

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

BOB'S TIRE CO., INC.

and

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 328**

Case 01-CA-183476

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 17, 2019, I served the above-entitled document(s) by **email or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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January 17, 2019

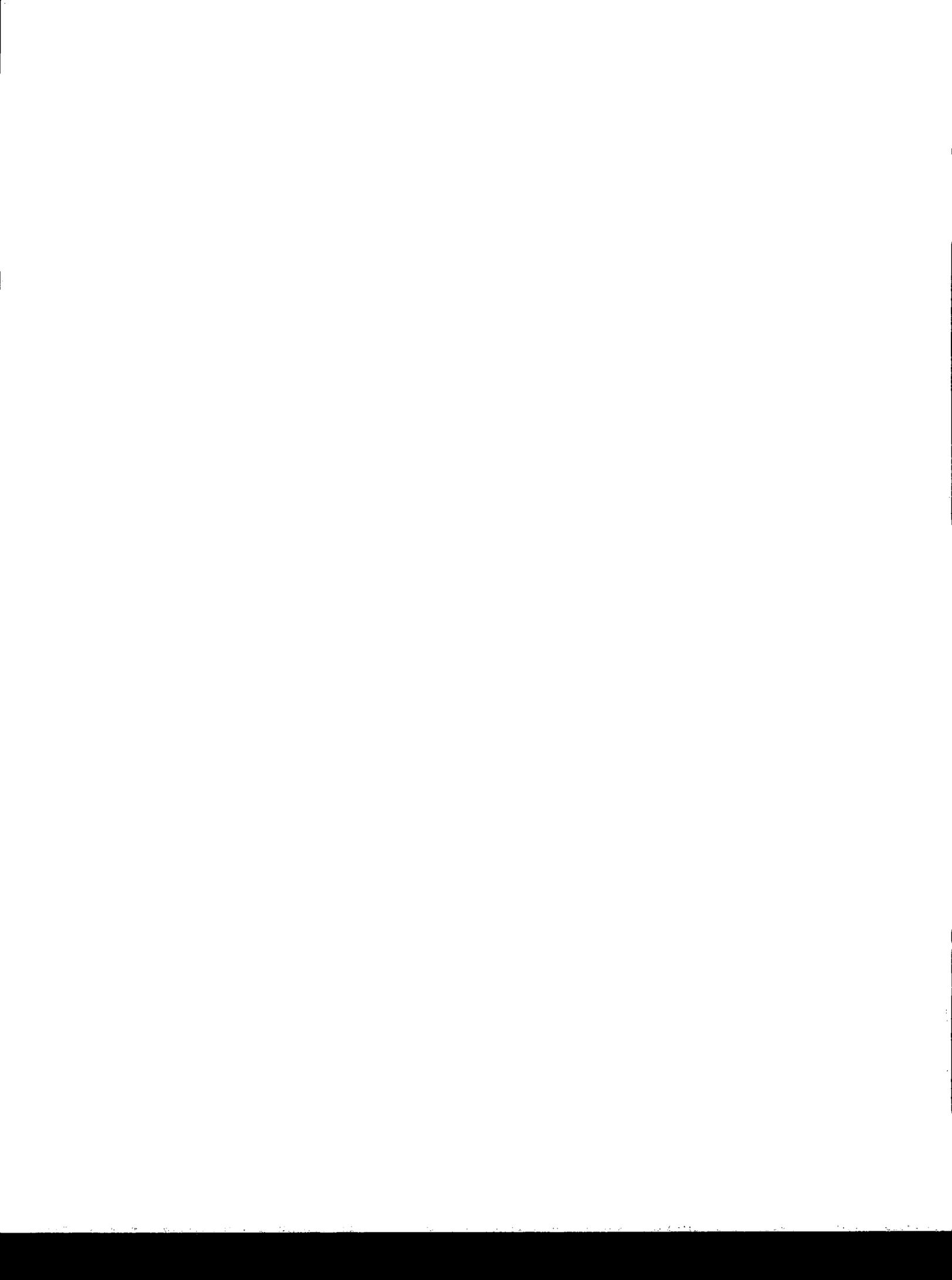
Date

Marcelina Cabrera, Designated Agent of NLRB

Name

Marcelina Cabrera

Signature



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**COUNSEL FOR THE GENERAL COUNSEL'S
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TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. STATEMENT OF THE CASE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("the Board"), Series 8, as amended, Counsel for the General Counsel submits this brief in answer to Respondent's Exceptions (herein "Exceptions") to the Decision of Administrative Law Judge Arthur J. Amchan (herein "ALJD"). For the reasons set forth below, and based upon the record as a whole, Counsel for the General Counsel urges the Board to affirm the judge's rulings, findings and conclusions and adopt his recommended Order.

