 a.m., before the strike deadline, and was positioned at the DHLNH entrance, not the entrance to DHL Express. TR. 1207. DHL Express paid for security guards, their transportation and lodging. Tr. 1206. Marzelli was the point of contact for strike security, with responsibility for approving invoices. Tr. 1205; 251-100. In the first week alone, DHL Express spent almost $30,000 for strike security for DHLNH. 251-101.

Before the strike, DHL Express strike security attempted to stop Delosantos from doing the Logan Airport pickup. Lee testified that he received a call from Delosantos, the DHLNH

driver who customarily made the Logan Airport pickup. Delosantos said that security at DHLNH would not let him take the truck to Logan. Lee called Maini and told him what happened. Tr. 901-2. Maini confirmed that he received a phone call from Lee notifying him that Delesantos "was being refused his work." Tr. 1119. Maini contacted Delesantos, who informed him that the security team was stopping him from leaving. Tr. 1120. Maini spoke directly to the security team and said the Union would consider it a lockout if Delesantos was prevented from working, and he was allowed to go. Tr. 1121.

In addition to helping DHLNH prepare for the strike, DHL Express intervened in DHLNH negotiations to try to avoid it. On April 26, Local 251 Principal Officer Matt Taibi received a cell phone call from John Telford ("Telford"), DHL Express' attorney. It is apparent that Telford got the number from DHLNH, since Taibi hadn't given him the number, and before he called, did not know who he was. Tr. 981. Telford "asked what the situation is with DHL Express. He was asking if there would be a labor dispute, if we would call a strike." Tr. 978. Taibi refused to disclose Local 251's plans. Telford then asked if Taibi would hold off on a potential strike if there was movement in negotiations and Taibi received a phone call from DHLNH. Taibi said he would certainly listen and make every effort to get a deal. Tr. 979. Taibi said he'd "call [Telford] back either way to update him." Tr. 979-80. In less than an hour, DHLNH attorney Davis called to offer more money – "if that would get it done and avoid a strike." Tr. 979. It was not enough. Taibi called Telford back to let him know DHLNH's offer "was not going to get it done." Tr. 980. Telford responded that DHL Express "would do what they have to do to protect the business." TR. 980. He "hoped to be able to hold off on a strike for when he and other DHL Express people got into town. Tr. 980, 983-5.

"DHL Express people," including senior management Seth Evans, Jeff Sidorsky and Laurice Bancroft, arrived on or about April 30. Evans testified that he and Bancroft reported to Providence to "provide assistance to the local service manager and ensure there were no issues on the facility." TR. 350. On April 30, at Bancroft's direction, Evans reported to the Providence facility as "a function of concerns about (the strike)." Tr. 346. Evan's job as controller is "financial accounting, managing the profit and loss, forecasting those kinds of things." Tr. 370. Evans was there for two reasons: "Number one, support the service manager and number two, assist in case there were any facility issues." Tr. 361. To state the obvious, Evans drew no distinction between supporting DHLNH and DHL Express. As far as he was concerned, ***the facility***, not just one company, was involved.

Once the strike began on April 30 at 7:15 a.m., DHL Express directly supported DHLNH by providing delivery vans and personnel. Lee arrived around 7:25 and saw his co-workers leaving. He also observed Budget rental trucks with DHL Express badging and logo. Prior to this moment, drivers had not been using rentals with the DHL Express logo. Tr. 902-3, 906, 907; 251-37, 38, 39. Lee was "100 percent" certain he saw the trucks on the morning of April 30. Tr. 908. The vans were in the customer service area of the DHL Express parking lot, where the Logan Airport trucks typically arrive. Tr. 910-11. Incredibly, Marzelli claimed he did not know why rental vans were parked in the DHL Express parking lot. Tr. 1209; 251-101. A Department of Transportation ["DOT"] number is assigned to DHL Express. Tr. 186 (Perry). The DOT number on the vans came back as registered to DHL Express. Lee reported what he saw to Maini. Tr. 912.

