NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1161, 18-1182

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

JOINT APPENDIX – VOLUME I

Kurt G. Larkin, Esq.
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
klarkin@huntonAK.com
(804) 788-8200

Counsel for Petitioner/ Cross-Respondent

Linda Dreeben, Esq.
Kira Vol, Esq.
Eric Weitz, Esq.
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
linda.dreeben@nlrb.gov
kira.vol@nlrb.gov
eric.weitz@nlrb.gov
(202) 273-0656
(202) 273-3757

Counsel for Respondent/ Cross-Petitioner

Thomas H. Kohn, Esq.
Markowitz and Richman
123 S. Broad Street, Suite 2020
Philadelphia, PA 19109
tkohn@markowitzandrichman.com
(215) 875-3100

Counsel for Intervenor

NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1161, 18-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

JOINT APPENDIX

Kurt G. Larkin, Esq.
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
klarkin@huntonAK.com
(804) 788-8200

Counsel for Petitioner/ Cross-Respondent

Linda Dreeben, Esq.
Kira Vol, Esq.
Eric Weitz, Esq.
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
linda.dreeben@nlrb.gov
kira.vol@nlrb.gov
eric.weitz@nlrb.gov
(202) 273-0656
(202) 273-3757

Counsel for Respondent/ Cross-Petitioner

Thomas H. Kohn, Esq.
Markowitz and Richman
123 S. Broad Street, Suite 2020
Philadelphia, PA 19109
tkohn@markowitzandrichman.com
(215) 875-3100

Counsel for Intervenor

UPS Ground Freight, Inc. v. NLRB
Case Nos. 18-1161, 18-1182

TABLE OF CONTENTS

Case No. 04-RC-165805

VOLUME I

Date	Document	Page
12/21/2015	Transcript of Hearing [pp. 1–351]	JA 0001
	Board Exhibits 1-3	JA 0352
	Employer's (UPS Freight) Exhibits 1-2	JA 0497
	Petitioner's (IBT Local 773) Exhibits 1-3	JA 0499

VOLUME II

12/10/2015	Petition for Election (GC Exh. 1)	JA 0504
12/10/2015	Notice of Representation Hearing	JA 0505
12/15/2015	UPS Ground Freight, Inc.'s Motion to Postpone Hearing and for Extension of Time to File Statement of Position (GC Exh. 2)	JA 0519
12/16/2015	Regional Director's Order Rescheduling Hearing Granted in Part (GC Exh. 3)	JA 0523
12/17/2015	UPS Ground Freight, Inc.'s Request for Issuance Of Hearing Subpoenas	JA 0524

Date	Document	Page
12/18/2015	UPS Ground Freight, Inc.'s Statement of Position (with attachments A-F) (GC Exh. 4)	JA 0526
	Att. A: List of Employees in Proposed Unit	JA 0527
	Att. B: Basis Contention that the Proposed Unit is not Appropriate	JA 0528
	Att. C: List of Employees to Be Added to Unit	JA 0534
	Att. D: Individual(s) Whose Eligibility to Vote UPS Ground Freight, Inc., Intends to Contest at the Pre-Election Hearing and Basis for Contesting Eligibility	JA 0541
	Att. E: Other Issues UPS Ground Freight, Inc. Intends to Raise at Pre-Election Hearing	JA 0545
	Att. F: Relevant Filings From: *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015); *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D.Tex. 2015); and*Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015)	JA 0559
12/18/2005	Email from NLRB to UPS Ground Freight, Inc. Regarding Issue of Taint Raised in Statement of Position[1]	JA 0663
12/21/2015	UPS Ground Freight, Inc. Email to NLRB Responding to Email Regarding Issue of Taint[2]	JA 0664

[1] This document is not part of the record submitted by the NLRB.
[2] This document is not part of the record submitted by the NLRB.

Date	Document	Page
01/05/2016	Regional Director's Decision and Direction of Election (GC Exh. 5)	JA 0666
01/06/2016	UPS Ground Freight, Inc.'s Letter Requesting Correction to Decision and Direction of Election[3]	JA 0687
01/07/2016	Regional Director's Erratum (GC Exh. 6)	JA 0690
01/07/2016	UPS Ground Freight, Inc.'s Letter Requesting Reconsideration of Decision to Conduct Mail Ballot Election	JA 0691
01/11/2016	Regional Director's Letter Denying Request to Reconsider Decision to Conduct Mail Ballot Election	JA 0694
1/11/2016	UPS Ground Freight, Inc.'s Special Appeal and Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election (with attachments) (GC Exh. 7)	JA 0696
	Exh. A: Decision and Direction of Election	JA 0710
	Exh. B: RC Petition	JA 0731
	Exh. C: UPS Ground Freight, Inc.'s Statement of Position	JA 0732
	Exh. D: Relevant Portions of Hearing Transcript	JA 0733
	Exh. E: UPS Ground Freight, Inc.'s Letter Requesting Correction to Decision and Direction of Election	JA 0738
	Exh. F: Regional Director's Erratum	JA 0741

[3] The first page of this letter is erroneously dated November 25, 2015.

Date	Document	Page
	Exh. G: UPS UPS Ground Freight, Inc.'s Letter Requesting Reconsideration of Decision to Conduct Mail Ballot Election	JA 0742
	Exh. H: Regional Director's Letter Denying Request to Reconsider Decision to Conduct Mail Ballot Election	JA 0745
01/12/2016	International Brotherhood of Teamsters, Local 773, Letter in Response to Special Appeal and Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election (GC Exh. 8)	JA 0747
01/29/2016	NLRB's Order Denying UPS Ground Freight, Inc.'s Request for Review of Acting Regional Director's Decision and Direction of Election (GC Exh. 9)	JA 0749
02/01/2016	Tally of Ballots (GC Exh. 10)	JA 0750
02/02/2016	UPS Ground Freight, Inc.'s Request for Issuance of Subpoenas Duces Tecum (GC Exh. 11)	JA 0751
02/03/2016	Regional Director's Order Denying Request for Issuance of Subpoenas Duces Tecum (GC Exh. 12)	JA 0752
02/04/2016	UPS Ground Freight, Inc.'s Request for Extension of Time to File Offer of Proof in Support of Election Objections	JA 0753
02/05/2016	Regional Director's Order Granting Extension of Time to File Proof of Objections	JA 0755
02/09/2016	UPS Ground Freight, Inc.'s Objections to the Results of the Election (GC Exh. 13)	JA 0756
02/16/2016	UPS Ground Freight, Inc.'s Offer of Proof in Support of Objections to the Results of the Election (GC Exh. 14)	JA 0770

Date	Document	Page
03/11/2016	Regional Director's Supplemental Decision on Objections to Election and Certification of Representative (GC Exh. 15)	JA 0790
03/18/2016	UPS Ground Freight, Inc.'s Request for One Week Extension of Deadline for Filing a Request for Review of the Region's Decision on Objections to Election and Certification of Representative	JA 0799
03/21/2016	Associate Executive Secretary's Letter Granting Extension of Time to File Request for Review	JA 0801
04/01/2016	UPS Ground Freight, Inc.'s Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative (with attachments A-D)	JA 0802
	Exh. A: "*NLRB Director in Philly Suspended For 30 Days*," Law 360, March 28, 2016; "*NLRB Official's Conflict of Interest and Possible Illegal Conduct Exposed in Letter*," RedState, June 17, 2015	JA 0842
	Exh. B: Letter from Wally Zimolong, Esq. to Senate and Congressional Representatives Regarding Regional Director, Dennis P. Walsh, June 4, 2015	JA 0849
	Exh. C: UPS Ground Freight, Inc.'s Letter Requesting Reconsideration of Decision to Conduct Mail Ballot Election, January 7, 2016	JA 0855

Date	Document	Page
	Exh. D: Relevant Filings From: *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D.Tex. 2015); *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015); and *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015)	JA 0860
04/05/2016	UPS Ground Freight, Inc.'s Motion for Leave to File Corrected Request for Review	JA 0963
04/05/2016	Associate Executive Secretary's Letter Granting Motion for Leave to File Corrected Request for Review	JA 0966
04/05/2016	UPS Ground Freight, Inc.'s Corrected Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative (with attachments A-D)[4] (GC Exh. 16)	JA 0968
04/08/2016	International Brotherhood of Teamsters, Local 773, Response to UPS Ground Freight, Inc.'s Corrected Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative (GC Exh. 17)	JA 1014
07/27/2017	Decision on Review and Order (365 NLRB No. 113) (GC Exh. 20)	JA 1025

[4] Exhibits A-D are attached to UPS Ground Freight's Original Request for Review, dated April 1, 2016, at JA pp. 0842-0860.

Case No. 04-CA-205359

Date	Document	Page
08/30/2017	Unfair Labor Practice Charge	JA 1032
09/13/2017	Complaint and Notice of Hearing (GC Exh. 24)	JA 1033
09/27/2017	UPS Ground Freight, Inc.'s Answer and Defenses to Complaint (GC Exh. 25)	JA 1037
10/12/2017	General Counsel's Motion for Summary Judgment (with attachments) [5]	JA 1047
	Exh. 18: ULP Charge 04-CA-193781 (refusal to bargain), February 24, 2017	JA 1053
	Exh. 19: Email from Board Agent Holding Case No. 04-CA-193781 in abeyance pending Request for Review, April 18, 2017	JA 1055
	Exh. 21: Email from IBT Local 773 to UPS Ground Freight, Inc. Requesting Negotiations, August 22, 2017	JA 1057
	Exh. 22: Response from UPS Ground Freight to IBT Local 773 Regarding Decision to Pursue Additional Legal Review, August 24, 2017	JA 1059
10/12/2017	General Counsel's Memorandum in Support of Motion for Summary Judgment	JA 1061
10/17/2017	Order Transferring Proceeding to the Board and Notice to Show Cause	JA 1070

[5] Exhibits 1-17, 20, and 23-25 were detached from the General Counsel's Motion for Summary Judgment and placed in chronological order in the Joint Appendix designated as "(GC Exh. ___).

Date	Document	Page
10/23/2017	UPS Ground Freight, Inc.'s Request for Extension of Time to Respond to Region's Motion for Summary Judgment	JA 1071
10/23/2017	Deputy Executive Secretary's Letter Granting Extension of Time to Respond to Region's Motion for Summary Judgment	JA 1074
11/20/2017	UPS Ground Freight, Inc.'s Corrected Opposition to General Counsel's Motion for Summary Judgment and Response to Board's Notice to Show Cause and Cross-Motion for Summary Judgment	JA 1075
06/01/2018	Decision and Order (366 NLRB No. 100)	JA 1133
08/14/2018	Amended Certified List of Record Contents filed by the NLRB in D.C. Circuit Nos. 18-1161 & 18-1182.	JA 1138

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: UPS FREIGHT TRUCKLOAD, Employer, and TEAMSTERS, LOCAL 773, Petitioner.	Case No. 04-RC-165805

The above-entitled matter came on for hearing pursuant to Notice before KATHLEEN O'NEILL, Hearing Officer, at the National Labor Relations Board, Region 4, 615 Chestnut Street, 7th Floor in Courtroom 3, Philadelphia, Pennsylvania 19106, Monday, December 21, 2015, at 10:00 a.m.

BURKE COURT REPORTING, LLC
1044 Route 23 North, Suite 206
Wayne, New Jersey 07470
(973) 692-0660

A P P E A R A N C E S

On Behalf of the Employer:

JAMES P. NAUGHTON, ESQUIRE
Hunton & Williams, LLP
500 East Main Street
Suite 1000
Norfolk, Virginia 23510
(757) 640-5324

And

KURT G. LARKIN, ESQUIRE
Hunton & Williams, LLP
Riverfront Plaza
951 East Byrd Street, East Tower
Richmond, Virginia 23219
(804) 788-8776

On Behalf of the Petitioner:

JEREMY E. MEYER, ESQUIRE
Cleary, Josem & Trigiani, LLP
325 Chestnut Street
Suite 200
Philadelphia, Pennsylvania 19106
(215) 735-9099

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Ted Lovely	16	79	116	120	55
Matthew Dibiase	122	179	206	--	--
Frank Cappetta	215	254	292	--	--
Greg Falcone	298	306	309	--	--
Frank Cappetta (Recalled)	310	--	--	--	--
Ted Lovely (Recalled)	349	--	--	--	--

E X H I B I T S

EXHIBIT NUMBER	IDENTIFIED	RECEIVED
BOARD'S		
B-1	6	7
B-2	8	8
B-3	12	12
EMPLOYER'S		
E-1	53	56
E-2	61	66
PETITIONER'S		
P-1	191	193
P-2	250	252
P-3	250	252

1 P R O C E E D I N G S

2 (Time: 11:17 a.m.)

3 HEARING OFFICER O'NEILL: On the record. This hearing

4 will come to order.

5 This is a formal hearing of UPS Ground Freight, Inc., Case

6 4-RC-165805 before the National Labor Relations Board.

7 The Hearing Officer appearing for the National Labor

8 Relations Board is Kathleen O'Neill.

9 All parties have been informed of the procedures at formal

10 hearing before the Board by service of a description of

11 procedures in certification and decertification cases with the

12 notice of hearing. I have additional copies of this document

13 for distribution if any party wants more.

14 Will counsel please state their appearances for the

15 record. For the Petitioner?

16 MR. MEYER: For the Petitioner I'm Jeremy Meyer from

17 Cleary, Josem & Trigiani representing Teamsters Local 773.

18 HEARING OFFICER O'NEILL: For the Employer:

19 MR. NORTON: James P. Norton, Hunton & Williams

20 representing the Employer.

21 MR. LARKIN: Kurt Larkin, Hunton & Williams representing

22 the Employer.

23 JUDGE RUGGIERO: Are there any other appearances?

24 (No response.)

25 HEARING OFFICER O'NEILL: Let the record show no

1 response.
2 Are there any other persons, parties or labor
3 organizations in the Hearing Room who claim an interest in this
4 proceeding?
5 (No response.)
6 HEARING OFFICER O'NEILL: Let the record show no
7 response.
8 I now propose to receive the formal papers. They have
9 been marked for identification as Board Exhibit 1(a) The
10 exhibit has already been shown to all parties.
11 (Board's Exhibit 1 identified.)
12 HEARING OFFICER O'NEILL: Are there any objections to the
13 receipt of Board Exhibit 1? For the Employer?
14 MR. NAUGHTON: Could I have just a moment?
15 HEARING OFFICER O'NEILL: Sure.
16 (Whereupon, Mr. Naughton reviewed the documents.)
17 MR. NAUGHTON: Sorry.
18 HEARING OFFICER O'NEILL: Okay.
19 MR. NAUGHTON: We've reviewed the documents.
20 HEARING OFFICER O'NEILL: No objection?
21 MR. NAUGHTON: Well, I mean I don't know that any
22 objection's required, they say what they say. If you're asking
23 do I object to their being admitted, I have no objection.
24 HEARING OFFICER O'NEILL: Okay. And for the Petitioner?
25 MR. MEYER: No objection.

1 HEARING OFFICER O'NEILL: Hearing no objections, the
2 formal papers are received in evidence.
3 MR. NAUGHTON: Well, just for the record I did have one
4 objection and I'll make it very quick. The Employer had
5 requested a postponement of two days so that the hearing would
6 begin tomorrow. We were granted one day and we do object to
7 that and our position, which we've stated in our position
8 statement is that we had been afforded inadequate time to
9 prepare for the hearing.
10 HEARING OFFICER O'NEILL: Okay. And you'll have more
11 time to explain your issues when we get through a few
12 preliminary matters.
13 MR. NAUGHTON: Right.
14 HEARING OFFICER O'NEILL: Board 1 is received.
15 (Board's Exhibit 1 received.)
16 HEARING OFFICER O'NEILL: Are there any motions to
17 intervene in these proceedings to be submitted to the Hearing
18 Officer for ruling by the Regional Director at this time?
19 (No response.)
20 HEARING OFFICER O'NEILL: I hear no response.
21 Are the parties aware of any other Employers or labor
22 organizations that have an interest in this proceeding? For
23 the Employer?
24 MR. NAUGHTON: No, ma'am.
25 HEARING OFFICER O'NEILL: And for the Petitioner?

1 MR. MEYER: No.
2 HEARING OFFICER O'NEILL: Are there any prehearing
3 motions made by any party that need to be addressed at this
4 time?
5 (No response.)
6 HEARING OFFICER O'NEILL: Let the record show no
7 response.
8 The parties to this proceeding have executed a document
9 which is marked as Board Exhibit 2. That exhibit contains a
10 series of stipulations.
11 (Board's Exhibit 2 identified.)
12 HEARING OFFICER O'NEILL: Are there any objections to the
13 receipt of Board Exhibit 2?
14 No objection
15 HEARING OFFICER O'NEILL: Hearing no objection Board
16 Exhibit 2 is received.
17 MR. NAUGHTON: Could I see Board Exhibit 2, ma'am?
18 (Whereupon, Mr. Naughton reviewed the document.)
19 MR. NAUGHTON: Okay.
20 HEARING OFFICER O'NEILL: Board Exhibit 2 is received.
21 (Board's Exhibit 2 received.)
22 HEARING OFFICER O'NEILL: For the Petitioner and then I
23 will ask the Employer -- for the Petitioner, would you please
24 read into the record the unit you are seeking?
25 MR. MEYER: Would you like me to read in the record what

1 -- I would like to amend the included. Should I read that?
2 HEARING OFFICER O'NEILL: If you could read in the
3 amendment that you're seeking, correct?
4 MR. MEYER: Okay. So we'd like to change the included
5 section to be all regular full-time --
6 HEARING OFFICER O'NEILL: You mean all full-time.
7 Regular goes before part-time. Okay, so --
8 MR. MEYER: So all full-time regular --
9 HEARING OFFICER O'NEILL: So all full-time and regular
10 part-time. MR. MEYER: And regular part-time road drivers,
11 including certified safety instructors and dispatch employees
12 employed by the Employer at its Kutztown, Pennsylvania
13 distribution center.
14 And the exclusions that appear on the petition --
15 HEARING OFFICER O'NEILL: Hang on one sec.
16 MR. MEYER: I'm sorry.
17 HEARING OFFICER O'NEILL: Okay. All full-time and
18 regular part-time road drivers, is it comma, safety?
19 MR. MEYER: Including the certified safety instructors.
20 HEARING OFFICER O'NEILL: Including.
21 MR. MEYER: And dispatch.
22 HEARING OFFICER O'NEILL: And dispatchers?
23 MR. MEYER: Yeah, dispatchers.
24 HEARING OFFICER O'NEILL: Let me read that back into the
25 record and see if we have it.

1 You are petitioning for all full-time -- you're seeking an
2 amendment to petition for all full-time and regular part-time
3 road drivers, including the certified safety instructors and
4 dispatchers employed by the Employer at its Kutztown,
5 Pennsylvania facility, is that correct?
6 MR. MEYER: Yes.
7 HEARING OFFICER O'NEILL: And for the Employer, what is
8 your position on that unit?
9 MR. NAUGHTON: The company disagrees that the unit
10 requested by the Union is appropriate. The company's
11 contention is that the following unit is the only appropriate
12 bargaining unit, a system-wide unit consisting of all full-time
13 and regular part-time road drivers employed by the Employer at
14 each of nine Advance Auto Parts Distribution Centers covered by
15 the Employer's third party service contract with Advance Auto
16 Parts.
17 I can read that again if you want.
18 HEARING OFFICER O'NEILL: Go ahead.
19 MR. NAUGHTON: A system-wide unit consisting of all full-
20 time and regular part-time road drivers employed by the
21 Employer at each of nine Advance Auto Parts Distribution
22 Centers covered by the Employer's third party service contract
23 with Advance Auto Parts.
24 HEARING OFFICER O'NEILL: Okay. So it's my understanding
25 that you believe that a multi-facility unit is appropriate,

1 correct?
2 MR. NAUGHTON: The only appropriate unit, yes, ma'am.
3 HEARING OFFICER O'NEILL: Is the only appropriate unit.
4 MR. NAUGHTON: Yes, ma'am.
5 HEARING OFFICER O'NEILL: And in addition, you disagree
6 with including the certified safety instructors and
7 dispatchers?
8 MR. NAUGHTON: Yes, we disagree.
9 HEARING OFFICER O'NEILL: Are there any petitions pending
10 in Regional Offices involving other facilities of the Employer?
11 MR. NAUGHTON: Not to our knowledge
12 HEARING OFFICER O'NEILL: And for the Petitioner, are you
13 aware of any others?
14 MR. MEYER: No, I'm not aware of any.
15 HEARING OFFICER O'NEILL: The parties are reminded that
16 prior to the close of the hearing, the Hearing Officer will
17 solicit the parties' positions on the type, date, time and
18 location of the election and the eligibility period, including
19 the most recent payroll ending date and any applicable
20 eligibility formula, but will not permit litigation of those
21 issues.
22 The Hearing Officer will also inquire as to the need for
23 foreign language ballots and notices of election. Please have
24 the relevant information with respect to these issues available
25 at that time.

1 The Employer completed -- strike that.
2 The parties have been advised that the hearing will
3 continue from day to day if necessary until completed unless
4 the Regional Director concludes that extraordinary
5 circumstances warrant otherwise.
6 The parties are also advised that upon request they shall
7 be entitled to a reasonable period at the close of hearing for
8 oral argument. Post hearing briefs shall be filed only upon
9 special permission of the Regional Director.
10 In addition, a party may offer into evidence a brief memo
11 of points and authorities, case citations or other legal
12 arguments during the course of the hearing and before the
13 hearing closes.
14 The Employer has completed and I have marked for
15 identification as Board Exhibit 3 the statement of position in
16 this matter.
17 (Board's Exhibit 3 identified.)
18 HEARING OFFICER O'NEILL: Are there any objections to
19 receipt of this exhibit into the record?
20 (No response.)
21 HEARING OFFICER O'NEILL: Hearing no objection, Board
22 Exhibit 3 is received.
23 (Board's Exhibit 3 received.)
24 HEARING OFFICER O'NEILL: For the Petitioner, you've now
25 heard the Employer's description of the unit. Does your

1 position remain that the single facility is the appropriate
2 unit here?
3 MR. MEYER: Yes.
4 HEARING OFFICER O'NEILL: And also your position remains
5 that the certified safety instructors and dispatchers should be
6 included in the unit?
7 MR. MEYER: Yes, although just to clarify, all of the
8 certified safety instructors and dispatchers also have the
9 title road drivers.
10 HEARING OFFICER O'NEILL: I understand.
11 In an off the record discussion with the parties we
12 discussed the issues that will go forward today that the
13 Regional Director has directed. The following issues will be
14 litigated in this proceeding, whether or not the appropriate
15 unit is the single facility located at Kutztown, Pa., or
16 whether it's the system-wide unit. That issue will be
17 litigated today.
18 We will not be litigating the issue of the safety
19 instructors, the dispatchers and/or if they are dual-function
20 employees along with the road driver title. So as we discussed
21 off the record, we're a little unclear as the title.
22 We understand it is road driver, but we aren't going to be
23 litigating the inclusion of the two individuals based on their
24 status as dispatchers or safety instructors and the people that
25 currently hold those titles are Frank Cappetta as mentioned in

1 the Employer's statement of position.
2 And the Employer also mentioned that an employee named
3 Carl David works as a dispatcher. So we will not be hearing
4 testimony on those issues. They will go to post hearing, if
5 necessary.
6 MR. MEYER: Just a correction. Carl David is not a
7 dispatcher, he's a certified safety instructor.
8 HEARING OFFICER O'NEILL: Understood. Okay. And we will
9 be hearing testimony on the supervisory status of Frank
10 Cappetta in this hearing today.
11 MS. CALLAHAN: Ma'am?
12 HEARING OFFICER O'NEILL: Yes.
13 MR. NAUGHTON: Briefly could I, whenever you think it
14 appropriate, I'd like to state an objection on the exclusion of
15 evidence on a certain issue, but I'll do it when it's
16 appropriate.
17 HEARING OFFICER O'NEILL: Sure, sure.
18 MR. NAUGHTON: You just let me know.
19 HEARING OFFICER O'NEILL: Please be aware -- please be
20 aware because of the single facility unit involves a
21 presumption under Board law, the burden lies with the party
22 seeking to rebut the presumption and you must present specific
23 detailed evidence in support of your position. General
24 conclusionary statements by witnesses will not be sufficient.
25 Okay. For the Employer, you wanted to raise an issue

1 before we go forward?
2 MR. NAUGHTON: Well, briefly. For the record I would
3 like to state an objection to the Region's decision to exclude
4 evidence at this hearing regarding the employment status as
5 dispatchers or certified safety instructors, as the case may
6 be, of Mr. Cappetta and Mr. David. We understand the Region's
7 ruling, but we do object on that for the record.
8 And we believe that given what is being litigated, it
9 makes perfectly good sense to -- and wouldn't take much more
10 time to resolve the employee status question. We're mindful
11 of the new rules, but for a number of reasons we object and
12 I'll elaborate on that at an appropriate point.
13 Ma'am, the Union has petitioned for a mail ballot. Are
14 you going to deal with that outside of this hearing?
15 HEARING OFFICER O'NEILL: That's going to be at the end
16 of the hearing, okay?
17 MR. NAUGHTON: That's fine. But we will get a chance to
18 talk about that today?
19 HEARING OFFICER O'NEILL: Yes. And you definitely will
20 need to put your positions on with regard to what type of
21 election you want as well as date, time, and place.
22 MR. NAUGHTON: Right.
23 HEARING OFFICER O'NEILL: Okay. At this point will the
24 Employer present its first witness?
25 MR. NAUGHTON: Can I have just a moment before we -- I

1 just want to make sure that we --
2 HEARING OFFICER O'NEILL: Sure. Off the record.
3 (Off the record.)
4 HEARING OFFICER O'NEILL: On the record. And Employer,
5 please present your first witness.
6 MR. NAUGHTON: The Employer calls Ted Lovely.
7 HEARING OFFICER O'NEILL: Hi Ted. Could you state your
8 name for the record and spell your last name?
9 MR. LOVELY: My name is Ted Lovely, L-o-v-e-l-y.
10 HEARING OFFICER O'NEILL: Would you raise your right
11 hand?
12 Whereupon,
13 TED LOVELY,
14 having been called as a witness by and on behalf of the
15 Employer and having been first duly sworn, was examined and
16 testified on his oath, as follows:
17 HEARING OFFICER O'NEILL: You may proceed.
18 DIRECT EXAMINATION
19 BY MR. LARKIN:
20 Q Good morning, Mr. Lovely, how are you?
21 A I'm doing good.
22 Q Where do you work?
23 A Where? Physical location?
24 Q For whom do you work?
25 A I work for UPS Freight in the Truckload Division.

1 Q That's UPS ground freight?
2 A Yes.
3 Q The Employer in this case?
4 A Correct.
5 Q Where physically do you work?
6 A Out of the Atlanta Alpharetta Office.
7 Q And how long have you been employed by UPS Freight?
8 A 23 years.
9 Q And what is your present position for UPS Freight?
10 A I'm the Vice President of Operations for the UPS Freight
11 Truckload Division.
12 Q How long have you held that position?
13 A About five years.
14 Q And, if you would just for background, could you just tell
15 us what your employment history with the company is prior to
16 that?
17 A Started out with UPS Freight -- I'm sorry -- UPS Truckload
18 which was a leasing company for UPS, moved into what was then
19 called Worldwide Dedicated Services which was their dedicated
20 division under the supply chain company. About six years ago
21 we merged in with the acquisition of Overnight and became UPS
22 Ground Freight and the Truckload Division.
23 Q Is that when you became the Vice President of Operations?
24 A A little bit after that, yes.
25 Q Now, can you just describe what your duties and

1 responsibilities are as the Vice President of Operations?
2 A I'm responsible for basically all the operations,
3 functions in the Truckload Division.
4 Q I'm sorry, something went on over here, I didn't hear
5 that.
6 A The operations functions within the Truckload Division.
7 Q Now, part of your function as Vice President of
8 Operations, does it include responsibility over work that UPS
9 Freight performs at the facility at Kutztown, Pennsylvania?
10 A Yes, it does.
11 Q Is the facility a UPS facility?
12 A No, it is a customer facility. Advance Auto is the -- I
13 guess owns or leases the warehouse that we would out of there.
14 Q And this is located in Kutztown proper?
15 A Correct. I'm not sure if it's actually that. We call it
16 Kutztown, but I don't know if the address is listed as
17 Kutztown, but --
18 HEARING OFFICER O'NEILL: If I can, I want to interrupt
19 for a minute just to get a bigger picture.
20 So UPS, many people are familiar with the brown trucks
21 that make the deliveries of your packages.
22 THE WITNESS: Correct.
23 HEARING OFFICER O'NEILL: Can you tell me where UPS
24 Ground Freight -- how it fits in the UPS structure or --
25 THE WITNESS: So you have the UPS parent and then UPS

1 Ground Freight is the subsidiary, which includes the LTL
2 Division and then the Transportation Management Division, which
3 is what I am up under which is --
4 HEARING OFFICER O'NEILL: What's the LTL?
5 THE WITNESS: LTL, less than truckload. And then the
6 Transportation Management is asset and non-asset based services
7 to customers.
8 HEARING OFFICER O'NEILL: So you're a subsidiary, UPS
9 Ground Freight, Inc., does not deliver packages to individuals
10 or --
11 THE WITNESS: No, they do.
12 HEARING OFFICER O'NEILL: Oh.
13 THE WITNESS: They would just, instead of being like a
14 parcel, something that somebody could kind of carry by hand,
15 which could be pallets, which could be large boxes, something
16 that's oversized that would not fit into the package network.
17 HEARING OFFICER O'NEILL: You also mentioned that your
18 UPS Freight Truckload services just one customer?
19 THE WITNESS: UPS, we have multiple customers.
20 HEARING OFFICER O'NEILL: I'm sorry, the Kutztown
21 facility --
22 THE WITNESS: Is just one customer, yes.
23 HEARING OFFICER O'NEILL: And the name of that?
24 THE WITNESS: Advance Auto. We basically dedicate
25 services so we take care of individual customers delivery dates

1 most of the time on site for those customers such as Advance
2 Auto.
3 HEARING OFFICER O'NEILL: And does Kutztown do deliveries
4 to other customers or just to Advance Auto?
5 THE WITNESS: They -- we deliver products out of the
6 Advance Auto warehouse to the Advance Auto stores that you see
7 in neighborhoods and cities.
8 BY MR. LARKIN:
9 Q So we were talking about the Kutztown facility is not a
10 UPS facility. I think you said it's an Advance Auto Parts
11 Distribution Center, correct?
12 A Yes.
13 Q Can you generally just describe the facility? You did
14 there little bit. Can you go into a little more details about
15 what it is and what's located there?
16 A Basically, it's a warehouse that will take inbound
17 shipments, then they will consolidated them into truckload
18 deliveries, which the drivers, the road drivers will then take
19 from the distribution facility in Kutztown and take it to
20 multiple stores around the city.
21 Q So what kind of products come into the warehouse?
22 A Auto parts and fluids and anything that you'd see in the
23 Advance Auto stores.
24 Q And are these products that are destined for --
25 A Advance other stores that consumers would buy from them.

Q So just to summarize then, the Kutztown Distribution Center is sort of a way station for products that are going to Advance Auto stores that are in the region?
A Yes.
Q What is -- you touched on this a little bit, but if you could describe what is UPS Freight's role at the Kutztown facility?
A Our role is to basically --
Q What do you do there?
A We basically manage the transportation for the Advance Auto warehouse, to deliver their products from that warehouse to the stores.
Q What's the region covered by the Kutztown facility, incidentally?
A It fits in between the Enfield, Connecticut; Roanoke, Virginia; Delaware; Ohio. So it's kind of that central location, Pa., us and New Jersey, Delaware, those type areas.
Q Now, does -- I guess based on what you're describing I take it Advance Auto -- does Advance Auto self-deliver any of these loads out of the warehouse to its various satellite Advance Auto stores or does UPS do that?
A UPS does that.
Q So Advance Auto has basically contracted out its delivery function?
A Correct.

1 HEARING OFFICER O'NEILL: And -- I'm sorry, would you
2 mind?
3 MR. NAUGHTON: Go ahead.
4 HEARING OFFICER O'NEILL: I don't know if you're familiar
5 -- so the warehouse in Kutztown is owned or leased by Advance
6 Auto, correct?
7 THE WITNESS: Correct.
8 HEARING OFFICER O'NEILL: And does UPS Ground Freight
9 have an office there?
10 THE WITNESS: Yes, they provide offices for us.
11 HEARING OFFICER O'NEILL: And do you have areas there
12 where you park trucks or do they go in a garage or do you have
13 an area in the --
14 THE WITNESS: They have areas that we park our equipment.
15 HEARING OFFICER O'NEILL: Okay.
16 THE WITNESS: On that facility or around that facility.
17 HEARING OFFICER O'NEILL: Okay.
18 THE WITNESS: Right now it's -- right now they're doing
19 some construction. They're actually parked in the front of the
20 facility.
21 BY MR. LARKIN:
22 Q And when you mentioned they earlier you mean Advance --
23 A Advance Auto.
24 Q Okay. Now, does Advance Auto and UPS Freight have an
25 actual contractual agreement --

1 A Yes.
2 Q -- that covers this work?
3 A It does. We have a master agreement with Advance Auto
4 that covers Kutztown and another eight locations.
5 Q So the contractual arrangement between Advance Auto and
6 UPS Freight, does it cover, I think you said it, but I'll go
7 one step at a time, does it cover more than the Kutztown
8 location?
9 A Yes.
10 Q How many other locations does yo9ur contractual agreement
11 with Advance Auto cover?
12 A A total of nine locations including Kutztown.
13 Q And the location at Kutztown you said is a Distribution
14 Center, correct?
15 A Yes.
16 Q What are the other eight locations covered by the
17 contract?
18 A You have Enfield, Connecticut. You mentioned Kutztown,
19 Pa. Delaware, Ohio; Selina, Kansas; Roanoke, Virginia;
20 Lakeland, Florida; Hazlehurst, Mississippi; Gastonia, North
21 Carolina; and Thompson, Georgia.
22 Q So those are nine Advance Auto facilities that the UPS
23 contract covers?
24 A Yes.
25 Q Are each of those facilities the same type of facility or

1 are they different?
2 A They're basically the same type of facility. They're
3 Advance Auto warehouses.
4 Q So they all -- to your knowledge, are they all -- are they
5 all distribution centers?
6 A Yes.
7 Q Now, as Vice President of Operations for the Truckload
8 Division do you have managerial responsibility over those nine
9 facilities or, I guess, over UPS' presence at the nine
10 facilities?
11 A Yes.
12 Q In that role are you familiar with the manner in which UPS
13 Freight services the Advance Auto contract?
14 A Yes.
15 Q How has the company, and when I use the term the company
16 during our examination, just assume I mean UPS Freight. If I
17 mean something different I'll say it, okay?
18 A Okay.
19 Q But how has the company organized the way that it provides
20 services under this contract, if any?
21 A We have organized the Advance Auto locations basically as
22 an entity within the entity because of its size. We have
23 separated it out with a national account manager with support
24 managers and supervisors that help the locations of the
25 locations reported to.

1 Q So do you have a -- can you specifically describe -- well,
2 let me ask it this way. Do you have a centralized management
3 structure supporting the contract?
4 A Yes.
5 Q And can you tell us who -- what are the personnel who make
6 up that centralized structure?
7 A You want the names or positions?
8 Q Both.
9 A So we have Quincy Adams who is the national account
10 manager for the Advance Auto business.
11 Q Okay.
12 A And we have Paul Dalessandro, which is the operations
13 support manager. We have Mark Girsham who is the operations
14 support supervisor. And we have Mina Metry who is the support
15 manager and basically does designs.
16 Q Okay. Let me just take those one at a time. So you have
17 a national account manager Quincy Adams.
18 A Correct.
19 Q Does Mr. Adams report to you?
20 A He reports up through my chain, yes.
21 Q And what is his responsibility as national account
22 manager?
23 A He is responsible for all of Advance Auto from the
24 customer to the operations center.
25 Q And physically where is he located?

1 A He's located in Dallas, Dallas/Fort Worth area.
2 Q Now, you said the -- Paul Dalessandro, his title was
3 again?
4 A Is the operations support manager.
5 Q And does he report to Mr. Adams?
6 A Yes.
7 Q And what is his role?
8 A He is basically there to help the national account manager
9 with the operations. So he will take on certain
10 responsibilities that have been delegated to him by Mr. Adams.
11 Q And Mark Girsham, operational support supervisor?
12 A Operational support supervisor.
13 Q Oh, I'm sorry, I forgot to ask you, where does Mr.
14 Dalessandro sit?
15 A He is located near Indianapolis.
16 Q Mr. Girsham, operational support supervisor, what is his
17 responsibility?
18 A He has more day-to-day operations. He'll be somebody that
19 will go on site to directly support the operations, potentially
20 run the operation, be there on a day-to-day type basis.
21 Q And where is he physically located?
22 A He's physically located in Richmond, Virginia.
23 Q Now, does Mr. Girsham get out to the nine facilities?
24 A Yes.
25 Q How frequently?

1 A Most weeks he's out in some facility.
2 Q And you said there was a fourth person, a support manager,
3 Mina Metry?
4 A Mina Metry, yes.
5 Q And what does -- is it Ms. Metry?
6 A Mr.
7 Q Mr. Metry, sorry. What is Mr. Metry's responsibilities as
8 support manager?
9 A He is on site in the Advance Auto transportation corporate
10 group and he helps support Advance Auto with designs and
11 solutions to gain efficiency within their network.
12 Q And where is he located?
13 A I believe he's in Raleigh.
14 Q Now, does Mr. Girsham and Mr. Metry, do they report to Mr.
15 Dalessandro?
16 A The -- Mr. Girsham reports to Dalessandro; Mr. Metry
17 reports to Quincy.
18 Q So is it fair to say you have supervisory responsibility
19 over all these folks?
20 A Yes.
21 Q But this would be -- are these the individuals who you
22 would consider your central management on the Advance contract?
23 A Yes.
24 Q Now, is there local management at each of the nine sites
25 you listed?

1 A There is local management at each of the nine sites.
2 Q And so what would you call the supervisory personnel
3 that's physically at each site?
4 A There's an operations manager that's responsible for each
5 site and then he'll have a staff of supervisors and
6 administrative personnel to help manage that site.
7 Q And so who would the site manager report to?
8 A The site manager --
9 HEARING OFFICER O'NEILL: I'm sorry. The operations
10 manager?
11 THE WITNESS: Yeah, the operations manager.
12 HEARING OFFICER O'NEILL: Oh, on site?
13 THE WITNESS: On site, yes.
14 HEARING OFFICER O'NEILL: Okay.
15 THE WITNESS: I mean they ultimately report up through
16 Quincy.
17 BY MR. LARKIN:
18 Q To Mr. Adams?
19 A Yes.
20 Q Mr. Adams?
21 A Correct.
22 Q Who is the operational support manager currently at
23 Kutztown, Pa.?
24 A Operational support manager or the on site manager?
25 Q The on site manager, I'm sorry.

1 A Yeah, we do not have an onsite manager. It's being
2 managed with support from Mr. Grisham and then another
3 individual from my implementations team that's coming in and
4 out.
5 HEARING OFFICER O'NEILL: So and who's that other person
6 from the implementations team?
7 THE WITNESS: It's Monte Copeland.
8 HEARING OFFICER O'NEILL: And what's Monte's title again?
9 THE WITNESS: He's implementation supervisor.
10 HEARING OFFICER O'NEILL: And is Monte Copeland on site
11 in Kutztown?
12 THE WITNESS: He is right now, yes.
13 HEARING OFFICER O'NEILL: Okay. And is he on site in the
14 past six months? Is he on site --
15 THE WITNESS: He's probably been -- I think he works like
16 ten on/four off type deal so --
17 HEARING OFFICER O'NEILL: And where is his home office?
18 THE WITNESS: His home office is in Georgia. He actually
19 works out of his home near Tifton, Georgia.
20 HEARING OFFICER O'NEILL: And Mr. Girsham's home office
21 was?
22 THE WITNESS: Richmond.
23 HEARING OFFICER O'NEILL: Richmond.
24 BY MR. LARKIN:
25 Q Now, you said that each site manager, I'm sort of shorting

1 the term, has a supervisory staff?
2 A Yes.
3 Q And is there any supervisory staff presently assigned at
4 Kutztown?
5 A Yes.
6 Q Who would that be?
7 A So right now -- right now we have a lot of temporary
8 people that are in there. The permanent supervisor that we
9 have on site is Matt DiBiase.
10 Q And what is --
11 HEARING OFFICER O'NEILL: Can you spell that last name,
12 Matt --
13 THE WITNESS: Can I get help from the floor, please?
14 (Laughter.)
15 THE WITNESS: Can you spell your last name for us, Matt?
16 MR. DiBIASE: D as in Delta, I as in India, capital B as
17 in Bravo, I as in India, A as in Alpha, S as in Sierra, E as in
18 Echo.
19 HEARING OFFICER O'NEILL: Go ahead.
20 BY MR. LARKIN:
21 Q And who does Mr. DiBiase presently report to?
22 A He's reporting to the support managers on site, so either
23 Mr. Copeland or Mr. Girsham.
24 HEARING OFFICER O'NEILL: And Mr. DiBiase's title is?
25 THE WITNESS: He's the operations supervisor, so the

1 onsite operations supervisor.
2 BY MR. LARKIN:
3 Q Can you, just for the record, spell Mr. Girsham's last
4 name?
5 A I think it's G-i-r-s-h-a-m.
6 Q Now, how much control does your central management team
7 exercise over daily operations that each of the nine
8 distribution centers -- each of the nine Advance Distribution
9 Centers?
10 A When you say the centralized team, you're talking about
11 Mr. Adams on down or --
12 Q Yeah. So -- and if you need to break it up, but when I
13 say the centralized management team I'm going to be referring
14 to Mr. Adams, who's your national account manager; Mr.
15 Dalessandro, who's your manager; Mr. Girsham and Mr. Metry.
16 A Basically they are responsible for servicing the Advance
17 Auto accounts. So they have quite a large latitude to get the
18 product delivered to the ultimate customer for Advance Auto,
19 which is the stores.
20 Q So they do exercise control over the nine locations?
21 A Yes.
22 Q Can you give us some examples of how they might do that?
23 A So for instance shared resources. Depending on staffing
24 locations they will make decisions as far as how they cover
25 staffing with drivers from other Advance Auto locations. If

1 the staffing's not available, then they'll make decisions as
2 far as using temporary labor or outside help to help deliver
3 the product.
4 In addition, depending on the asset needs we do have some
5 fluctuations that occur with new route designs. They would
6 move equipment around the network to fill those needs. We do
7 not either have to add equipment or --
8 Q Now, in order to effectuate all that will they issue
9 directives, directives to each of the locations?
10 A Yeah, they'll take a look from a volume standpoint and see
11 where the needs are, talk to the operations, find out where
12 extra resources are and assign them for either a period of time
13 or permanently to the locations.
14 Q And now how will they issue those directives? What do
15 they do, who do they talk to?
16 A They talk to the operations managers. And as far as they
17 show them the directives, they basically just have a
18 discussion, make the determination and then implement the plan.
19 Q And would that be the same, you said, for moving
20 equipment?
21 A Yes.
22 Q And then when you say moving equipment, just can you give
23 me a little more detail about what you mean?
24 HEARING OFFICER O'NEILL: And maybe you can start with
25 this for me. I'm wondering what type of vehicles you have and

1 the number they -- and are they permanently assigned at one
2 place or permanently unless there's a need? Maybe you can
3 describe the equipment that you have.
4 THE WITNESS: The equipment is tandem axle/single axle
5 day cabs and sleepers. So they're tractor -- we basically
6 provide the tractors for the account. Advance Auto has its own
7 trailers which we pull, which are multi sizes. Each location
8 has their pool of tractors that were assigned to them based off
9 of the design.
10 HEARING OFFICER O'NEILL: Do you know -- I don't know if
11 you know this. Do you not know how many are at Kutztown?
12 THE WITNESS: Not off the top of my head, I'm sorry.
13 HEARING OFFICER O'NEILL: Okay.
14 THE WITNESS: I mean I imagine it's probably in the 40 to
15 50 range of that.
16 HEARING OFFICER O'NEILL: Okay.
17 BY MR. LARKIN:
18 Q You just mentioned, I think, discussing the equipment a
19 day cab. What is a day cab?
20 A A day cab is a vehicle that a driver cannot sleep in,
21 whereas a sleeper will have a sleeper bunk so that if they're
22 on an overnight run they don't have to get a hotel, they can
23 lay down and take their ten hour break in the truck.
24 Q Do you know what the sizes of those vehicles are?
25 A The sizes -

1 Q The dimensions?
2 A I know that they're standard day cabs and sleepers. I'm
3 not sure. They're not extended cabs, they're not lowboys.
4 Q Now, what is the difference between -- I think you've
5 mentioned single and a double trailer?
6 A Axle.
7 Q Axle? What is the difference?
8 A The difference is the amount of weight that the tractor
9 can haul legally. So it will either have one axle or it will
10 have two axles on the back. You have your steer axle in the
11 front and then you have your two drive axles in the back or one
12 drive axle in the back.
13 Q And do you utilize both types of trailers at the Kutztown
14 location?
15 A Both type of tractors?
16 Q Tractors, yes.
17 A I believe they're all tandem axle. I think there is a
18 large majority of them are day cabs -- I'm sorry, a large
19 majority of them are sleepers and there's probably just a few
20 day cabs.
21 Q Let's focus in on the Kutztown facility for a little bit.
22 How many UPS Freight employees work on site at the Kutztown
23 facility?
24 A I believe at this time we have 29 or 30. I know we have
25 one person that's off on injury that's a permanent assigned

1 Kutztown road driver. We have another six UPS road drivers
2 from other Advance Auto locations. I believe it's three from
3 Lakeland and three from Hazlehurst. And then we have a group
4 of temps somewhere in that 13 to 15 range that we're using to
5 supplement the workforce.
6 Q Any other UPS employees on site besides the road drivers?
7 A We have some administrative staff and supervisory staff
8 that's a combination of UPS and temporary or third party staff.
9 Q You mentioned there were six drivers not permanently
10 assigned to Kutztown. I think you said thee from Hazlehurst
11 and that's Mississippi, correct?
12 A Yes.
13 Q And three from Lakeland. That's Florida?
14 A Yes.
15 Q And who are those people?
16 A They are permanent UPS road drivers that grant those
17 Advance Auto locations that are up in Kutztown on a temporary
18 basis.
19 Q So three -- and these are road drivers?
20 A Yes.
21 Q So they're the same job title as --
22 A They do the same thing for the Florida and the Mississippi
23 location as we do in Kutztown.
24 Q And are these folks -- so I guess -- what would you
25 consider them, to be transferred to the Kutztown facility for

1 the time being?
2 A They're temporarily transferred for support standpoint.
3 Q Let's focus on these road drivers who are the subject of
4 the Union's petition. They're called road drivers, you said,
5 that's their official title?
6 A Yes.
7 Q Can you describe the duties and responsibilities of a road
8 driver?
9 A So a road driver is responsible for following all DOT
10 regulations, delivering the freight from the warehouse to the
11 end customer in a safe and efficient manner.
12 Q So are they the folks -- do they drive the --
13 A They drive the day cabs and the sleepers and they pull the
14 Advance Auto trailers.
15 Q So the road drivers are --
16 HEARING OFFICER O'NEILL: Do you have job descriptions?
17 Do you have a job description for road driver?
18 THE WITNESS: Yes. Not with me, but --
19 HEARING OFFICER O'NEILL: Is that something you have with
20 you?
21 MR. LARKIN: I don't have it with me. I could get it.
22 HEARING OFFICER O'NEILL: Why don't you make
23 arrangements? You have my e-mail address so I can print it so
24 whether you want to have someone send it to you and then to my
25 e-mail?

1 THE WITNESS: The job description for the road driver.
2 HEARING OFFICER O'NEILL: And I'd like the job
3 description for everyone at Kutztown who's not the clerical
4 support, so above road driver that was called supervisor?
5 THE WITNESS: We have an operation manager, an operations
6 supervisor.
7 HEARING OFFICER O'NEILL: The -- above and let me ask
8 this. The road drivers report to whom by job title?
9 THE WITNESS: They will report to the operations manager.
10 HEARING OFFICER O'NEILL: Okay. So I'd like the
11 operations, the onsite operations manager job description as
12 well. And is there anyone after -- does the onsite operations
13 supervisor report to anyone locally at Kutztown or does the
14 operations supervisor report --
15 THE WITNESS: There's an onsite operations manager and an
16 onsite operations supervisor at Kutztown.
17 HEARING OFFICER O'NEILL: I'd like both the manager and
18 the supervisor.
19 MR. LARKIN: Okay, so road driver job description, ops
20 manager on site job description, ops supervisor on site job
21 description?
22 HEARING OFFICER O'NEILL: Yes.
23 MR. LARKIN: Right, okay.
24 BY MR. LARKIN:
25 Q So I think we were talking about the road driver job

1 classification. I take it they are the ones who drive your
2 tractor trailers and deliver Advance Auto's trucks?
3 A Yes.
4 Q To whom do the road drivers report?
5 A To the onsite operations management team.
6 Q Now, let' talk for a minute about the eight other Advance
7 Auto Distribution Centers. I think you said -- well, let me
8 ask you if I didn't ask already. The work performed by UPS
9 Freight at the other eight Advance Distribution Centers is
10 similar to the work performed at the Kutztown Distribution
11 Center?
12 A Yes. they basically do the same thing for Advance Auto.
13 Q And how are those facilities staffed?
14 A Very similar. There may be difference in head count, but
15 they're staffed the same way with the operations manager,
16 supervisor, administrative and drivers.
17 Q And what are the drivers at those facilities called?
18 A Road drivers also.
19 Q And do they perform the same type of work at -- do road
20 drivers who are assigned to the other eight Advance Auto
21 facilities perform the same type of work as the work performed
22 by road drivers assigned to Kutztown?
23 A Yes.
24 HEARING OFFICER O'NEILL: And do you know approximately
25 how many road drivers are at each of your other facilities, not

1 the temps that work through a different company and contractor?
2 THE WITNESS: Yeah, we're somewhere around -- without the
3 contractors we're somewhere probably around 280 to 300. I
4 don't have the exact count with me.
5 MR. NAUGHTON: If I may, Madam Hearing Officer, I think
6 we've got a list in the --
7 HEARING OFFICER O'NEILL: Yes, you did. Yes, it's in the
8 statement of position.
9 BY MR. LARKIN:
10 Q Let's talk a little bit about the day of a road driver.
11 Just take me through what it is that a road driver does any
12 given work shift.
13 A So the road driver would come in on his assigned schedule.
14 He would pick up his tractor, the pre-trip on the tractor. He
15 would pick up his load paperwork, grab the trailer that was
16 assigned to that load, do the pre-trip, exit the facility.
17 Then he would continue making deliveries.
18 The driver's first stop, he'd unload the freight at the
19 first stop, pick up returns, load it back on to the trailer.
20 Then he would go to the second stop using -- at each stop
21 they're using a lift gate and a power jack for the deliveries.
22 Then --
23 Q When you say each stop, does each stop mean a different
24 Advance Auto parts store?
25 A Correct.

1 Q Sort of a retail store?
2 A Basically the retail, local retail store, yes.
3 Q And so when the road driver makes a stop at a given
4 Advance Auto retail store what did he do?
5 A So basically, depending on -- we're in the process of
6 changing the way we're doing some of the stops, but in general
7 the road driver will go to the delivery, he'll see the manager,
8 the manager will unseal the trailer, will take off the product.
9 The manager will sign for the product, will pick up the returns
10 and load it back on to the trailer, shut up the trailer and
11 move on to the next stop and repeat that process until all the
12 products have been delivered.
13 Q So I take it each shift the road driver is driving,
14 they're driving one truck, is that correct, one tractor
15 trailer?
16 A Yes, at a time.
17 Q And then they have multiple stops to make along the way?
18 A Correct.
19 Q And is it the same number of stops every time or is it
20 different each time?
21 A It's going to vary depending on the route and the quantity
22 that's ordered by each store.
23 Q And so when -- if I'm a road driver and I get to my last -
24 - well, let me ask you this first. You said that when the road
25 driver stops at a given retail store, they drop off product and

1 then there are returns. What are returns?
2 A It could be return product that they're sending back to
3 the warehouse or it could be cores or batteries that have been
4 sold and the dead batteries being sent back.
5 Q And so these are -- returns I take it are products that go
6 back on the tractor trailer?
7 A Correct.
8 Q So when I, if I'm a road driver and I get to my last
9 scheduled stop at my last retail store for the day, what do I
10 do then?
11 A So basically after you've made the delivery then you would
12 bring the return product back to the Advance Auto warehouse.
13 In this for Kutztown it goes to an offsite warehouse called
14 Inmar.
15 HEARING OFFICER O'NEILL: What's it called?
16 MR. MEYER: I didn't catch that.
17 THE WITNESS: Offsite warehouse called Inmar.
18 HEARING OFFICER O'NEILL: Inmar, I-n-m-a-r?
19 HEARING OFFICER O'NEILL: I believe so.
20 BY MR. LARKIN:
21 Q And so does the road driver unload the return product at
22 this Inmar --
23 A They'll either unload their return product there or if
24 it's busy or closed then they'll bring the trailer back to the
25 Advance Auto yard and it will be taken at another time to be

1 offloaded.
2 Q And where does the road driver return the tractor trailer
3 when he's finished with his daily --
4 A To the Advance Auto warehouse location.
5 Q So if we're talking about Kutztown the work of the road
6 driver would begin and end at the Kutztown facility?
7 A Yes.
8 Q And in terms of scheduling how are they -- how are road
9 drivers scheduled on the runs?
10 A So basically the road drivers will be selected for the
11 runs to make the deliveries. A lot of times it's the same type
12 of runs on a weekly/daily basis, but it's going to depend on
13 how the flexibility of the stores actually work. They go to
14 the exact same stops.
15 Q So if I were a road driver where would I go to find out
16 what my schedule's going to be for that day or that week?
17 A Most of the time you'll be called and informed of your
18 schedule.
19 Q Who would do that?
20 A So it would be the dispatchers, usually the one that's
21 assigned to call and assign the schedules.
22 Q Now, that process you described of the road drivers
23 picking up their tractor trailer in the Distribution Center,
24 making a series of stops, collecting some returns, dropping
25 those off and then returning the trailer to the Distribution

1 Center, is that a description of a shift that a road driver
2 would perform at just Kutztown or at any of the nine
3 facilities?
4 A At any of the nine facilities except for the offsite
5 return location. Most of the locations have an onsite return
6 where they drop off the cores and the return product from the
7 stores.
8 Q But if I'm a road driver at Lakeland, Florida, am I
9 picking up the tractor trailer at the Lakeland facility?
10 A Yes.
11 Q And would I have a series of stops at retail stores to
12 make as part of my shift that day?
13 A Exactly the same, yes.
14 Q And am I going to be picking up returns?
15 A You're going to picking up returns and bringing it back to
16 the Lakeland warehouse in that case.
17 Q And is it fair to say the same process goes for the
18 Distribution Centers?
19 A Yes.
20 Q Now, when a road driver is newly hired to work at one of
21 these nine facilities do they undergo any type of new employee
22 driver training of any kind?
23 A Yes.
24 Q Can you tell us what that is?
25 A They go through a basic orientation that introduces them

1 to the companies and the general policies and procedures such
2 as the harassment and violence on property and things like
3 that.
4 Q And where do they receive that new employee training?
5 A It's usually right at the location.
6 Q So if I'm a Kutztown driver I receive my new employee
7 orientation at Kutztown?
8 A At the Kutztown facility, yes.
9 Q And who would provide that?
10 A And it could be either the operations supervisor or one of
11 the safety trainers.
12 Q Now, is the training that a road driver receives as a new
13 driver at the Kutztown facility, is it different in any way
14 than the new employee training that a road driver would receive
15 at any of the other eight Advance facilities?
16 A No, it should be exactly the same.
17 HEARING OFFICER O'NEILL: So that's the onsite operations
18 supervisor who gives the training?
19 THE WITNESS: Or the -- or one of the safety --
20 HEARING OFFICER O'NEILL: Or the safety trainer.
21 BY MR. LARKIN:
22 Q Now, do road drivers who are assigned to Advance Auto
23 Parts -- or well, UPS road drivers who perform work in Advance
24 Auto, one of these nine warehouses, do they receive any type of
25 training that's particularized to working at an Advance

1 Distribution Center?
2 A Yes.
3 Q Can you describe what kind of training that is?
4 A They will be trained on Advance Auto procedures as far as
5 the paperwork, the delivery requirements, how to use the
6 equipment, lift gates and pallet jacks.
7 Q What is a lift gate kind of like?
8 A So a lift gate is the device that's on the end of the
9 trailer that allows you to take it from trailer height down to
10 ground height and then move the product into the store.
11 Q And so what would be the purpose of using a lift gate?
12 A When you don't have a dock to make your delivery. I mean
13 the trailers and you know, they're several feet off the ground.
14 So most of the time if you have a dock you don't need a lift
15 gate, you'll back up to the facility with a dock and you'll
16 take it right into their warehouse or store.
17 When you don't have a dock, then a lift gate is used to
18 bring the product out, lower it down to ground level so that
19 you can then move it into the -- in this case into the Advance
20 Auto store.
21 Q So you said they're trained on how to use a lift gate and
22 there was another piece of equipment you mentioned.
23 A Pallet jack.
24 Q Pallet jack, what is that?
25 A The pallet jack is the device that helps move the pallets

1 or the containers from the trailer into the store.
2 Q Can you just describe what it is, like what it looks like
3 for the uninitiated?
4 A Okay. So basically it has two forks that would go into
5 the pallets. It has -- it goes into a handle or in most cases
6 for Advance Auto it's an electric pallet jack that will have
7 something that you help steer the pallet around. It lifts it
8 up and then moves it kind of like a forklift, just on a lot
9 smaller version.
10 Q Now, are pallet jacks used at all nine Advance locations?
11 A Yes.
12 Q And are lift gates used at all nine Advance locations?
13 A Yes.
14 Q So do the employees at each of the nine locations receive
15 the same training on how to use these devices?
16 A Yes.
17 Q And is there any other type of training that's
18 particularized to working at an Advance Distribution Center
19 that the road driver would receive?
20 A I said the paperwork is the main thing, HAZMAT training
21 for this particular account is big. Those are really the two
22 specific things that we would train all the drivers on.
23 Q Are road drivers assigned at the nine Advance Distribution
24 Centers subject to the same UPS Freight policies, corporate
25 policies?

1 A Yes.
2 Q Can you list any of what those policies are?
3 A Like the main ones being harassment, violence, you know,
4 as far as appearance guidelines, things like that.
5 HEARING OFFICER O'NEILL: And is there an employee
6 handbook?
7 THE WITNESS: There is not a physical handbook; there are
8 some things that are on line.
9 HEARING OFFICER O'NEILL: And what type of things are on
10 line?
11 THE WITNESS: Like the work rules and things like that
12 would be on line.
13 HEARING OFFICER O'NEILL: Do the employees all have a UPS
14 e-mail or access to --
15 THE WITNESS: They have what's called UPSers.com that
16 they can get into the UPS -- it's not the network, but the home
17 page, whatever you call it, where you have information on
18 benefits and things like that and they do have that. They
19 don't have an e-mail address.
20 HEARING OFFICER O'NEILL: Okay.
21 BY MR. LARKIN:
22 Q But that UPSer.com would be the way -- would be the way
23 that a driver could get access to these policies?
24 A Yes.
25 Q And I should have asked this in the beginning, but are

1 there computers at each of the nine Advance locations?
2 A Yes.
3 Q It seems like a crazy question in today's day and age, but
4 and are they -- do they have Internet access?
5 A Yes.
6 Q And are they available to road drivers to be used as
7 needed?
8 A Yes, as needed, but you can access it from your home.
9 Q So do road drives who are assigned to each of the nine
10 Advance Distribution Centers, do they make deliveries for any
11 other UPS Freight customer?
12 A No, they're assigned to the Advance Auto facilities and
13 that's what they deliver is Advance product.
14 Q How are your road drivers evaluated on their job
15 performance?
16 A I mean we have some standard measurements that the drivers
17 will be evaluated on. Most of it is electronic records such as
18 hard brakes, over-speed, MPG. We would evaluate, you know, the
19 customer service of any type of delivery issues.
20 Q So you say over-speed. I just want to take these one at a
21 time briefly. Over-speed, what does that mean?
22 A As a company we have set our tractors at 65 miles an hour
23 and anybody that goes over the 65 miles an hour by several
24 miles per hour will flag as an over-speed. And whenever it's
25 flagged as an over-speed, we'll investigate to see what

1 happened, make sure that, you know, there's not an issue as far
2 as the driver going too fast or the setting being wrong on the
3 truck.
4 Q So just to make sure I understand, if I'm a road driver
5 and I'm barreling down I-81 at 85 miles an hour, I'm not
6 suggesting that they do that, but let's just say that they did,
7 you can figure that out?
8 A Yes.
9 Q How do you find that out?
10 A It's on a device called a route tracker. It's an onboard
11 system that monitors the truck's behaviors from over-speeds,
12 hard brakes if you brake real quickly, and it takes a look at
13 MPG for if you're idling too long and things like that.
14 Q So in other words, how many MPG's, does that mean how many
15 miles per gallon?
16 A Miles per gallon.
17 HEARING OFFICER O'NEILL: So there --
18 MR. LARKIN: Go ahead.
19 HEARING OFFICER O'NEILL: Excuse me. So there's a device
20 in the truck that sends this information on --
21 THE WITNESS: Yes, back to the facility.
22 HEARING OFFICER O'NEILL: Yes. And is that the device
23 called a route tracker?
24 THE WITNESS: Route tracker.
25 HEARING OFFICER O'NEILL: And how is that monitored? For

1 example, does a red flag go up and the manager looks into it or
2 does the manager receive a printout? What --- how does that
3 work?
4 THE WITNESS: Usually it's a report. There are some e-
5 mails that will go out on certain instances to flag that one of
6 these occurrences has happened so we can follow up, but most of
7 the time it's a report that would be run that would use from an
8 evaluation standpoint for the group of drivers.
9 HEARING OFFICER O'NEILL: And who runs that report?
10 THE WITNESS: It would be the operations team, local
11 operations team.
12 BY MR. LARKIN:
13 Q Are route trackers installed on the tractor trailers in
14 all of the nine locations?
15 A Yes.
16 Q And the computer system that the data is fed to, is it a
17 centralized system?
18 A Yes.
19 Q And where is it warehoused?
20 A it's actually a separate company. They data warehouse it,
21 but we're able to log in and access.
22 Q Now, the measurements, I guess, the miles per gallon, the
23 hard braking, are the standards that I as a road driver am
24 supposed to stay within the same across the Advance system or
25 are there different standards in different places?

1 A As far as standards, right now we're using it. We just
2 put those devices on within the last couple of years and we're
3 using them from an improvement standpoint. We're not actually
4 -- have not set a measurement that said that you have to have
5 so many hard brakes or not as many hard brakes or over-speeds.
6 It's basically used to help with improving on efficiencies and
7 safety.
8 Q So there's not a necessarily don't go over 80? It's not
9 exactly used in that fashion?
10 A Don't go over 60 -- like I said, it will show an over-
11 speed, but it's not used that if you go over 80 miles an hour
12 that there is a disciplinary action that goes with it. It's
13 used to monitor and evaluate.
14 Q But -- okay. The monitoring and the evaluation process --
15 A Yes.
16 Q -- is it different in any of the nine Advance locations or
17 is it the same in all nine?
18 A Everybody has the same systems. You know, we basically
19 are working from an improvement process to try to reduce the
20 occurrences, improve the MPG so we can be safer and more
21 efficient.
22 Q Okay. Now, I want to talk about driver interchange. Are
23 road drivers at one of the Advance Distribution Centers
24 eligible or able to transfer to another Distribution Center?
25 A Yes.

1 Q And how would that happen?
2 A We have a centralized employment data base that if a
3 driver is interested in going to another facility we'd be able
4 to look and see if there is an available position to transfer
5 to.
6 Q Now, is that something that would be on his UPS.com site?
7 A It's through -- I don't know if it's through -- I assume
8 it would be, I've not actually logged into it that way, yes.
9 Q Now, are you aware, Mr. Lovely, how many times road
10 drivers have permanently transferred from one Advance Auto
11 Parts Distribution Center to another Advance Auto Parts
12 Distribution Center in the past several years?
13 A Yes.
14 Q Could you tell us?
15 A Yeah, we ran the report and in the last five years we've
16 had 27 drivers that have transferred from one Advance Auto
17 location to another on a permanent basis.
18 MR. LARKIN: I'm going to go ahead and enter an exhibit.
19 Do you want to just call it Employer 1?
20 HEARING OFFICER O'NEILL: Why don't you just mark it for
21 identification. Yep, Employer 1.
22 MR. LARKIN: I didn't bring tags.
23 MR. NAUGHTON: He might have it. Does the Court Reporter
24 have tags?
25 COURT REPORTER: You don't need to write it. Just mark it

1 on the bottom of the page and I'll stamp it.
2 MR. NAUGHTON: Okay.
3 MR. LARKIN: Just Employer 1?
4 HEARING OFFICER O'NEILL: Yeah.
5 (Employer's Exhibit 1 identified.)
6 MR. LARKIN: I'm handing the witness a document that has
7 been marked Employer's Exhibit 1.
8 BY MR. LARKIN:
9 Q Mr. Lovely, just take a second to look at that and then
10 when you're ready, please tell us what Employer's Exhibit 1 is,
11 please?
12 A It basically shows a list of the drivers that have moved
13 from one Advance location to another Advance location.
14 Q And let's just, just to make sure we all are on the same
15 page here, can you sort of just take us through the first, I
16 guess, going right to left, all those rows and going top to
17 bottom we'll call those columns, can you just take us -- you
18 see the very first row going across from left to right, it
19 looks like there's an employee named Dwayne Banks. Do you see
20 that?
21 A Yes.
22 Q And then there's a bunch of columns that have a bunch of
23 data associated with Mr. Banks.
24 A Yes.
25 Q Can you just sort of walk us across the columns and tell

1 us what this line of data is telling us?
2 A So Mr. Banks basically the job title RDS 3, hire date.
3 I'm not sure what the next one is but it's from department
4 would be like touchdown is 47535, gives us every Center name,
5 Kutztown, is being transferred to Department 47537, which is
6 Advance Auto Delaware, on September 7, 2011.
7 Q All right. So then to summarize then does this row of
8 information, is it telling us that on September 7, 2011 Dwayne
9 Banks transferred as a road driver from the Kutztown location
10 to the Delaware location?
11 A Yes.
12 Q So the first -- I would say one, two, three, four columns
13 from the right where it says service name, and then if you go
14 over two more columns to the right it says to/from service
15 center, do you see that title?
16 A Yes.
17 Q Okay. So the column would be facility name on the left.
18 That's where the employee came from, is that correct?
19 A Correct.
20 Q And the column on the right, the second from the right,
21 that's the facility they're going to, is that correct?
22 A Yes.
23 Q And is this information on Employer's Exhibit 1
24 information that you obtained from the company data base?
25 A Yes.

1 HEARING OFFICER O'NEILL: And I have a question about it.
2 Do you know any of the reasons people transferred?
3 MR. LARKIN: Did you get his answer?
4 THE WITNESS: No, I do not, I do not know the reasons
5 they transferred.
6 MR. LARKIN: I'd offer Employer's Exhibit 1.
7 HEARING OFFICER O'NEILL: Any objection
8 MR. MEYER: Just can I ask some quick questions?
9 HEARING OFFICER O'NEILL: Sure.
10 VOIR DIRE EXAMINATION
11 BY MR. MEYER:
12 Q Did you prepare this yourself?
13 A No.
14 Q Who prepared it?
15 A Our HR group.
16 Q Who is that?
17 A That would be Ryan -- Ryan Owens is our HR manager. He
18 had somebody within the HR group prepare it. I don't know who
19 it is.
20 Q Do you know how they prepared it? You asked him to
21 prepare a list and they gave you this list?
22 A I asked him to prepare a list of people that have
23 transferred from the Advance Auto locations to Advance Auto
24 locations.
25 MR. MEYER: I'm going to have an objection as to

1 foundation. He didn't prepare it himself. He says, you know,
2 it's a black box.
3 HEARING OFFICER O'NEILL: Okay, I'm going to overrule.
4 Are you offering this into evidence?
5 MR. LARKIN: Yes.
6 HEARING OFFICER O'NEILL: It's received as Employer 1.
7 (Employer's Exhibit 1 received.)
8 MR. LARKIN: Do you need another one?
9 HEARING OFFICER O'NEILL: No.
10 BY MR. LARKIN:
11 Q Okay. So Employer's Exhibit 1 addresses permanent driver
12 transfers, correct?
13 A Yes.
14 Q Are there ever temporary transfers of road drivers from
15 one Advance facility to another Advance facility?
16 A Yes.
17 Q And tell me why a driver might be temporarily transferred
18 from one to another Advance facility?
19 A We would transfer somebody temporarily to help support
20 that location for a couple of reasons, one being volume
21 fluctuations. Two could be the location, we're short on
22 staffing.
23 Q You mentioned, when we started here, that there were -- or
24 that there are six -- six road drivers from other Advance
25 facilities currently at Kutztown, correct?

1 A Yes.
2 Q Three from Lakeland and three from Mississippi.
3 A Correct.
4 Q Do you consider those three drivers working at Kutztown,
5 do you consider that to be a temporary transfer?
6 A Yes.
7 Q And so what are those six drivers doing at Kutztown?
8 A They're basically doing the road driver job.
9 Q Well, I know, we talked about that they do the same work,
10 but why did they come to Kutztown?
11 A Because Kutztown needed help with personnel staffing.
12 They have not been able to hire drivers so we temporarily
13 assigned those drivers to help out with the Kutztown location.
14 Q Okay. And who sort of decides that -- well, let's take it
15 step by step. Who decides that we need six drivers from other
16 locations to come to Kutztown?
17 A The operation would notify Quincy or somebody on his
18 staff.
19 HEARING OFFICER O'NEILL: The operation manager on site
20 at Kutztown?
21 THE WITNESS: The operations manager, yes, would notify
22 that they were short on staffing and we would -- or Quincy
23 would take a look at the other operations to determine if there
24 were drivers available based off of their staffing needs and
25 then they would temporarily assign those drivers from, in this

1 case, Lakeland and Hazlehurst, to Kutztown for a week to
2 sometimes it's been several months off and on.
3 BY MR. LARKIN:
4 Q So the length of a temporary transfer could vary depending
5 on what the need is on the other end?
6 A Yes.
7 Q And you said from a week to how far?
8 A A month or two.
9 Q Now, how would it be -- and just because this is an
10 example we've been talking about, how would the management team
11 decide that we need three from Mississippi and three from
12 Florida as opposed to let's take six from Enfield because
13 Enfield's closer?
14 A So we would -- Quincy and his team would take a look at
15 the operations and talk with the operation manager about their
16 schedule, available drivers and then they would take, in this
17 case, three from Lakeland and three from Hazlehurst and assign
18 them to Kutztown for a period of time.
19 Q Now, this temporary transfer process is that a common
20 occurrence within the system?
21 A Within Advance Auto, yes.
22 Q Are there any other examples of this type of transfer that
23 come to mind?
24 A I mean it happens fairly frequently, yes. And recently,
25 we opened up the Enfield location, we had drivers out of

1 Kutztown that were actually working up in Enfield during the
2 implementation phase.
3 Q When was that?
4 A A year ago.
5 Q So in 2014?
6 A I believe so, yes.
7 Q Is that the year you --
8 A 2014/2015 when we started it.
9 Q So the Enfield facility is newer than the other
10 facilities?
11 A Yes.
12 Q Okay.
13 HEARING OFFICER O'NEILL: How many Kutztown drivers went
14 to Enfield, if you know?
15 THE WITNESS: Not off the top of my head.
16 HEARING OFFICER O'NEILL: Okay. Do you know how long
17 they stayed?
18 THE WITNESS: No.
19
20 BY MR. LARKIN:
21 Q Now, when the -- generally speaking when a road driver's
22 temporarily transferred to a location are they performing the
23 same work at the location to which they're transferred as the
24 work that they performance back at, we'll call it their home
25 location?

1 A Yes.
2 Q Now, if you know, how many road driver temporary transfers
3 have taken place across this whole system of nine facilities
4 over the past three years?
5 A We've had 117 drivers that have worked at other Advance
6 Auto facilities besides their home facility for 413 weeks.
7 Q So when you say 117 drivers for 413 weeks, just explain
8 what you mean by that?
9 A Drivers that have gone to another facility. Lakeland sent
10 three drivers to Kutztown for somewhere from a week or more.
11 And it's up to 117 drivers with -- for 413 weeks over that
12 three-year period.
13 Q So the 117 are the total number of individual human beings
14 who went from one facility to another temporarily, is that
15 correct?
16 A Yes.
17 Q And --
18 HEARING OFFICER O'NEILL: And is this correct then, one
19 of those 117 might have spent one week, another one might have
20 spent three weeks. And so the way you came up with the 413
21 weeks was to multiply the 117 drivers, each one the number of
22 weeks they spent?
23 THE WITNESS: Correct.
24 HEARING OFFICER O'NEILL: Okay.
25 THE WITNESS: We actually took the week of each driver

1 and added it up.
2 MR. LARKIN: Give me just one second?
3 (Whereupon, Mr. Larkin and Mr. Naughton conferred.)
4 HEARING OFFICER O'NEILL: And I'm wondering how -- if you
5 can put that into context? In the three years I guess how many
6 weeks' worth of work -- let's see. To put this in context to
7 know how much temporary transfers -- how many weeks of work,
8 would it be the number of weeks of work times the number of
9 facilities times the number of employees or how would we -- I
10 want to know percentage-wise what this looks like.
11 Do you know that figure? What --
12 THE WITNESS: I'm not sure what you're -- what you're
13 trying to calculate. I said over the three-year period we've
14 got 117 different drivers that have worked at some facility for
15 Advance Auto besides their own for 413 weeks.
16 BY MR. LARKIN:
17 Q How many drivers system-wide?
18 A Within the Advance Auto, somewhere around that 275, 300,
19 something like that.
20 MR. LARKIN: I have another exhibit marked that I wanted
21 to --
22 HEARING OFFICER O'NEILL: Sure.
23 MR. LARKIN: I'm handing the witness a document that's
24 been pre-marked Employer's Exhibit 2.
25 (Employer's Exhibit 2 identified.)