This case stems from Respondent's decision to unilaterally subcontract a significant portion of unit work for about a year, as well as Respondent's decision to unilaterally terminate the annual Christmas bonus in December 2015, the first time it had failed to pay such a bonus since at least 2008, and, finally, Respondent's decision to unilaterally modify and terminate a separate discretionary bonus for unit employees. Based on witness credibility, documented record evidence, and established Board law,

the judge correctly found that Respondent violated Sections 8(a)(1) and (5) of the Act by: 1) unilaterally subcontracting unit work to non-unit employees for about a one-year period; 2) unilaterally failing to pay a Christmas bonus to unit employees in December 2015; and, 3) unilaterally initiating and then terminating a discretionary bonus in 2016 to those unit employees who worked on Saturday. As discussed below, Respondent took each of these unilateral acts without notifying the Union or providing it with an opportunity to bargain about the subcontracting of unit work and the modification and termination of bonuses for unit employees. Indeed, the unilateral acts were so apparent in their nature that Respondent's owner, Robert Bates, first openly conceded in his testimony that he "just did it" (referring to the above unilateral acts) without ever notifying the Union; and then explained his utter failure to do so with the following confession: "I don't know anything about the union, okay. *It's my fault, I guess*" (Tr. 174-175).

In its Exceptions, Respondent contends that the judge erred in concluding that it violated Section 8(a)(5) of the Act by unilaterally subcontracting the bargaining unit work at issue, and by unilaterally terminating the Christmas bonus. Despite its arguments in support of its Exceptions, Respondent nevertheless concedes therein that the subcontracted work at issue was, indeed, unit work that was performed by non-unit employees, and that it never notified the Union about its intentions to subcontract such work. Regarding the Christmas bonus, it argued that the judge largely (and therefore wrongly) based his decision regarding this issue on witness credibility—namely, that Respondent's witness should have been credited on this issue over the competing testimony of the General Counsel's primary witness, a former employee, who—unlike

Respondent's witness—testified consistently and stood to gain little from the judge's decision.

Respondent did not take Exceptions to the judge's conclusion that Respondent violated Sections 8(a)(1) and (5) by unilaterally initiating and then terminating a discretionary bonus to those unit employees who worked on Saturday.

II. THE FACTS

a. The Undisputed Facts Underlying the Allegation Regarding Unlawful Subcontracting of Unit Work

1. Respondent's Operations

Respondent, with its principal facility in New Bedford, Massachusetts (herein Respondent's "New Bedford yard" or "yard"), has been in business since about 1976 and is engaged in the recycling of tires (Tr. 147). Primarily responsible for Respondent's overall operations is Owner and President Robert Bates (Tr. 134). Respondent's operations consist of purchasing used tires from a number of vendors (such as car dealers, transfer stations, state government, truck and tire companies) and then re-selling those tires, some in their existing state and others in shredded form, depending on their condition (Tr. 181-182). In this regard, in some cases, the above vendors deliver the various tires to Respondent's New Bedford yard (roughly two to three acres in size) while in other cases, a complement of Respondent's truck drivers, along with an assistant, use company trucks to pick up the used tires from the vendor (Tr. 148, 182, 212). In either case, Respondent's yard employees first unload the incoming tires and then sort them based on by their future suitability (Tr. 182-184, 212). Yard workers manually place "good" tires into trailers located within the yard and "bad" tires onto piles from where they are eventually placed in one of the two "shredders,"

each of which is located inside a building at the New Bedford facility and which is operated by a “shredder operator” (Tr. 149-150, 162-163, 183-186, 212). Two yard workers feed tires onto the belt leading to the shredder (Tr. 163-164, 183-186). Heavier truck tires are placed on the belt by a machine called a “grappler”, which is operated by a mechanic (Tr. 185-186). Shredded tires, also known as tire chips, return to the yard via a conveyor belt where they are collected by yard workers and placed in piles (Tr. 187, 211-213). Historically, according to Bates, these tire chips were sold to various mills and other plants (Tr. 211-213).