Lee also observed DHLNH Manager Santiago's personal vehicle on the DHL Express side of the facility, along with other DHLNH vehicles. Tr. 913; 251-42. He observed DHL

Express Manager Marzelli at the top of the ramp to the DHLNH side of the facility during a customer pickup. 251-43. "Marzilli was helping a customer load up a pallet inside of the guy's truck." Tr. 916, 927; 251-44. Lee also saw Marzilli speaking to strike security. Tr. 918. During the strike, Lee learned that DHLNH was using the US postal service to deliver its packages. Tr. 919-21.

By assigning Evans and Bancroft to DHLNH, DHL Express became an ally to DHLNH. In *Carpenters (Missoula White Pine Sash)*, 301 NLRB 410, 416 (1990), the Board held:

> It may not be challenged that the assigning of one entity's employees to another entity for service at the struck facility as replacement employees during a strike is rendering assistance during a labor dispute. By making common cause with the struck employer, the employer supplying strike breakers is entering into the closest possible alliance with the struck employer against the striking employees and their collective-bargaining representative.

Based on the DHL Express vehicles on the picket line, individuals with DHL Express identification and additional managers, Taibi believed that DHL Express was acting as an ally to DHLNH, and he extended the picket line to DHL Express. Tr. 976-7; GC-45.

E. General Counsel Failed to Establish that Local 251 was engaged in a Joint Venture with Local 25.

General Counsel failed to prove that Locals 251 and 25 "participated in a planned course of action, jointly conceived, coordinated and adopted to attain a mutually agreed upon object." *Sheet Metal Workers Local 19 (Declard Associates)*, 316 NLRB 426, 434 (1995). Rather, as in *International Longshoremen's Ass'n*, AFL-CIO, 323 NLRB 1029, 1031, 1997 WL 339280, at *4, Local 251 "simply asked for the assistance of the [other] union [], and the latter agreed to give it…. In short, this case is not about joint planning; it is about a request for help and the granting of that request. Such conduct does not, by itself, establish a joint venture." *Compare Overnite Transportation Company*, 130 NLRB 1007, 1017 (1961) (unions engaged in

synchronized action, held joint meetings to discuss progress and plan courses of action, agreed to conduct and join in a strike and carried picket signs with the name of each of the unions).[19] Here, Taibi simply told Local 25 officials when and where Local 251 would be picketing. GC-45. There was no coordinated campaign. Nor was there any showing of any common purpose beyond one Local honoring another's picket line.

Local 25 will argue that its conduct was lawful or the matter should have been deferred under *Collyer*. Because General Counsel pled the Complaint as a joint venture, if Local 25 lawfully honored the picket line, Local 251 could not have coerced those employees. Put another way, if the underlying conduct by Local 25 is permitted by its CBA with DHL, there is no section 8(b)(4) violation.

F. General Counsel Failed to Establish Any "Pressure" at the Westborough Facility.

General Counsel presented no evidence that any person failed to enter the Westborough facility as a consequence of picketing by Local 251. Service Manager McArdle testified that on May 1 he learned there was "a situation" in Boston and at about 7:45 a.m. sent a Westborough driver to Logan Airport to pick up Westborough freight. Tr. 232; 233. At about 8:15 a.m., McArdle observed unfamiliar people in the building and parking lot and called police. Picketers left the parking lot and moved to the top of the public street. Tr. 240-1. Shortly after 9:00, McArdle went to the top of the hill and read a statement intended for DHL Express employees, Tr. 242-3, 258, but none were actually present. Tr. 282. A trash truck passed through the picket line unimpeded, collected the trash and left. Tr. 254 (McArdle); 524-5 (Fiutak). DHL Express

[19] General Counsel argued that a joint venture was shown merely by Local 25 honoring Local 251's picket line. Tr. 764.

drivers eventually arrived for work around an hour later than usual, Tr. 255, but McArdle never saw them until they arrived and had no idea where they were until then. Tr. 296.