1 BY MR. LARKIN:
2 Q Mr. Lovely, take a look at Employer's Exhibit 2 for a
3 moment and then when you're ready can you tell us what it is?
4 A So this is basically a report that I had run that shows
5 the total number of drivers that have moved temporarily from
6 one Advance Auto location and worked at another Advance Auto
7 location. That's in the top section. Then in the bottom
8 section it shows the total number of weeks that those drivers
9 worked.
10 Q So is it accurate to say that this spreadsheet shows two
11 separate corresponding tables?
12 A Yes.
13 HEARING OFFICER O'NEILL: And so at the top, the very top
14 where I see AAS, that's Advance Auto --
15 THE WITNESS: Selina.
16 HEARING OFFICER O'NEILL: Selina, AAR is?
17 THE WITNESS: Roanoke.
18 HEARING OFFICER O'NEILL: And H is?
19 THE WITNESS: Hazlehurst.
20 HEARING OFFICER O'NEILL: F?
21 THE WITNESS: Is Lakeland.
22 HEARING OFFICER O'NEILL: K?
23 THE WITNESS: Kutztown.
24 HEARING OFFICER O'NEILL: D?
25 THE WITNESS: Delaware.

1 HEARING OFFICER O'NEILL: G?
2 THE WITNESS: Gastonia.
3 HEARING OFFICER O'NEILL: T?
4 THE WITNESS: Thompson.
5 HEARING OFFICER O'NEILL: And E?
6 THE WITNESS: Enfield.
7 HEARING OFFICER O'NEILL: Okay.
8 THE WITNESS: So basically you could read it as AAS in
9 this top column provided four drivers to AAD. And if you drop
10 down to the second --
11 HEARING OFFICER O'NEILL: In a three-year period?
12 THE WITNESS: During a three-year period.
13 HEARING OFFICER O'NEILL: Okay.
14 THE WITNESS: For a total of nine weeks.
15 HEARING OFFICER O'NEILL: Okay. So let's look at the
16 Kutztown column and help me out with that then.
17 THE WITNESS: Okay.
18 HEARING OFFICER O'NEILL: So I'm going to go across the
19 top to one, two, three, four, five where it's AAK.
20 THE WITNESS: Right.
21 HEARING OFFICER O'NEILL: And the AAD facility provided
22 no drivers in three years, AAE ten, that's zero, zero, zero,
23 and then AAR provided five drivers.
24 THE WITNESS: I think it actually works different. I
25 think that column going down are the drivers that were provided

1 by Kutztown to those facilities. So like the AAK provided --
2 HEARING OFFICER O'NEILL: Oh, I see.
3 THE WITNESS: -- Enfield ten drivers. AAD --
4 HEARING OFFICER O'NEILL: Oh, I see. And then moving
5 down to the AAA column where I see that five, that means
6 Kutztown provided five drivers to Roanoke?
7 THE WITNESS: Yes.
8 HEARING OFFICER O'NEILL: And two drivers to Selina --
9 THE WITNESS: Selina.
10 HEARING OFFICER O'NEILL: Selina for a total of 17. And
11 for example, the AAE, where Kutztown provided the ten drivers,
12 and when I look at the chart underneath and I see the 54 weeks,
13 was that during the period when Enfield was opening?
14 THE WITNESS: I'm sure that was most of the time that
15 Enfield was opening, yes.
16 HEARING OFFICER O'NEILL: Okay.
17 BY MR. LARKIN:
18 Q So if we look across at the one, two, three, four, five,
19 six down in the left-hand column of the first table, AAK,
20 that's AAK meaning Kutztown, correct?
21 A Yes.
22 Q And so if we go across the columns does each number
23 correspond with the number of drivers from a separate location
24 who were transferred temporarily to Kutztown?
25 A Yes.

1 Q So if you look at AAS --
2 A They had seven drivers that were transferred to Kutztown
3 for a period of time.
4 Q And if we go down to this same corresponding box in the
5 bottom table, one, two, three, four, five, six down, AAK
6 Kutztown, and then cross it with the first column over to the
7 right, AAS Selina, there's a number 15.
8 A So that would be 15 weeks that those seven drivers worked
9 at Kutztown.
10 Q So seven Selina drives worked a total of 15 weeks at
11 Kutztown temporarily in the past three years, correct?
12 A Yes.
13 Q So if you go all the way over to the right totals and
14 there's a -- you know, at the far right-hand column of the
15 Kutztown row, total drivers 44. Is that 44 non-Kutztown
16 drivers who worked temporarily at Kutztown?
17 A Yes.
18 Q And then if we go down again to the corresponding row in
19 the second -- the bottom table, summary of weeks 163, does that
20 mean that those 44 drivers worked a total of 163 weeks at
21 Kutztown?
22 A Yes.
23 Q Okay. And I should -- this is an obvious question, but I
24 should ask, we were looking earlier at the temporary -- or the
25 permanent transfers. When I permanently transfer from one

1 location to the other, for that point going forward all of my
2 weeks are at my new location, isn't that right?
3 A Yes.
4 Q And who did you have prepare Employer's Exhibit 2?
5 A I had Mina Metry's supervisor prepare these who basically
6 does the same thing as Mina as far as the support group from a
7 solution's design.
8 Q And it was done at your request?
9 A Yes.
10 MR. LARKIN: I'd offer Exhibit 2.
11 MR. MEYER: I'll make the same objection, but --
12 HEARING OFFICER O'NEILL: Okay. I'm going to overrule
13 that and I'm going to accept this.
14 (Employer's Exhibit 2 received.)
15 HEARING OFFICER O'NEILL: So the -- and just to summarize
16 and to be clear, the top half of this chart shows drivers
17 Kutztown sent to other facilities?
18 THE WITNESS: It shows both. It shows the number of
19 drivers that Kutztown sent to other facilities were 17,
20 okay?
21 HEARING OFFICER O'NEILL: That's the top half of the
22 chart, yes.
23 THE WITNESS: Correct. And it also shows the number of
24 drivers that were sent by other facilities to Kutztown, which
25 would be if you trace the Kutztown from the left to the right,

1 it's 44.
2 HEARING OFFICER O'NEILL: I see.
3 THE WITNESS: Then it works the same way down here for
4 the number of weeks.
5 HEARING OFFICER O'NEILL: And the bottom part of the
6 chart shows the drivers sent to Kutztown?
7 THE WITNESS: It shows the number of weeks that the
8 drivers --
9 HEARING OFFICER O'NEILL: The number of weeks, okay,
10 sorry.
11 THE WITNESS: -- that like Kutztown --
12 HEARING OFFICER O'NEILL: Got it.
13 THE WITNESS: -- had those 17 drivers at other locations
14 for 72 weeks and other locations had them at Kutztown for 163
15 weeks.
16 HEARING OFFICER O'NEILL: I understand.
17 THE WITNESS: Okay.
18 MR. LARKIN: One moment.
19 BY MR. LARKIN:
20 Q These temporary transfers that we have been discussing are
21 they voluntary or are they involuntary?
22 A I would say it's voluntary that we'll go with the drivers
23 -- you know, most of the drivers are hired with the
24 understanding that they're going to work at that location and
25 periodically have opportunities to work at other locations. So

1 we would go to the drivers and ask for the volunteers
2 volunteering to go there.
3 And then after that, you know, a lot of the shorter
4 assignments, we can assign them for a week, it might not be as
5 voluntary.
6 Q So if you can't fill it with voluntary transfers you would
7 basically have to select someone to go?
8 A Correct. I wouldn't call it a forced dispatch, I'd call
9 it, it might be a reluctant agreement. We have other options
10 besides transferring the drivers. You know, somebody is just
11 dead set or has personal issues, I mean we're not going to --
12 we're not going to make somebody go that absolutely does not
13 want to. It doesn't benefit us or the employee.
14 HEARING OFFICER O'NEILL: And when your drivers go to
15 work in another facility on a temporary basis is there a
16 housing allowance or a food allowance?
17 THE WITNESS: Not usually.
18 HEARING OFFICER O'NEILL: Okay.
19 BY MR. LARKIN:
20 Q All right. Let's talking about equipment, interchange of
21 equipment, do the nine Advance Distribution Centers -- well,
22 does UPS share equipment that's located at each of the nine
23 Advance Distribution Centers?
24 A Occasionally, yes.
25 Q And can you give me an example of how or when you would

1 share equipment?
2 A Again, depending on the design and depending on the
3 volumes at the location there are times that we will have
4 equipment needs that we'll fill with rental tractors. Once we
5 start using a rental tractor, we will look at the system to
6 find out if there's any under-utilized equipment at another
7 Advance Auto location and try to transfer it to the Advance
8 Auto location that's using a rental tractor.
9 Q All right. So how would you physically accomplish that?
10 A Most of the time it would be some kind of physical
11 transfer that you'd send the driver and the truck up and then
12 have them ride back. You'd bring a driver down to grab the
13 truck to bring it back up.
14 Q So a road driver would transfer the equipment from one
15 location to the other?
16 A Most of the time, yes.
17 Q Are there -- do you -- are there any Advance Auto
18 documents or packages that are delivered among the facilities
19 by UPS?
20 A So we have a transfer or shuttle between our Roanoke
21 facility and the other Advance Auto facilities that has like
22 intercompany mail, paychecks, flyers, things of that nature
23 that will be moved from Roanoke to the other facilities.
24 Q And who will do that?
25 A It will be one of the Roanoke drivers most of the time.

1 Q So a Roanoke road driver would have a load of Advance
2 paperwork?
3 A Document, yes.
4 Q Destined for Kutztown, for example?
5 A Yes.
6 Q And so what would that -- what would that particular job
7 be? What would that road driver have to do?
8 A So the driver would go from Roanoke to like Kutztown, drop
9 off his load and then he would go back to Roanoke. And then
10 those documents -- I'll make the assumption then that the
11 internal documents that gets sent around the Advance system.
12 Q Now, these flyers and papers, are they circulated to all
13 nine locations?
14 A Yes.
15 Q Do road drivers in each of the nine facilities participate
16 in any other types of communications together?
17 A Occasionally we would. We'll have the safety trainer's
18 road drivers participate in group conference calls for what we
19 call comprehensive health and safety. So in the past we've
20 gotten them on a call together to share ideas, trade best
21 practices.
22 Q And so what sort of subjects might be talked about on a
23 call like that?
24 A You know, delivery techniques, if there's challenges at
25 one location's having, you know, how the other location's

1 handling it such as tail swings, which is basically depending
2 on where you set your tandems on the trailer it has a large or
3 a shorter arch. So it will be different subjects, basically
4 safety matters, compliance matters that would be discussed on
5 the calls.
6 Q Now, who would sort of -- who would originate or schedule
7 that call? Is there a person who says all right, we're going
8 to have a system call or whatever you -- whatever the term is?
9 A It would usually be somebody on the Advance Auto
10 management team, Paul and his group would --
11 Q Paul Dalessandro?
12 A Paul Dalessandro would set something up with the locations
13 and arrange to get the safety trainers together.
14 Q And this would be by what, like a conference dial in call?
15 A Yes.
16 Q And there would be -- would there be road drivers from
17 each of the facilities who would dial into the conference line?
18 A Yes.
19 Q And who would sort of -- would there be any specific
20 person who would conduct the call or would it just be a
21 brainstorming session?
22 A It would usually be Paul and his group would conduct the
23 call with -- you know, leading off with the topics and the
24 discussions, you know, whatever the issues might be for the
25 Advance group.

1 Parking lots are a big challenge for us with the cars,
2 tail spins, things like that so there would be items such as
3 that that would be talked about on the call.
4 Q What is a tail swing?
5 A A tail swing is whenever you're turning in the parking
6 lot, you know, you've got your back tandems on the trailer that
7 when you start swinging the tail swings out, to being aware
8 those tandems are set because it actually can be moved. If
9 you're set further up, then you have a larger tail swing than
10 if you're set further back.
11 Q Now, is there any sort of - I don't know if result is
12 really the right characterization, but are there any policies
13 or best practices that are -- that are generated out of these
14 phone calls?
15 A There's best practices that would be generated, yes.
16 Q And so who would be responsible for -- you know, who's the
17 keeper of that?
18 A Keeper of the best practices? It's usually the safety
19 team, the road driver safety trainers that would take that
20 information back to the locations.
21 Q So once these, you know, best practices are developed, who
22 would they then be disseminated to, to the road drivers in each
23 of the locations?
24 A Yes.
25 Q And how would that occur?

1 A It usually occurs either through safety meetings or the
2 CHSP local committees would take that information and
3 communicate it.
4 Q Now, let's talk about scheduling. Do -- and we touched on
5 this briefly earlier, but do road drivers at each of the nine
6 facilities work the same schedule?
7 A Very similar schedule, at least they have up until
8 probably the last year. We have what they describe as a 5X,
9 which is a five time a week delivery that just started a little
10 over a year ago. Before that each store had only one to three
11 deliveries a week.
12 Q So let's talk about 5X. First of all what is that?
13 HEARING OFFICER O'NEILL: And 5X would be going forward?
14 That's on a temporary arrangement as far as you know?
15 THE WITNESS: Advance has basically made the directive
16 that they're going to be going to five time a week deliveries
17 in all their locations. Right now the schedule is being put
18 together, but the goals like by the end of 2017 to have all
19 nine --
20 HEARING OFFICER O'NEILL: I see.
21 THE WITNESS: -- Distribution Centers on a 5X delivery
22 model.
23 BY MR. LARKIN:
24 Q So the 5X delivery model, this is something -- is this
25 something that UPS created or something that Advance created?

1 A Advance. Basically -- they're basically going to this
2 model to compete in their industry. Some of their competitors
3 such as Napa, O'Reilly, other auto parts distribution centers
4 are already on it or going to it. So for them to keep
5 competitive in the market they're basically telling us they
6 feel that's what they have to go to.
7 Q So they're saying to you this is a delivery model we want
8 to use at our facilities and then you're -- I guess is it fair
9 to say your contractual obligation is then to shift to that
10 schedule?
11 A Correct. We're working with them to shift to that
12 schedule across the network.
13 Q Now, is that -- where is the 5X schedule currently in
14 place?
15 A Right now you have Lakeland, Florida and Enfield,
16 Connecticut are on the 5X schedule. Kutztown is in the
17 transition phase of the 5X and then they have a little bit of
18 5X, but it's not been fully implemented in Gastonia, North
19 Carolina.
20 Q And have you been informed that this schedule will be
21 implemented in all nine facilities?
22 A Yes.
23 Q By when?
24 A 2017 is the date we've been given and that's changed from
25 -- recently it was 2019, but they've moved it up. They're

1 trying to expedite it.
2 Q I want to talk about the pay and benefits. How are road
3 drivers paid, how are they compensated?
4 A Compensated based on activity based pay, miles and stops.
5 Q So how does that work?
6 A So for every mile that the driver drives between the time
7 they leave the commissary to whenever they come back based on
8 the PC Miler, they would be paid those number of miles. PC
9 Miler is a mileage program that calculates from point to point
10 along the route. It's an industry program.
11 Q So it's basically like mileage pay?
12 A Correct.
13 Q Now, you said there was another form of pay?
14 A And stop pay.
15 Q What is that?
16 A That's basically for the stops that they make they get
17 compensated.
18 Q So every time my trailer stops at an Advance store I get a
19 flat rate for that?
20 A Correct.
21 Q Okay. So if I'm a road driver and I have to take a run
22 and it's got a series of stops, my pay is how many miles I
23 drive plus a flat rate for each stop I make?
24 A Yes, a stop pay for each stop.
25 Q Now, is that compensation system the same in all nine

1 locations?
2 A Yes.
3 Q Is there like an hourly rate of pay that road drivers get
4 paid?
5 A There is a -- there's a non-driving hourly rate that would
6 be for training or meetings, something that has -- that's
7 different from actually doing the delivery activity.
8 HEARING OFFICER O'NEILL: And how much is that?
9 THE WITNESS: It varies depending on length of service
10 and experience, somewhere in the 16.50 to 17.50, I believe.
11 HEARING OFFICER O'NEILL: And is that the same at all
12 your facilities?
13 THE WITNESS: Yes.
14 HEARING OFFICER O'NEILL: In that range?
15 THE WITNESS: That range, yes.
16 BY MR. LARKIN:
17 Q So I would make the hourly rate of pay about -- if I were
18 working for the company, but I was not actually assigned to a
19 delivery run, is that correct?
20 A Correct. And like I said, most of the time -- the only
21 time the hourly pay really comes into play is whenever, for
22 most of the drivers, it's the training pay, if we have a safety
23 meeting or we have some type of safety training we're asking
24 them to participate in and they'd get paid the non-hourly rate.
25 Most everything else is activity based pay, which is miles and

1 stops and then they have a delay pay if they're delayed past a
2 certain point at a stop.
3 HEARING OFFICER O'NEILL: And is the mileage -- the rate
4 -- the PC Miler gives them their rate per mile. Do they get
5 the same rate per mile at each facility or is the amount
6 different per mile?
7 THE WITNESS: The per mile is similar at each facility.
8 You have some geographic differences in the pay. The Enfield
9 and Kutztown is higher than the North Carolina --
10 HEARING OFFICER O'NEILL: And if you can just tell me
11 what they range from, from the cheapest --
12 THE WITNESS: The cheapest --
13 HEARING OFFICER O'NEILL: -- kind of the least expensive
14 to the most expensive?
15 THE WITNESS: It goes from like 40 cents up to 46, but
16 keep in mind that is depending on the length of service of or
17 the experience of the drivers will be the rate. When we hire
18 somebody on --
19 HEARING OFFICER O'NEILL: Oh.
20 THE WITNESS: When we hire a driver on if they have five
21 years of experience it may be 40 cents that we pay in Lakeland
22 and it would be 44 we would pay in Kutztown and Enfield.
23 HEARING OFFICER O'NEILL: Okay, so the same -- so the
24 driver with the five years' experience, depending their
25 geographic location, they'd have a higher rate in an area that

1 cost more, the cost of living was higher?
2 THE WITNESS: Correct.
3 HEARING OFFICER O'NEILL: Okay. Same for stop pay? Is
4 that the same everywhere or --
5 THE WITNESS: Stop pay for the non-5X is basically $16
6 for the first three stops and then $21 for the next however
7 many stops, four plus for all locations.
8 HEARING OFFICER O'NEILL: For all locations.
9 BY MR. LARKIN:
10 Q Now, do road drivers in the nine Advance Distribution
11 Centers, do they have the same Human Resources function?
12 A They -- yes, we have a centralized Human Resources
13 function.
14 Q And are there specific Human Resources personnel who are
15 responsible for administering HR services --
16 A Yes.
17 Q -- to the Advance sites?
18 A Yes.
19 Q Who is that?
20 A Ryan Owens is the Human Resources manager and then we have
21 Ken Thomas who is the Employee Relations supervisor.
22 Q Now, Mr. Owens and Mr. Thomas, where are they located?
23 A They're located in Richmond, Virginia.
24 Q Is that the company's headquarters?
25 A That is the -- where UPS Ground Freight's headquarters

1 are, yes.
2 Q Now, if a local site manager or a local site supervisor
3 wanted to terminate a road driver can they do that on their
4 own?
5 A No.
6 Q What do they have to do?
7 A They would have to contact usually it's Mr. Thomas,
8 present the reason why they'd want to terminate and then get
9 approval for that termination.
10 MR. LARKIN: One second.
11 HEARING OFFICER O'NEILL: Let's go off the record for a
12 moment.
13 (Whereupon, a recess was taken from 12:54 p.m. to 1:07 p.m.)
14 HEARING OFFICER O'NEILL: Back on the record.
15 MR. LARSON: The Employer has no further questions for
16 Mr. Lovely.
17 HEARING OFFICER O'NEILL: Okay.
18 MR. MEYER: May I proceed or do you want to take a break?
19 HEARING OFFICER O'NEILL: Yes, go ahead.
20 CROSS EXAMINATION
21 BY MR. MEYER:
22 Q All right. Way back in the beginning of your testimony
23 you were asked about the different locations and each one has
24 its own region, correct, each Distribution Center? Like each
25 Distribution Center like the Kutztown distribution Center, it

1 has its own region, right?
2 A The delivery area?
3 Q Yes.
4 A Yes.
5 Q And it has a set number of AAP retail stores in that
6 region, correct?
7 A Yes.
8 Q And there's no overlap, right? There's no store that's
9 served by more than one Distribution Center?
10 A No.
11 Q All right. So when you said -- talked between Enfield and
12 Roanoke and Delaware, that's just the three other regions that
13 bound -- that it has boundaries with?
14 A Correct.
15 Q Okay. Now, you talked a little bit about the sort of
16 chain of command and I believe under you is Quincy Adams, is
17 that right?
18 A Yes.
19 Q And then under Mr. Adams is both Paul Dalessandro and Mina
20 Metry?
21 A Yes.
22 Q And then under Paul is Mark Girsham?
23 A Correct.
24 Q And then where do the site -- like the site manager, like
25 Monte Copeland, I guess is the acting site manager in Kutztown,

1 right?
2 A Monte Copeland's a temporary manager at that location. He
3 actually reports apparently to the implementation function.
4 Q Okay.
5 A But the --
6 Q So who does he report to as onsite manager?
7 A For the function he's doing right now, he's reporting up
8 through Quincy.
9 Q But he reports directly to Quincy? He won't go to Metry
10 or one of the lower --
11 A He would go to Quincy.
12 Q Okay. And then below him is the operations supervisor
13 like Matt Di --
14 A DiBiase.
15 Q DiBiase, sorry, is underneath him and then who's under
16 Matt?
17 A Matt would --
18 Q Who does he supervise?
19 A He would basically help supervise from the driver
20 perspective.
21 Q So under him are the drivers directly? Okay. So the
22 drivers report to Matt?
23 A Yes, in a way. I mean they're the -- he would be assigned
24 the drivers. The operations manager is the one that has
25 ultimate responsibility for the drivers, but he would assign

1 Matt to work with the drivers on certain things.
2 Q And when you say the operations manager is that Monte
3 Copeland?
4 A Yes.
5 Q But both of them are in the Kutztown site, both Monte
6 Copeland --
7 A Matt is permanently in the Kutztown site. Monte has been
8 coming in and out of the Kutztown site.
9 Q Right, but he goes in and out because the onsite manager
10 is vacant?
11 A Correct.
12 Q And normally the onsite manager would be fixed at
13 Kutztown?
14 A Correct.
15 Q It's not usually a floating position?
16 A No.
17 Q How long has it been vacant?
18 A Five, five months.
19 Q Five months. Okay. And before that who was there?
20 A A lady by the name of Angie Bitner.
21 Q And when Angie was there she was at the Kutztown location
22 only?
23 A Yes.
24 Q Now, you mentioned a few times that Kutztown -- well, that
25 Kutztown takes temporary drivers, sometimes temps and sometimes

1 temporary transfer drivers to cover staffing problems there.
2 A Yes.
3 Q Just they're understaffed currently?
4 A Correct. They don't have enough drivers at that location.
5 We've not been able to hire a direct number.
6 Q And isn't it true that a little over a year ago they had
7 about 70 drivers?
8 A I believe so.
9 Q And now they're down to what?
10 A Right now it's 30 permanent drivers assigned to Kutztown.
11 Q And only 29 are currently working, right?
12 A I believe so.
13 Q One is out on a medical issue, you said?
14 A Right.
15 HEARING OFFICER O'NEILL: And I'm sorry, you said there
16 were 70 drivers about a year ago?
17 THE WITNESS: Um-hum.
18 HEARING OFFICER O'NEILL: And those are permanent, were
19 they permanent drivers?
20 THE WITNESS: I believe most of them were permanent
21 drivers.
22 HEARING OFFICER O'NEILL: And why the difference between
23 the 70 a year ago and the 29 or 30 now?
24 THE WITNESS: Part of it's because the Enfield
25 implementation came on so they ended up taking stores out of

1 Kutztown and putting them in the Enfield Distribution Center
2 and then part of it's just because of turnover in the
3 operation.
4 BY MR. LARKIN:
5 Q If they took stores away wouldn't that reduce the
6 understaffing of Kutztown?
7 A Um-hum.
8 Q So then why -- so that's -- but there's even -- so that's
9 why they went below 70 drivers, right?
10 A Correct. We need more than the 30 that we have.
11 Q I see, but you don't need a full complement of 70 anymore?
12 A No.
13 HEARING OFFICER O'NEILL: And what is a full complement
14 for Kutztown?
15 THE WITNESS: Actually, right now we're running the 29
16 drivers plus the six outside and somewhere around 13 temps, so
17 29, 35 -- somewhere between that 45 and 50.
18 BY MR. LARKIN:
19 Q And are you looking to hire permanent drivers up to 45 or
20 50, up to that level?
21 A Yes.
22 Q So the goal is not to have a lot of temps and temporary
23 transfers?
24 A That's correct.
25 Q And you mentioned an Inmar warehouse, which is where the

1 returns go?
2 A Yes.
3 Q Is Inmar also in Kutztown, in the Town of Kutztown?
4 A I believe so.
5 Q Or somewhere in the area?
6 A Yes, it's right around the area, a mile or so away.
7 Q But very close to Kutztown?
8 A Yes.
9 Q Do you know the individual road drivers?
10 A Not all of them, no.
11 Q You don't come into contact with them?
12 A Every once in a while. I mean I'm visiting locations.
13 Q Do you happen to know the three who are sitting behind me?
14 A Yes.
15 Q Okay.
16 A I know who they are.
17 Q So you know their name, but not much more than that?
18 A Correct.
19 Q And then did you -- now, I guess I'll draw your attention
20 -- do you have Employer's Exhibit 1? That's the --
21 A Yes.
22 Q Now, these are -- this is a list of all of the permanent
23 transfers between Distribution Centers over the last five
24 years, correct?
25 A Between Advance Auto's facilities, yes.

1 Q Between -- I'm sorry?
2 A Between the Advance Auto facilities, yes.
3 Q Right. Within the nine Advance Auto -- so permanent
4 transfers, right?
5 A Yes.
6 Q But it's not limited to just drivers, right?
7 A No, it does appear to be some --
8 HEARING OFFICER O'NEILL: Maybe I'll ask a quick
9 question.
10 A -- supervisors.
11 HEARING OFFICER O'NEILL: Under the column that's job CLS
12 CD when I see RDS3, that means road driver?
13 THE WITNESS: Those are the road drivers, yes.
14 HEARING OFFICER O'NEILL: Okay.
15 MR. MEYER: Where are you?
16 HEARING OFFICER O'NEILL: I'm in one, two, three, four,
17 five, column six. And when I see 0754 in that column, I see
18 for example, Kathleen Frey, what's a 0754, what job class is
19 that?
20 THE WITNESS: That is going to be a supervisory job code.
21 HEARING OFFICER O'NEILL: And when I see, working my way
22 down that column, OPSV, what does that mean?
23 THE WITNESS: That's another supervisor job code.
24 HEARING OFFICER O'NEILL: Okay. And let's see, did I get
25 -- what is an 0762?

1 THE WITNESS: Again, another supervisory job code.
2 HEARING OFFICER O'NEILL: And 0754 -- I'm sorry, that was
3 --
4 THE WITNESS: That was the same.
5 HEARING OFFICER O'NEILL: That was the same.
6 THE WITNESS: Supervisory job code.
7 HEARING OFFICER O'NEILL: I think I have all of them.
8 BY MR. MEYER:
9 Q Okay, and --
10 THE WITNESS: There was actually five on that list that
11 wouldn't be drivers.
12 HEARING OFFICER O'NEILL: okay.
13 BY MR. MEYER:
14 Q And, in fact, who's Todd Luchnick?
15 A He was a supervisor for Enfield.
16 Q And it looks like he started at Kutztown, right?
17 A Yes.
18 Q What did he do at Kutztown?
19 A I believe he was training in Kutztown because he was the
20 Advance Enfield supervisor.
21 Q So some of these transfers are just lists where the from
22 department is actually just where they trained, isn't that
23 right?
24 A I'd have to find out. I know that from Todd's case he was
25 in Advance Auto Enfield.

1 HEARING OFFICER O'NEILL: Do you know if that's true for
2 Kathleen Frey?
3 THE WITNESS: I don't know.
4 HEARING OFFICER O'NEILL: And how about Frank Hitchcock?
5 THE WITNESS: I don't know.
6 HEARING OFFICER O'NEILL: Robert Larose?
7 THE WITNESS: I don't know about Robert Larose.
8 HEARING OFFICER O'NEILL: How about Travis Lyons?
9 THE WITNESS: I do not know about Travis Lyons either.
10 BY MR. MEYER:
11 Q Do you know whether any of these drivers that are listed
12 as from Kutztown, in fact, just trained at Kutztown before
13 transferring to somewhere else?
14 A No, I don't know.
15 Q But this isn't limited to people who were their
16 permanently beyond their training, correct?
17 A Limited to -- say that again?
18 Q From department, from locations, it's not limited to
19 people who stay there beyond just their training. If they were
20 there for the training, then they're considered from there on
21 the chart, correct?
22 A Yes, it appears to be that, yes.
23 Q And also, I also noticed that if you look at the far right
24 column, the date, I guess that's the date of the transfer.
25 A Yes.

1 Q That more than half of them seem to be 2011. In fact most
2 of them seem -- and in fact, most of those 2011 are April,
3 2011. What happened in April 2011?
4 A I don't know; I don't know specifically.
5 Q You -- I already asked this earlier, but you asked for
6 this chart to be generated, correct?
7 A Yes.
8 Q Why did you go back five years?
9 A I just asked for the last five years' worth of
10 information. I had no specific reason for five years.
11 Q Well, when you asked for Exhibit 2, you only went back
12 three years, right?
13 A Correct, different group.
14 Q And if you went back only three years on this more than
15 half of the entries would disappear, correct?
16 A It looks that way.
17 Q In fact, I count for the ones involving Kutztown there are
18 only six after 2011.
19 A Okay.
20 Q All right. And there were no permanent transfers in 2015
21 at all, correct?
22 A Not according to this.
23 Q Oh, there is one. I'm sorry, there are two. Okay, I'll
24 take that back.
25 A You're right.

1 MR. NAUGHTON: We have an admission on the record that
2 counsel was wrong.
3 MR. MEYER: I'm happy to do it when it happens.
4 BY MR. MEYER:
5 Q Y9u may have already answered this so I apologize. You
6 testified at one point that Kutztown has not been able to hire
7 drivers. Is that because they haven't been able to find
8 applicants that they're willing to hire or they're not
9 authorized by UPS to hire more drivers?
10 A Yeah, they have not been able to find the applicants to
11 hire or we've hired and we've lost drivers at the same time, so
12 we've not been able to hire up to the full complement.
13 Q Okay. But UPS Freight would like them to hire more
14 drivers?
15 A Yes.
16 Q I want to clarify -- do you have Employer Exhibit 2, the
17 other chart?
18 HEARING OFFICER O'NEILL: Okay, off the record for one
19 minute.
20 (Off the record.)
21 HEARING OFFICER O'NEILL: On the record.
22 BY MR. MEYER:
23 Q So do you have Employer Exhibit 2 in front of you?
24 A Yes.
25 Q I see -- this is just an example, but under -- first

1 there's a Lakeland, Florida location, correct?
2 A Correct.
3 Q Which one is Lakeland, Florida?
4 A AAF.
5 Q Oh, for Florida, not Lakeland. Okay, all right. But most
6 of the other ones is the name of the City, right?
7 A Correct.
8 Q So like AAD is Delaware, Ohio, not Delaware the State.
9 A Correct.
10 Q Okay. And then under the AAS column, actually on the top
11 chart --
12 A Okay.
13 Q -- the top chart there's the AAS column and where that
14 intersects with AAK?
15 A Yes.
16 Q Right. So that's -- AAS is Salines, Kansas?
17 A Correct.
18 Q And AAK is Kutztown, Pennsylvania and I see seven
19 employees temporarily transferred.
20 A Yes.
21 Q And this is the last three years, correct?
22 A Correct.
23 Q And then the corresponding entry on the chart right below
24 it is 15 hours.
25 A Days.

1 Q Days, weeks, I'm sorry.
2 A 15 weeks.
3 Q 15 weeks. But that's the total of all seven of them.
4 A That's correct.
5 Q So they averaged a little over two weeks apiece, maybe?
6 A Yes.
7 Q In fact, if each one do -- it could have been each one do
8 two weeks and one of them did three weeks?
9 A Could be.
10 Q Okay. But that's how all these entries are done, the
11 weeks are -- they could be simultaneous weeks if two people are
12 transferred at the same time?
13 A Yes.
14 Q A single week would count as two weeks if there are two
15 people?
16 A Correct. Each driver would be counted as one week.
17 Q Right. And then I see under the intersection of --
18 HEARING OFFICER O'NEILL: Top or bottom of the chart?
19 MR. MEYER: Top chart's first.
20 BY MR. MEYER:
21 Q AAK and AAE, that's Edenfield or Edenfield?
22 A Enfield.
23 Q Enfield.
24 A Yes.
25 Q There's ten drivers who were transferred to Enfield?

1 A Yes.
2 Q And we don't know when that is, but it was sometime in the
3 prior three years?
4 A Correct.
5 Q Isn't it likely that was mostly, if not entirely right
6 when Enfield was opened?
7 A That would be it. That would be my assumption too, yes.
8 Q And that's also why there are so many hours for Enfield on
9 the second chart?
10 HEARING OFFICER O'NEILL: Weeks.
11 THE WITNESS: 54 weeks, yes.
12 BY MR. MEYER:
13 Q Weeks, I'm sorry. I keep wanting to make them hours, but
14 -- all right. And that was just to get the new location going?
15 A Correct. As they were transferring stores, the drivers
16 were there helping while we were staffing.
17 Q In the last three years have you opened or acquired any
18 other Distribution Center?
19 A I think that was the only one.
20 Q When did the Florida one -- the Florida one was acquired,
21 right?
22 A I don't know the date specifically when you say it was
23 acquired
24 A I may be wrong, but I thought it was a Distribution Center
25 that was already operating by some other company and you sort

1 of took it over, is that not accurate?
2 A It was -- they were either operated by Advance Auto or
3 another provider of Advance Auto.
4 Q Right. And then UPS came in and took over operations of
5 that.
6 A Correct.
7 Q But you don't know whether that was within the last three
8 years?
9 A No. I learned it from the Lakeland standpoint.
10 Q Okay. And can you think of any other facility that's
11 opened or been taken over by UPS in the last three years?
12 A No.
13 Q Now, you also testified that with interchange of equipment
14 you used the word occasionally shared equipment. How often is
15 occasionally?
16 A Just depends on what the volume needs are and who has the
17 extra equipment. So as recently as a couple of months ago,
18 we'd be moving equipment from one location to another.
19 Q Okay. Other than, you know, when Enfield opened, how many
20 times do you think it's happened in the last three years?
21 A In the last three years, I honestly don't know how often
22 it's happened. I know that we've moved equipment between
23 locations, but I don't have a number for you.
24 Q Okay. But it happens periodically, but not every day?
25 A It does not happen every day.

1 Q Does it happen every month?
2 A No, I wouldn't say every month.
3 Q Does it happen every year?
4 A Yes.
5 Q But that's between any Distribution Center to any other
6 Distribution Center within the network?
7 A Yes.
8 Q You don't know how often it's happened at Kutztown?
9 A No.
10 Q Or involving Kutztown on either end, I guess I should say.
11 A No.
12 Q And similarly, you also testified that safety trainers do
13 these conference calls, quote occasionally. How often is
14 occasionally?
15 A So this year I don't think we've had any. In the past we
16 were having safety calls probably, you know, once or twice a
17 year.
18 Q And when you say this year, you mean 2015?
19 A Correct.
20 Q And we're almost through the entire year at this point,
21 but --
22 HEARING OFFICER O'NEILL: And can I ask a quick question?
23 So you haven't had any in 2015. And in prior years you
24 had them. And is this correct, it's the drivers are present
25 for that as well as the managers for the safety call?

1 THE WITNESS: Yes.
2 BY MR. MEYER:
3 Q Well, you -- that's my next question is so managers are on
4 these calls?
5 A Yes.
6 Q But also you referred to drivers. Isn't it true that the
7 only drivers who are on there are the certified safety
8 trainers?
9 A Yes.
10 Q So any drivers who don't also wear the hat as certified
11 safety trainers are not on call?
12 A Not to my knowledge.
13 Q And I think you testified that they pass on their -- what
14 they learn on the call at safety meetings that are held with
15 the other drivers?
16 A Correct.
17 Q And about the pay and benefits, you talked about the miles
18 and mileage. It varies a little bit by geographic region?
19 A Yes.
20 Q But within each Distribution Center it's the same, right?
21 A They have the same schedule. There is a progressive pay
22 schedule that will start. If you have five years' experience
23 ==
24 Q Right.
25 A -- six months later you get a half cent increase and

1 basically it goes up to top scale.
2 Q But those schedules are the same within -- within Kutztown
3 everyone's on the same schedule for the mileage?
4 A Yes.
5 Q And then if you leave Kutztown area they might have a
6 different schedule that is adjusted by some cents?
7 A Yes.
8 Q Okay. And the -- and then the stop pay, you testified
9 that they're $16 for the first three stops and then $21
10 afterwards?
11 A Yes.
12 Q Isn't it true that in Florida it's only $13 stop pay?
13 A With the new change of the 5X they've gone to a different
14 stop pay for just the 5X stops. The non-5X are still at 16 and
15 21.
16 Q So under the new -- so you're phasing in the 5X right now?
17 A Yes.
18 Q So right now the different places are either over to 5X or
19 transitioning between three times and 5 times?
20 A Yes.
21 Q Right. So you're saying that under the new regime the
22 stop pay will be reduced to $13?
23 A In Lakeland and Enfield and I believe Gastonia they're at
24 $13 for the 5X stops.
25 Q But Kutztown is going to stay at $16?

1 A At this point that decision has not been made.
2 Q But it could be a different rate at that location?
3 MR. LARKIN: Objection.
4 HEARING OFFICER O'NEILL: If he knows.
5 THE WITNESS: Again, the decision has not been made.
6 BY MR. LARKIN:
7 Q Okay. But -- and the different locations are at different
8 phases or different stages of phasing in the 5X of it?
9 A Correct.
10 Q So is Enfield completely on 5X now?
11 A Yes.
12 Q And Kutztown is transitioning -- is in a transition phase
13 right now?
14 A Yes.
15 Q And right now they're still doing $16 at Kutztown for the
16 first three stops and 21 for each stop after this?
17 A Yes.
18 Q And at Enfield it's now $13 for every stop?
19 A For the 5X stops. Non-5X it will be 16 and 21.
20 Q I see.
21 A Because there is still going to be a combination. I can't
22 -- I do not know specifically for Enfield, but there is a
23 combination of 5X and non-5X.
24 Q And then you testified the non-driving hourly rate -- at
25 one point you said something like 16.50 to 17.50, around there.

1 Does that vary between the Distribution Centers?
2 A Yes.
3 Q And that's the variety within that dollar range?
4 A Yes. Again, it's like the mileage rate, it will vary
5 depending on length of service and as you go up from a six-
6 month basis there is a scale.
7 Q I see.
8 A And the scale is the same for locations and the geographic
9 areas.
10 Q But so within each Distribution Center they use the same
11 scale?
12 A Yes.
13 Q But in a different Distribution Center the scale might be
14 a little different?
15 A Depending on -- yes.
16 Q Depending on the cost of living or the market.
17 A Like Kutztown and Enfield have the same scale. Lakeland
18 and North Carolina would have the same scale.
19 Q Okay. And this non-driving rate, that's what the
20 certified safety trainers get when they're not driving, when
21 they're training, right?
22 A Yes, they get that plus an adjustment rate.
23 MR. MEYER: All right, that's all I have.
24 HEARING OFFICER O'NEILL: Okay. I have some questions.
25 I'm going to start. Is there an organizational chart for the -

1 - for UPS Ground?
2 THE WITNESS: There is.
3 HEARING OFFICER O'NEILL: There is? Is that something --
4 can you get that to us today?
5 MR. NAUGHTON: Today?
6 HEARING OFFICER O'NEILL: Yeah, by e-mail.
7 MR. NAUGHTON: I'll try. I don't know. I don't know is
8 the short answer.
9 HEARING OFFICER O'NEILL: Okay.
10 MR. NAUGHTON: We'll try.
11 HEARING OFFICER O'NEILL: Along with all the job
12 descriptions for the positions at Kutztown.
13 And are there other divisions of UPS Ground Freight that
14 service just one customer similar to what -- the Auto Parts?
15 THE WITNESS: Are there -- say it one more time?
16 HEARING OFFICER O'NEILL: Are there other divisions of
17 UPS Ground Freight that service just a single customer.
18 THE WITNESS: When you say other Divisions of Ground
19 Freight besides my Truckload Division?
20 HEARING OFFICER O'NEILL: Your Truckload Division.
21 THE WITNESS: We have like a transportation management
22 group that has specific customers and pay scales. Is that what
23 you're asking?
24 HEARING OFFICER O'NEILL: Yeah. Why don't we do this?
25 Why don't we go ahead and take a break for lunch. I do

1 have more questions and I'll ask those questions when we get
2 back.
3 So we're off the record.
4 (Whereupon, a luncheon recess was taken
5 from 12:33 p.m. to 2:07 p.m.)
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A F T E R N O O N S E S S I O N

(Time: 2:07 p.m.)

HEARING OFFICER O'NEILL: On the record.

And I remind you you're still under oath.

THE WITNESS: Okay.

HEARING OFFICER O'NEILL: For the Petitioner, did you have more questions of this witness?

MR. MEYER: No.

HEARING OFFICER O'NEILL: Okay. Are you aware -- is there any collective bargaining history at the facility involved, if you know, at Kutztown in the past?

THE WITNESS: Not that I'm aware of.

HEARING OFFICER O'NEILL: And are you aware at any of the other facilities, the nine?

THE WITNESS: Not that I'm aware of.

HEARING OFFICER O'NEILL: Okay. If you can try to give me a rough estimate, I'm just going to ask how far apart the facilities are and if it gets to the point where you have to say I don't know, it's over 250 miles -- okay.

So from Kutztown, let's see, roughly how far is it to the Connecticut facility?

THE WITNESS: Roughly, I don't know. I mean it's several

1 hundred miles.
2 HEARING OFFICER O'NEILL: Several hundred miles? And
3 would that be the closest to Kutztown?
4 THE WITNESS: Yeah, it's kind of border of PA. Enfield is up
5 north of it or northeast and Delaware, that would be to the
6 west.
7 HEARING OFFICER O'NEILL: And Delaware would also be
8 probably over 200 miles?
9 THE WITNESS: Um-hum.
10 HEARING OFFICER O'NEILL: Okay. And Roanoke?
11 THE WITNESS: And Roanoke would be down to the south.
12 HEARING OFFICER O'NEILL: And that would be over 200
13 miles?
14 THE WITNESS: Yes.
15 HEARING OFFICER O'NEILL: And all the other facilities of
16 the nine other than the ones we just mentioned are even a
17 longer distance?
18 THE WITNESS: Yes.
19 HEARING OFFICER O'NEILL: Okay. The hours of the
20 facility, what time do the drivers report or does it vary at
21 Kutztown?
22 THE WITNESS: It varies at Kutztown.
23 HEARING OFFICER O'NEILL: And do you know the range?
24 THE WITNESS: They start at midnight and I've seen
25 dispatchers go out as late as 8:00, 9:00 o'clock at night.

1 HEARING OFFICER O'NEILL: And are those the same hours at
2 the other facilities in the nine?
3 THE WITNESS: Similar.
4 HEARING OFFICER O'NEILL: The other eight?
5 THE WITNESS: Again, a lot of it's going to depend on
6 which ones are in the 5X. If they're in 5X, they're doing a
7 lot of the nighttime deliveries versus during the day.
8 HEARING OFFICER O'NEILL: You mentioned earlier that the
9 -- when the drivers are in a temporary assignment they don't
10 get a housing allowance or a food allowance?
11 THE WITNESS: Not that I'm aware.
12 HEARING OFFICER O'NEILL: So is there a place that the
13 Employer provides for them to stay when they go on a temporary
14 --
15 THE WITNESS: Most of the time they stay in their trucks
16 or there will be a time that we do, if it's an extended period,
17 we might put a hotel in there.
18 HEARING OFFICER O'NEILL: Do the employees wear a
19 uniform?
20 THE WITNESS: Yes.
21 HEARING OFFICER O'NEILL: And is that the same at all the
22 facilities, all the drivers?
23 THE WITNESS: Yes.
24 HEARING OFFICER O'NEILL: And is there a seniority list
25 at Kutztown?

1 THE WITNESS: A seniority list? We don't use seniority
2 lists as such.
3 HEARING OFFICER O'NEILL: Okay.
4 THE WITNESS: I'm sure there's, you know, there's a
5 record that would get who was hired first and so forth.
6 HEARING OFFICER O'NEILL: Okay. You don't make
7 assignments by or choose assignments by seniority?
8 THE WITNESS: Not that I'm aware of.
9 HEARING OFFICER O'NEILL: What benefits -- we talked
10 about the wages, but what's the benefit package offered at
11 Kutztown?
12 THE WITNESS: Specifically it's the same UPS package
13 that's offered to all the road drivers.
14 HEARING OFFICER O'NEILL: So there's a health benefit?
15 THE WITNESS: Health care and a 401(k) and vacation,
16 holidays, personal days. They have options for vision and
17 dental.
18 HEARING OFFICER O'NEILL: And that's the same in all nine
19 of the facilities?
20 THE WITNESS: Yes.
21 HEARING OFFICER O'NEILL: And you mentioned that the
22 employees, some of their rates are different depending upon how
23 many years' experience they have. Do the employees -- does
24 their pay, is it differentiated at all by how -- are they
25 awarded in any way for being a good employee like they get a

1 higher rate for --
2 THE WITNESS: It's based off of experience in the
3 industry when they're hired in and then it would be based off
4 of the length of service increments.
5 HEARING OFFICER O'NEILL: And do your employees receive
6 evaluations?
7 THE WITNESS: Not a formal evaluation, no.
8 HEARING OFFICER O'NEILL: Do they receive informal
9 evaluations?
10 THE WITNESS: Yes.
11 HEARING OFFICER O'NEILL: And tell me what that's like?
12 THE WITNESS: Well, I say informal evaluations. We do do
13 safety check rides. We call them S&D rides that they will be
14 evaluated on their driving skills according to our safety
15 programs. So that is a formal evaluation for that. Informal
16 --
17 HEARING OFFICER O'NEILL: And how often does that occur,
18 the safety check ride approximately?
19 THE WITNESS: Should be scheduled for two times a year.
20 HEARING OFFICER O'NEILL: Two times a year?
21 THE WITNESS: Yes.
22 HEARING OFFICER O'NEILL: And you mentioned then there's
23 also some type of informal evaluation?
24 THE WITNESS: Correct. And we're talking about the hard
25 brakes, over speeds and MPG. It would be more of an informal.

1 We take the least best and work with them to try to bring them
2 up to, you know, be above the least best and start over again.
3 HEARING OFFICER O'NEILL: Can you describe the
4 disciplinary policy for the road drivers?
5 THE WITNESS: Depending on the issue, it's usually verbal
6 counseling, written warning, suspension and then termination.
7 You could obviously jump between those, but --
8 HEARING OFFICER O'NEILL: And the two local -- it's the
9 operations manager and the operations supervisor, do they – do
10 each have the authority to issue a verbal warning?
11 THE WITNESS: Yes.
12 HEARING OFFICER O'NEILL: And do they have to check with
13 any higher authority?
14 THE WITNESS: For the verbals, no.
15 HEARING OFFICER O'NEILL: How about for a written
16 warning?
17 THE WITNESS: A written warning, no.
18 HEARING OFFICER O'NEILL: So both the local managers, the
19 local operations manager and operations supervisor can issue a
20 written warning without checking with anyone.
21 How about suspension?
22 THE WITNESS: Suspensions are supposed to be checked with
23 the operations and HR, with Quincy's group.
24 HEARING OFFICER O'NEILL: Okay.
25 THE WITNESS: Quincy Adams, then the HR group.

1 Terminations have to go through HR.
2 HEARING OFFICER O'NEILL: And are there guidelines for
3 discipline? For example, two no shows require a suspension?
4 Are there any guidelines or is that done --
5 THE WITNESS: The guidelines, yes. I mean not from an
6 absentee side. We do not have any guidelines. We do from a
7 safety standpoint, crashes, CSA violations, hours of service,
8 things like that.
9 HEARING OFFICER O'NEILL: And is there a written document
10 that describes how employees are disciplined?
11 THE WITNESS: Yes.
12 HEARING OFFICER O'NEILL: And what is that called?
13 THE WITNESS: Then they have the -- it would be in the
14 driver's -- the handbook. Then there's a supplement for CSA
15 hours of service that we put out. Recently it was basically
16 just a memo of guidance.
17 HEARING OFFICER O'NEILL: And is that driver's handbook
18 in effect for all nine facilities, the same handbook?
19 THE WITNESS: Yes.
20 HEARING OFFICER O'NEILL: And the memo you just put out
21 on discipline or --
22 THE WITNESS: For discipline, for hours of service
23 violations.
24 HEARING OFFICER O'NEILL: And is that the same for all
25 the facilities?

1 THE WITNESS: Yes.
2 HEARING OFFICER O'NEILL: And the suspensions, does local
3 management make a recommendation to -- actually, who would they
4 contact if their local manager and local supervisor wants to
5 suspend an employee at Kutztown, do you know --
6 THE WITNESS: Most of the time that would probably be
7 Paul Dalessandro that they would talk to and then he would
8 agree and it would go to HR.
9 HEARING OFFICER O'NEILL: And is there -- so the local
10 manager makes the recommendation on that?
11 THE WITNESS: Um-hum.
12 HEARING OFFICER O'NEILL: And do you know if the
13 recommendation is generally followed with the local managers'
14 recommendation as far as the discipline?
15 THE WITNESS: Usually as long as they have their details
16 in order.
17 HEARING OFFICER O'NEILL: And terminations, do the local
18 managers, when they -- who do they call if they or contact when
19 they need to --
20 THE WITNESS: They'd follow the same process. More than
21 likely, they'd call Paul Dalessandro, let him know what they're
22 doing. He would review the request and usually Employee
23 Relations would be -- Kim Thomas would take the first
24 evaluation of it.
25 HEARING OFFICER O'NEILL: And this is true for just

1 Kutztown or all your facilities go through the same process for
2 a termination?
3 THE WITNESS: All facilities.
4 HEARING OFFICER O'NEILL: And does local management make
5 a recommendation on the termination?
6 THE WITNESS: Yes.
7 HEARING OFFICER O'NEILL: And is that generally followed
8 by the
9 -- then it goes to the corporate level?
10 THE WITNESS: It --
11 HEARING OFFICER O'NEILL: To Dalessandro and Employee
12 Relations?
13 THE WITNESS: If they feel that they've got their
14 documentation and it's warranted. You know, just as a check
15 and a balance to make sure that there's nothing else going on
16 and they're going from no discipline to termination and, you
17 know, why they think that that would be needed.
18 HEARING OFFICER O'NEILL: And do you happen to know how
19 often Employee Relations confirms what local management
20 recommends as far as terminations? How about suspensions?
21 THE WITNESS: Yeah, I don't have any data on that.
22 HEARING OFFICER O'NEILL: And who sets the schedule for
23 the drivers?
24 THE WITNESS: It's usually the dispatcher.
25 HEARING OFFICER O'NEILL: And who grants time off? For

1 example, it's holiday time, drivers put in in advance that they
2 want time off, perhaps.
3 THE WITNESS: It would be the dispatcher or the manager.
4 HEARING OFFICER O'NEILL: And if -- what happens if a
5 number of drivers want off at the same time, who makes the
6 decision who can have off and who can't?
7 THE WITNESS: It would be the operations manager.
8 HEARING OFFICER O'NEILL: On site?
9 MR. MEYER: Did you get a verbal response to that?
10 HEARING OFFICER O'NEILL: Yes, it was operations manager
11 on site.
12 THE WITNESS: On site operations manager.
13 HEARING OFFICER O'NEILL: How are the purchases made for
14 each of the facilities, anything from office supplies to a
15 tractor?
16 THE WITNESS: The -- from the office supplies the
17 operations would do it. From a tractor, then there's a request
18 approval process that would start at the Quincy Adams level.
19 Once they did a design and it's submitted, we would go through
20 the capital improvement process and get it approved.
21 HEARING OFFICER O'NEILL: Does someone at the -- on site
22 make a request, I need another tractor? Is that how it begins?
23 THE WITNESS: Usually a request for equipment would begin
24 with a design that Mina Metry would put together from a request
25 from a customer, they want to add stores, they want to change

1 up a Distribution Center, whatever it might be, they'd go in
2 and make a design.
3 And then from that design we'd evaluate what's at the
4 operation as far as equipment types and needs and what's needed
5 with the new design. And then from there a request would go
6 from Mina to Quincy who would put it together and go in front
7 of our Capital Committee.
8 HEARING OFFICER O'NEILL: Where are personnel records
9 kept and maybe they're kept on line?
10 THE WITNESS: As far as I know, they're on line.
11 HEARING OFFICER O'NEILL: And who has access to -- in
12 Kutztown who would have access to the personnel files and the
13 disciplinary files?
14 THE WITNESS: For the personnel files it would be HR that
15 have access to them.
16 HEARING OFFICER O'NEILL: So at the local level there's
17 no access?
18 HEARING OFFICER O'NEILL: We don't keep things at the
19 local level. Disciplinary files you'd probably keep the
20 disciplinary files in the S&D routes and things like that
21 there.
22 HEARING OFFICER O'NEILL: That would be at the local
23 level?
24 THE WITNESS: Correct.
25 HEARING OFFICER O'NEILL: Who does the interviewing at

1 Kutztown?
2 THE WITNESS: The interviewing at Kutztown?
3 HEARING OFFICER O'NEILL: When you're hiring new
4 employees?
5 THE WITNESS: It's a two-phased interview. We have a
6 central Recruiting Department that will do the initial
7 interviews.
8 HEARING OFFICER O'NEILL: Central recruiting --
9 THE WITNESS: So it basically falls underneath their HR
10 function.
11 HEARING OFFICER O'NEILL: Okay.
12 THE WITNESS: They would take applicants and pre-qualify
13 them.
14 HEARING OFFICER O'NEILL: And central recruiting is that
15 located somewhere?
16 THE WITNESS: It's in Richmond.
17 HEARING OFFICER O'NEILL: In Richmond? And so are they
18 taking applications from on line?
19 THE WITNESS: Correct.
20 HEARING OFFICER O'NEILL: And that's phase one?
21 THE WITNESS: Phase one.
22 HEARING OFFICER O'NEILL: And what is phase two?
23 THE WITNESS: In phase two they would send them to the
24 operations manager to review, do a road test and meet where
25 possible and do an interview.

1 HEARING OFFICER O'NEILL: And so it's the local kind of
2 person, the local operations manager who does the interview and
3 the road test?
4 THE WITNESS: It could be a supervisor, but yes.
5 HEARING OFFICER O'NEILL: Or the supervisor. And who
6 makes the decision to hire the person or not hire the person?
7 THE WITNESS: Whenever they come to us, if they pass the
8 requirements as far as the driving test, then the operations
9 manager will say they're acceptable and then Recruiting will
10 make the job offer.
11 HEARING OFFICER O'NEILL: And am I correct that each auto
12 parts store is serviced by one of your nine facilities? For
13 example, you don't have two facilities delivering to the same
14 store?
15 THE WITNESS: To my knowledge, if you're serviced out of
16 Kutztown, then you're serviced with Kutztown. There is times
17 where again, depending on the design they'll switch stores from
18 Kutztown to Enfield depending on the customer's needs and
19 potentially some type of a routing efficiency that we've put
20 together.
21 HEARING OFFICER O'NEILL: Could you show the witness
22 Employer 2?
23 (Whereupon, the document was handed to the witness.)
24 HEARING OFFICER O'NEILL: Okay. So I'm looking at the
25 bottom half of Employer 2 --

1 THE WITNESS: Okay.
2 HEARING OFFICER O'NEILL: And Kutztown, where AAK,
3 Kutztown where it's 72 weeks in a three-year period. And what
4 percentage of work weeks is that 72? Is that -- do you figure
5 it -- and is this a way to figure it, that drivers work
6 approximately 50 weeks a year times --
7 THE WITNESS: Three years.
8 HEARING OFFICER O'NEILL: -- times three years so then
9 that per -- times 30 drivers.
10 THE WITNESS: Okay.
11 HEARING OFFICER O'NEILL: Does that sound about right?
12 So this will be actually maybe less than five percent of the 72
13 of total work weeks? I'm just trying to quantify what --
14 THE WITNESS: I can't do the math in my head.
15 HEARING OFFICER O'NEILL: Okay. Well, maybe we can look
16 at it this way, if you know. What percentage a year of weeks
17 are worked at Kutztown by temporary --- drivers from other
18 facilities, not the temps from an agency, from drivers coming
19 from --
20 THE WITNESS: I don't know the percentage. I'm not sure
21 even how to calculate the percentage.
22 HEARING OFFICER O'NEILL: okay. And do you know if it's
23 something less than five percent?
24 THE WITNESS: Sorry.
25 HEARING OFFICER O'NEILL: Okay, I don't have any other

1 questions at this time.
2 MR. LARKIN: Can I redirect?
3 HEARING OFFICER O'NEILL: Yes.
4 REDIRECT EXAMINATION
5 BY MR. LARKIN:
6 Q Mr. Lovely, going back to the pay, you mentioned that
7 prior to the implementation of the 5X schedule, which as you
8 said is sort of still in the process of being implemented,
9 stock pay was $16 for the first three stops and $21 for any
10 stop thereafter, is that correct?
11 A Yes.
12 Q And the stop pay was the same in all nine locations,
13 right?
14 A Yes.
15 Q And the current mileage rate at Kutztown is what?
16 A Today -- I misstated the 44 cents. Today the starting
17 rate is 40 cents a mile for drivers with five years' experience
18 or more. We're going to 44 as of January '16.
19 Q Okay. And the mileage rate for the drivers, I think you
20 were giving an example of Lakeland, Florida, is what?
21 A Starting at 39 cents a mile.
22 Q So let's say I'm a road driver that goes on a run that
23 requires 300 miles of driving and makes five stops. Let's just
24 take that hypothetical. The first three stops are at $16
25 apiece. That's $48, right?

1 A That's right.
2 Q The next two are $21 apiece. That's $42.
3 A Okay.
4 Q Now, if I'm in Kutztown my 300 miles will be at 40 cents a
5 mile, right?
6 A Yes.
7 Q All right. So --
8 A For a driver that was just hired on with five years'
9 experience.
10 Q Right. So 300 miles times 40 cents a mile equals $120.
11 Does that sound right to you?
12 A Yeah, it sounds close.
13 Q All right. 300 miles times 39 cents is $117. Sound
14 right?
15 A You've got the calculator. I'll trust your numbers.
16 Q So I'm making $48 for the first three stops, plus $42 for
17 the next two stops and at Kutztown I'm going to make $120 in
18 mileage pay. So for a 300-mile run with five stops, that would
19 be $210 for a driver at Kutztown with five years of experience,
20 if you add those three numbers together.
21 A As long as we're not talking 5X then that's correct.
22 Q Right. For a driver at Lakeland it would be $48, right,
23 because it's the same stop pay?
24 A Yes.
25 Q Plus $42 for the last two stops, right?

1 A Yes.
2 Q Plus $117 for 300 miles times 39 cents a mile, correct?
3 A Yes.
4 Q That comes out to $207. Sound right?
5 A Sounds close, yes.
6 Q So the difference between that run for a driver at
7 Kutztown with five years of experience compared to a driver at
8 Lakeland with five years' of experience is three bucks.
9 A Okay.
10 Q Sound right?
11 A The amount does.
12 Q So now you mentioned that the 5X schedule is where the
13 stop pay has been changed to $13 an hour at some locations.
14 A Yes.
15 Q And you mentioned that the final decision on what stop pa
16 is going to be for Kutztown hasn't been determined, correct?
17 A That's correct.
18 Q But it has been determined that all nine Advance
19 Distribution Centers will transition to a 5X schedule, correct?
20 A Yes.
21 Q Now, on the transfer issue, if I'm permanently transferred
22 from one location to another, then from that point into the
23 future as long as I'm at my transferred location, all of my
24 work weeks, unless I'm temporarily transferred somewhere else,
25 will be at my new permanent location, right?

1 A Yes.
2 Q So if you look at Employer Exhibit 1 about 12 -- well, 12
3 rows down there's someone named Farid Juya?
4 A Yes.
5 Q That's a road driver who currently works at Kutztown,
6 right?
7 A Yes.
8 Q All right. So that individual was transferred from
9 Delaware to Kutztown in March of 2015, right?
10 A That's what it looks like, yes.
11 Q So since then all weeks of work worked by Mr. Juya have
12 been in Kutztown, right?
13 A I would assume so, yes.
14 Q So if you just take the next one down, Michael Kindt,
15 Exhibit 1 reflects that Michael Kindt transferred from Kutztown
16 to Lakeland in July of 2013. Do you see that?
17 A Yes.
18 Q So assuming Mr. Kindt remains employed by UPS Freight and
19 that he continues to work at Lakeland, then all the weeks that
20 he has worked since July of 2013 have been at Lakeland?
21 A Unless he was temporarily transferred to another location,
22 yes.
23 MR. LARKIN: Just a second. I'm sorry.
24 HEARING OFFICER O'NEILL: I'll jump in for a minute.
25 And that -- you mentioned the transfer shuttle, the inter-

1 company shuttle that takes mail and so forth, is that one truck
2 a day, one truck a week?
3 THE WITNESS: I'm not a hundred percent sure on the
4 frequency. I believe it's weekly.
5 HEARING OFFICER O'NEILL: Weekly? And when that driver -
6 - and so that driver goes to more than one facility?
7 THE WITNESS: He goes from Roanoke to the facility, yes.
8 HEARING OFFICER O'NEILL: To a number of facilities or
9 just --
10 THE WITNESS: I think it's just to transfer Roanoke --
11 HEARING OFFICER O'NEILL: Roanoke to -- so someone from
12 Roanoke then goes to Kutztown about --
13 THE WITNESS: Once a week.
14 HEARING OFFICER O'NEILL: About once a week. And when
15 that driver goes up there is -- do you know, is he interacting
16 with the other drivers?
17 THE WITNESS: I do not know.
18 MR. LARKIN: Are you still going?
19 HEARING OFFICER O'NEILL: No, I'm finished. I'm so
20 sorry.
21 MR. LARKIN: I don't have anything further.
22 HEARING OFFICER O'NEILL: Okay. The Union?
23 RECROSS EXAMINATION
24 BY MR. MEYER:
25 Q Just a quick question about Farid Juya who you mentioned.

1 Do you know Farid Juya?
2 A (No verbal response.)
3 Q So you --
4 HEARING OFFICER O'NEILL: You have to say yes or no.
5 THE WITNESS: I'm sorry. No, I do not know him.
6 BY MR. MEYER:
7 Q Thank you. Do you -- all right, so you don't know
8 anything about him, you just see his name on this chart that
9 you asked be prepared?
10 A Yes.
11 MR. MEYER: Okay, that's all I have.
12 HEARING OFFICER O'NEILL: Okay. For the Employer, any
13 more questions?
14 MR. LARKIN: No.
15 HEARING OFFICER O'NEILL: Okay, you may step down.
16 (Witness excused.)
17 HEARING OFFICER O'NEILL: The Employer, your next
18 witness?
19 MR. NAUGHTON: We call Matthew DiBiase, please.
20 HEARING OFFICER O'NEILL: Mr. DiBiase, could you spell
21 your last name?
22 MR. DIBIASE: D-i-B—i-a-s-e.
23 HEARING OFFICER O'NEILL: And is Matt M-a-t-t?
24 MR. DiBIASE: Yes.
25 HEARING OFFICER O'NEILL: Okay. Could you raise your

1 right hand?
2 Whereupon,
3 MATT DiBIASE,
4 having been called as a witness by and on behalf of the
5 Employer and having been first duly sworn, was examined and
6 testified on his oath, as follows:
7 DIRECT EXAMINATION
8 BY MR. NAUGHTON:
9 Q Who do you work for, Mr. DiBiase?
10 A UPS Freight.
11 Q And what is your current assignment with UPS Freight?
12 A Operations supervisor.
13 Q At what location?
14 A Kutztown, Pennsylvania.
15 Q How long have you been with UPS Freight?
16 A Total?
17 Q Yes.
18 A Since June 1 of 2014.
19 Q And where -- how long have you been assigned to the
20 Kutztown location?
21 A October -- it was the week of October 5th. I think the
22 5th was Monday, I believe, of 2015.
23 Q And just briefly, before you came to Kutztown what
24 assignments did you have with UPS Freight?
25 A I did work for the Asset Light Group which was -- which is

1 Truckload and Intermodal Work Bridge.
2 Q And where were you assigned?
3 A Richmond, Virginia.
4 HEARING OFFICER O'NEILL: That still is a division of
5 Ground Freight?
6 THE WITNESS: Correct.
7 BY MR. NAUGHTON:
8 Q Is it just essentially a different department or division
9 of Ground Freight, of the company, the same company?
10 A Yes, we're -- it's a brokerage maybe that we don't use UPS
11 assets.
12 Q In other words, you use somebody else's tractor trailer or
13 other equipment to ship freight?
14 A Correct, yes.
15 Q Can you give us a brief description of your duties at
16 Kutztown?
17 A Essentially my day-to-day duties are completing reports,
18 weekly payroll, filling out -- if there's an accident filling
19 out reports, accident reports, safety calls, several conference
20 calls, I should say, that make up that, and if any of the
21 drivers or super -- admins have issues with payroll, I'll
22 handle that, time and labor adjustments surrounding payroll.
23 HEARING OFFICER O'NEILL: What's a time and labor
24 adjustment?
25 THE WITNESS: For example, if let's say someone wanted to

1 use a vacation day and it was extracted through the system, but
2 it didn't pay out then you have to do an adjustment and they
3 will, you know, cut a manual check for them for that vacation
4 or whatever they use.
5 HEARING OFFICER O'NEILL: And do your drivers punch a
6 clock or do they -- sign in sheet? How do they keep track of
7 their hours?
8 THE WITNESS: Well, they keep track of their like hours
9 of service via their log, but you know, they're paid by miles
10 and stops so there's no --
11 HEARING OFFICER O'NEILL: And how about attendance, who
12 keeps track of that?
13 THE WITNESS: Well, in our case at Kutztown, we have like
14 a day planner for vacation requests and things like that.
15 HEARING OFFICER O'NEILL: I'm finished.
16 BY MR. NAUGHTON:
17 Q Are you familiar with an employee named Frank Cappetta?
18 A Oh, yes.
19 Q You see him in the room today?
20 A Yes.
21 Q Show me, describe or show me who you're pointing to?
22 A Pink shirt, jacket.
23 Q All right. How long -- if you know, how long has Mr.
24 Cappetta been assigned to Kutztown?
25 A I don't have a -- I mean I know he's been there several

1 years.
2 Q And was he there when you started?
3 A Oh, yes.
4 Q During your time at Kutztown have you observed what Mr.
5 Cappetta's duties are?
6 A Yes.
7 Q And would you tell us what they are?
8 A Dispatching of drivers on a daily basis, the routing what
9 we call like a ship and pull that comes from the warehouse,
10 which essentially is putting this -- the routes together for
11 the drivers. And then we have the wave in load, which is once
12 that's dropped -- it's all kind of confusing to explain, but
13 once that's dropped, then we assemble the loads and then he
14 would assign a driver to those routes.
15 Q All right. You mentioned several things and I'm not sure
16 if I understood the term correctly, but the first one is
17 routing or shipping tool?
18 A Ship and pull.
19 Q Ship --
20 A Ship and pull.
21 Q Ship and pull.
22 A Yes.
23 Q Tell us what that is.
24 A So when the stores drop their -- or submit their orders to
25 the warehouse, they drop into the Advance Auto system of what

1 the -- basically the volume that the store needs. So that's
2 then put into a data base and, you know, it assigns Store XYZ
3 needs to two pallets and so forth and so forth. Then it's put
4 into routes and then from there drivers are assigned to --
5 Q Now, who or what puts the data for the amount of volume
6 into routes?
7 A It's a joint collaboration between the area transportation
8 manager of Advance, which is Rick Haas and Frank.
9 Q Tell us how that collaboration works?
10 A I really don't -- I mean --
11 HEARING OFFICER O'NEILL: I'm sorry, Frank Haas?
12 THE WITNESS: No, Rick Haas is the --
13 HEARING OFFICER O'NEILL: Rick Haas.
14 THE WITNESS: He's an Advance Auto employee. He's area
15 transportation manager.
16 BY MR. NAUGHTON:
17 Q Well, just tell us what you know about how that process
18 works?
19 A Well, he sends out daily the -- I'm not sure how often the
20 shipment comes out, whether that's weekly or daily, but you
21 know, it's sent us and then the wave in load is done on a daily
22 basis. I really don't know how to explain further. Between
23 the two of them they're able to route and assign -- Frank will
24 then assign drivers.
25 Q Without getting too technical then, in general terms, Rick

1 Haas --
2 A Haas.
3 Q Haas and Mr. Capetta jointly determine how many routes
4 they will need to be delivered each day?
5 A Correct, based on the store's demand.
6 Q And you mentioned something called a wave in load. Can
7 you explain to us what a wave in load is?
8 A Essentially it's routing the Advance Auto's warehouse to
9 how they pull the product. So based on what runs -- what
10 routes that need to be completed they will then pull the
11 product from the warehouse and load it according to the
12 dispatch times for the routes.
13 Q All right. Once -- I'm sorry, did you finish your answer?
14 A Yeah, that's it.
15 Q Once that process of determining how many routes need to
16 be run is completed, does somebody then assign drivers to run
17 those routes?
18 A Correct.
19 Q Who is that? Who makes that assignment?
20 A Frank would make that assignment.
21 Q And at least for as long as you've been around who has
22 been making those assignments?
23 A Frank.
24 Q How does he decide, if you know, who goes on which run
25 during the day?

A I don't know the -- I don't know how its individual process is for assigning drivers.

Q Well, to your knowledge, first of all do you give him any direction on how to assign the drivers?

A No.

Q To your knowledge does anybody else at Kutztown give him guidance on which drivers to assign?

A No.

Q If a driver -- let me start over.

Are some routes more popular than other routes in your experience with drivers? In other words, are there more desirable and less desirable routes?

A Sure. I mean some routes are longer miles or have more stops.

Q All right. Would you tell us whether longer miles and more stops are more or less popular?

A Well, you know, the more miles and the more stops are the most popular. More miles, more stops equals more money.

Q And are there, apart from distance and number of stops, are there any other factors that might cause a route to be more or less popular, such as, for example, location or what City it's going to or time of day?