In addition, incoming tires that contain rims must be “de-rimmed” before being shredded (Tr. 186). To this end, yard workers roll such tires to, and actively operate, separate “car tire derimmer” and “truck tire derimmer” machines to remove the rims (Tr.188). Yard workers also roll tires to, and independently operate, several other pieces of machinery located within the yard, including the “car tire sidewall cutter” and “truck tire sidewall cutter” machines, which as the names suggest, take the sidewalls off tires (Tr.188). These machines are also referenced in the record as “donut” machines because they take the sidewall off tires, leaving the end product looking like a donut (Tr. 20-22, 26).

At its New Bedford facility, the vast majority of Respondent’s employees perform the above “yard work” (also referred to by Bates as “general labor”) outside in the yard (Tr. 20-22, 26, 148, 194-195). Thus, yard workers perform a wide variety of duties that relate in any way to tires, including the above-described loading and unloading of tires from trucks, using various machines to shred and cut tires, sorting tires into piles, transporting tires around the yard, assisting truck drivers, and generally, performing all

aspects of tire-related functions in the yard, generally referred to as "yard work" (Tr. 20-22, 26). Many of the yard workers are cross-trained (Tr. 58-59). It is undisputed that to perform some of this work, yard workers operate the following eight machines, all of which are located in the yard: 1) car tire derimmer machine; 2) car tire dismount machine; 3) truck tire derimmer machine; 4) truck tire dismount machine; 5) car tire inspection machine; 6) truck tire inspection machine; 7) car tire sidewall cutter; and 8) truck tire sidewall cutter (Tr. 22-23: GCX 7, page 2). According to Bates, these eight machines represent the totality of machines that are located in the yard (Tr. 151-160).

2. The Union Campaign

In about early September 2015, the Union began organizing the approximately 70 to 79 yard employees employed by Respondent, all of whom had been referred to work for Respondent by a local temporary employment agency named BJ's Service Company, Inc. (herein called "BJs" or Respondent BJ's).¹ In this regard, Respondent has maintained a long-standing agreement with BJs through which it exclusively hires yard workers. The Union's campaign led to the filing of separate election petitions against Respondent and Respondent BJ's. On September 16, 2015, the parties signed a joint Stipulated Election Agreement naming Respondent and Respondent BJs as the joint employers of the following Unit:

All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters, and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc., working at the Bob's Tire Co., Inc., location on Brook Street,

¹ Following the issuance of the Complaint, but prior to the hearing in this matter, Respondent BJ's and the Union entered into a non-Board settlement agreement, which is pending approval by the Regional Director, whereby Respondent BJ's agreed to remedy certain Complaint allegations and the Union agreed to withdraw all charges and Complaint allegations against Respondent BJ's. Additionally, Respondent Bob's simultaneously entered into an informal Board settlement agreement with the Region regarding all Complaint allegations except the Section 8(a)(5) allegations regarding the unilateral modification to the bonus system and the unlawful subcontracting (CPX 2).

New Bedford, MA, but excluding all other employees, mechanics, shredder operators, truck drivers, clerical employees, and supervisors as defined in the Act.

(GCX 2). On September 23, 2015, an election was held, which the Union won by a final tally of 65 to 5 (GCX 3). On October 1, 2015, the Union was certified as the collective bargaining representative of the Unit (GCX 4).

On November 6, 2015, about a month following the Union's certification, Respondent contracted with Masis Staffing, Inc., a temporary employment agency which it had never previously used, and began surreptitiously hiring yard workers through Masis. In its Exceptions, Respondent claimed that the Masis workers were to be dedicated to "a new operation" begun by Respondent that month, namely taking off the tires and packaging them for shipment overseas—a resoundingly similar operation to that performed by unit employees, albeit perhaps with the shredded tire chips being sold to a new end user. Whatever differences existed between the ongoing and "new" operations, it is undisputed that Respondent never informed the Union at this time about its intention to undertake such a "new" operation, its purported purpose or need, or that Respondent would be hiring a classification contained within the bargaining unit—yard workers—through a different temporary agency to perform tasks related to this "new" function.