Similarly, Westborough Field Supervisor Fiutak testified that on May 1 DHL Express drivers arrived for work at their usual time. Tr. 545. Later, he observed some individuals in DHL uniforms "walking back and forth" in front of the DHL Express gate. Tr. 518, 533. Police arrived and at the direction of McArdle and the landlord, Tr.533-7, moved the picketers to the top of the driveway. Tr. 519, 533, 553. The garbage truck and other vehicles passed through unimpeded. Tr. 541.

General Counsel asks the ALJ to speculate that DHL Express employees honored the Local 251 picket line in Westborough, but offered no evidence that actually occurred. Neither McArdle nor Fiutak testified that anyone approached, let alone was "pressured," not to cross. To the contrary, other vehicles passed through unimpeded.

The Board has specifically disapproved a *per se* rule that picketing a secondary employer violates section 8(b)(4). In *Upholsterers (AFL-CIO) Local 61 Minneapolis House Furnishing Co.),* 132 NLRB 40, 73 (1961), the Board held:

> As we read the decisions of the Board and the courts in construing the term "inducement of employees" under the Act, they have not held that picketing is *per se* inducement of employees, even when it involved common entrance (employees and consumers) picketing.

Emphasis added. Similarly, in *Brewery Workers (AFL-CIO) Local 8 (Bert P. Williams, Inc.),* 148 NLRB 728, 748 (1964) the Board stated:

> The Board does not regard picketing of a secondary employer's premises as *per se* inducement or encouragement of employees of neutrals within the meaning of Section 8(b)(4)(i)(B) of the Act. and holds that whether in any given case picketing is intended or calculated to induce or encourage employees of secondary employees to engage in a working stoppage or refusal to perform services is determined by all the evidence in that particular case and not by an *a priori* assumption.

Even if General Counsel had presented evidence that Local 251 pressured anyone, picketing at that location would be lawful because Westborough performs Providence work. Westborough receives a JFK truck that travels on to Providence. Tr. 268. Fiutak confirmed that Westborough processes freight from Providence. Tr. 543, 562. In addition, Providence drivers occasionally "come directly from their routes to Westborough with their outbound freight pickups when they are running late and they are unable to make" the Providence to Westborough shuttle. Tr. 543-4, 563. Westborough also receives packages from Logan via a DHL Express driver from South Boston. Tr. 269. McArdle agreed that the JFK truck must, pursuant to an arbitration award, be routed through either Local 25 jurisdiction in Westborough or South Boston before it may travel to Providence. Tr. 272-3; Tr. 687 (Murphy); CP-4; 251-48. On May 1, this is precisely what occurred. Tr. 273.

G. General Counsel Failed to Establish that Local 251 "Impeded" Access to the South Boston Facility.

Local 251 did not impede access to the South Boston facility. DHL Express Field Operation Supervisor Perry testified that he entered the South Boston facility unimpeded at 4:40 a.m. on May 1. Tr. 137; 193. The JFK truck arrived shortly after 5:00 a.m. and was "greeted by the picketers," but Perry did not hear the conversation. Tr. 197-8. He did not know why the truck stopped because he was inside the facility when it arrived. Tr. 196. Perry told the driver to "standby and wait for your dispatcher to call." Tr. 147; 185-6. The truck entered the facility at "approximately 5:25 a.m." TR. 147. So as to the JFK truck, there was no violation of the Act.

General Counsel seems to rely on an episode with Perry. At about 7:30 a.m., Perry attempted to leave the parking lot when he was "greeted" by employees "standing in front of the exit." He "waited … for them to clear." Tr. 153. He did not honk his horn, attempt to move slowly through the exit, or ask police to intervene. Tr. 202. Perry then went to another exit

where, again, he "just waited." Tr. 154.[20] Picketer Sarong Rath confirmed that during the 15 minutes he picketed in front of the DHL pickup, Perry did not beep his horn, motion for him to move, or try to move past Rath. Tr. 1109.