A I mean I'm sure, you know, going into the Bronx, you know, would not be a popular route, especially during any type of heavy traffic. There's definitely more desirable locations to

1 make deliveries.
2 Q And at Kutztown, in your experience, who determines which
3 drivers get the more popular routes and the less popular
4 routes?
5 A The dispatcher, which is Frank. Frank.
6 Q If a driver has a complaint about which one he's assigned
7 to, to whom does he go with that complaint in your experience?
8 A To Frank.
9 Q And to your knowledge and in your experience who resolves
10 that complaint if it comes to Frank?
11 A He would handle it himself.
12 HEARING OFFICER O'NEILL: And I know you've been there
13 since October. Have you witnessed any complaint about
14 assignments?
15 THE WITNESS: Not to my -- you know, I mean I've heard
16 folks say, you know, I want -- I need -- I want a longer run or
17 I need a longer run to make more money, etc.
18 HEARING OFFICER O'NEILL: And have you -- have you
19 witnessed Frank resolving any of these issues about what route
20 someone wants?
21 THE WITNESS: I mean I've witnessed him talking to the
22 drivers, but you know, to what resolve happened I don't know
23 the outcome.
24 BY MR. NAUGHTON:
25 Q In your experience at Kutztown what is the range of

1 drivers' start times during the day?
2 A Well, midnight is what I would say is our first dispatch
3 time. You know, sometimes the driver will show up, you know,
4 11:30 p.m. prior and get himself situated before he dispatches
5 out.
6 Q And then how -- what's the last start time, more or less,
7 on a given day?
8 A I would say around at 7:00 to 8:00 o'clock.
9 Q 7:00 to 8:00 o'clock?
10 A A.m.
11 Q Sorry? You said that the start times for a given day
12 start about midnight.
13 A Correct.
14 Q And what is the last start time for that same day?
15 A Well, it would be around at 7:00 or 8:00 o'clock a.m.
16 Q Okay.
17 A But then they -- you know, they -— the later you dispatch,
18 the later you're arrive them back to the --
19 Q Right.
20 HEARING OFFICER O'NEILL: And what's the range of the
21 arrival back time? You know, what's approximately the first
22 driver back about what time and about what time the last driver
23 comes back?
24 THE WITNESS: You know, it depends on the number of miles
25 so just as an example somebody could dispatch at 1:00 or 2:00

1 a.m. and then arrive back around 7:00 or 8:00 a.m.
2 HEARING OFFICER O'NEILL: But I was wondering on average
3 about -- in an average week what time does the first driver
4 start to come back?
5 THE WITNESS: It's so hard to -- it's all based on the
6 route. The route would dictate. You know, the number of miles
7 and the number of stops is going to dictate when your arrival
8 time back to the yard is.
9 Q Well, let's try this way. Let's assume for the sake of
10 discussion that the first driver started somewhere around
11 midnight on his or her -- his route, I guess. Give us a range
12 of what time that driver is likely to come back?
13 A It could be, you know, 7:00 a.m. or you know, it could be
14 1:00 p.m. You know. if someone's on a 600 mile route then
15 somewhere in that range.
16 Q And then if the driver -- and then you said the last start
17 time is typically around what time in the morning?
18 A In the 7:00 or 8:00 o'clock.
19 Q 7:00 or 8:00 a.m. timeframe?
20 A Correct, yes. I mean I've seen a 10:00 a.m. dispatch on
21 some really short local runs as well.
22 Q But normally the last -- the last route start time is
23 somewhere around 7:00 to 8:00 a.m.?
24 A In my experience, yes.
25 Q And in you experience within broad relative limits, about

1 what time do those drivers finish up at night?
2 A That would -- the run at 7:00 or 8:00 a.m.?
3 Q Sure, the ones who started at 7:00 or 8:00 a.m.
4 A You know, usually by 5:00 or 5:30 they would be back to
5 the yard.
6 Q And is it -- and in some cases the return to the yard
7 times can be as late as 6:00 or 7:00 p.m.?
8 A Yes.
9 Q Now, are you familiar with a delivery system called 5X?
10 A Yes.
11 Q And referred earlier in testimony in this hearing that the
12 drivers at Kutztown are transitioning to a 5X system, is that
13 correct?
14 A That's correct, yes.
15 Q And is it correct in your understanding that the 5X system
16 means a typical -- a particular Advance Auto Parts store will
17 get a delivery from our drivers five days a week?
18 A Correct; no store will go no more than one day without a
19 delivery.
20 Q And the old system was either two or three times a week?
21 A Yes, or some were one time a week based on the volume in
22 the store.
23 Q And in your experience -- and since you have been at
24 Kutztown, would you tell us whether the company has been making
25 that transition while you've been there?

1 A Yes.
2 Q And in your experience who has been determining which
3 drivers then go to the 5X routes?
4 A Well, the -- Advance dictates what stores go to 5X based
5 on waves. So each wave has a set of stores that then
6 transitioned. And then once those stores transitioned, then
7 the dispatcher would assign the driver accordingly.
8 Q Are there different start times for the 5X drivers than
9 the two or 3X drivers?
10 A Well --
11 Q If you know?
12 A Yeah, during 5X it's, you know, nighttime deliveries so
13 stores would be -- all stores would be delivered on that route
14 before they opened unless it's a high risk area in which we
15 wouldn't deliver overnight. So that would be a daytime
16 delivery, but it would still be a 5X route. Just their
17 delivery time has been moved to accommodate that high risk.
18 Q Would you tell us whether on the 5X runs there are varying
19 start times and varying delivery locations or are they all the
20 same?
21 A I'm sorry, repeat that again?
22 Q For the 5X runs are all the start times the same or are
23 they different?
24 A They're different.
25 Q And for locations, in other words which stores the 5X run

1 services is it the same store every time or are there different
2 stores on a route or do they vary?
3 A The route would be set with -- the stores would be set for
4 that route, but you know, stores on that route might not get a
5 delivery, say on Tuesday, it might be Wednesday.
6 Q So on a 5X route you could have, among let's say, just for
7 the sake of discussion, let's say there are four 5X routes
8 right now. They may have four different start times, correct?
9 A Correct, yes.
10 Q And the actual number of stops on each run may vary from
11 route-to-route, correct?
12 A Yes.
13 Q And the number of miles driven may vary from route to
14 route, correct?
15 A Oh, yeah.
16 Q And given what you testified to earlier some of the routes
17 with more miles and more stops, would they be more popular than
18 others?
19 A Yes.
20 Q Okay. And are there other differences among the 5X routes
21 other than the ones we've just talked about?
22 A Not that I can think of right now.
23 Q Okay. Are there start times in the daily process that are
24 considered more desirable or less desirable?
25 A I don't know about -- you know, there's certain days of

1 the week that are surely more desirable.
2 Q Tell us about that?
3 A I would say, you know, the Monday through Friday routes,
4 you know -- in the 5X model there's you know, weekend
5 deliveries just based on the nature and the need of the
6 customer so weekends would be less desirable than weekday.
7 Q And who decides if a driver gets a route with a
8 Monday/Friday start as opposed to weekend start times?
9 A The dispatcher.
10 Q And that would be?
11 A Frank.
12 Q Who has been deciding which drivers are assigned to 5X
13 routes versus the 2X or 3X routes?
14 A The dispatchers will, Frank.
15 Q Frank?
16 A Yes.
17 Q From time to time do driver routes change during a given
18 week, meaning one day the route is so many miles and so many
19 tops and the next day it's more or less stops and more or less
20 miles?
21 A It can change, yes.
22 Q And who decides if those changes are going to occur on a
23 given day?
24 A It's dictated by the volume a store may have ordered,
25 things like that.

Q Are there some routes that are adjacent to one another? In other words, you take one route and it takes everything up to a certain point and then another route takes everything say to the east of that point or something like that?

A I'm not sure -- you mean directionally?

Q Now, forgive me if I'm -- it was a bad question. Are you familiar with a concept called splits in the routes?

A Oh, you mean if their volume exceeds -- sure.

Q Tell us how splits work?

A I mean a trailer can only hold so much merchandise. So if you have a route that has 12 stops on it and the first six exceed -- you know, max out the trailer, then it has to split, you know, into two routes or however many routes it would take to get that delivery done.

Q Is one of the functions of the dispatchers to decide the point at which a route is overloaded and then share some of that work in another route?

A Yes.

Q Who makes that decision?

A Frank.

Q So when there is a split, it means one route may have more or less work and the adjacent route will have more or less work, depending on the decision of what to split, correct?

A Correct, yes.

Q And is that a decision Frank makes in your experience?

A That or the -- between him or Rick in the Advance side.
Q Okay. Are there ever -- in addition to the assigned routes and let me ask this question. How long does an assigned route last? In other words, is it just for a day or is it for a week or longer than that potentially?
A I mean in my experience, you know, the routes -- you have a lot of drivers on the same route, you know, day after day.
Q Who makes the decision in your experience whether to keep the driver on the same route day after day or to move the driver to a different route?
A The dispatcher. In this case Frank.
Q From time to time are there unplanned loads that you have, meaning overloads or other kind of work like that?
A Oh, yes, every day.
Q And who decides which drivers will be assigned to take overloads?
A The dispatcher, which is Frank.
Q You've already heard testimony that among benefits of UPS Freight are paid vacation, correct?
A Um-hum.
Q Sorry?
A Yes.
Q You have to answer out loud.
And then you have sick leave, is that correct?
A Yes.

1 Q And then do you have something -- do you have other days
2 off from time to time?
3 A They're also given an option day, kind of like a floating
4 day.
5 Q A floating holiday?
6 HEARING OFFICER O'NEILL: Personal day?
7 THE WITNESS: Yeah, I guess you -- they call it an option
8 day. I don't know how you really want to classify it as, but
9 you know, it's a day off to use at your discretion.
10 BY MR. NAUGHTON:
11 Q All right. And from time to time do drivers call in sick?
12 A Oh, yeah. Yes.
13 Q And do you occasionally have a driver out on Worker's Comp
14 in your experience?
15 A I don't know about Workman's Comp since I've been there,
16 but you know, definitely sick.
17 Q Who decides who covers for the drivers who are out on
18 vacation or out sick or missed work for some other reason?
19 A The dispatcher. In this case Frank.
20 Q What if there happens to be, on a given day, more work
21 than available drivers? Who deals with that question of what
22 to do?
23 A So the dispatcher would look for outside help, whether it
24 be -- in our case we had remember temp drivers or lease
25 drivers. If those options are exhausted or we can't use them,

1 then we would use outside or third party carriers.
2 Q All right. Let's start with the temp drivers. Who
3 schedules the temp drivers for work?
4 A The dispatcher based on the needs of the operation.
5 Q And is that Mr. Cappetta?
6 A Yes.
7 Q Okay.
8 HEARING OFFICER O'NEILL: And excuse me. When -- and who
9 makes the decision of the number of temp drivers that are
10 needed?
11 THE WITNESS: Well, once Frank in this case, you know,
12 determines how many loads that we're going to have -- I'm just
13 giving you an example. Say there's 42 and we have 20 drivers,
14 but we need 22 drivers so then, you know, he would make the
15 need for that.
16 HEARING OFFICER O'NEILL: So what does he -- how does he
17 communicate that to you or to someone else or does he just pick
18 up a phone and start calling drivers? What happens?
19 THE WITNESS: Yeah, he would just call --
20 HEARING OFFICER O'NEILL: If you know.
21 THE WITNESS: Yeah, like say for example with the third
22 party or outside route, he would just call, you know, that
23 carrier up and see if they're available to assist. And if they
24 are, then he would assign them to that route.
25 HEARING OFFICER O'NEILL: And do you know does Frank have

1 authorization to contact the third party carriers on his own?
2 THE WITNESS: Yes.
3 HEARING OFFICER O'NEILL: And who gives him the list of
4 who he can use?
5 THE WITNESS: Well, in our case there's only one that was
6 being used.
7 HEARING OFFICER O'NEILL: And what was the name of that
8 one just so we know what we're talking about?
9 THE WITNESS: Oh, the carrier is Yesik.
10 HEARING OFFICER O'NEILL: How do you spell that?
11 THE WITNESS: Y-e-s-i-k, I believe.
12 HEARING OFFICER O'NEILL: And that's the one third party
13 carrier? When you're short that's where you guys go?
14 THE WITNESS: That was the case and then -- which is
15 still the case, but we also have Coyote, which is a -- to
16 assist us as well.
17 HEARING OFFICER O'NEILL: Okay.
18 BY MR. NAUGHTON:
19 Q Coyote is a broker, is that correct?
20 A Yeah, it's a UPS company.
21 Q An affiliate of UPS? Sorry.
22 A Yes, sorry.
23 Q Acquired this summer, do you know?
24 A Yeah, it was actually right in that October timeframe.
25 Q In terms of which temp driver to assign if you need to go

1 to your temps, who decides which one of them will get the work?
2 A He would have the dispatcher. Frank would.
3 Q And who decides what order they're going to be assigned
4 in?
5 A Frank would as well.
6 Q What if one of these overloads comes in at an odd hour, do
7 you know how Frank would get in touch with a driver to work
8 that load?
9 A I mean he would communicate with via telephone.
10 Q Does he have to see anybody else in the chain of command,
11 so to speak, before contacting a driver of his choice?
12 A No.
13 Q To your knowledge does anybody in the supervisory chain
14 tell Frank how much work on any given day to assign to temps,
15 how much to the regular drivers, how much to the visiting
16 drivers or does he make those calls generally on his own?
17 A He would make those calls on his own.
18 Q Do drivers have to schedule vacations?
19 A Yeah, they would, you know, say I want to take whatever
20 day or week or however they want to do it, so definitely in
21 advance. You can't call that day and say, yeah, I'm going to
22 take a vacation.
23 Q Yeah, I think that was probably everybody's hunch.
24 A Yeah.
25 Q So when drivers need to schedule vacations who do they see

1 to schedule their vacations?
2 A I mean since I've been there they'll go to Frank and he
3 has like a daily planner type thing and we just -- you know, he
4 just writes down the date that they are requesting or the week
5 that they're requesting in there so that when he goes to do the
6 schedule for that particular week or day, he knows who is
7 available.
8 HEARING OFFICER O'NEILL: And is there also a form to put
9 in because how do people get paid for vacation? What happens,
10 if you know?
11 THE WITNESS: Yeah, so when -- at the end of the week
12 when Frank will submit an e-mail to me with, you know, what
13 drivers were off, say, off Wednesday. He will give me the name
14 and then when I go to do payroll I didn't put that driver in
15 for a day off.
16 HEARING OFFICER O'NEILL: So then you know they're using
17 vacation time?
18 THE WITNESS: Well, he would indicate to me whether
19 they're going to use a vacation or if it was a sick day or
20 their option day.
21 BY MR. NAUGHTON:
22 Q When the driver is going to miss work for some reason,
23 let's say the driver gets sick and isn't going to come to work
24 the next day, who does he contact?
25 A He would contact the dispatcher or Frank and then he would

1 make arrangements to put another driver on that route of the
2 driver who has called out.
3 Q You said he would contact the dispatcher or Frank. Do you
4 mean --
5 A Well, in this case it's Frank is the dispatcher.
6 HEARING OFFICER O'NEILL: Are you a seven day a week
7 operation in Kutztown?
8 THE WITNESS: Oh, we are tran -- yeah, we are now because
9 of 5X.
10 HEARING OFFICER O'NEILL: You are now?
11 THE WITNESS: Yes.
12 HEARING OFFICER O'NEILL: Okay. And are you 24 -- is
13 someone there 24 hours?
14 THE WITNESS: Our staffing will be like that. Currently
15 there is like two hours of overlap on the weekends and the
16 evening that we don't have exactly 24/7 coverage, but we're
17 close.
18 HEARING OFFICER O'NEILL: And does Frank work seven days?
19 THE WITNESS: Well, we have our normal hours that we're
20 there and then we have -- he has a company cell phone and a
21 company laptop that he would be able to -- let's say a driver
22 called him at, you know, 3:00 o'clock in the morning, then he
23 can -- he has the tools to make those changes.
24 BY MR. NAUGHTON:
25 Q You said a company laptop. Do any of the road drivers

1 have company laptops to your knowledge?
2 A No.
3 Q Do any of the road drivers have company cell phones?
4 A No.
5 Q Who pays for the minutes on the company cell phone, if you
6 know, that's assigned to Frank?
7 A The company essentially does. I mean it hits the -- for
8 this operation that provides him in this case is who we have.
9 HEARING OFFICER O'NEILL: And the drivers -- so they
10 don't have company cell phones and how do you communicate with
11 them on the road?
12 THE WITNESS: Well, the tractor has a cell phone in there
13 that's used for -- it's called G2 link but that's how they --
14 that we can track the arrival and departure. So if they needed
15 to call the office, they could use that phone that's in there
16 that's attached to that tractor to make that call and then vice
17 versa.
18 HEARING OFFICER O'NEILL: Okay.
19 THE WITNESS: But it stays attached to that tractor.
20 HEARING OFFICER O'NEILL: Physically can they walk -- I
21 was just curious -- can they -- does it come unattached? Can
22 you walk out in the parking lot and --
23 THE WITNESS: Oh, yeah, yeah.
24 HEARING OFFICER O'NEILL: But at the end of the day it
25 stays in that truck and the beginning of the truck day it's in

1 the truck?
2 THE WITNESS: It's assigned to that -- to that tractor,
3 yes.
4 HEARING OFFICER O'NEILL: Tractor, sorry.
5 BY MR. NAUGHTON:
6 Q I'm going to ask you some questions about Frank's weekly
7 hours of work or his schedule. What days of the week does he
8 typically come into the office?
9 A Monday through Friday is his primary and then occasionally
10 on weekends he has to come in for the wave and load process or
11 packets although, you know, he would have the ability to do
12 that from home with the laptop.
13 Q We'll come back to the weekends in a minute. During the
14 week do you have any -- do you know what his approximate hours
15 of work are? What time does he show up for work typically?
16 A Between, you know, the 8:30 and 9:00 o'clock range.
17 Q Do you know -- have you assigned him specific hours of
18 work to be there?
19 A No, I have not.
20 Q To your knowledge, has anybody else?
21 A To my knowledge, no.
22 Q Does he ever -- from time to time does he come in after
23 9:00?
24 A Sure. I mean yes.
25 Q How often does that happen?

A I don't have a percentage, you know, of time, but --
Q And then in your experience what time does he leave work at night?
A It varies. It can be from 5:00 o'clock till 7:00 o'clock and in extreme cases 9:00 o'clock if he's waiting on packets from the warehouse.
Q To your knowledge -- well, first of all, have you set his go home time at night?
A No.
Q Do you know of anybody at Kutztown who set his go home time at night?
A No.
Q So as far as you know does he come to work and leave work on his own discretion?
A Yes.
Q Does he take a meal period during the day?
A Oh, yeah.
Q Is there any particular time that he takes it?
A You know, he's free to take his lunch on -- you know, it's not a board so he doesn't have like a set time.
Q And in your experience where does he take his lunch?
A I don't know where he goes to eat.
Q Well --
A Oh, it's offsite, you mean?
Q You tell me. Does he stay in the lunchroom at the

1 building or does he leave the premises?
2 A Oh, he leaves the premises.
3 Q And is there any set amount of time for his lunch break or
4 is it at his discretion?
5 A It's at his discretion.
6 Q Where physically in your experience, where physically is
7 Frank stationed while he's at work?
8 A His office is -- where he's been since I came there is in
9 the operations -- the onsite operations manager's office.
10 Q Okay. Could you tell us if he shares it with anybody
11 else?
12 A No.
13 Q From time to time do employees come to see him in the
14 office?
15 A Yes.
16 Q And where do they meet with him?
17 A In his office.
18 Q How big is the office?
19 A I don't know the size. I guess maybe ten by -- it's
20 square so maybe 12 by 12.
21 Q Do you have an office?
22 A Yes. Mine -- ours are side by side.
23 Q Is your office the same size as Frank's, bigger or
24 smaller?
25 A Yeah, they're proportionate.

1 Q What do you mean they're proportionate?
2 A Yeah, so they're a mirror image of each other so --
3 HEARING OFFICER O'NEILL: Same size?
4 THE WITNESS: Yes.
5 HEARING OFFICER O'NEILL: And did you say Frank is in the
6 same office as the operations manager?
7 THE WITNESS: Well, that office is designated for the
8 operations manager so that's where he's been since I've been
9 there.
10 BY MR. NAUGHTON:
11 Q So the question, I guess, is does he have that office to
12 himself?
13 A Oh, yes, he does.
14 Q Okay.
15 HEARING OFFICER O'NEILL: Is that because you don't have
16 a permanent operations manager right now?
17 THE WITNESS: I mean he's been there since I started so
18 --
19 HEARING OFFICER O'NEILL: Okay.
20 BY MR. NAUGHTON:
21 Q Once the schedule is set, once Mr. Cappetta determines the
22 schedule, how does that schedule -- how does he communicate the
23 schedule to employees -- to the drivers?
24 A Either via a phone call or if he sees the drivers in the
25 office. Sometimes Carl David will assist him in calling the

1 drivers, so either phone or person.
2 Q You say sometimes Carl David assists him?
3 A Yeah, in basically -- do you want me to finish?
4 Q Yeah, go ahead.
5 A Okay. You know, if you've got X number of drivers to call
6 and tell them their routes, so Carl will assist him in calling
7 the drivers.
8 Q And in your experience who assigns Carl David to help Mr.
9 Cappetta do that?
10 A Who assigns him?
11 Q Who assigns Carl to do that? Who tells him to help him?
12 A Oh, Frank would ask him to help call.
13 Q From time to time does Mr. Cappetta get calls from
14 employees outside of the time he's at the office, if you know?
15 A Oh, definitely, yes.
16 Q And tell us about that?
17 A About the calls?
18 Q Yeah. Does he tell you about these calls from time to
19 time?
20 A Yeah. I think it can vary from driver XYZ is calling out
21 or whatever the communication is, you know, they can call him
22 via phone.
23 Q And are you aware that they do so?
24 A Yes, I'm aware.
25 Q And who resolves those inquiries when those drivers call

1 Mr. Cappetta, as far as you know?
2 A It would depend on the nature of the call. If it's
3 related to dispatcher scheduling he would. If it's a payroll
4 function or, you know, some other matter then he could forward
5 it to me.
6 Q He could forward it to you?
7 A Hmmm.
8 Q Sorry?
9 A Yes. Sorry, I keep forgetting I've got a mike here.
10 Q How long, if you know, has Mr. Cappetta had a laptop, a
11 company laptop?
12 A I don't know how long he's had it, he's had it since I've
13 been there.
14 Q And the same question for the cell phone?
15 A He got his company cell phone the same time I did. We got
16 them the second week I was there so --
17 Q Okay. In your experience does it ever happen that a road
18 driver would have a breakdown on the road or an accident on the
19 road?
20 A Yes.
21 Q When drivers have breakdowns or accidents who do they
22 contact?
23 A It's a process. So obviously the first thing is if there
24 are injuries they would call 911.
25 Q Let's assume no injury though.

1 A Okay. Then they would call the UPS breakdown number first
2 and they'd take an initial report.
3 Q Is it an 800 number?
4 A 800 or 888, I can't remember the exact number, but -- and
5 then, then they would notify someone at the operation so --
6 Q And who do they call in your experience?
7 A They could either call Frank or they could call the actual
8 number at the office and --
9 HEARING OFFICER O'NEILL: And has there been an accident
10 called in while you've worked there since October?
11 THE WITNESS: Unfortunately, yes.
12 HEARING OFFICER O'NEILL: And how many, if you know?
13 THE WITNESS: I don't know the exact number off the top
14 of my head.
15 HEARING OFFICER O'NEILL: Is it more like two or three or
16 more like ten, 15?
17 THE WITNESS: It's not that high.
18 HEARING OFFICER O'NEILL: okay.
19 THE WITNESS: But it's more than two or three.
20 HEARING OFFICER O'NEILL: Okay.
21 BY MR. NAUGHTON:
22 Q And who, in your experience, did the drivers call at the
23 building when they had accidents?
24 A When I first came it was -- you know, I don't know what
25 the mix up -- what proportion of the calls were, but they

1 either called Frank or they call -- Carl was on, Carl David was
2 on thirds or nights, however you want to reference it. So if
3 they called into the operations then they would get Carl at
4 that point in time.
5 Q And what would Carl do with the call? Who did he tell
6 about it?
7 HEARING OFFICER O'NEILL: If you know.
8 BY MR. NAUGHTON:
9 Q If you know.
10 A I don't know.
11 Q Okay.
12 A And there's a procedure that, you know, once we received
13 that call and what we have to do.
14 Q From time to time did they call Mr. Capetta?
15 A I'm sure they did in my --
16 Q And I asked you earlier about breakdowns. Do breakdowns
17 occur from time to time?
18 A Yes.
19 Q Who are they supposed to call regarding breakdown?
20 A If it's like an equipment failure then they would be -- we
21 have a Pinsky SOS that they would call first and then they
22 would --
23 Q Let me just stop you. Pinsky is the contractor that
24 handles maintenance of the trucks?
25 A Correct.

Q The tractors?
A The tractors, yes.
Q And then after they call Pinsky, then what do they do?
A They would notify the operation.
Q Who do they call for that?
A Either Frank or call the main line.
Q Okay.
HEARING OFFICER O'NEILL: Are there written rules about what the procedure is if you break down?
THE WITNESS: Yes.
HEARING OFFICER O'NEILL: And are there written rules for what the procedure is if you have an accident?
THE WITNESS: Yes.
HEARING OFFICER O'NEILL: Can we get those?
MR. NAUGHTON: Today?
HEARING OFFICER O'NEILL: Yes.
MR. NAUGHTON: I don't know is the short answer.
HEARING OFFICER O'NEILL: Okay.
MR. NAUGHTON: I'll find out.
HEARING OFFICER O'NEILL: Okay. And I still, when I went back at lunch, I didn't have the job descriptions or the organizational chart yet.
MR. LARKIN: Well, they're not here.
HEARING OFFICER O'NEILL: Aren't you going to e-mail them to me?

1 MR. NAUGHTON: We're doing this right now.
2 HEARING OFFICER O'NEILL: Yeah.
3 MR. NAUGHTON: Wait a minute. Let's go off the record
4 for a moment. We'll try --
5 HEARING OFFICER O'NEILL: No, we'll stay on the record.
6 MR. NAUGHTON: All right. I'm the one to speak to about
7 this. We'll do what we can, ma'am, but we're both tied up
8 doing this. If we get a break we'll look into it.
9 HEARING OFFICER O'NEILL: I'm sorry, I thought that I had
10 asked you to do that earlier.
11 MR. NAUGHTON: Well, you did, but we haven't had an
12 opportunity to do it.
13 HEARING OFFICER O'NEILL: Okay. When we take -- when we
14 take a break if you can get --
15 MR. NAUGHTON: Which is fact. I mean you're jamming us
16 into the hearing, you're jamming us through the day, we're
17 putting on witnesses and we're doing the best we can --
18 HEARING OFFICER O'NEILL: Okay.
19 MR. NAUGHTON: -- but you can't expect us to do all of
20 this --
21 HEARING OFFICER O'NEILL: Well, during a break if you
22 could get all those items I've asked for --
23 MR. NAUGHTON: Thank you. All right, yeah, we'll try to
24 do it.
25 HEARING OFFICER O'NEILL: Okay.

1 MR. NAUGHTON: Let me get again what it is you want.
2 HEARING OFFICER O'NEILL: I wanted the organizational
3 chart.
4 MR. LARKIN: Right, got that.
5 HEARING OFFICER O'NEILL: And I want the job descriptions
6 for the --
7 MR. LARKIN: Got those.
8 HEARING OFFICER O'NEILL: -- two supervisory people and
9 all the unit people at Kutztown.
10 MR. NAUGHTON: Wait, I'm sorry, job descriptions for the
11 unit -- for the hourly?
12 HEARING OFFICER O'NEILL: Yeah, two supervisor --
13 MR. LARKIN: Road driver, Kutztown office manager,
14 Kutztown ops supervisor.
15 HEARING OFFICER O'NEILL: I'm sorry, I mean the job
16 descriptions for the operations manager, the operations
17 supervisor, the road drivers. If there are separate job
18 descriptions for dispatcher or safety, I want those. And now I
19 want the written procedures for what to do if you have an
20 accident and the written procedure for what you do if you ever
21 breakdown.
22 MR. NAUGHTON: All right. Procedures for breakdown.
23 HEARING OFFICER O'NEILL: Let's go off the record.
24 (Whereupon, a recess was taken
25 from 3:17 p.m. to 3:22 p.m.)

1 HEARING OFFICER O'NEILL: Back on the record.
2 And you're still under oath.
3 Okay, you can continue.
4 MR. NAUGHTON: Thank you.
5 DIRECT EXAMINATION (continued)
6 BY MR. NAUGHTON:
7 Q When Mr. Cappetta works -- comes to the office, other than
8 Monday through Friday, who, if anybody, instructs him to do so,
9 if you know?
10 A Outside of Monday through Friday?
11 Q Yeah, if he come -- you said he sometimes would come in on
12 a weekend if something happened. Who, if anybody, calls him
13 and directs him to show up?
14 A Oh, no one.
15 Q Okay. So as far --
16 A They --
17 Q Go ahead.
18 A That role of dispatcher and scheduling is critical to the
19 operation. I mean, it -- that's -- that's the heart. I mean,
20 at the end of the day, we have product to get from A to B, and
21 without that -- that function in place, then that -- that's it.
22 We're --
23 Q So --
24 A The operation doesn't move forward without that -- without
25 that role being fulfilled.

1 Q So as far as you know, does Mr. Cappetta decide for
2 himself when it's necessary for him to come in on a weekend?
3 A Yes. Well, there's like certain -- like, that weight and
4 load, like on a Saturday, you know, it would get sent out at a
5 rough time, maybe between 7:00 and 9:00 a.m.; so he would
6 have -- he would know that time.
7 Q From time-to-time have you observed -- you -- I think you
8 mentioned from time-to-time you've observed employees come
9 to -- Mr. Cappetta -- to the office to see Mr. Cappetta, right?
10 A Um-hmm. Yes.
11 Q Does he from time-to-time hold meetings with more than one
12 employee at a given time in his office?
13 A I mean, yeah, two or three drivers could go in there.
14 Q Who -- to your knowledge, who arranges those meetings,
15 other than him?
16 A Yeah, or -- or they just walk -- they just walk in and
17 shut the door. I mean, you know, it might necessarily be that
18 he arranged it at that particular time. They could just walk
19 right in, shut the door and --
20 Q But I guess what I'm getting at, do you ever arrange those
21 meetings for --
22 A Oh.
23 Q -- to be held in Mr. Cappetta's office?
24 A No.
25 Q To your knowledge does any other supervisor or manager do

that?
A No.
Q Okay. When Mr. Cappetta works in the office, does he punch a timeclock?
A No.
Q Do you know if he keeps any record of his hours during the week when he works at the office?
A I don't know what -- how he accounts for that.
Q Well, let me ask this question; do you require him to turn in any record of his hours each week?
A No. He just --
Q You. You personally.
A Oh, me personally, no.
Q Do you know that -- of anybody else at Kutztown who requires him to turn in any record of his hours during the week when he's working in the office?
A I mean, he -- on -- on Saturday when he submits the -- I mean, he will submit how many total hours that he worked, but I don't know if -- to my knowledge whoever directed that.
Q Do you know if he -- when he -- when he submits his hours, he's just work -- he submits a total number of hours for the week; correct?
A Correct. Yes.
Q Does he submit, to your knowledge, a chart showing I showed up at 9:00 and I worked till 7:00 Monday, 9:00 to 7:00

1 Tuesday, 9:00 to 7:00 Wednesday, and so forth?
2 A No, it's not itemized, it's just a flat number.
3 Q Total hours for the week?
4 A Total hours for the week, yes.
5 Q Okay. Do you know -- well, how is -- how is Mr. Cappetta
6 paid what -- for his services as dispatcher?
7 A So it's -- it's kind of weird because he doesn't have --
8 he gets paid an hourly rate but then they get -- then he gets
9 an adjustment to compensate that -- that rate.
10 HEARING OFFICER O'NEILL: What is his hourly rate?
11 THE WITNESS: I don't know that off the top of my head.
12 HEARING OFFICER O'NEILL: Okay. Then what do you -- what
13 do you mean by "adjustment"? What is that?
14 THE WITNESS: There's a better word for -- than
15 "adjustment." I can't quite articulate it now, but it's like
16 a -- you know, the hourly rate wouldn't just -- wouldn't be
17 enough, so there's a -- there's an adjustment that's added, so
18 like an assessorial to give him his total compensation.
19 HEARING OFFICER O'NEILL: Okay. Do you know what he makes
20 per week?
21 THE WITNESS: I don't know the exact number.
22 HEARING OFFICER O'NEILL: Um-hmm. And do you know the
23 range, on an average week what he makes?
24 THE WITNESS: No, not off the top of my head.
25 HEARING OFFICER O'NEILL: One moment.

1 I'm wondering about how much the drivers make annually,
2 sort of the high end and the low. If they're working full-
3 time, and I know it differs based on your route, but sort of a
4 drivers making the high end and the lower end, what is --
5 what's the range?
6 THE WITNESS: I mean, there's -- there's drivers making
7 over 100,000.
8 HEARING OFFICER O'NEILL: Um-hmm.
9 THE WITNESS: And there's drivers making 70,000.
10 HEARING OFFICER O'NEILL: So between 70 and 100 is about
11 what the drivers are making per year?
12 THE WITNESS: Yeah. Somewhere in that range.
13 HEARING OFFICER O'NEILL: Okay. And do you -- do you know
14 what Frank makes per year?
15 THE WITNESS: I don't know the exact number.
16 HEARING OFFICER O'NEILL: Would it be -- fall within 70 to
17 100?
18 THE WITNESS: Oh, yes.
19 HEARING OFFICER O'NEILL: Um-hmm.
20 BY MR. NAUGHTON:
21 Q Is there an hourly rate that we have assigned to drivers
22 for non-driving work?
23 A Yes.
24 Q What's that rate?
25 A 17.25 or 17.50, some --

Q Okay. And is the non-driving rate a base rate that Mr. Cappetta gets for his day-to-day work?
A Correct.
Q And then on top of that, do you have a 7.50 an hour supplement?
A Yeah, that's the -- that's the adjustment that I was -- that I was talking to you. It brings it up -- I think the total brings like 24.75 an hour.
Q Okay.
HEARING OFFICER O'NEILL: So he makes about -- about 24.75 an hour?
THE WITNESS: Um-hmm.
HEARING OFFICER O'NEILL: And how about if he works over 40 hours a week?
THE WITNESS: Well, I mean, he -- I don't know the arrangement, as he gets paid for 70 hours a week.
HEARING OFFICER O'NEILL: Um-hmm. At straight time?
THE WITNESS: At that -- at that rate, the 24 --
MR. NAUGHTON: 75?
THE WITNESS: 75, yes.
HEARING OFFICER O'NEILL: Um-hmm. Um-hmm.
BY MR. NAUGHTON:
Q Suppose -- now, you said he gets paid for 70 hours. The pay is based on 14 hours of pay per day for five days a week; correct?

A Yes.
Q All right. And he -- in other words, 14 hours Monday, 14 hours Tuesday, 14 hours Wednesday, Thursday and Friday, right, yield, I believe it's about -- that's 70 hours, right?
A Seventy, yeah.
HEARING OFFICER O'NEILL: Um-hmm.
BY MR. NAUGHTON:
Q Now, suppose he comes to work Monday at 9:00 and leaves at 7:00; Tuesday, 9:00, leaves at 7:00 and so on, all through the week, and takes an hour lunch each day, and so in other words he's - there's 10 hours -- 10 hours from start to finish, minus an hour of lunch, the -- leaving 45 hours at the site, how many hours a week do we pay him for?
A I mean, he's paid a minimum of 70.
Q Okay.
A And in some cases he'll -- if it's 74 hours, he would get paid for 74 hours.
Q Okay. So if he works more or less hours in a given week, he always gets at least 70 hours of pay; correct?
A Always 70, and if he works more, then he would be compensated for those additional hours.
Q All right, just to be clear on this, I'll give you a couple hypotheticals. If he -- if he literally shows up at 9:00 and leaves at 5:00 every day and doesn't take lunch and works 8 hours a day for 5 days that week, he gets paid for 70

1 hours; correct?
2 A Yes.
3 Q All right. If he works at night, meaning after he's gone
4 home, and he has to field employee calls or he has to come in
5 on weekends, does he submit a voucher for that extra work, if
6 you know?
7 A I mean, he doesn't submit anything to me. I mean, I'll --
8 all I get is on Saturday is 70 hours, you know, that's the -- I
9 get the same for him, for Carl (ph), and then Greg will get
10 either hourly pay for his, like the safety and visibility,
11 plus -- plus his loads.
12 Q Does Mr. Cappetta sometimes submit a report each week
13 seeking more than 70 hours pay?
14 A Only in the last two weeks I've seen it exceed 70.
15 Q Okay. So except for the last two weeks, your experience
16 has been that he would submit a summary showing that he was
17 entitled to 70 hours of pay for the week?
18 A Yeah, both him and Carl.
19 Q But he didn't itemize the hours or the days that he
20 worked?
21 A No.
22 Q Okay. And did you ever question that submission to him?
23 Did you ever question him about his submissions?
24 A Oh, no, I never questioned him.
25 Q Okay. And did you process it each time for payment?

1 A In the beginning I did, yes.
2 Q Okay. Then somebody else started doing it after a while?
3 A Correct. Yes.
4 Q Okay. All right, in your experience in most weeks, is Mr.
5 Cappetta actually working 70 hours a week? By the way, I'm
6 not -- I'm complaining about --
7 HEARING OFFICER O'NEILL: If you know.
8 BY MR. NAUGHTON:
9 Q If you know.
10 A You know, I would have no way of knowing that. I can
11 only -- I can only tell you from what I see.
12 Q Tell us what you've observed, that's all.
13 A I mean, I -- I see him there during my hours of operation.
14 I mean, as far as nights and weekends, I obviously could not
15 attest to that.
16 Q Okay. What -- what hours do you work typically at the
17 locations?
18 A So, you know, my hours are based on the need of the
19 operations, so sometimes it could be at 6:00 a.m. or to 8:00
20 a.m. I would say most of the time I'm there at 8:00 a.m., but
21 I'll come in earlier or if it's deemed necessary.
22 Q Okay. So are you typically there when Frank arrives in
23 the morning?
24 A Yes.
25 Q Do you know what the purpose or how this pay system came

1 to be in effect for him?
2 A I'm not privy to that information.
3 Q Did he ever tell you?
4 A No.
5 Q All right. So was it in place when you go there, as far
6 as you know?
7 A Yes.
8 Q Okay. Since you've been at the location, how many times
9 has Frank driven a tractor on a route?
10 A Since I've been there, none.
11 Q Sorry?
12 A None. Zero.
13 Q In preparing for this hearing, did you happen to check to
14 see when the last time he drove any -- any vehicle on a route
15 was?
16 A I mean, based on his driver ID, the last time that I saw
17 was in August.
18 HEARING OFFICER O'NEILL: August of 2014?
19 THE WITNESS: No, '15.
20 HEARING OFFICER O'NEILL: 2015.
21 BY MR. NAUGHTON:
22 Q And how many times did you see him do it in August,
23 according to his record?
24 A I -- I don't remember. It appeared that it was shuttles.
25 Q No, I don't mean -- I mean, how many dates? How many --

1 A Oh, I don't --
2 Q In August.
3 A I don't have the exact number. It's -- that was -- I
4 looked at that in and that was August. Went all the way back
5 to January.
6 Q Okay. But you have not seen any -- any times when he
7 drove since August?
8 A Other than he just did his S&P ride. An S&P ride.
9 Q That's just -- that's to examine a driver?
10 A Correct, yeah.
11 Q We'll come to that in a minute. You mentioned something
12 about those were shuttles, not a route. What do you mean by
13 that?
14 A So you know, currently we have the Inmar, you know,
15 advances doing an extension on to their warehouse, so
16 temporarily their reclamation is offsite at this Inmar
17 location. So one or two things will happen; either the driver
18 will get close to his hours of service and will not be able to
19 make to Inmar, so he would bring the trailer with returns back
20 to the yard and it would be placed on the shuttle line to be
21 taken over at a later time.
22 Or -- excuse me, or they would arrive during a time, like
23 say on the weekends, Inmar is not open, so if a driver has
24 deliveries on the weekend, when they're returning they
25 obviously cannot go to Inmar, so then they would bring the

1 shuttle or the trailer back to the yard, place it in the
2 shuttle line, and then on Monday when Inmar's back open, then
3 we would have shuttles with these trailers of returns.
4 Q And now so you've described the shuttle process. Is that
5 the route -- is that the work that Mr. Cappetta was doing when
6 you saw he drove?
7 A Yeah. Based on the way these -- shows in the system as
8 like zero per miles, just because of the way the TMW software,
9 the software that we use, the way it's looking at zip code to
10 zip code based on PC Miler, it would rate it as a zero term
11 because it's a flat -- flat rate for that shuttle. The
12 driver's getting a flat rate for that shuttle.
13 Q So would it be -- if it were a route where he was actually
14 delivering a volume to one of the Advance Auto Parts stores,
15 would it show up differently on that?
16 A Oh, yes, it would show up as a stop and you would get, you
17 know, stop pay versus a flat rate.
18 Q So based on what you observed, can you tell us whether it
19 was a shuttle that he was doing or it was actually a delivery
20 route?
21 A You know, based on it, it appeared to be shuttles.
22 Q And would a driver often do multiple shuttles on a day
23 shift?
24 A Yeah.
25 Q So in your experience and as he -- since you've been

1 there, has he ever driven Advance Auto Parts delivery route?
2 A Not since I've been there.
3 Q And just so the record is clear, you mentioned some kind
4 of a dispatch management system?
5 A Yeah, it's called TMW, it's a transportation, like,
6 management software. It's an off-the-shelf type product
7 that -- third party.
8 Q Okay. How are -- how -- you -- you were here for earlier
9 testimony by Mr. Lovely, right?
10 A Yes.
11 Q All right. And when route drivers are actually driving
12 their routes, how are they paid? Is it miles and stops, right?
13 A Yes, correct. Yes.
14 Q And they're not typically paid a flat hourly rate with a
15 supplement, are they?
16 A No. The only time they would get a flat rate is if do
17 a -- on a shuttle, in addition to their -- to their stops or
18 another route.
19 Q What happens if our customer, Advance Auto Parts, has a
20 complaint about a driver, what -- how does that get to our
21 attention?
22 A I mean, in the early time -- or the early time, meaning
23 when I first came to the operation, you know, Rick would --
24 from the customer, it's always coming via Rick Haas, who is
25 the -- our liaison between Advance and UPS.

1 Q Who would Rick Haas contact if there was a complaint about
2 a driver?
3 A To Frank.
4 Q Okay.
5 HEARING OFFICER O'NEILL: And have you witnessed that?
6 THE WITNESS: Oh, yes.
7 MR. NAUGHTON: All right.
8 BY MR. NAUGHTON:
9 Q And after that, did Frank bring the complaint to your
10 attention or did, as far as you know, did he handle it himself?
11 A I mean, in more recent --
12 Q Listen to my question. When you first were observing
13 it --
14 A Yeah.
15 Q -- did he bring the complaint to your attention or did he
16 go on and handle it some other way?
17 A Not in the beginning, no.
18 Q What did he do in the beginning? No, I'm saying, did he
19 bring it to you in the beginning?
20 A Rick or Frank?
21 Q Frank.
22 A Oh, Frank. No, not in the beginning.
23 Q Okay. Did that change at some point?
24 A It kind of changed in the fact that Rick would make the
25 whole office aware of it, just by his -- his presence. So --

1 Q Okay. All right. Did -- who continued to deal with the
2 complaints?
3 A I would say up until recently, you know, Frank dealt with
4 it, you know, 100 percent.
5 Q Okay. Have you started?
6 A Correct. Well, since, you know, myself and Monte have
7 come, there's been, you know, some assistance in that nature
8 there.
9 HEARING OFFICER O'NEILL: Can -- you came in in October as
10 the operations supervisor. Was there an operations supervisor
11 right before you came in or had the spot been vacant for some
12 time?
13 THE WITNESS: There was not a, you know -- well, when I
14 came there was, you know, Frank, Carl on third shift. And then
15 there was two admins on a first and the second shifts.
16 HEARING OFFICER O'NEILL: What were the titles of the
17 admins on the first and second? Do they -- what are their
18 titles?
19 THE WITNESS: Administrative assistant.
20 HEARING OFFICER O'NEILL: Okay. And how long had the
21 operations supervisor position been vacant before you came, if
22 you know?
23 THE WITNESS: Oh, I don't know.
24 HEARING OFFICER O'NEILL: Okay. And when you came, the
25 operations manager -- I know you have an acting operations

1 manager now; is that right?
2 THE WITNESS: Correct. Yeah, he came that same week that
3 I came.
4 HEARING OFFICER O'NEILL: Okay. And how long was the
5 operations manager position vacant when you arrived?
6 THE WITNESS: It's my understanding that it was vacant
7 since July. That's my understanding.
8 HEARING OFFICER O'NEILL: So July of --
9 THE WITNESS: '15.
10 HEARING OFFICER O'NEILL: -- '15.
11 And what's his name again, the person whose the operations
12 manager -- acting as the operations manager now?
13 THE WITNESS: Oh, Monte.
14 HEARING OFFICER O'NEILL: Monte.
15 THE WITNESS: Copeland.
16 HEARING OFFICER O'NEILL: Okay. But he's actually -- has
17 an office elsewhere?
18 THE WITNESS: Yeah, he's in the implementation group.
19 HEARING OFFICER O'NEILL: Okay. And so he's not permanent
20 as your office manager -- as an ops --
21 THE WITNESS: No.
22 HEARING OFFICER O'NEILL: Operations manager.
23 THE WITNESS: Until there is a permanent one hired --
24 HEARING OFFICER O'NEILL: Okay.
25 THE WITNESS: -- he is acting.

1 HEARING OFFICER O'NEILL: Okay.
2 BY MR. NAUGHTON:
3 Q Do you know whether Mr. Cappetta has removed drivers from
4 a route from time-to-time? For example, for reasons related to
5 performance or conduct on a route?
6 A I don't -- I don't know.
7 Q From time-to-time -- strike that.
8 From time-to-time do you hire new route drivers?
9 A Yes.
10 Q As part of that process, is there any testing that's done?
11 A Yes. So they -- a backing test and a road test would be
12 performed.
13 Q Who performs, in your experience, the road test and the
14 backing test?
15 A Predominantly -- well, there's three folks that could do
16 it. There could be Frank, Carl -- Frank Cappetta, Carl David,
17 or Greg Falcone. Greg and Carl and --
18 HEARING OFFICER O'NEILL: What's Greg's title?
19 THE WITNESS: Certified safety instructor, CSI, which is
20 the same as --
21 HEARING OFFICER O'NEILL: Um-hmm. And he's also a road
22 driver?
23 THE WITNESS: Correct.
24 HEARING OFFICER O'NEILL: Okay.
25 THE WITNESS: So they would -- they would perform the --

1 the road -- or the road test and the backing test. And then --
2 MR. NAUGHTON: Okay.
3 BY MR. NAUGHTON:
4 Q From time -- you are aware that Frank from time-to-time
5 performs the road and backing tests for applicants?
6 A Yes.
7 Q All right. And does the driver/applicant have to pass the
8 test in order to be hired?
9 A Yes.
10 Q Who decides if the driver passes or fails that test?
11 A One of the three of them performing the test would --
12 Q Let's focus on Mr. Cappetta now. If Mr. Cappetta decides
13 that the driver has failed, what happens to that application?
14 A Well, I mean, we don't -- we don't move forward.
15 Q Okay. In other words, he's not hired, right?
16 A Yeah. I mean, if they're not a -- not a good driver then
17 we can't hire them. They don't meet the -- well, the
18 procedures.
19 Q If -- if Carl David or the other gentleman you mentioned,
20 I think -- did you say --
21 A Greg Falcone.
22 Q Okay. If Mr. David or Mr. Falcone does the road test, do
23 they review the results with Mr. Cappetta?
24 A Sure.
25 HEARING OFFICER O'NEILL: If you know.

1 THE WITNESS: Sure.
2 BY MR. NAUGHTON:
3 Q If you know, yeah.
4 A Yeah.
5 HEARING OFFICER O'NEILL: Have you seen that?
6 THE WITNESS: Yes.
7 BY MR. NAUGHTON:
8 Q And who makes the final decision on pass/fail for the
9 applicants Carl David and Mr. Falcone have tested?
10 A I mean, if they say they failed, then I mean they -- you
11 know, it kind of, the buck stops there.
12 Q Do they review it with Mr. Cappetta?
13 A Yeah, they would just say that, you know, that drive XYZ,
14 you know, didn't pass their -- didn't pass the backing test so
15 therefore, you know, we're going to -- not going to move
16 forward with them.
17 Q All right. Do -- does Mr. Cappetta need, in your
18 experience, does Mr. Cappetta need approval from anybody higher
19 than him to -- to decide that we're not going to process the
20 applicant any further?
21 A No. I mean, if they fail the test then, as I said, it
22 stops there.
23 Q All right. Do you have shift employees? In other words,
24 people other than drivers or maybe drivers who work actually a
25 shift inside the building?

1 A Distole (ph) drivers?
2 Q Well, anybody.
3 A I mean, we have the -- the admins that do some work.
4 Q Do any of the admins support Mr. Cappetta's work?
5 A No, they support the operations work.
6 Q Okay. Does he use any of the admin workers in his -- in
7 his duties, if you know?
8 A I mean, Wendy will assist in the -- Wendy Perkins, she'll
9 assist in the weight and load in the morning times.
10 Q Okay.
11 A And then also in -- with the -- yeah.
12 Q At some point in your experience, has Mr. David been
13 moved? Has his shift been changed?
14 A Yeah, when I arrived at the location he was working the
15 third shift or night shift, however you want to --
16 Q Did that change?
17 A Yeah. Yes, he's now on dayshift.
18 Q And who -- who moved him?
19 A I'm not sure who made that exact call, whether it was --
20 whether Frank or whether he took himself off or -- I'm not
21 sure.
22 Q Oh, you mean either Mr. David changed himself or --
23 A Or --
24 Q -- or Frank, but you don't know who?
25 A Yes.

1 Q Do you know whether Mr. Cappetta was involved?
2 A I don't -- I don't know. I can't say with certainty.
3 Q Have you ever seen Mr. Cappetta do a space and bill --
4 visibility training with any driver since you've been here?
5 A I can't recall any on the S&V. Predominantly Carl and --
6 well, when Carl was on third shift, I mean, Greg took the brunt
7 of most of those.
8 Q Okay.
9 A And then since Carl's come on to dayshift, he's been
10 assisting on that, as well.
11 Q So just so we're clear, space and visibility training is a
12 form of safety training, right?
13 A Correct.
14 Q And you heard earlier testimony about that?
15 A Yes.
16 Q So you know what an S&V ride is; correct?
17 A Yes. I know of it, yes.
18 Q Okay. And that does require whoever the trainer is to get
19 on the truck with the driver; correct?
20 A Yes.
21 Q And again, just so we're -- the record is clear, to your
22 knowledge have you ever seen Mr. Cappetta do an S&V ride with a
23 driver?
24 A I can't remember specifically about an S&V ride, no.
25 Q Okay. All right.

1 MR. NAUGHTON: Can I have just a minute, please?
2 HEARING OFFICER O'NEILL: Sure.
3 (Pause.)
4 BY MR. NAUGHTON:
5 Q Oh, Mr. Dibiase, do you know who decides whether and if so
6 how many additional temporary drivers we might need at any
7 given time?
8 HEARING OFFICER O'NEILL: And when you're talking about
9 temporary, do you mean from a temp agency versus the --
10 MR. NAUGHTON: I mean the temp -- yeah, we've been calling
11 the other ones "visiting drivers."
12 HEARING OFFICER O'NEILL: Um-hmm.
13 MR. NAUGHTON: But temp drivers, yes, ma'am. Thanks for
14 that.
15 HEARING OFFICER O'NEILL: Um-hmm.
16 BY MR. NAUGHTON:
17 Q The temporary drivers from a temp agency, do you know who
18 decides whether we need more and if so how many?
19 A It's dictated on the need of the operation and as far as,
20 you know, how much --
21 Q I'm asking you a different question.
22 A Okay.
23 Q Do you know who decides if we need more and if so how
24 many?
25 A Yeah, Frank would recommend, you know, how many drivers

1 that we would need additionally to cover the routes.
2 HEARING OFFICER O'NEILL: Who does he make that
3 recommendation to?
4 THE WITNESS: In, you know, recent times either to, let's
5 see, Monte or to the -- to who you would call the Yesik, the
6 third party or call the lease companies.
7 BY MR. NAUGHTON:
8 Q He has sometimes called the lease companies directly?
9 A Well, it's kind of like once they're kind of assigned
10 there, you know, we just call them, the driver or the lease
11 driver up via their cell phone and say, hey, we have a route
12 for you. We don't actually need to call the lease company at
13 that point.
14 Q Oh, all right. Now, often does -- in your experience does
15 Mr. Cappetta do that from time-to-time?
16 A Oh, yes. We rely on the lease drivers due to the shortage
17 of company drivers.
18 Q Are the temp drivers or some of the temp drivers working
19 in what we sometimes call an "extra board capacity"?
20 A Umm --
21 Q Do you know what an extra board is?
22 A Yeah. I mean, I'm familiar with the concept. I mean, we
23 really don't have an extra board.
24 Q Right.
25 A I mean, we know how many routes that we have and how many

1 drivers we have and then if there's a difference, then that's
2 how many that --
3 Q If all your regular drivers, regular road drivers are busy
4 on a particular day, and you have unplanned extra loads, who do
5 they call for that?
6 A Either a lease driver or a third party.
7 Q Right. And who makes that -- that decision which one to
8 go to, in your experience?
9 A I mean, Frank would. I don't --
10 (Pause.)
11 MR. NAUGHTON: Thank you, Mr. Dibiase. No further
12 questions.
13 CROSS-EXAMINATION
14 BY MR. MEYER:
15 Q You've been in the Kutztown facility since October 5th of
16 this year?
17 A Yeah. Whatever day the 5th fell on, I believe that was a
18 Monday.
19 Q Okay.
20 A Yes.
21 Q So basically two and a half months?
22 A Correct, yes.
23 Q Long enough to call it Kutztown, not Cutstown.
24 You -- all right, so you testified that, just diving right
25 in, that there is for vacation requests there is like a Day

1 Planner that --
2 A Yeah, like a Day Planner and --
3 Q And where is that Day Planner?
4 A In the office where Frank sits.
5 Q Okay. Well, I'll get to the office in a minute. But
6 Frank has it, right?
7 A I mean, he doesn't carry it around with him.
8 Q Right.
9 A You know, it's in the -- it's in the office there.
10 Q Okay. Well, he -- and this is just a -- is this a UPS
11 official document, or is this just his own Day Planner that he
12 writes into?
13 A Yeah, it's just a -- you know, you could go to Staples and
14 buy.
15 Q Okay.
16 A Yeah, a spiral, you know --
17 Q Does he decide who gets vacation?
18 A I mean, we -- if the driver has -- I mean, the company,
19 you have a set, you know, vacations.
20 Q Right.
21 A I mean, he doesn't -- he doesn't -- you know, he doesn't
22 say, you have X-number of days, you have X-number of days;
23 that's set by the company.
24 Q Does he check to see if someone has enough days?
25 HEARING OFFICER O'NEILL: If you know.

1 THE WITNESS: I -- I couldn't answer that.
2 MR. MEYER: Okay.
3 BY MR. MEYER:
4 Q It's not his role to keep track of the number of days?
5 A I wouldn't say it's his role, no.
6 Q Okay. Does he -- has he ever denied someone vacation -- a
7 vacation request?
8 A Not to my knowledge.
9 Q Said that too many people are going out the same week or
10 anything like that?
11 A I don't think he's faced that. I mean --
12 Q Okay.
13 A -- I couldn't tell you for sure.
14 Q Well, you haven't been there that long.
15 A Yeah, exactly.
16 Q But you've never seen him deny --
17 A No.
18 Q All right. Now, he does decide how to dispatch drivers,
19 right?
20 A Yes.
21 Q Now, each driver -- isn't it true that each driver has --
22 each of the permanent drivers has a route they usually do?
23 A Yeah, that's what I've observed from the beginning.
24 Q Right.
25 A You know, how that was started I couldn't tell you.

1 Q And isn't it true that in deciding how to -- when he --
2 when he assigns the different routes, what Frank does is he --
3 he looks to see how much is being done by each driver's
4 standard route, and if there's some extra, then he shifts it
5 around and finds another driver to cover the extra?
6 A Correct, because he has to be cognizant of hours of
7 service for that driver.
8 Q Right. Right, the DOT regulations --
9 A Yes.
10 Q -- that cap the amount of time the driver can drive?
11 A Um-hmm.
12 Q So if there's too much on one route he has to -- he has to
13 split that off and give it to someone else?
14 A Or they'll have to -- or they'll have to, you know, lay it
15 over into the sleeper --
16 Q Right.
17 A -- sleeper cab.
18 Q Okay.
19 A Yeah.
20 Q So but when he's making the assignment it's simply looking
21 at the amount of work that's done, looking at everyone's
22 standard route and trying to balance it out; is that correct?
23 HEARING OFFICER O'NEILL: If you know.
24 THE WITNESS: Repeat that one more time, please.
25 BY MR. MEYER:

1 Q Isn't it true that in assigning the work, he looks at the
2 amount of work that needs to be done and he looks at the
3 standard route that everyone has and he tries to two balance?
4 Meaning he shifts people around if the standard routes they do
5 don't cover everything, and if someone is, you know, has --
6 their standard route doesn't have enough deliveries to justify
7 the whole thing they can maybe cover something over here?
8 A Yes. Some drivers have two routes.
9 Q Right. So but isn't it true that what he does is he looks
10 at the amount of work that needs to be done according to AAP,
11 and then he -- he looks at what drivers' standard routes are
12 and tries to balance the two out? Tries to --
13 A Yeah, he has X-number of loads, X-number of drivers --
14 Q Right.
15 A -- match them up.
16 Q That's right. And this driver always does this route, so
17 we -- we put all those on that one. And this driver always
18 does this route. And then after he puts everyone on their
19 regular route he sees what's left and then he just, sort of,
20 shifts it around and figures out how many temps have to pick up
21 the slack and stuff?
22 A Yeah. I wouldn't say always, but that's the pattern.
23 Q Right. Okay. Now, isn't it true that he runs the
24 schedules by you after he makes them?
25 A The schedules for the drivers?

1 Q The assignments, yeah.
2 A No.
3 Q Does he ever run them by Monte?
4 A I couldn't answer to that.
5 Q Now, you mentioned someone named Rick Haas?
6 A Yeah, he -- he's called an area transportation manager,
7 but essentially he -- he's an Advance Auto employee.
8 Q Right.
9 A Kind of acts as like a liaison between the warehouse and
10 UPS.
11 Q Okay. So the warehouse is owned or leased; you're not
12 sure what the ownership is of AAP; correct?
13 A Correct. Yeah.
14 Q And Haas is an AAP employee?
15 A Yes.
16 Q But he's on the site and he's the one who interacts with
17 the UPS people?
18 A Yes. It was understanding that actually was in the UPS
19 office at one time.
20 Q Okay. But at this time he doesn't work for UPS?
21 A No. No. No. No.
22 Q Okay. A couple times you referred to "Advance."
23 "Advance" is AAP, right?
24 A Advance Auto Parts, yes.
25 Q Right. Okay. Now, I was a little confused about

1 Frank's -- when -- how -- deciding that temps are needed. Is
2 he simply filling up the routes, the -- filling the work --
3 well, assigning the work to the regular drivers and figuring
4 out what's left and that's what makes him decide whether to
5 call temps?
6 A Yeah. Once again, you have X-number of routes.
7 Q Right.
8 A If you only have X-number of company drivers and then
9 there's 10 left, then you have to -- you have to cover those 10
10 routes.
11 Q Right. And does he -- does he discuss with anyone else
12 about calling temps?
13 A When I first arrived, no. I mean, and as time has gone
14 on, whether we utilize Coyote or -- Coyote is utilized in --
15 because I came from the -- the asset life and I can send an
16 email to that group --
17 Q Okay.
18 A -- to give that assistance.
19 Q And so you actually are the one who contacts Coyote?
20 A Yes. In an email. Frank will send me what he needs
21 coverage with.
22 Q I see.
23 A Like, so Frank would say, I need route whatever, he'll
24 send a snippet from the schedule, through the snipping tool,
25 send it over to me and then I just send out the email to -- to

1 the group.
2 Q So, in fact, what he does is after he assigns to the
3 permanent drivers, then he notes how much work is needed --
4 still needed and he sends it off to you and says this is what I
5 need covered some other way; correct?
6 A Only in the case of Coyote. I mean, if it's like -- if
7 it's like --
8 Q okay.
9 A -- if it's Yesik, then he -- he'll take care of that. Or
10 if, like I said, we'll have a repertoire of lease drivers, and
11 that he can go down that list and call them to see if they're
12 available.
13 Q How do you know whether to go with Yesik or Coyote?
14 A I don't know how he makes that decision.
15 Q Okay. Now, you said that Frank has a company supplied
16 cell phone?
17 A Um-hmm. Yes.
18 Q But the other drivers do have a phone that comes with
19 their truck; correct?
20 A Yeah, it's attached to that tractor, yes.
21 Q Right. And you also said Frank only got a cell phone when
22 you came; is that right?
23 A Yeah. There was no -- see, we're -- we were in the --
24 we're switching from Sprint to Verizon; so like the manager's
25 cell phone, like all of those phones were -- weren't really

1 active. So when I came, they ordered two phones; one for
2 myself and one for Frank.
3 Q And that was the first time he got one?
4 A That he got one?
5 Q Yeah.
6 A To my understanding, yes.
7 Q Okay. And -- okay. And before that, did he use his
8 personal cell phone? You don't know?
9 A I don't know.
10 Q Okay. Now, about Frank's office, you said he's in the
11 operations manager's office.
12 A Yes.
13 Q Well, where does Monte sit?
14 A He sits in my office.
15 Q So you share an office with Monte?
16 A Yes.
17 Q Because my understanding is that -- that Frank now works
18 in the lunchroom.
19 A That has taken place since I would say a week and a half
20 now.
21 Q Okay. But now he works in the lunchroom?
22 A He's -- he's in that -- he actually -- I don't know if he
23 chose to sit there. I mean, he could sit in the office, there
24 is a terminal or a computer there that he could sit at, but he
25 has been temporarily displaced due to the number of people that

1 have come in.
2 HEARING OFFICER O'NEILL: What do you mean "number of
3 people that have come in"?
4 THE WITNESS: UPS. You know, UPS folks that have --
5 HEARING OFFICER O'NEILL: UPS supervisor -- UPS managerial
6 people?
7 THE WITNESS: Yeah, that are not -- that are not specific
8 to the operation.
9 HEARING OFFICER O'NEILL: Okay.
10 BY MR. MEYER:
11 Q So who's Mark Grisham?
12 A Mark Grisham is -- I can't remember. You know, Mr. Lovely
13 testified. I don't remember his exact title, operations
14 support, something.
15 Q Isn't it true he's in the operations manager's office?
16 A He did sit there for two or three days. That's when the
17 initial displacement took place. And then from then we've had
18 a packed house there.
19 Q Okay. And isn't it true that -- I know you haven't been
20 here that long, or there that long, but isn't it true that
21 Frank doesn't have a designated work space and then works
22 wherever there is a free space for him to work?
23 A No. I mean, that office is where he's sat since day one
24 that I've been there.
25 Q Well, except for when he got displaced, right?

1 A Yeah. Yeah. But I mean that -- that office was where he
2 worked every day.
3 Q But it's called --
4 HEARING OFFICER O'NEILL: Since October? Since you came
5 in October?
6 THE WITNESS: Since I've come there. I mean, he -- from
7 the day one I showed up, I mean, he was in that office.
8 BY MR. MEYER:
9 Q And it's called the operations manager's office?
10 A I mean, if you need to --
11 Q Right.
12 A If you need to put a title on it, I mean, that's the
13 manager's office. There's two offices side-by-side; one for
14 the manager and one for the supervisor.
15 Q Right. And you haven't had a permanent operations manager
16 since you came?
17 A No, not since I came. It's my understanding, like I said,
18 I think it was around July.
19 Q Okay. And there was a period before you came that you had
20 not even an acting operations manager or onsite supervisor?
21 A I couldn't -- I mean --
22 Q Yeah.
23 A -- to my understanding that's -- I mean, I wasn't there;
24 so.
25 Q And you weren't involved in setting the hours that he

1 worked?
2 A (No audible response.)
3 Q You should say "yes" or "no."
4 A Oh, I'm sorry, no. I keep forgetting about the
5 microphone. Sorry.
6 Q Or when he's allowed to take lunch; you didn't set up any
7 of it?
8 A No.
9 Q And you weren't around when he started his current role.
10 Do you know what his different jobs he held at UPS were?
11 A I mean, he's been acting in the function that he has since
12 I've been there. Prior to that, I can't -- you know, I can't
13 attest.
14 Q Officially, Frank has three different hats, right?
15 He's -- he's a driver -- a road driver; he's a safety, whatever
16 it's called -- a certified safety instructor; and a dispatcher,
17 right? He has all three?
18 A Yeah, he has all three titles. His primary function is
19 dispatch.
20 Q Right. But he --
21 A Carl -- Carl and Greg take the safety portion
22 predominantly.
23 Q Okay. So Carl David and Greg Falcone are two road drivers
24 who are also certified safety instructors, right?
25 A Correct.

Q Okay. So while -- while Frank has three hats, they only have two, right? They have the certified safety instructor and road driver, right?

A I mean, I guess if you want to call it -- I mean, we all have three hats.

Q Okay. But they can all drive if they need to?

A Yeah. They all three have a CDL.

Q Right. And they all keep up their CDL?

A Yeah. I mean, we have -- I mean, Mark Grisham has a CDL, as well. I mean, he's a -- he's a regional level, so I mean, a CDL doesn't -- you know, there's other folks that have CDLs that aren't classified as road drivers.

Q Well, do they -- do they have to take their space and visibility ride?

A I -- I couldn't answer that.

Q Okay. But -- but Frank has -- does have to do a space and visibility ride every six months?

A Yeah. He just did one I guess last week.

Q Right.

MR. MEYER: I guess I'll mark this as Petitioner 1. Is that what I call mine?

HEARING OFFICER O'NEILL: Um-hmm.

(Petitioner's P-1 marked.)

BY MR. MEYER:

Q Okay, do you recognize this document?

1 A Yes.
2 Q Okay. And where is the date on it? Oh, yes, the second
3 line is dated the 18th. Do you see that? Friday, right? Is
4 that right?
5 A Yes. Looks like it. Yeah, it says the 18th on it.
6 Q Okay. Now, this is a test that needs to be taken by all
7 the drivers, right?
8 A Yeah, I wouldn't call it a "test." This is a requirement
9 of the job.
10 Q It's to make sure you're still competent at driving?
11 A Yes. Yes.
12 Q Right. And so you -- it includes an inspection of the
13 vehicle and also a driving test; is that right?
14 A Yeah. They do -- they ride along -- the -- either Greg or
15 Carl would ride along with the driver.
16 Q Right. And who tested Frank in this case?
17 A Greg Falcone.
18 Q Okay. And his name is listed under "Trainer" in the upper
19 right?
20 A That's correct.
21 Q Okay. And these -- these are done every six months for
22 every driver?
23 A They're supposed to, yes.
24 Q And obviously Frank had a -- does these every six months?
25 MR. NAUGHTON: Objection, it assumes --

HEARING OFFICER O'NEILL: If you know. If you know.

THE WITNESS: Yeah, I don't know. I don't know, this is the first one I've ever seen for Mr. Cappetta.

MR. MEYER: Okay.

BY MR. MEYER:

Q Now --

HEARING OFFICER O'NEILL: Do you want to move for admission?

MR. MEYER: Yeah, I'll move for admission.

HEARING OFFICER O'NEILL: Okay, any objection?

MR. NAUGHTON: (No response.)

HEARING OFFICER O'NEILL: Hearing no --

MR. NAUGHTON: Just a moment, please.

HEARING OFFICER O'NEILL: Oh.

(Pause.)

MR. NAUGHTON: No, no objection.

HEARING OFFICER O'NEILL: It's received.

(Petitioner's P-1 received.)

BY MR. MEYER:

Q Okay, now at one point you talked about how critical dispatching is. Whose doing dispatching today?

A Well, the -- the schedule is already planned.

Q Okay.

A So I mean, the driver already knows, you know, what -- what his route's going to be for today.

1 Q Do they -- do they schedule the entire week? Or is it a
2 day by day schedule?
3 A I mean, it -- I guess essentially it's day by day, but I
4 mean, based on the ship and pull we have an idea of -- I mean,
5 a basic foundation for the week.
6 Q Okay. And then -- so whose -- would Frank normally be
7 assigning the routes for the next day? Is that how it works?
8 A Correct, yeah.
9 Q So who's going to -- how are the routes going to be
10 assigned tomorrow if Frank's been sitting behind me all day
11 today?
12 A I guess Monte is trying to figure it out.
13 Q Okay. Is that what happens if Frank goes away on vacation
14 or --
15 A Well, I don't -- I can't really attest to that because,
16 you know, the only time that he's -- you know, he went -- that
17 he left was for a weekend and he was able -- he was able to
18 still perform his job duties via the laptop.
19 Q Okay. All right. Now, does -- does Mr. Cappetta fill out
20 DOT logs?
21 A Until recently I saw him filling out logs. I didn't know
22 he was required to keep one.
23 Q Okay. Do you know who he turns them into?
24 A I don't know if he's -- the last -- when he was last
25 requested to fill them out, I don't know if he's turned those

1 in yet; so.
2 Q Okay.
3 A But I saw him working on them.
4 Q You have seen him fill it out?
5 A Yeah, I saw him working on his.
6 Q Okay. So his time is -- is entered into DOT logs, right?
7 A As off-duty.
8 Q Right. Now, you talked about he paid -- he gets paid a
9 straight hourly wage; I think you said 17.25 an hour?
10 A I believe so, yes.
11 Q Yeah. And then he also gets a supplement of 7.50 on top
12 of that?
13 A Correct.
14 Q Now, the supplement, isn't it true that's for being a
15 certified safety instructor?
16 A I don't -- my understanding is that is basically when
17 you're not doing drive -- driving, you're -- that is to help
18 you get compensated up to a level of which you would get when
19 you're driving doing routes.
20 Q But that's the -- the 24.75 total, that's the same rate
21 that Greg Falcone gets?
22 A I don't have that answer.
23 Q Do you know whether that's what Carl David gets?
24 A I don't know.
25 Q Okay. How is it that you know Frank's pay rate but not

1 the other two employees?
2 A The -- it's based on -- that -- Carl's -- well, this would
3 be an assumption, but based on the time at which they were
4 hired, they should be at the same rate.
5 Q Okay.
6 A Because they were both, you know, '09 at some point in
7 time, I believe, is when they both came. So that would be --
8 they should be at the same rate.
9 Q Right. So but their -- you think that he's paid
10 comparably to Mr. Falcone because they came in at the same
11 time?
12 A No, Frank and Carl.
13 Q Oh, I see.
14 A Yeah. I don't know when Greg came to the operation.
15 Q Okay. Then regarding complaints by AAP customers or
16 whatever you call -- the stores; they would come to your
17 facility via Rick Haas I think you said, and that since you
18 deal with it now that you're there, but you understand before
19 that Frank would deal with them?
20 A Correct. Yes. And prior to that, you know, he was -- he
21 was the only one there; so now as time has progressed it's kind
22 of a joint task. You know, some -- in rare cases I guess a
23 store could call the operations itself, but usually they go
24 through some form of email to a district leader, which then
25 eventually gets to Rick Haas, and then that -- then Rick will

1 send out an email. And now he has, to help improve
2 communication, has several people included on that email.
3 Q And you're one of those people?
4 A Yes. Yes.
5 Q Right. And in fact, Frank doesn't have the authority to
6 change procedures in the facility if there's some problem,
7 right? He would have to go through you?
8 MR. NAUGHTON: Objection, the question is vague.
9 MR. MEYER: Okay.
10 THE WITNESS: Yeah.
11 BY MR. MEYER:
12 Q If -- if in order to address the concerns of AAP, if they
13 wanted him to change some method of operation, he wouldn't have
14 the authority to do that?
15 A Nor would I.
16 Q Okay. You would have to send it up the ladder somewhere?
17 A Yeah. I mean, anything related to the change of the
18 operation, you know, I would -- we wouldn't have the authority
19 to make that change.
20 Q Now, when you hire new route drivers, new road drivers,
21 rather, there's a backing test and a road test --
22 A Um-hmm.
23 Q -- right?
24 Is a backing test just to test how they -- if they can
25 back up an 18-wheeler without smashing into something? Is that

1 the --
2 A And then you know, because in the yard there's a series of
3 trailers going all the way down, and so you -- they would
4 determine if he's able to park that trailer in-between two
5 trailers.
6 Q I see. To angle the trailer in, that's the backing --
7 A Yeah, to back it in. That would be one form.
8 Q Okay. And then the -- any of the certified safety
9 instructors can administer this test?
10 A Um-hmm?
11 Q Yes?
12 A Yes.
13 Q And when they administer the test, there -- are -- is
14 there a form they fill out?
15 A Yes.
16 Q And so on the form they're simply indicating whether the
17 person can back up skillfully and without making a mistake?
18 A Yeah.
19 Q Are there categories to grade applicants?
20 A I can't -- you know, I can't remember what -- what's
21 actually on the form, but you know, there's places to indicate
22 or make -- to make -- take notes.
23 Q Right. And so when they're filling out the form, those
24 evaluations are what determine whether someone passes or fails?
25 A Yeah. Based on their observation of that driver --

1 Q Right.
2 A -- then they will then notate that on the form and then --
3 Q Right. Is there a point system built into the form? Do
4 you have a certain number of mistakes that you can make before
5 you hit the failure --
6 A I'm not familiar with that.
7 Q Okay. So you -- have you seen this form?
8 A Oh, I've seen the form, yes, but I -- you know, I can't
9 remember to the --
10 Q Okay.
11 A -- what's exactly on them.
12 Q But the form is primarily for them to note their
13 observation of how the applicant's performing?
14 A Yeah. Their observation of the --
15 Q Right.
16 A -- of that driver, yes.
17 Q And based on those observations, the applicant either
18 passes or fails the test?
19 A Correct.
20 Q And if they fail the test the bottom line is they're not
21 going to get hired, right?
22 A Yeah.
23 Q Okay. But Frank isn't the only one who can do this test?
24 A No. Like I mentioned, I mean, Greg -- Greg and Carl
25 predominantly tackle that role.