About a week later, by letter dated November 13, 2015, the Union requested information from Respondent covering 18 separate inquiries in order to prepare for bargaining (GCX 5). Of these inquiries, the following three inquiries (in relevant part) are of particular significance in the instant matter:

1. A list of all employees in the bargaining unit, with their job classifications, seniority or hire date(s), hire rate, pay increases and current wage rates;

4. A detailed description of all benefits offered to any bargaining unit employees, including but not limited to...bonuses;
9. A list of all tools and machinery utilized by bargaining unit employees, together with the vendor, purchase date and purchase price.

By letters dated December 4 and 10, 2015, Respondent responded to the Union's above requests for information and provided: 1) a spreadsheet containing the names of all yard workers supplied by BJs, but none of the yard workers hired through Masis; 2) a list of benefits that excluded any mention of the Christmas bonus or the discretionary Saturday bonus; and 3) the list of machinery utilized by unit employees, encompassing all eight pieces of machinery previously described that are stationed in Respondent's yard (GCX 7, GCX 8).

By early March 2016,² the Union learned from employees on its bargaining committee that Respondent had been subcontracting unit work to Masis. Consequently, at that session, the Union's attorney, Marc Gursky, asked Respondent about the Masis workers, specifically asking who these workers were, what duties and functions they performed, and what hours they worked (Tr. 30-31). Respondent, through its attorney, Greg Koldys, acknowledged that Masis workers were at the yard working alongside Unit employees, but said they performed different work and gave no further details (Tr. 30-31). By email dated March 4, Attorney Gursky wrote to Attorney Koldys, in relevant part, as follows:

It has come to our attention that Bob's is utilizing Massis [sic] Staffing to provide employees engaged in bargaining unit work. These employees operate machinery previously designated by Bob's as bargaining unit work, yet neither Bob's nor B.J.s identified these employees in response to previous information requests. We view this omission as an attempt to evade Bob's/BJ's bargaining obligation. Please provide the following information:

² All subsequent dates are in 2016 unless otherwise specified.

36. Any agreements with Massis [sic] Staffing, or any other temporary staffing agency currently providing employees at Bob's Tire Recycling. If no written agreement exists, please provide the terms of the agreement(s);

37. A list of all Massis [sic] Staffing employees, including date of hire, position, salary, benefits, and home address;

38. A list of all employees operating any machinery, including but not limited to mounting/dismounting, derimming, air testing and sidewall removal.

(Tr. 235-236; GCX 10). At the May 5 and 26 bargaining sessions, after Respondent initially failed to provide the requested information, the Union renewed its interest in obtaining it (Tr. 32). At the May 26 bargaining session, Attorney Koldys informed the Union that he would provide the Masis agreement to the Union once it was obtained (Tr. 32-33). At that session, Attorney Gursky continued asking the same set of questions regarding the parameters of the work performed by Masis-supplied workers, but received no answers (Tr. 33).

By email dated June 16, Respondent sent the Union a copy of the agreement between Masis Staffing and Respondent (Tr. 36-37; GCX 11). The Masis agreement shows that it was specifically prepared on November 6, 2015 by Masis for Respondent's owner, Bates, and was executed by the parties on the same date. Under Section 1 of this agreement, Masis agreed to "recruit, screen, interview, select, hire and assign its employees to perform the type of work described on Exhibit A attached hereto" at Respondent's New Bedford facility (GCX 11, page 2). The attached Exhibit A shows that the designated work to be performed by Masis-supplied employees was limited to:

- 1) "Light Industrial-Loaders/Unloaders" at an hourly rate of \$9, the same work at the

same hourly rate performed by unit employees; and 2) “Working Supervisor/Leader” at an hourly rate of \$10 (GCX 11, page 10). Masis charged Respondent a 35% premium or markup above the hourly rate earned by each referred employee (Tr. 179-180; GCX 11, page 10). The Masis agreement provided the Union with its first documentary glimpse regarding the scope of the duties performed by Masis-supplied yard workers (Tr. 37).