Meanwhile, the evidence is uncontradicted that DHL Express management entered and exited the South Boston facility consistently and unimpeded. Evans and Bancroft arrived in Boston shortly before 8:00 a.m., at the height of the picketing, and entered the facility to prepare a letter to picketers. GC-13. Maini appealed to Bancroft to "Help us get back to the table" and "They're paying slave wages," Tr. 329, and Evans returned inside. Tr. 341.

Thus, General Counsel failed to present any evidence that anyone was impeded. Rather, the ALJ is asked to speculate that the JFK truck was pressured by Local 251 to delay entrance to the facility <u>when it was Perry who told the driver to stand by and wait</u>. Perry did nothing to indicate he wanted to pass through the picket line.

Even if Perry's brief delay could be construed as impeding access, the ALJ should conclude that this conduct was de minimis. The Board has consistently held that this principle applies allegations of unlawful picketing. In Service Employees Intern. Union Local 525, AFL-CIO, 329 NLRB 638, 655 (1999), the Board held:

> Even assuming this incident qualifies as blocking, it was momentary and noncoercive, amounting to an inconsequential act of misconduct. See *Ornamental Iron Work Co.*, 295 NLRB 473 (1989). In fact, the entire incident may be considered de minimis in that it was of limited duration, impact, and significance. Thus, it does not warrant condemnation as a violation of Section 8(b)(1)(A). See *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973).

[20] Perry testified that he asked police to clear the pickets at the second exit, but later claimed Police had already left. Tr. 202. In any event, General counsel never inquired how Perry came to leave, or indeed whether he left at all. Tr. 154-155. "Eventually" he made it to Logan Airport. Tr. 177.

See *Eliason*, 355 NLRB at 807 fn. 30 (blocking ingress or egress is not coercive if it is "not significant, i.e. it is de minimis"); *In re Metropolitan Regional Council of Philadelphia and Vicinity, United Broth. of Carpenters and Joiners of America, AFL-CIO*, 335 NLRB 814, 816 (2001) (isolated 5 second picketing of neutral gate de minimis); *United Union of Roofers, Local 135*, 266 NLRB 321, 325 (1983) ("one walk across the road in vicinity of neutral gate" de minimis).

General Counsel is expected to argue that impeding Perry for 15 minutes is not de minimis, but this would misstate the Board's analysis. The Board examines the circumstantial evidence surrounding the picketing and appears to apply a sliding scale. For example, under section 8(g), "the very act of picketing could have induced a work stoppage … and cannot be tolerated for whatever period of time" in light of the danger to patients in a health care facility." *District 1199, Hospital and Health Care Employees (South Nassau Communities Hospital)*, 256 NLRB 74, 76 (1981); *West Lawrence Care Center*, 308 NLRB 1011, 1015 (1992) (picketing for only 45 minutes violated 8(g); picketing was not de minimis "especially as there was no assurance given that there would not be any recurrences"); SUBJECT: *Operating Engineers Local 99 (National Lutheran Home for the Aged) National Lutheran Home for the Aged*, 2001 WL 34050880, at *4.

Under section 8(b)(1)(A), however, the Board is more willing to stretch the duration of the picketing and consider whether it has been mitigated. In this case, Local 251's subsequent conduct has remedied any putative violation. Immediately after May 1, Local 251 and the Regional Director entered into an agreement by which Local 251 would refrain from any

unlawful picketing of DHL Express.[21] The Board has held that this factor mitigates against finding a violation. *See American Federation of Musicians, Local 76*, 1973 WL 12195, at *2 ("the conduct involved was so minimal and has been so substantially remedied by the Respondent's subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy."). Under these circumstances, there was no violation of section 8(b)(1)(A).

Conclusion

For the foregoing reasons, the Amended Complaint should be denied and dismissed.

Respectfully Submitted,

Teamsters Local 251
By their attorney,

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CERTIFICATE OF SERVICE

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

[21] The agreement was not offered into evidence, but referenced repeatedly during the proceedings and submitted as Exhibit 14 to Charging Party's Motion for Summary Judgment.