1 Q Okay. And that's Greg Falcone --
2 A Falcone, yes.
3 Q -- and Carl David?
4 A Yes. And when Carl was on nights, that burden fell on
5 Greg predominantly.
6 Q Okay. But Carl was still a certified safety instructor?
7 A Oh, yes. Yeah, definitely.
8 Q He just wasn't in at a convenient time --
9 A Yes.
10 Q -- on the premises?
11 A Yes.
12 Q All right.
13 HEARING OFFICER O'NEILL: So there's the two tests that
14 an -- a person whose being considered for hire, it's the safety
15 check ride and the backing test? Those are the two tests?
16 THE WITNESS: Yes.
17 HEARING OFFICER O'NEILL: And there's a form for each of
18 them?
19 THE WITNESS: I don't know if it's one form or two forms.
20 HEARING OFFICER O'NEILL: Could we get a copy of that
21 form, if there are one or two; the safety check ride and the
22 backing form?
23 MR. LARKIN: I want a copy of --
24 MR. NAUGHTON: The safety check form, the road -- and the
25 road test and the backing test. My hunch is it's one form, but

1 I don't know.
2 HEARING OFFICER O'NEILL: One form? It's either one or
3 two forms, yeah.
4 MR. LARKIN: Yeah, we'll look into that.
5 BY MR. MEYER:
6 Q So how -- in your day-to-day work, how much contact do you
7 have with the other distribution centers?
8 A I mean, I would say eight a day, you know, we're on the
9 phone to each other, you know, day-to-day. But you know,
10 especially when we have the drivers that are visiting from
11 other locations and we have a lot more interaction in that
12 case.
13 Q You mean the temporary assignment, the people who come?
14 And what type of interaction do you have? Is that about
15 arranging to bring them over? Or --
16 A Yeah. So typically, you know, that location, you know,
17 they might make the travel arrangements or we might make them.
18 It just varies. There's no, like, set -- set, you know, that
19 operations going to make them or we might make them. It's kind
20 of joint, you know --
21 Q Okay. But other than the arranging for those temporary
22 replacements, your distribution center basically can operate in
23 its own territory without worrying about the other centers?
24 A No. Because it's kind -- like, there's -- I don't know
25 what the -- there's something special about DC30, as far as on

1 the Advance network. I don't know what it is.
2 HEARING OFFICER O'NEILL: What's "DC30"?
3 THE WITNESS: DC30 is the DC in Kutztown.
4 MR. NAUGHTON: The what?
5 THE WITNESS: Kutztown.
6 MR. NAUGHTON: Couldn't hear what you said.
7 HEARING OFFICER O'NEILL: It's another name for Kutztown?
8 THE WITNESS: It's just Advance Auto Parts Distribution
9 Center 30; it's what they call it.
10 HEARING OFFICER O'NEILL: Oh, okay. So -- so --
11 THE WITNESS: That's the full long --
12 HEARING OFFICER O'NEILL: That's the Kutztown auto --
13 Advance Auto warehouse called --
14 THE WITNESS: Correct.
15 HEARING OFFICER O'NEILL: -- A --
16 THE WITNESS: AAP.
17 HEARING OFFICER O'NEILL: Oh, CROSS-EXAMINATION
18 (continued)30? That's Kutztown?
19 THE WITNESS: Yes.
20 MR. NAUGHTON: I thought I heard him say "CROSS-
21 EXAMINATION (continued)30."
22 THE WITNESS: Yes.
23 MR. NAUGHTON: Am I -- that's what --
24 THE WITNESS: It's distribution center.
25 HEARING OFFICER O'NEILL: Distribution center.

1 THE WITNESS: Yes.
2 HEARING OFFICER O'NEILL: Yeah.
3 MR. NAUGHTON: Okay.
4 THE WITNESS: So like for example, like on new stores,
5 like -- like the Enfield DC, because it's less than two years
6 old, it can't supply new store openings, so then our DC will
7 then supply it. So there is actually a lot of -- I wouldn't
8 say a lot, but there is communication between -- between DCs in
9 that case.
10 CROSS-EXAMINATION (continued)
11 BY MR. MEYER:
12 Q Like between you -- are the drivers communicating between
13 them?
14 A No, the driver -- I mean, they don't call each other up,
15 no.
16 Q Now, Enfield is the closest facility to you, right?
17 A I don't know the miles between. I would -- I would assume
18 that maybe --
19 Q Okay.
20 A I can't --
21 Q Have you been to the other facilities?
22 A No. I've only been here, you know, two and a half months;
23 so.
24 Q Okay.
25 MR. MEYER: All right, no further questions.

1 HEARING OFFICER O'NEILL: I have questions.
2 Have you, since you've been there, sat in on any
3 interviews of new hires?
4 THE WITNESS: For drivers?
5 HEARING OFFICER O'NEILL: For drivers.
6 THE WITNESS: Yes.
7 HEARING OFFICER O'NEILL: Yeah. And about how many?
8 THE WITNESS: Maybe two.
9 HEARING OFFICER O'NEILL: Two.
10 THE WITNESS: I don't know.
11 HEARING OFFICER O'NEILL: Okay. And we heard earlier
12 testimony that the initial hiring goes through corporate and
13 they send -- I guess, do they send -- what do they send you,
14 the résumé or?
15 THE WITNESS: Yeah. I guess essentially when someone
16 applies online, it goes through that -- that database, and then
17 they will then filter it to the appropriate location in which
18 that applicant applied for.
19 HEARING OFFICER O'NEILL: Okay. And then do you phone
20 that applicant, say, can you come on in on this day at this
21 time? Or how does that happen?
22 THE WITNESS: That's how -- I mean, I haven't personally
23 actually done that.
24 HEARING OFFICER O'NEILL: Okay. And did -- how did it get
25 arranged, the two interviews that you sat in on?

1 THE WITNESS: To be honest with you, I don't know. You
2 know, it just happened that I was there when it happened.
3 HEARING OFFICER O'NEILL: Okay. And did anyone else sit
4 in on the interview?
5 THE WITNESS: Yes.
6 HEARING OFFICER O'NEILL: Who else?
7 THE WITNESS: Paul Dalessandro was on -- he sat in on two.
8 And there's been Monte Copeland. And then that's all I can
9 think of outside people that --
10 HEARING OFFICER O'NEILL: Um-hmm.
11 THE WITNESS: -- sat in.
12 HEARING OFFICER O'NEILL: And who made the decision -- I
13 know you are relatively new, I don't know, is that -- is that
14 something that's -- one of your job responsibilities is to
15 interview the new applicants?
16 THE WITNESS: I'm not sure if that's -- that will become
17 one of mine, but as of right now that's not in -- in my role.
18 HEARING OFFICER O'NEILL: No. So you just happen to be
19 sitting in on the interviews?
20 THE WITNESS: Um-hmm. Yeah, it's kind of some exposure to
21 that process.
22 HEARING OFFICER O'NEILL: Okay. So were you the decision
23 maker on whether or not to hire the persons?
24 THE WITNESS: No. I mean, once -- I mean, I guess the
25 ultimate decision is can they drive a tractor or not, really.

1 I mean, they're skill level.
2 HEARING OFFICER O'NEILL: Okay, I don't have anything else
3 right now. Anybody else?
4 MR. NAUGHTON: Yes, I have some.
5 REDIRECT EXAMINATION
6 BY MR. NAUGHTON:
7 Q Mr. Dibiase, would you take a look at Petitioner's Exhibit
8 1, the space and visibility ride form? Would you look at
9 the -- look at with me in the upper left hand corner, do you
10 see a date for the -- the second line down under "Operation,"
11 do you see a date?
12 A Yes.
13 Q The "12/18/2015."
14 A Yes.
15 Q That was the Friday before this hearing?
16 A Correct. Yes.
17 Q Okay. And then do you see the time of the -- the start
18 time and the finish time on the right side of that?
19 A Yes.
20 Q What time did it start?
21 A 5:00 p.m.
22 Q And what time did it finish?
23 A 6:30.
24 Q Okay. Do you know about how long a typical S&V ride
25 lasts?

1 A It could be from one to two hours or more.
2 Q Is there any schedule at Kutztown -- is it's Cootstown
3 (ph) or Cutstown (ph)?
4 A I --
5 HEARING OFFICER O'NEILL: Kuhtstown (ph).
6 THE WITNESS: I guess apparently I've been --
7 MR. NAUGHTON: Cootstown (ph)?
8 THE WITNESS: -- pronouncing it wrong, too.
9 MR. NAUGHTON: It's neither; it's not Coots? Kuhts.
10 HEARING OFFICER O'NEILL: Kuhts.
11 MR. NAUGHTON: Okay.
12 BY MR. NAUGHTON:
13 Q Do you know if there's a schedule at Kutztown for S&V
14 rides?
15 A There should be. There should be a schedule, yes.
16 Q And do you know who prepares the schedule?
17 A You know, I don't know. I mean, I could -- from what I
18 can speak to, is that recently we had another safety trainer
19 come from another location down in Florida to help get us
20 caught up on -- on S&V rides because we were behind. So Carl
21 made up a schedule to plan out how we were going to accomplish
22 or to accomplish getting caught up on the S&V rides.
23 Q Do you know whether anybody put Mr. Cappetta on the
24 schedule for 5:00 on a Friday night for an S&V ride?
25 A I didn't see that schedule; so --

1 Q Okay. In your experience, how common is it for drivers to
2 be getting S&V rides at Friday night -- on Friday night at 5:00
3 p.m.?
4 A I don't know about Friday night at 5:00 p.m., but I mean,
5 they could happen at any time just based on the availability or
6 the route that they're on.
7 Q Okay. Had you ever seen a schedule for S&V rides?
8 A I have not, no. I just know that one was created recently
9 when -- when Kevin Burgess came from Lakeland to help get us
10 caught up.
11 Q How long ago was that that it was recently?
12 A Oh, that was just last week. We brought him in
13 specifically to help get the operation caught up.
14 Q Last week, were you at the Kutztown facility?
15 A Last week? Yes.
16 Q Yeah. And do you know Mr. Larkin on my right? Have you
17 met him before today?
18 A Yes.
19 Q All right. And Wednesday, Thursday and Friday of last
20 week, what office was he parked in?
21 A He -- he's -- he displaced or took over the operations
22 manager's office.
23 Q Okay. And how many days was he there to your knowledge?
24 A I think that -- that was Wednesday -- just three days, I
25 believe.

1 Q Okay.
2 A The days have become blurred at this point.
3 Q Okay. And before last Wednesday, have you ever seen Mr.
4 Larkin before in that office?
5 A No, I had not.
6 Q Had you ever seen him or talked to him in your life
7 before?
8 A No.
9 Q Have you ever met him before?
10 A Never met him before.
11 Q Okay. You were asked about whether Mr. Cappetta was
12 filling out DOT logs and you said you had recently seen him
13 doing so; correct?
14 A Correct.
15 Q When was the -- when did that happen, when you saw that?
16 A I mean, it was in two -- the last two weeks.
17 Q Okay. Do you -- I think you were asked by Union counsel
18 whether you actually knew what Carl's and Greg's pay rates
19 were. And do you know?
20 A I don't know the exact, I can only assume on a -- on --
21 based on the timeframe at which they were hired, which would
22 then correspond to it.
23 Q So beyond that you wouldn't know for sure?
24 A No.
25 Q Okay. You were asked questions about vacation decisions

1 and I -- if I understood your testimony correctly, you answered
2 counsel's questions by saying you didn't believe that Mr.
3 Cappetta decides how many days of vacation a driver gets per
4 year, that's set by the company based on years of service,
5 right?
6 A Uh --
7 Q Do you understand my question?
8 A Yeah. I mean, the company sets that.
9 Q Right. What role, if any, did Mr. Cappetta play in
10 determining when during the year or at what point in the week
11 or what point a month an employee could take vacation or a day
12 off?
13 A I -- I think the direct -- the employee requested the day.
14 Q Right. And how does that -- what -- how does Mr. Cappetta
15 get involved in that process?
16 A He would just notate it into the planner book, and then
17 when you go to make the schedule you would use that to
18 reference whether they could schedule a driver or not.
19 Q Do you have any knowledge or information one way or the
20 other whether Mr. Cappetta would tell a driver, I can't fit you
21 in this week but you can take the vacation next week or the
22 following week? Or if he had any input into that?
23 A I couldn't answer that.
24 Q Okay. You were also asked if regular drivers always do
25 the same route. Do you know whether the regular road drivers

always do the same route or not?
A Well, like I mentioned -- well, I couldn't say always. I mean, there's a pattern that certain drivers do set routes. A pattern exists, yes.
Q All right. And then is -- are there other drivers who do not necessarily do the same route every week?
A That's correct.
Q Okay. So just to be clear, I -- you have clearly testified that some drivers will often -- often or always take the same route, but not every driver takes the same route every day or every week; correct?
A Correct.
Q When Mr. Cappetta is preparing these dispatch assignments, who, if anybody, is giving him direction to do it -- how to do it?
A I mean, that's -- that's his function as the dispatcher, is to make those decisions.
Q So what's the answer? Who other than Frank is deciding those things?
A There wouldn't be anyone else in that -- in that role.
Q Where is the driver log kept, the DOT driver log?
A Well, we have a system called Rapid Log, which would take the paper logs and scan them and make them electronic copy. But now we are transitioning to electronic logs or e-logs.
Q Where -- where, for example, would Mr. Cappetta's driver

1 log be maintained?
2 A He would submit a paper log to -- one of the admins would
3 then scan it into the -- or actually, in this case now, she
4 manually builds it into the Zeta database. Rapid Log is no
5 longer.
6 Q All right. So I'm trying to understand; if you saw Mr.
7 Cappetta filling out a DOT hours log for a driver, was he
8 writing it out with a pen and filling out a paper form or was
9 he doing it on a computer?
10 A No, on the paper form.
11 Q Okay. What happens to that paper form after it's filled
12 out?
13 A He would then turn them in to, there's like a little bin
14 on the wall for driver logs or he could have handed them to
15 Christina, who is the -- Christina's the admin who would then
16 input it into the -- into the program.
17 Q Okay. So the procedure is -- as recently as whenever you
18 saw Frank filling out a log, is he would fill out a paper form
19 with a pen or a pencil, right?
20 A Yeah.
21 Q And then he would put it in a slot on a wall someplace;
22 correct?
23 A I mean, I never saw him do it, so you know, but it -- that
24 would be the process. Or to hand it to Christina --
25 Q Right.

1 A -- and input it -- she --
2 Q Then at that point Christina would then input it into an
3 electronic system?
4 A Yes.
5 Q Okay. What happens to the paper form after that, do you
6 know?
7 A It's saved into a file cabinet, and there's like a
8 retention of -- I don't remember the exact retention for those
9 logs.
10 Q But more than a year, right?
11 A I don't know the retention. I mean, it's more than a
12 month, obviously.
13 Q Okay. That's -- in other words, if it were a few weeks
14 ago it might -- the paper log might still be there; correct?
15 A Oh, yeah. It should be there and should also be into the
16 system by now.
17 Q All right. Do you know if Frank has access to those --
18 those file cabinets in the course of his job?
19 A Oh, yeah.
20 MR. NAUGHTON: Give me just one moment?
21 HEARING OFFICER O'NEILL: Um-hmm.
22 (Pause.)
23 MR. NAUGHTON: Thanks, Mr. Dibiase, nothing further.
24 HEARING OFFICER O'NEILL: Okay. I've got one question.
25 THE WITNESS: Yes.

1 HEARING OFFICER O'NEILL: Since you've worked there, of
2 your company drivers, UPS drivers, I don't mean the ones from
3 the outside temp agencies, of company drivers what percentage
4 are from another -- another UPS location?
5 THE WITNESS: Oh, we just have -- we've had the six that
6 have been visiting.
7 HEARING OFFICER O'NEILL: Just the six since you -- the
8 whole time you've been there?
9 THE WITNESS: Yeah. One -- one -- you know, the numbers
10 have fluctuated. You know, when I first came it was fewer and
11 then it's gotten as high as up to six.
12 HEARING OFFICER O'NEILL: Uh-huh. And how about when you
13 first started, do you remember how many there were?
14 THE WITNESS: I don't know.
15 HEARING OFFICER O'NEILL: Okay. That's it.
16 Anything else?
17 MR. MEYER: No.
18 HEARING OFFICER O'NEILL: Okay, you may step down.
19 (Witness excused.)
20 HEARING OFFICER O'NEILL: Do you have another witness?
21 MR. NAUGHTON: Not right now.
22 HEARING OFFICER O'NEILL: Okay, Petitioner?
23 MR. MEYER: Okay, I'm going to call Frank.
24 MR. NAUGHTON: Can I request a five minute bathroom break?
25 HEARING OFFICER O'NEILL: Sure.

MR. MEYER: Yes.

MR. NAUGHTON: Awesome.

HEARING OFFICER O'NEILL: Off the record.

(Whereupon, a brief recess was taken.)

HEARING OFFICER O'NEILL: Back on the record.

MR. MEYER: Frank Cappetta.

HEARING OFFICER O'NEILL: Have a seat and then state your full name and spell your last name.

MR. CAPPETTA: Frank Cappetta, C-A-P-P-E-T-T-A.

HEARING OFFICER O'NEILL: Okay. Can you raise your right hand?

(Whereupon,

FRANK CAPPETTA,

was called as a witness by and on behalf of Petitioner and, after having been duly sworn, was examined and testified as follows:)

HEARING OFFICER O'NEILL: Okay.

MR. MEYER: Okay, are we ready to proceed?

HEARING OFFICER O'NEILL: Yes.

MR. MEYER: Okay.

DIRECT EXAMINATION

BY MR. MEYER:

Q Mr. Cappetta, are you currently employed?

A Yes.

Q Who do you work for?

1 A UPS Freight Truckload.
2 Q And how long have you worked for UPS Freight Truckload?
3 A June 2009.
4 Q That was your hire --
5 A Yes.
6 Q -- date?
7 A Yeah.
8 Q When were you -- when you were hired, what was your job
9 title?
10 A Road driver.
11 Q Is that still your title?
12 A Yes.
13 Q Do you have any additional titles?
14 A Dispatch, certified safety instructor.
15 Q Okay. Is that a single title, dispatch/safety instructor?
16 A It's like a three-hat deal.
17 Q Okay. So safety -- certified safety instructor is one
18 role you have?
19 A Yeah.
20 Q And then dispatch is another one top of that?
21 A Yes.
22 Q When did you become a certified safety instructor?
23 A 2011.
24 Q Okay. And how did your -- well, first, as a road driver,
25 what did you do?

1 A Delivered freight of all -- of Advance Auto Parts up
2 through the Northeast region.
3 Q Okay. And so were you always working in this facility in
4 Kutztown?
5 A Yes.
6 Q And all right, and then when you became a certified safety
7 instructor, what happened? How did your job change?
8 A Just like any other certified safety instructor, you give
9 S&V rides. You give -- you train drivers, new hires, and that
10 sort.
11 Q When you say "S&V rides," is that the safety and
12 visibility?
13 A Space and visibility --
14 Q Space and visibility.
15 A -- space and visibility ride.
16 Q Okay. And what is the space and visibility ride?
17 A It's -- it's how you rate a driver on their safety and you
18 know, how they perform behind the wheel of a truck. You're in
19 the passenger seat while they're driving.
20 Q Is that a DOT regulation?
21 A No, that's a UPS requirement.
22 Q It's a UPS requirement. How often are you required -- is
23 a driver required to --
24 A Every six months.
25 Q And how often do you get your S&V ride?

1 A Every six months.
2 Q Okay. You keep up your driver qualifications?
3 A Yes.
4 Q Do you have a CDL?
5 A Yes.
6 Q Do you wear a uniform when you work?
7 A Yes.
8 Q Is your uniform the same as the drivers?
9 A Yes.
10 Q Now, as a certified safety trainer, do you also do
11 training?
12 A Occasionally, yes.
13 Q Okay. And what type of training do you do? What
14 circumstances?
15 A Like, when for example, through -- during orientations, if
16 Carl is -- needs assisting -- needs some assistance, I help him
17 out with new drivers.
18 Q That's Carl David?
19 A Carl David, yes.
20 Q And he's another certified safety instructor?
21 A Yes.
22 Q All right. And then tell me about when did you add on the
23 dispatch hat?
24 A 2011-2012.
25 Q Okay.

1 A Right around that timeframe.
2 Q It was after you got the certified safety instructor?
3 A Yes.
4 Q But you became a dispatcher, not sure of the year?
5 A Not sure of the exact year. It was right around -- right
6 around the 2011-2012.
7 HEARING OFFICER O'NEILL: Can I interrupt for a second?
8 So for the past year, if you could give me a percentage of --
9 what percentage of your time you're doing dispatch work, what
10 percentage of your time you're doing safety, and what
11 percentage of your time you're doing road driver on average in
12 the past year?
13 THE WITNESS: I would say in the past year, 80 percent
14 dispatch, 10 percent safety, 10 percent road driver.
15 HEARING OFFICER O'NEILL: Okay. And with -- with respect
16 to the dispatch, we've heard some testimony that there's a
17 number of runs and they've got to have drivers assigned to
18 them. Can you take us through your day when you're working as
19 a dispatcher, what you do when you come in, and in particular I
20 want you to tell us -- we've heard, and if it's true, that
21 the -- that you've got to match up drivers and routes and if
22 that's one of things. So tell us what happens when you come
23 in? What do you do?
24 THE WITNESS: Well, the first thing I do is I look at the
25 schedule and I see it's -- like, it's based off of the senior

1 advisory partner and the weight and load, which is something
2 that comes from Advance Auto Parts.
3 HEARING OFFICER O'NEILL: Um-hmm.
4 THE WITNESS: So I take that data and it's basically --
5 basically the loads are already given to me, so it's like, hey,
6 this is Route ABC, these are the stops, these are the delivery
7 times, put a driver on it. So --
8 HEARING OFFICER O'NEILL: So for the most part, has
9 Advance figured out that there will be one route -- that this
10 route -- and do the routes have names or numbers or?
11 THE WITNESS: Yeah. Like it will be AAK320, it will be
12 Route 320, Route 147, Route 87, Route --
13 HEARING OFFICER O'NEILL: And is Route 320 about the same
14 every --
15 THE WITNESS: Every week.
16 HEARING OFFICER O'NEILL: -- every week?
17 THE WITNESS: Yes.
18 HEARING OFFICER O'NEILL: And let's -- well, we'll use 320
19 right now. Do you know off the top of your head what
20 geographic area that covers?
21 THE WITNESS: Route 320, I'm going to say New Jersey.
22 Four stops in South Jersey.
23 HEARING OFFICER O'NEILL: That's -- that's a South Jersey?
24 THE WITNESS: Yes.
25 HEARING OFFICER O'NEILL: So what you get from Advance

1 is -- tell me, does it come by computer? Does it come by
2 paper? And what does it say?
3 THE WITNESS: It comes in email form.
4 HEARING OFFICER O'NEILL: Uh-huh.
5 THE WITNESS: And it comes in the form of a -- the store
6 numbers are listed on the left hand side of the column, and it
7 says "Store 1234." It's four stores, for example.
8 HEARING OFFICER O'NEILL: Um-hmm.
9 THE WITNESS: Four-stop load.
10 HEARING OFFICER O'NEILL: Um-hmm.
11 THE WITNESS: Store 1234, Store 5678, four stores, be
12 there at this time, this time, this time and this time. The
13 delivery times are all set. It's all preset up by, you know,
14 Rick Haas, the transportation manager.
15 HEARING OFFICER O'NEILL: Uh-huh.
16 THE WITNESS: And I get them and I just assign a driver to
17 the load.
18 HEARING OFFICER O'NEILL: Okay. And how do you -- I know
19 that you have approximately 30 drivers who are Kutztown
20 driver -- UPS drivers. You also have about six visitors right
21 now from other facilities. And then we've heard some testimony
22 that there are some drivers that come from temporary -- from
23 agencies. So tell me how you decide which driver's going to do
24 which load?
25 THE WITNESS: Well, we have two people from out of town

1 right now, not six.
2 HEARING OFFICER O'NEILL: Okay.
3 THE WITNESS: And we have, I believe, 30 of our own
4 drivers right now.
5 HEARING OFFICER O'NEILL: Um-hmm.
6 THE WITNESS: And I'm not sure if it's 10 or 12 temp
7 drivers right now.
8 HEARING OFFICER O'NEILL: Okay.
9 THE WITNESS: But that's round -- round ballpark.
10 HEARING OFFICER O'NEILL: Okay.
11 THE WITNESS: But how do I decide? Basically let's say
12 for example I've got 29 or 30 UPS drivers, 25 of them already
13 know what they're doing all week pretty much.
14 HEARING OFFICER O'NEILL: And what --
15 THE WITNESS: Like --
16 HEARING OFFICER O'NEILL: -- what do you mean by that?
17 THE WITNESS: Like, Monday, Tuesday -- Monday through
18 Friday, I don't have to tell that one guy, hey, you're doing
19 this on Monday, Tuesday, Wednesday, Thursday or Friday; he
20 knows what he's doing all week.
21 HEARING OFFICER O'NEILL: And does he know that because he
22 does Route 320 Monday through Friday week after week?
23 THE WITNESS: Yes.
24 HEARING OFFICER O'NEILL: And are there -- and is that
25 true for all 30 of your regular drivers, or do some of them not

1 have --
2 THE WITNESS: No, the --
3 HEARING OFFICER O'NEILL: -- assignments?
4 THE WITNESS: -- guys that are, like the -- let's -- we
5 have 29 or 30 UPS drivers, the two guys from out of town and
6 then the temp drivers.
7 HEARING OFFICER O'NEILL: Um-hmm.
8 THE WITNESS: The 29 or 30 UPS drivers, like I said, a
9 majority of them know what they're doing already.
10 HEARING OFFICER O'NEILL: Um-hmm.
11 THE WITNESS: Now, the whatever's left over, you know, we
12 put let's say all the loads, you know, in a pile, and we
13 have -- we start picking them off. Okay, you already know what
14 you're doing, and whatever's left over, that's -- you know,
15 it's like a math problem; you just figure out, okay, this guy
16 does that load, that guy does this load, and you know --
17 HEARING OFFICER O'NEILL: So of the 30, about how many
18 have a regular route that they do Monday to Friday, week after
19 week?
20 THE WITNESS: I would say 23.
21 HEARING OFFICER O'NEILL: Twenty-three. Now, the other
22 seven, how do you figure out where they're going to drive? And
23 is that your job to figure it out, what route they're going to
24 drive?
25 THE WITNESS: It all depends on driver preference. If the

1 driver tells me, hey, I don't really like to go to New York
2 City, I don't like those areas, I don't like the bad
3 neighborhoods, okay. Okay, well, I'll put you here.
4 HEARING OFFICER O'NEILL: Um-hmm.
5 THE WITNESS: You know, I always check with the driver. I
6 don't just say, hey, you're doing this, you're doing that.
7 HEARING OFFICER O'NEILL: Um-hmm. And has it happened
8 that you have routes that maybe nobody wants --
9 THE WITNESS: Absolutely.
10 HEARING OFFICER O'NEILL: -- sort of the bottom?
11 THE WITNESS: Absolutely.
12 HEARING OFFICER O'NEILL: And how do you decide who's
13 going to do that?
14 THE WITNESS: When a guy tells me either (a) sorry, I
15 don't want to do that or (b) I'm not interested in doing that,
16 then I hand them over to upper management.
17 HEARING OFFICER O'NEILL: And who do -- who in upper
18 management?
19 THE WITNESS: Either Monte Copeland or Matthew Dibiase.
20 HEARING OFFICER O'NEILL: And about how often does that
21 happen?
22 THE WITNESS: Not very often. Guys, you know, they're --
23 they want to work so they're not going to --
24 HEARING OFFICER O'NEILL: And when you say "not very
25 often," once a year? Once a month? Once a week? I mean,

1 what --
2 THE WITNESS: Oh, at least once a week.
3 HEARING OFFICER O'NEILL: At least once a week?
4 THE WITNESS: At least once a week, yeah.
5 HEARING OFFICER O'NEILL: Uh-huh. And is that something
6 you send by email? Or how do you -- how do you bring it to the
7 attention of Monte or Matt?
8 THE WITNESS: I just -- I just go into their office and
9 let them know what's going on.
10 HEARING OFFICER O'NEILL: And can you tell me maybe
11 that -- did that happen recently? An example you can remember
12 when it happened?
13 THE WITNESS: I can't remember.
14 HEARING OFFICER O'NEILL: When it comes to your drivers
15 from out of town, how do you decide or do you decide what
16 work -- what route they'll get?
17 THE WITNESS: Upper management has told me that I got to
18 keep those guys busy because they come in from out of town.
19 HEARING OFFICER O'NEILL: Um-hmm.
20 THE WITNESS: And they're paid a premium to come and help
21 us out.
22 HEARING OFFICER O'NEILL: Um-hmm.
23 THE WITNESS: So upper management tells me to make sure I
24 keep them busy.
25 HEARING OFFICER O'NEILL: So how do you do that?

1 THE WITNESS: If a guy -- like I got one driver that came
2 from Mississippi, he told me -- they told me, hey, this guy's
3 expensive, come to help us, so make sure you give him miles, so
4 I send him to Buffalo.
5 HEARING OFFICER O'NEILL: Um-hmm.
6 THE WITNESS: So I just try to give him, you know --
7 HEARING OFFICER O'NEILL: Um-hmm. How about, let's talk
8 about when there's a need to get drivers from either, is it
9 Yesik?
10 THE WITNESS: That's our third party carrier.
11 HEARING OFFICER O'NEILL: Your party carrier is Yesik.
12 And then there was also a discussion about --
13 THE WITNESS: Coyote.
14 HEARING OFFICER O'NEILL: -- Coyote.
15 THE WITNESS: Um-hmm.
16 HEARING OFFICER O'NEILL: Okay. So if you -- if all your
17 drivers, the 30 are assigned routes, the two out of towners are
18 assigned routes, is that the point when you need to go to a
19 third party carrier?
20 THE WITNESS: Yeah. When we have, for example, let's say
21 we have 40 loads, and every single driver that's on the roster
22 is running, and let's say I have 10 that are left that are not
23 covered, I can either (a) send an email to Matt and say, hey,
24 can you get Coyote to cover these roads, and he'll go, well,
25 I'll try.

1 HEARING OFFICER O'NEILL: Um-hmm.
2 THE WITNESS: And then from the very beginning, since
3 2009, even before UPS took over the account in Kutztown, and
4 Yesik trucking was always the carrier there. So it wasn't like
5 I decided to say I'm going to call this guy.
6 HEARING OFFICER O'NEILL: Okay.
7 THE WITNESS: He's always been the carrier in that
8 terminal, even before UPS was there.
9 HEARING OFFICER O'NEILL: And is this true that Coyote's
10 something you're using more recently, and in the past you used
11 more Yesik?
12 THE WITNESS: Yeah. Management wants to use Coyote
13 because they're -- they're a UPS company. So they want to be
14 able to keep the money in-house rather than go outside to a
15 third party carrier.
16 HEARING OFFICER O'NEILL: Okay. So with respect to Yesik,
17 who determines how many Yesik drivers are going to come on the
18 schedule for that day?
19 THE WITNESS: It all depends on -- well Rick Haas, the
20 transportation manager, he actually was the one that originally
21 hired on Yesik Trucking before UPS.
22 HEARING OFFICER O'NEILL: Um-hmm.
23 THE WITNESS: So he has a very good friendship and rapport
24 with Yesik Trucking so he makes recommendations and he says,
25 hey, you know, put this driver on this load because he's

1 dependable. He's, you know, he's on time. He's never late.
2 And the loads that we have are very time sensitive, so he
3 sometimes makes recommendations to make sure that those loads
4 are covered on time.
5 HEARING OFFICER O'NEILL: Okay. But when you get --
6 you -- you're the one who has the -- do you call it the
7 schedule?
8 THE WITNESS: The dispatch --
9 HEARING OFFICER O'NEILL: The dispatch --
10 THE WITNESS: Yeah, the dispatch schedule.
11 HEARING OFFICER O'NEILL: The dispatch schedule. And so
12 does it come to your attention first that, oh, I don't have
13 enough drivers? Is that something -- you're the one who
14 discovers that?
15 THE WITNESS: Yeah. It's -- you can do process of
16 elimination. If you have 40 loads, 30 drivers --
17 HEARING OFFICER O'NEILL: Thirty drivers --
18 THE WITNESS: -- I got 10 left.
19 HEARING OFFICER O'NEILL: Now, you -- and -- and at that
20 point, do you make a decision, well, I either -- we -- I either
21 got to call Yesik or I've got to call have Matt call Coyote?
22 THE WITNESS: The first choice is Coyote because they're a
23 UPS company.
24 HEARING OFFICER O'NEILL: Uh-huh.
25 THE WITNESS: And the second choice would be Yesik.

1 HEARING OFFICER O'NEILL: So how do you -- how do you
2 communicate that, to Matt? Or do you just call Coyote? How
3 does that work?
4 THE WITNESS: No, I have to communicate that to Matt.
5 HEARING OFFICER O'NEILL: And then you tell him how many
6 you need?
7 THE WITNESS: Yes. We have three loads that are open, see
8 if -- see what they can do. Or see if they're -- they have any
9 availability.
10 HEARING OFFICER O'NEILL: And he makes the contact?
11 THE WITNESS: He makes the call, yes.
12 HEARING OFFICER O'NEILL: Okay. With respect to the
13 Yesik -- and you -- about when did you guys start using Coyote?
14 THE WITNESS: Probably when Matt first started. He was
15 the one that actually --
16 HEARING OFFICER O'NEILL: So that --
17 THE WITNESS: -- put me on to Coyote.
18 HEARING OFFICER O'NEILL: Somewhat recently?
19 THE WITNESS: Yeah.
20 HEARING OFFICER O'NEILL: So in October. So what -- I'm
21 going to ask you about Yesik and you can also tell me how --
22 maybe it worked before Matt came and brought the Coyote
23 connection and after, if -- if it's different.
24 THE WITNESS: Um-hmm.
25 HEARING OFFICER O'NEILL: When -- same thing, when --

1 you're doing the dispatch schedule and you go, oh, I've got 40
2 loads and only 30 drivers working today, I'm going to need 10
3 more, how did you contact Yesik? And this is before Matt came;
4 what would you do before Matt came?
5 THE WITNESS: Either (a) with the previous terminal
6 manager, the -- Paul Dalessandro, he used to be the national
7 account manager, he used to request an email, hey, let me know
8 what you need. You have to get approve to use Yesik as a
9 carrier.
10 HEARING OFFICER O'NEILL: Um-hmm.
11 THE WITNESS: You couldn't just pick up the phone and go,
12 hey, I need you to come and pull this load. You had to get
13 approval.
14 HEARING OFFICER O'NEILL: And so when you realized you
15 were short drivers --
16 THE WITNESS: You would -- I would reach out to Paul
17 Dalessandro, send him an email and he would say, okay, what are
18 his rates and then you would ask for his rates and stuff like
19 that, and so forth.
20 HEARING OFFICER O'NEILL: And when you're getting the
21 third party contractor through -- drivers through Yesik, are
22 you able to name select? You know, oh, I like this driver and
23 that driver. Or do you tell --
24 THE WITNESS: No, he just -- he just sends me a body. Or,
25 like, like if you -- like if there's a driver that knows the

1 account or something like that, he'll send that driver because
2 he knows the account.
3 HEARING OFFICER O'NEILL: Um-hmm.
4 THE WITNESS: Because he knows how to, you know, unload
5 the freight for Advance Auto Parts.
6 HEARING OFFICER O'NEILL: And in the past year have you
7 ever been the one to contact Yesik to request additional
8 drivers?
9 THE WITNESS: Yes.
10 HEARING OFFICER O'NEILL: And how often have you been the
11 one to make the contact?
12 THE WITNESS: Well, since for about the last six months
13 through -- through the direction of Paul Dalessandro; he's
14 given me that and said, hey, if you need Yesik, just you can
15 make that phone call.
16 HEARING OFFICER O'NEILL: So you don't -- you don't have
17 to send an email to Paul -- to Dalessandro each time?
18 THE WITNESS: Right now currently? Not anymore, no,
19 because he's just -- he's just telling me to, hey, get the job
20 done and get the load covered, you know what I mean? I don't
21 need an email every 10 minutes for me to get a load covered.
22 HEARING OFFICER O'NEILL: I --
23 THE WITNESS: I guess it got tedious for him and he wanted
24 me to, you know --
25 HEARING OFFICER O'NEILL: Okay. Go ahead?

1 MR. MEYER: Oh, okay. I guess you covered a lot of my
2 topics so --
3 HEARING OFFICER O'NEILL: You can keep going.
4 MR. MEYER: -- give me a second.
5 HEARING OFFICER O'NEILL: Well, I'll keep going.
6 MR. MEYER: Well, I -- you can if you want.
7 HEARING OFFICER O'NEILL: Thank you.
8 Okay, what role do you have, if any, in hiring and
9 interviewing?
10 THE WITNESS: None.
11 HEARING OFFICER O'NEILL: Okay.
12 THE WITNESS: I can give a road and a backup test. But as
13 far as -- no.
14 HEARING OFFICER O'NEILL: Okay. And in -- in the road and
15 backup test, I've not seen the form, is there one form that
16 covers both or are there two different forms?
17 THE WITNESS: Road test is one form. It gives pretty
18 simple -- the equipment that you're using for the road test.
19 The driver's information. Driver's license number. How many
20 miles you drove. What -- you know, what you did on the test.
21 HEARING OFFICER O'NEILL: Okay.
22 THE WITNESS: And that kind of thing.
23 HEARING OFFICER O'NEILL: What kind of information does it
24 ask you to fill in about the -- what happened?
25 THE WITNESS: You know -- yeah, like where did you drive?

1 How his preterit inspection was on vehicle. You know, driving
2 over railroad tracks, stuff like that.
3 HEARING OFFICER O'NEILL: Uh-huh. And the backup test,
4 what does that entail?
5 THE WITNESS: That is just making sure you know how to
6 maneuver the vehicle, backing in-between two trailers, backing
7 up against the dock.
8 HEARING OFFICER O'NEILL: Um-hmm.
9 THE WITNESS: Showing that you can maneuver the truck
10 safely.
11 HEARING OFFICER O'NEILL: Uh-huh. And how do you rate
12 them? For example, is it, you know, 1 to 5, you know, "1,"
13 you're not so great, "5" is great. How does it work?
14 THE WITNESS: Well --
15 HEARING OFFICER O'NEILL: Or is it just you can do it or
16 you can't?
17 THE WITNESS: Well, you know, as a trainer, you can
18 really -- you can really tell if somebody knows what they're
19 doing or if somebody's just terrible and doesn't -- if you
20 don't feel safe even being in the truck of the vehicle with the
21 driver as he's backing up, or -- you know, there's certain
22 things that you can see in a driver that -- that okay, this guy
23 knows what he's doing. Okay, this guy -- you know.
24 HEARING OFFICER O'NEILL: But --
25 THE WITNESS: But you also have to follow the guidelines,

as well.

HEARING OFFICER O'NEILL: Um-hmm. And what kind of things does that form ask you that you -- if you know?

THE WITNESS: Does he -- shifting in turns. Does he -- does he give plenty of space cushion in front of him? Does he, you know, turn signals and stuff like that. That kind of stuff.

HEARING OFFICER O'NEILL: Um-hmm. Are you involved in the disciplinary process at all?

THE WITNESS: No.

HEARING OFFICER O'NEILL: And have you ever recommended that anyone get a warning?

THE WITNESS: No.

HEARING OFFICER O'NEILL: Have you ever issued a warning?

THE WITNESS: No.

HEARING OFFICER O'NEILL: How about suspension; have you ever recommended a suspension?

THE WITNESS: No.

HEARING OFFICER O'NEILL: Have you ever issued a suspension?

THE WITNESS: No.

HEARING OFFICER O'NEILL: How about termination; have you ever been involved with a termination?

THE WITNESS: No.

HEARING OFFICER O'NEILL: Okay. You've never recommended

1 that someone be terminated?
2 THE WITNESS: No.
3 HEARING OFFICER O'NEILL: Okay. I haven't heard the --
4 that there have been any layoffs at your facility. It looks
5 like you're always trying to hire; correct?
6 THE WITNESS: Yeah, we're trying to hire. Yes.
7 HEARING OFFICER O'NEILL: Okay. And do employees get any
8 type of evaluation? An annual evaluation that says how they're
9 doing?
10 THE WITNESS: Other than the space and visibility ride,
11 no.
12 HEARING OFFICER O'NEILL: Correct.
13 THE WITNESS: That's about it. Every six months.
14 HEARING OFFICER O'NEILL: Okay. If a driver is not
15 satisfied with his or her assignment, has that ever happened
16 when they've come and expressed that to you?
17 THE WITNESS: Sure. But you know, it's either -- if
18 they're not happy with their assignment they can -- they can --
19 more than happy to go speak to Matt or Monte.
20 HEARING OFFICER O'NEILL: Uh-huh.
21 THE WITNESS: They've done it before.
22 HEARING OFFICER O'NEILL: Uh-huh. And do -- what's your
23 authority? What can you do about it?
24 THE WITNESS: I can't -- if they're refusing dispatch, I
25 can't discipline anybody for refusing dispatch, I have to push

1 it on to upper management.
2 HEARING OFFICER O'NEILL: Um-hmm. And are some of the
3 routes more desirable the other routes?
4 THE WITNESS: It all depends on the driver.
5 HEARING OFFICER O'NEILL: Um-hmm.
6 THE WITNESS: If the driver tells me, I don't care where
7 you send me, then I can pretty send him wherever he wants to
8 go. But if somebody -- it's all on the driver.
9 HEARING OFFICER O'NEILL: Um-hmm. If you -- when the
10 drivers come -- when the -- when you're making -- when you're
11 making decisions on the routes that are, sort of, set in stone,
12 you said there are many drivers who have an established route.
13 THE WITNESS: Um-hmm.
14 HEARING OFFICER O'NEILL: How did -- how did those routes
15 get established in the first place, do you know? Were --
16 you've been there since 2009?
17 THE WITNESS: Yes. Some drivers have been on the same
18 route since 2009.
19 HEARING OFFICER O'NEILL: Um-hmm.
20 THE WITNESS: It's like, it's how it just fell. Like, you
21 know, it's not -- nothing by choice, it's you know, a driver
22 would come in and it all is based on, you know, how many
23 stores -- how many stores we lost to those others opening DCs
24 and if a route -- if a driver comes in and goes, hey, you know,
25 do you have something else that's comparable or with a little

1 bit more miles, little bit less miles? Or it's all -- it's all
2 on the driver and how he wants to run.
3 HEARING OFFICER O'NEILL: When -- and that -- when a
4 driver -- you -- drivers who start -- you've had some drivers
5 who had established routes when you took over the -- you took
6 over dispatch in 2011?
7 THE WITNESS: 2012, 2011. 2012.
8 HEARING OFFICER O'NEILL: 2012?
9 THE WITNESS: 2011, 2012.
10 HEARING OFFICER O'NEILL: And so at that point, there was
11 drivers with established routes, some?
12 THE WITNESS: Yes.
13 HEARING OFFICER O'NEILL: And since 2012 have you also
14 brought on -- had new drivers come in?
15 THE WITNESS: Yeah, absolutely.
16 HEARING OFFICER O'NEILL: And --
17 THE WITNESS: Yes.
18 HEARING OFFICER O'NEILL: -- how was it -- and are some of
19 those new drivers now, sort of, in a given slot where
20 they're -- they have a regular route now?
21 THE WITNESS: Well, right now being that things are
22 transitioning over to 5X, it's -- it's a real mess right now as
23 far as routes. But we're trying to, you know, fill slots as
24 best as possible right now.
25 HEARING OFFICER O'NEILL: Okay. And they started phasing

1 in 5X at your facility when?
2 THE WITNESS: Let's see -- the week before Thanksgiving.
3 HEARING OFFICER O'NEILL: Okay. Before -- before that,
4 how did you -- how would a new driver get into a regular slot?
5 How would that assignment happen?
6 THE WITNESS: Well, the way a new driver comes on is,
7 we -- we put him with a trainer for a week or two, and then we
8 try to integrate him into the -- into the rotation by either
9 (a) driving with somebody for a week, driving with a trainer
10 for a week and then we put him on, let's say, like a, you know,
11 an easier local route, just not to give him something so hard.
12 You know, and then we just start, you know, we'll start growing
13 from there.
14 HEARING OFFICER O'NEILL: Um-hmm. And who makes the
15 decision what route that person will be on as they get more
16 experience?
17 THE WITNESS: It -- it all depends on how comfortable he
18 is. If he tells me, hey, I'm good with what you gave me. It's
19 nice and easy, then you just stay on that. But other -- it
20 all -- it all depends on how the driver feels.
21 HEARING OFFICER O'NEILL: Um-hmm.
22 THE WITNESS: I try to feel out the driver and how he
23 feels on -- on what he can handle.
24 HEARING OFFICER O'NEILL: Um-hmm. Okay, go ahead.
25 MR. MEYER: Okay.

1 DIRECT EXAMINATION (continued)
2 BY MR. MEYER:
3 Q What -- do you have an office?
4 A Right now, no.
5 Q Had you ever had an office assigned to you?
6 A Not assigned. I just chose a work station. It was an
7 office. It was an open office, and I chose to work there.
8 Q Was that the manager office?
9 A Yeah.
10 Q Okay. And how long did you end up working there?
11 A In that office?
12 Q Yeah.
13 A Three or four months.
14 Q Okay. And then why -- why did you leave?
15 A I was asked to leave.
16 Q By who?
17 A Mark Grisham.
18 Q Okay. And where do you -- where do you work now?
19 A Whatever's an available work station. In front of the
20 break room seems to be pretty quiet, easy. It's next to a
21 bathroom, next to a vending machine; so.
22 HEARING OFFICER O'NEILL: Can I -- can I ask this? July
23 is when your operations manager -- you lost your last
24 operations manager.
25 THE WITNESS: Yes.

1 HEARING OFFICER O'NEILL: And where did you work -- where
2 did -- where was your office before that person left?
3 THE WITNESS: The -- in the front. Not in that office,
4 but in the -- I had one of the work stations.
5 HEARING OFFICER O'NEILL: Okay. From where I -- what I
6 understand, there are two offices side by side that are about
7 the same size.
8 THE WITNESS: Um-hmm.
9 HEARING OFFICER O'NEILL: One is the operations manager's
10 office, and the other one is for the operations supervisor.
11 The -- when -- when -- prior to July, you weren't sitting in
12 either one of those offices?
13 THE WITNESS: Well, the one on the right was occupied by
14 the transportation manager.
15 HEARING OFFICER O'NEILL: Um-hmm.
16 THE WITNESS: No, the one on the right was the operation's
17 manager. The one on the left was Rick Haas'.
18 HEARING OFFICER O'NEILL: Uh-huh.
19 THE WITNESS: The transportation manager for Advance Auto
20 Parts.
21 HEARING OFFICER O'NEILL: And you mentioned you were
22 sitting somewhere else. Where was that called?
23 THE WITNESS: It's like a -- it's like an office inside of
24 an office. Like, when you walk into the office, there's like a
25 little work station to the left. And then you walk maybe five

1 feet up ahead and there's an office to the right and an office
2 to the left. So --
3 HEARING OFFICER O'NEILL: Um-hmm. And when did you -- I
4 know that you had Matthew Dibiase come in October, around
5 October 5th. When did you last have a -- a supervisor -- an
6 operations supervisor before that? Before he came in October.
7 THE WITNESS: Well, I don't know if he was titled an
8 operations supervisor, but it was John Lilly.
9 HEARING OFFICER O'NEILL: Okay.
10 THE WITNESS: And he was -- I guess he was the supervisor.
11 That was July -- July or August.
12 HEARING OFFICER O'NEILL: He left around July -- or he
13 left close in time to when the operations manager left?
14 THE WITNESS: Shortly after.
15 HEARING OFFICER O'NEILL: Um-hmm. Did you job duties
16 change around the time in July when these two left?
17 THE WITNESS: I took on a little bit more responsibility,
18 but you know --
19 HEARING OFFICER O'NEILL: What extra responsibility did
20 you take on?
21 THE WITNESS: More to do with, like, the weight and load
22 templates and the ship and pull from Advance Auto Parts. Like,
23 you know, he -- just dealing with that -- that translation
24 *(sic)* was -- was more of the responsibilities.
25 HEARING OFFICER O'NEILL: Um-hmm. And the weight and load

1 and the ship and pull --
2 THE WITNESS: That --
3 HEARING OFFICER O'NEILL: -- they show how much --
4 THE WITNESS: Yeah, that's --
5 HEARING OFFICER O'NEILL: -- material is going to each --
6 how much freight is going to each location?
7 THE WITNESS: Yeah. That's data that's provided by
8 Advance Auto Parts.
9 HEARING OFFICER O'NEILL: Um-hmm.
10 THE WITNESS: That's submitted to UPS so we can put
11 together -- it's, sort of, kind of like routing their
12 warehouse.
13 HEARING OFFICER O'NEILL: Um-hmm.
14 THE WITNESS: But you know, that -- that's like a -- I
15 don't know, it's kind of hard to explain, but it's -- it's like
16 routing their warehouse, but we're -- we're, sort of, kind of,
17 doing their work for them in a sense.
18 HEARING OFFICER O'NEILL: And from -- from July up until
19 October, did you -- from July until the present, you've had
20 someone come in as the operations manager? Someone come from
21 outside who acted as the operations manager?
22 THE WITNESS: Paul Dalessandro was -- was in town a lot.
23 He was the one that was basically running the place for a
24 while.
25 HEARING OFFICER O'NEILL: Um-hmm. And how often would he

be in during that --

THE WITNESS: He used to come every other week. So he would come one week and then he would stay, work mobile from home another week, and then he would come one week. Like that.

HEARING OFFICER O'NEILL: And was there anyone else in management from July -- I know in October you had your operations supervisor, but who else was coming in?

THE WITNESS: Yeah, that's when -- when Matt came on in October, that's when Quincy started. I guess Quincy took the job of national account manager and then that's when the other -- the current upper management is there now.

HEARING OFFICER O'NEILL: And were you ever the highest authority on site?

THE WITNESS: No.

HEARING OFFICER O'NEILL: And if -- if it was a week when your acting operations manager was working from home, was that the -- was he still the highest authority even though he was working remotely?

THE WITNESS: Yeah. He would -- he called me every day. He would let me know what needs to be done and direct me on what I needed to do.

HEARING OFFICER O'NEILL: Okay.

DIRECT EXAMINATION (continued)

BY MR. MEYER:

Q Do you keep a book that keeps track of vacations for time

1 off?
2 A Yeah, it's a -- it's a Daily Planner.
3 Q Okay.
4 A What -- what drivers have to do is, there's a day
5 off/vacation personal day request form that has to be filled
6 out. They fill that out. They request the dates that they
7 need. They sign it, they date it. And it has to be submitted
8 to upper management for approval.
9 Q So who -- who does it go to, like, when you say "upper
10 management"?
11 A It needs to go to do -- well, at the time it was going to
12 Paul Dalessandro.
13 Q Okay. At the time; what time are you talking about?
14 A More recently they were going to either Monte Copeland or
15 Matthew Dibiase, but before that it was going to Paul
16 Dalessandro.
17 Q I see. When you -- when you didn't have a --
18 A Right.
19 Q -- operations manager, then it would go to --
20 A Yeah.
21 Q But right now who does it go to?
22 A Right now it's -- I guess it would -- would have to go to
23 them. It would have to Matt and Monte.
24 Q Okay. But do you keep -- is there a book that you are in
25 control of that the drivers will work in the time off?

A Oh, yeah, when they -- when they put in a request, I can, yeah, I can gladly put your name down. Doesn't mean you're going to get it.

Q Okay. Who decides whether they get it or not?

A Upper management.

Q Okay. Do you ever --

HEARING OFFICER O'NEILL: And who? When you say "upper management" --

THE WITNESS: Oh, it's either Matt or Monte.

HEARING OFFICER O'NEILL: Um-hmm.

BY MR. MEYER:

Q Do you have any role in that?

A No. I can't decide whether a guy gets vacation or not.

Q Do you make any recommendations about that?

A No.

Q Do you keep track of how much time off a person has? How many -- whether they have their floating day or whether they have --

A I don't have access to that.

Q Do you know how many days of vacation someone has?

A No.

Q Okay. When someone's sick, who do they call? When a driver is sick.

A Protocol is you have to call upper management and then they would call me.

1 Q Why -- rather than saying "upper management," say who they
2 call.
3 A Well, the way it works is, if you -- if you're going to
4 call out sick, you just can't pick up the phone and go I'm
5 going to call Frank because I'm going to call out sick. You
6 can't do that. You got -- this has been from 2009; you have to
7 call the supervisor or the operations manager to call out sick.
8 And then that's when --
9 Q Okay.
10 A -- it will trickle down to me and they'll go, hey, Frank,
11 you know, John Doe just called out sick.
12 Q Okay. When you say "trickle down" that means they would
13 call --
14 A The driver --
15 Q -- on site supervisor or on site manager and then that
16 person will call you?
17 A Correct.
18 Q And tell you that they're not on the schedule that day?
19 A Yes.
20 Q And then during the time that you didn't have an
21 operations manager or operations supervisor on site, who would
22 they call then?
23 A They would have to call Paul.
24 Q And where -- where does Paul work?
25 A Paul is a -- I guess he's remote or mobile, but he -- I

1 guess he works from home.
2 Q Okay.
3 A Ohio.
4 Q But not -- not in your site?
5 A He -- no, he's not at this time, no.
6 Q But he would stop by Kutztown?
7 A He used to come every other week.
8 Q Okay. Now, when you have a onsite supervisor --
9 operations supervisor and operations manager, how much contact
10 do you have with people offsite?
11 A Offsite? What do you mean?
12 Q Like, how much contact do you have with people who are
13 not -- working at the Kutztown location when you have an
14 operations manager and an operations supervisor would?
15 A You mean do I speak to them off the clock outside of work?
16 Q No. Do you -- do you need to talk to them -- interact
17 with them for -- to do your work? The people who are not
18 working at Kutztown, do you have to interact with them to do
19 your job?
20 HEARING OFFICER O'NEILL: And are you asking him, for
21 example, you have -- there's other locations like Enfield --
22 MR. MEYER: Right.
23 HEARING OFFICER O'NEILL: -- and -- is that what you're
24 asking how much he --
25 MR. MEYER: Yes.

1 THE WITNESS: Yeah, no I don't interact with anybody right
2 there.
3 BY MR. MEYER:
4 Q Do you know the name of the operations manager in any of
5 the other facilities?
6 A No.
7 Q Do you know the name of the operations supervisor -- the
8 onsite supervisor in any of the other facilities?
9 A No.
10 Q Do you come to into any regular contact with them?
11 A No.
12 Q Now, have you ever been assigned temporarily to any other
13 facility?
14 A No.
15 Q Okay. Other than the test you administer to applicants,
16 do you have any other role in the hiring process?
17 A No.
18 Q And when you administer this test, is it just a pass/fail
19 test or do you have any -- what type of feedback is there?
20 A It's pretty simple; you know what you're doing. You know,
21 I can pass you over to upper management and they continue the
22 interview process.
23 Q Okay. And do you -- have you ever failed someone?
24 A Sure.
25 Q What information do you pass on when someone's failed?

A Well, he hit -- like if he hit the building or if he hit a trailer --
Q Okay.
A -- then we don't want you working for us.
Q Okay. All right. Is there a scoring system you use? Or is it just simply a thumbs up or thumbs down?
A Pretty much, number -- a scoring system.
Q When you say -- is there a score? Do you have a number from 1 to 100 that you grade people on?
A No.
Q Okay. It's just a sort of pass/fail type --
A Yes.
Q Okay. And do you ever drive?
A Yes.
Q Okay. When was the last time you drove?
A August I did some shuttles. And in July I did some routes.
Q Okay. When you -- earlier we had testimony about the shuttles. I think Matt testified about that.
A Um-hmm.
Q But you -- that was the shuttle run to --
A It's like 10 miles each way, round trip.
Q Right. And that's the -- I can't remember --
A From Kutztown to Inmar.
Q Inmar is the return center?

A It's classified as Allentown, but it's like, I don't know, it's a 10, 15 minute drive each way.

Q Okay. And then in July you -- you drove a regular route?

A I did routes, yes.

Q Okay. How many days in July did you do it?

A I think three.

Q Okay.

MR. MEYER: I guess I can mark these as Petitioner 2 and 3. They were stapled together like this. I can make them one, but --

(Petitioner's P-2 and P-3 marked.)

MR. NAUGHTON: Ma'am, may I have permission to Voir Dire the Witness about these exhibits before they are offered? These look like company records and there's been no subpoena issued to the company, so I would like to know how they were obtained. And I can wait for cross, but I would like -- I would like to know --

MR. MEYER: I think if you look in the upper right hand corner there's a yellow copy that the driver retains.

MR. NAUGHTON: Okay.

MR. MEYER: In the --

MR. NAUGHTON: I see it says that, but I don't know --

HEARING OFFICER O'NEILL: Okay.

MR. NAUGHTON: -- if that's how he got these.

HEARING OFFICER O'NEILL: Okay.

1 MR. NAUGHTON: I can't tell from this.
2 HEARING OFFICER O'NEILL: Why don't -- go ahead with your
3 questions and on cross you can ask the Witness.
4 MR. MEYER: Okay.
5 BY MR. MEYER:
6 Q The -- do you recognize these documents?
7 A Yes.
8 Q Okay. What are they?
9 A These are my driver logs.
10 Q Okay. Is that your signature on the signature line? It
11 looks like -- Petitioner 2 actually has two of them, right?
12 A Yes.
13 Q Is that your signature in the bottom left of each --
14 A Yes.
15 Q -- halves of this page?
16 A Yeah.
17 Q And then in Petitioner 3, on the bottom left, is that your
18 signature there?
19 A Yes.
20 Q Okay. What runs do these show? I mean, what days do
21 these -- do these show your runs?
22 A This is July 1st, July 7th and July 8th.
23 Q Okay. The July 1st being Petitioner 3, and the 7th and
24 8th on Petitioner 2, right?
25 A Yes.

1 Q So how did you get these documents?
2 A These are my copies. These -- I have -- I have the copies
3 of these.
4 Q Okay.
5 HEARING OFFICER O'NEILL: Are you required by DOT to keep
6 copies?
7 THE WITNESS: Yes.
8 MR. MEYER: All right, I don't mind if he has any Voir
9 Dire, but I would like to move them in.
10 HEARING OFFICER O'NEILL: Um-hmm.
11 MR. NAUGHTON: We're okay.
12 HEARING OFFICER O'NEILL: Any objection? Okay. They're
13 received.
14 (Petitioner's P-2 and P-3 received.)
15 BY MR. MEYER:
16 Q How did you end up driving in July?
17 A Well, at that time we were shorthanded and whenever
18 there's a little left over I was told to take a run. Paul
19 Dalessandro said, hey, I need you to run.
20 Q Okay.
21 A You run.
22 Q How much do you get paid?
23 A Hourly?
24 Q Yes.
25 A 17.25 base, and 17 -- 7.50 driver classification

1 adjustment.
2 Q And what's the driver classification adjustment?
3 A They -- they add that on to your -- to your base pay based
4 on your -- when you're a certified safety instructor.
5 Q Do you get anything extra for being a dispatcher?
6 A No.
7 Q Are you getting paid the same amount as Mr. David and Mr.
8 Falcone?
9 A Hourly rate or?
10 Q Hourly rate. I'm not talking about when you're driving,
11 but I'm talking about your hourly rate.
12 A Yes.
13 Q So yes, you're getting paid the same rate as those two?
14 A Yes.
15 Q And you're getting the same rate as you would -- I'll
16 strike that.
17 When you drive, you get paid mileage and stops?
18 A Mileage and stops.
19 Q Okay. What's your mileage rates?
20 A Forty-six cents a mile.
21 Q Okay. And what's your stop rate?
22 A $16 for the first three stops, 21 after that.
23 Q Okay.
24 A From the fourth on.
25 Q And there's been some testimony about -- that that's

1 changing with the 5X; is that correct?
2 HEARING OFFICER O'NEILL: If you know.
3 THE WITNESS: I haven't seen any changes yet.
4 MR. MEYER: Okay. All right, that's all I have.
5 HEARING OFFICER O'NEILL: Okay. I have a question.
6 Do you know, either because you've seen records or you've
7 talked to drivers, so what the -- what the annual wages -- sort
8 of, well, I know there's a range because of mileage, but sort
9 of the low and the high, what do drivers make there?
10 THE WITNESS: I wouldn't know exactly what a low and a
11 high is, but from what management has told me, the median is
12 between 60 and 70 per year.
13 HEARING OFFICER O'NEILL: Um-hmm. Okay, for the Employer?
14 MR. NAUGHTON: Yes, ma'am.
15 HEARING OFFICER O'NEILL: Do you have questions?
16 MR. NAUGHTON: Sure. I do have some.
17 CROSS-EXAMINATION
18 BY MR. NAUGHTON:
19 Q Mr. Cappetta, I'm Jim Naughton. I'm the company's lawyer.
20 I have some questions for you.
21 In July when you ran the runs that are identified on
22 Petitioner's 2 and 3, the driver's daily log, do you -- were
23 there temps assigned to Kutztown on those days?
24 A Were there temp drivers?
25 Q Yeah, were there temp drivers assigned back then?

A No, because -- no, we -- we were going away from those, from the temp drivers, because I was told they were too expensive.
Q Who told you they were too expensive?
A Paul Dalessandro.
Q Okay. So at that time you -- there were no temps on board?
A No.
Q Do you know if at the time you took these runs every available driver was already engaged?
A Yeah. Like, the way -- the way it was set up was, when -- when everybody was running, Carl David, Greg Falcone, and you know, when they went out, and I was the last one left, I had to take a run. That was my duty to take the run.
Q Okay. And since July that's the only three times it's happened that way, that you had to drive --
A A run? Yes.
Q A route, yeah. Okay. On those three days when you took these runs, did you also get paid for that week at the -- at the non-driving rate, the same number of hours?
A No. What happens is I get the paid the route mileage and stops, and then whatever hours I worked. I don't get both. I get -- I can't get both.
Q So if we were to check your records for that week, you would not have been paid for 70 hours of --

A Correct.
Q -- of office work --
A Yes.
Q -- so to speak; is that correct?
A Yes, I would not have gotten paid that.
Q So you adjusted down for those three days?
A Yes.
Q Did -- how did you decide which route -- you took the one that was left; is that what you did each day?
A Yeah, whatever was left over. So if we couldn't -- we weren't allow to push a load into the next day, that's the customer's request; so --
Q Was it a different route each day?
A Yeah. I believe one of them was Blairstown, New Jersey. The other one was Brook Lawn. And I'm not sure what the other one was, but three different routes.
Q All right. Earlier this year did you temporarily transfer to the Enfield facility?
A No.
Q Okay. How about in January or February of this year; did you --
A No.
Q -- go to Enfield?
A Never.
Q Never?

1 A I went to Enfield to help, to give some -- to help out,
2 but I never transferred over there.
3 Q What did -- you went to help in what respect?
4 A Paul Dalessandro asked me to go give them a hand with, you
5 know, helping them implement a new sense of dispatching up
6 there. So he wanted to, you know, use my ideas up there and
7 see what -- what I could do to help out those guys up there.
8 Q And did you go there?
9 A Yes.
10 Q How long were you there?
11 A I think three days.
12 Q Three days?
13 A Yes.
14 Q And tell me what -- tell us what you did in those three
15 days at Enfield.
16 A At first I went in and I just -- to be honest, the first
17 day I just watched what they did, and did nothing; just to see
18 what they did in that operation. And then the second day, I
19 gave some ideas on, you know, how I -- you know, how I dispatch
20 in Kutztown. And the third day, I almost had to do a load the
21 third day.
22 Q What did you do the third day since you didn't take a
23 load?
24 A The third day I was helping the -- the current dispatch --
25 I don't know if he's still there, but I was helping the

1 dispatcher there.
2 Q What were you helping him do?
3 A Get the loads covered.
4 Q All right. And the second day you said you shared some of
5 your ideas on dispatch?
6 A Yes.
7 Q Tell us -- tell us what those ideas were and who you
8 shared them with. First of all, who did you share them with?
9 A I think his name was Frank Hitchcock.
10 Q Who was he?
11 A He was the -- I think he was the night dispatcher.
12 Q Okay.
13 A Third shift dispatcher.
14 Q All right. And what were the ideas that you shared with
15 him?
16 A Basically the same that I do here. You know, if you've
17 got 40 loads, and you -- you got 30 drivers, you try to
18 maximize the driver's hours and see what they have available to
19 drive, and see what -- how you can get all the loads covered.
20 I guess he wasn't very good at it, and I was trying to help
21 him.
22 Q What else did you show him?
23 A That's really it. Up there was a zoo up there.
24 Q And that -- okay. Did you make any other suggestions for
25 improvements?

1 A That's really it. No.
2 Q And was there a site manager there when you -- when you
3 went there?
4 A Yes.
5 Q Who was that?
6 A Todd Luchnick. Todd Luchnick.
7 Q Okay. Was he a regular site manager, as far as you know?
8 A He was the operations manager.
9 Q Was that -- was this a new open -- a newly opened facility
10 at the time?
11 A Yes.
12 Q And it was Paul who asked you to go?
13 A Yes.
14 Q All right. Did you stay there overnight or did you
15 commute home every day?
16 A I stayed there overnight for three days.
17 Q At -- did you stay at a hotel?
18 A Yes.
19 Q Okay. So did you have dealings of any kind with gentlemen
20 at -- with the site manager at Enfield when you were there? I
21 mean, not dealings but did you speak to him from time-to-time?
22 A Yeah.
23 Q Did you have some discussions about the dispatch problems
24 you had observed?
25 A No, he didn't want to take any advice from me at all.

1 Q All right, so he wouldn't speak to you about it?
2 A No.
3 Q Not at all?
4 A He was -- no.
5 Q Okay. But Paul -- did you tell him that Paul had asked
6 you to come to Enfield to give advice to the dispatch?
7 A Yes.
8 Q And he said, I don't want to talk to you?
9 A Yes.
10 Q Okay. Did -- were there any supervisors that you spoke
11 with or had dealings with in Enfield?
12 A No.
13 Q Not at all?
14 A No.
15 Q Okay. Did the -- was the dispatcher willing to listen to
16 your ideas?
17 A No.
18 Q He wasn't either?
19 A No.
20 Q So did he change anything based on your recommendations?
21 A No.
22 Q Did you prepare a report?
23 A No.
24 Q Did you tell -- did you share this result with Paul?
25 A Yes.

1 Q Okay. Did you ever go to any other locations temporarily
2 to help with dispatch problems?
3 A No.
4 Q Okay. You mentioned that your hourly pay was the same as
5 Carl David and Mr. Falcone. I gather your weekly pay was
6 higher than theirs; is that correct?
7 A What do you mean "weekly pay higher"? What --
8 Q Your weekly -- your weekly wage. You said that your --
9 when you were working in the office as a dispatch you got 17.25
10 plus 7.50 an hour.
11 A Yes.
12 Q And you said, "That was my" -- your understanding was that
13 was the same hourly rate as Mr. David and Mr. Falcone.
14 A Yes.
15 Q Was your weekly pay higher? In other words were you paid
16 by the company regularly for more hours than they were paid
17 for?
18 A I don't know how much they would make. I just -- you
19 know, depending on what hours they put in.
20 Q All right. You had some arrangement where you got paid
21 for 70 hours; 14 hours a day, right?
22 A What do you -- when you say "arrangement," explain that.
23 Q All right. You had -- somebody had set up so that you
24 would be paid for 14 hours of straight time every day, every
25 work day?

1 A There's no arrangement. You come in, you work, you go
2 home.
3 HEARING OFFICER O'NEILL: If --
4 THE WITNESS: You don't --
5 HEARING OFFICER O'NEILL: If you don't mind.
6 So you testified earlier that your wage rate is 17.25,
7 plus the 7.50 driver --
8 THE WITNESS: Driver classification adjustment.
9 HEARING OFFICER O'NEILL: Okay. Which comes to 24.75.
10 THE WITNESS: Yes.
11 HEARING OFFICER O'NEILL: And does that vary -- do you
12 work 40 hours a week? Fifty? Does it vary? Tell me, in a
13 typical week, when you're not driving, when you pretty much
14 have a dispatcher week --
15 THE WITNESS: If I'm working six and a half days and it's
16 pretty much going to come close to 68 to 70 hours a week.
17 HEARING OFFICER O'NEILL: Um-hmm.
18 THE WITNESS: If I'm not driving at all, if I'm just
19 working -- I can't remember the last time I worked Monday
20 through Friday, but it would be less than that.
21 HEARING OFFICER O'NEILL: Um-hmm. So how do you keep
22 track of your hours? Or do you keep track of your hours?
23 THE WITNESS: Absolutely. My driver logs is one.
24 HEARING OFFICER O'NEILL: Not your driver log. Let's talk
25 about a week when you don't drive at all.

1 THE WITNESS: Okay. I have to fill out a log every day.
2 HEARING OFFICER O'NEILL: You fill out a log whether you
3 drive or not, just in case you're needed to drive. So it's a
4 week that you do no driving, where do you put down the hours
5 that you worked, if you write them down?
6 THE WITNESS: There's a report that Matt does where every
7 day he asks me, hey, how many hours did you work yesterday?
8 HEARING OFFICER O'NEILL: Um-hmm. And do you have a
9 standard number of hours report? Or does it matter? Do you
10 punch a clock when you come in? Does -- a sign in sheet?
11 THE WITNESS: There's no clock.
12 HEARING OFFICER O'NEILL: How -- how do you -- what do you
13 tell him?
14 THE WITNESS: If he asks me, hey, how many hours do you --
15 how many hours do you have for yesterday, I tell him, 12, 13,
16 10-1/2.
17 HEARING OFFICER O'NEILL: Um-hmm.
18 THE WITNESS: Fourteen.
19 HEARING OFFICER O'NEILL: And you count from the time you
20 came in to the time you leave?
21 THE WITNESS: Yes.
22 HEARING OFFICER O'NEILL: And do you ever work at home?
23 THE WITNESS: Yes.
24 HEARING OFFICER O'NEILL: And when you work at home, how
25 are you paid for that?

1 THE WITNESS: I calculate that in my -- in -- when -- at
2 the end of the week when I submit my hours, I calculate that,
3 as well.
4 HEARING OFFICER O'NEILL: Um-hmm. And is 70 the number of
5 hours you were -- you are paid for generally each week?
6 THE WITNESS: Like I said, depending on how many hours I
7 do. If it's -- if I work six and a half days, seven days,
8 comes up to 70 or more, that's what I put in.
9 HEARING OFFICER O'NEILL: In the -- in the past three
10 months how often has it come to about 70 hours?
11 THE WITNESS: Past three months? About 75 percent of the
12 time.
13 HEARING OFFICER O'NEILL: Okay.
14 CROSS-EXAMINATION (continued)
15 BY MR. NAUGHTON:
16 Q And how long have you been getting 70 hours a week, at
17 least, of pay? At least since July of this year, right?
18 A Like she said, the last three months, about 75 percent of
19 the time.
20 Q No, I -- I'm sorry; have you been getting at least 70
21 hours' worth of 24.75 an hour?
22 A At least, yes.
23 Q Okay. And that's -- and how long has that been the case,
24 ever since you became a dispatcher?
25 A No. Because when I would do dispatch back in 2011, 2012

1 when I took that over, it all depended on if I -- if I drove.
2 Q Okay.
3 A Or -- so you can't get both.
4 Q All right. At some point, and by using the word
5 "arrangement" I'm not trying to imply anything wrong, I'm just
6 saying at some point did it become your understanding that the
7 company was going to pay you at least 70 hours a week or for 70
8 hours a week?
9 A No.
10 Q Okay. Have you had week -- when did you start getting
11 paid as much as 70 hours a week? When did that start?
12 A You got to -- you got to do 70 hours a week to get paid
13 for it.
14 Q When did it start?
15 A Last two, three months.
16 Q Just then?
17 A Well, I've gotten 70 before. It's not like I haven't
18 gotten 70 before. But --
19 HEARING OFFICER O'NEILL: Can I ask this?
20 In the past year when you've spent 80 percent of your time
21 working as a dispatcher, how many times have your hours been
22 below 70? How many weeks in the past year?
23 THE WITNESS: Past year? Twenty-six weeks.
24 HEARING OFFICER O'NEILL: Have been below 70?
25 THE WITNESS: Yes.

1 HEARING OFFICER O'NEILL: About -- so about half?
2 THE WITNESS: Um-hmm.
3 HEARING OFFICER O'NEILL: Okay. And were they -- is that
4 because you're on vacation and you only get paid for so many
5 hours? Or --
6 THE WITNESS: No, I just -- depends on the workweek, how
7 it goes. If you only work five days, you know, it's what it
8 is.
9 HEARING OFFICER O'NEILL: Okay.
10 BY MR. NAUGHTON:
11 Q For the workweeks, you said there was about 26 weeks where
12 you didn't work 70 hours. For those weeks, were you still paid
13 for at least 70 hours, that's what I'm asking.
14 A No.
15 Q You -- were you paid less?
16 A Yes.
17 MR. NAUGHTON: Can I have a minute, ma'am?
18 HEARING OFFICER O'NEILL: Sure.
19 (Pause.)
20 MR. NAUGHTON: May we have a few minutes off the record,
21 please?
22 HEARING OFFICER O'NEILL: Sure.
23 MR. NAUGHTON: Thank you.
24 HEARING OFFICER O'NEILL: Off the record.
25 (Whereupon, a brief recess was taken.)