Further, by email dated August 18, Respondent provided the Union with “a list of the people provided by Masis who have worked at Bob’s at various times” (GCX 12). The list contained a total of 111 such workers and it was the first time the names of these workers had been identified to the Union (Tr. 37-38; GCX 12). In the same email, Respondent also informed the Union it would “forward information as to what work they specifically performed” (GCX 12). By email dated September 14, Respondent finally provided a spreadsheet to the Union showing the duties and functions that each of the 111 Masis workers had performed while employed at Respondent’s yard (Tr. 40-42; GCX 14). The spreadsheet provided overwhelming proof that each and every one of the 111 Masis employees had performed significant amounts of unit work—in some cases, Masis employees exclusively performed unit work. More specifically, the spreadsheet, which was prepared by Respondent, showed that 101 of the 111 Masis workers (91%) performed “general labor” in the yard, which is the very essence of unit work, as defined by the unit description (i.e., “yard workers”) in the Stipulated Election Agreement (Tr. 41; GCX 3; GCX 14). Of these 101 workers, the great majority—67 workers—exclusively performed “general labor” in the yard (Tr. 41; GCX 14). Six (6) Masis workers (part of the 101 workers who performed “yard work”) were also listed as

having served as a “helper on truck,” another undisputed unit position (Tr. 41; GCX 14). Twenty-two of the 111 Masis workers were listed as having “cut and strapped tire tops (threads),” another undisputed aspect of unit work (Tr. 41; GCX 14). Thirty Masis workers were listed as having “cut and strapped sidewalls” —more unit work—as part of their work duties (Tr. 40; GCX 14). Only four of these 30 Masis workers (Cavanaugh, Coelho, DeSouza, and Doyle) *exclusively* cut and strapped sidewalls, which was purportedly the heart of the “new” operation. Finally, four of the 111 Masis workers were listed as having performed all of the above duties, as well as operating Bobcats, forklifts and other machinery, which was all considered unit work (Tr. 41; GCX 14). Buttrussing the above undisputed documentary spreadsheet, two unit employees, Tomas Ventura and Miguel Sam Cosme, credibly testified at the hearing that they observed Masis workers perform unit work (Tr. 77-83, 88-93, 96, 107-116, 118-119, 128-130). The judge specifically credited Ventura’s testimony in this regard (ALJD at page 4, lines 14-16). As noted by the judge, even Respondent’s owner, Bates, conceded that Masis workers periodically performed unit work (ALJD at page 4, lines 16-17).

The production of the above spreadsheet was the first time the Union learned from Respondent about the specific components and volume of unit work that Masis employees had been performing (Tr. 43). It is undisputed that prior to the disclosure of the Masis spreadsheet, Respondent had never informed the Union that it had subcontracted unit work to Masis employees and, of course, never offered to bargain with the Union about that subcontracting (Tr. 45). In this regard, although Respondent’s owner, Bates, once escorted Union representative Carlos Gonzalez through the yard,

Bates never indicated that new equipment—purportedly involving non-unit duties—had ever been purchased (Tr. 50-51). It is also undisputed that the Union never acquiesced to the subcontracting of unit work (Tr. 45-46). Finally, although Respondent claimed in its Exceptions that there were “no adverse consequences” to unit employees because of the constant use of Masis workers, it is undisputed that employee Tomas Ventura and others were suddenly laid off for several days in March 2016, and returned to the yard only to observe Masis-supplied workers perform Unit work (Tr. 84; ALJD at page 5, lines 32-33). It is also undisputed that Masis workers worked a considerable amount of overtime that was not afforded to unit employees (ALJD at page 5, lines 30-31).

Based on the foregoing, the judge was correctly constrained to find that Respondent had not “established that its subcontracting involved a change in the nature, scope or direction of its operation” (ALJD, page 5, lines 11-12), and that, despite its attempt at obfuscation, Respondent “was merely substituting Masis employees for [unit] employees who worked for it” (ALJD at page 5, lines 35-37).

b. The Undisputed Facts Underlying the Allegation Regarding Respondent’s Termination of the Christmas Bonus

Former long-term employee Ventura credibly testified that Respondent maintained an established bonus system from at least 2008 through about December 2014 whereby Respondent paid an annual Christmas bonus, in cash, to unit employees (including Ventura) in amounts ascending over the years from \$20 to \$100 (Tr. 75-77, 86-87). According to Ventura, following the certification of the Union, in December 2015, Respondent failed to pay any Christmas bonus to any unit employee, including to Ventura (Tr. 76, 86-87). Bates did not specifically refute Ventura’s testimony regarding the employer’s historical annual payment of Christmas bonuses and it is undisputed that

Respondent did not pay a Christmas bonus to unit employees in December 2015. Owner Bates did not provide much of a defense to this issue during his testimony other than to generally state that he did not know he needed to notify and/or bargain with the Union about bonuses (Tr. 141-145). It is also undisputed that the Union never waived its right to bargain about this matter inasmuch as Respondent never notified the Union about the existence of the annual Christmas bonus in its response to the Union's November 13, 2015 letter wherein the Union specifically sought information about "benefits offered to any bargaining unit employee, including... bonuses." There is no evidence that Respondent later reinstated the Christmas bonus in 2016 or thereafter, or sought to bargain with the Union about that bonus.

Based on the foregoing, the judge credited Ventura over Bates³ and found that Respondent violated Section 8(a)(5) of the Act "in failing to pay its employees a Christmas bonus in 2015 because such a bonus was paid with sufficient regularity that employees would have been justified in expecting to receive such a bonus as part of their wages" (ALJD at page 6, lines 6-10).

III. ARGUMENT

A. The Subcontracting Issue

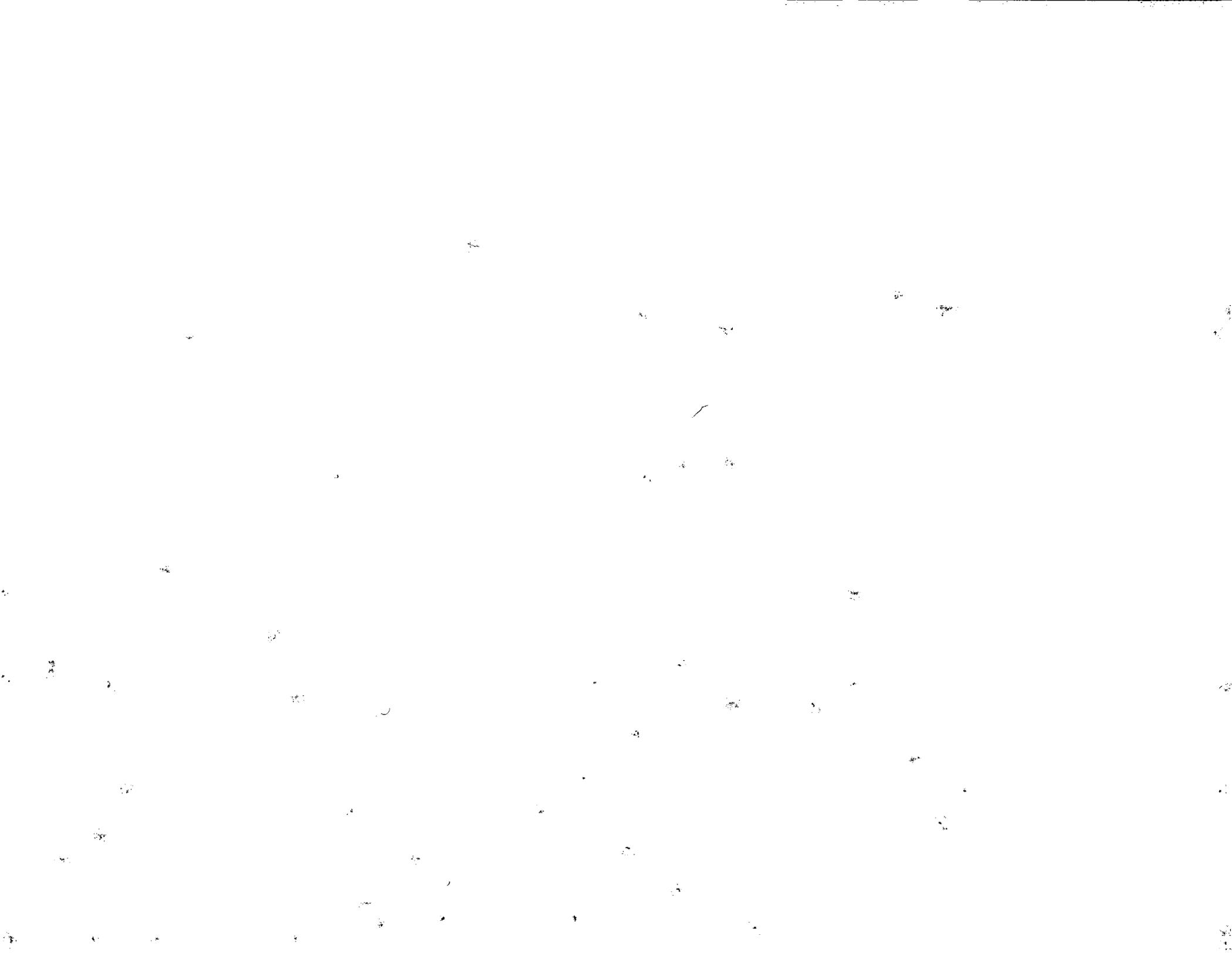
In its Exceptions, Respondent claims that the judge erred in finding that Respondent unlawfully unilaterally subcontracted unit work because the judge found that: 1) the subcontracted unit work was *not* a change in the scope, nature and direction