1 HEARING OFFICER O'NEILL: Back on the record.
2 CROSS-EXAMINATION (continued)
3 BY MR. NAUGHTON:
4 Q Do you -- do you keep track of your pay annually? I'm not
5 asking you for the exact number, but do you have a general idea
6 of what you would make in a year in 2014 and 2015 to date?
7 A Not to the exact penny, but yeah.
8 Q All right. In 2014, is it accurate that you made
9 somewhere in the neighborhood of 90,000?
10 A Yes.
11 Q Okay. And so far this year you're at, you know, within
12 about 10 days of the end of year, assuming you get paid through
13 the end of year, which I assume is true, you'll be making 90 or
14 95,000 this year?
15 A No.
16 Q How much do you think you're going to make this year?
17 A Eighty-two, eight-four.
18 Q Okay.
19 A Like I said, I don't know the exact number.
20 Q Okay. And I'm not holding you to the exact number, I
21 understand.
22 All right, did employees from time-to-time contact you at
23 home? In other words when you were at home did they call you
24 occasionally with problems?
25 A What kind of problems?

1 Q I don't know, that's what I'm -- I'm asking you first, any
2 kind of problems?
3 A You know, you got to tell me the kind of problems.
4 Q No. Did they call you at home with some kind of problems
5 from time-to-time?
6 HEARING OFFICER O'NEILL: Are you talking about a work
7 related problem?
8 MR. NAUGHTON: Yeah, yeah. Not a personal problem, a work
9 related problem.
10 HEARING OFFICER O'NEILL: Start with that.
11 BY MR. NAUGHTON:
12 Q Did they call you occasionally with work related problems
13 when you were at home?
14 A Yes.
15 Q Okay. How did you deal with those problems?
16 A If it was serious, like an accident, I would direct them
17 to management.
18 Q Okay. All right, did they call you from time-to-time with
19 complaints about their dispatch or concerns about their
20 dispatch?
21 A No.
22 Q Never?
23 A No.
24 Q All right. Did they ever call you with requests about
25 their work? Like they want a different route or they wanted a

1 different assignment or something like that?
2 A Yeah, like they would say, hey, this -- I don't really
3 like this run, it's not to my liking, can we adjust or -- yeah.
4 Q How often did you get the calls or inquiries like that?
5 A At least once a week you get a driver that doesn't, you
6 know --
7 Q And did you get -- at work, did you get similar inquiries
8 from employees where they would come to you about questions
9 about their assignment or their workload or anything like that?
10 A Yes.
11 Q Okay. How often did that happen?
12 A At least once a week.
13 Q Okay.
14 HEARING OFFICER O'NEILL: And what did you do when you
15 would get a call and someone says, I don't like my route, this
16 -- I don't want to be on this; what do you do?
17 THE WITNESS: Well, you got to ask why, you know, what's
18 the problem? And if it's something that -- it's something
19 minor that I can -- that I can handle, it's -- you know, I --
20 I'll, you know --
21 HEARING OFFICER O'NEILL: But --
22 THE WITNESS: But if it's something major, I would have
23 to -- I would direct them --
24 HEARING OFFICER O'NEILL: What are some typical things
25 that -- they say that they don't like their route, what are the

1 typical replies that you've received it?
2 THE WITNESS: Like, if it's a safety issue or if it's
3 something that he just tells me, I don't want to do the route
4 anymore, I can't make that call or say, okay that's fine; I
5 have to direct them to management. That's refusal of dispatch.
6 HEARING OFFICER O'NEILL: Um-hmm.
7 THE WITNESS: I have that -- can't --
8 HEARING OFFICER O'NEILL: And are you able to switch them
9 to another route?
10 THE WITNESS: If management directs me to, yes.
11 HEARING OFFICER O'NEILL: Um-hmm.
12 THE WITNESS: If they tell me, you know, take this guy off
13 this route, put him on this route, no problem.
14 HEARING OFFICER O'NEILL: Um-hmm. And if someone calls
15 with a complaint, he doesn't like his route, can you, if you
16 have another available route because you've been short drivers,
17 can you just decide, well, I'll put him on a different route
18 today?
19 THE WITNESS: Sure. Yes.
20 HEARING OFFICER O'NEILL: You can put him on. And what's
21 the difference -- we've heard talk you've got some routes that
22 are more miles and more stops, of course that's going to be
23 more lucrative. And the some of your routes are not as
24 lucrative. What's the difference in the amount of pay you can
25 make on one day? Like, what's a really good route? What do

1 you make on one of those?
2 THE WITNESS: Well, right now since we're transitioning
3 over to 5X, you can do a run that's 200 miles local, I don't
4 know the Harrisburg area, and it may have 12 stops on it.
5 HEARING OFFICER O'NEILL: Um-hmm.
6 THE WITNESS: That can pay you, do the math; 16 -- that
7 can pay you, let's just say ballpark figure of $300.
8 HEARING OFFICER O'NEILL: Um-hmm.
9 THE WITNESS: And you can get a route that's 400 miles,
10 and 3 stops, and it can pay you less than that because there
11 was more stops on that other route.
12 HEARING OFFICER O'NEILL: Um-hmm.
13 THE WITNESS: It all depends on how the driver feels.
14 Like, some drivers, they -- they prefer to do a route that's
15 700 miles and 1 stop, rather than do the 200 miles and 13
16 stops.
17 HEARING OFFICER O'NEILL: Um-hmm.
18 THE WITNESS: Because they don't want to move the stuff
19 around in the trailer. They don't -- they just want to just
20 drive, go, and come back.
21 HEARING OFFICER O'NEILL: Um-hmm.
22 THE WITNESS: That's how they feel. It's how they -- it's
23 all based on the driver.
24 HEARING OFFICER O'NEILL: So, what factors do you consider
25 when you assign -- you testified of the -- of the 30 regular

1 drivers you have, I think you said, was it about 20 have
2 regular routes? I forgot what you said.
3 THE WITNESS: Twenty-three to twenty-five.
4 HEARING OFFICER O'NEILL: Okay. They have regular routes?
5 THE WITNESS: Yeah.
6 HEARING OFFICER O'NEILL: And you've got the five who do
7 not have -- about five that don't have *(sic)*. And then you
8 have your people coming in from the other facilities.
9 THE WITNESS: Um-hmm.
10 HEARING OFFICER O'NEILL: So with those maybe -- the five
11 people and the two, three, four, up to say six from other UPS
12 facilities coming in, what factors do you consider when you
13 give them the route? For example, if you had a seniority sheet
14 and you had to go, alright, this guy's next highest, he gets
15 that route. This guy gets -- is it -- is there something like
16 seniority route or --
17 THE WITNESS: Well --
18 HEARING OFFICER O'NEILL: -- seniority list? Do you
19 consider their skill? What do you consider?
20 THE WITNESS: For me personally, I would go with skill,
21 based on me knowing the driver.
22 HEARING OFFICER O'NEILL: Um-hmm.
23 THE WITNESS: The rapport that I have with the driver.
24 But Paul Dalessandro has been -- I don't know if he -- he's
25 going to implement it very soon. That's what he was telling

1 me. That we're going to base it on seniority very soon.
2 HEARING OFFICER O'NEILL: Uh-huh.
3 THE WITNESS: So, with the new 5X implementation that's
4 going in, it's going to be based on seniority if -- unless that
5 has changed. But the last thing that he has told me, that it's
6 going to go on seniority.
7 HEARING OFFICER O'NEILL: Okay. And in the past year, you
8 said you would mainly consider the person's skill as a driver
9 when you were deciding what route. And --
10 THE WITNESS: Well, skill and how they feel on the run. I
11 ask them first. You know, I say, I got this run going here, is
12 that something you think you can do? And you know, if he says
13 no problem, then put him on it.
14 HEARING OFFICER O'NEILL: Um-hmm. Um-hmm. And when you
15 say "skill," do you happen to know, like, this driver's better
16 than the other? Or are they all about the same?
17 THE WITNESS: No, I -- I get feedback from the trainers.
18 I get feedback from Greg and Carl and you know, just, you know,
19 just drivers talk.
20 HEARING OFFICER O'NEILL: Um-hmm.
21 THE WITNESS: You know, hey that guy, you know -- so.
22 HEARING OFFICER O'NEILL: Um-hmm. And when a driver --
23 because the amount of money you can make in a day can be pretty
24 different depending on what route, when you get a complaint
25 about a driver, maybe -- has this happened; a driver, look, I'm

1 on a lousy route, I'm not making enough, there's not enough
2 miles, has that ever happened?
3 THE WITNESS: Yes.
4 HEARING OFFICER O'NEILL: And what do you do with that
5 complaint?
6 THE WITNESS: Either (a) I can have them come in and sit
7 down and speak to management, see what we can do.
8 HEARING OFFICER O'NEILL: Um-hmm. And when you say "speak
9 to management," who would they speak to?
10 THE WITNESS: I've had drivers call Paul himself. And
11 Paul would call me up and say, see if you have something a
12 little better for this driver. And the other driver's on the
13 verge of quitting, you know, et cetera.
14 HEARING OFFICER O'NEILL: Um-hmm. And can you switch that
15 person to a different route, the person who -- have you done
16 that? Some -- has someone complained about not making enough
17 money on the route and have you switched them?
18 THE WITNESS: Yes.
19 HEARING OFFICER O'NEILL: And did you do that without
20 checking with someone?
21 THE WITNESS: I --
22 HEARING OFFICER O'NEILL: Or did you --
23 THE WITNESS: I -- 99.9 percent of the time check with
24 Paul before I make any moves like that.
25 HEARING OFFICER O'NEILL: Um-hmm.

1 CROSS-EXAMINATION (continued)
2 BY MR. NAUGHTON:
3 Q So the answer to the investigation officer's question is
4 that most of the time you check with Paul, but sometimes you
5 would make the switch yourself; is that correct, in the case
6 you described?
7 A It all depends on -- it all depends on the driver.
8 Q The question though is your -- in answering the
9 investigating officer's question you said the vast majority of
10 the time you check with Paul first before you made a switch of
11 the driver?
12 A Yes.
13 HEARING OFFICER O'NEILL: I think his test --
14 BY MR. NAUGHTON:
15 Q But some --
16 HEARING OFFICER O'NEILL: I think your testimony was 99.9
17 percent of the time --
18 MR. NAUGHTON: Right.
19 HEARING OFFICER O'NEILL: -- you check with Paul --
20 THE WITNESS: Yes.
21 HEARING OFFICER O'NEILL: -- before switching a driver --
22 THE WITNESS: Yes.
23 HEARING OFFICER O'NEILL: -- whose complaining about a
24 route?
25 THE WITNESS: Yes.

1 MR. NAUGHTON: All right.
2 BY MR. NAUGHTON:
3 Q And then so there were sometimes when you made the switch
4 without checking with Paul; is that correct?
5 A Yes.
6 Q All right.
7 HEARING OFFICER O'NEILL: And can you give an example of
8 that?
9 THE WITNESS: If a driver came to me and said, I don't
10 feel safe on this run.
11 HEARING OFFICER O'NEILL: Um-hmm.
12 THE WITNESS: If you don't feel safe and I feel that
13 you're going to put the company in harm's way by backing into a
14 building or by backing into a car, I'm not going to put you on
15 the same run.
16 HEARING OFFICER O'NEILL: Has that happened in the past
17 year where a driver told you --
18 THE WITNESS: Yes.
19 HEARING OFFICER O'NEILL: And you made that decision on
20 your own?
21 THE WITNESS: No, I called Paul first.
22 HEARING OFFICER O'NEILL: Um-hmm.
23 BY MR. NAUGHTON:
24 Q The question was, give an example to the investigating
25 officer when you did it without calling Paul.

1 A Without calling Paul?
2 Q Yes.
3 A It's .1 percent, so it's not very -- it's not very many
4 times that I make a call on my own --
5 Q Got that.
6 HEARING OFFICER O'NEILL: Can -- can -- I'll ask you this;
7 can you remember the last time you switched a driver because a
8 driver complained about a route and you switched the driver
9 without checking with Paul? If you can remember the last time
10 you did it?
11 THE WITNESS: Maybe within the last six months.
12 HEARING OFFICER O'NEILL: Um-hmm. And do you remember
13 that example?
14 THE WITNESS: No.
15 HEARING OFFICER O'NEILL: All right.
16 BY MR. NAUGHTON:
17 Q You were earlier describing the, sort of, the procedure
18 when the driver calls in sick. And you were asked about the
19 period when there was no manager on site from roughly July
20 until fairly recently, and you said in those cases during that
21 period they would call Paul.
22 A Yes.
23 Q All right. Now, you've also testified, am I correct, that
24 Paul would, according to your testimony, be on site for a week
25 and then away for a week; correct?

1 A Yes.
2 Q And are you -- is it your testimony, though, that all the
3 drivers would nevertheless call Paul, even when he was away
4 from the site?
5 A That's protocol. You have to call -- you have to call
6 upper management to call off sick.
7 Q Did he -- do you know if he -- they all had his cell phone
8 number?
9 A Everybody has Paul's cell phone number.
10 Q Um-hmm. And once -- when -- once the driver called Paul,
11 then did Paul call you?
12 A If it -- if it was something that he can handle on his own
13 he wouldn't call me.
14 Q All right. If he could not handle it on his own he would
15 call you?
16 A Yes.
17 Q Okay. And did that happen fairly frequently?
18 A Depending on the kind of route.
19 Q Okay. If he -- if the driver calls in sick, and says he
20 can't come to work, you have to get involved every time, don't
21 you, to change the -- change the assignment?
22 A Not necessarily.
23 Q Okay. But you -- isn't that part of your job, is to
24 change assignments when drivers call in sick?
25 A Yes.

1 Q Okay. So at least in some cases you had to be involved,
2 didn't you?
3 A Not all cases.
4 Q Okay.
5 HEARING OFFICER O'NEILL: So if a driver calls in sick and
6 you suddenly a run and you have to get someone to fill in for
7 it, what factors do you use to decide in who you're going to
8 pick for the -- to put into that?
9 THE WITNESS: Who's available.
10 HEARING OFFICER O'NEILL: Um-hmm.
11 THE WITNESS: Who has hours available.
12 HEARING OFFICER O'NEILL: Um-hmm.
13 THE WITNESS: And that's really it.
14 HEARING OFFICER O'NEILL: Um-hmm.
15 THE WITNESS: Who's available and who has the hours to do
16 the load.
17 HEARING OFFICER O'NEILL: And -- and usually the case you
18 have two people available to do it?
19 THE WITNESS: Recently I -- it's been tough but we -- you
20 know, with the demands of the customer, they've been always --
21 they've been telling us to have somebody on standby 24/7.
22 HEARING OFFICER O'NEILL: Um-hmm.
23 THE WITNESS: So right now, if somebody calls out
24 tomorrow, there's -- there's going to be somebody to cover the
25 road.

1 HEARING OFFICER O'NEILL: Um-hmm. And whose --
2 THE WITNESS: So my -- the phone call to me technically
3 doesn't even have to happen because there's somebody 24/7.
4 HEARING OFFICER O'NEILL: Um-hmm. Who decides who's on
5 standby?
6 THE WITNESS: What do you mean who decides?
7 HEARING OFFICER O'NEILL: I'm sorry; I thought you said --
8 do you -- you have a driver on standby --
9 THE WITNESS: Yes.
10 HEARING OFFICER O'NEILL: -- just in case someone calls
11 out?
12 THE WITNESS: Yes.
13 HEARING OFFICER O'NEILL: And who selects that person?
14 Says, you're on standby for --
15 THE WITNESS: It all depends on who -- how many hours the
16 drivers have available. Like, if there's four drivers left
17 that don't have a load that can do -- you can say, you can be
18 on standby. Or you can -- it all depends.
19 HEARING OFFICER O'NEILL: Who tells the driver they're on
20 standby, if anyone?
21 THE WITNESS: I can tell them.
22 HEARING OFFICER O'NEILL: Um-hmm. And you can decide
23 which driver's on standby?
24 THE WITNESS: Yes.
25 HEARING OFFICER O'NEILL: And how long has that been going

1 on?
2 THE WITNESS: I want to say the last month.
3 HEARING OFFICER O'NEILL: Um-hmm.
4 BY MR. NAUGHTON:
5 Q Were there times, sir, where there were more drivers
6 available than there were runs in your experience?
7 A Absolutely, yes.
8 Q Okay. Were there times then when you had to decide who
9 was going to get the last run and who was not going to get the
10 work that day or that week?
11 A No. What they were doing was management was saying, okay,
12 you have this many amount of drivers with no loads *(sic)*. So
13 they would either (a) send them to go help another location or
14 (b) I don't know what they did with the drivers to be honest
15 with you.
16 Q Okay. I guess in the first instance, though, as you're
17 making up the dispatch list, were you -- were you going down
18 the list and assigned drivers to loads?
19 A The remaining loads or the --
20 Q Any loads; were you assigning drivers to loads?
21 A Yes.
22 Q Okay. Did there come a time when you got to the point
23 where you could see there were more drivers available than
24 there were runs?
25 A Yes.

1 Q Okay. And when you got to that point, how did you decide
2 which ones to give the remaining runs to and which ones were
3 not going to get the runs?
4 HEARING OFFICER O'NEILL: What factors would you consider?
5 THE WITNESS: Sometimes I factor driver skill. Or if this
6 driver just started today and this driver's been here for the
7 last six months, I'm not going to give this driver that just
8 started today the load. It's only right.
9 MR. NAUGHTON: Okay.
10 BY MR. NAUGHTON:
11 Q Did you take into account whether you knew of complaints
12 about the driver's performance?
13 A No.
14 Q Okay. So it was skill and whether somebody had -- had
15 been at it for a while?
16 A Yes.
17 Q Okay. You mentioned a supervisor named John Lilly left
18 this summer; is that right?
19 A Yes.
20 Q And you -- I believe I heard you testify that -- and I
21 believe I heard you testify that you were asked to take over
22 some of what John Lilly had been doing, right?
23 A It wasn't necessarily me that was taking over his
24 responsibilities, but it was -- I don't really know what his
25 responsibilities were to be honest with you.

Q I'm not quoting you. I don't think I'm trying to quote you exactly, but I've written down that "I took over more responsibilities when John Lilly left."
A I never said when John Lilly left.
Q Okay. Did you ever take over any of the responsibilities that somebody told you John Lilly had been -- had been doing before --
A No.
Q -- he left?
A No.
Q Okay. So if -- if you -- so you said nothing about taking over anything from John Lilly after he left?
A I said my responsibilities grew as there -- as basically there was nobody in the office to --
Q Oh, after John Lilly left your responsibilities grew?
A Yes.
Q Okay.
A Which -- which entailed the weight and load, the ship and pull, the responsibilities from Advance Auto Parts.
Q Okay. So I'm sorry; let me make sure I've got those new responsibilities. What were they that you remember after he left?
A The weight and load, the ship and the pull; basically responsibilities that have to do with Advance Auto Parts.
Q So you were dealing with the customer more than before?

1 A Yes.
2 Q Okay. Anything else that you can remember that you took
3 over after -- after Lilly left?
4 A No.
5 Q Okay. Okay. How often did Dalessandro call you during
6 the weeks when he was away from the building?
7 A Daily.
8 Q Okay. How many times a day?
9 A I don't know, at least five.
10 Q Okay.
11 A Minimum.
12 Q How many times did you talk to him during the weeks when
13 he was at the building?
14 A Daily.
15 Q Okay. Do you know whether he called anybody else at the
16 building from UPS Freight on the weeks where he was out of
17 town, other than yourself?
18 HEARING OFFICER O'NEILL: If you know.
19 THE WITNESS: No. I don't know.
20 MR. NAUGHTON: Okay.
21 BY MR. NAUGHTON:
22 Q Is it accurate that -- and forgive me if this has been
23 asked already, I can't remember; is it accurate to say that
24 from about the time that Angie left as site manager until about
25 two weeks ago you occupied the site manager's office?

1 A No.
2 Q Okay. What part of that question is wrong?
3 A Occupying the office.
4 Q Okay. I don't mean "occupy," I mean sat in the office,
5 worked in the office. I don't mean that you were occupying it
6 in any -- way.
7 A I worked in all different kinds of stations. Depends on
8 who was in town. If upper management was in town and they
9 needed the office, I would go work elsewhere.
10 Q Okay.
11 A That -- that's never been labeled my office. There's no
12 personal belongings of mine in the office or nothing.
13 Q Were you -- how many days do you recall not being in the
14 office up until about two weeks ago from the time Angie left
15 until about two weeks ago?
16 A I don't know.
17 Q Did you ever put a particular screensaver on the computer
18 in the site manager's office?
19 A Yes.
20 Q What was that?
21 A Dallas Cowboy's screensaver.
22 Q When did you do that?
23 A I don't remember.
24 Q Well, was it sometime before or after July of this year?
25 HEARING OFFICER O'NEILL: And we're sticking with

1 supervisory indicia. If you want to ask him if he used a
2 computer, I don't --
3 MR. NAUGHTON: I will. Evidentially he did enough to put
4 a screensaver on.
5 BY MR. NAUGHTON:
6 Q Did you use a computer in that office?
7 A Occasionally, yes.
8 Q Okay. Was there a different computer in the site
9 manager's office than the laptop that you have issued?
10 A No.
11 Q All right. So you -- I'm sorry; was there a computer in
12 the site manager's office?
13 A Yes.
14 Q Okay. And did you use that computer from time-to-time
15 when you --
16 A Yes.
17 Q Okay. And it was -- and recently you've been given
18 another computer from the company, right?
19 A I don't have it anymore, but --
20 Q Did you have it for a while? A laptop?
21 A Two months.
22 Q Okay. When did you -- you say you don't have it anymore,
23 did you turn it in?
24 A No. It either crashed, something happened to it.
25 Q Okay.

1 A They took it from me to either fix it or I don't know
2 what -- what happened to it.
3 Q How recently did they take it to fix it?
4 A Last week some time.
5 Q Okay. So it hasn't been returned from the --
6 A No.
7 Q Is it your understanding it's being repaired?
8 A From my understanding, yes.
9 Q Um-hmm. From time-to-time -- I want to ask you a question
10 or two about Yesik. Am I pronouncing that right, the
11 contractor?
12 A Yesik.
13 Q Yesik. From time-to-time were you able to call a
14 particular Yesik driver to bring him over to cover some work
15 that needed to be done? Did you ever call a particular Yesik
16 driver or did you just go call the company and say send
17 somebody over?
18 A No, I call the owner of the company and he sends the
19 driver to work.
20 Q All right. Did you -- did he ever tell you, here's a list
21 of people you can -- you can select from?
22 A No.
23 Q Okay. Okay.
24 (Pause.)
25 HEARING OFFICER O'NEILL: Okay, I'm going to jump in and

1 ask a question --
2 MR. NAUGHTON: Sure, go right ahead.
3 HEARING OFFICER O'NEILL: -- about the employees who come
4 from other UPS facilities to help out.
5 As a dispatcher, you're aware of approximately how many
6 employees come from other UPS facilities; is that correct?
7 THE WITNESS: Yes.
8 HEARING OFFICER O'NEILL: Okay. I'm going to -- could you
9 show him Employer 2?
10 Okay, this is a chart that the Employer put into evidence.
11 And the bottom half of the chart, in the middle there where
12 it's "AAK," the Employer contends that there are about 72 weeks
13 that drivers from other facilities came and helped out over the
14 past three years. And I'm just wondering does that number
15 sound about right, about 72 weeks' worth of people coming in
16 over the past three years from other UPS facilities? If --
17 THE WITNESS: Am I looking at it this way or this way?
18 HEARING OFFICER O'NEILL: Oh. I'm looking at it, this
19 way. The Employer tells us that over three years there were 72
20 weeks covered by UPS drivers from other UPS facilities. Does
21 that seem about right to you? Or --
22 THE WITNESS: So this means 54 drivers went to Enfield?
23 HEARING OFFICER O'NEILL: Yes.
24 THE WITNESS: Okay.
25 HEARING OFFICER O'NEILL: And this means --

1 MR. MEYER: If I can?
2 HEARING OFFICER O'NEILL: Yeah.
3 MR. MEYER: I think you're -- it's not 54 drivers, those
4 are weeks.
5 HEARING OFFICER O'NEILL: Weeks, I'm sorry. Yeah, these
6 are 54 weeks --
7 THE WITNESS: Fifty-four weeks that drivers were in
8 Enfield.
9 HEARING OFFICER O'NEILL: Yes.
10 THE WITNESS: Yeah, that would -- that would probably be
11 the -- when Enfield was opening.
12 HEARING OFFICER O'NEILL: When Enfield was starting?
13 THE WITNESS: Yeah.
14 HEARING OFFICER O'NEILL: And 11 weeks drivers went to
15 Roanoke over the past three years. Are you aware of --
16 THE WITNESS: That --
17 HEARING OFFICER O'NEILL: -- drivers go down there?
18 THE WITNESS: Yeah, they needed help, as well.
19 HEARING OFFICER O'NEILL: They needed help. And seven
20 went to, how about "S," do you know what that one is?
21 THE WITNESS: Selina.
22 HEARING OFFICER O'NEILL: Selina. Does that sound
23 about -- over three years' worth? I don't know if you would
24 remember that.
25 THE WITNESS: That was a long time ago.

1 HEARING OFFICER O'NEILL: So -- okay. So that sounds
2 about right?
3 THE WITNESS: Um-hmm.
4 HEARING OFFICER O'NEILL: And as a dispatcher or working
5 as a dispatcher 80 percent of the time, what percentage in
6 an -- on an average year are routes covered by drivers from
7 other UPS facilities? These visitor drivers. Is it like, more
8 like 1 percent? Ten percent? Fifty percent? I don't know if
9 you can even estimate it. What do you see?
10 THE WITNESS: Kutztown, we try to cover it with our own
11 fleet.
12 HEARING OFFICER O'NEILL: Uh-huh.
13 THE WITNESS: If -- if it's so bad where we got to get
14 help from outside, I would say 3 to 5 percent.
15 HEARING OFFICER O'NEILL: Three to five percent. At any
16 time of the year or is it just bad weeks?
17 THE WITNESS: Just recently because we've been having, you
18 know, short staff. You know, trying to get drivers in.
19 HEARING OFFICER O'NEILL: Um-hmm.
20 THE WITNESS: In the past, you know, like I said, we've
21 had 75 drivers in the shop at one time, so we didn't have those
22 issues.
23 HEARING OFFICER O'NEILL: And how -- so for how long has
24 it been maybe to 3 to 5 percent?
25 THE WITNESS: I want to say --

1 HEARING OFFICER O'NEILL: Of visitors.
2 THE WITNESS: I want to say last 30 to 60 days.
3 HEARING OFFICER O'NEILL: Um-hmm. And prior to that, like
4 what percentage of your drivers were from the other UPS
5 facilities?
6 THE WITNESS: Oh, before what's going on right now?
7 HEARING OFFICER O'NEILL: Yeah.
8 THE WITNESS: Zero.
9 HEARING OFFICER O'NEILL: Zero. So --
10 Okay, further questions for this witness?
11 MR. NAUGHTON: Okay, I think Mr. Larkin may have a
12 question that he's giving me.
13 CROSS-EXAMINATION (continued)
14 BY MR. NAUGHTON:
15 Q While we're waiting for Mr. Larkin, Mr. Cappetta, is there
16 a schedule prepared for space and visibility training runs?
17 A Not a schedule that's prepared. Mark Grisham came in the
18 last two weeks and said, hey, we got till the end of the year
19 to get these done, let's get them done. And so it wasn't a
20 schedule. Selecting who needed who needed one, who doesn't
21 need one, and just getting them done.
22 Q Am I correct -- I think somebody asked you this earlier;
23 is it correct that you -- you don't talk to other distribution
24 centers; correct?
25 A No.

Q Is that right?
A No.
Q Is that wrong?
A No, I don't speak to other distribution -- other Advance Auto Parts distribution centers?
Q Right.
A No.
Q All right. So you ever talk to other distribution centers; correct?
A No.
Q Am I right?
A Yes, you're right.
Q Okay.
MR. NAUGHTON: So what was your question?
BY MR. NAUGHTON:
Q So you really wouldn't know what percentage of driver transfers, Exhibit 2, represents at any of the other eight facilities; correct?
A No clue.
MR. NAUGHTON: That's all I have. Thank you, ma'am.
MR. MEYER: I have one quick question.

REDIRECT EXAMINATION

BY MR. MEYER:
Q Are you here -- are you testifying here today in response to a subpoena?

A Yes.

MR. MEYER: Okay.

HEARING OFFICER O'NEILL: Okay. Anything else for this witness?

(No response.)

HEARING OFFICER O'NEILL: Okay, you may step down.

THE WITNESS: Thank you.

(Witness excused.)

1 E V E N I N G S E S S I O N

2 (6:01 p.m.)

3 HEARING OFFICER O'NEILL: Okay, do you have another

4 witness?

5 MR. MEYER: I'm going to call Gary Falcone. Greg Falcone,

6 I'm sorry. Long day. I don't think his is going to be that

7 long but I -- I'm also bad at predicting; so --

8 HEARING OFFICER O'NEILL: That's okay.

9 MR. NAUGHTON: How late do you plan to go?

10 HEARING OFFICER O'NEILL: Until we're finished, I think.

11 I don't -- do you have more witnesses?

12 MR. NAUGHTON: Do I?

13 HEARING OFFICER O'NEILL: Yes.

14 MR. NAUGHTON: I don't know yet. I mean, I might have

15 rebuttal but I --

16 HEARING OFFICER O'NEILL: Okay.

17 MR. NAUGHTON: -- as of now, I put on my case --

18 HEARING OFFICER O'NEILL: Okay.

19 MR. NAUGHTON: -- but --

20 HEARING OFFICER O'NEILL: Okay, and for the Petitioner,

21 you have --

22 MR. MEYER: Greg. I don't think I'm going to call Carl.

23 But I mean, that could change --

24 HEARING OFFICER O'NEILL: You may, okay.

25 MR. MEYER: -- but --

1 HEARING OFFICER O'NEILL: Well, let's go -- let's move.
2 MR. MEYER: Yeah, let's just go.
3 HEARING OFFICER O'NEILL: Yeah. Oh, I'm sorry; could you
4 state your full name, please?
5 MR. FALCONE: Greg Falcone, F-A-L-C-O-N-E.
6 HEARING OFFICER O'NEILL: And can you raise your right
7 hand, please?
8 MR. NAUGHTON: I'm sorry, ma'am. I -- I asked the
9 question how late do you intend to go and --
10 HEARING OFFICER O'NEILL: I -- I think until we finish
11 this evening. Do you want to come back tomorrow?
12 MR. NAUGHTON: I -- well, as you can see I'm still here,
13 so --
14 HEARING OFFICER O'NEILL: Yeah.
15 MR. NAUGHTON: -- I can come back tomorrow, and I will. I
16 mean, I'll stay over tonight if we can. I would be glad to.
17 HEARING OFFICER O'NEILL: Yeah. My preference is if we
18 can finish in the next hour to just stay and finish it.
19 MR. MEYER: I really don't think this will take long.
20 HEARING OFFICER O'NEILL: Okay.
21 MR. MEYER: But again, I am bad at predicting so --
22 HEARING OFFICER O'NEILL: Okay. Let's try and --
23 MR. MEYER: Here's another problem. The other practical
24 problem we're dealing with is you haven't made a decision about
25 briefs. We're obviously going to ask for that. If you decide

1 against it, there's no way we're going to make a closing
2 statement tonight.
3 HEARING OFFICER O'NEILL: Okay. Well, let's just keep
4 going.
5 MR. NAUGHTON: Well, you've also asked us for a lot of
6 documents. I mean, a lot. A dozen documents. We haven't had
7 a chance to look at them yet.
8 HEARING OFFICER O'NEILL: Okay, if you can get them, you
9 can get them. Send an email. Okay.
10 MR. NAUGHTON: With respect, you've asked us for number
11 one, a number of documents for the first time today. You
12 didn't -- they're not under subpoena. We want to get them and
13 look at them and -- and make a decision about what they are and
14 then to turn them over. If you want us to make that effort,
15 you've asked for them, we want to comply, but it's -- as of
16 now, we think it's impossible to get them today.
17 HEARING OFFICER O'NEILL: Okay.
18 MR. NAUGHTON: So we'll do the best we can and I just --
19 HEARING OFFICER O'NEILL: Have you -- have you requested
20 them?
21 MR. LARKIN: Yes.
22 MR. NAUGHTON: You asked for them.
23 HEARING OFFICER O'NEILL: Yeah. You've -- you've made a
24 request for them?
25 MR. LARKIN: Yes.

1 HEARING OFFICER O'NEILL: Have you received them yet?
2 MR. LARKIN: No.
3 HEARING OFFICER O'NEILL: Okay.
4 MR. NAUGHTON: So again, you asked me do I want to
5 continue tomorrow?
6 HEARING OFFICER O'NEILL: Right.
7 MR. NAUGHTON: It's obvious that I'm still here, so I've
8 canceled my flight.
9 HEARING OFFICER O'NEILL: Okay. I --
10 MR. NAUGHTON: Let me finish, please, with respect. I'm
11 here. I can come tomorrow morning, and I'll stay overnight. I
12 would be happy to. And if it takes whatever time it takes, it
13 takes. So yes, I'll come back in the morning.
14 HEARING OFFICER O'NEILL: Okay. At this point I would
15 like to try to continue and try to finish tonight. And I hope
16 that we will, but if we need to come back.
17 All right, let's -- can you proceed?
18 MR. MEYER: Did you swear him in? I didn't --
19 HEARING OFFICER O'NEILL: Yes, I did.
20 MR. MEYER: Okay.
21 (Whereupon,
22 GREG FALCONE,
23 was called as a witness by and on behalf of Petitioner and,
24 after having been duly sworn, was examined and testified as
25 follows:)

1 DIRECT EXAMINATION
2 BY MR. MEYER:
3 Q Mr. Falcone, are you currently employed?
4 A Yes, I am.
5 Q Who do you work for?
6 A UPS Freight Truckload.
7 Q And when were you hired?
8 A Right around May/June 2009.
9 Q Okay. And when you were hired what was your job title?
10 A Route driver.
11 Q Is that currently your job title?
12 A I am. And I'm also a certified safety instructor.
13 Q And when did you become a certified safety instructor?
14 A I'm thinking it was 2010, 2011.
15 Q You don't remember the exact year?
16 A No, I don't.
17 Q Okay. Now, these days -- well, can -- can you be shown
18 Employer Exhibit 1?
19 A Yes.
20 Q What -- this is a list of employees who transferred and
21 there was -- earlier there was some testimony about a Juya
22 Farid or Farid Juya?
23 A Yes.
24 Q I guess it's Farid Juya. Do you know Farid Juya?
25 A Yes, I do.

1 Q Who is he?
2 A He's an individual that I actually did a backing test
3 with, a road test, and I trained him.
4 Q When he was first hired you trained him or you --
5 A Yes, that is correct.
6 Q Okay. Now, this document says that he was hired
7 originally at the Delaware facility. Where is the Delaware
8 facility?
9 A That's in Ohio.
10 Q Okay. Is that correct?
11 A No, it's not correct. It's -- that's totally false.
12 Q And how do you know it's totally false?
13 A Because I did his initial backing test. I did his initial
14 road test. He actually came in for a backing test and he was
15 screwing up really bad and I stopped him before he hit the
16 trailer, and I told him if he was my cousin I would suggest
17 that he go out and go to like a trucking school and refresh on
18 backing up site sight and blind side. He took my suggestion.
19 He left and came back a month or two later and he did the
20 backing test flawlessly. And then he did a road test. And
21 then I trained here thereafter.
22 Q I see there's a hire date, which is the one-, two-,
23 three-, four-, five-, six-, seventh column over. Do you see
24 that?
25 A One-, two-, three-, four -- yes.

1 Q And what's the hire date?
2 A The hire date is -- it looks like March 04, 2015.
3 Q Right. And then the transfer date is at the far -- the
4 last column. What date is that?
5 A That looks like March 10, 2015.
6 Q So he only worked for six days before he transferred to
7 Kutztown, according to this document?
8 A I don't know he could have if I did his backing test, his
9 road test, and I trained him. I don't know how that's even
10 possible.
11 Q So you don't think this is accurate?
12 A No, I do -- I think this is in accurate honestly.
13 Q Okay. And --
14 MR. LARKIN: I'm going to object to this whole line of
15 questioning. Counsel hasn't laid any foundation that he has
16 any idea what this document is. He's never seen it before. He
17 has no firsthand knowledge, and he's not able to look at this
18 document and say that the data on it is inaccurate. He can
19 talk about --
20 HEARING OFFICER O'NEILL: Well --
21 MR. LARKIN: -- his firsthand knowledge of Mr. Juya. But
22 unless he knows who hired and when, he can't testify that this
23 is inaccurate.
24 HEARING OFFICER O'NEILL: Okay. I understand your
25 objection.

1 The testimony you gave earlier about Mr. Juya, is that
2 from your personal knowledge of working with him and training
3 him?
4 THE WITNESS: Yes.
5 HEARING OFFICER O'NEILL: Thank you.
6 BY MR. MEYER:
7 Q Do you know -- the fourth name down is James Calvin. Do
8 you know him?
9 A Not really.
10 Q Did he ever work in Kutztown?
11 A Not that I'm aware of.
12 Q Okay. Do you know all the drivers in Kutztown?
13 A Yeah.
14 Q Okay. Would you have known if worked as a driver in 2014?
15 A Probably.
16 Q Okay. And I see his hire date was November -- is listed
17 as November 3, 2014, and his transfer date was about two weeks
18 later on November 18, 2014.
19 A I don't honestly know. I don't remember that individual.
20 Q But you have no memory of him working at Kutztown?
21 A No, I don't.
22 Q Okay. How about Eric Davis, do you know who he is?
23 A No.
24 Q Have you ever known someone working there named Eric
25 Davis?

1 A No.
2 Q Would you have known a driver named Eric Davis if he
3 worked in 2011?
4 A Probably.
5 Q Okay.
6 MR. NAUGHTON: Objection, he's speculating.
7 HEARING OFFICER O'NEILL: I'll allow it.
8 BY MR. MEYER:
9 Q How about Thomas Hunt, do you know how he is?
10 A Yeah, I did meet him. And I think he was -- he was -- he
11 came to our place for training and then he went to Enfield, and
12 I think he had a very short career.
13 Q Okay. Did he -- was he ever a permanent driver at
14 Kutztown?
15 A No, he wasn't.
16 Q He just came for training?
17 A Yes, that's correct.
18 Q But he wasn't attached to your distribution center?
19 A No, he was not.
20 Q Did you train him?
21 A I think I was involved in part of his training. I think
22 Carl David might have been involved in the other part of.
23 Q Okay. How about Clarence McIntyre?
24 A Doesn't sound familiar.
25 Q Okay. You don't know that name?

1 A No.
2 Q If he worked as a driver in 2011, would you have known
3 him?
4 MR. NAUGHTON: Objection, speculation.
5 HEARING OFFICER O'NEILL: Yeah, can you rephrase that?
6 MR. MEYER: Okay.
7 BY MR. MEYER:
8 Q Did you -- did you know all the drivers who worked in 2011
9 at Kutztown?
10 A For the most part. I was out for a few months.
11 Q Oh, you were?
12 A Yes.
13 Q Okay. How about Carol Mills, do you know who she is?
14 A No.
15 Q Christopher Riley?
16 A Chris Riley? Sounds familiar but I don't really -- don't
17 place it.
18 Q How about Claudio Torres?
19 A No.
20 Q Okay. You know most of the drivers who have worked in
21 Kutztown since 2009, right?
22 A Yeah, that's true.
23 Q Okay. I also noticed in the far right column, it looks
24 like a lot of these transfers happened to -- in April 2011. Do
25 you happen to know what happened in April 2011?

1 A No, I don't.
2 Q Okay. Does it help if I point out that a lot of the 2011
3 transfers happened in -- so they were transferred to Lakeland?
4 A They might have been guys that came up and got trained for
5 Lakeland, that's a possibility because we -- as I heard in
6 early testimony about Lakeland coming on board later and --
7 Q Do you know when Lakeland came on board to UPS?
8 A I'm thinking it was probably between 2011, 2012.
9 Q Okay.
10 MR. MEYER: That's all the questions I have.
11 HEARING OFFICER O'NEILL: Okay. Is that a practice at
12 your facility, that drivers come who are going to be assigned
13 in another facility, but they've come just for training? Does
14 that happen?
15 THE WITNESS: It does happen sometimes because, like for
16 example with Enfield, because the trainer -- because Carl and I
17 are located in Kutztown, they'll send them there for like the
18 basic training and then they'll ship them back to --
19 Or they'll have like, you know, for example, Carl had gone
20 to Enfield to train some drivers. So it's all -- it varies.
21 HEARING OFFICER O'NEILL: Okay. Can you tell me, you work
22 as a certified safety --
23 THE WITNESS: Instructor.
24 HEARING OFFICER O'NEILL: -- instructor. And do you -- do
25 you do some driving and some --

THE WITNESS: Yes, I do.

HEARING OFFICER O'NEILL: What percentage do you do of each?

THE WITNESS: It all varies. It depends on --

HEARING OFFICER O'NEILL: In an average year? Maybe the past year?

THE WITNESS: I'll say 50/50, but it, like I said, I would have to look at the stats because if there's a load that's not covered I'm put it to do it. And if there's safety work, like lately we were pushing the S&V rides and I was taken off the road completely and just put on to finish the S&V rides. So.

HEARING OFFICER O'NEILL: Okay.

MR. MEYER: Okay, do have another question, so --

DIRECT EXAMINATION (continued)

BY MR. MEYER:

Q Do you know what happened in November of 2014? I see there's a bunch of transfers to Enfield in November 2014.

A Well, that was when Enfield came on line. That's when they opened that facility.

Q Okay. And then are you here -- are you testifying here in response to a subpoena?

A Yes, I am.

MR. MEYER: That's it.

HEARING OFFICER O'NEILL: Okay. Do you have any questions?

1 MR. NAUGHTON: Yes.
2 CROSS-EXAMINATION
3 BY MR. NAUGHTON:
4 Q Sir, you mentioned that were away for a few months?
5 A Yeah.
6 Q When was that?
7 A I -- I know I was out 2010, the beginning of 2011. I
8 think I came back in April -- no, I'm sorry, May. March 2011
9 is when I came back.
10 Q Have you had any other periods since that time when you
11 were out for an extended period of time? More than say a week
12 at a time?
13 A Yeah. I think -- well, I had a two-week or a 10-day
14 vacation.
15 Q Okay. Other than -- other than that, were you -- have you
16 had any extended periods of absence?
17 A I think I did in 2012, from August probably through
18 November.
19 Q Okay. Anything -- anything else in 2011 when you were
20 going for more than say --
21 A I don't believe so.
22 Q -- a week?
23 A Not that I can recall.
24 Q Okay. You said that Hunt, that the driver Hunt, Thomas
25 Hunt just came to you for training.

1 A Yes.
2 Q What do you mean by that?
3 A Well, since I'm a trainer, that's what we do; is train new
4 hires. He was, from what I understood, he was a new hire from
5 Enfield that was sent to our location for training.
6 Q Okay. Do you know where they -- where he was hired for a
7 fact?
8 A For fact, no.
9 Q Okay. So can you swear to it that he was hired in
10 Kutztown versus Enfield or Enfield versus Kutztown?
11 A I -- I was told he was from Connecticut.
12 Q Okay.
13 A So that's all I -- you know --
14 Q So other than --
15 A Enfield's in Connecticut, so I'm going to draw a
16 conclusion that --
17 Q All right. Other than what somebody told you, do you have
18 any personal knowledge of that?
19 A No.
20 Q All right. All right, and Eric Davis, do you know
21 actually where he was hired?
22 A No, I don't.
23 Q Okay. Clarence McIntyre, do you know where he was hired?
24 A Don't recall the name. I don't have the list in front of
25 me anymore, either.

1 Q Carol Mills, do you know where was -- is Carol a man or a
2 woman?
3 A I have no idea.
4 Q Okay. All right, Christopher Riley, any idea?
5 A No.
6 Q Okay. And Claudio Torres, do you know where -- what
7 location he was actually hired into?
8 A No.
9 Q Okay.
10 A Can I add something?
11 HEARING OFFICER O'NEILL: Sure.
12 BY MR. NAUGHTON:
13 Q Well, you've answered my question.
14 A Well, he wasn't hired in Kutztown if that's what you mean.
15 Q Torres, you mean?
16 A Yeah.
17 Q Did he tell you that?
18 A No, I don't recall ever seeing him at the location.
19 Q Okay.
20 A Or training him.
21 Q All right. And is that -- is that the basis of your
22 testimony?
23 A Yes.
24 Q Your knowledge? Okay.
25 MR. NAUGHTON: Thank you, sir.

1 MR. MEYER: I have one more question.
2 HEARING OFFICER O'NEILL: All right, sure.
3 MR. MEYER: Unless you want to --
4 HEARING OFFICER O'NEILL: No, go ahead.
5 REDIRECT EXAMINATION
6 BY MR. MEYER:
7 Q How long is the training for a new driver?
8 A The basic training is 10 days, between orientation and on
9 the road driving. We -- lately we've had candidates that have
10 lasted two months, almost three months because of their skill
11 level being so minimal.
12 Q You mean the training can take as long as two or three
13 months?
14 A Yes, it can.
15 Q So it -- it's -- it could be as short as 10 days or as
16 long as two or three months; is that right?
17 A This is true.
18 Q Okay. And when you say 10 days, is that 10 working days,
19 like two weeks?
20 A Ten working days, that's correct.
21 Q So it would be really two weeks?
22 A Yes. Essentially.
23 Q Okay. So for example, when James Calvin was hired on
24 November 3rd and then transfers from Kutztown to Enfield on, I
25 guess, 15 days later, that was probably just at the completion

of his training?

A That's probably correct. I would -- I would say yes.

Q That's fine.

A That's logical.

HEARING OFFICER O'NEILL: Okay. All right, you may step down.

THE WITNESS: All right, thanks.

(Witness excused.)

MR. MEYER: And we're resting.

HEARING OFFICER O'NEILL: Okay. I want to recall for a moment Frank Cappetta.

MR. MEYER: Okay.

HEARING OFFICER O'NEILL: Could come on back up?

MR. CAPPETTA: You want me back up there?

HEARING OFFICER O'NEILL: Thank you. Have a seat and you're still under oath.

(Whereupon,

FRANK CAPPETTA,

having previously been called as a witness by and on behalf of the Hearing Officer and, after having been previously sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY HEARING OFFICER O'NEILL:

Q Earlier you testified that when you have more drivers than routes available you were -- you sometimes consider the skill

1 of a driver when you're filling a driver into that -- a slot.
2 Do you remember testifying that way?
3 A Um-hmm.
4 Q Yeah. And when you say "driver skill," can you tell me
5 what some of the skills are? What are you considering?
6 A Experience level. Feedback from the trainers. Feedback
7 from other drivers. If I ended up training the guy myself, if
8 I know if he's comfortable doing a certain route.
9 Q Um-hmm. And what are certain skills that a driver would
10 have that make them very desirable for a certain route, where
11 another driver may not have some skills? What --
12 A Like, for example, we would have a driver that came in
13 that, I don't know, he -- let's say he used to work for a
14 company in Ohio. He's an LTL driver. He's a city driver. I
15 know that, okay, he's used to going into a city because that's
16 what he used to do before coming to work here.
17 Q Um-hmm.
18 A So if I send him into, you know, the five boroughs of New
19 York City, I know he's going to be okay.
20 Q Okay.
21 A He's used to that already.
22 Q I see. I understand.
23 MR. MEYER: Did you ever define what "LTL" is? This has
24 been a long hearing and I --
25 THE WITNESS: Less than truckload.

1 MR. MEYER: Okay.
2 HEARING OFFICER O'NEILL: Okay. Yeah. Any -- any more
3 questions for this witness?
4 (No response.)
5 HEARING OFFICER O'NEILL: Okay, you can step down.
6 Let's go off the record for five minutes. Let me talk to
7 the Regional Director about briefs.
8 (Whereupon, a brief recess was taken.)
9 HEARING OFFICER O'NEILL: Back on the record.
10 Okay, do either of you have a witness to call at this
11 time; for the Employer? Are you through with your witnesses?
12 MR. NAUGHTON: At this time --
13 HEARING OFFICER O'NEILL: Yes.
14 MR. NAUGHTON: -- we don't have any other witnesses on
15 hand.
16 HEARING OFFICER O'NEILL: Uh-huh, yeah.
17 MR. NAUGHTON: We --
18 HEARING OFFICER O'NEILL: And for the Petitioner, you have
19 no more witnesses?
20 MR. MEYER: No more witnesses.
21 HEARING OFFICER O'NEILL: Okay. I just want to summarize
22 the positions of the parties on the unit contention.
23 And for Petitioner, your position is that the unit is all
24 full-time and regular part-time route drivers, including
25 certified safety instructors and depositors employed by

1 Employer at its Kutztown facility; correct? That is still your
2 position?
3 MR. MEYER: That is still my position.
4 HEARING OFFICER O'NEILL: And for the Employer, could you
5 state your position on the unit?
6 MR. LARKIN: Uh --
7 HEARING OFFICER O'NEILL: Restate your position.
8 MR. NAUGHTON: Go ahead, Kurt, I'll let you do it.
9 MR. LARKIN: Yeah. The Company disagrees that the unit
10 requested is appropriate under the Act, and contends that the
11 only appropriate unit is a system wide unit consisting of all
12 full-time and regular part-time route drivers employed by the
13 Employer at each of nine Advance Auto Parts distribution
14 centers covered by the Employer's third party service contract
15 with Advance Auto Parts.
16 HEARING OFFICER O'NEILL: Okay. And in the unit that the
17 Petitioner is seeking, I think we have agreement there are
18 approximately, is it, 29 or 30?
19 MR. NAUGHTON: Approximately, I think.
20 MR. MEYER: I believe 29. But there was some testimony
21 that someone may be out on an injury.
22 HEARING OFFICER O'NEILL: So it's approximately 29 or 30?
23 MR. MEYER: Yes.
24 HEARING OFFICER O'NEILL: And the total number of
25 employees, I know it's in the Employer's Exhibit -- Statement

1 of Position, in all the of the facilities is how many? Do
2 you --
3 MR. NAUGHTON: You just took my copy. Let me -- hang on
4 just a minute, I can get it.
5 HEARING OFFICER O'NEILL: Do you remember?
6 MR. NAUGHTON: I think it's about 287, but let me just
7 double check.
8 (Pause.)
9 MR. NAUGHTON: We produced it, the -- all the list.
10 HEARING OFFICER O'NEILL: Okay.
11 MR. NAUGHTON: I think it's approximately 287.
12 HEARING OFFICER O'NEILL: Right. It would be all of the
13 employees listed on --
14 MR. LARKIN: Attachment C.
15 HEARING OFFICER O'NEILL: -- Attachment C?
16 MR. NAUGHTON: Yes, ma'am. Again, I don't have the exact
17 number, but I believe it's somewhere in the neighborhood of
18 287. Could be a few more, a few less.
19 HEARING OFFICER O'NEILL: Okay. For the Petitioner, do
20 you wish to proceed to an election in any alternate unit if the
21 unit found -- sought is found to be inappropriate by the
22 Regional Director?
23 MR. MEYER: You mean, their version of the unit?
24 HEARING OFFICER O'NEILL: If any other unit is found
25 appropriate?

1 MR. MEYER: We're willing to proceed on any other -- any
2 other appropriate unit, but I don't know -- I believe I would
3 ask for the petition to be dismissed if their unit's approved
4 because -- because then --
5 HEARING OFFICER O'NEILL: You would have --
6 MR. MEYER: -- we would have less than 30 percent since
7 all of our showing of interest is in the 30 that we --
8 HEARING OFFICER O'NEILL: Well, you would -- you would
9 have -- let me go off the record for a minute.
10 (Whereupon, a brief recess was taken.)
11 HEARING OFFICER O'NEILL: Back on the record.
12 What's the estimated length of the transcript?
13 COURT REPORTER: Two hundred pages, give or take 30.
14 That's my best guess.
15 MR. NAUGHTON: So 200 to 230?
16 COURT REPORTER: Somewhere like that.
17 HEARING OFFICER O'NEILL: Okay, I want to explore the
18 election details.
19 The Petitioner on the petition has asked for a mail
20 ballot; is that still your position?
21 MR. MEYER: Yes. Frankly, I don't see any other practical
22 way to do this within the oddness of their shifts. So yes, we
23 believe a mail ballot is the best way to do it.
24 HEARING OFFICER O'NEILL: Okay. And is there any -- is
25 there any time in January that -- presumably a decision would

1 issue in January. Is there any time in January that would --
2 that is not a good time for a mail ballot? Is there
3 anything --
4 MR. MEYER: I don't think so.
5 HEARING OFFICER O'NEILL: No.
6 MR. MEYER: Just as quick as possible.
7 HEARING OFFICER O'NEILL: And for the Employer, what is
8 your position on the election details?
9 MR. LARKIN: The --
10 MR. NAUGHTON: Go ahead.
11 MR. LARKIN: The Company would just note that it's the
12 Board's longstanding policy that elections, as a general rule,
13 should be conducted manually in the absence of good cause to
14 the contrary. The Company is -- believes that we can set a
15 split poll that would --
16 HEARING OFFICER O'NEILL: And what hours -- what hours do
17 you suggest?
18 MR. LARKIN: 3:00 to 5:00 a.m. --
19 MR. NAUGHTON: And 3:00 to 5:00 p.m.
20 MR. LARKIN: -- and 3:00 to 5:00 p.m. And that would be
21 more than adequate to capture the bargaining unit. Assuming --
22 assuming, this is all assuming, of course, that the petitioned
23 for unit is found appropriate. If that's the case, then -- and
24 we're proceeding to an election in the petitioned for unit at
25 Kutztown, we're talking about 3:00 to 5:00 a.m., 3:00 to 5:00

1 p.m. at Kutztown.
2 HEARING OFFICER O'NEILL: Now --
3 MR. LARKIN: Yeah, we also have an appropriate location on
4 site to conduct the secret ballot.
5 HEARING OFFICER O'NEILL: And what is that?
6 MR. LARKIN: The Company has brought a RV on site.
7 HEARING OFFICER O'NEILL: Um-hmm.
8 MR. LARKIN: More than adequate to set up a polling --
9 HEARING OFFICER O'NEILL: What is that RV currently being
10 used for?
11 MR. LARKIN: Meetings.
12 HEARING OFFICER O'NEILL: Supervisory meetings? Or are
13 they employee meetings?
14 MR. LARKIN: Employee meetings. Employee meetings, I
15 don't think supervisors. You guys won't be out there, right?
16 UNIDENTIFIED SPEAKER: No.
17 HEARING OFFICER O'NEILL: Was it brought for the Union
18 campaign?
19 MR. LARKIN: Yes.
20 HEARING OFFICER O'NEILL: And so it's for employee
21 meetings are held in this RV. And do any supervisors have
22 their offices in there?
23 MR. LARKIN: No.
24 HEARING OFFICER O'NEILL: Well temporarily?
25 MR. LARKIN: No.

1 HEARING OFFICER O'NEILL: Okay. And what's your position
2 on holding it in the RV, if we held a manual?
3 MR. MEYER: Well, I -- I think -- I think it's a bad idea.
4 The RV, if it's -- if it's brought in and it's -- it's
5 associated with the anti-union consultant they've hired, I
6 just -- I just can't see that ever being apparent to the
7 employees it's a neutral location.
8 HEARING OFFICER O'NEILL: Okay. And is there a lunchroom?
9 MR. LARKIN: No.
10 HEARING OFFICER O'NEILL: Is there a break room?
11 MR. LARKIN: But there is an employee break room on site.
12 HEARING OFFICER O'NEILL: Um-hmm. How big is that,
13 approximately?
14 MR. LARKIN: It's approximately the same size as -- well,
15 it's a little -- it's actually larger than the inside of the
16 RV. There are two bathrooms. It's a break room with vending
17 machines. It leads -- there are two doors. Actually, there's
18 three doors: there's one from the outside that leads in;
19 there's a door that leads into the actual warehouse proper; and
20 then there is a door that leads back into the administrative
21 area, and behind the administrative area there's some
22 supervisory offices. Obviously, if the election was conducted
23 in the guest -- in the break room, the supervisors would not be
24 on site from -- while the polls were open.
25 HEARING OFFICER O'NEILL: Okay. And how -- is that -- is

1 that RV there permanently?
2 MR. LARKIN: No.
3 HEARING OFFICER O'NEILL: Okay.
4 MR. MEYER: Can I just add about their hours?
5 HEARING OFFICER O'NEILL: Yes.
6 MR. MEYER: I -- I think on their own testimony there are
7 people who go out around midnight and don't come back until
8 8:00 in the morning. I don't know how that -- their hours
9 capture everybody.
10 MR. LARKIN: The company, Advance Auto Parts, is -- will
11 be able to work with the Company once the Regional Director
12 picks a date so that the loads are scheduled for that
13 particular day in a way in which the employees are available in
14 those windows.
15 HEARING OFFICER O'NEILL: So despite the customer demand,
16 you can still schedule everyone to -- to be present during one
17 of those schedules?
18 MR. LARKIN: To hold the National Labor Relations Board
19 election, yes.
20 HEARING OFFICER O'NEILL: Okay. And how far -- these
21 drivers, how far -- miles, are -- kind of, the longest routes,
22 how far out might they be that they're going to come back for
23 this?
24 MR. LARKIN: Well, that assumes that they've gone yet.
25 HEARING OFFICER O'NEILL: Yeah. If --

1 MR. LARKIN: The majority of -- I believe the times are
2 3:00 to 5:00 and 3:00 to 5:00.
3 HEARING OFFICER O'NEILL: Okay.
4 MR. LARKIN: The 3:00 to 5:00 a.m. is -- is suggested as a
5 way to get most of them before they go.
6 HEARING OFFICER O'NEILL: Okay. And what's -- the
7 geographic area that you cover, I'm just trying to get an idea
8 of miles, how big it is.
9 MR. NAUGHTON: What's the radius?
10 HEARING OFFICER O'NEILL: Maybe you can tell us roughly
11 how far North, South --
12 MR. DAVID: The longest route is about 650 miles, out
13 towards the Buffalo, New York area.
14 HEARING OFFICER O'NEILL: Okay. And how about -- how far
15 East do you guys go?
16 MR. DAVID: We don't go East that far; only into New
17 Jersey.
18 HEARING OFFICER O'NEILL: To New Jersey.
19 MR. DAVID: So that would --
20 HEARING OFFICER O'NEILL: Uh-huh. And how --
21 MR. DAVID: -- be about 150 miles maybe furthest East.
22 HEARING OFFICER O'NEILL: How far West?
23 MR. DAVID: West, about 150, 200 miles West would be the
24 furthest we go West.
25 HEARING OFFICER O'NEILL: Um-hmm. And South?

1 MR. DAVID: Hundred fifty. About 150 miles South.
2 HEARING OFFICER O'NEILL: Um-hmm.
3 MR. MEYER: Can I just add that the -- the other thing
4 that makes me uncomfortable with their hours, even with their
5 representation that they'll, you know, move around the shifts
6 to make sure everyone is available, is that if they're
7 rearranging the regular shifts to accommodate the election,
8 there's always the concern that the people making the decision
9 are going to have strategic -- electoral strategic factors in
10 when -- how they set the schedule. Deciding to make, you know,
11 everyone might have a window to vote, but some people might
12 have a little smaller window if there are people who they think
13 might vote a certain way.
14 MR. LARKIN: I think --
15 MR. MEYER: And that's just an uncomfortable --
16 MR. LARKIN: -- I think perhaps it's overstating it to say
17 that we're going to rearrange the schedule. I think it's
18 simply a matter of delaying some start times on some loads to
19 make sure that the -- you know, there's not what usually
20 happens, which is sort of a stagger of people leaving, you
21 know, at various hours. If we can work with the customer to
22 push, you know, some of these departure times back so that
23 everybody's leaving around roughly the same time, you know, a
24 two-hour window ought to catch everyone. You know, we're not
25 going to be, you know, rearranging the schedule to -- to, you

1 know, exclude people.
2 HEARING OFFICER O'NEILL: The reader of the record is
3 going to -- will consider your positions on mail versus manual
4 and --
5 So, what is the eligibility cutoff date? So what's
6 payroll period ending date immediately preceding today? When
7 does payroll cutoff?
8 MR. LARKIN: Payroll cuts off every Saturday. So that
9 means that the one immediately preceding today --
10 HEARING OFFICER O'NEILL: Weekly or bi-weekly?
11 MR. LARKIN: Weekly, right?
12 HEARING OFFICER O'NEILL: It's weekly?
13 MR. LARKIN: Right. So that would have been the 19th.
14 HEARING OFFICER O'NEILL: Okay.
15 MR. LARKIN: Immediately preceding today.
16 HEARING OFFICER O'NEILL: Okay. And then it's weekly
17 after that? Always on a Saturday?
18 MR. MEYER: Is that right?
19 MR. LARKIN: Yes, that's correct.
20 HEARING OFFICER O'NEILL: Okay. Yes.
21 For the Employer, what is the name, address, email
22 address, fax number, and telephone number of the Employer's
23 onsite rep to whom the Regional Director should transmit the
24 notice of election if a notice is directed?
25 MR. LARKIN: All right, so it will be Matthew Dibiase,

1 9755 Commerce Circle, Kutztown, Pennsylvania 19530. Business
2 phone (610) 285-5380.
3 Matt, you want to say your email address?
4 MR. DIBIASE: Yeah, it's "M," and then my last name,
5 D-I-B-I-A-S-E, at UPS.com. [mdibiase@ups.com]
6 HEARING OFFICER O'NEILL: Did you get that?
7 COURT REPORTER: One more time?
8 HEARING OFFICER O'NEILL: It's --
9 MR. DIBIASE: M, my last name, which is D-I-B-I-A-S-E, at
10 UPS.com.
11 COURT REPORTER: Okay, thank you.
12 HEARING OFFICER O'NEILL: Okay. And we're still asking, a
13 fax number.
14 MR. LARKIN: Oh, I'm sorry.
15 HEARING OFFICER O'NEILL: If you know.
16 MR. LARKIN: I think we put one on the statement, (610)
17 285-5384.
18 HEARING OFFICER O'NEILL: Thank you.
19 For the Employer and the Petitioner, if an election is
20 directed, may the Region communicate with your election
21 observer regarding election procedures any issues that arise
22 during the election, the pre-election conference, and the
23 ballot count? For the Petitioner?
24 MR. MEYER: Yes.
25 HEARING OFFICER O'NEILL: For the Employer?

1 MR. LARKIN: Yes.
2 HEARING OFFICER O'NEILL: Okay. The Region --
3 Off the record.
4 (Whereupon, a brief recess was taken.)
5 HEARING OFFICER O'NEILL: Back on the record.
6 The Regional Director will issue a decision in this matter
7 as soon as practical and will immediately transmit and document
8 to the parties and their designate representatives by email,
9 fax or overnight mail, if neither an email address nor fax
10 number is provided.
11 If an election is directed, the Employer must provide the
12 voter list to be timely filed and served. The voter list must
13 be received by the Regional Director and the parties named in
14 the direction within two business days after the issuance of
15 the direction, unless a longer period based on extraordinary
16 circumstances is specified in the decision and the direction of
17 election. A certificate of service on all parties must be
18 filed with the Regional Director when the voter list is filed.
19 The Region will no longer serve the voter list.
20 The Employer must submit the list in an electronic format
21 approved by the General Counsel, unless the Employer certifies
22 that it does not have the capacity to produce the list in the
23 required format. The list must be filed in common every day
24 electronic file formats that can be searched. Accordingly,
25 unless otherwise agreed to by the parties, the list must be

1 provided in a table in a Microsoft Word file, or a file that is
2 compatible with Microsoft Word.
3 The first column of the list must begin with each
4 employee's last name, and the list must be alphabetized,
5 overall or by department by the last name. Because the list
6 will be used during the election, the font size of the list
7 must be the equivalent to Times New Roman 10 or larger. That
8 font does not need to be used, but the font must be that size
9 or larger. A sample optional form for the list is provided on
10 the NLRB website.
11 And the Board has stated that it is presumptively
12 appropriate for the Employer to produce multiple versions of
13 the list where the data required is kept in separate databases
14 or files, as long as all the lists link the information to the
15 same employees using the same names, in the same order, and are
16 provided within the allotted time.
17 If the Employer provides multiple lists, the list used at
18 the election will be the list containing the employees' names
19 and addresses. The list must include the full names, work
20 locations, shifts, job classifications, and contact
21 information, including home addresses, available personal email
22 addresses, and available home and personal cellular telephone
23 numbers of all eligible employees.
24 The Employer must also include, in a separate section of
25 that list, the same information for those individuals the

1 parties have agreed will be permitted to vote subject to
2 challenge, or those individuals who, according to the decision
3 and direction of election, will be permitted to vote subject to
4 challenge.
5 For the Employer, I'm sorry, on dates for the election, I
6 missed that with you. I want to go back to that. I'm
7 wondering, is there a day of the week that works better than
8 other days? We would look for when you have the most people
9 working.
10 MR. NAUGHTON: Wednesday is usually the best day of the
11 week.
12 HEARING OFFICER O'NEILL: Wednesday's the best day. And
13 are there any Wednesdays in January that do not work for you?
14 MR. LARKIN: Are there?
15 MR. NAUGHTON: Is there -- is there a holiday weekend
16 coming up in January?
17 HEARING OFFICER O'NEILL: There --
18 MR. NAUGHTON: Martin Luther King Day is on Monday.
19 HEARING OFFICER O'NEILL: Um-hmm.
20 MR. NAUGHTON: This -- the 18th might be a problem because
21 people -- excuse me, the 20th might be a problem. I'm speaking
22 without talking to them, but I'm assuming that it's possible
23 that people might try to blend in some vacation with a long
24 weekend.
25 HEARING OFFICER O'NEILL: Is that -- do --

1 MR. NAUGHTON: We want as many people as possible at the
2 election. Monday, the 18th, is Martin Luther King Day.
3 HEARING OFFICER O'NEILL: Okay. So are you saying that
4 Wednesday, then, the --
5 MR. NAUGHTON: The 20th.
6 HEARING OFFICER O'NEILL: -- what is that, the 20th, is
7 not a good day?
8 MR. NAUGHTON: Well, let me ask these gentlemen.
9 Are there -- do you guys know that there are going to be
10 scheduled vacations that might interfere?
11 MR. CAPPETTA: No.
12 HEARING OFFICER O'NEILL: Not? Okay. So there's no -- so
13 your preference would be a Wednesday, if it is directed, a
14 Wednesday in January?
15 MR. NAUGHTON: Yes, ma'am.
16 HEARING OFFICER O'NEILL: Okay. Okay, and for the
17 Employer, your position on the need for a brief? You
18 mentioned -- off the record you told us you wanted to file a
19 brief and you're reason for wanting to file the brief?
20 MR. NAUGHTON: My reason -- well, our reasons for
21 filing -- wanting to file a brief is that there are some, we
22 think, unusual issues in this case. There are some still
23 unsettled positions regarding --
24 HEARING OFFICER O'NEILL: And what are the unusual issues?
25 MR. NAUGHTON: Well, I -- one of the unusual issues is the

1 relationship of supervisory status to the complaint we had
2 about taint and the showing of interest.
3 HEARING OFFICER O'NEILL: Um-hmm.
4 MR. NAUGHTON: Another one is the, in connection with our
5 argument about the only appropriate unit, there appears to be
6 some not yet settled law on the applicability of *Specialty*
7 *Healthcare*. We're not convinced that the full Board has ever
8 applied *Specialty Healthcare* to a multi-facility unit. And we
9 made some other arguments in our -- in our position statement,
10 which I would like to incorporate by reference.
11 We think there are a number of -- you know, there are
12 always certain issues in common when you're talking about
13 multi-facility versus single facility, but I think we've got a
14 lot of moving parts in this case, and I think we have an
15 extensive development of the facts, which would be easier and
16 much more efficient for everybody to put together with an
17 opportunity to look at the facts and state them coherently and
18 succinctly in a brief.
19 HEARING OFFICER O'NEILL: Okay, let me just take a brief -
20 - Regional Director -- acting Regional Director's here, so let
21 me take a break. He's expecting me to come in on this; so --
22 (Whereupon, a brief recess was taken.)
23 HEARING OFFICER O'NEILL: Back on the record.
24 The Regional Director has concluded that briefs may not be
25 filed. I will now permit the parties to make -- the Regional

1 Director feels that the issues are not so complex, so that we
2 are not allowed the briefs.
3 I will allow the parties oral argument. Does anyone want
4 a brief recess to prepare?
5 MR. NAUGHTON: I would like a brief recess until tomorrow
6 morning at 9:00 a.m. to present oral argument, and I -- and we
7 do -- we would like to present oral argument if we're going to
8 be denied a brief.
9 HEARING OFFICER O'NEILL: Okay.
10 MR. NAUGHTON: I've made arrangements to stay tonight.
11 I'm still here obviously.
12 HEARING OFFICER O'NEILL: Um-hmm.
13 MR. NAUGHTON: So I would like to -- if we can get it done
14 in half an hour, I think. But we would like to have an
15 opportunity to prepare it.
16 HEARING OFFICER O'NEILL: I -- I'll give you a brief
17 recess, and I think we're just going to on the record tonight
18 and finish it. Do you need a half an hour?
19 MR. NAUGHTON: How much time do you want to prepare for
20 oral argument? She's going to give us oral argument.
21 MR. LARKIN: Till tomorrow.
22 MR. NAUGHTON: Yeah, that's what I said. 8:00 tomorrow
23 morning?
24 HEARING OFFICER O'NEILL: No. What -- if you want a half
25 an hour to prepare tonight and then we'll --

1 MR. LARKIN: That's not enough time. I mean, with all due
2 respect, with the issues in this hearing, with these -- with
3 the unique legal issue presented by whether *Specialty* does or
4 doesn't apply to this case, and which will require argument,
5 I -- I contend on both tests, the old one and the new one, a
6 half an hour is just, with all due respect, and I know this is
7 coming from the Regional Director, is a shamefully
8 inappropriate amount of time to prepare a closing argument in
9 this case, when at this time last year we would have had a
10 post-hearing brief. I think it is an absolute denial of due
11 process to ask us to do it in a half hour. We cannot do it in
12 a half hour.
13 HEARING OFFICER O'NEILL: Okay. With that, I'm going to
14 start the half an hour now. While you begin to get ready, I
15 will also check with the Regional Director, but I think the
16 decision --
17 So can someone tell me what the time is right now?
18 MR. MEYER: The time is 6:53.
19 HEARING OFFICER O'NEILL: So at --
20 MR. NAUGHTON: 7:30?
21 HEARING OFFICER O'NEILL: -- at 7:30.
22 MR. NAUGHTON: I'm not sure we're going to be ready at
23 7:30.
24 HEARING OFFICER O'NEILL: I understand. I'm going to go
25 talk to the Regional Director, but -- but right now I'm telling

1 you we'll do it at 7:30.
2 Let's go off the record.
3 (Whereupon, a brief recess was taken.)
4 HEARING OFFICER O'NEILL: Back on the record.
5 And for the Employer, are you ready to present your oral
6 argument?
7 MR. NAUGHTON: In just a second, yes.
8 HEARING OFFICER O'NEILL: And I had said 30 minutes
9 before. And when you came back in the room you said that it
10 was okay to get going; are you still -- should we go off the
11 record, you need a little more time?
12 MR. NAUGHTON: Another 20 minutes won't make a difference.
13 HEARING OFFICER O'NEILL: Okay.
14 MR. NAUGHTON: So ready whenever you -- do you want me to
15 go first?
16 HEARING OFFICER O'NEILL: We are ready. Yes.
17 EMPLOYER CLOSING ARGUMENT
18 MR. NAUGHTON: Madam Hearing Examiner, the -- we have --
19 we have requested to file post-hearing briefs; that request was
20 summarily denied. We have requested to present oral argument
21 tomorrow morning after an overnight recess to allow us to
22 prepare; that request was also denied.
23 As everyone knows, the Union saw our written proffer and
24 summary of evidence as set forth in our extensive position
25 statement on Friday, presumably by midday. We did not have

1 that opportunity, and the first the Employer heard of the
2 Union's evidence was this afternoon when it was put into the
3 record at the hearing.
4 We have had no fair opportunity to review the transcript,
5 to prepare a brief or make argument based on application of the
6 law to the facts. We've been here since before 10:00 a.m. when
7 the hearing was supposed to convene. It's now after 7:00 p.m.
8 Except for a 30-minute lunch recess, we've been at it now for
9 close to 9-1/2 hours. We are being denied a fair hearing.
10 This is not a fair opportunity to make a closing argument. It
11 is a denial of due process. And I second my colleague's
12 comments about the nature of that deliberate denial of due
13 process.
14 Giving us 30 minutes to "prepare" a closing argument is
15 not a fair substitute for the type of preparation we've been
16 denied. We're not going to allow the Regional Director to
17 claim that we were given an opportunity to make reasonable or
18 meaningful oral argument under the circumstances. It is a sham
19 and it's a denial of due process.
20 So I will reiterate the comment we're being denied a fair
21 hearing. We're being denied a fair opportunity to make
22 argument based on a review of the transcript, and an
23 opportunity to sit down and think about how to apply the law to
24 the facts; so we're not given a fair opportunity.
25 So all I can say at this point is that we reiterate all of

1 the objections we've made. We reiterate the points we made in
2 of statement of position. And we rely on the evidence and the
3 arguments made in case today. And it would be meaningless to
4 try to make further oral argument under the circumstances. So
5 that's all we have to say. We're not going to -- we're not
6 going to play the game by claiming that this constitutes any
7 fair or meaningful opportunity to make closing argument.
8 Thank you very much.
9 Further, I would state on the record, I understand
10 completely that the hearing examiner doesn't necessarily make
11 these decisions and we understand that.
12 HEARING OFFICER O'NEILL: For the Petitioner?
13 PETITIONER CLOSING ARGUMENT
14 MR. MEYER: Sure. I'm only going to address the two
15 issues that we went to the hearing over, not the -- I
16 understand that the -- the taint issue is going to be
17 administratively investigated, so I'm not going to address
18 that, except to the extent it overlaps with a supervisory
19 issue. And I also won't address the other arguments raised in
20 the statement of position that weren't litigated in hearing.
21 So my -- what I will address are the two issues that we did go
22 forward with, which is the single versus multi-location issue,
23 and the supervisory issue.
24 So about the single and multi-location issue. The
25 standard is pretty clear. The -- for -- there's a presumption

1 that a single --if a petitioned for unit is a single location
2 unit, the presumption is that's what the appropriate unit is.
3 It has to be overcome.
4 The way that an employer can overcome that presumption
5 is -- is by introducing evidence, and the Board considers that
6 using nine different factors that were articulated Budget Rent
7 A Car Systems, which is 337 NLRB 884: that's Number 1 is
8 central control of labor relations; Number 2 is local autonomy;
9 Number 3 is interchange of employees; Number 4 is similarity of
10 skills; Number 5 is conditions of employment; Number 6 is
11 supervision; Number 7 is geographic separation; Number 8 is
12 plant integration; and Number 9 is bargaining history.
13 There also -- the Employer raised in their position
14 statement the issue of whether the presumption in *Specialty*
15 *Healthcare* could apply to this case or not. *Specialty*
16 *Healthcare* is 5 -- I mean, I'm sorry, 357 NLRB No. 83. Our
17 position, *Specialty Healthcare* had a pretty strong presumption
18 in favor a single location unit. Our position is that
19 regardless of *Specialty Healthcare* applies, a single unit
20 should prevail in this case, under both the *Specialty*
21 *Healthcare* presumption, or the traditional presumption that
22 maybe isn't as strong, but I think it's still strong enough,
23 the single unit is appropriate in this case. Looking -- but
24 I'm going to focus on the factors in *Budget Rent A Car*, which
25 is the traditional factors as I understand them.

1 So control -- central control of labor relations, it
2 appears that the labor policies are set centrally. That is not
3 in our favor.
4 Local autonomy, though, is heavily in our favor. We
5 have -- the structure of these different district centers is
6 pretty clear. They each receive parts from the client, AAP,
7 and then they deliver them to the different AAP retail stores
8 in their region. The regions do not overlap. Each store is
9 assigned a particular region. While every once in a while a
10 reginal border may change, that doesn't happen as a matter of
11 course, and for the most part the drivers, as they go out and
12 make their deliveries just do not cross paths with the drivers
13 from any other region.
14 The only driver who does cross between the region is this
15 mail or document delivery driver, but that goes out of Roanoke,
16 not any of the employees in the petitioned for unit. They
17 don't drive the shuttle that goes around from location to
18 location crossing district lines.
19 The petitioned for unit, the drivers in the petitioned for
20 unit never cross district lines. They stay where they are,
21 with the rare exception of temporary transfers; that I'll get
22 to later.
23 Because they function autonomously and in parallel with
24 one another, we believe that the local autonomy factor heavily
25 favors the single location unit.

1 With regard to interchange, there's two types of
2 interchange that they have introduced evidence on. They've
3 introduced evidence on so-called permanent interchange, which
4 is supported by Employer Exhibit 1, and temporary interchange,
5 which is Employer Exhibit 2.
6 With regard to Employer Exhibit 1, first of all, there
7 are -- this shows 27 people in the last five years have done
8 allegedly permanent interchange. But the evidence shows with a
9 close reading of this list, is that according to the -- if you
10 look at the sixth column, 5 of those 27 people are not drivers.
11 Are not relevant to this case. They're management people who
12 may have moved between them, but -- between the facilities, but
13 they're not drivers. The drivers do not have interchange to
14 any significant extent.
15 With regard to the 22 remaining ones, 16 of those 22; so
16 all but what, 8, yeah -- can I do math? All but 6, I'm sorry;
17 all but 6 of the remaining ones are cases where it was not a
18 real permanent reassignment. This was a temporary -- this was
19 someone being sent to one location to be trained for a new
20 newly opening location.
21 Of the 16 -- of the 22 remaining things, when you take out
22 the management people, you're left with 11 very short-term
23 periods between the hiring and the transfer date where someone
24 started somewhere else, often Kutztown, and then moved to
25 either Lakeland in April of 2011 when that facility came on

1 line, or went from -- went to Enline (ph) in November of 2014
2 when that -- when that facility went online. If you take -- if
3 you exclude -- and each one of them, some of them were, you
4 know, they're so-called transfer was only after working a
5 matter of a couple weeks at their alleged home facility. This
6 was not a permanent transfer; this was someone registering with
7 the company at one location where they went for training
8 because their new location was not capable of training people
9 yet.
10 And these are both unusual circumstances, and the case law
11 says when you're talking about just opening a facility, that's
12 not matter of course, that's an unusual circumstance that
13 doesn't as regular run of the mill interchange, and that's what
14 you have here. If you exclude the 5 management people and the
15 16 cases of temporary situations where a new facility is
16 opening, what you're left with is, more math, is 6 instances
17 over the last 5 years of interchange. And not all of them even
18 involved the Kutztown petitioned for facility.
19 I submit that's simply insignificant when you're
20 considering the number of years and -- five years and all of
21 these employees. I'm not sure if any -- there may be one or
22 two ones involved in Kutztown in the entire five-year period
23 that is not a temporary training or involving management.
24 With regard to temporary interchange, during the testimony
25 of Mr. Lovely, there was an admission that the temporary

1 interchange was -- was maybe 5 percent of the total hours
2 worked. And the -- in New Britain Transport, which is 330 NLRB
3 397, the Board instructed that the presumption cannot be
4 rebutted where employer's interchange data is represented in
5 the aggregate form, rather than as a percentage of the total
6 employees. And that's precisely what they've done here.
7 They've given these big numbers of X-number of hours; well that
8 set of hours is over a three year period and the hours look big
9 because two employees who are transferred temporarily for the
10 same week, that counts as two people, even though it's only one
11 week in time. If you're talking about, as a percentage,
12 it's -- it's 5 percent and it's insignificant.
13 I submit that the -- both the permanent interchange
14 figures and the temporary interchange figures when looked at
15 closely are not a significant amount of interchange. Certainly
16 not the type of interchange you see that require -- that would
17 cause this one district facility to lose its identity as a --
18 an individual unit and be, sort of, melted into the aggregate
19 whole. There just isn't enough contact for that to occur.
20 The fourth -- going back to the original nine-part test,
21 the fourth one is similarity of skills. So we acknowledge that
22 that does -- they are similar. The drivers are the same other
23 places, that's why they get trained at different locations.
24 And the conditions of employment are very similar, with
25 the exception of the pay rate. The pay rate does vary. They

1 vary it because of market conditions. And the Union believes
2 that that's enough to at least make the conditions of
3 employment a wash, rather than favoring one side or the other.
4 The sixth factor is supervision. There is no crossing of
5 supervision, as far as the record shows. There is -- the
6 facilities all have their own supervisory staff. They all have
7 their own operations manager and operations supervisor whose on
8 site, and the drivers answer to that person; whether they're
9 the dispatch driver or the training driver.
10 Now, in this particular Kutztown facility, something
11 unusual happened this last summer, and that's that in July
12 they -- they got their head chopped off. The -- their two
13 supervisor -- on site supervisory people were gone, and for a
14 period of time the corporate people came in and took direct
15 control of that. But that was a temporary situation and the
16 temporary situation has now passed. By October they had an
17 onsite SVP and an acting -- an acting on site manager, and
18 that's where we are now. Eventually, they'll probably get a
19 permanent.
20 But the -- if you -- in a normal circumstance when both of
21 the management people at the facility don't leave at the same
22 time, the supervision is independent of all of the other
23 facilities. The supervision at Kutztown is different than at
24 Enfield or at Lakeland or at whatever you want to talk about.
25 So for that reason the supervision factor also favors the

1 Union's unit.
2 We haven't talked very much about geographic separation
3 because there's really nothing in controversy here. There's
4 no -- there were no facts at issue to be argued over because
5 the bottom line is that these are really distant facilities.
6 If you look at the geographic serration factor as its -- as its
7 considered by, you know, different Board rulings, there's one
8 about whether 20 miles separating the different plants is too
9 much, another one where 43 miles could pass because the things
10 were so integrated that it had overcome the fact that 43 miles
11 is pretty far apart. There's another one where the Board
12 actually found something as far away as 90 miles apart could
13 function as a single unit. But most of the cases involve
14 things where the distance at issue is between like 20 miles or
15 something like that.
16 In this case, the closest facility to Kutztown -- I went
17 on Google Maps and I entered in the towns, I didn't know the
18 address of the facilities, but I just did one town name to the
19 other. From Kutztown to Enfield, Connecticut is 246 miles.
20 That's the closest facility to Kutztown. The next closest is
21 Roanoke, which 260 miles. And the next closest is Delaware,
22 Ohio, which is 461 miles.
23 The furthest one is Selina, Kansas at 1265 miles.
24 Lakeland, Florida is just over 1,000 miles. And if we were to
25 buy the unit that they are proposing, with all of them

1 together, then to go from Enfield, Connecticut to Selina,
2 Kansas is over 1500 miles. That's simply off the charts if you
3 look at the geography once.
4 I think the geography doesn't just favor us, it alone
5 could kill their proposal, because there's no way that the
6 employees can have a common identity with so much physical
7 distance between them. Especially when their routes do not
8 cross. There's no contact between them. There are these
9 occasional temporary assignments, which as I said -- pointed
10 out, are de minimis, are less than 5 percent of the total work
11 time. But the geography is so vast that it simply -- I do not
12 see how they can overcome that -- that factor, even in light of
13 all the others.
14 And finally, Number 8 is plant and product integration.
15 It looks like that one's not being favored as much because the
16 economy's getting more integrated overall, but the bottom line
17 is that that's more about, you know, one plant produces
18 something and another one warehouses it. And so there's like a
19 direct production line between them. And it -- how integrated
20 they are means maybe they're working very closely together.
21 In this case, what we have is a lot of distribution
22 centers that are really working in parallel. They all get
23 supplies. There wasn't much testimony where it comes from, but
24 they get supplies from somewhere and they all go to the
25 different distribution centers and the distribution centers

1 each in parallel distribution them to the different retail
2 shops within their region. But they're working in parallel.
3 There are no cross -- cross-communication between them in terms
4 of product or production. So in that case, the plant
5 production integration does not favor the Employer's
6 Petitioner.
7 And finally, the bargaining history doesn't exist, so
8 that's not a factor.
9 So of the -- the first eight, given that the ninth doesn't
10 apply here, we have the centrality of labor relations, which we
11 admit is -- favors the Employer. Local autonomy clearly favors
12 the Union's version of the Petitioner. Interchange favors the
13 Union on this petition. Similarity of skills, they are
14 similar, so that favors the Employer. Conditions of employment
15 also are similar between them. Supervision also favors the
16 Union. Geographical separation very strongly favors the Union,
17 and I submit so strongly it can overwhelm everything else. And
18 plant and production integration follow -- favor the Union.
19 If you -- if you add up the points, that -- that's five to
20 three. But it isn't just points, it is -- you know, they're
21 not all weighted equally. And again, I think the geographic
22 separation just by looking at the cases, is -- is pretty
23 overwhelming in this case.
24 But the -- I also want to direct your attention to
25 Highlander Foods, which 348 NLRB 1200, in which the --

1 MR. NAUGHTON: I'm sorry; 3-what?
2 MR. MEYER: I'm sorry, 348 NLRB 1200. It was a 2006 case.
3 I guess it's also called Kroeger Limited Partnership, but --
4 So in that case, the Board found that the similarity of
5 employee skills and working conditions, the centralized
6 personnel and labor relations policies, and some limited
7 integration among seven facilities was outweighed by the local
8 autonomy, the lack of interchange -- of substantial
9 interchange, the functional -- or functional integration, and
10 the geographical separation and absence of bargaining history.
11 That's the exact same mix as here, except their geographic
12 separation that fit -- that worked against the multi-location
13 thing, what was too far apart were facilities that were between
14 8 and 13 miles apart. That was just too far for -- to have
15 that factor favor the multi-location unit. And again, in this
16 case the closest one is 20-some times that, and the furthest
17 one, who knows -- that's beyond my math skills at this late in
18 the day.
19 But in case, this case is very similar in terms of how the
20 factors came out of *Highlander Foods*, except that our geography
21 one is a -- is a much more stronger weight on our side.
22 HEARING OFFICER O'NEILL: And *Highlander Foods* was 348?
23 MR. MEYER: NLRB 1200.
24 HEARING OFFICER O'NEILL: Okay.
25 MR. MEYER: All right, and that -- that's my argument on

1 the first question, the multi-location thing.
2 With regard to the supervisory issue -- give me a second.
3 I move my hands around and bury my pages.
4 All right, so under 1211, as you know, the indicia of
5 supervisory status is the ability to hire, transfer, suspend,
6 layoff, recall, promote, discharge, assign, reward, discharge
7 direct employees or direct their grievances.
8 I don't think any of them even arguably apply, except for
9 the ability to assign. That's really what this is about.
10 That's really what the evidence is about.
11 I'm going to briefly talk about hire because there was
12 some very minimal evidence about that. The bottom line is that
13 there is no evidence that Mr. Cappetta uses his independent
14 judgment to hire anyone. He does a test, which is a -- he uses
15 his -- the fact that he's a certified safety trainer, to test
16 employees who may be -- who are applicants. And what he does
17 is he uses a form and he marks down whether or not in his
18 experience and his -- and he is able -- he evaluates them as
19 being able to back up a truck and drive a truck safely. And if
20 the answer is no, he reports that to them.
21 Now, it is true that if the answer's no they're not going
22 to get the job, but that's not him deciding he doesn't want to
23 give them a job, that's him decided, you know, I am an expert
24 on truck safety and looking at this and looking at the
25 checklist I have, this person is not safe; and based on that,

1 they don't pass this test. And that's all it is. That's not
2 the ability to hire. And that's not using independent judgment
3 of the type necessary for supervisory status.
4 With regard to assignment, we submit that he also is a not
5 a supervisor on that basis. I admit that there's a lot more
6 back and forth about that issue. The assignment, what happens
7 is, the evidence shows that the drivers have -- each have a
8 usual route, the permanent drivers. But a lot of times the --
9 the workload that comes in does not correspond with what, you
10 know, the routes that people normally do. So then what Mr.
11 Cappetta does, is he -- the work comes in, he gives -- you
12 know, he spreads the work to the -- to the routes, filling all
13 the normal routes, and then sees what's left. And then
14 whatever's left he either has to move some work over here or
15 there, depending on whose available. Who has less work. He
16 can try to split off their route or whatever, but it's --
17 it's -- I think at one point he referred to it as a math
18 problem. It's just figuring out where to put the work in
19 various slots.
20 Now, of course, because this facility is so understaffed,
21 there's also these temporary employees. And there's also --
22 there's also the transfers that are currently there. And he
23 explained that he does that on the basis of his evaluation of
24 the skill, and again, he is a certified safety instructor, so
25 he uses his expertise on that. And he -- and his understanding

1 of seniority and how long they've been around. And then when
2 all that's done, then he goes to the temps.
3 We had some conflicting testimony about the procedure of
4 getting temps. For that, I -- I submit Mr. Cappetta credibly
5 testified that he had to -- he had to get permission to fill
6 the temps. He can't just do it on it on his own. Although, at
7 times he has been sort of put on autopilot and given the
8 blanket authority to do -- to do stuff. But that, you know,
9 this has been a weird year. There was a three-month period
10 when there -- he was working without supervision. It was a
11 temporary thing; that as I said before has passed. And I don't
12 think that reflects on what the unit is right now or going
13 forward.
14 And for that reason we submit he doesn't use his
15 independent judgment to direct employees or assign employees.
16 I guess it would be more assign than direct. He doesn't look
17 over the shoulder of -- when their doing their work in their
18 truck, they're pretty on their own. It's really just assign.
19 But he doesn't use his independent judgment to assign, he's
20 simply figuring out his math problem of how to assign the work
21 to all these various slots, and then what to do with the
22 spillover and he works with his supervisory people when they're
23 available to do that.
24 For that reason, we would ask that Mr. Cappetta found that
25 he -- Cappetta be found that he's not a supervisor. And that

1 you -- you include him in the unit.
2 One more thing is that the Union is willing to waive the
3 employee list to get an earlier election.
4 HEARING OFFICER O'NEILL: Okay. So all 10 days -- you're
5 willing to waive all 10 days?
6 MR. MEYER: Yes.
7 HEARING OFFICER O'NEILL: Okay.
8 MR. MEYER: And that's it.
9 HEARING OFFICER O'NEILL: Okay.
10 MR. NAUGHTON: There is one other objection I should have
11 stated on the record.
12 We also do object, and I think we have, but just to be
13 clear, we object to the denial of an opportunity to contest
14 inclusion of employees Cappetta and David on the grounds of
15 their status as dispatchers and either not -- not sharing a
16 community of interest with the road drivers or as dual-function
17 employees who do not share a sufficient community of interest
18 with those -- those drivers.
19 So I just want to make sure that we've added that, as
20 well.
21 HEARING OFFICER O'NEILL: Okay. This is --
22 MR. NAUGHTON: Oh, and I had one other thing. I'm sorry.
23 HEARING OFFICER O'NEILL: And I'm going to have one other
24 thing, so go ahead.
25 MR. NAUGHTON: I'm sure you are. Yes, ma'am.

1 During the hearing, you asked us -- the company to -- if
2 we could produce a number of documents, roughly I think a dozen
3 by the time we were done. We are trying to get those. We
4 would request the opportunity to supplement the record with
5 those documents, if we can obtain them, by close of business
6 tomorrow. We'll submit them electronically and we ask that the
7 record be left open for that limited purpose.
8 HEARING OFFICER O'NEILL: And for the Petitioner, are you
9 willing to stipulate that it's -- we can leave the record open
10 to submit those documents tomorrow?
11 MR. MEYER: On.
12 HEARING OFFICER O'NEILL: Okay. I'm not going to leave
13 the record open for that.
14 As I said, I had one more thing. This is a little unusual
15 and if either one of you needs to ask more questions or argue,
16 I'm going to recall Mr. Lovely for one question, which -- to
17 clarify something that the Union's already conceded, but I'm
18 not sure how clear the record was from my notes.
19 And you're still under oath.
20 THE WITNESS: Okay.
21 HEARING OFFICER O'NEILL: Okay.
22 (Whereupon,
23 TED LOVELY,
24 having previously been called as a witness by and on behalf of
25 Hearing Officer and, after having been previously sworn, was

1 examined and testified as follows:)

2 DIRECT EXAMINATION

3 BY HEARING OFFICER O'NEILL: :

4 Q You mentioned earlier an online handbook and --

5 A Yes.

6 Q -- that that handbook applies to the employees of all nine

7 of your facilities. And is that created at headquarters?

8 A Yes.

9 Q Okay. And does that contain provisions such as explaining

10 the benefits, employee policies?

11 A Yes.

12 Q And is that all created at the corporate level?

13 A Yes.

14 Q Okay. And the wages, you mentioned earlier that they are

15 also determined -- the parameters for the wages are determined

16 at the corporate level, as well?

17 A Yes.

18 HEARING OFFICER O'NEILL: Thank you.

19 Okay, is there any follow-up to that?

20 MR. MEYER: No.

21 MR. NAUGHTON: No, ma'am.

22 HEARING OFFICER O'NEILL: Okay, you may step down.

23 (Witness excused.).

24 HEARING OFFICER O'NEILL: Okay, if there is -- is there is

25 nothing further, then we'll close.

1 (No response.)

2 HEARING OFFICER O'NEILL: Okay, the hearing is now closed.

3 (Whereupon, at 7:35 p.m., the hearing in the above-entitled

4 matter was closed.)

C E R T I F I C A T E

This is to certify that the attached proceedings done before the NATIONAL LABOR RELATIONS BOARD REGION FOUR

In the Matter of:

UPS FREIGHT TRUCKLOAD,

Employer,

and

TEAMSTERS LOCAL 773,

Petitioner.

Case No.: 04-RC-165805

Date: December 21, 2015

Place: Philadelphia, Pennsylvania

Were held as therein appears, and that this is the original transcript thereof for the files of the Board

_____
Official Reporter

BURKE COURT REPORTING, LLC
1044 Route 23 North, Suite 206
Wayne, New Jersey 07470
(973) 692-0660

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION

UPS Ground Freight Inc. **Employer** **and** **Teamsters Local 773** **Petitioner**	Case No. Official Exhibit No. 04-RC-165805 Board 2 **Case 04-RC-165805** Identified Rejected Received IN THE MATTER OF: UPS Grand Freight Date: Witness: Reporter: 12/21/15 — MKM No. Pages: 2

STIPULATION

The parties in this matter stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of a Description of Procedures in Certification and Decertification Cases. The Hearing Officer has offered to us additional copies of the Description of Procedures.

2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the parties hereby make a joint motion to the Regional Director to amend the petition and other formal documents to correctly reflect the names as set forth above.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

4. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar or other bar to an election in this matter.

6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts are as follows:

UPS Ground Freight Inc., herein the Employer, is a ~~Delaw~~Virginia corporation with a main office located in Richmond, VA and a facility located in in Kutztown, PA. The Employer is engaged in the delivery of freight. During the past 12-month period the Employer has purchased and received at its Kutztown, PA facility goods valued in excess of $50,000 from points located outside the Commonwealth of Pennsylvania.

Upon receipt of this Stipulation by the Hearing Officer it may be admitted, without objection, as a Board exhibit in this proceeding.

For the Employer

For the Petitioner

RECEIVED:

Hearing Officer

December 21, 2015
Date

Board Exhibit No. 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS FREIGHT TRUCKLOAD

Employer

and Case 04–RC–165805

TEAMSTERS LOCAL 773

Petitioner Date of Mailing: December 16, 2015

AFFIDAVIT OF SERVICE OF: ORDER RESCHEDULING HEARING IN-PART

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on, **December 16, 2015**, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

KURT G LARKIN, ESQUIRE HUNTON & WILLIAMS, LLP RIVERFRONT PLAZA, EAST TOWER 951 E BYRD STREET RICHMOND, VA 23219-4074	RAYMOND COPELAND, INTERIM TERMINAL MANAGER UPS FREIGHT TRUCKLOAD 9755 COMMERCE CIRCLE KUTZTOWN, PA 19530
Case No: 04-RC-165805 Official Exhibit No. Board 1 Disposition: Identified ✓ Rejected ____ Received ✓ IN THE MATTER OF: UPS Grand Freight Date: 12/21/15 Witness: Reporter: Milan No. Pages: Packet	MR BRIAN TAYLOR TEAMSTERS LOCAL 773 1345 HAMILTON STREET ALLENTOWN, PA 18102-4328
Date: December 16, 2015	**Designated Agent of the NLRB** **/s/ Rita Messina** Rita Messina Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

UPS FREIGHT TRUCKLOAD

Employer

and Case 04–RC–165805

TEAMSTERS LOCAL 773

Petitioner

ORDER RESCHEDULING HEARING GRANTED IN-PART

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from Friday, December 18, 2015 to Monday, December 21, 2015 at 10:00 a.m. in the Regional Office, 615 Chestnut Street, Suite 710, Philadelphia, PA. The hearing will continue on consecutive days until concluded.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by **no later than noon Eastern time on December 18, 2015**. The Statement of Position may be e-Filed but, unlike other documents, must be filed by noon Eastern time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: December 16, 2015

Harold A. Maier

HAROLD A. MAIER
Acting Regional Director, Fourth Region
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ups Freight Truckload **Employer** **and** **Teamsters Local 773** **Petitioner**	**Case 04-RC-165805**

AFFIDAVIT OF SERVICE OF: Petition dated December 10, 2015, **Notice of Representation Hearing dated** December 10, 2015, **Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on December 10, 2015, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Brian Taylor
Teamsters Local 773
1345 Hamilton Street
Allentown, PA 18102-4328
briantaylor29@yahoo.com
Fax: (610)770-9581

Raymond Copeland, Interim Terminal Manager
Ups Freight Truckload
9755 Commerce Circle
Kutztown, PA 19530
raymondcopeland@ups.com
Fax: (610)285-5384

December 10, 2015	Jane Peterson, Designated Agent of NLRB
Date	Name

Jane Peterson /s/ Jane Peterson
Signature

Run as of: 12/10/2015 3:17:59 PM ET

Action Participant List

Case Name: UPS Freight Truckload

Case Number: 04-RC-165805

Employer (04-RC-165805)

(Primary)
Raymond Copeland, Interim Terminal Manage
Ups Freight Truckload
9755 Commerce Circle
Kutztown, PA 19530
Phone: (610)285-5380
Fax: (610)285-5384
Email: raymondcopeland@ups.com

Petitioner (04-RC-165805)

(Primary)
Brian Taylor
Teamsters Local 773
1345 Hamilton Street
Allentown, PA 18102-4328
Phone: (610)434-4451
Mobile: (484)695-4549
Fax: (610)770-9581
Email: briantaylor29@yahoo.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

Ups Freight Truckload **Employer** **and** **Teamsters Local 773** **Petitioner**	**Case 04-RC-165805**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Friday, December 18, 2015** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at a Hearing Room, 615 Chestnut Street, Suite 710, Philadelphia, PA 19106, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Ups Freight Truckload must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on December 17, 2015. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: December 10, 2015

Dennis P. Walsh

DENNIS P. WALSH
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 04
615 Chestnut St Ste 710
Philadelphia, PA 19106-4413

FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
04-RC-165805	12/10/15

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer UPS FREIGHT TRUCKLOAD	2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 9755 COMMERCE CIRCLE KUTZTOWN PA 19530
3a. Employer Representative – Name and Title RAYMOND COPELAND	3b. Address (if same as 2b – state same) 9755 COMMERCE CIRCLE KUTZTOWN PA 19530
3c. Tel. No. 610-285-5380 / 3d. Cell No. 610-285-5380	3e. Fax No. 610-285-5384 / 3f. E-Mail Address RAYMONDCOPELAND@UPS.COM
4a. Type of Establishment (Factory, mine, wholesaler, etc.) WAREHOUSE	4b. Principal product or service DELIVERY OF GOODS / 5a. City and State where unit is located: KUTZTOWN PA
5b. Description of Unit Involved Included: ALL REGULAR FULL-TIME AND PART-TIME DRIVERS Excluded: ALL OTHER EMPLOYEES INCLUDING GUARDS AND SUPERVISORS AS DEFINED IN THE ACT	6a. No. of Employees in Unit: 29 6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [✓] No [ ]

Check One: [✓] 7a. Request for recognition as Bargaining Representative was made on (Date) 12/10/2015 and Employer declined recognition on or about _____ (Date) (If no reply received, so state). NO REPLY

[ ] 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state). NONE	8b. Address
8c. Tel No. / 8d Cell No.	8e. Fax No. / 8f. E-Mail Address
8g. Affiliation, if any	8h. Date of Recognition or Certification / 8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? NO If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

NONE			
10a. Name	10b. Address	10c. Tel. No. / 10d. Cell No.	
		10e. Fax No. / 10f. E-Mail Address	

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: [ ] Manual [✓] Mail [ ] Mixed Manual/Mail		
11b. Election Date(s): 12/22/2015	11c. Election Time(s): N/A	11d. Election Location(s): N/A

12a. Full Name of Petitioner (including local name and number) INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 773	12b. Address (street and number, city, state, and ZIP code) 1345 HAMILTON ST ALLENTOWN PA 18102
12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (If none, so state) INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
12d. Tel No. 610-434-4451 / 12e. Cell No. 484-714-5414	12f. Fax No. 610-770-9581 / 12g. E-Mail Address BTAYLOR@TEAMSTER773.ORG

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title BRIAN A. TAYLOR ORGANIZER/TRUSTEE	13b. Address (street and number, city, state, and ZIP code) 1345 HAMILTON ST ALLENTOWN PA 18102
13c. Tel No. 610-434-4451 / 13d. Cell No. 484-714-5414	13e. Fax No. 610-770-9581 / 13f. E-Mail Address BTAYLOR@TEAMSTER773.ORG

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title	Date
BRIAN A. TAYLOR	Brian A. Taylor	ORGANIZER/TRUSTEE	12/10/2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 04-RC-165805	Date Filed

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
UPS Ground Freight, Inc.	610-285-5380	610-285-5384
1b. Address *(Street and number, city, state, and ZIP code)*	**1d. Cell No.:**	**1f. e-Mail Address**
9755 Commerce Circle, Kutztown, PA 19530	404-991-0206	Raymondcopeland@UPS.com

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? ☒ Yes ☐ No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? ☐ Yes ☒ No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. *(If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

See Attachment B, appended hereto.

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded
See Attachment C, appended hereto.	None.

Case No. 04-RC-165805 Official Exhibit No. Board 3

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

See Attachment D, appended hereto.

Disposition: Identified ✓ Rejected ____ Received ✓
IN THE MATTER OF: UPS Ground Freight
Date: 10/21/15 Witness: — Reporter: MBM
No. Pages: Perfect

5. Is there a bar to conducting an election in this case? ☐ Yes ☒ No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

See Attachment E, appended hereto.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
		Temporary Mobile Office (RV) located in trailer lot adjacent to Maintenance Shop located at address above
8e. Eligibility Period (e.g. special eligibility formula)	**8f. Last Payroll Period Ending Date**	**8g. Length of payroll period**
None	December 12, 2015	☒ Weekly ☐ Biweekly ☐ Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
Kurt G. Larkin, Esq.	/s/ Kurt G. Larkin	December 18, 2015
9d. Address *(Street and number, city, state, and ZIP code)*		**9e. e-Mail Address**
Hunton & Williams LLP, 951 East Byrd Street, Richmond, VA 23219		Klarkin@hunton.com
9f. Business Phone No.: 804-788-8776	**9g. Fax No.** 804-788-8218	**9h. Cell No.** 804-332-3965

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Bd'd 3

CASE NO. 04-RC-165805
ATTACHMENT A
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

List of Employees in Proposed Unit

Employee Name	Work Location	Shift	Job Classification
Burger, David	Kutztown	Varies	Road Driver
Camuso, Christopher	Kutztown	Varies	Road Driver
Cappetta, Frank[1]	Kutztown	Varies	Road Driver
Cox, Clifton	Kutztown	Varies	Road Driver
David, Carl[2]	Kutztown	Varies	Road Driver
Delacruz, Marcelo	Kutztown	Varies	Road Driver
Dubon, Sebastian	Kutztown	Varies	Road Driver
Faith, Barrie	Kutztown	Varies	Road Driver
Falcone, Gregory	Kutztown	Varies	Road Driver
Finlayson, Alan	Kutztown	Varies	Road Driver
Franco, Gary	Kutztown	Varies	Road Driver
Hertzog, Tim	Kutztown	Varies	Road Driver
Hyman Jr, Alex	Kutztown	Varies	Road Driver
Irizarry, Carlos	Kutztown	Varies	Road Driver
Johnson, Arthur	Kutztown	Varies	Road Driver
Johnson, Willie	Kutztown	Varies	Road Driver
Juya, Farid	Kutztown	Varies	Road Driver
Kline, Merle	Kutztown	Varies	Road Driver
Knappenberger, Gene	Kutztown	Varies	Road Driver
Long, Nathan	Kutztown	Varies	Road Driver
Luna Jr, Vinicio	Kutztown	Varies	Road Driver
Pascarella, Ronald	Kutztown	Varies	Road Driver
Rose, Ken	Kutztown	Varies	Road Driver
Roush, Donald	Kutztown	Varies	Road Driver
Sealey Jr, Ivan	Kutztown	Varies	Road Driver
Shoestock, Mark	Kutztown	Varies	Road Driver
Stachowicz, Bogdan	Kutztown	Varies	Road Driver
Thomas, Kaliek	Kutztown	Varies	Road Driver
Wentz, Wayne	Kutztown	Varies	Road Driver

[1] For the reasons set forth in this SOP, the Company challenges Mr. Cappetta's inclusion in the bargaining unit.

[2] For the reasons set forth in this SOP, the Company challenges Mr. David's inclusion in the bargaining unit.

CASE NO. 04-RC-165805
ATTACHMENT B
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

3(a): State the basis for your contention that the proposed unit is not appropriate.

I. INTRODUCTION

On December 10, 2015, the International Brotherhood of Teamsters Local 773 ("the Union"), filed a petition for election ("the Union's petition") seeking to represent a unit of all regular full-time and part-time drivers employed by UPS Ground Freight, Inc. ("UPS Freight" or "the Company") at its Kutztown facility located at 9755 Commerce Circle in Kutztown, Pennsylvania ("Kutztown facility"). The petitioned-for unit, however, is inappropriate because it excludes the regular drivers (full-time and part-time) ("Road Drivers") employed by the Company at eight other distribution facilities, which the evidence will prove share an overwhelming community of interest with the employees sought to be represented by the Union.

In summary and as described more fully below, the bargaining unit proposed by the Union is inappropriate because the Road Drivers assigned to the Kutztown, PA facility are part of an integrated system of warehouse facilities established specially and solely for the purpose of providing national service to a single commercial customer through a unified delivery operation. UPS Freight is party to a national contract with Advance Auto Parts ("AAP"), under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. To most efficiently service the contract, UPS Freight has established on site facilities at each of AAP's nine strategically located parts distribution centers across the United States. The distribution centers comprising the Company's AAP operation are located in Kutztown, PA ("Kutztown facility"), Enfield, CT ("Enfield facility"), Lakeland, FL ("Florida facility"), Salina, KS ("Kansas facility"), Gastonia,

NC (Gastonia facility"), Delaware, OH ("Delaware facility"), Roanoke, VA ("Virginia facility"), Hazelhurst, MS ("Hazelhurst facility"), and Thomson, GA ("Thomson facility") (collectively the "AAP distribution facilities"). Road Drivers at these facilities share an overwhelming community of interest with those at Kutztown; therefore the only appropriate bargaining unit is one including the Road Drivers at all nine AAP distribution facilities.

II. APPLICABLE LEGAL STANDARDS

Section 9(a) of the Act permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. *See* 29 U.S.C. § 159(a). To determine the appropriateness of a proposed bargaining unit, the National Labor Relations Board ("NLRB" or "the Board") first assesses whether the employees in the petitioned-for unit are identifiable "readily as a group who share a community of interest." *See A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 14-15 (2014) (citing *United Operations, Inc.*, 338 NLRB 123 (2002)). In so doing, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct job functions and perform distinct work; (3) are functionally integrated with the Employer's other employees; (4) have frequent contact with other employees; (5) interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id.*

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), one of its most controversial decisions to date, the NLRB overturned twenty years of precedent by permitting bargaining units to be petitioned-for and certified even when a larger and "more appropriate" bargaining units exist in the employer's workforce. *See id.* (finding that "[b]ecause a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the

proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.").[3] Nevertheless, even under *Specialty Healthcare* and its progeny, the Board has recognized that a petitioned-for unit will be deemed inappropriate where ***"the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit . . ."*** *See id.*, at 11. (emphasis added).

III. THE COMPANY'S POSITION

The Union's petitioned-for bargaining unit is not appropriate under the Act because the Road Drivers employed by the Company at its other AAP distribution facilities share an overwhelming community of interest with the Road Drivers at the Kutztown facility. Stated differently, the Union's petitioned-for bargaining unit is inappropriate because the only appropriate unit is a "system wide" unit comprised of all Road Drivers employed by the Company at all of its AAP distribution facilities. This conclusion is compelled by considerable evidence the Company intends to present at the Representation Hearing, including but not limited to:

- UPS Freight is party to a national contract with AAP, under which it performs all operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. In other words, UPS Freight is AAP's primary contractual delivery service nationwide. To most efficiently service the contract, UPS Freight has established on site facilities at each of AAP's nine strategically located parts distribution centers across the United States.

[3] *Specialty Healthcare* was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015). *See also NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581-82 (4th Cir. 1995). These dissents are fully incorporated into this Statement of Position by reference, and the Company expressly preserves its right to rely upon them throughout the course of these proceedings in asserting that the Board's traditional community of interest standards should apply. The Company, however, acknowledges *Specialty Healthcare* provides the rule of decision in this proceeding (although it objects to application of that rule here).

- The Road Drivers at all of the Company's AAP distribution facilities perform work under a single, national contract with AAP.

- The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company's contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company's AAP distribution facilities.

- All Road Drivers employed by the Company at the nine AAP distribution facilities have same job title.

- All Road Drivers use, and are trained on, the same equipment - tractor trailers (either sleeper cabs or day cabs).

- All Road Drivers perform the same duties relating to the transport and delivery of parts and other supplies to regional AAP stores around the country. They are tasked on a daily basis with hauling a tractor trailer load of AAP parts and other equipment that is loaded at their assigned distribution facility. Once on the road, they make a series of stops at the AAP retail stores located within the delivery territory of the AAP distribution center to which they are assigned, where they offload each store's requested inventory. UPS Freight Road Drivers working under the AAP contract do the exact same work, and do not perform work, or make deliveries, for any other UPS Freight customer besides AAP.

- All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, driver behavior, miles per gallon on tractors, and delivery performance.

- UPS Freight considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. The "departmental line" that results from the Company's integrated operation encompasses Road Drivers at all of the Company's AAP distribution facilities.

- There is a frequent transfer of equipment among AAP distribution facilities. Road Drivers from various AAP distribution facilities participate in the shifting of such equipment, and are assigned the task according to driver staffing and availability.

- Road Drivers from the Roanoke facility deliver intra-company mail to the other AAP distribution facilities in the integrated unit every week.

- All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for jobs at each of the other AAP distribution facilities. Road Drivers have permanently transferred from one AAP distribution facility to another in the past.

- There is substantial evidence of permanent Road Driver transfers between and among AAP distribution centers. In the past several years, 27 UPS Freight Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system.

- There is also substantial evidence of temporary Road Driver transfers between and among distribution centers. There is significant driver-interchange between locations. For example, when AAP opened the Enfield facility in 2014, UPS Freight temporarily transferred Road Drivers from the Kutztown facility to the Enfield facility to perform freight deliveries until the Enfield facility hired its own group of Road Drivers (and/or temps). During the hiring period, Kutztown and Enfield Road Drivers worked together. Additionally, there are currently six Road Drivers temporarily assigned to the Kutztown facility from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. The visiting Road Drivers are completely integrated into the Kutztown operation. Additional evidence of Road Driver interchange is plentiful. Over the past 3 years, ***117 Road Drivers*** have been temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of ***413 weeks***. In that same time period, ***44 Road Drivers*** have been temporarily transferred to the Kutztown facility from the Company's other AAP distribution facilities to perform work for a total of ***163 weeks***.

- The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities.

- All Road Drivers are employed under the same UPS Freight corporate policies.

- All Road Drivers receive roughly the same rates of pay.

- All Road Drivers are entitled to the same corporate benefit plans.

- All Road Drivers receive the same corporate training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers.

- The Company provides trainers from AAP to participate in conference calls with the Road Drivers from each of the distribution centers. These Road Drivers together serve on the Company's Comprehensive Health and Safety Committee to discuss best safety practices, current operational issues, and improved incident occurrences at all of the AAP distribution facilities.

- The Company has traditionally utilized the same Road Driver schedule at all of its AAP distribution facilities. Earlier this year, the Company implemented a pilot program revising the Road Driver schedule at the Kutztown facility, and is in the process of implementing the same Road Driver schedule at all of the other AAP distribution facilities. Once the pilot is fully implemented, the Company's expectation is that all Road Drivers will work under the revised delivery schedule system-wide.

Specialty Healthcare and its progeny recognize that "[a] petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment of what would be an appropriate unit.'" *Odwalla*, 357 NLRB 132, slip op. at 5 (citing *Specialty Healthcare*, 357 NLRB 83, slip op. at 13)). Here, the facts will show that the Union is attempting to do just that. As the Board stated in *Specialty Healthcare*, "[i]t is highly significant that, except in situations where there is a prior bargaining history, the community of interest test focuses almost exclusively on how the employer has chosen to structure the workplace." 357 NLRB No. 83, slip op. at 9, n.19. The facts set forth above, which will be further developed at the Representation Hearing, demonstrate that the Company has chosen to structure its AAP distribution facilities under a single contract, with centralized management, with a high degree of integration and interchange of Road Drivers provided substantially similar terms and conditions of employment. Given these facts, which unquestionably establish an overwhelming community of interest shared by the Road Drivers employed at all of the Company's AAP distribution facilities, the Union's petitioned-for unit is wholly inappropriate, and should be rejected in favor of the bargaining unit proposed in Attachment C to the Company's Statement of Position.

If the Region agrees the petitioned-for unit is inappropriate, it must dismiss the petition inasmuch as the Union cannot demonstrate the requisite showing of interest in the unit proposed in Attachment C.

CASE NO. 04-RC-165805
ATTACHMENT C
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

3b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

List of Employees to be Added to Unit

Employee Name	Work Location	Shift	Job Classification
Acheampong, Prince	Delaware	Varies	Road Driver
Akenteng, Alfred	Delaware	Varies	Road Driver
Blackshear IV, Louis	Delaware	Varies	Road Driver
Byrdsong, Willie	Delaware	Varies	Road Driver
Coburn, Vernon	Delaware	Varies	Road Driver
Crosby, Eric	Delaware	Varies	Road Driver
Crowder, Dawn	Delaware	Varies	Road Driver
Dill, Todd	Delaware	Varies	Road Driver
Eddy II, Richard	Delaware	Varies	Road Driver
Fickle, Gary	Delaware	Varies	Road Driver
Grauman, Alexander	Delaware	Varies	Road Driver
Gregory, Daniel	Delaware	Varies	Road Driver
Halloum, Tarik	Delaware	Varies	Road Driver
Hawkins, Eddie	Delaware	Varies	Road Driver
Hickman, David	Delaware	Varies	Road Driver
Holloway, Charles	Delaware	Varies	Road Driver
Hunt, Larry	Delaware	Varies	Road Driver
Jahr, Wendell	Delaware	Varies	Road Driver
Jones, Gregory	Delaware	Varies	Road Driver
Lee, Teddy	Delaware	Varies	Road Driver
Leezer, David	Delaware	Varies	Road Driver
Link, Steve	Delaware	Varies	Road Driver
Marcum, Robert	Delaware	Varies	Road Driver
Mays Jr, Donald	Delaware	Varies	Road Driver
Mckenzie, William	Delaware	Varies	Road Driver
Miller, Rodney	Delaware	Varies	Road Driver
Neff, Adam	Delaware	Varies	Road Driver
Neff, Victor	Delaware	Varies	Road Driver
Perroud, Charles	Delaware	Varies	Road Driver
Rutledge, David	Delaware	Varies	Road Driver
Sutton, Dwight	Delaware	Varies	Road Driver
Tyler, Alonzo	Delaware	Varies	Road Driver
White, Chris	Delaware	Varies	Road Driver
Wilgus, Kevin	Delaware	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Williams, Ronald	Delaware	Varies	Road Driver
Wrenn, Sean	Delaware	Varies	Road Driver
Zeeb, Richard	Delaware	Varies	Road Driver
Acevedo Molina, Angel	Enfield	Varies	Road Driver
Alberti, Martin	Enfield	Varies	Road Driver
Baloune, Zakaria	Enfield	Varies	Road Driver
Brown, Jimmy	Enfield	Varies	Road Driver
Butcher, Darrell	Enfield	Varies	Road Driver
Campbell, Oneil	Enfield	Varies	Road Driver
Casler, Colin	Enfield	Varies	Road Driver
Cintron, Edwin	Enfield	Varies	Road Driver
Daniels, Deon	Enfield	Varies	Road Driver
Dixon, Christopher	Enfield	Varies	Road Driver
Fuentes Jr, Francisco	Enfield	Varies	Road Driver
Gifford, Sean	Enfield	Varies	Road Driver
Hall, Ainsworth	Enfield	Varies	Road Driver
Hoy, Ricky	Enfield	Varies	Road Driver
Jensen, Richard	Enfield	Varies	Road Driver
Johnson, Ainsworth	Enfield	Varies	Road Driver
Moody, Dion	Enfield	Varies	Road Driver
Perez Jr, Raynie	Enfield	Varies	Road Driver
Ransom, Sean	Enfield	Varies	Road Driver
Thresher, Robert	Enfield	Varies	Road Driver
Wiggins, Ernest	Enfield	Varies	Road Driver
Annas, Wesley	Gastonia	Varies	Road Driver
Arrowood, Robert	Gastonia	Varies	Road Driver
Braun, Edward	Gastonia	Varies	Road Driver
Cauthen, Steven	Gastonia	Varies	Road Driver
Davis Jr, Jimmy	Gastonia	Varies	Road Driver
Davis Sr, Kenneth	Gastonia	Varies	Road Driver
Davis, Jordan	Gastonia	Varies	Road Driver
Davis, Virgil	Gastonia	Varies	Road Driver
Geddis, Aaron	Gastonia	Varies	Road Driver
Hager, Charley	Gastonia	Varies	Road Driver
Hood, Gary	Gastonia	Varies	Road Driver
Hopper, Robert	Gastonia	Varies	Road Driver
Jenkins, Marvin	Gastonia	Varies	Road Driver
Kendrick, Randy	Gastonia	Varies	Road Driver
Mccrae, Valentino	Gastonia	Varies	Road Driver
Meek, Ronnie	Gastonia	Varies	Road Driver
Morris, Michael	Gastonia	Varies	Road Driver
Osterhoudt, Douglas	Gastonia	Varies	Road Driver
Pendergraph, Clyde	Gastonia	Varies	Road Driver
Phillips, Robert	Gastonia	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Poole, Joshua	Gastonia	Varies	Road Driver
Pope Sr, William	Gastonia	Varies	Road Driver
Postell, James	Gastonia	Varies	Road Driver
Ramsey, Michael	Gastonia	Varies	Road Driver
Reinhardt, Terry	Gastonia	Varies	Road Driver
Scarborough Sr, Johnny	Gastonia	Varies	Road Driver
Shepard, Kyle	Gastonia	Varies	Road Driver
Shepherd III, James	Gastonia	Varies	Road Driver
Simmons Jr, David	Gastonia	Varies	Road Driver
Vinesett, Wallace	Gastonia	Varies	Road Driver
Walker, Paul	Gastonia	Varies	Road Driver
Whitehouse, Don	Gastonia	Varies	Road Driver
Whitman, Whitcomb	Gastonia	Varies	Road Driver
Adams, Jarvis	Hazelhurst	Varies	Road Driver
Aucoin, Eugene	Hazelhurst	Varies	Road Driver
Brown, Chad	Hazelhurst	Varies	Road Driver
Brown, Kadarrius	Hazelhurst	Varies	Road Driver
Brown, Terrance	Hazelhurst	Varies	Road Driver
Buckley, Richard	Hazelhurst	Varies	Road Driver
Burns, Roger	Hazelhurst	Varies	Road Driver
Craft, Willie	Hazelhurst	Varies	Road Driver
Cruel, Ronnie	Hazelhurst	Varies	Road Driver
Dille, Archie	Hazelhurst	Varies	Road Driver
Dyess, Joe	Hazelhurst	Varies	Road Driver
Gentry, Chauncey	Hazelhurst	Varies	Road Driver
Graves, Dennis	Hazelhurst	Varies	Road Driver
Greer Jr, Ras	Hazelhurst	Varies	Road Driver
Heidelberg, Craig	Hazelhurst	Varies	Road Driver
Hemphill Sr, William	Hazelhurst	Varies	Road Driver
Henderson, Eric	Hazelhurst	Varies	Road Driver
Johnson, Kenneth	Hazelhurst	Varies	Road Driver
Johnson, Reginald	Hazelhurst	Varies	Road Driver
Jones Jr, Steve	Hazelhurst	Varies	Road Driver
Kelly Jr, Alex	Hazelhurst	Varies	Road Driver
Lloyd, Carl	Hazelhurst	Varies	Road Driver
Lowery, Rodney	Hazelhurst	Varies	Road Driver
Mack, Edward	Hazelhurst	Varies	Road Driver
Marler, Ronald	Hazelhurst	Varies	Road Driver
Moody Jr, Wesley	Hazelhurst	Varies	Road Driver
Phillips, Michael	Hazelhurst	Varies	Road Driver
Rhymes, Leonard	Hazelhurst	Varies	Road Driver
Shorter, Carroll	Hazelhurst	Varies	Road Driver
Smith, Tim	Hazelhurst	Varies	Road Driver
Spann, Vincent	Hazelhurst	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Spencer Jr, Roy	Hazelhurst	Varies	Road Driver
Sullivan, Barry	Hazelhurst	Varies	Road Driver
Thomas, Jamaal	Hazelhurst	Varies	Road Driver
Walls, Bobby	Hazelhurst	Varies	Road Driver
Barchanowicz Sr, Richard	Lakeland	Varies	Road Driver
Barrow, Gordon	Lakeland	Varies	Road Driver
Bembry, Eric	Lakeland	Varies	Road Driver
Bettard, Alfred	Lakeland	Varies	Road Driver
Bolton, Mary	Lakeland	Varies	Road Driver
Broome, Kelvin	Lakeland	Varies	Road Driver
Burgess, Kevin	Lakeland	Varies	Road Driver
Cabrera, Daniel	Lakeland	Varies	Road Driver
Carroll, Anthony	Lakeland	Varies	Road Driver
Carter Jr, Willie	Lakeland	Varies	Road Driver
Clifton, Ryan	Lakeland	Varies	Road Driver
Crottie, Joseph	Lakeland	Varies	Road Driver
Davis, Eric	Lakeland	Varies	Road Driver
Dignin, Thomas	Lakeland	Varies	Road Driver
Duffey Sr, Gerald	Lakeland	Varies	Road Driver
George, Nepton	Lakeland	Varies	Road Driver
Gomez Jr, Alfredo	Lakeland	Varies	Road Driver
Gordon, Antoine	Lakeland	Varies	Road Driver
Graham, Darryl	Lakeland	Varies	Road Driver
Griggs Jr, Bibb	Lakeland	Varies	Road Driver
Herrera, Jorge	Lakeland	Varies	Road Driver
Johnson, Larry	Lakeland	Varies	Road Driver
Kozlov, Vassili	Lakeland	Varies	Road Driver
Leonard, James	Lakeland	Varies	Road Driver
Madden Jr, Richard	Lakeland	Varies	Road Driver
Mills, Carol	Lakeland	Varies	Road Driver
Mills, Glenn	Lakeland	Varies	Road Driver
Monroe II, Alvin	Lakeland	Varies	Road Driver
Moore, Vance	Lakeland	Varies	Road Driver
Nelson, Eric	Lakeland	Varies	Road Driver
Norton, Melvin	Lakeland	Varies	Road Driver
Nunez, Jorge	Lakeland	Varies	Road Driver
Odum, Phillip	Lakeland	Varies	Road Driver
Ortiz, Oscar	Lakeland	Varies	Road Driver
Perry, Joshua	Lakeland	Varies	Road Driver
Peters, Michael	Lakeland	Varies	Road Driver
Ramberac, Jason	Lakeland	Varies	Road Driver
Ruiz, Confesor	Lakeland	Varies	Road Driver
Sanders, Byron	Lakeland	Varies	Road Driver
Satchel III, Frank	Lakeland	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Stephens Jr., Billy	Lakeland	Varies	Road Driver
Stewart II, Samuel	Lakeland	Varies	Road Driver
Vanhouter, Gregory	Lakeland	Varies	Road Driver
Viveiros, Joseph	Lakeland	Varies	Road Driver
Ayers, Christopher	Roanoke	Varies	Road Driver
Bridgman, Daniel	Roanoke	Varies	Road Driver
Brown, Kenneth	Roanoke	Varies	Road Driver
Burton, Randall	Roanoke	Varies	Road Driver
Claybrook, Jimmy	Roanoke	Varies	Road Driver
Clements, Marvin	Roanoke	Varies	Road Driver
Cockram, Lelan	Roanoke	Varies	Road Driver
Ferrell Jr., William	Roanoke	Varies	Road Driver
Fowler, Dennis	Roanoke	Varies	Road Driver
Fullen, Marcus	Roanoke	Varies	Road Driver
Goad, Robert	Roanoke	Varies	Road Driver
Harper, Clayton	Roanoke	Varies	Road Driver
Higgs, Gregory	Roanoke	Varies	Road Driver
Ingraham, David	Roanoke	Varies	Road Driver
Kalstrom, C. Mark	Roanoke	Varies	Road Driver
King, Thomas	Roanoke	Varies	Road Driver
Loback, Keith	Roanoke	Varies	Road Driver
Locklear, Roy	Roanoke	Varies	Road Driver
Miller, Timmy	Roanoke	Varies	Road Driver
Montgomery, David	Roanoke	Varies	Road Driver
Morris, Samuel	Roanoke	Varies	Road Driver
O'dell, Darren	Roanoke	Varies	Road Driver
Page, Thomas	Roanoke	Varies	Road Driver
Poff Jr, Massie	Roanoke	Varies	Road Driver
Pryor, Gabriel	Roanoke	Varies	Road Driver
Rauscher, Kyle	Roanoke	Varies	Road Driver
Reynolds, Linwood	Roanoke	Varies	Road Driver
See, Stephen	Roanoke	Varies	Road Driver
Smith, Ricky	Roanoke	Varies	Road Driver
Stump, Willie	Roanoke	Varies	Road Driver
Thurman, Charles	Roanoke	Varies	Road Driver
Tosh, Phillip	Roanoke	Varies	Road Driver
Walls, Edward	Roanoke	Varies	Road Driver
Wells, Jerry	Roanoke	Varies	Road Driver
Wenger, Charles	Roanoke	Varies	Road Driver
Williams, Hugh	Roanoke	Varies	Road Driver
Beckley, Errol	Salina	Varies	Road Driver
Burge, Christopher	Salina	Varies	Road Driver
Chamberlin, Kenneth	Salina	Varies	Road Driver
Dater, Greg	Salina	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Dwerlkotte, Jeffrey	Salina	Varies	Road Driver
Epp, Steven	Salina	Varies	Road Driver
Godfrey, Richard	Salina	Varies	Road Driver
Grieser, Paul	Salina	Varies	Road Driver
Harder, Jerry	Salina	Varies	Road Driver
Imhof, Robert	Salina	Varies	Road Driver
Jennings, Bernard	Salina	Varies	Road Driver
Meehan, John	Salina	Varies	Road Driver
Potts, Mitchell	Salina	Varies	Road Driver
Pudge, Harold	Salina	Varies	Road Driver
Ramsdale, Leigh	Salina	Varies	Road Driver
Reidelberger, Joey	Salina	Varies	Road Driver
Rundell, Steven	Salina	Varies	Road Driver
Schneider, Steven	Salina	Varies	Road Driver
Shatto, Terry	Salina	Varies	Road Driver
Walker III, Ira	Salina	Varies	Road Driver
Wegele, Weldon	Salina	Varies	Road Driver
Weidner, Dave	Salina	Varies	Road Driver
Wheeler, Max	Salina	Varies	Road Driver
Abrams, Joseph	Thompson	Varies	Road Driver
Bowman Sr, Larry	Thompson	Varies	Road Driver
Clem, William	Thompson	Varies	Road Driver
Cunningham, Robert	Thompson	Varies	Road Driver
Dickerson, Gabrium	Thompson	Varies	Road Driver
Elliott, Tracy	Thompson	Varies	Road Driver
Griffin, David	Thompson	Varies	Road Driver
Harrison, David	Thompson	Varies	Road Driver
Hillman, Danny	Thompson	Varies	Road Driver
Hinton, Benjamin	Thompson	Varies	Road Driver
Hope, Jerry	Thompson	Varies	Road Driver
Jett, Michael	Thompson	Varies	Road Driver
Johnson, William	Thompson	Varies	Road Driver
Jones, Michael	Thompson	Varies	Road Driver
Lawton Jr, James	Thompson	Varies	Road Driver
Lewis Sr, Dedrick	Thompson	Varies	Road Driver
Moore, Karl	Thompson	Varies	Road Driver
Nolen, Zachary	Thompson	Varies	Road Driver
Smith, Gary	Thompson	Varies	Road Driver
Smith, Jarvis	Thompson	Varies	Road Driver
Stewart Jr, Goldie	Thompson	Varies	Road Driver
Strong, Lional	Thompson	Varies	Road Driver
Swint, Sidney	Thompson	Varies	Road Driver
Thomas, Willie	Thompson	Varies	Road Driver
Turner, Michael	Thompson	Varies	Road Driver

Employee Name	Work Location	Shift	Job Classification
Welch, Jeffery	Thompson	Varies	Road Driver
Williams, Kevin	Thompson	Varies	Road Driver
Wilson, Richard	Thompson	Varies	Road Driver
Wirsu, Thomas	Thompson	Varies	Road Driver

CASE NO. 04-RC-165805
ATTACHMENT D
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

4. List any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

I. EMPLOYEE FRANK CAPPETTA IS A STATUTORY SUPERVISOR INELIGIBLE TO VOTE IN THE PETITIONED-FOR ELECTION.

The Company intends to contest at the pre-election hearing the eligibility of Frank Cappetta to vote in the petitioned-for election on the basis of his status as a statutory supervisor within the meaning of the Act.[4] Specifically, Section 2(11) of the Act provides that individuals are supervisors if: (1) they hold the authority to engage in any of twelve delineated supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *Loparex LLC,* 353 NLRB No. 126 (2009), *enf. Loparex LLC v. NLRB,* 591 F.3d 540 (7th Cir. 2009). "Supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In order to satisfy Section 2(11)'s "independent judgment" requirement, the putative supervisor must act or effectively recommend action "free of control of others and form an opinion or evaluation by discerning and comparing data." Furthermore, such judgment must rise above the "routine or clerical." *Id.* at 693.

The facts presented at the Representation Hearing will establish that Mr. Cappetta performs a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite independent judgment. Mr. Cappetta was hired by

[4] As set forth in greater detail in Attachment E, Mr. Capetta's supervisory status is relevant not only to his eligibility to vote in the petitioned-for election, but also to the validity of any cards solicited by him in support of the Union's showing of interest supporting its petition.

the Company as a Road Driver in July 2009. However, he has been acting almost exclusively as the Company's dispatcher since 2011. In this position, Mr. Cappetta has, for the past four years, responsibly directed the work of every other employee in the petitioned-for unit. Mr. Cappetta's responsibility as a dispatcher is to plan and execute the Company's daily delivery operation, in part by assigning every delivery route originating from the Kutztown facility. He routinely and on a daily basis coordinates loads, assigns work to drivers and other employees, dispatches the Company's daily list of runs, creates and coordinates the drivers' schedules, and assigns and schedules replacement drivers (for example, if an employee calls out sick, etc.). No one in the Company's management chain directs or oversees the manner in which Mr. Cappetta sets the daily schedule, assigns work, and covers open delivery routes – he performs these tasks with complete autonomy. Indeed, between July and October 2015, Mr. Cappetta had no direct on site supervisory oversight – the managerial positions budgeted for the Kutztown facility were vacant during that time.

Mr. Capetta also participates in the Company's hiring process. He evaluates driver applicants and makes recommendations concerning new hires, administers pre-hire road tests and evaluates employee performance in the completion of the test, evaluates and supervises driver pre-trip and post-trip tasks, and performs driver skill assessments related to driver qualifications, among other tasks. Additionally, for most of the time since mid-July 2015 (when the previous site manager left the Company), Mr. Cappetta has physically occupied the site manager's office, with the knowledge and consent of his Regional Operations Manager. When employees enter the Company's assigned office area in the Kutztown facility to check in for work and pick up their assigned daily load, they literally see Mr. Cappetta sitting in the site manager's office, from where he assigns their driving duties that day.

Each of these functions correspond with various primary and secondary indicia of supervision set forth in Section 2(11), and require Mr. Cappetta to exercise independent judgment that is not merely routine or clerical in nature in the interest of the Company. As a result, Mr. Cappetta is a statutory supervisor and therefore is not eligible to vote in the petitioned-for election.

II. EMPLOYEES FRANK CAPPETTA AND CARL DAVID ARE INELIGIBLE TO VOTE BECAUSE THEY DO NOT SHARE A COMMUNITY OF INTEREST WITH THE DRIVERS COMPRISING THE PUTATIVE UNIT.

Even if Mr. Cappetta is not deemed ineligible as a statutory supervisor, both he and employee Carl David are ineligible to participate in the election. As set forth in the Union's petition, the proposed bargaining unit is comprised of only those individuals employed as "regular full-time and part-time drivers." Here, the facts will show that Mr. Cappetta has, since 2011, almost never performed functions as a Road Driver for the Company, and that Mr. David rarely performed such functions in the year preceding the Union's petition. As stated above, Mr. Cappetta's regular duties involve dispatch functions requiring him to perform various tasks relating to the assignment of work, scheduling, performance evaluations, and the hiring and training of new employees. Mr. David serves in a similar capacity, albeit without the degree of autonomy and independent judgment exercised by Mr. Cappetta.[5]

As the Board held in *Columbia College*, 346 NLRB 726, 728-729 (2006), "an employee with job responsibilities encompassing more than one position [is] a dual function employee...." The Board includes such employees in an appropriate unit only if they have a community of interest with the petitioned-for unit. The relevant test, in this regard, is whether they "regularly perform duties similar to those performed by unit members for sufficient periods of time to

[5] For this reason, the Company does not allege that Mr. David is a statutory supervisor under the Act. He is, nevertheless, ineligible to participate in the vote for the reasons set forth above.

demonstrate that they have a substantial interest in working conditions in the unit." *Berea Publishing Co.*, 140 NLRB 516, 519 (1963).

The record at hearing will reflect that neither Mr. Cappetta nor Mr. David performs duties sufficiently similar to those performed by the putative unit members for a sufficient period of time to establish the requisite community of interest. To the contrary, both perform dispatch functions that are, at best, incompatible, and at worst, antagonistic, to those performed by the Drivers comprising the petitioned-for unit. As a result, both should be excluded from the unit, and deemed ineligible to participate in any election resulting from the Union's petition.

CASE NO. 04-RC-165805
ATTACHMENT E
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

6. Describe all other issues you intend to raise at the pre-election hearing.

I. THE COMPANY INTENDS TO CHALLENGE THE BOARD'S NEWLY-ENACTED ELECTION RULES.

The Union's petition is being processed in accordance with the procedures set forth by the Board in its new election rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 ("the Final Rule"), which became effective April 14, 2015. The Final Rule is intended to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions." *See NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). According to the Board, the Final Rule provides "targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." *Id.*

The reality, however, is that the Final Rule enacted comprehensive modifications to the Board election process. Viewed as a whole, those modifications severely and unfairly abbreviate the pre-election period, burden employers with new and onerous administrative tasks upon pain of waiver, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. Specifically, the Final Rule incorporates, among others, the following modifications:

a. The Final Rule requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election. *See* 29 C.F.R. §102.63(a).

b. The Final Rule abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases shown to be sufficiently "complex" to warrant delay for a limited additional time period or under undefined "special circumstances" and/or "extraordinary circumstances." *See* 29 C.F.R. §102.63(a).

c. The Final Rule requires employers, during the critical initial days following the filing of a petition for election, to prepare and file a burdensome written "statement of position" addressing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers' legal rights to contest any omitted issues at the hearing. *See* 29 C.F.R. §§102.63(b); 102.66(d).

d. The Final Rule requires employers to prepare and include with the statement of position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, as well as a second list (together with the above described additional information) of all individuals in any alternative unit contended for by the employer; and a third list (together with the above described additional information) of all individuals who the employer contends should be excluded from the petitioned-for unit. *See* 29 C.F.R. §102.63(b).

e. The Final Rule contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely "to determine if a question of representation exists," and provides that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit," which have traditionally been deemed necessary and appropriate issues for pre-election consideration, "ordinarily need not be litigated or resolved before an election is conducted." *See* 29 C.F.R. §102.64(a).

f. Relatedly, the Final Rule limits the parties' right to introduce evidence at the Section 9(c) hearing solely to that which is "relevant to the existence of a question of representation." *See* 29 C.F.R. §102.66(a).

g. The Final Rule requires parties to prepare and present "offers of proof" at the outset of the Section 9(c) hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. *See* 29 C.F.R. §102.66(c). Employers are further precluded from introducing evidence into the record on issues that were not previously addressed in the newly-required statement of position. *Id.*

h. The Final Rule precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except

upon special permission from, and addressing only subjects permitted by, the Regional Director. *See* 29 C.F.R. §102.66(h).

i. The Final Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* 29 C.F.R. §102.67(1). The Final Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

For the reasons articulated by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), UPS Freight objects to the Final Rule and its application in these proceedings. UPS Freight incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in those proceedings such that those objections and arguments shall be deemed to be set forth fully herein. The relevant filings are attached to the Company's Statement of Position as Attachment F.

UPS Freight also objects to the application of the guidance set forth in General Counsel Memorandum 15-06, entitled Guidance Memorandum on Representation Case Procedure Changes. The application of certain principles in that memorandum even further restrict and interfere with an employer's right to fully investigate and respond to a union's petitioned-for representation. For example, the memorandum allows a Regional Director to decline to hold a pre-election hearing on subjects crucial to the viability to the union's petitioned-for unit, including whether supervisory participation in union organizing tainted the showing of interest (an objection the Company is raising here). *See* GC Memorandum 15-06 at 18.

Among other harms, the procedural modifications imposed by the Final Rule severely hinder the Company in the following manner.

A. The Final Rule Severely Hinders the Company's Ability and Opportunity to Effectively Respond to the Union's Petition

The Final Rule severely hinders the Company's ability and opportunity to investigate all issues related to the petition, unfairly burdens the Company with onerous administrative tasks upon pain of waiver, all but eliminates formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudices the Company's ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of the National Labor Relations Act ("NLRA" or "the Act").

The restrictions imposed by the Final Rule have already materially prejudiced UPS Freight in several respects. The Union's petition was filed in the midst of the holiday season, which presents significant difficulties to the Company given the nature of its business. Additionally, the task of investigating the petition, adequately preparing and preserving its position in response, protecting its own business interests, and engaging in lawful dialogue with its employees concerning the ramifications of representation, is rendered near-impossible, however, as a result of the unfairly shortened "critical period" and the new and onerous administrative tasks imposed by the Final Rule. This is particularly true given the penal nature of Section 102.66(d) of the Board's Rules and Regulations, which expressly provides, in pertinent part, that "[a] party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position."

Anticipating this severe prejudice to the Company, the undersigned counsel specifically requested additional time both for the preparation of this Statement of Position and for the scheduled Representation Hearing, but only a portion of the requested extension was granted.

The Regional Director's denial of even the brief extension requested by the Company presents significant prejudice to the Company. Indeed, although the Union's petition purports to implicate only a limited number of employees at a single location, the compelling circumstances set forth in Attachment B to the Company's Statement of Position dictate that the appropriate scope of the proposed unit is significantly greater, and requires investigation of significant factors involving nearly three hundred employees at nine locations in the same number of states. The logistical obstacles created by the breadth of the required investigation are further complicated both by the expected scattering of employees during the holiday season, and the increased operational demands placed upon the Company during this time of year. Despite these real and obvious complications, the imposition of the Final Rule, even with the limited extension granted by the Regional Director, limits the Company to just eight days from the date of the filing of the Union's petition to prepare its Statement of Position, upon pain of waiver, and to eleven days in which to prepare for the Representation Hearing. This simply is not enough time given the gravity of the issue involved, which implicates not only the Company's business operations, but also the terms and conditions under which the unit employees will be employed and the Section 7 rights of employees both in (and outside of) the petitioned-for unit.

Despite these obvious harms, the Company has attempted, in good faith, to investigate and to preserve its rights going forward to the best of its ability given the considerable time limitations, and has attempted in good faith to comply with the procedural requirements imposed by the Final Rule despite their obvious prejudicial impact. For these reasons, and for the others set forth in the filings included in Attachment F, the Company maintains that its submission of its Statement of Position and its other efforts to comply with the Final Rule cannot be deemed a waiver of its objections to the Final Rule, and respectfully asserts that the Board's processing of

the Union's position in accordance with the Final Rule has rendered it unable to ascertain all facts and issues necessary to effectively protect its rights, and the rights of its employees, in the instant proceeding.

B. The Final Rule Severely Hinders the Company's Ability and Opportunity to Respond to the Union's Organizing Campaign in Violation of Section 8(c).

Moreover, Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Consistent with Section 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Final Rule, however, infringes upon an employer's Section 8(c) rights in several respects.

1. <u>The Final Rule Violates the Section 8(c) Policy of Encouraging Uninhibited Debate</u>.

By unfairly reducing the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprives an employer of adequate time to present its views in a meaningful manner to its employees. Such a result is inconsistent with the policies reflected in Section 8(c) favoring uninhibited, robust, and wide-open debate.

This is particularly true given the Final Rule's imposition of additional and unilateral obligations on the employer, including: (1) the compelled posting of an election notice within 2 business days after service of the notice of hearing; (2) the expectation that the hearing is to be opened within 8 days after the service of the notice of hearing; (3) the requirement that employers prepare and file a comprehensive Statement of Position addressing the issues they wish to litigate at the hearing, among other information, upon risk of waiving their legal rights to

contest any issue not presented in the statement; (4) the requirement that the parties prepare and present written "offers of proof" in support of their position at the hearing; and (5) the requirement that employers prepare and provide to the labor organization "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters." These obligations, all of which must be satisfied during a now-abbreviated critical period, preoccupy and avert employers from the exercise of their lawful rights under Section 8(c), and, when viewed as a whole, render employers unable to effectively respond to a union organizing campaign.

The practical impact of these modifications is to effectively eliminate any meaningful opportunity for an employer to lawfully communicate with its employees concerning campaign issues during the pre-election timeframe the Board has traditionally referred to as the "critical period" – "a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005). Such a result is not only contrary to the spirit and intent of the Act, but threatens the express rights granted to both employers and employees by the Act.

2. The Final Rule Improperly Compels Employer Speech.

Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compel

an employer to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. The time between the filing of a petition and the conduct of the election has long been referenced as the "critical period" for a reason. As noted in the dissent to the Final Rule, the critical period is the point in time in during which "the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)).

For this reason alone, an employer's ability to make general, pre-petition statements concerning its position on unionization, based on general observations at a time when no organizing efforts are taking place, is no substitute for post-petition speech. The benefit of the critical period is that it permits an employer to identify and understand the issues fueling the organizing effort and address them in a specific manner during the campaign, while at the same time lawfully educating its workforce on the lawful changes that would necessarily take place in the event of unionization, such as the collective bargaining process and the impact it might have on their terms and conditions of employment. The artificially abbreviated critical period imposed by the Final Rule's modifications severely and unreasonably restrict the employer's ability to respond to union campaign efforts or to provide a lawful, management-sided perspective on the changes that could result from representation.

In reality, the unfairly shortened critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively *compel* an employer to address the issue of unionization ***prior*** to the filing of a petition – and quite possibly

prior to the onset of any organizing efforts - for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also conceivable that, by addressing the issue of unionization prior to the filing of a petition, and at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final Rule. The First Amendment, which protects "both the right to speak freely and the right to refrain from speaking at all," *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer's right to decide when and how to address the issue of unionization with its employees, or to refrain from doing so at all. The Company's right to refrain from such speech is directly, and prejudicially, implicated by the Final Rule.

C. The Final Rule Also Hinders Employees in the Full Exercise of the Rights Guaranteed Them Under Section 7 of the Act.

Finally, the Final Rule severely restricts an employer's rights under Section 8(c) by eliminating any meaningful opportunity to lawfully communicate with employees concerning the issues raised by a union campaign ***during*** the pre-election timeframe. These Section 8(c) violations necessarily result in the frustration of the rights of those employees participating in the election. Indeed, as Board Members Miscimarra and Johnson noted in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to *require employees to vote as quickly as possible* – at the time determined exclusively by the petitioning union – *at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues*." 79 Fed. Reg. 74,460 (emphasis added).

The harm identified in the dissent's analysis of the Final Rule's emphasis on the unfairly abbreviated critical period is precisely the harm that must be avoided here. The Board's newly-enacted election process permits the Union to act upon its leisure in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election (or, as here, at a time when the Company is materially prejudiced due to significant seasonal operational obligations). The prior election processes provided an employer – even one with no previous notice of the union's efforts - with ample opportunity to address the relevant issues with its workforce and to meaningfully communicate its response to the union's efforts. The Final Rule, however, unreasonably circumscribes the Company's opportunity ***to respond***. The undesirable, but likely, result is an election decided by uninformed voters.

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ***and shall also have the right to refrain from any or all of such activities*** . . . ." 29 U.S.C. §157 (emphasis added). But, the right to refrain is only meaningful if the employees have full access to information concerning the consequences of representation before the election. The modifications to the election process imposed by the Board's adoption of the Final Rule ensure that they do not.

D. Conclusion

Based on the foregoing, there are compelling reasons for the Regional Director to dismiss the Union's petition. The procedural modifications imposed by the new Rule severely hinder the

Company's ability and opportunity to investigate all issues related to the petition, burden the Company with onerous administrative tasks upon pain of waiver, all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudice the Company's ability respond to the Union's organizing campaign in violation of the United States Constitution and Section 8(c) of the Act. Additionally, the unfairly shortened "critical period" contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compel an employer to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. Finally, the Final Rule hinders employees in the full exercise of the rights guaranteed them under Section 7 of the Act. For these reasons, and others set forth in the filings included in Attachment F, the Company respectfully requests that the Union's petition be dismissed, or alternatively that it be processed in a manner which effectively relieves the Company of the harms set forth above.