³ It is not surprising that the judge credited Ventura over Bates' competing testimony. Ventura, a former employee with little to gain from the outcome of the case, testified with consistently smooth directness and was clearly more credible than Bates, who, on the other hand, wobbled through his testimony like an angry puppet on a string, constantly contradicted himself, displayed bouts of brusqueness, and, despite sitting emperor-like on the stand with a constant smirk, appeared entirely unprepared to testify about matters of any significance.

of Respondent's business; and 2) Masis workers were not Respondent's employees and therefore not part of the bargaining unit (Exceptions at page 6, lines 1-4).

The first of these arguments, i.e., that the subcontracted unit work was not a change in the scope, nature and direction of Respondent's business, is a non-sequitor inasmuch as Respondent *now* concedes that the work performed by Masis workers was, indeed, unit work (Exceptions at page 7, lines 8-9: "As Bob's employees doing unit work, they [Masis workers] would be part of the bargaining unit"). Moreover, Respondent further concedes that unit "workers were capable of doing the work" (Exceptions at page 6, line 11-12); and that Masis yard workers were hired only because of "a lack of available employees from BJs" (Exceptions at page 7, lines 15-16). In light of Respondent's admissions and concessions, it is abundantly clear that the judge was correct in finding that the subcontracted unit work was, in fact, unit work and not a change in the scope, nature and direction of Respondent's business, as defined by the Board in cases such as O.G.S. Technologies, 356 NLRB 642, 646 (2011). Even in the absence of Respondent's concessions, the documentary evidence and credited testimony clearly shows that the overwhelming majority of the Masis workers performed unit work at one time or another—some exclusively so. It seems that in its Exceptions, Respondent has finally agreed with that inescapable conclusion. Thus, there is no merit to its claim that the subcontracted unit work at issue was related to a change in the scope, nature and direction of Respondent's business. As such, this claim must be rejected.

In direct contradiction of its first claim above, Respondent's second meritless claim is that it could not have subcontracted unit work because Masis workers were its



employees all along—either directly, or as a joint employer with Masis. And, the argument continues, since all Masis workers were actually Respondent's employees performing unit work, there was no work that was or could have been subcontracted! Beyond the fact that this argument is the polar opposite of Respondent's first above claim, i.e., that it actually did subcontract work because of a change in the scope, nature and direction of Respondent's operations, Respondent's argument in this regard relies more on monumental faux revisionism than it does on tangible evidence, of which there is none to support its claim.

Here, it is undisputed that Respondent made no effort at the hearing to show that it was the employer of the Masis workers, either as a standalone employer, or as a joint employer. Consequently, the record is devoid of any reliable evidence showing that Respondent was the employer, independently or jointly, of the Masis-supplied workers. On the contrary, the most reliable evidence in this regard—the November 2015 agreement between Masis and Respondent—firmly establishes that the parties considered the Masis-supplied workers to be exclusively employed by Masis, not Respondent. Moreover, the trace evidence in the record showing that Respondent's supervisors periodically oversaw Masis workers is rendered asunder by the more plentiful evidence that Masis supplied its own individual to supervise Masis workers and that Masis, not Respondent, provided health insurance benefits directly to these workers. Most importantly, at the time these events unfolded, Respondent did not take any steps indicating it believed itself to be the employer (joint or otherwise) of the Masis workers. More specifically, when the Union requested information in November 2015 regarding the names of *Respondent's employees who were performing Unit work,*

Respondent merely provided the names of employees supplied by BJs (with which it was an established joint employer) and did not provide any names of workers supplied by Masis. It took another 10 months after the Union's initial information request for Respondent to cough up the names and duties of the Masis workers, which it unwillingly divulged only after a multitude of follow-up Union requests and pending Board charges on the matter. Thus, at least from November 2015 through September 2016, Respondent clearly signaled that it did not consider itself to be the employer of the Masis-supplied workers. Indeed, the first time this kitchen sink argument surfaced is in Respondent's Exceptions, far later than it should have waited before establishing any material evidence on the issue.

In sum, neither of Respondent's arguments in this regard has merit, both should be dismissed, and the judge's decision, which is far more consistent with the record evidence, should be upheld.

B. The Christmas Bonus

In its Exceptions, Respondent maintains that the judge's determination regarding Respondent's unilateral act to discontinue annual Christmas bonuses should be reversed because: 1) former employee Ventura should not have been credited by the judge, and conversely, owner Bates should have been credited regarding the history of that bonus; and 2) such bonuses should not be considered terms and conditions of employment because they were not of a fixed nature, or paid with sufficient regularity over a sufficient length of time such that employees would reasonably expect to receive the bonus as part of their wages. Neither argument has merit.

With regard to Respondent's attack on the judge's credibility findings, the Board's well-established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). A careful examination of the record reveals no basis to reverse the judge's findings in this regard. Although there were some responses by Ventura that were lost in translation, Ventura nevertheless clearly, crisply, and repeatedly testified that he received a Christmas bonus in ascending amounts from \$20 to \$100 every year he worked at Respondent from 2008 through 2014, but that Respondent ceased paying out any such bonus to all unit employees during Christmas 2015—two months after the Union was certified (Tr. 75-77, 86-88). On the other hand, Bates was a mess of a witness with a clouded memory, or antagonistic approach, about many issues of import. No one with working senses who witnessed the hearing would have ever credited Bates over Ventura. Thus, based on the above well-established Board law, Respondent's claim in this regard lacks merit and should be dismissed.

Regarding Respondent's second claim, i.e., that such bonuses should not be considered terms and conditions of employment because they were not of a fixed nature, or paid with sufficient regularity over a sufficient length of time such that employees would reasonably expect to receive the bonus as part of their wages, this argument, too, lacks credence.

An employer must bargain with the union before changing existing terms and conditions of employment. NLRB v. Katz, 369 U.S. 736, 747 (1962). Any bonus paid to unit employees, including a holiday bonus, is a mandatory bargaining subject if the

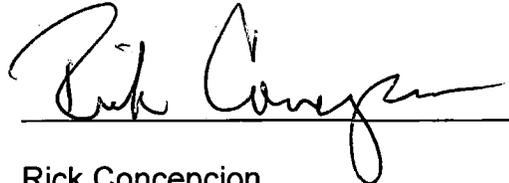
employer's conduct raised the employees' reasonable expectation that the bonus will be paid. Sykel Enterprises, Inc., 324 NLRB 1123, 1124-1125 (1997). Gas Machinery Co., 221 NLRB 862, 865 (1975)("What is crucial in determining whether a bonus is part of the wage structure rather than a gift is...whether, by course of conduct or otherwise, Respondent has justified its employees' expectations that they would receive the bonus as part of wages."); Waxie Sanitary Supply, 337 NLRB 303 (2001); Laredo Coca-Cola Bottling Co., 241 NLRB 167, 173-174 (1979), enfd. 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). See also, U.S. Information Services, Inc., 341 NLRB 988 (2004)(Christmas bonus paid on a nonregular or intermittent basis to some but not all bargaining unit employees still considered a mandatory subject of bargaining).

Respondent's primary argument is that because the Christmas bonus ranged in ascending amounts from \$20 to \$100 over a seven-year period, it was not sufficiently "fixed" in amount such that employees should reasonably expect *any* bonus at Christmas. This argument is fatally flawed. It presupposes that because an annual Christmas bonus increases in amount along a relatively narrow \$80 spectrum over the years, no employee should ever expect the traditional annual holiday bonus - even at the lower end of that spectrum. The more rationale view, of course, is that Respondent's holiday bonus was "**fixed**" along that \$80 ascending spectrum, whetting the expectation of every Unit employee to divine how much higher the next bonus amount could potentially be. U.S. Information Services, Inc., supra. In this setting, zero holiday bonus was clearly not an integer on an employee's bonus expectation scale. Nor was the absence of granting such a holiday bonus within Respondent's long-

running historical practice. Accordingly, the judge properly found a violation in this regard and Respondent's argument should be rejected.

Dated at Hartford, Connecticut, this 17th day of January 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Concepcion", is written over a horizontal line.

Rick Concepcion
Counsel for the General Counsel
National Labor Relations Board
Region 1, Sub-Region 34