II. THE COMPANY INTENDS TO CHALLENGE THE UNION'S PETITION ON THE GROUNDS THAT THE SHOWING OF INTEREST WAS TAINTED BY SUPERVISORY SOLICITATION

As set forth in Attachment D, the Company intends to present evidence at the Representation Hearing that its employee, Frank Cappetta, is a statutory supervisor as that term is contemplated by Section 2(11) of the Act. Mr. Capetta's supervisory status is relevant not only to his eligibility to vote in the petitioned-for election, but also to the viability of the Union's petition to the extent it is supported by a showing of interest based on "tainted" cards solicited by him.

Indeed, the Board noted in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), that "solicitations [of union authorization cards by supervisors] are inherently coercive absent

mitigating circumstances." *Id.* at 906, 911 (emphasis added). The *Harborside* Board noted in this regard that "supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" because the employee "will reasonably be concerned that the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." *Id.* at 911. As such, including cards solicited by supervisors in a tally of the union's support "can paint a false portrait of employee support during [the union's] election campaign." *Id.* at 912 (citation omitted). The Board has found supervisor coercion not only in cases of direct solicitation, but also in cases where "employees had reason to believe that whether they signed a card would become known" to a pro-union supervisor. *See, e.g., Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005).

For this reason, when evaluating a claim of majority support, the Board has a longstanding policy of refusing to consider union authorization cards solicited by supervisors. *See, e.g., Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986) (accepting cards of employees solicited by supervisors, or which were signed while supervisors were present, "at odds with the Board's longstanding policy of rejecting cards directly solicited by supervisors"); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984) (noting "the Board has long refused to count cards directly solicited by supervisors"); *A.T.I. Warehouse, Inc.*, 169 NLRB 580, 580 (1968) ("It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid" for purposes of determining union majority); *see also Heck's, Inc.*, 61 LRRM 1128 (1966) (neither cards signed by statutory supervisors nor those solicited by supervisors constitute valid designations of union as bargaining representative).

And, upon this same reasoning, the Board has held that, if a supervisor directly solicits authorization cards, those cards are tainted and may not be counted for the showing of interest.

See, e.g., Dejana Industries, Inc., 336 N.L.R.B. 1202 (2001) (dismissing petition for election where supervisor was directly involved in collecting the authorization cards used to support the showing of interest); *National Gypsum Co.*, 215 NLRB 74 (1974) (finding supervisory taint when supervisors personally solicited and obtained signatures and signed their names as "witnesses" on the back of many of the cards before turning them in to the petitioner); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960) (dismissing petition when a supervisor participated in obtaining the signatures of all the employees whose cards were submitted for the showing of interest); *The Toledo Stamping & Manufacturing. Co.*, 55 NLRB 865, 867 (1944) (dismissing petition when authorization cards secured with the assistance of a supervisor). As the Board noted:

> [W]e recognize that applying this bright-line rule of excluding all cards directly solicited by a supervisor may seem unduly harsh in situations in which employees and petitioning unions may not be fully aware that the card solicitor possesses any of the indicia of statutory supervisory status. However, we find this possible disadvantage is outweighed by the benefits of providing the Board's Regional Directors and all parties in representation cases with clear procedural guidance. A bright-line rule also avoids possible election delays due to administrative investigations, by encouraging petitioners to gather new, untainted cards where there is any allegation that the petitioner's card solicitor possesses supervisory authority.

Dejana Industries, Inc., 336 N.L.R.B. at 1202.

Upon good faith belief, the Company intends to prove through the course of these proceedings that the Union's showing of interest, and indeed the campaign itself, has been tainted as a result of the solicitations and other participation by Mr. Cappetta. Given the impact of the Final Rule, which unfairly shortens the time between the filing of the Union's petition and the Representation Hearing, the Company has been unable to fully develop the facts giving rise to this issue and posits that the best, current evidence of Mr. Cappetta's participation in the Union's card solicitation activities may well exist in the cards themselves. Pending the

Company's development of additional, relevant evidence, the Company requests that a formal check of the cards be conducted by the Regional Director to ascertain Mr. Cappetta's participation as a witness to the card signings for the purpose of evaluating the validity of the showing of interest supporting the Union's petition. Ultimately, however, and regardless whether Mr. Cappetta witnessed the signing of some or all of the authorization cards presented by the Union, the Company believes that Mr. Cappetta was actively involved in the union organizing effort and that he encouraged some or all of the drivers in the unit either to sign cards or support the Union. Any such actions by Mr. Cappetta would taint the showing of interest and require that the petition be dismissed.

CASE NO. 04-RC-165805
ATTACHMENT F
TO UPS GROUND FREIGHT INC.'S
STATEMENT OF POSITION

Relevant Filings From *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. 823 Congress, Suite 230 Austin, TX 78701, ASSOCIATED BUILDERS AND CONTRACTORS, INC. CENTRAL TEXAS CHAPTER 2600 Longhorn Blvd., Suite 105 Austin, TX 78758, and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/ TEXAS 400 W. 15TH St., #804 Austin, TX 78701 Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, 1099 14th St., N.W. Washington, D.C. 20570 Defendant.	Case No. 1:15-cv-00026 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. ("ABC OF TEXAS"), ASSOCIATED BUILDERS AND CONTRACTORS, INC., CENTRAL TEXAS CHAPTER ("ABC CENTRAL TEXAS") and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/TEXAS ("NFIB/TEXAS") (collectively "THE PLAINTIFFS"), seek declaratory and injunctive relief against the Defendant NATIONAL LABOR RELATIONS BOARD ("DEFENDANT" OR "THE BOARD"), for violating Federal law.

2. This civil action seeks judicial review of the Board's issuance of a new rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule") (attached hereto). The new Rule revises and supersedes longstanding regulations implementing Section 9 of the National Labor Relations Act, as amended (the "Act"), pursuant to which the Board conducts union representation elections among employees of employers covered by the Act.

3. As further explained below, the new Rule makes sweeping changes in pre-election and post-election procedures that depart from the plain language and legislative history of the Act and exceed the Board's statutory authority. The evident purpose of the changes is to achieve the impermissible pro-union objective of accelerating the election process to such an extent that employers will be unable to respond effectively to union organizing campaigns. The new Rule achieves this result by preventing employers in most cases from exercising their statutory rights to appropriate hearings regarding voting eligibility, and by shortening the election period so that employers have no meaningful opportunity to lawfully communicate with affected employees about their electoral rights. As stated in the strongly dissenting opinion of Board Members Miscimarra and Johnson: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460.

4. The Board also has provided no adequate justification for overruling many decades of Board and judicial precedent that preserved a careful balance of employer, employee, and union rights in the election process. The Board's failure to provide an adequate justification

supported by substantial evidence in the record renders the new rule arbitrary and capricious and an abuse of discretion, all in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. The new Rule will have a deeply destabilizing and harmful impact on many of Plaintiffs' member employers and their employees in Texas (and elsewhere). If the Board's new rule is allowed to go into effect as scheduled on April 14, 2015, Plaintiffs' member employers will be deprived of their rights to appropriate hearings and due process relating to the conduct of pre-election and post-election proceedings. Plaintiffs' members will also lose their statutorily protected rights to communicate with their own workers on union-election-related issues.

6. Absent judicial intervention, the new Rule is scheduled to go into effect on April 14, 2015. For the reasons more fully set forth below, the Rule should be declared unlawful and set aside prior to its effective date.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331 (Federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. § 702 ("[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof").

8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because ABC of Texas and ABC Central Texas are corporations residing within the Western District of Texas. In addition, all of the Plaintiffs have members that are incorporated and reside in this District, and the new Rule will adversely impact Plaintiffs and their members in this District. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

PARTIES

9. Plaintiff ABC of Texas, a Texas corporation headquartered in Austin, is a trade association representing seven chapters and more than 1500 member construction contractors and related employers in Texas. ABC of Texas advocates on behalf of its chapters and members in support of free enterprise and the Merit Shop philosophy, which holds that work in the construction industry should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC Central Texas, a Texas corporation headquartered in Austin, is one of the chapter members of ABC of Texas and itself represents more than 200 merit shop construction contractors and related employers in Texas. Plaintiffs are affiliated with Associated Builders and Contractors, Inc., a national trade association representing more than 21,000 chapter members. ABC and many of its members filed comments opposing the new Rule prior to its issuance.

10. Plaintiff NFIB/Texas represents approximately 24,000 Texas employers from its office located in Austin. NFIB Texas is the state's leading small business advocacy organization. NFIB nationally is the leading advocate of small business owners representing hundreds of thousands of small business owners throughout the country. NFIB and many of its members filed comments opposing the new Rule prior to its issuance.

11. Plaintiffs have standing to pursue this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3)

neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

12. Plaintiffs' members would otherwise have standing to sue in their own right because they will suffer imminent harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. *Inter alia*, Plaintiffs' members will be required to spend many hours and many dollars in efforts to prepare in advance for union petitions, and will be compelled to participate in an invalid administrative process, because they will not have sufficient time or opportunity to respond to such petitions under the new Rule.

13. The interests at stake are germane to Plaintiffs' principles, which include the mission of protecting the rights of their members to freedom from unlawful government interference with the operation of their businesses and to communicate with their employees regarding their rights to refrain from supporting unionization.

14. The claims asserted and relief requested by Plaintiffs do not require participation of Plaintiffs' members, because Plaintiffs' Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the Act. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the absence of substantial evidence supporting the Rule in the Administrative Record and the failure of the Department to provide adequate explanation of its reversal of four decades of policy implementing the Act's requirements. The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

15. The Defendant Board is an independent federal agency charged with administration and enforcement of the Act. The Board has been delegated rulemaking authority

to carry out these functions, but is required to exercise such rulemaking authority in a manner consistent with the Act and is subject to suit and judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*. (the "APA").

STATUTORY AND REGULATORY FRAMEWORK PRIOR TO THE NEW RULE

16. In Section 9 of the Act, 29 U.S.C. 159, Congress spelled out the means by which employees of private sector employers should be allowed to designate unions as their exclusive collective bargaining representatives or to refrain from that action.

17. Section 9(a) allows unions to represent employees in collective bargaining provided that they are "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes…." Section 9(b) provides that it is the Board's obligation to "decide in each case" the "unit appropriate for purposes of collective bargaining, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." Section 9(c) provides that when a petition for a representation election is filed, the Board must investigate the petition and "shall provide for an appropriate hearing upon due notice" before the election is held. This provision also states that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

18. Congress amended the Act in 1947 (the "Taft-Hartley amendments") because of concerns that the Board had adopted election procedures that were not sufficiently neutral to preserve employee freedom of choice with regard to union representation, including an early attempt by the Board to eliminate pre-election hearings. See S. Rep. 80-105, 80th Cong. at 3, reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947.

19. One of the Taft-Hartley Amendments was the enactment of Section 8(c) of the Act, which protects the right of employers to engage in protected speech prior to an election. The Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2009).

20. Congress further amended the Act in the Labor Management Reporting and Disclosure Act ("LMRDA") of 1959. At that time, Congress rejected legislative efforts to shorten the time period for holding elections, and specifically rejected a bill that would have deferred voter eligibility issues to post-election hearings. Senator John F. Kennedy, then-chair of the Conference Committee, repeatedly stated that at least 30 days were required between the petition's filing and the election in order to "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024.

21. Pursuant to the foregoing statutory requirements, the Board has for decades adhered to a balanced set of pre-election procedures that have allowed employers sufficient time and opportunity to raise issues affecting the conduct of elections in appropriate pre-election hearings. *See* 29 C.F.R. 102.60, *et seq*. Such issues have included questions regarding the appropriateness of the requested bargaining unit as well as the eligibility of certain categories of employees to vote in the election. *Id.* at 102.66. Following such hearings, employers have been allowed 25 days to request review of regional director decisions by the Board prior to any tally of ballots in an election. *Id.* at 102.67.

22. The foregoing procedures of the Board have worked effectively and in a timely but balanced manner to allow the full exercise of free choice by employees with regard to

unionization, while at the same time preserving employer due process and free speech rights, consistent with the protections of the Act. Thus, the Board has consistently met or improved upon its time targets to conduct elections over the last decade: elections have been conducted within a median of 38 days from the filing of union petitions, bettering the Board's time targets of 42 days from petition to election. In addition, more than 90% of all petitions do not currently require pre-election litigation under the Board's procedures but are resolved by agreement of the parties. Unions are not prejudiced by the operation of the current procedures, as they have won a substantial majority of elections conducted under the Board's current rules.

THE BOARD'S NEW RULE

23. The Board's new Rule is "[m]assive in scale and unforgiving in its effect." 79 Fed. Reg. at 74430 (dissenting opinion). The Rule's primary purpose and effect are to accelerate the timetable of union representation elections, in particular by shortening the time allowed for employers to contest the appropriateness of the petition in pre-election hearings, and in some instances disallowing such hearings altogether on such fundamental questions as who is eligible to vote.

24. Specific provisions of the new Rule that Plaintiffs contend below violate the Act and/or the APA include the following:

a. The new Rule improperly shortens the time between the filing of the union petition and the first day of a hearing, except for cases shown to be sufficiently "complex" as to be delayed for a limited additional time period under undefined "special circumstances" and/or "extraordinary circumstances." *See* Section 102.63(a) of the new Rule.

b. The new Rule imposes an unprecedented new requirement that employers must first file a written "statement of position" providing a long list of burdensome information prior to exercising their statutory right to a pre-election hearing. Section 102.63(b). Such information must for the first time include, *inter alia*, a list of all employees, work location, shifts, and job classifications of all individuals in the petitioned-for unit, as well as a second list of all such employees (together with the above described additional information) for all individuals in any alternative unit contended for by the employer; and a third list of all such employees (together

with the above described additional information) for all individuals who the employer contends should be excluded from the petitioned-for unit. *Id.*

c. The above required statement of position must also for the first time state in writing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding any individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing. *Id. See also* Section 102.66(d). No comparable requirement is imposed on union petitioners. All of the above information must be provided, upon risk of waiving employers' legal rights to contest such issues at the hearing, in a length of time that is inadequate for many employers to meaningfully understand and exercise their legal rights.

d. The new Rule improperly limits the purpose of a hearing conducted under Section 9(c) of the Act as being solely "to determine if a question of representation exists." *See* Section 102.64(a). For the first time, the Rule asserts that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." *Id.*

e. The new Rule also for the first time limits the right of parties in such hearings to introduce into the record evidence to that which is "relevant to the existence of a question of representation" thereby excluding other issues contemplated by Section 9(c) of the Act. *See* Section 102.66(a).

f. The new Rule also for the first time requires parties to make "offers of proof" at the outset of any hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. Section 102.66(c). Employers are further precluded from introducing evidence into the record that is not previously encompasses by various aspects of the newly required Statement of Position. *Id.*

g. The new Rule for the first time denies employers the opportunity to present post-hearing briefs and to review a hearing transcript prior to stating their post-hearing positions on the record, except upon special permission of the Regional Director and addressing only subjects permitted by the Regional Director. Section 102.66(h).

h. The new Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. See Section 102.67(l). The Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

i. The new Rule for the first time eliminates the longstanding requirement that election ballots be impounded while any request for review of the Regional Director's decision is pending at the Board and eliminates the previous 25-day waiting period for review filings which previously allowed the Board time to consider such requests for review prior to the vote. *See* Section 101.21(d), removed and reserved.

j. The new Rule for the first time eliminates the right of employers to obtain mandatory Board review of post-election disputes if they enter into stipulated election agreements prior to the election instead of exercising their right to a pre-election hearing. See Section 102.62(b) and 102.69.

25. Due to the length of the new Rule (182 pages of the Federal Register), the foregoing summary of significant and unprecedented changes which Plaintiffs seek to challenge in this Complaint is necessarily a non-exclusive list.

CLAIMS FOR RELIEF

COUNT I – The New Rule Exceeds The Board's Statutory Authority Under Section 9 of the Act, In Violation of the APA.

26. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 25 of this Complaint, as though fully set forth below.

27. As noted above, Section 9(b) of the Act, 29 U.S.C. 159(b) requires the Board to "decide in each case … the unit appropriate for collective bargaining…." Section 9(c) further provides that when a petition for a representation election is filed, the Board must investigate the petition and "shall provide for an appropriate hearing upon due notice" before the election is held. This provision also states "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

28. Legislative history of the Act including rejected amendments to the Act in 1947 and 1959 confirms that the Act requires the Board to allow employers the right to adequately prepare for, present evidence at and otherwise fairly litigate issues of unit appropriateness and voter eligibility in appropriate pre-election hearings, and that the Board must decide "in each case" the unit that is appropriate for the purposes of collective bargaining based on all the evidence submitted. Congress further rejected efforts to expedite the election process in the manner now adopted in the new Rule.

29. The new Rule, by the provisions summarized above and in other ways, violates each of the foregoing statutory provisions and Congressional intent. Specifically, the new Rule impermissibly restricts employers' ability to prepare for, present evidence and fairly litigate issues of unit appropriateness and voter eligibility in petitioned-for bargaining units.

30. The new Rule further vests excessive authority in Hearing Officers and excessively derogates the Board's own decision-making authority, both of which violate the foregoing provisions of the Act and Congressional intent and exceeding statutory authority within the meaning of the Administrative Procedure Act.

COUNT II – The New Rule Violates The Act and The APA By Failing To Assure To Employees The Fullest Freedom In Exercising The Rights Guaranteed By [The] Act.

31. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Complaint, as though fully set forth below.

32. As noted above, Section 9(b) of the Act requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." The new Rule violates this provision, inter alia, by compelling the invasion of privacy rights of the employees of Plaintiffs' member employers by disclosure of their names and job duties to a petitioning union prior to any determination that the petition is supported by a sufficient showing of interest to proceed to an election in an appropriate bargaining unit.

33. The new Rule further violates the Act and the privacy rights of employees by compelling employers to disclose unprecedented personal information, including personal phone numbers and email addresses, about all employees who are deemed to be part of an appropriate bargaining unit, and additional employees whose status has not been determined prior to a direction of election.

COUNT III – The New Rule Violates The Act And The APA By Interfering With Protected Speech During Representation Election Campaigns.

34. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 33 of this Complaint, as though fully set forth below.

35. Section 8(c) of the Act, 29 U.S.C. 158(c) protects the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. As noted above, the Supreme Court has characterized Section 8(c) as favoring uninhibited, robust, and wide-open debate in labor disputes. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). This right only has meaning if there is enough time for parties to communicate with employees about their choice of representation.

36. The new Rule interferes with these protected rights because it is intended to, and inevitably will, substantially shorten the time between the filing of a representation petition and the date of the election, thereby curtailing the ability of parties to exercise their rights to engage in protected speech.

COUNT IV – The New Rule Is Arbitrary And Capricious And An Abuse of Agency Discretion Within The Meaning Of The APA

37. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 36 of this Complaint, as though fully set forth below.

38. By reversing decades of policy and precedent without adequate justification, the Defendants have acted in an arbitrary and capricious manner in violation of the APA, and the new Rule should be set aside on this additional ground pursuant to 5 U.S.C. § 706.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request this Court to enter judgment in their favor and:

1. Declare that the provisions of the new Rule described above violate the Act and the APA;

2. Vacate and set aside the provisions of the new Rule shown to be unlawful in this Complaint and any related provisions that cannot be lawfully severed therefrom;

3. Declare that the new Rule is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law;

4. Issue an injunction vacating the new Rule and barring the Board from enforcing or applying the challenged portions of the Department's new Rule, together with any other provisions of the Rule that incorporate or otherwise rely on the challenged provisions found to be unlawful.

5. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

6. Grant Plaintiffs such other relief as may be necessary and appropriate.

Respectfully submitted,

/s/ Mark Jodon
Maurice Baskin (*pro hac vice* pending)
Mark Jodon (Bar No. 10669400)
Travis Odom (Bar No. 24056063)
Littler Mendelson, P.C.
1301 McKinney Street
Suite 1900
Houston, TX 77010-3031
Ph: 713.951.9400
Fax: 713.951.9212

mbaskin@littler.com
mjodon@littler.com
todom@littler.com
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BAKER DC, LLC AND SHANNON W. COTTON, MICHAEL A. MURPHY, AND JORGE E. GONZALEZ VILLAREAL **1110 Vermont Avenue, NW** **Washington, D.C. 20005,** **Plaintiff,** **v.** **NATIONAL LABOR RELATIONS BOARD** **1099 Fourteenth Street, NW** **Washington, D.C. 20570,** **Defendant.**	**Case No. 15-cv-00571-ABJ**

AMENDED COMPLAINT

1. On April 14, 2015, the National Labor Relations Board ("the Board") put into effect a new Rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101, 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule").

2. The new Rule went into effect notwithstanding a pending legal challenge filed in this district by a broad coalition of trade associations representing millions of businesses throughout the country, who have alleged that the new Rule violates the National Labor Relations Act ("the Act") and the Administrative Procedure Act (the "APA").[1]

3. On April 15, 2015, the United Construction Workers Local Union No. 202-Metropolitan Regional Council of Carpenters ("the Union") filed a petition with the National

[1] *See Chamber of Commerce of the United States of America, et al v. NLRB, Case No. 15-cv-00009-ABJ.* Dispositive cross-motions have been filed in that case and have been fully briefed by the parties.

Labor Relations Board (the "Board") seeking to represent employees of Baker DC, LLC ("Baker") working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule.

4. Among other dramatic changes to the representation election process, the new Rule:

a. Requires employers to post a notice of election constituting compelled speech prior to any determination by the Board that the petition has sufficient merit to require an election to be held;

b. Requires employers to file a burdensome written Statement of Position prior to any hearing being held, upon penalty of precluding employers from presenting evidence at the hearing on any issue not addressed in the Statement, contrary to the rights given to employers to present such evidence in Section 9 of the Act;

c. Requires employers to disclose to a petitioning union confidential information about employees inside and outside the petitioned-for unit prior to any hearing being held, upon the same unlawful penalty;

d. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;

e. Requires employers to turn over employees' highly personal and private information such as personal phone numbers and e-mail addresses to labor organizations within two business days after a decision and direction of election is issued;.

f. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review; and

g. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary).

5. Because the new Rule offends the First and Fifth Amendments of the Constitution of the United States, contravenes clear Congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the Act, the Administrative Procedure Act ("the APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the Board resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim including hearings and other actions taken by the Board in promulgating the new Rule—occurred in the District of Columbia; and (iii) Baker is headquartered and does business in the District of Columbia.

PARTIES

8. The Board is an independent federal agency in the Executive Branch and is subject to the APA. The Board's headquarters are located at 1099 Fourteenth Street, NW, Washington, D.C. 20570.

9. Baker is a concrete contractor operating in the greater Washington DC area from its headquarters location at 1100 Vermont Ave., N.W., Washington, D.C. 20005. Baker

specializes in commercial "cast in place" concrete construction, restoration, retrofit, specialty underpinning work, and blast fortification.

10. Baker employs employees who are covered by the Act and are subject to the Board's rules regarding union organizing, to the extent that such rules are consistent with the Act. Baker's employees are not currently covered by a union. Plaintiffs Cotton, Murphy, and Gonzalez Villareal are employed by Baker. There are several hundred other employees employed by Baker who are similarly situated. As noted above, the Union filed a petition with the Board on April 15, 2015 seeking to represent Baker's employees working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area.

STANDING AND RIPENESS

11. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule. Accordingly, Baker and its co-Plaintiff employees will imminently suffer concrete and substantial injury in fact, including **irreparable harm,** as a result of the new Rule. Such harm includes but is not limited to the following:

a. Compelled infringement of Plaintiffs' free speech rights due to the newly required posting of a notice of election on or before April 17, 2015, (two business days after receipt of the Notice of Petition from the Board);

b. Unprecedented compelled pre-hearing disclosure of the names and locations of Baker's employees' to an outside third party (the Union), upon penalty of being precluded from presenting evidence relating to the voting eligibility and appropriate unit of such employees, in direct violation of the Section 9(c)(1) of the Act;.

c. Compelled filing by Baker of a newly required pre-hearing Statement of Position upon penalty of being precluded from presenting evidence relating to any issue not addressed in the Statement, in further violation of Section 9.

d. Preclusion of Baker from presenting evidence on voter eligibility issues in violation of Congressional intent to allow all such evidence to be presented under the Taft-Hartley Act.

e. Unprecedented compelled post-hearing disclosure of private and personal phone numbers and e-mail addresses of Baker's employees, within the impracticable deadline of 2 business days following the Board's direction of election.

f. Infringement of Plaintiffs' free speech rights during the unlawfully abbreviated election campaign.

CLAIMS FOR RELIEF

COUNT I: The New Rule Exceeds The Board's Authority Delegated By Congress By Imposing Unprecedented Disclosure Requirements On Baker, Including Compelled Disclosure Of Confidential, Personal and Private Information Regarding Their Employees.

12. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

13. Section 7 of the Act gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

14. Section 9(b) of the Act provides that the Board shall "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act.

15. Section 9(c)(1) of the Act, enacted as one of the Taft-Hartley amendments of 1947, requires that the Board conduct an "appropriate hearing" with regard to all "questions concerning representation." As was made clear by Senator Robert Taft, chief sponsor of the Taft-Hartley Act, Congress intended by this language to require the Board to hold such hearings in order to "decide questions of unit and eligibility to vote." 93 Cong. Rec. 6858, 6860 (June 12, 1947).

16. Nothing in the Act authorizes the Board to require employers to disclose the confidential names and work locations of their employees prior to a determination that a petition merits a direction of election after an appropriate hearing, upon penalty of being precluded from presenting evidence regarding the voting eligibility or unit appropriateness of such employees. Section 102.63(b) of the new Rule nevertheless requires Baker and similarly situated employers to make such a disclosure upon penalty of otherwise being precluded from presenting evidence that Section 9(c)(1) guarantees to employers the right to present.

17. Nothing in the Act authorizes the Board to require employers to disclose the personal and private phone numbers and personal email addresses of their employees within two business days after a direction of election is issues, or at any other time. Section 102.62 of the new Rule nevertheless requires such post-hearing disclosures, exceeding the Board's authority under the Act and constituting a gross invasion of employer and employee privacy contrary to the intent of Congress.

Count II: The New Rule Impermissibly Restricts Baker's Right To Present Evidence On Questions Concerning Representation At An Appropriate Hearing In Violation Of Section 9 and the Fifth Amendment to the U.S. Constitution.

18. Section 9 of the Act states that the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b). Section 9(c) of the Act further provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

19. The new Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting Baker's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit. In particular, the requirement that Baker file a written Statement of Position on each and every potential that could arise during a hearing, at a time when no pre-hearing discovery is permissible, upon penalty of precluding Baker from presenting evidence on unit and voter eligibility issues as expressly permitted by the Act, violates Section 9 and Congressional intent.

20. The new Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The new Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

21. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the Baker to communicate about the election and for Plaintiff employees to decide whether to vote for or against union representation, the new Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the Act and is otherwise contrary to Section 9(b) of the Act.

22. The new Rule also deprives Baker of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing Baker from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying Baker the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

Count III: The New Rule Violates Plaintiffs' First Amendment and Statutory Rights of Free Speech.

23. Section 8(c) of the Act protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *Chamber of Commerce v. Brown,* 554 U.S. 60, 67-68 (2008); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

24. Notwithstanding these requirements, the new Rule violates Plaintiffs' free speech rights by compelling Baker to engage in certain speech prior to the Board making any determination that an election will be held on the Union petition. Specifically, the new Rule requires Baker to post a new mandatory workplace notice to be posted within two days after the filing of a representation petition. In the present case, because Baker received the Board's Notice of Petition on April 15, 2015, the new Rule unlawfully requires Baker to post the mandatory new notice by April 17, 2015. The new Rule violates the D.C. Circuit's holding in *National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 955 (D.C. Cir. 2013), overruled on other ground by *American Meat Inst. v. U.S Dept. of Agriculture*, 760 F. 3d 18 (D.C. Cir. 2014) (*en banc*).

25. By enacting Section 8(c), Congress further directed that employers be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress determined that employers, such as Baker, must have the opportunity to effectively

communicate with their employees on the subjects of union organizing and collective bargaining. *Chamber of Commerce v. Brown, supra*, 554 U.S. at 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes." (internal quotation omitted)); *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (citation omitted)).

26. The new Rule impermissibly curtails Plaintiffs' right to communicate with each other by substantially shortening the period between an election petition and the holding of an election, and the new Rule impermissibly limits Plaintiffs' ability to exercise its rights under Section 8(c) of the Act and the First Amendment.

COUNT IV: The Board's Actions Are Arbitrary and Capricious

27. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

28. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)). The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

29. The new Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the new Rule exist only in a small fraction of cases.

30. The new Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more

than 90 percent of cases.

31. The new Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the Board's established time targets for many years.

32. The new Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to Baker's free speech rights and the opportunity for a full and informed debate before an election.

33. The new Rule also mandates, for the first time in the Board's history, that Baker gives its employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

34. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

35. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

36. The new Rule concludes that it will reduce election-related litigation, despite available evidence that the new Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are

currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

37. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

38. The Board's actions in adopting the new Rule are arbitrary and capricious, and the new Rule was enacted without observance of the necessary procedures required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter judgment in its favor and:

1. Vacate and set aside the new Rule;
2. Declare that the new Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the Act, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that the Board violated the APA in issuing the new Rule;
4. Declare that the new Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain the Board, its agents, employees, successors, and all persons acting in concert or participating with the Board from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the new Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: April 21, 2015

Respectfully submitted,

/s/ Maurice Baskin
Maurice Baskin (D.C. Bar No. 248898)
LITTLER MENDELSON, P.C.
1150 17th Street N.W.
Suite 900
Washington, DC 20036
202.842.3400 Telephone
202.842.0011 Facsimile
mbaskin@littler.com

Counsel for Plaintiff Baker DC, LLC

/s/ Glenn M. Taubman
Glenn M. Taubman (D.C. Bar No. 384079)
National Right to Work Legal Defense Foundation
8001 Braddock Rd., Suite 600
Springfield, VA 22160
703-321-8510
gmt@nrtw.org

Counsel for Plaintiffs Cotton, Murphy, and Gonzalez Villareal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, 1615 H Street, NW Washington, D.C. 20062 and COALITION FOR A DEMOCRATIC WORKPLACE, 901 7th Street NW, 2nd Floor Washington, D.C. 20001 and NATIONAL ASSOCIATION OF MANUFACTURERS, 733 10th Street NW, Suite 700 Washington, D.C. 20001 and NATIONAL RETAIL FEDERATION 1101 New York Ave NW Washington, D.C. 20005 and SOCIETY FOR HUMAN RESOURCE MANAGEMENT 1800 Duke Street Alexandria, VA 22314 Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD 1099 14th Street NW Washington, D.C. 20570 Defendant.	Case No. 1:15-cv-9 **COMPLAINT**

DB1/ 81547246.5

INTRODUCTION

1. For nearly 80 years, the National Labor Relations Board ("NLRB" or "Board") has conducted workplace elections so that workers can decide if they want to be represented by a union for purposes of collective bargaining. Like political elections, representation elections offer all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected, lawful speech about how workers should vote in the election.

2. Congress's overarching "policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes"—including the "freewheeling use of the written and spoken word" (*Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008))—is so central to the representation election process that Congress expressly guaranteed an employer's right to engage in speech concerning unionization (so long as that speech, of course, "contains no threat of reprisal or force or promise of benefit"). 29 U.S.C. § 158(c).

3. The Board's recently issued "ambush" election rule (the "Final Rule") implements sweeping changes to the NLRB's representation election process that, as the dissenting Board Members explained, impermissibly "limits the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important." 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014). By rapidly (and needlessly) accelerating the election process, the Final Rule "improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'" *Id.* at 74,430.

4. In doing so, the Final Rule is "contrary to common sense, contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions." *Id.* at 74,430-31. And the Final

Rule is "fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues." *Id.* at 74,431.

5. Although the Final Rule does not provide any guidelines about the time frame in which elections will be conducted, the changes implemented in the Final Rule would allow elections to be held in as little as 14 days after the employer is first notified of the election petition. Under the NLRB's current procedures, the Board expects that elections will be held within a median of 42 days from the filing of a petition, and that 90 percent of elections will be held within 56 days of the filing of a petition.

6. Among other dramatic changes to the representation election process, the Final Rule:

a. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;

b. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review;

c. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary); and

d. Requires employers to turn over employees' highly personal information such as home and cell phone numbers and e-mail addresses to labor organizations to aid unions in their election campaign efforts.

7. Moreover, as the dissenting Board Members point out, the Final Rule "leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether

and why rulemaking is necessary." 79 Fed. Reg. at 74,431. The Board already handles election requests quickly, with over 95 percent of elections occurring in less than two months (and with over 90 percent of elections generating no pre-election litigation, above the Board's stated goal of 85 percent). Indeed, for several years, the Board has surpassed its own internal time target for handling elections—a feat its prior General Counsel has described as "outstanding." And unions already win more than two-thirds of all representation elections—so the Board's massive modifications to the election process cannot be justified or explained by any legitimate concern about employer "coercion" during the current pre-election period.

8. Because the Final Rule offends the First and Fifth Amendments to the Constitution of the United States, contravenes clear congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the National Labor Relations Act ("NLRA"), the Administrative Procedure Act ("APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the NLRB resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim—including hearings and other actions taken by the Board in promulgating the Final Rule—occurred in the District of Columbia; and (iii) the Chamber, CDW, NAM, and NRF are headquartered or maintain offices in the District of Columbia, and SHRM does business in the District of Columbia.

PARTIES

11. Plaintiff Chamber of Commerce of the United States of America ("Chamber") is a

non-profit organization created and existing under the laws of the District of Columbia. The Chamber's headquarters are located at 1615 H Street, NW, Washington, D.C. The Chamber is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. Of particular relevance here, the Chamber represents the interests of its member-employers in employment and labor-relations matters—including matters arising under the NLRA—before courts, Congress, the Executive Branch, and regulatory agencies of the federal government. The Chamber is authorized to bring this action on behalf of its member companies.

12. Plaintiff Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. CDW's membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country. CDW is authorized to bring this action on behalf of itself, its members, and its member companies.

13. Plaintiff National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is authorized to bring this action on behalf of itself, its members, and its member companies.

14. Plaintiff National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main

Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans. NRF is authorized to bring this action on behalf of itself, its members, and its member companies.

15. Plaintiff Society for Human Resource Management ("SHRM") is the world's largest membership organization devoted to human resource management. Representing more than 275,000 members in over 90,000 companies, SHRM is the leading provider of resources to serve the needs of human resource professionals and advance the professional practice of human resource management. SHRM members represent their employer companies on a myriad of human resource issues, including labor relations matters. SHRM is authorized to bring this action on behalf of itself and its members.

16. Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. These employers, in turn, employ millions of employees who are covered by the NLRA and entitled to organize and petition the NLRB to hold a representation election pursuant to the Final Rule's expedited procedures. The vast majority of these employees are not currently represented by a union. There are, however, active union organizing campaigns involving employees of many of the businesses represented by Plaintiffs. The Plaintiffs' members expect that these employees, or the unions that seek to represent them, will file election petitions soon after the Final Rule becomes effective on April 14, 2015, and all subsequent elections will be governed by the Final Rule's expedited procedures.

17. These injuries that the Plaintiffs' members will incur as a result of the Final Rule include less time for employers to communicate with workers about the election, in derogation of

employers' free speech rights under Section 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes; less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit; less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit; less time for employers to determine whether individuals encompassed by the petition are actually eligible to vote in the election; less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver; and less time for employers to negotiate an election agreement that would obviate the need for a pre-election hearing. Many of Plaintiffs' members will incur additional costs in order to prepare for the shortened, and inadequate, time to respond to an election petition under the Final Rule.

18. In addition, the Final Rule will restrict employers' ability to litigate issues of eligibility and inclusion at the pre-election hearing, even if those issues are timely raised; sharply limit employers' opportunity to seek Board review of a Regional Director's decision before the election; and eliminates mandatory Board review of post-election disputes, making such review discretionary only. In these circumstances, if the union wins the election, the employer may be denied any Board review of the Regional Director's decision and the employer's only recourse for judicial review will be to subject itself to an unfair labor practice proceeding by refusing to bargain with the union.

19. Therefore, in the absence of relief from this Court, many of the Plaintiffs' members will suffer concrete and particularized injuries as a result of the Final Rule soon after it becomes effective.

20. Defendant NLRB is an independent federal agency in the Executive Branch and is

subject to the APA. The NLRB's headquarters are located at 1099 14th Street, NW, Washington, D.C.

21. The Board consists of a Chairman and four Members.

22. Mark G. Pearce, in his official capacity, is Chairman of the Board.

23. Kent Y. Hirozawa, in his official capacity, is a Member of the Board.

24. Philip A. Miscimarra, in his official capacity, is a Member of the Board.

25. Harry I. Johnson III, in his official capacity, is a Member of the Board.

26. Nancy Schiffer, in her previous official capacity, was a Member of the Board until her term expired on December 16, 2014.

27. Richard F. Griffin, Jr., in his official capacity, is the NLRB's General Counsel.

FACTS

28. For nearly 80 years, the Board has conducted workplace elections so that workers can decide whether they want to be represented by a union for purposes of collective bargaining.

29. In the last ten years, the Board has conducted elections within a median of 38 days from the filing of the petition—well below the Board's time target of 42 days.

30. By comparison, in 1960 the median time from petition to the Board's *direction* of an election was 82 days, with even more time elapsing before the election actually occurred. 76 Fed. Reg. at 36,814, n.16.

31. By 1975, however, the Board had succeeded in reducing the time between petition and election. That year, only 20.1 percent of all elections occurred more than 60 days after a petition was filed—and this percentage later decreased to 16.5 percent by 1985. *Id.* at 36,814, n.19.

32. In the past two years, the Board has beat its own time targets for conducting representation elections, deciding pre-election issues at the regional level, and closing pending

representation cases:

a. In 2013, 94.3 percent of all elections occurred within a 56-day period after the filing of the petition, which was better than the Board's stated goal of 90 percent. That rate improved to 95.7 percent in 2014, again well above the 90 percent goal.

b. In 2013, regional directors issued 159 pre-election decisions in a median of 32 days after the petition, below the 45-day target.

c. In 2014, 88.1 percent of all NLRB representation cases were "closed" within 100 days of the petition being filed. That rate exceeded the agency's stated goal of 85.3 percent for 2014.

33. The speed with which the Board conducted elections in 2013 and 2014 under its existing procedures is consistent with the trend over the past five decades of reducing the time period between the filing of the petition and the election.

34. The number of representation cases processed by the Board has also dropped substantially:

a. In 1959, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases. 79 Fed. Reg. at 74,450.

b. In fiscal year 2013, only 1,986 representation petitions were filed, almost the same number as the year before, and reflecting a decline of about 80 percent over the last 50 years. *Id.*

35. As of October 1, 2014, there were only 48 representation cases pending at the Board—well below the caseload 50 years ago. *Id.*

36. In fiscal year 2014, the Board itself decided only 43 representation cases, down

from 1,880 cases in 1959.

37. Under the Board's current election procedures, there is no pre-election litigation in more than 90 percent of representation cases because the parties negotiate and enter into an election agreement. 79 Fed Reg. at 74,387.

38. In 2013, labor organizations won 64.1 percent of the representation elections conducted by the Board.

39. Nonetheless, in June 2011, the Board proposed unprecedented and sweeping changes to its procedures for conducting representation elections designed to further reduce the time between an election petition being filed and the holding of an election. 76 Fed. Reg. 36,812 (June 22, 2011) (Notice of Proposed Rulemaking) ("the Proposed Rule").

40. Less than 30 days after publishing the Proposed Rule, the Board held a two-day hearing at which nearly 70 witnesses testified, with each witness having approximately 5 minutes to speak. Many witnesses testified against the Proposed Rule.

41. When the comment period for the Proposed Rule closed, the Board had received more than 65,000 comments—many of them, like Plaintiffs' comments, opposed to the Proposed Rule.

42. About two months after the comment period closed, the Board announced that it would hold a public meeting less than two weeks later during which the Board's Members would vote on a resolution concerning a modified rule.

43. At the meeting, the Board adopted the resolution it had released only the day before, including certain changes that differed from those set forth in the 2011 Proposed Rule.

44. Sometime the next month—in December 2011—Board Chairman Mark Pearce and then-Member Craig Becker voted to approve the rule as modified. The final rule issued on

December 22, 2011 ("2011 Final Rule"). Then-Member Hayes did not participate in the vote, but subsequently published a dissent.

45. Plaintiffs Chamber and CDW filed a complaint asking this Court to invalidate the 2011 Final Rule.

46. In May 2012, this Court did so on the ground that the Board, with only two Members voting, lacked a statutory quorum when it approved the 2011 Final Rule. *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 28-30 (D.D.C. 2012). The Court did not "reach—and expresse[d] no opinion on—Plaintiffs' other procedural and substantive challenges to the rule." *Id.* at 30.

47. The Board appealed the Court's decision to the U.S. Court of Appeals for the District of Columbia Circuit, but later voluntarily sought and obtained dismissal of its own appeal. 2013 WL 6801164 (D.C. Cir. 2013).

48. The Board issued a second Notice of Proposed Rulemaking ("2014 Proposed Rule") on February 6, 2014, under the same docket number as the 2011 Proposed Rule and containing the same proposals on workplace elections. 79 Fed. Reg. 7,318.

49. In doing so, the Board remarked that the 2014 Proposed Rule was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.*

50. Except for Chairman Pearce, none of the Members on the Board when it issued the 2014 Proposed Rule served on the Board or otherwise participated in the 2011 rulemaking process.

51. The Board provided for a 60-day comment period for the 2014 Proposed Rule. The Board told commentators that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7,319.

52. Plaintiffs all filed comments on the 2014 Proposed Rule.

53. On April 10-11, 2014, the Board held a public hearing on the 2014 Proposed Rule.

54. Plaintiffs CDW, NAM, SHRM, and the Chamber participated, through their respective representatives, at the public hearing.

55. On December 12, 2014, the Board announced that a majority of its Members had voted to adopt a final rule, which would be published in the Federal Register on December 15, 2014 and take effect on April 14, 2015. Members Phillip A. Miscimarra and Harry I. Johnson III dissented.

56. The Final Rule was published in the Federal Register on December 15, 2014. 79 Fed. Reg. 74,308.

57. The Final Rule largely adopted the changes outlined in the 2014 Proposed Rule, with some modifications. Nonetheless, as the dissenting Board members remarked, "the Rule's primary purpose and effect remain the same: Initial representation elections must occur as soon as possible." 79 Fed. Reg. at 74,430.

58. The dissenting Board Members expressed concern that "[w]e still do not understand the reason for embarking on the path our colleagues have taken." 79 Fed. Reg. at 74,434. They wrote that "the Final Rule manifest[s] a relentless zeal for slashing time from every stage of the current pre-election procedure in fulfillment of the requirement that an election be scheduled 'at the earliest date practicable,' but the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues." *Id.* at 74,432.

59. "Unfortunately," the dissenting Board Members explained, "the inescapable

impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." *Id.* at 74,460.

CLAIMS FOR RELIEF

COUNT I
(The Final Rule Is Not in Accordance With the NLRA, Exceeds the Board's Statutory Authority, and Violates the First and Fifth Amendments of the Constitution of the United States)

60. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

61. Section 7 of the NLRA gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

62. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.

63. Section 9(b) of the NLRA provides that "in order to assure to employees the fullest freedom in exercising the rights guaranteed by" the NLRA, the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b).

64. Section 9(c) of the NLRA provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

65. The Final Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting the employer's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit.

66. The Final Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The Final Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

67. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the employer to communicate about the election and for employees to decide whether to vote for or against union representation, the Final Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the NLRA and is otherwise contrary to Section 9(b) of the NLRA.

68. Section 8(c) of the NLRA protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "merely implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

69. By these provisions, Congress directed that employers would be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress

determined that employers must have the opportunity to effectively communicate with their employees on the subjects of union organizing and collective bargaining. *See Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes." (internal quotation omitted)); *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (citation omitted)).

70. The Final Rule impermissibly curtails an employer's right to communicate with its employees by substantially shortening the period between an election petition and the holding of an election, and the Final Rule impermissibly limits employers' ability to exercise their rights under Section 8(c) and the First Amendment.

71. The Final Rule further violates the Free Speech Clause of the First Amendment by compelling employers to engage in certain speech during the election process, specifically a new mandatory workplace notice to be posted after the filing of a representation petition.

72. The Final Rule also deprives employers of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing employers from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying the employer the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

73. The Board's actions are not in accordance with law, contrary to constitutional rights, and in excess of the Board's statutory jurisdiction and authority and in violation of 5 U.S.C. § 706(2)(A)-(C).

74. Unless vacated, held unlawful, and set aside, the Final Rule will adversely affect

the rights of Plaintiffs and their members.

COUNT II
(The Board's Actions Are Arbitrary and Capricious)

75. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

76. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)).

77. The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

78. The Final Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the Final Rule exist only in a small fraction of cases.

79. The Final Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more than 90 percent of cases.

80. The Final Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the agency's established time targets for many years.

81. The Final Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to employer free speech rights and the opportunity for a full and informed debate before an election.

82. The Final Rule also mandates, for the first time in the Board's history, that

employers give their employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

83. The Final Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

84. The Final Rule concludes that it will reduce election-related litigation, despite available evidence that the Final Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

85. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

86. The Board's actions in adopting the Final Rule are arbitrary and capricious, and the Final Rule was enacted without observance of procedure required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment in their favor and:

1. Vacate and set aside the Final Rule;
2. Declare that the Final Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the NLRA, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that Defendant violated the APA in issuing the Final Rule;
4. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain Defendant, its agents, employees, successors, and all persons acting in concert or participating with Defendant from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the Final Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: January 5, 2015

Respectfully submitted,

/s/ Jonathan C. Fritts
Allyson N. Ho (D.C. Bar No. 477589)
Charles I. Cohen (D.C. Bar No. 284893)
Michael W. Steinberg (D.C. Bar No. 964502)
Jonathan C. Fritts (D.C. Bar No. 464011)
David R. Broderdorf (D.C. Bar No. 984847)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
202.739.3000

Counsel for the Plaintiffs

Kathryn Comerford Todd (D.C. Bar No. 477745)
Warren Postman (D.C. Bar No. 995083)
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
202.463.5337

Counsel for Plaintiff Chamber of Commerce of the United States of America

Patrick N. Forrest (D.C. Bar No. 489950)
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street NW, Suite 700
Washington, D.C. 20001
202.637.3061

Counsel for Plaintiff National Association of Manufacturers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Association of Manufacturers, National Retail Federation, and Society for Human Resource Management, by and through undersigned counsel, respectfully move this Court to enter summary judgment in Plaintiffs' favor. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. In accordance with Local Civil Rule 7(c), a Proposed Order is attached as Exhibit 1. Plaintiffs also respectfully request oral argument.

Dated: February 4, 2015

Respectfully submitted,

/s/ Allyson N. Ho

Allyson N. Ho (D.C. Bar No. 477589)
Charles I. Cohen (D.C. Bar No. 284893)
Michael W. Steinberg (D.C. Bar No. 964502)
Jonathan C. Fritts (D.C. Bar No. 464011)
David R. Broderdorf (D.C. Bar No. 984847)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202.739.3000

Counsel for the Plaintiffs

Kathryn Comerford Todd (D.C. Bar No. 477745)
Tyler Green (D.C. Bar No. 982312)*
Steven P. Lehotsky (D.C. Bar No. 992725)
Warren Postman (D.C. Bar No. 995083)
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
202.463.5337

Counsel for Plaintiff Chamber of Commerce of the United States of America

Linda Kelly (D.C. Bar No. 477635)
Patrick N. Forrest (D.C. Bar No. 489950)
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
202.637.3061

Counsel for Plaintiff National Association of Manufacturers

*Application for admission to the U.S. District Court for the District of Columbia pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 1:15-cv-00009-ABJ Judge Amy Berman Jackson

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Kathryn Comerford Todd (D.C. Bar No. 477745)
Tyler Green (D.C. Bar No. 982312)*
Steven P. Lehotsky (D.C. Bar No. 992725)
Warren Postman (D.C. Bar No. 995083)
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
202.463.5337

Counsel for Plaintiff Chamber of Commerce of the United States of America

Linda Kelly (D.C. Bar No. 477635)
Patrick N. Forrest (D.C. Bar No. 489950)
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street NW, Suite 700
Washington, D.C. 20001
202.637.3061

Counsel for Plaintiff National Association of Manufacturers

Allyson N. Ho (D.C. Bar No. 477589)
Charles I. Cohen (D.C. Bar No. 284893)
Michael W. Steinberg (D.C. Bar No. 964502)
Jonathan C. Fritts (D.C. Bar No. 464011)
David R. Broderdorf (D.C. Bar No. 984847)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
202.739.3000

Counsel for the Plaintiffs

*Application for admission to the U.S. District Court for the District of Columbia pending

TABLE OF CONTENTS

Page

INTRODUCTION 1
BACKGROUND 2
I. Plaintiffs 3
II. Representation Election Procedures 5
III. In 2011, The Board Made Changes To The Election Rules, Which Were Set Aside By This Court 8
IV. In 2014, The Board Issued The Final Election Rule Challenged Here 10
STANDARD OF REVIEW 13
ARGUMENT 13
I. The Final Rule Is Contrary To §§ 3, 8, And 9 Of The NLRA 13
A. The Final Rule Violates The NLRA By Undermining The Statutorily Guaranteed "Appropriate Hearing." 16
1. Congress has already spoken to the issue of an "appropriate" pre-election hearing 17
2. The Final Rule deprives employers of an appropriate hearing, as the Board has previously recognized 23
B. The Final Rule Conflicts With The NLRA By Impermissibly Limiting Robust Debate And Depriving Employees Of An Informed Election 26
II. The Final Rule Is Arbitrary And Capricious In Violation Of The APA 31
A. The Final Rule Unnecessarily Abandons Established Procedures For Unexplained Reasons, Despite The Board's Undisputed Success In Timely Conducting Elections 32
B. Contrary To The Board's Stated Goals, The Final Rule Will Trigger More Election-Related Litigation 33
1. The Final Rule undermines the incentive for the parties to negotiate election agreements, a critical litigation-reducing component of representation elections 34
2. The Final Rule will increase federal-court litigation 36
3. The potential to moot litigation involving some voter eligibility issues cannot justify increasing litigation concerning the validity of the election itself 38
C. The Final Rule's Mandatory Disclosures of Employees' Personal Information Is Arbitrary and Disregards Substantial Privacy Concerns 40

TABLE OF CONTENTS
(continued)

Page

III. The Final Rule Unconstitutionally Compels Employer Speech 42
CONCLUSION 44

TABLE OF AUTHORITIES

Page(s)

CASES

44 Liquormart v. Rhode Island,
517 U.S. 484 (1996) 43

AFL v. NLRB,
308 U.S. 401 (1940) 36

AFL-CIO v. FEC,
333 F.3d 168 (D.C. Cir. 2003) 31

Am. Bioscience, Inc. v. Thompson,
269 F.3d 1077 (D.C. Cir. 2001) 13

Am. Meat Inst. v. United States, Dep't of Agric.,
760 F.3d 18 (D.C. Cir. 2014) (en banc) 27, 43, 44

Am. Ship Bldg. Co. v. NLRB,
380 U.S. 300 (1965) 30

Armstrong v. Manzo,
380 U.S. 545 (1965) 25

Ashland Facility Operations, LLC v. NLRB,
701 F.3d 983 (4th Cir. 2012) 29

**Barre-Nat'l, Inc.*,
316 NLRB 877 (1995) 18, 24, 39

Barton Nelson, Inc.,
318 NLRB 712 (1995) 38

Bell Atl. Tel. Cos. v. FCC,
131 F.3d 1044 (D.C. Cir. 1997) 14

Brodie v. U.S. Dep't of Health & Human Servs.,
796 F. Supp. 2d 145 (D.D.C. 2011) 13

Buckley v. Valeo,
424 U.S. 1 (1976) 27

Chamber of Commerce of the United States. v. NLRB,
879 F. Supp. 2d 18 (D.D.C. 2012) 9

Chamber of Commerce of the United States v. NLRB,
No. 12-5250, 2013 WL 6801164 (D.C. Cir. Dec. 9, 2013) 9

Chamber of Commerce v. Brown,
554 U.S. 60 (2008) 1, 15, 26

Chamber of Commerce v. SEC,
412 F.3d 133 (D.C. Cir. 2005) 37

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 14, 32

Cmty. Action Comm'n of Fayette Cnty., Inc.,
338 NLRB 664 (2002) 38

Comcast Corp. v. FCC,
579 F.3d 1 (D.C. Cir. 2009) 41

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986) 22

Curry v. Prince George's Cnty., Md.,
33 F. Supp. 2d 447 (D. Md. 1999) 28

Edward J. DeBartolo Corp. v. Fl. Gulf Coast Build. & Constr. Trades Council,
485 U.S. 568 (1988) 15

E.L.C. Elec., Inc.,
344 NLRB 1200 (2005) 29

Emineth v. Jaeger,
901 F. Supp. 2d 1138 (D. N.D. 2012) 28

Excelsior Underwear, Inc.,
156 NLRB 1236 (1966) 40

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 23

Goodyear Tire & Rubber Co.,
138 NLRB 453 (1962) 29

Greater Yellowstone Coal. v. Bosworth,
209 F. Supp. 2d 156 (D.D.C. 2002) 13

Hamilton Test Sys., New York, Inc. v. NLRB,
743 F.2d 136 (2d Cir. 1984) 39

Hammontree v. NLRB,
894 F.2d 438 (D.C. Cir. 1990) 14, 30

Harborside Healthcare, Inc.,
343 NLRB 906 (2004) 38

Inland Empire Dist. Council v. Millis,
325 U.S. 697 (1945) 20, 23

Int'l Hod Carriers Bldg. & Common Laborers Union of Am.,
135 NLRB 1153 (1962) 19

Martini v. Fed. Nat'l Mortg. Ass'n,
178 F.3d 1336 (D.C. Cir. 1999) 14

Mathews v. Eldridge,
424 U.S. 319 (1976) 25

McConnell v. FEC,
540 U.S. 93 (2003) 27

Milavetz, Gallop & Milavetz, P.A. v. United States,
59 U.S. 229 (2010) 43

Mills v. Alabama,
384 U.S. 214 (1966) 28

**Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 31, 32, 33, 40

N. Manchester Foundry, Inc.,
328 NLRB 372 (1999) 24

Nat'l Ass'n of Mfrs. v. NLRB,
717 F.3d 947 (D.C. Cir. 2013) 26, 27, 44

Nat'l Cable & Telecomm. Ass'n v. FCC,
567 F.3d 659 (D.C. Cir. 2009) 13, 14

Ne. Hosp. Corp. v. Sebelius,
657 F.3d 1 (D.C. Cir. 2011) 14

NLRB v. Arkema, Inc.,
710 F.3d 308 (5th Cir. 2013) 29

NLRB v. Beverly Health & Rehab. Servs., Inc.,
120 F.3d 262, 1997 WL 457524 (4th Cir. Aug. 12, 1997) 39

NLRB v. Curwood Inc.,
397 F.3d 548 (7th Cir. 2005) 29

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979) 25

NLRB v. Gissel Packing Co.,
395 U.S. 575 (1969) 26, 27

NLRB v. Ky. River Cmty. Care, Inc.,
532 U.S. 706 (2001) 36

NLRB v. Lorimar Prods., Inc.,
771 F.2d 1294 (9th Cir. 1985) 39

NLRB v. Parsons Sch. of Design,
793 F.2d 503 (2d Cir. 1986) 39

NLRB v. S. W. Evans & Son,
181 F.2d 427 (3d Cir. 1950) 20, 23

Office of Commc'n, Inc. of United Church of Christ v. FCC,
327 F.3d 1222 (D.C. Cir. 2003) 14

**Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*,
475 U.S. 1 (1986) 42, 43, 44

Public Citizen v. FMCSA,
374 F.3d 1209 (D.C. Cir. 2004) 37, 41

Shays v. FEC,
414 F.3d 76 (D.C. Cir. 2005) 14

SNE Enters.,
348 NLRB 1041 (2006) 38

**Sorenson Commc'ns Inc. v. FCC*,
755 F.3d 702 (D.C. Cir. 2014) ..... *passim*

Teamsters Local Union No. 115 (Vila-Barr Co.),
157 NLRB 588 (1966) 19

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 13

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 44

Utica Mut. Ins. Co. v. Vincent,
375 F.2d 129 (2d Cir. 1967) 20, 21

Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 43

Wooley v. Maynard,
430 U.S. 705 (1977) 42, 44

Zauderer v. Office of Disciplinary Council for Sup. Ct. of Ohio,
471 U.S. 626 (1985) 43, 44

CONSTITUTIONAL PROVISIONS

U.S. Const. First Amendment ..... *passim*

U.S. Const. Fifth Amendment 25

STATUTES

5 U.S.C. § 706 (Administrative Procedure Act ("APA")) 13, 23

29 U.S.C. §§ 151-169 (National Labor Relations Act ("NLRA")) ..... *passim*

Labor Management Relations Act, 1947 ("LMRA") 21

Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") ..... *passim*

OTHER AUTHORITIES

29 C.F.R. § 101.17 5

29 C.F.R. § 101.18(a) 5

29 C.F.R. § 101.20(c) 6

29 C.F.R. § 101.21(b) 6

29 C.F.R. § 101.21(d) 7

29 C.F.R. § 101.23(b) 19

29 C.F.R. § 102 3

29 C.F.R. § 102.62(d) 40

29 C.F.R. § 102.64(a) 6, 16, 23

29 C.F.R. § 102.66(a) 6, 16

29 C.F.R. § 102.67(l) 40

29 C.F.R. § 102.69(b)-(h) 7

76 Fed. Reg. 36,812 (June 22, 2011) 8

76 Fed. Reg. 80,142 (Dec. 22, 2011) 8, 9, 21, 30

77 Fed. Reg. 25,548 (Apr. 30, 2012) 9

79 Fed. Reg. 7318 (Feb. 6, 2014) 10, 20

79 Fed. Reg. 74,308 (Dec. 15, 2014) ..... *passim*

105 Cong. Rec. 16,629 (1959) 22, 30

105 Cong. Rec. 5361 (1959) 29

105 Cong. Rec. A8062 (1959) 21, 22

H.R. Rep. No. 74-1147 (1935) 20

H.R. Rep. No. 86-1147 (1959) 22

H.R. Rep. No. 86-741 (1959) 20, 21, 29, 30

NLRB, Board Chairman Releases Details of Election Proposal for Wednesday Vote (Nov. 29, 2011), http://www.nlrb.gov/news-outreach/news-story/board-chairman-releases-details-election-proposal-wednesday-vote 9

NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports 4, 8

NLRB, FY 2013 Performance & Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/NLRB2013par.pdf 7

NLRB, NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-issues-final-rule-modernize-representation-case-procedures 11

NLRB, NLRB Sets Vote on Portions of Proposed Election Rule (Nov. 18, 2011), http://www.nlrb.gov/news-outreach/news-story/nlrb-sets-vote-portions-proposed-election-rule 9

NLRB, Summary of Operations, 2002-2012 Reports, http://www.nlrb.gov/reports-guidance/reports/summary-operations 7

NLRB, Summary of Operations, FY2014 Performance and Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf 7

S. Rep. No. 74-573 (1935) 20, 21

S. Rep. No. 86-187 (1959) 20

INTRODUCTION

For nearly 80 years, the National Labor Relations Board has conducted workplace elections for union representation. Union elections provide all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected speech. Congress's overarching "policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes"—including the "freewheeling use of the written and spoken word," *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008)—is so central to the union election process that Congress expressly guaranteed an employer's right to engage in speech concerning unionization, 29 U.S.C. § 158(c) (so long as that speech, of course, "contains no threat of reprisal or force or promise of benefit").

The Board's "ambush" or "quickie" election rule (the "Final Rule") makes sweeping changes to the election process that, as the dissenting Board Members put it, impermissibly "limit[ ] the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important." Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014) (Members Miscimarra & Johnson, dissenting ("dissent")). It "improperly shortens the time needed for employees to understand relevant issues, compelling them to 'vote now, understand later.'" *Id.* at 74,430.

It also sharply curtails the statutorily mandated pre-election review of issues critical to the election process—as well as limits the taking of evidence necessary for meaningful post-election review. In these ways and others, the Final Rule is "contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions." *Id.* at 74,430-31.

Even if the Board's choices were permissible under the National Labor Relations Act ("NLRA"), which they are not, they are invalid under the Administrative Procedure Act ("APA"). The administrative record demonstrates a gaping disconnect between the problem the Board purported to address and the solution it adopted. The vast majority of elections go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* at 74,431. Although the Board's goal of eliminating "unnecessary" litigation may be laudable, the available evidence demonstrates that the Final Rule will have the opposite effect. *Id.* at 74,449-50. And the Board declined to adopt—without a reasoned explanation—common-sense protections against the invasion of employee privacy threatened by new mandatory disclosures of personal information.

In addition to violating the NLRA and the APA, the Final Rule also runs afoul of the First Amendment's prohibition against compelled speech by impermissibly co-opting employers to deliver the government's own preferred message. The Board's mandatory disclosures on behalf of those filing petitions do not involve commercial speech but, instead, serve the interests of those seeking union representation. Such compulsion is unconstitutional.

For all these reasons, summary judgment should be granted to plaintiffs and the Final Rule vacated and set aside.

BACKGROUND

Congress has authorized the Board to conduct workplace elections regarding union representation provided certain conditions are satisfied. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. The Board's regulations setting forth the election procedures at

issue in this case—the Final Rule—consume, in total, almost 200 pages in the Federal Register and are codified at 29 C.F.R. part 102, subpart C.[1]

I. Plaintiffs

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country.

The Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. Its membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women throughout the country.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans.

---

[1] Because this case is governed by Local Civil Rule 7(h)(2), such that any facts will be derived solely from the administrative record (and from judicial notice), Plaintiffs are not required to submit a Rule 7(h)(1) Statement of Material Facts As To Which There Is No Genuine Dispute. Because the Board has not yet filed the administrative record, Plaintiffs have attached for the Court's convenience, as Exhibits 2-11, their comments, which are part of the administrative record.

The Society for Human Resource Management ("SHRM") is the world's largest membership organization devoted to human resource management, representing more than 275,000 members in over 90,000 companies.

Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 1; Exhibit 3 (CDW 2011 comments) at 2; Exhibit 4 (NAM 2011 comments) at 1-2; Exhibit 5 (NRF 2011 comments) at 1; Exhibit 6 (SHRM 2011 comments) at 13-14. These employers, in turn, employ millions of employees who are not currently represented by a union but are covered by the NLRA and thus entitled to petition the Board to hold a representation election in accordance with the Final Rule's expedited procedures. *Id.* Unions have, in recent years, filed petitions for elections involving employees at many of the businesses represented by plaintiffs.[2] Particularly given the recent history of union election petitions involving many of the plaintiffs' member companies, it is likely that election petitions will be filed involving employees at many of these companies once the Final Rule becomes effective on April 14, 2015.

As a result of the forthcoming application of the Board's Final Rule to these petitions and elections, Plaintiffs' members will suffer the following injuries, among others:

- Less time for employers to communicate with workers about the election, in derogation of employers' free speech rights under § 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes, 79 Fed. Reg. at 74,318-19 (citing Chamber, NAM, NRF, and SHRM comments);
- Less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit, *id.* at 74,369-73;

[2] Monthly reports of elections are publicly available on the NLRB's website. *See* NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

- Less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit, and whether they are even eligible to vote, *id.*;
- Less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver, *id.*; and
- Less time for employers to negotiate a stipulated election agreement that would obviate the need for a pre-election hearing. *Id.* at 74,375 (citing CDW comments).

Plaintiffs' members also will incur economic costs before election petitions are filed because of the shortened, and inadequate, time to respond once an election petition is filed under the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 56-57 (noting economic costs); Exhibit 4 (NAM 2011 Comments) at 24 (same); Exhibit 5 (NRF 2011 Comments) at 1-2 (same). The Board, in the Final Rule, recognized and estimated that employers will incur additional post-petition costs as well, including the new notice of petition, statement of position, voter lists, and costs related to the expedited timeline for the election process. 79 Fed. Reg. at 74,461-66.

II. Representation Election Procedures

Under long-established procedures—outlined by Board rules and regulations in 29 C.F.R. Parts 101, 102, and 103—the election process begins when an employee, union, or employer files a petition for an election with the Board. 29 C.F.R. § 101.17. The petition is filed with one of the Board's many regional offices throughout the country. *Id.* To conduct an election (and certify the results thereof), the Board, through its regional offices, initially assigns the petition to a regional staff member for a preliminary investigation. *Id.* § 101.18(a). If the petition presents reasonable cause to believe that a "question of representation" exists—that is, the regional director finds a sufficient basis to spend taxpayer resources to consider holding an election—the

regional office will proceed to hold an "appropriate" hearing concerning the petition. 29 U.S.C. § 159(c)(1). The hearing provides an opportunity for the parties to present evidence on issues that will affect the election, such as whether the employees are covered by the NLRA, whether the collective bargaining unit defined in the petition is an appropriate one, and whether certain individuals or groups of individuals would be eligible to vote in the election, or be included in the putative bargaining unit, or both. 29 C.F.R. §§ 102.64(a) & 102.66(a).

This pre-election hearing, which usually occurs within 7 to 14 days after the petition is filed, is conducted "before a hearing officer who normally is an attorney or field examiner attached to the Regional Office." *Id.* § 101.20(c). The hearing officer does not have authority to make "any recommendations" with respect to the issues presented in the hearing. 29 U.S.C. § 159(c)(1). The hearing officer only "insure[s] that the record contains a full statement of the pertinent facts as may be necessary for determination of the case." 29 C.F.R. § 101.20(c). All parties "are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions." *Id.* The record developed at the hearing is the basis for all subsequent decision-making on these issues. *Id.* § 101.21(b).

When the hearing concludes, the hearing officer does not render any decision or make any recommendations. The evidentiary record is presented to the regional director, who decides the issues in dispute before the election occurs. *Id.* The parties may file post-hearing briefs with the regional director on these issues. *Id.*

Although § 3(b) of the Act authorizes the Board "to delegate to its regional directors its powers" to "investigate and provide for hearings," to "determine whether a question of representation exists," and to "direct an election" and "certify the results thereof," it also provides an opportunity to request Board review (before the election is held) of any action taken

by regional directors. 29 U.S.C. § 153(b). Therefore, if the regional director decides to hold an election based on the evidence introduced at the pre-election hearing, the election is set for a date at least 25 to 30 days after the regional director's decision, to allow the Board sufficient time to consider a party's request to review that decision. 29 C.F.R. § 101.21(d).

After the election is held as scheduled by the regional director, the election results will be certified only after any post-election hearing and resolution of challenges and objections. *Id.* § 102.69(b)-(h). The parties are entitled to seek post-election Board review of the resolution of challenges and objections, unless restricted in some manner by an election agreement. *Id.* § 102.69(c), (e), (f). If the union wins the majority of valid votes cast in the election, the employer is obligated to engage in collective bargaining with the union over wages, hours, and other terms and conditions of employment for the employees in the bargaining unit. *See* 29 U.S.C. § 158(a)(5).

Over the last ten years, under the procedures described above, elections have occurred within a median of 38 days from the filing of the petition—below the Board's internal target of 42 days.[3] In 2013, nearly 95 percent of all elections occurred within 56 days from the filing of the petition—better than the Board's internal target of 90 percent.[4] That rate improved to 95.7 percent in 2014.[5] And the vast majority of elections—90 percent—go forward without any pre-election litigation at all because the parties negotiate some form of election agreement. 79 Fed. Reg. at 74,375.

---

[3] NLRB, Summary of Operations, 2002-2012 Reports, http://www.nlrb.gov/reports-guidance/reports/summary-operations (last visited Feb. 4, 2015).

[4] NLRB, FY 2013 Performance & Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/NLRB2013par.pdf, at 38 (lasted visited Feb. 4, 2015).

[5] NLRB, Summary of Operations, FY2014 Performance and Accountability Report, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf, at 41 (last visited Feb. 4, 2015).

Historically, a majority of elections result in union representation. For example, unions won 71 percent of about 1,600 elections in 2011, 59 percent of about 1,550 elections in 2012, 60 percent of about 1,450 elections in 2013, and 63 percent of about 1,450 elections in 2014.[6]

III. In 2011, The Board Made Changes To The Election Rules, Which Were Set Aside By This Court

In 2011, the Board proposed sweeping changes to the election process intended to drastically reduce the time between petition and election. Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,812-47 (June 22, 2011). Dissenting Member Hayes criticized the changes as not rationally related to any systemic problem of procedural delay, and criticized the Board for engaging in an illicit attempt to enshrine by "administrative fiat in lieu of Congressional action . . . organized labor's much sought-after 'quickie election,' a procedure under which elections will be held in 10 to 21 days from the filing of the petition." *Id.* at 36,831 (Member Hayes, dissenting). In the dissent's view, "the principal purpose for this radical manipulation of our election process [wa]s to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.'" *Id.*

Less than a month after publishing the proposed rule, the Board held a two-day hearing at which nearly 70 witnesses testified (with each witness having about 5 minutes to speak). Representation—Case Procedures, 76 Fed. Reg. 80,142 (Dec. 22, 2011). Many witnesses testified against the proposed rule. *Id.* When the comment period closed, the Board had received more than 65,000 comments—many of them, like those submitted by plaintiffs here, opposed the proposed rule and offered alternatives for the Board to consider. *Id.* at 80,140.

On November 18, 2011, the Board announced that it would hold a public meeting on November 30, 2011, during which the Board would vote on a resolution concerning a modified

---

[6] NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

rule.[7] The Board issued the resolution the day before the hearing. Board Resolution No. 2011-1.[8] At the meeting, the Board adopted the resolution, including changes (immaterial to the instant litigation) to the proposed rule. *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 22-23 (D.D.C. 2012). At some point within the next month, Board Chairman Pearce and then-Member Becker voted to approve the rule as modified. *Id.* at 23-24. The final rule issued on December 22, 2011 ("2011 Final Rule"). 76 Fed. Reg. at 80,138. Then-Member Hayes did not participate in the vote, but subsequently published a dissent. *Chamber of Commerce*, 879 F. Supp. 2d at 23-24; *see also* Representation, Case Procedures, 77 Fed. Reg. 25,548-75 (Apr. 30, 2012) (Member Hayes, dissenting).

Two of the plaintiffs in the instant litigation, Chamber and CDW, challenged the 2011 Final Rule in this Court. *Chamber of Commerce*, 879 F. Supp. 2d at 21. In May 2012, the Court set aside the 2011 Final Rule on the ground that the Board lacked a statutory quorum when it approved the rule. *Id.* at 28-30. The Court did not "reach—and expresse[d] no opinion on—Plaintiffs' other procedural and substantive challenges to the rule." *Id.* at 30. The Board appealed the decision, but subsequently sought and obtained voluntary dismissal of its own appeal. *Chamber of Commerce of the United States v. NLRB*, No. 12-5250, 2013 WL 6801164, at *1 (D.C. Cir. Dec. 9, 2013).

IV. In 2014, The Board Issued The Final Election Rule Challenged Here

In February 2014, the Board issued a second Notice of Proposed Rulemaking ("2014 Proposed Rule") under the same docket number as the 2011 Proposed Rule and containing the same proposals on elections. Representation—Case Procedures, 79 Fed. Reg. 7318 (Feb. 6,

[7] NLRB, NLRB Sets Vote on Portions of Proposed Election Rule (Nov. 18, 2011), http://www.nlrb.gov/news-outreach/news-story/nlrb-sets-vote-portions-proposed-election-rule (last visited Feb. 4, 2015).

[8] NLRB, Board Chairman Releases Details of Election Proposal for Wednesday Vote (Nov. 29, 2011), http://www.nlrb.gov/news-outreach/news-story/board-chairman-releases-details-election-proposal-wednesday-vote (last visited Feb. 4, 2015).

USCA Case #18-1161 Document #1769787 Filed: 01/23/2019 Page 470 of 513

2014). In doing so, the Board remarked that the 2014 Proposed Rule was "in essence, a reissuance of the proposed rule of June 22, 2011." *Id.*

Among other changes, the Board proposed:

- To require employers to post a workplace notice immediately after a petition is filed;
- To require employers to disclose to unions the personal information of employees including personal telephone numbers and email addresses;
- To severely limit the scope of pre-election hearings to focus solely on whether there is a "question of representation," meaning:
    - Hearing officers could exclude evidence unrelated to the basic question of whether the Board should hold an election; and
    - The parties would not have the right to present evidence on important issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election;
- To eliminate the mandatory 25-30 day period between the regional director's decision to hold an election and the election itself; and
- To eliminate post-election Board review as a matter of right and make it solely at the Board's discretion.

Id. at 7318-37.

The Board provided for a 60-day comment period and informed commenters that it was not necessary to "resubmit any comment or repeat any argument that has already been made." *Id.* at 7319. To ensure that the Board understood the ramifications of its proposed actions, however, many commenters who previously submitted comments (like plaintiffs) did so again, highlighting the disconnect between the proposed changes and the Board's election-handling

performance in recent years, and recommending that the Board focus instead on the small subset of cases actually delayed under current procedures. *See, e.g.*, 79 Fed. Reg. at 74,315-17, 74,419; *see also* Exhibits 2-11 (copies of plaintiffs' 2011 & 2014 comments). Commenters asserted that the proposed changes conflict with the NLRA, particularly with §§ 3, 8(c), and 9. *Id.* at 74,318-19, 74,385-86, 74,395. Commenters expressed further concern that the proposed changes, contrary to the Board's stated goal of reducing election-related litigation, would actually increase it by reducing the time and incentives to enter election agreements. *Id.* at 74,324, 74,334, 74,388, 74,408-09. Under the Board's current procedures, there is no pre-election litigation in more than 90 percent of cases because the parties enter into an election agreement. *Id.* at 74,375.

Commenters offered various alternatives to the changes proposed by the Board. To address privacy concerns raised by the mandatory release of employee personal information, commenters proposed offering employees an opt-out procedure (an "unsubscribe" option for election-related texts and emails), imposing penalties for misuse of the information, and requiring the lists containing the information to be destroyed after the election. *Id.* at 74,341-42, 74,346, 74,358-60.

The Board announced its adoption of the Final Rule on December 12, 2014, and published it in the Federal Register three days later.[9] Members Miscimarra and Johnson submitted a lengthy dissent highlighting the numerous, serious flaws they perceived in the Final Rule. *Id.* at 74,430 (dissent). Expressing regret that the Board declined to pursue a more targeted approach that could have garnered broad, bipartisan support without creating a conflict with the Board's statutory mandate, the dissent argued that the Rule's "election now, hearing later" and "vote now, understand later" approach violates both the NLRA and the APA. *Id.*

---

[9] NLRB, NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-issues-final-rule-modernize-representation-case-procedures (last visited Feb. 4, 2015).

Specifically, the dissent identified conflicts with the NLRA that are created by the Final Rule's quest for "quickie elections"; curtailment of robust debate and free speech; limitations on the scope of pre-election hearings and the type of evidence that may be taken in those hearings; allowance of *ultra vires* decision-making and recommendations by hearing officers; and imposition of unequal burdens on employers. The dissent further argued that even if the Final Rule did not conflict with the NLRA, it was still arbitrary and capricious under the APA given the lack of a coherent rationale; the conflict between the Board's determinations and the actual evidence before it; and the Board's failure to meaningfully address evidence that reducing the opportunity for pre-election and post-election Board review would result in more litigation, not less, and jeopardize the stipulated-election agreements that govern 90 percent of Board-conducted elections. *Id.* at 74,434-52.

The dissent further argued that the Final Rule implicates serious constitutional concerns by infringing on protected speech and raising due process concerns. *Id.* at 74,431-36. The dissent noted the "great care" the Board has taken in the past "to avoid interpreting and applying [NLRA § 8(c)] in a manner that raises serious constitutional concerns regarding free speech infringement." *Id.* at 74,440 (citing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-11 (2010)). The dissent echoed the employee-privacy concerns raised by the commenters, *id.* at 74,452-55, and lamented that the Board's insistence on pursuing the course adopted in the Final Rule made consensus impossible on reforms the dissenting members might also have embraced. *Id.* at 74,431. In the dissent's view, the Final Rule was so flawed in so many respects that they "must dissent from the Final Rule including all its parts." *Id.*

The Rule is set to take effect on April 14, 2015. *Id.* at 74,308.

STANDARD OF REVIEW

The Final Rule is agency action subject to judicial review under the APA, 5 U.S.C. § 706. Under § 706, a reviewing court must "'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting 5 U.S.C. § 706(2)(A)). A court must also invalidate any agency action that is "contrary to constitutional right," 5 U.S.C. § 706(2)(B), "in excess of statutory jurisdiction, authority, or limitations," *id.* § 706(2)(C), or that fails to "observ[e] ... procedures required by law," *id.* § 706(2)(D).

"[W]hen a party seeks review of agency action under the APA . . . [t]he 'entire case' on review is a question of law" and may be resolved on a motion for summary judgment. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The Court's review is generally confined to the administrative record before the Board when it issued the Final Rule. *See, e.g.*, *Brodie v. U.S. Dep't of Health & Human Servs.*, 796 F. Supp. 2d 145, 150 (D.D.C. 2011). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* Where a plaintiff prevails on its APA challenge, vacating the agency action and remanding to the agency is the standard remedy. *See, e.g.*, *Am. Bioscience, Inc.*, 269 F.3d at 1084; *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) ("As a general matter, an agency action that violates the APA must be set aside.").

ARGUMENT

I. The Final Rule Is Contrary To §§ 3, 8, And 9 Of The NLRA.

Where, as here, an APA challenge "involves an agency's interpretation of its governing statute, *Chevron*'s familiar framework applies." *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567

F.3d 659, 663 (D.C. Cir. 2009) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Under that framework a reviewing court first asks if the statute itself resolves the issue—and if so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). An agency interpretation fails that standard if it "runs counter to the unambiguously expressed intent of Congress" as expressed through the Act's "text, legislative history, and structure as well as its purpose." *Shays v. FEC*, 414 F.3d 76, 96, 105 (D.C. Cir. 2005). If the statute is ambiguous—that is, if the congressional mandate is susceptible of more than one interpretation—then a reviewing court considers whether the agency's interpretation of the statute is a reasonable one. *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

Under *Chevron*, a reviewing court has "a duty to conduct an 'independent examination' of the statute in question looking not only 'to the particular statutory language at issue,' but also to 'the language and design of the statute as a whole.'" *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 9 n.4 (D.C. Cir. 2011) (quoting *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1345-46 (D.C. Cir. 1999)). "For this purpose the court 'must first exhaust the traditional tools of statutory construction.'" *Office of Commc'n, Inc. of United Church of Christ v. FCC*, 327 F.3d 1222, 1224 (D.C. Cir. 2003) (quoting *Bell Atl.*, 131 F.3d at 1047). "The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." *Bell Atl.*, 131 F.3d at 1047 (internal citations omitted); *see also Hammontree v. NLRB*, 894 F.2d 438, 444 (D.C. Cir. 1990). It is a cardinal principle of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the Final Rule fails the *Chevron* analysis because it creates a process for handing representation elections that is irreconcilable with §§ 3, 8, and 9 of the Act. First, the Final Rule improperly limits pre-election hearings by allowing hearing officers to exclude evidence regarding fundamental issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election. The exclusion of this evidence prevents effective pre-election consideration of those issues by the regional director or the Board in violation of §§ 3(b) and 9(c)(1) of the NLRA, and undermines effective post-election review of any sort as well.

Most fundamentally, the Final Rule violates § 9(c)(1)'s requirement of an "appropriate" pre-election hearing by creating a "quickie election" process that resembles legislative proposals Congress considered and rejected in amending the Act in 1947 and 1959. The Rule's operative premise—speed at all costs—is squarely contradicted by legislative history indicating that Congress believed that there should be a period of at least 30 days between the petition and the election in order to ensure that employees are adequately informed before they cast their votes. In all events, an "appropriate hearing" must be one that conforms with the Fifth Amendment's guarantee of due process, and the system left in place by the Final Rule fails on that score.

Second, the Final Rule improperly truncates informed debate regarding union representation, contrary to §§ 8(c) and 9(b) of the Act—statutory text that reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Depriving the parties of adequate time for that debate, the new Rule rushes them into

an uninformed election. Indeed, the Final Rule subverts the Act's primary purpose—to permit sufficient time and information to "assure . . . the *fullest* freedom in exercising the rights guaranteed by [the] Act," 29 U.S.C. § 159(b) (emphasis added)—and improperly interferes with the free speech rights protected under § 8(c) of the Act, 29 U.S.C. § 158(c), and guaranteed by the First Amendment. At a minimum, the agency's interpretation of its statutory mandate is constitutionally suspect and should thus be avoided.

A. The Final Rule Violates The NLRA By Undermining The Statutorily Guaranteed "Appropriate Hearing."

The Final Rule severely restricts the scope of the pre-election hearing required by the NLRA. Under the Final Rule, the hearing officers who preside over pre-election hearings are advised to exclude evidence on fundamental issues affecting the election, including supervisory status and other issues of voter eligibility or inclusion. *See* 29 C.F.R. § 102.64(a) ("Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted."); *id.* § 102.66(a) (a party's indisputable right to introduce at the pre-election hearing is now limited to "the existence of a question of representation"). This contradicts the fundamental understanding—recognized by the Supreme Court, Congress, and the Board itself—that Congress required an "appropriate hearing" to give interested parties a full and adequate opportunity to present their evidence on *all* substantial issues. By allowing the exclusion of evidence on important election issues of voter eligibility, inclusion, and supervisory status, the Final Rule fails to provide an "appropriate" pre-election hearing for all employers as required under § 9(c)(1) of the NLRA, thus precluding the creation of an adequate record for decision-making or subsequent review.

1. Congress has already spoken to the issue of an "appropriate" pre-election hearing.

Section 9(c)(1) establishes the process that must be followed after a representation petition is filed, including the requirement of an "appropriate" pre-election hearing and an adequate "record of such hearing" to permit resolution by the Board of election-related issues:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for *an appropriate hearing* upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds *upon the record of such hearing* that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereto.

29 U.S.C. § 159(c)(1) (emphases added). Section 9(c)(1) necessarily requires "an appropriate hearing upon due notice" *before* an election, because the hearing provides the basis for the Board to determine whether and how an election shall occur. *Id.* The right to a pre-election hearing is reinforced by § 9(c)(4), which only permits "the waiving of hearings by stipulation." *Id.* § 159(c)(4).

Congress further intended that hearing officers who preside over pre-election hearings perform only an evidence-gathering function, not a decision-making function. Under §§ 4(a) and 9(c)(1) of the NLRA, Board members (or, under the delegation authority set forth in § 3(b), regional directors) are exclusively responsible for all decision-making in representation cases. Indeed, § 9(c)(1) prohibits hearing officers from having *any* decision-making authority—they cannot even make "any recommendations." *Id.* § 159(c)(1). Moreover, "[t]he Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts."

29 U.S.C. § 154(a). The Act thus vests all decision-making authority on election-related issues exclusively in Board members (or regional directors by delegation).

What is more, the pre-election hearing record provides the sole basis for the following key decisions (among others):

- Whether the Board's jurisdictional standards and other prerequisites for an election are satisfied;
- What constitutes the "appropriate bargaining unit" for purposes of the election; and
- Whether particular individuals are eligible to vote, whether such issues require resolution before any election, and if so how they should be resolved.

29 U.S.C. §§ 153(b), 159(c)(1).

And the NLRA requires that "any interested person" have a *pre-election* opportunity to seek Board review of "*any action* of a regional director" delegated under § 3(b). 29 U.S.C. § 153(b) (emphasis added). This pre-election review is the only mechanism for the Board to order a "stay of *any action* taken by the regional director." *Id.* For the Board to review "any action" of a regional director and decide whether to issue a stay of the election, there necessarily must be record evidence on the issues that are subject to review—in particular, issues of voter eligibility, inclusion, and supervisory status. Even if the regional director decides to defer a decision on voter eligibility issues until after the election, there still must be an evidentiary record concerning those issues for the Board to consider in reviewing the propriety of the regional director's decision to defer resolution of those issues—a decision that may well affect the validity of the entire election. *See Barre-Nat'l, Inc.*, 316 NLRB 877, 878 n.9 (1995) (noting that the right to present evidence at a pre-election hearing is distinct from the issue whether the regional director or Board makes a pre-election decision based on that evidence).

The statutory conflict between the NLRA and the Final Rule is further evidenced by the Rule rendering superfluous a provision of the statute that authorizes an expedited election procedure. *See* 29 U.S.C. § 158(b)(7)(C). The § 8(b)(7) exception applies when a union engages in so-called "recognitional picketing"—picketing intended to force the employer to recognize a union as the bargaining representative of its employees—and an employer files an unfair labor practice charge as a result. *Id.* Under the Board's implementing regulations for that statutory provision, where there is recognitional picketing "the Director may, *without a prior hearing*, direct that an election be held in an appropriate unit of employees" and "fix[] the basis of eligibility of voters . . . ." 29 C.F.R. § 101.23(b) (emphasis added). Section 8(b)(7)(C) was "designed to shield employers and employees from the adverse effects of prolonged recognitional or organizational picketing and to provide a procedure whereby the representation issue that gave rise to the picketing could be resolved as quickly as possible." *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588, 589 (1966).

But as the Board has explained, when Congress created that expedited election procedure, it also "rejected efforts . . . to dispense generally with preelection hearings" in all other representation cases. *Int'l Hod Carriers Bldg. & Common Laborers Union of Am.*, 135 NLRB 1153, 1154, 1157 (1962) ("The expedited election procedure is applicable, of course, only in a Section 8(b)(7)(C) proceeding."). The Final Rule would effectively implement an expedited procedure for *all* § 9(c) cases—rendering superfluous the statutorily provided expedited process in cases of recognitional picketing.

The history of amendments to the NLRA's text further confirms the importance, and required scope, of the pre-election hearing. From the beginning, Congress attached importance to the development of an adequate record in election hearings, including evidence pertaining to

election issues generally. *See, e.g.*, 79 Fed. Reg. at 7343 n.100 (citing S. Rep. No. 74-573, at 14 (1935), reprinted in 2 NLRB, Legislative History of the NLRA, 1935, at 2314 (hereinafter "NLRA Hist.")) (in representation cases the "entire election procedure becomes part of the record," providing a "guarantee against arbitrary action by the Board" (internal quotation marks omitted)); H.R. Rep. No. 74-1147, at 23 (1935), reprinted in 2 NLRA Hist. at 3073 ("The hearing required to be held in any [representation] investigation provides an appropriate safeguard and opportunity to be heard."). But as the Supreme Court explained, the NLRA as originally enacted in 1935 did not require the Board to hold elections at all, much less to hold pre-election hearings. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). The Board thus held a number of "prehearing elections"—*i.e.*, elections conducted before a hearing was held to determine the scope of the bargaining unit and the eligibility of certain employees to vote in the election.[10] The Board's rules and regulations in effect at the time entitled parties to a pre-election hearing only if "substantial issues" were raised. *See NLRB v. S. W. Evans & Son*, 181 F.2d 427, 430 (3d Cir. 1950). Such issues concerned the "[bargaining] unit, eligibility to vote, and timeliness of the election." *Id.* at 430.

In 1947, Congress amended the Act to make pre-election hearings mandatory by adding §§ 9(c)(1) and (4) to the Act. 29 U.S.C. §§ 159(c)(1) & (4). These require the Board to conduct the "appropriate hearing" *before* any election, and permit "the waiving of hearings" *only* "by stipulation" of all parties. *Id.*; *see also S. W. Evans*, 181 F.2d at 429 (noting that the amended Act now makes mandatory a pre-election hearing"); *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d

---

[10] *See, e.g.*, H.R. Rep. No. 86-741, at 24 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB."); S. Rep. No. 86-187, at 30 (1959), *reprinted in* 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct").

129, 133-34 (2d Cir. 1967) (noting that "under the amendment the hearing must invariably precede the election").

The purpose of pre-election hearings, as reflected in the legislative history of the 1947 amendments, is to collect evidence concerning all of the issues relevant to the election—including the eligibility of employees to vote in the election:

> Obviously, ***there can be no choice of representatives and no bargaining unless units for such purposes are first determined.*** And employees themselves cannot choose these units, because ***the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.***
>
> This provision is similar to section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—In the conduct of any election for the purpose herein indicated the Board shall designate ***who may participate in the election*** and establish the rules to govern the election.

S. Rep. No. 74-573, at 14 (1935), *reprinted in* 2 NLRA Hist. 2313 (emphases added); *see also* 76 Fed. Reg. at 80,165 n.116 (citing 93 Cong. Rec. 7002 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1625 (supplemental analysis of LMRA by Senator Taft—the principal sponsor of the 1947 amendments)) (noting that the House rejected a provision authorizing pre-election hearings). Congress thus intended that issues of voter eligibility and inclusion would *not* be litigated separately (and post-election) from issues concerning the appropriateness of the bargaining unit.

When it amended the Act again in 1959, Congress once more rejected proposals to permit the Board to conduct elections with no pre-election hearing. *See* H.R. Rep. No. 86-741, at 24-25 (1959), *reprinted in* 1 LMRDA Hist. 782-83. Conference Committee members who opposed the proposals for pre-hearing elections regarded them as improperly effectuating "quickie elections," and insisted on leaving unchanged the conventional role played by pre-election hearings. 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813 (opposing "pre-

hearing or so-called quickie election" and stating that the "right to a hearing is a sacred right"). As an alternative to scaling back pre-election hearings, Congress adopted the language in § 3(b) of the Act authorizing the Board to delegate its election responsibilities to regional directors, subject to each party's right to seek pre-election Board review regarding "any action" by regional directors, including the right to seek a Board-ordered "stay" of any election. 29 U.S.C. § 153(b). The ranking House conferee, Chairman Barden, described the approach as follows:

> The conferees adopted a provision that there should be some consideration given to expediting the handling of some of the representation cases. Therefore, the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under section 9 of the act.
>
> Upon an appeal to the Board by any interested party the Board would have the authority to review and stay any action of a regional director, delegated to him under section 9. But the hearings have not been dispensed with. *There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out.* The right to a formal hearing before an election can be directed is preserved without limitation or qualification.

105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714 (emphasis added), *describing* H.R. Rep. No. 86-1147, at 1 (1959) (conf. report), *reprinted in* 1 LMRDA Hist. 934. Chairman Barden expressed opposition to any "so-called quicky election," again stating that "[t]he right to a hearing is a sacred right . . . ." 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813.

The failure of the proposed reform underscores the conflict between the Final Rule and congressional intent concerning the election process. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting *NLRB v. Bell Aerospace Co.*, 416

U.S. 267, 275 (1974))). The Board is attempting to implement, through rulemaking, the very type of expedited election process that Congress rejected. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-39 (2000). This attempt cannot survive *Chevron* scrutiny.

2. The Final Rule deprives employers of an appropriate hearing, as the Board has previously recognized.

The Final Rule should be set aside because it eviscerates the pre-election hearing and takes numerous steps to slash the time between the petition and election—thereby adopting the very type of expedited election system that Congress has repeatedly rejected. By authorizing regional directors and hearing officers to reject evidence on the scope of the bargaining unit for voter eligibility and inclusion purposes, the Final Rule makes the taking of evidence useless for all of the decision-making required under §§ 3 and 9 (except on the narrow issue whether an election of some kind is required under the Act). Significantly, the Final Rule suggests that evidence pertaining to voter eligibility should be excluded from the pre-election hearing even if the relevant issues affect a substantial portion of the bargaining unit. 29 C.F.R. § 102.64(a).

This approach is "not in accordance" with the Act, 5 U.S.C. § 706(2)(A), since it is contrary to the requirement in § 9(c)(1) that in all cases, absent stipulation otherwise, an "appropriate hearing" must be conducted before the election. Congress provided that an "appropriate hearing" must include the "full and adequate opportunity" to present evidence on *all* issues related to the election and disputed by the parties: "We think the statutory purpose . . . is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections." *Inland Empire*, 325 U.S. at 708; *see also S. W. Evans*, 181 F.2d at 430 (parties entitled to pre-election hearing to present substantial issues related to the election). And when the pre-election hearing is bypassed, the foreseeable result will be more post-election

litigation and more elections set aside after the fact. *See* 79 Fed. Reg. at 74,445 (dissent); *see also infra* 33-40.

The Final Rule's shortcoming here is confirmed by its rejection of over 60 years of agency practice under the § 9(c)(1) framework adopted by Congress in 1947. The Board reaffirmed, during the Clinton Administration and with all members agreeing, that § 9(c) limits its authority to narrow the scope of pre-election hearings. Specifically, the Board recognized that § 9(c) provides a *statutory* right to introduce evidence on issues of voter eligibility and inclusion at the pre-election hearing. *See Barre-Nat'l, Inc.*, 316 NLRB 877; *see also N. Manchester Foundry, Inc.*, 328 NLRB 372 (1999) (affirming requirement to allow evidence-taking at pre-election hearing). All of the participating Board members held that § 9(c) of the Act itself—not just the Board's then-existing regulations—require the Board to permit parties to present evidence in support of their positions at a pre-election hearing.

For example, in *Barre-National*, the regional director instructed the hearing officer to refuse to allow the employer to present evidence at a hearing regarding the supervisory status of a group of employees that constituted eight to nine percent of the potential bargaining unit. 316 NLRB at 877. Instead, the regional director permitted only an offer of proof by the employer and—similar to what the Final Rule would accomplish—permitted the employees to vote subject to challenge, leaving the evidence gathering and resolution of the supervisory issue to the post-election challenge procedure.

The Board held that the regional director erred by refusing to allow the employer to present this evidence. According to the Board, the pre-election hearing "did not meet the requirements *of the Act* and the Board's Rules and Statements of Procedure." *Id.* at 878 (emphasis added); *see also N. Manchester Foundry*, 328 NLRB at 372-73 (holding that pre-

USCA Case #18-1161 Document #1769787 Filed: 01/23/2019 Page 485 of 513

election hearing "did not meet the requirements *of the Act*, or of the Board's Rules" because the hearing officer "precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters" (emphasis added)).

The Board cannot discharge its § 3(b) authority over all representation cases—to effectively decide whether issues of voter eligibility require pre-election resolution, how they should be resolved, or whether there should be a stay of the election pending resolution of such matters—without an adequate hearing record at the regional office level, including all evidence that reasonably bears on those issues. And if the Board's delegate admits evidence only on, for example, *whether* an appropriate bargaining unit exists, but excludes evidence of *who* may be in the bargaining unit or eligible to vote in the election, the review promised by statute becomes illusory and the election results themselves suspect.

Even if Congress left the definition of an "appropriate hearing" to the Board's unfettered discretion—which it did not—avoiding due process concerns would supply an additional reason to reject the Board's interpretation of the NLRA to permit the evisceration of the pre-election hearing that must take place absent an election agreement. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) ("[I]n the absence of a clear expression of Congress' intent . . . we decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

The Fifth Amendment precludes government decisions that would otherwise deprive a party of liberty or property and "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, as the dissent

explains, the "private interests affected by this extraordinary government action are substantial" and include "the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation [and] the fundamental right of an employer . . . to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit." 79 Fed. Reg. at 74,451 (dissent). At the least, the hearing left in place by the Final Rule—a hearing that allows exclusion of evidence on important questions before an election—raises serious constitutional questions and should therefore be rejected.

For these reasons, the Final Rule is irreconcilable with the statutory scheme established by Congress and should be vacated.

B. The Final Rule Conflicts With The NLRA By Impermissibly Limiting Robust Debate And Depriving Employees Of An Informed Election.

The Final Rule also conflicts with § 8(c) of the NLRA, a critical piece of the NLRA's election scheme. Section 8(c) protects the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form," provided there is no "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The § 8(c) free-speech guarantee reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Robust debate is thus indispensable to the procedure for free and fair elections established by the NLRA.

Consistent with § 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The time during the critical pre-election "campaign" period is when employers can provide information to their employees regarding the election and the consequences of unionization. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 955

USCA Case #18-1161 Document #1769787 Filed: 01/23/2019 Page 487 of 513

(D.C. Cir. 2013) (hereinafter "*NAM*"), *overrruled on other ground by Am. Meat Inst. v. United States, Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (noting that § 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present." (internal quotation marks and citation omitted)).

The Act does not just protect the free speech rights of employers. The NLRA also gives employees the right "to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activit[y] . . . ." 29 U.S.C. § 157. Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure *to employees* the *fullest freedom* in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphases added). The "fullest freedom" requirement is reinforced by the protection of free speech rights in § 8(c). *Gissel Packing Co.*, 395 U.S. at 617.

But these rights are meaningful only if the parties have sufficient time to engage in free speech *before* an election. *See* 79 Fed. Reg. at 74,438 (dissent) ("[The right to engage in protected speech before an election] only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation."); *cf. Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976), *superseded by statute on other ground as stated in McConnell v. FEC*, 124 S. Ct. 619 (2003) ("Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."). An election can affect workers for years to come. This is exactly why Congress and the courts guarantee, and protect, employer free speech rights in the labor relations setting. *NAM*, 717 F.3d at 955.

It is impossible to square Congress's policy judgment in favor of *robust* debate with the Board's directive that regional directors schedule elections *as quickly as possible*, regardless of other statutory objectives and requirements that do not support the fastest possible NLRA elections. When elections can take place in as little as two weeks from the filing of the petition, parties "will have too little time[,] measured by any reasonable standard," for robust debate to occur. 79 Fed. Reg. at 74,439 (dissent).

The Board's curtailment of debate mirrors the sort that courts have routinely rejected when applied to political electioneering. *Id.* at 74,439 n.588 (dissent) (citing *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-55 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election)). This is especially true where, as (regrettably) here, the government seeks to privilege some speech based on its content. *See* 79 Fed. Reg. at 74,440 (dissent) ("It is apparent from the statements of numerous commentators supporting the Rule that . . . the Final Rule will specifically disadvantage anti-union speech more than pro-union speech," by depriving employers of sufficient time to express their views against unionization, "and will correspondingly enhance a petitioning union's chances of electoral success."). The Board was never meant to have the power to suppress debate, much less to the advantage of one side.

The Board's stated justification for impinging on § 8(c) rights revolves around the idea that employers still have time to speak, either before an election petition is filed or during the limited time between the filing of the petition and the election. *Id.* at 74,319. This explanation does not withstand scrutiny. An employer's ability to make general, pre-petition observations

about unions is no substitute for post-petition speech. It is the filing of the petition that "initiates what the Board and the courts consider the 'critical period' prior to the election, a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance." *Id.* at 74,439-40 & n.591 (dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)).

Moreover, the legislative history of the 1959 amendments demonstrates that Congress believed that at least 30 days between petition and election was necessary to adequately assure employees the statutorily guaranteed "fullest freedom" in choosing whether to be represented by a union. As explained by then Senator John F. Kennedy, Jr., who chaired the Conference Committee, a 30-day period before an election is a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (emphasis added). Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints." *Id.* at 5770, *reprinted in* 2 LMRDA Hist. 1085; *see also* H.R. Rep. No. 86-741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783 (30-day period was designed to "guard[] against 'quickie' elections").

Notably, until now, the Board's own procedures, consistent with congressional intent, have required the interval between petition and election to be longer than 30 days (absent stipulation by the parties). Under those procedures, at least 7 days were required before the pre-

election hearing, 76 Fed. Reg. at 80,139; an additional 7 days elapsed before the filing of post-hearing briefs, *id.* at 80,140; and regional directors were instructed not to schedule an election sooner than 25-30 days after directing an election. *Id.* These rules resulted in a pre-election period of at least 39 days from the filing of a petition (again, excluding situations where the parties voluntarily agreed to a shorter pre-election period).

Congress's rejection of pre-hearing election proposals based on opposition to "quickie elections" demonstrates that Congress believed a minimum period of 30 days after the filing of a petition was necessary for employers and employees to enjoy the "fullest freedom" in connection with representation elections. Indeed, Congress specifically rejected proposals to expedite the Board's pre-election procedures based on concerns that elections would take place *too quickly* to satisfy the Act's objective of giving employees (and employers) "the fullest freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b); *see* 105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714, *describing* H.R. Rep. No. 86-741, at 1 (1959), *reprinted in* 1 LMRDA Hist. 934 ("There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out."). The Final Rule's deliberate attempt to reduce the time for free speech and debate to much less than 30 days—potentially cutting that minimum time in half—thus contravenes clear congressional intent. The Board does not have "general authority to define national labor policy by balancing the competing interests of labor and management." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *see Hammontree*, 894 F.2d at 441 (rejecting the Board's argument that in light of "competing" objectives it has discretion to disregard one of Congress' goals).

As the dissent explains, the Board's rationale for limiting the opportunity for free speech is "the hallmark characteristic associated with *every* infringement on free speech: the government

simply determines the speech is not necessary." 79 Fed. Reg. at 74,440 (dissent). But Congress has already made a specific, contrary policy judgment in favor of robust debate. The Final Rule cannot be reconciled with—and, indeed, thwarts—that legislative judgment. Furthermore, the Rule's impingement on free speech unacceptably creates "serious constitutional difficulties" with the First Amendment that cannot stand. *See AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003). For these reasons, too, the Final Rule conflicts with the NLRA and should be set aside.

II. The Final Rule Is Arbitrary And Capricious In Violation Of The APA.

Even if the Final Rule were consistent with the NLRA, which it is not, it would still violate the APA because it is arbitrary and capricious. Agency action is arbitrary and capricious when the agency has not engaged in "reasoned decision-making"—that is, the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to . . . the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

The hundreds of pages in the Board's Final Rule contain remarkably little logic or sound explanation for the sweeping changes made by the Final Rule—which "leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary." 79 Fed. Reg. at 74,431 (dissent).

All available evidence indicates that the vast majority of election cases go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* As for the Board's goal of

eliminating "unnecessary" litigation in the representation-election process, the available evidence demonstrates instead that the Final Rule will have the opposite effect. *Id.* at 74,449-50 (dissent). As the dissent sums up, "the available data do not provide a rational basis for the Final Rule's wholesale reformulation of election procedures." *Id.* at 74,434. Indeed, the record squarely contradicts the purported reasons for the Final Rule. Because the Board has thus "offered an explanation for its decision that runs counter to the evidence," *State Farm*, 463 U.S. at 43, the Final Rule must be set aside. *See Chevron*, 467 U.S. at 842-43; *Sorenson*, 755 F.3d at 709-10.

A. The Final Rule Unnecessarily Abandons Established Procedures For Unexplained Reasons, Despite The Board's Undisputed Success In Timely Conducting Elections.

In light of all available objective data regarding the Board's election-related performance measures, the Final Rule is best characterized as a "solution in search of a problem." 79 Fed. Reg. at 74,449 (dissent). Most glaringly, the Board did not find the "problem"—significant delays, characterized as more than 56 days from petition to election—in more than a fraction of all cases. To the contrary, the evidence shows that significant delays occur in less than 6 percent of elections. *Id.* at 74,434. And only about one-tenth of those elections, or 0.6 percent of all elections, involve delays related to the procedures the Rule eviscerates: the pre-election hearing or regional director decision-making before the election. 79 Fed. Reg. at 7349 (Members Miscimarra & Johnson, dissenting from Notice of Proposed Rulemaking). As the dissent from the Final Rule put it, "[t]hese relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections." 79 Fed. Reg. at 74,456 (dissent).

Recent D.C. Circuit precedent demonstrates why the Board acted arbitrarily and capriciously here. In *Sorenson*, the FCC sought to implement a new rule mandating sales charges on phones manufactured for the hearing impaired. 755 F.3d at 707. According to the FCC, the new rule was intended to deter fraudulent acquisition and use of the equipment—fraud

that could artificially drain the fund created to finance use of the devices. *Id.* The problem was that "the agency offer[ed] no evidence suggesting there [wa]s fraud to deter." *Id.* Insofar as the agency could point only to a speculative problem it sought to resolve, actions taken to remedy that problem were arbitrary and capricious. *Id.* at 709. So too here, the Final Rule is a solution in search of problem that cannot withstand even deferential reasonableness review. In the D.C. Circuit's words, the Board cannot create a rule to "defeat a bogeyman whose existence was never verified." *Id.* at 710.

There is simply no rational connection between the Board's massive overhaul of the entire election process for *all* cases and the narrow subset of election cases in which a significant delay occurs. The Final Rule thus epitomizes arbitrary and capricious agency action. This Court should vacate it.

B. Contrary To The Board's Stated Goals, The Final Rule Will Trigger *More* Election-Related Litigation.

Worse still, the available evidence here actually contradicts the Board's stated rationale for its action. *See State Farm*, 463 U.S. at 43 ("Normally, the agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency."). The lone tangible goal articulated by the Final Rule is that "[d]uplicative and unnecessary litigation is eliminated." 79 Fed. Reg. at 74,308. But even if *some* litigation is eliminated, the Board failed to consider that the *total amount* of election-related litigation will only increase under the Final Rule. *See id.* at 74,435 (dissent) ("our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase*, as will the number of rerun elections"). That is because (1) the Final Rule sharply reduces the ability of and incentives for parties to enter into stipulated or consent election agreements, and (2) the Final Rule's elimination of the 25 to 30-day waiting

period for the Board to grant pre-election review of a regional director's decision, together with the elimination of mandatory post-election review and the exclusion of relevant evidence necessary for any meaningful review, will lead to an increase federal-court litigation that can take years to resolve.

1. The Final Rule undermines the incentive for the parties to negotiate election agreements, a critical litigation-reducing component of representation elections.

Under the election procedures that the Final Rule would displace, there is no pre-election litigation in 90 percent of cases because the parties negotiate an election agreement. *Id.* at 74,375. The high number of stipulated elections, in turn, has enabled the Board to conduct elections within a median of 38 days after the petition. *Id.* at 74,341 (dissent). That is likely why the Board's own Casehandling Manual directs Board agents to make every effort to secure an election agreement as early as possible in the process.[11]

The Board admits that existing procedures lead to election agreements in an overwhelming majority of cases. *Id.* at 74,318. And the Board acknowledges that "the bargaining units and election details agreed upon in the more than 90 percent of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation." *Id.* at 74,387. But the Final Rule eliminates the very incentives and expectations that drive the parties toward election agreements.

---

[11] *See, e.g.*, Casehandling Manual, Part Two, § 11008 (Noting, as part of the Board's initial communication, "it should be emphasized that it is the Agency's policy to make every effort to secure an election agreement . . . ."); *id.* § 11084.2 ("[E]fforts to dispose of a case by agreement should begin during the first contacts with the parties, and continue at all stages thereafter . . . ."); *see also* Report of Best Practices Committee: Representation Cases (December 1997) at 8 ("[T]he Committee concludes that the best practice is to keep the lines of communication open with the parties . . . and be tenacious in pursuing an agreement, as well as in narrowing the issues in the event a hearing is necessary . . . .").

For example, the Final Rule provides no guidance on when an election will be scheduled if an employer enters into an election agreement with the union, despite many calls from commenters for the Board to provide this guidance. *Id.* at 74,324. This information is essential in negotiating an election agreement. Under existing procedures, the time target for an election is well known and clearly communicated to all parties and the general public.[12] Employers are well aware of the 42-day target for holding an election and are routinely told that, if they enter into an election agreement, there is discretion to negotiate an election date anywhere within that 42-day period. The ability to negotiate a mutually acceptable date, within that known time target, is a significant incentive to enter into an election agreement.

Furthermore, without the failsafe of mandatory post-election review, employers will be more reluctant to enter into binding election agreements. *See id.* at 74,450 ("[M]aking Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline*, thereby resulting in an increase in pre- and post-election litigation." (emphasis added)).

The Board acknowledges as much, but speculates that "[a]ny short term difficulties in reaching election agreements[ ] should dissipate quickly, as they have in the past when prior time targets have been adjusted." *Id.* at 74,324. Changes effected by the Final Rule, however, are so sweeping and unprecedented that the Board's reliance on the "past" rings hollow. *See id.* at 74,450 (dissent) ("It [is] natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties' willingness to compromise on pre-election issues."). The Board is introducing a scheme that fundamentally changes the hearing process envisioned by Congress. And whatever deference may be due to some predictive

[12] *See, e.g.*, GC Mem. 11-09, at 18-19 (Mar. 16, 2011); GC Mem. 07-04, at 10 (Apr. 4, 2007); GC Mem. 06-04, at 8 (Mar. 21, 2006); GC Mem. 04-02, at 2 (Apr. 22, 2004).

judgments of agencies, courts are required to step in when those predictions defy logic and the available evidence. *Sorenson*, 755 F.3d at 710 ("But unlike its counterpart, the [agency's new] Rule did not want for evidence; instead, there was contrary evidence questioning its efficacy and necessity. The Commission left these serious concerns unaddressed. Accordingly, its decision to implement the [new] Rule was arbitrary and capricious."). Removing an essential litigation-reducing tool will necessarily cause pre- and post-election litigation increases in these cases—an arbitrary and capricious result that this Court should refuse to countenance. *Id.*

The Board's failure to adequately address these concerns, especially given the contradictions between the stated objectives of the Final Rule and the actual evidence before the Board, underscores the conflict between the agency's action and the outcome.

2. The Final Rule will increase federal-court litigation.

In severely curtailing the opportunity for Board review—*i.e.*, by removing the 25-30 day waiting period (thus shrinking the time for pre-election review) and by making mandatory post-election review discretionary—the Final Rule will force more employers to turn to the federal courts for the review that is denied by the Board. To be clear, the NLRA does not permit direct judicial review of representation decisions. *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940). As a consequence, an employer may seek judicial review only indirectly—after an election has been held and the results certified—by refusing to bargain with the union, at which point the Board can prosecute an unfair labor practice complaint that will result in a final, appealable Board order. *See, e.g., NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001). In seeking review of that order in a court of appeals, the employer can then challenge the Board's (or regional director's) determinations in the underlying representation case.

Under the Board's current election system, "in only very few cases do employers refuse to bargain in order to test the validity of the certification. From FY 2008 to FY 2013, between 8

and 13 test of certification cases were filed each year in the U.S. Circuit Courts of Appeals." 79 Fed. Reg. at 74,344 n.176. That is not surprising, given the opportunities for Board review under the current system. But the Final Rule's severe curtailment of those opportunities likely will lead to an increase in "test of certification" cases in federal court—and even a slight increase in these cases will necessarily trigger more litigation, as the dissent explains. *Id.* at 74,451 (dissent) ("The elimination of mandatory post-election Board review is also likely to cause an increase in 'test of certification' cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board's certification.").

In *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004), the D.C. Circuit made clear that an agency acts arbitrarily and capriciously if it counts the benefits of a rule without accounting for the offsetting costs. *Id.* at 1217-19 ("That analysis, then, assumes away the exact effect that the agency attempted to use it to justify. The agency's reliance on the cost-benefit analysis to justify this increase is therefore circular, and the rationality of that explanation is correspondingly doubtful."). The D.C. Circuit reaffirmed that same precept in *Chamber of Commerce v. SEC*, 412 F.3d 133, 142-44 (D.C. Cir. 2005) ("And, as we have just seen, uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure."). Here, the Final Rule pursues quicker elections at all costs, including the likelihood of increased post-election litigation that will delay the resolution of the ultimate question in an election: whether the union properly represents a particular group of employees. That selective focus on purported benefits while ignoring offsetting costs is arbitrary and capricious. *See Pub. Citizen*, 374 F.3d at 1217-19.

3. The potential to moot litigation involving some voter eligibility issues cannot justify increasing litigation concerning the validity of the election itself.

According to the Board, a party that, under the current system, would have litigated a supervisory status issue before an election may decide not to litigate that issue post-election under the Final Rule if the margin of victory for the union makes those voters irrelevant to the outcome. 79 Fed. Reg. at 74,387. In this light, the Board advocates that under its "vote now, hearing later" model for voter eligibility and inclusion disputes—including supervisory status—only 15 percent of deferred issues "will ever have to be addressed." *Id.* at 74,387 n.370. But that proposition fails to consider that deferring voter eligibility and inclusion issues can taint the entire election, no matter how the vote tally comes out.

For example, as commenters explained, employees whose supervisory status is in doubt may engage in conduct that will later require overturning the election.[13] *Id.* at 74,388, 74,408. There is no shortage of cases in which the Board has ruled that objectionable conduct by low-level or first-line supervisors materially affected an election.[14] Thus, deferring resolution of issues of supervisory status will not serve to reduce litigation, as the Final Rule purportedly seeks to do. It will result in the Board having to set aside more elections. And there is little point to reducing pre-election litigation if the results of the election must ultimately be set aside.

---

[13] *See SNE Enters.*, 348 NLRB 1041, 1043-44 (2006) (setting aside election result even though supervisors who engaged in pro-union conduct had been eligible voters in three prior Board elections, stating that it does not matter "that the supervisors here engaged in the conduct prior to the time when they were adjudicated to be supervisors"); *Harborside Healthcare, Inc.*, 343 NLRB 906, 911(2004) ("The essential point . . . . is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.").

[14] *See Harborside Healthcare*, 343 NLRB at 911-14 (comments by first-level supervisor encouraging nursing assistants to vote for the union and solicitation of union authorization cards interfered with the nursing assistants' free choice and materially affected the outcome of the election); *Barton Nelson, Inc.*, 318 NLRB 712, 712-13 (1995) (personal distribution of anti-union hats by shift supervisors directly to large number of employees in the petitioned-for unit was objectionable conduct requiring setting aside an election); *Cmty. Action Comm'n of Fayette Cnty., Inc.*, 338 NLRB 664, 667 (2002) (setting aside an election where a supervisor responded to an employee's question about rumors that she would not get her job back after the annual summer layoff by stating that if the union won she might not have a job).

Indeed, the Final Rule would put employers "on the horns of a difficult dilemma." *See Barre-Nat'l, Inc.*, 316 NLRB at 880 (Member Cohen, dissenting). As the dissent here points out, "[m]any employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election." 79 Fed. Reg. at 74,438 n.581 (dissent). Furthermore, "[w]here employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election." *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, 1997 WL 457524, at *4 (4th Cir. Aug. 12, 1997) (unpublished table decision).[15]

Thus, the Final Rule would not only shift litigation from the pre-election phase to the post-election phase, it also would transfer the litigation from the Board to the federal courts, by making the circuitous path of a "certification test" case the only guaranteed opportunity for review of a regional director's decision. Worse still, the chances that a new election will need to be held, months or years after the first, will also increase if crucial issues of eligibility and inclusion are deferred until after the election. For these reasons, the Final Rule is entirely counter-productive. The Board's elaborate efforts to shirk its statutory obligations to conduct an "appropriate" pre-election hearing and to review the decisions of its regional directors will not

[15] *See also NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986) (finding a post-election change in unit size of about 10 percent denied employees the right to an informed vote); *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (holding that a unit reduction from 17 employees in two classifications to 11 employees in one classification required a new election); *Hamilton Test Sys., New York, Inc. v. NLRB*, 743 F.2d 136, 140-41 (2d Cir. 1984) (ruling that reduction of unit by 50 percent and removal of two classifications rendered election results void).

reduce litigation; it will only move it to federal court and delay the ultimate resolution of the representation case. Where, as here, an agency's explanation of facts runs counter to the actual evidence before it and cannot answer the comments raised during the rulemaking process, the agency's action should be set aside. *See State Farm*, 463 U.S. at 43; *Sorenson*, 755 F.3d at 710.

C. The Final Rule's Mandatory Disclosures of Employees' Personal Information Is Arbitrary and Disregards Substantial Privacy Concerns.

The Final Rule mandates disclosure of all potential voters' personal telephone numbers and email addresses. The Rule accomplishes that result by requiring employers to provide labor organizations "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ('cell') telephone numbers) of all eligible voters." 29 C.F.R. §§ 102.62(d) & 102.67(l). Not only has the Board imposed these new and intrusive disclosure obligations, it has also failed to provide any "opt-out" procedure for employees, 79 Fed. Reg. at 74,346, 74,453 (dissent), and failed to provide any meaningful penalty for misuse of the personal information.

Under the existing system, employers are required to provide unions only with employees' home addresses per the Board's 1966 decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1939-40 (1966). The Board points to technological developments in support of its expanded disclosure requirements, but does not explain why those requirements are necessary. Though commenters pointed out the privacy danger of disclosing email addresses, 79 Fed. Reg. at 74,341-42, the Board's only response was that disclosing home addresses is even more dangerous.[16] But no one can reasonably question that technology brings greater risks when employees' personal data is compromised.

[16] The Board also discounted the point that home phone numbers are not required under *Excelsior* even though they existed at the time of that decision. 79 Fed. Reg. at 74,338-39.

Even worse, while acknowledging that "the privacy, identity theft, and other risks may be greater than the Board has estimated," the Board nonetheless asserted—without any reasoning or analysis—that those "risks are worth taking." 79 Fed. Reg. at 74,341-42. That conclusory statement is insufficient to satisfy the reasoned decision-making requirement of the APA. *See Pub. Citizen*, 374 F.3d at 1217 ("The agency may of course think that [the] effects [of its Rule] are not problematic (or are outweighed by other considerations, like cost), but if so it was incumbent on it to say so in the rule *and to explain why*." (emphasis added)); *cf. Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) ("That a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect" the agency's rule. (citation omitted)). At the same time, the Board inexplicably declined to put in place common-sense privacy protections—like those suggested by the National Association of Manufacturers and the Chamber—that would require unions to destroy the personal contact information after a period of time. 79 Fed. Reg. at 74,360.

The Board gave those concerns even shorter shrift by declining to announce penalties for misusing the information. Although the Final Rule provides that "[p]arties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters," the Rule stops short of announcing a penalty, saying only that "should such misuse of the list occur, the Board will provide an appropriate remedy." *Id.* at 74,344. The APA's reasoned-analysis standard—though a deferential one—requires more than an agency's *ipse dixit* assurances that its decision is for the best, especially in the face of serious privacy and safety concerns. *See Sorenson*, 755 F.3d at 709; *Pub. Citizen*, 374 F.3d at 1217. The Rule should be set aside for that reason, too.

III. The Final Rule Unconstitutionally Compels Employer Speech.

Quite apart from the conflict discussed above with § 8(c)'s free-speech guarantees, the Final Rule also violates the First Amendment by compelling employer speech through a mandatory post-petition notice that must be posted in the employer's workplace within two business days after the employer receives notice that a petition has been filed. 79 Fed. Reg. at 74,309 (dissent). In essence, the Board is commandeering employers to disseminate a message the employer may not support or agree with, simply because someone filed a petition with the government—a petition that may not even provide a valid basis to proceed to an election.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principle applies to individuals and corporations alike; thus, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 16 (1986) (plurality opinion). A regulation compelling speech is therefore generally subject to strict scrutiny, and can survive only if it is a "narrowly tailored means of serving a compelling state interest." *Id.* at 19.

Here, the Rule compels employers to post workplace notices after a petition is filed with the Board, but before the Board has even determined that an election should occur. 79 Fed. Reg. at 74,309 ("When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow."). By forcing employers to post a notice that facilitates a union's organizing campaign, the Rule conscripts employers in speech that they may not want to make. That compelled speech implicates employers' First Amendment rights just as surely as a law requiring the employer to post notices of political campaign meetings.

Nor can it be argued that the government may compel employers' speech as a form of commercial speech regulation. Under the commercial speech doctrine, the government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (citation omitted). The Supreme Court has thus held that the government can require commercial speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). And under Supreme Court precedent, it can include compelled disclosures about the efficacy, safety, and quality of the advertiser's product. *See, e.g.*, *Zauderer v. Office of Disciplinary Council for Supreme Court of Ohio*, 471 U.S. 626, 637-40 (1985); *Am. Meat Inst.*, 760 F.3d at 22.

But the Final Rule's mandate that employers must post workplace notices after a petition is filed with the Board has nothing to do with regulating a commercial transaction. Under *Zauderer* and its progeny, compelled disclosure may be permissible to convey "purely factual and uncontroversial" information—but such disclosures may be required only if they regulate commercial messages. *See Zauderer*, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 59 U.S. 229, 249-50 (2010).

Where, as here, the government seeks to co-opt a speaker's message not to regulate a commercial transaction but, rather, to assist a union in its campaign to organize employees, the regulation is presumptively unconstitutional. Indeed, this case is all but controlled by *Pacific Gas & Elec. Co.* In that case, the challenged law required a commercial actor (a power company), in a commercial setting (the posting of its bills to consumers), to disseminate the message of other groups with competing policy goals. *Pac. Gas & Elec. Co.*, 475 U.S. at 4-7.

The Supreme Court held that the law could not survive strict scrutiny without once suggesting that a different standard should apply merely because the speech of a commercial actor was being regulated. *Id.* at 19-21; *see also Wooley*, 430 U.S. at 714-16 (prohibiting government from compelling speech when the message favored another party). The *Zauderer* exception is thus just as inapplicable here as it would be in other First Amendment contexts. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

Indeed, while the D.C. Circuit did not have occasion to address directly the validity of the Final Rule's election-notice requirement in *NAM*, 717 F.3d at 959 n.19, it did hold in that case that *Zauderer* was inapplicable in a materially indistinguishable context. Specifically, the Board in *NAM* argued that it could compel employers to post a notice of employee rights, notwithstanding NLRA § 8(c), because the notice was a compelled commercial disclosure, subject to less scrutiny under *Zauderer*. *Id.* at n.18. The D.C. Circuit rejected that argument, however, because there was no suggestion that the notice was intended or needed to regulate a commercial transaction. *Id.*[17]

Because the Final Rule's notice requirement is not a regulation of a commercial transaction, and instead compels speech in support of a union's organizing campaign, it is subject to strict scrutiny—a burden it cannot satisfy.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to plaintiffs and vacate the Final Rule.

---

[17] Although the en banc D.C. Circuit recently abrogated *NAM* to the extent that it held that *Zauderer* applied only to disclosure requirements intended to prevent customer deception, the Court did not attempt to expand *Zauderer* beyond the context of commercial transactions. *See Am. Meat Inst.*, 760 F.3d at 20-22 (noting that the Court was addressing "commercial speech" and merely holding *Zauderer* is not limited to cases where the government is seeking to prevent deception in commercial transactions).

Dated: February 4, 2015

Respectfully submitted,

/s/ Allyson N. Ho

Allyson N. Ho (D.C. Bar No. 477589)
Charles I. Cohen (D.C. Bar No. 284893)
Michael W. Steinberg (D.C. Bar No. 964502)
Jonathan C. Fritts (D.C. Bar No. 464011)
David R. Broderdorf (D.C. Bar No. 984847)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202.739.3000

Counsel for the Plaintiffs

Kathryn Comerford Todd (D.C. Bar No. 477745)
Tyler Green (D.C. Bar No. 982312)*
Steven P. Lehotsky (D.C. Bar No. 992725)
Warren Postman (D.C. Bar No. 995083)
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
202.463.5337

Counsel for Plaintiff Chamber of Commerce of the United States of America

Linda Kelly (D.C. Bar No. 477635)
Patrick N. Forrest (D.C. Bar No. 489950)
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
202.637.3061

Counsel for Plaintiff National Association of Manufacturers

*Application for admission to the U.S. District Court for the District of Columbia pending

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Statement of Position was served by electronic mail this 18th day of December, 2015 to:

Brian Taylor
Organizer/Trustee
International Brotherhood of Teamsters Local 773
1345 Hamilton Street
Allentown, PA 18102
(610) 434-4451 (office)
(484) 714-5414 (cell)
(610) 770-9581 (fax)
btaylor@teamster773.org

/s/ Kurt G. Larkin

		AAS	AAR	AAH	AAF	AAK	AAD	AAG	AAT	AAE	Total Drivers
	AAD	4	1	1	0	0	0	0	0	0	6
	AAE	1	0	1	3	10	1	0	0	0	16
	AAF	0	0	1	0	0	0	1	0	0	2
	AAG	0	0	0	0	0	0	0	4	0	4
	AAH	5	0	0	4	0	0	3	2	0	14
	AAK	7	5	4	4	0	8	2	2	12	44
	AAR	0	0	0	0	5	1	3	1	0	10
	AAS	0	0	2	0	2	4	1	0	0	9
	AAT	0	4	1	3	0	1	3	0	0	12
Totals:		**17**	**10**	**10**	**14**	**17**	**15**	**13**	**9**	**12**	**117**

		AAS	AAR	AAH	AAF	AAK	AAD	AAG	AAT	AAE	Sum of Weeks
	AAD	9	2	2	0	0	0	0	0	0	13
	AAE	3	0	2	11	54	1	0	0	0	71
	AAF	0	0	1	0	0	0	3	0	0	4
	AAG	0	0	0	0	0	0	0	8	0	8
	AAH	9	0	0	20	0	0	32	2	0	63
	AAK	15	32	19	29	0	16	14	6	32	163
	AAR	0	0	0	0	11	1	8	2	0	22
	AAS	0	0	4	0	7	20	2	0	0	33
	AAT	0	12	6	5	0	1	12	0	0	36
Totals:		**36**	**46**	**34**	**65**	**72**	**39**	**71**	**18**	**32**	**413**

Case No. Official Exhibit No.
04-RC 165805 Exh 2
Disposition: Identified ✓
Rejected ____ Received ✓
IN THE MATTER OF:
UPS Grand Freight
Date: Witness: Reporter:
12/21/15 Lacey Milan
No. Pages: 1

Ex. 2

UPS Freight

Advance Auto Listing 2009 to present 12 18 16 with inactive employees.xlsx

Advance Auto to Advance Auto

REG_NR	DIS_NR	OP_TYP_CD	SYS_EMP_ID_NR	EMP_NA	JOB_CLS_CD	EMP_RHR_DT	EMP_EMT_STS_CD	FromDept	SVC_NAME	ToDept	TO /From Service Center	ToKeyDate
27	12	FRT	3759535	BANKS, DWAYNE	RDS3	01/04/2011	T	47535	TL_AAP_KUTZTOWN	47537	TL_AAP_DELAWARE	09/07/2011
27	12	FRT	3645819	BLANKENSHIP, DARELL	RDS3	05/11/2010	T	47536	TL_AAP_ROANOKE	55108	TL_AAP_LAKELAND	06/18/2014
27	12	FRT	3764716	CANTRELL, TODD	RDS3	03/20/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/13/2011
27	12	FRT	4310252	CAVIN, JAMES	RDS3	11/03/2014	T	47535	TL_AAP_KUTZTOWN	62750	TL_AAP_ENFIELD	11/18/2014
27	12	FRT	3759536	CRITESER, ROBERT	RDS3	01/04/2011	T	55103	TL_AAP_SALINA	47537	TL_AAP_DELAWARE	12/14/2011
27	12	FRT	3761787	DAVIDSON, ROBERT	RSS3	02/15/2011	T	47537	TL_AAP_DELAWARE	55103	TL_AAP_SALINA	05/03/2011
27	12	FRT	3761646	DAVIS, ERIC	RDS3	02/13/2011		47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	4312021	FREY, KATHLEEN	0754	11/05/2014		47535	TL_AAP_KUTZTOWN	62750	TL_AAP_ENFIELD	11/28/2014
27	12	FRT	2114470	HITCHCOCK, FRANK	0754	11/04/2014	T	47535	TL_AAP_KUTZTOWN	62750	TL_AAP_ENFIELD	11/28/2014
27	12	FRT	4302281	HUNT, THOMAS	RDS3	10/27/2014	T	47535	TL_AAP_KUTZTOWN	62750	TL_AAP_ENFIELD	11/12/2014
27	12	FRT	3994691	JOHNSTON, JON	RDS3	11/27/2012	T	47536	TL_AAP_ROANOKE	47535	TL_AAP_KUTZTOWN	09/19/2013
27	12	FRT	4434148	JUYA, FARID	RDS3	03/04/2015		47537	TL_AAP_DELAWARE	47535	TL_AAP_KUTZTOWN	03/10/2015
27	12	FRT	3756833	KINDT, MICHAEL	RDS3	07/22/2013	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	07/24/2013
27	08	FRT	3761320	LAROSE JR, ROBERT	OPSV	01/07/2013	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	3764722	LEONARD, JAMES	RDS3	03/20/2011		47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/13/2011
27	12	FRT	4322476	LUCHNICK, TODD	0762	11/10/2014	T	47535	TL_AAP_KUTZTOWN	62750	TL_AAP_ENFIELD	11/28/2014
27	12	FRT	3888874	LYONS, TRAVIS	0754	01/30/2012	T	55101	TL_AAP_THOMSON	47537	TL_AAP_DELAWARE	06/25/2015
27	12	FRT	3763256	MCINTYRE, CLARENCE	RDS3	02/27/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	3763261	MILLS, CAROL	RDS3	02/27/2011		47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	4057049	PALMER, DARREL	RDS3	07/17/2013	T	55102	TL_AAP_HAZLEHURST	47537	TL_AAP_DELAWARE	01/15/2014
27	12	FRT	3642304	REILLY, KEVIN	RDS3	02/21/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	3761318	RILEY, CHRISTOPHER	RDS3	02/06/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	3657465	ROGERS, PAUL	RDS3	07/19/2010	T	47537	TL_AAP_DELAWARE	55103	TL_AAP_SALINA	05/03/2011
27	12	FRT	3764298	SANTIAGO, WILLIAM	RDS3	03/14/2011	T	47537	TL_AAP_DELAWARE	55103	TL_AAP_SALINA	04/05/2011
27	12	FRT	3346502	TORRES, CLAUDIO	RDS3	02/21/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	3764835	TURI, MICHAEL	RDS3	03/18/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011
27	12	FRT	3761319	WHITMAN, DANIEL	RDS3	02/05/2011	T	47535	TL_AAP_KUTZTOWN	55108	TL_AAP_LAKELAND	04/05/2011

Case No. Official Exhibit No.

04-RC-165805 Emp 1

Disposition: Identified ✓

Rejected____ Received ✓

IN THE MATTER OF:

VB Grand Freight

Date: Witness: Reporter:

10/01/15 Lacy MLM

No. Pages: 1

Er. 1

UPS Freight - Space & Visibility Ride Form

Operation: Advance Auto Kutztown
Date: 12/18/2015
Driver: Frank Coppetta
Employee ID: 541374
License Expiration Date: 9/3/2019
DOT Physical Expiration Date: 3/11/2017

Reason for Training: [ ] Initial [✓] Periodic [ ] Accident Follow-Up

Trainer: Co. Falcone
Commentary & Driver Drill Completed: [✓] Y [ ] N
Trainer Behind Wheel Demonstration Time: ___ (total minutes)
Miles Driven: 25
Ride Start Time: 5:00pm Ride Finish Time: 6:30

INSTRUCTIONS: Enter a "Y" for yes or an "N" for no in the boxes as appropriate.
Use "R" to indicate the item was reviewed with the driver if the situation did not occur.
There should be no blank boxes.

✓ = Yes

1. PRE-TRIP INSPECTION OF VEHICLE
- [✓] 1.Reviews and signs DVIR
- [✓] 2.Looks for leakage of coolants, fuel, lubricants
- [✓] 3.Exterior - tires, all lights, doors, glass, mirrors, reflectors
- [✓] 4.Checks horn, windshield wipers, steering, defrosters, fuel
- [✓] 5.Checks brake action, tractor protection value and park brake
- [✓] 6.Checks emergency warning devices, fire extinguisher
- [✓] 7.Checks required documents
- [✓] 8.Visually checks to verify 5th wheel coupled properly
- [R] 9.Makes a test stop *

2. ENGINE, CLUTCH AND TRANSMISSION
- [✓] 10.Buckles seat belt before starting engine
- [✓] 11.Uses clutch properly, shifts smoothly - starts in lowest gear
- [✓] 12.Refrains from over revving and / or rolling back

3. AIM HIGH IN STEERING - Find a safe path well ahead
- [✓] 13.Looks ahead in travel path
- [✓] 14.Centers vehicle in traffic lane at all times
- [✓] 15.Hands are properly positioned on steering wheel
- [✓] 16.Maintains proper driving posture
- [✓] **17.Maintains 8 - 12 seconds eye lead time**

Turning
- [✓] 18.Signals intention, 100ft in advance
- [✓] 19.Checks traffic and turns when path is clear
- [✓] 20.Makes smooth, safe turns, centered in traffic lane with in 3ft of curb
- [✓] 21.Uses button-hook turn when necessary
- [✓] 22.Avoids shifting on turns *
- [✓] 23.Turns into proper lane

4. GET THE BIG PICTURE - Stay back and see it all
- [✓] 24.Looks one block ahead in city or residential traffic
- [✓] 25.In city traffic, looks building line to building line
- [✓] 26.On highway or rural roads, looks fence line to fence line
- [✓] 27.On highway or rural roads, looks one half mile ahead
- [✓] 28.Uses proper space cushion to avoid sudden stops
- [✓] 29.Identifies "billboards" and adjusts to traffic conditions
- [✓] 30.Avoids tailgating while waiting for chance to pass
- [✓] 31.Does not pass in unsafe locations
- [✓] 32.Uses ground-viewing habit
- [✓] 33.Passes with sufficient clear space ahead
- [✓] 34.Enters and exit lanes smoothly
- [✓] **35.When stopped in traffic, leaves one car length**

5. KEEP YOUR EYES MOVING - Scan, don't stare
- [✓] 36.Driver stays alert
- [✓] 37.Does not stare, disposes of eye-holding problems
- [R] 38.Moves eyes using the triangular method *
- [R] 39.Checks mirrors every 5 to 8 seconds *
- [✓] 40.Avoids in-vehicle distractions

KEEP YOUR EYES MOVING (Continued)

Railroad Grade Crossings
- [✓] 41.Approaches prepared to stop
- [✓] 42.Clears crossing by looking left, right, left in advance
- [✓] 43.Selects proper pulling gear prior to crossing (does not shift on RR)
- [✓] 44.Crosses at safe speed

Intersections
- [✓] 45.Heeds all traffic signs
- [✓] 46.Approaches intersections prepared to stop
- [✓] 47.Clears all intersections by looking left, right, left
- [R] 48.Checks mirrors while approaching intersection *
- [✓] 49.Comes to a full stop at stop signs
- [✓] 50.Applies "right turn on red" correctly
- [✓] 51.Keeps steer axle wheels straight waiting to turn.
- [✓] **52.Counts one, two, three after vehicle ahead moves**
- [✓] **53.Handles state green lights and decision points** smoothly
- [✓] **54.Scans steering wheels of parked vehicles**

6. LEAVE YOURSELF AN OUT - Be Prepared. Expect the unexpected
- [✓] 55.Leaves other vehicles sufficient space
- [✓] **56.Maintains 4 - 6 following time for speeds <30 mph**
- [✓] **57.Maintains 6 - 8 following time for speeds >30 mph**
- [✓] 58.Allows for space on all sides of vehicle
- [✓] **59.Starting up at intersections, looks left, right, left**
- [✓] 60.Adjusts speed to headlight spray
- [✓] 61.Reduces speed before entering curves
- [✓] 62.Takes path of least resistance
- [✓] 63.Adjusts speeds to road and weather conditions

Backing
- [✓] 64.Avoids all unnecessary backing
- [✓] 65.Backs first, if necessary
- [✓] 66.Backs immediately and scans area constantly
- [R] 67.Tops horn before backing, and every 3 seconds *
- [✓] 68.Looks back as well as checks mirrors
- [✓] 69.Back to driver's side
- [✓] **70. (GOAL) Get out and look before backing.**
- [✓] 71.Backs at a safe, controlled speed

7. MAKE SURE THEY SEE YOU - Don't gamble. Use horn, lights and signals
- [✓] **72.Establishes eye to eye contact**
- [✓] 73.Uses proper headlight beam
- [✓] 74.Uses Horn properly.
- [✓] 75.Signals lane changes well in advance
- [✓] 76.Signals until lane change is complete

Stopping
- [✓] 77.Alerts traffic to rear when stopping and stopped
- [✓] 78.Comes to full stop
- [✓] 79.Uses 4-ways as prescribed by the DOT
- [✓] 80.Stops behind stop line, can view entire cross-walk
- [✓] 81.When pulling from curb, looks over traffic side shoulder

No. Official Exhibit No.
04-RC-165845 Pet.
Disposition: Identified ✓
Rejected ____ Received ✓
IN THE MATTER OF:
UB Grand Freight
Date: 12/2/15 Witness: D. Lizse Reporter: MLow
No. Pages: 7

Pet-1

Drill Drive Worksheet

☐ New Driver Training
☑ Periodic Driver Training
☐ Accident Follow-up
☐ At-Risk

Date of Observation: 12/18/2015 Employee ID Number: _____

Driver: Frank Coppetta License Expiration: __/__/__

Observer: G-Falcone Location: AAK DOT Expiration: __/__/__

Ride Start Time: ___ Ride End Time: _____ Demonstration Time: From: 0805 To: 0807

Stroke count on lines below:

Eye Lead Time: In Seconds	///
Following Distance: In Seconds	///
Left Intersection (Clean/Dirty)	///
Right Intersection (Clean/Dirty)	
Traffic Lights: Fresh or Stale? Point of Decision?	
Left Curb: Motorists and Pedestrians (Clean/Dirty)	///
Right Curb: Motorists and Pedestrians (Clean/Dirty)	
Left Mirror: (Clean/Dirty)	
Right Mirror: (Clean/Dirty)	
Speed Limit	

Instructions:

For 2 minutes, the Observer should record eye movements from the driver by stroke counting potential hazards in changing traffic situations. Each drill drive should last a total of 2 minutes. The goal of Defensive Driving is to move eyes to front every 2 seconds and to the rear every 5-8 seconds. This is done by using the Triangle Seeing Habit. The Drill Points that will be observed are: Eye Lead Time, Following Distance, Intersections, Traffic Lights, Motorists and Pedestrians, Speed Limit and Mirrors.

Count the number of eye movements above and record below:

Intersections: 19
Traffic Lights: 0
Eye Lead Time: 3
Motorists and Pedestrians: 13
Following Distances: 3
Speed: 4
Mirrors: 10

Total Eye Movements: 65

Explanation of Ratings

5 More than 45 eye movements, 30 in front - 15 to the rear. Flows smoothly.
4 More than 45 eye movements - No Hesitation or Prompting.
3 Between 16 -44 eye movements - Ocasionally Needs Prompting.
2 Less than 15 eye movements - Needs some Prompting.
1 Methods are Incorrect or Incomplete - Unable to Continue.

Frank Cappetta's S & V Ride December 18th 2015

Frank is an excellent driver always keeping his truck and trailer centered in the travel lane at all times. He used he turn signals well in advance and left them on until his lane change was complete. He stayed in the right lane most of the ride. There were no railroad tracks along the ride, but were reviewed.

His backing skills are excellent as well.

Positive points;

1. ***When a vehicle is on the shoulder of the highway he always moves over a lane.***
2. ***He leaves plenty of space between his truck and the vehicle ahead.***
3. ***A++ He does an excellent pre and post trip inspection.***

Items Reviewed;

1. ***Needs to use the triangular method.***
2. ***Needs to check his mirrors 5 to 8.***
3. ***Needs to tap his horn every time he backs up.***
4. ***Needs to check mirrors when approaching intersections.***
5. ***Needs to stop behind the stop line and be able to view the entire crosswalk.***
6. ***Needs to avoid shifting on turns and curves.***

Frank knows the "Five Seeing Habits" and "The Ten Point Commentary".

On the "Two Minute Drive Drill" He scored a "65".

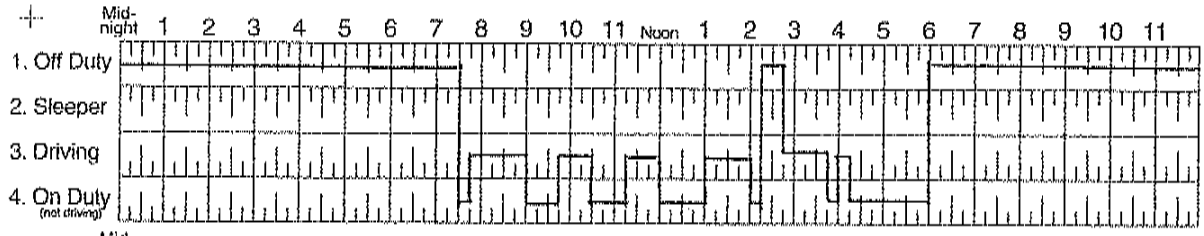
DRIVER'S DAILY LOG

Original (White): Home Terminal
Copy (Yellow): Driver Retains

07/07/15 — DATE (MONTH/DAY/YEAR)
240 — DRIVER MILES
NA — TEAM MILES
657857 / 531752 — VEHICLE NUMBERS
354137 1 — DRIVER ID(S)

UPS FREIGHT — COMPANY
NA — CO-DRIVER NAME

1000 SEMMES AVE. - RICHMOND, VA 23224 — MAIN ADDRESS
2800504 — SHIPPING DOCUMENT NUMBER(S), OR NAME OF SHIPPER AND COMMODITY



TOTALS
1400
0500
0500

Total MUST add up to 24 hours.
.25 = 1/4 hr
.50 = 1/2 hr
.75 = 3/4 hr

Remarks:
V.I.
Kutztown, PA.
Blairstown, NJ.
Franklin, NJ.
Rockaway, NJ.
Stroudsburg, PA.
BREAK
Kutztown, PA.
Allentown, PA.

Number of off-duty days INCLUDING today:

Case No. CH-RC-165865 Official Exhibit No. Pet 2
Disposition: Identified ✓ Received ✓ Rejected

SIGNATURE / CERTIFICATION

396.11 DVIR Completed: FC — Repairs Needed: N

Show when and where each change of duty status occurred. Use time standard at home terminal.

©Copyright 1995, 2004. Eclipse Software Systems, Inc., Greeley, CO. All rights strictly reserved. Duplication in any manner is prohibited.

Please initial to certify.

VA Grand Freight

Date: 10/21/15 Witness: Capetta Reporter: WM

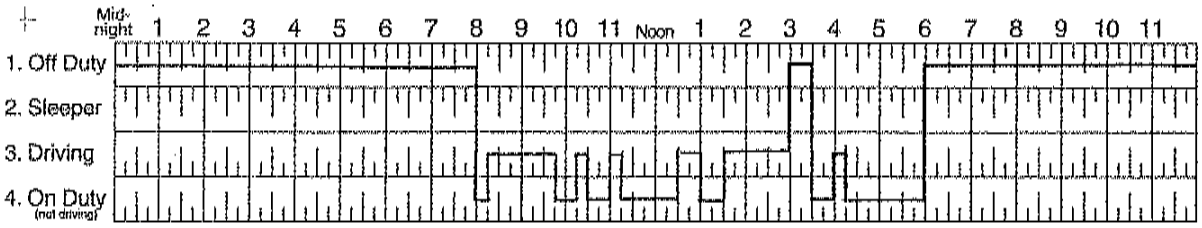
DRIVER'S DAILY LOG

Original (White): Home Terminal
Copy (Yellow): Driver Retains

07/08/15 — DATE (MONTH/DAY/YEAR)
200 — DRIVER MILES
NA — TEAM MILES
No. Pages: 657857 / 105527 — VEHICLE NUMBERS
354137 1 — DRIVER ID(S)

UPS FREIGHT — COMPANY
NA — CO-DRIVER NAME

1000 SEMMES AVE. - RICHMOND, VA 23224 — MAIN ADDRESS
2800830 — SHIPPING DOCUMENT NUMBER(S), OR NAME OF SHIPPER AND COMMODITY



TOTALS
1450
0425
0525

Total MUST add up to 24 hours.
.25 = 1/4 hr
.50 = 1/2 hr
.75 = 3/4 hr

Remarks:
V.I.
Kutztown, PA.
Gibbstown, NJ.
Brooklawn, NJ.
Woodlynne, NJ.
Philadelphia, PA.
BREAK
Allentown, PA
Kutztown PA.
V.I.

Number of off-duty days INCLUDING today:

Pet 2

SIGNATURE / CERTIFICATION

396.11 DVIR Completed: FC — Repairs Needed: N

Show when and where each change of duty status occurred.

©Copyright 1995, 2004. Eclipse Software Systems, Inc., Greeley, CO.

Please initial

DRIVER'S DAILY LOG

Original (White): Home Terminal
Copy (Yellow): Driver Retains

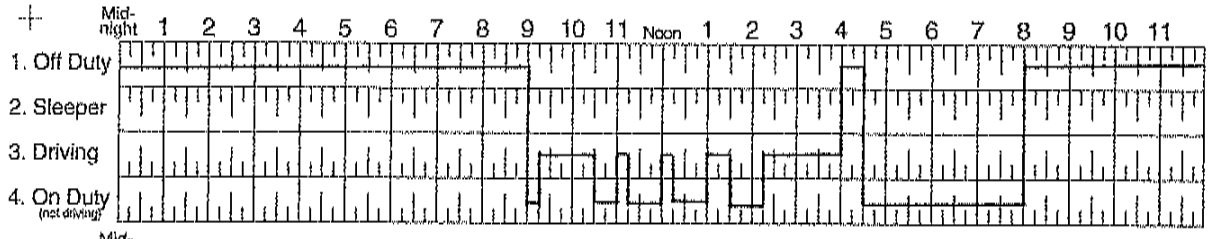
DATE (MONTH/DAY/YEAR)	DRIVER MILES	TEAM MILES	VEHICLE NUMBERS	DRIVER ID(S)
07/01/15	200	N/A	657857/538943	3541371

COMPANY: UPS FREIGHT

CO-DRIVER NAME: N/A

MAIN ADDRESS: 1000 SEMMES AVE. - RICHMOND, VA 23224

SHIPPING DOCUMENT NUMBER(S), OR NAME OF SHIPPER AND COMMODITY: 2800829



TOTALS
1. Off Duty: 1350
2. Sleeper:
3. Driving: 0400
4. On Duty (not driving): 0650

Total MUST add up to 24 hours.
.25 = 1/4 hr
.50 = 1/2 hr
.75 = 3/4 hr

Remarks:
V.I. Kutztown, PA
Gibbstown, NJ
Brooklawn, NJ
Woodlynne, NJ
Philadelphia, PA
Break. Kutztown, PA

Number of off-duty days INCLUDING today:

SIGNATURE/CERTIFICATION

396.11 DVIR Completed: FC
Repairs Needed: N

Show when and where each change of duty status occurred. Use time standard at home terminal.

©Copyright 1995, 2004. Eclipse Software Systems, Inc., Greeley, CO. All rights strictly reserved. Duplication in any manner is prohibited.

Please initial to certify.

Case No. 04-RC-[illegible]
Official Exhibit No. Pet 3
Disposition: Identified ✓
Rejected ____ Received ✓
IN THE MATTER OF: UPS Ground Freight
Date: 12/21/15 Witness: Reporter: Carlotta Wilson
No. Pages: 1

Pet 3